No. _____

IN THE

Supreme Court of the United States

WELLNESS INTERNATIONAL NETWORK, LIMITED, RALPH OATS, AND CATHY OATS,

Petitioners,

v.

RICHARD SHARIF,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

CATHERINE STEEGE
Counsel of Record
BARRY LEVENSTAM
MELISSA M. HINDS
LANDON RAIFORD
JENNER & BLOCK LLP
353 N. Clark Street
Chicago, Illinois 60654
(312) 222-9350
csteege@jenner.com

Attorneys for Petitioners

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QUESTIONS PRESENTED

In *Stern v. Marshall*, 131 S. Ct. 2594, 2620 (2011), the Court held that "in one isolated respect" Congress exceeded the limitations of Article III of the Constitution when it established the current framework under which bankruptcy courts decide matters. *Stern* framed the operative constitutional question as "whether the action at issue stems from the bankruptcy itself," and concluded that because the debtor Stern's state-law-based counterclaim against a creditor, Marshall, was "in no way derived from or dependent upon bankruptcy law" and would "exist[] without regard to any bankruptcy proceeding" the bankruptcy court could not constitutionally enter a final order in that action. *Id.* at 2618.

Since *Stern*, the lower courts have demonstrated considerable confusion in determining when an action "stems from the bankruptcy itself." Here, the United States Court of Appeals for the Seventh Circuit held that bankruptcy courts lack the constitutional authority to decide, in an action against the debtor, whether property in the debtor's possession is property of the bankruptcy estate under 11 U.S.C. § 541 because that determination also required the resolution of state-law issues. Pet. App. 45a-51a. The Seventh Circuit also held that Article III did not permit a bankruptcy court to exercise the judicial power of the United States to determine an action against a debtor who had consented to the exercise of that power by voluntarily

filing his petition in bankruptcy court. *Id.* at 31a-45a. The Seventh Circuit's decision reflects, and exacerbates, the considerable confusion in the lower courts over when "the action at issue stems from the bankruptcy itself" and whether a debtor, after filing his petition in the bankruptcy court, may then object to the bankruptcy court's rulings against him on Article III grounds. As a practical matter, the Seventh Circuit's decision represents a crippling reduction of the bankruptcy courts' authority both because property of the estate determinations are often the most fundamental issues in a bankruptcy case and because state-law issues permeate all aspects of bankruptcy cases. The questions presented therefore are:

1. Whether the presence of a subsidiary state property law issue in a 11 U.S.C. § 541 action brought against a debtor to determine whether property in the debtor's possession is property of the bankruptcy estate means that such action does not "stem[] from the bankruptcy itself" and therefore, that a bankruptcy court does not have the constitutional authority to enter a final order deciding that action.

2. Whether Article III permits the bankruptcy courts to exercise the judicial power of the United States over claims against a debtor where the debtor has consented to the exercise of such judicial power by voluntarily filing for bankruptcy relief.

In addition, this case also presents the two questions currently before the Court in *Executive Benefits Insurance Agency v. Arkison*, 133 S. Ct. 2880 (2013) (No. 12-1200). Because of the procedural posture of *Executive Benefits*—there the district court reviewed the bankruptcy court's summary judgment order *de novo*—it is possible that the Court may conclude that no constitutional violation occurred and thus, not reach the issues on which *certiorari* was granted. In such event, this case presents the opportunity to address those questions, about which there is also a split among the circuits:

3. Whether Article III permits the exercise of the judicial power of the United States by the bankruptcy courts on the basis of litigant consent, and if so, whether implied consent based on a litigant's conduct is sufficient to satisfy Article III.

4. Whether bankruptcy courts have the statutory authority to submit proposed findings of fact and conclusions of law for *de novo* review by a district court in a "core" proceeding under 28 U.S.C. § 157(b).

PARTIES TO THE PROCEEDINGS BELOW AND RULE 29.6 STATEMENT

Petitioner Wellness International Network, Limited, is a subsidiary of WIN Network, Inc. No publicly-held entity owns ten percent or more of the stock of Wellness International Network, Limited.

The petitioners are Wellness International Network, Limited, Ralph Oats, and Cathy Oats, the plaintiffs and appellees below.

The respondent is Richard Sharif, the defendant and appellant below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Wellness International Network, Limited, Ralph Oats, and Cathy Oats (collectively "Wellness") respectfully submit this petition for a writ of certiorari to review a decision of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-66a) is reported at 727 F.3d 751. The district court's opinion (Pet. App. 69a-91a) is unreported. The bankruptcy court's opinion (Pet. App. 92a-120a) is unreported.

JURISDICTION

The court of appeals entered its judgment on August 21, 2013. On September 5, 2013, the court of appeals granted an extension of time in which to file a petition for rehearing or rehearing *en banc* to September 18, 2013. On September 18, 2013, Wellness timely filed its Petition for Rehearing and Rehearing *En Banc*. On October 7, 2013, the court of appeals denied the Petition for Rehearing. Pet. App. 67a-68a. On December 20, 2013, Justice Kagan granted an extension of time in which to file a petition for a writ of certiorari to February 5, 2014. This Court has jurisdiction under 28 U.S.C. § 1254(1).

28 U.S.C. § 2403(a) applies in this case. The notification required by Supreme Court Rule 29.4(b)

has been made to the Solicitor General of the United States. The court of appeals did not make a certification to the Attorney General pursuant to 28 U.S.C. § 2403(a).[1]

CONSTITUTIONAL PROVISIONS INVOLVED

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. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office.

U.S. CONST. art III, § 1.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 157 is reproduced in full in an appendix hereto. Pet. App. 121a-124a.

STATEMENT OF THE CASE

In a situation where a non-debtor litigant had *not* consented to be sued in bankruptcy court, *Stern*

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[1] This may be due to the fact that Respondent first raised a constitutional issue in his reply brief in the court of appeals. Pet. App. 17a.

held, as did a plurality of the Court in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), that Article III of the Constitution precluded the bankruptcy court from entering a final judgment on a state-law claim that did not "stem[] from the bankruptcy itself" and which would not "necessarily be resolved in the claims allowance process." 131 S. Ct. at 2618. *Stern* left open the question of exactly what matters would "stem[] from the bankruptcy itself." *Id.* Nevertheless, the Court's statement that its decision did "not change all that much," *id.* at 2620, strongly suggested that the Court would continue to hold that bankruptcy courts have the constitutional authority to hear and determine those matters that historically have been the "[c]ritical features of every bankruptcy"—"the exercise of exclusive jurisdiction over all of the debtor's property." *Central Va. Cmty. College v. Katz*, 546 U.S. 356, 363-64 (2006).

The lower courts have not uniformly followed the Court's suggestion that its holding in *Stern* is narrow. Litigation over the breadth of *Stern* has extended to virtually every type of action and contested matter that arises in a bankruptcy case and this case is a prime example of the great uncertainty that currently exists over the reach of *Stern*. *See, e.g.*, Jonathan C. Lipson, *Stern, Seriously: The Article I Judicial Power, Fraudulent Transfers, and Leveraged Buyouts*, Wis. L. Rev. 1161, 1187-94 (2013) (explaining the ambiguity created in *Stern* over whether bankruptcy courts may decide issues of state law); Tyson A. Crist, *Stern*

v. Marshall: Application of the Supreme Court's Landmark Decision in the Lower Courts, 86 Am. Bankr. L.J. 627, 629 (2012) ("*Stern* has once again left the bankruptcy world in an unsettled state with many new questions, but few clear answers").

The Seventh Circuit's conclusion that bankruptcy courts can no longer decide disputes with a debtor over whether his property belongs to the bankruptcy estate if the dispute involves state property law issues represents a crippling blow to the ability of bankruptcy courts to adjudicate bankruptcy cases. Instead of not "chang[ing] all that much," 131 S. Ct. at 2620, the Seventh Circuit's reading of *Stern* will change almost everything because state-law issues underlie virtually all aspects of bankruptcy cases.

This case also presents the question of whether a litigant can consent to a non-Article III adjudication in a different posture from that of *Stern* and the case currently before the Court, *Executive Benefits Insurance Agency v. Arkison*, 133 S. Ct. 2880 (2013) (No. 12-1200). In both *Executive Benefits* and *Stern,* the litigants challenging the constitutional authority of the bankruptcy courts were third parties that had been sued by the bankruptcy estate. In this case, the party challenging the constitutional authority of the bankruptcy court is the debtor who voluntarily chose to file his bankruptcy petition in the bankruptcy court and then only objected to the bankruptcy court's ruling after he lost. Thus, this case presents the question of consent in the context of a litigant

who affirmatively selected the bankruptcy court as the forum in which to proceed. This case, therefore, presents an opportunity to clarify the extent of the bankruptcy court's constitutional authority in actions against a debtor. Moreover, to the extent that the Court does not reach the merits of either of the two questions presented in *Executive Benefits*, this case presents an opportunity to address those questions as well.

A. The Bankruptcy Court's Entry Of Final Judgment Against Sharif.

Richard Sharif ("Sharif") filed suit against Wellness in federal district court in Texas. He lost his case after he ignored Wellness's discovery requests, resulting in the material facts of the case being deemed admitted against him. The Fifth Circuit affirmed the judgment against Sharif, calling his suit against Wellness "feckless" and remanding so that the district court could consider an award of attorney's fees. Pet. App. 5a. On remand, the district court in Texas entered judgment for $655,596.13 in favor of Wellness and against Sharif. Pet. App. 6a.

Following entry of the judgment, Wellness commenced a collection action in the district court in Texas. Pet. App. 6a. On the heels of a civil contempt order for failing to respond to post-judgment discovery about his assets, Sharif filed a chapter 7 bankruptcy petition in the United States Bankruptcy Court for the Northern District of Illinois. *Id.*

Once in bankruptcy, Sharif again failed to produce documents about his assets to his bankruptcy trustee. Pet. App. 7a-8a. Based on a personal financial statement Wellness obtained showing that Sharif had more assets than he listed on his bankruptcy schedules, Wellness filed suit against Sharif in the bankruptcy court pursuant to 11 U.S.C. § 727 seeking to block Sharif's discharge. Pet. App. 8a. As part of that complaint, Wellness also sought a declaratory judgment that assets Sharif purportedly held in trust—the same assets appearing on Sharif's personal financial statement—actually were property of Sharif's bankruptcy estate. *Id.*

Sharif again failed to respond properly to Wellness's discovery requests or to the bankruptcy court's discovery orders. Pet. App. 8a-9a. Wellness moved for sanctions, asking the bankruptcy court, among things, to enter a default judgment against Sharif. Pet. App. 9a. Sharif responded with a motion for summary judgment, asking the bankruptcy court to enter final judgment in his favor on all counts of the complaint. Pet. App. 10a. On July 6, 2010, the bankruptcy court denied Sharif's summary judgment motion, entered a default judgment against Sharif in which the bankruptcy court denied Sharif his discharge and found that the assets purportedly held by Sharif in the so-called Soad Wattar Trust were property of Sharif's bankruptcy estate. Pet. App. 10a-14a.

B. Appellate Proceedings In The District Court And The Court Of Appeals.

Sharif appealed to the United States District Court for the Northern District of Illinois. Pet. App. 14a. Sharif filed his opening appeal brief six weeks after the Court had decided *Stern*, but did not challenge the constitutional authority of the bankruptcy court to enter final judgment. Pet. App. 15a. Instead, after briefing on the appeal was complete, Sharif moved for leave to file a supplemental brief so that he could raise a constitutional challenge based on *Stern*. Pet. App. 15a. The district court denied Sharif's motion as untimely and affirmed the bankruptcy court's judgment. Pet. App. 15a-17a.

Sharif then appealed to the Seventh Circuit. Pet. App. 17a. Once again, Sharif failed to object to the bankruptcy court's constitutional authority to enter a final judgment and did not cite *Stern*. Pet. App. 17a. As a result, Wellness did not address *Stern* in its response brief. No. 12-1349, Dkt. 14 (7th Cir.). Sharif first cited *Stern* in his reply, arguing that the bankruptcy court lacked jurisdiction to declare what assets were property of Sharif's bankruptcy estate. Pet. App. 17a. Sharif did not contest the constitutional authority of the bankruptcy court to decide the discharge claim. *Id.* Sharif also did not file a FED. R. APP. P. 44(a) notice that he was raising a constitutional issue and the United States was not otherwise notified that the court of appeals would be addressing a constitutional question.

The Seventh Circuit issued its decision on August 21, 2013. Pet. App. 1a. It affirmed the judgment denying Sharif a discharge, holding that Wellness's objections to Sharif's discharge "stem from federal law, not state law, as the provisions of 11 U.S.C. § 727 provide the relevant rules of decision" and the decision "to grant or deny discharge is central to the restructuring the debtor-creditor relationship." Pet. App. 45a-46a.

The Seventh Circuit reached the opposite result on the property of the estate claim, holding that the bankruptcy court lacked the constitutional authority to decide whether property in the debtor's possession was property of the debtor's bankruptcy estate. Pet. App. 46a-51a. The court of appeals reached this result even though it also acknowledged that this Court "has not come close to holding that an Article III judge must decide claims for which the Bankruptcy Code itself provides the rule of decision." Pet. App. 46a. Focusing on the fact that property of the estate determinations under § 541 of the Bankruptcy Code also involve questions of state law, the court of appeals concluded that Wellness's request for a declaration that the supposed trust assets were estate property is a "state-law claim between private parties that is wholly independent of federal bankruptcy law and is not resolved in the claims-allowance process" and therefore "is indistinguishable from the tortious-interference counterclaim in *Stern*." Pet. App. 48a, 51a.

The court of appeals also held that Sharif could not waive his constitutional objection based on *Stern* because such objections "implicate[] separation-of-powers principles" and are not waivable. Pet. App. 3a. In doing so, the court of appeals noted that the issue of waiver "is a thorny question", acknowledging that the circuits are split on this issue. Pet. App. 18a.

Finally, the court of appeals addressed what authority a bankruptcy court had over matters classified as "core" under 28 U.S.C. § 157(b)(2) but that are outside of the bankruptcy court's constitutional authority to decide. Pet. App. 51a-54a. Again recognizing that its decision created a split in the circuits, the court of appeals held that bankruptcy courts have no authority to do anything, including presiding over pre-trial discovery, in matters that are denominated as core under § 157(b)(2), but where the bankruptcy courts may not constitutionally enter a judgment order. Pet. App. 51a-54a.

The effect of the Seventh Circuit's decision is that bankruptcy courts in that Circuit have no authority to preside over or determine disputes with the debtor about whether property in a debtor's possession is property of the bankruptcy estate under 11 U.S.C. § 541. The decision also holds that bankruptcy courts have no authority to decide state-law issues even where the state-law issue arises in the context of an action that is based on the Bankruptcy Code.

REASONS FOR GRANTING THE PETITION

This petition presents three fundamental questions about the constitutional and statutory limits on the authority of non-Article III bankruptcy judges.

First, this case presents the Court with an opportunity to clarify the scope of the exception established in *Stern*: when does an "action stem[] from the bankruptcy itself." 131 S. Ct. at 2618. *Stern* suggested that an action would "stem[] from the bankruptcy itself" if the action was derived from or dependent on bankruptcy law and would exist only in the context of a bankruptcy case. *Id.* The action at issue here would, on its face, appear to meet both requirements—it was brought against the debtor under § 541 of the Bankruptcy Code to determine whether property in the debtor's possession belonged to the bankruptcy estate, a determination that only has relevance in the context of a bankruptcy case. Indeed, historically bankruptcy courts (and their historical precursors) have always decided such issues. *Mueller v. Nugent*, 184 U.S. 1, 13-14 (1902); Thomas E. Plank, *Why Bankruptcy Judges Need Not And Should Not Be Article III Judges*, 72 Am. Bankr. L.J. 567, 584-87, 600-10 (1998).

Nonetheless, the Seventh Circuit, in a radical departure from historical precedent that will undermine the efficacy of the bankruptcy process, concluded that the action under § 541 was a state-

law claim that did not "stem[] from the bankruptcy" and the bankruptcy court, therefore, lacked constitutional authority to decide the dispute. That holding directly conflicts with a decision of the Fourth Circuit. *Canal Corp. v. Finnman (In re Johnson)*, 960 F.2d 396 (4th Cir. 1992). *Johnson* held that bankruptcy courts continued to have the authority to enter final orders in actions against a debtor to determine whether property in the debtor's possession belonged to the bankruptcy estate following this Court's decision in *Northern Pipeline*, 458 U.S. at 50. *See Johnson*, 960 F.2d at 400-02. The Seventh Circuit differed from the Fourth Circuit because the Seventh Circuit characterized the § 541 claim as a state-law claim and concluded that the presence of a state-law issue took the claim outside of the bankruptcy court's constitutional authority to decide.

The Seventh Circuit's conclusion that a § 541 claim is a state-law claim also conflicts with the decisions of six circuits, all of which hold that actions under § 541 are federal law claims even though these actions almost always involve issues of state-law. *See Croft v. AMS SAManagement LLC (In re Croft)*, 737 F.3d 372, 374 (5th Cir. 2013); *Tyler v. DH Capital Mgmt., Inc.*, 736 F.3d 455, 461 (6th Cir. 2013); *Parks v. Dittmar (In re Dittmar)*, 618 F.3d 1199, 1204 (10th Cir. 2010); *Redmond v. Lentz & Clark, P.A. (In re Wagers),* 514 F.3d 1021, 1028 (10th Cir. 2007); *Abboud v. The Ground Round, Inc. (In re The Ground Round, Inc.)* 482 F.3d 15, 17 (1st Cir. 2007); *Am. Bankers Ins. Co. of Fla. v. Maness*, 101

F.3d 358, 362-63 (4th Cir. 1996); *N.S. Garrott & Sons v. Union Planters Nat'l Bank of Memphis (In re N.S. Garrott & Sons)*, 772 F.2d 462, 466 (8th Cir. 1985). The Seventh Circuit's conclusion that bankruptcy courts lack the constitutional authority to decide even Bankruptcy Code-based claims if they involve state-law issues threatens to shift much of the traditional work of bankruptcy courts to the district courts as state-law issues permeate many, if not most, aspects of bankruptcy cases. *See Stern*, 131 S. Ct. at 2616.

Second, this case also presents the Court with the question of whether Article III is violated when a bankruptcy court enters a final order against a debtor. In *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833, 847-50 (1986), the Court concluded that Article III was not violated when the litigant who advanced the Article III objection had voluntarily filed suit in a non-Article III forum. That is exactly what the debtor Sharif did here, voluntarily choosing to file bankruptcy knowing that he was subjecting his person and property to the authority of the bankruptcy court. Consistent with *Schor*, in the analogous context of whether a debtor waives his Seventh Amendment right to trial by jury by voluntarily filing a bankruptcy petition, *see Granfinanciera S.A. v. Nordberg*, 492 U.S. 33, 53 (1989), the Sixth Circuit has held that a debtor consents to proceed without a jury, and waives his Seventh Amendment right to a jury, by filing a bankruptcy petition. *See Longo v. McLaren (In re McLaren)*, 3 F.3d 958 (6th Cir. 1993). By holding

that the debtor could not consent to proceed in bankruptcy court on questions about whether his property belonged to the bankruptcy estate, the Seventh Circuit's decision created a split with the Sixth Circuit, and reached a result that is inconsistent with *Schor*. In addition, this case also presents a variation of the consent question before the Court in *Executive Benefits*, 133 S. Ct. 2880 (No. 12-1200), whether a litigant can consent by his litigation conduct to a decision by a non-Article III court.

Finally, the Seventh Circuit's decision also presents the same question currently before the Court in *Executive Benefits,* 133 S. Ct. 2880 (No. 12-1200): whether a bankruptcy court has the statutory authority to recommend proposed findings of fact and conclusions of law in a matter that while previously denominated as core as 28 U.S.C. § 157(b)(2) is held to be outside of the bankruptcy court's constitutional authority to decide. If the Court does not address that question in *Executive Benefits*, this case presents an opportunity for the Court to do so.

I. The Court Should Resolve The Question Of Whether An Action Against The Debtor Based On 11 U.S.C. § 541 Is A Federal Law Action "That Stems From The Bankruptcy Itself" Such That a Bankruptcy Court May Enter A Judgment Order.

A. The Seventh Circuit's Holding Directly Conflicts With A Decision Of The Fourth Circuit.

Stern held that bankruptcy courts "lack[] the constitutional authority to enter a final judgment on a state-law counterclaim that is not resolved in the process of ruling on a creditor's proof of claim." 131 S. Ct. at 2620. In striking 28 U.S.C. § 157(b)(2)(C) as unconstitutional, the Court emphasized that it was not invalidating the authority of bankruptcy courts to enter final judgments in all circumstances; instead, the Court suggested that bankruptcy courts could continue to decide by final order those actions that "stem[] from the bankruptcy itself or would necessarily be resolved in the claims allowance process." 131 S. Ct. at 2618. As the Court explained, because the state-law action against the creditor that was at issue in *Stern* "is in no way derived from or dependent upon bankruptcy law" and would "exist[] without regard to any bankruptcy proceeding," it was outside of the constitutional bounds of the bankruptcy court's authority to enter a final judgment. *Id.*

The Seventh Circuit's decision that, as a result of *Stern*, bankruptcy courts may no longer enter final orders in actions against a debtor seeking to determine whether property in the debtor's possession is property of the estate conflicts squarely with a decision of the Fourth Circuit holding that bankruptcy courts may enter final orders in such matters. *Canal Corp. v. Finnman* (*In re Johnson)*, 960 F.2d 396, 400-02 (4th Cir. 1992). In *Johnson*, the debtor operated a pyramid scheme. The defrauded investors brought suit in bankruptcy court against the bankruptcy estate, seeking a declaration that certain funds were not property of the estate, but instead were subject to a constructive trust. The bankruptcy court agreed, entering a final order declaring that the funds did not belong to the estate and directing the bankruptcy trustee to distribute them to some, but not all, of the investors. The investors who did not receive a distribution objected and their objections were denied by a final order. *Id.* at 398-99.

On appeal, the Fourth Circuit addressed the authority of the bankruptcy court to enter a final order in light of this Court's decision in *Northern Pipeline*. *Johnson*, 960 F.2d at 400-02. *Northern Pipeline*, like *Stern*, holds that bankruptcy courts lack the constitutional authority to enter final orders on state-law claims against non-debtor parties. *Compare Northern Pipeline*, 458 U.S. at 69-72 *with Stern*, 131 S. Ct. at 2615. The Fourth Circuit concluded that the bankruptcy court had the constitutional authority to enter its orders because

the determination of whether the property belonged to the bankruptcy estate was inextricably tied to the question of who was entitled to the funds. Both matters therefore were "intimately tied to the traditional bankruptcy functions and the estate, and, therefore, are core matters within the clear jurisdiction of the bankruptcy court." *Johnson,* 960 F.2d at 402. The Fourth Circuit's conclusion that the bankruptcy court had the authority to enter a final order hinged on the fact that, just as in the instant case, the debtor was in possession of the property in dispute. *Id.* As the Eleventh Circuit explained in a subsequent case, *In re Electric Machinery Enterprises, Inc.*, 479 F.3d 791, 797 (11th Cir. 2007), the debtor's possession of the disputed asset is what gave the bankruptcy court the authority to enter a final order in *Johnson*.

Unlike the Fourth Circuit, the Seventh Circuit ignored the teachings of this Court and thus failed to recognize the central importance that determinations about property of the estate historically have had in bankruptcy cases. "Bankruptcy jurisdiction, as understood today and at the time of the framing, is principally *in rem* jurisdiction." *Central Va. Cmty. College*, 546 U.S. at 369. "In bankruptcy, 'the court's jurisdiction is premised on the debtor and his estate, and not on the creditors.'" *Id.* at 370 quoting *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 447 (2004).

Indeed, historically, non-Article III judicial officers exercised this *in rem* jurisdiction over the

debtor and all property in the debtor's actual or constructive possession. *See* 2A Collier on Bankruptcy, ¶ 38.09[2], at 1428-29 (James Wm. Moore *et al.* eds. 14th ed. 1978); Thomas E. Plank, *Why Bankruptcy Judges Need Not And Should Not Be Article III Judges*, 72 Am. Bankr. L.J. 567, 584-87, 600-10 (1998). For example, the Nation's first bankruptcy law, the Bankruptcy Act of 1800, like the English statute before it, expressly allowed bankruptcy commissioners, who were appointed by the district court, "to take into their possession, all the estate, real and personal, of every nature and description to which the said bankrupt may be entitled, either in law or equity, in any manner whatsoever, and cause the same to be inventoried and appraised to the best value." Bankruptcy Act of 1800, § 5, 2 Stat. 25 (repealed 1803). Further, the 1800 Act authorized bankruptcy commissioners to "assign, transfer, or deliver over, all and singular the said bankrupt's estate and effects. . . ." to third parties. *Id.* at § 6. The 1800 Act gave bankruptcy commissioner's power over the debtor's estate so complete that a commissioner could "imprison recalcitrant third parties in possession of the estate's assets." *Central Va. Cmty. College,* 546 U.S. at 370 citing Bankruptcy Act of 1800, § 14, 2 Stat. 25 (repealed 1803).

The power of bankruptcy referees under the Bankruptcy Act of 1898 to enter final orders determining whether property in the debtor's possession was property of the bankruptcy estate also was unquestioned. Section 38 of the 1898 Act

authorized referees to determine ownership of property in the actual or constructive possession of the bankrupt. Bankruptcy Act of 1898, § 38, 30 Stat. 544, (Code, tit. 11 U.S.C. § 66) (repealed 1978); *see* 2A Collier on Bankruptcy, ¶ 38.09[2], at 1428-29 (James Wm. Moore et al. eds. 14th ed. 1978).

In *Mueller v. Nugent*, for example, the Court held that a referee under the 1898 Act could exercise the judicial authority of the court and determine in a summary proceeding whether property claimed to be held in trust should be delivered to the bankruptcy estate. 184 U.S. at 13-15. The Court reasoned that because the Act, like the modern Code, *see* 11 U.S.C. § 541(a), vested title to a debtor's property in the bankruptcy estate upon the filing of the bankruptcy petition, all property in the debtor's actual or constructive possession on the petition date was placed by operation of law into the custody of the bankruptcy court and a referee therefore could exercise summary jurisdiction over that property. 184 U.S. at 13-15. The Court acknowledged that a referee's authority to make orders about property in the debtor's actual or constructive possession was central to the bankruptcy process, stating that the "bankruptcy court would be helpless indeed" and the "grant of jurisdiction to cause the estates of bankrupts to be collected, ... would be seriously impaired," if a referee could not do so. *Id.* at 14. *Accord Taylor v. Sternberg*, 293 U.S. 470, 471-73 (1935) (holding that referee had authority to direct turnover of property in debtor's constructive possession).

Following *Mueller*, courts of appeals decisions interpreting the 1898 Act consistently acknowledged the authority of bankruptcy referees to enter final orders regarding whether property in the debtor's possession was property of the estate. *See, e.g., White v. Murtha*, 343 F.2d 831, 832 (5th Cir. 1965) (affirming bankruptcy referee's order for the turnover property of the debtor's estate); *Heath v. Helmick*, 173 F.2d 157, 159 (9th Cir. 1949) (affirming bankruptcy referee's order holding that real property was property held by debtor's estate where debtor remained "in continuous possession" of property even though a third party held title); *In re Stewart*, 179 F. 222, 225 (6th Cir. 1910) (affirming bankruptcy referee's order holding that funds in possession of debtor's agent were property of the estate and ordering their turnover). Especially relevant here is that under the 1898 Act, a bankruptcy referee could enter final orders that property held by a debtor's alter ego was property of the estate. *E.g.*, *Wellston Okla., Natural Gas Auth. Bondholders v. Nesbitt (In re Eufaula Enters.),* 565 F.2d 1157, 1160-62 (10th Cir. 1977).

Decisions under the Bankruptcy Reform Act of 1978 have continued this long-standing tradition of affirming bankruptcy court orders deciding whether property in the debtor's possession is estate property without questioning the bankruptcy courts' authority to enter such final orders. *See, e.g.*, *Daniels v. Agin*, 736 F. 3d 70, 72-73 (1st Cir. 2013) (affirming bankruptcy court's final order finding that property in the debtor's possession was estate property);

C.O.P. v. C.W. Mining Co. (In re C.W. Mining Co.), 641 F.3d 1235, 1238, 1243 (10th Cir. 2011) (same). The fact that the circuit courts have accepted virtually without question the constitutional authority of bankruptcy courts to decide whether property the debtor is holding is property of the estate is likely due to the fact, as this Court recognized, that one of the "[c]ritical features of every bankruptcy" is the bankruptcy court's control over "all of the debtor's property." *Central Va. Cmty. College*, 546 U.S. at 363-64.

Against this backdrop, the Seventh Circuit's post-*Stern* conclusion—that an action to determine whether property in the debtor's possession belongs to the bankruptcy estate does not "stem[] from the bankruptcy itself," 131 S. Ct. at 2618, and is therefore outside of a bankruptcy court's constitutional authority to decide—marks a radical departure from existing precedent. An action to determine if property in the debtor's possession is property of the bankruptcy estate cannot "exist[] without regard to any bankruptcy proceeding." *Id.* This conclusion ineluctably flows from the fact that a bankruptcy estate has no existence outside of the bankruptcy case because it is the "commencement of a case ... [that] creates an estate." 11 U.S.C. § 541(a). Thus, an action to determine what is included within a bankruptcy estate is the quintessential action that "stems from the bankruptcy itself." 131 S. Ct. at 2618. Indeed, if an action against the debtor to decide whether property he holds belongs to his bankruptcy estate is not an

action that "stems from the bankruptcy itself" it is hard to imagine what actions would meet this exception.

Granting the petition, therefore, presents the Court with the opportunity to define the parameters of what actions "stem[] from the bankruptcy itself". By holding that a debtor may unilaterally eliminate the constitutional authority of a bankruptcy court to make decisions about property in the debtor's possession simply by claiming that he holds the property in trust, the Seventh Circuit has "rendered [the bankruptcy process] practically inefficient." *Mueller*, 184 U.S. at 14.

The decision also has created considerable confusion over exactly what types of actions would "stem[] from the bankruptcy itself" that should be addressed. A debtor who files a bankruptcy petition in the Seventh Circuit can now refuse to turn over property he holds to his trustee, claiming he is the trustee of a sham trust and force the trustee to litigate the issue in district court. A debtor who files in the Fourth Circuit will be subject to the more summary proceedings before the bankruptcy court. Until the conflict is resolved, bankruptcy court orders in jurisdictions following the Fourth Circuit's view will be subject to challenge, delaying the administration of bankruptcy estates and the payment of funds owed to creditors. Further the lower courts will continue to struggle with how they should apply *Stern*.

B. The Seventh Circuit's Holding That An Action Against The Debtor Under 11 U.S.C. § 541 Is A State-Law Action Conflicts With Decisions Of The First, Fourth, Fifth, Sixth, Eighth And Tenth Circuits.

The Seventh Circuit concluded that the bankruptcy court could not enter a final order on the § 541 claim because deciding that claim required the bankruptcy court also to decide a state-law issue. The presence of that state-law issue (whether Sharif's alleged trust was a sham) caused the Seventh Circuit to conclude that the claim did not differ from the state-law counterclaim at issue in *Stern*. Pet. App. 48a.

But the two claims are fundamentally different. The claim at issue in *Stern* was not based on the Bankruptcy Code at all; instead, the debtor sued a creditor on a common law tort claim to recover money damages for an injury that occurred before the bankruptcy case began. 131 S. Ct. at 2601. The action at issue in this case is not based on the common law but on a specific provision of the Bankruptcy Code, § 541, and it is an action against the debtor. Pet. App. 8a. In the court of appeals even the debtor Sharif described the action as one based on federal law—§ 541—and argued that only the bankruptcy trustee could ask the bankruptcy court to determine whether property belonged to the bankruptcy estate. No. 12-1349, Dkt. 29 at 30-31

(7th Cir.).[2] The Seventh Circuit, however, ignored the fact that the statutory basis for the claim was a provision of the Bankruptcy Code. Instead, it focused on the fact that state law would determine whether the trust was a sham and therefore concluded that the action against the debtor was no different than the state-law counterclaim against a creditor in *Stern.* Pet. App. 48a.

The Seventh Circuit's ruling conflicts with decisions of the First, Fourth, Fifth, Sixth, Eighth, and Tenth Circuits, all of which hold that federal bankruptcy law dictates to what extent a debtor's interest in property is property of the bankruptcy estate for purposes of 11 U.S.C. § 541. *Croft*, 737 F.3d at 374; *Tyler,* 736 F.3d at 461; *Dittmar,* 618 F.3d at 1204; *Wagers,* 514 F.3d at 1028; *The Ground Round,* 482 F.3d at 17; *Am. Bankers Ins. Co. of Fla.*, 101 F.3d at 363; *N.S. Garrott & Sons*, 772 F.2d at 466. As the Seventh Circuit itself held before *Stern*, "[t]he question of whether a debtor's interest in property is 'property of the estate' is a federal

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[2] While demonstrating that the parties below understood the action to be a federal claim based on the Bankruptcy Code, Sharif's argument that only a trustee has the ability to seek relief under § 541 is incorrect. Wellness did not seek turnover of estate property to itself; instead it sought a declaration that would benefit the estate. Creditors frequently bring such § 541 actions. *See, e.g.*, *Shurley v. Texas Commerce Bank (In re Shurley)*, 115 F.3d 333 (5th Cir. 1997) (creditor brought suit to determine whether assets debtor claimed were held in trust were estate property); *Strong v. Page (In re Page)*, 239 B.R. 755, 759 (Bankr. W.D. Mich. 1999) (same).

question to be decided by federal law" even if "courts must look to the applicable state law to determine the extent (if any) of the Debtor's legal or equitable interest in the property." *In re Marrs-Winn Co.*, 103 F.3d 584, 591 (7th Cir. 1996).

The Seventh Circuit's post-*Stern* conclusion that § 541 property of the estate determinations against a debtor are now state-law claims "wholly independent of federal bankruptcy law" and therefore outside of the constitutional authority of bankruptcy courts to decide conflicts with the decisions of six other circuits. Pet. App. 51a. This split threatens to cause great uncertainty in the lower courts about how *Stern* should be applied. If, as the Seventh Circuit concluded, *Stern* means that bankruptcy courts may not decide state-law issues, most of the traditional work of bankruptcy courts will necessarily be transferred to the district courts.

As this Court has noted "[c]ritical" to every bankruptcy case is the collection of estate property. *Central Va. Cmty. College*, 546 U.S. at 363-64; *see also* 11 U.S.C. § 704(a)(1) (trustee's duties include collecting estate property). Yet determinations about what constitutes estate property under § 541 almost always require some reference to state law because outside of bankruptcy "[p]roperty interests are created and defined by state law." *Stern*, 131 S. Ct. at 2616; *Butner v. United States*, 440 U.S. 48, 55 (1979). As the First, Fourth, Fifth, Sixth, Eighth, and Tenth Circuits have all concluded, the fact that state law determines whether a debtor has an

interest in property does not transform the action into a state-law claim because federal law determines whether that interest qualifies as property of the estate. *See Croft*, 737 F.3d at 374; *Tyler,* 736 F.3d at 461; *Dittmar,* 618 F.3d at 1204; *Wagers,* 514 F.3d at 1028; *The Ground Round,* 482 F.3d at 17; *Am. Bankers Ins. Co. of Fla.,* 101 F.3d at 363; *N.S. Garrott & Sons*, 772 F.2d at 466. The Seventh Circuit's decision, however, means that this "critical" aspect of every bankruptcy case can no longer proceed in the bankruptcy court due to the inevitable presence of state-law issues in these disputes.

In addition to property of the estate determinations under § 541, many other Bankruptcy Code-based actions against both debtors and creditors involve considerations of state law. Objections to a debtor's exemptions under § 522, to the dischargeability of a debt under § 523, and to creditors' claims under § 502, all typically involve an interplay between state law and the Bankruptcy Code, yet courts have traditionally viewed these actions, like property of the estate determinations, as federal actions based on the Bankruptcy Code that exist only in a bankruptcy case. *See, e.g.*, *Farinash v. Stockburger (In re Stockburger)*, 106 F.3d 402 (6th Cir. 1997) (table decision) ("Section 522[] is a federal statute which has incorporated state law into its application. Upon incorporation, state law became a part of the federal statutory scheme; so it is federal law being given effect, not state law."); *In re Gupta*, 394 F.3d 347, 349-50 (5th Cir. 2004) ("the ultimate

determination of dischargeability [under § 523] is, however, a federal question" even though state law may be "important" in deciding the case); *In re Harford Sands, Inc.*, 372 F.3d 637, 640 (4th Cir. 2004) (court held allowance of a claim under § 502 is a matter of federal law even as it noted that the claim would also need to be valid under state law). Further, courts have traditionally viewed these types of actions, like property of the estate determinations, as at the core of any bankruptcy and within the constitutional authority of bankruptcy judges to decide. *Central Va. Cmty. College*, 546 U.S. at 363-64; Thomas Plank, *Why Bankruptcy Judges Need Not and Should Not Be Article III Judges*, 72 Am. Bankr. L.J. 567, 584-90, 600-10 (1998).

Until this Court clarifies the scope of the "stems from the bankruptcy itself" exception as set forth in *Stern* and addresses whether the presence of a state-law issue prevents a bankruptcy court from entering a final order, even in matters that historically always have been within the province of the bankruptcy courts to decide and are based upon specific provisions of the Bankruptcy Code, the lower courts will continue to struggle with these issues. Only this Court can resolve these issues.

II. The Court Should Resolve The Question Of Whether Article III Permits A Debtor Who Voluntarily Files For Bankruptcy To Consent To The Entry Of A Final Judgment By The Bankruptcy Court.

Relying upon *Stern*, the Seventh Circuit held that a debtor cannot, consistent with Article III, consent to the entry of a final judgment order by a bankruptcy court. Pet. App.51a-54a. But both *Stern* and the case currently before the Court, *Executive Benefits*, address the question of consent given by a party other than the debtor. Here, the party objecting to the bankruptcy court's constitutional authority is the debtor who voluntarily chose to file his bankruptcy petition necessarily understanding that he was subjecting his person and his property to the *in rem* jurisdiction of the bankruptcy court. The debtor's voluntary decision to invoke the bankruptcy court's authority makes this case fundamentally different from *Stern* and *Executive Benefits*.

Unlike a creditor who is sued by the bankruptcy estate, a debtor is in a position nearly identical to that of the litigants in *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833, 847-50 (1986). The parties claiming an Article III violation in *Schor*, like the debtor in this case, voluntarily chose to file suit in a non-Article III forum, leading the Court to conclude that they had consented to that forum and waived their right to an Article III court. *Id.*; *cf. Granfinanciera*, 492 U.S. at 59 n.14 (noting this distinction). Thus, whatever the ruling in *Executive*

Benefits, the consent question presented by this case is fundamentally different from those the Court decided in *Stern* and may decide in *Executive Benefits*.

The issue also is ripe for this Court's consideration. The Seventh Circuit's decision that a debtor who voluntarily filed for bankruptcy continues to have the right to insist upon an Article III tribunal to decide whether property in his possession is property of his bankruptcy estate conflicts with the Sixth Circuit's decision in *Longo v. McLaren (In re McLaren)*, 3 F.3d 958, 960-61 (6th Cir. 1993). In the analogous context of Seventh Amendment jury trial rights, *McLaren* holds that a debtor who voluntarily files for bankruptcy, like Sharif did here, submits himself to the equitable jurisdiction of the bankruptcy court and consents to proceed without a jury. *Id.*

McLaren is in conflict with the Seventh Circuit's decision because this Court has equated the right to trial by jury with the right to trial by an Article III court. *Granfinanciera*, 492 U.S. at 53. The Court held in *Granfinanciera* that "if a statutory cause of action is legal in nature, the question whether the Seventh Amendment permits Congress to assign its adjudication to a tribunal that does not employ juries as factfinders requires the same answer as the question whether Article III allows Congress to assign adjudication of that cause of action to a non-Article III tribunal." *Id.* *Stern* adopts the *Granfinanciera* analysis, 131 S. Ct. at 2616, and the

two decisions together stand for the proposition that if a litigant has a right to trial by jury, he also has the right to be heard in an Article III court. *See* Ralph Brubaker, *A "Summary" Statutory and Constitutional Theory of Bankruptcy Judges' Core Jurisdiction After Stern v. Marshall*, 86 Am. Bankr. L.J. 121, 150-51 (2012) (explaining that *Stern* and *Granfinanciera* equate the right to a trial by jury to the right to an Article III court).

In *McLaren*, the Sixth Court concluded, relying upon *Granfinanciera,* 492 U.S. at 53, that a debtor-defendant who voluntarily initiates a bankruptcy case, thereby forcing his creditors to come to bankruptcy court, submits himself to the equitable jurisdiction of the bankruptcy courts. 3 F.3d at 960-61. *McLaren* further held that, like a creditor who, by filing a claim, transforms the action against him into an equitable action and looses the right to trial by jury, so too does the voluntary debtor. *Id.* *McLaren* thus stands for the proposition that a debtor consents to proceed before a non-Article III court by filing his bankruptcy petition; a position that conflicts with the Seventh Circuit's decision.

Further, the distinction the Court noted in *Granfinanciera* between consent to a non-Article III adjudication and submission to the bankruptcy court's equitable jurisdiction does not apply to debtors. The Court suggested in *Granfinanciera* that the two concepts were different for a creditor. It reasoned that while a creditor submits to the bankruptcy court's equitable jurisdiction by filing a

proof of claim, it does not necessarily consent in the same way the litigants did in *Schor,* 478 U.S. at 849, because a creditor lacks an alternative forum in which to pursue its proof of claim against a debtor. *Granfinanciera,* 492 U.S. at 59 n.14. In *Stern*, the Court adopted that distinction, holding that when a creditor files a proof of claim in the bankruptcy case he does not consent to proceed in a non-Article III forum because the creditor has no other forum in which to collect its claim. 131 S. Ct. at 2614.

The same, however, is not true of a debtor who voluntarily chooses, as Sharif did here, to file his bankruptcy petition. As the Court explained in *United States v. Kras*, where it held that a debtor did not have a constitutional right to file a bankruptcy case without first paying a filing fee, "bankruptcy is not the only method available to a debtor for the adjustment of his legal relationship with his creditors." 409 U.S. 434, 445 (1973). Thus, a debtor who voluntarily chooses to file a bankruptcy case, receiving the benefits bankruptcy offers such as the automatic stay and the potential to receive a discharge, is in a fundamentally different position than a creditor filing a proof of claim. A voluntary debtor truly does consent expressly to proceed before a non-Article III court. A voluntary debtor, therefore, is no different from the litigants in *Schor*, who had a choice of proceeding on their claims in either federal district court or before a CFTC administrative law judge. 478 U.S. at 849. By holding that the debtor Sharif could not consent to a non-Article III adjudication, the Seventh Circuit's

decision conflicts with the Sixth Circuit's decision in *McLaren* and this Court's decision in *Schor*.

Consequently, the Court should grant *certiorari* to address whether a debtor consents to the authority of the bankruptcy court to decide those actions that arise against the debtor in the context of his bankruptcy case.

III. In The Event The Court Does Not Address Either Of The Questions At Issue In *Executive Benefits*, It Should Grant The Writ In This Case To Allow Those Issues To Be Decided.

This case also raises two questions currently before the Court in *Executive Benefits*, 133 S. Ct. 2880 (2013) (No.12-1200): (a) assuming the Court were to conclude that there is no distinction between debtors and creditors, *see infra Section II herein*, whether litigants can give their implied consent to the entry of a final order by a bankruptcy judge; and (b) whether a bankruptcy court has the statutory authority to enter proposed findings of fact and conclusions of law in an action, that while denominated as core under 28 U.S.C. § 157(b)(2), is outside of the bankruptcy court's constitutional authority to decide.

It is not clear that this Court will have to decide either or both of these two questions to rule in *Executive Benefits* given the unique procedural posture of that case. The respondent in *Executive Benefits* argues that the Court does not have to, and

should not, reach the constitutional issue of consent because petitioner "received the full Article III review it desired." Brief of Respondent at 54, *Executive Benefits Ins. Agency v. Arkison*, No. 12-1200 (Nov. 8, 2013). In *Executive Benefits*, the district court reviewed the bankruptcy court's summary judgment order *de novo* and "accorded the bankruptcy court no deference." *Id.* at 54-55. Thus, the respondent argues that the question of consent is moot because an Article III judge entered judgment after a *de novo* review. *Id.* If the question of consent is moot, so too will be the second question addressing whether there is a statutory gap in § 157.

If this Court agrees with the respondent in *Executive Benefits*, the circuits will continue to be divided on both of these important questions, making *certiorari* on these issues in this case extremely important.

A. The Split Among The Circuits Concerning The Question Of Consent Continues To Deepen.

Addressing the question of consent continues to be important. At the time this Court granted review in *Executive Benefits*, only two circuits had addressed the issue: the Sixth Circuit held a non-debtor litigant could not consent, *Waldman v. Stone*, 698 F.3d 910, 917-18 (6th Cir. 2012), and the Ninth Circuit held a non-debtor litigant could consent, both expressly and implicitly through its litigation conduct, *Executive Benefits Insurance Agency v.*

Arkison (In re Bellingham Ins. Agency, Inc.), 702 F.3d 553, 556-57 (9th Cir. 2012). Since then, three additional courts of appeals' decisions have addressed this question. The Seventh Circuit held in the instant case that a debtor could not implicitly consent. Pet. App. 33a-45a. In a subsequent decision, the Seventh Circuit distinguished between implied and express consent and suggested that a creditor's express consent might authorize a bankruptcy court to enter a final order. *Peterson v. Somers Dublin Ltd.*, 729 F.3d 741, 747 (7th Cir. 2013). The Fifth Circuit has adopted the reasoning of the Sixth Circuit in a case where the objecting party was a debtor and held that all forms of consent are impermissible. *See BP RE, L.P. v. RML Waxahachie Dodge, L.L.C. (In re BP RE, L.P.),* 735 F.3d 279, 286-87 (5th Cir. 2013). Only this Court can resolve this conflict and ensure uniformity in the lower courts on this important issue.

B. The Circuits Are Split On Whether There Is A Statutory Gap In 28 U.S.C § 157(b).

The circuits also are clearly divided on the question of whether there is a statutory gap in § 157 that precludes a bankruptcy court from presiding over or recommending proposed findings in a matter that before *Stern* would have been viewed as core, but is now outside of the bankruptcy court's constitutional authority to decide. Since the Court granted review of this issue in *Executive Benefits*, the Seventh Circuit also has held in this case that there is a statutory gap. Pet. App. 51a-54a.

This issue needs to be resolved to ensure the efficient administration of bankruptcy cases. If there is a statutory gap, Congress is unlikely to remedy the statutory problem until this Court rules on the issue. If there is no statutory gap (which petitioner submits is the case), until this question is decided, bankruptcy courts in the Seventh Circuit will not be able to preside over or have anything to do with unconstitutional core proceedings, while continuing to have the authority under § 157(c) to preside over non-core matters. The Seventh Circuit directed on remand that the district court had to restart the proceedings from scratch, including allowing additional time for discovery, notwithstanding Sharif's prior discovery violations—violations the Seventh Circuit found sufficient to sustain the judgment on the discharge counts. Pet. App. 54a, 58a-65a. This means that in the Seventh Circuit the parties to a bankruptcy court judgment that is successfully challenged based upon *Stern* will be required to re-litigate everything in the case.

This result is anomalous given that it means that bankruptcy courts can have no part in actions that Congress, and historical precedent and practice, deemed most central to bankruptcy administration, such as the § 541 determination at issue in this case. *See Gecker v. Flynn (In re Emerald Casino, Inc.)*, 459 B.R. 298, 300 n.1 (Bankr. N.D. Ill. 2011) (describing this result as "bizarre"). This also will undoubtedly result in significant litigation gamesmanship. For example, a non-creditor defendant subject to the bankruptcy court's authority under § 157(c) to

recommend a ruling has a ticket out of the bankruptcy court merely by filing a proof of claim. Once the proof of claim is filed, the lawsuit becomes a counterclaim against a creditor, falling under § 157(b)(2)(C), the provision held unconstitutional in *Stern* and thus, under the Seventh Circuit's decision in this case, no longer capable of being decided in the bankruptcy court.

In the circuits where the issue has not been resolved, litigants will face inevitable challenges to district court orders based on bankruptcy courts' proposed findings in unconstitutional core matters. At least five judicial districts have enacted local standing orders directing the bankruptcy courts to enter proposed findings and conclusions of law in unconstitutional core proceedings and all of the judgments entered pursuant to these standing orders will continue to be subject to challenge by the losing party until the question of whether there is a statutory gap is decided. *See* Tyson A. Crist, *Stern v. Marshall: Application of the Supreme Court's Landmark Decision in the Lower Courts*, 86 Am. Bankr. L.J. 627, 679 n.290 (2012) (listing jurisdictions with such orders).

Until this question is resolved, the authority of bankruptcy courts to recommend rulings in these circumstances remains subject to challenge, threatening the efficient administration of the courts and the validity of the orders based upon such proposed rulings. The ability of district courts to address the problem through standing orders also

remains subject to challenge. Only this Court can clarify this issue in a uniform manner across the circuits.

* * *

Granting *certiorari* here provides an additional vehicle for this court to address the questions of consent and the purported statutory gap in 28 U.S.C. § 157. In the alternative, this Court should hold this case pending its resolution of *Executive Benefits* and grant, vacate, and remand this case for further consideration in light of this Court's decision in the above-mentioned case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted, or, in the alterative, the Court should hold this case pending the Court's resolution of *Executive Benefits*, and depending on the decision in that case, grant the petition to address any questions left unresolved in *Executive Benefits* or remand this case to the Seventh Circuit Court of Appeals for further consideration.

Respectfully submitted,

CATHERINE STEEGE
Counsel of Record
BARRY LEVENSTAM
MELISSA M. HINDS
LANDON RAIFORD
JENNER & BLOCK LLP
353 N. Clark Street
Chicago, Illinois 60654
(312) 222-9350
csteege@jenner.com

Attorneys for Petitioners

APPENDIX

Appendix A

In the

United States Court of Appeals

For the Seventh Circuit

No. 12-1349

WELLNESS INTERNATIONAL NETWORK, LIMITED, RALPH OATS AND CATHY OATS,

Plaintiffs-Appellees,

v.

RICHARD SHARIF,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 1:10-cv-05303 — **Harry D. Leinenweber**, *Judge*.

ARGUED SEPTEMBER 18, 2012 - DECIDED AUGUST 21, 2013

Before FLAUM, SYKES, and TINDER, *Circuit Judges*.

TINDER, *Circuit Judge*. This appeal is the most recent chapter in a decade-long saga spanning two circuits involving the debtor, Richard Sharif, and his judgment creditors, Wellness International Network, Ltd., Ralph Oats, and Cathy Oats (collectively, "WIN"). After being slapped with a judgment in excess of $650,000 in the Northern District of Texas as a sanction for his failure to engage in discovery, Sharif filed for Chapter 7 bankruptcy in the Northern District of Illinois. WIN filed a five-count adversary complaint in the bankruptcy court. Counts I through IV sought to prevent discharge of Sharif's debts under 11 U.S.C. § 727, and Count V sought a declaratory judgment that a trust of which Sharif was trustee was in fact Sharif's alter ego. Sharif continued his evasive and dilatory tactics, failing to respond to WIN's and the bankruptcy trustee's discovery requests. The bankruptcy court ordered Sharif to comply with the discovery requests and warned him that failure to do so would result in a default judgment. Sharif tendered some discovery but his responses fell far short of full compliance. After a hearing, the bankruptcy judge issued an opinion and order entering default judgment in WIN's favor and subsequently awarded attorney's fees to WIN. Sharif appealed to the district court. *See* 28 U.S.C. § 158(a)(1).

After the bankruptcy judge's entry of judgment but before briefing on the appeal in the district court, the Supreme Court decided *Stern v. Marshall*, 131 S. Ct. 2594 (2011), in which it held that a bankruptcy court lacked constitutional

authority to enter final judgment on a debtor's state-law counterclaim against a creditor, even though Congress had granted the bankruptcy court statutory authority to do so. A few months after *Stern* was decided, Sharif filed his opening brief in the district court, but he did not challenge the bankruptcy judge's authority to enter final judgment on the adversary complaint. In December 2011, Sharif's sister filed a motion in the district court to withdraw the reference on the basis of *Stern*. Later that month, our court decided *Ortiz v. Aurora Health Care, Inc.* (*In re Ortiz*), 665 F.3d 906 (7th Cir. 2011), in which we dismissed a direct appeal from a bankruptcy court on the ground that there was no final judgment because the bankruptcy judge had lacked constitutional authority to enter one under *Stern*. Shortly thereafter, Sharif filed a motion for supplemental briefing in the district court so that he could advance a *Stern* argument. The district judge denied both motions as untimely, holding that a *Stern* objection to a bankruptcy judge's authority to enter final judgment is waivable and that Sharif's failure to raise it earlier constituted waiver, and affirmed the bankruptcy court's entry of default judgment. Sharif's sister did not appeal the denial of her motion to withdraw the reference, but Sharif appealed the balance of the district court's decision to this court.

We hold that a constitutional objection based on *Stern* is not waivable because it implicates separation-of-powers principles. We also hold that the bankruptcy judge lacked constitutional authority to enter a final judgment on the alter-ego claim. In

contrast, we hold that the bankruptcy judge had constitutional authority to enter final judgment on the first four counts of the adversary complaint, each of which were objections to the discharge of Sharif's debts. Finally, we hold that the entry of default judgment and awarding of fees were proper sanctions under the circumstances, though we remand for a recalculation of fees.

I. Background

A. Texas Litigation

The parties' relationship began when Sharif entered into distributorship contracts with WIN for the sale of health and wellness products. In January 2003, Sharif and others sued WIN in the Northern District of Illinois claiming that WIN was running a pyramid scheme. *Sharif v. Wellness Int'l Network, Ltd.*, 376 F.3d 720, 722 (7th Cir. 2004). In 2004, our court reversed the district court's denial of WIN's motion to compel arbitration on some of the claims. *Id.* at 726-27. On remand, the district court dismissed without prejudice the claims that were not subject to arbitration pursuant to forum-selection clauses in the contracts requiring suit to be filed in the Northern District of Texas, and this court affirmed. *Muzumdar v. Wellness Int'l Network, Ltd.*, 438 F.3d 759 (7th Cir. 2006).

Sharif and his co-plaintiffs refiled their suit in the Northern District of Texas. *See In re Sharif*, 447 B.R. 853, 854 (Bankr. N.D. Ill. 2011). They ignored WIN's discovery requests, resulting in the material

facts being deemed admitted against them. The district court subsequently granted summary judgment for WIN, and the Fifth Circuit affirmed, observing as follows:

> A review of the record on appeal demonstrates that Appellants' untimely performance in this court mirrors a lengthy history in the district court of dilatoriness and hollow posturing interspersed with periods of non-performance or insubstantial performance and compliance by Appellants and their counsel, leaving the unmistakable impression that they have no purpose other than to prolong this contumacious litigation for purposes of harassment or delay, or both. The time is long overdue to terminate Appellants' feckless litigation at the obvious cost of time and money to the Defendants by affirming all rulings of the district court but remanding the case to that court for the reinstatement of its consideration of Appellees' motion for attorney's fees. In so doing, we caution Appellants that any further efforts to prolong or continue proceedings in this court, including the filing of petitions for rehearing, will potentially expose them to the full panoply of penalties, sanctions, damages, and double costs pursuant to FRAP 38 at our disposal.

Sharif v. Wellness Int'l Network, Ltd., 273 F. App'x 316, 317 (5th Cir.), *cert. denied*, 555 U.S. 1085 (2008). On remand, the district court awarded $655,596.13 in attorney's fees to WIN as a sanction against Sharif and his co-plaintiffs. No. 3:05—CV-01367—B, 2008 WL 2885186 (N.D. Tex. July 22, 2008).

Thereafter, WIN served Sharif with post-judgment discovery requests to discover Sharif's assets, but Sharif ignored them. In November 2008, the Texas district court granted WIN's motion to compel discovery and ordered Sharif to respond to WIN's outstanding discovery requests; Sharif ignored the court's order and failed to appear for his deposition. WIN followed-up with a motion for civil contempt. In February 2009, Sharif was arrested and held in civil contempt for discovery violations, but the Texas district court released him on his own recognizance after he promised to respond to the post-judgment discovery requests and to reimburse WIN for fees and other costs associated with the motion to compel and the motion for civil contempt. *See* 447 B.R. at 855; *Wellness Int'l Network v. J.P. Morgan Chase Bank, N.A.*, 407 B.R. 316, 318 (Bankr. N.D. Ill. 2009). Sharif again ignored the district court's orders.

B. Sharif Files for Bankruptcy

Two weeks later, on February 24, 2009, Sharif filed for bankruptcy under Chapter 7 in the Northern District of Illinois. The bankruptcy petition listed WIN as a creditor, along with various members of

Sharif's family to whom he allegedly owed $271,000 in undocumented loans. WIN was the only creditor to file a proof of claim.

At some point, WIN obtained a June 14, 2002, loan application that Sharif had submitted to the now-defunct Washington Mutual on which he claimed to have owned the following assets: (1) three businesses worth $2,400,000; (2) three parcels of real property worth $1,400,000; (3) a retirement account worth $1,400,000; and (4) three bank accounts containing $180,000 in cash ("Loan Assets"). Thus, in 2002 Sharif had represented to a financial institution that he had assets worth $5,380,000, and Washington Mutual had approved a loan based on those representations. WIN had requested documents related to these assets during the Texas litigation, but Sharif had never tendered them.

On March 25, 2009, the bankruptcy trustee, Horace Fox, Jr., held the initial creditors' meeting, *see* 11 U.S.C. § 341, and at this meeting both WIN and Fox requested that Sharif provide documents related to the Loan Assets; Fox continued the meeting until April so that Sharif could gather the documents. On April 21, the § 341 creditors' meeting resumed but Sharif failed to provide the requested documentation. Instead, Sharif informed WIN and Fox that he had lied on the loan application and that he never had owned the Loan Assets; rather, those assets were owned by the Soad Wattar Trust, of which Sharif was trustee. WIN then requested that Sharif produce documentation evidencing the formation and funding of the Soad Wattar Trust. Fox

again continued the § 341 meeting so that Sharif could gather the requested documents, but Sharif never produced any of them.

C. Adversary Proceeding

WIN subsequently initiated an adversary proceeding in the bankruptcy court. The amended complaint asserted five counts: Count I alleged that Sharif had "continuously concealed property that he owns by holding such property in the name of the Soad Wattar Living Trust with improper intent to deceive" in violation of 11 U.S.C. § 727(a)(2)(A). Count II alleged that Sharif had "concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information" in violation of § 727(a)(3). Count III alleged that Sharif had knowingly and fraudulently made a false oath or account with regard to his bankruptcy case in violation of § 727(a)(4)(A). Count IV alleged that Sharif had failed to explain the disappearance of the more than $5 million of Loan Assets in violation of § 727(a)(5). And Count V sought a declaratory judgment pursuant to 28 U.S.C. §§ 2201 and 2202 that the Soad Wattar Trust is Sharif's alter ego and that its assets should therefore be treated as part of Sharif's bankruptcy estate.

On February 10, 2010, WIN served requests for production and interrogatories on Sharif in both his individual capacity and in his capacity as trustee for the Soad Wattar Trust; all responses were due on March 15. On March 12, Sharif requested an indefinite extension of time to respond to all

discovery requests; his counsel indicated that Sharif had gone to Syria to tend to his terminally ill mother. On March 24, Sharif failed to appear for his deposition and through counsel filed a motion for an extension of time, which the bankruptcy court subsequently denied. WIN's counsel and Sharif's counsel conferred on April 13 to resolve the unfulfilled discovery requests. WIN requested that Sharif provide complete responses to the outstanding discovery requests by April 23 and provide potential dates for his deposition. Sharif's counsel did not agree to these requests because he did not know if or when Sharif would return to the United States.

On April 15, WIN filed a motion for sanctions and, in the alternative, a motion to compel discovery. On April 21, the bankruptcy court granted WIN's motion to compel discovery, ordering "[t]hat Richard Sharif, individually and as Trustee has to April 28, 2010 to comply with all of [WIN's] outstanding discovery requests, including document production, interrogatories, and [Rule] 2004 examination, and *it is further ordered that in the event Richard Sharif fails to comply by April 28, 2010, an order of default will be entered against him in the proceeding*, and the [Motion for Sanctions] is continued for proof of compliance to April 28, 2010." (Emphasis added.) The bankruptcy court's order effectively gave Sharif a six-week extension from the date his discovery responses were initially due. On April 27, Sharif produced approximately 1,500 pages of documents; the court rescheduled the hearing on the motion for May 24 to allow WIN time to review whether the tendered discovery fulfilled the discovery requests.

WIN finally deposed Sharif on May 13. Sharif admitted that he had not provided any documentation concerning the creation and funding of the Soad Wattar Trust. Nor had he provided source data and documents used to complete his tax returns or his signed tax returns. He also admitted that he had not provided information about multiple bank accounts. On May 20, more than three weeks after the court-ordered deadline, Sharif's counsel produced additional documents. The bankruptcy court held a hearing on May 24 and took the matter under advisement. Almost a month later, on June 22, Sharif filed a motion for summary judgment.

On July 6, the bankruptcy court issued its opinion and order entering default judgment for WIN on all five counts of the adversary complaint. The bankruptcy judge found that Sharif had violated the discovery order as follows:

- Sharif and his attorney had signed the interrogatory responses as trustee of the Soad Wattar Trust but the responses lacked a statement of verification as required by Federal Rule of Civil Procedure 33(b) (made applicable to bankruptcy proceedings by Federal Rule of Bankruptcy Procedure 7033), *see, e.g., Hindmon v. Nat'l Ben Franklin Life Ins. Corp.*, 677 F.2d 617, 619 (7th Cir. 1982).

- Sharif had not signed the interrogatory responses directed toward him in his

individual capacity; only his attorney had signed them.

- Sharif had ignored the bankruptcy court's October 20, 2009, order requiring that he turn over documents related to the Loan Assets to Fox.

- Sharif had failed to turn over documents related to the Loan Assets in response to WIN's requests for production.

- Sharif had failed to produce any documents related to any trust in which he had an interest, despite the fact that in his sworn bankruptcy petition he had claimed to control property of the Richard Sharif Revocable Trust.

- Sharif had failed to produce bank statements and account records relating to himself and the Soad Wattar Trust and instead provided only names and addresses of three financial institutions with corresponding account numbers.

- Sharif had failed to produce documents relating to his personal bank accounts and instead stated that the documents were available at JP Morgan Chase Bank.

- Sharif had failed to disclose AG Edwards accounts in his bankruptcy petition, and he had failed to produce documents concerning those accounts.

- He had failed to produce documents concerning approximately $752,050 in assets held by AG Edwards in joint tenancy for Sharif and his mother, Soad Wattar, and he had failed to produce any documents to support his deposition testimony that those assets had been transferred to Wachovia.

- He had failed to produce documents related to a variable annuity worth $39,248 held at AG Edwards for his and his sister's benefit as joint tenants.

- Sharif had failed to disclose information related to numerous other accounts that he had admitted having an interest in during his deposition.

- Sharif had failed to disclose why he no longer held a 10% ownership interest in Logan Square MRI & Diagnostic Center, Inc., that he had once claimed.

- Sharif had failed to disclose why he no longer held 100% ownership interest in Sharif Pharmacy, though he had claimed such an interest on his 2002 federal tax return—he said the tax return was incorrect and that he owns only a 10% interest in the pharmacy, but he provided no documentation of that interest.

- Sharif had failed to produce corporate records of Sharif Pharmacy and Hermosa Medical Center after 2006.

- Sharif had failed to produce documents evidencing the formation and funding of the Soad Wattar Trust.

    - He claimed that the trust had been funded with a $2 million inheritance that had been transferred by international wire from Beirut, Lebanon, through Dubai, United Arab Emirates, but he did not produce any documents related to such a transfer.

    - He had failed to produce documents showing transfers of assets to the Soad Wattar Trust, with the exception of one house.

    - He had produced amendments to the Soad Wattar Trust but he had not produced the original trust instrument.

- Sharif had failed to produce his signed federal and state tax returns.

- Sharif had failed to produce the source documents used to prepare his tax returns.

- Sharif had failed to produce documents related to the $271,000 that he allegedly owed his family members.

The bankruptcy court rejected Sharif's contention that, while there were deficiencies, he had made a good-faith effort to comply with all discovery requests. It also noted that Sharif's "supplemental production" on May 20 had occurred several weeks after the court-imposed April 28 deadline and after the May 13 deposition. In response to Sharif's argument that WIN had not consulted with his attorney *after* the discovery had been tendered, the bankruptcy court noted "that a phone call would have been futile because [Sharif] was so grossly out of compliance with his discovery obligations." The court concluded that Sharif had "failed to comply with most of [WIN's] discovery requests" and that his "lack of compliance is a pattern that has continued from the time of the underlying litigation in Texas to the instant bankruptcy case and adversary proceeding." Accordingly, the bankruptcy judge entered a default judgment in WIN's favor on all five counts of the adversary complaint and ordered Sharif to pay WIN's attorney's fees.

Judgment was entered in both the bankruptcy proceeding and the adversary proceeding. Subsequently, on August 9, the bankruptcy court issued an order awarding WIN $54,405.99 in attorney's fees and $8,349.75 in other costs in connection with the motion for sanctions. And on November 18, the court awarded WIN additional fees and other costs it had incurred in connection with the § 341 creditors' meetings. Sharif timely appealed all four judgments to the district court.

D. Appeal to the District Court

On August 9, 2011, Sharif filed his opening appellate brief in the district court, asserting only two claims of error. First, he argued that his right to due process under the Fifth Amendment had been violated because WIN had not conferred with his counsel after the discovery responses were tendered, so he was never given notice of the particular deficiencies prior to the hearing on the motion for sanctions. Second, he argued that the bankruptcy court had abused its discretion in entering a default judgment because he had been a trustee of the Soad Wattar Trust, not a beneficiary.

On December 12, 2011, Ragda Sharifeh, Sharif's sister, filed a motion to withdraw the reference in the district court.[1] She argued that the bankruptcy court had lacked jurisdiction to enter a final judgment on WIN's adversary complaint under *Stern v. Marshall*, 131 S. Ct. 2594 (2011). On January 12, 2012, Sharif filed a motion for supplemental briefing on *Stern* and this court's then-two-week-old decision in *In re Ortiz*, 665 F.3d 906 (7th Cir. 2011).

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[1] This was not Ragda's first attempt to undo the bankruptcy court's judgment. *See* 457 B.R. 702, 720-32 (Bankr. N.D. Ill. 2011); 447 B.R. 853, 865-68 (Bankr. N.D. Ill. 2011); 446 B.R. 870, 883-85 (Bankr. N.D. Ill. 2011). Indeed, Ragda initiated her own adversary proceeding against Sharif and Fox (though she asserted claims only against Fox), which the bankruptcy court dismissed. 457 B.R. at 720-32. Her appeal of that dismissal is currently pending before a different district judge.

The district court denied both Ragda's motion to withdraw the reference and Sharif's motion for supplemental briefing as untimely and affirmed the bankruptcy court's judgment. *Sharifeh v. Fox*, Nos. 11 C 8811, 09 BK 05868, 09-AP-00770, 10-AP-02239, 10 C 5303, 10 C 5333, 10 C 6057 & 11 C 175, 2012 WL 469980 (N.D. Ill. Feb. 10, 2012). With regard to the *Stern* issue, the court assumed that Ragda had standing to raise the issue but concluded that objections based on the bankruptcy court's authority to enter a final judgment are waivable because they do not implicate subject-matter jurisdiction and that, by failing to raise the issue sooner, Ragda had voluntarily waived the issue. *Id.* at *5-7. It similarly denied Sharif's motion for supplemental briefing because, although *Ortiz* had only recently been decided, *Stern* had been decided a month and a half before Sharif submitted his opening brief, yet Sharif had not raised the issue then. *Id.* at *10. On the merits, the court applied a deferential standard of appellate review, considering whether the bankruptcy court's entry of sanctions constituted an abuse of discretion and whether its factual findings were clearly erroneous. *Id.* at *7. It first rejected Sharif's due-process argument, concluding that Sharif had received notice and an opportunity to be heard and that the bankruptcy court had expressly warned Sharif in its April 21 order that failure to comply with the discovery requests would result in a default judgment. *Id.* at *8-9. The court then concluded that the bankruptcy judge had not abused her discretion in finding that Sharif had failed to comply with the order compelling discovery and that he had acted willfully and in bad faith. *Id.* at *9. The

district court therefore affirmed the four judgments of the bankruptcy court in their entirety, *id.* at *10, and Sharif now appeals (though Ragda does not).

Between his opening and reply briefs, Sharif raises several issues in this court. Specifically, he contends that the bankruptcy court lacked jurisdiction to enter a final judgment under *Stern*; that the bankruptcy court abused its discretion in awarding default judgment as a discovery sanction; that the bankruptcy court erred in awarding fees and costs to WIN; that the judgment on Count V is void because Illinois law required WIN to join the Soad Wattar Trust's beneficiaries; and that the alter-ego claim should have been brought by Fox, not WIN. The purple elephant in this case is whether the bankruptcy court had authority to enter a final judgment and, if not, whether that is an issue that may be waived. We begin there.

II. The Bankruptcy Court's Authority

Sharif argues that the bankruptcy court lacked constitutional authority to enter final judgment, default or otherwise, on WIN's adversary complaint under the holdings of *Stern v. Marshall*, 131 S. Ct. 2594 (2011), and *In re Ortiz*, 665 F.3d 906 (7th Cir. 2011). WIN responds that Sharif waived this argument by failing to present it sooner and, through his litigation conduct, consented to final adjudication by the bankruptcy judge. Sharif replies that this issue is not waivable and may be raised at any time.

As we discuss later, whether Sharif's objection to the bankruptcy court's constitutional authority is waivable is a thorny question. The only two circuits to have addressed the issue head-on since *Stern* was decided issued their respective decisions after we heard oral argument in this appeal and came to opposite conclusions. *In re Bellingham Ins. Agency, Inc.*, 702 F.3d 553, 566-70 (9th Cir. 2012) (waivable), *cert. granted*, 133 S. Ct. 2880 (2013) (No. 12-1200); *Waldman v. Stone*, 698 F.3d 910, 917-18 (6th Cir. 2012) (not waivable), *cert. denied*, 133 S. Ct. 1604 (2013). On June 24, 2013, the Supreme Court granted a petition for a writ of certiorari in the case from the Ninth Circuit, which raised the issue of whether a *Stern* objection is waivable. *Exec. Benefits Ins. Agency v. Arkison*, 133 S. Ct. 2880 (2013) (No. 12-1200). A final answer to that question is likely to be rendered when the Supreme Court decides that case next term. But we think the path to resolution of that issue is sufficiently clear that we should address it now rather than further extending the litigation between Sharif and WIN by waiting for the conclusion of the *Executive Benefits* case. We therefore proceed to consider Sharif's appeal, but before addressing the constitutional issues, we must determine whether the bankruptcy court had statutory authority to enter final judgment on WIN's claims. *In re Ortiz*, 665 F.3d at 911; *see Stern*, 131 S. Ct. at 2604-08.

A. Statutory Authority

District courts have "original and exclusive jurisdiction of all cases under title 11," and they have

original jurisdiction "of all civil proceedings arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. § 1334(a)-(b). Bankruptcy courts are units of the district courts, 28 U.S.C. § 151, and the bankruptcy judges "serve as judicial officers of the United States district courts established under Article III of the Constitution," §152(a)(1). The district courts may refer "any or all" bankruptcy cases and proceedings to their respective district's bankruptcy judges, § 157(a), which is how the bankruptcy judge came to preside over Sharif's bankruptcy proceedings and WIN's adversary complaint, *see* N.D. Ill. Local R. 40.3.1(a).

Congress has granted bankruptcy judges the authority to hear, determine, and enter final orders and judgments in "all cases under title 11 and all core proceedings," subject to traditional appellate review in the district court. §§ 157(b)(1) & 158. Proceedings "that arise in a bankruptcy case or under Title 11" are "core proceedings." *Stern*, 131 S. Ct. at 2605; *see also* § 157(b)(2) (providing nonexhaustive list of sixteen types of core proceedings). Proceedings that do not arise in a bankruptcy case or under title 11 but are otherwise related to a case under title 11 are noncore proceedings. *See Stern*, 131 S. Ct. at 2604-05. A bankruptcy judge may hear noncore proceedings but, absent consent of the parties, *see* § 157(c)(2), may only "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 considering the bankruptcy judge's proposed findings and conclusions and after

reviewing de novo those matters to which any party has timely and specifically objected," § 157(c)(1).

The first four counts of WIN's adversary complaint clearly are core matters, and Sharif does not argue otherwise. In those counts, WIN objected to the discharge of Sharif's debts under 11 U.S.C. § 727(a). Congress has explicitly identified "objections to discharges" as core proceedings. 28 U.S.C. § 157(b)(2)(J). The bankruptcy court therefore had statutory authority to enter final judgment on WIN's first four claims.

Sharif asserts that the fifth count, the alter-ego claim, is a noncore matter, which would mean that the bankruptcy court lacked statutory authority to enter final judgment unless the parties consented. Unlike objections to discharge, alter-ego claims are not expressly listed as core proceedings in § 157(b)(2), but that list is not exhaustive and the fact that it is a state-law claim is not dispositive, *see* § 157(b)(3) ("A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law."). Courts have reached differing conclusions as to whether alter-ego claims are core matters. *Compare Cent. Vt. Pub. Serv. Corp. v. Herbert*, 341 F.3d 186, 192 (2d Cir. 2003) (core), *with Mirant Corp. v. Southern Co.*, 337 B.R. 107, 117 (N.D. Tex. 2006) (noncore). But we need not determine whether the alter-ego claim is core or noncore because Sharif has waived the issue. Unlike the murky issue of waiver surrounding the bankruptcy court's constitutional authority, it is clear that a party can waive an

argument concerning the core/noncore status of a claim under § 157. *See Stern*, 131 S. Ct. at 2606-08; *Waldman*, 698 F.3d at 917-18. Sharif never argued in either the bankruptcy court or the district court that the alter-ego claim was a noncore matter. *See, e.g., Puffer v. Allstate Ins. Co.*, 675 F.3d 709, 718 (7th Cir. 2012) ("It is a well-established rule that arguments not raised to the district court are waived on appeal." (citations omitted)). Furthermore, in this court, he merely asserts in his jurisdictional statement that the alter-ego claim was not a core matter, without any supporting argument or authority. *See, e.g., United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) (per curiam) ("A skeletal 'argument', really nothing more than an assertion, does not preserve a claim." (citation omitted)). So we proceed on the assumption that the alter-ego claim was a core proceeding over which the bankruptcy court had authority under § 157(b)(1) to enter final judgment, but the existence of statutory authority will not justify the bankruptcy court's actions if the court lacked constitutional authority, *cf. Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174-79 (1803).

B. Constitutional Authority

Article III, § 1, vests the "judicial Power of the United States" in a judiciary with judges who enjoy life tenure (subject to removal only by impeachment) and whose salaries may not be diminished. *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 16 (1955). "Article III is 'an inseparable element of the constitutional system of checks and balances' that 'both defines the power and protects the

independence of the Judicial Branch.'" *Stern*, 131 S. Ct. at 2608 (quoting *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 58 (1982) (plurality opinion)). It "could neither serve its purpose in the system of checks and balances nor preserve the integrity of judicial decisionmaking if the other branches of the Federal Government could confer the Government's 'judicial Power' on entities outside Article III." *Id.* at 2609. Therefore, as a general rule, 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." *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1855). So suits that are made of "the stuff of the traditional actions at common law tried by the courts at Westminster in 1789," *N. Pipeline*, 458 U.S. at 90 (Rehnquist, J., concurring in judgment), must be decided by Article III judges when brought within the bounds of federal jurisdiction. *Stern*, 131 S. Ct. at 2609.

Bankruptcy judges are not Article III judges. They are appointed to 14-year terms "by the court of appeals of the United States for the circuit in which [their] district is located," 28 U.S.C. § 152(a), and a bankruptcy judge may be removed "for incompetence, misconduct, neglect of duty, or physical or mental disability" by a majority vote of "the judicial council of the circuit in which the judge's official duty station is located," § 152(e). And although by statute their salaries are equivalent to "92 percent of the salary of a judge of the district court of the United States," § 153(a), since they are not Article III judges their

salaries may be diminished by Congress, *cf. N. Pipeline*, 458 U.S. at 53 (plurality opinion).

Stern v. Marshall held that a bankruptcy court lacked authority under Article III, § 1, to enter final judgment on a bankruptcy petitioner's state-law counterclaim for tortious interference that was not resolved in the process of ruling on a creditor's proof of claim. 131 S. Ct. at 2620. But *Stern* was not the Supreme Court's first foray into the Article III thicket surrounding bankruptcy judges and, as explained shortly, the Court's decision in *Stern* was heavily influenced by its two previous decisions concerning Article III limitations in the bankruptcy context.

In *Northern Pipeline*, the Court held that a bankruptcy court lacked constitutional authority to enter final judgment on a debtor's state-law contract claim against a noncreditor, but no rationale commanded a majority of the Justices. 458 U.S. at 63-87 (plurality opinion); *id.* at 90-92 (Rehnquist, J., concurring in judgment). A majority, however, agreed on two basic principles, namely, that adjudication of the contract claim at issue did not implicate the so-called "public rights" doctrine, *id.* at 67-76 (plurality opinion); *id.* at 91 (Rehnquist, J., concurring in judgment), and that the bankruptcy courts were not mere adjuncts to the district courts, *id.* at 76-87 (plurality opinion); *id.* at 91 (Rehnquist, J., concurring in judgment). After *Northern Pipeline*, Congress enacted the current statute, the Bankruptcy Act of 1984, in which (among other changes) it created the core/noncore distinction.

A few years later, the Court returned to the Article III issue presented by bankruptcy courts, albeit in a less direct manner. In *Granfinanciera, S.A. v. Nordberg*, a bankruptcy trustee had brought an action to recover an allegedly fraudulent monetary conveyance from third parties that had not submitted claims against the bankruptcy estate, and the third parties had demanded a jury trial under the Seventh Amendment. 492 U.S. 33, 36-37 (1989). The Court explained that "the question whether the Seventh Amendment permits Congress to assign [a cause of action's] adjudication to a tribunal that does not employ juries as factfinders requires the same answer as the question whether Article III allows Congress to assign adjudication of that cause of action to a non-Article III tribunal." *Id.* at 53. It then concluded that the fraudulent-conveyance actions at issue could be resolved only by Article III courts because they did not involve "public rights" and instead were "quintessentially suits at common law that ... resemble[d] state-law contract claims brought by a bankrupt corporation to augment the bankruptcy estate." *Id.* at 56. As a result, the Court held that the third parties were constitutionally entitled to a jury trial, notwithstanding the fact that Congress had designated fraudulent-conveyance actions as core proceedings. *Id.* at 36, 49-64.

Stern v. Marshall involved a long-running dispute between Vickie Marshall (commonly known as Anna Nicole Smith) and Pierce Marshall concerning the sizeable will of J. Howard Marshall (Vickie's husband and Pierce's father). Before J. Howard died and left Vickie nothing in his will, she

filed suit in Texas probate court claiming that Pierce had fraudulently induced J. Howard to sign a living trust that excluded her and that J. Howard had intended to give Vickie half his estate. *Id.* at 2601. After J. Howard died, Vickie filed for bankruptcy in the Central District of California. Pierce filed a complaint in the bankruptcy proceeding, asserting that Vickie had defamed him and seeking a declaration that his defamation claim was not dischargeable in the bankruptcy proceedings. He subsequently filed a proof of claim for the defamation action so that he could recover damages for it from Vickie's bankruptcy estate. *See* 11 U.S.C. §§ 523(a) & 501(a). Vickie responded with a counterclaim for tortious interference with the gift she had expected from J. Howard, the same claim that she had asserted in Texas probate court. 131 S. Ct. at 2601. The bankruptcy court granted summary judgment for Vickie on Pierce's defamation claim and, after a bench trial, entered judgment for Vickie on her counterclaim. In response to Pierce's objection that the bankruptcy court lacked jurisdiction over Vickie's counterclaim, the bankruptcy court concluded that Vickie's counterclaim was a core proceeding under 28 U.S.C. § 157(b)(2)(c) and, therefore, that it had power to enter judgment on the counterclaim under § 157(b)(1). 131 S. Ct. at 2601-02. Meanwhile, the Texas probate court had conducted a jury trial on the merits of the tortuous-interference suit and had entered judgment in Pierce's favor. *Id.* at 2602.

Pierce appealed to the district court, which held that Vickie's counterclaim was *not* a "core proceeding" under § 157(b)(2)(C). Accordingly, the

district court treated the bankruptcy court's judgment as proposed, not final, and conducted de novo review in accordance with §157(c)(1). Even though by that time the Texas probate court had already issued its judgment, the district court declined to give that judgment preclusive effect and found in Vickie's favor. 131 S. Ct. at 2602. The Ninth Circuit reversed on a different issue and in turn was reversed by the Supreme Court in *Marshall v. Marshall*, 547 U.S. 293 (2006). On remand, the Ninth Circuit held that Vickie's counterclaim was not a core proceeding, which meant that the Texas probate court's judgment had been first in time and that the district court had erred in failing to give that judgment preclusive effect. *In re Marshall*, 600 F.3d 1037, 1055-65 (9th Cir. 2010). The Supreme Court again granted certiorari, 131 S. Ct. 63 (2010), but this time it affirmed the Ninth Circuit, albeit on different grounds.

The Court first rejected Pierce's argument (and the Ninth Circuit's holding) that Vickie's counterclaim was not "a core proceeding" under § 157(b)(2)(C), which specifies that core proceedings include "counterclaims by the estate against persons filing claims against the estate." 131 S. Ct. at 2604-05; *see also id.* at 2605 ("Under our reading of the statute, core proceedings are those that arise in a bankruptcy case or under Title 11."). As a result, the Court held that the bankruptcy court had been granted statutory authority to enter judgment on the counterclaim. *Id.* at 2605.

After addressing another statutory argument (which we explore later), the Court turned to the constitutionality of the bankruptcy court's entry of final judgment and concluded that the bankruptcy court had impermissibly exercised the "judicial Power of the United States." *See id.* at 2620 ("The Bankruptcy Court below lacked the constitutional authority to enter final judgment on a state law counterclaim that is not resolved in the process of ruling on a creditors' proof of claim."). The Court reasoned that the state-law counterclaim did not involve "public rights" and did not stem from a federal statutory scheme or involve a particularized area of law. *Id.* at 2614-15; *see also Granfinanciera*, 492 U.S. at 54-56. Rather, it "involve[d] the most prototypical exercise of judicial power: the entry of final, binding judgment *by a court* with broad substantive jurisdiction, on a common law cause of action, when the action neither derives from nor depends upon any agency regulatory regime." *Id.* at 2615.

The Court then rejected Vickie's argument that Pierce's filing of a claim in the bankruptcy proceeding took her counterclaim outside the confines of Article III, explaining that Pierce's defamation claim did not affect "the nature of Vickie's counterclaim for tortious interference as one at common law that simply attempt[ed] to augment the bankruptcy estate." *Id.* at 2616. Vickie based her argument on both *Katchen v. Landy*, in which the Court held that a bankruptcy referee could rule on a trustee's voidable-preference claim against a creditor who had filed a claim because resolution of the

preference issue was necessary to resolve the creditor's claim, 382 U.S. 323, 329-36 (1966), and *Langenkamp v. Culp*, in which the Court held that a preferential-transfer claim against a creditor who had filed a claim could be heard in bankruptcy because under those circumstances "the ensuing preference action by the trustee become[s] integral to the restructuring of the debtor-creditor relationship," 498 U.S. 42, 44 (1990) (per curiam). But *Katchen and Langenkamp* were distinguishable, the Court explained, because unlike in those cases there "was never reason to believe that the process of ruling on Pierce's proof of claim would necessarily result in the resolution of Vickie's counterclaim." *Stern*, 131 S. Ct. at 2617. Another difference was that the preference actions in *Katchen and Langenkamp* were rights of recovery created by federal bankruptcy law, whereas Vickie's counterclaim was neither derived from nor dependent upon bankruptcy law but instead was "a state tort action that exist[ed] without regard to any bankruptcy proceeding." *Id.* at 2618. The Court concluded "that Congress may not bypass Article III simply because a proceeding may have *some* bearing on a bankruptcy case; the question is whether the action at issue stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process." *Id.*

The Court also rejected Vickie's argument that the bankruptcy courts were merely "adjuncts" of the district courts. *See id.* at 2618-19; *see also N. Pipeline*, 458 U.S. at 84-86 (plurality opinion); *id.* at 91 (Rehnquist, J., concurring in judgment). Bankruptcy courts, the Court explained, "do not

'ma[k]e only specialized, narrowly confined factual determinations regarding a particularized area of law' or engage in 'statutorily channeled factfinding functions.'" 131 S. Ct. at 2618 (brackets in original) (quoting *N. Pipeline*, 458 U.S. at 85 (plurality opinion)). Rather, they "resolve '[a]ll matters of fact and law in whatever domains of the law to which' the parties' counterclaims might lead," *id.* at 2618-19 (brackets in original) (quoting *N. Pipeline*, 458 U.S. at 91 (Rehnquist, J., concurring in judgment)), thereby exercising "the essential attributes of judicial power," *id.* at 2618. And unlike the adjunct agency in *Crowell v. Benson*, which had no independent authority to enforce its orders and instead relied on the district courts' decisions to enforce or set aside the agency's orders, 285 U.S. 22, 44-45, 51-65 (1932), "a bankruptcy court resolving a counterclaim under 28 U.S.C. § 157(b)(2)(C) has the power to enter 'appropriate orders and judgments' — including final judgments — subject to review only if a party chooses to appeal." 131 S. Ct. at 2619 (citing §§ 157(b)(1), 158(a)—(b)). In view of its authority to make the final determination in core proceedings, the Court concluded, "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." *Id.*

In re Ortiz applied *Stern* and held that a bankruptcy court lacked constitutional authority to enter final judgment on debtors' claims that were grounded in Wisconsin law. 665 F.3d at 911-14. Aurora Health Care, Inc., had filed proofs of claim in approximately 3,200 bankruptcy cases in the Eastern

District of Wisconsin that had listed the debtors' medical treatment information. *Id.* at 908. A group of debtors (actually, two groups) filed a class-action lawsuit against Aurora, alleging that Aurora had willfully violated a Wisconsin statute barring disclosure of patients' healthcare records. The bankruptcy judge dismissed the suit on summary judgment, concluding that the Wisconsin statute required proof of actual damages and that the debtors had failed to marshal evidence of actual damages. *Id.* at 910; *see* 430 B.R. 523, 534-358 (Bankr. E.D. Wis. 2010). A few months before *Stern* was decided, we authorized the parties to bring a direct appeal to this court under 28 U.S.C. § 158(d)(2).

Based on *Stern*, we held that, although the debtors' claims were "core proceedings," the bankruptcy court had lacked constitutional authority to enter final judgment. *In re Ortiz*, 665 F.3d at 911-14. The debtors' disclosure claims, we explained, were "simply ordinary state-law claims," in all material respects identical to the counterclaim in *Stern*: they involved private parties litigating interests defined by state law that were not historically determined by the executive or legislative branches; no governmental parties were involved; the claims did "not flow from a federal statutory scheme," *id.* at 913; and the claims did not involve "a particularized area of the law" where Congress had established a body with particular expertise to determine certain factual matters in an efficient and inexpensive manner. *Id.* at 914 (quotations omitted) (citing *Stern*, 131 S. Ct. at 2609,

2612-16). Also, just as in *Stern*, the fact that Aurora had filed "proofs of claim in the debtors' bankruptcies did not give the bankruptcy judge authority to adjudicate the debtors' state-law claims." *Id.* While there was some factual overlap between the debtors' claims and Aurora's proofs of claim, the debtors' claims were not necessarily resolvable in the claims-allowance process, nor were they "'integral to the restructuring of the debtor-creditor relationship.'" *Id.* (quoting *Stern*, 131 S. Ct. at 2617). The debtors' claims simply sought "'to augment the bankruptcy estate — the very type of claim that ... must be decided by an Article III court.'" *Id.* (quoting *Stern*, 131 S. Ct. at 2616). Therefore, the bankruptcy judge had lacked constitutional authority to enter final judgment on the debtors' claims, *id.*, and because there was no final judgment, we had to dismiss the appeal for lack of appellate jurisdiction, *id.* at 915; *see* 28 U.S.C. § 158(d).

Sharif contends that under *Stern* and *Ortiz* the bankruptcy judge lacked constitutional authority to enter final judgment on WIN's adversary complaint, in particular the alter-ego claim. Under ordinary principles of waiver, however, Sharif's argument is not preserved because he waited too long to assert it. But the parties dispute whether ordinary principles of waiver apply to a *Stern* objection.

1. Waiver

WIN asserts, and the district court held, that *Stern* itself indicates that Sharif's Article III

objection is waivable and that, through his litigation conduct and failure to raise the objection sooner, Sharif in fact waived it. *See Sharifeh*, 2012 WL 469980, at *10; *see also id.* at *5-7 (denying Ragda's motion to withdraw the reference on the ground that she had waived her *Stern* objection). Sharif, on the other hand, contends that his *Stern* objection is not waivable and can be raised at any time because it concerns the bankruptcy court's subject-matter jurisdiction. Neither view is persuasive.

In *Stern*, the Court held that Pierce had waived his alternative, nonconstitutional argument that the bankruptcy court had lacked jurisdiction over his defamation claim under 28 U.S.C. § 157(b)(5) ("personal injury tort and wrongful death claims shall be tried in the district court"). 131 S. Ct. at 2606-08. The Court reasoned that neither the text nor the context of § 157(b)(5) had the hallmarks of a jurisdictional statute and explained that "we are not inclined to interpret statutes as creating a jurisdictional bar when they are not framed as such." *Id.* at 2607 (citing *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 516 (2006)). Section 157 in general merely "allocates the authority to enter final judgment between the bankruptcy court and the district court" and "does not implicate questions of subject-matter jurisdiction." *Id.* (citations omitted). And § 157(b)(5) merely "specifies where a particular category of cases should be tried." *Id.* The Court held that these "statutory limitation[s]" were waivable and that, given his "course of conduct" in the bankruptcy court, Pierce had "consented to that court's resolution of his

defamation claim (and [had] forfeited any argument to the contrary)." *Id.* at 2607-08.

At first blush, then, *Stern* appears to support WIN's waiver argument. But there is a significant difference between the waived objection in *Stern* and Sharif's objection, namely, the argument in *Stern* concerned only the bankruptcy court's *statutory* authority, whereas Sharif's argument concerns the bankruptcy court's *constitutional* authority. We discern nothing in *Stern* that supports the proposition that a party may waive an Article III objection to a bankruptcy judge's entry of final judgment. In point of fact, a different portion of the *Stern* opinion casts serious doubt on whether notions of waiver and consent have any role in bankruptcy, given that creditors must go to the bankruptcy court to pursue their claims. *See* 131 S. Ct. at 2614-15 & n.8; *see also Granfinanciera*, 492 U.S. at 59 n.14. For these reasons, we do not think *Stern* supports WIN's position.

As for Sharif's argument, it is true that questions of subject-matter jurisdiction may be raised at any time, as parties cannot consent to subject-matter jurisdiction; indeed, such questions must be considered by a court *sua sponte*. *See, e.g.*, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998); *Capron v. Van Noorden*, 6 U.S. (2 Cranch) 126, 127 (1804). But we disagree with Sharif that his Article III, § 1, objection concerns the bankruptcy court's subject-matter jurisdiction, for several reasons. First, as noted above, *Stern* held that § 157 constitutes a statutory allocation of

authority between the bankruptcy courts and the district courts, and Article III, § 1, can be viewed similarly, that is, as an allocation of authority between Article III courts and non-Article III courts. Second, in resolving the constitutional issue in *Stern*, the Court never asserted that the bankruptcy court in that case had lacked subject-matter jurisdiction; rather, it held that "[t]he Bankruptcy Court ... lacked the *constitutional authority* to enter a final judgment on a state law counterclaim that is not resolved in the process of ruling on a creditor's proof of claim," 131 S. Ct. at 2620 (emphasis added). Third, the constitutional bases of federal subject-matter jurisdiction are set forth in Article III, § 2, whereas Sharif's objection to the bankruptcy court's entry of final judgment is based on Article III, § 1. Finally, Sharif's reliance on *Ortiz* for the proposition that a *Stern* objection is jurisdictional is misplaced, as the jurisdictional issue in *Ortiz* concerned whether there was a valid final judgment for purposes of *appellate* jurisdiction, given the unique procedural posture of that appeal (a direct appeal from the bankruptcy court); *Ortiz* did *not* hold that the bankruptcy court had lacked jurisdiction. Consequently, we do not think the waiver issue can be resolved under the well-established principle that questions of subject-matter jurisdiction are not waivable. Nevertheless, we agree with Sharif that under current law his constitutional objection to the bankruptcy court's entry of final judgment is not waivable.

Although consent has no role under Article III, § 2, the Supreme Court has acknowledged a limited role for notions of consent and waiver under Article

III, § 1. *See Stern*, 131 S. Ct. at 2613-14; *id.* at 2625-26, 2627-28 (Breyer, J., dissenting); *Peretz v. United States*, 501 U.S. 923, 936-39 (1991); *Granfinanciera*, 492 U.S. at 59 n.14; *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848-57 (1986); *cf. Roell v. Withrow*, 538 U.S. 580 (2003) (holding that under 28 U.S.C. § 636(c)(1) parties may consent to proceedings before a magistrate judge through their litigation conduct).

This appears to stem from the fact that § 1 protects two separate interests — it safeguards litigants' right to have their cases decided by independent and impartial judges, and it also operates as an inseparable element of separation of powers by protecting the judicial branch from encroachment by the political branches. *Stern*, 131 S. Ct. at 2608-09; *Schor*, 478 U.S. at 848-50; *N. Pipeline*, 458 U.S. at 58 (plurality opinion). The guarantee of an independent and impartial judiciary serves primarily to protect personal interests, and so it "is subject to waiver, just as are other personal constitutional rights that dictate the procedures by which civil and criminal matters must be tried." *Schor*, 478 U.S. at 848-49 (citations omitted). The role that § 1 plays in our system of checks and balances, however, protects the larger structural interests of our constitutional government, and "[t]o the extent that this structural principle is implicated in a given case, the parties cannot by consent cure the constitutional difficulty for the same reason that the parties by consent cannot confer on federal courts subject-matter jurisdiction beyond the limitations imposed by Article III, § 2." *Id.* at 850-51 (citation

omitted). "When these Article III limitations are at issue, notions of consent and waiver cannot be dispositive because the limitations serve institutional interests that the parties cannot be expected to protect." *Id.* at 851; *see also Freytag v. C.I.R.*, 501 U.S. 868, 896-98 (1991) (Scalia, J., concurring in judgment). But *cf. Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 231 (1995) (rejecting proposition "that legal defenses based upon doctrines central to the courts' structural independence can never be waived"); *Freytag*, 501 U.S. at 893-901 (same).

The dual nature of Article III, § 1, renders notions of waiver and consent more nuanced than they are in other areas. The practical problem, of course, is the difficulty of separating out the waivable personal safeguard from the nonwaivable structural safeguard, for in every case an argument that a party waived the personal protection can be met with the argument that the court must still consider the objection because the structural aspect cannot be waived. The net result would be that an Article III, § 1, argument can never be waived and that parties can never consent to adjudication by a non-Article III tribunal, which would render *Schor's* discussion of the waivability of the personal protections meaningless. But a close examination of *Schor* demonstrates how this difficulty is to be resolved.

Schor involved an Article III challenge to an agency's authority to decide a state-law counterclaim. A customer brought a claim for

reparations against his commodity futures broker before the Commodity Futures Trading Commission (CFTC), and the broker filed a state-law counterclaim for the same amount. After the CFTC ruled in favor of the broker on both the claim and the counterclaim, the customer appealed on the ground that the CFTC's adjudication of the counterclaim ran afoul of Article III, § 1. The Court held that the CFTC's assumption of jurisdiction over the state-law counterclaim was not unconstitutional. Although the customer had consented to proceed before the CFTC rather than an Article III court, *id.* at 849-50, the Court explained that consent could not be dispositive due to the structural interests protected by Article III, § 1, *id.* at 851. The Court then examined several factors and held that "the congressional scheme [did] not impermissibly intrude on the province of the judiciary." *Id.* at 851-52. While the counterclaim at issue was a private right (rather than a public right) traditionally decided by courts, the Court found it significant that the CFTC dealt only with a "particularized area of law," *id.* at 852 (quoting *N. Pipeline*, 458 U.S. at 85 (plurality opinion)); the CFTC's adjudicatory powers departed from the traditional agency model in only one respect, its jurisdiction over state-law counterclaims, *id.*; like in *Crowell*, 285 U.S. 22, the CFTC's orders were enforceable only by a district court, its factual findings were reviewed under a "weight of the evidence" standard, and its legal conclusions were reviewed de novo, *Schor*, 478 U.S. at 853; and the CFTC's counterclaim jurisdiction was "limited to that which [was] necessary to make the reparations procedure workable," *id.* at 856. Therefore, the Court

concluded, "the magnitude of any intrusion on the Judicial Branch [could] only be termed *de minimis*." *Id.*; *see also Peretz*, 501 U.S. at 936-37 (holding that a criminal defendant in a felony trial may consent to jury selection presided over by a magistrate judge: no structural issues were implicated because magistrates were appointed and subject to removal by Article III judges; the district court made the ultimate decision to invoke the magistrate's assistance, subject to veto by the parties; and the decision whether to empanel the jury whose selection was overseen by the magistrate remained entirely with the trial judge).

As noted earlier, since we heard oral argument, two of our sister circuits have addressed the waiver issue head-on and have come to divergent conclusions; both circuits relied on *Schor*. In *Waldman v. Stone*, the Sixth Circuit held that a *Stern* objection to the bankruptcy court's constitutional authority is not waivable. 698 F.3d at 917-18. Stone filed for bankruptcy and initiated an adversary proceeding against Waldman, seeking both discharge of his debts to Waldman and affirmative relief (e.g., fraud, specific performance). After a bench trial, the bankruptcy court discharged Stone's obligations and awarded him a little over $3 million on his affirmative claims. *Id.* at 915-16. On appeal, the court held that Waldman could and had in fact waived any objection to the bankruptcy court's *statutory* authority, but it held that Waldman could not waive the *constitutional* objection. *Id.* at 917-18. The court rejected the argument that, in bankruptcy cases like Stone's, the "personal right" character

predominates. *Id.* While acknowledging that the case did not pose a great risk of aggrandizement of the legislative and executive branches, the court explained that this took "too narrow a view of the interests preserved by Article III," which is also concerned with diminution of the judicial branch. *Id.* at 918; *see also id.* ("To the extent that Congress can shift the judicial Power to judges without [the tenure and salary] protections, the Judicial Branch is weaker and less independent than it is supposed to be." (citing *Schor*, 478 U.S. at 850)). And because Waldman's objection implicated both his personal rights and the structural interests advanced by Article III, the objection could not be waived. *Id.*

The Ninth Circuit reached the opposite conclusion in *In re Bellingham Insurance Agency, Inc.*, 702 F.3d at 566-70. In that case, Bellingham Insurance Agency, Inc., filed a Chapter 7 bankruptcy petition, after which the trustee filed a complaint against Executive Benefits Insurance Agency, Inc., seeking to recover allegedly fraudulent conveyances and to hold Executive Benefits liable for Bellingham's debts. The bankruptcy court granted summary judgment to the trustee, and the district court affirmed. Prior to oral argument before the Ninth Circuit, Executive Benefits argued for the first time that the bankruptcy judge was constitutionally prohibited from entering final judgment on the trustee's claims. *Id.* at 557. The court held that Executive Benefits had waived its right to have an Article III judge decide the matter, *see id.* at 566-70, finding the waivable nature of an Article III, § 1, objection to be "well established," *id.* at 566-67 (citing

MacDonald v. Plymouth Cnty. Trust Co., 286 U.S. 263, 267 (1932)). Like the Sixth Circuit it relied on *Schor*: "Following the genesis of the modern bankruptcy system, the Supreme Court clarified that 'Article III, § l'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.'" *Id.* at 567 (quoting *Schor*, 478 U.S. at 848). In a footnote, the court acknowledged that Schor held "that 'notions of consent and waiver cannot be dispositive' of Article III problems when 'the encroachment or aggrandizement of one branch at the expense of the other' is at stake, because in such cases structural principles are implicated in addition to private rights entitlements." *Id.* at 567 n.9 (quoting *Schor*, 478 U.S. at 850-51). But it reasoned that while aggrandizement was an issue in *Schor* (because that case involved an executive agency adjudicating a state-law counterclaim), "the allocation of authority between bankruptcy courts and district courts *does not implicate structural interests*, because bankruptcy judges are 'officer[s] of' the district court and are appointed by the Courts of Appeals." *Id.* (emphasis added) (citing 28 U.S.C. §§ 151, 152(a)(1)). Therefore, the court concluded, "as a personal right, Article III's guarantee of an impartial and independent federal adjudication is subject to waiver." *Id.* at 567 (quoting *Schor*, 478 U.S. at 848). In another footnote, the court commented that it is this principle that allows "federal magistrate judges, acting with the consent of the litigants, to enter final judgments in proceedings that would otherwise be

the exclusive province of Article III courts." *Id.* at 567 n.10 (citing 28 U.S.C. § 636(c)(1)). It also noted that consent to a magistrate's entry of final judgment "may be implied from a litigant's actions." *Id.* (citing *Roell*, 538 U.S. at 586-87). Finally, the court observed that "§ 157(c)(2) expressly provides that bankruptcy courts may enter final judgments in non-core proceedings 'with the consent of all the parties to the proceeding," *id.* at 567, and it concluded that "[i]f consent permits a non-Article III judge to decide finally a non-core proceeding, then it surely permits the same judge to decide a core proceeding in which he would, absent consent, be disentitled to enter final judgment," *id.*

We think the Sixth Circuit has the better view under current law. *Schor* holds that waiver or consent may be a factor in determining whether delegation of judicial business to non-Article III tribunals is unconstitutional, but it cannot be dispositive because of the structural role of Article III, § 1. And *Stern* unequivocally holds that 28 U.S.C. § 157(b) violates the structural protections of Article III, § 1, in permitting a bankruptcy judge to enter final judgment in certain "core proceedings." In other words, unlike *Schor*, where party consent was permissible because the statutory scheme at issue did not implicate structural concerns, the Supreme Court has already held that the statutory scheme granting bankruptcy judges authority to enter final judgment in core proceedings *does* implicate structural concerns where the core proceeding at issue is "'the stuff of the traditional actions at common law tried by the courts at Westminster in

1789,'" *Stern*, 131 S. Ct. at 2609 (quoting *N. Pipeline*, 458 U.S. at 90 (Rehnquist, J., concurring in judgment)). Therefore, we cannot agree with our colleagues on the Ninth Circuit that the allocation of authority between bankruptcy courts and district courts with regard to core proceedings does not implicate structural interests. We also observe that in *Stern* the Court rejected the proposition that the fact that bankruptcy judges are appointed by Article III judges makes a difference; the Court explained that since it was the bankruptcy court itself that "exercise[d] 'the essential attributes of judicial power [that] are reserved to Article III courts,' it [did] not matter who appointed the bankruptcy judge or authorized the judge to render final judgments in such proceedings. The constitutional bar remain[ed]." *Id.* at 2619 (second alteration in original) (quoting *Schor*, 478 U.S. at 851).

It is true that under 28 U.S.C. § 157(c)(2) parties may consent to final resolution of a noncore proceeding by a bankruptcy judge, but we do not think that this inexorably leads to the conclusion that parties may consent to final adjudication of a core proceeding by a bankruptcy judge or waive a *Stern* objection. For one thing, the Supreme Court has not passed on the constitutionality of § 157(c). *Cf. Stern*, 131 S. Ct. at 2615 n.8 (observing that "the notion of 'consent' does not apply in bankruptcy proceedings as it might in other contexts"); *Granfinanciera*, 492 U.S. at 59 n.14 ("Parallel reasoning [to *Schor*] is unavailable in the context of bankruptcy proceedings, because creditors lack an alternative forum to the bankruptcy court in which

to pursue their claims."). In any event, the statutory scheme established by Congress for core proceedings differs in significant respects from the scheme for noncore proceedings. Whereas Congress has vested bankruptcy judges with authority to enter final orders and judgments in core proceedings subject only to review by the district court under traditional appellate standards, *see* §§ 157(b), 158(a), in noncore proceedings Congress has vested bankruptcy judges with authority to hear the matter and submit proposed findings of fact and conclusions of law to the district court, and it is the district court that enters final judgment after de novo review, § 157(c)(1). Section 157(c)(2) permits a bankruptcy judge to enter final judgment in a noncore proceeding, but only if the parties consent and the district court decides to refer the matter to the bankruptcy court. Thus, a strong argument can be made that with respect to noncore proceedings Congress has left the essential attributes of judicial power to Article III courts, and so the structural interests at issue with regard to core proceedings are not present under the current statutory scheme applicable to noncore proceedings, thereby allowing room for notions of waiver and consent. *Cf. Peretz*, 501 U.S. at 936-37; *United States v. Raddatz*, 447 U.S. 667, 681-84 (1980) (holding that there was no Article III impediment to a magistrate judge's submission of proposed findings of fact and conclusions of law concerning suppression motion because ultimate suppression decision was made by the district judge). In this case we need not, and do not, express an opinion on the constitutionality of § 157(c)(2), or for that matter § 636(c)(1), which

permits litigants to consent to entry of final judgment by a magistrate judge, *cf. Technical Automation Servs. Corp. v. Liberty Surplus Ins. Corp.*, 673 F.3d 399, 404-07 (5th Cir. 2012) (declining to hold that *Stern* affected a magistrate judge's authority to enter final judgment on a state-law counterclaim under § 636(c)(1)). Our discussion is intended only to show that, unlike the Ninth Circuit, we do not think that a party's *Stern* objection to a bankruptcy court's entry of final judgment in a core proceeding is waivable simply because Congress has authorized litigants to consent to a bankruptcy judge's final adjudication of a noncore proceeding.[2]

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[2] We also disagree with the Ninth Circuit that *MacDonald v. Plymouth County Trust Co.*, 286 U.S. 263 (1932), supports the notion that the waivability of an Article III, § 1, objection is "well established." *In re Bellingham Ins. Agency, Inc.*, 702 F.3d at 566-67. Prior to the Bankruptcy Act of 1978, federal district courts served as bankruptcy courts and employed a "referee" system. *See N. Pipeline*, 458 U.S. at 53 (plurality opinion). In *MacDonald*, the Court held that the parties could consent to have an action to set aside voidable preferences summarily tried by a referee —i.e., the parties could agree to waive the benefits of the procedures employed in plenary suits tried to the district courts. 286 U.S. at 265-68. But *MacDonald* was decided on statutory grounds — the question was whether the referee had *statutory* jurisdiction, and the Court's holding was based on its conclusion that the relevant statutory definitions of "courts" and "court of bankruptcy" included the referee. *Id.* at 268. The *MacDonald* Court did not mention the Constitution, let alone Article III, § 1. Furthermore, as the plurality in *Northern Pipeline* observed, the particular adjunct functions exercised by the bankruptcy referees prior to the 1978 Act were "never ... explicitly endorsed by" the Supreme Court, and the bankruptcy courts created under the 1978 Act, which are very similar to the bankruptcy courts in existence today, differed

In sum, we hold that under current law a litigant may not waive an Article III, § 1, objection to a bankruptcy court's entry of final judgment in a core proceeding. We thus turn to consider Sharif's constitutional objection to the bankruptcy court's authority, despite the fact that he waited so long to assert it.

2. The Bankruptcy Court Lacked Constitutional Authority

Sharif maintains that the bankruptcy judge lacked constitutional authority to enter final judgment on Count V of WIN's adversary complaint, the alter-ego claim. He concedes, however, that the bankruptcy court had authority to enter final judgment on the first four counts of the complaint, which objected to discharge of Sharif's debts under 11 U.S.C. § 727. We agree with Sharif on both points.

The first four counts of the complaint sought to prevent discharge of Sharif's debts. These claims stem from federal law, not state law, as the provisions of 11 U.S.C. § 727 provide the relevant

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significantly from the old referee system. 458 U.S. at 79 n.31. We simply do not see how a decision interpreting an old statute that differs considerably from current law can support the proposition that waiver of an Article III, § 1, objection is "well established." *See Plaut*, 514 U.S. at 232 n.6 ("Of course the unexplained silences of our decisions lack precedential weight." (citations omitted)); *Webster v. Fall*, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." (citations omitted)).

rules of decision. Moreover, whether to grant or deny discharge is central to the restructuring of the debtor-creditor relationship. Although it is debatable whether such restructuring falls under the rubric of public rights, *see Stern*, 131 S. Ct. at 2614 n.7; *Granfinanciera*, 492 U.S. at 56 n.11; *but cf. N. Pipeline*, 458 U.S. at 71 (plurality opinion) ("[T]he 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 ... . The former may well be a 'public right,' but the latter obviously is not."), it is clear that WIN's objections to discharge differ markedly from the state-law claims at issue in *Stern*, *Granfinanciera*, *Northern Pipeline*, and *Ortiz*. The Supreme Court has not come close to holding that an Article III judge must decide claims for which the Bankruptcy Code itself provides the rule of decision, and we will not do so here, where the parties concede that the bankruptcy judge had authority.

Our analysis of the alter-ego claim is somewhat hampered by the posture of this case. Because the bankruptcy court entered default judgment it had no need to address the merits of the alter-ego claim and thus no need to identify what WIN substantively would have been required to show to establish that the Soad Wattar Trust was Sharif's alter ego, and the parties have not filled that informational void. Our independent research of Illinois law reveals that the alter-ego theory of liability most commonly, if not exclusively, arises in the context of piercing the corporate veil, in which

creditors attempt to disregard the corporate form to reach the personal assets of the shareholders. *See, e.g., Van Dorn Co. v. Future Chem. & Oil Corp.*, 753 F.2d 565, 569-73 (7th Cir. 1985); *Main Bank v. Baker*, 427 N.E.2d 94, 101-02 (Ill. 1981). "Piercing the corporate veil" is an equitable doctrine that depends on the circumstances in each case. *Koch Refining v. Farmers Union Cent. Exch., Inc.*, 831 F.2d 1339, 1345 (7th Cir. 1987); *see Main Bank*, 427 N.E.2d at 102. There are two showings that must be made to establish that a corporation is merely an alter ego: "'first, there must be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist; and second, circumstances must be such that an adherence to the fiction of separate corporate existence would sanction a fraud or promote injustice.'" *Koch Refining*, 831 F.2d at 1345 (quoting *Gallagher v. Reconco Builders, Inc.*, 415 N.E.2d 560, 563-64 (Ill. App. Ct. 1980)); *see also Main Bank*, 427 N.E.2d at 101. "The degree of control one entity holds over another [(i.e., the first element)] has been measured in Illinois by evidence of misrepresentation; commingling of funds, assets, or identities; undercapitalization; failure to operate at arm's length; and failure to comply with corporate formalities." *Koch Refining*, 831 F.2d at 1345 (citing *Main Bank*, 427 N.E.2d at 102); *see also Van Dorn Co.*, 753 F.2d at 570 (listing similar factors). "Once the first element of the test is established, *either* the sanctioning of a fraud (intentional wrongdoing) *or* the promotion of injustice, will satisfy the second element." *Van Dorn Co.*, 753 F.2d at 570.

It is unclear whether Illinois recognizes an analogous alter-ego theory to disregard the separate legal identity of a trust. *Cf. In re Vebeliunas*, 332 F.3d 85, 90 (2d Cir. 2003) ("The question whether the 'alter ego theory' of piercing applies to trusts is a matter of state law." (citation omitted)). WIN cites no cases to support such a cause of action, and the only case cited by Sharif involved a court's refusal to impose a resulting trust due to the party's inequitable conduct, *see Am. Nat'l Bank & Trust v. Vinson*, 653 N.E.2d 13, 15-16 (Ill. App. Ct. 1995). But we proceed on the assumption that such a theory exists and that it is governed by the standards for piercing the corporate veil because the parties have so assumed and the merits are not at issue in this appeal.

In almost all material respects, WIN's alter-ego claim is indistinguishable from the tortious-interference counterclaim in *Stern*, the fraudulent-conveyance claim in *Granfinanciera*, the contract claim in *Northern Pipeline*, and the disclosure claims in *Ortiz*. The alter-ego claim is a state-law claim that does not involve "public rights." The dispute is between private parties and involves no governmental parties. It stems from state law rather than a federal regulatory scheme. And it does not involve a particularized area of law. Instead, it is a commonlaw claim for which state law provides the rule of decision, and it is intended only to augment the bankruptcy estate. *See Stern*, 131 S. Ct. at 2611-15; *Granfinanciera*, 492 U.S. at 49-59; *N. Pipeline*, 458 U.S. at 67-76 (plurality opinion); *id.* at 91 (Rehnquist, J., concurring in judgment); *In re Ortiz*,

665 F.3d at 914. Furthermore, it is beyond dispute that the bankruptcy court was not acting as an adjunct to the district court. *See Stern*, 131 S. Ct. at 2618-19; *N. Pipeline*, 458 U.S. at 76-87 (plurality opinion); *id.* at 91 (Rehnquist, J., concurring in judgment).

WIN argues that the bankruptcy court had authority to enter judgment on the alter-ego claim because WIN had to establish that the Soad Wattar Trust was Sharif's alter ego in order to establish the grounds for denying discharge under 11 U.S.C. § 727. Though it is not clear, WIN appears to be trying to fit this case within the narrow confines of *Katchen*, 382 U.S. at 329-36, and *Langenkamp*, 498 U.S. at 44, but for several reasons we are not persuaded. First, WIN's alter-ego claim technically was asserted against a nonparty to the bankruptcy proceedings, the Soad Wattar Trust (of which Sharif was trustee). The holdings of *Katchen* and *Langenkamp* can come into play only where the party against whom the action is asserted has filed a claim against the bankruptcy estate. *See Stern*, 131 S. Ct. at 2615-18; *In re Ortiz*, 665 F.3d at 914. Second, while the alter-ego claim may have some overlap with the objections to discharge, nothing indicates that it has any relation to the claims-allowance process. *See Stern*, 131 S. Ct. at 2618 ("Congress may not bypass Article III simply because a proceeding may have some bearing on a bankruptcy case; the question is whether the action at issue stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process."); *In re Ortiz*, 665 F.3d at 914. Third, the trustees' rights of recovery in

Katchen and *Langenkamp* were creatures of federal bankruptcy law, whereas the alter-ego claim here, like the counterclaim in *Stern*, "is in no way derived from or dependent upon bankruptcy law; it is a state [claim] that exists without regard to any bankruptcy proceeding." *Stern*, 131 S. Ct. at 2618. Finally, it simply cannot be said that by resolving WIN's objections to discharge the bankruptcy court necessarily would have needed to resolve the alter-ego claim. To be sure, there is some factual overlap, particularly with respect to Count I, which alleged that Sharif had continuously concealed property in the Soad Wattar Trust with intent to deceive. But in passing on the merits of the alter-ego claim, the bankruptcy court would have had to determine, first, whether Illinois law recognizes an alter-ego theory for piercing a trust and, second, whether the evidence satisfied the applicable standard. Assuming that the standard for trust piercing is similar to that for corporate-veil piercing, that would require not only a showing of concealment of assets in the trust with intent to deceive, but also that there was a unity of ownership (or a merger of the legal and equitable estates, in trust lingo) such that the trust and Sharif ceased to exist as separate entities. Thus, even if we could look past the facts that the Soad Wattar Trust did not file a claim and that the objections to discharge have nothing to do with the claims-allowance process, we cannot say that in resolving WIN's claims under 11 U.S.C. § 727 the bankruptcy court *necessarily* would have resolved the alter-ego claim had it reached the merits (as opposed to entering default judgment). *See Stern*, 131 S. Ct. at 2617-18; *In re Ortiz*, 665 F.3d at 914.

In sum, WIN's alter-ego claim is a state-law claim between private parties that is wholly independent of federal bankruptcy law and is not resolved in the claims-allowance process. *Accord In re Madison Bentley Assocs.*, 474 B.R. 430, 439 (S.D.N.Y. 2012). Consequently, we hold that although the bankruptcy court had constitutional authority to enter final judgment on WIN's objections to discharge, it lacked constitutional authority to enter final judgment on WIN's alter-ego claim. *Cf. Waldman*, 698 F.3d at 919-21 (holding that although bankruptcy court had constitutional authority to enter final judgment on debtor's disallowance claims against creditor, it did not have constitutional authority to enter final judgment on debtor's state-law claims).

3. Remedy

So the bankruptcy court lacked constitutional authority to enter final judgment on the alter-ego claim, but what is the proper remedy? Sharif requests the relatively modest remedy of remanding to the district court and allowing him to object to the bankruptcy court's July 6, 2010, order as a report and recommendation. The district judge could then enter final judgment "after considering the bankruptcy judge's proposed findings [of fact] and conclusions [of law] and after reviewing de novo those matters to which any party has timely and specifically objected." 28 U.S.C. § 157(c)(1). While perhaps the most practical and equitable remedy, there are serious questions as to whether it is authorized by statute.

Recall that Sharif waived his contention that the alter-ego claim is a noncore proceeding and that, as a result, we proceeded on the assumption that it is a core proceeding. In core proceedings, "§157(b)(1) authorizes bankruptcy courts to '*enter* appropriate orders and judgments,' not to propose them." *Waldman*, 698 F.3d at 921. No statutory provision authorizes a bankruptcy court to propose findings of fact and conclusions of law in a core proceeding; such a report and recommendation from the bankruptcy court is statutorily authorized only in noncore proceedings, *see* § 157(c)(1). So "[f]or the bankruptcy judge's orders to function as proposed findings of fact or conclusions of law ..., we would have to hold that the [alter-ego claim was] 'not a core proceeding' but [is] 'otherwise related to a case under title 11.'" *In re Ortiz*, 665 F.3d at 915 (quoting § 157(c)(1)). *But see In re Bellingham Ins. Agency, Inc.*, 702 F.3d at 566 n.8 (rejecting *Ortiz* as not "thoroughly reasoned").

In *Waldman*, the Sixth Circuit did precisely that, even though (like Sharif) the party raising the *Stern* objection had waived his statutory argument that the affirmative claims were noncore. 698 F.3d at 921-22. The court reasoned that "the fortuity of Waldman's waiver of his own rights does nothing to diminish the bankruptcy court's authority under § 157(c)(1)." *Id.* at 922. And because the court concluded that the affirmative claims for fraud were noncore, it remanded the matter to the district court with instructions to treat the bankruptcy court's purported entry of final judgment as proposed findings and conclusions and to review them de novo under § 157(c)(1). *Id.*

We find the Sixth Circuit's approach to be reasonable, but given the total lack of argument from Sharif and WIN on whether the alter-ego claim is truly core or noncore, we will leave it to the district court to make that determination in the first instance. Because the core/noncore status of the alter-ego claim is not apparent, we explore the proper course of action should that claim turn out to be a core proceeding.

Assuming that the alter-ego claim is in fact a core matter, it is difficult to find a statutory basis on which the district court could rely to treat the bankruptcy court's order as proposed findings and conclusions. To be sure, the bankruptcy court never reached the merits of the claim because it entered default judgment as a discovery sanction. But there is no statutory provision authorizing a bankruptcy court to preside over discovery, apart from its authority over core and noncore matters. It is true that magistrate judges often preside over pretrial matters such as discovery, even if the district court ultimately decides the claims for which discovery is sought, but 28 U.S.C. § 636(b)(1)(A) expressly authorizes a district judge to "designate a magistrate judge to hear and determine any pretrial matter pending before the court," with certain exceptions and subject to reconsideration by the district judge if "the magistrate judge's order is clearly erroneous or contrary to law." No analogous statutory authorization exists for bankruptcy judges. It appears, therefore, that if the alter-ego claim is in fact a core proceeding, the only statutorily authorized remedy would be for the district court to

withdraw the reference, *see* § 157(d), and then set a new discovery schedule. Of course, this would present a windfall to Sharif, but it is difficult to see any other solution under the peculiar circumstances of this case.

Accordingly, on remand the district court shall first determine whether the alter-ego claim is a core or a noncore proceeding. If it concludes that it is a noncore proceeding, then the court may treat the bankruptcy court's order purporting to enter final judgment on the alter-ego claim as proposed findings of fact and conclusions of law to be reviewed de novo. *See* Fed. R. Bankr. P. 9033(d) ("The district judge shall make a de novo review upon the record or, after additional evidence, of any portion of the bankruptcy judge's findings of fact or conclusions of law to which specific written objection has been made in accordance with this rule. The district judge may accept, reject, or modify the proposed findings of fact or conclusions of law, receive further evidence, or recommit the matter to the bankruptcy judge with instructions."). If, on the other hand, the court determines the alter-ego claim to be a core proceeding, then it shall order that the reference of the alter-ego claim to the bankruptcy court be withdrawn and conduct fresh discovery proceedings in the district court, though the district judge will have discretion in setting a more abbreviated schedule given that prior discovery has been had.

III. Appellate Jurisdiction

We must next determine what effect, if any, our holding that the bankruptcy court lacked constitutional authority to enter final judgment on the alter-ego claim has on our appellate jurisdiction over the remainder of Sharif's appeal. *See, e.g., In re Ortiz*, 665 F.3d at 910; *India Breweries, Inc. v. Miller Brewing Co.*, 612 F.3d 651, 657 (7th Cir. 2010). As noted earlier, in *Ortiz* we concluded that the bankruptcy court's lack of constitutional authority to enter final judgment on the debtors' claims deprived us of appellate jurisdiction, but that was due to the unique posture of that appeal, namely, we had permitted the parties to bypass the district court and bring a direct appeal from bankruptcy court. 665 F.3d at 914-15. Here, Sharif first appealed to the district court and then brought this appeal from the district court's judgment affirming the bankruptcy court, so *Ortiz* does not control our jurisdictional inquiry.

As a general rule, we have jurisdiction over a bankruptcy appeal that has first been appealed to the district court only if *both* the bankruptcy court's original order *and* the district court's order reviewing the bankruptcy court's original order are final. *In re Rimsat, Ltd.*, 212 F.3d 1039, 1044 (7th Cir. 2000); *see* 28 U.S.C. § 158(a)(1) & (d)(1). Finality in the bankruptcy context "is considerably more flexible than in an ordinary civil appeal taken under 28 U.S.C. § 1291," *In re Gould*, 977 F.2d 1038, 1040-41 (7th Cir. 1992), as it does not require that the entire bankruptcy proceeding have been terminated, *see,*

e.g., *In re Kilgus*, 811 F.2d 1112, 1116 (7th Cir. 1987). Rather, the test for finality in this context "is whether an order resolves a discrete dispute that, but for the bankruptcy, would have been a stand-alone suit." *Zedan v. Habash*, 529 F.3d 398, 402 (7th Cir. 2008); *In re USA Baby, Inc.*, 674 F.3d 882, 883 (7th Cir. 2012).

The bankruptcy court's order entering default judgment on WIN's adversary complaint was a final, appealable judgment, as it resolved all claims of the complaint against all parties. *See Zedan*, 529 F.3d at 402 ("We have consistently explained that the final disposition of any adversary proceeding falls within our jurisdiction."); *In re Teknek, LLC*, 512 F.3d 342, 345 (7th Cir. 2007). That the entry of default judgment was a discovery sanction makes no difference because, unlike monetary sanctions, a sanction such as default judgment or dismissal that completely eliminates the possibility of a decision on the merits is final for purposes of appeal. *See In re Golant*, 239 F.3d 931, 934-35 (7th Cir. 2001). Nor does our conclusion that the bankruptcy judge lacked authority to enter final judgment on the alter-ego claim alter finality. The only claims over which the bankruptcy judge had constitutional authority were objections to the discharge of Sharif's debts, and the denial of discharge in the adversary proceeding finally resolved those claims. *See In re Marchiando*, 13 F.3d 1111, 1113-14 (7th Cir. 1994) ("an order declaring the debt either dischargeable or not is a final, appealable order" (citing *In re Riggsby*, 745 F.2d 1153, 1154 (7th Cir. 1984))); *see also In re Weber*, 892 F.2d 534, 537 (7th Cir. 1989); *cf. Zedan*,

529 F.3d at 407 (Easterbrook, C.J., concurring) (arguing that objections to discharge are better handled as contested matters rather than adversary proceedings and requesting the appropriate committees to look into this subject, as the manner in which the objection is presented affects appellate review). There was nothing else for the bankruptcy court to do with respect to WIN's adversary complaint.

The district court's judgment affirming the bankruptcy court's judgment is also a final, appealable judgment. While it is true that a district judge's decision to remand for further proceedings in the bankruptcy court may destroy the finality of the bankruptcy court's order, *see In re Lopez*, 116 F.3d 1191, 1192 (7th Cir. 1997); *In re Riggsby*, 745 F.2d at 1155, the district judge in this case affirmed the bankruptcy court's judgment and that affirmance is a final decision, *see In re Golant*, 239 F.3d at 935; *In re Weber*, 892 F.2d at 538. That the bankruptcy court lacked constitutional authority to enter judgment on the alterego claim does not alter this conclusion. The district judge reviewed the alter-ego claim under traditional standards of appellate review rather than de novo, but that does not alter the fact that it entered a final judgment; it simply constitutes a defect in the final judgment, not a lack of finality. We thus have appellate jurisdiction under § 158(d) to consider the remaining balance of Sharif's appeal.

IV. Sanctions Were Not an Abuse of Discretion

Sharif challenges the district court's affirmance of both the default judgment and the award of attorney's fees to WIN as discovery sanctions, *see* Fed. R. Civ. P. 37(b); *see also* Fed. R. Bankr. P. 7037 (rendering Fed. R. Civ. P. 37 applicable in adversary proceedings), though he focuses almost exclusively on the default judgment. A court's imposition of sanctions under Rule 37 is reviewed for an abuse of discretion, *Nat'l Hockey League v. Metro. Hockey Club, Inc.*, 427 U.S. 639, 642 (1976) (per curiam); *In re Thomas Consol. Indus., Inc.*, 456 F.3d 719, 724 (7th Cir. 2006), which requires the appealing party to demonstrate clearly "that no reasonable person would agree [with] the trial court's assessment of what sanctions are appropriate," *Marrocco v. Gen. Motors Corp.*, 966 F.2d 220, 223 (7th Cir. 1992). When reviewing a district court's affirmance of a bankruptcy court's ruling we apply the same standards as the district court, *In re Snyder*, 152 F.3d 596, 599 (7th Cir. 1998), reviewing factual findings for clear error and legal conclusions de novo, *In re UNR Indus., Inc.*, 986 F.2d 207, 208 (7th Cir. 1993).

A. Default Judgment

Sharif challenges the bankruptcy court's entry of default judgment on two fronts. First, he contends that the bankruptcy court violated his right to due process by entering default judgment without providing him notice that his discovery responses were deficient. Second, he maintains that his

discovery responses were in substantial compliance with the discovery order and, therefore, that the bankruptcy court abused its discretion in imposing the severe sanction of default. Neither argument is persuasive.

The sanctions of dismissal and entry of default judgment are strong medicine, so before a court imposes such a sanction it must find by clear and convincing evidence that the party against whom the sanction is imposed displayed willfulness, bad faith, or fault. *Maynard v. Nygren*, 332 F.3d 462, 467-68 (7th Cir. 2003). Although courts are strongly encouraged to make such a finding explicitly, on appeal it may be inferred from the sanction order. *In re Golant*, 239 F.3d at 936. Another necessity flowing from the severity of the sanction is that a court must give at least the party's attorney notice and an opportunity to respond before entering a default judgment (or dismissing the case), but there need not be repeated warnings formalized in writing. *See, e.g., Ball v. City of Chicago*, 2 F.3d 752, 755 (7th Cir. 1993) ("'Due warning' need not be repeated warnings and need not be formalized in a rule to show cause. A judge is not obliged to treat lawyers like children. But there should be an explicit warning in every case."); *Halas v. Consumer Servs., Inc.*, 16 F.3d 161, 164 (7th Cir. 1994) ("a formal, written order to comply with discovery is not required under Rule 37(b); an oral directive from the district court provides a sufficient basis ... if it unequivocally directs the party to provide the requested discovery"). Moreover, despite the severity of the sanction, a court is not required to issue less severe

sanctions before deciding to enter default judgment (or to dismiss the case). *See Patterson v. Coca-Cola Bottling Co.*, 852 F.2d 280, 284 (7th Cir. 1988) ("a district court is not required to fire a warning shot").

In arguing deficient notice, Sharif relies in part on the requirement that in a motion to compel disclosure or discovery the moving party "must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action." Fed. R. Civ. P. 37(a). We are unable to see how Rule 37(a) supports Sharif's argument. Sharif's responses to WIN's discovery requests were due on March 15, 2010, but Sharif ignored those requests. On April 13, WIN's counsel conferred with Sharif's counsel and requested complete responses to discovery requests by April 23. Sharif's counsel would not agree to WIN's request, so on April 15 WIN filed its motions to compel and for sanctions in the bankruptcy court. Accordingly, WIN satisfied its Rule 37(a) obligation to confer in good faith with Sharif prior to filing its motion to compel with the bankruptcy court.

Sharif also maintains that he was not given proper notice that his production was deficient and that WIN made no demands and identified no deficiencies between April 28 and the evidentiary hearing on May 24. On April 21, the bankruptcy court granted the motion to compel and continued the motion for sanctions. In its order, the court expressly stated that an order of default would be

entered if Sharif did not comply with the discovery requests by April 28 (approximately six weeks after the original due date). *Cf. In re Thomas Consol.*, 456 F.3d at 727 (warning was sufficient where district court warned trustee's lawyer that case would "never get to a trial" if he continued failing to comply with orders). After five years of Sharif refusing to produce requested documents (including, of course, the prior litigation), on April 27 he produced approximately 1,500 pages of documents. But his response fell woefully short of the discovery that WIN had requested. As set forth earlier in this opinion, Sharif failed to produce any documents on several matters that were the focus of WIN's requests. He failed to produce documents related to the Loan Assets, documents concerning several accounts in which he had an interest, documents concerning business ventures with which he had claimed to be involved, his signed federal and state tax returns, source documents used to prepare his tax returns, and documents related to the $271,000 he allegedly owed his family. Perhaps most importantly, he failed to produce any documents concerning the formation and funding of the Soad Wattar Trust. Additionally, much of the discovery that he tendered was deficient—for example, he failed to verify and/or sign his interrogatory responses, and instead of producing bank statements and other records related to his bank accounts he provided the names and addresses of the banks with corresponding account numbers. *Cf.* Fed. R. Civ. P. 37(a)(4) ("an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond"); *In re Thomas Consol. Indus.*, 456 F.3d at 725. During his

deposition on May 13, Sharif admitted many of these deficiencies, including his failure to produce any documentation concerning the creation and funding of the Soad Wattar Trust. On May 20, Sharif tendered supplemental discovery, which did not address the deficiencies. Then on May 24, the bankruptcy court held a hearing to determine whether Sharif had complied with the court's order compelling discovery.

Sharif had notice and he had an opportunity to be heard (he failed to show up for the May 24 hearing, but he was represented by counsel and he does not claim that the court prevented him from attending). This is *not* a case where the question of compliance is a close call. We agree with both the bankruptcy court and the district court that a phone call to Sharif's counsel "would have been futile" in light of the gross deficiencies in Sharif's responses to WIN's discovery requests, not to mention the then-five-year pattern of Sharif engaging in dilatory tactics to avoid his obligations to WIN. Sharif was provided ample notice that WIN sought discovery of his and the Soad Wattar Trust's finances. He also had notice that if he failed to respond WIN would seek sanctions, including default judgment. The bankruptcy court then expressly informed Sharif (at least, Sharif's counsel, which is all that was required) that failure to comply with the discovery requests would result in default. The bankruptcy court, rather than issuing default merely on WIN's say so at the May 24 hearing, conducted its own, independent analysis. This case is thus far afield from *Kruger v. Apfel*, 214 F.3d 784, 787-88 (7th Cir.

2000) (per curiam), relied upon by Sharif, in which we reversed a sanction of dismissal where there had been one mistake (a missed filing deadline) and the only "notice" had been a magistrate's recommendation of dismissal, which the district court had accepted without review, *id.* at 786. The fact that the bankruptcy court did not afford Sharif more bites at the apple does not mean that his due process rights to notice and opportunity to be heard were violated.

We also conclude that the bankruptcy court's implied finding of willfulness, bad faith, or fault was not clearly erroneous and that it did not abuse its discretion in imposing the severe sanction of default. Sharif does not dispute that the discovery responses tendered on April 27 were deficient—he admitted most of those insufficiencies at his deposition. Yet he appears to claim that the supplemental discovery he tendered on May 20 and the materials he submitted in his June 22 motion for summary judgment placed him in substantial compliance. We decline to consider the materials he presented after the bankruptcy court's deadline of April 28 passed. We also note that when he made the same argument before the bankruptcy court he failed to specify the documents produced after the deadline, the information contained therein, whether they were responsive to WIN's requests, and why they had not been produced sooner. His failure to develop his argument below waives it on appeal. *See, e.g., Williams v. Dieball*, No. 12-3348, 2013 WL 3942932, at *3-4 (7th Cir. Aug. 1, 2013). Considering only the discovery that Sharif tendered before the April 28

deadline, there is clear and convincing evidence that Sharif's noncompliance with the discovery order was willful and in bad faith. The evidence of bad faith becomes overwhelming once Sharif's history of dilatory and feckless tactics is taken into account. *Cf. Smith v. Smith*, 145 F.3d 335, 344 (5th Cir. 1998) ("In making its 'bad faith' determination, the district court was entitled to rely on its complete understanding of the parties' motivations. Defendants present no authority for the proposition that the district court is prevented from considering a party's actions in a related case in making its bad faith determination under Fed. R. Civ. P. 37. Moreover, the dilatory and obstructive conduct of the defendants has been well-documented and the extreme sanction of default judgment was warranted by their actions." (internal citations omitted)).

In many respects this case is similar to *Golant*, in which we upheld a bankruptcy court's entry of default judgment as a discovery sanction, where the court had repeatedly ordered Golant to comply with discovery requests and he had failed to do so; Golant had admitted failing to produce numerous documents; and Golant had produced a fair number of documents in response to the discovery requests but had failed to produce "many important documents." *In re Golant*, 239 F.3d at 936-37. Entry of default judgment, we concluded, was the only adequate sanction, reasoning that "[w]here a debtor in bankruptcy refuses to be completely forthright with information regarding his financial dealings and resources—information that is of paramount importance to an efficient and fair

bankruptcy proceeding— the bankruptcy court is left with little recourse but to enter default judgment against the debtor," *id.* at 937. As in *Golant*, the bankruptcy court here did not abuse its discretion in imposing the sanction of default judgment. *See also In re Kilgus*, 811 F.2d at 1118 ("Judges must be able to enforce deadlines. Doing so means the use of sanctions, even severe ones such as default, when parties ignore the ongoing proceedings and demand the right to set their own deadlines. The entry of defaults may be especially important in bankruptcy cases, which may involve hundreds or thousands of parties.").

B. Attorney's Fees

The district court entered two separate orders against Sharif awarding WIN attorney's fees and costs. Sharif has appealed both, but he made no argument in his opening brief as to why the fee awards are erroneous, so WIN contends that he has waived any claims concerning them. Sharif responds that reversal of the fee awards is the "natural corollary" to reversal of the sanction of default judgment.

Sharif's failure to develop an argument in his opening brief has waived any claim he may have to the propriety of awarding fees and costs in the first place. We have concluded that the bankruptcy court did not abuse its discretion in entering default judgment as a discovery sanction on the first four counts of the complaint, so the "natural corollary" is that the fee awards should be upheld unless there is

an independent reason that they are improper. Even in his reply brief Sharif fails to identify an independent basis as to why the fee awards should not be upheld if the sanction of default is upheld.

Nevertheless, we agree that a remand to the bankruptcy court is necessary for a recalculation of the fee awards. The bankruptcy court premised its calculations on WIN having successfully obtained a default judgment on all five counts of the adversary complaint. But the court had constitutional authority to enter judgment on only four of those counts. It seems eminently reasonable that the fee awards should be adjusted to reflect that fact. We therefore direct the district court to remand the fee awards to the bankruptcy court for a recalculation of each.

V. Conclusion

In sum, the portion of the district court's judgment affirming the bankruptcy court's entry of default judgment denying discharge of Sharif's debts is AFFIRMED. The portion of the district court's judgment affirming the bankruptcy court's entry of default judgment on WIN's alter-ego claim is REVERSED, the bankruptcy court's judgment on the alter-ego claim is VACATED, and the case is REMANDED to the district court for further proceedings consistent with the instructions set forth in this opinion. Lastly, the district court's judgment affirming the bankruptcy court's two fee awards is REVERSED and REMANDED to the district court with instructions to remand the orders to the bankruptcy court for recalculation.

Appendix B

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

October 7, 2013

Before

JOEL M. FLAUM, *Circuit Judge*
DIANE S. SYKES, *Circuit Judge*
JOHN DANIEL TINDER, *Circuit Judge*

No. 12-1349

WELLNESS INTERNATIONAL NETWORK, LIMITED, RALPH OATS and CATHY OATS,	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
Plaintiffs-Appellees,	
v.	No. 1:10-cv-05303
RICHARD SHARIF,	**Harry D. Leinenweber**, *Judge*.
Defendant-Appellant.	

O R D E R

On consideration of the petition for rehearing and/or rehearing en banc, filed on September 18, 2013, no judge in active service has requested a vote,

and all of the judges on the original panel have voted to DENY the petition for rehearing.

Accordingly, the petition for rehearing is **DENIED**.

Appendix C

United States District Court,

N.D. Illinois,

Eastern Division.

Ragda SHARIFEH, Movant,

v.

Horace FOX, Jr., Defendant.

Richard Sharif, Appellant,

v.

Wellness International Network Ltd., Ralph Oats and Cathy Oats, Defendants.

Nos. 11 C 8811, 09 BK 05868, 09–AP–00770,

10–AP–02239, 10 C 5303, 10 C 5333, 10 C 6057,

11 C 175.

Feb. 10, 2012.

MEMORANDUM OPINION AND ORDER

HARRY D. LEINENWEBER, District Judge.

This case concerns four appeals stemming from a bankruptcy filing by Richard Sharif ("Sharif") and an adversary proceeding filed by his creditor, Wellness International Network, Ltd. ("Wellness"). After Sharif failed to respond to certain discovery requests, the Bankruptcy Court refused to discharge Sharif's debt to Wellness, entered a default against him in the adversary proceeding, and ordered him to pay certain fines and fees. Pending before the Court are

Sharif's appeal of those rulings, as well as his sister Ragda Sharifeh's efforts to withdraw the reference to the Bankruptcy Court. Because all the appeals raise the same issues, the Court will decide them jointly. For the reasons stated, the motion to withdraw the reference is denied, and this Court affirms the Bankruptcy Court's rulings in their entirety.

I. BACKGROUND

This case has its roots in a dispute litigated in the United States District Court for the Northern District of Texas. In 2005, Appellant Richard Sharif (hereinafter, "Sharif") and others brought suit against Wellness International Network, Ltd. and Ralph and Cathy Oats (collectively, "Wellness"), alleging fraud and violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"). When Sharif failed to participate in discovery, the district court granted summary judgment to Wellness, a ruling that was affirmed by the Fifth Circuit Court of Appeals. In a brief ruling, the appeals court found:

> A review of the record on appeal demonstrates that Appellants' untimely performance in this court mirrors a lengthy history in the district court of dilatoriness and hollow posturing interspersed with periods of non-performance or insubstantial performance by Appellants and their counsel, leaving the unmistakable impression that they have no purpose other than to prolong this contumacious litigation for purposes of harassment or delay, or both.

> The time is long overdue to terminate Appellants' feckless litigation....

Sharif v. Wellness Int'l Network, Ltd., 273 Fed. App'x 316, 317 (5th Cir. 2008). On remand, the district court ordered Sharif to pay Wellness $655,596 in attorney fees. *See Sharif v. Wellness Int'l Network, Ltd.*, No 3:05–CV–01367–B, 2008 WL 5220526 (S.D.Tex. Dec. 12, 2008). Wellness attempted to collect those fees, in part by serving Sharif with discovery requests seeking information related to his assets. Sharif refused to respond to discovery and failed to appear for his deposition. He was held in contempt, arrested, and subsequently released on his own recognizance with a promise to respond to the post-judgment discovery. Sharif never responded, and filed for bankruptcy in the Northern District of Illinois.

A. The Bankruptcy Proceeding

Sharif's bankruptcy petition listed Wellness as a creditor, and Wellness filed a proof of claim. Wellness then obtained, through it own efforts, a loan application Sharif had submitted to Washington Mutual Bank, dated June 14, 2002, in which he admitted that he owned: (1) three businesses valued at $2.4 million; (2) three pieces of property valued at $1.4 million; (3) a retirement account valued at $1.4 million; and (4) three bank accounts with $180,000 in cash (the "Loan Application Assets"). Washington Mutual approved the loan based on these representations. Sharif never produced documents relating to these assets in the Texas litigation.

On March 25, 2009, the parties held the initial Section 341 creditors' meeting. Wellness requested that Sharif provide documentation related to the Loan Application Assets, and the meeting was continued until April 21, 2009, to allow him to do so. At that time, Sharif failed to provide any documents related to those assets. Instead, he said he had lied on the loan application, and he did not own any of the assets. Rather, he said, they were owned by the Soad Wattar Living Trust, of which he claimed to be the trustee. (Soad Wattar, now deceased, was Sharif's mother.) Wellness requested that Sharif produce documents evidencing the formation and funding of the trust. The creditors' meeting was continued until June 3, 2009. Sharif failed to provide the requested documents and unsuccessfully sought a protective order requesting that he not have to turn over that information.

On October 20, 2009, due to Sharif's failure to produce the requested documents, the Bankruptcy Trustee filed a Motion for Turnover of the property of the estate, which the Bankruptcy Court granted pursuant to 11 U.S.C. §§ 521(3) and 542(a). Among other things, the Bankruptcy Court ordered Sharif to turn over documentation related to the trust. Sharif failed to comply with this order.

B. The Adversary Proceeding

On August 24, 2009, after Sharif failed to provide documents related to the Soad Wattar Trust, Wellness filed an adversary proceeding against Sharif, individually and as trustee of the trust. The Adversary Complaint objected to the discharge of

Sharif's debt pursuant to 11 U.S.C. §§727(a)(2), (3), (4) and (5). Essentially, the Complaint accused Sharif of hiding assets, and sought a declaratory judgment that the Soad Wattar Trust was Sharif's alter ego.

Sharif was to respond to Wellness's discovery requests by March 15, 2010, and his deposition was noticed for March 24, 2010. On March 12, 2010, almost a month after being served with discovery, Sharif's counsel requested an extension of time to complete discovery. Sharif's counsel said he believed Sharif had traveled to Syria.

On March 24, 2010, Sharif filed a motion to postpone his deposition and delay his discovery responses. Sharif did not appear at his deposition. On April 7, 2010, the Bankruptcy Court denied that motion. On April 13, Wellness's counsel conferred with Sharif's counsel to resolve the dispute over the discovery responses. Wellness wanted Sharif to respond to the discovery requests by April 23, 2010, but Sharif's counsel could not agree to that because he did not know when Sharif would return to this country.

Wellness responded by filing a Motion to Compel, which was granted by the Bankruptcy Court on April 21, 2010. The Bankruptcy Court ordered Sharif to respond to all outstanding discovery requests by April 28, 2010. The Bankruptcy Court warned that if he did not do so, an Order of Default would be entered against him. On April 27, 2010, Sharif produced about 1,500 pages of discovery. On May 13, 2010, Sharif sat for his deposition. Unsatisfied with

his answers, Wellness supplemented its Motion to compel with his deposition testimony. At a hearing on May 24, 2010, counsel for Wellness identified several categories of documents that Sharif had failed to produce, including: (1) documents related to the Richard Sharif Trust, which was listed on his Bankruptcy Petition; (2) documents relating to accounts at A.G. Edwards in Sharif's name; (3) documents relating to certain bank accounts at Banco Popular, J.P. Morgan Chase, and Wells Fargo that Sharif owned or to which he had access; (4) documents related to the formation and founding of the Soad Wattar Trust; and (5) documents showing the disposition of the Loan Application Assets. Following a lengthy recitation of these various deficiencies by counsel for Wellness, Sharif's counsel said that Sharif had made a good faith effort to comply with the discovery requests. He said that Sharif was unable to meet the deadlines because he was in Syria with his dying mother, and produced proof of the Syria trip. Sharif's counsel objected that counsel for Wellness had not consulted with him before supplementing its motion to compel and moving for default. Sharif did not attend this hearing.

After the evidentiary hearing, the Bankruptcy Court issued a ruling granting Wellness's motion to compel on July 6, 2010. The Bankruptcy Court found that Sharif was prohibited from opposing Wellness' claims in the adversary proceeding, struck his answer to the adversary complaint, and entered a default judgment in favor of Wellness. The Court also denied Sharif a discharge pursuant to 11 U.S.C.

§ 727(a)(2)-(a)(6). This order was entered both in the adversary proceeding and the bankruptcy proceeding.

In its ruling, the Bankruptcy Court outlined various failings by Sharif in connection with his discovery obligations, including his failure to sign or verify certain discovery responses and his continuous failure to provide documents requested by Wellness and the bankruptcy trustee. The Bankruptcy Court then outlined several categories in which Sharif was deficient. Specifically, Sharif failed to produce: (1) documents related to the Washington Mutual Loan Application and the assets listed therein; (2) documents related to the Richard Sharif Revocable Trust that he listed in his sworn bankruptcy schedule; (3) certain bank statements and financial records; (4) records showing the disposition of certain assets in which he once claimed an interest; (5) records showing the formation and funding of the Soad Wattar Trust; (6) signed tax returns; and (7) documents evidencing alleged debts to family members.

The Bankruptcy Court found that Sharif had not made a "serious effort" to comply with the discovery requests either before or after his mother's death. The Bankruptcy Court further found that counsel for Wellness had met its obligation under Local Rule 37.2 to consult with counsel for Sharif before filing the initial motion to compel. The court noted that while Sharif's counsel asserted that additional documents had been turned over following the deposition, those documents were still produced after the April 28, 2010 deadline. Nor did counsel for

Sharif explain what the documents contained, why they were not produced sooner, or whether they were responsive to Wellness' requests.

The Bankruptcy Court concluded by noting, "This court has stated time and time again that Bankruptcy Courts provide extraordinary relief that requires extraordinary cooperation." Because Sharif had failed to comply with most of Wellness' discovery requests, and because the lack of compliance was part of a pattern dating back to the underlying litigation in Texas, the court granted the motion to compel.

Subsequently, on August 9, 2010, the Bankruptcy Court awarded attorneys' fees and costs to Wellness in connection with the motion for sanctions in the amount of $54,405.99, and $8,349.75, respectively. On November 18, 2010, the Court entered an order granting Wellness fees and costs in connection with the 341 creditors' meeting.

Sharif appealed all of these orders. Initially, three of the appeals were pending before Judge James B. Zagel, but this Court granted the parties' joint motion to consolidate all the appeals before this Court, which had been assigned the appeal with the lowest case number.

Sharif argues: (1) that he was deprived of due process when Wellness failed to confer with his counsel about obtaining discovery, or to otherwise specify any particular deficiency prior to the hearing on the sanctions; and (2) that the Bankruptcy Court abused its discretion in declaring a default, denying

discharge, and finding that the Soad Wattar Trust was the property of the bankruptcy estate.

C. Ragda Sharifeh's Involvement

Before the Court can decide these appeals, however, it must deal with a separate challenge from Sharif's sister, Ragda Sharifeh ("Sharifeh"). Sharifeh contends that she is the beneficiary of the Soad Wattar Trust. After learning that the Bankruptcy Court had found the Trust to be the alter ego of her brother, she filed suit in Cook County Circuit Court and an adversary proceeding in the Bankruptcy Court. Her adversary Complaint alleged that the Bankruptcy Trustee, Horace Fox. Jr., had wrongfully converted the assets of the Soad Wattar Trust and sought a declaration that she was the beneficiary of the trust. The Bankruptcy Court subsequently dismissed this Complaint on numerous grounds, including that her claims were barred because of the Court's previous order defaulting Sharif on Wellness's adversary complaint. In that order, the Bankruptcy Court noted that Sharifeh had given deposition testimony to the effect that Sharif had been her agent in conducting the Texas litigation. She also testified that she knew Sharif had claimed to own the Loan Application Assets, and that she told him to make that claim in order to secure a loan for her mother.

Sharifeh is appealing the ruling dismissing her adversary complaint, and her appeal is pending before Judge John F. Grady in Case No. 11 C 7374. In the meantime, she also has filed a Motion to Withdraw the Reference that has been assigned to

this Court. In that Motion, she asks this Court to find that under *Stern v. Marshall*, —— U.S. ——, 131 S. Ct. 2594, 180 L.Ed.2d 475 (2011), the Bankruptcy Court did not have jurisdiction to enter final judgments either in Wellness' adversary proceeding, 09–AP–770, or her own, 10–AP–2239.

II. MOTION TO WITHDRAW REFERENCE

As a preliminary point, the Court notes that Sharifeh was not a party to the Wellness adversary proceeding, and does not explain how she has standing to seek the withdrawal of a reference in a proceeding to which she was not a party. That aside, her Motion to Withdraw the References, after final orders have been issued, is untimely and unmeritorious.

A. Legal Standard

Bankruptcy cases are automatically referred to bankruptcy judges for the same federal district pursuant to 28 U.S.C. § 157(a). *Southern Elec. Coil, LLC v. FirstMerit Bank, N.A.*, No. 11 C 6135, 2011 WL 6318963, at *2 (N.D. Ill. Dec. 16, 2011) (citing *In re Vicars Ins. Agency, Inc.*, 96 F.3d 949, 951 (7th Cir. 1996)). A bankruptcy court may hear "core" proceedings and enter final judgment pursuant 28 U.S.C. § 157(b)(1)-(2). *Southern Elec. Coil*, 2011 WL 6318963, at *2. By contrast, a bankruptcy court may hear non-core proceedings that are "otherwise related to a case under Title 11," but may only submit proposed findings of facts and conclusions of law to the district court. *Id.*; see 28 U.S.C. § 157(c)(1). The district court then reviews *de novo* those

findings to which a party objects, and enters a final judgment. *Id.*

Among the core proceedings that a bankruptcy judge may determine are proceedings to "determine, avoid, or recover fraudulent conveyances." 28 U.S.C. § 157(b)(2)(H). Although not styled as such in Wellness' Adversary Complaint, Sharifeh argues that this is the type of adversary claim that Wellness brought against Sharif.

Sharifeh contends that in *Stern*, the U.S. Supreme Court cast severe doubt on the continuing ability of Bankruptcy Courts to rule on this type of claim. She contends that in light of *Stern*, the Bankruptcy Court did not have the authority to enter final orders in either adversary proceeding. As such, she moves to withdraw the reference in both adversary proceedings pursuant to 28 U.S.C. § 157(d), which allows a district court to withdraw, in whole or in part, any case referred to the bankruptcy court "on timely motion of a party, for cause shown."

B. Analysis

In *Stern*, a case involving the marital exploits of the late Anna Nicole Smith ("Anna Nicole"), her stepson E. Pierce Marshall ("Pierce") filed a defamation claim and proof of claim in Anna Nicole's bankruptcy proceeding. *Stern*, 131 S. Ct. at 2601. He alleged that Anna Nicole defamed him by falsely accusing him of fraudulently gaining control of his late father's assets and preventing his father from leaving property to Anna Nicole, his much younger wife. *Id.*

Anna Nicole responded by filing a counterclaim for tortious interference with the gift she expected to receive from her husband. *Id.* Counterclaims by the bankruptcy estate against people filing claims against it were also considered core proceedings by statute, *see* 28 U.S.C. § 157(b)(2)(c), but the Supreme Court nonetheless found that this type of claim was a state law action independent of the federal bankruptcy laws that could only be heard by Article III judges. *Stern*, 131 S. Ct. at 2610–11.

In the wake of *Stern*, some courts have questioned whether bankruptcy courts constitutionally may rule upon fraudulent conveyance claims. *See In re Canopy Fin., Inc.*, No. 11 C 5360, 2011 WL 3911082, at *3 (N.D. Ill. Sept. 1, 2011) (finding that *Stern* made it clear that bankruptcy courts lack authority to enter final judgment on fraudulent conveyance claims); *In re The Mortgage Store, Inc.*, No. 11–00439 JMS/RLP, 2011 WL 5056990, at *3–4 (recounting split in case law over whether bankruptcy courts may still enter final judgment on such claims).

While interesting, the Court need not enter this fray. Sharifeh gives no explanation as to her failure to raise a *Stern* objection prior to this late date, when both her appeal and that of her brother are pending. Nor did Sharif himself at any time raise this issue. Although *Stern* was decided after the final orders were issued in Sharif's case, it predated by two months the Bankruptcy Court's ruling dismissing Sharifeh's own adversary complaint.

Sharifeh treats her objection as one of subject matter jurisdiction, which can be raised at any time. However, that was not the basis for the ruling in *Stern*. *See In re U.S. Digital*, 461 B.R. 276, 2011 WL 6382551, at *1 (Bankr. Del. Dec. 20, 2011) ("*Stern* in no way limits the bounds of a bankruptcy court's subject matter jurisdiction."); *see also Stern*, 131 S. Ct. at 2607 (noting that the statute at issue, 28 U.S.C. § 157, allocates authority between the district court and bankruptcy court, but that allocation "does not implicate questions of subject matter jurisdiction.").

Indeed, *Stern* itself contains language indicating that objections based on a bankruptcy court's authority to enter a final judgment are waivable. As an alternative argument, Pierce contended that the bankruptcy court did not have jurisdiction to enter judgment on his defamation claim because it was a personal injury case that, by statute, had to be tried in the district court. *Stern*, 131 S. Ct. at 2606; *see* 28 U.S.C. § 157(b)(5). Rejecting that argument, the high court noted that the stepson had consented to the bankruptcy court's resolution of his defamation claim for more than two years, waiving any objection on that basis. *Stern*, 131 S. Ct. at 2606–07. The Court added, "We have recognized 'the value of waiver and forfeiture rules' in 'complex' cases, and this case is no exception.' If Pierce believed that the Bankruptcy Court lacked the authority to decide his claim for defamation, he should have said so—and said so promptly." *Id.* at 2608 (internal citations omitted).

The same is true here. If Sharifeh believed that the Bankruptcy Court lacked authority to decide her

claims, she should have raised the issue well prior to now. *See In re Wilderness Crossing*, No. 09–14547, 2011 WL 5417098, at *1 (Bankr. W.D. Mich. Nov. 8, 2011) (holding that parties may waive *Stern*-based objections). It is far too late now, and smacks of a delay tactic in litigation that dragged on for too long. *See In re Mandalay Shores Co-op. Housing Ass'n Inc.*, 58 B.R. 586, 587 (N.D. Ill. 1986) ("Although the Bankruptcy Code does not specify when a motion to withdraw reference must be filed, common sense dictates that it must precede dismissal of the bankruptcy proceedings.").

None of these conclusions is upended by the late-arising cases cited in Sharifeh's reply. *See In re Ortiz*, 665 F.3d 906, 2011 WL 6880651, at *7 (7th Cir. Dec. 30, 2011) (noting "This case does not present any question about a bankruptcy judge's authority to enter a final judgment when the parties have consented."); *see also In re Republic Windows & Doors, LLC v. Levey*, No. 08–34112, 2011 WL 6157342 (Bankr. N.D .Ill. Dec. 12, 2011) (concluding that "Contrary to the Defendant's broad reading of *Stern*, that decision does not implicate subject matter jurisdiction.")

But Sharifeh further contends in her reply that her jurisdictional waiver was not truly voluntary; that she tried to have the matter adjudicated in Cook County Chancery Court. Sharifeh abandoned that effort after the bankruptcy judge, Judge Cox, upon hearing of the Chancery Court action, called it an effort to "spirit away assets" and announced she would ask the U.S. Attorney's Office to investigate. Sharifeh's abandonment of the state court case was

done solely "out of fear that her actions ... would result in criminal charges being brought against her." Pet'r's Reply 5.

While that might plausibly demonstrate why Sharifeh moved her efforts to bankruptcy court, it does not explain why she never contested the bankruptcy court's jurisdiction once she got there. Her vigorous efforts there belie any claim of timidity toward the bankruptcy judge. Sharifeh herself admits that, even after the judge's comments, Sharifeh filed an adversary complaint, a motion to intervene and a motion to vacate an order of that same bankruptcy judge. *Id.* She also filed a motion asking Judge Cox to recuse herself over the comment, and then an appeal when that motion was denied. *See In re: Richard Sharif*, No. 11–438, (N.D. Ill. March 3, 2011) (denying recusal appeal and finding nothing improper about Judge Cox's comments).

Simply put, a litigant unafraid to ask a judge to recuse herself would not be afraid to file a motion contesting that court's jurisdiction. The Court finds that waiver, not fear, was behind Sharifeh's failure to raise this issue before now.

For these reasons, Sharifeh's Motion to Withdraw Reference is denied.

III. SHARIF APPEAL

A. Standard of Review

The Court reviews the Bankruptcy Court's entry of sanctions for abuse of discretion, and its findings of fact for clear error. *In re Thomas Consol. Indust., Inc.*, 456 F.3d 719, 724 (7th Cir. 2006).

Federal Rule of Civil Procedure 37 is applicable to adversary proceedings in bankruptcy through Rule 7037 of the Bankruptcy Rules. *Id.* at 724 n. 4. Rule 37(a) allows courts to enter orders compelling parties to comply with discovery, and Rule 37(b) provides that a failure to obey such an order may justify certain sanctions, including a default judgment against the delinquent party. When imposing the sanction of a default judgment or dismissal of a case under Rule 37(b), the court must find that the delinquent party displayed willfulness, bad faith, or fault. *Id.* (citing *Maynard v. Nygren*, 332 F.3d 462, 467 (7th Cir.2003)). Such a finding should be explicit, but may be implied from the sanction order. *Id.* (citing *Golant v. Levy*, 239 F.3d 931, 937 (7th Cir. 2001)).

B. Analysis

As a preliminary matter, much of the evidence that Sharif points to here about the Soad Wattar Trust comes not from evidence presented at the hearing on the motion for sanctions, but from a Motion for Summary Judgment on Wellness' adversary complaint submitted to the Bankruptcy Court on June 22, 2010. The motion was denied as moot due to the court's ruling on Wellness' motion for sanctions. Wellness asks this Court not to consider

the information in the summary judgment motion, given that it was not presented to the Bankruptcy Court as part of its consideration of the discovery dispute. Ultimately it does not matter. Even considering the contents of the motion, Sharif cannot prevail because the Court will not attach to it the significance that Sharif would like.

When considering the appropriateness of sanctions, this Court is to "look at the entire procedural history of the case." *Rice v. City of Chi.*, 333 F.3d 780, 784 (7th Cir. 2003) (internal citations omitted). Among the factors to consider are the frequency and magnitude of the non-compliance, the party's failure to comply with court deadlines, the effect of these failures on the court's time and schedule, prejudice to other litigations, and the possible merits of the suit. *Id.* (citing *Williams v. Chicago Bd. of Educ.*, 155 F.3d 853, 857 (7th Cir. 1998)).

The summary judgment motion contends that Sharif and Sharifeh had produced documents or sworn testimony to show that he never had an interest in the Loan Application assets, and that the Soad Wattar Trust was funded with money Wattar received as a result of her husband's death. Sharifeh, according to the motion, became the successor beneficiary of the Soad Wattar Trust on October 8, 2007. Sharif contended that he never received funds from the Soad Wattar Trust, nor received any compensation for acting as its trustee. He claims he lied on the Washington Mutual loan application in order to help his mother purchase a home.

The motion for summary judgment also includes a declaration from an accountant, Thomas Snaza ("Snaza"), who prepared the tax returns for both the trust and Sharif personally. Snaza declared that over the past six years, he had not discovered any transactions in which Sharif used the assets of the trust for his own benefit or any evidence that Sharif had received financial compensation for acting as trustee of the trust. Upon Soad Wattar's death, according to the summary judgment motion, Sharifeh became the successor beneficiary to the trust. She also claims that she became the successor trustee, replacing Sharif.

Sharif argues that the summary judgment motion, and its accompanying affidavits, are important to show that the merits of Wellness' claim were weak. However, the Court notes that Wellness did not have an opportunity to respond to the motion or challenge the evidence brought forward. Sharif cannot reasonably expect this Court to accept his version of events, particularly as to the ownership of the Soad Wattar Trust, when he was defaulted for failing to provide discovery on this very matter.

Nor do the contents of the motion show that Sharif substantially complied with his discovery obligations, much less by the date ordered by the Bankruptcy Court, which was April 28, 2010, nearly two months prior to the filing of the motion for summary judgment on June 22, 2010. So it does not provide a basis for reversing the Bankruptcy Court's rulings.

1. Whether Sharif was Denied Due Process

Sharif argues that the failure of Wellness' attorneys to consult with his lawyer before supplementing its motion to compel amounted to a violation of his due process rights because he was not on notice of what he had to do to avoid the sanction of default. Presumably, Sharif means that the Bankruptcy Court, and not Wellness, violated his right to due process when it granted the motion to compel although the parties had not conferred after Wellness supplemented its motion. It is true that the imposition of sanctions under Rule 37 must follow notice and the opportunity to respond. *See Rothman v. Emory Univ.*, 123 F.3d 446, 455 (7th Cir. 1997). Here, however, Sharif received both.

Contrary to Sharif's argument that he had no notice that the Bankruptcy Court might impose drastic sanctions, the Court explicitly informed him in its April 21, 2010, order that "in the event Richard Sharif fails to comply by April 28, 2010, an order of default will be entered against him in the proceeding." Further, the Bankruptcy Court held a lengthy hearing on May 24, 2010, on the alleged violations, which Sharif did not attend. At that hearing, counsel for Sharif was given an opportunity to explain his failure to comply with his discovery obligations. To the extent he argues that Rule 37 required more of the Bankruptcy Court or Wellness, Sharif is mistaken.

Rule 37(a) requires a party to certify that it has in good faith conferred or attempted to confer with the party failing to provide discovery before filing a

motion to compel. However, there is no dispute that Wellness' counsel conferred with Sharif's prior to filing the motion to compel. Sharif cites no authority for the proposition that Wellness had a duty to again confer before supplementing its motion. Additionally, Wellness supplemented its motion with testimony from Sharif's deposition, which he and his counsel attended. So Wellness' complaints cannot have come as a surprise to Sharif.

The Bankruptcy Court specifically addressed this issue and found that an additional certification was not required. This Court concurs. In particular, the Bankruptcy Court noted, "[A] phone call would have been futile because the Debtor was so grossly out of compliance with his discovery obligations." This is especially true given the history of this dispute, dating back to the Texas litigation. Sharif has shown, time and time again, an unwillingness to turn over information that would allow Wellness to collect its judgment against him. There is no reason to think an additional phone call from Wellness' counsel would have solved the problem.

2. Whether the Bankruptcy Court Abused its Discretion

Sharif points to several supposed flaws with the Bankruptcy Court's order, none of which justify reversal. First, he contends that the Bankruptcy Court did not provide any insight into the deficiencies in Sharif's discovery responses.

This is not so. As detailed above, the 18–page order outlines numerous deficiencies in some detail. Nor can the Court accept Sharif's argument that he

made a good-faith effort to comply with discovery. It is true that Sharif delivered some 1,500 pages of documents to counsel for Wellness prior to the deposition. Yet it is clear, based on Sharif's own deposition, that he failed to turn over numerous categories of documents.

A few examples will suffice. Sharif admitted that he had not provided any documents evidencing the source and funding of the Soad Wattar Trust. Sharif Dep. at 109:11–110:24. Sharif admitted that he did not provide the source data and documents used to complete his tax returns. *Id.* at 133:24–136:2. He admitted that he did not provide signed copies of his tax returns. *Id.* at 130:2–131:6. He admitted to not having provided information about various accounts, including the Soad Wattar Living Trust Account at Banco Popular. *Id.* at 107:5–108:1.

Additionally, although Sharif produced documents following the deposition, apparently including bank statements relating to the Soad Wattar Trust and Sharif's personal accounts, it is not clear (and Sharif has made no effort to make it clear) exactly what was produced, much less whether this brought Sharif anywhere near compliance with the discovery requests. As such, despite Sharif's arguments, the Court cannot find that he substantially complied with the discovery requests.

Nor did the Bankruptcy Court err in finding that Sharif acted willfully and in bad faith. While the court did not expressly use these terms that is the clear implication of its findings that Sharif had not made a serious effort to comply with the discovery

requests, either before or after his mother's death, that he was grossly out of compliance with his obligations, and that his lack of compliance was part of a pattern that had continued from the time of the Texas litigation. *See Smith v. Smith*, 145 F.3d 335, 344 (5th Cir. 1998) (holding that in imposing sanctions court may consider a party's actions in a related case).

Finally, Sharif argues that the Bankruptcy Court abused its discretion in seizing the Soad Wattar trust and turning it over to the bankruptcy trustee to pay his debts. In so arguing, he insists that the Soad Wattar Trust is a real trust, with a real beneficiary—his sister, Sharifeh. Even if this is true, however, the Court notes that Sharifeh brought her own appeal to the Bankruptcy Court's order dismissing her adversary proceeding in which she sought to be pronounced the rightful owner of the assets in the Soad Wattar Trust. That case is pending before Judge Grady, and this Court will not comment on its merits.

IV. SHARIF MOTION TO SUPPLEMENT BRIEFING SCHEDULE

Lastly, Sharif moved on January 12, 2012 to file supplemental briefings in the 10 C 5303 appeal based on the Seventh Circuit's December 30, 2011 ruling in *In Re Ortiz.*, 665 F.3d 906, 2011 WL 6880651 (7th Cir.). Sharif seeks to argue, as his sister did, that the bankruptcy court was without jurisdiction. Sharif pegs his motion to the recent *Ortiz* ruling, but the issue dealt with stems from *Stern v. Marshall* (*See Infra* II. B., discussing *Stern*

and *Ortiz*). Stern was decided by the United States Supreme Court on June 23, 2011, a month and a half before Sharif filed his appellate brief on August 9, 2011 in this case. Sharif now seeks to raise this issue, for the first time, six months after Stern. The court finds this motion untimely, and therefore denies it.

V. CONCLUSION

For the reasons stated herein, the Court rules as follows:

1. Ragda Sharifeh's Motion to Withdraw Reference, brought in Case No. 11 C 8811 is denied.

2. Richard Sharif's Motion to Set Supplemental Briefing Schedule, brought in Case No. 10 C 5303 is denied.

3. The rulings of the Bankruptcy Court in the appeals in Case Nos. 10 C 5303, 10 C 5333, 10 C 6057, and 11 C 175 are affirmed in their entirety.

IT IS SO ORDERED.

Appendix D

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re:	)	Chapter 7
	)	
Richard Sharif,	)	Case No. 09 B 05868
	)	
Debtor.	)	
	)	
	)	
Wellness International Network, Ltd. aka WIN, Ralph Oats and Cathy Oats,	)	
	)	
Plaintiffs,	)	
	)	Adv. No. 09 A 00770
v.	)	
	)	
Richard Sharif, Individually and as Trustee of the Soad Wattar Trust	)	Judge Jacqueline P. Cox
	)	
Defendant.	)	

Order on Plaintiff's Motion to Compel or Motion for Sanctions

This matter is before the court on the motion of Wellness International Network, Ltd., Cathy Oats and Ralph Oats (collectively, the "Plaintiffs" or

"WIN") to compel the Debtor, Richard Sharif, to produce discovery documents, to attend a Rule 2004 examination, and to respond to various discovery requests and interrogatories. In the alternative, Plaintiffs' motion seeks sanctions against Mr. Sharif for failure to comply with discovery requests, deadlines and orders of this court. For the reasons that follow, Plaintiffs' motion for sanctions is GRANTED.

Background

Prior to filing his chapter 11 petition, the Debtor and the Plaintiffs herein were involved in litigation in the District Court for the Northern District of Texas. The Debtor and several other parties filed a complaint on July 8, 2005 against Wellness International Network, Ltd., WIN Network, Inc., Ralph Oats, Cathy Oats, and Sheri Matthews in the United States District Court for the Northern District of Texas asserting fraud, RICO and other claims seeking damages of nearly $1 million. Pls. Am. Compl. Objecting to Discharge, case no. 09 A 0770, dkt. no. 10 at 2 (the "Am. Compl."). The Debtor and his co-plaintiffs did not conduct any discovery in that action and did not cooperate with WIN's efforts to obtain discovery. *Id.* The Debtor and his co-plaintiffs did not serve initial disclosures and failed to respond to written discovery. *Id.* The Debtor and his co-plaintiffs had admissions deemed against them for their failure to respond to discovery requests. WIN subsequently moved for summary judgment on the grounds that the admissions negated all claims asserted; the Debtor and his co-

plaintiffs failed to introduce any evidence in support of the claims. *Id.* The district court granted summary judgment on these grounds. *Id.* The Debtor and his co-plaintiffs appealed the entry of summary judgment to the Fifth Circuit in 2007. *Id.* The Fifth Circuit affirmed all of the district court's rulings and noted:

> A review of the record on appeal demonstrates that Appellant's untimely performance in this court mirrors a lengthy history in the district court of dilatoriness and hollow posturing interspersed with periods of nonperformance or insubstantial performance and compliance by Appellants and their counsel, leaving the unmistakable impression that they have no purpose other than to prolong this contumacious litigation for purposes of harassment or delay, or both. The time is long overdue to terminate Appellants' feckless litigation at the obvious cost of time and money to the Defendants by affirming all rulings of the district court but remanding the case to that court for the reinstatement of its consideration of Appellees' motion for attorney's fees. In so doing, we caution Appellants that any further efforts to prolong or continue proceedings in this court, including the filing of petitions for rehearing, will potentially expose them to the full panoply of penalties, sanctions, damages, and double costs pursuant to FRAP 38 at our disposal.

Id. at 2-3 (citing *Sharif v. Wellness Intl Network*

Ltd., no. 07-10834, 2008 U.S. App. Lexis 7483, at *2 (5th Cir. April 8, 2008)). On remand the district court awarded the Plaintiffs herein attorneys' fees in the amount of $655,596.13 as a sanction against the Debtor and his co-plaintiffs. *See* Order on Mot. for Civil Contempt, Civil Action No. 3:05-CV-01367-B, Docket No. 180 at p.1, District Court for the Northern District of Texas, Dallas Division (February 10, 2009). Plaintiffs herein subsequently served the Debtor with post-judgment discovery and document requests. *Id.* The Debtor never complied with the Plaintiffs' discovery requests and did not tender responsive documents. *Id.*

The Plaintiffs filed a Motion to Compel post-judgment discovery on October 13, 2008; the motion was granted on November 19, 2008 and the Texas district court ordered the Debtor to respond to outstanding discovery requests. *Id.* at 1-2. Despite the district court's order compelling the Debtor to comply with discovery requests, the Debtor did not respond to such requests nor did he appear for a deposition. *Id.*

On December 4, 2008 Plaintiffs filed a Motion for Civil Contempt against the Debtor for violating the Texas court's order on the Motion to Compel. *Id.* At a show cause hearing on January 13, 2009, at which the Debtor did not appear, the Texas court found clear and convincing evidence that the Debtor had violated several court orders compelling the Debtor to comply with outstanding discovery requests and the order to appear at the January 13, 2009 show cause hearing. *Id.* at 3. The Texas court held the Debtor in civil contempt for his discovery violations

and ordered him to respond to post-judgment discovery and reimburse Plaintiffs for attorneys' fees and costs incurred to prepare and file the motion to compel and the motion for civil contempt. *Id.* at 3-5. On February 24, 2009, two weeks after the Texas court's contempt ruling, the Debtor filed the instant bankruptcy case.

On August 24, 2009, Plaintiffs filed adversary proceeding 09 A 00770 asking the court to deny Debtor a discharge pursuant to 11 U.S.C. § 727. Count I of the adversary complaint alleges that the Debtor "has continuously concealed property that he owns by holding such property in the name of the Soad Wattar Living Trust with improper intent to deceive" in violation of 11 U.S.C. § 727(a)(2). Am. Compl. ¶ 19. Plaintiffs further assert that the Debtor is the Trustee of the Soad Wattar Trust, exercises complete control over the trust, and holds out the assets in the trust as his own.

Count II alleges that the Debtor has "concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information" in violation of 11 U.S.C. § 727(a)(3). *Id.* at ¶ 22.

Count III alleges that the Debtor knowingly and fraudulently made a false oath or account in connection with his bankruptcy case in violation of 11 U.S.C. § 727(a)(4)(A). Specifically, Plaintiffs assert that Debtor failed to disclose companies in which he was an officer within the past 6 years despite the fact that part of Debtor's bankruptcy petition requires the Debtor to list all businesses in which the debtor was an officer, director, partner or

managing executive of a corporation. In response to this question Debtor did not list any businesses. *See* Statement of Financial Affairs ("SOFA"), Voluntary Chapter 7 Bankruptcy Petition (the "Petition"), case no. 09 B 05868, dkt. no. 1 at p. 29, ¶ 18. Plaintiffs assert that the Debtor is or has been an officer of Logan Square MRI and Diagnostic Center, Inc.; Allied Medical Management, Inc.; and Logan Square Surgery Center, Ltd.

Count IV alleges that the Debtor has failed to explain the loss of $5M in assets that he claimed to own in a 2002 Washington Mutual Bank, N.A. Loan Application (the "Loan Application") in violation of 11 U.S.C. § 727(a)(5). The assets listed in the Loan Application include the following: (1) Logan Square MRI Center; (2) Sharif Pharmacy; (3) Hermosa Medical Center; (4) three Banco Popular Accounts containing $90,000, $40,000 and $50,000, respectively; (3) $1,400,000 in a retirement fund 401(k); and $1,400,000 in real estate (collectively, the "Loan Application assets"). *See* Loan Application, Ex. No. 54 to Hearing Ex. No. 15 at p. WM 0840-0841. Although Debtor presently claims that he does not own any of the property that he once claimed to own in the loan application, he has failed to explain its loss or disposition.

Count V seeks a declaratory judgment that the Soad Wattar Trust is the alter ego of the Debtor because the Debtor exercises complete control over the trust, there is a unity of interest between Debtor and the trust such that separate personalities do not exist, and continuing to recognize the Debtor and the trust as separate would promote injustice.

On April 15, 2010, in this adversary proceeding, the Plaintiffs filed a Motion for Sanctions, Costs and Fees, and in the alternative, a Motion to Compel, Motion for Costs and Fees, and Motion to Modify Scheduling Order (hereinafter the "Sanctions Motion"). The court held a hearing on the Sanctions Motion on April 21, 2010. At the hearing, Plaintiffs argued that the Debtor had failed to comply with discovery requests and missed discovery deadlines for document production and responding to interrogatories. This court entered an order on April 21, 2010 compelling the Debtor to comply with all outstanding discovery by April 28, 2010 or else an order of default would be entered against the Debtor in adversary proceeding 09 A 00770. This court continued the hearing on the Sanctions Motion to April 28, 2010.

On April 28, 2010, the parties appeared before this court and the Plaintiffs noted that the Debtor had produced some documents along with certain interrogatory responses on the afternoon of April 27, 2010. *See* May 24, 2010 Transcript of Sanctions Hearing, *Wellness International, Ralph Oats, and Cathy Oats v. Richard Sharif, Individually and as Trustee of the Soad Wattar Trust* at 4 (the "Hearing Transcript"). This court continued the hearing to May 24, 2010 to allow Plaintiffs additional time to assess whether or not the Debtor's document production and discovery responses were in compliance with the April 21, 2010 order compelling the Debtor to comply with all outstanding discovery. At the hearing on May 24, 2010, the Plaintiffs argued that the Debtor still had not fully complied

with discovery requests and should be sanctioned. *Id.*

A. Debtor Failed to Sign or Verify His Interrogatory Responses

Federal Rule of Civil Procedure 33(b), applicable to this adversary pursuant to Bankruptcy Rule of Procedure 7033, requires:

> (1) ... [I]nterrogatories must be answered:
>
> > (A) by the party to whom they are directed; or
> >
> > (B) if that party is a public or private corporation, a partnership, an association, or a governmental agency, by any officer or agent, who must furnish the information available to the party.
>
> (3) ... Each interrogatory must, to the extent it is not objected to, be answered separately and fully in writing under oath ...
>
> (5) The person who makes the answers must sign them, and the attorney who objects must sign any objections.

Fed. R. Civ. P. 33(b)(1)-(5). Additionally, the Seventh Circuit Court of Appeals and the United States District Court for the Northern District of Illinois have determined that under Rule 33, answers to interrogatories must be verified and must be signed by the person answering the interrogatory, not only by the party's attorney. *See, e.g., Hindmon v. Natl.-Ben Franklin Life Ins. Corp.*, 677 F.2d 617, 619 (7th Cir. 1982) (observing that interrogatory answers signed by an attorney and not the party violated "the

clear mandate of Federal Rule of Civil Procedure 33(a)"); accord *Overton v. City of Harvey*, 29 F.Supp.2d 894, 901 (N.D.I11.1998) (striking as summary judgment exhibit plaintiffs unverified answers to interrogatories signed only by attorney).

The Debtor's interrogatory responses as Trustee of the Soad Wattar Revocable Living Trust (the "Soad Wattar Trust") were signed by Debtor and Debtor's attorney but did not contain a statement verifying the interrogatory answers. *See* Hearing Transcript at 6; Richard Sharif's Answers to Interrogatories as Trustee of the Soad Wattar Revocable Living Trust, Hearing Ex. No. 3 at p. 9 ("Sharif Trustee Interrog. Answers"). Similarly, the Debtor's individual interrogatory responses were signed by Debtor's attorney and did not contain a statement verifying the interrogatory answers. *See* Richard Sharif's Answers to Plaintiffs' First Request for Interrogatories, Hearing Ex. No. 4 at p. 9 ("Sharif Individual Interrog. Answers"); Hearing Transcript at 6. They should have been signed by the Debtor as required by FRCP 33 and FRBP 7033.

Debtor was not present at the hearing and Debtor's attorney offered no explanation as to why the interrogatory responses were not signed and verified as required under the Federal Rules of Civil Procedure and the Federal Rules of Bankruptcy Procedure.

B. Debtor's Failure to Provide Documents Requested by Plaintiffs and the Trustee.

Plaintiffs asserted that the Debtor has continuously failed to produce numerous documents

that were requested by the Plaintiffs in requests for production and by the Trustee at the 341 meeting and in a subsequent motion to compel. Plaintiffs also asserted that the Debtor has failed to produce these documents despite this court's April 21, 2010 order compelling the Debtor to comply with all outstanding discovery requests.

1. Washington Mutual Loan Application and Related Documents

During the Debtor's initial 341 meeting on March 25, 2009, Plaintiffs and the United States Trustee requested that the Debtor provide documents relating to the Loan Application wherein the Debtor asserted that he owned various assets. The assets listed in the Loan Application include the following: (1) Logan Square MRI Center; (2) Sharif Pharmacy; (3) Hermosa Medical Center; (4) three Banco Popular Accounts containing $90,000, $40,000 and $50,000; (3) $1,400,000 in a retirement fund 401(k) account; and $1,400,000 in real estate. *See* Loan Application as noted above at p. WM 0840-0841. The 341 meeting was continued to April 21, 2009 to allow the Debtor additional time to gather any documents related to the Loan Application assets. *See* Sanctions Motion at p. 5. When the Debtor appeared at the continued 341 meeting he did not provide the U.S. Trustee or the Plaintiffs with the requested documents, and instead alleged that none of the Loan Application assets belonged to him. *Id.* The Debtor asserted that the Soad Wattar Trust owned all of the Loan Application assets, that the Debtor was the Trustee of the Trust, and that the Debtor had lied when he represented that he owned the assets listed in the Loan

Application. *Id.* At his Rule 2004 examination the Debtor confirmed under oath that he had testified at the 341 meeting that he lied in the Loan Application:

> Q: The third sentence [of Debtor's answer to the Amended Adversary Complaint states], defendant testified at the 341 meeting that he lied on the loan application, that he did not own of the real estate listed in the loan application, and that this property is owned by Soad Wattar Trust, his mother or sister. Do you see that statement? I'd be glad to orient you if you --
>
> A: Yeah. Is that by the Answer, defendant admits?
>
> Q: Uh huh.
>
> A: Yeah. That on April '09 — okay.
>
> Q: Is that a true statement?
>
> A: Yes, yeah.

May 13, 2010 Rule 2004 Examination of Richard Sharif, *Wellness International, Ralph Oats, and Cathy Oats v. Richard Sharif Individually and as Trustee of the Soad Wattar Trust*, Hearing Ex. No. 15 at pp. 60-61 ("Transcript of Debtor's 2004 Examination").

Based upon the Debtor's assertion that the Trust owned the assets listed in the Loan Application assets, the Plaintiffs and the U.S. Trustee requested documents relating to the formation and funding of the Soad Wattar Trust and documents evidencing ownership or transfer of the Loan Application assets.

See Sanctions Motion at p. 5. The 341 meeting was continued again to June 3, 2009 to give the Debtor time to provide the requested documents. At the June 3, 2009 meeting the Debtor again failed to provide any of the requested documents. Sanctions Motion at p. 5.

Subsequent to the Debtor's refusal to provide the documents requested at his second and third 341 meetings, the Debtor brought a Motion for Protective Order before this court and requested that he be granted leave to tender documents relating to the Loan Application and the Soad Wattar Trust under a protective order to prevent disclosure of information to the Debtor's creditors and creditors' attorneys. *See* 09 B 5868, dkt. no. 23. The Debtor's Motion for Protective Order was denied on June 11, 2009. *See* 09 B 5868, dkt. no. 25. Despite this court's denial of Debtor' Motion for Protective Order, the Debtor never tendered any documents relating to the Loan Application, thereby prompting the Trustee to file a Motion for Turnover of Documents from Richard Sharif to Horace Fox, Jr. ("Trustee's Motion") on October 20, 2009. *See* 09 B 5868, dkt. no. 40. This court granted the Trustee's Motion on October 27, 2009 (09 13 5868, dkt. no. 42). To date the Debtor has failed to comply with this court's order to turn over the required documents to the Trustee. *See* Sanctions Motion at p. 6.

The Plaintiffs also requested that the Debtor provide documents relating to each of the Loan Application assets in their requests for production. *See* Richard Sharif s Response to Plaintiffs' First Request for Production of Documents, Hearing Ex.

No. 1, ¶¶ 15-22 ("Sharif Production Responses"). The Debtor's response failed to produce any documents relating to the Loan Application assets.

2. Richard Sharif Revocable Trust Documents

Plaintiffs asserted that the Debtor failed to disclose all requested information or documents relating to the Richard Sharif Revocable Trust despite interrogatory and production requests requiring him to do so.

The Debtor listed the Richard Sharif Revocable Trust in his Petition as property owned by another person that the Debtor controls. *See* SOFA at p. 27. Based on this disclosure, the Plaintiffs' interrogatories requested the Debtor to identify each trust for the benefit of others that the Debtor had created or contributed to in the last five years. *See* Richard Sharif s Answers to Plaintiffs' First Request for Interrogatories, Hearing Ex. No. 4 at p. 8, ¶ 11 ; Richard Sharif s Response as Trustee to Plaintiffs' First Request for Production of Documents, Hearing Ex. No. 2 at p. 2, ¶ 11 ("Sharif Trustee Production Responses"). The Debtor responded to the interrogatory with the answer "none", which is wholly inconsistent with the Debtor's sworn bankruptcy schedules which list the Richard Sharif Revocable Trust on page 27. *See* Sharif Individual Interrog. Answers at p. 8, ¶ 11; Hearing Transcript at 9; SOFA ¶ 14.

The Plaintiffs also requested that the Debtor produce all documents referencing or evidencing any assets held in trust in which the Debtor claims or has an interest. Sharif Production Responses at ¶ 42

and Sharif Trustee Production Responses at ¶ 42. Again, despite Debtor's acknowledgment of having an interest in the Richard Sharif Revocable Trust in his sworn bankruptcy schedules (*See* SOFA at p. 27), the Debtor failed to produce any documents relating to the trust. Hearing Transcript at 9-11.

3. Bank Statements and Financial Records

Plaintiffs asserted that the Debtor failed to produce bank statements and account records relating to financial transactions involving Mr. Sharif individually and the Soad Wattar Trust. The Plaintiffs requested that the Debtor produce documents evidencing any account at a financial institution in which the Debtor is a designated signatory. Sharif Trustee Production Responses at p. 7, ¶ 44; Sharif Production Responses at pp. 7-8, ¶ 44. The Debtor failed to produce any documents responsive to these requests and instead listed the names and addresses of three financial institutions with corresponding account numbers. *See* Sharif Production Responses at p. 7, ¶ 44; Sharif Trustee Production Responses at p. 7, ¶ 44; Hearing Transcript at 11.

The Plaintiffs also requested that the Debtor produce documents relating to any checking, savings, money market, passbook, demand deposit, negotiable order of withdrawal or trust account in which the Debtor had any interest. Sharif Trustee Production Responses at p. 8, ¶ 49; Sharif Production Responses at p. 8, ¶ 49, The Debtor failed to produce any documents responsive to this request, even though he has a personal account with JP Morgan Chase

Bank, and acknowledged his lack of compliance during his 2004 examination. Transcript of Debtor's 2004 Examination at 166. Instead, the Debtor responded to Plaintiffs' requests by stating that any such documents are available at JP Morgan Chase and providing corresponding account numbers. Sharif Trustee Production Responses at p. 8, ¶ 49; Hearing Transcript at 11-12.

During their investigation, the Plaintiffs independently discovered numerous documents that the Debtor failed to produce relating to assets held at AG Edwards in which the Debtor has an interest. The Plaintiffs discovered account statements from AG Edwards for the period of September to October of 2003 in the name of Soad Wattar, the Debtor's mother, and Richard Sharif as joint tenants. A.G. Edwards & Sons, Inc. Account Statements, Ex. No. 61 to 2004 Examination of Debtor ("AG Statements"). These account statements revealed that approximately $752,050 in assets were held by AG Edwards in the joint tenancy of Soad Wattar and Richard Sharif. *See* AG Statements. In his Rule 2004 examination the Debtor admitted that while he does have documents relating to this AG Edwards account, he did not produce them. Transcript of Debtor's 2004 Examination at 172-173. The Debtor also stated that the assets in this AG Edwards account were transferred to Wachovia Bank, but the Debtor failed to produce any transfer documents. Transcript of Debtor's 2004 Examination at 174. The Debtor also failed to disclose the AG Edwards accounts in his bankruptcy petition. *See* Petition, The Debtor failed to produce information or

documentation regarding the AG Edwards account or its disposition despite interrogatories and requests for production requiring him to produce all documents evidencing any interest he had in any account from 2002 to the present, along with all documents showing the disposition or transfer of such accounts from 2002 to the present. *See* Sharif Trustee Production Responses at p. 8, ¶ 49; Sharif Individual Interrog. Answers at nos. 6-7; Hearing Transcript at 16-18.

The Plaintiffs also discovered a variable annuity held at AG Edwards for the benefit of the Debtor and his sister, Ragda Sharifeh, as joint tenants. The Plaintiffs found an AG Edwards statement showing the TransAmerica Triple Advantage VA with a valuation of $39,248. AG Statements at AGE 0180-0181. Once again, the Debtor failed to provide any information or produce any documentation relating to this annuity despite receiving interrogatories and document requests requiring him to do so. Hearing Transcript at 22. At his 2004 examination the Debtor was unable to identify where the $39,248 is currently located. Transcript of Debtor's 2004 Examination at 178-179.

The Plaintiffs estimate that approximately $912,000 in assets were held at AG Edwards for the benefit of the Debtor individually or jointly with his mother and his sister, yet the Debtor provided no discovery information or documentation regarding these AG Edwards accounts. Hearing Transcript at 24.

The Debtor also failed to provide any information

or documentation evidencing other accounts that he admitted to having an interest in at his 2004 Examination. Hearing Transcript at 26-31. The Debtor admitted to holding the following accounts but produced no documentation or information about the accounts in response to Plaintiff's' discovery requests: Soad Wattar Living Trust account at Banco Popular; account at Raymond Jones; checking account at JP Morgan Chase. During his Rule 2004 examination, Debtor admitted his failure to produce the requested documents and offered production:

1) Q: Sir, I'm just asking. You have not given me one single account statement for the trust [at Banco Popular], have you?

   A: Account statement?

   Q: Yes.

   A: You mean, from like the investment firm?

   Q: Yes.

   A: There are boxes available. These are, you know --

   Q: You have not provided us a single account statement, have you?

   A: I did not. Again, I did not know that you needed that one. If not, it's available.

2) Q: Where are there accounts besides Banco Popular?

   A: Banco Popular, absolutely, and whatever you need from Wells Fargo, provide you with it.

Q: I'm just asking for the names of the companies – Wells Fargo and who else?

A: Wells Fargo, Wachovia, which is now Wells Fargo, has a mortgage payment for the house because it comes out of the mother's living trust every month. This is two – three. What else?

Q: Any investment firms like Smith Barney or Morgan Stanley? I'm just throwing out people that I can think of.

A: There is one she [Debtor's mother] has an account with Raymond James, since 2005, one account. I just remembered this. I believe that's all I know right now.

3) Q: I'm asking why have you not produced to me the JP Morgan Chase account statements as requested in discovery?

A: Counsel, I did list the only account that I have. I'm sorry if I didn't produce the statement available. I know there's a question, Counselor, that I need to reproduce because my lawyer would have told me to produce it. I went by the name of the bank and my account but –

Transcript of Debtor's 2004 Examination at pp. 107-109; 143-144. Plaintiff's argue that even though the Debtor stated during the Rule 2004 Examination that he could produce documents relating to the undisclosed accounts, as shown above, the point is that the Debtor is still grossly out of

compliance with his discovery obligations despite this court's April 21, 2010 order compelling him to comply with all outstanding discovery.

4. Conveyance, Disposal, or Transfer of Asset Documents

Plaintiffs asserted, and Debtor Sharif s Answers to Interrogatories show, that the Debtor failed to provide information relating to the conveyance, disposal, or transfer of certain assets in which the Debtor once claimed an interest. *See* Sharif Individual Interrog. Answers and Sharif Trustee Interrog. Answers at p. 6-7, ¶¶ 16-8. At his 2004 examination the Debtor admitted that he had once owned a 10% interest in the Logan Square MRI & Diagnostic Center, Inc. ("Logan Square") and had relinquished such interest. *See* Transcript of Debtor's 2004 Examination at p. 95. However, the Debtor never provided any information or documentation evidencing the disposition of his interest in Logan Square, and he admitted the same at the 2004 examination despite having received Plaintiffs' interrogatories and requests for production inquiring about the disposition of his interest in Logan Square. *See* Transcript of Debtor's 2004 Examination at 96; Sharif Individual Interrog. Answers at p. 7, ¶¶ 6-8.

At his 2004 examination the Debtor denied ever having an ownership interest in Sharif Pharmacy (Transcript of Debtor's 2004 Examination at 61), but the Debtor produced a 2002 federal income tax return in which he represented to the IRS he was the 100% owner of Sharif Pharmacy. *See* Transcript of Debtor's 2004 Examination at 68. After the Debtor

was confronted with the inconsistency between his testimony and his 2002 federal income tax return Debtor stated that he does not examine his tax returns because his accountant does and he does not understand them. *Id.* at 69. The Debtor admitted that his ownership interest in the Sharif Pharmacy was 10% and that the 100% listed in his tax return was an error. *Id.* at 68. Whether the Debtor's ownership interest in Sharif Pharmacy was 10% or 100%, he produced no documentation evidencing the transfer of his interest in the pharmacy and acknowledged his failure to comply during the 2004 examination. *See* Transcript of Debtor's 2004 Examination at 72. The Debtor also admitted that he asked the office manager of Sharif Pharmacy for responsive documents from 1992 through the present but never undertook any other efforts to obtain documents from 2006 to the present. *Id.* at 87.

5. Corporate Records

Plaintiffs asserted that the Debtor failed to produce corporate records for Sharif Pharmacy and Hermosa Medical Center after 2006. Plaintiffs' discovery requests specifically designated corporate records for Sharif Pharmacy and Hermosa Medical Center as documents for production. *See* Sharif Trustee Production Responses, Hearing Ex. No. 2 at ¶¶ 7-8; Sharif Production Responses, Hearing Ex. No. 1 at ¶¶ 7-8. The Debtor never produced the requested documents even after this court's April 21, 2010 order compelling the Debtor's compliance with all outstanding discovery requests. Hearing Transcript at 34-36.

6. Documents Evidencing the Formation and Funding of the Soad Wattar Trust

Plaintiffs asserted that the Debtor failed to produce documents relating to the formation and funding of the Soad Wattar Trust. Hearing Transcript at 38. Plaintiffs argued that these documents are critical because nearly everything the Debtor owned is now in the Soad Wattar Trust.

Plaintiffs' requests for production required the Debtor to produce documents establishing and funding the Soad Wattar Trust, evidencing the transfer of assets into the trust, and all other documents related to assets held in the trust. *See* Sharif Trustee Production Responses, Hearing Ex. No. 2 at ¶¶ 27, 45-46, 49-50; Hearing Transcript at 38-41. Plaintiffs specifically requested all deeds, records, titles, or other documents that related to assets in the name of the Soad Wattar Trust from 2002 to the present. Debtor alleges that the Trust was funded with a $2,000,000 inheritance from his deceased father that came from an international wire transfer from Beirut, Lebanon through a financial entity in Dubai. Transcript of Debtor's 2004 Examination at 109. However, Debtor also admitted that he did not have any of the documents evidencing the wire transfers in his possession and that he had not produced such documents to Plaintiffs. Transcript of Debtor's 2004 Examination at 110-111. The Debtor also admitted that except for one asset, the Revere house, he had failed to produce any documents showing transfers of assets into the Soad Wattar Trust from 1992 to the present. *See id.* at 104-105. In sum, Debtor failed to produce

documentation showing from where the money and property in the Soad Wattar Trust came.

Plaintiffs also requested the 1992 trust instrument that purportedly established the Soad Wattar Trust. Sharif s Trustee Responses at ¶ 11 concern amendments to the Soad Wattar Trust and not the original document that established the Trust. Debtor admitted in his 2004 examination that he failed to produce the original trust instrument. Transcript of Debtor's 2004 Examination at 101.

7. Signed Tax Returns and Documents Used to Prepare Debtor's Tax Returns

Plaintiffs asserted that the Debtor failed to produce signed tax returns or any of the underlying source documents used to prepare such tax returns. Hearing Transcript at 44. While Plaintiffs did receive some federal and state tax returns from 2003-2008 from the Debtor, not one of the tax returns received was signed. *See* Hearing Transcript at 44; Sharif Production Responses at ¶ 10 and Sharif Trustee Production Responses at ¶ 10. When the Debtor was questioned about the unsigned tax returns at his 2004 examination, he stated that he was 100% sure that the tax returns that went to the government were signed, but he never produced any signed tax returns to the Plaintiffs. *See* Transcript of Debtor's 2004 Examination at 130-131. The Debtor also stated that he never attempted to obtain signed tax returns from the IRS. *Id.* at 130.

The Debtor also failed to produce the source documents used to prepare his tax returns and admitted the same in his 2004 examination. *See id* at 135.

8. Documents Evidencing Debts Owed to Debtor's Family Members

Plaintiffs asserted that the Debtor failed to produce any documents underlying the debts that he owes to his family members. *See* Sharif Production Responses & Sharif Trustee Production Responses at ¶¶ 34-37; Hearing Transcript at 54. The Debtor's bankruptcy petition listed several debts owed to the Debtor's family members including the following: (1) $49,000 to Haifa Kaj, Debtor's sister; (2) $39,000 to Jamal Sharif, Debtor's brother; (3) $93,000 to Ragda Sharifeh, Debtor's wife; and (4) $90,000 to Soad Wattar, Debtor's mother. *See* Petition at Schedule F, p. 17; Hearing Transcript at 55. Based on these disclosures in the Debtor's Schedule F, the Plaintiffs requested that the Debtor produce documents referencing or evidencing any debts owed to the above family members. *See* Sharif Production Responses, Hearing Ex. No. 1 at ¶¶ 34-37; Sharif Trustee Production Responses, Hearing Ex. No. 2 at ¶¶ 34-37. The Debtor failed to produce any documents evidencing the amounts he owes to his family and asserted that all of the debts were created with oral agreements. *See* Sharif Production Responses, ¶¶ 34-37; Hearing Transcript at 56. The Plaintiffs contend, and the court agrees, that it is hard to believe that $271,000 was transferred as loans to the Debtor and no documents such as wire transfer forms, bank statements, canceled checks,

emails, enclosure letters, etc. were created in doing so.

* * *

In response to all of the Plaintiffs' assertions regarding the Debtor's non-compliance, the Debtor's attorney argued that while there may be some deficiencies in the Debtor's discovery responses, the Debtor did make a good faith effort to comply with all discovery requests. Hearing Transcript at 75-76. Debtor's attorney pointed out that the Debtor was initially unable to meet the discovery deadlines because he was in Syria attending to his ill mother who subsequently passed away. Hearing Transcript at 68. When this court requested proof of the Debtor's whereabouts the Debtor's attorney produced airline tickets to Syria and a copy of the mother's death certificates. *Id.* This court does not believe that the Debtor made a serious effort to comply with Plaintiffs' discovery requests both before or after his mother's death.

Debtor's attorney argued that Plaintiffs' counsel never called him to object to the sufficiency of the discovery responses and production; Plaintiffs simply filed this motion for sanctions. Hearing Transcript at 68-69. Debtor's attorney also asserted that Plaintiff's supplement to their Sanctions Motion did not contain the proper certification as required by Northern District of Illinois Local Rule 37.2 certifying that the movant consulted with opposing counsel regarding the discovery defects before filing a motion pursuant to Federal Rule of Civil Procedure 26. Hearing Transcript at 77-78. This court notes that a phone

call would have been futile because the Debtor was so grossly out of compliance with his discovery obligations. This court also notes that Plaintiffs did in fact comply with Local Rule 37.2 because their Sanctions Motion contained the required certification. Sanctions Motion at 12.

Debtor's attorney asserts that he produced some documents after the Debtor's 2004 examination. Debtor's attorney argued that he surmised at the Debtor's 2004 examination that the plaintiffs wanted more documents than what they had received based on the questions that were posed to the Debtor; in response Debtor's attorney took it upon himself to produce bank statements from several financial institutions relating to the Soad Wattar Trust, the Debtor's personal bank accounts and the Sharif Pharmacy. Hearing Transcript at 70-71. Debtor's attorney never specified exactly which documents were produced after the 2004 examination so it is unclear what was contained in the late production, or whether the documents were responsive to Plaintiffs' requests and why they were not produced sooner. The court notes that the Debtor's 2004 examination took place on May 13, 2010, so any documents produced after that were well outside of the April 28, 2010 deadline that the court gave the Debtor to complete all outstanding discovery and prevented the Plaintiffs from questioning the Debtor about them at the Rule 2004 examination.

Conclusion

This court has stated time and time again that Bankruptcy Courts provide extraordinary relief

which requires extraordinary cooperation from Debtors. This extraordinary cooperation encompasses full compliance with all discovery requests in a timely manner. Failure to comply with discovery can result in sanctions including, but not limited to, a default judgment and attorneys' fees and costs. *See*, e.g., *In re Golant*, 239 F.3d 931, 933-34 (7th Cir. 2001) (affirming entry of default judgment against a debtor who failed to produce documents after the bankruptcy court compelled him to do so); *In re Thomas Consol. Indus.*, 2005 WL 3776322 (N.D. Ill. 2005) (affirming dismissal of claims as a sanction for violating bankruptcy court's discovery orders compelling compliance with outstanding discovery requests).

It is apparent to this court that the Debtor has failed to comply with most of the Plaintiffs' discovery requests as documented in this Order. While the court understands and sympathizes with the Debtor's loss of his mother, this court finds that Debtor's disclosures are still inadequate given this court's order compelling the Debtor to comply with all outstanding discovery by April 28, 2010. At no time has the Debtor asserted that he has not had sufficient time to comply with Plaintiffs' requests. The Debtor's lack of compliance is a pattern that has continued from the time of the underlying litigation in Texas to the instant bankruptcy case and adversary proceeding.

This court finds that the Debtor has failed to comply with this court's order compelling him to comply with all of Plaintiffs' outstanding discovery requests. As a sanction for Debtor's failure to comply

with discovery requests, this court enters default judgment against Debtor and in favor of Plaintiffs in adversary proceeding 09 A 00770. Judgment is entered in favor of Plaintiffs on all counts of their adversary complaint.

On Count I this court finds that the Debtor, with the intent to hinder, delay, or defraud Plaintiffs, has transferred, removed, destroyed, mutilated, or concealed property of the Debtor, within one year before the filing of the petition in violation of 11 U.S.C. § 727(a)(2). Specifically, the Debtor has failed to produce any documents regarding the assets in the Loan Application, which the Debtor once claimed to own, or what was transferred into the Soad Wattar Trust. Additionally, the Debtor has failed to produce any documents evidencing the formation or funding of the Soad Wattar Trust, or the disposition of the $5 million in assets listed in the Loan Application. This court finds that the Debtor has transferred, removed, destroyed, mutilated, or concealed these pertinent documents with the intent to hinder or delay Plaintiffs from discovering assets that may be used to satisfy the judgment amount that the Debtor owes to Plaintiffs.

On Count II this court finds that the Debtor has concealed, destroyed, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which his financial condition or business transactions might be ascertained in violation of 11 U.S.C. § 727(a)(3). Specifically, the Debtor has failed to produce any documents showing how his financial condition changed from the point when he claimed to own the

Loan Assets to now. The Debtor has not produced any documents showing his ownership interest in the Loan Assets and what happened to those assets.

On Count III this court finds that the Debtor knowingly and fraudulently made a false oath in connection with this bankruptcy case in violation of 11 U.S.C. § 727(a)(4)(A). Specifically, as noted above, the Debtor omitted material information from his bankruptcy schedules such as his failure to disclose companies in which he was an officer within the past six years.

On Count IV this court finds that the Debtor has failed to satisfactorily explain the loss of the assets listed in the Loan Application in violation of 11 U.S.C. § 727(a)(5)

On Count V this court enters a declaratory judgment in finding that the Soad Wattar Trust is the alter ego of the Defendant Richard Sharif because he treats its assets as his own property and it would be unjust to allow Debtor to maintain that the trust is a separate entity.

The Defendant is directed to reimburse Plaintiffs for attorneys' fees incurred to file and to prosecute the Sanctions Motion and the supplemental sanctions motion which was filed after the Debtor's Rule 2004 Examination. Debtor is directed to reimburse Plaintiffs for costs incurred in obtaining the Debtor's Rule 2004 examination, including court reporter and videographer costs.

Plaintiffs are hereby ordered to submit an affidavit within fourteen (14) days of the date of this order which sets forth the attorneys' fees and costs

associated with pursuing the Sanctions Motion and its supplement.

Due to the court's findings that the Debtor Richard Sharif has not carried out his discovery obligations and has violated 11 U.S.C. § 727, the court defaults Richard Sharif on the Amended Adversary Complaint herein and:

1. Richard Sharif is prohibited from opposing Plaintiffs' claims in adversary proceeding 09 A 00770;
2. Richard Sharif's answer to the Amended Complaint is stricken;
3. Default is entered in favor of the Plaintiffs and against Richard Sharif on Counts I through V of 09 A 00770;
4. Richard Sharif is hereby denied a discharge pursuant to 11 U.S.C. § 727(a)(2)-(a)(6).

Dated: July 6, 2010 **ENTERED:**

_____

Jacqueline P. Cox
United States Bankruptcy Judge

Appendix E

§ 157. Procedures

(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

(b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

(2) Core proceedings include, but are not limited to--

(A) matters concerning the administration of the estate;

(B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;

(C) counterclaims by the estate against persons filing claims against the estate;

(D) orders in respect to obtaining credit;

(E) orders to turn over property of the estate;

(F) proceedings to determine, avoid, or recover preferences;

(G) motions to terminate, annul, or modify the automatic stay;

(H) proceedings to determine, avoid, or recover fraudulent conveyances;

(I) determinations as to the dischargeability of particular debts;

(J) objections to discharges;

(K) determinations of the validity, extent, or priority of liens;

(L) confirmations of plans;

(M) orders approving the use or lease of property, including the use of cash collateral;

(N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate;

(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims; and

(P) recognition of foreign proceedings and other matters under chapter 15 of title 11.

(3) The bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise

related to a case under title 11. A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law.

(4) Non-core proceedings under section 157(b)(2)(B) of title 28, United States Code, shall not be subject to the mandatory abstention provisions of section 1334(c)(2).

(5) The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

(c)(1) A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, 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 considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

(2) 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.

(d) The district court may withdraw, in whole or in

part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

(e) If the right to a jury trial applies in a proceeding that may be heard under this section by a bankruptcy judge, the bankruptcy judge may conduct the jury trial if specially designated to exercise such jurisdiction by the district court and with the express consent of all the parties.

* * * *