No. 12-51270 consolidated with 12-51279

In the United States Court of Appeals for the Fifth Circuit

IN THE MATTER OF: BP RE, L.P.,
Debtor.

BP RE, LP,
Appellant,

v.

RML WAXAHACHIE DODGE, LLC, RML-MCLARTY-LANDERS AUTOMOTIVE HOLDINGS, LLC, RML WAXAHACHIE FORD, LLC, RML WAXAHACHIE GMC, LLC, RLJ-MCLARTY-LANDERS AUTOMOTIVE GROUP,
Appellees.

On Appeal from the United States District Court for the Western District of Texas, Waco Division, No. 6:10-cv-267, No. 6:12-cv-227, Hon. Walter S. Smith, Judge Presiding

RESPONSE TO PETITION FOR REHEARING EN BANC

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CERTIFICATE OF INTERESTED PERSONS

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Appellees.

The undersigned counsel of record certifies the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate their possible recusal or disqualification.

1. Appellant BPRE, LP is represented in the Fifth Circuit by:

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2. Appellees RML Waxahachie Dodge, LLC, RML-McLarty-Landers Automotive Holdings, LLC, RML Waxahachie Ford, LLC, RML Waxahachie GMC, LLC, and RLJ-McLarty-Landers Automotive

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RULE 35 STATEMENT

Rehearing by the en banc Court is not warranted because the Panel's decision fully complies with the Supreme Court's opinion in *Stern v. Marshall*, 131 S. Ct. 2594 (2011) and with this Court's precedents, including *Frazin v. Haynes & Boone, L.L.P. (In re Frazin)*, 732 F.3d 313 (5th Cir. 2013) and *Technical Automation Servs. Corp. v. Liberty Surplus Ins. Corp.*, 673 F.3d 399, 406 (5th Cir. 2012).

Nor is this case of exceptional import; the Panel's decision is limited to the bankruptcy context and will not deprive bankruptcy courts of the authority to decide those claims crucial to the bankruptcy. Additionally, bankruptcy courts will continue to hear and propose findings of fact and conclusions of law in all non-core proceedings in accordance with 28 U.S.C. §157(c)(2). Therefore, the petition should be denied.

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INTRODUCTION

Rehearing by the en banc Court is not warranted in this case because the Panel's decision fully complies with precedents set by the Supreme Court and this Court. The Panel's opinion simply applies the pronouncements in *Stern v. Marshall* to the case at bar—holding that the bankruptcy court lacked authority to render a final judgment because BPRE brought common-law claims not necessary to the resolution of the bankruptcy estate and that any consent by BPRE was irrelevant because structural interests were implicated. Slip Op. at 11, 14; *see also Stern v. Marshall*, 131 S. Ct. 2594, 2609 (2011); *id.* at 2620.

The Panel's decision further is buttressed by this Court's opinion in *Frazin v. Haynes & Boone, L.L.P. (In re Frazin),* 732 F.3d 313 (5th Cir. 2013). *Frazin* previously held that a bankruptcy court lacked the constitutional authority to adjudicate a state-law claim that would not be necessarily resolved in the claims-allowance process and that the structural concerns implicated by such an action could not be cured by consent. *Frazin,* 732 F.3d at 320 n.3, 322. The Panel's proper application of *Stern* and *Frazin* does not create a conflict.

Moreover, because the Panel's decision will have limited effect on a bankruptcy court's actions, and will not affect cases involving magistrates or any arbitration proceeding, this case is not of exceptional import to warrant en banc review. Bankruptcy courts will continue to resolve claims crucial to bankruptcy cases as well as hear and propose

findings of fact and conclusions of law in all non-core proceedings in accordance with 28 U.S.C. §157(c)(2). Therefore, BPRE, L.P. respectfully requests that the petition for rehearing en banc be denied.

STATEMENT OF THE CASE

On November 25, 2009, BPRE filed its Adversary Complaint[1] asserting multiple state law contract and tort claims and requesting a trial by jury. DR.12-51270.1-20; Slip Op. at 2. In accordance with the local rules, BPRE also filed a statement regarding consent, explaining that it consented to a final judgment by the bankruptcy court only after a jury trial. *See* Slip Op. at 3-4. Although required by Federal Rule of Bankruptcy 7012(b) and Bankruptcy Local Rule 9015, Appellees never consented to a jury trial or final judgment by the bankruptcy court. *See* Slip Op. at 9. After the bankruptcy court denied BPRE's jury demand, BPRE filed a motion to withdraw the reference, explaining that "BPRE respectfully does not consent to the Bankruptcy Court entering a final order or judgment in any non-core proceeding." Slip Op. at 4.

Following a July 19, 2010 trial on the merits, the bankruptcy court denied all of BPRE's requested relief and entered a take-nothing judgment. Slip Op. at 4; DR.12-51270.1399-414; DR.12-51270.1415-16. On appeal, the district court affirmed in part and vacated and remanded in part, concluding that the bankruptcy court failed to

[1] BPRE originally filed its Adversary Complaint along with BP Automotive LP. BP Automotive was soon after dropped from the suit. *See* Slip Op. at 2 n.1.

address BPRE's fraud claims. Slip Op. at 4; ROA.12-51279.703-13. On remand, the bankruptcy court denied BPRE relief as to its fraud claims. Slip Op. at 4-5; DR.12-51270.1713-17. The district court affirmed. Slip Op. at 5; ROA.12-51270.502-09.

BPRE timely appealed to this Court, which vacated and remanded based on the Supreme Court's recent decision in *Stern v. Marshall*, and this Court's opinion in *Frazin*. Slip. Op. at 19. Notably, Appellees originally did not even respond to BPRE's *Stern v. Marshall* objection, addressing it only based on questions from the panel at oral argument and on request for supplemental briefing. But even with those opportunities, at no point did Appellees contend that applying *Stern* to this case would affect decisions by magistrate judges or arbitrators and Appellees never argued that applying *Stern* would conflict with prior precedents of this Court or any other circuit. Instead, Appellees raised these arguments for the first time in their petition.

ARGUMENT

I. THE PANEL OPINION PROPERLY APPLIED *STERN* AND THIS COURT'S DECISIONS.

The petition for rehearing en banc should be denied because there is no conflict with the Supreme Court's decision in *Stern* or this Court's decisions—before or after *Stern*. Moreover, all of the issues presented in the petition for rehearing were decided by *Stern* and/or *Frazin* such that the Panel was bound by those precedents.

A. The Panel's Decision Fully Comports With the Supreme Court's and This Court's Requirement That an Article III Judge Render Final Judgment on Claims Not Necessary to the Resolution of the Bankruptcy Estate.

The Panel's decision comports entirely with *Stern*'s pronouncement that bankruptcy courts lack jurisdiction to enter final judgments on state-law claims when those claims are not resolved in the process of ruling on a creditor's proof of claim. *Stern*, 131 S. Ct. at 2620 (determining that the bankruptcy court "lacked the constitutional authority to enter a final judgment" on the debtor's counterclaim); Slip Op. at 10-11. As in *Stern*, the claims at issue in this case are common-law claims for breach of contract, fraud, and tortious interference—"the stuff of traditional actions at common law tried by the courts at Westminster in 1789." *Stern*, 131 S. Ct. at 2609 (quoting *N. Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 89 (1982) (Rehnquist, J., concurring in judgment)); *see also* Slip Op. at 2.

While it is true that *Stern* involved core rather than non-core claims, any question about the importance of this distinction was effectively resolved in the Supreme Court's *Northern Pipeline* decision. *Northern Pipeline* held that the bankruptcy court lacked the constitutional authority to adjudicate the debtor's state law claims, which sought monetary damages for "alleged breaches of contract and warranty, as well as for alleged misrepresentation, coercion, and

duress." 458 U.S. at 56; *id.* at 89-90 (Rehnquist, J., concurring in judgment); *see also Stern*, 131 S. Ct. at 2611 ("[I]n *Northern Pipeline* we rejected the argument that the public rights doctrine permitted a bankruptcy court to adjudicate a state law suit brought by a debtor against a company that had not filed a claim against the estate.").

This Court's decision in *Frazin* provides further support. In *Frazin*, the Court was presented with a question of whether the bankruptcy court had the constitutional authority to render a final judgment on a non-core Deceptive Trade Practices Act claim that was "independent of the federal bankruptcy law" and would not be necessarily resolved in any claims-allowance process. *Frazin*, 732 F.3d at 322 (quoting *Stern*, 131 S. Ct. at 2611). Like the Panel in this case, *Frazin* held that the "bankruptcy court lacked the authority to enter a final judgment" as to the debtor's affirmative state law claim. *Id.* at 323; Slip Op. at 18-19.

Frazin and the Panel's decision are fully consistent with Fifth Circuit precedent. The cases cited by Appellees and amicus curiae stand only for the unremarkable proposition that *Stern* has no impact on a bankruptcy court's authority to enter a final judgment on claims necessary to adjudicating the bankruptcy estate. *See Fire Eagle L.L.C. v. Bischoff (In re Spillman Dev. Group)*, 710 F.3d 299, 306 (5th Cir. 2013) (holding *Stern* "inapplicable" to claim that was "inextricably intertwined with the interpretation of a right created by

federal bankruptcy law"); *Tanguy v. West (In re Davis)*, No. 12-20555, 2013 U.S. App. LEXIS 16468, *7-8 (5th Cir. Aug. 8, 2013) (holding *Stern* did not prevent bankruptcy court from deciding "counterclaim against the bankruptcy estate itself, for acts which were allegedly committed during the pendency of the bankruptcy proceedings"); *First Nat'l Bank v. Crescent Elec. Supply Co. (In re Renaissance Hosp. Grand Prairie Inc.)*, 713 F.3d 285, 294 n.12 (5th Cir. 2013) (finding in dicta that it was "highly implausible" that priority of liens could not be resolved through the bankruptcy process). Far from standing in conflict with the Panel's decision (and *Frazin*), these cases show that the Panel properly applied *Stern*.

In light of these cases, the Panel simply was following the precedents set by the Supreme Court and this Court. The Panel's decision offers no extension of the law, just its application.

B. The Panel's Decision Fully Comports With Supreme Court and This Court's Precedents Establishing that a Lack of Constitutional Authority Cannot be Cured by Consent.

Not finding a true conflict between the Panel's decision and *Stern* or this Court's decisions, Appellees attempt to manufacture a conflict by asserting that the Panel erroneously determined that any consent by BPRE[2] would be irrelevant to the bankruptcy court's authority to

[2] BPRE disagrees with the Panel's determination that it consented to the bankruptcy court's rendering a final judgment after a bench trial—shown by its repeated objection in the bankruptcy and district courts prior to trial. DR.12-

render a final judgment. But the Supreme Court has long held that structural concerns associated with a lack of constitutional authority cannot be cured by consent, and this Court's *Frazin* decision had already decided this very issue.

Stern explained that allowing a bankruptcy court to enter judgment on a state common-law claim raises structural, institutional concerns. *Stern*, 131 S. Ct. at 2608; *see also Technical Automation Servs. Corp. v. Liberty Surplus Ins. Corp.*, 673 F.3d 399, 406 (5th Cir. 2012) ("The Court's decision hinged on the separation of powers mandated by Article III of the Constitution, which requires that the judiciary be 'truly distinct from both the legislature and the executive.'" (quoting *Stern*, 131 S. Ct. at 2608)). Indeed, "Article III 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." *Stern*, 131 S. Ct. at 2609. As the Supreme Court explained, "Is there really a threat to the separation of powers where Congress has conferred the judicial power outside Article III only over

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51270.170-193; *id.* at 839-43. BPRE further disagrees that Appellees consented to such a judgment—despite the 1987 advisory committee note to Federal Rule of Bankruptcy 7008 providing that "only express consent in the pleadings or otherwise is effective to authorize entry of a final order or judgment by the bankruptcy judge in a non-core proceeding." However, because it is irrelevant whether the parties consented, the en banc court need not address this issue in deciding whether to deny the petition.

certain counterclaims in bankruptcy? The short but emphatic answer is yes." *Id.* at 2620; *id.* ("We cannot compromise the integrity of the system of separated powers and the role of the Judiciary in that system, even with respect to challenges that may seem innocuous at first blush.").

The Supreme Court previously held that to the extent this "structural principle" behind Article III "is implicated in a given case, the parties cannot by consent cure the constitutional difficulty for the same reason that parties by consent cannot confer on federal courts subject-matter jurisdiction beyond the limitations imposed by Article III, §2." *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 850-51 (1986). Thus, *Stern*'s holding that a bankruptcy court's rendering of a final judgment on a claim not necessary to the claims-allowance process implicates the structural principle behind Article III means that consent is irrelevant.

The Panel correctly applied these Supreme Court precedents. Slip Op. at 12-14, 16. Indeed, "[w]hen 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." Slip Op. at 14 (quoting *Schor*, 478 U.S. at 851).

Frazin previously had come to the same conclusion when it explained that these structural concerns "cannot be ameliorated by [a party's] consent or waiver." 732 F.3d at 320 n.3 (quoting *Schor*, 478 U.S. at 851). Like in *Frazin*, the Supreme Court's "concern for

separation of powers and the independence of the judiciary [would be] equally as sharp with respect to the state-law [claims brought by BPRE] as it was with the counterclaim brought by Vickie in *Stern*." *Frazin*, 732 F.3d at 319; Slip Op. at 14.

The Sixth Circuit's decision in *Waldman v. Stone* is in accord—"[t]he issue here is not so much the aggrandizement of the Legislative or Executive Branches, as it is the diminution of the Judicial one." 698 F.3d 910, 918 (6th Cir. 2012). "To the extent that Congress can shift the judicial Power to judges without [the Article III] protections, the Judicial Branch is weaker and less independent than it is supposed to be." *Id.* (citing *Schor*, 478 U.S. at 850). A bankruptcy court's ability to issue a final judgment on state-law claims that would not necessarily be adjudicated in the claims-allowance process "thus implicates not only [a litigant's] personal rights, but also the structural principal advanced by Article III." *Id.* *Waldman*, therefore, held that because the structural principle of Article III is implicated in this type of case, it is "not [a party's] to waive." *Id.* Because this case "is similar to *Waldman* in all critical respects," the Panel properly relied on the Sixth Circuit's thorough opinion. Slip Op. at 12; *id.* at 12 n.10.

Contrary to Appellees' assertions, the Panel's decision does not conflict with *McFarland v. Leyh* (*In re Texas General Petroleum Corp.*), which analyzed a litigant's *personal* rights under Article III and the Seventh Amendment. 52 F.3d 1330, 1336-37 (5th Cir. 1995) ("Whether

an Article III court is necessary involves the same inquiry as whether a litigant has a Seventh Amendment right to a jury trial."). As *Stern*, *Frazin*, and *Waldman* make clear, the issue of a bankruptcy court rendering a final judgment on claims that would not necessarily be resolved in any claims-allowance process involves structural concerns, not personal ones. *Stern*, 131 S. Ct. at 2619; *Frazin*, 732 F.3d at 319-20; *Waldman*, 698 F.3d at 918. This case does not present a situation in which a party can waive its personal constitutional rights. Indeed, parties cannot create constitutional authority through consent. *See Schor*, 478 U.S. at 850-51.

The Panel also correctly noted that *Executive Benefits Insurance Agency v. Arkison (In re Bellingham Insurance Agency, Inc.),* "disregards the critical structural interests underlying Article III." Slip Op. at 13 (citing *Executive Benefits*, 702 F.3d 553 (9th Cir. 2012), *cert. granted*, 133 S. Ct. 2880 (2013)). In contrast to *Stern*'s repeated discussion of the structural interests involved in this circumstance, *Executive Benefits* determined that Article III's guarantee was solely a "personal right" and thus could be waived. *Executive Benefits*, 702 F.3d at 567. In doing so, the Ninth Circuit concluded that "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.* at 567 n.9. But this conclusion disregards *Stern*'s pronouncement that

structural interests are implicated despite the fact that bankruptcy judges are appointed by the Article III courts, rather than the President. *Stern*, 131 S. Ct. at 2619. Indeed, "it does not matter who appointed the bankruptcy judge or authorized the judge to render final judgments in such proceedings. The constitutional bar remains." *Id.*

Executive Benefits also largely relies on the fact 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.'" *Executive Benefits*, 702 F.3d at 567. As the Panel correctly concluded, this reliance disregards the separation of statutory and constitutional authority.[3] Slip Op. at 13. And the Panel's opinion is fully supported by *Stern*, which provides that Congress cannot create authority through statute that the Constitution prohibits through Article III. *See Stern*, 131 S. Ct. at 2608 ("Although we conclude that §157(b)(2)(C) permits the Bankruptcy Court to enter final judgment on Vickie's counterclaim, Article III of the Constitution does not.").

Finally, Appellees and amicus curiae are wrong that BPRE never challenged the bankruptcy court's authority below and thus that "this

[3] Appellees' other cited cases are inapposite because they similarly rely entirely on a statutory, rather than constitutional, analysis. *See Beitel v. OCA, Inc. (In re OCA, Inc.)*, 551 F.3d 359, 368 (5th Cir. 2008) (analyzing the statutory scheme without addressing Article III); *MacDonald v. Plymouth County Trust Co.*, 286 U.S. 263, 267-68 (1932) (conducting a statutory analysis of the then-current Bankruptcy Act without addressing the constitutional concerns); *Newcomb v. Wood*, 97 U.S. 581, 583 (1878) (deciding case without addressing any constitutional concerns).

case raises unique concerns about gamesmanship and sandbagging which were not present in the Sixth and Ninth Circuit decisions." Br. of Amicus Curiae at 6. In fact, BPRE objected numerous times in both the bankruptcy and district courts, explaining that "because BPRE does not consent to the entry of final judgments and orders by the bankruptcy judge and Defendants have yet to consent, pursuant to 28 U.S.C. §157(c)(2), the District Court is the only court that can render a final judgment on such non-core claims." DR.12-51270.170-93; *id.* at 839-43; *see also* ROA.12-51270.367-68; ROA.12-51279.204-05.

As the Panel noted, objections were made before judgment (in fact, several months before) and before any adverse merits decisions were rendered by the bankruptcy or district courts. *See* Slip Op. at 12 n.10. BPRE's objections in the lower courts thus stand in stark contrast to *McFarland* and *Executive Benefits*, in which no objection was ever raised to the bankruptcy court's entering of a final judgment until after it was rendered. *McFarland*, 52 F.3d at 1337; *Executive Benefits*, 702 F.3d at 568. Even in *Waldman*, the objecting party did not raise its challenge until appeal. *Waldman*, 698 F.3d at 917. Of course, *Waldman* properly found this of no moment because a party can no more create constitutional authority through consent than it can confer subject matter jurisdiction on a court. *See id.* at 922; *see also Schor*, 478 U.S. at 850-51.

Like it did when deciding that the bankruptcy court lacked the

constitutional authority to render a final judgment in this case, the Panel carefully followed the existing authorities—including this Court's own decision—in deciding that consent could not cure the constitutional defect. There is no conflict with the Supreme Court or this Court's decisions that would necessitate review en banc.

II. THE PANEL'S DECISION DOES NOT EXTEND TO MAGISTRATE JUDGES OR ARBITRATION AND WILL NOT UPEND THE CURRENT WORKINGS OF BANKRUPTCY COURTS.

Appellees wrongly contend that the Panel's decision will overturn thousands of decisions by magistrates and arbiters. Indeed, this Court has already decided that issue as to magistrate judges. In *Technical Automation Services Corp. v. Liberty Surplus Insurance Corp.*, the Court explained that although *Stern* held that bankruptcy courts "lack constitutional authority to enter final judgment when the counterclaim did not 'stem[] from the bankruptcy itself or would necessarily be resolved in the claims allowance process,'" that decision did not overrule this Court's precedent regarding magistrate judges. 673 F.3d at 406-07 (quoting *Stern*, 131 S. Ct. at 2618).

Similarly, *Stern* does not suggest that its holding would extend to arbitrations. Based on the contracts forming their basis, the Supreme Court and this Court have long favored arbitration for common law claims similar to those at issue in *Stern* and this case. *See, e.g.*, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614,

625-26 (1985) ("The 'liberal federal policy favoring arbitration agreements' . . . is at bottom a policy guaranteeing the enforcement of private contractual arrangements" and finding "no reason to depart from these guidelines where a party bound by an arbitration agreement raises claims founded on statutory rights" (citation omitted)). Allowing parties to arbitrate simply does not raise the structural constitutional concerns implicated here. *See Schor*, 478 U.S. at 855 ("Congress may encourage parties to settle a dispute out of court or resort to arbitration without impermissible incursions on the separation of powers"). It thus is unsurprising that Appellees have cited no authority that would suggest that *Stern* or the Panel's decision would extend to arbitrations.

Moreover, the Panel's decision does not suggest any application other than to adversary proceedings involving common-law claims that are not necessary to the resolution of the bankruptcy estate. Indeed, the opinion implies that its holding would not extend to magistrate judges, much less arbitrations. *See* Slip Op. at 14 n.11 (explaining that *Technical Automation* determined that "although there are similarities between the magistrate-judge and bankruptcy statutory schemes, they are distinct, and *Stern*'s was a narrow holding not affecting magistrate judges" (citing *Technical Automation*, 673 F.3d at 407)).

Appellees further overreach when they incorrectly suggest that the Panel's decision will preclude bankruptcy courts from handling the majority of adversary proceedings. Indeed, the Panel explained that

§157(c) would not "affect the authority of the bankruptcy court to decide those claims crucial to bankruptcy cases" and that "no one disputes here the bankruptcy court's ability to continue to issue findings of fact and conclusions of law on related issues." Slip Op. at 14. As the Supreme Court intonated, the bankruptcy courts are not barred from "'hearing all counterclaims' or proposing findings of fact and conclusions of law on those matters, but rather . . . it must be the district court that 'finally decide[s]' them." *Stern*, 131 S. Ct. at 2620 (citation omitted) (alteration in original). "We do not think the removal of counterclaims such as Vickie's from core bankruptcy jurisdiction meaningfully changes the division of labor in the current statute." *Id.*

The Panel's decision comports with *Stern* and this Court's decisions. Appellees are correct that *Stern* is "narrow"; it is limited to the bankruptcy context and common-law claims that are not necessary to resolving the bankruptcy estate. Similarly, the Panel's decision does not extend to determinations by magistrate judges or to cases heard in arbitration. Nor will it upend the current procedures in bankruptcy court. Therefore, the Panel's decision will be equally "narrow" in its application, and review by the en banc court is not warranted.

CONCLUSION

For the foregoing reasons, BPRE respectfully requests that the Court deny the petition for rehearing en banc.

Dated: December 6, 2013

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I certify that this Response was filed with the Court by electronic format, on the 6th day of December, 2013, and an electronic copy of the Response was served on all counsel of record, as listed below on the same date:

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