Columbus Bar Association
Bankruptcy Law Institute

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Decisions Interpreting *Stern v. Marshall*

(current as of April 20, 2012)

Hon. John E. Hoffman, Jr.
United States Bankruptcy Judge
Southern District of Ohio

Brian L. Gifford, Law Clerk

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Note: With the exception of bracketed text and text appearing outside of quotation marks, this summary is comprised of the original text of the opinions. In preparing the summary, certain conventions have been followed. Pinpoint citations have not been used, and any text contained in the footnotes of opinions is quoted without indicating that the text is from a footnote. For the sake of readability, certain citations, footnotes and internal quotation marks have been omitted. Omitted text is signaled with ellipses.

I. BROAD V. NARROW CONSTRUCTION OF *STERN*

A. COURTS BROADLY CONSTRUING *STERN*

Meoli v. Huntington Nat'l Bank (In re Teleservices Grp., Inc.), 456 B.R. 318 (Bankr. W.D. Mich. 2011) (Hughes, J.) (In a lengthy opinion issued shortly after *Stern* was decided, the bankruptcy court—largely in *dicta*—suggested that *Stern* could have a far-reaching impact on the administration of bankruptcy cases: "[B]ombshell does fairly describe *Stern's* impact upon the more practical issue of how bankruptcy judges are to perform what the Code still calls us to do. *Stern* is careful to limit its holding to only the specific issue that was before the Court. Unfortunately, this is not a situation where those who labor in the fields can wait until the next fistfight between an expectant heir and his stepmom finds its way to the Court. Everyday I am presented with numerous orders that Congress expects me to either sign as final or forward on with a report and recommendation. However, prior to *Stern*, I did have a standard—28 U.S.C. § 157(b)(2)—to serve as my guide. But now I am told that that standard is unreliable when tested against the Constitution itself. . . . My frustration with *Stern* is that it offers virtually no insight as to how to recalibrate the core/non-core dichotomy so that I can again proceed with at least some assurance that I will not be making the same constitutional blunder with respect to some other aspect of [28 U.S.C. §] 157(b)(2). *Stern* certainly reaffirms that only an Article III judge can enter a judgment associated with the estate's recovery of contract and tort claims designed to augment the estate. *Stern* also emphasizes that the guaranty of such oversight cannot be avoided by making the recovery part of the claims allowance process. . . . But *Stern* is silent as to how much further this constitutional protection extends into the bankruptcy process. For example, [28 U.S.C. §] 157(b)(2) also gives me the statutory authority to enter final orders regarding objections to claims, the estate's procurement of credit, and the turnover of the estate's property. I would assume that a few of these activities remain within the authority that I am able to exercise independent of an Article III judge. However, *Stern's* reticence leaves me wondering whether my assumption is a good one. At most, I am told that a judicially recognized 'public rights' exception might permit a non-Article III judge to act on his own with respect to some aspects of the bankruptcy process. However, as *Stern* itself concedes, the Court has yet to give clear definition to this exception as a general proposition, let alone as to how it might apply in the bankruptcy arena. . . . Congress, through Section 363(b) of the Bankruptcy Code, has directed that the estate's property cannot be disposed of by the bankruptcy trustee outside of the ordinary course without 'notice and a hearing.' Likewise, Sections 1129, 1225, and 1325 all contemplate a court confirming plans submitted in cases filed under Chapters 11, 12, and 13. If I continue to order sales as I did prior to *Stern*, is not the purchaser of that property left with the risk that the sale will be later declared null because it was not authorized by the right court? *Cf.* 11 U.S.C. § 549(a)(2)(B). And is not the debtor of a Chapter 13 plan confirmed by me post-*Stern* left to wonder whether the discharge he is to receive as a consequence of the ordered plan will really protect him from a creditor's subsequent efforts to collect? . . . [U]nless some rationale is found to justify a different outcome, *Stern's* sweeping statements concerning Article III's reach portend a new world where my colleagues and I will in fact become only the functional equivalents of 'magistrate judges, law clerks and the Judiciary's administrative officials.' 131 S. Ct. at 2627 (Breyer, J., dissenting). . . . There is room, then, even after *Stern* to consider further the appellant's argument in *Northern Pipeline* that a bankruptcy court can still enter at least some orders as if it were an independent legislative court. However, in doing so, I suggest that it is better to focus attention upon the more fundamental

question of whether Congress needs a court at all with respect to much of what is required of me under the Bankruptcy Code as now enacted. Or, to frame the question another way: Are many of the court-like functions I perform as a bankruptcy judge even necessary? . . . *Murray*'s *Lessee* raises a second constitutional issue that remains unanswered—Can Congress repose with the judicial branch the various bankruptcy functions it could have legitimately assigned to its own court or even no court at all? . . . *Murray's Lessee* compels me, as it should others, to consider further the dilemma that was presented in its final pages. That is, if there are tasks which Congress can legitimately assign to a bankruptcy judge as opposed to an Article III judge, how can Congress then delegate the task to an Article III court (or to me as its adjunct) without violating the separation of powers? . . . [W]hy the fuss? There would be none if this portion of *Murray's Lessee* can just be ignored. It is possible, after all, to continue under the core/non-core rubric if the only questions that keep surfacing are whether I, as an adjunct of an Article III court, can enter a final order without depriving the affected person of his Fifth Amendment right to due process. However, quite a fuss will arise if another 'clever tenant' includes this portion of *Murray's Lessee* in his objection the next time a critical industry is at risk of collapsing and the solution lies in a quick Section 363(b) sale of its desirable assets. Does anyone really want to wait until then to see whether the Court will again cite *Murray's Lessee*, but this time for the proposition that the sale order is invalid because it could NOT be signed by an Article III court or its adjunct?").

Tabor v. Kelly (In re Davis), 2011 WL 5429095 (Bankr. W.D. Tenn. Oct. 5, 2011) (Latta, J.) ("Other bankruptcy judges believe that *Stern* is to be limited solely to the particular core proceeding at issue there: a counterclaim by the estate against a person filing a claim against the estate. . . . I do not agree with the conclusion of these bankruptcy judges.").

B. COURTS NARROWLY CONSTRUING *STERN*

Pfizer Inc. v. Law Offices of Peter G. Angelos (In re Quigley Co.), 2012 WL 1171848 (2d Cir. Apr. 10, 2012) (Livingston, J.; Straub, J.; Walker, J.) ("Whatever *Stern's* precise contours (a matter we need not reach) we conclude that *Stern* has no application to the present case. The Supreme Court in *Stern* indicated that its holding was a narrow one. *See id.* at 2620 ("We conclude today that Congress, in one isolated respect, exceeded [Article III's] limitation in the Bankruptcy Act of 1984.") . . . .").

Badami v. Sears (In re AFY, Inc.), 461 B.R. 541 (B.A.P. 8th Cir. 2012) (Kressel, J.; Schermer, J.; Venters, J.) ("In *Stern v. Marshall*, the Supreme Court found that although 28 U.S.C. § 157(b)(2)(C) designated as a core proceeding 'counterclaims by the estate against persons filing claims against the estate,' it was unconstitutional for a bankruptcy judge to determine such counterclaims, at least to the extent that the counterclaim arose under state or other nonbankruptcy law. That section is not implicated here. While there has been an enormous amount of discussion regarding the implications of *Stern v. Marshall*, the Supreme Court itself has cautioned that its holding is a narrow one, affecting only this one small part of the bankruptcy judges' authority. Unless and until the Supreme Court visits other provisions of Section 157(b)(2), we take the Supreme Court at its word and hold that the balance of the authority granted to bankruptcy judges by Congress in 28 U.S.C. § 157(b)(2) is constitutional.").

Mercury Cos. v. FNF Sec. Acquisition, Inc., 460 B.R. 778 (D. Colo. 2011) (Martinez, J.) ("Defendants cite case law describing *Stern* as a 'watershed' decision, and a 'bombshell.' However, the Supreme Court's holding in *Stern*—that bankruptcy courts do [not] have the authority to enter final judgments on state law counterclaims that are not resolved in the process of ruling on creditors' proofs of claim—was explicitly narrow . . . .").

Official Comm. of Unsecured Creditors of Appalachian Fuels, LLC v. Energy Coal Res., Inc. (In re Appalachian Fuels, LLC, 2012 WL 1344984 (E.D. Ky. Apr. 18, 2012) (Bunning, J.) ("Defendants . . . argue that despite the fact that they have all filed proofs of claim against the Debtor's estate, it would be unconstitutional for the Bankruptcy Court to enter final orders and judgments against them. *Katchen v. Landy*, 382 U.S. 323 (1966) and *Langenkamp v. Culp*, 498 U.S. 42 (1990) held that bankruptcy courts have the power to rule, without a jury trial, on avoidable preference claims against creditors who have filed proofs of claims against the bankruptcy estate. These Defendants assert that *Katchen* and *Langenkamp* should be reconsidered in light of the fact that they rest on a faulty, previously unchallenged presumption, namely that bankruptcy courts have constitutional authority to rule on the validity of proofs of claim in the first place. It appears that no party has asked the Supreme Court to consider whether non-Article III bankruptcy courts are constitutionally permitted to determine whether to allow creditor's claims. Defendants contend that this is supported by footnote 7 from *Stern* and footnote 11 from *Granfinanciera*, where the Court noted that the parties to those cases had not requested reconsideration of the public rights framework for bankruptcy. *See Stern*, 131 S. Ct. at 2614 n.7 ("We noted that we did not mean to 'suggest that the restructuring of debtor-creditor relations is in fact a public right.'" (quoting *Granfinanciera*, 492 U.S. at 56 n.11)). For these reasons, Defendants ask this Court to overrule *Katchen* and *Langenkamp* or distinguish them on the grounds that the parties therein did not contest the bankruptcy court's authority to rule on the validity of a proof of claim. The Court refuses to do so. . . . Defendants are in essence asking the Court to consider the entire constitutionality of 28 U.S.C. § 157 and whether bankruptcy judges have the authority to not only adjudicate some but all bankruptcy matters. Unless and until the Supreme Court rules that § 157 is unconstitutional, this Court will continue to adhere to its principles. Since [the] Defendants [asserting this argument] have all filed proofs of claim against the bankruptcy estate, Plaintiff's fraudulent conveyance and preferential transfer claims arise out of the claims allowance process, and therefore the Bankruptcy Court has authority to enter final orders and judgments on such claims.").

Feuerbacher v. Moser, 2012 WL 1070138 (E.D. Tex. Mar. 29, 2012) (Crone, J.) ("This [Court's] view appears consistent with that of numerous other courts advocating a narrow interpretation of *Stern*. . . . Indeed, the *Stern* decision is replete with language emphasizing that the ruling should be limited to the unique circumstances of that case[.]").

BankUnited Fin. Corp v. FDIC (In re BankUnited Fin. Corp.), 462 B.R. 885 (Bankr. S.D. Fla. 2011) (Isicoff, J.) ("Since its release, a maelstrom of opinions and articles have been written about the scope of *Stern*, ranging in tone from 'much ado about nothing' to 'the end of the bankruptcy world as we know it.' . . . I am not going to be one of those bankruptcy judges who seizes on, and

seeks to analyze, every line in the *Stern* opinion to determine what ripples may emerge from the self-described isolated pebble dropped in the jurisdictional waters.").

Burtch v. Huston (In re USDigital, Inc.), 461 B.R. 276 (Bankr. D. Del. 2011) (Sontchi, J.) ("To broadly apply *Stern's* holding is to create a mountain out of a mole hill.")

McClelland v. Grubb & Ellis Valuation & Advisory Grp. (In re McClellan), 460 B.R. 397 (Bankr. S.D.N.Y. 2011) (Morris, J.) ("The Court agrees that *Stern* has a narrow application . . . .").

In re Olde Prairie Block Owner, LLC, 457 B.R. 692 (Bankr. N.D. Ill. 2011) (Schmetterer, J.) ("In responding to concerns by the four dissenting Justices, the *Stern* opinion specified that its holding is a 'narrow' one that 'does not change all that much.' . . . The opinion certainly did not hold that a Bankruptcy Judge cannot ever decide a state law issue. Indeed, a large portion of the work of a Bankruptcy Judge involves actions in which non-bankruptcy issues must be decided and that 'stem from the bankruptcy itself or would necessarily be resolved in the claims allowance process,' . . . for example, claims disputes, actions to bar dischargeability, motions for stay relief, and others. Those issues are likely within the 'public rights' exception as defined in *Stern*.").

In re Crescent Res., LLC, 457 B.R. 506 (Bankr. W.D. Tex. 2011 (Gargotta, J.) ("[T]he Court . . . is of the opinion, at this point, that *Stern* . . . should be applied narrowly.").

In re Ambac Fin. Grp., Inc., 457 B.R. 299 (Bankr. S.D.N.Y. 2011) (Chapman, J.) ("As the Debtor accurately observed in its Supplemental Brief, . . . '*Stern v. Marshall* . . . has nothing to do with the Court's in rem jurisdiction to administer property of the estate. The narrow issue in *Stern* was whether a bankruptcy court had subject matter jurisdiction to hear and finally resolve a debtor's counterclaim against a third party.' . . . Unfortunately, *Stern v. Marshall* has become the mantra of every litigant who, for strategic or tactical reasons, would rather litigate somewhere other than the bankruptcy court.").

Brook v. Ford Motor Credit Co. (In re Peacock), 455 B.R. 810 (Bankr. M.D. Fla. 2011) (McEwen, J.) ("The narrow holding in *Stern*, as just described, does not impact a bankruptcy court's ability to enter a final judgment in any other type of core proceeding authorized under 28 U.S.C. § 157(b)(2).").

Tibble v. Wells Fargo Bank, N.A. (In re Hudson), 455 B.R. 648 (Bankr. W.D. Mich. 2011) (Gregg, J.) ("Except for the types of counterclaims addressed in *Stern v. Marshall*, a bankruptcy judge remains empowered to enter final orders in all core proceedings . . . .").

ARDI Ltd. P'ship v. Buncher Co. (In re River Entm't Co.), 2012 WL 1098570 (Bankr. W.D. Pa. Mar. 30, 2012) (Deller, J.) ("[T]he question decided in *Stern* was a narrow one, as the Supreme Court held that Congress had only exceeded its authority in 'one isolated respect,' i.e. providing bankruptcy courts with the ability to finally adjudicate state law tort counterclaims to a proof of claim, absent consent of the parties. In fact, the Supreme Court's entire public rights analysis in *Stern* occurred from the viewpoint of whether the specific state law tort counterclaim asserted fell

into any of Supreme Court's admittedly 'varied formulations' of the public rights exception. To interpret the *Stern* opinion in any broader sense would 'meaningfully change[ ] the division of labor' between the bankruptcy courts and the district courts, contrary to the stated intent of the Supreme Court.").

Shaia v. Taylor (In re Connelly), 2012 WL 1098431 (Bankr. E.D. Va. Mar. 30, 2012) (Huennekens, J.) ("*Stern* was, by its own express language, intended to be narrowly construed. Had the Supreme Court intended for its holding to be broadly interpreted, it would have said so. Chief Justice Roberts, writing for the majority, repeatedly emphasized the limited impact of the decision and stressed the narrow nature of the holding. . . . Given the deliberate efforts to limit the impact of *Stern* and the numerous qualifiers in the holding, this Court will not expand the reach of *Stern* beyond that intended by the Supreme Court. *Stern* only affects a bankruptcy court's constitutional authority to enter final judgments in a discrete subset of core proceedings that are based entirely upon state law issues that will not necessarily be resolved in restructuring debtor-creditor relations in connection with the administration of a bankruptcy case. The Court recognizes that some courts have taken a more expansive view of the impact of *Stern*. These courts view *Stern* as stripping bankruptcy courts of the authority to enter final judgments in proceedings where the debtor seeks to augment the estate, as such proceedings are legal actions that seek to take the property of another and are therefore akin to 'traditional actions at common law.' . . . The Supreme Court did not hold in *Stern* that the restructuring of the debtor-creditor relationship was not a public right. Until such time as the Supreme Court rules otherwise, bankruptcy courts retain the constitutional authority to adjudicate such restructuring issues in the context of a bankruptcy case.").

City of Sioux City, Iowa v. Civic Partners Sioux City, LLC (In re Civic Partners Sioux City, LLC), 2012 WL 761361 (Bankr. N.D. Iowa Mar. 8, 2012) (Collins, J.) ("Much has been written and discussed about the scope and implications of *Stern v. Marshall*. . . . Most courts have concluded that the Supreme Court should be taken at its word—that the holding in *Stern* was very narrow in spite of some language in the analysis that could be given a broader application or interpretation. . . . The Supreme Court repeatedly used language to emphasize the narrowness of its holding. . . . This Court agrees that Stern was narrowly written and applies it accordingly.").

Bohm v. Titus (In re Titus), 2012 WL 695604 (Bankr. W.D. Pa. Feb. 29, 2012) (Markovitz, J.) ("This Court is inclined to agree with those authorities that construe the *Stern* decision narrowly and hold that, notwithstanding *Stern*, a bankruptcy court possesses the constitutional authority to enter a final decision regarding a fraudulent transfer action that is brought pursuant to state law by way of § 544(b)(1).").

Black, Davis & Shue Agency, Inc. v. Frontier Ins. Co. in Rehab. (In re Black, Davis & Shue Agency, Inc.), 2012 WL 360062 (Bankr. M.D. Pa. Feb. 2, 2012) (France, J.) ("In deciding the matter before me, I am inclined to follow those courts which have concluded that *Stern* was decided narrowly and should have a limited impact on a bankruptcy courts' authority to enter a final decision on a matter.").

Burtch v. Seaport Capital, LLC (In re Direct Response Media, Inc.), 2012 WL 112503 (Bankr. D. Del. Jan. 12, 2012) (Gross, J.) ("There are two views as to the effect and holding of *Stern*. The broad interpretation, espoused by defendants of preference and fraudulent transfer actions, is that *Stern* strips bankruptcy courts of authority to enter a final judgment in any case where the debtor is bringing any action which seeks to augment the estate because they are legal actions that seek to take another's property and can only be finally adjudicated by an Article III judge (the "Broad Interpretation"). . . . Conversely, *Stern* also has been narrowly interpreted by debtors and bankruptcy trustees. They argue that by its express language, the opinion stands for a narrow proposition of law based on the unique set of facts that was before the Supreme Court in *Stern* and that the Supreme Court did not divest bankruptcy courts of authority to enter final orders on core matters, other than a Debtor's state law counterclaim. Further, the Supreme Court did not intend to alter the division of labor between the district courts and bankruptcy courts. The narrow interpretation argues that *Stern* does not (1) limit bankruptcy courts' authority to enter final orders in preference or fraudulent conveyance actions (even if those actions seek to augment the estate), or (2) prohibit bankruptcy courts from ruling on a debtor's or trustee's state law counterclaims when determining a proof of claim in the bankruptcy, or when deciding a matter that is directly and conclusively related to the bankruptcy (the "Narrow Interpretation"). Complicating the holding is Justice Scalia's partial concurrence which undermines the rationale set forth by Chief Justice Roberts and the argument that *Stern* is a majority opinion standing for the Broad Interpretation. In the face of confusion, the Court as have many others throughout the nation, will attempt to present a reasoned analysis of the issues before it, based on this Court's interpretation of *Stern*. . . . This Court disagrees that the *Stern* decision stands for the Broad Interpretation . . . . The Broad Interpretation is based on a holding that the Supreme Court has never made, namely, that restructuring of the debtor-creditor relationship is not a public right, nor falls within any other exception that would permit a non-Article III court to finally adjudicate those matters. As previously stated, the Supreme Court expressly took measures to limit the reach and breadth of its opinion and its interpretation by lower courts. . . . The Court adopts the Narrow Interpretation and holds that *Stern* only removed a non-Article III court's authority to finally adjudicate one type of core matter, a debtor's state law counterclaim asserted under § 157(b)(2)(C). By extension, the Court concludes that *Stern* does not remove the bankruptcy courts' authority to enter final judgments on other core matters, including the authority to finally adjudicate preference and fraudulent conveyance actions like those at issue before this Court.").

Hagan v. Classic Prods. Corp. (In re Wilderness Crossings, LLC), 2011 WL 5417098 (Bankr. W.D. Mich. Nov. 8, 2011) (Dales, J.) ("Our common law tradition counsels in favor of hewing closely to the holdings of higher authority and although the multifarious rationales in *Stern* are quite broad, the holding is mercifully narrow.").

Liberty Mut. Ins. Co. v. Citron (In re Citron), 2011 WL 4711942 (Bankr. E.D.N.Y. Oct. 6, 2011) (Rosenthal, J.) ("The Court notes that in the 'noise' after the Supreme Court decision, one can find decisions supporting broad, narrow, and middle-of-the-road interpretations of the *Stern* ruling. This Court chooses to accept the Supreme Court at its word and read the decision narrowly.")

II. SUBJECT-MATTER JURISDICTION V. CONSTITUTIONAL AUTHORITY TO ENTER FINAL JUDGMENT OR ORDER

Badami v. Sears (In re AFY, Inc.), 461 B.R. 541 (B.A.P. 8th Cir. 2012) (Kressel, J.; Schermer, J.; Venters, J.) ("Shortly before trial, [defendant] filed a motion to dismiss the plaintiff's complaint. Because it is short, we quote the motion in its entirety: 'Comes now Defendant Robert A. Sears and moves this Court to dismiss this adversary proceeding at Plaintiff's costs for lack of subject matter jurisdiction [under *Stern*].' . . . [Plaintiff] objected to the motion, pointing out that the bankruptcy court clearly had jurisdiction and nothing in *Stern v. Marshall* holds or even suggests otherwise. [Plaintiff] construed the motion to raise the issue of whether or not the adversary proceeding was a core proceeding and as a challenge to the bankruptcy judge's authority to enter a final order determining the proceeding. The bankruptcy court similarly construed the motion and held that the adversary proceeding was a core proceeding and that it was constitutional for it to hear and determine it. . . . On appeal, [defendant,] almost as if he did not read [plaintiff's] response or the court's order, renews his argument that the bankruptcy court lacks subject matter jurisdiction based on *Stern*. . . . [Defendant's] argument represents a basic misunderstanding of both bankruptcy jurisdiction and the Supreme Court's opinion in *Stern v. Marshall*. In 28 U.S.C. § 1334, Congress has vested the district courts with jurisdiction over bankruptcy cases, civil proceedings arising under the Bankruptcy Code or arising in or related to bankruptcy cases. [Defendant] raises no question regarding whether this adversary proceeding falls within that jurisdictional grant nor does he make any constitutional challenge to that grant. . . . So the real question raised, although not correctly posed by [defendant] is whether or not Congress' grant of authority to bankruptcy judges under any or all these core subdivisions is unconstitutional as violative of Article III. This is the question addressed by the Supreme Court in *Stern v. Marshall*.").

CirTran Corp. v. Advanced Beauty Solutions, LLC (In re Advanced Beauty Solutions, LLC), 2012 WL 603692 (B.A.P. 9th Cir. Feb. 8, 2012) (Pappas, J; Hollowell, J.; Perris, J.) ("*Stern* also makes clear that 28 U.S.C. § 157, the statute considered by the Court, merely 'allocates the authority to enter final judgment between the bankruptcy court and the district court,' and contrary to [defendant's] position here, '[t]hat allocation does not implicate questions of subject matter jurisdiction.' *Id*. at 2607. . . . *Stern* did not restrict the bankruptcy courts' subject matter jurisdiction, but instead, dealt only with a litigant's constitutional right to have certain bankruptcy-related disputes decided by an Article III court . . . .").

Dev. Specialists, Inc., v. Akin Gump Strauss Hauer & Feld LLP, 462 B.R. 457 (S.D.N.Y. 2011) (McMahon, J.) ("*Stern* makes clear that the issues of jurisdiction and final adjudicative power are distinct. Consenting to jurisdiction—which everyone agrees the Bankruptcy Court possesses under the 'related to' doctrine enshrined in 28 U.S.C. § 1334—is not the same as consenting to the entry of a final determination by a non-Article III tribunal . . . .").

Official Comm. of Unsecured Creditors of Appalachian Fuels, LLC v. Energy Coal Res., Inc. (In re Appalachian Fuels, LLC, 2012 WL 1344984 (E.D. Ky. Apr. 18, 2012) (Bunning, J.) ("Defendant . . . argues that *Stern* has created a 'no-man's land' of statutorily defined core claims that cannot be tried at all in the federal court system absent some other jurisdictional basis, because the Bankruptcy

Court is not statutorily empowered to treat a core claim in the same manner as a claim falling within 28 U.S.C. § 157(c)(1), i.e., a non-core claim. Thus, [Defendant] argues that if the Court does not sever the core claims against [it] and allow them to remain in the Bankruptcy Court, the Court must dismiss these claims against [Defendant] for lack of jurisdiction as part of a withdrawal of the remainder of the case. This argument is without merit. . . . This Court's jurisdiction over bankruptcy matters stems from 28 U.S.C. § 1334, not § 157. Pursuant to § 1334, the Court has original jurisdiction over bankruptcy cases and all civil proceedings 'arising under title 11, or arising in or related to cases under title 11.' [section] 157(a) then allows this Court to refer actions within its bankruptcy jurisdiction to the bankruptcy judges of this district. Thus, [Defendant's] argument that the core claims against it must remain in Bankruptcy Court or be dismissed from this Court for lack of jurisdiction is wholly incorrect. If this Court does not have jurisdiction over this proceeding pursuant to § 1334, then the Bankruptcy Court also lacks jurisdiction to hear the case.").

Fort v. Sun Trust Bank (In re Int'l Payment Grp., Inc.), 2012 WL 1107840 (D.S.C. Apr. 2, 2012) (Cain, J.) ("The court notes that the holding in *Stern* did not involve an analysis of subject matter jurisdiction.").

Neilson v. Entm't One, Ltd. (In re Death Row Records, Inc.), 2012 WL 1033350 (C.D. Cal. Mar. 8, 2012) (Walter, J.) ("To the extent any of the parties contend that *Stern* implicated subject matter jurisdiction, that argument is clearly erroneous. *Stern* did not restrict subject matter jurisdiction, but instead addressed a litigant's constitutional right to have certain bankruptcy disputes decided by an Article III court. . . . Accordingly, the issue presented is not whether the parties are able to consent to the Bankruptcy Court's jurisdiction but whether they are able to consent to the Bankruptcy Judge's power to conduct a jury trial and enter final judgment.").

Sharifeh v. Fox, 2012 WL 469980 (N.D. Ill. Feb. 10, 2012) (Leinenweber, J.) ("This case concerns four appeals stemming from a bankruptcy filing by Richard Sharif ("Sharif") and an adversary proceeding filed by [one of] his creditor[s], 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. . . . [She commenced] . . . an adversary proceeding . . . alleg[ing] that the Bankruptcy Trustee . . . had wrongfully converted the assets of [a trust] and sought a declaration that she was the beneficiary of the trust. The Bankruptcy Court subsequently dismissed this Complaint on numerous grounds . . . . Sharifeh is appealing the ruling dismissing her adversary complaint . . . . 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* . . . the Bankruptcy Court did not have jurisdiction to enter final judgments either in Wellness' adversary proceeding . . . or her own . . . . 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*[,] [which] noted 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.'").

Walker, Truesdell, Roth & Assocs. v. Blackstone Grp., L.P. (In re Extended Stay, Inc.), 2011 WL 5532258 (S.D.N.Y. Nov. 10, 2011) (Scheindlin, J.) ("*Stern* is not a decision concerning subject matter jurisdiction.").

Meyers v. Textron Fin. Corp. (In re AIH Acquisitions, LLC), 2011 WL 4000894 (N.D. Tex. Sept. 7, 2011) (McBryde, J.) ("The parties state the issue as involving 'jurisdiction' of the bankruptcy court. Actually, the 'jurisdiction' dispute turns not on whether the bankruptcy court had jurisdiction but on whether the bankruptcy court had the constitutional authority to enter a final judgment in the form of the dismissal with prejudice.").

In re Clark, 465 B.R. 556 (Bankr. D. Idaho 2011) (Myers, J.) ("As the Supreme Court recently clarified [in *Stern*], [28 U.S.C. § 157(b)(5)] is not 'jurisdictional' but instead addresses where such claims shall be tried.").

Liquidating Tr. of the MPC Liquidating Trust v. Granite Fin. Solutions, Inc. (In re MPC Computers, LLC), 465 B.R. 384 (Bankr. D. Del. 2012) (Walsh, J.) (Denying defendant's post-confirmation motion to dismiss adversary proceeding for breach of contract and unjust enrichment on the basis of lack of subject matter jurisdiction. "The question pondered by the Supreme Court in *Stern*, whether the bankruptcy judge had the power to enter a final judgment in a state law counterclaim by the estate, is entirely separate from the question of whether a bankruptcy judge has jurisdiction to hear a matter without entering a final judgment.").

Samson v. Blixseth (In re Blixseth), 463 B.R. 896 (Bankr. D. Mont. 2012) (Kirscher, J.) (The court had previously ruled that, after *Stern*, it could not constitutionally hear and determine the fraudulent conveyance claim as a core proceeding. Determining that it also lacked the statutory authority to hear the case as a non-core proceeding, the court held that it lacked subject matter jurisdiction to adjudicate the fraudulent conveyance claims. On motion for reconsideration, the court concluded that it did indeed have subject-matter jurisdiction to adjudicate the fraudulent transfer claims asserted in the adversary proceeding—but lacked the constitutional authority to do so—stating: "Shortly after the Supreme Court entered its decision in *Stern v. Marshall*, this Court entered its August 1, 2011 decision concluding [that] '[s]ince this Court may not constitutionally hear the fraudulent conveyance claim as a core proceeding, and this Court does not have statutory authority to hear it as a non-core proceeding, it may in no case hear the claim. Therefore, this Court grants the parties fourteen days in which to move the District Court to withdraw its reference, in whole or in part, pursuant to 28 U.S.C. § 157(e), or else it will dismiss the fraudulent conveyance claims for lack of subject matter jurisdiction.' Such decision was flawed. . . . [B]ecause the United States District Court for the District of Montana would have the requisite subject-matter jurisdiction to adjudicate the claims in this Adversary Proceeding, so too does this Court.").

Reed v. Linehan (In re Soporex, Inc.), 463 B.R. 344 (Bankr. N.D. Tex. 2011) (Houser, J.) ("Of significance, *Stern* clarified bankruptcy courts' constitutional power, not their subject matter jurisdiction. Subject matter jurisdiction over bankruptcy cases and proceedings remains in the district court pursuant to 28 U.S.C. § 1334. In contrast, 28 U.S.C. § 151 grants bankruptcy courts the power to 'exercise' certain 'authority' conferred upon the district courts by title 28, but

bankruptcy courts are not granted their own independent subject matter jurisdiction over bankruptcy cases and proceedings. Moreover, 28 U.S.C. § 157 simply provides procedures pursuant to which the district court may refer bankruptcy cases and proceedings to the bankruptcy courts for either final determination or proposed findings and conclusions. The Court in *Stern* discussed this critical distinction at length, . . . and expressly clarified that 28 U.S.C. § 157 is not jurisdictional.").

Heller Ehrman LLP v. Gregory Canyon Ltd. (In re Heller Ehrman LLP), 461 B.R. 606 (Bankr. N.D. Cal. Aug. 30, 2011) (Montali, J.) ("In their reply, Defendants contended that the Supreme Court's recent decision in *Stern v. Marshall* . . . stripped this court of jurisdiction over this adversary proceeding. The court disagrees. In *Stern v. Marshall*, the Supreme Court addressed the issue of when a bankruptcy judge has the power and authority to enter final orders, and did not address subject matter jurisdiction found in 28 U.S.C. § 1334. As the court agrees with Defendants that it and the district court both lack related to subject matter jurisdiction [of liquidating debtor's postconfirmation action to recover a disputed account], a bankruptcy judge's power and authority to enter findings of fact and a final judgment is not implicated.").

Kirschner v. Agoglia (In re Refco Inc.), 461 B.R. 181 (Bankr. S.D.N.Y. 2011) (Drain, J.) ("[Whether] this Court[ ] [has the] ability to issue a final judgment [on a fraudulent conveyance claim asserted under § 544(b)] . . . . is not a question about the Court's subject matter jurisdiction; litigants and at least one court contending to the contrary misread *Stern* and ignore the expansive nature of the bankruptcy courts' subject matter jurisdiction.").

Levey v. Hanson's Window & Constr., Inc. (In re Republic Windows & Doors, LLC), 460 B.R. 511 (Bankr. N.D. Ill. 2011) (Cox, J.) ("Here, the Defendant relies on *Stern* for its assertion that this Court lacks subject matter jurisdiction to finally determine the Trustee's claims in his First Amended Complaint. Contrary to the Defendant's broad reading of *Stern*, that decision does not implicate subject matter jurisdiction. There the Court articulated quite clearly that '[s]ection 157 allocates the authority to enter final judgment between the bankruptcy court and the district court. . . . That allocation does not implicate questions of subject matter jurisdiction.' *Stern*, 131 S. Ct. at 2607. (emphasis added). *Stern* addresses the authority of bankruptcy courts to enter final judgment assuming that subject matter jurisdiction exists.").

Goldstein v. Eby-Brown, Inc. (In re Universal Mktg., Inc.), 459 B.R. 573 (Bankr. E.D. Pa. 2011) (Frank, J.) ("Defendant's argument reads far too much into *Stern*. In *Stern*, the Supreme Court held that Congress exceeded its constitutional authority when it designated certain types of counterclaims to proofs of claim as 'core proceedings.' The Court did not hold that the bankruptcy court lacked subject matter jurisdiction to adjudicate the debtor's state law claim. The Court held only that Congress' delegation of authority to enter a final judgment, as a 'core proceeding,' without the non-debtor's consent, was unconstitutional. Nothing in the specific holding in *Stern* precludes the bankruptcy court from exercising subject matter jurisdiction to hear a fraudulent transfer claim by treating it as a 'related proceeding' and issuing proposed findings of fact and conclusions of law. In other words, *Stern* does not affect the exercise of federal bankruptcy jurisdiction to hear certain claims, but simply whether the authority to enter a final order resides in the district court or the bankruptcy court.").

In re Olde Prairie Block Owner, LLC, 457 B.R. 692 (Bankr. N.D. Ill. 2011) (Schmetterer, J.) ("[A]lthough bankruptcy practitioners and judges often use the shorthand terms 'core jurisdiction' and 'related jurisdiction' when discussing § 157, that provision is not jurisdictional. Rather, as *Stern* emphasized: 'Section 157 allocates the authority to enter final judgment between the bankruptcy court and the district court. . . . That allocation does not implicate questions of subject matter jurisdiction. . . .'").

Meoli v. Huntington Nat'l Bank (In re Teleservices Grp., Inc.), 456 B.R. 318 (Bankr. W.D. 2011) (Hughes, J.) ("As the Court in *Stern* emphasized early in its opinion, the delegation of authority by the district courts to the bankruptcy courts as their adjuncts is not jurisdictional.").

Fairchild Liquidating Trust v. New York (In re Fairchild Corp.), 452 B.R. 525 (Bankr. D. Del. 2011) (Sontchi, J.) ("The issue in *Stern v. Marshall* was when, under the United States Constitution, the bankruptcy court could enter a final judgment as opposed to proposed findings of fact and conclusions of law in a case where subject matter jurisdiction existed under 28 U.S.C. § 1334(a). . . . As such, *Stern v. Marshall* is not a case about subject matter jurisdiction. Rather it addresses the power of the bankruptcy court to enter final orders, assuming that subject matter jurisdiction exists.").

Stoebner v. PNY Techs., Inc. (In re Polaroid Corp.), 451 B.R. 493 (Bankr. D. Minn. 2011) (Kishel, J.) ("As *Stern v. Marshall* emphasizes, this is not a matter of jurisdiction. . . . Bankruptcy jurisdiction reposes in the United States District Court, under 28 U.S.C. § 1334(a).").

Joyner v. Liprie (In re Liprie), 2012 WL 1144614 (Bankr. W.D. La. Apr. 4, 2012) (Summerhays, J.) ("As a preliminary matter, as this court has previously held, *Stern* does not implicate this court's subject mater jurisdiction under 28 U.S.C. § 1334, only its authority to enter final orders and judgments in certain matters. . . . The court also disagrees with [plaintiff's] assertion that *Stern* precludes entry of final orders and judgments in any matter that involves a state-law claim or issue. As the Supreme Court recognized in *Butner v. U.S.*, 440 U.S. 48 (1979), state law undergirds many federal bankruptcy law determinations. Given the Supreme Court's assurance in *Stern* that the court's ruling in that case was a narrow ruling that would not have a radical impact on current practice, the court declines to construe *Stern* so broadly as to preclude this court from addressing the myriad core bankruptcy matters that may, nevertheless, require the court to address questions of state law.").

Shaia v. Taylor (In re Connelly), 2012 WL 1098431 (Bankr. E.D. Va. Mar. 30, 2012) (Huennekens, J.) ("The Supreme Court has explicitly established that § 157 is not a jurisdictional statute: 'Section 157 allocates the authority to enter final judgments between the bankruptcy court and the district court. *See* §§ 157(b)(1), (c)(1). That authority does not implicate questions of subject matter jurisdiction.' *Stern v. Marshall*, 131 S. Ct. 2594, 2607 (2011).").

Burns v. Dennis (In re Se. Materials, Inc.), 2012 WL 1034322 (Bankr. M.D.N.C. Mar. 27, 2012) (Waldrep, J.) ("As many courts have noted, the Supreme Court emphasized in *Stern* that 28 U.S.C. § 157 is not a jurisdictional statute: 'Section 157 allocates the authority to enter final judgment

between the bankruptcy court and the district court. That allocation does not implicate questions of subject matter jurisdiction.' *Stern*, 131 S. Ct. at 2607.").

City of Cent. Falls, R.I. v. Cent. Falls Teacher's Union (In re City of Cent. Falls, R.I.), 2012 WL 1080589 (Bankr. D.R.I. Mar. 23, 2012) (Bailey, J.) ("[I]t is inaccurate to state that outside of core proceedings, a bankruptcy judge lacks subject-matter jurisdiction. Neither Congress by statute nor the Supreme Court in *Stern v. Marshall* or otherwise has so limited the jurisdiction of a bankruptcy judge. Provided the matter in question is related to a bankruptcy case—the present matters unquestionably are—it remains within the subject-matter jurisdiction created in § 1334 and referred to the bankruptcy court under § 157(a). The bankruptcy judge retains authority to hear and enter proposed findings and conclusions in the matter, with judgment to enter finally in the district court.").

Credit Suisse Sec. v. TMST, Inc. (In re TMST, Inc.), 2012 WL 589572 (Bankr. D. Md. Feb. 22, 2012) (Keir, J.) ("Although sometimes referred to as a reference of 'jurisdiction,' the issue of constitutional authority of a non-Article III judge to enter final orders pursuant to 28 U.S.C. § 157 is not a question of constitutionality of subject matter jurisdiction, a defect of which could not be 'cured' by consent. Subject matter [jurisdiction] is constitutionally conferred upon the United States District Court by 28 U.S.C. § 1334. The issue addressed in the opinion in *Stern v. Marshall* is to what extent by reference under 28 U.S.C. § 157, a non-Article III judge may exercise final order power over such matters.").

In re Am. Housing Found., 2012 WL 443967 (Bankr. N.D. Tex. Feb. 10, 2012) (Jones, J.) ("As a threshold matter, the Court submits that describing the '*Stern* problem' as raising an issue of subject matter jurisdiction is misguided. As explained by the Supreme Court in *Stern*, subject matter jurisdiction over all bankruptcy cases and proceedings is, under the statute, conferred on the district courts. . . .).

In re Julien, 2012 WL 314349 (Bankr. D. Neb. Feb. 1, 2012) (Saladino, J.) ("Counsel for [bank] asserts that this court likely lacks jurisdiction over the conflict between the two non-debtor parties in light of *Stern v. Marshall*. . . . However, couching the issue in terms of 'jurisdiction' is technically incorrect. . . . Thus, this bankruptcy court has the statutory authority, and therefore the jurisdiction, to hear the dispute between [the parties] and submit proposed findings of fact and conclusions of law to the district court.").

Searcy v. Knight (In re Am. Int'l Refinery), 2012 WL 293005 (Bankr. W.D. La. Jan. 31, 2012) (Summerhays, J.) ("[Liquidating] Trustee asserts a range of avoidance and non-bankruptcy claims against an array of defendants, including former officers and directors of [the debtor]. The moving defendants contend that the court lacks subject matter jurisdiction over this adversary proceeding based on the Supreme Court's recent decision in *Stern v. Marshall* . . . . The claims asserted in this adversary proceeding fall within the jurisdictional grant of section 1334(b). The Trustee asserts fraudulent transfer and avoidance claims under 11 U.S.C. §§ 547, 548, 549, and 550. These claims are created by the Bankruptcy Code, and thus fall within the court's 'arising under' jurisdiction. The remaining claims are state common law claims that do not fall within the court's 'arising under' or

'arising in' jurisdiction under section 1334(b). Nevertheless, the court is satisfied that the outcome of this proceeding 'could conceivably have [an] effect on the estate being administered in bankruptcy,' and thus falls within the court's 'related to' jurisdiction under section 1334(b). . . . The moving defendants, nevertheless, argue that *Stern v. Marshall* deprives the court of subject matter jurisdiction and requires dismissal under Rules 12(b)(1) and 7012. . . . In *Stern*, the Court held that section 157(b)(2)(C) was unconstitutional to the extent that it authorizes non-Article III bankruptcy judges to enter final orders and judgments on common law counterclaims to proofs of claim . . . . Was the Supreme Court's decision in *Stern* a decision about the scope of subject matter jurisdiction under section 1334(b)? The majority of cases addressing this issue have squarely held that *Stern* does not address subject matter jurisdiction under section 1334 and, accordingly, is not grounds for a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1). . . . The court agrees with the reasoning of the cases holding that *Stern* does not support the dismissal of a 'related to' matter pending before a bankruptcy court. The flaw in the moving defendants' jurisdictional argument is that it confounds subject matter jurisdiction under section 1334 with the procedural scheme under section 157 for handling core and non-core 'related to' proceedings. . . . In sum, the *Stern* arguments raised by the moving defendants do not support dismissal for lack of subject matter jurisdiction under Rule 12(b)(1).").

Samson v. W. Capital Partners LLC (In re Blixseth), 2011 WL 6217416 (Bankr. D. Mont. Dec. 14, 2011) (Kirscher, J.) ("[Defendant] argues this Court lacks subject matter jurisdiction to hear Counts I, II, V and VI of the Plaintiff's complaint and therefore, must dismiss said claims based upon the United States Supreme Court's recent ruling in *Stern* . . . and this Court's prior interpretation of *Stern* . . .: 'Since this Court may not constitutionally hear the fraudulent conveyance claim as a core proceeding, and this Court does not have statutory authority to hear it as a non-core proceeding, it may in no case hear the claim. Therefore, this Court grants the parties fourteen days in which to move the District Court to withdraw its reference, in whole or in part, pursuant to 28 U.S.C. § 157(e), or else it will dismiss the fraudulent conveyance claims for lack of subject matter jurisdiction.' . . . Having now had the benefit of more time to reflect on *Stern v. Marshall*, the Court finds its conclusion . . . may be flawed. . . . [S]everal courts have recently concluded that *Stern v. Marshall* does not deprive bankruptcy courts of subject matter jurisdiction. Following the express language of *Stern v. Marshall*, this Court concludes that because the United States District Court for the District of Montana would have the requisite subject-matter jurisdiction to adjudicate the claims in this Adversary Proceeding, so too does this Court. The Court's [prior] decision is, to the extent it is inconsistent with the decision expressed today, overruled.").

Farooqi v. Carroll (In re Carroll), 464 B.R. 293 (Bankr. N.D. Tex. 2011) (Houser, J.) ("From this Court's perspective, *Stern* does not implicate the grant of subject matter jurisdiction over bankruptcy cases and proceedings arising in the bankruptcy case, under the Bankruptcy Code . . . or related to the bankruptcy case under 28 U.S.C. § 1334. That subject matter jurisdiction is, and has been since 1984, vested in the [district court] under 28 U.S.C. § 1334. Then, under 28 U.S.C. § 151, Congress granted bankruptcy courts the power to 'exercise' certain 'authority conferred' upon the district courts by title 28, but bankruptcy courts were not granted their own independent subject matter jurisdiction over bankruptcy cases and proceedings. Congress also provided further procedures in 28 U.S.C. § 157 pursuant to which the district court may refer bankruptcy cases and proceedings to

the bankruptcy courts for either final determination or proposed findings and conclusions. . . . *Stern* simply clarified bankruptcy courts' constitutional power, not their subject matter jurisdiction. The Court in Stern discussed this critical distinction at length, . . . and expressly clarified that 28 U.S.C. § 157 is not jurisdictional.").

Hagan v. Classic Prods. Corp. (In re Wilderness Crossings, LLC), 2011 WL 5417098 (Bankr. W.D. Mich. Nov. 8, 2011) (Dales, J.) ("[T]he court believes that parties may waive *Stern*-based objections, because such objections do not challenge the court's subject matter jurisdiction.").

Haw. Nat'l Bancshares, Inc. v. Sunra Coffee LLC (In re Sunra Coffee LLC), 2011 WL 4963155 (Bankr. D. Haw. Oct. 18, 2011) (Faris, J.) ("*Stern v. Marshall* does not limit the bankruptcy court's subject matter jurisdiction. A court which lacks subject matter jurisdiction cannot hear the matter at all and must dismiss it. . . . *Stern v. Marshall* deals with the power of the bankruptcy court to enter a final judgment, and does not limit the bankruptcy court's power to hear pretrial matters or to provide proposed findings and conclusions and a recommended judgment to the district court. Further, the parties cannot create subject matter jurisdiction by consent, . . . but even under *Stern v. Marshall* the bankruptcy court can enter judgment against a consenting party.").

Liberty Mut. Ins. Co. v. Citron (In re Citron), 2011 WL 4711942 (Bankr. E.D.N.Y. Oct. 6, 2011) (Rosenthal, J.) ("Contrary to Defendant's assertions, *Stern* does not deprive a bankruptcy court of subject matter jurisdiction.").

Oxford Expositions, LLC v. Questex Media Grp., LLC (In re Oxford Expositions, LLC), 2011 WL 4054872 (Bankr. N.D. Miss. Sept. 13, 2011) (Houston, J.) ("*Stern* . . . has caused a great deal of consternation among bankruptcy professionals, particularly concerning the extent of its impact on bankruptcy court jurisdiction. . . . There are some students of bankruptcy lore who are concerned that *Stern* impacts the subject matter jurisdiction of the bankruptcy courts. This court does not believe that is the case at all. . . . In summary, the holding in *Stern* was limited, and the majority, in the opinion of this court, did not intend to obliterate the subject matter jurisdiction of the bankruptcy courts.").

III. BANKRUPTCY COURTS' CONSTITUTIONAL AUTHORITY TO FINALLY ADJUDICATE MATTERS THAT ARE CORE PROCEEDINGS UNDER 28 U.S.C. § 157(b)(2)

A. MATTERS SPECIFICALLY IDENTIFIED BY COURTS AS CORE UNDER 28 U.S.C. § 157(b)(2)(A)

Sheehan v. Dobin, 2012 WL 426285 (D.N.J. Feb. 9, 2012) (Wolfson, J.) ("[U]nlike *Stern*, the matter before me does not involve a proof of claim or a state law counterclaim involving a debtor and creditor. [T]he instant appeal concerns an adversary proceeding filed by the Trustee to determine the extent and validity of the Debtor's ownership interest in a piece of property. This is the essence of a core bankruptcy proceeding. Moreover, the Bankruptcy Court's jurisdiction here did not arise

under 28 U.S.C. § 157(b)(2)(C) as in *Stern*, but instead, arose under 28 U.S.C. § 157(b)(2)(A), (K), (N) and/or (O) as explained by Judge Lyons in his decision. For these reasons, the Court finds that *Stern* is inapplicable to this matter . . . .").

Grocery Haulers, Inc. v. Great Atl. & Pac. Tea Co. (In re Great Atl. & Pac. Tea Co.), 2012 WL 264187 (S.D.N.Y. Jan. 30, 2012) (Seibel, J.) ("Before the Court is the appeal of Grocery Haulers, Inc. . . . from the Bankruptcy Court's Order . . . denying GHI's motion seeking a ruling that the automatic stay does not bar litigation that GHI sought to bring in New Jersey district court against the [d]ebtors [pursuant to its proposed third-party complaint based on the debtor's rejection of a trucking agreement with GHI] or, in the alternative, that good cause existed to grant relief from the automatic stay. . . . I am not persuaded by GHI's argument that the Supreme Court's decision in [*Stern*]—which held that a bankruptcy court 'lack[s] 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'—means that the Bankruptcy Court lacks the authority to enter final judgment on the claims [to be asserted in the third-party complaint]. . . . Although I need not decide the issue definitively, I am inclined to conclude that the proposed third-party claims would be core or at least claims that arose in the bankruptcy case, and the Bankruptcy Court would have the ability to enter final judgment. In any event, it is not so clear that the Bankruptcy Court could *not* enter final judgment that [the bankruptcy court's] conclusions are an abuse of discretion. First, Appellant's claims relate to 'matters concerning the administration of the estate,' making them core under the Bankruptcy Code. 28 U.S.C. § 157(b)(2)(A) . . . . Further, rejection of 'executory contracts are fundamental issues of bankruptcy law unique to the Bankruptcy Code,' and thus challenges to the effects of rejection orders are core proceedings because they are claims that would not exist independent of the bankruptcy case. . . . Moreover, even if Appellant's proposed claims are neither related to administration of the estate nor core, they certainly 'arose in' Appellees' chapter 11 case, because Appellees' right to reject executory contracts under Section 365 is 'based on a right created by the Bankruptcy Code' and thus claims flowing from such a right can only be brought in a case under the Bankruptcy Code. Accordingly, the Bankruptcy Court likely has authority after *Stern* to enter final judgment on them. . . . For the reasons stated above, I do not find that the Bankruptcy Court abused its discretion in determining not to lift the stay. This is not to say that a reasonable jurist could not have come out the other way, but [the bankruptcy court] considered the appropriate factors and reached a conclusion within the range of permissible decisions.").

Turner v. First Cmty. Credit Union (In re Turner), 462 B.R. 214 (Bankr. S.D. Tex. 2011) (Bohm, J.) ("This particular dispute is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (C) and (O), and the general 'catch-all' language of 28 U.S.C. § 157(b)(2). . . . Because the Debtors' suit against [a financial institution for indefinitely freezing the [D]ebtors' account postpetition and withdrawing funds from the account to pay amounts due from the [D]ebtors without seeking relief from the automatic stay] is in effect a counterclaim against this institution which filed proofs of claim in the Debtors' main case [for loans made to the Debtors], at first blush it would appear that *Stern* is on all fours and therefore that: (1) this Court does not have the constitutional authority to enter a final judgment in this dispute; and (2) this Court must therefore submit proposed findings of fact and conclusions of law to the District Court, together with a proposed judgment to be signed by that Article III Court. However, . . . the undersigned bankruptcy judge believes that he does have

constitutional authority to sign a final judgment in this adversary proceeding. First, in *Stern*, the suit between the debtor's estate and the creditor concerned state law issues. In the suit at bar, the suit arises out of alleged violations of the automatic stay imposed by an express Bankruptcy Code provision—i.e. § 362(a). Moreover, the relief sought by the Debtors is based upon another express Bankruptcy Code provision—i.e. § 362(k), which expressly provides for recovery of damages by a debtor for a creditor's violation of the automatic stay. State law has no equivalent to these statutes; they are purely a creature of the Bankruptcy Code. . . . Alternatively . . . [t]his suit involves the adjudication of rights created under a complex public rights scheme, and therefore it falls within the Bankruptcy Court's constitutional authority. . . . The automatic stay is one of the most important—if not the most important—features of the Bankruptcy Code, and it is integral to the public bankruptcy scheme.").

Szilagyi v. Chicago Am. Mfg., LLC (In re Lakewood Eng'g & Mfg. Co.), 459 B.R. 306 (Bankr. N.D. Ill. 2011) (Hollis, J.) ("The resolution of this particular proceeding concerns the administration of the estate under § 157(b)(2)(A). . . . As Plaintiffs anticipated, 'the principal issues in the adversary proceeding are whether [Chicago American Manufacturing, LLC] has a valid license to use certain Lakewood marks and patents under Illinois law and whether any such license was terminated when the Bankruptcy Court approved the rejection of CAM's purported license under 11 U.S.C. § 365.' . . . [T]his court is ruling only on claims 'derived from or dependent upon bankruptcy law,' unlike the state law tort action at issue in *Stern* . . . . In the course of this Memorandum Opinion, this court interprets a contract under principles described in Illinois law, and then determines the effect of rejection of that contract under bankruptcy law. Rejection of a contract and the effects thereof are creations purely of bankruptcy law. This action clearly 'stems from the bankruptcy itself.'").

In re Whitley, 2011 WL 5855242 (Bankr. S.D. Tex. Nov. 21, 2011) (Bohm, J.) ("[T]his particular dispute is a core proceeding pursuant to 28 U.S.C. §§ 157(b)(2)(A), (B), (E) and (O). . . . The dispute at bar is not a counterclaim of the Debtor, nor does it arise out of state law; therefore, *Stern* does not apply. This suit arises out of alleged violations of the disclosure requirements imposed by an express Bankruptcy Code provision—i.e. § 329. Moreover, the Trustee also seeks relief based upon another express Bankruptcy Code provision—i.e. § 330, which allows the Court to award or deny compensation to attorneys that represent the debtor and the debtor's estate. State law has no equivalent to these statutes; they are purely creatures of the Bankruptcy Code. Accordingly, the resolution of this dispute is not based on state common law, *Stern* does not apply, and this Court has the constitutional authority to enter a final judgment in this dispute pursuant to 28 U.S.C. §§ 157(a) and (b)(1). . . . The dispute at bar relates solely to compensation of an attorney (i.e. Baker), a right established by §§ 329 & 330 of the Bankruptcy Code; and thus, it falls within this Court's constitutional authority. Moreover, whether this Court approves payment of Baker's fees affects the amount of distributions that will be made to unsecured creditors, as their claims are subordinate to the administrative claim that Baker will hold if his requested fees are allowed. Accordingly, the dispute at bar falls within the 'public rights' exception articulated in *Stern* because the outcome of this dispute affects the distribution of property among all of the Debtor's creditors.").

In re Gow Ming Chao, 2011 WL 5855276 (Bankr. S.D. Tex. Nov. 21, 2011) (Bohm, J.) ("This is a core proceeding pursuant to 28 U.S.C. §§ 157(b)(2)(A) and (O). . . . An order converting a case

from one chapter to another is considered a final order. Therefore, this Court must determine whether it has the constitutional authority to enter the order converting this Chapter 11 case to a Chapter 7 case. The Court concludes that it does have such authority for two reasons. First, the facts in the case at bar are easily distinguishable from the facts in *Stern*. . . . In the case at bar, there is no state law issue involved. Rather, the issues concern whether the Debtors have complied with express provisions of the Bankruptcy Code, the Federal Bankruptcy Rules, the Bankruptcy Local Rules for the Southern District of Texas, and the U.S. Trustee Guidelines for Chapter 11 cases. These are all pure bankruptcy issues which involve fundamental compliance in order for the bankruptcy system to properly operate. Accordingly, this Court concludes that it does indeed have the constitutional authority to sign the order converting this Chapter 11 case to a Chapter 7 case. . . . Alternatively . . . [t]he Chapter 11 case initiated by the Debtors involves the adjudication of rights created under a complex public rights scheme, and therefore it falls within the Bankruptcy Court's constitutional authority.").

B. ALLOWANCE OR DISALLOWANCE OF CLAIMS AGAINST THE ESTATE/EXEMPTIONS FROM PROPERTY OF THE ESTATE: 28 U.S.C. § 157(b)(2)(B)

1. CLAIM OBJECTIONS

Kurz v. EMAK Worldwide, Inc., 464 B.R. 635 (D. Del. 2011) (Hillman, J.) ("In *Stern v. Marshall*, the Supreme Court opined that the 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.' Thus, *Stern's* holding is very limited and only removes state-law counterclaims from the bankruptcy court's jurisdiction when they 'cannot be fully resolved in the claims allowance process.' The present matter, however, is very factually distinct from *Stern*. As noted above, the proof of claim is identical to the state action; therefore, it must be adjudicated in order for the bankruptcy court to resolve the proof of claim.").

Tolliver v. Bank of Am. (In re Tolliver), 464 B.R. 720 (Bankr. E.D. Ky. 2012) (Wise, J.) (Mortgagees filed a secured proof of claim, and the Chapter 13 debtor commenced an adversary proceeding objecting to the claim. "[T]he parties do not dispute that this Court may issue a final judgment on the Plaintiff's objection to the Defendants' proof of claim. The Court agrees. The Supreme Court has expressly authorized the bankruptcy court to enter final judgment in the claims resolution process.").

In re Borin, 461 B.R. 719 (Bankr. W.D. Mich. 2011) (Dales, J.) ("An objection to claim is clearly a 'core' proceeding within the meaning of 28 U.S.C. § 157(b)(2)(B), and the Supreme Court's recent decision in [*Stern*] . . . does not undermine this court's authority to enter a final order. . . . [T]he high court recognized that non-tenured judicial officers may resolve disputes in the claims allowance process, including disputes 'integral to the restructuring of the debtor-creditor relationship.'").

Meoli v. Huntington Nat'l Bank (In re Teleservices Grp., Inc.), 456 B.R. 318 (Bankr. W.D. Mich. 2011) (Hughes, J.) ("[W]hen all is said and done, claims allowance is nothing more than a final step

in an overall process chosen by Congress whereby it has allowed a debtor to voluntarily turnover his property for distribution to his creditors in exchange for certain protections in return—to wit, the automatic stay and, later, the discharge. In fact, in fashioning this aspect of that process, Congress itself has already established much of the distribution scheme without the involvement of a court at all by requiring proofs of claim, by establishing priorities, and by setting the criteria for claim allowance. It stands to reason, then, that Congress has the ability as well to delegate to whomever it chooses the task of completing whatever remains of the allowance process so that a final distribution can be made and the case closed. After all, the point of *Murray's Lessee* is that Congress can set the terms of the process, including who is to make decisions as part of that process, if without Congress there would be no process in the first place. . . . The only restraint, as *Stern* itself correctly instructs, is that Congress cannot within that process include mechanisms whereby a person would be deprived of either his liberty or his property without that decision maker also being vested with the independence guaranteed by Article III of the Constitution.").

Jordan River Liquidating Trust v. Jay & P, LLC (In re Jordan River Res., Inc.), 455 B.R. 657 (Bankr. W.D. Mich. 2011) (Dales, J.) ("The court may enter final judgment because the controversy involves claims to a *res* within the court's jurisdiction (permissibly resolved by a bankruptcy judge) rather than a proceeding to augment the estate (presumptively within the purview of a life-tenured district judge with salary protections under Article III of the U.S. Constitution). . . . The court can enter final judgment in this matter, subject to appellate review under 28 U.S.C. § 158, because resolving the Plaintiff's objection to Ms. Merkle's [claim] 'stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process.' *Stern*, 131 S. Ct. at 2601.").

Buffets, Inc. v. Ca. Franchise Tax Bd. (In re Buffets Holdings, Inc.), 455 B.R. 94 (Bankr. D. Del. 2011) (Walrath, J.) ("The Court has core jurisdiction over the motions for summary judgment, which essentially involve the allowance of the FBE's claims. 11 U.S.C. § 505(a)(1); 28 U.S.C. §§ 157(b)(1)(B) & 1334. *See, e.g.*, *Stern v. Marshall*, —— U.S. ——, 131 S. Ct. 2594, 2618, 180 L. Ed. 2d 475 (2011) (concluding that 'the question [of bankruptcy court jurisdiction] is whether the action at issue stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process') . . . .").

In re Archdiocese of Milwaukee, 2012 WL 619190 (Bankr. E.D. Wis. Feb. 24, 2012) (Kelley, J.); ***In re Archdiocese of Milwaukee***, 2012 WL 528141 (Bankr. E.D. Wis. Feb. 17, 2012) (Kelley, J.) ("Allowance of proofs of claim falls within the core jurisdiction of the Bankruptcy Court under 28 U.S.C. §§ 1334 and 157(b)(2)(B). Unlike the entry of a final order on a State law counterclaim, allowance of claims was not deemed unconstitutional in *Stern*. . . . In *Stern*, the Supreme Court reaffirmed that bankruptcy courts have the authority to restructure the debtor-creditor relationship and determine 'creditors' hierarchically ordered claims to a pro rata share of the bankruptcy res.' . . . Accordingly, this Court has authority to enter a final order [on the debtor's claim objection(s)].").

S. La. Ethanol, LLC v. Whitney Nat'l Bank (In re S. La. Ethanol, LLC), 2012 WL 506870 (Bankr. E.D. La. Feb. 15, 2012) (Magner, J.); ***Sigillito v. Hollander (In re Hollander)***, 2011 WL 6819022 (Bankr. E.D. La. Dec. 28, 2011) (Magner, J.) ("[In *Stern*,] [e]ight . . . justices of the present United States Supreme Court have indicated that a bankruptcy court's exercise of power over the liquidation

of proofs of claim was a constitutional delegation of power from Congress. . . . The eight . . . were comprised from both the majority and dissent.").

2. OBJECTIONS TO EXEMPTIONS

In re Carlew, 2012 WL 826893 (Bankr. S.D. Tex. Mar. 9, 2012) (Bohm, J.) ("In the dispute at bar, the Chapter 7 Trustee has objected to the Debtor's exemption of the Insurance Proceeds pursuant to Section 522(1) and Fed. Bankr. R. 4003(b). State law has no equivalent to this statute and rule; therefore, the facts in this case are distinguishable from those in *Stern*, which involved solely state law. Granted, the resolution of the dispute at bar does hinge on Texas state law regarding homestead exemption. But, unlike *Stern*, where the resolution of the debtor's counterclaim did not necessarily adjudicate the creditor's claim, here, the resolution will certainly determine whether the Debtor has a claim to the Insurance Proceeds. If he does—i.e. if these proceeds are exempt—there will necessarily be less funds available for distribution for creditors. If the Debtor does not have a claim to the Insurance Proceeds—i.e. the proceeds are not exempt—then the Trustee will have more funds to distribute the proceeds to pay creditors. For these reasons, the dispute at bar is sufficiently distinguishable from the dispute in *Stern* for this Court to sign a final order. . . . In the alternative, even if *Stern* somehow applies, this Court concludes that the one exception articulated in *Stern* by the Supreme Court applies—specifically, that this Court may enter a final order over essential bankruptcy matters under the 'public rights' exception. Under *Thomas v. Union Carbide Agric. Prods. Co.*, a right closely integrated into a public regulatory scheme may be resolved by a non-Article III tribunal. . . . The Bankruptcy Code is a public scheme for restructuring debtor-creditor relations, necessarily including the exercise of exclusive jurisdiction over all of the debtor's property, the equitable distribution of that property among the debtor's creditors, and the ultimate discharge that gives the debtor a 'fresh start' by releasing him, her, or it from further liability for old debts. The key issue before this Court involves a dispute over whether or not certain property (i.e. the Insurance Proceeds) is exempt. The right to exempt property from the bankruptcy estate is established by an express provision of the Bankruptcy Code (section 522) and is central to the public bankruptcy scheme, as it relates to both the exercise of exclusive jurisdiction over the property of the estate (because before property can become exempt, it is property of the estate) and the equitable distribution of that property among a debtor's creditors. . . . As such, this determination is not only inextricably tied to the bankruptcy scheme, but it also involves the adjudication of rights created by the Bankruptcy Code. For these reasons, this matter falls within this Court's authority, and therefore this Court may enter a final order . . . .").

In re Hill, 2011 WL 6936357 (Bankr. S.D. Tex. Dec. 30, 2011) (Bohm, J.) ("In the case at bar, there are both facts and law that give this Court constitutional authority to sign a final order on the Objection to Exemptions. The Objection to Exemptions puts the following issues in dispute: Should the Debtor even be allowed to amend his Schedule C to claim the proceeds as exempt? . . . Resolution of this issue requires application of pure judicially-created bankruptcy law, and therefore this Court concludes that *Stern* has no application and that this Court has constitutional authority to enter a final order on this issue. . . . [E]ven if *Stern* somehow applies, this Court concludes that the one exception articulated in *Stern* by the Supreme Court applies—specifically, that this Court may enter a final order over essential bankruptcy matters under the 'public rights' exception. . . . The

Bankruptcy Code is a public scheme for restructuring debtor-creditor relations, necessarily including 'the exercise of exclusive jurisdiction over all of the debtor's property, the equitable distribution of that property among the debtor's creditors, and the ultimate discharge that gives the debtor a "fresh start" by releasing him, her, or it from further liability for old debts.' *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 363–64 (2006) . . . . The key issue before this Court involves a dispute over whether or not certain property (i.e. the Lawsuit and the proceeds flowing therefrom) is exempt or is not exempt—and therefore property of the estate. The right to exempt property from the bankruptcy estate is established by an express provision of the Bankruptcy Code (section 522) and is central to the public bankruptcy scheme, as it relates to both the exercise of exclusive jurisdiction over the debtor's property (because before property can become exempt, it is property of the estate) and the equitable distribution of that property among a debtor's creditors. . . . As such, this determination is not only inextricably tied to the bankruptcy scheme, but it also involves the adjudication of rights created by the Bankruptcy Code. For these reasons, this matter falls within this Court's authority, and therefore this Court may enter a final order on the Objection to Exemptions.").

In re Okwonna-Felix, 2011 WL 3421561 (Bankr. S.D. Tex. Aug. 3, 2011) (Bohm, J.) ("In determining whether to approve the proposed settlement in the Motion, a key issue before this Court involves a dispute over whether or not property of the estate is exempt. The right to exempt property from the bankruptcy estate is established by the Bankruptcy Code and is central to the public bankruptcy scheme, as it relates to both the exercise of exclusive jurisdiction over the debtor's property (because before property is deemed exempt, it is property of the estate and the equitable distribution of that property among the debtor's creditors. As such, this determination is not only inextricably tied to the bankruptcy scheme, but it also involves the adjudication of rights created by the Bankruptcy Code. For all these reasons, this matter falls within this Court's authority, and therefore this Court may enter a final order on the Motion.").

C. COUNTERCLAIMS BY THE ESTATE AGAINST PERSONS FILING CLAIMS AGAINST THE ESTATE: 28 U.S.C. § 157(b)(2)(C)

1. BANKRUPTCY COURTS HAVE THE CONSTITUTIONAL AUTHORITY TO FINALLY ADJUDICATE THE COUNTERCLAIM(S)

Picard v. Estate of Madoff, 464 B.R. 578 (S.D.N.Y. 2011) (Pauley, J.) ("*Stern* distinguished *Katchen* and *Langenkamp* on their facts and held that because the bankruptcy court's resolution of the creditor's proof of claim for defamation did not fully resolve Smith's tortious interference counterclaim, Congress could not bypass Article III and vest the bankruptcy court with the power to enter a final judgment on that counterclaim. . . . Here, however, the Trustee's common law claims might still be resolved as part of 'the allowance or disallowance' of [the] proofs of claims [filed by Mark and Andrew Madoff], and it would be premature to insist that the common law claims be litigated in an Article III court. Together, Mark and Andrew have filed approximately $90 million in proofs of claims for, *inter alia*, unpaid compensation, wages and bonuses. The Trustee . . . asserts common law claims seeking to recover the excessive compensation Mark and Andrew received

while neglecting their fiduciary duties to [Bernard L. Madoff Investment Securities LLC ("BLMIS")]. Thus, the common law claims for breach of fiduciary duty, negligence and unjust enrichment overlap with the process of determining whether Mark and Andrew were entitled to any compensation at all from BLMIS. Under *Stern*, the bankruptcy court retains authority to determine all of the Trustee's common law claims to the extent that it must do so to determine the allowance or disallowance of Mark and Andrew's proofs of claim. . . . Because Mark and Andrew 'invoked the aid of the bankruptcy court by offering a proof of claim and demanding its allowance [they] must abide by the consequences of that procedure,' and there is 'no basis for [them] to insist that the issue be resolved in an Article III Court.'").

Sundale, Ltd. v. Fla. Assocs. Capital Enters., LLC, 2012 WL 488110 (S.D. Fla. Feb. 14, 2012) (Marra, J.) ("The Supreme Court . . . made clear that it did not intend its decision in *Stern* to have broad implications . . . . The facts presently before the Court are materially distinguishable from those in *Stern*. That case involved a [tortious] interference counterclaim that was a 'state law action independent of the federal bankruptcy law and not necessarily resolvable by a ruling on the creditor's proof of claim in bankruptcy.' . . . [T]he crux of [the debtor's] argument [here] is that the [funds advanced by the creditor on account of which the creditor filed its proof of claim] were never intended to be a loan . . . . [The debtor] relied on this theory to advance numerous affirmative defenses against [the] proof of claim and as the premise for its two counterclaims . . . . All of the affirmative defenses and the counterclaims thus have one common thread. . . . [A] resolution of the proof of claim necessarily resolves the . . . counterclaims. . . . Because [the debtor's] counterclaims are necessarily resolved by resolution of [the] proof of claim, the self-declared narrow holding in *Stern* is distinguishable from the facts presently before the Court. The question here, therefore, is whether a bankruptcy court can enter a final judgment on a state law counterclaim that is necessarily resolved by a ruling on the creditor's proof of claim in bankruptcy. Because [*Stern*] emphasized that bankruptcy courts lack jurisdiction to resolve state law counterclaims that are not 'necessarily resolved by a ruling on the creditor's proof of claim in bankruptcy,' this Court concludes that those claims that are 'necessarily resolved' are appropriate for final judgment by a bankruptcy court. Thus, when a counterclaim is 'necessarily resolved' by a ruling on a creditor's proof of claim, the Court holds that bankruptcy courts can enter final judgments on such claims.").

Gecker v. Flynn (In re Emerald Casino, Inc.), 2012 WL 280724 (N.D. Ill. Jan. 31, 2012) (Pallmeyer, J.) (The Chapter 7 trustee commenced adversary proceedings asserting counterclaims against certain directors and officers who had filed proofs of claim in the debtor's bankruptcy case. "Just weeks ago [in *Ortiz*], our Court of Appeals described *Stern* as holding 'that Article III prohibited Congress from giving bankruptcy courts authority to adjudicate claims that went beyond the claims allowance process.' . . . [In this adversary proceeding,] Count V, against Defendant Donald F. Flynn, asks the court to classify Flynn's pre-petition loans to [the debtor] as equity rather than debt. . . . This court concludes that [this counterclaim] could indeed be resolved in the process of ruling on the proofs of claim. For example, in the course of adjudicating Donald Flynn's proof of claim, the bankruptcy court may conclude that Flynn's loans to [the debtor] were equity investments, rather than debt obligations. The bankruptcy court would presumably disallow Flynn's proof of claim in that amount and rule in favor of the Trustee on her counterclaim.").

Tolliver v. Bank of Am. (In re Tolliver), 464 B.R. 720 (Bankr. E.D. Ky. 2012) (Wise, J.) (Holder of note and mortgage and its servicing agent filed secured proof of claim for principal and outstanding fees and costs due on the Chapter 13 debtors mortgage loan, and the debtor commenced an adversary proceeding asserting multiple counterclaims against the mortgagees for alleged violations of state and federal law. "The Supreme Court recognized in *Stern* that whether a bankruptcy court can enter a final judgment on a state-law counterclaim has to be decided on a case-by-case basis. And if after such analysis it is concluded that the counterclaim stems from the bankruptcy itself or that nothing remains for adjudication of the counterclaim once the bankruptcy judge resolves the claim objection, then the counterclaim can be tried and finally resolved by the bankruptcy court. . . . In its simplest form, this proceeding is about an accounting of the Debtor's payments and the application of those payments by the Defendant. These types of commercial contractual analyses, everyday occurrences for bankruptcy courts, are a far cry from the debtor's counterclaim of tortious interference at issue in *Stern*. Thus, at first blush, the Court observes generally that the instant case does not present the 'one isolated respect' discussed in *Stern*. However, the cautionary admonition from the Supreme Court that *Stern* is to be interpreted narrowly does not relieve the Court of the obligation to determine whether each of Plaintiff's counterclaims may be 'necessarily resolved' in the claims objection process. The Court looks to the Supreme Court for guidance in how to make this determination—should the Court (a) examine the factual overlap of the claim resolution and the counterclaim? or (b) compare the legal elements which must be determined to resolve the claim and the counterclaim? or (c) compare the remedies sought by the counterclaim and the impact of same on the claims allowance process? or (d) some combination of the above? . . . In making [its] analysis in *Stern*, it appears to this Court that the Supreme Court looked not only to the factual overlap of the claim resolution and the counterclaim, but also the legal elements which must be determined to resolve the claim and the counterclaim and the remedies sought by the counterclaim and the impact on the claims allowance process. But it is not apparent from this analysis that any one of these issues is dispositive or that one issue is more important than another in comparing the factual overlap, the legal elements and the remedies. Because of this, this Court is left to conclude that while it should consider all these issues in making its case-by-case analysis, none are dispositive or carry more weight than the other. Against this background, the Court shall proceed by addressing whether each of the counterclaims alleged are necessarily resolved in the claims objection process. If not, then they shall be treated as proceedings which the Court may hear, but not finally adjudicate absent the parties' consent." After conducting the analysis described above, the bankruptcy court concluded that certain counterclaims—those asserting that the mortgagees: (1) fraudulently and intentionally misrepresented the fees and costs associated with the loan; (2) converted the debtor's property by wrongfully and intentionally misapplying her payments; (3) breached the implied covenant of good faith and fair dealing by misapplying payments and charging unauthorized fees in order to maximize profits; and (4) breached their contractual duties by applying payments to late charges, fees and expenses—would necessarily be resolved in the claims objection process and that the court therefore had the constitutional authority to enter a final judgment on those counterclaims. Furthermore, the bankruptcy court held that the debtor's counterclaim under the Fair Debt Collection Practices Act "arises in federal rather than state law. . . . *Stern* addressed the Court's ability to enter final judgments on state law counterclaims; it makes no mention of a bankruptcy court's ability to enter final judgments on federal counterclaims properly referred to it by the District Court such as this

one. Because the Supreme Court did not address federal law counterclaims, and *Stern* is to be narrowly applied, the Court finds that the limitations set forth in *Stern* do not apply to the Plaintiff's FDCPA claim . . . and the Court has the authority to enter a final judgment on this cause of action . . . .").

Turner v. First Cmty. Credit Union (In re Turner), 462 B.R. 214 (Bankr. S.D. Tex. 2011) (Bohm, J.) ("Because the Debtors' suit against [a financial institution for indefinitely freezing the debtors' account postpetition and withdrawing funds from the account to pay amounts due from the debtors without seeking relief from the automatic stay] is in effect a counterclaim against this institution which filed proofs of claim in the Debtors' main case [for loans made to the Debtors], at first blush it would appear that *Stern* is on all fours and therefore that: (1) this Court does not have the constitutional authority to enter a final judgment in this dispute; and (2) this Court must therefore submit proposed findings of fact and conclusions of law to the District Court, together with a proposed judgment to be signed by that Article III Court. However, for the reasons set forth below, the undersigned bankruptcy judge believes that he does have constitutional authority to sign a final judgment in this adversary proceeding. First, in *Stern*, the suit between the debtor's estate and the creditor concerned state law issues. In the suit at bar, the suit arises out of alleged violations of the automatic stay imposed by an express Bankruptcy Code provision—i.e. § 362(a). Moreover, the relief sought by the Debtors is based upon another express Bankruptcy Code provision—i.e. § 362(k), which expressly provides for recovery of damages by a debtor for a creditor's violation of the automatic stay. State law has no equivalent to these statutes; they are purely a creature of the Bankruptcy Code. . . . Alternatively . . . [t]his suit involves the adjudication of rights created under a complex public rights scheme, and therefore it falls within the Bankruptcy Court's constitutional authority. . . . The automatic stay is one of the most important—if not the most important—features of the Bankruptcy Code, and it is integral to the public bankruptcy scheme.").

Adams Nat'l Bank v. GB Herndon & Assocs., Inc. (In re GB Herndon & Assocs., Inc.), 459 B.R. 148 (Bankr. D.D.C. 2011) (Teel, J.) ("[T]he Supreme Court [in *Stern*] recognized a[n] . . . exception to Article III's requirement that common law claims be heard by an Article III tribunal: when the 'action at issue stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process.' . . . Because a ruling on [lender's claims for breach of a prepetition forbearance agreement with the debtor] would necessarily dispose [of] each count asserted as a counterclaim [by the debtor, *i.e.*, breach of a Building Loan Agreement, tortious interference with the debtor's sales contracts with third parties, breach of the duty of good faith and fair dealing, misrepresentation, fraud and undue influence], I find that this court had authority to hear and enter final judgment on the debtor's counterclaim's. . . . Any decision on [lender's claims] would necessarily dispose of each of these counts. The forbearance agreement provided that the defendants irrevocably waived any claim . . . . In ruling on [the] complaint, I would necessarily have to determine that the forbearance agreement was enforceable, and in ruling on any defenses the debtor had to the complaint, I would necessarily have to decide whether the waiver clause in particular was enforceable. Making this determination would necessarily dispose of any counterclaims that existed prior to the execution of the forbearance agreement. Thus, to the extent the counterclaims were based on acts that occurred prior to the execution of the forbearance agreement, this court had authority to hear and decide the claims. To the extent the counts asserted as counterclaims were based on acts or omissions after the

forbearance agreement, a finding that the forbearance agreement was enforceable would necessarily dispose of those as well. Counts I, II, III, and V all allege as integral parts of the claims [the lender's] failure to advance funds as provided in the Building Loan Agreement. Paragraph 2.3 of the forbearance agreement provided that 'Lender shall not be obligated to advance any further funds to complete the Project.' In finding the forbearance agreement enforceable, I would necessarily determine that [the lender] had no further obligation to advance funds. Thus, to the extent the counts were based on a failure to advance funds after the forbearance agreement, the court likewise had authority to decide the debtor's counterclaims. Counts IV and VI both alleged facts that speak to the enforceability of the forbearance agreement in the first instance. Finding the agreement enforceable would necessarily resolve these counts and, thus, I had authority to decide these portions of the debtor's counterclaims as well.").

Alaska Fur Gallery v. First Nat'l Bank Alaska (In re Alaska Fur Gallery, Inc.), 457 B.R. 764 (Bankr. D. Alaska 2011) (MacDonald, J.) (The debtor commenced an adversary proceeding to determine whether the defendant had a lien on certain of the debtor's personal property. The defendant had filed several proofs of claim. Although the bankruptcy court abstained from hearing most of the issues relating to the proofs of claim pending the outcome of a state court proceeding, the parties to the adversary proceeding asked the court to determine one discrete issue with regard to the proofs of claim—whether two of the claims were secured by the debtor's business personal property. The bankruptcy court held that it had the constitutional authority to finally adjudicate that issue. "[T]his court has the constitutional authority to determine the [issue of whether the claims were secured by the debtor's property]. Although [that issue is] raised in the context of a suit the debtor has brought against one of its creditors, that creditor has filed proofs of claim in this bankruptcy case and the issue[ ] to be determined 'would necessarily be resolved in the claims allowance process.'").

In re Olde Prairie Block Owner, LLC, 457 B.R. 692 (Bankr. N.D. Ill. 2011) (Schmetterer, J.) ("[*Stern*] certainly did not hold that a Bankruptcy Judge cannot ever decide a state law issue. Indeed, a large portion of the work of a Bankruptcy Judge involves actions in which non-bankruptcy issues must be decided and that 'stem from the bankruptcy itself or would necessarily be resolved in the claims allowance process' . . . [Here, a secured creditor] filed a proof of claim in Debtor's bankruptcy case, asserting a claim that arose from Debtor's default under a loan contract . . . . [T]wo of Debtor's counterclaims—Counts I and III—related directly to that contract and had to be resolved in order to rule on [the proof of] claim. Count I of Debtor's Counterclaim sought 'rescission' based on economic duress. . . . Before [the creditor's] contract claim could be allowed, it was necessary to resolve any defenses Debtor asserted, including economic duress. . . . Debtor's Counterclaim [in] Count III asserted that [the creditor] breached the contractual duty of good faith and fair dealing [and] Debtor sought an award of damages . . . . If [the creditor] had breached the duty of good faith and fair dealing, its claim would at least have been reduced by the setoff . . . claimed by Debtor. Count III of the Counterclaim had to be resolved in order to rule on [the creditor's] claim and determine the amount due on the claim itself, and therefore remains a core proceeding subject to final adjudication by a Bankruptcy Judge as allowed under *Stern*.").

Spanish Palms Mktg., LLC v. Kingston (In re Kingston), 2012 WL 632398 (Bankr. D. Idaho Feb. 27, 2012) (Pappas, J.) (Plaintiffs/creditors brought adversary proceeding against debtor/ defendant asserting nondischargeability claims under § 523(a)(2)(B) and (6). Debtor asserted counterclaims "seeking the following relief: (1) avoidance of a fraudulent transfer pursuant to § 548(a); (2) breach of an implied covenant of good faith and fair dealing; (3) a limit on Plaintiffs' ability to recover under applicable Nevada statutes; (4) an objection to Plaintiffs' creditors' claim in [debtor's] bankruptcy case; and (5) a declaratory judgment relating to a dispute between the parties over the language of a contractual guaranty." The debtor also sought "an adjustment or elimination of Plaintiffs' claim in his bankruptcy case". . . [as well as] "costs and damages arising as a result of his bankruptcy filing under the breach of an implied covenant of good faith and fair dealing claim." The court first determined that "all claims and counterclaims asserted in this adversary proceeding are core proceedings as defined in 28 U.S.C. § 157(b)(1) and (2)." The court next addressed the issue of whether it could "consistent with the Constitution, enter a final judgment as to any or all of Plaintiffs' claims and [debtor's] counterclaims." Concluding that it had the constitutional authority to finally adjudicate all of the parties' claims and counterclaims, the court reasoned: "The Supreme Court's recent decision in *Stern v. Marshall* . . . does not prohibit a bankruptcy court from entering a final judgment resolving issues under the Bankruptcy Code, which would be completely resolved in the bankruptcy process, or that flow from a federal statutory scheme. . . . Plaintiffs' exception-to-discharge claims are premised solely on provisions of the Code, will be completely resolved in the bankruptcy process, and the Court has constitutional authority to issue a final judgment in regards to those claims. . . . Bankruptcy courts may issue final judgments on a debtor's counterclaim against a creditor when the 'action at issue stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process.' *Stern*, 131 S. Ct. at 2618. In addition, a bankruptcy court may issue a final judgment, even where a counterclaim is based on state law, so long as resolution of the counterclaim is necessary to a determination of whether a creditor's claim should be allowed in a bankruptcy case. . . . All of [the debtor's] non-attorneys' fees counterclaims, even those based on state law, seek a determination of whether Plaintiffs' claim as a creditor should be allowed in his bankruptcy case, and, if so, the extent to which that claim should be allowed. Because the issues raised by [the debtor's] counterclaims are so integrally related to the bankruptcy claims allowance process, the Court has constitutional authority to issue a final judgment in each of the counterclaims. . . . Plaintiffs assert that, inasmuch as [the debtor's] breach of an implied duty of good faith and fair dealing counterclaim seeks to recover costs and damages, and not just a setoff against their claim, the Court does not have constitutional authority to enter a final judgment regarding the counterclaim. The Court's consideration of the costs and damages portion of that counterclaim, however, is not that easily isolated. Rather, the determination of the issues raised by that counterclaim are intricately melded with determining whether Plaintiffs' alleged breach of an implied duty of good faith should reduce or eliminate Plaintiffs' claims in the bankruptcy case. Because the resolution of the costs and damages issue is tied to the claim allowance issue, the Court has the constitutional authority to decide the costs and damages issue as well.").

City of Sioux City, Iowa v. Civic Partners Sioux City, LLC (In re Civic Partners Sioux City, LLC), 2012 WL 761361 (Bankr. N.D. Iowa Mar. 8, 2012) (Collins, J.) ("First National Bank, a creditor to Debtor Civic Partners Sioux City, LLC, filed a Petition for Money Judgment, Foreclosure of Real

Estate Mortgage and Foreclosure of Security Agreement against Debtor, in the Iowa District Court for Woodbury County. . . . [T]he City [of Sioux City, Iowa], also a creditor to Debtor, filed its own Petition at Law for Breach of Contract against Debtor, in the same court . . . . Debtor [then] filed a voluntary Chapter 11 petition . . . [and] immediately removed both the breach of contract action by the City and the foreclosure action by First National to th[e] [bankruptcy] [c]ourt as adversary proceedings in the underlying bankruptcy. Debtor had filed counter-claims in both actions. . . . Debtor is the developer and owner of an entertainment and shopping complex in Sioux City, Iowa. The complex was to be an anchor in the redevelopment of an area in Sioux City known as the Historic 4th Street Area. Debtor received its primary financing for the facility from First National, which holds a first security interest in the structure and some of the equipment. The City agreed to do some of the necessary work on surrounding infrastructure and support for the facility. In exchange, the City took a second security interest on much of First National's collateral. The City also received an agreement on tax assessment for the property. . . . Debtor's Counter–Claim alleged that the City had breached a contract between them by: (a) failing to design and construct the public improvements in and around Fourth Street; (b) failing to design and construct sidewalks and streets so that surface drainage flows away from and not into Debtor's buildings; and (c) failing to maintain common area. Debtor's notice of removal alleged that the action was a 'core proceeding.'" In the removed adversary proceeding in which First National asserted its foreclosure claims, the Debtor "asserted affirmative defenses of waiver and set-off against First National's claims, just as it did in the City's case. Debtor also made a counter-claim against First National for tortious interference with business relationships or expectancies derived from the property. Debtor asked that any award on the counter-claim be set-off against First National's claim against Debtor." In the adversary proceedings, the Debtor also asserted counterclaims for equitable subordination against both the City and First National. In ruling on the City's motion for abstention and remand, the bankruptcy court addressed the question of whether "the . . . adversaries involve core or non-core proceedings." Concluding that it had the constitutional authority to finally adjudicate both the claims and the counterclaims asserted in the adversary proceedings, which it classified as core, the court stated: "In order to make the determination between non-core and core matters, this Court, and most others, have routinely relied on the list of examples Congress provided in 28 U.S.C. § 157(b)(2) to safely determine if a matter was core and fell within the Court's dispositive authority. The Supreme Court's recent decision in *Stern v. Marshall* . . . noted an additional layer, or step, of analysis is now required in cases like the one pending before this Court. *Stern* . . . provided guidance on how broadly § 157(b)(2)(C) could reach without exceeding constitutional limits. *Stern* provided that guidance when it stated: 'The Bankruptcy Court lacked the constitutional authority to enter a final judgment on a state law counter-claim that is not resolved in the process of ruling on a creditor's proof of claim.' 131 S. Ct. at 2620. . . . Cases decided since *Stern v. Marshall* addressing issues, like the one before this Court, of whether a counter-claim by the bankruptcy estate is a core proceeding, have resolved the constitutional authority question by looking at 'whether the action stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process.' . . . Under this test, the Court believes that the counter-claims in both of the adversaries are core proceedings over which the Court has dispositive authority. . . . Here, both adversary plaintiffs (the City and First National) have made claims against Debtor and incorporated their state court complaints (that have become adversaries in this Court) in the proof of claims filed with the Court. To be clear, the proof of claim for both the City and First National is actually based on their claims in the Adversary

Complaint. This brings the case squarely under § 157(b)(2)(C), the same as in *Stern*. Unlike *Stern*, however, in this case the counter-claim made by Debtor is necessarily resolved in the process of the ruling on the creditor's proof of claim. Resolution of each of the parties' claims will necessarily require determination of the amount, if any, each of the creditors owes on Debtor's counter-claim. Debtor specifically alleged not only the counter-claim, but also the affirmative defense of set-off of any amount awarded in the counterclaim against any recovery either of the creditors made on their claim. . . . This case is factually unlike *Stern* in one very important respect. In *Stern*, the court specifically noted that the counter-claim required a court to make 'several factual, legal determinations that were not disposed of in passing on objections to Pierce's proof of claim for defamation, *which the Court denied almost a year earlier*.' 131 S. Ct. at 2617 (emphasis added). In *Stern*, there was no pending proof of claim. Thus, there was no right of set-off or reduction of the proof of claim wrapped up in, or to be resolved in, the counter-claim. Here, both the proof of claim of the City and First National are pending and have not been resolved. The counter-claims alleged in both cases specifically require the Court to determine whether there are off-sets or reductions in the allowable proof of claims of Plaintiffs. . . . This case also differs in a significant way from a recent decision of the Eighth Circuit Bankruptcy Appellate Panel after *Stern v. Marshall*. *In re Schmidt*, 453 B.R. 346 (B.A.P. 8th Cir. 2011). In *Schmidt*, the Bankruptcy Appellate Panel held that state court replevin actions removed by the debtor upon filing did not involve bankruptcy causes of action and were not core proceedings. *Id*. at 350–51. While the removed state court claims in that case are analogous to the claims here, the B.A.P. specifically noted in *Schmidt* that the creditors filing the replevin actions had not filed proof of claims against the bankruptcy estate. *Id*. at 351. The B.A.P. noted that if they had done so, the matters would have been core proceedings. *Id*. at 351. The fact that both creditors here filed their proof of claims, and based those claims on the claims in their adversary complaints, makes them core proceedings under *Schmidt*. The resolution of the counter-claims is also core because they go to the amount and validity of the claims asserted. 28 U.S.C. § 157(b)(2)(B) & (C). . . . The fact that Debtor has specifically asserted set-off of its counter-claim as an affirmative defense is further reason to treat these as core proceedings. . . . While the Bank filed the foreclosure claim, it also made a claim for a money judgment which serves as the basis for its proof of claim. Debtor has asserted a counter-claim which seeks to set-off the value of that counter-claim against any money judgment or entitlement to proof of claim. That alone brings the foreclosure proceeding and the intertwined counterclaim into the category of core proceedings. . . . Moreover, . . . Debtor in these cases has also alleged equitable subordination. The Bank, in particular, has specifically acknowledged the equitable subordination claim has been raised as part of Debtor's counter-claim in the adversary proceedings. Debtor has also raised equitable subordination as to the City. . . . [E]quitable subordination, set forth in § 510(c), can only be raised in a bankruptcy court. . . . [S]uch a claim, like others, specifically arising in and arising under title 11 is a unique creature of bankruptcy law. . . . In other words, the Court would have jurisdiction under the portion of *Stern v. Marshall* noting that a counter-claim which arises under the Bankruptcy Code would be a core proceeding.").

Trimco-Display, LLC v. Logic Supply, Inc., 2012 WL 733879 (D. Vt. Mar. 6, 2012) (Murtha, J.) (Logic Supply filed suit against Trimco in federal district court in Vermont, alleging that Trimco "ordered computer systems from it, some of which were delivered, and the balance of which were refused, causing damage to Logic Supply. . . . Trimco filed counterclaims against Logic Supply

alleging the computer systems were defective and not timely delivered causing damage to Trimco in the form of lost sales. Logic Supply dismissed its original action against Trimco, leaving only the counterclaims [pending]." Trimco moved to transfer venue of the case to the United States District Court for the District of New Jersey, which is the district in which its Chapter 7 bankruptcy case was pending. In the bankruptcy case, Logic Supply had filed a claim based on the same causes of action alleged in its complaint filed in the district court in Vermont but later withdrew its proof of claim. The district court denied Trimco's motion to transfer, reasoning: "As discussed in detail in *Stern v. Marshall* . . . Congress may not bypass Article III courts 'simply because a proceeding may have some bearing on a bankruptcy case.' In *Stern*, the Court decided Congress overstepped its authority in the Bankruptcy Act of 1984, holding the bankruptcy court, in that case, '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.' '[T]he question is whether the action at issue stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process.' Here, Trimco's counterclaims do not stem from the bankruptcy itself. Trimco alleges state law claims of breach of contract, fraudulent misrepresentation, and negligent misrepresentation in connection with dealings between the parties beginning more than a year prior to the bankruptcy. . . . Further, as Logic Supply has withdrawn its proof of claim in the bankruptcy proceeding, Trimco's counterclaims would not necessarily be resolved in the claims allowance process. Accordingly, a bankruptcy court could not render a final judgment on Trimco's state law counterclaim and, as 'the presumption is in favor of Art[icle] III courts,' *Stern*, 131 S. Ct. at 2518 (citation omitted), this Court declines to transfer venue of this case to the United States District Court for the District of New Jersey.").

Black, Davis & Shue Agency, Inc. v. Frontier Ins. Co. in Rehab. (In re Black, Davis & Shue Agency, Inc.), 2012 WL 360062 (Bankr. M.D. Pa. Feb. 2, 2012) (France, J.) (The receiver for an insurance carrier asserted proofs of claim against the debtor-insurance agency for damages as a result of the debtor's alleged breach of an agency agreement under which the carrier was to underwrite workers' compensation insurance and the debtor was to act as its agent. The receiver alleged that the debtor-agent failed to properly calculate premium amounts and failed to remit to the carrier premiums the debtor had collected. The debtor commenced an adversary proceeding that included state law counterclaims alleging that the carrier: (1) breached the agency agreement by failing to properly audit premium payments; (2) breached its duty of care in multiple ways; (3) breached its fiduciary duties to the debtor; (4) breached an implied covenant of good faith and fair dealing; (5) would be unjustly enriched by retaining benefits received from the debtor without compensation; and (6) was liable for defamation. The bankruptcy court stated that "the test prescribed by *Stern* for determining whether a bankruptcy court has constitutional authority to issue a final order adjudicating a debtor's state law counterclaim against a bankruptcy claimant is whether the counterclaim 'stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process.' In the matter before me, the counterclaims do not stem from the bankruptcy case. Therefore, the issue here is whether the counterclaims would necessarily be resolved in the claims allowance process. Before this determination can be made, however, a threshold question must be addressed. To meet the requirements of *Stern*, must a bankruptcy court be certain that a counterclaim necessarily will be resolved in the adjudication of the claim before it has an opportunity to hear evidence at trial? The phrase 'would necessarily be resolved in' has not been

construed directly by any court post-*Stern*. The phrase is substantially similar to the phrase 'actually and necessarily decided' that has been employed by some courts addressing issue preclusion. Issue preclusion may be applied if the issue in question was actually and necessarily decided in a prior proceeding. . . . Although the two phrases are similar, cases construing the term 'actually and necessarily decided' in the context of issue preclusion are of little utility here. A court considering whether issue preclusion applies in a case has the benefit of hindsight—it can read the findings and conclusions of the prior proceeding and determine with certainty whether an issue was decided or not. Application of the phrase 'would necessarily be resolved in the claims allowance process' requires the court to predict how the evidence will be developed to substantiate both the creditor's claim and the debtor's counterclaim, a more difficult undertaking if the pleadings do not make clear the connections between the two. A more apt analogy may be found in cases dealing with issues of federal question jurisdiction where a civil defendant seeks to remove a case from state to federal court based on the existence of a federal question in the complaint. . . . Resolving an issue of federal question jurisdiction requires a court to examine the existing pleadings and determine whether the record, when fully developed, will create a right to relief that necessarily depends on federal law. The phrase 'necessarily depends on' as used in federal question doctrine cases has been narrowly construed. . . . [A] claim 'necessarily depends on' a question of federal law only when *every* legal theory supporting the claim requires the resolution of a federal issue. . . . Applying [that analysis], if Debtor's counterclaim could be resolved without considering [the proof of] claim, then this Court has no constitutional authority to hear the counterclaim. . . . Therefore, I must first determine whether any of the counts asserted by Debtor in its counterclaim exist independently of Frontier's claims or, to the contrary, are inextricably tied to the claims." The court concluded that the counterclaims for breach of the agency agreement, breach of fiduciary duty, breach of the covenant of good faith and fair dealing and unjust enrichment would necessarily be resolved in the claims litigation process and that the court therefore had the constitutional authority to enter a final judgment on those counterclaims.).

Yellow Sign, Inc. v. Freeway Foods, Inc. (In re Freeway Foods of Greensboro, Inc.), 2012 WL 112192 (Bankr. M.D.N.C. Jan. 13, 2012) (Waldrep, J.) (After a thorough discussion of the history of the bankruptcy courts, the Bankruptcy Act of 1898, the Bankruptcy Reform Act of 1978, the Supreme Court's decision in *Marathon*, the Bankruptcy Amendments and Federal Judgeship Act of 1984 and the *Stern* decision, the bankruptcy court concluded that "*Stern* provides a two-prong test: 'the question is whether the action at issue stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process.' . . . If either prong of the test is met, then the bankruptcy court has constitutional authority to enter a final order. Conversely, if the action neither stems from the bankruptcy itself nor would necessarily be resolved in the claims allowance process, the bankruptcy court lacks constitutional authority to enter final judgment and may only submit proposed findings of fact and conclusions of law to the district court. . . . Waffle House filed a proof of claim in the amount of $165,023.17 for rent, royalties, bookkeeping, and several other categories of debts pursuant to certain contracts, principally a Franchise Agreement, between Waffle House and [the debtor]. [Yellow Sign, Inc.] ("YSI") filed a proof of claim in the amount of $5,399,880.58 for repayment [of amounts due under a Credit Agreement]. . . . [In its counterclaims, the debtor] seeks a declaratory judgment against YSI and Waffle House that the value of the restaurants it surrendered as part of YSI's alleged wrongful foreclosure exceeded $6.5 million and

that the foreclosure was a sham. [The debtor] alleges that it overpaid YSI and is entitled to a refund. . . . In order to allow the YSI and Waffle House claims, it will be necessary to determine (1) if [the debtor] breached the loan documents that gave rise to the alleged 'sham' foreclosure and (2) the value of the foreclosed assets. Therefore . . . the Court has the constitutional authority to enter a final judgment regarding this claim. . . . [The debtor also] seeks an order directing YSI and Waffle House to specifically perform an alleged settlement agreement involving the obligations of [the debtor] to YSI and Waffle House. . . . It is necessary to determine (1) whether such a settlement agreement existed and (2) whether YSI and Waffle House breached the settlement agreement in order to allow the YSI and Waffle House claims. . . . [The debtor] seeks an order directing YSI and Waffle House to specifically perform an alleged promise involving the obligations of [the debtor] to YSI and Waffle House pursuant to the . . . loan documents. . . . It is necessary to determine (1) whether such a promise was made, (2) whether [the debtor] reasonably relied upon it, and (3) whether [the debtor] is entitled to specific performance of the promise in order to allow the YSI and Waffle House claims . . . so the Court has the constitutional authority to enter a final judgment regarding this claim. . . . [The debtor] seeks damages from Waffle House for the alleged breach of an accounting services agreement. . . . [S]ince Waffle House filed a proof of claim for bookkeeping services, among other things, it will be necessary to determine if a default occurred under the accounting services agreement to allow the Waffle House claim. Therefore, pursuant to *Stern*, the Court has the constitutional authority to enter a final judgment regarding this claim. . . . [The debtor] seek[s] damages from YSI and Waffle House for the alleged conversion of a collateral securities account. . . . In order to allow the YSI and Waffle House claims, it will be necessary to determine (1) if [the debtor] breached the . . . loan documents and (2) whether YSI and Waffle House had the right to seize control of the account. Therefore, pursuant to *Stern*, the Court has the constitutional authority to enter a final judgment for [the debtor] regarding this claim.").

Oxford Expositions, LLC v. Questex Media Grp., LLC (In re Oxford Expositions, LLC), 2011 WL 4054872 (Bankr. N.D. Miss. Sept. 13, 2011) (Houston, J.) ("The Supreme Court [in *Stern*] has now instructed that state law counterclaims, which would not necessarily have to be resolved in the process of ruling on a creditor's proof of claim, are no longer core proceedings simply by virtue of being statutorily listed in § 157(b)(2)(C). . . . By implication, the converse should also be true: The *Stern* opinion does not abrogate the authority of a bankruptcy court to enter a judgment on a state law counterclaim that by necessity must be resolved in the process of ruling on the creditor's proof of claim. Consequently, where the two are inextricably tied, the counterclaim could conceivably still be a core proceeding.").

FNB Bank v. Carlton (In re Carlton), 2011 WL 3799885 (Bankr. N.D. Ala. Aug. 26, 2011) (Robinson, J.) ("The determination of the [debtor's] claims [under the Truth in Lending Act] involves the allowance of the Bank's claims—or more accurately, the reconsideration of their allowance pursuant to § 502(j). If the Debtor is entitled to recover on her TILA claims, then the Bank's allowed claims will be subject to set-off via reconsideration under § 502(j). . . . [B]ecause an adjudication of the TILA claims would be the basis for a reconsideration of the allowance of the Bank's claims via setoff, it appears this non-article III judge does in fact have the necessary subject matter jurisdiction to enter a final order on the TILA claims. *See Stern v. Marshall*, 131 S. Ct. 2594 (2011).").

2. BANKRUPTCY COURTS DO NOT HAVE THE CONSTITUTIONAL AUTHORITY TO FINALLY ADJUDICATE THE COUNTERCLAIM(S)

Ortiz v. Aurora Health Care, Inc. (In re Ortiz), 665 F.3d 906 (7th Cir. 2011) (Tinder, J.; Williams, J.; Gottschall, J.) ("Like the debtor's counterclaim in *Stern v. Marshall*, the debtors' claims [against a medical provider for disclosing the debtors' medical information in the provider's proofs of claim] are based on a state law that is independent of the federal bankruptcy law and not necessarily resolvable by a ruling on the creditor's proof of claim [for medical services]. . . . Although there is some *factual* overlap between the debtors' claims and [the medical provider's] proofs of claim, the bankruptcy judge was required to and did make several factual and legal determinations that were not disposed of in passing on objections to [the] proofs of claim. In granting [the medical provider's] summary judgment motion [on the counterclaims filed against it], the bankruptcy judge interpreted a Wisconsin state law to require proof of actual damages as an essential element of the debtors' claims and found that there was no genuine issue of material fact as to the lack of actual damages. Nothing about these decisions involved an adjudication of [the medical provider's] proofs of claim and there is no reason to believe that the process of adjudicating [the] proof[s] of claim would necessarily resolve the debtors' claims. *Stern* reaffirmed 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. The debtors' action owes its existence to Wisconsin state law and will not necessarily resolve in the claims allowance process. That the circumstances giving rise to the claims involved procedures in the debtors' bankruptcies is insufficient to bypass Article III's requirements.").

Sergent v. McKinstry, 2012 WL 967056 (E.D. Ky. Mar. 21, 2012) (Thapar, J.) (The trustee of the Chapter 11 debtor's unsecured creditors trust commenced an adversary proceeding asserting state law claims for breach of fiduciary duty and gross negligence against Harold Sergent, one of the founders of the debtor, who had filed proofs of claim for "expectation damages for the commissions and royalties that he would have earned in the future had Black Diamond not entered bankruptcy and rejected the Consulting & Sales Agreement and Royalty Agreement." According to the district court: "Although the Sergent Claims are core for purposes of [28 U.S.C. § 157(b)(2)], they cannot constitutionally be treated as core. . . . [The Supreme Court held in *Stern* that] [e]xercising [the judicial power of the United States] includes entering final judgment on a counterclaim that is a 'state law action independent of the federal bankruptcy law and not necessarily resolvable by a ruling on the creditor's proof of claim in bankruptcy.' . . . Will ruling on Sergent's Proofs of Claims necessarily resolve the Plaintiff's counterclaims for gross negligence and breach of fiduciary duty? For both counterclaims, the answer is no. . . . The [trustee] gives three reasons for disallowing Sergent's Claims: (1) as claims for the 'services of an insider of the debtor,' Sergent's Proofs of Claim 'exceed[ ] the reasonable value' of his services, *see* 11 U.S.C. § 502(b)(4); (2) Sergent's Proofs of Claim are subordinated to the claims of Black Diamond's more senior lenders, who have not yet been fully compensated, *see id*. § 510(a); and (3) that the Consulting & Sales Agreement and Royalty Agreement contain termination clauses that ended Sergent's rights to the commissions and royalties because Black Diamond's assets were transferred to another entity . . . . Even assuming that

the proofs of claim are disallowable on one of these three bases, a court could not enter judgment on either of . . . two [of the trustee's claims for relief] without deciding additional issues. On the Plaintiff's gross negligence claim, a court must determine if Sergent actually mismanaged Black Diamond, whether his mismanagement exhibited malice or willfulness beyond mere negligence, and the amount of any consequent losses to Black Diamond. Because the Plaintiff seeks punitive damages for her gross negligence claim, a court also has to determine whether Sergent's mismanagement rises to the level of wanton and reckless disregard for the lives, safety or property of others. Thus, ruling on the Proofs of Claim alone will not dispose of the gross negligence claim. Nor does ruling on the Proofs of Claim necessarily resolve the breach of fiduciary duty claim. The Plaintiff alleges that Sergent self-dealt by appearing on both sides of a transaction. To rule on this allegation, a court must determine: (1) whether Sergent was a fiduciary of Black Diamond; (2) whether he had personal financial interests in the Consulting & Sales Agreement and the Royalty Agreement; (3) whether the value of the commissions and royalties was reasonable or otherwise fair; and (4) if liable, the amount of money Sergent self-dealt. Even then, Sergent is not liable unless his self-dealing constitutes willful misconduct or wanton or reckless disregard for the best interests of the corporation and its shareholders—more than mere negligence. Ruling on Sergent's Proofs of Claim and breach of fiduciary duty counterclaim, may, of course, involve some overlap in a court's decisionmaking. But some overlap is not enough. *Stern*, 131 S. Ct. at 2617 (acknowledging that there was 'some overlap' between the debtor's counterclaim and the creditor's proof of claim, but nonetheless holding that 'there was never any reason to believe that the process of adjudicating [the creditor's] proof of claim would necessarily resolve [the debtor's] counterclaim'). . . . Even if a court were to disallow the Proofs of Claim because Sergent is an insider whose commissions and royalties were unreasonably valued, the Bankruptcy Court would still have to decide at least two additional issues to rule on the breach of fiduciary duty claim. First, the reasonableness inquiry is different. For the Proofs of Claim, the question is whether the commissions and royalties that Sergent expected to receive in the *future* were reasonable in light of his services. The breach of fiduciary duty claim, by contrast, requires considering whether the commissions and royalties that Sergent allegedly diverted to himself in the *past* were reasonable. A court would also have to decide a second issue to rule on the breach of fiduciary duty claim: whether Sergent acted with willful misconduct in entering the Consulting & Sales Agreement and the Royalty Agreement. This culpability determination plays no role in a court's allowance or disallowance of Sergent's Proofs of Claim. For example, a court could conceivably disallow Sergent's Proofs of Claim because the value of his services was unreasonable and simultaneously find Sergent not liable for breach of fiduciary duty because his conduct was not willful or grossly negligent. Consequently, ruling on Sergent's Proofs of Claim will not necessarily resolve either of the Sergent Claims for gross negligence and breach of fiduciary duty. Therefore, it is unconstitutional to treat the Sergent Claims as core proceedings for the purpose of final adjudication.").

Ameriwest Bank v. Starbuck Bancshares Inc. (In re AmericanWest Bancorporation), 2012 WL 394379 (E.D. Wash. Feb. 3, 2012) (Suko, J.) ("The Bankruptcy Court considered, and so must this Court, the recent decision of the United States Supreme Court [in *Stern*], which held that bankruptcy judges do not have Article III constitutional authority to enter final judgment under 28 U.S.C. § 157(b)(2)(C) on a debtor's state-law counterclaim which is not resolved in the process of ruling on the creditor's proof of claim. The Bankruptcy Court noted the existence of state law

counterclaims by AmericanWest Bank in the adversary proceeding at issue, requiring final judgment to be entered by this Court. . . . *Stern* appears to prevent the bankruptcy court from entering a final judgment on the counterclaim(s) at issue here . . . .").

Gecker v. Flynn (In re Emerald Casino, Inc.), 2012 WL 280724 (N.D. Ill. Jan. 31, 2012) (Pallmeyer, J.) (The Chapter 7 trustee commenced adversary proceedings asserting counterclaims against certain directors and officers who had filed proofs of claim in the debtor's bankruptcy case. "Just weeks ago [in *Ortiz*], our Court of Appeals described *Stern* as holding 'that Article III prohibited Congress from giving bankruptcy courts authority to adjudicate claims that went beyond the claims allowance process.' . . . [In this adversary proceeding, the trustee asserts counterclaims seeking] . . . compensatory and punitive damages for Defendants' alleged breach of fiduciary duty [and] state law breach of contract claim. . . . [T]his court agrees with Defendants that [the counterclaims for breach of contract and breach of fiduciary duty] are state law claims to augment the bankruptcy estate [and do not appear amendable to final adjudication by the bankruptcy court]. True, in deciding factual issues as part of the claims resolution process, [the bankruptcy court] will make determinations relevant to the Trustee's counterclaims as well. But that overlap may not be enough to escape the *Stern* holding; after all, if the [debtor in possession] in *Stern* prevailed in her claim of intentional interference, presumably the findings supporting that determination would have defeated Pierce Marshall's defamation claim, as truth is a defense to such a claim. That overlap evidently did not satisfy the Court, which observed, 'Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law.' . . . Though the Trustee would prefer to minimize its reach, [according to the Seventh Circuit's decision in *Ortiz*,] *Stern* is indeed 'quite significant,' in its conclusion that bankruptcy courts lack authority to finally adjudicate claims that go beyond the claims allowance process. The Trustee, of course, has far more experience with the claims allowance process than does this court, but she has not pressed the argument that her counterclaims are unaffected by *Stern*. For now, the court concludes that *Stern* precludes [the bankruptcy court's] entry of a final judgment on any state law counterclaim that would bring assets into the bankruptcy estate.").

Petroleum Eng'rs, Inc. v. Axis Onshore, L.P., 2011 WL 7083662 (M.D. La. Dec. 14, 2011) (Dalby, J.) ("The United States Supreme Court in *Stern* . . . held that the Bankruptcy Court lacked the authority to enter a final judgment on a state law counterclaim that would not necessarily be resolved by [the] process of ruling on a proof of claim filed in the bankruptcy proceeding. Axis [the debtor] acknowledged that the Bankruptcy Court would not have the authority to enter a final judgment on its counterclaim against PEI and Hamilton because the issues raised in its counterclaim go beyond the issues raised in PEI's proof of claim, which was later withdrawn, and Hamilton never filed a proof of claim in the Bankruptcy Proceeding. Thus, this case does not fall within the category of cases over which the Bankruptcy Court has the authority to enter a final judgment, and Axis seeks transfer to the United States District Court for the Northern District of Texas.").

Corwin v. Gorilla Cos. (In re Gorilla Cos.), 2011 WL 4005403 (D. Ariz., Sept. 8, 2011) (Campbell, J.) (The bankruptcy court had granted judgment in favor of the debtor, Gorilla Companies LLC, and against Robb and Jillian Corwin for almost $3 million on Gorilla's

counterclaims; the bankruptcy court also disallowed the proofs of claims asserted by the Corwins. On appeal, the Corwins argued that the bankruptcy court did not have the constitutional authority to enter final judgment on the counterclaims. They lost the appeal based in part on the district court's application of the Ninth Circuit's opinion in *Stern*, but filed a motion for rehearing after the Supreme Court issued its decision. "The Corwins argue that the Supreme Court opinion recently issued in *Stern* applied a new test when determining the reach of a bankruptcy court's jurisdiction over counterclaims to proofs of claim. The Corwins argue that [the Ninth Circuit] employed the 'necessary to resolve' test, holding that a counterclaim is core if the counterclaim is necessary or a prerequisite to resolving a proof of claim, and that [the Supreme Court in] *Stern* employed a 'necessarily resolves' test, whereby the relevant inquiry is 'whether ruling on a proof of claim resolves the counterclaim.'. . . The Court is not persuaded by Gorilla's contention that *Stern* upheld [the Ninth Circuit's decision] and therefore worked no change in the law. The tests in [the Supreme Court's decision in] *Stern* and [the Ninth Circuit's decision in *Stern*] are different, albeit in a nuanced fashion, and *Stern* merely upheld the judgment below rather than the entire rationale. . . . Nor is the Court persuaded by Gorilla's suggestion that the change was not significant. The Supreme Court itself suggested that the distinction was significant. *Stern*, 131 S. Ct. at 2620 (If our decision today does not change all that much, then why the fuss? Is there really a threat to the separation of powers where Congress has conferred the judicial power outside Article III only over certain counterclaims in bankruptcy? The short but emphatic answer is yes.). *Stern* found § 157(b)(2)(C) unconstitutional as applied to compulsory counterclaims that, although deemed core under the statute because they are necessary to resolve proofs of claim, are nonetheless not decided in resolving the proofs of claim.").

Siegel v. FDIC (In re IndyMac Bancorp Inc.), 2011 WL 2883012 (C.D. Cal. July 15, 2011) (Klausner, J.) (In its capacity as receiver for IndyMac Bank, the FDIC filed a proof of claim against the bankruptcy estate of IndyMac Bancorp, in which the FDIC asserted a claim for, among other things, $50 million of tax refunds. The Chapter 7 trustee brought an adversary proceeding against the FDIC objecting to the proof of claim and counterclaiming for declaratory relief on the issue of the ownership of the tax refunds. The FDIC sought to withdraw the reference to the bankruptcy court with respect to the trustee's counterclaim regarding the ownership issue; the trustee opposed the request. Following *Stern*, the district court held that the bankruptcy court would not have the authority to enter a final judgment on the trustee's counterclaim because "the ownership dispute arises out of . . . a prepetition state-law contract claim." Citing the bankruptcy court's familiarity with the case and other factors bearing on judicial efficiency, however, the district court declined to withdraw the reference.).

Tolliver v. Bank of Am. (In re Tolliver), 464 B.R. 720 (Bankr. E.D. Ky. 2012) (Wise, J.) (Mortgagees filed secured proof of claim for principal and outstanding fees and costs due on the Chapter 13 debtors' mortgage loan, and the debtor commenced an adversary proceeding asserting multiple counterclaims against the mortgagees for alleged violations of state and federal law. "The Supreme Court recognized in *Stern* that whether a bankruptcy court can enter a final judgment on a state-law counterclaim has to be decided on a case-by-case basis. And if after such analysis it is concluded that the counterclaim stems from the bankruptcy itself or that nothing remains for adjudication of the counterclaim once the bankruptcy judge resolves the claim objection, then the

counterclaim can be tried and finally resolved by the bankruptcy court. . . . In its simplest form, this proceeding is about an accounting of the Debtor's payments and the application of those payments by the Defendant. These types of commercial contractual analyses, everyday occurrences for bankruptcy courts, are a far cry from the debtor's counterclaim of tortious interference at issue in *Stern*. Thus, at first blush, the Court observes generally that the instant case does not present the 'one isolated respect' discussed in *Stern*. However, the cautionary admonition from the Supreme Court that *Stern* is to be interpreted narrowly does not relieve the Court of the obligation to determine whether each of Plaintiff's counterclaims may be 'necessarily resolved' in the claims objection process. The Court looks to the Supreme Court for guidance in how to make this determination—should the Court (a) examine the factual overlap of the claim resolution and the counterclaim? or (b) compare the legal elements which must be determined to resolve the claim and the counterclaim? or (c) compare the remedies sought by the counterclaim and the impact of same on the claims allowance process? or (d) some combination of the above? . . . In making [its] analysis in *Stern*, it appears to this Court that the Supreme Court looked not only to the factual overlap of the claim resolution and the counterclaim, but also the legal elements which must be determined to resolve the claim and the counterclaim and the remedies sought by the counterclaim and the impact on the claims allowance process. But it is not apparent from this analysis that any one of these issues is dispositive or that one issue is more important than another in comparing the factual overlap, the legal elements and the remedies. Because of this, this Court is left to conclude that while it should consider all these issues in making its case-by-case analysis, none are dispositive or carry more weight than the other. Against this background, the Court shall proceed by addressing whether each of the counterclaims alleged are necessarily resolved in the claims objection process. If not, then they shall be treated as proceedings which the Court may hear, but not finally adjudicate absent the parties' consent." After conducting the analysis described above, the bankruptcy court concluded that certain of the counterclaims (for violations of the Kentucky Consumer Protection Act and a Kentucky statute governing the legal rate of interest that a lender may charge) would not necessarily be resolved in the claims objection process and that the court therefore did not have the constitutional authority to enter a final judgment on those counterclaims.).

Berks Behavioral Health, LLC v. St. Joseph Reg'l Health Network (In re Berks Behavioral Health, LLC), 464 B.R. 684 (Bankr. E.D. Pa. 2012) (Raslavich, J.) (A provider of mental health care services commenced a bankruptcy case, and a regional health network that was both a lessor of nonresidential real property to the debtor and a party to a management services agreement with the debtor filed proofs of claim for over $1 million in lease rejection damages. The debtor commenced an adversary proceeding against the regional health network, alleging that the network breached the management services agreement. The bankruptcy court concluded that it lacked the constitutional authority to finally adjudicate the debtor's counterclaim: "It is the Debtor's position that unlike the counterclaim in *Stern*, the [debtor's counterclaim] will be disposed of when the Court allows (or disallows) the [health network's] claims. In the Court's view, however, Debtor has the premises reversed. *Stern* holds that resolving the claim objection must resolve the causes of action in the adversary proceeding for core jurisdiction to exist. That will not occur here. The Proofs of Claim seek unpaid rent; the adversary proceeding demands damages for alleged breach of a management agreement. [The Debtor's] demand goes well beyond the claim for unpaid rent.").

Reed v. Linehan (In re Soporex, Inc.), 463 B.R. 344 (Bankr. N.D. Tex. 2011) (Houser, J.) ("[A]ccording to the Supreme Court [in *Stern*], entering a final judgment with respect to the debtor's counterclaim, which would not have been decided by the allowance of the claimant's proof of claim, would be an impermissible exercise of the judicial power of the United States by a non-Article III tribunal. . . . [T]wo of the Defendants [in this adversary proceeding] filed proofs of claim in the [debtor's] case for amounts allegedly owed to them for unpaid compensation and benefits. . . . [T]he Trustee is [asserting] a [counter]claim . . . for breach of the fiduciary duties of due care and loyalty [and] a [counter]claim for corporate waste. In deciding whether [the Defendants] are owed unpaid compensation and benefits . . . as asserted in their proofs of claim, this Court will not be called upon to decide the Trustee's state law claims against them . . . . Thus, *Stern* is directly implicated and, according to the Supreme Court, this Court lacks constitutional authority to finally determine the [counterclaims for breach of the duties of care and loyalty and corporate waste].").

In re Olde Prairie Block Owner, LLC, 457 B.R. 692 (Bankr. N.D. Ill. 2011) (Schmetterer, J.) ("Counts II, IV, and V [of the Debtor's counterclaim] each required legal and factual determinations different from [the creditor's proof of claim for amounts due under a loan]. In Count II, Debtor's tortious interference counterclaim, it had to be determined whether [the creditor] took active and wrongful steps to prevent Debtor from settling a condemnation proceeding. Counts IV and V required a determination whether [the creditor] owed Debtor an extracontractual fiduciary duty or duty of reasonable care. These Counts do have some factual overlap with [the creditor's] claim: for example, whether [the creditor] took control of the condemnation proceeding and what it did (or did not do) if it took control. But determining enforceability of a contract in [the proof of claim] and Debtor's Counts I and III is different from deciding in Debtor's other Counts whether the parties owed each other duties under state law that were independent of the contract and whether those duties were breached. Like the counterclaim at issue in *Stern*, Counts II, IV, and V are state law claims that are not necessarily resolved in ruling on [the] proof of claim. Therefore, although those counterclaims were core proceedings under statute, 28 U.S.C. § 157(b)(2)(C), under the Constitution for reasons discussed in *Stern*, they must be treated as non-core proceedings and are not subject to final adjudication by a Bankruptcy Judge without consent of the parties.").

Burns v. Dennis (In re Se. Materials, Inc.), 2012 WL 1034322 (Bankr. M.D.N.C. Mar. 27, 2012) (Waldrep, J.) (Under *Stern*, "the question is whether the action at issue stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process. . . . If either prong of the test is met, then the bankruptcy court has constitutional authority to enter a final order. Conversely, if the action neither stems from the bankruptcy itself nor would necessarily be resolved in the claims allowance process, the bankruptcy court lacks constitutional authority to enter final judgment and may only submit proposed findings of fact and conclusions of law to the district court. . . . Tony and Betty filed proofs of claim [for monies they loaned the debtor], and [the Chapter 7 trustee's claims against them] for breach of fiduciary duty could be characterized as counterclaims by the estate against them. But even if that supposition is correct, these claims are state law tort claims, and they do not stem from the Bankruptcy Code. . . . It will not be necessary to determine whether Tony and/or Betty breached any fiduciary duties to the Debtor or its creditors in order to allow their proofs of claim. These claims do not meet either prong of the *Stern* test. The Court will issue proposed findings of fact and conclusions of law regarding these claims. . . . The Trustee also . . . seeks damages from Tony and Betty for unjust enrichment. This claim is a counterclaim by the estate

against the proofs of claim filed by Tony and Betty, and 28 U.S.C. § 157(b)(2)(C) provides that such counterclaims are core proceedings. The claim does not satisfy the first prong of the *Stern* test because it is a state law tort claim and does not stem from the Bankruptcy Code. The claim also fails the second prong of the *Stern* test because it is not necessary to determine whether Tony and Betty were unjustly enriched in order to allow or disallow their proofs of claim. The Court has no constitutional authority to enter a final order with regard to this claim and will submit proposed findings of fact and conclusions of law.").

Black, Davis & Shue Agency, Inc. v. Frontier Ins. Co. in Rehab. (In re Black, Davis & Shue Agency, Inc.), 2012 WL 360062 (Bankr. M.D. Pa. Feb. 2, 2012) (France, J.) (The receiver for an insurance carrier asserted proofs of claim against the debtor-insurance agency for damages as a result of the debtor's alleged breach of an agency agreement pursuant to which the carrier was to underwrite workers' compensation insurance and the debtor was to act as its agent. The receiver alleged that the debtor-agent failed to properly calculate premium amounts and failed to remit to the carrier premiums the debtor had collected. The debtor commenced an adversary proceeding that included state law counterclaims alleging that the carrier: (1) breached the agency agreement by failing to properly audit premium payments; (2) breached its duty of care in multiple ways; (3) breached its fiduciary duties to the debtor; (4) breached an implied covenant of good faith and fair dealing; (5) would be unjustly enriched by retaining benefits received from the debtor without compensation; and (6) was liable for defamation. "[T]he test prescribed by *Stern* for determining whether a bankruptcy court has constitutional authority to issue a final order adjudicating a debtor's state law counterclaim against a bankruptcy claimant is whether the counterclaim 'stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process.' In the matter before me, the counterclaims do not stem from the bankruptcy case. Therefore, the issue here is whether the counterclaims would necessarily be resolved in the claims allowance process." The bankruptcy court concluded that the counterclaim for defamation would not necessarily be resolved in the claims objection process and that the court therefore did not have the constitutional authority to enter a final judgment on that counterclaim.).

Yellow Sign, Inc. v. Freeway Foods, Inc. (In re Freeway Foods of Greensboro, Inc.), 2012 WL 112192 (Bankr. M.D.N.C. Jan. 13, 2012) (Waldrep, J.) ("*Stern* provides a two-prong test: 'the question is whether the action at issue stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process.' If either prong of the test is met, then the bankruptcy court has constitutional authority to enter a final order. Conversely, if the action neither stems from the bankruptcy itself nor would necessarily be resolved in the claims allowance process, the bankruptcy court lacks constitutional authority to enter final judgment and may only submit proposed findings of fact and conclusions of law to the district court. . . . Waffle House filed a proof of claim in the amount of $165,023.17 for rent, royalties, bookkeeping, and several other categories of debts pursuant to certain contracts, principally a Franchise Agreement, between Waffle House and [the debtor]. [Yellow Sign, Inc.] ("YSI") filed a proof of claim in the amount of $5,399,880.58 for repayment [of amounts due under a Credit Agreement]." The debtor asserted counterclaims against YSI and Waffle House, seeking a declaratory judgment that the foreclosure sale conducted by YSI and/or Waffle House was commercially unreasonable in violation of Georgia law; that the foreclosure sale conducted by YSI and/or Waffle House was not conducted in good faith and was therefore wrongful; that YSI and Waffle House were unjustly enriched; that YSI and Waffle House

[tortiously] interfered with the business relationship between the debtor and its landlords; that YSI and Waffle House breached the covenant of good faith and fair dealing and committed fraud in dealing with the debtor; that the actions of YSI and Waffle House constituted an unfair trade practice; that they conspired to wrongfully take control of the franchises of the debtor; that the corporate form of YSI and Waffle House should be disregarded because they were alter egos of each other; and that YSI and Waffle House was liable for attorneys' fees and expenses for bad faith and litigiousness. "In order to allow the YSI and Waffle House claims, it will not be necessary to determine" these counterclaims. . . . However, [the parties] have consented, so the Court has the constitutional authority to enter a final judgment regarding [these counterclaims].").

Fort v. Sun Trust Bank (In re Int'l Payment Grp., Inc.), 2011 WL 5330783 (Bankr. D.S.C. Nov. 3, 2011) (Burris, J.) ("Debtor was in the business of foreign currency exchange and Defendant provided financial services for its business. . . . Defendant filed two proofs of claim in the bankruptcy case. . . . stating claims for indemnity in the amount of $30,271.57 . . . . There has been no objection to allowance of these claims. . . . [A]fter the claims against the estate were filed, [the Chapter 7 trustee of the debtor's estate] commenced the above-captioned adversary proceeding in this Court. The trustee asserts state law causes of action unrelated to or far beyond the scope of Defendant's claims against the estate. The causes of action asserted include: (1) breach of contract accompanied by a fraudulent act; (2) aiding and abetting a breach of fiduciary duty; (3) negligence and gross negligence; (4) breach of fiduciary duty; (5) tortious interference with contractual relations; (6) violation of the South Carolina Unfair Trade Practices Act . . .; (7) violation of the South Carolina Uniform Commercial Code . . . ; and (8) conversion. The trustee seeks approximately $40 million in damages. In response, Defendant asserted forty-three separately named defenses, none based on bankruptcy law. Neither the Complaint nor the Answer mentions the Defendant's claims against the estate. . . . The trustee and Defendant here agree that, like the *Stern* case, resolution of Defendant's claim against the estate will not result in a resolution of the disputes raised in this lawsuit. It also appears that the claims against Defendant here dwarf those involved in any dispute that may arise over allowance of the proof of claim. Also like *Stern*, the trustee's causes of action consist of state law claims of the bankruptcy estate against a creditor who filed proofs of claim against the estate. Although the trustee attempts to distinguish this matter from *Stern* by pointing out that the trustee's actions against Defendant are made directly in a Complaint and are, therefore, not counterclaims to a proof of claim, courts have held that such actions are in the nature of a counterclaim when asserted against parties who have filed proofs of claim in the bankruptcy case. . . . Even with [this and other attempts by the trustee] to distinguish this matter from *Stern*, the facts are quite similar, and Defendant raises valid questions about the referral of the lawsuit to a non-Article III court. [J]ust like *Stern*, the causes of action asserted by the trustee are only remotely related, and likely unrelated, to Defendant's proofs of claim against the estate and there is no reason to believe that 'the process of adjudicating [the] proof[s] of claim would necessarily resolve [the estate's] counterclaim.'").

In re Mandel, 2011 WL 4599969 (Bankr. E.D. Tex. Sept. 30, 2011) (Rhoades, J.) (Former friends who "imagined their [company] . . . could rival Google and make everyone connected with [it] incredibly rich . . . fell out shortly after forming [the company]." The friend who ultimately became the debtor "formed a new company to develop internet search technology that appeared very familiar" to the other individuals, who filed proofs of claim against the debtor for "(i) theft or

misappropriation of trade secrets; (ii) breach of contract . . .; (iii) breach of fiduciary duty; (iv) fraud and fraudulent inducement; and (v) oppression of shareholder rights. . . . [The debtor] assert[ed] counterclaims . . . for (i) breach of fiduciary duty, (ii) tortious interference with . . . prospective business relationships; (iii) conversion and civil theft, (iv) breach of contract, (v) legal malpractice, (vi) civil conspiracy, and (vii) copyright infringement. . . . The Supreme Court's analysis in *Stern* limits this Court's constitutional authority to determine counterclaims to matters that must necessarily be decided in ruling on a creditor's proof of claim. Several of the counterclaims asserted by [the debtor] fall outside of this new jurisdictional boundary. . . . [The debtor's] counterclaims against [one of the claimants, who was an attorney] for legal malpractice and breach of contract relate to [the claimant's] performance of his duties as general counsel for [the company the friends had formed]. In light of *Stern*, the Court lacks the constitutional authority to decide these claims. Second, the Court need not reach [the Debtor's counterclaim] for copyright infringement in order to determine the allowability of the [proofs of claim] at issue and, therefore, the Court lacks the constitutional authority to decide that claim as well.").

McKinstry v. Sergent (In re Black Diamond Mining Co.), 2011 WL 4433624 (Bankr. E.D. Ky. Sept. 21, 2011) (Scott, J.) ("Sergent filed five proofs of claim . . . for alleged 'money loaned' to Black Diamond. . . . Trustee McKinstry [has filed a complaint] against Sergent [asserting] state law claims of breach of fiduciary duty, willful misconduct and gross negligence against Sergent . . . . [T]his Court cannot constitutionally treat the state law claims against Sergent as 'core' proceedings. . . . In [*Stern*] the Supreme Court held that a counterclaim can be considered core on a constitutional basis only if it would 'necessarily be resolved in the claims allowance process.' The [trustee's claims against Sergent] will not 'necessarily be resolved' by the process of ruling on Sergent's proofs of claim. Trustee McKinstry's objections to the [proofs of claim] raise several legal arguments . . . that this Court may be able to resolve as a matter of law or through a limited amount of fact-finding without ruling on the breach of fiduciary duty and other allegations of misconduct underlying [her counterclaims against Sergent]. Accordingly, just as in [*Stern*], this Court cannot constitutionally assert core jurisdiction over the [the trustee's claims against Sergent] under 28 U.S.C. § 157(b)(2)(C).").

Sw. Sports Ctr., Inc. v. Kleem (In re Sw. Sports Ctr., Inc.), 2011 WL 4002559 (Bankr. N.D. Ohio Sept. 6, 2011) (Harris, J.) (An individual obtained a judgment and judgment lien on account of amounts owed him under an agreement requiring redemption of his stock for a price based in part on the appraised value of the real estate, which was arrived at by averaging appraisals submitted by the parties and a neutral third party. The judgment debtor filed a Chapter 11 case, in which the holder of the judgment filed a proof of claim. The debtor commenced an adversary proceeding against the claimant. "In its complaint [against the claimant] the debtor listed seven counts: Count I, that [the claimant's appraiser] provided the court with a false and misleading appraisal and over-inflated the appraisal value of the real estate; Count II, that [the claimant and his appraiser] conspired to provide a false and inflated valuation of the real estate; Count III, that defendants engaged in a pattern of fraud in order to obtain recovery from the debtor; Count IV, that [the claimant's appraiser] was negligent in preparing the appraisal of the real property; Count V, that the debtor was entitled to punitive damages; Count VI, that because the debtor did not owe [the claimant] any money, his judgment lien should be avoided; and Count VII, that because the debtor did not owe [the claimant] any money, the debtor's objection to [the] proof of claim should be

sustained. . . . The debtor's claims in its Adversary Proceeding are said by the debtor to be counterclaims to [the] proof of claim and as such are considered 'core proceedings' pursuant to § 157(b)(2)(C) under *Stern*. However, because the debtor's Adversary Proceeding is based on Ohio state law, *Stern* also holds that this Court lacks the constitutional authority to enter a final judgment on a counterclaim when it is based on a state's common law and is otherwise independent of federal bankruptcy law. . . . The Bankruptcy Court's ruling on [the] proof of claim [based on the prepetition judgment] will not resolve the debtor's counterclaim[s]. Thus this Court has no authority under the U.S. Constitution to enter a final judgment. In other words, after *Stern*, if this matter were tried in bankruptcy court, the undersigned judge could only issue proposed findings of fact and conclusions of law, with *de novo* review by a United States District Judge. Alternatively, one or more of the parties could seek withdrawal of the reference pursuant to 28 U.S.C. § 157(d) and Rule 5011(a) and have the matter heard entirely before a United States District Judge. Under these circumstances, abstention is the proper course.").

Jones v. Mandel (In re Mandel), 2011 WL 2728415 (Bankr. E.D. Tex. July 12, 2011) (Rhoades, J.) (A designer and builder of residential homes filed a proof of claim for amounts the debtors owed him for his work on certain of the debtors' properties. In a counterclaim, the debtors asserted "that they paid for an exclusive, copyrighted set of plans with respect to [one of the properties] . . . that [the claimaint] improperly used the plans for [that] property to build another, virtually identical home [and that they were entitled to] restitution of the amounts they paid . . . relating to [the] designs for [that] property. In light of the recent opinion by the Supreme Court in *Stern v. Marshall* . . . the Court does not have the constitutional authority to decide this counterclaim—at least not in the absence of the parties' express consent.").

D. ORDERS IN RESPECT TO OBTAINING CREDIT: 28 U.S.C. § 157(b)(2)(D)

E. ORDERS TO TURN OVER PROPERTY OF THE ESTATE: 28 U.S.C. § 157(b)(2)(E)

Badami v. Sears (In re AFY, Inc.), 461 B.R. 541 (B.A.P. 8th Cir. 2012) (Kressel, J.; Schermer, J.; Venters, J.) ("[T]he first question in determining a bankruptcy judge's authority to enter a final order is to see if Congress has granted the court the statutory authority to do so by designating it a core proceeding. This case constitutes a core proceeding under several sections of § 157. The proceeding is a dispute between the representatives of two bankruptcy estates—Badami is the trustee appointed in the case of AFY, Inc. and Robert A. Sears is the debtor-in-possession in his Chapter 11 case with all of the rights and duties of a trustee. . . . It is a request for an order to turn over property of the estate. . . . So the real question raised, although not correctly posed by Sears, is whether or not Congress' grant of authority to bankruptcy judges under any or all these core subdivisions is unconstitutional as violative of Article III. . . . In *Stern v. Marshall*, the Supreme Court found that although 28 U.S.C. § 157(b)(2)(C) designated as a core proceeding 'counterclaims by the estate against persons filing claims against the estate,' it was unconstitutional for a bankruptcy judge to determine such counterclaims, at least to the extent that the counterclaim arose under state or other nonbankruptcy law. That section is not implicated here. While there has been

an enormous amount of discussion regarding the implications of *Stern v. Marshall*, the Supreme Court itself has cautioned that its holding is a narrow one, affecting only this one small part of the bankruptcy judges' authority. Unless and until the Supreme Court visits other provisions of Section 157(b)(2), we take the Supreme Court at its word and hold that the balance of the authority granted to bankruptcy judges by Congress in 28 U.S.C. § 157(b)(2) is constitutional.").

In re Fairfield Sentry Ltd., 458 B.R. 665 (S.D.N.Y. 2011) (Preska, J.) ("Although asserted in several state- and foreign-law guises, all of the claims involved in these cases rest on the same essential theory: redemptions from the Funds prior to the discovery of Madoff's fraud—and prior to the commencement of the BVI liquidation proceedings—were based on inaccurate and falsely inflated calculations of the Funds' [net asset value] because of the fraud. Therefore, the theory goes, portions of these redemption payments should be clawed back or rescinded for the benefit of the Funds' now-bankrupt estates because the redemption payments were mistakenly too high. . . . The claims are not 'orders to turn over property of the estate,' because an 'action for turnover of property is core when its purpose is the collection rather than the creation, recognition or liquidation of a matured debt. Numerous courts have therefore held that an action is non-core when property which is the subject of a significant dispute between the parties is sought to be recovered through a turnover action.' . . . These actions are subject to significant dispute, resolution of which will determine whether the funds redeemed are in fact property of the Funds' estates.").

In re Crescent Res., LLC, 457 B.R. 506 (Bankr. W.D. Tex. 2011) (Gargotta, J.) ("This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (E) [relating to turnover], and (H) on which this Court can enter a final judgment. . . . [T]he Court . . . is of the opinion, at this point, that *Stern* . . . should be applied narrowly. The facts and issues in *Stern* do not relate to matters under consideration of the Court. The Court therefore finds that *Stern* does not apply to this case.").

Shaia v. Taylor (In re Connelly), 2012 WL 1098431 (Bankr. E.D. Va. Mar. 30, 2012) (Huennekens, J.) ("[T]he Trustee initiated this Adversary Proceeding by filing a complaint under § 542 of the Bankruptcy Code seeking to recover payment of a promissory note dated December 6, 2007, made payable to bearer by J. Brian Taylor and Mark G. Taylor (the "Taylors" or the "Defendants") in the original principal amount of $187,066.68 (the "Taylor Note"). . . . This Adversary Proceeding seeks turnover of estate property under § 542(b) of the Bankruptcy Code which is a core proceeding under 28 U.S.C. § 157(b)(2)(E). Neither of these provisions was impacted by the Supreme Court's narrow holding in *Stern*. The critical factor in *Stern* that prevented the bankruptcy court from entering a final order or judgment was the lack of a sufficient nexus between the counterclaim asserted by Vickie and the bankruptcy case. . . . The Supreme Court recognized this distinction in its two-prong test to determine whether a bankruptcy court has Constitutional authority to issue a final judgment in a core proceeding under 28 U.S.C. § 157(b)(2)(C), stating that '[t]he question is whether the action at issue stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process.' . . . While this Adversary Proceeding does not stem from the bankruptcy itself, it must necessarily be resolved in the process of allowing the Defendants' proofs of claim. The amount stated in each of the Defendants' proof of claim is currently listed as 'unknown at this time' because the claims are asserted as a right of setoff against the Defendants' liability on the Taylor Note. Until the dispute over the Defendants' liability on the Taylor Note has been resolved, the amount of Defendants' allowed claims (if any)

cannot be determined. This Adversary Proceeding falls squarely within the second prong of the test set forth in *Stern* for counterclaims brought under 28 U .S.C. § 157(b)(2)(C). The Court, therefore, has the constitutional authority in addition to the statutory authority to adjudicate this matter and to enter a final decision in this Adversary Proceeding.").

Burns v. Dennis (In re Se. Materials, Inc.), 2012 WL 1034322 (Bankr. M.D.N.C. Mar. 27, 2012) (Waldrep, J.) (Under *Stern*, "the question is whether the action at issue stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process. . . . If either prong of the test is met, then the bankruptcy court has constitutional authority to enter a final order. Conversely, if the action neither stems from the bankruptcy itself nor would necessarily be resolved in the claims allowance process, the bankruptcy court lacks constitutional authority to enter final judgment and may only submit proposed findings of fact and conclusions of law to the district court. Tony, Betty, and Chris filed proofs of claim [for monies loaned] against the Debtor. . . . Having determined that the [Chapter 7 trustee's turnover] claim is core under the statute, the Court must next determine if these actions 'stem[ ] from the bankruptcy itself or would necessarily be resolved in the claims allowance process.' Since *Stern*, at least one court has found a turnover action to be a bankruptcy cause of action. . . . This conclusion is supported by the fact that actions for turnover occur exclusively under the Bankruptcy Code. . . . Pursuant to *Stern*, the Court has the constitutional authority to enter a final judgment regarding turnover proceedings. In addition, because Tony and Betty have both filed proofs of claim for 'monies loaned' by them to the Debtor, and the Trustee asserts that they owe money to the Debtor, the Court concludes that it will be necessary to resolve the Trustee's claims in the process of allowing or disallowing Tony's and Betty's proofs of claim. Both prongs of the *Stern* test have been met. The Court may enter final orders with regard to these claims.").

Rentas v. Claudio (In re Garcia), 2012 WL 1021449 (Bankr. D.P.R. Mar. 26, 2012) (Lamoutte, J.) ("*Stern v. Marshall* held that bankruptcy courts, as a constitutional matter, cannot enter a final judgment on a counterclaim that did not arise under Title 11 or in a case under Title 11 arising out of state law with no link to federal law or regulations, even when 28 U.S.C. § 157(b)(2)(C) grants such authority. . . . [I]n its lengthy analysis to determine when bankruptcy courts can issue final judgments, the [*Stern*] Court reasoned 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.' . . . This does not mean that the bankruptcy courts are completely devoid of jurisdiction to hear such matters. . . . It simply means that if the bankruptcy court entertains them, it may only address them by submitting proposed findings of fact and conclusions of law (unless the parties otherwise expressly consent in writing). . . . [W]hen considering their authority to issue final orders, bankruptcy courts must first consider whether they have the statutory authority to issue a final order in a matter before them. . . . [*Stern*] further mandates that when doing so, a bankruptcy court must first consider whether it has the necessary statutory authority and if it does it must then consider if it has the constitutional authority to finally adjudicate the dispute. The decision in *Central Va. Cmty. College v. Katz*, 546 U.S. 356, 363–364, 126 S. Ct. 990, 163 L. Ed. 2d 945 (2006), provides the following guidance as to what constitutes a 'fundamental bankruptcy matter': 'Critical features of every bankruptcy proceeding are the exercise of exclusive jurisdiction over all of the debtor's property, the equitable distribution of that property among the debtor's creditors, and the ultimate

discharge that gives the debtor a 'fresh start' by releasing him, her, or it from further liability for old debts.' The instant case does not involve a counterclaim nor is it solely based on state law: it involves a request by the Trustee for the turnover of property that allegedly belongs to the bankruptcy estate under 11 U.S.C. §§ 541 & 542. . . . [T]hat is one of the most fundamental core procedures in bankruptcy cases that stems from federal law. The *Stern* doctrine does not impair this court's subject-matter jurisdiction over property of the bankruptcy estate. . . . This court finds that a turnover action is a fundamental bankruptcy matter that 'stems from the bankruptcy itself' and 'would necessarily be resolved in the claims allowance process' because it intricately hinges on the proper constitution of the bankruptcy estate. *Stern v. Marshall*, 131 S. Ct. at 2618. . . . Therefore, this court has subject-matter jurisdiction to entertain the instant core adversary proceeding and can ultimately issue a final determination on its merits in accordance with *Stern v. Marshall*.").

In re Hernandez, 2012 WL 952633 (Bankr. S.D. Cal. Mar. 19, 2012) (Mann, J.) ("Whether this Court has constitutional authority to enter findings of fact and conclusions of law in this motion for reconsideration brought pursuant to Bankruptcy Rule 9013 based upon *Stern v. Marshall* . . . is an issue that the Court will address *sua sponte*. . . . The Court believes it has such authority . . . . This [m]otion involving turnover of property of the estate is . . . one that stems from the bankruptcy itself . . . .").

In re McCrory, 2011 WL 4005455 (Bankr. N.D. Ohio Sept. 8, 2011) (Whipple, J.) ("Proceedings involving the turnover of property of the bankruptcy estate are core proceedings that the court may hear and determine. . . . The matter at issue is one that 'stems from the bankruptcy itself' that is within this court's jurisdiction to decide [under *Stern*].").

Badami v. Sears (In re AFY, Inc.), 2011 WL 3812598 (Bankr. D. Neb. Aug. 18, 2011) (Saladino, J.) ("[*Stern*] made a point of noting that Congress exceeded its constitutional authority only in 'one isolated respect.' In particular, no other subsection of 28 U.S.C. § 157(b)(2) was found to be unconstitutional. This adversary proceeding was filed to identify and force the turnover of certain property alleged to be property of the debtor's bankruptcy estate, which constitutes a core proceeding under 28 U.S.C. § 157(b)(2)(E). Further, the trustee's right to bring a turnover proceeding is created by Title 11. 11 U.S.C. § 542. This court is not deprived of subject matter jurisdiction simply because resolution of the lawsuit may require the application of state law.").

F. PROCEEDINGS TO DETERMINE, AVOID OR RECOVER PREFERENCES: 28 U.S.C. § 157(b)(2)(F)

1. BANKRUPTCY COURTS HAVE THE CONSTITUTIONAL AUTHORITY TO FINALLY ADJUDICATE THE PREFERENCE ACTION

Official Comm. of Unsecured Creditors of Appalachian Fuels, LLC v. Energy Coal Res., Inc. (In re Appalachian Fuels, LLC, 2012 WL 1344984 (E.D. Ky. Apr. 18, 2012) (Bunning, J.) ("The question now becomes whether the holding of *Stern* renders unconstitutional fraudulent conveyance and preference proceedings statutorily defined by Congress as core. First, it should be noted that

there is a disagreement among courts regarding the extent to which *Stern* will impact the bankruptcy court's authority to enter final orders and judgments in other core proceedings. . . . In its decision, the Supreme Court clearly intended to, and did in fact, limit the application of its holding. . . . Notably, the Court did not find that the bankruptcy court lacked constitutional authority to enter a final judgment on all state law counterclaims. . . . Further, the Court emphasized that its holding would not 'meaningfully change[ ] the division of labor' under § 157. *Id*. Most importantly, nothing in the Supreme Court's opinion actually limits a bankruptcy court's authority to adjudicate the other 'core proceedings' identified in section 157(b)(2). . . . Indeed, one bankruptcy court has stated that '[t]o broadly apply *Stern's* holding is to create a mountain out of a mole hill.' *In re USDigital, Inc.*, 461 B.R. 276, 292 (Bankr. D. Del. 2011). . . . Despite the Supreme Court's intention to limit the application of its holding, several courts have expressed uncertainty about *Stern's* effect on the bankruptcy court's authority to enter final orders and judgments in other statutorily defined core proceedings. . . . Arguably, the Supreme Court's reliance on *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989) has called into question whether bankruptcy courts can continue to enter final orders and judgments in fraudulent conveyance claims. In *Stern*, the Court explained that *Granfinanciera's* 'distinction between actions that seek "to augment the bankruptcy estate" and those that seek "a pro rata share of the bankruptcy res" reaffirms that Congress may not bypass Article III simply because a proceeding may have some bearing on a bankruptcy case. . . .' *Stern*, 131 S. Ct. at 2618 (quoting *Granfinanciera*, 492 U.S. at 56) (internal citations omitted) (emphasis in the original)). Moreover, the Court stressed that the 'question is whether the action at issue stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process.' *Id*. Many courts have viewed this language as a new limit on the Court's constitutional authority to finally resolve other 'core' proceedings, such as fraudulent conveyance or preference actions. . . . However, despite the reliance on *Granfinanciera* in *Stern*, the fact still remains that the sole issue in *Granfinanciera* was whether defendants who had not filed a proof of claim against the bankruptcy estate had a Seventh Amendment jury trial right in light of statutory authority that allowed a non-Article III tribunal to adjudicate the claims against them. *Granfinanciera*, 492 U.S. at 50 ("We are not obliged to decide today whether bankruptcy courts may conduct jury trials in fraudulent conveyance suits brought by a trustee against a person who has not entered a claim against the estate, either in the rare procedural posture of this case or under the current statutory scheme. Nor need we decide whether, if Congress has authorized bankruptcy courts to hold jury trials in such actions, that authorization comports with Article III when non-Article III judges preside over the actions subject to review in, or withdrawal by, the district courts. . . . The sole issue before us is whether the Seventh Amendment confers on petitioners a right to a jury trial in the face of Congress' decision to allow a non-Article III tribunal to adjudicate the claims against them." (internal citations omitted)). Furthermore, *Granfinanciera* has been the law for over twenty years, and it was not until after the Court's decision in *Stern* that the bankruptcy court's authority to enter final orders and judgments in fraudulent conveyance or preference actions has been challenged. . . . Taking the specific facts and issues in *Stern* and *Granfinanciera* into consideration, in addition to the Supreme Court's deliberate attempt to limit the scope of its holdings in both cases, this Court cannot extend the holding of *Stern* to fraudulent conveyance and preference actions. The statutorily core claim examined in *Stern* was a counterclaim based on state tort law and was 'in no way derived from or dependent upon bankruptcy law.' *See Stern*, 131 S. Ct. at 2618. In the present proceeding, Plaintiff's fraudulent conveyance and preference claims 'arise under' the Bankruptcy Code, or at least, 'arise in' a bankruptcy case. *See* 11 U.S.C. §§ 544, 547, 548, 550. The *Stern* decision itself

acknowledged that whether a matter is core requires a consideration of 'whether the action at issue stems from the bankruptcy itself' or is 'derived from or dependent upon bankruptcy law. . . .' *Stern*, 131 S. Ct. at 2618. Moreover, but for the bankruptcy, Plaintiff could not assert the fraudulent conveyance and preference claims against Defendants. . . . Accordingly, Plaintiff's fraudulent transfer and preference claims are statutorily defined core claims to which the holding of *Stern* does not apply, and therefore the Bankruptcy Court has authority to enter final orders and judgments on such claims pursuant to 28 U.S.C. § 157(b)(1). . . . Next, [certain] Defendants . . . argue that despite the fact that they have all filed proofs of claim against the Debtor's estate, it would be unconstitutional for the Bankruptcy Court to enter final orders and judgments against them. *Katchen v. Landy*, 382 U.S. 323 (1966) and *Langenkamp v. Culp*, 498 U.S. 42 (1990) held that bankruptcy courts have the power to rule, without a jury trial, on avoidable preference claims against creditors who have filed proofs of claims against the bankruptcy estate. These Defendants assert that *Katchen* and *Langenkamp* should be reconsidered in light of the fact that they rest on a faulty, previously unchallenged presumption, namely that bankruptcy courts have constitutional authority to rule on the validity of proofs of claim in the first place. It appears that no party has asked the Supreme Court to consider whether non-Article III bankruptcy courts are constitutionally permitted to determine whether to allow creditor's claims. Defendants contend that this is supported by footnote 7 from *Stern* and footnote 11 from *Granfinanciera*, where the Court noted that the parties to those cases had not requested reconsideration of the public rights framework for bankruptcy. *See Stern*, 131 S. Ct. at 2614 n.7 ("We noted that we did not mean to 'suggest that the restructuring of debtor-creditor relations is in fact a public right.'" (quoting *Granfinanciera*, 492 U.S. at 56 n.11)). For these reasons, Defendants ask this Court to overrule *Katchen* and *Langenkamp* or distinguish them on the grounds that the parties therein did not contest the bankruptcy court's authority to rule on the validity of a proof of claim. The Court refuses to do so. . . . Defendants are in essence asking the Court to consider the entire constitutionality of 28 U.S.C. § 157 and whether bankruptcy judges have the authority to not only adjudicate some but all bankruptcy matters. Unless and until the Supreme Court rules that § 157 is unconstitutional, this Court will continue to adhere to its principles. Since [the] Defendants [asserting this argument] have all filed proofs of claim against the bankruptcy estate, Plaintiff's fraudulent conveyance and preferential transfer claims arise out of the claims allowance process, and therefore the Bankruptcy Court has authority to enter final orders and judgments on such claims.").

West v. Freedom Med., Inc. (In re Apex Long Term Acute Care-Katy, L.P.), 465 B.R. 452 (Bankr. S.D. Tex. 2011) (Isgur, J.) (The trustee under the debtor's confirmed Chapter 11 plan commenced adversary proceedings seeking to avoid preferential transfers made to defendants who either had filed proofs of claim or held claims scheduled by the debtor and whose claims the trustee sought to disallow under § 502(d) of the Bankruptcy Code. The bankruptcy court approved a settlement of three of the adversary proceedings, and the trustee sought to dismiss those adversary proceedings with prejudice. The trustee requested the entry of a default judgment in the fourth adversary proceeding. After noting that dismissals with prejudice and default judgments are a final adjudication on the merits, the bankruptcy court considered whether it had the constitutional authority to finally adjudicate the preference claims. The court concluded that it did: "Preferential transfers are among the most difficult types of claims to classify. On the one hand, the right to avoid preferential transfers is established by the Bankruptcy Code itself, not by state law. The recovery of preferences has long been considered an integral part of the bankruptcy process. . . . Conversely,

[certain] Supreme Court precedent seems to indicate that the public rights doctrine—the major exception allowing non-Article III tribunals to adjudicate disputes—does not apply to preferential transfer actions when the defendant has not filed a proof of claim in the bankruptcy case. . . . [Certain Supreme Court decisions, including *Granfinanciera*, *Katchen* and *Langenkamp*], taken together, imply that § 547 claims fall outside the public rights doctrine. But [*Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356 (2006)]—*the most recent pronouncement*—weighs heavily in the other direction. . . . [The bankruptcy court stated that *Katz* stood for the proposition that '[a]ctions to recover preferential transfers involve either *in rem* adjudication or orders ancillary to the bankruptcy courts' *in rem* jurisdiction, either of which suffices to establish the Court's authority to issue a judgment.'] . . . .This Court concludes that the resolution of certain fundamental bankruptcy issues falls within the public rights doctrine. The Supreme Court has never decided the question, but it noted in dicta in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.* that the restructuring of debtor-creditor relations may well be a public right. . . . The Supreme Court stepped back from this statement in *Granfinanciera* and *Stern*, clarifying that it did not mean to suggest that the restructuring of debtor-creditor relations is in fact a public right. However, the Supreme Court did not state that fundamental bankruptcy matters are not public rights . . . . Because [*Stern*] assumes that its impact on the day-to-day activities of bankruptcy courts will not be radical, this Court concludes that after *Stern*, most fundamental bankruptcy matters must fall within bankruptcy courts' constitutional authority. *Katz* provides guidance as to which matters are fundamental: Critical features of every bankruptcy proceeding are the exercise of exclusive jurisdiction over all of the debtor's property, the equitable distribution of that property among the debtor's creditors, and the ultimate discharge that gives the debtor a fresh start by releasing him, her, or it from further liability for old debts. Many of these critical features are disputed matters, and they could be decided by the bankruptcy courts only through the public rights doctrine. . . . Bankruptcy has always been a distinctly public concern . . . . [A]t the time the Bankruptcy Clause was incorporated into Article I, bankruptcy was a distinctly political matter: the stability of debtor-creditor relationships was closely linked to the viability of the republic. The Bankruptcy Clause gives Congress the power to regulate debtor-creditor relations at least in part for the purpose of protecting the entire constitutional scheme. The bankruptcy power thus involves uniquely public concerns. . . . The bankruptcy scheme is therefore a unique public rights scheme, and the public rights doctrine applies at least to fundamental bankruptcy matters. The issue, then, is to determine which matters fall within the bankruptcy scheme. *Stern* makes clear that not all matters connected to a bankruptcy case fall within bankruptcy courts' constitutional authority. *Stern* also provides some guidance for determining where the line is drawn: the question is whether the action at issue stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process. . . . To determine whether an issue stems from the bankruptcy itself, the Court considers whether the disputed right is established by the Bankruptcy Code or whether the substantive outcome of the issue is in any way affected by bankruptcy law. . . . When the substantive outcome of a non-bankruptcy law claim is affected by bankruptcy law, the claim may be transformed into a bankruptcy matter. . . . To determine whether a matter would necessarily be resolved in the claims allowance process, the Court considers whether the matter can be resolved through the exercise of *in rem* jurisdiction over the bankruptcy estate or whether the proceeding is necessary to effectuate such *in rem* jurisdiction. . . . Bankruptcy jurisdiction, since the time of the framing, has been principally *in rem* jurisdiction . . . Under English bankruptcy law, the bankruptcy court had the authority to deal only with that which is the bankrupt's estate; but [had] no power to determine what *is* the bankrupt's estate. . . . From the

nineteenth century until the Bankruptcy Code was enacted in 1978, American bankruptcy law preserved this distinction between administrative authority over the estate and the authority to decide legal or equitable disputes over what was included in the estate. The administrative authority was known as summary jurisdiction, while legal or equitable disputes over the extent of the property of the estate required a plenary action. . . . The distinction between plenary and summary jurisdiction was eliminated by the 1978 Bankruptcy Reform Act. . . . As is well known, the Supreme Court held in *Marathon* that this expansive grant of jurisdiction was unconstitutional. . . . Congress' attempt to resolve the constitutional problems that were at issue in *Marathon* was unsuccessful: *Stern* held that some matters that fall within the statutory definition of core proceedings do not fall within bankruptcy courts' constitutional authority. . . . Professor Brubaker has argued that the plenary/summary distinction—rather than the statutory core/non-core distinction—marks the true constitutional extent of bankruptcy courts' authority. . . . The historical understanding of the plenary/summary distinction informs, but does not dictate, the Court's analysis of whether matters are integrally related to the claims adjudication process. Following the traditional distinction, this Court reads *Stern's* consideration of whether the action at issue . . . would necessarily be resolved in the claims allowance process as calling for an examination of whether the action falls within the Bankruptcy Court's *in rem* jurisdiction. However, the Court interprets the reach of bankruptcy courts' *in rem* jurisdiction in light of the Supreme Court's most recent analysis, as set forth in *Katz*. The Court concludes that preference actions both stem from the bankruptcy itself and are decided primarily pursuant to *in rem* jurisdiction. The cause of action for preferential transfers is established by the Bankruptcy Code. The provision for recovering preferences is integrally bound up in the overall scheme for ensuring equitable distribution among creditors. Preferential transfers are payments for legitimate debts. Preferences are avoidable precisely because they enable some creditors to receive more than their fair distribution under the Bankruptcy Code. The entire purpose of the cause of action, then, is to enforce the Bankruptcy Code's equality of distribution. In this respect, preferential transfer actions are fundamentally different from fraudulent transfer actions, although the two causes of action superficially resemble. As *Granfinanciera* held, fraudulent transfer actions primarily seek to augment the bankruptcy estate. . . . Fraudulent transfer actions are not necessarily asserted against entities that were ever legitimate creditors of the debtor. Preferential transfer actions, in contrast, are part of the administration of the estate: they are concerned with determining the amounts of claims under the Bankruptcy Code. And unlike fraudulent transfer actions, preference actions are decided pursuant to bankruptcy courts' *in rem* jurisdiction over the estate. This is because, under the Bankruptcy Code, amounts that are preferentially transferred were always really part of the bankruptcy estate. . . . *Katz* stated that recovery of a preference may be necessary to effectuate the bankruptcy courts' *in rem* jurisdiction over the estate. When the trustee seeks recovery under § 550(a), a court order mandating turnover may technically involve in personam process, but the order is ancillary to and in furtherance of the court's *in rem* jurisdiction. . . . The recovery of a preference is thus different in kind from the adjudication of a legal claim owned by the estate, which involves the exercise of *in personam* jurisdiction for the purposes of augmenting the estate, not just administering it. . . . Because the bankruptcy courts' *in rem* jurisdiction applies only to property of the estate, the preferentially transferred property must actually be property of the estate. In essence, the effect of § 547 is to define the *res* as of 90 days before the petition (one year for transfers to insiders). If the antecedent 90–day res was distributed inequitably, the Bankruptcy Code merely provides for its equitable distribution. . . . Congress has the constitutional authority to define preferentially transferred assets as part of the estate and to grant

authority over the property to bankruptcy courts. The authority to recover preferences has been a core aspect of the administration of bankruptcy estates since at least the 18th century. . . . Preference actions therefore may be resolved through the exercise of a bankruptcy court's *in rem* jurisdiction over the bankruptcy estate, and preferences may be recovered through orders ancillary to the court's *in rem* jurisdiction. . . . This outcome is most obvious when the defendant has filed a proof of claim against the estate and the amount sought is not more than the amount of the defendant's claim. When the defendant has filed a proof of claim against the estate, the claim is disallowed under § 502(d) of the Bankruptcy Code unless the defendant has returned the amount of the transfer. . . . Once the estate recovers the amount of the transfer, the amount recovered does not offset the defendant's claim; it increases it. Because the preferential payment was made on account of a valid antecedent debt, the (now unpaid) amount of that debt is added to the defendant's claim against the estate. Resolution of the defendant's claim against the estate therefore requires a determination of whether any transfers are avoidable under § 547. Because the recovery of preferences does not offset, but rather increases, a defendant's claim against the estate, there is no fundamental reason why a preference action in which the estate seeks to recover an amount greater than the defendant's claim against the estate should be treated differently. *Katz* suggests that the mere determination of avoidance falls within the court's *in rem* jurisdiction. Even if the estate seeks a turnover order under § 550(a), a bankruptcy court may issue such an order ancillary to and in furtherance of the court's *in rem* jurisdiction. . . . And the claim is similarly intertwined with the claims-allowance process: because § 502(d) still applies, a bankruptcy court must determine the full amount that must be paid back to the estate before the defendant's claim can be allowed. Finally, the same result occurs even when the defendant has not filed a proof of claim against the estate. The determination of avoidance falls within the bankruptcy court's *in rem* jurisdiction over the estate. Because the preferentially transferred property is part of the bankruptcy estate, a turnover order under § 550(a) would be in furtherance of the bankruptcy court's *in rem* jurisdiction. And even when the defendant has not filed a proof of claim, the preference action is necessary to determine the amount of the defendant's claim against the estate on the basis of the antecedent debt. The result of a successful preferential transfer claim is to make the defendant a creditor of the estate or to increase the amount of the defendant's claim against the estate. . . . The defendant thus becomes a creditor of the estate, even if the defendant had not previously filed a proof of claim. A § 547 action therefore, by its nature, involves a determination of whether the defendant is a creditor of the estate. . . . Preference actions stem from the bankruptcy itself and would necessarily be resolved in the claims allowance process. They fall within the boundaries of the public rights doctrine. . . . Considering [the] broadened definition of public rights, the unique public concerns in the bankruptcy context, the close integration of all preferential transfer actions into the claims adjudication process, and *Katz's* characterization of preferential transfer determinations and recovery actions as *in rem* or ancillary to *in rem* actions, the Court concludes that the determination and recovery of preferential transfers falls within the public rights doctrine. Actions to determine or recover preferences are so closely integrated into the public bankruptcy scheme that they may be finally adjudicated by non-Article III bankruptcy judges.").

Zazzali v. 1031 Exch. Grp. (In re DBSI, Inc.), 2012 WL 1242305 (Bankr. D. Del. Apr. 12, 2012) (Walsh, J.) ("The majority opinion in *Stern* contains language that could support either the broad or the narrow interpretation. . . . I agree with my colleagues that *Stern's* holding should be read narrowly and thus restricted to the case of a 'state-law counterclaim that is not resolved in the process of ruling on a creditor's proof of claim.' [*Stern*,] 131 S. Ct. at 2620. I note also that

numerous other recent decisions have agreed with the narrow interpretation. . . . Thus, I find that *Stern* is not applicable to this action, as it does not involve a state-law counterclaim by the estate. Consequently, I conclude that I can enter a final judgment on the core preference, post-petition transfer, fraudulent transfer, and unjust enrichment claims and issue proposed findings of fact and conclusions of law on the non-core causes of action.")

Burns v. Dennis (In re Se. Materials, Inc.), 2012 WL 1034322 (Bankr. M.D.N.C. Mar. 27, 2012) (Waldrep, J.) (Under *Stern*, "the question is whether the action at issue stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process. . . . If either prong of the test is met, then the bankruptcy court has constitutional authority to enter a final order. Conversely, if the action neither stems from the bankruptcy itself nor would necessarily be resolved in the claims allowance process, the bankruptcy court lacks constitutional authority to enter final judgment and may only submit proposed findings of fact and conclusions of law to the district court. Tony, Betty, and Chris filed proofs of claim against the Debtor. . . . The Trustee asserts several claims against Tony, Betty, and Chris based on Section 547 of the Bankruptcy Code. . . . Beginning with *Katchen v. Landy* and continuing with *Langenkamp v. Culp*, the Supreme Court has pronounced that the resolution of a preference claim brought by the trustee against a creditor who has filed a proof of claim is an integral part of the general claims resolution process under Section 502(d) of the Bankruptcy Code. . . . Section 502(d) preclude[s] entities which have received voidable transfers from sharing in the distribution of the assets of the estate unless and until the voidable transfer has been returned to the estate. Thus, before a claim may be allowed, a court must resolve any preference or fraudulent transfer issues that the trustee might raise. In both *Katchen* and *Langenkamp*, the Supreme Court relied on Section 502(d) to conclude that a creditor-defendant who files a proof of claim has no Seventh Amendment right to a jury trial in a subsequent preference action brought by the trustee. If a creditor who files a proof of claim is met, in turn, with a preference action . . . that action becomes part of the claims-allowance process which is triable only in equity. In *Stern*, the Court found that under *Langenkamp v. Culp* a preferential transfer claim can be heard in bankruptcy when the allegedly favored creditor has filed a claim, because then the ensuing preference action by the trustee become[s] integral to the restructuring of the debtor-creditor relationship. . . . If, in contrast, the creditor has not filed a proof of claim, the trustee's preference action does not become[ ] part of the claims-allowance process subject to resolution by the bankruptcy court. . . . *Stern* described *Katchen* as holding that a bankruptcy referee had summary jurisdiction over a preference claim because it was not possible for the referee to rule on the creditor's proof of claim without first resolving the voidable preference issue. One of the consequences of filing a claim against the estate was resolution of the preference issue as part of the process of allowing or disallowing claims, and accordingly there was no basis for the creditor to insist that the issue be resolved in an Article III court. The conclusion is inescapable: if a defendant in a preference action has filed a proof of claim, then the matter is a core proceeding, and the bankruptcy court may enter a final order. Because Tony, Betty, and Chris have filed proofs of claim against the estate, the resolution of the Section 547 preference claims against them are core proceedings, and the Court may enter final orders.").

Stalnaker v. Fitch (In re First Ams. Ins. Serv., Inc.), 2012 WL 171583 (Bankr. D. Neb. Jan. 20, 2012) (Saladino, J.) ("The avoidance and recovery of preferential transfers under 11 U.S.C. § 547

is a core proceeding under 28 U.S.C. § 157(b)(2)(F). . . . Under *Stern*, bankruptcy court [authority to finally adjudicate] core proceedings such as these is constitutional.").

Burtch v. Seaport Capital, LLC (In re Direct Response Media, Inc.), 2012 WL 112503 (Bankr. D. Del. Jan. 12, 2012) (Gross, J.) ("This Court disagrees that the *Stern* decision stands for the . . . proposition that a non-Article III court does not have authority to enter a final judgment on a preference . . . claim brought by the Debtor to augment the estate, or any other core claim (as defined in 28 U.S.C. § 157(b)(2)) that is not a state law counterclaim. [That proposition] is based on a holding that the Supreme Court has never made, namely, that restructuring of the debtor-creditor relationship is not a public right, nor falls within any other exception that would permit a non-Article III court to finally adjudicate those matters. [T]he Supreme Court expressly took measures to limit the reach and breadth of its opinion and its interpretation by lower courts. The Court . . . holds that *Stern* only removed a non-Article III court's authority to finally adjudicate one type of core matter, a debtor's state law counterclaim asserted under § 157(b)(2)(C). By extension, the Court concludes that *Stern* does not remove the bankruptcy courts' authority to enter final judgments on other core matters, including the authority to finally adjudicate preference . . . actions like those at issue before this Court. . . . [I]n the present case the Trustee seeks to recover alleged preferences . . . as property of the estate, and, thus, are within the Court's core jurisdiction. Additionally, the alleged transfers that the Trustee complains of arguably may have led to the filing of the Chapter 7 petition. Without the bankruptcy filing, there would not have been state law causes of action. The preference . . . claims arise both under Title 11 and in a case under Title 11 and are by definition 'core' issues under § 157(b)(2)(F) & (H) for which a bankruptcy court has authority to enter final adjudications.").

Customized Distribution, LLC v. Coastal Bank & Trust (In re Lee's Famous Recipes, Inc.), 2011 WL 7068916 (Bankr. N.D. Ga. Dec. 12, 2011) (Brizendine, J.) ("[A] bankruptcy judge can enter a final judgment on a claim for a voidable preferential transfer asserted in connection with a proof of claim because resolution of that issue would be inherent to the process of allowing or disallowing the creditor's claim.").

Liberty Mut. Ins. Co. v. Citron (In re Citron), 2011 WL 4711942 (Bankr. E.D.N.Y. Oct. 6, 2011) (Rosenthal, J.) ("Plaintiff . . . asserts a preferential avoidance claim as an alternative cause of action under Section 547 of the Bankruptcy Code. . . . Defendant has recently asserted a counterclaim as an affirmative defense, seeking an offset under New York Debtor Creditor Law for payments allegedly made for the benefit of the Debtor. To date, Defendant has not filed a proof of claim in the bankruptcy case. . . . Asserting its interpretation of the recent Supreme Court ruling in *Stern* . . . Defendant argues the claims against her all derive from or involve state law or common law claims; these claims will not be resolved in the claims allowance process because she never filed a proof of claim in the case; and therefore, a bankruptcy judge does not have the constitutional authority to determine Plaintiff's claims. . . . *Stern* concerned the constitutional authority of a bankruptcy court to enter final judgment in an adversary proceeding on a state law counterclaim. . . . The Supreme Court's narrow holding removed from a bankruptcy court's core jurisdiction a common law claim against a defendant who did not file a proof of claim in the bankruptcy case. . . . Unlike the counterclaim in *Stern*, Defendant's counterclaim here is not independent of the Bankruptcy Code and it relies upon a finding of Defendant's liability pursuant to Plaintiff's claims brought under

several provisions of the Bankruptcy Code. . . . The facts of this adversary proceeding do not fall within the narrow ruling of *Stern*.").

2. BANKRUPTCY COURTS DO NOT HAVE THE CONSTITUTIONAL AUTHORITY TO FINALLY ADJUDICATE THE PREFERENCE ACTION

Meoli v. Huntington Nat'l Bank (In re Teleservices Grp., Inc.), 456 B.R. 318 (Bankr. W.D. Mich. 2011) (Hughes, J.) (The court stated in *dicta* that "*Stern* and *Granfinanciera* now seem to hold that only an Article III court would be capable of entering the money judgment needed to recover [a] preference.").

Tabor v. Kelly (In re Davis), 2011 WL 5429095 (Bankr. W.D. Tenn. Oct. 5, 2011) (Latta, J.) (The Chapter 7 trustee sought, among other things, to avoid allegedly preferential transfers arising from a Ponzi scheme perpetrated by the debtor. The defendant had not filed a proof of claim. The court stated: "The recovery of preferential transfers may in some cases arise as part of the claims allowance process in bankruptcy. Prior to 1978, in those cases in which a creditor was said to have received a preferential transfer in the period preceding bankruptcy, the [Supreme] Court [in *Katchen*] permitted the bankruptcy referee to resolve the question of the voidable preference in the context of ruling on the creditor's proof of claim. . . . The lesson there was that if an issue arises and necessarily must be determined as part of the claims allowance process, the bankruptcy court may proceed. When it does, there will be nothing left for an Article III court to determine. . . . In [*Langenkamp*] . . . the [Supreme] Court explained that . . . [i]f the creditor has not filed a proof of claim . . . [t]he trustee can recover allegedly preferential transfers only by filing what amounts to a legal action to recover a monetary transfer. In those circumstances the preference defendant is entitled to a jury trial. . . . The [Supreme] Court in *Stern* seems to suggest that a distinction can be drawn between fraudulent conveyance actions, which arise under state common law, and preferential transfer actions, which are created by federal bankruptcy law (*see Stern*, 131 S. Ct. at 2618), but the Court in *Granfinanciera* made no such distinction, and in fact noted that actions to recover preferential transfers or fraudulent conveyances were often brought at law in 18th century England. . . . The relevant distinction announced in *Granfinanciera* was that between actions that seek 'to augment the bankruptcy estate,' which are matters of private right, and those that seek a 'pro rata share of the bankruptcy res,' which may or may not be matters of public right. . . . While not clearly adopting this distinction, the Court in *Stern* indicated that actions that properly may be assigned to the bankruptcy courts for final decision are those that stem from the bankruptcy itself or would necessarily be resolved in the claims allowance process. . . . Using this test, when a creditor who has not filed a proof of claim is sued by the bankruptcy trustee to recover a preferential transfer, it is a matter of private right, which, as we have seen, requires the exercise of the judicial power of the United States, a power that cannot be exercised by a non-Article III judge. This division appears fairly distinct and relatively easy to apply. If a civil proceeding has the primary purpose of augmenting the bankruptcy estate, rather than resolving claims against the estate, it is a matter of private right that must be determined by an Article III court.").

3. COURTS IDENTIFYING BUT NOT DECIDING THE ISSUE

Capmark Fin. Grp. Inc. v. Goldman Sachs Credit Partners L.P., 2012 WL 698134 (S.D.N.Y. Mar. 5, 2012) (Sweet, J.) (Denying the defendants' motion to transfer litigation from Southern District of New York to the District of Delaware, the district court stated: "The impact of the recent *Stern* decision on the jurisdiction of bankruptcy courts remains unclear. In *Stern*, the Supreme Court held that, although a bankruptcy court had statutory authority under 28 U.S.C. § 157 to issue a final and binding judgment on a claim based exclusively on a right assured by state law, the bankruptcy court nonetheless lacked the constitutional authority to do so. . . . The venue to which the Defendants seek to transfer this action, the Delaware Bankruptcy Court, has recognized the jurisdictional confusion the *Stern* decision has created . . . . Given th[e] uncertainty surrounding the recent *Stern* decision, the scope of [Bankruptcy] Judge Sontchi's authority to decide the preference claims, assuming he were granted the opportunity to hear them, is unclear. The fact that there is no guarantee that Judge Sontchi would be the trier of fact weakens the argument that transfer to the District of Delaware would promote judicial economy.").

Richardson v. Checker Acquisition Corp. (In re Checker Motors Corp.), 463 B.R. 858 (Bankr. W.D. Mich. 2012) (Gregg, J.) ("These adversary proceedings are statutory core proceedings because the plaintiff seeks to determine, avoid or recover . . . preferences. 28 U.S.C. § 157(b)(2)(F) and (G). Notwithstanding the recent Supreme Court decision [in] *Stern* . . . this court tentatively believes it is constitutionally authorized to enter final orders in these adversary proceedings. However, at this juncture in these adversary proceedings, no final order is contemplated or now necessary and the issue addressed by *Stern* may be revisited in the future.").

Peterson v. Enhanced Investing Corp. (Cayman) Ltd. (In re Lancelot Investors Fund, L.P.), 2012 WL 761593 (Bankr. N.D. Ill. Mar. 8, 2012) (Cox, J.) (The bankruptcy court granted defendants' motions for summary judgment on Chapter 7 trustee's claims for avoidance and recovery of transfers made in the course of a Ponzi scheme operated by the debtor, concluding that recovery on the claims was barred by the safe harbor provisions of § 546(e) and (g) of the Bankruptcy Code. The court found, however, that its constitutional authority to enter summary judgment in favor of the defendants on the trustee's claims—which were based on §§ 544, 547, 548(a)(1)(B) and 550—was in question after *Stern*: "*Stern's* ruling may mean that fraudulent transfer [and preference] claims have to be resolved by Article III judges where their resolution does not necessarily resolve a proof of claim. However, because resolution of the various transfer claims asserted by the Trustee could affect the extent of funds the estate has available for distribution to its creditors, this matter [would be within the court's 'related-to' jurisdiction under] . . . 28 U.S.C. § 157(c)(1). . . . Separate Orders will be entered on each Motion for Summary Judgment. Before the court enters those Orders, however, it invites the parties to submit briefs on whether the Orders resolve core matters on which this court may enter final Orders in light of the Supreme Court's ruling in *Stern v. Marshall* . . . and the recent Seventh Circuit Court of Appeals ruling in *Ortiz* . . . .").

In re Am. Hous. Found., 2012 WL 443967 (Bankr. N.D. Tex. Feb. 10, 2012) (Jones, J.) ("For purposes of its analysis, the Court assumes that its authority to decide the cases here is

unconstitutional under *Stern*. After all, these actions are core proceedings under the statute; the defendants are not claims-filing creditors in the bankruptcy case . . . and the preference claims, unlike [those in] *Katchen* and [*Langenkamp*], are not brought as part of the claims reconciliation process, but, rather, to augment the bankruptcy estate. The Court appreciates the quandary raised by *Stern*. Preference . . . actions are labeled as core proceedings under § 157(b)(2)(F) . . . . [T]hey arise under or in the Bankruptcy Code and thus satisfy *Stern's* definition of a core proceeding. Even if they were not 'arising' matters, they certainly would be related to the bankruptcy case. In either event, the Court, at least arguably, cannot decide these suits because doing so would constitute an unconstitutional exercise of authority improperly conferred on this Court, and all bankruptcy courts, by Congress. . . . [But] [i]t is clear from *Stern* that this Court, as a bankruptcy court, is permitted to issue proposed findings and conclusions in lieu of a final order.").

Bayonne Med. Ctr. v. Bayonne/Omni Dev., LLC (In re Bayonne Med. Ctr.), 2011 WL 5900960 (Bankr. D.N.J. Nov. 1, 2011) (Stern, J.) (Liquidating trustee brought adversary proceeding against defendants, asserting, among other claims for relief, state law causes of action to enforce a pledge and to recover alleged preferential . . . transfers. The trustee's complaint asserted that his cause of action for enforcement of the pledge was a core matter. Approximately six weeks post-*Stern*, after the parties had proceeded for two years in the bankruptcy court, and after summary judgment motions had been fully briefed and argued (at two hearings, one held several weeks before *Stern* was decided and the other conducted one week after the *Stern* opinion was issued), the court "solicited the positions of the parties regarding consent to its authority to 'hear and *determine*' the causes before it." The defendants consented to entry of a final judgment by the bankruptcy court; the trustee did not. Although it concluded that the state-law based claim to enforce the pledge was a non-core proceeding, the court found that "the trustee-plaintiff, by virtue of his pleading and conduct in this litigation, has consented to this court's adjudication of all matters pled in his Adversary Proceeding." Based on this finding, the court was not required to determine whether it had the constitutional authority to finally adjudicate the preference claims. Nonetheless, the court questioned its authority to do so, stating: "*Stern v. Marshall* could implicate more than just state law based counterclaims as statutory core matters which are nonetheless beyond the adjudicatory authority of this court (absent consent). A pall may have been cast upon bankruptcy court adjudication of the wide range of frequently litigated 'proceedings to determine, avoid, and recover fraudulent conveyances' in bankruptcy. *See* 131 U.S. at 2614 (including n.7 and text associated with it). Such proceedings are 'core' by statute. The same pall may extend to avoidance of preferences, likewise deemed core by statute. 28 U.S.C. § 157(b)(2)(F).").

G. MOTIONS FOR RELIEF FROM THE AUTOMATIC STAY: 28 U.S.C. § 157(b)(2)(G)

Meoli v. Huntington Nat'l Bank (In re Teleservices Grp., Inc.), 456 B.R. 318 (Bankr. W.D. Mich. 2011) (Hughes, J.) ("Relief from the automatic stay and denial of a debtor's discharge are also worth considering [in the wake of *Stern*]. Key to the analysis in either of these areas is deciding whether Congress, in exercising its powers to enact uniform bankruptcy laws, can impose by fiat broad, statutory restraints like the automatic stay and the discharge injunction without violating the Fifth Amendment's guaranties. If Congress cannot, issues far more serious than those raised in *Stern*

must first be addressed. If, though, as all seem to agree, Congress has the ability to unilaterally impose such restraints, then a compelling argument can be made that bankruptcy judges are also capable of making these types of decisions without any Article III judge's supervision.").

In re Salander O'Reilly Galleries, 453 B.R. 106 (Bankr. S.D.N.Y. 2011) (Morris, J.) (A party to a prepetition consignment agreement with the debtor moved for relief from the automatic stay so that it could arbitrate the issue of whether a work of art that it had consigned to the debtor was property of the estate. The bankruptcy court stated that "[n]owhere in *Marathon, Granfinanciera,* or *Stern* does the Supreme Court rule that the bankruptcy court may not rule with respect to state law when determining a proof of claim in the bankruptcy, or when deciding a matter directly and conclusively related to the bankruptcy. . . . The automatic stay, the estate and the discharge were created by Congress pursuant to its Article I power to enact a bankruptcy law.").

H. PROCEEDINGS TO DETERMINE, AVOID OR RECOVER FRAUDULENT TRANSFERS: 28 U.S.C. § 157(b)(2)(H)

1. BANKRUPTCY COURTS HAVE THE CONSTITUTIONAL AUTHORITY TO FINALLY ADJUDICATE THE FRAUDULENT TRANSFER ACTION

Kelley v. JPMorgan Chase & Co., 464 B.R. 854 (D. Minn. 2011) (Nelson, J.) (The district court held that *Stern* did not warrant withdrawal of reference in adversary proceeding in which trustee asserted fraudulent transfer and preference claims arising from a long running Ponzi scheme, reasoning: "As Plaintiffs note, their claims . . . appear to be quintessential core bankruptcy claims, including claims to recover preferences and fraudulent transfers under Section 157(b)(2)(F) and (H). . . . [T]he process of garnering fraudulently-transferred assets back into the bankruptcy estate—to the resultant benefit of all creditors—is one of those proceedings which is by its very nature essential to the adjustment and restructuring of debtor-creditor relationships that is at the core of federal bankruptcy jurisdiction. . . . Granted, the bankruptcy statute includes counterclaims by the estate against persons filing claims against the estate as a core proceeding, and as *Stern* demonstrates, such counterclaims may not constitutionally extend to generic state common-law claims such as tortious interference. Such claims often have only a fortuitous relationship with bankruptcy rather than being a claim that stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process. . . . The claim at issue in *Stern*, however, was in no way derived from or dependent upon bankruptcy law, but rather was a state tort action that exists without regard to any bankruptcy proceeding. . . .").

Official Comm. of Unsecured Creditors of Appalachian Fuels, LLC v. Energy Coal Res., Inc. (In re Appalachian Fuels, LLC, 2012 WL 1344984 (E.D. Ky. Apr. 18, 2012) (Bunning, J.) (The district court addressed motions to withdraw the reference of an adversary proceeding commenced by the Committee to "(1) avoid and recover funds that were allegedly fraudulently or preferentially transferred to the Defendants; (2) recover damages arising out of Defendants' corporate waste, breaches of fiduciary duty, civil conspiracy, unjust enrichment, and aid and abetment of other

Defendants in doing the same; and (3) recover damages arising from the legal malpractice and conflicted representation committed by Appalachian Fuels' attorneys. . . . The Committee alleges that Appalachian Fuels was reduced to an 'insolvent husk' as the result of self-dealing by brothers Larry and Stephen Addington (along with other family members and friends) who 'surreptitiously used Appalachian Fuels to generate funds and acquire assets that they then transferred to themselves and numerous corporate alter egos,' referred to in the Amended Complaint as 'Insiders.' . . . For several years, the Insiders forced Appalachian Fuels to enter into several transactions that benefitted themselves at the expense of Appalachian Fuels and its creditors. . . . These transactions shifted valuable assets to the Insiders while leaving any associated liabilities with Appalachian Fuels. . . . This continued even after Appalachian Fuels became insolvent and had been forced into bankruptcy. . . . Thus, the Insiders actually intended to and did remove assets from the reach of creditors for their own benefit." The withdrawal motions were filed by multiple creditors, only some of whom had filed proofs of claim with the bankruptcy court. At the time the motions to withdraw the reference were filed in the district court, six motions to dismiss the claims asserted by the Committee were pending in the bankruptcy court. "[O]n February 3, 2012, the Bankruptcy Court ordered that all matters in the adversary proceeding be stayed pending disposition of the motions to withdraw the reference presently before this Court.' . . . [I]n considering whether a withdrawal motion should be granted, 'whether a proceeding is core or non-core . . . is a central question.' . . . However, whether a proceeding is core or non-core will not alone determine whether the proceeding must be withdrawn. District courts may withdraw both core and non-core proceedings. . . . Several of the moving Defendants argue that the Court should withdraw the reference of the instant adversary proceeding because it involves, for the most part, non-core claims. In support of their argument, Defendants allege that the Supreme Court's recent opinion in *Stern v. Marshall* . . . invalidates 28 U.S.C. §§ 157(b)(2)(F) and (H) as a basis for bankruptcy courts to enter final orders and judgments in fraudulent transfer and preference actions where, as here, [several of the movants] have not filed a proof of claim against the bankruptcy estate. There is no disagreement that Plaintiff's state law tort claims arising out of Defendants' alleged corporate waste, breaches of fiduciary duty, civil conspiracy, unjust enrichment, and aid and abetment of other Defendants in doing the same are clearly non-core claims under § 157(c)(1). . . . In *Stern*, the Supreme Court found that Congress' enumeration of core matters in § 157(b)(2) overstepped constitutional boundaries in at least one respect and therefore determined that identifying a claim as 'core' or 'non-core' under [§ 157(b)(2)] does not necessarily determine whether a bankruptcy court is constitutionally empowered to finally adjudicate the matter. . . . The Supreme Court found [in *Stern*] that although the bankruptcy court had statutory authority, pursuant to § 157(b)(2)(C), to enter a final judgment on the state law counterclaim, it lacked constitutional authority to do so under Article III. *Stern*, 131 S. Ct. at 2608. The Court stated that '[t]he Bankruptcy Court below 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.' *Id*. at 2620. The Court emphasized that the issue before it was a 'narrow one' and that its decision would not change 'all that much.' *Id*. (internal quotations omitted). Furthermore, the Court concluded that 'Congress, in one isolated respect, exceeded the limitation in the Bankruptcy Act of 1984.' *Id*. (emphasis added). . . . The question now becomes whether the holding of *Stern* renders unconstitutional fraudulent conveyance and preference proceedings statutorily defined by Congress as core. First, it should be noted that there is a disagreement among courts regarding the extent to which *Stern* will impact the bankruptcy court's authority to enter final orders and judgments in other core proceedings. . . . In its decision, the

Supreme Court clearly intended to, and did in fact, limit the application of its holding. . . . Notably, the Court did not find that the bankruptcy court lacked constitutional authority to enter a final judgment on all state law counterclaims. . . . Further, the Court emphasized that its holding would not 'meaningfully change[ ] the division of labor' under § 157. *Id*. Most importantly, nothing in the Supreme Court's opinion actually limits a bankruptcy court's authority to adjudicate the other 'core proceedings' identified in section 157(b)(2). . . . Indeed, one bankruptcy court has stated that '[t]o broadly apply *Stern's* holding is to create a mountain out of a mole hill.' *In re USDigital, Inc.*, 461 B.R. 276, 292 (Bankr. D. Del. 2011). . . . Despite the Supreme Court's intention to limit the application of its holding, several courts have expressed uncertainty about *Stern's* effect on the bankruptcy court's authority to enter final orders and judgments in other statutorily defined core proceedings. . . . Arguably, the Supreme Court's reliance on *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989) has called into question whether bankruptcy courts can continue to enter final orders and judgments in fraudulent conveyance claims. In *Stern*, the Court explained that *Granfinanciera's* 'distinction between actions that seek "to augment the bankruptcy estate" and those that seek "a pro rata share of the bankruptcy res" reaffirms that Congress may not bypass Article III simply because a proceeding may have some bearing on a bankruptcy case. . . .' *Stern*, 131 S. Ct. at 2618 (quoting *Granfinanciera*, 492 U.S. at 56) (internal citations omitted) (emphasis in the original)). Moreover, the Court stressed that the 'question is whether the action at issue stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process.' *Id*. Many courts have viewed this language as a new limit on the Court's constitutional authority to finally resolve other 'core' proceedings, such as fraudulent conveyance or preference actions. . . . However, despite the reliance on *Granfinanciera* in *Stern*, the fact still remains that the sole issue in *Granfinanciera* was whether defendants who had not filed a proof of claim against the bankruptcy estate had a Seventh Amendment jury trial right in light of statutory authority that allowed a non-Article III tribunal to adjudicate the claims against them. *Granfinanciera*, 492 U.S. at 50 ("We are not obliged to decide today whether bankruptcy courts may conduct jury trials in fraudulent conveyance suits brought by a trustee against a person who has not entered a claim against the estate, either in the rare procedural posture of this case or under the current statutory scheme. Nor need we decide whether, if Congress has authorized bankruptcy courts to hold jury trials in such actions, that authorization comports with Article III when non-Article III judges preside over the actions subject to review in, or withdrawal by, the district courts. . . . The sole issue before us is whether the Seventh Amendment confers on petitioners a right to a jury trial in the face of Congress' decision to allow a non-Article III tribunal to adjudicate the claims against them." (internal citations omitted)). Furthermore, *Granfinanciera* has been the law for over twenty years, and it was not until after the Court's decision in *Stern* that the bankruptcy court's authority to enter final orders and judgments in fraudulent conveyance or preference actions has been challenged. . . . Taking the specific facts and issues in *Stern* and *Granfinanciera* into consideration, in addition to the Supreme Court's deliberate attempt to limit the scope of its holdings in both cases, this Court cannot extend the holding of *Stern* to fraudulent conveyance and preference actions. The statutorily core claim examined in *Stern* was a counterclaim based on state tort law and was 'in no way derived from or dependent upon bankruptcy law.' *See Stern*, 131 S. Ct. at 2618. In the present proceeding, Plaintiff's fraudulent conveyance and preference claims 'arise under' the Bankruptcy Code, or at least, 'arise in' a bankruptcy case. *See* 11 U.S.C. §§ 544, 547, 548, 550. The *Stern* decision itself acknowledged that whether a matter is core requires a consideration of 'whether the action at issue stems from the bankruptcy itself' or is 'derived from or dependent upon bankruptcy law. . . .' *Stern*, 131 S. Ct. at 2618. Moreover, but

for the bankruptcy, Plaintiff could not assert the fraudulent conveyance and preference claims against Defendants. . . . Accordingly, Plaintiff's fraudulent transfer and preference claims are statutorily defined core claims to which the holding of *Stern* does not apply, and therefore the Bankruptcy Court has authority to enter final orders and judgments on such claims pursuant to 28 U.S.C. § 157(b)(1). . . . Next, [certain] Defendants . . . argue that despite the fact that they have all filed proofs of claim against the Debtor's estate, it would be unconstitutional for the Bankruptcy Court to enter final orders and judgments against them. *Katchen v. Landy*, 382 U.S. 323 (1966) and *Langenkamp v. Culp*, 498 U.S. 42 (1990) held that bankruptcy courts have the power to rule, without a jury trial, on avoidable preference claims against creditors who have filed proofs of claims against the bankruptcy estate. These Defendants assert that *Katchen* and *Langenkamp* should be reconsidered in light of the fact that they rest on a faulty, previously unchallenged presumption, namely that bankruptcy courts have constitutional authority to rule on the validity of proofs of claim in the first place. It appears that no party has asked the Supreme Court to consider whether non-Article III bankruptcy courts are constitutionally permitted to determine whether to allow creditor's claims. Defendants contend that this is supported by footnote 7 from *Stern* and footnote 11 from *Granfinanciera*, where the Court noted that the parties to those cases had not requested reconsideration of the public rights framework for bankruptcy. *See Stern*, 131 S. Ct. at 2614 n.7 ("We noted that we did not mean to 'suggest that the restructuring of debtor-creditor relations is in fact a public right.'" (quoting *Granfinanciera*, 492 U.S. at 56 n.11)). For these reasons, Defendants ask this Court to overrule *Katchen* and *Langenkamp* or distinguish them on the grounds that the parties therein did not contest the bankruptcy court's authority to rule on the validity of a proof of claim. The Court refuses to do so. . . . Defendants are in essence asking the Court to consider the entire constitutionality of 28 U.S.C. § 157 and whether bankruptcy judges have the authority to not only adjudicate some but all bankruptcy matters. Unless and until the Supreme Court rules that § 157 is unconstitutional, this Court will continue to adhere to its principles. Since [the] Defendants [asserting this argument] have all filed proofs of claim against the bankruptcy estate, Plaintiff's fraudulent conveyance and preferential transfer claims arise out of the claims allowance process, and therefore the Bankruptcy Court has authority to enter final orders and judgments on such claims.").

Fox. v. Picard (In re Madoff), 2012 WL 990829 (S.D.N.Y. Mar. 26, 2012) (Koeltl, J.) (In appeal from a judgment in an adversary proceeding arising from the Madoff ponzi scheme, the district court stated, in *dicta*: "While the Appellants did not argue that the Trustee lacked standing to assert the claims asserted in the New York Action, Appellant Marshall, in a letter to the Court after oral argument, asserted that the Bankruptcy Court lacked the authority to enter final judgment on the Trustee's fraudulent conveyance claims under the Supreme Court's recent decision in *Stern v. Marshall*, 131 S. Ct. 2594 (2011). This argument is unpersuasive. *Stern* did not concern the jurisdiction of a bankruptcy court to hear a claim, but only the limitations on its ability to enter certain final judgments. Further, Appellant Marshall points to no language in *Stern* that can reasonably be interpreted as holding that the power explicitly accorded by Congress to the bankruptcy courts to enter judgment in fraudulent transfer actions such as the New York Action violates Article III of the United States Constitution. The specific issue in *Stern* was the constitutional authority for a bankruptcy court to enter judgment on a state law counterclaim that is not resolved in the process of ruling on a creditor's proof of claim. *Id*. at 2620. The Court in *Stern* said that its decision was a 'narrow' one and purported not to 'meaningfully change[ ] the division of labor in the [bankruptcy] statute.' *Id*. The adjudication of fraudulent transfer and

avoidance actions is a basic feature of that division of labor. *See* 28 U.S.C. § 157(b)(2)(F), (H) (providing for bankruptcy court jurisdiction over avoidance actions and fraudulent conveyance actions). . . . Appellant Marshall also points to the reliance in *Stern* on *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989). *Granfinanciera* held that there was a right to a jury trial on a fraudulent conveyance action by a trustee against a third party who had not submitted a claim against the estate, and rejected an argument that the 'public rights' exception applied to such a claim. *Id*. at 55–56. In this case, each of the Appellants, as well as the [settling] defendants, did bring claims against the [Madoff] estate. Moreover, this case does not involve the right to a jury trial. Rather, it involves orders of the Bankruptcy Court that were not final judgments and the approval of a settlement agreement under Bankruptcy Rule 9019.").

Walker, Truesdell, Roth & Assocs. v. Blackstone Grp., L.P. (In re Extended Stay, Inc.), 2011 WL 5532258 (S.D.N.Y. Nov. 10, 2011) (Scheindlin, J.) (District court denied motions to withdraw the reference filed in adversary proceedings commenced by trustees of litigation trust challenging transfers made in failed leveraged buyout. "[T]he complaints focus primarily on fraudulent conveyance and preferential transfer claims. Moreover, many of these claims are asserted against creditors who filed proofs of claim in the Debtors' bankruptcy. Plaintiffs' claims against those defendants would likely be 'resolved in the process of ruling on [their] proof[s] of claim.' *Stern*, 131 S. Ct. at 2620. Requiring withdrawal of such actions would be contrary to the language of *Stern*, which categorizes itself as a 'narrow' decision that does not 'meaningfully change[ ] the division of labor' between bankruptcy courts and district courts. *Id*. Indeed, courts considering *Stern* have declined to give it the expansive scope that plaintiffs request. . . . *Stern* does not affect the ability of the bankruptcy court to rule on state law fraudulent conveyance claims . . . .").

Menotte v. United States (In re Custom Contrs., LLC), 462 B.R. 901 (Bankr. S.D. Fla. 2011) (Hyman, J.) (Rejecting the IRS's argument that "*Stern v. Marshall* limits the Court's authority to enter a final order in this fraudulent transfer action. The *Stern* Court did not directly address the authority of bankruptcy courts to enter final orders in fraudulent conveyance actions and explicitly intended its decision to be read narrowly. . . . While *Stern* held that bankruptcy judges lacked authority to enter final judgments on state law counterclaims not necessarily resolved in the claims allowance process, it did not hold that bankruptcy judges lack authority to enter final judgments on fraudulent transfer claims or any of the other fifteen types of matters identified in § 157(b)(2)'s non-exhaustive list of core proceedings.").

Kirschner v. Agoglia (In re Refco Inc.), 461 B.R. 181 (Bankr. S.D.N.Y. 2011) (Drain, J.) (Trustee of litigation trust established under confirmed plan brought adversary proceeding in which he (1) sought avoidance and recovery of alleged fraudulent transfers under § 544(b) and the fraudulent transfer provisions of the New York Debtor-Creditor Law and (2) asserted unjust enrichment and equitable subordination claims. Before addressing the merits of the defendant's dismissal motion, which the court granted, [the bankruptcy court] thoroughly analyzed the question of whether, after *Stern*, bankruptcy courts have the constitutional authority to finally adjudicate fraudulent transfer claims: "Reasonable people may differ over whether *Stern's* prohibition on the bankruptcy court's issuance of a final judgment extends to fraudulent transfer claims, at least where, as here, the defendant has not filed a proof of claim in the case. . . . This confusion stems in large measure from the various rationales stated by the majority for its holding in *Stern*. . . . Clearly several of these

rationales argue that *Stern* does not preclude the bankruptcy court from issuing a final judgment on a fraudulent transfer claim. Unlike the state law tortious interference claim in *Stern*, the Trustee's fraudulent transfer claim here 'flow[s] from a federal statutory scheme,' and is 'completely dependent upon adjudication of a claim created by federal law.' [*Stern*, 131 S. Ct.] at 2614. . . . [N]ot only is the Trustee's fraudulent transfer cause of action expressly provided by the Bankruptcy Code, 11 U.S.C. § 544, but also Congress placed that section, as well as the other statutory avoidance powers under 11 U.S.C. §§ 547, 548, 549 and 553, within a unique statutory framework, such as the safe harbor of 11 U.S.C. § 546(e), the recovery and preservation provisions of 11 U.S.C. §§ 550 and 551 and the 'pay or face claim disallowance' rule of 11 U.S.C. § 502(d). . . . [T]he adjudication of fraudulent transfer claims in a bankruptcy context is a 'particularized area of the law,' [*Stern*, 131 S. Ct.] at 2615, because of the place such litigation often takes in the overall case and the familiarity of bankruptcy courts not only with the Bankruptcy Code's fraudulent transfer scheme but also with how such cases are developed, paid for, litigated and resolved in the multi-party bankruptcy context, which differs significantly from the two-party state law setting. . . . In addition, the pursuit of avoidance claims has been 'a core aspect of the administration of bankrupt estates since the 18th century, *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 369–70, 126 S. Ct. 990, 163 L. Ed. 2d 945 (2006), tied to, if not solely based on, the bankruptcy courts' principally in rem jurisdiction.' *Id*. (addressing preference avoidance litigation) . . . . Since the enactment of the Bankruptcy Code, the management and determination of statutory avoidance claims has been a primary function of the bankruptcy courts. Such claims often play a prominent role in bankruptcy cases, either because of their sheer numbers or because of the effect that the potential avoidance of a transfer, lien or obligation may have on creditors' recoveries. . . . Statutory avoidance claims under the Bankruptcy Code may not be the meat and potatoes of bankruptcy practice, but they are at least the salad and dessert, in marked contrast with the peculiar tortious interference claim in *Stern*. . . . Significantly, the Emergency Rule drafted and issued by the Administrative Office of the United States Courts shortly after *Marathon* recognized the bankruptcy courts' power to issue final judgments in preference and fraudulent transfer proceedings. . . . This approach also continued on a widespread basis after the 1984 enactment of the Federal Judgeship Act of 1984 ("BAFJA"), which set forth the core/non-core structure presently governing bankruptcy court jurisdiction. . . . [C]ourts almost uniformly sustained the constitutionality of BAFJA's grant of power to the bankruptcy courts to decide preference and fraudulent transfer claims as part of their core jurisdiction. After *Granfinanciera* . . . however, in which the Supreme Court saw fit to use the public right/private right analysis of *Marathon* to help it determine the entitlement under the Seventh Amendment of a defendant in a fraudulent transfer proceeding to a jury trial, the bankruptcy courts' power to issue final judgments in avoidance proceedings was left more open to doubt. At least where the defendant had not filed a proof of claim, *Granfinanciera* concluded, in the Seventh Amendment context, that fraudulent conveyance actions were 'more accurately characterized as a private rather than a public right as we have used those terms in our Article III decisions,' . . . being 'quintessentially suits at common law that more nearly resemble state law contract claims brought by a bankruptcy corporation to augment the bankruptcy estate than they do creditors' hierarchically ordered claims to a pro rata share of the bankruptcy res.' . . . Thereafter, at least two courts questioned the bankruptcy courts' power to issue a final judgment in a fraudulent transfer proceeding. . . . On the other hand, by far the majority of courts after *Granfinanciera* continued to hold that bankruptcy courts had the power to issue final judgments in fraudulent transfer proceedings as core matters. . . . Numerous opinions distinguished between the right to a jury trial, at issue in

Granfinanciera, and the power of a bankruptcy court to issue a final order notwithstanding its Article I status, finding that the jury trial issue implicated in *Granfinanciera* did not restrict the bankruptcy courts' power to decide motions to dismiss and summary judgment motions on fraudulent transfer claims on a final basis. Of course, though, the majority in *Stern* applied the logic of *Granfinanciera*'s Seventh Amendment decision to the Article III question before it: 'Vickie's counterclaim—like the fraudulent conveyance claim at issue in *Granfinanciera*—does not fall within any of the varied formulations of the public rights exception in this Court's cases,' *Stern*, 131 S. Ct. at 2614, thus suggesting that the majority in *Stern* would have concluded, if asked, that a bankruptcy judge lacks the power to issue a final order or judgment on a fraudulent transfer claim. Nevertheless, the other express rationales for the majority's decision in *Stern*, summarized by Justice Scalia . . . argue differently. They are . . . entirely consistent with the role of fraudulent transfer and other statutory avoidance claims under the Bankruptcy Code, with the Emergency Rule, and with the clear majority of holdings after *Marathon* and *Granfinanciera* that bankruptcy courts have the constitutional power to issue final judgments on statutory avoidance claims. . . . In this regard it is significant that Chief Justice Roberts characterized *Stern* as resolving only a 'narrow' question, *id*. at 2620, concluding that 'Congress, in one isolated respect, exceeded [Article III's] limitation [on Congress' power] in the Bankruptcy Act of 1984' such that '[t]he Bankruptcy Court below 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.' *Id*. . . . Given the repeated and emphatic limiting language in *Stern*, the Emergency Rule and the case law discussed above . . . and the role of fraudulent transfer claims under the Bankruptcy Code, including their management and resolution ultimately by the bankruptcy courts in the context of Congress' bankruptcy scheme, Article III of the Constitution does not prohibit the bankruptcy courts' determination of fraudulent transfer claims under 11 U.S.C. §§ 544 and 548 by final judgment.").

Goldstein v. Eby-Brown, Inc. (In re Universal Mktg., Inc.), 459 B.R. 573 (Bankr. E.D. Pa. 2011) (Frank, J.) (The court was not required to determine whether it had the constitutional authority to finally adjudicate the Chapter 7 trustee's fraudulent transfer claim—brought under § 544 and the Pennsylvania UFTA—because "that issue [would not be] ripe [until] the Trustee files an amended complaint asserting a claim under § 544 that passes muster under 12(b)(6) . . . ." Nonetheless, the court questioned the soundness of the defendant's argument that the court "lack[ed] constitutional authority to hear the claim," stating: "The initial flaw in the Defendant's argument is its premise: that the Trustee is seeking to avoid pre-petition transfers under Pennsylvania law. I do not read the Complaint to assert an avoidance claim under Pennsylvania law, *i.e.*, PUFTA. Rather, it appears that sole authority for the Trustee's fraudulent transfer claim is 11 U.S.C. § 544, a Bankruptcy Code provision that permits a trustee to avoid transfers that are avoidable under applicable nonbankruptcy law by certain hypothetical or actual creditors of the debtor. . . . Even though § 544 incorporates state law to provide the 'rules of decision,' a § 544 claim is a federal bankruptcy cause of action. . . . In that respect, it differs from the debtor's claim in *Stern*. It is not a '*state law action independent of the federal bankruptcy law*,' *Stern*, 131 S. Ct. at 2611 (emphasis added). To the contrary, it 'flow[s] from a federal statutory scheme,' *id*. at 2614. To the extent, then, that the Defendant is arguing that this court lacks jurisdiction to hear the fraudulent transfer claim because the claim, like the claim at issue in *Stern*, is a state law claim and not a federal bankruptcy claim, the Defendant is attacking a straw man.").

In re Crescent Res., LLC, 457 B.R. 506 (Bankr. W.D. Tex. 2011) (Gargotta, J.) ("On September 3, 2010, the . . . [l]itigation [t]rust [established under the debtor's confirmed Chapter 11 plan] filed an adversary complaint against [the defendant, an energy company and the parent corporation of the debtor's former corporate parent]. . . . The complaint allege[d] that the 2006 transaction [that] created [the debtor] rendered [it] insolvent. . . . [T]he [litigation] [t]rust alleges that the 2006 transaction [that] created [the debtor] involved [the debtor] borrowing approximately $1.5 billion, using the assets of [the debtor] as collateral. [The debtor] then transferred $1.187 billion of those loan proceeds to [the defendant]. The [litigation] [t]rust alleges that this transaction left [the debtor] insolvent and the complaint seeks return of the $1.187 billion under . . . theories of state law fraudulent transfers. . . ." Although the bankruptcy court's opinion primarily addressed the issue of whether defendant could invoke the attorney-client privilege to prevent the litigation trust from utilizing as evidence in the adversary proceeding material in joint client files, the court stated in dicta: "The Court has received the recent letter briefs filed by [the parties] . . . . These are not filed pleadings with the Court. Nonetheless, the Court has read them and is of the opinion, at this point, that *Stern v. Marshall* . . . should be applied narrowly. The facts and issues in *Stern* do not relate to matters under consideration of the Court. The Court therefore finds that *Stern* does not apply to this case.").

Miller v. Greenwich Capital Fin. Prods., Inc. (In re Am. Bus. Fin. Servs., Inc.), 457 B.R. 314 (Bankr. D. Del. 2011) (Walrath, J.) (The Chapter 7 trustee asserted fraudulent transfer claims against two entities allegedly hired by the debtor to assist it in obtaining DIP financing. After briefly discussing *Stern*, the court concluded that "the claims before this Court arose after [the debtor] filed bankruptcy and relate entirely to matters integral to the bankruptcy case. If not for the bankruptcy, these claims would never exist. Therefore, this Court concludes that it has jurisdiction to hear this adversary proceeding as it directly stems from the bankruptcy case.").

In re Safety Harbor Resort & Spa, LLC, 456 B.R. 703 (Bankr. M.D. Fla. 2011) (Williamson, J.) (In *dicta*, the court stated: "Nor does the *Stern* Court's reliance on *Granfinanciera* actually limit a bankruptcy court's jurisdiction to finally resolve the other core proceedings identified in section 157(b)(2). Understandably, some bankruptcy courts have expressed concerns about the litigation that may result due to uncertainties created by *Stern* with respect to other types of proceedings defined as core under section 157(b)(2) that were not at issue in *Stern*. To be sure, the *Stern* Court did explain that *Granfinanciera's* distinction between actions that seek 'to augment the bankruptcy estate' and those that seek a 'pro rata share of the bankruptcy res' reaffirms that Congress may not bypass Article III simply because a proceeding may have some bearing on a bankruptcy case. And the *Stern* Court did emphasize that the 'question is whether the action at issue stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process.' It is understandable that some would view that language as a new limit on the Court's constitutional authority to finally resolve other 'core' proceedings, such as fraudulent conveyance or preference actions. . . . But the *Stern* Court's use of the word 'reaffirm' makes clear that nothing has changed. The sole issue in *Granfinanciera* was whether the Seventh Amendment conferred on petitioners a right to a jury trial in the face of Congress' decision to allow a non-Article III tribunal to adjudicate the claims against them. *Granfinanciera* did not hold that bankruptcy courts lack jurisdiction to enter final judgments on fraudulent conveyance claims. In fact, the Supreme Court went to great lengths to emphasize that issue was not even before it in that case. As explained in *Granfinanciera*,

'however helpful it might be for us to adjudge every pertinent statutory issue presented by the 1978 Act and the 1984 Amendments, we cannot properly reach out and decide matters not before us. The only question we have been called upon to answer in this case is whether the Seventh Amendment grants petitioners a right to a jury trial.' And the language from *Granfinanciera* that some courts and commentators fear may limit bankruptcy courts' jurisdiction—language relied on by the *Stern* Court—has been the law for over twenty years. Yet, this Court is not aware of a single case during the twenty years preceding *Stern* challenging a bankruptcy court's authority to enter final judgments in fraudulent conveyance actions. . . . In the end, the *Granfinanciera* Court held that the Seventh Amendment guarantees a right to a jury trial in a fraudulent conveyance action. But the Court did not 'express any view as to whether the Seventh Amendment or Article III allows jury trials in such actions to be held before non-Article III bankruptcy judges subject to the oversight provided by the district courts.' Neither did the *Stern* Court. In fact, in its discussion of both *Katchen* and *Langenkamp*, the *Stern* Court notes that the trustees in those cases were asserting rights of recovery created by federal bankruptcy law under Section 60a of the Bankruptcy Act of 1898 and 11 U.S.C. § 547. . . . Of course, years from now, the Supreme Court may hold that section 157(b)(2)(F) dealing with fraudulent conveyances is unconstitutional, just as it did with section 157(b)(2)(C). But the job of bankruptcy courts is to apply the law as it is written and interpreted today. Bankruptcy courts should not invalidate a Congressional statute, such as section 157(b)(2)(F)—or otherwise limit its authority to finally resolve other core proceedings—simply because dicta in *Stern* suggests the Supreme Court may do the same down the road. The Supreme Court does not ordinarily decide important questions of law by cursory dicta. And it certainly did not do so in *Stern*.").

Ivey v. Buchanan (In re Whitley), 2012 WL 1268670 (Bankr. M.D.N.C. Apr. 13, 2012) (Stocks, J.) ("("James Edward Whitley (the "Debtor") was the sole shareholder and principal officer of South Wynd Financial, Inc., a corporation purportedly in the business of invoice funding and receivables financing ("factoring"). In reality, the Debtor's factoring business was non-existent, fictitious, and amounted to a Ponzi scheme. On March 8, 2010, a group of unsecured creditors filed an involuntary petition against the Debtor. Charles Ivey (the "Plaintiff") was appointed as Trustee and subsequently commenced multiple adversary proceedings against some of the investors in the Debtor's investment scheme, including the Defendant. . . . The Trustee asserts fraudulent transfer claims pursuant to 11 U.S.C. § 548(a)(1)(A) and 11 U.S.C. § 544 through [the North Carolina UFTA] to avoid transfers made by the Debtor to the Defendant. The court is called upon to determine, pursuant to *Stern*, whether it may enter a final judgment as to the fraudulent transfer claims asserted by the Plaintiff. . . . Under the test formulated by the Supreme Court in *Stern v. Marshall* the court may enter final judgment in a core proceeding where 'the action at issue stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process.' *Stern*, 131 S. Ct. at 2618. Where a defendant has filed a proof of claim, a fraudulent transfer action brought under either section 548 or section 544 becomes a part of the process of allowance and disallowance of claims. *See Langenkamp v. Culp*, 498 U.S. 42, 44 (1990) ("[B]y filing a claim against the bankruptcy estate the creditor triggers the process of 'allowance and disallowance of claims' . . . If the creditor is met, in turn, with a preference action from the trustee, that action becomes part of the claims-allowance process. . . . In other words, the creditor's claim and the ensuing preference action by the trustee become integral to the restructuring of the debtor-creditor relationship.") (internal quotation omitted) . . . The fraudulent transfer claims asserted against the

Defendants are core proceedings under 28 U.S.C. § 157(b)(2)(H), and each of the Defendants filed a proof of claim for monies loaned. The court therefore may enter final judgment on the Plaintiff's claims because it is necessary to decide the fraudulent transfer claims in order to allow or disallow the Defendants' proofs of claim.").

Zazzali v. 1031 Exch. Grp. (In re DBSI, Inc.), 2012 WL 1242305 (Bankr. D. Del. Apr. 12, 2012) (Walsh, J.) ("In November 2008, DBSI Inc. ("DBSI") and several of its affiliates (collectively "Debtors") filed for bankruptcy protection under chapter 11 of the Bankruptcy Code . . . . Debtors' plan of liquidation was confirmed in October 2010, naming James R. Zazzali ("Trustee") as litigation trustee of the DBSI Estate Litigation Trust. . . . Shortly after his appointment, Trustee commenced these adversary actions. In the 1031 Exchange Action, Trustee is seeking the avoidance and recovery of fraudulent transfers pursuant to 11 U.S.C. §§ 544, 548, 550, and 551, and asserting claims for declaratory relief related to federal securities laws, unjust enrichment, rescission of certain agreements between Debtors and defendants, and the disallowance of claims against the bankruptcy estate pursuant to 11 U.S.C. § 502. In the Air Performance Action and the Blind Gallery Action, Trustee asserts claims for the avoidance and recovery of preferential transfers under 11 U.S.C. § 547, fraudulent transfers under § 548, and post-petition transfers under § 549, recovery of the avoided transfers under §§ 550 and 551, and disallowance of claims under § 502. In the remaining actions—the Atlas Vans Action, Brooks & Amaden Action, Hoefer Action, IBF Group Action, and New West Action–Trustee asserts avoidance and recovery claims under §§ 544, 547, 548, 550, and 551, as well as unjust enrichment premised on the avoidance actions. . . . As the [m]otions [to dismiss] were filed in conjunction with motions to withdraw the reference, Movants ask this Court to dismiss these proceedings if the District Court does not grant the motions to withdraw the reference. . . . In support of their Motions, Movants argue that 1) under *Stern*, 'a bankruptcy court, not being an Article III court, cannot adjudicate an adversary proceeding seeking to recover money from the defendant on causes of action sounding in preference or fraudulent conveyance'; and 2) under *Stern* and *Granfinanciera*, these particular adversary actions cannot be adjudicated in this Court because the Movants did not consent to bankruptcy court adjudication, intend to demand a jury trial in their answers to the complaints, and certain of the Movants did not file proofs of claim in the bankruptcy case. . . . It is customary—and indeed, necessary—for courts to state the standard of review in evaluating a motion to dismiss. As Movants have admitted here that they have invented this 'motion to dismiss for lack of authority to adjudicate' as a procedural device, there is no established standard of review to apply. Essentially, Movants are seeking to have the adversary actions dismissed entirely because, on their reading of *Stern*, this Court cannot enter final judgments in these proceedings. In so arguing, I find that Movants both misinterpret *Stern's* narrow holding and do not acknowledge the distinction between the bankruptcy court's ability to hear a proceeding and to adjudicate such proceeding. . . . There has been much debate about the scope of the *Stern* decision and its effect on the division of labor between the bankruptcy courts and the district courts. . . . courts have split between a broad interpretation of *Stern* and a narrow interpretation. . . . The broad interpretation holds that bankruptcy judges cannot enter final adjudications on avoidance actions because such actions are quintessentially suits at common law and thus must be decided by an Article III judge. . . . In contrast, the narrow view restricts *Stern's* holding to its facts in that the decision only specifically removed a debtor's state law counterclaims under § 157(b)(2)(C) from final adjudicatory authority of the bankruptcy court. . . . After an analysis of both interpretations, Judge Gross adopted the narrow interpretation and held that *Stern* does not

remove the bankruptcy courts' authority to enter final judgments on other core matters, including the authority to finally adjudicate preference and fraudulent conveyance actions. . . . Though Movants cite several cases from other jurisdictions embracing the broad interpretation of *Stern*, I am not persuaded that I should follow these decisions. The majority opinion in *Stern* contains language that could support either the broad or the narrow interpretation. . . . I agree with my colleagues that *Stern's* holding should be read narrowly and thus restricted to the case of a 'state-law counterclaim that is not resolved in the process of ruling on a creditor's proof of claim.' [*Stern*,] 131 S. Ct. at 2620. I note also that numerous other recent decisions have agreed with the narrow interpretation. . . . Thus, I find that *Stern* is not applicable to this action, as it does not involve a state-law counterclaim by the estate. Consequently, I conclude that I can enter a final judgment on the core preference, post-petition transfer, fraudulent transfer, and unjust enrichment claims and issue proposed findings of fact and conclusions of law on the non-core causes of action.").

Ruby v. Ryan (In re Ryan), 2012 WL 1144333 (Bankr. E.D. Va. Apr. 4, 2012) (Santoro, J.) ("Since the instant action does not exist absent the bankruptcy filing—*i.e.*, an avoidance action under 11 U.S.C. § 548 exists only when a case under Title 11 of the United States Code is pending—the ruling in *Stern v. Marshall*, 131 S. Ct. 2594, 180 L. Ed. 2d 475 (2011) is not at issue.").

Chow v. Prince (In re Prince), 2012 WL 1095506 (Bankr. E.D. Tex. Mar. 30, 2012) (Rhoades, J.) ("The [plaintiff] chapter 7 trustee brought this adversary proceeding seeking to avoid and recover allegedly fraudulent transfers of real property, among other things. . . . [Specifically, the trustee] allege[s] that the various debtors fraudulently transferred nine residential real properties to the Clovis L. Prince, Katherine M. Robinson ["Robinson"], and Tamika D. Prince Trust (the "Trust"). . . . The plaintiff's amended complaint contains four counts: Count One, seeking to recover the prepetition transfers of the debtors' interest in the real property as fraudulent pursuant 11 U.S.C. §§ 548 and 550; Count Two, seeking to recover the transfers [of] the debtors' interest in the real property as fraudulent pursuant to Texas Business and Commerce Code §§ 24.001 et seq. (the "TUFTA") and Oklahoma Statutes tit. 24 § 112 et. seq. . . ., made applicable by 11 U.S.C. § 544(b)(1); Count Three, seeking to recover the transfers to the Trust as transfers of an interest of the debtors in property to a self-settled trust or like device pursuant to 11 U.S.C. § 548(e)(1); and Count Four, seeking an accounting of the monies Robinson has received from the real properties and turnover to the estate of the postpetition rents and postpetition insurance proceeds pursuant to 11 U.S.C. §§ 541 and 542. . . . At the hearing on the plaintiff's motion for summary judgment, however, counsel for Robinson suggested that *Stern v. Marshall* . . . means that this Court lacks the authority to exercise its core jurisdiction over the fraudulent transfer claims asserted by the plaintiff [against Robinson, who has not filed a proof of claim]. . . . *Stern* addressed whether bankruptcy courts have the authority to enter judgments in a different type of core proceeding, namely, 'counterclaims by the estate against persons filing claims against the estate,' 11 U.S.C. § 157(b)(2)(C), which are based on state law. *Stern* described this question as a 'narrow' one, and held that Congress exceeded its constitutional authority 'in one isolated respect' in granting bankruptcy courts the jurisdiction to enter judgment on such state law counterclaims. *Id*. at 2620. Specifically, *Stern* held that the bankruptcy courts 'lacked the constitutional authority to enter final judgment on a state law counterclaim that is not resolved in the process of ruling on a creditor's proof of claim.' *Id*. at 2620. *Stern* referred to its decision as a 'removal of counterclaims such as [Debtor's] from core bankruptcy jurisdiction.' (emphasis added). Further, *Stern* expressly acknowledged that its decision should not

"meaningfully change[ ] the division of labor in [28 U.S.C. § 157].' *Id.* . . . The statutory provision at issue in *Stern* is not at issue here. This adversary proceeding does not involve a state law counterclaim by the bankruptcy estate. Rather, in this proceeding, the chapter 7 trustee seeks to recover allegedly fraudulent transfers of the Real Property and to identify and force the turnover of certain property alleged to be property of the debtors' bankruptcy estates. The chapter 7 trustee's claims 'flow directly from a federal statutory scheme; namely, 11 U.S.C. §§ [542,] 544(b) and 548.' *Feuerbacher v. Moser*, No. 4:11–CV–272 *11 (E.D. Tex. Mar. 29, 2011) (citing *In re Refco*, 462 B.R. 181 (Bankr. S.D.N.Y. 2011)). As the U.S. District Court for the Eastern District of Texas recently explained, the expressly narrow holding of *Stern* does not preclude this Court from adjudicating turnover and fraudulent conveyance claims brought pursuant to §§ 542, 544(b) and 548 of the Bankruptcy Code. *See id.* (discussing *Stern* in the context of fraudulent transfer claims brought pursuant to the Bankruptcy Code and applicable state law. . . . As to the TUFTA cause of action, this Court is not deprived of subject matter jurisdiction simply because resolution of the lawsuit requires the application of state law. . . . The fraudulent transfer provisions in TUFTA and § 548 of the Bankruptcy Code are virtually identical. . . . Cases interpreting TUFTA are frequently relied on in § 548 cases and vice versa. . . . Because the standards are substantially the same, the plaintiff's TUFTA claims are necessarily resolved as part of the plaintiff's fraudulent transfer claim. *See Stern*, 131 S. Ct. at 2620 (bankruptcy court has constitutional authority to issue a final order adjudicating a debtor's state law counterclaim against a bankruptcy claimant where the counterclaim 'stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process.'). Thus, the Court concludes that it has jurisdiction to enter a final order on all of the plaintiff's claims in this proceeding.").

Burns v. Dennis (In re Se. Materials, Inc.), 2012 WL 1034322 (Bankr. M.D.N.C. Mar. 27, 2012) (Waldrep, J.) (Under *Stern*, "the question is whether the action at issue stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process. . . . If either prong of the test is met, then the bankruptcy court has constitutional authority to enter a final order. Conversely, if the action neither stems from the bankruptcy itself nor would necessarily be resolved in the claims allowance process, the bankruptcy court lacks constitutional authority to enter final judgment and may only submit proposed findings of fact and conclusions of law to the district court. Tony, Betty, and Chris filed proofs of claim against the Debtor. . . . Because Tony, Betty, and Chris have filed proofs of claim, the Court has the authority to enter a final judgment [on the fraudulent transfer actions the trustee brought against them]. In *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833, 106 S. Ct. 3245, 92 L. Ed. 2d 675 (1986), the Supreme Court reaffirmed that litigants can waive the right to an adjudication by an Article III court. . . . Similarly, in *Granfinanciera*, the Court suggested that if the defendant had submitted a claim against the estate, the result would [have been] different. . . . Thus, even before *Stern*, it was well settled that a bankruptcy court could enter final orders in avoidance actions against a party who filed a proof of claim. It has long been questionable whether some avoidance actions fall within the bankruptcy court's core jurisdiction, but there has been no dispute that a bankruptcy court must disallow 'any claim of any entity from which property is recoverable' because of a preferential transfer or fraudulent conveyance. 11 U.S.C. § 502(d). Such actions are core proceedings in which a bankruptcy court may enter a final order. . . . After *Stern* . . . even without consent, a bankruptcy court can enter a final judgment in a fraudulent transfer action under either Section 548 or Section 544 so long as the defendant has also filed a claim against

the estate, making the fraudulent transfer action part of the process of allowance and disallowance of claims.").

Bohm v. Titus (In re Titus), 2012 WL 695604 (Bankr. W.D. Pa. Feb. 29, 2012) (Markovitz, J.) (In an adversary proceeding brought by Chapter 7 trustee against the debtor—a former partner of a defunct law firm—and his wife, the trustee asserted claims under § 544(b) and the Pennsylvania UFTA, seeking avoidance and recovery of alleged fraudulent transfers. The bankruptcy court awarded judgment in favor of the trustee. Addressing the impact of *Stern* on its authority to enter a final judgment, the bankruptcy court stated: "Because of the recent decision by the United States Supreme Court in *Stern v. Marshall* . . . an issue arises as to whether this Court has the constitutional authority to enter a final decision in a fraudulent transfer action that is brought pursuant to state law by way of § 544(b)(1). . . . [T]his very issue has been raised by certain similarly situated parties in other adversary proceedings that are presently pending before this Court. As the Court understands it, these litigants argue only that this Court lacks the constitutional authority to enter a final decision in a fraudulent transfer action brought under state law via § 544(b)(1), not that this Court lacks subject matter jurisdiction altogether regarding such an action. This Court is inclined to agree with those authorities that construe the *Stern* decision narrowly and hold that, notwithstanding *Stern*, a bankruptcy court possesses the constitutional authority to enter a final decision regarding a fraudulent transfer action that is brought pursuant to state law by way of § 544(b)(1). . . . Therefore, this Court concludes that it possesses the constitutional authority to enter a final judgment . . . .").

Cardiello v. Arbogast (In re Arbogast), 2012 WL 390214 (Bankr. W.D. Pa. Feb. 7, 2012) (Markovitz, J.) (In an adversary proceeding brought by Chapter 7 trustee against the debtor—a former partner of a defunct law firm—and his wife, the trustee asserted claims under § 544(b) and the Pennsylvania UFTA, seeking avoidance and recovery of alleged fraudulent transfers. Following trial, the bankruptcy court awarded judgment in favor of the trustee on her constructive fraudulent transfer claims. Before doing so, the court discussed the impact of *Stern* on its authority to enter a final judgment: "[A]n issue arises as to whether this Court has the constitutional authority to enter a final decision in a fraudulent transfer action that is brought pursuant to state law by way of § 544(b)(1). . . . In fact, this very issue has been raised by certain similarly situated parties in other adversary proceedings that are presently pending before this Court. As the Court understands it, these litigants argue only that this Court lacks the constitutional authority to enter a final decision in a fraudulent transfer action brought under state law via § 544(b)(1), not that this Court lacks subject matter jurisdiction altogether regarding such an action. This Court is inclined to agree with those authorities that construe the *Stern* decision narrowly and hold that, notwithstanding *Stern*, a bankruptcy court possesses the constitutional authority to enter a final decision regarding a fraudulent transfer action that is brought pursuant to state law by way of § 544(b)(1). . . .Therefore, this Court concludes that it possesses the constitutional authority to enter a final judgment in the . . . [f]raudulent [t]ransfer [a]ction. Also supporting the preceding conclusion by the Court is the fact that the Debtor removed the . . . [f]raudulent [t]ransfer [a]ction to this Court; because of such removal, the Debtor arguably consented to have this Court enter a final judgment in the . . . [f]raudulent [t]ransfer [a]ction. . . . However, the Court also holds that, even if it does not possess such authority, it at least possesses subject matter jurisdiction over such a fraudulent transfer action and, thus, also the constitutional authority to submit proposed findings of fact and conclusions of law to a district court regarding said action.").

Stalnaker v. Fitch (In re First Ams. Ins. Serv., Inc.), 2012 WL 171583 (Bankr. D. Neb. Jan. 20, 2012) (Saladino, J.) (Bankruptcy court issued recommendation that the district court deny the defendant's motion to withdraw the reference of adversary proceeding in which the Chapter 11 trustee asserted claims under §§ 544, 547 and 548, attempting to recover from the defendant the "nearly $1.2 million [received] from [the debtor] within the two years before it filed for bankruptcy protection." The court stated: "In the present case, the plaintiff's causes of action are core proceedings. The avoidance and recovery of preferential transfers under 11 U.S.C. § 547 is a core proceeding under 28 U.S.C. § 157(b)(2)(F). Avoidance and recovery of fraudulent transfers under 11 U.S.C. § 548 is a core proceeding under 28 U.S.C. § 157(b)(2)(H). Avoidance and recovery of fraudulent transfers under state law via 11 U.S.C. § 544(b)(1) is also a core proceeding under 28 U.S.C. § 157(b)(2)(H). Under *Stern*, bankruptcy court jurisdiction over core proceedings such as these is constitutional. The Supreme Court has made clear that, although a person who has not filed a claim against the bankruptcy estate has a right to a jury trial when sued by the bankruptcy trustee to recover allegedly fraudulent monetary transfers because those are actions at law, 'by submitting a claim against the bankruptcy estate, creditors subject themselves to the court's equitable power to disallow those claims[.]' *Granfinanciera, S.A. v. Nordberg*, 429 U.S. 33, 59 n .14 (1989) (citing *Katchen v. Landy*, 382 U.S. 323 (1966)). Here, the defendant has filed a proof of claim in the [debtor's] case and has therefore brought himself within the court's jurisdiction, because the resolution of the trustee's causes of action are a necessary part of the claims resolution process. . . . Most, if not all, of the plaintiff's causes of action are core proceedings which the bankruptcy court may hear and decide[.]").

Zazzali v. Swenson (In re DBSI, Inc.), 2012 WL 112640 (Bankr. D. Del. Jan. 13, 2012) (Walsh, J.) ("With respect to the [fraudulent transfer] counts based on 11 U.S.C. § 548, I find that these counts clearly fall within 28 U.S.C. § 157(b)(2)(H). These counts are founded solely on bankruptcy law. With respect to the [fraudulent transfer] counts based on 11 U.S.C. § 544(b)(1), it is not so obvious that these are core proceedings since, in part, they rely upon 'applicable law other than the Bankruptcy Code.' Nevertheless, it clearly falls within the language of 28 U.S.C. § 157(b)(2)(H). Since the Supreme Court's ruling in *Stern v. Marshall* . . . there has been considerable debate among the courts as to whether a § 544(b)(1) cause of action is a core proceeding. I am persuaded by the analysis of the *Stern* decision undertaken by the Court in *In re Refco, Inc.*, 2011 WL 5974532 (Bankr. S.D.N.Y. 2011) that it is and I therefore determine that 11 U.S.C. §[ ] 544(b)(1) counts are core proceedings.").

Burtch v. Seaport Capital, LLC (In re Direct Response Media, Inc.), 2012 WL 112503 (Bankr. D. Del. Jan. 12, 2012) (Gross, J.) (Through a series of transactions challenged by the Chapter 7 trustee, the debtor "became a co-borrower and co-guarantor" of obligations that certain affiliated entities undertook in connection with their acquisition of various companies. The trustee asserted claims in the adversary proceeding against the debtor's parent company and the debtor's affiliate—as well as the lender that financed the challenged transactions—seeking the avoidance and recovery of alleged fraudulent and preferential transfers, disallowance or equitable subordination of the lender's claims and turnover. The trustee's fraudulent transfer claims—predicated on the allegation that the Debtor's parent company directed the Debtor to pay $7.6 million on a loan on which an affiliate of the debtor was obligated—were made under § 544(b) and the UFTA/UFCA as well as § 548. The trustee's complaint also pleaded state law claims against the debtor's parent, its affiliates and various

individuals, including the officers and directors of the debtor's affiliates and the former shareholders of the debtor's parent company. These included claims for breach of fiduciary duty, aiding and abetting breach of fiduciary duty, negligence, corporate waste, unjust enrichment and imposition of a constructive trust. Defendants filed Rule 12(b)(6) dismissal motions. Before turning to the merits of the motions to dismiss, the court addressed whether it had the constitutional authority "to enter final orders" on the avoidance claims asserted by the trustee. The court began its analysis by noting that *Stern* is susceptible to both a "Broad Interpretation" and a "Narrow Interpretation," explaining: "The Broad Interpretation argues that *Stern's* guidance on the bankruptcy courts' authority to enter final judgments is threefold: (1) the adjudication of a debtor's state law counterclaim against a defendant who had filed a proof of claim in the bankruptcy case, did not fall within the public rights exception; (2) the *Stern* Court reaffirmed the *Granfinanciera* Court's distinction between the two types of actions that the estate might assert against a defendant; and (3) the Supreme Court held that actions which seek to augment the estate, which presumably would include avoidance actions, require adjudication by an Article III court because those legal actions seek through a money judgment to take the defendant's property and that adjudication can only be made by a member of the independent Article III judiciary. If this Court were to agree with the Broad Interpretation of *Stern*, it would thereby hold that it no longer has authority to make final adjudications on a bankruptcy estate's avoidance action claims against defendants, even if those defendants filed proofs of claim against the estate, and where the bankruptcy estate's claims seek to 'augment the bankruptcy estate' by obtaining a money judgment and taking the defendant's property. Additionally, if this Court were to adopt the Broad Interpretation of *Stern*, the Court would not have constitutional authority to enter final judgments with respect to the counts alleged in the Amended Complaint. The Court would have to issue a report and recommendation to the District Court. The District Court would then have to decide whether to accept the report and recommendation in making its own decision as to whether a final judgment should be entered with regard to the Motions to Dismiss. . . . The Narrow Interpretation argues that *Stern* was by the express language in the opinion intended to be very narrowly construed. Additionally, the Narrow Interpretation argues that the holding only specifically removed a debtor's state law counterclaims under § 157(b)(2)(C), as a subset of core proceedings under § 157(b)(2), from final adjudicatory authority of the bankruptcy court. The holding was not intended to remove all core proceedings under 28 U.S.C. § 157(b)(2) from final adjudicatory authority of the bankruptcy courts. Indeed, such a holding would turn the bankruptcy process on its head and would 'meaningfully change the division of labor' between the bankruptcy courts and the district courts, in essence making the bankruptcy court an adjunct or magistrate of the district courts for all core proceedings as defined in 28 U.S.C. § 157(b)(2). . . . Chief Justice Roberts' majority opinion repeatedly emphasizes the narrowness of the Court's decision and repeats the Supreme Court's insistence that the decision is limited. The Court attempted to make it clear that it was invalidating one aspect of the bankruptcy court's authority over core proceedings—where a debtor asserts a state law counterclaim against a creditor who filed a proof of claim in the bankruptcy case. *Stern*, 131 S. Ct. at 2620. The Court must honor the Chief Justice's express limitations and assurances regarding the narrowness of the minimal breadth of the decision. Those express limitations define the narrow reach of the decision and cannot be simply disregarded as *dicta*. Moreover, assuming, arguendo, that the Broad Interpretation is correct, it did not receive a majority of the votes on the Supreme Court. Justice Scalia's partial concurrence in the judgment, while disavowing the majority's rationale, requires that even if the opinion is broadly interpreted to hold that bankruptcy courts no longer have authority to make a final adjudication on

core matters that seek to 'augment the estate' such as fraudulent transfer and preference actions, that proposition of law only received plurality support of four justices, and is not a binding holding on this Court. . . . This variation of the Narrow Interpretation argues that Justice Scalia's partial concurrence in the judgment requires *Stern* to be narrowly interpreted as a 4–4–1 plurality. In his partial concurrence, Justice Scalia joined in the judgment, but he did not adopt the reasoning of the Chief Justice's opinion. *Stern*, 131 S. Ct. at 2620–21. He instead reached his concurrence utilizing a very different analysis. *Id*. Accordingly, a majority of the justices did not adopt the rationale of Chief Justice Roberts' opinion, giving impetus to a narrow interpretation. . . . If this Court were to grant the Defendants' Motions to Dismiss and deny the Trustee's request, it would dramatically restructure the division of labor between district courts and bankruptcy courts by requiring that district courts hear most adversary proceedings. . . . Reading *Stern* as standing for the Broad Interpretation, i.e., that a bankruptcy court does not have constitutional authority to make a final adjudication of a fraudulent transfer or preference cause of action for the purpose of augmenting the estate, would essentially strip the bankruptcy court of a authority to hear a significant portion of its typical docket, as well as reduce the role of the bankruptcy court. If, *Stern* was meant to be read 'narrowly,' and not to 'meaningfully change the division of labor' between the district and bankruptcy courts, the Supreme Court could not have intended to strip the bankruptcy court of authority to adjudicate to finality those traditional core bankruptcy issues. . . . This Court disagrees that the *Stern* decision stands for the Broad Interpretation and proposition that a non-Article III court does not have authority to enter a final judgment on a preference or fraudulent conveyance claim brought by the Debtor to augment the estate, or any other core claim (as defined in 28 U.S.C. § 157(b)(2)) that is not a state law counterclaim. The Broad Interpretation is based on a holding that the Supreme Court has never made, namely, that restructuring of the debtor-creditor relationship is not a public right, nor falls within any other exception that would permit a non-Article III court to finally adjudicate those matters. As previously stated, the Supreme Court expressly took measures to limit the reach and breadth of its opinion and its interpretation by lower courts. . . . The Court adopts the Narrow Interpretation and holds that *Stern* only removed a non-Article III court's authority to finally adjudicate one type of core matter, a debtor's state law counterclaim asserted under § 157(b)(2)(C). By extension, the Court concludes that *Stern* does not remove the bankruptcy courts' authority to enter final judgments on other core matters, including the authority to finally adjudicate preference and fraudulent conveyance actions like those at issue before this Court.").

Gugino v. Canyon Cnty. (In re Bujak), 2011 WL 5326038 (Bankr. D. Idaho Nov. 3, 2011) (Pappas, J.) (Chapter 7 trustee brought an adversary proceeding against the defendant seeking to avoid and recover alleged preferences and constructive fraudulent transfers. Defendant filed Rule 12(b)(6) motion, asserting that the bankruptcy court "lacks the constitutional power to enter a final judgment on Trustee's fraudulent conveyance claims, and as a result, the claims must be dismissed." Rejecting this argument and denying the dismissal motion, the court reasoned: "This is not a *Stern*-type case because: 1) Trustee's fraudulent conveyance claims against the [defendant] are not based on state law, but instead, stem solely from the bankruptcy case and arise exclusively under the Bankruptcy Code; and 2) resolution of Trustee's avoidance claims is necessary to determine the allowance or disallowance of the [defendant] creditor['s] claim in the bankruptcy case. Moreover, if Trustee prevails, even if this Court lacks the constitutional power to finally decide Trustee's § 548 and § 544(b) claims against the [defendant] the [defendant] can always request de novo review of this Court's findings and conclusions by the district court. Because of this, and because this Court

has the unchallenged power to adjudicate Trustee's preference claim against the County, this is not an appropriate situation for withdrawal of reference by the district court.").

Liberty Mut. Ins. Co. v. Citron (In re Citron), 2011 WL 4711942 (Bankr. E.D.N.Y. Oct. 6, 2011) (Rosenthal, J.) ("Plaintiff commenced this adversary proceeding seeking to set aside alleged fraudulent conveyances pursuant to Section 548 of the Bankruptcy Code and Sections 273, 275, and 276 of New York Debtor Creditor Law, applicable to the proceeding under Section 544 of the Bankruptcy Code. . . . Defendant . . . asserted a counterclaim as an affirmative defense, seeking an offset under New York Debtor Creditor Law for payments allegedly made for the benefit of the Debtor. To date, Defendant has not filed a proof of claim in the bankruptcy case. . . . [In support of her dismissal motion,] Defendant argues the claims against her all derive from or involve state law or common law claims; these claims will not be resolved in the claims allowance process because she never filed a proof of claim in the case; and therefore, a bankruptcy judge does not have the constitutional authority to determine Plaintiff's claims. . . . The facts of this adversary proceeding do not fall within the narrow ruling of *Stern*. The claims against the Defendant [under § 548 and § 544] and the potential counterclaim are related to the underlying bankruptcy case and are not a plain-vanilla state law counterclaim.").

Heller Ehrman LLP v. Arnold & Porter, LLP (In re Heller Ehrman LLP), 2011 WL 4542512 (Bankr. N.D. Cal. Sept. 28, 2011) (Montali, J.) (In "Recommendation of Bankruptcy Judge Regarding [Defendants'] Motions to Withdraw the Reference" of adversary proceeding, the court acknowledged that "[t]he Supreme Court stated that it had concluded in *Granfinanciera v. Nordberg*, 492 U.S. 33 (1989), that 'Congress could not constitutionally assign resolution of [a] fraudulent conveyance action to a non-Article III court.'" . . . The court concluded, however, that "[t]he comments in *Stern* about *Granfinanciera* do support an argument that the statutory designation of fraudulent transfer actions as core may be unconstitutional; however, one could also extrapolate from statements made in the decision that such a delegation is not appropriate when section 544(b) and section 548 claims are asserted. *Id*. at 2618 (a matter may be core if the 'action at issue stems from the bankruptcy itself'). The bottom line, though, is that the Supreme Court did not hold in *Stern* that bankruptcy judges lack authority to render final judgments on fraudulent transfer claims. In fact, it emphasized—repeatedly—that its holding was narrow and limited to Section 157(b)(2)(C) (counterclaims). Given these express limitations of the holding, I believe I am still bound by the Ninth Circuit's holding in *In re Mankin*, 823 F.2d 1296 (9th Cir.1987), that fraudulent transfer actions are core whether arising directly under section 548 of the Bankruptcy Code or from state law (but made available to a bankruptcy estate under section 544(b)) and that Section 157(b)(2)(H) (fraudulent transfers) does not violate Article III of the Constitution by authorizing bankruptcy judges to decide them.").

Springel v. Prosser (In re Innovative Commc'n Corp.), 2011 WL 3439291 (Bankr. D.V.I. Aug. 5, 2011) (Fitzgerald, J.) ("In this adversary proceeding, the Trustee seeks to avoid and recover prepetition fraudulent conveyances and unauthorized postpetition transfers. An action to avoid and recover unauthorized postpetition transfers pursuant to 11 U.S.C. § 549 is purely a creation of the Bankruptcy Code and does not otherwise exist outside of Title 11. In contrast, as is the case here, an action to recover a fraudulent conveyance can be asserted on the basis of 11 U.S.C. § 548 alone or pursuant to 11 U.S.C. § 544(b) and applicable state law. . . . Fraudulent conveyance actions as

set forth in 11 U.S.C. § 548 are a creation of federal statute for application in bankruptcy proceedings. However, the dicta in [*Stern*] results in uncertainty as to how to proceed with actions brought pursuant to § 544(b) and applicable state law. As was the case in [*Stern*], 28 U.S.C. § 157 designates 'proceedings to determine, avoid, or recover fraudulent conveyances' as core. *See* 28 U.S.C. § 157(b)(2)(H). Although the Supreme Court narrowly limited its holding to the constitutionality of § 157(b)(2)(C), as to the claims asserted pursuant to § 544(b) and applicable state law, this is our Report and Recommendation. As to claims asserted pursuant to §§ 548 and 549, we issue a final judgment in this matter. Assuming, *arguendo*, that the District Court disagrees and reads [*Stern*] broadly to conclude that the dicta in the opinion limits this court's jurisdiction to making a Report and Recommendation, this Memorandum Opinion in its entirety constitutes our Report and Recommendation to the District Court.").

2. BANKRUPTCY COURTS DO NOT HAVE THE CONSTITUTIONAL AUTHORITY TO FINALLY ADJUDICATE THE FRAUDULENT TRANSFER ACTION

Paloian v. Am. Express Co. (In re Canopy Fin., Inc.), 464 B.R. 770 (N.D. Ill. 2011) (Hibbler, J.) (In an adversary proceeding brought by the Chapter 7 trustee against American Express, the trustee asserted claims under §§ 544, 548 and 550 for avoidance and recovery of alleged fraudulent transfers. American Express moved to withdraw the reference, "arguing that the reference violates Article III of the United States Constitution." Concluding that the bankruptcy court lacked the constitutional authority to finally adjudicate the fraudulent transfer claims, the court reasoned: "[T]he Court in *Granfinanciera* made clear that a court deciding a fraudulent conveyance action was exercising Article III judicial power. In *Stern*, the Court then reiterated this point, and held specifically that only Article III courts could enter final judgment on actions like those described in *Granfinanciera* that 'are quintessentially suits at common law.' 131 S. Ct. 2614–16. The Court recognized that there is a somewhat ill-defined exception to the general limitations on the authority of 'legislative' courts not covered by the protections of Article III that applies to cases involving 'public rights.' *Id*. at 2610. However, the Court found that the 'public rights' doctrine did not apply to the counterclaim in question because, like the claims in *Granfinanciera*, it was a claim 'at common law that simply attempts to augment the bankruptcy estate.' *Stern*, 131 S. Ct. at 2616. Thus, by likening the claim in question to the fraudulent conveyance claims in *Granfinanciera*, the *Stern* Court made clear that the Bankruptcy Court lacks constitutional authority to enter final judgment on the claims presented here.").

Heller Ehrman LLP v. Arnold & Porter, LLP (In re Heller Ehrman LLP), 464 B.R. 348 (N.D. Cal. 2011) (Breyer, J.) ("The purpose of the division [between core and non-core proceedings] is to place final adjudicative authority over 'public rights' with the bankruptcy court, but restrict final determination of matters not at the 'core' of the Congressionally created right to bankruptcy discharge to the Article III courts. *See Stern*, 131 S. Ct. at 2610–11. Fraudulent conveyance actions are categorized as 'core' under the statute. 18 U.S.C. § 157(b)(2)(H). . . . *Granfinanciera* principally addressed the question of whether a defendant had a Seventh Amendment right to a jury trial in a fraudulent conveyance action despite the action's designation as a 'core proceeding' in the

bankruptcy statute. In coming to its decision, the Court addressed whether fraudulent conveyance actions were properly characterized as 'private rights' or 'public rights.' [The *Granfinanciera* court stated:] 'Although the issue admits of some debate, a bankruptcy trustee's right to recover a fraudulent conveyance under 11 U.S.C. § 548(a)(2) seems to us more accurately characterized as a private rather than a public right as we have used those terms in our Article III decisions.' *Granfinanciera*, 492 U.S. at 55; *see also id*. at 56 (There can be little doubt that fraudulent conveyance actions by bankruptcy trustees—suits which . . . constitute no part of the proceedings in bankruptcy but concern controversies arising out of it—are quintessentially suits at common law that more nearly resemble state law claims brought by a bankrupt corporation to augment the bankruptcy estate than they do creditors' hierarchically ordered claims to a pro rata share of the bankruptcy res. They therefore appear matters of private rather than public right.) . . . Thus, the Supreme Court found a fraudulent conveyance action subject to Article III judicial power because such a claim is properly characterized as a 'private right' under the Court's Article III jurisprudence. . . . The Supreme Court relied upon and reiterated this language in *Granfinanciera* in holding that the counterclaim at issue in *Stern* could not be finally decided by a bankruptcy court because it did not fall into the 'public rights' exception to the exercise of Article III judicial power. 131 S. Ct. at 2611–614. The Court stated the 'counterclaim—like the *fraudulent conveyance claim* at issue in *Granfinanciera*—does not fall within any of the varied formulations of the public rights exception in this Court's cases.' *Id*. at 2614 (emphasis added). Thus, *Stern* specifically linked the public rights exception in the Seventh Amendment context from *Granfinanciera* to the question of whether an Article I bankruptcy court had authority to enter a final judgment on a claim, finding a determination in one context dispositive of the other context as well. . . . The Supreme Court continued that the filing of a claim against the estate '[i]n no way affects the nature of [debtor's] counterclaim for tortious interference as one at common law that simply attempts to augment the bankruptcy estate—the very type of claim that we held in *Northern Pipeline* and *Granfinanciera must be decided by an Article III court*.' *Id*. at 2616 (emphasis added). By likening the claim in question explicitly to the fraudulent conveyance claims in *Granfinanciera*, this Court believes that *Stern* clearly implied that the bankruptcy court lacks constitutional authority to enter final judgment on the fraudulent conveyance claims presented here. . . .").

In re Fairfield Sentry Ltd., 458 B.R. 665 (S.D.N.Y. 2011) (Preska, J.) (The debtors in Chapter 15 bankruptcy case, which was ancillary to a foreign liquidation proceeding in the British Virgin Islands ("BVI"), were offshore funds that had invested with Bernard Madoff and became insolvent when the Madoff fraud came to light. Before commencing the Chapter 15 ancillary proceeding, plaintiffs/debtors filed actions in state court seeking to recover distributions made by the funds before the fraud was uncovered. In the state court cases, the plaintiffs/debtors asserted claims for money had and received, unjust enrichment, mistaken payment and constructive trust. After filing the Chapter 15 case, plaintiffs/debtors removed actions filed in the state court to the bankruptcy court. Plaintiffs/debtors also filed additional identical actions in bankruptcy court, and after the defendants filed motions to remand the cases to state court, the plaintiffs amended the pleadings to add statutory claims under BVI law for "unfair preferences" and "undervalue transactions." In a pre-*Stern* decision, the bankruptcy court held that it had core jurisdiction over the avoidance claims in particular, and the actions as a whole, because they impacted the court's core bankruptcy functions under Chapter 15 and were analogous to traditionally core United States bankruptcy proceedings to avoid and recover fraudulent transfers and preferences. Accordingly, the bankruptcy

court denied the defendants' motions for equitable remand and abstention. The district court reversed, finding that the bankruptcy court lacked core jurisdiction because the cases did not "arise under" or "arise in" a title 11 case. In addition to concluding that there was no statutory basis for subject matter jurisdiction, the district court also held that the actions could not be heard by an Article I court, reasoning: "[T]he essence of the claims is not, as the Bankruptcy Court found, traditionally core in nature. As shown by a review of the operative complaints, these claims are disputes between two private parties that have existed for centuries and are 'made of "the stuff of the traditional actions at common law tried by the courts at Westminster in 1789."' *See Stern*, 131 S. Ct. at 2609 (quoting *N. Pipeline*, 458 U.S. at 90, 102 S. Ct. 2858 (Rehnquist, J., concurring in the judgment)). . . . The Bankruptcy Court focused on the addition of the BVI-law claims as tipping the balance in favor of core jurisdiction because those claims are 'traditionally core in nature.' . . . The addition of these claims, however, does not alter the calculus. Like the fraudulent conveyance suits at issue in *Granfinanciera* . . . the BVI claims here are 'quintessentially suits at common law that more resemble state law contract claims brought by a bankrupt corporation to augment the bankruptcy estate than they do creditors' hierarchically ordered claims to a pro rata share of the bankruptcy res.' *Granfinanciera*, 492 U.S. [at 56]. And like the fraudulent conveyance suits in *Granfinanciera*, the fact that these claims can be brought in bankruptcy is not dispositive. . . . [I]f Congress creates an independent federal right, it may assign adjudication of that right to an Article I court. Where the right exists in the common law, however, Congress may not constitutionally assign adjudication of that right to a non-Article III court because 'Congress has nothing to do with it.' [*Stern*, 131 S. Ct.] at 2614. . . . The adjudication of these cases to a final judgment by an Article I court would violate these principles. As described above, the claims in these cases are not independent federal claims or even independent foreign law claims. They are classic common law claims for money had and received or mistaken payment. The claims are matters of private right because they are disputes between two private parties about whether the redemptions were proper. The claims have 'nothing to do' with a matter of public right. *See id.* They do not involve ordering of creditors' claims or other statutory rights; they 'resemble state law contract claims brought by a bankrupt corporation to augment the bankruptcy estate.' *Granfinanciera*, 492 U.S. at 56 . . . . Plaintiffs' argument boils down to the assertion that any recovery will accrue to the benefit of the Funds' bankruptcy estates. However, *Granfinanciera* holds that common-law actions to augment the size of the estate involving disputed facts to be determined by a jury are not core, as opposed to actions to divvy up and order claims against the estate, which are. . . . Pre-petition common law actions for a claim requiring adjudication of factual disputes unrelated to bankruptcy are not core claims. These claims are private rights because they are 'state law action[s] independent of the federal bankruptcy law and not necessarily resolvable by a ruling on the creditor's proof of claim in bankruptcy.' *Stern*, 131 S. Ct. at 2611. They are therefore not core claims and may not be adjudicated by an Article I court absent consent.").

Weisfelner v. Blavatnik (In re Lyondell Chem. Co.), 2012 WL 1038749 (S.D.N.Y. Mar. 29, 2012) (Cote, J.) ("Lyondell Chemical Company ("Lyondell") was North America's third largest independent, publicly-traded chemical company. Basell AF S.C.A. ("Basell") was a Luxembourg entity. On December 20, 2007, Lyondell was acquired by and merged with Basell to create LyondellBasell Industries AF S.C.A. ("LBI"), the third largest chemical company in the world. On January 6, 2009, Lyondell and certain affiliates filed for relief under Chapter 11 of the Bankruptcy Code. LBI filed for bankruptcy. . . . The Bankruptcy Court [later] granted the Official Committee

of Unsecured Creditors (the "Committee") standing to pursue claims arising out of the merger of Lyondell and Basell (the "Merger") on July 21, 2009. This adversary proceeding commenced the following day, with a complaint filed on behalf of the Debtors' estates. . . . In light of the complexity of the litigation, the Bankruptcy Court divided the case into phases. The first phase ("Phase 1") consisted of certain claims against financing party defendants ("FPDs") that needed to be tried prior to LBI's emergence from bankruptcy. Trial in Phase 1 was to take place in early December 2009. . . . Pursuant to the Plan, the LB Litigation Trust was established in order to pursue estate claims that had not been settled or otherwise disposed of pursuant to the revised settlement of March 11, 2010 and the Plan. Edward Weisfelner was appointed as Trustee of the Litigation Trust (the "Trustee") and was substituted as the plaintiff in the first of these actions. . . . The Trustee filed an amended complaint on July 23, 2010 against individuals and corporate entities involved in the merger of Lyondell and Basell and the subsequent collapse of LBI. The amended complaint [contained] twenty-one counts under the Bankruptcy Code, state law, Delaware law, and Luxembourg law[,] [including claims seeking the avoidance and recovery of alleged intentional and constructive fraudulent transfers under the Bankruptcy Code and state law, claims seeking the avoidance and recovery of alleged preferential transfers, claims asserting alleged illegal dividends and stock redemptions (under Delaware law) as well as tort, breach-of-fiduciary-duty, mismanagement, breach-of-contract, equitable-subordination, recharacterization and aiding and abetting claims.] The gravamen of the amended complaint is that senior executives at Lyondell, Basell and other companies involved in the Merger exaggerated the earnings potential of the two companies for personal gain; as a result, LBI was severely under-capitalized after the Merger and was destined to fail in the face of a foreseeable industry downturn. . . . The Trustee brought a related action against NAG Investments LLW ("NAG") on June 16, 2011 to recover [$]100 million transferred by Basell less than two weeks before the Merger. The amended complaint in this related action (the "NAG Action") brings a claim of fraudulent transfer pursuant to the Bankruptcy Code against NAG, and is based on the same facts that gave rise to certain claims in the initial action brought on July 23, 2010 (the "Main Action"). . . . [T]he defendants filed thirteen motions to dismiss under Fed. R. Civ. P. 12(b)(6) and forum non conveniens grounds. Five of these motions were resolved by the parties. On March 10, 2011, the Bankruptcy Court conducted approximately eight hours of oral argument on the remaining eight motions. In August, the Honorable Robert E. Gerber stated that 'quite a bit of work has proceeded' in the course of preparing to rule on the motions. . . . At the close of discovery . . . the parties filed six motions for summary judgment involving issues that were not dependent on the outcome of the pending motions to dismiss. . . . Briefing on the summary judgment motions closed in November. . . . [The] defendants in the Main Action [subsequently] filed their motion to withdraw the reference. . . . [M]any of the core claims are for fraudulent conveyance and such claims do not fall within the public rights exception. Fraudulent conveyance actions by a bankruptcy trustee against a person who has not submitted a claim against a bankruptcy estate 'are quintessentially suits at common law that more nearly resemble state-law contract claims brought by a bankrupt corporation to augment the bankruptcy estate than they do creditors' hierarchically ordered claims to a pro rata share of the bankruptcy res.' *Granfinanciera, S.A., et al. v. Nordberg*, 492 U.S. 33, 56, 109 S. Ct. 2782, 106 L. Ed. 2d 26 (1989). The Supreme Court determined in *Granfinanciera* that such actions therefore 'appear matters of private rather than public right.' *Id.* . . . In *Stern*, the Supreme Court used this determination from *Granfinanciera* to support its holding on the scope of Article III. It concluded that, "like the fraudulent conveyance claim at issue in *Granfinanciera*," a counterclaim for tortious interference that simply attempts to

augment the bankruptcy estate "does not fall within any of the varied formulations of the public rights exception." *Stern*, 131 S. Ct. at 2616. Under both *Stern* and *Granfinanciera*, then, it is axiomatic that a fraudulent conveyance claim against a person who has not submitted a claim against a bankruptcy estate, brought solely to augment the bankruptcy estate, is a matter of private right. The Trustee brings such claims in counts 1–4, 11, 17, and 19 of the Main Action and in the NAG Action; these claims are therefore matters of private right. . . . Second, all or almost all of the Trustee's fraudulent conveyance claims will not necessarily be resolved in ruling on any defendant's proof of claim. This is because only two defendants, Nell Limited and AI International, filed proofs of claim in the bankruptcy cases. At most, then, only claims against these two defendants will be addressed in the claims resolution process. . . . The Trustee contests each of these determinations. He contends that a bankruptcy court can, in fact, enter final judgment on all the core fraudulent conveyance claims in light of the multiple bases on which *Stern* was decided, the *Stern* court's insistence that its holding was 'narrow,' the historical practice of bankruptcy courts, and other Supreme Court decisions. The Trustee thus claims that these proceedings are 'dominated by claims arising under the Bankruptcy Code,' and that withdrawal is therefore inappropriate. The Trustee cites to a number of decisions by bankruptcy courts in this district and elsewhere that have reached similar conclusions . . . [including] *In re Refco, Inc.*, 461 B.R. 181, 184–94 (Bankr. S.D.N.Y. 2011) . . . . The basic rationale for these decisions is that *Granfinanciera* addresses fraudulent conveyance claims in a Seventh Amendment context, not an Article III context, and the comments in *Stern* comparing the claims in that case to those in *Granfinanciera* are *dicta*. Furthermore, the other express rationales for the opinion in *Stern* may weigh against applying the holding in *Granfinanciera* to an Article III context. . . . Unlike the claim in *Stern*, so the argument goes, fraudulent conveyance claims 'flow from a federal statutory scheme,' *Thomas v. Union Carbide Agr. Products Co.*, 473 U.S. 568, 584–585, 105 S. Ct. 3325, 87 L. Ed. 2d 409 (1985), and are 'completely dependent upon adjudication of a claim provided by federal law,' *Commodity Futures Trading Com'n v. Schor*, 478 U.S. 833, 856, 106 S. Ct. 3245, 92 L. Ed. 2d 675 (1986), and the asserted authority to decide them is limited to a 'particularized area of law.' *Marathon*, 458 U.S. at 85; *see also Stern*, 131 S. Ct. at 2614–15 (Scalia, J., concurring); *In re Refco, Inc.*, 461 B.R. at 186–87. . . . The Court is unaware of any district court decisions in the Southern District of New York that have embraced the Trustee's reasoning on this issue. Rather, the consensus among district courts in this district appears to be that, post-*Stern*, bankruptcy courts lack authority to enter final judgments in fraudulent conveyance actions that will not necessarily be decided in ruling on a proof of claim, absent the parties' consent. Th[e] [Trustee's] argument runs directly contrary to the clear language of *Stern*. Specifically, *Stern* provides that '[the debtor's] counterclaim—like the fraudulent conveyance claim at issue in *Granfinanciera*—does not fall within any of the varied formulations of the public rights exceptions in this Court's cases.' *Stern*, 131 S. Ct. at 2614 (emphasis supplied). The Court then lists each of these public rights exceptions and explains why the counterclaim at issue in *Stern*—and by implication, the fraudulent conveyance claim in *Granfinanciera*—does not fit within any of them. *Id*. at 2614–15. . . . The *Stern* Court compares the claim at issue in *Stern* to that in *Granfinanciera*. It makes no mention of the differing legal contexts. *Stern* thus leaves no room for a fraudulent conveyance claim that is somehow a matter of private right in a Seventh Amendment context, but a matter of public right in an Article III context. Simply put, fraudulent conveyance claims in *Stern* and *Granfinanciera* are matters of either public or private right; they cannot be both. . . . The Trustee argues that a number of his claims will necessarily be resolved in ruling on a creditor's proof of claim. Specifically, he contends that the fraudulent conveyance

claims against Nell Limited and the equitable subordination claim against AI International are integrally related to these parties' proofs of claim, and are central to the actions as a whole. The defendants contest these assertions. Even if the Trustee is correct, however, a substantial majority of the fraudulent conveyance claims have been brought against third-party defendants who, like the petitioners in *Granfinanciera*, have not filed claims against the estate. *See Granfinanciera*, 492 U.S. at 58. It is therefore not necessary to decide this issue in order to conclude, as the defendants claim, that Article III claims 'predominate' in these actions. . . . For the above reasons, the bankruptcy court lacks final adjudicative authority over the Trustee's core fraudulent conveyance claims against all parties except Nell Limited, at a minimum. It is left to the bankruptcy court to determine, in the first instance, its adjudicative authority with respect to the other claims.").

Adelphia Recovery Trust v. FLP Grp., Inc., 2012 WL 264180 (S.D.N.Y. Jan. 30, 2012) (Crotty, J.) (Plaintiff brought action under §§ 544(b) and 550 seeking to avoid and recover an alleged fraudulent transfer, asserting that Adelphia, a cable company and former debtor in possession, did not receive reasonably equivalent value from defendant FLP Group, Inc. in return for Adelphia's prepetition payment of $149 million to repurchase 1.1 million shares of its stock. Upon confirmation of its Chapter 11 plan, Adelphia transferred title to the fraudulent transfer claim to the plaintiff. Prior to the Supreme Court's decision in *Stern*, the defendants had successfully opposed the plaintiff's motion to withdraw the reference to the bankruptcy court. Post-*Stern*, the defendants moved to withdraw the reference, arguing that the bankruptcy court lacked the constitutional authority to finally adjudicate the fraudulent transfer claim. Although it denied defendants' motion to withdraw the reference, the district court held that the bankruptcy court did not have constitutional power to adjudicate a fraudulent transfer claim to final judgment, reasoning: "To determine whether a bankruptcy court can adjudicate a 'core' claim to final judgment, a court, under the logic employed in *Stern*, should consider: whether the claims involve a public or private right; whether the claims will be resolved in ruling on a creditor's proof of claim; and whether the parties consent to final adjudication by a nonArticle III tribunal. . . . In [*Granfinanciera*] the Supreme Court held that 'a bankruptcy trustee's right to recover a fraudulent conveyance under 11 U.S.C. § 548(a)(2) seems to us more accurately characterized as a private right than a public right as we have used those terms in our Article III decisions.' The Court reasoned that fraudulent conveyance suits were 'quintessentially suits at common law that more nearly resemble state law contract claims brought by a bankrupt corporation to augment the bankruptcy estate than they do credit[or]s' hierarchically ordered claims to a pro rata share of the bankruptcy res.' . . . *Granfinanciera*, however, 'was explicit in limiting its holding to the Seventh Amendment issue presented'—a noncreditor's insistence that it had a right to a jury trial—'it left open the issues decided by *Stern*: "We do not decide today whether . . . the Seventh Amendment or Article III allows jury trials in [fraudulent conveyance, private right] actions to be held before non-Article III bankruptcy judges subject to the oversight provided by the district courts . . ."' [*Dev. Specialists, Inc. v. Akin Gump Strauss Hauer & Feld LLP*, 462 B.R. 457 (S.D.N.Y. 2011] (quoting *Granfinanciera*, 492 U.S. at 64). . . . In *Stern*, the Court relied on and recounted the Court's prior holding in *Granfinanciera* that a bankruptcy trustee's right to recover a fraudulent conveyance is 'more accurately characterized as a private right than a public right.' *Id*. at 2614 (quoting *Granfinanciera*, 492 U.S. at 55–56). The Court stated that the tortious interference 'counterclaim—like the fraudulent conveyance claim at issue in *Granfinanciera*—does not fall within any of the varied formulations of the public rights exception in this Court's cases.' *Id*. at 2614. The Court went on to state that 'Congress could not

constitutionally assign resolution of the fraudulent conveyance action to a non-Article III court. . . .' *Id*. at 2614 & n.7 (citing *Granfinanciera*, 492 U.S. at 56 & n.11). . . . These Supreme Court precedents demonstrate that a fraudulent transfer claim involves a private right. . . . The fraudulent transfer claims involve a private right; the adjudication of this claim will not necessarily be decided in ruling on a third party proof of claim; and Defendants have not consented to final adjudication by the Bankruptcy Court. In light of those findings, the fraudulent transfer action here is beyond the Bankruptcy Court's final adjudicatory power.").

Dev. Specialists, Inc., v. Orrick, Herrington & Sutcliffe, LLP, 2011 WL 6780600 (S.D.N.Y. Dec. 23, 2011) (McMahon, J.) ("DSI . . . argu[es] that its claim against Orrick for fraudulent conveyance should not be withdrawn from the Bankruptcy Court. It argues that this one claim does indeed involve 'public rights,' and so should remain in the Bankruptcy Court. . . . The short answer is that—at least as to a party like Orrick, which filed no proof of claim in the Coudert bankruptcy and so is not a creditor of the Coudert estate—the Supreme Court rejected that argument long before it decided *Stern*. In *Granfinanciera*, . . . the high court 'rejected a bankruptcy trustee's argument that a fraudulent conveyance action filed on behalf of a bankruptcy estate against a noncreditor in a bankruptcy proceeding fell within the public rights exception.' *Stern*, 131 S. Ct. at 2614. DSI suggests that this statement by the *Stem* court is simply dicta, but even if it were, the Supreme Court's actual holding in *Granfinanciera*—which the *Stern* court correctly summarizes—is not. In *Granfinanciera*, the Supreme Court specifically said: 'Although the issue admits of some debate, a bankruptcy trustee's right to recover a fraudulent conveyance under 11 U.S.C. § 548(a) (2) seems to us more accurately characterized as a private rather than a public right as we have used those terms in our Article III decisions.' . . . That single sentence eliminated any 'debate' about whether DSI's fraudulent conveyance claim against Orrick—a noncreditor of the Coudert estate—involves a private or a public right. Furthermore, the Supreme Court's express reliance on its Article III jurisprudence in disposing of the public rights/private rights issue in *Granfinanciera* effectively eviscerates DSI's suggestion that there might be some difference between the scope of public rights for Article III purposes and for Seventh Amendment purposes (*Granfinanciera* having arisen in the context of a noncreditor's insistence that it had a right to a jury trial on the fraudulent conveyance claim against it). . . . DSI argues that its fraudulent conveyance claims must involve public rights because they would not exist 'but for' Coudert's bankruptcy. This is sophistry. Fraudulent conveyance claims are created by state law—in this case, New York's Debtor and Creditor Law—not under Title 11. And it goes without saying that fraudulent conveyance and other fraudulent transfer claims are routinely adjudicated outside the bankruptcy context; one need not be in bankruptcy to assert such a claim. They are, as the Supreme Court recognized in *Granfinanciera*, akin to claims arising under state law contract principles—both types of claims can lead to recoveries that would augment a bankruptcy estate, but they do so by vindicating private rights. . . . The Bankruptcy Code does no more than give the bankruptcy trustee the exclusive right to pursue fraudulent conveyance claims that would have the effect of returning assets to the bankruptcy estate; this reflects Congress' intent that the assets of an entity that invokes the protection of federal bankruptcy law should be marshaled and distributed equitably among all the bankrupt's creditors, rather than ending up in the hands of the few who win a race to the courthouse.").

Stettin v. Centurion Structured Growth LLC, 2011 WL 7413861 (S.D. Fla. Dec. 19, 2011) (Jordan, J.) (Chapter 11 trustee of the debtor—a law firm engaged in "multi-million dollar Ponzi

scheme" involving the "sale of fictitious confidential structured settlements purportedly between the law firm's clients and third parties"—filed adversary proceeding against the defendants, which were hedge funds and "feeder funds" that invested in "the Banyon entities." The debtor had formed the Banyon entities as vehicles to be used for the purpose of soliciting "funds to purchase the law firm's settlements." In the adversary proceeding the trustee sought "to avoid and recover fraudulent transfers [allegedly received by the defendants] and other related relief." Defendants moved to withdraw the reference, arguing that "cause exists to withdraw the reference because they are entitled to a jury trial under the Seventh Amendment on the claims asserted against them in the adversary proceeding and have not consented to trial before the bankruptcy court." The court granted the motion to withdraw the reference stating: "The defendants have neither filed nor otherwise asserted any claim against the estate or the disputed *res*. Accordingly, the trustee's fraudulent conveyance action cannot be considered part of the claims adjudication process or integral to the restructuring of debtor-creditor relations. As a result, I find that the defendants have not submitted themselves to the jurisdiction of the bankruptcy court or lost their Seventh Amendment right to a jury trial in this adversary proceeding by filing the proofs of claim on behalf of the Banyon entities.").

McCarthy v. Wells Fargo Bank, N.A. (In re El-Atari), 2011 WL 5828013 (E.D. Va. Nov. 18, 2011) (Brinkema, J.) (In adversary proceeding brought by Chapter 7 trustee against defendant to recover alleged fraudulent transfers, the district court denied the defendant's motion to withdraw the reference. Concluding that while the bankruptcy court retained the authority to hear the trustee's fraudulent transfer claims, it lacked the constitutional authority to finally adjudicate them, stating: "*Stern*, together with *Granfinanciera*, clearly supports the conclusion that the authority to issue a final decision in a fraudulent conveyance action is reserved for Article III courts.").

Dev. Specialists, Inc., v. Akin Gump Strauss Hauer & Feld LLP, 462 B.R. 457 (S.D.N.Y. 2011) (McMahon, J.) ("*Stern* represents the first time a solid majority of the Supreme Court has applied the categorical, historical approach to limit the final adjudicative authority of the Bankruptcy Court following the 1984 Act. *Granfinanciera*, meanwhile, was explicit in limiting its holding to the Seventh Amendment issued presented—it left open the issues decided in *Stern*: 'We do not decide today whether . . . the Seventh Amendment or Article III allows jury trials in [fraudulent conveyance, private right] actions to be held before non-Article III bankruptcy judges subject to the oversight provided by the district courts pursuant to the 1984 Amendments.' . . . Only in *Stern* did the Court actually hold that a fraudulent conveyance action implicating private rights must be finally determined in an Article III forum.").

Retired Partners of Coudert Bros. Trust v. Baker & McKenzie LLP (In re Coudert Bros. LLP), 2011 WL 5593147 (S.D.N.Y. Sept. 23, 2011) (McMahon, J.) ("[T]he Claims allege that the active partners, anticipating bankruptcy, sought to avoid their obligations to the retired partners, who were creditors of the Coudert firm. They did so by transferring Coudert's assets to the Firms for less than fair consideration, rendering Coudert unable to satisfy its obligations. The Trust sues to undo the transaction so the retired partners' claims can be satisfied. However labeled, this appears to be a quintessential fraudulent conveyance claim. And in *Granfinanciera* the Supreme Court ruled, in the context of the Seventh Amendment, that a claim of fraudulent conveyance implicates private rather

than public rights, 'notwithstanding Congress' designation of fraudulent conveyance actions as 'core proceedings' in the 1984 Bankruptcy Act.").

Sitka Enters., Inc. v. Segarra-Miranda, 2011 WL 7168645 (D.P.R. Aug. 12, 2011) (Cerezo, J.) ("This appeal [of the bankruptcy court's order denying defendants' motion to dismiss Chapter 7 trustee's § 548 claim] turns on a controlling question of law recently decided by the Supreme Court of the United States in *Stern* . . . regarding the lack of constitutional authority of the Bankruptcy Court as a non-Article III court to adjudicate a trustee's action to recover a fraudulent conveyance characterized as an action involving private rather than public rights. . . . The *Stern* decision has its roots in *Granfinanciera*, [which] rejected the . . . argument that a fraudulent conveyance action fell within the public rights exception. . . . At footnote 7 [of the *Stern* decision] the Court stated outright that 'Congress could not constitutionally assign the resolution of the fraudulent conveyance action to a non-Article III court.' Given this definitive finding by the Court in *Stern*, the resolution of the fraudulent conveyance action brought by the trustee in this case cannot be adjudicated by the Bankruptcy Court since it lacks constitutional authority to do so under the restrictions placed by Article III.").

Levey v. Hanson's Window & Constr., Inc. (In re Republic Windows & Doors, LLC), 460 B.R. 511 (Bankr. N.D. Ill. 2011) (Cox, J.) (In an adversary proceeding brought by the Chapter 7 trustee against company owned by associate of debtor's insiders, the trustee alleged that the defendant ordered products from the financially strapped debtor without any intention of making payment for the goods. According to the trustee, the transfers of goods by the debtor were made in order to effectuate a scheme devised by the debtor's insiders to strip the company of its remaining assets. The trustee sought a recovery from defendant on his breach of contract, unjust enrichment, turnover and actual as well as constructive fraudulent transfer claims (asserted under both §§ 544—and the Illinois UFTA—and § 548). Relying on *Stern*, the defendant moved to dismiss under Rule 12(b)(1) for lack of subject matter jurisdiction and under Rule 12(b)(6) for failure to state a claim. Addressing the defendant's Rule 12(b)(1) motion, the court stated: "Here, the Defendant relies on *Stern* for its assertion that this Court lacks subject matter jurisdiction to finally determine the Trustee's claims in his First Amended Complaint. Contrary to the Defendant's broad reading of *Stern*, that decision does not implicate subject matter jurisdiction. There the Court articulated quite clearly that '[s]ection 157 allocates the authority to enter final judgment between the bankruptcy court and the district court. . . . That allocation *does not implicate questions of subject matter jurisdiction*.' *Stern*, 131 S. Ct. at 2607. (emphasis added). *Stern* addresses the authority of bankruptcy courts to enter final judgment assuming that subject matter jurisdiction exists." Insofar as the trustee's fraudulent transfer claims were concerned, the court suggested that it did not have the constitutional authority to finally adjudicate them, stating: "The recovery of . . . funds [on these claims] would augment the bankruptcy estate, making these proceedings non-core, but related. The Court therefore determines that it has related-to jurisdiction . . . pursuant to 28 U.S.C. § 157(c)(1).").

Meoli v. Huntington Nat'l Bank (In re Teleservices Grp., Inc.), 456 B.R. 318 (Bankr. W.D. Mich. 2011) (Hughes, J.) (Chapter 7 trustee brought an adversary proceeding seeking avoidance and recovery of alleged actual and constructive fraudulent transfers—totaling in excess of $50 million—received by defendant bank from the corporate debtor and affiliated entities operating a Ponzi scheme. The trustee sought relief under §§ 502(d), 542, 544(b) (and the Michigan UFTA),

547, 548(a), 549 and 550. Prior to the Supreme Court's decision in *Stern*, the bankruptcy court conducted a 12-day trial and issued a 127-page opinion in which the court found that further proceedings would be required in order to fully adjudicate the trustee's claims against the bank. Post-*Stern*, the bank filed a motion "to amend . . . [the court's] pretrial order . . . designati[ng] . . . adversary proceeding as a matter in which [the court] could enter a final determination subject only to ordinary appellate review[,] . . . contend[ing] that [the court] lack[s] the constitutional authority to enter what in this instance could be a multi-million dollar judgment against it arising from fraudulent transfers." The court granted the bank's motion, concluding that it did not have the constitutional authority to finally adjudicate the trustee's fraudulent transfer claims and stating: "[A]pplication of *Stern* to the matter at hand is easy. This is admittedly a complex case and the wide variety of arguments made have posed any number of challenges. But, in the end, all that is before me is simply an action by [the Chapter 7] trustee to compel Huntington to account under Section 550(a) for fraudulent transfers she has traced to Huntington either directly or through a related company, CyberCo. There is also no question that if Trustee prevails, the relief awarded will be a money judgment because the transfers themselves were in the form of money. Indeed, whatever was transferred to Huntington has long ago lost its identity. And finally, it is clear from the energy and creativity already expended that Huntington has no intention of having the federal government assist Trustee in depriving it of millions of dollars without being afforded all that is meant by the Fifth Amendment's guaranty of due process. . . . Therefore, while *Granfinanciera*'s historical references to the recovery of fraudulent conveyances and preferences through the common law courts offers additional insight, it is not a necessary component to my decision that any judgment that will enter against [the bank] in this adversary proceeding must be entered by an Article III judge. *Stern*, coupled with the Court's earlier decision in *Murray's Lessee*, is all that is needed to realize that the taking that Trustee has in mind in this adversary proceeding requires the oversight of a judicial officer with the independence that is only guaranteed by life tenure and salary protection. . . . The real issue in both *Stern* and *Katchen* was whether the relief sought by the estate included the involuntary recovery of property from a third party. *Northern Pipeline*, *Granfinanciera*, and *Stern* all referred to such recoveries as augmenting the estate. *See, e.g.*, *Stern*, 131 S. Ct. at 2616. Put simply, it is irrelevant whether the defense is based upon state law or a preference received if all that is at issue is claims allowance—i.e., what will be a particular claimant's share in the estate's distribution vis-a-vis all other claimants. In either instance, the non-Article III judge is competent to make that decision. On the other hand, if the trustee is using the allowance process to also add to the estate's coffers at the claimant's expense, then the claimant who is being asked to return perhaps millions in preferences should be just as deserving of an Article III judge's independence as an accused tortfeasor defending against a trustee's state law counterclaim.").

Ivey v. Vester (In re Whitley), 2012 WL 1268220 (Bankr. M.D.N.C. Apr. 13, 2012) (Stocks, J.) ("James Edward Whitley (the "Debtor") was the sole shareholder and principal officer of South Wynd Financial, Inc., a corporation purportedly in the business of invoice funding and receivables financing ("factoring"). In reality, the Debtor's factoring business was non-existent, fictitious, and amounted to a Ponzi scheme. On March 8, 2010, a group of unsecured creditors filed an involuntary petition against the Debtor. Charles Ivey (the "Plaintiff") was appointed as Trustee and subsequently commenced multiple adversary proceedings against some of the investors in the Debtor's investment scheme, including the Defendant. . . . The Trustee asserts fraudulent transfer claims pursuant to 11 U.S.C. § 548(a)(1)(A) and 11 U.S.C. § 544 through [the North Carolina

UFTA] to avoid transfers made by the Debtor to the Defendant. The court is called upon to determine, pursuant to *Stern*, whether it may enter a final judgment as to the fraudulent transfer claims and, if not, whether the court may make findings of fact and conclusions of law for submission to the district court. . . . [T]he Defendant argues that this court may neither enter a final judgment in this proceeding nor make proposed findings of fact and conclusions of law for submission to the district court. . . . The Defendant has not filed a proof of claim in the underlying bankruptcy case. Consequently, this is not a proceeding in which a final judgment may be entered because the claims 'would necessarily be resolved in the claims allowance process.' *Stern v. Marshall*, 131 S. Ct. at 2618. . . . A number of courts have considered whether the bankruptcy court may enter a final judgment where, as in this proceeding, a fraudulent transfer claim has been asserted against a defendant who has not filed a proof of claim or consented to the court entering a final judgment. The courts are divided on this issue. Many, perhaps most, courts have concluded that the bankruptcy court may not enter a final judgment under such circumstances. . . . Having reviewed decisions on both sides of the issue, the court adopts the view that under *Stern v. Marshall*, this court may not enter a final judgment with respect to a fraudulent transfer action against a defendant who has not filed a proof of claim or consented to the bankruptcy court entering a final judgment.").

Burns v. Dennis (In re Se. Materials, Inc.), 2012 WL 1034322 (Bankr. M.D.N.C. Mar. 27, 2012) (Waldrep, J.) (Under *Stern*, "the question is whether the action at issue stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process. . . . If either prong of the test is met, then the bankruptcy court has constitutional authority to enter a final order. Conversely, if the action neither stems from the bankruptcy itself nor would necessarily be resolved in the claims allowance process, the bankruptcy court lacks constitutional authority to enter final judgment and may only submit proposed findings of fact and conclusions of law to the district court. . . . Neither DLI nor Maria Dennis filed proofs of claim against the Debtor. . . . [Certain of the Chapter 7 trustee's] claims [against them] are fraudulent conveyance actions pursuant to Sections 544(b) and 548 of the Bankruptcy Code. . . . The second prong of the *Stern* test cannot be satisfied because neither DLI nor Maria filed a proof of claim. But do such claims satisfy the first prong of the *Stern* test? Do they stem from the Bankruptcy Code? These are questions as to which reasonable minds have already differed. . . . It is obvious that Sections 544(b) and 548 are part of the Bankruptcy Code, and it appears at first blush that they must be bankruptcy causes of action. However, history teaches otherwise. . . . Prior to the founding of this country, fraudulent conveyances had long been decided in English courts of law through the application of the common law. . . . Fraudulent conveyance actions are common law actions that were decided by courts of law in England and by district courts under the Bankruptcy Act of 1898. Fraudulent conveyance suits are 'quintessentially suits at common law that more nearly resemble state law contract claims brought by a bankrupt corporation to augment the bankruptcy estate than they do creditors' hierarchically ordered claims to a pro rata share of the bankruptcy res.' *Granfinanciera*, 492 U.S. at 55–56. 11 U.S.C. § 548 is aimed only at such conveyances as would be fraudulent and voidable under common law or under the statute of 13 Elizabeth. . . . Section 544 incorporates 'applicable law,' meaning state fraudulent conveyance law, which itself is patterned on the common law. The Uniform Fraudulent Conveyance Act, approved by the National Conference of Commissioners on State Laws in 1918, is essentially a restatement of the statute of 13 Elizabeth. States which have not adopted the Uniform Fraudulent Conveyance Act or a similar version of the statute of 13 Elizabeth have recognized the statute of 13

Elizabeth as part of the common law. . . . In addition, fraudulent conveyance claims are private rights and do not fall within the public rights exception. Thus, fraudulent conveyance actions under Section 544(b) and Section 548 do not 'stem from the Bankruptcy Code' in the context of applying the second prong of the *Stern* test. Bankruptcy courts may not enter final orders in fraudulent conveyance actions, at least where the defendant has not filed a proof of claim. . . . The Court realizes that there are well-reasoned opinions that have reached the opposite conclusion, adopting what has been called the 'narrow view.' . . . These courts make various observations in support of the narrow view, one of which is that bankruptcy courts have entered final judgments in fraudulent transfer actions for many years. . . . Another observation cited in support of the narrow view is that the majority opinion in *Stern* did not address fraudulent conveyances, and specifically stated that its holding was narrow. . . . Although fraudulent conveyances were not addressed by *Stern*, that does not mean that the *Stern* analysis should not be applied to other provisions of 28 U.S.C. § 157(b)(2). . . . Another observation of courts that take the narrow view of *Stern* is that the broader view restructures the division of labor between district courts and bankruptcy courts by requiring that district courts hear most adversary proceedings. The Supreme Court, however, did not believe the holding in *Stern* would have this effect. Because a bankruptcy court clearly has jurisdiction over fraudulent conveyance causes of action, it may hear such matters as usual—the only difference is that the document produced by the bankruptcy court should be titled 'Proposed Findings of Fact and Conclusions of Law' and not 'Judgment.'").

Field v. Albright (In re Maui Indus. Loan & Fin. Co.), 2012 WL 405056 (Bankr. D. Haw. Feb. 8, 2012) (Faris, J.) ("[T]he [Chapter 7] trustee sued [defendant]. The complaint alleges (in summary) that the debtor operated a Ponzi scheme from 1986 through 2009, that [defendant] invested $97,152.00 in the Ponzi scheme, and that the debtor paid him approximately $155,418.02. The complaint states five claims. The first count seeks avoidance of the transfers under 11 U.S.C. § 548; the second count seeks recovery of the transfers under 11 U.S.C. § 550; the third count seeks avoidance of the transfers under [the Hawaii UFTA]; the fourth count seeks avoidance of the transfers under 11 U.S.C. § 544; and the fifth claim seeks recovery of the transferred amounts under the doctrines of unjust enrichment and constructive trust. . . . The first four counts of the trustee's complaint are statutory core matters. *See* 28 U.S.C. § 157(b)(2)(B), (H). The fifth count of the complaint, alleging unjust enrichment, is a statutory non-core claim. . . . The remaining question is whether the court has the constitutional authority to enter final judgment on the four statutory core claims. *See Stern v. Marshall*, 131 S. Ct. 2594 (2011). The Supreme Court has indicated that the Bankruptcy Code's codification of traditionally common law claims, such as section 548, does not grant an Article I court the constitutional authority to enter final judgment. *See Granfinanciera*, 492 U.S. at 49–50. Both section 548 of the Bankruptcy Code and section 651C of the Hawaii [UFTA] are codifications of common law claims. Therefore, as a precautionary measure, the court will submit findings and recommendations on all four statutory core claims.").

Yellow Sign, Inc. v. Freeway Foods, Inc. (In re Freeway Foods of Greensboro, Inc.), 2012 WL 112192 (Bankr. M.D.N.C. Jan. 13, 2012) (Waldrep, J.) (In an adversary proceeding created by removal of state court action, corporate Chapter 7 debtor's franchisor and an affiliate of the franchisor, asserting claims under North Carolina/Georgia UFTA, sought to avoid prepetition transfers that debtor allegedly made in order to frustrate franchisor's ability to collect the $5.4 million debt underlying its proof of claim. The Chapter 7 trustee sought dismissal of the plaintiffs'

state law fraudulent transfer claims. "[B]efore considering the merits of the Dispositive Motions," the court "held a hearing . . . to address issues regarding [its] authority to render final judgments on the claims and counterclaims in th[e] Adversary Proceeding." The court noted that "*Stern* provides a two-prong test for determining whether a bankruptcy court has the constitutional authority to finally adjudicate a claim: 'the question is whether the action at issue stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process.' *Stern*, 131 S. Ct. at 2618. If either prong of the test is met, then the bankruptcy court has constitutional authority to enter a final order. Conversely, if the action neither stems from the bankruptcy itself nor would necessarily be resolved in the claims allowance process, the bankruptcy court lacks constitutional authority to enter final judgment and may only submit proposed findings of fact and conclusions of law to the district court. . . . 28 U.S.C. § 157(b)(2)(H) indicates that [the UFTA-based claim] is a core proceeding. But it does not satisfy the first prong of the *Stern* test because it is based on state fraudulent transfer law and does not stem from the Bankruptcy Code. Although [plaintiffs] have filed proofs of claim, as described above, it is not necessary to determine if [the debtor] fraudulently transferred assets in order for the Court to allow the [plaintiffs'] proofs of claim. Therefore, absent consent, the Court has no constitutional authority to enter a final judgment regarding this claim. However, the parties have consented, so the Court may enter a final judgment.").

Tabor v. Kelly (In re Davis), 2011 WL 5429095 (Bankr. W.D. Tenn. Oct. 5, 2011) (Latta, J.) (The Chapter 7 trustee sought, among other things, to avoid—pursuant to §§ 544 (and the Tennessee UFTA) and 548—alleged fraudulent transfers arising from a Ponzi scheme perpetrated by the debtor. The defendant, who had not filed a proof of claim, took "the position that, as the result of *Stern v. Marshall*, 'a bankruptcy court has no authority to decide a matter that could have been brought if the bankruptcy case had never been filed.'". . . He argued "that the bankruptcy court is without authority to hear any cause of action brought pursuant to section 544(b)(1). Further, the [d]efendant asserts that while the bankruptcy court may have authority to hear and determine the section 548 claims, the interests of judicial economy and convenience, and the risk of inconsistent, overlapping decisions dictates that the bankruptcy court abstain from hearing those matters to permit the Defendant to seek withdrawal of the reference by the district court. Finally, the [d]efendant asserts that the Trustee has failed to demonstrate that the transfers to the Defendant were fraudulent as a matter of law, and thus, that he is entitled to summary judgment. . . . The Trustee responds that the facts and circumstances of this case are distinguishable from those in *Stern v. Marshall*, and thus, the bankruptcy court does have authority to entertain state fraudulent transfer claims as well as federal fraudulent transfer claims. The Trustee asserts that this is so because the claims that he is pursuing 'arise under' the Bankruptcy Code by virtue of sections 548 and 544(b), even though section 544(b)(2) incorporates state law. The Trustee asserts that his complaint initiated a core proceeding and that the Defendant has admitted that it is a core proceeding; thus, the Trustee concludes, the bankruptcy court has authority to hear and determine these claims." Before turning to the merits of the parties' motions, the court addressed these arguments regarding "what authority [it had] with respect to this dispute," stating: "There is no question that the bankruptcy courts have statutory authority to hear and determine the types of actions which are the subject of the complaint in this adversary proceeding. 28 U.S.C. § 157(b)(1). Further, preferential transfers in all instances and fraudulent conveyances in some instances may be recovered pursuant to federal bankruptcy law. *See* 11 U.S.C. §§ 547 and 548. As the result of the Court's decision in *Stern*, however, the fact that Congress has designated a particular type of proceeding as 'core' is insufficient. The bankruptcy

courts cannot rely upon the core/non-core distinction to determine whether they may hear and finally determine a particular cause of action. Instead they must determine whether the statutory authority delegated to them by Congress is within the constitutional guidelines provided by *Stern*. This is the analysis that must be undertaken in this case before there can be any consideration of the merits of the complaint pursuant to the motions for summary judgment. . . . The [*Stern*] Court turned next to a discussion of what sorts of claims can be termed a matter of 'public right' that can be decided outside the judicial branch. . . . Of particular note is the Court's decision in *Granfinanciera* . . . the only case in which the Court has considered the public rights/private rights distinction in the context of bankruptcy since its decision in *Northern Pipeline*. As characterized in *Stern*, there the Court 'rejected a bankruptcy trustee's argument that a fraudulent conveyance action filed on behalf of the bankruptcy estate against a non-creditor in a bankruptcy proceeding fell within the "public rights" exception.' *Stern*, 131 S. Ct. at 2614. In *Granfinanciera*, the Court said: '[i]f a statutory right is not closely intertwined with a federal regulatory program Congress has power to enact, and if that right neither belongs to nor exists against the Federal Government, then it must be adjudicated by an Article III court.' *Granfinanciera*, 492 U.S. at 54–55, 109 S. Ct. 2782, quoted in *Stern*, 131 S. Ct. at 2614. The Court continued: 'Although the issue admits of some debate, *a bankruptcy trustee's right to recover a fraudulent conveyance under 11 U.S.C. § 548(a)(2) seems to us more accurately characterized as a private rather than a public right* as we have used those terms in our Article III decisions. In *Northern Pipeline* the plurality noted that the restructuring of debtor-creditor relations in bankruptcy "may well be a 'public right.' But the plurality also emphasized that state-law causes of action for breach of contract or warranty are paradigmatic private rights, even when asserted by an insolvent corporation in the midst of Chapter 11 reorganization proceedings. . . . *There can be little doubt that fraudulent conveyance actions by bankruptcy trustees*—suits which we said in *Schoenthal v. Irving Trust Co.*, 287 U.S., at 94–95, 53 S. Ct., at 51 (citation omitted), "constitute no part of the proceedings in bankruptcy but concern controversies arising out of it"—*are quintessentially suits at common law that more nearly resemble state-law contract claims brought by a bankrupt corporation to augment the bankruptcy estate than they do creditors' hierarchically ordered claims to a pro rata share of the bankruptcy res*. They therefore appear *matters of private rather than public right*.' *Id.*, 492 U.S. at 55–56, 109 S. Ct. at 2797–98 (emphasis added; some internal citations omitted), partially quoted in *Stern*, 131 S. Ct. at 2614. . . . The *Stern* Court then goes on to compare this formulation to the petitioner's counterclaim: '[Petitioner]'s counterclaim—like the fraudulent conveyance claim at issue in *Granfinanciera*—does not fall within any of the varied formulations of the public rights exception in this Court's cases. It is not a matter that can be pursued only by [the] grace of the other branches, as in *Murray's Lessee*, or one that "historically could have been determined exclusively by" those branches. The claim is instead one under state common law between two private parties. It does not "depend[ ] on the will of congress." Congress has nothing to do with it.' *Stern*, 131 S. Ct. at 2614. The Court continues with other examples from its prior decisions, in each case distinguishing the petitioner's counterclaim as a private rather than a public right. It concludes: 'What is plain here is that *this case involves the most prototypical exercise of judicial power*: *the entry of a 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. *If such an exercise of judicial power may nonetheless be taken from the Article III Judiciary simply by deeming it part of some amorphous* "*public right*," *then Article III would be transformed from the guardian of individual liberty and separation of powers we have long recognized into mere wishful thinking*.' *Id*. at 2615

(emphasis added). The Court's conclusion is clear: a judge that enters a final, binding judgment on a common law cause of action that is not derived from nor dependent upon a federal regulatory regime is exercising judicial power. . . . Although the Court was not called upon to decide the particular issue before this court, it seems inescapable that if a cause of action is legal in nature, and it is a matter of private rather than public right, the Seventh Amendment right to jury trial attaches to it and it must be heard and decided by an Article III court. In *Granfinanciera*, the Supreme Court decided that actions to recover fraudulent conveyances under section 548(a)(2) are more accurately characterized as matters of private rather than public right. *Id*. at 55. Fraudulent conveyance actions were not part of the proceedings in bankruptcy prior to 1978 and they 'are quintessentially suits at common law that more nearly resemble state-law contract claims brought by a bankruptcy corporation to augment the bankruptcy estate than they do creditors' hierarchically ordered claims to a pro rata share of the bankruptcy res.' *Id*. at 56. If this is true concerning constructive fraud claims under section 548(a)(2), I see no reason why it would not also be true with respect to actual fraud claims under section 548(a)(1). Section 548(a)(1) merely codifies the action for fraudulent conveyance that has been part of the common law since at least *Twyne's Case*, 3 Coke 80b, 76 Eng. Rep. 809 (Star Chamber, 1601). Under *Granfinanciera* it makes no difference that a portion of the claim is brought under section 548(a)(2) of the Bankruptcy Code and another portion under section 544(b), which incorporates state law. So long as a defendant has not subjected himself to the claims adjudication process by filing a proof of claim, the fraudulent conveyance action does not arise as part of the claims allowance process. It is a matter of private right that cannot constitutionally be determined without a jury if demanded nor by a non-Article III tribunal.").

Samson v. Blixseth (In re Blixseth), 2011 WL 3274042 (Bankr. D. Mont. Aug. 1, 2011) (Kirscher, J.) *order amended on denial of reconsideration*, 2012 WL 10193 (Bankr. D. Mont. Jan. 3, 2012) (Kirscher, J.) ("Fraudulent conveyance claims in bankruptcy do not fall within the public rights exception. Although codified by the Bankruptcy Reform Act of 1978, fraudulent conveyance claims are 'quintessentially suits at common law that more nearly resemble state law contract claims brought by a bankrupt corporation to augment the bankruptcy estate than they do creditors' hierarchically ordered claims to a pro rata share of the bankruptcy res.' *Granfinanciera*, 492 U.S. at 56. That reasoning was reaffirmed by *Stern* as the Court rejected the contention that the debtor's compulsory counterclaim fell under the public rights exception: '*Granfinanciera*'s distinction between actions that seek "to augment the bankruptcy estate" and those that seek "a pro rata share of the bankruptcy res," reaffirms 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.' *Stern*, 131 S. Ct. at 2618 (emphasis in the original). Such language implies that bankruptcy actions tied to the claims allowance process would fall within the public rights exception as integrally related to federal administration of bankruptcy, while actions to augment the estate would not. Since Trustee's fraudulent conveyance claim is essentially a common law claim attempting to augment the estate, does not stem from the bankruptcy itself and would not be resolved in the claims allowance process, it is a private right that must be adjudicated by an Article III court. This Court's jurisdiction over that claim as a core proceeding is therefore unconstitutional.").

3. COURTS IDENTIFYING BUT NOT DECIDING THE ISSUE

Exec. Benefits Ins. Agency v. Arkison (In re Bellingham Ins. Agency Inc.), 661 F.3d 476 (9th Cir. 2011) (Kozinski, J.; Paez, J.; Collins, J.) ("The court invites supplemental briefs by any amicus curiae addressing the following questions: Does *Stern v. Marshall*, 131 S. Ct. 2594 (2011), prohibit bankruptcy courts from entering a final, binding judgment on an action to avoid a fraudulent conveyance? If so, may the bankruptcy court hear the proceeding and submit a report and recommendation to a federal district court in lieu of entering a final judgment?").

Picard v. Flinn Invs., LLC, 463 B.R. 280 (S.D.N.Y. 2011) (Rakoff, J.) ("[Defendant] argues that, because actions to recover fraudulent transfers do not fall within the 'public rights exception,' bankruptcy courts cannot 'enter a final judgment' without usurping the 'judicial Power' reserved for Article III courts. Resolution of this argument requires 'significant interpretation' of both Article III and the Supreme Court precedent analyzing it. The answer is by no means obvious. For example, the Supreme Court in *Stern* suggested that its holding applied only narrowly to state law counterclaims and did not 'meaningfully change[ ] the division of labor' between district and bankruptcy courts. 131 S. Ct. at 2620. Moreover, the Supreme Court's argument that the "experts" in the federal system at resolving common law counterclaims . . . are the Article III courts seemingly does not apply to actions to avoid fraudulent transfers. *Id*. at 2615. Given the difficulty of this question, the Court withdraws the reference to bankruptcy court on this issue for the purpose of determining whether final resolution of claims to avoid transfers as fraudulent requires an exercise of 'judicial Power' that the bankruptcy court lacks.").

Sharifeh v. Fox, 2012 WL 469980 (N.D. Ill. Feb. 10, 2012) (Leinenweber, J.) ("This case concerns four appeals stemming from a bankruptcy filing by Richard Sharif ("Sharif") and an adversary proceeding filed by [one of] his creditor[s], 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. . . . [based on *Stern*]. . . . 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. . . . In the wake of *Stern*, some courts have questioned whether bankruptcy courts constitutionally may rule upon fraudulent conveyance claims. . . . While interesting, the Court need not enter this fray [because Sharifeh has waived her argument based on *Stern*.]").

Geron v. Levine (In re Levine), 2012 WL 310944 (S.D.N.Y. Feb. 1, 2012) (Engelmayer, J.) ("The parties agree that one claim in the complaint—the fraudulent conveyance claim—is core. As to this claim, whether the Bankruptcy Court may enter a final judgment may depend on a finding of whether, as in *Stern*, only private rights are at issue. If the claim does not implicate private rights, the Bankruptcy Court could, pursuant to § 157(b), enter final judgment as to that claim only.

However, if the Bankruptcy Court were to grant summary judgment on this core claim, the Trustee could, and has indicated to the Court that he would, appeal such a grant to this Court. Thus, the Court would be compelled to rule on the Bankruptcy Court's jurisdiction to enter such a final order. . . . Alternatively, if this Court were to find that the fraudulent conveyance claim implicates only private rights, then pursuant to the Supreme Court's holding in *Stern*, this Court would be compelled to treat any decision below as constituting proposed findings of fact and conclusions of law, for the Court to review de novo, inasmuch as the Bankruptcy Court would be precluded from entering final judgment without the parties' consent. Thus, in either posture, ruling on the fraudulent conveyance claim will all but inevitably come before this Court.").

Hagan v. e-Limidebt, Inc. (In re Gifford), 2011 U.S. Dist. LEXIS 104488 (W.D. Mich. Sept. 15, 2011) (Jonker, J.) ("[T]he Chapter 7 Trustee . . . filed a complaint under 11 U.S.C. §§ 548 and 550 to recover allegedly fraudulent transfers by Debtors to Defendant . . . in the amount of $2,699.37. Defendant failed to answer the complaint, and Plaintiff subsequently filed a motion for entry of a default judgment against Defendant. . . . The Bankruptcy Court held a hearing on August 4, 2011, to address Plaintiff's motion, but Defendant did not appear . . . . The Bankruptcy Court's Report and Recommendation followed. . . . [T]he Bankruptcy Court concluded that default judgment against Defendant was appropriate, and that the complaint constituted a core matter under 28 U.S.C. § 157(b)(2). Relying on the Supreme Court's recent decision in *Stern v. Marshall*, . . . however, the Bankruptcy Court concluded it lacked the constitutional authority to enter a final judgment in this matter and therefore submitted its Report and Recommendation to this Court for the entry of judgment. . . . After reviewing the Bankruptcy Court's Report and Recommendation and the record below, the Court grants Plaintiff's motion for default and enters a money judgment in favor of Plaintiff . . . as recommended by the Bankruptcy Court. In entering this Order, the Court does not reach the issue of whether *Stern* required the Bankruptcy Court to refer the case to the Court for entry of judgment. It is undisputed the Court has jurisdiction to enter judgment in this matter, and the Bankruptcy Court's reference of the matter to the Court does not constitute reversible error.").

Paloian v. LaSalle Bank Nat'l Ass'n (In re Doctors Hosp. of Hyde Park, Inc.), 463 B.R. 93 (Bankr. N.D. Ill. 2011) (Schmetterer, J.) (Given the procedural posture of the case, the court was not required to decide whether, after *Stern*, bankruptcy courts have the constitutional authority to finally adjudicate fraudulent transfer claims. But the court noted: "That authority was arguably called into question by the Supreme Court decision in *Stern v. Marshall*. That decision held that the Constitution requires the 'removal of [certain trustee] counterclaims . . . from core bankruptcy jurisdiction' and placed [them] within the purview of an Article III judge for entry of final judgment. 131 S. Ct. at 2620. The *Stern* holding was directed at non-bankruptcy law counterclaims that are not resolved in the process of ruling on a creditor's proof of claim. *Id*. at 2619–20. Based on this holding, a bankruptcy judge's authority to enter final judgment on non-bankruptcy law matters statutorily designated as 'core proceedings' has been called into question. For example, in an article in the *Bankruptcy Law Letter*, University of Illinois law professor Ralph Brubaker argues that § 157(b)(2)(H) is likewise unconstitutional to the extent it would allow a bankruptcy judge to enter final judgment. Ralph Brubaker, *Article Ill's Bleak House (Part II)*: *The Constitutional Limits of Bankruptcy Judge's Core Jurisdiction*, *Bankr. L. Letter*, Sept. 2011, at 1–2.").

Miller v. Grosso (In re Miller), 2012 WL 1098455 (Bankr. D. Mass. Mar. 30, 2012) (Bailey, J.) ("If a bankruptcy court may not enter final judgment in a proceeding to avoid or recover a fraudulent transfer, it may nonetheless hear the matter and enter proposed findings and conclusions, subject to review and entry of final judgment in the district court, essentially as a noncore matter that falls within the scope of 28 U.S.C. § 157(c)(1). . . . By the same token, when a bankruptcy court enters final judgment in a core matter that on appeal is later determined on *Stern* grounds to have been outside its authority, the reviewing court on appeal may treat the bankruptcy court's findings and conclusions as proposed findings and conclusions under § 157(c)(1) and subject to review by the district court as prescribed therein. . . . In view of these options, the Court need not at this juncture decide the issue of its authority to enter final judgment on the fraudulent transfer counts. The Court will proceed to try this adversary proceeding and will decide its authority to enter final judgment in conjunction when it prepares its findings and conclusions. If I conclude that a bankruptcy judge lacks authority to enter final judgment, I will enter proposed findings and conclusions under § 157(c)(1). If I conclude that a bankruptcy judge is authorized to enter final judgment, I will enter findings and conclusions and final judgment but add that if a reviewing court ultimately determines that the bankruptcy court did not have authority to enter final judgment over one or more counts, the bankruptcy court's findings of fact and conclusions of law may be treated as proposed findings and conclusions, subject [to] entry of final judgment by the district court after review pursuant to 28 U.S.C. § 157(c)(1).").

Peterson v. Enhanced Investing Corp. (Cayman) Ltd. (In re Lancelot Investors Fund, L.P.), 2012 WL 761593 (Bankr. N.D. Ill. Mar. 8, 2012) (Cox, J.) (The bankruptcy court granted defendants' motions for summary judgment on Chapter 7 trustee's claims for avoidance and recovery of transfers made in the course of a Ponzi scheme operated by the debtor, concluding that recovery on the claims was barred by the safe harbor provisions of § 546(e) and (g) of the Bankruptcy Code. The court found, however, that its constitutional authority to enter summary judgment in favor of the defendants on the trustee's claims—which were based on §§ 544, 547, 548(a)(1)(B) and 550—was in question after *Stern*: "*Stern's* ruling may mean that fraudulent transfer claims have to be resolved by Article III judges where their resolution does not necessarily resolve a proof of claim. However, because resolution of the various transfer claims asserted by the Trustee could affect the extent of funds the estate has available for distribution to its creditors, this matter [would be within the court's 'related-to' jurisdiction under] . . . 28 U.S.C. § 157(c)(1). . . . Separate Orders will be entered on each Motion for Summary Judgment. Before the court enters those Orders, however, it invites the parties to submit briefs on whether the Orders resolve core matters on which this court may enter final Orders in light of the Supreme Court's ruling in *Stern v. Marshall* . . . and the recent Seventh Circuit Court of Appeals ruling in *Ortiz* . . . .").

Crescent Res. Litig. Trust v. Fields (In re Crescent Res., LLC), 2012 WL 691876 (Bankr. W.D. Tex. Mar. 2, 2012) (Gargotta, J.) (The bankruptcy court denied the plaintiff litigation trust's motion to certify for direct appeal pursuant to 28 U.S.C. § 158 an order dismissing with prejudice plaintiff's state law fraudulent transfer claims asserted under § 544(b). The court's dismissal of the § 544(b) claims was based on its determination that the debtor's confirmed plan of reorganization "did not adequately preserve the claims made under 'state fraudulent transfer law' pursuant to 11 U .S.C. § 544(b)(1)" and, thus, the "[t]rust lacked standing to assert them . . . ." In support of its motion for direct appeal, the plaintiff argued that the court lacked the constitutional authority to enter an order

dismissing the § 544(b) claims with prejudice. Rejecting this argument, the court reasoned: "the Court disagrees with the Trust that this case is 'squarely within the category of state law proceedings' implicated by the Supreme Court's ruling in *Stern v. Marshall*. *Stern* considered a very different issue, specifically, whether a bankruptcy court could issue a final order regarding a state-law counter-claim based on allegations of tortious interference with an inheritance. . . . The *Stern* Court held § 157(b)(2)(C) was unconstitutional to the extent it swept counterclaims not arising in or under Title 11 into the category of core proceedings. . . . By contrast, this Court dismissed certain counts of the Trust's Amended Complaint that were asserted pursuant to Title 11, specifically under 11 U.S.C. § 544(b)(1), for lack of standing. The Court's ruling was based on its review of the preservation language in the Debtor's Plan of Reorganization and related bankruptcy filings. The Court fails to see how this case falls within the scope of *Stern*. Moreover, the Trust requests an interlocutory appeal of the Amended Order, in effect representing that the Order was not a 'final order' that would be implicated by *Stern*. . . . [T]he Court fails to see how its ruling on standing under 11 U.S.C. § 544(b) falls within the scope of *Stern*. Moreover, given that the content of the Court's ruling on standing did not involve a determination of the Court's authority [under] *Stern*, the issue presented of whether the Court had such authority is, therefore, not an appropriate issue for appeal, interlocutory or otherwise.").

In re Am. Housing Found., 2012 WL 443967(Bankr. N.D. Tex. Feb. 10, 2012) (Jones. J.) ("The Court addresse[d] 37 motions filed in 20 lawsuits [commenced by the plaintiff trustee of liquidating trust] . . . . The suits include fraudulent transfer actions based both on substantive federal law (§ 548 of the Bankruptcy Code) and substantive state law (through § 544 of the Bankruptcy Code) and preference actions (§ 547 of the Bankruptcy Code). Many, if not all, of the defendants are *not* claims-filing creditors in the [debtor's] bankruptcy case. . . . The defendants seek dismissal [for lack of subject matter jurisdiction] under Rule 12(b)(1) of the Federal Rules of Civil Procedure, as incorporated by Rule 7012 of the Federal Rules of Bankruptcy Procedure. . . . For purposes of its analysis, the Court assumes that its authority to *decide* the cases here is unconstitutional under *Stern*. After all, these actions are core proceedings under the statute; the defendants are not claims-filing creditors in the bankruptcy case; as in *Granfinanciera*, the fraudulent transfer claims do not satisfy any of the 'varied formulations' of the public rights doctrine; and the preference claims, unlike *Katchen* and [*Langenkamp*], are not brought as part of the claims reconciliation process, but, rather, to augment the bankruptcy estate.").

Rancher Energy Corp. v. Gas Rock Capital, LLC (In re Rancher Energy Corp.), 2011 WL 5320971 (Bankr. D. Colo. Nov. 2, 2011) (Romero, J.) ("Of additional concern, as a result of the recent decision of the United States Supreme Court in *Stern v. Marshall* . . . a question of [constitutional authority] may exist with respect to . . . claim[s] for damages resulting from Gas Rock's violation of usury law . . . [and] for recovery under the fraudulent transfer acts of Wyoming or Colorado and § 544. To avoid any [constitutional authority] questions as this case proceeds towards trial, the Court will therefore require the parties to formally consent to this Court's adjudication of the issues or, alternatively, file simultaneous briefs addressing the issue of whether this Court has [constitutional authority] to adjudicate those claims without such consent.").

Bayonne Med. Ctr. v. Bayonne/Omni Dev., LLC (In re Bayonne Med. Ctr.), 2011 WL 5900960 (Bankr. D.N.J. Nov. 1, 2011) (Stern, J.) (Liquidating trustee brought adversary proceeding against

defendants, asserting, among other claims for relief, state law causes of action to enforce a pledge and to recover alleged fraudulent transfers—under §§ 544 (and the New Jersey UFTA) and 548—and preferences. According to the trustee's complaint, his cause of action for enforcement of the pledge was a core matter. Approximately six weeks post-*Stern*, after the parties had proceeded for two years in the bankruptcy court, and after summary judgment motions had been fully briefed and argued (at two hearings, one held several weeks before *Stern* was decided and the other conducted one week after the *Stern* opinion was issued), the court "solicited the positions of the parties regarding consent to its authority to 'hear and *determine*' the causes before it." The defendants consented to entry of a final judgment by the bankruptcy court; the trustee did not. Although it concluded that the state-law based claim to enforce the pledge was a non-core proceeding, the court found that "the trustee-plaintiff, by virtue of his pleading and conduct in this litigation, has consented to this court's adjudication of all matters pled in his Adversary Proceeding." Based on this finding, the court was not required to determine whether it had the constitutional authority to finally adjudicate the fraudulent transfer claims. The court expressed its doubts, however, noting: "*Stern v. Marshall* could implicate more than just state law based counterclaims as statutory core matters which are nonetheless beyond the adjudicatory authority of this court (absent consent). A pall may have been cast upon bankruptcy court adjudication of the wide range of frequently litigated 'proceedings to determine, avoid, and recover fraudulent conveyances' in bankruptcy. *See* 131 U.S. at 2614 (including n.7 and text associated with it). Such proceedings are 'core' by statute.").

I. DISCHARGEABILITY OF PARTICULAR DEBTS: 28 U.S.C. § 157(b)(2)(I)

1. ENTERING FINAL JUDGMENT ON ISSUE OF THE DISCHARGEABILITY OF THE DEBT

Bushman v. Moore, 2011 WL 7655696 (S.D. Tex. Sept. 14, 2011) (Gilmore, J.) ("Appellants claim they are entitled to a new trial on the basis of the Supreme Court's recent decision in *Stern v. Marshall*. . . . Appellants assert that the opinion in *Stern v. Marshall* 'invalidates the original judgment and the supplemental findings of fact and conclusions of law because a bankruptcy judge who lacks the protections of Article III is not constitutionally authorized to enter a final judgment even with consent.' . . . In *Stern v. Marshall*, the Supreme Court characterizes the question as a 'narrow one' and holds that the 'Bankruptcy Court below 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.' . . . Here, in contrast to *Stern v. Marshall*, the Bankruptcy Court was not ruling on a state law counterclaim, but on a determination as to the dischargeability of particular debts under 28 U.S.C. § 157(b)(2)(I). These types of claims remain under the bankruptcy judge's core proceedings jurisdiction following *Stern v. Marshall*. This Court [denies] the Appellants' motion as to this issue.").

Husky Int'l Elecs., Inc. v. Ritz (In re Ritz), 459 B.R. 623 (Bankr. S.D. Tex. 2011) (Bohm, J.) ("[T]he Bankruptcy Court has the authority to determine when the statutorily established right to a discharge does *not* apply. When a bankruptcy court determines the extent of a creditor's

dischargeable claim, the court simply decides that a particular creditor is entitled to something more than the creditor would otherwise get out of the bankruptcy bargain. Such determinations are inextricably tied to the bankruptcy scheme and involve the adjudication of rights created by the Bankruptcy Code.").

McCurdie v. Strozewski (In re Strozewski), 458 B.R. 397 (Bankr. W.D. Mich. 2011) (Gregg, J.) ("This adversary proceeding is a core proceeding. 28 U.S.C. § 157(b)(2)(I) (determinations regarding dischargeability of a debt). Notwithstanding a recent Supreme Court decision, *Stern v. Marshall*, this court is constitutionally authorized to enter a final order.").

Musich v. Graham (In re Graham), 455 B.R. 227 (Bankr. D. Colo. 2011) (Brooks, J.) ("The Court notes that the Supreme Court's recent ruling in [*Stern*], may put into doubt this Court's ability and authority to rule on this issue because it emanates from an interpretation of Colorado civil tort law and criminal law. The alleged tortious conduct—the assault and wrongful acts under state law—have been fully adjudicated by the state court. This Bankruptcy Court is dealing only with the question of dischargeability. Moreover, the matter at hand is agreed to by the parties to be a 'core' proceeding under 28 U.S.C. § 157(b)(2)(A) and (I) and this matter indeed appears to be a 'core' proceeding,—statutorily and constitutionally—thus, this Court believes it can issue this ruling accordingly.").

Williams v. Laughlin (In re Laughlin), 2012 WL 1014754 (Bankr. S.D. Tex. Mar. 23, 2012) (Bohm, J.) ("The Supreme Court's decision in *Stern v. Marshall* recognized significant limitations on bankruptcy courts' authority to enter a final order. . . . In *Stern*, the debtor filed a counterclaim based solely on state law, and the resolution of this counterclaim did not resolve the validity, or invalidity, of the claim held by the defendant. Here, a creditor . . . has filed suit under an express bankruptcy statute, § 523(a)(2), (4), and (6), requesting this Court to issue a judgment that the debt owed to Williams is nondischargeable. This suit is therefore based on an express bankruptcy statute; indeed, the requested relief is unique to the [Bankruptcy] Code and could never be obtained under state law. For these reasons alone, this Court concludes that *Stern* is inapposite, and therefore it has constitutional authority to enter a final judgment in this dispute. Alternatively, to the extent that *Stern* applies, this Court concludes that the 'public rights' exception articulated in *Stern* applies to this suit; and, therefore, this Court has constitutional authority to enter a final judgment. [In *Stern*], the counterclaim did not constitute a 'public rights' dispute. . . . Although public rights disputes may be decided by non-Article III tribunals, public rights disputes must involve rights 'integrally related to a particular federal government action.' . . . The Court concludes . . . that it may exercise authority over essential bankruptcy matters under the 'public rights' exception. Under *Thomas v. Union Carbide Agric. Prods. Co.*, a right closely integrated into a public regulatory scheme may be resolved by a non-Article III tribunal. . . . The Bankruptcy Code is a public scheme for restructuring debtor-creditor relations, necessarily including 'the exercise of exclusive jurisdiction over all of the debtor's property, the equitable distribution of that property among the debtor's creditors, and the ultimate discharge that gives the debtor a 'fresh start' by releasing him, her, or it from further liability for old debts.' . . . This suit involves a dispute over the Debtor's discharge. The right to a discharge is established by the Bankruptcy Code and is central to the public bankruptcy scheme. . . . Determinations of whether a debtor meets the conditions for a discharge are integral to the bankruptcy scheme, and the Bankruptcy Court has the authority to make such determinations. . . .

Similarly, the Bankruptcy Court has the authority to determine when the statutorily established right to a discharge does not apply. Unless a creditor proves the applicability of an exception to discharge, the creditor is entitled to collect only against the bankruptcy estate. When a bankruptcy court determines the extent of a creditor's nondischargeable claim, the court simply decides that a particular creditor is entitled to something more than the creditor would otherwise get out of the bankruptcy bargain. Such determinations are inextricably tied to the bankruptcy scheme and involve the adjudication of rights created by the Bankruptcy Code. This adversary proceeding therefore falls within the Bankruptcy Court's authority, and the judgment entered is a final order.").

Donahoo v. Simone (In re Simone), 2012 WL 987284 (Bankr. D. Md. Mar. 22, 2012) (Alquist, J.) ("This [adversary proceeding, pursuant to § 523(a)(2)(A), for the non-dischargeability of a loan made from plaintiff to debtors under false pretenses,] is a core proceeding over which this court has statutory and constitutional authority. *See Stern v. Marshall*, —— U.S. ——, 131 S. Ct. 2594, 180 L. Ed. 2d 475 (2011). . . . To the extent that it is found that this Court lacks authority to enter its order herein as a final order, the Court submits this determination as proposed findings of fact and conclusions of law.").

First Horizon Home Loan Corp. v. Apostle (In re Apostle), 2012 WL 918217 (Bankr. W.D. Mich. Mar. 16, 2012) (Gregg, J.) ("This court has jurisdiction over this bankruptcy case. 28 U.S.C. § 1334. The case and all related proceedings have been referred to this court for decision. . . . This adversary proceeding is a core proceeding[,] [because plaintiffs are seeking a determination that the debt owed to debtor-defendant related to the sale of a condominium and boat slip is excepted from discharge under 11 U.S.C. § 523(a)(2)(A) as a result of debtor-defendant's failure to disclose an outstanding mortgage lien on the property at the sale closing]. 28 U.S.C. § 157(b)(2)(I) (determinations regarding dischargeability of a debt). Notwithstanding [the] recent [*Stern*] decision, . . . this court is constitutionally authorized to enter a final order.").

In re Vance, 2012 WL 847946 (Bankr. W.D. La. Mar. 12, 2012) (Hunter, J.) ("The above-captioned Motion To Lift the Automatic Stay[—to remove to the district court certain probate estate litigation—]is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(G). . . . The estate litigation is reportedly ready for trial. . . . [The allegations] are state law causes of action against the debtor, the ultimate resolution of which may later be asserted in this Court, in an Adversary Proceeding, as grounds for non-dischargeability under 11 U.S.C. § 523(a)(2), (4) and (6), should the movants prevail in the Texas litigation and seek additional relief in this Court. . . . The idea that . . . the Bankruptcy Court [may finally adjudicate these causes of action] merely because the outcome of the state court litigation may bear on the claim/counter-claims asserted in this Court was soundly rejected . . . in *Stern* . . . wherein the Court concluded that the bankruptcy courts have no constitutional authority to issue final orders under 28 U.S.C. § 157(b)(2)(C), regarding the exercise of jurisdiction over counterclaims by the estate against persons filing claims against the estate, when those claim/counter-claims are state law cause[s] of action not arising under the Bankruptcy Code. . . . [But] the Bankruptcy Court, through the United States District Court, has sole jurisdiction over the Bankruptcy estate and may issue a final ruling on the dischargeability of the claims ultimately resulting from the state court's final judgment creating same. In this Court, an adversary proceeding alleging non-dischargeability under § 523(a)(2) and (4) in a Chapter 13 case is often put on a 'procedural hold' pending the outcome of the state court action under which the claim arises,

and after final ruling of the state court setting the amount of the claim, the issue of dischargeability of that claim is decided here. The claims asserted in the Texas litigation are solely state law causes of action in probate and corporate law. None of the claims and counter-claims asserted therein arise in or under the Bankruptcy Code. . . . For the reasons stated herein, the Motion to Lift the Automatic [S]tay is [granted] solely to pursue the Texas litigation, [and modified] to allow the parties [to] proceed to judgment, but reserving the recovery of any money judgment or the dischargeability of same to this Court.").

Swimmer v. Moeller (In re Moeller), 2012 WL 952859 (Bankr. S.D. Cal. Mar. 5, 2012) (Taylor, J.) ("[Debtor-defendant] seeks dismissal of a cause of action seeking a determination that a claim based on an alleged breach of fiduciary duty is nondischargeable under 11 U.S.C. § 523(a)(4). . . . Neither party questions this Court's authority to decide this motion as a result of *Stern v. Marshall*. . . . The Court, however, independently evaluates the scope of its power and determines that such authority exists here. Under 28 U.S.C. § 157(b)(1), bankruptcy judges can hear and enter final judgments in core proceedings arising under Title 11 or arising in a bankruptcy case. [Under 28 U.S.C. § 157(b)(2)(I), a] case seeking to determine the dischargeability of a creditor's claim is core; it arises under the Bankruptcy Code and can arise only in a bankruptcy case. . . . Here, the determination is final only as to a single cause of action. Further, resolution of this motion to dismiss requires assumption of the plausible allegations of the complaint, rather than determinations of fact. Thus, the Court determines only the applicability of a Bankruptcy Code's exception to discharge under the facts as set forth in the complaint. . . . [T]he Court concludes that . . . it will grant the motion with prejudice because, under the facts of this case, a section 523(a)(4) exception to discharge is unavailable to the [p]laintiff as a matter of law.").

Spanish Palms Mktg., LLC v. Kingston (In re Kingston), 2012 WL 632398 (Bankr. D. Idaho Feb. 27, 2012) (Pappas, J.) ("The Supreme Court's recent decision in *Stern v. Marshall* . . . does not prohibit a bankruptcy court from entering a final judgment resolving issues under the Bankruptcy Code, which would be completely resolved in the bankruptcy process, or that flow from a federal statutory scheme. . . . Plaintiffs' [§ 523(a)(2)(B) and (6)] exception-to-discharge claims are premised solely on provisions of the Code, will be completely resolved in the bankruptcy process, and the Court has constitutional authority to issue a final judgment in regards to those claims.")

Ford Motor Credit Co. v. Franceschini (In re Franceschini), 2012 WL 113337 (Bankr. S.D. Tex. Jan. 12, 2012) (Isgur, J.) ("Because bankruptcy judges are not Article III judges, they may not exercise the judicial power of the United States. *Stern v. Marshall*, 131 S. Ct. 2594, 2609 (2011). . . . Bankruptcy judges therefore may not enter final judgments or orders in matters that fall within the exclusive authority of the Article III judiciary. . . . The Court may, however, exercise authority over essential bankruptcy matters under the public rights doctrine. . . . [A] right closely integrated into a public regulatory scheme may be resolved by a non-Article III tribunal. . . . The Bankruptcy Code is a public scheme for restructuring debtor-creditor relations, necessarily including the exercise of exclusive jurisdiction over all of the debtor's property, the equitable distribution of that property among the debtor's creditors, and the ultimate discharge that gives the debtor a fresh start by releasing him, her, or it from further liability for old debts. . . . This case involves a dispute over whether [the debtor's] debt to Ford [Motor] Credit is dischargeable under § 523(a)(6) of the Bankruptcy Code. The right to a discharge is established by the Bankruptcy Code and is central to

the public bankruptcy scheme. Determinations of whether a debtor meets the conditions for a discharge are integral to the bankruptcy scheme, and bankruptcy courts have the authority to make such determinations pursuant to its *in rem* jurisdiction. . . . There is no dispute as to the amount of [the debtor's] debt to Ford [Motor] Credit; the issue is the portion of the debt that is nondischargeable. This Court has constitutional authority to enter a final judgment in this adversary proceeding.").

Hertzler v. Hoopes (In re Hoopes), 2011 WL 5545765 (Bankr. D. Colo. Nov. 14, 2011) (Brown, J.) (Plaintiffs, individuals who had engaged the debtor to construct their home, commenced an adversary proceeding against the debtor, asserting that his failure to pay subcontractors had "resulted in mechanics liens on [plaintiffs'] residence." Plaintiffs also sought a determination that their claim against the debtor was nondischargeable under § 523(a)(4). The debtor, relying on *Stern*, moved for dismissal. The bankruptcy court denied the motion to dismiss: "In *Stern v. Marshall*, the Supreme Court concluded that a 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.' . . . The Supreme Court itself recognized the limitation of this holding, clearly stating that 'Congress, *in one isolated respect*, exceeded [the] limitation in the Bankruptcy Act of 1984' to enter final orders. . . . [N]umerous opinions in this Court have applied the Colorado mechanics lien statute [requiring that funds paid to a contractor be held in trust for payment to subcontractors], have acknowledged jurisdiction to determine such cases, and determined debts to be nondischargeable in bankruptcy. . . . Further, whether a fiduciary duty is breached in the context of § 523(a)(4) is clearly a matter for the bankruptcy courts. . . . Therefore, this Court is not precluded by *Stern* from hearing the [plaintiff's] claims . . . under the mechanics lien statute.").

Sanders v. Muhs (In re Muhs), 2011 WL 3421546 (Bankr. S.D. Tex. Aug. 2, 2011) (Isgur, J.) (The court held that the debt owed to the plaintiff was nondischargeable under 11 U.S.C. §§ 523(a)(2)(A) and 523(a)(2)(B), stating: "At least two overlapping classes of claims fall within the Court's constitutional authority: (1) matters invoking only the Court's *in rem* jurisdiction over the bankruptcy estate and (2) disputes over rights created by the Bankruptcy Code as an integral part of the public bankruptcy scheme . . . . The right to discharge is established by the Bankruptcy Code and is central to the public bankruptcy scheme . . . . Similarly, the Bankruptcy Court has the authority to determine when the statutorily established right to a discharge does *not* apply. When a bankruptcy court determines the extent of a creditor's dischargeable claim, the court simply decides that a particular creditor is entitled to something more than the creditor would otherwise get out of the bankruptcy bargain. Such determinations are inextricably tied to the bankruptcy scheme and involve the adjudication of rights created by the Bankruptcy Code.").

2. DETERMINING THE ISSUE OF THE DISCHARGEABILITY OF THE DEBT AND ENTERING FINAL JUDGMENT ON THE UNDERLYING CLAIM FOR RELIEF IN AMOUNT CERTAIN

Dragisic v. Boricich (In re Boricich), 464 B.R. 335 (Bankr. N.D. Ill. 2011) (Schmetterer, J.) (The bankruptcy court found that it had jurisdiction to enter a "final dollar judgment"—notwithstanding creditor's reliance on nonbankruptcy law for his theory of recovery—after finding debt arising from shareholder derivative claims (alleging embezzlement, fraud and defalcation in a fiduciary capacity) to be nondischargeable. The court stated: "The counterclaim in *Stern* involved no antecedent bankruptcy determination and was in an action for which a party might demand a trial by jury. . . . In contrast, this [a]dversary proceeding to bar dischargeability of debt due to Plaintiff under 11 U.S.C. § 523(a)(4), [is] claimed to be a core proceeding under 28 U.S.C. § 157(b)(2)(I) but is one in which no party has a right to jury trial. . . . Moreover, this action contrasts with *Stern* in being an action directly under and defined by the Bankruptcy Code to determine nondischargeability rather than being independent of bankruptcy law. That characteristic of the action is not changed because the theory of recovery arose under nonbankruptcy law. Indeed, most claims in the bankruptcy system that require application of Code provisions arise under nonbankruptcy law. The bankruptcy judge often must look to state law and rights as they stood pre-bankruptcy to adjudicate disputes. . . . In *Stern* itself the holding was limited to the debtor's counterclaim and similar actions, namely state law counterclaims that are not resolved in the process of ruling on a creditor's proof of claim. . . . *Stern* left intact the authority of a bankruptcy judge to fully adjudge a creditor's claim. In this case, the claim was an adversary proceeding against debtor to bar dischargeability of a debt due to Plaintiff. Therefore, the authority to enter a final dollar judgment as part of the adjudication of nondischargeability, as recognized in [*N.I.S. Corp.* v. *Hallahan (In re Hallahan)*, 936 F.2d 1496, 1508 (7th Cir. 1991)], was not impaired by *Stern*. Quite clearly it was necessary here to determine the amount of debt in order to determine the debt that is nondischargeable. Therefore, under the clear exception recognized by *Stern*, final judgment is authorized because such resolution is required to resolve the creditor's claim.").

Farooqi v. Carroll (In re Carroll), 464 B.R. 293 (Bankr. N.D. Tex. 2011) (Houser, J.) (The bankruptcy court held that it had the constitutional authority to liquidate state law claims through the entry of a money judgment following trial and to determine whether that judgment is nondischargeable, stating: "[T]here can be little doubt that this Court, as an Article I tribunal, has the Constitutional authority to hear and finally determine what claims are non-dischargeable in a bankruptcy case. Determining the scope of the debtor's discharge is a fundamental part of the bankruptcy process . . . . Congress clearly envisioned that bankruptcy courts would hear and determine all core proceedings, . . . which include, as relevant here, determinations as to the dischargeability of particular debts. . . . The Supreme Court has never held that bankruptcy courts are without Constitutional authority to hear and finally determine whether a debt is dischargeable in bankruptcy. In fact, the Supreme Court's decision in *Stern* clearly implied that bankruptcy courts have such authority when it concluded that bankruptcy courts had the Constitutional authority to

decide even state law counterclaims to filed proofs of claim if the counterclaim would necessarily be decided through the claims allowance process.").

In re Vance, 2012 WL 847946 (Bankr. W.D. La. Mar. 12, 2012) (Hunter, J.) ("The above-captioned Motion To Lift the Automatic Stay[—to remove to the district court certain probate estate litigation—]is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(G). . . . The estate litigation is reportedly ready for trial. . . . [The allegations] are state law causes of action against the debtor, the ultimate resolution of which may later be asserted in this Court, in an Adversary Proceeding, as grounds for non-dischargeability under 11 U.S.C. § 523(a)(2), (4) and (6), should the movants prevail in the Texas litigation and seek additional relief in this Court. . . . The idea that . . . the Bankruptcy Court [may finally adjudicate these causes of action] merely because the outcome of the state court litigation may bear on the claim/counter-claims asserted in this Court was soundly rejected . . . in *Stern* . . . wherein the Court concluded that the bankruptcy courts have no constitutional authority to issue final orders under 28 U.S.C. § 157(b)(2)(C), regarding the exercise of jurisdiction over counterclaims by the estate against persons filing claims against the estate, when those claim/counter-claims are state law cause[s] of action not arising under the Bankruptcy Code. . . . [But] the Bankruptcy Court, through the United States District Court, has sole jurisdiction over the Bankruptcy estate and may issue a final ruling on the dischargeability of the claims ultimately resulting from the state court's final judgment creating same. In this Court, an adversary proceeding alleging non-dischargeability under § 523(a)(2) and (4) in a Chapter 13 case is often put on a 'procedural hold' pending the outcome of the state court action under which the claim arises, and after final ruling of the state court setting the amount of the claim, the issue of dischargeability of that claim is decided here. The claims asserted in the Texas litigation are solely state law causes of action in probate and corporate law. None of the claims and counter-claims asserted therein arise in or under the Bankruptcy Code. . . . For the reasons stated herein, the Motion to Lift the Automatic [S]tay is [granted] solely to pursue the Texas litigation, [and modified] to allow the parties [to] proceed to judgment, but reserving the recovery of any money judgment or the dischargeability of same to this Court.").

Whited v. Galindo (In re Galindo), 2012 WL 345942 (Bankr. S.D. Cal. Feb. 1, 2012) (Mann, J.) ("Whether this Court has constitutional authority to enter findings of fact and conclusions of law in this adversary proceeding based upon [*Stern*] has not been raised by the parties . . . . The Court believes it has such authority on a number of bases . . . . This case on debt dischargeability is 'core' to the Bankruptcy Code. 28 U.S.C. § 157(b)(2)(L) (discharge issues are statutorily core); *Grogan v. Garner*, 498 U.S. 279, 284 (1991) (bankruptcy courts have exclusive jurisdiction over discharge matters). In the Ninth Circuit, 'the Bankruptcy Court has jurisdiction to enter a monetary judgment on a disputed state law claim in the course of making a determination that a debt is dischargeable.'. . . [The parties have made admissions] in their pleadings that this Court had jurisdiction to decide the matter as referred from the District Court. *See, e.g., Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848–49 (1986) (recognizing that parties can agree to be bound by a decision of a court that may lack specific constitutional authority to make a final decision without their consent). Nevertheless, the Court is aware of an issue that bankruptcy courts lack constitutional authority to quantify a non-dischargeable debt, despite their recognized authority to determine the debtor's ability to discharge that debt. . . . If the District Court determines this case to be only 'related to' Title 11, to the extent that this Court lacks authority to enter a final judgment,

this Memorandum Decision may serve as the Court's recommended findings of fact and conclusions of law for the District Court to review de novo.").

Sigillito v. Hollander (In re Hollander), 2011 WL 6819022 (Bankr. E.D. La. Dec. 28, 2011) (Magner, J.) (The bankruptcy court determined that plaintiffs' claim arising from debtor's concealment of defects in real property plaintiffs purchased from debtors was nondischargeable and awarded plaintiffs a monetary judgment. The bankruptcy court further concluded that liquidating the disputed claim against the bankruptcy estate and determining the claim's dischargeability fell within the court's "core jurisdiction." After appeals to the district court and Fifth Circuit on plaintiffs' fraud claim, the limited issue on remand was the proper standard of proof plaintiffs must meet to establish their fraud claim. Before addressing this issue, the bankruptcy court discussed the statutory and constitutional bases for its prior nondischargeability determination: "Just as importantly, the liquidation of claims against the estate and the applicability of a debtor's discharge to a particular claim are also matters properly assigned under the United States Constitution to an Article I court for final determination. . . . The Bankruptcy Code is an administrative scheme confected by Congress that creates, in favor of claimants, specific, public rights to a debtor's estate while bestowing other public rights in favor of debtors. . . . The bankruptcy court's exercise of power over the liquidation of a creditor's claim has long been affirmed by various courts[,] [including the U.S. Supreme Court in *Stern*]. . . . Under the Constitution, Congress has been given the authority to make laws or regulations regarding bankruptcy. . . . Nothing in the Constitution grants to any citizen the right of discharge. That right is instead a Congressionally created public right the administration of which can be proscribed by Congress and delegated for enforcement to an Article I court. . . . Thus, consideration of the issues presented are both core and a proper exercise of the authority delegated to this Court by Congress under the Bankruptcy Code. As such, a final judgment on these issues will not offend the separation of powers principle.").

Mich. State Univ. Fed. Credit Union v. Ueberroth (In re Ueberroth), 2011 Bankr. LEXIS 5136 (Bankr. W.D. Mich. Dec. 19, 2011) (Hughes, J.) ("Plaintiff Michigan State University Credit Union has filed a complaint to determine the dischargability of a debt owed by [the debtor] to Plaintiff and seeking a money judgment against [the debtor]. The court has determined that this is a core matter. *See* [28] U.S.C. § [1]57(b)(2). However, in light of the recent U.S. Supreme Court decision *Stern v. Marshall*, . . . the court is submitting this Report and Recommendation to the District Court for the entry of judgment. [The debtor was properly served with the complaint and the motion for default judgment, but did not file a timely answer, otherwise respond or appear at the hearing on the motion, which was properly noticed.] [F]or the reasons stated, this court recommends that the District Court enter a non-dischargable money judgment in favor of Plaintiff Michigan State University Credit Union and against [the debtor] in the amount of $2,795.93, together with interest at the statutory rate, pursuant to 11 U.S.C. § 523(a)(2)(A).").

DeAngelis v. Antonelli (In re Antonelli), 2011 WL 5509494 (Bankr. D.R.I. Nov. 10, 2011) (Votolato, J.) ("Plaintiff urges the Court to rule that it has the power to determine money damages in dischargeability proceedings. [A]llowing the bankruptcy judge to settle both the dischargeability of the debt and the amount of the money judgment accords with the rule generally followed by courts of equity that having jurisdiction of the parties to controversies brought before them, they will decide all matters in dispute and decree complete relief. *In re Hallahan*, 936 F.2d 1496, 1508 (7th

Cir. 1991) (*citing Alexander v. Hillman*, 296 U.S. 222, 242 (1935)). While the court's language in *Hallahan* certainly was a reasonable statement in 1935 and 1991, recent Supreme Court treatment of this subject [in *Stern*] has cast a much dimmer light on the power of non-Article III courts to render money judgments in dischargeability litigation. . . . [W]here the only effect of the money judgment against this debtor would be to enhance [the Plaintiff's] future ability to collect the debt from [the Defendant's] post-bankruptcy income and assets, with no effect at all on property of the bankruptcy estate or creditors' claims against the estate . . . the bankruptcy court's role should be limited by applying the limited jurisdiction approach. . . . Here, Plaintiff's claim is based on a decision of the Rhode Island Commission on Human Rights, which resolved a two party dispute that is clearly unrelated to the bankruptcy estate. While it is, of course, a function of this Court to hear and determine § 523 and § 727 denial of discharge issues, that jurisdiction does not include the power to issue a Writ of Execution in a dispute where the outcome will have no effect on the bankruptcy estate. Accordingly, Plaintiff's Application for the Issuance of a Writ of Execution is [denied].").

Reed v. Johnson (In re Johnson), 2011 Bankr. LEXIS 3542 (Bankr. W.D. Mich. Aug. 22, 2011) (Hughes, J.) ("Plaintiffs . . . have filed a complaint [seeking a] declaration of non-dischargability and money judgment against [the debtor]. The court has determined that this is a core matter. *See* 28 U.S.C. § 157(b)(2). However, in light of the recent U.S. Supreme Court decision *Stern v. Marshall*, . . . the court is submitting this Report and Recommendation to the District Court for the entry of judgment. [F]or the reasons stated, this court recommends that the District Court declare the debt non-dischargable pursuant to 11 U.S.C. § 523 and that it enter a money judgment in favor of Plaintiffs . . . and against [the debtor] in the amount of $15,727.17, pursuant to 11 U.S.C. § 523.").

Sanders v. Muhs (In re Muhs), 2011 WL 3421546 (Bankr. S.D. Tex. Aug. 2, 2011) (Isgur, J.) (After *Stern* "the Bankruptcy Court has the authority to determine when the statutorily established right to a discharge does *not* apply . . . . Such determinations are inextricably tied to the bankruptcy scheme and involve the adjudication of rights created by the Bankruptcy Code. . . . Moreover, a bankruptcy court may determine the amount of the debt that is excepted from discharge. *In re Morrision*, 555 F.3d 473 (5th Cir. 2009).").

VanBeek v. Noorman (In re Noorman), 2011 Bankr. LEXIS 3176 (Bankr. W.D. Mich. Aug. 1, 2011) (Hughes, J.) ("Plaintiffs . . . have filed a complaint to determine the dischargability of a debt owed by [the debtor] to Plaintiffs and seeking a money judgment against [the debtor]. The court has determined that this is a core matter. *See* 28 U.S.C. § 157(b)(2). However, in light of the recent U.S. Supreme Court decision *Stern v. Marshall*, . . . the court is submitting this Report and Recommendation to the District Court for the entry of judgment. [Defendant was properly served with the complaint and the motion for default judgment, but did not file a timely answer, otherwise respond or appear at the hearing on the motion, which was properly noticed.] [F]or the reasons stated, this court recommends that the District Court enter a non-dischargable money judgment in favor of Plaintiffs . . . and against [the debtor] . . . in the amount of $74,911.00, together with interest at the statutory rate and costs of $250.00, pursuant to 11 U.S.C. § 523(a)(4).").

J. OBJECTIONS TO DISCHARGES: 28 U.S.C. § 157(b)(2)(J)

K. DETERMINATIONS OF THE VALIDITY, EXTENT OR PRIORITY OF LIENS: 28 U.S.C. § 157(b)(2)(K)

Sheehan v. Dobin, 2012 WL 426285 (D.N.J. Feb. 9, 2012) (Wolfson, J.) ("[U]nlike *Stern*, the matter before me does not involve a proof of claim or a state law counterclaim involving a debtor and creditor. [T]he instant appeal concerns an adversary proceeding filed by the Trustee to determine the extent and validity of the Debtor's ownership interest in a piece of property. This is the essence of a core bankruptcy proceeding. Moreover, the Bankruptcy Court's jurisdiction here did not arise under 28 U.S.C. § 157(b)(2)(C) as in *Stern*, but instead, arose under 28 U.S.C. § 157(b)(2)(A), (K), (N) and/or (O) as explained by Judge Lyons in his decision. For these reasons, the Court finds that *Stern* is inapplicable to this matter . . . .").

Amegy Bank Nat'l Ass'n v. Brazos M & E, Ltd. (In re Bigler LP), 458 B.R. 345 (Bankr. S.D. Tex. 2011) (Bohm, J.) ("[T]his suit [between two suppliers of the debtor and a postpetition lender over the priority of the parties' respective liens on property of the estate that was sold pursuant to the debtor's liquidating Chapter 11 plan free and clear of all liens, with the liens attaching to the proceeds in the same order of priority that they had prior to the sale,] concerns a dispute that must be resolved in order to determine the appropriate distribution among the Debtors' creditors. The determination of lien priority on assets that were once property of the bankruptcy estate are part of the 'public rights' exception, as it involves the exercise of the Bankruptcy Court's *in rem* jurisdiction over the estate. . . . Resolution of the lawsuit pending in this Court arises from an express provision of the Plan, the very purpose of which is to distribute cash to the prevailing party or parties—thereby accomplishing the very objective of the public right known as the bankruptcy process (i.e. paying claims of creditors). . . . Therefore, not only does this lawsuit involve a right integral to the bankruptcy scheme—the determination of lien priority—but it also involves a right created by the Bankruptcy Code—distribution of property of the estate to creditors pursuant to the Plan. Accordingly, this dispute falls within the undersigned judge's constitutional authority to enter a final judgment.").

Tibble v. Wells Fargo Bank, N.A. (In re Hudson), 455 B.R. 648 (Bankr. W.D. Mich. 2011) (Gregg, J.) ("Except for the types of counterclaims addressed in *Stern v. Marshall*, a bankruptcy judge remains empowered to enter final orders in all core proceedings . . . . This adversary proceeding, even though it requires reviewing, discussing and deciding state law issues, pertains to the determination of the validity, extent, or priority of the Bank's asserted mortgage lien in Lot 5. Regardless of the state law issues, this adversary proceeding 'arises under' § 544(a)(3) of the Bankruptcy Code . . . . This judge cannot envision a core proceeding that is more 'core' than lien avoidance. The court will enter a final order. . . . If this court's order is appealed, and the district court decides this court is not constitutionally authorized to issue a final order in this adversary proceeding, this Opinion should be treated as a report and recommendation.").

Frazer v. Prop. Owners Ass'n of Canyon Vill. at Cypress Springs (In re Frazer), 2012 WL 719412 (Bankr. S.D. Tex. Mar. 5, 2012) (Bohm, J.) (Chapter 13 debtors filed an adversary proceeding seeking a declaration that: "(1) the lien held by the homeowners' association on their homestead is subordinate to the lien held by the home lender; and (2) because the home lender's lien exceeds the value of the homestead, the lien of the homeowners' association may be 'stripped' so that the association is required to release its lien and be paid under the debtors' Chapter 13 plan as an unsecured creditor." The association "vigorously oppose[d] the relief sought by the debtors[,] . . . contend[ing] that . . . its lien is superior to the home lender's lien and, therefore, may not be "stripped" under the debtors' plan. The bankruptcy court concluded that it had the constitutional authority to adjudicate the dispute, stating: "The facts in the case at bar are easily distinguishable from the facts in *Stern*. In *Stern*, the debtor filed a counterclaim against a creditor who had filed a proof of claim. The debtor's counterclaim was based solely on state law; there was no Code provision undergirding the counterclaim. Moreover, the resolution of the counterclaim was not necessary to adjudicating the claim of the creditor. Under these circumstances, the Supreme Court held that the bankruptcy court lacked constitutional authority to enter a final judgment on the debtor's counterclaim. In the dispute at bar, there are both facts and law that give this Court constitutional authority to sign a final order in this proceeding. The Plaintiffs' Complaint for Determination of Lien Status and Removal and Release of Lien puts the following issue in dispute: Does the Association's lien have priority over the Bank's lien on the Debtors' homestead? There is no doubt that state law governs this issue; and in this respect, the dispute at bar is similar to *Stern*. But, that is where the similarity ends. In *Stern*, the resolution of the counterclaim filed by the debtor did not necessarily lead to a determination of the validity of the claim filed by the defendant. Here, the resolution of the dispute necessarily determines the extent of the claim held not only by the Association, but also by the Bank. Stated differently, the resolution of the dispute necessarily determines whether the claim held by the Association will be completely secured or completely unsecured. If the Association's lien is junior to the Bank's lien, then 11 U.S.C. § 506(a) dictates that the Association has only an unsecured claim in this Chapter 13 case. Thus, the dispute at bar is not only distinguishable from *Stern* because claims against the estate are being determined here; it is distinguishable because an express bankruptcy statute—i.e. § 506(a)—determines whether the Association has a secured claim or an unsecured claim. And, once this issue is resolved, all creditors in this Chapter 13 case, as well as the Chapter 13 trustee, will then be able to assess how the Debtors' Plan will treat all of the claims. This is yet one more distinguishing fact in this dispute: Unlike *Stern*, the resolution of this dispute will crystallize the treatment of all claims under the Plan. For all of these reasons, this Court concludes that *Stern* has no application and that this Court has the constitutional authority to enter a final order in this adversary proceeding. . . . In the alternative, even if *Stern* somehow applies, this Court concludes that the one exception articulated in *Stern* by the Supreme Court applies—specifically, that this Court may enter a final order over essential bankruptcy matters under the 'public rights' exception. . . . The Bankruptcy Code is a public scheme for restructuring debtor-creditor relations, necessarily including the exercise of exclusive jurisdiction over all of the debtor's property, the equitable distribution of that property among the debtor's creditors, and the ultimate discharge that gives the debtor a fresh start by releasing him, her, or it from further liability for old debts. The key issue before this Court involves a dispute over whether the Association's lien or the Bank's lien has priority. The right to determine priority of claims on the bankruptcy estate is established by provisions of the Bankruptcy Code (sections 503(b), 506(a), and 507(a)) and is central to the public bankruptcy scheme, as it relates to the equitable distribution

of property among a debtor's creditors. As such, this determination is not only inextricably tied to the bankruptcy scheme, but it also involves the adjudication of rights created by the Bankruptcy Code. For these reasons, this matter falls within this Court's authority, and therefore this Court may enter a final order on the Plaintiffs' Complaint . . . .").

Credit Suisse Sec. v. TMST, Inc. (In re TMST, Inc.), 2012 WL 589572 (Bankr. D. Md. Feb. 22, 2012) (Keir, J.) (Following sale by Chapter 11 trustee of debtor's mortgage servicing rights, creditor filed adversary proceeding seeking a determination as to the existence, extent and priority of its lien in the sale proceeds. The court, "reviewing the question *sua sponte*," found that it had the constitutional authority to finally adjudicate the parties' competing claims to the sale proceeds, stating: "[T]he decision by this court as to the existence and extent of the lien of Plaintiff is a decision determining part of the question as to which claimants (Plaintiff as a secured creditor or the estate for unsecured creditors) hold rights to distributions from funds now held as part of the bankruptcy estates by the Trustee. Under prior statutory and even traditional English bankruptcy practice, 'summary' power existed in non-article III judicial officers as to such determinations, including allowance of claims of creditors.").

Customized Distribution, LLC v. Coastal Bank & Trust (In re Lee's Famous Recipes, Inc.), 2011 WL 7068916 (Bankr. N.D. Ga. Dec. 12, 2011) (Brizendine, J.) ("The Court believes its ruling is consistent with the rationale in *Stern* and that this Court has authority to enter a final ruling on [a marshaling action commenced by one creditor with respect to several parcels of real property in which another entity also asserted a security interest] because resolution of same bears substantively upon the issues of claim allowance and the distribution of estate property with an attendant effect on the creditors of this estate. A central tenet of bankruptcy jurisdiction is the responsibility of this Court to manage and oversee the administration of the estate, reorganization of the debtor, and payment on allowed claims of its creditors. This Court is also the appropriate forum to sort out competing claims and relative priorities of alleged secured claims.").

Quality Props., LLC v. Pine Apple Conveyor Serv., Inc. (In re Quality Props., LLC), 2011 WL 6161010 (Bankr. N.D. Ala. Nov. 29, 2011) (Robinson, J.) ("Unlike the counterclaim in [*Stern*], which addressed an issue that was not integral to the restructuring of the debtor-creditor relationship, the alleged liens in the [r]emoved [adversary proceedings] affect the pro rata distribution of the Debtor's assets. To resolve the claims in the [r]emoved [adversary proceedings], this Court would have to decide the validity and priority of the liens and mortgage, and the claims allowance process would leave no issues for another court to address. Therefore, proceedings in this Court with regard to the liens claimed in the [r]emoved [adversary proceedings] and [the bank's] mortgage are both core and constitutionally authorized, and this Court can enter appropriate orders and judgments. 28 U.S.C. § 157(b)(1).").

Fleury v. Specialized Loan Servicing, LLC, 2011 WL 4851141 (Bankr. E.D. Cal. Oct. 6, 2011) (Sargis, J.) ("Among the types of proceedings Congress has denoted as core, are determinations of the validity, extent, or priority of liens. 28 U.S.C. § 157(b)(2)(K). Core proceedings, by definition, are matters that arise in or under Title 11 . . . . However, the court must also consider if it possesses the Constitutional authority to resolve this dispute under Article III. The question, as framed by the Supreme Court in *Stern* is, whether the action at issue stems from the bankruptcy itself or would

necessarily be resolved in the claims allowance process[.] . . . Here, the validity of the deed of trust, which creates the secured claim, is an issue that would plainly be resolved in the claims allowance process. In fact, the [plaintiffs] have previously sought a determination of the validity of the claim asserted by [the alleged owner of the deed of trust] . . . . This court has both Constitutional and statutory authority to adjudicate this adversary proceeding and enter orders and judgments, subject to review pursuant to 28 U.S.C. § 158.").

L. CONFIRMATIONS OF PLANS: 28 U.S.C. § 157(b)(2)(L)

In re Wash. Mut., Inc., 461 B.R. 200 (Bankr. D. Del. 2011) (Walrath, J.) (The court denied confirmation of debtors' modified Chapter 11 plan and directed certain issues to mediation, but concluded that "[c]onfirmation of a plan of reorganization is within the bankruptcy court's core jurisdiction.").

In re Yellowstone Mountain Club, LLC, 460 B.R. 254 (Bankr. D. Mont. 2011) (Kirscher, J.) (The district court reversed the bankruptcy court's order confirming debtors' Chapter 11 plan. On remand, the bankruptcy court granted debtors' motion under Rule 9010 to approve a "Settlement Term Sheet" *nunc pro tunc*. A creditor, Timothy Blixseth, opposed the motion on various grounds, one of which was that, after *Stern*, the court lacked subject matter jurisdiction to adjudicate the debtor's motion. Rejecting this argument, the court stated: "Blixseth argues this Court lacks subject matter jurisdiction to hear the matters . . ., based upon the United States Supreme Court's recent ruling in *Stern v. Marshall*. . . . The 'jurisdiction of the bankruptcy courts, like that of other federal courts, is grounded in, and limited by, statute.' . . . In recent years, various courts of appeal have articulated the limits on bankruptcy court jurisdiction over matters arising after confirmation of a debtor's reorganization plan. . . . In short, under *Resorts Int'l*[,] [*Inc.*, 372 F.3d 154 (3d Cir. 2004)], as a condition for bankruptcy court post-confirmation jurisdiction, the outcome of a dispute must produce some effect on the reorganized debtor or a confirmed plan. . . . '[W]here there is a close nexus to the bankruptcy plan or proceeding, as when a matter affects the interpretation, implementation, consummation, execution, or administration of a confirmed plan or incorporated litigation trust agreement, retention of post-confirmation bankruptcy court jurisdiction is normally appropriate.' . . . This Court distills an important lesson from these decisions for application of the close nexus test as developed in *Resorts Int'l*, and as adopted and refined by the Ninth Circuit. In particular, to support jurisdiction, there must be a close nexus connecting a proposed post-confirmation proceeding in the bankruptcy court with some demonstrable effect on the debtor or the plan of reorganization. Applying the Ninth Circuit case law to the facts of this case, it is clear that consideration of the Settlement Term Sheet and defining the scope of the exculpation clause in the Debtors' Third Amended Joint Plan of Reorganization directly impact the Debtors, the bankruptcy estates and implementation of the Debtors' Third Amended Joint Plan of Reorganization. This Court's retention of jurisdiction in this instance is appropriate, notwithstanding the decision in *Stern v. Marshall*. Therefore, Blixseth's standing objection to this Court's subject matter jurisdiction is overruled.").

In re Safety Harbor Resort & Spa, LLC, 456 B.R. 703 (Bankr. M.D. Fla. 2011) (Williamson, J.) ("The Debtor proposed a chapter 11 plan that provides for the contribution of substantial assets from the principals of the [its] parent company, Olympia Investment Group, LLC., who are also the non-debtor guarantors of a debt owed to a creditor, German American Capital Corporation, to help effect a successful reorganization. In exchange for that contribution, the Debtor requested releases for the non-debtor guarantors. The Court, instead, imposed a four-year stay on any actions by German American against the non-debtor guarantors. German American has requested that the Court impose certain 'lock-up' restrictions on the reorganized Debtor's business operations and the non-debtor guarantors to prevent the Debtor and the non-debtor guarantors from disposing of assets during the four-year injunction period to thwart any potential future collection efforts. . . . "The Debtor objects to German American's proposed 'lock-up' restrictions [relating to the order confirming the plan] with respect to the non-debtor guarantors on the basis that they exceed this [c]ourt's constitutional authority under the Supreme Court's recent decision in *Stern v. Marshall*. . . . The Debtor reads *Stern* too broadly. The Supreme Court's holding in *Stern* was very narrow. The Supreme Court merely held that Congress exceeded its authority under the Constitution in one isolated instance by granting bankruptcy courts jurisdiction to enter final judgments on counterclaims that are not necessarily resolved in the process of ruling on a creditor's proof of claim. Nothing in *Stern* limits a bankruptcy court's jurisdiction over other 'core' proceedings. Nor does the *Stern* Court's reliance on its earlier decision in [*Granfinanciera*] somehow impose some new limitation on this Court's jurisdiction that has not existed since that case was decided over twenty years ago. Besides, parties can still consent—either expressly or impliedly—to a bankruptcy court's jurisdiction after *Stern*. [T]his [c]ourt has jurisdiction to impose 'lock-up' restrictions on the reorganized Debtor's business operations and the non-debtor guarantors . . . . [T]he few cases that have considered whether confirmation is a core proceeding have universally agreed that it is. . . . Nothing in *Stern* changes that . . . . For those reasons, this Court agrees with the *Stern* Court that the decision in *Stern* does not change all that much.").

In re Cottonwood Corners Phase V, LLC, 2012 WL 566426 (Bankr. D. N.M. Feb. 17, 2012) (Jacobvitz, J.) (Debtor's proposed Chapter 11 plan sought to impose on secured creditor a "Subordination, Non-disturbance and Attornment Agreement" ("SNDA") between the debtor's primary secured creditor and [two of the debtor's replacement tenants] "that contain[ed] the same terms as the former SNDA between [the secured creditor] and [its] now defunct former tenant." The secured creditor "assert[ed] that it is questionable whether, in light of the Supreme Court's decision in *Stern v. Marshall* . . . that this Court has jurisdiction to enter a judgment for injunctive relief or otherwise to bind two non-debtor parties to an SNDA." Rejecting this argument, the court stated that it "disagrees that *Stern v. Marshall* precludes the Court from confirming a plan that would bind a lender to terms that afford a debtor and its tenants with the functional equivalent of an SNDA. . . . Because the Court is denying confirmation on other grounds, the Court need not decide whether *Stern v. Marshall* otherwise implicates the Court's authority to enjoin [the secured creditor] by compelling it to take actions or refrain from taking actions in accordance with the SNDA terms contained in the Plan.").

In re Foresee, 2011 Bankr. LEXIS 2967 (Bankr. W.D. Mo. Aug. 4, 2011) (Federman, J.) ("This is a core proceeding under 28 U.S.C. § 157(b)(2) over which the Court has jurisdiction pursuant to 28 U.S.C. §§ 1334(b), 157(a), and 157(b)(1), because plan confirmation arises under the Bankruptcy Code and arises in bankruptcy cases. *See also Stern v. Marshall* . . . .").

M. ORDERS APPROVING THE USE OR LEASE OF PROPERTY: 28 U.S.C. § 157(b)(2)(M)

Wells Fargo Bank, N.A. v. Madan (In re AJ Town Centre, L.L.C.), 2012 WL 1106747 (D. Ariz. Apr. 2, 2012) (Snow, J.) (Wells Fargo Bank, N.A. filed a motion to withdraw the reference of an action it had commenced to recover the entire amount of the debtors' loan indebtedness from certain guarantors. "Wells Fargo contends that the bankruptcy court's involvement in the Guarantor Adversary Proceeding is 'a waste of judicial resources' because the bankruptcy court 'has no constitutional authority to enter a final order and may not have constitutional authority to hear and determine any issue in the proceeding.' . . . Wells Fargo bases its lack of constitutional authority argument on [*Stern*]. . . . Wells Fargo's reliance on *Stern* is misplaced. In *Stern*, the Court held that bankruptcy courts 'lack[ ] 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. . . . The Supreme Court emphasized that this holding was 'narrow,' stating that the Respondent 'has not argued that the bankruptcy courts are barred from hearing all counterclaims or proposing findings of fact and conclusions of law on those matters, but rather that it must be the district court that finally decide[s] them.' . . . As discussed, the Bankruptcy Court is hearing the instant case under its 'related to' jurisdiction. The Bankruptcy Court is therefore statutorily restricted from issuing a final judgment in this case, and was so restricted even prior to the Supreme Court's holding in *Stern*. *See* 28 U.S.C. § 157(c)(1). *Stern* does not affect bankruptcy courts' ability to hear cases and issue proposed findings of fact and conclusions of law. . . . Although this Court may be required to review findings of fact and conclusions of law by the Bankruptcy Court and issue a final order, this possibility does not, without more, persuade the Court to withdraw the reference. Both the Ninth Circuit and this District have recognized that, in non-core proceedings, 'the bankruptcy court acts as an adjunct to the district court, in a fashion similar to that of a magistrate or special master.' . . . The Bankruptcy Court possesses legal expertise that may help it determine whether certain claims are preempted by the bankruptcy code. Moreover, the Bankruptcy Court may prove more efficient given its factual expertise over allegations common to this action and the related Bankruptcy Proceedings and Debtor Adversary Proceeding. . . . Referral to the Bankruptcy Court allows the Court and the parties to take advantage of the Bankruptcy Court's expertise, with this Court retaining the ability to issue a final judgment if required.").

N. ORDERS APPROVING THE SALE OF PROPERTY: 28 U.S.C. § 157(b)(2)(N)

Ritenour v. Osborne, 2012 WL 912947 (S.D. Fla. Mar. 16, 2012) (Moore, J.) ("Appellants in this case contest the Bankruptcy Court's sale of the Debtor's interest in a lease, challenging the Bankruptcy Court's jurisdiction to authorize the sale and assignment, and alleging that the Bankruptcy Court erred in authorizing the sale and assignment of the lease pursuant to 11 U.S.C.

§§ 363 and 365. . . . The [l]ease was appropriately determined an asset of the Debtor's estate, and its sale and assignment were clearly within the jurisdiction of the Bankruptcy Court. Appellant provides no valid argument to the contrary, and Appellant's attempt to extrapolate the Supreme Court's holding in [*Stern*] is meritless. In *Stern*, the debtor's estate filed a counterclaim against a creditor's claim. The counterclaim relied upon a determination of whether Texas common law recognized a cause of action for tortious interference with an inter vivos gift. The Supreme Court held that a bankruptcy court lacked [constitutional authority] to enter a [final] judgment because: (1) the counterclaim was entirely based upon state common law; (2) the adjudication of the counterclaim was entirely independent of federal bankruptcy law; and (3) the counterclaim was not necessarily resolvable by a ruling on the creditor's proof of claim. . . . In the instant case, the sale of the [l]ease is part of the core proceeding and arises solely in the context of this bankruptcy matter. It is an asset of the Debtor's estate and may be sold pursuant to 11 U.S.C. [§] 363. The sale is governed by federal bankruptcy law, and there is no resolution of state law issues necessary to effect its disposition. The sale of the [l]ease was therefore within the [authority] of the Bankruptcy Court [to finally adjudicate].").

Hagan v. Smith (In re Naughton), 2011 WL 4479478 (W.D. Mich. Sept. 6, 2011) (Dales, J.) *report and recommendation adopted*, *Hagan v. Smith (In re Naughton)*, 2011 WL 4479459 (W.D. Mich. Sept. 27, 2011) (Neff, J.) ("Given the nature of the Trustee's claim in this case—she seeks authority to sell real estate belonging to the bankruptcy estate and non-debtor co-owners under 11 U.S.C. § 363(b) and (h) . . . I may not have the authority under 28 U.S.C. § 157(c) to enter final judgment if, as some believe, this power is reserved exclusively for judges with life tenure and salary protections afforded by Article III of the Constitution. . . . The Trustee filed a motion for default judgment. . . . I determined that the Complaint seeks authority to sell property belonging to third parties, relief that the Supreme Court recently implied may fall within the exclusive authority of a judge with life tenure and salary protection as prescribed in Article III of the United States Constitution. . . . Because the Defendants failed to appear or otherwise participate in this matter, I am unwilling to find that they have consented to entry of a final judgment by a United States Bankruptcy Judge. . . . Trustee's counsel and I discussed whether it would be better for me to issue a Report and Recommendation to the District Court or simply enter a final judgment for the Bankruptcy Court. Counsel requested that I issue a Report and Recommendation due to his concern that a sale order under 11 U.S.C. § 363(h) might be vulnerable to collateral attack later, under *Stern*. Because the Trustee's buyer's title will ultimately depend upon the validity of the order authorizing the sale of the estate's interest and the interests of the co-owners, I believe it is prudent to ask the District Court to consider entering final judgment authorizing the Trustee to sell not just the estate's interest in the real estate, but also the interests of the Defendants, as 11 U.S.C. § 363(h) allows. In this circumstance, an ounce of prevention may be worth a pound of cure.").

O. MATTERS SPECIFICALLY IDENTIFIED BY COURTS AS CORE UNDER THE CATCHALL PROVISION OF 28 U.S.C. § 157(b)(2)(O)

Sheehan v. Dobin, 2012 WL 426285 (D.N.J. Feb. 9, 2012) (Wolfson, J.) ("[U]nlike *Stern*, the matter before me does not involve a proof of claim or a state law counterclaim involving a debtor and

creditor. [T]he instant appeal concerns an adversary proceeding filed by the Trustee to determine the extent and validity of the Debtor's ownership interest in a piece of property. This is the essence of a core bankruptcy proceeding. Moreover, the Bankruptcy Court's jurisdiction here did not arise under 28 U.S.C. § 157(b)(2)(C) as in *Stern*, but instead, arose under 28 U.S.C. § 157(b)(2)(A),(K), (N) and/or (O) as explained by Judge Lyons in his decision. For these reasons, the Court finds that *Stern* is inapplicable to this matter . . . .").

Turner v. First Cmty. Credit Union (In re Turner), 462 B.R. 214 (Bankr. S.D. Tex. 2011) (Bohm, J.) ("This particular dispute is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (C) and (O), and the general 'catch-all' language of 28 U.S.C. § 157(b)(2). . . . Because the Debtors' suit against [a financial institution for indefinitely freezing the debtors' account postpetition and withdrawing funds from the account to pay amounts due from the debtors without seeking relief from the automatic stay] is in effect a counterclaim against this institution which filed proofs of claim in the Debtors' main case [for loans made to the Debtors], at first blush it would appear that *Stern* is on all fours and therefore that: (1) this Court does not have the constitutional authority to enter a final judgment in this dispute; and (2) this Court must therefore submit proposed findings of fact and conclusions of law to the District Court, together with a proposed judgment to be signed by that Article III Court. However, for the reasons set forth below, the undersigned bankruptcy judge believes that he does have constitutional authority to sign a final judgment in this adversary proceeding. First, in *Stern*, the suit between the debtor's estate and the creditor concerned state law issues. In the suit at bar, the suit arises out of alleged violations of the automatic stay imposed by an express Bankruptcy Code provision—i.e. § 362(a). Moreover, the relief sought by the Debtors is based upon another express Bankruptcy Code provision—i.e. § 362(k), which expressly provides for recovery of damages by a debtor for a creditor's violation of the automatic stay. State law has no equivalent to these statutes; they are purely a creature of the Bankruptcy Code. . . . Alternatively . . . [t]his suit involves the adjudication of rights created under a complex public rights scheme, and therefore it falls within the Bankruptcy Court's constitutional authority. . . . The automatic stay is one of the most important—if not the most important—features of the Bankruptcy Code, and it is integral to the public bankruptcy scheme.").

Szilagyi v. Chicago Am. Mfg., LLC (In re Lakewood Eng'g & Mfg. Co.), 459 B.R. 306 (Bankr. N.D. Ill. 2011) (Hollis, J.) ("The resolution of this particular proceeding concerns the administration of the estate under § 157(b)(2)(A). . . . As Plaintiffs anticipated, 'the principal issues in the adversary proceeding are whether [Chicago American Manufacturing, LLC] has a valid license to use certain Lakewood marks and patents under Illinois law and whether any such license was terminated when the Bankruptcy Court approved the rejection of CAM's purported license under 11 U.S.C. § 365.'. . . [T]his court is ruling only on claims 'derived from or dependent upon bankruptcy law,' unlike the state law tort action at issue in *Stern* . . . . In the course of this Memorandum Opinion, this court interprets a contract under principles described in Illinois law, and then determines the effect of rejection of that contract under bankruptcy law. Rejection of a contract and the effects thereof are creations purely of bankruptcy law. This action clearly 'stems from the bankruptcy itself.'").

In re Gow Ming Chao, 2011 WL 5855276 (Bankr. S.D. Tex. Nov. 21, 2011) (Bohm, J.) ("This is a core proceeding pursuant to 28 U.S.C. §§ 157(b)(2)(A) and (O). . . . An order converting a case from one chapter to another is considered a final order. Therefore, this Court must determine

whether it has the constitutional authority to enter the order converting this Chapter 11 case to a Chapter 7 case. The Court concludes that it does have such authority for two reasons. First, the facts in the case at bar are easily distinguishable from the facts in *Stern*. . . . In the case at bar, there is no state law issue involved. Rather, the issues concern whether the Debtors have complied with express provisions of the Bankruptcy Code, the Federal Bankruptcy Rules, the Bankruptcy Local Rules for the Southern District of Texas, and the U.S. Trustee Guidelines for Chapter 11 cases. These are all pure bankruptcy issues which involve fundamental compliance in order for the bankruptcy system to properly operate. Accordingly, this Court concludes that it does indeed have the constitutional authority to sign the order converting this Chapter 11 case to a Chapter 7 case. . . . Alternatively . . . [t]he Chapter 11 case initiated by the Debtors involves the adjudication of rights created under a complex public rights scheme, and therefore it falls within the Bankruptcy Court's constitutional authority.").

In re Whitley, 2011 WL 5855242 (Bankr. S.D. Tex. Nov. 21, 2011) (Bohm, J.) ("[T]his particular dispute is a core proceeding pursuant to 28 U.S.C. §§ 157(b)(2)(a), (B), (E) and (O). . . . The dispute at bar is not a counterclaim of the Debtor, nor does it arise out of state law; therefore, *Stern* does not apply. This suit arises out of alleged violations of the disclosure requirements imposed by an express Bankruptcy Code provision—i.e. § 329. Moreover, the Trustee also seeks relief based upon another express Bankruptcy Code provision—i.e. § 330, which allows the Court to award or deny compensation to attorneys that represent the debtor and the debtor's estate. State law has no equivalent to these statutes; they are purely creatures of the Bankruptcy Code. Accordingly, the resolution of this dispute is not based on state common law, *Stern* does not apply, and this Court has the constitutional authority to enter a final judgment in this dispute pursuant to 28 U.S.C. §§ 157(a) and (b)(1). . . . The dispute at bar relates solely to compensation of an attorney (i.e. Baker), a right established by §§ 329 & 330 of the Bankruptcy Code; and thus, it falls within this Court's constitutional authority. Moreover, whether this Court approves payment of Baker's fees affects the amount of distributions that will be made to unsecured creditors, as their claims are subordinate to the administrative claim that Baker will hold if his requested fees are allowed. Accordingly, the dispute at bar falls within the 'public rights' exception articulated in *Stern* because the outcome of this dispute affects the distribution of property among all of the Debtor's creditors.").

P. MATTERS UNDER CHAPTER 15: 28 U.S.C. § 157(b)(2)(P)

In re Fairfield Sentry Ltd., 458 B.R. 665 (S.D.N.Y. 2011) (Preska, J.) (The debtors in Chapter 15 bankruptcy case, which was ancillary to a foreign liquidation proceeding in the British Virgin Islands ("BVI"), were offshore funds that had invested with Bernard Madoff and became insolvent when the Madoff fraud came to light. Before commencing the Chapter 15 ancillary proceeding, plaintiffs/debtors filed actions in state court seeking to recover distributions made by the funds before the fraud was uncovered. In the state court cases, the plaintiffs/debtors asserted claims for money had and received, unjust enrichment, mistaken payment and constructive trust. After filing the Chapter 15 case, plaintiffs/debtors removed actions filed in the state court to the bankruptcy court. Plaintiffs/debtors also filed additional identical actions in bankruptcy court, and after the defendants filed motions to remand the cases to state court, the plaintiffs amended the pleadings to add statutory claims under BVI law for "unfair preferences" and "undervalue transactions." In a

pre-*Stern* decision, the bankruptcy court held that it had core jurisdiction over the avoidance claims in particular, and the actions as a whole, because they impacted the court's core bankruptcy functions under Chapter 15 and were analogous to traditionally core United States bankruptcy proceedings to avoid and recover fraudulent transfers and preferences. Accordingly, the bankruptcy court denied the defendants' motions for equitable remand and abstention The district court reversed, finding that the bankruptcy court lacked core jurisdiction because the cases did not "arise under" or "arise in" a Title 11 case. In addition to concluding that there was no statutory basis for subject matter jurisdiction, the district court also held that the actions could not be heard by an Article I court, reasoning: "[T]he essence of the claims is not, as the Bankruptcy Court found, traditionally core in nature. As shown by a review of the operative complaints, these claims are disputes between two private parties that have existed for centuries and are 'made of "the stuff of the traditional actions at common law tried by the courts at Westminster in 1789."' *See Stern,* 131 S. Ct. at 2609 (quoting *N. Pipeline*, 458 U.S. at 90, 102 S. Ct. 2858 (Rehnquist, J., concurring in the judgment)). . . . The Bankruptcy Court focused on the addition of the BVI-law claims as tipping the balance in favor of core jurisdiction because those claims are 'traditionally core in nature.' . . . The addition of these claims, however, does not alter the calculus. Like the fraudulent conveyance suits at issue in *Granfinanciera* . . . the BVI claims here are 'quintessentially suits at common law that more resemble state law contract claims brought by a bankrupt corporation to augment the bankruptcy estate than they do creditors' hierarchically ordered claims to a pro rata share of the bankruptcy res.' *Granfinanciera*, 492 U.S. [at 56]. And like the fraudulent conveyance suits in *Granfinanciera*, the fact that these claims can be brought in bankruptcy is not dispositive. . . . [I]f Congress creates an independent federal right, it may assign adjudication of that right to an Article I court. Where the right exists in the common law, however, Congress may not constitutionally assign adjudication of that right to a non-Article III court because 'Congress has nothing to do with it.' [*Stern*, 131 S. Ct.] at 2614. . . . The adjudication of these cases to a final judgment by an Article I court would violate these principles. As described above, the claims in these cases are not independent federal claims or even independent foreign law claims. They are classic common law claims for money had and received or mistaken payment. The claims are matters of private right because they are disputes between two private parties about whether the redemptions were proper. The claims have 'nothing to do' with a matter of public right. *See id.* They do not involve ordering of creditors' claims or other statutory rights; they 'resemble state law contract claims brought by a bankrupt corporation to augment the bankruptcy estate.' *Granfinanciera*, 492 U.S. at 56 . . . . Plaintiffs' argument boils down to the assertion that any recovery will accrue to the benefit of the Funds' bankruptcy estates. However, *Granfinanciera* holds that common-law actions to augment the size of the estate involving disputed facts to be determined by a jury are not core, as opposed to actions to divvy up and order claims against the estate, which are. . . . Pre-petition common law actions for a claim requiring adjudication of factual disputes unrelated to bankruptcy are not core claims. These claims are private rights because they are 'state law action[s] independent of the federal bankruptcy law and not necessarily resolvable by a ruling on the creditor's proof of claim in bankruptcy.' *Stern*, 131 S. Ct. at 2611. They are therefore not core claims and may not be adjudicated by an Article I court absent consent.").

IV. BANKRUPTCY COURTS' CONSTITUTIONAL AUTHORITY TO FINALLY ADJUDICATE MATTERS THAT ARE CORE PROCEEDINGS NOT ENUMERATED IN § 157(b)(2)

A. LIEN AVOIDANCE UNDER § 544(A)

Sheehan v. Dobin, 2012 WL 426285 (D.N.J. Feb. 9, 2012) (Wolfson, J.) ("[T]he Trustee filed an Adversary Proceeding in the Bankruptcy Court . . . to determine the validity of the Appellants' ownership in the Lots. [T]he Trustee filed a [M]otion for Summary Judgment, arguing that deeds transferring the Property from Eight Bulls to the Sheehans as individuals were recorded after the Petition date and, therefore, were unenforceable against the Trustee. Specifically, the Trustee argued that her interest in the Property was that of a bona fide purchaser without notice and that her interest was perfected as of the Petition Date as provided by Section 544 of the United States Bankruptcy Code. On November 8, 2010, Judge Lyons issued an Order granting summary judgment in favor of the Trustee and declaring that Appellants had no legal interest in the Lots. . . . [U]nlike *Stern*, the matter before me does not involve a proof of claim or a state law counterclaim involving a debtor and creditor. [T]he instant appeal concerns an adversary proceeding filed by the Trustee to determine the extent and validity of the Debtor's ownership interest in a piece of property. This is the essence of a core bankruptcy proceeding. . . . [T]he Court finds that *Stern* is inapplicable to this matter . . . .").

Tibble v. Wells Fargo Bank, N.A. (In re Hudson), 455 B.R. 648 (Bankr. W.D. Mich. 2011) (Gregg, J.) (The bankruptcy court found that it had the constitutional authority to finally adjudicate an action brought by Chapter 7 trustee under § 544(a)(3) to avoid the lender's mortgage based on an error in the legal description. "This adversary proceeding, even though it requires reviewing, discussing and deciding state law issues, pertains to the determination of the validity, extent, or priority of the Bank's asserted mortgage lien . . . . Regardless of the state law issues, this adversary proceeding 'arises under' § 544(a)(3) of the Bankruptcy Code. This judge cannot envision a core proceeding that is more 'core' than lien avoidance.").

In re Salander O'Reilly Galleries, 453 B.R. 106 (Bankr. S.D.N.Y. 2011) (Morris, J.) (In dispute between liquidation trust and prepetition consignor of artwork, the bankruptcy court held that it had the constitutional authority to finally adjudicate liquidation trustee's action seeking to avoid [the consignor's] interest as consignor in the [artwork] pursuant to 11 U.S.C. § 544(a), on account of [the consignor's] failure to file a financing statement, and to assert a superior interest as assignee of the Bank's lien. The court reasoned: "The matter that [the consignor] seeks to arbitrate in Jersey—whether the [artwork] was property of the debtor at the time the case was commenced—is an essential and inseparable element of an action under Bankruptcy Code § 544(a). Resolution of the § 544 matter will go to the heart of whether [the consignor's] claim will be allowed. [The consignor's] requested relief is inextricably bound up with the resolution of the art claim and proof of claim it filed in this case, and falls squarely within the jurisdiction of the bankruptcy court. . . . *Stern* is replete with language emphasizing that the ruling should be limited to the unique circumstances of that case, and the ruling does not remove from the bankruptcy court its jurisdiction over matters directly related to the estate that can be finally decided in connection with restructuring

debtor and creditor relations. . . . Nowhere in *Marathon, Granfinanciera,* or *Stern* does the Supreme Court rule that the bankruptcy court may not rule with respect to state law when determining a proof of claim in the bankruptcy, or when deciding a matter directly and conclusively related to the bankruptcy. . . . In the matter at bar, upon the papers filed and authority cited by the parties with respect to this matter, there are two foreseeable outcomes with respect to the art claim and proof of claim filed by [the consignor]: The Trust will avoid [the consignor's] interest . . . pursuant to Bankruptcy Code § 544 or as assignee of the Bank and liquidate the [artwork] for the benefit of creditors, paying [the consignor] its dividend as a general unsecured creditor; or [the consignor] will recover the [artwork] and exit this case with its painting in hand. In either scenario, the Bankruptcy Court's ruling will finally determine [the consignor's] art claim and proof of claim. The present motion for relief from the stay, which implicates the adjudication of the proof of claim, is within the jurisdiction of this Court.").

Sender v. Cygan (In re Rivera), 2011 WL 4382001 (Bankr. D. Colo. Sept. 20, 2011) (Brooks, J.) ("The Plaintiff, in his capacity as Chapter 7 Trustee, seeks to assert his 'strong arm' powers under 11 U.S.C. § 544(a)(3) to avoid the Defendants' lien on the Debtor's property because the deed of trust, executed for the benefit of the Defendants, although properly indexed in the appropriate recording office and containing the correct and complete street address of the property, did not contain any legal description of the property and, therefore, failed to provided sufficient notice of the Defendants' lien to subsequent interest holders. . . . The Plaintiff seeks the status of a bona fide purchaser of the property under 11 U.S.C. § 544(a)(3) in order to avoid the Defendants' lien and to recover the property for the benefit of the estate pursuant to 11 U.S.C. § 550(a)(1). . . . This issue of whether a deed of trust which contains no legal description can adequately provide notice to subsequent interest holders appears to be a case of first impression in Colorado and this Court believes that the Colorado Supreme Court is the more appropriate judicial body to decide the important, consequential, and unsettled issue of state law. This Court believes it is wise and prudent, if not necessary, [*s*]*ee Stern v. Marshall*, — U.S. —, 131 S. Ct. 2594, 180 L . Ed. 2d 475 (2011), to defer and look to the Colorado Supreme Court for interpretation of the state law and application of the statutes which are central to the ongoing commerce of the state.").

B. PROCEEDINGS TO AVOID OR RECOVER UNAUTHORIZED POSTPETITION TRANSFERS UNDER § 549

Goldstein v. Eby-Brown, Inc. (In re Universal Mktg., Inc.), 459 B.R. 573 (Bankr. E.D. Pa. 2011) (Frank, J.) ("Defendant appears to limit its argument to the Trustee's claim to set aside pre-petition transfers. The Defendant does not appear to contend that the court lacks [constitutional authority] to hear the Trustee's claim for avoidance of post-petition transfers pursuant to 11 U.S.C. § 549.").

Zazzali v. 1031 Exch. Grp. (In re DBSI, Inc.), 2012 WL 1242305 (Bankr. D. Del. Apr. 12, 2012) (Walsh, J.) ("The majority opinion in *Stern* contains language that could support either the broad or the narrow interpretation. . . . I agree with my colleagues that *Stern's* holding should be read narrowly and thus restricted to the case of a 'state-law counterclaim that is not resolved in the process of ruling on a creditor's proof of claim.' [*Stern*,] 131 S. Ct. at 2620. I note also that numerous other recent decisions have agreed with the narrow interpretation. . . . Thus, I find that

Stern is not applicable to this action, as it does not involve a state-law counterclaim by the estate. Consequently, I conclude that I can enter a final judgment on the core preference, post-petition transfer, fraudulent transfer, and unjust enrichment claims and issue proposed findings of fact and conclusions of law on the non-core causes of action.")

Springel v. Prosser (In re Innovative Commc'n Corp.), 2011 WL 3439291 (Bankr. D.V.I. Aug. 5, 2011) (Fitzgerald, J.) ("In this adversary proceeding, the Trustee seeks to avoid and recover . . . unauthorized postpetition transfers. An action to avoid and recover unauthorized postpetition transfers pursuant to 11 U.S.C. § 549 is purely a creation of the Bankruptcy Code and does not otherwise exist outside of Title 11. . . . As to claims asserted pursuant to . . . [§]549, we issue a final judgment in this matter. Assuming, *arguendo*, that the District Court disagrees and reads [*Stern*] broadly to conclude that the dicta in the opinion limits this court's jurisdiction to making a Report and Recommendation, this Memorandum Opinion in its entirety constitutes our Report and Recommendation to the District Court.").

C. DETERMINING WHETHER PROPERTY IS PROPERTY OF THE ESTATE

BankUnited Fin. Corp. v. FDIC (In re BankUnited Fin. Corp.), 462 B.R. 885 (Bankr. S.D. Fla. 2011) (Isicoff, J.) ("Contrary to the FDIC–R's argument, what is or is not property of a bankruptcy estate is an issue that stems from the bankruptcy itself . . . since the concept of what is property of a bankruptcy estate does not exist outside of a bankruptcy case. Moreover, the fact that the determination of whether the Tax Refunds are property of the estate is determined under non-bankruptcy law and is an issue that could be resolved in a non-bankruptcy forum is irrelevant since the issue of what is property of the estate is virtually always a matter of state law or other non-bankruptcy law.").

In re Salander O'Reilly Galleries, 453 B.R. 106 (Bankr. S.D.N.Y. 2011) (Morris, J.) (The bankruptcy court held that it had the constitutional authority to enter a final judgment on whether artwork consigned to the debtor was property of the estate, even if making that determination required the bankruptcy court to apply state law in deciding the effect of the creditor's failure to file a financing statement. The determination of whether the artwork was property of the estate ultimately turned on whether the creditor had an unperfected security interest that could be avoided pursuant to § 544(a). "[W]hether the [artwork] was property of the debtor at the time the case was commenced . . . is an essential and inseparable element of an action under Bankruptcy Code § 544(a). Resolution of the § 544 matter will go to the heart of whether [the creditor's] claim will be allowed. [The creditor's] requested relief (relief from the stay to permit it to arbitrate the ownership issue] is inextricably bound up with the resolution of . . . proof of claim it filed in this case . . . . [T]he Court will have to determine whether the Debtor and the estate had an interest in the [artwork], as part of determining the order of the priorities of the competing interests in the work of art, as well as whether [the creditor's] claim may be allowed.").

Joyner v. Liprie (In re Liprie), 2012 WL 1144614 (Bankr. W.D. La. Apr. 4, 2012) (Summerhays, J.) ("The present adversary proceeding is a pre-petition state court proceeding that was removed after

the debtor filed for relief under Chapter 7 of the Bankruptcy Code. [Plaintiff asserted fraudulent conveyance claims against the debtor and several non-debtor entities, and certain of the defendants] filed motions to dismiss on the grounds that the claims asserted by [plaintiff] are estate claims that may only be brought by the duly-appointed Chapter 7 trustee. . . . In his opposition to the Motions to Dismiss, [plaintiff] questions whether this court has jurisdiction to enter final orders (including an order on the Motions to Dismiss) on the state law [fraudulent conveyance] claims asserted in the Amended Complaint following [*Stern*, which] addresses the constitutionality of 28 U.S.C. § 157(b)(2)(C). . . . In *Stern*, the Court held that section 157(b)(2)(C) was unconstitutional to the extent that it authorizes non-Article III bankruptcy judges to enter final orders and judgments on common law counterclaims to proofs of claim. . . . In the present case, the Motions to Dismiss contend that the claims asserted by [plaintiff] are estate claims that can be brought only by the Chapter 7 trustee. This case thus presents not only the question of whether the claims asserted by [plaintiff] are property of the bankruptcy estate under 11 U.S.C. § 541, but whether [plaintiff] has standing to assert estate claims. This determination directly affects the Chapter 7 trustee's administration of the bankruptcy estate and is a core matter upon which the bankruptcy court may enter final orders and judgments. *See* 28 U.S.C. § 157(b)(2)(A). [Plaintiff's] reliance on the Seventh Circuit's decision in *In re Ortiz*, 665 F.3d 906 (7th Cir. 2011) does not change this result. In *Ortiz*, the Seventh Circuit addressed whether the bankruptcy court could enter final orders on the merits of the state law claims asserted by the debtor against a creditor. In contrast, here, the question before the court is whether the claims at issue are property of the estate. While the resolution of this question may require the court to refer to state law in order to determine whether the claims at issue are estate or creditor claims, the inquiry is ultimately a core matter governed by federal bankruptcy law.").

D. APPROVAL OF SETTLEMENTS UNDER BANKRUPTCY RULE 9019

Police & Fire Ret. Sys. of the City of Detroit v. Ambac Fin. Grp., Inc. (In re Ambac Fin. Grp., Inc.), 2011 WL 6844533 (S.D.N.Y. Dec. 29, 2011) (Buchwald, J.) (The bankruptcy court approved a settlement between the debtor and the plaintiffs in two securities class action lawsuits. The settlement was conditioned on the bankruptcy court entering an order releasing claims asserted in separate shareholder derivative actions against the debtor's directors and officers. The bankruptcy court held that the derivative claims were property of the debtor's estate and that the debtor therefore had the authority to settle them. A plaintiff in one of the derivative actions appealed, asserting that the bankruptcy court lacked the constitutional authority to enter a final order approving the settlement. According to the district court, although "[t]he full reach of *Stern* has yet to be determined . . . it is clear that the case does not implicate the approval of settlements, relating to property of the debtor's estate, under Rule 9019 [because] there is a fundamental difference between a court's entry of a final, binding judgment on the merits of a claim and its approval of a settlement of that claim." . . . While *Stern* may implicate a bankruptcy court's authority to effectuate the former, it does not affect the court's ability to engage in the latter. Indeed, the permissive standard that bankruptcy courts apply in reviewing settlements under Rule 9019—whether the settlement is above 'the lowest point in the range of reasonableness'—illuminates the distinct nature of settlement review as compared to final adjudication. . . . Thus, there was no constitutional infirmity in the bankruptcy court's issuance of the 9019 Order.").

In re Wash. Mut., Inc., 461 B.R. 200 (Bankr. D. Del. 2011) (Walrath, J.) (The bankruptcy court held that it had jurisdiction to approve global settlement agreement and confirmation of modified plan incorporating the agreement: "Compromises were routinely approved under the Bankruptcy Act and continue to be approved by bankruptcy courts in the context of almost every bankruptcy case . . . . Settlements are often included in a plan of reorganization . . . . [T]here is a fundamental difference between approval of a settlement of claims (which the Court is being asked to do here) and a ruling on the merits of the claims . . . . As an initial matter, a court does not have to have jurisdiction over the underlying claims in order to approve a compromise of them . . . . The standards which a court must apply in considering a settlement establish that the court is not rendering a final decision on the merits of the underlying claims being compromised . . . . The 'lowest point in the range of reasonableness' is far from the standard required for an Article III court to enter a final determination on the merits of the claims. The Court's conclusion in the January 7 Opinion was not a decision on the merits of the underlying claims but merely a determination that the settlement of those claims by the Debtors on the terms of the [global settlement agreement] was reasonable.").

In re Ambac Fin. Grp., Inc., 457 B.R. 299 (Bankr. S.D.N.Y. 2011) (Chapman, J.) ("Unfortunately, *Stern v. Marshall* has become the mantra of every litigant who, for strategic or tactical reasons, would rather litigate somewhere other than the bankruptcy court. Whatever *Stern v. Marshall* may ultimately be held to mean, this Court is confident that, as a matter of law and practice, it most certainly does not stand for the proposition that the bankruptcy court cannot approve the compromise and settlement of a claim which is indisputably property of a debtor's estate.").

In re Okwonna-Felix, 2011 WL 3421561 (Bankr. S.D. Tex. Aug. 3, 2011) (Bohm, J.) ("In *Stern*, the Supreme Court held that contrary to § 157(b)(1), a bankruptcy court may not constitutionally enter a final judgment on a counterclaim that would not necessarily be resolved through adjudication of the proof of claim. . . . Importantly, the particular counterclaim in *Stern* did not constitute a 'public rights' dispute. . . . A 'public rights' dispute may be decided by non-Article III tribunals, but such dispute must involve rights integrally related to a particular federal government action. . . . Entering a final judgment with respect to the counterclaim based upon a private right would be an impermissible exercise of the judicial power of the United States. . . . [A] bankruptcy court's authority to enter a final judgment over certain disputes involving state law issues is now questionable. For the reasons set forth below, the undersigned judge concludes that he does have constitutional authority to enter a final order in the dispute at bar. . . . In *Stern*, the suit between the debtor's estate and the creditor concerned purely state law issues. . . . In the dispute at bar, the Debtor is requesting this Court to approve a settlement under an express bankruptcy provision, i.e. Bankruptcy Rule 9019. This Rule gives bankruptcy courts discretion to approve a compromise. State law has no equivalent to Bankruptcy Rule 9019. Moreover, the factors which bankruptcy courts are required to review in making a determination of whether or not to approve a settlement have been developed entirely by the federal courts, including the Supreme Court of the United States. . . . Accordingly, because the resolution of the Motion is not based on state common law, but entirely on federal bankruptcy law (both the Rule and the case law instructing how to apply the Rule), the holding in *Stern* is inapplicable, and this Court has the constitutional authority to enter a final order in this contested matter pursuant to 28 U.S.C. §§ 157(a) and (b)(1). Alternatively, even if this Court is incorrect and *Stern* does govern, this Court concludes that the one exception

articulated by the Supreme Court applies. Specifically, the Court concludes that it may exercise authority over essential bankruptcy matters under the 'public rights' exception.").

E. SUBSTANTIVE CONSOLIDATION

In re LLS Am., LLC, 2011 WL 4005447 (Bankr. E.D. Wash. Sept. 8, 2011) (Williams, J.) ("The issue is whether the recent decision [in *Stern*] precludes this Court from entering final, binding findings of fact and conclusions of law, and from entering a final order regarding substantive consolidation. . . . Even though one cited example listed in § 157(b)(2)(C), i.e., counterclaims by the estate, has been determined by *Stern* to be 'non-core,' the *Stern* decision in no way limits a bankruptcy court's authority to enter final appealable decisions on core issues. Substantive consolidation does not exist outside the context of a bankruptcy proceeding. It is only available in a bankruptcy proceeding commenced under the federal bankruptcy scheme. Although not expressly provided for in the Bankruptcy Code, it has been a tool utilized by bankruptcy courts since the Bankruptcy Act of 1898. Clearly, substantive consolidation is a core matter as it 'arises under' Title 11 or 'arises in' a case under Title 11. Substantive consolidation is premised upon the goal of a ratable fair distribution to creditors, which is one of the fundamental goals and purposes of the federal bankruptcy scheme. It is not a matter of state law and does not arise under state law. In many respects, bankruptcy courts are courts of equity and substantive consolidation is an exercise of the Court's general equitable powers. It is a remedy or exercise of jurisdiction which is necessary in certain bankruptcy proceedings to accomplish one of the primary goals of the bankruptcy system. As such, it is a core matter and the bankruptcy court has authority to enter final findings of fact and conclusions of law and judgment regarding substantive consolidation. This Court therefore concludes that the Order for Substantive Consolidation is within the Court's authority as the relief sought arises in a case under Title 11 and is fundamental to the bankruptcy process and to the adjudication of claims. The narrow holding of *Stern v. Marshall* does not apply to the Motion for Substantive Consolidation.").

F. EQUITABLE SUBORDINATION UNDER § 510(c)

Burtch v. Huston (In re USDigital, Inc.), 461 B.R. 276 (Bankr. D. Del. 2011) (Sontchi, J.) (Addressing bankruptcy courts' statutory and constitutional authority to decide equitable subordination claims, the court determined that a proceeding in which a party seeks equitable subordination is both statutorily and constitutionally core. "[E]quitable subordination, as set forth in section 510(c), can only be raised in bankruptcy court. Like a preference claim—and unlike a fraudulent conveyance claim—it is a unique creature of bankruptcy law. Thus . . . a claim for equitable subordination under 11 U.S.C. § 510(c) . . . is a non-enumerated core proceeding under 28 U.S.C. § 157. . . . [While the *Stern* decision could be interpreted broadly, doing so would be] contrary to the letter and the spirit of the Supreme Court's holding. Chief Justice Roberts made as much clear in his summation: 'We conclude today that Congress, *in one isolated respect*, exceeded' the Constitutional limitation on the exercise of judicial power to Article III judges by empowering the bankruptcy court '*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*.' It is clear from the Court's own words in its conclusion that it considered its holding to be narrow. . . .").

Miller v. Greenwich Capital Fin. Prods., Inc. (In re Am. Bus. Fin. Servs., Inc.), 457 B.R. 314 (Bankr. D. Del. 2011) (Walrath, J.) ("The Supreme Court recently held . . . that bankruptcy courts lack the constitutional authority as Article I courts to enter final judgments on state law counterclaims even if they are core proceedings . . . [but also held that] its decision is a 'narrow one' which focuses on 'whether the action at issue stems from the bankruptcy itself.' Here, the claims before this Court [including an equitable subordination claim] arose after ABFS filed bankruptcy[.] [The equitable subordination claim is predicated on actions taken post-petition] and relate entirely to matters integral to the bankruptcy case. If not for the bankruptcy, these claims would never exist. Therefore, this Court concludes that it has [constitutional authority to hear and enter a final judgment on] this adversary proceeding as it directly stems from the bankruptcy case.").

Burns v. Dennis (In re Se. Materials, Inc.), 2012 WL 1034322 (Bankr. M.D.N.C. Mar. 27, 2012) (Waldrep, J.) (Under *Stern*, "the question is whether the action at issue stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process. . . . If either prong of the test is met, then the bankruptcy court has constitutional authority to enter a final order. Conversely, if the action neither stems from the bankruptcy itself nor would necessarily be resolved in the claims allowance process, the bankruptcy court lacks constitutional authority to enter final judgment and may only submit proposed findings of fact and conclusions of law to the district court. . . . The Trustee alleges that the acts, omissions, and conduct of Tony and Betty resulted in injury to the Debtor and its creditors and constitute a basis for equitably subordinating their claims . . . against the bankruptcy estate pursuant to Section 510(c) of the Bankruptcy Code. This claim is a counterclaim by the estate against the proofs of claim filed by Tony and Betty, and 28 U.S.C. § 157(b)(2)(C) provides that such counterclaims are core proceedings. The claim satisfies the first prong of the *Stern* test because a claim for equitable subordination stems from Section 510(c) of the Bankruptcy Code. . . . The Court has the constitutional authority to enter a final order with regard to this claim.").

City of Sioux City, Iowa v. Civic Partners Sioux City, LLC (In re Civic Partners Sioux City, LLC), 2012 WL 761361 (Bankr. N.D. Iowa Mar. 8, 2012) (Collins, J.) ("The Bank, in particular, has specifically acknowledged the equitable subordination claim has been raised as part of Debtor's counter-claim in the adversary proceedings. Debtor has also raised equitable subordination as to the City. . . . [E]quitable subordination, set forth in § 510(c), can only be raised in a bankruptcy court. . . . [S]uch a claim, like others, specifically arising in and arising under title 11 is a unique creature of bankruptcy law. . . . In other words, the Court would have jurisdiction under the portion of *Stern v. Marshall* noting that a counter-claim which arises under the Bankruptcy Code would be a core proceeding.").

Burtch v. Seaport Capital, LLC (In re Direct Response Media, Inc.), 2012 WL 112503 (Bankr. D. Del. Jan. 12, 2012) (Gross, J.) ("[The court acknowledges that both broad and narrow interpretations of *Stern* exist, but] adopts the Narrow Interpretation and holds that *Stern* only removed a non-Article III court's authority to finally adjudicate one type of core matter, a debtor's state law counterclaim asserted under § 157(b)(2)(C). By extension, the Court concludes that *Stern* does not remove the bankruptcy courts' authority to enter final judgments on other core matters, including the authority to finally adjudicate [equitable subordination,] preference and fraudulent conveyance actions like those at issue before this Court. . . . The Trustee has not [pleaded] facts sufficient to

plausibly show that . . . CapSource engaged in any inequitable conduct. . . . As a result, [the court will grant CapSource's motion to dismiss and] the equitable subordination count will be dismissed.").

Rancher Energy Corp. v. Gas Rock Capital, LLC (In re Rancher Energy Corp.), 2011 WL 5320971 (Bankr. D. Colo. Nov. 2, 2011) (Romero, J.) ("Of additional concern, as a result of the recent decision of the United States Supreme Court in *Stern v. Marshall* . . . a question of [constitutional authority] may exist with respect to . . . claim[s] for damages resulting from Gas Rock's violation of usury law . . . [and] for recovery under the fraudulent transfer acts of Wyoming or Colorado and § 544 [but not with respect to the debtor's equitable subordination claim].").

O'Cheskey v. Horton (In re Am. Hous. Found.), 2011 WL 4625349 (Bankr. N.D. Tex. Sept. 30, 2011) (Jones, J.) ("The causes of action asserted herein [—including the trustee's equitable subordination claim—] are core proceedings under 28 U.S.C. § 157(b). In the event a superior court determines that some or all of the causes of action here are not core proceedings subject of the Court's jurisdiction, these findings and conclusions are submitted as proposed findings and conclusions.").

Samson v. Blixseth (In re Blixseth), 2011 WL 3274042 (Bankr. D. Mont. Aug. 1, 2011) (Kirscher, J.) *order amended on denial of reconsideration*, 2012 WL 10193 (Bankr. D. Mont. Jan. 3, 2012) (Kirscher, J.) ("Although this Court has core jurisdiction over the equitable subordination . . . claims pursuant to its statutory authority, that authority may not be exercised unless it is also constitutional. '*Granfinanciera's* distinction between actions that seek to augment the bankruptcy estate and those that seek a pro rata share of the bankruptcy res, reaffirms 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.' . . . [T]he equitable subordination and preferential transfer claims arise from the Bankruptcy Code and the claims allowance process, therefore, this Court's jurisdiction over those claims is constitutionally acceptable.").

G. MODIFYING CHAPTER 13 PLANS

In re Hill, 2011 WL 6936357 (Bankr. S.D. Tex. Dec. 30, 2011) (Bohm, J.) ("The other matter pending before this Court is the [Chapter 13 trustee's] [m]otion to [m]odify [the debtor's Chapter 13 plan]. This Motion is brought pursuant to § 1329(a)(1). Both Ocwen and the Debtor oppose this Motion, thus putting the relief requested by the Trustee in dispute. What is not in dispute, however, is that this matter arises solely out of a pure bankruptcy statute, namely § 1329(a)(1). Indeed, the Debtor's confirmed plan, which the Trustee now seeks to modify so that the settlement proceeds from the Lawsuit are used to pay a higher percentage of unsecured claims, was confirmed pursuant to § 1325(a)—which is a process that is uniquely done under the Bankruptcy Code. There is absolutely no state law involved in confirmation of a Chapter 13 plan, or modification of such a plan. For these reasons, *Stern* is entirely inapplicable and this Court has the constitutional authority a sign a final order regarding the Motion to Modify.").

H. CONTRACT ASSUMPTION OR REJECTION UNDER § 365

Szilagyi v. Chicago Am. Mfg., LLC (In re Lakewood Eng'g & Mfg. Co.), 459 B.R. 306 (Bankr. N.D. Ill. 2011) (Hollis, J.) ("[T]he principal issues in the adversary proceeding are whether [Chicago American Manufacturing, LLC] has a valid license to use certain Lakewood marks and patents under Illinois law and whether any such license was terminated when the Bankruptcy Court approved the rejection of CAM's purported license under 11 U.S.C. § 365. . . . [T]his court is ruling only on claims 'derived from or dependent upon bankruptcy law,' unlike the state law tort action at issue in *Stern* . . . . In the course of this Memorandum Opinion, this court interprets a contract under principles described in Illinois law, and then determines the effect of rejection of that contract under bankruptcy law. Rejection of a contract and the effects thereof are creations purely of bankruptcy law. This action clearly 'stems from the bankruptcy itself.'").

I. DISMISSING AND CONVERTING BANKRUPTCY CASES

In re USA Baby, Inc., 2012 WL 1021273 (7th Cir. Mar. 28, 2012) (Posner, J; Wood, J.; Tinder, J.) (In an opinion affirming the conversion of a Chapter 11 case to Chapter 7 on the motion of the Chapter 11 trustee and over the objection of an equity holder, the Seventh Circuit stated that "nothing in *Stern v. Marshall* . . . which [the equity holder] cites repeatedly, affects our analysis. The Supreme Court held in [*Stern*] that bankruptcy judges may not enter final judgments on common law claims that are independent of federal bankruptcy law; we cannot fathom what bearing that principle might have on the present case.").

Mahanna v. Bynum, 465 B.R. 436 (W.D. Tex. 2011) (Sparks, J.) (The bankruptcy court dismissed the debtors' case on the motion of the Chapter 11 trustee. On appeal, the debtors argued that the bankruptcy court did not have the constitutional authority to dismiss their case. The district court disagreed: "*Stern* considered a very different issue, specifically, whether a bankruptcy court could issue a final order regarding a state-law counter-claim based on allegations of tortious interference with an inheritance. Here, by contrast, the dismissal disposed of the bankruptcy case, which was clearly a case arising under or in Title 11, and thus remained a 'core' proceeding as contemplated by the Supreme Court in *Stern*. And *Stern* did not destroy all finality in bankruptcy courts, it simply held § 157(b)(2)(C) was unconstitutional to the extent it swept counterclaims not arising in or under Title 11 into the category of 'core' proceedings. . . . [T]his appeal is entirely frivolous, and constitutes an unjustifiable waste of judicial resources . . . .").

In re Gow Ming Chao, 2011 WL 5855276 (Bankr. S.D. Tex. Nov. 21, 2011) (Bohm, J.) ("An order converting a case from one chapter to another is considered a final order. Therefore, this Court must determine whether it has the constitutional authority to enter the order converting this Chapter 11 case to a Chapter 7 case. The Court concludes that it does have such authority for two reasons. First, the facts in the case at bar are easily distinguishable from the facts in *Stern*. . . . In the case at bar, there is no state law issue involved. Rather, the issues concern whether the Debtors have complied with express provisions of the Bankruptcy Code, the Federal Bankruptcy Rules, the Bankruptcy Local Rules for the Southern District of Texas, and the U.S. Trustee Guidelines for

Chapter 11 cases. These are all pure bankruptcy issues which involve fundamental compliance in order for the bankruptcy system to properly operate. Accordingly, this Court concludes that it does indeed have the constitutional authority to sign the order converting this Chapter 11 case to a Chapter 7 case. . . . Alternatively . . . [t]he Chapter 11 case initiated by the Debtors involves the adjudication of rights created under a complex public rights scheme, and therefore it falls within the Bankruptcy Court's constitutional authority.").

J. ATTORNEY COMPENSATION/SANCTIONS

In re Whitley, 2011 WL 5855242 (Bankr. S.D. Tex. Nov. 21, 2011) (Bohm, J.) ("The dispute at bar is not a counterclaim of the Debtor, nor does it arise out of state law; therefore, *Stern* does not apply. This suit arises out of alleged violations of the disclosure requirements imposed by an express Bankruptcy Code provision—i.e. § 329. Moreover, the Trustee also seeks relief based upon another express Bankruptcy Code provision—i.e. § 330, which allows the Court to award or deny compensation to attorneys that represent the debtor and the debtor's estate. State law has no equivalent to these statutes; they are purely creatures of the Bankruptcy Code. Accordingly, the resolution of this dispute is not based on state common law, *Stern* does not apply, and this Court has the constitutional authority to enter a final judgment in this dispute pursuant to 28 U.S.C. §§ 157(a) and (b)(1). . . . The dispute at bar relates solely to compensation of an attorney (i.e. Baker), a right established by §§ 329 & 330 of the Bankruptcy Code; and thus, it falls within this Court's constitutional authority. Moreover, whether this Court approves payment of Baker's fees affects the amount of distributions that will be made to unsecured creditors, as their claims are subordinate to the administrative claim that Baker will hold if his requested fees are allowed. Accordingly, the dispute at bar falls within the 'public rights' exception articulated in *Stern* because the outcome of this dispute affects the distribution of property among all of the Debtor's creditors.").

First Weber Grp., Inc. v. Horsfall (In re Horsfall), 2011 WL 5865454 (Bankr. W.D. Wis. Nov. 17, 2011) (Martin, J.) ("*Stern v. Marshall* curtailed bankruptcy court jurisdiction, and may move circuit courts in the direction of allowing bankruptcy courts to issue orders only in matters that are clearly core. . . . While the *Stern* decision may have had an impact on the way courts interpret a bankruptcy court's authority to issue sanctions under § 1927[,] [providing that '[a]ny attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct'], the holding does not directly affect the issues in this case. Unlike § 157(b)(2)(C), § 1927 arguably does not 'confer Article III power on a bankruptcy court' because it only references 'courts of the United States,' which, depending on the interpretation, may not include bankruptcy courts. The question is whether bankruptcy courts have erroneously exercised authority to sanction attorneys when § 1927 arguably does not allow them to do so. This issue has not come before the Seventh Circuit Court of Appeals post-*Stern*, and the law in the Seventh Circuit as it currently stands is that bankruptcy courts may impose § 1927 sanctions through its authority under § 105. Therefore, if § 1927 sanctions are warranted, this court may impose them.").

K. ENFORCING ASSET PURCHASE AGREEMENT

CirTran Corp. v. Advanced Beauty Solutions, LLC (In re Advanced Beauty Solutions, LLC), 2012 WL 603692 (B.A.P. 9th Cir. Feb. 8, 2012) (Pappas, J; Hollowell, J.; Perris, J.) (Shortly after filing for Chapter 11 protection, the debtor ("ABS") filed a § 363 sale motion, seeking authority to sell substantially all of its assets—including certain intellectual property—to CirTran Corporation ("CirTran") under an asset purchase agreement ("APA") ultimately approved by the court. "When CirTran defaulted under the APA and, eventually, ABS sued CirTran in the bankruptcy court, CirTran failed to respond to the ABS complaint, and ABS was awarded the Default Judgment for nearly $2 million in money damages against CirTran. No appeal was taken by CirTran from that judgment. However, CirTran later moved to set aside the Default Judgment under Civil Rule 60(b), and when the bankruptcy court rejected that effort, CirTran appealed its order to the district court. But that appeal was dismissed when CirTran failed to prosecute it. ABS then pursued various proceedings against CirTran in the bankruptcy court to enforce and collect the Default Judgment. The bankruptcy court entered several orders supporting ABS's efforts to get paid, culminating in an order directing CirTran to return the copyrights it had purchased under the APA to ABS. After return of the copyrights, and almost two years after entry of the Default Judgment, CirTran filed a motion asking that the bankruptcy court deem the Default Judgment satisfied. When the court denied that motion, CirTran appealed to the Panel. . . . In its Opening Brief in this appeal, filed shortly after the Supreme Court decided *Stern* in June 2011, CirTran argue[d] for the first time that, based upon the Supreme Court's decision, the bankruptcy court lacked subject matter jurisdiction over the adversary proceeding in which the Default Judgment and order were entered, and from which this appeal arose. Ambitiously, CirTran request[ed] that 'the ABS complaint and its default judgment . . . be vacated and the ABS complaint dismissed.' . . . Given the convoluted procedural status of the contest facing the Court in *Stern*, and the strictures expressed by the Court concerning the breadth of its holding, we seriously doubt that CirTran's argument has any traction that the bankruptcy court in this case 'did not have subject matter jurisdiction over ABS's complaint' and that the Panel must 'vacate the entry of the default judgment entered against CirTran. . . .' [CirTran's] *Stern*-type attack on the bankruptcy court's constitutional authority to finally decide this dispute [is] fraught with challenges. The bankruptcy court entered a judgment in an adversary proceeding in which ABS, a chapter 11 debtor, sought to enforce an agreement effectuating a § 363 sale of assets by the bankruptcy estate to CirTran, a major creditor, as part of the ABS's reorganization efforts, and where a significant portion of the consideration for the CirTran purchase consisted of a reduction in its creditor's claim in the bankruptcy case. As compared to the prebankruptcy tort claim examined in *Stern*, and even though ABS sued CirTran for breach of contract, it is not at all clear that the bankruptcy court lacked a constitutional basis under 28 U.S.C. § 157(b)(2) to entertain the action as a core proceeding, and therefore, to enter the Default Judgment. *See* 28 U.S.C. § 157(b)(2)(A), (N) and (O) (providing that core proceedings include, but are not limited to, matters concerning administration of a bankruptcy estate; orders approving sales of estate property; and other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor relationship). . . . But the Panel need not decide whether, even if timely presented, *Stern* would constitute an impediment to enforcement of the bankruptcy court's Default Judgment in this appeal. . . . Given [its] track record, we conclude that CirTran's latest attempt to avoid its obligations under the Default Judgment [is] simply too little, too late. CirTran's argument

on appeal that the bankruptcy court lacked subject matter jurisdiction to enter the Default Judgment amounts to a prohibited collateral attack on that judgment. Even if CirTran's argument had merit, which we doubt, we decline to consider it under these circumstances.").

Harris v. Pyramid Gom, Inc. (In re Capco Energy, Inc.), 2012 WL 253140 (Bankr. S.D. Tex. Jan. 25, 2012) (Isgur, J.) ("The Defendants argue that the Court does not have the constitutional authority to enter final judgment in this adversary proceeding . . . [brought by the liquidating trustee to enforce the defendants' guaranty of asset purchaser's obligations under a purchase and sale agreement executed in connection with Capco's Chapter 11 plan]. The Court agrees. This proceeding does not involve bankruptcy law and is instead concerned with the enforcement of state-law contract rights. Although the Trustee's rights under the purchase and sale agreement and the guaranties were established in connection with a chapter 11 plan, the rights are not established by bankruptcy law and cannot be enforced through the Court's in rem jurisdiction over the bankruptcy estate. . . . The Court holds that it does not have constitutional authority to enter a final judgment in this proceeding. The Court will, following the trial of the remaining claims in this proceeding, submit this memorandum opinion as part of its report and recommendation to the District Court with respect to entry of a final judgment.").

L. DAMAGES FOR VIOLATION OF THE DISCHARGE INJUNCTION

Palazzola v. City of Toledo (In re Palazzola), 2011 WL 3667624 (Bankr. N.D. Ohio Aug. 22, 2011) (Whipple, J.) (The debtors brought an adversary proceeding against the City of Toledo, alleging among other things, violation of constitutional rights under 42 U.S.C. § 1983 and "that the court has jurisdiction over this proceeding under 28 U.S.C. § 157(b)(2)(I), that 'this is a core proceeding,' and that the court has jurisdiction 'over Plaintiffs' federal claims' pursuant to 28 U.S.C. 1331." The bankruptcy court found that *Stern* "makes clear that statutory authority under § 157 alone is insufficient to confer subject matter jurisdiction where the exercise of such jurisdiction would be in contravention of *Article III of the United States Constitution*. Thus, the court must consider whether it has constitutional authority to hear Plaintiffs' § 1983 claim. . . . Plaintiffs' § 1983 claim alleges damages for personal injuries sustained as a result of Defendant's violation of the discharge injunction imposed under 11 U.S.C. § 524. This is, in essence, a personal injury tort claim. . . . As such, it is 'the stuff of the traditional actions at common law tried by the courts at Westminster in 1789.' *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 727 (1999). Moreover, Plaintiffs' § 1983 claim does not fall under the 'public rights' exception such that this court may hear and determine the claim.").

M. DISTRIBUTION OF PROPERTY OF THE ESTATE

Amegy Bank Nat'l Ass'n v. Brazos M & E, Ltd. (In re Bigler LP), 458 B.R. 345 (Bankr. S.D. Tex. 2011) (Bohm, J.) ("[T]his suit [between two suppliers of the debtor and a postpetition lender over the priority of the parties' respective liens on property of the estate that was sold pursuant to the debtor's liquidating Chapter 11 plan free and clear of all liens, with the liens attaching to the proceeds in the same order of priority that they had prior to the sale] concerns a dispute that must be resolved in order to determine the appropriate distribution among the Debtors' creditors. The determination of lien priority on assets that were once property of the bankruptcy estate are part of the 'public rights' exception, as it involves the exercise of the Bankruptcy Court's *in rem* jurisdiction over the estate. . . . Resolution of the lawsuit pending in this Court arises from an express provision of the Plan, the very purpose of which is to distribute cash to the prevailing party or parties—thereby accomplishing the very objective of the public right known as the bankruptcy process (i.e. paying claims of creditors). . . . Therefore, not only does this lawsuit involve a right integral to the bankruptcy scheme—the determination of lien priority—but it also involves a right created by the Bankruptcy Code—distribution of property of the estate to creditors pursuant to the Plan. Accordingly, this dispute falls within the undersigned judge's constitutional authority to enter a final judgment.").

In re Whitley, 2011 WL 5855242 (Bankr. S.D. Tex. Nov. 21, 2011) (Bohm, J.) ("[W]hether this Court approves payment of Baker's fees affects the amount of distributions that will be made to unsecured creditors, as their claims are subordinate to the administrative claim that Baker will hold if his requested fees are allowed. Accordingly, the dispute at bar falls within the 'public rights' exception articulated in *Stern* because the outcome of this dispute affects the distribution of property among all of the Debtor's creditors.").

N. CLAIMS BROUGHT TO AUGMENT THE ESTATE

Dev. Specialists, Inc. v. Peabody Energy Corp. (In re Coudert Bros.), 2011 WL 7678683 (S.D.N.Y. Nov. 23, 2011) (Engelmayer, J.) ("The Plan Administrator's claim is more aptly viewed as a breach of contract claim, or as one sounding in quasi-contract. And that, in fact, is how the Plan Administrator's other three claims against Peabody are pled. Put differently, where, as here, a non-core legal claim has essentially been dressed up as [a] bankruptcy claim, that label does not justify treating the claim as core. The Plan Administrator separately argues that this action must be deemed core under 28 U.S.C. § 157(b)(2)(O) because the proceedings may affect the liquidation of the assets of the estate or the adjustment of the . . . debtor-creditor relationship . . . . But proceedings are not rendered core simply because they may involve property of the estate which one day may be used to satisfy creditors. As the Supreme Court held in *Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 102 S. Ct. 2858, 73 L. Ed. 2d 598 (1982) and reaffirmed this year in *Stern v. Marshall*, —— U.S. ——, 131 S. Ct. 2594, 180 L. Ed. 2d 475 (2011), Congress cannot constitutionally empower a non-Article III Bankruptcy Court to adjudicate, with finality, claims that are not within the core of the bankruptcy authority created in the Constitution. To hold, as the Plan Administrator suggests, that § 157(b)(2)(O) makes any proceeding core when the proceeding has the capacity to affect the ultimate assets of the estate would create an exception to

Marathon that would swallow the rule. . . . Once the Plan Administrator's claim for turnover is properly characterized, it is clear that no cause of action pled in this adversary proceeding depend[s] on the bankruptcy laws for its existence. Where a contract sued upon was formed prior to the bankruptcy petition, it will generally be highly unlikely that a proceeding based on that contract turns on the bankruptcy laws; the Court has been presented with no contrary argument here. Nor is this a proceeding that directly impacts an indisputably core function such as the administration of claims against the estate. . . . Further, each claim asserted by the Plan Administrator could proceed in a court that lacks federal bankruptcy jurisdiction. Each claim is a creature of New York law; absent Coudert's bankruptcy filing, each would have been properly been brought in New York State court. In sum, neither the individual claims asserted nor the proceeding as a whole constitutes a core claim or proceeding capable of final resolution by the Bankruptcy Court under 28 U.S.C. § 157(b)(1).").

Retired Partners of Coudert Bros. Trust v. Baker & McKenzie LLP (In re Coudert Bros. LLP), 2011 WL 5593147 (S.D.N.Y. Sept. 23, 2011) (McMahon, J.) (After the debtor—a law firm—commenced its Chapter 11 case, a trust representing the interests of certain retired partners of the firm ("Trust") commenced a lawsuit in state court against 10 of the debtor's then-current partners and several laws firms that had successfully recruited the debtor's partners, contending that the active partners and the firms had conspired to transfer the debtor's assets to the other law firms in such a way that none of the firms would be liable for the debtor's contractual obligations to the retired partners. The defendants removed the state court actions to the district court, which referred the lawsuit to the bankruptcy court. In the lawsuit, the Trust asserted state law causes of action for breach of the debtor's partnership agreement, tortious interference with the agreement and successor liability. The bankruptcy court dismissed the Trust's claims for relief on several grounds, including that the claims were property of the debtor's estate and that the Trust therefore lacked standing to bring those claims. On appeal by the Trust, the district court held that "*Stern* demonstrates that . . . [w]hat matters for Article III purposes—and so the question that must be asked in any challenge to the Bankruptcy Court's authority to make final adjudications—is whether the claim to be adjudicated involves a 'public' or a 'private' right. If the latter, Congress cannot vest final adjudicative power in the Bankruptcy Court consistent with Article III. . . . Moreover, *Stern* confirmed that, 'even with respect to matters that arguably fall within the scope of the "public rights" doctrine, the presumption is in favor of Art. III courts.' . . . Thus, the Article III issue in this case is whether the Claims involve 'public' or 'private' rights. . . . [T]he Trust is correct that its claims involve only the vindication of private rights. . . . [T]he Trust's Claims . . . involve a right created by state law, a right independent of and antecedent to the reorganization petition that conferred jurisdiction upon the Bankruptcy Court. . . . The Trust sues to undo the [transfer of the debtor's assets] so the retired partners' claims can be satisfied. However labeled, this appears to be a quintessential fraudulent conveyance claim[,] [and a] fraudulent conveyance implicates private rather than public rights . . . The remaining Claim is for tortious interference—the very type of claim found to involve only 'private rights' in *Stern* itself. . . . The Firms argue that I should focus, not on the nature of the rights asserted, but on the legal basis on which the Bankruptcy Court below rested its final order of dismissal. They argue that [the bankruptcy court's] conclusion that the Trust lacks standing—since he determined that the Claims belong to the debtor's estate—renders his decision an integral part of the claims allowance process itself, and/or goes to the Bankruptcy Court's power [over] the debtor's estate property. As a result, the Firms argue, it implicates the 'core' public right

of debt-forgiveness and relationship restructuring. . . . This argument is interesting, but ultimately it is not persuasive. [The bankruptcy court] dismissed with prejudice—finally and as a matter of law—claims that the Trust asserted under state law against another private party. Under *Marathon* and *Stern*, [the Bankruptcy Court] lacked the power to do so; [the bankruptcy court's] rationale for doing so cannot change that dispositive fact. . . . The Supreme Court has never treated the legal basis on which the non-Article III tribunal purported to act as relevant, let alone dispositive, to the constitutional issue." The district court dismissed the appeal and treated the Bankruptcy Court's order as a report and recommendation.).

Krystal Energy Co. v. Navajo Nation (In re Krystal Energy Co.), 2012 WL 32636 (Bankr. D. Ariz. Jan. 6, 2012) (Nielsen, J.) ("This adversary proceeding seeks, *inter alia*, to adjudicate a demand for damages by the Chapter 11 bankruptcy estate of Krystal Energy Co., Inc. against the Navajo Nation, a sovereign Indian tribe. . . . While [the debtor/plaintiff] alleges this court has core bankruptcy jurisdiction to liquidate the damages claim as an estate asset . . . care should be taken to not transgress the limits of bankruptcy court jurisdiction. . . . *Stern v. Marshall*, 131 S. Ct. 2594, 2611–13 (2011) (Bankruptcy Court lacks Constitutional authority to enter a final judgment on estate's state law counterclaim to bankruptcy claim). Accordingly, the court will enter proposed findings and conclusions. § 157(C)(1).").

Heights Melrose Grp., LLC v. ICity Condo, Inc. (In re Heights Melrose Grp., LLC), 2011 U.S. Dist. LEXIS 153073 (Bankr. S.D. Tex. Sept. 29, 2011) (Isgur, J.) ("[The debtor/plaintiff] moves for summary judgment against [the defendants], seek[ing] a declaratory judgment that [the defendants] do not have any right, title, or interest in several condominium units . . . . [The defendants] filed a counterclaim, asserting that the foreclosure sale at which [the debtor] bought the condominium units was invalid. . . . [Under *Stern*,] this Court may not issue final orders or judgments in matters that are within the exclusive authority of Article III courts. . . . The Court may, however, exercise authority over essential bankruptcy matters under the 'public rights' exception. . . . The Bankruptcy Code is a public scheme for restructuring debtor-creditor relations, necessarily including 'the exercise of exclusive jurisdiction over all of the debtor's property, the equitable distribution of that property among the debtor's creditors, and the ultimate discharge that gives the debtor a "fresh start" by releasing him, her, or it from further liability for old debts.' . . . This proceeding involves a dispute over the parties' respective interests in certain condominium units. Heights Melrose, a debtor in Chapter 11, claims the condominium units as property of the estate. The condominium units make up the bulk of the estate's property. This dispute has a major impact on the bankruptcy case. However, this impact is not enough to give the Bankruptcy Court authority to decide the dispute. Instead, the Court must consider the nature of the dispute and the extent to which the law governing the dispute is affected by the public bankruptcy scheme—not merely the extent to which the dispute will impact a particular bankruptcy case. This proceeding is based entirely on state law, not on rights created by the Bankruptcy Code. The determination of whether the foreclosure sale was valid is a traditional property dispute that would typically be resolved by a state court. 'Who owns Blackacre' is a question traditionally resolved by a non-bankruptcy court. The Court therefore considers whether the dispute is so intertwined with essential bankruptcy matters that the filing of the bankruptcy petition transformed the character of the dispute from a typical private rights dispute to a public rights dispute. *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.) . . . . The dispute over the foreclosure sale would not necessarily be resolved through the claims adjudication process or through the resolution of any other essential bankruptcy matter. The state law character of the dispute is not altered; bankruptcy law has no impact on the outcome of this proceeding. This proceeding therefore is not so closely intertwined with the public bankruptcy scheme that it falls within the Bankruptcy Court's authority. The Bankruptcy Court may not enter a final judgment in this proceeding.").

O. ENFORCEMENT OF THE AUTOMATIC STAY

Turner v. First Cmty. Credit Union (In re Turner), 462 B.R. 214 (Bankr. S.D. Tex. 2011) (Bohm, J.) (The Chapter 13 debtors commenced an adversary proceeding against their credit union, alleging that the credit union violated the automatic stay by indefinitely freezing the debtors' account postpetition and withdrawing funds from the account to pay amounts due from the debtors. "[T]his Court concludes that the [public rights] exception articulated by the Supreme Court [in *Stern*] applies. . . . The Bankruptcy Code is a public scheme for restructuring debtor-creditor relations . . . . Given the central role of the automatic stay in the bankruptcy scheme, the broad effect of the automatic stay, and the fiduciary duty imposed upon debtors, this Court concludes that enforcement of the automatic stay fits within the 'public rights' exception.").

P. ENFORCEMENT OF COURT ORDERS

Moore v. Paladini (In re CD Liquidation Co.), 462 B.R. 124 (Bankr. D. Del. 2011) (Gross, J.) ("*Stern* holds that bankruptcy courts do not have authority to enter final judgments on state law counterclaims. The Supreme Court urged a narrow reading of *Stern*. Here, there are no state law counterclaims. More directly and dispositive of any *Stern* implications, the Supreme Court explicitly ruled that a bankruptcy court has authority to enter a final judgment where 'the action at issue stems from the bankruptcy itself.' The Injunction Motion does not raise any substantive or state law issues. It involves the most basic and intrinsic authority of this or any court—the authority to enforce its order. The order the Court is enforcing is the Confirmation Order which the Court clearly had jurisdiction and authority to issue and which enjoins Paladini from proceeding with the Paladini Action.").

ARDI Ltd. P'ship v. Buncher Co. (In re River Entm't Co.), 2012 WL 1098570 (Bankr. W.D. Pa. Mar. 30, 2012) (Deller, J.) ("Applying [a] narrow interpretation, *Stern* is plainly inapposite to the matter before the Court. Despite its origination as a state law claim for conversion, the instant matter hinges entirely on this Court's ability to interpret and enforce the terms of its own Consent Order. The entry of the Consent Order was the intended resolution of several issues in the bankruptcy . . . . It is clear that the Consent Order could and, in fact, did 'arise in' the bankruptcy proceeding. Therefore, this Court finds that because the crux of actual dispute is the interpretation of the Consent Order . . . the narrow holding in *Stern* simply does not apply to this Court's ability to finally adjudicate the matter before it.").

V. SUPPLEMENTAL JURISDICTION

Townsquare Media, Inc. v. Brill, 652 F.3d 767 (7th Cir. 2011) (Posner, J.; Kanne, J.; Rovner, J.) ("We'll merely assume that the bankruptcy court could have exercised supplemental jurisdiction over the state-law claims, at least to the extent of recommending a decision. But we note parenthetically the oddity that the cases that permit bankruptcy judges to exercise supplemental jurisdiction allow them to make and not just recommend the decision resolving the supplemental claim. This is inconsistent with the statutory treatment of 'related to' jurisdiction (and why should supplemental jurisdiction be broader?) and is in tension with the Supreme Court's reluctance to allow bankruptcy judges dispositive authority over state-law claims. *Stern v. Marshall*, —U.S.—, 131 S. Ct. 2594, 2609–13, 2614 (2011) . . . .").

City of Alexandria v. Symbiotic Partners, LLC (In re N.R. Grp., L.L.C.), 2011 WL 7444637 (Bankr. W.D. La. Dec. 2, 2011) (Hunter, J.) ("The [adversary proceeding came] before the bankruptcy court on its sua sponte review of the Complaint for Declaratory Judgment, to Annul a Tax Sale, and to determine the extent and validity of a lien or ownership interest in real property once leased by the debtor pursuant to a lease which was deemed rejected as of July 17, 2009. . . . This court suggests that the validity of the tax sales of the real property once leased by the debtor under 11 U.S.C. § 365 may fall beyond the bankruptcy court's constitutionally permissible 'related to' jurisdiction, particularly after *Stern*. Although the Supreme Court did not expressly address rejection rights, the conclusion that the reasoning therein confirms Constitutional restraints on the Bankruptcy Court's jurisdiction is inescapable with regard to 'related to' jurisdiction under 28 U.S.C. § 1334. While the dissent in *Stern* notes that the Bankruptcy Courts frequently encounter disputes between a landlord and third parties who have some relationship with the debtor and the administration of the bankruptcy estate, over which the United States District Courts have exclusive jurisdiction, such a relationship here is lacking. [As the] . . . Complaint [states][,] '[t]he Debtor is no longer a lessee of the property and the lease has been deemed rejected by final Order of this Court. The Debtor at no time owned the real property. . . . The Trustee has asserted no estate interest in or claim to the real property. The [plaintiff] shows that the property is not property of the estate and the Chapter 7 Trustee exercises no control over the immovable property and further that the lease is no longer executory.' Even if the causes of action can be cast by plaintiff as supplemental claims under 28 U.S.C. § 1367(a), over which the bankruptcy courts could exercise 'related-to' jurisdiction under . . . controlling 5th Circuit precedent[,] . . . [t]his Court cannot justify the exercise of jurisdiction in the above-captioned adversary complaints regarding state law causes of action concerning the validity of tax sales to third parties, of property already determined by the District Court to be owned by the former lessor of the debtor. . . . For the reasons stated in this Report and Recommendation, this Court [recommends] that the District Court withdraw the reference [of the [adversary proceeding].").

McKinstry v. Sergent (In re Black Diamond Mining Co.), 2011 WL 4433624 (Bankr. E.D. Ky. Sept. 21, 2011) (Scott, J.) ("Given the Supreme Court's recent decision in [*Stern*] . . . this Court doubts very seriously that the Supreme Court would find that the bankruptcy courts have supplemental jurisdiction which could include claims entirely unrelated to bankruptcy merely

because those claims relate to the same case or controversy as a cause of action pending before the bankruptcy court.").

VI. PROCEDURAL ISSUES

A. CONSENT AND WAIVER

1. CONSENT AND WAIVER GENERALLY

Technical Automation Servs. Corp. v. Liberty Surplus Ins. Corp., 673 F.3d 399 (5th Cir. 2012) (King, J.; Jolly, J.; Wiener, J.) ("[W]e have raised, *sua sponte*, a jurisdictional question relating to whether, in the light of *Stern v. Marshall*, the magistrate judge had authority under Article III of the Constitution to try and enter judgment in the state law counterclaim in this case. We hold that, notwithstanding *Stern*, the magistrate judge had jurisdictional authority. . . . Th[e] holding [of] [*Stern*] can be translated to the many similarities of the statutory powers of federal magistrate judges. Whereas Article III judges 'hold their offices during good behavior, without diminution of salary,' bankruptcy judges and federal magistrate judges are Article I judges who lack tenure and salary protection. . . . Moreover, the text of [2]8 U.S.C. § 157(b) (the statute addressed in *Stern*) and the text of the Magistrates Act, 28 U.S.C. § 636(c), allow Article I judges to enter final judgments, allow for judges' final judgment to be binding without further action from an Article III judge, entitle the decisions to deference on appeal, and permit the courts to exercise 'substantive jurisdiction reaching any area of the *corpus juris*.'. . . Although the similarities between bankruptcy judges and magistrate judges suggest that the Court's analysis in *Stern* could be extended to this case, the plain fact is that our precedent [holding that magistrate judges have the constitutional authority to enter final judgments with the consent of the parties] is there, and the authority upon which it was based has not been overruled. Moreover, we are unwilling to say that *Stern* does that job *sub silentio*, especially when the Supreme Court repeatedly emphasized that *Stern* had very limited application. . . . Article III jurisprudence is complex, requiring the court to do an examination of every delegation of judicial authority. . . . Notwithstanding that this constitutional question may be seen in a different light post *Stern*, we will follow our precedent and continue to hold, until such time as the Supreme Court or our court *en banc* overrules our precedent, that federal magistrate judges have the constitutional authority to enter final judgments on state-law counterclaims.").

Ortiz v. Aurora Health Care, Inc. (In re Ortiz), 665 F.3d 906 (7th Cir. 2011) (Tinder, J.; Williams, J.; Gottschall, J.) (Although the Seventh Circuit concluded that the record did not establish that the debtor had consented to a final adjudication of its claims by the bankruptcy court, it suggested in *dicta* that litigants can consent to a final adjudication by an Article I tribunal: "We did not ask for briefing on [defendant's] argument that the debtors consented to the bankruptcy judge's authority by opposing [defendant's] motions for the district court to withdraw its reference. Under 28 U.S.C. § 157(c)(2), a district court may, 'with the consent of all the parties . . . 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' 28 U.S.C. § 158. [Defendant] compares the debtors' opposition to its motions to withdraw to cases where a party's course of conduct may result in

consent to a claim's resolution by a non-Article III judge. . . .Yet given the debtor's motions for abstention and remand, we cannot find an implied consent to the bankruptcy judge's authority to resolve their claims. And even if we could find an implied consent on the debtors' part, we could not find that all parties consented because [the defendant] opposed the bankruptcy judge hearing the matter in its motions to withdraw. So this case does not present any question about a bankruptcy judge's authority to enter a final judgment when the parties have consented.").

CirTran Corp. v. Advanced Beauty Solutions, LLC (In re Advanced Beauty Solutions, LLC), 2012 WL 603692 (B.A.P. 9th Cir. Feb. 8, 2012) (Pappas, J; Hollowell, J.; Perris, J.) (Shortly after filing for Chapter 11 protection, the debtor ("ABS") filed a § 363 sale motion, seeking authority to sell substantially all of its assets—including certain intellectual property—to CirTran Corporation ("CirTran") under an asset purchase agreement ("APA") ultimately approved by the court. "When CirTran defaulted under the APA and, eventually, ABS sued CirTran in the bankruptcy court, CirTran failed to respond to the ABS complaint, and ABS was awarded the Default Judgment for nearly $2 million in money damages against CirTran. No appeal was taken by CirTran from that judgment. However, CirTran later moved to set aside the Default Judgment under Civil Rule 60(b), and when the bankruptcy court rejected that effort, CirTran appealed its order to the district court. But that appeal was dismissed when CirTran failed to prosecute it. ABS then pursued various proceedings against CirTran in the bankruptcy court to enforce and collect the Default Judgment. The bankruptcy court entered several orders supporting ABS's efforts to get paid, culminating in an order directing CirTran to return the copyrights it had purchased under the APA to ABS. After return of the copyrights, and almost two years after entry of the Default Judgment, CirTran filed a motion asking that the bankruptcy court deem the Default Judgment satisfied. When the court denied that motion, CirTran appealed to the Panel. . . . In its Opening Brief in this appeal, filed shortly after the Supreme Court decided *Stern* in June 2011, CirTran argues for the first time that, based upon the Supreme Court's decision, the bankruptcy court lacked subject matter jurisdiction over the adversary proceeding in which the Default Judgment and order were entered, and from which this appeal arose. Ambitiously, CirTran requests that 'the ABS complaint and its default judgment must thus be vacated and the ABS complaint dismissed.' . . . As the Supreme Court noted [in *Stern*], if CirTran really questioned the authority of the bankruptcy court to enter a final judgment under 28 U.S.C. § 157(b), '[it] should have said so—and said so promptly.' . . . *Stern*, 131 S. Ct. at 2608. Put another way, even if the holding in *Stern* is somehow applicable to this action, CirTran's challenge to the bankruptcy court's authority in this case is hardly 'prompt.' . . . [T]he Panel need not decide whether, even if timely presented, *Stern* would constitute an impediment to enforcement of the bankruptcy court's Default Judgment in this appeal. We therefore decline to address CirTran's constitutional challenge. . . . [E]ven if we were inclined to credit CirTran's argument that the bankruptcy court somehow lacked the constitutional power or jurisdiction to enter the Default Judgment, clearly, CirTran long ago lost its right to challenge the bankruptcy court's rulings. While CirTran contends otherwise, a party does not have a timeless right to challenge the subject matter jurisdiction of the trial court that enters a final judgment against that party. Indeed, the Supreme Court has held that, subject to narrow exceptions not applicable here, a bankruptcy court's final orders are not subject to a subsequent collateral attack based upon a challenge to its subject matter jurisdiction. . . . Given [its] track record, we conclude that CirTran's latest attempt to avoid its obligations under the Default Judgment [is] simply too little, too late. CirTran's argument on appeal that the bankruptcy court lacked subject matter jurisdiction to enter the Default Judgment amounts

to a prohibited collateral attack on that judgment. Even if CirTran's argument had merit, which we doubt, we decline to consider it under these circumstances.").

Dev. Specialists, Inc., v. Akin Gump Strauss Hauer & Feld LLP, 462 B.R. 457 (S.D.N.Y. 2011) (McMahon, J.); ***Retired Partners of Coudert Bros. Trust v. Baker & McKenzie LLP (In re Coudert Bros. LLP)***, 2011 WL 5593147 (S.D.N.Y. Sept. 23, 2011) (McMahon, J.) ("*Stern* confirmed that consent can be a sufficient basis for Article I final adjudication: 'Section 157 allocates the authority to enter final judgment between the Bankruptcy Court and the district court. *See* §§ 157(b)(1), (c)(1). That allocation does not implicate questions of subject matter jurisdiction. *See* § 157(c)(2) (parties may consent to entry of final judgment by Bankruptcy Judge in non-core case).' *Stern*, 131 S. Ct. at 2608.").

Mercury Cos. v. FNF Sec. Acquisition, Inc., 460 B.R. 778 (D. Colo. 2011) (Martinez, J.) ("[After *Stern*,] [t]here is some question in this case as to whether the Bankruptcy Court would have had the authority, absent the parties' consent, to enter orders and judgment in the Adversary Proceeding. . . . However, the Court need not resolve that question because both parties consented to the Bankruptcy Court's authority to enter orders and judgment in the Adversary Proceeding.").

Sharifeh v. Fox, 2012 WL 469980 (N.D. Ill. Feb. 10, 2012) (Leinenweber, J.) ("This case concerns four appeals stemming from a bankruptcy filing by Richard Sharif ("Sharif") and an adversary proceeding filed by [one of] his creditor[s], 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. . . . [She commenced] . . . an adversary proceeding . . . alleg[ing] that the Bankruptcy Trustee . . . had wrongfully converted the assets of [a trust] Trust and sought a declaration that she was the beneficiary of the trust. The Bankruptcy Court subsequently dismissed this Complaint on numerous grounds . . . . Sharifeh is appealing the ruling dismissing her adversary complaint . . . . 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* . . . the Bankruptcy Court did not have jurisdiction to enter final judgments either in Wellness' adversary proceeding . . . or her own . . . . 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. . . . *Stern* itself contains language indicating that objections based on a bankruptcy court's authority to enter a final judgment are waivable. . . . If Sharifeh believed that the Bankruptcy Court lacked authority to decide her claims, she should have raised the issue well prior to now. . . . It is far too late now, and smacks of a delay tactic in litigation that dragged on for too long. . . . Sharifeh further contends in her reply that her jurisdictional waiver was not truly voluntary; that she tried to have the matter adjudicated in [state court]. Sharifeh abandoned that effort after the bankruptcy judge . . . 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. 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. . . . The Court finds that waiver, not fear, was behind Sharifeh's failure to raise this issue before now.").

Weisfelner v. Blavatnik (In re Lyondell Chem. Co.), 2012 WL 1038749 (S.D.N.Y. Mar. 29, 2012) (Cote, J.) ("The Trustee contends that the defendants consented to final adjudication by a bankruptcy court implicitly through, among other things, participating in proceedings before the bankruptcy court without objection since July 2010. The Trustee also notes that the bankruptcy court's final, non-appealable order confirming the Plan contains language specifically authorizing the bankruptcy court to 'hear and determine' the claims in these proceedings. He contends that this language forecloses the defendants from contesting the bankruptcy court's authority to hear and determine these claims. . . . Under Fed. R. Bankr. P. 7012(b), which requires 'express consent of the parties' for a bankruptcy court to enter final orders and judgments in non-core matters, mere implied consent appears to be insufficient. Fed R. Bankr. P. 7012(b). Regardless, a court should not lightly infer from a litigant's conduct consent to have private state-created rights adjudicated by a non-Article III bankruptcy judge. . . . There is no implied consent where, as here, defendants seek withdrawal at the close of discovery before any trial activities or judgment, and where new precedent renders unclear the authority of the bankruptcy to enter final judgment on certain claims. The Trustee cites to no authority indicating otherwise. . . . The Trustee's argument that the order confirming the Plan contains language authorizing the bankruptcy court to 'hear and determine' these claims is similarly unavailing. This order confirmed the bankruptcy court's subject matter jurisdiction; it did not address the bankruptcy court's authority to enter final judgments under Article I. Jurisdiction retention language from a Plan, by itself, does not confer upon a bankruptcy court authority to enter final orders.").

Midway Venture, LLC v. Gladstone (In re Pacers, Inc.), 2012 WL 947956 (S.D. Cal. Mar. 20, 2012) (Lorenz, J.) (After filing second amended complaint asserting claims against Chapter 11 trustee and others for alleged misrepresentation and implied equitable indemnity arising from asset sale, the plaintiff moved to withdraw the reference of the adversary proceeding it had commenced in bankruptcy court. The Chapter 11 trustee opposed the withdrawal motion, arguing that the plaintiff had "conceded that [the action] was a core proceeding in its initial complaint for damages and again in its [first amended complaint]." Rejecting this argument and granting the plaintiff's motion to withdraw the reference, the district court stated: "Plaintiff's prior concessions have no bearing on this Court's determination. Plaintiff's causes of action relate to a sales transaction that merely involved bankruptcy proceedings, and thus 'is not a core proceeding but . . . is otherwise related to a case under title 11.' *See* 28 U.S.C. § 157(c)(1). In addition, Plaintiff's alleged misrepresentation is an action at 'common law[,] . . . the very type of claim that . . . must be decided by an Article III court.' *Stern*, 131 S. Ct. at 2616. Therefore, the Court concludes that Plaintiff's adversary proceeding is a non-core proceeding.").

Neilson v. Entm't One, Ltd. (In re Death Row Records, Inc.), 2012 WL 1033350 (C.D. Cal. Mar. 8, 2012) (Walter, J.) ("Although the Supreme Court held that Congress may not vest in a non-Article III court the power to adjudicate, render final judgments, and issue binding orders on certain state law claims, the Supreme Court did not hold that the parties cannot themselves consent to give a

non-Article III judge that power. It has long been established that there is no absolute individual right to have a claim adjudicated by an Article III court, and as such, the right is subject to waiver. . . . The Supreme Court's decision in *Stern* itself implicitly confirmed that the parties can consent to a bankruptcy judge exercising Article III power without violating the Constitution.").

TV Tokyo Corp. v. 4Kids Entm't, Inc. (In re 4Kids Entm't, Inc.), 463 B.R. 610 (Bankr. S.D.N.Y. 2011) (Chapman, J.) (Chapter 11 debtor-licensee, which had held all television broadcast, video, merchandising, and other rights to Japanese anime outside Japan under licensing agreement with members of a Japanese consortium, asserted counterclaims in adversary proceeding seeking a determination that the licensing agreement was not validly terminated prepetition and thus constituted an executory contract that remained property of the debtor's estate. The court found that "there is no question as to the core nature of this proceeding," adding that "by virtue of the Schedule June 2 [Agreed Order Setting Trial], [licensors] consented to this Court's adjudication of this Adversary Proceeding. Accordingly, it is the Court's view that it has authority to enter a final judgment in this Adversary Proceeding and any limitations on its authority arguably imposed by *Stern v. Marshall* . . . are inapplicable.").

Reed v. Linehan (In re Soporex, Inc.), 463 B.R. 344 (Bankr. N.D. Tex. 2011) (Houser, J.) ("Whether consent works after *Stern* remains an open issue.").

Paloian v. LaSalle Bank Nat'l Ass'n (In re Doctors Hosp. of Hyde Park, Inc.), 463 B.R. 93 (Bankr. N.D. Ill. 2011) (Schmetterer, J.) ("[The] issue following remand is the [court's] holding following trial . . . that [certain] rental payments were not fraudulent transfers [under §§ 544 (and the Illinois UFTA) and 548]. The remand order sought further consideration of two issues: First, whether there was a true sale of accounts receivable from the [Debtor] Hospital, and that issue further involves the question whether [alleged bankruptcy remote entity] was in fact an actual business entity and not a part, department, or function of the Debtor." Upon remand, the plaintiff Chapter 11 trustee moved for summary judgment on these issues, and the court then entered an "order call[ing] on the parties to [state] . . . whether they will consent to entry of final judgment [on the fraudulent transfer claims] under 28 U.S.C. § 157(c)(2)." . . . The court stated: "In this case, the parties are apprehensive, in the absence of authority interpreting *Stern*, that a bankruptcy judge may lack authority to enter final judgment on proceedings to recover fraudulent conveyances. The *Stern* decision has arguably called into question the authority of a bankruptcy judge to enter final judgment on actions to recover a fraudulent conveyance and in other actions based on non-bankruptcy law. If that be so, then the proceeding here would constitute a 'related matter,' in which the parties could consent to entry of judgment by a Article I judge under 28 U.S.C. 157(c)(2). *Stern* did not either impliedly or expressly end a litigant's right to consent to entry of final judgment by an Article I judge. 28 U.S.C. § 157(c)(2). . . . However, the parties here did not both consent to entry of final judgment by a bankruptcy judge. Therefore, after the remanded trial, proposed Findings of Fact and Conclusions of Law must be prepared here and submitted to a District Court Judge for review and possible entry of judgment.").

Adams Nat'l Bank v. GB Herndon & Assocs., Inc. (In re GB Herndon & Assocs., Inc.), 459 B.R. 148 (Bankr. D.D.C. 2011) (Teel, J.) ("[T]he Court's lengthy discussion in part III(A) of its *Stern* decision of structural principles underlying Article III raises a concern that the Court might think

that even bankruptcy judge adjudications with the consent of the parties would run afoul of Article III. In contrast to the personal right to an Article III adjudication, when the structural separation of powers principles embodied in Article III would be offended by adjudication of a dispute by a non-Article III tribunal, the limitations those principles embody cannot be waived by the parties. [*Commodity Futures Trading Comm'n v.*] *Schor*, [478 U.S. 833,] 850–51 [(1986)]. '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, 106 S. Ct. 3245. Namely, in addition to the individual right to a fair and impartial tribunal, Article III, § 1, 'safeguards the role of the Judicial Branch in our tripartite system by barring congressional attempts to transfer jurisdiction [to non-Article III tribunals] *for the purpose of emasculating constitutional courts*.' *Id*. at 850 (citations and internal quotations omitted) (alterations in original) (emphasis added). . . . The Court's failure in *Stern* to address this non-waivable character of the structural protections of Article III suggests, however, that it was not thinking that bankruptcy judges' adjudications, made with the consent of the parties, would run afoul of Article III under the structure of the current bankruptcy system. . . . The Court has upheld Article III courts' discretionary referrals, pursuant to the consent of the parties, of civil matters for adjudication by non-Article III entities. *Heckers v. Fowler*, 69 U.S. (2 Wall.) 123, 17 L. Ed. 759 (1865). Indeed, that practice has a historical pedigree such that it would pass constitutional muster under Justice Scalia's view in his concurring opinion in *Stern*, 131 S. Ct. at 2621, that 'an Article III judge is required in all federal adjudications, unless there is a firmly established historical practice to the contrary.' *See Heckers v. Fowler*, 69 U.S. at 131 ("Practice of referring pending actions under a rule of court, by consent of parties, was well known at common law.") . . . . The Court has upheld exercise of the Article III judicial power by a magistrate judge, a non-Article III judge, with the consent of the parties. *See Peretz v. United States*, 501 U.S. 923, 936 (1991) ("Even assuming that a litigant may not waive structural protections provided by Article III, *see Schor*, 478 U.S. at 850–851, we are convinced that no such structural protections are implicated by the procedure followed in this case" (addressing referral of jury voir dire to magistrate judge in a criminal case)). Magistrate judges operate under a statutory scheme which allows them to decide referred civil actions by consent, a statutory scheme that is roughly similar to the current bankruptcy system allowing bankruptcy judges to decide referred proceedings by consent of the parties. Courts of appeal, including the court of appeals for this circuit, that have addressed the issue have uniformly held that Article III is not violated when a magistrate judge, operating pursuant to the consent of the parties and referral from the district court, enters a final judgment in a civil action. . . . Similarly, under the current bankruptcy system, a bankruptcy judge's hearing and determining a matter by the consent of the parties does not offend Article III. Under the current bankruptcy system, bankruptcy judges are appointed (and re-appointed) by the court of appeals under 28 U.S.C. § 152(a)(1) for a fourteen-year term and may be removed from office only by the circuit judicial council 'for incompetence, misconduct, neglect of duty, or physical or mental disability' under 28 U.S.C. § 152(e). Moreover, the district court decides whether to provide that bankruptcy cases and proceedings shall be referred to the bankruptcy judges for the district, 28 U.S.C. § 157(a), and any proceeding referred to the bankruptcy judges may be withdrawn by the district court. 28 U.S.C. § 157(d). When a proceeding is decided by a bankruptcy judge pursuant to the consent of the parties, the ruling still remains subject to review on appeal by an Article III tribunal. 28 U.S.C. § 158. The statutory scheme is not one designed to emasculate the Article III judiciary, and thus does not raise an Article III structural concern. . . . [T]he Court in *Stern* gave broad hints that the structural interest would not prohibit adjudication of

such a counterclaim when there is consent. . . . First, . . . it quoted and embraced the . . . [language] from *Thomas* [*v. Union Carbide Agric. Prods Co.*, 473 U.S. 568, 584 (1985)] without qualification, a passage in which the Court had emphasized that the *Northern Pipeline* holding only addressed bankruptcy court adjudication of a bankruptcy trustee's contract action when there has *not* been consent. . . . In this regard, the Court in *Stern* thought that its decision 'does not change all that much.' . . . A ruling that § 157(c)(2), permitting the bankruptcy judge, with the consent of the parties, to decide non-core proceedings, is unconstitutional, however, would be a huge change. . . . Second, it cited 28 U.S.C. § 157(c)(2) (allowing the bankruptcy court, with the parties' consent, to enter final judgments in non-core proceedings that would otherwise require proposed findings of fact and conclusions of law subject to de novo review by the district court) without suggesting it was constitutionally infirm. . . . Third, it noted that after *Northern Pipeline*, Congress provided in a 1984 act that bankruptcy judges were to be appointed by the courts of appeals for the circuits in which their districts are located. . . . In addition, it noted that 'the current bankruptcy system . . . permits the district court to withdraw from the bankruptcy court any referred case, proceeding, or part thereof, § 157(d).' These are both features of the current bankruptcy system that Congress enacted in 1984 in response to *Northern Pipeline* and in an attempt to assure that the bankruptcy system would pass constitutional muster. These provisions go to the structural interest that Article III protects, not the individual interest it protects. Fourth, the Court contrasted Pierce, who had not truly consented to have the counterclaim against him decided by the bankruptcy court, to the objecting party in *Schor*. In *Schor*, the Court explained that: '[O]ur prior discussions of Article III, § I's guarantee of an independent and impartial adjudication by the federal judiciary of matters within the judicial power of the United States intimated that this guarantee serves to protect primarily personal, rather than structural interests. . . . [A]s a personal right, Article III's guarantee of an impartial and independent federal adjudication is subject to waiver, just as are other personal constitutional rights that dictate the procedures by which civil and criminal matters must be tried. . . . Indeed, the relevance of concepts of waiver to Article III challenges is demonstrated by our decision in *Northern Pipeline*, in which the absence of consent to an initial adjudication before a non-Article III tribunal was relied on as a significant factor in determining that Article III forbade such adjudication.' . . . Fifth, as noted [in Ralph Brubaker, *Article III's Bleak House (Part II)*: *The Statutory Limits of Bankruptcy Judges' Core Jurisdiction*, 31 Bankr. L. Letter No. 9, at 4–7 (Sept. 2011)], *Stern* adopted an analytical framework under which the Court's decisions regarding the permissible extent to which referees under the Bankruptcy Act of 1898 could treat matters as summary proceedings in which they could issue final judgments control when bankruptcy judges under the current bankruptcy system may enter similar judgments without running afoul of Article III. Congress had often left it to the Court under the 1898 Act to decide what proceedings fell within the category of a summary proceeding. . . . Of pertinence to the issues of the effect of consent, the Court held in *MacDonald* [*v. Plymouth County Trust Co.*, 286 U.S. 263, 52 S. Ct. 505, 76 L. Ed. 1093 (1932)] that '[t]he referee may, if the parties consent, try the issues which must otherwise be tried in a plenary suit brought by the trustee,' and in such a suit, '[w]e can perceive no reason why the privilege of claiming the benefits of the procedure in a plenary suit . . . may not be waived by consent, as any other procedural privilege of the suitor may be waived, and a more summary procedure substituted.' . . . As noted by Brubaker, at 24, although *MacDonald* was a decision interpreting a statute, and did not address Article III, it is doubtful that the Court would have adopted the statutory construction it adopted if there were an Article III structural problem with referees deciding with consent of the litigants a matter that would otherwise be tried by an Article III court

as a plenary matter. . . . For all of these reasons, I conclude that even after *Stern v. Marshall*, the bankruptcy court may adjudicate a proceeding, without running afoul of Article III, when there has been consent by the parties.").

In re Olde Prairie Block Owner, LLC, 457 B.R. 692 (Bankr. N.D. Ill. 2011) (Schmetterer, J.) ("A Bankruptcy Judge may enter final judgment in a non-core proceeding that is otherwise related to a bankruptcy case if the parties consent. . . . Counterclaims like that in *Stern* must under the Constitution be treated as non-core proceedings, . . . so they are subject to that consent procedure. Thus, parties may consent to final adjudication by a Bankruptcy Judge of counterclaims not necessarily resolved by a ruling on a creditor's claim, even though that Judge would not otherwise have that authority. . . . Consent given for final ruling on non-core matters has widespread use and importance in bankruptcy cases in this District, to such an extent that relatively few non-core proceedings go to District Judges for entry of final judgments. The statutory right of parties to agree to final adjudication of non-core proceedings by Bankruptcy Judges is therefore a significant part of the efficiency of the bankruptcy process under which the role of the District Judge is usually that of adjudging appeals from the consented final judgments. . . . The Supreme Court's opinion in *Stern* in no way altered the system of final adjudication by consent embodied in § 157(c)(2). It is true, as Debtor argues, that parties cannot confer subject matter jurisdiction on a court by consent. . . . But although bankruptcy practitioners and judges often use the shorthand terms 'core jurisdiction' and 'related jurisdiction' when discussing § 157, that provision is not jurisdictional. . . . The issue at hand, therefore, is not whether the parties here could consent to a Bankruptcy Judge's jurisdiction, but whether they could consent to a Bankruptcy Judge's power to enter final judgment. . . . This issue has importance outside the bankruptcy system. If *Stern* had destroyed the power of Bankruptcy Judges to enter final judgments by consent in non-core but otherwise related proceedings, that would have called into question the power of Magistrate Judges and other Article I judicial officers to make final adjudication by consent and thereby required a vast increased burden on the District Judges. To the contrary, it is well established that litigants may waive their personal right to have an Article III judge preside over a civil trial.").

Pro-Pac, Inc. v. Chapes (In re Pro-Pac, Inc.), 456 B.R. 894 (Bankr. E.D. Wis. 2011) (Kelley, J.) (Corporate Chapter 11 debtor brought adversary proceeding against two defendants—its former employee and a competitor of the debtor in the warehousing business. The debtor's complaint, which was filed several months before its liquidating plan was confirmed, alleged that former employee and officer of the debtor, aided and abetted by competitor, had breached his duty of loyalty to debtor by diverting accounts to the competitor. Following a two-day trial, which was completed less than a month before *Stern* was decided, the bankruptcy court entered final judgment in favor of the debtor. The court found that the parties had consented to entry of final judgment on the debtor's state-law claims for breach of fiduciary duty and aiding and abetting a breach of fiduciary duty: "The Supreme Court's recent decision in *Stern v. Marshall* . . . limited the authority of the bankruptcy court to enter final judgments on certain state law counterclaims even though counterclaims to proofs of claim are denominated as core proceedings in 28 U.S.C. § 157(b)(2)(C). However, *Stern* confirms that the bankruptcy court has the authority to render final judgments even in non-core proceedings with the consent of the parties. The Supreme Court stated: 'Section 157 allocates the authority to enter final judgment between the bankruptcy court and the district court. *See* § 157(b)(1), (c)(1). That allocation does not implicate questions of subject matter jurisdiction.

See § 157(c)(2) (parties may consent to entry of final judgment by bankruptcy judge in non-core case).' *Id*. at 2607. Since [defendants] clearly consented to this Court's entry of a final judgment on [debtor's] Complaint, even if this action is a non-core proceeding, this Court has both the subject matter jurisdiction and authority to proceed.").

In re Safety Harbor Resort & Spa, LLC, 456 B.R. 703 (Bankr. M.D. Fla. 2011) (Williamson, J.) ("[P]arties can still consent—either expressly or impliedly—to a bankruptcy court's [adjudication of a 'constitutionally non-core' proceeding] after *Stern*.").

Meoli v. Huntington Nat'l Bank (In re Teleservices Grp., Inc.), 456 B.R. 318 (Bankr. W.D. Mich. 2011) (Hughes, J.) (The court concluded that it "could still enter a final judgment against [the defendant bank on the Chapter 7 trustee's avoidance claims]" in the event that "[the bank] and Trustee both . . . consent," reasoning: "As the Court in *Stern* emphasized early in its opinion, the delegation of authority by the district courts to the bankruptcy courts as their adjuncts is not jurisdictional. *Stern*, 131 S. Ct. at 2606–7. Indeed, the Court concluded that the stepson's consent in *Stern* to having his own claim decided by the bankruptcy court would have precluded him from objecting to that court's authority under 28 U.S.C. § 157(b)(2)(C) to also adjudicate the estate's counterclaim against him had not the constitutional issue been raised. And common sense also suggests that if the parties before a district court may consent to binding arbitration as a form of alternative dispute resolution, then they certainly should be able to choose the bankruptcy judge as their arbiter if that is the alternative they prefer.").

In re BearingPoint, Inc., 453 B.R. 486 (Bankr. S.D.N.Y. 2011) (Gerber, J.) ("[I]n *Stern v. Marshall*, the majority, while repeatedly stating that Pierce had consented to the bankruptcy court's determination, nevertheless found his consent, under the facts there, inadequate. As I assume that the majority would not have reached out to decide constitutional issues it did not need to decide (such as what it would do if there were a freely given and unequivocal consent), the better view, I think, is that the *Stern v. Marshall* conclusion rested on the basis that the consent there was only implied or under duress. But it may now be, and it's fair to assume that it will now be argued, that consent, no matter how uncoerced and unequivocal, will never again be sufficient for bankruptcy judges ever to issue final judgments on non-core matters. That huge uncertainty presages litigation over that issue with the potential to tie up this case, and countless others, in knots.").

ARDI Ltd. P'ship v. Buncher Co. (In re River Entm't Co.), 2012 WL 1098570 (Bankr. W.D. Pa. Mar. 30, 2012) (Deller, J.) ("Even if the holding in *Stern* did apply to the instant matter, this Court finds that both parties have consented to entry of final judgment by the bankruptcy court. This Court further concludes that such consent is sufficient to allow this Court to hear and finally determine the instant matter, regardless of whether it is statutorily defined as 'core' or 'non-core.' To determine whether, and to what extent, consent to bankruptcy court adjudication remains viable following the *Stern* decision, courts must answer three questions: A) are parties capable of waiving their right to adjudication of an Article III case or controversy by an Article III tribunal? B) is the matter of a type that may be adjudicated based on consent? and C) can consent can be implied from the acts or inaction of the parties in question? In determining whether parties are capable of consenting to final adjudication of a case or controversy by a non-Article III tribunal, courts must consider both the personal and structural protections of Article III. . . . The Supreme Court has consistently upheld a

litigant's ability to waive its 'personal' right to have its matter heard by an Article III judge. However, the Supreme Court has simultaneously concluded that the separation of powers principles implicated in the 'structural' protections of Article III, are beyond the ability of individual parties to waive. . . . Despite this conclusion, the Supreme Court has repeatedly upheld final adjudication by non-Article III tribunals when it has concluded that the structural protections of Article III are not implicated. . . . Whether the structural protections of Article [III] are 'implicated' depends primarily on the degree of control exercised by Article III judges over . . . the non-Article III tribunal in question. This Court finds that based on the degree of control exercised by Article III judges over bankruptcy courts, the structural protections of Article III are not implicated in the bankruptcy statutory scheme and, therefore, parties may effectively consent to final adjudication of matters by non-Article III bankruptcy courts. . . . Similar to the Magistrates Act, the current statutory scheme in bankruptcy provides Article III judges with substantial 'control' over the bankruptcy courts. For example, bankruptcy judges are appointed and subject to removal by Article III judges. *See* 28 U.S.C. § 152(a), (e). Article III judges also have the ability to withdraw the reference of cases to the bankruptcy courts upon a motion of any party-in-interest, or sua sponte for 'cause shown.' *See* 28 U.S.C. § 157(d). Certainly 'cause shown' would include the fact that the civil litigation at issue is an Article III case or controversy. Perhaps most importantly, motions to withdraw the reference must be heard by Article III district court judges, ensuring all parties access to an Article III forum. *See* Fed R. Bankr.P. 5011(a). Consequently it is an Article III judge that has plenary authority over the matter if he or she chooses to exercise such authority. . . . As the structural protections of Article III appear not to be implicated or eroded in the bankruptcy scheme when the parties consent, this Court can easily conclude that a party's waiver of the personal protections of Article III is sufficient to allow bankruptcy courts to finally adjudicate Article III cases and controversies. To find otherwise would be to completely ignore recent Supreme Court precedent in cases upholding the constitutionality of the Magistrate's Act. . . . Such a finding would also ignore the portion of the *Stern* opinion wherein the Supreme Court reaffirmed the viability of the consent provisions with regard to non-core matters under 28 U.S.C. § 157(c)(2). . . . With regard to the second question, this Court finds that consent will apply to permit final adjudication by non-Article III bankruptcy courts of non-core and core matters alike. There is no dispute that bankruptcy courts may finally adjudicate non-core matters upon the consent of all parties to the proceeding. This ability is codified at 28 U.S.C. § 157(c)(2), and was recognized by the Supreme Court in *Stern*. *See Stern*, 131 S. Ct. 2607–08. Following a need created by *Stern*, it also appears that an extension of the consent provision contained in 28 U.S.C. § 157(c)(2) to core matters is both logical and appropriate. Prior to *Stern* bankruptcy courts maintained the ability to finally adjudicate all core matters regardless of consent. Therefore, because there was no reason for a 'consent' provision to exist, the lack of such a provision is without consequence. Additionally, all of the structural protections present in the bankruptcy jurisdictional scheme with regard to non-core matters are present with regard to core matters as well. For example, Article III judges maintain the same control over bankruptcy judges regardless of whether the bankruptcy judge is hearing a core or non-core matter, and parties retain the right to seek withdrawal of the reference regardless of whether the opposing party has defined the matter as core or non-core in its pleadings. *See* 28 U.S.C. §§ 152(a)–(c), 157(a). In addition, it seems only logical that a statutory scheme which provides bankruptcy courts with the ability to finally adjudicate matters 'related to' a bankruptcy case via consent should apply to matters that purportedly 'arise in' or 'arise under' the same. As a result, this Court concludes that consent applies to provide bankruptcy courts with the ability to

finally adjudicate both statutorily defined core and non-core matters brought before them. Finally, this Court finds that consent can be implied from the action (or inaction) of the parties to a proceeding. *Stern* clearly stands for the proposition that consent can be implied through the statements of a party and by a party's delay in contesting the ability of a non-Article III tribunal to adjudicate the action. *See Stern*, 131 S. Ct. 2607–08. Indeed, the Supreme Court determined that through his actions, statements acquiescing to adjudication by the bankruptcy court, and failure to object to bankruptcy court adjudication, the claimant in *Stern* had implicitly consented to the bankruptcy court hearing and determining his non-core defamation claim, and waived any arguments to the contrary.").

Shaia v. Taylor (In re Connelly), 2012 WL 1098431 (Bankr. E.D. Va. Mar. 30, 2012) (Huennekens, J.) ("The Court also has the authority to enter a final decision in this Adversary Proceeding because the Defendants have consented to the Court's authority to do so. The Supreme Court has long recognized that parties can consent to be bound by a decision of a court that may otherwise lack constitutional authority to enter a final judgment. *See, e.g.*, *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848–49 (1986) ("[A]s a personal right, Article III's guarantee of an impartial and independent federal adjudication is subject to waiver, just as are other personal constitutional rights that dictate the procedures by which civil and criminal matters must be tried."). This ability of parties to consent to adjudication by a non-Article III tribunal was explicitly recognized in *Stern*. . . . In this case, the Defendants filed proofs of claim seeking $10,000 in damages resulting from the Debtor's failure to pay the BOV Loan and asserting a right of setoff against any sums owed to the estate under the terms of the Taylor Note. Much like Pierce [in *Stern*], the Defendants have consented to the resolution of these claims by this Court, including any state law issues that must be resolved in the process of adjudicating the Defendants' claims. . . . As a resolution of the dispute concerning the Defendants' liability on the Taylor Note is necessary to adjudicate the Defendants' proofs of claim, the Defendants impliedly consented to the resolution of the Adversary Proceeding by filing their claims. Accordingly, the Court may properly hear and determine the Adversary Proceeding under 28 U.S.C. § 157(b)(1).").

Burns v. Dennis (In re Se. Materials, Inc.), 2012 WL 1034322 (Bankr. M.D.N.C. Mar. 27, 2012) (Waldrep, J.) ("*Stern* might result in more work for litigants, who may elect to file written objections to the proposed findings and conclusions of the bankruptcy court. Of course, litigants may avoid this extra work by consenting to the entry of a final order by the bankruptcy court. A majority of courts have concluded that the bankruptcy court has the authority to render final judgments even in non-core proceedings with the consent of the parties.").

Trinity Commc'ns, LLC v. Momentum Telecomms., Inc. (In re Trinity Commc'ns, LLC), 2012 WL 1067673 (Bankr. E.D. Tenn. Mar. 14, 2012) (Rucker, J.) ("Momentum argues that because the estate has filed a claim against it that is a state law breach of contract claim, *Stern v. Marshall* applies, and the counterclaim is no longer a core proceeding under 28 U.S.C. § 157(b)(2)(C) because the counterclaim involves state law breach of contract issues. However, Momentum also filed a proof of claim in Trinity's bankruptcy case asserting an amount due under the First Master Services Agreement. . . . It further filed two applications for administrative expenses with this court. . . . Thus, Momentum consented to this court's resolution of its proof of claim and its application for administrative expenses.").

Spanish Palms Mktg., LLC v. Kingston (In re Kingston), 2012 WL 632398 (Bankr. D. Idaho Feb. 27, 2012) (Pappas, J.) ("Even if the Court did not have constitutional power to enter a final judgment as to any of the claims raised by the parties in this adversary proceeding, the parties, in their submissions, have expressly consented to the Court's entry of such judgments. 28 U.S.C. § 157(c)(2) provides that, where the parties consent, a bankruptcy judge may hear and determine, and may enter appropriate orders and judgments, in a proceeding that is, otherwise, only 'related to' a bankruptcy case. In this regard, the *Stern* decision did not alter the system of final adjudication by consent embodied in 28 U.S.C. § 157(c)(2). Since both Plaintiffs and [the debtor] have consented to the Court's ability to hear and enter a final judgment disposing of all claims and counterclaims raised in this adversary proceeding, including the 'costs and damages' component of [the debtor's] breach of an implied duty of good faith counterclaim, this consent provides an additional basis for the Court's power to do so.").

Credit Suisse Sec. v. TMST, Inc. (In re TMST, Inc.), 2012 WL 589572 (Bankr. D. Md. Feb. 22, 2012) (Keir, J.) (Following sale by Chapter 11 trustee of debtors' mortgage servicing rights, creditor filed adversary proceeding seeking a determination as to the existence, extent and priority of its lien in the sale proceeds. The court, "reviewing the question *sua sponte*," found that it had the constitutional authority to finally adjudicate the parties' competing claims to the sale proceeds, stating: "All parties have stated unequivocally in written filings in this Adversary Proceeding that the matters raised by the Complaint are 'core' under 28 U.S.C. § 157 and thereby indicated their agreement that the Bankruptcy Court could enter final orders in determining the Adversary Proceeding." The court pointed out that "the issue of constitutional authority of a non-Article III judge to enter final orders pursuant to 28 U.S.C. § 157 is not a question of constitutionality of subject matter jurisdiction, a defect of which could not be 'cured' by consent. Subject matter [jurisdiction] is constitutionally conferred upon the United States District Court by 28 U.S.C. § 1334. The issue addressed in the opinion in *Stern v. Marshall* is to what extent by reference under 28 U.S.C. § 157, a non-Article III judge may exercise final order power over such matters.").

Willson v. Vanderlick (In re Cent. La. Grain Coop., Inc.), 2012 WL 293173 (Bankr. W.D. La. Jan. 31, 2012) (Summerhays, J.) ("Chapter 7 trustee . . . of [the debtor] . . . assert[ed] claims against . . . former members of the [d]ebtor's board of directors. The Trustee's original complaint for damages . . . alleg[ing] that these defendants breached their fiduciary duties to the Debtor, failed to exercise adequate oversight and control, and failed to maintain adequate records. . . . In addition to the former directors, the Trustee asserts a claim against [debtor's D & O insurance carrier] . . . pursuant to the Louisiana Direct Action Statute . . . alleg[ing] that [the D & O carrier] issued a . . . [p]olicy . . . that covers the losses alleged in the Complaint. . . . The [D & O carrier] . . . subsequently filed a Motion for Summary Judgment seeking dismissal of the claims against it on the grounds of the 'insured versus insured' exclusion in the . . . D & O Policy." The bankruptcy court denied the D & O carrier's motion for summary judgment. The court noted that it had the authority to finally adjudicate the trustee's claims based on the parties' consent: "After the hearing on this matter, the court held a telephone conference with the parties to discuss whether the Supreme Court's ruling in *Stern v. Marshall* . . . precludes the court from entering final orders or judgments in this adversary proceeding. Subsequently, the parties consented to the court entering final orders or judgments in

this proceeding. . . . In light of 28 U.S.C. § 157(c), the court concludes that this stipulation is sufficient to allow the court to enter final orders under *Stern*.").

Yellow Sign, Inc. v. Freeway Foods, Inc. (In re Freeway Foods of Greensboro, Inc.), 2012 WL 112192 (Bankr. M.D.N.C. Jan. 13, 2012) (Waldrep, J.) ("[A]ll of the parties . . . have consented to the Court entering a final judgment. The Supreme Court has repeatedly recognized that parties can agree to be bound by a decision of a court that may lack specific constitutional authority to make a final decision without their consent. *See, e.g.*, *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848–49, 106 S. Ct. 3245, 92 L. Ed. 2d 675 (1986) . . . . [After *Stern*] the overwhelming majority of courts have concluded that 'the bankruptcy court has the authority to render final judgments even in non-core proceedings with the consent of the parties.' . . . Thus, because it is necessary to decide this claim in order to allow or disallow the . . . proof of claim, and because the parties have consented, the Court may enter a final judgment regarding this claim.").

Henderson v. Cmty. Bank of Miss. (In re Evans), 2011 WL 6258473 (Bankr. S.D. Miss. Dec. 15, 2011) (Olack, J.) (Citing case law "holding that power to consent under 28 U.S.C. § 157(c)(2) remains undisturbed after *Stern v. Marshall*," the court pointed out that it "need not address the core/non-core distinction because the parties clearly have consented to the final adjudication by this Court of all of their claims.").

Nation's Capital Child & Family Dev., Inc. v. Marylyn Tree, LLC (In re Nation's Capital Child & Family Dev., Inc.), 2011 WL 6001086 (Bankr. D.D.C. Nov. 30, 2011) (Teel, J.) ("By reason of the parties' consent to this court's adjudicating the claims, there is no issue under *Stern v. Marshall* . . . regarding this court's authority, despite Article III of the Constitution, to issue the order dismissing the claims against [defendants].").

Hagan v. Classic Prods. Corp. (In re Wilderness Crossings, LLC), 2011 WL 5417098 (Bankr. W.D. Mich. Nov. 8, 2011) (Dales, J.) ("[T]he court believes that parties may waive *Stern*-based objections, because such objections do not challenge the court's subject matter jurisdiction.").

Bayonne Med. Ctr. v. Bayonne/Omni Dev., LLC (In re Bayonne Med. Ctr.), 2011 WL 5900960 (Bankr. D.N.J. Nov. 1, 2011) (Stern, J.) ("Having concluded that there has been (and continues to be) full consent to proceed with adjudication in this court, the question persists: is such consent effective under the law? This court concludes that 28 U.S.C. § 157(c)(2) expressly permits adjudication here of noncore matters by consent, and that *Stern v. Marshall* does not hold or suggest otherwise. That recent Supreme Court case dealt with adjudication by the bankruptcy court of a *statutorily* core cause of action (that is, the estate's counterclaim to a claim and an exception-to-discharge adversary proceeding). *See* 28 U.S.C. § 157(b)(2)(C). *Adjudication* of the state-law based counterclaim, not consented to by the creditor-claimant, was held to be beyond the constitutional authority of the non-Article III bankruptcy court. *Sub judice*, the immediate context is adjudication by consent of noncore but 'related to' causes of action. Adjudication of the Pledge enforcement (Count I) and the other cited noncore causes, per 28 U.S.C. § 157(c)(2), is within the subject matter jurisdiction of this court, is permitted, and is not barred by *Stern* . . . . [U]nlike *Stern v. Marshall*, the plaintiff-trustee has expressed consent to adjudication by this court of all causes pled. That is, having expressed the necessary consent to adjudication of all *noncore causes* . . . the

trustee *a fortiori* has consented to the balance of the causes pled, i.e., *the statutory core causes*. The defendants have likewise consented. Therefore, even if absent consent the Constitution would generally have an Article III judge adjudicate the statutory core matters at issue in this proceeding *(a proposition not decided here)*, consent of the parties for determination by a non-Article III judge would appear to authorize this court to hear and *determine* Counts II through VI, and IX through XI (i.e., the statutory core causes).").

Reinke v. Nw. Tr. Servs., Inc. (In re Reinke), 2011 WL 5079561 (Bankr. W.D. Wash. Oct. 26, 2011) (Overstreet, J.) ("[Debtor] asserts various state and federal causes of action [in an adversary proceeding he brought] against defendants related to the initiation and pursuit of foreclosure proceedings against two parcels of real property owned by him. [Debtor] filed a proceeding under chapter 11 of the Bankruptcy Code . . . and a resolution of these causes of action is critical to confirmation of a chapter 11 plan in that proceeding. . . . [I]n the middle of the trial, the United States Supreme Court issued its decision in *Stern v. Marshall*. . . . [C]ounsel for [Debtor] raised a question as to whether *Stern* applied to the claims at issue. Counsel for each of the defendants gave their oral consent on the record to this Court's entry of a final order on all claims in the case. [Debtor] took no further action with regard to the Court's jurisdiction. Accordingly, the Court finds that [Debtor] is deemed to have consented to this Court's entry of a final order. . . . The Court advised [Debtor's] counsel at the hearing that if he did not believe the Court had the authority to enter a final order on all claims, he should immediately file a motion for that determination. No action was taken by [Debtor]. In *Stern*, the Supreme Court made it clear that the parties are deemed to have consented to the bankruptcy court's final adjudication by failing to object to the court's adjudication in a timely fashion.").

Haw. Nat'l Bancshares, Inc. v. Sunra Coffee LLC (In re Sunra Coffee LLC), 2011 WL 4963155 (Bankr. D. Haw. Oct. 18, 2011) (Faris, J.) ("Even assuming that [secured creditor's] claims against [guarantor] are not core proceedings, the bankruptcy court had statutory authority to enter final judgment against him based on his consent. While subject matter jurisdiction may not be conferred by consent, . . . a party may waive its right to an Article III court. Consent to the bankruptcy court's entry of final judgment may be express or implied from the parties' conduct.").

Tabor v. Kelly (In re Davis), 2011 WL 5429095 (Bankr. W.D. Tenn. Oct. 5, 2011) (Latta, J.) (The court rejected the Chapter 7 trustee's argument that the defendant consented to the bankruptcy court's final adjudication of the avoidance claims asserted in the adversary proceeding because he was one of the creditors who filed the involuntary petition: "The court must consider whether the fact that the Defendant was one of the petitioning creditors changes the analysis of the public/private rights distinction. *Stern* suggests not. Even though the counterclaim under consideration in *Stern* was raised in response to a proof of claim, the counterclaim required adjudication of facts that were not necessary to the claims adjudication process, and indeed sought affirmative relief beyond mere set off against the proof of claim. The Trustee in this adversary proceeding is seeking affirmative relief against the Defendant for the benefit of the bankruptcy estate. We have seen that certain rights arise in connection with such a proceeding, including the right to have the matter heard and determined by an Article III court. Is this a right that may be waived by a party to an adversary proceeding in bankruptcy? The *Stern* Court seems to indicate that it may not when it rejects the argument that the right to have the counterclaim in that case heard by an Article III court was waived

when the counter-defendant filed his proof of claim. Relying on *Granfinanciera*, the Court distinguished prior decisions noting that in bankruptcy proceedings 'creditors lack an alternative forum to the bankruptcy court in which to pursue their claims.' *Stern*, 131 S. Ct., at 2614–15, quoting *Granfinanciera*, 492 U.S. at 59, n.14, 109 S. Ct. 2782. The Court seems to suggest that the requirement of a hearing and determination by an Article III court is jurisdictional. . . . Even were it possible for the Defendant to have waived his right to a final determination by an Article III court, he cannot be said to have done so by joining in the filing of the involuntary petition in this case. . . . While the filing of a proof of claim may invoke the claims resolution process in bankruptcy, the filing of an involuntary petition does not do so. In no way can a petitioner be charged with anticipating all outcomes of the filing, such that his act may be interpreted as the knowing relinquishment of rights that might arise at a stage much later in the involuntary bankruptcy case.").

Oxford Expositions, LLC v. Questex Media Grp., LLC (In re Oxford Expositions, LLC), 2011 WL 4054872 (Bankr. N.D. Miss. Sept. 13, 2011) (Houston, J.) ("Insofar as consent is concerned, by way of analogy, this court would look to another recent Supreme Court decision, *AT & T Mobility, LLC v. Conception*, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011), where the court effectively held that if parties to a contract had contractually agreed to binding arbitration, a final decision could be rendered by an arbitration panel even though the arbitrators might not enjoy the attributes of Article III judges. . . . Indeed, many arbitrators are not licensed attorneys, and unlike United States Bankruptcy Judges, they are not appointed to fourteen year terms by an Article III Court of Appeals, nor do they have their compensation statutorily linked to the compensation of Article III district judges. Certainly if non-judges can enter binding decisions with the contractual consent of the parties, then bankruptcy judges ought to be able to enter final judgments in non-core bankruptcy proceedings where the parties have consented to their doing so. [T]hat is expressly acknowledged by the Supreme Court's majority in *Stern*.").

2. EFFECT OF PRE-*STERN* CONSENT

Dev. Specialists, Inc., v. Akin Gump Strauss Hauer & Feld LLP, 462 B.R. 457 (S.D.N.Y. 2011) (McMahon, J.) ("[Plaintiff] argues that [defendant] 'consented' to final adjudication in Bankruptcy Court when it stated in its answer that the Bankruptcy Court had 'jurisdiction' under 28 U.S.C. §§ 157, 158, 959(a) and 1334. . . . However, *Stern* makes clear that the issues of jurisdiction and final adjudicative power are distinct. . . . Consenting to jurisdiction—which everyone agrees the Bankruptcy Court possesses under the 'related to' doctrine enshrined in 28 U.S.C. § 1334—is not the same as consenting to the entry of a final determination by a non-Article III tribunal, even if [defendant] could have 'knowingly and voluntarily' foregone a right to such adjudication on statutory 'core' matters before *Stern*. . . . Thus, I conclude that *Stern* provided the [defendants] with a legal basis to contest the Bankruptcy Court's adjudicative power that they did not have before last summer. For that reason, the [defendants] should not be found to have consented to final adjudication in the Bankruptcy Court.").

Mercury Cos. v. FNF Sec. Acquisition, Inc., 460 B.R. 778 (D. Colo. 2011) (Martinez, J.) ("[Plaintiff/DIP] filed a[n] . . . adversary proceeding . . . against Defendant[s] . . . in the Bankruptcy Court. . . . The [a]dversary [p]roceeding arose from an alleged stock purchase agreement between

[DIP] and [one of the Defendants] under which [one of the Defendants] agreed to purchase from [DIP] all of the outstanding capital stock of four of [DIP's] subsidiaries. The Complaint in the [a]dversary [p]roceeding alleged, *inter alia*, that [one of the Defendants] breached that stock purchase agreement. . . . [T]he operative . . . [a]mended [c]omplaint . . . [included] claims against [one of the Defendants] for fraudulent transfer, breach of contract . . . , and breach of the implied covenant of good faith and fair dealing . . . . The . . . complaint also added as defendants [former affiliates of the DIP] . . . each of which was either a subsidiary sold by [DIP] to [one of the Defendants] under the stock purchase agreement, or an entity related to one of those subsidiaries. . . . Plaintiff's claims against those entities—fraudulent transfer, and preference (in the alternative)—are based on Plaintiff's alleged mistaken transfer of $1.68 million to those entities immediately following the sale of the subsidiaries to [one of the Defendants]. . . . Defendants filed a Motion to Withdraw the Reference in the Adversary Proceeding[,] . . . argu[ing] . . . based on the Supreme Court's recent decision in *Stern v. Marshall* . . . [that] the Bankruptcy Court does not have the authority to enter orders and judgment on Plaintiff['s] claims in the Adversary Proceeding. They therefore argue that the referral of this action to the Bankruptcy Court should be withdrawn, and the action should be moved to this Court. . . . In response, Plaintiff argues, . . . that Defendants have consented to the authority of the Bankruptcy Court to enter orders and judgment in this action by litigating this action in the Bankruptcy Court for nearly 19 months. In reply, Defendants argue, . . . that one cannot consent to the Bankruptcy Court's jurisdiction where the Bankruptcy Court does not have the authority to resolve claims before it. . . . [After *Stern*,] [t]here is some question in this case as to whether the Bankruptcy Court would have had the authority, absent the parties' consent, to enter orders and judgment in the Adversary Proceeding. . . . However, the Court need not resolve that question because both parties consented to the Bankruptcy Court's authority to enter orders and judgment in the Adversary Proceeding. There is substantial support for that conclusion. . . . First, both parties admitted in their pleadings in the Adversary Proceeding that the Bankruptcy Court had jurisdiction over the action and that the action was a core proceeding under 28 U.S.C. § 157. . . . [T]he Adversary Proceeding was filed on January 27, 2010, and Defendants waited nearly 19 months, until August 15, 2011, to challenge the authority of the Bankruptcy Judge to enter orders and judgment in the Adversary Proceeding. In the meantime, not only did Defendants consent in their responsive pleadings to the authority of the Bankruptcy Court to enter orders and judgment, but they also heavily litigated the action in the Bankruptcy Court, filing a witness and exhibit list, . . . deposition notices, . . . expert disclosures, . . . a motion for partial summary judgment, . . . a motion for summary judgment . . . and a motion in limine . . . . In so doing, Defendants . . . impliedly consented to the authority of the Bankruptcy Court to enter orders and judgment in the Adversary Proceeding. . . . In response to Plaintiff's argument that Defendants consented to the Bankruptcy Court's authority, Defendants only cite to *Stern* and a single secondary source discussing *Stern*. . . . However, in *Stern* itself, the Court held that the defendant in the adversary proceeding had consented to the authority of the Bankruptcy Court to resolve his defamation claim against the debtor by filing the claim and litigating it there for over two years. . . . This holding constitutes a clear rejection of Defendant's argument that one cannot consent to the authority (constitutional or otherwise) of the bankruptcy court to enter final orders and judgment in an adversary proceeding. This is confirmed by the numerous post-*Stern* decisions in which courts have held that one can so consent. . . . [T]he much older Supreme Court cases of *Langenkamp* . . . and *Granfinanciera* . . . appear to provide a stronger basis for Defendants' argument that the reference should be withdrawn. Those cases dealt with the same type of claims involved in the Adversary Proceeding—fraudulent transfer and

preference—and those cases emphasized the importance of whether the defendant in the adversary proceeding had filed a proof of claim against the bankruptcy estate. . . . The fact of the matter is that *Stern* did not significantly change the legal landscape relevant to Plaintiff's claims against Defendants in the Adversary Proceeding. Thus, there is no (apparent) legitimate basis for Defendants to have waited nearly 19 months to attempt to withdraw the reference in the Adversary Proceeding. During that nearly 19–month period, Defendants repeatedly manifested their consent to the authority of the Bankruptcy Court to enter orders and judgment in the Adversary Proceeding. Therefore, the Court refuses to withdraw the reference at this late stage of that proceeding.").

Neilson v. Entm't One, Ltd. (In re Death Row Records, Inc.), 2012 WL 1033350 (C.D. Cal. Mar. 8, 2012) (Walter, J.) (Chapter 11 Trustee of Death Row Records, Inc. and Marion "Suge" Knight, Jr. commenced an adversary proceeding against Entertainment One Ltd. ("eOne") and Koch Entertainment LP ("Koch") (collectively "Defendants") in bankruptcy court asserting the following claims for relief: (1) declaratory judgment against eOne; (2) breach of contract against eOne; (3) breach of contract against Koch; and (4) turnover and accounting against Koch. Koch demanded a jury trial with respect to claims three and four of the Complaint. '[O]n November 5, 2009, Koch consented to have the jury trial conducted in the Bankruptcy Court. In February of 2012, shortly before the scheduled trial date, eOne and Koch filed motions to withdraw the reference. "Koch . . . [took] the position that *Stern* prohibited a non-Article III court from conducting a jury trial on claims three and four of the Complaint regardless of the parties' consent, and Koch suggested that the best course of action would be to withdraw the reference of the adversary proceeding from the Bankruptcy Court. The Trustee argued that any motion to withdraw the reference would be untimely pursuant to [the applicable] [l]ocal [b]ankruptcy [r]ule . . . [and] also represented that [he] long ago conceded that Koch had a Seventh Amendment right to a jury trial on these claims for relief." Concluding that the defendants had consented to the bankruptcy court's adjudication of the Trustee's claims, the district court denied the withdrawal motion: "Although consent may be withdrawn by a party, it may only be withdrawn if the notice of withdrawal is timely, i.e., when withdrawal would not unduly interfere with or delay the proceedings In this case, Defendants not only waited until long after the deadline established by Local Bankruptcy Rule 9015-2(h) to file this Motion to Withdraw Reference, but the original trial date of March 5, 2012 has already been delayed due to the late filing of this Motion to Withdraw Reference. While [the bankruptcy judge] gave Defendants an extension of time to file the Motion to Withdraw Reference, he did so only because he was concerned about his constitutional authority to conduct a jury trial and enter final judgment in this adversary proceeding. . . . Because the Court concludes that the Bankruptcy Court has the constitutional authority to conduct the jury trial and enter final judgment in this adversary proceeding, and after considering the efficient use of judicial resources, delay and costs to the parties, uniformity of bankruptcy administration, the prevention of forum shopping, and other related factors, the Court concludes that Defendants, at this late stage, may not withdraw their consent to a bankruptcy judge conducting the jury trial and entering final judgment.").

Adelphia Recovery Trust v. FLP Grp., Inc., 2012 WL 264180 (S.D.N.Y. Jan. 30, 2012) (Crotty, J.) (Plaintiff brought action under §§ 544(b) and 550 seeking to avoid and recover an alleged fraudulent transfer, asserting that Adelphia, a cable company and former debtor in possession, did not receive reasonably equivalent value from defendant FLP Group, Inc. in return for Adelphia's prepetition payment of $149 million to repurchase 1.1 million shares of its stock. Upon confirmation of its

Chapter 11 plan, Adelphia transferred title to the fraudulent transfer claim to the plaintiff. Prior to the Supreme Court's decision in *Stern*, the defendants had successfully opposed the plaintiff's motion to withdraw the reference to the bankruptcy court. Post-*Stern*, the defendants moved to withdraw the reference, arguing that the bankruptcy court lacked the constitutional authority to finally adjudicate the fraudulent transfer claim. The court rejected plaintiff's argument "that Defendants consented to the Bankruptcy Court's final adjudication of the instant claims in 2007 by successfully opposing Plaintiff's motion to withdraw reference to the Bankruptcy Court," stating: "There is no indication that Defendants, in conceding that the claim was core, expressly consented to final adjudication by a bankruptcy judge. While this may have been implied at that time, *Stern* provided [defendants] with a legal basis to contest the Bankruptcy Court's adjudicative power that they did not have before. . . . Accordingly, the Court will not read Defendants pre-*Stern* conduct as an implied consent to final adjudication by the Bankruptcy Court because any such consent was not knowingly made. . . . Post- *Stern*, Defendants have explicitly indicated that they do not consent to final adjudication by the Bankruptcy Court.").

Retired Partners of Coudert Bros. Trust v. Baker & McKenzie LLP (In re Coudert Bros. LLP), 2011 WL 5593147 (S.D.N.Y. Sept. 23, 2011) (McMahon, J.) ("Applying *Stern* here: the [plaintiff] filed a proof of claim for retirement payments against the estate. While this constitutes consent to final adjudication of the [plaintiff's] contractual rights against [debtor], and any other state law private rights necessarily determined therewith, it does not constitute consent to resolution of any other private rights. I have already concluded that not all of the issues raised by the Claims will be resolved in ruling on the [plaintiff's] proof of claim. Therefore, under *Stern*, some other evidence of express or implied consent must be identified to uphold [the bankruptcy court's] exercise of final adjudicative authority. . . . The [defendants] did not brief this issue, and so failed to identify any indicia of implied consent. Nor could they. Following *Stern*, it is doubtful whether mere participation in litigation is enough to imply consent. Even if it were, a finding of consent is not consistent with the record in this case. First, the [plaintiff] filed a demand for a jury trial of 'all issue so triable in the matter' immediately upon removal, thereby expressing its intention to reserve whatever Article III rights it had. . . . Nor was the [plaintiff] ever informed of its right to an Article III adjudication, calling into serious question the 'knowing and voluntary' nature of any waiver of rights. . . . Indeed, until *Stern* strongly embraced the approach of the *Marathon* plurality, it is doubtful that the [plaintiff] knew or could have known that it had a right to Article III adjudication that it was waiving. . . . Thus, I find that the [plaintiff] did not consent, expressly [or] impliedly, to a final adjudication of the Claims before [the bankruptcy court]. Because I have already found that the Claims raise issues of private, rather than public right, and would not be resolved in the process of ruling on the [plaintiff's] proof of claim, [the bankruptcy court] lacked the power to enter a final order dismissing the claims.").

TV Tokyo Corp. v. 4Kids Entm't, Inc. (In re 4Kids Entm't, Inc.), 463 B.R. 610 (Bankr. S.D.N.Y. 2011) (Chapman, J.) (Finding that, by way of June 2 [Agreed Order Setting Trial], [licensors] "consented to th[e] Court's adjudication of this Adversary Proceeding. Accordingly, it is the Court's view that it has authority to enter a final judgment in this Adversary Proceeding and any limitations on its authority arguably imposed by *Stern v. Marshall* . . . are inapplicable.").

In re Olde Prairie Block Owner, LLC, 457 B.R. 692 (Bankr. N.D. Ill. 2011) (Schmetterer, J.) ("Debtor and [secured creditor] expressly consented in their pleadings to final adjudication by a Bankruptcy Judge of all of Debtor's Counterclaims, even if they were later determined to be non-core proceedings. Their power to consent recognized by 28 U.S.C. § 157(c)(2) was not disturbed by *Stern*. . . . Debtor cannot undo that consent now that it is faced with unfavorable rulings following motions resulting in dismissal of four Counts with prejudice and losing after trial of Count III. Withdrawal of consent would require a motion and showing of good cause. Good cause can hardly be shown at this stage of proceedings once Debtor has litigated to the end and lost. Not only has Debtor not even sought to withdraw its consent, the context and long history of litigation proceedings between the parties would render such withdrawal at this stage singularly inappropriate.").

Pro-Pac, Inc. v. Chapes (In re Pro-Pac, Inc.), 456 B.R. 894 (Bankr. E.D. Wis. 2011) (Kelley, J.) (Corporate Chapter 11 debtor brought adversary proceeding against two defendants—its former employee and officer ("Chapes") as well as a competitor of the debtor in the warehousing business ("WOW"). The debtor's complaint, which was filed several months before its liquidating plan was confirmed, alleged that Chapes, aided and abetted by WOW, had breached his duty of loyalty to debtor by diverting accounts to WOW. After conducting a two-day trial, which was completed less than a month before *Stern* was decided, the bankruptcy court entered final judgment in favor of the debtor. Concluding that the defendants, through their earlier filings in the adversary proceeding, had consented to its final adjudication of the debtor's claims, the court stated: "In the Complaint, [debtor] alleged that this is a core proceeding under § 157(b)(2)(O) as a matter affecting the liquidation of the assets of the bankruptcy estate. . . . WOW admitted this allegation in its Answer, indicating its consent to this Court's entry of a final judgment. . . . Chapes stated that he lacked knowledge and information sufficient to form a belief as to the allegation that this is a core proceeding, and denied the allegation. . . . However, Chapes subsequently entered into a Stipulation pursuant to 28 U.S.C. § 157(e) consenting to this Court's conduct of a jury trial in this adversary proceeding. That Stipulation effectively demonstrates Chapes' consent to the trial of this matter as a core proceeding.")

Meoli v. Huntington Nat'l Bank (In re Teleservices Grp., Inc.), 456 B.R. 318 (Bankr. W.D. Mich. 2011) (Hughes, J.) ("[Defendant bank], though, clearly has not given its consent when that consent is now recognized for what it must be—a knowing waiver of [the bank's] right to have an Article III judge, as opposed to me, make the final decision of whether the federal government will assist Trustee in depriving [the bank] of its property. Granted, I have heard twelve days of testimony and examined a huge number of exhibits. I have also issued a 127 page opinion that sets forth my assessment of the same. However, I perceive no prejudice to Trustee if I at this time were to convert my endeavor to a report and recommendation so that a district court judge may later make his or her own independent assessment of Trustee's claim and [the bank's] defenses.").

Brook v. Ford Motor Credit Co. (In re Peacock), 455 B.R. 810 (Bankr. M.D. Fla. 2011) (McEwen, J.) ("The Court is concerned that perhaps the real 'cause' of the last-minute change in position [with respect to the bankruptcy court's authority to enter a final judgment] is not the Supreme Court's ruling in *Stern v. Marshall*, but rather this Court's recent oral ruling (which will soon be reduced to writing and published) in a similar adversary proceeding brought by a chapter 7

trustee [involving] FCCPA claims [and in which] the undersigned struck the defendant creditor's setoff defense, determining, *inter alia*, that to permit it would violate public policy and that the elements of setoff under Florida law were not present in any event. Counsel for the Defendant in this adversary proceeding staffed the hearing at which [that] ruling was announced. Should [that ruling] be the reason for the Defendant's change in position, the Court notes that forum shopping can never be cause for leave to withdraw consent to the bankruptcy court's adjudicative authority.").

Miller v. Grosso (In re Miller), 2012 WL 1098455 (Bankr. D. Mass. Mar. 30, 2012) (Bailey, J.) ("In the two answers he filed in this adversary proceeding, and despite his position that the adversary proceeding as a whole was not a core proceeding, [defendant] expressly consented to entry of final orders or judgment by the bankruptcy court. As to non-core counts, he remains bound by those expressions of consent. In his response to the court's latest order, he states that he does not consent to entry of final judgment by this court. The court had indeed solicited the parties' positions as to whether they consent, but that order was directed to problems arising from *Stern*. *Stern* did not involve non-core matters but proceedings in which a bankruptcy judge lacked authority to enter final judgment notwithstanding that the proceeding was core. [Defendant's] present indication of lack of consent therefore affects only those core matters that *Stern* has put in issue. It cannot alter his previously expressed consent as to the non-core count. Both parties having consented to entry of final judgment on the non-core count, the bankruptcy court may under § 157(c)(2) determine and enter final judgment on that count.").

Nation's Capital Child & Family Dev., Inc. v. Marylyn Tree, LLC (In re Nation's Capital Child & Family Dev., Inc.), 2011 WL 6001086 (Bankr. D.D.C. Nov. 30, 2011) (Teel, J.) ("As reflected by . . . the court's Pretrial Order signed on April 21, 2010, '[t]he parties agree[d] that this is to be a non-jury trial and that the court may enter final orders and judgments reviewable only by way of appeal under 28 U.S.C. § 158.' . . . By reason of the parties' consent to this court's adjudicating the claims, there is no issue under *Stern v. Marshall* . . . regarding this court's authority, despite Article III of the Constitution, to issue the order dismissing the claims against [defendants].").

Bayonne Med. Ctr. v. Bayonne/Omni Dev., LLC (In re Bayonne Med. Ctr.), 2011 WL 5900960 (Bankr. D.N.J. Nov. 1, 2011) (Stern, J.) (Liquidating trustee brought adversary proceeding against defendants, asserting, among other claims for relief, state law causes of action to enforce a pledge and to recover alleged fraudulent transfers—under §§ 544 (and the New Jersey UFTA) and 548—and preferences. According to the trustee's complaint, his cause of action for enforcement of the pledge was a core matter. Approximately six weeks post-*Stern*, after the parties had proceeded for two years in the bankruptcy court, and after summary judgment motions had been fully briefed and argued (at two hearings, one held several weeks before *Stern* was decided and the other conducted one week after the *Stern* opinion was issued), the court "solicited the positions of the parties regarding consent to its authority to 'hear and *determine*' the causes before it." The defendants consented to entry of a final judgment by the bankruptcy court; the trustee did not. Finding that the trustee could not revoke his consent to the bankruptcy court's final adjudication of the claims at that late stage of the litigation, the court reasoned: "This court finds that the trustee-plaintiff, by virtue of his pleading and conduct in this litigation, has consented to this court's adjudication of all matters pled in his Adversary Proceeding Complaint. . . . [T]he trustee attempts to withdraw consent with respect to noncore matters. It is thus adjudication here of the noncore

proceeding(s) to which the trustee has objected belatedly. However, that effort to reverse course should be unavailing. Only after oral argument of opposing summary judgment motions was completed and the defendants had explicitly consented to adjudication of all Adversary Proceeding matters by this court, did the plaintiff announce his nonconsent to this court's determination of noncore matters. Thus, the trustee's litigation of this matter from April 15, 2009 up to his counsel's August 19, 2011 reversal of tactics consistently expressed consent to adjudication here. The plaintiff's late-day tactical change of heart will not be permitted. It is a variation of forum shopping, undertaken only after full exposition by both sides of the contested issues and expansive court inquiry into and colloquy regarding the merits of various positions of the parties. Moreover, absolutely no reason or cause was expressed by the plaintiff for the effort to withdraw consent. In fact, the plaintiff—demanding until the August 19[,] [2011] letter full and complete adjudication by this court of all of the causes pled here and placed solely by the plaintiff before this court—has waived his right to 'withdraw' his consent and is estopped from denying that he has consented to adjudication by this court.").

Tabor v. Kelly (In re Davis), 2011 WL 5429095 (Bankr. W.D. Tenn. Oct. 5, 2011) (Latta, J.) ("The Trustee suggests that the constitutional defect in the referral of the present proceeding to the bankruptcy court may be overcome by the consent of the parties. . . . I believe that as a general proposition this analysis is correct, but it does not apply to this proceeding in which the [d]efendant has not consented to trial by the bankruptcy court. . . . [A]lthough [the defendant] admitted that this adversary proceeding is a core proceeding over which the bankruptcy court may enter final judgment . . . I have determined that the fact that these types of causes of action are described as core proceedings in the applicable statute, is not dispositive of the question of the bankruptcy court's authority to hear and finally determine them. Thus, in agreeing that the adversary proceeding is a core proceeding, the Defendant cannot be said to have intentionally relinquished a known right. Further, [the defendant] has demanded a jury trial and has not consented to the conduct of that trial by the bankruptcy court. As we have seen, the right to a jury trial necessarily implies the right to final determination by an Article III court. In failing to consent to the conduct of a jury trial by this bankruptcy court, the Defendant indicated his lack of consent to final decision by the bankruptcy court.").

B. WITHDRAWAL OF REFERENCE

Picard v. Flinn Invs., LLC, 463 B.R. 280 (S.D.N.Y. 2011) (Rakoff, J.) ("Flinn argues that, because actions to recover fraudulent transfers do not fall within the 'public rights exception,' bankruptcy courts cannot 'enter a final judgment' without usurping the 'judicial Power' reserved for Article III courts. Resolution of this argument requires 'significant interpretation' of both Article III and the Supreme Court precedent analyzing it. The answer is by no means obvious. For example, the Supreme Court in *Stern* suggested that its holding applied only narrowly to state law counterclaims and did not 'meaningfully change[ ] the division of labor' between district and bankruptcy courts. 131 S. Ct. at 2620. Moreover, the Supreme Court's argument that the "experts" in the federal system at resolving common law counterclaims . . . are the Article III courts' seemingly does not apply to actions to avoid fraudulent transfers. *Id*. at 2615. Given the difficulty of this question, the Court withdraws the reference to bankruptcy court on this issue for the purpose of determining

whether final resolution of claims to avoid transfers as fraudulent requires an exercise of 'judicial Power' that the bankruptcy court lacks.").

Dev. Specialists, Inc., v. Akin Gump Strauss Hauer & Feld LLP, 462 B.R. 457 (S.D.N.Y. 2011) (McMahon, J.) ("Withdrawal will promote judicial economy. Because the Bankruptcy Court is not able to finally determine these proceedings without the consent of the Firms—which does not appear to be forthcoming—any recommendations it makes will need to be reviewed de novo in this Court. It would be inefficient to allow these proceedings to go forward, knowing that they will have to be substantially repeated. . . . [A]s no discovery has taken place, and no case management plan or other course of proceeding has been agreed on, bringing the actions before this Court will not cause undue delay or require any duplication of effort. And because only issues of law have been presented in the case so far, [the bankruptcy judge's] familiarity with the underlying facts does not weigh in favor of retention of the case before him.").

Official Comm. of Unsecured Creditors of Appalachian Fuels, LLC v. Energy Coal Res., Inc. (In re Appalachian Fuels, LLC, 2012 WL 1344984 (E.D. Ky. Apr. 18, 2012) (Bunning, J.) ("In conclusion, the Court finds that the holding of *Stern* does not apply to the fraudulent transfer and preference claims in Plaintiff's Amended Complaint. Therefore, core claims predominate in this case, and this factor weighs in favor of denying the motions to withdraw. However, even if the Supreme Court subsequently found that it was unconstitutional for bankruptcy judges to enter final orders and judgments on fraudulent transfer and preference proceedings, they would still have the authority to submit proposed findings of fact and conclusions of law to the district court on these matters. . . . Given that bankruptcy cases are regularly handled by bankruptcy judges and that they have special expertise in handling these particular cases, withdrawing the reference would not promote judicial economy or uniformity in bankruptcy administration. The claims against Defendants are, for the most part, quintessential core bankruptcy claims, including claims to recover preferences and fraudulent transfers under 28 U.S.C. § 157(b)(2)(F), (H). Of the 107 counts asserted by Plaintiff, the majority are for avoidance and/or recovery of fraudulent transfers and are premised on Sections 544, 548 and 550 of the Bankruptcy Code. As stated above, such adversary proceedings are clearly core proceedings within the meaning of § 157(b)(2)(H). . . . The Court finds that the judicial economy and uniformity in bankruptcy administration factors weigh in favor of denying the moving parties' motions to withdraw. Withdrawal of the reference at this early stage of the litigation would result in losing the benefit of the Bankruptcy Court's expertise in both the law and facts. This proceeding is in its early stages. However, Judge Scott has presided over the underlying bankruptcy action since 2009. Since that time, there have been numerous adversary proceedings filed. Allowing the case to remain with the Bankruptcy Court means that the discovery issues, settlement conferences and motion practice will be supervised most efficiently by the same court that is currently supervising the other adversary proceedings filed in connection with the bankruptcy estate. Although Judge Scott may not have any specific knowledge of the facts of this adversary proceeding because discovery has yet to commence, he has expansive knowledge of the Debtor's estate and several of the Defendants who have filed proofs of claim against the estate. Moreover, it is not Judge Scott's familiarity with the facts of this case, but rather the Bankruptcy Court's particularized knowledge of bankruptcy matters in general, that convinces the Court that judicial economy and uniformity in bankruptcy administration would be best served by allowing this case to remain in the Bankruptcy Court for pretrial proceedings. . . . Furthermore, since a majority of the claims are core,

the bankruptcy judge has the authority to enter final orders and judgments on these claims. As for the non-core claims, even though the bankruptcy judge may only issue proposed findings of fact and conclusions of law, these recommendations will narrow the issues to be resolved by this Court. . . . Finally, keeping the case with the Bankruptcy Court accords with the Supreme Court's statement in *Stern* that the decision does not 'meaningfully change[ ] the division of labor' in 28 U.S.C. § 157 between the bankruptcy and district courts. *Stern*, 131 S. Ct. at 2620. Accordingly, the Court finds that judicial economy and uniformity in the administration of bankruptcy would not be served by withdrawing the reference at this time. . . . The moving parties argue that handling all claims in one venue would be an economical use of all parties' resources. Moreover, since discovery has not commenced, they assert that withdrawal of the reference will not cause any additional undue burden, delay or cost to the parties. Given the considerations above concerning judicial economy and uniformity in the administration of bankruptcy, the Court finds this argument unpersuasive. Even if this Court is ultimately needed to adjudicate or preside over a jury trial on certain claims, it is not clear that this would cause unnecessary delay and costs, especially considering the efficiency of having the Bankruptcy Court handle all pre-trial matters in the first instance. . . . Several of the moving Defendants argue that their right to a jury trial weighs heavily in favor of withdrawal of the reference. Because these Defendants did not consent to a jury trial in the Bankruptcy Court, they contend the Bankruptcy Court lacks jurisdiction to conduct the trial and therefore the case should be withdrawn to the district court. While the Defendants are correct that the Bankruptcy Court lacks the authority to conduct a jury trial without the consent of all of the parties, the Court disagrees that this factor compels withdrawal of the reference at this juncture. The parties' right to a jury trial does not remove the bankruptcy judge's authority to enter final orders and judgments when necessary in core proceedings. . . . In *In re Healthcentral.com*, 504 F.3d 775, 787 (9th Cir. 2007), the Ninth Circuit examined cases from numerous courts that had addressed the issue of whether, once a jury request is made, a bankruptcy court must relinquish jurisdiction and the case be transferred to the district court. 'Universally these courts have all reached the same holding, that is, a Seventh Amendment jury trial right does not mean the bankruptcy court must instantly give up jurisdiction and that the case must be transferred to the district court.' *Id*. Rather, the bankruptcy court may retain jurisdiction over the matter for pre-trial proceedings. . . . Thus, even if withdrawal of the reference is ultimately necessary for a jury trial, the court need not withdraw the reference immediately.").

Joe Gibson's Auto World, Inc. v. Zurich Am. Ins. Co. (In re Joe Gibson's Auto World, Inc.), 2012 WL 1107763 (D.S.C. Apr. 2, 2012) (Cain, J.) ("Plaintiff [and Chapter 11 Debtor] Joe Gibson's Auto World, Inc., was a South Carolina car dealership which was sued by hundreds of customers who alleged a fraudulent and deceptive advertising scheme ("Consumer Claimants"). [After filing its Chapter 11 case,] [a] global settlement agreement was reached with [the] Defendants [Zurich American Insurance Company and Universal Underwriters Insurance Company] paying a settlement amount in exchange for a release from defense and/or indemnity obligations. [Shortly before its liquidating plan was confirmed, the Plaintiff commenced an adversary proceeding against the Defendants in the bankruptcy court.] [In the adversary proceeding,] Plaintiff filed a complaint alleging that the claims brought by the Consumer Claimants are covered by an umbrella policy [issued by the Defendants] and that even though Defendants assumed the defense of many claims and parts of claims, they have denied other claims. Plaintiff alleges causes of action for breach of contract, bad faith refusal to pay a claim, and asks for a declaratory judgment finding the claims of

the Consumer Claimants are covered by the umbrella policy. Plaintiff also demanded a jury trial on these claims. Defendants deny that coverage is available under the umbrella policy and counterclaimed requesting a declaratory judgment determining their rights and obligations, if any, under the umbrella policy. On September 30, 2009, the bankruptcy court found that these claims were core proceedings and Defendants' subsequent motion to reconsider the order was denied. . . . Defendants then filed the instant motion seeking a mandatory withdrawal of reference to the bankruptcy court pursuant to *Stern v. Marshall* . . . or alternatively a permissive withdrawal. . . . Here, the bankruptcy court found that the claims asserted by Plaintiff, like the claims asserted in *Stern*, are core matters under § 157(c)(1) which 'are only remotely related and likely unrelated to Defendant's proofs of claims against the estate and there is no reason to believe that the process of adjudicating [the] proof[s] of claim would necessarily resolve [the estate's] counterclaim.' . . . Defendant contends that pursuant to *Stern*, the bankruptcy court lacks the constitutional authority to decide Plaintiff's state law claims. The court rejects this interpretation of the holding in *Stern*. While pursuant to *Stern*, the bankruptcy court cannot enter a final judgment on the state law claims, the court does not believe that *Stern* precludes the court from allowing the pretrial proceedings to be handled by the bankruptcy court. Further, the Court also finds the bankruptcy court has authority to enter proposed findings of fact and conclusions of law on dispositive motions in regard to the state law claims, and thus, mandatory withdrawal of the reference is not required at this time. . . . Even where the parties have a right to a jury trial, immediate withdrawal is not required. . . . The mere fact that the district court must conduct a jury trial in an adversary proceeding does not mean that the bankruptcy court immediately loses jurisdiction of the entire matter or that the district court cannot delegate to the bankruptcy court the responsibility for supervising discovery, conducting pre-trial conferences, and other matters short of the jury selection and trial. . . . Defendants' Motion to Withdraw Reference to the Bankruptcy Court . . . is [denied].").

Fort v. Sun Trust Bank (In re Int'l Payment Grp., Inc.), 2012 WL 1107840 (D.S.C. Apr. 2, 2012) (Cain, J.) ("On April 12, 2010, Plaintiff[,] . . . [the] Trustee in bankruptcy for the debtor International Payment Group, Inc., filed an adversary complaint in the bankruptcy court alleging eight state law claims against Defendant SunTrust Bank: breach of contract accompanied by a fraudulent act, aiding and abetting breach of fiduciary duty, negligence and gross negligence, breach of fiduciary duty, tortious interference with contractual relations, violations of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. 39–5–10, et. seq., violation of S.C. Code Ann. § 36–4–102, et seq., and conversion." . . . [Sun Trust moved for withdrawal of the reference of the] claims to the bankruptcy court. . . . In *Stern v. Marshall* . . . the Supreme Court held that, while a bankruptcy judge has the statutory authority to enter a final judgment on a debtor's counterclaim pursuant to the plain language of 28 U.S.C. § 157(b) (2)(C), it was unconstitutional for a bankruptcy judge to enter a final judgment on a debtor's state law counterclaim that was not resolved in the process of ruling on a creditor's proof of claim. . . . In light of *Stern*, the bankruptcy court sua sponte raised the issue of whether it had the constitutional authority to hear the state law claims asserted in the above adversary proceeding as the state law claims at issue here fall into this category. Subsequently, Defendant filed a motion to dismiss due to lack of subject matter jurisdiction. . . . The bankruptcy court found that the claims asserted by Plaintiff are like the claims asserted in *Stern*—core matters under § 157(c)(1) which 'are only remotely related and likely unrelated to Defendant's proofs of claims against the estate and there is no reason to believe that the process of adjudicating [the] proof[s] of claim would necessarily resolve [the estate's] counterclaim.'. . . Further, as the

bankruptcy court noted, while the Defendant's motion sought dismissal based upon lack of subject matter jurisdiction, the motion actually questioned the constitutionality of the referral. . . . Therefore, citing Fed. R. Bankr. P. 5011(a), the bankruptcy court declined to rule on the motion and instead deferred any further challenge to the referral to this court. . . . Thereafter, Defendant filed the instant motion to withdraw the reference. . . . Defendant contends that pursuant to *Stern*, the bankruptcy court lacks the constitutional authority to decide Plaintiff's state law claims. The court rejects this interpretation of the holding in *Stern*. While pursuant to *Stern*, the bankruptcy court cannot enter a final judgment on the state law claims, the court does not believe that *Stern* precludes the court from allowing the pretrial proceedings to be handled by the bankruptcy court. The Court finds the bankruptcy court has authority to enter proposed findings of fact and conclusions of law on the state law claims, and thus, mandatory withdrawal of the reference is not required. . . . Even where the parties have a right to a jury trial, immediate withdrawal is not required. . . . The mere fact that the district court must conduct a jury trial in an adversary proceeding does not mean that the bankruptcy court immediately loses jurisdiction of the entire matter or that the district court cannot delegate to the bankruptcy court the responsibility for supervising discovery, conducting pre-trial conferences, and other matters short of the jury selection and trial. . . . For the foregoing reasons, Defendant's Motion to Withdraw Reference to the bankruptcy Court . . . is [denied].").

Wells Fargo Bank, N.A. v. Madan (In re AJ Town Centre, L.L.C.), 2012 WL 1106747 (D. Ariz. Apr. 2, 2012) (Snow, J.) (Wells Fargo Bank, N.A. filed a motion to withdraw the reference of an action it had commenced to recover the entire amount of the debtors' loan indebtedness from certain guarantors. "Wells Fargo contends that the bankruptcy court's involvement in the Guarantor Adversary Proceeding is 'a waste of judicial resources' because the bankruptcy court 'has no constitutional authority to enter a final order and may not have constitutional authority to hear and determine any issue in the proceeding.' . . . Wells Fargo bases its lack of constitutional authority argument on [*Stern*]. . . . Wells Fargo's reliance on *Stern* is misplaced. In *Stern*, the Court held that bankruptcy courts 'lack[ ] 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. . . . The Supreme Court emphasized that this holding was 'narrow,' stating that the Respondent 'has not argued that the bankruptcy courts are barred from hearing all counterclaims or proposing findings of fact and conclusions of law on those matters, but rather that it must be the district court that finally decide[s] them.' . . . As discussed, the Bankruptcy Court is hearing the instant case under its 'related to' jurisdiction. The Bankruptcy Court is therefore statutorily restricted from issuing a final judgment in this case, and was so restricted even prior to the Supreme Court's holding in *Stern*. *See* 28 U.S.C. § 157(c)(1). *Stern* does not affect bankruptcy courts' ability to hear cases and issue proposed findings of fact and conclusions of law. . . . Although this Court may be required to review findings of fact and conclusions of law by the Bankruptcy Court and issue a final order, this possibility does not, without more, persuade the Court to withdraw the reference. Both the Ninth Circuit and this District have recognized that, in non-core proceedings, 'the bankruptcy court acts as an adjunct to the district court, in a fashion similar to that of a magistrate or special master.' . . . The Bankruptcy Court possesses legal expertise that may help it determine whether certain claims are preempted by the bankruptcy code. Moreover, the Bankruptcy Court may prove more efficient given its factual expertise over allegations common to this action and the related Bankruptcy Proceedings and Debtor Adversary Proceeding. . . . Referral to the Bankruptcy Court allows the Court and the parties to take

advantage of the Bankruptcy Court's expertise, with this Court retaining the ability to issue a final judgment if required.").

Parks v. Consumer Law Assocs. (In re Lewis), 2012 WL 1073126 (Bankr. D. Kan. Mar. 29, 2012) (Nugent, J.) ("Defendants renew their motion to withdraw the reference of all claims in this proceeding arguing that because this Court lacks life tenure and salary protection, Article III of the Constitution requires that the District Court decide all of the claims asserted here. After careful review of the Supreme Court's recent decision in *Stern* and its long-standing precedent in *Marathon*, I agree that absent the parties' consent to this Court's determination of the claims made by the trustee, this Court is likely unable to enter final judgment and that trial on all of the claims, whether core and whether jury-eligible or not, should be conducted in the District Court. . . . [D]efendants here argue that the [Kansas Consumer Protection Act ("KCPA")] unconscionability and disgorgement claims asserted by [the Chapter 7 trustee] are, like Vicki's counterclaim in *Stern*, matters that lie beyond the public right exception. Those claims involve issues that are not core proceedings. The only impact resolving these causes of action will have on this case is a possible recovery for the estate if [the Chapter 7 trustee] prevails and recovers money for the benefit of their creditors. But *Stern* may not really matter here. Unlike Pierce Marshall in *Stern*, none of these defendants has filed a claim in this case and none of them has consented to this Court entering final judgment in this proceeding. Instead, these defendants are more like the defendant in *Marathon*: they are 'entit[ies] that [are] not otherwise part of the bankruptcy proceedings' who will, nevertheless, be subjected to the adjudication of state law claims against them, without their consent, by a judge who lacks tenure and salary guarantees. In this circumstance, there is no constitutional authority for the bankruptcy court to enter final judgment on these claims over these defendants' withheld consent. . . . An additional and somewhat less controversial reason to grant the defendants' renewed motion is that the District Court will hear a variety of other claims in this proceeding, all of which will involve the same set of facts as the KCPA unconscionability and disgorgement claims. Presumably much of the same conduct that the trustee claims supports her KCPA deceptive acts may also support the unconscionability claim. And determining whether these defendants should disgorge their compensation is likely bound up in whether they are liable for professional negligence or misconduct. Because there is no reason to subject the parties to multiple trials on the same facts, judicial economy requires that all of the claims should be tried to the District Court, even those that will not be submitted to the jury. . . . Finally, with the entry . . . of the final pretrial order in this matter, the bankruptcy court's work in this proceeding is complete. The time to file dispositive motions has passed. The District Court should withdraw the reference of this adversary proceeding in its entirety for all future proceedings. The Bankruptcy Court should retain the reference of the [debtors'] bankruptcy case for further administration and closing.").

Weisfelner v. Blavatnik (In re Lyondell Chem. Co.), 2012 WL 1038749 (S.D.N.Y. Mar. 29, 2012) (Cote, J.) ("Lyondell Chemical Company ("Lyondell") was North America's third largest independent, publicly-traded chemical company. Basell AF S.C.A. ("Basell") was a Luxembourg entity. On December 20, 2007, Lyondell was acquired by and merged with Basell to create LyondellBasell Industries AF S.C.A. ("LBI"), the third largest chemical company in the world. On January 6, 2009, Lyondell and certain affiliates filed for relief under Chapter 11 of the Bankruptcy Code. LBI filed for bankruptcy. . . . The Bankruptcy Court [later] granted the Official Committee of Unsecured Creditors (the "Committee") standing to pursue claims arising out of the merger of

Lyondell and Basell (the "Merger") on July 21, 2009. This adversary proceeding commenced the following day, with a complaint filed on behalf of the Debtors' estates. . . . In light of the complexity of the litigation, the Bankruptcy Court divided the case into phases. The first phase ("Phase 1") consisted of certain claims against financing party defendants ("FPDs") that needed to be tried prior to LBI's emergence from bankruptcy. Trial in Phase 1 was to take place in early December 2009. . . . Pursuant to the Plan, the LB Litigation Trust was established in order to pursue estate claims that had not been settled or otherwise disposed of pursuant to the revised settlement of March 11, 2010 and the Plan. Edward Weisfelner was appointed as Trustee of the Litigation Trust (the "Trustee") and was substituted as the plaintiff in the first of these actions. . . . The Trustee filed an amended complaint on July 23, 2010 against individuals and corporate entities involved in the merger of Lyondell and Basell and the subsequent collapse of LBI. The amended complaint [contained] twenty-one counts under the Bankruptcy Code, state law, Delaware law, and Luxembourg law[,] [including claims seeking the avoidance and recovery of alleged intentional and constructive fraudulent transfers under the Bankruptcy Code and state law, claims seeking the avoidance and recovery of alleged preferential transfers, claims asserting alleged illegal dividends and stock redemptions (under Delaware law) as well as tort, breach-of-fiduciary-duty, mismanagement, breach-of-contract, equitable-subordination, recharacterization and aiding abetting claims.] The gravamen of the amended complaint is that senior executives at Lyondell, Basell and other companies involved in the Merger exaggerated the earnings potential of the two companies for personal gain; as a result, LBI was severely under-capitalized after the Merger and was destined to fail in the face of a foreseeable industry downturn. . . . The Trustee brought a related action against NAG Investments LLW ("NAG") on June 16, 2011 to recover [$]100 million transferred by Basell less than two weeks before the Merger. The amended complaint in this related action (the "NAG Action") brings a claim of fraudulent transfer pursuant to the Bankruptcy Code against NAG, and is based on the same facts that gave rise to certain claims in the initial action brought on July 23, 2010 (the "Main Action"). . . . [T]he defendants filed thirteen motions to dismiss under Fed. R. Civ. P. 12(b)(6) and forum non conveniens grounds. Five of these motions were resolved by the parties. On March 10, 2011, the Bankruptcy Court conducted approximately eight hours of oral argument on the remaining eight motions. In August, the Honorable Robert E. Gerber stated that 'quite a bit of work has proceeded' in the course of preparing to rule on the motions. . . . At the close of discovery . . . the parties filed six motions for summary judgment involving issues that were not dependent on the outcome of the pending motions to dismiss. . . . Briefing on the summary judgment motions closed in November. . . . [The] defendants in the Main Action [subsequently] filed their motion to withdraw the reference. . . . Under the pre-*Stern* standard, the threshold inquiry in evaluating a request for permissive withdrawal was whether the claim was core or non-core, because that issue determined both questions of efficiency and uniformity, and the relevance of parties' jury trial rights. . . . After *Stern*, the core/non-core distinction may or may not remain relevant to a district court's withdrawal of the reference 'for cause.' . . . Withdrawal is not appropriate here because it would result in significant inefficiencies. This Court will benefit from exposure to the bankruptcy court's knowledge and expertise when it rules on the outstanding motions. The bankruptcy court has performed the yeoman's work of preparing these matters for trial. It has presided over the bankruptcy case underlying these proceedings since January 2009. It reviewed the evidence developed in Phase 1 in order to approve the settlement agreement in March 2010 and confirm the Plan in April 2010. It presided over pretrial proceedings in these matters from July 2010 until the defendants filed their motions to withdraw the reference. It oversaw discovery and motion practice,

and began work on six motions to dismiss. This Court, on the other hand, was only made aware of these proceedings in November 2011, and has not performed any work on the outstanding motions, presided over any pretrial proceedings, or overseen any discovery or motion practice. The bankruptcy court is well positioned to issue proposed findings of fact and conclusions of law or final orders or judgments on the outstanding motions, as appropriate. . . . The defendants make three primary arguments in support of their contention that withdrawal will increase efficiency. First, they claim that withdrawal is appropriate because the bankruptcy court may not enter final judgment on fraudulent conveyance claims and withdrawal would therefore eliminate unnecessary layers of litigation. Second, they contend that withdrawal is appropriate because it is unclear whether, under the bankruptcy code, the bankruptcy court can enter proposed findings of fact and conclusions of law on core Article III claims. Third, they argue in the alternative that *de novo* review of such claims is unnecessary and will create unnecessary layers of litigation. Each of these arguments is misguided. . . . For the reasons discussed above, the defendants are correct that the bankruptcy court may not enter final judgment on most of the fraudulent conveyance claims, on any non-core claims, and possibly on other claims as well. But they are mistaken that the layers of litigation that this may create are unnecessary or inefficient. Given the extensive experience the bankruptcy court has acquired in this matter, permitting it to rule on the pending motions and to conduct pre-trial proceedings will be of assistance to this Court and to the parties. . . . The defendants are wrong that there is uncertainty whether the Bankruptcy Court can enter proposed findings of fact and conclusions of law on fraudulent conveyance claims. It is clear that Bankruptcy Court can enter such orders. . . . The defendants are similarly mistaken that *de novo* review is impractical and will create unnecessary layers of litigation in this case. The defendants argue that any findings of fact by a trial court will be highly dependent on the credibility of witnesses, and that it would be inappropriate for this Court to conduct *de novo* review of a 'cold record' when the issues in the case are so dependent on live testimony. This argument is unpersuasive at this stage in the litigation, when there are pending motions and the case is not yet trial ready. This Court has no intention of allowing these matters to proceed to trial, over defendants' objections, before a court that lacks authority to enter final orders. Defendants are free to raise their witness credibility arguments again upon a renewed motion to withdraw once the pending motions have been decided and the case is ready for trial. . . . None of the other [withdrawal] factors weigh in favor of withdrawing the reference at this time. The defendants have a right to a jury trial, but they have not yet asserted this right and the case is not yet trial-ready. The Seventh Amendment conveys a guarantee of a jury trial to a party litigating a fraudulent conveyance action when the party has not filed a claim against the bankruptcy estate and the action is not integral to the restructuring of debtor-creditor relations. *Granfinanciera*, 492 U.S. at 58–59. If and when the defendants assert their jury trial rights and/or the case proceeds to trial, then, the defendants are free to move for withdrawal a second time. It is unclear whether the defendants are engaged in forum shopping or simply believe that withdrawal of the reference will reduce the time and expense of litigation. The Trustee claims that the bankruptcy court has issued discovery rulings adverse to the defendants, and claims that these rulings provided the defendants with a motive to engage in forum shopping; the defendants note that the bankruptcy court has yet to rule on any motions and argue that there is therefore no motive for forum shopping. . . . Similarly, it is unclear the extent to which withdrawal will have a negative impact on the uniformity of bankruptcy administration. The Trustee points to a number of allegedly novel issues of bankruptcy law implicated by these matters and argues that it would be useful to have the bankruptcy court's opinion on these issues in the first instance; the defendants note that the

matters of central importance in this dispute revolve around non-core claims or core Article III claims, and that the plan of reorganization was confirmed more than a year and a half ago. The defendants further note that because there is no longer an estate to administer, any concerns of uniformity of bankruptcy administration are de minimus. . . . It is not necessary to resolve the parties' differences on these issues at this time. Regardless of the defendants' true motivations for moving to withdraw or the impact of withdrawal on the uniformity of bankruptcy administration, withdrawal at this stage would result in significant inefficiencies and is inappropriate.").

KeyBank Nat'l Ass'n v. Huntington Nat'l Bank (In re Schwab Indus., Inc.), 2012 WL 910069 (N.D. Ohio Mar. 16, 2012) (Gwin, J.) ("[The t]hird-party defendants . . . move the Court to withdraw the reference of this proceeding to the bankruptcy court. . . . The motion is unopposed. Because the claims [and cross-claims] at issue [for declaratory judgments concerning the contractual rights of the parties under various agreements and breach of trust under Florida statutory and common law] are not core proceedings, and the bankruptcy court cannot adjudicate disputes reserved for Article III courts, *Stern v. Marshall*, —— U.S. ——, 131 S. Ct. 2594, 180 L. Ed. 2d 475 (2011), the Court [grants] the Defendants' motion for withdrawal of bankruptcy reference. . . . The bankruptcy court deemed the adversary proceeding to be core under 28 U.S.C. § 157(b)(2)(A) and (O). This court reviews the bankruptcy court's legal ruling *de novo*. . . . Though the bankruptcy court appears to have accepted . . . that only claims that would have no existence outside of the bankruptcy may be considered core proceedings arising in a Title 11 bankruptcy case, the bankruptcy court appears to have believed that being intimately involved with a significant portion of the discharge of a debtor's assets was enough to render a claim non-existent outside of the bankruptcy proceedings. Because the nature of the action was 'by a secured creditor seeking to recover an asset,' and successful prosecution of KeyBank's claim would enlarge the creditors' trust, the bankruptcy court reasoned, it had the form of a matter arising in a bankruptcy case. . . . But the fact that the resolution of an action may result in more or fewer assets in the estate does not make that action a core proceeding. . . . Rather, '[a] core proceeding either invokes a substantive right created by federal bankruptcy law or one which could not exist outside of bankruptcy.' . . . And the rights invoked in this proceeding could exist outside of bankruptcy. . . . Even if the proceeding were core, the bankruptcy court would lack the requisite Article III authority to preside. The fact that a proceeding may be statutorily designated as core does not mean that a bankruptcy court may adjudicate it. '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.' *Stern*, 131 S. Ct. at 2618 . . . . A claim existing independently of the Bankruptcy Code and derived entirely from state law that 'simply seeks to augment the bankruptcy estate . . . must be decided by an Article III court.' *Id.* at 2616.").

Neilson v. Entm't One, Ltd. (In re Death Row Records, Inc.), 2012 WL 1033350 (C.D. Cal. Mar. 8, 2012) (Walter, J.) (Chapter 11 Trustee of Death Row Records, Inc. and Marion "Suge" Knight, Jr. commenced an adversary proceeding against Entertainment One Ltd. ("eOne") and Koch Entertainment LP ("Koch") (collectively "Defendants") in bankruptcy court asserting the following claims for relief: (1) declaratory judgment against eOne; (2) breach of contract against eOne; (3) breach of contract against Koch; and (4) turnover and accounting against Koch. Koch demanded a jury trial with respect to claims three and four of the Complaint. '[O]n November 5, 2009, Koch

consented to have the jury trial conducted in the Bankruptcy Court. In February of 2012, shortly before the scheduled trial date, eOne and Koch filed motions to withdraw the reference. "Koch . . . [took] the position that *Stern* prohibited a non-Article III court from conducting a jury trial on claims three and four of the Complaint regardless of the parties' consent, and Koch suggested that the best course of action would be to withdraw the reference of the adversary proceeding from the Bankruptcy Court. The Trustee argued that any motion to withdraw the reference would be untimely pursuant to [the applicable] [l]ocal [b]ankruptcy [r]ule . . . [and] also represented that [he] long ago conceded that Koch had a Seventh Amendment right to a jury trial on these claims for relief." Concluding that the defendants had consented to the bankruptcy court's adjudication of the Trustee's claims, the district court denied the withdrawal motion: "[I]n *Stern*, the Supreme Court held that Congress, 'in one isolated respect' exceeded the limitations of Article III in the Bankruptcy Act of 1984, because it authorized non-Article III bankruptcy courts to enter final judgments on certain state law claims that could only be properly adjudicated by an Article III court. . . . Although the Supreme Court held that Congress may not vest in a non-Article III court the power to adjudicate, render final judgments, and issue binding orders on certain state law claims, the Supreme Court did not hold that the parties cannot themselves consent to give a non-Article III judge that power. It has long been established that there is no absolute individual right to have a claim adjudicated by an Article III court, and as such, the right is subject to waiver. . . . The Supreme Court's decision in *Stern* itself implicitly confirmed that the parties can consent to a bankruptcy judge exercising Article III power without violating the Constitution. For example, the *Stern* Court cited 28 U.S.C. § 157(c)(2), which permits a bankruptcy judge to enter final judgments in non-core proceedings with the consent of the parties, without the slightest suggestion or hint that it was constitutionally infirm . . . . Accordingly, the Court concludes that *Stern* does not affect the parties' ability to consent to a non-Article III judge exercising Article III powers—including conducting a jury trial and entering a final judgment in this adversary proceeding. . . . Because the Court concludes that the Bankruptcy Court has the constitutional authority to conduct the jury trial and enter final judgment in this adversary proceeding, and after considering the efficient use of judicial resources, delay and costs to the parties, uniformity of bankruptcy administration, the prevention of forum shopping, and other related factors, the Court concludes that Defendants, at this late stage, may not withdraw their consent to a bankruptcy judge conducting the jury trial and entering final judgment. . . . Defendants' Motion to Withdraw Reference is [denied].").

Picard v. Avellino, 2012 WL 826602 (S.D.N.Y. Feb. 29, 2012) (Rakoff, J.) ("Each of the defendants in the above captioned cases seeks mandatory withdrawal of the reference to the bankruptcy court of the underlying adversarial proceeding brought against each of them respectively by plaintiff Irving [H.] Picard, the trustee appointed pursuant to the Securities Investor Protection Act . . . . [E]ach of the defendants argues that the Supreme Court's decision in *Stern* . . . prevents the bankruptcy court from finally resolving fraudulent transfer actions because resolution of such actions requires an exercise of the 'judicial Power' reserved for Article III courts. For substantially the reasons stated in *Picard v. Flinn Invs., LLC*, 463 B.R. 280 (S.D.N.Y. 2011) the Court withdraws the reference in each case in order to address this issue.").

Bohm v. Titus (In re Titus), 2012 WL 695604 (Bankr. W.D. Pa. Feb. 29, 2012) (Markovitz, J.) (In an adversary proceeding brought by Chapter 7 trustee against the debtor—a former partner of a defunct law firm—and his wife, the trustee asserted claims under § 544(b) and the Pennsylvania

UFTA, seeking avoidance and recovery of alleged fraudulent transfers. The bankruptcy court awarded judgment in favor of the trustee. Addressing the impact of *Stern* on its authority to enter a final judgment, the bankruptcy court stated: "Because of the recent decision by the United States Supreme Court in *Stern v. Marshall* . . . an issue arises as to whether this Court has the constitutional authority to enter a final decision in a fraudulent transfer action that is brought pursuant to state law by way of § 544(b)(1). . . . [T]his very issue has been raised by certain similarly situated parties in other adversary proceedings that are presently pending before this Court. As the Court understands it, these litigants argue only that this Court lacks the constitutional authority to enter a final decision in a fraudulent transfer action brought under state law via § 544(b)(1), not that this Court lacks subject matter jurisdiction altogether regarding such an action. This Court is inclined to agree with those authorities that construe the *Stern* decision narrowly and hold that, notwithstanding *Stern*, a bankruptcy court possesses the constitutional authority to enter a final decision regarding a fraudulent transfer action that is brought pursuant to state law by way of § 544(b)(1). . . . Therefore, this Court concludes that it possesses the constitutional authority to enter a final judgment . . . . Also supporting the preceding conclusion by the Court is the fact that the Debtor removed the . . . [f]raudulent [t]ransfer [a]ction to this Court; because of such removal, the Debtor arguably consented to have this Court enter a final judgment in the . . . [f]raudulent [t]ransfer [a]ction.").

Geron v. Levine (In re Levine), 2012 WL 310944 (S.D.N.Y. Feb. 1, 2012) (Engelmayer, J.) (The district court granted the parties' joint motion to withdraw the reference of adversary proceeding in which the Chapter 7 trustee asserted fraudulent transfer claims as well as state-law claims for conversion, unjust enrichment and imposition of a constructive trust, stating: "The parties agree that apart from the fraudulent conveyance claim, all other claims in the complaint are non-core. Because the parties do not consent to final adjudication by the Bankruptcy Court as to these non-core claims, the Bankruptcy Court cannot enter final judgment as to them. . . . The right to a jury trial counsels in favor of withdrawal of the reference in this case. Here, the Trustee has demanded a jury trial. All but one of the claims in the complaint are non-core, and thus if summary judgment is not granted as to those claims, they will all be brought to trial before this Court. And even if the Court held that one core claim (fraudulent conveyance) did not implicate solely private rights and thus a final resolution of it in the Bankruptcy Court was consistent with *Stern*, only that claim could be thus resolved; the remainder of the claims would have to be resolved in a jury trial before this Court. Because the Trustee demands a jury trial, for efficiency's sake, all claims, both core and non-core, should be resolved before this Court. . . . [T]he Bankruptcy Court lacks final adjudicative authority over most, if not all, of the claims. As to the core claim, if the Bankruptcy Court grants defendants' motion, the Trustee would appeal the judgment to this Court. As to the non-core claims, if the Bankruptcy Court submits to this Court a proposed finding of fact and conclusion of law recommending that this Court grant the defendants' motion, the recommendation would be subject to de novo review. Thus, in the event that the defendants' motion was granted as to all claims, this Court would be forced to act as both trial court and appellate court, splitting the dispute into multiple claims set in differing procedural postures. . . . [I]f the Court grants either of the [cross-]motions [for summary judgment] with respect to the core claim, the parties will undoubtedly request that this Court rule, pursuant to the Supreme Court's decision in *Stern*, on whether the Bankruptcy Court had authority to enter such a final order at all. Such an inquiry would be avoided altogether if this Court were to withdraw the reference.").

Adelphia Recovery Trust v. FLP Grp., Inc., 2012 WL 264180 (S.D.N.Y. Jan. 30, 2012) (Crotty, J.) (Plaintiff brought action under §§ 544(b) and 550 seeking to avoid and recover an alleged fraudulent transfer, asserting that Adelphia, a cable company and former debtor in possession, did not receive reasonably equivalent value from defendant FLP Group, Inc. in return for Adelphia's prepetition payment of $149 million to repurchase 1.1 million shares of its stock. Upon confirmation of its Chapter 11 plan, Adelphia transferred title to the fraudulent transfer claim to the plaintiff. Prior to the Supreme Court's decision in *Stern*, the defendants in the adversary proceeding successfully opposed the plaintiff's motion to withdraw the reference to the bankruptcy court. Post-*Stern*, the defendants moved to withdraw the reference, arguing that the bankruptcy court lacked the constitutional authority to finally adjudicate the fraudulent transfer claim. Although it found that the bankruptcy court did not have constitutional power to adjudicate a fraudulent transfer claim to final judgment, the district court denied defendants' motion to withdraw the reference, stating: "Having determined that the Bankruptcy Court lacks the constitutional power to issue a final judgment in this proceeding, the Court considers whether the Bankruptcy Court has statutory or other authority to submit proposed findings of fact and conclusions of law to this Court under the Judicial Code, Fed. R. Bankr. P. 9033 or the Standing Order of Reference. This Court begins by noting that the Southern District of New York's Board of Judges recently amended its Standing Order of Reference to bankruptcy judges, giving them explicit authority to issue proposed findings and conclusions in connection with core matters that are found to fall within the *Stern* holding. In accordance with that Order, the Bankruptcy Court has the authority to issue proposed [findings] of fact and conclusions of law in this case. . . . Under 28 U.S.C. § 157(b)(1), bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11 . . . and may enter appropriate orders and judgments, subject to [deferential] review. . . . Under 28 U.S.C. § 157(c)(1), a Bankruptcy Court may hear and submit proposed findings of fact and conclusions of law to the district court, subject to de novo review, in a non-core proceeding. These provisions suggest that Congress wanted Bankruptcy Judges to finally adjudicate bankruptcy-related matters whenever Article III permitted them to do so, and to issue recommended findings subject to de novo review in the District Court whenever it did not. Understandably, the Judicial Code and Bankruptcy Rules do not specifically contemplate bankruptcy courts issuing proposed findings of fact and conclusions of law in core matters where the particular provision of 28 U.S.C. § 157(b)(2)—in this case 28 U.S.C. § 157(b)(2)(H), which designates fraudulent transfer claims as 'core'—is found to violate Article III of the Constitution. Congress's failure to anticipate *Stern*, and provide bankruptcy courts with the explicit power to issue findings of fact and conclusions of law in core matters, however, is not dispositive. . . . 'Since Congress delegated broader authority to bankruptcy courts in core matters than non-core matters, 28 U.S.C. § 157(b)(1), (c) (1), and the delegation included the authority to hear and determine all cases and enter appropriate orders, 28 U.S.C. § 157(b)(1), there appears to be no reason why bankruptcy courts cannot continue to hear all pre-trial proceedings and enter as an appropriate order proposed findings of fact and conclusions of law in the manner authorized by Section 157(c)(1).' . . . Allowing a bankruptcy judge to issue findings of facts and conclusions of law in core matters is described favorably in *Stern*: '[T]he current bankruptcy system . . . requires the district court to review de novo and enter final judgment on any matters that are "related to" the bankruptcy proceedings, and permits the district court to withdraw from the bankruptcy court any referred case, proceeding or part thereof. [Respondent] has not argued that the bankruptcy courts are barred from hearing all counterclaims or proposing findings of fact and conclusions of law on these matters, but rather that it must be the district court that

finally decides them. We do not think the removal of counterclaims such as [Petitioner's] from core bankruptcy jurisdiction meaningfully changes the division of labor in the current statute.' [*Stern*,] 131 U.S. S. Ct. 2620. Removing fraudulent transfer actions from bankruptcy court jurisdiction would meaningfully change the division of labor between bankruptcy and district courts. . . . Thus, the logical conclusion (and the most realistic one too) is that bankruptcy courts may issue proposed findings of facts and conclusions of law in such fraudulent transfer actions.").

S. La. Ethanol, LLC v. CHS-SLE Land, LLC, 2012 WL 208828 (E.D. La. Jan. 23, 2012) (Zainey, J.) (Reorganized debtor in liquidating Chapter 11 case filed postconfirmation state court judicial dissolution proceedings against defendants, which removed the case to district court. After the district court referred the adversary proceeding to the bankruptcy court, the defendants moved to withdraw the reference. The district court denied the motion, stating: "This Court is persuaded that *Stern* does not draw the validity of the reference into question under the facts of this case so as to mandate withdrawal of the reference. Moreover, the pre-*Stern* standards that govern permissive withdrawal of a reference continue to be valid, and the movant has not established that withdrawal is appropriate under those standards. . . . It is not clear to this Court whether the status of the bankruptcy proceedings is such that bankruptcy jurisdiction continued to exist when this case was removed to federal court. Remand may very well be appropriate in this case if the bankruptcy court concludes that it no longer has jurisdiction over cases related to [debtor's] bankruptcy or that the standards governing abstention apply here. If *Stern* concerns prevent the bankruptcy court from taking this action on its own then the parties should note that this Court would give great deference to any proposed findings and conclusions pursuant to 28 U.S.C. § 157(c)(1) recommending remand to state court.").

S. La. Ethanol, LLC v. Agrico Sales, Inc., 2012 WL 174646 (E.D. La. Jan. 20, 2012) (Zainey, J.) (Reorganized debtor in liquidating Chapter 11 case filed postconfirmation adversary proceeding against the defendant, bringing claims for "[b]reach of [c]ontract of [d]eposit, [n]egligence, [c]onversion and [d]issolution of [c]ontract." The defendant "filed a Motion to Withdraw Reference in which it states that it opts to have the adversary proceeding transferred to district court so that the district court can take up [its] pending motion to dismiss. Via its reply memorandum [defendant] suggests that federal jurisdiction is lacking in this case and that the bankruptcy court cannot adjudicate this matter in light of *Stern v. Marshall*." The district court denied the withdrawal motion, reasoning: "The Court is persuaded that *Stern* changes nothing for the instant case and has no direct impact on whether the automatic reference should be withdrawn. In contrast to what happened in *Stern*, [the reorganized debtor's] adversary complaint does not fall into one of the categories that Congress attempted to deem as core under § 157(b)(2). The adversary complaint raises issues of state law and the claims exist wholly outside of Title 11. Under the pre-*Stern* jurisprudence [the reorganized debtor's] adversary complaint was clearly a non-core matter as contemplated by § 157(c)(1). *Stern* changed nothing about § 157(c)(1) except perhaps to clarify that some matters that Congress had statutorily deemed to be core would now have to be treated as non-core and therefore referred under § 157(c)(1) instead of § 157(b)(1). . . . [W]hen a case is in federal court solely because it is related to a bankruptcy then it should be referred to the bankruptcy judge presiding over the bankruptcy at issue. If the case is of such a nature such that a federal forum is not necessary so as to effectuate the bankruptcy then the appropriate course of action may very well be abstention under § 1334(c) but it is not withdrawal of the reference to place the matter before

a district judge who has no familiarity with the bankruptcy case. And this Court is persuaded that the bankruptcy judge, who is intimately familiar with the bankruptcy case itself, is uniquely well-suited to determine whether a case should be 'close at hand' in federal court for the purpose of protecting the bankruptcy process or whether abstention is appropriate.").

Field v. Trust Estate of Rose Kepoikai (In re Maui Indus. Loan & Fin. Co.), 2011 WL 6934757 (D. Haw. Dec. 29, 2011) (Kobayashi, J.); ***Field v. Trust Estate of Rose Kepoikai (In re Maui Indus. Loan & Fin. Co.)***, 2011 WL 6934571 (D. Haw. Dec. 29, 2011) (Kobayashi, J.) (The complaint filed by the Chapter 7 trustee in the adversary proceedings alleged that the debtor had been operated as a Ponzi scheme. "[The trustee asserted] the following . . . claims, seeking to avoid the transfers from [debtor] to the [d]efendants: (1) fraudulent transfer (11 U.S.C. § 548); (2) transferee liability (11 U.S.C. § 550); (3) state law fraudulent transfer [under the Hawaii UFTA]; (4) strong arm powers (11 U.S.C. § 544); (5) unjust enrichment/constructive trust; (6) aiding and abetting/participation in breach of fiduciary duty; and (7) [claims under the] Uniform Fiduciaries Act . . . . [Defendants] argue under *Stern v. Marshall* . . . that a bankruptcy judge lacks authority to enter a final judgment on a claim that is traditionally adjudicated by Article III courts and does not involve 'public rights.' In this adversary proceeding, they argue that the fraudulent transfer claims are essentially common law claims that do not involve 'public rights,' and the bankruptcy court lacks constitutional authority to enter final judgment on these claims. . . . This Court agrees with the . . . conclusion that, even if the bankruptcy court does not have jurisdiction to enter a final judgment on the fraudulent concealment claims—an issue this court need not decide at this time—the bankruptcy court may enter findings and recommendations. . . . [N]either judicial economy nor substantial prejudice to Defendants require the immediate withdrawal of the reference. Withdrawal of the reference at this stage would result in this Court losing the benefit of the bankruptcy court's experience in both the law and facts, and leading to an inefficient allocation of judicial resources. . . . The parties are . . . [directed] to file an appropriate motion renewing their request to withdraw the reference when the bankruptcy court has sufficiently resolved the core matters, including the fraudulent transfer claims.").

Dev. Specialists, Inc., v. Orrick, Herrington & Sutcliffe, LLP, 2011 WL 6780600 (S.D.N.Y. Dec. 23, 2011) (McMahon, J.) ("[I]t would promote the [efficient] allocation of judicial resources if claims brought by bankruptcy trustees against non-creditor third parties in order to recover estate assets—whether they could be finally adjudicated by a Bankruptcy Judge or not—were in most instances supervised through the pretrial process in the Bankruptcy Court. . . . A district court would be foolish, in such circumstances, not to cede to the Bankruptcy Court the task of pre-trial supervision and preliminary determination (via Report and Recommendation) of dispositive motions. *Stern* creates no impediment to so doing, . . . and the reference can readily be withdrawn when the case is trial-ready if the parties still do not consent to allow the Bankruptcy Court to preside at trial. In this sense, the district court would be using the Article I Bankruptcy Judge in the same manner as it routinely employs Article I Magistrate Judges: to supervise discovery, rule on non-dispositive motions, and report and recommend on dispositive motions." The court concluded, however, that withdrawal of the reference was appropriate because "the 'unfinished business claims' [*i.e.*, claims under New York contract and partnership law for recovery of profits attributable to unfinished business taken by former partners of the debtor, Coudert Brothers LLP, to their new jobs at Orrick, Herrington & Sutcliffe, LLP] involve a pure—and novel—issue of New York law.

Although [the bankruptcy judge] has spoken to the legal viability of those claims, the Bankruptcy Court has no particular expertise to bring to bear on resolving it; and the Bankruptcy Judge's intimate familiarity with the facts of Coudert's demise give him no edge over this court where this particular issue of law is involved.").

Stettin v. Centurion Structured Growth LLC, 2011 WL 7413861 (S.D. Fla. Dec. 19, 2011) (Jordan, J.) (Chapter 11 trustee of the debtor—a law firm engaged in "multi-million dollar Ponzi scheme" involving the "sale of fictitious confidential structured settlements purportedly between the law firm's clients and third parties"—filed adversary proceeding against the defendants, which were hedge funds and "feeder funds" that invested in "the Banyon entities." The debtor had formed the Banyon entities as vehicles to be used for the purpose of soliciting "funds to purchase the law firm's settlements." In the adversary proceeding the trustee sought "to avoid and recover fraudulent transfers [allegedly received by the defendants] and other related relief." Defendants moved to withdraw the reference, arguing that "cause exists to withdraw the reference because they are entitled to a jury trial under the Seventh Amendment on the claims asserted against them in the adversary proceeding and have not consented to trial before the bankruptcy court." The court granted the motion to withdraw the reference stating: "The defendants have neither filed nor otherwise asserted any claim against the estate or the disputed *res*. Accordingly, the trustee's fraudulent conveyance action cannot be considered part of the claims adjudication process or integral to the restructuring of debtor-creditor relations. As a result, I find that the defendants have not submitted themselves to the jurisdiction of the bankruptcy court or lost their Seventh Amendment right to a jury trial in this adversary proceeding by filing the proofs of claim on behalf of the Banyon entities. . . . Accordingly, cause exists for the withdrawal of the reference, *see* 28 U.S.C. § 157(d), but I do not find that complete withdrawal is appropriate at this time. The bankruptcy court will continue to handle all pretrial matters. . . . However, in an abundance of caution, in light of the Supreme Court's recent opinion in *Stern v. Marshall* . . . and the uncertainties concerning the extent of its application, all dispositive motions shall be referred to the bankruptcy court only for report and recommendation.").

S. Elec. Coil, LLC v. FirstMerit Bank, N.A., 2011 WL 6318963 (N.D. Ill. Dec. 16, 2011) (Kendall, J.) (The plaintiff, the widow of the partial owner of the debtor in possession, filed a state court action against a bank and financial services firm seeking to prevent the bank from liquidating a securities account that plaintiff's husband had pledged to secure his guaranty of the bank's loans to the DIP. "[T]he [DIP] filed a notice of removal removing the state court lawsuit to the Bankruptcy Court for the Northern District of Illinois, . . . arguing that the [adversary] proceeding would affect the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the debtor-equity security holder relationship, pursuant to 28 U.S.C. § 157(b)(2)(O)." The bank filed a motion to withdraw the reference, asserting "that the Bankruptcy Court does not have jurisdiction and requesting that this District Court adjudicate the issues raised in the underlying Adversary Case 'for cause shown' pursuant to 28 U.S.C. § 157(d)." The district court denied the withdrawal motion, stating: "The parties . . . dispute the import of the holding in the Supreme Court's recent decision in *Stern v. Marshall* on whether the Bankruptcy Court may even conduct fact-finding . . . . [The bank] argues that *Stern's* holding mandates that the present reference be withdrawn thereby precluding the Bankruptcy Court from conducting fact-finding. The Court disagrees with such an overly broad application of the holding, because while the Supreme Court held at least part of the

statutory scheme unconstitutional, it explicitly stated that 'the question presented here is a "narrow" one' applying only to certain claims. Further, the *Stern* Court, albeit in dicta, stated that its ruling did not preclude a bankruptcy court from hearing counterclaims and proposing findings of facts. . . . [T]his Court declines to extend *Stern*'s constitutionality analysis to a different claim within § 157(b)(2) when the Bankruptcy Court is best poised to perform the analysis when the parties involved dispute the potential outcome's effect on the Debtor's estate.").

Michaelson v. Golden Gate Private Equity, Inc. (In re Appleseed's Intermediate Holdings, Inc.), 2011 WL 6293251 (D. Del. Dec. 15, 2011) (Irenas, J.) (Defendants moved to withdraw the reference of adversary proceeding commenced by litigation trustee following Chapter 11 plan confirmation. The district court noted that "[t]he parties agree that four out of the five claims against the [Defendants are core]. 'Core proceedings include . . . proceedings to determine, avoid, or recover fraudulent conveyances.' 28 U.S.C. § 157(b)(1)(H). Four of the five claims against the [Defendants] fall under this statute. In this case, Plaintiff and the . . . Defendants both argue that the Bankruptcy Court may not have the authority to enter final judgments in this case. *See Stern*, —U.S.—, 131 S. Ct. 2594, 180 L. Ed. 2d 475. Thus, after fully litigating the case, if the Bankruptcy Court did not have authority to enter final judgments, the parties could potentially have to re-litigate the entire case. While the Court has serious doubts that *Stern* requires such a result, there is no doubt that the case has spawned significant confusion. To avoid confusion and future collateral attacks on a judgment issued by the Bankruptcy Court, the prudent action is to withdraw the reference at this juncture."). [W]ithdrawing the reference would promote uniformity in bankruptcy administration in this particular case insofar as all decisions would originate from one court. If this Court did not withdraw the reference, different standards of review would apply to different claims, depending on whether the claim was core or non-core. This could result in the application of different facts to different claims in the same case. For example, if the Bankruptcy Court found a certain fact relevant in both a core and a non-core claim, but this Court found that fact to be erroneous, though not clearly erroneous, then this Court would be required to accept that fact for the core claim and reject that fact for the non-core claim. Uniformity in bankruptcy administration would not be promoted by such an irrational result.").

Schwartz v. Deutsche Bank Nat'l Trust Co. (In re Schwartz), 2011 U.S. Dist. LEXIS 144470 (D. Mass. Dec. 15, 2011) (Young, J.) (Following trial in bankruptcy court, judgment was rendered in favor of Deutsche Bank and Homeq Servicing Corp. on debtor's claims for wrongful foreclosure, fraud, a declaration that the defendants' mortgage was void, violation of Chapter 93A of the Massachusetts Consumer Protection Act, unfair servicing practices, intentional infliction of emotional distress and unfair debt collection practices. The bankruptcy court granted judgment for the defendants. Thereafter, the bankruptcy court granted debtor's motion for a new trial on the wrongful foreclosure claim and ultimately rendered judgment in favor of the debtor on this claim. The defendants appealed to the district court. Deutsche Bank and Homeq Servicing ultimately dismissed their appeal, and the debtor's cross-appeal of the bankruptcy court's judgment in favor of the defendants on the debtor's remaining claims for relief went forward. The district court affirmed the bankruptcy court's dismissal of debtor's claim for intentional infliction of emotional distress because the debtor had failed to file a timely notice of appeal and also affirmed its determination that the debtor was not entitled to a judgment declaring Deutsche Bank's lien void. After expressing concern about the bankruptcy court's constitutional authority to enter final

judgment on the remaining claims asserted by the debtor in the adversary proceeding, the district court withdrew the reference for these claims on its own motion in order "to preserve a higher interest"—effectively treating the bankruptcy court's prior judgment as proposed conclusions of law. The district court stated: "Here, the Court withdraws the reference for these proceedings on these counts in the interest of judicial economy and to ensure that the adversary proceeding conforms with the constitutional requirements elucidated in *Stern v. Marshall* . . . . At this juncture, the Court expresses no opinion on *Stern v. Marshall's* reach. Rather, it simply appears to be the better part of valor to assume responsibility for the further course of these proceedings now. The careful work of the Bankruptcy Judge is, of course, entitled to all proper deference.").

Stettin v. Gibraltar Private Bank & Trust Co. (In re Rothstein Rosenfeldt Adler, P.A.), 2011 WL 7413914 (S.D. Fla. Nov. 28, 2011) (Scola, J.) (In Chapter 11 case of law firm that operated a Ponzi scheme, trustee brought adversary proceeding against the defendant, asserting preference and fraudulent transfer claims as well as a variety of common law claims, including aiding-and-abetting, breach-of-fiduciary-duty and conversion claims. Initially, the district court "withdrew the reference to the bankruptcy court for purposes of trial, but left in place the reference as to all other matters, including dispositive pretrial motions." Thereafter, the defendant sought reconsideration of the order withdrawing the reference "based upon the Supreme Court's decision in *Stern v. Marshall* . . . which [the defendant] contend[ed] precludes the bankruptcy court from adjudicating case dispositive motions. . . . [The defendant] sought a new order withdrawing the reference as to trial and pretrial dispositive motions." The district court granted the motion for reconsideration: "In *Stern,* [t]he Supreme Court merely held that Congress exceeded its authority under the Constitution in one isolated instance by granting bankruptcy courts jurisdiction to enter final judgments on counterclaims that are not necessarily resolved in the process of ruling on a creditor's proof of claim. . . . As a number of courts have recognized recently, *Stern* issued a very narrow, case specific holding. . . . Indeed, the Court itself was quick to emphasize that 'the question presented here is a "narrow" one' and 'our decision today does not change all that much' in bankruptcy law. *See Stern,* 131 S. Ct. at 2620. . . . Nevertheless, given *Stern*'s relatively new vintage and the uncertainties concerning the full extent of its applications, . . . the Court will withdraw the reference as to any case dispositive motions. Pursuant to 28 U.S.C. § 157(c)(1), however, all such motions shall be referred to the bankruptcy court for proposed findings of fact and conclusions of law. This procedure strikes an appropriate balance of the interests at stake, while also respecting the self-described narrowness of the Supreme Court's decision in *Stern*.").

McCarthy v. Wells Fargo Bank, N.A. (In re El-Atari), 2011 WL 5828013 (E.D. Va. Nov. 18, 2011) (Brinkema, J.) ("Finding that *Stern* precludes bankruptcy judges from issuing final orders in fraudulent conveyance proceedings does not, however, lead inexorably to the further conclusion that defendant's motion for withdrawal of the reference must be granted, because bankruptcy courts also have jurisdiction to 'hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11.' § 157(c)(1). Under this provision, after overseeing discovery and taking evidence, the bankruptcy judge submits proposed legal and factual findings to the district court, which then reviews the matter de novo and issues a final decision. . . . Regardless of whether the effect of *Stern* was to remove certain proceedings from the list of 'core proceedings' under § 157(b)(2) or simply to strike the phrase 'and determine' from § 157(b)(1), it does not follow that bankruptcy courts have lost all power to hear a fraudulent conveyance proceeding. Even if a

fraudulent conveyance action, such as the one brought against [defendant], has lost its vaunted status as a core proceeding, it is clearly 'related to a case under title 11.' . . . As such, the bankruptcy court retains the authority to 'submit proposed findings of fact and conclusions of law' that the district court then considers before entering a final judgment.").

Walker, Truesdell, Roth & Assocs. v. Blackstone Grp., L.P. (In re Extended Stay, Inc.), 2011 WL 5532258 (S.D.N.Y. Nov. 10, 2011) (Scheindlin, J.) ("In holding that *Stern* does not mandate withdrawal of these five actions, I do not reach the issue of how *Stern* applies to each of the 125 claims at issue. The bankruptcy court is capable of making that determination initially, subject to de novo review by this Court. In the event that the bankruptcy court does not have constitutional authority to enter a final judgment on certain claims, it may submit proposed findings of fact and conclusions of law to this Court. Withdrawing the reference simply due to the uncertainty caused by *Stern* is a drastic remedy that would hamper judicial efficiency on the basis of a narrow defect in the current statutory regime identified by *Stern*. Neither the Supreme Court nor most of the courts to consider *Stern* have given it the expansive effect advocated by plaintiffs. Accordingly, *Stern* does not provide a basis independent of section 157(d) for mandatory withdrawal in these five actions.").

Boyd v. King Par, LLC, 2011 WL 5509873 (W.D. Mich. Nov. 10, 2011) (Bell, J.) (Chapter 7 trustee asserted fraudulent transfer and alter ego claims against corporate debtor's former president. The fraudulent transfer claims were based on § 544(b) (and the Michigan UFTA) and § 548. Defendant "moved to withdraw the bankruptcy reference [claiming] he is entitled to a jury trial before an Article III judge, and because the Bankruptcy Court does not have jurisdiction to enter a final judgment." The district court found that withdrawal of the reference was not warranted, reasoning: "On the issue of the bankruptcy court's ability to enter a final judgment, the Court must bear in mind the Supreme Court's recent determination in *Stern v. Marshall* . . . that the 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.' There is considerable disagreement and uncertainty as to the extent to which *Stern* will impact the bankruptcy court's authority to enter final judgments in other core proceedings. [E]ven if there is uncertainty regarding the bankruptcy court's ability to enter a final judgment on any or all of the claims against [the] Defendant . . . that does not deprive the bankruptcy court of the power to entertain all pre-trial proceedings, including summary judgment motions. . . . The important considerations in this case are what is the most efficient use of judicial resources, and what will promote uniformity of bankruptcy administration. The answer is unquestionably to leave this case with the bankruptcy court for pretrial proceedings. The bankruptcy court is familiar with the debtor's estate, the bankruptcy court has already become familiar with the parties to this adversary proceeding, the issue of fraudulent conveyances is a core bankruptcy matter, and allowing the bankruptcy court to oversee discovery and other pre-trial matters will promote uniformity of bankruptcy administration. If, after discovery and the resolution of the motions, it appears that there are matters that require a jury trial, the bankruptcy court will advise this Court that the matter is ready for a final pretrial conference.").

City Bank v. Compass Bank, 2011 WL 5442092 (W.D. Tex. Nov. 9, 2011) (Cardone, J.) ("[E]ven if a matter is a core proceeding under the statute, the Supreme Court recently held [in *Stern*] that Article III of the Constitution prohibits a bankruptcy court from entering final judgment on a state law claim that is independent of a federal statutory scheme. . . . For the purpose of this [m]otion to

[withdraw the reference] [of adversary proceeding in which plaintiff asserted a fraudulent transfer claim as well as claims for fraud, conversion and tortious interference with contractual relations], the Court assumes without deciding, that the fraudulent transfer claim is non-core. Accordingly, this factor may cut in favor of granting the motion to withdraw the reference to bankruptcy court to avoid the possibility of the two step process—i.e. when the bankruptcy court submits proposed findings of fact and conclusions of law, and then the district court enters final judgment after de novo review. Nevertheless, it is more efficient here to allow the case to proceed in the bankruptcy court. . . . [T]he Court assumes for the purposes of th[e] [withdrawal] [m]otion, but does not decide, that [plaintiff] has a jury trial right. . . . Motions to withdraw pose significant risks of forum shopping because a party can first observe the bankruptcy judge's rulings, and then decide whether to bring the motion. . . . If the party likes the bankruptcy judge's rulings, then the party will not bring the motion. . . . But if the party dislikes the rulings, then the party could bring a motion to withdraw. . . . By waiting to decide the withdrawal motion until the eve of a jury trial, the district court takes this power out of the hands of the parties. A bankruptcy judge can manage the pretrial issues with the potential for de novo review in the district court. And if a jury trial becomes necessary, a party can then move to withdraw the case at that time.").

Siegel v. FDIC (In re IndyMac Bancorp Inc.), 2011 WL 2883012 (C.D. Cal. July 15, 2011) (Klausner, J.) (In its capacity as receiver for IndyMac Bank, the FDIC filed a proof of claim against the bankruptcy estate of IndyMac Bancorp, in which the FDIC asserted a claim for, among other things, $50 million of tax refunds. The Chapter 7 trustee brought an adversary proceeding against the FDIC objecting to the proof of claim and counterclaiming for declaratory relief on the issue of the ownership of the tax refunds. The FDIC sought to withdraw the reference to the bankruptcy court with respect to the trustee's counterclaim regarding the ownership issue; the trustee opposed the request. Following *Stern*, the district court held that the bankruptcy court would not have the authority to enter a final judgment on the trustee's counterclaim because "the ownership dispute arises out of . . . a prepetition state-law contract claim." Citing the bankruptcy court's familiarity with the case and other factors bearing on judicial efficiency, however, the district court declined to withdraw the reference.).

Parks v. Persels & Assocs., LLC (In re Kinderknecht), 2012 WL 1252687 (Bankr. D. Kan. Apr. 13, 2012) (Nugent, J.) ("I first re-examine my authority to enter a final order on the defendants' summary judgment motion. The defendants timely demanded a jury trial on all of the trustee's claims and withheld their consent to a bankruptcy judge conducting that jury trial. In making my recommendation to the District Court concerning their initial motion to withdraw the reference, I concluded that the motion should be deferred pending my deciding the summary judgment motion now before me and that the reference should be withdrawn as to any surviving actions. Nothing offered by the defendants in support of their renewed *Stern* motion changes that view. . . . Of the trustee's five causes of action, only her fraudulent transfer claim is a core proceeding under 28 U.S.C. § 157(b)(2)(H). Defendants are entitled to a jury trial on that claim, but that fact does not preclude my entering a final order granting summary judgment if that is warranted. The balance of the trustee's claims are non-core proceedings that are, at best, related to the case as that term is used in § 157(c)(1). Whether they are matters of private right or not, I remain empowered to decide them and submit proposed findings of fact and conclusions of law to the District Court for its review. As I have noted in my recently-entered order in . . . similar litigation, I do not consider these cases to

be at all similar to the circumstances in *Stern v. Marshall*, nor is my jurisdiction of them limited by the rule in that case: that bankruptcy courts lack the power to enter a final judgment on a counterclaim against a claimant under § 157(b)(2)(C). Neither of these defendants is a claimant in [debtor's] bankruptcy and the trustee's claims are not counterclaims. Therefore, except with respect to any order I may enter on the § 548(a) fraudulent transfer claim, my findings of fact and conclusions of law made in determining the instant summary judgment motion should be deemed proposed findings of fact and conclusions of law under Fed. R. Bankr. P. 9033.").

City of Alexandria v. Symbiotic Partners, LLC (In re N.R. Grp., L.L.C.), 2011 WL 7444637 (Bankr. W.D. La. Dec. 2, 2011) (Hunter, J.) ("The [adversary proceeding came] before the bankruptcy court on its sua sponte review of the Complaint for Declaratory Judgment, to Annul a Tax Sale, and to determine the extent and validity of a lien or ownership interest in real property once leased by the debtor pursuant to a lease which was deemed rejected as of July 17, 2009. . . . This court suggests that the validity of the tax sales of the real property once leased by the debtor under 11 U.S.C. § 365 may fall beyond the bankruptcy court's constitutionally permissible 'related to' jurisdiction, particularly after *Stern*. Although the Supreme Court did not expressly address rejection rights, the conclusion that the reasoning therein confirms Constitutional restraints on the Bankruptcy Court's jurisdiction is inescapable with regard to 'related to' jurisdiction under 28 U.S.C. § 1334. While the dissent in *Stern* notes that the Bankruptcy Courts frequently encounter disputes between a landlord and third parties who have some relationship with the debtor and the administration of the bankruptcy estate, over which the United States District Courts have exclusive jurisdiction, such a relationship here is lacking. [As the] . . . Complaint [states][,] '[t]he Debtor is no longer a lessee of the property and the lease has been deemed rejected by final Order of this Court. The Debtor at no time owned the real property. . . . The Trustee has asserted no estate interest in or claim to the real property. The [plaintiff] shows that the property is not property of the estate and the Chapter 7 Trustee exercises no control over the immovable property and further that the lease is no longer executory.' . . . This Court cannot justify the exercise of jurisdiction in the above-captioned adversary complaints regarding state law causes of action concerning the validity of tax sales to third parties, of property already determined by the District Court to be owned by the former lessor of the debtor. . . . For the reasons stated in this Report and Recommendation, this Court [recommends] that the District Court withdraw the reference [of the [a]dversary [p]roceeding[ ]").

Cappello Capital Corp. v. Americanwest Bank (In re AmericanWest Bancorporation), 2011 WL 6013779 (Bankr. E.D. Wash. Dec. 2, 2011) (Williams, J.) ("The California District Court decision determined that 'related to' jurisdiction exists. The existence of state law counterclaims by [the defendant in the adversary proceeding] raises issues under the recent decision *Stern v. Marshall* . . . . That decision will require the final judgment in this adversary, if not to all issues, at least as to some issues, to be made by the U.S. District Court of the Eastern District of Washington. Remand [to the California state court] is not advisable as jurisdiction over controversies which require application of bankruptcy law and procedures rests primarily in the federal courts. Because of the state law issues in this adversary . . . this Court will recommend withdrawal of reference by the District Court. It is the District Court which has the authority to determine if withdrawal of reference, either in whole or in part, should occur. The District Court may determine it should manage this adversary and the new adversary or determine that this Court should preside over both or either until trial is

conducted by the District Court. Assuming application of *Stern v. Marshall*, . . . it is the District Court which must enter final judgment.").

Small v. Seterus, Inc. (In re Small), 2011 WL 7645816 (Bankr. S.D. Ala. Nov. 22, 2011) (Mahoney, J.) ("[T]he United States Supreme Court's recent decision in [*Stern*] guides the instant analysis. In that case, the Supreme Court held that a bankruptcy court lacked constitutional authority to enter a final and binding order as to a state law counterclaim asserted by the debtor in her bankruptcy case. At a minimum, the *Stern* decision calls into question this bankruptcy court's authority to enter a final order with regard to causes of action that are non-core and not integral to the bankruptcy case. Here, the Plaintiff asserts six pre-petition causes of action that find their basis in state law[,] [including (1) wrongful foreclosure, (2) negligence, (3) wantonness, (4) breach of fiduciary duty, (5) defamation, and (6) breach of the mortgage agreement]. With that in mind, this Court finds that withdrawal of the reference is not compelled by § 157(d) because the resolution of the Plaintiff's complaint does not require substantial and material interpretation of non-bankruptcy federal law. However, withdrawal is likely mandatory under *Stern v. Marshall*. Plaintiff's claims are non-core, state law claims that are not integral to the bankruptcy case. Plaintiff's suit is not a claim against the estate. Rather, any recovery by the Plaintiff would become an asset of the estate. The *Stern* decision counsels that this Court cannot enter a final judgment as to those claims. Further, permissive withdrawal is appropriate in this case. The Plaintiff demands a jury trial as to every count alleged and seeks compensatory and punitive damages. The Plaintiff has the right to seek a jury trial as to her claims and this Court does not, at present, have the authority to try jury trial matters. This Court finds sufficient cause to withdraw the reference based on the nature of the Plaintiff's causes of action, request for a jury trial, and requested relief. The District Court could also conclude that abstention from the matters might be appropriate pursuant to 28 U.S.C. § 1334(c)(2). That section provides that a proceeding based upon 'state law claim[s] or state law cause[s] of action' that could not have been brought in federal court without bankruptcy court jurisdiction may be subject to abstention. This Court has the present ability and constitutional authority to handle all discovery and pretrial issues up to the point of trial. If the matter cannot be resolved, through settlement or otherwise, during that pretrial period, this Court recommends that the District Court withdraw the reference at that time in order to conduct a jury trial regarding Plaintiff's six causes of action.").

C. ABSTENTION

Schmidt v. Klein Bank (In re Schmidt), 453 B.R. 346 (B.A.P. 8th Cir. 2011) (Federman, J.; Venters, J.; Saladino, J.) (Lender commenced actions in state court seeking replevin and other relief against several corporate borrowers and the corporations' shareholders, who guaranteed the debt. After bankruptcy filings by the shareholders/guarantors, the pending state court actions were removed to the bankruptcy court. The lender moved for remand of the replevin actions to state court, asserting that it had satisfied all the elements for mandatory abstention under 28 U.S.C. § 1334(c)(2) —including the requirement that the claims in the state court action were non-core. The bankruptcy court denied the motion for remand, holding that the replevin claims were core under 28 U.S.C. § 157(b)(2)(A), (B) and (O). "The [b]ankruptcy [c]ourt concluded that mandatory abstention did not apply because the [r]eplevin [a]ctions, even the parts seeking relief against the non-debtor

corporations and the corporations' assets, are core to the [d]ebtors' bankruptcy cases." On appeal, the bankruptcy appellate panel reversed the bankruptcy court's decision, holding that the bankruptcy court erred in finding that the replevin actions were core, and remanded on the question of whether the matters could be timely adjudicated in state court. The panel reasoned: "Replevin [a]ctions do not 'arise under' Title 11 because they do not involve causes of action expressly created or determined by the Bankruptcy Code, nor do they involve a right created by federal bankruptcy law. In addition, they do not 'arise in' the bankruptcy cases because they would, and indeed did, exist regardless of the bankruptcy filing. Nevertheless, the [b]ankruptcy [c]ourt determined that the [r]eplevin [a]ctions were core, concluding that they may fall within as many as three of the sixteen different types of core proceedings enumerated in 28 U.S.C. § 157(b)(2). . . . However, in *Stern* the United States Supreme Court rejected the notion that § 157 embodies a category of matters that are core, but do not arise under or arise in a bankruptcy case. As the Court stated, 'core proceedings are those that arise in a bankruptcy case or under title 11.' That is so regardless of whether the matter can be fitted into one of the enumerated examples in § 157(b)(2). Since the Replevin Actions do not arise under or arise in the [d]ebtors' bankruptcy cases, they are, simply, not core. . . . Certainly, if [the lender] were to file proofs of claim in the [d]ebtors' bankruptcy cases based on the guaranties, the resolution of those claims would be core, inasmuch as the allowance or disallowance of claims against a debtor's bankruptcy estate is a matter that arises under the Bankruptcy Code pursuant to 11 U.S.C. § 502. However, while filing proofs of claim in the [d]ebtors' bankruptcy cases makes the [lender's] claims against the [d]ebtors core, it does not make its claims against the non-debtor corporations core. . . . [A]bsent extraordinary circumstances, if a principal wishes to use the Bankruptcy Code to protect the assets of its corporation, or wants a bankruptcy court to decide causes of action against the corporation, it needs to file a bankruptcy case on behalf of the corporation.").

Garner v. BankPlus, 2012 WL 1232323 (S.D. Miss. Feb. 29, 2012) (Lee, J.) ("Subsection (b)(2) provides a list of sixteen categories of 'arising under' and 'arising in' proceedings, some specific and others more general. *See Stern v. Marshall*, 131 S. Ct. 2594, 2605 (2011) (holding that 'core proceedings are those that arise in a bankruptcy case or under Title 11[,]' and explaining that '[t]he detailed list of core proceedings in § 157(b)(2) provides courts with ready examples of such matters.'). BankPlus submits that two of the general categories apply here, namely, § 157(b)(2)(A), which includes 'matters concerning the administration of the estate,' and 157(b)(2)(O), which includes 'other proceedings affecting . . . the adjustment of the debtor-creditor relationship.' BankPlus reasons that this case concerns the administration of the debtors' bankruptcy estates, first, because the debtors' causes of action herein are property of their bankruptcy estates, and second, because plaintiffs' complaint seeks enforcement of an alleged modification of loans as to which BankPlus is a creditor in the bankruptcy proceedings, or put another way, because the plaintiffs are suing in this case to modify obligations that are involved in the pending bankruptcies. BankPlus further submits that since plaintiffs seek herein a restructuring of their loan obligations, then their claims fit within subsection (O) as they seek to affect the adjustment of the debtor-creditor relationship. . . . The Fifth Circuit has cautioned against a broad reading of these 'catch-all' provisions; otherwise, the entire range of proceedings under bankruptcy jurisdiction—including claims that qualify as merely 'related to' the bankruptcy case—would fall within the scope of core proceedings, a result contrary to the purpose of the 1984 Bankruptcy Act. . . . Regardless of how it is interpreted, any fair reading of [*Stern*], confirms that the catch-all provisions must be read

narrowly. . . . Contrary to BankPlus's urging, plaintiffs' claims in this cause are not core simply because they are an asset of the bankruptcy estates. This action is not a proceeding that could arise only in the context of a bankruptcy. None of plaintiffs' claims implicates the peculiar rights and powers of bankruptcy, nor do any of the claims depend on the bankruptcy laws for their existence. . . . The claims do not involve a substantive right provided by title 11, nor is any of a nature that it could arise only in the context of a bankruptcy case or based on any right created by the federal bankruptcy law. . . . Rather, all the claims are based entirely on state law. Plaintiffs' causes of action arose entirely before the debtors filed their bankruptcy petitions and, but for the bankruptcy filings, could have proceeded in state court. . . . Therefore, the court finds that plaintiffs' claims in this suit are non-core proceedings. From this conclusion, it follows that mandatory abstention applies, and that plaintiffs' motion is therefore due to be granted.").

Turturici v. Nat'l Mortg. Servicing, LP, 2011 WL 4480169 (E.D. Cal. Sept. 26, 2011) (Mueller, J.) (The bankruptcy court dismissed an adversary proceeding after determining that discretionary abstention was appropriate. On appeal, the district court affirmed: "The court acknowledges the recent decision of the United States Supreme Court in *Stern*[,] [in which] the Court found that the bankruptcy court did not have the constitutional authority to enter final judgment on plaintiff's state law-based counterclaim. . . . However, *Stern* is inapplicable in the present case; unlike in *Stern*, here the bankruptcy court did not enter final judgment . . . but rather exercised its discretion to abstain.").

D. SUBMISSION OF PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW IN MATTERS THAT ARE STATUTORILY CORE BUT CONSTITUTIONALLY NONCORE

Ortiz v. Aurora Health Care, Inc. (In re Ortiz), 665 F.3d 906 (7th Cir. 2011) (Tinder, J.; Williams, J.; Gottschall, J.) (The Seventh Circuit held that, "[l]ike the debtor's counterclaim in *Stern v. Marshall*, the debtors' claims [against a medical provider for disclosing the debtors' medical information in the provider's proofs of claim] are based on a state law that is independent of the federal bankruptcy law and not necessarily resolvable by a ruling on the creditor's proof of claim [for medical services]." . . . Concluding therefore that the bankruptcy court "lacked authority under Article III to enter final judgments on the disclosure claims[,]" the court of appeals dismissed the appeal for lack of appellate jurisdiction. Because the bankruptcy court's entry of summary judgment against the debtor and in favor of the medical provider disposed of core claims, the Seventh Circuit found that it could not review the bankruptcy judge's order on the basis that its order functioned as proposed findings of fact or conclusions of law: "The bankruptcy judge's orders cannot be considered interlocutory under 28 U.S.C. § 158(a)(3), or final decisions, judgments, orders, or decrees within the meaning of 28 U.S.C. § 158(d)(1). The orders dismissed the debtors' complaints and ended the litigation and § 158(d)(1) only gives us 'jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of' § 158, which address the appellate jurisdiction of district courts and appellate panels. For the bankruptcy judge's orders to function as proposed findings of fact or conclusions of law under 28 U.S.C. § 157(c)(1), we would have to hold that the debtors' complaints were 'not a core proceeding' but are 'otherwise related to a case under title 11.' *Id.* As we just concluded, the debtors' claims qualify as core

proceedings and therefore do not fit under § 157(c)(1). The direct appeal provision in 28 U.S.C. § 158(d)(2)(A) also does not authorize us to review on direct appeal a bankruptcy judge's proposed findings of fact and conclusions of law.").

Exec. Benefits Ins. Agency v. Arkison (In re Bellingham Ins. Agency Inc.), 661 F.3d 476 (9th Cir. 2011) (Kozinski, J.; Paez, J.; Collins, J.) ("The court invites supplemental briefs by any amicus curiae addressing the following questions: Does *Stern v. Marshall,* 131 S. Ct. 2594 (2011), prohibit bankruptcy courts from entering a final, binding judgment on an action to avoid a fraudulent conveyance? If so, may the bankruptcy court hear the proceeding and submit a report and recommendation to a federal district court in lieu of entering a final judgment?").

Field v. Lindell (In re Mortg. Store, Inc.), 464 B.R. 421 (D. Haw. 2011) (Seabright, J.) (In action brought by Chapter 7 trustee to recover alleged fraudulent transfers under §§ 544 and 548 defendants filed a motion to withdraw the reference, "argu[ing] that the bankruptcy court lacks jurisdiction to determine the fraudulent transfer claims in light of *Stern*." After acknowledging the split of authority on the issue, the district court denied the defendants' motion to withdraw the reference, stating: "Under either line of cases, *Stern* only addresses a bankruptcy court's jurisdiction to enter a judgment, as opposed to findings and recommendations, on a core proceeding over which it has no constitutional authority to enter a final judgment. Indeed, *Stern* discussed only whether the bankruptcy court could enter a final judgment; it did not express any opinion regarding whether the bankruptcy court has authority to conduct pretrial proceedings and submit findings and recommendations. And even if the bankruptcy court does not have jurisdiction to enter a final judgment on the fraudulent transfer claims, mandatory withdrawal of the reference is inapplicable if the bankruptcy court retains the ability to enter a finding and recommendation on these claims. . . . Construing *Stern* as suggesting that bankruptcy courts have no authority whatsoever over core proceedings for which they cannot enter final judgments would certainly change bankruptcy courts' ability to effectively preside over these matters and leave district courts to determine these issues in the first instance without the benefit of the bankruptcy court's expertise—such a result would be neither 'narrow,' 'isolated,' nor intended by Congress. Thus, to the extent that Congress runs afoul of the Constitution by granting bankruptcy courts the power to enter final judgments on particular 'core' proceedings as defined by 28 U.S.C. § 157(b)(2), the court construes those proceedings as no longer part of that definition, *i.e.*, no longer 'core' proceedings, such that the bankruptcy court has authority to enter findings and recommendations pursuant to 28 U.S.C. § 157(c)(1). . . . [T]he court finds that even if the bankruptcy court does not have jurisdiction to enter a final judgment on the fraudulent [transfer] claims—an issue this court need not decide at this time—the bankruptcy court may enter findings and recommendations.").

Heller Ehrman LLP v. Arnold & Porter, LLP (In re Heller Ehrman LLP), 464 B.R. 348 (N.D. Cal. 2011) (Breyer, J.) ("Defendants argue . . . that withdrawal of the reference is mandatory because the bankruptcy court lacks express statutory authority to submit proposed findings of fact and conclusions of law on fraudulent conveyance claims post- *Stern*. The bankruptcy code specifically provides that a bankruptcy court may hear and 'submit proposed findings of fact and conclusions of law to the district court,' subject to de novo review, in a proceeding 'that is not a core proceeding.' 28 U.S.C. § 157(c)(1) . . . . However, since fraudulent conveyance matters, such as those at issue here, are expressly 'core' matters under 28 U.S.C. § 157(b)(2)(H) there is no explicit

comparable authority to follow a similar procedure. Defendants argue that even if one would speculate that Congress would have allowed bankruptcy courts to render proposed findings of fact and conclusions of law in core proceedings had they foreseen *Stern*, a federal court is not free to rewrite a statutory scheme in anticipation of what Congress might have wanted. . . . Thus, defendants argue that absent explicit authority bankruptcy courts cannot follow this procedure. This Court finds the reasoning of Defendants . . . unpersuasive. First, Title 28 does not prohibit the use of this procedure. The absence of an explicit provision is not a prohibition. Second, Section 157(a)(1) of the Judicial Code contains a broad grant of discretion to district courts. They 'may provide that any and all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.' 28 U.S.C. § 157(a)(1). Section 157(b) also provides broad authorization to bankruptcy judges to 'hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11 . . . and may enter appropriate orders and judgments, subject to review under section 158 of this title.' 28 U.S.C. § 157(b)(1). Thus, the statute contains general grants of broad authority to both district and bankruptcy courts. . . . Since Congress delegated broader authority to bankruptcy courts in core matters than non-core matters, 28 U.S.C. § 157(b)(1), (c)(1), and the delegation included the authority to hear and determine all cases and enter appropriate orders, 28 U.S.C. § 157(b)(1), there appears to be no reason why bankruptcy courts cannot continue to hear all pre-trial proceedings and enter as an appropriate order proposed findings of fact and conclusions of law in the manner authorized by Section 157(c)(1). . . . Tellingly, this approach was favorably described in *Stern*: 'Pierce has not argued that the bankruptcy courts "are barred from hearing all counterclaims" or proposing findings of fact and conclusions of law on the matters, but rather that it must be the district court that finally decides them. We do not think the removal of counterclaims such as Vickie's from core bankruptcy jurisdiction meaningfully changes the division of labor in the statute; we agree with the United States that the question presented here is a "narrow one."' 131 S. Ct. at 2620. Removing fraudulent conveyance actions from core bankruptcy jurisdiction, and also determining bankruptcy courts could not enter proposed findings of fact and conclusions of law on such actions, would meaningfully change the division of labor in the statute between bankruptcy and district courts. This Court does not believe that such a meaningful change is consistent with the intention of the Supreme Court. Rather, the logical conclusion is that the bankruptcy court may enter proposed findings of fact and conclusions of law on such actions even though it may no longer finally decide them.").

Official Comm. of Unsecured Creditors of Appalachian Fuels, LLC v. Energy Coal Res., Inc. (In re Appalachian Fuels, LLC, 2012 WL 1344984 (E.D. Ky. Apr. 18, 2012) (Bunning, J.) ("[Defendant's] argument also raises an issue that has recently been addressed in several bankruptcy cases post-*Stern*, namely that if there are statutorily defined core claims that the bankruptcy courts cannot finally adjudicate, there is no statutory authority to allow them to submit proposed findings of fact and conclusions of law to the district court on such claims. This argument is unpersuasive and has been repeatedly rejected by numerous bankruptcy and district courts. . . . In *Stern*, the Supreme Court specifically stated that the 'removal of counterclaims such as [debtor's] from core bankruptcy jurisdiction [does not] meaningfully change[ ] the division of labor in [§ 157].' *Stern*, 131 S. Ct. at 2620. Since Congress delegated broader authority to bankruptcy courts in core matters than in non-core matters, including the authority to hear and determine all cases and enter appropriate orders, it simply would not make sense to preclude bankruptcy courts from also

submitting proposed findings of fact and conclusions of law to the district court on core matters. Removing fraudulent conveyance actions from core bankruptcy jurisdiction, and also determining bankruptcy courts could not enter proposed findings of fact and conclusions of law on such actions, would meaningfully change the division of labor in the statute between bankruptcy and district courts. . . . Moreover, as stated above, § 157(a) allows district courts to refer actions within its bankruptcy jurisdiction to the bankruptcy judges of their districts, so the distinction between core or non-core is immaterial.").

Fort v. Sun Trust Bank (In re Int'l Payment Grp., Inc.), 2012 WL 1107840 (D.S.C. Apr. 2, 2012) (Cain, J.) ("On April 12, 2010, Plaintiff[,] . . . [the] Trustee in bankruptcy for the debtor International Payment Group, Inc., filed an adversary complaint in the bankruptcy court alleging eight state law claims against Defendant SunTrust Bank: breach of contract accompanied by a fraudulent act, aiding and abetting breach of fiduciary duty, negligence and gross negligence, breach of fiduciary duty, tortious interference with contractual relations, violations of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. 39–5–10, et. seq., violation of S.C. Code Ann. § 36–4–102, et seq., and conversion." . . . [Sun Trust moved for withdrawal of the reference of the] claims to the bankruptcy court. . . . In *Stern v. Marshall* . . . the Supreme Court held that, while a bankruptcy judge has the statutory authority to enter a final judgment on a debtor's counterclaim pursuant to the plain language of 28 U.S.C. § 157(b)(2)(C), it was unconstitutional for a bankruptcy judge to enter a final judgment on a debtor's state law counterclaim that was not resolved in the process of ruling on a creditor's proof of claim. . . . In light of *Stern*, the bankruptcy court sua sponte raised the issue of whether it had the constitutional authority to hear the state law claims asserted in the above adversary proceeding as the state law claims at issue here fall into this category. Subsequently, Defendant filed a motion to dismiss due to lack of subject matter jurisdiction. . . . The bankruptcy court found that the claims asserted by Plaintiff are like the claims asserted in *Stern*—core matters under § 157(c)(1) which 'are only remotely related and likely unrelated to Defendant's proofs of claims against the estate and there is no reason to believe that the process of adjudicating [the] proof[s] of claim would necessarily resolve [the estate's] counterclaim.'. . . Further, as the bankruptcy court noted, while the Defendant's motion sought dismissal based upon lack of subject matter jurisdiction, the motion actually questioned the constitutionality of the referral. . . . Therefore, citing Fed. R. Bankr. P. 5011(a), the bankruptcy court declined to rule on the motion and instead deferred any further challenge to the referral to this court. . . . Thereafter, Defendant filed the instant motion to withdraw the reference. . . . Defendant contends that pursuant to *Stern*, the bankruptcy court lacks the constitutional authority to decide Plaintiff's state law claims. The court rejects this interpretation of the holding in *Stern*. While pursuant to *Stern*, the bankruptcy court cannot enter a final judgment on the state law claims, the court does not believe that *Stern* precludes the court from allowing the pretrial proceedings to be handled by the bankruptcy court. The Court finds the bankruptcy court has authority to enter proposed findings of fact and conclusions of law on the state law claims, and thus, mandatory withdrawal of the reference is not required. . . . The bankruptcy code specifically provides that a bankruptcy court may hear and 'submit proposed findings of fact and conclusions of law to the district court,' subject to de novo review, in a proceeding 'that is not a core proceeding.' 28 U.S.C. § 157(c) (1) (emphasis added). However, since fraudulent conveyance matters, such as those at issue here, are expressly 'core' matters under 28 U.S.C. § 157(b)(2)(H), there is no explicit comparable authority to follow a similar procedure. At least one bankruptcy court initially determined that it had 'no statutory authority to render findings of fact and

conclusions of law for core proceedings that it may not constitutionally hear.' *Samson v. Blixseth (In re Blixseth)*, 2011 WL 3274042, at *12 (Bankr. D. Mont. Aug.1, 2011) (holding it had no authority to enter proposed findings of fact and conclusions of law on a "core" fraudulent conveyance claim). Recently, the bankruptcy court amended its earlier ruling in *In re Blixseth*. *In re Blixseth*, 463 B.R. 896, 2012 WL 10193, at *8–10 (Bankr. D. Mont. Jan.3, 2012) ("The Court sua sponte amends its August 1, 2011, Memorandum of Decision and Order. . . . [S]everal courts have recently concluded that *Stern v. Marshall* does not deprive bankruptcy courts of subject matter jurisdiction. . . . [B]ecause the United States District Court for the District of Montana would have the requisite subject-matter jurisdiction to adjudicate the claims in this Adversary Proceeding, so too does this Court."). . . . [T]his court joins the majority of courts that have since concluded that *Stern* did not eliminate the ability of bankruptcy courts to issue proposed findings and conclusions of law. . . . Additionally, the court notes that at least three districts, the Southern District of New York, the Southern District of Florida and the District of Delaware, recently issued standing orders giving bankruptcy courts explicit authority to issue proposed findings and conclusions of law in connection with core matters that are found to fall within the *Stern* holding.").

Joe Gibson's Auto World, Inc. v. Zurich Am. Ins. Co. (In re Joe Gibson's Auto World, Inc.), 2012 WL 1107763 (D.S.C. Apr. 2, 2012) (Cain, J.) ("Plaintiff [and Chapter 11 Debtor] Joe Gibson's Auto World, Inc., was a South Carolina car dealership which was sued by hundreds of customers who alleged a fraudulent and deceptive advertising scheme ("Consumer Claimants"). [After filing its Chapter 11 case,] [a] global settlement agreement was reached with [the] Defendants [Zurich American Insurance Company and Universal Underwriters Insurance Company] paying a settlement amount in exchange for a release from defense and/or indemnity obligations. [Shortly before its liquidating plan was confirmed, the Plaintiff commenced an adversary proceeding against the Defendants in the bankruptcy court.] [In the adversary proceeding,] Plaintiff filed a complaint alleging that the claims brought by the Consumer Claimants are covered by an umbrella policy [issued by the Defendants] and that even though Defendants assumed the defense of many claims and parts of claims, they have denied other claims. Plaintiff alleges causes of action for breach of contract, bad faith refusal to pay a claim, and asks for a declaratory judgment finding the claims of the Consumer Claimants are covered by the umbrella policy. Plaintiff also demanded a jury trial on these claims. Defendants deny that coverage is available under the umbrella policy and counterclaimed requesting a declaratory judgment determining their rights and obligations, if any, under the umbrella policy. On September 30, 2009, the bankruptcy court found that these claims were core proceedings and Defendants' subsequent motion to reconsider the order was denied. . . . Defendants then filed the instant motion seeking a mandatory withdrawal of reference to the bankruptcy court pursuant to *Stern v. Marshall* . . . or alternatively a permissive withdrawal. . . . Here, the bankruptcy court found that the claims asserted by Plaintiff, like the claims asserted in *Stern*, are core matters under § 157(c)(1) which 'are only remotely related and likely unrelated to Defendant's proofs of claims against the estate and there is no reason to believe that the process of adjudicating [the] proof[s] of claim would necessarily resolve [the estate's] counterclaim.' . . . Defendant contends that pursuant to *Stern*, the bankruptcy court lacks the constitutional authority to decide Plaintiff's state law claims. The court rejects this interpretation of the holding in *Stern*. . . . Further, the Court also finds the bankruptcy court has authority to enter proposed findings of fact and conclusions of law on dispositive motions in regard to the state law claims, and thus, mandatory withdrawal of the reference is not required at this time. . . . At least one bankruptcy court initially

determined that it had 'no statutory authority to render findings of fact and conclusions of law for core proceedings that it may not constitutionally hear.' *Samson v. Blixseth (In re Blixseth)*, 2011 WL 3274042, at *12 (Bankr. D. Mont. Aug. 1, 2011) (holding it had no authority to enter proposed findings of fact and conclusions of law on a "core" fraudulent conveyance claim). Recently, the bankruptcy court amended its earlier ruling in *In re Blixseth*. *In re Blixseth*, 463 B.R. 896, 2012 WL 10193, at *8–10 (Bankr. D. Mont. Jan. 3, 2012) ("The Court sua sponte amends its August 1, 2011, Memorandum of Decision and Order. . . . [S]everal courts have recently concluded that *Stern v. Marshall* does not deprive bankruptcy courts of subject matter jurisdiction. . . . [B]ecause the United States District Court for the District of Montana would have the requisite subject-matter jurisdiction to adjudicate the claims in this Adversary Proceeding, so too does this Court."). . . . [T]his court joins the majority of courts that have since concluded that *Stern* did not eliminate the ability of bankruptcy courts to issue proposed findings and conclusions of law. . . . Additionally, the court notes that at least three districts, the Southern District of New York, the Southern District of Florida and the District of Delaware, recently issued standing orders giving bankruptcy courts explicit authority to issue proposed findings and conclusions of law in connection with core matters that are found to fall within the *Stern* holding.").

Feuerbacher v. Moser, 2012 WL 1070138 (E.D. Tex. Mar. 29, 2012) (Crone, J.) ("Assuming *arguendo* that the bankruptcy court was without the constitutional power to enter a final judgment in this case, the vast majority of courts to confront the issue have concluded that bankruptcy courts nonetheless have unquestioned authority to submit proposed findings and conclusions of law.").

Weisfelner v. Blavatnik (In re Lyondell Chem. Co.), 2012 WL 1038749 (S.D.N.Y. Mar. 29, 2012) (Cote, J.) ("The defendants are wrong that there is uncertainty whether the Bankruptcy Court can enter proposed findings of fact and conclusions of law on fraudulent conveyance claims. It is clear that [the] Bankruptcy Court can enter such orders. The defendants point out that 28 U.S.C. § 157(c)(1) and Bankruptcy Rule 9033 permit a bankruptcy court to make proposed findings of fact and conclusions of law on claims that are designated 'non-core,' but there is no corresponding provision that authorizes a bankruptcy court to enter proposed findings or conclusions in core proceedings over which the bankruptcy court lacks authority to enter final judgments. The defendants claim that there is thus a statutory 'gap' with respect to claims implicated by the holding in *Stern*, and the bankruptcy court may lack authority to propose findings of fact and conclusions of law on such claims. . . . The defendants are mistaken. The Supreme Court was explicit that the question presented in *Stern* was 'narrow,' and that the case would not 'meaningfully change[ ] the division of labor' between bankruptcy courts and district courts: *Stern*, 131 S. Ct. at 2620. Disallowing bankruptcy courts from issuing findings of fact and conclusions of law on core Article III claims would significantly change the division of labor between bankruptcy courts and district courts. As evidence, one need look no farther than the large number of motions to withdraw the reference that have been brought before this court in the wake of *Stern*, many of which advance statutory 'gap' arguments similar to those advanced here. . . . When Congress enacted the 1984 Act, it delegated bankruptcy courts greater authority over core claims than non-core claims. Post-*Stern*, this statutory structure should be upheld as much as possible. . . . Moreover, Congress clearly did not anticipate the holding in *Stern* when it enacted the 1984 Act. Rather, as indicated in the conference report to the 1984 Act, Congress intended for core proceedings to consist of all those 'matters over which the bankruptcy court can exercise summary jurisdiction,' and to exclude those

'state-based causes of action' that bankruptcy courts cannot finally adjudicate under Article III. 130 Cong. Rec. S 8891 (daily ed. June 29, 1984), reprinted in 1984 U.S. Code Cong. & Admin. News 601. By granting bankruptcy courts authority to issue recommended findings in all non-core matters related to a bankruptcy proceeding, Congress intended such authority to reach all bankruptcy-related claims that bankruptcy courts cannot finally adjudicate under Article III. The fact that Congress failed in its constitutional line-drawing does not require invalidation of this broader statutory purpose. . . . Thus, pursuant to this district's Amended Standing Order of Reference, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court in all those core matters that it cannot finally determine. *See* Amended Standing Order of Reference, Case No. 12 Misc. 00032 (S.D.N.Y. Jan. 31, 2012).").

Stettin v. Regent Capital Partners, LLC (In re Rothstein, Rosenfeldt, Adler, P.A.), 2012 WL 882497 (S.D. Fla. Mar. 14, 2012) (Marra, J.); ***Stettin v. Mooring Capital Fund, LLC (In re Rothstein, Rosenfeldt, Adler, P.A.)***, 2012 WL 827200 (S.D. Fla. Mar. 9, 2012) (Marra, J.); ***Stettin v. TD Bank, N.A. (In re Rothstein, Rosenfeldt, Adler, P.A.)***, 2012 WL 827124 (S.D. Fla., Mar. 9, 2012) (Marra, J.) (The defendants in several adversary proceedings in which the Chapter 11 trustee sought to avoid fraudulent transfers argued "that withdrawal of the reference is mandatory because the Bankruptcy Court lacks express statutory authority to submit proposed findings of fact and conclusions of law on fraudulent conveyance claims post— *Stern*." The district court rejected this argument. "The Bankruptcy Code specifically provides that a bankruptcy court may hear and 'submit proposed findings of fact and conclusions of law to the district court,' subject to *de novo* review, in a proceeding 'that is not a core proceeding.' 28 U.S.C. § 157(c)(1). However, since fraudulent conveyance matters, such as those at issue here, are expressly 'core' matters under 28 U.S.C. § 157(b)(2)(H), there is no explicit comparable authority to follow a similar procedure. [It is argued] that even if one would speculate that Congress would have allowed bankruptcy courts to render proposed findings of fact and conclusions of law in core proceedings had they foreseen *Stern*, a federal court is not free to rewrite a statutory scheme in anticipation of what Congress might have wanted [and] that absent explicit authority bankruptcy courts cannot follow this procedure. . . . Th[is] reasoning . . . merely demonstrate[s] that uncertainty exists following *Stern*, but the majority of district and bankruptcy courts that have addressed this argument conclude that what is certain is that the Supreme Court did not intend to deprive the bankruptcy courts of any role in dealing with fraudulent conveyance actions. . . . Allowing a bankruptcy judge to issue findings of facts and conclusions of law in core matters is described favorably in *Stern* . . . . Removing fraudulent transfer actions from bankruptcy court jurisdiction would meaningfully change the division of labor between bankruptcy and district courts. . . . At this time, the Court, in its discretion, finds that neither judicial economy nor substantial prejudice to [the defendant(s)] require the immediate withdrawal of the reference.").

Blixseth v. Brown, 2012 WL 691598 (D. Mont. Mar. 5, 2012) (Molloy, J.) ("In *Stern v. Marshall* . . . the United States Supreme Court held that bankruptcy courts do not have constitutional authority to issue final judgments in core proceedings that are based on state- or common-law claims. Specifically, the Court concluded that, while a bankruptcy court had statutory authority to hear the estate's common-law counterclaim for tortious interference—a core proceeding under 28 U.S.C. § 157(b)(2)(C)—it did not have authority to hear the case under Article III of the United States Constitution, since only Article III judges have the power to hear cases at the common law, or in

equity, or in admiralty. . . . The Bankruptcy Court for the District of Montana recently addressed the effect of *Stern* in the underlying bankruptcy proceeding here. *See Blixseth v. Blixseth*, 2011 WL 3274042 at *10–*12 (Bankr. D. Mont. Aug. 1, 2011). There, a trustee had filed a fraudulent conveyance claim (among others) against Blixseth. The Bankruptcy Court concluded the proceeding was a core proceeding under § 157(b)(2)(H) ("proceedings to determine, avoid, or recover fraudulent conveyances"). But it reasoned that, under *Stern*, it could not issue a final judgment on the fraudulent conveyance claim because it was a core, common-law claim. . . . To that extent, in my view, the Bankruptcy Court's reading of *Stern* is correct. A bankruptcy court cannot issue a final judgment on core, common-law or state-law claims. . . . The Bankruptcy Court, though, went one step further. It concluded that it could not even address the fraudulent conveyance claim—e.g., by issuing proposed findings and conclusions—because it did not have statutory authority to do so . . . : The Bankruptcy Court's reading of *Stern* is reasonable, but it leads to an odd result—Why, for example, would a bankruptcy court be permitted to issue proposed findings and conclusions in a non-core proceeding, *see* 28 U.S.C. § 157(c)(1), but not a core proceeding, which, by definition, is more central to the bankruptcy litigation? . . . Not only is this an odd result, it is probably not the result that the *Stern* Court intended. . . . The *Stern* Court expressed that its decision would not 'meaningfully change' or have any 'practical consequences' on the courts' workload. . . . *Stern*, then, suggests that bankruptcy courts may issue proposed findings of fact and conclusions of law in core, common-law claims, so long as the district court makes the final decision. . . . *Stern* does not bar the Bankruptcy Court from issuing proposed findings of fact and conclusions of law in this matter. As a practical matter, the bankruptcy court's proposed findings and conclusions would be helpful to the district court, given 'the value of the bankruptcy judge's familiarity with relevant law and the facts of the case[ ] before [it].' *Emerald Casino*,[*Inc. v. Flynn*], 2012 WL 280724 at *4–*5 [(N.D. Ill. Jan. 31, 2012)].").

Ivey v. Vester (In re Whitley), 2012 WL 1268220 (Bankr. M.D.N.C. Apr. 13, 2012) (Stocks, J.) ("Having determined that the Bankruptcy Court lacks the constitutional power to issue a final judgment in this [fraudulent transfer action], the court must consider whether it has statutory or other authority to submit proposed findings of fact and conclusions of law to the district court. Under 28 U.S.C. § 157(b)(1), bankruptcy judges 'may hear and determine all cases under title 11 and all core proceedings arising under title 11 . . . and may enter appropriate orders and judgments, subject to review. . . .' Under 28 U.S.C. § 157(c)(1), a Bankruptcy Court may hear and 'submit proposed findings of fact and conclusions of law to the district court,' subject to de novo review, in a non-core proceeding. These provisions suggest that Congress wanted Bankruptcy Judges to finally adjudicate bankruptcy-related matters whenever Article III permitted them to do so, and to issue recommended findings subject to de novo review in the District Court whenever it did not. . . . Consistent with this reasoning, the District Court for the Northern District of California has held that 'Since Congress delegated broader authority to bankruptcy courts in core matters than non-core matters, 28 U.S.C. § 157(b)(1), (c)(1), and the delegation included the authority to hear and determine all cases and enter appropriate orders, 28 U.S.C. § 157(b)(1), there appears to be no reason why bankruptcy courts cannot continue to hear all pre-trial proceedings and enter as an appropriate order proposed findings of fact and conclusions of law in the manner authorized by Section 157(c)(1).' *In re Heller Ehrman LLP*, 2011 WL 6179149, at *6. Like the pre-trial proceedings at issue in *Heller Ehrman*, fraudulent transfer claims are core under 11 U.S.C. § 157(b)(2). Thus, after *Stern*, even without the consent

of the litigants, the court may hear the fraudulent conveyance action, even though ultimately it may only submit proposed findings and conclusions to the district court.").

Zazzali v. 1031 Exch. Grp. (In re DBSI, Inc.), 2012 WL 1242305 (Bankr. D. Del. Apr. 12, 2012) (Walsh, J.) ("Movants also argue that in the event that this Court determines that it does not have the authority to finally adjudicate the actions, it must dismiss the actions because there is no statutory authority for a bankruptcy court to submit proposed findings of fact and conclusions of law to the district court where the proceeding is 'core but precluded by Article III,' as it were. Movants base their argument on the text of 28 U.S.C. § 157(c), which provides [that] '[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.' 28 U.S.C. § 157(c)(1) (emphasis added). According to Movants, this provision means that the bankruptcy court has no authority to make recommendations to the district court where the matter is 'core' under the statute but cannot be finally adjudicated by the bankruptcy court because of Article III considerations as expounded in *Stern*. . . . Aside from the fact that I conclude that I do have authority to finally adjudicate the core matters in these actions, I reject this argument, as it implies that *Stern* has eviscerated the grant of subject matter jurisdiction to the bankruptcy courts under 28 U.S.C. §§ 1334 and 157(a)—a reading that the *Stern* majority expressly disavowed. 131 S. Ct. at 2607 ("Section 157 allocates the authority to enter final judgment between the bankruptcy court and the district court. That allocation does not implicate questions of subject matter jurisdiction.") (citation omitted). As the court noted in [*Kirschner v. Agoglia (In re*] *Refco, [Inc.)*, 461 B.R. 181 (Bankr. S.D.N.Y. 2011)], there is language in the *Stern* majority opinion that strongly suggests that any such 'core but precluded' proceedings are to be treated as matters 'related to' the bankruptcy case, i.e. that the bankruptcy court should make recommendations to the district court: '[T]he current bankruptcy system also requires the district court to review de novo and enter final judgment on any matters that are "related to" the bankruptcy proceedings, § 157(c)(1), and permits the district court to withdraw from the bankruptcy court any referred case, proceeding, or part thereof, § 157(d). Pierce has not argued that the bankruptcy courts "are barred from 'hearing' all counterclaims" or proposing findings of fact and conclusions of law on those matters, but rather that it must be the district court that "finally decide[s]" them. We do not think the removal of counterclaims such as Vickie's from core bankruptcy jurisdiction meaningfully changes the division of labor in the current statute; we agree with the United States that the question presented here is a "narrow" one.' [*Stern*,] 131 S. Ct. at 2620 (cited in *Refco*, 461 B.R. at 193) (citations omitted). If Movants' reading of *Stern* were correct, it would both implicate the bankruptcy court's subject matter jurisdiction to hear certain matters and dramatically change the respective roles of the district and bankruptcy courts—two things the *Stern* court repeatedly insisted it did not do with its decision. Further, as the *Refco* court points out, 'when addressing the consequences of holding a statute unconstitutional[,] courts must impose a remedy that best corresponds to what Congress would have intended if it had known about such holding. 461 B.R. at 193 (citing *United States v. Booker*, 543 U.S. 220, 246, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005)). Applying that principle to § 157, I agree that 'it would be absurd to conclude that the bankruptcy courts are deprived of jurisdiction over matters designated by Congress as core when, for Article III reasons, Congress gave jurisdiction to bankruptcy courts

to issue proposed findings of fact and conclusions of law in non-core matters.' *Id*. *Stern* has not changed the bankruptcy court's subject matter jurisdiction, and consequently, this Court can hear any claims—including those at issue here—over which it has at least 'related to' jurisdiction. Where there is such a 'related to' matter, this Court can issue proposed findings of fact and conclusions of law to the district court. . . . Lastly, Movants argue that since this Court cannot conduct a jury trial (which Movants state they intend to demand), it would be a waste of resources for this Court to issue proposed findings of fact and conclusions of law to the district court for *de novo* review. Movants insist that this would somehow result in 'two trials, the first leading to a bankruptcy court recommendation; the second to a district court final order.' . . . Going further, Movants argue that the hearing in this Court would 'be a mere "rehearsal" because its outcome will be non-binding on objecting parties and on the court that will conduct the second hearing. It is difficult to conceive of a greater or more unnecessary waste of judicial resources and of the time, money, and other resources of the litigants.'. . . The recommendation system that Movants are disparaging is the exact mechanism that 28 U.S.C. § 157(c)(1)—and the court in *Stern*—contemplates and that has long been used by bankruptcy and district courts across the country. These concerns about judicial economy were undoubtedly considered when § 157 was enacted. Moreover, Movants misconstrue what is meant by ' de novo review.' *De novo* review does not mean a *de novo* hearing; rather, it means that '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.' Fed. R. Bankr. P. 9033(d). *See also In re Hipp, Inc.*, 895 F.2d 1503, 1519 (5th Cir.1990) (contrasting review that is "truly de novo—i.e., a further trial proceeding at which the determination will be based solely on the evidence freshly presented in open court at that further proceeding" to "review under Rule 9033(d) which may be solely on the record and without any additional hearing or evidence"). Thus, there will not be 'two trials.'. . . With regard to Movants' argument that they will demand a jury trial, which I cannot conduct, this issue is not before me as there has been no demand made. Further, once the jury demand is made, it is customary in this district for the bankruptcy court to preside over the action until the case is ready for trial. . . . Thus, a right to a jury trial, even when invoked, is not grounds to dismiss the action from this Court. . . . I note that the determination of whether this Court can enter a final judgment in this matter has been rendered academic by the recently issued Amended Standing Order of Reference by the U.S. District Court for the District of Delaware. The existing standing order was amended to add: 'If a bankruptcy judge or district judge determines that entry of a final order or judgment by a bankruptcy judge would not be consistent with Article III of the United States Constitution in a particular proceeding referred under this order and determined to be a core matter, the bankruptcy judge shall, unless otherwise ordered by the district court, hear the proceeding and submit proposed findings of fact and conclusions of law to the district court. The district court may treat any order of the bankruptcy court as proposed findings of fact and conclusions of law in the event the district concludes that the bankruptcy judge could not have entered a final order or judgment consistent with Article III of the United States Constitution.' Amended Standing Order of Reference, dated Feb. 29, 2012. In other words, the District Court can treat any order issued by this Court as a recommendation if it later determines that Article III precluded me from entering a final judgment.").

Miller v. Grosso (In re Miller), 2012 WL 1098455 (Bankr. D. Mass. Mar. 30, 2012) (Bailey, J.) ("If a bankruptcy court may not enter final judgment in a proceeding to avoid or recover a fraudulent transfer, it may nonetheless hear the matter and enter proposed findings and conclusions, subject to

review and entry of final judgment in the district court, essentially as a noncore matter that falls within the scope of 28 U.S.C. § 157(c)(1) . . . .").

Bohm v. Titus (In re Titus), 2012 WL 695604 (Bankr. W.D. Pa. Feb. 29, 2012) (Markovitz, J.) ("This Court is inclined to agree with those authorities that construe the *Stern* decision narrowly and hold that, notwithstanding *Stern*, a bankruptcy court possesses the constitutional authority to enter a final decision regarding a fraudulent transfer action that is brought pursuant to state law by way of § 544(b)(1). . . . Therefore, this Court concludes that it possesses the constitutional authority to enter a final judgment . . . . However, the Court also holds that, even if it does not possess such authority, it at least possesses subject matter jurisdiction over such a fraudulent transfer action and, thus, also the constitutional authority to submit proposed findings of fact and conclusions of law to a district court regarding said action. Therefore, the Court concludes that, because it possesses subject matter jurisdiction over the . . . [f]raudulent [t]ransfer [a]ction, it thereby is also vested with the constitutional authority to at least propose findings of fact and conclusions of law to a district court regarding such action. . . . In light of the foregoing, the Court takes the view that the instant Memorandum Opinion (and accompanying Order of Court) constitutes a final judgment to the extent that it pertains to the . . . [f]raudulent [t]ransfer [a]ction. However, if a U.S. District Court ultimately disagrees with this Court and determines that, pursuant to *Stern v. Marshall*, this Court may not enter a final judgment in such action, then the portions of this Court's opinion and order that pertain to such action constitute proposed findings of fact and conclusions of law.").

Adelphia Recovery Trust v. FLP Grp., Inc., 2012 WL 264180 (S.D.N.Y. Jan. 30, 2012) (Crotty, J.) ("Having determined that the Bankruptcy Court lacks the constitutional power to issue a final judgment in this proceeding, the Court considers whether the Bankruptcy Court has statutory or other authority to submit proposed findings of fact and conclusions of law to this Court under the Judicial Code, Fed. R. Bankr. P. 9033 or the Standing Order of Reference. This Court begins by noting that the Southern District of New York's Board of Judges recently amended its Standing Order of Reference to bankruptcy judges, giving them explicit authority to issue proposed findings and conclusions in connection with core matters that are found to fall within the *Stern* holding. In accordance with that Order, the Bankruptcy Court has the authority to issue proposed [findings] of fact and conclusions of law in this case. . . . Under 28 U.S.C. § 157(b)(1), bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11 . . . and may enter appropriate orders and judgments, subject to [deferential] review. . . . Under 28 U.S.C. § 157(c)(1), a Bankruptcy Court may hear and submit proposed findings of fact and conclusions of law to the district court, subject to *de novo* review, in a non-core proceeding. These provisions suggest that Congress wanted Bankruptcy Judges to finally adjudicate bankruptcy-related matters whenever Article III permitted them to do so, and to issue recommended findings subject to *de novo* review in the District Court whenever it did not. Understandably, the Judicial Code and Bankruptcy Rules do not specifically contemplate bankruptcy courts issuing proposed findings of fact and conclusions of law in core matters where the particular provision of 28 U.S.C. § 157(b)(2)—in this case 28 U.S.C. § 157(b)(2)(H), which designates fraudulent transfer claims as 'core'—is found to violate Article III of the Constitution. Congress's failure to anticipate *Stern*, and provide bankruptcy courts with the explicit power to issue findings of fact and conclusions of law in core matters, however, is not dispositive. . . . 'Since Congress delegated broader authority to bankruptcy courts in core matters than non-core matters, 28 U.S.C. § 157(b)(1), (c) (1), and the delegation included

the authority to hear and determine all cases and enter appropriate orders, 28 U.S.C. § 157(b)(1), there appears to be no reason why bankruptcy courts cannot continue to hear all pre-trial proceedings and enter as an appropriate order proposed findings of fact and conclusions of law in the manner authorized by Section 157(c)(1).' . . . Allowing a bankruptcy judge to issue findings of facts and conclusions of law in core matters is described favorably in *Stern*: '[T]he current bankruptcy system . . . requires the district court to review de novo and enter final judgment on any matters that are "related to" the bankruptcy proceedings, and permits the district court to withdraw from the bankruptcy court any referred case, proceeding or part thereof. [Respondent] has not argued that the bankruptcy courts are barred from hearing all counterclaims or proposing findings of fact and conclusions of law on these matters, but rather that it must be the district court that finally decides them. We do not think the removal of counterclaims such as [Petitioner's] from core bankruptcy jurisdiction meaningfully changes the division of labor in the current statute."' [*Stern*,] 131 U.S. S. Ct. 2620. Removing fraudulent transfer actions from bankruptcy court jurisdiction would meaningfully change the division of labor between bankruptcy and district courts. . . . Thus, the logical conclusion (and the most realistic one too) is that bankruptcy courts may issue proposed findings of facts and conclusions of law in such fraudulent transfer actions.").

RES-GA Four LLC v. Avalon Builders of GA LLC, 2012 WL 13544 (M.D. Ga. Jan. 4, 2012) (Treadwell, J.) ("[I]t is abundantly clear from *Stern* and cases interpreting it that there are matters that may not be decided by a non-Article III judge. . . . This, of course, does not mean a non-Article III judge is precluded from hearing matters and submitting proposed findings of fact and conclusions of law to a district court. Indeed, the *Stern* majority noted that Pierce 'ha[d] not argued that the bankruptcy courts "are barred from hearing all counterclaims" or proposing findings of fact and conclusions of law on those matters. . . .' [*Stern*, 131 S. Ct. at 2620.] The majority quoted directly from 28 U.S.C. § 157(c)(1), which allows bankruptcy judges to hear and submit proposed findings of fact and conclusions of law to district judges in non-core proceedings that otherwise are related to a case under title 11. . . . Although § 157(b) does not expressly grant bankruptcy judges the authority to submit proposed findings of fact and conclusions of law in core proceedings, courts uniformly agree this power exists. . . . Significantly, § 157(b) (1) does not require bankruptcy judges to enter final judgment in core proceedings. Congress could not have intended to provide bankruptcy judges with the authority to hear non-core proceedings related to a title 11 case and submit proposed findings of fact and conclusions of law, but not extend the same power to core proceedings. . . . The rule that a bankruptcy court has the power to hear a referred case whether it is core or non-core is logical because every core proceeding necessarily is also 'related to' the bankruptcy case for purposes of 28 U.S.C. § 1334(b). . . . The Court acknowledges that the court in *Samson v. Blixseth (In re Blixseth)*, 2011 WL 3274042, at *12 (Bankr. D. Mont. Aug.1, 2011) concluded that '[u]nlike in non-core proceedings, a bankruptcy court has no statutory authority to render findings of fact and conclusions of law for core proceedings that it may not constitutionally hear.' This holding has already faced serious criticism. . . . In view of pre-and post-*Stern* jurisprudence, the Court disagrees with *In re Blixseth* and concludes that bankruptcy courts have authority to hear and submit proposed findings of fact and conclusions of law in proceedings related to title 11 cases, regardless of whether they are classified as core or non-core. While the contours of claims of which a bankruptcy court may enter final judgment are largely uncertain post-*Stern*, the Court is confident the bankruptcy court has, at a minimum, subject matter jurisdiction to hear these related proceedings.").

Justmed, Inc. v. Byce (In re Byce), 2011 WL 6210938 (D. Idaho Dec. 14, 2011) (Winmill, J.) ("If the bankruptcy court determines it is faced with an 'unconstitutional core' matter, the question is how would Congress intend for the bankruptcy court to handle the matter in light of *Stern*. The two possibilities are that 'unconstitutional core' matters default to the procedure used for non-core matters, (i.e., proposed findings and recommendations under 28 U.S.C. § 157(c)) or, alternatively, that such matters should be entirely removed from the bankruptcy courts. . . . A majority of district courts considering the issue hold that the bankruptcy courts retain the power to enter proposed findings and recommendations. . . . This Court agrees with the majority view for several reasons. First, in enacting § 157(b), Congress intended to expand bankruptcy courts' powers to their constitutional limit. . . . Second, allowing the bankruptcy courts to hear (but not finally decide) 'unconstitutional core' matters is consistent with *Stern*. *Stern* described its holding as limiting the bankruptcy court's authority 'to enter final judgments.' . . . Additionally, the Court's explanation as to why it believed its decision to be so 'narrow' is illuminating: '[T]he current bankruptcy system also requires the district court to review de novo and enter final judgment on any matters that are "related to" the bankruptcy proceedings, § 157(c)(1). . . . Pierce has not argued that the bankruptcy courts "are barred from 'hearing' all counterclaims" or proposing findings of fact and conclusions of law on those matters, but rather that it must be the district court that "finally decide[s]" them. We do not think the removal of counterclaims . . . from core bankruptcy jurisdiction meaningfully changes the division of labor in the current statute; we agree with the United States that the question presented here is a "narrow" one.' . . . Based on this passage, it appears that the Supreme Court intended for unconstitutional core matters to default to the § 157(c)(1) procedure, rather than to be wholly removed from the bankruptcy court. Consequently, even assuming the bankruptcy court is faced with a *Stern*-type matter, the bankruptcy court may enter proposed findings of fact and conclusions of law and submit them to this Court for de novo review.").

McCarthy v. Wells Fargo Bank, N.A. (In re El-Atari), 2011 WL 5828013 (E.D. Va. Nov. 18, 2011) (Brinkema, J.) ("Even if a fraudulent conveyance action, such as the one brought against [defendant], has lost its vaunted status as a core proceeding, it is clearly 'related to a case under title 11.' . . . As such, the bankruptcy court retains the authority to 'submit proposed findings of fact and conclusions of law' that the district court then considers before entering a final judgment.").

Retired Partners of Coudert Bros. Trust v. Baker & McKenzie LLP (In re Coudert Bros. LLP), 2011 WL 5593147 (S.D.N.Y. Sept. 23, 2011) (McMahon, J.) ("[T]he intent behind [the Bankruptcy and Federal Judgeship Act of 1984] is clear: Congress wanted Bankruptcy Judges to finally adjudicate bankruptcy-related matters whenever Article III permitted them to do so, and to issue recommended findings subject to *de novo* review in the District Court whenever it did not. . . . Having concluded that the Bankruptcy Court in this case could not finally determine the Claims, this Court should effectuate the scheme as far as possible by treating the 'final' conclusions as recommendations, and subject them to de novo review.").

Paloian v. Am. Express Co. (In re Canopy Fin., Inc.), 464 B.R. 770 (N.D. Ill. 2011) (Hibbler, J.) (In adversary proceeding brought by Chapter 7 trustee against American Express, the trustee asserted claims under §§ 544, 548 and 550 for avoidance and recovery of alleged fraudulent transfers. American Express moved to withdraw the reference, "arguing that the reference violates

Article III of the United States Constitution." After determining that the bankruptcy court did not have the constitutional authority to finally adjudicate the fraudulent transfer claims, the district court addressed American Express's contention "that the Bankruptcy Court . . . [also] lacks statutory authority [under 28 U.S.C. § 157(c)(1)] to hear his claims and provide proposed findings of fact and conclusions of law to this court because the statute only provides that authority for non-core proceedings." . . . Rejecting this argument, the court stated: "There is some appeal to the argument American Express sets forth because the Supreme Court cannot rewrite a statute. However, the argument fails for a couple of reasons. Most importantly, it seems to conflict with the language of the Supreme Court's opinion in *Stern*. The Court did not rule directly on this question. Nonetheless, throughout its opinion, the Court explicitly limited its holding to a decision that bankruptcy courts were without constitutional authority to enter final judgment on certain claims. . . . It never suggested that bankruptcy courts could not otherwise hear those claims. In fact, in dicta, the Court suggested the opposite . . . . Thus, the Court at least implied that the effect of its decision was to 'remove' certain claims from 'core bankruptcy jurisdiction,' and to relegate them to the category of claims that are merely 'related to' bankruptcy proceedings and thus subject to being heard, but not finally decided, by bankruptcy courts. . . . This language alone, drafted mere months ago by our nation's highest court, certainly provides this court with sufficient authority to deny the argument American Express sets forth. However, contrary to the suggestions of American Express, it is also reconcilable with the remainder of the Supreme Court's opinion. The Court held the statute's treatment of certain claims to be unconstitutional. One might presume, as American Express has, that this decision voided any statutory language applicable to those claims, leaving them to occupy a virtual 'no man's land' on the statutory landscape. Under that interpretation, claims such as [the trustee's] remain core proceedings, but may not be treated like core proceedings or non-core proceedings. However, there are other reasonable interpretations available. . . . The Court holds that *Stern* did not strip the Bankruptcy Court of the authority to hear [the trustee's] claims against American Express and to propose findings of fact and conclusions of law on those claims to this court. The Court therefore holds that American Express has failed to show cause for withdrawing the reference of these proceedings to the Bankruptcy Court.").

Reed v. Linehan (In re Soporex, Inc.), 463 B.R. 344 (Bankr. N.D. Tex. 2011) (Houser, J.) ("[T]he question remains—what can this Court do with respect to a statutorily defined 'core' proceeding that the Supreme Court has held in *Stern* cannot be finally determined by a bankruptcy court? Can it issue proposed findings and conclusions to the district court as it is expressly authorized to do by statute with respect to those proceedings that are 'related to' a bankruptcy case? For the reasons set forth below, this Court concludes the answer to this question is yes. . . . First, the Supreme Court itself at least implied in *Stern* that the effect of its decision was to 'remove' certain claims from 'core bankruptcy jurisdiction,' and to relegate them to the category of claims that are merely 'related to' bankruptcy proceedings and thus are subject to being heard, but not finally determined, by bankruptcy courts when it stated that 'the current bankruptcy system . . . requires the district court to review de novo and enter final judgment on any matters that are "related to" the bankruptcy proceedings, and permits the district court to withdraw from the bankruptcy court any referred case, proceeding, or part thereof. [Respondent] has not argued that the bankruptcy courts are barred from "hearing" all counterclaims or proposing findings of fact and conclusions of law on those matters, but rather that it must be the district court that finally decides them. We do not think the removal of counterclaims such as [Petitioner's] from core bankruptcy jurisdiction meaningfully changes the

division of labor in the current statute; we agree with the United States [appearing as amicus curiae] that the question presented here is a "narrow" one.' . . . And, as noted previously, this Court has statutory authority to issue proposed findings of fact and conclusions of law to the district court with respect to 'related to' proceedings. 28 U.S.C. § 157(c)(1). . . . Second, the Supreme Court's analysis in *Stern* also provides strong authority for the proposition that there remain only two types of proceedings under 28 U.S.C. § 157: (1) 'core' proceedings that arise 'in' a bankruptcy case or 'under' title 11, and (2) 'non-core' proceedings that are 'related to' a bankruptcy case. The *Stern* Court came to this conclusion after holding § 157(b)(1) 'ambiguous,' thus requiring an authoritative interpretation. . . . In short, the Supreme Court concluded that there were '[t]wo options. The statute does not suggest that any other distinctions need be made.' . . . Third, and in the alternative, if there is now a third type of proceeding not expressly addressed in 28 U.S.C. § 157—*i.e.*, statutorily defined 'core' proceedings over which a bankruptcy court lacks constitutional authority to finally determine—there is no constitutional impediment, and should be no other impediment, to a bankruptcy court hearing this type of proceeding and then issuing proposed findings of fact and conclusions of law to the district court for de novo review. Admittedly, there is no express statutory authority to do so in title 28. No doubt that is because Congress fully expected that the bankruptcy courts would hear and finally determine all core proceedings in accordance with 28 U.S.C. § 157(b)(1). From this Court's perspective, it is absurd to think that simply because Congress did not anticipate the Supreme Court's ruling in *Stern* when it enacted, in 1984, 28 U.S.C. §§ 1334 (which vests jurisdiction over bankruptcy cases and proceedings in such cases in the district courts) and 157 (which permits the district court to refer bankruptcy cases and all proceedings 'arising under title 11 or arising in or related to a case under title 11' to the bankruptcy courts) that the bankruptcy courts can now do nothing with respect to these types of claims. Since Congress expressly provided for the issuance of proposed findings of fact and conclusions of law with respect to 'related to' proceedings over which the bankruptcy court had no authority to issue a final judgment except if the litigants expressly consented, there is no reason to believe that any impediment exists to this Court issuing proposed findings and conclusions to the district court with respect to core proceedings of the type that the *Stern* court has now concluded may not constitutionally be finally determined by a bankruptcy judge. If this Court issues proposed findings of fact and conclusions of law to the district court with respect to the Trustee's [state law] claims, an Article III tribunal with jurisdiction over the Debtors' bankruptcy cases and all arising in, under and related to proceedings will actually decide the issues. *See* 28 U.S.C. § 1334(a) and (b). That passes both Constitutional muster and facilitates the expeditious resolution of bankruptcy cases and proceedings, over which the district court now must have greater involvement. . . . Finally, . . . other courts have come to the same conclusion—*i.e.*, that *Stern* did not strip the bankruptcy courts of the authority to hear these types of claims and to propose findings of fact and conclusions of law to the district court for de novo review. . . . For these reasons, this Court will issue proposed findings of fact and conclusions of law to the district court with respect to that portion of the [defendants'] Motion addressing the Trustee's [state law claims] . . . .").

Levey v. Hanson's Window & Constr., Inc. (In re Republic Windows & Doors, LLC), 460 B.R. 511 (Bankr. N.D. Ill. 2011) (Cox, J.) ("The Defendant next argues that even the submission of findings of fact and conclusions of law 'will be impermissibly exercising judicial power reserved to the district court by Article III of the Constitution,' and that 'it is unrealistic to think that the district court's view of a case presented for de novo review will be completely unaffected by the

bankruptcy court's proposed findings of fact and conclusions of law.' . . . This is contrary to the holding of *Stern*. Nothing in that decision can be read to preclude this Court from submitting proposed findings of fact and conclusions of law to the district court. There the Court addresses this issue by noting that 'Pierce has not argued that the bankruptcy courts "are barred from hearing all counterclaims" or proposing findings of fact and conclusions of law on those matters, but rather it must be the district court that finally decides them.' *Stern*, 131 S. Ct. at 2620. The Defendant has not offered any case law in support of its suggestion that the district courts rubber stamp the proposed findings submitted by bankruptcy judges. The *Stern* opinion by its own terms 'is a narrow one' and this Court declines to disregard the Supreme Court's position on the validity of the process by which proposed findings of fact and conclusions of law are submitted to the district court.").

Goldstein v. Eby-Brown, Inc. (In re Universal Mktg., Inc.), 459 B.R. 573 (Bankr. E.D. Pa. 2011) (Frank, J.) ("[A]ssum[ing] arguendo that . . . the Constitution prohibits a bankruptcy court from exercising 'core' jurisdiction (*i.e.*, entering final judgments without consent of the non-debtor defendant) to decide adversary proceedings asserting claims under 11 U.S.C. § 544 [,] it does not follow that the bankruptcy court must dismiss a § 544 claim for lack of subject matter jurisdiction. . . . I disagree with the . . . conceptualization of bankruptcy jurisdiction that suggests that a category of matters exist which are 'core' but not 'related.' This category does not exist. I fail to see how Congress' express, unambiguous delegation of subject matter jurisdiction in 'related proceedings' is vitiated by the absence of an explicit mechanism for the issuance of proposed findings of fact and conclusions of law in cases in which Congress may have exceeded its constitutional authority in designating proceedings as 'core.' If the proceedings are not core, they nonetheless are related proceedings that a bankruptcy court is authorized to hear and submit proposed findings of fact and conclusions of law to the district court pursuant to 28 U.S.C. § 157(c)(1).").

Gecker v. Flynn (In re Emerald Casino, Inc.), 459 B.R. 298 (Bankr. N.D. Ill. 2011) (Wedoff, J.) ("[E]ven if the trustee's bankruptcy complaint were wholly within the scope of the *Stern* decision, and so removed from core jurisdiction, it would still affect the extent of the estate available to pay Emerald's creditors. Therefore, the trustee's complaint would at least be within the 'related-to' jurisdiction of the bankruptcy court and, as set forth in 28 U.S.C. § 157(c)(1), a bankruptcy judge may propose findings and conclusions to the district court for that court's entry of judgment pursuant to such jurisdiction. . . . The defendants make a statutory argument, based on *Stern*, that would eliminate all bankruptcy court activity in this proceeding. The argument runs this way: first, as *Stern* recognized, § 157(b)(2)(C) defines as 'core' any claims by the estate against a creditor who has filed a claim against the estate; second, § 157(c)(1) only applies related-to jurisdiction to a proceeding 'that is not a core proceeding; and so, the argument concludes, a § 157(b)(2)(C) counterclaim—being statutorily core—cannot be within the related-to jurisdiction. There appears to be at least some judicial support for this argument. *See In re Blixseth*, 2011 WL 3274042, at *12 (Bankr. D. Mont. Aug.1, 2011). . . . The argument, however, ignores the remedy flowing from *Stern's* holding that the statute unconstitutionally allows judgments to be entered by a non-Article III court. . . . *Stern* states that the remedy for this constitutional violation is to remove counterclaims covered by the decision from core jurisdiction. . . . With this remedy, the counterclaim is no longer covered by the statutory definition of 'core.' As a result, to the extent that the estate's claims are not subject to a final judgment by the bankruptcy court, they are non-core, and fully within the

definition of related-to jurisdiction in § 157(c)(1). In addition to following *Stern*, applying this remedy avoids the bizarre result of the defendants' argument: a claim brought by the estate against a creditor who has not filed a claim against the estate would be within the bankruptcy court's related-to jurisdiction, but if the creditor later filed a claim in the bankruptcy case, then—although the estate's claim could have a major impact on the bankruptcy estate by offsetting the creditor's claim—the claim would now be a counterclaim under § 157(b)(2)(C), and bankruptcy court jurisdiction would be completely lost. Even if the Supreme Court had not already directed a more reasonable remedy for the constitutional violation it found in *Stern*, the perverse effect of the remedy suggested by the defendants' argument would require that it be rejected.").

Adams Nat'l Bank v. GB Herndon & Assocs., Inc. (In re GB Herndon & Assocs., Inc.), 459 B.R. 148 (Bankr. D.D.C. 2011) (Teel, J.) ("Although, for the reasons previously stated, I believe this court had authority to hear and enter a final judgment disposing of the defendants' counterclaims, and entering a judgment in favor of [plaintiff] as to its claims, in the event the district court on appeal finds otherwise, the following are my proposed findings of facts and conclusions of law. . . .").

In re Olde Prairie Block Owner, LLC, 457 B.R. 692 (Bankr. N.D. Ill. 2011) (Schmetterer, J.) ("As discussed above, Counts II, IV, and V of Debtor's Counterclaim are non-core proceedings under *Stern* because they were not necessarily resolved in ruling on [the secured creditor's claim]. But those and the other Counts are 'related to' Debtor's bankruptcy case: if successful, they would have limited liability to [the secured creditor], recovered damages, and otherwise increased the potential recovery of unsecured creditors. Therefore, a Bankruptcy Judge could at least hear those Counts under 28 U.S.C. § 157(c)(1) without consent. Even if Counts I and III could not be treated under the *Stern* exception for counterclaims that must be decided in order to decide a claim against the bankruptcy estate, they would also then be 'related proceedings' as defined by our Circuit . . . [and] therefore susceptible to consent for final judgment under § 157(c)(2).").

Shaia v. Taylor (In re Connelly), 2012 WL 1098431 (Bankr. E.D. Va. Mar. 30, 2012) (Huennekens, J.) ("The procedures set forth in 28 U.S.C. § 157(c)(1) can be applied to the affected subset of core proceedings impacted by *Stern* so that a bankruptcy court may continue to hear such matters but not decide them. Application of the procedures set forth in § 157(c)(1) in this regard will effectuate the intent of Congress entirely consistent with the Supreme Court's ruling in *Stern*. It accords with accepted principles of statutory interpretation by preserving as much of the authority of bankruptcy courts as is constitutionally permissible. . . . Therefore, to the extent that it is determined that this Court may not enter final orders or judgments in this Adversary Proceeding, any rulings or other disposition the Court may make shall be deemed to be proposed findings of fact and conclusions of law subject to *de novo* review and entry of a final order by the district court as set forth in § 157(c)(1).").

Burns v. Dennis (In re Se. Materials, Inc.), 2012 WL 1034322 (Bankr. M.D.N.C. Mar. 27, 2012) (Waldrep, J.) ("While at least one bankruptcy court has determined that it has no statutory authority to render findings of fact and conclusions of law for core proceedings that it may not constitutionally hear . . . this Court will join the majority of courts that have concluded that *Stern* did not eliminate the ability of bankruptcy courts to issue such proposed findings and conclusions. ").

City of Cent. Falls, R.I. v. Cent. Falls Teacher's Union (In re City of Cent. Falls, R.I.), 2012 WL 1080589 (Bankr. D.R.I. Mar. 23, 2012) (Bailey, J.) ("This adversary proceeding arises in the bankruptcy case of the City of Central Falls, Rhode Island (the "City"), a proceeding for adjustment of debts of a municipality under chapter 9 of the Bankruptcy Code. The plaintiff is Robert G. Flanders, Jr. (the "Receiver") in his capacity as the state-appointed receiver of the City. The principal defendants are two labor unions . . . (jointly, the "Unions"). Each is party to a collective bargaining agreement with the Central Falls School District (the "School District"), which—suffice it to say for now—runs the public schools in Central Falls. As part of his efforts to fashion a feasible and comprehensive plan of debt adjustment in this bankruptcy case, the Receiver has been renegotiating the CBAs with the Unions, but his efforts have been impeded by uncertainty over two issues: (i) whether the School District is part of the City, such that the debts and contract obligations of the School District are obligations of the City and therefore subject to adjustment in this bankruptcy case; and (ii) whether the Receiver, acting on behalf of the City, has the power under Rhode Island's Fiscal Stability Act, the statute defining his powers as receiver, to collectively bargain with the Unions. By his complaint in this adversary proceeding, the Receiver seeks a declaratory judgment resolving both issues in the affirmative, and he has now moved for summary judgment to that effect. In response, the Teachers' Union has moved to dismiss for lack of subject matter jurisdiction or to abstain . . . . The Teachers' Union . . . argues that even if the declaratory judgment counts are core, the Supreme Court's recent decision in *Stern v. Marshall* . . . precludes the bankruptcy court from entering final judgment on them. In *Stern*, the Supreme Court held that Congress violated Article III of the United States Constitution in 28 U.S.C. § 157(b) by assigning to bankruptcy judges—judges lacking life tenure and protection against diminution of salary—for final adjudication as a core proceeding a counterclaim by the bankruptcy estate against a creditor who asserted a claim against the estate where resolution of the counterclaim was not necessarily resolved in the process of adjudicating the creditor's proof of claim. In the discussion above, this court has already decided that the declaratory judgment counts are not core and therefore that, lacking the Unions' consent, the bankruptcy court may not enter final judgment but is limited to hearing the matter and submitting proposed findings and rulings to the district court, with judgment to be entered by the district court. When asked at hearing whether such a conclusion—specifically, a determination that the claims at issue are merely 'related to' and not core—would render the present argument moot, the Teachers' Union said it would not; but counsel could not explain why, except to state that, in *Stern*, the Supreme Court signaled that 'the bankruptcy courts need to carefully consider whether they should be deciding certain types of purely state law questions.' I understand the Teachers' Union to be arguing that *Stern* somehow invalidates the procedure prescribed in 28 U.S.C. § 157(c)(1) for a matter that is not a core proceeding but that is otherwise related to a bankruptcy case and that arises entirely under state law. *Stern* provides no support for this reading. *Stern* concerned only the authority of a bankruptcy court, as a court whose judges lack the full protections of Article III, to enter certain final judgments, and it rested exclusively on a separation-of-powers rationale. It did not address the validity of a judgment entered by the district court, whose Article III credentials the Teachers' Union does not dispute, pursuant to the process set forth in 28 U.S.C. § 157(c)(1). Nor did it address concerns of federalism; although the counterclaim at issue in *Stern* arose under state law, the determinative feature of that counterclaim was that it did not arise under the Bankruptcy Code. The operative dichotomy was not federal versus state, but bankruptcy versus nonbankruptcy. The Teachers' Union has offered no reason why

Stern should affect the validity of § 157(c)(1) procedures and judgments. In *Stern* itself, the Supreme Court indicated that the fault it found was limited to 'one isolated respect' of the bankruptcy jurisdictional scheme in § 157 and that its decision did not meaningfully change the division of labor in the statute. I am satisfied that *Stern* had no effect on § 157(c)(1) and that a bankruptcy judge may hear the Receiver's declaratory judgment complaint and propose findings of facts and conclusions of law on its two counts.").

In re Am. Housing Found., 2012 WL 443967 (Bankr. N.D. Tex. Feb. 10, 2012) (Jones. J.) ("The Court addresse[d] 37 motions filed in 20 lawsuits [commenced by the plaintiff trustee of liquidating trust] . . . . The suits include fraudulent transfer actions based both on substantive federal law (§ 548 of the Bankruptcy Code) and substantive state law (through § 544 of the Bankruptcy Code) and preference actions (§ 547 of the Bankruptcy Code). Many, if not all, of the defendants are not claims-filing creditors in the [debtor's] bankruptcy case. . . . The defendants seek dismissal [for lack of subject matter jurisdiction] under Rule 12(b)(1) of the Federal Rules of Civil Procedure, as incorporated by Rule 7012 of the Federal Rules of Bankruptcy Procedure. . . . The important question here, as defendants contend, is whether dismissal is required because, under *Stern*, only an Article III judge in an Article III court can hear and finally determine the fraudulent transfer and preference claims made here by the plaintiff-trustee. . . . The Court's so-called jurisdiction over such claims, which are undeniably 'core,' is unconstitutional, defendants argue. In addition, they submit that this Court is not permitted to enter proposed findings of fact and conclusions of law to the district court on these claims because § 157(c)(1) allows bankruptcy judges to submit proposed findings and conclusions in only non-core proceedings. . . . Their argument, stripped to its essence, is that *Stern*, coupled with the present statutory framework, leaves the Court with no choice but to dismiss these causes of action. More to the point, defendants contend that *Ster*n and the statute create a procedural quandary that the Court is powerless to address; Congress alone can fix the problem. . . . For purposes of its analysis, the Court assumes that its authority to *decide* the cases here is unconstitutional under *Stern*. After all, these actions are core proceedings under the statute; the defendants are not claims-filing creditors in the bankruptcy case; as in *Granfinanciera*, the fraudulent transfer claims do not satisfy any of the 'varied formulations' of the public rights doctrine; and the preference claims, unlike *Katchen* and [*Langenkamp*], are not brought as part of the claims reconciliation process, but, rather, to augment the bankruptcy estate. The Court appreciates the quandary raised by *Stern*. Preference and fraudulent transfer actions are labeled as core proceedings under § 157(b)(2)(F) and (H), respectively; they arise under or in the Bankruptcy Code and thus satisfy *Stern's* definition of a core proceeding. Even if they were not 'arising' matters, they certainly would be related to the bankruptcy case. In either event, the Court, at least arguably, cannot decide these suits because doing so would constitute an unconstitutional exercise of authority improperly conferred on this Court, and all bankruptcy courts, by Congress. . . . [T]he natural follow-up question is whether, in a *Stern*-like scenario—core but unconstitutional—the bankruptcy court may hear the claim (but not decide it by entering a final judgment) and issue proposed findings and conclusions. This assumes, as here, that the parties in light of *Stern* affirmatively do not consent to final disposition by a bankruptcy judge. The insistence that dismissal is required begs the same question. Dismissal here would be a harsh remedy. Subject matter jurisdiction is not in question; accepting the pleaded facts as true, the causes of action here are brought strictly in accordance with the statutory scheme. If, given *Stern*, the Court is required to dismiss the cases here, it must also mean the Court cannot hear the cases and issue proposed findings

and conclusions to the District Court. The defendants' attack on the Court's ability to do so is made on two levels. First, they submit that the statute, § 157, simply does not contemplate, and thus does not allow, the Court to so handle the cases. Second, and most important, they submit that even if the statute can be so construed, *Stern* (and, really, the import of *Stern*) does not authorize such treatment. The second point, in effect, takes their reading of *Stern* to the most dramatic and defining conclusion: the entire statutory framework of the bankruptcy system is unconstitutional and unworkable. Simple logic dictates that if the Court cannot hear a statutorily defined core proceeding, it certainly cannot hear a non-core proceeding. The system breaks down. So, can the Court hear and propose as opposed to hearing and deciding? The Court disagrees with the defendants and concludes it can—on both levels. . . . The Court first points out the obvious. Construing together subsections (b)(1) (court can hear and decide core matters) and (c)(1) (court may merely hear related-to matters) of § 157, it makes little sense to suggest that a bankruptcy judge has authority to hear a matter and issue proposed findings of fact and conclusions of law on 'related to' matters but does not have authority to do the same with respect to 'core' matters. Apart from any constitutional issue, a matter that is 'core,' by definition, has a greater connection to a bankruptcy case than a matter merely 'related to' that same case. . . . An even more involved analysis of the statute reveals that its text does not bar the Court from issuing non-binding findings of fact and conclusions of law. Section 157(b)(1) provides as follows: '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.' 28 U.S.C. § 157(b)(1) (emphasis added). Likewise, section 157(c)(1) provides: '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.' 28 U.S.C. § 157(c)(1) (emphasis added). Defendants read these two sections in tandem to stand for the proposition that the Court is limited to *only* issuing final orders when hearing core matters, just as the Court is limited to *only* proposing findings and conclusions on related-to matters. They are correct on the latter point given § 157(c)(1)'s use of the word 'shall.' . . . However, the text of § 157(b)(1) is flexible. It states that the bankruptcy courts *may* hear *and decide* bankruptcy cases (*the* bankruptcy cases) and core proceedings within such cases. Unlike subsection (c)(1), which accords the bankruptcy court no discretion, the plain text of subsection (b)(1) does not bar the bankruptcy court from hearing the case and proposing findings and conclusions. Indeed, the mandatory language in § 157(c)(1), contrasted with the permissive language in subsection (b)(1), suggests that bankruptcy courts have discretion in deciding how to handle (b)(1) core proceedings as compared to (c)(1) related-to proceedings. . . . This makes sense. Congress, reacting to *Northern Pipeline*, through use of the word 'shall' in § 157(c)(1) ensured that bankruptcy courts would not have the power to finally determine cases that have less to do with the debtor and the bankruptcy process itself, i.e., cases that potentially implicate constitutional problems under Article III. . . . Congress did not intend for § 157 to prohibit bankruptcy courts from issuing non-binding findings of fact and conclusions of law to a district court on core matters. . . . Though defendants argue otherwise, *Stern* supports this Court issuing proposed findings and conclusions. Defendants seize onto the portion of the *Stern* opinion that construes the statute to mean a core matter cannot be a related-to matter. Defendants argue that this suggests that

Stern stands for the proposition that a bankruptcy court cannot treat a core matter like a related-to matter, i.e., issue proposed findings and conclusions to the district court. Defendants fail to appreciate the context of what the Supreme Court was actually addressing, however. . . . By clarifying that a core matter cannot be a related-to matter, the Supreme Court was responding to Pierce's argument that a bankruptcy judge may enter final judgment on a core proceeding only if that proceeding also 'aris[es] in' a Title 11 case or 'aris[es] under' Title 11 itself. . . . Pierce's argument '[supposed] that some core proceedings will arise in a Title 11 case or under Title 11 and some will not.' In other words, Pierce was arguing that some 'core' matters were not really core. The Supreme Court rejected this reading of § 157, finding that 'core' is modified by the 'arising' language of the statute and that a 'core' proceeding cannot likewise be a 'related to' proceeding. Nowhere in *Stern* does the Supreme Court suggest that a bankruptcy court is foreclosed from issuing proposed findings of fact and conclusions of law when hearing a core matter. . . . Given the Supreme Court's explanation in *Stern* that it could not 'rewrit[e] the statute . . . to bypass the constitutional issue,' . . . [D]efendants argue that this Court would likewise be rewriting the statute by issuing proposed findings of fact and conclusions of law. But the Court is not rewriting the statute; the Court is merely interpreting it, given the discretionary language presented in § 157. . . . The Supreme Court, in contrast, could not construe the statute to avoid the constitutional problem because the statute specifically authorizes bankruptcy judges to decide core matters. . . . As argued by the defendants, *Stern* certainly calls into question the use of the core/non-core distinction as a means to determine whether the bankruptcy court can finally decide a case. It specifically does not, however, cast doubt on the bankruptcy court's ability, within the 'division of labor' between the district court and the bankruptcy court, to hear a case. The major distinction here is that this Court has not decided the pending causes of action and, with *Stern* as its authority, may hear the causes of action and issue proposed findings and conclusions. . . . As argued by the defendants, *Stern* certainly calls into question the use of the core/non-core distinction as a means to determine whether the bankruptcy court can finally decide a case. It specifically does not, however, cast doubt on the bankruptcy court's ability, within the "division of labor" between the district court and the bankruptcy court, to hear a case. The major distinction here is that this Court has not decided the pending causes of action and, with *Stern* as its authority, may hear the causes of action and issue proposed findings and conclusions. . . . It is clear from *Stern* that this Court, as a bankruptcy court, is permitted to issue proposed findings and conclusions in lieu of a final order. Beyond its purposely limited holding, the Supreme Court emphasized that it was not making a major structural change to practice before the bankruptcy courts . . . . The Supreme Court did not intend to strip the bankruptcy courts of their ability to enter proposed findings of fact and conclusions of law in cases such as are before the Court here. . . . [W]hen the Supreme Court states that it is removing claims such as Vickie's 'from core bankruptcy jurisdiction,' it cannot mean that it is removing them from the bankruptcy court's ability to hear them. . . . The term 'core jurisdiction,' as used by the Supreme Court, concerns the constitutional capacity of bankruptcy courts—not statutory jurisdiction—over an issue. The Supreme Court in *Stern*, interpreting the Constitution, sent a clear message that bankruptcy courts cannot finally decide matters that implicate the exercise of federal judicial power. But, as also emphasized by the Supreme Court, *Stern*, except 'in one isolated respect,' is not meant to rejigger the division of labor that is allocated as between the district courts and the bankruptcy judges. It does not foreclose the ability of this Court to issue proposed findings of fact and conclusions of law subject to de novo review by the District Court, an Article III court.").

In re Containership Co. (TCC) A/S, 2012 WL 443716 (Bankr. S.D.N.Y. Feb. 10, 2012) (Lane, J.) ("The Movants . . . claim that the automatic stay should be lifted because this Court lacks jurisdiction to adjudicate these adversary proceedings in light of the Supreme Court's recent decision in *Stern* . . . . [I]t is premature to determine under *Stern* whether this Court may render a final judgment in any of these numerous adversary proceedings. It is true that these are adversary actions by a foreign representative to augment the size of the estate. . . . But the cases have only just begun, and the Movants have not yet filed answers to the Debtor's complaints. Answers to the adversary complaints would require the Movants to address the fundamental question of whether these adversary proceedings are core or non-core proceedings, information that would be beneficial in determining whether Rule 9033 should be invoked. . . . The heart of the *Stern* decision goes to a bankruptcy court's ability to render a final judgment, a matter that is not at issue today. . . . If this Court eventually determines that it lacks jurisdiction to enter a final judgment in any of these adversary proceedings, this Court may issue proposed findings of fact and conclusions of law pursuant to Rule 9033 of the Federal Rules of Bankruptcy Procedure. *See* Amended Standing Order of Reference M–431, dated January 31, 2012 (Preska, Acting C.J.) (providing that where a bankruptcy court cannot enter final judgment in a core proceeding, it may hear the proceeding and submit proposed findings of fact and conclusions of law). . . . Such proposed findings of fact and conclusions of law would be reviewed by the United States District Court for the Southern District of New York[.]").

Cardiello v. Arbogast (In re Arbogast), 2012 WL 390214 (Bankr. W.D. Pa. Feb. 7, 2012) (Markovitz, J.) ("Therefore, the Court concludes that, because it possesses subject matter jurisdiction over the . . . [f]raudulent [t]ransfer [a]ction, it thereby is also vested with the constitutional authority to at least propose findings of fact and conclusions of law to a district court regarding such action. In light of the foregoing, the Court takes the view that the instant Memorandum Opinion (and accompanying Order of Court) constitutes a final judgment to the extent that it pertains to the . . . [f]raudulent [t]ransfer [a]ction. However, if a U.S. District Court ultimately disagrees with this Court and determines that, pursuant to *Stern v. Marshall*, this Court may not enter a final judgment in such action, then the portions of this Court's opinion and order that pertain to such action constitute proposed findings of fact and conclusions of law.").

Searcy v. Knight (In re Am. Int'l Refinery), 2012 WL 293005 (Bankr. W.D. La. Jan. 31, 2012) (Summerhays, J.) ("Even assuming, *arguendo*, that *Stern* precludes the bankruptcy court from entering final orders or judgments with respect to the Trustees' claims, the district court still has jurisdiction over these claims under section 1334. This proceeding would, however, be subject to the procedure for litigating non-core 'related to' matters under section 157. Section 157(c)(1) provides that a bankruptcy judge 'may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11,' and that '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.' While *Stern* did conclude that one aspect of section 157 violates Article III—section 157(b)(2)(C)—it did not invalidate the procedure for dealing with non-core 'related to' matters.").

Stalnaker v. Fitch (In re First Ams. Ins. Serv., Inc.), 2012 WL 171583 (Bankr. D. Neb. Jan. 20, 2012) (Saladino, J.) ("To the extent the [trustee's] complaint includes causes of action that are not core proceedings, they are certainly related to the [debtor's] bankruptcy case, which gives the bankruptcy court the authority to hear those causes of action and recommend their disposition to the district court for entry of final judgment.").

Redmond v. Brad Noll & Assocs., Inc. (In re Brooke Corp.), 2011 WL 6752422 (Bankr. D. Kan. Dec. 16, 2011) (Somers, J.) (Defendant moved to dismiss action by Chapter 7 trustee based in part on a lack of constitutional authority under *Stern*. The bankruptcy court denied defendant's motion: "*Stern* holds that . . . under Article III of the Constitution, bankruptcy courts lack [constitutional authority] to enter final judgments [on counterclaims by the estate against persons filing claims against the estate]. . . . The difficult question of whether the reasoning of *Stern* would apply to any of the claims asserted by the Trustee is one which the Court leaves for another day. The fallout from *Stern* is far from settled. . . . As argued by the Trustee, in announcing its decision, the Supreme Court expressly used very narrow terms, stating that it found Congress had overstepped its authority only 'in one isolated respect.' . . . This has been the basis for some courts to find *Stern* should be interpreted narrowly[, although] other courts have found wide implications . . . . Assuming, without deciding, that [constitutional authority] to enter final judgment on some of the Trustee's claims is lacking, the result would not be dismissal. This Court would retain authority to hear the claims and make recommendations to the district court, for review and subsequent judgment. Whether that procedure will be required in this case can await later decision.").

Samson v. W. Capital Partners LLC (In re Blixseth), 2011 WL 6217416 (Bankr. D. Mont. Dec. 14, 2011) (Kirscher, J.) ("[Defendant] argues this Court lacks subject matter jurisdiction to hear Counts I, II, V and VI of the Plaintiff's complaint and therefore, must dismiss said claims based upon the United States Supreme Court's recent ruling in *Stern* . . . and this Court's prior interpretation of *Stern* . . . . 'Since this Court may not constitutionally hear the fraudulent conveyance claim as a core proceeding, and this Court does not have statutory authority to hear it as a non-core proceeding, it may in no case hear the claim. Therefore, this Court grants the parties fourteen days in which to move the District Court to withdraw its reference, in whole or in part, pursuant to 28 U.S.C. § 157(e), or else it will dismiss the fraudulent conveyance claims for lack of subject matter jurisdiction.' . . . Having now had the benefit of more time to reflect on *Stern v. Marshall*, the Court finds its conclusion . . . may be flawed. . . . [S]everal courts have recently concluded that *Stern v. Marshall* does not deprive bankruptcy courts of subject matter jurisdiction. Following the express language of *Stern v. Marshall*, this Court concludes that because the United States District Court for the District of Montana would have the requisite subject-matter jurisdiction to adjudicate the claims in this Adversary Proceeding, so too does this Court. The Court's [prior] decision is, to the extent it is inconsistent with the decision expressed today, overruled.").

D & B Swine Farms, Inc. v. Murphy-Brown, L.L.C. (In re D & B Swine Farms, Inc.), 2011 WL 6013218 (Bankr. E.D.N.C. Dec. 2, 2011) (Leonard, J.) (Debtor filed adversary proceeding alleging that defendants committed postpetition breach of prepetition contracts. In a pre-*Stern* ruling, the court "acknowledged that it was an unsettled question whether a post-petition breach of a pre-petition contract was a core claim." The court noted, however, "that *Stern* now drives the analysis as to the classification of such claims. In light of the ruling in *Stern*, a state common law

action against a defendant who filed no claim for breach of contract to augment the estate—whether the breach occurred pre- or post-petition—must be classified as a non-core proceeding. In this case, therefore, this court does not have authority to enter final judgment with respect to any of the claims asserted by [the debtor] this action. . . . However, because the court finds that [debtor's] claims must be considered non-core post-*Stern* but are 'related to' the underlying bankruptcy case, the court retains the authority to hear the claims and 'submit proposed findings of fact and conclusions of law to the district court,' pursuant to 28 U.S.C. § 157(c)(1). On this issue, the court rejects the approach taken by the Bankruptcy Court for the District of Montana in [*Blixseth*]. . . . Other courts have found that the decision in *Stern* had the effect of removing certain claims from core bankruptcy jurisdiction, and relegat[ing] them to the category of claims that are merely related to bankruptcy proceedings and thus subject to being heard, but not finally decided by bankruptcy court. . . . This court finds the latter approach congruent with the Supreme Court's intention in *Stern*. Therefore, the court would normally hear all of [debtor's] claims and 'submit proposed findings of fact and conclusions of law to the district court,' pursuant to 28 U.S.C. § 157(c)(1) . . . . However, as discussed above, [several of] the [contracts] contain arbitration provisions. It is well-accepted that arbitration[ ] provisions are generally favored in federal courts. In bankruptcy proceedings, however, whether a proceeding is a 'core proceeding' generally determines whether an arbitration clause can be enforced. . . . [B]ecause *Stern* mandates essentially that the claims that this court previously classified as core be classified as non-core, the primary basis for the court's previous denial of the motion to compel arbitration is no longer applicable.").

Gugino v. Canyon Cnty. (In re Bujak), 2011 WL 5326038 (Bankr. D. Idaho Nov. 3, 2011) (Pappas, J.) ("Even if there were a question about this Court's constitutional power to finally determine Trustee's claims against the [defendant] in this case, there is nothing in *Stern* to prevent the district court, upon any appeal from this Court's decision, from simply treating this Court's findings of fact and conclusions of law as 'proposed,' or as 'recommendations' subject to *de novo* review. The majority in *Stern* expressly noted that the creditor in that case had not argued that bankruptcy courts are barred from hearing all counterclaims against a creditor, nor from entering proposed findings and conclusions on such matters, which could then be submitted to a district court to 'finally decide' the issues. . . . In fact, that is exactly the approach taken by the district court when it was asked to review the bankruptcy court's decision in *Stern*, a procedure that drew no criticism from the Supreme Court.").

Bayonne Med. Ctr. v. Bayonne/Omni Dev., LLC (In re Bayonne Med. Ctr.), 2011 WL 5900960 (Bankr. D.N.J. Nov. 1, 2011) (Stern, J.) ("There is some irony, however, fostered by *Stern v. Marshall*. No clear statutory authority persists for the adjudication by consent of statutorily 'core' matters, which are, nevertheless, matters not otherwise to be adjudged by non-Article III judicial officers. This 'gap' would logically and appropriately be filled by judicial extension of § 157(c)(2). The potential for such circumstances would arise where (as in *Stern v. Marshall*) open-ended state-law based counterclaims are pled by debtors but (unlike that case) consent to adjudicate were to be found. However, *Stern v. Marshall* could implicate more than just state law based counterclaims as statutory core matters which are nonetheless beyond the adjudicatory authority of this court (absent consent). A pall may have been cast upon bankruptcy court adjudication of the wide range of frequently litigated 'proceedings to determine, avoid, and recover fraudulent conveyances' in bankruptcy. *See* 131 U.S. at 2614 (including n.7 and text associated with it). Such

proceedings are 'core' by statute. 28 U.S.C. § 157(b)(2)(H). The same pall may extend to avoidance of preferences, likewise deemed core by statute. 28 U.S.C. § 157(b)(2)(F). . . . This court finds that it is authorized by consent to hear and determine all causes of action pled by the plaintiff *sub judice*. If it be determined on appeal that this conclusion regarding adjudication is in part or *in toto* erroneous, then this Opinion and the Order and Judgment issued herewith should be considered, to the extent necessary and as an alternative to final judgment, proposed findings of fact and conclusions of law per 28 U.S.C. § 157(c)(1), directly or by logical extension.").

Tabor v. Kelly (In re Davis), 2011 WL 5429095 (Bankr. W.D. Tenn. Oct. 5, 2011) (Latta, J.) ("The court has determined that the civil proceeding before it raises questions that may not be heard and finally determined by a non-Article III court. The Defendant has demanded a jury trial. If this adversary proceeding must be tried, the bankruptcy court recommends that the district court withdraw the reference. This does not mean, however, that the bankruptcy court is without authority to entertain the motions for summary judgement that are before it. Just as it can in 'related to' bankruptcy proceedings, the bankruptcy court may prepare proposed findings of fact and conclusions of law leaving any final determination to the *de novo* review of the district court. *Stern*, 131 S. Ct. at 2620; *see* 28 U.S.C. § 157(c)(1). The impact of *Stern* is that neither the bankruptcy court nor the parties may simply rely upon the list of core proceedings provided by Congress to determine whether a bankruptcy judge may finally determine a particular proceeding. Instead, the bankruptcy court must determine whether the proceeding is a matter of public or private right. Matters of private right may not be finally decided by a bankruptcy judge without the consent of the parties. A bankruptcy judge may, however, prepare proposed findings of fact and conclusions of law for de novo review by the Article III district judge.").

Heller Ehrman LLP v. Arnold & Porter, LLP (In re Heller Ehrman LLP), 2011 WL 4542512 (Bankr. N.D. Cal. Sept. 28, 2011) (Montali, J.) ("Assuming—as I do not—that fraudulent transfer actions can no longer constitutionally be tried by a non-Article III judges, title 28 does not prohibit the use of the proposed findings procedure. The absence of a provision is not a prohibition. Further, *Stern* approved exactly such a procedure. Similarly, the fact that Bankruptcy Rule 9033 only mentions non-core proceedings in no way prohibits following the same procedure in core matters. . . . [I]f the fraudulent transfer claims are ultimately determined to fall outside the scope of my authority they would still be related to the bankruptcy case. I could enter proposed findings and, as stated above, I could determine dispositive motions that do not require factual findings. . . . Finally, where a right to a jury exists and the parties do not consent to my presiding, our Bankruptcy Local Rules provide a simple procedure that once again spares the district judge from dealing with these specialized cases until it is time to call the jury.").

Oxford Expositions, LLC v. Questex Media Grp., LLC (In re Oxford Expositions, LLC), 2011 WL 4054872 (Bankr. N.D. Miss. Sept. 13, 2011) (Houston, J.) ("In the absence of consent, the bankruptcy court has subject matter jurisdiction to consider a non-core proceeding, but must only make proposed findings of fact and conclusions of law which are to be submitted to the district court for the entry of a final order after reviewing de novo those matters to which a party has timely and specifically objected.").

Sw. Sports Ctr., Inc. v. Kleem (In re Sw. Sports Ctr., Inc.), 2011 WL 4002559 (Bankr. N.D. Ohio Sept. 6, 2011) (Harris, J.) (An individual obtained a judgment and judgment lien on account of amounts owed him under an agreement requiring redemption of his stock for a price based in part on the appraised value of the real estate, which was arrived at by averaging appraisals submitted by the parties and a neutral third party. The judgment debtor filed a Chapter 11 case, in which the holder of the judgment filed a proof of claim. The debtor commenced an adversary proceeding against the claimant. "In its complaint [against the claimant] the debtor listed seven counts: Count I, that [the claimant's appraiser] provided the court with a false and misleading appraisal and over-inflated the appraisal value of the real estate; Count II, that [the claimant and his appraiser] conspired to provide a false and inflated valuation of the real estate; Count III, that defendants engaged in a pattern of fraud in order to obtain recovery from the debtor; Count IV, that [the claimant's appraiser] was negligent in preparing the appraisal of the real property; Count V, that the debtor was entitled to punitive damages; Count VI, that because the debtor did not owe [the claimant] any money, his judgment lien should be avoided; and Count VII, that because the debtor did not owe [the claimant] any money, the debtor's objection to [the] proof of claim should be sustained. . . . The debtor's claims in its Adversary Proceeding are said by the debtor to be counterclaims to [the] proof of claim and as such are considered 'core proceedings' pursuant to § 157(b)(2)(C) under *Stern*. However, because the debtor's Adversary Proceeding is based on Ohio state law, *Stern* also holds that this Court lacks the constitutional authority to enter a final judgment on a counterclaim when it is based on a state's common law and is otherwise independent of federal bankruptcy law. . . . The Bankruptcy Court's ruling on [the] proof of claim [based on the prepetition judgment] will not resolve the debtor's counterclaim[s]. Thus this Court has no authority under the U.S. Constitution to enter a final judgment. In other words, after *Stern*, if this matter were tried in bankruptcy court, the undersigned judge could only issue proposed findings of fact and conclusions of law, with *de novo* review by a United States District Judge. Alternatively, one or more of the parties could seek withdrawal of the reference pursuant to 28 U.S.C. § 157(d) and Rule 5011(a) and have the matter heard entirely before a United States District Judge. Under these circumstances, abstention is the proper course.").

Samson v. Blixseth (In re Blixseth), 2011 WL 3274042 (Bankr. D. Mont. Aug. 1, 2011) (Kirscher, J.) ("Unlike in non-core proceedings, a bankruptcy court has no statutory authority to render findings of fact and conclusions of law for core proceedings that it may not constitutionally hear. While 28 U.S.C. § 157(c)(1) allows a bankruptcy judge to render findings and conclusions in 'a proceeding that is not a core proceeding but that is otherwise related to a case under title 11,' no other code provision allows bankruptcy judges to do the same in core proceedings. Similarly, no provision allows parties to consent to a bankruptcy court making final decisions in core proceedings as 28 U.S.C. § 157(c)(2) allows parties to consent for non-core proceedings. The code provides only that '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.' 28 U.S.C. § 157(b)(1). Since this Court may not constitutionally hear the fraudulent conveyance claim as a core proceeding, and this Court does not have statutory authority to hear it as a non-core proceeding, it may in no case hear the claim. Therefore, this Court grants the parties fourteen days in which to move the District Court to withdraw its reference, in whole or in part, pursuant to 28 U.S.C. § 157(e), or else it will dismiss the fraudulent conveyance claims for lack of subject

matter jurisdiction.") (reconsidered in *Samson v. Blixseth (In re Blixseth)*, 2012 WL 10193 (Bankr. D. Mont. Jan. 3, 2012) (Kirscher, J.)).

E. DEFAULT JUDGMENTS

Best W. Int'l, Inc. v. Richland Hotel Corp., 2012 WL 608016 (D. Ariz. Jan. 18, 2012) (Anderson, J.) ("[A] U.S. magistrate judge, as a non-Article III judge, does not have jurisdiction to enter a final judgment against a non-consenting, defaulted defendant. . . . While the Ninth Circuit has not expressly addressed whether a magistrate judge has the constitutional authority to enter a default judgment against a non-consenting, defaulted defendant, the Supreme Court [in *Stern*] recently held that a U.S. bankruptcy judge, also a non-Article III judge under the Constitution, '[l]ack[s] the constitutional authority to enter final judgment on a state law counterclaim that is not resolved in the process of ruling on a creditor's proof of claim.' Therefore, the undersigned Magistrate Judge will proceed by Report and Recommendation.").

Liberty Media Holdings, LLC v. Vinigay.com, 2011 WL 810250 (D. Ariz. Mar. 3, 2011) (Anderson, J.) ("While the Ninth Circuit has not expressly addressed whether a magistrate judge has the constitutional authority to enter a default judgment, the Supreme Court has recently held [in *Stern*] that, because a U.S. bankruptcy judge is not an Article III judge under the Constitution, a bankruptcy judge '[l]ack[s] the constitutional authority to enter final judgment on a state law counterclaim that is not resolved in the process of ruling on a creditor's proof of claim.' . . . Accordingly, the undersigned Magistrate Judge proceeds by report and recommendation.").

Hagan v. e-Limidebt, Inc. (In re Gifford), 2011 U.S. Dist. LEXIS 104488 (W.D. Mich. Sept. 15, 2011) (Jonker, J.) ("[T]he Chapter 7 Trustee filed a complaint under 11 U.S.C. §§ 548 and 550 to recover allegedly fraudulent transfers by Debtors to Defendant . . . in the amount of $2,699.37. Defendant failed to answer the complaint, and Plaintiff subsequently filed a motion for entry of a default judgment against Defendant. . . . The Bankruptcy Court held a hearing on August 4, 2011, to address Plaintiff's motion, but Defendant did not appear . . . . The Bankruptcy Court's Report and Recommendation followed. . . . [T]he Bankruptcy Court concluded that default judgment against Defendant was appropriate, and that the complaint constituted a core matter under 28 U.S.C. § 157(b)(2). Relying on the Supreme Court's recent decision in *Stern v. Marshall*, . . . however, the Bankruptcy Court concluded it lacked the constitutional authority to enter a final judgment in this matter and therefore submitted its Report and Recommendation to this Court for the entry of judgment. . . . After reviewing the Bankruptcy Court's Report and Recommendation and the record below, the Court grants Plaintiff's motion for default and enters a money judgment in favor of Plaintiff . . . as recommended by the Bankruptcy Court. In entering this Order, the Court does not reach the issue of whether *Stern* required the Bankruptcy Court to refer the case to the Court for entry of judgment. It is undisputed the Court has jurisdiction to enter judgment in this matter, and the Bankruptcy Court's reference of the matter to the Court does not constitute reversible error.").

Mich. State Univ. Fed. Credit Union v. Ueberroth (In re Ueberroth), 2011 Bankr. LEXIS 5136 (Bankr. W.D. Mich. Dec. 19, 2011) (Hughes, J.) ("Plaintiff Michigan State University Credit Union has filed a complaint to determine the dischargability of a debt owed by [the debtor] to Plaintiff and

seeking a money judgment against [the debtor]. The court has determined that this is a core matter. *See* [28] U.S.C. § [1]57(b)(2). However, in light of the recent U.S. Supreme Court decision *Stern v. Marshall*, . . . the court is submitting this Report and Recommendation to the District Court for the entry of judgment. [The debtor was properly served with the complaint and the motion for default judgment, but did not file a timely answer, otherwise respond or appear at the hearing on the motion, which was properly noticed.] [F]or the reasons stated, this court recommends that the District Court enter a non-dischargable money judgment in favor of Plaintiff Michigan State University Credit Union and against [the debtor] in the amount of $2,795.93, together with interest at the statutory rate, pursuant to 11 U.S.C. § 523(a)(2)(A).").

Hagan v. Classic Prods. Corp. (In re Wilderness Crossings, LLC), 2011 WL 5417098 (Bankr. W.D. Mich. Nov. 8, 2011) (Dales, J.) (The court entered default judgment on Chapter 7 trustee's preference claim. Explaining why it had the authority to do so notwithstanding *Stern*, the court stated: "The court is constrained to discuss the Supreme Court's recent decision in *Stern v. Marshall* . . . because it implicates the court's authority to enter final judgment on this [m]otion [for default judgment]. Certainly, there is authority in our district holding that bankruptcy judges lack the constitutional authority to enter final judgments in avoidance and recovery actions under Chapter 5, and the court recently issued a 'Report and Recommendation' rather than a default judgment in a preference action, based on concerns springing from *Stern*. . . . With the benefit of case development and further reflection, however, the court is unwilling to automatically extend the *dicta* in *Stern* to default judgment motions under Chapter 5, particularly where the amount at issue is relatively small compared to transaction costs. . . . Second, the court believes that parties may waive *Stern*-based objections, because such objections do not challenge the court's subject matter jurisdiction. . . . Third, the Defendant admitted the Plaintiff's factual allegations by failing to answer them. Therefore, the court's only task on this Motion is to determine whether the well-pleaded factual allegations establish a right to relief under the law. As a practical matter, irrespective of whether the court enters a final judgment or proposed findings of fact, the standard of review (in the unlikely event of appeal) will be the same because in a default setting, the court is not resolving factual disputes—the facts are admitted. *See* Fed. R. Civ. P. 8(b)(6). The appellate court will review legal rulings de novo regardless of the form of the bankruptcy court's ruling. *Compare* Fed. R. Bankr. P. 8013 *with id*. 9033(d).").

Richardson v. BDSM Corp., (In re Tevilo Indus., Inc.), 2011 WL 4793343 (Bankr. W.D. Mich. Aug. 30, 2011) (Dales, J.) *report and recommendation adopted sub nom. Richardson v. BDSM Corp.*, 2011 WL 4434894 (W.D. Mich. Sept. 23, 2011) (Bell, J.) ("Given the nature of the Trustee's claims in this case, and confusion engendered by the Supreme Court's recent decision in *Stern*, I may not have the authority under 28 U.S.C. § 157(c) to enter final judgment if, as some believe, this power is reserved exclusively for judges with life tenure and salary protections afforded by Article III of the Constitution . . . . Because the Defendant failed to appear or otherwise participate in this matter, I am unwilling to find that it consented to entry of final judgment by a United States Bankruptcy Judge. . . . [A]lthough the Complaint sought avoidance of a preference—a cause of action arising under Title 11 of the United States Code—it also presaged the taking of property to augment the estate under 11 U.S.C. § 550, which the Supreme Court [in *Stern*] recently suggested may, in the absence of consent, fall within the exclusive authority of [Article III judges]. . . . I have previously determined that the Bankruptcy Court lacked authority to enter final judgment by default

in traditional contract actions arising under state law without the consent of the litigants, and . . . I follow this same procedure today, even though preference actions find their origins not in state law, but instead in the Bankruptcy Code itself. I believe that, in a default setting and until the bankruptcy courts receive guidance from higher authority regarding the effect of *Stern* on causes of action under Chapter 5 of the Bankruptcy Code, the most prudent and expedient course of action requires me to make a recommendation, rather than enter a final judgment. By proceeding in this fashion, I am attempting to insulate the ultimate judgment from collateral attack given the presently-confused state of the law. I leave open the possibility, after briefing in a full adversarial contest, that I may have the authority under 28 U.S.C. § 157(b) to enter final judgment in actions premised on Chapter 5 of Title 11, United States Code.").

Reed v. Johnson (In re Johnson), 2011 Bankr. LEXIS 3542 (Bankr. W.D. Mich. Aug. 22, 2011) (Hughes, J.) ("Plaintiffs . . . have filed a complaint [seeking a] declaration of non-dischargability and money judgment against [the debtor]. The court has determined that this is a core matter. *See* 28 U.S.C. § 157(b)(2). However, in light of the recent U.S. Supreme Court decision *Stern v. Marshall*, . . . the court is submitting this Report and Recommendation to the District Court for the entry of judgment. [F]or the reasons stated, this court recommends that the District Court declare the debt non-dischargable pursuant to 11 U.S.C. § 523 and that it enter a money judgment in favor of Plaintiffs . . . and against [the debtor] in the amount of $15,727.17, pursuant to 11 U.S.C. § 523.").

Boyd v. Northside Auto Inc. (In re Sturgis Iron & Metal Co.), 2011 Bankr. LEXIS 3200 (Bankr. W.D. Mich. Aug. 2, 2011) (Hughes, J.) ("[T]he court [has] heard Trustee's . . . motion entitled 'Motion for Entry of Default Judgment.' This report and recommendation is made because Trustee seeks as relief a default judgment that would provide for the recovery of money from Defendant [for violation of a discovery order]. *Cf. Stern v. Marshall . . . .*").

VanBeek v. Noorman (In re Noorman), 2011 Bankr. LEXIS 3176 (Bankr. W.D. Mich. Aug. 1, 2011) (Hughes, J.) ("Plaintiffs . . . have filed a complaint to determine the dischargability of a debt owed by [the debtor] to Plaintiffs and seeking a money judgment against [the debtor]. The court has determined that this is a core matter. *See* 28 U.S.C. § 157(b)(2). However, in light of the recent U.S. Supreme Court decision *Stern v. Marshall*, . . . the court is submitting this Report and Recommendation to the District Court for the entry of judgment. [Defendant was properly served with the complaint and the motion for default judgment, but did not file a timely answer, otherwise respond or appear at the hearing on the motion, which was properly noticed.] [F]or the reasons stated, this court recommends that the District Court enter a non-dischargable money judgment in favor of Plaintiffs . . . and against [the debtor] . . . in the amount of $74,911.00, together with interest at the statutory rate and costs of $250.00, pursuant to 11 U.S.C. § 523(a)(4).").

F. DISPOSITIVE MOTIONS

Ameriwest Bank v. Starbuck Bancshares Inc. (In re AmericanWest Bancorporation), 2012 WL 394379 (E.D. Wash. Feb. 3, 2012) (Suko, J.) ("The Court further notes that the Bankruptcy Court has already been highly involved in this case, and is very familiar with the facts and issues. Due to a pending summary judgment motion filed before the Bankruptcy Court, this Court will refer all

pretrial matters, including the pending summary judgment, to the Bankruptcy Court. The Bankruptcy Court will then sua sponte supplement its Report and Recommendation after all pending pretrial and dispositive motions have been determined. Proceeding in this fashion will speed the bankruptcy to resolution and conserve scarce resources of the parties and of both courts.").

Dev. Specialists, Inc., v. Orrick, Herrington & Sutcliffe, LLP, 2011 WL 6780600 (S.D.N.Y. Dec. 23, 2011) (McMahon, J.) ("A district court [may] cede to the Bankruptcy Court the task of pre-trial supervision and preliminary determination (via Report and Recommendation) of dispositive motions. *Stern* creates no impediment to so doing . . . .").

Stettin v. Centurion Structured Growth LLC, 2011 WL 7413861 (S.D. Fla. Dec. 19, 2011) (Jordan, J.) (Chapter 11 trustee of the debtor—a law firm engaged in "multi-million dollar Ponzi scheme" involving the "sale of fictitious confidential structured settlements purportedly between the law firm's clients and third parties"—filed an adversary proceeding against the defendants, which were hedge funds and "feeder funds" that invested in "the Banyon entities." The debtor had formed the Banyon entities as vehicles to be used for the purpose of soliciting "funds to purchase the law firm's settlements." In the adversary proceeding the trustee sought "to avoid and recover fraudulent transfers [allegedly received by the defendants] and other related relief." Defendants moved to withdraw the reference, arguing that "cause exists to withdraw the reference because they are entitled to a jury trial under the Seventh Amendment on the claims asserted against them in the adversary proceeding and have not consented to trial before the bankruptcy court." The court granted the motion to withdraw the reference, stating: "The defendants have neither filed nor otherwise asserted any claim against the estate or the disputed *res*. Accordingly, the trustee's fraudulent conveyance action cannot be considered part of the claims adjudication process or integral to the restructuring of debtor-creditor relations. As a result, I find that the defendants have not submitted themselves to the jurisdiction of the bankruptcy court or lost their Seventh Amendment right to a jury trial in this adversary proceeding by filing the proofs of claim on behalf of the Banyon entities. . . . Accordingly, cause exists for the withdrawal of the reference, *see* 28 U.S.C. § 157(d), but I do not find that complete withdrawal is appropriate at this time. The bankruptcy court will continue to handle all pretrial matters. . . . However, in an abundance of caution, in light of the Supreme Court's recent opinion in *Stern v. Marshall* . . . and the uncertainties concerning the extent of its application, all dispositive motions shall be referred to the bankruptcy court only for report and recommendation.").

Stettin v. Gibraltar Private Bank & Trust Co. (In re Rothstein Rosenfeldt Adler, P.A.), 2011 WL 7413914 (S.D. Fla. Nov. 28, 2011) (Scola, J.) (In Chapter 11 case of law firm that operated a Ponzi scheme, trustee brought adversary proceeding against the defendant, asserting preference and fraudulent transfer claims as well a variety of common law claims, including aiding-and-abetting, breach-of-fiduciary-duty and conversion claims. Initially, the district court "withdrew the reference to the bankruptcy court for purposes of trial, but left in place the reference as to all other matters, including dispositive pretrial motions." Thereafter, the defendant sought reconsideration of the order withdrawing the reference "based upon the Supreme Court's decision in *Stern v. Marshall* . . . which [the defendant] contend[ed] precludes the bankruptcy court from adjudicating case dispositive motions. . . . [The defendant] sought a new order withdrawing the reference as to trial and pretrial dispositive motions." The district court granted the motion for reconsideration: "In *Stern*, [t]he

Supreme Court merely held that Congress exceeded its authority under the Constitution in one isolated instance by granting bankruptcy courts jurisdiction to enter final judgments on counterclaims that are not necessarily resolved in the process of ruling on a creditor's proof of claim. . . . As a number of courts have recognized recently, *Stern* issued a very narrow, case specific holding. . . . Indeed, the Court itself was quick to emphasize that 'the question presented here is a "narrow" one' and 'our decision today does not change all that much' in bankruptcy law. *See Stern*, 131 S. Ct. at 2620. . . . Nevertheless, given *Stern*'s relatively new vintage and the uncertainties concerning the full extent of its applications, . . . the Court will withdraw the reference as to any case dispositive motions. Pursuant to 28 U.S.C. § 157(c)(1), however, all such motions shall be referred to the bankruptcy court for proposed findings of fact and conclusions of law. This procedure strikes an appropriate balance of the interests at stake, while also respecting the self-described narrowness of the Supreme Court's decision in *Stern*.").

Ortiz v. Aurora Health Care, Inc. (In re Ortiz), 464 B.R. 807 (Bankr. E.D. Wis. 2012) (Kelley, J.) (The bankruptcy court, on remand from the Seventh Circuit, "recommend[ed] that the District Court deny [the motion by the medical provider that had disclosed the debtors' medical information in the provider's proofs of claim] for [s]ummary [j]udgment as to the claims on judicial estoppel and the absolute litigation privilege [but] since [the medical provider] has established that there is no genuine issue of material fact as to the Debtors' lack of actual damages, [also] recommend[ed] that the District Court grant [the medical provider's] Motion as a matter of law, on that basis.").

Tolliver v. Bank of Am. (In re Tolliver), 464 B.R. 720 (Bankr. E.D. Ky. 2012) (Wise, J.) (Bankruptcy court denied parties' cross-motions for summary judgment on issues that the court determined it did not have the constitutional authority to finally adjudicate, stating that it would "proceed to hear those matters at trial following which the Court shall enter judgment and make the appropriate recommendations to the District Court in accordance with its analysis herein.").

Paloian v. LaSalle Bank Nat'l Ass'n (In re Doctors Hosp. of Hyde Park, Inc.), 463 B.R. 93 (Bankr. N.D. Ill. 2011) (Schmetterer, J.) ("Assuming *arguendo* that fraudulent conveyance actions are impacted by *Stern* and therefore removed from a bankruptcy judge's Constitutional authority to enter final judgment, Trustee Paloian's adversary claims still affect the amount available to pay Doctors Hospital's creditors. This places . . . the Adversary Complaint within the 'related-to' jurisdiction of the bankruptcy judge under 28 U.S.C. § 157(c)(1). Bankruptcy judges with related jurisdiction may still propose Findings of Fact and Conclusions of Law to a District Court Judge for decision whether to enter final judgment. But [s]ummary judgment cannot be granted by a Bankruptcy Judge where that Bankruptcy Judge lacks authority to enter judgment.").

Kirschner v. Agoglia (In re Refco Inc.), 461 B.R. 181 (Bankr. S.D.N.Y. 2011) (Drain, J.) ("[T]he denial of [the] motion to dismiss . . . would be only an interlocutory order, and thus could not in any event be subject to *Stern's* prohibition of this Court's entry of final judgments.").

Gecker v. Flynn (In re Emerald Casino, Inc.), 459 B.R. 298 (Bankr. N.D. Ill. 2011) (Wedoff, J.) ("[E]ven if the trustee's bankruptcy complaint were wholly within the scope of the *Stern* decision, and so removed from core jurisdiction . . . [d]enial of summary judgment is consistent with related-to jurisdiction, in that it leaves the entry of ultimate judgment to the district court.").

Lehman Brothers Holdings Inc. v. JPMorgan Chase Bank, N.A. (In re Lehman Brothers Holdings Inc.), 2012 WL 1355659 (Bankr. S.D.N.Y. Apr. 19, 2012) (Peck, J.) ("The captioned adversary proceeding brought jointly by Lehman Brothers Holdings Inc. ("LBHI," and, together with its affiliated debtor entities, "Lehman") and its Official Committee of Unsecured Creditors (the "Committee," and, together with LBHI, the "Plaintiffs") seeks to recover $8.6 billion from JPMorgan Chase, N .A. ("JPMC") for the benefit of Lehman's creditors. The litigation relates to transactions that occurred shortly before LBHI's bankruptcy filing and highlights various defensive actions taken by JPMC as part of the bank's efforts to limit the impact on JPMC of a default by Lehman. The litigation touches on and illuminates the safe harbor provisions of . . . the Bankruptcy Code . . . . This decision resolves a broad-based motion to dismiss (the "Motion") brought by JPMC at the outset of the litigation. The Motion is quite ambitious in its scope and endeavors to preemptively dispose of all counts in Plaintiffs' First Amended Complaint . . . . While the Motion has been pending, the parties have engaged in robust pretrial discovery and also have briefed and argued questions concerning the authority of the bankruptcy court to render decisions in this litigation and perform its judicial functions in light of the holding of the United States Supreme Court in *Stern v. Marshall*, 131 S. Ct. 2594 (2011). These questions and related procedural steps taken to address them have contributed to the delay in deciding the Motion and, as explained in more detail in the next section of this decision, prompted the filing of a motion by JPMC to withdraw the reference that currently is pending in the United States District Court for the Southern District of New York (the "District Court"). JPMC confirmed at a pretrial conference in January that it does not object to having this Court issue this decision on the Motion. . . . That certainly is some progress, but regardless of this concession, the Court always has had the authority to decide the Motion. . . . *See O'Toole v. McTaggart (In re Trinsum Group, Inc.)*, No. 08–12547(MG), Adv. Proc. No. 11–01284(MG), 2012 Bankr. LEXIS 1573, at *10 (Bankr. S.D.N.Y. Apr. 9, 2012) (noting that "both before and after *Stern v. Marshall*, it is clear that the bankruptcy court may handle all pretrial proceedings, including the entry of an interlocutory order dismissing fewer than all of the claims in an adversary complaint"); *Kirschner v. Agoglia (In re Refco Inc.)*, 461 B.R. 181, 185 (Bankr. S.D.N.Y. 2011) (citing *Retired Partners of Coudert Bros. Trust v. Baker & McKenzie LLP (In re Coudert Bros. LLP)*, 2011 U.S. Dist. LEXIS 110425, at *36–37 (S.D.N.Y. 2011)) (explaining that "the denial of [defendant's] motion to dismiss in whole or in part, would be only an interlocutory order, and thus could not in any event be subject to *Stern*'s prohibition of this Court's entry of final judgments" [because] "an order and judgment granting [defendant's] motion to dismiss, like an order granting summary judgment, would contain no factual findings and would be subject to the same de novo standard of review on appeal as proposed conclusions of law and a recommendation to the district court"). . . . Due to its procedural character and the fact that the Court in deciding any motion to dismiss functions as a non-final gatekeeper in assessing the legal sufficiency of allegations in a complaint, any judicial determination of such a motion at the trial court level involves no factual findings and always is subject to a de novo standard of appellate review. As such, the Supreme Court's analysis in *Stern* is inapposite to this decision.").

O'Toole v. McTaggart (In re Trinsum Grp., Inc.), 2012 WL 1194100 (Bankr. S.D.N.Y. Apr. 9, 2012) (Glenn, J.) ("This case raises an important issue regarding when a bankruptcy court must enter proposed findings of fact and conclusions of law under Rule 9033 of the Federal Rules of Bankruptcy Procedure in non-core matters, or in core matters in which the bankruptcy court may

not enter a final order or judgment consistent with Article III of the U.S. Constitution. In this case, an adversary complaint was filed against eleven defendants alleging claims that are non-core, or core but not subject to entry of a final order or judgment by the bankruptcy court consistent with Article III of the U.S. Constitution, absent consent of the parties. Seven of the defendants consented to the bankruptcy court's entry of final orders or judgment, while four did not. . . . The bankruptcy court dismissed with prejudice two of four claims in the adversary complaint and entered partial judgment under Rule 7054 of the Federal Rules of Bankruptcy Procedure with respect to the dismissal of the two claims against the consenting defendants. The dismissal order stated that the order was an interlocutory order as to the non-consenting defendants, but would become the proposed findings of fact and conclusions of law upon the final disposition of the adversary proceeding. The plaintiff now seeks to have the dismissal order amended to provide that the dismissal of the claims against the non-consenting defendants constitutes the proposed findings of fact and conclusions of law, entitling the plaintiff to immediate review by the district court. For the reasons explained below, the Court rejects that argument and denies the motion. . . . This adversary proceeding arises out of the merger of a Marakon Associates, Inc. ("Marakon") and Integrated Finance Limited, LLC ("IFL") in February 2007, which created Trinsum Group, Inc. ("Trinsum," and with IFL, the "Debtors"). The merger was ultimately unsuccessful, and in July 2008, an involuntary case under chapter 7 was commenced against Trinsum. On January 29, 2009, the Debtor consented to an order of relief and the case was converted to one under chapter 11. . . . On February 24, 2009, IFL filed a voluntary petition under chapter 11 of the Bankruptcy Code, and on March 6, 2009, the Court entered an order directing joint administration of the Trinsum and IFL bankruptcy cases. . . . On November 10, 2010, Chief Judge Gonzalez confirmed the Debtors' First Modified Joint Plan of Liquidation. . . . On that same date, Marianne T. O'Toole (the "Distributing Agent") was appointed as the Distributing Agent of the Debtors' estates. On January 27, 2011, the Distributing Agent filed a complaint (as amended on August 16, 2011, the "Amended Complaint"), alleging: (I) breach of fiduciary duty as to the Marakon Directors; (II) gross negligence and/or recklessness as to the Marakon Directors; (III) breach of fiduciary duty as to the Trinsum Directors; and (IV) corporate waste as to the Trinsum Directors. Thereafter, the defendants moved to dismiss counts III and IV of the Amended Complaint. . . . Some of the Distributing Agent's claims in this case are non-core, or core but not subject to entry of a final order or judgment by the bankruptcy court consistent with Article III of the U.S. Constitution, absent consent of the parties. Accordingly, on August 8, 2011, Chief Judge Gonzalez entered an order instructing the Defendants to file express statements, in accordance with Rules 7008(a) and 7012(b) of the Federal Rules of Bankruptcy Procedure, stating whether they admit or deny that the Adversary Proceeding is core or non-core and, if they contend it is non-core, whether they consent to entry of a final order. . . . The Trinsum Directors (the "Consenting Defendants") filed statements denying that the Adversary Proceeding is a core proceeding but nevertheless consenting to the Court's entry of final orders or judgment. The Marakon Directors (the "Non–Consenting Defendants") filed statements denying that the Adversary Proceeding is a core proceeding and stating that they do not consent to the Court's entry of final orders or judgment. . . . On September 15, 2011, the Defendants either filed or renewed earlier motions to dismiss, in whole or in part, the Amended Complaint. . . . On January 20, 2012, Chief Judge Gonzalez issued an opinion dismissing Counts 3 and 4 of the Amended Complaint with prejudice and denying the Distributing Agent's motion for leave to amend with respect to those counts of the Amended Complaint. . . . On January 28, 2012, Chief Judge Gonzalez entered the Dismissal Order. . . . As to the Consenting Defendants, Chief Judge Gonzalez concluded it was

appropriate to enter partial judgment on the dismissed claims under Rule 54(b) of the Federal Rules of Civil Procedure ("Rule 54(b)"), made applicable to adversary proceedings by Rule 7054. As to the Non–Consenting Defendants, the Dismissal Order makes clear that the order is an interlocutory order, but would become the Court's proposed findings of fact and conclusions of law at the conclusion of the adversary proceeding. . . . The Distributing Agent now seeks to modify the Dismissal Order. . . . The Marakon Directors filed a statement indicating that they do not object to the relief sought by the Distributing Agent. . . . The Distributing Agent argues that the Dismissal Order improperly prevents her from appealing the Dismissal Order with respect to the non-consenting defendants; she filed a timely notice of appeal with respect to the consenting defendants. In support of her argument, the Distributing Agent asserts that the Dismissal Order has the 'unintended consequence' of prejudicing her rights, and that it 'constitute[s] an unconstitutional assertion of Article III power in a non-core proceeding.' . . . Additionally, she argues that in a non-core proceeding under 28 U.S.C. § 157(c)(1) and Rule 9033, 'every order is immediately reviewable as a matter of law.' . . . Finally, the Distributing Agent argues that under *Stern v. Marshall*, a bankruptcy judge lacks authority to issue a final order in a non-core proceeding. . . . Although this is a true statement, absent consent, the Distributing Agent misapplies the holding in *Stern v. Marshall*, as well as relevant statutory authority. . . . The Distributing Agent's argument that every order is immediately reviewable as a matter of law in a non-core matter is unsupported by any statute, rule, or case law. To the contrary, both before and after *Stern v. Marshall*, it is clear that the bankruptcy court may handle all pretrial proceedings, including the entry of an interlocutory order dismissing fewer than all of the claims in an adversary complaint, as occurred in this case. The Dismissal Order did not, as the Distributing Agent contends, transform 'proposed findings of fact and conclusions of law into an interlocutory order appealable only at the end of the case.' . . . Rather, the Dismissal Order simply made clear what was already true: as to the Non–Consenting Defendants, the Dismissal Order is interlocutory because it did not dispose of all claims in the Amended Complaint. Unless and until the bankruptcy court enters proposed findings of fact and conclusions of law, triggering application of Rule 9033, . . . appellate review by the district court of interlocutory orders is limited to discretionary review pursuant to 28 U.S.C. § 158(a)(3). . . . This same result follows whether the interlocutory order relates to non-core claims, or to core claims as to which the bankruptcy court cannot enter final orders or judgments consistent with Article III of the U.S. Constitution absent consent of the parties. . . . Bankruptcy judges are permitted to hear non-core proceedings that are 'otherwise related to a case under title 11.' 28 U.S.C. § 157(c)(1). In such instances, 'any final order or judgment shall be entered by the district judge.' *Id*. Pre-*Stern* case law clearly established that, in such instances, bankruptcy courts may enter interlocutory orders; only entry of a final order or judgment requires the bankruptcy court to submit proposed findings of fact and conclusions of law to the district court. . . . The distinction between final and interlocutory orders in the context of bankruptcy courts has been a source of confusion. However, a number of commentators have provided useful guidance for distinguishing between a final and interlocutory order. *See, e.g.*, 16 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 3926.2. . . . Additionally, then-Judge Breyer provided a thorough explanation of the rule of 'flexible finality' in the context of bankruptcy. *See In re Saco Local Dev. Corp.*, 711 F.2d 411, 444 (1st Cir.1983). In *Saco*, Judge Breyer reasoned that finality in bankruptcy was best understood in the context of discrete adversary proceedings and contested matters within the larger bankruptcy case itself. Once the relevant''judicial units' of the bankruptcy case are properly defined, 'ordinary concepts of finality apply.' 1 *Collier On Bankruptcy* ¶ 5.08[1][b]. An

order dismissing fewer than all of the claims in an adversary complaint is unquestionably an interlocutory order. . . . After *Stern v. Marshall*, the ability of bankruptcy judges to enter interlocutory orders in non-core proceedings, or in core proceedings as to which the bankruptcy court may not enter final orders or judgments consistent with Article III absent consent, has been reaffirmed by the courts that have had occasion to address the issue. . . . In adversary proceedings, orders dismissing fewer than all claims are considered to be interlocutory. . . . Additionally, orders granting summary judgment as to some or not all claims are generally regarded as interlocutory. . . . [This] comport[s] with the doctrine of flexible finality articulated in *Saco* as well as with the traditional parameters of finality. . . . The adversary proceeding being the relevant judicial unit, the order ending the adversary proceeding would generally be the only final order. . . . Although an interlocutory order of a bankruptcy judge is only subject to discretionary review by the district court under section 158(a)(3), Rule 54, made applicable to adversary proceedings by Rule 7054, provides an avenue for entering a partial final judgment, and for immediate appellate review under section 158(a)(1). Under Rule 54, a court may order entry of a 'final judgment as to one or more, but fewer than all, claims or parties . . . if the court expressly determines that there is no just reason for delay.' Fed. R. Civ. P. 54(b). But entering a partial judgment under Rule 7054 assumes the authority of the bankruptcy court to enter a final order or judgment, something the bankruptcy court cannot do, absent consent, in non-core matters or core matters as to which a bankruptcy judge cannot enter a final order or judgment consistent with Article III. An appeal of a partial judgment entered under Rule 7054 proceeds in the manner of an appeal from any other final order or judgment under 28 U.S.C. § 158(a)(1). . . . Here, the Dismissal Order dismissed only two of four causes of action in the Amended Complaint. Therefore, the Dismissal Order was interlocutory. And although Rule 7054 permits entry of a final judgment as to fewer than all claims or parties, a partial judgment could not be entered with respect to the claims asserted against the Non–Consenting Defendants; a partial judgment could be and was entered with respect to the claims against the Consenting Defendants. Neither section 157(c)(1) nor Rule 9033 required that proposed findings of fact and conclusions of law be entered at the time the Court rendered the Opinion or when the Dismissal Order was entered. The policy against piecemeal appeals generally counsels against prematurely submitting proposed findings of fact and conclusions of law under Rule 9033. Because the Distribution Agent can seek to take an interlocutory appeal under 28 U.S.C. § 158(a)(3) and Rule 8003, the district court can make the decision in the exercise of its discretion whether to review the Opinion and Dismissal Order with respect to the dismissal of Counts III and IV against all defendants at this time." The bankruptcy court summarized the rationale for its holding as follows: "[A]n order dismissing fewer than all of the claims in the complaint is an interlocutory order. There is no absolute right to an immediate appeal from an interlocutory order; rather, an appeal from an interlocutory order is permitted only with leave of the district court pursuant to 28 U.S.C. § 158(a)(3) and Rule 8003 of the Federal Rules of Bankruptcy Procedure. Contrary to the argument of the Distributing Agent, nothing in the Bankruptcy Code or in Rule 9033 requires the bankruptcy court to file proposed findings of fact and conclusions of law, and to trigger immediate district court review, at the time an interlocutory order dismissing fewer than all claims is first entered. . . . Although the Bankruptcy Code and Rules may permit a bankruptcy court to accelerate review of an otherwise interlocutory order by filing proposed findings of fact and conclusions of law before the end of the case, the strong federal policy against piecemeal appeals ordinarily counsels against it unless judicial efficiency or other factors support it. The Dismissal Order entered partial judgment under Rule 54(b) with respect to the Consenting Defendants, but only an interlocutory order with respect to the Non–Consenting

Defendants. If the parties want the Opinion granting the motion to dismiss reviewed at one time as to all defendants, section 158(a)(3) provides the parties with a path to seek such review as to the Non–Consenting Defendants. It is now a matter, however, for the district court to decide. Accordingly, the Distributing Agent's Motion is denied.").

Walter v. Freeway Foods, Inc. (In re Freeway Foods of Greensboro, Inc.), 2012 WL 966745 (Bankr. M.D.N.C. Mar. 21, 2012) (Waldrep, J.) ("Because the Court has denied the motion with respect to these claims, *Stern v. Marshall* . . . is not implicated; denial of a dispositive motion does not constitute a final order.").

Peterson v. Enhanced Investing Corp. (Cayman) Ltd. (In re Lancelot Investors Fund, L.P.), 2012 WL 761593 (Bankr. N.D. Ill. Mar. 8, 2012) (Cox, J.) (The bankruptcy court granted defendants' motions for summary judgment on Chapter 7 trustee's claims for avoidance and recovery of transfers made in the course of a Ponzi scheme operated by the debtor, concluding that recovery on the claims was barred by the safe harbor provisions of § 546(e) and (g) of the Bankruptcy Code. The court found, however, that its constitutional authority to enter summary judgment in favor of the defendants on the trustee's claims—which were based on §§ 544, 547, 548(a)(1)(B) and 550—was in question after *Stern*: "*Stern's* ruling may mean that fraudulent transfer [and preference] claims have to be resolved by Article III judges where their resolution does not necessarily resolve a proof of claim. However, because resolution of the various transfer claims asserted by the Trustee could affect the extent of funds the estate has available for distribution to its creditors, this matter [would be within the court's 'related-to' jurisdiction under] . . . 28 U.S.C. § 157(c)(1). . . . Separate Orders will be entered on each Motion for Summary Judgment. Before the court enters those Orders, however, it invites the parties to submit briefs on whether the Orders resolve core matters on which this court may enter final Orders in light of the Supreme Court's ruling in *Stern v. Marshall* . . . and the recent Seventh Circuit Court of Appeals ruling in *Ortiz* . . . .").

West v. WRH Energy Partners, LLC (In re Noram Res., Inc.), 2011 WL 6936361 (Bankr. S.D. Tex. Dec. 30, 2011) (Isgur, J.) ("[Under *Stern*] this Court may not issue a final order or judgment in matters that are within the exclusive authority of Article III courts. . . . The Court may, however, issue interlocutory orders, even in proceedings in which the Court does not have authority to issue a final judgment. The Court need not decide the extent of its authority to enter a final judgment with respect to any of the Trustee's claims. The Court has the authority to decide an interlocutory motion to dismiss. Because the Court does not enter a final judgment, the constitutional limitations on the Court's authority to enter final judgments are not implicated.").

Olsen v. PG Design/Build, Inc. (In re Smeltzer Plumbing Sys., Inc.), 2011 WL 6176213 (Bankr. N.D. Ill. Dec. 12, 2011) (Barbosa, J.) ("[S]ince the Court is satisfied that the matter is within the *jurisdictional* grant under 28 U.S.C. § 1334(b), I need not spend much time at this point inquiring about whether the issue at hand is 'core' or 'non-core,' since I am denying the motion for summary-judgment. Because a denial of summary judgment simply lets the proceeding continue, it is not a 'final order,' and therefore a bankruptcy court can enter such an order rather than make proposed findings of fact and conclusions of law for the district court, even if the subject matter is 'non-core.'").

West v. Avery (In re Noram Res., Inc.), 2011 WL 5357895 (Bankr. S.D. Tex. Nov. 7, 2011) (Isgur, J.) (The Chapter 7 trustee ("Trustee") sued debtor's officers and directors ("Directors") for breach of duty of care to debtor, and the Directors filed motions to dismiss all of the Trustee's claims under Rule 12(b)(6), for failure to state a claim upon which relief can be granted. "Final adjudication of this adversary proceeding likely does not fall within the Bankruptcy Court's constitutional authority. The Trustee asserts that his claims are core proceedings under 28 U.S.C. § 157(b)(2)(A), (B), (C), and (O). Even if the Trustee's claims fall within the statutory core authority of the Bankruptcy Court, the statutory grant of authority is likely unconstitutional under *Stern*. Three of the Directors filed proofs of claim in the Debtors' bankruptcy cases [for salary, severance and monies loaned. While the salary and severance claims are closely connected to the Trustee's executive compensation and bonus claims, and the factual issues involved could be tied to the Trustee's challenge to the Directors claims against the estate,] the larger issue of whether the Directors breached the duty of care . . . would not necessarily be resolved through the adjudication of [their] claims against the estate. [Additionally, the claim for monies loaned] does not appear to be intertwined with any of the Trustee's claims against the Directors. . . . This proceeding is not integrally bound up in the bankruptcy process. The Trustee's claims against the Directors are based entirely on Canadian law, and the Canadian-law character of the claims is in no way altered by bankruptcy law. . . . Under *Stern*, the Bankruptcy Court probably does not have constitutional authority to enter a final judgment in this adversary proceeding. However, the Court has the authority to decide a motion to dismiss. The Court does not enter a final judgment with respect to any claim; the constitutional limitations on the Court's authority to enter final judgments are not implicated. . . . The Court grants, in part, the Directors' motions to dismiss.").

Walter v. Freeway Foods, Inc. (In re Freeway Foods of Greensboro, Inc.), 2011 WL 5118419 (Bankr. M.D.N.C. Oct. 26, 2011) (Waldrep, J.) ("[T]he Court lacks constitutional authority to enter final judgment on these causes of action . . . and must therefore enter proposed . . . conclusions of law when considering the Dispositive Motions as they pertain to these causes of action.").

Tabor v. Kelly (In re Davis), 2011 WL 5429095 (Bankr. W.D. Tenn. Oct. 5, 2011) (Latta, J.) ("The court has determined that [this adversary proceeding, in which the Chapter 7 trustee seeks the avoidance and recovery of allegedly fraudulent and/or preferential transfers against a Defendant who has not filed a proof of claim,] raises questions that may not be heard and finally determined by a non–Article III court. . . . This does not mean, however, that the bankruptcy court is without authority to entertain the motions for [summary judgment] that are before it. Just as it can in 'related to' bankruptcy proceedings, the bankruptcy court may prepare proposed . . . conclusions of law leaving any final determination to the *de novo* review of the district court.").

Heller Ehrman LLP v. Arnold & Porter, LLP (In re Heller Ehrman LLP), 2011 WL 4542512 (Bankr. N.D. Cal. Sept. 28, 2011) (Montali, J.) ("Assuming—as I do not—that fraudulent transfer actions can no longer constitutionally be tried by a non-Article III judges, title 28 does not prohibit the use of the proposed findings procedure. The absence of a provision is not a prohibition. Further, *Stern* approved exactly such a procedure. Similarly, the fact that Bankruptcy Rule 9033 only mentions non-core proceedings in no way prohibits following the same procedure in core matters. . . . [I]f the fraudulent transfer claims are ultimately determined to fall outside the scope of my authority they would still be related to the bankruptcy case. I could enter proposed findings and,

as stated above, I could determine dispositive motions that do not require factual findings. . . . Finally, where a right to a jury exists and the parties do not consent to my presiding, our Bankruptcy Local Rules provide a simple procedure that once again spares the district judge from dealing with these specialized cases until it is time to call the jury.").

Legal Xtranet v. AT&T Mgmt. Servs., L.P. (In re Legal Xtranet), 2011 WL 3236053 (Bankr. W.D. Tex. July 26, 2011) (Clark, J.) ("The real point of the Plaintiff's couching this action as one arising under section 542(b) is clear: if the matter is truly one arising under section 542(b), then it may be a core proceeding, on which this court can rule with finality. If, on the other hand, this is not a matter arising under section 542(b), then it may well be an action the basis for which in no way derives from or is dependent on bankruptcy law. In the latter event, this court could not adjudicate the dispute to final judgment. *See Stern v. Marshall* . . . . The court need not decide that question on this motion, which seeks only dismissal under Rule 12(b)(6). The fact that the court denies relief on this motion in no way decides the questions raised by the *Stern v. Marshall* decision, which questions are reserved for another day.").

Janis v. Wefald (In re Wefald), 2011 WL 5909210 (Bankr. E.D.N.C. July 13, 2011) (Humrickhouse, J.) ("Inasmuch as the court will deny judgment on the pleadings as to some of the claims forming the subject of Janis' motion, and therefore no final judgment is being entered, the analysis and conclusions set forth in *Stern v. Marshall* . . . are inapplicable.").

VII. JUDGMENTS ENTERED PRE-*STERN*

Faulkner v. Kornman (In re Heritage Org., L.L.C.), 459 B.R. 911 (Bankr. N.D. Tex. 2011) (Houser, J.) ("Before the Court is the 'Certain Defendants Motion to Vacate Final Judgment Pursuant to Fed. R. Civ. P. 60(b)(4) and Fed. R. Bankr. P. 9024' . . . . In the Motion and its supporting Memorandum of Law, the Defendants argue that this 'Court was without Article III power to enter such Final Judgment, and, thus, the Final Judgment and the Memorandum Opinion containing the findings and conclusions that support it are void,' relying upon the Supreme Court's recent decision in *Stern* . . . . [E]ven assuming there is a *Stern* problem here, this Court's exercise of jurisdiction over the claims asserted against the Defendants in the Adversary Proceeding was neither a clear usurpation of power or so glaring as to constitute a total want of jurisdiction, nor egregious . . ., where the court wrongfully extends its jurisdiction beyond the scope of its authority. The Defendants consented to this Court's exercise of jurisdiction and entry of a final judgment, had the opportunity to appeal if they changed their mind, did in fact appeal from the Final Judgment, and then agreed to the dismissal of that appeal. Whether characterized as a direct attack on the Final Judgment . . . or a collateral attack on the Final Judgment . . . the Defendants are not entitled to Rule 60(b)(4) relief from the Final Judgment.").

VIII. MISCELLANEOUS

Statek Corp. v. Dev. Specialists, Inc. (In re Coudert Bros. LLP), 673 F.3d 180 (2d Cir. 2012) (Newman, J.; Calabresi, J.; Hall, J.) (The Second Circuit held that the "bankruptcy court should not have applied the choice of law rules of New York, the state in which it sits, but instead the choice

of law rules of Connecticut, where [the claimant] filed its pre-bankruptcy action seeking damages that later [formed the basis of] its claim against the bankruptcy estate. Although the case was not technically transferred under 28 U.S.C. § 1404(a), the practical effect of filing a proof of claim in the bankruptcy court was to transfer the case from Connecticut federal court to New York federal court. . . . [T]he claimant here . . . did not choose to litigate in New York. Instead, it affirmatively chose to file its complaint against [the debtor] somewhere else. The record is clear that [the claimant] exercised its venue privilege in favor of Connecticut. Only in the midst of the Connecticut proceedings—well after they were initiated, when [the debtor] had filed for bankruptcy—did [the claimant] come to New York. Realistically, [the claimant] had no other option. *Cf. Stern v. Marshall*, —— U.S. ——, ——, 131 S. Ct. 2594, 2614, 180 L. Ed. 2d 475 (2011) (creditor-plaintiff 'did not truly consent to resolution of [state-law claims] in the bankruptcy court proceedings,' because by operation of the Bankruptcy Code, '[h]e had nowhere else to go if he wished to recover from [the] estate.'). . . . Under these circumstances, it would be fundamentally unfair to allow [the debtor's] bankruptcy, coming as it did in the midst of the Connecticut action, to deprive [the claimant] of the state-law advantages adhering to the exercise of its venue privilege.").

DiVittorio v. HSBC Bank USA, NA (In re DiVittorio), 670 F.3d 273 (1st Cir. 2012) (Ripple, J.; Lipez, J.; Howard, J.) ("We do not believe that the Supreme Court's recent decision in [*Stern*] affects the jurisdiction of the bankruptcy court to render a decision in this matter. *Stern* held [that] . . . [t]he Bankruptcy Court below 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. . . . Here, however, it first was necessary to resolve the validity of [the debtor's] claim [against HSBC under the Massachusetts version of the federal Truth in Lending Act] to determine whether HSBC was entitled to relief from the automatic stay.").

Matrix IV, Inc. v. Am. Nat'l. Bank & Trust Co. of Chicago, 649 F.3d 539 (7th Cir. 2011) (Sykes, J.; Bauer, J.; Griesbach, J.) (Discussing equitable subordination as an underlying claim, but focusing on the impact of *Stern* relating to *res judicata* and claim preclusion issues.).

Pfizer Inc. v. Law Offices of Peter G. Angelos (In re Quigley Co.), 2012 WL 1171848 (2d Cir. Apr. 10, 2012) (Livingston, J.; Straub, J.; Walker, J.) ("[*Stern*'s] facts . . . are far removed from the instant situation. The [bankruptcy court's preliminary injunction and subsequent order regarding the scope of the injunction] concern the stay of litigation during the pendency of [the debtor's] bankruptcy, rather than the entry of final judgment on a common law claim. Enjoining litigation to protect bankruptcy estates during the pendency of bankruptcy proceedings, unlike the entry of the final tort judgment at issue in *Stern*, has historically been the province of the bankruptcy courts. . . . Accordingly, the bankruptcy court was well within constitutional bounds when it exercised jurisdiction to enjoin the [lawsuits against a non-debtor third party].").

Ca. Franchise Tax Bd. v. Wilshire Courtyard (In re Wilshire Courtyard), 459 B.R. 416 (B.A.P. 9th Cir. 2011) (Pappas, J.; Kirscher, J.; Sargis, J.) ("The Panel is cognizant of the Supreme Court's recent decision in *Stern v. Marshall* . . . wherein the court holds that a bankruptcy court lacks '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.' *Id.* at 2620. However, we conclude that the

Supreme Court's decision is inapposite to the issues raised in this case involving a post-confirmation challenge to the bankruptcy court's jurisdiction to decide the tax dispute.").

Wolgast v. Richards, 463 B.R. 445 (E.D. Mich. 2012) (Ludington, J.) (Plaintiff/debtor moved for Rule 11 sanctions against a party that had filed a motion against him for costs in a prepetition lawsuit. "[B]ecause Plaintiff's motion simply challenges the merits of Defendant's motion, rather than stating an independent claim for relief, the Supreme Court decision in *Stern v. Marshall* . . . is not implicated. . . . In this case, Plaintiff's Rule 11 motion raises not a counterclaim, but a defense to Defendant's motion [for costs]. Accordingly, the limitation articulated in *Stern* is not implicated in this case.").

Blixseth v. Brown, 2012 WL 691598 (D. Mont. Mar. 5, 2012) (Molloy, J.) ("[The debtor][,] Timothy Blixseth[,] filed this lawsuit alleging that his former attorney, Defendant Steven Brown and his law firm, engaged in various misconduct when he sat as chair of the Unsecured Creditors Committee in Blixseth's bankruptcy proceedings. Blixseth claims that Brown's co-defendants conspired with Brown and aided and abetted him. The defendants move to dismiss for lack of subject matter jurisdiction [based on the *Barton* Doctrine] and for failure to state a claim for which relief can be granted. . . . Blixseth argues that the *Barton* Doctrine cannot be applied here because the Bankruptcy Court is without jurisdiction under *Stern v. Marshall* . . . . In *Stern*, the U.S. Supreme Court held that bankruptcy courts may not issue final judgments on 'core,' common-law or state-law claims. That holding, though, does not bar application of the *Barton* Doctrine. . . . Here, all of Blixseth's claims against the various lawyers are core claims because they arise out Brown's alleged misconduct as Chair of the Committee, which involved 'matters concerning the administration of the estate.' 28 U.S.C. § 157(b)(2)(A). . . . *Stern* does not bar the Bankruptcy Court from issuing proposed findings of fact and conclusions of law in this matter. It therefore does not bar application of the *Barton* Doctrine either.").

Nodaway Valley Bank v. Bohr (In re Bohr), 2012 U.S. Dist. LEXIS 22286 (W.D. Mo. Feb. 22, 2012) (Kays, J.) ("First, the Court considers whether Plaintiff's requested relief is a core or non-core right. Issuance of a writ of execution is not a substantive right provided by the Bankruptcy Code, and, therefore, is not considered a core right. In the July 12, 2011 hearing, [the bankruptcy court] suggested this was the case, noting that under the United States Supreme Court decision in *Stern v. Marshall*, the bankruptcy court did not have the authority to issue a writ of execution because issuance of the writ does not arise under the Bankruptcy Code and was not related to the bankruptcy case.").

Salazar v. U.S. Bank Nat'l Ass'n (In re Salazar), 2012 WL 280759 (S.D. Cal. Jan. 31, 2012) (Lorenz, J.) ("Defendants[,] [which apparently did not file proofs of claim,] argue that debtor's claims challenge the nonjudicial foreclosure procedures of a mortgage loan and do not draw from or rely on bankruptcy law and therefore, are non-core proceedings that should be heard in this Court. In other words, like the *Stern* case, the state law claims at issue in this action are 'in no way derived from or dependent upon bankruptcy law.' Debtor contends, however, that [her] adversary complaint is a core proceeding because the claims concern the administration of the estate; would determine, avoid or recover fraudulent conveyances; or affect the liquidation of the assets of the estate or the adjustment of the debtor-creditor relationship. . . . The Court disagrees. [The] adversary complaint

is a state law wrongful foreclosure action which clearly could have been filed in state court and would not be 'resolved in the process of ruling on a creditor's proof of claim.' As a result, the bankruptcy court cannot enter a final judgment on debtor's adversary action.").

Foley v. Wells Fargo Bank, N.A., 2012 WL 75949 (D. Nev. Jan. 10, 2012) (Jones, J.) ("It is possible, of course, that wrongful foreclosure type claims are non-core claims that a non-Article III bankruptcy court cannot finally determine absent consent of the parties, *see Stern v. Marshall*, 131 S. Ct. 2594, 2611 (2011) (citing *N. Pipeline Constr. Co. v. Marathon Pipe Line Co*., 458 U.S. 50 (1982)), in which case the bankruptcy court had no power to rule on the propriety of foreclosure. But even assuming that is the case, and even assuming Plaintiff did not wa[i]ve any such objection by failing to appeal the bankruptcy court's Order Terminating Automatic Stay to the bankruptcy appellate panel or the district court in California, he failed to institute the present suit in this Court within ninety days of the entry of that order.").

Hill v. New Concept Energy, Inc. (In re Yazoo Pipeline Co.), 459 B.R. 636 (Bankr. S.D. Tex. 2011) (Isgur, J.) (The bankruptcy court held that it lacked constitutional authority to enter final judgment in a proceeding where plaintiffs' claims were based entirely on state law, but concluded that *Stern* did not limit bankruptcy court's authority to enter pretrial order regarding matters within its statutory jurisdiction, stating: "The Court therefore considers whether the dispute is so intertwined with essential bankruptcy matters that the filing of the bankruptcy petition transformed the character of the dispute from a typical private rights dispute to a public rights dispute. *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.) . . . Although the claims in this proceeding involve conduct that took place within the context of a bankruptcy case, bankruptcy law does not alter the state-law character of the claims. The claims would not necessarily be resolved through the claims adjudication process or through the resolution of any other essential bankruptcy matter. This Court does not have authority to enter a final judgment in this matter. On this Court's Recommendation, the District Court has ordered that the reference will be withdrawn after all pretrial matters are concluded. Because the Court does not at this time dispose of any claims by issuance of a final order, the Court need not decide the extent of its authority over the claims in this proceeding. *Stern* restricts a bankruptcy court's authority to enter a final order or judgment, but it does not limit this Court's authority to enter pre-trial orders in matters that are within its statutory jurisdiction.").

In re Bechuck, 2012 WL 1144611 (Bankr. S.D. Tex. Apr. 4, 2012) (Bohm, J.) ("Having concluded that this Court has jurisdiction over this matter, this Court nevertheless notes that *Stern* . . . sets forth certain limitations on the constitutional authority of bankruptcy courts to enter final orders. Therefore, this Court has a duty to constantly inquire into its constitutional authority to enter a final order for any matter brought before this Court. In the first instance, this Court concludes that its denial of the [Chapter 7 trustee's application to employ counsel ("Application")] is not a final order because the denial is without prejudice to the refiling of another application seeking approval of the [f]irm that includes the [detailed information regarding the proposed attorneys' qualifications] discussed in this Memorandum Opinion. . . . Hence, this Court has the constitutional authority to enter the order denying the Application because this order is an interlocutory order. Alternatively,

even if the order denying the Application is somehow a final order, this Court nevertheless concludes that it has the constitutional authority to enter the order. The Court arrives at this conclusion because the facts in *Stern* are entirely distinguishable from those in the case at bar. In *Stern*, the debtor's counterclaim was based solely on state law; there was no Bankruptcy Code provision undergirding the counterclaim. . . . Moreover, the resolution of the counterclaim was not necessary to adjudicating the claim of the creditor. . . . Under these circumstances, the Supreme Court held that the bankruptcy court lacked constitutional authority to enter a final judgment on the debtor's counterclaim. . . . In the case at bar, the Application is based solely on an express bankruptcy statute and an express bankruptcy rule: 11 U.S.C. § 327 and Bankruptcy Rule 2014. State law has no equivalent to this statute and this rule; they are purely creatures of the Bankruptcy Code. Accordingly, because the resolution of this matter is based on solely bankruptcy law, not state law, *Stern* is inapplicable, and this Court has the constitutional authority to enter a final order on the Application.").

Bays v. Bays (In re Bays), 2012 WL 996949 (Bankr. E.D. Wash. Mar. 23, 2012) (Rossmeissl, J.) ("This Court has in this case faced the issue of whether the [Chapter 7] trustee's quiet title action against a third party (Kelly Case) [in another adversary proceeding filed by the trustee in this bankruptcy case] was 'core' or 'non-core.' . . . The Court in that instance concluded it was 'core' and proceeded to enter final judgment. Although Mr. Case appealed that judgment, his appeal was dismissed by the Bankruptcy Appellate Court. . . . Subsequent to that judgment quieting title in favor of the trustee against Kelly Case, the United States Supreme Court rendered its decision in the case of *Stern v. Marshall* . . . . The Supreme Court in *Marshall* found the granting of power to the bankruptcy judges to make final judgments in core proceedings unconstitutional in one instance 'a counterclaim by the estate against persons filing claims against the estate.' 28 U.S.C. § 157(b)(2)(C). The majority characterized the decision as a 'narrow one' that 'does not change that much.' *Stern v. Marshall*, 131 S. Ct. at 2620. This Court did not rely on § 157(b)(C), the unconstitutional subsection, in its decision on Kelly Case's challenge to the Court's authority to enter a final judgment on the trustee's claim for quiet title. . . . Rather the Court based its decision on 28 U.S.C. § 157(b)(2)(A), (K) and (O), provisions which were not held to be unconstitutional in *Marshall*. This Court has in rem jurisdiction over assets of the bankruptcy estate. *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440, 124 S . Ct. 1905 (2004). The property awarded [the debtor] in the dissolution is property of the estate. 11 U.S.C. § 541(a)(7). This Court has the authority to enter a final judgement on the trustee's suit to quiet title in estate property. . . . Even if it is subsequently concluded that this Court does not have the authority to enter a final judgment in this matter, it clearly has the authority to hear the matter, make proposed findings of fact and conclusions of law, subject to District Court de novo review. 28 U.S.C. § 157(c). In the event such a conclusion is reached in this matter, this Court's decision should be considered and treated as a proposed findings and conclusions, made in the form of a report and recommendation submitted to the District Court for its de novo review.").

Dawson v. Quigley (In re Dawson), 2012 WL 877102 (Bankr. C.D. Ill. Mar. 15, 2012) (Fines, J.) ("In considering the Plaintiff's request for this Court to reconsider and amend its judgment regarding Count IV of the Plaintiff's Complaint [alleging libel and/or defamation], the Court finds that the parties accurately set out the law concerning this Court's lack of [authority] to enter a final judgment following the Supreme Court's decision in *Stern v. Marshall*. . . . As such, this Court will submit its

proposed findings of fact and conclusions of law to the United States District Court for the Central District of Illinois for entry of a final judgment on Count IV of the Plaintiff's Complaint.").

In re Thalmann, 2012 WL 864600 (Bankr. S.D. Tex. Mar. 13, 2012) (Bohm, J.) ("This Memorandum Opinion addresses two issues related to a final state court judgment obtained against the debtor prior to the filing of his Chapter 13 bankruptcy petition. The first issue concerns whether the debtor filed his Chapter 13 petition in bad faith by scheduling the final state court judgment as 'disputed' and failing to list the amount of the judgment when the debtor would not be eligible for relief under Chapter 13 had he properly scheduled the judgment. The second issue is whether a receiver appointed . . . to collect that judgment is authorized to file a proof of claim on behalf of the judgment creditor. For the reasons set forth herein, the Court concludes that the debtor has acted in bad faith, and further concludes that the receiver is not authorized to file a proof of claim. . . . Having concluded that this Court has jurisdiction over these contested matters, this Court nevertheless notes that [*Stern*] sets forth certain limitations on the constitutional authority of bankruptcy courts to enter final orders. . . . In *Stern*, the suit between the debtor's estate and the creditor concerned solely state law issues. . . . In the case at bar, the Motion to Dismiss arises out of whether the Debtor acted in bad faith in filing his bankruptcy petition. The relief sought in the Motion is based upon Bankruptcy Code Sections 1307(c)—providing that a bankruptcy court may dismiss or convert a case for cause—and 1325(a)(3) and (a)(7), which provide that in confirming a plan, the bankruptcy court may consider whether the debtor acted in good faith when filing his petition and proposing his plan. State law has no equivalent to these statutes; they are purely a creature of the Bankruptcy Code. Accordingly, because the resolution of this dispute is based on express bankruptcy statutes, not state law, *Stern* is inapplicable, and this Court has the constitutional authority to enter a final judgment on the Motion pursuant to 28 U.S.C. §§ 157(a) and (b)(1). . . . Moreover, the resolution of the counterclaim [in *Stern*] was not necessary to adjudicating the claim of the creditor. In the dispute at bar, both the facts and the law give this Court constitutional authority to sign a final order in this proceeding. Here, the Debtor filed an objection to the Proof of Claim, not a counterclaim on an issue that was not necessary to adjudicating the claim. [Section] 502(a) and Bankruptcy Rule 3007(a), not state law, govern objections to claims. Further, the objection is based upon another Bankruptcy Rule—i.e. Rule 3001(b)—which provides that creditors or their authorized agents have authority to execute a proof of claim. While state law determines whether the [r]eceiver is an authorized agent of [the judgment creditor], the resolution of the dispute necessarily determines the validity of the claim, which was not true in *Stern*. For these reasons, this Court concludes that *Stern* has no application and that this Court has constitutional authority to enter a final order on this issue.").

Trinity Commc'ns, LLC v. Momentum Telecomms., Inc. (In re Trinity Commc'ns, LLC), 2012 WL 1067673 (Bankr. E.D. Tenn. Mar. 14, 2012) (Rucker, J.) ("The parties in this case spend much time debating whether this adversary proceeding involves core or non-core issues and whether the court thus has discretion to deny arbitration. . . . Momentum's claims and Trinity's claims in this adversary proceeding are more related than were the state law torts at issue in *Stern v. Marshall*. . . . This case involves a creditor who has filed a proof of claim and two applications for administrative expenses. Although the initial proof of claim is not at issue in this Adversary Proceeding according to Momentum, the application for administrative expenses has been consolidated with this proceeding. . . . In addition, in this action the contracts at issue include a

prepetition contract, the automatic renewal of that contract, as well as a postpetition contract. Although Momentum's claims against the estate involve state law breaches of both contracts, Momentum sought this court's resolution of those claims. Were these the court's only considerations, the court would be inclined to keep the matter. However, the estate's counterclaims against Momentum also include state law breach of contract claims that do not involve the resolution of bankruptcy issues as much as they involve the extent to which Momentum did or did not meet its obligations to provide VoIP services under the Master Services Agreements. Further, at this point in the proceeding, the potential for conflict between arbitration and the purposes of bankruptcy law is almost nonexistent. The court concludes that, as explained below, there is an easier solution to the resolution of Momentum's motion than determining whether all of the issues raised by both Momentum in the application for administrative expenses and by Trinity in its Complaint are core or non-core. Although the parties spend considerable effort debating whether the issues raised by the parties are core or non-core, and as a result, whether this court has the discretion to deny arbitration, the court finds it more productive to follow the lead of other courts . . . and conclude that the core/non-core distinction is not dispositive. Rather, the court will . . . determine whether an inherent conflict exists between arbitration and the underlying purposes of the Bankruptcy Code. . . . In *Katchen v. Landy*, the Supreme Court determined that the bankruptcy court had jurisdiction to 'order the surrender of voidable preferences asserted and proved by the trustee in response to a claim filed by the creditor who received the preferences.' . . . Thus, the case involved the avoidance of a preference, and the Court found that as such, under the prior bankruptcy statutes, it was 'part and parcel of the allowance process and [was] subject to summary adjudication by a bankruptcy court.' . . . In contrast, this adversary proceeding involves the parties' claims of breach of the Master Services Agreements, instead of avoidance of preferences. In addition, the importance of bankruptcy court's involvement in the allowance process would be minimal at this point since the only claim that remains to be determined is Momentum's. Indeed, the Supreme Court in *Stern v. Marshall* also distinguished both *Katchen* and *Langenkamp*, finding that in *Stern* 'there was never any reason to believe that the process of adjudicating [the stepson's] proof of claim would necessarily resolve [the debtor's] counterclaim.' . . . In contrast, both *Katchen* and *Langenkamp* involved the resolution of preference actions by the trustee that became 'integral to the restructuring of the debtor-creditor relationship.'. . . In addition, in both of those cases 'the trustee bringing the preference action was asserting a right of recovery created by federal bankruptcy law.' . . . The debtor's counterclaim in *Stern* was 'a state tort action that exist[ed] without regard to any bankruptcy proceeding.' . . . [T]he court concludes that submission of the parties' breach of contract disputes to arbitration in accordance with the arbitration clause of the Second Master Services Agreement will not interfere with an inherent policy underlying the Bankruptcy Code. . . . Momentum's motion to compel arbitration and stay this proceeding will therefore be [granted].").

Smith v. CitiMortgage, Inc. (In re Smith), 2012 WL 566246 (Bankr. W.D. Tex. Feb. 21, 2012) (Clark, J.) ("Even if this court were to agree . . . that the [debtors'] post-discharge . . . claims [alleging violations of Texas law as well as the Fair Debt Collections Practices and Fair Credit Reporting Acts] are 'core' claims because they arise from the same facts as the Smiths' claim for violation of the discharge injunction, the Supreme Court's recent decision in *Stern v. Marshall* would seem to preclude this court from entering a final judgment on the Smiths' debt collection claims.").

Field v. Abatie (In re Mortg. Store, Inc.), 2012 Bankr. LEXIS 940 (Bankr. D. Haw. Jan. 31, 2012) (Faris, J.) (Plaintiff, the Chapter 7 trustee for debtor, a mortgage company, asked the court to enter judgment in its favor and against defendants, a married couple who had defaulted on a promissory note held by debtor, on certain motions, including a motion for summary judgment, a motion for default judgment, and a motion for an interlocutory decree of foreclosure. Defendants did not oppose the motion. The trustee "requested that summary judgment, default judgment, and an interlocutory decree of foreclosure be entered by the United States District Court, in order to avoid any uncertainties in enforcement which might arise under *Stern v. Marshall* . . . and no defendant has opposed this procedure. Good cause appearing therefore, and pursuant to 28 U.S.C. § 157(c), the Court submits these Proposed Findings of Fact and Conclusions of Law to the United States District Court for the District of Hawaii for entry of a final judgment in this case.").

M2M Multihull, LLC v. West (In re West), 2012 WL 204221 (Bankr. D.R.I. Jan. 20, 2012) (Votolato, J.) ("The United States Supreme Court recently discussed the restrictive nature of, and the limited jurisdiction of bankruptcy courts. . . . In *Stern* the Court emphatically counsels against any suggestion that bankruptcy courts, through their 11 U.S.C. § 105 powers, may exercise authority over non-debtor defendants, as M2M urges this Court to do . . . . In summary, M2M [a nondebtor] asserts state contract and tort actions against non-debtor parties, and asks this to Court adjudicate them. Since M2M seeks a money recovery specifically for itself and not for the estate, this litigation is not a related proceeding. In fact, the matters which M2M seeks to litigate here clearly cover territory that *Stern* says is not part of the bankruptcy court's limited Article I turf.").

Special Value Continuation Partners, L.P. v. Jones, 2011 WL 5593058 (Bankr. S.D. Tex. Nov. 10, 2011) (Isgur, J.) ("Although the extent of *Stern's* reach is unclear, there is little question a bankruptcy judge lacks constitutional authority to enter a final judgment in this case. These are state law causes of action by nondebtors against nondebtors. The causes of action neither derive from nor depend upon any agency regulatory scheme. . . . Additionally, the causes of action do not stem from the Holdco bankruptcy proceedings nor will the causes of action necessarily be resolved by the claims allowance process in those bankruptcies. . . . Entering a final judgment in this case would be the 'prototypical exercise of judicial power' and an Article I judge lacks the constitutional authority to do so.").

In re Chameleon Entm't Sys., Inc., 2011 WL 3880993 (Bankr. D. Colo. Sept. 2, 2011) (Romero, J.) ("[T]he resolution of questions of invalidity of the Settlement based on acts alleged to have been committed by the parties' attorneys, as well as the other issues raised by the Movants, are matters which could be brought in another court and therefore are not core proceedings under 28 U.S.C. § 157(a). Further, such matters do not affect the bankruptcy estate, and are therefore not 'related to' matters over which this Court may exercise jurisdiction. The Court approved the Settlement based on the record before it, and cannot now find the Settlement to be invalid based on factual issues which should be raised in a court of general jurisdiction, not a court of limited jurisdiction. Moreover, even were the additional issues raised by the Movants found to be core proceedings, under United States Supreme Court's ruling in [*Stern*], this Court may not address these questions. . . . The Supreme Court noted litigants must receive a determination from a court of general jurisdiction created under Article III of the Constitution, in 'any matter which, from its nature, is the subject of a suit at the common law, or in equity, or in admiralty.' If and only if a court of general jurisdiction

finds the Settlement should be held to be void on any of the grounds alleged by the Movants, this Court might have a basis for reconsidering the February 6, 2008 Orders, and then possibly only to consider whether damages might lie under 11 U.S.C. § 303. As noted in its previous orders, the questions raised in the instant Motion and in the previous, related motions, are for another forum. The Movants cannot use repetitive motions to bring before this Court issues which should be brought before a court of general jurisdiction.").

Bailey v. Hako-Med USA, Inc. (In re Bailey), 2011 WL 7702799 (Bankr. S.D. Ga. July 29, 2011) (Davis, J.) ("The issue is unclear whether this Court, as an Article I court, has the Constitutional authority to impose non-monetary sanctions—such as arrest and incarceration—which result in the deprivation of personal liberty. An Article I court imposing incarceration runs a substantial risk of attempting to exercise the full judicial power of the United States, which is reserved only to Article III courts by the Constitution. Such remedy may lie outside the constitutional limits of the powers granted to a non-Article III bankruptcy court. . . . This concern . . . is especially true in light of the recent Supreme Court case *Stern v. Marshall*, 131 S. Ct. 2594 (2011). In that case the Court held that even though a bankruptcy court had the statutory authority to enter judgment on a debtor's compulsory counterclaim against a creditor who had filed a proof of claim, it lacked the Constitutional authority to do so. *Id*. . . . This continuation of the Supreme Court's narrow view of bankruptcy courts' authority (*see e.g., Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982)) is a reminder of the limits of this Court's power. It is noteworthy that Defendants in this case filed no proof of claim in the Debtor's Chapter 11 case, so this Court's use of arrest as a sanction is on even weaker Constitutional ground than the bankruptcy court's exercise of a specifically enumerated core power, as was rejected in *Stern*. This case involves the personal liberty interest of a non-party to the underlying bankruptcy case, not just an economic interest, as was the case in *Stern*. Because of the nature of the sanctions recommended by this Court (*see* Part III, *infra*), it is Constitutionally prudent to leave the final determination to the United States District Court for the Southern District of Georgia. That course of action carries with it the added benefit of judicial economy, as any appeal from a contempt sanction issued by this Court would be heard by the United States District Court for the Southern District of Georgia.").