National Conference of Bankruptcy Judges

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Decisions Interpreting *Wellness Int'l Network, Ltd. v. Sharif*

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

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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. No attempt has been made to track the subsequent history of the cases summarized.

Table of Authorities

I. Participation in Litigation Without Challenging Court's Adjudicative Authority

Blixseth v. Glasser (In re Yellowstone Mountain Club, LLC), — F. App'x —, No. 14-35395, 2016 WL 3947830 (9th Cir. July 22, 2016) (Kozinski, J.; Paez, J.; Berzon, J.)

Rationale for Finding Consent: Defendant consented by intervening in the bankruptcy court proceedings and not objecting to the court's entry of final judgment until more than 18 months after he became aware of the issue concerning the court's constitutional authority.

Case Synopsis: "Blixseth intervened in the bankruptcy court proceedings, thereby 'voluntarily appear[ing] . . . before the non-Article III adjudicator.' *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, (2015) (quoting *Roell v. Withrow*, 538 U.S. 580 (2003)). Even if Blixseth is correct that he could not give his knowing and voluntary consent before the case law made him aware of the jurisdictional issue, this Court's decision in *Marshall v. Stern*, 600 F.3d 1037 (9th Cir. 2010) gave Blixseth 'ample reason to be alert to the possible jurisdictional problem.' *In re Bellingham Ins. Agency, Inc.*, 702 F.3d 553, 569 (9th Cir. 2012). That decision issued on March 19, 2010. Blixseth has not indicated that he objected to the court's jurisdiction at any point before October 12, 2011. So, Blixseth was 'made aware of the need for consent and the right to refuse it' more than eighteen months before his objection, and he 'still voluntarily appeared to try the case.' *Wellness Int'l Network*, 135 S. Ct. at 1948 (quoting *Roell*, 538 U.S. at 590, 123 S. Ct. 1696). Blixseth thereby consented to the bankruptcy court's jurisdiction."

Kingdom Fresh Produce, Inc. v. Stokes Law Office, L.L.P. (In re Delta Produce, L.P.), 817 F.3d 141 (5th Cir. 2016) (Reavley, J.; Prado, J.; Costa, J.)

Rationale for Finding Consent: Subsequent PACA claimants consented to the final adjudication of their claims by the bankruptcy court when they, without raising a constitutional objection, joined a proceeding in which the original PACA claimants had consented to the court's entry of final judgment.

Case Synopsis: "This attorney's fee dispute has its roots in the Perishable Agricultural Commodities Act (PACA), a Depression-era statute designed to protect sellers of perishable produce from delinquent purchasers. Two such purchasers filed for bankruptcy and the bankruptcy court appointed special counsel to collect and disburse funds to PACA-protected sellers that had claims against the purchasers-turned-debtors. When special counsel sought approval of his fees and expenses, which would be paid out of the PACA fund, some sellers objected and appealed the bankruptcy court's fee award to the district court, which vacated it. Now that this same chain of events—fee awards, objections, appeals, and vacaturs—has occurred twice more, this case is ripe for decision. The question is: can special counsel's fees and expenses be disbursed from the PACA fund? . . . The original PACA claimants that filed in federal district court consented to adjudication of their claims, which necessarily implicated the entire PACA trust, in bankruptcy court. Claimants

like Kingdom Fresh later filed PACA claims in this proceeding in which the docket sheet put them on notice that the original filers had consented to bankruptcy court adjudication. They raised no constitutional objection when joining the case. This consent—express from some parties and implied from others—thus vested the bankruptcy court with jurisdiction to preside over the PACA claims even if doing so posed a *Stern* problem."

Richer v. Morehead, 798 F.3d 487 (7th Cir. 2015) (Posner, J.; Kanne, J.; Hamilton, J.)

Rationale for Finding Consent: Plaintiff and Defendant consented by failing to challenge the court's constitutional authority to enter final judgment while actively engaging in litigation.

Case Synopsis: Before bankruptcy, Marvin and Gail Richer entered into an "Equity Participation Agreement" with Patrick Morehead under which Morehead was to receive a percentage of the net proceeds from the sale of commercial real property owned by a trust controlled by the Richers. After the Richers filed their bankruptcy case, Morehead filed a proof of claim asserting a secured claim, and the Richers commenced an adversary proceeding in which they sought a determination that Morehead had no claim at all under the terms of the Equity Participation Agreement and governing Illinois law because the property owned by the trust had not yet been sold. After finding that it had the constitutional authority to enter a final order because the Richers were not seeking any relief beyond disallowance of Morehead's proof of claim, the bankruptcy court entered an order holding that Morehead had an allowed unsecured claim in the amount of $945,000. The district court affirmed without addressing the *Stern*-claim or consent issues. On appeal, the Seventh Circuit affirmed. In so doing, it made no mention of the bankruptcy court's conclusion that the Richers' adversary proceeding presented a non-*Stern* claim. Instead, the Seventh Circuit stated as follows regarding consent: "[B]ecause the parties consented to have this issue of Illinois common law decided by the bankruptcy judge even though bankruptcy judges are not Article III judges, the bankruptcy judge was acting within his jurisdiction in interpreting the Equity Participation Agreement. The parties' consent was implicit, but implied consent is good enough [under *Wellness*], at least when as in this case the parties are sophisticated businessmen represented by counsel who can be presumed to be aware of their clients' legal rights. Alternatively (and equivalently) the parties forfeited any objection to the bankruptcy court's adjudication of the contract claim by failing to object at any point during the litigation to the bankruptcy judge's adjudicating the claim."

Wellness Int'l Network, Ltd. v. Sharif, 617 F. App'x 589 (7th Cir. 2015) (Flaum, J.; Sykes, J.; Hamilton, J.)

Rationale for Finding Consent: Appellant waived right to challenge the bankruptcy court's constitutional authority by failing to raise the issue in his opening brief and waiting until his reply brief to do so.

Case Synopsis: "The [Supreme] Court concluded [in *Wellness*] that a litigant's entitlement to 'an Article III adjudicator is a "personal right'" that may be waived through the knowing and voluntary

consent of the parties. The Supreme Court directed us to decide whether Sharif consented to adjudication by the bankruptcy court or whether he forfeited his *Stern* objection by waiting to raise it. . . . We conclude that Sharif forfeited his *Stern* argument when he was first before us. The Supreme Court's decision made clear that a litigant's right to an Article III adjudicator is 'a personal right,' and, thus, can be waived through consent. As such, this personal right can also be forfeited if not properly raised. *See id.* (directing court on remand to decide whether Sharif forfeited objection). We explained in our earlier decision that Sharif waited too long to raise his *Stern* objection because he did not mention the issue until his reply brief. Although we concluded initially that we could not enforce the forfeiture, the Supreme Court has since made clear that we can. By waiting until his reply brief to challenge the bankruptcy court's authority to decide the alter-ego claim, Sharif failed to preserve his challenge, and we will not address the issue."

Mandel v. Jones, No. 4:12-CV-87, 2016 WL 4943366 (E.D. Tex. Sept. 16, 2016) (Clark, J.)

Rationale for Finding Consent: Parties impliedly consented by participating at trial (presentation of evidence and argument on the debtors' counterclaim) without asserting an objection to the court entering final judgment and by including the restitution counterclaim in the "Disputed Issues of Fact" section of the joint pre-trial order.

Case Synopsis: Although it allowed the claimant's claim against the estate based on breach of contract, the bankruptcy court held that it lacked the constitutional authority to decide the debtors' counterclaim for restitution absent the parties' express consent. During the pendency of the appeal to the district court, the Supreme Court decided *Wellness*. Thus, the district court on appeal considered whether the parties had impliedly consented to the bankruptcy court's entry of judgment on the debtor's state law counterclaim by their litigation conduct: "In this case, counsel for [the claimant] presented argument and evidence related to the [debtors'] counterclaim for restitution at trial of the adversary proceeding. In opening statements, counsel for [the claimant] argued that he would prevail on the [debtors'] counterclaim for restitution. During trial, counsel for [the claimant] questioned [the debtor-husband] extensively, eliciting several minutes of testimony related to [the debtor-husband's] position on his counterclaim for restitution. Counsel for [the claimant] also elicited testimony about whether [the claimant's] plans for the Normandy Property had a copyright symbol on them, and whether anyone else had ever seen such a symbol on [the claimant's] plans, implying that the [debtors] could have placed the symbol on the plans themselves. Counsel for the [debtors] elicited a large amount of testimony on this topic. Throughout the court proceedings, neither counsel objected to the Bankruptcy Court's trial of [the debtor-husband's] counterclaim. Additionally, the parties included the restitution counterclaim in the "Disputed Issues of Fact" section of the Pre-Trial Order, which is signed by counsel for both the [debtors] and [the claimant] as well as by Judge Rhoades. The parties clearly impliedly consented to the Bankruptcy Court entering final judgment on the [debtors'] restitution counterclaim in this case. However, the parties do not request that this court remand the restitution counterclaim to the Bankruptcy Court for decision based on their implied consent."

E. Car. Masonry, Inc. v. Weaver Cooke Constr., LLC, No. 5:15-CV-252-BR, 2016 U.S. Dist. LEXIS 29029 (E.D.N.C. Jan. 20, 2016) (Britt, J.)

Rationale for Finding Consent: Defendants consented by filing motions for summary judgment and failing to object to court's order certifying summary judgment orders as final.

Case Synopsis: Prior to filing bankruptcy, the owner of a real estate development project ("Debtor") filed suit in state court against numerous parties, including the project's general contractor ("Weaver Cooke") and subcontractors Carolina Masonry, Inc. ("ECM"), based on allegedly defective construction. Once the case was removed and transferred to the bankruptcy court, Weaver Cooke filed third-party claims "against numerous subcontractors, including ECM, for negligence, contractual indemnity, and breach of express warranty." ECM filed a motion for summary judgment on all Weaver Cooke's claims. The bankruptcy court denied the motion for summary judgment and ECM's subsequent motion for reconsideration, and the district court certified the orders as final. In deciding ECM's appeal, the district court held: "ECM and Weaver Cooke expressly consented to the bankruptcy court's entry of final orders. [A]ll the parties by their conduct have knowingly and voluntarily impliedly consented to the bankruptcy court's entry of final orders. That conduct consists of failing to object to the bankruptcy court's . . . order . . . regarding certification of the numerous summary judgment orders in the proceeding as final. Finding that all parties have consented to the bankruptcy court's entry of final orders, this court will employ a *de novo* review of the bankruptcy court's legal conclusions and mixed questions of law and facts and a clear error review of its factual findings."

Gallinghouse & Assocs., Inc. v. Black (In re Black), No. 15-11935, 2016 WL 5376182 (Bankr. E.D. La. Sept. 26, 2016) (Brown, J.)

Rationale for Finding Consent: Chapter 11 debtor and creditor that filed proof of claim consented to bankruptcy court's adjudication of the debtor's objection to the proof of claim where both the debtor and the creditor failed to challenge the court's constitutional authority to enter final judgment while actively engaging in claims litigation.

Case Synopsis: Chapter 11 debtor William Black and his non-debtor spouse Deborah Black were married in 1989 and divorced over 20 years later. Sometime in between, "Mrs. Black, [while] employed [by] Gallinghouse & Associates, Inc. and G&A Publishing, Inc. ("Gallinghouse Companies"), embezzled funds from the Gallinghouse Companies. She was convicted in state court on several counts of theft/embezzlement, and was sentenced to prison. . . . Additionally, in the criminal case against Mrs. Black, there is a judgment of restitution (the "restitution judgment")." In connection with proofs of claim filed by the Gallinghouse Companies based on the restitution judgment, the Bankruptcy Court was faced with determining (1) "the extent to which [a state court] restitution judgment [that was entered only against the debtor's non-debtor ex-spouse] is a community debt for which both [the debtor and his ex-spouse] are liable" and (2) "the extent to which [the debtor's] Thrift Savings plan ["TSP"] may be used to satisfy the Restitution Judgment." The Bankruptcy Court held that the restitution judgment was a community debt and that "that the

portion of the TSP account that was in existence at the time the petition for divorce was filed is community funds." In addition, the Court allowed the Gallinghouse Companies' proofs of claims "because the community funds are liable for the restitution debt." According to the bankruptcy court: "The division of a marital community is generally not a core matter over which this court would have jurisdiction. Article III, however, permits bankruptcy judges to adjudicate *Stern* claims with the parties' knowing and voluntary consent [as explained in *Wellness*]. It appears quite clear from the pre-trial order and the arguments that the parties have consented to this court's jurisdiction as they submitted this issue to the court without any reservations or objections."

In re Sinclair, — B.R. —, No. 11-34564, 2016 WL 4681137 (Bankr. S.D. Tex. Sept. 7, 2016) (Bohm, J.)

Rationale for Finding Consent: Chapter 13 debtor impliedly consented to bankruptcy court's entry of a final order on motion seeking a determination that he was entitled to a discharge after completing his plan payments by filing the motion and making a record at a hearing without challenging the court's constitutional authority to finally adjudicate the matter.

Case Synopsis: The bankruptcy court held that *Stern* did not preclude it from finally adjudicating motion filed by Chapter 13 debtor seeking a determination that he was entitled to a discharge after completing his plan payments. Alternatively, the court found that it "has the constitutional authority to enter a final order [on the motion] because [the debtor] has consented, impliedly if not explicitly, to adjudication of this issue by this Court. Indeed, [the debtor] filed the [motion] in this Court, and proceeded to make a record at a hearing without ever objecting to this Court's constitutional authority to enter a final order on the [motion]. This Court finds that these circumstances constitute consent to this Court entering final orders on the [motion]."

Liberty Bank & Trust Co. v. Danley (In re Danley), 552 B.R. 871 (Bankr. M.D. Ala. 2016) (Sawyer, J.)

Rationale for Finding Consent: Plaintiff/counterclaim defendant that had commenced action in state court consented to final adjudication by bankruptcy court through its removal of the case to bankruptcy court. The Plaintiff also consented by filing a motion for summary judgment. One co-defendant consented by participating in hearings at which he failed to challenge the court's constitutional authority to enter final judgment. The other co-defendant consented by filing an answer and counterclaim in which she failed to challenge the bankruptcy court's constitutional authority. The co-defendants raised the constitutional argument in their motion for remand or abstention, but the bankruptcy court found that they had made the argument too late (nearly six months after the case was removed) to negate their implied consent.

Case Synopsis: Liberty Bank and Trust Company ("Liberty Bank") obtained *in rem* relief from the automatic stay in the bankruptcy case of Stacy and Stephanie Danley (the "Danleys"), became the owner of the Danleys' residence through foreclosure, and sued them for ejectment. Stacy Danley

asserted a counterclaim alleging that the "foreclosure was wrongful because Liberty Bank had refused to accept payments" from him and "also demanded a jury trial on all counts." Liberty Bank removed the litigation to the bankruptcy court and filed a motion for summary judgment. In response, the Danleys filed motions to remand or abstain, and Stephanie Danley filed her own answer and counterclaim. According to the bankruptcy court: "[A] litigant may waive his or her right to an Article III adjudicator by litigating before a bankruptcy court and failing to expressly refuse consent to adjudication by the bankruptcy court. Liberty Bank's consent can be implied from its removal of the case to this Court. . . . As for the Danleys, the Court has held several hearings on this case . . . at which Stacy Danley has appeared and advocated, and Stephanie Danley has filed an answer and counterclaim. Yet at no time did the Danleys indicate their refusal to consent to adjudication by the Court until they filed their motion for remand or abstention, almost six months after the case was removed and on the eve of a summary judgment hearing. Such a long delay vitiates their refusal. The Danleys have not completely waived their right to an Article III adjudicator, however, because they timely demanded a jury trial on their counterclaims and did not expressly consent to having it conducted by this Court. Bankruptcy courts can conduct jury trials only 'with the express consent of all the parties.' 28 U.S.C. § 157(e). When a litigant holds a constitutional right to a jury trial that the bankruptcy court lacks statutory authority to preside over, the case must be referred to an Article III adjudicator to conduct the trial. That said, a litigant's constitutional right to have disputed facts determined by a jury does not divest the bankruptcy court of the power to adjudicate the case on undisputed facts when the bankruptcy court otherwise has such power, whether by consent of the parties or because the matter is a 'core' proceeding. While the Danleys have preserved their right to a jury trial in front of an Article III adjudicator (assuming, arguendo, that the right to a jury trial attaches to their counterclaims), their jury demand does not preclude the Court from deciding the merits of Liberty Bank's summary judgment motion. The Court holds that the Danleys have waived their right to an Article III adjudicator and consented to adjudication by the Court to the extent that an adjudication can be made without conducting a trial. The Court has the power to adjudicate Liberty Bank's motion for summary judgment."

In re McCollom Interests, LLC, 551 B.R. 292 (Bankr. S.D. Tex. 2016) (Bohm, J.)

Rationale for Finding Consent: Law firm impliedly consented to entry of final order on its fee application by filing the application with the bankruptcy court and by appearing at two hearings on the application without challenging the court's constitutional authority.

Case Synopsis: The bankruptcy court held that *Stern* did not preclude it from entering a final order on the final fee application filed by the law firm retained by the Chapter 7 trustee. Alternatively, the court held that the law firm had consented to entry of a final order because "the Firm filed its Final Fee Application in this Court, this Court held two hearings during which two of the Firm's attorneys appeared and gave testimony; and the Firm never objected to this Court's constitutional authority to enter a final order on the Final Fee Application. If these circumstances do not constitute implied consent, nothing does."

In re Breland, No. 09-11139-JCO, 2016 WL 3193819 (Bankr. S.D. Ala. May 27, 2016) (Oldshue, J.)

Rationale for Finding Consent: IRS actively participated in the proceeding after stating in its papers that the bankruptcy court lacked authority to enter final judgment in the noncore matter.

Case Synopsis: Bankruptcy court held that the parties impliedly consented to its final adjudication of Chapter 11 debtor's motion to recover attorney fees from the IRS under 26 U.S.C. § 7430 as prevailing party in tax claim litigation. The court declined to award attorney fees to the debtor, concluding that the IRS's position was substantially justified. The debtor did not raise an issue regarding the court's adjudicatory authority. In a footnote in its brief in opposition to the debtor's motion to recover attorney fees, the IRS stated that because the motion "constitutes a non-core proceeding, the bankruptcy court is required, in the absence of the express consent of all parties, to submit proposed findings of fact and conclusions of law to the district court for de novo review and entry of an appropriate order." But the IRS fully participated in the litigation over the recoverability of attorney fees, including "actively appearing before the Court at various hearings," filing a joint stipulation of facts and proposed findings of fact and conclusions of law.

In re King, 546 B.R. 682 (Bankr. S.D. Tex. 2016) (Bohm, J.)

Rationale for Finding Consent: Parties impliedly consented to entry of final order on law firm's fee application, the applicant by filing the application with the bankruptcy court, the objectors by filing its objection, and all parties by appearing and litigating the dispute without challenging the court's constitutional authority to enter a final order.

Case Synopsis: The bankruptcy court held that *Stern* did not preclude it from entering a final order on the final fee application filed by the Chapter 7 trustee's counsel. Alternatively, the court found that it "has the constitutional authority to enter a final order because all of the parties in this contested matter have consented, impliedly if not explicitly, to adjudication of this dispute by this Court. [T]he Applicant filed its Fee Application in this Court, Western Surety filed its objection, this Court held a hearing that lasted more than one hour; the Applicant then filed a post-hearing brief, Western Surety filed a response to the post-hearing brief, the Trustee thereafter filed a post-hearing supplemental brief, and the parties never objected to this Court's constitutional authority to enter a final order on the Fee Application. If these circumstances do not constitute implied consent, nothing does."

Wisdom v. Gugino (In re Wisdom), No. 11-01135-JDP, 2016 WL 1039694 (Bankr. D. Idaho Mar. 15, 2016) (Myers, J.)

Rationale for Finding Consent: Defendant impliedly consented by filing answer that admitted subject matter jurisdiction only and moving for summary judgment.

Case Synopsis: Allen Wisdom ("Wisdom"), the pro se Chapter 7 debtor, objected to the final report filed by the panel trustee Jeremy Gugino ("Gugino"). After his objection was overruled by the bankruptcy court, Wisdom "filed the complaint commencing [an] adversary proceeding. . . . In [his "First Amended Complaint" ("FAC")], Wisdom allege[d] several causes against Gugino and simultaneously Gugino's surety, Liberty Mutual Insurance Co. ("Liberty Mutual"). Though he d[id] so in counts that at times assert[ed] claims against other defendants, Wisdom contend[ed] [that] Gugino (a) 'breached a contract' by not selling certain litigation settlements to Wisdom; (b) breached several alleged 'fiduciary duties' to Wisdom; (c) is liable on theories of negligence, negligence per se, and gross negligence; (d) tortiously interfered with contract; (e) committed constructive fraud; (f) intentionally and negligently inflicted emotional distress; (g) slandered Wisdom; and (h) engaged in civil conspiracy. These claims [were] mostly, though not exclusively, based on Gugino's liquidation of specific life insurance policies, which also formed the basis of Wisdom's . . . objection [to the trustee's final report]. In addition, Wisdom raise[d] claims based on Gugino's settlement of various lawsuits which constituted property of the estate. And overarching these claims, Wisdom contend[ed] that Gugino never met the statutory qualifications to act as trustee. . . . Gugino's answer to the FAC admit[ted] subject matter jurisdiction, but assert[ed] [that] the FAC's allegations regarding the core nature of the proceedings are 'legal conclusions which do not require an answer.' Gugino is wrong. Rule 7012(b) expressly requires that '[a] responsive pleading shall admit or deny an allegation that the proceeding is core or non-core.' However, Gugino's conduct throughout this matter (including the request for summary judgment) acknowledges and manifests consent to this Court's entry of final orders and judgment as to any matter that is non-core or that might be argued to be statutorily designated as core but outside the Court's constitutional authority to enter final judgment."

Chatz v. Stepaniants (In re Fatoorehci), 546 B.R. 786 (Bankr. N.D. Ill. 2016) (Hollis, J.)

Rationale for Finding Consent: Trustee filed complaint alleging that bankruptcy court had jurisdiction and that the proceeding was a core matter; the defendant admitted these allegations, did not demand a jury trial, appeared before the court through his counsel on several occasions and appeared in person at trial as a witness, never suggesting that the court lacked the authority to enter a final judgment.

Case Synopsis: The bankruptcy court granted summary judgment in favor of the defendant on the Chapter 7 trustee's § 548(a) constructive fraudulent transfer claims after concluding that the parties had consented to the entry of a final judgment: "[T]he parties knowingly and voluntarily consented to adjudication by this court. The Trustee alleged in his complaint and [defendant] admitted in his answer that this court has jurisdiction over this proceeding. They also alleged and admitted that this proceeding is a core matter, and [defendant] did not demand a trial by jury. The parties appeared before the court through counsel on numerous occasions (and [defendant] appeared in person, as a witness at trial), and neither one ever suggested that they sought anything other than a final judgment, or that they did not consent to adjudication in this court. . . . Even if [defendant's] consent was implicit, 'implied consent is good enough.' *Richer v. Morehead*, 798 F.3d 487, 490 (7th Cir. 2015). Although [defendant] is not a 'sophisticated businessman' as the parties were in *Richer*, he

is represented by competent counsel who is experienced in bankruptcy practice. 'Alternatively (and equivalently) the parties forfeited any objection to the bankruptcy court's adjudication of the . . . claim by failing to object at any point during the litigation to the bankruptcy judge's adjudicating the claim.' *Id*. For all of the reasons stated above, this court has the constitutional authority to enter a final judgment on this complaint."

Wilkins v. AmeriCorp Inc. (In re Allegro Law LLC), 545 B.R. 675 (Bankr. M.D. Ala. 2016) (Sawyer, J.)

Rationale for Finding Consent: Defendants answered, litigated for two years before refusing consent, and then failed to appear at trial, resulting in entry of a default judgment against them.

Case Synopsis: The Chapter 7 trustee brought adversary proceeding seeking to compel defendants to turn over alleged property of the estate, on theory that they were alter egos of debtor. She also sought to recover alleged preferential, fraudulent, and unauthorized postpetition transfers. The Defendants filed motion for bankruptcy judge's recusal, and trustee moved for entry of default judgment after the defendants failed to appear for trial. Finding that the defendants had waived their right to an Article III adjudication, the court reasoned: "In its decision affirming [the bankruptcy court's] denial of arbitration, the District Court held that Counts I and V of [the complaint] are non-core. Counts II, III, and IV are nominally core proceedings under 28 U.S.C. § 157(b)(2)(F) and (H), but under the facts of this case they merely seek augmentation of the bankruptcy estate and thus fall under the *Stern* exception to a bankruptcy court's power of final adjudication over core claims. . . . After the Supreme Court remanded *Wellness Int'l Network* to the Seventh Circuit, the Seventh Circuit determined that the defendant had waived his right to an Article III adjudicator by failing to timely raise it—a matter of five months. *Wellness Int'l Network, Ltd. v. Sharif*, 617 Fed. Appx. 589, 590 (7th Cir. 2015). Notably, that case, like this one, also involved protracted litigation caused by a 'pattern of discovery evasion' by the defendant, and resulted in an entry of default judgment by the bankruptcy court. *Wellness Int'l Network*, 135 S. Ct. at 1941. Here, McCallan and his co-Defendants waited almost two years to demand a jury trial and to refuse consent to adjudication by this Court. By that time, he had already violated at least three of this Court's discovery orders, provoked two motions to compel by Hamm, and had been arrested as a consequence of the bench warrant issued by this Court. Under these facts, the Court readily concludes that McCallan's jury trial demand and assertion of his right to an Article III adjudicator were untimely. Alternatively, McCallan (and his counsel) waived those rights by failing to subsequently reiterate them and by giving the Court (and opposing counsel) the false impression that they intended to defend this suit at a bench trial conducted by this Court. In short, all of the parties have consented to final adjudication by this Court."

In re Odin Demolition & Asset Recovery, LLC, 544 B.R. 615 (Bankr. S.D. Tex. 2016) (Bohm, J.)

Rationale for Finding Consent: Parties impliedly consented to bankruptcy court's entry of a final order by litigating the motion to reopen without asserting a challenge to the court's constitutional authority to finally adjudicate the matter.

Case Synopsis: Motion to reopen debtor's Chapter 11 was filed by defendants in state court lawsuit that was being prosecuted by the reorganized debtor case. Movants sought a determination as to whether the reorganized debtor's ability to prosecute claims that were the subject of pending state court action had been specifically and unequivocally reserved in confirmed plan. The bankruptcy court held that *Stern* did not preclude it from entering a final order on the motion to reopen. Alternatively, the court found that it "has the constitutional authority to enter a final order on the Motion to Reopen because the parties in this contested matter have consented, impliedly if not explicitly, to adjudication of this dispute by this Court. [T]he Movants filed the Motion to Reopen in this Court, the Debtor filed the Debtor's Objection, Northwinds filed its joinder to the Debtor's Objection, the Movants filed a Reply, the Debtor filed a Response to the Reply, the parties proceeded to make a record at [two hearings conducted by the Court]—and all of these pleadings were filed and hearings were held without any of the parties ever objecting to this Court's constitutional authority to enter a final order on the Motion to Reopen. If these circumstances do not constitute consent, nothing does."

In re DeRosa-Grund, 544 B.R. 339 (Bankr. S.D. Tex. 2016) (Bohm, J.)

Rationale for Finding Consent: Parties impliedly consented to bankruptcy court's entry of a final order by litigating the motion to reopen without asserting a challenge to the court's constitutional authority to finally adjudicate the matter.

Case Synopsis: The bankruptcy court held that *Stern* did not preclude it from entering a final order on the motion to reopen. Alternatively, the court found that it "has the constitutional authority to enter a final order on the Motion to Reopen because the parties in this contested matter have consented, impliedly if not explicitly, to adjudication of this dispute by this Court. Indeed, the Debtor filed the Motion to Reopen in this Court, New Line filed its response opposing the Motion to Reopen, and the parties proceeded to make a record in a multi-day hearing without ever objecting to this Court's constitutional authority to enter a final order on the Motion to Reopen. If these circumstances do not constitute consent, nothing does."

Wisper II, LLC v. Abernathy (In re Wisper, LLC), No. 13-10770, 2015 Bankr. LEXIS 4083 (Bankr. W.D. Tenn. Dec. 2, 2015) (Croom, J.)

Rationale for Finding Consent: Plaintiff consented to bankruptcy court's adjudication of its claims for relief by filing adversary complaint and by alleging that its claims were core. Plaintiff consented to bankruptcy court's adjudication of Defendants' counterclaim even though Plaintiff disputed core

nature of counterclaim in its answer; Plaintiff consented to adjudication of counterclaim by failing to challenge the court's entry of a final order, by not raising the non-core issue during the trial and by filing a brief that identified the "issues to be decided" as including issues raised by the counterclaim. Defendants consented to the adjudication of their counterclaim by filing it and by alleging that it was a core proceeding. In addition, Defendants consented to the adjudication of Plaintiff's claims by filing multiple documents that, while arguing that the bankruptcy court lacked subject matter jurisdiction and that they were entitled to a jury trial, failed to clearly challenge the Court's constitutional authority to issue a final order. Finally, the Defendants consented to the adjudication of the Plaintiff's claims by filing a post-trial brief that raised substantive issues with the Plaintiff's claims, but did not contest the bankruptcy court's constitutional authority to issue final judgment.

Case Synopsis: In the adversary proceeding commenced by Wisper II, LLC ("Wisper II"), the reorganized Chapter 11 debtor, against the debtor's managing member Matt Abernathy and his spouse Adria Abernathy (together, the "Defendants"), Wisper II alleges that the Defendants engaged in certain conduct that "give[s] rise to . . . turnover, conversion, preference, and fraudulent transfer claims. . . . In their Counter-Complaint, the Defendants allege that Wisper II is liable for . . . payroll taxes the IRS collected from Matt Abernathy following confirmation of the creditors' Chapter 11 plan. . . . As the Supreme Court made clear in *Wellness* . . . [a] party may impliedly consent to entry of a final decision by the bankruptcy court [and a] party's consent may be implied from his conduct. [T]he Court finds that Wisper II consented to the Court's constitutional authority over its claims against the Defendants. The filing of an adversary complaint along with an allegation that all of the actions are core proceedings constitutes consent to entry of a final order in the matter. With respect to the Defendants' Tax Counterclaim, the Court finds that Wisper II impliedly consented to entry of a final order by this Court. Although Wisper II disputed that the claim was a core proceeding in its Answer to the Counter-Complaint, it never addressed the Court's authority to issue a final order. During the trial, Wisper II never asserted that the Tax Counterclaim was a non-core proceeding or that the Court lacked constitutional authority to issue a final order in the dispute. In addition, Wisper II began its Post-Trial Brief by [identifying] [t]he issues *to be decided* [as including] [w]hether Matt Abernathy is entitled to judgment against Wisper on the Counter-Complaint regarding his voluntary post-confirmation payment of payroll taxes for which he served as the responsible person. In the Court's opinion, this statement indicates that Wisper II consents to this Court finally resolving the Tax Counterclaim. If Wisper II disputed the Court's authority to finally resolve the Tax Counterclaim, it would have chosen a different phrase than 'to be decided.' In addition, . . . Wisper II's Post-Trial Brief [addresses its] claims against the Defendants—claims that they asserted were core proceedings and within this Court's constitutional authority to finally decide. [I]f Wisper II disputed the Court's ability to enter a final order in the Tax Counterclaim, it could have somehow separated the counterclaim from the claims set out in its Amended Complaint rather than group them all together as 'issues to be decided.' Based on these facts, the Court concludes that Wisper II's actions, when taken together, constitute consent to the Court's constitutional authority to finally resolve the Tax Counterclaim. The Court also finds that the Defendants have consented to entry of a final order in their Tax Counterclaim. As with the filing of an adversary complaint, the filing of a counterclaim and the allegation that the claim is a core proceeding constitutes consent to final adjudication by this Court. Turning to the claims set forth by Wisper II against the Defendants,

the Court finds that the Defendants have impliedly consented to the Court's constitutional authority to issue a final order in those matters. . . . The Defendants filed a number of pleadings with this Court in which they failed to challenge this Court's constitutional authority to issue a final order. Although they challenged the Court's subject matter jurisdiction in their various motions to dismiss, they limited their challenge to the two claims that were resolved prior to the trial. They never extended their subject matter jurisdiction argument beyond those claims until after the Court had determined that it had subject matter jurisdiction over all the claims. The Defendants failed to seek any type of relief from the Court's determination that it did in fact have subject matter jurisdiction over Wisper II's claims. The Defendants filed eight pleadings after filing their Amended Answer to the Amended Complaint. Although they stated in one of these pleadings that '[t]he subject matter in the Amended Complaint involves core and non-core proceedings as both equitable and legal issues are involved,' they made this assertion in arguing that they had a right to a jury trial in this proceeding. The Defendants never raised the issue of jurisdiction or constitutional authority in any of their subsequent pleadings. Even in filing their procedurally-defective [motion requesting that this Court refer the adversary proceeding to the District Court], they failed to assert that this Court lacked the authority to issue a final order. Instead, they argued that Wisper II's failure to consent to a jury trial required this Court to refer the adversary proceeding to the District Court. Even in moving to extend the Pre-Trial and Scheduling Order deadlines, the Defendants failed to assert that the Court lacked the constitutional authority to finally resolve Wisper II's claims. The Defendants also failed to raise the issues of jurisdiction or constitutional authority at the trial in this matter or in their Post-Trial Brief. Had they disputed the Court's authority to issue a final order, they could have asserted that position in either venue. They did neither. In fact, in their Post-Trial Brief, the Defendants argued that the Court should not grant Wisper II any recovery on its preference and fraudulent transfer claims for substantive reasons—not procedural or jurisdictional ones. . . . Based on all of these facts [indicating that the parties have consented to the Court's entry of final judgment], the Court concludes that it has constitutional authority to render a final decision in these matters. For this reason, it is unnecessary for the Court to determine whether each individual claim is a *Stern* claim, a core proceeding, or a non-core proceeding.").

Feggins v. LVNV Funding LLC (In re Feggins), 540 B.R. 895 (Bankr. M.D. Ala. 2015) (Sawyer, J.)

Rationale for Finding Consent: Defendants appeared and litigated claims in consolidated adversary proceeding and did not withhold their consent to final adjudication by the bankruptcy court.

Case Synopsis: In consolidated adversary proceedings, plaintiffs—all debtors in pending Chapter 13 cases—asserted violations of the FDCPA based on defendants' filing of proofs of claim on allegedly time-barred debts. At trial, defendants filed two virtually identical motions for judgment on partial findings, one following plaintiffs' case in chief and the other after defendants' case in chief. The court held that defendants had impliedly consented to entry of a final judment, finding: "The Defendants have not expressly consented to adjudication, but their consent may be implied from the course of their conduct in this litigation. The Defendants have repeatedly moved for entry

of judgment in their favor on numerous grounds. (Docs. 5, 16, 21, 32, 39, 51, 62, 63, 65). Yet nowhere in this mass of filings have the Defendants suggested they seek anything other than a final judgment in their favor, or that they do not consent to adjudication in this Court. Based upon these filings, the Court concludes that the Defendants have consented to entry of a final judgment by a bankruptcy court."

Gilbert v. Anh Van Dang (In re Anh Van Dang), No. 14-36790, 2015 WL 6689316 (Bankr. S.D. Tex. Oct. 30, 2015) (Bohm, J.)

Rationale for Finding Consent: Parties impliedly consented to entry of a final judgment in the nondischargeability action. Debtors consented by filing the bankruptcy petitions with the expectation that the nondischargeability litigation would ensue; Defendants/Debtors impliedly consented by participating in the adversary proceeding without objecting to the court's authority to enter a final judgment.

Case Synopsis: The bankruptcy court found that *Stern* did not preclude it from entering final judgment in nondischargeability action in which it was required to determine whether to give collateral estoppel effect to a Texas state court jury verdict. Alternatively, the court held that the parties had consented to entry of a final judgment: "[T]his Court has the constitutional authority to enter a final order because all of the parties at bar have consented, impliedly if not explicitly, to adjudication of this dispute by this Court. . . . The Debtors each filed Chapter 7 petitions shortly after the jury verdict, clearly anticipating that nondischargeability proceedings would be filed in bankruptcy court; the Plaintiffs then filed their adversary proceedings, and neither [of the debtors] have ever given any indication that they object to this Court's authority to issue a final order regarding dischargeability. Indeed, the Debtors have each filed answers to the original complaints and also filed responses opposing the motions for summary judgment. In these pleadings, neither [of the debtors] have objected to this Court's authority to enter a final order. For their part, the Plaintiffs have not lodged any objections either. Under all of these circumstances, this Court concludes that all of the parties have consented to this Court entering a final order as to whether the Final Judgment is a nondischargeable debt."

In re Wilcox, 539 B.R. 137 (Bankr. S.D. Tex. 2015) (Bohm, J.)

Rationale for Finding Consent: Parties consented by participating in the litigation without objecting to the court's constitutional authority to enter a final judgment.

Case Synopsis: The bankruptcy court held that *Stern* did not preclude it from entering final judgment on the motion of the United States Trustee ("UST") to convert a debtor's case from Chapter 7 to Chapter 11 pursuant to 11 U.S.C. § 706(b) or, in the alternative, to dismiss pursuant to 11 U.S.C. § 707(a) (the "Motion "). Alternatively, the court held that the parties had consented to entry of a final judgment: "[T]he UST filed the Motion in this Court, the Debtor filed the Response opposing the Motion, and the parties proceeded to make a record in a multi-day hearing

without ever objecting to this Court's constitutional authority to enter a final order on the Motion. If these circumstances do not constitute consent, nothing does."

Miller v. Popovich (In re Hunt), No. 2:11-BK-58222-ER, 2015 WL 5749794 (Bankr. C.D. Cal. Sept. 30, 2015) (Robles, J.)

Rationale for Finding Consent: Plaintiff and Defendant consented by failing to challenge the court's constitutional authority to enter final judgment while actively engaging in litigation.

Case Synopsis: The Chapter 7 trustee (the "Trustee") sought to avoid prepetition transfers from the debtor to the debtor's brother as actual and constructive fraudulent transfers and to recovery the property or its value from the brother. There is no indication in the decision that the brother had filed a proof of claim. The Trustee filed a motion for summary judgment; the defendant filed a counterclaim and his own motion for summary judgment. According to the bankruptcy court, "the parties' failure to object to the Court's jurisdiction constitutes implied consent to the entry of final judgment."

In re Digerati Techs., Inc., 537 B.R. 317 (Bankr. S.D. Tex. 2015) (Bohm, J.)

Rationale for Finding Consent: Parties impliedly consented to entry of final order on law firm's fee application, the applicant by filing the application with the bankruptcy court, the objectors by filing their objections, and all parties by appearing and litigating the dispute without challenging the court's constitutional authority to enter a final order.

Case Synopsis: The bankruptcy court held that *Stern* did not preclude it from entering a final order on the final fee application filed by the law firm retained by the Chapter 11 debtor. Alternatively, the court found that it "has the constitutional authority to enter a final order because all of the parties in this contested matter have consented, impliedly if not explicitly, to adjudication of this dispute by this Court. [T]he Applicant filed its Fee Application in this Court, the Objectors filed an initial objection and then thereafter filed the Amended Objection, the Applicant then filed its response to the Amended Objection, and also filed its Motion to Strike the Amended Objection, which this Court denied, and the parties proceeded to make a record in a multi-day hearing without ever objecting to this Court's constitutional authority to enter a final order on the Fee Application. If these circumstances do not constitute implied consent, nothing does."

In re Dobbs, 535 B.R. 675 (Bankr. N.D. Miss. 2015) (Woodard, J.)

Rationale for Finding Consent: Attorney who was the subject of a show cause order consented by participating in hearings and filing documents without challenging the bankruptcy court's constitutional authority to enter final judgment.

Case Synopsis: The bankruptcy court entered a show cause order requiring attorney Neal H. Labovitz to appear and show cause why he should not be sanctioned based on his having forged a Chapter 13 debtor's signature on a bankruptcy petition and filing a bankruptcy case on the debtor's behalf without authorization. "[T]here is no question as to [the Court's] constitutional authority to hear this matter and enter a final order [because] it arises through Mr. Labovitz's position as an officer of this Court (thereby bringing it under the purview of Fed. R. Bankr. P. 9011, 11 U.S.C. § 105, and [sections 525 through 528 of the Bankruptcy Code]. Furthermore, Mr. Labovitz has impliedly consented to this Court's authority by filing documents, appearing at hearings, and otherwise participating in the bankruptcy cases and adjudication of the Show Cause Order without objection."

Agin v. Green Tree Servicing, LLC (In re Shubert), 535 B.R. 488 (Bankr. D. Mass. 2015) (Feeney, J.)

Rationale for Finding Consent: Plaintiffs and defendants consented when they failed to challenge bankruptcy court's authority to enter a final judgment on § 544 strong-arm claim.

Case Synopsis: "The specific issue presented is whether the Trustee may avoid the mortgage executed by the Debtor pursuant to his avoiding powers under 11 U.S.C. § 544(a)(3) due to the absence of a proper certificate of acknowledgment in accordance with [state law]. . . . This Court has jurisdiction and authority to resolve the dispute as the matter arises under title 11 and is a core proceeding under 28 U.S.C. § 157(b)(1) and (b)(2)(K). Moreover, no party has objected to the Court's entry of a final order, and thus they have consented to entry of a final order."

In re CTLI, LLC, 534 B.R. 895 (Bankr. S.D. Tex. 2015) (Bohm, J.)

Rationale for Finding Consent: Parties impliedly consented to bankruptcy court's entry of a final order. The movant filed the motion with the bankruptcy court, and the objecting party responded. And neither party challenged the court's constitutional authority to finally adjudicate the matter.

Case Synopsis: The bankruptcy court held that *Stern* did not preclude it from finally adjudicating motion filed by former equity holder to revoke order confirming Chapter 11 plan proposed by the debtor's other equity holder, as having been fraudulently obtained. Alternatively, the court found that it "has the constitutional authority to enter a final order because the parties have consented to adjudication by this Court. Indeed, [the movant] chose to file the Motion in this Court, Wilson filed his Response in this Court, and neither party—both of whom are represented by counsel in this dispute—has objected to this Court's constitutional authority to enter a final order. If this is not consent, then nothing is."

Hackman v. Wilson (In re Hackman), 534 B.R. 867 (Bankr. E.D. Va. 2015) (Kenney, J.)

Rationale for Finding Consent: Plaintiffs consented to the bankruptcy court entering final judgment by filing and litigating non-core claims in bankruptcy court for more than eight months and by failing to file a motion to withdraw the reference in response to a scheduling order, which provided that failure to file the withdrawal motion or to seek other appropriate relief would constitute consent to the court's entry of a final judgment.

Case Synopsis: The Chapter 11 debtor and other entities filed an adversary proceeding complaint against HSBC Holdings, PLC, and Hong Kong and Shanghai Banking Corp., (collectively, "HSBC"), alleging that Edmund E. Wilson ("Wilson") had embezzled their funds and deposited those funds with HSBC. The plaintiffs asserted claims for unjust enrichment, conspiracy, violations of Virginia Computer Crimes Act and RICO. They sought recovery of the funds, imposition of a constructive trust on the funds and a freeze order. HSBC filed a motion to dismiss the adversary proceeding. The bankruptcy court granted the dismissal motion, finding that the plaintiffs had impliedly consented to the court's entry of a final order: "The Plaintiffs, having initiated the action and having litigated the case for more than eight months in this Court without raising an objection to the Court's ability to enter final orders, have consented to the entry of final orders by the undersigned bankruptcy judge." The court cited its initial scheduling order, which provided as follows: "Any party not consenting to the entry of a final order by the Bankruptcy Judge shall file a Motion to withdraw the reference or for other appropriate relief within 30 days of the entry of this Scheduling Order, and shall promptly set the matter for a hearing. The failure to comply with the terms of this paragraph shall be deemed to constitute consent to the entry of final orders by the Bankruptcy Judge."

In re Wright, 533 B.R. 222 (Bankr. S.D. Tex. 2015) (Bohm, J.)

Rationale for Finding Consent: Parties impliedly consented to bankruptcy court's entry of a final order by litigating the debtor's motion to extend the stay without asserting a challenge to the court's constitutional authority to finally adjudicate the matter.

Case Synopsis: The bankruptcy court held that *Stern* did not preclude it from entering a final order on the Chapter 11 debtor's motion to extend the stay. Alternatively, the court found that it "has the constitutional authority to enter a final order because all of the parties in this contested matter have consented, impliedly if not explicitly, to adjudication by this Court. . . . Specifically, both the Debtor and [the secured creditor] filed pleadings in this Court and then adduced testimony, introduced exhibits, made closing arguments, and then filed post-hearing briefs. At no time did they object to this Court's constitutional authority to enter a final order on the Motion. Thus, to the extent that entering an order denying the Motion constitutes entering a final order, this Court holds that the parties have, by their actions, consented to this Court's constitutional authority to enter a final order."

Clay v. City of Milwaukee (In re Clay), No. 14-27268-GMH, 2015 WL 3878454 (Bankr. E.D. Wis. June 22, 2015) (Halfenger, J.)

Rationale for Finding Consent: Defendant consented by opposing the debtor's motion for summary judgment on her avoidance claims without challenging the court's authority to enter a final judgment.

Case Synopsis: "[The debtor,] Pamela Clay[,] commenced this adversary proceeding to avoid under 11 U.S.C. §§ 522 and 548 the City of Milwaukee's tax foreclosure of her residence. She has moved for summary judgment. The City opposes that motion arguing that Ms. Clay received reasonably equivalent value when the City obtained the property through foreclosure. . . . The City, in opposing Ms. Clay's request for summary judgment, did not contend that this court lacks the authority to enter summary judgment on her claim under §§ 522 and 548 nor did it otherwise contend that a judgment can only be entered by an Article III judge. Consequently, the City has consented to final adjudication by this court."

II. Affirmatively Seeking Relief By Filing Motion or Adversary Proceeding

True Traditions, LC v. Wu, 552 B.R. 826 (N.D. Cal. 2015) (Freeman, J.)

Rationale for Finding Consent: Defendant filed cross motion for summary judgment.

Case Synopsis: District court concluded that defendant had consented to entry of final judgment by filing a cross motion for summary judgment on the trustee's fraudulent transfer claim, stating: "[T]he right to seek Article III adjudication can also invite litigation hijinks. Courts confronted with the thorny issue of implied consent to enter final judgment are finely attuned to the concerns of litigation misconduct and sandbagging identified in *Stern*. This concern is particularly acute where, as here, a party seeks affirmative relief from the bankruptcy court believing it might win and then cries foul over the court's entry of final judgment when it loses. . . . Appellant was aware of the need to consent and challenged the bankruptcy court's jurisdiction earlier in the proceeding (after initially admitting the court's jurisdiction). When it came time for summary judgment, however, Appellant sought final judgment in its favor without ever mentioning consent. . . . Here, the consequence of Appellant's decision to seek summary judgment in its favor, and of failing to raise the issue of consent in either its opposition to Appellees' summary judgment motion or its own affirmative motion, is the appropriate finding that Appellant consented to the bankruptcy court's authority to enter final judgment."

Robinson v. Sterne Agee Grp., Inc., No. 3:15CV382-JAG-3, 2015 WL 5179002 (E.D. Va. Sept. 4, 2015) (Gibney, J.)

Rationale for Finding Consent: The Plaintiff consented to the adjudication of its claim by filing adversary proceeding. The Plaintiff consented to the adjudication of the Defendant Chapter 7 trustee's counterclaims by filing a proof of claim, because the Trustee's counterclaims would necessarily be resolved in the claims allowance process.

Case Synopsis: "[Prior to the commencement of its Chapter 7] involuntary bankruptcy proceeding, Anderson & Strudwick, Inc ("Anderson") . . . merged its assets with the Sterne Agee Group, Inc. ("SAG"). . . . [After an order for relief was entered], SAG brought a declaratory action in Bankruptcy Court to determine the rights to common stock held in an escrow account ("Escrow Funds"). The [Chapter 7] Trustee filed counterclaims, asserting that SAG had no rights to the Escrow Funds. [F]ive months after the Trustee filed his counterclaims, SAG filed a Motion to Withdraw Reference . . . . SAG claims that the Court should grant either mandatory or permissive withdrawal because the Bankruptcy Court does not have the authority to hear and decide the Trustee's counterclaims. After considering the factors for mandatory and permissive withdrawal, the Court finds neither appropriate. . . . The Trustee's counterclaims do not qualify as *Stern* claims because the counterclaims would necessarily be resolved in the claims allowance process. In fact, Trustee's counterclaims seek to establish the converse of SAG's adversary [proceeding in which it seeks] a declaration that 'the Escrowed funds were placed in the Escrow Account pursuant to an

arm's length purchase of the Debtor's [Anderson's] assets.' Trustee's . . . claim seeks to prove the exact opposite: that the purchase was not in fact an arm's length purchase, and thus SAG is a successor to Anderson, making indemnification inapplicable. . . . In the alternative, SAG has consented to the authority of the bankruptcy court to hear its claim as well as the Trustee's counterclaims. . . . [Under *Wellness*], the party should have been 'made aware of the need for consent and the right to refuse it,' and with this knowledge still voluntarily appear[ed] to try its case before a non-Article III court. SAG initiated the proceeding in Bankruptcy Court, [and] SAG submitted a proof of claim asserting its rights in Bankruptcy Court a month later. SAG waived its right to have its claims heard by an Article III court by submitting to the equitable jurisdiction of the Bankruptcy Court."

Capuccio v. Capuccio (In re Capuccio), Nos. 16-10604-JDL, 16-1053-JDL, 2016 Bankr. LEXIS 3401 (Bankr. W.D. Okla. Sep. 16, 2016) (Loyd, J.)

Rationale for Finding Consent: Plaintiff cannot withdraw express consent without good cause; by filing proof of claim, plaintiff impliedly consented to any counterclaim that would necessarily be resolved in claims allowance process.

Case Synopsis: Plaintiff brought nondischargeability action against Debtor for breach of fiduciary duties associated with Debtor's guardianship of their mother—particularly, misappropriating funds—and Debtor filed a counterclaim that "[arose] out of the very set of transactions upon which the dischargeability action [was] based." Bankruptcy court found that Plaintiff had both expressly and impliedly consented to its final adjudication of the counterclaim: "In this case, Plaintiff executed a *Jury Trial and Jurisdictional Acknowledgments and Consents* by which he expressly consented to this Court's exercise of jurisdiction to the extent of a final entry of judgment in the case. . . . Having consented in writing to the jurisdiction of the court, there is no automatic right to withdraw such consent. *In re Kingsley Capital Inc.*, 423 B.R. 344, 352 (B.A.P. 10th Cir. 2010) ("[W]e do agree that withdrawal of §157(c)(2) consent does require both a motion and a showing of good cause, neither of which was present here.") (*quoting Carter v. Sea Land Services, Inc.*, 816 F.2d 1018 (5th Cir. 1987) stating "once a right, even a fundamental right, is knowingly and voluntarily waived, a party has no constitutional right to recant at will."). No such attempt to withdraw consent has been filed by the Plaintiff, nor has good cause been shown to support any withdrawal. Further, Plaintiff filed a Proof of Claim in this proceeding for the same amount sought in the adversary. 'A creditor who files a proof of claim in a bankruptcy case submits to the bankruptcy court's equitable jurisdiction for determination not only of the claim itself, but also any counterclaim or defense that must necessarily be resolved in the claims allowance process.' *Stern*, 131 S. Ct. at 2607–08, 2616–18. Courts have also extended this principle to counterclaims filed by a defendant in an adversary proceeding where resolution of the claims and counterclaims could not be resolved without determining the merits of the creditor's claim. In short, by Plaintiff's express and implied consent, this Court has jurisdiction over this adversary proceeding, including Debtor's Counterclaim."

In re Sinclair, — B.R. —, No. 11-34564, 2016 WL 4681137 (Bankr. S.D. Tex. Sept. 7, 2016) (Bohm, J.)

Rationale for Finding Consent: Chapter 13 debtor impliedly consented to bankruptcy court's entry of a final order on motion seeking a determination that he was entitled to a discharge after completing his plan payments by filing the motion and making a record at a hearing without challenging the court's constitutional authority to finally adjudicate the matter.

Case Synopsis: The bankruptcy court held that *Stern* did not preclude it from finally adjudicating motion filed by Chapter 13 debtor seeking a determination that he was entitled to a discharge after completing his plan payments. Alternatively, the court found that it "has the constitutional authority to enter a final order [on the motion] because [the debtor] has consented, impliedly if not explicitly, to adjudication of this issue by this Court. Indeed, [the debtor] filed the [motion] in this Court, and proceeded to make a record at a hearing without ever objecting to this Court's constitutional authority to enter a final order on the [motion]. This Court finds that these circumstances constitute consent to this Court entering final orders on the [motion]."

Robinson v. JH Portfolio Debt Equities, LLC (In re Robinson), 554 B.R. 800 (Bankr. W.D. La. 2016) (Norman, J.)

Rationale for Finding Consent: Defendant consented to entry of final judgment by moving to dismiss the complaint.

Case Synopsis: Chapter 13 debtor filed an adversary proceeding seeking a recovery under the FDCPA against defendants who filed proofs of claim based on time-barred debts. Finding that the parties had consented to entry of a final judgment, the court stated: "The plaintiff has [expressly] consented to the entry of final orders or judgment in this adversary proceeding and defendant JH Portfolio has failed to object to this Court's entry of a final order or judgment pursuant to *Stern*. Still further, JH Portfolio has requested the Court to dismiss the complaint. Accordingly, pursuant to *Wellness*, the Court finds JH Portfolio has impliedly consented to this Court entering a final judgment or order."

Liberty Bank & Trust Co. v. Danley (In re Danley), 552 B.R. 871 (Bankr. M.D. Ala. 2016) (Sawyer, J.)

Rationale for Finding Consent: Plaintiff/counterclaim defendant that had commenced action in state court consented to final adjudication by bankruptcy court through its removal of the case to bankruptcy court. The Plaintiff also consented by filing a motion for summary judgment. One co-defendant consented by participating in hearings at which he failed to challenge the court's constitutional authority to enter final judgment. The other co-defendant consented by filing an answer and counterclaim in which she failed to challenge the bankruptcy court's constitutional authority. The co-defendants raised the constitutional argument in their motion for remand or

abstention, but the bankruptcy court found that they had made the argument too late (nearly six months after the case was removed) to negate their implied consent.

Case Synopsis: Liberty Bank and Trust Company ("Liberty Bank") obtained *in rem* relief from the automatic stay in the bankruptcy case of Stacy and Stephanie Danley (the "Danleys"), became the owner of the Danleys' residence through foreclosure, and sued them for ejectment. Stacy Danley asserted a counterclaim alleging that the "foreclosure was wrongful because Liberty Bank had refused to accept payments" from him and "also demanded a jury trial on all counts." Liberty Bank removed the litigation to the bankruptcy court and filed a motion for summary judgment. In response, the Danleys filed motions to remand or abstain, and Stephanie Danley filed her own answer and counterclaim. According to the bankruptcy court: "[A] litigant may waive his or her right to an Article III adjudicator by litigating before a bankruptcy court and failing to expressly refuse consent to adjudication by the bankruptcy court. Liberty Bank's consent can be implied from its removal of the case to this Court. . . . As for the Danleys, the Court has held several hearings on this case . . . at which Stacy Danley has appeared and advocated, and Stephanie Danley has filed an answer and counterclaim. Yet at no time did the Danleys indicate their refusal to consent to adjudication by the Court until they filed their motion for remand or abstention, almost six months after the case was removed and on the eve of a summary judgment hearing. Such a long delay vitiates their refusal. The Danleys have not completely waived their right to an Article III adjudicator, however, because they timely demanded a jury trial on their counterclaims and did not expressly consent to having it conducted by this Court. Bankruptcy courts can conduct jury trials only 'with the express consent of all the parties.' 28 U.S.C. § 157(e). When a litigant holds a constitutional right to a jury trial that the bankruptcy court lacks statutory authority to preside over, the case must be referred to an Article III adjudicator to conduct the trial. That said, a litigant's constitutional right to have disputed facts determined by a jury does not divest the bankruptcy court of the power to adjudicate the case on undisputed facts when the bankruptcy court otherwise has such power, whether by consent of the parties or because the matter is a 'core' proceeding. While the Danleys have preserved their right to a jury trial in front of an Article III adjudicator (assuming, arguendo, that the right to a jury trial attaches to their counterclaims), their jury demand does not preclude the Court from deciding the merits of Liberty Bank's summary judgment motion. The Court holds that the Danleys have waived their right to an Article III adjudicator and consented to adjudication by the Court to the extent that an adjudication can be made without conducting a trial. The Court has the power to adjudicate Liberty Bank's motion for summary judgment."

In re King, 546 B.R. 682 (Bankr. S.D. Tex. 2016) (Bohm, J.)

Rationale for Finding Consent: Parties impliedly consented to entry of final order on law firm's fee application, the applicant by filing the application with the bankruptcy court, the objectors by filing its objection, and all parties by appearing and litigating the dispute without challenging the court's constitutional authority to enter a final order.

Case Synopsis: The bankruptcy court held that *Stern* did not preclude it from entering a final order on the final fee application filed by the Chapter 7 trustee's counsel. Alternatively, the court found

that it "has the constitutional authority to enter a final order because all of the parties in this contested matter have consented, impliedly if not explicitly, to adjudication of this dispute by this Court. [T]he Applicant filed its Fee Application in this Court, Western Surety filed its objection, this Court held a hearing that lasted more than one hour; the Applicant then filed a post-hearing brief, Western Surety filed a response to the post-hearing brief, the Trustee thereafter filed a post-hearing supplemental brief, and the parties never objected to this Court's constitutional authority to enter a final order on the Fee Application. If these circumstances do not constitute implied consent, nothing does."

Wisdom v. Gugino (In re Wisdom), No. 11-01135-JDP, 2016 WL 1039694 (Bankr. D. Idaho Mar. 15, 2016) (Myers, J.)

Rationale for Finding Consent: Defendant impliedly consented by filing answer that admitted subject matter jurisdiction only and moving for summary judgment.

Case Synopsis: Allen Wisdom ("Wisdom"), the pro se Chapter 7 debtor, objected to the final report filed by the panel trustee Jeremy Gugino ("Gugino"). After his objection was overruled by the bankruptcy court, Wisdom "filed the complaint commencing [an] adversary proceeding. . . . In [his "First Amended Complaint" ("FAC")], Wisdom allege[d] several causes against Gugino and simultaneously Gugino's surety, Liberty Mutual Insurance Co. ("Liberty Mutual"). Though he d[id] so in counts that at times assert[ed] claims against other defendants, Wisdom contend[ed] [that] Gugino (a) 'breached a contract' by not selling certain litigation settlements to Wisdom; (b) breached several alleged 'fiduciary duties' to Wisdom; (c) is liable on theories of negligence, negligence per se, and gross negligence; (d) tortiously interfered with contract; (e) committed constructive fraud; (f) intentionally and negligently inflicted emotional distress; (g) slandered Wisdom; and (h) engaged in civil conspiracy. These claims [were] mostly, though not exclusively, based on Gugino's liquidation of specific life insurance policies, which also formed the basis of Wisdom's . . . objection [to the trustee's final report]. In addition, Wisdom raise[d] claims based on Gugino's settlement of various lawsuits which constituted property of the estate. And overarching these claims, Wisdom contend[ed] that Gugino never met the statutory qualifications to act as trustee. . . . Gugino's answer to the FAC admit[ted] subject matter jurisdiction, but assert[ed] [that] the FAC's allegations regarding the core nature of the proceedings are 'legal conclusions which do not require an answer.' Gugino is wrong. Rule 7012(b) expressly requires that '[a] responsive pleading shall admit or deny an allegation that the proceeding is core or non-core.' However, Gugino's conduct throughout this matter (including the request for summary judgment) acknowledges and manifests consent to this Court's entry of final orders and judgment as to any matter that is non-core or that might be argued to be statutorily designated as core but outside the Court's constitutional authority to enter final judgment."

Richardson v. JPMorgan Chase Bank, N.A. (In re Jordan), 543 B.R. 878 (Bankr. C.D. Ill. 2016) (Gorman, J.)

Rationale for Finding Consent: Plaintiff Chapter 7 trustee impliedly consented to entry of a final judgment by filing complaint seeking mortgage avoidance; Defendant mortgage holder did so by filing a motion to dismiss seeking a final order of dismissal.

Case Synopsis: "The Trustee has filed a complaint to avoid a mortgage held by JPMorgan Chase on the Debtor's residence, claiming that the original lender and mortgagee was unlicensed and therefore the mortgage is void. JPMorgan Chase has responded by filing a motion to dismiss asserting that under controlling Illinois law, even if the original lender was unlicensed, the mortgage remains valid and enforceable. . . . Consent to the entry of a final order where constitutional authority is not present or is questionable must be knowing and voluntary but need not be express; consent may be implied. Here, the Court finds that both the Trustee and JPMorgan have impliedly consented to this Court's entry of a final order. The Trustee filed his complaint raising no questions regarding the Court's constitutional authority to enter the final order he requested in the complaint. Likewise, JPMorgan's motion to dismiss asks the Court to enter a final order of dismissal. A final order will be entered based on the implied consent of both parties."

Wisper II, LLC v. Abernathy (In re Wisper, LLC), No. 13-10770, 2015 Bankr. LEXIS 4083 (Bankr. W.D. Tenn. Dec. 2, 2015) (Croom, J.)

Rationale for Finding Consent: Plaintiff consented to bankruptcy court's adjudication of its claims for relief by filing adversary complaint and by alleging that its claims were core. Plaintiff consented to bankruptcy court's adjudication of Defendants' counterclaim even though Plaintiff disputed core nature of counterclaim in its answer; Plaintiff consented to adjudication of counterclaim by failing to challenge the court's entry of a final order, by not raising the non-core issue during the trial and by filing a brief that identified the "issues to be decided" as including issues raised by the counterclaim. Defendants consented to the adjudication of their counterclaim by filing it and by alleging that it was a core proceeding. In addition, Defendants consented to the adjudication of Plaintiff's claims by filing multiple documents that, while arguing that the bankruptcy court lacked subject matter jurisdiction and that they were entitled to a jury trial, failed to clearly challenge the Court's constitutional authority to issue a final order. Finally, the Defendants consented to the adjudication of the Plaintiff's claims by filing a post-trial brief that raised substantive issues with the Plaintiff's claims, but did not contest the bankruptcy court's constitutional authority to issue final judgment.

Case Synopsis: In the adversary proceeding commenced by Wisper II, LLC ("Wisper II"), the reorganized Chapter 11 debtor, against the debtor's managing member Matt Abernathy and his spouse Adria Abernathy (together, the "Defendants"), Wisper II alleges that the Defendants engaged in certain conduct that "give[s] rise to . . . turnover, conversion, preference, and fraudulent transfer claims. . . . In their Counter-Complaint, the Defendants allege that Wisper II is liable for . . . payroll taxes the IRS collected from Matt Abernathy following confirmation of the creditors' Chapter 11

plan. . . . As the Supreme Court made clear in *Wellness* . . . [a] party may impliedly consent to entry of a final decision by the bankruptcy court [and a] party's consent may be implied from his conduct. [T]he Court finds that Wisper II consented to the Court's constitutional authority over its claims against the Defendants. The filing of an adversary complaint along with an allegation that all of the actions are core proceedings constitutes consent to entry of a final order in the matter. With respect to the Defendants' Tax Counterclaim, the Court finds that Wisper II impliedly consented to entry of a final order by this Court. Although Wisper II disputed that the claim was a core proceeding in its Answer to the Counter-Complaint, it never addressed the Court's authority to issue a final order. During the trial, Wisper II never asserted that the Tax Counterclaim was a non-core proceeding or that the Court lacked constitutional authority to issue a final order in the dispute. In addition, Wisper II began its Post-Trial Brief by [identifying] [t]he issues *to be decided* [as including] [w]hether Matt Abernathy is entitled to judgment against Wisper on the Counter-Complaint regarding his voluntary post-confirmation payment of payroll taxes for which he served as the responsible person. In the Court's opinion, this statement indicates that Wisper II consents to this Court finally resolving the Tax Counterclaim. If Wisper II disputed the Court's authority to finally resolve the Tax Counterclaim, it would have chosen a different phrase than 'to be decided.' In addition, . . . Wisper II's Post-Trial Brief [addresses its] claims against the Defendants—claims that they asserted were core proceedings and within this Court's constitutional authority to finally decide. [I]f Wisper II disputed the Court's ability to enter a final order in the Tax Counterclaim, it could have somehow separated the counterclaim from the claims set out in its Amended Complaint rather than group them all together as 'issues to be decided.' Based on these facts, the Court concludes that Wisper II's actions, when taken together, constitute consent to the Court's constitutional authority to finally resolve the Tax Counterclaim. The Court also finds that the Defendants have consented to entry of a final order in their Tax Counterclaim. As with the filing of an adversary complaint, the filing of a counterclaim and the allegation that the claim is a core proceeding constitutes consent to final adjudication by this Court. Turning to the claims set forth by Wisper II against the Defendants, the Court finds that the Defendants have impliedly consented to the Court's constitutional authority to issue a final order in those matters. . . . The Defendants filed a number of pleadings with this Court in which they failed to challenge this Court's constitutional authority to issue a final order. Although they challenged the Court's subject matter jurisdiction in their various motions to dismiss, they limited their challenge to the two claims that were resolved prior to the trial. They never extended their subject matter jurisdiction argument beyond those claims until after the Court had determined that it had subject matter jurisdiction over all the claims. The Defendants failed to seek any type of relief from the Court's determination that it did in fact have subject matter jurisdiction over Wisper II's claims. The Defendants filed eight pleadings after filing their Amended Answer to the Amended Complaint. Although they stated in one of these pleadings that '[t]he subject matter in the Amended Complaint involves core and non-core proceedings as both equitable and legal issues are involved,' they made this assertion in arguing that they had a right to a jury trial in this proceeding. The Defendants never raised the issue of jurisdiction or constitutional authority in any of their subsequent pleadings. Even in filing their procedurally-defective [motion requesting that this Court refer the adversary proceeding to the District Court], they failed to assert that this Court lacked the authority to issue a final order. Instead, they argued that Wisper II's failure to consent to a jury trial required this Court to refer the adversary proceeding to the District Court. Even in moving to extend the Pre-Trial and Scheduling Order deadlines, the Defendants failed to assert that

the Court lacked the constitutional authority to finally resolve Wisper II's claims. The Defendants also failed to raise the issues of jurisdiction or constitutional authority at the trial in this matter or in their Post-Trial Brief. Had they disputed the Court's authority to issue a final order, they could have asserted that position in either venue. They did neither. In fact, in their Post-Trial Brief, the Defendants argued that the Court should not grant Wisper II any recovery on its preference and fraudulent transfer claims for substantive reasons—not procedural or jurisdictional ones. . . . Based on all of these facts [indicating that the parties have consented to the Court's entry of final judgment], the Court concludes that it has constitutional authority to render a final decision in these matters. For this reason, it is unnecessary for the Court to determine whether each individual claim is a *Stern* claim, a core proceeding, or a non-core proceeding.").

MT Tech. Enters., LLC v. Nolte (In re Nolte), 542 B.R. 185 (Bankr. E.D. Va. 2015) (Huennekens, J.)

Rationale for Finding Consent: Plaintiff consented to entry of final judgment on the nondischargeability complaint by filing the adversary proceeding and alleging that the matter is a core proceeding. The plaintiff consented to a final adjudication on the allowance of its claim by filing its proof of claim. The defendant consented by admitting the allegation that the matter is a core proceeding.

Case Synopsis: In the adversary proceeding filed by the plaintiff/creditor against the individual Chapter 11 debtor, the parties sought the following relief: (1) the plaintiff sought a judgment declaring its $8.84 million claim to be nondischargeable under § 523(a)(6), and (2) the defendant/debtor sought a judgment disallowing the plaintiff's claim in its entirety. The bankruptcy court entered judgment in favor of the defendant, after concluding that the parties had consented to the court's final adjudication of the claims asserted in the complaint, stating: "The plaintiff has consented to the jurisdiction of this Court by commencing this Adversary Proceeding and by filing its Proof of Claim herein. Plaintiff has alleged in paragraph one of the Complaint that this matter is a core proceeding. Defendant has admitted this allegation in his answer. Any *Stern* objections have been waived by the parties, and the Court has the authority to enter final judgment in this proceeding."

In re Sharif, 541 B.R. 681 (Bankr. N.D. Ill. 2015) (Cox, J.)

Rationale for Finding Possible Consent: Movant's seeking relief from the bankruptcy court, while at the same time stating that it does not consent to the court's jurisdiction, "may" amount to a waiver.

Case Synopsis: "This matter came before the Court on September 16, 2015, on the Motion of the Estate of Soad Wattar, Haifa Sharifeh as Executrix . . . requesting that the August 5, 2010 Order directing the turnover of property alleged to be Soad Wattar's be vacated for lack of personal jurisdiction pursuant to Federal Rule of Civil Procedure 60(b)(4) ("Motion"). The Motion also seeks

an accounting and return of the property. . . . Even though the Motion was filed in the bankruptcy court, the movant contends that it does not consent to this Court's jurisdiction over any state court claims, without identifying those claim(s). . . . The movant's effort to seek relief from a bankruptcy court, while contending that it does not consent to that court's jurisdiction over any state court claims may also amount to a waiver on the consent issue."

DePaola v. Sleepy's LLC (In re Prof'l Facilities Mgmt. Inc.), No. 14-31095-WRS, 2015 WL 6501231 (Bankr. M.D. Ala. Oct. 27, 2015) (Sawyer, J.)

Rationale for Finding Consent: Defendant consented to the bankruptcy court entering a final judgment by asserting a counterclaim seeking a recovery in an amount greater than the amount the plaintiff/trustee sought to recover on her non-core contract claim against the defendant.

Case Synopsis: "[Defendant] demanded in its counterclaim nearly twice as much money as [the plaintiff trustee] did in her complaint for damages . . . . That is no mere recoupment defense. [Defendant] likely would not have waived its right to a jury trial had it limited its counterclaim to the amount [the trustee] demanded, or had included language indicating its intent to limit its demand in its pleadings, but it did not do so. . . . Counsel for [defendant] asserted at a hearing on this issue that [defendant] only sought to eliminate [the trustee's] right of recovery, not seek an affirmative claim against the estate, but [defendant's] written pleadings belie its counsel's assertion. The prayer for relief in [defendant's] counterclaim expressly seeks an award of the larger amount from this Court. A litigant's written pleadings will be taken over later assertions to the contrary. . . . In short, [defendant] has consented to adjudication of its counterclaim (and, necessarily, [the trustee's] own claims since the counterclaim cannot be determined without determining them), and has waived its right to a jury trial. The Court will grant [the trustee's] motion to strike [defendant's] jury demand."

Conti v. Perdue Bioenergy, LLC (In re Clean Burn Fuels, LLC), 540 B.R. 195 (Bankr. M.D.N.C. 2015) (Aron, J.)

Rationale for Finding Consent: Preference defendant impliedly consented to the bankruptcy court's entry of a final judgment by filing a motion for summary judgment.

Case Synopsis: The Chapter 7 trustee filed a preference complaint, seeking to avoid nearly $15 million in payments that the debtor, the operator of an ethanol facility, made to Perdue Bioenergy, LLC ("Perdue"), a corn supplier. Perdue asserted affirmative defenses, and the parties filed cross-motions for summary judgment. The bankruptcy court held that Perdue had impliedly consented to the entry of final judgment by the bankruptcy court, reasoning: "In its Amended Answer, Perdue did not consent to this Court's entry of a final judgment. However, Perdue later requested this Court to enter final judgment in its Motion for Summary Judgment. The Supreme Court, in allowing parties to impliedly consent to bankruptcy courts' jurisdiction, noted that such a rule promotes the 'pragmatic virtue[]' of 'checking gamesmanship.' *Wellness*, 135 S. Ct. at 1948; *see also Haley v. Barlays Bank Del. (In re Carter)*, 506 B.R. 83, 88 (Bankr. D. Ariz. 2014) ("If a

Stern objection were not deemed waived by the party making it seeking summary judgment, then the party could seek or permit a substantive ruling by the Bankruptcy Court, and then waive that objection if the ruling is favorable but insist on it if unfavorable, and get a second bite at the apple."). To prevent the gamesmanship described in *Haley*, this Court will interpret Perdue's Motion for Summary Judgment as its consent to this Court's entry of a final judgment."

Northen v. MDC Innovations, LLC (In re C & M Invs. of High Point Inc.), No. 13-10661, 2015 WL 5120819 (Bankr. M.D.N.C. Aug. 26, 2015) (Aron, J.)

Rationale for Finding Consent: Despite objecting in their answer to the bankruptcy court's constitutional authority to enter final judgment, the defendants impliedly consented to entry of final judgment by moving for summary judgment.

Case Synopsis: "The Trustee initiated the present action against the Defendants and Mark to obtain a declaratory judgment as to the ownership rights of the parties with respect to Innovations and Inventions, obtain an accounting of Innovations and Inventions, and avoid and recover pre-petition fraudulent transfers and post-petition transfers. Mark filed a cross-claim against the Defendants for fraud, unfair and deceptive trade practices under North Carolina law, and specific performance. The Defendants moved for summary judgment as to the solvency of Wayne, the validity of his transfers, and the ownership of certain patents. Mark moved for summary judgment as to the ownership rights of the parties in Innovations and Inventions, as well as with respect to the existence and enforceability of certain contractual rights. Lastly, the Trustee moved for summary judgment as to the ownership interest of the bankruptcy estate in Innovations and Inventions. . . . In Mark's Answer he consented to this Court's adjudication, which provides constitutional authority under *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932 (2015). Defendants[] generally denied that this Court has constitutional authority to enter a final order, but they have not otherwise argued against this Court's constitutional authority in their numerous briefs. More significantly, this Court interprets the Defendants' Motion for Summary Judgment as consent for this Court to enter a final judgment. *See Wellness*, 135 S. Ct. at 1948 (noting that the implied consent standard reflects the 'pragmatic virtues' of 'increasing judicial efficiency and checking gamesmanship'); *see also Haley v. Barlays Bank Del. (In re Carter)*, 506 B.R. 83, 88 (Bankr. D. Ariz. 2014) (finding that a summary judgment movant waived its *Stern* objection to the court's constitutional authority because the party also moved for summary judgment and commenting that "it is difficult to understand how both the objection to final judgment and the request for entry of final judgment could have been filed in compliance with Rule 9011(b).")."

In re Digerati Techs., Inc., 537 B.R. 317 (Bankr. S.D. Tex. 2015) (Bohm, J.)

Rationale for Finding Consent: Parties impliedly consented to entry of final order on law firm's fee application, the applicant by filing the application with the bankruptcy court, the objectors by filing their objections, and all parties by appearing and litigating the dispute without challenging the court's constitutional authority to enter a final order.

Case Synopsis: The bankruptcy court held that *Stern* did not preclude it from entering a final order on the final fee application filed by the law firm retained by the Chapter 11 debtor. Alternatively, the court found that it "has the constitutional authority to enter a final order because all of the parties in this contested matter have consented, impliedly if not explicitly, to adjudication of this dispute by this Court. [T]he Applicant filed its Fee Application in this Court, the Objectors filed an initial objection and then thereafter filed the Amended Objection, the Applicant then filed its response to the Amended Objection, and also filed its Motion to Strike the Amended Objection, which this Court denied, and the parties proceeded to make a record in a multi-day hearing without ever objecting to this Court's constitutional authority to enter a final order on the Fee Application. If these circumstances do not constitute implied consent, nothing does."

In re CTLI, LLC, 534 B.R. 895 (Bankr. S.D. Tex. 2015) (Bohm, J.)

Rationale for Finding Consent: Parties impliedly consented to bankruptcy court's entry of a final order. The movant filed the motion with the bankruptcy court, and the objecting party responded. And neither party challenged the court's constitutional authority to finally adjudicate the matter.

Case Synopsis: The bankruptcy court held that *Stern* did not preclude it from finally adjudicating motion filed by former equity holder to revoke order confirming Chapter 11 plan proposed by the debtor's other equity holder, as having been fraudulently obtained. Alternatively, the court found that it "has the constitutional authority to enter a final order because the parties have consented to adjudication by this Court. Indeed, [the movant] chose to file the Motion in this Court, Wilson filed his Response in this Court, and neither party—both of whom are represented by counsel in this dispute—has objected to this Court's constitutional authority to enter a final order. If this is not consent, then nothing is."

Perkins v. LVNV Funding, LLC (In re Perkins), 533 B.R. 242 (Bankr. W.D. Mich. 2015) (Gregg, J.)

Rationale for Finding Consent: Plaintiff consented by filing non-core, FDCPA action in bankruptcy court; Defendants consented by moving for an order dismissing the complaint.

Case Synopsis: The bankruptcy court concluded that the parties had consented to the entry of final judgment on the plaintiff's claims alleging violations of the FDCPA for filing proofs of claim based on time-barred debts, reasoning: "In non-core, related to proceedings in this District 'in which the parties timely *object* to the entry of a final judgment or order by the bankruptcy judge, the bankruptcy court shall file and serve proposed findings of fact and conclusions of law . . .' LCivR 83.2(b) (emphasis added)[.] The Local Rules of the District Court thus notify the parties at the outset of an adversary proceeding that they have the right to decline to have the bankruptcy court enter a final order or judgment in a non-core, related to proceeding. Here, the parties' actions are indicative of consent to entry of a final judgment or order by this court. None of the parties have

objected, as contemplated by the Local Rules of the District Court, to the entry of an order by this court on the Motion to Dismiss. All of the parties in this adversary proceeding are represented by competent legal counsel. . . . The court therefore concludes that by failing to take action pursuant to the Local Rules of the District Court, the parties have knowingly and voluntarily elected to have this court enter a final judgment or order. In addition, the Plaintiff has separately given her implied, if not express, consent to the entry of a final judgment or order by this court in her Complaint (as defined below) and Response (as defined below) to the Motion to Dismiss. The Plaintiff decided to file her Complaint in this court, as opposed to the District Court. The Complaint includes jurisdictional allegations, two of which state that, at least under the Plaintiff's interpretation, this adversary proceeding is a core proceeding. While the court disagrees with the Plaintiff's characterization of this matter as a core proceeding for reasons already stated, the court infers from the allegations in the Complaint that the Plaintiff consents to entry of final judgment or order, as opposed to submission of proposed findings of fact and conclusions of law to the District Court. Moreover, in the Complaint, the Plaintiff expressly requests that 'this Honorable Court enter judgment for the Plaintiff and against the Defendants' for damages under the FDCPA, punitive damages, sanctions, and any other relief that this court believes is 'just, equitable and proper.' Taking the allegations and requests for relief in the Complaint on the whole, the Plaintiff has implicitly, if not expressly, consented to the jurisdiction of this court to enter a final judgment or order in this adversary proceeding. The Defendants have also consented to the entry of a final judgment or an order by this court. In their Motion to Dismiss, the Defendants expressly request that this court enter an order dismissing the Complaint. This request is reiterated in the Reply (as defined below) filed by the Defendants. Finally, the Defendants have not filed a motion to withdraw the reference or otherwise intimated, whether through pleadings or during hearings, that they do not consent to this court's entry of a final judgment or order."

III. Deemed Consent Based on Failure to Respond Despite Notice Contained in Summons/Motion

Campbell v. Carruthers (In re Campbell), 553 B.R. 448 (Bankr. M.D. Ala. 2016) (Sawyer, J.)

Rationale for Finding Consent: Defendant consented by failing to answer or respond to a complaint where the summons contained a warning that default would be deemed to constitute implied consent.

Case Synopsis: The bankruptcy court held that the defendant attorney impliedly consented to its entry of final judgment on the noncore FDCPA claim when the defendant was served with a summons warning that failure to appear would be deemed to constitute consent to entry of final judgment by the bankruptcy court. The court reasoned: "As an attorney, Carruthers could not have failed to realize the meaning of this language or the ramifications of choosing to ignore this lawsuit. Courts considering this issue in identical circumstances both before and after *Wellness International Network* have determined that a defendant's failure to litigate after receipt of a summons with the above-quoted language amounts to the defendant's implied consent to bankruptcy court adjudication. E.g., *Hopkins v. M & A Ventures (In re Hoku Corp.)*, 61 Bankr. Ct. Dec. 257, 2015 WL 8488949, *2–3 (Bankr. D. Idaho Dec. 10, 2015); *Executive Sounding Bd. Assocs. Inc. v. Advanced Mach. & Eng'g Co. (In re Oldco M Corp.)*, 484 B.R. 598, 614–15 (Bankr. S.D.N.Y. 2012). To hold otherwise would turn the law of waiver, consent, and default judgments on its head. The Court agrees with and adopts the reasoning of *Hoku* and *Oldco M*, and holds that a defendant who receives notice of an adversary proceeding against him in bankruptcy court and fails to defend himself impliedly consents to the bankruptcy court's adjudication under 28 U.S.C. § 157(c)(2)."

Ridley v. Brock (In re Brock), No. 15-31274, 2016 Bankr. LEXIS 2132 (Bankr. D.N.J. May 25, 2016) (Poslusny, J.)

Rationale for Finding Consent: Defendant consented by failing to answer or respond to a complaint where the summons contained a warning that default would be deemed to constitute implied consent.

Case Synopsis: In adversary proceeding alleging employment discrimination and sexual harassment, Debtor was served with a summons stating, in all capital letters: "If you fa[il] to respond to this summons, your failure will be deemed to be your consent to entry of a judgment by the bankruptcy court and judgment by default may be taken against you for the relief demanded in the complaint." Relying on Judge Glenn's decision in *Oldco M Corp.* and Judge Pappas's decision in *Hoku Corp.*, the bankruptcy court held that "construing the Debtor's failure to respond [to the summons, which 'contain[ed] an unequivocal and fair warning,'] as consent to the Bankruptcy Court's authority to enter default judgment is the most practical result." The court reasoned that "[t]his comports with the need for judicial efficiency noted in *Wellness*" because "[e]ntering Default Judgment avoids unnecessary procedural hurdles such as the Plaintiff needing to move to withdraw the reference simply to have the district court enter the default judgment [and] it avoids a rather awkward interpretation of *Wellness*—that a defendant who actually litigates his case can somehow

waive his right to an Article III judge by failing to raise a *Stern* objection, but a defendant who is completely unresponsive somehow maintains his right to an Article III judge."

Johns v. Brown (In re Fannon), No. 12-10075, 2015 WL 9594302 (Bankr. S.D. W. Va. Dec. 31, 2015) (Volk, J.)

Rationale for Finding Consent: Defendant consented by failing to challenge the court's adjudicatory authority in his answer, by failing to respond to summary judgment motion after receiving a notice generated by the court advising the defendant that his failure to oppose the motion would result in the entry of judgment against him.

Case Synopsis: After his counsel had been granted leave to withdraw from representation of the defendant in a fraudulent transfer action filed by the Chapter 7 trustee, the now pro se defendant failed to oppose the trustee's motion for summary judgment. "[T]he Court sent . . . [the pro se defendant] a notice respecting the nature of [the trustee's] motion, the right to respond to the same by [a date certain], and the fact that [his] failure to do so would be deemed 'a representation' on his part that he did 'not object to the relief sought by [the trustee] and that judgment may be entered against [him.]'" The court found that the defendant had "impliedly, but knowingly and voluntarily, consented to entry of final judgment." The court reasoned: "First, [the defendant] did not seek a jury trial or otherwise reflect in his answer that he objected to the final adjudicatory exercise by the bankruptcy court. Second, in the notice recently transmitted to him by the Court, [the defendant] was explicitly advised that his failure to respond to the summary judgment motion would result in judgment being entered against him. He nevertheless failed to respond. The attribution of implied consent is thus appropriate."

Johns v. Frye (In re Frye), No. 13-20078, 2015 WL 9593606 (Bankr. S.D. W. Va. Dec. 31, 2015) (Volk, J.)

Rationale for Finding Consent: Pro se defendants consented by failing to respond to summary judgment motion after receiving a notice generated by the court advising them that their failure to oppose the motion would result in the entry of judgment against them.

Case Synopsis: Chapter 7 trustee brought a fraudulent transfer action against the pro defendants, who failed to respond to the trustee's motion for summary judgment. "[The Court] sent . . . [the pro se defendants] a notice respecting the nature of [the trustee's] motion, the right to respond to the same by [a date certain], and the fact that [their] failure to do so would be deemed 'a representation' on [their] part that they 'did not object to the relief sought by [the trustee] and that judgment may be entered against [them.]'" The court found that the defendant had "impliedly, but knowingly and voluntarily, consented to entry of final judgment," reasoning: "[Defendants] were explicitly advised that their failure to respond to the summary judgment motion would result in judgment being entered against them. They nevertheless failed to respond. The attribution of implied consent is thus appropriate."

Ivey v. ES2, LLC (In re ES2 Sports & Leisure, LLC), 544 B.R. 833 (Bankr. M.D.N.C. 2015) (Kahn, J.)

Rationale for Finding Consent: Defendants consented by failing to appear in the adversary proceeding and failing to respond to the trustee's motion for summary judgment after being notified by the language contained in the summons they were served with of the need for their consent to entry of judgment by the court and their right to refuse it.

Case Synopsis: Chapter 7 trustee for company that managed a country club filed an adversary proceeding against the debtor's parent company ("ES2") and against Matthew Birely ("Birely"), a former officer, director and majority owner of company. The trustee's complaint requested a declaration that ES2 was an alter ego of Birely, asserted claims for unjust enrichment, breach of fiduciary duty, unfair and deceptive trade practices, and sought the avoidance of preferential and postpetition transfers. The defendants failed to appear in the adversary proceeding and did not respond to the Trustee's motion for summary judgment. The bankruptcy court granted partial summary judgment in favor of the trustee, concluding that the defendants had consented to the entry of a final judgment, reasoning: "The clerk of this Court properly issued a summons on each of the Defendants . . . . Plaintiffs properly and timely served a copy of the summons on each Defendant and filed proof of service on the Defendants . . . . The summons, which was issued on Official Form B 250B, expressly and conspicuously provides Defendants notice that, if they fail to appear, their failure will be deemed to be consent to entry of judgment by this Court for the relief demanded in the Complaint. Neither Defendant has appeared or otherwise defended in this adversary proceeding. . . . [T]he Clerk of Court [later] entered default against Defendant ES2 . . . [and] Defendant Birely. . . . The notice provided on Official Form B 250B served upon the Defendants in this case is sufficient to put properly served defendants on notice of the need for their consent to entry of judgment by this Court and their right to refuse it. The Defendants' failure to respond constituted a waiver of their right to have these claims heard by an Article III court, and, due to this waiver, the Court therefore has the constitutional authority to enter judgment on the claims over which it has subject matter jurisdiction, statutory authority, and personal jurisdiction."

Hopkins v. M & A Ventures (In re Hoku Corp.), No. AP 15-08043-JDP, 2015 WL 8488949 (Bankr. D. Idaho Dec. 10, 2015) (Pappas, J.)

Rationale for Finding Consent: Defendant consented by failing to answer or respond to a complaint where the summons contained a warning that default would be deemed to constitute implied consent.

Case Synopsis: Trustee brought fraudulent transfer claim against defendant that did not file a proof of claim. Relying on Judge Glenn's decision in *Oldco M Corp.*, the bankruptcy court held that "whatever legal or other interests that may require an Article III judge to enter a final judgment absent the parties' consent are more than adequately served and protected by this sort of plain, bold warning to Defendant [the summons stated conspicuously (in all capital letters): 'Your failure to

appear will be deemed to be your consent to entry of a judgment by the bankruptcy court and default may be taken against you for the relief demanded in the complaint.'] that its silence will be interpreted as consent to entry of a default judgment by the bankruptcy court." Suggesting that its determination may be based on the concept of forfeiture rather than consent, the court added: "The Court acknowledges the guidance provided in *Wellness* that, in gauging whether a party has consented to entry of a final judgment by a 'non-Article III adjudicator' in bankruptcy cases, the question is whether that consent is 'knowing and voluntary.' However, as noted above, *Wellness* explored the manner in which a litigating party might waive its right to an Article III judge; the Court did not discuss how that right might be forfeited by failure to appear and defend at all. Here, this Court concludes that, in light of the notice provided in the properly-served summons, Defendant's total failure to appear and defend can be presumed to satisfy the *Wellness* standard."

IV. Other Ways in Which Litigants Might Impliedly Consent

Crest One Spa v. TPG Troy, LLC (In re TPG Troy, LLC), 793 F.3d 228 (2d Cir. 2015) (Winter, J.; Pooler, J.; Sack, J.)

Rationale for Finding Consent: Petitioning creditors expressed consent on the record in colloquy between the bankruptcy judge and counsel.

Case Synopsis: The court found that petitioning creditors had consented to the bankruptcy court's exercising its jurisdiction to award attorneys' fees and costs pursuant to § 303(i)(1) of the Bankruptcy Code absent an award of punitive damages based on colloquy between the bankruptcy judge and the creditors' counsel on the record during which counsel stated that "we would be content to consent to Your Honor determining the fees."

Dynamic Tools, Inc. v. Atlas Copco Tools & Assembly Sys., LLC (In re Rapid-Torc, Inc.), No. H-15-377, 2016 U.S. Dist. LEXIS 136582 (S.D. Tex. Oct. 3, 2016) (Rosenthal, J.)

Rationale for Finding Consent: Respondent waived objection to bankruptcy court's constitutional authority to enter a final judgment when it failed to raise objection on appeal.

Case Synopsis: Prior to the debtor's bankruptcy filing, "Hytorc contracted with [two other companies] to manufacture tools [for the debtor] based on drawings it created. . . . using [the debtor's] logos and branding." The purchaser of all the debtor's assets asked the bankruptcy court to exercise jurisdiction over and enjoin a state court lawsuit that Hytorc had brought against the manufacturing companies post-petition for trade secret misappropriation. The bankruptcy court did so, but "declined to determine whether it had constitutional authority to enter final judgment under [*Stern*]," and Hytorc appealed. On appeal, the district court noted: "There is at least a colorable argument that this state-law trade-secrets dispute is [a *Stern* claim]. Objections to a bankruptcy court's final adjudication of a *Stern* claim are waivable so long as the waiver is knowing and voluntary. The waiver need not be express; when a party knows the basis for a *Stern* objection and fails to press it, that failure implies consent. The bankruptcy court explicitly noted that it was unsure of its authority under *Stern* to enter final judgment, but Hytorc does not include in its appellate brief arguments challenging this authority. Hytorc has therefore waived an argument that final judgment was improper under *Stern*."

MT Tech. Enters., LLC v. Nolte (In re Nolte), 542 B.R. 185 (Bankr. E.D. Va. 2015) (Huennekens, J.)

Rationale for Finding Consent: Plaintiff consented to entry of final judgment on the nondischargeability complaint by filing the adversary proceeding and alleging that the matter is a core proceeding. The plaintiff consented to a final adjudication on the allowance of its claim by

filing its proof of claim. The defendant consented by admitting the allegation that the matter is a core proceeding.

Case Synopsis: In the adversary proceeding filed by the plaintiff/creditor against the individual Chapter 11 debtor, the parties sought the following relief: (1) the plaintiff sought a judgment declaring its $8.84 million claim to be nondischargeable under § 523(a)(6), and (2) the defendant/debtor sought a judgment disallowing the plaintiff's claim in its entirety. The bankruptcy court entered judgment in favor of the defendant, after concluding that the parties had consented to the court's final adjudication of the claims asserted in the complaint, stating: "The plaintiff has consented to the jurisdiction of this Court by commencing this Adversary Proceeding and by filing its Proof of Claim herein. Plaintiff has alleged in paragraph one of the Complaint that this matter is a core proceeding. Defendant has admitted this allegation in his answer. Any *Stern* objections have been waived by the parties, and the Court has the authority to enter final judgment in this proceeding."

In re DeLotto, No. BR 15-10648, 2015 WL 6876775 (Bankr. D.R.I. Nov. 9, 2015) (Finkle, J.)

Rationale for Finding Consent: Creditor impliedly consented to the bankruptcy court's entry of final judgment on the debtor's sanctions motion by "obliquely" raising the argument that the court lacked jurisdiction and failing to fully brief it.

Case Synopsis: "Debtor Scott DeLotto filed four motions titled 'Motion for Imposition of Sanctions and Other Relief for Willful Violation of Automatic Stay' (collectively, the "Motions") against Liberty Life Assurance Company of Boston ("Liberty Life"). The Motions are essentially the same but are cumulative; each successive motion accounts for each monthly transaction by Liberty Life that took place between April and July 2015 against Mr. DeLotto's benefits payable under a disability insurance policy. He alleges that these transactions constituted 'setoff' in violation of Bankruptcy Code §§ 362(a)(6) and (7). Liberty Life [opposed the Motions,] . . . . defend[ing] its actions on the grounds that these transactions are in the nature of recoupment, not setoff, and therefore not stayed in bankruptcy. . . . Liberty Life obliquely asserts by way of a footnote . . . that because Mr. DeLotto's claims are in essence claims for benefits under ERISA, it is 'unlikely' that this Court has jurisdiction over the claims, referencing the United States Supreme Court decisions *Stern v. Marshall*, 131 S. Ct. 2594 (2011) and *Wellness Int'l Network Ltd. v. Sharif*, 135 S. Ct. 1932 (2015). It does not develop this argument, nor does it raise any objection to this Court's entry of a final order in this matter. It is important to note that bankruptcy courts in fact have jurisdiction over so-called '*Stern* claims,' the limitation as held in these two cases is that bankruptcy courts lack the constitutional authority to render final judgments or orders on such claims absent the parties' express or implied consent. Hence, even if the claims presented here were *Stern* claims, Liberty Life has impliedly consented to their final adjudication by this Court. *See also Garcia–Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638, 645 (1st Cir. 2000) (holding that failure to brief an argument constitutes waiver); *Blacksmith Invs., Inc. v. Woodford (In re Woodford)*, 418 B.R. 644, 646 n.1 (B.A.P. 1st Cir. 2009) (same). At any rate, Liberty Life mischaracterizes the nature of this action. Mr. DeLotto's claims are not *Stern* claims because he alleges violations of the automatic stay. As

such, his claims stem directly from the Bankruptcy Code (§ 362), and would not exist independently outside of Mr. DeLotto's bankruptcy case."

Thelen LLP v. Fontana (In re Thelen LLP), No. 09-15631 (MEW), 2015 Bankr. LEXIS 2787 (Bankr. S.D.N.Y. Aug. 21, 2015) (Wiles, J.)

Rationale for Finding Consent: Plaintiffs and defendants consented when they exchanged letters "agree[ing] to litigate the disputes in the Bankruptcy Court." And once the defendants successfully argued that the Plaintiff-Trustee had consented to a final judgment by the bankruptcy court, they could not later argue that they themselves had not consented.

Case Synopsis: Chapter 7 trustee for law firm's bankruptcy estate filed adversary proceeding against former partner Gary Fontana ("Fontana") for repayment of "periodic draw payments made to Fontana by Thelen [that] exceeded Fontana's share [under the partnership agreement]." The action was consolidated with adversary proceedings against other partners (collectively with Fontana, the "Defendants"). Before trial on the claims against Fontana (the rest of the Defendants settled), Fontana disputed the bankruptcy court's authority to issue a final judgment, but the court found that Fontana "unequivocally consented": "In 2013, the [Defendants] sent a letter to the Trustee's counsel that included a demand that any claims against them be subject to arbitration. The Trustee's counsel responded in a letter . . . that the Trustee did not believe arbitration was available or appropriate, but that the Trustee would be happy to agree upon procedures if the [Defendants] would 'agree to litigate the disputes in the Bankruptcy Court.' The litigation subsequently proceeded in this Court (without defendants filing a motion to compel arbitration) until September 2014, when the defendants filed a motion for summary judgment. At that point the Trustee attempted to reverse his prior position and filed a belated motion to compel arbitration of the parties' disputes. The [Defendants] opposed the Trustee's motion; they argued that they had previously accepted the Trustee's request that they agree to resolve the parties' disputes in the Bankruptcy Court and that the Trustee therefore should be estopped from seeking arbitration. The [Defendants] . . . stated [that they] '*did* agree to litigate the disputes in the Bankruptcy Court'. . . . Ironically, after Fontana and his co-defendants strenuously argued that the Trustee could not be permitted to change his mind about litigating the claims in the Bankruptcy Court . . . , and after the [Defendants] obtained a decision . . . that enforced the parties' prior 'agreement' to litigate in this Court, it is now Fontana who is attempting to change his own position and who wishes to argue that no 'agreement' to litigate in this Court was ever made. The Court rejects that contention."

IDEA Boardwalk, LLC v. Revel Entm't Grp., LLC (In re Revel AC, Inc.), 532 B.R. 216 (Bankr. D.N.J. 2015) (Kaplan, J.)

Rationale for Finding Consent: Asset purchaser and tenants consented to bankruptcy court's final adjudication of the tenants' possessory rights under § 365(h) when they agreed to the terms of an order approving the § 363 sale of the Chapter 11 debtors' assets, which provided that the

bankruptcy court would retain "exclusive jurisdiction to resolve any controversy arising out of or related to th[e] Sale Order [or] the [Asset Purchase] Agreement."

Case Synopsis: "Before the Court is the cross motion ("Cross Motion") of IDEA Boardwalk, LLC ("IDEA"), filed in connection with the Debtors' prior motion to reject certain leases and executory contracts, in which IDEA seeks an order clarifying its rights under 11 U.S.C. § 365(h). . . . [About a month after filing their Chapter 11 petitions] the Debtors filed a motion (the "Rejection Motion") to reject the Agreements held with [various tenants (the "Tenants")]. . . . On the Shutdown Date [September 2, 2014], the Debtors ceased operations and barred the Tenants from accessing the premises. Each of the Tenants gave notice of its intent to continue exercising possessory leasehold rights under § 365(h). . . . [More than seven months later] the Court entered an order ("Sale Order") approving the sale of the Debtors' assets to Polo North. . . . IDEA filed its Cross Motion, seeking clarification of its § 365(h) rights as they related to the pending Rejection Motion. Subsequently . . . the Court entered an order granting the Rejection Motion. . . . Polo North adopts the position originally set forth by the Debtor/Defendant, that the Tenants' § 365(h) elections were invalid because the Agreements are not true leases. Polo North contends that the Agreements are either management or joint venture agreements, and, consequently, there are no possessory rights capable of being retained by the Tenants. As such, the Agreements would not fall within the purview of § 365(h). Needless to say, the Tenants maintain that the dictates of § 365(h) do apply because the Agreements are indeed true leases. At this juncture, the parties seek a determination of their respective rights. . . . To the extent there is a challenge to the Court's ability to render a final judgment, the failure of the parties to object to the Sale Order constitutes consent to this Court's authority. . . . The Supreme Court [in *Wellness*] acknowledged that consent need not be express. Here, when the parties agreed to the terms of the Sale Order, they consented to the specific grant of both exclusive jurisdiction and authority of the bankruptcy court."

E. Smalis Painting Co. v. Smalis (In re Smalis), No. AP 14-2075-CMB, 2015 WL 3745352 (Bankr. W.D. Pa. June 12, 2015) (Böhm, J.)

Rationale for Finding Consent: Plaintiff and Defendant consented by identifying proceeding as core matter on which the bankruptcy court may enter final judgment.

Case Synopsis: In adversary proceeding seeking allowance of a late filed proof of claim, the bankruptcy court stated that: "the parties have identified this matter as a core matter upon which the bankruptcy court may enter final judgment. Therefore, this Court finds that the parties knowingly and voluntarily consented to adjudication by this Court."

V. Cases in Which Courts Found No Implied Consent

Messer v. Magee (In re FKF 3, LLC), No. 13-CV-3601 (KMK), 2016 WL 4540842 (S.D.N.Y. Aug. 30, 2016) (Karas, J.)

Rationale for Finding No Consent: Defendant did not—merely by having filed proof of claim—consent to bankruptcy court's adjudication of claims for relief that litigation trustee appointed by the Chapter 11 debtor's confirmed plan of reorganization asserted against the Defendant; Defendant demonstrated lack of consent by requesting jury trial in answer and by promptly filing motion to withdraw the reference.

Case Synopsis: "The Supreme Court has recently reaffirmed that parties can consent to final adjudication by a bankruptcy court, even when the claims at issue are so-called '*Stern* claims,' over which the bankruptcy court would otherwise lack constitutional authority to finally adjudicate. Here, [Plaintiff Gregory Messer, as trustee of the FKF Trust ("Trustee"), which was established pursuant to the confirmed Chapter 11 plan of debtor FKF 3, LLC] argues that [Defendant John F. Magee ("Magee")] has consented to a final adjudication of the Trustee's common law claims by the Bankruptcy Court because he filed two proofs of claim and litigated those claims to a certain extent in the Bankruptcy Court. However, as the Court explained in *Stern*, a creditor does not consent to final adjudication of a debtor's common law counterclaim merely by filing a proof of claim . . . . Magee's filing of the proofs of claim . . . do not amount to consent as to final adjudication as to the Trustee's common law claims, especially where Magee's amended answer demanded a jury trial and raised the Court's lack of constitutional authority as an affirmative defense, and where he filed his initial motion to withdraw the reference less than two months after filing the amended answer."

NSJS Ltd. P'ship v. Waco Town Square Partners, LP (In re Waco Town Square Partners, LP), 536 B.R. 756 (S.D. Tex. 2015) (Atlas, J.)

Rationale for Finding No Consent: A party that the bankruptcy court enjoined did not consent by failing to challenge bankruptcy court's constitutional authority because the party was unaware of the need to consent.

Case Synopsis: NSJS Limited Partnership ("NSJS") commenced a state court lawsuit against, among others entities, Waco Town Square Partners II ("WTSP II") and the Community Bank & Trust ("Community Bank"). WTSP II then commenced a Chapter 11 case and obtained confirmation of a plan of reorganization. The confirmation order provided that NSJS would be permitted to pursue claims against Community Bank if the claims were not derivative of claims belonging to WTSP II's bankruptcy estate and if NSJS timely filed an amended complaint. Paragraph 22 of the order confirming the plan (the "Confirmation Order") stated that "[i]f an Amended Complaint is not filed within the time period proscribed in this Order, all claims contained in the NSJS Lawsuit shall be deemed [derivative claims] and must be immediately dismissed with prejudice." NSJS filed an amended complaint that undisputedly asserted claims only against non-

debtors and did so in a manner that was in no way derivative of claims belonging to the bankruptcy estate. NSJS, however, filed the amended complaint after the deadline established by the Confirmation Order, so the bankruptcy court ordered NSJS to dismiss the state court lawsuit. In response to NSJS's argument that the bankruptcy court had no authority to order it to dismiss the lawsuit, Community Bank relied on "*Wellness*, [in which] the Supreme Court held that bankruptcy courts have authority to decide *Stern*-type claims submitted to them by consent. . . . The Supreme Court held that the key inquiry is whether the litigant or counsel was made aware of the need for consent and the right to refuse it, and still voluntarily consented. In the case before this Court, NSJS clearly consented to entry of the Confirmation Order, including paragraph 22. It did not, however, give knowing consent to entry of an Order requiring it to dismiss with prejudice the State Court Lawsuit which, at the time the Order was entered, involved only non-derivative claims by a non-debtor against non-debtors."

Salim v. Grossman, No. 15 Civ. 4629 (PGG), 2015 U.S. Dist. LEXIS 177034 (S.D.N.Y. July 8, 2015) (Gardephe, J.)

Rationale for Finding No Consent: Defendants did not impliedly consent to bankruptcy court adjudication when they failed to re-assert their objection once the district court referred the case back to the bankruptcy court with instructions to issue proposed findings of fact and conclusions of law after determining that the bankruptcy court lacked constitutional authority.

Case Synopsis: Chapter 7 trustee sought to avoid fraudulent and preferential transfers to Petitioners, who filed a motion to withdraw the reference. The district court found that the bankruptcy court lacked constitutional authority to enter a final judgment on the avoidance claims and returned the case to the bankruptcy court. Rather than issue proposed findings of fact and conclusions of law, the bankruptcy court entered a final judgment in favor of the trustee, and Petitioners failed to appeal. When the trustee sought to enforce the judgment, the Petitioners filed a petition for a writ of mandamus. The trustee "contend[ed] that Petitioners' failure to object to or appeal from the Bankruptcy Court Judgment amount[ed] to 'knowing and voluntary consent' to that court's exercise of jurisdiction[,]" but the district court disagreed, finding that "[a]lthough the Supreme Court has held that a bankruptcy court 'may adjudicate finally a claim at issue' with the parties' consent, there was no such 'knowing and voluntary consent' by Petitioners here. Petitioners' objection to the Bankruptcy Court's exercise of jurisdiction is set forth in their motion to withdraw the bankruptcy reference. After this Court remanded the action to the Bankruptcy Court with instructions to issue proposed findings of fact and conclusions of law, Petitioners were under no obligation to re-assert their objection to that court's exercise of jurisdiction. This Court had already ruled that the Bankruptcy Court lacked [constitutional authority] to decide the avoidance issues. Accordingly, the fact that Petitioners did not again object to the Bankruptcy Court's exercise of [constitutional authority] on remand does not amount to consent to that court's exercise of [constitutional authority]."

Gochá v. Credit Advocates Law Firm, LLC (In re Werkmeister), No. 14-80302, 2016 WL 758234, (Bankr. W.D. Mich. June 3, 2015) (Dales, J.)

Rationale for Finding No Consent: Defendant did not consent by failing to answer or respond to a complaint.

Case Synopsis: In fraudulent conveyance action, bankruptcy court found that because "the Defendant has not appeared or otherwise participated in the bankruptcy case, . . . the court is unable to determine whether both parties have voluntarily and knowingly consented to entry of a final judgment resolving the Plaintiff's claims by an Article I judge. As a result, the Bankruptcy Court's authority under 28 U.S.C. § 157(c) to enter final judgment in response to the Motion is in doubt. . . . In an analogous situation involving motions for default judgment on clearly non-core claims, Chief Judge Paul L. Maloney and District Judge Janet T. Neff have concurred in this admittedly cautious approach, and adopted this court's recommendation to enter judgments by default in the District Court. The court follows this same procedure today, given the possibility that the claims at issue in this adversary proceeding are *Stern* claims, and given the absence of the Defendant's consent to entry of a final judgment by an Article I judge. Despite the short delay that may result from employing the procedures under Fed. R. Bankr. P. 9033, the entry of a final judgment by the District Court, rather than the Bankruptcy Court, will reduce the risk of collateral attack based on *Stern*, thereby promoting the 'just, speedy, and inexpensive determination' of this proceeding."

Klein v. Khilji (In re Klein), No. 2:11-bk-12718-RN, 2015 Bankr. LEXIS 3844 (Bankr. C.D. Cal. Nov. 4, 2015) (Robles, J.)

Rationale for Finding No Consent: Plaintiff-debtor who brought state court action will not be deemed to have impliedly consented to bankruptcy court adjudication when he made no appearance in bankruptcy court subsequent to removal.

Case Synopsis: During the pendency of his Chapter 7 case, Plaintiff filed claims for elder abuse under state law against multiple banks and corporations in state court, which one defendant removed to the bankruptcy court. The bankruptcy court found that all of the defendants had consented to its entry of a final judgment (by express consent with the exception of one defendant that "impliedly consented . . . by filing a motion to dismiss"), but that Plaintiff had not consented: "[S]ubsequent to the removal, [Plaintiff] has made no appearance. While it is true that Plaintiff may impliedly consent to adjudication before the Bankruptcy Court, such consent 'must still be knowing and voluntary.' Implied consent is knowing and voluntary if 'the litigant or counsel was made aware of the need for consent and the right to refuse it, and still voluntarily appeared to try the case before the non-Article III adjudicator.' Here, Plaintiff has not voluntarily appeared before the Bankruptcy Court and there is nothing in the record to suggest that Plaintiff was aware of the need to consent and the right to refuse it. The record is insufficient to support a finding that Plaintiff has impliedly consented to this Court's jurisdiction."

Sec. Inv'r Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC, 531 B.R. 439 (Bankr. S.D.N.Y. 2015) (Bernstein, J.)

Rationale for Finding No Consent: Defendants would have impliedly consented had they failed to answer or respond to a complaint where the summons contained a warning that default would be deemed to constitute implied consent, but the defendants filed motions to dismiss in which they argued that the bankruptcy court did not have constitutional authority to enter a final judgment.

Case Synopsis: "In *Wellness* the Supreme Court ruled that parties may consent to the final adjudication of a so called *Stern* claim by a Bankruptcy Court. Consent can be express or implied but must be knowing and voluntary. . . . [T]he key inquiry is whether the litigant or counsel was made aware of the need for consent and the right to refuse it, and still voluntarily appeared to try the case before the non-Article III adjudicator. Accordingly, consent provides another basis to permit the entry of a final judgment by this Court [if] consent was given." The defendants received summonses containing the warning that failure to respond would constitute deemed consent to entry of a judgment by the bankruptcy court. "[T]he proper service of a summons containing [this] warning followed by the defendant's default in pleading constitutes the defendant's implied consent to the entry of a default judgment by the bankruptcy court. [But] [t]hese defendants did not default in pleading because they filed timely motions to dismiss, and raised the issue of the Court's authority to enter a final judgment in their motions. Hence, they did not impliedly consent to the entry of a final judgment, much less a default judgment, against them by this Court."

SNMP Research Int'l, Inc. v. Nortel Networks Inc. (In re Nortel Networks Inc.), No. 09-10138(KG), 2015 WL 3506697 (Bankr. D. Del. June 2, 2015) (Gross, J.)

Rationale for Finding No Consent: Although plaintiff filed action in bankruptcy court rather than district court, the bankruptcy court did not find implied consent because the plaintiff reserved its rights clearly in its complaint.

Case Synopsis: "The Court is addressing a narrow but complex issue in this adversary proceeding: does the Court have authority to enter judgments or orders with respect to the claims of the plaintiff, a non-debtor, against a non-debtor defendant for what are clearly non-core claims of copyright infringement, misappropriation of trade secrets under state law and breach of contract. . . . The parties are the plaintiffs, SNMP Research International, Inc. and SNMP Research, Inc. (jointly "SNMP"), and the defendants, Nortel Networks Inc., and its United States affiliates ("Debtors") and Avaya Inc. ("Avaya"). . . . Avaya and the Debtors make a strong case for a finding that SNMP consented to the Court's authority to fully adjudicate SNMP's claims all the way to a final order. After all, SNMP filed the case in this Court when it could have sued Avaya in the District Court at the outset. SNMP briefed the Radware Inc. motion to dismiss and only filed a notice of intention to move to withdraw the reference on the day of oral argument. Then, SNMP waited almost 17 months to file its motion to withdraw the reference. There is persuasive case law holding that a litigant's actions qualify as consent to a bankruptcy court's authority to adjudicate claims to finality. Cases which support SNMP's position make the point that courts should be cautious before making

a finding of consent. The Court certainly agrees with the concept of caution and the Supreme Court's emphasis on consent being 'knowing and voluntary' reinforces deliberation. The Court is persuaded that SNMP did not consent to the Court's authority. The Court is not willing to base a finding of implied consent on the filing of the Complaints in this Court when, as here, SNMP expressly gave notice in the Complaints that it was reserving its rights and, indeed, that it intended to seek the withdrawal of the reference because it was not submitting itself to the Court's authority to enter final orders. SNMP made its intention known and reserved its rights clearly." The reservation of rights was expressly set forth in the plaintiff's complaint: "The causes of action against Nortel are core. The causes of action against Avaya are not core within the meaning of 28 U.S. § 157(b), and SNMP does not consent to the entry of final orders by the Bankruptcy Judge in this proceeding as to causes of action against Avaya. . . . SNMP intends to seek the permission of the District Court to withdraw the reference to this Court of this adversary proceeding. SNMP Research alternatively relies on the subject matter jurisdiction of the District Court to hear this adversary proceeding independent of bankruptcy jurisdiction and venue. . . . Diversity jurisdiction over this adversary proceeding also alternatively exists. . . ."