No. 15-1224

IN THE

# Supreme Court of The United States

SHOLEM PERL,

*Petitioner*,

*v.*

EDEN PLACE, LLC,

*Respondent*.

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

## REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI


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## PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The statement of the parties to the proceeding and the corporate disclosure statement included in the petition for a writ of certiorari remain accurate.

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**PETITIONER'S REPLY BRIEF**

Eden Place says that there is no circuit split. There is. Eden Place also says that there are "vehicle problems" with Perl's petition. There aren't.

First, the split. Trying to explain away the Ninth Circuit's clean break from its sister circuits, Eden Place purports to harmonize cases that defy harmonization. But no amount of interpretive spin can alter the facts. The circuit split is real.

In one corner stand the Second, Third, Fifth, Seventh, Tenth, and Eleventh Circuits, holding—in line with *Liberty Mutual Insurance Co.* v. *Wetzel*, 424 U.S. 737 (1976)—that a bankruptcy court's order finding liability (on whatever basis) is not "final" for purposes of appellate jurisdiction until the court assesses damages. In the other corner stands the Ninth Circuit alone, holding that a bankruptcy court's order finding liability *is* "final" for purposes of appellate jurisdiction even though the bankruptcy court has not assessed damages.

The Ninth Circuit's decision betrays 28 U.S.C. § 158's text, which limits appellate jurisdiction to appeals from "final" judgments, orders, and decrees in bankruptcy cases. More importantly, the Ninth Circuit's decision to allow piecemeal appeals before a final damages award will disrupt the bankruptcy process in the seven States making up the Ninth Circuit. That is no overstatement: Bad precedent on questions of finality affects more than just the "immediate parties"; it impairs "the smooth

functioning of our judicial system." *Budinich* v. *Beckton Dickson and Co.*, 486 U.S. 196, 201 (1988).

Eden Place cannot quibble with the proposition that issues of finality are of particular importance to bankruptcy practitioners, so it instead argues that the case is not a good vehicle for resolving the circuit split because Perl (1) never asked for damages in the bankruptcy court and (2) did not participate in the appeal below and thus did not raise the jurisdictional issue that features in his petition. Opp. 20–24. Those arguments are easily dispatched.

On the first point, the record speaks for itself: Perl asked the bankruptcy court for a wide range of relief, including "an order . . . [a]ssessing sanctions for Eden's willful violation of the automatic stay including reimbursing the Debtors for their reasonable attorneys' fees and costs in connection with the enforcement of the automatic stay." C.A. E.R. 213–14; Pet. App. 24a (Watford, J., dissenting) (noting that Perl "requested all appropriate relief, including but not limited to attorney's fees").

On the second point, this Court's precedents speak for themselves: "[E]very federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review, even though the parties are prepared to concede it." *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986) (internal quotation marks omitted).

## I. THE CIRCUIT SPLIT IS REAL (AND LOPSIDED).

Eden Place's attempt to brush aside the circuit split depends on the kind of hyper-distinguishing that we have all encountered: A party to a car-accident case argues that an old precedent involving a red Buick is inapposite because the new dispute involves a blue Volvo. Roughly speaking, that is what Eden Place tries here. It argues that there is no circuit split because the cases from the other circuits did not all arise in the particular context of a bankruptcy court's order finding a violation of the automatic stay.

That assertion is wrong for the three Circuits that did address the issue in the automatic-stay context. But more importantly, it misses the point. Before the decision below, every court of appeals to consider the question had held that a bankruptcy court's order (on whatever issue) is not final under § 158 if the court left the question of damages unresolved. *See In re Fugazy Exp., Inc.*, 982 F.2d 769, 776 (2d Cir. 1992) ("[F]or a bankruptcy court order to be final within the meaning of § 158(d), the order . . . must completely resolve all of the issues pertaining to a discrete claim, including issues as to the proper relief."); *In re Brown*, 803 F.2d 120, 122–23 (3d Cir. 1986) (holding that order was not final because "damages ha[d] not been assessed" against creditor who violated the automatic stay); *In re Morrell*, 880 F.2d 855, 856–57 (5th Cir. 1989) ("Determinations of liability without an assessment of damages are as likely to cause duplicative litigation in bankruptcy as they are in civil litigation . . . . The rule for appeals from bankruptcy

decisions determining liability but not damages under 28 U.S.C. § 158(d) must therefore be the same as the rule under § 1291."); *In re Behrens*, 900 F.2d 97, 100 (7th Cir. 1990) (holding that order was not final where "bankruptcy court determined that Woodhaven was in contempt of court and liable . . . for actual damages" but "never set the amount of damages"); *In re Rollison*, 566 F. App'x 679, 680 (10th Cir. 2014) (no final order where the bankruptcy court still needed to "determine an amount of damages for which it has taken no evidence"); *In re Atlas*, 210 F.3d 1305, 1308 (11th Cir. 2000) ("[A] bankruptcy court's order is not final for purposes of appellate jurisdiction where the bankruptcy court finds liability for violation of the automatic stay, but defers assessment of damages.").

The Ninth Circuit said precisely the opposite below. *See* Pet. App. 12a–13a (holding that "the ruling by the bankruptcy court that Eden Place violated the automatic stay" is final and immediately appealable because, even though the bankruptcy court did not assess damages flowing from its order, the order "affected substantive *rights* related to damages" and "is as final as it will ever be in this case" (emphasis added)). A split exists.

Eden Place tries to marginalize the cases from the other circuits by noting that they predate this Court's decision in *Bullard v Blue Hills Bank*, 135 S. Ct. 1686 (2015). Give those other six circuits some time to absorb *Bullard*, Eden Place argues, and they may come around to the Ninth Circuit's view. Opp. 17. But that will not happen because *Bullard* did not change the rules of finality. It merely affirmed the long-

established rule that, in bankruptcy, appeals can be taken from orders that "*finally* dispose of discrete disputes." 135 S. Ct. at 1692 (emphasis added). "Final" in § 158 still means "final." *See* 28 U.S.C. § 158(a)(1) (permitting appeals from "final judgments, orders, and decrees"); 28 U.S.C. § 158(d)(1) (granting appellate jurisdiction only from "final decisions, judgements, orders, and decrees"); *compare* 28 U.S.C. § 1291 (permitting civil appeals from "final decisions").

In *Wetzel*, this Court said (outside of the bankruptcy context) that "final" means liability plus damages. 424 U.S. at 742. Every court since *Wetzel* has articulated the same rule in the bankruptcy context.[1] The Ninth Circuit charted its own path and got it wrong.

## II. THERE ARE NO VEHICLE PROBLEMS.

Yelling "shark!" at the beach is a good way to get people out of the water—if sharks are known to visit the area. Eden Place yells "vehicle problem" in its cert opposition and hopes for a similar reaction—reflexive acceptance without pause to examine the premise. But we're in a court of law, not on a beach. This Court can take the time to examine the

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[1] In fact, even the post-*Bullard* decision that Eden Place cites (at Opp. 17) follows *Wetzel*'s logic in holding that a bankruptcy court's order approving a settlement is not final under § 158 if "[t]he question of who gets what part of the settlement or any other asset" is "unresolved." *Schaumburg Bank & Trust Co. v. Alsterda*, 815 F.3d 306, 313 (7th Cir. 2016).

premise of Eden Place's vehicle arguments. And when it does, it will see that the premise is false.

Eden Place claims seven different times in its Opposition that Perl did not request damages in his original motion to enforce the stay. *See* Opp. (I), 9, 14, 15, 18, 20–21, 22. Not true. As Judge Watford explained in his dissent—and as Perl's motion shows—Perl "requested all appropriate relief, including but not limited to attorney's fees." Pet. App. 24a. In his emergency motion to enforce the automatic stay, Perl sought, among other things, (1) an order finding Eden Place "in civil contempt" for violating the automatic stay, (2) an order compelling Eden Place to "immediately surrender possession of the Home" and otherwise "[d]irecting Eden to remedy its [automatic stay] violations," and (3) an order "[a]ssessing *sanctions* for Eden's willful violation of the automatic stay *including* reimbursing the Debtors for their reasonable attorneys' fees and costs in connection with the enforcement of the automatic stay."[2] C.A. E.R. 213–14 (emphasis added). That last request tracks 11 U.S.C. § 362(k)(1), which says that "an individual injured by any willful violation of a stay provided by this section shall recover *actual damages*, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages." (emphasis added).

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[2] Perl's motion also included a catchall request for an order granting "such other and further relief as may be just and proper." C.A. E.R. 214.

If Perl's request for sanctions was not clear enough, the transcript of the hearing before the bankruptcy court erases any doubt that the court was considering compensatory and even punitive damages:

> And so in terms of contempt, I think that it's a separate issue about whether there are damages that should be imposed for violation of the automatic stay. To me, that is not an issue on which I have a full enough record today to make a ruling. I am not inclined to impose punitive damages based on what I know today. I think there may be damages that arise for Mr. Perl and his family having to move out and whatever has been incurred in that regard. . . . . So what I'm inclined to do is continue this hearing to a later point . . . to determine whether there are damages that would offset [Perl's damages] against [Eden Place's damages].

C.A. E.R. 149. That damages hearing was set for July 30, 2013. Pet. App. 53a. It never took place because Eden Place appealed prematurely on July 12, 2013.

Eden Place also faults Perl's "lack of involvement" in the BAP and Ninth Circuit (Opp. 20) and contends that Perl's failure to "advance his current [jurisdictional] arguments below" (Opp. 22) somehow counsels against review. That, of course, is wrong.

As this Court has said too many times to count, "every federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also

that of the lower courts in a cause under review, even though the parties are prepared to concede it." *Bender,* 475 U.S. at 541 (internal quotation marks omitted); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 671 (2009) ("Subject-matter jurisdiction [to accept appeal] cannot be forfeited or waived and should be considered when fairly in doubt."); *Wetzel*, 424 U.S. at 740 ("Though neither party has questioned the jurisdiction of the Court of Appeals to entertain the appeal, we are obligated to do so on our own motion if a question thereto exists."); *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934) (appellate jurisdiction "cannot be waived or be overcome by an agreement of the parties. An appellate federal court must satisfy itself not only of its own jurisdiction, but also of that of the lower courts in a cause under review."). Whatever Perl's participation at the Ninth Circuit, the jurisdictional error cannot be waived.

Eden Place also argues that certiorari review is unwarranted because even if this Court vacates the Ninth Circuit's decision on jurisdictional grounds and remands to allow the bankruptcy court to hold a damages hearing, the Ninth Circuit will eventually reach the same decision on the merits, accepting Eden Place's argument that it did not violate the automatic stay.

Two responses. First, it is not a given that the Ninth Circuit will reach the same result on the merits. Perl didn't have appellate counsel the first go-round

to point out the problems with the Ninth Circuit's reasoning. Now he does.[3]

Second, and more importantly, more is at stake than simply damages for Eden Place's violation of the automatic stay. When questions of finality are in play, this Court is less concerned with the interests "of the immediate parties" than with "those that pertain to the smooth functioning of our judicial system." *Budinich*, 486 U.S. at 201. The Ninth Circuit's decision will make bankruptcy cases anything but smooth and should be corrected.

There is no shark in the water. This case is a proper vehicle for resolving a question of systemic concern to bankruptcy litigants in the largest circuit in the Country.

* * *

One other point deserves mention. Eden Place's argument about Perl's failure to participate in the appeals below illustrates why, from a policy standpoint, the decision below will prove a menace to bankruptcy litigants. Bankrupt debtors typically don't have extra cash on hand to bankroll appellate

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[3] If this case returns to the Ninth Circuit after remand (a proposition that is far from certain), Perl's new appellate counsel can show, for example, that Congress carved out exceptions to the automatic stay but narrowly drew those exceptions so as not to apply in cases like this one. *See* 3 Collier on Bankruptcy ¶ 362.05[20] (16th ed. 2015) (explaining that residential-lessor exception to automatic stay in 11 U.S.C. § 362(b)(22) "does not apply . . . to an eviction judgment obtained by a purchaser of property at a foreclosure").

litigation. They are, after all, bankrupt. A debtor who knows that he stands to recover $100,000 in damages if he prevails on appeal is more likely to fight on—and is more attractive to appellate lawyers who might take the case on a contingency. In the same way, a debtor who knows his claim is worth only $100 will likely decide that participating in an appeal is not worth the effort. Here, Perl didn't know whether his claim was worth $100,000 or $100 because Eden Place jumped the gun. Eden Place cannot fault Perl for not having the money to defend a premature appeal over a judgment that may or may not have yielded enough damages to cover Perl's appellate legal fees.[4]

## CONCLUSION

For all these reasons and those set out in Perl's petition, this Court should grant the petition for a writ

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[4] In the same way, Eden Place's suggestion that Perl's failure to offer evidence of damages during the three years that this case has bounced around on appeal somehow counsels against review (Opp. 3, 21) is also without merit. Perl would have put on evidence of damages at the continued damages hearing before the bankruptcy court, but Eden Place robbed Perl of that opportunity by filing a premature appeal before the hearing could be held. In August 2013 (after Eden took its appeal), the parties stipulated to the dismissal of Perl's bankruptcy petition with the court "retain[ing] post-dismissal jurisdiction" over Perl's "request for damages/sanctions." Aug. 7, 2013 Minute Entry, *In re Sholem Perl*, No. 2:13-bk-26126 (Bankr. C.D. Cal.); *see also* Pet. App. 26a (Watford, J., dissenting). The day for Perl to present evidence of damages will come if this Court grants the petition and vacates the decision below.

of certiorari and should vacate the Ninth Circuit's judgment for lack of jurisdiction.

Respectfully submitted,

July 1, 2016

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