No.

IN THE
Supreme Court of the United States

ROBERT RAEL; LISA RAEL, PETITIONERS

v.

PATRICK S. LAYNG, UNITED STATES TRUSTEE FOR REGION 19

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

PETITION FOR WRIT OF CERTIORARI

STEPHEN R. WINSHIP
Counsel of Record

Winship & Winship, PC
145 N. Durbin Street Suite 201
Casper, WY 82601
steve@winshipandwinship.com
(307) 234-8991

QUESTIONS PRESENTED

This case presents a conflict as to the subject matter jurisdiction of bankruptcy courts. It also presents conflicts as to whether an order entered by a court without subject matter jurisdiction is enforceable and the standard for determining what constitutes a willful disobeyance of a "lawful" order under 11 U.S.C. § 727(a)(6)(A).

In the Tenth Circuit, a bankruptcy court's subject matter jurisdiction now includes the allowance of sales of property of the bankruptcy estate free and clear of liens after a Chapter 11 plan has been confirmed (even though the plan vested said property in the debtor).

1. Whether a bankruptcy court's subject matter jurisdiction over what was property of the bankruptcy estate continues after the confirmation of a Chapter 11 plan, which plan vested said property in the debtor?

2. Whether matters under 11 U.S.C. § 727(a)(6)(A) are to be construed strictly against the party objecting to the bankruptcy discharge and liberally in favor of the debtor such that the debtor must be shown to have willfully and intentionally disobeyed an order?

3. If a bankruptcy court entered an order on a matter that it did not have subject matter jurisdiction, is the order void only if the bankruptcy court plainly usurped its power?

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OPINIONS BELOW

The Judgment of the Tenth Circuit is reported at *Rael v. Layng,* 753 Fed.Appx. 649 (10th Cir. 2018) (App. 1a). The order of the United States District Court for the District of Wyoming ("District Court") is unreported, but is available at App. 11a. The Amended Opinion of the United States Bankruptcy Court for the District of Wyoming ("Bankruptcy Court") is reported at *In re Rael,* 2017 WL 4083128 (Bankr. D. Wyo. Sept. 14, 2017). The Bankruptcy Court's Order Denying Debtor's Motion to Set Aside Order is unreported, but is available at App. 64a.

JURISDICTION

The Order and Judgment of the Tenth Circuit was entered on December 7, 2018 (App. 1a). A petition for rehearing was denied on January 25, 2019 (App. 10a). This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

11 U.S.C. § 350(a) and (b)

> Closing and reopening cases: (a) After an estate is fully administered and the court has discharged the trustee, the court shall close the case. (b) A case may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause.

11 U.S.C. § 363(b)(1)

> The Trustee, after notice and a hearing, may use, sell or lease, other than in the ordinary course of business, property of the estate…

11 U.S.C. § 363(f)

> Use, sale or lease of property: (f) The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if--(1) applicable nonbankruptcy law permits sale of such property free and clear of such interest; (2) such entity consents; (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property; (4) such interest is in bona fide dispute; or (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

11 U.S.C. § 727(a)(6)(A)

> The court shall grant the debtor a discharge, unless--(6) the debtor has refused, in the case--(A) to obey any lawful order of the court, other than an order to respond to a material question or to testify…

11 U.S.C. § 1107(a)

> Rights, powers, and duties of debtor in possession: (a) Subject to any limitations on a trustee serving in a case under this chapter, and to such limitations or conditions as the court prescribes, a debtor in possession shall have all the rights, other than the right to compensation under section 330 of this title, and powers, and shall perform all the functions and duties, except the duties specified in sections 1106(a)(2), (3), and (4) of this title, of a trustee serving in a case under this chapter.

11 U.S.C. § 1141(b)

> Effect of confirmation: (b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.

28 U.S.C. § 157(b)(1) and (2)(N)

> Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title. (2) Core proceedings include, but are not limited to…(N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate…

28 U.S.C. § 1334(a) and (b)

> Bankruptcy cases and proceedings: (a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11. (b) Except as provided in subsection (e)(2), and notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

Fed. R. Bank. P. 6004(c)

> (c) Sale Free and Clear of Liens and Other Interests. A motion for authority to sell property free and clear of liens or other interests shall be made in accordance with Rule 9014 and shall be served on the parties who have liens or other interests in the property to be sold. The notice required by subdivision (a) of this rule shall include the date of the hearing on the motion and the time within which objections may be filed and served on the debtor in possession or trustee.

Fed. R. Bankr. P. 9024(b)(4) (Fed. R. Civ. P. 60(b)(4))

> (b) Grounds for Relief from a Final Judgment, Order or Proceeding. On motion and just terms, the court may relieve a party or its

> legal representative from a final judgment, order, or proceeding for the following reasons…(4) the judgment is void…

STATEMENT

1. Background.

This case presents the important and recurring question in federal bankruptcy law of what subject matter jurisdiction remains in the bankruptcy court after a Chapter 11 plan is confirmed. This issue has divided lower courts for years. Related to this controversial and unresolved issue of subject matter jurisdiction is the applicable standard for reviewing § 727(a)(6)(A) complaints, and particularly the meaning of the term "willful" as that term is used in bankruptcy law.

Robert and Lisa Rael ("Raels") were the principals of several Wyoming based business entities of which Wells Fargo Bank N.A. ("Wells Fargo") was the principal secured creditor thereof. Raels personally guaranteed these business loans by, *inter alia,* granting mortgages in favor of that bank against their many real estate holdings located throughout Big Horn County, Wyoming. When the business loans went into default, these businesses filed for protection in the Bankruptcy Court under Chapter 11 of the Bankruptcy Code. In response to these bankruptcy filings, Wells Fargo sought to collect the defaulted obligations from the Raels personally, which precipitated their Chapter 11 filing on May 1, 2008.

Raels' Amended Chapter 11 Plan of Reorganization ("Plan") was confirmed on January 20, 2010. It did not provide that any property of the estate would remain under the jurisdiction of the Bankruptcy Court. As part of the Plan, the IRS payroll tax obligation was to be paid through the previously confirmed Chapter 11 plan of one of Raels' business entities – Professional Contractors, Inc. Wells Fargo's claim, insofar as it pertained directly to Raels, was to be satisfied under the Plan by partial payments and the sale or surrender of several of the real estate parcels that secured Wells Fargo's deficiency claim. The case was closed after confirmation of the Plan and a final decree was entered.

The Raels subsequently defaulted on their payments and other performance called for under the Plan. (Professional Contractors, Inc. also defaulted.) Starting on November 28, 2011, Wells Fargo filed complaints in state court against Raels in order to obtain judgments on the amounts they owed to Wells Fargo and to foreclose on its pre-petition mortgages. (These complaints were filed without having obtained relief from the automatic stay from the Bankruptcy Court.) A judgment was obtained by Wells Fargo against Raels (and their related entities) on September 6, 2012. To enforce the judgment, Wells Fargo attached Raels' bank accounts and filed its judgment as a lien in the Big Horn County, Wyoming real estate records on October 3, 2012 against Raels' real property interests.

More than three years after the Plan was confirmed, Raels reopened their bankruptcy case. Afterwards, the Bankruptcy Court approved, under § 363(f)[1], the sale of some of Raels' real estate ("Parcel") that had, *inter alia,* been a subject of and treated in Raels' Plan ("Sale Order"). The Sale Order provided that the proceeds from the sale of the Parcel were to be turned over to Wells Fargo (which was based on the mutual mistake of both the Bankruptcy Court and Raels that Wells Fargo held a mortgage against the Parcel).

The sale of the Parcel was closed on April 4, 2014 at which time the sale proceeds check was made out only to the Raels by the title insurance company in the amount of $122,283.81. By the time of the closing on the Parcel, it had been discovered that the lien interest of Wells Fargo arose from a judgment lien, which had expired by the time of the closing. Because of the uncertainty that had developed as to Wells Fargo's lien interest in these proceeds since the original sale motion had been filed, Raels held onto the sale check without cashing or depositing it in their bank account until March 9, 2015.

With the understanding that the Bankruptcy Court had jurisdiction over the Parcel (and Raels' other property), Raels sought to enforce the automatic stay against Wells Fargo's lawsuits and collection efforts against them through contempt

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1. All citations are to the United States Code, Title 11, unless otherwise noted.

motions.[2] The Bankruptcy Court denied these stay violation motions. Relying upon § 1141(b) and *In re Houlik,* 481 B.R. 661 (10th Cir. BAP 2012), the Bankruptcy Court determined that this Parcel was not property of the estate, and therefore the Bankruptcy Court did not have "related to" jurisdiction over matters concerning the Parcel. (App. at 54a.) Specifically, the Bankruptcy Court, using the "close nexus" standard for determining "related to" jurisdiction, found that it "…has jurisdiction over disputes regarding alleged property of the bankruptcy estate at the outset of the case. When property leaves the bankruptcy estate, however, the bankruptcy court's jurisdiction [over the] proceeding comes to an end." (App. at 59a.) The Bankruptcy Court concluded that the matters relating to Wells Fargo's judgment lien could be decided in state court.

After the Bankruptcy Court's ruling had been affirmed on appeal,[3] the Raels (and their counsel) understood the Sale Order to have been rendered null and void by the determination that there was no Bankruptcy Court jurisdiction over the Parcel after the Plan had been confirmed. Accordingly, the Raels, on advice of their counsel, disbursed the proceeds of

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2. Because individual Chapter 11 bankruptcy case law looks to Chapter 13 precedent, Raels argued that bankruptcy courts retain jurisdiction over property of the estate post-confirmation. See e.g. *U.S. v. Harchar,* 371 B.R. 254, 267 (N.D. Ohio 2007) and *In re Binder,* 224 B.R. 483, 489-90 (Bankr. D. Colo. 1998).

3. *In re Rael,* 527 B.R. 799 (10th Cir. BAP 2015).

the now consummated Parcel sale to administrative expenses. With the original purpose for reopening their Chapter 11 case having been thwarted, the Raels converted their case to Chapter 7.

The United States Trustee ("UST") objected to the Raels' Chapter 7 discharge under § 727(a)(6)(A) by contending that the Sale Order was still enforceable and therefore Raels had willfully violated the Bankruptcy Court's Sale Order. Raels sought to dismiss this complaint on the basis that because the Bankruptcy Court had previously ruled that it had no jurisdiction over the Parcel, the Sale Order was no longer in effect. Alternatively, Raels sought to have the Sale Order voided under Rule 60(b)(4). Both motions were denied.

2. Bankruptcy Court Order on Jurisdiction Over Parcel.

Relying upon the Bankruptcy Court's earlier conclusion in the contempt matters that it had no subject matter jurisdiction over the Parcel, Raels requested that the Sale Order be considered void and should therefore be vacated. The Bankruptcy Court denied this Rule 60(b)(4) motion by reasoning that there was in fact jurisdiction because property sales are "core proceedings" under 28 U.S.C. § 157(b)(2)(N), and that § 363 authorized such a sale. (App. at 70a) Related to that holding, the Bankruptcy Court found that the Parcel sale "affected the estate being administered in bankruptcy." (App. at 71a.) Further, the Bankruptcy Court held that a judgment is void for

lack of jurisdiction only if the exercise of such jurisdiction "is a plain usurpation of power" and that "a court does not usurp its power when it erroneously exercises jurisdiction." (App. at 70a.)

3. Bankruptcy Court Amended Opinion (§ 727(a)(6)(A)).

After a trial of the matter, the Bankruptcy Court determined that the Raels did not willfully disobey the Sale Order. In its Amended Opinion, the Bankruptcy Court emphasized that a debtor's mistake as to the subject order is insufficient to deny a discharge under § 727(a)(6)(A):

> Debtors testified that they relied on counsel's advice. In this instance, a number of events combined to call into question the legitimacy of the order. In its first contempt order, the court found that its jurisdiction over property that leaves the bankruptcy estate "comes to an end." The
> Bankruptcy Appellate Panel found that the property pledged to Wells Fargo "was not estate property." When combined with advice from counsel, it was not unreasonable for Debtors to have faith in Mr. Winship or have any reason to believe he was in error…Debtors established their actions were not willful as they reasonably relied on the advice of counsel. Revocation of discharge is not

> appropriate given the principal [sic] that the exceptions to the general policy favoring discharge be narrowly construed.

(App. at 59a.)

4. District Court Order on Appeal

The UST appealed the Bankruptcy Court's Opinion, and Raels cross-appealed on, *inter alia,* the denial of their Rule 60(b)(4) motion. The District Court reversed the Bankruptcy Court's Opinion based on its independent determination of Raels' intent to violate the Sale Order (App. at 34a), but affirmed the denial of Raels' Rule 60(b)(4) motion. On an issue raised for the first time at the appellate level, the UST argued that Raels had not provided any evidence that they had relied on advice of counsel from the time that the sale of the Parcel closed until the approximate time that the Bankruptcy Appellate Panel for the Tenth Circuit affirmed the Bankruptcy Court's Contempt Order or approximately eight months ("Gap Period"). Specifically, the District Court found "the bankruptcy court did not discuss the period between the sale of the Cowley property and the 2015 advice [of counsel]." (App. at 32a.) The District Court then went on to conclude that "…the bankruptcy court's reasoning does not support a finding that the Raels relied on their counsel's advice." (App. at 34a.)

The District Court affirmed the Bankruptcy Court's denial of Rael's Rule 60(b)(4) motion because,

under 28 U.S.C. § 157(b)(2)(N), "…the bankruptcy court was statutorily within its jurisdiction to enter the order." (App. at 44a.) Even if there had been an error of subject matter jurisdiction in entering the Sale Order, the District Court ruled that it would not have represented a "plain usurpation of power" and therefore was enforceable. (App. at 44a.)

5. Tenth Circuit Judgment

The Tenth Circuit affirmed the District Court by holding that bankruptcy courts continue to retain the power to grant asset sales pursuant to § 363 after a Chapter 11 plan had been confirmed. (App. at 7a-8a.) The Tenth Circuit relied upon § 1107(a), 28 U.S.C. § 157(b)(2)(N) and Fed. R. Bankr. P. 6004 for this expansion of a bankruptcy court's jurisdiction. (App. at 7a-8a.) The Judgment's jurisdictional ruling is notable by the absence of any reference to § 1141(b):

> …The case had been reopened before the Sale Order was entered. And, because entry of a sale order is a core proceeding, the bankruptcy court was statutorily within its jurisdiction to enter an order-again, at the Raels' request-authorizing them to sell the property. See 11 U.S.C. §§ 363(f)-(h) (setting forth circumstances under which trustee may sell property in the bankruptcy estate); 11 U.S.C. § 1107(a) (providing that, subject to limitations not applicable here, a

> debtor in possession has the same rights and powers as the trustee); 28 U.S.C. § 157(b)(2)(N) (providing that bankruptcy court may hear and determine all core proceedings, which include "orders approving the sale of property"); Fed. R. Bankr. P. 6004 (establishing procedure for obtaining bankruptcy court order authorizing sale of property).

App. at 7a-8a.

This fundamental jurisdictional holding proved to be the "hinge" or basis for most of the remaining portions of the Judgment. For instance, the Judgment held as to Raels' Rule 60(b)(4) arguments:

> All of the Raels' Rule 60(b) arguments are based on their challenge to the bankruptcy court's jurisdiction to enter the Sale Order and their mischaracterization of the rulings in the Contempt Orders and BAP Order. *Having already concluded that the bankruptcy court had jurisdiction to enter the Sale Order* and that neither the Contempt Orders nor the BAP Order suggested otherwise, we find no error in the bankruptcy court's denial of the Rule 60(b) motions on the same basis.

App. at 9a (emphasis added).

While it would seem that § 1141(b) (and §§ 1142 and 1143) read in conjunction with the admonition in *Celotex Corp. v. Edwards,* 514 U.S. 300, 308, n. 6 (1995) that "bankruptcy courts have no jurisdiction over proceedings that have no effect on the estate of the debtor," would have resolved the jurisdictional disputes that the Judgment exemplifies, that clearly has not been the case. The Sale Order was therefore a "lawful order."

As to the specific § 727(a)(6)(A) claim, the Judgment found that even if Raels were mistaken in their belief that the Sale Order was rendered null and void by the Bankruptcy Court's subsequent jurisdictional ruling (as part of the contempt orders), that failure to obey the Sale Order was an unexcused refusal to obey it for purposes of denying their discharge (App. at 10a-17a.) Further, the Judgment affirmed the District Court's findings that Raels' neglect or failure in explaining their noncompliance with the Sale Order in the Gap Period was the equivalent of a willful violation of the Sale Order. (App. at 12a-14a.)

6. Tenth Circuit Order Denying Petition for Rehearing

Raels argued that the Tenth Circuit's Judgment was contrary to its prior jurisdictional ruling on a bankruptcy court's subject matter jurisdiction post-confirmation. (§ 1141(b) was also reemphasized and the Judgment's overruling, in

practical effect, of *Houlik.)* Raels also argued that its reasoning on the § 727(a)(6)(A) standards, and particularly its reliance on the Gap Period, was contrary to its own rulings regarding raising issues for the first time on appeal, and that such evidentiary gaps should be subject to remand for further fact finding. Raels' Petition for Rehearing was denied.

REASONS FOR GRANTING THE PETITION

I. THE CIRCUIT COURTS' CONFLICTS OVER "RELATED TO" BANKRUPTCY COURT SUBJECT MATTER JURISDICTION POST-CONFIRMATION SHOULD BE RESOLVED.

A bankruptcy court exercises subject matter jurisdiction over civil proceedings that, *inter alia,* arise in a bankruptcy case or that relate to a bankruptcy case. 28 U.S.C. § 1334(b). While § 1334 does not expressly limit the bankruptcy court's post-confirmation jurisdiction, most courts agree that once confirmation occurs, the bankruptcy court's jurisdiction shrinks. See e.g. *In re Resorts Int'l, Inc.,* 372 F.3d 154, 165 (3rd Cir. 2004). This Court has made clear that bankruptcy courts, being court of limited jurisdiction, "…have no jurisdiction over proceedings that have no effect on the estate of the debtor" and that "related to jurisdiction cannot be limitless." *Celotex,* 514 U.S. at 308, n. 6.

The interpretation of a bankruptcy court's "related to" jurisdiction post-confirmation has created a direct and intolerable conflict over this

recurring and important issue of bankruptcy law. The circuit courts are divided whether, after confirmation of a Chapter 11 plan, the "conceivable effect" test or the "close nexus" test applies as to "related to" jurisdiction. The Second Circuit has explained that a case is "related to" a bankruptcy proceeding "if the action's outcome might have any conceivable effect on the bankruptcy estate." *Parmalat Capital Fin. Ltd. v. Bank of Am. Corp.,* 639 F.3d 572, 579 (2nd Cir. 2011). This expansive jurisdictional interpretation is also followed by the Eighth Circuit. See *In re Farmland Indus., Inc.,* 567 F.3d 1010, 1020 (8th Cir. 2009). The Tenth, Sixth and Federal Circuits also follow the "any conceivable effect" test. See *In re CF & I Fabricators of Utah, Inc.,* 150 F.3d 1233, 1237 (10th Cir. 1998); *In re Wolverine Radio Co.,* 930 F.2d 1132, 1140-43 (6th Cir. 1991) and *Phoenix Petroleum, v. U.S.,* 215 F.3d 1345 at * 5 (Fed. Cir. 1999). Even a contingent outcome post-confirmation can satisfy the "conceivable effects" test. *Parmalat,* 639 F.3d at 579. Other circuits take a narrower view of "related to" subject matter jurisdiction by requiring that the matter have a "close nexus" to the bankruptcy plan (or proceeding), and that "the confirmed plan must provide for the retention of the jurisdiction over the dispute." See *In re Kirkland,* 600 F.3d 310, 317 (4th Cir. 2010); *In re Pegasus Gold Corp.,* 394 F.3d 1189, 1194 (9th Cir. 2005); *In re Resorts Int'l, Inc.,* 372 F.3d at 166-67. An even narrower interpretation of the bankruptcy court's post-confirmation jurisdiction is represented by the Seventh and Fifth Circuits. In *In re Pettibone Corp. v. Easley,* 935 F.2d 120, 122 (7th Cir. 1991), the Seventh Circuit held that "[o]nce the bankruptcy

court confirms a plan of reorganization, the debtor may go about its business without further supervision or approval. The firm also is without the *protection* of the bankruptcy court. It may not come running to the bankruptcy judge every time something unpleasant happens." This interpretation is followed by the Fifth Circuit as well. *In re Craig's Stores of Texas, Inc.,* 266 F.3d 388, 390 (5th Cir. 2001).

The Sixth Circuit explained its adherence to the "any conceivable effect" test:

> The "related to" inquiry asks not whether the *assertion* of the claims would effect [sic] the bankruptcy estate but whether the *outcome* of the claims would effect [sic] the estate. Furthermore, the "related to" inquiry asks not whether there is a nexus between the other proceeding and the *settlement agreement* but whether there is a nexus between the other proceeding and the *bankruptcy case.*

In re Greektown Holdings, LLC, 728 F.3d 567, 578 (6th Cir. 2014) (internal citations omitted). That opinion went on to criticize the Eleventh Circuit's interpretation of related to jurisdiction in *Matter of Munford, Inc.,* 97 F.3d 449, 454 (11th Cir. 1994) as being "subject matter jurisdiction by consent." 728 F.3d at 578.

The Tenth Circuit's adoption of the "any conceivable effect" interpretation as a basis for jurisdiction is the probable explanation for the Tenth Circuit's refusal to acknowledge the impact of § 1141(b) on post-confirmation jurisdiction in this case. Under § 1141(b), once a Chapter 11 plan is confirmed, what was property of the bankruptcy estate, vests back into the (reorganized) debtor unless the plan specifically provides otherwise. Contrast that with § 363(b), which provides in relevant part: "[t]he trustee, after notice and a hearing, may use, sell or lease, other than in the ordinary course of business, *property of the estate*…" (emphasis added). In other words, there is no "property of the estate" remaining after a Chapter 11 plan is confirmed, and thus §363 is inapplicable to post-confirmation sales. The confirmation of a Chapter 11 plan causes the cessation of administration of the bankruptcy estate because the estate's property has been distributed or vested back into the reorganized debtor. *Valley Historic Ltd. Partnership v. Bank of New York,* 486 F.3d 831, 828 (4th Cir. 2007). See also *In re Cary Metal Prod., Inc.,* 23 F.3d 1159, 1164 (7th Cir. 1994).

Specific to the survival of § 363 powers post-confirmation that the Judgment permits, one court explained that §363(b) and (f) control asset sales prior to plan approval while § 1123(a)(5)(D) and § 1141(c) govern sales made pursuant to a Chapter 11 plan, and found that it had "no continuing jurisdiction with regard to the type of sale that is before the court [under § 363(f)], because Section 363(f) is not operational once the plan is confirmed."

In re Golf, LLC, 322 B.R. 874, 877 (Bankr. D. Neb. 2004).

Similarly, another court looked to § 1141(b) and determined that "§ 363 has no applicability after a Chapter 11 plan is confirmed." Upon confirmation and consummation of a plan, "…the property's relationship to the estate, and therefore the bankruptcy court's jurisdiction over the property ends." *In re Western Integrated Networks, LLC,* 329 B.R. 334, 341 (Bankr. D. Colo. 2005). See also *In re Altmeyer,* 2014 WL 4959146 at * 2 (Bankr. S.D. Ill. Oct. 2, 2014).

Confirming the basic jurisdictional error represented by the above referenced portions of the Judgment is its reliance upon § 1107(a), which refers to the powers of a "debtor-in-possession." (App. at 7a.) Similar to the effect of plan confirmation on property of the bankruptcy estate, the debtor loses its debtor-in-possession powers under § 1107 when a Chapter 11 plan is confirmed. See *In re United Operating, LLC,* 540 F.3d 351, 355 (5th Cir. 2008).

The Judgment's reference to core proceeding as a basis for jurisdiction (App. at 8a) is equally erroneous. [4] While 28 U.S.C. § 157(b)(2)(N) refers to property sales as "core proceedings," that provision does not confer post-confirmation jurisdiction on

4. It is puzzling that the Judgment cites to Fed. R. Bankr. P. 6004 as a basis for jurisdiction considering the limited substantive effect to be accorded to the Federal Rules of Bankruptcy Procedure under 28 U.S.C. § 2075. See e.g. *In re Layton,* 480 B.R. 392, 399 (Bankr. N.D. Fla. 2012).

bankruptcy courts. See *Zerand-Bernal Group, Inc. v. Cox,* 23 F.3d 159, 162 (7th Cir. 1994). Unlike 28 U.S.C. § 157(a), the subsection addressing "core proceedings," 28 U.S.C. § 157(b), does not include the phrase "related to." A proceeding is not a core proceeding if it does not impact upon property of the estate. *Matter of Xonics, Inc.,* 813 F.2d 127, 131-32 (7th Cir. 1987). See also *In re Ener1, Inc.,* 558 B.R. 91, 95 (Bankr. S.D. N.Y. 2016).

It is ironic that the instant matter had its origins with the Bankruptcy Court's reliance upon the jurisdictional ruling in *Houlik,* which after acknowledging the impact of § 1141(b), adopted the "close nexus" rule for post-confirmation jurisdiction issues. 481 B.R. at 675. By finding that post-confirmation a bankruptcy court continues to have jurisdiction to order the sale of property under § 363(f), the Tenth Circuit appears to have effectively reversed *Houlik* in order to allow an expansive post-confirmation jurisdiction for bankruptcy courts.

In summary, the Judgment has the effect of allowing sales of assets free and clear of liens after a Chapter 11 plan is confirmed, even though there is no remaining bankruptcy estate. Allowing such a powerful "tool" while the debtor is no longer under the supervision of the bankruptcy court is an invitation to erode the concept that bankruptcy courts are courts of limited jurisdiction. More important, the Judgment impermissibly renders § 1141(b) superfluous. See *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992). Indeed the Judgment effectively rewrites § 363(b) so as to omit

the phrase "property of the estate." See *Utility Air Reg. Group v. E.P.A.,* 573 U.S. 302, 328 (2014) (rewriting or supplementing statutes under the guise of interpretation is improper). The effect of this jurisdictional ruling in the Judgment was to determine that the Sale Order was a "lawful order" as that term is used in § 727(a)(6).

Review by this Court is necessary to ensure the Bankruptcy Code's efficient administration in the crucial area of bankruptcy courts' jurisdiction once a Chapter 11 plan is confirmed. There is an overriding importance of achieving national "uniform[ity]" in the bankruptcy context. See *U.S. Const. Art. I,* § 8, cl. 4. Particular to this case and the need for uniformity, is that it is likely Raels would have prevailed in a circuit that adhered to a narrower jurisdictional view as represented by those courts following the close nexus test for post-confirmation jurisdiction. The conflict over the extent of the bankruptcy courts' jurisdiction post-confirmation will persist until this court intervenes.

II. IN DECIDING § 727(a)(6)(A) PROCEEDINGS, ALL COURTS SHOULD APPLY A STANDARD OF STRICT CONSTRUCTION AGAINST THE OBJECTING PARTY AND LIBERAL CONSTRUCTION IN FAVOR OF DEBTOR SUCH THAT A DEBTOR'S MISTAKE OR FAILURE TO EXPLAIN THE DISOBEYANCE OF AN ORDER DOES NOT RESULT IN A DENIAL OF BANKRUPTCY DISCHARGE.

In § 727(a)(6)(A) proceedings, most courts recognize that a denial of discharge is a harsh and extraordinary measure, which is contrary to the general policy of the Bankruptcy Code of giving Chapter 7 debtors a "fresh start." See e.g. *In re Jordan,* 521 F.3d 430, 433 (4th Cir. 2008); *In re Osborne,* 476 B.R. 284, 292 (Bankr. D. Kan. 2012). To foster that policy, most courts agree that in all § 727 proceedings, the law is to be construed strictly against those who object to the debtor's discharge and liberally in favor of the debtor. *Jordan,* 521 F.3d at 433; *In re Hicks,* 2006 WL 6810987 at * 8 (9th Cir. BAP, Feb. 1, 2006); *In re Leone,* 463 B.R. 229, 242 (Bankr. N.D. N.Y. 2011); *In re Harmon,* 379 B.R. 182, 187 (Bankr. M.D. Fla. 2007). However, it does not appear that the Tenth Circuit applies this statutory construction principle to § 727(a)(6)(A) proceedings. As to the instant case, it is quite clear this judicial policy was not a consideration in the Judgment.

In the Judgment's evaluation of § 727(a)(6)(A)'s application hereto, the Tenth Circuit relied upon its earlier precedent in *Standiferd v. United States Trustee,* 641 F.3d 1209 (10th Cir. 2011). While *Standiferd* looked in part to the Fourth Circuit's decision in *Jordan* for much of its analysis of § 727(a)(6)(A), it notably did not include or adopt that part of *Jordan* which held that "[t]he statute is construed strictly against the party seeking revocation and liberally in the debtor's favor." *Jordan,* 521 F.3d at 433. Consistent with *Standiferd, t*he Judgment in this case only requires that a debtor's "refusal" to obey an order be found to be "willful" without explaining the criteria for

determining such an ambiguous term (App. at 10a). Indeed after referencing the "willful" standard, the Judgment emphasizes its prior holding in *Standiferd* that "the Code does not grant the 'substantial benefit' of discharge 'indiscriminately'…" (App. at 10a). Contrast that with the Fourth Circuit's explanation that "[t]he term used in § 727(a)(6)(A) is refused not failed." *Jordan,* 521 F.3d at 433. That decision went on to favorably cite other precedent requiring the "showing of a willful or intentional act" in order to show that the debtor refused to obey the lawful order. *Id.* at 434. To refine that standard, the Fourth Circuit quoted from a lower court: "[t]he trustee must show more than mere failure to obey the court's order that results from inadvertence, *mistake*, or inability to comply..." *Id.* (Emphasis added, internal citations omitted.) Similarly, another circuit court determined that "[a] mere failure to obey the order, resulting from inadvertence, or an ability to comply, is insufficient; the party seeking revocation must demonstrate some degree of violation or willfulness on the part of the debtor." *In re Matos,* 267 Fed.Appx. 884, 886 (11th Cir. 2008). See also *In re Fatsis,* 435 B.R. 814, 818 (Bankr. D. Mass. 2010) (scienter must be shown). Contrast these decisions with the Judgment, which effectively held that a "failure" to explain disobeyance of the order results in the denial of discharge.

The Judgment in this instant case does not reflect that any of the above factors were considered. A liberal construction applied to this matter would have mandated that Raels' discharge would not have

been denied especially if the Tenth Circuit would have recognized that a "mistake" negates "willfulness." In the Judgment, the Tenth Circuit held that "[a] party acts willfully when he fails to comply with a court order even if he subjectively believes the order was invalid." (App. at 11a.) Such a position negates the defense of mistake or inadvertance by a debtor as is recognized by the Fourth and Eleventh Circuits.

"Willful" is not defined in the Bankruptcy Code. (Nor is "refused.") However, in *Kawaauhau v. Geiger,* 523 U.S. 57, 61 (1998), this court has had occasion to examine that term as is used in § 523(a)(6). In that decision, this Court likened the willful standard to a subjective motive to do harm when it stated that § 523(a)(6) "triggers in the lawyer's mind the category 'intentional torts,' as distinguished from negligent or reckless torts." *Id.* at 61. See also *Miller v. J.D. Abrams, Inc.,* 156 F.3d 598, 603-04 (5th Cir. 1998). While the circuit courts (and lower courts) are divided post-*Geiger* as to the amount of subjectivity that is necessary to except a debt from discharge under § 523(a)(6), *Geiger* is clear that negligence and even recklessness will not satisfy the willfulness standard. This Court will also likely determine the issue of subjective intent for purposes of § 362(a) violations in *Taggart v. Lorenzen,* Case No. 18-489 (cert. accepted Jan. 4, 2019). Similar to this case, *Taggart* is likely to resolve the circuit court split as to what the standard is for a willful violation of the automatic stay if there is knowledge of the stay and the creditor intended the actions which constitute the violation or whether a good faith belief

precludes a finding of willful violation. (See *In re Pratt,* 462 F.3d 14, 21 (1st Cir. 2006) (objective standard) and *In re Taggart,* 888 F.3d 438 (9th Cir. 2018) (subjective standard).) This Court should resolve the meaning of "willful" as that term is used in bankruptcy law.

The courts are seemingly unified that under § 727(a)(6)(A), "the party objecting to discharge satisfies this burden [refused to obey] by demonstrating the debtor received the order in question and failed to comply with its terms." *Jordan,* 521 F.3d at 433. However, contrary to the line of cases suggesting a showing of a debtor's subjective intent as part of the willfulness requirement is required, the burden shifts to the debtor "to explain noncompliance." According to this standard, it is apparently presumed in the Tenth Circuit that there was a willful and intentional violation of an order if the debtor for whatever reason does not explain noncompliance with the order. This construction of § 727(a)(6)(A) is improper under the liberal construction standard normally accorded to § 727(a) cases, as is illustrated by the instant case. In other words, contrary to other § 727(a) (and § 523(a)), conjecture or a technical omission by debtor could cause the loss of the discharge under this position. In the § 727(a)(6)(A) context, the Eleventh Circuit noted that "[t]he reason for denying a discharge must be real and substantive, not merely conjectural." *Matos,* 267 Fed.Appx. at 886. In the instant case, the Tenth Circuit presumed that because there was allegedly nothing in the trial record to indicate that Raels relied on advice of counsel during the Gap

Period, the Raels must have been relying only upon themselves in their alleged violation of the Sale Order or simply because they did not pay Wells Fargo, they willfully violated the Sale Order. The Judgment displays the "conjectural or technical" analysis the Eleventh Circuit warned against. This is willfulness by default, and hardly comports with a liberal construction of the law and facts in this matter.

The District Court found, and the Tenth Circuit affirmed, that because Raels had only addressed their reasons for withholding payment to Wells Fargo after the Gap Period, they had failed to meet their burden of proof under § 727(a)(6)(A), and therefore willfully and intentionally violated the Sale Order. (App. at 33a-36a.) However, the standard is "refused" not "failed." *Jordan,* 521 F.3d at 433. The District Court assumed the fact finding role by inferring Raels' willful and intentional violation of the Sale Order merely because its review of the record did not find that there had been a sufficient explanation by the Raels for not turning over the proceeds when the sale closed. In other words, silence actually means a willful violation. The District Court found the advice of counsel defense did not become applicable until approximately eight months later even though they were represented by the same attorney during the Gap Period. Not only did the District Court decide factual issues *de novo* (Raels' willfulness in the Gap Period), it based its ruling on an argument that had never been raised by the United States Trustee in the Bankruptcy Court. This new argument as to the lack of advice of counsel

should not have been considered at the appellate level. *Tele-Communications, Inc. v. CIR,* 104 F.3d 1229, 1232-33 (10th Cir. 1997). By not raising this issue during the trial, neither the Bankruptcy Court nor Raels were given an opportunity to address any advice of counsel provided in the Gap Period. More important, Raels were precluded from pointing out during the trial the evidence that showed the advice of counsel defense was applicable for all periods of time. This constitutes a lack of fair notice as to this new contention. *In re Fustolo,* 896 F.3d 76, 86-87 (1st Cir. 2018) (reversal based on lack of fair notice of new claim relating to § 727(a)(6)).

There is nothing about the above scenario that reflects a willful and intentional violation of the Sale Order by Raels. Rather, the District Court and the Tenth Circuit inferred a willful and intentional violation merely because there was, *arguendo*, silence by Raels' counsel (or lack of explanation) as to the Sale Order during the Gap Period. It represents at most a mere failure. Under the *Jordan* and *Matos* standard, this strict liability type result would not have occurred. As *Jordan* indicates "…the word 'refused' does in fact require the showing of a willful or intentional act, not merely the showing of a mistake or inability to comply." *Jordan,* 521 F.3d at 434. Not only is the Judgment devoid of any such analysis, it in fact implies that the element of willfulness requires only knowledge of the order and that the debtor intended the actions that constitute the violation of the order.

In the instant case, the rules shifted for Raels. They were denied relief against Wells Fargo for a stay violation because there was no subject matter jurisdiction over the Parcel that gave rise to the Sale Order. Relying on that holding, they understood that the Sale Order was null and void because the Bankruptcy Court ruled that it did not have subject matter jurisdiction over the Parcel, and accordingly Raels distributed the sale proceeds in a manner that was contrary to the Sale Order (and also because it was discovered that Wells Fargo had no lien against the sale proceeds). Then the rules changed again and the courts decided that the Bankruptcy Court did have subject matter jurisdiction over the Parcel. This is the sort of "mistake" that courts (other than the Tenth Circuit) would recognize as being insufficient to invoke the "death penalty" in bankruptcy law – denial of discharge.

Uniformity of bankruptcy law also compels that this Court grant the petition on this issue as well. The conflicting views as to what is a "willful" act under bankruptcy law is ripe for this Court's review. Most important, is that Raels' discharge hangs in the balance. In the instant case, the Tenth Circuit equates the failure or absence of explanation for the violation of a lawful order as being willful, which conflicts with most other courts including the Fourth and Eleventh Circuits.

III. THE STANDARD FOR DETERMINING A COURT'S SUBJECT MATTER JURISDICTION SHOULD NOT CHANGE DEPENDING ON WHEN IN THE LITIGATION THIS ISSUE IS RAISED

SUCH THAT A JURISDICTIONAL ERROR WILL ALWAYS RENDER A JUDGMENT VOID.

Section 727(a)(6)(A) requires a showing of debtor's refusal to obey a "lawful" order. Even if this Court determines that the Bankruptcy Court did not have the "related to" jurisdiction to enter the Sale Order, the Raels could nevertheless still have their discharge denied for their failure (or neglect) in obeying it. Generally the enforceability of an order or judgment entered by a court without jurisdiction is void or unenforceable. Because of the Bankruptcy Court's finding that it did not have subject matter jurisdiction to find Wells Fargo in contempt (almost 6 months after the Sale Order was entered), Raels sought to have the Sale Order determined to be void under Fed. R. Bankr. P. 9024(b)(4) (Fed. R. Civ. P. 60(b)(4)). This motion was denied by all three courts reviewing it by finding there was subject matter jurisdiction for the Sale Order.

A court must refrain from taking any action regarding the merits of a case if subject matter jurisdiction is lacking. *Kontrick v. Ryan,* 540 U.S. 443, 455 (2004). It follows then that "[a] jurisdictional error will render a judgment void." *United Student Aid Funds, Inc. v. Espinosa,* 559 U.S. 260, 291 (2010). See also *Vallely v. Northern Fire & Marine Ins. Co.,* 254 U.S. 348, 353 (1920) (orders issued when there is no jurisdiction are "nullities"). In other words, if there was never a jurisdictional basis for the Sale Order, the Sale Order should have been vacated. In *U.S. Catholic Conf. v. Abortion Rights Mobilization, Inc.,* 487 U.S. 72, 76 (1988), this

Court reversed a contempt order by holding that "…if a district court does not have subject-matter jurisdiction over the underlying action, and the process was not issued in aid of determining that jurisdiction, then the process is void…" The Eleventh Circuit acknowledges this basic jurisdictional principle: "[a]lthough it is rather unusual for a court to learn…that its prior decision lacked a jurisdictional basis, the few courts confronting this issue uniformly have vacated their prior decision." *IAL Aircraft Holding, Inc. v. F.A.A.,* 216 F.3d 1304, 1306 (11th Cir. 2000).

The Bankruptcy and District Courts held that the Sale Order was a "lawful" order for purposes of § 727(a)(6)(A) because any jurisdictional error regarding the Sale Order was not "a plain usurpation of power" citing to *Gschwind v. Cessna Aircraft Co.*, 232 F.3d 1342, 1346 (10th Cir. 2000). The "court does not usurp its power when it erroneously exercises jurisdiction." *Id.* (App. at 43a and 70a.) See also *Wendt v. Leonard,* 431 F.3d 410 (4th Cir. 2005) and *Hunter v. Underwood,* 362 F.3d 468 (8th Cir. 2004). Clearly the plain usurpation doctrine is driven by other policies than subject matter jurisdiction. Nevertheless there are few judicial policies that enjoy a higher priority than determining subject matter jurisdiction. See *Arbaugh v. Y & H Corp.,* 546 U.S. 500, 514 (2006).

Issues of subject matter jurisdiction may be raised at any time. *Henderson ex rel. Henderson v. Shinseki,* 562 U.S. 428, 434 (2011). However, as demonstrated by Raels' appeal, what constitutes

subject matter jurisdiction and its effect on the underlying case will vary in the Tenth Circuit depending on when and how the jurisdiction issue was raised. In those courts requiring a showing of "plain usurpation of power," the meaning of subject matter jurisdiction becomes much more flexible when the issue is raised later in the case (such as under Rule 60(b)(4)). Such floating standards, which have no statutory basis, should not be condoned by this Court on such a fundamental and basic issue as a court's subject matter jurisdiction.

The Judgment cited to *Maness v. Meyers,* 419 U.S. 449 (1975) for the proposition that parties must obey an order until it is reversed by orderly and proper proceedings. However, that rule was made contingent on the court having jurisdiction. The court in *Maness* held that "[t]he orderly and expeditious administration of justice by the courts requires that an order *issued by a court with jurisdiction over the subject matter* and person must be obeyed by the parties until it is reversed by orderly and proper proceedings." *Id.* at 459. (Emphasis added, internal citations omitted.)

In like manner, this Court conditioned the enforceability of a judgment or order on subject matter jurisdiction in *Walker v. City of Brimingham,* 388 U.S. 307 (1967), which the Tenth Circuit also relied upon. *Walker* made clear in that case that the jurisdiction of the district court that was enforcing an injunction through its contempt power was not an issue. The Judgment's reliance upon *GTE Sylvania, Inc. v. Consumers Union of the U.S., Inc.,* 445 U.S.

375 (1980) is similarly misapplied: "There is no doubt that the Federal District Court in Delaware had jurisdiction to issue the temporary restraining order and preliminary injunction." *Id.* at 386.

The circuit courts are divided as to what constitutes a "void" judgment for purposes of Rule 60(b)(4). As reflected in *IAL Aircraft Holding,* the Eleventh Circuit considers federal court jurisdiction as much narrower than the Tenth Circuit (and other circuits). This judge made law of having to prove the nearly impossible (and subjective) standard of "plain usurpation of power" has created a hollow remedy that ignores the basic constitutional principle that federal courts are courts of limited jurisdiction. It is necessary that this Court intervene in order to clarify the subject matter jurisdiction of federal courts insofar as it relates to "lawful" orders.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Stephen R. Winship
Winship & Winship, P.C.
145 S. Durbin Street, Suite 201
Casper, WY 82601
(307) 234-8991
steve@winshipandwinship.com
Counsel for Petitioners