No. 09-1525

IN THE

Supreme Court of the United States

LOGAN T. JOHNSTON, III,
Cross-Petitioner,

v.

MELVIN STERNBERG,
STERNBERG & SINGER, LTD.,
Cross-Respondents.

On Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF IN SUPPORT OF CONDITIONAL CROSS-PETITION FOR CERTIORARI

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August 31, 2010

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REPLY BRIEF IN SUPPORT OF CONDITIONAL CROSS-PETITION FOR CERTIORARI

Petitioners and Cross-Respondents Melvin Sternberg and his law firm Sternberg and Singer (collectively, "Sternberg") have asked this Court to review the question whether damages for emotional distress resulting from stay violations are recoverable under 11 U.S.C. § 362(k)(1). As explained in our brief in opposition, Sternberg's request should be denied because that question was neither raised nor decided below and implicates no circuit split on these facts.

If the Court decides to grant Sternberg's petition, however, it should also grant our conditional cross-petition, which raises the question whether the same statutory provision authorizes the recovery of attorneys' fees incurred in prosecuting damages actions for violations of the automatic stay. Unlike the emotional-distress issue, the Ninth Circuit's attorney-fees holding was central to the opinion below, is indisputably important, represents a clean break with the consensus view of courts and commentators, and has already been a target of criticism from several quarters.

Notably, Sternberg does not attempt to deny the existence of a clear circuit split on the fees question. Nor does Sternberg deny that the Ninth Circuit's fees ruling will encourage stay violations, leave debtors and creditors unprotected, and introduce significant uncertainty into the bankruptcy system nationwide.

Instead, Sternberg argues that (1) the fees question is not ripe because the district court has yet to implement the Ninth Circuit's ruling on remand, (2) the circuit split over the fees question does not squarely implicate more than two circuits, and (3) the Ninth Circuit, in his

view, was correct on the merits. If the Court decides to grant Sternberg's petition, none of these reasons would justify denial of the conditional cross-petition.

1. *Despite the acknowledged circuit split, Sternberg* argues that the Court should deny the cross-petition because the district court has yet to perform the ministerial task of implementing the Ninth Circuit's fees ruling on remand. That argument erroneously conflates jurisdictional and discretionary notions of finality. Virtually all of the cases that Sternberg cites involve either 28 U.S.C. § 1291, which governs the jurisdiction of the courts of appeals, or 28 U.S.C. § 1257(a), which imposes a strict finality requirement, animated by federalism and comity concerns, on cases that come to this Court from the *state* courts. *See, e.g.*, BIO 3 (citing *Wrotten v. New York*, 130 S. Ct. 2520 (2010)).

By contrast, this Court's "cases make clear that there is no absolute bar to review of nonfinal judgments of the lower federal courts." *Mazurek v. Armstrong*, 520 U.S. 968, 975 (1997) (per curiam). Because the Court "has unquestioned jurisdiction to review interlocutory judgments of federal courts of appeals," the posture of a case is relevant only to the extent that it affects the Court's assessment of whether review is appropriate. Gressman, et al., *Supreme Court Practice* § 4.18, at 281 (9th Cir. 2007). Here, if the Court grants certiorari to decide the emotional-distress issue, then the principal reason justifying the denial of certiorari in interlocutory cases—the risk that judicial resources will be wasted on a case that might otherwise have been resolved below, *id.* at 283—will fall away.

In any event, the interlocutory posture of a case coming from a federal appeals court typically does not preclude review where, as here, "there is some important

and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari." *Id.* Faced with a clear-cut issue of law concerning the availability of attorneys' fees under 11 U.S.C. § 362(k)(1), Sternberg does not explain why the procedural posture here poses any special obstacle to review. Sternberg says only that an "assessment of how much of [the] $69,000 fee award is attributable to correcting the stay violation and how much relates to litigation of the damages action will inform this [C]ourt's understanding of how Section 362[(k)(1)] functions in practice." Sternberg BIO 3. But it is not apparent why the Court's interpretation of the text, structure, and purpose of the statute should be affected by the specific amounts at issue in this case. In any event, the fee application filed in the bankruptcy court, together with the bankruptcy court's "painstaking" accounting of "each individual billing entry," provides more than enough information to answer Sternberg's question. App. 31; *see also* App. 62-78 (setting forth and analyzing billing invoices).

In past cases, this Court has had no trouble interpreting fees statutes where the lower courts had not yet made an award or an assessment of the amount of the fees in question. *See, e.g.*, *Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571 (2008); *Martin v. Franklin Capital Corp.*, 546 U.S. 132 (2005); *Melkonyan v. Sullivan*, 501 U.S. 89 (1991). Indeed, in the landmark attorneys' fees case of *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968), the Court reviewed a decision in which the court of appeals had remanded to the district court for an assessment of fees.

2. Sternberg concedes that the Fifth Circuit, in direct conflict with the Ninth Circuit, has held that attorneys' fees for prosecuting a damages action are recover-

able under Section 362(k)(1). BIO 6. The circuit split is direct, acknowledged, and unlikely to be resolved absent intervention by this Court. The Ninth Circuit, by its own account, did "not create a circuit split lightly." App. 23.

Nevertheless, Sternberg argues that the cross-petition should be denied because the split does not encompass more circuits. But as explained in our cross-petition, the Ninth Circuit's decision also runs contrary to the established past practice in most of the circuits, which have routinely affirmed fee awards that would be precluded under the decision below, as well as the consensus view among courts and commentators. Cross-Pet. 9-10. Sternberg points out that the leading bankruptcy treatises understandably have not yet analyzed the Ninth Circuit's novel interpretation of the statute, but does not deny that the treatises make no distinction between fees incurred to enforce the stay and fees incurred to recover damages resulting from a stay violation.

Most important, Sternberg makes no attempt to deny the immediate impact of the circuit split. Sternberg has no answer to the fact that "[b]ankruptcy practitioners and observers have already predicted that the Ninth Circuit's holding will have a significant practical impact on creditors, debtors, trustees, and judges bound by Ninth Circuit precedent"—the circuit with the most bankruptcy filings. Cross-Pet. 11-12. Similarly, Sternberg does not deny that the open disagreement between the Fifth and Ninth Circuits will introduce significant uncertainty into the bankruptcy system nationwide: Debtors, creditors, and practitioners in California and Texas will face drastically different incentives going forward, and courts in New York and Illinois will be forced to choose between the two regimes. In a national bankruptcy system designed to foster both "predictability and

uniformity," *Assocs. Commercial Corp. v. Rash*, 520 U.S. 953, 965 (1997), that situation is intolerable.

3. In our view, the decision below is inconsistent with the text, structure, and purpose of 11 U.S.C. § 362(k)(1). Sternberg, echoing the Ninth Circuit's policy arguments, disagrees. The cross-petition and opposition reveal the parties' very different understandings of the law and the practical importance of the question presented. If the Court grants the cross-petition, there will be time enough to respond to Sternberg's merits arguments in detail. For present purposes, the depth of the parties' disagreement on the merits only mirrors the split between courts and commentators and underscores the need for review.

CONCLUSION

If the petition for a writ of certiorari in No. 09-1374 is granted, this cross-petition should also be granted.

Respectfully submitted,

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