IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2011

IN RE BLOCKBUSTERS, INC.,

Debtor,

NATALLIE SANTANA,

Petitioner,

v.

RACHAEL RAY WARNER BAKES, INC.,

Respondent.

On Writ of Certiorari
to the United States Courts of Appeals
for the Thirteenth Circuit

BRIEF FOR PETITIONER

TEAM NUMBER P 9
COUNSEL FOR PETITIONER
QUESTIONS PRESENTED

I. Whether a debtor’s unauthorized use of cash collateral permits a bankruptcy trustee to avoid and recover the funds transferred to a third party vendor when there is no express statutory exception in §§ 549 or 550 for a transferee that provided reasonably equivalent value, acted in good faith, or in the ordinary course of business.

II. Whether Article III of the United States Constitution permits a bankruptcy judge to hear and rule on actions to recover the funds from an unauthorized post-petition transfer pursuant to §§ 549 and 550.
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OPINION BELOW

By order and decision, the United States Bankruptcy Court for the District of Moot entered an order avoiding the transfer based on the debtor’s unauthorized use of cash collateral and awarding judgment against Respondent for $150,000, and in doing so held that: 1) the bankruptcy trustee is permitted to avoid and recover the transferred funds because there are no valid defenses, including that the transferee acted in good faith, in the ordinary course of business, or provided reasonably equivalent value, thus not harming the estate and 2) bankruptcy courts have the constitutional authority to issue orders for actions arising under the Bankruptcy Code. The United States District Court for the District of Moot affirmed without opinion. (R. 6). On October 10, 2011, the United States Court of Appeal for the Thirteen Circuit reversed the judgment of the District Court and remanded the matter for further proceedings in Case No. 11-628. (R. 15).

STATEMENT OF JURISDICTION

The formal statement of jurisdiction is waived pursuant to Competition Rule VIII.

CONSTITUTIONAL AND STATUTORY PROVISIONS


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STATEMENT OF THE CASE

At issue is a dispute in which Natallie Santana ("Trustee" or "Petitioner") was exercising her rights and properly performing her duties under the Bankruptcy Code (the "Code"). The Trustee maximized the value of the estate by recovering the funds from an unauthorized transfer of cash collateral to Rachael Ray Warner Bakes, Inc. ("Vendor" or "Respondent"). This Court must now decide whether the trustee may recover the funds from Respondent under §§ 549 and 550, and whether the bankruptcy court has the constitutional authority to rule on issues that arise out of the Bankruptcy Code (the "Code").

Blockbuster, Inc. ("Debtor") was a business that specialized in hosting conventions that featured characters from Stephen Sondheim’s and Andrew Lloyd Webber’s Broadway shows. (R. 2-3). At the conventions, Debtor sold a significant amount of memorabilia based on the Broadway shows. (R. 3). However, Debtor’s merchandise and ticket sales began to rapidly decline as theatergoers developed a taste for newer and edgier shows. (R. 3). Broadway Bank (the "Bank") held a properly perfected security interest in all of Debtor’s assets, deposit accounts and accounts receivable. (R. 3). Debtor desperately needed to host a successful convention in the fall of 2008, but failed to do so because of the severe economic downturn. (R. 3). This caused Debtor to default on its loan from the Bank, which led the Bank to threaten to accelerate the loan. (R. 3). After negotiations regarding refinancing failed, Debtor filed for relief under Chapter 11 of the Code. (R. 3).

The Debtor required financing to fund its spring 2009 convention, so Debtor and the Bank negotiated the terms of a cash collateral order that was approved by the bankruptcy court. (R. 3-4). The stipulated order provided an itemized budget that only allowed Debtor to spend $1,500,000 of cash collateral, of which $500,000 was allotted for payments to vendors such as
Respondent. (R. 4). The order did not permit Debtor to exceed any budgeted line item without written consent from the Bank. Furthermore, the order granted the Bank a blanket lien on all the Debtor’s assets, including post-petition assets. (R. 4).

The Debtor’s financial fate and ability to successfully reorganize hinged on the outcome of the spring 2009 convention. (R. 4). Debtor wanted to make this its largest and most publicized convention to date. (R. 4). Debtor contracted with Respondent to provide a $250,000 cake that was a full-scale model of the set of “West Side Story”. (R. 4). Respondent knew that it was doing business with a company in bankruptcy, and Debtor even supplied Respondent with a copy of the cash collateral order. (R. 4). Respondent never requested a line item in the budget nor received explicit consent from the Bank or the bankruptcy court. (R. 4). Debtor agreed to pay Respondent $100,000 in advance and to pay the remaining $150,000 balance in cash on delivery. (R. 4). Respondent had no pre-petition relationship with Debtor and did not file a proof of claim in the bankruptcy proceeding. (R. 5).

Debtor sent an authorized wire transfer for $100,000 of the Bank’s cash collateral to Respondent. (R. 4). Debtor spent the remaining $400,000 allotted for payments to vendors on other expenses related to the convention and exceeded the total approved budget of $1,500,000. (R. 5). On the day before the convention, Debtor sent a wire transfer for the remaining $150,000 to Respondent, which constituted an unauthorized transfer of the Bank’s cash collateral. (R. 4-5).

The convention was a huge success primarily because of the cake. (R. 5). The media coverage of the cake increased publicity and attendance for the convention. (R. 5). Shortly after the convention, the Bank discovered that Debtor exceeded its budget and had made an unauthorized transfer of its cash collateral. (R. 5). The Bank sought and received the appointment of the Chapter 11 Trustee. (R. 5). Trustee brought this action to avoid and recover
the unauthorized $150,000 post-petition transfer to Respondent, pursuant to 11 U.S.C. §§ 549(a) and 550(a)(1), as a core proceeding of the bankruptcy case. (R. 5-6).

The Honorable Ivy Grey, Bankruptcy Judge for the District of Moot, conducted a bench trial and found that the $150,000 payment was from funds that constituted property of the estate. (R. 6). Moreover, it was an improper use of cash collateral as it was not authorized by the court or the Bank. (R. 6). Respondent unsuccessfully raised multiple defenses including that it acted in good faith and that the transfer did harm the estate since the cake was profitable. (R. 6). The court held that Respondent could not present such evidence because the plain language of the Code required avoidance of the transfer, which left Respondent liable to pay $150,000 back to the estate. (R. 6). Additionally, Respondent objected to the bankruptcy court’s constitutional authority to enter a final order avoiding the transfer, which Judge Grey promptly overruled by holding that the court can issue orders for any action that arises under the Code. (R. 6).

Therefore, the bankruptcy court entered an order avoiding the transfer to Respondent and awarding a judgment for $150,000 in favor of Trustee. (R. 6). Respondent subsequently appealed. (R. 6). The Honorable Mary-Tipton Thalheimer, United States District Court Judge for the District of Moot, affirmed the bankruptcy court on both issues without opinion. (R. 6). A divided Thirteenth Circuit Court of Appeals reversed, and the appeal to this Court followed. (R. 15).
SUMMARY OF THE ARGUMENTS

This Court is presented with two issues: (1) whether a trustee, according to §§ 549 and 550, may avoid and recover funds where a debtor-in-possession has made a post-petition transfer of cash collateral to a good faith transferee in the ordinary course of business who provided reasonably equivalent value, and (2) whether Article III of the Constitution permits a bankruptcy judge to hear and determine a final action to recover such unauthorized post-petition transfers.

Pursuant to § 363(c)(2), Debtor could not transfer funds that constituted cash collateral without the authorization of the court or the Bank. Trustee was able to avoid and recover the funds from Vendor pursuant to §§ 549 and 550, as the critical inquiry is whether the funds constituted cash collateral while in possession of the Debtor. This interpretation is consistent with the language of the Code. The Bank’s lien on the funds was stripped upon the unauthorized transfer and the lien would not automatically revive upon avoidance to a party without a security interest. This Court should disregard the lower court’s two-sided transfer theory and adopt the analysis proffered by the Tenth Circuit, holding that Trustee could avoid the transfer in order to protect the interests of any other unsecured creditors with an interest in the bankruptcy estate.

The Thirteenth Circuit erred in finding that the Trustee’s right to avoid a transfer was subject to Respondent’s equitable defenses because there are no “harmless” error, ordinary course of business, nor “innocent vendor” exceptions to § 549. While these exceptions may exist in other contexts, Congress had the power to include these exceptions for unauthorized post-petition transfers of cash collateral, but specifically chose not to do so. Good faith transferees have the ability to protect themselves when dealing with Chapter 11 debtors and may file for an administrative expense claim if such protective measures fail. Courts may not create their own remedies as the power of equity is limited to the confines of the Code.
The bankruptcy court has the authority to adjudicate actions arising under § 549. Congress did not usurp Article III protections in delegating the ability to decide such actions to bankruptcy courts. This Court should not misconstrue the narrow holding in *Stern* that would result in bankruptcy courts having more limited jurisdiction. Furthermore, § 549 satisfies even a broad reading of *Stern* because such actions are core proceedings that stem from the bankruptcy itself.

This Court may also determine that bankruptcy is a “public right” since it satisfies the five factors expressed by this Court. Bankruptcy is necessary for restructuring creditor-debtor relationships. Pursuant to its Article I powers, Congress may delegate its Article III powers to non-Article III tribunals. Moreover, sufficient power is reserved in Article III courts as they may remove or withdraw any action for cause. Although consent is unnecessary as the unauthorized transfer constituted funds that were in constructive possession of the court, the issue of consent is irrelevant in a § 549 action against a transferee who has already been fully compensated for their goods or services. Further, no one factor in the public rights exception analysis is dispositive.

Finally, the Code was promulgated to create a more efficient process for the administration of the bankruptcy estate. To employ such a process requires the keen eye of specialized bankruptcy judges and characteristics that allow for responsiveness to economic conditions.

This Court should reverse the Thirteenth Circuit Court of Appeals and hold that (1) a trustee has the right to avoid and recover funds from an unauthorized post-petition transfer, and (2) bankruptcy courts have the authority to decide such matters.
ARGUMENTS

In a civil appeal, this Court should employ a de novo standard when reviewing conclusions of law and a clearly erroneous standard when reviewing findings of fact. Tudisco v. United States (In re Tudisco), 183 F.3d 133, 136 (2d Cir. 1999). Neither party challenges the lower court’s finding of facts, so this Court should review the questions of law de novo. Id.

I. The express language of the Bankruptcy Code allows the Trustee to avoid and recover the unauthorized post-petition transfer of cash collateral, and there are no applicable exceptions to §§ 549 and 550.

This Court should reverse the Thirteenth Circuit Court of Appeals because the Trustee was entitled to avoid and recover the transfer pursuant to §§ 549 and 550. A trustee’s ability to avoid a transfer is a fundamental tenet of bankruptcy law that ensures property of the estate is not wrongfully squandered at the expense of unsecured creditors. The court’s order must be followed to uphold the integrity of the judicial process. Moreover, the power to avoid the transfer under § 549 is not subject to any implicit equitable defenses, as vendors have alternative remedies and the ability to prevent such occurrences. Finally, following the law’s express language and avoiding the transfer does not hinder the reorganization.

A. Sections 549 and 550 permit Trustee to recover the unauthorized transfer since the funds constituted cash collateral while in the debtor’s possession.

The Bankruptcy Code places clear restrictions on the post-petition use of cash collateral. 11 U.S.C. §§ 363(c)(2), (e). Sections 363(c)(2) and 363(e) prohibit the post-petition use of cash collateral unless the secured creditor consents or the bankruptcy court expressly authorizes such use upon a finding that the creditor’s interest is adequately protected. Such restrictions are responsive to the needs of the debtor to conduct further business and to the creditor’s concerns over protection of their security interests. Marathon Petroleum Co., LLC v. Cohen (In re Delco Oil), 599 F. 3d 1255, 1258 (11th Cir. 2010). Section 549(a) allows a trustee to avoid an
Unauthorized post-petition transfer of cash collateral. The only elements the trustee must prove in order to avoid a transfer are that: (1) the transfer was unauthorized, (2) the funds are property of the estate, and (3) the transfer occurred post-petition. See Manuel v. Allen (In re Allen), 217 B.R. 952, 955 (Bankr. M.D. Fla. 1998). Once the court determines that the transfer is avoidable, the trustee may recover, for the benefit of the estate, the property transferred, or its value, from the initial transferee or the entity for whose benefit such transfer was made. See 11 U.S.C. § 550(a).

This Court has stated that it is proper to begin “with the understanding that Congress says in a statute what it means and means in a statute what it says.” Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 6 (2000). If the plain language of the statute is clear, courts will enforce it according to its terms as long as it does not lead to an absurd result. Id. Where the plain meaning of a statute is not clear or is susceptible to two or more acceptable interpretations, a court may look beyond the text. Finley v. United States, 490 U.S. 545, 554 (1989). There is no apparent ambiguity in the statute, so the plain language is sufficient to support Petitioner’s claim and no further inquiry is necessary. However, if this Court finds that there is an ambiguity, then congressional intent supports Petitioner’s interpretation. This Court noted that appeals to statutory history are well taken only to resolve “statutory ambiguity”. Toibb v. Radloff, 501 U.S. 157, 162 (1991). In the Rules of Construction, § 101(54) of the Code defines transfer to mean “each mode … of disposing of or parting with … property.” This shows that Congress intended the transfer to be viewed from the debtor’s side of the transaction.

The Delco facts are largely analogous to the instant case. In Delco, the bankruptcy court rejected the Chapter 11 debtor’s request to use the previously administered cash collateral. 599 F. 3d at 1257. The debtor-in-possession used $1.9 million of cash collateral to purchase oil from a vendor without the secured lender’s authorization and in defiance of the court order. Id. at 1260.
The court held that the transfer was avoidable pursuant to § 363(c)(2). *Id.* The court acknowledged the vendor’s assertion that once the funds were transferred to the vendor they were free and clear of any encumbrances and recognized the creditor held no security interest in the funds. *See Id.* at 1259; *see also* U.C.C. § 9-332(b). However, the existence of any post-transfer lien was deemed irrelevant. *In re Delco*, 599 F.3d at 1259.

According to *Delco*, in deciding whether a transfer is avoidable the court need only determine whether the transferred funds constituted cash collateral while the funds were in the possession of the debtor, not at the time of filing or after the transfer. *Id.* The creditor held a perfected security interest while in the debtor’s possession, so the funds constituted cash collateral. Accordingly, pursuant to § 363(c)(2), the funds could not be transferred without consent from the creditor or court. *Id.* at 1260. The trustee can recover under §§ 549 and 550 if the funds constituted cash collateral while in the debtor’s hands prior to the transfer. *Id.*

The Thirteenth Circuit Court of Appeals asserted that there is an ambiguity in the statute because strictly following the plain language of § 549 would produce an absurd, inequitable result. (R. 8). The lower court found that the *Delco* holding was a misguided, rigid interpretation of the Code and subsequently delineated an unworkable interpretation that is unsupported by the Code. The court posited an alternative interpretation that ignores the source of the funds as cash collateral before the transfer and instead focuses on the funds not being cash collateral on the recipient side of the transaction. (R. 8-10). Under this analysis, once the funds are transferred to Respondent, the Bank’s lien on the funds is stripped and the funds no longer constitute cash collateral. This creates a purported anomaly of the transfer being simultaneously authorized and unauthorized. Likely realizing that the analysis was incongruent with the Code, this Court reasoned that while the transaction need not always be viewed from the transferee’s side, the
court reserves an interpretive license to preserve the ancient harmony between the Uniform Commercial Code\(^1\) and the Bankruptcy Code. \(^2\) (R. 10).

The Eleventh Circuit’s interpretation of the timing issue is supported by the overall intent of the Code. All statutes must be read in context with the overall statutory scheme. See Am. Bankers Ass’n v. Gould, 412 F.3d 1081, 1086 (9th Cir. 2005). This court often reiterates the canon of interpretation that statutes should be read so as to give meaning to every word and provision. See Ransom v. FIA Card Servs., N.A., 131 S. Ct. 716, 724 (2011); Leocal v. Ashcroft, 543 U.S. 1, 12 (2004). This Court stated that “statutory language cannot be construed in a vacuum; the words of the statute must be read in their context and with a view to their place in the overall statutory scheme.” Davis v. Mich. Dep’t of Treasury, 489 U.S. 803, 809 (1989).

If this Court adopts the lower court’s interpretation, it would directly conflict with the overall statutory scheme of the Code. There would be little to stop a debtor-in-possession from freely distributing cash collateral without the authorization of the creditor or the court because once the funds are transferred they would no longer constitute cash collateral pursuant to § 363(c)(2). This interpretation would allow debtors to circumvent the important provisions in § 363(c), thereby rendering it virtually meaningless. In re Delco, 599 F.3d at 1260. This could encourage fraud and collusion among the debtor-in-possession and transferees because, if the fraud went undetected, the transfer would not be subject to avoidance under § 549. Therefore, in

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\(^1\) Uniform Commercial Code § 9-332(b) provides that “a transferee of funds from a deposit account takes the funds free of a security interest in the deposit account unless the transferee acts in collusion with the debtor in violating the rights of the secured party.”

\(^2\) The court below specifically cited §§ 363 and 1108 of the Bankruptcy Code when proffering its argument for the historical harmony between the Uniform Commercial Code and the Bankruptcy Code. The latter Code section provides that “[u]nless the court, on request of a party in interest and after notice and a hearing, orders otherwise, the trustee may operate the debtor's business.”
accordance with the statutory intent and in maintaining uniformity with other provisions in the Code, this Court should adopt the Eleventh Circuit’s interpretation in *Delco*.

In the instant case, when applying the express language of the Code, Trustee should be permitted to avoid and recover the unauthorized transferred funds. Similar to the debtor in *Delco*, Debtor was aware of the restrictions imposed by the bankruptcy court’s order and chose to ignore them by transferring $150,000 to Respondent. The transfer of funds was not authorized by either the bankruptcy court or the Bank, the funds constituted property of the estate, and the transfer occurred post-petition. Therefore, since all the conditions of § 549 were fulfilled and the funds constituted cash collateral in the Debtor’s hands, Trustee was entitled to institute a § 549 avoidance action. Finally, Respondent was the initial transferee, so Trustee was permitted to recover the second transfer for the benefit of the estate pursuant to § 550.

**B. Recovery of the transfer is permissible because the secured creditor's lien does not automatically revive.**

However, if this Court adopts the Thirteenth Circuit’s two-sided transfer analysis, the critical inquiry becomes whether the secured creditor’s lien revives upon avoidance. Most courts have held that avoiding a transfer made to a secured creditor would have little meaning because the creditor’s lien would revive. *See, e.g.*, *Dave Noake Inc. v. Harold's Garage, Inc.* (*In re Dave Noake, Inc.*), 45 B.R. 555, 557 (Bankr. D. Vt. 1984); *Lowe v. Sheinfeld, Maley & Kay, P.C. (In re Saunders)*, 155 B.R. 405, 414–15 (Bankr. W.D. Tex. 1993). Other courts have fashioned different remedies with similar outcomes. *See McCord v. Agard (In re Bean)*, 252 F.3d 113, 116 (2d Cir. 2001) (holding that § 550 limited the trustee's recovery to the equity already recovered); *Fleet Nat'l Bank v. Gray (In re Bankvest Capital Corp.)*, 375 F.3d 51, 70 (1st Cir. 2004) (refusing to automatically revive the creditor’s lien, but allowing recovery under § 502(h)); *Rushton v. Bank of Utah (In re C.W. Mining Co.)*, 2011 WL 4597443 (Bankr. D. Utah 2011)
(holding after a § 549 avoidance, the lien revived automatically due to transferee’s status as a secured creditor).

The instant situation is distinct from the aforementioned cases and bears greater resemblance to the analysis proffered in Research–Planning, Inc. v. Segal (In re First Capital Mortg. Loan Corp.), 917 F.2d 424 (10th Cir. 1990). In Research–Planning, the debtor, an escrow agent, made unauthorized payments to First Security Bank of Utah, a good faith creditor, in violation of the escrow agreement with Research–Planning. Id. at 425-26. The debtor was involuntarily placed into bankruptcy and the trustee brought two § 547 preference actions against First Security which were subsequently settled. Id. at 426. Research–Planning then brought an action claiming that the transferred funds were subject to a trust in its favor. Id. The Tenth Circuit held that once recovered pursuant to § 550, the funds’ trust status did not revive. Id. at 427-29. The court noted “the special nature of the trustee’s avoidance powers could not revive any beneficial or equitable claim to the funds . . . without offending the avoidance powers' purpose of augmenting the estate for the benefit of all creditors.” Id. at 426.

Although Research–Planning dealt with avoidance of transfers under § 547, this Court should apply a similar analysis in the instant case because it should not employ an equitable exception to limit a trustee’s avoidance powers. Case law that dictates a lien must revive upon avoidance is appropriate only in avoidance of transfers that were made to secured creditors. The transferee in Research–Planning was a third party unsecured creditor, much like Respondent. Moreover, the funds were encumbered by a trust like the cash collateral funds in the instant case. Petitioner acknowledges that if the payments were made to the Bank, then the Trustee’s avoidance of the transfer would be fruitless. Whether the court allowed the lien to revive automatically, avoided the transfer but subjected the transfer to the Bank’s lien, or allowed
recovery under § 502(h), the outcome would have little practical difference. These options are not appropriate due to Respondent’s status as an unsecured creditor, as there are presumably other unsecured creditors that would receive a distribution from the recovered funds.³

C. **Trustee’s avoidance powers are not subject to implicit, equitable defenses.**

Avoidance under § 549 originated in the 1978 Bankruptcy Code.⁴ The specialized commission that adopted the Code recommended that the rule of *caveat emptor* be abandoned in bankruptcy, and the transferee be shielded from liability if: (1) the transfer was prior to the filing of a notice in the local records which gave notice of real estate and personal property transactions, (2) the transferee did not know of the filing of the petition, and (3) the transferee gave a reasonably equivalent value.⁵ However, Congress rejected the commission’s proposal when it adopted § 549(a)(1) and subjected the transferee to liability for any unauthorized post-petition transfer of property. Congress’ intent in refusing this initial liability shield for transferees was to shift the risk to the transferee in order to encourage lending to debtors in bankruptcy.

Congress subsequently weaved into the fabric of the Code exceptions to both §§ 549 and 550. Section 549(c) provides a limited, express exception to the trustee’s avoidance powers for a transfer of an interest in real property to a good faith purchaser without knowledge of the bankruptcy. Congress also created an exception in 549(b) making transfers that occur between the filing of an involuntary petition and the order for relief unavoidable. Further, § 550(b)(1) provides that a trustee may not recover from anyone subsequent to the initial transferee that takes for value, in good faith, and without knowledge of the avoidability of the transfer. It is clear that Congress chose to include certain limited exceptions and specifically not to craft others.

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³ See infra pp. 13-16.
Congress clearly knew how to draft a statute to create explicit exceptions to rules in the Code if it intended them to exist. *See New Falls Corp. v. Boyajian (In re Boyajian)*, 367 B.R. 138, 142 (B.A.P. 9th Cir. 2007). A court should only interpret a statute in a manner that is consistent with the statute’s plain language. *CBS, Inc. v. PrimeTime 24 Joint Venture*, 245 F.3d 1217, 1222 (11th Cir. 2001). It is an important principal of statutory construction that no implicit defenses should be read into the statute. *Cast Steel Prods., Inc. v. Admiral Ins. Co.*, 348 F.3d 1298, 1303 (11th Cir. 2003). However, the Thirteenth Circuit’s analysis erroneously provided exceptions for lack of diminution to the estate, transferees acting in the ordinary course of business, and innocent vendors. All of these exceptions are absent from the explicit language of the Code and are not supported by congressional intent.

1. **No exception to § 549 exists based on “harmless error” or providing reasonably equivalent value.**

This Court should hold that § 549 should not be interpreted as having an exception for transfers that cause no direct diminution of the estate or those in which the transferee gave reasonably equivalent value. The purported “harmless error” exception is refuted by the language of the Code and unsupported by case law, thus it is insufficient as a matter of law. *In re Delco*, 599 F. 3d at 1262; *see also In re C.W. Mining Co.*, 2011 WL 4597443, at *4 (Bankr. D. Utah 2011). The court was aware that the vendor in *Delco* had caused no specific harm and had provided reasonably equivalent value in return for the cash collateral funds. 599 F. 3d at 1262. However, the court was not persuaded by the vendor’s argument due to the lack of an express exception to § 549, and held that the trustee was entitled to avoid the unauthorized transfer. *Id.* Accordingly, this Court should find that no such exception exists.

Moreover, providing reasonably equivalent value is not an element of avoiding a transfer under § 549. Congress recognized that a transferee that has provided reasonably equivalent value
may defeat certain avoidance actions by creating express exceptions in the statute. For example, the failure to provide reasonably equivalent value is an affirmative element in avoidance actions under § 548(a)(2), and giving new value is an affirmative defense to a preference action under § 547(c)(4). Sections 549(a) and (b) both implement equivalent value and offer it as a possible defense. Clearly, Congress had the ability to craft an exception to § 549 regarding equivalent value but purposefully chose not to do so. Therefore, it should not be judicially created.

The purported “value” defense is contrary to case law. One court specifically rejected the proposition that an initial transferee that gave reasonably equivalent value should qualify as an exception to avoidance under § 549(a). See Hankin v. Mersey Mold & Model Co. (In re Countryside Manor), 239 B.R. 443 (Bankr. D. Conn. 1999). Another court found that even when a transferee provided value in exchange for the transfer of personal property, it was immaterial to the avoidance of the transfer. See Cossitt v. First Am. State Bank (In re Fort Dodge Creamery Co.), 121 B.R. 831, 834-35 (Bankr. N.D. Iowa 1990).

The Thirteenth Circuit’s argument for the “harmless error” exception relies largely on Dill v. Brad Hall and Assocs. (In re Indian Capitol Distrib., Inc.), 2011 WL 4711895, at *11 (Bankr. D. N.M. 2011). In Indian Capitol, the debtor was granted the temporary use of cash collateral and subsequently entered into an agreement with a vendor to purchase petroleum after the permissible time. Id. at *2. The court held that the trustee did not have standing to bring the proceeding, as the value of the collateral was unchanged since the estate received the equivalent value from the vendor in exchange for the cash collateral. Id. at *9. The court criticized Delco for failing to analyze the trustee’s standing and whether there was harm to the estate. Id. at *11.

The Thirteenth Circuit cites Bohen to support the proposition that, similar to § 549 avoidance powers, § 547 avoidable preferences are not recoverable when there is no diminution
of the estate. McCuskey v. Nat’l Bank of Waterloo, (In re Bohen Enters.), 859 F.2d 561, 566 (8th Cir. 1988). However, this simple proposition does not take into account the full scope of the analysis; the dispositive issue was whether the debtor followed the terms of the agreement rather than whether there was diminution of the estate. In Bohen, the debtor failed to follow the terms of the loan agreement. Id. at 562. Later, the trustee sought recovery on the basis that it constituted an avoidable preference, and the transferee asserted the earmarking defense. Id. at 563-64. The court concluded the earmarking doctrine did not apply to these particular facts, as it requires: (1) an agreement that the funds will be used to pay a specified antecedent debt, (2) performance of that agreement according to its terms, and (3) no diminution of the estate. Id. at 566. The court held that because the second prong of the earmarking doctrine was not satisfied, such defense could not protect the transfer from avoidance. Id. at 567.

The Thirteenth Circuit is correct in recognizing the commonalities of Bohen to the instant case, but for the wrong reasons. Although the defense was never raised in the instant case, similar to Bohen, Respondent could not successfully use the earmarking doctrine because the cash collateral order was not performed according to its terms, thus the second prong is not satisfied. As in Bohen, the Bank and the court did not intend for the cash collateral order to be used for any purpose outside of its express terms. If this Court chooses to draw the parallel between § 547 and § 549, equity does not allow it to deviate from the requirements of the Code.

The “no harm, no foul” approach does not work in the context of § 549. This Code provision is meant to address contempt of court not merely to rectify economic harm; it emphasizes the importance of respect for judicial authority and adherence to court orders. This

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6 Moreover, the majority mischaracterizes the importance of diminution of the estate for the earmarking doctrine, as it is merely a limitation, not the justification for the doctrine. See Parks v. FIA Card Servs (In re Marshall), 550 F.3d 1251, 1257 (10th Cir. 2008).
Court should not tolerate such an injury to the integrity of the judicial process and bankruptcy system. This Court must consider the necessity of parties adhering to court orders when creating precedent that could undermine respect for the law simply because there is little economic harm.

The Thirteenth Circuit asserted that applying this Court’s analysis in Delco would create an unjustified windfall to the estate. (R. 10). However, this analysis fails to take into account the existence of unsecured creditors. In a § 549 action, it is necessary to determine where the recovered funds belong post-avoidance. Weiss v. People Sav. Bank (In re Three Partners), 199 B.R. 230, 237 (Bankr. D. Mass. 1995). If the funds were merely to be distributed to the Bank upon the distribution of the assets, then no benefit to the estate would accrue from the avoidance. However, it is unlikely that Trustee would have bothered to file an action under § 549 had it not been to maximize the value of the estate and protect the unsecured creditors’ interests. The Bank would not be the sole beneficiary of the funds. Also, the unauthorized use of cash collateral necessitated the appointment of Trustee and the present litigation brought before this Court. This litigation warrants the imposition of significant administrative expense claims to the detriment of the unsecured creditors, thus causing a clear and tangible harm to the estate. Therefore, even if the purported “harmless error” exception existed, Respondent would not satisfy the requirements because there was harm to the estate.

2. **No exception exists to § 549 for a transferee acting in the ordinary course of business.**

This Court should not read an ordinary course of business exception into § 549 because the law does not support such a defense. The Thirteenth Circuit reasoned that Debtor’s transfer to Respondent was authorized under §§ 1108 and 363(c) of the Code, which allowed Debtor to continue to operate and use property of the estate in the ordinary course of business, respectively. However, this is faulty reasoning. First, the bar on Debtor using cash collateral pursuant to
§ 363(c)(2) is a specific limitation on Debtor’s express ordinary course powers in § 363(c)(1). *In re Delco*, 599 F. 3d 1263-64. Section 363(c)(1) provides that a debtor may enter into transactions in the ordinary course of business. Immediately following, § 363(c)(2) provides that a trustee may not use, sell, or lease cash collateral under § 363(c)(1) without the authorization of the creditor or court. Any purported exception based on the ordinary course of business under § 1108 is subject to § 363(c)(2), and prohibition against the use of cash collateral is immediate and self-effectuating. *In re A-1 Specialty Gasolines*, 246 B.R. 445, 450 (Bankr. S.D. Fla. 2000).

If Congress intended to craft an exception to § 549 based on a transfer occurring in the ordinary course then it knew how to do so. *See In re Boyajian*, 367 B.R. at 142; *see also In re Delco*, 599 F. 3d at 1263-64. Congress drafted an exception for § 547 preference avoidance actions. *See 11 U.S.C. § 547(c)(2)(B)*. This exception was designed to encourage creditors to continue to deal with debtors in financial trouble on standard business terms by eliminating the concern that the payments would be disgorged as preferences. *Barnhill v. Johnson*, 503 U.S. 393, 402 (1992). The same rationale does not apply to § 549 because the debtor is already in bankruptcy and there is no need to assuage concerns to encourage creditors to continue to do business with the debtor. Since Congress chose not to implement the same exception in § 549, this Court should not deviate from the plain language by reading an implicit exception into the statute. *Cast Steel Prods.*, 348 F.3d at 1303. The Eleventh Circuit in *Delco* refused to legislate from the bench and craft an ordinary course exception into § 549 when Congress specifically declined to do so. *In re Delco*, 599 F.3d 1263-64. Likewise, this Court should adhere to the congressional mandate and not read an equitable exception into the statute.
Even if this Court determined that an ordinary course of business exception should be read into the statutory language, Respondent still could not satisfy it. Selling a cake structured as the “West Side Story” set was likely not in the ordinary course of Respondent’s business. Dealings that are idiosyncratic fall outside the broad range of the ordinary course and should be deemed extraordinary. In re Tolona Pizza Prods. Corp., 3 F.3d 1029, 1033 (1993). Debtor’s purchase of this cake should certainly be considered extraordinary. Nothing in the record supports the proposition that it was in Respondent’s ordinary course of business to sell such extravagant cakes, nor that it was in the Debtor’s customary practices to buy such cakes from similar vendors for its conventions. Thus, Respondent could not satisfy the alleged exception.

Finally, §§ 363(c)(1) and 1108 allow the debtor-in-possession to continue to operate and use cash collateral in the ordinary course of business, unless the court orders otherwise (emphasis added). In this case, the court ordered otherwise by entering the stipulated cash collateral order authorizing Debtor to use a specific amount of cash collateral. (R. 4). Therefore, §§ 363(c)(1) and 1108 cannot protect this transaction, even if the transfer otherwise could be considered in the ordinary course of business, because it was in violation of the court order.

3. **No exception exists to § 549 for transfers involving “innocent vendors”**.

Section 549 contains no express defense based on the transferee’s status (as a vendor, purchaser, or otherwise) or upon its state of mind based on the transferee acting in good faith. At least one court has recognized, in regard to § 549, that there should be no inquiry into the transferee’s intent where the terms of the cash collateral order are unambiguous. *LWD Trucking, Inc. v. K&B Capital, LLC. (In re LWD, Inc.),* 332 B.R. 543, 551 (Bankr. W.D. Ky. 2005). In

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7 This Court stated that the prerequisites for the ordinary course of business exception for § 547 are that it must be “in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee; made in the ordinary course of business or financial affairs of the debtor and the transferee; and made according to ordinary business terms.” *Union Bank v. Wolas,* 502 U.S. 151, 155 (1991).
LWD, the debtor made nearly $500,000 worth of unauthorized post-petition transfers of cash collateral in contravention of the court approved term sheet, and the trustee avoided the transfer pursuant to § 549. Id. at 549-51. The court reasoned that the term sheet was explicit and the post-petition transfers were in clear violation of its terms. Id. Since there was no ambiguity in the order, the terms should have been honored. Id.

This Court should not read an “innocent vendor” or good faith transferee exception into § 549. First, there is very little factual distinction between the term sheet in LWD and the stipulated cash collateral order in the instant case. Both agreements were clear in their expression of the funds allocated to the debtor and its accompanying use restrictions. There is no analytical difference in reference to a § 549 vendor-transferee transaction versus an asset purchaser-transferee transaction. Second, although it is undisputed that Respondent acted in good faith and was an innocent vendor, this fact is irrelevant because this exception does not exist as a matter of law. Again, if Congress intended to incorporate an exception to § 549 based on the transferee’s state of mind, it would have chosen to do so. See In re Boyajian, 367 B.R. at 142; see also In re Delco, 599 F. 3d 1263-64. The law does not allow such inquiry, so no exception exists within § 549 for “innocent vendors” or good faith transferees.

Moreover, the Thirteenth Circuit cites Martinez v. Hutton (In re Harwell), 628 F.3d 1312, 1322-23 (11th Cir. 2010) for the proposition that the Eleventh Circuit receded from their previous ruling in Delco by crafting an equitable good faith exception to § 550(a). However, the court only applied this exception to those initial transferees that qualified under the common law “mere conduit” doctrine. Id. at 1324. In order to meet the criteria for the mere conduit exception the transferee must establish that the transferee: (1) does not have control over the assets received, and (2) acted in good faith as an innocent participant in the fraudulent transfer. Id. at
1323. Respondent does not satisfy the first requirement as it had exclusive control over the assets received from the unauthorized transfer. Furthermore, the mere conduit doctrine will never apply to circumstances where there is no subsequent transfer. Clearly, the analysis in *Martinez* does not warrant this Court granting an unqualified equitable exception for an innocent vendor.

4. **The bankruptcy courts’ equitable powers cannot create substantive rights that are not previously codified in the Bankruptcy Code.**

Section 105 provides that the court may issue any order that is necessary or appropriate to carry out any provision of the Code. This is the source of the bankruptcy court’s power of equity. However, congressional intent and case law both hold that this power of equity is limited to the confines of the Code. *See Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206 (1988). This Court held that it was not within the purview of any court to circumvent the Code by crafting its own equitable remedies. *Id.* at 969; *see also Official, Unsecured Creditors’ Comm. v. Stern (In re SPM Mfg. Corp.)*, 984 F.2d 1305, 1311 (1st Cir. 1993).

It is clear that Congress was aware of its ability to draft exceptions. *See* 11 U.S.C. §§ 549(c),(b), 550(b). However, Respondent does not qualify under any of the delineated exceptions as: (1) the transfer did not involve real property, (2) the transfer did not fall within an involuntary gap period, and (3) Respondent’s status was that of an initial transferee. The Thirteenth Circuit has attempted to fashion an exception for innocent vendors, lack of harm to the estate, and transfers in the ordinary course of business when it is clear from the plain language and congressional intent that they do not exist as a matter of law. The adoption of any exception where a specific Code provision already exists is an overextension of the court’s equitable powers and is an attempt to circumvent congressional intent through judicial activism.
D. Allowing § 549 avoidance without exception comports with bankruptcy policy.

Such limitation on the ability of the bankruptcy courts to fashion their own equitable remedy need not run afoul of public policy. The Code already contains a relevant provision that protects post-petition vendors and Respondent should have considered such provisions. Pursuant to § 503, post-petition vendors are permitted to have an administrative expense claim, which are paid before all other claims. See 11 U.S.C. 503(b)(1)(A). Administrative expenses must be “actual and necessary to the preservation of the estate” and the “benefit must run to the debtor and be fundamental to the conduct of its business.” Varsity Carpet Servs., Inc. v. Richardson, (In re Colortex Indus., Inc.), 19 F.3d 1371, 1383 (11th Cir. 1994).

In this case, the requirements for an administrative expense claim have been met. In order to continue the operation of its business, Debtor was largely dependent on the success of its spring 2009 convention, and the cake successfully generated publicity for the event. (R.5). Respondent should have filed for an administrative expense claim under § 503, but failed to do so. Respondent now has the status of a pre-petition unsecured creditor, pursuant to § 502(h).

Vendors doing business with debtors have the ability to protect themselves by demanding explicit demonstration of authorization through court approval or consent of the secured creditor. In addition to requesting a copy of the cash collateral order, Respondent could have requested a line item on the budget specifically delineating the amount of cash collateral allocated to Respondent. In addition, it could have obtained an agreement from the Bank and Debtor that would provide Respondent some assurance that the transfer was authorized. One of the core concerns of the Thirteenth Circuit is that a strict interpretation of § 549 may require vendors to engage in a sophisticated tracing analysis. (R. 9). However, this would be unnecessary if
Respondent required a verified cash usage authority certificate prior to the transaction. This would not be burdensome to Debtor or subvert the reorganization, as these preventative methods would have completely protected Respondent in a quick and efficient manner. Respondent knew that it was doing business with a debtor in bankruptcy and failed to take the necessary precautions to protect itself. Therefore, Respondent’s failure to take such precautions does not warrant this Court employing equitable remedies that are not expressly supported by the Code.

II. The bankruptcy court has the authority to adjudicate actions arising under § 549 as core proceedings or through the “public rights” exception to Article III.

The delegation of power to non-Article III tribunals has caused some controversy, but § 549 avoidance is merely a congressional creation for bankruptcy proceedings that does not require Article III protections. This Court’s dicta in Stern should not be extrapolated and interpreted broadly to result in bankruptcy courts losing their authority to rule on core proceedings. The bankruptcy court has authority to hear § 549 actions, as such actions are core proceedings that stem from the bankruptcy itself. Moreover, the bankruptcy court does not need consent to decide § 549 actions because it has historically had summary jurisdiction. Finally, bankruptcy meets the criteria to be a “public rights” exception to Article III. Commodity Futures Trading Comm’n v. Schor, 478 U.S. 833, 851 (1986).

A. The holding in Stern should be narrowly construed so as not to remove bankruptcy courts’ historical adjudicative authority.

The Bankruptcy Act of 1978 established bankruptcy courts in judicial districts as adjuncts of district courts. This Court in Northern Pipeline held that the statutory authority of bankruptcy judges to hear a state law contract claim against an entity that was not a party to the bankruptcy was too broad and violated Article III. N. Pipeline Constr. Co. v. Marathon Pipeline Co., 458

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8 Jonathon Friedland & Bill Schwartz, Punishing the Innocent: Lessons from Delco Oil, AM. BANKR. INST. J. 1, 88 (2010).

In Stern, Vickie Lynn Marshall, publicly known as Anna Nicole Smith, filed a suit against J. Howard Marshall’s son, Pierce, claiming he tortuously interfered with her expectancy in a trust from her husband, J. Howard. 131 S. Ct. at 2595. When J. Howard died, Vickie filed for bankruptcy and Pierce filed a proof of claim in the proceeding. Id. Pierce asserted that Vickie owed him damages for defamation, and Vickie filed a counterclaim in her bankruptcy case for tortuous interference. Id. While this Court accepted Vickie’s argument that § 157(b)(2)(C) grants the bankruptcy court statutory authority to hear her counterclaim and enter final judgment, the statute itself ran afoul of Article III. Id. at 2608. This Court reasoned that Article III cannot serve its position in the system of checks and balances if other branches are able to confer judicial power to non-Article III tribunals. Id. at 2609. Congress may not “withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty.” Stern, 131 S. Ct. at 2609 (quoting Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272, 284 (1856)).

This Court held that, “in one isolated respect,” the bankruptcy court “lacked the constitutional authority to enter a final judgment on a state law counterclaim that is not resolved in the process of ruling on a creditor's proof of claim.” Id. at 2620. The bankruptcy court’s
inability to enter a final order for Vickie’s counterclaim was consistent with *Katchen v. Landy*, 382 U.S. 323 (1966) and *Langenkamp v. Culp*, 498 U.S. 42 (1990). *Id.* Those cases dealt with § 547 avoidable preferences, which were derived from or dependent upon bankruptcy law. *Stern*, 131 at 2620. In contrast, Vickie’s counterclaim was in no way derived from or dependent upon bankruptcy law; it was a state tort action that existed without regard to the bankruptcy case. *Id.*

*Stern*’s narrow holding should not be misconstrued based on dicta. *Stern* did not create a paradigm shift in bankruptcy courts’ jurisdictional authority. *See In re Bujak*, 2011 WL 5326038, at *2 (Bankr. D. Idaho 2011). It does not upend the division of labor between district and bankruptcy courts. *Id.* This Court has explicitly stated *Stern*’s narrow holding “does not change much at all” as the “practical consequences” do not invalidate the jurisdiction of bankruptcy courts. 131 S. Ct. at 2619-20. This Court did not find 28 U.S.C. § 157(b)(2)(C) facially unconstitutional, rather its holding was limited to certain state law counterclaims. *Id.* at 2619-20. Bankruptcy courts have continuously followed this Court’s mandate to interpret *Stern* narrowly. *See In re USDigital, Inc.*, 2011 WL 6382551, at *59-63 (Bankr. D. Del. 2011) (stating that “to broadly apply *Stern*’s holding is to create a mountain out of a mole hill . . . its numerous attempts to limit its scope should be respected.”); *In re Safety Harbor*, 455 B.R. at 715 (“The Supreme Court plainly intended to, and in fact did, narrowly limit the scope of its holding in *Stern* ”); *S. Elec. Coil, LLC v. FirstMerit Bank, N.A.*, 2011 WL 6318963 (N.D. Ill. 2011); *In re Salander O'Reilly Galleries*, 453 B.R. 106, 115–16 (Bankr. S.D. N.Y. 2011); *Menotte v. United States (In re Custom Contractors, LLC)*, 2011 WL 6046397, at *4 (Bankr. S.D. Fla. 2011).

**B. Bankruptcy courts have jurisdiction to enter final orders for § 549 actions because they stem from the bankruptcy itself.**

Prior to *Stern*, this Court decided a case involving avoidance of fraudulent transfers under § 548 and declined to rule on the bankruptcy court’s jurisdictional authority. *Granfinanciera,*
The bankruptcy court denied Granfinanciera’s petition for a jury trial under the Seventh Amendment, as it determined that a suit to recover a fraudulent transfer was a core proceeding under 28 U.S.C. § 157(b)(2)(H).\textsuperscript{9} Id. at 36. This Court acknowledged that § 548 fraudulent conveyance actions are quintessentially common law actions, resembling state law contract claims brought by debtors, to augment the estate rather than creditors' prioritized claims to a pro rata distribution of the bankruptcy res. Id. at 34-35. However, Congress has the ability to create actions similar to those with a basis in common law and designate adjudication by a non-Article III tribunal without a right to a jury. Id. at 52. Ultimately, this Court held that the Seventh Amendment guaranteed the right to a jury trial in a fraudulent conveyance action. Id. at 35. This Court did not “express any view as to whether the Seventh Amendment or Article III allows jury trials in such actions to be held before non-Article III bankruptcy judges subject to the oversight provided by the district courts.” Id. at 64. Therefore, Granfinanciera did not provide any express holding as to the bankruptcy court’s jurisdiction.

This Court, in Stern, revisited its analysis of Granfinanciera to proffer a test that determines the bankruptcy court’s authority to hear state law counterclaims. This Court reasoned that the critical inquiry is whether the action stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process. Id. at 56; Stern, 131 at 2618. If either of these requirements is met, the bankruptcy court has the ability to hear and issue a final order for the proceeding. Stern, 131 at 2618.

Bankruptcy courts may enter final judgments on § 549 avoidance actions because they stem from the bankruptcy proceeding. Even if this Court’s holding in Granfinanciera is

\textsuperscript{9} 28 U.S.C. § 157(b)(2)(H) provides that “core proceedings include, but are not limited to . . . proceedings to determine, recover, or avoid fraudulent transfers.”
misconstrued to disallow the bankruptcy court from entering final judgments on § 548 actions, the instant case satisfied the requirements for the test in *Stern*. The bankruptcy court should be permitted to rule on § 549 actions as core proceedings because they stem from the bankruptcy itself. Bankruptcy courts have consistently determined that they have the jurisdictional authority to adjudicate matters that arise out of the statutory framework of the Code. *See In re Safety Harbor*, 455 B.R. at 715; *see also In re Custom Contractors*, 2011 WL 6046397, at *4. The crucial characteristic distinguishing the instant case from the § 548 in *Granfinanciera* is that § 549 avoidance claims did not originate in common law.

The historical difference between fraudulent conveyances and § 549 avoidance actions helps illustrate why bankruptcy judges should have the authority to hear and decide the latter. In 1551, the Statute of Elizabeth made any transfer avoidable, in which the transferor had intent to hinder, delay, or defraud creditors. Statute of Elizabeth, 1571 (Eng.), 13 Eliz. 1, c. 5. Due to the Anglicization of the United States’ legal system, such a statute indicates that fraudulent transfers have an origin that clearly pre-dates the conception of the Code. In contrast, the ability to avoid post-petition transfers due to the unauthorized use of cash collateral is a unique creation of Congress for the sole purpose of use in the bankruptcy context. Prior to the Bankruptcy Reform Act of 1978, avoidance of post-petition transfers was allowed only in specific circumstances. *Jones v. Springer*, 226 U.S. 148, 153-54 (1912).

Actions to augment the bankruptcy estate under supervision of a non-Article III judge did not exist in any manner consistent with the modern form of § 549 prior to the Act. The judge’s ability to issue a cash collateral order and the trustee’s capacity to avoid any transfer in violation of that order are contemporary responses to create a more efficient process for Chapter 11 reorganizations. As the dissent for the Thirteenth Circuit Court of Appeals accurately stated, the
ability of the judge to control and supervise the assets of the bankruptcy estate does not merely “stem from the bankruptcy,” rather it is the bankruptcy.” (R. 20) (quoting Stern, 131 S. Ct. at 2618).

Moreover, this Court in Stern stated that Granfinanciera’s distinction between proceedings that seek to augment the estate and those seeking a pro rata distribution of the bankruptcy res “reaffirms that Congress will not bypass Article III simply because a proceeding may have some bearing on a bankruptcy case.” Stern, 131 S. Ct. at 2618 (emphasis added). This Court's use of the word “reaffirms” emphasizes that Stern did not dramatically change the law. In re Safety Harbor, 456 B.R. at 717. In Stern, this Court’s reliance on Granfinanciera did not impose new limitations on bankruptcy courts’ jurisdiction that did not exist over twenty years ago, so Stern should not result in an unprecedented shift in jurisdictional authority. Id. at 717. Yet, in the last two decades no cases have challenged the bankruptcy court’s presumptive authority to enter final judgments on avoidance actions. Id.

C. The bankruptcy court had jurisdiction to enter the final order for the § 549 action because the court had summary jurisdiction through possession of the bankruptcy res.

The bankruptcy courts have authority to enter final judgment in matters, even those outside of its core jurisdiction, when litigants consent to adjudication. See 28 U.S.C 157(b)(2)(C); Stern 131 S. Ct. at 2608; In re Safety Harbor, 456 B.R. at 718; In re Custom Contractors, 2011 WL 6046397 at *7-8 (stating that Stern had not invalidated authority by consent and, if so, it would have called into question the already settled constitutionality of magistrate judges); Custom Contractors also supports the proposition that a litigant’s consent to the bankruptcy court’s jurisdiction can be implied. Id. at *7-8. Petitioner acknowledges that Respondent most likely did not provide consent. However, Petitioner contends that consent was not required.
Even if Respondent did not consent, it was not required because the court had possession of the bankruptcy res, which supplied consent for jurisdictional purposes. Under the Bankruptcy Act of 1898, the referees had summary jurisdiction for disputes that: (1) involved property in the actual or constructive possession of the estate, (2) the third party consented to the bankruptcy court’s jurisdiction, or (3) arising from a non-debtor’s counterclaim. *Taubel-Scott-Kitzmiller Co. v. Fox*, 264 U.S. 426, 430-33 (1924); *see also PIC Realty Corp. v. Evans*, 605 F.2d 476, 479-480 (9th Cir. 1979). If this Court determines that this standard may still be applied to the Code, then the bankruptcy court’s possession of the property would suffice to give it jurisdictional authority. Relevant to the instant case, the possession requirement under the first prong need not be actual possession, but may be constructive. *Id.* at 431-33. The definition of possession may include property delivered to the trustee, but thereafter wrongfully taken from the trustee’s custody. *Id.*

The Thirteenth Circuit posited that the critical inquiry was not the origin of § 549 as a unique creation of the Code, but rather, that the key question is whether the avoidance arose as part of the claims allowance process, pursuant to the holding in *Katchen*. (R. 14). This Court in *Stern* stated that the bankruptcy court could hear a preferential transfer action when the trustee files a claim against the allegedly favored creditor because it becomes integral to the restructuring of the debtor-creditor relationship. 131 S. Ct. at 2617. However, inquiry into whether the action arose from the claims allowance process is only necessary where the bankruptcy court lacks constructive possession of the property in question. *Taubel*, 264 U.S. at 434. Because bankruptcy courts have in rem jurisdiction over property of the estate, § 547 preference avoidance actions, like the one at issue in *Katchen*, define the res as of 90 days prior to the petition date. In other words, the bankruptcy court has jurisdiction in § 547 proceedings over any property in the possession of the debtor 90 days prior to the bankruptcy and beyond.
The same analysis should be applied for § 549 proceedings. The bankruptcy court had constructive possession of the bankruptcy estate from the petition date. Once the § 549 avoidance action was filed and the transfer was recovered, pursuant to § 550, the res was restored to the estate as it existed on the petition date. Congress has the authority to define preferentially transferred assets under § 547 as part of the estate and to grant authority over the property to non-Article III judges. In re Apex, 2011 Bankr. Lexis 5162 at *30-31. “The authority to recover preferences ‘has been a core aspect of the administration of bankruptcy estates since at least the 18th Century.’” Id. (quoting Cent. Va. Cmty. College v. Katz, 546 U.S. 356, 377 (2006)). There is no reason that the analysis should not be extended to § 549 avoidance actions. This means that the bankruptcy court had constructive possession over the res from 90 days before the petition date and beyond, thus Respondent consented to the court’s jurisdiction.

D. Bankruptcy courts have jurisdiction to enter final orders pursuant to § 549 because bankruptcy falls under the “public rights” exception to Article III.

This Court’s jurisprudence recognizes that Congress can establish non-Article III tribunals to resolve cases involving “public rights.” See, e.g., Stern, 131 S. Ct. at 2610. While this Court has never decided the question of whether bankruptcy is a public right, it has noted in dicta that the restructuring of debtor-creditor relations may constitute a public right. N. Pipeline, 458 U.S. at 71. Applying the analysis originally proffered in Schor, and subsequently adopted in Stern, the five factors for determining whether there is a public right are:

(1) the origins and importance of the right to be adjudicated;
(2) the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts;
(3) the extent to which the delegation nonetheless reserves judicial power for exercise by Article III courts;
(4) the presence or absence of consent to an initial adjudication before a non-
Article III tribunal; and
(5) the concerns that drove Congress to depart from adjudication in an Article III
court.

_Stern_, 131 S. Ct. at 2625 (Breyer, J., dissenting) (quoting _Schor_, 478 U.S. at 851). However, this
Court has refused to adopt formalistic and unbending rules on Article III challenges, recognizing
that such rules would unduly restrict Congress’ ability enact innovative and necessary legislation
pursuant to its Article I powers. _Schor_, 478 U.S. at 852. This Court has also cautioned that no
one factor of this test is determinative. _Id_. Rather, this Court should consider the practical effect
that such congressional action will have on the role of the judiciary. _Id_. Precedent has also
demonstrated that Article III does not grant litigants an absolute right to plenary proceedings
before an Article III judge. _Id_. at 848.

1. **Bankruptcy is an important congressionally promulgated scheme.**

Congress is vested with the power to create uniform laws concerning bankruptcy. _See_
U.S. CONST. Art. I, § 8. The framers of the Constitution recognized that legislative regulation of
debtor-creditor relations was necessary for political stability and successful commerce. _See In re
Apex_, 2011 Bankr. Lexis 5162, at *15-16 (discussing how Shay’s Rebellion prompted the need
for uniform federal bankruptcy laws regulating debtor–creditor relationships). Bankruptcy today
exists under a statutory scheme that has evolved since 1800 and performs the important functions
of granting bankruptcy courts exclusive jurisdiction over all of the debtor’s property, including
its equitable distribution to satisfy creditors, and to provide a discharge or modification of the
debt. _See Katz_, 546 U.S. at 364.

Section 549 serves the fundamental purpose of granting the trustee the power to protect
unsecured creditors by avoiding unauthorized post-petition transfers of cash collateral under the
constructive possession of the bankruptcy court. _See, e.g., In re Dave Noake_, 45 B.R. at 557. It
is clear that bankruptcy courts have been granted power to adjudicate certain claims that do not originate in common law. Unlike *Stern*, the avoidance of post-petition transfers does not resemble any common law analog; therefore it poses no risk of encroachment on the federal judiciary. Even if § 549 avoidance actions were similar to existing suits at common law, this factor is mitigated by the bankruptcy court’s history of adjudicating cases that closely resemble common law claims. *Stern*, 131 S. Ct. at 2626 (Breyer, J., dissenting).  

2. **Bankruptcy courts’ jurisdiction over § 549 does not significantly impinge on the powers normally vested in Article III courts.**

Bankruptcy courts adjudicating matters that are core proceedings under § 157(b)(2) generally do not infringe on the powers normally vested in Article III courts. An action to recover a post-petition transfer is a statutory action, not in equity, to return misappropriated res to the bankruptcy estate. This is a cause of action that falls within the purview of the bankruptcy court’s *in rem* jurisdiction. See *In re Apex*, 2011 Bankr. Lexis 5162, at *19-20. Under the current statutory construction of § 157(b)(2), there may be some actions that encroach on Article III judicial powers, as in *Stern*. 131 S. Ct. at 2608. However, this Court has repeatedly recognized the ability of Congress to delegate Article III powers to non-Article III tribunals. See, e.g., *Thomas v. Union Carbide Agr. Prods. Co.*, 473 U.S. 568, 569 (1985); *Schor*, 478 U.S. at 851 (holding that the Commodities Futures Trading Commission’s assumption of jurisdiction over common law counterclaims did not violate Article III). Non-Article III tribunals often apply legal standards to cases involving private interests with little or no review from Article III courts.

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10 Justice Breyer’s dissenting opinion provided an example of a traditionally common law claim that bankruptcy courts frequently hear. *Stern*, 131 S. Ct. at 2626. The hypothetical involved a debtor-in-possession that owned 40 acres of land that was challenged by a claim from a creditor. *Id.* If the claim was brought in a bankruptcy proceeding, the court would be allowed to apply state property law; the same law would govern a state court proceeding. *Id.*

11 This case held that right to compensation under the Federal Insecticide, Fungicide, and Rodenticide Act from “follow-on” registrants could be decided by non-Article III tribunals, as FIFRA did not arise from state common law.

3. Congress reserved significant judicial power for Article III courts.

Bankruptcy courts are under the direct supervision of Article III courts. Any party may appeal a decision of a bankruptcy court to the federal district court, where the district court will review all findings of fact for clear error and all conclusions of law de novo. Fed. R. Bankr. P. 8013; Tudisco, 183 F.3d at 136. This Court has previously held that the supervision of non-Article III tribunals by Article III courts was a sufficient reservation of power so as not impinge upon constitutional protections. Crowell v. Benson, 285 U.S. 22, 52 (1932) (holding that the U.S. Employees’ Compensation Commission did not impinge upon Article III rights where the district court could review whether findings of facts submitted by the commission were “supported by evidence in the record”). The standard of review for the bankruptcy court’s factual findings is more stringent than the standard applied in Crowell.

Moreover, the district courts may withdraw any proceeding referred to the bankruptcy court on its own motion or motion of any party. 28 U.S.C. § 157(d). This reservation of control for Article III judges is greater than in this Court’s previous cases where the delegation of adjudicatory power to non-Article III tribunals was upheld. Stern, 131 S. Ct. at 2627 (Breyer, J., dissenting); cf. N. Pipeline, 458 U.S. at 80 (contrasting pre-1978 bankruptcy law that provided district courts with the ability to withdraw the case from the bankruptcy referee with the unconstitutional 1978 Act that provided no such power to the district courts).
4. **The bankruptcy court’s in rem jurisdiction does not require parties’ consent.**

This Court has previously held, in *Granfinanciera*, that the determination of whether a transferee has a right to a jury trial in regards to a trustee’s § 547 action hinges upon whether the creditor submitted a claim against the estate. *Granfinanciera*, 492 U.S. at 58. By filing the claim in the bankruptcy proceeding, the creditor consented to the jurisdiction of the bankruptcy court. *Langenkamp v. Culp*, 498 U.S. 42, 58 (1990). However, consent is not at issue with § 549 actions as property of the estate is in the constructive possession of the bankruptcy court.\(^\text{12}\)

However, if this Court finds that the court’s constructive possession of property of the estate does not substitute for consent, then inquiry into the structural difference between the § 547 action in *Granfinanciera* and § 549 avoidance in the instant case is necessary. In a § 547 preference avoidance, the transferee holds a claim against the bankruptcy estate as a creditor, and thus has the incentive to file a claim against the estate. This would bring them within the ambit of this Court’s holdings in *Langenkamp* and *Granfinanciera*, as consent is tied to the actual filing of the proof of claim. In a §549 action, a transferee that has never done business with the debtor prior to the bankruptcy has no such incentive to file a claim against the estate because the transferee has no interest in the bankruptcy estate and is likely fully compensated prior to avoidance. In the instant case, Respondent had no previous claim against the estate and was fully compensated for its services prior to the avoidance, so Respondent never had reason to file a claim against the estate.

However, as previously stated, this Court need not view the issue of consent as dispositive. If this Court allowed consent to be viewed as such it would deny Congress the right to enact legislation regulating post-petition debtor-creditor relations when the vendor transferee is

\(^{12}\) *See supra* pp. 27-29.
conducting business with the debtor for the first time. The mere action of doing business with a
Chapter 11 debtor and being compensated from property of the estate should serve as consent to
the bankruptcy court’s jurisdiction in the context of § 549 avoidance claims.

5. Congress established bankruptcy courts to create a system where specialized judges
could efficiently administer the estate with consistency while providing a scheme
that is responsive to economic conditions.

This Court has long recognized that the principal purpose of bankruptcy is to secure a
timely and efficient administration of the estate. Ex parte Christy, 44 U.S. 292, 312 (1845).
Congress has established non-Article III tribunals to avoid the unnecessary delays associated
with the usual modes of trial. Bailey v. Glover, 88 U.S. 342, 346 (1874); see generally Wiswall v.
Campbell, 93 U.S. 347, 350-351 (1876); United States Fid. & Guar. Co., v. Bray, 225 U.S. 205,
218 (1912). The rationale for Congress’ delegation of power to the bankruptcy courts was to
bring about a more efficient process for the administration of the estate by avoiding the
unnecessary delays of Article III trials. The Federalist Papers discussed the importance of
establishing uniform bankruptcy laws to prevent fraud and administer the estates with
expediency. The Federalist No. 42, at 271 (James Madison) (Clinton Rossiter ed., 1961). To be
effective, a single tribunal must have broad authority to restructure debtor-creditor relations.
Katchen, 382 U.S. at 355.

Moreover, Congress crafted the Bankruptcy Code to allow the judicial system to respond
relatively swiftly to any changes in economic conditions that alter the demand for bankruptcy
proceedings. The ability of Congress to determine the number of bankruptcy judges allows the
legislature to raise or lower the threshold necessary to bring about a bankruptcy proceeding.
Therefore, Congress can fine-tune the system to effectively and adequately respond without
wasting resources. If bankruptcy judges were to enjoy life tenure, Congress’ ability to adjust the
number of bankruptcy judges would be hampered, thus curtailing the legislature’s ability to meet the demands of the market.

Finally, bankruptcy judges bring expertise to an intricate area of law that requires a high level of experience in order to render consistent, well-reasoned interpretations of the law. The detail and subtleties of such a complex code must be scrutinized with the sharpened eye of experience. While the *Federalist Papers* warn of the dangers of periodical appointments, from a practical standpoint bankruptcy judges are well insulated from the dangers that Article III aims to protect against. Bankruptcy judges are appointed for fourteen-year terms by the Court of Appeals and such length of tenure likely mitigates any concerns over judicial independence.

**CONCLUSION**

For the foregoing reasons, Petitioner respectfully requests that this Court reverse the judgment of the Thirteenth Circuit Court of Appeals and hold that: (1) a trustee may avoid and recover funds from the unauthorized post-petition transfer of cash collateral to a good faith transferee who provided reasonably equivalent value, and (2) bankruptcy courts may hear and determine such actions. Petitioner requests that this Court affirm the bankruptcy court’s ruling.

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13 *See The Federalist* No. 42, at 271 (James Madison) (Clinton Rossiter ed., 1961) “Periodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to [a judge’s] necessary independence.”
APPENDIX A


In this title--
(1) “after notice and a hearing”, or a similar phrase--

(A) means after such notice as is appropriate in the particular circumstances, and such opportunity for a hearing as is appropriate in the particular circumstances; but

(B) authorizes an act without an actual hearing if such notice is given properly and if--

(i) such a hearing is not requested timely by a party in interest; or

(ii) there is insufficient time for a hearing to be commenced before such act must be done, and the court authorizes such act;

(2) “claim against the debtor” includes claim against property of the debtor;

(3) “includes” and “including” are not limiting;

(4) “may not” is prohibitive, and not permissive;

(5) “or” is not exclusive;

(6) “order for relief” means entry of an order for relief;

(7) the singular includes the plural;

(8) a definition, contained in a section of this title that refers to another section of this title, does not, for the purpose of such reference, affect the meaning of a term used in such other section; and

(9) “United States trustee” includes a designee of the United States trustee.
APPENDIX B


(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

(b) Notwithstanding subsection (a) of this section, a court may not appoint a receiver in a case under this title.

(c) The ability of any district judge or other officer or employee of a district court to exercise any of the authority or responsibilities conferred upon the court under this title shall be determined by reference to the provisions relating to such judge, officer, or employee set forth in title 28. This subsection shall not be interpreted to exclude bankruptcy judges and other officers or employees appointed pursuant to chapter 6 of title 28 from its operation.

(d) The court, on its own motion or on the request of a party in interest--

(1) shall hold such status conferences as are necessary to further the expeditious and economical resolution of the case; and

(2) unless inconsistent with another provision of this title or with applicable Federal Rules of Bankruptcy Procedure, may issue an order at any such conference prescribing such limitations and conditions as the court deems appropriate to ensure that the case is handled expeditiously and economically, including an order that--

(A) sets the date by which the trustee must assume or reject an executory contract or unexpired lease; or

(B) in a case under chapter 11 of this title--

(i) sets a date by which the debtor, or trustee if one has been appointed, shall file a disclosure statement and plan;

(ii) sets a date by which the debtor, or trustee if one has been appointed, shall solicit acceptances of a plan;

(iii) sets the date by which a party in interest other than a debtor may file a plan;

(iv) sets a date by which a proponent of a plan, other than the debtor, shall solicit acceptances of such plan;

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(v) fixes the scope and format of the notice to be provided regarding the hearing on approval of the disclosure statement; or

(vi) provides that the hearing on approval of the disclosure statement may be combined with the hearing on confirmation of the plan.
APPENDIX C

11 U.S.C. § 363. Use, sale, or lease of property

(a) In this section, “cash collateral” means cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents whenever acquired in which the estate and an entity other than the estate have an interest and includes the proceeds, products, offspring, rents, or profits of property and the fees, charges, accounts or other payments for the use or occupancy of rooms and other public facilities in hotels, motels, or other lodging properties subject to a security interest as provided in section 552(b) of this title, whether existing before or after the commencement of a case under this title.

(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, except that if the debtor in connection with offering a product or a service discloses to an individual a policy prohibiting the transfer of personally identifiable information about individuals to persons that are not affiliated with the debtor and if such policy is in effect on the date of the commencement of the case, then the trustee may not sell or lease personally identifiable information to any person unless--

(A) such sale or such lease is consistent with such policy; or

(B) after appointment of a consumer privacy ombudsman in accordance with section 332, and after notice and a hearing, the court approves such sale or such lease--

(i) giving due consideration to the facts, circumstances, and conditions of such sale or such lease; and

(ii) finding that no showing was made that such sale or such lease would violate applicable nonbankruptcy law.

(2) If notification is required under subsection (a) of section 7A of the Clayton Act in the case of a transaction under this subsection, then--

(A) notwithstanding subsection (a) of such section, the notification required by such subsection to be given by the debtor shall be given by the trustee; and

(B) notwithstanding subsection (b) of such section, the required waiting period shall end on the 15th day after the date of the receipt, by the Federal Trade Commission and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, of the notification required under such subsection (a), unless such waiting period is extended--

(i) pursuant to subsection (e)(2) of such section, in the same manner as such subsection (e)(2) applies to a cash tender offer;

(ii) pursuant to subsection (g)(2) of such section; or

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(iii) by the court after notice and a hearing.

(c)(1) If the business of the debtor is authorized to be operated under section 721, 1108, 1203, 1204, or 1304 of this title and unless the court orders otherwise, the trustee may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing.

(2) The trustee may not use, sell, or lease cash collateral under paragraph (1) of this subsection unless--

(A) each entity that has an interest in such cash collateral consents; or

(B) the court, after notice and a hearing, authorizes such use, sale, or lease in accordance with the provisions of this section.

(3) Any hearing under paragraph (2)(B) of this subsection may be a preliminary hearing or may be consolidated with a hearing under subsection (e) of this section, but shall be scheduled in accordance with the needs of the debtor. If the hearing under paragraph (2)(B) of this subsection is a preliminary hearing, the court may authorize such use, sale, or lease only if there is a reasonable likelihood that the trustee will prevail at the final hearing under subsection (e) of this section. The court shall act promptly on any request for authorization under paragraph (2)(B) of this subsection.

(4) Except as provided in paragraph (2) of this subsection, the trustee shall segregate and account for any cash collateral in the trustee's possession, custody, or control.

(d) The trustee may use, sell, or lease property under subsection (b) or (c) of this section--

(1) in the case of a debtor that is a corporation or trust that is not a moneyed business, commercial corporation, or trust, only in accordance with nonbankruptcy law applicable to the transfer of property by a debtor that is such a corporation or trust; and

(2) only to the extent not inconsistent with any relief granted under subsection (c), (d), (e), or (f) of section 362.

(e) Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used, sold, or leased, or proposed to be used, sold, or leased, by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest. This subsection also applies to property that is subject to any unexpired lease of personal property (to the exclusion of such property being subject to an order to grant relief from the stay under section 362).

(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.

(g) Notwithstanding subsection (f) of this section, the trustee may sell property under subsection (b) or (c) of this section free and clear of any vested or contingent right in the nature of dower or curtesy.

(h) Notwithstanding subsection (f) of this section, the trustee may sell both the estate's interest, under subsection (b) or (c) of this section, and the interest of any co-owner in property in which the debtor had, at the time of the commencement of the case, an undivided interest as a tenant in common, joint tenant, or tenant by the entirety, only if--

(1) partition in kind of such property among the estate and such co-owners is impracticable;

(2) sale of the estate's undivided interest in such property would realize significantly less for the estate than sale of such property free of the interests of such co-owners;

(3) the benefit to the estate of a sale of such property free of the interests of co-owners outweighs the detriment, if any, to such co-owners; and

(4) such property is not used in the production, transmission, or distribution, for sale, of electric energy or of natural or synthetic gas for heat, light, or power.

(i) Before the consummation of a sale of property to which subsection (g) or (h) of this section applies, or of property of the estate that was community property of the debtor and the debtor's spouse immediately before the commencement of the case, the debtor's spouse, or a co-owner of such property, as the case may be, may purchase such property at the price at which such sale is to be consummated.

(j) After a sale of property to which subsection (g) or (h) of this section applies, the trustee shall distribute to the debtor's spouse or the co-owners of such property, as the case may be, and to the estate, the proceeds of such sale, less the costs and expenses, not including any compensation of the trustee, of such sale, according to the interests of such spouse or co-owners, and of the estate.

(k) At a sale under subsection (b) of this section of property that is subject to a lien that secures an allowed claim, unless the court for cause orders otherwise the holder of such claim may bid at
such sale, and, if the holder of such claim purchases such property, such holder may offset such claim against the purchase price of such property.

(l) Subject to the provisions of section 365, the trustee may use, sell, or lease property under subsection (b) or (c) of this section, or a plan under chapter 11, 12, or 13 of this title may provide for the use, sale, or lease of property, notwithstanding any provision in a contract, a lease, or applicable law that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title concerning the debtor, or on the appointment of or the taking possession by a trustee in a case under this title or a custodian, and that effects, or gives an option to effect, a forfeiture, modification, or termination of the debtor's interest in such property.

(m) The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

(n) The trustee may avoid a sale under this section if the sale price was controlled by an agreement among potential bidders at such sale, or may recover from a party to such agreement any amount by which the value of the property sold exceeds the price at which such sale was consummated, and may recover any costs, attorneys' fees, or expenses incurred in avoiding such sale or recovering such amount. In addition to any recovery under the preceding sentence, the court may grant judgment for punitive damages in favor of the estate and against any such party that entered into such an agreement in willful disregard of this subsection.

(o) Notwithstanding subsection (f), if a person purchases any interest in a consumer credit transaction that is subject to the Truth in Lending Act or any interest in a consumer credit contract (as defined in section 433.1 of title 16 of the Code of Federal Regulations (January 1, 2004), as amended from time to time), and if such interest is purchased through a sale under this section, then such person shall remain subject to all claims and defenses that are related to such consumer credit transaction or such consumer credit contract, to the same extent as such person would be subject to such claims and defenses of the consumer had such interest been purchased at a sale not under this section.

(p) In any hearing under this section--

(1) the trustee has the burden of proof on the issue of adequate protection; and

(2) the entity asserting an interest in property has the burden of proof on the issue of the validity, priority, or extent of such interest.
APPENDIX D

11 U.S.C. § 502. Allowance of claims or interests

(a) A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest, including a creditor of a general partner in a partnership that is a debtor in a case under chapter 7 of this title, objects.

(b) Except as provided in subsections (e)(2), (f), (g), (h) and (i) of this section, if such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim in lawful currency of the United States as of the date of the filing of the petition, and shall allow such claim in such amount, except to the extent that--

(1) such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured;

(2) such claim is for unmatured interest;

(3) if such claim is for a tax assessed against property of the estate, such claim exceeds the value of the interest of the estate in such property;

(4) if such claim is for services of an insider or attorney of the debtor, such claim exceeds the reasonable value of such services;

(5) such claim is for a debt that is unmatured on the date of the filing of the petition and that is excepted from discharge under section 523(a)(5) of this title;

(6) if such claim is the claim of a lessor for damages resulting from the termination of a lease of real property, such claim exceeds--

(A) the rent reserved by such lease, without acceleration, for the greater of one year, or 15 percent, not to exceed three years, of the remaining term of such lease, following the earlier of--

(i) the date of the filing of the petition; and

(ii) the date on which such lessor repossessed, or the lessee surrendered, the leased property; plus

(B) any unpaid rent due under such lease, without acceleration, on the earlier of such dates;

(7) if such claim is the claim of an employee for damages resulting from the termination of an employment contract, such claim exceeds--

(A) the compensation provided by such contract, without acceleration, for one year following the earlier of--

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(i) the date of the filing of the petition; or

(ii) the date on which the employer directed the employee to terminate, or such employee
terminated, performance under such contract; plus

(B) any unpaid compensation due under such contract, without acceleration, on the earlier of
such dates;

(8) such claim results from a reduction, due to late payment, in the amount of an otherwise
applicable credit available to the debtor in connection with an employment tax on wages,
salaries, or commissions earned from the debtor; or

(9) proof of such claim is not timely filed, except to the extent tardily filed as permitted under
paragraph (1), (2), or (3) of section 726(a) of this title or under the Federal Rules of Bankruptcy
Procedure, except that a claim of a governmental unit shall be timely filed if it is filed before 180
days after the date of the order for relief or such later time as the Federal Rules of Bankruptcy
Procedure may provide, and except that in a case under chapter 13, a claim of a governmental
unit for a tax with respect to a return filed under section 1308 shall be timely if the claim is filed
on or before the date that is 60 days after the date on which such return was filed as required.

(c) There shall be estimated for purpose of allowance under this section--

(1) any contingent or unliquidated claim, the fixing or liquidation of which, as the case may be,
would unduly delay the administration of the case; or

(2) any right to payment arising from a right to an equitable remedy for breach of performance.

(d) Notwithstanding subsections (a) and (b) of this section, the court shall disallow any claim of
any entity from which property is recoverable under section 542, 543, 550, or 553 of this title or
that is a transferee of a transfer avoidable under section 522(f), 522(h), 544, 545, 547, 548, 549,
or 724(a) of this title, unless such entity or transferee has paid the amount, or turned over any
such property, for which such entity or transferee is liable under section 522(i), 542, 543, 550, or
553 of this title.

(e)(1) Notwithstanding subsections (a), (b), and (c) of this section and paragraph (2) of this
subsection, the court shall disallow any claim for reimbursement or contribution of an entity that
is liable with the debtor on or has secured the claim of a creditor, to the extent that--

(A) such creditor's claim against the estate is disallowed;

(B) such claim for reimbursement or contribution is contingent as of the time of allowance or
disallowance of such claim for reimbursement or contribution; or

(C) such entity asserts a right of subrogation to the rights of such creditor under section 509 of
this title.
(2) A claim for reimbursement or contribution of such an entity that becomes fixed after the commencement of the case shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section, or disallowed under subsection (d) of this section, the same as if such claim had become fixed before the date of the filing of the petition.

(f) In an involuntary case, a claim arising in the ordinary course of the debtor's business or financial affairs after the commencement of the case but before the earlier of the appointment of a trustee and the order for relief shall be determined as of the date such claim arises, and shall be allowed under subsection (a), (b), or (c) of this section or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

(g)(1) A claim arising from the rejection, under section 365 of this title or under a plan under chapter 9, 11, 12, or 13 of this title, of an executory contract or unexpired lease of the debtor that has not been assumed shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

(2) A claim for damages calculated in accordance with section 562 shall be allowed under subsection (a), (b), or (c), or disallowed under subsection (d) or (e), as if such claim had arisen before the date of the filing of the petition.

(h) A claim arising from the recovery of property under section 522, 550, or 553 of this title shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section, or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

(i) A claim that does not arise until after the commencement of the case for a tax entitled to priority under section 507(a)(8) of this title shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section, or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

(j) A claim that has been allowed or disallowed may be reconsidered for cause. A reconsidered claim may be allowed or disallowed according to the equities of the case. Reconsideration of a claim under this subsection does not affect the validity of any payment or transfer from the estate made to a holder of an allowed claim on account of such allowed claim that is not reconsidered, but if a reconsidered claim is allowed and is of the same class as such holder's claim, such holder may not receive any additional payment or transfer from the estate on account of such holder's allowed claim until the holder of such reconsidered and allowed claim receives payment on account of such claim proportionate in value to that already received by such other holder. This subsection does not alter or modify the trustee's right to recover from a creditor any excess payment or transfer made to such creditor.

(k)(1) The court, on the motion of the debtor and after a hearing, may reduce a claim filed under this section based in whole on an unsecured consumer debt by not more than 20 percent of the claim, if--
(A) the claim was filed by a creditor who unreasonably refused to negotiate a reasonable alternative repayment schedule proposed on behalf of the debtor by an approved nonprofit budget and credit counseling agency described in section 111;

(B) the offer of the debtor under subparagraph (A)--

(i) was made at least 60 days before the date of the filing of the petition; and

(ii) provided for payment of at least 60 percent of the amount of the debt over a period not to exceed the repayment period of the loan, or a reasonable extension thereof; and

(C) no part of the debt under the alternative repayment schedule is nondischargeable.

(2) The debtor shall have the burden of proving, by clear and convincing evidence, that--

(A) the creditor unreasonably refused to consider the debtor's proposal; and

(B) the proposed alternative repayment schedule was made prior to expiration of the 60-day period specified in paragraph (1)(B)(i).

(a) An entity may timely file a request for payment of an administrative expense, or may tardily file such request if permitted by the court for cause.

(b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including--

(1)(A) the actual, necessary costs and expenses of preserving the estate including--

(i) wages, salaries, and commissions for services rendered after the commencement of the case; and

(ii) wages and benefits awarded pursuant to a judicial proceeding or a proceeding of the National Labor Relations Board as back pay attributable to any period of time occurring after commencement of the case under this title, as a result of a violation of Federal or State law by the debtor, without regard to the time of the occurrence of unlawful conduct on which such award is based or to whether any services were rendered, if the court determines that payment of wages and benefits by reason of the operation of this clause will not substantially increase the probability of layoff or termination of current employees, or of nonpayment of domestic support obligations, during the case under this title;

(B) any tax--

(i) incurred by the estate, whether secured or unsecured, including property taxes for which liability is in rem, in personam, or both, except a tax of a kind specified in section 507(a)(8) of this title; or

(ii) attributable to an excessive allowance of a tentative carryback adjustment that the estate received, whether the taxable year to which such adjustment relates ended before or after the commencement of the case;

(C) any fine, penalty, or reduction in credit relating to a tax of a kind specified in subparagraph (B) of this paragraph; and

(D) notwithstanding the requirements of subsection (a), a governmental unit shall not be required to file a request for the payment of an expense described in subparagraph (B) or (C), as a condition of its being an allowed administrative expense;

(2) compensation and reimbursement awarded under section 330(a) of this title;

(3) the actual, necessary expenses, other than compensation and reimbursement specified in paragraph (4) of this subsection, incurred by--
(A) a creditor that files a petition under section 303 of this title;

(B) a creditor that recovers, after the court's approval, for the benefit of the estate any property transferred or concealed by the debtor;

(C) a creditor in connection with the prosecution of a criminal offense relating to the case or to the business or property of the debtor;

(D) a creditor, an indenture trustee, an equity security holder, or a committee representing creditors or equity security holders other than a committee appointed under section 1102 of this title, in making a substantial contribution in a case under chapter 9 or 11 of this title;

(E) a custodian superseded under section 543 of this title, and compensation for the services of such custodian; or

(F) a member of a committee appointed under section 1102 of this title, if such expenses are incurred in the performance of the duties of such committee;

(4) reasonable compensation for professional services rendered by an attorney or an accountant of an entity whose expense is allowable under subparagraph (A), (B), (C), (D), or (E) of paragraph (3) of this subsection, based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title, and reimbursement for actual, necessary expenses incurred by such attorney or accountant;

(5) reasonable compensation for services rendered by an indenture trustee in making a substantial contribution in a case under chapter 9 or 11 of this title, based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title;

(6) the fees and mileage payable under chapter 119 of title 28;

(7) with respect to a nonresidential real property lease previously assumed under section 365, and subsequently rejected, a sum equal to all monetary obligations due, excluding those arising from or relating to a failure to operate or a penalty provision, for the period of 2 years following the later of the rejection date or the date of actual turnover of the premises, without reduction or setoff for any reason whatsoever except for sums actually received or to be received from an entity other than the debtor, and the claim for remaining sums due for the balance of the term of the lease shall be a claim under section 502(b)(6);

(8) the actual, necessary costs and expenses of closing a health care business incurred by a trustee or by a Federal agency (as defined in section 551(1) of title 5) or a department or agency of a State or political subdivision thereof, including any cost or expense incurred--

(A) in disposing of patient records in accordance with section 351; or
(B) in connection with transferring patients from the health care business that is in the process of being closed to another health care business; and

(9) the value of any goods received by the debtor within 20 days before the date of commencement of a case under this title in which the goods have been sold to the debtor in the ordinary course of such debtor's business.

(c) Notwithstanding subsection (b), there shall neither be allowed, nor paid--

(1) a transfer made to, or an obligation incurred for the benefit of, an insider of the debtor for the purpose of inducing such person to remain with the debtor's business, absent a finding by the court based on evidence in the record that--

(A) the transfer or obligation is essential to retention of the person because the individual has a bona fide job offer from another business at the same or greater rate of compensation;

(B) the services provided by the person are essential to the survival of the business; and

(C) either--

(i) the amount of the transfer made to, or obligation incurred for the benefit of, the person is not greater than an amount equal to 10 times the amount of the mean transfer or obligation of a similar kind given to nonmanagement employees for any purpose during the calendar year in which the transfer is made or the obligation is incurred; or

(ii) if no such similar transfers were made to, or obligations were incurred for the benefit of, such nonmanagement employees during such calendar year, the amount of the transfer or obligation is not greater than an amount equal to 25 percent of the amount of any similar transfer or obligation made to or incurred for the benefit of such insider for any purpose during the calendar year before the year in which such transfer is made or obligation is incurred;

(2) a severance payment to an insider of the debtor, unless--

(A) the payment is part of a program that is generally applicable to all full-time employees; and

(B) the amount of the payment is not greater than 10 times the amount of the mean severance pay given to nonmanagement employees during the calendar year in which the payment is made; or

(3) other transfers or obligations that are outside the ordinary course of business and not justified by the facts and circumstances of the case, including transfers made to, or obligations incurred for the benefit of, officers, managers, or consultants hired after the date of the filing of the petition.
APPENDIX F

11 U.S.C. § 547. Preferences

(a) In this section--

(1) “inventory” means personal property leased or furnished, held for sale or lease, or to be furnished under a contract for service, raw materials, work in process, or materials used or consumed in a business, including farm products such as crops or livestock, held for sale or lease;

(2) “new value” means money or money's worth in goods, services, or new credit, or release by a transferee of property previously transferred to such transferee in a transaction that is neither void nor voidable by the debtor or the trustee under any applicable law, including proceeds of such property, but does not include an obligation substituted for an existing obligation;

(3) “receivable” means right to payment, whether or not such right has been earned by performance; and

(4) a debt for a tax is incurred on the day when such tax is last payable without penalty, including any extension.

(b) Except as provided in subsections (c) and (i) of this section, the trustee may avoid any transfer of an interest of the debtor in property--

(1) to or for the benefit of a creditor;

(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

(3) made while the debtor was insolvent;

(4) made--

(A) on or within 90 days before the date of the filing of the petition; or

(B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and

(5) that enables such creditor to receive more than such creditor would receive if--

(A) the case were a case under chapter 7 of this title;

(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

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(c) The trustee may not avoid under this section a transfer--

(1) to the extent that such transfer was--

(A) intended by the debtor and the creditor to or for whose benefit such transfer was made to be a contemporaneous exchange for new value given to the debtor; and

(B) in fact a substantially contemporaneous exchange;

(2) to the extent that such transfer was in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee, and such transfer was--

(A) made in the ordinary course of business or financial affairs of the debtor and the transferee; or

(B) made according to ordinary business terms;

(3) that creates a security interest in property acquired by the debtor--

(A) to the extent such security interest secures new value that was--

(i) given at or after the signing of a security agreement that contains a description of such property as collateral;

(ii) given by or on behalf of the secured party under such agreement;

(iii) given to enable the debtor to acquire such property; and

(iv) in fact used by the debtor to acquire such property; and

(B) that is perfected on or before 30 days after the debtor receives possession of such property;

(4) to or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave new value to or for the benefit of the debtor--

(A) not secured by an otherwise unavoidable security interest; and

(B) on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor;

(5) that creates a perfected security interest in inventory or a receivable or the proceeds of either, except to the extent that the aggregate of all such transfers to the transferee caused a reduction, as of the date of the filing of the petition and to the prejudice of other creditors holding unsecured claims, of any amount by which the debt secured by such security interest exceeded the value of all security interests for such debt on the later of--
(A)(i) with respect to a transfer to which subsection (b)(4)(A) of this section applies, 90 days before the date of the filing of the petition; or

(ii) with respect to a transfer to which subsection (b)(4)(B) of this section applies, one year before the date of the filing of the petition; or

(B) the date on which new value was first given under the security agreement creating such security interest;

(6) that is the fixing of a statutory lien that is not avoidable under section 545 of this title;

(7) to the extent such transfer was a bona fide payment of a debt for a domestic support obligation;

(8) if, in a case filed by an individual debtor whose debts are primarily consumer debts, the aggregate value of all property that constitutes or is affected by such transfer is less than $600; or

(9) if, in a case filed by a debtor whose debts are not primarily consumer debts, the aggregate value of all property that constitutes or is affected by such transfer is less than $5,850.

(d) The trustee may avoid a transfer of an interest in property of the debtor transferred to or for the benefit of a surety to secure reimbursement of such a surety that furnished a bond or other obligation to dissolve a judicial lien that would have been avoidable by the trustee under subsection (b) of this section. The liability of such surety under such bond or obligation shall be discharged to the extent of the value of such property recovered by the trustee or the amount paid to the trustee.

(e)(1) For the purposes of this section--

(A) a transfer of real property other than fixtures, but including the interest of a seller or purchaser under a contract for the sale of real property, is perfected when a bona fide purchaser of such property from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest that is superior to the interest of the transferee; and

(B) a transfer of a fixture or property other than real property is perfected when a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the transferee.

(2) For the purposes of this section, except as provided in paragraph (3) of this subsection, a transfer is made--

(A) at the time such transfer takes effect between the transferor and the transferee, if such transfer is perfected at, or within 30 days after, such time, except as provided in subsection (c)(3)(B); or

(B) at the time such transfer is perfected, if such transfer is perfected after such 30 days; or

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(C) immediately before the date of the filing of the petition, if such transfer is not perfected at
the later of--

(i) the commencement of the case; or

(ii) 30 days after such transfer takes effect between the transferor and the transferee.

(3) For the purposes of this section, a transfer is not made until the debtor has acquired rights in
the property transferred.

(f) For the purposes of this section, the debtor is presumed to have been insolvent on and during
the 90 days immediately preceding the date of the filing of the petition.

(g) For the purposes of this section, the trustee has the burden of proving the avoidability of a
transfer under subsection (b) of this section, and the creditor or party in interest against whom
recovery or avoidance is sought has the burden of proving the nonavoidability of a transfer under
subsection (c) of this section.

(h) The trustee may not avoid a transfer if such transfer was made as a part of an alternative
repayment schedule between the debtor and any creditor of the debtor created by an approved
nonprofit budget and credit counseling agency.

(i) If the trustee avoids under subsection (b) a transfer made between 90 days and 1 year before
the date of the filing of the petition, by the debtor to an entity that is not an insider for the benefit
of a creditor that is an insider, such transfer shall be considered to be avoided under this section
only with respect to the creditor that is an insider.

XVIII
§ 548. Fraudulent transfers and obligations

(a)(1) The trustee may avoid any transfer (including any transfer to or for the benefit of an insider under an employment contract) of an interest of the debtor in property, or any obligation (including any obligation to or for the benefit of an insider under an employment contract) incurred by the debtor, that was made or incurred on or within 2 years before the date of the filing of the petition, if the debtor voluntarily or involuntarily--

(A) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or

(B)(i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

(ii)(I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

(II) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital;

(III) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured; or

(IV) made such transfer to or for the benefit of an insider, or incurred such obligation to or for the benefit of an insider, under an employment contract and not in the ordinary course of business.

(2) A transfer of a charitable contribution to a qualified religious or charitable entity or organization shall not be considered to be a transfer covered under paragraph (1)(B) in any case in which--

(A) the amount of that contribution does not exceed 15 percent of the gross annual income of the debtor for the year in which the transfer of the contribution is made; or

(B) the contribution made by a debtor exceeded the percentage amount of gross annual income specified in subparagraph (A), if the transfer was consistent with the practices of the debtor in making charitable contributions.

(b) The trustee of a partnership debtor may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within 2 years before the date of the filing of the petition, to a general partner in the debtor, if the debtor was insolvent on the date such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation.
(c) Except to the extent that a transfer or obligation voidable under this section is voidable under section 544, 545, or 547 of this title, a transferee or obligee of such a transfer or obligation that takes for value and in good faith has a lien on or may retain any interest transferred or may enforce any obligation incurred, as the case may be, to the extent that such transferee or obligee gave value to the debtor in exchange for such transfer or obligation.

(d)(1) For the purposes of this section, a transfer is made when such transfer is so perfected that a bona fide purchaser from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest in the property transferred that is superior to the interest in such property of the transferee, but if such transfer is not so perfected before the commencement of the case, such transfer is made immediately before the date of the filing of the petition.

(2) In this section--

(A) “value” means property, or satisfaction or securing of a present or antecedent debt of the debtor, but does not include an unperformed promise to furnish support to the debtor or to a relative of the debtor;

(B) a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency that receives a margin payment, as defined in section 101, 741, or 761 of this title, or settlement payment, as defined in section 101 or 741 of this title, takes for value to the extent of such payment;

(C) a repo participant or financial participant that receives a margin payment, as defined in section 741 or 761 of this title, or settlement payment, as defined in section 741 of this title, in connection with a repurchase agreement, takes for value to the extent of such payment;

(D) a swap participant or financial participant that receives a transfer in connection with a swap agreement takes for value to the extent of such transfer; and

(E) a master netting agreement participant that receives a transfer in connection with a master netting agreement or any individual contract covered thereby takes for value to the extent of such transfer, except that, with respect to a transfer under any individual contract covered thereby, to the extent that such master netting agreement participant otherwise did not take (or is otherwise not deemed to have taken) such transfer for value.

(3) In this section, the term “charitable contribution” means a charitable contribution, as that term is defined in section 170(c) of the Internal Revenue Code of 1986, if that contribution--

(A) is made by a natural person; and

(B) consists of--

(i) a financial instrument (as that term is defined in section 731(c)(2)(C) of the Internal Revenue Code of 1986); or
(ii) cash.

(4) In this section, the term “qualified religious or charitable entity or organization” means--

(A) an entity described in section 170(c)(1) of the Internal Revenue Code of 1986; or

(B) an entity or organization described in section 170(c)(2) of the Internal Revenue Code of 1986.

(e)(1) In addition to any transfer that the trustee may otherwise avoid, the trustee may avoid any transfer of an interest of the debtor in property that was made on or within 10 years before the date of the filing of the petition, if--

(A) such transfer was made to a self-settled trust or similar device;

(B) such transfer was by the debtor;

(C) the debtor is a beneficiary of such trust or similar device; and

(D) the debtor made such transfer with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made, indebted.

(2) For the purposes of this subsection, a transfer includes a transfer made in anticipation of any money judgment, settlement, civil penalty, equitable order, or criminal fine incurred by, or which the debtor believed would be incurred by--

(A) any violation of the securities laws (as defined in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47))), any State securities laws, or any regulation or order issued under Federal securities laws or State securities laws; or

(B) fraud, deceit, or manipulation in a fiduciary capacity or in connection with the purchase or sale of any security registered under section 12 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78l and 78o(d)) or under section 6 of the Securities Act of 1933 (15 U.S.C. 77f).
APPENDIX H

11 U.S.C. § 549. Postpetition transactions

(a) Except as provided in subsection (b) or (c) of this section, the trustee may avoid a transfer of property of the estate--

(1) that occurs after the commencement of the case; and

(2) (A) that is authorized only under section 303(f) or 542(c) of this title; or

(B) that is not authorized under this title or by the court.

(b) In an involuntary case, the trustee may not avoid under subsection (a) of this section a transfer made after the commencement of such case but before the order for relief to the extent any value, including services, but not including satisfaction or securing of a debt that arose before the commencement of the case, is given after the commencement of the case in exchange for such transfer, notwithstanding any notice or knowledge of the case that the transferee has.

(c) The trustee may not avoid under subsection (a) of this section a transfer of an interest in real property to a good faith purchaser without knowledge of the commencement of the case and for present fair equivalent value unless a copy or notice of the petition was filed, where a transfer of an interest in such real property may be recorded to perfect such transfer, before such transfer is so perfected that a bona fide purchaser of such real property, against whom applicable law permits such transfer to be perfected, could not acquire an interest that is superior to such interest of such good faith purchaser. A good faith purchaser without knowledge of the commencement of the case and for less than present fair equivalent value has a lien on the property transferred to the extent of any present value given, unless a copy or notice of the petition was so filed before such transfer was so perfected.

(d) An action or proceeding under this section may not be commenced after the earlier of--

(1) two years after the date of the transfer sought to be avoided; or

(2) the time the case is closed or dismissed.
APPENDIX I


(a) Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b), or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from--

(1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or

(2) any immediate or mediate transferee of such initial transferee.

(b) The trustee may not recover under section 1(a)(2) of this section from--

(1) a transferee that takes for value, including satisfaction or securing of a present or antecedent debt, in good faith, and without knowledge of the voidability of the transfer avoided; or

(2) any immediate or mediate good faith transferee of such transferee.

(c) If a transfer made between 90 days and one year before the filing of the petition--

(1) is avoided under section 547(b) of this title; and

(2) was made for the benefit of a creditor that at the time of such transfer was an insider, the trustee may not recover under subsection (a) from a transferee that is not an insider.

(d) The trustee is entitled to only a single satisfaction under subsection (a) of this section.

(e)(1) A good faith transferee from whom the trustee may recover under subsection (a) of this section has a lien on the property recovered to secure the lesser of--

(A) the cost, to such transferee, of any improvement made after the transfer, less the amount of any profit realized by or accruing to such transferee from such property; and

(B) any increase in the value of such property as a result of such improvement, of the property transferred.

(2) In this subsection, “improvement” includes--

(A) physical additions or changes to the property transferred;

(B) repairs to such property;

(C) payment of any tax on such property;
(D) payment of any debt secured by a lien on such property that is superior or equal to the rights of the trustee; and

(E) preservation of such property.

(f) An action or proceeding under this section may not be commenced after the earlier of--

(1) one year after the avoidance of the transfer on account of which recovery under this section is sought; or

(2) the time the case is closed or dismissed.
APPENDIX J


Unless the court, on request of a party in interest and after notice and a hearing, orders otherwise, the trustee may operate the debtor's business.
APPENDIX K


(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

(b)(1) 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--

(A) matters concerning the administration of the estate;

(B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;

(C) counterclaims by the estate against persons filing claims against the estate;

(D) orders in respect to obtaining credit;

(E) orders to turn over property of the estate;

(F) proceedings to determine, avoid, or recover preferences;

(G) motions to terminate, annul, or modify the automatic stay;

(H) proceedings to determine, avoid, or recover fraudulent conveyances;

(I) determinations as to the dischargeability of particular debts;

(J) objections to discharges;

(K) determinations of the validity, extent, or priority of liens;

(L) confirmations of plans;

(M) orders approving the use or lease of property, including the use of cash collateral;
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;

other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims; and

recognition of foreign proceedings and other matters under chapter 15 of title 11.

The bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11. A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law.

Non-core proceedings under section 157(b)(2)(B) of title 28, United States Code, shall not be subject to the mandatory abstention provisions of section 1334(c)(2).

The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

Notwithstanding the provisions of paragraph (1) of this subsection, the district court, with the consent of all the parties to the proceeding, may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title.

The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

If the right to a jury trial applies in a proceeding that may be heard under this section by a bankruptcy judge, the bankruptcy judge may conduct the jury trial if specially designated to exercise such jurisdiction by the district court and with the express consent of all the parties.
APPENDIX L

U.S. CONST. art. I, § 8

The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States;

To borrow money on the credit of the United States;

To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;

To establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;

To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;

To provide for the punishment of counterfeiting the securities and current coin of the United States;

To establish post offices and post roads;

To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;

To constitute tribunals inferior to the Supreme Court;

To define and punish piracies and felonies committed on the high seas, and offenses against the law of nations;

To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;

To provide and maintain a navy;

To make rules for the government and regulation of the land and naval forces;

To provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions;

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To provide for organizing, arming, and disciplining, the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress;

To exercise exclusive legislation in all cases whatsoever, over such District (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings;--And

To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.
APPENDIX M

U.S. CONST. art III.

Section 1.

The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

Section 2.

The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;--to all cases affecting ambassadors, other public ministers and consuls;--to all cases of admiralty and maritime jurisdiction;--to controversies to which the United States shall be a party;--to controversies between two or more states;--between a state and citizens of another state;--between citizens of different states;--between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed.

Section 3.

Treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attainted.