No. 11-628

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 2011

IN THE MATTER OF IN RE BLOCKBUSTERS, INC. DEBTOR,

Debtor,

NATALLIE SANTANA, Chapter 11 Trustee

Petitioner,

v.

RACHEL RAY WARNER BAKES, INC.,

Respondent.

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

BRIEF FOR RESPONDENT

Team R 50
Counsel for the Respondent
QUESTIONS PRESENTED

1) Whether a debtor’s unauthorized use of cash collateral permits a bankruptcy trustee to recover funds transferred to a good faith transferee in the ordinary course of business who provided reasonably equivalent value in exchange for the transfer.

2) Whether Article III of the Constitution permits a bankruptcy judge to hear and determine an action to recover unauthorized post-petition transfers pursuant to 11 U.S.C. §§ 549 and 550.
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By order and decision, the United States Bankruptcy Court for the District of Moot entered an order avoiding the transfer and awarding judgment against Respondent for $150,000. (R. 6). The United States District Court of Moot affirmed. (R. 6). The United States Court of Appeals for the Thirteenth Circuit reversed the District Court’s findings. (R. 7).

STATEMENT OF JURISDICTION

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

STATEMENT OF THE CASE

Debtor Blockbuster, Inc. is a Broadway-inspired venture engaged primarily in the business of hosting conventions for musical-loving conventioneers. (R. 3). The Debtor was financed by Creditor Broadway Bank, which held a perfected security interest in all of the Debtor’s assets (including bank accounts and accounts receivable.) (R. 3). In the wake of the Lehman Brothers collapse of 2008, the Debtor became increasingly financially unstable and was unable to make payments due on the Creditor’s loan. (R. 3). The Creditor threatened to declare default and accelerate the loan, ultimately resulting in the Debtor filing a voluntary Chapter 11 petition for bankruptcy. (R. 3).

The Debtor needed funding from the Creditor for the Spring 2009 convention and the parties negotiated a cash collateral order. (R. 3). The bankruptcy court entered the agreement as a stipulated cash collateral order permitting the Debtor to spend a total of $1,500,000 of the Creditor’s cash collateral for the Spring 2009 convention with a cap of no more than $500,000 in payments to vendors such as the Respondent in this case. (R. 4). The order additionally provided the Creditor with a lien on all of the Debtor’s assets, including assets acquired post-petition, and that the Debtor could not spend more than the articulated amounts without written consent of the Creditor. (R. 4).

In order to create a “spectacle” at the 2009 convention to make the “biggest show ever”, the Debtor contacted Rachel Ray Warner Bakes, Inc., the Respondent in this case. (R. 4). Debtor asked Respondent to prepare a full-scale, life-size cake of the stage set of the musical production “West Side Story.” (R. 4). The price of the cake was $250,000, and the parties do not dispute that the cake has at least a market value of $250,000. (R. 4). Nervous about committing to a project of this size with a company in bankruptcy, the Respondent had the
Debtor’s counselor provide a copy of the cash collateral order to verify the Debtor could pay for the cake. (R. 4). Respondent reviewed the order and determined that the $500,000 vendor cap was sufficient to cover the cost of the cake. (R. 4). Respondent then agreed to prepare the cake for Debtor only on the condition that the Debtor pay Respondent $100,000 in advance, and the remaining $150,000 in cash before delivery. (R. 4). The Debtor agreed and wire transferred $100,000 to Respondent. (R. 4). The parties agree that the $100,000 transfer was not in violation of the cash collateral order.

On the day before the convention, the Debtor wire transferred the remaining $150,000 balance to the Respondent, who then assembled the life-sized “West Side Story” set cake. (R. 5). However, at the time this later transfer of $150,000 was made, the Debtor had already exceeded the $1,500,000 authority outlined in the cash collateral order. (R. 5). Neither the Respondent, nor the Creditor, were aware of that fact at that time. (R. 5). The Debtor, on the other hand, was the only party with knowledge of how much it spent on the Spring convention. (R. 5). The Debtor ultimately violated the stipulated court order and spent more of the Creditor’s cash collateral than the parties had agreed to. (R. 5).

Respondent did not have a pre-existing relationship with the Debtor. (R. 5). Before the transaction that is the subject of this case, the Respondent had never done business or contracted with the Debtor. (R. 5). Although Respondent was in contact with Debtor’s counsel and obtained written confirmation that the order would cover the cost of the cake, the Respondent did not monitor the financial details of Debtor’s 2009 complete expenditures for compliance with the court’s order. (R. 5). The Respondent has not filed a proof of claim in this case. (R. 5).

The Spring 2009 convention was a huge success as a result of Respondent’s “West Side Story” cake. (R. 5). Unlike the failing conventions of previous years that resulted in the
venture’s bankruptcy, the Spring 2009 convention turned a profit, attributable directly to Respondent’s cake. (R. 5). Local press featured the cake prominently in publications, and many of the conventioneers stated they attended the convention because of the cake. (R. 5). However, the Debtor’s misbehavior was revealed shortly after the event, and the sweet success of the cake-inspired convention was cut short. (R. 5).

The Creditor successfully obtained appointment of a Chapter 11 trustee who is the Petitioner in this case. (R. 5). The Petitioner brings this case against Respondent Rachel Ray Warner Bakes, Inc., to recover the $150,000 the Debtor gave to the bakery in exchange for the successful life-sized cake. (R. 6). Petitioner brings this proceeding under sections 459 and 550. (R. 6).

**SUMMARY OF THE ARGUMENT**

A debtor’s unauthorized use of cash collateral does not permit a bankruptcy trustee to recover funds transferred in good faith to a transferee in the ordinary course of business where reasonably equivalent value was provided in exchange for the transfer. If there was reasonably equivalent value in exchange for the transfer, trustees cannot establish there was diminution of the estate. Bankruptcy courts are courts of equity, and if the trustee cannot establish diminution of the estate, the bankruptcy court would not be able to grant an equitable remedy. In fact, if the bankruptcy court were to recover funds transferred in good faith in the ordinary course of business where reasonably equivalent value was exchanged, the trustee, the estate, creditors, and bad-faith debtors in possession would receive a windfall of both the reasonably equivalent value and the transfer. Interpreting the statute under the interpretation urged by Petitioner would lead to malicious and intentional abuse of the bankruptcy process and discourage good faith transferees from engaging in business with debtors.
Article III of the Constitution is unambiguous: it grants adjudicative powers to the Judicial Branch. Congress occasionally exceeds its authority by creating legislation that usurps Article III powers by Article I courts. Giving the bankruptcy court the power to hear and determine actions to recover unauthorized post-petition transfers is a usurpation of Article III authority. The Constitution vests the adjudicative power in the judicial branch to maintain the system of checks and balances. Congress has overstepped that bound by permitting Article I courts to determine actions to recover unauthorized post-petition transfers, and as such, in order to uphold the system of checks and balances. This Court has recently recognized Congress’ overstepping the Constitutional boundary in *Stern v. Marshall*, finding that the bankruptcy court is not an Article III court, therefore did not have the authority to hear proceedings in a counterclaim to the bankruptcy. Not only has this Court recognized the Constitutional barriers, but legislative history and public policy additionally indicate the bankruptcy court lacks the authority to make determinations in actions to recover unauthorized post-petition transfers. Finally, the public rights doctrine, a narrow and rarely applied exception to the need for Article III adjudication, simply cannot apply to a determination to recover unauthorized post-petition transfers. The exception is extremely limited and applies to circumstances outside of the post-petition transfer context. The exception has never been applied to the bankruptcy proceedings process, and does not involve the government as a party in bankruptcy proceedings (the traditionally recognized need for the exception.) Thus, as Congress once again stepped outside the boundaries of its Article I powers, and the public rights exception does not comport with this scheme, the bankruptcy court simply lacks the authority to determine actions for unauthorized post-petition transfers.
ARGUMENT

For civil appeals, this Court reviews decisions of the bankruptcy courts de novo on conclusions of law and utilizes a clear error standard for review of findings of fact. *Tudisco v. United States (In re Tudisco)*, 183 F.3d 133, 136 (2d Cir. 1999).

(A) A DEBTOR’S UNAUTHORIZED USE OF CASH COLLATERAL DOES NOT PERMIT A BANKRUPTCY TRUSTEE TO RECOVER FUNDS TRANSFERRED TO A GOOD FAITH TRANSFEREE IN THE ORDINARY COURSE OF BUSINESS WHO PROVIDED REASONABLY EQUIVALENT VALUE IN EXCHANGE FOR THE TRANSFER.

This Court should adopt the holding of the Thirteenth Circuit and find that section 549 does not allow a trustee to recover from a post-petition creditor who transacted with a debtor in possession in good faith, in the ordinary course of business, and who provided reasonably equivalent value in exchange for the transfer, even if the debtor in possession uses cash collateral in violation of a cash collateral order. This result is supported by the Thirteenth Circuits’ well-reasoned finding that the transfer between the parties was authorized by the Bankruptcy Code, and is therefore not avoidable through the use of section 549.

Even if this Court finds that the transfer was not authorized by the Bankruptcy Code, the result should be upheld on alternate grounds. Redressability, equity, and policy all favor finding the transfer unreachable through the trustee’s avoidance or recovery powers.

As the Thirteenth Circuit found, a transfer made for value in the ordinary course of business to a post-petition creditor is authorized by section 1108 and section 363(c)(1) of the Bankruptcy Code. (R. 9). Once authorized by these sections, the source of the funds transferred to a post-petition trade creditor is an “internal matter” for the debtor, bank, and bankruptcy court to resolve in the event of discrepancies. *Id.* Post-petition creditors need not concern themselves
with tracing the provenance of funds as long as they exchange for value, in good faith, and provide reasonably equivalent value in the exchange. *Id.*

The Thirteenth Circuit’s decision should also be upheld because there was no redressable harm to give a plaintiff jurisdiction to challenge the transfer. A bankruptcy case is exclusively within the jurisdiction of the Federal court system. 28 U.S.C. §1334(a). Accordingly, bankruptcy matters brought before the court are subject to the redressability requirement. *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26 at 41-42 (U.S. 1976). Redressability requires that the plaintiff “must have suffered, or be threatened with, some ‘distinct and palpable injury’; and second, there must be “some causal connection between plaintiff's asserted injury and defendant's challenged action.” *Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464 at 491 (U.S. 1982). In the instant case, Petitioner has alleged no such harm, relying only on the bare language of section 549 to establish her claim. On the facts of the case, petitioner spent $250,000 cash to acquire a cake worth at least that amount. (R. 4,5). As the estate has suffered no diminution, there is no redressable harm.

Even if this Court finds that the transfer was unauthorized, and finds redressable harm in a reasonably equivalent exchange of money for goods, a third ground requires this Court to affirm the holding of the Thirteenth Circuit. Blockbusters cannot be permitted to bring a suit in equity whose genesis is Blockbuster’s own violation of a court order. Equity requires a plaintiff with clean hands to dispense justice. *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 814 (U.S. 1945). It is inequitable to allow a party who violates an order of the court to collect a windfall by using that very violation to create the circumstances which establish the *prima facie* case.
Finally, even should this Court adopt the Eleventh Circuit’s *In re Delco* analysis, this case should, at a minimum, be remanded to determine if it meets the equitable exception to section 549 that the Eleventh Circuit established in *Martinez v. Hutton (In re Harwell)*, 628 F.3d 1312 (11th Cir. Fla. 2010).

1. The Thirteenth Circuit Correctly Held That The Transaction At Issue Was Authorized By The Bankruptcy Code.

The Thirteenth Circuit correctly held that a transfer from a debtor in possession (“DIP”) to a good faith transferee, for the purpose of permitting the DIP to conduct its ordinary business, is not unauthorized as to the vendor if (1) the DIP has been authorized to use the property of the estate to transact business under section 1108 and section 363(c)(1) and (2) the DIP received reasonably equivalent value in exchange for the transfer. (R. 9). This result is not altered, regardless of the source of funds used to effectuate the transfer.

Section 1108 authorizes the DIP in its capacity as trustee to operate the debtor’s business unless the court is moved otherwise by a party in interest and so orders. 11 U.S.C. §1108. This blanket authority provides reassurance to persons dealing with the debtor company that the DIP is empowered to make decisions in the ordinary course of business that will be respected by the court. *In re Curlew Valley Associates*, 14 B.R. 506, 513 (Bankr. D. Utah 1981).

Once authorized to operate the business by section 1108, a trustee may conduct ordinary business transactions without notice or hearing under the aegis of §363(c)(1). 11 USC §363(c)(1). This allows the trustee to sell, lease, or use property of the estate in the ordinary course of business without notice or hearing. *Id.* This includes cash collateral that has been authorized for use by either the order of the court or the agreement of all interested parties. 11 U.S.C. §363(c)(2).
Petitioner asks the court to read section 363(c)(2) to mean that the transfers between post-petition debtors in possession and post-petition trade creditors that use cash collateral in violation of the court’s cash collateral order are unauthorized under section 363(c)(2) and therefore avoidable under section 549. However, as the Thirteenth Circuit held in the instant case, “a formalistic application of this provision against post-petition trade creditors who provide reasonably equivalent value in good faith would create a system in which each and every “employee, vendor and customer of a chapter 11 debtor” would be required to engage in a “sophisticated tracing analysis through a debtor’s bank accounts before it can be confident that it may retain funds remitted by a debtor in the ordinary course of business.” (R. 13). As the Thirteenth Circuit explained, such a result is inimical to the purposes and policies of the reorganization scheme in bankruptcy.

As this Court is well aware, bankruptcy’s reorganization scheme exists in equity to allow creditors to capture the going concern value of a business and enhance their recovery over that of a simple liquidation. *Toibb v. Radloff*, 501 U.S. 157, 164 (U.S. 1991). Allowing a recovery under §549 against a good faith transferee in the ordinary course of business who provided reasonably equivalent value in exchange for the transfer will undermine the reasonable certainty of payment that post-petition creditors are currently granted by the Bankruptcy Code, and increase the costs to an estate in reorganization. In order to allow ongoing operations to proceed smoothly, the Bankruptcy Code includes provisions to give post-petition trade creditors certainty that they will be paid for their goods and services. Absent these protections, trade creditors will be understandably hesitant to deal with an estate in bankruptcy. *In re Old Carco LLC*, 424 B.R. 633, 642 (Bankr. S.D.N.Y. 2010). Specifically, the code uses the interplay between §1108,
§363, §503(b), and §507(a)(2) to give post-petition transactions with a reorganization debtor some stability.

The operational freedom given by sections 1108 and 363 have been discussed above. These provisions work in concert with two other key sections to provide certainty of payment to vendors dealing with an estate in the throes of reorganization. Post-petition trade creditors who are not paid for their goods and services by a reorganizing debtor have administrative priority for their claims under section 503(b) as “actual, necessary costs and expenses” of preserving the estate. 11 U.S.C. §503(b). That administrative claim is be paid in the priority established by section 507(a)(2), placing an trade creditor’s claim immediately after the trustee’s expenses to maintain the estate and ahead of almost all other unsecured creditors. 11 U.S.C. §507(a)(2).

These provisions, taken together, operate to protect a post-petition trade creditor from mistakes or less than honest actions by a DIP operating a post-petition business. Once a DIP is functioning under these provisions, the source of funding for payment to a post-petition trade creditor is best understood as an “internal matter between the Debtor, the Bank, and the bankruptcy court.” (R. 9). It is not reasonable to expect each post-petition trade creditor to delve into the books of the DIP before authorizing every transaction. (R. 13).

Notably, this analysis correctly places consequences for violation of a cash collateral order under R. 4001 squarely and appropriately on the DIP. U.S.C.S. Bankruptcy R 4001. This is consistent with bankruptcy’s equitable foundations and serves a deterrent purpose in future cases, as it requires the entity best situated to avoid the harm to bear the risks. Cf. Fine v. Sovereign Bank, 634 F. Supp. 2d 126 (D. Mass. 2008). Clearly, the entity best positioned to avoid violations of cash collateral order is the DIP, not the post-petition trade creditor. In fact, placing the consequences for such a violation on the post-petition trade creditor would result in
an increase to the cost of doing business in reorganizations, frustrate the purpose of the
bankruptcy scheme, and encourage future bad acts by DIPs, who may hope to obtain a windfall.

2. **Even If The Transaction Was Not Authorized, A Trustee Should Not Be Permitted To Bring An Action To Recover Funds Transferred To A Good Faith Transferee In The Ordinary Course Of Business Who Provided Reasonably Equivalent Value In Exchange For The Transfer, Because There Has Been No Diminution Of The Estate.**

It is axiomatic that, to establish standing, a federal plaintiff must allege some threatened or actual injury traceable to an action of the defendant which can be remediated through the exercise of a federal court’s powers. *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (U.S. 1976). In order to establish whether a plaintiff has met this standard, which is known as redressability, a court applies the “injury-in-fact” test. *Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, 491 (U.S. 1982). As a threshold matter, plaintiff “must have suffered, or be threatened with, some ‘distinct and palpable injury’. *Id.* There must also be “some causal connection between plaintiff’s asserted injury and defendant’s challenged action.” *Id.*

Application of the doctrine of redressability to 11 U.S.C §549 was recently illustrated in *In re Indian Capital Distributing, Inc.* 2011 WL 4711895 (Bankr. D.N.M. Oct 5, 2011). DIP Indian Capital, a distributor of petroleum products to gas stations, filed for Chapter 11 protection. *Id* at 1. The DIP sought and received permission to use cash collateral to operate in the ordinary course of business for a period of approximately one month, after which its application to extend was denied. *Id* at 2. In violation of that order the DIP continued to use cash collateral to purchase gasoline and diesel products for distribution. *Id* at 2,9. After discovering the violation of the cash collateral order, the court appointed a Chapter 11 trustee to oversee the business. *Id.* The Chapter 11 trustee, relying on *Marathon Petroleum Co., LLC v.*
Cohen (In re Delco Oil, Inc.), 599 F.3d 1255 (11th Cir. Fla. 2010) brought a §549 action against the seller of the petroleum products in an attempt to recover the funds. *Id* at 2.

Rejecting *Delco*, the court found that the DIP had received reasonably equivalent value in fuel for the dollars exchanged. Because the estate had suffered no diminution it had experienced no redressable harm. Lacking redressability, the case was dismissed with leave to refile upon showing an economic harm to the estate.

The facts in this case are a close parallel to *Indian Capital*. An appointed trustee attempted to use §549 to avoid a transaction between DIP and its post-petition supplier. The trustees’ section 549 action is equally misplaced here as it was in *Indian Capital*. The violation of the cash collateral order did not inflict a threatened or actual injury to the Petitioner. Blockbusters received at least reasonably equivalent value in the form of a cake for the dollars exchanged. (R. 10). Petitioner has failed to establish (and cannot allege) economic harm to the estate at any point. *Id*.

In fact, the cake provided a net benefit. *Id*. Accordingly, if Petitioner is permitted to recover the $150,000 payment for the cake, the estate will have been enriched beyond the condition it enjoyed prior to purchase. The character of the transaction makes the return of the cake an impossibility; it has been completely consumed in the course of its use. Instead, the estate will have possession of the cake (an item valued by all parties as having a value of at least $250,000), including the resultant success of Blockbuster’s spring convention, in addition to the $150,000 cash that Blockbuster owed Rachael Ray Bakes on delivery. (R. 4,5).

By contrast, as the Thirteenth Circuit wisely noted, Respondent will be left merely an unsecured claim, through the operation of 11 U.S.C. §502(h), which treats all claims that arise from recovery under §550 as if they had arisen prior to the date of the filing of the petition. 11
U.S.C. §502(h). This result leaves the claim of Respondent subordinated from an administrative claim under § 503(b) to a general claim under § 502(h). (R. 11). This cannot be an equitable result.

Like the trustee in Indian Capital, the trustee’s reliance on Delco is misplaced. In that case, DIP Delco Oil, Inc., a distributor of petroleum products, was denied permission to use cash collateral to continue operations. Id at 1257. Delco violated that order and distributed more than $1.9 million in cash to Marathon Petroleum Co., LLC for petroleum products intended for distribution. Id. Approximately one month after the final distribution to Marathon, Delco voluntarily converted its bankruptcy to a Chapter 7 petition. Id. The Chapter 7 trustee filed an adversary proceeding against Marathon under §549 to recover the post-petition transfers under a strict liability interpretation of §549 avoidance powers. Id. The Bankruptcy court found in favor of the trustee and allowed the avoidance of the payments, a decision that was ultimately upheld by the Eleventh Circuit Court of Appeals. Id.

The Thirteenth Circuit correctly found this decision to be “erroneous[ly] focused on the source of the funds the debtor chose to use to make the transfer” rather than the “transfer aspect of the transaction, as section 549 commands.” (R. 9). Under this rule, each and every “employee, vendor and customer of a chapter 11 debtor must engage in a sophisticated tracing analysis through a debtor’s bank accounts before it can be confident that it may retain funds remitted by a debtor in the ordinary course of business.” Id. Moreover, as discussed below, the Delco rule in the Eleventh Circuit is subject to an equitable exception that could apply here.
Because Blockbusters suffered no diminution of the estate there has been no threatened or actual injury to satisfy the threshold prong of the “injury in fact” test.\(^1\) Simply put, the actions of Respondent Rachael Ray Warner Bakes caused no harm to the estate. (R. 10). Failing to present a redressable harm, petitioner’s action must fail.

3. **Equity Does Not Allow A DIP To Use The Bankruptcy Court To Benefit From Its Bad Acts.**

Bankruptcy is a system founded in equity, and bankruptcy courts are required to base their decisions on equitable principles. *Pepper v. Litton*, 308 U.S. 295 at 304 (U.S. 1939) citing *Local Loan Co. v. Hunt*, 292 U.S. 234 at 240. From the very beginning of American jurisprudence, courts have required plaintiffs requesting equitable relief to approach the court with “clean hands”. *Sparhawk v. Yerkes*, 142 U.S. 1 at 15,16 (U.S. 1891). This court has found this principle to extend to the equitable relief afforded in bankruptcy. *Caplin v. Marine Midland Grace Trust Co.*, 406 U.S. 416 (U.S. 1972).

In the instant case, Petitioner requests the court to uphold a lower court decision allowing her to void a transfer of estate property on the grounds that the transfer was not authorized under section 549. Assuming, *arguendo*, that Petitioner’s theory applies, the transfer would be avoided under section 549 and recovered through the operation of section 550. 11 U.S.C. §549, 11 U.S.C. §550. Section 502(h) would allow Rachael Ray to make a claim for the recovered transfer with the same priority as a pre-petition general unsecured creditor. 11 U.S.C. §502(h). This would leave the Petitioner with the cake and the cash payment for the cake, and only a deeply (subordinated claim) against it for the avoided transfer. This result would clearly benefit the bankruptcy estate at the expense of Rachael Ray. Equity will not allow this result.

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\(^1\) The causal connection requirement of the test similarly fails, since absent an injury, there can be nothing to be linked causally to the actions of the Respondent.
The trustee alleges that the transfer was unauthorized because the debtor in possession made the transfer from funds that were prohibited from use by a court order granted under Bankruptcy Rule 4001 while section 362(c)(2) rendered such a prohibited transfer unauthorized. Trustee then reads section 549 to automatically allow avoidance of any unauthorized transfer, with no exceptions. However, the violation of the court order that allowed the chain of events to proceed was made by DIP Blockbusters, not Respondent. The Bankruptcy court below removed the Blockbusters board (acting in the capacity of a DIP) and replaced them with the current Petitioner, but this transfer of trustees' does not relieve Blockbusters of responsibility for the violation and somehow place it on Respondent.

This subordination of Rachael Ray’s claim under Petitioner’s theory is also an absurd result, as a partial or complete failure to pay on the part of the debtor in possession would unquestionably give Respondent an administrative priority claim under section 503(b) for the unpaid amount. 11 U.S.C. §503(b).

4. **Should This Court Adopt The Delco Standard, This Case Must Be Remanded For Determination Of Whether It Meets the Equitable Exception Of Martinez v. Hutton.**

Even under the Eleventh Circuit’s Delco standard, Martinez v. Hutton (In re Harwell), 628 F.3d 1312 (11th Cir. Fla. 2010) allows a transferee to raise equitable defenses to the trustee’s avoidance powers. This case should be remanded for consideration of those defenses, if the Delco standard is to be applied.

In Martinez, the Eleventh Circuit requires that courts 'step back and evaluate a transaction in its entirety to make sure that [its] conclusions are logical and equitable’. Id at 1322. It based this decision on the equitable nature of bankruptcy, citing from a prior Eleventh Circuit opinion in In re Chase & Sanborn Corp., 848 F.2d 1196 (11th Cir. Fla. 1988). In Sanborne, the court found that an intermediate bank that had been the initial recipient of funds in a §548 fraudulent
transfer could escape liability under §550(1) on equitable grounds due to the complexity of the wire transfers at issue and the difficulty in ascertaining the origin of the wire transfer. This result was reached even though the bank had exercised its independent judgment on the disbursement of the funds, factors that would normally lead to a determination of initial transferee status and strict liability. The court found that requiring a bank to ascertain the source of wired funds, determine the solvency or lack thereof of the source, and verify the consideration received for the transfer prior to honoring the transfer would unduly burden the wire transfer system and affirmed the Bankruptcy Court’s determination that the trustee’s avoidance powers did not apply. *Id* at 1202. In making that determination, court noted that “[i]t is especially important to consider the goal of a law, and the effect of a particular ruling, in areas of law such as bankruptcy jurisdiction that are so strongly rooted in equitable principles.” *Id*.

In reality, *Martinez* simply underscores the fact that *Delco* reaches a strange, unsupportable, and inequitable result. The better analysis is the Thirteenth Circuit’s decision in *Blockbuster*. By finding that authorization under §1108 and §363(c)(1) is sufficient and leaving section 363(c)(2) matters as housekeeping between the DIP, the Bank, and the court, the result is a system that puts the risks of violating a cash collateral order on the correct party, the one best situated to avoid the harm. It further protects innocent post-petition trade creditors and prevents uncertainty from burdening the reorganization system. If this court instead adopts the *Delco* standard, Respondent should at least be entitled to a remand to develop the record in order to demonstrate that the Eleventh Circuit’s equitable defenses to trustee’s avoidance powers are applicable.

**(B) ARTICLE III OF THE CONSTITUTION DOES NOT GIVE THE BANKRUPTCY COURT THE POWER TO HEAR AND DETERMINE AN ACTION TO RECOVER UNAUTHORIZED POST-PETITION TRANSFERS PURSUANT TO 11 U.S.C. §§ 549 & 550.**
District courts are vested with all original and exclusive jurisdiction of cases under title 11, and original jurisdiction of proceedings “arising under”, “arising in”, or “related to” cases under title 11. 28 U.S.C. § 1334(a) & (b). 28 U.S.C. § 157 permits district courts to refer 1) any case or proceeding to be heard by the bankruptcy court, and 2) to make determinations in core proceedings. 28 U.S.C. § 157 (b)(1). Bankruptcy courts are required to submit proposed findings of fact and conclusions of law to the district court for review and final determinations in non-core proceedings. 28 U.S.C. § 157 (c)(1). As the proceeding at bar is non-core, the bankruptcy court does not have the authority to make final determinations. Even if the bankruptcy court had statutory authority to hear this proceeding, it lacks the Constitutional authority to do so under Article III. The Constitution, precedent, legislative history, and public policy mandate upholding the decision of the Thirteenth Circuit. (R. 7).

1) The Thirteenth Circuit Correctly Found the Bankruptcy Court Lacks Statutory Authority to Make Final Determinations Because These Proceedings Were Neither Core Nor Did the Parties Consent.

The Thirteenth Circuit properly found that since these proceedings are non-core, the bankruptcy court lacked the statutory authority to make final determinations. (R. 7). Likewise, since the parties did not consent, the bankruptcy court lacked statutory authority to make final determinations. (R. 7). Congress vested authority to the bankruptcy court at 28 U.S.C. § 1334, and specified what final determinations the bankruptcy court may make at 28 U.S.C. § 157. As this Court recently noted in Stern v. Marshall, “Congress has divided bankruptcy proceedings into three categories: those that “aris[e] under title 11”; those that “aris[e] in” a title 11 case; and those that are “related to a case under title 11.” See, Stern v. Marshall, 131 S. Ct. 2594, 2603 (U.S. 2011) citing 28 U.S.C. § 1334(a). “Pursuant to 28 U.S.C. § 157(b)(1), bankruptcy courts may enter judgments in “all core proceedings arising under title 11, or arising in a case under
title 11, [or] referred under [28 U.S.C. § 157(a)].” See, RES-GA Four LLC v. Avalon Builders of GA LLC, 2012 WL 13544 (M.D. Ga., 2012). “When a bankruptcy judge determines that a referred “proceeding . . . is not a core proceeding but is otherwise related to a case under title 11,” the judge may only “submit proposed findings of fact and conclusion of law to the district court.” 28 U.S.C. § 157 (c)(1). It is the district court that enters final judgment in such cases after reviewing de novo any matter to which a party objects.” Stern v. Marshall, 131 S. Ct. 2594, 2605 (U.S. 2011). Thus, “the bankruptcy court cannot enter final orders relating to non-core proceedings, unless the parties consent.” See, In re Am. Cmty. Services, Inc., 86 B.R. 681, 685 (D. Utah 1988). In Stern v. Marshall, this Court found “Under our reading of the statute, core proceedings are those that arise in a bankruptcy case or under title 11.” Stern v. Marshall, 131 S. Ct. 2594, 2605 (U.S. 2011). Thus, unless the proceeding at bar “arises in” the bankruptcy case or “under title 11”, the proceeding is merely “related to” the bankruptcy and must be submitted to the district court for a final determination. The Thirteenth Circuit properly held that these proceedings are non-core proceedings merely “related to” the bankruptcy case. (R. 7).

a) The Thirteenth Circuit Correctly Found the Bankruptcy Court Lacks Statutory Authority to Make Final Determinations Because These Proceedings Were Non-Core.

The plain language of 28 U.S.C. § 157(a) permits the district court to refer all cases and proceedings to a bankruptcy court. Congress cabined that broad referral with 28 U.S.C. § 157(c)(1), which states that “A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11 . . . [and] shall submit proposed findings of fact and conclusions of law to the district court . . .” 28 U.S.C. § 157(c)(1) (emphasis added). It is thus clear that Congress intended bankruptcy judges to hear all proceedings, even those in which the bankruptcy court may not make final determinations, including these §§ 549
and 550 proceedings. Whether or not Congress intended the bankruptcy court to make final determinations in these proceedings turns on whether the §§ 549 and 550 proceedings are core. The plain language of 28 USC § 157 (b)(1) and the bankruptcy court’s treatment of this type of proceeding suggests these proceedings are non-core. As such, the Thirteenth Circuit correctly found the bankruptcy court lacked the statutory authority to make final determinations in these proceedings.

i. The plain language of 28 USC § 157 (b)(1) suggests this proceeding is non-core. This Court recently addressed the definition of core in Stern v. Marshall, noting that “It does not make sense to describe a “core” bankruptcy proceeding as merely “related to” the bankruptcy case; oxymoron is not a typical feature of congressional drafting. See Northern

Pipeline . . . 102 S.Ct. 2858 (distinguishing “. . . the core of the federal bankruptcy power, . . . from the adjudication of state-created private rights”); Collier on Bankruptcy ¶ 3.02[2], p. 3–26, n. 5 (16th ed. 2010) (“The terms ‘non-core’ and ‘related’ are synonymous”).” See, Stern v. Marshall, 131 S. Ct. 2594, 2605 (U.S. 2011).

Congress chose to define core proceeding by way of an extensive, non-exhaustive list of sixteen examples at 28 U.S.C. § 157 (b)(2).

“Core proceedings include, but are not limited to— (A) matters concerning the administration of the estate . . . (F) proceedings to determine, avoid, or recover preferences . . . (H) proceedings to determine, avoid, or recover fraudulent conveyances. . . . [and] (O) 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. . . .” See, 28 U.S.C. § 157 (b)(2). The extensive list provides context to illustrate that Congress did not intend these proceedings to be core. U.S.C. § 157 (b)(2)(A) does not apply to these proceedings because

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2 The full text of 28 U.S.C. § 157 (b)(2) is attached hereto as Appendix J. The excerpts selected here are the closest examples that parallel the proceedings at bar. However, none of the enumerated examples remotely mirror the proceedings at bar.
administrative matters are codified in Chapter 3 of the Code and these proceedings are brought under Chapter 5 of the code. The distinction between all proceedings concerning the estate versus proceedings concerning the administration of the estate is crucial. As the court in Weiner’s, Inc. found, state law “litigation is not transformed into an estate administration matter simply because it may ultimately bring funds into the estate, and thereby allow the renovation of damaged estate property.” Weiner’s, Inc. v. T.G. & Y. Stores Co., 191 B.R. 30, 32 (S.D.N.Y. 1996) citing Acolyte, 69 B.R. at 172, 175 (action is not a turnover action merely because it brings funds into the estate). As Weiner’s points out, failing to distinguish between estate proceedings and estate administration proceedings would lead to absurd, unintended results. If every proceeding involving the estate were considered an estate administration proceeding (or core under Petitioner’s interpretation of the statute), trustees could bring claims against even the most tangential of defendants, and bind otherwise uninvolved parties to the whims of the bankruptcy judges. The Thirteenth Circuit therefore properly concluded that the case at bar does not involve the administration of the estate, but rather, is merely an attempt by the trustee to expand the estate. (R. 14). As such, U.S.C. § 157 (b)(2)(A) does not apply to these proceedings.

These proceedings are not one of the enumerated core proceedings identified by Congress at 28 U.S.C. § 157 (b)(2). These proceedings do not even fall under the catchall provision, 28 U.S.C. § 157 (b)(2)(O). These proceedings do not “affect[] the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship” because bankruptcy courts have recognized that state law actions to enlarge the estate are not core unless they are “essential” or “integral” to the administration of the estate. See, In re J. Baranello & Sons, Inc., 149 B.R. 19, 25 (Bankr.E.D.N.Y.1992). This point was addressed in Bernheim, noting that “Subsection (O) does not render a proceeding core merely because the resolution of
the action may result in more, or less, assets in the estate.” See, *Bernheim v. Chubb Ins. Co. of Canada*, 160 B.R. 42, 47 (D.N.J. 1993) citing *Baranello*, 149 B.R. at 26. *Bernheim* pointed out that unless the party involved is a creditor, subsection (O) will not apply because the action will not have any effect on the debtor-creditor relationship. *Id.* The Respondent in the proceedings at bar is not a creditor, therefore, according to *Bernheim*, the catchall provision does not apply.

Lastly, *Weiner’s* makes clear that in determining whether a proceeding is core or non-core under the § 157(b)(2)(O) catchall provision, an action will only be core if it “otherwise bears a close nexus” to the case. See, *Weiner's, Inc. v. T.G. & Y. Stores Co.*, 191 B.R. 30, 32-33 (S.D.N.Y. 1996). The proceedings at bar, as tangential, state-law proceedings against a non-creditor third party who took for value in good faith without knowledge of the voidability of the transfer, cannot be said to bear a close nexus to the chapter 11 case. It is therefore clear that the plain language of 28 USC § 157 (b)(1) suggests this proceeding is non-core

ii. State law claims only “related to” the case under title 11 are non-core.

Causes of action that can be brought outside of the existence of the bankruptcy do not otherwise bear a “close nexus” to the bankruptcy case. See, *Weiner's, Inc. v. T.G. & Y. Stores Co.*, 191 B.R. 30, 32-33 (S.D.N.Y. 1996). Bankruptcy courts have thus recognized that “adversary proceedings that rest solely in issues of state law . . . are not “core” proceedings, but are “related” or “noncore” matters.” See, *M & E Contractors, Inc. v. Kugler-Morris Gen. Contractors, Inc.*, 67 B.R. 260, 262 (N.D. Tex. 1986). This Court has also recognized that “state-law claims, such as . . . cases against third parties or disputes involving property in the possession of a third party” are non-core. See *Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 97 (U.S. 1982). Because bankruptcy courts cannot make final determinations in non-core proceedings, bankruptcy courts cannot make final determinations in proceedings that rest on state law.
The proceedings at bar have all of the markings of a state law conversion action: allegedly wrongful exercise of dominion or control over money (in violation of the cash collateral order), an allegedly wrongful taking or refusal to surrender the money by the Respondent, and a demand of return by the trustee on behalf of the creditor (in the form of the §§ 549 and 550 proceedings). Bankruptcy courts have already found that “Conversion is often defined as the wrongful exercise of dominion or control over a chattel.” See, Matter of Ries, 22 B.R. 343, 346 (Bankr. W.D. Wis. 1982), and Production Credit Asn. of Madison v. Nowatzski, 90 Wis.2d. (344) at 353-54 (280 N.W.2d 118). The parallels between the conversion cases and the proceedings at bar suggest these proceedings are more like a state law cause of action than a core bankruptcy proceeding. Therefore, the Thirteenth Circuit properly held that these proceedings are non-core and not subject to final determinations by the bankruptcy court. (R. 7).

b) The Thirteenth Circuit Correctly Found the Bankruptcy Court Lacks Statutory Authority to Make Final Determinations Because the Parties Did Not Consent.

The only exception where the bankruptcy court may determine non-core proceedings is § 157(c)(2). 28 USC § 157 (c)(2) permits the district court to refer a proceeding “related to” a case under title 11 to a bankruptcy judge to hear and determine and enter appropriate orders and judgments, with the consent of all the parties to the proceeding, subject to review under section 158 of title 11. See, 28 USC § 157 (c)(2). 28 § USC 157(e) further addresses consent and holds that if a proceeding involves the right to a jury trial, the bankruptcy court may conduct the jury trial if specially designated to exercise such jurisdiction by district court and with the express consent of all the parties. 28 § USC 157(e). However, the facts at bar do not evidence any form of consent, much less express consent. Therefore, the appellate court’s finding that there is no consent in this matter was proper.
In *Stern v. Marshall*, this Court set a very high standard for the plain meaning of consent. In Stern, this Court found that Marshall did not consent to jurisdiction of the counterclaim by the bankruptcy court despite all of the following: 1) he filed a proof of claim, 2) he did not object to the jurisdiction until more than two years after he filed his claim, 3) he filed several adverse discover rulings in two plus years before he objected to the jurisdiction, 4) he advised the bankruptcy court that he was “happy to litigate [his] claim there,” and 5) he advised the court he “did choose” the bankruptcy court and “would be more than pleased to do it [t]here.” *Stern v. Marshall*, 131 S. Ct. 2594, 2607 (U.S. 2011). The facts at bar do not evidence even as much consent as the evidence in Stern. Respondent never filed a proof of claim. Respondent timely objected to the jurisdiction of the bankruptcy court forum, and never advised at any time that it chose to adjudicate its claim in the bankruptcy court. As this Court in Stern found that Marshall “did not truly consent to resolution of” the counterclaim, these facts indicate that Respondent certainly did not consent to the bankruptcy court forum. *Id.* Additionally, as required by Bankruptcy Rules 7008(a) and 7012(b), the parties must designate whether or not the parties consent. Petitioner cannot establish that Respondent consented under Bankruptcy Rules 7008(a) and 7012(b). U.S.C.S. Bankruptcy R 7008(a), 7012(b). The plain language of the statute thus lends itself to the appellate court’s conclusion that Respondent did not consent.

Furthermore, this Court recently noted in *Stern* that “as we recognized in *Granfinanciera*, the notion of “consent” does not apply in bankruptcy proceedings as it might in other contexts.” *Stern v. Marshall*, 131 S. Ct. 2594, 2615 (U.S. 2011). In *Granfinanciera*, this Court held that parties who did not file a proof of claim had a right to a jury trial if sued by the trustee to recovery allegedly fraudulently transfers. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989). In the case at bar, Respondent, like the defendant in *Granfinanciera*, did not file a proof of claim.
against the estate. *Id.* In *Granfinanciera*, this Court reiterated that holding a party who did not submit a claim against the estate could “go far to dismantle the statutory scheme.” *Id.*, quoting *Atlas Roofing Inc. v. Occupational Safety Commission*, 430 U.S. 442, 454 (U.S. 1977). Therefore, the plain language of 28 USC § 157(c)(2) and § 157(e) suggest that as Respondent did not consent to this forum, the bankruptcy court has no statutory authority to make final determinations in these proceedings. The Thirteenth Court’s findings were thus proper and consistent with this Court’s holdings in *Stern* and *Granfinanciera*, because the parties did not consent.

c) **Because the Bankruptcy Court Only Had the Power to Submit Proposed Findings of Fact and Conclusions of Law to the District Court, it Did Not Have the Power to Make Final Determinations.**

28 U.S.C. § 157 (c)(1) states that “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.” 28 U.S.C. § 157 (c)(1).

The plain language of this statute reinforces Respondent’s interpretation of the statute: that Congress intended the district court to retain exclusive jurisdiction over non-core proceedings. As the proceedings at bar are non-core, but only otherwise related to the bankruptcy case, the bankruptcy judge only has the power to submit proposed findings of fact and conclusions of law for the § 550 proceeding. Thus, because the bankruptcy court only has proposed findings of facts and conclusions of law to the district court, the Thirteenth Circuit
properly held that the bankruptcy court did not have the power to make final determinations in the proceedings at bar.

2) Even if the Bankruptcy Court Had the Statutory Authority to Make Final Determinations in the §§ 549 and 550 Proceedings, the Bankruptcy Court Lacked the Constitutional Authority to Make Final Determinations.

As this Court recently recognized in *Stern v. Marshall*, even when a bankruptcy court may have the statutory authority to enter a judgment in a proceeding, Article III of the Constitution limits the bankruptcy courts from making final determinations in any and all proceedings. *Stern v. Marshall*, 131 S. Ct. 2594 (U.S. 2011). The proceedings at bar are precisely the type of claim this Court sought to preserve Article III rights for in *Stern*.

a) The Bankruptcy Court Does Not Have the Constitutional Power to Hear These Proceedings Because Article III Vests Adjudicative Powers in the Judiciary Branch.

   iii. Article III vests adjudicative power in the judicial branch to maintain the system of checks and balances. Article III clearly and plainly states that “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.” U.S. Cont. art. III, § 1. Consistent with this language, this Court has previously addressed bankruptcy courts Article III limitations in *Commodity Futures*, holding courts should “construe federal statutes so as “to avoid serious doubt of their constitutionality.” *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 841 (U.S. 1986). This Court also recognizes that the Framers of the Constitution “considered it essential that “the judiciary remain [] truly distinct from both the legislature and the executive.” *Stern v. Marshall*, 131 S. Ct. 2594, 2608 (U.S. 2011), quoting The Federalist No. 78, p. 466 (C. Sossiter ed. 1961) by Alexander Hamilton. As this Court recently noted in *Stern v. Marshall*:

        Article III is “an inseparable element of the constitutional system of checks and balances” that “both defines the power and protects the independence
of the Judicial Branch.” *Northern Pipeline*, 458 U.S. 50, 58. Under “the basic concept of separation of powers ... that flow[s] from the scheme of a tripartite government” adopted in the Constitution, “the ‘judicial Power of the United States’ ... can no more be shared” with another branch than “the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto.” *United States v. Nixon*, 418 U.S. 683, 704 (U.S. 1974), quoting U.S. Const., Art. III, § 1. *Id.*

The importance of the tripartite government is likewise recognized by the bankruptcy judges, despite the fact that it lessens their power. For example, in *Matter of Seven Springs Apartments*, the bankruptcy judge recognized that “The judicial power under the Constitution is to be exercised by independent judges, but only within the scope of the jurisdiction granted to them by Congress. A failure of Congress to act, despite a need for legislation, cannot justify an usurpation of congressional power by any other branch of government to supply what Congress failed to provide. The federal courts have universally recognized that adherence to the constitutional mandate for separation of powers precludes an assumption of power by the courts to create their own jurisdiction. As the Supreme Court noted in *Northern ...* “The Framers chose to leave to Congress the precise role to be played by the lower federal courts in the administration of justice.” *Matter of Seven Springs Apartments, Phase II*, 33 B.R. 458, 471 (Bankr. N.D. Ga. 1983). The system of checks and balances is therefore vital because it protects each branch and “protect[s] the individual as well.” *Bond v. United States*, 131 S. Ct. 2355, (U.S. 2011). The protections of Article III extend to the Respondent. To uphold Respondent’s Constitutional protections, the Thirteenth Circuit properly held that the bankruptcy court lacks authority to make final determinations in these proceedings.

iv. This Court has recognized that Congress exceeded the limitations of Article III in the bankruptcy code.

This Court recently recognized that in some respects, Congress exceeded its authority by improperly giving Article I judges Article III powers. Permitting an Article I bankruptcy judge
to make a final determination in the proceeding at bar (between two private, non-governmental parties) denies Respondent its Constitutional right to be heard before an Article III court. As this Court noted in Stern:

“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.” Murray’s Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272, (U.S. 1856). When a suit is made of “the stuff of the traditional actions at common law tried by the courts at Westminster in 1789,” Northern Pipeline, 458 U.S. 50, 90 (Rehnquist, J., concurring in judgment), and is brought within the bounds of federal jurisdiction, the responsibility for deciding that suit rests with Article III judges.


This Court also imposed Article III limitations on the bankruptcy court in Northern, where it found that a state law causes of action not otherwise part of the bankruptcy must be heard by an Article III court. Northern Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 97 (U.S. 1982). The Court concluded that assignment of such state law claims for resolution by those judges “violates Art. III of the Constitution.” Because the proceedings at bar have all the markings of a state law conversion action, the Thirteenth Circuit properly held that Respondent has a Constitutional right to be heard by an Article III judge.

b) The Bankruptcy Court is Not an Article III Court, Therefore the Bankruptcy Court Does Not Have the Constitutional Power to Hear These Proceedings.

Article III clearly and plainly states that “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.” U.S. Cont. art. III, § 1. The Framers of our Constitution prescribed these qualities to guarantee the separation of powers and the right to an independent tribunal. Stern v. Marshall, 131 S. Ct. 2594, 2609 (U.S. 2011). Bankruptcy judges, unlike Article III judges, do not enjoy lifetime appointment or guaranteed compensation. Rather, bankruptcy judges are appointed for a
fourteen year term, are excusable for cause, and salaries are subject to statutory grant. 28 U.S.C. § 152. As this Court noted in *Stern*, “functionally, bankruptcy judges can be compared to magistrate judges, law clerks, and the Judiciary’s administrative officials, whose lack of Article III tenure and compensation protections do not endanger the independence of the Judicial Branch.” *Id.* This Court has thus made clear the distinction between Article III courts and Article I courts mandates cases be determined by the appropriate judiciary.

c) **Legislative History and Public Policy Indicate the Bankruptcy Court Lacks Constitutional Authority to Determine These Proceedings.**

Legislative history indicates Congress intended the bankruptcy court to be adjudicated by Article III judges with the Constitutional guarantees afforded to all Article III judges. However, as that intention did not come to fruition, we must conclude Congress did not intend bankruptcy judges, lacking the protections of Article III judges to adjudicate these proceedings. The House of Representatives noted that “the most severe problem in the bankruptcy administration was the court system.” H.R. REP. 95-595, P.L. 95-598, Bankruptcy Reform Act of 1978, House Report No. 95-595. H.R. 8200 proposed a sweeping change to the bankruptcy system that would “establish[] bankruptcy courts that are independent of the United States District Courts. The judges of the proposed bankruptcy courts are granted full Constitutional tenure.” *Id.* The bill envisioned appointment of judges by the president with the advice and consent of the senate. *Id.* The House proposed a “full grant of powers and protections provided under Article III of the Constitution. Constitutional principles governing the federal courts also establish a strong presumption in favor of the life-tenured federal judiciary. A full grant to the proposed bankruptcy courts of the jurisdiction and powers necessary to the proper functioning of a bankruptcy system raises serious Constitutional doubts if that presumption is avoided.” *Id.* “Any attempt to do otherwise would run afoul of the appointments clause of the Constitution.” *Id.*
H.R. 8200 clearly fell short of that intention. But this history does make clear that House did not want a court that fell short of true independence making final determinations. While the scheme at present does not offer true independence for all adjudications, the history behind the current scheme suggests that even Congress sought to preserve Article III in the bankruptcy scheme.

Public policy would suggest these proceedings be left to be determined by the Article III courts. The guarantees for Article III judges were clear and unequivocal standards the Framers delineated for the system of checks and balances. *INS v. Chadha*, 462 U.S. 919, 944 (U.S. 1893). Undercutting the Framers intent in order to be “efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution.” *Id.* Expeditious litigation does not outweigh Constitutionally-granted rights. As this Court held in *Chadha*: “the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution.” *Id.* The Framers intended this to be so for the good of the nation. Public policy, and legislative history, thus indicate that the bankruptcy court lacks the Constitutional authority to make final determinations in these proceedings.

3) The Public Rights Doctrine Exception Does Not Fit These Facts Because it Has Never Been Applied to These Facts, it Would Not Comport with the Framer’s Intent, Legislative Intent, or Public Policy, and These Facts Do Not Justify Broadening the Public Rights Exception.

As *Stern v. Marshall* points out, the public rights doctrine and consent are the two exceptions recognized by this Court for granting non-Article III courts power to make judicial determinations. *Stern v. Marshall*, 131 S. Ct. 2594, 2605 (U.S. 2011). Neither exception fits squarely with the facts in the case at bar. Electing to expand these exceptions to the case at bar would be inconsistent with this Court’s previous holdings, inconsistent with legislative intent, and inconsistent with public policy.
a) Public Rights Doctrine Has Not Been Applied to Similar Facts.

The public rights doctrine is one exception this Court has recognized that gives Congress the ability to make and assign rights to a non-Article III tribunal for three purposes: 1) cases where the government is either bringing the case or a party to the case, 2) cases where new rights are created under federal regulatory schemes and 3) where an administrative agency acts as an “adjunct” of the Article III tribunal that makes final rulings. *Stern v. Marshall*, 131 S. Ct. 2594, 2610, and 2612 – 2613 (U.S. 2011). The doctrine, however, has never been applied to the bankruptcy context and is an extremely narrow exception. *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 97 (U.S. 1982) and *Crowell v. Benson*, 285 U.S. 22, 52 (U.S. 1932).

This Court has recently expressed its discomfort with extending the exception for fear of the exception swallowing the rule, holding that “exercise of judicial power may nonetheless be taken from the Article III Judiciary simply by deeming it part of some amorphous “public right,” then Article III would be transformed from the guardian of individual liberty and separation of powers the Court has long recognized into mere wishful thinking.” *Stern v. Marshall*, 131 S. Ct. 2594, 2598 (U.S. 2011). The case at bar is even further from public right than the core, compulsory counterclaim this Court rejected in *Stern*. As these facts do not fit under any construct of the public rights doctrine exception, this claim should not be exempted from the Constitutional right to adjudication by an Article III court.

In *Granfinanciera*, this Court held that “[u]nless a legal cause of action involves ‘public rights,’ Congress may not deprive parties litigating over such a right of the Seventh Amendment's guarantee to a jury trial.” *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989). The Court also indicated that actions that “state-law contract claims brought by a bankrupt corporation to augment the bankruptcy estate” are “matters of private rather than public right.”
Bernheim v. Chubb Ins. Co. of Canada, 160 B.R. 42, 45 (D.N.J. 1993) Like the proceeding in Bernheim, the proceedings at bar are a state law cause of action that is an attempt to augment the estate. Thus, the Thirteenth Circuit’s finding that the proceedings at bar are not a matter of public right was proper.

b.) There is No Reason to Broaden the Public Rights Exception on These Facts.

In Northern Pipeline, this Court “concluded that this “public rights” exception extended “only to matters arising between” individuals and the Government “in connection with the performance of the constitutional functions of the executive or legislative departments ... that historically could have been determined exclusively by those” branches. Id. This Court also struck down the regulatory scheme aspect of the exception, expressly rejecting the argument that the exception should apply to every bankruptcy proceeding as “flow[ing] from a federal statutory scheme, [such] as in Thomas.” Stern v. Marshall, 131 S. Ct. 2594, 2603 (U.S. 2011). Lastly, Stern pointed out that the entire Northern Court “rejected the debtor's argument that the Bankruptcy Court's exercise of jurisdiction was constitutional because the bankruptcy judge was acting merely as an adjunct of the district court or court of appeals.” Id. If this Court did not permit the core, compulsory counterclaim of Stern to extend the public rights doctrine, there is no reason to extend the public rights doctrine to these facts. The bankruptcy proceedings at bar do not involve the government as a party. The government is not bringing the suit. The bankruptcy code as a whole has not been recognized as a public right arising from a federal regulatory scheme (in fact, filing for bankruptcy is not a right but a privilege). Lastly, the bankruptcy court is not an adjunct of the Article III courts. These facts indicate the case at bar does not fit under any aspect of the public rights doctrine exception. Thus, the parties should thus not be denied their Constitutional right to adjudication by an Article III court.
Lastly, there is no reason to broaden the public rights exception on these facts because the case at bar involves two private, non-governmental parties. Allowing these facts to extend public rights doctrine will prevent innocent vendors in the ordinary course of business from engaging in business with Chapter 11 entities, or, alternatively, it will strip vendor’s Constitutional rights if they do engage in business with Chapter 11 entities. As this Court pointed out in Northern, “a matter of public rights must at a minimum arise “between the government and others” . . . In contrast, “the liability of one individual to another under the law as defined,” . . . is a matter of private rights. Our precedents clearly establish that only controversies in the former category may be removed from Art. III courts and delegated to legislative courts or administrative agencies for their determination.” Northern Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 97 (U.S. 1982). The proceedings at bar do not involve the government as a party to the case. Nor is the government bringing the case. Thus, this Court has previously found that the facts at bar do not warrant broadening the public rights exception. Consistent with this Court’s own previous findings, the Thirteenth Circuit thus properly held that the public rights exception is not applicable to these proceedings.
APPENDIX A

11 U.S.C. §362(c)(2)

§ 362. Automatic stay

(c) Except as provided in subsections (d), (e), (f), and (h) of this section—

(1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate;

(2) the stay of any other act under subsection (a) of this section continues until the earliest of—

(A) the time the case is closed;
(B) the time the case is dismissed; or
(C) if the case is a case under chapter 7 of this title concerning an individual or a case under chapter 9, 11, 12, or 13 of this title, the time a discharge is granted or denied;
§ 363. Use, sale, or lease of property

(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.
APPENDIX C

11 U.S.C. §502(h)

§ 502. Allowance of claims or interests

(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.
§ 503. Allowance of administrative expenses

(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.
APPENDIX E

11 U.S.C. §507(a)(2)

§ 507. Priorities

(a) The following expenses and claims have priority in the following order:

(1) First:

(A) Allowed unsecured claims for domestic support obligations that, as of the date of the filing of the petition in a case under this title, are owed to or recoverable by a spouse, former spouse, or child of the debtor, or such child’s parent, legal guardian, or responsible relative, without regard to whether the claim is filed by such person or is filed by a governmental unit on behalf of such person, on the condition that funds received under this paragraph by a governmental unit under this title after the date of the filing of the petition shall be applied and distributed in accordance with applicable nonbankruptcy law.

(B) Subject to claims under subparagraph (A), allowed unsecured claims for domestic support obligations that, as of the date of the filing of the petition, are assigned by a spouse, former spouse, child of the debtor, or such child’s parent, legal guardian, or responsible relative to a governmental unit (unless such obligation is assigned voluntarily by the spouse, former spouse, child, parent, legal guardian, or responsible relative of the child for the purpose of collecting the debt) or are owed directly to or recoverable by a governmental unit under applicable nonbankruptcy law, on the condition that funds received under this paragraph by a governmental unit under this title after the date of the filing of the petition be applied and distributed in accordance with applicable nonbankruptcy law.

(C) If a trustee is appointed or elected under section 701, 702, 703, 1104, 1202, or 1302, the administrative expenses of the trustee allowed under paragraphs (1)(A), (2), and (6) of section 503(b) shall be paid before payment of claims under subparagraphs (A) and (B), to the extent that the trustee administers assets that are otherwise available for the payment of such claims.

(2) Second, administrative expenses allowed under section 503(b) of this title, unsecured claims of any Federal reserve bank related to loans made through programs or facilities authorized under section 13(3) of the Federal Reserve Act (12 U.S.C. 343), and any fees and charges assessed against the estate under chapter 123 of title 28.
APPENDIX F

11 U.S.C. §549

§ 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 G

11 U.S.C. §550

§ 550. Liability of transferee of avoided transfer

(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 (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 H

VIII
11 U.S.C. §1108

§ 1108. Authorization to operate business
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.
§ 152. Appointment of bankruptcy judges

(a) (1) Each bankruptcy judge to be appointed for a judicial district, as provided in paragraph (2), shall be appointed by the court of appeals of the United States for the circuit in which such district is located. Such appointments shall be made after considering the recommendations of the Judicial Conference submitted pursuant to subsection (b). Each bankruptcy judge shall be appointed for a term of fourteen years, subject to the provisions of subsection (e). However, upon the expiration of the term, a bankruptcy judge may, with the approval of the judicial council of the circuit, continue to perform the duties of the office until the earlier of the date which is 180 days after the expiration of the term or the date of the appointment of a successor. Bankruptcy judges shall serve as judicial officers of the United States district court established under Article III of the Constitution.

(2) The bankruptcy judges appointed pursuant to this section shall be appointed for the several judicial districts as follows:

(3) Whenever a majority of the judges of any court of appeals cannot agree upon the appointment of a bankruptcy judge, the chief judge of such court shall make such appointment.

(4) The judges of the district courts for the territories shall serve as the bankruptcy judges for such courts. The United States court of appeals for the circuit within which such a territorial district court is located may appoint bankruptcy judges under this chapter for such district if authorized to do so by the Congress of the United States under this section.

(b) (1) The Judicial Conference of the United States shall, from time to time, and after considering the recommendations submitted by the Director of the Administrative Office of the United States Courts after such Director has consulted with the judicial council of the circuit involved, determine the official duty stations of bankruptcy judges and places of holding court.

(2) The Judicial Conference shall, from time to time, submit recommendations to the Congress regarding the number of bankruptcy judges needed and the districts in which such judges are needed.

(3) Not later than December 31, 1994, and not later than the end of each 2-year period thereafter, the Judicial Conference of the United States shall conduct a comprehensive review of all judicial districts to assess the continuing need for the bankruptcy judges authorized by this section, and shall report to the Congress its findings and any recommendations for the elimination of any authorized position which can be eliminated when a vacancy exists by reason of resignation, retirement, removal, or death.

(c) (1) Each bankruptcy judge may hold court at such places within the judicial district, in addition to the official duty station of such judge, as the business of the court may require.

(2) (A) Bankruptcy judges may hold court at such places within the United States outside the judicial district as the nature of the business of the court may require, and upon such notice as the court orders, upon a finding by either the chief judge of the bankruptcy court (or, if
the chief judge is unavailable, the most senior available bankruptcy judge) or by the judicial
council of the circuit that, because of emergency conditions, no location within the district is
reasonably available where the bankruptcy judges could hold court.

(B) Bankruptcy judges may transact any business at special sessions of court held
outside the district pursuant to this paragraph that might be transacted at a regular
session.

(C) If a bankruptcy court issues an order exercising its authority under
 subparagraph (A), the court—

(i) through the Administrative Office of the United States Courts, shall—
   (I) send notice of such order, including the reasons for the issuance of such
   order, to the Committee on the Judiciary of the Senate and the Committee on the
   Judiciary of the House of Representatives; and
   (II) not later than 180 days after the expiration of such court order submit
   a brief report to the Committee on the Judiciary of the Senate and the Committee
   on the Judiciary of the House of Representatives describing the impact of such
   order, including—
      (aa) the reasons for the issuance of such order;
      (bb) the duration of such order;
      (cc) the impact of such order on litigants; and
      (dd) the costs to the judiciary resulting from such order; and
   (ii) shall provide reasonable notice to the United States Marshals Service before
   the commencement of any special session held pursuant to such order.

(d) With the approval of the Judicial Conference and of each of the judicial councils involved, a
bankruptcy judge may be designated to serve in any district adjacent to or near the district for
which such bankruptcy judge was appointed.

(e) A bankruptcy judge may be removed during the term for which such bankruptcy judge is
appointed, only for incompetence, misconduct, neglect of duty, or physical or mental disability
and only by the judicial council of the circuit in which the judge’s official duty station is located.
Removal may not occur unless a majority of all of the judges of such council concur in the order
of removal. Before any order of removal may be entered, a full specification of charges shall be
furnished to such bankruptcy judge who shall be accorded an opportunity to be heard on such
charges.
APPENDIX J

28 U.S.C. § 157

§ 157. Procedures

(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;
   (N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate;
   (O) 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
   (P) recognition of foreign proceedings and other matters under chapter 15 of title 11.

(3) 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.

(4) 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).
(5) 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.

c) (1) 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.

(2) 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.

d) 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.

e) 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 K

28 U.S.C. §1334

§ 1334. Bankruptcy cases and proceedings

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

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

(c) (1) Except with respect to a case under chapter 15 of title 11, nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

   (2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

(d) Any decision to abstain or not to abstain made under subsection (c) (other than a decision not to abstain in a proceeding described in subsection (c)(2)) is not reviewable by appeal or otherwise by the court of appeals under section 158 (d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title. Subsection (c) and this subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

(e) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction—

   (1) of all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate; and

   (2) over all claims or causes of action that involve construction of section 327 of title 11, United States Code, or rules relating to disclosure requirements under section 327.
APPENDIX L

U.S. Cont. art. III, § 1.

Article 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.
Rule 4001. Relief from Automatic Stay; Prohibiting or Conditioning the Use, Sale, or Lease of Property; Use of Cash Collateral; Obtaining Credit; Agreements

(a) Relief From Stay; Prohibiting or Conditioning the Use, Sale, or Lease of Property.

(1) Motion. A motion for relief from an automatic stay provided by the Code or a motion to prohibit or condition the use, sale, or lease of property pursuant to §363(e) shall be made in accordance with Rule 9014 and shall be served on any committee elected pursuant to §705 or appointed pursuant to §1102 of the Code or its authorized agent, or, if the case is a chapter 9 municipality case or a chapter 11 reorganization case and no committee of unsecured creditors has been appointed pursuant to §1102, on the creditors included on the list filed pursuant to Rule 1007(d), and on such other entities as the court may direct.

(2) Ex Parte Relief. Relief from a stay under §362(a) or a request to prohibit or condition the use, sale, or lease of property pursuant to §363(e) may be granted without prior notice only if (A) it clearly appears from specific facts shown by affidavit or by a verified motion that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party or the attorney for the adverse party can be heard in opposition, and (B) the movant's attorney certifies to the court in writing the efforts, if any, which have been made to give notice and the reasons why notice should not be required. The party obtaining relief under this subdivision and §362(f) or §363(e) shall immediately give oral notice thereof to the trustee or debtor in possession and to the debtor and forthwith mail or otherwise transmit to such adverse party or parties a copy of the order granting relief. On two days notice to the party who obtained relief from the stay without notice or on shorter notice to that party as the court may prescribe, the adverse party may appear and move reinstatement of the stay or reconsideration of the order prohibiting or conditioning the use, sale, or lease of property. In that event, the court shall proceed expeditiously to hear and determine the motion.

(3) Stay of Order. An order granting a motion for relief from an automatic stay made in accordance with Rule 4001(a)(1) is stayed until the expiration of 14 days after the entry of the order, unless the court orders otherwise.

(b) Use of Cash Collateral.

(1) Motion; Service.

(A) Motion. A motion for authority to use cash collateral shall be made in accordance with Rule 9014 and shall be accompanied by a proposed form of order.

(B) Contents. The motion shall consist of or (if the motion is more than five pages in length) begin with a concise statement of the relief requested, not to exceed five pages, that lists or summarizes, and sets out the location within the relevant documents of, all material provisions, including:
(i) the name of each entity with an interest in the cash collateral;

(ii) the purposes for the use of the cash collateral;

(iii) the material terms, including duration, of the use of the cash collateral; and

(iv) any liens, cash payments, or other adequate protection that will be provided to each entity with an interest in the cash collateral or, if no additional adequate protection is proposed, an explanation of why each entity's interest is adequately protected.

(C) Service. The motion shall be served on: (1) any entity with an interest in the cash collateral; (2) any committee elected under §705 or appointed under §1102 of the Code, or its authorized agent, or, if the case is a chapter 9 municipality case or a chapter 11 reorganization case and no committee of unsecured creditors has been appointed under §1102, the creditors included on the list filed under Rule 1007(d); and (3) any other entity that the court directs.

(2) Hearing. The court may commence a final hearing on a motion for authorization to use cash collateral no earlier than 14 days after service of the motion. If the motion so requests, the court may conduct a preliminary hearing before such 14-day period expires, but the court may authorize the use of only that amount of cash collateral as is necessary to avoid immediate and irreparable harm to the estate pending a final hearing.

(3) Notice. Notice of hearing pursuant to this subdivision shall be given to the parties on whom service of the motion is required by paragraph (1) of this subdivision and to such other entities as the court may direct.

c) Obtaining Credit.

(1) Motion; Service.

(A) Motion. A motion for authority to obtain credit shall be made in accordance with Rule 9014 and shall be accompanied by a copy of the credit agreement and a proposed form of order.

(B) Contents. The motion shall consist of or (if the motion is more than five pages in length) begin with a concise statement of the relief requested, not to exceed five pages, that lists or summarizes, and sets out the location within the relevant documents of, all material provisions of the proposed credit agreement and form of order, including interest rate, maturity, events of default, liens, borrowing limits, and borrowing conditions. If the proposed credit agreement or form of order includes any of the provisions listed below, the concise statement shall also: briefly list or summarize each one; identify its specific location in the proposed agreement and form of order; and identify any such provision that is proposed to remain in effect if interim approval is granted, but final relief is denied, as provided under Rule 4001(c)(2). In addition, the motion shall describe the nature and extent of each provision listed below:

(i) a grant of priority or a lien on property of the estate under §364(c) or (d);
(ii) the providing of adequate protection or priority for a claim that arose before the commencement of the case, including the granting of a lien on property of the estate to secure the claim, or the use of property of the estate or credit obtained under §364 to make cash payments on account of the claim;

(iii) a determination of the validity, enforceability, priority, or amount of a claim that arose before the commencement of the case, or of any lien securing the claim;

(iv) a waiver or modification of Code provisions or applicable rules relating to the automatic stay;

(v) a waiver or modification of any entity's authority or right to file a plan, seek an extension of time in which the debtor has the exclusive right to file a plan, request the use of cash collateral under §363(c), or request authority to obtain credit under §364;

(vi) the establishment of deadlines for filing a plan of reorganization, for approval of a disclosure statement, for a hearing on confirmation, or for entry of a confirmation order;

(vii) a waiver or modification of the applicability of nonbankruptcy law relating to the perfection of a lien on property of the estate, or on the foreclosure or other enforcement of the lien;

(viii) a release, waiver, or limitation on any claim or other cause of action belonging to the estate or the trustee, including any modification of the statute of limitations or other deadline to commence an action;

(ix) the indemnification of any entity;

(x) a release, waiver, or limitation of any right under §506(c); or

(xi) the granting of a lien on any claim or cause of action arising under §§544, 1 545, 547, 548, 549, 553(b), 723(a), or 724(a).

(C) Service. The motion shall be served on: (1) any committee elected under §705 or appointed under §1102 of the Code, or its authorized agent, or, if the case is a chapter 9 municipality case or a chapter 11 reorganization case and no committee of unsecured creditors has been appointed under §1102, on the creditors included on the list filed under Rule 1007(d); and (2) on any other entity that the court directs.

(2) Hearing. The court may commence a final hearing on a motion for authority to obtain credit no earlier than 14 days after service of the motion. If the motion so requests, the court may conduct a hearing before such 14-day period expires, but the court may authorize the obtaining of credit only to the extent necessary to avoid immediate and irreparable harm to the estate pending a final hearing.
(3) Notice. Notice of hearing pursuant to this subdivision shall be given to the parties on whom service of the motion is required by paragraph (1) of this subdivision and to such other entities as the court may direct.

(d) Agreement Relating to Relief From the Automatic Stay, Prohibiting or Conditioning the Use, Sale, or Lease of Property, Providing Adequate Protection, Use of Cash Collateral, and Obtaining Credit.

(1) Motion; Service.

(A) Motion. A motion for approval of any of the following shall be accompanied by a copy of the agreement and a proposed form of order:

(i) an agreement to provide adequate protection;

(ii) an agreement to prohibit or condition the use, sale, or lease of property;

(iii) an agreement to modify or terminate the stay provided for in §362;

(iv) an agreement to use cash collateral; or

(v) an agreement between the debtor and an entity that has a lien or interest in property of the estate pursuant to which the entity consents to the creation of a lien senior or equal to the entity's lien or interest in such property.

(B) Contents. The motion shall consist of or (if the motion is more than five pages in length) begin with a concise statement of the relief requested, not to exceed five pages, that lists or summarizes, and sets out the location within the relevant documents of, all material provisions of the agreement. In addition, the concise statement shall briefly list or summarize, and identify the specific location of, each provision in the proposed form of order, agreement, or other document of the type listed in subdivision (c)(1)(B). The motion shall also describe the nature and extent of each such provision.

(C) Service. The motion shall be served on: (1) any committee elected under §705 or appointed under §1102 of the Code, or its authorized agent, or, if the case is a chapter 9 municipality case or a chapter 11 reorganization case and no committee of unsecured creditors has been appointed under §1102, on the creditors included on the list filed under Rule 1007(d); and (2) on any other entity the court directs.

(2) Objection. Notice of the motion and the time within which objections may be filed and served on the debtor in possession or trustee shall be mailed to the parties on whom service is required by paragraph (1) of this subdivision and to such other entities as the court may direct. Unless the court fixes a different time, objections may be filed within 14 days of the mailing of the notice.
(3) *Disposition; Hearing.* If no objection is filed, the court may enter an order approving or disapproving the agreement without conducting a hearing. If an objection is filed or if the court determines a hearing is appropriate, the court shall hold a hearing on no less than seven days’ notice to the objector, the movant, the parties on whom service is required by paragraph (1) of this subdivision and such other entities as the court may direct.

(4) *Agreement in Settlement of Motion.* The court may direct that the procedures prescribed in paragraphs (1), (2), and (3) of this subdivision shall not apply and the agreement may be approved without further notice if the court determines that a motion made pursuant to subdivisions (a), (b), or (c) of this rule was sufficient to afford reasonable notice of the material provisions of the agreement and opportunity for a hearing.
APPENDIX N

U.S.C.S. Bankruptcy R 7008(a)

**Rule 7008. General Rules of Pleading**

(a) Applicability of Rule 8 F.R.Civ.P. Rule 8 F.R.Civ.P. applies in adversary proceedings. The allegation of jurisdiction required by Rule 8(a) shall also contain a reference to the name, number, and chapter of the case under the Code to which the adversary proceeding relates and to the district and division where the case under the Code is pending. In an adversary proceeding before a bankruptcy judge, the complaint, counterclaim, cross-claim, or third-party complaint shall contain a statement that the proceeding is core or non-core and, if non-core, that the pleader does or does not consent to entry of final orders or judgment by the bankruptcy judge.
APPENDIX O

U.S.C.S. Bankruptcy R 7012(b)

Rule 7012. Defenses and Objections—When and How Presented—By Pleading or Motion—

Motion for Judgment on the Pleadings

b) Applicability of Rule 12(b)–(i) F.R.Civ.P. Rule 12(b)–(i) F.R.Civ.P. applies in adversary
proceedings. A responsive pleading shall admit or deny an allegation that the proceeding is core
or non-core. If the response is that the proceeding is non-core, it shall include a statement that the
party does or does not consent to entry of final orders or judgment by the bankruptcy judge. In
non-core proceedings final orders and judgments shall not be entered on the bankruptcy judge's
order except with the express consent of the parties.