Index No. 23-0115

IN THE

Supreme Court of the United States

IN RE EUGENE CLEGG, DEBTOR

VERA LYNN FLOYD, CHAPTER 7 TRUSTEE,

Petitioner,

\- against –

EUGENE CLEGG,

Respondent,

ON APPEAL FROM THE
United States Court of Appeals
For the Thirteenth Circuit

BRIEF FOR PETITIONER

TEAM 25
COUNSEL FOR THE PETITIONER
DATED JANUARY 18, 2024

QUESTIONS PRESENTED

1. Whether any post-petition, pre-conversion increase in equity in a debtor's property inures to the benefit of the debtor or to the bankruptcy estate upon conversion of a case from chapter 13 to chapter 7 pursuant to 11 U.S.C. §§ 348 and 541.

2. Whether a chapter 7 trustee may sell, as property of the bankruptcy estate, the ability to avoid and recover transfers pursuant to 11 U.S.C. §§ 547 and 550.

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STATEMENT OF JURISDICTION

The formal statement of jurisdiction is waived in accordance with the rules of the Duberstein Moot Court Competition.

STATEMENT OF FACTS

After retiring from the United States Army in 2011, Emily "Pink" Clegg ("Pink") transferred 100% of her membership interest in The Final Cut, LLC ("Final Cut") to the Debtor-Respondent, Eugene Clegg. R. at 5. Final Cut is a historic, single-screen movie theater which consistently produced a net profit each year. R. at 5. The Respondent's income was solely based on his salary from Final Cut. R. at 5.

In order to renovate the theater, the respondent borrowed a $850,000 loan from Eclipse Credit Union ("Eclipse") on behalf of Final Cut. The Loan was properly perfected by Eclipse and secured by the respondent who executed an unconditional, unsecured personal guaranty in an unlimited amount. R. at 5. With the help of other local veterans who volunteered their time, the Respondent was able to undertake the renovation work and reduce labor costs to not exceed the loan amount. R. at 5. The Respondent had about $75,000 left of the loan which he had donated to the Veteran of Foreign Wars in 2017 without informing Eclipse. R. at 5.

With the new renovations, the theater reopened and was profitable for three years until March 2020 when COVID-19 ran ramped and caused an executive order requiring individuals to stay at home. R.at 6. The theater was closed for nearly a year and gained no profits. R. at 6. Having received no income from the theater, the Respondent was forced to borrow $50,000 from his own mother, Pink, on an unsecured basis. R. at 6.

In February of 2021, the theater finally reopened its doors to the public but failed to recover the pre-pandemic levels of attendance. R. at 6. Having no income, the Respondent was unable to make mortgage payments for months which caused the Loan Servicer commence foreclosure proceedings. R. at 6.

The Respondent sought relief under Chapter 13 of the Bankruptcy Code in December of 2021 ("Petition Date"). R. at 6. In the Schedule A/B, the Respondent valued his home at $350,000 based on appraisal done prior to the Petition Date. R. at 6. In filing his Schedule C, the Respondent claimed the state law homestead exemption for $30,000. R. at 6. The Respondent then disclosed that he had made payments of $20,000 to Pink within one year of the Petition Date. R. at 7.

The Respondent filed a Chapter 13 plan where he would make payments to the creditors for a three-year period including making monthly payments to the Mortgage Servicer from his future earnings from Final Cut. R. at 7. The Plan specifically valued the home at $350,000 and gave the Respondent no equity in his home. R. at 7.

After the creation of the Plan, Eclipse learned of the Respondents actions pertaining to donating the rest of the loan to the Veterans of Foreign Wars and commenced a proceeding to have the Respondent's loan debt declared non-dischargeable. R. at 7.

Due to the Chapter 13 trustee objecting to the Respondent's plans, the respondent changed his plan to increase the payments to creditors by $20,000 over the three-year period. R. at 7. The Respondent's original plans would have caused the creditors to receive less than a liquidation under Chapter 7. R. at 7. The Chapter 13 Trustee agreed to not seek to recover the payments made to Pink prior to the Petition Date. R. at 8. While Eclipse objected to the Plans, Eclipse agreed to withdraw the objection in exchange for $150,000 with $25,000 deemed non-dischargeable even with conversion. R. at 8.

On February 12, 2022, the Respondent's plan was accepted and confirmed by the bankruptcy court and explicitly confirmed that all property of the estate was to be vested in the Respondent. R. at 8. The bankruptcy court also approved the agreement between the respondent and Eclipse. R. at 8.

For eight months, the Respondent made payments under the plan. R. at 8. In September of 2022, the Respondent stopped working at the theater and therefore, stopped receiving an income. R. at 8. The theater permanently closed forcing Eclipse to "commence foreclosure proceedings against Final Cut." R. at 8. The Respondent was then unable to continue making payments under his plan and chose to convert his Chapter 13 to a Chapter 7. R. at 8. With the conversion, the bankruptcy court converted the case to a Chapter 7. R. at 8. The Trustee, upon this information, had informed, in her final report, that she had distributed $10,000 to the Servicer and returned the funds that were held in reverse for Eclipse back to the Respondent. R. at 8-9.

Vera Lynn Floyd was appointed as the trustee for the respondent's Chapter 7 estate. R. at 9. The conversion assigned a $350,000 value to the home and alleged preferential transfers to Pink. R. at 9. The Respondent was also indebted to Eclipse for $200,000 due to the foreclosure. R. at 9. In the statement of intention during the conversion, the Respondent said that he intended to reaffirm his mortgage debt and stay in his home. R. at 9.

In a new appraisal of the Respondent's home, the home's value increased by $100,000 to a $450,000 value. R. at 9. With this information, the Trustee then placed the home for sale in order to maintain her duty to "collect and reduce to money the property of the estate for which such trustee serves" to serve the creditors. R. at 9. Eclipse offered to purchase the home and the preference claim against Pink for $470,000 and the Trustee filed a motion to sell both to Eclipse. R. at 9.

The Respondent then objected to the motion because (1) the increase in the equity of his home should be to his benefit and (2) the Trustee's ability to recover transfers cannot be sold. R. at 10. The Bankruptcy Court denied the Motion and ruled in favor of the Respondent.

SUMMARY OF THE ARGUMENT

The increase in the equity of the Respondent's home is entitled to the benefit of the bankruptcy estate and Trustee. Under the plain meaning of 11 U.S.C. §348(f)(2), the home's appreciation benefits the creditors and the estate. After a conversion form a chapter 13, any property of the estate that is in the possession of the debtor shall consist of "property of the estate." 11 U.S.C. §348(f)(2). There is no legislative history created to inform the code or specify the directions of the code. It is not the job of the courts to update the laws, just to enforce them.

If the courts were to allow the equity to benefit the debtor, it would violate the best interest of society. Debtors converting to chapter 7 do so to minimize their assets. Therefore, if their home appreciates in value and they sell it and keep the benefit of the appreciation, they are not truly bringing their assets to a minimum. The appreciation of the home would have significantly benefitted the debtor therefore minimizing the effects of the liquidation and ultimately making the liquidation irrelevant.

Furthermore, Chapter 5 causes of action are property of the bankruptcy estate pursuant to 541(a)(1). Therefore, the action can be sold by the trustee with court approval pursuant to 547(b) and 550(a). Generally, courts have found that causes of actions are considered property of the estate. Specifically, legal and equitable interests that belong to the debtor are considered property. *Parker v. Goodman (In re Parker)*, 499 F.3d 616 (6th Cir. 2007). Property of the estate therefore includes any cause of action the debtor had on the petition date, as well as avoidance actions created on the petition date". *Madoff Inv. Sec*., LLC, 460 B.R. 106, 114 (Bankr. S.D.N.Y. 2011). The debtor possessed a cause of action with his preference to Pink. Therefore, that preference is considered property of the estate with which the Trustee has the obligation and authority to sell the recover of transfer.

ARGUMENT

I. POST-PETITION INCREASES IN EQUITY PRIOR TO THE DATE OF CONVERSION CONSTITUTE PROPERTY OF THE CHAPTER 7 ESTATE.

Under a plain meaning reading of 11 U.S.C. §348(f)(2), the home's appreciation benefits the creditors and the estate. Nothing in the rest of the Bankruptcy Code or the legislative history negates that, and it would not be in the best interest of public policy to hold otherwise.

A. The words of the statute state that post-petition increases in equity prior to the date of conversion constitute property of the chapter 7 estate.

The respondent's home is part of the estate since it was under the control of the debtor on the date of conversion. *United States v. Ron Pair Enterprises,* 489 U.S. 235, 241 (1989). The home's appreciation is part of the home, and therefore is part of the estate as well. Segal v. Rochelle, 382 U.S. 375, 379 (1966); 11 U.S.C. §541(a)(6-7). The legislative history, although likely not relevant, shows that Congress did not attempt to exclude appreciation from the estate.

In re Castleman, 631 B.R. 914, 919 (Bankr. W.D. Wash. 2021); *Goetz v. Weber (In re Goetz)*, 651 B.R. 292, 302 (B.A.P. 8th Cir. 2023); 11 U.S.C. §541(a)(6).

1. The home is property of the estate.

The plain meaning of the statute shows that the home is part of the estate. The statute states that everything in the possession of the debtor is part of the estate and leaves no carveout for appreciation. 11 U.S.C. §348(f)(1)(A); *Ron Pair*, 489 U.S. at 241.

11 U.S.C. §348(f)(1)(A) states clearly that "property of the estate in the converted case shall consist of property of the estate, as of the date of filing of the petition, that remains in the possession of or is under the control of the debtor on the date of conversion." Since the home was in the possession of the debtor on the date of conversion, the home is part of the estate. The statute in no way states that only part of the home's value is included in the estate; it simply says that the home is in the estate, and if the meaning of the statue is clear from the words, it is to be followed as worded. *Ron Pair*, 489 U.S. at 241.

In *Ron Pair*, 489 U.S. at 241, the Court determined that, when evaluating a statute that is clear on its face, the court should only look at the plain words of the statute. The respondent had filed a Chapter 11 plan that did not include payment of post-petition on an over-secured prepetition tax lien. *Id.* at 237. When determining the meaning of 11 U.S.C. §506(b) to determine whether the government is entitled to receive the post-petition interest on the lien, the Court determined that its inquiry into the meaning of this statute, as well as the inquiry into the meaning of any other statute that is clear on its face, is solely based on the wording of the statute. *Id*. at 241.

2. Appreciation of the home is part of the estate.

11 U.S.C. §541(a)(6-7) states that "proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case" are part of the estate. Under these definitions, an increase in the equity of the home would become part of the property of the estate since it is a profit from the property of the home. *Segal,* 382 U.S. at 376 (1996).

In *Segal*, 382 U.S. at 376, the Court determined that "the term 'property' has been construed most generously and an interest is not outside its reach because it is novel or contingent or because enjoyment must be postponed." A dispute had arisen as to whether certain tax refunds are considered property in a bankruptcy proceeding, and the Court determined that it did to include alienable and leviable assets that are rooted in one's pre-bankruptcy past and are not going to prohibit the bankrupt party from having a fresh start. *Id*. at 379-380.

11 U.S.C. 1306(a)(1) states that "property of the kind specified in such section that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 11, or 12 of this title, whichever occurs first" is part of the estate. Therefore, even if the respondent were to argue that the appreciation is new property, the new property is still part of the estate.

3. The legislative history likely is not relevant, and even if it is relevant, it indicates that post-petition increases in equity prior to the date of conversion constitute property of the chapter 7 estate.

To understand the statute, the Court should only be looking at the statute. *Ron Pair*, 489 U.S. 235 at 241. However, even if the Court were to look at the legislative history, it would see that the legislative history is consistent with the notion that post-petition increases in equity prior to the date of conversion constitute property of the chapter 7 estate.

The respondent might argue that the Court should look to additional information to better understand the statute, citing the Court's statement in *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 610 n.4 (1991) that "common sense suggests that inquiry benefits from reviewing additional information rather than ignoring it." However, such an argument ignores the context in which the statement was made. In *Mortier*, the Court was grappling with how to handle a conflict of laws between local regulation and the EPA's regulation. *Id*. at 606. The Court was evaluating if the EPA's regulations were intended to preempt local regulations that contradicted it, and nothing on the face of the statute indicated whether it did. *Id*. Unlike in *Mortier*, where the Court was grappling with conflict between two valid laws, in this case the conflict is between a law and its legislative history, and a legislative history is not a validly enforceable law in the same way that a local regulation is.

Even if the Court were to look at the legislative history, it would see that the legislative history does not have anything contrary to the petitioner's argument. The legislative history solely addresses how to handle property that is acquired after the petition. *Castleman*, 631 B.R. at 919. As stated above, the appreciation of the home is not new property that was acquired, and therefore the legislative history does not address it.

Although the legislative history does show some intention to overrule cases inconsistent with the respondent's position, Congress declined to incorporate any provisions consistent with that intent into the law. *R*. at 16. *Goetz*, 651 B.R. at 302. There is no reason to think that Congress's decision to do so was inadvertent; during legislation, there frequently are compromises that cause certain potential provisions to not be included. *Id*.

In fact, there is evidence that Congress intentionally omitted those provisions. If Congress did not wish to include appreciation in the estate, it would have done so. Congress knows how to indicate what is to be excluded from the estate and showed that it can do so in 11 U.S.C. §541(a)(6), where it excludes "proceeds, product, offspring, rents, or profits of or from property of the estate" that are "earnings from services performed by an individual debtor after the commencement of the case." Therefore, if Congress wished to exclude home appreciation from the estate, it could have included a provision explicitly stating so.

Since the statute itself is clear, there is no need to look to the legislative history to find the meaning of the statue. However, even if the Court were to look to the legislative history, it would see that Congress did not intend to exclude post-petition pre-conversion interest, and that it only wished to exclude new assets acquired after filing, which is consistent with the absence of anything in the statute exempting home appreciation.

B. <u>Such an interpretation is consistent with the rest of the statute.</u>

Despite what appear to be internal inconsistences within the Bankruptcy Code, the controlling statute is 11 U.S.C. §348(f)(1), since that is the provision specifically about what is in the estate. *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384-85 (1992). Redundancy and inconsistency does not mean that the plain meaning should not be followed.

1. To understand any statute provision, it needs to be considered for its purpose.

When designing statutes, Congress designed specific provisions to address specific issues. *RadLAX*, 566 U.S. at 645. Therefore, when looking at how to resolve a particular issue, courts should look at the provisions of the statute that were made specifically for the issue at hand, which is 11 U.S.C. §348(f)(2). In this instance, the Court needs to look to statutory provisions specifically about what is part of the estate.

2. Even though 11 U.S.C. 348(f)(1) appears to contradict other statutory provisions on their face, 11 U.S.C. 348(f)(1) still prevails.

While the respondent might argue that our interpretation of 11 U.S.C. §348(f)(1) contradicts other parts of the statute, that is not to say that our interpretation is any less valid. While 11 U.S.C. §1327(b) states that "confirmation of a plan vests all of the property of the estate in the debtor," which appears to be contrary to 11 U.S.C. §348(f)(2), it is important to remember that in statutory construction when two statues conflict, the one with more specific language prevails. *Morales*, 504 U.S. at 384-85. Therefore, since 11 U.S.C. §1327(b) does not include any specific language while 11 U.S.C. §348(f)(2) includes specific language about the section only applying to conversions out of chapter 13, 11 U.S.C. §348(f)(2) supersedes.

While the respondent might claim that this interpretation of 11 U.S.C. §348(f)(1) contradicts 11 U.S.C. §522(a)(2), the inconsistency does not matter since 11 U.S.C. §522(a)(2), unlike 11 U.S.C. §348(f)(1), is not about what is included in the estate.

The respondent might argue that such a reading of 11 U.S.C. §348(f)(1)(A) would make 11 U.S.C. §348(f)(2) unnecessary. 11 U.S.C. §348(f)(2) states that in a bad faith conversion, the property of the estate is everything that was a part of the estate on the date of conversion. The respondent might argue that, under the trustee's interpretation of 11 U.S.C. §348(f)(1)(A), the contents of the estate is the same regardless of if the conversion is made in good faith or in bad faith, and therefore it is unnecessary to have two separate provisions of the statue, one with the general rule and one with the special rule for bad faith conversions.

However, such an argument does not negate the meaning of 11 U.S.C. §348(f)(1)(A). Redundancy and inconsistency within a statute does not mean that one of the provisions is not being interpreted correctly. It is the job of Congress, not of the courts, to determine the appropriate wording of statutes and to avoid redundancies and inconsistencies. Courts are responsible solely for interpreting and enforcing the laws as Congress wrote them, and not for rewriting the laws in a way that the courts find to be more efficient wording.

C. Allowing the debtor to keep the appreciation would be counter to the best interest of society.

Additionally, permitting the appreciation to benefit the debtor would not be in the best interest of public policy. It would create an incentive for more bankruptcies to start in chapter 7 before converting to chapter 13, which would be a waste of judicial resources, and it would put future debtors at risk of their home depreciating.

Under chapter 7 bankruptcy, a debtor is giving up their assets to get a fresh start. In other words, they are bringing their own assets down to a bare minimum as part of the agreement. Therefore, if their home appreciates in value and they sell it and keep the benefit of the appreciation, they are not truly bringing their assets to a minimum. When their creditors are already not getting the full amount of the debt they are rightfully owed, it would be unfair to the creditors if the debtor were to take large proceeds from an appreciated home without the creditors receiving anything.

Others argue that preventing the debtor from keeping the benefits of appreciation is contrary to the best interest of public policy (Barrera 653). The argument goes that if a debtor filed chapter 7 from the outset, they would be able to keep the benefit of the appreciation, but they are unable to do the same if they start with a chapter 13 then later switch to a chapter 7, thus providing a disincentive to chapter 13 bankruptcies.

First, such an argument is not valid in all circumstances. Since the home's appreciation does not go to the benefit of the debtor, the home's depreciation would not go to the benefit of the debtor either.

In *Castleman*, 75 F.4th at 1058, the Ninth Circuit determined that prohibiting the appreciation from benefitting the debtor does not cause universal harm to debtors. A couple converted from chapter 13 to chapter 7, and their home appreciated by $200,000 post-petition pre-conversion. *Id*. at 1054. The court did not permit the appreciation to benefit the debtor, and noted that doing so is not inherently unfair, since stopping appreciation from benefitting the debtor also stops depreciation from harming the debtor. *Id.* at 1058.

Although Mr. Clegg's case saw appreciation in the value of the home, like the *Castleman* case, other cases could have depreciation in the value of the home. Therefore, even though this policy harmed the debtor in this instance, in other instances it could benefit the debtor, depending on market conditions. Since market conditions will not always be the same, such a policy does not universally harm all debtors. *Id.*

Furthermore, any incentives against chapter 13 bankruptcies that it provides are not bad. Even though the incentives against chapter 13 bankruptcies are not as strong as some claim, there likely is still some incentive against chapter 13 bankruptcies, considering homes typically appreciate, not depreciate, in value over time. While a chapter 13 bankruptcy would be preferable to a chapter 7 bankruptcy as a matter of public policy since it involves credits eventually being repaid in full, a chapter 13 bankruptcy that turns into a chapter 7 bankruptcy is worse than a bankruptcy that starts and ends in chapter 7. When a bankruptcy starts in chapter 13 and later switches to chapter 7, it wastes judicial resources by needing to both start in one chapter then make a switch later. Instead, in a bankruptcy that starts and ends in one chapter occupies less judicial resources. Therefore, discouraging chapter 13 bankruptcies that have a strong possibility of becoming chapter 7 bankruptcies is good as a matter of public policy.

By allowing the appreciation to benefit the debtor, the Court would be setting a precedent that depreciation harms the debtor who is trying to get a fresh start. Although doing so might create a slight incentive to chapter 13 bankruptcies, it could also lead to more bankruptcies that end in chapter 7 first starting in chapter 13, which would be a waste of judicial resources.

II. PREFERENCE ACTIONS ARE PROPERTY OF THE ESTATE THAT TRUSTEE, VERA LYNN FLOYD, CAN SELL.

The Debtor paid Pink $20,000 within one year prior to the petition date. R at 7. The Trustee will be able to sell the action due to the action being a part of the estate. This conclusion is formulated by an analysis of the relevant statutes and their plain meaning. Also, Supreme Court cases and district court opinions are scrutinized to show that the preference actions are property of the estate, along with the policy implications.

A. The plain-meaning language of section 547(b), 550(a), and 704(a) unambiguously grants the trustee a duty.

Section 547(b) allows a trustee to, "avoid a transfer of an interest in the debtor's property made within ninety days (or one year where the transfer is to an insider) before the petition date" 11 U.S.C §547(b). In this case the transfer was to an insider (Pink), and the one year standard applies. The code acts to protect, "Equality of distribution among creditors is a central policy of the Bankruptcy Code… This mechanism prevents the debtor from favoring one creditor over others by transferring property shortly before filing for bankruptcy" *Begier v. IRS*, 496 U.S. 53, 58, 110 S. Ct. 2258, 2263 (1990). Once the payment is avoided, the trustee can recover the payment pursuant to 550(a) and distribute pro rata to the creditors 11 U.S.C. §550(a). Additionally, section 704(a) explains that a trustee in a section 7 bankruptcy has a duty to, "collect and reduce to money the property of the estate for which such trustee serves, and close such estate as expeditiously as is compatible with the best interests of parties in interest" 11 U.S.C. §704(a)(1). The trustee has a statutory power that is construed through 547, 550, and 704(a)(1). The payments to Pink were made within one year and aggregated to $20,000, satisfying the one-year requirement in 547. R at 7. However, that is not the issue. The issue that ties together the statutes are whether the action qualifies as property of the estate.

B. <u>The Broad Language of Section 541 incorporates a Cause of Action to Qualify as Property of the Estate.</u>

Section 541(a)(1) explains property of the estate as, "all legal or equitable interests of the debtor in property as of the commencement of the case". 11 U.S.C. 541(a)(1). Continuing with the language of the statute, the term "commencement" has a profound impact on the interpretation. The majority in the United States Court of Appeals for the 13th Circuit explained that "as of commencement of the case" means that 541(a)(1) only pulls claims that existed prior to the petition date. Therefore, not the avoidance powers that the trustee wields. R. at 20. *Sec. Inv'r Prot. Corp. v. Bernard L. Madoff Inv. Sec*., LLC, 460 B.R. 106 (Bankr. S.D.N.Y. 2011) has read "as of the commencement of the case" more broadly than the majority in the appellate court, "'All legal or equitable interests of the debtor in property as of the commencement of the case'…Property of the estate therefore includes any cause of action the debtor had on the petition date, as well as avoidance actions created on the petition date". *Madoff Inv. Sec*., LLC, 460 B.R. 106, 114 (Bankr. S.D.N.Y. 2011). The New York Southern Bankruptcy Court has a vastly different interpretation than the majority. Section 541 is not easily digestible, and it was intended to be, (a) "broad definition of 'property of the estate'". *Patterson v. Shumate*, 504 U.S. 753, 757, 112 S. Ct. 2242, 2246 (1992). Speaking generally, courts have found that cause of actions qualify as property of the estate. In *Parker v. Goodman (In re Parker)*, 499 F.3d 616 (6th Cir. 2007), the court held, "'legal and equitable interests,' causes of action that belong to the debtor constitute property of the estate under § 541(a)(1)." *Goodman (In re Parker)*, 499 F.3d 616, 624 (6th Cir. 2007). *See also*, *Granfinanciera v. Nordberg*, 492 U.S. 33, 109, 2796 S. Ct. 2782 (1989) (The court adding that there is a "…right to recover a fraudulent conveyance under 11 U.S.C. § 548(a)(2)").

The majority in the Appellate decision claimed chapter 5 cause of actions are statutory powers, not property of the estate. That analysis is incorrect for two reasons. First, the language of 541 is broader than the majority paints it. The section's introductory clause starts as, "the estate is comprised of all the following property". It does not say "the estate is *only* comprised of…" Brendan Gage, *Is There a Statutory Basis for Selling Avoidance Actions*, Norton Journal of Bankruptcy Law and Practice, May. 2013, at 10. The section can be read in a more general manner, and it is not a concrete and definitive list. Second, the Supreme Court decision of *United States v. Whiting Pools*, Inc., 462 U.S. 198, 103 S. Ct. 2309 (1983) argues that causes of action are property of the estate. The court explained 541(a)(1), "as a definition of what is included in the estate, rather than as a limitation." *Whiting Pools, Inc.,* 462 U.S. at 2312 (1983). The court also mentioned:

> In the context of this case, § 541(a)(1) is intended to include in the estate any property made available to the estate by other provisions of the Bankruptcy Code. See H. R. Rep. No. 95-595, p. 367 (1977). Several of these provisions bring into the estate property in which the debtor did not have a possessory interest at the time the bankruptcy proceedings commenced. *Whiting Pools, Inc.*, 462 U.S. at 2313-14 (1983)

The court not only includes preference action as property of the estate but takes it a step further to even include estate property that was not clear at the commencement. Which demonstrates as analogous to the current case.

C. <u>The 5th, 7th, 8th, and 9th Circuit agree that avoidance actions are property of the estate.</u>

Four of the circuits have agreed that a cause of action qualifies as property of the estate. Each Circuit has their own interpretation of this issue since each Circuit has not been presented solely on avoidance actions constituting as property of the estate. The 3rd Circuit is the only circuit that definitively disagrees. Brendan Gage, *Is There a Statutory Basis for Selling Avoidance Actions*, Norton Journal of Bankruptcy Law and Practice, May. 2013, at 10.

The 5th Circuit's first case was *In re MortgageAmerica Corp.*, 714 F.2d 1266 (5th Cir. 1983). The case was about a creditor who brought three claims against the shareholders of a chapter 7 bankruptcy in state court. The court explained, "The debtor continues to have a 'legal or equitable interest' in the property fraudulently transferred within the meaning of 11 U.S.C.S. § 541(a)(1) of the Bankruptcy Code." Id at 1267. Also, the court cited *Whiting Pools* in their decision as well, "541(a)(1) is intended to include in the estate any property made available to the estate by other provisions of the Bankruptcy Code," [*1276] which would include property made available... *Whiting Pools, supra*, 103 S. Ct. at 2313." Id at 1275-76. The court here does not outright say it, but it is clear the intent is that avoidance, preference or fraudulent transfers of property qualify as property of the estate. This came to a head in *Cadle Co. v. Mims (In re Moore)*, 608 F.3d 253 (5th Cir. 2010). That court said, "Thus, under our precedent, the Texas fraudulent-conveyance actions are property of the estate under § 541(a)(1) that the trustee may sell to Cadle." *Id* at 259. *MortgageAmerica* starts out vague and unclear, but *Cadle* confirms that fraudulent transfers are in fact property of the estate.

In the 7th Circuit, in the case of *In re Leonard*, 125 F.3d 543 (7th Cir. 1997) the court described, "the fraudulent-conveyance suit is 'property of the estate'". *Id* at 544. Deciding if the action was property of the estate or not was not the main purpose of this case, but it clearly states that is property of the estate. *See* *Mellon Bank, N.A. v. Dick Corp*., 351 F.3d 290 (7th Cir. 2003), "no one doubts that this debtor in possession (or a trustee) could bring a preference-recovery action under § 547. [**9] The operating business counts as an 'estate'". *Id* at 293. *Mellon* gives the most conclusive answer in the 7th circuit that elaborates that preference actions can be brought by a trustee and that operating business in *Mellon* counts as property of the estate.

In the 8th circuit the prominent case is *Pitman Farms v. ARKK Food Co., LLC (In re Simply Essentials, LLC)*, 78 F.4th 1006 (8th Cir. 2023). The court firmly elaborates on, "Avoidance actions are property of the estate… that only a trustee or debtor in possession may pursue once a bankruptcy is under way." *Id* at 1010. The 8th Circuit is the clearest in its intentions and evidently states that avoidance actions are property of the estate. The court cited *Whiting Pools* many times throughout the opinion and was persuaded by it.

The 9th Circuit held in *Silverman v. Birdsell*, 796 F. App'x 935 (9th Cir. 2020) that, "that a bankruptcy trustee may sell an estate's avoidance claims to a creditor when the creditor is pursuing interests common to all creditors and allowing the creditor to exercise those powers will benefit the remaining creditors." *Id* at 937. The 9th Circuit is clear in their opinion here and also adds the provision to make sure all the creditors are aligned in their interest. In the current matter, getting back the preference action from Pink would maximize the estate and fulfill the requirements from the 9th Circuit.

The 3rd Circuit is the lone circuit that disagrees with the other analyses. The majority in this case presumes *Cybergenics* to conclusively say it cannot transfer cause of actions, but this is incorrect. The first reason, as the dissent provided in *Artesanias Hacienda Real S.A. de C.V. v. N. Mill Capital, LLC (In re Wilton Armetale, Inc.*), 968 F.3d 273 (3d Cir. 2020) the 3rd Circuit never meant *Cybergenics* to be interpreted as the majority thought. The court said,
"But *Cybergenics* does not hold that trustees cannot transfer causes of action. It leaves that question open because the asset transfer at issue did not reach the creditors' claims." *Id* at 285. The court that decided *Cybergenics* enlightens that Cybergenics was never intended to say trustees cannot transfer causes of action. Furthermore, the court leaves that question unanswered and open. The second reason, in *Official Comm. of Unsecured Creditors of Cybergenics Corp. ex rel. Cybergenics Corp. v. Chinery*, 330 F.3d 548 (3d Cir. 2003) the court continually says "assets of the debtor…" *Id* at 554. Assets of the debtor and property of the estate are two different concepts and the court never distinguish them. The bankruptcy code differentiates property of the estate and asset of the debtor. Brendan Gage, *Is There a Statutory Basis for Selling Avoidance Actions*, Norton Journal of Bankruptcy Law and Practice, May. 2013, at 12. The 3rd Circuit arguably takes the hardest stance on transferring causes of action, but the majority inflates *Cybergenics* purpose.

D. Policy implications of Allowing Preference Actions to Qualify as Property of the Estate Create Asset Maximization

Section 704(a) gives the trustee a duty to, "Collect and reduce [of] the property of the estate". The trustee has a duty to maximize the value of the estate, and the sale of avoidance actions maximize the assets (of the estate). The sale of avoidance actions would allow the trustee to convert the action into cash for the creditors for a pro rata distribution. Doing so, would maximize the estate and fulfill *Cybergenics* the trustee's statutory duties. *See Commodity Futures Trading Com v. Weintraub*, 471 U.S. 343, 105 S. Ct. 1986 (1985). Which states, "in seeking to maximize the value of the estate, the trustee must investigate the conduct of prior management to uncover and assert causes of action against the debtor's officers and directors." *Id* at 1993. Not only does the trustee have a duty to maximize the estate, "he or she also has a duty to minimize administrative expenses." R at 35. The purchase price by eclipse is reasonable. R at 35. Also, the sale eliminates the need for the Trustee to, "incur administrative expenses investigating and litigating the preference claim, the ultimate distribution to creditors is maximized." R at 35. The trustee, here, has fulfilled her statutory duty.

CONCLUSION

For the reasons stated above, the Petitioner respectfully requests that this court reverse the decision of the United States Court of Appeals for the Thirteenth Circuit and hold: (1) the post-petition, pre-conversion increase in equity insures to the benefit of the bankruptcy estate and (2) that the trustee may sell, as property of the bankruptcy estate, the ability to avoid and recover transfers.