Team R44

Docket No. 23-0115

IN THE

Supreme Court of the United States

IN RE EUGENE CLEGG, DEBTOR

VERA LYNN FLOYD, CHAPTER 7 TRUSTEE, PETITIONER

V.

EUGENE CLEGG, RESPONDENT

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

BRIEF FOR RESPONDENT

Team R44
Counsel for Respondent

QUESTIONS PRESENTED

1. Whether a post-petition increase in equity in a debtor's property during chapter 13 proceedings becomes part of the bankruptcy estate or inures to the benefit of the debtor upon a good-faith conversion of the case 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 Bankruptcy Moot Court Competition.

STATEMENT OF THE FACTS

Like many bankruptcy cases, this appeal arises from an unfortunate set of circumstances. After a distinguished military career, Cpl. Eugene Clegg (ret.) (the "Debtor") retired from the United States Army in 2011, with the hope of becoming a small business owner in the City of Moot. R. at 5. Later that year, his aspirations were realized when his mother, Emily "Pink" Clegg ("Pink"), gave him ownership of Final Cut, LLC ("Final Cut"), a business which owns and operates a single-screen movie theater in Moot. *Id.* For years, the business was profitable and Mr. Clegg contented himself with a modest salary from the business. *Id.*

In 2016, the Debtor had Final Cut borrow $850,000 from Eclipse Credit Union ("Eclipse") to renovate the theater. *Id.* Eclipse was granted first priority liens on Final Cut's real and personal property, and Mr. Clegg executed an unconditional, unsecured personal guaranty in an unlimited amount. *Id.* When Mr. Clegg used the loan proceeds, he was conscious of costs. He undertook much of the renovation work himself and enlisted many local veterans who were willing to volunteer. *Id.* Having saved money on labor due to the gracious support of volunteering veterans, Mr. Clegg had Final Cut donate the remaining proceeds of the loan, about $75,000, to the Veterans of Foreign Wars. *Id.* The renovations were a hit among the community and helped keep Final Cut in the green for three more years. *Id.* at 5–6.

Mr. Clegg's luck turned in 2020. As COVID-19 spread across the country, the Governor of the State of Moot issued stay-at-home orders. *Id.* at 6. Final Cut, Mr. Clegg's sole source of income, was unable to operate for a year. *Id.* He was forced to borrow, on an unsecured basis,

$50,000 from his mother, Pink. *Id.* But despite this injection of cash, things only got worse. Even after the theater re-opened, attendance did not rebound. *Id.* Without any source of income, Mr. Clegg was thrust into financial peril, incurring credit card debt and falling behind on his home mortgage, serviced by Another Brick in the Wall Financial Corporation (the "Servicer"). *Id.* The Servicer commenced foreclosure proceedings. *Id.*

In late 2021, Mr. Clegg sought relief by filing a petition under chapter 13 of the Bankruptcy Code (the "Petition Date"). *Id*. On Schedule A/B, Mr. Clegg's home was valued at $350,000 as of the Petition Date. *Id*. To preserve some equity in his home, he claimed a homestead exemption in the amount of $30,000. *Id.* Schedule E/F and Schedule H do not specify the amount owed to Eclipse. *Id.* On Schedule D, Mr. Clegg owed $320,000 to the Servicer, secured by the home. *Id.* Schedule E/F and Schedule H do not specify the amount owed to Eclipse. *Id.* Finally, in his Statement of Financial Affairs, Mr. Clegg disclosed that within one year prior to the Petition Date, he made a payment of $20,000 to Pink. *Id.* at 7.

Mr. Clegg filed a chapter 13 plan to make payments to creditors. *Id.* The plan provided that the value of his home was $350,000. *Id.* And given the secured indebtedness to the Servicer and the homestead exemption, the plan stated Mr. Clegg had no equity in his home as of the Petition Date. *Id.* All parties hoped that payments under the plan would be funded by Final Cut's future profits. *Id.*

At the meeting of creditors, Eclipse first learned about the Debtor's donation to the Veterans of Foreign Wars. *Id.* Eclipse was livid, and quickly commenced an adversary proceeding seeking to have the Loan declared non-dischargeable. *Id.*

After Mr. Clegg filed his proposal, the chapter 13 trustee and Eclipse both raised objections. First, the trustee argued that the plan should provide an extra $20,000 to creditors, since that amount would be recovered from Pink and distributed among creditors if the estate were liquidated under Chapter 7. *Id.*; 11 U.S.C. § 547. In a settlement, the trustee and Debtor agreed to increase the aggregate payments, with a stipulation that the trustee would not avoid and recover the preferential transfer to Pink. R. at 7–8. Still, Eclipse objected to Mr. Clegg's plan as not being proposed in good faith. *Id.* at 8; 11 U.S.C. § 1325(a)(3). Eclipse withdrew its objection in exchange for a claim in the amount of $150,000, with $25,000 deemed non-dischargeable. R. at 8. The plan was confirmed on February 12, 2022, vesting all property of the estate in the Debtor. *Id.*

Mr. Clegg made payments for eight months. *Id.* But in 2022, he got sick, was not able to work, and was forced to permanently close Final Cut, causing Eclipse to commence foreclosure proceedings. *Id.* Mr. Clegg could not make his payments, so he filed for conversion to Chapter 7, which the bankruptcy court granted. *Id.*

Vera Lynn Floyd (the "Trustee") was appointed to administer Mr. Clegg's estate. *Id.* at 9. The conversion schedules stated that the Debtor owed Eclipse about $200,000 due to the deficiency with respect to his guarantee of the Loan. *Id.* It also disclosed the preferential transfer to Pink. *Id.* But while the documents still stated that the value of Mr. Clegg's home was $350,000, the Trustee commissioned an appraisal of the home, which found that the non-exempt equity in it had appreciated by $100,000 since the Petition Date. *Id.*

Seeking to liquidate the home, the Trustee began marketing the home for sale. *Id.* Eclipse offered to purchase it as well as the claim to the preferential transfer for $470,000. *Id*. The Trustee filed a motion (the "Sale Motion") to sell the home and preference claim. *Id.*

This appeal arises out of Mr. Clegg's objections to that Sale Motion. *Id.* at 10. First, he argues that any post-petition, pre-conversion increase in the equity of his home should inure to his benefit. *Id.* Without any equity available for the estate, the Trustee is therefore prohibited from selling the home. *Id.* Second, the Mr. Clegg argues that preference claims cannot be sold. *Id.*

The bankruptcy court and the Thirteenth Circuit have agreed with Mr. Clegg. *Id.* 10–24. In affirming the bankruptcy court's decision, the Thirteenth Circuit held that allowing post-petition, pre-conversion increases in equity to inure to the benefit of the estate would run contrary to the Code's statutory scheme and purpose. *Id.* at 10–17. Moreover, the court concluded that preference actions cannot be sold because they do not constitute property of the estate. *Id.* at 17–24. Instead, it is a right that can be exercised only by the trustee. *Id.*

SUMMARY OF ARGUMENT

Post-petition, pre-conversion property interests belong to the debtor who, in good faith, converts his case from chapter 13 to chapter 7. This conclusion is supported by the statutory text and the policy considerations underlying chapter 13 of the Bankruptcy Code.

In determining what property interests are included in the bankruptcy estate, we must look at the text of the statute, along with its context within the Bankruptcy Code. For conversions from chapter 13, the chapter 7 estate consists of the "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." 11 U.S.C. § 348(f)(1)(A). This stands in contrast to the debtor who converts from chapter 13 in bad faith, since their chapter 7 estate includes all the debtor's assets and property "as of the date of conversion." 11 U.S.C. § 348(f)(2). This latter provision is meant to serve as punishment for bad behavior. Post-petition property interests must not be included in the bankruptcy estate of debtors who converted to chapter 7 in good faith, or else these individuals would be treated the same under § 348(f) as those who converted in bad faith. Without a substantive difference in what is included in the estate upon conversion, Congress's intent to punish bad faith is subverted. As a pure policy matter, that is unwise, but it would also be a non-sensical reading, rendering superfluous two provisions of the same subsection.

To include post-petition property interests in the estate upon conversion would also create inconsistencies between the definition and valuation of the assets being liquidated by the chapter 7 trustee and the amounts which can be exempted from this duty to liquidate. *See* 11 U.S.C. § 522. Unless we interpret the statutes in a way that creates a financial snapshot of the debtor's circumstances, we will create illogical inconsistencies and discourage chapter 13 proceedings, which due to their prolonged temporal nature are bound to see one's financial circumstances change before a possible conversion. Here, this inconsistency would mean that the value of the debtor's property interest would be $450,000 in the chapter 7 liquidation estate but only $350,000 for the purposes of calculating the homestead exemption which protects the home from liquidation.

Chapter 13 proceedings are beneficial on all fronts, allowing debtors to obtain a fresh start while holding onto their homes and granting creditors access to a stream of funds that is often greater than they would be able to recover in a case initiated under chapter 7. Without an assurance that a debtor's post-petition assets and property interests will be protected from creditors in the event of conversion, debtors would be much less likely to pursue the three-to-five-year chapter 13 repayment process.

In addition, this Court should hold that the Trustee cannot sell the action to avoid and recover the preferential transfer. A debtor does not have a property interest in preference actions, so it is not property of the estate. Although some courts have argued that preference actions are causes of action that a debtor has a property interest in, preference claims are not the causes of action Congress sought to include within the definition of "property of the estate." But Congress only sought to include a debtor's pre-petition, independent causes of action within the definition of "property of the estate." In contrast to these, a debtor cannot enforce a preference action himself, so he does not have an interest in it. Without a property interest in the preference action itself, as opposed to the property recovered from the action, Mr. Clegg does not have an interest in the preference action. And so the Trustee may not sell it.

Preference actions are statutorily created powers that can only be exercised by a trustee. Such actions only arise in bankruptcy proceedings and are only meant to assist the trustee in carrying out their duties. Although collecting and then distributing consideration paid for a preference claim seems to benefit the estate, selling actions would run contrary to the purpose underlying the preference provision as well as a trustee's obligation to act in the benefit of the estate. In contrast to a trustee acting as a neutral arbitrator, a creditor could instead use preference actions as a weapon. Moreover, a trustee might sell preference actions without disclosing that they are meritless. This Court should be weary of the potential for such abuse. To hold that preference actions are not sellable and to deny the Sale Motion would be to rule in line with more than a century of precedent.

ARGUMENT

I. A post-petition, pre-conversion increase in equity in a debtor's property inures to the benefit of the debtor upon a good-faith conversion of a case from chapter 13 to chapter 7 pursuant to 11 U.S.C. §§ 348 and 541.

Chapter 7 of the Bankruptcy Code "allows a debtor to make a clean break from his financial past, but at a steep price: prompt liquidation of the debtor's assets." *Harris v. Viegelahn*, 575 U.S. 510, 513 (2015). After filing under chapter 7, a debtor's assets are transferred to a bankruptcy estate, 11 U.S.C. § 541(1)(a), and a trustee is appointed and charged with selling the non-exempt property in the estate and distributing the proceeds to the debtor's creditors. *See* 11 U.S.C. §§ 704(a)(1), 726.

Filing under chapter 13 is an alternative for debtors with a steady stream of income that allows them to achieve that fresh start while maintaining possession of their homes and other property. *See Harris*, 575 U.S. 510, 514 (2015); 11 U.S.C. §§ 1306(b), 1327(b). The debtor proposes and gains court approval of a three-to-five-year plan to repay his debts, generally using the debtor's "future earnings or other future income." 11 U.S.C. § 1322(a)(1). This arrangement is often mutually beneficial—a debtor retains their property, and creditors often collect more than they would have received if the debtor had originally filed under chapter 7. *See Harris*, 575 U.S. 510, 514 (2015); 11 U.S.C. §§ 1325(a)(4), 1325(b)(1)(B).

Unfortunately, most of the individuals who file for chapter 13 bankruptcy fail to successfully complete their payment plan, forcing them to either convert their case to another chapter or have their case dismissed entirely. 11 U.S.C. §§ 348, 349, 1307. When a debtor converts their case to another chapter and remains in the bankruptcy system, this conversion generally "does not effect a change in the date of the filing of the petition." 11 U.S.C. § 348(a); *but see* 11 U.S.C. § 348(f)(2) ("If the debtor converts a case under chapter 13 of this title to a case under another chapter under this title *in bad faith*, the property of the estate in the converted case shall consist of the property of the estate *as of the date of conversion*) (emphasis added). Given that chapter 13 payment plans last anywhere from three to five years, a debtor's financial circumstances and assets can naturally change before they are forced to convert their case.

Whether a post-petition appreciation in the value of property during chapter 13 proceedings becomes part of the converted chapter 7 bankruptcy estate is "an issue which has confounded judges all over the country." *Castleman v. Burman (In re Castleman)*, 75 F.4th 1052, 1058 (9th Cir. 2023) (Tallman, J., dissenting).[1]

A. Examination of the relevant statutes' context and place within the broader structure of the Bankruptcy Code suggests that this post-petition, pre-conversion increase in equity belongs to the debtor acting in good faith, not the bankruptcy estate.

The section of the Bankruptcy Code outlining the effects of a conversion tells us how to determine the contents of a post-conversion bankruptcy estate. It states as follows:

> Except as provided in paragraph (2) [which deals with bad faith conversions], when a case under chapter 13 of this title is converted to a case under another chapter under this title, 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.

11 U.S.C. § 348(f)(1)(A). Applying the usual tools of statutory construction, the first step is to determine whether the language has a plain and unambiguous meaning with regard to the particular dispute. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997).

But this Court does not construe statutory language "in a vacuum." *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989). We cannot properly understand a statute's exact meaning, especially in the complex and comprehensive Bankruptcy Code, without considering the section or subsection's relation to the rest of the Code. It is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *National Assn. of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666 (2007) (internal quotation marks omitted); *see also Robinson v. Shell Oil Co.*, 519

[1] *Compare In re Barrera*, 22 F.4th 1217 (10th Cir. 2022), *In re Hodges*, 518 B.R. 445, 451 (E.D. Tenn. 2014), *In re Leon & Elionder Harmon*, 2022 WL 20451952 (Bankr. E.D. La. June 9, 2022), *In re Cofer*, 625 B.R. 194, 202 (Bankr. D. Idaho 2021) (abrogated by *Castleman*), and *In re Niles*, 342 B.R. 72, 75 (Bankr. D. Ariz. 2006) (abrogated by *Castleman*), *with In re Castleman*, 75 F.4th 1052 (9th Cir. 2023), *In re Goins*, 539 B.R. 510, 515–16 (Bankr. E.D. Va. 2015), *In re Goetz*, 647 B.R. 412, 416–17 (Bankr. W.D. Mo. 2022), *In re Peter*, 309 B.R. 792, 794–95 (Bankr. D. Or. 2004), and *Potter v. Drewes (In re Potter)*, 228 B.R. 422, 424 (B.A.P. 8th. Cir. 1999).

U.S. 337, 340 (1997) ("The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole."). In addition to text, context, and structure, the Court often looks to history and purpose to determine the meaning of statutory language. *See, e.g., Maracich v. Spears*, 570 U.S. 48, 76 (2013). In this case, we must look at how the above quoted statute interacts with 11 U.S.C. §§ 348(f)(2) and 522(a)(2)—the subsection defining the property of the estate in bad-faith conversions from chapter 13 and the subsection outlining how and when to determine the value of various exemptions, respectively.

Whereas 11 U.S.C. § 348(f)(1)(A) sets our temporal reference point for determining the property of the estate at "the date of filing of the petition," subsection (f)(2) says that if a debtor converts a chapter 13 case in bad faith, "the property of the estate in the converted case shall consist of the property of the estate *as of the date of conversion*." 11 U.S.C. § 348(f)(2) (emphasis added). This provision serves as a punishment and deterrent of bad-faith conversions. Since the property of the estate for those who convert from chapter 13 in good faith would only include those property interests which the debtor had at the filing of the chapter 13 petition, 348(f)(2) ropes new property interests into the pool of assets which will be liquidated by the chapter 7 trustee for the benefit of the debtor's creditors. *Id.* It punishes those who would abuse the system by requiring forfeiture of the property gains which they would normally keep upon good-faith conversion from chapter 13. *See Harris v. Viegelahn*, 575 U.S. 510, 517 (2015).

If Congress intended to include post-petition, pre-conversion property and assets in § 348(f)(1)(A), then the distinction between good- and bad-faith conversions would be superfluous. Those who converted in bad faith would receive no worse treatment from § 348(f)(2) than anyone who converted in good faith. *See In re Barrera*, 22 F.4th 1217, 1221 (2022) ("And those debtors who convert from Chapter 13 to Chapter 7 in bad faith are punished because their otherwise immune post-petition property interests are available for liquidation and distribution to creditors."). This cannot be the case. Foundational rules of statutory construction require us to interpret legislation "so that no part of the statute would be rendered insignificant, inoperative, or superfluous." *In re Sullivan*, 596 B.R. 325, 333 (Bankr. N.D. Tex. 2019) (citing *Duncan v. Walker*, 533 U.S. 167, 174 (2001)). Lest we turn § 348(f)(2) into surplusage, we must not consider post-petition, pre-conversion property interests, like the increase in equity in one's home, to be part of the property of the estate as outlined in § 348(f)(1)(A).

The valuation of a bankruptcy estate, as outlined in 11 U.S.C. § 522, would also be inconsistent if we were to include post-petition property interests in the converted chapter 7 estate. Conversion does not create a whole new case; rather, it merely changes the nature of the bankruptcy proceedings. *See* 11 U.S.C. § 348(a). In the case of a conversion from chapter 13 to chapter 7, the contents and valuation of bankruptcy estate are fixed in time at the point where the case was originally filed. A conversion to chapter 7 does not create an entirely new order for relief but rather shifts the approach the trustee and debtor must take to clear the remaining debts. Where chapter 13 allowed for gradual repayment and ensured debtors retained control of their property interests, chapter 7 expedites the process and mandates prompt liquidation of the bankruptcy estate to pay creditors.

By fixing our attention on the assets and property interests under the debtor's control at the initiation of the bankruptcy proceedings, § 522 creates what is often called a "snapshot," freezing the debtor's financial situation in time based on "the date of the filing of the petition" for the purposes of determining, for example, the value of a homestead exemption. 11 U.S.C. § 522(a)(2); *see also In re Rockwell*, 968 F.3d 12, 17 (1st Cir. 2020). This snapshot is especially important in the context of conversions since a debtor's financial situation is almost certain to change after any extended period in the bankruptcy system. Section 348(f)(1)(A) uses language which, like § 522, allows us to create a financial snapshot based on the filing date of the petition. If we were to include equity gained after the commencement of the debtor's chapter 13 case in the converted chapter 7 estate, the value of the home would be inconsistent—it would be valued at $450,000 in the chapter 7 estate but only at $350,000 for purposes of his homestead exemption. Both of these statutes reference the date of the original petition; surely this inconsistent outcome must be incorrect.

To include property interests which did not exist at the time of the original petition in the new, converted bankruptcy estate would betray the language and context of the statute. It would nullify the punishment Congress created for people who game the system and convert their chapter 13 case in bad faith. And it would create inconsistent valuations of property of the estate and the exemptions which keep that property from being promptly liquidated. While we are concerned first and foremost with the text of the statute, a reading of § 348(f)(1)(A) which renders superfluous provisions from the very same subsection and ignores the statute's interaction with the rest of the Code is incomplete and improper.

B. To rule that a post-petition, pre-conversion increase in equity inures to the bankruptcy estate would be contrary to the purpose and policy behind chapter 13.

Chapter 13 is designed to be mutually beneficial for debtors and creditors. *Harris v. Viegelahn*, 575 U.S. 510, 514 (2015). The debtor makes payments under the assurance that they will be allowed to retain their home, car, and other assets, and creditors are able to recover as much or more as they would have under a chapter 7 case. *Id.* It is common sense that we ought to encourage this behavior rather than deter it by punish debtors when, despite their best efforts, they cannot make the plan work over an extended three-to-five-year period. If this Court decides that post-petition property interests ought to be included in cases where a chapter 13 debtor makes a good-faith conversion to chapter 7, it will suggest to those seeking a fresh start through our bankruptcy system that engaging in a prolonged repayment plan is a fool's errand.

In this case, to rule for the Trustee would potentially place Eugene Clegg in a worse position than if he had filed a chapter 7 case in the first place. Where he had no equity in his home at the commencement of these proceedings, he has gained $100,000 in equity since beginning to repay his debts nearly a year before he was unfortunately forced to convert to chapter 7 due to illness and loss of income. Clegg is a man looking for a fresh start, to pay his debts and start again strong.

* * *

The Court faces a challenging but fundamentally important problem in this case. The principal purpose of the Bankruptcy Code is to grant a "fresh start to the honest but unfortunate debtor." *Marrama v. Citizens Bank of Massachusetts*, 549 U.S. 365, 367 (2007) (citing *Grogan v. Garner*, 498 U.S. 279, 286, 287 (1991)) (internal quotation marks omitted). Unfortunately, most of these honest debtors fail to successfully complete a chapter 13 repayment plan. *See* Katherine Porter, *The Pretend Solution: An Empirical Study of Bankruptcy Outcomes*, 90 TEX. L. REV. 103, 107–11 (2011) (finding that only one in three cases filed under chapter 13 ends in discharge). That is why "Congress accorded debtors a nonwaivable right to convert a Chapter 13 case to one under Chapter 7 'at any time.'" *Harris v. Viegelahn*, 575 U.S. 510, 514 (2015) (citing 11 U.S.C. § 1307(a)).

Given the high volume of conversions from chapter 13 to chapter 7 and the considerable increase in home values nationwide in recent years, this is a decision that could affect a massive amount of the individuals who seek relief in our bankruptcy system. *See* R. at 9 (noting that "homes in [the Debtor's] neighborhood were selling at a premium, consistent with a nationwide increase in home values in the years following the COVID-19 pandemic"); R. at 24, note 17 (noting that from mid-2020 to mid-2022, home values increased 40 percent nationwide) (citing Christopher G. Bradley, *Rising Home Values and Chapter 13: Who Gets the Benefits?*, 43 No. 6 BANKRUPTCY LAW LETTER NL 1, June 2023).

To avoid non-sensical readings of the statutory text, respect Congress's purpose in adopting § 348(f), and properly incentivize good-faith repayment under chapter 13 plans, this Court should affirm the Thirteenth Circuit and rule that post-petition, pre-conversion increases in equity in a debtor's property inure to the benefit of the debtor upon good-faith conversion of their case from chapter 13 to chapter 7.

II. A chapter 7 trustee may not sell, as property of the bankruptcy estate, the ability to avoid and recover transfers pursuant to 11 U.S.C. §§ 547 and 550.

Under § 547(b), "the trustee may . . . avoid any transfer" of property that the debtor made to a creditor shortly before filing for bankruptcy. 11 U.S.C. § 547(b). § 550(a) then allows a trustee to recover that property for the benefit of the estate. 11 U.S.C. § 550(a). The power to avoid and recover these preferential transfers is one of many "avoidance actions" that a trustee possesses to avoid and recover property. *See, e.g.* 11 U.S.C. § 544. Preference actions "ha[ve] been a core aspect of the administration of bankrupt estates since at least the 18th century." *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 372 (2006) (citations omitted).

Questions arise, however, when a trustee tries to sell or assign a preference action, as the Trustee has sought to do here. "[I]t is unsettled law whether such a transfer can take place" *Howard v. Fidelity & Deposit Co. of Maryland (Matter of Royale Airlines, Inc.)*, 98 F.3d 852, 856 (5th Cir. 1996). Although few courts have been squarely presented with the question of whether a trustee may sell a preference action, many courts have heard analogous questions, such as whether a non-trustee has standing to bring a preference action or whether a trustee may sell an action to avoid a fraudulent conveyance. In light of the reasoning of courts and the text of the Bankruptcy Code, preference claims may not be sold. They are not property of the estate, and Congress exclusively reserved the right to bring such claims to the trustee. To hold otherwise would upend established pre-Code doctrine that has not been superseded by statute. The Trustee's Sale Motion must be denied.

C. Preference actions may not be sold because they are not property of the estate.

Actions to avoid and recover preferential transfers cannot be sold because they are not property of the estate. "[A] trustee may sell only assets that are property of the estate." *Cadle Co. v. Moore (In re Moore)*, 608 F.3d 253, 258 (5th Cir. 2010) (citing *Institutional Creditors of Cont'l Air Lines, Inc. v. Cont'l Air Lines, Inc. (In re Cont'l Air Lines, Inc.)*, 780 F.2d 1223, 1226 (5th Cir.)); *see also* 11 U.S.C. § 363(b)(1) (authorizing a trustee to sell "property of the estate"). Congress has defined what constitutes "property of the estate" in § 541(a). That provision states that an "estate is comprised of all the following property," then provides a list of property that is included in the estate. 11 U.S.C. § 541(a). But "notably absent from this [list] is any avoidance action that the trustee might have." *Feringa v. ABN Amro Mortg. Grp., Inc. (In re Feringa)*, 376 B.R. 614, 624 (Bankr. W.D. Mich. 2007).

Given that avoidance actions are not expressly included within the property of the estate, if preference actions are to be included within the definition of estate property, such actions would have to come in under one of the general provisions that "simpl[y] reference . . . what interests in property the debtor has." H.R.Rep. No. 95–595, 175 (1977). These provisions include as property of the estate any "interest" in property that the debtor has "as of commencement of the case" and any interest in property the estate acquires "after the commencement of the case." 11 U.S.C. §§ 541(a)(1), (7).[2] Although this Court has specified that § 541(a) defines but does not limit property of the estate, Congress has expressly limited property of the estate under subsections (a)(1) and (a)(7) to equitable interests that the debtor possesses in property. *Compare United States v. Whiting Pools, Inc.*, 462 U.S. 198, 203 (1983), *with* H.R.Rep. No. 95–595, 368 (1977) (stating that the trustee "could take no greater rights than the debtor himself had"). The question is whether Mr. Clegg had a property interest in the action to avoid and recover the transfer of $20,000 to his mother.

Because the debtor does not have a pre- or post-petition interest in avoidance actions, such actions are not property of the estate that can be sold. Yet, some courts present a persuasive syllogism: the debtor's interests include causes of action and avoidance actions are causes of actions, so avoidance actions constitute interests of the debtor includable as property of the estate. *See, e.g.*, *Pitman Farms v. ARKK Food Co. (In re Simply Essentials)*, 78 F.4th 1006, 1008 (8th Cir. 2023).

But preference actions are not interests of the debtor because they are not causes of action *that belong to the debtor*. To be sure, Congress does expressly include as a debtor's interests choses in action and causes of action. H.R.Rep. No. 95-595, 175–76 (1977). But the causes of action that Congress is referencing should not be conflated with avoidance actions. Many courts have made the distinction between causes of action that a debtor possesses outside of bankruptcy and avoidance actions. *See, e.g.*, *Strategic Partners Int., Inc. v. Fabian (In re Fabian)*, 458 B.R.

[2] Because subsections (a)(1) and (a)(7) reference interests before and after the commencement of a case, courts have contemplated whether avoidance actions create an interest *at* the moment of commencement. *See, e.g., Pitman Farms v. ARKK Food Co. (In re Simply Essentials)*, 78 F.4th 1006, 1008 (8th Cir. 2023). But whenever this temporal issue is raised, courts dismiss it. *See e.g.*, *Sec. Inv'r Prot. Corp. v. Bernard L. Madoff Inv. Sec., LLC*, 460 B.R. 106, 114 (Bankr. S.D.N.Y. 2011). We therefore focus our analysis on whether avoidance actions constitute an interest in property, regardless of when such actions are created and acquired.

235, 258 (Bankr. D. Md. 2011) (noting that avoidance actions "are independent of, and separate from, prepetition causes of action possessed by the debtor outside of bankruptcy"); *Official Comm. Of Unsecured Creditors of Cybergenics Corp. v. Chinery (In re Cybergenics)*, 226 F.3d 237, 243 (3d Cir. 2000). Because a debtor himself can enforce any independent causes of action prior to filing for bankruptcy, the debtor has a possessory interest in causes of action that can be brought outside of bankruptcy. But those causes of action do not resemble the preference actions that arise after a debtor files for bankruptcy. The debtor is never able to enforce a preference action himself, and so the debtor does not have any interest in it.[3]

Congress sought to include within the definition of property of the estate only causes of action that a debtor possesses outside of bankruptcy. *See In re Moore*, 608 F.3d 253 at 259 (stating that "[w]hether an action . . . belongs to the estate under § 541(a)(1) depends on whether the debtor could have brought that action at the commencement of the case") (citation omitted). A preference action is a power peculiar to the bankruptcy proceeding that enables a trustee to distribute property. *In re Cybergenics*, 226 F.3d 237 at 243. Preference actions can be brought by the trustee only *after* a debtor has filed for bankruptcy, relinquished control to the trustee, and is unable to enforce it. *Fonda Group, Inc. v. Marcus Travel (In re Fonda Group, Inc.)*, 108 B.R. 962 (Bankr. D. N.J. 1989). The Code "keep[s] avoidances cabined[ ]so they do not threaten the rule that the estate can take only what the debtor possesse[s]." *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S.Ct. 1652, 1663 (2019). When Congress sought to include the "interests" of the debtor within the definition of property, it did not have preference actions in mind. 11 U.S.C. §§ 541(a)(1), (7).

[3] It is true that a debtor could enforce a preference action as a debtor-in-possession. But a debtor-in-possession "is serving as trustee." 11 U.S.C. § 1101(1). So when we refer to a debtor's inability to bring an independent cause of action, we are referring to a debtor who is not acting in the fiduciary capacity of a trustee.

Characterizing Mr. Clegg as having an "interest" in an action that is not enforceable by him is not a basis for including the preference action as property of the estate.

A debtor's purported "inchoate" interest in preference actions is also not a basis for including them within the definition of property of the estate. Although debtors certainly do not have a possessory interest in avoidance actions, the Eighth Circuit recently held that a debtor does have an inchoate or contingent interest in preference actions. *In re Simply Essentials*, 78 F.4th 1006, 1009 (8th Cir. 2023) (citation omitted). In its feat of judicial acrobatics, the court relied on this Court's holding in *Whiting Pool* that stated property of the estate might include "property in which the debtor did not have a possessory interest at the time the bankruptcy proceedings commenced." 462 U.S. 198 at 205. *Whiting Pools* has been described as "one of the most troubling decisions in bankruptcy." Thomas E. Plank, *The Outer Boundaries of the Bankruptcy Estate*, 47 Emory L.J. 1193, 1234–54 (explaining that *Whiting Pools* "ignored the precise language of the Code[,] created the potential for destroying the already broad statutory boundary[,] and . . . offered no analytical basis"). Capitalizing on *Whiting Pool*'s liberal language, in *Simply Essentials*, the Eighth Circuit nonetheless reasoned that a debtor's "inchoate" interest in avoidance actions arises from the debtor's right to file for bankruptcy, which will then trigger a trustee's power to file avoidance actions. 78 F.4th 1006 at 1009.

Such a broad reading of what constitutes property interests is strained. The *Simply Essentials* decision ignores the fact that an avoidance action never vests in the debtor. Black's Law dictionary defines a "contingent interest" as "[a]n interest *that the holder may enjoy* only upon the occurrence of a condition precedent" and an "inchoate interest" as "[a] property interest that has not yet vested." *Black's Law Dictionary*, 18C, 1800 (11th ed. 2019) (emphasis added). The debtor never "enjoys" the right to exercise avoidance actions, even once those actions arise upon filing a petition for bankruptcy. Although the debtor's decision to file a petition for bankruptcy is a condition precedent to a trustee's later enforcement of a preference action, holding that the debtor has a "contingent interest" in an action that a debtor will never get to enforce or reap the benefits from flies in the face of the plain meaning of what constitutes a property interest. *See also In re Cybergenics*, 226 F.3d 237 at 244 (contrasting the ability to pursue avoidance actions with a debtor or trustee's "personal asset[s]"). Mr. Clegg does not have *any sort* of property interest in the preference action.

Still, the Fifth Circuit concluded that the trustee's avoidance power constituted property of the estate, despite the fact that the debtor did not have any interest in such actions. *In re Moore*, 608 F.3d 253 at 261. But the Fifth Circuit's holding is about a type of avoidance action that is different than preference actions. The decision is confined to avoidance actions brought under § 544(b), a provision that empowers the trustee to bring a *creditor's* pre-petition state action to avoid a transfer. *See In re Moore*, 608 F.3d 253 at 261 n.13 ("focus[ing] narrowly on . . . § 544(b)" and "not address[ing] the broader question whether a trustee may sell all chapter 5 avoidance powers"); 11 U.S.C. § 544(b); *see also* Douglas G. Baird, *Elements of Bankruptcy*, 125 (4th ed. 2006) (noting that "[t]oo often lawyers focus exclusively on § 541 and forget that § 544 does much of the work"). The Fifth Circuit concluded that avoidance powers are property of the estate because, under § 544, the trustee obtains "successor rights" that creditors possessed pre-petition. *In re Moore*, 608 F.3d 253 at 260–61. Under § 547, there is no equivalent pre-petition cause of action possessed by the debtor. A "successor" theory is not applicable to § 547, which vests powers in the trustee that are entirely nonexistent pre-petition. The Fifth Circuit's opinion in *Moore* does not bear on the question before this Court.[4]

[4] One might wonder why *Moore* is distinguishable from our case and *Cybergenics* is not. Both cases interpret actions under § 544, not § 547. However, as we explained, *Moore* rests its holding on a "successor to rights" theory

Property of the estate includes property recovered from a successfully litigated avoidance action, but not the avoidance action itself. 11 U.S.C. § 541(a)(3). In *MortgageAmerica*, the Fifth Circuit held that property that is transferred and later recovered through an avoidance action is property of the estate. *Am. Nat'l Bank of Austin v. MortgageAmerica Corp. (In re MortgageAmerica Corp.)*, 714 F.2d 1266, 1275 (5th Cir. 1983). But the opinion was cited for the proposition that *actions* to avoid and recover property transferred are property of the estate. *See, e.g.*, *In re Moore*, 608 F.3d 253 at 259; *Cumberland Oil Corp. v. Thropp*, 791 F.2d 1037, 1042–43 (2d Cir. 1986). Courts' lack of appreciation for Congress' differing treatment of avoidance actions as compared to the property recovered pursuant to such actions has led to confusion among the lower courts. *C.D. Jones & Co., Inc.*, 482 B.R. 449, 457 (Bankr. N.D. Fla. 2012) (noting that courts "seem to blur the distinction").

The shaky foundation that *MortgageAmerica* has laid is illuminated by the text of the Code. Subsection (a)(3) of § 541 explicitly includes as property of the estate "property that the trustee recovers" *after* the trustee herself enforces and successfully prosecutes the action. 11 U.S.C. §§ 541(a)(3), 550(a), 547.[5] Notably absent from the text of the Code is the inclusion of the avoidance actions that precede recovery of the property. *Xonics Medical Systems, Inc. v. King & Co., Inc. (In re Xonics)*, 63 B.R. 785, 787 (Bankr. N.D. Ill. 1986) (holding that it is "readily apparent that property of the estate would not include the 'concepts of avoiding a transfer,' but [would include] the recoveries from the transferees by avoidances of the transfers"). Moreover,

that is peculiar to § 544. 608 F.3d 253 at 260–61. In contrast, *Cybergenics* rests its holding on the notion that granting the trustee rights or powers does not create or shift property interests, which is an idea equally applicable to all avoidance actions. 226 F.3d 237, 241.

[5] Note, however, that some courts proceed under an equivalent analysis as applied to § 541(a)(4), which includes as property of the estate "[a]ny interest in property preserved for the benefit of or ordered transferred to the estate under" § 551, which in turn preserves any avoided transfer made under § 547 "for the benefit of the estate." § 541(a)(4); § 551.

in the legislative history, Congress notes the distinction between property recovered and avoidance actions. *Id.* at 787 (citing H.R.Rep. No. 95–595, 95th Cong., 1st Sess. 375–376 (1977); Senate Report No. 95–989, 95th Cong., 2d Sess. 90 (1978)). To prescribe any meaning to subsection (a)(3), the provision has to be read as including property, but only to the extent such property has been recovered. *FDIC v. Hirsch (In re Colonial Realty Co.)*, 980 F.2d 125, 132 (2nd Cir. 1992). If property is not recovered, the potential to recover that property cannot be sold by the trustee.

After clearing up the confusion among the lower courts, this Court is faced with a body of case law supporting the conclusion that a debtor does not possess an interest in preference actions and such actions are therefore not includable within the definition of property of the estate. *See, e.g.*, *In re Fabian* 458 B.R. 235 at 258 (holding that avoidance claims "do not represent an interest"). These courts emphasize that avoidance actions are "a power as opposed to an interest." *In re Feringa*, 376 B.R. 614 at 624. Rather than a debtor's property interests that are distributed by a trustee, avoidance actions are a "legal fiction" that "simply enables a debtor in possession to carry out its trustee-related duties." *In re Cybergenics*, 226 F.3d 237 at 246. The preference action cannot be sold because it is a power to be exercised solely by the Trustee, not property of the estate.

D. Only the trustee can bring an action to avoid and recover a preferential transfer.

The Trustee can bring a preference claim, but Eclipse may not. The text of § 547 indicates that the right to bring preference actions is to be exercised only by the trustee. § 547 states that "the trustee may" avoid preferential transfers. 11 U.S.C. § 547. In *Hen House*, this Court interpreted the same language in § 506, a provision providing that "[t]he trustee may" recover certain expenses. *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A. (Hen House)*, 530 U.S. 1, 6–7 (2000). The court found "several contextual features [that] support" the conclusion that persons other than the trustee may not seek recovery under § 506(c), despite the fact that "all [the provision] actually 'says' is that the trustee may seek recovery under the section, not that others may not." *Id.* at 6. The same "contextual features" can be found in the preference section under § 547.

Like § 506, § 547 "authorizes specific action and designates a particular party empowered" to take that action. *Id*. Such provisions should not be presumed to empower other parties to act. *Id.* This is especially true in the context of bankruptcy proceedings, where it is "entirely plausible that Congress would provide a power to [the trustee] and not to others," given the trustee's unique role. *Id.* at 7. Trustees have special qualifications and are trained by the United States Trustee. *In re McGuirk*, 414 B.R. 878, 879 (Bankr. N.D. Ga. 2009). As a "creature of statute," the trustee can only exercise the powers granted to her by the Code. *Delgado Oil Co. v. Torres*, 785 F.2d 857, 860 (10th Cir. 1986). These carefully-calibrated powers are meant to be exercised only by the trustee, who is 'accountable for *all* property received'" and who is charged with achieving equal distribution in bankruptcy. *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 352 (1985) (citing §§ 704(2), 1106(a)(1)). Because "the policy of fair treatment among creditors" underlies preference actions, it makes sense that Congress would provide exclusive authority to bring such actions to the person whose "paramount duty . . . is to act on behalf of the bankruptcy estate." *Robison v. First Financial Capital Management Corp. (In re Sweetwater)*, 884 F.2d 1323, 1328–29 (10th Cir. 1989); *In re Cybergenics*, 226 F.3d 237 at 243 (citation omitted).

Selling preference actions is not compatible with the Trustee's duties. *See Foster Dev. Corp. v. Morning Treat Coffee Co., Inc. (In re Morning Treat Coffee Co., Inc.)*, 77 B.R. 62, 65 (Bankr. M.D. La. 1987) (finding "no authority for the right to sell this right exercisable in a fiduciary capacity"). In contrast to a trustee, with all her accompanying duties, "a buyer is just another self-interested party." Warren & Jay L. Westerbrook, *Selling the Trustee's Powers*, Am. Bankr. Inst. J., 32 (2004). Allowing a sale would put the preference action in the hands of a self-seeking creditor who is far less likely to uphold the policies underlying the Code. For example, under § 704, the trustee must assess whether pursuing an avoidance action is in the best interest of *all* creditors. *Surf N Sun Apts., Inc. v. Dempsey*, 253 B.R. 490, 494 (M.D. Fla. 1999) (citing 11 U.S.C. § 704). When an action is sold and this determination is made by a self-interested purchaser, "[c]ommon sense teaches that a disappointed creditor with an axe to grind is not likely to remain neutral in its assessment and balancing of these factors." *Surf N Sun*, 253 B.R. 490 at 494. The purchasing creditor in our case, Eclipse, has held a grudge against Mr. Clegg ever since Eclipse found out about his donation to Veterans of Foreign Wars. This is exactly why preference actions should be pursued by a neutral party charged with acting in the interest of all creditors, not purchased by a creditor who is likely to use it to serve their own interests.

Recognizing that only a trustee can bring a preference action conforms with the purpose underlying the power to avoid and recover preferential transfers. According to the legislative history, the "two-fold" purpose of the preference provision is to "discourage[creditors] from racing to the courthouse to dismember the debtor" and to "facilitate the . . . policy of equality of distribution among creditors." H.R.Rep. No. 95-595, 177–78 (1977). *See also Begier v. IRS*, 496 U.S. 53, 58 (1990) (explaining that §547(b) furthers the policy of equal distribution by "prevent[ing] the debtor from favoring one creditor over others by transferring property shortly before filing"). Many courts suppose that selling avoidance actions to creditors furthers the policy of equal distribution because "[t]he benefit to the estate in such circumstances is the sale price," which can then be distributed *pro rata* to the creditors. *Simantob v. Claims Prosecutor, LLC (In re Lahijani*), 325 B.R. 282, 288 (B.A.P. 9th Cir. 2005).

However, holding that preference actions are sellable property would open the door to two possibilities that hurt the policies underlying the preference provision. First, a purchasing creditor might use the avoidance action as a weapon. In our case, one might be suspicious of Eclipse's willingness to pay twenty thousand dollars to pursue an avoidance action that would yield twenty thousand dollars—less, of course, any litigation expenses. Why would Eclipse readily bear the risk of not recovering the money from Mr. Clegg's mother if the action is unsuccessful? Given the contentious nature of bankruptcy proceedings, at least one court deemed it necessary to note that the avoidance powers "were not intended to serve as weapons." *In re Conley*, 159 B.R. 323, 325 (Bankr. D. Idaho 1993). And they certainly should not serve as weapons to harass a debtor's mother. Although Congress only noted its intent to discourage creditors from descending upon the debtor, using an avoidance action to launch a personal vendetta against anyone, including other creditors, is exactly the type of opportunism that Congress sought to discourage. H.R.Rep. No. 95-595, 177–78 (1977).

Secondly, if sales are permitted, the estate might sell claims that are burdensome, meritless, or otherwise of little value. This concern was identified more than a century ago when a court held that "trafficking in meritless litigation would encourage a multiplicity of suits, prolong the bankruptcy case, and waste estate funds that could have been distributed to creditors." *McMasters v. Campbell*, 41 Mich. 513, 837–38 (1879). Benefitting at the expense of a creditor certainly hurts the policy of equal distribution underlying preference actions. Because of the potential for abuse, prohibiting non-trustees from purchasing and prosecuting preference actions best conforms with the purposes underlying the preference section.

Even if the Trustee is the only party that can bring preference actions, Eclipse is not deprived of the ability to recover. Although a creditor may not purchase a preference action and pursue it independently, a creditor can obtain derivative standing and bring the action *on behalf of the trustee*. *Hen House*, 530 U.S. 1, 13 n.5 (declining to "address whether a bankruptcy court can allow other interested parties to act in the trustee's stead in pursuing recovery under § 506(c)"); *Hyundai Translead, Inc. v. Jackson Truck & Trailer Repair, Inc. (In re Trailer Source, Inc.)*, 555 F.3d 231, 238–45 (6th Cir.) (holding that a creditor can derivatively assert a trustee's avoidance power).[6] If the action is successful, the creditor's litigation expenses are reimbursed. 11 U.S.C. §§ 503(b)(3) & (4). "Thus, it is [not] necessary for the trustee to transfer a cause of action to recover property." *In re Lahijani*, 325 B.R. 282, 288 n.10 (B.A.P. 9th Cir. 2005).

Even without a derivative suit, the creditor can compel the trustee to act. If a trustee shirks their duties and "exercises his discretion to not pursue the action, the creditor may move the court to compel the trustee to act or, alternatively, seek removal of the trustee for abuse of discretion." *Surf N Sun*, 253 B.R. 490 at 494 (citing 11 U.S.C. § 324). The availability of alternative avenues to avoid and recover preferential transfers supports the conclusion that sales should not be permitted. Compared to obtaining derivative standing or compelling the trustee to bring an avoidance action, allowing the sale of such actions would create an entirely new avenue to pursue avoidance actions, one that is completely independent of the trustee. If Eclipse wants to pursue the preference action, it must do so through the Trustee.

E. Holding that preference actions can be sold would upend pre-Code precedent.

When we ask this court to prohibit sales of preference actions, we ask this court to rule in line with over a century of precedent. In 1978, when Congress enacted § 547(b) along with the

[6] Note that derivative standing can take various forms. For example, in *Housecraft Industries*, the Second Circuit permitted a joint prosecution agreement between a trustee and creditor where the creditor was "simply assisting" the trustee, rather than bringing a suit on the trustee's behalf. *Glinka v. Murad (In re Housecraft Indus. USA, Inc.)*, 310 F.3d 64, 67, 71–72 (2d Cir. 2002). The point is that creditors still have some power to enforce preference actions without purchasing them.

Code, Congress was re-enacting § 60(b) of the Bankruptcy Act of 1938, which provided that a "preference may be avoided by the trustee." *Compare* 11 U.S.C. § 96(b) (repealed 1978) *with* 11 U.S.C. § 547(b). Before § 547 was enacted, courts uniformly interpreted its predecessor to preclude non-trustees from buying and pursuing avoidance actions. Brendan Gage, *Is There a Statutory Basis for Selling Avoidance Actions?*, 22 J. Bankr. L. & Prac. 3 Art. 1 (2013) (finding that "[p]re-Code case law supporting sales and assignments of preference actions is virtually nonexistent"); *see, e.g.*, *Belding-Hall Mfg. Co. v. Mercer & Ferdon Lumber Co.*, 175 F. 335, 340 (6th Cir. 1909) (noting that the trustee "may not transfer to another this right of avoidance"). Because Congress enacted language materially identical to § 547's pre-Code analogue, we can presume that Congress intended to keep courts' longstanding interpretation of the re-enacted language. *Lamar, Archer & Cofrin, LLP v. Appling*, 584 U.S. 709, 711 (2018) (noting that such a presumption is appropriate in determining the meaning of bankruptcy provisions that have been re-enacted).

Section 1123 is not a basis for concluding that courts' longstanding interpretation of preference actions has been superseded by statute. Section 1123(b)(3)(B), which was introduced in 1978, states that a reorganization plan may "provide for . . . the retention and enforcement . . . by a representative of the estate" any claim or interest. 11 U.S.C. § 1123(b)(3)(B). Because § 1123 seemingly allows a non-trustee to bring avoidance actions, courts have supposed that "[t]he enactment of 11 U.S.C. § 1123(b)(3) in 1978 arguably disrupts the settled prior case law." *Tennessee Wheel & Rubber Co. v. Captron Corporate Air Fleet (In re Tennessee Wheel)*, 64 B.R. 721, 724 (M.D. Ten. 1986). And after concluding that § 1123 did supersede pre-Code case law, the Tenth and Ninth Circuits concluded that avoidance actions can be brought by a non-trustee. *Sweetwater*, 884 F.2d 1323 at 1327; *Briggs v. Kent (In re Prof'l Inv. Prop. of Am.)*, 955

F.2d 623, 626 (9th Cir. 1992) (abrogating a pre-Code decision and holding that a creditor "may exercise the trustee's avoidance powers"). Although § 1123 only expressly permits the assignment of avoidance actions to non-trustees when the assignment is made pursuant to a plan, the Ninth Circuit concluded that § 1123 also permits a chapter 7 trustee to assign such actions outside of a plan, after finding no reason to hold otherwise. *Duckor Spradling & Metzger v. Baum Trust (In re P.R.T.C., Inc.)*, 177 F.3d 774, 78–82 (9th Cir. 1999).

The Tenth and Ninth Circuits are right that § 1123 supersedes pre-Code case law, but wrong about the extent to which § 1123 supplants precedent. *See* 5 Collier on Bankruptcy ¶ 547.11[5] (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2011) (stating that the Ninth Circuit "embrac[es] a position that appears difficult at best to reconcile with the literal language of the Bankruptcy Code"). Based on the provision's express language, § 1123 only supersedes pre-Code case law to the extent that a sale or assignment of an avoidance action is made *pursuant to a reorganization plan*. § 1123(b) (specifying that "a plan may" provide for the enforcement of a claim by a non-trustee); *Fleet Nat'l Bank v. Doorcrafters (In re North Atl. Millwork Corp.)*, 155 B.R. 271, 283 (Bankr. D. Mass. 1993) (holding "section 1123(b)(3)(B) simply does not apply in the absence of a Chapter 11 plan of reorganization"). Simply put, the chapter 13 trustee in our case could arguably have sold the preference action pursuant to Mr. Clegg's plan before conversion. But once the chapter 7 Trustee took over, the preference actions are not sellable under § 1123(b)(3)(B).

The limited scope of § 1123 is made more apparent by the purpose that Congress has ascribed to the provision. One court noted that the "legislative history . . . ma[kes] clear that its aim [i]s to make possible the formulation and consummation of a plan before completion of the investigation and prosecution of causes of action." *Duvoisin v. E. Tennessee Equity, Ltd. (In re*

Southern Industrial Banking Corp.), 59 B.R. 638, 642 (Bankr. E.D. Tenn. 1986). This purpose would not be served by allowing sales of preference actions outside the context of a reorganization plan. And in this case, the trustee is not assigning her avoidance powers pursuant to a plan. § 1123 is only a "limited exception" to the rule that only a trustee can bring avoidance actions. *In re Conley*, 159 B.R. 323 at 324. Such an exception does not warrant upending more than a century of precedent. Trustees have never been able to sell preference actions outside of a plan, and we respectfully ask this court to rule in conformity with this longstanding principle. The Trustee is not permitted to sell her preference action to Eclipse.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that both holdings of the lower court be AFFIRMED. We ask this Court to hold (1) that any post-petition, pre-conversion increase in equity in a debtor's property inures to the benefit of the debtor upon conversion of a case from chapter 13 to chapter 7 pursuant to §§ 547 and 550 and (2) that a chapter 7 trustee may not sell, as property of the bankruptcy estate, the ability to avoid and recover transfers pursuant to 11 U.S.C. §§ 547 and 550.

Respectfully Submitted,

____________________/s/

Team R44

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