No. 23-

IN THE

Supreme Court of the United States

ROBERT W. REMMERT,

Petitioner,

v.

BRIAR CAPITAL WORKING FUND CAPITAL, L.L.C., AS ASSIGNEE OF SOUTH COAST SUPPLY COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

ROBIN M. ZIEK
24 Greenway Plaza,
Suite 2050
Houston, TX 77046

GEORGE W. VIE III
Counsel of Record
GEORGE W VIE III PC
4249 Dickson Street
Houston, TX 77007
(281) 916-3600
george.vie@georgevie.com

Counsel for Petitioner

115155

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

In the decision below, the court of appeals—in a "res nova" issue for the Fifth Circuit—held that bankruptcy preference claims arising under 11 U.S.C. 547 may be sold by the bankruptcy estate. The court of appeals also determined the mere act of sale conferred standing, even if the purchaser does not qualify as a representative of the bankruptcy estate that could exercise avoidance powers like the debtor or bankruptcy trustee. The questions presented are:

> Whether an avoidance action can be sold and, if so, whether the sale will confer standing on the purchaser to prosecute the avoidance action even though (i) the purchaser does not qualify as a representative of the bankruptcy estate and (ii) the purchaser will exercise statutory avoidance powers for its benefit alone.

PARTIES TO THE PROCEEDING

Petitioner Robert W. Remmert was defendant-appellee in the court of appeals.

Respondent Briar Capital Working Fund Capital, L.L.C., as assignee of South Coast Supply Company, was plaintiff-appellant in the court of appeals.

RELATED PROCEEDINGS

United States Bankruptcy Court (S.D. Tex.):

> *In the Matter of South Coast Supply Company*, No. 17-35898
>
> *South Coast Supply Company* v. *Remmert*, Adv. No. 18-03084 (Dec. 20, 2018) (order withdrawing the reference).

United States District Court (S.D. Tex.):

> *Briar Capital Working Fund Capital, as assignee of South Coast Supply Company* v. *Remmert*, No. 4:18-CV-2867 (Sept. 12, 2022) (granting motion to dismiss for lack of jurisdiction).

United States Court of Appeals (5th Cir.):

> *Briar Capital Working Fund Capital, L.L.C., as assignee of South Coast Supply Company* v. *Remmert*, No. 4:18-CV-2867 (Jan. 22, 2024) (reversing and remanding for trial).

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PETITION FOR A WRIT OF CERTIORARI

Robert W. Remmert respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra* 1a-18a) is reported at 91 F.4th 376. The opinion of the district court (App., *infra* 21a-36a) is unreported but available at 2022 WL 4137840.

JURISDICTION

The judgment of the court of appeals was entered on January 22, 2024. This Court has jurisdiction under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant portions of the bankruptcy statutes involved are reproduced in the appendix to this petition. App., *infra*, 59a-82a.

STATEMENT

Chapter 11 of the Bankruptcy Code sets out a framework for reorganizing a bankrupt business. The filing of a petition creates a bankruptcy estate consisting of all the debtor's assets and rights. "The estate is the pot out of which creditors' claims are paid." *Mission Prod.*

Holdings v. *Tempnology, LLC*, 139 S. Ct. 1652, 1658 (2019). It is administered by either a trustee or, as in this case, the debtor-in-possession.[1]

Avoidance actions are property of the bankruptcy estate under 11 U.S.C. 541(a)(1). Usually, the avoidance actions stay with the bankruptcy estate to be pursued by the debtor; or the bankruptcy trustee during administration; or after reorganization plan confirmation, by the liquidation trustee. These fiduciaries and representatives of the bankruptcy estate will thereby ensure the proceeds of any avoidance action will benefit all creditors.

In this case, the debtor's reorganization plan explicitly allowed one secured creditor—already overcollateralized—to buy an avoidance action against petitioner, the debtor's former chief financial officer. Under the plan, that one creditor could keep any amount that it recovers in the avoidance action, even if the recovery exceeds the amount necessary to pay the debtor's obligation to that creditor. The reorganization plan does not require the purchaser to give any of the recovery, under any circumstances, to the debtor or any other creditors. And the estate received nothing for selling the preference claim because the creditor was already paid in full when it took back its collateral. In short, no funds from the action will be returned to the bankruptcy estate even though the statutory purpose of the avoidance action is to claw back alleged preferential transfers and fraudulent transfers for the benefit of the estate and its creditors.

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1. "Debtor in possession" refers to a debtor in a chapter 11 case for which no trustee has been appointed. 11 U.S.C. 1101(1).

After the assignment to Briar Capital, the district court determined that respondent did not have standing to pursue the avoidance claim because (1) it is not a representative of the estate that could exercise avoidance powers in addition to those of the debtor or bankruptcy trustee; and (2) the unique avoidance powers in bankruptcy may not be sold to a single creditor that will pursue claims for its benefit alone. App., *infra* 33a-34a.

A panel of the Fifth Circuit reversed the dismissal for lack of subject matter jurisdiction. App., *infra* 18a. It held that the property of the debtor's estate generally included causes of action, and preference or avoidance actions would be among the causes of action. App., *infra* 10a-11a. The court of appeals also held the avoidance actions were property interests created after the bankruptcy was filed. And if sold by a trustee or debtor in possession, the purchaser would have standing through the act of sale, even if not a fiduciary or representative of the estate under 11 U.S.C. 1123(b)(3). App., *infra* 16a-17a.

A. Legal And Factual Background

1. South Coast Supply Company filed bankruptcy in the Southern District of Texas. Petitioner had been an officer of South Coast and was a long-time friend of South Coast's chief executive officer. During this time, South Coast had been using petitioner's credit. Relevant here, South Coast was forced to borrow $800,000 from petitioner under a loan agreement. South Coast issued forty-seven checks consistent with the loan agreement, totaling over $320,000. App., *infra* 2a. After petitioner resigned from South Coast, he sent a demand letter requesting over $405,000 to satisfy the loan. Days later,

South Coast filed a voluntary Chapter 11 petition for bankruptcy. *Id.* South Coast prosecuted the bankruptcy as a debtor-in-possession and obtained appointment of a chief restructuring officer during the bankruptcy. *Id.*

2. Briar Capital filed a proof of claim in the bankruptcy proceedings for $2.5 million, secured by collateral valued at $3.9 million. App., *infra* 2a-3a. Thus, Briar Capital's proof of claim undisputedly asserted that it was over secured by almost $1.4 million. Briar Capital was also the only secured lender of South Coast, and its loan to South Coast was collateralized with present and future assets, both tangible and intangible. App., *infra* 23a.

3. During the bankruptcy, South Coast had filed an adversary action to claw back $316,000 of the loan payments it had made to Petitioner in the year before South Coast filed bankruptcy. *Id.* petitioner responded that his loan to South Coast was part of a pattern of business lending, and the payments made to him were in the ordinary course of the business and according to ordinary business terms, and so the payments were exceptions to a trustee's claw back powers under 11 U.S.C. 547. App., *infra* 71a-72a.

4. South Coast subsequently amended its Chapter 11 Plan and assigned to Briar Capital its avoidance claims against petitioner, even though Briar Capital was over secured by the assets of South Coast. Under the amended plan, if Briar Capital recovered on any of the avoidance actions in an amount exceeding the debt owed to it by South Coast, Briar Capital would keep the funds recovered for itself. App., *infra* 5a. In contrast, the original reorganization plan required Briar Capital to

return excess recovery to South Coast for deposit into the unsecured creditors account. App., *infra* 27a.

At the hearing to confirm the plan, South Coast's chief restructuring officer testified that Briar Capital would receive cash, inventory, and receivables that the chief restructuring officer believed would be collectable at around sixty percent of value. As a result, without attributing any value to the avoidance claim against petitioner sold to Briar Capital, it received assets with a total value of over $3 million. App., *infra* 28a. And none of the money from the avoidance claim would come back to the pot out of which creditors' claims would be paid. Petitioner timely objected to the bankruptcy reorganization plan, but over those objections, the reorganization plan was approved by the bankruptcy court. A few months later, South Coast's bankruptcy was closed.

B. Procedural History

1. District court proceedings

a. After the reference to bankruptcy was withdrawn, App., *infra* 28a, 28 U.S.C. 157(d), the district court set the avoidance action on a trial docket. Petitioner moved to dismiss under Rule 12(b)(1), arguing that Briar Capital lacked standing to prosecute the avoidance action. *Id.* First, the bankruptcy estate of South Coast would not benefit from any recovery under the preference action assigned or sold to Briar Capital, contrary to the policy reasons for granting statutory actions to a representative of the estate. Second, all potential recovery would go to Briar Capital, a secured creditor. Thus, Briar Capital failed to qualify as a representative of the estate, and

therefore lacked standing to prosecute the assigned avoidance claims.

b. In granting the motion to dismiss and determining that Briar Capital lacked standing, the district court was guided by *McFarland* v. *Leyh* (*In re Texas General Petroleum Corp.*), 52 F.3d 1330 (5th Cir. 1995). App., *infra* 29a. In that case, the Fifth Circuit held that under 11 U.S.C. 1123(b)(3)(B), a party other than the debtor or the trustee could show standing to enforce a claim when (i) it has been appointed and (ii) it is a "representative of the estate."[2] Here, the bankruptcy court's approval of a plan that assigned to a stranger to the estate enforcement of an avoidance claim was an "appointment," but status as a representative of the estate was determined case-by-case. Together, whether these two factors were present in the case was a question of law and the resulting determination was jurisdictional on the existence of standing.

c. The district court determined that Briar Capital lacked standing to pursue the claims against petitioner. Briar Capital was not a representative of the estate since it would keep all funds from the action against petitioner to the exclusion of the debtor South Coast or any of its other

2. The *In re Texas General Petroleum Corp.* panel adopted this test from the Tenth Circuit to determine when a plan may transfer avoidance powers to a party other than the debtor or the trustee, thereby conferring standing on the third party. *In re Mako, Inc.*, 985 F.2d 1052, 1054 (10th Cir. 1993).

The Tenth Circuit added, "[d]etermining a party's representativeness under the second element requires the court to decide whether a successful recovery by the appointed representative would benefit the debtor's estate and particularly, the debtor's unsecured creditors." *Id.*

creditors. Standing was absent so long as Briar Capital sought to exercise bankruptcy avoidance powers for its own, sole benefit. Next the district court determined the right of the trustee or debtor-in-possession to commence an avoidance action could not be sold. That determination was based on a survey of relevant bankruptcy precedent, after noting the Fifth Circuit had not held that sales of preference actions were permissible. App., *infra* 34a-35a.

2. Fifth Circuit proceedings

a. The court of appeals rejected the district court's views. It held property of the estate under the bankruptcy code is intended to include any property made available to the estate by other provisions of the code, citing *U.S.* v. *Whiting Pools, Inc.*, 462 U.S. 198, 205 (1983); thus including preference claims as a type of avoidance action.

b. The Fifth Circuit acknowledged the question of whether preference claims may be sold was "indeed a novel issue for this circuit." App., *infra* 7a-8a. Answering the question, it first held a broad reading of section 541(a)(1) suggested preference actions fall within the statute's scope. Notably, the court of appeals described a "successful preference claim" as one that "voids the allegedly preferential transfer and returns that property to the estate. *In re Tusa-Expo Holdings, Inc.*, 811 F.3d 786, 791–92 (5th Cir. 2016)." App., *infra* 10a. (But the record here show this preference claim would not return money to the bankruptcy estate, whether successful or not.)

c. The court of appeals also held preference actions generally may qualify as property of the estate under

11 U.S.C. 541(a)(7). App., *infra* 11a. It found support in decision of the Eighth and Ninth Circuits, citing *In re Simply Essentials*, LLC, 78 F.4th 1006 (8th Cir. 2023) and *In re Lahijani*, 325 B.R. 282, 288 (9th Cir. 2005). The *In re Lahijani* decision itself recognized "some disagreement among courts about the exercise by others of the trustee's bankruptcy-specific avoiding power causes of action."

d. Lastly, the decision below rejected petitioner's argument that Briar Capital lacked standing to pursue an avoidance action because it is not a "representative of the estate." App., *infra* 15a-16a. The Fifth Circuit concluded that since preference claims can be sold, the purchaser has standing to pursue the claim "regardless of whether it is a 'representative of the estate.'" App., *infra* 16a.

REASONS FOR GRANTING THE PETITION

This Court should grant the petition because the opinion of the court of appeals undermines the purpose of the avoiding powers in bankruptcy and the core principles that protect creditors like petitioner.

The filing of a bankruptcy petition creates an estate that includes the legal or equitable interests of the debtor in property as of the commencement of the case. 11 U.S.C. 541(a)(1). In a Chapter 11 bankruptcy where the debtor assumes debtor-in-possession status, the debtor obtains most of the powers of a bankruptcy trustee, including the power to pursue claims belonging to the estate. 11 U.S.C. 1107(a). The avoidance powers under the bankruptcy code are within the unique purview of the trustee or debtor-in-possession but they protect bankruptcy rights

that inure to the benefit of unsecured creditors. As this Court has explained, the avoiding powers of the trustee to invalidate a limited category of transfers by the debtor or transfers of an interest of the debtor in property are intended to "maximize the funds available for, and ensure equity in, the distribution to creditors in a bankruptcy proceeding. . . ." *Merit Mgmt. Grp., LP* v. *FTI Consulting, Inc.*, 583 U.S. 366, 369 (2018).

Yet the Court has also commented on the bankruptcy code's "stringent limits on 'avoidance' actions—the exceptional cases in which trustees (or debtors) may indeed unwind pre-bankruptcy transfers that undermine the bankruptcy process." *Mission Prod. Holdings* v. *Tempnology, LLC*, 139 S. Ct. 1652, 1663 (2019). Those avoidance powers, says the Court, "can be invoked in only narrow circumstances." *Id.*

In this case, the court of appeals affirmed an assignment or sale of avoidance claims even though the purchaser is an over secured creditor that obtained, by mere objection to a proposed plan, valuable avoidance claims it would prosecute for its sole benefit. Such a result is contrary to the policy for avoidance actions, which are for the benefit of all creditors, not just the individual creditor holding the avoidance claim. *See Moore* v. *Bay* (*In re Sassard & Kimball, Inc.*), 284 U.S. 4, 5 (1931). The Court should correct this expansion of the standing rule for avoidance powers and the resulting upset of the equitable balance between debtor and bankruptcy creditors.

A. The Fifth Circuit's Decision Is Incorrect And Does Not Square With The Eighth Circuit Case On Which It Joined

1. As this Court has stated, "the requirement that a claimant have standing is an essential and unchanging part of the case-or-controversy requirement of Article III." *Davis* v. *Federal Election Comm'n*, 554 U.S. 724 (2008). In this bankruptcy setting, standing to assert the statutory powers of the debtor-in-possession or trustee to pursue preference claims and other statutory avoidance actions are given by statute to those persons and to a "representative of the estate." 11 U.S.C. 1123(b)(3). But Briar Capital's recovery would not benefit the debtor's estate or particularly the debtor's unsecured creditors, a fact that is undisputed on this record. Briar Capital thus does not qualify as a representative of the estate and accordingly lacks standing to pursue the claims for the bankruptcy estate.

2. The court of appeals had declined before to answer whether a bankruptcy trustee could sell causes of action that arise from its avoidance powers, noting a "split of authority."[3] In the case below, the court of appeals reached the issue and held such actions are property of the estate that may be sold under 11 U.S.C. 363(b). But in concluding that standing was present by the mere act of sale, the court of appeals mistakenly gave too much focus to the general right to sell property of the estate under 11 U.S.C.

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3. *Cadle Co.* v. *Mims* (*In re Moore*), 608 F.3d 253, 261 n.13 (5th Cir. 2010) ("We do not address the broader question whether a trustee may sell all chapter 5 avoidance powers, such as the power to avoid preferences under § 547 or to avoid fraudulent transfers under § 548.").

363(b). The court of appeals did not fully engage with the policy and purpose of the avoidance actions—designed "to ensure that the debtor deals fairly with its creditors"[4]—or the language of 11 U.S.C. 547.

The approach of the court of appeals permitting sale and transfer of preference claims and other statutory avoidance actions to any third party without ensuring the estate will be fairly represented—or represented at all—erroneously confers standing to third parties to prosecute unique avoidance claims for their own benefit. As this Court has cautioned, the bankruptcy code "aims to make reorganizations possible. But it does not permit anything and everything that might advance that goal." *Mission Prod. Holdings*, 139 S. Ct. at 1665 (citing *Florida Dept. of Revenue* v. *Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 51 (2008) (in enacting Chapter 11, Congress "struck a balance" among multiple competing interests (cleaned up))). That balance includes the limitations of 11 U.S.C. 1123(b)(3), which says a plan may provide for "the retention and enforcement by the debtor, by the trustee, or by a representative of the estate appointed for such purpose, of any such claim or interest" belonging to the debtor or to the estate. Third parties like Briar Capital are not the debtor, the trustee, or—on this record—a representative of the estate.

3. This case is a strong vehicle to answer the questions presented. The record is without dispute, and the standing issue is outcome determinative. Certiorari is warranted so the Court may review whether sales of avoidance actions

4. *Merit Mgmt.*, 583 U.S. at 370 (citing C. Tabb, *Law of Bankruptcy* §6.2 (4th ed. 2016)).

created within the bankruptcy proceeding and by 11 U.S.C. 547 are impermissible where the unique statutory powers of avoidance are not intended to benefit the estate, but sold or assigned for the benefit of just a single creditor.

The issues are important to the underlying policies of bankruptcy law. First, only the trustee or debtor-in-possession or similar representative of the estate will advance the interests of all creditors and maximize the value of the debtor's estate. Second, permitting one creditor to buy a claim from the trustee or debtor and pursue that claim on its own behalf would risk a recovery of more of the bankruptcy estate that was rightfully due to that creditor. Standing to bring these claims must remain only with those who act as fiduciaries of the bankruptcy estate and represent the bankruptcy estate—not with third parties that are self-interested in their own recovery.

4. The decision of the court of appeals to open the bankruptcy marketplace for statutory avoidance actions will distort the bankruptcy process. It will also create disuniformity in the bankruptcy laws, contrary to the congressional and judicial interest in nationwide uniformity for bankruptcy rules.

In contrast, limiting standing to those who have the fiduciary role of a representative of the estate makes good sense, is good policy, and reflects the statutory regime and essential principles of bankruptcy administration. As the Court has explained, equality of distribution among creditors is a central policy of the bankruptcy code. "According to that policy, creditors of equal priority should receive pro rata shares of the debtor's property." *Begier v. IRS*, 496 U.S. 53, 58 (1990). Avoidance powers advance that policy by permitting a trustee or debtor-in-possession

to avoid certain preferential payments, in turn preventing the debtor from favoring one creditor over another. In the case below, however, the avoidance powers have been sold to favor the only secured creditor over all other creditors.

a. Consider petitioner's situation. He loaned a company hundreds of thousands of dollars. Once that company filed bankruptcy, he was sued for recovery of the loan payments made to him in the twelve months before bankruptcy. Over objection, that suit—arising from statutory avoidance powers of estate fiduciaries—was sold to the only secured creditor for its sole benefit, and the bankruptcy estate was closed. In this setting, petitioner cannot be placed back on the same footing as all the creditors in a similar position—collectively, the unsecured creditors.

b. Because petitioner had been paid by South Coast on its loan obligation, he did not file a proof of claim for the preference payments made. Yet if Briar Capital manages to claw back the preference, it need not give any funds back to the estate. Petitioner will have lost his right to recover his proportionate share of what should be a recovery to the estate; the same is true for the other unsecured creditors in a similar situation or class. In short, petitioner will be left without any remedy, since the bankruptcy estate has already been distributed to those unsecured creditors and the bankruptcy closed.

c. To be sure, the bankruptcy court may still have jurisdiction over post-bankruptcy matters as part of the reorganization plan. But with no funds coming back into the estate from the avoidance action, there will be no means for petitioner to obtain his proportionate share of any recovery. In this way, the court of appeals' holding

defeats the purpose of the preference statute: the claw back of the preference will not benefit the bankruptcy estate.

5. The court of appeals erred in finding support from the Eight Circuit decision *In re Simply Essentials, LLC*, 78 F.4th 1006 (8th Cir. 2023). In that case, there was some benefit to the bankruptcy estate—an important and different circumstance from the undisputed record here. The Eight Circuit noted that the successful bidder of the avoidance action in *In re Simply Essentials* offered to (1) assume all risks, costs, and fees of the avoidance actions, (2) reduce its own claims against the estate by $20 million, (3) provide the bankruptcy estate with the first $600,000 in proceeds recovered, and (4) provide the estate with 15 percent of the proceeds, after deduction of the bidder's costs and fees. 78 F.4th at 1008. Simply put, the facts of *In re Simply Essentials, LLC* are so distinguishable from this case that the concerns raised here were not present there.

Yet *In re Simply Essentials* relied, as least in part, on the Fifth Circuit decision in *In re Moore*, 608 F.3d 253, 261 & n.13 (5th Cir. 2010). *See In re Simply Essentials*, 78 F.4th at 1010. This confusion in the readings of these cases by the two courts underscores why review by the Court is essential to bring clarity to this question. *In re Moore* did hold causes of action that exist independent of an existing bankruptcy case, and then brought into the estate under Section 544, may be sold or assigned.[5] But

5. In *Moore*, the Fifth Circuit held that a trustee may sell causes of action that it has inherited from creditors under a different statute, 11 U.S.C. 544(b).

not until the case below did the Fifth Circuit approve assignment or sale of actions that would exist only because of the bankruptcy case, such as those under 11 U.S.C. 547, 548, and 549.

And in its analysis, the Eight Circuit observed that, on its record, "[w]hether the avoidance action is brought by the trustee or by a creditor, the action is brought for the benefit of the estate and therefore belongs to the estate." *In re Simply Essentials*, 78 F.4th at 1008. Not so here. Briar Capital was undisputedly over secured, with significant equity protection in its collateral, yet it obtained avoidance claims allegedly directed at loan payments to petitioner worth more than $300,000. Briar Capital need not remit any of the recovery on the avoidance claims to South Coast or to any other South Coast creditors, even if the recovery exceeds the amount necessary to pay South Coast's debt to Briar Capital. Thus, the avoidance action is not brought for the benefit of the estate and would not maximize the value of the bankruptcy estate. The position taken by the Fifth Circuit panel is wrong and its new rule will distort the bankruptcy administration process.

While the Fifth Circuit said it was joining the Eighth and Ninth Circuits in its decision, not all circuits would agree with the court of appeals' approach. The Third Circuit in *Official Comm. of Unsecured Creditors of Cybergenics Corp.* v. *Chinery* (*In re Cybergenics Corp.*), 226 F.3d 237 (3d Cir. 2000) explained that a debtor's exercise of avoidance powers must benefit the creditors, not the debtor itself. *In re Cybergenics* cited the Fourth Circuit's decision in *Wellman* v. *Wellman* (*In re Wellman*), 933 F.2d 215 (4th Cir. 1991) (holding avoidance powers provide for recovery only if the recovery is for the

benefit of the estate). And the Ninth Circuit decision of the bankruptcy appellate panel acknowledged, without extended discussion, "some disagreement among courts about the exercise by others of the trustee's bankruptcy-specific avoiding power causes of action." *In re Lahijani*, 325 B.R. at 288.

6. In contrast to other circuits, the court of appeals' approach on this record turns 11 U.S.C. 547(b) actions into commodities. With its standing analysis, the court may incentivize the debtor-in-possession to benefit itself, or a specific creditor, to the detriment of the bankruptcy estate and other creditors. Below, Briar Capital argued that preference powers should be sold as it would maximize the value of bankruptcy estates. But this undisputed record established the opposite. Briar Capital would be pursuing claims only for itself and might recover more than rightfully due to it. As the bankruptcy court commented in *In re Vogel Van & Storage, Inc.*, 210 B.R. 27, 33 (N.D.N.Y. 1997), aff'd on other grounds, 142 F.3d 571 (2d Cir. 1998), the sale or assignment of avoidance claims to an objecting creditor to pursue on its own behalf is objectionable. It would run contrary to core bankruptcy policy because the assignee would not represent the interests of all creditors in maximizing the value of the debtor's estate. In contrast, limiting the powers of avoidance would promote the "prime bankruptcy policy of equality of distribution among creditors of the debtor." *Id.* The Court should grant review to bring clarity to the standing question arising from the potential sale of preference claims and avoidance actions.

B. The Error In The Decision Below Is Exceptionally Important And Warrants This Court's Review

1. The Court has acknowledged that the equitable distribution of all the debtor's property among its creditors is a "critical feature" of bankruptcy proceedings. *See Cent. Va. Cmty. Coll.* v. *Katz*, 546 U.S. 356, 363-64 (2006). In enacting the Bankruptcy Code, Congress struck careful balances to further an equitable outcome for both the debtor and its creditors, secured and unsecured. This includes limits on the unique statutory avoidance powers. The bankruptcy trustee can recover fraudulent transfers under 11 U.S.C. 548(a)(1), for example, only when the transfers took place within two years of the petition date. And avoidance claims must be brought with their own limitations period. 11 U.S.C. 546(a). But the policy reason for these remedies in the first instance is to marshall the assets of the bankruptcy estate; 11 U.S.C. 541 provides that the bankruptcy estate comprises "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. 541(a)(1). The avoidance claims and other actions under 11 U.S.C. 546, 547 and 548 "generally attempt to protect creditors from transactions which are designed, or have the effect, of unfairly draining the pool of assets available to satisfy creditors' claims." *See 5 Collier on Bankruptcy* (16th ed. 2015) ¶ 548.01[a][1] (discussing 11 U.S.C. 548 and fraudulent transfer law). The avoidance actions are intended to prevent shareholders, secured creditors, and others from benefitting at the expense of unsecured creditors. Yet the decision below will permit the opposite, undesirable result.

2. The court of appeals turns the avoidance powers into a commodity for the trustee or debtor-in-possession

to use any way that they see fit. Nothing in the bankruptcy statutes suggests this was intended. If this holding remains, it could be damaging to unsecured creditors, as they may now have little leverage or bargaining power to keep the avoidance actions in the bankruptcy estate; in the hands of fiduciaries or those who represent the estate; or to otherwise retain a benefit within the bankruptcy estate for general unsecured creditors.

This case, with all essential facts not in dispute, presents the Court with an opportunity to restore the balance and equities expected in the bankruptcy administration. A decision by the Court that places the standing analysis on proper footing will provide clarity to the bankruptcy courts faced with potential sales and assignments of avoidance actions to those who do not qualify as representatives of the estate.

3. The Court's present decisions do not give a clear answer to the standing issue addressed below. The holding of the court of appeals, left uncorrected by the Court, will likely change the default approach from trustees (or debtors-in-possession) retaining avoiding powers to instead putting them up for sale. Debtors-in-possession especially may make short-sighted or bad deals, putting the avoidance power into the hands of others who do not represent the estate and will not act as fiduciaries protecting the interests of unsecured creditors. Or, like the undisputed case case here, the preference action will not bring money into the bankruptcy estate at all, defeating any chance to pay creditors their proportionate share of the recovery.

Even if avoidance actions are property of the bankruptcy estate and can be sold, the sale must confer standing by ensuring the purchaser's responsibilities qualify it as a representative of the estate. As the district court noted, the "primary concern is whether a successful recovery by the appointed representative would benefit the debtor's estate and particularly, the debtor's unsecured creditors." App., *infra* 29a-30a. The motive for this concern "is that the proceeds recovered in an avoidance action satisfy the claims of priority and general unsecured creditors before the debtor benefits." *McFarland* v. *Leyh* (*in Re Tex. Gen. Petroleum Corp.*), 52 F.3d 1330, 1335 (5th Cir. 1995).

The court of appeals rejected its prior rule that whether a party is a representative of the estate is to be decided on a case-by-case approach. Instead, it held the mere act of sale is enough to confer standing. In so holding, the court of appeals abandoned the language of 11 U.S.C. 1123(b)(3). This Court should correct that departure from the statute.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ROBIN M. ZIEK
24 Greenway Plaza,
Suite 2050
Houston, TX 77046

GEORGE W. VIE III
Counsel of Record
GEORGE W VIE III PC
4249 Dickson Street
Houston, TX 77007
(281) 916-3600
george.vie@georgevie.com

Counsel for Petitioner

April 22, 2024

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED JANUARY 22, 2024

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 22-20536

IN THE MATTER OF
SOUTH COAST SUPPLY COMPANY,

Debtor,

BRIAR CAPITAL WORKING FUND CAPITAL, L.L.C., as assignee of South Coast Supply Company,

Appellant,

versus

ROBERT W. REMMERT,

Appellee.

January 22, 2024, Filed

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:18-CV-2867

Before STEWART, DENNIS, and WILSON, *Circuit Judges.*

JAMES L. DENNIS, *Circuit Judge.*

Appendix A

This appeal arises out of a Chapter 11 Bankruptcy petition and raises a res nova issue for our circuit. Because we find that preference claims arising under 11 U.S.C. § 547 may be sold, we REVERSE the district court's dismissal for lack of subject matter jurisdiction and REMAND for further proceedings.

I. Background

South Coast Supply Company ("South Coast"), an industrial products distributor founded in 1972, began experiencing financial issues in 2016, which it later attributed to mismanagement. South Coast was forced to borrow $800,000 from Robert Remmert, its then-CFO, pursuant to a loan agreement. South Coast issued forty-seven checks pursuant to the terms of the loan agreement, totaling over $320,628.04, until Remmert resigned from South Coast. After his resignation, on October 17, 2017, Remmert sent a demand letter requesting $405,261.87 to satisfy the loan, less than the actual $578,199.04 left on the original loan. On October 20, 2017, South Coast filed a voluntary Chapter 11 petition for bankruptcy in the Southern District of Texas.

South Coast continued to operate its business as a debtor-in-possession, and the bankruptcy court appointed J. Patrick Magill as South Coast's Chief Restructuring Officer ("CRO"). At the time the CRO was appointed, Briar Capital Working Fund Capital, L.L.C. ("Briar Capital") was South Coast's sole secured lender and had filed proof of claim in the bankruptcy proceeding, thereby asserting a claim for $2,563,191.07. Briar Capital's proof

of claim stated that it had a lien on property valued at $3,926,263.88.

Five months into the bankruptcy case, South Coast was not generating enough cash flow to remain liquid and cash-flow-positive. South Coast sought post-petition debtor-in-possession ("DIP") financing. It requested and received an order from the bankruptcy court authorizing it to obtain DIP financing from Solstice Capital, LLC ("Solstice"). The order specified that Briar Capital would have lien priority over Solstice as to property obtained by South Coast prior to the date on which Solstice advanced DIP financing to South Coast. Solstice, by contrast, would have lien priority over Briar Capital as to property obtained after that date. By doing so, the bankruptcy court found that Briar Capital's interests in its collateral were sufficiently protected. Additionally, Briar Capital received junior liens on all Solstice collateral. Around this time, South Coast also filed the instant lawsuit against Remmert attempting to "avoid" more than $300,000 of allegedly preferential transfers made to Remmert right before the bankruptcy proceedings were initiated under 11 U.S.C. § 547, and to recover, i.e., claw back, the value of the avoided transfers under 11 U.S.C. §550.

After obtaining DIP financing, South Coast filed its first proposed Chapter 11 plan. The first plan proposed to sell all South Coast's "intangible assets," including intellectual property, to Solstice for $500,000. Solstice also agreed to pay up to $200,000 to satisfy claims entitled to administrative treatment under the Bankruptcy Code. Additionally, the first plan provided for the transfer of

some of South Coast's property to Briar Capital to satisfy Briar Capital's claim but did not provide for any payment of Briar Capital's administrative expenses incurred in participating in the bankruptcy proceeding, which are traditionally prioritized and paid in full. The first plan also provided that unsecured creditors would receive $500,000 in cash.

Briar Capital objected to the first plan, asserting the plan did not offer it fair compensation. South Coast and Briar Capital settled their issues and agreed to a second, modified plan. The second plan provided that Briar Capital would abandon its security interest in $700,000 of sale proceeds that South Coast planned to distribute to other creditors and would also waive its claim to recover administrative expenses incurred in participating in the bankruptcy proceedings. In exchange, Briar Capital received South Coast's interest in this pending preference action against Remmert, which was seeking to avoid more than $300,000 of allegedly preferential transfers.

At the confirmation hearing of the second plan, the CRO testified about the value of the assets to be transferred to Briar Capital, stating that "it was very difficult to give a concrete valuation of any kind of inventory," that the estimate of the inventory transferred was "our best guess," and that he was uncertain and concerned about the real value of the collateral. The CRO also testified that the value of the accounts receivable transferred to Briar Capital was $400,000, but it was possible they could be worth less. The CRO specifically testified that because of South Coast's settlement with Briar Capital, the second

proposed plan allowed the $700,000 of proceeds from the sale of South Coast's assets to be distributed to unsecured creditors and administrative claimants, rather than to Briar Capital, the secured creditor. Remmert objected on a limited basis, arguing that the plan should explicitly provide that only this one existing preference lawsuit would be assigned to Briar Capital. The bankruptcy court approved the plan over Remmert's objection, finding that the plan complied with the Bankruptcy Code, was proposed in good faith, and was not forbidden by law.

The order confirming the plan contained a paragraph titled "Assignment of Claims," which provided that "[a]s of the Effective Date of the Plan, [South Coast] and the bankruptcy estate assign and convey to Briar Capital and/or authorize to prosecute on their behalf" the preference action against Remmert attempting to avoid payments made prior to the filing of the bankruptcy petition. The plan itself specifically states that "[a]s of the Effective Date of the Plan, [South Coast] and the estate assign and convey to Briar Capital and/or authorizes Briar Capital to prosecute on their behalf all of [sic] their potential claims against Robert W. Remmert," including the currently pending preference lawsuit. The plan also provided that Briar Capital was permitted to keep any amount it recovered from Remmert, even if the recovery exceeded the amount it was owed to satisfy its debt, stating that "[a]ny and all recoveries and proceeds of such recoveries shall be solely the property of Briar Capital."

As a result of the plan's approval, Briar Capital was substituted as assignee of South Coast in this preference

action against Remmert, leading to this instant suit. The parties litigated the case from January 2019 until August 2022. Eleven days before trial, Remmert filed a motion to dismiss under Rule 12(b)(1) of the Federal Rules of Civil Procedure, arguing that Briar Capital lacked standing to prosecute the preference action. The district court agreed, holding that since a successful recovery would not benefit South Coast's estate or its unsecured creditors, Briar Capital lacked standing to bring the preference claim against Remmert as a representative of the estate under 11 U.S.C. § 1123(b)(3)(B) of the Bankruptcy Code. Acknowledging the absence of caselaw from our circuit, the district court followed cases from bankruptcy courts ruling that outright sales of preference actions under 11 U.S.C. § 547 are impermissible. Therefore, the district court dismissed the suit for lack of subject matter jurisdiction. This timely appeal followed.

II. Standard of Review

We review a dismissal for lack of subject matter jurisdiction de novo, applying the same standards as the district court. *In re S. Recycling, LLC*, 982 F.3d 374, 379 (5th Cir. 2020); *Griener v. United States*, 900 F.3d 700, 703 (5th Cir. 2018). "The burden of proving subject matter jurisdiction lies with the party asserting jurisdiction, and it must be proved by a preponderance of the evidence." *In re S. Recycling, LLC*, 982 F.3d at 379 (citing *Ballew v. Cont'l Airlines, Inc.*, 668 F.3d 777, 781 (5th Cir. 2012) ("The plaintiff must prove by a preponderance of the evidence that the court has jurisdiction based on the complaint and evidence.")).

III. Analysis

While Briar Capital raises several issues on appeal, this appeal turns on whether preference claims – a type of avoidance action – may validly be sold.[1]

A. Preference Claims Arising Under 11 U.S.C. § 547 May Be Sold

Briar Capital argues the district court erred in finding that preference claims cannot be sold, and thus, that it did not have standing to bring this claim. The district court, relying on various bankruptcy court opinions in light of the "absence of explicit authorization from the Fifth Circuit for sales of 11 U.S.C. § 547 avoidance actions," found that Briar Capital did not have standing, and dismissed its claims for lack of subject matter jurisdiction. "Avoidance actions are claims to avoid a transfer of property by the debtor that was made voidable by the Bankruptcy Code. Avoidance actions include claims to recover fraudulent transfers and certain preferential transfers made too close in time to the filing of bankruptcy." *In re Simply Essentials, LLC*, 78 F.4th 1006, 1008 (8th Cir. 2023). At issue is whether a preference action, a specific type of avoidance action, may be sold. This question of whether preference claims may be sold is indeed a novel issue for

1. The parties also disagree about the applicability of res judicata or claim preclusion in this case. Briar Capital contends that the August 2018 order confirming the Chapter 11 reorganization plan should have preclusive effect. Remmert responds that this argument was not properly preserved for appeal. We do not address this issue as we decide this appeal on other grounds.

this circuit. The Fifth Circuit has expressly reserved the question of whether a debtor-in-possession may sell the power to avoid preferences under 11 U.S.C. § 547. *In re Moore*, 608 F.3d 253, 261 (5th Cir. 2010) ("A split of authority exists as to whether the trustee may sell causes of action that arise from his avoidance powers."). We hold that 11 U.S.C. § 547 preference actions may be validly sold, and that Briar Capital has standing to bring this action for the following reasons.

* * *

As a general bankruptcy rule, a debtor-in-possession, "after notice and a hearing, may use, sell, or lease . . . *property of the estate*." Title 11, United States Code, Section 363(b)(1) (emphasis added).[2] Property of the estate, in turn, is defined in 11 U.S.C. § 541. Briar Capital argues preference claims are property of the estate – and therefore can be sold by a debtor-in-possession under § 363(b)(1) – because they fall within the definitions of property of the estate listed in §§ 541(a)(1) and 541(a)(7). We address each subsection in turn.

Briar Capital first asserts that preference claims fall in the general, broad definition of property of the estate in

2. As the bankruptcy court did not appoint a trustee in this case, and South Coast continued to operate its business as a debtor-in-possession, the rights and powers referenced in this opinion are those of a debtor-in-possession. *See* 11 U.S.C. § 1107 ("[A] debtor in possession shall have all the rights, other than the right to compensation under section 330 of this title, and powers, and shall perform all the functions and duties . . . of a trustee").

§ 541(a)(1) relying, in part, on the Supreme Court's broad reading of § 541(a)(1) in *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 205, 103 S. Ct. 2309, 76 L. Ed. 2d 515 (1983). Section 541(a)(1) defines "property of the estate" to include "all legal or equitable interests of the debtor in property as of the commencement of the case." In *Whiting Pools, Inc.*, the Court held that the reorganization estate included property of the debtor that had already been seized by a creditor before the debtor filed for reorganization. *Id.* at 205. In interpreting "property of the estate," the Court stated that § 541(a)(1) "is intended to include in the estate any property made available to the estate by other provisions of the Bankruptcy Code." *Id.* The Court also looked to the congressional report on the Bankruptcy Code and stated that the "congressional goal of encouraging reorganizations and Congress' choice of methods to protect secured creditors suggest that Congress intended a broad range of property to be included in the estate." *Id.* at 204. The Fifth Circuit has echoed this sentiment, asserting that "[t]he scope of property rights and interests included in a bankruptcy estate is very broad: The conditional, future, speculative, or equitable nature of an interest does not prevent it from being property of the bankruptcy estate." *In re Kemp*, 52 F.3d 546, 550 (5th Cir. 1995). Additionally, courts have generally noted that this broad definition includes causes of action. *In re Greenhaw Energy, Inc.*, 359 B.R. 636, 642 (Bankr. S.D. Tex. 2007) (citing *In re Equinox Oil Co.*, 300 F.3d 614, 618 (5th Cir. 2002) ("Section 541 is read broadly and is interpreted to 'include all kinds of property, including tangible or intangible property' [and] causes of action[.]")).

Reading § 541(a)(1) broadly, as we must, preference actions fall within its scope. A preference action is property, as it is a right of action created by federal bankruptcy law to avoid a transfer of property. *In re Moore*, 608 F.3d at 257-58 ("[T]he term 'all legal and equitable interests of the debtor in property' is all-encompassing and includes rights of action as bestowed by either federal or state law."). Preference actions are a mechanism in the Bankruptcy Code by which additional property is made available to the estate, fitting squarely within the *Whiting Pools* definition. A successful preference claim voids the allegedly preferential transfer and returns that property to the estate. *In re Tusa-Expo Holdings, Inc.*, 811 F.3d 786, 791-92 (5th Cir. 2016) ("If a trustee establishes each of the requirements of § 547(b), the transfer is a preference, which must be returned to the bankruptcy estate . . . "). Additionally, claims to avoid allegedly preferential transfers arise with the filing of the bankruptcy petition, making them property that the debtor has an interest in as of the commencement of the case. *See In re Simply Essentials, LLC*, 78 F.4th 1006 (holding that avoidance actions are property of the estate under 11 U.S.C. § 541(a)(1) and (a)(7)). Thus, preference actions plainly fit the statutory definition of "property of the estate" and may validly be sold under § 363(b).

Briar Capital also argues that preference actions generally may qualify as property of the estate under § 541(a)(7). Section 541(a)(7) provides that property of the estate includes "any interest in property that the estate acquires after the commencement of the estate." Briar Capital contends that "a right of action that accrues post-

petition is estate property if it is created with or by property of the estate or related to or arises out of property that is already part of the estate." Similarly to Section 541(a)(1), the Fifth Circuit has held that "Congress enacted § 541(a)(7) to clarify its intention that § 541 be an all-embracing definition and to ensure that property interests created with or by property of the estate are themselves property of the estate." *In re TMT Procurement Corp.*, 764 F.3d 512, 525 (5th Cir. 2014). Preference actions clearly qualify as "property of the estate" under this section. *In re Simply Essentials, LLC*, 78 F.4th 1006 ("the avoidance actions clearly qualify as property of the estate under subsection (7)"). Keeping in mind our own precedent mandates a broad reading of § 541(a)(7), it is apparent that "[t]he Bankruptcy Code makes these assets available to the estate after the commencement of the case." *Id.* Thus, we also hold that the preference actions qualify as property of the estate under § 541(a)(7).

Beyond the clear statutory language, we find that our decision is bolstered by other courts across the country. We join the Eighth and Ninth Circuits in finding that preference claims are property of the estate that can be sold. *In re Simply Essentials, LLC*, 78 F.4th at 1011 ("Chapter 5 avoidance actions are property of the estate"); *In re Lahijani*, 325 B.R. 282, 288 (9th Cir. 2005) ("While there is some disagreement among courts about the exercise by others of the trustee's bankruptcy-specific avoiding power causes of action, the Ninth Circuit permits such actions to be sold or transferred.") (first citing *In re P.R.T.C., Inc.*, 177 F.3d 774, 781 (9th Cir. 1999); and then citing *In re Prof'l Inv. Props. of Am.*, 955 F.2d 623,

625-26 (9th Cir. 1992)). In so deciding, the Eighth Circuit addressed Remmert's chief argument in this case – that the avoidance powers are unique powers belonging to the trustee and that should not have been sold to someone who would not exercise those powers for the benefits of all creditors. Specifically, the appellants in *In re Simply Essentials* argued that "allowing the sale of avoidance actions would violate the trustee's fiduciary duty or undermine the purpose of avoidance actions." *In re Simply Essentials, LLC*, 78 F.4th at 1010. In response, the court succinctly explained that the trustee's fiduciary duties require it to maximize the value of the estate, which may include and even require the sale of an avoidance action. *Id.* The court held that allowing the sale of avoidance actions "is consistent with the congressional intent behind including a fiduciary duty to maximize the value of the estate." *Id.*

The Ninth Circuit has also found that all avoidance powers, including preference actions, may be sold. *In re P.R.T.C., Inc.*, 177 F.3d 774. A Bankruptcy Appeals Panel within the Ninth Circuit rejected the appellants' argument that the estate received no benefit where there was no specific portion of future recoveries reserved for the estate. *In re Lahijani*, 325 B.R. at 288 ("We reject appellants' argument that the avoiding power causes of action should not have been sold to one who would not exercise the powers for the benefit of all creditors.").[3]

3. While Bankruptcy Appeals Panel decisions are not binding precedent, we find the rationale persuasive. *See In re Silverman*, 616 F.3d 1001, 1005 n.1 (9th Cir. 2010) (noting that while decisions from the Bankruptcy Appeals Panel are not binding, they are persuasive authority given their expertise in bankruptcy law).

It decided that "[t]he benefit to the estate in such circumstances is the sale price, which might or might not include a portion of future recoveries for the estate." *Id.* at 287.

In rejecting these arguments, the courts took a broad view of what benefits the estate, which we adopt here. This logic of maximization of the estate applies even under circumstances like these, where a creditor is not pursuing the claim for the benefit of all creditors. In this case, Briar Capital waived the right to recover administrative expenses and its security interest in $700,000 of sales proceeds, in exchange for the right to pursue this preference claim. Although Briar Capital does not owe any percentage of the possible recovery in this case to the estate, its waiver of the right to collect administrative expenses and its release of its claim to $700,000 are concrete benefits to the estate. Interpreting the Bankruptcy Code to allow the sale of preference actions does not undermine the purpose of avoidance actions. Rather, it is consistent with the trustee's duty to maximize the estate.

Remmert also raises concerns about equity, a general policy underlying the Bankruptcy Code. Specifically, Remmert argues that since "Briar Capital would be pursuing claims only for itself" it "would be potentially allowed to recover more than rightfully due to it." We have already addressed this policy concern in a similar context[4] by reiterating that the sale of avoidance actions "will not

4. While the *In re Moore* court did not address the sale of preference actions, the policy arguments underlying its holding apply with equal force in this case.

necessarily undermine core bankruptcy principles. In approving such sales, bankruptcy courts must ensure that fundamental bankruptcy policies of asset value maximization and equitable distribution are satisfied. Bankruptcy courts must make those decisions on a case by case basis in light of the factual circumstances." *In re Moore*, 608 F.3d at 262 n.18; *see also In re Lahijani*, 325 B.R. at 288 ("The court's obligation in § 363(b) sales is to assure that optimal value is realized by the estate under the circumstances.").[5] Allowing the sale of preference actions will grant bankruptcy courts more flexibility in distributing assets, maximize the value of the bankruptcy estate, and in turn, allow for more equitable distribution of assets.

In fact, allowing for the sale of preference claims may be the most equitable option. For example, in some cases, the estate may not have sufficient funds to pursue preference actions. By assigning the actions to creditors who may be able to pursue the actions, the bankruptcy court and the debtor have more flexibility in distributing the remaining assets and can most effectively maximize the bankruptcy estate. *In re Simply Essentials, LLC*, 78 F.4th at 1010 ("When an estate cannot afford to pursue avoidance actions, the best way to maximize the value of

5. *In re Moore* cited this proposition – that allowing the sale of preference actions gives bankruptcy courts flexibility to maximize the value of the estate – favorably in dicta, stating that "[b]ankruptcy courts may determine, in any given situation, whether a sum-certain offer maximizes estate assets or whether, instead, an offer that includes a portion of future recoveries is more appropriate." *In re Moore*, 608 F.3d at 262 n.19 (citing *In re Lahijani*, 325 B.R. at 288).

the estate is to sell the actions."); *see also In re P.R.T.C.*, 177 F.3d at 777 (allowing the sale where the estate did not have the funds to pursue the avoidance claims, but believed they may be valuable). Maximization of the bankruptcy estate certainly benefits all creditors, as there are more assets to be distributed. Here, the estate received a benefit by Briar Capital's release of its claim to $700,000 as well as all administrative expenses, and the subsequent approval of the bankruptcy plan in exchange for the rights to the preference claim. We reject Remmert's blanket contention that allowing the sale of preference actions clashes with general principles of equity articulated in the Bankruptcy Code and instead find that bankruptcy courts are capable of determining what is the most equitable under the specific circumstances of each case, which may include selling preference claims. As Briar Capital validly purchased the claim outright, it has standing to pursue the lawsuit as purchaser of the claim.

B. One Need Not Be a Representative of the Estate to Pursue a Validly Purchased Preference Claim

Though we find that avoidance actions are "property of the estate" which can be sold, Remmert still argues Briar Capital lacks standing to pursue such claims because it is not a "representative of the estate." The district court had two related findings. First, it found that under § 1123(b)(3)(B), a statute by which a third party may pursue a claim belonging to the estate, Briar Capital was not a representative of the estate and had no authority to pursue this claim under this particular provision of

the Bankruptcy Code. Secondly, the district court found that preference claims could not be sold, and so Briar Capital did not have standing to pursue this claim as a purchaser. Thus, it concluded that Briar Capital did not have standing under either avenue. Because we find that preference claims can be sold, we hold that Briar Capital has standing to pursue this claim as a purchaser of the claim regardless of whether it is a "representative of the estate."

Remmert appears to argue that the "representative of the estate" issue is dispositive: Briar Capital is not a representative of the estate and thus, has no standing to bring the preference claim.[6] Remmert's view is that even if preference claims are found to be property of the estate which may be sold, since they are unique powers entrusted to the estate under the Bankruptcy Code, there ought to be an additional requirement on purchasers of these claims: that they must be representatives of the estate to have standing to pursue the claim. Briar Capital, contrastingly, argues that these issues are "exclusive and independent." We find that Briar Capital has the more compelling argument. Whether Briar Capital is a "representative of the estate" is irrelevant to this appeal.

---

6. While not explicit in Remmert's brief, at oral argument we asked Remmert "if this claim is property of the estate, and property can be sold or conveyed . . . do they have to be a representative of the estate?" Remmert's counsel responded "they do." Remmert also stated in supplemental briefing to this Court that while one issue is whether avoidance actions are property which can be sold, a second issue is "when such a sale will confer standing because the purchaser's responsibilities qualify it as a 'representative of the estate.'"

This conclusion is supported by the plain text of the Bankruptcy Code. Title 11, United States Code, Section 1123(b)(3) states that a Chapter 11 bankruptcy plan *may* provide for the "settlement or adjustment of any claim or interest belonging to the debtor or the estate" or "the retention or enforcement by the debtor, by the trustee, or by a representative of the estate appointed for such purpose of any such claim." On the other hand, 11 U.S.C. § 363 provides that a debtor-in-possession "after notice and a hearing, may use, sell, or lease . . . property of the estate." Remmert relies upon 11 U.S.C. § 1123(b)(3), arguing that Briar Capital's failure to meet the requirements of this section is fatal to its standing argument. This reliance is inapposite. The Bankruptcy Code provides different mechanisms by which a debtor-in-possession may liquidate its assets. There is no requirement in 11 U.S.C. § 363 that the purchaser of a piece of the estate's property also be a representative of the estate, only that the debtor-in-possession give notice and hold a hearing. These requirements were met in this case and the bankruptcy court found that the plan complied with the Bankruptcy Code, was proposed in good faith, and maximized the value of the estate. There is no additional requirement on the purchaser of a preference claim to qualify as a representative of the estate to have standing to pursue the validly purchased claim. In holding that preference claims may be sold, we also hold that the purchasers of preference claims have standing to pursue them.

IV. Conclusion

We hold that preference actions may be sold pursuant to 11 U.S.C. § 363(b)(1) because they are property of the estate under 11 U.S.C. §§ 541(a)(1) and (7). And, even if Briar Capital does not qualify as a representative of the estate, it has standing to pursue the preference claim as it validly purchased the claim outright. The district court therefore erred in finding that Briar Capital lacked standing to bring this claim. We REVERSE and REMAND for further proceedings.

APPENDIX B — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED FEBRUARY 14, 2024

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 22-20536

IN THE MATTER OF
SOUTH COAST SUPPLY COMPANY,

Debtor,

BRIAR CAPITAL WORKING FUND CAPITAL, L.L.C., AS ASSIGNEE OF SOUTH COAST SUPPLY COMPANY,

Appellant,

versus

ROBERT W. REMMERT,

Appellee.

February 14, 2024, Filed

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:18-CV-2867

Before STEWART, DENNIS, and WILSON, *Circuit Judges.*

Appendix B

JUDGMENT

This cause was considered on the record on appeal and was argued by counsel.

IT IS ORDERED and ADJUDGED that the judgment of the District Court is REVERSED, and the cause is REMANDED to the District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that Appellant pay to Appellee the costs on appeal to be taxed by the Clerk of this Court.

Certified as a true copy and issued as the mandate on February 14, 2024

Attest: /s/ Lyle W. Cayce

Clerk, U.S. Court of Appeals, Fifth Circuit

APPENDIX C — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, FILED SEPTEMBER 12, 2022

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
TEXAS, HOUSTON DIVISION

CIVIL ACTION NO. 4:18-CV-2867

BRIAR CAPITAL WORKING FUND CAPITAL, LLC, AS ASSIGNEE OF SOUTH COAST SUPPLY COMPANY,

Plaintiff,

vs.

ROBERT W. REMMERT,

Defendant.

Filed September 12, 2022

MEMORANDUM OPINION AND ORDER

This case is before the Court because a reference to the United States Bankruptcy Court for the Southern District of Texas was withdrawn by Judge Hughes on the recommendation of Judge Bohm. (Dkt. 1; Dkt. 3). *See* Southern District of Texas bankruptcy cases 17-35898 and 18-3084. The plaintiff, Briar Capital Working Fund Capital, LLC ("Briar Capital"), is bringing avoidance

claims that were assigned to it by the bankruptcy debtor, South Coast Supply Company ("South Coast"), in South Coast's reorganization plan. The defendant, Robert W. Remmert ("Remmert"), is the former Chief Financial Officer of South Coast.

Remmert has filed a motion to dismiss the case under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction. The Court has considered the parties' briefing, the record of this case, the records of the related bankruptcy and adversary proceedings, and the applicable law. Remmert's motion (Dkt. 64) is **GRANTED**. This case is **DISMISSED WITHOUT PREJUDICE**.

I. FACTUAL AND PROCEDURAL BACKGROUND

South Coast, an industrial products distributor founded in 1972, filed a Chapter 11 bankruptcy petition in 2017, blaming its recent financial problems on "mismanagement on the part of certain employees who [we]re no longer employed by the company." *See* Southern District of Texas bankruptcy case number 17-35898 at docket entries 1, 4. South Coast continued to operate its business as a debtor-in-possession; the bankruptcy court appointed a Chief Restructuring Officer ("CRO") for the company but did not appoint a Chapter 11 trustee. *See* Southern District of Texas bankruptcy case number 17-35898 at docket entries 34 and 36.

South Coast also brought an adversary proceeding against Remmert, its former CFO, in which it sought avoidance and recovery of payments under 11 U.S.C.

§§ 547(b)(5) and 550 and disallowance of claims under 11 U.S.C. § 502(d). *See* Southern District of Texas bankruptcy case number 17-35898 at docket entry 123. The payments at issue in the adversary proceeding were "payments to Remmert in repayment of certain loans made to South Coast[.]" *See* Southern District of Texas bankruptcy case number 17-35898 at docket entry 123, page 2. The payments totaled $316,624.10. *See* Southern District of Texas bankruptcy case number 17-35898 at docket entry 123, page 2.

When the CRO was appointed, Briar Capital was South Coast's sole secured lender, and Briar Capital had filed a proof of claim in South Coast's bankruptcy asserting a claim for $2,563,191.07. *See* Southern District of Texas bankruptcy case number 17-35898 at claim document 23-1, page 2 and docket entry 241, page 12. Briar Capital's proof of claim stated that Briar Capital had a lien on property valued at $3,926,263.88. *See* Southern District of Texas bankruptcy case number 17-35898 at claim document 23-1, page 2. Briar Capital's loan agreement with South Coast stated that the loan was collateralized with "all of [South Coast's] now owned or hereafter acquired assets, whether tangible or intangible[.]" *See* Southern District of Texas bankruptcy case number 17-35898 at claim document 23-1 part 2, page 4.

Less than two weeks after South Coast filed its bankruptcy petition, Briar Capital moved for the appointment of a Chapter 11 case trustee under 11 U.S.C. § 1104, leveling charges against South Coast's leadership of "fraud, dishonesty and incompetence" and asserting

that the company's senior management "c[ould] not be trusted with the fiduciary responsibilities of a debtor-in-possession." *See* Southern District of Texas bankruptcy case number 17-35898 at docket entry 20, page 4. South Coast made two motions requesting authority to use cash collateral, pointedly "reserv[ing] the right to object to Briar Capital's claim upon full review of its proof of claim." *See* Southern District of Texas bankruptcy case number 17-35898 at docket entry 4 and docket entry 83, page 3. Briar Capital filed two objections to South Coast's use of cash collateral in which it accused South Coast of "breach[ing] its duties and obligation under its loan agreement regarding reporting and cash management[,] transferr[ing] substantially all of its inventory at a drastically reduced discount[,] and divert[ing] Briar Capital's cash collateral away from a blocked account." *See* Southern District of Texas bankruptcy case number 17-35898 at docket entry 23, page 1 and docket entry 102. In its second objection, Briar Capital contended that, since the beginning of the bankruptcy case, South Coast had "repeatedly failed to meet its operating budget" and proven itself "unable to provide adequate protection for the use of Briar Capital's cash collateral." *See* Southern District of Texas bankruptcy case number 17-35898 at docket entry 102, pages 1-2. When South Coast sought post-petition debtor-in-possession ("DIP") financing, it opted not to accept such financing from Briar Capital, even though Briar Capital had offered a DIP financing proposal at South Coast's request. *See* Southern District of Texas bankruptcy case number 17-35898 at docket entry 102, pages 1-2.

Instead of borrowing from Briar Capital, South Coast requested and received an order from the bankruptcy court authorizing it to obtain DIP financing from a company called Solstice Capital, LLC ("Solstice"). *See* Southern District of Texas bankruptcy case number 17-35898 at docket entries 110 and 121. The bankruptcy court's order approving the DIP financing stated that Solstice and Briar Capital had reached an agreement whereby Briar Capital would have lien priority over Solstice with regard to property obtained by South Coast prior to the date on which Solstice first advanced DIP financing to South Coast, while Solstice would have lien priority over Briar Capital with regard to property obtained by South Coast after that date. *See* Southern District of Texas bankruptcy case number 17-35898 at docket entry 121, pages 4-6. Under this arrangement, the bankruptcy court found that Briar Capital's interests in its collateral "[we]re adequately protected by the proposed DIP Financing, which preserve[d] for Briar Capital the proceeds of all inventory and accounts to the date on which [DIP] financing commence[d]." *See* Southern District of Texas bankruptcy case number 17-35898 at docket entry 121, page 5. Briar Capital also received a junior security interest in the collateral in which Solstice had the first lien. *See* Southern District of Texas bankruptcy case number 17-35898 at docket entry 121, page 4. The bankruptcy court's order approving the DIP financing additionally noted that "Briar Capital ha[d] filed a Proof of Claim in the amount of $2,563,191.07 as of the Petition Date" and that Briar Capital had "assert[ed] that it [wa] s over-secured, with collateral value of $3,926,263.88 according to its Proof of Claim." *See* Southern District of

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Texas bankruptcy case number 17-35898 at docket entry 121, page 2.

After obtaining approval for DIP financing from Solstice, South Coast filed a proposed reorganization plan under which it would sell certain inventory, accounts, intellectual property, contract rights, and other assets to Solstice for $700,000, $500,000 of which would go into the unsecured creditors account and $200,000 of which would go into a debtor-in-possession account to pay for administrative and priority claims. *See* Southern District of Texas bankruptcy case number 17-35898 at docket entry 168. According to the CRO's testimony at the confirmation hearing, the proposed sale did not include any "inventory [or] accounts receivable" in which Briar Capital had a first-priority lien interest. *See* Southern District of Texas bankruptcy case number 17-35898 at docket entry 241, page 16.

Briar Capital objected to confirmation of the proposed reorganization plan. *See* Southern District of Texas bankruptcy case number 17-35898 at docket entry 209. In its objection, Briar Capital argued that the proposed reorganization plan improperly "fail[ed] to provide Briar Capital with a lien that attache[d] to the proceeds" of the sale to Solstice. *See* Southern District of Texas bankruptcy case number 17-35898 at docket entry 209, page 4. Even though other assets were earmarked for repayment of Briar Capital's loan to South Coast, Briar Capital contended that South Coast had overstated those assets' values and that South Coast was "unable to show [that] the myriad of speculative assets offered instead of the Solstice proceeds [wa]s a legally acceptable equivalent

of the $700,000 in cash." *See* Southern District of Texas bankruptcy case number 17-35898 at docket entry 209, pages 4-7.

To address Briar Capital's concerns, South Coast modified its proposed reorganization plan to assign its avoidance action against Remmert—which became this case—to Briar Capital. *See* Southern District of Texas bankruptcy case number 17-35898 at docket entry 230, pages 46-47 and docket entry 241, pages 19-20. The modified plan also allowed Briar Capital to pocket any amounts that it received under the plan, even if those amounts exceeded South Coast's debt to Briar Capital; as originally proposed, the plan had required Briar Capital to give any surplus to South Coast for deposit into the unsecured creditors account. *See* Southern District of Texas bankruptcy case number 17-35898 at docket entry 230, pages 22-23, 46-47.

After South Coast made its modifications to the reorganization plan, Briar Capital withdrew its objection. *See* Southern District of Texas bankruptcy case number 17-35898 at docket entry 226. The modified plan was confirmed. *See* Southern District of Texas bankruptcy case number 17-35898 at docket entry 230. At the confirmation hearing, the CRO testified that, under the plan, Briar Capital had received or would receive $896,000 in cash; roughly $1,795,000 in inventory; and approximately $600,000 in accounts receivable, of which "about $400,000" was likely collectible. *See* Southern District of Texas bankruptcy case number 17-35898 at docket entry 241, pages 21-26. Assuming that only $400,000 of the accounts

receivable were collectible, the total value of the assets received by Briar Capital was $3,091,000. This amount did not include any estimate of the value of the avoidance claim against Remmert. *See* Southern District of Texas bankruptcy case number 17-35898 at docket entry 241, page 27.

Briar Capital pursued the avoidance action against Remmert as assignee of South Coast. Judge Bohm recommended withdrawal of the reference to the bankruptcy court. (Dkt. 1). Judge Hughes withdrew the reference (Dkt. 3), and the case was then reassigned to the undersigned judge. (Dkt. 18). Remmert has now filed a motion to dismiss under Rule 12(b)(1) on the basis that Briar Capital lacks standing to prosecute the avoidance action.

II. LEGAL STANDARDS

a. Rule 12(b)(1)

A motion filed under Federal Rule of Civil Procedure 12(b)(1) allows a party to challenge the subject matter jurisdiction of the district court to hear a case. *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001). The party asserting that federal subject matter jurisdiction exists bears the burden of proving it by a preponderance of the evidence. *Ballew v. Continental Airlines, Inc.*, 668 F.3d 777, 781 (5th Cir. 2012). Under Rule 12(b)(1), the court may consider any of the following: (1) the complaint alone; (2) the complaint supplemented by the undisputed facts evidenced in the record; or (3) the complaint supplemented

by undisputed facts plus the court's resolution of disputed facts. *Walch v. Adjutant General's Department of Texas*, 533 F.3d 289, 293 (5th Cir. 2008). The subject matter jurisdiction of a federal court can be challenged at any stage of the litigation. *In re Canion*, 196 F.3d 579, 585 (5th Cir. 1999). "Furthermore, parties cannot confer subject matter jurisdiction on federal courts." *Id.*

b. The standing to pursue avoidance actions

Briar Capital is pursuing avoidance claims that were assigned to it by South Coast in South Coast's reorganization plan. Those claims seek avoidance and recovery of payments under 11 U.S.C. §§ 547(b)(5) and 550 and disallowance of claims under 11 U.S.C. § 502(d).

11 U.S.C. § 1123(b)(3)(B) allows a Chapter 11 reorganization plan to authorize a party other than the debtor or a trustee to exercise avoidance powers. *McFarland v. Leyh (In re Texas General Petroleum Corp.)*, 52 F.3d 1330, 1335 (5th Cir. 1995). "Under Section 1123(b)(3)(B), a party other than the debtor or the trustee that seeks to enforce a claim must show (1) that it has been appointed, and (2) that it is a representative of the estate." *Id.* (adopting a test articulated by the Tenth Circuit in *In re Mako*, 985 F.2d 1052, 1054 (10th Cir. 1993)). The bankruptcy court's approval of a plan that clearly appoints a stranger to the estate to enforce an avoidance claim satisfies the first element. *Id.* "As for the second element, courts apply a case-by-case analysis to determine whether the appointed party's responsibilities qualify it as a representative of the estate. The primary

concern is whether a successful recovery by the appointed representative would benefit the debtor's estate and particularly, the debtor's unsecured creditors." *Id.* (citation and quotation marks omitted).

The question of whether the two-part test adopted by the Fifth Circuit in *McFarland* is met "is generally a question of law[,]" and a party that cannot satisfy the test lacks standing to bring the purportedly assigned claim. *Id.* at 1334-36, 1339. The standing determination is jurisdictional. *See In re Texas Wyoming Drilling, Inc.*, 647 F.3d 547, 550 (5th Cir. 2011) (characterizing the question of standing to assert post-confirmation claims based on adequacy of preservation language in confirmed reorganization plan as a jurisdictional question); *In re United Operating*, 540 F.3d 351, 354-56 (5th Cir. 2008) (same) ("Standing is a jurisdictional requirement, and we are obliged to ensure it is satisfied regardless whether the parties address the matter.").

III. ANALYSIS

The Court concludes that Briar Capital does not have standing to pursue the avoidance claims against Remmert.

a. The *McFarland* test is not met.

The second element of the test adopted by the Fifth Circuit in *McFarland* is not met. A successful recovery by Briar Capital would not benefit South Coast's estate or its unsecured creditors. To the contrary, South Coast's reorganization plan explicitly allows Briar Capital to

pocket any amounts that it recovers from Remmert, even if the recovery exceeds the amount necessary to pay South Coast's debt to Briar Capital; and the plan does not require Briar Capital to give any of the Remmert recovery, under any circumstances, to South Coast or any other creditors. *See* Southern District of Texas bankruptcy case number 17-35898 at docket entry 230, pages 46-47.

Briar Capital's recovery from Remmert will not benefit anyone but Briar Capital. Accordingly, the second element of the test adopted by the Fifth Circuit in *McFarland* is not met, and Briar Capital lacks standing to pursue the avoidance actions against Remmert. *Texas General Petroleum Corp. v. Evans*, 58 B.R. 357, 358 (Bankr. S.D. Tex. 1986) ("Intervenor clearly comes into court as a creditor of the debtor trying to exercise the avoidance power for itself as a sole creditor, not for the benefit of the debtor's estate or the creditors as a whole. . . . Furthermore, the avoidance of any liens by Marmid on the property involving the mineral interests will not benefit the debtor's estate or the general body of creditors of the estate. In the absence of that showing, Marmid is precluded from asserting its claims."); *see also In re Amarex, Inc.*, 96 B.R. 330, 334 (W.D. Okla. 1989) ("[I]n instances in which the purported representative has been found to be a 'stranger' to the bankruptcy estate, such that a successful recovery would only benefit the representative and not the estate or its unsecured creditors, courts have concluded that § 1123 does not authorize such a party to prosecute a claim, in spite of a provision in a plan of reorganization that authorizes the representative to do so."); *In re Railworks Corp.*, 325 B.R. 709, 718-19 (Bankr.

D. Md. 2005) ("The second requirement [of the test exists] to ensure that the person seeking to enforce the claim will not violate the longstanding prohibition against an individual creditor recovering a debt for his own personal gain. . . . The Bankruptcy Code specifically requires that the stranger to the estate enforcing these claims do so as a representative of the estate, and courts have interpreted this as a requirement that any recovery benefit the estate or unsecured creditors."); *cf. McFarland*, 52 F.3d at 1336 (holding that a liquidating trustee had standing to assert a fraudulent conveyance action because the liquidating trust "act[ed] on behalf of the Class 5 unsecured creditors" and "[t]he proceeds from th[e] fraudulent conveyance action w[ould] benefit the Class 5 unsecured creditors").

b. The Fifth Circuit has not authorized the sales of avoidance actions created by 11 U.S.C. § 547.

Briar Capital acknowledges that it will be the sole beneficiary of any recovery that it obtains from Remmert in this case. (Dkt. 68 at p. 12). However, Briar Capital argues that it need not satisfy the *McFarland* test because it "purchased" the avoidance action against Remmert by withdrawing its objection to South Coast's reorganization plan and in turn "allowing" the distribution of the $700,000 that Solstice paid for South Coast's assets to other creditors and the debtor-in-possession account. (Dkt. 68 at pp. 12-15). Relying heavily on the Seventh Circuit's opinion in *Mellon Bank v. Dick Corp.*, 351 F.3d 290 (7th Cir. 2003), Briar Capital contends that South Coast's assignment of the Remmert avoidance action was an "effective[ ] s[ale]" of property of the bankruptcy

estate in which Briar Capital paid consideration through its "forbearance[.]" (Dkt. 68 at p. 11). Since Briar Capital's forbearance constituted consideration for a sale by South Coast of the avoidance actions against Remmert, the argument continues, Briar Capital has standing to pursue the case against Remmert even though Briar Capital's recovery from Remmert will not benefit anyone but Briar Capital. (Dkt. 68 at pp. 9-12).

The Court disagrees. As Briar Capital (to its credit) admits, the Fifth Circuit has expressly reserved the "question whether a trustee [or debtor in possession][1] may sell . . . the power to avoid preferences under [11 U.S.C.] § 547[,]" noting a "split of authority" on the issue. *In re Moore*, 608 F.3d 253, 261 & n.13 (5th Cir. 2010). In *Moore*, the Fifth Circuit held that a trustee may "sell causes of action that he has inherited from creditors" under a different statute, 11 U.S.C. § 544(b). *Id.* at 261-62. 11 U.S.C. § 544(b) avoidance claims, however, "are unique among the trustee's avoidance powers, because they do not create a cause of action, but allow the trustee to step into the shoes of a creditor with an existing claim." *Cedar Rapids Lodge & Suites, LLC v. Seibert*, No. 14-CV-4839,

1. With a few exceptions not relevant here, a debtor in possession in a Chapter 11 case "ha[s] all the rights . . . and powers, and shall perform all the functions and duties . . . of a trustee[.]" 11 U.S.C. § 1107; *see also In re Gandy*, 299 F.3d 489, 497 n.10 (5th Cir. 2002) ("The right of the trustee to commence an avoidance action is extended to a debtor in possession[.]"). The caselaw discussing trustees' ability (or inability) to sell avoidance actions accordingly informs the analysis of whether debtors in possession may sell those actions.

2018 U.S. Dist. LEXIS 47912, 2018 WL 747408, at *10 (D. Minn. Feb. 7, 2018). The cases recognize a distinction "between avoidance claims that the bankruptcy statute creates specifically for the trustee and pre-existing claims inherited from creditors under [11 U.S.C.] § 544(b)." *Id.* In line with that distinction, the Fifth Circuit emphasized in *Moore* that its analysis "focus[ed] narrowly on the trustee's ability to sell causes of action . . . that exist independent of the bankruptcy proceeding." *Id.* at 261.

Given the Fifth Circuit's reservation of the question, the Court will follow the numerous cases holding that outright sales of avoidance actions created by 11 U.S.C. § 547 are impermissible. *See*, *e.g.*, *Brekelmans v. Salas (In re Salas)*, No. 318-2662, 2020 Bankr. LEXIS 3408, 2020 WL 9172379, at *4-6 (Bankr. M.D. Tenn. Dec. 7, 2020) ("Other courts have refused to allow trustees to sell their powers to pursue avoidance actions and have not recognized that a purchaser has standing to assert the trustee's powers on their own behalf."); *In re McGuirk*, 414 B.R. 878, 879 (Bankr. N.D. Ga. 2009) ("A trustee's avoidance powers, including those under Sections 547, 548 and 549 of the Bankruptcy Code, are unique statutory powers intended to benefit the estate, not a single creditor."); *In re North Atlantic Millwork Corp.*, 155 B.R. 271, 281 (Bankr. D. Mass. 1993) ("[T]he statutory scheme is clear. Absent section 1123(b)(3)(B), section 547 of the Bankruptcy Code only gives trustees and debtors-in-possession . . . the power to avoid preferential transfers, although most courts have found an implied but qualified right for creditors' committees to initiate adversary proceedings[.]"); *In re S & D Foods, Inc.*, 110 B.R. 34, 36 (Bankr. D. Colo. 1990)

("The Courts have consistently held that only the trustee, the debtor in possession, or other representative of the estate under § 1123(b)(3)(B), may enforce the avoidance powers under §§ 547 and 548."); *see also In re Boyer*, 372 B.R. 102, 105 (D. Conn. 2007) ("The sale or assignment of avoidance claims to an objecting creditor is not permitted if the creditor intends to pursue the claims on its own behalf."). The *Boyer* opinion convincingly reasons that "only th[e] trustee or debtor-in-possession represents the interests of all the creditors in maximizing the value of the debtor's estate" and that "by allowing one creditor to buy a claim from the trustee and pursue that claim on his own behalf, that creditor may be allowed to recover more of the estate's assets than would otherwise rightfully be due to that creditor." *Boyer*, 372 B.R. at 106. Furthermore, a prominent bankruptcy treatise, specifically referencing the *Mellon Bank* case on which Briar Capital relies, has noted that:

> [b]y design, a trustee is supposed to pursue avoidance actions for the benefit of the estate and its creditors, rather than a particular party. In addition, there is also the concern in the chapter 11 context that a debtor in possession might bargain away avoidance actions too cheaply at the expense of the estate, or bargain away the rights of unsecured creditors for the benefit of secured parties (which appears to have occurred in the *Mellon Bank* case). 7 *Collier on Bankruptcy* ¶ 1109.05[4].

Given the persuasive concerns articulated by *Boyer* and the *Collier* treatise, and considering the absence

of explicit authorization from the Fifth Circuit for sales of 11 U.S.C. § 547 avoidance actions, the Court concludes that Briar Capital lacks standing here. By all appearances, Briar Capital, at all relevant times, was oversecured and had a significant equity cushion in its collateral. Nevertheless, simply through an objection to South Coast's confirmation plan, Briar Capital obtained avoidance claims directed at payments totaling more than $300,000. Briar Capital is not required to remit any of the recovery on the avoidance claims to South Coast or to any other South Coast creditors, even if the recovery exceeds the amount necessary to pay South Coast's debt to Briar Capital. The Court concludes that the purported sale of South Coast's avoidance claims against Remmert did not give Briar Capital standing to pursue those claims.

IV. CONCLUSION

Remmert's motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) (Dkt. 64) is **GRANTED**. Briar Capital's claims are **DISMISSED WITHOUT PREJUDICE** for lack of subject matter jurisdiction. Any other pending motions are **DENIED AS MOOT**. The Court will issue a separate final judgment.

SIGNED at Houston, Texas, on September 12, 2022.

/s/ George C. Hanks, Jr.
GEORGE C. HANKS, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX D — FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, FILED SEPTEMBER 12, 2022

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
TEXAS, HOUSTON DIVISION

CIVIL ACTION NO. 4:18-CV-2867

BRIAR CAPITAL WORKING FUND CAPITAL, LLC, AS ASSIGNEE OF SOUTH COAST SUPPLY COMPANY,

Plaintiff,

vs.

ROBERT W. REMMERT,

Defendant.

Filed September 12, 2022

FINAL JUDGMENT

In a *Memorandum Opinion and Order* issued simultaneously with this judgment, the Court granted Defendant Robert W. Remmert's motion to dismiss this case under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction. (Dkt. 64).

In accordance with that ruling, Plaintiff Briar Capital Working Fund Capital, LLC's claims are **DISMISSED WITHOUT PREJUDICE**. Any other pending motions are **denied as moot**. Each party shall bear its own fees and costs.

THIS IS A FINAL JUDGMENT.

SIGNED at Houston, Texas, on September 12, 2022.

/s/ George C. Hanks, Jr.
GEORGE C. HANKS, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX E — REPORT AND RECOMMENDATION OF THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF TEXAS, FILED AUGUST 17, 2018

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS,
HOUSTON DIVISION

Case No. 17-35898

Chapter 11

Adversary No. 18-03084

In re: SOUTH COAST SUPPLY COMPANY,

Debtor.

SOUTH COAST SUPPLY COMPANY,

Plaintiff,

v.

ROBERT W. REMMERT,

Defendant.

Appendix E

REPORT AND RECOMMENDATION TO THE UNITED STATES DISTRICT COURT RECOMMENDING THAT IT WITHDRAW THE REFERENCE OF THIS ADVERSARY PROCEEDING [Adv. Doc. No. 10]

I. INTRODUCTION

In this adversary proceeding (the "*Adversary Proceeding*"), the plaintiff, South Coast Supply Company, the debtor-in-possession in the main Chapter 11 case (the "*Debtor*"), has asserted a claim against Robert W. Remmert (the "*Defendant*") under 11 U.S.C. §§ 547(b) and 550 to recover preferential payments totaling $316,624.10 (the "*Preferential Claim*"). [Adv. Doc. No. 1 at 2, ¶ 10]. The Defendant has moved to withdraw the reference of the Adversary Proceeding, which the Debtor opposes. [Adv. Doc. Nos. 7-8, 10] The undersigned judge now issues this Report and Recommendation to the District Court recommending that it withdraw the reference of the Adversary Proceeding.

II. RELEVANT PROCEDURAL AND FACTUAL BACKGROUND OF THE MAIN CHAPTER II CASE AND THE ADVERSARY PROCEEDING

On October 20, 2017, the Debtor filed a voluntary Chapter 11 petition, initiating the main case. [Main Case, Doc. No. 1]. On April 23, 2018, the Debtor filed a complaint against the Defendant initiating the Adversary Proceeding. [Adv. Doc. No. 1]. On June 6, 2018, the Defendant filed his answer, which expressly demands a

jury trial and expressly does not consent to this Court entering a final judgment in the Adversary Proceeding or to holding a jury trial. [Adv. Doc. No. 6].

On June 6, 2018, the Defendant filed his motion to withdraw the reference of the Adversary Proceeding. [Adv. Doc. No. 7]. On June 12, 2018, the Debtor filed a response opposing this motion. [Adv. Doc. No. 8]. On June 18, 2018, the Defendant filed his first amended motion to withdraw the reference of the Adversary Proceeding. [Adv. Doc. No. 10]. On June 26, 2018, this Court held a hearing on the first amended motion to withdraw the reference, and then took the matter under advisement.

Meanwhile, on August 14, 2018, this Court held a confirmation hearing in the main Chapter 11 case. On August 17, 2018, this Court entered an order confirming the Debtor's Second Amended Plan, as modified (the "Plan"). [Main Case, Doc. No. 168]. Pursuant to the terms of the Plan, the Debtor assigned the Preference Claim to one of its creditors, Briar Capital Working Capital Fund, LLC. [*Id.*] Thus, Briar Capital Working Capital Fund, LLC now stands in the shoes of the Debtor in the Adversary Proceeding and will hereinafter referred to as the Plaintiff. At the confirmation hearing held on August 14, 2018, the undersigned judge, knowing that the Plan assigned the Preference Claim to the Plaintiff, inquired of the Plaintiff's attorney as to whether his client took the same position as the Debtor with respect to the Defendant's first amended motion to withdraw the reference. Plaintiff 's attorney responded that just like the Debtor, the Plaintiff opposes the withdrawal of the reference.

III. THIS COURT RECOMMENDS THAT THE DISTRICT COURT WITHDRAW THE REFERENCE OF THE ADVERSARY PROCEEDING

A. Mandatory Withdrawal of the Reference

Under General Order 2005-6 of the United States District Court for the Southern District of Texas, authorized by 28 U.S.C. 157(a), "cases and proceedings arising under Title 11 or arising in or related to a case under Title 11 of the United States Code are automatically referred to the bankruptcy judges of this District." 28 U.S.C. § 157(d) provides for both mandatory and permissive withdrawal of the reference by the district courts. *See* 28 U.S.C. § 157(d). Section 157(d) requires mandatory withdrawal of the reference "if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce." *Id.*

Here, there are no pled causes of action involving federal law outside of the Bankruptcy Code. The only claim that has been pleaded—the Preference Claim—is made pursuant to express provisions of the Bankruptcy Code: 11 U.S.C. §§ 548(e) and 550. Therefore, mandatory withdrawal does not apply to the Adversary Proceeding.

B. Permissive Withdrawal of the Reference

"The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its

own motion or on timely motion of any party, for cause shown." 28 U.S.C. § 157(d). The Fifth Circuit has held that district courts should decide "cause" for permissive withdrawal of the reference by considering whether: (1) the underlying lawsuit is a non-core proceeding; (2) uniformity in bankruptcy administration will be promoted; (3) forum shopping and confusion will be reduced; (4) economical use of the debtors' and creditors' resources will be fostered; (5) the bankruptcy process will be expedited; and (6) a party has demanded a jury trial. *Holland Am. Ins. Co. v. Succession of Roy*, 777 F.2d 992, 999 (5th Cir. 1985) (discussed in *Tow v. Speer (In re Royce Homes, L.P.)*, Adv. No. 11-03191, Adv. Doc. No. 201 (Bankr. S.D. Tex. Oct. 13, 2011)). A review of these factors weighs strongly in favor of withdrawal of the reference of the Adversary Proceeding by the District Court.

1. The First Factor: The Underlying Lawsuit is a Core Proceeding

The Plaintiff has brought causes of action against the Defendants under §§ 547 and 550. Proceedings to avoid and recover allegedly preferential transfers are statutorily defined core proceedings. 28 U.S.C. § 157(b)(2)(F); *see Sommers v. Burton (In re Conard Corp.)*, 806 F.2d 610, 613 (5th Cir. 1986). Accordingly, the Adversary Proceeding is a core proceeding. The first factor, therefore, weighs against withdrawal of the reference.

2. The Second Factor: Uniformity in Bankruptcy Administration will be Promoted

"If a bankruptcy court is already familiar with the facts of the underlying action, then allowing that court to adjudicate the proceeding will promote uniformity in the bankruptcy administration." *In re British Am. Props. III, Ltd.*, 369 B.R. at 327; *see Palmer & Palmer, P.C. v. U.S. Trustee (In re Hargis)*, 146 B.R. 173, 176 (N.D. Tex. 1992); *Kenai Corp. v. Nat'l Union Fire Ins. Co. (In re Kenai Corp.)*, 136 B.R. 59, 61 (S.D.N.Y. 1992).

In considering the second factor, the undersigned judge has examined two previous Reports and Recommendations on withdrawal of the reference which he prepared. *Waldron v. Nat'l Union Fire Ins. Co. (In re EbaseOne Corp.)*, 2006 WL 2405732, No. 01–31527–H4–7, Adv. No. 06–3197, at *4 (Bankr. S.D. Tex. June 14, 2006); *Veldekens v. GE HFS Holdings, Inc. (In re Doctors Hosp. 1997, L.P.)*, 351 B.R. 813, 867-68 (Bankr. S.D. Tex. 2006) (Discussed in *Royce Homes and British American Properties III, Ltd.*). In *EbaseOne*, this Court observed that it had not reached any substantive issues in the adversary proceeding because the motion to withdraw reference was filed shortly after the filing of the complaint. Because it had not reached a significant level of familiarity with the case, the Court concluded that the second factor favored withdrawal. In contrast, in *Doctors Hospital 1997, L.P.*, this Court had conducted multiple extended hearings on an application for preliminary injunction and several motions for summary judgment. The Court determined that it had reached a

significant level of familiarity with the underlying facts of the adversary proceeding and that withdrawal of the reference would disrupt the uniformity of bankruptcy administration.

Of these two examples, the present facts are closer to *EbaseOne*. The undersigned judge has held only two hearings in the Adversary Proceeding since the Debtor initiated the Adversary Proceeding. The first hearing was very brief. It was the status conference that this Court normally holds soon after any adversary proceeding is filed in order to ensure that all counsel agree to the discovery deadlines, pretrial conference date, and trial date that this Court's scheduling order has set forth. The second hearing was also relatively brief: it was on the Defendant's first amended motion to withdraw reference. This Court has not held any hearings in the Adversary Proceeding concerning the merits of the dispute (such as discovery issues, motions to dismiss, or motions for summary judgment). Therefore, this Court has not gained any in-depth familiarity with the underlying facts in the Adversary Proceeding. Accordingly, the second factor favors withdrawal of the reference.

3. The Third Factor: Forum Shopping and Confusion will be Reduced

The Debtor initiated the Adversary Proceeding before this Court. The Defendant did not participate in the main Chapter 11 case before the Debtor filed suit against him—indeed, the Defendant is not even a creditor in the main case; and, therefore, the undersigned judge issued

no rulings against the Defendant that would lead him to forum shop. United States District Judge Kenneth M. Hoyt has previously observed that "[On some sense, any party who objects to Bankruptcy Court adjudication is forum shopping." *Veldekens v. GE HFS Holdings, Inc.*, 362 B.R. 762 (S.D. Tex. 2007) (quoted in *Royce Homes*, Adv. No. 11-03191, Adv. Doc. No. 201, p. 7, ¶ 3). "A good faith claim of right . . . should not on that basis alone be denied as forum shopping." *Id.* Here, the Defendant has a good faith right to a jury trial in the District Court *(see* sixth factor below), and nothing in the record indicates that he is forum shopping. Indeed, the Defendant filed his initial motion to withdraw reference on the same date he filed his answer, so it is not as if he sat on his hands and let this Court spend significant time becoming acquainted with the Preference Claim and then, on the eve of trial, sought to withdraw the reference. Just to the contrary: he moved very quickly to seek a withdrawal of the reference.

Under all of these circumstances, the third factor favors withdrawal of the reference.

4. The Fourth Factor: Economical Use of Debtor's and Creditors' Resources will be Fostered

Bankruptcy aims to maximize the efficient use of resources to administer the debtor's estate and resolve related litigation. *Plan Adm'r v. Lone Star RV Sales, Inc. (In re Conseco Fin. Corp.)*, 324 B.R. 50, 55 (N.D. Ill. 2005). However, "the fact that a given law or procedure is efficient . . . will not save it if it is contrary to the Constitution."

Stern v. Marshall, 131 S. Ct. 2594, 2619 (2011) (quoting *INS v. Chadha*, 462 U.S. 919, 944 (1983)). Here, the Defendant has not filed any proof of claim in the main Chapter 11 case and has demanded a jury trial in the District Court. Under these circumstances, the Constitution both guarantees a jury trial to the Defendant and requires an Article III court to adjudicate the preference claims against him. *Granfinanciera, S.A. v. Nordberg*, 469 U.S. 33, 54-55, 64 (1989); *Exec. Benefits Ins. Agency v. Arkinson (In re Bellingham Ins. Agency, Inc.)*, 702 F.3d 553, 562-63 (9th Cir.), *cert. granted,* 133 S. Ct. 2880 (2013). The undersigned judge believes that immediate withdrawal of reference will serve the interest of judicial economy and conservation of resources because it will allow the District Court to gain familiarity with the facts of the Adversary Proceeding before trial. Accordingly, the interests of judicial economy and conservation of resources support the withdrawal of reference.

The fourth factor favors withdrawal of the reference.

5. The Fifth Factor: The Bankruptcy Process will be Expedited

"A district court should consider the importance of the proceeding to the bankruptcy case and refuse to withdraw the reference if the withdrawal would unduly delay the administration of the bankruptcy case." *In re British Am. Props. III, Ltd.*, 369 B.R. 322, 328 (Bankr. S.D. Tex. 2007) (citing *In re Pruitt*, 910 F.2d 1160, 1168 (3d Cir. 1990)). Here, there will be no delay whatsoever in the administration of the Debtor's estate if the District

Court adjudicates the Adversary Proceeding. Indeed, in the main Chapter 11 case, this Court has already confirmed the Plan, which means that the administration of the Debtor's Chapter 11 estate has occurred and the estate has ceased to exist.[1] *Wooley v. Haynes & Boone, LLP (In re SI Restructuring Inc.)*, 714 F.3d 860, 864 (5th Cir. 2013) (quoting *Dynasty Oil & Gas, LLC v. Citizens Bank (In re United Operating, LLC)*, 540 F.3d 351, 355 (5th Cir. 2008)) ("When a Chapter 11 plan is confirmed, however, the estate ceases to exist. . . ."). Thus, there will be no delay in the administration of the Debtor's estate (or to distributions to creditors in the main case pursuant to the confirmed Plan) if the District Court withdraws the reference and adjudicates the Adversary Proceeding.

Under all of these circumstances, the fifth factor favors withdrawal of the reference.

6. The Sixth Factor: A Party has Demanded a Jury Trial

"A party against whom legal action has been brought to recover monetary damages and who has never filed a claim against the estate is entitled to a jury trial under the constitutional mandates of the Seventh Amendment to the United States Constitution, notwithstanding Congress' characterization of the action as a core proceeding." *Nu Van Tech., Inc. v. Cottrell, Inc. (In re*

1. As already noted, the Plan's treatment of the Plaintiff's claim includes the conveyance to the Plaintiff of the Preference Claim against the Defendant.

Nu Van Tech, Inc.), No. 01-49589-DML-11, 03-4219, 2003 WL 23785355, at *2 (N.D. Tex. Oct. 14, 2003). Here, the Plaintiff has sued the Defendant under 11 U.S.C. §§ 547 and 550 to recover alleged preferential payments of $316,624.10—i.e., monetary damages—and the Defendant has not filed a proof of claim in the main Chapter 11 case. Under these circumstances, the Defendant is entitled to a jury trial under *Granfinanciera, S.A.*, 492 U.S. at 64; the demand that he has made for a jury trial is a wholly legitimate one. *Levine v. M & A Custom Home Builder & Developer, LLC*, 400 B.R. 200, 205 (S.D. Tex. 2008) (quoting *Granfinanciera, S.A.*, 492 U.S. at 43) ("[The Trustee's] claims against Medina are suits at law for which the 7th Amendment right to a jury trial applies. The Supreme Court has directly held that 'Where is not dispute that actions to recover preferential or fraudulent transfers were often brought at law in the late 18th-central England.'").

In the Debtor's response opposing the Defendant's first amended motion to withdraw the reference—which the Plaintiff adopted when it took assignment of the Preference Claim under the terms of the confirmed Plan—it is set forth that "preference actions are within the jurisdiction of the bankruptcy courts and defendants in such actions have no right to a jury trial." [Adv. Doc. No. 8 at 2, ¶ 2]. This response then states that the undersigned judge reached this conclusion in *In re Quality Infusion Care, Inc.*, 2013 WL 6189948, at *2-3 (Bankr. S.D. Tex. 2013) by relying upon Bankruptcy Judge Marvin Isgur's opinion in *In re Apex Long Term Care—Katy, L.P.*, 465 B.R. 452 (Bankr. S.D. Tex. 2011). The undersigned

judge reached no such conclusion in *Quality Infusion.* In that particular adversary proceeding, which involved a preference claim, the defendant did **not** request a jury trial. Nevertheless, because the defendant had not filed a proof of claim in the main case, this Court believed it had an independent duty to determine if it had the constitutional authority to enter a final judgment. In the first instance, the Court determined it could do so because it was denying in part the plaintiff's motion for summary judgment, which meant that no final judgment was being entered at that time. *Quality Infusion*, 2013 WL 61899488, at *2. Alternatively, the Court determined that to the extent that its ruling did constitute a final judgment, the Court had the authority to enter such a judgment because the holding in *Stern* did not encompass claims brought under 11 U.S.C. § 547(b). *Id.* at *3. The undersigned judge emphasizes here that it stands by this ruling because the defendant in *Quality Infusion* had not demanded a jury trial.

The Plaintiff (standing in the shoes of the Debtor) insists that Judge Isgur's opinion in *Apex* unquestionably stands for the proposition that a bankruptcy court has the constitutional authority to adjudicate and enter a final judgment in an action seeking solely to recover preferential payments even if the Defendant has demanded a jury trial and not filed a proof of claim in the main case. The undersigned judge disagrees with this interpretation of *Apex.* In *Apex*, which involved four adversary proceedings seeking to recover preferential payments, the defendants in two of the adversary proceedings had filed proofs of claim and the defendants in the other two adversary

proceedings had not filed proofs of claim. 465 B.R. at 468. However, none of these defendants made jury demands. Judge Isgur ruled that in the two adversary proceedings where the defendants had not filed proofs of claim, he nevertheless had the authority to adjudicate the preference actions and enter a final judgment. *Id.* Thus, the undersigned judge interprets the *Apex* holding to be that a bankruptcy court has the constitutional authority to enter a final judgment in an adversary proceeding involving solely a preference claim even if the defendant has not filed a proof of claim in the main case so long as the defendant has not requested a jury trial. To the extent that the holding in *Apex* is that a bankruptcy court can adjudicate and enter a final judgment in a preference action where the defendant has not filed a proof of claim and has demanded a jury trial, the undersigned judge disagrees with this holding.

For all of the reasons set forth above, the sixth factor weighs heavily in favor of withdrawal of the reference.

IV. CONCLUSION

The undersigned judge believes that five of the six *Holland America* factors favor withdrawal of the reference by the District Court; and that substantial weight should be given to the sixth factor. Indeed, "[w]hen a defendant has a 7th Amendment right to a jury trial and does not consent to a jury trial [in the bankruptcy court], no further 'cause' for withdrawal of the reference must be shown." *Levine*, 400 B.R. at 206. Under these circumstances, the undersigned judge believes that cause exists under

28 U.S.C. § 157(d), and therefore recommends that the District Court immediately withdraw the reference of the Adversary Proceeding.

Signed on this 17th day of August, 2018.

/s/ Jeff Bohm
Jeff Bohm
United States Bankruptcy Judge

APPENDIX F — SUPPLEMENT TO REPORT AND RECOMMENDATION OF THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF TEXAS, FILED AUGUST 17, 2018

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS,
HOUSTON DIVISION

Case No. 17-35898

Chapter 11

Adversary No. 18-03084

IN RE: SOUTH COAST SUPPLY COMPANY,

Debtor.

SOUTH COAST SUPPLY COMPANY,

Plaintiff,

v.

ROBERT W. REMMERT,

Defendant.

Appendix F

SUPPLEMENT TO REPORT AND RECOMMENDATION TO THE UNITED STATES DISTRICT COURT RECOMMENDING THAT IT WITHDRAW THE REFERENCE OF THIS ADVERSARY PROCEEDING [Adv. Doc. No. 10]

The undersigned judge has recommended that the District Court withdraw the reference of the above-referenced adversary proceeding. [Adv. Doc. No. 17]. In the Report and Recommendation, the undersigned judge failed to address one of the arguments made by the Plaintiff, which opposes the Defendant's first amended motion to withdraw the reference. The undersigned judge submits this supplement to address this argument.

The Plaintiff contends that the Defendant is disingenuous when he asserts that he has filed no proof of claim in the main case. [Adv. Doc. No. 8 at 2, ¶ 3]. The Plaintiff contends that the Defendant has in fact filed two claims because claim number 36 and claim number 37 are claims filed by corporations of which the Defendant is an officer and owner. [*Id.*]. This Court disagrees that these two claims constitute a claim filed by the Defendant, in his individual capacity.

The case of *Official Committee of Unsecured Creditors v. Welsh (In re Phelps Techs., Inc.)*, 238 B.R. 819 (Bankr. W.D. Mo. 1999) is directly on point:

> The Committee has argued, in its response to the Defendants' Motion to Withdraw the

> Reference filed in the District Court, that the proof of claim filed by Welsh & O'Connor, P.C., against Phelps Technologies, Inc., "subjects all three Defendants to this Court's jurisdiction and waives their rights to a jury trial." The Committee argues that, by filing the proof of claim, the professional corporation has "opened up" the corporation's principals, Welsh and O'Connor, to counterclaims "for their individual negligence" in performing services for the Debtors. This argument was made entirely without any legal support, and the Court finds it to be without merit. It is basic hornbook law that a corporate entity is a separate and distinct entity from its shareholders and owners, and the Court does not believe that the filing of a proof of claim by the professional corporation in this case in any way subjects the corporate principals to the jurisdiction of the bankruptcy court or in any way waives their Seventh Amendment right to a trial by jury.

Id. at 824-25.

Like the committee in *Welsh*, the Plaintiff here has cited no authority in support of its argument that the Defendant, in his individual capacity, is deemed to have filed a proof of claim because his two corporations have filed claims. The undersigned judge adopts the reasoning of *Welsh* and concludes that the Defendant has not filed a claim in the main Chapter 11 case. Accordingly, the undersigned judge concludes that the Defendant has not

in any way waived his right to the jury trial in the District Court that he has requested.

The undersigned judge reiterates his recommendation to the District Court that it withdraw the reference of the above-referenced adversary proceeding.

Signed on this 17th day of August, 2018.

/s/ Jeff Bohm
Jeff Bohm
United States Bankruptcy Judge

APPENDIX G — ORDER WITHDRAWING THE REFERENCE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, FILED DECEMBER 20, 2018

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS,
HOUSTON DIVISION

Civil Action H-18-2867

SOUTH COAST SUPPLY COMPANY,

Plaintiff,

versus

ROBERT REMMERT,

Defendant.

Bankruptcy 18-03084

IN RE SOUTH COAST SUPPLY COMPANY,

Debtor.

December 20, 2018

Appendix G

ORDER WITHDRAWING THE REFERENCE

The reference to the United States Bankruptcy Court for the Southern District of Texas, Houston Division, is withdrawn to the docket of Judge Lynn N. Hughes.

Signed on December 20, 2018, at Houston, Texas.

/s/ Lynn N. Hughes
Lynn N. Hughes
United States District Judge

APPENDIX H — RELEVANT STATUTORY PROVISIONS

11 U.S.C. § 363. USE, SALE, OR LEASE OF PROPERTY

(a) In this section, "cash collateral" means cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents whenever acquired in which the estate and an entity other than the estate have an interest and includes the proceeds, products, offspring, rents, or profits of property and the fees, charges, accounts or other payments for the use or occupancy of rooms and other public facilities in hotels, motels, or other lodging properties subject to a security interest as provided in section 552(b) of this title [11 USCS § 552(b)], whether existing before or after the commencement of a case under this title.

(b)

(1) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate, except that if the debtor in connection with offering a product or a service discloses to an individual a policy prohibiting the transfer of personally identifiable information about individuals to persons that are not affiliated with the debtor and if such policy is in effect on the date of the commencement of the case, then the trustee may not sell or lease personally identifiable information to any person unless—

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

(B) after appointment of a consumer privacy ombudsman in accordance with section 332 [11 USCS § 332], and after notice and a hearing, the court approves such sale or such lease—

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

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

(2) If notification is required under subsection (a) of section 7A of the Clayton Act [15 USCS § 18a(a)] in the case of a transaction under this subsection, then—

(A) notwithstanding subsection (a) of such section [15 USCS § 18a(a)], the notification required by such subsection to be given by the debtor shall be given by the trustee; and

(B) notwithstanding subsection (b) of such section [15 USCS § 18a(b)], the required waiting period shall end on the 15th day after the date of the receipt, by the Federal Trade Commission and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, of the notification required under such subsection

(a) [15 USCS § 18a(a)], unless such waiting period is extended—

(i) pursuant to subsection (e)(2) of such section [15 USCS § 18a(e)(2)], in the same manner as such subsection (e)(2) applies to a cash tender offer;

(ii) pursuant to subsection (g)(2) of such section [15 USCS § 18a(g)(2)]; or

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

(c)

(1) If the business of the debtor is authorized to be operated under section 721, 1108, 1183, 1184, 1203, 1204, or 1304 of this title [11 USCS § 721, 1108, 1183, 1184, 1203, 1204, or 1304] and unless the court orders otherwise, the trustee may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing.

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

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

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

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

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

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

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

(2) only to the extent not inconsistent with any relief granted under subsection (c), (d), (e), or (f) of section 362 [11 USCS § 362].

(e) Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used, sold, or leased, or proposed to be used, sold, or leased, by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest. This subsection also applies to property that is subject to any unexpired lease of personal property (to the exclusion of such property being subject to an order to grant relief from the stay under section 362 [11 USCS § 362]).

(f) The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if—

(1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;

(2) such entity consents;

(3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;

(4) such interest is in bona fide dispute; or

(5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

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

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

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

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

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

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

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

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

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

(l) Subject to the provisions of section 365 [11 USCS § 365], the trustee may use, sell, or lease property under subsection (b) or (c) of this section, or a plan under chapter 11, 12, or 13 of this title [11 USCS §§ 1101 et seq., 1201 et seq., or 1301 et seq.] may provide for the use, sale, or lease of property, notwithstanding any provision in a contract, a lease, or applicable law that is conditioned on the insolvency or financial condition of the debtor, on the

commencement of a case under this title concerning the debtor, or on the appointment of or the taking possession by a trustee in a case under this title or a custodian, and that effects, or gives an option to effect, a forfeiture, modification, or termination of the debtor's interest in such property.

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

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

(o) Notwithstanding subsection (f), if a person purchases any interest in a consumer credit transaction that is subject to the Truth in Lending Act or any interest in a

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

(p) In any hearing under this section—

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

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

Appendix H

11 U.S.C. § 541. PROPERTY OF THE ESTATE

(a) The commencement of a case under section 301, 302, or 303 of this title [11 USCS § 301, 302, or 303] creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

(2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is—

(A) under the sole, equal, or joint management and control of the debtor; or

(B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.

(3) Any interest in property that the trustee recovers under section 329(b), 363(n), 543, 550, 553, or 723 of this title [11 USCS § 329(b), 363(n), 543, 550, 553, or 723].

(4) Any interest in property preserved for the benefit of or ordered transferred to the estate under section 510(c) or 551 of this title [11 USCS § 510(c) or 551].

(5) Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date—

(A) by bequest, devise, or inheritance;

(B) as a result of a property settlement agreement with the debtor's spouse, or of an interlocutory or final divorce decree; or

(C) as a beneficiary of a life insurance policy or of a death benefit plan.

(6) 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.

(7) Any interest in property that the estate acquires after the commencement of the case.

Appendix H

11 U.S.C. § 547. PREFERENCES

(a) In this section—

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

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

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

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

(b) Except as provided in subsections (c) and (i) of this section, the trustee may, based on reasonable due diligence in the circumstances of the case and taking into account a party's known or reasonably knowable affirmative defenses under subsection (c), avoid any transfer of an interest of the debtor in property—

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

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

(3) made while the debtor was insolvent;

(4) made—

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

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

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

(A) the case were a case under chapter 7 of this title [11 USCS §§ 701 et seq.];

(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title [11 USCS §§ 101 et seq.].

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

(1) to the extent that such transfer was—

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

(B) in fact a substantially contemporaneous exchange;

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

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

(B) made according to ordinary business terms;

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

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

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

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

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

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

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

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

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

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

(5) that creates a perfected security interest in inventory or a receivable or the proceeds of either, except to the extent that the aggregate of all such transfers to the transferee caused a reduction, as of the date of the filing of the petition and to the prejudice of other creditors holding unsecured claims, of any amount by which the debt secured by such security interest exceeded the value of all security interests for such debt on the later of—

Appendix H

(A)

(i) with respect to a transfer to which subsection (b)(4)(A) of this section applies, 90 days before the date of the filing of the petition; or

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

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

(6) that is the fixing of a statutory lien that is not avoidable under section 545 of this title [11 USCS § 545];

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

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

(9) if, in a case filed by a debtor whose debts are not primarily consumer debts, the aggregate value of all property that constitutes or is affected by such transfer is less than $7,575.

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

(e)

(1) For the purposes of this section—

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

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

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

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

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

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

(i) the commencement of the case; or

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

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

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

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

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

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

(j) [Deleted]

Appendix H

11 U.S.C. § 1123. CONTENTS OF PLAN

(a) Notwithstanding any otherwise applicable nonbankruptcy law, a plan shall—

(1) designate, subject to section 1122 of this title [11 USCS § 1122], classes of claims, other than claims of a kind specified in section 507(a)(2), 507(a)(3), or 507(a)(8) of this title [11 USCS § 507(a)(2), 507(a)(3), or 507(a)(8)], and classes of interests;

(2) specify any class of claims or interests that is not impaired under the plan;

(3) specify the treatment of any class of claims or interests that is impaired under the plan;

(4) provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest;

(5) provide adequate means for the plan's implementation, such as—

(A) retention by the debtor of all or any part of the property of the estate;

(B) transfer of all or any part of the property of the estate to one or more entities, whether organized before or after the confirmation of such plan;

(C) merger or consolidation of the debtor with one or more persons;

(D) sale of all or any part of the property of the estate, either subject to or free of any lien, or the distribution of all or any part of the property of the estate among those having an interest in such property of the estate;

(E) satisfaction or modification of any lien;

(F) cancellation or modification of any indenture or similar instrument;

(G) curing or waiving of any default;

(H) extension of a maturity date or a change in an interest rate or other term of outstanding securities;

(I) amendment of the debtor's charter; or

(J) issuance of securities of the debtor, or of any entity referred to in subparagraph (B) or (C) of this paragraph, for cash, for property, for existing securities, or in exchange for claims or interests, or for any other appropriate purpose;

(6) provide for the inclusion in the charter of the debtor, if the debtor is a corporation, or of any corporation referred to in paragraph (5)(B) or (5)(C) of this subsection, of a provision

prohibiting the issuance of nonvoting equity securities, and providing, as to the several classes of securities possessing voting power, an appropriate distribution of such power among such classes, including, in the case of any class of equity securities having a preference over another class of equity securities with respect to dividends, adequate provisions for the election of directors representing such preferred class in the event of default in the payment of such dividends;

(7) contain only provisions that are consistent with the interests of creditors and equity security holders and with public policy with respect to the manner of selection of any officer, director, or trustee under the plan and any successor to such officer, director, or trustee; and

(8) in a case in which the debtor is an individual, provide for the payment to creditors under the plan of all or such portion of earnings from personal services performed by the debtor after the commencement of the case or other future income of the debtor as is necessary for the execution of the plan.

(b) Subject to subsection (a) of this section, a plan may—

(1) impair or leave unimpaired any class of claims, secured or unsecured, or of interests;

(2) subject to section 365 of this title [11 USCS § 365], provide for the assumption, rejection, or assignment of any executory contract or unexpired lease of the debtor not previously rejected under such section;

(3) provide for—

(A) the settlement or adjustment of any claim or interest belonging to the debtor or to the estate; or

(B) the retention and enforcement by the debtor, by the trustee, or by a representative of the estate appointed for such purpose, of any such claim or interest;

(4) provide for the sale of all or substantially all of the property of the estate, and the distribution of the proceeds of such sale among holders of claims or interests;

(5) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims; and

(6) include any other appropriate provision not inconsistent with the applicable provisions of this title [11 USCS §§ 101 et seq.].

(c) In a case concerning an individual, a plan proposed by an entity other than the debtor may not provide for the use, sale, or lease of property exempted under section 522 of this title [11 USCS § 522], unless` the debtor consents to such use, sale, or lease.

(d) Notwithstanding subsection (a) of this section and sections 506(b), 1129(a)(7), and 1129(b) of this title [11 USCS §§ 506(b), 1129(a)(7), and 1129(b)], if it is proposed in a plan to cure a default the amount necessary to cure the default shall be determined in accordance with the underlying agreement and applicable nonbankruptcy law.