SO ORDERED.
SIGNED this 23rd day of November, 2022

THIS ORDER HAS BEEN ENTERED ON THE DOCKET.
PLEASE SEE DOCKET FOR ENTRY DATE.

Suzanne H. Bauknight
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

In re

Case No. 3:21-bk-31540-SHB
Chapter 7

MITA RANA
aka MITA A. RANA
aka MITA BAROT
aka MITA G. BAROT
aka MITA BAROT-RANA

Debtor

MITA RANA

Plaintiff

v.

Adv. Proc. No. 3:22-ap-3023-SHB

HIGHMARK CAPITAL CORPORATION

Defendant

MEMORANDUM AND ORDER
ON MOTION TO DISMISS

On August 24, 2022, Plaintiff filed the Complaint initiating this adversary proceeding to avoid preferential payments pursuant to 11 U.S.C. § 547(b) for recovery under 11 U.S.C. § 550

[Doc. 1]. Defendant filed a Special Appearance and Motion to Dismiss ("Motion to Dismiss") and supporting brief on September 14, 2022 [Docs. 9, 10[1]], as amended on September 20, 2022 [Doc. 13], arguing that the Complaint should be dismissed for improper venue. Plaintiff filed a response and brief in opposition to the Motion to Dismiss on October 5, 2022, arguing that venue is proper in the Eastern District of Tennessee [Docs. 14, 15]. On October 6, 2022, Defendant filed a supplemental brief in support of its Motion to Dismiss, although it did not obtain authorization from the Court to do so. [Doc. 16.]

Rule 12(b)(3) authorizes dismissal for wrong or "improper venue." Fed. R. Civ. P. 12(b)(3). "Whether venue is 'wrong' or 'improper' depends exclusively on whether the court in which the case was brought satisfies the requirements of federal venue laws." *Atl. Marine Constr. Co., Inc. v. U.S. Dist. Ct. for W. Dist. of Tex.*, 571 U.S. 49, 55 (2013). Venue in bankruptcy cases is governed primarily by 28 U.S.C. § 1409, the pertinent provisions of which provide:

> (a) Except as otherwise provided in subsections (b) and (d), a proceeding **arising under** title 11 or **arising in or related to** a case under title 11 may be commenced in the district court in which such case is pending.
>
> (b) Except as provided in subsection (d) of this section, a trustee in a case under title 11 may commence a proceeding **arising in or related to** such case to recover a money judgment of or property worth less than $1,525 . . . or a consumer debt of less than $22,700 . . . , or a debt (excluding a consumer debt) against a noninsider of less than $27,750 . . . , only in the district court for the district in which the defendant resides.

(Emphasis added.)

Defendant's argument that "[v]enue of this Adversary Proceeding is not with this Bankruptcy Court for the Eastern District of Tennessee" [Doc. 13 at ¶ 8], rests solely on §

[1] The docket reflects a motion to dismiss filed as document number 8; however, an incorrect pdf of the proposed order granting the motion rather than the motion itself was uploaded.

1409(b). Defendant's argument fails to acknowledge the provisions of subsection (a) – that a proceeding (which includes adversary proceedings) "arising under," "arising in," or that is "related to a case filed under title 11" is properly venued in the district where the bankruptcy case was filed. By its express terms, subsection (b) applies only to proceedings "arising in" or that are "related to" the bankruptcy case; that is, it does not include proceedings "arising under" a bankruptcy case. *See Richardson v. Cellco P'ship (In re Munson)*, 627 B.R. 507, 516 (Bankr. C.D. Ill. 2021) ("Notably absent from subsection (b) is any reference to proceedings "arising under title 11," which are unambiguously included in the general venue provision set forth in subsection (a).").

In its supplemental brief, Defendant cited to *N1 Creditors' Trust v. Crown Packaging Corp. (In re Nukote International)*, 457 B.R. 668 (Bankr. M.D. Tenn. 2011), in which the court determined that there was an "overlap" between "arising under" and "arising in" proceedings for the purposes of venue and that, based on legislative history, Congress intended that proper venue for preference actions to recover non-consumer debts under certain amounts against noninsiders (i.e., "arising in" proceedings) would be in the districts where the creditors resided.

This Court respectfully disagrees with the determination in *In re Nukote International* and rejects any need to look beyond the wording of the statute, choosing, instead, to adopt the analysis of almost all courts that have examined this issue. Because preference actions are proceedings that "arise under" Title 11, venue is properly determined under § 1409(a).

> "Only when statutory text is ambiguous do we consider 'other indicia of congressional intent such as the legislative history.'" *Bruton v. High Speed Cap., LLC (In re Cirino Constr. Co., Inc.),* No. 19-51037, Adv. No. 20-06077, 2020 WL 2989750, at *2 (Bankr. M.D.N.C. May 22, 2020) (quoting *Copley v. United States*, 959 F.3d 118, 123 (4th Cir. 2020)).
>
> > Congress included all three types of bankruptcy proceedings, including those "arising under" title 11 and those "arising in" or "related to" title 11,

> in 28 U.S.C. § 1409(a). Congress only included two types of bankruptcy proceedings, those "arising in" or "related to" title 11, in 28 U.S.C. § 1409(b). "[Where] Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."
>
> *Id.* at *2 (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)). Other cases have referred to the omission of the "arising under" language from 28 U.S.C. § 1409(b) as "intentional" and "deliberate." *Webster v. Rep. Nat'l Distrib. Co., LLC (In re Tadich Grill of Wash. D.C., LLC),* 598 B.R. 65, 69 (Bankr. D.D.C. 2019); *Moyer v. Bank of Am., N.A. (In re Rosenberger)*, 400 B.R. 569, 573 (Bankr. W.D. Mich. 2008).

Insys Liquidation Tr. v. Haley Techs., Inc. (In re Insys Therapeutics, Inc.), No. 19-11292 (JTD), Adv. Pro. No. 21-50141(JTD), 2021 WL 3508612, at *2 (Bankr. D. Del. June 17, 2021).

Indeed, the terms "arising under," "arising in," and "related to" have long been recognized as terms of art that hold specific meanings under the Bankruptcy Code and related provisions, especially concerning jurisdiction and venue. *Van Huffel Tube Corp. v. A & G Indus. (In re Van Huffel Tube Corp.)*, 71 B.R. 155, 156-57 (Bankr. N.D. Ohio 1987). "The 'arising under' language is derived from the 'arising under' language of the Constitution which is the basis of federal question jurisdiction." *Id.* The term "arising under" means "any proceeding that could not occur but for a provision found in" the Bankruptcy Code. *Id.* at 156.

As the Sixth Circuit has explained, "The phrase 'arising under title 11' describes those proceedings that involve a cause of action created or determined by a statutory provision of title 11 . . . and 'arising in' proceedings are those that, by their very nature, could arise only in bankruptcy cases," *Mich. Emp. Sec. Comm'n v. Wolverine Radio Co., Inc. (In re Wolverine Radio Co.)*, 930 F.2d 1132, 1144 (6th Cir. 1991) (citations omitted). On the other hand, "related to" actions are not core proceedings under 28 U.S.C. § 157 and do not invoke substantive rights created by title 11; instead, they are "related to" a case based on "whether the outcome of the

proceeding could conceivably have any effect on the estate being administered in bankruptcy." *Robinson v. Mich. Consol. Gas Co., Inc.*, 918 F.2d 579, 583 (6th Cir. 1990) (citations omitted).

Preference actions, which are core proceedings under 28 U.S.C. § 157(b)(2)(F), fall within the scope of "arising under" proceedings because the substantive right being invoked is expressly provided only by title 11. *See In re Tadich Grill of Wash. D.C., LLC*, 598 B.R. at 67. Accordingly, venue for a preference action is proper in the district where the bankruptcy case is filed because the action "arises under" title 11.

The Bankruptcy Court for the Eastern District of New York recently rejected a motion to dismiss based on a venue argument similar to Defendant's:

> 28 U.S.C. § 1409 is the venue statute for proceedings taking place in a bankruptcy case. Congress clearly enacted a sweeping provision in subsection (a) establishing proper venue for all bankruptcy proceedings, including adversary proceedings, in the district where the underlying bankruptcy case is pending. This broad grant of venue was included to ensure that bankruptcy estates would be handled as efficiently as possible for the benefit of the estate and its creditors. It stands in sharp contrast to the venue requirements for federal proceedings in general, which give deference to a defendant's place of business if they have limited or no connection with the plaintiff's choice of venue. This grant of venue in the bankruptcy court is restricted only by the limited exceptions delineated in subsections (b) and (d) which provide instances where actions must be brought in a non-debtor's home court. The specific language of subsection (b) clearly and unambiguously applies only to proceedings brought by the trustee that "arise in" or "relate to" title 11, subject to certain monetary limits. Notably, this exception omits actions that "arise under" title 11, leaving these actions to be governed entirely by § 1409(a).
>
> It is beyond question that a preference action "arises under" title 11. Thus, a plain reading of § 1409(a) and (b) compels the Court to conclude that venue of this proceeding is proper in the Eastern District of New York as it falls squarely within § 1409(a), and neither of the exceptions set forth in this subsection apply. The Court recognizes that some courts have concluded that subsection (b) applies to small–dollar preference actions such as this, and therefore venue in this Court would be improper, as the Defendant is neither incorporated in New York, nor is New York its primary place of business. Although these courts have employed various tactics to limit the considerable scope of § 1409(a), the Court respectfully disagrees with their reasoning. Because § 1409(b) makes no reference to proceedings arising under title 11, this exception applies to a small subset of proceedings a trustee may bring.

Mendelsohn v. Cent. Garden & Pet Co. (In re Petland Discs., Inc.), No. 8-19-72292-reg, Adv.

No. 20-08088-reg, 2021 WL 1535793, *1 (Bankr. E.D.N.Y. Jan. 26, 2021).

The decision in *In re Nukote International* relies on the conclusion by the Ninth Circuit BAP that "the terms 'arising under' and 'arising in' cannot be interpreted as mutually exclusive" so that Congress's omission in § 1409(b) of "arising under" does not preclude application of that subsection to § 547(b) preference actions. *In re Little Lake Indus.*, 158 B.R. at 484, *cited in In re Nukote Int'l*, 457 B.R. at 671, 672 ("*Little Lake* has the better of this debate."). This Court chooses, as it must, to follow the Supreme Court's direction that Congress "says in a statute what it means and means in a statute what it says there" and that "[w]hen the words of a statute are unambiguous . . . judicial inquiry is complete." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992) (citation omitted); *see also Lamie v. U.S. Trustee*, 540 U.S. 526, 533-34 (2004) (declining the invitation to supplement statutory language to address what was arguably an inadvertent error in drafting); *Russello v. United States*, 564 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

Accordingly, this Court now joins the overwhelming majority of courts that have refused to ignore Congress's omission of "arising under" from the venue provision of § 1409(b). *See In re Insys Therapeutics, Inc.*, 2021 WL 3508612, at *1-2; *In re Munson*, 627 B.R. at 516-17; *In re Petland Discs., Inc.*, 2021 WL 1535793, *1; *In re Cirino Constr. Co., Inc.*, 2020 WL 2989750, at *3; *In re Tadich Grill of Wash. D.C., LLC,* 598 B.R. at 67-71; *Klein v. ODS Techs., LP (In re J & J Chem., Inc.)*, 596 B.R. 704, 712-14 (Bankr. D. Idaho 2019); *Ross v. Buckles (In re Skyline Manor, Inc.)*, No. BK14-80934, A15-8035, 2015 WL 9274105 (Bankr. D. Neb. Dec. 18, 2015); *Straffi v. Gilco World Wide Mkts. (In re Bamboo Abbott, Inc.)*, 458 B.R. 701 (Bankr. D.N.J.

2011); *Schwab v. Peddinghaus Corp. (In re Excel Storage Prods., L.P.),* 458 B.R. 175 (Bankr. M.D. Pa. 2011); *Redmond v. Gulf City Body & Trailer Works, Inc. (In re Sunbridge Cap., Inc.)*, 454 B.R. 166 (Bankr. D. Kan. 2011); *Moyer v. Bank of Am., N.A. (In re Rosenberger)*, 400 B.R. 569 (Bankr. W.D. Mich. 2008); *Ryan v. Wolter (In re Nashmy)*. No. 7-06-11823 ML, Adv. No. 07-1068 M, 2007 WL 2305672 (Bankr. D.N.M. Aug. 6, 2007); *Ehrlich v. Am. Express Travel Related Servs. Co. (In re Guilmette)*, 202 B.R. 9 (Bankr. N.D.N.Y. 1996); *In re Van Huffel Tube Corp.*, 71 B.R. 155 (Bankr. N.D. Ohio 1987).[2]

The Court, accordingly, directs the following:

1. The Motion to Dismiss Case filed by Defendant, as amended, on September 20, 2022 [Doc. 13], is DENIED.

2. As required by Federal Rule of Civil Procedure 12(a)(4)(A), Defendant shall file an answer to the Complaint within fourteen days from entry of this Order.

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[2] *But see Dynamerica Mfg., LLC v. Johnson Oil Co., LLC (In re Dynamerica Mfg., LLC)*, No. 08-11515 (KG), Adv. No. 10-50759 (KG), 2010 WL 1930269 (Bankr. D. Del. May 10, 2010); *Miller v. Hirn (In re Raymond)*, Bankr. No. 08–82033, Adv. Pro. No. 09-6177, 2009 WL 6498170, at *1 (Bankr. N.D. Ga. June 17, 2009).