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SAFE HARBOR PROVIDED BY SECTION 546(e) OF THE BANKRUPTCY CODE

Recorded Thursday, September 2, 2021

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Agenda

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CLE Credit:

New York: 1.0 Total: Professional Practice

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Panel Biographies

Philip Anker is co-chair of WilmerHale's bankruptcy and Financial Restructuring Practice Group. He is an experienced bankruptcy litigator and counselor who has practiced for more than 30 years in the field. Among other honors, he has been inducted as a Fellow of the American College of Bankruptcy, has been selected as one of the "Best Lawyers" in the areas of Bankruptcy and Creditor Debtor Rights/Insolvency and Reorganization Law in the *Best Lawyers in America*, and is listed in *Benchmark Litigation* as a national star in the area of bankruptcy litigation.

Mr. Anker has represented the full panoply of clients in business bankruptcy cases: debtors, Chapter 11 trustees, trustees of post-confirmation trusts, creditors' committees, secured creditors, debtor-in-possession lenders, noteholders, indenture trustees, unsecured trade creditors, equity holders, investors and purchasers of companies, claims and assets in bankruptcy. He has played a leading role in some of the largest, most prominent bankruptcy cases and related litigation, including Adelphia, Boston Generating, Boy Scouts, Energy Future Holdings, Enron, Global Crossing, Intelsat, Lyondell, Momentive, Refco, Sears and Tribune. Among other prominent cases, Mr. Anker obtained the allowance for a group of noteholders of nearly $600 million in make-whole claims in one of the largest Chapter 11 cases ever, completed the successful defense at trial of a multi-billion-dollar fraudulent transfer action, and successfully prosecuted, at trial and on appeal, claims for contempt arising out of an acquisition, also led by Mr. Anker, of substantially all of the assets of a leading data fusion company. Mr. Anker has argued and prevailed in nine separate bankruptcy appeals in the US Courts of Appeals, including *In re MPM Silicones, LLC*, 874 F.3d 787 (2d Cir. 2017); *Delaware Trust Co. v. Energy Future Intermediate Holding Co.*, 842 F.3d 249 (3d Cir. 2016); *In re Tribune Co. Fraudulent Transfer Litigation*, 818 F.3d 98 (2d Cir. 2016); *Adelphia Recovery Trust v. Bank of America*, No. 09-0039-CV, 379 F. App'x 10 (2d Cir. 2010), *aff'g*, 390 B.R. 80 (S.D.N.Y. 2008); *Eastman Kodak Co. v. Wachovia Bank, N.A.*, 456 F.3d 1277 (11th Cir. 2006); *MBNA America Bank, N.A. v. Hill*, 436 F.3d 104 (2d Cir. 2006); *Arruda v. Sears, Roebuck & Co.*, 310 F.3d 13 (1st Cir. 2002); and *AT&T Universal Card Servs. v. Mercer*, 246 F.3d 391 (5th Cir. en banc 2001). Mr. Anker also successfully argued for the investment bank defendants in the New York Court of Appeals in *Kirschner v. KPMG, et al.*, 15 N.Y. 3d 446, 938 N.E. 2d 941, 912 N.Y.S. 2d 508 (N.Y. Ct. App. 2010), which resulted in that court's seminal decision reinforcing the *in pari delicto* defense and the dismissal of $2 billion in claims against the banks.

Camille C. Bent is a Partner in BakerHostetler's Bankruptcy and Restructuring practice group, concentrating in the areas of corporate bankruptcy, restructuring and commercial litigation. She has significant experience in disputes and transactions arising out of corporate insolvencies, including asset sale, fraudulent transfer, negligent misrepresentation, and wrongful redemption cases, and she has served as the bankruptcy specialist in transactional matters. Camille has represented debtors, creditors, trustees, committees, and other interested parties, and her practice is industry agnostic. She currently represents Irving H. Picard, Securities Investor Protection Act

Trustee for the liquidation of Bernard L. Madoff Investment Securities, LLC, and litigates multimillion-dollar avoidance and recovery actions against foreign and domestic entities.

Camille is a member of the Bankruptcy & Restructuring Committee at the New York City Bar Association, and she is Co-Chair of BakerHostetler's New York Inclusion and Diversity Committee.

Jonathan Flaxer is Co-Managing Partner at Golenbock, Eiseman , Assor, Bell & Peskoe. He has devoted his career to business bankruptcy practice, successfully representing Chapter 11 debtors and trustees, creditors' committees, indenture trustees, distressed debt investors, distressed asset acquirers, and landlords. Mr. Flaxer has also led numerous successful out-of-court workouts. He is active in several professional organizations and writes and lectures on bankruptcy-related topics. He has recently been appointed to serve as chapter 11 trustee in cases involving a law firm, a residential building and a large construction company.

Thomas R. Slome is a partner in the firm's Bankruptcy and Creditors' Rights department. Tom represents a wide variety of creditors in all aspects of bankruptcy including corporate reorganization, bankruptcy related litigation, debtor-in-possession and exit financing, creditors' rights, and out of court debt restructuring. Tom's clients include banks, factors, equipment lessors, mutual funds, hedge and private equity funds, energy service companies, landlords, developers, brokers, hospitals, trustees, creditors' committees and debtors.

Tom is the Treasurer of the New York City Bar Association. He is also the former Chair and currently a member of the Committee on Bankruptcy and Corporate Reorganization of the City Bar. Tom is also the former Chair and currently a member of the Chapter 11 Lawyers' Advisory Committee of the Eastern District of New York Bankruptcy Court, which was established by the Court as a liaison between the Bankruptcy Judges of the District and its Bankruptcy Bar.

Over the course of the last decade, Tom has represented parties involved in some of the most notable bankruptcy cases including most recently, Borders, Boston Generating, Frontier Communications, Hostess, Lehman Brothers, Lyondell, Patriot Coal, Sears, Sizmek, SunEdison, Tribune, Vitamin World, Westinghouse and Windstream to name a few. Additionally, Tom has experience with bankruptcy cases of manufacturers, importers, retailers and service companies in a wide array of industries, including aviation, construction, electronics, energy, fashion, finance, foreign companies (Chapter 15 cases), healthcare, manufacturing, not-for-profit, real estate, retail, software, and telecommunications. Tom has also served as a court-appointed examiner and mediator in numerous cases pending in the Southern and Eastern Districts of New York and the District of Delaware. He has mediated dozens of preference and fraudulent conveyance lawsuits and claims objections, as well as several contentious legal battles involving creditors and/or creditors' committees and chapter 11 debtors over plans of reorganization.

OUTLINE FOR PODCAST ON THE SAFE HARBOR PROVIDED BY
<u>SECTION 546(e) OF THE BANKRUPTCY CODE</u>

I. Introduction and Background

a. Fraudulent Transfer Framework

i. <u>Two Year Fraudulent Transfers under 11 U.S.C. § 548</u>: A bankruptcy trustee or other estate representative can avoid a transfer made within two years before the bankruptcy filing if the transfer was an intentional or constructive fraudulent conveyance.

ii. <u>Six Year Fraudulent Transfers under 11 U.S.C. § 544</u>: A bankruptcy trustee or other estate representative can avoid a transfer if an unsecured creditor could have done so under state or other non-bankruptcy fraudulent transfer law immediately before the debtor filed for bankruptcy.

1. Note: In New York, this period has been reduced to four years for transfers occurring post- April 2020 by the with NY's adoption of the Uniform Voidable Transactions Act.

iii. <u>Preferential Transfers under 11 U.S.C. § 547</u>: A bankruptcy trustee or other estate representative can avoid a payment to an unsecured creditor made outside the ordinary course of business that allows that creditor to recover more than other unsecured creditors will recover in the bankruptcy case.

II. The Safe Harbor Defense under 11 U.S.C. § 546(e)

a. Section 546(e) of the Code provides a safe harbor against all fraudulent transfer claims, other than intentional fraudulent transfer claims under Section 548, directed at many transfers involving securities. The defense insulates the protected transactions against intentional fraudulent transfer claims where the transfer occurred more than two years before the bankruptcy filing, and against all constructive fraudulent transfer claims.

b. First Requirement: A Qualifying Transfer

i. The safe harbor defense requires a "qualifying transfer," or a settlement payment or a transfer in connection with a securities contract.

ii. Cases Examining the Qualifying Transfer Requirement

1. *Securities Investor Protection Corp. v. Bernard L. Madoff Inv. Securities LLC*, 2013 WL 1609154 (S.D.N.Y. Apr. 15, 2013).

c. Second Requirement: A Qualifying Participant

i. The safe harbor defense also requires a "qualifying participant;" it must be "by," "to," or "for the benefit of" one of six specified entities, a financial institution, a financial participant, a stockbroker, a commodity broker, a forward contract merchant, or a securities clearing agency.

ii. Cases Examining the Qualifying Participant Requirement

1. *Merit Management Group, LP v. FTI Consulting, Inc.*, 138 S. Ct. 883, 200 L. Ed. 2d 183 (2018).

2. *In re Tribune Fraudulent Conveyance Litig. ("Tribune I")*, 818 F.3d 98, 105 (2d Cir. 2016).

3. *In re Tribune Fraudulent Conveyance Litig. ("Tribune II"),* 946 F.3d 66 (2d Cir. 2019).

iii. Current Status of the Law on 546(e)

1. *In re Nine West LBO Securities Litig.*, 482 F.Supp.3d 187 (S.D.N.Y. Aug. 27, 2020).

2. *In re Boston Generating LLC*, 617 B.R. 442 (Bankr. S.D.N.Y. June 18, 2020).

3. *In re Greektown Holdings*, 621 B.R. 797 (Bankr. E.D. Mich. Oct. 21, 2020).

4. *In re Tribune Fraudulent Conveyance Litig. ("Tribune III")*, --- F.4th ---, 2021 WL 3700337 (2d Cir. Aug. 20, 2021).

McKinney's Debtor and Creditor Law § 273

§ 273. Transfer or obligation voidable as to present or future creditor

Effective: April 4, 2020
Currentness

(a) A transfer made or obligation incurred by a debtor is voidable as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

(1) with actual intent to hinder, delay or defraud any creditor of the debtor; or

(2) without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:

(i) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

(ii) intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due.

(b) In determining actual intent under paragraph one of subdivision (a) of this section, consideration may be given, among other factors, to whether:

(1) the transfer or obligation was to an insider;

(2) the debtor retained possession or control of the property transferred after the transfer;

(3) the transfer or obligation was disclosed or concealed;

(4) before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;

(5) the transfer was of substantially all the debtor's assets;

(6) the debtor absconded;

(7) the debtor removed or concealed assets;

(8) the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;

(9) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;

(10) the transfer occurred shortly before or shortly after a substantial debt was incurred; and

(11) the debtor transferred the essential assets of the business to a lienor that transferred the assets to an insider of the debtor.

(c) A creditor making a claim for relief under subdivision (a) of this section has the burden of proving the elements of the claim for relief by a preponderance of the evidence.

Credits
(Added L.2019, c. 580, § 2, eff. April 4, 2020.)

Editors' Notes

SUPPLEMENTARY PRACTICE COMMENTARIES

by James Gadsden and Alan Kolod

2020

Sections 273 (transactions voidable by present and future creditors) and 274 (transactions voidable by only present creditors) are the two principal operative sections of the Article 10, each one setting out two of the four principal rules for the avoidance of transactions. The distinctions drawn based on which creditors may obtain avoidance were first codified in the UFCA and appear to be based on notions of the persons most likely to be injured by each type of avoidable transfer. Neither the UVTA nor the UFTA appears to have reconsidered these rules and nothing in the prior or new DCL Article 10 requires proof that the challenged transaction was directed at the particular plaintiff-creditor, whether present or future. Sections 273 and 274 provide for the avoidance of both transfers made and obligations incurred. For ease of presentation, this commentary often speaks only of transfers, but the same rules are equally applicable to obligations incurred by a debtor within the scope of the rules in these sections.

Rights to avoid transactions under Section 273 are extended to both creditors existing at the time of the transfer and to subsequent or future creditors. Section 273 incorporates Section 4 of the UVTA, which restated Section 4 of the UFTA. That section, in turn, essentially restated Sections 5, 6 and 7 of the UFCA, which were incorporated in Sections 274, 275 and 276, respectively, of former DCL Article 10.

“Actual Intent to Hinder, Delay or Defraud”

The first category of transactions voidable under Section 273(a)(1) encompasses transactions made with "actual intent to hinder, delay or defraud" any creditor of the debtor. Since enactment of 13 Elizabeth, transfers made with intent to hinder or delay creditors have been considered to involve "actual fraud" and to be avoidable despite the absence of deception or misrepresentation. *See, Husky Int'l. Elecs., Inc. v. Ritz*, 136 Sup. Ct. 1581 (2016) (actual intent to hinder, delay or defraud is "actual fraud"). However, in line with the purpose of new Article 10 to eliminate references to "fraud," these commentaries refer to such transactions as subject to avoidance for "actual *intent*." Section 273(a)(1) does not require proof that a transfer (or incurrence of a debt) was made with the intent to facilitate a true fraud and thereby to defraud creditors (such as by paying prior investors in a pyramid or Ponzi scheme in order to keep it afloat). There is no requirement that a transaction involve common law deceit or fraudulent misrepresentation to be voidable for "actual intent." Actual intent to hinder or delay creditors suffices.

This provision carries forward one of the principal reforms effected by former DCL § 276 (UFCA § 7), which required proof of "actual intent, *as distinguished from intent presumed in law*, to hinder, delay or defraud." (italics supplied) That provision was intended to abolish legal presumptions of fraud, which had been employed by courts to expand the application of the Statute of 13 Elizabeth to transactions to which it did not originally apply, such as transactions for inadequate consideration by an insolvent. The elimination of presumptions of fraud is further evidenced by the inclusion of "badges of fraud" in Section 273(b), which include many of the traditional presumptions, but are now described as "factors" to which "consideration may be given" in "determining actual intent."

Consistently with the abolition of presumptions of intent, former Section 273-a has been repealed. That section had made a transfer by a debtor against whom a suit has been commenced *per se* voidable if any later judgment rendered in the case was not satisfied. Under the current statute a transfer made by a person who is a defendant is codified as a factor that may, in appropriate circumstances, support a finding of actual intent under Section 273(b)(4).

Section 273(a)(1) (incorporating UVTA § 4(a)(1)) is substantially similar to New York's prior avoidance provision dealing with "actual intent to hinder, delay or defraud" (former DCL § 276, incorporating UFCA § 7) and does not change New York law. Nevertheless, Official Comments number 2 and number 8 to Section 4 of the UVTA, added when the UVTA was promulgated in 2014, have been viewed as suggesting otherwise and as attempting to resuscitate legal presumptions of intent or *per se* fraud, particularly for trusts in which the settlor retains a beneficial interest.

One of the key purposes of UFCA § 7, as expressed in its language and explained in the Prefatory Note and footnotes to the UFCA published by the ULC, was to eliminate the use of presumptions of law to establish improper intent ("In the Act as drafted all possibility of a presumption of law as to intent is avoided."). This purpose was accomplished by the addition of the word "actual" before the phrase "intent to hinder, delay and defraud" in 13 Elizabeth. The significance of that addition was then emphasized by the distinction drawn between "actual intent" and "intent presumed in law."

Despite this clear history, those two new comments to UVTA § 4(a)(1), approvingly cited decisions, including some predating the UFCA, all from states other than New York, which arguably utilized presumptions of fraud to avoid certain types of transfers. These two comments provoked a highly negative reaction from the estate planning bar nationally, which believed the comments disregarded alternative interpretations of the cases, were unduly argumentative and were incorrect. This segment of the bar raised concerns that enactment of the UVTA by a state might be deemed an endorsement of those comments and result in the avoidance of transfers deemed *per se* improper as made with intent to hinder, delay or defraud creditors without evidence or findings of actual intent to hinder, delay or defraud.

That concern is unwarranted. The 2014 comments relate to Section 4(a)(1) of the UVTA. That section is identical to Section 4(a)(1) of the UFTA, which itself was substantially identical to UFCA Section 7, incorporated as DCL § 276. The comments to UFTA § 4(a)(1) do not evidence any intent by the drafters of the UFTA to make any change to the meaning of UFCA § 7. And the new comments to UVTA § 4(a)(1) were written 30 years after the drafting of the UFTA by persons who had not been drafters of the UFTA. In short, the new comments shed no light on the intentions in 1984 of the actual drafters of UFTA § 4(a)(1), the text of which remained unchanged in UVTA § 4(a)(1). The comments also do not resolve any uncertainty or ambiguity as to the meaning of that section. There is nothing to suggest (and the new comments do not state otherwise) that the UFTA's 1984 deletion of the words "intent presumed in law" (which had emphasized that the UFCA's requirement of proof of "actual intent" was inconsistent with legal presumptions of intent) was designed to undo the abolition of legal presumptions, which had been one of the stated goals of the UFCA, or to dispense with the requirement of proof of "actual intent to hinder, delay or defraud" in all claims under UVTA 4(a)(1), now codified in New York as DCL § 273(a)(1).

Thus, as noted in the supporting memoranda submitted by the New York City Bar Association and the New York State Bar Association, contained in the Governor's bill jacket of legislative history of the Article 10, the 2014 comments to the UVTA are neither necessary nor useful to interpret, or resolve any ambiguities in, DCL Section 273(a)(1).

Secondly, the 2014 official comments are not contained in the Governor's bill jacket. There is no evidence they were relied upon or considered by the New York legislature in enacting the new Article 10. Therefore, it would be inappropriate to consider them in determining legislative intent, particularly in light of the bar association reports disavowing the comments, which *were* part of the legislative history.

It is also important to note that new DCL Article 10 contains no provision declaring any particular type of transaction to be *per se* fraudulent or avoidable, other than the four types of constructively voidable transactions involving the failure of a financially distressed debtor to receive reasonably equivalent or new value. Indeed, new Article 10 deletes two provisions of the prior Article 10 that had declared *per se* avoidable (i) transfers by an insolvent partnership to a partner and (ii) transfers by a defendant in a suit. No reported New York state court decision post-dating enactment of the prior DCL Article 10 has applied or endorsed the notion of *per se* fraud or a legal presumption of fraud (other than the provisions relating to "constructive intent" expressly set out in Article 10). *See, Marine Midland Bank v. Murkoff*, 120 A.D.2d 122 at 128 (2d Dept. 1986)(enactment of UFCA § 7 in New York evidenced "a clear indication of legislative intent ... to displace and eradicate the State's common-law presumption of intent to defraud flowing from certain acts ...")

In addition to all this, the correctness of the comments as statements of New York law is, at best, questionable. For example, comment 2 discusses examples from other states of two legal presumptions or rules of *per se* fraud (concerning non-possessory property interests and self-settled trusts) that predated enactment of the UFCA. The history of such presumptions in New York is complicated. They arose as common law rules, but many were eventually codified in various statutes, including the laws governing assignments for the benefit of creditors, trusts and estates, sales and bulk sales. Those provisions functioned as subject-specific "avoidance" rules. Some rules were clearly expressed as evidentiary presumptions of an intent to deceive creditors, but others simply prohibited or made ineffective certain kinds of transactions as inconsistent with law, without regard to any tendency to deceive. As a practical matter, there is no functional difference between a conclusive presumption that certain transactions evidence an intent to defraud and a rule that certain transactions are *per se* fraud without regard to intent. The New York Court of Appeals has never resolved whether the two different kinds of rules were to be treated differently after the abolition of "presumptions" under UFCA § 7. As noted in the prior paragraph, there are no New York court decisions that have applied any of these presumptions or *per se* rules under DCL Article 10 since it was enacted in 1925, and virtually all of the common law rules that had been codified have long-since been repealed.

In addition, comment 8 appears to have attempted to rehabilitate such presumptions or *per se* rules with an argument based on the meaning of the term "intent," which disregards the fact that the statutory standard is "actual intent." Comment 8 uses a very broad definition of "intent" (that a person intends the natural consequences of his actions). But, in doing so, it changes the meaning of UVTA § 4(a)(1) to prohibit every action that has a foreseeable effect of hindering, delaying or defrauding creditors (without regard to the actual intent of the transferor). By thus making the transferor's purpose irrelevant, the prohibition, as the comment notes, would apply to many transactions considered perfectly appropriate and not voidable which might tend to hinder a particular creditor. The comment then proposes solving this self-created problem by resort to "norms" of impermissible creditor conduct (to which the UVTA itself never makes any reference), to determine when actions that have the effect of delaying or hindering are nevertheless permissible and when they are not. The UVTA, however, makes no reference to any such norms and provides no means to identify them. Equally important, the "problem" such norms purport to solve does not exist if the phrase "actual intent to hinder, delay or defraud" is given its correct narrower meaning. The broad definition of "intent" used in comment 8 has been considered and rejected as an interpretation of the meaning of "actual intent" in a fraudulent transfer case decided under Bankruptcy Code § 548(a)(1)(A), the language of which is identical to UVTA § 4(a)(1), in a decision issued after the UVTA was promulgated. *In re Lyondell Chemical Co., (Weisfelner v. Hofman)*, 554 B.R. 635, 650-51 (S.D.N.Y. 2016) (distinguishing and rejecting *In re Sentinel Management Group, Inc.*, 728 F.3d 660 (7th Cir. 2013), which was cited approvingly in the new comment 8 for the broad standard of intent.) When the narrow meaning of "actual intent" (action *for the purpose of* hindering or delaying a creditor) is used, there is no need to resort to such supposed norms.

For all these reasons, it would be inappropriate to consider the two new comments as stating New York law. As noted by the New York City and New York State bar associations, the new statute does not adopt or endorse the comments and does not change New York law, except as expressly provided in the statute. Section 273(a)(1) itself does not relax the requirement of proof of "actual intent" and does not provide for any presumptions of fraud or grounds for *per se* voidability regardless of actual intent. In short, the very truncated general discussion of old fraudulent conveyance cases from other states set out in those official comments to Section 4 of the UVTA has no authority with respect to the meaning or effect of New York's new Section 273.

"Constructive Fraud" or "Constructive Intent"

What has traditionally been called "constructive fraud" is dealt with in Section 273(a)(2) (and in Section 274(a), discussed below). These Commentaries, for several reasons, refer to transactions covered by these sections as made with "constructive intent," rather than "actual intent," to hinder, delay or defraud creditors. Deletion of any reference to "fraud" with respect to such transactions is appropriate for several reasons. First, the voidability of these transactions is unrelated to proof of the debtor's intent, but turns on objective facts concerning the debtor's distressed financial condition and the inadequate consideration it received. These facts, if proved, make it highly likely, if not virtually certain, that a debtor's creditors will be hindered from collecting their debts, regardless of the debtor's purpose. That is sufficient for avoidance. The law might be said to "infer" intent to hinder collection from these facts and, therefore, no further proof of intent needs to be offered. That "constructive intent" to hinder collection establishes the grounds for avoidance, and there is no need or justification to refer to the transaction in question as "fraudulent" in any sense, actual or constructive. Historically, transfers made with "constructive intent" (unlike transfers made with "actual intent") have not been deemed to be "fraudulent" for any purpose, such as denial of a discharge in a bankruptcy case.

Thus, Section 273(a)(2) permits avoidance without proof of any intent by the debtor-transferor to hinder, delay or defraud creditors. A transaction is voidable under that section if the debtor did not receive reasonably equivalent value and the debtor either (i) was left with unreasonably small assets for a business or transaction in which it was engaged or about to engage or (ii) intended to incur or believed or reasonably should have believed that it would incur debts beyond its ability to repay as they came due. In both of these situations, which have been referred to as "equitable insolvency," the transferor has created an objectively unreasonable risk that both present creditors, and parties to whom it may become indebted in the future, will be left unpaid. Thus, such transfers are avoidable by both present and future creditors.

The analogous and substantially similar "constructive intent" rules in the previous statute were contained in former DCL § 274 (UFCA § 5) "Conveyance by a Party in Business" and former DCL § 275 (UFCA § 6) "Conveyance by a Person About to Incur Debts." These rules of "constructive intent" (along with new DCL § 274, discussed in the next section) are the only legal presumptions of intent that survived enactment of UFCA § 7 (DCL § 276).

Proof of Voidability

Actual intent to hinder, delay or defraud is often inferred from circumstantial evidence. In determining actual intent, consideration may be given to, among other factors, eleven specified factors listed in Section 273(b). (UVTA § 4(b)). These derive from the common law "badges of fraud," developed in the decisions under the UFCA, UFTA and prior law, and may be considered evidence of, but do not give rise to a legal presumption of, intent to hinder, delay or defraud creditors. A number of these factors historically had served as conclusive or rebuttable presumptions. These include transfers by a defendant in a lawsuit, transfers after which the debtor retained possession or control of the transferred property, concealed transfers and transfers by an insolvent for inadequate consideration. Claims based on actual intent do not require proof either of lack of an exchange of reasonably equivalent value or of the debtor's impaired financial condition, although such facts or their absence are factors that may be considered in establishing actual intent. Because of the requirement of proof of *actual* intent, the statute does not identify any particular transactions or types of transactions as *per se*, or even presumptively, voidable. The requirement of proof of "actual intent to hinder, delay or defraud" a creditor must be met in every instance under DCL 273(a)(1). The identical rule was set forth in former DCL § 276 (UFCA § 7).

It should be noted that the listed factors include several which would tend to negate rather than establish the existence of "actual intent" and that the statute does not provide guidance as to how the factors are to be weighed to make a determination of "actual intent." It should also be noted that one of the factors that may be considered is receipt by the debtor of reasonably equivalent value. Presumably, proof of this factor would tend to negate "actual intent," but proof of failure to receive reasonably equivalent value is not listed as a factor evidencing "actual intent." This would suggest that proof of "constructive intent" under Section 274(a) could not be used to support a finding of "actual intent." *See, Marine Midland Bank v. Murkoff*, 120 A.D.2d 122 at 126 (2d Dept. 1986)(proof of transfer by an insolvent for less than equivalent value creates no presumption of "actual intent").

Finally, Section 273(c) establishes the burden of persuasion to avoid a transfer on each of the Section 273 grounds as the preponderance of the evidence, explicitly excluding the "clear and convincing" standard as the proper standard to establish a claim under the section, including claims based on "actual intent to hinder delay or defraud" under Section 273(a)(1). The prior law contained no codified rules on burden of proof.

Source-UVTA § 4

Notes of Decisions (568)

McKinney's Debtor and Creditor Law § 273, NY DEBT & CRED § 273
Current through L.2021, chapters 1 to 416. Some statute sections may be more current, see credits for details.

McKinney's Consolidated Laws of New York Annotated
Debtor and Creditor Law (Refs & Annos)
Chapter 12. Of the Consolidated Laws (Refs & Annos)
Article 10. Uniform Voidable Transactions Act (Refs & Annos)

McKinney's Debtor and Creditor Law § 274

§ 274. Transfer or obligation voidable as to present creditor

Effective: April 4, 2020
Currentness

(a) A transfer made or obligation incurred by a debtor is voidable as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

(b) A transfer made by a debtor is voidable as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent.

(c) Subject to subdivision (b) of section two hundred seventy-one of this article, a creditor making a claim for relief under subdivision (a) or (b) of this section has the burden of proving the elements of the claim for relief by a preponderance of the evidence.

Credits
(Added L.2019, c. 580, § 2, eff. April 4, 2020.)

Editors' Notes

SUPPLEMENTARY PRACTICE COMMENTARIES

by James Gadsden and Alan Kolod

2020

Section 274 is the second of the two principal operative sections of Article 10 and sets out the other two principal rules for the avoidance of transactions made with "constructive intent." As with Section 273, Section 274 provides for the avoidance of both transfers made and obligations incurred. Rights under this section are extended only to creditors with claims at the time of the transfer. The rationale for this limitation is that the circumstances establishing the constructive intent in the two types of transactions voidable under Section 274 do not appear to be directed at, and would not likely or necessarily harm, potential future creditors.

Section 274(a) permits a creditor whose claim arose prior to the transaction to avoid a transaction made for less than reasonably equivalent value by a debtor who is insolvent in the balance sheet sense as defined in Section 272 or who becomes insolvent by reason of the transaction. This rule is similar to former DCL § 273 (UFCA § 4).

Section 274(b) establishes the special rules applicable to transfers by a debtor to an "insider" as defined in Section 270(h). The prior case law had permitted avoidance of such transfers as made with "constructive intent," despite the presence of an exchange of equal value in the form of debt satisfaction, on the grounds that such transfers were not made in "good faith." As a result, if any of the three types of financial distress that formed the basis for a finding of constructive intent were present, the lack of "fair consideration" mandated avoidance. However, proof of insolvency would give avoidance rights only to present creditors and proof of the other two grounds of constructive intent would result in avoidance rights by both present and future creditors. Furthermore, the 6-year statute of limitations would be applicable in each case.

The modification of the definition of "fair value" to "reasonably equivalent value" and elimination of the "good faith" requirement, as discussed in the Commentary to Section 272, eliminates these bases to avoid preferential transfers benefiting "insiders." Thus, Section 274(b) now deals with the subject directly through the adoption of the concept of an "insider preference" found in federal bankruptcy law (Bankruptcy Code § 547). Payment of a debt owed to an unrelated creditor is considered to be for reasonably equivalent value, but the potential for an insolvent debtor to injure creditors by preferring relatives or other affiliated parties, subjects such insider transfers by an insolvent debtor to avoidance under Section 274(b) where the transferee had reason to believe that the transferor is insolvent. Insolvency is the only type of financial distress that justifies avoidance of an insider preferential payment made after the effective date of the new Article 10.

Section 277(f), in turn, provides certain defenses to the insider creditor. To the extent that the insider gives new value after the transfer not subject to a valid lien, if the transfer to the insider was made in ordinary course of business of the debtor and insider, or if the transfer was made in a good faith effort to rehabilitate the financial affairs of the debtor and was given both to secure new value as well as to satisfy an antecedent debt, then the transfer to the insider is not voidable. The statute of repose applicable to transactions avoided as insider preferences is one year. DCL § 278(c)

Section 274(c) establishes the preponderance standard as the burden of persuasion on the plaintiff for claims under Section 274. Although Section 274(a) places the burden of proof of balance sheet insolvency on the plaintiff, Section 271(b) creates a presumption of insolvency, shifting the burden of persuasion to the defendant--if the plaintiff creditor establishes "equitable" insolvency--that the debtor was not paying its undisputed debts as they came due. These rules are new since the predecessor statute contained no codified rules on burden of proof.

Source-UVTA § 5

Notes of Decisions (7)

McKinney's Debtor and Creditor Law § 274, NY DEBT & CRED § 274
Current through L.2021, chapters 1 to 416. Some statute sections may be more current, see credits for details.

McKinney's Consolidated Laws of New York Annotated
Debtor and Creditor Law (Refs & Annos)
Chapter 12. Of the Consolidated Laws (Refs & Annos)
Article 10. Uniform Voidable Transactions Act (Refs & Annos)

McKinney's Debtor and Creditor Law § 278

§ 278. Extinguishment of claim for relief

Effective: April 4, 2020
Currentness

A claim for relief with respect to a transfer or obligation under this article is extinguished unless action is brought:

(a) under paragraph one of subdivision (a) of section two hundred seventy-three of this article, not later than four years after the transfer was made or the obligation was incurred or, if later, not later than one year after the transfer or obligation was or could reasonably have been discovered by the claimant;

(b) under paragraph two of subdivision (a) of section two hundred seventy-three or subdivision (a) of section two hundred seventy-four of this article, not later than four years after the transfer was made or the obligation was incurred; or

(c) under subdivision (b) of section two hundred seventy-four of this article, not later than one year after the transfer was made.

Credits
(Added L.2019, c. 580, § 2, eff. April 4, 2020.)

Editors' Notes

SUPPLEMENTARY PRACTICE COMMENTARIES

by James Gadsden and Alan Kolod

2020

Section 278 establishes a four year "statute of repose" for avoidance claims brought under DCL Article 10, with a one-year discovery period for "actual intent" claims. For "insider preference" claims under Section 274(b), the period is one year (conforming to the reach-back period under Bankruptcy Code § 547(b)(4)(B)). This is a change from New York's prior case law, which applied to fraudulent conveyance claims New York's six-year statute of limitations under CPLR § 213 for an action (i) based on fraud (with a two-year discovery period) or (2) for which no other limitation is provided. The rationale for this change is that, as described elsewhere and highlighted by the change in nomenclature from "fraudulent transfers" to "voidable transactions," claims under Article 10 are not claims for common law fraud or deceit. New York's period of limitations is longer than the periods applicable in other states.

In another significant change, unlike a statute of limitations, Section 278 is a statute of repose extinguishing the statutory claim and not merely placing a limit on when a claim for relief may be asserted. As a result, any other state applying New York's DCL Article 10 should apply the New York statute of repose, and a New York court should apply the applicable statute of repose when it is applying the UVTA-based voidable transactions law of another jurisdiction pursuant to Section 279.

Claims brought in New York based on transactions which occurred prior to the effective date of new Article 10 or based on a state law without a statute of repose will continue to be subject to New York's applicable statute of limitations. This may also be the case with claims to avoid transactions based on any supplementary laws of New York or another state that are preserved by Section 280.

Source-UVTA § 9

Notes of Decisions (2)

McKinney's Debtor and Creditor Law § 278, NY DEBT & CRED § 278
Current through L.2021, chapters 1 to 416. Some statute sections may be more current, see credits for details.

United States Code Annotated
Title 11. Bankruptcy (Refs & Annos)
Chapter 5. Creditors, the Debtor, and the Estate (Refs & Annos)
Subchapter III. The Estate (Refs & Annos)

11 U.S.C.A. § 544

§ 544. Trustee as lien creditor and as successor to certain creditors and purchasers

Effective: June 19, 1998
Currentness

(a) The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by--

(1) a creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists;

(2) a creditor that extends credit to the debtor at the time of the commencement of the case, and obtains, at such time and with respect to such credit, an execution against the debtor that is returned unsatisfied at such time, whether or not such a creditor exists; or

(3) a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists.

(b)(1) Except as provided in paragraph (2), the trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of this title or that is not allowable only under section 502(e) of this title.

(2) Paragraph (1) shall not apply to a transfer of a charitable contribution (as that term is defined in section 548(d)(3)) that is not covered under section 548(a)(1)(B), by reason of section 548(a)(2). Any claim by any person to recover a transferred contribution described in the preceding sentence under Federal or State law in a Federal or State court shall be preempted by the commencement of the case.

CREDIT(S)

(Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2596; Pub.L. 98-353, Title III, § 459, July 10, 1984, 98 Stat. 377; Pub.L. 105-183, § 3(b), June 19, 1998, 112 Stat. 518.)

Notes of Decisions (2080)

11 U.S.C.A. § 544, 11 USCA § 544
Current through PL 117-38.

End of Document

United States Code Annotated
Title 11. Bankruptcy (Refs & Annos)
Chapter 5. Creditors, the Debtor, and the Estate (Refs & Annos)
Subchapter III. The Estate (Refs & Annos)

11 U.S.C.A. § 546

§ 546. Limitations on avoiding powers

Effective: December 12, 2006
Currentness

(a) An action or proceeding under section 544, 545, 547, 548, or 553 of this title may not be commenced after the earlier of--

(1) the later of--

(A) 2 years after the entry of the order for relief; or

(B) 1 year after the appointment or election of the first trustee under section 702, 1104, 1163, 1202, or 1302 of this title if such appointment or such election occurs before the expiration of the period specified in subparagraph (A); or

(2) the time the case is closed or dismissed.

(b)(1) The rights and powers of a trustee under sections 544, 545, and 549 of this title are subject to any generally applicable law that--

(A) permits perfection of an interest in property to be effective against an entity that acquires rights in such property before the date of perfection; or

(B) provides for the maintenance or continuation of perfection of an interest in property to be effective against an entity that acquires rights in such property before the date on which action is taken to effect such maintenance or continuation.

(2) If--

(A) a law described in paragraph (1) requires seizure of such property or commencement of an action to accomplish such perfection, or maintenance or continuation of perfection of an interest in property; and

(B) such property has not been seized or such an action has not been commenced before the date of the filing of the petition;

such interest in such property shall be perfected, or perfection of such interest shall be maintained or continued, by giving notice within the time fixed by such law for such seizure or such commencement.

(c)(1) Except as provided in subsection (d) of this section and in section 507(c), and subject to the prior rights of a holder of a security interest in such goods or the proceeds thereof, the rights and powers of the trustee under sections 544(a), 545, 547, and 549 are subject to the right of a seller of goods that has sold goods to the debtor, in the ordinary course of such seller's business, to reclaim such goods if the debtor has received such goods while insolvent, within 45 days before the date of the commencement of a case under this title, but such seller may not reclaim such goods unless such seller demands in writing reclamation of such goods--

(A) not later than 45 days after the date of receipt of such goods by the debtor; or

(B) not later than 20 days after the date of commencement of the case, if the 45-day period expires after the commencement of the case.

(2) If a seller of goods fails to provide notice in the manner described in paragraph (1), the seller still may assert the rights contained in section 503(b)(9).

(d) In the case of a seller who is a producer of grain sold to a grain storage facility, owned or operated by the debtor, in the ordinary course of such seller's business (as such terms are defined in section 557 of this title) or in the case of a United States fisherman who has caught fish sold to a fish processing facility owned or operated by the debtor in the ordinary course of such fisherman's business, the rights and powers of the trustee under sections 544(a), 545, 547, and 549 of this title are subject to any statutory or common law right of such producer or fisherman to reclaim such grain or fish if the debtor has received such grain or fish while insolvent, but--

(1) such producer or fisherman may not reclaim any grain or fish unless such producer or fisherman demands, in writing, reclamation of such grain or fish before ten days after receipt thereof by the debtor; and

(2) the court may deny reclamation to such a producer or fisherman with a right of reclamation that has made such a demand only if the court secures such claim by a lien.

(e) Notwithstanding sections 544, 545, 547, 548(a)(1)(B), and 548(b) of this title, the trustee may not avoid a transfer that is a margin payment, as defined in section 101, 741, or 761 of this title, or settlement payment, as defined in section 101 or 741 of this title, made by or to (or for the benefit of) a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency, or that is a transfer made by or to (or for the benefit of) a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency, in connection with a securities contract, as defined in section 741(7), commodity contract, as defined in section 761(4), or forward contract, that is made before the commencement of the case, except under section 548(a)(1)(A) of this title.

(f) Notwithstanding sections 544, 545, 547, 548(a)(1)(B), and 548(b) of this title, the trustee may not avoid a transfer made by or to (or for the benefit of) a repo participant or financial participant, in connection with a repurchase agreement and that is made before the commencement of the case, except under section 548(a)(1)(A) of this title.

(g) Notwithstanding sections 544, 545, 547, 548(a)(1)(B) and 548(b) of this title, the trustee may not avoid a transfer, made by or to (or for the benefit of) a swap participant or financial participant, under or in connection with any swap agreement and that is made before the commencement of the case, except under section 548(a)(1)(A) of this title.

(h) Notwithstanding the rights and powers of a trustee under sections 544(a), 545, 547, 549, and 553, if the court determines on a motion by the trustee made not later than 120 days after the date of the order for relief in a case under chapter 11 of this title and after notice and a hearing, that a return is in the best interests of the estate, the debtor, with the consent of a creditor and subject to the prior rights of holders of security interests in such goods or the proceeds of such goods, may return goods shipped to the debtor by the creditor before the commencement of the case, and the creditor may offset the purchase price of such goods against any claim of the creditor against the debtor that arose before the commencement of the case.

(i)(1) Notwithstanding paragraphs (2) and (3) of section 545, the trustee may not avoid a warehouseman's lien for storage, transportation, or other costs incidental to the storage and handling of goods.

(2) The prohibition under paragraph (1) shall be applied in a manner consistent with any State statute applicable to such lien that is similar to section 7-209 of the Uniform Commercial Code, as in effect on the date of enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, or any successor to such section 7-209.

(j) Notwithstanding sections 544, 545, 547, 548(a)(1)(B), and 548(b) the trustee may not avoid a transfer made by or to (or for the benefit of) a master netting agreement participant under or in connection with any master netting agreement or any individual contract covered thereby that is made before the commencement of the case, except under section 548(a)(1)(A) and except to the extent that the trustee could otherwise avoid such a transfer made under an individual contract covered by such master netting agreement.

CREDIT(S)

(Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2597; Pub.L. 97-222, § 4, July 27, 1982, 96 Stat. 236; Pub.L. 98-353, Title III, §§ 351, 393, 461, July 10, 1984, 98 Stat. 358, 365, 377; Pub.L. 99-554, Title II, §§ 257(d), 283*(l)*, Oct. 27, 1986, 100 Stat. 3114, 3117; Pub.L. 101-311, Title I, § 103, Title II, § 203, June 25, 1990, 104 Stat. 268, 269; Pub.L. 103-394, Title II, §§ 204(b), 209, 216, 222(a), Title V, § 501(b)(4), Oct. 22, 1994, 108 Stat. 4122, 4125, 4126, 4129, 4142; Pub.L. 105-183, § 3(c), June 19, 1998, 112 Stat. 518; Pub.L. 109-8, Title IV, § 406, Title IX, § 907(e), (o)(2), (3), Title XII, § 1227(a), Apr. 20, 2005, 119 Stat. 105, 177, 182, 199; Pub.L. 109-390, § 5(b), Dec. 12, 2006, 120 Stat. 2697.)

Notes of Decisions (784)

11 U.S.C.A. § 546, 11 USCA § 546
Current through PL 117-38.

United States Code Annotated
Title 11. Bankruptcy (Refs & Annos)
Chapter 5. Creditors, the Debtor, and the Estate (Refs & Annos)
Subchapter III. The Estate (Refs & Annos)

11 U.S.C.A. § 547

§ 547. Preferences

Effective: December 27, 2020
Currentness

(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), (i), and (j) 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;

(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.

(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--

(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;

(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 $6,825 [originally “$5,000”, adjusted effective April 1, 2019] [1] .

(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)(1) In this subsection:

(A) The term “covered payment of rental arrearages” means a payment of arrearages that--

(i) is made in connection with an agreement or arrangement--

(I) between the debtor and a lessor to defer or postpone the payment of rent and other periodic charges under a lease of nonresidential real property; and

(II) made or entered into on or after March 13, 2020;

(ii) does not exceed the amount of rental and other periodic charges agreed to under the lease of nonresidential real property described in clause (i)(I) before March 13, 2020; and

(iii) does not include fees, penalties, or interest in an amount greater than the amount of fees, penalties, or interest--

(I) scheduled to be paid under the lease of nonresidential real property described in clause (i)(I); or

(II) that the debtor would owe if the debtor had made every payment due under the lease of nonresidential real property described in clause (i)(I) on time and in full before March 13, 2020.

(B) The term “covered payment of supplier arrearages” means a payment of arrearages that--

(i) is made in connection with an agreement or arrangement--

(I) between the debtor and a supplier of goods or services to defer or postpone the payment of amounts due under an executory contract for goods or services; and

(II) made or entered into on or after March 13, 2020;

(ii) does not exceed the amount due under the executory contract described in clause (i)(I) before March 13, 2020; and

(iii) does not include fees, penalties, or interest in an amount greater than the amount of fees, penalties, or interest--

(I) scheduled to be paid under the executory contract described in clause (i)(I); or

(II) that the debtor would owe if the debtor had made every payment due under the executory contract described in clause (i)(I) on time and in full before March 13, 2020.

(2) The trustee may not avoid a transfer under this section for--

(A) a covered payment of rental arrearages; or

(B) a covered payment of supplier arrearages.

CREDIT(S)

(Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2597; Pub.L. 98-353, Title III, §§ 310, 462, July 10, 1984, 98 Stat. 355, 377; Pub.L. 99-554, Title II, § 283(m), Oct. 27, 1986, 100 Stat. 3117; Pub.L. 103-394, Title II, § 203, Title III, § 304(f), Oct. 22, 1994, 108 Stat. 4121, 4133; Pub.L. 109-8, Title II, §§ 201(b), 217, Title IV, §§ 403, 409, Title XII, §§ 1213(a), 1222, Apr. 20, 2005, 119 Stat. 42, 55, 104, 106, 194, 196; Pub.L. 116-54, § 3(a), Aug. 23, 2019, 133 Stat. 1085; Pub.L. 116-260, Div. FF, Title X, § 1001(g)(1), Dec. 27, 2020, 134 Stat. 3219.)

AMENDMENT OF SUBSECTION (B)

<Pub.L. 116-260, Div. FF, Title X, § 1001(g)(2)(A)(i), Dec. 27, 2020, 134 Stat. 3220, provided that effective on the date that is 2 years after December 27, 2020, subsec. (b), is amended, in the matter preceding paragraph (1), by striking ", (i), and (j)" and inserting "and (i)".>

REPEAL OF SUBSECTION (J)

<Pub.L. 116-260, Div. FF, Title X, § 1001(g)(2)(A)(ii), Dec. 27, 2020, 134 Stat. 3220, provided that effective on the date that is 2 years after December 27, 2020, subsec. (j) is stricken.>

ADJUSTMENT OF DOLLAR AMOUNTS

<For adjustment of dollar amounts specified in subsec. (c)(9) of this section by the Judicial Conference of the United States, effective Apr. 1, 2019, see note set out under 11 U.S.C.A. § 104.>

<By notice published Feb. 12, 2019, 84 F.R. 3488, the Judicial Conference of the United States adjusted the dollar amounts in provisions specified in subsec. (c)(9) of this section, effective Apr. 1, 2019, as follows:>

<Adjusted $6,425 to $6,825.>

<By notice published Feb. 22, 2016, 81 F.R. 8748, the Judicial Conference of the United States adjusted the dollar amounts in provisions specified in subsec. (c)(9) of this section, effective Apr. 1, 2016, as follows:>

<Adjusted $6,225 to $6,425.>

<By notice published Feb. 21, 2013, 78 F.R. 12089, the Judicial Conference of the United States adjusted the dollar amounts in provisions specified in subsec. (c)(9) of this section, effective Apr. 1, 2013, as follows:>

<Adjusted $5,850 to $6,225.>

<By notice published Feb. 25, 2010, 75 F.R. 8747, the Judicial Conference of the United States adjusted the dollar amounts in provisions specified in subsec. (c)(9) of this section, effective Apr. 1, 2010, as follows:>

<Adjusted $5,475 to $5,850.>

<By notice published Feb. 14, 2007, 72 F.R. 7082, the Judicial Conference of the United States adjusted the dollar amounts in provisions specified in subsec. (c)(9) of this section, effective Apr. 1, 2007, as follows:>

<Adjusted $5,000 to $5,475.>

Notes of Decisions (3835)

Footnotes

1 See Adjustment of Dollar Amounts notes set out under this section and 11 U.S.C.A. § 104.

11 U.S.C.A. § 547, 11 USCA § 547
Current through PL 117-38.

United States Code Annotated
Title 11. Bankruptcy (Refs & Annos)
Chapter 5. Creditors, the Debtor, and the Estate (Refs & Annos)
Subchapter III. The Estate (Refs & Annos)

11 U.S.C.A. § 548

§ 548. Fraudulent transfers and obligations

Currentness

(a)(1) The trustee may avoid any transfer (including any transfer to or for the benefit of an insider under an employment contract) of an interest of the debtor in property, or any obligation (including any obligation to or for the benefit of an insider under an employment contract) incurred by the debtor, that was made or incurred on or within 2 years before the date of the filing of the petition, if the debtor voluntarily or involuntarily--

(A) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or

(B)(i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

(ii)(I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

(II) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital;

(III) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured; or

(IV) made such transfer to or for the benefit of an insider, or incurred such obligation to or for the benefit of an insider, under an employment contract and not in the ordinary course of business.

(2) A transfer of a charitable contribution to a qualified religious or charitable entity or organization shall not be considered to be a transfer covered under paragraph (1)(B) in any case in which--

(A) the amount of that contribution does not exceed 15 percent of the gross annual income of the debtor for the year in which the transfer of the contribution is made; or

(B) the contribution made by a debtor exceeded the percentage amount of gross annual income specified in subparagraph (A), if the transfer was consistent with the practices of the debtor in making charitable contributions.

(b) The trustee of a partnership debtor may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within 2 years before the date of the filing of the petition, to a general partner in the debtor, if the debtor was insolvent on the date such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation.

(c) Except to the extent that a transfer or obligation voidable under this section is voidable under section 544, 545, or 547 of this title, a transferee or obligee of such a transfer or obligation that takes for value and in good faith has a lien on or may retain any interest transferred or may enforce any obligation incurred, as the case may be, to the extent that such transferee or obligee gave value to the debtor in exchange for such transfer or obligation.

(d)(1) For the purposes of this section, a transfer is made when such transfer is so perfected that a bona fide purchaser from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest in the property transferred that is superior to the interest in such property of the transferee, but if such transfer is not so perfected before the commencement of the case, such transfer is made immediately before the date of the filing of the petition.

(2) In this section--

(A) "value" means property, or satisfaction or securing of a present or antecedent debt of the debtor, but does not include an unperformed promise to furnish support to the debtor or to a relative of the debtor;

(B) a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency that receives a margin payment, as defined in section 101, 741, or 761 of this title, or settlement payment, as defined in section 101 or 741 of this title, takes for value to the extent of such payment;

(C) a repo participant or financial participant that receives a margin payment, as defined in section 741 or 761 of this title, or settlement payment, as defined in section 741 of this title, in connection with a repurchase agreement, takes for value to the extent of such payment;

(D) a swap participant or financial participant that receives a transfer in connection with a swap agreement takes for value to the extent of such transfer; and

(E) a master netting agreement participant that receives a transfer in connection with a master netting agreement or any individual contract covered thereby takes for value to the extent of such transfer, except that, with respect to a transfer under any individual contract covered thereby, to the extent that such master netting agreement participant otherwise did not take (or is otherwise not deemed to have taken) such transfer for value.

(3) In this section, the term "charitable contribution" means a charitable contribution, as that term is defined in section 170(c) of the Internal Revenue Code of 1986, if that contribution--

(A) is made by a natural person; and

(B) consists of--

(i) a financial instrument (as that term is defined in section 731(c)(2)(C) of the Internal Revenue Code of 1986); or

(ii) cash.

(4) In this section, the term "qualified religious or charitable entity or organization" means--

(A) an entity described in section 170(c)(1) of the Internal Revenue Code of 1986; or

(B) an entity or organization described in section 170(c)(2) of the Internal Revenue Code of 1986.

(e)(1) In addition to any transfer that the trustee may otherwise avoid, the trustee may avoid any transfer of an interest of the debtor in property that was made on or within 10 years before the date of the filing of the petition, if--

(A) such transfer was made to a self-settled trust or similar device;

(B) such transfer was by the debtor;

(C) the debtor is a beneficiary of such trust or similar device; and

(D) the debtor made such transfer with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made, indebted.

(2) For the purposes of this subsection, a transfer includes a transfer made in anticipation of any money judgment, settlement, civil penalty, equitable order, or criminal fine incurred by, or which the debtor believed would be incurred by--

(A) any violation of the securities laws (as defined in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47))), any State securities laws, or any regulation or order issued under Federal securities laws or State securities laws; or

(B) fraud, deceit, or manipulation in a fiduciary capacity or in connection with the purchase or sale of any security registered under section 12 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78***l*** and 78***o***(d)) or under section 6 of the Securities Act of 1933 (15 U.S.C. 77f).

CREDIT(S)

(Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2600; Pub.L. 97-222, § 5, July 27, 1982, 96 Stat. 236; Pub.L. 98-353, Title III, §§ 394, 463, July 10, 1984, 98 Stat. 365, 378; Pub.L. 99-554, Title II, § 283(n), Oct. 27, 1986, 100 Stat. 3117; Pub.L. 101-311, Title I, § 104, Title II, § 204, June 25, 1990, 104 Stat. 268, 269; Pub.L. 103-394, Title V, § 501(b)(5), Oct. 22, 1994, 108 Stat. 4142; Pub.L. 105-183, §§ 2, 3(a), June 19, 1998, 112 Stat. 517; Pub.L. 109-8, Title IX, § 907(f), (o)(4) to (6), Title XIV, § 1402, Apr. 20, 2005, 119 Stat. 177, 182, 214.)

Notes of Decisions (2197)

11 U.S.C.A. § 548, 11 USCA § 548
Current through PL 117-38.

617 B.R. 442
United States Bankruptcy Court, S.D. New York.

IN RE: BOSTON GENERATING LLC,
et al., Post-Confirmation Debtors.
Mark Holliday, as the Liquidating Trustee
of the BosGen Liquidating Trust, Plaintiff,
v.
K Road Power Management, LLC, et al., Defendants.

Case No. 10-14419 (SCC)
|
Adv. Proc. No. 12-01879 (RG)
|
Signed June 18, 2020

Synopsis

Background: Trustee of liquidating trust established under bankrupt limited liability companies' (LLC) confirmed Chapter 11 plan brought adversary proceeding for avoidance of alleged fraudulent transfers effected in connection with prepetition leveraged recapitalization of debtors' membership interests. Defendants filed motion to dismiss.

Holdings: The Bankruptcy Court, Robert E. Grossman, J., held that:

Delaware's three-year statute of repose on cause of action brought to recover distributions to members of an LLC was limited in its application, and did not apply to strong-arm fraudulent transfer claims brought by trustee for benefit of creditors;

New York's borrowing statute could not be applied when assessing timeliness of strong-arm claims by trustee;

allegations in complaint filed by trustee of liquidating trust established under debtor's confirmed Chapter 11 plan stated plausible actual and constructive fraudulent transfer claims;

unjust enrichment claim was duplicative of trustee's fraudulent transfer avoidance claims;

exception to statutory "safe harbor" from avoidance claims, for actual fraudulent transfer claims pursuant to bankruptcy fraudulent transfer statute, was limited in its application to actual fraudulent transfer claims brought pursuant to bankruptcy statute; and

statutory "safe harbor" applied to prevent trustee of liquidating trust established under bankrupt LLCs' confirmed Chapter 11 plan from pursuing strong-arm claims.

Motion granted.

Procedural Posture(s): Motion to Dismiss.

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MEMORANDUM OPINION RESOLVING MOTION TO DISMISS THIRD AMENDED COMPLAINT

Honorable Robert E. Grossman, United States Bankruptcy Judge

I. Introduction [1]

This adversary proceeding was commenced almost eight years ago to recover ***449** approximately $1 billion in allegedly fraudulent transfers under New York State law by the Debtors to the Defendants. The Trustee asserts claims for intentional and constructive fraudulent transfers under New York's DCL, as well as under the theory of unjust enrichment. In response, the Defendants filed the MTD asserting, among other things, that: (i) the Trustee's claims were time barred; (ii) the Trustee failed to state a plausible claim for relief; (iii) the transfers sought to be avoided are safe-harbored pursuant to section 546(e) of the Bankruptcy Code; and (iv) the Lenders ratified the transfers and thus, are estopped from now trying to avoid and recover the transfers. For the reasons stated below, the Court dismisses all counts pursuant to section 546(e) of the Bankruptcy Code. Notwithstanding the fact that Counts I through V of the TAC are dismissed pursuant to the safe harbor of section 546(e), the Court will provide an analysis below of *all* the legal issues raised by the parties in their papers. The legal conclusions the Court reaches were shaped by an analysis of *all* the legal issues presented and therefore warrant explanation.

The questions posed in the MTD and the Opposition thereto raise a series of complex and, in some instances, novel issues. However, at its very heart, the issue for the Court is whether to apply an analysis of the facts in isolation or to apply an approach that looks at the transactions at issue in a broader sense so as to view the entire picture established by the record. How a court applies applicable law is very often a function of how the court views facts presented. First, the parties ask the Court to interpret a Delaware Statute of Repose, which limits the claw-back period to three (3) years to recover a wrongful distribution made to a Delaware LLC's members. The Defendants ask the Court to find that the three (3) year limitation period contained in the Delaware Statute of Repose applies not only to claims for wrongful distribution brought by a Delaware LLC against its own members, but also to claims asserted by creditors to recover the same distribution. There is a dearth of authority interpreting the statute of repose as it applies to the issues before the Court. However, based on the Court's analysis of the statute and relevant case law, the Court finds the Delaware Statute of Repose does not apply in the instant case.

Second, the Defendants ask this Court to find that the Trustee's pleadings fail to satisfy the threshold requirement of setting forth a plausible basis for relief. At the most basic level, the Trustee's complaint is premised on the alleged illegality of the Debtors' 2006 leveraged recapitalization. This recapitalization was funded by more than $2 billion in loans from, among others, Bank of America, N.A., Carlyle Capital Investment, LTD, Credit Suisse (Cayman Islands Branch), and Goldman Sachs Credit Partners L.P. The Defendants proffer that because the loans were made by some of the world's most sophisticated financial institutions it is implausible to conclude those same lenders were defrauded. Notwithstanding the Court's skepticism as to the Trustee's probability of success on the claims asserted, that is not the appropriate inquiry at this stage of the proceeding. The Court must determine whether the Trustee has articulated more than a “sheer possibility” for obtaining the relief sought. The Court holds the TAC clearly articulates a claim, that the parties/people in control of the Debtors engaged in a scheme to hinder, delay, and defraud the creditors/lenders that financed the Leveraged Recap Transaction by making ***450** material misstatements and omissions during the course of the Lenders' due diligence, which formed the basis for their decision to lend. The Court is hesitant to assume that the size of an institution insulates it from being a victim of a fraud. The Court's determination as to whether the Trustee will be able to establish that this conduct rises to the level of being violative of the law and the damages for such actions must be left to another day.

A sub-issue to the Defendants' plausibility argument concerns whether the Trustee, for his intentional fraudulent transfer claims, was required to plead that a “critical mass” of the EBG board of directors, which approved the Leveraged Recap Transaction, acted with fraudulent intent. Judge Gerber in *Lyondell* and later Judge Sullivan in *Tribune* adopted a rule requiring that a plaintiff plead a “critical mass” acted with fraudulent intent *or otherwise explain how actors with fraudulent intent otherwise caused the disposition of property.* On appeal to the District Court, Judge Cote reversed Judge Gerber's “critical mass” test and held the actions of the CEO alone could be imputed to the entire board of directors. Here, the Defendants assert the “critical mass” test should be applied and therefore, the intentional fraudulent transfer claims must be dismissed because only two of the seven EBG board members allegedly acted with fraudulent intent. Because the Court concludes that the TAC satisfies the more stringent “critical mass” test, it need not delve into the split at the District Court level concerning the appropriate test to apply. The TAC satisfies the “critical mass” test, and by necessity Judge Cote's less stringent test for imputation to the entire board, because the Trustee has alleged *how actors with fraudulent intent otherwise caused the disposition of property.* Namely, the Trustee alleges that K Road: (i) was EBG's agent;

(ii) had fraudulent intent based on various badges of fraud; and (iii) through manipulation, dominance, and control of EBG's operations, caused BosGen and EBG to incur debt under the Credit Facilities and thereafter, transfer the monies to EBG's members for no consideration.

Third, the Court must determine whether section 546(e)'s safe harbor provision applies to the transfers the Trustee seeks to avoid. In answering this question, the Court relies on the United States Supreme Court's recent decision in *Merit* and its interplay with the Second Circuit's December 2019 *Tribune* decision. More specifically, the Court's determination of whether section 546(e) applies to the transfers will focus on whether BosGen and EBG qualify as "financial institutions" by virtue of their agency relationship with "financial institutions" in connection with a securities contract. While also concluding that the additional requirements for safe harbor established in section 546(e) have been met, the Court holds that both BosGen and EBG qualify as "financial institutions" under the Bankruptcy Code.

Finally, the Defendants ask the Court to dismiss the TAC because the Lenders ratified the transfers at issue. In answering this question, the parties call upon the Court to address the split of authority on whether the ratification defense requires the Lenders' knowledge of the material facts related to the fraudulent transfer—namely, the fraud itself. In other words, does ratification require the Lenders' full knowledge of the Debtors' intent and financial condition, or, is it sufficient that the Lenders had mere knowledge of the transferees' identity and approved the transaction. The Court adopts the Material Facts Test and holds that for purposes of the instant motion the Lenders cannot be found to have ratified the transfers at issue because the scope of the Lenders' ***451** knowledge concerning the material facts of the Leveraged Recap Transaction is unclear.

A more fulsome discussion of the Court's holding follows.

II. Background [2]

Boston Generating LLC ("BosGen") and EBG Holdings LLC ("EBG"), both Delaware limited liability companies, constituted with their subsidiaries "a wholesale power generation company that own[ed] and operate[d] three electric power generating facilities located in the Boston metropolitan area." Decl. of Jeff Hunter ¶ 6, Case No. 10-14419 (Bankr. S.D.N.Y. Aug. 18, 2010), ECF No. 2 (the "Hunter Decl."). EBG was a holding company with no significant independent business operations and BosGen served as EBG's main operating entity. *See* Hunter Decl. ¶ 12.

In October 2006, EBG's board of directors approved a leveraged recapitalization transaction whereby BosGen and EBG would borrow approximately $2.1 billion from lenders for use, in part, to fund a $925 million tender offer and the distribution of $35 million in dividends to EBG LLC interest holders (the "Leveraged Recap Transaction"). *See* Third Amended Complaint filed by Mark Holliday, the Liquidating Trustee of the BosGen Liquidating Trust (the "Trustee") ¶¶ 1, 27, 117, 122-25, AP Case No. 12-01879 (Bankr. S.D.N.Y. Apr. 3, 2019), ECF No. 272-1 (the "TAC").

a. Background of the Leveraged Recapitalization Transaction

i. The Tender Offer

In an "Offer to Purchase," dated November 16, 2006, EBG and BosGen offered "to purchase for cash up to $925,000,000 in value of Class A and Class B units of limited liability company interests in the Company ('Units') now outstanding ...." [3] Decl. of Philip D. Anker, AP Case No. 12-01879 (Bankr. S.D.N.Y. July 18, 2019), ECF No. 290-1, at 1 (the "Tender Offer"). Three points are made abundantly clear in the Tender Offer that are relevant in determining the issues before the Court.

First, the Tender Offer provides that both EBG and BosGen are offering to purchase EBG member units. *See* Tender Offer, at 9 ("*We* invite our Members to tender outstanding units for purchase by *us.*") (emphasis added), 11 ("... *we* are offering up to $925,000,000 in value of outstanding Units of the Company's membership interests ....") (emphasis added).

***452** Second, EBG and BosGen condition the Tender Offer on receipt of $2.1 billion in "new financing." The Tender Offer states, the "Company [including BosGen and EBG] is negotiating with prospective lenders with respect to the New Financing." *Id.* at 23. Further, BosGen and EBG "will not be required to accept for payment, purchase or pay for any Units tendered ... [if] any of the following events has occurred ...: The New Financing is not consummated ... or the Company does not receive proceeds thereof sufficient to enable the Company to carry out the Recapitalization ...." *Id.*

at 20. According to the Tender Offer, the "New Financing" will consist of: (i) up to $1.4 billion in senior secured first lien credit facilities, (ii) up to $400 million in senior secured second lien term loan facilities, and (iii) up to $300 million in a senior unsecured term loan facility. *See id.* at 23. Without all three credit facilities described above (and discussed in further detail below), the Tender Offer fails.

Finally: (i) the procedures articulated in the Tender Offer for unit redemptions, (ii) BosGen and EBG's reservation of authority to accept or reject a tendering member's units; and (iii) BosGen and EBG's agreement to pay The Bank of New York ("BONY") for its services make clear that BONY acted as a depository and agent for both BosGen and EBG in connection with the Tender Offer. As to (i), pursuant to the Tender Offer, members tendered their units by submitting a Letter of Transmittal along with required documents to BONY no later than December 14, 2006. *See id.* at 1, 4. Thereafter, "[w]e [including EBG and BosGen] will pay for Units purchased pursuant to the Offer by depositing the aggregate determined purchase price for the Units *with the Depository, which will act as agent* for tendering [m]embers for the purpose of receiving payment from [EBG and BosGen] *and transmitting payments to the tendering [m]embers.*" *Id.* at 19 (emphasis added).

Thus, the Tender Offer demonstrates that both EBG and BosGen were in an agency relationship with BONY for purposes of transmitting monies to tendering EBG LLC members. On several additional occasions throughout the Tender Offer, BONY is listed as the depository for the "Company," thus lending more weight to the conclusion that BONY acted as BosGen and EBG's agent in connection with the Tender Offer. *See id*. at 2 (noting members may direct questions or requests for assistance to BONY in connection with the Tender Offer), 6 (same), 10 (noting the "Company" will "pay the fees and expenses incurred in connection with the Offer by The Bank of New York, which is the Depository for the Offer."), 36 (noting questions concerning the Tender Offer should be directed to BONY and the Letters of Transmittal should be delivered by each EBG LLC member to BONY).

As to (ii), BosGen and EBG controlled BONY, which was acting as BosGen and EBG's agent, in connection with the Tender Offer. The Tender Offer provides, "[f]or purposes of the Offer, we will be deemed to have accepted the payment (and therefore purchased) ... Units that are validly tendered at or below the determined purchase price ... *only when, as and if we give oral or written notice to the Depository of our acceptance of the Units for payment pursuant to the Offer.*" Tender Offer, at 19 (emphasis added). Thus, BosGen and EBG authorized BONY to act on their behalf in connection with the Tender Offer and expressly reserved ultimate decision-making authority to determine whether to accept tendered units. In short, the EBG LLC member tendered its unit to BONY and thereafter, BONY held the tendered unit for BosGen ***453** and EBG until BosGen and EBG instructed BONY how to proceed.

As to (iii), the Tender Offer provides that "[w]e [defined to include BosGen and EBG] have retained The Bank of New York to act as Depository in connection with this Offer. The Depository will receive reasonable and customary compensation for its respective services, will be reimbursed by us for reasonable out-of-pocket expenses and will be indemnified against certain liabilities in connection with the Offer." Tender Offer, at 34. Thus, the language cited from the Tender Offer in this section of the Court's opinion demonstrates that both BosGen and EBG, as BONY's customers, manifested their intent for BONY to serve as their agent in connection with a securities contract (the Tender Offer).

ii. The Lenders' Presentation

On December 4, 2006, BosGen presented the proposed Leveraged Recap Transaction in New York to a group of lenders. *See* Decl. of William H. Gussman, Jr., AP Case No. 12-01879 (Bankr. S.D.N.Y. Nov. 1, 2013), ECF No. 152-4 (the "Lenders' Presentation"). The Lenders' Presentation states that "Boston Generating LLC ('BostonGen' or the 'Company') and EBG Holding LLC ('EBG') intend to enter into $2.1. billion of credit facilities in connection with the proposed recapitalization of the Company and EBG." Lenders' Presentation, at 1. Further, prospective lenders are informed the "proceeds [from the credit facilities] will be primarily used to repay outstanding indebtedness and to purchase outstanding units of EBG Holdings pursuant to a recapitalization." *Id.* More precisely, prospective lenders are informed $1.025 billion will be used to fund "Unit Buybacks Distributions and Warrants Repurchase." *Id.* at 2. As to timing, the Lenders' Presentation called for lender commitments by December 15, 2006 and closing and funding of the credit facilities to occur on December 22, 2006. *Id.* at 35.

iii. The Confidential Information Memorandum

Also in December 2006 and presumably in connection with the Lenders' Presentation, Credit Suisse Securities (USA) LLC ("Credit Suisse"), as "Joint Lead Arranger" and "Joint Bookrunner," and Goldman Sachs Credit Partners L.P. ("Goldman Sachs"), as" Joint Lead Arranger" and "Joint Bookrunner," furnished a Confidential Information Memorandum to prospective lenders on behalf of BosGen and EBG in connection with the proposed Leveraged Recap Transaction. *See* Decl. of Tibor L. Nagy, Jr., AP Case No. 18-01879 (Bankr. S.D.N.Y. Nov. 1, 2013), ECF No. 155-9 (the "CIM"), at 3, 24. The CIM provides that both BosGen and EBG are effectuating the proposed Leveraged Recap Transaction for EBG to repurchase tendered LLC member units, repurchase certain warrants, and make a "distribution" payment to all EBG LLC members.

Specifically, the CIM provides that Credit Suisse and Goldman Sachs have been retained by *EBG and BosGen* to arrange $2.1 billion of credit facilities in connection with the proposed recapitalization of *EBG and BosGen. See id.*, at 24 (emphasis added). The CIM goes on to address how proceeds from the $2.1 billion in credit facilities will be used by BosGen and EBG and states,

> [a]s part of the proposed transaction, EBG has made a tender offer to its members ... in which members have the opportunity to tender all or a portion of their EBG units at a price within a range of prices .... EBG will also repurchase from affiliates of K Road certain warrants to purchase EBG units .... In addition, the Company intends to make a pro rata distribution to its members prior to the purchase of units ***454** in the Tender Offer in order to simplify certain tax planning matters for members and the Company. The Company currently estimates the distribution to be $35 million.

Id. at 24. Finally, and consistent with the Lenders' Presentation, the CIM informs prospective lenders that $1.025 billion from the proposed Leveraged Recap Transaction will be used to fund "Unit Buyback Distribution and Warrant Repurchase." *Id.*, at 25. In short, the CIM demonstrates *both BosGen and EBG* intended for slightly more than $1 billion of the $2.1 billion in loans from the proposed credit facilities to fund, pursuant to the Tender Offer, unit redemptions, warrant redemptions, and a distribution that would be made to EBG's LLC members.

b. BosGen and EBG Execute the Credit Facilities in Furtherance of the Leveraged Recap Transaction

In order to finance the Leveraged Recap Transaction and fund the Tender Offer, three credit facilities (the "Credit Facilities") were executed, which raised $2.1 billion for BosGen and EBG in new capital.[4] *See* TAC, ¶¶ 122-23; TAC Ex. E ($1,450,000,000 First Lien Credit and Guaranty Agreement, dated December 21, 2006, by and among BosGen as the "Borrower," the "Guarantors," the "Initial Lenders," the "Synthetic Issuing Banks," the "Fronting Bank," Credit Suisse as "First Lien Collateral Agent, Credit Suisse as "Administrative Agent," Credit Suisse Securities (USA) LLC and Goldman Sachs Credit Partners L.P. as "Co-Syndication Agents" and as "Co-Documentation Agents," and Credit Suisse Securities (USA) LLC and Goldman Sachs Credit Partners L.P. as "Joint Lead Arrangers" and as "Joint Book Running Managers") (the "First Lien Credit Agreement")); TAC Ex. F ($350,000,000 Second Lien Credit and Guaranty Agreement, dated December 21, 2006, by and among BosGen as the "Borrower," the "Guarantors," the "Initial Lenders," Credit Suisse as "Second Lien Collateral Agent, Credit Suisse as "Administrative Agent," Credit Suisse Securities (USA) LLC and Goldman Sachs Credit Partners L.P. as "Co-Syndication Agents" and as "Co-Documentation Agents," and Credit Suisse Securities (USA) LLC and Goldman Sachs Credit Partners L.P. as "Joint Lead Arrangers" and as "Joint Book Running Managers") (the "Second Lien Credit Agreement")); TAC Ex. G ($300,000,000 Credit Agreement, dated December 21, 2006, by and among EBG as the "Borrower," the "Initial Lenders," Credit Suisse as "Administrative Agent," Credit Suisse Securities (USA) LLC and Goldman Sachs Credit Partners L.P. as "Co-Syndication Agents" and as "Co-Documentation Agents," and Credit Suisse Securities (USA) LLC and Goldman Sachs Credit Partners L.P. as "Joint Lead Arrangers" and as "Joint Book Running Managers") (the "Mezz Agreement")). To fund the Tender Offer for EBG member units worth up to $925 million, money infused into BosGen from the First Lien

Credit Agreement and the Second Lien Credit Agreement had to be transferred to EBG—i.e., $300 million that went into EBG from the Mezz Agreement would be insufficient to meet the capital requirements for the Tender Offer.

The Credit Facilities indicate that proceeds from the First Lien Credit Agreement ***455** and the Second Lien Credit Agreement would be transferred by BosGen to EBG and used by EBG with the proceeds from the Mezz Agreement to fund the Tender Offer. The "Preliminary Statement" to the First Lien Credit Agreement provides, among other things, "the Borrower [defined as Bos Gen only, not EBG] has requested that the Lender Parties lend to the Borrower ... to fund in part the Distribution and the Tender Offer ..." TAC Ex. E., at 1(1) (the "First Lien Preliminary Statement"). More specifically, section 2.14 of the First Lien Credit Agreement provides:

> (a) The proceeds of the Term B Loans shall be available (and the Borrower agrees that it shall use such proceeds) solely (i) to refinance all outstanding indebtedness under the Existing Credit Agreements, (ii) to provide working capital for the Loan Parties, (iii) to fund the Distribution and the Tender Offer of EBG Holdings, and (iv) pay transaction fees and expenses.

TAC Ex. E § 2.14 (the "First Lien Funding Provision," together with the First Lien Preliminary Statement, the "First Lien Funding Provisions"). [5]

Similarly, the "Preliminary Statement" to the Second Lien Credit Agreement provides, among other things, "the Borrower [defined as Bos Gen only, not EBG] has requested that the Lenders lend to the Borrower ... to fund in part the Distribution and the Tender Offer ..." TAC Ex. F, at 1(1) (the "Second Lien Preliminary Statement"). Later, the Second Lien Credit Agreement provides:

> (a) The proceeds of the Loans shall be available (and the Borrower agrees that it shall use such proceeds) solely (i) to refinance all outstanding indebtedness under the Existing Credit Agreements, (ii) to provide working capital for the Loan Parties, (iii) to fund the Distribution and the Tender Offer of EBG Holdings, and (iv) pay transaction fees and expenses.

TAC Ex. F § 2.14 (the "Second Lien Funding Provision," together with the Second Lien Preliminary Statement, the "Second Lien Funding Provisions").

Finally, the "Preliminary Statement" to the Mezz Agreement provides, "Simultaneously with the entering into of this Agreement, [Bos Gen] and the Guarantors ... are entering into that certain ... [First Lien Credit Agreement and Second Lien Credit Agreement] ... the proceeds of which shall be used to ... (ii) fund the Distribution and the Tender Offer ...." TAC Ex. G, at 1(3) (the "Mezz Preliminary Statement"). Further, the Mezz Agreement provides:

> ***456** The proceeds of the Loans shall be available (and the Borrower agrees that is shall use such proceeds) solely (i) to fund the Distribution and the Tender Offer of the Borrower, (ii) to pay transaction fees and expenses and (iii) for general corporate purposes.

TAC Ex. G § 2.13 (the "Mezz Funding Provision," together with the Mezz Preliminary Statement, the "Mezz Funding Provisions"). Thus, BosGen and EBG clearly intended for the proceeds from the Credit Facilities to be used, in part, "to fund the Distribution and the Tender Offer."

c. The Transfers to Complete the Leveraged Recap Transaction and Thereafter, Fund: (i) the Unit Redemptions; (ii) the Warrant Redemptions; and (iii) the Distribution

The $2.1 billion cash infusion into BosGen and EBG from the Credit Facilities entered BosGen and EBG bank accounts on December 21, 2006 and thereafter, portions of those monies became the subject of: (i) a two-step intercompany transfer from BosGen to EBG; and (ii) transfers to EBG's LLC members.

i. The Two-Step Inter-Company Transfer

The First Lien Credit Agreement and the Second Lien Credit Agreement closed on December 21, 2006 and thereafter, the Lenders transferred $1.8 billion into BosGen's account with U.S. Bank, Nation Association ("US Bank"), Account Number -1092 (the "US Bank Account"). *See* TAC ¶¶ 123-24, and Ex. H. Thereafter, on December 22, 2008, step one of the inter-company transfer occurred (the "Step One Transfer") —BosGen caused US Bank to transfer $707,967,367.00 (the "$708 Million") from the US Bank Account to EBG's account with Bank of America ("BoA"), Account Number -3956 (the "BoA Account"). *See id.* ¶ 124, and Ex. H. Step-two of the inter-company transfer occurred sometime between December 22, 2006 and December 28, 2006—EBG caused the $708 Million in the BoA Account to be transferred (the "First BONY Transfer," together with the Step One Transfer, the "BosGen Transfer") to EBG's account with BONY, Account Number -1363 (the "BONY Account"). *See id.* ¶¶ 124-25, and Ex. H. Neither the Trustee's nor the Defendants' papers state the exact date the First BONY Transfer occurred.

ii. The Funds Flow Memorandum

BosGen delivered the "Closing Date Funds Flow Memorandum," to US Bank on December 21, 2006 wherein BosGen authorizes US Bank to act as its agent in connection with: (i) the receipt of funds from the Lenders pursuant to the First Lien Credit Agreement and the Second Lien Credit Agreement; and (ii) the BosGen Transfer. *See* TAC Ex. H (the "FFM") (Instructional Letter introducing the FFM).

As evidence of an agency relationship between BosGen and US Bank, the FFM provides "the deposits listed on the third page ... of the FFM will be transferred to the Depository [US Bank] on the Closing Date." *Id.* at 1(i). Thereafter, the "disbursements listed on the third page of the FFM will be disbursed by the Depository on the Closing Date ...." *Id.* at 2(ii). The FFM goes on to state, "[t]he Depository [US Bank] is hereby authorized and instructed to accept such deposits and to make such allocations, transfers and payments in accordance with the FFM." *See id.* at 2.

Pursuant to the FFM, US Bank initiated the BosGen Transfer on BosGen's behalf in connection with the Tender Offer to fund unit redemptions, warrant redemptions, and a distribution. The FFM demonstrates US Bank sent the $708 Million, on behalf of BosGen, from the US Bank Account to EBG's BoA Account and that ***457** those funds would be used for "Distribution, Unit Buyback and Warrant Repurchases," along with "Transaction Fees and Expenses." FFM, at 503. Thus, US Bank served as BosGen's agent for the BosGen Transfer, which the FFM demonstrates was an upstream transfer of monies to EBG in connection with the Tender Offer to fund unit redemptions, warrant redemptions, and a distribution.

iii. The $300 Million Infusion into EBG Pursuant to the Mezz Agreement

The Mezz Agreement closed on December 21, 2006 and thereafter, the Lenders transferred $300 million (the "$300 Million") into EBG's BoA Account. *See id.* ¶¶ 125-26, and Ex. H. EBG then caused the $300 Million to be transferred from the BoA Account to the BONY Account (the "Second BONY Transfer"). *See id.* Neither the Trustee's nor the Defendants' papers state the exact date the Second BONY Transfer occurred.

Following the First BONY Transfer and the Second BONY Transfer, the BONY Account held approximately $1.08 billion from the Credit Facilities, which as discussed below, EBG used in connection with the Tender Offer to fund the Unit Redemptions, the Warrant Redemptions, and the Distribution (the preceding three capitalized terms are defined below). *See id.* ¶ 125.

iv. The EBG Transfers to its LLC Members

On December 26, 2006 and December 28, 2006, EBG caused BONY to disburse from the BONY Account to EBG's LLC members more than $1 billion (the "EBG Transfers"), "consisting of the $708 million that BostonGen had transferred to it, the $300 million of Mezzanine Debt, and certain of its own cash ...." *Id.* The EBG Transfers by BONY on EBG's behalf to EBG's LLC members was composed of the following: (i) $34,996,291.24 as a dividend to EBG members' equity interests (the "Distribution"); (ii) $925,017,940 to redeem EBG's members' equity units pursuant to the Tender Offer (the "Unit Redemptions"); and (iii) $50,359,12713 to redeem warrants held by K Road (the "Warrant Redemptions"). *See id.*

d. BosGen's Chapter 11 Cases

More than three and a half years after the Credit Facilities closed and EBG made the Unit Redemptions, the Warrant Redemptions, and the Distribution, on August 18, 2010, each of the Debtors in the above-captioned chapter 11 cases filed voluntary petitions for relief under title 11 of the United State Code (the "Bankruptcy Code"). On November 24, 2010, the Court entered an Order authorizing the sale of substantially all of the Debtors' operating assets to Constellation Holdings, Inc. or its nominee (the "Sale"). *See* Sale Order, Case No. 10-14419 (Bankr. S.D.N.Y. Nov. 14, 2010), ECF No. 494. Proceeds from the Sale funded the Debtors' liquidating plan.

i. Chapter 11 Confirmed Plan

A liquidating plan was subsequently confirmed, under which the Lenders pursuant to the First Lien Credit Agreement received $1,005,902,449.94 of the sale proceeds in satisfaction of virtually all of their claims. *See* Disclosure Statement § III.F., at 27, Case No. 10-14419 (Bankr. S.D.N.Y. July 20, 2011), ECF No. 868 (the "Disclosure Statement"); *see also* First Mod. to Second Am. Joint Plan of Liquidation § 502, Case No. 10-14419 (Bankr. S.D.N.Y. Aug. 26, 2011), ECF No. 904 (confirmed Aug. 31, 2011 (ECF No. 915)) (the "Plan"). The Debtors' estates were substantively consolidated pursuant to the Plan. *See id.*

The Lenders pursuant to the First Lien Credit Agreement were left with a deficiency claim of $25,000,000. The Lenders pursuant to the Second Lien Credit Agreement received no proceeds directly from ***458** the sale; they were granted an unsecured claim in the amount of $346,500,000. *See, e.g.*, Disclosure Statement § I.A, at 6, 9-10 n.8; Plan § 3.02.3. The Lenders pursuant to the Mezz Agreement also received an unsecured claim in the amount of $426,911,567. *See* Disclosure Statement §§ I.A, at 9-10 n.8, III.F. All three tranches of the Lenders voted to accept the Plan. *See* Decl. of Jeffrey S. Stein ¶¶ 3, 14, Case No. 10-14419 (Bankr. S.D.N.Y. Aug. 24, 2011), ECF No. 898.

ii. Liquidating Trust Created

The Plan created a liquidating trust to pursue claims on behalf of the Debtors' general unsecured creditors (the "Trust"). *See* Plan §§ 7.02, 8.01. Those creditors, whose claims are classified in Class 4B of the Plan, consist almost entirely of the Lenders who financed the Leveraged Recap Transaction. The Disclosure Statement estimates that there are $820,571,000 in Class 4B general unsecured claims, consisting of (1) the Lenders' $25,000,000 deficiency pursuant to the First Lien Credit Agreement, (2) the Lenders' $346,500,000 claim pursuant to the Second Lien Credit Agreement, (3) the Lenders' $426,911,567 claim pursuant to the Mezz Agreement, and (4) miscellaneous other claims totaling approximately $22 million. *See* Disclosure Statement § I.A., at 9-10, n.8.

The Trust's assets include (1) all of the Debtors' causes of action and (2) causes of action, if any, of Class 4B claim holders to the extent those creditors purported to assign those causes of action to the Trust. The Trustee abandoned all of the Debtors' causes of action. *See* TAC ¶ 63. The Trustee asserts that all Class 4B holders, in fact, assigned all of their causes of action related to the Leveraged Recap Transaction to the Trust. *See id.* ¶¶ 4, 61; *see also* Plan § 7.02. Any proceeds recovered in this action (net of the Trust's costs and the Trustee's and his counsel's fees) will be distributed to the holders of Class 4B claims under the Plan—i.e., overwhelmingly to the Lenders who financed the Credit Facilities for the Leveraged Recap Transaction.

iii. Liquidating Trustee Appointed and Procedural History of this Adversary Proceeding

Craig R. Jalbert ("Jalbert"), the first liquidating trustee appointed pursuant to the Plan and the Trust, commenced the above-captioned adversary proceeding on August 17, 2012. Mark Holliday succeeded Jalbert as the Trustee and on August 1, 2013 amended Jalbert's original complaint. *See* Am. Compl., AP Case No. 12-01879 (Bankr. S.D.N.Y. Aug. 1, 2013), ECF No. 96 (the "Amended Complaint"). The Amended Complaint asserted six causes of action to avoid and recover the Unit Redemptions, the Warrant Redemptions, and the Distribution that the Defendants received as a result of, or in exchange for, their membership interests in EBG. *See id.* The Trustee then sought leave to file a Second Amended Complaint, purportedly to address arguments raised in Defendants' motions to dismiss, but the Court did not grant permission for the filing. *See* AP Case No. 12-01879 (Bankr. S.D.N.Y. Jan. 10, 2014), ECF Nos. 181, Ex. 1, and (Bankr. S.D.N.Y. May 27, 2012), ECF No. 212, at 276:13-20. When the Trustee retained new counsel in March 2019, counsel sought leave to file the TAC. *See* Mot. to Amend and File

Third Am. Compl., AP Case No. 12-01879 (Bankr. S.D.N.Y. Apr. 3, 2019), ECF No. 272 (the "Motion for Leave"). The Defendants consented to the Trustee filing the TAC so they could move to dismiss on the merits. *See* Defendants.' Consent to Relief Requested in Motion for Leave, AP Case No. 12-01879 (Bankr. S.D.N.Y. Apr. 23, 2019), ECF No. 277. Whereas the complaints filed prior to the TAC treated the BosGen Transfer and the ***459** EBG Transfers together, the Trustee now seeks to avoid as intentional and constructive fraudulent conveyances what he characterizes as two "sets" of transfers: an "initial transfer" of the $708 Million from BosGen to EBG, and the "subsequent transfer" of those and additional funds from EBG to its members.

III. Summary of the TAC [6]

The Trustee initiated this adversary proceeding asserting the claims of individual creditors that were assigned to the Trust pursuant to the Plan. *See* TAC ¶ 63. Such creditors include (a) the Lenders, and (b) all other general unsecured creditors of the Debtors (the "Other General Claimants"). *See id.* Upon intentional and constructive fraudulent transfer theories pursuant to the New York Debtor & Creditor Law (the "DCL") and under the theory of unjust enrichment, the Trustee seeks to recover from the defendants in the above-captioned adversary proceeding (the "Defendants") [7] the BosGen Transfer and the EBG Transfers. *See* TAC ¶¶ 146-154 (Count I: asserting intentional fraudulent conveyance claims against the Defendants on behalf of EBG's creditors to avoid and recover the Unit Redemptions, the Warrant Redemptions, and the Distribution pursuant to sections 276 and 278 of the DCL), ¶¶ 155-164 (Count II: asserting an intentional fraudulent conveyance claim against the Defendants on behalf of BosGen's creditors to avoid and recover the BosGen Transfer pursuant to sections 276 and 278 of the DCL), ¶¶ 165-175 (Count III: asserting constructive fraudulent conveyance claims against the Defendants on behalf of EBG's creditors to avoid and recover the Unit Redemptions, the Warrant Redemptions, and the Distribution pursuant to sections 273-75, and 278 of the DCL), ¶¶ 176-186 (Count IV: asserting a constructive fraudulent conveyance claim against the Defendants on behalf of BosGen's creditors to avoid and recover the BosGen Transfer pursuant to sections 273-75, and 278 of the DCL), ¶¶ 187-196 (Count V: asserting an unjust enrichment claim against the Defendants on behalf of both BosGen and EBG's creditors for recovery of the BosGen Transfer, the Unit Redemptions, the Warrant Redemptions, and the Distribution).

In support of Counts I through V, the Trustee alleges two entities separate and apart from BosGen and EBG, K Road and Harbinger, by and through their officers and employees, assumed control of BosGen and EBG in October 2005 and devised a scheme to defraud the Lenders into entering the Credit Facilities to BosGen and EBG's peril. *See* TAC ¶¶ 66-84. According to the TAC, as a merchant seller of electricity, BosGen was subject to various market forces, and by early 2006, those forces, coupled with the expiration of contracts granting BosGen favorable energy prices, signaled a dismal future for the Debtors. *See id.* ¶¶ 1, 86. Thus, by mid-2006, K Road and Harbinger allegedly schemed to sell their EBG LLC member interests before the electricity market collapsed. *See id.* ¶¶ 78-79. According to the Trustee, realizing that a sale or initial public offering would reveal the impending crisis, K Road created two sets of books for the Debtors. *See id.* ¶¶ 1, 80–81. Then, K Road used the false set's inflated figures ***460** along with baseless projections to lure banks into funding the Leveraged Recap Transaction that would allow it, Harbinger, and EBG's other owners to sell their EBG LLC member interests back to EBG and leave the Lenders holding the proverbial bag. *See id.* ¶¶ 1–3, 81, 83–93, 99.

At various instances in the TAC, the Trustee alleges the Lenders were misled regarding the risk profile, expected performance, and solvency of BosGen and EBG. *See id.* ¶¶ 85–102, 114–16, 138, 145. As a result, the Lenders were allegedly defrauded out of $2.1 billion in cash that they transferred to BosGen and EBG. *See id.* ¶¶ 122–23, Ex. H at 503, 504. Approximately $1.8 billion of the Lenders' money went to BosGen via the First Lien Credit Agreement and the Second Lien Credit Agreement and thereafter, the BosGen Transfer of the $708 Million from its US Bank Account to EBG's BoA Account occurred. *See* TAC ¶¶ 122–23. The Trustee alleges the BosGen Transfer left BosGen: (i) balance sheet insolvent by at least $535 million, *see* TAC ¶ 129, (ii) with unreasonably small capital because it had no prospect of servicing its debts while also maintaining its operations, *see* TAC ¶¶ 136–38. and (iii) with no chance of paying those debts as they came due. *See id.* ¶¶ 143–45.

According to the Trustee, EBG used proceeds from the BosGen Transfer, together with the $300 Million from the Mezz Agreement, to fund the Tender Offer to its unit holders. *See id.* ¶¶ 125–26. Following the First BONY Transfer and the Second BONY Transfer, EBG had BONY effectuate the Unit Redemptions to the Defendants, which the Trustee alleges, left EBG hopelessly insolvent. *See id.* ¶¶ 125-26,129-133, 136-145, Ex. H at 503, 506. Further, the Trustee asserts EBG added to its insolvency woes by making the Distribution and effectuating the Warrant Redemptions. *See id.* ¶ 125, Ex. H at 506.

Allegedly, the Step One Transfer [8] and EBG Transfers are rife with badges of fraud too. *See* TAC ¶¶ 124–25, 152, 162. Each transfer purportedly rendered the transferor insolvent, stripped it of liquidity, and transferred the financial risk from the equity holders to the creditors without their informed consent. Plus, neither BosGen nor EBG received any value or consideration in exchange for the BosGen Transfer and/or the EBG Transfers. And the only reason that either transferor had the ability to make the conveyances was because of the fraud that they—via the K Road Insiders—had committed against the Lenders. *See id.* ¶¶ 152, 162.

Three and a half years following the BosGen Transfer and the EBG Transfers, the Debtors collapsed. According to the Trustee, the Debtors' demise was only briefly delayed by virtue of a merger in 2007 with another company. *See id.* ¶ 134. The Trustee claims that once BosGen and EBG's new owner realized the false assumptions built into K Road's projections, BosGen and EBG were spun off and placed into bankruptcy before this Court. *See id.* ¶ 135. Following these allegations, the Defendants moved to dismiss the TAC on various grounds. *See* Mem. of Law in Supp. of Motion to Dismiss Third Am. Compl., AP Case No. 12-01879 (Bankr. S.D.N.Y. July 18, 2019), ECF No. 289 (the "MTD").

*461 IV. Summary of the MTD, the Trustee's Opposition, Defendants' Reply, and Supplemental Filings

a. The MTD

Pursuant to Fed. R. Civ. P. 8, 9(b), and 12(b)(6) as incorporated into this proceeding by Fed. R. Bankr. P. 7008, 7009, and 7012, the Defendants moved to dismiss the TAC. The MTD asserts seven (7) grounds exist to dismiss all, or a portion, of the TAC.

First, the Defendants insist the Trustee's claims are implausible and not plead with sufficient particularity. Namely, the Defendants argue the TAC states claims for fraud on behalf of the Lenders challenging the Leveraged Recap Transaction and it's implausible fraud existed in securing the loans for the Leveraged Recap Transaction because (i) some of the world's most sophisticated lenders financed the transaction, and (ii) the Credit Facilities expressly disclosed and required the Debtors to use the loan proceeds in connection with the Tender Offer to fund the Unit Redemptions, the Warrant Redemptions, and the Distribution. Based on the implausibility of a fraud where sophisticated lenders were involved and the Debtors' full disclosure as to the use of the funds from the Credit Facilities, along with the failure to plead with particularity, the Defendants request dismissal of the TAC.

Second, the Defendants assert the Trustee's claims are time barred. The Trustee's claims seek to avoid and recover distributions made by two Delaware limited liability companies in December 2006 to their members. According to the Defendants, the Delaware Code contains a statute of repose applicable here that, after three years, extinguishes an LLC member's liability for distributions from the company and thus, the Trustee's claims must be dismissed as time barred.

Third, the Trustee's claims are not subject to avoidance and are "safe-harbored" pursuant to section 546(e) of the Bankruptcy Code. The Defendants contend the BosGen Transfer and the EBG Transfers qualified as "settlement payments" and/or payments "in connection with a securities contract" by or to a financial institution and thus, the TAC must be dismissed.

Fourth, the unjust enrichment claims against the Defendants should be dismissed because, in addition to being "safe-harbored," the Trustee's claim fails as a matter of New York state law.

Fifth, the Trustee's claims on behalf of the Lenders should be dismissed because the Lenders consented to and ratified the Unit Redemptions, the Warrant Redemptions, and the Distribution. Based on the Lenders' ratification, the TAC should be dismissed.

Sixth, the Trustee failed to adequately plead claims for intentional fraudulent conveyance. More specifically, the Defendants assert the Trustee was required to allege that a "critical mass" of the EBG board of directors acted with fraudulent intent when they approved the Leveraged Recap Transaction. The Trustee plead no such "critical mass" and thus, the TAC must be dismissed.

Finally, the TAC must be dismissed as to some of the Defendants because they are corporate entities that are no longer in existence and are not amenable to suit.

b. The Trustee's Opposition

On August 30, 2019, the Trustee filed his opposition to the MTD. *See* Memo of Law in Opposition to Motion to Dismiss TAC, AP Case No. 12-01879 (Bankr. S.D.N.Y. Aug. 30, 2019), ECF No. 291 (the "Opposition"). The Opposition challenges the entirety of the Defendants' arguments in the MTD.

***462** First, the Trustee believes his state law fraudulent-transfer claims are well plead. Namely, the Trustee asserts claims under New York law against entities that received, directly and indirectly, almost $1 billion in cash from BosGen and EBG while providing no consideration in return. The gravamen of the complaint is that the parties in control of BosGen and EBG—K Road and Harbinger, among others—engaged in a scheme to hinder, delay, and defraud the Lenders and these insiders alone received a windfall of hundreds of millions of dollars while simultaneously placing BosGen and EBG on a foreseeable path to bankruptcy.

Second, the Trustee asserts his claims are not time-barred. According to the Trustee, this action was brought within New York's applicable six-year statute of limitations for DCL claims and the Defendants cite no authority supporting the application of any foreign law to the Trustee's New York claims—including the inapplicable Delaware statute of repose.

Third, the Trustee asserts section 546(e) of the Bankruptcy Code does not preempt the Trustee's state-law claims and thus, it is irrelevant whether sections 546(e)'s requirements are met here. In the event section 546(e) preempts the Trustee's state-law fraudulent transfer claims, the Trustee asserts sections 546(e)'s requirements are not met. Namely, there is no (i) transfer by, or to (or for the benefit of) a "financial institution," (ii) "settlement payment," and/or (iii) transfer "in connection with a securities contract."

Fourth, the Trustee contends the Defendants' ratification argument also fails. The Lenders did not "ratify" the fraudulent transfers, and certainly did not do so as a matter of law.

Finally, the Trustee makes the conclusory assertion that the "Defendants' remaining arguments are also without merit" and requests "this Court deny Defendants' motion in its entirety." *See* Opposition, at 4, 48-49.

c. The Defendants Reply to the Opposition and Supplemental Filings

On September 27, 2019, the Defendant filed their reply to the Opposition. *See* Reply Memo of Law in Supp. of Motion to Dismiss TAC, AP Case No. 12-01879 (Bankr. S.D.N.Y. Sept. 27, 2019), ECF No. 293 (the "Reply"). The Reply reasserts that: (i) Delaware's three-year statute of repose applies to the Trustee's claims; (ii) the claims are not well-plead; (iii) section 546(e) preempts the TAC's state-law claims; and (iv) the Lenders' ratified the transfers at issue.

Following the end of briefing, the Defendants and the Trustee filed a total of three (3) letters on the docket. From the Defendants, the first letter brought an additional statutory provision related to Delaware's three-year statute of repose to the Court attention, which the Defendants claim is dispositive in their favor. *See* Letter to Judge Lane, AP Case No. 12-01879 (Bankr. S.D.N.Y. Dec. 16, 2019), ECF No. 299 (the "First Letter"). Four-days later, the Trustee filed the second letter responding to the substance of the First Letter. *See* Letter to Judge Lane, AP Case No. 12-01879 (Bankr. S.D.N.Y. Dec. 23, 2019), ECF No. 302 (the "Second Letter"). Finally, the Defendants filed a third letter bringing to the Court's attention the recent decision issued by the United States Court of Appeals for the Second Circuit (the "Second Circuit") in *Tribune. See* Letter to Judge Lane, AP Case No. 12-01879 (Bankr. S.D.N.Y. Dec. 24, 2019), ECF No. 303 (the "Third Letter").

d. Oral Argument

On February 24, 2020, Judge Lane heard arguments in connection with the ***463** MTD, the Opposition, the Reply, the First Letter, the Second Letter, and the Third Letter. *See* Hr'g Tr., AP Case No. 12-01879 (Bankr. S.D.N.Y. Feb. 24, 2020), ECF No. 309. On April 25, 2020, the Clerk of the Court reassigned this adversary proceeding to this Court. *See* Notice of Reassignment, AP Case No. 12-01879 (Bankr. S.D.N.Y. Apr. 25, 2020), ECF No. 310. This Court conducted a status conference in this matter on May 19, 2020 at which time the Court heard further arguments in connection with the MTD, the Opposition, the Reply, the First Letter, the Second Letter, and the Third Letter. *See* Hr'g Tr., AP Case No. 12-01879 (Bankr. S.D.N.Y. May 19, 2020), ECF No. 313 (the "May Transcript"). The decision below follows.

V. Timeliness of the Trustee's Claims

Before the TAC's substantive allegations are examined, the Court must determine whether the Trustee's claims are timely. The Court holds the Trustee's claims for intentional and constructively fraudulent transfers pursuant to the DCL were timely filed. However, the Trustee's claim for unjust enrichment under New York state-law is time barred.

a. Applicable Statutory Provisions

Both BosGen and EBG are Delaware limited liability companies. By statute, Delaware shortens the limitations period to three-years for actions brought by Delaware LLC's to recover money distributed to its LLC members. Specifically, Delaware law provides:

> (c) Unless otherwise agreed, a member who receives a distribution from a limited liability company shall have no liability under this chapter or other applicable law for the amount of the distribution after the expiration of 3 years from the date of the distribution unless an action to recover the distribution from such member is commenced prior to the expiration of the said 3-year period and an adjudication of liability against such member is made in the said action.

Del. Code Ann. tit. 6, § 18-607(c) (the "Delaware Statute of Repose").[9]

***464** Similarly, New York has its own statute of repose governing transfers by a New York LLC to its LLC members. The New York Limited Liability Company Law (the "NYLLCL") provides:

> (c) Unless otherwise agreed, a member who receives a wrongful distribution from a limited liability company shall have no liability under this article or other applicable law for the amount of the distribution after the expiration of three years from the date of the distribution.

NYLLCL § 508(c) (the "NY Statute of Repose")[10].

Finally, the NYLLCL contains a provision addressing the proper forum's law to apply when a foreign LLC's members are sued in a New York court for return of a distribution. The NYLLCL provides:

> (a) the laws of the jurisdiction under which a foreign limited liability company is formed govern its organization and internal affairs *and the liability of its members and managers*; and
>
> (b) a foreign limited liability company may not be denied a certificate of authority by reason of any difference between such laws and the laws of this state.

NYLLCL § 801 (emphasis added) (the "NY Foreign LLC Law").

b. Whether the Trustee's DCL Claims are Time-Barred

Claims brought pursuant to the DCL are subject to a six-year statute of limitations. *See* N.Y. Civ. Practice Law & R. ("NYCPLR") § 213(8); *In re Bernard L. Madoff Inv. Securities, LLC*, 458 B.R. 87, 109 (Bankr. S.D.N.Y. 2011) (applying six-year statute of limitations to DCL claims). The BosGen Transfer and EBF Transfers occurred in December 2006 and the Trustee brought this action in August 2012. Thus, the Trustee's DCL claims are timely under New York's six-year limitation period unless another applicable law, such as the Delaware Statute of Repose, applies to shorten the limitations period. The Defendants ask the Court to hold that the Delaware Statute of Repose: (i) applies to suits brought by creditors to recover a Delaware LLC's member distributions; and (ii) trumps New York's six-year limitation period for DCL claims. In contrast, the Trustee ***465** asks the Court to hold that: (i) the Delaware Statute of Repose does not apply to creditor suits to recover a Delaware LLC's distribution to its members, leaving the Court to apply New York's six-year limitations period for DCL claims; and (ii) even if the Delaware Statute of Repose could be applied to creditor suits against a Delaware LLC's members, it should give way to New York law and its six-year limitations period because New York has a greater interest in seeing its law applied in this proceeding. After evaluating how another jurisdiction has interpreted the Delaware Statute of Repose and analyzing the interpretation New York courts have ascribed to the virtually identical NY Statute of Repose, the Court concludes the Delaware Statute of Repose does not apply to creditor suits brought to recover a Delaware LLC's distribution to its members. Therefore, New York's six-year limitations period for DCL claims governs.

i. New York's Choice of Law Standard

Here, New York's choice-of-law rules govern because a federal court exercising bankruptcy jurisdiction must apply the conflict of laws rules of the state in which the federal court sits to determine the applicable limitations period for fraudulent transfer claims. *See* *Bianco v. Erkins (In re Gaston v. Snow)*, 243 F.3d 599, 605-07 (2d Cir. 2001). The first step of New York's choice-of-law rules is to determine whether there is an actual conflict between the laws of the jurisdictions involved. *See* *Drenis v. Haligiannis,* 452 F. Supp.2d 418, 426 (S.D.N.Y. 2006). New York law applies when no jurisdictional conflict exists. *See* *Curley v. AMR Corp.*, 153 F.3d 5, 12 (2d Cir.1998) (holding the Court will dispense with a choice of law analysis when there is no conflict). If a jurisdictional conflict does exist, New York courts will apply the law of the state with the greatest interest. *See* *id.* at 12-13.

First, the Court must determine whether the Delaware Statute of Repose applies to creditor suits, thus potentially shortening the limitations period to three-years for the Trustee's DCL claims and creating a conflict between New York and Delaware substantive law. [11] Second, only if the Delaware Statute of Repose can be applied to creditor suits against a Delaware LLC's members, will the Court then engage in the "interest analysis" to resolve whether Delaware or New York has the greater interest in seeing its law applied. Because the Delaware Statute of Repose does not apply to creditor suits, there is no conflict of law present and the Court need not delve into which jurisdiction has the greatest interest in seeing its law applied.

ii. The NY Foreign LLC Law

Reading their papers, the Trustee and the Defendants take divergent paths at the outset applying New York law. According to the Defendants, the NY Foreign LLC Law applies, it directs the Court to the Delaware Statute of Repose, which also applies, and therefore the Trustee's DCL claims are time barred. The Trustee ***466** argues, the NY Foreign LLC Law does not apply to fraudulent conveyance claims (only to claims regarding the LLC's internal affairs). Further, the Trustee posits that even if the NY Foreign LLC law applies here, the Delaware Statute of Repose is inapplicable to creditor suits thus leaving the Court to apply New York's six-year limitations period for DCL claims. Step one of the analysis must be whether the NY Foreign LLC Law applies only narrowly to claims involving an LLC's internal affairs or whether it applies more broadly to fraudulent conveyance claims against a foreign LLC's members.

The Court holds the NY Foreign LLC Law applies broadly to fraudulent conveyance claims against a foreign LLC's members. The NY Foreign LLC Law's coverage is not limited by its terms to claims among and between the LLC and its members, or stated another way, the LLC's internal affairs. *See* *Treeline 1 OCR, LLC v. Nassau Cty. Indus. Dev. Agency*, 82 A.D.3d 748, 918 N.Y.S.2d 128, 131 (2d Dep't 2011) (applying Texas law to claims against a Texas LLC for damage to real property pursuant to the NY Foreign LLC Law). The NY Foreign LLC Law governs "the liability of its members and managers" *without any limitation. See id.* The Trustee argues the NY Foreign LLC Law codifies the common law internal affairs doctrine and must therefore be interpreted restrictively to apply only to the LLC's internal affairs. The Court will not ascribe this restrictive reading to the NY Foreign LLC Law based on the plain language of the statute and Appellate Division, Second Department's decision in *Treeline 1 OCR, LLC.* Because the Court holds the NY Foreign LLC Law applies to fraudulent conveyance claims against a foreign LLC's members, the Court proceeds to step two of the analysis addressing whether the Delaware Statute of Repose applies to *creditor* suits against a Delaware LLC's members. [12]

***467** iii. Whether the Delaware Statute of Repose Applies to Creditor Claims

1. The Plan Language of the Delaware Statute of Repose Demonstrates It Does Not Apply to Creditor Claims

The Court holds that the Delaware Statute of Repose does not apply to suits brought by a liquidating trustee standing in the shoes of creditors, not the debtor, seeking to recover a Delaware LLC's member distributions. The Court could not locate decisive authority from a Delaware court addressing whether the Delaware Statute of Repose applies to creditor claims, though one Delaware Court has intimated it does not. *See* *Pepsi-Cola Bottling Co. of Md. v. Handy*, Case No. 1973-S, 2000 WL 364199, at *5 (Del. Ch. March 15, 2000) ("The defendants, however, give a far more expansive reading to § 18-607 than its language warrants. They claim that the statute shields LLC members against *any* other claims against them, *i.e.,* against *all* claims except those that arise under § 18-607. Nothing in § 18-607 so provides."). With this backdrop, the Court will endeavor to determine, based on Delaware's rules for statutory construction, whether the Delaware Statute of Repose applies to the Trustee's claims.

When interpreting a state's statute, a federal court must employ that state's statutory construction principles. *See* *Brownsburg Area Patrons Affecting Change v. Baldwin,* 137 F.3d 503, 507 (7th Cir. 1998). The primary rule of statutory construction requires this Court to ascertain and effectuate the Delaware legislature's intent. *See* *In re Adoption of Swanson*, 623 A.2d 1095, 1096 (Del. 1993). Where a statute "is unambiguous and there is no reasonable doubt as to the meanings of the words used, the court's role is limited to an application of the literal meaning of those words." *Id.* at 1096–97.

The Court finds the Delaware Statute of Repose's interpretation by the United States District Court for the Southern District of Illinois in *A Communications Co. v. Bonutti* persuasive. There, Judge Gilbert addressed whether the Delaware Statute of Repose applied to creditor breach of fiduciary duty claims against a Delaware LLC's members and held:

> When the Court reads subsection (c) in context and views it in its place in the statutory scheme, the Court is further convinced that Delaware's legislature intended subsection (c) to modify the liability set forth in subsection (a) and (b) of Section 18–607. Under statutory construction principles, 'words of a statute must be read in their context and with a view to their place in the overall statutory scheme.' Section 18–607 contains three subsections and *sets forth limitations on distributions from a limited liability company to a member....*

A Communications Co. v. Bonutti, 55 F. Supp.3d 1119, 1126-27 (S.D. Ill. 2014) (emphasis added) (internal citations omitted). The Court adopts Judge Gilbert's reasoning and concludes the correct interpretation of the Delaware Statute of Repose is that it modifies the liability of LLC members *to the LLC* under sections 18-607(a)-(b) of title 6 of the Delaware Code. Thus, in this Court's view, the Delaware Statute of Repose does not apply to creditor claims against a Delaware LLC's members. This interpretation is consistent with how New York courts interpret the NY Statute of Repose, which is virtually identical to the Delaware Statute of Repose. By analogy, the Court finds persuasive New York's interpretation of its own statute of repose.

***468 2. The New York Statute of Repose Does Not Apply to Creditor Claims and, By Analogy, Supports the Holding that the Plain Language of Delaware's Statute of Repose Does Not Apply to Creditor Claims**

The NY Statute of Repose provides, "a member who receives a wrongful distribution from a limited liability company shall have no liability under this article or other applicable law for the amount of the distribution after the expiration of three years from the date of the distribution." NYLLCL § 508(c). Courts have applied this three-year time limit to avoidance actions under 11 U.S.C. § 544 and the DCL. *See* *Geron v. Craig (In re Direct Access Partners, LLC)*, 602 B.R. 495, 517-18 (Bankr. S.D.N.Y. 2019) (applying the NY Statute of Repose to claims asserted by the chapter 7 trustee standing in the debtor's shoes); *O'Connell v. Shallo (In re Die Fliedermaus LLC)*, 323 B.R. 101, 108 (Bankr. S.D.N.Y. 2005) (same). However, other courts have concluded, and this Court agrees, that there is a distinction between a trustee standing in a debtor's shoes suing for the *benefit of creditors* versus suing *as a creditor.* Given the virtually identical language used in the Delaware Statute of Repose to that used in the NY Statute of Repose, it's instructive by analogy for this Court to determine whether the NY Statute of Repose applies to creditor claims to recover a distribution to a New York LLC's members. It does not.

The three-year limitation imposed by the NY Statute of Repose does not apply to fraudulent transfers claims brought by creditors against a New York LLC's members. *See Lyman Commerce Solutions, Inc. v. Lung*, Case No. 12-civ-4398, 2015 WL 1808693, at *5 (S.D.N.Y. Apr. 20, 2015) ("Section 508, by its terms, applies to amounts owed by a member to 'the limited liability company'—*not* to outside creditors."). The Court agrees with *Lyman's* reasoning because "[t]o hold that outside creditors are subject to Section 508's limitations period when bringing claims for fraudulent conveyances to corporate members would be to hold that fraudulent transfers to a corporate insider could be challenged for only half as long as transfers to persons outside the corporate entity. Such a holding would turn the purposes of the fraudulent conveyance statute on its head ...." *Id.*

Additionally, the Appellate Division, First Department, held the three-year limitation period imposed by the NY Statute of Repose does not override the six-year statute of limitations for fraudulent conveyance claims brought by creditors under the DCL. The Appellate Division, First Department held that the plain language of the NY Statute of Repose indicates that it applies to members of an LLC and holds them "liable to the limited liability company" for wrongful distributions and does not extend to apply to claims of outside creditors. *Setters v. AI Properties and Developments (USA) Corp.*, 139 A.D.3d 492, 492, 32 N.Y.S.3d 87, 89 (1st Dep't. 2016). [13]

***469** iv. Conclusion

As the Delaware Statute of Repose is inapplicable to creditor claims for the reasons stated above, no conflict of law exists. Therefore, this Court is left with New York's six-year limitations period for DCL claims [14] and the Trustee's DCL claims are timely.

c. Whether the Trustee's Unjust Enrichment Claim is Time-Barred

The Trustee's unjust enrichment claim is time-barred under New York law because such claim seeks monetary recovery. Under New York law, the statute of limitations applicable to an unjust enrichment claim depends on the nature of the substantive remedy the plaintiff seeks. *See Loengard v. Santa Fe Indus., Inc.,* 514 N.E.2d 113, 519 N.Y.S.2d 801, 70 N.Y.2d 262, 266 (1987). The limitations period is six years where a plaintiff seeks an equitable remedy, but three years where a plaintiff seeks monetary damages. *See Ingrami v. Rovner,* 45 A.D.3d 806, 808, 847 N.Y.S.2d 132 (2d Dep't 2007); *see Lia v. Saporito,* 909 F.Supp.2d 149, 167 (E.D.N.Y. 2012); *Kermanshah v. Kermanshah,* 580 F. Supp.2d 247, 261 (S.D.N.Y. 2008); *Grynberg v. Eni S.p.A.,* Case No. 06-civ-6495, 2007 WL 2584727, at *3 (S.D.N.Y. Sept. 5, 2007). The applicable limitations period begins "upon the occurrence of the wrongful act giving rise to a duty of restitution and not from the time the facts constituting the fraud are discovered." *Cohen v. S.A.C. Trading Corp.,* 711 F.3d 353, 364 (2d Cir. 2013) (quoting *Coombs v. Jervier,* 74 A.D.3d 724, 724, 906 N.Y.S.2d 267 (2d Dep't 2010)).

The TAC plainly states the Trustee is seeking monetary damages in connections with his unjust enrichment claim. The Trustee alleges, "[t]his count [unjust enrichment] is asserted on behalf of the EBG Creditors and the BosGen Creditors. Upon information and belief, the creditor claims described herein exceed $800 million." TAC ¶ 188. Further into the unjust enrichment count in the TAC, the Trustee alleges that:

> [a]s a direct and proximate result of the foregoing, this Court should find that the Transferee Defendants ... have been unjustly enriched, and the EBG Creditors and BosGen Creditors whose claims and causes of action have been assigned to the Liquidating Trust ... have been damaged thereby in an amount to be determined at trial. Equity and good conscience demand a return of the funds received by the Transferee Defendants ... or an award of damages equivalent to the amount by the Transferee Defendants ... were unjustly enriched ... [plus pre-judgment and post judgment interest with fees and costs].

TAC ¶ 196; *see id.* ¶ Prayer for Relief, at 69(c) ("on Count Five ... EBG and BosGen Creditors have been damaged in an amount to be determined at trial but believed to be in excess of $1 billion ....”). The Trustee seeks monetary damages more than three-years after the transfers complained of occurred and thus, his unjust enrichment claim is time-barred.

d. New York's Borrowing Statute

The Defendants assert that the Trustee's claims are barred for a second, ***470** independent reason—CPLR § 202. As noted above, this Court must apply New York choice of law rules. *See* *In re Gaston v. Snow*, 243 F.3d 599, 605-07 (2d Cir. 2001). CPLR section 202 provides:

> An action based upon a cause of action accruing without the state cannot be commenced after the expiration of the time limited by the laws of either the state or the place without the state where the cause of action accrued, except that where the cause of action accrued in favor of a resident of the state the time limited by the laws of the state shall apply.

CPLR § 202 (the “Borrowing Statute”). Under the Borrowing Statute, “when a nonresident plaintiff sues upon a cause of action that arose outside of New York, the court must apply the shorter limitation period, including all relevant tolling provisions, of either: (1) New York; or (2) the state where the cause of action accrued.” *Stuart v. Am. Cyanamid Co.*, 158 F.3d 622, 627 (2d Cir. 1998). Here, many of the Lenders and Other General Claimants, who the Trustee is suing on behalf of, are not New York residents. Therefore, according the Defendants, the Borrowing Statute applies, other (shorter) limitations periods apply via the Borrowing Statute, and the Trustee's claims are time barred. The Borrowing Statute places the burden of proof on the Defendants, and they have not provided the Court with sufficient documentation to carry their burden of proof on this issue. *Cf.* Reply, at 19-20 (arguing the Trustee bears the burden of proving residency in New York under the Borrowing Statute).

The burden of proving that a particular statute of limitation has expired falls on the defendant. *See* *Cuccolo v. Lipsky, Goodkin & Co.*, 826 F. Supp. 763, 767 n.3 (S.D.N.Y. 1993). However, the plaintiff bears the burden of proving that a particular statute of limitation has been tolled. *See* *id.* Finally, when another state's statute of limitation is considered pursuant to the Borrowing Statute, the party seeking to benefit therefrom bears the burden of proof. *See* *id.* (citing *Katz v. Goodyear Tire & Rubber Co.*, 737 F.2d 238, 243 (2d Cir. 1984)).

In *Cuccolo*, considering a defendant's motion to dismiss pursuant to Rule 12(b)(6) based, in part, on the Borrowing Statute, the Court held:

> there is no evidence in the papers submitted to the Court indicating that defendants would be amenable to jurisdiction in New Jersey. Plaintiffs' argument is based on *Stafford v. Int'l Harvester Co.*, 668 F.2d 142, 152 (2d Cir. 1981), which held that New York's borrowing statute does not require consideration of the limitations period of another jurisdiction if the plaintiff's cause of action could not have been brought there. The Court of Appeals explained: ‘Insofar as the purpose of the borrowing statute is ... to prevent a plaintiff from forum shopping, it makes no sense at all to apply [a statute of] limitation of a state where the defendant could not have been sued.’ *Id.* Although *Stafford*'s reasoning has been questioned ... this Court is bound by the Second Circuit's holding. Since plaintiffs' argument was not contested and no evidence indicated the defendants—who bore the burden of proof—would be amenable to a New Jersey court's jurisdiction, only the New York statute of limitations will be considered.
>
> *Cf.* *Maiden v. Biehl*, 582 F. Supp. 1209, 1215 (S.D.N.Y. 1984) (defendants proffered evidence indicating they would be amenable to foreign court's jurisdiction).

Id. The Defendants have not demonstrated in their papers that they would be amenable to suit in another foreign jurisdiction ***471** and that alone under *Stafford* and *Cuccolo* is sufficient to deny Defendants' request to apply the Borrowing Statute. Additionally, as further support of the Court's conclusion, the Defendants have not identified a jurisdiction in which the Trustee's claims are untimely. Thus, the Borrowing Statute cannot be applied here.

VI. Pleading Standards for the Trustee's Claims on Behalf of the Lenders and the Other General Claimants

a. Standard for Motion to Dismiss

A motion to dismiss for failure to state a cause of action under Federal Rule of Civil Procedure 12(b)(6) ("Rule 12(b)(6)"), made applicable to this adversary proceeding by Fed. R. Bankr. P. 7012, requires a determination as to whether the complaint properly states a claim under Fed. R. Civ. P. 8 ("Rule 8"). *See* Fed. R. Bankr. P. 7008. Under Rule 8, a complaint must contain a "short and plain statement of the claim showing the pleader is entitled to relief." *Ashcroft v. Iqbal,* 556 U.S. 662, 668, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). Recently, the Supreme Court has twice taken up the requirements of Rule 8. *See id.* at 662, 129 S.Ct. 1937; *see also* *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). In both cases, the Supreme Court emphasized two principles which form the basis for determining a Rule 12(b)(6) motion.

First, the tenet that a court must "accept all factual allegations as true" is limited to factual allegations and does not apply to legal conclusions listed in the plaintiff's complaint. *Ashcroft v. Iqbal,* 556 U.S. at 668, 129 S.Ct. 1937. The Court explained that legal conclusions are not entitled to the assumption of truth: "[w]hile legal conclusions can provide the complaint's framework, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Id.* at 676, 129 S.Ct. 1937.

Second, "only a complaint that states a plausible claim for relief survives a motion to dismiss." *Id.* The Supreme Court has explained that "[t]he plausibility standard is not akin to a probability requirement, but asks for more than a sheer possibility." *Id.* This two-pronged approach now forms the standard to be applied when courts are determining a motion to dismiss for failure to state a cause of action. *Id.* Courts must focus only on the allegations in the complaint which are entitled to the assumption of truth, "discounting legal conclusions clothed in the factual garb." *Gowan v. Novator Credit Mgmt. (In re Dreier LLP),* 452 B.R. 467, 475 (Bankr. S.D.N.Y. 2011). Based on these well-pleaded factual allegations, courts must determine if the complaint states a plausible claim for relief. *See* *id.*

Determining whether a complaint states a plausible claim is "context specific, requiring the court to draw on its experience and common sense." *Ashcroft v. Iqbal,* 556 U.S. at 668, 129 S.Ct. 1937. However, the "pleadings must create the possibility of a right to relief that is more than speculative." *Spool v. World Child Int'l Adoption Agency,* 520 F.3d 178, 184 (2d Cir. 2008). A complaint has facial plausibility when "the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal* 556 U.S. at 668, 129 S.Ct. 1937. Additionally, courts must "draw inferences ... in the light most favorable to the [nonmovant], and construe the complaint liberally." *Gowan v. Novator Credit Mgmt.,* 452 B.R. at 476 (quoting *Gregory v. Daly,* 243 F.3d 687, 691 (2d Cir. 2001) (other citations omitted)).

***472** Finally, "courts must consider the complaint in its entirety." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.* 551 U.S. 308, 310, 127 S.Ct. 2499, 168 L.Ed.2d 179 (2007). The Court may take judicial notice of the public record in related cases involving one of the parties. *Mangiafico v. Blumenthal,* 471 F.3d 391, 398 (2d Cir. 2006). A court may even consider a document that has not been incorporated by reference " 'where the complaint relies heavily upon its terms and effect, which renders the document integral to the complaint.' " *Buena Vista Home Entm't, Inc. v. Wachovia Bank, N.A. (In re Musicland Holding Corp.),* 374 B.R. 113, 119 (Bankr. S.D.N.Y. 2007) (citing *Chambers v. Time Warner, Inc.,* 282 F.3d 147, 153 (2d Cir. 2002) (other citations omitted)).

b. Heightened Pleading Standard for Intentional Fraud

Fed. R. Civ. P. 9(b) ("Rule 9(b)"), which is applicable in this case pursuant to Bankruptcy Rule 7009, governs claims for intentional fraudulent transfers. *Silverman v. Actrade Capital, Inc. (In re Actrade Fin. Techs. Ltd.),* 337 B.R. 791, 801 (Bankr. S.D.N.Y. 2005). The first and second counts in the TAC arise under DCL §§ 276 and 278, and each count requires a finding of intent by the transferor to defraud. *Picard v. Madoff, et al. (In re Bernard L. Madoff Inv. Sec. LLC),* 458 B.R. 87, 105 (Bankr. S.D.N.Y. 2011) ("*Picard v. Madoff*") (citing *Gowan v. The Patriot Group, LLC (In re Dreier LLP),* 452 B.R. 391, 424 (Bankr. S.D.N.Y. 2011)). As intentional intent fraudulent transfers, these claims must meet the heightened specificity requirements under Rule 9(b). *Sharp Int'l Corp. v. State Street Bank & Trust Co. (In re Sharp Int'l Corp.),* 403 F.3d 43, 56 (2d Cir. 2005). However, where a bankruptcy trustee is the party asserting the intentional fraudulent transfer claim, the Second Circuit has adopted " 'a more liberal view ... since a trustee is an outsider to the transaction who must plead fraud from second-hand knowledge.' " *Picard v. Cohmad Sec. Corp. et al. (In re Bernard L. Madoff Inv. Sec. LLC),* 454 B.R. 317, 329 (Bankr. S.D.N.Y. 2011) ("*Picard v. Cohmad*") (citing *Nisselson v. Softbank AM Corp. (In re MarketXT Holdings Corp.),* 361 B.R. 369, 395 (Bankr. S.D.N.Y. 2007) (other citations omitted)).

c. The Trustee's Intentional Fraud Claims are Well Plead

i. Allegations Necessary to Sustain Counts I and II

Section 276 of the DCL provides that "every conveyance made and every obligation incurred with actual intent ... to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors." This section authorizes a party "to avoid transactions which have the purpose or effect of removing property from a debtor's estate which should properly be used to repay creditors." *Kramer v. Mahia (In re Kahn),* Case No. 11-01520, 2014 WL 10474969, at *21 (E.D.N.Y. Dec. 24, 2014) (citing *Strauss v. Sixty-Five Brokers (In re Churchill Mortg. Inv. Corp.),* 256 B.R. 664, 675 (Bankr. S.D.N.Y. 2000)).

To survive a motion to dismiss on an intentional fraud claim pursuant to DCL section 276:

> a plaintiff must allege that a defendant acted with 'actual intent to hinder, delay, or defraud' creditors and must plead its allegations with particularity as required by Rule 9(b). Due to the difficulty of proving intent, plaintiffs may rely on 'badges of fraud'—'circumstances so commonly associated with fraudulent transfers that their presence gives rise to an inference of intent.' The 'badges of fraud' include: 'a close relationship between ***473** the parties to the alleged fraudulent transaction; a questionable transfer not in the usual course of business; inadequacy of the consideration ... and retention of control of the property by the transferor after the conveyance.

Techno-Comp. Inc. v. Arcabascio, 130 F. Supp.3d 734, 745 (E.D.N.Y. 2015) (internal citations omitted).

ii. The Trustee's Allegations Were Sufficient to Sustain Counts I and II

The Trustee sufficiently plead intentional fraud pursuant to section 276 of the DCL. Taken together, all of the allegations in the TAC plead: (i) that the K Road Insiders, which included the CEO and Chairman of EBG's board of directors, were agents of BosGen and EBG; (ii) the K Road Insiders' knowledge, by virtue of their dominance and control of the EBG's operations, was imputed to BosGen and EBG; (iii) the K Road Insiders omitted and/or misrepresented the Debtors' financial condition to the Lenders; (iv) the K Road Insiders intended to defraud the Lenders and the Other Claimants; and (v) the BosGen Transfer and the EBG Transfers provided value to the Defendants with no value to BosGen and/or EBG in return. The specific fraud allegedly committed by the K Road Insiders was concealing and misrepresenting BosGen and EBG's true financial condition from the Lenders. *See* TAC ¶¶ 17-27, 74-77, 83, 88, 104, 106, 117 (alleging the K Road Insiders caused the board of directors to approve the Leveraged Recap Transaction, which the Trustee alleges was fraudulent), ¶¶ 17-24, 74-76 (alleging K Road directly appointed and controlled two members of EBG's seven-member board of directors and all of EBG's senior management was comprised of K Road Insiders), ¶ 26 (alleging the remaining five of the seven directors on EBG's board were controlled by K Road because, as K Road internally acknowledged, the "EBG Board of Directors would approve whatever K Road told them to, as long as the Nominating Committee was in agreement").

More specifically, the Trustee alleges numerous badges of fraud which the Court finds sufficient to hold that the Trustee has satisfied the pleading requirements of Rule 8 and Rule 9(b) for a DCL section 276 claim. Among other allegations sufficient to demonstrate "badges of fraud" were present surrounding the BosGen Transfer and the EBG Transfers, the Trustee alleges: (i) inadequacy of consideration for the BosGen Transfer and the EBG Transfers because, a) BosGen and EBG were balance-sheet insolvent as a result of the transfers, b) BosGen and EBG knew they could not pay their debts as they came due as a result of the transfers, c) BosGen and EBG received no value or consideration in exchange for the transfers, and d) such transfers rendered BosGen and EBG insolvent; (ii) a close-relationship between K Road, EBG, BosGen, parties to the alleged fraud; and (iii) the BosGen Transfer and EBG Transfers were questionable transactions based on false and misleading projections. *See* TAC ¶¶ 152, 162 (summaries for Counts I and II).

iii. Whether a "Critical Mass" of the EBG Board Acted with Fraudulent Intent

The Defendants assert that the Trustee was required to allege that a "critical mass" of the EBG board acted with fraudulent intent. According to the Defendants, the Trustee's allegation that K Road, Harbinger, and the Nominating Committee "dominated and controlled" the Debtors such that their intent can be imputed to the entire board of directors is insufficient. The Court disagrees.

***474** In *Weisfelner v. Fund 1 (In re Lyondell Chem. Co.)*, 503 B.R. 348, 388 (Bankr. S.D.N.Y. 2014), Judge Gerber held that where board approval is required, a plaintiff must plead that a "critical mass" of directors acted with the requisite intent *or otherwise explain how actors with fraudulent intent otherwise caused the disposition of property. See id.* (emphasis added). Here, the Trustee has alleged *how actors with fraudulent intent otherwise caused the disposition of property.* The TAC alleges that K Road: (i) was EBG's agent; (ii) had fraudulent intent based on the badges of fraud discussed above; and (iii) through manipulation, dominance, and control of EBG's operations, caused BosGen and EBG to incur debt under the Credit Facilities and thereafter, transfer the monies to EBG's members for no consideration. *See* TAC ¶¶ 74-76 (alleging K Road directly appointed and controlled two members of EBG's seven-member board of directors and all of EBG's senior management was comprised of K Road Insiders), ¶ 26 (alleging the remaining five of the seven directors on EBG's board were controlled by K Road because, as K Road internally acknowledged, the "EBG Board of Directors would approve whatever K Road told them to, as long as the Nominating Committee was in agreement"). The Trustee may not be able to prove these facts following discovery. Nevertheless, he has plead facts sufficient to withstand the MTD under the Bankruptcy Court's decision in *Lyondell.*

Further, Judge Cote reversed Judge Gerber's decision in *Lyondell* holding the CEO's "knowledge that the EBITDA figures were fraudulent, as well as his intent in creating and presenting them, can be imputed." *In re Lyondell*, 554 B.R. 635, 648 (S.D.N.Y. 2016). In reaching this holding, the District Court rejected the Bankruptcy Court's determination that an additional showing—through a "critical mass" or otherwise—was necessary to impute the acts of corporate agents for transactions involving board approval. *See id.* at 647–50.

Notwithstanding the District Court's decision in *Lyondell*, the Defendants argue the Bankruptcy Court's reasoning should still apply for two reasons. First, because Judge Sullivan, sitting on the District Court, agreed that Judge Gerber's holding that the "critical mass" test "appropriately accounts for the distinct roles played by directors and officers under corporate law." Reply, at 5 (quoting Judge Sullivan in *Tribune*). However, Judge Sullivan's full quotation provides that the "critical mass" test "appropriately accounts for the distinct roles play by directors and officers under corporate law, *while also factoring in the power certain officers and other actors may exercise over the corporation's decision to consummate a transaction.*" (quoting *Kirschner v. Fitzsimons (In re Tribune Co. Fraudulent Conveyance Litigation)*, Case No. 12-civ-2652, 2017 WL 82391, at *6 (S.D.N.Y. Jan. 6, 2017) (emphasis added) (noting Judge Cote's reversal of *Lyondell*, disagreeing with Judge Cote, concluding her decision in *Lyondell* was not binding in *Tribune*, and holding, "Specifically, the Court agrees with ... [Judge Gerber] that the intent of the debtor's officers may be imputed to the debtor if the officers were 'in a position to control the disposition of [the transferor's] property,' thereby effectuating the underlying offense."))); *see In re Adler, Coleman Clearing Corp.*, 263 B.R. 406 (S.D.N.Y. 2001) (cited with approval by Judge Sullivan for the proposition that that a transferee's intentional fraudulent intent may be ascribed to the transferor corporation where transferee "dominated or controlled [transferor's] disposition" of its property). As discussed above, the Trustee has alleged such domination of BosGen and EBG by the K Road Insiders.

***475** Second, Judge Cote was given the opportunity to reverse Judge Sullivan's *Tribune* decision when she took the case over following Judge Sullivan's elevation to the Second Circuit, and she declined to do so. *See* *Fitzsimons* *(In re Tribune Co. Fraudulent Conveyance Litigation)*, Case No. 12-civ-2652, 2019 WL 1771786, at *3 (S.D.N.Y. Apr. 23, 2019). The Court refuses to infer anything from Judge Cote's *inaction.*

Notwithstanding that there is a split of authority at the district court level concerning the appropriate test to apply for imputation of a director or officer's knowledge and/or conduct to the entire board, the facts alleged in the TAC satisfy the tests adopted by Judge Gerber in *Lyondell* and Judge Sullivan in *Tribune* for the reasons stated above. [15]

d. The Trustee's Constructive Fraud Claims are Well Plead

i. Allegations Necessary to Sustain Counts III and IV

The DCL provides several paths to recover a constructively fraudulent transfer:

> [A] conveyance by a debtor is deemed constructively fraudulent if it is made without 'fair consideration,' and ... one of the following conditions is met: (i) the transferor is insolvent or will be rendered insolvent by the transfer in question, DCL § 273; (ii) the transferor is engaged in or is about to engage in a business transaction for which its remaining property constitutes unreasonably small capital, DCL § 274; or (iii) the transferor believes that it will incur debt beyond its ability to pay, DCL § 275.

In re Sharp Int'l Corp., 403 F.3d 43, 53 (2d Cir. 2005). Such claims need not be plead with particularity under Rule 9(b). Instead, "the pleading standards of Rule 8 ... apply, subject, of course, to the 'plausibility' requirements of *Iqbal* and *Twombly.*" *Techno-Comp. Inc. v. Arcabascio*, 130 F. Supp.3d 734, 746 (E.D.N.Y. 2015).

ii. The Trustee's Allegations Were Sufficient to Sustain Counts III and IV

The Trustee sufficiently plead that BosGen and EBG did not receive fair consideration from the BosGen Transfer and the EBG Transfers. *See* TAC ¶¶ 124-25, 152, 162, 170, 181, 191. Further, the Trustee alleged that BosGen and EBG: (i) were rendered insolvent by the transfers; (ii) were left with unreasonably small capital following the transfers; and (iii) believed they would incur debt beyond their ability to pay. *See* TAC ¶¶ 129-135, 136-145, 171-72, 182-83.

e. Count V (Unjust Enrichment) Must Be Dismissed Pursuant to Rule 12(b)(6)

Pursuant to New York state law, "unjust enrichment is not a catchall cause of action to be used when others fail. It is available only in unusual situations when, though the defendant has not breached a contract nor committed a recognized tort, circumstances create an equitable obligation running from the defendant to the plaintiff." ***476** *Corsello v. Verizon N.Y., Inc.*, 967 N.E.2d 1177, 18 N.Y.3d 777, 790–91 (2012). "Typical cases are those in which the defendant, though guilty of no wrongdoing, has received money to which he or she is not entitled." *Eidelman v. Sun Products Corp.*, Case No. 16-civ-3914, 2017 WL 4277187, at *6 (S.D.N.Y. Sep. 25, 2017) (quoting *Corsello v. Verizon N.Y., Inc.*, 18 N.Y.3d at 790, 944 N.Y.S.2d 732, 967 N.E.2d 1177).

Here, the Trustee alleges a wrongdoing—the same wrongdoing that underlies his intentional and constructive DCL fraudulent transfer claims—and that this wrongdoing is the source of the Defendants' "equitable obligation" to pay the same damages that the Trustee plead in connection with his other tort claims under the DCL. "Although a plaintiff 'may plead unjust enrichment in the alternative to his other claims,' " the unjust enrichment claim will not survive a motion to dismiss where the plaintiff " 'fail[s] to explain how [it] is not merely duplicative of [his] other causes of action.' " *Nelson v. MillerCoors, LLC*, 246 F.Supp.3d 666, 679 (E.D.N.Y. 2017). The Trustee's unjust enrichment claim duplicates his claims pursuant to the DCL. Further, the Trustee has not offered the Court any explanation as to why the unjust enrichment claim is not merely duplicative of the DCL claims. Therefore, the unjust enrichment claim fails under New York law and must be dismissed pursuant to Rule 12(b)(6). *See* *Corsello v. Verizon N.Y., Inc.*, 18 N.Y.3d at 790, 944 N.Y.S.2d 732, 967 N.E.2d 1177 (unjust enrichment claim is "not available" where its underlying allegations "simply duplicate" plaintiffs' legal causes of action); *Ebin v. Kangadis Food Inc.*, Case No. 13-civ-2311, 2013 WL 6504547, at *7 (S.D.N.Y. Dec. 11, 2013) (dismissing unjust enrichment claims under New York and New Jersey law where plaintiffs "failed to explain" how it is "not merely duplicative of their other causes of action.").

f. Plausibility

As discussed above, the Trustee sufficiently *plead* the intentional and constructive fraudulent transfer claims contained in Counts I through IV of the TAC. However, this doesn't end the inquiry. Counts I through IV must also state a *plausible* basis for the relief sought. The plausibility determination is "context specific, requiring the court to draw on its experience and common sense." *Ashcroft v. Iqbal,* 556 U.S. 662, 668, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). For a claim to be plausible, it must state more than the "sheer possibility" for relief. *See* *id.*

The lynchpin of the TAC is that the K Road Insiders actively concealed from, and misrepresented information to, the Lenders. The TAC alleges the K Road Insiders controlled the flow of information to the Lenders by, among other things, concealing the terms of material hedge contracts from those who could have identified errors in BosGen's cash flow projections and maintaining two sets of books so the Lenders would not identify the misinformation. *See* TAC ¶¶ 85-102, 110-16. Additionally, the Trustee alleged the K Road Insiders concealed the same information from the financial firms retained by the Debtors to provide consulting services and issue opinions in connection with the Leveraged Recap Transaction, and those financial firms disclaimed any responsibility for BosGen's financial projections. *See* TAC ¶¶ 2, 78, 96-97, 105, 107, 120.

The Defendants contend the participation of independent financial firms and sophisticated lenders in the Leveraged Recap Transaction demonstrates the Lenders were not duped. However, sophisticated parties can be the subject of a fraud. This Court is not prepared at this stage of the proceeding to hold that the Trustee's claims are implausible where the Trustee ***477** has alleged material misstatements and omissions by the Debtors in connection with the Leveraged Recap Transaction. *See* *LaMonica v. CEVA Group (In re CIL Ltd.)*, 582 B.R. 46, 108-09 (Bankr. S.D.N.Y. 2018) (holding that plausibility based on the involvement of independent third parties, such as the financial firms and the "sophisticated lenders," is only relevant when the third parties had access to all relevant information), *amended on reconsideration on other grounds*, Case No. 13-11272, 2018 WL 3031094 (Bankr. S.D.N.Y. June 15, 2018).

The Defendants note, however, that the Debtors were able in June 2007—only six months after the closing—to effect a sale by merger to another major company in which the Debtors were valued at more than $1 billion. The Debtors became a wholly owned subsidiary of US Power Generating Company ("USPG") in a transaction in which USPG agreed to allow EBG's new equity holders to retain a majority of the equity in the newly merged entity. *See* Hunter Decl. ¶ 10. Nearly four years after the Leveraged Recap Transaction that allegedly rendered the company insolvent, and following convulsions in the energy marketplace caused by the global financial crisis, EBG and its subsidiaries, including BosGen, filed for chapter 11 protection. *See* TAC ¶ 59. As of the petition date, the Debtors' total indebtedness included approximately $1.1 billion under the First Lien Credit Agreement, $350 million under the Second Lien Credit Agreement, and $422 million under the Mezzanine Credit Agreement. *See* Hunter Decl. ¶¶ 28-35. The Debtors had virtually no other debt than the amounts owed under the Credit Facilities. *See* Disclosure Statement § I.A.

In light of these facts, the Trustee may have a difficult time proving, among other things, that the Leveraged Recap Transaction left the Debtors insolvent or that somehow the Lenders were duped. However, the Court is not prepared to say now it's completely implausible. The allegations in the TAC state more than a "sheer possibility" for relief under the DCL for intentional and constructive fraudulent transfers. Therefore, the Court finds the Trustee's request for relief plausible.

g. Conclusion

For the reasons stated above, the Court dismisses Count V pursuant to Rules 8 and 12(b)(6). The Trustee sufficiently plead Counts I through IV and met the plausibility standard. In any event, Counts I through V are dismissed pursuant to section 546(e) of the Bankruptcy Code.

VII. The Safe Harbor

Pursuant to section 546(e) of the Bankruptcy Code, certain transfers are excepted from avoidance and recovery. To qualify for this "safe-harbor," section 546(e) of the Bankruptcy Code provides the payments sought to be avoided must be (i) qualifying payments, such as securities "settlement payment[s]" or "transfer[s] ... in connection with a securities contract," and (ii) made by, or to (or for the benefit of) a "financial institution."

As an initial matter, the Court must determine whether the Trustee's state-law claims are preempted by section 546(e) of the Bankruptcy Code. The Court holds section 546(e) preempts Counts I through V in the TAC.

a. Section 546(e) Preempts the Trustee's Claims

i. The Safe Harbor Preempts the Trustee's Constructive Fraudulent Transfer Claims in Counts III and IV

Recently, the Second Circuit held that section 546(e)'s safe harbor preempts state-law constructive fraudulent transfer claims asserted by a litigation trustee ***478** standing in the shoes of a debtor's creditors. *See* *In re Tribune Co. Fraudulent Conveyance Litigation*, 818 F.3d 98, 119-124 (2d Cir. 2016) ("*Tribune I*").[16] The Court next must determine whether this holding applies when a litigation trustee suing on behalf of a debtor's creditors assert state law *intentional* fraudulent transfer claims. It does.

ii. The Safe Harbor Preempts the Trustee's State Law Intentional Fraudulent Transfer Claims in Counts I and II

1. Whether the Trustee's Intentional Fraudulent Transfer Claims are Preempted

As discussed in *Tribune I* and *II*, the safe harbor's scope is not limited to avoidance actions brought by a "trustee." The safe harbor's coverage extends to suits brought by a debtor's creditors. *See* *Tribune I*, 818 F.3d at 119-124. The Second Circuit reasoned that if the safe harbor would preclude the bankruptcy trustee from avoiding a transfer, the debtor's creditors cannot do an end-run around that safe harbor by causing a bankruptcy trustee to abandon his standing to sue, thereby allowing creditors to sue free and clear of the safe harbor. *See* *id.* The Second Circuit's reasoning applies equally to the Trustee's state law *intentional* fraudulent transfer claims asserted on behalf of the Lenders and the Other General Claimants.

Neither *Tribune I* nor *II* addressed whether section 546(e) preempts intentional state law fraudulent transfer claims and the Court sees no reason why *Tribune*'s reasoning does not extend to intentional state law fraudulent transfer claims. Nevertheless, the Court will engage in the appropriate inquiry.

Preemption is always a matter of congressional intent, even where that intent must be inferred. *See* *Cipollone v. Liggett Grp., Inc.,* 505 U.S. 504, 516, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992). As in the present matter, the presumption against preemption usually goes to the weight to be given to the lack of an express statement overriding state law. *See* *Tribune I*, 818 F.3d at 111-12. The presumption is strongest when Congress is legislating in an area recognized as traditionally one of state law alone. *See* *id.* However, the present context is not such an area. To be sure, the regulation of creditors' rights has " 'a history of significant federal presence.' " *Id.* (quoting *United States v. Locke,* 529 U.S. 89, 90, 120 S.Ct. 1135, 146 L.Ed.2d 69 (2000)). Congress's power to enact bankruptcy laws was made explicit in the Constitution as originally enacted, Art. 1, § 8, cl. 4. Once a party enters bankruptcy, the Bankruptcy Code constitutes a wholesale preemption of state laws regarding creditors' rights. *See* *id.*; *Eastern Equip. and Servs. Corp. v. Factory Point Nat. Bank, Bennington,* 236 F.3d 117, 120 (2d Cir. 2001) ("The United States Bankruptcy Code provides a comprehensive federal system of penalties and protections to govern the orderly conduct of debtors' affairs and creditors' rights."); *In re Miles,* 430 F.3d 1083, 1091 (9th Cir.2005) ("Congress intended the Bankruptcy Code to create a whole scheme under federal control that would adjust *all* of the rights and duties of creditors and debtors

***479** alike ....”). The Court in Tribune I held, “[w]hile the issue before us is often described as whether Section 546(e) preempts state fraudulent conveyance laws, that is a mischaracterization. Appellants' state law claims were preempted when the Chapter 11 proceedings commenced and were not dismissed.” *Tribune I*, 818 F.3d at 112 (internal citations omitted). Thus, section 546(e) preempts the Trustee's intentional fraudulent transfer claims under the DCL. Next, the Court must examine whether, despite the safe harbor's preemption of state law, section 546(e) creates an exception from its coverage for state law intentional fraudulent transfer claims. It does not.

2. The Safe Harbor Excludes from its Coverage Claims Brought Pursuant to Section 548(a)(1)(A) of the Bankruptcy Code and this Exclusion Does Not Extend to Encompass State Law Intentional Fraudulent Transfer Claims

Section 546(e) excepts from its coverage claims for intentional fraudulent transfers brought under the Bankruptcy Code. The Trustee argues that this section 548(a)(1)(A) “exception” also includes intentional fraudulent transfers brought under state law. The Court declines to extend section 546(e)'s exception for intentional fraudulent transfer claims brought under the Bankruptcy Code to include state law intentional fraudulent transfers claims.

Section 548(a)(1)(A) of the Bankruptcy Code empowers a trustee to avoid a transfer made with actual intent to hinder, delay or defraud any entity. Section 276 of the DCL requires a showing of actual intent to hinder, delay, or defraud creditors. Fundamentally, there is no difference between a claim brought pursuant to the DCL compared to one under the Bankruptcy Code for avoidance and recovery of an intentional fraudulent transfer. *See* *In re Actrade Fin. Tech. Ltd.*, 337 B.R. 791, 799 n.5 (Bankr. S.D.N.Y. 2005) (“A cause of action under DCL § 276 is substantially similar to that under § 548(a)(1)(A) but has a six-year statute of limitations as opposed to the one-year reach back period provided for under the Bankruptcy Code.”). However, Congress did not act with only New York in mind and this Court is bound by the plain language of section 546(e), which provides an exception only for intentional fraudulent transfer claims brought under the Bankruptcy Code and no more. *See* *US Bank Nat'l Assoc. v. Verizon Communications, Inc.*, 892 F. Supp.2d 805, 816-17 (N.D. Tex. 2012) (rejecting an argument similar to the one advanced here by the Trustee because “it conflict[s] with the clear language of [section] 546(e), which operates notwithstanding all of [section] 544”; “that Congress did expressly exclude [section] 548(a)(1)(A) implies that it did not want to exclude state ‘actual intent’ fraudulent transfer claims.”).

In fact, Congress may well have had its reasons for not excepting state law intentional fraudulent transfer claims from the safe harbor. While it's true that sections 548(a)(1)(A) and 546(e) apply to all cases brought under the Bankruptcy Code, that is not the case for intentional state law fraudulent transfer claims that may be brought through section 544 of the Bankruptcy Code. As Judge Holwell held in *Drenis*, some states have adopted the Uniform Fraudulent Conveyance Act (the “UFCA”) and other have adopted the Uniform Fraudulent Transfer Act (the “UFTA”). While the UFCA and the UFTA are similar in most respects, there are differences between the two. *See* *Drenis v. Haligiannis,* 452 F. Supp.2d 418, 426-27 (S.D.N.Y. 2006). *Compare,* Del. Code Ann. tit. 6 § 1308 (providing good faith on part of transferee or exchange of reasonably equivalent value as a defense to intentional ***480** fraudulent conveyance under § 1304(a)(1), as distinguished from constructive fraudulent conveyance), *with* DCL § 276 (providing that every conveyance with actual intent to defraud present or future creditors is fraudulent, irrespective of transferee's good faith (or lack thereof) or exchange of fair consideration).

At a minimum, *Drenis* demonstrates state law fraudulent transfer statutes are far from uniform. Further, there are fifty (50) separate state judiciaries interpreting those fifty (50) separate “uniform” [sic] statutes. The *Tribune I* Court held “that the policies reflected in Section 546(e) relate to securities markets, which are subject to extensive federal regulation. The regulation of these markets has existed and grown for over eighty years and reflects very important federal concerns.” *Tribune I*, 818 F.3d at 112. Congress may have specifically excluded state law intentional fraudulent transfer claims from section 546(e)'s exception having determined the need for stability in the securities markets overrode the potential danger of creditors escaping claims for intentional fraud based on a fear that inconsistent application of fifty (50) states' fraudulent transfer statutes would result in instability in the securities markets. In any event, state law intentional fraudulent transfer claims are not excepted from section 546(e)'s coverage within the section 548(a)(1)(A) exception to section 546(e) nor anywhere else in section 546(e) of the Bankruptcy Code.

iii. The Safe Harbor Preempts the Trustee's Unjust Enrichment Claim in Count V

In *AP Servs. LLP*, a litigation trustee brought, among other causes of action, an unjust enrichment claim under New York state law in connection with a leveraged buyout transaction. The Court held,

> The Trustee's claim for unjust enrichment is preempted by Section 546(e). The unjust enrichment claim "seeks to recover the same payments ... held ... unavoidable under § 546(e)." Indeed, "[a]llowing recovery for unjust enrichment ... would implicate the same concerns regarding the unraveling of settled securities transactions ... which is precisely the result that section 546(e) precludes. The Court could not permit the unjust enrichment claim to go forward without frustrating the purpose of Section 546(e). The unjust enrichment claim (Count Five) is thus dismissed.

In re AP Servs. LLP v. Silva, 483 B.R. 63, 71 (S.D.N.Y. 2012) (internal citations omitted). Here, the Trustee's unjust enrichment claim seeks recovery of the BosGen Transfer and the EBG Transfers, which is an attempt to unwind a securities transaction. Allowing this would thwart section 546(e)'s purpose and thus, Count V of the TAC is preempted.

iv. Preemption Conclusion

Because the Court holds section 546(e) preempts all the Trustee's claims, the next determination must be whether the BosGen Transfer [17] and/or the EBG Transfers satisfy section 546(e)'s safe harbor requirements, i.e., "financial institution" and "settlement payment" or "in connection with a securities contract." If the transfers do, Counts I through V must be dismissed under the safe harbor. Applying *Merit* and *Tribune II*, among other cases, to the facts presented here, the Court holds that the BosGen Transfer and the EBG Transfers satisfy the safe-harbor requirements of section 546(e) and thus, Counts I through V of the TAC are dismissed.

***481** *b. Statutory Predicate for the Safe Harbor and a Brief Synopsis of the Safe Harbor's Construction*

i. Statutory Provisions

Section 546(e) provides that a transfer: (i) which qualifies as a settlement payment or is one made in connection with a securities contract (ii) by, or to, or for the benefit of, a financial institution will fall within the scope of section 546(e)'s safe harbor and is not subject to avoidance. *See* 11 U.S.C. § 546(e). [18]

The Bankruptcy Code defines "settlement payment" as, "a preliminary settlement payment, a partial settlement payment, an interim settlement payment, a settlement payment on account, a final settlement payment, or any other similar payment commonly used in the securities trade." 11 U.S.C. § 741(8); *see* 11 U.S.C. § 101 (51A) (defining "settlement payment" "for purposes of the forward contract provisions of this title, [as] a preliminary settlement payment, a partial settlement payment, an interim settlement payment, a settlement payment on account, a final settlement payment, a net settlement payment, or any other similar payment commonly used in the forward contract trade.").

The Bankruptcy Code defines "securities contract" to include, among other things:

> (a) (i) a contract for the purchase, sale, or loan of a security ..., or option on any of the foregoing, including an option to purchase or sell any such security ... and including any repurchase ... transaction on any such security ... (whether or not such repurchase ... transaction is a "repurchase agreement", as defined in section 101).

11 U.S.C. § 741(7)(a)(1).

The Bankruptcy Code defines "financial institution" as:

> (A) a Federal reserve bank, or an entity that is a commercial or savings bank, industrial savings bank, savings and loan association, trust company, federally-insured credit union, or receiver, liquidating agent, or conservator for such entity and, when any such Federal reserve bank, receiver, liquidating agent, conservator *or entity is acting as agent or custodian for a customer* (whether or not a "customer", as defined in section 741) *in connection with a securities contract* (as defined in section 741) ....

11 U.S.C. § 101(22) (emphasis added). Under this definition, a private entity (or, the customer) qualifies as a financial institution provided: (i) a financial institution (such as a commercial bank) transfers money on the customer's behalf; (ii) as such customer's agent; (iii) in connection with a securities contract (as defined above). *See* 11 U.S.C § 741(2) (defining "customer"); 11 U.S.C. § 101(22) (providing the term "customer," as used in this section, ***482** is not limited to the definition provided in section 741).

ii. Interpreting "Settlement Payment" and "In Connection with a Securities Contract"

In *In re Quebecor World (USA) Inc.*, 453 B.R. 201 (Bankr. S.D.N.Y. 2011), Judge Peck addressed Defendants motion for summary judgment wherein they contended that prepetition payments totaling approximately $376 million received from Quebecor World (USA) Inc. ("QWUSA", and with its various debtor and non-debtor affiliates, "Quebecor") during the preference period were exempt from avoidance as a matter of law by virtue of section 546(e). "The question presented calls for examination of this "safe harbor" provision with particular emphasis on the proper application of the term "settlement payment" as defined in section 741(8) of the Code when used in reference to a repurchase and subsequent cancellation of privately-placed notes." *Id.* at 203. Relying on the Second Circuit's decision in *In re Enron Creditors Recovery Corp. v. Alfa S.A.B. de C.V.*, 651 F.3d 329 (2d Cir. 2011) ("*Enron*"), Judge Peck held that the payments at issue were protected as both settlement payments and transfers in connection with a securities contract. *See* *In re Quebecor World (USA) Inc.*, 453 B.R. at 215-19.

On October 29, 2007, the agent under the Credit Agreement wired approximately $426 million to QWUSA's main operating account at Bank of America, N.A. ("Bank of America"). Bank of America then wired approximately $376 million of this amount to CIBC Mellon Trust Co. ("CIBC Mellon"), the trustee for the notes (the "Disputed Transfer"). CIBC Mellon, in turn, wired to each noteholder its portion of that amount. *See* *id.*

Judge Peck held:

> The definition [of settlement payment] in the Code may be self-referential and circular, but the direction given by the *Enron* majority with respect to that definition is both uncomplicated and crystal clear—a settlement payment, quite simply, is a "transfer of cash ... made to complete [a] securities transaction." *Enron,* [651 F.3d at 339] 2011 WL 2536101, at *9 (quotations omitted).
>
> Under this easy-to-apply formulation, the Court concludes that the Disputed Transfer qualifies for the exemption under section 546(e). The transaction in question involves three elements that together support this conclusion—(i) the transfer by QWUSA of cash (ii) to a financial institution that was acting as agent for the Noteholders (iii) made to repurchase and cancel securities, *i.e.,* to complete a securities transaction. The first part of the formulation—that the "settlement payment" be a "transfer of cash"—is demonstrated by the wiring of funds from QWUSA to CIBC Mellon. The second required component, consistent with section 546(e), is that the transfer be made to a financial institution. This requirement is satisfied by the involvement of CIBC Mellon, a financial institution, in receiving the Disputed Transfer. The third element is present because the cash was transferred for securities in "completion" of the transaction.

In re Quebecor World (USA) Inc., 453 B.R. 201, 215 (Bankr. S.D.N.Y. 2011), *aff'd*, 480 B.R. 468 (S.D.N.Y. 2012), *aff'd*, 719 F.3d 94 (2d Cir. 2013). Recently, the United States Supreme Court in *Merit* addressed the breadth of the term "financial institution" as used in section 546(e). *Merit* leaves unchanged Judge Peck's analysis of what is or is not a settlement payment or transfer made in connection with a securities contract.

***483** iii. Tribune I

In *Tribune,* the Official Committee of Unsecured Creditors brought an adversary proceedings asserting intentional fraudulent transfer claims against corporate debtor's cashed-out shareholders, officers and directors, financial advisors, and others who benefited from a prepetition leveraged buyout of the debtor, and, after conditional stay relief was granted, individual creditors brought actions asserting state-law constructive fraudulent transfer claims to unwind buyouts of debtor's shareholders. *See* *Tribune I*, 818 F.3d. 98, 106 (2d Cir. 2016).

Tribune transferred over $8 billion to a securities clearing agency (or financial institution as used in section 546(e)), acting as an intermediary in the leveraged buyout transaction. *See* *id.* In turn, the intermediary paid the funds to the shareholders in exchange for their shares that were then returned to Tribune. *See* *id.* In short, *Tribune I* held safe harbor protections did, in fact, apply to any transaction that passed through a financial intermediary, regardless of whether the banks and brokers at issue received any of the funds themselves. *See* *id.* at 112.

iv. Merit

The United States Supreme Court's decision in *Merit* addresses the "by or to (or for the benefit of) a ... financial institution" requirement of section 546(e). *See* *Merit,* ––– U.S. ––––, 138 S. Ct. 883, 200 L.Ed.2d 183 (2017). In 2007, a would-be racing casino Valley View Downs, LP agreed to purchase the stock of Bedford Downs Management Corporation, a company with which it had been competing for the last available harness-racing license in Pennsylvania. *See* *id.* at 890-92. After Valley View was unable to secure a necessary gaming license in the time allotted for it to do so under a financing agreement, it and its parent company Centaur, LLC filed for bankruptcy. *See* *id.* The Bankruptcy Court confirmed a reorganization plan and appointed FTI Consulting, Inc. as trustee of the Centaur litigation trust. *See* *id.*

Thereafter, FTI Consulting filed a lawsuit against Merit Management to claw back $16.5 million in funds that Merit Management had received as a stockholder in Bedford Downs. *See* *id.* As part of the stock acquisition agreement, Valley View had arranged for Credit Suisse to finance the transaction. *See* *id.* Credit Suisse wired the purchase price to the Citizens Bank of Pennsylvania, which agreed to serve as the third-party escrow agent for the transaction. *See* *id.* Merit Management, along with other Bedford Downs shareholders, deposited its stock certificates into escrow, and Citizens Bank of Pennsylvania distributed the purchase proceeds to stockholders including Merit Management. *See* *id.*

Before the Court determined whether the transfer at issue was "made by or to (or for the benefit of)" a financial institution, it first identified the relevant transfer to test in that inquiry. *See* *id.* at 891-95. Merit posited that the relevant transfer should include not only the Valley–View–to–Merit end-to-end transfer, but also all of its component parts, *i.e.,* the Credit–Suisse–to–Citizens–Bank and the Citizens–Bank–to–Merit transfers. *See* *id.* FTI maintained that the only relevant transfer is the transfer that it sought to avoid, specifically, the overarching transfer between Valley View and Merit. *See* *id.*

Ultimately, the Court concluded that the relevant transfer for purposes of section 546(e)'s safe harbor was the overarching transfer between Valley View and Merit, not the component transfers to and between the financial institutions. *See* *id.* at 896-97. The Court held that if an entity covered by the exception is only a "conduit" or a component part of an overall ***484** transfer, then the safe harbor does not apply. *See* *id.* Because the parties did not assert that either Valley View or Merit Management was a "financial Institution," or other covered entity, the transfer fell outside the section 546(e) safe harbor. *See* *id.* In light of *Merit*, the Second Circuit recalled *Tribune I.*

v. *Tribune II*

Merit abrogated *Tribune I*'s holding that "the language of Section 546(e) covers all transfers by or to financial intermediaries that are 'settlement payment[s]' or 'in connection with a securities contract.' " Nevertheless, the Second Circuit held in *Tribune II* that the transfers at issue were still safe harbored.

On recall, the *Tribune II* Court held the transferor debtor, Tribune, itself met the statutory definition of a "financial institution." *See* *Tribune II*, 946 F.3d 66, 78-80 (2d Cir. 2019). In *Tribune II*, the transferor qualified as a "financial institution" because it was a "customer" of a trust company and bank (Computershare) that was "acting as agent" for its "customer" in "connection with a securities contract." *See* *id.* at 78-79. The securities contract in Tribune was the *tender offer repurchase and redemption* of Tribune's shares from its shareholders. *See* *id.* (emphasis added).

More specifically, the Second Circuit concluded Tribune qualified as a financial institution because it retained:

> Computershare to act as 'Depositary' in connection with the LBO tender offer. Computershare is a 'financial institution' for the purposes of Section 546(e) because it is a trust company and a bank [pursuant to the Office of the Comptroller of the Currency website]. Therefore, Tribune was likewise a 'financial institution' with respect to the LBO payments if it was Computershare's 'customer,' and Computershare was acting as its agent. In its role as Depositary, Computershare performed multiple services for Tribune. First, Computershare received and held Tribune's deposit of the aggregate purchase price for the shares. Then, Computershare received tendered shares, retained them on Tribune's behalf, and paid the tendering shareholders. Given these facts, we conclude that Tribune was Computershare's 'customer' with respect to the LBO payments.

Id. at 78 (internal citations omitted). Further, the Court concluded that Computer share was Tribune's agent because "Tribune manifested its intent to grant authority to Computershare by depositing the aggregate purchase price for the shares with Computershare and entrusting Computershare to pay the tendering shareholders. Computershare, in turn, manifested its assent by accepting the funds and effectuating the transaction." *Id.* at 80.

Given the entirety of this backdrop concerning section 546(e), the Court turns to the BosGen Transfer and the EBG Transfers at issue.

c. The BosGen Transfer Meets Section 546(e)'s Safe Harbor Requirements

The BosGen Transfer meets the statutory requirements for safe harbor because a financial institution (US Bank), as agent for its customer (BosGen), transferred the $708 Million to EBG in connection with the tender offer by EBG for the Unit Redemptions, the Warrant Redemptions, and the Distribution. Additionally, or, in the alternative, the BosGen Transfer meets the statutory requirements for safe harbor because BosGen transferred the $708 Million to a financial institution (BONY), as agent for its customers (BosGen and EBG) in connection with the Tender Offer.

To support his argument that the BosGen Transfer was neither a settlement ***485** payment nor a transfer in connection with a securities contract, the Trustee asserts that the BosGen Transfer was a standalone payment from BosGen to EBG of an LLC distribution, that this LLC distribution was an isolated dividend falling outside section 546(e)'s scope, and therefore, the Trustee can avoid the BosGen Transfer. Each of, and certainly in the aggregate, the Lenders' Presentation, the CIM, the FFM, the Tender Offer, and the Credit Facilities demonstrate the BosGen Transfer was a settlement payment and a transfer in connection with a securities contract.

i. The BosGen Transfer was a "Settlement Payment"

Simply put, a transfer of cash to a financial institution made to repurchase and cancel securities—in other words, to complete a securities transaction--qualifies for the safe harbor as a settlement payment. *See Enron*, 651 F.3d 329, 334 (2d Cir. 2011). The first part of the formulation—that the "settlement payment" be a transfer of cash—is demonstrated by the wiring of funds from BosGen's US Bank Account to EBG's BoA Account. *See* FFM (providing also that BoA would thereafter wire the funds to BONY). The second component, that the transfer be made by or to a financial institution, is addressed below. The third element is met because the BosGen Transfer was made to EBG to fund the Unit Redemptions, the Warrant Redemption, and the Distribution, i.e., to complete a securities transaction (the Tender Offer).

As the transfer of cash is self-evident and the requirement that such transfer be by, to, or for the benefit of, a financial institution addressed below, the Court turns to whether the BosGen Transfer was made to complete a securities transaction and holds that it was. BosGen Transferred the $708 Million to EBG for EBG to fund the Unit Redemptions, the Warrant Redemption, and the Distribution—i.e., to complete a securities transaction (the Tender Offer).

First, the Court must determine whether EBG repurchased "securities." Thereafter, the Court turns to whether the BosGen Transfer was made to complete the repurchase of "securities." Though the Bankruptcy Code's definition of "security" does not expressly include the LLC member units and warrants that are the subject of the Tender Offer. The definition of security is broad and includes, among other things, any "other claim or interest commonly known as 'security.' " 11 U.S.C. § 101(49)(A)(xiv). The LLC member units and warrants most certainly qualify as securities under the Bankruptcy Code's broad definition. *See In re Lehman Bros. Holdings Inc.*, 855 F.3d 459, 473 (2d Cir. 2017) (citing with approval, *O'Donnell v. Tristar Esperanza Props., LLC (In re Tristar Esperanza Props., LLC)*, 488 B.R. 394, 399 (9th Cir. BAP 2013) (concluding that a membership interest in an LLC is a "security"), *aff'd*, 782 F.3d 492 (9th Cir. 2015)); *see also O'Cheskey v. Templeton (In re Am. Hous. Found.)*, Case No. 09-20232-RLJ-11, 2013 WL 1316723, at *18, 2013 Bankr. LEXIS 1449 (Bankr. N.D. Tex. Mar. 30, 2013) (concluding that the enumerated list in section 101(49) is not exhaustive and that securities are not limited to the items specifically identified), *aff'd in part, rev'd in part on other grounds*, 785 F.3d 143 (5th Cir. 2015). Indeed, the residual clause set forth in section 101 (49)(A)(xiv) clearly opens the door to securities not specifically listed; *see also SeaQuest Diving, LP v. S & J Diving, Inc. (In the Matter of SeaQuest Diving, LP)*, 579 F.3d 411, 418 (5th Cir. 2009) (observing that subsection (A)(xiv) is a "broad residual category").

***486** BosGen made the BosGen Transfer to complete a securities transaction. The Credit Facilities expressly say in the First Lien Funding Provisions, the Second Lien Funding Provisions, and the Mezz Funding Provisions that the monies loaned to Bos Gen and EBG pursuant to the First Lien Credit Agreement, the Second Lien Credit Agreement, and the Mezz Agreement will be made available to fund the Tender Offer. Put another way, of course the $708 Million was transferred to EBG to complete the repurchase of securities—without it, EBG would not have had enough money from the Mezz Agreement (providing for the $300 Million) to fund the Unit Redemptions, the Warrant Redemptions, and the Distribution which required over $900 million.

Further, the Trustee concedes that "[t]here was ... [a] settlement payment here—the transfer from EBG to its members." Opposition, at 31 (conceding also that the BosGen Transfer funded that settlement payment). For the reasons stated above, the BosGen Transfer qualifies as a "settlement payment" and, in any event, it was also a transfer "in connection with a securities contract."

ii. The BosGen Transfer was Made "In Connection with a Securities Contract"

The BosGen Transfer occurred in connection with a securities contract too. The term "securities contract" includes "any repurchase ... transaction on any such security." 11 U.S.C. § 741(7)(a)(1). Under "§ 546(e), a transfer is 'in connection with' a securities contract if it is 'related to' or 'associated with' the securities contract." *Picard v. Ida Fishman Revocable Tr. (In re Bernard L. Madoff Inv. Sec. LLC)*, 773 F.3d 411, 421 (2d Cir. 2014). "Section 546(e) sets a low bar for the required relationship between the securities contract and the transfer sought to be avoided," "merely requir[ing] that the transfer have a connection to the securities contract." *Id.* at 422. Here, the BosGen Transfer had a substantial relationship to the Tender Offer.

The Trustee concedes the Tender Offer was a securities contract between EBG and its members. *See* Opposition, at 30. However, the Tender Offer was more than a securities contract between EBG and its members. The Tender Offer was a contract among BosGen, EBG, and EBG's members. *See* Tender Offer, at 9 (providing both BosGen and EBG invite members to tender). As discussed above, the Lenders' Presentation, the CIM, the Credit Facilities, and the FFM all demonstrate a large portion of the monies loaned to BosGen and EBG pursuant to the First Lien Credit Agreement, the Second Lien Credit Agreement, and the Mezz Agreement would be used to fund the Tender Offer *made by BosGen and EBG.* As more direct evidence of this, the First Lien Funding Provisions and the Second Lien Funding Provisions make clear a portion of the monies loaned to BosGen would be transferred to fund the Tender Offer. Thus, the BosGen Transfer occurred in connection with a securities contract (the Tender Offer).

By analogy, in *Tribune II*, the Court held the securities contract was the tender offer repurchase and redemption of Tribune's shares from its shareholders. *See* *Tribune II*, 946 F.3d 66, 78-80 (2d Cir. 2019). As "shares" are securities under the Bankruptcy Code, so too are the units and warrants that were redeemed pursuant to the Tender Offer. *See* Section VI(c)(i). The *Tribune* Court had "no trouble concluding, based on Section 741(7)'s plain language, that all of the payments at issue, *including those connected to the redemption of shares*, were "in connection with a securities contract." *Id.* at 81 (emphasis added). ***487** Likewise, this Court concludes that the BosGen Transfer funded the Unit Redemptions, the Warrant Redemptions, and the Distribution and thus, were made in connection with a securities contract.

iii. <u>BosGen Qualifies as a "Financial Institution" for the BosGen Transfer By Virtue of its Relationship with US Bank</u>

The customer of a "financial institution" will itself qualify as a "financial institution" under section 546(e) of the Bankruptcy Code if, (i) the "financial institution" acts as its customer's agent, (ii) in connection with a securities contract. As the Trustee correctly writes, "for the customer to qualify as a financial institution, the bank that sends or receives the relevant transfer must be acting as the customer's agent or custodian in connection with a securities contract." Opposition, at 29. As demonstrated below, the Trustee's test is met here because US Bank sent the BosGen Transfer, as BosGen's agent, in connection with the Tender Offer. Thus, BosGen qualifies as the financial institution for purposes of section 546(e)'s safe harbor.

As a preliminary matter, the Court notes at the outset that US Bank is a "financial institution" for purposes of section 546(e) of the Bankruptcy Code because it is a bank pursuant to the Office of the Comptroller of the Currency website. *See* Office of the Comptroller of the Currency, Office of the Comptroller of the Currency at https://www.occ.treas.gov/topics/charters-and-licensing/financial-institution-lists. The next two inquiries are whether: (i) BosGen was US Bank's customer; and (ii) US Bank served as BosGen's agent in connection with a securities contract. If the answer to both of those questions is yes, the BosGen Transfer is safe harbored.

1. BosGen Was US Bank's Customer

The FFM and its terms demonstrate BosGen was US Bank's customer. *See* FFM (providing instructions to US Bank from BosGen for the disbursement of funds by US Bank from BosGen's US Bank Account). Further, nowhere in the record does the Trustee dispute BosGen is US Bank's customer. Next, US Bank must have acted as BosGen's agent in connection with a securities contract.

2. US Bank Acted as BosGen's Agent in Connection with a Securities Contract

An agency relationship is typically established by "written or spoken words *or other conduct of the principal which, reasonably interpreted, causes the agent to believe that the principal desires him so to act on the principal's account.*" *Itel Containers Int'l Corp. v. Atlanttrafik Express Service Ltd.*, 909 F.2d 698, 702 (2d Cir. 1990) (emphasis added) (quoting Restatement (Second) of Agency § 26 (1958)). The elements of an agency relationship are: (1) "a manifestation by the principal that the agent shall act for him," (2) "accept [ance of] the undertaking" by the agent, and (3) "an understanding between the parties that the principal is to be in control of the undertaking." *In re Rubin Bros. Footwear, Inc.,* 119 B.R. 416, 422 (S.D.N.Y. 1990). Of these, the critical element is control of the agent by the principal. *In re Shulman Transp. Enterprises, Inc.,* 744 F.2d 293, 295 (2d Cir. 1984).

The agency test's first requirement is satisfied. In the FFM, BosGen manifested an intent for US Bank to act on its behalf in connection with a securities contract. Therein, BosGen authorizes US Bank to act in connection with: (i) the receipt of funds from the Lenders pursuant to the First Lien Credit Agreement and the Second Lien Credit Agreement; and (ii) the BosGen Transfer. *See* TAC Ex. H (the ***488** "FFM") (Instructional Letter introducing the FFM). As evidence that BosGen manifested an intent for US Bank to serve as its agent, the FFM provides "the deposits listed on the third page ... of the FFM will be transferred to the Depository [US Bank] on the Closing Date." *Id.* at 1(i). Thereafter, the "disbursements listed on the third page of the FFM will be disbursed by the Depository on the Closing Date ...." *Id.* at 2(ii). The FFM goes on to state, "[t]he Depository [US Bank] is hereby authorized and instructed to accept such deposits and to make such allocations, transfers and payments in accordance with the FFM." *See id.* at 2. The FFM further demonstrates that US Bank sent the $708 Million, on behalf of BosGen, from the US Bank Account to EBG's BoA Account and that those funds would be used for "Distribution, Unit Buyback and Warrant Repurchases," along with "Transaction Fees and Expenses." FFM, at 503. Thus, US Bank served as BosGen's agent for the BosGen Transfer, which the FFM demonstrates was an upstream transfer of monies to EBG in connection with the Tender Offer to fund the Unit Redemptions, the Warrant Redemptions, and the Distribution.

The agency test's second requirement is satisfied. US Bank accepted the task of serving as BosGen's agent. As evidence of US Bank's acceptance, US Bank did actually receive the monies loaned to BosGen pursuant to the First Lien Credit Agreement and the Second Lien Credit Agreement and thereafter, did actually transfer a portion of those loan proceeds to EBG on BosGen's behalf to fund the Tender Offer. *See* FFM.

The agency test's third requirement is satisfied. BosGen remained in control of the undertaking. Namely, the BosGen directed US Bank to effectuate the BosGen Transfer to fund the Tender Offer. *See* FFF (providing "the disbursements ... *are to be disbursed by the Depository* ..." and further providing, that US Bank "is authorized *and instructed* to accept such deposits ... and to make such allocations ...") (emphasis added).

Tribune's reasoning further supports the conclusion that US Bank served as BosGen's agent in connection with the Tender Offer. There, the transferor qualified as a "financial institution" because it was a "customer" of a trust company and bank (Computershare) that was "acting as agent" for its "customer" in "connection with a securities contract." *See* *Tribune II*, 946 F.3d 66, 78-80 (2d Cir. 2019). The securities contract in *Tribune* was the tender offer repurchase and redemption of Tribune's shares from its shareholders. *See* *id.* (emphasis added).

As in *Tribune*, BosGen qualifies as a "financial institution." BosGen retained US Bank to act as depository and agent in connection with the Tender Offer. [19] The result of this relationship being, BosGen is likewise a financial institution with respect to the BosGen Transfer because: (i) BosGen was US Bank's customer; (ii) US Bank was acting as BosGen's agent for the BosGen Transfer; and (iii) the BosGen Transfer was in connection with a securities contract. [20]

***489** Thus, the BosGen Transfer meets the safe harbor requirements of section 546(e) of the Bankruptcy Code and Counts II and IV of the TAC are dismissed.

iv. Additionally, or, In the Alternative, Both BosGen and EBG Qualify as "Financial Institutions" for the BosGen Transfer By Virtue of Their Relationship with BONY

As a preliminary matter, the Court notes at the outset that BONY is a "financial institution" for purposes of section 546(e) of the Bankruptcy Code because it is a bank pursuant to the Office of the Comptroller of the Currency website. *See* Office of the Comptroller of the Currency, Office of the Comptroller of the Currency at https://www.occ.treas.gov/topics/charters-and-licensing/financial-institution-lists. Also, the Trustee concedes BONY qualifies as a financial institution. *See* May Transcript, at 28:16-18. The next two inquiries are whether: (i) BosGen and/or EBG was BONY's customer; and (ii) BONY served as BosGen and/or EBG's agent in connection with a securities contract. If the answer to both of those questions is yes as to BosGen or EBG, the BosGen Transfer is safe harbored.

1. BosGen and EBG Were BONY's Customers

The Tender Offer provides that "[w]e [defined to include BosGen and EBG] have retained The Bank of New York to act as Depository in connection with this Offer. The Depository will receive reasonable and customary compensation for its respective services, will be reimbursed by us for reasonable out-of-pocket expenses and will be indemnified against certain liabilities in connection with the Offer." Tender Offer, at 34. Thus, according to the Tender Offer, both BosGen and EBG were BONY's customers.

2. BONY Acted as Both BosGen and EBG's Agent in Connection with a Securities Contract

As discussed above in section VII(c)(iii)(2), an agency relationship is established by (1) "a manifestation by the principal that the agent shall act for him," (2) "accept [ance of] the undertaking" by the agent, and (3) "an understanding between the parties that the principal is to be in control of the undertaking." *In re Rubin Bros. Footwear, Inc.,* 119 B.R. 416, 422 (S.D.N.Y. 1990).

The agency test's first requirement is satisfied. BosGen and EBG manifested their intent for BONY to act as their agent in connection with the Tender Offer *prior to the Step One Transfer* (as early as November 16, 2006, the date of the Tender Offer). The Court's conclusion that BONY acted as both BosGen and EBG's agent in connection with the Tender Offer is supported by: (i) the procedures articulated in the Tender Offer for unit redemptions, (ii) BosGen and EBG's reservation of authority to accept or reject a tendering member's units; and (iii) BosGen and EBG's agreement to pay BONY for its services. As to (i), pursuant to the Tender Offer, members tendered their units by submitting a Letter of Transmittal along with required documents to BONY no later than December 14, 2006. *See* Tender Offer, at 1, 4. Thereafter, "[w]e [including EBG and BosGen] will pay for Units purchased pursuant to the Offer by depositing the aggregate determined purchase price for the Units *with the Depository, which will act as agent* for tendering [m]embers for the purpose of receiving payment from [EBG and BosGen] *and transmitting payments to the tendering [m]embers.*" *Id.* at 19 (emphasis added). Thus, the Tender Offer demonstrates that both EBG and BosGen were in an agency relationship with BONY for purposes of transmitting ***490** monies to tendering EBG members. On several additional occasions throughout the Tender Offer, BONY is listed as the depository for the "Company," thus lending more weight to the conclusion that BONY acted as BosGen and EBG's agent in connection with the Tender Offer. *See id.* at 2 (noting members may direct questions or requests for assistance to BONY in connection with the Tender Offer), 6 (same), 10 (noting the "Company" will "pay the fees and expenses incurred in connection with the Offer by The Bank of New York, which is the Depository for the Offer."), 36 (noting questions concerning the Tender Offer should be directed to BONY and the Letters of Transmittal should be delivered by each member to BONY).

As to (ii), BosGen and EBG controlled BONY, their agent, in connection with the Tender Offer. The Tender Offer provides, "[f]or purposes of the Offer, we will be deemed to have accepted the payment (and therefore purchased) ... Units that are validly tendered at or below the determined purchase price ... *only when, as and if we give oral or written notice to the Depository of our acceptance of the Units for payment pursuant to the Offer.*" Tender Offer, at 19 (emphasis added). Thus, BosGen and EBG authorized BONY to act on their behalf in connection with the Tender Offer and expressly reserved ultimate decision-making authority to determine whether to accept tendered units. In short, the EBG LLC member tendered its unit to BONY and thereafter, BONY held the tendering unit for BosGen and EBG until BosGen and EBG instructed BONY how to proceed.

As to (iii), The Tender Offer provides that "[w]e [defined to include BosGen and EBG] have retained The Bank of New York to act as Depository in connection with this Offer. The Depository will receive reasonable and customary compensation for its respective services, will be reimbursed by us for reasonable out-of-pocket expenses and will be indemnified against certain liabilities in connection with the Offer." Tender Offer, at 34. Thus, according to the Tender Offer, BosGen and EBG retained BONY to act as their Depository in connection with a securities contract (the Tender Offer). As discussed below, the language cited from the Tender Offer in this section of the Court's opinion demonstrates BosGen and EBG manifested their intent for BONY to serve as their agent in connection with the Tender Offer.

The agency test's second requirement is satisfied. BONY accepted the task of serving as BosGen and EBG's agent. As evidence of BONY's acceptance, BONY did actually receive the Letter of Transmittal from EBG LLC members and thereafter, did actually transfer monies to those members for the Unit Redemptions, the Warrant Redemptions, and the Distribution.

The agency test's third requirement is satisfied. BosGen and EBG remained in control of the undertaking. The Court's conclusion is supported by language in the Tender Offer that provides, "Units that are validly tendered at or below the determined purchase price ... *only when, as and if we give oral or written notice to the Depository of our acceptance of the Units for payment pursuant to the Offer.*" Tender Offer, at 19 (emphasis added). Thus, BosGen and EBG authorized BONY to act on their behalf in connection with the Tender Offer and expressly reserved ultimate decision-making authority to determine whether to accept tendered units.

In short, both BosGen and EBG qualify as "financial institutions." BosGen and EBG retained BONY to act as depository and agent in connection with the Tender Offer. The result of this relationship being, BosGen and EBG are likewise a financial institutions with respect to the BosGen Transfer because: (i) BosGen and EBG were BONY's customers; (ii) BONY acted ***491** as both BosGen and EBG's agent for the BosGen Transfer; and (iii) the BosGen Transfer was in connection with a securities contract.

Thus, the BosGen Transfer meets the safe harbor requirements of section 546(e) of the Bankruptcy Code and Counts II and IV of the TAC are dismissed.

3. The Trustee Argues Only the Step One Transfer is Relevant

The Court will address the Trustee's contention that the appropriate inquiry here is whether the *Step One Transfer*, not the overarching BosGen Transfer, qualifies for the safe harbor. According to the Trustee, BONY was not acting as BosGen or EBG's agent in connection with the Tender Offer when EBG received the $708 Million into its BoA Account and thus, EBG does not qualify as a financial institution as BONY's customer. *See* Opposition, at 28-29; May Transcript, at 30:2-10 ("MR. REID: Well, let's take the obvious. If Boston Generating had sent the money to the BONY account directly, and not the Bank of America account, then I think the argument would fall away because clearly BONY, in this counter factual world, received the money and was acting as agent. But the fact that it is planning to act as agent in the future and eventually does act as agent in the future does not fall within the statutory language that requires it be acting at the time. That's our argument."). Put another way, the Trustee asks the Court to review the Step One Transfer as an isolated transaction.

The Trustee points the Court to a footnote in Judge Cote's *Tribune* decision in which she holds that a transfer "is a settlement payment" to a bank that "is acting as agent" for its customer in connection with a securities contract. *In re Tribune Co. Fraudulent Conveyance Litigation*, Case No. 11-MDL-2295, 2019 WL 1771786, at *11 n.11 (S.D.N.Y. Apr. 23, 2019). According to the Trustee, neither BosGen nor EBG qualifies as a financial institution because the BosGen Transfer went first to BoA and BoA was neither of their agents in connection with a securities contract. The Trustee contends the inquiry ends here.

Section 546(e) provides that the Trustee may not avoid a transfer that is by or to *(or for the benefit of)* a financial institution as a settlement payment or in connection with a securities contract. *See* 11 U.S.C. § 546(e) (emphasis added). The Step One Transfer to BoA, which is the first part of the BosGen Transfer, was clearly intended for the benefit of a financial institution, BONY. *See* FFM (describing, before the BosGen Transfer even occurred, the transfer of the $708 Million from US Bank to BoA and thereafter, BONY using $1.011 billion to fund the Unit Redemptions, the Warrant Redemptions, and the Distribution pursuant to the Tender Offer). The $708 Million was transferred for the benefit of a financial institution (BONY) in connection with a securities contract (the Tender Offer), and BONY was both BosGen and EBG's agent.

According to the Trustee, because EBG did not cause BoA to effectuate the First BONY transfer until a few days after BoA received monies from the Credit Facilities,[21] BONY does not qualify as a "financial institution" acting in connection with a securities contract because BONY could not have manifested their intent to serve as agent prior to their receipt of the First BONY Transfer and the Second BONY Transfer. *See* May Transcript, at 28-31. The Court disagrees.

As discussed above, BONY manifested their intent to serve as BosGen and EBG's ***492** agent in connection with the Tender Offer well before the First BONY Transfer. In any event, following the Supreme Court's *Merit* decision, the Court must examine the overarching transaction. In this case, that is the BosGen Transfer, not the Step One Transfer. In *Merit*, the Supreme Court held that the relevant transfer for purposes of section 546(e)'s safe harbor was the overarching transfer between Valley View and Merit, not the component transfers to and between the financial institutions. *See* *Merit*, 138 S. Ct. 883, 896-97 (2017). The Supreme Court held that if an entity covered by the exception is only a "conduit" or a component part of an overall transfer, then the safe harbor does not apply. *See* *id.* Because the parties did not assert that either Valley View or Merit Management was a "financial Institution," or other covered entity, the transfer fell outside the section 546(e) safe harbor. *See* *id.* Unlike in *Merit*, the parties to the overarching transfer (BosGen and EBG) both qualify as "financial institutions" for the BosGen Transfer because of their relationship with BONY in connection with the Tender Offer. *Merit*'s holding does not instruct the Court to confine its inquiry to the Step One Transfer. In fact, *Merit* requires the opposite.

For the reasons articulated above, BONY's agency relationship with BosGen and EBG has been established pursuant to the term of the Tender Offer and the parties' conduct, and the relevant transaction to consider under *Merit* is the overarching BosGen Transfer.

d. The Unit Redemptions and the Warrant Redemptions Meet Section 546(e)'s Safe Harbor Requirements

i. Constructive Fraudulent Transfer of the Unit Redemptions and the Warrant Redemptions

In light of *Tribune II*, the Trustee concedes his constructive fraudulent transfer claim to recover the Unit Redemptions and the Warrant Redemptions made by EBG to its members fails. *See* Opposition, at 25-26 (conceding Count III survives only to the extent it seeks to avoid the Distribution). Further, the Trustee concedes: (ii) the Tender Offer was a securities contract between EBG and its members, *see id.* at 30; (ii) that "[t]here was ... [a] settlement payment here—the transfer from EBG to its members," *id.* at 31; and (iii) that EBG "transferred funds to BONY for that bank to act as EBG's agent in connection with the subsequent settlement payments," *id.* at 30—i.e., that EBG was a financial institution as BONY's (its agent's) customer.

ii. Intentional Fraudulent Transfer of the Unit Redemptions and the Warrant Redemptions

Because this Court holds that: (i) section 546(e) of the Bankruptcy Code also preempts the Trustee's state-law intentional fraudulent transfer claims; and (ii) the Unit Redemptions and the Warrant Redemptions are safe harbored from the Trustee's state-law constructive fraudulent transfer claims, the Trustee's state-law intentional fraudulent transfer claim to recover the Unit Redemptions and the Warrant Redemptions is safe harbored too.

iii. Conclusion

Accordingly, those portions of Counts I and III that seeks to recover the Unit Redemptions and the Warrant Redemptions from the Defendants are dismissed pursuant to section 546(e) of the Bankruptcy Code.

e. The Distribution Meets Sections 546(e)'s Safe Harbor Requirements

The Trustee asserts next that the Distribution falls outside section 546(e) because dividend payments are not settlement payments ***493** or payments made in connection with a securities contract. As discussed above, the Trustee concedes the Distribution was made by a financial institution (BONY), as agent for its customer (EBG). The Trustee relies on Judge Gerber's *In re Global Crossing, Ltd.* decision, 385 B.R. 52, 56 n.1 (Bankr. S.D.N.Y. 2008), which holds that issuance of a dividend on previously purchased stock is not a "settlement payment" exempt from section 546(e)'s coverage. However, in *Global Crossing*, the dividend was a true dividend to shareholders who retained their equity following the dividend. No purchase of stock or securities contracts were involved in *Global Crossing* at all. *See* *id.* at 59-60. It was not, as here, a transfer in exchange for the member's equity interest.

The Distribution was not an isolated dividend paid in the ordinary course. EBG paid the $35 million as part of an integrated transaction—which the TAC itself describes as a singular "Leveraged Recap Transaction"—that comprised the "use [of] more than $1 billion to redeem equity interests in EBG, redeem warrants, and pay a dividend to equity." TAC ¶ 1. The Tender Offer specifically contemplated that the $35 million would be paid "prior to the purchase of Units in the Offer" to "return value to Members ... consistent with the Recapitalization and [to] enhance the benefits of the Recapitalization." Tender Offer, at 28. Accordingly, because EBG paid the Distribution as part of a single, integrated transaction to settle EBG's repurchase of its members' shares, those payments were "settlement payments"—i.e., "transfers ... made to complete [a] securities transaction." *See* *Enron*, 651 F.3d 329, 334-35 (2d Cir. 2011).

Further, the payments plainly fall within section 546(e) as "transfer[s] made ... in connection with a securities contract." Under "§ 546(e), a transfer is 'in connection with' a securities contract if it is 'related to' or 'associated with' the securities contract." *Picard v. Ida Fishman Revocable Tr. (In re Bernard L. Madoff Inv. Sec. LLC)*, 773 F.3d 411, 421 (2d Cir. 2014). "Section 546(e) sets a low bar for the required relationship between the securities contract and the transfer sought to be avoided," "merely requir[ing] that the transfer have a connection to the securities contract." *Id.* at 422. That "low bar" is easily met here because EBG's payment "ha[d] a connection to" and was thus "related to" the Tender Offer, which expressly contemplated that the Distribution would be paid as part of the purchase transaction. Other courts have held that "dividends" paid as part of an integrated securities transaction fall within sections 546(e)'s scope. *See* *Crescent Res. Litig. Tr. v. Duke Energy Corp.*, 500 B.R. 464, 471-476 (W.D. Tex. 2013) (holding that $1 billion that subsidiaries transferred to parent as a "distribution or dividend" was a "settlement payment" and transfer "in connection with a securities contract" because the payment was part of an integrated transaction to sell parent's equity-security holdings in subsidiaries).

Accordingly, those portions of Counts I and III that seek to recover the Distribution from the Defendants are dismissed pursuant to section 546(e) of the Bankruptcy Code.

VIII. Ratification

Next, the Defendants assert the Trustee's claims *on behalf of the Lenders* must be dismissed because the Lenders ratified the Leveraged Recap Transaction. For the reasons that follows, the Court finds the Defendants reasoning unpersuasive.

More specifically, they argue that because the Lenders were aware that the proceeds from the Credit Facilities would ***494** be used to cash out EBG's LLC members they are estopped from seeking to avoid the very transfer they allegedly approved. Relying primarily on *Lyondell*, the Defendants encourage the court to adopt the view that "[c]reditors who authorized or sanctioned the transaction, or, indeed, participated in it themselves, can hardly claim to have been defrauded by it, or otherwise to be victims of it." *In re Lyondell Chemical Co.*, 503 B.R. 348, 383-84 (Bankr. S.D.N.Y. 2014). In *Lyondell*, the Court noted that a creditor's knowledge that it was lending "for the purpose of financing an LBO, and that the LBO proceeds would go to the stockholders" was sufficient to establish a ratification defense. *Id.* at 385. In response, the Trustee claims that the Lenders could not have possibly ratified the transaction because they loaned money in reliance on fraudulent financial statements and projections.

The Trustee believes that the appropriate question to ask is whether the Lenders "had full knowledge of all material facts" surrounding the transaction (the "Material Facts Test"). *See* *ASARCO LLC v. Americas Mining Corp.*, 396 B.R. 278, 427 (S.D. Tex. 2008). "Ratification 'is the act of knowingly giving sanction or affirmance to an act which would otherwise be unauthorized and not binding.' " *PAH Litigation Trust v. Water Street Healthcare Partners, L.P. (In re Physiotherapy Holdings Inc.)*, Case No. 13-12965, 2016 WL 3611831, at *12 (Bankr. D. Del. June 20, 2016) (quoting 57 N.Y. Jur.2d Estoppel, Ratification and Waiver § 87 (2007)). This defense "implies assent, express or implied, and a change of position on the part of one who acts in reliance on such assent." *Id.* With regard to transactions such as the Leveraged Recap Transaction, courts have noted that "[w]here the allegedly ratifying party's silent acquiescence to a transaction credibly appears to have resulted from the complexity of the situation rather than intent, ratification does not occur." *Adelphia Recovery Trust v. HSBC Bank USA (In re Adelphia Recovery Trust)*, 634 F.3d 678, 693-94 (2d Cir. 2011) (citing *King v. Ionization Int'l, Inc.*, 825 F.2d 1180, 1187 (7th Cir. 1987)). Other courts have held that the ratification defense is applicable "only if [the creditor] actually participated in structuring the transaction that damaged creditors." *Tronox Inc. v. Kerr McGee Corp. (In re Tronox, Inc.)*, 503 B.R. 239, 276 (Bankr. S.D.N.Y. 2013). *See also* *In re Refco, Inc.*

Sec. Litig., No. 07 MDL 1902 GEL, 2009 WL 7242548, at *11 (S.D.N.Y. Nov. 13, 2009), report adopted, 2010 WL 5129027 (S.D.N.Y. Jan. 12, 2010) (noting that the transferee was "heavily involved in structuring the transaction for the purchase of PlusFunds shares). In *Tronox*, the Court held that because the defendants "did not establish that the bondholders *knowingly gave sanction to the fraudulent conveyances complained of* in this case," a finding of ratification was inappropriate. *In re Tronox*, 503 B.R. at 276.

Both the *Adelphia* court and the *Tronox* court appeared to endorse the Material Facts Test. Contrary to the Defendants' assertions, the use of proceeds from the Credit Facilities is simply one piece of the entire "fraud alleged in the complaint.' " *In re Refco Inc. Sec. Litigation*, 2009 WL 7242548, at *10. As a result, the Court holds that there is a material dispute as to whether or not the Lenders had knowledge of the material facts surrounding the Leveraged Recap Transaction. With respect to the loans made pursuant to the Credit Facilities and BosGen and EBG's ability to repay those loans, BosGen and EBG's financial health is likely the most material fact. As Judge Gross noted in *Physiotherapy Holdings*,

> [c]ompanies rely on cash flow to service their debts. A firm with poor cash flows may find itself unable to pay its debts as they come due. Clearly, this information is highly pertinent to a reasonable investor's ***495** decision to lend money to a company. Simply put, the Trustee has advanced sufficient allegations to suggest that the Senior Noteholders may have been misled into lending money to a company whose financial health was poorer than represented. Because intent is the central element of ratification, it is far from certain that the Senior Noteholders intended to extend credit to an insolvent company. Rather, the bondholders 'simply bought into [the transaction] based on the information available to them.'

In re Physiotherapy Holdings, Inc., 2016 WL 3611831, at *12 (quoting *Tronox,* 503 B.R. at 276). The Trustee has alleged that the information in, among other things, the Lenders' Presentations, the CIM, and the Tender Offer did not indicate BosGen and EBG's true financial condition by omission and misrepresentation, provide accurate projections for BosGen's future cash flow, or disclose the risks associated with various hedge contracts BosGen had entered. Thus, a finding of ratification is inappropriate at this juncture.

The Court finds *Lyondell* distinguishable from the facts presented here because there were no allegations in *Lyondell* that their lenders relied on false financial statements. There, the creditors knew they were participating in a leveraged buyout that carried potential risk. Whereas here, the Lenders knew they were participating in a leveraged recapitalization transaction that carried potential risk but also, according to the Trustee, may have made the decision to loan money based on material misstatements and omissions. For these reasons, the Court adopts the Material Facts Test discussed above and the Defendants request to dismiss the TAC based on the Lenders' ratification of the Leveraged Recap Transaction is denied.

IX. Claims Against Defunct Entities

To the extent the Trustee purports to sue corporate entities that are no longer in existence, the claims against those defendants are barred because they have not been (and cannot be) served with the TAC and are not amenable to suit. "At common law, the dissolution of a corporation abruptly ended its existence, thus abating all pending actions by and against it and terminating its capacity thereafter to sue or be sued. Thus, statutory authority is necessary to prolong the life of a corporation past its date of dissolution." *In re Citadel Indus., Inc.*, 423 A.2d 500, 503 (Del. Ch. 1980). Thus, the Trustee may sue a dissolved corporation only if there is express statutory authority granting him the right. No such statutory right exits here. For example, the Trustee purports to sue Trade Claim Acquisition, L.L.C. TAC ¶ 41, Ex. A. But that Delaware LLC was canceled in 2010. *See* Anker Decl., Ex. 2.[22] Under Delaware LLC law, a Delaware LLC that has been issued its certificate of cancellation from the Secretary of State cannot be sued. *See* Del. Code Ann. tit. 6, § 18-803(b); *see also* *Kwon v. Yun*, Case No. 05-civ-1142, 2008 WL 190058, at *1 (S.D.N.Y. Jan. 22, 2008); *Matthew v. Laudamiel*, Case No. 5957-VCN, 2012 WL 605589, at *21 (Del. Ch. Feb. 21, 2012). Here, the same holds true for Defendant Epic Distressed Debt Holdings, Inc. ("Epic"), a Delaware corporation that was dissolved as of September 3, 2009. *See* Anker Decl., Ex. 3; *Citadel Indus.*, 423 A.2d at 503.

Similarly, the Trustee has sued Greenwich International, Ltd. ("Greenwich") and Cedarview EBG Holdings, Ltd. ("Cedarview," together with Epic and Greenwich, the

"Defunct Entities"). They too, are canceled corporations—Bermudan and Cayman Islands companies, respectively, that ***496** were dissolved and stricken from the companies registers years before the Trustee filed suit. *See* Anker Decl., Exs. 4 & 5. Under applicable law, those entities also cannot be sued. *Cf. Eluv Holdings (BVI) Ltd. v. Dotomi, LLC*, Case No. 6894-VCP, 2013 WL 1200273, at *11 (Del. Ch. Mar. 26, 2013). Thus, this action must be dismissed as against all dissolved entities that, under the applicable law of the jurisdiction of their incorporation, are no longer subject to suit.

X. Conclusion

For the reasons stated above: (i) Counts I through IV of the TAC are dismissed as to all the Defendants pursuant to section 546(e) of the Bankruptcy Code; (ii) Count V of the TAC is dismissed as to all Defendants pursuant to, a) New York's applicable statute of limitations, b) Rules 8 and 12(b)(6), and c) section 546(e) of the Bankruptcy Code; and (iii) additionally, Counts I through V of the TAC are dismissed as to the Defunct Entities. The Defendants are directed to submit an Order to the Court consistent with this opinion.

All Citations

617 B.R. 442

Footnotes

1 Capitalized terms used in Section I but not defined therein shall have the meanings ascribed to them below.

2 The background provided herein is drawn from the TAC, the exhibits attached thereto, and the documents referenced therein, from the record of the proceedings in the Debtors' bankruptcy cases and this adversary proceeding, and from other public records. *See In re Hydrogen, L.L.C.*, 431 B.R. 337, 345 (Bankr. S.D.N.Y. 2010). On a motion brought pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the Court may consider "any written instrument attached to [the complaint] as an exhibit or any statements or documents incorporated in it by reference," as well as any "documents that are integral to the complaint" (meaning documents where "the complaint relies heavily upon its terms and effect") and any "documents that the plaintiffs either possessed or knew about and upon which they relied in bringing the suit." *In re Tribune Co. Fraudulent Conveyance Litigation*, Case No. 12-cv-2652, 2019 WL 1771786, at *5 (S.D.N.Y. Apr. 23, 2019) (internal quotation marks omitted). The Court "may also take judicial notice of relevant matters of public record." *Id.* (internal quotation marks omitted).

3 The Tender Offer defines the term "Company" as EBG "(together with its subsidiaries ...." BosGen is an EBG subsidiary and thus, the term "Company" encompasses, among other subsidiaries, both EBG and BosGen. *See* Hunter Decl. ¶ 12. Additionally, the Tender Offer provides the term "Company" may be used interchangeably with "EBG," "we," or "us."

4 Following execution of the Credit Facilities on December 21, 2006, the debt in the Credit Facilities was immediately syndicated and the list of initial participants in the syndication (the "Lenders") is attached to the TAC. *See* TAC, Exhibits B and C. Many of the Lenders are listed as having a New York address. Further, each of the Credit Facilities contains a New York choice of law provision.

5 The First Lien Credit Agreement and the Second Lien Credit Agreement define "Distribution" as follows, "EBG Holdings intends to make a pro rate distribution to its unit holders, prior to the purchase of Units in the Tender Offer, in an amount of up to $40,000,000.00 to be financed in part with the proceeds from the Facilities." TAC Ex. E, at 1(4), and Ex. F, at 1(4). The Mezz Agreement defines Distribution substantially the same. *See* TAC, Ex. G, at 1(4). The term "Distribution" as defined in the Credit Facilities encompasses the Distribution (as defined below).

The First Lien Credit Agreement and the Second Lien Credit Agreement define "Tender Offer" as follows, "(a) the offer by EBG Holdings to purchase outstanding Units of limited liability company interest in EBG Holdings pursuant to the Offer to Purchase dated November 16, 2006 ... and (b) the repurchase of warrants and the cashless exercise of warrants referred to in such Offer of Purchase." TAC Ex. E, at 34, and Ex. F, at 30. The Mezz Agreement defines Tender Offer substantially the same. *See* TAC Ex. G, at 27-28. Thus, the Tender Offer encompasses the Unit Redemptions and the Warrant Redemptions (as both terms are defined below).

6 Capitalized terms used in this section but not defined herein shall have the meanings ascribed to them in the TAC.

7 The TAC more specifically defines the Defendants to be those "who or that received a transfer or distribution pursuant to the Leveraged Recap Transaction and list the Defendants in Ex. A. The list of defendants in Ex. A to the TAC is incorporated herein into the definition of the "Defendants."

8 The Trustee asks the Court to look only at the Step One Transfer to determine whether the $708 Million left BosGen fraudulently under the DCL. According to the Trustee, the Court must examine the Step One Transfer as an isolated transaction without regard to the overarching transaction concerning the $708 Million, which is the BosGen Transfer that ultimately came to rest in the BONY Account.

9 To provide context for the Delaware Statute of Repose, the two preceding sub-paragraphs provide as follows:

> (a) A limited liability company shall not make a distribution to a member to the extent that at the time of the distribution, after giving effect to the distribution, all liabilities of the limited liability company, other than liabilities to members on account of their limited liability company interests and liabilities for which the recourse of creditors is limited to specified property of the limited liability company, exceed the fair value of the assets of the limited liability company, except that the fair value of property that is subject to a liability for which the recourse of creditors is limited shall be included in the assets of the limited liability company only to the extent that the fair value of that property exceeds that liability. For purposes of this subsection (a), the term "distribution" shall not include amounts constituting reasonable compensation for present or past services or reasonable payments made in the ordinary course of business pursuant to a bona fide retirement plan or other benefits program.
>
> (b) A member who receives a distribution in violation of subsection (a) of this section, and who knew at the time of the distribution that the distribution violated subsection (a) of this section, shall be liable to a limited liability company for the amount of the distribution. A member who receives a distribution in violation of subsection (a) of this section, and who did not know at the time of the distribution that the distribution violated subsection (a) of this section, shall not be liable for the amount of the distribution. Subject to subsection (c) of this section, this subsection shall not affect any obligation or liability of a member under an agreement or other applicable law for the amount of a distribution.

Del. Code Ann. tit. 6, §§ 18-607(a)-(b).

10 To provide context for the NY Statute of Repose, the two preceding sub-paragraphs provide as follows:

> (a) A limited liability company shall not make a distribution to a member to the extent that, at the time of the distribution, after giving effect to the distribution, all liabilities of the limited liability company, other than liabilities to members on account of their membership interests and liabilities for which recourse of creditors is limited to specified property of the limited liability company, exceed the fair market value of the assets of the limited liability company, except that the fair market value of property that is subject to a liability for which the recourse of creditors is limited shall be included in the assets of the limited liability company only to the extent that the fair value of such property exceeds such liability.
>
> (b) A member who receives a distribution in violation of subdivision (a) of this section, and who knew at the time of distribution that the distribution violated subdivision (a) of this section, shall be liable to the limited liability company for the amount of the distribution. A member who receives a distribution in violation of subdivision (a) of this section, and who did not know at the time of the distribution that the distribution violated subdivision (a) of this section, shall not be liable for the amount of the distribution. Subject to subdivision (c) of this section, this subdivision shall not affect any obligation or liability of a member under the operating agreement or other applicable law for the amount of a distribution.

NYLLCL §§ 508(a)-(b).

11 To be sure, the Delaware Statute of Repose is more than a procedural limitations period. In *Vivaro Corp.*, this Court addressed whether the NY Statute of Repose overtook the six year limitations period for DCL claims

and held the New York "statute of repose overrides the six year statute of limitations normally applied to NYDCL fraudulent conveyance claims, provided that the transfers at issue were in fact distributions made by the *LLC to LLC members.*" *In re Vivaro Corp.*, 524 B.R. 536, 548 (Bankr. S.D.N.Y. 2015) (emphasis added). Here, the Delaware Statute of Repose, were it applicable to creditor suits, would not automatically override the DCL's six-year limitations period. Were the Delaware Statute of Repose applicable to creditor suits, it would lead to the "interest analysis" referenced above.

12 The Court holds the Delaware Statute of Repose does not apply to creditor suits and therefore, the conflict of law inquiry ends. Had the Court determined the Delaware Statute of Repose applied to creditor suits, an interest analysis would have been required to determine which jurisdiction has the greater interest in having its law applied here. Where a conflict of laws exists in tort actions, New York's choice-of-law rules use an "interest analysis" that applies the laws of the jurisdiction with the greatest interest in the application of its law "based on the occurrences within each jurisdiction, or contacts of the parties with each jurisdiction, that 'relate to the purpose of the particular law in conflict.' " *Pension Comm. of Univ. of Montreal Pension Plan v. Banc. of Am. Secs., LLC,* 446 F.Supp.2d 163, 192 (S.D.N.Y. 2006) (internal citations omitted); *see* *AroChem Int'l, Inc. v. Buirkle,* 968 F.2d 266, 269–70 (2d Cir. 1992); *Advanced Portfolio Tech., Inc. v. Advanced Portfolio Tech., Ltd.,* Case No. 94-civ-5620, 1999 WL 64283, at *5 (S.D.N.Y. Feb. 8, 1999). "When the law is one which regulates conduct, such as fraudulent conveyance statutes, the law of the jurisdiction where the tort occurred will generally apply because that jurisdiction has the greatest interest in regulating behavior within its borders," *Pension Comm. of Univ. of Montreal,* 446 F.Supp.2d at 192 (internal quotations and citations omitted), "and parties engaging in those activities would have a reasonable expectation that their activities would be governed by the law of the state in which they are located and reside." *GFL Advantage Fund Ltd. Colkitt,* Case No. 03-civ-1256, 2003 WL 21459716, at *3 (S.D.N.Y. June 24, 2003). The Trustee contends New York has the greatest interest in seeing its law applied to this dispute because, among other things: (i) BosGen and EBG both had their principle places of business in the New York at the time of the transfers; (ii) K Road allegedly in New York directed the transfers; (iii) the Lenders' presentation occurred in New York; (iv) the majority of the Lenders were based in New York; and (v) the Credit Facilities provided they by New York law. *See* TAC ¶¶ 5-6, 8-15, 205-06, Ex. B (list of lenders); Ex. E § 9.17, Ex. F § 9.16, Ex. G § 8.12. Were there a conflict of laws present, the Court expresses no opinion on how it might have decided which jurisdiction has the greater interest in seeing its law applied.

13 There are three cases from New York State courts which support the view that both the NY Statute of Repose and the Delaware Statute of Repose apply to creditor claims against an LLC's members. *See* *Peckar & Abramson, P.C. v. Lyford Holdings, Ltd.,* 135 A.D.3d 108, 115, 20 N.Y.S.3d 41, 46 (1st Dep't 2015) (applying three-year limitations period under analogous New York LLP law to creditor's claim); *Bd. of Managers of Chocolate Factory Condo. v. Chocolate Partners, LLC,* 992 N.Y.S.2d 157, 2014 WL 1910237, at *12 (Sup. Ct. Kings County 2014) (holding the three-year limitations period contained in the NY Statute of Repose "applies both to claims by the limited liability company against its members and by third party creditors."); *Mostel v. Petrycki,* 885 N.Y.S.2d 397, 399, 25 Misc.3d 929, 932 (Sup. Ct. N.Y. County 2009). However, *Chocolate Factory,* *Mostel,* and *Peckar* were decided pre-*Setters* and this Court considers those decisions overruled and/or unpersuasive in light of *Setters.*

14 The NY Statute of Repose applies only to transfers made by a New York limited liability company. Here, it's inapplicable because the BosGen Transfer and the EBG Transfers were effectuated by Delaware limited liability companies.

15 Certainly, the TAC satisfies the less stringent standard for imputation adopted by Judge Cote in *Lyondell*, which accounts for a distinction in cases addressing "the imputation of a transferee's intent" from those addressing imputation of an agent's intent. *Lyondell*, 554 B.R. at 649. Under Judge Cote's approach, when a single corporate officer's conduct falls within the scope of his authority as an agent, everything such agent

knows or does is imputed to their principals. *See* *Kirschner v. KPMG LLP*, 15 N.Y.3d 446, 465, 912 N.Y.S.2d 508, 938 N.E.2d 941 (2010).

16 The Second Circuit recalled *Tribune I* following the United States Supreme Court's decision in *Merit Mgmt. Grp., LP v. FTI Consulting, Inc.*, ––– U.S. ––––, 138 S. Ct. 883, 200 L.Ed.2d 183 (2018) ("*Merit*"), and issues an amended opinion. *See* *In re Tribune Co. Fraudulent Conveyance Litigation*, 946 F.3d 66 (2d Cir. 2019) ("*Tribune II*"). *Tribune II* reaffirmed *Tribune I*'s holding that section 546(e) preempts state law constructive fraudulent transfer claims asserted by a litigation trustee standing in the shoes of creditors. *See* *Tribune II*, 946 F.3d at 81-82.

17 Again, the Court recognizes the Trustee asks the Court to look only at the Step One Transfer and not the overarching transaction, which is the BosGen Transfer.

18 The full text of the section 546(e) provides,

> (e) Notwithstanding sections 544, 545, 547, 548(a)(1)(B), and 548(b) of this title, the trustee may not avoid a transfer that is a margin payment, as defined in section 101, 741, or 761 of this title, *or settlement payment*, as defined in section 101 or 741 of this title, *made by or to (or for the benefit of)* a commodity broker, forward contract merchant, stockbroker, *financial institution*, financial participant, or securities clearing agency, *or* that is a transfer *made by or to (or for the benefit of)* a commodity broker, forward contract merchant, stockbroker, *financial institution*, financial participant, or securities clearing agency, *in connection with a securities contract*, as defined in section 741(7), commodity contract, as defined in section 761(4), or forward contract, that is made before the commencement of the case, except under section 548(a)(1)(A) of this title.

Id. (emphasis added).

19 The FFM acknowledges it is delivered to US Bank by BosGen "pursuant to Section 3.22 of the Security Deposit Agreement dated as of December 21, 2006 (the 'Security Deposit Agreement') by and among the Borrower [defined as BosGen], the Guarantors from time to time party thereto, Credit Suisse, Cayman Islands Branch, as First Lien Collateral Agent and as Second Lien Collateral Agent, *and U.S. Bank National Association, as depository (the 'Depository').* The FFM, at 1.

20 The Court has already concluded above in Section VII (c)(ii) that the BosGen Transfer was in connection with a securities contract.

21 The record before the Court does not make clear how many days elapsed between BoA receipt of funds from: (i) the Step One Transfer; and (ii) the Mezz Agreement and the subsequent First BONY Transfer and Second BONY Transfer.

22 The certificate of cancellation for Trade Claim Acquisition was filed with the Delaware Secretary of State. This Court takes judicial notice of that document as a public filing.

End of Document

621 B.R. 797
United States Bankruptcy Court,
E.D. Michigan, Southern Division,
Detroit.

IN RE: GREEKTOWN HOLDINGS, LLC, et al., Debtors.
Buchwald Capital Advisors, LLC, solely in its capacity as Litigation Trustee to the Greektown Litigation Trust, Plaintiff,
v.
Dimitrios ("Jim") Papas, Viola Papas, Ted Gatzaros, Maria Gatzaros, Barden Development, Inc., Lac Vieux Desert Band of Lake Superior Indians, Sault Ste. Marie Tribe of Chippewa Indians, Kewadin Casinos Gaming Authority, and Barden Nevada Gaming, LLC, Defendants.

Case No. 08-53104 Jointly Administered
|
Adv. Proc. No. 10-05712
|
Signed October 21, 2020

Synopsis

Background: Litigation trustee for litigation trust created pursuant to confirmed Chapter 11 plan, filed adversary complaint seeking to avoid, pursuant to the Michigan Uniform Fraudulent Transfer Act (MUFTA), approximately $155,000,000 in prepetition wire transfers that were funded by senior notes issued by debtor and that were made by debtor to individuals to satisfy amount owed to them from the transfer of their majority interest in a parent company of debtor. Defendants moved for summary judgment pursuant to the Bankruptcy Code's "safe harbor" provision for "settlement payments." The Bankruptcy Court, Walter J. Shapero, J., 2015 WL 8229658, granted motion and subsequently dismissed defendants with prejudice from the proceeding. Litigation trustee appealed. The United States District Court for the Eastern District of Michigan, Paul D. Borman, J., affirmed. Litigation trustee appealed. The Court of Appeals vacated and remanded.

Holdings: On remand, the Bankruptcy Court, Maria L. Oxholm, J., held that:

transfers were not ones made from or by financial institution;

transfers were not ones made for the benefit of financial institution;

financial institution was not, under Michigan or federal common law, an "agent" of first debtor; and

financial institution was not acting as a "custodian" for the benefit of debtor.

Motion denied.

Procedural Posture(s): Motion for Summary Judgment.

Attorneys and Law Firms

***801** Shannon L. Deeby, Clark Hill PLC, Linda M. Watson, Birmingham, MI, Mark Parry, New York, NY, Edward Todd Sable, Detroit, MI, for Plaintiff.

Michael O. Fawaz, Lisa Sommers Gretchko, Royal Oak, MI, Patrick M. McCarthy, Ann Arbor, MI, James Morgan, Chicago, IL, Nancy K. Stone, Franklin, MI, for Defendants.

CORRECTED OPINION DENYING DEFENDANTS DIMITRIOS ("JIM") PAPAS, VIOLA PAPAS, TED GATZAROS, AND MARIA GATZAROS' MOTION FOR SUMMARY JUDGMENT (ECF No. 266) [1]

Maria L. Oxholm, United States Bankruptcy Judge

***802** I. INTRODUCTION

Before the Court is Defendants Dimitrios ("Jim") Papas, Viola Papas, Ted Gatzaros, and Maria Gatzaros' ("Defendants," "Papases" or "Gatzaroses") Motion for Summary Judgment pursuant to Federal Rule of Civil Procedure 56, made applicable pursuant to Federal Rule of Bankruptcy Procedure 7056, arguing that there is no genuine issue of material fact that the safe harbor provision of 11 U.S.C. § 546(e) bars this adversary complaint. Plaintiff Buchwald Capital Advisors LLC, solely in its capacity as Liquidating Trustee for the Greektown Litigation Trust, ("Plaintiff") filed this adversary proceeding seeking to avoid transfers from the debtor Greektown Holdings, LLC ("Holdings") to the Papases and Gatzaroses under 11 U.S.C. § 544 and to recover the transferred funds or the value of those funds from the Papases and Gatzaroses under 11 U.S.C. § 550. In this motion, Defendants assert that the transfers are protected from avoidance by the § 546(e) safe harbor provision. For the reasons that follow, the Court denies Defendants' motion for summary judgment.

II. JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1334 and 28 U.S.C. § 157. This adversary proceeding seeks to avoid and recover prepetition transfers as fraudulent and therefore is a core proceeding as defined in 28 U.S.C. § 157(b)(2)(H).

III. PROCEDURAL HISTORY

While this adversary proceeding has a lengthy history dating back to 2010, the Court will only focus on the procedural background as it relates to this motion. This motion was originally filed and argued before this Court's predecessor, the Honorable Walter Shapero (Retired), who granted Defendants' motion on November 24, 2015. [ECF No. 685]. In doing so, Judge Shapero made numerous findings based on then binding Sixth Circuit precedent, *In re QSI Holdings, Inc.*, 571 F.3d 545 (6th Cir. 2009) (abrogated by *Merit Management Group, LP v. FTI Consulting, Inc.*, ––– U.S. ––––, 138 S. Ct. 883, 200 L.Ed.2d 183 (2018)). The Court's opinion was affirmed by the District Court on January 24, 2018. [ECF No. 745]. Plaintiff subsequently appealed the decision to the Sixth Circuit. Pending appeal, the United States Supreme Court issued a decision in *Merit Management Group, LP v. FTI Consulting, Inc.*, ––– U.S. ––––, 138 S. Ct. 883, 200 L.Ed.2d 183 (2018) that directly addresses the issues in this case. As a result, on April 22, 2019, the Sixth Circuit issued an order vacating and remanding this case for reconsideration. [2] [ECF No. 748; Filed on May 8, 2019].

***803** The parties have filed supplemental briefs addressing the motion in light of *Merit Management*. In their supplemental brief, Defendants maintain that this Court should not re-evaluate several of its earlier conclusions that were not implicated by *Merit Management* arguing that they are beyond the instructions of the Sixth Circuit's remand, and the law of the case doctrine dictates that they should not be disturbed. These conclusions include: (1) "a single component transfer of the 2005 Transaction cannot be isolated when conducting a Section 546(e) analysis: the transaction must be evaluated as an integrated whole"; (2) Merrill Lynch is a financial institution; (3) the challenged transfers were settlement payments; and (4) the challenged transfers were made in connection with a securities contract. [ECF No. 794, p. 1].

Defendants raise three separate arguments in support of their summary judgment motion: (1) Judge Shapero already conducted the factual and legal analysis required by *Merit Management*, that the transaction must be viewed in its entirety; (2) the transfers were for the benefit of Merrill Lynch; and (3) Holdings is by 11 U.S.C. § 101(22)(A) deemed to be a "financial institution" because Merrill Lynch was acting as an agent or custodian for its customer Holdings in making the transfers.

In response, Plaintiff asserts that in addition to the Sixth Circuit's mandate to reconsider this case in light of *Merit Management*, this Court is free to examine the prior grant of summary judgment under one of the three exceptions to the "law of the case" doctrine, citing to *Westside Mothers v. Olszewski*, 454 F.3d 532, 538 (6th Cir. 2006). Plaintiff first claims that defining the transfer at issue is directly implicated by *Merit Management*. Plaintiff next argues this Court should reconsider the following: (1) the transfers were not settlement payments; (2) the transfers were not made in connection with a securities contract; and (3) Merrill Lynch is not a financial institution. Finally, Plaintiff contends that Defendants fail to establish that Holdings meets the requirements of § 101(22)(A) to be deemed a "financial institution."

After a hearing on November 21, 2019, the parties filed post hearing briefs to clarify the different Merrill Lynch entities involved and their roles in the relevant transfers. The parties also analyzed the definition of a "financial institution" under § 101(22)(A) and whether Holdings, itself, qualifies as a "financial institution" by virtue of its status as a "customer" of Merrill Lynch. [ECF Nos. 782, 788, and 794].

IV. SUMMARY JUDGMENT STANDARD

Fed. R. Civ. P. 56, incorporated by Fed. R. Bankr. P. 7056 provides that

> summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." By its very terms, this standard provides that the mere ***804** existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247–48, 106 S. Ct. 2505, 2509–10, 91 L.Ed.2d 202 (1986). "[S]ubstantive law will identify which facts are material[,]" and "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id.* at 248, 106 S. Ct. at 2510. Moreover, the disputed material fact must be "genuine." *Id.* "[A] material fact is 'genuine,' ... if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* The rule "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23, 106 S. Ct. 2548, 2552, 91 L.Ed.2d 265 (1986).

The moving party "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Id.* at 323, 106 S. Ct. at 2552. "[W]here the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the 'pleadings, depositions, answers to interrogatories, and admissions on file.' " *Id.* at 324, 106 S. Ct. 2548, 2552. Thereafter, "the nonmoving party [has] to go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate "specific facts showing that there is a genuine issue for trial." *Id.*

V. ANALYSIS

a. Findings of Fact

i. Predecessor's Findings

Before turning to *Merit Management* and the Sixth Circuit's order, it is important to understand this Court's predecessor's opinion granting Defendants' motion for summary judgment ("Opinion") [ECF No. 685]. A summary follows.

Significantly, in its Opinion, the court noted that "[n]either party ... contests the authenticity of any exhibit or disputes the occurrence or essential details of the transactions evidenced thereby. There are no genuine disputes as to any material facts, only as to how those facts should be construed and their legal consequences." *Id.* at 8.

In terms of factual findings, defendants Papases and Gatzaroses collectively owned approximately 86% of the membership interests in Monroe Partners, LLC ("Monroe") who, in turn, owned a 50% interest in Greektown Casino, LLC ("Greektown Casino").[3] [ECF No. 685, p. 3]. The other 50% interest in Greektown Casino was owned by Kewadin Greektown Casino, LLC ("Kewadin"). *Id.*

On July 28, 2000, Defendants and Monroe entered into an agreement ("the 2005 Redemption") wherein "Monroe purchased and redeemed the membership interests ***805** ... of Defendants in exchange for Monroe's agreement to pay Defendants specified future installment payments." *Id.* Contemporaneous to this agreement, "Kewadin became the owner of equivalent membership interests in Monroe and also obligated itself to make these installment payments" to Defendants. *Id.* The installment payments were made for some time. *Id.*

In 2005, the parties entered into a series of agreements ("the 2005 Transaction") that provided for a settlement and payment of the balances then owing to Defendants. *Id.* "The Papases agreed to a discounted payment in full of about $95 million, and the Gatzaroses agreed to a partial payment of about $55 million, leaving an outstanding balance of about $50 million." *Id.* Pursuant to the 2005 Transaction, "the source of the money to be used to pay Defendants the indicated sums would be obtained pursuant to a reorganization of Greektown Casino's corporate and financial structure." *Id.* Accordingly, "in September 2005, Monroe and Kewadin incorporated Greektown Holdings, LLC ("Holdings"), with Monroe and Kewadin each owning a 50% interest in Holdings, and with each transferring to Holdings all of their interests in Greektown Casino." *Id.* at 3-4. "Aside from Greektown Casino, Holdings' only other asset was a wholly-owned subsidiary Greektown Holdings II, Inc." *Id.* at 4.

The Opinion also outlined the relevant events that took place as part of the 2005 Transaction. They are,

(a) Holdings issued approximately $182 million in unsecured senior notes ("Senior Notes") to be purchased by Merrill Lynch, Pierce, Fenner & Smith Inc. ("Merrill Lynch") pursuant to a Note Purchase Agreement;

(b) Merrill Lynch sold the Senior Notes to certain qualified institutional purchasers;

(c) The net proceeds from the indicated sale of the Senior Notes was used (primarily, but not solely) to make the agreed-upon payments to Defendants;

(d) On November 8, 2005, the Michigan Gaming Control Board (MGCB) approved by written order the transfer of Monroe and Kewadin's interests in Greektown Casino to Holdings. Dkt. 266 Ex. 5-A. Consummation of the 2005 Transaction required the MGCB's approval, as it is the Michigan state agency with jurisdiction over casino licensure and regulation. See Mich. Comp. Laws § 432.204(1); Mich. Admin. Code r. § 432.1509;

(e) On November 15, 2005, the MGCB also issued a written order approving the 2005 Transaction, including as a specific condition the referred-to payments to Defendants. Dkt. 266 Ex. 5-B;

(f) On November 22, 2005, Holdings and Merrill Lynch issued an Offering Memorandum covering the Senior Notes. It specifically described the 2000 Redemption and further indicated that the proceeds of the offering would be distributed to effectuate the indicated and contemplated payments to Defendants (specifically, by way of a distribution to Monroe and Kewadin, which would then make distributions to Defendants). Dkt. 266, Ex. 5-C at 7. The Offering Memorandum's "Use of Proceeds" section indicated that "[c]oncurrently with the closing of the offering of the notes, [Holdings] will dividend" approximately $170 million to Monroe and Kewadin, which will use the funds to pay former members of Monroe (i.e. Defendants). Id. at 30. The November 22, 2005 Note Purchase Agreement between Merrill Lynch (on its own behalf ***806** and on behalf of the identified initial purchasers of the Senior Notes) and Holdings included a covenant providing that Holdings will use the net proceeds of the Senior Note sale as specified in the referred-to Offering Memorandum's "Use of Proceeds" section. Dkt. 266, Ex. 5-D at 11; and

(g) On December 2, 2005, Holdings issued the Senior Notes to Merrill Lynch and, on the same day, Holdings directly made those indicated payments by wire transfers from Merrill Lynch to the Papases' and Gatzaroses' bank accounts with Chase Manhattan Bank and Comerica Bank, respectively ("Wire Payments").

[ECF No. 685, p. 4-5].

On May 29, 2008, Greektown Casino, Holdings, Monroe, Kewadin, and other related entities filed their Chapter 11 bankruptcies. [ECF No. 685, p. 6]. This adversary proceeding followed.

With regard to the legal conclusions in the Opinion, two issues were presented: (1) whether § 546(e) precludes Plaintiff's avoidance action because the Wire Payments qualify as a transfer that is a settlement payment made by or to a financial institution; and (2) whether § 546(e) precludes Plaintiff's avoidance action because the Wire Payments qualify as a transfer made by or to a financial institution in connection with a securities contract. Section 546(e) provides,

> Notwithstanding sections 544, 545, 547, 548(a)(1)(B), and 548(b) of this title, the trustee may not avoid a transfer that is a margin payment, as defined in section 101, 741, or 761 of this title, or settlement payment, as defined in section 101 or 741 of this title, made by or to (or for the benefit of) a commodity broker, forward contract merchant,

> stockbroker, financial institution, financial participant, or securities clearing agency, or that is a transfer made by or to (or for the benefit of) a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency, in connection with a securities contract, as defined in section 741(7), commodity contract, as defined in section 761(4), or forward contract, that is made before the commencement of the case, except under section 548(a)(1)(A) of this title.

§ 546(e).

1. Wire Payments were a "settlement payment" made by or to a "financial institution"

For the first issue, the court held that the Wire Payments were a "settlement payment" made by or to a "financial institution." The court noted that case law interpreted the term "settlement payment" in 11 U.S.C. § 741(8) [4] broadly to "encompass[ ] most transfers of money or securities made to complete a securities transaction[,]" citing to *Contemporary Indus. Corp. v. Frost*, 564 F.3d 981, 986 (8th Cir. 2009); *In re QSI Holdings, Inc.*, 571 F.3d at 549; *Crescent Resources Litig. Trust v. Duke Energy Corp.* 500 B.R. 464 (W.D. Tex. 2013); and *Resorts Intern., Inc. v. Lowenschuss*, 181 F.3d 505, 515 (3d Cir. 1999). The Court thereafter turned to 11 U.S.C. § 101(49), which defines "security" or "securities" "to include a note, stock, or other claim or interest commonly known as ***807** 'security.' " [ECF No. 685, p. 10]. In applying these definitions, the court reasoned that "the Senior Notes, because they are in fact notes, must be considered securities and the 2005 Transaction must be considered a securities transaction." [ECP No. 685, p. 11]. Accordingly, the Court concluded "that the exchange of the Senior Notes and money between Holdings and Merrill Lynch was a settlement payment because it was a direct exchange of money and securities." [ECF No. 685, p. 11-12].

The court disagreed with the Plaintiff that the Wire Payments were either dividends that Holdings transferred to its parent entities (Monroe and Kewadin), who thereafter paid Defendants, or were "naked gifts" that Holdings made to Defendants. In distinguishing the transfers from dividends or gifts, the court opined that the transfers of money were made to complete the 2005 Transaction. [ECF No. 685, p. 17].

In comparing the 2005 Transaction to a novation, the court relied on a test cited in *Perry Drug Stores v. CSK Auto Corp.*, 93 Fed. Appx. 677, 681 (6th Cir. 2003) to prove novation under Michigan law. [5] Under this test, the following elements must be established: "(1) parties capable of contracting; (2) a valid obligation to be displaced; (3) the consent of all parties to the substitution based upon sufficient consideration; (4) the extinction of the old obligation and the creation of a valid new one." [ECF No. 685, p. 14].

The Opinion does not explicitly conclude on all the elements; rather, it focuses on the consideration exchanged by the parties. The court explained the consideration exchanged by the parties as follows,

> As part and parcel of the 2005 Transaction, there existed a clear triangular exchange of benefits and burdens, each aspect being reciprocal and supported by consideration. Holdings, although not bound to do so, voluntarily and by the consent of all the involved parties, undertook the obligation to settle and assume Monroe and Kewadin's prior obligations to Defendants using the Senior Notes proceeds. In exchange for undertaking this burden, Holdings benefitted by obtaining from Monroe and Kewadin a 100% interest in Greektown Casino, which constitutes consideration that Holdings received. Although Monroe and Kewadin surrendered to Holdings their direct ownership interests in Greektown Casino, they benefitted by being relieved of their obligations to pay Defendants on the debts from the 2000 Redemption. Defendants settled the installment amounts owing to

> them and benefitted by being paid immediately.

[ECF No. 685, p. 14-15].

The court also dismissed Plaintiff's argument that Defendants are disregarding corporate formalities in that "the Wire Payments were not made by Monroe and Kewadin [(]the parties that originally owed Defendants the money stemming from the 2000 Redemption ...[)] but rather were made by Holdings, a newly created entity that owed Defendants no obligations." ***808** *Id.* at 15. The court reasoned that "[i]f Holdings had no obligation to pay Defendants for such debts, but it voluntarily undertook that obligation by shared agreement and with all parties receiving consideration, then there is no serious argument that the Wire Payments were gratuitous or lacked consideration." *Id.* The court emphasized that § 546(e) "merely requires a payment to be made to 'complete' a securities transaction, it does not limit payment or receipt to particular parties to a multiparty transaction"— it did not matter that nothing was directly exchanged between Holdings and Defendants. *Id.* Finally, the court held that "[e]ven accepting that a traditional corporation-to-shareholder dividend is a gratuitous transfer lacking consideration, such a transfer loses that gratuitous character when it is actually exchanged for consideration." [6] *Id.* at 16. The Opinion additionally includes a case law discussion which also led the court to conclude that the Wire Payments were settlement payments. [7] *Id.* at 21-28.

The court additionally concluded that the 2005 Transaction should be considered as a whole, and not be separated into its component parts. *Id.* at 17-21. The court utilized the step transaction doctrine that provides that "interrelated yet formally distinct steps in an integrated transaction may not be considered independently of the overall transaction[,]" citing to *In re Big V Holding Corp.*, 267 B.R. 71, 92 (Bankr. D. Del. 2001). Per *In re Big V Holding Corp.,* three tests were developed for determining whether to apply the step transaction doctrine: (1) the end result test; (2) the interdependent test; and (3) the binding commitment test. After analyzing all three tests, the court found that all three compelled the court to view the separate component transactions as "components of a single whole." *Id.*

Next, the court held that the Wire Payments were "made by or to a financial institution." *Id.* at 32. The court concluded that "[t]here is no factual dispute that the Wire Payments were made by way of a wire transfer from Holdings (via its account with Merrill Lynch) to Defendants' respective bank accounts with Chase Manhattan Bank and Comerica Bank." *Id.* at 28. Relying on *QSI Holdings,* the court agreed with Defendants who argued that the Wire Payments were made by Merrill Lynch, which is a financial institution as defined in § 101(22)(A).

Of significance, the court dismissed Plaintiff's argument that "just because the Wire Payments were *made from* Merrill Lynch, does not mean they were *made by* Merrill Lynch for the purposes of § 546(e)." *Id.* The court found Plaintiff's argument to be "a peculiar, strained, and somewhat metaphysical distinction that finds no support in the plain language of § 546(e), the indicated case law, or logic. Section 546(e) does not require (or even imply) the distinctions that Plaintiff wishes to have this Court make." *Id.* at 30. The court further elaborated in a footnote,

> Although it is not factually clear whether the subject funds were transferred from Merrill Lynch itself, or by some bank account that a third party maintained on Merrill Lynch's behalf, this ***809** would not be relevant because, in any event, Merrill Lynch would be effectively and functionally 'making' the transfers, either personally or through such third party agent, and would nevertheless satisfy the 'making' requirement.

[ECF No. 685, p. 30, fn. 10].

The court also rejected Plaintiff's argument that "Merrill Lynch was not or should not be considered as 'acting as' a 'financial institution' in conducting the 2005 Transaction." Plaintiff maintained that Merrill Lynch's role as a financial institution terminated when Merrill Lynch and Holdings exchanged the Senior Notes and the money. *Id.* at 29-30. Thus, Plaintiff claimed that Merrill Lynch was not acting as a financial institution with respect to its disbursement of the Wire Payments to Defendants. *Id.* Rather, "Merrill Lynch was simply maintaining the money of its client (Holdings) in a client account and paying that money to whomever that client requested." *Id.* at 30. The court was not persuaded and opined that § 546(e) only requires that the settlement payment was "made by a financial institution"—and it "need not act in any particular role." *Id.* at 31.

Notably, the court further disagreed with Plaintiff's argument that Merrill Lynch was acting as a mere conduit and rejected *In re Munford, Inc.,* 98 F.3d 604 (11th Cir. 1996) (relied on by Plaintiff). The court concluded that the Eleventh Circuit's holding in *In re Munford, Inc.*— that § 546(e) was inapplicable to transfers in which a financial institution acted only as an intermediary--has been explicitly rejected by multiple Circuit Courts of Appeals including the Sixth Circuit, *QSI Holdings*, 571 F.3d at 551. In fact, the court went further to hold,

> Furthermore, although no party specifically made this argument, the Court also finds that, as an alternate and independent basis, the "financial institution" requirement may very well be satisfied by the identities of the entities to whom Merrill Lynch transferred the funds. As noted, § 546(e) applies to transfers "made by *or to* a financial institution" (emphasis added). There is no factual dispute that Merrill Lynch transferred the funds to Defendants' respective accounts with Chase Manhattan Bank and Comerica Bank.

[ECF No. 685, p. 31].

Accordingly, the court concluded on the first issue that "Defendants have met the necessary requirements of § 546(e) and have proven that Plaintiff cannot avoid the Wire Payments because they are settlement payments made by or to a financial institution." *Id.* at 32.

<u>2. Wire Payments qualify as a transfer made by or to a financial institution "in connection with a securities contract"</u>

Turning to the second issue, the court also ruled in Defendants' favor on their alternative basis for applying the safe harbor provision and found that the Wire Payments were transfers made by a financial institution in connection with a securities contract. Having concluded that the Senior Notes were "securities," the Note Purchase Agreement was a "securities contract," and the Wire Payments were transfers made by or to a financial institution, the remaining issue for the court to determine was whether the Wire Payments were "in connection with" the Note Purchase Agreement. [ECF No. 685, p. 32]. Here, Plaintiff conceded that "the exchange of the Senior Notes and money between Holdings and Merrill Lynch was 'in connection with a securities contract,' but argue[d] that the Wire Payments to Defendants were not so in connection." *Id.* at 32-33.

***810** In its analysis, the court noted that the Bankruptcy Code does not define "in connection with," but that case law interprets the phrase broadly, citing to *In re Lehman Bros. Holdings Inc.,* 469 B.R. 415, 442 (Bankr. S.D.N.Y. 2012); *Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC*, 2013 WL 1609154 *9 (S.D.N.Y. Apr. 15, 2013); *In re Quebecor World (USA) Inc.*, 480 B.R. 468, 479 n.8 (S.D.N.Y. 2012); and *Morse/Diesel, Inc. v. Provident Life and Acc. Ins. Co.,* 166 F.3d 1214, *4 (6th Cir. 1998) (unpublished). The court rejected Plaintiff's argument that the phrase should be interpreted narrowly to require that the transfers must have as their sole purpose the completion of the securities contract, as provided in *In re Qimonda Richmond, LLC,* 467 B.R. 318, 323 (Bankr. D. Del. 2012). The court explained that § 546(e) requires "a" connection and nothing more, further indicating that there is no temporal or existential requirement and that a transfer can be in connection with more than one thing. *Id.* at 34-35.

The court held that "Holdings was legally bound to use the Senior Note proceeds to pay Defendants. In other words, the 'connection' not only existed, it was a thoroughly contemplated and mandatory connection." *Id.* Therefore, the court determined that the Wire Payments were transfers made by a financial institution in connection with a securities contract – the Note Purchase Agreement.

Thus, the court ruled that Plaintiff could not avoid the transfers. *Id.* at 35-36. The court's conclusions on both issues were affirmed by the District Court. [ECF No. 745].

ii. The Court's Additional Findings on Remand

The following are additional findings of facts necessary for the determination of the third issue regarding whether Holdings qualifies as a "financial institution" because Merrill Lynch was acting as an agent or custodian for its customer Holdings. For this issue, the parties cited the Court to (1) the Commitment Letter; (2) the Strategic Alternatives Letter; (3) the Note Purchase Agreement; (4) the New

Credit Agreement; and (5) the Flow of Funds Memorandum. The facts are contained in these documents. For clarity, the Court will provide the relevant excerpts identifying the parties for each agreement, as the roles of some of the parties changed throughout this transaction. Additionally, the acronym "Merrill Lynch" is used for Merrill Lynch Capital Corporation in some of the agreements and Merrill Lynch Pierce Fenner & Smith in other agreements. [8] Also, most of these agreements were referenced by the Court's predecessor using different ECF citations. These documents were originally filed under seal and the parties reattached them to their supplemental briefs on remand. For correlation with their new arguments, the Court uses the parties' citations as identified in their latest supplemental briefs.

The first agreement signed on September 23, 2005 is titled "$290,000,000 Senior Credit Facility Commitment Letter" ("Commitment Letter") and is signed by Merrill Lynch Capital Corporation, identified as "Merrill Lynch" and Greektown Casino, L.L.C. ("Operating Company"). [ECF No. 817-1; Exh. A, pg. 2]. Merrill Lynch and the Operating Company, along with other parties, were parties to a then Existing Credit Agreement that was to mature on December 31, 2005. *Id.* In this Commitment Letter, the Operating Company seeks a commitment from Merrill Lynch to establish a new senior secured ***811** credit facility for the newly formed Michigan Limited Liability Company ("Company," this is Holdings) in the amount of $290,000,000. *Id.* at 3. The Commitment Letter additionally indicates that "the Operating Company and Merrill Lynch, Pierce, Fenner & Smith ('MLPFS') have entered into that certain letter agreement dated September 23, 2005 (the 'Strategic Alternatives Letter') pursuant to which the Operating Company has given MLPFS the mandate to arrange an offering of senior unsecured notes." *Id.* [9] Of significance, this Commitment Letter states that "[t]he agreements between the Operating Company and MLPFS with respect to such mandate, and the offering of the Senior Notes and the obligations of MLPFS with respect thereto, are set forth in the Strategic Alternatives Letter and are governed thereby." *Id.*

On September 24, 2005, MLPFS, identified as "Merrill Lynch," entered into a signed agreement with Greektown Casino, L.L.C. ("Greektown") "to act as exclusive financial advisor to ... Greektown and Greektown Holdings, L.L.C. ('Holdings') in connection with exploring Strategic Alternatives" ("Strategic Alternatives Letter"). [ECF No. 809-6; Exh. D, p. 2]. The strategic alternatives are specifically defined in the letter. [10] *Id.* The time frame for this ***812** engagement is from September 24, 2005 until July 31, 2006. *Id.* at 3. Pursuant to the Strategic Alternatives Letter,

> If, during such period, (i) Greektown or one or more of the Greektown Entities or (ii) solely with respect to any Strategic Alternative related to the Temporary Casino or the Permanent Casino (each, as defined in the Commitment Letter), Kewadin Casinos Gaming Authority (the **"Authority"),** the Sault Ste. Marie Tribe of Chippewa Indians (the **"Tribe")** or any instrumentality of the Authority or the Tribe on behalf of one or more of the Greektown Entities proposes to effect any Strategic Alternative, ***each of the Greektown Entities agrees and, if appropriate, agrees to cause the Tribe and the Authority to engage Merrill Lynch (or one or more of its affiliates as designated by Merrill Lynch) as its sole lead administrative agent, sole lead bookrunning manager, sole lead managing underwriter, sole tender and placement agent, sole dealer-manager, sole lead arranger or principal counterparty or exclusive financial advisor, as the case may be, in connection with any such transaction*** on customary terms mutually acceptable to Merrill Lynch, Holdings and Greektown (including without limitation, as applicable, representations, warranties, covenants, conditions, indemnities and fees) for such transactions at such time; provided, however, that Merrill Lynch may decline any such engagement in its sole and absolute discretion.

[ECF No. 809-6; Exh. D; ¶ 2] (emphasis added). The Strategic Alternatives Letter further clarifies that "any such engagement of Merrill Lynch shall only become a commitment by Merrill Lynch to assume such engagement when such engagement is set forth and agreed to by Merrill Lynch ***in a separate underwriting, financing, placement agency, dealer-manager, commitment or other applicable type of agreement***." *Id.* (Emphasis added). Thus, the Strategic Alternatives Letter "is not intended to constitute[ ] ... an agreement or commitment" by Merrill Lynch "to act as underwriter, placement agent, arranger or financial advisor in connection with any Strategic Alternative." *Id.* Notably, the Strategic Alternatives Letter provides that "Merrill Lynch has been retained to ***act solely as financial advisor*** to Greektown and the Greektown Entities. In such capacity, Merrill Lynch shall ***act as an independent contractor, and any duties of Merrill Lynch arising out of its engagement pursuant to this Agreement shall be owed solely to Greektown and the Greektown Entities***." [ECF No. 809-6; Exh. D; ¶ 7] (emphasis added).

On November 22, 2005, Holdings (as Issuer) and MLPFS (as Initial Purchaser) entered into a purchase agreement ("Note Purchase Agreement") identifying,

> Greektown Holdings, L.L.C., a Michigan limited liability company, as issuer (the "Company") and Greektown Holdings II, Inc., a Michigan corporation, as co-issuer ("Greektown Holdings" and, together with the Company, the "Issuers") confirm their agreement with Merrill Lynch & Co., Merrill Lynch, Pierce, Fenner, & Smith Incorporated ("Merrill Lynch") and each of the other Initial Purchasers named in Schedule A hereto (collectively, the "Initial Purchasers", which term shall also include any initial purchaser substituted as hereinafter provided in Section 11 hereof) for whom Merrill Lynch is acting as representative (in such capacity, the "Representative") with respect to the issue and sale by the Issuers and the purchase by the Initial Purchasers, acting severally and not jointly, of the respective principal amounts set forth in Schedule A attached hereto of $185,000,000 aggregate ***813** principal amount of the Issuers' 10¾% Senior Notes due 2013 (the "Securities")....

[ECF No. 809-7; Exh. E; p. 1].[11] The agreement provides, in pertinent part,

> The Issuers acknowledge and agree that ... (ii***) in connection with the offering contemplated hereby and the process leading to such transaction, the Initial Purchasers are and have been acting solely as principals and are not the agents or fiduciaries of the Issuers or any of their creditors, employees or any other party***, (iii) the ***Initial Purchasers have not assumed and will not assume an advisory or fiduciary responsibility in favor of the Issuers with respect to the offering contemplated hereby or the process leading thereto*** (irrespective of whether the Initial Purchasers have advised or are currently advising the Issuers on other matters) and the ***Initial Purchasers have no obligation to the Issuers with respect to the offering contemplated hereby except the obligations expressly set forth in this Agreement,*** (iv) ***the Initial Purchasers and their affiliates may be engaged in a broad range of transactions that involve interests that differ from those of the Issuers*** and (v) the Initial Purchasers have not provided any legal, accounting, regulatory or tax advice with respect to the offering contemplated hereby and the Issuers have consulted their own legal, accounting, regulatory and tax advisors to the extent they have deeded appropriate.

[ECF No. 809-7; Exh. E; p. 2] (emphasis added).

On December 2, 2005, certain parties entered into a credit agreement ("New Credit Agreement") as follows,

> Credit Agreement, dated as of December 2, 2005, among Greektown Holdings, L.L.C. ("Greektown Holdings") and Greektown Holdings II, Inc. ("Greektown Corporation"), as the Borrowers, various financial institutions, as the lenders, Merrill Lynch Pierce, Fenner and Smith Incorporated ("MLPFS"), as the sole Lead Arranger and the Sole Bookrunner, and the syndication agent, Merrill Lynch Capital Corporation, as the Administrative Agent ("MLCC"), and documentation agent(s) party thereto (the "New Credit Agreement").

[ECF No. 817-4; Exh. C – New Credit Agreement, p. 13]. As to MLCC's role as the Administrative Agent, section 9.1 (a) and (b) states,

> (a) ***Each Lender hereby designates MLCC to act as the Administrative Agent under and for purposes of this Agreement and the other Loan Documents and authorizes MLCC, in its capacity as the Administrative Agent, to act on behalf of such Lender under this Agreement and the other Loan Documents.*** Subject to the terms and conditions hereof, ***MLCC accepts such appointment and agrees to act as the Administrative Agent on behalf of the Lenders and to perform the duties of the Administrative Agent*** in accordance with the provisions of this Agreement and the other Loan Documents. ***Each Lender agrees that the Administrative Agent, at its option, may delegate its duties, rights and powers, and that each sub-agent shall implement all such duties, rights and powers on behalf of the Administrative Agent*** ***814** that are required of the Administrative Agent on behalf of the Lenders. The Administrative Agent and such sub-agent may perform any and all of their duties and exercise their rights and powers through their respective Affiliates, directors, officers, employees, agents and advisors. The exculpatory provisions of Section 9.3 shall apply to such sub-agent and each such Affiliate, director, officer, employee, agent and advisor and to their respective activities. The Administrative Agent may replace such sub-agent upon consent of the Required Lenders and the exculpatory provisions of Section 9.3 shall apply to such replacement sub-agent.
>
> (b) Each Lender authorizes the Administrative Agent to act on behalf of such Lender under this Agreement and the other Loan Documents and, in the absence of other written instructions from the Required Lenders received from time to time by the Administrative Agent (with respect to which the Administrative Agent agrees that it will comply, except as otherwise provided in this Section or as otherwise advised by counsel in order to avoid contravention of applicable law), to exercise such powers hereunder and thereunder as are specifically delegated to or required of the Administrative Agent, by the terms hereof and thereof, together with such powers as may be reasonably incidental thereto.

[ECF No. 817-4, Exh. C, p. 124-25, § 9.1(a) and (b)] (emphasis added). With regard to MLPFS, section 9.9 of the New Credit Agreement provides,

> The Sole Lead Arranger, the Sole Book Runner, the Syndication Agent and the Co-Documentation Agents. ***The Sole Lead Arranger, the Sole Book Runner, the Syndication Agent and the Co-Documentation Agents hereunder shall not have any right, power, obligation, liability, responsibility or duty under this Agreement (or any other Loan Document) other than those applicable to it in its capacity as a Lender to the extent it is a Lender hereunder.*** Without limiting the foregoing, the Lender so identified as the "**Sole Lead Arranger**" the "**Sole Book Runner**", the "**Syndication Agent**", and the "**Co-Documentation Agents**" shall not have or be deemed to have any fiduciary relationship with any Lender. Each Lender acknowledges that it has not relied, and will not rely, on the Lender so identified as the "**Sole Lead Arranger**" the "**Sole Book Runner**", the "**Syndication Agent**" or the "**Co-**

> **Documentation Agents**” in deciding to enter into this Agreement and each other Loan Document to which it is a party or in taking or not taking action hereunder or thereunder.

[ECF No. 817-4; Exh. C – New Credit Agreement, § 9.9].

Also dated December 2, 2005 is the Flow of Funds Memorandum, which “sets forth the fund transfer procedures followed in connection with” the 2005 Transaction. [ECF No. 809-11; Exh. G; p. 1]. This Memorandum lists the principal documents related to the 2005 Transaction and the specific transactions that are deemed to have occurred simultaneously. [ECF No. 809-11; Exh. G; p. 2-3]. This includes the transaction expenses. “Greektown Holdings paid $3,838,007.88 in the aggregate for transaction fees at the closing as set forth in more detail in paragraph E below.” [ECF No. 809-11; Exh. G; p. 3; § 2A]. As it relates to MLPFS and MLCC only, paragraph E provides,

1. Note Purchase Agreement Fees and Expenses. Greektown Holdings paid the following fees and expenses pursuant ***815** to the Note Purchase Agreement:

   • MLPFS Fee. $3,700,000.00 in immediately available funds was transferred by Greektown Holdings to MLPFS for placement fees pursuant to the terms of the Note Purchase Agreement.

   • MLPFS Expenses. $96,157.88 in immediately available funds was transferred by Greektown Holdings to MLPFS for expenses incurred pursuant to the terms of the Note Purchase Agreement.

   ...

2. New Credit Agreement Fees and Expenses. Greektown Holdings paid the following fees and expenses pursuant to the Note Purchase Agreement:

   • MLCC Fees. $5,075,000.00 in immediately available funds was transferred by Greektown Casino to MLCC for closing fees pursuant to the terms of the New Credit Agreement and related agreements.

   • MLCC Administrative Fees. $100,000.00 in immediately available funds was transferred by Greektown Casino to MLCC for administrative agent fees pursuant to the terms of the New Credit Agreement and related agreements.

   • MLCC Expenses. $89,240.60 in immediately available funds was transferred by Greektown Casino to MLCC for expenses pursuant to the terms of the New Credit Agreement and related agreements.

   ...

[ECF No. 809-11; Exh. G; p. 5-6; § E]. Finally, the Flow of Funds Memorandum includes an account transfers section wherein the parties acknowledge that the actual net transfers summarized in a chart were made. [ECF No. 809-11; Exh. G; p. 6-7]. Of relevance, (1) $90,491,741.62 from MLPFS (transferor) to Papases (recipient); and (2) $55,000,000 from MLPFS (transferor) to Gatzaroses (recipient). [ECF No. 809-11; Exh. G; p. 6-7]. MLPFS, as transferor, additionally made eight other transfers in the aggregate amount of $23,804,162.40 to different entities and/or individuals. [ECF No. 809-11; Exh. G; p. 7-8]. MLCC, as transferor, also made eight transfers in the aggregate amount of $184,735,486.48 to different entities and/or individuals. [ECF No. 809-11; Exh. G; p. 8-9]. The Flow of Funds Memorandum does not contain any provision modifying either MLPFS' or MLCC's relation to Holdings as provided in other agreements.

b. Conclusions of Law

i. Merit Management

Merit Management resolved a circuit split by ruling in favor of the minority circuits that “the only relevant transfer for purposes of the safe harbor is the transfer that the trustee seeks to avoid.” *Id.* *Merit Management* overruled *In re QSI Holdings, Inc.*, 571 F.3d 545 (6th Cir. 2009). The Supreme Court in *Merit Management* was tasked with “determin[ing] how the safe harbor operates in the context of a transfer that was executed via one or more transactions, *e.g.,* a transfer from A → D that was executed via B and C as intermediaries, such that the component parts of the transfer include A → B → C → D.” *Merit Management*, 138 S. Ct. at 888. The issue as framed provides,

> If a trustee seeks to avoid the A → D transfer, and the § 546(e) safe harbor

> is invoked as a defense, the question becomes: When determining whether the § 546(e) securities safe harbor saves the transfer from avoidance, should courts ***816** look to the transfer that the trustee seeks to avoid (*i.e.,* A → D) to determine whether that transfer meets the safe-harbor criteria, or should courts look also to any component parts of the overarching transfer (*i.e.,* A → B → C → D)?

Id. Per *Merit Management*, the safe harbor will not insulate a transfer merely because a qualified intermediary acted as a conduit between the debtor and the transferee.

By way of background, debtor Valley View Downs, LP's ("Valley View") and Bedford Downs were competing for a limited harness-racing license in the state of Pennsylvania. Ultimately, the two companies agreed that Bedford Downs would withdraw as a competitor for the license and in exchange Valley View would "purchase all of Bedford Downs' stock for $55 million after Valley View obtained the license." *Id.* As planned, after Valley View was awarded the license, it proceeded with the corporate acquisition. The actual transfer occurred as follows,

> Valley View proceeded with the corporate acquisition required by the parties' agreement and arranged for the Cayman Islands branch of Credit Suisse to finance the $55 million purchase price as part of a larger $850 million transaction. Credit Suisse wired the $55 million to Citizens Bank of Pennsylvania, which had agreed to serve as the third-party escrow agent for the transaction. The Bedford Downs shareholders, including petitioner Merit Management Group, LP, deposited their stock certificates into escrow as well. At closing, Valley View received the Bedford Downs stock certificates, and in October 2007 Citizens Bank disbursed $47.5 million to the Bedford Downs shareholders, with $7.5 million remaining in escrow at Citizens Bank under the multiyear indemnification holdback period provided for in the parties' agreement. Citizens Bank disbursed that $7.5 million installment to the Bedford Downs shareholders in October 2010, after the holdback period ended. All told, Merit received approximately $16.5 million from the sale of its Bedford Downs stock to Valley View. Notably, the closing statement for the transaction reflected Valley View as the "Buyer," the Bedford Downs shareholders as the "Sellers," and $55 million as the "Purchase Price." App. 30.

Id. Despite securing the last harness-racing license, "Valley View never got to open its racino" and consequently filed for Chapter 11 bankruptcy. *Id.*

In the adversary proceeding, the trustee of the litigation trust, FTI Consulting, Inc. ("FTI"), sought to avoid Valley View's allegedly fraudulent transfers of $16,503,850 to transferee Merit Management Group, LP ("Merit") pursuant to 548(a)(1)(B). *Id.* at 891. Merit argued that "the Court should look not only to the Valley View–to–Merit end-to-end transfer, but also to all its component parts." [12] Under this view, Merit claimed that the safe harbor provision of § 546(e) applied to bar the avoidance action "because the transfer was a 'settlement payment ... made by or to (or for the benefit of)'; a covered 'financial institution'—here, Credit Suisse and Citizens Bank." *Id.* at 891-92. "FTI, by contrast, ***817** maintain[ed] that the only relevant transfer for purposes of the § 546(e) inquiry is the overarching transfer between Valley View and Merit"; and "[b]ecause that transfer was not made by, to, or for the benefit of a financial institution," the safe harbor does not apply. *Id.*

The full language of § 546(e) provides,

> ***Notwithstanding sections 544, 545, 547, 548(a)(1)(B), and 548(b) of this***

> ***title, the trustee may not avoid a transfer that is a*** margin payment, as defined in section 101, 741, or 761 of this title, or ***settlement payment***, as defined in section 101 or 741 of this title, ***made by or to (or for the benefit of) a*** commodity broker, forward contract merchant, stockbroker, ***financial institution***, financial participant, or securities clearing agency, ***or that is a transfer made by or to (or for the benefit of) a*** commodity broker, forward contract merchant, stockbroker, ***financial institution***, financial participant, or securities clearing agency***, in connection with a securities contract***, as defined in section 741(7), commodity contract, as defined in section 761(4), or forward contract, that is made before the commencement of the case, ***except under section 548(a)(1)(A) of this title.***

Id. (Emphasis added).

After analyzing "[t]he language of § 546(e), the specific context in which that language is used, and the broader statutory structure[,]" the Supreme Court determined that "all support the conclusion that the relevant transfer for purposes of the § 546(e) safe-harbor inquiry is the overarching transfer that the trustee seeks to avoid under one of the substantive avoidance provisions." *Id.* at 892-93. In so ruling, the Supreme Court emphasized that § 546(e) is a limitation on an otherwise avoidable transfer,

> The transfer that the "the trustee may not avoid" is specified to be "a transfer that *is* " either a "settlement payment" or made "in connection with a securities contract." § 546(e) (emphasis added). Not a transfer that involves. Not a transfer that comprises. But a transfer that is a securities transaction covered under § 546(e). The provision explicitly equates the transfer that the trustee may otherwise avoid with the transfer that, under the safe harbor, the trustee may not avoid. In other words, to qualify for protection under the securities safe harbor, § 546(e) provides that the otherwise avoidable transfer itself be a transfer that meets the safe-harbor criteria.

Id. at 894.

The Supreme Court explained that "it is only logical to view the pertinent transfer under § 546(e) as the same transfer that the trustee seeks to avoid pursuant to one of its avoiding powers." The *Merit Management* court emphasized, however, that "the trustee is not free to define the transfer that it seeks to avoid in any way it chooses. Instead, that transfer is necessarily defined by the carefully set out criteria in the Code." *Id.* Thus, once an avoidance action is filed, a defendant "is free to argue that the trustee failed to properly identify an avoidable transfer under the Code, including any available arguments concerning the role of component parts of the transfer." *Id.* However, "[i]f a trustee properly identifies an avoidable transfer, ... the court has no reason to examine the relevance of component parts when considering a limit to the avoiding power[.]" *Id.* at 894–95. Thus, because Merit did not argue "that FTI improperly identified the Valley View–to–Merit transfer as the transfer to be avoided," the Supreme Court held that "the Credit Suisse and Citizens Bank component parts are simply irrelevant to the analysis under § 546(e)." *Id.* at 895. Ultimately, "[b]ecause the parties ***818** d[id] not contend that either Valley View or Merit is a 'financial institution' or other covered entity, [the Supreme Court concluded that] the transfer falls outside of the § 546(e) safe harbor." *Id.* at 897.

The Supreme Court disagreed with petitioner that by adding "the 2006 addition of the parenthetical '(or for the benefit of)' to § 546(e)[ ] ... Congress meant to abrogate the 1998 decision of the Court of Appeals for the Eleventh Circuit in *In re Munford, Inc.,* 98 F.3d 604, 610 (11th Cir. 1996) (*per curiam*), which held that the § 546(e) safe harbor was inapplicable to transfers in which a financial institution acted only as an intermediary." *Id.* Rather, "Congress' addition of this language ... is rooted in the text of the statute as a whole" and meant to "ensure[ ] that the scope of the safe harbor matched the scope of the avoiding powers." *Id.* Stressing that "by tracking language already included in the substantive avoidance provisions, the amendment reinforces the connection between the inquiry under § 546(e) and the otherwise avoidable transfer that the trustee seeks to set aside." *Id.* at 895-96.

Likewise, the Supreme Court was not persuaded by Merit's argument that the inclusion of securities clearing agencies as covered entities under § 546(e), meant Congress intended to "protect intermediaries without reference to any beneficial interest in the transfer." *Id.* at 896. Merit's reasoning was that "a securities clearing agency is defined as, *inter alia,* an intermediary in payments or deliveries made in connection with securities transactions, see 15 U.S.C. § 78c(23)(A) and 11 U.S.C. § 101(48)." *Id.* The Supreme Court provided a different explanation,

> Reading § 546(e) to provide that the relevant transfer for purposes of the safe harbor is the transfer that the trustee seeks to avoid under a substantive avoiding power, the question then becomes whether that transfer was "made by or to (or for the benefit of)" a covered entity, including a securities clearing agency. If the transfer that the trustee seeks to avoid was made "by" or "to" a securities clearing agency (as it was in *Seligson*), then § 546(e) will bar avoidance, and it will do so without regard to whether the entity acted only as an intermediary. The safe harbor will, in addition, bar avoidance if the transfer was made "for the benefit of" that securities clearing agency, even if it was not made "by" or "to" that entity. This reading gives full effect to the text of § 546(e).

Id. at 896.

Finally, the Supreme Court emphasized the statutory purpose of enacting the safe harbor provision,

> Congress was concerned about transfers "*by* an industry hub" specifically: The safe harbor saves from avoidance certain securities transactions "made by or to (or for the benefit of)" covered entities. See § 546(e). Transfers "***through***" a covered entity, conversely, appear nowhere in the statute. And although Merit complains that, absent its reading of the safe harbor, protection will turn "on the identity of the investor and the manner in which it held its investment," that is nothing more than an attack on the text of the statute, which protects only certain transactions "made by or to (or for the benefit of)" certain covered entities.

Id. at 897 (emphasis added). [13]

ii. The Sixth Circuit's Mandate and Law of the Case Doctrine

The Court will now identify the issues properly before it on remand.

***819** In determining the issues to address on remand, the Court is guided by the framework for the law of the case doctrine discussed in *Westside Mothers v. Olszewski*, 454 F.3d 532, 538 (6th Cir. 2006). There the Sixth Circuit stated,

> The law of the case doctrine provides that "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Scott v. Churchill,* 377 F.3d 565, 569–70 (6th Cir.2004) (quoting *Arizona v. California,* 460 U.S. 605, 618, 103 S.Ct. 1382, 75 L.Ed.2d 318 (1983)). The doctrine precludes a court from reconsideration of issues "decided at an early stage of the litigation, either explicitly or by necessary inference from the disposition." *Hanover Ins. Co. v. Am. Eng'g Co.,* 105 F.3d 306, 312 (6th Cir.1997) (quoting *Coal Res., Inc. v. Gulf & Western Indus., Inc.,* 865 F.2d 761, 766 (6th Cir.1989)). Pursuant to the law of the case doctrine, and the complementary "mandate rule," upon remand the trial court is bound to "proceed in accordance with the mandate and law of the case as established by the appellate court." *Id.* (quoting *Petition of U.S. Steel Corp.,* 479 F.2d 489, 493 (6th Cir.), *cert. denied,* 414 U.S. 859, 94 S.Ct. 71, 38 L.Ed.2d 110 (1973)). The trial court is required to "implement both the letter and the spirit" of the appellate court's mandate, "taking into account the appellate court's opinion and the circumstances it embraces." *Brunet v. City of Columbus,* 58 F.3d 251, 254 (6th Cir.1995).
>
> The law of the case doctrine precludes reconsideration of a previously decided issue unless one of three "exceptional circumstances" exists: (1) where substantially different evidence is raised on subsequent trial; (2) where a subsequent contrary view of the law is decided by the controlling authority; or (3) where a decision is clearly erroneous and would work a manifest injustice. *Hanover Ins. Co.,* 105 F.3d at 312.

Id. at 538.

After careful consideration, the Court concludes that it will limit its reconsideration to issues that are directly implicated by *Merit Management*. For the reasons explained below, the Court finds that it is unnecessary to reconsider the remaining issues because even after adopting the Court's predecessor's findings and conclusions, the Court holds that Defendants fail to satisfy the requirements of § 546(e).

The Court concludes that the first issue—identifying the relevant transfer to test in the § 546(e) inquiry--is directly implicated by *Merit Management*. The Supreme Court in *Merit Management* held that "the relevant transfer for purposes of the § 546(e) safe-harbor inquiry is the overarching transfer that the trustee seeks to avoid under one of the substantive avoidance provisions." *Merit Mgmt. Grp., LP*, 138 S. Ct. at 893. Here, the Court's predecessor utilized the step transaction doctrine to similarly conclude that the 2005 Transaction must be viewed as a whole. Despite reaching the same legal conclusion, the court misapplied the legal conclusion to its analysis by considering a component part of the transaction. Namely the transfer from Merrill Lynch to the Defendants. [14] *Merit Management* makes clear ***820** that once the trustee identifies the transfer it seeks to avoid, and defendant does not object to such identification, the component parts are irrelevant to the analysis of the safe harbor provision.

The second issue, whether the 2005 Transaction was for Merrill Lynch's benefit, was not considered in the Opinion. The Opinion references Merrill Lynch's role in its discussion and conclusion that "the financial institution need not act in any particular role." Again, the Opinion declined to follow *In re Munford, Inc.* *Merit Management* contains a brief discussion of the parenthetical "(for the benefit of)." The Court will address this issue in light of that discussion.

The third issue is the argument left open by footnote two of *Merit Management*. That is, whether Holdings can itself be deemed a financial institution as defined by § 101(22)(A) by virtue of its status as a customer of Merrill Lynch. It is the most challenging as it encompasses issues that were addressed by the Court's predecessor that now combine with new factual and legal issues. Section 101(22)(A) defines the term "financial institution" as:

> (A) a Federal reserve bank, or an entity that is a commercial or savings bank, industrial savings bank, savings and loan association, trust company, federally-insured credit union, or receiver, liquidating agent, or conservator for such entity and, when any such Federal reserve bank, receiver, liquidating agent, conservator or entity is acting as agent or custodian for a customer (whether or not a "customer", as defined in section 741) in connection with a securities contract (as defined in section 741) such customer;

§ 101(22)(A). As discussed in part IV(a)(i) of this opinion, the Court's predecessor decided that Merrill Lynch was a financial institution, the challenged transfers were settlement payments, and the transfers were made in connection with a securities contract. These issues were not specifically addressed in *Merit Management*. Plaintiff urges this Court to reconsider these issues claiming they fall within the exceptions to the law of the case doctrine. Because the Court holds that Merrill Lynch was not acting as an agent or a custodian for Holdings (the other requirement of § 101(22)(A) that Defendants must establish), it is unnecessary to reconsider the issues already addressed and decided by the Court's predecessor.

iii. Analysis

1. <u>Identifying the Transfer</u>

Per *Merit Management*, the relevant transfer is the one that is identified by the trustee and is otherwise an avoidable transfer. Here, Plaintiff identifies the transfer it seeks to avoid as the transfer from Holdings to Defendants. Defendants do not argue that Plaintiff improperly identified the Holdings-to-Defendants transfer as the transfer to be avoided. Defendants attempt to argue that the 2005 transfers to them were made by Merrill Lynch, as a financial institution, with Holdings being the mere conduit. Such a characterization is disingenuous. [15] The transfer ***821** cannot be identified as one from or by Merrill Lynch, as concluded by the Court's predecessor. Plaintiff could not avoid a transfer of Merrill Lynch's property as Merrill Lynch is not the debtor and its property is not property of the estate. *Merit Management* instructs that the "focus must remain on the transfer the trustee sought to avoid." Here, the transfer to be avoided is the one from the transferor (Holdings) to the transferee (Defendants). Per *Merit Management*, Merrill Lynch, Chase Manhattan Bank and Comerica Bank ***(component parts of the 2005 Transaction) "are simply irrelevant to the analysis under § 546(e).***" *Merit Management*, 138 S. Ct. at 895. (Emphasis added).

Consequently, the 2005 transfers fall outside of the § 546(e) safe harbor. Neither party disputes that neither Holdings nor the Defendants, on their own, are a financial institution or other covered entity.

2. Was the 2005 Transaction for Merrill Lynch's Benefit?

Defendants alternatively argue that the 2005 Transaction was "for the benefit of" Merrill Lynch. [16] Defendants assert that Merrill Lynch was not a mere intermediary, but rather an integral participant with many roles in the overall transfer, "serving as the underwriter, initial purchaser of the Senior Notes, the agent for the other purchasers of the Senior Notes, recipient of the note proceeds, ... exchange agent, ... and disbursing bank." [Def's Motion, ECF No. 782, p. 13]. Furthermore, Defendants stress that had the transaction not been concluded, Merrill Lynch would not realize the benefit of its bargain – various substantial fees and related compensation from the sale of the notes.

Plaintiff, however, contends that a transfer is "for the benefit of" an entity only if the benefit to that entity is "direct, ascertainable and quantifiable." *In re Int'l Mgmt. Assoc.*, 399 F.3d 1288, 1293 (11th Cir. 2005). Furthermore, such benefit must also "correspond[ ] to the value of the property transferred or received." *Mack v. Newton*, 737 F.2d 1343, 1359-60 (5th Cir. 1984). Here, Plaintiff points out that Defendants only suggest that Merrill Lynch, as a noteholder, had an interest in the "ongoing operations of the Casino," which the transfers to the Defendants helped to preserve. Plaintiff claims any such benefit, was indirect at best, unquantified, and lacks any correspondence to the value of the transfers at issue.

In reply, Defendants claim that Merrill Lynch received a significant, quantifiable benefit from participation in the 2005 Transaction and benefitted more than any other party. Defendants emphasize that Merrill Lynch made a significant investment in Holdings through the purchase of at least $160,000,000 in the Senior Notes, that carried an interest rate of 10.75%, a significant rate of return. Defendants point to the Offering Memorandum which they claim confirms that several millions of dollars in fees and expenses would be paid to ***822** Merrill Lynch out of the funds generated from the note sale and for the new credit facility.

As *Merit Management* explains, the addition of the phrase "for the benefit of" to the 2006 amendment to § 546(e) was intended to track the same language in the other substantive avoidance provisions. This ensured that the scope of the safe harbor matched the scope of the avoiding powers. *Id.* at 895-96. Accordingly, the Court will look to other avoiding provisions to determine the interpretation of the phrase "for the benefit of" in the scope of those avoiding powers. Defendants do not dispute the application of Plaintiff's cited cases addressing the phrase "for the benefit of" – they only argue that the standard has been met. Plaintiff's cited cases provide that the relevant phrase is typically applied in the context of an individual or an entity that is a creditor or guarantor of debtor's debt.

In reviewing the cited authority, the Court concludes that Defendants must establish that Merrill Lynch received a direct, ascertainable, and quantifiable benefit corresponding in value to the payments to Defendants. Both of Plaintiff's cases address the phrase "for whose benefit such transfer was made" in 11 U.S.C. 550(a)(1). The statute allows the trustee to "recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from--... the entity for whose benefit such transfer was made[.]" § 550(a)(1). In the first case, *Mack,* 737 F.2d at 1359–60, the Fifth Circuit held that "an incidental, unquantifiable, and remote benefit bearing no necessary correspondence to the value of the property transferred or received" is insufficient to satisfy the "for the benefit of" requirement of § 550. Subsequently, the Eleventh Circuit in *In re Int'l Mgmt. Assoc.* addressed whether recovery of a payment under "§ 550(a)(1) requires us to assess whether providing the unquantifiable key to a larger transaction can qualify a party as an 'entity for whose benefit' a putatively voidable transfer is made." *In re Int'l Mgmt. Assoc.*, 399 F.3d at 1289. The court there concluded that under the facts presented, the bankruptcy court interpreted the term "benefit" too broadly to meet the requirements of § 550(a)(1),

> The overarching purpose of the transaction before us was to obtain a loan from Healthcare REIT to restructure the financing of the assisted living facilities and to provide capital for continued operations. A condition of that loan was that Reily be the sole owner of the stock of the debtor corporations. Therefore, the acquisition of the stock was in the interest of furthering the loan and the restructuring—goals which fulfilled Reily's purposes. Hence, Reily was "benefitted" in a larger sense when he obtained complete control of the debtors' assets and therefore fulfilled a necessary condition of obtaining the funds from Health Care REIT. This is the "benefit" that both the trustee and the bankruptcy court attributed to Reily in order to underpin liability.... However, *this sort of unquantifiable advantage is not the sort of "benefit" contemplated by 11 U.S.C. § 550(a)*.

Id. (Emphasis added). The Eleventh Circuit instructed that "[t]he paradigm case of a benefit under § 550(a) is the benefit to a guarantor by the payment of the underlying debt of the debtor." *Id.* at 1292. The court explained that,

> The example of a debt and a guarantor affords some insight into the intention of Congress in enacting § 550(a). The fact that Reily attained complete control over the debtors' assets does not give rise to a quantifiable benefit or one bearing the "necessary correspondence ***823** to the value of the property transferred or received." *Mack v. Newton,* 737 F.2d 1343, 1359–60 (5th Cir.1984).3

Id. The Eleventh Circuit stressed that there needs to be a "direct benefit" that is tangible or quantifiable. *Id.*

The Court holds that Defendants failed to meet their burden to establish that Merrill Lynch received a direct, ascertainable, and quantifiable benefit corresponding in value to the payments to Defendants that Plaintiff seeks to avoid and recover. The fact that several millions of dollars in fees and expenses would be paid to Merrill Lynch out of the funds generated from the note sale and for the new credit facility is insufficient to establish the 2005 Transaction was "for the benefit of" Merrill Lynch. This is not to say that Merrill Lynch did not benefit from the 2005 Transaction. Of course, Merrill Lynch benefitted by receiving fees for services provided to Holdings. However, the benefit it received is not the type of benefit contemplated by the phrase "for the benefit of." Rather, the fees associated with its services were a benefit that was incidental to the 2005 Transaction. Moreover, the fees associated with its services do not correspond in value to the 2005 transfers to the Defendants. Therefore, the Court concludes that the 2005 Transaction was not for the benefit of Merrill Lynch.

3. Is Holdings by § 101(22)(A) deemed to be a "financial institution" because Merrill Lynch was acting as agent or custodian for its customer Holdings in making the transfers?

Lastly, as their third basis for relief Defendants raise footnote two of *Merit Management*. Defendants claim that Holdings is by § 101(22)(A) deemed to be a "financial institution" because Merrill Lynch was acting as an agent or a custodian for its customer Holdings when making the transfers. As noted, footnote two opens the door to another avenue for protection under the safe harbor provision. Section 101(22)(A) defines the term "financial institution" as

> **(A)** a Federal reserve bank, **or an entity that is a commercial or savings bank**, industrial savings bank, savings and loan association, trust company, federally-insured credit union, or receiver, liquidating agent, or conservator for such entity **and**,

> **when any such** Federal reserve bank, receiver, liquidating agent, conservator or **entity is acting as agent or custodian for a customer** (whether or not a "customer", as defined in section 741) **in connection with a securities contract** (as defined in section 741) such customer;

§ 101(22)(A). (Emphasis added). As previously stated, the Court will limit its analysis to the "acting as agent or a custodian" for a customer requirement of the definition.

a. Was Merrill Lynch an "Agent" of Holdings?

Defendants first claim that Holdings is by § 101(22)(A) deemed to be a "financial institution" because Merrill Lynch was acting as an agent (underwriter and disbursing agent) for its customer Holdings in making the transfer. The Bankruptcy Code does not define the term "agent," thus, the parties urge the Court to look at the general common-law definition of agency. The parties dispute whether a fiduciary relationship is required to form an agency relationship.

To determine whether an agency relationship exists, Defendants rely on a test articulated by the Michigan Supreme Court in *St. Clair Intermediate School Dist. v. Intermediate Educ. Ass'n,* 458 Mich. 540, 557-58, 581 N.W.2d 707, 716 (Mich. 1998),

> ***824** Under the common law of agency, in determining "[w]hether an agency has been created," we consider "the relations of the parties as they in fact exist under their agreements or acts" and note that in its broadest sense agency "includes every relation in which one person acts for or represents another by his authority." *Saums v. Parfet*, 270 Mich. 165, 258 N.W. 235, 237 (Mich. 1935). We further recognized in *Saums* that "[t]he characteristic of the agent is that he is a business representative. His function is to bring about, modify, affect, accept performance of, or terminate contractual obligations between his principal and third persons." *Id.* at 235. Also fundamental to the existence of an agency relationship is the right to control the conduct of the agent, *Capitol City Lodge No. 141, FOP v. Meridian Twp.*, 90 Mich.App. 533, 282 N.W.2d 383 (Mich. Ct. App. 1979), with respect to the matters entrusted to him. See *Int'l Longshoremen's Ass'n, AFL–CIO v. NLRB*, 56 F.3d 205, 211 (D.C. Cir. 1995) (citing 1 Restatement, Second, Agency, § 14, p. 60, and cases applying this principle).

Id. Under this test, Defendants assert that an agent does not have to be a fiduciary. While Defendants acknowledge that a fiduciary duty may arise out of an agency relationship, no such duty is required under Michigan law to determine whether an agency relationship has been created. Defendants additionally cite to the Second Circuit case *In re Tribune Co.,* 946 F.3d 66 (2d Cir. 2019), which held that "a financial institution acted as an agent for its customer where that financial institution accepted funds as part of a securities transaction and further effectuated that transaction." [ECF No. 809, p. 12].

Plaintiff, however, contends that the federal common law—not Michigan law—governs the interpretation of a federal statute. Plaintiff claims that federal common law defines agency as "the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act." Restatement (Third) of Agency § 1.01 (2006). Plaintiff additionally cites to *Keating v. Peterson's Nelnet, LLC*, 615 Fed. Appx. 365, 372 (6th Cir. 2015); *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322, 112 S. Ct 1344, 117 L.Ed.2d 581 (1992); and *Soberay Mach. & Equip. Co. v. MRF Ltd., Inc.*, 181 F.3d 759, 767 (6th Cir. 1999) (internal citation omitted) ("a party 'who contracts *to accomplish something for another or to deliver something to another,* but who is not acting as a fiduciary for the other, is a non-agent contractor. He may be anyone who has made a contract and who is not an agent.' ").

Either way, Plaintiff claims that Michigan law endorses the same federal common law definition of agency, citing to *Leonardo Harper LLC v. Landmark Commer. Real Estate Servs.*, 2017 WL 1103534, *3, 2017 Mich. App. LEXIS 446, *7–8 (Mich. Ct. App. Mar. 21, 2017) ("an agency relationship is a fiduciary relationship created by express or implied contract or by law, in which one party (the agent) may act on behalf of another party (the principal) and bind that other party by words or actions."). Furthermore, Plaintiff asserts that *St. Clair Intermediate Sch. Dist.,* relied on by Defendants, does not contradict the fiduciary requirement. Plaintiff emphasizes that *St. Clair Intermediate Sch. Dist.,* did not discuss what gives rise to an agency relationship, but rather held that, once agency is established, the principal has the right to control its agent. Moreover, Plaintiff maintains that even *In re Tribune* applied the fiduciary relationship requirement to its determination of whether ***825** an agency relationship existed. Plaintiff differentiates *In re Tribune,* arguing that in that case it was undisputed that Tribune was the customer of a financial institution it had hired to make distributions in connection with a securities contract. Here, Plaintiff maintains that there is no evidence that MLPFS was a financial institution or that Holdings was its customer in connection with its agreement to sell MLPFS Notes.

Finally, because § 546(e) is an affirmative defense, Plaintiff maintains that the burden is on Defendants to establish the elements of an agency relationship – mutual consent to a fiduciary relationship in which the agent acts on the principal's behalf and under the principal's control. Plaintiff relies on *In re Grand Eagle Cos.,* 288 B.R. 484, 495 (Bankr. N.D. Ohio 2003). Furthermore, per *Beck-Wilson v. Principi*, 441 F.3d 353, 365 (6th Cir. 2006), to prevail on summary judgment, Defendants must point to evidence " 'establishing the defense so clearly that no rational jury could have found to the contrary.' " *Id.*

In reply, Defendants disagree with Plaintiff's interpretation of *In re Tribune* as requiring a fiduciary relationship for finding agency. Defendants argue that in making the agency determination, the *Tribune* Court looked at the following factors: (1) the principal manifests intent to grant authority to the agent to act on the principal's behalf and subject to the principal's control and (2) "the agent manifests assent or otherwise consents to so act." *In re Tribune*, 946 F.3d at 79. Defendants claim that the Second Circuit found the agency requirement satisfied where the financial institution accepted the funds as part of the securities transaction and further effectuated the transaction. *Id.*

The Court concludes that the cited cases analyzing agency under either Michigan common law or federal common law both cite to the Restatement (Third) of Agency § 1.01 (2006), [17] which provides,

> [a]gency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act.

Id. Under this definition, the fiduciary relationship is not a prerequisite for the finding of agency; rather, it is the result of such an agency relationship. Comment *e* to Restatement § 1.01 explains that if an agency relationship exists, the agent owes a fiduciary obligation to the principal,

> The scope of an agency relationship defines the scope of an agent's duties to a principal and a principal's duties to an agent. If the relationship between two persons is one of agency as defined in this section, the agent owes a fiduciary obligation to the principal. The word "fiduciary" appears in the black-letter definition to characterize or classify the type of legal relationship that results if the elements of the definition are present and to emphasize that an agency relationship creates the agent's fiduciary obligation as a matter of law.
>
> As a general matter, the term "fiduciary" signifies that an agent must act loyally in the principal's interest as well as on the principal's behalf.

***826** Restatement (Third) of Agency § 1.01 (2006) (cmt. *e*). See also *Hollingsworth v. Perry*, 570 U.S. 693, 714, 133 S. Ct. 2652, 2667, 186 L.Ed.2d 768 (2013) (" 'If the relationship between two persons is one of agency ..., the agent owes a fiduciary obligation to the principal.' 1 Restatement § 1.01, Comment *e*."). Thus, "[t]o establish that a relationship is one of agency, it is not necessary to prove its fiduciary character as an element." Restatement (Third) of Agency § 1.01, cmt. *e*.

Noteworthy here, the Restatement's commentary also explains agency in the context of intermediaries stating,

> ***Many actors perform an intermediary role between parties who engage in a transaction. Not all are agents***

> ***in any sense, and not all who are agents act on behalf of those who use the intermediary service provided.*** For example, an employee of a courier service who shuttles documents among parties who are closing a transaction among them is not the parties' agent simply because an intermediary function is provided.
>
> If an intermediary lacks authority even to negotiate on behalf of a party, characterizing the intermediary as an agent may not carry much practical import because the scope of the agency would be very narrow. But despite the narrowness of its scope, an agency relation imposes legal consequences when the agent's acts are within its scope. In some circumstances, an agent's inaction will have legal consequences for the principal.

Restatement (Third) of Agency § 1.01, cmt. *h* (emphasis added). According to the Restatement, it is important to understand the relationship between the parties and the acts to be performed on behalf of the principal to determine whether an agency relationship exists and the scope of the agency.

St. Clair Intermediate Sch. Dist., relied on by Defendants for the definition of agency, focused on the characteristics of an agent as a business representative. There, the Michigan Supreme Court considered in relevant part whether the Michigan Employment Relations Commission ("MERC") correctly determined that the Michigan Educational Special Services Association ("MESSA") is an agent of the Michigan Education Association ("MEA"). The Public Employment Relations Act ("PERA"), patterned after the National Labor Relations Act ("NLRA"), "governs labor relations in public employment." *Id.* at 559, 581 N.W.2d at 717. Specifically, M.C.L. § 423.210 "imposes a duty of collective bargaining on public employers, unions, and their agents." *Id.* at 550, 581 N.W.2d at 713. In interpreting the term agent, the court concluded "that the Legislature did not intend an expansive definition of agency in the PERA, but, rather, adopted the common-law principles of agency in use in federal labor law." *Id.* at 559, 581 N.W.2d at 717. The court held,

> Under the common law of agency, in determining "[w]hether an agency has been created," we consider "the relations of the parties as they in fact exist under their agreements or acts" and note that in its broadest sense agency "includes every relation in which one person acts for or represents another by his authority." *Saums v. Parfet,* 270 Mich. 165, 170–171, 258 N.W. 235 (1935). We further recognized in *Saums* that ***"[t]he characteristic of the agent is that he is a business representative. His function is to bring about, modify, affect, accept performance of, or terminate contractual obligations between his principal and third persons."*** *Id.* at 172, 258 N.W. 235. Also fundamental to the existence of an agency relationship is the right to control the conduct of the ***827** agent, *Capitol City Lodge No. 141, FOP v. Meridian Twp.,* 90 Mich.App. 533, 541, 282 N.W.2d 383 (1979), with respect to the matters entrusted to him. See *Int'l Longshoremen's Ass'n, AFL–CIO v. NLRB,* 312 U.S. App DC 241, 249, 56 F.3d 205 (1995), citing 1 Restatement, Second, Agency, § 14, p. 60, and cases applying this principle.

St. Clair Intermediate Sch. Dist., 458 Mich. at 557–58, 581 N.W.2d at 716 (footnote omitted) (emphasis added); see also *Wigfall v. City of Detroit*, 504 Mich. 330, 340, 934 N.W.2d 760, 765–66 (2019). In concluding that the facts of the case supported a finding of agency, the Michigan Supreme Court emphasized that it reached its conclusion "on the basis of the ***common law of agency as developed both by Michigan courts and federal administrative and judicial precedent."*** *Id.* at 562–63, 581 N.W.2d at 718 (emphasis added).

Further, the Court is not persuaded by the agency analysis in *In re Tribune Co.* as it does not distinguish between mere intermediaries contracted for the purpose of effectuating a transaction and agents who are authorized to act on behalf of their customers in such transactions. The Second Circuit in *In re Tribune Co.,* also cited to and relied on the Restatement (Third) of Agency § 1.01's definition of agency. The sum and substance of the agency application states,

> Here, Tribune manifested its intent to grant authority to Computershare by depositing the aggregate purchase price for the shares with Computershare and entrusting Computershare to pay the tendering shareholders. Computershare, in turn, manifested its assent by accepting the funds and effectuating the transaction. Then, as the transaction proceeded,

> Tribune maintained control over key aspects of the undertaking.

In re Tribune Co. Fraudulent Conveyance Litig., 946 F.3d at 80. Thus, by merely authorizing Computershare to accept funds as part of the securities transaction and further effectuating the transaction, the *Tribune* court found the first requirement of agency satisfied. Additionally, the *Tribune* court did not address any agreements between the parties in its agency analysis. As a result, this Court has no way of determining whether the pertinent language of any agreements between the *Tribune* parties is similar to the language of the relevant agreements in the present case as it relates to the relationship of the parties, their roles, duties, obligations, etc.

Under *Tribune's* analysis any intermediary hired to effectuate a transaction would qualify as its customer's agent. And consequently, if such an intermediary would be a financial institution, the debtor's status would transform to one of a financial institution itself. This would result in a complete workaround of *Merit Management*, which opined that the safe harbor provision does not insulate a transfer simply because a qualified intermediary acted as a mere conduit. *Merit Mgmt. Grp.*, 138 S. Ct. at 897 ("The safe harbor saves from avoidance certain securities transactions 'made by or to (or for the benefit of)' covered entities.... Transfers 'through' a covered entity, conversely, appear nowhere in the statute.") *Id.* To establish common law agency, there must be a finding that a principal authorized the agent to act on its behalf. Otherwise, any service provider would qualify as an agent.

Given the purpose of § 546(e), as examined by *Merit Management*, it is crucial to distinguish between agents as defined under common law and mere intermediaries. Not all actors who "perform an intermediary role between parties who engage in a transaction[ ] ... are agents in any sense, and not all who are agents act on behalf of ***828** those who use the intermediary service provided." Restatement (Third) of Agency § 1.01, cmt. *h*.

Accordingly, the Court holds that to prove agency Defendants must establish that (1) Holdings manifested assent to MLPFS and/or MLCC that MLPFS and/or MLCC shall act on Holdings' behalf; (2) subject to Holdings' control; and (3) MLPFS and/or MLCC manifest assent or otherwise consent so to act. Furthermore, for the first requirement, "to act on the principal's behalf" means to be "a business representative" with the ability "to bring about, modify, affect, accept performance of, or terminate contractual obligations between his principal and third persons." *St. Clair Intermediate Sch. Dist.*, 458 Mich. at 557–58, 581 N.W.2d at 716; Restatement (Third) of Agency § 1.01 (2006).

Generally, the existence of agency is a question of fact. *St. Clair Intermediate Sch. Dist.*, 458 Mich. at 556, 581 N.W.2d at 716 ("When there is a disputed question of agency, if there is any testimony, either direct or inferential, tending to establish it, it becomes a question of fact[.]"). Furthermore, the label or designation placed on the relationship by the parties is not determinative. *Universal Life Church, Inc. v. Comm'r of Lottery*, 96 Mich. App. 385, 388, 292 N.W.2d 169, 170 (1980); *Caldwell v. Cleveland-Cliffs Iron Co.*, 111 Mich. App. 721, 732, 315 N.W.2d 186, 191 (1981) ("While the label the parties place on their relationship is not determinative, the existence of an agency relationship and the scope of the relationship are questions of fact.").

However, the existence of agency is a question of law for the court "when the contract is in writing and there is no dispute or room for disputed inference as to the other documents, correspondence, and acts which might sometimes bear upon construction." *Texas Co. v. Brice*, 26 F.2d 164, 167 (6th Cir. 1928); *N.L.R.B. v. Int'l Bhd. of Elec. Workers*, 514 F.3d 646, 650 (6th Cir. 2008) ("Unless there is no genuine issue of material fact, the presence, or absence, of agency requires a factual analysis").

Under the facts of this case, the determination of the existence of an agency relationship is a question of law for the Court. Here, Defendants rely on numerous agreements in support of their argument that an agency relationship existed. The Flow of Funds Memorandum confirms that the parties acted in accordance with the agreements. As the Court's predecessor found, "[n]either party ... contests the authenticity of any exhibit or disputes the occurrence or essential details of the transactions evidenced thereby. There are no genuine disputes as to any material facts, only as to how those facts should be construed and their legal consequences."

In support of their argument that MLPFS acted as Holdings' agent, Defendants claim three documents establish that MLPFS acted as Holdings' agent. They are: (1) the Engagement Letter ("Strategic Alternatives Letter"); (2) the Notes Purchase Agreement and (3) the New Credit Agreement. Under these documents Defendants allege that MLPFS was responsible for (1) serving as the exclusive financial advisor; (2) representing Holdings before the Michigan Gaming Control Board; (3) arranging for, structuring and advising on the Senior Notes and the Senior Credit Facility; (4) serving as underwriter, book runner, and syndication agent for the Senior Notes and Senior Credit Facility; and (5) acting as disbursing agent in the 2005 Transaction to distribute proceeds of the Senior Notes to various parties, including to the Papases and Gatzaroses. [ECF No. 809, p. 13].

***829** In response, Plaintiff first argues that Defendants have not presented any evidence that MLPFS had an agency relationship with Holdings with respect to the Note Purchase Agreement. [18] In fact, Plaintiff stresses that the Note Purchase Agreement expressly disclaims that MLPFS was the agent or fiduciary for Holdings—"[t]he Issuers acknowledge[d] and agree[d] that ... (ii) in connection with the offering contemplated hereby and the process leading to such transaction, the Initial Purchasers [we]re and ha[d] been acting solely as principals and *[we]re not the agents or fiduciaries of the Issuers*." [ECF No. 809-7; Exh. E; p. 2] (emphasis added). Furthermore, Plaintiff asserts that "MLPFS owed money to Holdings for the Notes it had purchased. It was not holding funds as a fiduciary, but, rather, it had an obligation to pay Holdings for the Notes under the Note Purchase Agreement." [ECF No. 817, p. 17]. Thus, Plaintiff argues that when MLPFS transferred funds to Defendants it did so to satisfy its debt to Holdings for its purchase of the Notes, in the manner it and Holdings had mutually agreed under the Flow of Funds Memorandum. Plaintiffs further contends that MLPFS could not act as a "disbursing agent" simply by agreeing to pay money to Defendants, as Defendants argue, because it never agreed to act as Holdings' fiduciary. Plaintiff relies on *Soberay Mach. & Equip. Co.,* 181 F.3d at 767 (A "party 'who contracts to accomplish something for another or to deliver something to another, but who is not acting as a fiduciary for the other, is a non-agent contractor.' "). Accordingly, Plaintiff maintains there is no evidence that MLPFS was under the control of Holdings or was acting as a fiduciary for Holdings with respect to Holdings' assets.

Plaintiff provides three reasons that the Strategic Alternatives Letter does not evidence that MLPFS was the agent of Holdings with respect to a securities contract or with respect to the transfers to Defendants. First, Holdings was not a party to it. Next, the Strategic Alternatives Letter disavows any agency or fiduciary relationship between MLPFS and Holdings, stating that MLPFS is acting "solely as financial advisor" and "as an independent contractor." Lastly, at the time of the transfers, the Strategic Alternatives Letter was no longer in effect, having been superseded by the Note Purchase Agreement.

Finally, Plaintiff argues that the New Credit Agreement does not evidence an agency relationship between MLPFS and Holdings. Plaintiff contends that the New Credit Agreement is not a securities contract and, therefore, not relevant to the application of the definition of a "financial institution" or the safe harbor provision ***830** with respect to the transfers made to Defendants under the Note Purchase Agreement as modified by the Flow of Funds Memorandum. Even if the Court considers the New Credit Agreement, Plaintiff maintains that under the New Credit Agreement, MLPFS was sole lead arranger, sole book runner and syndication agent with respect to the senior credit facility. In those capacities, Plaintiff argues MLPFS was acting on behalf of MLCapital ("MLCC"), not Holdings. Plaintiff further points out that Section 9.9 of the New Credit Agreement disavows any obligation or duty by MLPFS to Holdings (other than one that might arise if it became a Lender under the New Credit Agreement). [ECF No. 817-4; Exh. C, p. 129, § 9.9].

In reply, Defendants reiterate the different roles MLPFS had in connection with Holdings' restructuring that would qualify it as Holdings' agent, and further provide that "Holdings granted authority to MLPFS to collect and distribute the proceeds of the note sale on Holdings' behalf. The Flow of Funds Memorandum shows that MLPFS disbursed those proceeds to various creditors and others as directed by Holdings." [ECF No. 819; p. 9]. Additionally, Defendants for the first time argue that MLCC also acted as Holdings' agent in connection with the restructuring. Defendants point to the Flow of Funds Memorandum which shows that (1) Holdings granted authority to MLCC to collect and distribute the proceeds of the loan; (2) MLCC agreed by disbursing millions of dollars to various creditors as directed; and (3) was therefore controlled by Holdings.

The Court concludes that Defendants failed to establish an agency relationship between Holdings and MLPFS or between Holdings and MLCC. None of the evidence Defendants have presented supports the crucial elements of an agency relationship. Here, the cited agreements govern the relationship of the parties. [19]

Turning to the first element, after reviewing the documents, the Court concludes that Holdings did not authorize MLPFS to act on Holdings' behalf. MLPFS was merely authorized to perform contractual services. MLPFS was never authorized to conduct business on behalf of Holdings. The agreements do not establish that MLPFS was "a business representative" or could "bring about, modify, affect, accept performance of, or terminate contractual obligations between Holdings and third persons" as defined in *St. Clair Intermediate Sch. Dist.* In fact, MLPFS was on the other side of the transaction (Holdings as issuers and MLPFS as purchaser; Holdings as borrower and MLPFS as lender).

First, the Commitment Letter, entered into by Merrill Lynch Capital Corporation, identified as "Merrill Lynch" and Greektown Casino, L.L.C. ("Operating Company"), references the Strategic Alternatives Letter pursuant to which the "Operating Company has given MLPFS the mandate to arrange an offering of senior unsecured notes." [ECF No. 817-1; Exh. A]. The Commitment Letter makes clear that the obligations of MLPFS with respect to such mandate are set forth in, and governed by, the Strategic Alternatives Letter. *Id.*

The Strategic Alternatives Letter is an agreement between MLPFS, identified ***831** as "Merrill Lynch" and Greektown Casino, L.L.C. ("Greektown"). [ECF No. 809-6, Exh. C]. Under this agreement, MLPFS was "to act as exclusive financial advisor to ... Greektown and Greektown Holdings, L.L.C. ('Holdings') in connection with exploring Strategic Alternatives" identified in the agreement from September 24, 2005 until July 31, 2006. Per this agreement Merrill Lynch was "retained to ***act solely as financial advisor*** to Greektown and the Greektown Entities. In such capacity, Merrill Lynch shall ***act as an independent contractor, and any duties of Merrill Lynch arising out of its engagement pursuant to this Agreement shall be owed solely to Greektown and the Greektown Entities***." [20] [ECF No. 809-6; Exh. D; ¶ 7] (emphasis added). According to this agreement, Greektown —not Holdings—authorized or retained MLPFS to act as a financial advisor. Thus, while Holdings may have benefitted from this agreement, the agreement does not evidence Holdings' assent that MLPFS act on its behalf or that MLPFS be subject to Holdings' control. It is not necessary for the Court to determine whether MLPFS in its capacity as a sole financial advisor was an agent, because even assuming it was, it would be an agent of Greektown and not Holdings, per the signed agreement. Moreover, the Strategic Alternatives Letter was superseded by the Note Purchase Agreement.

Furthermore, the Strategic Alternative Letter contemplates a separate agreement to engage Merrill Lynch to act in certain roles. During this exploratory period, if the Greektown Entities proposed to implement any Strategic Alternative,

> each of the Greektown Entities agrees ... to cause the Tribe and the Authority to engage Merrill Lynch (or one or more of its affiliates as designated by Merrill Lynch) ***as its sole lead administrative agent, sole lead bookrunning manager, sole lead managing underwriter, sole tender and placement agent, sole dealer-manager, sole lead arranger or principal counterparty or exclusive financial advisor***, as the case may be, in connection with any such transaction ...

[ECF No. 809-6; Exh. D; ¶ 2] (emphasis added). The Strategic Alternatives Letter further clarifies that "any such engagement of Merrill Lynch ***shall only become a commitment by*** Merrill Lynch to assume such engagement when such engagement is set forth and agreed to by Merrill Lynch ***in a separate underwriting, financing, placement agency, dealer-manager, commitment or other applicable type of agreement***." *Id.* (Emphasis added). Thus, this Strategic Alternatives Letter does not authorize MLPFS to act in any of the listed roles, it only contemplates the possibility of such engagement. In addition, MLPFS did not assent to act in any of these roles. Rather, it reserved the right to commit to act in those roles pursuant to terms set forth in a separate agreement.

The relevant agreement is the Note Purchase Agreement between Holdings (as Issuer) and MLPFS (as Initial Purchaser); it does not authorize MLPFS to act on Holdings' behalf. The preamble states,

> Greektown Holdings, L.L.C., a Michigan limited liability company, as issuer (the "Company") and Greektown Holdings II, Inc., a Michigan corporation, as co-issuer ("Greektown Holdings" and, together ***832** with the Company, the "Issuers") confirm their agreement with Merrill Lynch & Co., Merrill Lynch, Pierce, Fenner, & Smith Incorporated ("Merrill Lynch") and each of the other Initial Purchasers named in Schedule A hereto (collectively, the "Initial Purchasers", which term shall also include any initial purchaser substituted as hereinafter provided in Section 11 hereof) for whom Merrill Lynch is acting as representative (in such capacity, the "Representative") with respect to the issue and sale by the Issuers and the purchase by the Initial Purchasers, acting severally and not jointly, of the respective principal amounts set forth in Schedule A attached hereto of $185,000,000 aggregate principal amount of the Issuers' 10¾% Senior Notes due 2013 (the "Securities")....

[ECF No. 809-7; Exh. E; p. 1].

The pertinent language in this agreement provides,

> The Issuers acknowledge and agree that ... (ii) ***in connection with the offering contemplated hereby and the process leading to such transaction***, the ***Initial Purchasers are and have been acting solely as principals and are not the agents or fiduciaries of the Issuers or any of their creditors, employees or any other party,*** (iii) the ***Initial Purchasers have not assumed and will not assume an advisory or fiduciary responsibility in favor of the Issuers with respect to the offering contemplated hereby or the process leading thereto*** (irrespective of whether the Initial Purchasers have advised or are currently advising the Issuers on other matters) and the ***Initial Purchasers have no obligation to the Issuers with respect to the offering contemplated hereby except the obligations expressly set forth in this Agreement***, (iv) the ***Initial Purchasers and their affiliates may be engaged in a broad range of transactions that involve interests that differ from those of the Issuers*** and (v) the Initial Purchasers have not provided any legal, accounting, regulatory or tax advice with respect to the offering contemplated hereby and the Issuers have consulted their own legal, accounting, regulatory and tax advisors to the extent they have deeded appropriate.

[ECF No. 809-7; Exh. E; p. 2] (emphasis added). Pursuant to this agreement, MLPFS is now one of the initial purchasers and a representative of the other initial purchasers. In this capacity, MLPFS is, and was, acting solely as a principal and not an agent *or* fiduciary for Holdings. MLPFS further disclaimed any advisory or fiduciary responsibility in favor of Holdings (regardless of whether it previously served in such a role) and any obligations to Holdings (other than those set forth in the agreement). In fact, the agreement provides that MLPFS and its affiliates "may be engaged in a broad range of transactions that involve interests that differ from those of" Holdings. This language expressly contradicts the classic definition of agency. Defendants attempt to argue that this is not a global disclaimer, rather it is limited to the "offering." The Court disagrees. The plain language of the agreement provides that the above disclaimers are "***in connection with the offering contemplated hereby and the process leading to such transaction.***" *Id.* (Emphasis added).

Defendants reliance on designations in the New Credit Agreement to establish the authority of MLPFS or MLCC to act on behalf of Holdings is not persuasive. Specifically, the following paragraph designates the roles of MLPFS and MLCC under the agreement.

> ***833** Credit Agreement, dated as of December 2, 2005, among Greektown Holdings, L.L.C. ("Greektown Holdings") and Greektown Holdings II, Inc. ("Greektown Corporation"), as the Borrowers, various financial institutions, as the lenders, Merrill Lynch Pierce, Fenner and Smith Incorporated ("MLPFS"), as the sole Lead Arranger and the Sole Bookrunner, and the syndication agent, Merrill Lynch Capital Corporation, as the Administrative Agent ("MLCC"), and documentation agent(s) party thereto (the "New Credit Agreement").

[ECF No. 817-4; Exh. C, p. 13]. These designations without more are not dispositive on the issue of agency. Defendants do not cite the Court to any other provision that would support their position on the existence of an agency relationship. Plaintiff points the Court to section 9.9 of the New Credit Agreement,

> <u>The Sole Lead Arranger, the Sole Book Runner, the Syndication Agent and the Co-Documentation Agents.</u> The Sole Lead Arranger, the Sole Book Runner, the Syndication Agent and the Co-Documentation Agents ***hereunder shall not have any right, power, obligation, liability, responsibility or duty under this Agreement (or any other Loan Document) other than those applicable to it in its capacity as a Lender to the extent it is a Lender hereunder***. Without limiting the foregoing, the Lender so identified as the "**Sole Lead Arranger**" the "**Sole Book Runner**", the "**Syndication Agent**", and the "**Co-Documentation Agents**" shall not have or be deemed to have any fiduciary relationship with any Lender. Each Lender acknowledges that it has not relied, and will not rely, on the Lender so identified as the "**Sole Lead Arranger**" the "**Sole Book Runner**", the "**Syndication Agent**" or the "**Co-Documentation Agents**" in deciding to enter into this Agreement and each other Loan Document to which it is a party or in taking or not taking action hereunder or thereunder.

[ECF No. 817-4; Exh. C, § 9.9] (emphasis added). Pursuant to this clause, MLPFS, in its capacity as the sole lead arranger, the sole book runner, the syndication agent, limited its role to that of a lender, to the extent it is a lender. MLPFS disclaimed any other right, power, obligation, liability, responsibility or duty. It further clarified that it did not have any fiduciary relationship with any other lender.

Finally, the Court concludes the Flow of Funds Memorandum does not contain any provision modifying MLPFS' relation to Holdings as provided in other agreements. Also dated December 2, 2005, the Flow of Funds Memorandum "sets forth the fund transfer procedures followed in connection with" the 2005 Transaction. [ECF No. 809-11; Exh. G; p. 1]. This Memorandum lists the principal documents related to the 2005 Transaction and the specific transfers that are deemed to have occurred simultaneously. [ECF No. 809-11; Exh. G; p. 2-3]. This includes the transaction expenses and account transfers. The account transfers section is limited to a chart that summarizes the actual net transfers that were made. [ECF No. 809-11; Exh. G; p. 6-7]. These net transfers list MLPFS and MLCC as transferors. However, this chart shows that MLPFS and MLCC merely effectuated the 2005 Transaction in accordance with agreements under which MLPFS disclaimed any agency relationship with Holdings and MLCC served as an agent to other lenders. This is the only document Defendants offer to show that MLPFS disbursed the proceeds of the loan. Therefore, Defendants failed to prove the first element of agency—that Holdings manifested assent ***834** to MLPFS that MLPFS shall act on Holdings' behalf.

With respect to the second element, because the Court concludes that there is no evidence that Holdings authorized MLPFS to act on its behalf, it follows that MLPFS could not be subject to Holdings' control with regard to such nonexistent authorization.

For the same reason, Defendants cannot prove the third element. There is no evidence that MLPFS assented or otherwise consented to act as Holdings' agent. The contractual language of the Note Purchase Agreement expressly contradicts the classic definition of common law agency as cited by the parties. Not only does the language disclaim the existence of an agency relationship; it further disclaims any fiduciary duties that would result from such a relationship.

Similarly, the Court concludes that Defendants failed to show that Holdings authorized MLCC to act on its behalf. Under the New Credit Agreement, MLCC as the administrative agent was an agent of the lenders—not Holdings. Pursuant to § 9.1(a) and (b) of the agreement, each lender authorized MLCC to act on behalf of such lender under the agreement and other loan documents. Moreover, as with MLPFS, the Flow of Funds Memorandum merely evidences that MLCC disbursed the proceeds of the loan. It does not contain any provision modifying MLCC's relation to Holdings as provided in other agreements. Without more, this evidence is insufficient to establish that an agency relationship existed between Holdings and MLCC. Consequently, Defendants failed to prove the elements of an agency relationship between Holdings and MLCC.

b. Was Merrill Lynch a "Custodian" of Holdings?

Defendants alternatively argue that MLPFS was acting as a "custodian" for the benefit of its customer Holdings in connection with the Notes Offering, a securities transaction. Defendants urge the Court to look to securities law and regulations for guidance in interpreting the term "custodian."[21] Per the securities regulations, specifically 17 C.F.R. § 270.17f-4 (c)(2), the term "custodian" is defined as "a bank or other person that is authorized to hold assets for another in connection with a securities transaction." [ECF No. 809, p. 14]. In support of their argument, Defendants point to the Flow of Funds Memorandum and section 2.b of the Notes Purchase Agreement, which provides that MLPFS was "authorized to accept delivery of ...and make payment of the purchase price" of the Senior Notes. Thus, Defendants explain that "[t]he proceeds of the Senior Notes were advanced to and held by MLPFS for the benefit of the ultimate recipients, the Papases and Gatzaroses, pursuant to the terms of the Notes Purchase Agreement and Offering Memorandum." [ECF No. 809, p. 14].

Defendants also argue that MLPFS would also qualify as a "custodian" under the Bankruptcy Code definition of § 101(11)(C) that provides,

> (11) The term "custodian" means—
>
> ***835** * * *
>
> (C) trustee, receiver, or agent under applicable law, or under a contract, that is appointed or authorized to take charge of property of the debtor for the purpose of enforcing a lien against such property, or for the purpose of general administration of such property for the benefit of the debtor's creditors.

§ 101(11)(C). Defendants argue that courts recognize this code definition to be descriptive, not exhaustive, citing to *In re Quality Laser Works*, 211 B.R. 936, 943 (BAP 9th Cir. 1997); *In re UTE Lake Ranch, Inc.*, 2016 WL 6472043, at *2 (Bankr. D. Colo. Sept. 14, 2016); and *In re Purner*, 2005 WL 6485179, at *2 (Bankr. S.D. Cal. 2005). Defendants further maintain that this definition has been broadly interpreted, *In re Matter of Cash Currency Exchange, Inc.*, 762 F.2d 542 (7th Cir. 1985), to include an "agent under applicable law, or under a contract." Defendants rely on *In re Pine Lake Village Apartment Co.*, 17 B.R. 829 (Bankr. S.D.N.Y. 1982), which explicitly used the language "under a contract" as applied to "agent." Lastly, Defendants stress that a person or entity need not be acting for the benefit of all creditors in order to be a "custodian" within the meaning of the Bankruptcy Code, citing to *In re Ohakpo*, 494 B.R. 269, 280 (Bankr. E.D. Mich. 2013) and *In re Skinner*, 213 B.R. 335, 340 (Bankr. W.D. Tenn. 1997).

In response, Plaintiff first claims that Defendants' position is contrary to the facts and fails to establish a custody arrangement. Plaintiff explains that MLPFS (1) was not "holding" any proceeds of a Notes Offering for Holdings; and (2) did not "advance" any funds to Defendants. Rather, Plaintiff argues that MLPFS was a debtor to Holdings for the Notes it was obligated to, and did, purchase. Plaintiff stresses that this obligation to pay Holdings was not contingent or conditional on its resale of the Notes, explaining that,

> When MLPFS bought the Notes at closing, it owed the net purchase price to Holdings. The Note Purchase Agreement obligated MLPFS to pay Holdings at a specified account. Holdings had no right to direct MLPFS to wire funds to any other party. But, at the request of Holdings, MLPFS agreed to wire the funds owed to Holdings to the parties identified in the Flow of Funds Memorandum. There is no evidence that MLPFS had custody of funds belonging to Holdings, was under Holdings' control or had any obligation to remit funds to Movants before it agreed to do so in the Flow of Funds Memorandum and received the Notes at closing.

[ECF No. 817, p. 19-20]. Therefore, Plaintiff contends that evidence establishes that MLPFS simply owed a debt to Holdings and paid it as Holdings requested—and not that MLPFS was "custodian" of the funds of Holdings.

Even were the Court to adopt Defendants' "custodial" characterization, Plaintiff asserts that the statutory definition of "custodian" in § 101(11) controls and Defendants cannot meet this definition. Plaintiff argues that Defendants failed to provide any authority to dispute the application of § 101(11)'s definition in this case. Per *Wysocki v. IBM Corp.*, 607 F.3d 1102, 1106 (6th Cir. 2010) (quoting *Lamie v. U.S. Trustee*, 540 U.S. 526, 534, 124 S.Ct. 1023, 157 L.Ed.2d 1024 (2004)), "if the meaning of [statutory] language is plain, then 'the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms.' " Defendants do not argue that the statutory definition of the term "custodian" is either unclear or absurd. Plaintiff further provides that the definition of "custodian" was ***836** in the Bankruptcy Code at the time Congress added § 101(22), which uses the term "custodian". Had Congress intended that the statutory definition of "custodian" in § 101(11) not be used in § 101(22)(A), it could easily have written "whether or not a 'custodian', as defined in section 101(11)"—as it did with the word "customer." Accordingly, Plaintiff argues that § 101(11)'s definition of the term "custodian" controls. Lastly, Plaintiff maintains that even if 17 C.F.R. § 270.17f-4(c)(2) applied, it does not cover the role of MLPFS as it was never a custodian of its own debt to Holdings, and its payment of that debt as agreed is not evidence of a custodial relationship.

The Court holds that § 101(11) governs the interpretation of the term "custodian." When a statute "contains an explicit and multi-faceted definition of [a] term[,] ... that definition must govern the resolution of this case; [the court is] not at liberty to put [its] gloss on the definition that Congress provided by looking to the generally accepted meaning of the defined term." *Tennessee Prot. & Advocacy, Inc. v. Wells*, 371 F.3d 342, 346 (6th Cir. 2004) (citing *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon,* 515 U.S. 687, 698 n.10, 115 S. Ct. 2407, 132 L.Ed.2d 597 (1995)).

> [I]it is well-settled law that when a statutory definition contradicts the everyday meaning of a word, the statutory language generally controls: judges should "construe legislation as it is written, not as it might be read by a layman." *Meese v. Keene,* 481 U.S. 465, 485, 107 S.Ct. 1862, 95 L.Ed.2d 415 (1987). Only when following the literal language of the statute would lead to "an interpretation which is inconsistent with the legislative intent or to an absurd result" can a court modify the meaning of the statutory language. *Appleton v. First Nat'l Bank of Ohio,* 62 F.3d 791, 801 (6th Cir.1995).

Tennessee Prot. & Advocacy, Inc., 371 F.3d at 349–50; *Wysocki*, 607 F.3d at 1106. Finally, the Court "will not interpret a statute in a manner that renders part of it irrelevant, particularly where, as here, the statute has an unambiguous meaning if we simply apply the definition provided in the statute itself." *Stanovsek v. Holder*, 768 F.3d 515, 519 (6th Cir. 2014) (internal citation omitted).

While it would be proper to analyze cases interpreting § 101(11)(C)'s definition in other contexts, it is inappropriate to adopt and interpret a completely different definition, such as 17 C.F.R. § 270.17f-4(c)(2), especially when the language of the CFR's definition does not mirror the definition in the Bankruptcy Code. Defendants do not argue that the Bankruptcy Code's statutory definition of the term "custodian" is either unclear or absurd. Nor do Defendants argue that the statutory definition is ambiguous. Rather, Defendants merely argue that there is not much case law interpreting the statute in the context of the safe harbor provision. Defendants cite to no authority for the application of 17 C.F.R. § 270.17f-4(c)(2) instead of § 101(11).

Accordingly, the Court holds that the definition of the term "custodian" in § 101(11) governs. The Bankruptcy Code provides:

> "custodian" means—
>
> (A) receiver or trustee of any of the property of the debtor, appointed in a case or proceeding not under this title;
>
> (B) assignee under a general assignment for the benefit of the debtor's creditors; or
>
> (C) trustee, receiver, or agent under applicable law, or under a contract, that is appointed or authorized to take charge of property of the debtor for the purpose ***837** of enforcing a lien against such property, or for the purpose of general administration of such property for the benefit of the debtor's creditors.

§ 101(11).

Under this definition, Defendants assert that MLPFS was a "custodian" under § 101(11)(C).

Section 101(11)(C) contains three requirements. Defendants must prove that: (1) MLPFS was a trustee, receiver or agent "under applicable law, or under a contract"; (2) MLPFS had been "appointed or authorized to take charge of the property of" Holdings; and (3) MLPFS was acting for the purpose of either "enforcing a lien against such property" or "general administration of such property for the benefit of Holdings' creditors."

The Court holds that the first requirement of § 101(11)(C) is descriptive, rather than exhaustive. Plaintiff argues that a custodian has to fit into one of the listed categories, relying on *Burgess v. United States*, 553 U.S. 124, 130, 128 S. Ct. 1572, 1574, 170 L.Ed.2d 478 (2008) (quoting *Colautti v. Franklin*, 439 U.S. 379, 392-93, n.10, 99 S.Ct. 675, 58 L.Ed.2d 596 (1979)), which provides that "[a]s a rule, [a] definition which declares what a term 'means' ... excludes any meaning that is not stated." Here, Plaintiff claims that there is no evidence that MLPFS was ever a trustee, receiver, agent, or assignee for Holdings under any circumstances listed in § 101(11). The Defendants' cited cases address the actual provision, including its legislative history. The Ninth Circuit Bankruptcy Appellate Panel in *In re Quality Laser Works,* provides in pertinent part,

> The legislative history of the definition indicates that Congress intended the term "custodian" to encompass a variety of prepetition agents who have taken charge of a debtor's assets. *Matter of Cash Currency Exchange, Inc.,* 762 F.2d 542, 553 (7th Cir.1985), *cert. denied Fryzel v. Cash Currency Exchange, Inc.,* 474 U.S. 904, 106 S.Ct. 233, 88 L.Ed.2d 232 (1985); *In re Redman Oil Co., Inc.,* 95 B.R. 516, 520 (Bankr.S.D.Ohio 1988). Senate Report No. 989 illustrates that the categories of custodians are descriptive rather than exhaustive:
>
> Paragraph [11] defines "custodian". There is no similar definition in current law. It is defined to facilitate drafting, and means a prepetition liquidator of the debtor's property, such as an assignee for the benefit of creditors, a receiver of the debtor's property, or a liquidator or administrator of the debtor's property. The definition of custodian to include a receiver or trustee is descriptive, and not meant to be limited to court officers with those titles. The definition is intended to include other officers of the court if their functions are substantially similar to those of a receiver or trustee. *Redman Oil,* 95 B.R. at 520 (quoting H.R.No. 95–595, 95th Cong. 1st Sess. 310 (1977), U.S.Code Cong. & Admin.News 1978, pp. 5787, 6267); see also *Cash Currency,* 762 F.2d at 553.

In re Quality Laser Works, 211 B.R. 936, 943 (B.A.P. 9th Cir. 1997), *aff'd*, 165 F.3d 37 (9th Cir. 1998); see also *In re Ute Lake Ranch, Inc.*, No. 16-17054 EEB, 2016 WL 6472043, at *2 (Bankr. D. Colo. Sept. 14, 2016) (same); and *In re Purner*, No. 03-03932, 2005 WL 6485179, at *2 (Bankr. S.D. Cal. Dec. 19, 2005) (same). Defendants further argue that § 101(11)(C)'s definition includes an agent under *either* applicable law, or under a contract. *In re Matter of Cash Currency Exch., Inc.,* acknowledged "the unrestrictive language used in this definition," and found that since "Congress did not refer specifically to administrative receivers in the legislative history[,]" the definition includes ***838** court-appointed and administrative receivers. *Id.* at 553. See also *In re Pine Lake Village Apartment Co.*, 17 B.R. 829 (Bankr. S.D.N.Y. 1982).

Even with a descriptive interpretation of the first requirement, the Court concludes that Defendants failed to establish the first requirement. They do not argue that MLPFS or MLCC was either a trustee or a receiver—whether authorized or appointed. It appears that Defendants claim that MLPFS and/or MLCC qualified as an agent under applicable law or contract. The Court already determined that Defendants failed to establish a common law agency relationship. Likewise, the Court finds that Defendants failed to establish that MLPFS and/or MLCC was an agent under contract. As discussed in the preceding section, MLPFS disclaimed any such agency relationship in the relevant agreements. Despite the list of categories in the first requirement being descriptive, Defendants still have not established they satisfy the first requirement.

As to the second requirement, while the parties dispute the characterization of MLPFS/MLCC's role in effectuating the transfer, the resolution of this dispute is not relevant to the Court's determination. That is, whether MLPFS/MLCC was "appointed or authorized" by Holdings "to take charge" of any property of Holdings or whether MLPFS/MLCC owed a debt to Holdings for the purchase of Notes, which debt it paid by the transfers it made. Even adopting Defendants' characterization, the Court concludes that Defendants fail to meet the other necessary requirements to qualify as a custodian.

Finally, the Court concludes that Defendants fail to meet the third requirement. Defendants do not argue that MLPFS is enforcing a lien. Rather, citing to *In re Ohakpo*, 494 B.R. 269, 280 (Bankr. E.D. Mich. 2013) and *In re Skinner*, 213 B.R. 335, 340 (Bankr. W.D. Tenn. 1997), Defendants erroneously argue that a person or entity need not act for the benefit of all creditors to qualify as a "custodian" within the meaning of the Bankruptcy Code.

In re Ohakpo holds that a person or entity must be acting for the benefit of all creditors when acting for the purpose of general administration of such property. The *In re Ohakpo* court held that a court officer appointed and authorized by state court order "to take charge of personal property of [debtor] for the purpose of enforcing a lien against such property" was a custodian within under § 101(11)(C). *In re Ohakpo*, at 278. There, the debtors argued that the court officer was not a custodian "because his seizure of the Automobiles was only for the purpose of enforcing a lien against the Automobiles to pay the RBS judgment and not pay any of the [debtor's] other creditors." *Id.* After factually distinguishing cases relied on by the debtors, the *In re Ohakpo* court explained the statutory construction of § 101(11)(C),

> But, more fundamentally, the Court respectfully disagrees with their interpretation of § 101(11)(C), first because it is contrary to a well-established rule of statutory construction known as the rule of the last antecedent, and second because it is contrary to more persuasive case law on this issue.
>
> The Sixth Circuit Court of Appeals has explained the rule of the last antecedent as follows:
>
> > When a word such as a pronoun points back to an antecedent or some other referent, the true referent should generally be the closest appropriate word. Consistent with this principle, the courts ordinarily assume that "a limiting clause or phrase ... modif[ies] only the noun or phrase that it immediately follows." Although not an "absolute" imperative, the "rule ***839** of the last antecedent" creates at least a rough presumption that such qualifying phrases attach only to the nearest available target.
>
> *Carroll v. Sanders (In re Sanders),* 551 F.3d 397, 399 (6th Cir.2008) (quoting *Barnhart v. Thomas,* 540 U.S. 20, 26, 124 S.Ct. 376, 157 L.Ed.2d 333 (2003)) (other internal quotation marks and citations omitted).
>
> The corollary to this rule is that a modifying clause separated by a comma is read to modify all preceding clauses instead of only the last antecedent. "[T]he last antecedent rule does not apply when the modifying clause is set off by a comma." *Cracker Barrel Old Country Store, Inc. v. Cincinnati Ins. Co.,* 499 Fed.Appx. 559, 564 (6th Cir.2012). " 'The presence of a comma separating a modifying clause in a statute from the clause immediately preceding it is an indication that the modifying clause was intended to modify all of the preceding clauses and not only the last antecedent one, thus making the last-antecedent

rule inapplicable.' " *Id.* (quoting 82 C.J. S. Statutes § 443). The Third Circuit Court of Appeals provides a helpful example of the rule and its corollary:

> Under the last-antecedent rule of construction, therefore, the series "A or B with respect to C" contains two items: (1) "A" and (2) "B with respect to C." On the other hand, under the rule of grammar the series "A or B, with respect to C" contains these two items: (1) "A with respect to C" and (2) "B with respect to C."

Stepnowski v. Commissioner, 456 F.3d 320, 324 n. 7 (3d Cir.2006) (citation omitted).

> ***The last antecedent rule means that the phrase "for the benefit of the debtor's creditors" attaches only to the immediately preceding clause of § 101(11)(C): "for the purpose of general administration of such property." The omission of a comma separating "for the benefit of the debtor's creditors" from the rest of the definition means that this modifying clause was not intended to modify all of the preceding clauses.*** The Debtors' reading of the statute would be correct if there was a comma preceding the phrase "for the benefit of the debtor's creditors." But there is no comma.

In re Ohakpo, at 279–80. (Emphasis added). The court additionally found support for its interpretation of § 101(11)(C) in *Skinner v. First Union National Bank (In re Skinner),* 213 B.R. 335 (Bankr.W.D.Tenn. 1997), which also "rejected the argument advanced by the Debtors in this case that one can only be a custodian if they have taken possession of a debtor's property for the purpose of enforcing a lien on the property for the benefit of all of the debtor's creditors, and not just the judgment creditor that requested the issuance of a writ of execution on personal property." *Id.* at 280.

Accordingly, the Court holds that the phrase "for the benefit of the debtor's creditors" applies to a person or entity that is appointed or authorized to take charge of property of the debtor for the purpose of general administration of such property. The "for the benefit of the debtor's creditors" requirement is not necessary when a person or entity is appointed or authorized to take charge of property of the debtor for the purpose of enforcing a lien. Plaintiff's cases further support this conclusion. See *Taylor's of St. Petersburg, Inc. v. Gugino* (*In re Taylor's of St. Petersburg, Inc.*), 110 B.R. 593, 596 (Bankr. M.D. Fla. 1990) and *Flournoy v. City Finance* (*In re Lewis*), 12 B.R. 106, 108 (Bankr. M.D. Ga. 1981).

***840** Here, there is no evidence that Defendants had a lien on Note sale proceeds or that MLPFS and/or MLCC was enforcing it. The Defendants were creditors of Holdings' parent companies—not Holdings. Next, there is no evidence that MLPFS and/or MLCC was acting "for the purpose of general administration of such property for the benefit of the debtor's creditors." Defendants presented no evidence that MLPFS and/or MLCC administered Holdings' assets for the benefit of *all* of Holdings creditors. Consequently, the Court holds that Defendants' failed to establish that MLPFS and/or MLCC was a custodian within the meaning of § 101(11)(C).

VI. CONCLUSION

For the foregoing reasons, the Court holds that per *Merit Management*, the relevant transfer is the one that is identified by the trustee and is an otherwise avoidable transfer. Here, Plaintiff identifies the transfer it seeks to avoid as a transfer from Holdings to Defendants. Because neither the transferor (Holdings) or the transferee (Defendants), on their own, are a financial institution or other covered entity, the 2005 Transaction falls outside of the § 546(e) safe harbor.

Next, the Court holds that Defendants failed to meet their burden to establish that the 2005 Transaction was "for the benefit" of Merrill Lynch. Specifically, Defendants failed to show that Merrill Lynch received a direct, ascertainable, and quantifiable benefit corresponding in value to the payments to Defendants that Plaintiff seeks to avoid and recover.

Finally, the Court holds that Defendants failed to prove that Holdings is by § 101(22)(A) deemed to be a "financial institution" because Merrill Lynch was acting as an agent or a custodian for its customer Holdings in making the transfers. None of the evidence presented by Defendants establishes an agency relationship between Holdings and MLPFS and/or MLCC. Likewise, none of the evidence presented by Defendants proves that MLPFS and/or MLCC was acting as a "custodian" for Holdings within the meaning of § 101(11)(C).

Accordingly, Defendants failed to prove the 2005 Transaction is protected from avoidance by the § 546(e) safe harbor provision. Consequently, the Court denies Defendants' motion for summary judgment pursuant to Federal Rule of Civil Procedure 56.

All Citations

621 B.R. 797

Footnotes

1 This corrected opinion is issued to correct typographical errors. The substance of the opinion remains the same.

2 The Sixth Circuit's order provided as follows:

> On February 27, 2018, two weeks after this appeal was filed, the United States Supreme Court decided *Merit Management Group, LP v. FTI Consulting, Inc.*, [––– U.S. ––––], 138 S. Ct. 883[, 200 L.Ed.2d 183] (2018), and in the process resolved a circuit split over the correct interpretation of Section 546(e) of the Bankruptcy Code—the safe harbor provision at issue in this case. *Merit Management* squarely addresses the dispositive issue in this case and abrogated the Sixth Circuit precedent on which both the bankruptcy court and district court relied, *see* *In re QSI Holdings, Inc.*, 571 F.3d 545 (6th Cir. 2009). Accordingly, we hereby vacate the district court's judgment and remand the case to the bankruptcy court for reconsideration in accordance with the Supreme Court's recent decision in *Merit Management*. *See* *In re Markowitz*, 190 F.3d 455, 458 (6th Cir. 1999).

[ECF No. 748].

3 "Greektown Casino owned and operated a casino in downtown Detroit, Michigan." [ECF No. 685, p. 3].

4 § 741(8) defines settlement payment as:

> **(8)** "settlement payment" means a preliminary settlement payment, a partial settlement payment, an interim settlement payment, a settlement payment on account, a final settlement payment, or any other similar payment commonly used in the securities trade;

§ 741(8).

5 The court cited to Black's Law Dictionary (9th ed. 2009), which defines "novation" as:

> 1. The act of substituting for an old obligation a new one that either replaces an existing obligation with a new obligation or replaces an original party with a new party. A novation may substitute (1) a new obligation between the same parties, (2) a new debtor, or (3) a new creditor.
>
> 2. A contract that (1) immediately discharges either a previous contractual duty or a duty to make compensation, (2) creates a new contractual duty, and (3) includes as a party one who neither owed the previous duty nor was entitled to its performance.

[ECF No. 685, p. 14].

6 For the same reasons the court dismissed Plaintiff's "naked gift" theory. *Id.* at 16.

7 The court relied on *Crescent Resources Litig. Trust v. Duke Energy Corp.,* 500 B.R. 464 (W.D. Tex. 2013). The court distinguished *In re Qimonda Richmond, LLC,* 467 B.R. 318 (Bankr. D. Del. 2012) and *In re Mervyn's Holdings, LLC*, 426 B.R. 488 (Bankr. D. Del. 2010) from the case at bar and was unpersuaded by *Michaelson v. Farmer (In re Appleseed's Intermediate Holdings, LLC)*, 470 B.R. 289 (D. Del. 2012). [ECF No. 685, p. 21-28].

8 The Opinion does not distinguish between the different Merrill Lynch entities involved in the 2005 Transaction. The Opinion identifies MLPFS as Merrill Lynch. [ECF No. 685, p. 4].

9 The Strategic Alternatives Letter was actually signed on September 24, 2005.

10 The Engagement Letter defines strategic alternatives covered by the agreement,

> Strategic Alternatives. As used in this Agreement, the term **"Strategic Alternatives",** includes whether effected directly or indirectly in one or a series of transactions (i) any public offering or private placement of securities, including debt securities, any security that is convertible or exchangeable into common stock or preferred stock, any other securities involving any refinancing, tender or restructuring of existing indebtedness, any recapitalization, extraordinary dividend, spin-off or divestiture, or any other transaction or series of transactions directly or indirectly involving Greektown, Holdings, Monroe Partners, L.L.C. and/or any of their respective direct and indirect subsidiaries existing on the date hereof or hereafter formed (the **"Greektown Entities")** for the purpose of creating or increasing value to Greektown or the Greektown Entities, (ii) the commitment or placement of any bank, bridge or similar debt financing or the placement thereof, (iii) any arrangement or funding of new money needs of Greektown and/or one or more of the Greektown Entities, (iv) any derivative or hedging program, (v)' any joint venture or other similar business combination of Greektown and/or one or more of the Greektown Entities, (vi) any merger, consolidation (other than any merger or consolidation between or among any of the Greektown Entities), negotiated purchase, tender or exchange or redemption offer by Greektown and/or one or more of the Greektown Entities (including restructuring of existing redemption and subscription agreements) or (vii) any other investment or venture by Greektown and/or one or more of the Greektown Entities that is not funded from cash flows from operations of Greektown and/or one or more of the Greektown Entities. Merrill Lynch acknowledges and agrees that none of the following shall constitute a Strategic Alternative: (a) any capital contributions to any of the Greektown Entities or any loans or other monies advanced to any of the Greektown Entities from any of the direct or indirect owners of any of the Greektown Entities as of the date hereof, other than loans or advances obtained by any of the Greektown Entities from an unaffiliated third party for the purpose of funding loans made by such Greektown Entity to Greektown, (b) any offering of membership interests of any of the Greektown Entities required by that certain Development Agreement, dated as of August 2, 2002, by and among Greektown, the City of Detroit and The Economic Development Corporation of the City of Detroit or (c) the Incremental Facility (as defined in that certain commitment letter, of even date herewith, by and between Greektown and Merrill Lynch Capital Corporation (the **"Commitment Letter"**)**.**

[ECF No. 809-6; Exh. D; ¶ 1].

11 Schedule A lists the Initial Purchasers and the principal amount of securities purchased by each: MLPFS $166,500,000, Wachovia Capital Markets, LLC $9,250,000, and NatCity Investments, Inc. $9,250,000. [ECF No. 809-7; Exh. E; Sch A-1].

12 *Merit Mgmt.,* 138 S. Ct. at 892,

> Here, those component parts include one transaction by Credit Suisse to Citizens Bank (*i.e.,* the transmission of the $16.5 million from Credit Suisse to escrow at Citizens Bank), and two transactions by Citizens Bank to Merit (*i.e.,* the transmission of $16.5 million over two installments by Citizens Bank as escrow agent to Merit). Because those component parts include transactions by and to financial institutions, Merit contends that § 546(e) bars avoidance.

13 In footnote two, the Supreme Court left open the question of whether a debtor or petitioner could qualify as a financial institution by virtue of its status as a customer under 11 U.S.C. § 101(22). This definition was mentioned in a footnote to Merit's brief, but not argued by the parties nor considered by the Supreme Court. *Id.* at 890, n.2.

14 The Court went even further and held *sua sponte* that the "financial institution" requirement was additionally satisfied as the funds were transferred to Defendants' respective accounts with Chase Manhattan Bank and Comerica Bank, both of whom qualified as financial institutions. [ECF No. 685; p 31-32].

15 In trying to distinguish *Merit Management* Defendants argue that in *Merit Management* the parties did not challenge the identification of the overall transfer sought to be avoided. Here, Defendants claim that the

nature and scope of the overall transaction is contested. The Court disagrees. First, the parties in *Merit* disputed the identity of the transfer,

> The parties and the lower courts dedicate much of their attention to the definition of the words "by or to (or for the benefit of)" as used in § 546(e), and to the question whether there is a requirement that the "financial institution" or other covered entity have a beneficial interest in or dominion and control over the transferred property in order to qualify for safe harbor protection. In our view, those inquiries put the proverbial cart before the horse. **Before a court can determine whether a transfer was made by or to or for the benefit of a covered entity, the court must first identify the relevant transfer to test in that inquiry. At bottom, that is the issue the parties dispute in this case.**

Merit Mgmt., 138 S. Ct. at 892. (Emphasis added). Second, in reviewing the record, the Court finds that there is no dispute that the transfer at issue is of Holdings' property.

16 At this stage in briefing and arguments, the parties did not distinguish between the MLPFS or MLCC; rather they only identified Merrill Lynch.

17 It is important to note that some referenced federal cases from the Sixth Circuit requiring fiduciary relationship as a prerequisite element for finding agency analyze Ohio law. See *In re Grand Eagle Cos.,* 288 B.R. 484, 495 (Bankr. N.D. Ohio 2003); *Soberay Mach. & Equip. Co. v. MRF Ltd., Inc.,* 181 F.3d 759, 767 (6th Cir. 1999); and *Eyerman v. Mary Kay Cosmetics, Inc.*, 967 F.2d 213, 219 (6th Cir. 1992).

18 Defendants do not argue that either Chase or Comerica acted as agent for Holdings. However, Plaintiff adds:

> The record also contains no evidence that Chase ever acted as an agent for the Papases, or that Comerica did so for the Gatzaroses, in connection with a securities transaction, or otherwise. To the contrary, the record merely shows that Chase and Comerica provided ordinary banking services by receiving wire transfers. (Flow of Funds Memorandum, Dkt. 278, Exh. D at 2-5.). A banker is not generally an agent for its customer. "[T]he banker/customer relationship is one of creditor to debtor, which does not give rise to a fiduciary relationship." *Shahin v. Delaware Fed. Credit Union*, 602 F. App'x 50, 53 (3d Cir. 2015); *Manufacturers Hanover Tr. Co. v. Yanakas*, 7 F.3d 310, 318 (2d Cir. 1993); *Miller v. Am. Nat. Bank & Tr. Co. of Chicago*, 4 F.3d 518, 520 (7th Cir. 1993). Here, all Chase and Comerica did was receive money into the Papases' and Gatzaroses' banking accounts. That does not constitute an agency relationship and, therefore, does not confer financial-institution status under the statute.

[ECF No. 788, p. 14].

19 The Court notes that the relevant agreements all contain a New York choice of law provision. See ECF No. 809-6, Exh. D – Strategic Alternatives Letter, ¶ 14; ECF No. 809-7 Exh. E, Purchase Agreement, § 15; ECF No. 817-4; and Exh. C, New Credit Agreement, p. 133, § 10.9. Neither party argues that New York law should govern the determination of agency relationship under these agreements.

20 In the Strategic Alternatives Letter, Holdings is identified as "Holdings," Greektown Entities is identified as "any respective direct and indirect subsidiaries" of Greektown, Holdings and Monroe Partners, L.L.C. [ECF No. 809-6; Exh. D; ¶ 1]. Moreover, the signature block of this agreement is signed on behalf of Greektown Casino, L.L.C.

21 Defendants reason that,

> There do not appear to be any cases that have interpreted the word "custodian" in the context of section 546(e). Nevertheless, the overwhelming weight of authority calls for the interpretation of § 546(e) in light of constructions and usages of securities law and practices in the securities industry. See, e.g., *QSI Holdings, Inc. v. Alford* (*In re QSI Holdings, Inc.*), 571 [F.3d] F.2d 545, 549-50 (6th Cir. 2009); *Lowenschuss v. Resorts Int'l, Inc.* (*In re Resorts Int'l, Inc.*), 181 F.3d 505, 516 (3d Cir. 1999); *Kaiser Steel Corp. v. Charles [Schwab] Schwabb, Inc.*, 913 F.2d 846, 849-50 (10th Cir. 1990).

[ECF No. 809, p 14].

482 F.Supp.3d 187
United States District Court, S.D. New York.

IN RE: NINE WEST LBO
SECURITIES LITIGATION
Pertains to All Associated Actions

20 MD. 2941 (JSR)
|
Signed August 27, 2020

Synopsis
Background: Trustee for trust representing unsecured creditors and indenture trustee for various notes brought actions against shareholders, directors, and officers of fashion retail company, with trustee for trust representing unsecured creditors raising state-law fraudulent conveyance claims pursuant to Bankruptcy Code, as well as unjust enrichment claims pursuant to state law, and indenture trustee raising fraudulent conveyance claims pursuant to state law, all arising out of bankrupting and bankruptcy of company in connection with leveraged buyout of company. Following consolidation of actions into multidistrict litigation, shareholders filed motion to dismiss, as did directors and officers, with each motion arguing for application of statutory safe harbor which provided that bankruptcy trustee could not avoid transfer, made by, to, or for benefit of financial institution, that was settlement or transfer payment made in connection with securities contract.

Holdings: The District Court, Jed S. Rakoff, Senior District Judge, held that:

document outside of complaint could be considered in resolving motions;

safe harbor applied with respect to fraudulent conveyance claims brought against shareholders by trustee for trust representing unsecured creditors;

accordingly, safe harbor also preempted indenture trustee's state-law fraudulent conveyance claims against shareholders;

safe harbor applied with respect to fraudulent conveyance claims brought against directors and officers by trustee for trust representing unsecured creditors;

as matter of first impression, bank customer's status as financial institution under Bankruptcy Code could extend to payments made in connection with securities contract but not processed by bank; and

insofar as claims sought same payments as fraudulent conveyance claims, safe harbor preempted state-law unjust enrichment claims brought against directors and officers by trustee for trust representing unsecured creditors.

Motions granted.

Procedural Posture(s): Motion to Dismiss for Failure to State a Claim.

***190** OPINION AND ORDER

JED S. RAKOFF, U.S.D.J.

This multidistrict litigation arises from the 2014 leveraged buyout (the "LBO") of ***191** the fashion retail company, The Jones Group, Inc. ("Jones Group"). Plaintiffs – consisting of Marc Kirschner, as trustee for the Nine West Litigation Trust representing unsecured creditors (the "Litigation Trustee"), and Wilmington Savings Fund Society, FSB as successor indenture trustee for various notes issued by Nine West (the "Indenture Trustee") – bring these consolidated actions against officers, directors, and shareholders of Jones Group, claiming breach of fiduciary duty, aiding and abetting breach of fiduciary duty, fraudulent conveyance, unjust enrichment, and other assorted state law claims arising out of the bankrupting, and bankruptcy, of the company in connection with the LBO.

Specifically, plaintiffs allege that the defendant officers and directors arranged for the company to merge with an affiliate of Sycamore Partners Management, L.P. ("Sycamore"), a private equity company, and sold off valuable "crown jewel" businesses to other Sycamore affiliates for a fraction of their real price. The result was to leave what remained, now called Nine West Holding Inc. ("Nine West"), bereft of its most successful product lines and with over $1.5 billion in debt, of which more than $1 billion was prior Jones Group debt.

Pursuant to the Court's June 12, 2020 scheduling order, now before the Court are two motions to dismiss – one on behalf of the shareholder defendants and the other on behalf of the director and officer defendants (the "D&O defendants") –

relating to those claims arguably affected by the safe harbor found in 11 U.S.C. § 546(e). Both the shareholder defendants and the D&O defendants argue that certain payments made to them in connection with the LBO are shielded from the fraudulent conveyance and unjust enrichment claims under the § 546(e) "safe harbor."

These motions are litigated in the shadow of In re Tribune Company Fraudulent Conveyance Litigation, 946 F.3d 66 (2d Cir. 2019), petition for cert. filed, 2020 WL 3891501, ––– U.S. ––––, ––– S.Ct. ––––, ––– L.Ed.2d –––– (U.S. July 6, 2020), a recent Second Circuit opinion that examined the scope of the § 546(e) safe harbor in the context of a leveraged buyout. There, the Second Circuit held that when a bank serves as a paying agent to help a company effectuate payments to its shareholders in connection with a securities contract, all payments made in connection with that securities contract are safe harbored from a bankruptcy trustee's avoidance powers with respect to certain fraudulent conveyance claims. Id. at 72. Despite plaintiffs' best efforts to distinguish Tribune's holding from the issues presented by the instant motions, the Court holds that Tribune largely controls these issues, and therefore grants both motions to dismiss.

I. Factual Background [1]

A. The Merger and the Shareholder Payments

Prior to the merger, Jones Group was a publicly traded global footwear and apparel ***192** company. Compl. ¶ 45. In 2014, Sycamore, a private equity firm, acquired Jones Group through an LBO transaction. [2] Id. ¶¶ 52-60. Sycamore effectuated the transaction by creating a new subsidiary – Jasper Parent – into which Jones Group was merged and ultimately renamed Nine West Holdings, Inc. ("Nine West"). Id. ¶ 132.

As part of the LBO, several payments were made to Jones Group shareholders, directors, and officers. First, shares of common stock were cancelled and converted into the right to receive $15 in cash; in total, Nine West paid Jones Group's public shareholders $1.105 billion for the common shares. Id. ¶¶ 61, 135. Second, shares of restricted stock and stock equivalent units, held by directors and officers, were likewise cancelled and converted into the right to receive $15 in cash, plus any unpaid dividends that had accumulated on those restricted shares; in total, Nine West paid Jones Group's directors and officers $78 million in connection with those shares. Id. In addition, Nine West paid approximately $71 million in change in control payments to certain directors and officers. Id. ¶ 40; Pls' D&O Mem. App. 1.

In the Complaint, plaintiffs refer to the above-mentioned payments, including common shares, restricted shares, share equivalent units, and unpaid dividends, as "shareholder transfers." Compl. ¶ 41. They allege that the $1.105 billion common share payments, made to the public shareholders, were effectuated through a different mechanism than were the payments in connection with the restricted stock, stock equivalent units, accumulated dividends, and change in control payments made to the directors and officers. Id. ¶ 135.

With respect to the common shares, plaintiffs allege the payments "were made by a non-agent contractor that performed the ministerial function of processing share certificates and cash, and whose rights and obligations were governed solely by contract." Id. However, the merger agreement that governed the transaction specified that such payments were to be made by a "paying agent" and "pursuant to a paying agent agreement in customary form." [3] See Declaration of Andrew G. Devore in Support of Public Shareholder Defendant's Motion to Dismiss Under the Safe Harbor of 11 U.S.C. § 546(e) ("Devore Decl."), Dkt. No. 92-2 (the "Merger Agreement"), § 4.2. The Paying Agent Agreement, in turn, identifies the paying agent as Wells Fargo. [4] Devore Decl., Dkt. No. 92-1 (the "PAA"), at 2. The PAA was signed by three parties: Nine West, Jasper Parent, and Wells Fargo. Id. While it empowers Wells Fargo to "act as [Nine West's] special agent for the purpose of distributing the Merger Consideration," it also tasks Jasper Parent with key roles in ***193** the effectuation of the payments, including depositing with Wells Fargo the money to complete the transaction. Id. at 2, § 1.4. And the PAA assigns Nine West different responsibilities depending on whether the payments were for book-entry securities or certificate securities. [5] Id. § 1.3.

As for the restricted shares, share equivalent units, and unpaid dividends, the Complaint alleges that the payments "were processed through the payroll and by other means." Compl. ¶ 135. [6] The Merger Agreement further specifies that, upon the completion of the merger, the restricted shares and the share equivalent units would be cancelled, and the holder of each share would be entitled to $15 in cash, "plus any unpaid dividends that have accumulated on such Restricted Share." Merger Agreement § 4.3

B. Procedural History

In April 2018, roughly four years after the merger closed, Nine West filed for bankruptcy. Compl. ¶¶ 7, 147. The bankruptcy court approved Nine West's Chapter 11 plan in February 2019. Id. ¶¶ 13-17. Under that plan, the Litigation Trustee is empowered to bring putative claims on behalf of Nine West's estate arising from the merger, and the Indenture Trustee is authorized to assert fraudulent conveyance claims against former shareholders of Jones Group. Id. ¶¶ 15-16.

As relevant here, the Litigation Trustee brings state law constructive and intentional fraudulent conveyance claims challenging the above-mentioned payments pursuant to 11 U.S.C. § 544, which grants the bankruptcy trustee the authority to bring state law claims to avoid and recover transfers of a debtor that unsecured creditors would have been able to assert outside of bankruptcy. In addition, the Litigation Trustee brings unjust enrichment claims against certain directors and officers seeking disgorgement and restitution of the payments these defendants received in connection with the merger. The Indenture Trustee also brings constructive and intentional fraudulent conveyance claims challenging the same payments but pursuant only to state law.

Now before the Court are two motions to dismiss certain of these claims. First, the public shareholder defendants [7] move to dismiss plaintiffs' intentional and constructive fraudulent conveyance claims. Dkt. No. 88. Second, the D&O defendants [8] ***194** move to dismiss the plaintiffs' intentional and constructive fraudulent conveyance claims and the Litigation Trustee's unjust enrichment claims with respect to payments made in connection with restricted shares, share equivalent units, and accumulated dividends. [9] Dkt. No. 93.

II. Legal Analysis

In order to survive a motion to dismiss, a plaintiff must "state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). When deciding a motion to dismiss, the Court "accept[s] all factual allegations in the complaint and draw[s] all reasonable inferences in the plaintiff's favor." ATSI Commc'ns, Inc. v. Shaar Fund, Ltd., 493 F.3d 87, 98 (2d Cir. 2007). Unlike factual allegations, however, legal conclusions pleaded in a complaint are "not entitled to the assumption of truth." Iqbal, 556 U.S. at 679, 129 S.Ct. 1937.

A. Considering Documents Outside the Complaint

The § 546(e) safe harbor is an affirmative defense. See In re Bernard L. Madoff Inv. Securities LLC, No. 11-MC-0012, 2011 WL 3897970, at *11 (S.D.N.Y. Aug. 31, 2011). "A court may dismiss a claim on the basis of an affirmative defense only if the facts supporting the defense appear on the face of the complaint." United States v. Space Hunters, Inc., 429 F.3d 416, 426 (2d Cir. 2005). For purposes of this rule, a court may also consider: (1) facts subject to judicial notice; (2) documents incorporated in the complaint by reference; or (3) documents integral to the complaint. Chambers v. Time Warner, Inc., 282 F.3d 147, 153 (2d Cir. 2002). A document is "integral" where the complaint "relies heavily upon its terms and effect." Id.

A threshold question the Court must resolve is whether the Court may consider on these motions to dismiss the Paying Agent Agreement (the "PAA"), which is the agreement between the Jones Group, Jasper Parent, and Wells Fargo that lays out the terms under which Wells Fargo would effectuate the $1.105 billion in payments made to the public shareholders in the merger.

The shareholder defendants maintain that the PAA is both incorporated by reference ***195** in, and integral to, the Complaint. Memorandum of Law in Support of Public Shareholder Defendants' Motion to Dismiss Under the Safe Harbor of 11 U.S.C. § 546(e) ("Shareholder Defs' Mem."), Dkt. No. 90, at 9. First, they argue that the Complaint "contains a number of assertions about Wells Fargo's role and the [PAA's] terms and effects." They point to a single example, where the Complaint references, but does not quote from, the PAA: In describing the effectuation of the shareholder payments, the Complaint alleges that the "payments for Common Shares in the LBO, totaling $1.105 billion, were made by a non-agent contractor that performed the ministerial function of processing share certificates and cash, and whose rights and obligations were governed solely by contract." Compl. ¶ 135. This "contract," the shareholder defendants explain, is the PAA. Shareholder Defs' Mem. at 9-10. Second, the shareholder defendants suggest that the rule allowing courts to consider omitted documents that are integral to the complaint is designed to deal with precisely this sort of situation, where plaintiffs have made a "strategic choice to omit" relevant documents. Id. at 10 (citing Williams v. GMAC Mort., Inc., No. 13-cv-4315, 2014 WL 2560605, at *1 (S.D.N.Y. June 6, 2014)); Reply Memorandum of Law in Further Support of Public Shareholder Defendants' Motion to Dismiss Under the Safe Harbor of 11 U.S.C. § 546(e) ("Shareholder Reply"), Dkt. No. 279, at 4 n.3 (citing Tulczynska v. Queens Hosp. Ctr., No. 17-cv-1669, 2019 WL 6330473, at *6-7 (S.D.N.Y. Feb. 12, 2019)).

In response, plaintiffs insist that they have no obligation to plead or reference documents that the shareholder defendants want to use as evidence in support of an affirmative defense. Pls' Shareholder Mem. at 15 (citing Rosen v. Brookhaven Capital Management, Co. Ltd., 194 F. Supp. 2d 224, 227 (S.D.N.Y. 2002)). And plaintiffs further point out that the cases cited by the defendants are cases where the documents at issue were relevant to the plaintiff's prima facie claim. Id. Here, by contrast, the PAA is not relevant to whether plaintiffs have pled a prima facie case of fraudulent conveyance; it is relevant only to whether the shareholder defendants can make out the § 546(e) affirmative defense. Id. [10]

The leading case on the issue in the Second Circuit is Chambers v. Time Warner, 282 F.3d 147 (2d Cir. 2002). The Chambers court affirmed the district court's decision to consider written contracts between plaintiffs and defendants, because "[t]he Amended Complaint is replete with references to the contracts and requests judicial interpretation of their terms." Id. at 153 n.4. The Chambers court disapproved, however, of the district court's decision to consider certain unsigned codes laying out standard terms for contracts with members of plaintiffs' union because "[t]he Amended Complaint does not refer to the Codes, plaintiffs apparently did not rely on them in drafting it, and none of the Codes submitted to the court were signed by the [defendants]," and also because "the parties disagree as to whether ***196** and how the Codes relate to or affect the contractual relationships at issue." Id. at 154.

Here, the PAA lies somewhere between the contracts and the unsigned codes at issue in Chambers. On the one hand, unlike in Chambers, the Complaint here is not "replete" with references to the PAA; instead, as mentioned above, the Complaint contains a single reference to the PAA. But, on the other hand, unlike the codes, no one here disputes whether or how the PAA relates to the issues at the center of these motions. And plaintiffs clearly relied on the PAA – even if only to get around it – while drafting the Complaint. What is more, the reference to the PAA, like the references to the contracts in Chambers, seems to request judicial interpretation of its terms. The Complaint goes out of its way to describe Wells Fargo as a "non-agent contractor," a legal conclusion that is not entitled to the assumption of truth. And "insofar as the Complaint relies on the terms of [the Paying Agent Agreement], [the Court] need not accept its description of those terms, but may look to the agreement itself." Broder v. Cablevision Systems Corp., 418 F.3d 187, 198 (2d Cir. 2005).

What is more, the Tribune courts, faced with a similar set of allegations, deemed the paying agent agreement integral to the complaint. There, the Tribune shareholders submitted transaction documents, including the relevant paying agent agreement, in opposing the Tribune trustee's motion to amend their complaint to include a claim for constructive fraudulent conveyance. See In re Tribune Co. Fraudulent Conveyance Litig., No. 12-cv-2652 (S.D.N.Y.), Dkt. No. 6094, Ex. 11. The district court held that the complaint, "when read in combination with documents that are either judicially noticeable or are integral to the complaint, establish that [the paying agent] was acting as Tribune's agent." Tribune, 2019 WL 1771786, at *9-11. And, on appeal, the Second Circuit took note of the fact that the defendants had relied on the argument that certain "transaction documents" were integral to the complaint. Tribune, 946 F.3d at 77-78. Following Tribune, the Court holds that the PAA is integral to Complaint and can be considered at the motion to dismiss stage.

B. Payments to the Shareholder Defendants

Both the Litigation Trustee and the Indenture Trustee assert fraudulent conveyance claims against the public shareholders. The shareholder defendants move to dismiss those claims on the ground that § 546(e) of the Bankruptcy Code safe harbors the public shareholder payments from the Litigation Trustee's claims and preempts the Indenture Trustee's claims.

In broad strokes, the purpose of that provision, as the Second Circuit recently observed, is to "promote finality and certainty for investors, by limiting the circumstances ... under which securities transactions could be unwound," and thereby "enhancing the efficiency of securities markets" and reduc[ing] the cost of capital to the American economy." Tribune, 946 F.3d at 92. As explained below, the Court holds that plaintiffs' attempts to claw back payments made to the shareholder defendants in connection with an LBO that closed more than four years ago are foreclosed by § 546(e).

i. Whether § 546(e) Safe Harbors the Payments From the Litigation Trustee's Fraudulent Conveyance Claims

1. General Legal Standard

Sections 544 through 553 of the Bankruptcy Code outline "the circumstances under which a trustee" may set aside "certain types of transfers and recapture ***197** the value of those avoided transfers for the benefit of the estate." Merit Management Group, LP v. FTI Consulting, Inc., ––– U.S. ––––, 138 S.Ct. 883, 888, 200 L.Ed.2d 183 (2018). The Code also sets out "a number of limits on the exercises of these avoiding powers." Id. at 889. As relevant here, § 546(e) provides, in relevant part:

> Notwithstanding section 544 ... of this title, the trustee may not avoid a transfer that is a ... settlement payment ... made by or to (or for the benefit of) a ... financial institution ... or that is a transfer made by or to (or for the benefit of) a ... financial institution ... in connection with a securities contract, ... that is made before the commencement of the case, except under section 548(a)(1)(A) of this title. [11]

11 U.S.C. § 546(e). Put simply, the safe harbor applies where two requirements are met: (1) there is a qualifying transaction (i.e., there is a "settlement payment" or a "transfer payment ... made in connection with a securities contract) and (2) there is a qualifying participant (i.e., the transfer was "made by or to (or for the benefit of) a ... financial institution").

2. Qualifying Transaction

The shareholder defendants argue that Nine West's payments in connection with the common shares were qualifying transactions for two independent reasons: (1) the payments were "settlement payments" and (2) the payments were transfers "made in connection with a securities contract." The Court agrees in both respects.

a. In Connection with a Securities Contract

The Second Circuit has observed that the Bankruptcy Code defines "securities contract" with "extraordinary breadth" to include, inter alia, a "contract for the purchase or sale of a security, including any repurchase transaction on any such security," as well as "any other agreement or transaction that is similar to an agreement or transaction referred to in this subparagraph." Tribune, 946 F.3d at 81 (first quoting In re Bernard L. Madoff Inv. Sec. LLC, 773 F.3d 411, 417 (2d Cir. 2014) and then quoting 11 U.S.C. § 741 (7)(A)(i), (vii)). In Tribune, the Second Circuit held that Tribune's payments for the redemption of shares from its public shareholders were "in connection with a securities contract." Id.

Here, just as in Tribune, the shareholder defendants argue, Nine West's payments to the public shareholders were for the redemption of shares and thus made in connection with a securities contract. Shareholder Defs' Mem. at 13.

Plaintiffs attempt to distinguish Tribune. They argue that, unlike in Tribune, the common shares were not "redeemed" by Nine West; instead, they were "cancelled and converted into the right to receive $15 per share in cash." Pls' Shareholder Mem. at 22 (quoting Complaint ¶ 132). After the closing, plaintiffs contend, "the former shareholders' stock certificates became nothing more than pieces of paper evidencing their respective rights to payment pursuant to the [Merger Agreement]." Id. ***198** And because the shares ceased to exist after the merger, the Merger Agreement did not – and, indeed, could not – involve their purchase. Id. at 22-23.

For two reasons, the Court rejects plaintiffs' argument and finds that the public shareholder transfers were made in connection with a securities contract. First, plaintiffs' attempt to distinguish Tribune is unsuccessful. Tribune involved a two-step LBO transaction: first, there was a tender offer, which involved the redemption of shares from public shareholders, and second there was, as here, a merger, which involved the cancelation and conversion of the remaining shares into the right to receive cash. See Declaration of Andrew G. Devore In Support of Reply Memorandum of Law in Further Support of Public Shareholder Defendants' Motion to Dismiss Under the Safe Harbor Act of 11. U.S.C. § 546(e), Dkt. No. 280-1. While the Second Circuit did not specifically discuss this distinction between redemption and cancellation, it had "no trouble concluding, based on Section 741(7)'s plain language, that all of the payments at issue, including those connected to the redemption of shares, were 'in connection with a securities contract.' " Tribune, 946 F.3d at 81.

Second, as the shareholder defendants persuasively argue, § 741(7)(A)(vii) covers not only contracts for the repurchase of securities but also any other "similar" contract or agreement. As noted above, the Second Circuit has given this provision wide scope, observing that "few words in the English language are as expansive as 'any' and 'similar' " and defining "similar" to "mean[ ] 'having characteristics in common,' or 'alike in substance or essentials.' " Madoff, 773 F.3d at 419. There is no substantive or essential difference between an LBO that is effectuated through share redemption and one effectuated through share cancellation. Therefore, regardless of how the transaction is characterized, the Court finds that Nine West, at the least, entered into a transaction "similar" to a repurchase, and that the payments to the public shareholders in connection with the Merger Agreement fall within the catch-all of § 741(7)(A)(vii). [12]

b. Settlement Payment [13]

Under the Bankruptcy Code, a "settlement payment" means "a preliminary settlement payment, a partial settlement payment, an interim settlement payment, a settlement payment on account, a final settlement payment, or any other similar payment commonly used in the securities trade." 11 U.S.C. § 741(8). The Second Circuit has held that a "settlement payment" includes a "transfer of cash made to complete a securities transaction." Enron Creditors Recovery v. Alfa, S.A.B. de C.V., 651 F.3d 329, 334-35 (2d Cir. 2011); see also In re Quebecor World (USA) Inc., 453 B.R. 201, 215 (Bankr. S.D.N.Y. 2011) ("[T]he direction given by the Enron majority with respect to that definition is both uncomplicated and crystal ***199** clear – a settlement payment, quite simply, is a transfer of cash made to complete a securities transaction.").

In light of the Second Circuit's capacious interpretation of § 741(8), the Court holds, in the alternative, that the payments made to the shareholder defendants were "settlement payments" – that is, transfers of cash made to complete the merger. [14]

3. Qualifying Participant

After determining that the shareholder payments are qualifying transactions, the Court must next determine whether those transactions involved a qualifying participant – that is, whether the transfer was "made by or to (or for the benefit of) a ... financial institution." § 546(e). Here, the shareholder defendants make two arguments: First, that Nine West counts as a qualifying participant and therefore all of the public shareholder payments are safe harbored by § 546(e); and second that certain public shareholders independently count as qualifying institutions either because they are registered under the Investment Company Act of 1940 or because they are themselves commercial banks. The Court again agrees with the shareholder defendants in both respects.

a. Whether Nine West is Qualifying Participant

The shareholder defendants' primary argument is that Nine West qualifies as a "financial institution" under the relevant provisions of the Bankruptcy Code. As discussed above, § 546(e) safe harbors qualifying transactions that are made by or to (or for the benefit of) a ... financial institution. Section 101(22) of the Bankruptcy Code, in turn, defines a "financial institution" as, in relevant part:

> [A]n entity that is a commercial or savings bank ... and, when any such ... entity is acting as agent or

> custodian for a customer (whether or not a 'customer', as defined in section 741) in connection with a securities contract (as defined in section 741) such customer.

11 U.S.C. § 101(22)(A). In other words, when a bank is acting as an agent for a customer in connection with a securities contract, that customer counts as a "financial institution," for the purposes of the § 546(e) safe harbor. In Tribune, the Second Circuit announced and applied this interpretation of § 546(e) for the first time. It held that Tribune was a financial institution because, during that merger, Tribune was a "customer" of Computershare, a bank, and that Computershare acted as Tribune's "agent" in that merger by serving as its paying agent to effectuate the redemption payments made to the Tribune's former shareholders. 946 F.3d at 77-80.

The shareholder defendants argue that this case is on all fours with Tribune. That is, Nine West qualifies as a financial institution under § 101(22)(A) because, during the merger, Nine West was a "customer" of Wells Fargo, a "commercial bank", and that Wells Fargo acted as Nine West's "agent" in the merger by serving as its paying agent to effectuate the payments to the shareholder defendants. Shareholder Defs' Mem. at 14. In response, plaintiffs dispute only whether Wells Fargo served as Nine West's "agent."

i. Legal Standard for Agency

In finding that Computershare was Tribune's agent, the Second Circuit looked to common law, where the establishment of an agency relationship requires: (1) "the principal's manifestation of ***200** intent to grant authority to the agent"; (2) "agreement by the agent"; and (3) "the principal['s] ... mainten[ance] [of] control over key aspects of the undertaking." Tribune, 946 F.3d. at 79.

First, the Tribune court found that Tribune manifested its intent to grant authority to Computershare by "depositing the aggregate purchase price for the shares with Computershare and entrusting Computershare to pay the tendering shareholders." Id. at 80. Second, it found that Computershare "manifested its assent by accepting the funds and effectuating the transaction." Id. And finally, it found that Tribune maintained control over key aspects of the undertaking as the transaction proceeded. Id. Specifically on this last point, the Tribune court observed that Tribune had to give Computershare notice of its acceptance of the shares before Computershare was to pay the tendering shareholders. Id.

ii. Whether Wells Fargo was Nine West's Agent

The shareholder defendants argue that here, as in Tribune, all three elements of agency are satisfied, for substantially the same reasons that the Tribune court relied on. Plaintiffs make two arguments in response: (1) that Wells Fargo was not an agent but merely a "non-agent service provider"; and (2) that, to the extent Wells Fargo was anyone's agent, it was Jasper Parent's agent, not Nine West's agent. [15]

1. Whether Wells Fargo Was a "Non-agent Contractor"

Plaintiffs first argue, as they allege in the Complaint, that Wells Fargo was not an agent at all, but merely a "non-agent contractor." Pls' Shareholder Mem. at 17; Complaint ¶ 135. In essence, plaintiffs claim that Wells Fargo was not an agent because it did not have a fiduciary relationship with either Jasper Parent or Nine West. Pls' Shareholder Mem. at 18. Specifically, plaintiffs cite to two Second Circuit cases that, they contend, show that where a service provider is performing specified tasks in accordance with a contract, that contractual arrangement does not mean the service provider is an agent for its customer. Id. (citing, inter alia, Bridgestone/Firestone, Inc. v. Recovery Credit Servs., Inc., 98 F.3d 13, 20 (2d. Cir. 1996)). Plaintiffs note that while Wells Fargo had specific contractual duties involving the holding and disbursing funds, maintaining records, and complying with specific directions, plaintiffs conclude, it "had no independence or decision-making authority," no "discretion as to whom it would pay or how much it would pay per share," and "no say over how to invest the money it held." Id. at 19-20.

But, as the shareholder defendants argue, plaintiffs are confusing cause and effect. A relationship of agency gives rise to a fiduciary relationship, see Tribune, 946 F.3d at 79; but a fiduciary relationship is not itself a necessary prerequisite to establishing agency. See Shareholder Reply at 7 (citing Restatement (Third) of Agency § 1.01 cmt. e). In any event, the shareholder defendants contend that plaintiffs' argument is foreclosed by Tribune, where the Second Circuit squarely held that a paying agent that had accepted the funds and effectuated the transaction was an agent of the customer. 946 F.3d at 80.

Plaintiffs attempt to circumvent Tribune by arguing that there are "significant differences between the facts in this case ***201** compared to Tribune." Pls' Shareholder Mem. at 21. As discussed below, however, while the factual wrinkles here might lead the Court to conclude that Wells Fargo was someone else's agent, what is clear is that Wells Fargo, to at least some customer, was an agent.

2. Whether Wells Fargo was Only Jasper Parent's Agent

Plaintiffs next argue that the terms of the merger Agreement and the PAA make clear that, if Wells Fargo was anyone's agent, it was Jasper Parent's agent, not Nine West's agent. Here, unlike in Tribune, the LBO was effectuated by merging the target company (Nine West) and a shell company (Jasper Parent). As a result, the PAA was not a bilateral agreement between Nine West and Wells Fargo but a trilateral agreement between Nine West, Jasper Parent, and Wells Fargo. See PAA at 2. Plaintiffs contend that, even assuming the Court considers the PAA, that document makes clear that Wells Fargo was acting on behalf of, and subject to the control of, Jasper Parent, not Nine West. Pls' Shareholder Mem. at 11. [16]

Looking to Tribune, plaintiffs argue that in finding that Computershare was acting as Tribune's agent, the Second Circuit explained that: (1) Tribune had deposited the aggregate purchase price with Computershare and (2) Computershare could not issue payments until Tribune provided notice of its acceptance. Pls' Shareholders Mem. at 11. Here, plaintiffs point out, it was Jasper Parent, not Nine West, that was tasked with depositing the funds and accepting the shares. See PAA § 1.4 ("Parent shall deposit (or cause to be deposited) with the Paying Agent ... cash in immediately available funds ... sufficient to pay the Merger Consideration ...."); id. ("The Paying Agent agrees that it will not release or pay any funds from the Payment Fund to or for the account of any of the Shareholders ... unless and until Parent has notified the Paying Agent that the Effective Time of the Merger has occurred."). [17] In addition, plaintiffs point out that, under the Merger Agreement, it was Jasper Parent, not Nine West, that directed Wells Fargo how to invest the funds until they are paid out. Merger Agreement § 4.2(a). By contrast, plaintiffs argue, Nine West's role in the PAA ranged from "trivial" to "nonexistent." [18] Pls' Shareholder Mem. at 13.

In response, the shareholder defendants argue that even if Wells Fargo was an ***202** agent of Jasper Parent, Wells Fargo also served as Nine West's agent for the purposes of distributing the payments to the shareholder defendants. Shareholder Reply at 6. In particular, the shareholder defendants point to the following features of the PAA as evidence of agency relationship between Nine West and Wells Fargo: (1) the PAA expressly provides that Nine West "desires that the Paying Agent act as its special agent for the purpose of distributing the Merger Consideration"; (2) Nine West was tasked with delivering to Wells Fargo a list of the owners of common shares who were to receive payment; (3) Nine West instructed and authorized Wells Fargo to cancel the shares upon delivery; (4) Nine West was responsible for paying Wells Fargo; (5) Nine West was responsible for indemnifying Wells Fargo; and (6) upon completion of the merger, Wells Fargo was instructed to deliver to Nine West "any and all funds which had been made available" to Wells Fargo. Shareholder Reply at 4-5. [19]

The Court agrees with the shareholder defendants and holds that Wells Fargo was Nine West's agent with respect to the Merger Agreement. Ultimately, the money belonged to Nine West and was paid to its shareholders. While plaintiffs try to use Jasper Parent's involvement to confuse the matter, the district court's analysis in Tribune ably resolves the issue: "[Wells Fargo] was entrusted with [millions] of dollars of [Nine West] cash and was tasked with making payments on [Nine West's] behalf to Shareholders upon the tender of their stock certificates to [Wells Fargo]. This is a paradigmatic principal-agent relationship." 2019 WL 1771786, at *11. While Nine West may have had less control over the shareholder transfers than did Tribune, it nevertheless had enough control over key elements of the transaction so as to establish an agency relationship with Wells Fargo.

In sum, then, the Court holds that Nine West, in virtue of its relationship with Wells Fargo, is a financial institution under § 101(22)(A) and all of the payments made to the public shareholders pursuant to the Merger Agreement were settlement payments and/or transfers made in connection with a securities contract under § 546(e). Accordingly, the Court holds that all of the payments made to the public shareholders are safe harbored under § 546(e).

b. Whether Certain Shareholder Defendants Independently Count as Qualifying Participants

In the alternative, the Court also finds that certain shareholder defendants independently count as qualifying participants, irrespective of Nine West's status. Section 101(22)(A) does not contain the statute's only definition of a "financial institution." Rather, § 101(22)(B) further defines "financial institution" to include "in ***203** connection with a securities contract ... an investment company registered under the Investment Company Act of 1940." 11 U.S.C. 101(22)(B).

The shareholder defendants maintain, and submit SEC documents to prove,[20] that at least 82 of them are registered under the 1940 Act and therefore independently qualify as "financial institutions" under § 546(e).[21] In addition, one shareholder defendant – Natixis S.A. – is independently a financial institution because it is simply a "commercial bank," pursuant to 11 U.S.C. § 101(22). See Joinder and Supplement of Defendant Natixis S.A. to Public Shareholder Defendants' Motion to Dismiss Under the Safe Harbor of 11 U.S.C. § 546(e) ("Natixis Joinder"), Dkt. No. 243.[22] Because the payments to these shareholders, which allegedly totaled over $338 million, were part of a qualifying transaction (for the reasons discussed above), they independently qualify for the § 546(e) safe harbor.

ii. Whether § 546(e) Preempts the Indenture Trustee's State Law Fraudulent Conveyance Claims Against the Shareholder Defendants

In addition to the Litigation Trustee's fraudulent conveyance claims brought under § 544 of the Bankruptcy Code, the Indenture Trustee asserts the same claims against the same defendants but without invoking § 544. In Tribune, however, the Second Circuit held that § 546(e) impliedly preempts state law fraudulent conveyance claims by individual creditors that would be barred by the safe harbor if brought by a bankruptcy trustee. 946 F.3d at 90-97. Because the Court holds that the § 546(e) safe harbor applies, the Court also holds that the Indenture Trustee's claims against the shareholder defendants are preempted by that provision.

***204** C. Director and Officer Payments

To the extent the D&O defendants received common shares as public shareholders, the foregoing analysis applies equally to them. In addition, the D&O defendants also move to dismiss plaintiffs' fraudulent conveyance claims and the Litigation Trustee's unjust enrichment claims as to payments made in connection with restricted shares, share equivalent units, and accumulated dividend payments.

i. Whether § 546(e) Safe Harbors the Payments From the Litigation Trustee's Fraudulent Conveyance Claims

As discussed above, the § 546(e) safe harbor applies where two requirements are met: (1) there is a qualifying transaction; and (2) there is a qualifying participant.

1. Qualifying Transaction

The D&O defendants argue that the payments for restricted shares, share equivalent units, and accumulated dividends all qualify as both (1) "settlement payments" and (2) transfers "in connection with a securities contract." Memorandum of Law in Support of Former Director and Officer Defendants' Motion to Dismiss Under the Section 546(e) Securities Safe Harbor ("D&O Defs' Mem."), Dkt. No. 94, at 8; Reply Memorandum of Law of Former Director and Officer Defendants in Support of Their Motion to Dismiss the Complaint ("D&O Reply"), Dkt. No. 281, at 6. Plaintiffs concede that, if the Court finds that the payments for the common shares count as qualifying transactions, then so must the payments for restricted shares and share equivalent units. Pls' D&O Mem. at 10. But plaintiffs contend that the accumulated dividend payments still should not count as qualifying transactions because they did not involve the purchase, sale, loan, or even cancellation of any security. Id. The only question for the Court to resolve here, thus, is whether the accumulated dividend payments count as qualifying transactions.

As discussed above, the Second Circuit construes broadly both "settlement payments" and "transfers in connection with a securities contract." The D&O defendants make two arguments for why the accumulated dividend payments should count as qualifying transactions.

First, the D&O defendants contend that the Complaint itself concedes that accumulated dividends were transfers "made from the cancellation of Jones Group shares in connection with the LBO." D&O Defs' Mem. at 7 (quoting Compl. ¶ 40). But the D&O defendants are taking the Complaint out of context. In full, that sentence reads: "First, all the Directors and Officers knew that they would receive, individually or through family members, affiliated entities, or trusts, material amounts from the cancellation of Jones Group shares in connection with the LBO." Compl. ¶ 40. That sentence could just as well refer to the money the directors and officers would receive in connection with the restricted share and share equivalent units. The Court therefore rejects this first argument.

Second, the D&O defendants point out that other courts have held that dividend payments made as part of an integrated transaction where the shareholder gives up her equity count as qualifying transactions. On point here is In re Boston Generating, 617 B.R. 442, 492–93, (S.D.N.Y. June 18, 2020). In that case, the court held that dividend payments may count as "settlement payments" when they are made in exchange for the holder's equity interest. Specifically, the court homed in on the fact that the dividend payments were made "as part of an integrated transaction ... that comprised the use of more than $1 billion to redeem equity interests in [the target ***205** company], redeem warrants, and pay a dividend to equity." [23] Id. By contrast, where a dividend is paid in the ordinary course to shareholders who retain their equity following the dividend, such payments are not "settlement payments." Id.

While In re Boston Generating is not precedent binding on this Court, the Court finds its reasoning persuasive, especially in light of the wide berth that the Second Circuit has afforded the "qualifying transaction" prong of the analysis. Here, as in In re Boston Generating, the accumulated dividend payments were tied to the restricted shares and paid as part of the settlement of the Merger Agreement. See Merger Agreement § 4.3 (holders of restricted shares shall receive "an amount in cash, for each Restricted Share, equal to the Per Share Merger Consideration plus any unpaid dividends that have accumulated on such Restricted Share ...."). All of the cases on which plaintiffs rely are cases in which dividend payments were made for securities that the transferees continued to hold, exactly the sort of situation that is distinguished in In re Boston Generating. See Pls' D&O Mem. at 11. Accordingly, the Court holds that the accumulated dividend payments were both settlement payments and transfers made in connection with a securities contract.

2. Qualifying Participant

To satisfy the "qualifying participant" prong of the analysis, the D&O defendants argue that Nine West should be considered a "financial institution" with respect to all payments made in connection with the Merger Agreement, even those payments with respect to which Wells Fargo played no role.

As discussed above, the Court holds that Nine West qualifies as a financial institution under § 101(22)(A) because, during the merger, it was a customer of Wells Fargo, which acted as its agent in that merger by serving as its paying agent to effectuate the payments to the public shareholders. Unlike the common share payments, however, which were effectuated through Wells Fargo, plaintiffs allege that the payments for restricted shares, share equivalent units, and accumulated dividends "were processed through the payroll and by other means." Compl. ¶ 135. The question here, then, is whether Nine West's status as a "financial institution" extends to these other payments, which were made in connection with the merger, but that weren't themselves processed by Wells Fargo.

At bottom, this is a question of statutory interpretation. As quoted above, § 101(22)(A) defines a financial institution as, in relevant part:

> [A]n entity that is a commercial or savings bank ... and, when any such ... entity is acting as agent or custodian for a customer (whether or

> not a 'customer', as defined in section 741) in connection with a securities contract (as defined in section 741) such customer.

Ultimately, the parties disagree over "when" Wells Fargo is acting as Nine West's agent in connection with a securities contract. Advocating for a "contract-by-contract" approach, the D&O defendants argue that a customer of a bank is a "financial institution" under § 101(22)(A) with respect to a securities contract. Accordingly, once the Court finds that Nine West is a "financial institution" as a customer of Wells Fargo in connection with the Merger Agreement, § 546(e) protects ***206** all "settlement payments" or transfers "in connection with" the Merger Agreement made "by or to (or for the benefit of)" Nine West, regardless whether Wells Fargo itself processed or otherwise served as an agent with respect to these payments. D&O Reply at 4.

Plaintiffs offer an alternative reading. Taking a "transfer-by-transfer" approach, plaintiffs argue that a customer of a bank is a "financial institution" under § 101(22)(A) with respect to particular transfers. On this reading, even if Wells Fargo served as Nine West's agent in connection with the Merger Agreement, § 546(e) protects only those payments with respect to which Wells Fargo played an agency role. Pls' D&O Mem. at 8-9. Where, as here, certain payments made in connection with the securities contract were not processed by the paying agent, those payments are not safe harbored. In support of their position, plaintiffs stress that, under the statute, a customer of a bank only counts as a financial institution "when [a bank] is acting as agent." Id. at 8. Thus, "customer status as a financial institution is ... transitory and transactional in nature and exists only when and to the extent the bank is playing an agency role with respect to a specific transfer." Id. 8-9.

For two reasons, the Court adopts the "contract-by-contract" interpretation of § 101(22)(A). First, the reading is more consistent with the text of the statute. The statute provides that a customer of a bank qualifies as a financial institution "when [the bank] is acting as agent ... in connection with a securities contract." If plaintiffs' reading were right, the statute should have read: "when [the bank] is acting as agent ... in connection with a transfer." Indeed, § 101(22)(A), which simply defines the term "financial institution," does not even mention the word "transfer."

Second, plaintiffs' proposed reading runs into tension with the Supreme Court's decision in Merit Mgmt. Grp., LP v. FTI Consulting, Inc., ––– U.S. ––––, 138 S. Ct. 883, 892 n.6, 200 L.Ed.2d 183 (2018). In that case, the Supreme Court held that "the relevant transfer for purposes of the § 546(e) safe-harbor inquiry is the overarching transfer that the trustee seeks to avoid," and "not any component part of that transfer." Id. at 893. In so holding, the Court rejected an interpretation that some lower courts had given to § 546(e) that "transfers in which financial institutions served as mere conduits" are safe harbored, just because the money passed through a financial institution. Id. at 892. But plaintiffs' reading effectively asks the Court to revive a version of that conduit theory, affording safe harbor only where "the bank is playing an agency role with respect to a specific transfer." Pls' D&O Mem. at 9. In light of Merit, such a narrow focus on the mechanics of each individual transfer is misplaced.

In sum, then, the Court holds that the relevant inquiry under Tribune and in light of Merit is not whether the bank had a role in a specific payment or transfer but whether that bank was acting as an agent in connection with a securities contract. When, as here, a bank is acting as an agent in connection with a securities contract, the customer qualifies as a financial institution with respect to that contract, and all payments made in connection with that contract are therefore safe harbored under § 546(e). For that reason, the payments made to the D&O defendants – viz., payments in connection with restricted shares, share equivalent units, and accumulated dividends – are safe harbored under § 546(e), even if, as plaintiffs allege, they were not themselves processed by Wells Fargo.

***207** ii. Whether § 546(e) Preempts the Indenture Trustee's State Law Fraudulent Conveyance Claims Against the D&O Defendants

As explained above, because the Court holds that the § 546(e) safe harbor applies to the payments made in connection with the restricted shares, share equivalent units, and accumulated dividends, the Court also holds that the Indenture Trustee's fraudulent conveyance claims against the D&O defendants are preempted by that provision.

iii. Whether § 546(e) preempts the Litigation Trustee's Unjust Enrichment Claims Against the D&O Defendants [24]

Finally, the D&O defendants argue that the Litigation Trustee's unjust enrichment claims against certain former directors and officers are preempted by § 546(e)'s safe harbor. Here, the Litigation Trustee is seeking "disgorgement and restitution of, and a judgment against [certain defendants] in the amount of, the payments, benefits, incentives, and other things of value [those defendants] received in connection with the 2014 Transaction." Compl. § 191.

Where an unjust enrichment claim "seeks to recover the same payments held unavoidable under § 546(e)," it would "render the § 546(e) exemption meaningless, and would wholly frustrate the purpose behind that section." AP Servs. LLP v. Silva, 483 B.R. 63, 71 & n.64 (S.D.N.Y. 2012). The D&O defendants argue that because the Litigation Trustee is seeking to recoup money that these defendants received in connection with transfers that have been safe harbored, those claims are preempted by § 546(e).

In response, the Litigation Trustee argues that the D&O defendants are misframing the doctrine: unjust enrichment claims are only preempted where they are "substantially identical" to the avoidance claims barred by § 546(e). Pls' D&O Mem. at 13 (quoting In re Contemporary Indus Corp., No. A99-8135, 2007 WL 5256918, at *5 (Bankr. D. Neb. June 29, 2007)), aff'd, No. 8:07CV288, 2008 WL 11450766 (D. Neb. Jan. 8, 2008), aff'd, 564 F.3d 981 (8th Cir. 2009), abrogated in part by Merit Mgmt. Grp., LP v. FTI Consulting, Inc., ––– U.S. ––––, 138 S. Ct. 883, 892 n.6, 200 L.Ed.2d 183 (2018). Here, the Litigation Trustee argues, the unjust enrichment claims "are based not on the allegations that [Nine West] engaged in intentional and constructive fraudulent conveyance, but on the allegations that the former directors and officers of Jones Group breached their fiduciary duties and engaged in other personal wrongdoing." Id. at 12-13. In other words, because the unjust enrichment claims sound in breach of fiduciary duty, not fraudulent conveyance, the Litigation Trustee insists they are not preempted by § 546(e).

But, as the D&O defendants persuasively respond, it is the remedy sought, rather than the allegations pled, that determines whether § 546(e) preempts a state law claim. See, e.g., Contemporary Industries Corp. v. Frost, 564 F.3d 981, 988 (8th Cir. 2009) (Beam, J.) abrogated on other grounds by ***208** Merit, ––– U.S. ––––, 138 S.Ct. 883, 200 L.Ed.2d 183 (2018). This rule also promotes the purpose of § 546(e), which is to "to limit[ ] the circumstances ... under which securities transactions could be unwound." Tribune, 946 F.3d at 92.

Therefore, because the Court holds that the payments made in connection with the restricted shares, share equivalent units, and accumulated dividends are safe harbored under § 546(e), the Court likewise dismisses the Litigation Trustee's unjust enrichment claims as to those payments. The Court notes, however, that the unjust enrichment claims are not dismissed with respect to the change in control payments, which, as discussed above, the D&O defendants have not yet moved to dismiss.

* * * * *

For the foregoing reasons, the Court hereby dismisses all fraudulent conveyance and unjust enrichment claims with respect to payments made in connection with common shares, restricted shares, share equivalent units, and accumulated dividends. [25] The Clerk of the Court is directed to close docket entries 88 and 93 in 20-md-2941. In addition, because all of the claims in the complaints in the following actions have now been dismissed, the Clerk is to enter judgment in favor of defendants in 20-cv-4286, 20-cv-4289, 20-cv-4299, 20-cv-4434, 20-cv-4440, 20-cv-4479, and 20-cv-4480.

SO ORDERED.

All Citations

482 F.Supp.3d 187

Footnotes

1 Plaintiffs in this multidistrict litigation have filed seventeen virtually identical complaints. After the motions to dismiss were briefed, amended complaints were filed in certain actions pursuant to Fed. R. Civ. P. 15(a)(1)(B). The amendments were mostly technical. Because plaintiffs do not object to the pending motions being treated as addressed to the amended pleadings, Plaintiffs' Memorandum of Law in Opposition to Former Director and Officer Defendants' Motion to Dismiss Under 11 U.S.C. § 546(e) ("Pls' D&O Mem."), Dkt. No. 272, at 5 n.5, the Court cites, unless otherwise noted, to the amended complaint filed in Kirschner, et al. v. McClain et al., No. 20-cv-4262, Dkt. No. 110. Each cited allegation is also found in the other operative complaints, and every reference to the "Complaint" hereinafter effectively refers to each of the complaints in these actions.

2 "In a typical LBO, a target company is acquired with a significant portion of the purchase price being paid through a loan secured by the target company's assets." Tribune, 946 F.3d at 71 n.

3 Plaintiffs acknowledge that the Merger Agreement is incorporated in the Complaint. See Plaintiffs' Memorandum of Law in Opposition to Public Shareholder Defendants' Motion to Dismiss Under 11 U.S.C. § 546(e) ("Pls' Shareholder Mem."), Dkt. No. 271, at 6. In any event, as discussed below, the Court holds that certain documents central to the transaction at issue here – viz., the Merger Agreement and the Paying Agent Agreement – are "integral" to the Complaint and therefore appropriate for the Court to consider at the 12(b)(6) stage. Chambers v. Time Warner, Inc., 282 F.3d 147, 153 (2d Cir. 2002). Accordingly, the Court relies on those documents in the statement of facts.

4 Plaintiffs also acknowledged the identity of Wells Fargo in the Status Report they filed with this Court on June 10, 2020. See 20-md-2941, Dkt. No. 10 at 8.

5 Book-entry securities are investments whose ownership is recorded electronically. By contrast, certificate securities are investments whose ownership is recorded with a stock certificate.

6 The Complaint does not contain any allegations with respect to how the change in control payments were effectuated, although plaintiffs suggest in their briefing that they were processed in the same manner as the restricted shares, share equivalent units, and accumulated dividends. See Pls' D&O Mem. at 2. Because the D&O defendants have not yet moved to dismiss the claims relating to the change in control payments, this question is ultimately beyond the scope of the instant motions.

7 The moving shareholder defendants are identified in the signature pages to their memo in support of their motion to dismiss. Others have joined in that motion. See 20-md-2941, Dkt. Nos. 95, 100, 101, 108, 112, 115, 135, 143, 149, 155, 157, 159, 178, 181, 184, 189, 192, 195, 202, 204, 205, 210, 214, 218, 225, 231, 240, 243, 251, 264, 268, 276, 282, 300, 309, 314, and 316.

8 The Director Defendants who have moved to dismiss are Gerald C. Crotty, John D. Demsey, Robert L. Mettler, Mary Margaret Hastings Georgiadis, Matthew H. Kamens, Sidney Kimmel, Ann Marie C. Wilkins, James A. Mitarotonda, Jeffrey Nuechterlein, and Lowell W. Robinson. The Officer Defendants who have moved to dismiss are Christopher R. Cade, Wesley R. Card, Ira M. Dansky, Richard L. Dickson, Cynthia DiPietrantonio, Joseph T. Donnalley, Tami Fersko, John T. McClain and Aida Tejero-DeColli. In addition, the following former directors, officers, and employees who are alleged to have received payments in connection with restricted shares, share equivalent units, and unpaid dividends have joined in the D&O defendants' motion to dismiss: Irene A. Koumendouros, Ira Margulies, John D'Souza, Jack Gross, Patricia Kenny, Vincent Morales, Daniel Fishman, Frances Lukas, Mitchel Levine, Nicoletta Palma and Stephen C. Troy, Dkt. No. 101; Janet Carr, Dkt. No. 105; Kathleen Nedorostek Kaswell, Joseph Stafiniak, and Mary E. Belle, Dkt. No. 108; Nicola Guarna and Robert Rodriguez, Dkt. No. 112; Lynne Bernstock, Jeffery Brisman, Janice Brown, Katherine Butler, James Capiola, Gregory Clark, Eric Dauwalter, Mark DeZao, Beth Dorfsman, Eileen Dunn, Rosa Genovesi, Laurie Gentile, Bryan Gilligan, Ninive Giordano, Stacey Harmon, Richard Hein, Gerald Hood, Linda Kothe, Arundhati Kulkarni, Suzanne Maloney, Zine Mazouzi, Susan McCoy, Thomas Nolan, Pamela Paul, Charles Pickett, Amy Rapawy, Joseph Rosato, Mahmood Hassani-Sadi, Arlene Starr, Larissa Sygida, Kimberly Thomas, and Norman Veit, Dkt. No. 115; Whitney L. Smith, Dkt. No. 135; Heather Harlan and George Sharp, Dkt. No. 143;

Jamie Cygielman, Harvest Street Capital, LLC, and Robyn Mills, Dkt. No. 189; Stefani Greenfield, Dkt. No. 218; Wayne Kulkin, Dkt. No. 235; and Kathleen O'Brien Gibber and Thomas Murray, Dkt. No. 264.

9 As confirmed at oral argument, the D&O defendants do not move to dismiss plaintiff's fraudulent conveyance claims with respect to the change in control payments. See Transcript of Oral Argument, August 13, 2020 ("Tr."), at 23:15-20.

10 Relying on Goldman v. Belden, 754 F.2d 1059, 1066 (2d Cir. 1985), plaintiffs also argue that limited quotations of a document are not enough "to make the document integral to the complaint." Id. This argument, however, is meritless. Goldman discusses whether a particular document had been incorporated in a complaint, 754 F.2d at 1066, not whether it was integral to the complaint, which is a separate inquiry. Indeed, "[e]ven where a document is not incorporated by reference, the court may nevertheless consider it where the complaint relies heavily upon its terms and effect, which renders the document integral to the complaint." Chambers, 282 F.3d at 153.

11 Section 546(e) applies to all fraudulent transfer claims, except for intentional fraudulent transfer claims brought under § 548(a)(1)(A). Such claims may be brought only as to transfers made within two years prior to the bankruptcy. See 11 U.S.C. § 548(a)(1)(A). Because the transfers at issue here occurred nearly four years before Nine West filed for bankruptcy, Compl. ¶¶ 1, 7, the Litigation Trustee cannot and does not bring his intentional fraudulent conveyance claims under Section 548(a)(1)(A). As a result, the shareholder defendants invoke the § 546(e) safe harbor against all of the Litigation Trustee's fraudulent conveyance claims.

12 Plaintiffs further argue that the cancelation and conversion of shares is not similar to the redemption of shares (or to any other agreement or transaction listed in § 741) because the cancellation of shares does not involve "a security changing hands," something they deem to be a crucial element of any "transaction." Even if that were right (which the Court doubts), plaintiffs ignore that § 741(7)(A)(vii) covers not just transactions but agreements. If nothing else, the cancelation and conversion of shares constitutes an agreement that is sufficiently similar to a redemption of shares to fall within the statute's definition of a "securities contract."

13 Because the Tribune court found that the payments at issue were transfers in connection with a securities contract, it declined to reach whether those same payments would also "qualify as 'settlement payments' under Section 546(e)." 946 F.3d at 80 n.12.

14 Plaintiffs do not address whether the payments were settlement payments in their briefs and did not take up the Court's invitation to address the issue at oral argument. Tr. at 34:16-22.

15 Plaintiffs also make the threshold argument that the Court should not consider the Paying Agent Agreement at the 12(b)(6) phase. For the reasons discussed above, the Court disagrees.

16 In support of this point, plaintiffs also cite to the Jones Group Proxy, which advised shareholders that Wells Fargo would pay them "on behalf of Parent." Pls' Shareholder Mem. at 11. Because the proxy statement is neither incorporated in nor integral to the Complaint, the Court declines to consider the document at the 12(b)(6) stage – nor would consideration of the document change the Court's analysis.

17 The shareholder defendants unsuccessfully attempt to elide this point by using the name "Nine West" to refer collectively to Jasper Parent and Nine West. See Shareholder Defs' Mem. at 6 n.8. As a result, every time the PAA mentions "Jasper Parent," the defendants swap in "Nine West."

18 Plaintiffs also argue that § 101(22)(A)'s analysis should proceed transfer-by-transfer, rather than contract-by-contract. And plaintiffs therefore conclude that to the extent Wells Fargo was Nine West's agent, it was only so with respect to the transfers for the certificate securities not the book-entry securities because to the extent Nine West exercised meaningful control over the payments, it was only with respect to the former. As discussed at greater length below, the Court rejects plaintiffs' proffered interpretation of § 101(22)(A) and holds that the analysis of whether a bank is an agent under the statute must proceed contract-by-contract. Plaintiffs' attempt to distinguish between the payments made in connection with the book-entry securities and certificate securities, therefore, is unavailing.

19 The shareholder defendants also contend that plaintiffs' argument undermines plaintiffs' fraudulent conveyance claims, which requires that the transfer sought to be avoided have been made by the debtor-transferor – that is, by Nine West. Because plaintiffs purport to act on behalf of Nine West's (not Jasper Parent's) creditors, the shareholder defendants argue plaintiffs have no standing to seek to avoid transfers made by or on behalf of Jasper Parent. Shareholder Reply at 4-5. Ultimately, then, shareholder defendants conclude, one of two things must be true: Either Wells Fargo made the payments on behalf of Nine West, in which case the payments are safe harbored under § 546(e) or Wells Fargo made the payments only on behalf of Jasper Parent, in which case the transfers were not made by Nine West and are therefore not subject to avoidance. Id. It is unnecessary, however, for the Court to reach this argument.

20 The Court can take judicial notice of the SEC filings establishing such status. See Paulsen v. Stifel, Nicolaus & Co., 2019 WL 2415213, at *6 (S.D.N.Y. Jun. 4, 2019).

21 While Plaintiffs do not dispute that public shareholders registered under the 1940 Act are qualifying participants, they do dispute whether one particular defendant – Gabelli Global Series Fund Inc. ("Gabelli") (originally sued as "Defendant NY-8") – has proffered any judicially noticeable evidence of its status as an investment company registered under the 1940 Act. See Joinder of Defendant NY-8 to Public Shareholder Defendants' Motion to Dismiss, Dkt. No. 149; Pls' Shareholder Mem. at 24 n.18. But Gabelli submitted the requisite documents along with its supplemental reply. See Supplemental Reply of Gabelli Global Series Fund Inc. In Further Support of Public Shareholder Defendants' Motion to Dismiss, Dkt. No. 282. Therefore, the Court holds that Gabelli independently qualifies as a financial institution.

22 As above, plaintiffs do not question whether commercial banks qualify as financial institutions under the statute but dispute whether Natixis has submitted judicially noticeable documentation of its status as such. Pls' Shareholder Mem. at 24 n.18. To establish its status as a commercial bank, Natixis submitted public documents, including: (1) an excerpt from the French Financial Agents Register; and (2) a copy of the Natixis's amended articles of incorporation, with a certified English translation of the relevant portions. Natixis Joinder at 2; see also Declaration of Joseph Cioffi in Support of Joinder and Supplement of Defendant Natixis S.A. To Public Shareholder Defendants' Motion to Dismiss Under the Safe Harbor of 11 U.S.C. § 546(e), Dkt. No. 244. Plaintiffs contend that the Court should not take judicial notice of these documents because they are "foreign documents, whose accuracy is not apparent on their face." Pls' Shareholder Mem. at 24 n.18. But plaintiffs cite no authority for the proposition that courts cannot take judicial notice of publicly filed foreign documents with certified English translations. Indeed, courts in this district have taken judicial notice of such documents. E.g., In re Enron Corp., 323 B.R. 857, 869 (Bankr. S.D.N.Y. 2005). Therefore, the Court holds that Natixis independently qualifies as a financial institution.

23 For similar reasons, the court concluded that the dividend payments also counted as "transfers made in connection with a securities contract." In re Boston Generating, 617 B.R. at 493..

24 The Litigation Trustee brings the unjust enrichment claims only against the former directors and officers who are alleged to have played "a key role in advocating for and/or approving the Merger," namely: Kimmel, Demsey, Kamens, Mitarotonda, Nuechterlein, Robinson, and Donnalley, see 20-cv-4287, Dkt. No. 130; McClain, Crotty, and Fersko, see 20-cv-4262, Dkt. No. 110 Cade and Dansky, see 20-cv-4265, Dkt. No. 53; Georgiadis, see 20-cv-4292, Dkt. No. 1; Card and Wilkins, see 20-cv-4346, Dkt. No. 1; and Dickson and Mettler, 20-cv-4436, Dkt. No. 134.

25 In particular, the Court dismisses the following claims in their entirety: Counts V and VI in the amended complaint in 20-cv-4262, Dkt. No. 110; Counts IV and V in the amended complaint in 20-cv-4265, Dkt. No. 53; Counts I and II in the amended complaint in 20-cv-4267, Dkt. No. 45; Counts I and II in the complaint in 20-cv-4286, Dkt. No. 1; Counts V and VI in the amended complaint in 20-cv-4287, Dkt. No. 130; Counts I and II in the complaint in 20-cv-4289, Dkt. No. 1; Counts IV, V, and VI in the complaint in 20-cv-4292, Dkt. No. 1; Counts I and II in the complaint in 20-cv-4299, Dkt. No. 1; Counts I and II in the complaint in 20-cv-4335, Dkt. No. 1; Counts V and VI in the complaint in 20-cv-4346, Dkt. No. 1; Counts I and II in the amended complaint in 20-cv-4433, Dkt. No. 100; Counts I and II in the complaint in 20-cv-4434, Dkt. No. 4; Counts V and VI in the amended complaint in 20-cv-4436, Dkt. No. 134; Counts I and II in the complaint in 20-cv-4440, Dkt. No.

1; Counts I and II in the complaint in 20-cv-4479, Dkt. No. 1; Counts I and II in the complaint in 20-cv-4480, Dkt. No. 1; and Counts I and II in the amended complaint in 20-cv-4569, Dkt. No. 112.

The Court also dismisses the following unjust enrichment claims only with respect to the payments made in connection with common shares, restricted shares, share equivalent units, and accumulated dividends, but not with respect to the change in control payments: Count IV in the amended complaint in 20-cv-4262; Count III in the amended complaint in 20-cv-4265; Count IV in the amended complaint in 20-cv-4287; Count IV in the complaint in 20-cv-4346; and Count IV in the amended complaint in 20-cv-4436.

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138 S.Ct. 883
Supreme Court of the United States

MERIT MANAGEMENT GROUP, LP, Petitioner
v.
FTI CONSULTING, INC.

No. 16–784.
|
Argued Nov. 6, 2017.
|
Decided Feb. 27, 2018.

Synopsis

Background: Trustee of litigation trust created pursuant to confirmed Chapter 11 plan of debtor, an entity that sought to develop a "racino" in Pennsylvania, brought adversary proceeding, seeking to avoid debtor's allegedly fraudulent transfers of $16,503,850 to transferee, the partial owner of debtor's competitor, as part of debtor's purchase of competitor's stock. The United States District Court for the Northern District of Illinois, Joan B. Gottschall, J., 541 B.R. 850, granted motion for judgment on the pleadings in transferee's favor. Trustee appealed. The Seventh Circuit Court of Appeals, Wood, Chief Judge, 830 F.3d 690, reversed. Certiorari was granted.

Holdings: The Supreme Court, Justice Sotomayor, held that:

the only relevant transfer for purposes of the Bankruptcy Code's "securities safe harbor" provision is the transfer that the trustee seeks to avoid under a substantive avoiding power, abrogating *In re Quebecor World (USA) Inc.*, 719 F.3d 94, *In re QSI Holdings, Inc.*, 571 F.3d 545, *Contemporary Indus. Corp. v. Frost*, 564 F.3d 981, *In re Resorts Int'l, Inc.*, 181 F.3d 505, and *In re Kaiser Steel Corp.*, 952 F.2d 1230, and

in the present case, the transfer between debtor and transferee was not "made by or to (or for the benefit of)" a financial institution and so fell outside the safe harbor.

Affirmed and remanded.

Procedural Posture(s): On Appeal; Motion for Judgment on the Pleadings.

***885** *Syllabus* [*]

The Bankruptcy Code allows trustees to set aside and recover certain transfers for the benefit of the bankruptcy estate, including, as relevant here, certain fraudulent transfers "of an interest of the debtor in property." 11 U.S.C. § 548(a). It also sets out a number of limits on the exercise of these avoiding powers. Central here is the securities safe harbor, which, *inter alia,* provides that "the trustee may not avoid a transfer that is a ... settlement payment ... made by or to (or for the benefit of) a ... financial institution ... or that is a transfer made by or to (or for the benefit of) a ... financial institution ... in connection with a securities contract." § 546(e).

Valley View Downs, LP, and Bedford Downs Management Corp. entered into an agreement under which Valley View, if it got the last harness-racing license in Pennsylvania, would purchase all of Bedford Downs' stock for $55 million. Valley View was granted the license and arranged for the Cayman Islands branch of Credit Suisse to wire $55 million to third-party escrow agent Citizens Bank of Pennsylvania. The Bedford Downs shareholders, including petitioner Merit Management Group, LP, deposited their stock certificates into escrow. Citizens Bank disbursed the $55 million over two installments according to the agreement, of which petitioner Merit received $16.5 million.

Although Valley View secured the harness-racing license, it was unable to achieve its goal of opening a racetrack casino. Valley View and its parent company, Centaur, LLC, filed for Chapter 11 bankruptcy. Respondent FTI Consulting, Inc., was appointed to serve as trustee of the Centaur litigation trust. FTI then sought to avoid the transfer from Valley View to Merit for the sale of Bedford Downs' stock, arguing that it was constructively fraudulent under § 548(a)(1)(B). Merit contended that the § 546(e) safe harbor barred FTI from avoiding the transfer because it was a "settlement payment ... made by or to (or for the benefit of)" two "financial institutions," Credit Suisse and Citizens Bank. The District Court agreed with Merit, but the Seventh ***886** Circuit reversed, holding that § 546(e) did not protect transfers in which financial institutions served as mere conduits.

Held : The only relevant transfer for purposes of the § 546(e) safe harbor is the transfer that the trustee seeks to avoid. Pp. 891 – 897.

(a) Before a court can determine whether a transfer was "made by or to (or for the benefit of)" a covered entity, it must first identify the relevant transfer to test in that inquiry. Merit posits that the relevant transfer should include not only the Valley–View–to–Merit end-to-end transfer, but also all of its component parts, *i.e.,* the Credit–Suisse–to–Citizens–Bank and the Citizens–Bank–to–Merit transfers. FTI maintains that the only relevant transfer is the transfer that it sought to avoid, specifically, the overarching transfer between Valley View and Merit. Pp. 891 – 895.

(1) The language of § 546(e) and the specific context in which that language is used support the conclusion that the relevant transfer for purposes of the safe-harbor inquiry is the transfer the trustee seeks to avoid. The first clause of the provision—"Notwithstanding sections 544, 545, 547, 548(a)(1)(B), and 548(b) of this title"—indicates that § 546(e) operates as an exception to trustees' avoiding powers granted elsewhere in the Code. The text makes clear that the starting point for the § 546(e) inquiry is the expressly listed avoiding powers and, consequently, the transfer that the trustee seeks to avoid in exercising those powers. The last clause—"except under section 548(a)(1)(A) of this title"—also focuses on the transfer that the trustee seeks to avoid. Creating an exception to the exception for § 548(a)(1)(A) transfers, the text refers back to a specific type of transfer that falls within the avoiding powers, signaling that the exception applies to the overarching transfer that the trustee seeks to avoid, not any component part of that transfer. This reading is reinforced by the § 546 section heading, "Limitations on avoiding powers," and is confirmed by the rest of the statutory text: The provision provides that "the trustee may not avoid" certain transfers, which naturally invites scrutiny of the transfers that "the trustee ... may avoid," the parallel language used in the avoiding powers provisions. The text further provides that the transfer that is saved from avoidance is one "that *is* " (not one that involves) a securities transaction covered under § 546(e). In other words, to qualify for protection under the securities safe harbor, § 546(e) provides that the otherwise avoidable transfer itself be a transfer that meets the safe-harbor criteria. Pp. 893 – 894.

(2) The statutory structure also supports this reading of § 546(e). The Code establishes a system for avoiding transfers as well as a safe harbor from avoidance. It is thus only logical to view the pertinent transfer under § 546(e) as the same transfer that the trustee seeks to avoid pursuant to one of its avoiding powers. In an avoidance action, the trustee must establish that the transfer it seeks to set aside meets the carefully set out criteria under the substantive avoidance provisions of the Code. The defendant in that avoidance action is free to argue that the trustee failed to properly identify an avoidable transfer under the Code, including any available arguments concerning the role of component parts of the transfer. If a trustee properly identifies an avoidable transfer, however, the court has no reason to examine the relevance of component parts when considering a limit to the avoiding power, where that limit is defined by reference to an otherwise avoidable transfer, as is the case with § 546(e). Pp. 894 – 895.

***887** (b) The primary argument Merit advances that is moored in the statutory text—concerning Congress' 2006 addition of the parenthetical "(or for the benefit of)" to § 546(e)—is unavailing. Merit contends that Congress meant to abrogate the Eleventh Circuit decision in *In re Munford, Inc.,* 98 F.3d 604, which held that § 546(e) was inapplicable to transfers in which a financial institution acted only as an intermediary. However, Merit points to nothing in the text or legislative history to corroborate its argument. A simpler explanation rooted in the text of the statute and consistent with the interpretation of § 546(e) adopted here is that Congress added the "or for the benefit of" language that is common in other substantive avoidance provisions to the § 546(e) safe harbor to ensure that the scope of the safe harbor and scope of the avoiding powers matched.

That reading would not, contrary to what Merit contends, render other provisions ineffectual or superfluous. Rather, it gives full effect to the text of § 546(e). If the transfer the trustee seeks to avoid was made "by" or "to" a covered entity, then § 546(e) will bar avoidance without regard to whether the entity acted only as an intermediary. It will also bar avoidance if the transfer was made "for the benefit of" that entity, even if it was not made "by" or "to" that entity.

Finally, Merit argues that reading the safe harbor so that its application depends on the identity of the investor and the manner in which its investment is held rather than on the general nature of the transaction is incongruous with Congress' purportedly "prophylactic" approach to § 546(e). But this argument is nothing more than an attack on the text of the statute, which protects only certain transactions "made by or to (or for the benefit of)" certain covered entities. Pp. 894 – 896.

(c) Applying this reading of the § 546(e) safe harbor to this case yields a straightforward result. FTI sought to avoid the Valley–View–to–Merit transfer. When determining whether the § 546(e) safe harbor saves that transfer from avoidance liability, the Court must look to that overarching transfer to evaluate whether it meets the safe-harbor criteria. Because the parties do not contend that either Valley View or Merit is a covered entity, the transfer falls outside of the § 546(e) safe harbor. Pp. 896 – 897.

830 F.3d 690, affirmed and remanded.

SOTOMAYOR, J., delivered the opinion for a unanimous Court.

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Opinion

Justice SOTOMAYOR delivered the opinion of the Court.

To maximize the funds available for, and ensure equity in, the distribution to creditors in a bankruptcy proceeding, the Bankruptcy Code gives a trustee the power to invalidate a limited category of ***888** transfers by the debtor or transfers of an interest of the debtor in property. Those powers, referred to as "avoiding powers," are not without limits, however, as the Code sets out a number of exceptions. The operation of one such exception, the securities safe harbor, 11 U.S.C. § 546(e), is at issue in this case. Specifically, this Court is asked to determine how the safe harbor operates in the context of a transfer that was executed via one or more transactions, *e.g.,* a transfer from A → D that was executed via B and C as intermediaries, such that the component parts of the transfer include A → B → C → D. If a trustee seeks to avoid the A → D transfer, and the § 546(e) safe harbor is invoked as a defense, the question becomes: When determining whether the § 546(e) securities safe harbor saves the transfer from avoidance, should courts look to the transfer that the trustee seeks to avoid (*i.e.,* A → D) to determine whether that transfer meets the safe-harbor criteria, or should courts look also to any component parts of the overarching transfer (*i.e.,* A → B → C → D)? The Court concludes that the plain meaning of § 546(e) dictates that the only relevant transfer for purposes of the safe harbor is the transfer that the trustee seeks to avoid.

I

A

Because the § 546(e) safe harbor operates as a limit to the general avoiding powers of a bankruptcy trustee, [1] we begin with a review of those powers. Chapter 5 of the Bankruptcy Code affords bankruptcy trustees the authority to "se[t] aside certain types of transfers ... and ... recaptur[e] the value of those avoided transfers for the benefit of the estate." Tabb § 6.2, p. 474. These avoiding powers "help implement the core principles of bankruptcy." *Id.,* § 6.1, at 468. For example, some "deter the race of diligence of creditors to dismember the debtor before bankruptcy" and promote "equality of distribution." *Union Bank v. Wolas,* 502 U.S. 151, 162, 112 S.Ct. 527, 116 L.Ed.2d 514 (1991) (internal quotation marks omitted); see also Tabb § 6.2. Others set aside transfers that "unfairly or improperly deplete ... assets or ... dilute the claims against those assets." 5 Collier on Bankruptcy ¶ 548.01, p. 548–10 (16th ed. 2017); see also Tabb § 6.2, at 475 (noting that some avoiding powers are designed "to ensure that the debtor deals fairly with its creditors").

Sections 544 through 553 of the Code outline the circumstances under which a trustee may pursue avoidance. See, *e.g.,* 11 U.S.C. § 544(a) (setting out circumstances under which a trustee can avoid unrecorded liens and conveyances); § 544(b) (detailing power to avoid based on rights that unsecured creditors have under nonbankruptcy law); § 545 (setting out criteria that allow a trustee to avoid a statutory lien); § 547 (detailing criteria for avoidance of so-called "preferential transfers"). The particular avoidance provision at issue here is § 548(a), which provides that a "trustee may avoid" certain fraudulent transfers "of an interest of the debtor in property." § 548(a)(1). Section 548(a)(1)(A) addresses so-called "actually" fraudulent transfers, which are "made ... with actual intent to hinder, delay, or defraud ***889** any entity to which the debtor was or became ... indebted." Section 548(a)(1)(B) addresses "constructively" fraudulent transfers. See *BFP v. Resolution Trust Corporation,* 511 U.S. 531, 535, 114 S.Ct. 1757, 128 L.Ed.2d 556 (1994). As relevant to this case, the statute defines constructive fraud in part as when a debtor:

> "(B)(i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and
>
> "(ii)(I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation. 11 U.S.C. § 548(a)(1).

If a transfer is avoided, § 550 identifies the parties from whom the trustee may recover either the transferred property or the value of that property to return to the bankruptcy estate. Section 550(a) provides, in relevant part, that "to the extent that a transfer is avoided ... the trustee may recover ... the property transferred, or, if the court so orders, the value of such property" from "the initial transferee of such transfer or the entity for whose benefit such transfer was made," or from "any immediate or mediate transferee of such initial transferee." § 550(a).

B

The Code sets out a number of limits on the exercise of these avoiding powers. See, *e.g.,* § 546(a) (setting statute of limitations for avoidance actions); §§ 546(c)-(d) (setting certain policy-based exceptions to avoiding powers); § 548(a)(2) (setting limit to avoidance of "a charitable contribution to a qualified religious or charitable entity or organization"). Central to this case is the securities safe harbor set forth in § 546(e), which provides (as presently codified and in full):

> "Notwithstanding sections 544, 545, 547, 548(a)(1)(B), and 548(b) of this title, the trustee may not avoid a transfer that is a margin payment, as defined in section 101, 741, or 761 of this title, or settlement payment, as defined in section 101 or 741 of this title, made by or to (or for the benefit of) a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency, or that is a transfer made by or to (or for the benefit of) a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency, in connection with a securities contract, as defined in section 741(7), commodity contract, as defined in section 761(4), or forward contract, that is made before the commencement of the case, except under section 548(a)(1)(A) of this title."

The predecessor to this securities safe harbor, formerly codified at 11 U.S.C. § 764(c), was enacted in 1978 against the backdrop of a district court decision in a case called *Seligson v. New York Produce Exchange,* 394 F.Supp. 125 (S.D.N.Y.1975), which involved a transfer by a bankrupt commodity broker. See S. Rep. No. 95–989, pp. 8, 106 (1978);

see also Brubaker, Understanding the Scope of the § 546(e) Securities Safe Harbor Through the Concept of the "Transfer" Sought To Be Avoided, 37 Bkrtcy. L. Letter 11–12 (July 2017). The bankruptcy trustee in *Seligson* filed suit seeking to avoid over $12 million in margin payments made by the commodity broker debtor to a clearing association on the basis that the transfer was constructively fraudulent. The clearing association attempted to defend on the theory that it was a mere "conduit" for the transmission of the margin payments. 394 F.Supp., at 135. The District Court found, however, triable issues of fact on that question and denied summary judgment, ***890** leaving the clearing association exposed to the risk of significant liability. See *id.,* at 135–136. Following that decision, Congress enacted the § 764(c) safe harbor, providing that "the trustee may not avoid a transfer that is a margin payment to or deposit with a commodity broker or forward contract merchant or is a settlement payment made by a clearing organization." 92 Stat. 2619, codified at 11 U.S.C. § 764(c) (repealed 1982).

Congress amended the securities safe harbor exception over the years, each time expanding the categories of covered transfers or entities. In 1982, Congress expanded the safe harbor to protect margin and settlement payments "made by or to a commodity broker, forward contract merchant, stockbroker, or securities clearing agency." § 4, 96 Stat. 236, codified at 11 U.S.C. § 546(d). Two years later Congress added "financial institution" to the list of protected entities. See § 461(d), 98 Stat. 377, codified at 11 U.S.C. § 546(e). [2] In 2005, Congress again expanded the list of protected entities to include a "financial participant" (defined as an entity conducting certain high-value transactions). See § 907(b), 119 Stat. 181–182; 11 U.S.C. § 101(22A). And, in 2006, Congress amended the provision to cover transfers made in connection with securities contracts, commodity contracts, and forward contracts. § 5(b)(1), 120 Stat. 2697–2698. The 2006 amendment also modified the statute to its current form by adding the new parenthetical phrase "(or for the benefit of)" after "by or to," so that the safe harbor now covers transfers made "by or to (or for the benefit of)" one of the covered entities. *Id.,* at 2697.

C

With this background, we now turn to the facts of this case, which comes to this Court from the world of competitive harness racing (a form of horse racing). Harness racing is a closely regulated industry in Pennsylvania, and the Commonwealth requires a license to operate a racetrack. See *Bedford Downs Management Corp. v. State Harness Racing Comm'n,* 592 Pa. 475, 485–487, 926 A.2d 908, 914–915 (2007) (*per curiam*). The number of available licenses is limited, and in 2003 two companies, Valley View Downs, LP, and Bedford Downs Management Corporation, were in competition for the last harness-racing license in Pennsylvania.

Valley View and Bedford Downs needed the harness-racing license to open a " 'racino,' " which is a clever moniker for racetrack casino, "a racing facility with slot machines." Brief for Petitioner 8. Both companies were stopped before the finish ***891** line, because in 2005 the Pennsylvania State Harness Racing Commission denied both applications. The Pennsylvania Supreme Court upheld those denials in 2007, but allowed the companies to reapply for the license. See *Bedford Downs,* 592 Pa., at 478–479, 926 A.2d, at 910.

Instead of continuing to compete for the last available harness-racing license, Valley View and Bedford Downs entered into an agreement to resolve their ongoing feud. Under that agreement, Bedford Downs withdrew as a competitor for the harness-racing license, and Valley View was to purchase all of Bedford Downs' stock for $55 million after Valley View obtained the license. [3]

With Bedford Downs out of the race, the Pennsylvania Harness Racing Commission awarded Valley View the last harness-racing license. Valley View proceeded with the corporate acquisition required by the parties' agreement and arranged for the Cayman Islands branch of Credit Suisse to finance the $55 million purchase price as part of a larger $850 million transaction. Credit Suisse wired the $55 million to Citizens Bank of Pennsylvania, which had agreed to serve as the third-party escrow agent for the transaction. The Bedford Downs shareholders, including petitioner Merit Management Group, LP, deposited their stock certificates into escrow as well. At closing, Valley View received the Bedford Downs stock certificates, and in October 2007 Citizens Bank disbursed $47.5 million to the Bedford Downs shareholders, with $7.5 million remaining in escrow at Citizens Bank under the multiyear indemnification holdback period provided for in the parties' agreement. Citizens Bank disbursed that $7.5 million installment to the Bedford Downs shareholders in October 2010, after the holdback period ended. All told, Merit received approximately $16.5 million from the sale of its

Bedford Downs stock to Valley View. Notably, the closing statement for the transaction reflected Valley View as the "Buyer," the Bedford Downs shareholders as the "Sellers," and $55 million as the "Purchase Price." App. 30.

In the end, Valley View never got to open its racino. Although it had secured the last harness-racing license, it was unable to secure a separate gaming license for the operation of the slot machines in the time set out in its financing package. Valley View and its parent company, Centaur, LLC, thereafter filed for Chapter 11 bankruptcy. The Bankruptcy Court confirmed a reorganization plan and appointed respondent FTI Consulting, Inc., to serve as trustee of the Centaur litigation trust.

FTI filed suit against Merit in the Northern District of Illinois, seeking to avoid the $16.5 million transfer from Valley View to Merit for the sale of Bedford Downs' stock. The complaint alleged that the transfer was constructively fraudulent under § 548(a)(1)(B) of the Code because Valley View was insolvent when it purchased Bedford Downs and "significantly overpaid" for the Bedford Downs stock. [4] Merit moved for judgment on the pleadings under Federal Rule of Civil Procedure 12(c), contending that the § 546(e) safe harbor barred FTI from avoiding the Valley View–to–Merit transfer. According to Merit, the safe harbor applied because the transfer was a "settlement payment ***892** ... made by or to (or for the benefit of)" a covered "financial institution"—here, Credit Suisse and Citizens Bank.

The District Court granted the Rule 12(c) motion, reasoning that the § 546(e) safe harbor applied because the financial institutions transferred or received funds in connection with a "settlement payment" or "securities contract." See 541 B.R. 850, 858 (N.D.Ill.2015). [5] The Court of Appeals for the Seventh Circuit reversed, holding that the § 546(e) safe harbor did not protect transfers in which financial institutions served as mere conduits. See 830 F.3d 690, 691 (2016). This Court granted certiorari to resolve a conflict among the circuit courts as to the proper application of the § 546(e) safe harbor. [6] 581 U.S. ——, 137 S.Ct. 2092, 197 L.Ed.2d 894 (2017).

II

The question before this Court is whether the transfer between Valley View and Merit implicates the safe harbor exception because the transfer was "made by or to (or for the benefit of) a ... financial institution." § 546(e). The parties and the lower courts dedicate much of their attention to the definition of the words "by or to (or for the benefit of)" as used in § 546(e), and to the question whether there is a requirement that the "financial institution" or other covered entity have a beneficial interest in or dominion and control over the transferred property in order to qualify for safe harbor protection. In our view, those inquiries put the proverbial cart before the horse. Before a court can determine whether a transfer was made by or to or for the benefit of a covered entity, the court must first identify the relevant transfer to test in that inquiry. At bottom, that is the issue the parties dispute in this case.

On one side, Merit posits that the Court should look not only to the Valley View–to–Merit end-to-end transfer, but also to all its component parts. Here, those component parts include one transaction by Credit Suisse to Citizens Bank (*i.e.,* the transmission of the $16.5 million from Credit Suisse to escrow at Citizens Bank), and two transactions by Citizens Bank to Merit (*i.e.,* the transmission of $16.5 million over two installments by Citizens Bank as escrow agent to Merit). Because those component parts include transactions by and to financial institutions, Merit contends that § 546(e) bars avoidance.

FTI, by contrast, maintains that the only relevant transfer for purposes of the § 546(e) safe-harbor inquiry is the overarching transfer between Valley View and Merit of $16.5 million for purchase of the stock, which is the transfer that the trustee seeks to avoid under § 548(a)(1)(B). Because that transfer was not made by, to, or for the benefit of a financial institution, FTI contends that the safe harbor has no application.

The Court agrees with FTI. The language of § 546(e), the specific context in ***893** which that language is used, and the broader statutory structure all support the conclusion that the relevant transfer for purposes of the § 546(e) safe-harbor inquiry is the overarching transfer that the trustee seeks to avoid under one of the substantive avoidance provisions.

A

Our analysis begins with the text of § 546(e), and we look to both "the language itself [and] the specific context in which that language is used...." *Robinson v. Shell Oil Co.,* 519 U.S. 337, 341, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997). The pertinent language provides:

> "Notwithstanding sections 544, 545, 547, 548(a)(1)(B), and 548(b) of this title, the trustee may not avoid a transfer that is a ... settlement payment ... made by or to (or for the benefit of) a ... financial institution ... or that is a transfer made by or to (or for the benefit of) a ... financial institution ... in connection with a securities contract ..., except under section 548(a)(1)(A) of this title."

The very first clause—"Notwithstanding sections 544, 545, 547, 548(a)(1)(B), and 548(b) of this title"—already begins to answer the question. It indicates that § 546(e) operates as an exception to the avoiding powers afforded to the trustee under the substantive avoidance provisions. See A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 126 (2012) ("A dependent phrase that begins with *notwithstanding* indicates that the main clause that it introduces or follows derogates from the provision to which it refers"). That is, when faced with a transfer that is otherwise avoidable, § 546(e) provides a safe harbor notwithstanding that avoiding power. From the outset, therefore, the text makes clear that the starting point for the § 546(e) inquiry is the substantive avoiding power under the provisions expressly listed in the "notwithstanding" clause and, consequently, the transfer that the trustee seeks to avoid as an exercise of those powers.

Then again in the very last clause—"except under section 548(a)(1)(A) of this title"—the text reminds us that the focus of the inquiry is the transfer that the trustee seeks to avoid. It does so by creating an exception to the exception, providing that "the trustee may not avoid a transfer" that meets the covered transaction and entity criteria of the safe harbor, "except" for an actually fraudulent transfer under § 548(a)(1)(A). 11 U.S.C. § 546(e). By referring back to a specific type of transfer that falls within the avoiding power, Congress signaled that the exception applies to the overarching transfer that the trustee seeks to avoid, not any component part of that transfer.

Reinforcing that reading of the safe-harbor provision, the section heading for § 546—within which the securities safe harbor is found—is: "Limitations on avoiding powers." Although section headings cannot limit the plain meaning of a statutory text, see *Florida Dept. of Revenue v. Piccadilly Cafeterias, Inc.,* 554 U.S. 33, 47, 128 S.Ct. 2326, 171 L.Ed.2d 203 (2008), "they supply cues" as to what Congress intended, see *Yates v. United States,* 574 U.S. ––––, ––––, 135 S.Ct. 1074, 1083, 191 L.Ed.2d 64 (2015). In this case, the relevant section heading demonstrates the close connection between the transfer that the trustee seeks to avoid and the transfer that is exempted from that avoiding power pursuant to the safe harbor.

The rest of the statutory text confirms what the "notwithstanding" and "except" clauses and the section heading begin to suggest. The safe harbor provides that "the trustee may not avoid" certain transfers. § 546(e). Naturally, that text invites ***894** scrutiny of the transfers that "the trustee may avoid," the parallel language used in the substantive avoiding powers provisions. See § 544(a) (providing that "the trustee ... may avoid" transfers falling under that provision); § 545 (providing that "[t]he trustee may avoid" certain statutory liens); § 547(b) (providing that "the trustee may avoid" certain preferential transfers); § 548(a)(1) (providing that "[t]he trustee may avoid" certain fraudulent transfers). And if any doubt remained, the language that follows dispels that doubt: The transfer that the "the trustee may not avoid" is specified to be "a transfer that *is* " either a "settlement payment" or made "in connection with a securities contract." § 546(e) (emphasis added). Not a transfer that involves. Not a transfer that comprises. But a transfer that is a securities transaction covered under § 546(e). The provision explicitly equates the transfer that the trustee may otherwise avoid with the transfer that, under the safe harbor, the trustee may not avoid. In other words, to qualify for protection under the securities safe harbor, § 546(e) provides that the otherwise avoidable transfer itself be a transfer that meets the safe-harbor criteria.

Thus, the statutory language and the context in which it is used all point to the transfer that the trustee seeks to avoid as the relevant transfer for consideration of the § 546(e) safe-harbor criteria.

B

The statutory structure also reinforces our reading of § 546(e). See *Hall v. United States,* 566 U.S. 506, 516, 132 S.Ct. 1882, 182 L.Ed.2d 840 (2012) (looking to statutory structure in interpreting the Bankruptcy Code). As the Seventh Circuit aptly put it, the Code "creates both a system for avoiding transfers and a safe harbor from avoidance —logically these are two sides of the same coin." 830 F.3d, at 694; see also *Fidelity Financial Services, Inc. v. Fink,* 522 U.S. 211, 217, 118 S.Ct. 651, 139 L.Ed.2d 571 (1998) ("Section 546 of the Code puts certain limits on the avoidance powers set forth elsewhere"). Given that structure, it is only logical to view the pertinent transfer under § 546(e) as the same transfer that the trustee seeks to avoid pursuant to one of its avoiding powers.

As noted in Part I–A, *supra,* the substantive avoidance provisions in Chapter 5 of the Code set out in detail the criteria that must be met for a transfer to fall within the ambit of the avoiding powers. These provisions, as Merit admits, "focus mostly on the characteristics of the transfer that may be avoided." Brief for Petitioner 28. The trustee, charged with exercising those avoiding powers, must establish to the satisfaction of a court that the transfer it seeks to set aside meets the characteristics set out under the substantive avoidance provisions. Thus, the trustee is not free to define the transfer that it seeks to avoid in any way it chooses. Instead, that transfer is necessarily defined by the carefully set out criteria in the Code. As FTI itself recognizes, its power as trustee to define the transfer is not absolute because "the transfer identified must satisfy the terms of the avoidance provision the trustee invokes." Brief for Respondent 23.

Accordingly, after a trustee files an avoidance action identifying the transfer it seeks to set aside, a defendant in that action is free to argue that the trustee failed to properly identify an avoidable transfer under the Code, including any available arguments concerning the role of component parts of the transfer. If a trustee properly identifies an avoidable transfer, however, the court has no reason to examine the relevance of component ***895** parts when considering a limit to the avoiding power, where that limit is defined by reference to an otherwise avoidable transfer, as is the case with § 546(e), see Part II–A, *supra*.

In the instant case, FTI identified the purchase of Bedford Downs' stock by Valley View from Merit as the transfer that it sought to avoid. Merit does not contend that FTI improperly identified the Valley View–to–Merit transfer as the transfer to be avoided, focusing instead on whether FTI can "ignore" the component parts at the safe-harbor inquiry. Absent that argument, however, the Credit Suisse and Citizens Bank component parts are simply irrelevant to the analysis under § 546(e). The focus must remain on the transfer the trustee sought to avoid.

III

A

The primary argument Merit advances that is moored in the statutory text concerns the 2006 addition of the parenthetical "(or for the benefit of)" to § 546(e). Merit contends that in adding the phrase "or for the benefit of" to the requirement that a transfer be "made by or to" a protected entity, Congress meant to abrogate the 1998 decision of the Court of Appeals for the Eleventh Circuit in *In re Munford, Inc.,* 98 F.3d 604, 610 (1996) (*per curiam*), which held that the § 546(e) safe harbor was inapplicable to transfers in which a financial institution acted only as an intermediary. Congress abrogated *Munford,* Merit reasons, by use of the disjunctive "or," so that even if a beneficial interest, *i.e.,* a transfer "for the benefit of" a financial institution or other covered entity, is sufficient to trigger safe harbor protection, it is not necessary for the financial institution to have a beneficial interest in the transfer for the safe harbor to apply. Merit thus argues that a transaction "by or to" a financial institution such as Credit Suisse or Citizens Bank would meet the requirements of § 546(e), even if the financial institution is acting as an intermediary without a beneficial interest in the transfer.

Merit points to nothing in the text or legislative history that corroborates the proposition that Congress sought to overrule *Munford* in its 2006 amendment. There is a simpler explanation for Congress' addition of this language that is rooted in the text of the statute as a whole and consistent with the interpretation of § 546(e) the Court adopts. A number of the substantive avoidance provisions include that language, thus giving a trustee the power to avoid a transfer that was made to "or for the benefit of" certain actors. See § 547(b)(1) (avoiding power with respect to preferential transfers "to or for the benefit of a creditor"); § 548(a)(1) (avoiding power with respect to certain fraudulent transfers "including any transfer to or for the benefit of an insider ..."). By adding the same language to the § 546(e) safe harbor, Congress ensured that the scope of the safe harbor matched the scope of the avoiding powers. For example, a trustee seeking to avoid a preferential transfer under § 547 that was made "for the benefit of a creditor," where that creditor is a covered entity under § 546(e), cannot now escape application of the § 546(e) safe harbor just because the transfer was not "made by or to" that entity.

Nothing in the amendment therefore changed the focus of the § 546(e) safe-harbor inquiry on the transfer that is otherwise avoidable under the substantive avoiding powers. If anything, by tracking language already included in the substantive avoidance provisions, the amendment reinforces the connection between the inquiry under § 546(e) and the otherwise ***896** avoidable transfer that the trustee seeks to set aside.

Merit next attempts to bolster its reading of the safe harbor by reference to the inclusion of securities clearing agencies as covered entities under § 546(e). Because a securities clearing agency is defined as, *inter alia,* an intermediary in payments or deliveries made in connection with securities transactions, see 15 U.S.C. § 78c(23)(A) and 11 U.S.C. § 101(48) (defining "securities clearing agency" by reference to the Securities Exchange Act of 1934), Merit argues that the § 546(e) safe harbor must be read to protect intermediaries without reference to any beneficial interest in the transfer. The contrary interpretation, Merit contends, "would run afoul of the canon disfavoring an interpretation of a statute that renders a provision ineffectual or superfluous." Brief for Petitioner 25.

Putting aside the question whether a securities clearing agency always acts as an intermediary without a beneficial interest in a challenged transfer—a question that the District Court in *Seligson* found presented triable issues of fact in that case—the reading of the statute the Court adopts here does not yield any superfluity. Reading § 546(e) to provide that the relevant transfer for purposes of the safe harbor is the transfer that the trustee seeks to avoid under a substantive avoiding power, the question then becomes whether that transfer was "made by or to (or for the benefit of)" a covered entity, including a securities clearing agency. If the transfer that the trustee seeks to avoid was made "by" or "to" a securities clearing agency (as it was in *Seligson*), then § 546(e) will bar avoidance, and it will do so without regard to whether the entity acted only as an intermediary. The safe harbor will, in addition, bar avoidance if the transfer was made "for the benefit of" that securities clearing agency, even if it was not made "by" or "to" that entity. This reading gives full effect to the text of § 546(e).

B

In a final attempt to support its proposed interpretation of § 546(e), Merit turns to what it perceives was Congress' purpose in enacting the safe harbor. Specifically, Merit contends that the broad language of § 546(e) shows that Congress took a "comprehensive approach to securities and commodities transactions" that "was prophylactic, not surgical," and meant to "advanc[e] the interests of parties in the finality of transactions." Brief for Petitioner 41–43. Given that purported broad purpose, it would be incongruous, according to Merit, to read the safe harbor such that its application "would depend on the identity of the investor and the manner in which it held its investment" rather than "the nature of the transaction generally." *Id.,* at 33. Moreover, Merit posits that Congress' concern was plainly broader than the risk that is posed by the imposition of avoidance liability on a securities industry entity because Congress provided a safe harbor not only for transactions "to" those entities (thus protecting the entities from direct financial liability), but also "by" these entities to non-covered entities. See Reply Brief 10–14. And, according to Merit, "[t]here is no reason to believe that Congress was troubled by the possibility that transfers *by* an industry hub could be unwound but yet was unconcerned about trustees' pursuit of transfers made *through* industry hubs." *Id.,* at 12–13 (emphasis in original).

Even if this were the type of case in which the Court would consider statutory purpose, see, *e.g., Watson v. Philip Morris Cos.,* 551 U.S. 142, 150–152, 127 S.Ct. 2301, 168 L.Ed.2d 42 (2007), here Merit fails to ***897** support its purposivist arguments. In fact, its perceived purpose is actually contradicted by the plain language of the safe harbor. Because, of course, here we do have a good reason to believe that Congress was concerned about transfers "*by* an industry hub" specifically: The safe harbor saves from avoidance certain securities transactions "made by or to (or for the benefit of)" covered entities. See § 546(e). Transfers "through" a covered entity, conversely, appear nowhere in the statute. And although Merit complains that, absent its reading of the safe harbor, protection will turn "on the identity of the investor and the manner in which it held its investment," that is nothing more than an attack on the text of the statute, which protects only certain transactions "made by or to (or for the benefit of)" certain covered entities.

For these reasons, we need not deviate from the plain meaning of the language used in § 546(e).

IV

For the reasons stated, we conclude that the relevant transfer for purposes of the § 546(e) safe harbor is the same transfer that the trustee seeks to avoid pursuant to its substantive avoiding powers. Applying that understanding of the safe-harbor provision to this case yields a straightforward result. FTI, the trustee, sought to avoid the $16.5 million Valley View–to–Merit transfer. FTI did not seek to avoid the component transactions by which that overarching transfer was executed. As such, when determining whether the § 546(e) safe harbor saves the transfer from avoidance liability, *i.e.,* whether it was "made by or to (or for the benefit of) a ... financial institution," the Court must look to the overarching transfer from Valley View to Merit to evaluate whether it meets the safe-harbor criteria. Because the parties do not contend that either Valley View or Merit is a "financial institution" or other covered entity, the transfer falls outside of the § 546(e) safe harbor. The judgment of the Seventh Circuit is therefore affirmed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

All Citations

138 S.Ct. 883, 200 L.Ed.2d 183, 86 USLW 4088, 65 Bankr.Ct.Dec. 92, Bankr. L. Rep. P 83,219, 18 Cal. Daily Op. Serv. 1861, 2018 Daily Journal D.A.R. 1757, 27 Fla. L. Weekly Fed. S 73

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 Avoiding powers may be exercised by debtors, trustees, or creditors' committees, depending on the circumstances of the case. See generally C. Tabb, Law of Bankruptcy § 6.1 (4th ed. 2016) (Tabb). Because this case concerns an avoidance action brought by a trustee, we refer throughout to the trustee in discussing the avoiding power and avoidance action. The resolution of this case is not dependent on the identity of the actor exercising the avoiding power.

2 The term "financial institution" is defined as:
"(A) a Federal reserve bank, or an entity that is a commercial or savings bank, industrial savings bank, savings and loan association, trust company, federally-insured credit union, or receiver, liquidating agent, or

conservator for such entity and, when any such Federal reserve bank, receiver, liquidating agent, conservator or entity is acting as agent or custodian for a customer (whether or not a 'customer', as defined in section 741) in connection with a securities contract (as defined in section 741) such customer; or

"(B) in connection with a securities contract (as defined in section 741) an investment company registered under the Investment Company Act of 1940." 11 U.S.C. § 101(22).

The parties here do not contend that either the debtor or petitioner in this case qualified as a "financial institution" by virtue of its status as a "customer" under § 101(22)(A). Petitioner Merit Management Group, LP, discussed this definition only in footnotes and did not argue that it somehow dictates the outcome in this case. See Brief for Petitioner 45, n. 14; Reply Brief 14, n. 6. We therefore do not address what impact, if any, § 101(22)(A) would have in the application of the § 546(e) safe harbor.

3 A separate provision of the agreement providing that Bedford Downs would sell land to Valley View for $20 million is not at issue in this case.

4 In its complaint, FTI also sought to avoid the transfer under § 544(b). See App. 20–21. The District Court did not address the claim, see 541 B.R. 850, 852–853, n. 1 (N.D.Ill.2015), and neither did the Court of Appeals for the Seventh Circuit.

5 The parties do not ask this Court to determine whether the transaction at issue in this case qualifies as a transfer that is a "settlement payment" or made in connection with a "securities contract" as those terms are used in § 546(e), nor is that determination necessary for resolution of the question presented.

6 Compare *In re Quebecor World (USA) Inc.,* 719 F.3d 94, 99 (C.A.2 2013) (finding the safe harbor applicable where covered entity was intermediary); *In re QSI Holdings, Inc.,* 571 F.3d 545, 551 (C.A.6 2009) (same); *Contemporary Indus. Corp. v. Frost,* 564 F.3d 981, 987 (C.A.8 2009) (same); *In re Resorts Int'l, Inc.,* 181 F.3d 505, 516 (C.A.3 1999) (same); *In re Kaiser Steel Corp.,* 952 F.2d 1230, 1240 (C.A.10 1991) (same), with *In re Munford, Inc.,* 98 F.3d 604, 610 (C.A.11 1996) (*per curiam*) (rejecting applicability of safe harbor where covered entity was intermediary).

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United States District Court,
S.D. New York.

SECURITIES INVESTOR PROTECTION CORPORATION, Plaintiff,
v.
BERNARD L. MADOFF INVESTMENT SECURITIES LLC, Defendant.
In re Madoff Securities.
Pertains To: Consolidated proceedings on 11 U.S.C. § 546(e).

No. 12 MC 115(JSR).
|
April 15, 2013.

OPINION AND ORDER

JED S. RAKOFF, District Judge.

***1** Section 546(e) of the Bankruptcy Code, 11 U.S.C. § 546(e), reads as follows:

> Notwithstanding sections 544, 547, [and] 548(a)(1)(B) of this title, the trustee may not avoid a transfer that is a ... settlement payment, as defined in section 101 or 741 of this title, made by or to (or for the benefit of) a ... stockbroker, ... or that is a transfer made by or to (or for the benefit of) a ... stockbroker, ... in connection with a securities contract, as defined in section 741(7), ... except under section 548(a)(1)(A) of this title.

In *Picard v. Katz,* 462 B.R. 447 (S.D.N.Y.2011), and *Picard v. Greiff,* 476 B.R. 715 (S.D.N.Y.2012), the Court held that Section 546(e) applies to certain of the avoidance and recovery actions brought by Irving Picard (the "Trustee"), the trustee appointed under the Securities Investor Protection Act ("SIPA"), 15 U.S.C. § 78aaa *et seq.,* to administer the estate of Bernard L. Madoff Investment Securities LLC ("Madoff Securities"). Accordingly, the Court dismissed all of the Trustee's avoidance and recovery claims in those actions except those claims proceeding under Sections 548(a)(1)(A) and 550(a) of the Bankruptcy Code. *Katz,* 462 B.R. at 453; *Greiff,* 476 B.R. at 722–23. After the Court's decision in *Greiff,* the Trustee consented to entry of judgment dismissing its avoidance claims under 11 U.S.C. §§ 544, 547, and 548(a)(1)(B) in numerous adversary proceedings in which the defendants had filed a motion before this Court to withdraw the reference to the Bankruptcy Court, and in which the Trustee did not challenge the good faith of the recipients of transfers from Madoff Securities. *See* Consent Order Granting Certification Pursuant to Fed.R.Civ.P. 54(b) for Entry of Final Judgment Dismissing Certain Claims and Actions, No. 12 MC 115, ECF No. 109 (S.D.N.Y. May 12, 2012). Those cases are now on appeal before the Court of Appeals for the Second Circuit.

However, collateral questions about the applicability of Section 546(e) remained in many of the cases not covered by that Consent Order. These questions were jointly briefed by the remaining parties, and the Court heard oral argument on November 27, 2012. By a "bottom line" Order dated February 12, 2013, the Court, in addition to substantially reaffirming the reasoning and rulings set forth in *Katz* and *Greiff,* ruled that:

(1) Where the Trustee has sought to avoid transfers to an initial transferee, the avoidance of which would otherwise be barred by Section 546(e) under the Court's rulings in *Katz* and *Greiff,* the initial transferee will not be able to prevail on a motion to dismiss some or all of the Trustee's avoidance claims simply on the basis of the Section 546(e) "safe harbor" *if* the Trustee has alleged that the initial transferee had actual knowledge of Madoff Securities' fraud; and

(2) Where the Trustee has sought to recover transfers made to a subsequent transferee, the avoidance of which would otherwise be barred by Section 546(e) as to the initial transferee, the subsequent transferee will not be able to prevail on a motion to dismiss some or all of the Trustee's avoidance claims simply on the basis of the Section 546(e) "safe harbor" *if* the Trustee has alleged that the subsequent transferee had actual knowledge of Madoff Securities' fraud.

***2** While these conclusions are implicit in the rulings in *Katz* and *Greiff,* this Opinion and Order elaborates the reasons for the Court's rulings in the February 12, 2013 Order. In so doing, the Court assumes familiarity with the underlying facts of Madoff Securities' fraud and ensuing bankruptcy. The Court recounts here only those facts that are relevant to the Section 546(e) issues.

As stated in *Greiff,*

> For many years prior to filing for bankruptcy, Madoff Securities—a securities broker-dealer registered with the Securities and Exchange Commission ("SEC") under § 15(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78*o*(b)—purported to operate three business units: an investment advisory unit, a market making unit, and a proprietary trading unit. Clients investing in the investment advisory unit ... signed either a "Customer Agreement," an "Option Agreement," a "Trading Authorization Limited to Purchases and Sales of Securities and Options," or some combination of the three (collectively, the "account agreements"). Pursuant to these agreements, Madoff Securities purported to make securities investments on the clients' behalf. Accordingly, Madoff Securities sent monthly or quarterly statements to each of its investment advisory clients showing the securities that Madoff Securities claimed to hold for the client and the trades that it claimed to have executed on the client's behalf during the applicable period.
>
> In reality, the investment advisory unit of Madoff Securities never, or almost never, made the trades or held the securities described in the statements it sent to investment advisory clients, at least during all years here relevant. Instead, Madoff Securities operated its investment advisory division as a Ponzi scheme. Thus, when clients withdrew money from their accounts with Madoff Securities, they did not actually receive returns on successful investments, but instead only the very money that they and others had deposited with Madoff Securities for the purpose of purchasing securities.

476 B.R. at 717–18 (citations and footnotes omitted). After Madoff Securities' scheme was revealed and the Trustee was appointed to oversee the estate pursuant to SIPA, the Trustee brought hundreds of avoidance and recovery actions seeking to return to the bankruptcy estate fraudulent and preferential transfers made by Madoff Securities to its customers and others. The Trustee brought these actions pursuant to 11 U.S.C. §§ 547, 548(a)(1)(A) & (B), and 550(a), as well as comparable provisions of New York law incorporated by reference under 11 U.S.C. § 544(b).

The defendants in this consolidated proceeding argue that Section 546(e) of the Bankruptcy Code requires that the Trustee's claims pursuant to Sections 544, 547, and 548(a)(1)(B) be dismissed pursuant to Section 546(e)'s "safe harbor" that protects transfer made in relation to securities trading. As noted, this Court, in *Katz* and *Greiff,* held that Section 546(e) "precludes the Trustee from bringing any action to recover from any of Madoff's customers any of the monies paid by Madoff Securities to those customers except in the case of actual fraud." *Katz,* 462 B.R. at 452;*see also* *Greiff,* 476 B.R. at 718 (quoting *Katz*). In making this determination, the Court found that the transfers at issue were "made by or to (or for the benefit of) a ... stockbroker, in connection with a securities contract."*See* *Katz,* 462 B.R. at 451 (quoting 11 U.S.C. § 546(e)). The Court further found that Madoff Securities qualified as a stockbroker either "by virtue of the trading conducted by its market making and proprietary trading divisions," or because Madoff Securities' customers, "having every reason to believe that Madoff Securities was actually engaged in the business of effecting securities transactions, have every right to avail themselves of all the protections afforded the customers of stockbrokers, including the protection offered by § 546(e)." *Greiff,* 476 B.R. at 719–20. The Court also found that "the account agreements between Madoff Securities and the defendants clearly qualify as securities contracts" under Section 741(7) of the Bankruptcy Code, either because they were made pursuant to " 'a master agreement that provides for' the purchase and sale of securities" under Section 741(7)(a)(x) or because the agreements " 'related to an [ ] agreement or transaction' in securities, and they obligated Madoff Securities, a stockbroker, to reimburse customers" under Section 741(7)(a)(xi). *Id.* & n. 6. Therefore, the Court found that Section 546(e)'s requirement that the payments be transfers "made by ... a ... stockbroker ... in connection with a securities contract" was satisfied.

***3** Furthermore, the Court alternatively found that "the defendants' withdrawals from their accounts constituted 'settlement payments' from a stockbroker and therefore fall within the coverage of § 546(e) for that independent reason." *Id.* at 720. As the Court stated, "[t]he Second Circuit has interpreted [Section 741(8)'s] 'extremely broad' definition to apply, *inter alia,* to 'the transfer of cash or securities made to complete [a] securities transaction.' " *Id.* at 721 (quoting *Enron Creditors Recovery Corp. v. Alfa, S.A.B. de C.V.,* 651 F.3d 329, 334 (2d Cir.2011)). Since "what clients had contracted for was Madoff Securities' implementation of its investment strategy," their "withdrawals therefore constituted partial settlement of these securities contracts." *Id.*

On the foregoing basis, the Court held, both in *Katz* and *Greiff,* that Section 546(e) required the dismissal of the Trustee's avoidance claims except those brought under Section 548(a) (1)(A) and related recovery claims under Section 550(a). Notwithstanding these clear holdings, the Trustee, in briefing the instant matters, attempts to re-litigate —or more precisely, re-re-litigate—these basic principles. *See, e.g.,* Trustee's Mem. of Law at 52–58, No. 12 MC 115, ECF No. 370 (S.D.N.Y. filed Sept. 28, 2012). The Court once again rejects the Trustee's arguments. For example, the Court reaffirms its determination that there is no Ponzi scheme or fraud "exception" to Section 546(e). *See, e.g., Greiff,* 476 B.R. at 721 ("[I]n this Court's view, [an illegal conduct exception] cannot survive the broad and literal interpretation given § 546(e) in Enron."). Similarly, while the Trustee here argues that the defendants' account agreements with Madoff Securities are illegal and therefore are void and unenforceable, this argument is but a new articulation of the Trustee's previously-rejected argument in favor of a "fraud" exception to Section 546(e), which the Court once again rejects.

Turning to what is properly before the Court in the instant proceedings, the defendants who remain are primarily those whom the Trustee alleges did not act in "good faith." These defendants include both some of the initial transferees of funds from Madoff Securities (primarily, certain of Madoff Securities' direct customers) and some of the subsequent transferees of those funds—*i.e.,* some of those who received payments from initial transferees, including investors in so-called "feeder funds" that held customer accounts with Madoff Securities. While a lack of "good faith" may mean different things in different contexts, *see Katz,* 462 B.R. at 454, where the Trustee has adequately alleged that these defendants had, not mere suspicions, but actual knowledge of Madoff's scheme, then, as the Trustee argues, the fact that these defendants signed account agreements is meaningless for purposes of Section 546(e)—because if they knew that Madoff Securities was a Ponzi scheme, then they must have known that the transfers they received directly or indirectly from Madoff Securities were not "settlement payments." Similarly, since such defendants are alleged to have known in effect that the account agreements never led to a transaction for the "purchase, sale, or loan of a security," they therefore also must have known that the transfers could not have been made in connection with an actual "securities contract."

***4** It must be stressed that whether the Trustee will be able to prove such actual knowledge is not before the Court. Since these are motions to dismiss, the Trustee's factual allegations, if adequately pleaded, must be taken as true. And if the allegations adequately allege that a defendant had actual knowledge of Madoff's scheme, such a transferee stands in a different posture from an innocent transferee, even as concerns the application of Section 546(e). As the Court noted in *Katz,* the purpose of this section is "minimiz [ing] the displacement caused in the commodities and securities markets in the event of a major bankruptcy affecting those industries." *Katz,* 462 B.R. at 452 (quoting *In re Manhattan Inv. Fund Ltd.,* 310 B.R. 500, 513 (Bankr.S.D.N.Y.2002)). In the context of Madoff Securities' fraud, that goal is best achieved by protecting the reasonable expectations of investors who believed they were signing a securities contract; but a transferee who had actual knowledge of the Madoff "Ponzi" scheme did not have any such expectations, but was simply obtaining moneys while he could. Neither law nor equity permits such a person to profit from a safe harbor intended to promote the legitimate workings of the securities markets and the reasonable expectations of legitimate investors.

The Court implicitly suggested this result in *Katz,* by noting that those customers "who were actual participants in the fraud" would not be "entitled to invoke the protections of section 546(e)" because, unlike innocent customers, they would not have believed that the settlement payments "were entirely bona fide." *Katz,* 462 B.R. at 452 n. 3. This, indeed, would be true not only as to full-fledged participants in the fraud, but also those who had actual knowledge of its workings (and thereby effectively participated in it by taking advantage of its workings). What *Katz* thus implied, the Court now makes explicit.

It should be noted, however, that it is not enough to satisfy this exception to Section 546(e)'s safe harbor for the Trustee simply to allege that a transferee did not take in "good faith." So far as the Trustee's cases are concerned, "good faith" chiefly has relevance as a statutory requirement that a defendant must meet in order to prevent a trustee from recovering certain transfers. *See, e.g.,* 11 U.S.C. §§ 548(c), 550(b); *see also* *Katz* 462 B.R. at 453. But it nowhere appears in Section 546(e).[1] Since the language of that section is plain, *see* *Katz,* 462 B.R. at 452, and since its purpose is protection of the securities markets and of the reasonable expectations of legitimate participants in these markets, *id.* at 452–53, the burden is on the Trustee to prove that a transferee does not meet what the language and purpose of Section 546(e) require. And, as the discussion above demonstrates, to do this, the Trustee must show, at a minimum, that the transferee had actual knowledge that there were no actual securities transactions being conducted.[2]

***5** Applying these principles, the Court first turns to initial transferees and then to subsequent transferees. The principal group of initial transferees who are part of the instant proceedings are the "Cohmad defendants," i.e., those defendants named in the Trustee's First Amended Complaint ("FAC") filed against Cohmad Securities Corporation ("Cohmad") and various Cohmad owners, employees, and associates.[3] *See* FAC, *Picard v. Cohmad Sec. Corp.,* No. 12 Civ. 2676, Adv. Pro. No. 09–01305 (Bankr.S.D.N.Y. filed Oct. 8, 2009). The Trustee seeks to avoid and recover under Sections 544, 547, 548(a)(1), 550, and 551 of the Bankruptcy Code approximately $94 million in fraudulent commissions paid to Cohmad and fictitious profits withdrawn from Madoff Securities customer accounts owned by individuals associated with Cohmad. *See* FAC ¶¶ 137–42. The pertinent allegations, viewed in the light most favorable to the Trustee, are as follows:

For over two decades, Cohmad and Madoff Securities were closely intertwined both personally and professionally. *See* FAC ¶¶ 4–5. Cohmad was formed in February 1985 by Madoff and his friend and former neighbor, Maurice "Sonny" Cohn, for the purpose of recruiting customers to invest in Madoff Securities. *Id.* ¶ 48. Members of both the Madoff and Cohn families served as Cohmad's officers and directors, and the two families shared close personal relationships. *Id.* ¶¶ 50, 54–56. Madoff Securities acted as an administrator for Cohmad's employee benefits plans, and Cohmad shared office space, a computer network, and utilities with Madoff Securities. *Id.* ¶¶ 108–110. Cohmad's offices were interspersed among Madoff Securities' offices, and no signage indicated that Cohmad was a separate company. *Id.* ¶¶ 111–12. Unlike most Madoff Securities employees, Marcia Cohn, Sonny Cohn's daughter and a co-owner and officer of Cohmad, had access to Madoff Securities' seventeenth floor office, where the fraudulent investment advisory business was located, and records indicate that her card was used to access the seventeenth floor with regularity in the year before Madoff Securities' fraud was revealed. *Id.* ¶¶ 113–14.

Cohmad and Madoff Securities were understood to be the same entity by many Madoff Securities' investors. When Cohmad representatives met with potential Madoff Securities customers, they often presented themselves as registered representatives of Madoff Securities, and they at times referred to Madoff Securities' work as if it were their own. *Id.* ¶¶ 89, 92–94, 104. Even when they did not present themselves as working for Madoff Securities, Cohmad representatives remained involved with customers' accounts after their referral and held themselves out as personally tracking "the Madoff system." *Id.* ¶¶ 100, 102.

Cohmad was very successful at generating new customers for Madoff Securities: when Madoff's fraud was revealed in December 2008, approximately twenty percent of Madoff Securities' active customer accounts had been referred by Cohmad representatives. FAC ¶ 5. From 2002 through 2008, Madoff made direct payments totaling nearly $14.6 million to Sonny Cohn personally. *Id.* ¶ 61. From the late 1990s through 2008, Madoff Securities made payments to Cohmad on a monthly basis, amounting to nearly $100 million, in response to Cohmad's requests for payment, in which Cohmad sought payment for "professional services" and sometimes gave no reason at all for the requests. *Id.* ¶¶ 60–62. Cohmad would then distribute the majority of these payments to its employees based on the value of customer accounts that the representatives had referred to Madoff Securities. *Id.* ¶ 65.

***6** The "Cohmad Cash Database," a database developed by a Madoff Securities employee and maintained by a Cohmad employee, "monitored the actual cash value of each referred account without considering the fictitious profits." FAC ¶¶ 69, 73. "Importantly, in situations where [Madoff Securities] customer statements showed a positive balance due to fictitious profits, but the account was actually in a negative position because the customer had withdrawn from the account more money than the customer had deposited, the Cohmad Cash Database showed the negative account balance of the [Madoff Securities] customer account." *Id.* ¶ 74. The Cohmad Cash Database was also used to determine the commissions owed to each Cohmad Representative for the accounts they referred to Madoff Securities. Commission payments decreased when customer accounts experienced negative net cash activity, regardless of the fictitious profits reflected in their account statements. *Id.* ¶ 75. Neither Cohmad nor the Cohmad representatives ever objected to the manner in which Madoff Securities calculated these commissions. *Id.* ¶ 80. Based on these and other such allegations, the Trustee infers "that the Cohmad Representatives were aware that customer account statements reflected fictitious profits." *Id.* ¶ 81.

The Trustee adds the following allegations regarding Robert Jaffe, an owner and executive of Cohmad. *See* FAC ¶ 14. Although Jaffe referred many customers to Madoff Securities and reports at the time indicated that Jaffe was paid by Madoff Securities for his services, neither Madoff Securities nor Cohmad have records of any such payments. *Id.* ¶¶ 82–83. "When asked about those fees ..., Jaffe, in his on-the-record testimony with the Massachusetts Division of Securities, exercised his Fifth Amendment Rights and refused to answer the question." *Id.* ¶ 82.[4] Jaffe and Madoff Securities also "had an arrangement ... whereby he and others close to or affiliated with him would be entitled to withdraw from [Madoff Securities] more money than he put in." *Id.* ¶ 84. On a number of occasions, Jaffe directed Madoff to "execute" back-dated trades in order to provide Jaffe with "fictitious gains and losses in almost exact dollar amounts requested." *Id.* ¶ 88. For example, on April 5, 2006, Jaffe requested from Madoff Securities a "long term gain of approximately $600,000" for one of the accounts he controlled, in response to which Madoff Securities "executed" a sale of Aetna stock on April 4, the day before the request, in order to yield the "long term" gain sought. *Id.* The Trustee alleges that Jaffe made these demands "because he knew that such trades were fabricated and thus any gain or loss could be accomplished with a stroke of a key." *Id.*

Although the Cohmad defendants seek to have the Trustee's avoidance claims under all but Section 548(a)(1)(A) dismissed under Section 546(e), it is obvious that the foregoing allegations—which, it must again be stressed, are entirely unproven but must be taken as true for the limited purposes of this motion—sufficiently allege actual knowledge of, and indeed participation in, every aspect of Madoff's Ponzi scheme that, on the Court's foregoing analysis, would negate applicability of Section 546(e). Accordingly, the Court denies the Cohmad defendants' motion to dismiss the Trustee's claims on the basis of Section 546(e).

***7** With respect to the initial transferees other than the Cohmad defendants, the Court leaves it to the Bankruptcy Court to determine, consistent with this Opinion, whether actual knowledge has been adequately alleged. The Court therefore turns next to the subsequent transferees, *i.e.,* those defendants who received transfers of funds from Madoff Securities indirectly either from a direct transferee (*i.e.,* a Madoff Securities customer) or through one or more mediate transferees.

In order to recover a fraudulent or preferential transfer of debtor property from a subsequent transferee, the Trustee must first show that the initial transfer of that property by the debtor is subject to avoidance under one of the Bankruptcy Code's avoidance provisions (*e.g.,* 11 U.S.C. §§ 544, 547 & 548). *See* 11 U.S.C. § 550(a). However, even if the initial (or mediate) transferee fails to raise a Section 546(e) defense against the Trustee's avoidance of certain transfers—either because the Trustee did not bring an adversary proceeding against that transferee, or because the transferee settled with the Trustee, or simply because that transferee failed to raise the defense—the subsequent transferee is nonetheless entitled to raise a Section 546(e) defense against recovery of those funds. *See* *In re M. Fabrikant & Sons, Inc.,* 394 B.R. 721, 744 (Bankr.S.D.N.Y.2008) ("Fundamental principles of due process require that transferees who claim an interest in ... property ... have a full and fair opportunity to contest claims of fraudulent transfer." (quoting *Tanaka v. Nagata,* 76 Hawai'i 32, 868 P.2d 450, 455 (Haw.1994))). Furthermore, where Section 546(e) applies to the Trustee's claims, the Trustee may only proceed against a subsequent transferee insofar as he seeks to recover those subsequent transfers under Section 550(a) as to which he could have avoided the initial transfer under Section 548(a)(1)(A). *See* *Picard v. Katz ("Katz II"),* 466 B.R. 208, 214 (S.D.N.Y.2012).

There is one caveat to this rule: to the extent that an innocent customer transferred funds to a subsequent transferee who had actual knowledge of Madoff Securities' fraud, that subsequent transferee cannot prevail on a motion to dismiss on the basis of Section 546(e)'s safe harbor. Again, this follows from the general principles enunciated earlier in this Opinion. A defendant cannot be permitted to in effect launder what he or she knows to be fraudulently transferred funds through a nominal third party and still obtain the protections of Section 546(e). *Cf.* *In re Int'l Admin. Servs., Inc.,* 408 F.3d 689, 707 (11th Cir.2005) (rejecting a reading of Section 550(a) to require successive avoidance and recovery actions because it would encourage creditors to "design increasingly complex transactions, with the knowledge that more transfers decrease the likelihood of a successful avoidance action"). In sum, if the Trustee sufficiently alleges that the transferee from whom he seeks to recover a fraudulent transfer knew of Madoff Securities' fraud, that transferee cannot claim the protections of Section 546(e)'s safe harbor.

***8** While the Court will not here parse through each of the complaints against various subsequent transferees party to these proceedings to see if a given complaint meets these standards—this will be left to the Bankruptcy Court—mention should be made here of the arguments presented by a group of subsequent transferee defendants who have dubbed themselves the "Financial Institution Defendants." *See* Consol. Mem. of Law on Behalf of Fin. Inst. Defs., No. 12 MC 115, ECF No. 257 (S.D.N.Y. filed July 27, 2012). This group of defendants argue that Section 546(e) should require dismissal of the Trustee's claims under Section 544, 547, and 548(a) (1)(B) not only on the basis of account agreements with Madoff Securities, *see supra,* but also because the transfers to these defendants were made in conjunction with agreements that independently satisfy Section 546(e)'s requirements.

Section 546(e) protects a transfer that is a "settlement payment ... made by or to (or for the benefit of) a ... financial institution [or] financial participant," or that is "made by or to (or for the benefit of) a ... financial institution [or] financial participant ... in connection with a securities contract." 11 U.S.C. § 546(e). The Bankruptcy Code defines a "financial institution" to include an entity that is "a Federal reserve bank, or an entity that is a commercial or savings bank." 11 U.S.C. § 101(22)(A); *see also* *Contemporary Indus. Corp. v. Frost,* 564 F.3d 981, 987 (8th Cir.2009) (finding that "a bank" "is a financial institution"). The Bankruptcy Code includes in the definition of a "financial participant" "an entity that, at the time it enters into a securities contract ... [or] swap agreement, ... or at the time of the date of the filing of the petition, ... has gross mark-to-market positions of not less than $100,000,000 (aggregated across counterparties) in one or more such agreements or transactions with the debtor or any other entity (other than an affiliate) at such time or on any day during the 15–month period preceding the date of the filing of the petition." 11 U.S.C. § 101(22A)(A). Thus, where the Trustee alleges that a defendant is "a banking institution," "a national bank," or "a nationally chartered bank," or where the Trustee alleges that a defendant entered into a swap agreement with collateral payments and reference amounts worth at least $100 million, the defendant may be deemed to constitute a protected "financial institution" or "financial participant" for the purposes of Section 546(e) on the face of the complaint.

While the Court described above what a securities contract includes as applied to the Madoff Securities account agreements, the definition of a securities contract is in fact much broader and includes, *inter alia,* investment fund subscription agreements and redemption requests, margin loans, and total return swaps coupled with a securities sale transaction. *See*11 U.S.C. § 741(7)(A)(i), (iv), (vi) & (xiii). In the scenarios put forward here, Madoff Securities was not a party to these contracts. Rather, the Financial Institution Defendants argue that the transfers from Madoff Securities were made "in connection with" these third-party securities contracts because the transfers from Madoff Securities were made in conjunction with transactions based on those contracts.

***9** The issue, then, is whether Section 546(e) requires that the securities contract that the transfer is made "in connection with" must be a securities contract with the debtor. Nowhere in the language of Section 546(e) is such a relationship explicitly required. This stands in contrast to other provisions of the Bankruptcy Code, such as Section 548(a)(1)(A), which explicitly focus on the intent of the debtor. *See*11 U.S.C. § 548(a)(1) (A) (providing for avoidance of fraudulent transfers based on the debtor's "actual intent to hinder, delay, or defraud"). Rather, a broader reading of the securities contracts covered by the Section 546(e) safe harbor is implied by the Second Court's decision in *Enron,* which reads Section 546(e) broadly to suggest that a transfer can be part of a chain of payments that together constitute a settlement payment. *See*651 F.3d at 334–35. [5] By analogy, then, the definition of a transfer made "in connection with a securities contract" must be similarly broad. Additionally, the Court notes that the term "financial participant" is defined to include entities that have "gross mark-to-market positions of not less than $100,000,000 (aggregated across counterparties) in one or more [securities or swap] agreements or transactions with the debtor or *any other entity."* 11 U.S.C. § 101(22A)(A) (emphasis added). The incorporation of this definition into Section 546(e) implies that Section 546(e)'s reach does not depend on the involvement of the debtor in the securities contract at issue.

Rather, the Court concludes that Section 546(e)'s requirement that a transfer be made "in connection with a securities contract" means that the transfer must be "related to" that securities contract. *See* *Lehman Bros. Holdings Inc. v. JPMorgan Chase Bank, N .A. (In re Lehman Bros. Holdings Inc.),* 469 B.R. 415, 442 (Bankr.S.D.N.Y.2012) ("It is proper to construe the phrase 'in connection with' broadly to mean 'related to.' "); *cf.* *Interbulk, Ltd. v. Louis Dreyfus Corp. (In re Interbulk, Ltd.),* 240 B.R. 195, 202 (Bankr.S.D.N.Y.1999) (finding that "a natural reading of 'in connection with' suggests a broader meaning similar to 'related to' " in the context of Section 546(g), an analogue to Section 546(e)). However, this broad "related to" notion is tempered by the fact that it must be alleged that the *initial* transfer from Madoff Securities to, for example, its customer must itself be related to that security agreement. Thus, a withdrawal by a Madoff Securities customer caused by that party's payment obligations to a subsequent transferee under a securities contract could qualify as "related to" that later transaction under the securities contract, whereas a withdrawal that just happens to be used in relation to a securities contract a few levels removed from that initial transfer might not suffice.

Accordingly, the question at the motion to dismiss stage is whether the Trustee has alleged that that initial transfer was made in connection with (*i.e.,* related to) a covered securities contract and to or for the benefit of a financial participant. Take, for example, a hypothetical situation in which the Trustee alleges that a withdrawal of funds by an investment fund from its Madoff Securities customer account occurred because an investor in that fund sought redemption of its investment under the terms of its investment contract. Assuming that either the investment fund or the investor qualifies as a financial institution or financial participant, [6] and barring other circumstances that may appear on the facts of a given case, that situation appears to fit within the plain terms of Section 546(e): an initial transfer that was "made by or to (or for the benefit of) a ... financial institution [or] financial participant ... in connection with a securities contract."

***10** In summary, the Court concludes that while Section 546(e) generally applies to the adversary proceedings brought by the Trustee, those defendants who claim the protections of Section 546(e) through a Madoff Securities account agreement but who actually knew that Madoff Securities was a Ponzi scheme are not entitled to the protections of the Section 546(e) safe harbor, and their motions to dismiss the Trustee's claims on this ground must be denied. Furthermore, both initial transferees and subsequent transferees are entitled to raise a defense based on the application of Section 546(e) to the initial transfer from Madoff Securities. And finally, to the extent that a defendant claims protection under Section 546(e) under a separate securities contract as a financial participant or financial institution, the Bankruptcy Court must adjudicate those claims in the first instance consistent with this Opinion. Except to the extent provided in other orders, the Court directs that what remains of the adversary proceedings listed in Exhibit A of item number 119 on the docket of 12 Misc. 115 be returned to the Bankruptcy Court for further proceedings consistent with this Opinion and Order.

SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2013 WL 1609154

Footnotes

1 It may be noted that, here, as in *Katz,* "[b]oth sides agree that if the defendants had actual knowledge of Madoff's scheme, it would constitute lack of good faith." 462 B.R. at 454 (S.D.N.Y.2011). Conversely, here, unlike in *Katz, id.,* both sides are not in agreement that willful blindness equals lack of good faith. But this is all besides the point here, because neither "good faith" nor the lack of it is a relevant standard for determining the scope and applicability of Section 546(e).

2 While in some contexts "willful blindness" is sufficient to substitute for actual knowledge, this is not such a context, for, as noted in *Katz,* a securities customer has no duty to inquire as to his broker's *bona fides. See* 462 B.R. at 455. Indeed, even in situations where the claim is that the recipients of fraudulent and preferential transfers aided and abetted a securities fraud, "the overwhelming weight of authority holds

that actual knowledge is required, rather than a lower standard such as recklessness or willful blindness." *Rosner v. Bank of China,* No. 06 Civ. 13562, 2008 WL 5416380, at *7 (S.D.N.Y. Dec.18, 2008), *aff'd,*349 F. App'x 637 (2d Cir.2009) (quoting *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC,* 446 F.Supp.2d 163, 202 n. 279 (S.D.N.Y.2006)).

3 The Court's discussion here applies only to those defendants in the Cohmad actions that have moved to withdraw the reference and therefore put their cases before this Court. *See* Notice of Mot. to Dismiss at 10, No. 12 MC 115, ECF No. 259 (S.D.N.Y. filed July 27, 2012).

4 In a civil case, an adverse inference can be drawn from invoking the Fifth Amendment privilege against self-incrimination. *See* *Baxter v. Palmigiano,* 425 U.S. 308, 318, 96 S.Ct. 1551, 47 L.Ed.2d 810 (1976).

5 In *Enron,* the Second Circuit found that a settlement payment covers any "transfer of cash or securities made to complete a securities transaction." 651 F.3d at 334 (alteration and quotation marks omitted). To the extent that, for example, an initial transfer from Madoff securities to an investment fund customer and the subsequent transfer from the investment fund to its redeeming investors may together comprise a "settlement payment" under *Enron, see id.* at 339, that transfer may fall within the purview of Section 546(e), assuming it meets the statute's other requirements.

6 Because this determination must be made on the basis of the specific allegations in the Trustee's complaint in a given adversary proceeding, the Court sets out here the general framework to be applied consistent with its other pronouncements on the application of Section 546(e), but it does not endeavor to apply these principles to the facts of each individual case. To the extent that a given defendant may qualify as a financial institution or a financial participant, but it is not alleged in the pleadings, that becomes an issue of fact that must be decided after discovery.

End of Document

818 F.3d 98
United States Court of Appeals,
Second Circuit.

In re TRIBUNE COMPANY FRAUDULENT CONVEYANCE LITIGATION.
Note Holders, Deutsche Bank Trust Company Americas, Law Debenture Trust Company of New York, Wilmington Trust Company, Individual Retirees, William A. Niese, on behalf of a putative class of Tribune Company retirees, Plaintiffs–Appellants–Cross–Appellees, Mark S. Kirschner, as Litigation Trustee for the Tribune Litigation Trust, Plaintiff, Tendering Phones Holders, Citadel Equity Fund Ltd., Camden Asset Management LLP and certain of their affiliates, Plaintiffs–Intervenors,
v.
Large Private Beneficial Owners, Financial Institution Holders, Financial Institution Conduits, Merrill Lynch, Pierce, Fenner & Smith, Inc., on behalf of a putative class of former Tribune Company shareholders, Pension Funds, including public, private, and Taft Hartley Funds, Individual Beneficial Owners, Mario J. Gabelli, on behalf of a putative class of former Tribune Company shareholders, Mutual Funds, At–Large, Estate of Karen Babcock, Phillip S. Babcock, Douglas Babcock, Defendants Listed on Exhibit B, Defendants–Appellees–Cross–Appellants, Current and Former Directors and Officers, Betsy D. Holden, Christopher Reyes, Dudley S. Taft, Enrique Hernandez, Jr., Miles D. White, Robert S. Morrison, William A. Osborn, Harry Amsden, Stephen D. Carver, Dennis J. FitzSimons, Robert Gremillion, Donald C. Grenesko, David Dean Hiller, Timothy J. Landon, Thomas D. Leach, Luis E. Le, Mark Hianik, Irving Quimby, Crane Kenney, Chandler Bigelow, Daniel Kazan, Timothy Knight, Thomas Finke, Sam Zell and Affiliated Entities, EGI–TRB, LLC, Equity Group Investments, LLC, Sam Investment Trust, Samuel Zell, Tower CH, LLC, Tower DC, LLC, Tower DL, LLC, Tower EH, LLC, Tower Gr, Large Shareholders, Chandler Trusts and their representatives, Financial Advisors, Valuation Research Corporation, Duff & Phelps, LLC, Morgan Stanley & Co. Inc. and Morgan Stanley Capital Services, Inc., GreatBanc Trust Company, Citigroup Global Markets, Inc., CA Public Employee Retirement System, Calpers, University Of CA Regents, T. Rowe Price Associates, Inc., Morgan Keegan & Company, Inc., NTCA, Diocese of Trenton–Pension Fund, First Energy Service Company, Maryland State Retirement and Pension System, T Bank LCV QP, T Bank–LCV–PT, Japan Post Insurance, Co., Ltd., Servants of Relief for Incurable Cancer (aka Dominican Sisters of Hawthorne), New Life International, New Life International Trust, Salvation Army, Southern Territorial Headquarters, City of Philadelphia Employees, Ohio Carpenters' Midcap (aka Ohio Carpenters' Pension Fund), Tilden H. Edwards, Jr., Malloy and Evans, Inc., Bedford Oak Partners, LP, Duff and Phelps LLC, Durham J. Monsma, Certain Tag–Along Defendants, Michael S. Meadows, Wirtz Corporation, Defendants.[*]

Docket Nos. 13–3992–cv, 13–3875–cv, 13–4178–cv, 13–4196–cv.
|
Argued: Nov. 5, 2014.
|
Decided: March 29, 2016.

Synopsis

Background: Unsecured creditors committee in Chapter 11 case brought adversary proceedings asserting actual fraudulent transfer claims against corporate debtor's cashed-out shareholders, officers and directors, financial advisors, and others who benefited from prepetition leveraged buyout (LBO) of debtor, and, after conditional stay relief was granted, individual creditors brought actions asserting state-law constructive fraudulent transfer claims to unwind buyouts of debtor's shareholders. Following consolidation of actions by the Judicial Panel on Multidistrict Litigation, 831 F.Supp.2d 1371, defendants moved to dismiss individual creditor actions. The United States District Court for the Southern District of New York, Richard J. Sullivan, J., 499 B.R. 310, granted motion, and cross-appeals were taken.

Holdings: The Court of Appeals, Winter, Circuit Judge, held that:

creditors were not barred by the Bankruptcy Code's automatic stay provision from bringing state-law constructive fraudulent conveyance claims while avoidance proceedings challenging the same transfers brought by a party exercising the powers of a bankruptcy trustee on an intentional fraud theory were ongoing, but

creditors' state-law constructive fraudulent conveyance claims were preempted by the section of the Code barring bankruptcy trustees from avoiding, as constructively fraudulent to creditors, transfers that are settlement payments in securities transactions or made in connection with a securities contract, abrogating *In re Lyondell Chemical Company*, 503 B.R. 348.

Affirmed.

Procedural Posture(s): Motion to Dismiss.

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Before WINTER, DRONEY, Circuit Judges, and HELLERSTEIN, District Judge. [**]

Opinion

WINTER, Circuit Judge:

Representatives of certain unsecured creditors of the Chapter 11 debtor Tribune Company appeal from Judge Sullivan's grant of a motion to dismiss their state law, constructive fraudulent conveyance claims brought against Tribune's former shareholders. Appellants seek to recover an amount sufficient to satisfy Tribune's debts to them by avoiding (recovering) payments by Tribune to shareholders that purchased all of its stock. The payments occurred in a transaction commonly called a leveraged buyout ("LBO"), [1] soon after which Tribune went into Chapter 11 bankruptcy. Appellants appeal the district court's dismissal for lack of statutory standing, and appellees cross-appeal from the district court's rejection of their argument that appellants' claims are preempted. [2]

We address two issues: (i) whether appellants are barred by the Bankruptcy Code's automatic stay provision from bringing state law, constructive fraudulent conveyance claims while avoidance proceedings against the same transfers brought by a party exercising the powers of a bankruptcy trustee on an intentional fraud theory are ongoing; and (ii) if not, whether the creditors' state law, constructive fraudulent conveyance claims are preempted by Bankruptcy Code Section 546(e).

On issue (i), we hold that appellants are not barred by the Code's automatic stay because they have been freed from its restrictions by orders of the bankruptcy court and by the debtors' confirmed reorganization plan. On issue (ii), the subject of appellees' cross-appeal, we hold that appellants' claims are preempted by Section 546(e). That Section shields from avoidance proceedings brought by a bankruptcy trustee transfers by or to financial intermediaries effectuating settlement payments in securities transactions or made in connection with a securities contract, except through an intentional fraudulent conveyance claim.

We therefore affirm.

BACKGROUND

a) *The LBO*

Tribune Media Company (formerly known as "Tribune Company") is a multimedia corporation that, in 2007, faced ***106** deteriorating financial prospects. Appellee Samuel Zell, a billionaire investor, proposed to acquire Tribune through an LBO. In consummating the LBO, Tribune borrowed over $11 billion secured by its assets. The $11 billion plus, combined with Zell's $315 million equity contribution, was used to refinance some of Tribune's pre-existing bank debt and to cash out Tribune's shareholders for over $8 billion at a premium price—above its trading range—per share. It is undisputed that Tribune transferred the over $8 billion to a "securities clearing agency" or other "financial institution," as those terms are used in Section 546(e), acting as intermediaries in the LBO transaction. Those intermediaries in turn paid the funds to the shareholders in exchange for their shares that were then returned to Tribune. Appellants seek to satisfy Tribune's debts to them by avoiding Tribune's payments to the shareholders. Appellants do not seek money from the intermediaries. *See* Note 8, *infra.*

b) *Bankruptcy Proceedings*

On December 8, 2008, with debt and contingent liabilities exceeding its assets by more than $3 billion, Tribune and nearly all of its subsidiaries filed for bankruptcy under Chapter 11 in the District of Delaware. A trustee was not appointed, and Tribune and its affiliates continued to operate the businesses as debtors in possession. *See* 11 U.S.C. § 1107(a) ("Subject to any limitations on a trustee ... a debtor in possession shall have all the rights ..., and powers, and shall perform all the functions and duties ... of a trustee...."). In discussing the powers of a bankruptcy trustee that can be exercised by a trustee or parties designated by a bankruptcy court, we shall refer to the trustee or such parties as the "trustee *et al.*"

The bankruptcy court appointed an Official Committee of Unsecured Creditors (the "Committee") to represent the interests of unsecured creditors. In November 2010, alleging that the LBO-related payments constituted intentional fraudulent conveyances, the Committee commenced an action under Code Section 548(a)(1)(A) against the cashed out Tribune shareholders, various officers, directors, financial advisors, Zell, and others alleged to have benefitted from the LBO. An intentional fraudulent conveyance is defined as one in which there was "actual intent to hinder, delay, or defraud" a creditor. 11 U.S.C. § 548(a)(1)(A).

In June 2011, two subsets of unsecured creditors filed state law, constructive fraudulent conveyance claims in various federal and state courts. The plaintiffs, the appellants before us, were: (i) the Retiree Appellants, former Tribune employees who hold claims for unpaid retirement benefits and (ii) the Noteholder Appellants, the successor indenture trustees for Tribune's pre-LBO senior notes and subordinated debentures. A constructive fraudulent conveyance is, generally speaking, a transfer for less than reasonably equivalent value made when the debtor was insolvent or was rendered so by the transfer. *See* *Picard v. Fairfield Greenwich Ltd.,* 762 F.3d 199, 208–09 (2d Cir.2014).

Before bringing these actions, appellants moved the bankruptcy court for an order stating that: (i) after the expiration of the two-year statute of limitations period during which the Committee was authorized to bring avoidance actions under 11 U.S.C. § 546(a), eligible creditors had regained the right to prosecute their creditor state law claims; and (ii) the automatic stay imposed by Code Section 362(a) was lifted solely to permit the immediate filing of their complaint. In support of that motion, ***107** the Committee argued that, under Section 546(a), the "state law constructive fraudulent conveyance transfer claims ha[d] reverted to individual creditors" and that the "creditors should consider taking appropriate actions to preserve those claims." Statement of the Official Committee of Unsecured Creditors in Supp. of Mot. 3, *In re Tribune Co.,* No 08–13141(KJC) (Bankr.D.Del. Mar. 17, 2011).

In April 2011, the bankruptcy court lifted the Code's automatic stay with regard to appellants' actions. The court reasoned that because the Committee had elected not to bring the constructive fraudulent conveyance actions within the two-year limitations period following the bankruptcy petition imposed by Section 544, fully discussed *infra,* the unsecured creditors "regained the right, if any, to prosecute [such claims]." J. App'x at 373. Therefore, the court lifted the Section 362(a) automatic stay "to permit the filing of any complaint by or on behalf of creditors on account of such Creditor [state law fraudulent conveyance] Claims." *Id.* The court clarified, however, that it was not resolving the issues of whether the individual creditors had statutory standing to bring such claims or whether such claims were preempted by Section 546(e).

On March 15, 2012, the bankruptcy court set an expiration date of June 1, 2012 for the remaining limited stay on the state law, fraudulent conveyance claims. In July 2012, the bankruptcy court ordered confirmation of the proposed Tribune reorganization plan. The plan terminated the Committee and transferred responsibility for prosecuting the intentional fraudulent conveyance action to an entity called the Litigation Trust. The confirmed plan also provided that the Retiree and Noteholder Appellants could pursue "any and all LBO–Related Causes of Action arising under state fraudulent conveyance law," except for the federal intentional fraudulent conveyance and other LBO-related claims pursued by the Litigation Trust. J. App'x at 643. Under the plan, the Retiree and Noteholder Appellants recovered approximately 33 cents on each dollar of debt. The plan was scheduled to take effect on December 31, 2012, the date on which Tribune emerged from bankruptcy.

c) *District Court Proceedings*

Appellants' various state law, fraudulent conveyance complaints alleged that the LBO payments, made through financial intermediaries as noted above, were for more than the reasonable value of the shares and made when Tribune was in distressed financial condition. Therefore, the complaints concluded, the payments were avoidable by creditors under the laws of various states. These actions were later consolidated with the Litigation Trust's ongoing federal intentional fraud claims in a multi-district litigation proceeding that was transferred to the Southern District of New York. *In re: Tribune Co. Fraudulent Conveyance Litig.,* 831 F.Supp.2d 1371 (J.P.M.L.2011).

After consolidation, the Tribune shareholders moved to dismiss appellants' claims. The district court granted the motion on the ground that the Bankruptcy Code's automatic stay provision deprived appellants of statutory standing to pursue their claims so long as the Litigation Trustee was pursuing the avoidance of the same transfers, albeit under a different legal theory. *In re Tribune Co. Fraudulent Conveyance Litig.,* 499 B.R. 310, 325 (S.D.N.Y.2013). The court held that the bankruptcy court had only "conditionally lifted the stay." *Id.* at 314.

The district court rejected appellees' preemption argument based on Section 546(e). That Section bars a trustee *et al.* from exercising its avoidance powers under ***108** Section 544 to avoid transfers by the debtor to specified financial intermediaries, e.g. a "securities clearing agency" or "financial institution," that is a "settlement payment" in a securities transaction or is a transfer "in connection with a securities contract." The district court held that Section 546(e) did not bar appellants' actions because: (i) Section 546(e)'s prohibition on avoiding the designated transfers applied only to a bankruptcy trustee *et al., id.* at 315–16; and (ii) Congress had declined to extend Section 546(e) to state law, fraudulent conveyance claims brought by creditors, *id.* at 318.

DISCUSSION

We review *de novo* the district court's grant of appellees' motion to dismiss. *See* *Mary Jo C. v. N.Y. State & Local Ret. Sys.,* 707 F.3d 144, 151 (2d Cir.2013). The relevant facts being undisputed for purposes of this proceeding, only issues of law are before us.

a) *Statutory Standing to Bring the Claims*

We first address the district court's dismissal of appellants' claims on the ground that they lacked standing to bring them because of Section 362(a)(1).[3] *In re Tribune,* 499 B.R. at 325. When a bankruptcy action is filed, any "action or proceeding against the debtor" is automatically stayed by Section 362(a). The purpose of the stay is "to protect creditors as well as the debtor," *Ostano Commerzanstalt v. Telewide Sys., Inc.,* 790 F.2d 206, 207 (2d Cir.1986) (per curiam), by avoiding wasteful, duplicative, individual actions by creditors seeking individual recoveries from the debtor's estate, and by ensuring an equitable distribution of the debtor's estate. *See* *In re McMullen,* 386 F.3d 320, 324 (1st Cir.2004) (noting that Section 362(a)(1), among other things, "safeguard[s] the debtor estate from piecemeal dissipation ... ensur[ing] that the assets remain within the exclusive jurisdiction of the bankruptcy court pending their orderly and equitable distribution among the creditors"). Although fraudulent conveyance actions are against third parties rather than a debtor, there is caselaw, discussed *infra,* stating that the automatic stay applies to such actions.[4] *See* *In re Colonial Realty Co.,* 980 F.2d 125, 131 (2d Cir.1992).

The district court ruled that Section 362's automatic stay provision deprived appellants of statutory standing to bring their claims because the Litigation Trustee was still pursuing an intentional fraudulent conveyance action challenging the same transfers under Section 548(a)(1)(A). *In re Tribune,* 499 B.R. at 322–23. We disagree. The Bankruptcy Code empowers a bankruptcy court to release parties from the automatic stay "for cause" shown. *In re Bogdanovich,* 292 F.3d 104, 110 (2d Cir.2002) (*quoting* 11 U.S.C. § 362(d)(1)). Once a creditor obtains "a grant of relief from the automatic stay" under Section 362(d), it may "press ***109** its claims outside of the bankruptcy proceeding." *St. Paul Fire & Marine Ins. Co. v. PepsiCo, Inc.,* 884 F.2d 688, 702 (2d Cir.1989), *disapproved of on other grounds by* *In re Miller,* 197 B.R. 810 (W.D.N.C.1996).

In the present matter, the bankruptcy court granted appellants relief from the automatic stay on three occasions. On April 25, 2011, the bankruptcy court granted appellants relief "to permit the filing of any complaint by or on behalf of creditors on account of such Creditor [state law fraudulent conveyance] Claims." J. App'x at 373. A second order, entered on June 28, 2011, clarified that "neither the automatic stay of [Section 362] nor the provisions of the [original lift-stay order]" barred the parties in the state law actions from consolidating and coordinating these actions. J. App'x at 376. And the bankruptcy court's third order, entered on March 15, 2012, set an expiration date of June 1, 2012, for the "stay imposed on the state law constructive fraudulent conveyance actions." J. App'x at 521. None of the Tribune shareholders filed objections to these orders.

Finally, the reorganization plan, confirmed by the bankruptcy court and in all pertinent respects an order of that court, expressly allowed appellants to pursue "any and all LBO–Related Causes of Action arising under state fraudulent conveyance law." J. App'x at 643. Section 5.8.2 of the plan provided that "nothing in this Plan shall or is intended to impair" the rights of creditors to attempt to pursue disclaimed state law avoidance claims. J. App'x at 695.

Thus, under both the bankruptcy court's orders and the confirmed reorganization plan, if appellants had actionable state law, constructive fraudulent conveyance claims, assertion of those claims was no longer subject to Section 362's automatic stay. *See, e.g., In re Heating Oil Partners, LP,* 422 Fed.Appx. 15, 18 (2d Cir.2011) (holding that the automatic stay terminates at discharge); *United States v. White,* 466 F.3d 1241, 1244 (11th Cir.2006) (similarly recognizing that the automatic stay terminates when "a discharge is granted").

For the foregoing reasons, we hold that appellants' claims are not barred by Section 362.

b) *Section 546(e) and Preemption*
We turn now to the issue raised by the cross-appeal: whether appellants' claims are preempted because they conflict with Code Section 546(e).

1. Conflict–Preemption Law
Under the Supremacy Clause, Article VI, Clause 2 of the Constitution, federal law prevails when it conflicts with state law. *Arizona v. United States,* ––– U.S. ––––, 132 S.Ct. 2492, 2500, 183 L.Ed.2d 351 (2012).

As discussed throughout this opinion, Section 546(e)'s reference to limiting avoidance by a trustee provides appellants with a plain language argument that only a trustee *et al.,* and not creditors acting on their own behalf, are barred from bringing state law, constructive fraudulent avoidance claims. However, as discussed *infra,* we believe that the language of Section 546(e) does not necessarily have the meaning appellants ascribe to it. Even if that meaning is one of multiple reasonable constructions of the statutory scheme, it would not necessarily preclude preemption because a preemptive effect may be inferred where it is not expressly provided.

Under the implied preemption ***110** doctrine,[5] state laws are "preempted to the extent of any conflict with a federal statute. Such a conflict occurs ... when [ ] state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hillman v. Maretta,* ––– U.S. ––––, 133 S.Ct. 1943, 1949–50, 186 L.Ed.2d 43 (2013) (citations and internal quotation marks omitted); *accord In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.,* 725 F.3d 65, 97 (2d Cir.2013) *cert. denied sub nom. Exxon Mobil Corp. v. City of New York,* ––– U.S. ––––, 134 S.Ct. 1877, 188 L.Ed.2d 948 (2014) (courts will find implied preemption when "state law directly conflicts with the structure and purpose of a federal statute") (citation and internal quotation marks omitted).

Appellants argue that a recognized presumption against preemption limits the implied preemption doctrine. They argue that Section 546(e) preempts creditors' state law, fraudulent conveyance claims only if the claims would do " 'major damage' to 'clear and substantial' federal interests." Resp. & Reply Br. of Pls.–Appellants–Cross–Appellees 45 (*quoting Hillman,* ––– U.S. ––––, 133 S.Ct. 1943, 1950, 186 L.Ed.2d 43 (2013) (citation omitted)). The presumption against inferring preemption is premised on federalism grounds and, therefore, weighs most heavily where the particular regulatory area is "traditionally the domain of state law." *Hillman,* 133 S.Ct. at 1950; *see also Madeira v. Affordable Hous. Found., Inc.,* 469 F.3d 219, 241 (2d Cir.2006) ("The mere fact of 'tension' between federal and state law is generally not enough to establish an obstacle supporting preemption, particularly when the state law involves the exercise of traditional police power."). According to appellants, the presumption against preemption fully applies in the present context because fraudulent conveyance claims are "among 'the oldest [purposes] within the ambit of the police power.' " Resp. & Reply Br. of Pls.–Appellants–Cross–Appellees 36 (*quoting California v. Zook,* 336 U.S. 725, 734, 69 S.Ct. 841, 93 L.Ed. 1005 (1949)).

Preemption is always a matter of congressional intent, even where that intent must be inferred. *See Cipollone v. Liggett Grp., Inc.,* 505 U.S. 504, 516, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992) (congressional intent is the "ultimate touchstone of pre-emption analysis") (*quoting Malone v. White Motor Corp.,* 435 U.S. 497, 504, 98 S.Ct. 1185, 55 L.Ed.2d 443 (1978)) (internal quotation marks omitted); *N.Y. SMSA Ltd. P'ship v. Town of Clarkstown,* 612 F.3d 97, 104 (2d Cir.2010) ("The key to the preemption inquiry is the intent of Congress."). As in the present matter, the presumption against preemption usually goes to the weight to be given to the lack of an express statement overriding state law.

The presumption is strongest when Congress is legislating in an area recognized as traditionally one of state law alone.

See *Hillman,* 133 S.Ct. at 1950 (stating that because "[t]he regulation of domestic relations is traditionally the domain of state law ... [t]here is [ ] a presumption against ***111** pre-emption") (internal quotation marks and citation omitted). However, the present context is not such an area. To understate the proposition, the regulation of creditors' rights has "a history of significant federal presence." *United States v. Locke,* 529 U.S. 89, 90, 120 S.Ct. 1135, 146 L.Ed.2d 69 (2000).

Congress's power to enact bankruptcy laws was made explicit in the Constitution as originally enacted, Art. 1, § 8, cl. 4, and detailed, preemptive federal regulation of creditors' rights has, therefore, existed for over two centuries. Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States,* 3 Am. Bankr.Inst. L.Rev. 5, 7 (1995). Once a party enters bankruptcy, the Bankruptcy Code constitutes a wholesale preemption of state laws regarding creditors' rights. *See* *Eastern Equip. and Servs. Corp. v. Factory Point Nat. Bank, Bennington,* 236 F.3d 117, 120 (2d Cir.2001) ("The United States Bankruptcy Code provides a comprehensive federal system of penalties and protections to govern the orderly conduct of debtors' affairs and creditors' rights."); *In re Miles,* 430 F.3d 1083, 1091 (9th Cir.2005) ("Congress intended the Bankruptcy Code to create a whole scheme under federal control that would adjust *all* of the rights and duties of creditors and debtors alike....").

Consider, for example, the present proceeding. While the issue before us is often described as whether Section 546(e) preempts state fraudulent conveyance laws, Resp. & Reply Br. of Pls.–Appellants–Cross–Appellees 33, that is a mischaracterization. Appellants' state law claims were preempted when the Chapter 11 proceedings commenced and were not dismissed. Appellants' own arguments posit that those claims were, at the very least, stayed by Code Section 362. Whether, as appellants argue, they were restored in full after two years, *see* 11 U.S.C. § 546(a)(1)(A), or by order of the bankruptcy court, *see* 11 U.S.C. § 349(b)(3), is hotly disputed. But if they were restored, it was by force of federal law.

Once Tribune entered bankruptcy, the creditors' avoidance claims were vested in the federally appointed trustee *et al.* 11 U.S.C. § 544(b)(1). A constructive fraudulent conveyance action brought by a trustee *et al.* under Section 544 is a claim arising under federal law. *See* *In re Intelligent Direct Mktg.,* 518 B.R. 579, 587 (E.D.Cal.2014); *In re Trinsum Grp., Inc.,* 460 B.R. 379, 387–88 (S.D.N.Y.2011); *In re Sunbridge Capital, Inc.,* 454 B.R. 166, 169 n. 16 (Bankr.D.Kan.2011); *In re Charys Holding Co., Inc.,* 443 B.R. 628, 635–36 (Bankr.D.Del.2010). Although such a claim borrows applicable state law standards regarding avoiding the transfer in question, *see* *Universal Church v. Geltzer,* 463 F.3d 218, 222 n. 1 (2d Cir.2006), the claim has its own statute of limitations, 11 U.S.C. § 546(a)(1)(A), measure of damages, *see* 11 U.S.C. § 550, and standards for distribution, 11 U.S.C. § 726. A disposition of this federal law claim extinguishes the right of creditors to bring state law, fraudulent conveyance claims. *See* *St. Paul Fire,* 884 F.2d at 701 *disapproved of on other grounds by* *In re Miller,* 197 B.R. 810 (W.D.N.C.1996) (noting that "creditors are bound by the outcome of the trustee's action"); *see also* *In re PWS Holding Corp.,* 303 F.3d 308, 314–15 (3d Cir.2002) (barring creditor's state law, fraudulent transfer claims after trustee released § 544 claims). And, if creditors are allowed by a bankruptcy court, trustee, or, as appellants argue, by the Bankruptcy Code, to bring state law actions in their own name, that permission is a matter of grace granted under federal authority. The standards for granting that permission, moreover, have everything to do with ***112** the Bankruptcy Code's balancing of debtors' and creditors' rights, *In re Coltex Loop Cent. Three Partners, L.P.,* 138 F.3d 39, 44 (2d Cir.1998), or rights among creditors, *United States v. Ron Pair Enters., Inc.,* 489 U.S. 235, 248, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989), and nothing to do with the vindication of state police powers.

We also note here, and discuss further *infra,* that the policies reflected in Section 546(e) relate to securities markets, which are subject to extensive federal regulation. The regulation of these markets has existed and grown for over eighty years and reflects very important federal concerns.

In the present matter, therefore, there is no measurable concern about federal intrusion into traditional state domains. Our bottom line is that the issue before us is one of inferring congressional intent from the Code, without significant countervailing pressures of state law concerns.

2. The Language of Section 546(e)

Section 544(b) empowers a trustee *et al.* to avoid a "transfer ... [by] the debtor ... voidable under applicable law by a[n] [unsecured] creditor." Section 548(a) also provides the trustee *et al.* with independent federal intentional, 11 U.S.C. § 548(a)(1)(A), and constructive fraudulent conveyance claims, 11 U.S.C. § 548(a)(1)(B).

Section 546(e) provides in pertinent part:

> Notwithstanding sections 544, ... 548(a)(1)(B) ... of this title, the trustee may not avoid a transfer that is a ... settlement payment ... made by or to (or for the benefit of) a ... stockbroker, financial institution, financial participant, or securities clearing agency, or that is a transfer made by or to (or for the benefit of) a ... stockbroker, financial institution, financial participant, or securities clearing agency, in connection with a securities contract ... except under section 548(a)(1)(A)....

Id. § 546(e). Section 546(e) thus expressly prohibits trustees *et al.* from using their Section 544(b) avoidance powers and (generally) Section 548 against the transfers specified in Section 546(e). However, Section 546(e) creates an exception to that prohibition for claims brought by trustee *et al.* under Section 548(a)(1)(A) that, as noted, establishes a federal avoidance claim to be brought by a trustee *et al.* based on an intentional fraud theory. As discussed *supra,* the Litigation Trust has brought a Section 548(a)(1)(A) claim against the same transfers challenged by appellants' actions before us on this appeal. That claim is still pending.

The language of Section 546(e) covers all transfers by or to financial intermediaries that are "settlement payment[s]" or "in connection with a securities contract." Transfers in which either the transferor or transferee is not such an intermediary are clearly included in the language. The Section does not distinguish between kinds of transfers, e.g., settlements of ordinary day-to-day trading, LBOs, or mergers in which shareholders of one company are involuntarily cashed out. So long as the transfer sought to be avoided is within the language quoted above, the Section includes avoidance proceedings in which the intermediary would escape a damages judgment. *But see* *In re Lyondell Chem. Co.,* 503 B.R. 348, 372–73 (Bankr.S.D.N.Y.2014), *as corrected* (Jan. 16, 2014), that Section 546(e) does not include "LBO payments to stockholders at the very end of the asset transfer chain, where the stockholders are the ultimate beneficiaries of the constructively fraudulent transfers, and can give the money back to injured creditors with no damage to anyone but themselves."

***113** 3. Appellants' Legal Theory

Appellants' state law, constructive fraudulent conveyance claims purport to be brought under mainstream bankruptcy procedures directly mandated by the Code. However, an examination of the Code as a whole, in contrast with an isolated focus on the word "trustee" in Section 546(e), reveals that appellants' theory relies upon adhering to statutory language only when opportune and resolving various ambiguities in a way convenient to that theory. Even then, their legal theory results in anomalies and inconsistencies with parts of the Code. The consequence of those ambiguities, anomalies, and conflicts is that a reader of Section 546(e), at the time of enactment, would not have necessarily concluded that the reference only to a trustee *et al.* meant that creditors may at some point bring state law claims seeking the very relief barred to the trustee *et al.* by Section 546(e). Its meaning, therefore, is not plain.

(i) Appellants' Theory of Fraudulent Conveyance Avoidance Proceedings

Appellants' theory goes as follows. When a debtor enters bankruptcy, all "legal or equitable interests of the debtor in property," 11 U.S.C. § 541(a)(1), vest in the debtor's bankruptcy estate. This property includes legal claims that could have been brought by the debtor. *See* *U.S. ex rel. Spicer v. Westbrook,* 751 F.3d 354, 361–62 (5th Cir.2014) ("The phrase 'all legal or equitable interests' includes legal claims—whether based on state or federal law."). Therefore, "the Trustee is conferred with the authority to represent *all* creditors and the Debtor's estate and with the sole responsibility of bringing actions on behalf of the Debtor's estate to marshal assets for the estate's creditors." *In re Stein,* 314 B.R. 306, 311 (D.N.J.2004). However, fraudulent conveyance claims proceed on a theory that an insolvent debtor may not make what are essentially gifts that deprive creditors of assets available to pay debts. *See* *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.,* 527 U.S. 308, 322, 119 S.Ct. 1961, 144 L.Ed.2d 319 (1999). Therefore, before a bankruptcy takes place, fraudulent conveyance claims belong to creditors rather than to the debtor. As a consequence, Section 544(b)(1) provides that a bankruptcy trustee may avoid "any transfer of an interest of the debtor ... that is voidable under applicable law by a creditor holding an unsecured claim." 11 U.S.C. § 544(b)(1). The responsibility of the trustee *et al.* is to "step into the shoes of a creditor under state law and avoid any transfers such a creditor could have avoided." *Univ. Church v. Geltzer,* 463 F.3d 218, 222 n. 1 (2d Cir.2006).

The trustee *et al.,* however, is subject to a statute of limitations that requires such claims to be brought within two years of the commencement of the bankruptcy proceeding. *See* 11 U.S.C. § 546(a)(1)(A). Appellants infer from this statute of limitations that if the trustee *et al.* fails to act to enforce such claims during that two-year period, the claims revert to creditors who may then pursue their own state law, fraudulent conveyance actions. Resp. & Reply Br. of Pls.–Appellants–Cross–Appellees 1. This position assumes that, although the power to bring such actions is clearly vested in the trustee *et al.* when the bankruptcy proceeding begins, if the power is not exercised, it returns in full flower to the creditors after the bankruptcy ends or after two years.

Appellants' theory also is that their fraudulent conveyance claims were only stayed under Section 362(a), rather than extinguished when assumed by the trustee on behalf of the bankrupt estate by the ***114** trustee *et al.* under Section 544, and could be asserted by them as creditors when the Section 362(a) stay was lifted. Accordingly, appellants argue, when the Committee did not bring constructive fraudulent conveyance actions against the LBO transfers by December 8, 2010, appellants regained the right to bring their own state law actions. *See* Resp. & Reply Br. of Pls.–Appellants–Cross Appellees 6. Moreover, they correctly note that Section 362's automatic stay was, as discussed *supra,* lifted. In either case—automatically after two years or by the bankruptcy court's lifting of the stay—appellants assert that the right to bring state law actions has reverted to them.

(ii) Ambiguities, Anomalies, and Conflicts

When appellants' arguments and their relation to the Code are viewed, as we must view them, in their entirety, *In re Boodrow,* 126 F.3d 43, 49 (2d Cir.1997) ("The Supreme Court has thus explained ... 'we must not be guided by a single sentence or [part] of a sentence [of the Code], but look to the provisions of the whole law, and to its object and policy.' ") (*quoting* *Kelly v. Robinson,* 479 U.S. 36, 43, 107 S.Ct. 353, 93 L.Ed.2d 216 (1986)), they reveal material ambiguities, anomalies, and outright conflicts with the purposes of Code Sections 544, 362, and 548, not to mention the outright conflict with Section 546(e) discussed *infra.*

A critical step in the logic of appellants' theory finds no support in the language of the Code. In particular, the inference that fraudulent conveyance actions revert to creditors if either the two-year statute of limitations passes without an exercise of the trustees' *et al.* powers under Section 544 or the Section 362(a) stay is lifted by the bankruptcy court has no basis in the Code's language. To begin, the language of the automatic stay provision applies only to actions against "the debtor." 11 U.S.C. § 362. To be sure, there are cases barring fraudulent conveyance actions brought by creditors before the passing of the limitations period or lifting of the stay. *See, e.g., In re Crysen/Montenay Energy Co.,* 902 F.2d 1098, 1101 (2d Cir.1990). The rationales of these cases vary. Some rely on Section 362(a) on the theory that the fraudulent conveyance claims are the property of the debtors' estate. *See* *In re MortgageAmerica Corp.,* 714 F.2d 1266, 1275–76 (5th Cir.1983); *Matter of Fletcher,* 176 B.R. 445, 452 (Bankr.W.D.Mich.1995), *rev'd and remanded on other grounds sub nom. In re Van Orden,* No. 1:95–CV–79, 1995 WL 17903731 (W.D.Mich. Sept. 5, 1995). Some do not mention Section 362(a) and rely on the need to protect trustees' *et al.* powers to bring Section 544 avoidance actions. *See* *In re Van Diepen, P.A.,* 236 Fed.Appx. 498, 502–03 (11th Cir.2007); *In re Clark,* 374 B.R. 874, 876 (Bankr.M.D.Ala.2007); *In re Tessmer,* 329 B.R. 776, 780 (Bankr.M.D.Ga.2005). All the caselaw agrees that the trustee *et al.'s* powers under Section 544 are exclusive, at least until the stay is lifted or the two-year period expires.

Equally important is the fact that the inference of a reversion of fraudulent conveyance claims to creditors drawn from Section 544's statute of limitations is not based on the language of the Code, which says nothing about the reversion of claims vested in the trustee *et al.* by Section 544. Statutes of limitation usually are intended to limit the assertion of stale claims and to provide peace to possible defendants, *Converse v. Gen. Motors Corp.,* 893 F.2d 513, 516 (2d Cir.1990), and not to change the identity of the authorized plaintiffs without some express language to that effect. A decisive part of appellants' legal theory thus has no support in the language of the Code.

***115** Even if this gap is assumed not to exist, or can be otherwise traversed, appellants' theory encounters other serious problems. Section 544, vesting avoidance powers in the trustee *et al.,* is intended to simplify proceedings, reduce the costs of marshalling the debtor's assets, and assure an equitable distribution among the creditors. *See In re MortgageAmerica Corp.,* 714 F.2d 1266, 1275–76 (5th Cir.1983) (noting that "[t]he 'strong arm' provision of the [Bankruptcy] Code, 11 U.S.C. § 544, allows the bankruptcy trustee to step into the shoes of a creditor for the purpose of asserting causes of action under state fraudulent conveyance acts for the benefit of all creditors, not just those who win a race to judgment" and Section 362 helps prevent "[a]ctions for the recovery of the debtor's property by individual creditors under state fraudulent conveyance laws [that] would interfere with [the bankruptcy] estate and with the equitable distribution scheme dependent upon it"). However, these purposes are hardly consistent with the process hypothesized by appellants.

Accepting for purposes of argument appellants' view of the applicable process, Section 362, at the very least, prevented appellants (for a time) from bringing their state law, fraudulent conveyance claims, while Section 546(e) barred the Committee from seeking to enforce or, necessarily, to settle them. Appellants' argument thus seems to posit that their claims are on hold until the trustees *et al.* decide whether to bring an action they are powerless to bring or to pass on to creditors a power they do not have. In short, it assumes that, when creditors' avoidance claims are lodged in the trustee *et al.* and are diminished in that hand by the Code, they reemerge in undiminished form in the hands of creditors after the statute of limitations governing actions by the trustee *et al.* has run or the bankruptcy court lifts the automatic stay.

In the context of the Code, however, any such process is a glaring anomaly. Section 548(a)(1)(A) vests trustees with a federal claim to avoid the very transfers attacked by appellants' state law claims—but only on an intentional fraud theory. There is little apparent reason to limit trustees *et al.* to intentional fraud claims while not extinguishing constructive fraud claims but rather leaving them to be brought later by individual creditors. In particular, enforcement of the intentional fraud claim is undermined if creditors can later bring state law, constructive fraudulent conveyance claims involving the same transfers. Any trustee would have grave difficulty negotiating more than a nominal settlement in the federal action if it cannot preclude state claims attacking the same transfers but not requiring a showing of actual fraudulent intent. Unable to settle, a trustee *et al.* will be reluctant to expend the estate's resources on vigorously pursuing the federal claim while awaiting the stayed state claims to revert and to be litigated by creditors. As happened in the present matter, the result is that the trustee *et al.'s* action awaits the pursuit of piecemeal actions by creditors. This is precisely opposite of the intent of the Code's procedures. While a bankruptcy court can reduce the delay by an early lifting of the automatic stay with regard to constructive fraudulent conveyance actions, that action would underline the anomaly of applying the stay to the bringing of claims that are barred to trustees *et al.*

Staying ordinary state law, constructive fraudulent conveyance claims by individual creditors while the trustee deliberates is a rational method of avoiding piecemeal litigation and ensuring an equitable distribution of assets among creditors. *See* ***116** *MBNA Am. Bank, N.A. v. Hill,* 436 F.3d 104, 108 (2d Cir.2006) ("The objectives of the Bankruptcy Code ... include ... 'the need to protect creditors and reorganiz[e] debtors from piecemeal litigation....' ") (*quoting Ins. Co. of N. Am. v. NGC Settlement Trust & Asbestos Claims Mgmt. Corp.,* 118 F.3d 1056, 1069 (5th Cir.1997)). However, the scheme described by appellants does not resemble this method either in simplicity or in the equitable treatment of creditors.

To rationalize these anomalies, appellants speculate as to—more accurately, imagine—a deliberate balancing of interests by Congress. They argue that Congress wanted to balance the need for certainty and finality in securities markets, recognized in Section 546(e), against the need to maximize creditors' recoveries, recognized in various other provisions. Congress did so, they argue, by limiting only the avoidance powers of trustees *et al.,* not those of individual creditors (save for the stay), in Section 546(e) because actions by trustees *et al.* are a greater threat to securities markets than are actions by individual creditors. Resp. & Reply Br. of Pls.–Appellants–Cross–Appellees 71. That greater threat results from the fact that a trustee's power of avoidance is funded by the debtor's estate, *see* 11 U.S.C. §§ 327, 330, supported by national long-arm jurisdiction, *see* Fed. R. Bankr.P. 7004(d), (f), and can be used to avoid the entirety of a transfer, *Tronox Inc. v. Anadarko Petroleum Corp. (In re Tronox Inc.),* 464 B.R. 606, 615–17 (Bankr.S.D.N.Y.2012) (*citing* *Moore v. Bay,* 284 U.S. 4, 52 S.Ct. 3, 76 L.Ed. 133 (1931)). Creditors, in turn, have no such funding, are limited by state jurisdictional rules, and can sue only for their individual losses. *See* *In re Integrated Agri, Inc.,* 313 B.R. 419, 428 (Bankr.C.D.Ill.2004). Therefore, appellants argue that a deliberate "balance" was struck by protecting securities markets from trustees' *et al.* actions while subjecting them to the lesser disruption individual creditors' actions might cause after a two-year stay. Resp. & Reply Br. of Pls.–Appellants–Cross–Appellees 83–85. For a court to upset this delicate balance would constitute judicial intrusion on policy decisions rightfully left to the Congress.

However, the balance described above is an *ex post* explanation of a legal scheme that appellants must first construct, and then justify as rational, because it is essential to their claims. Although they argue that the scheme was deliberately constructed by Congress, that argument lacks any support whatsoever in the legislative deliberations that led to Section 546(e)'s enactment.

Moreover, appellants' arguments understate the number of creditors who would sue, if allowed, and the corresponding extent of the danger to securities markets. Creditors may assign their claims and various methods of aggregation can lead to billions of dollars of claims, as here.

(iii) No Plain Meaning

These issues reflect ambiguities as to exactly what is transferred to trustees *et al.* by Section 544(b)(1). It is clear that trustees *et al.* own the debtors' estates, which include the debtors' property and legal claims. *See* 11 U.S.C. § 541(a)(1) (Among other things, the "estate is comprised of ... all legal or equitable interests of the debtor in property as of the commencement of the case"); *U.S. ex rel. Spicer v. Westbrook,* 751 F.3d 354, 361–62 (5th Cir.2014) ("The phrase 'all legal or equitable interests' includes legal claims —whether based on state or federal law."). Avoidance claims belong to creditors, however, and whether they become the property of the debtors' estates is a debated, and somewhat metaphysical, issue. *See* ***117** Note 7, *infra.* The issue does have a limited practical bearing on the present matter, however. If the claims asserted by appellants became the property of the debtor's estate upon Tribune's bankruptcy and were thereby limited in the hands of the Committee, their reversion in an unaltered form, whether occurring automatically or by act of the Committee or bankruptcy court, might seem counterintuitive.

Appellants' reliance on the applicability of the automatic stay to their claims would arguably support the "property" view. The stay is intended in part to protect the property rights of the trustee *et al.* in the debtor's estate. Subjecting avoidance actions by creditors to the stay has been supported by various courts on the ground that such claims are either the property of the debtor's estate or have an equivalent legal status. *See* *In re MortgageAmerica Corp.,* 714 F.2d 1266, 1275–76 (5th Cir.1983); *In re Swallen's, Inc.,* 205 B.R. 879, 882 (Bankr.S.D.Ohio 1997); *Matter of Fletcher,* 176 B.R. 445, 452 (Bankr.W.D.Mich.1995).

Whether, and to what degree, fraudulent conveyance claims become the property of a bankrupt estate was, at the time of Section 546(e)'s enactment, and now, anything but clear. The principal Supreme Court precedent held that such claims are the property of the debtor's estate. *Trimble v. Woodhead,* 102 U.S. 647, 649, 26 L.Ed. 290 (1880). It is a very old decision but has not been expressly overruled. Subsequent court of appeals decisions are bountiful in contradictory statements regarding the property issue. *Compare* *In re Cybergenics Corp.,* 226 F.3d 237, 241, 246 (3d Cir.2000) (stating that "fraudulent transfer claims have long belonged to a transferor's *creditors,* whose efforts to collect their debts have essentially been thwarted as a consequence of the transferor's actions" but also noting that the debtor's " 'assets' and 'property of the estate' have different meanings, evidenced in part by the numerous provisions in the Bankruptcy Code that distinguish between property of the estate and property of the debtor, or refer to one but not the other"), *and* *Picard v. Fairfield Greenwich Ltd.,* 762 F.3d 199, 212 (2d Cir.2014) ("Our case law is clear that assets targeted by a fraudulent conveyance action do not become property of the debtor's estate under the Bankruptcy Code until the Trustee obtains a favorable judgment."), *with* *Cumberland Oil Corp. v. Thropp,* 791 F.2d 1037, 1042 (2d Cir.1986) (noting that causes of action alleging violation of fraudulent conveyance laws would be property of the estate), *and* *Nat'l Tax Credit Partners v. Havlik,* 20 F.3d 705, 708–09 (7th Cir.1994) ("[T]he right to recoup a fraudulent conveyance, which outside of bankruptcy may be invoked by a creditor, is property of the estate that only a trustee or debtor in possession may pursue once a bankruptcy is underway.").

Use of the term "property" as a short-hand way of suggesting exclusivity has merit, Henry E. Smith, *Property and Property Rules,* 79 N.Y.U. L.Rev. 1719, 1770–74 (2004), but Section 544(b)(1) does not expressly state whether the bundle of rights transferred can revert. However, we need not resolve either the "property" or the reversion issues. Whether the statutory language has a plain meaning turns on whether a consensus would have existed among reasonable, contemporaneous readers as to meaning of that language in the particular statutory context. *See* *Pettus v. Morgenthau,* 554 F.3d 293, 297 (2d Cir.2009) ("[W]e attempt to ascertain how a reasonable reader would understand the statutory text, considered as a whole."); *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.,* 541 U.S. 246, 252–53, 124 S.Ct. 1756, 158 L.Ed.2d 529 (2004) (noting that "[s]tatutory construction must begin ***118** with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose") (*quoting* *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.,* 469 U.S. 189, 194, 105 S.Ct. 658, 83 L.Ed.2d 582 (1985)). If differing views as to meaning were reasonable at the time of Section 546(e)'s enactment, its meaning is less than plain. *See, e.g.,* *Rodriguez v. Cuomo,* 953 F.2d 33, 39–40 (2d Cir.1992).

Appellants' arguments on meaning rely not only on the reference to a trustee's *et al.* powers but equally, or more so, on a claim of settled law at the time of Section 546(e)'s enactment that creditors' avoidance rights not only revert to creditors but also revert in their original breadth. However, whether fraudulent conveyance claims revert as a matter of law upon a trustee's failure to act was, both at the time Section 546(e) was passed as well as now, unclear, as discussed *supra.* A contemporaneous reader would not, therefore, necessarily have believed it plain that Section 546(e)'s reference only to a trustee's *et al.* avoidance claim meant that creditors could bring their own claims. [6]

A contemporaneous reader would also notice that the language of the automatic stay provision does not literally apply to appellants' actions and that no provision for the reversion of claims vested in the trustee *et al.* by Section 544 exists. As explained *supra,* having to draw an inference of reversion of rights from that provision's statute of limitations might well have appeared as a leap several bridges too far to such a reader. Indeed, the vesting of avoidance claims in the trustee *et al.,* the lack of applicable language in the automatic stay provision, and the lack of a statutory basis for reversion might well have suggested to such a reader that Section 544's vesting of avoidance proceedings in the trustee *et al.* cut off creditors from any avoidance rights other than a share of the proceeds in bankruptcy.

Even passing these obstacles, the structure of the Code and the relationship of its pertinent sections might have suggested to a contemporaneous reader that altered rights do not revert to creditors unaltered, or to put it another way, a trustee *et al.* cannot pass on, or "allow" to revert through passivity, a right the trustee *et al.* does not have. To be sure, contemporaneous readers might have taken other views, including those of appellants, but that is the very definition of ambiguity.

(iv) Conclusion

We need not resolve these issues or even hold that the lack of statutory support, ambiguities, anomalies, or conflicts with purposes of the Code are sufficient to support a preemption holding. They are sufficient, however, to dispel the suggestions found in some discussions of these issues of a clear textual basis for appellants' theory in the Code and an overall consistency with congressional purpose. *See* *In re Lyondell Chem. Co.,* 503 B.R. 348, 358–59 (Bankr.S.D.N.Y.2014) *as corrected* (Jan. 16, 2014); *In re: Tribune Co. Fraudulent Conveyance Litig.,* 499 B.R. at 315. We also need not issue a decision that affects fraudulent conveyance actions brought by creditors whose claims are not subject to Section 546(e). Our ensuing discussion concludes that the purposes and history of that Section necessarily reflect an intent to preempt the claims before us. We turn now to the conflict between those claims and Section 546(e).

4. Conflict with Section 546(e)

As discussed *supra,* the meaning of Section 546(e) with regard to appellants' ***119** rights to bring the actions before us is ambiguous. We must, therefore, look to its language, legislative history, and purposes to determine its effect. *Marvel Characters, Inc. v. Simon,* 310 F.3d 280, 290 (2d Cir.2002). Every congressional purpose reflected in Section 546(e), however narrow or broad, is in conflict with appellants' legal theory. Their claims are, therefore, preempted.

Section 546(e) was intended to protect from avoidance proceedings payments by and to financial intermediaries in the settlement of securities transactions or the execution of securities contracts. The method of settlement through intermediaries is essential to securities markets. Payments by and to such intermediaries provide certainty as to each transaction's consummation, speed to allow parties to adjust the transaction to market conditions, finality with regard to investors' stakes in firms, and thus stability to financial markets. *See* H.R.Rep. No. 97–420 (1982); H.R.Rep. No. 95–595 (1977). Unwinding settled securities transactions by claims such as appellants' would seriously undermine—a substantial understatement—markets in which certainty, speed, finality, and stability are necessary to attract capital. To allow appellants' claims to proceed, we would have to construe Section 546(e) as achieving the opposite of what it was intended to achieve.

Allowing creditors to bring claims barred by Section 546(e) to the trustee *et al.* only after the trustee *et al.* fails to exercise powers it does not have would increase the disruptive effect of an unwinding by lengthening the period of uncertainty for intermediaries and investors. Indeed, the idea of preventing a trustee from unwinding specified transactions while allowing creditors to do so, but only later, is a policy in a fruitless search of a logical rationale.

The narrowest purpose of Section 546(e) was to protect other intermediaries from avoidance claims seeking to unwind a bankrupt intermediary's transactions that consummated transfers between customers. *See* H.R.Rep. No. 97–420 (1982). It must be emphasized that appellants' legal theory would clearly allow such claims to be brought (later) by creditors of the bankrupt intermediary. Even the narrowest purpose of Section 546(e) is thus at risk.

Some judicial and other discussions of these issues avoid addressing the full effects of adopting appellants' arguments. *See* *In re Lyondell Chem. Co.,* 503 B.R. 348, 359–78 (Bankr.S.D.N.Y.2014) *as corrected* (Jan. 16, 2014). Such analysis always begins by reliance on the "trustee" language, *id.* at 358, but then narrows the scope of the transfers covered by Section 546(e)'s language. For example, appellants argue that the concerns of the *amicus curiae* Securities and Exchange Commission regarding the effect of the district court's decision on the securities markets are misplaced, because appellants are not seeking money from the intermediaries. [7] Resp. & Reply Br. of Pls.-Appellants Cross–Appellees 78–82. In doing so, they rely upon the *Lyondell* opinion, which, after relying on the "trustee" language, held that Section 546(e) is not preemptive of ***120** state law, fraudulent conveyance actions involving LBOs because such actions do not implicate the purposes of Section 546(e). 503 B.R. at 372–73.

There is no little irony in putting lynchpin reliance on the word "trustee" while ignoring the language that follows. In any event, Section 546(e)'s language clearly covers payments, such as those at issue here, by commercial firms to financial intermediaries to purchase shares from the firm's shareholders. 11 U.S.C. § 546(e) (limitations on avoidance of transfers made to a financial intermediary "in connection with a securities contract"). A search for legislative purpose is heavily informed by language, and analyzing all the language of a provision and its relationship to the Code as a whole is preferable to using literalness here and perceived legislative purpose (without regard to language) there as needed to reach particular results. *See* *King v. Burwell,* ––– U.S. ––––, 135 S.Ct. 2480, 2489, 192 L.Ed.2d 483 (2015) ("[O]ftentimes the meaning—or ambiguity—of certain words or phrases may only become evident when placed in context. So when deciding whether the language is plain, we must read the words in their context and with a view to their place in the overall statutory scheme. Our duty, after all, is to construe statutes, not isolated provisions.") (internal quotation marks and citations omitted).

We do not dwell on this because we perceive no conflict between Section 546(e)'s language and its purpose. Section 546(e) is simply a case of Congress perceiving a need to address a particular problem within an important process or market and using statutory language broader than necessary to resolve the immediate problem. Such broad language is intended to protect the process or market from the entire genre of harms of which the particular problem was only one symptom. The legislative history of Section 546(e) clearly reveals such a purpose. That history (confirmed by the broad language adopted) reflects a concern over the use of avoidance powers not only after the bankruptcy of an intermediary, but also after a "customer" or "other participant" in the securities markets enters bankruptcy. *See* H.R.Rep. No. 97–420 (1982). To be sure, the examples used by the Section's proponents focused on the immediate concern of creditors of bankrupt brokers seeking to unwind payments by the bankrupt firm to other intermediaries. *Id.* Such actions were perceived as creating a danger of "a ripple effect," *id.,* a chain of bankruptcies among intermediaries disrupting the securities market generally. From these examples, appellants, and others, have argued that when monetary damages are sought only from shareholders, or an LBO is involved, the purposes of Section 546(e) are not implicated. *See* Resp. & Reply Br. of Pls.–Appellants–Cross–Appellees 79; *In re Lyondell,* 503 B.R. at 358–59. Even apart from using the oil and water mixture of applying a narrow literalness to the word "trustee" and disregarding the rest of the Section's language, we disagree.

As courts have recognized, Congress's intent to "minimiz[e] the displacement caused in the commodities and securities markets in the event of a major bankruptcy affecting those industries," *In re Quebecor World (USA) Inc.,* 719 F.3d 94, 100 (2d Cir.2013) (*quoting Enron Creditors Recovery Corp. v. Alfa, S.A.B. de C.V.,* 651 F.3d 329, 333 (2d Cir.2011)), reflected a larger purpose memorialized in the legislative history's mention of bankrupt "customers" or "other participant[s]" and in the broad statutory language defining the transactions covered. That larger ***121** purpose was to "promot [e] finality ... and certainty" for investors, by limiting the circumstances, e.g., to cases of intentional fraud, under which securities transactions could be unwound. *In re Kaiser Steel Corp.,* 952 F.2d 1230, 1240 n. 10 (10th Cir.1991) (*quoting* H. Rep. No. 484, 101st Cong.2d Sess. 2 (1990), *reprinted in* 1990 U.S.C.C.A.N. 223, 224).

The broad language used in Section 546(e) protects transactions rather than firms, reflecting a purpose of enhancing the efficiency of securities markets in order to reduce the cost of capital to the American economy. *See* Bankruptcy of Commodity and Securities Brokers: Hearings Before the Subcomm. on Monopolies and Commercial Law of the Comm. on the Judiciary, 47th Cong. 239 (1981) (statement of Bevis Longstreth, Commissioner, SEC) (explaining that, without 546(e), the Bankruptcy Code's "preference, fraudulent transfer and stay provisions can be interpreted to apply in harmful and costly ways to customary methods of operation essential to the securities industry"). As noted, central to a highly efficient securities market are methods of trading securities through intermediaries. Section 546(e)'s protection of the transactions consummated through these intermediaries was not intended as protection of politically favored special interests. Rather, it was sought by the SEC—and corresponding provisions by the CFTC, *see* Bankruptcy Act Revision: Hearings on H.R. 31 and H.R. 32 Before the Subcomm. on Civil & Constitutional Rights of the H. Comm. on the Judiciary, 94th Cong., Supp.App. Pt. 4, 2406 (1976)—in order to protect investors from the disruptive effect of after-the-fact unwinding of securities transactions.

A lack of protection against the unwinding of securities transactions would create substantial deterrents, limited only by the copious imaginations of able lawyers, to investing in the securities market. The effect of appellants' legal theory would be akin to the effect of eliminating the limited liability of investors for the debts of a corporation: a reduction of capital available to American securities markets.

For example, all investors in public companies would face new and substantial risks, if appellants' theory is adopted. At the very least, each would have to confront a higher degree of uncertainty even as to the consummation of securities transfers. The risks are not confined to the consummation of securities transactions. Pension plans, mutual funds, and similar institutional investors would find securities markets far more risky if exposed to substantial liabilities derived from investments in securities sold long ago. If appellants were to prevail, a pension plan whose position in a firm was cashed out in a merger would have to set aside reserves in case the surviving firm went bankrupt and triggered avoidance actions based on a claim that the cash out price exceeded the value of the shares. Every economic downturn would expose such institutional investors not only to a decline in the value of their current portfolios but also to claims for substantial monies received from mergers during good times.

Given the occasional volatility of economic events, any transaction buying out shareholders would risk being attacked as a fraudulent conveyance avoidable by creditors if the firm faltered. Appellants' legal theory would even reach investors who, after voting against a merger approved by other shareholders, were involuntarily cashed out. Tender offers, which almost always involve a premium above trading price, Lynn A. Stout, *Are Takeover Premiums Really Premiums? Market Price, Fair Value, and Corporate Law,* 99 Yale L.J. 1235, 1235 (1990), would imperil ***122** cashed out shareholders if the surviving entity encountered financial difficulties.

If appellants' theory was adopted, individual investors following a conservative buy-and-hold strategy with a diversified portfolio designed to reduce risk might well decide that such a strategy would actually increase the risk of crushing liabilities. Such a strategy is adopted because it involves low costs of monitoring the prospects of individual companies and emphasizes the offsetting of unsystematic risks by investing in multiple firms. *See* *Leigh v. Engle,* 858 F.2d 361, 368 (7th Cir.1988). Appellants' legal theory might well require costly and constant monitoring by investors to rid their portfolios of investments in firms that might, under then-current circumstances, be subject to mergers, stock buy-backs, or tender offers (and would otherwise be good investments). Investing in multiple companies, the essence of diversification, would increase the danger of avoidance liability.

The threat to investors is not simply losing a lawsuit. Given the costliness of defending such legal actions and the long delay in learning their outcome, exposing investors to even very weak lawsuits involving millions of dollars would be a substantial deterrent to investing in securities. The need to set aside reserves to meet the costs of litigation—not to mention costs of losing—would suck money from capital markets.

As noted, concern has been expressed that LBOs are different from other transactions in ways pertinent to the Bankruptcy Code. *In re Lyondell Chem. Co.,* 503 B.R. 348, 354, 358–59 (Bankr.S.D.N.Y.2014), *as corrected* (Jan. 16, 2014). However, the language of Section 546(e) does not exempt from its protection payments by firms to intermediaries to fund ensuing payments to shareholders for stock.

Moreover, securities markets are heavily regulated by state and federal governments. The statutory supplements used in law school securities regulation courses are thick enough to rival Kevlar in stopping bullets. Mergers and tender offers are among the most regulated transactions. *See, e.g.,* Williams Act, 15 U.S.C.A. §§ 78m(d)–(e), 78n(d). Much of the content of state and federal regulation is designed to protect investors in such transactions. Much of that content is also designed to maximize the payout to shareholders cashed out in a merger, *see, e.g.,* *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.,* 506 A.2d 173, 182 (Del.1986); *Unocal Corp. v. Mesa Petroleum Co.,* 493 A.2d 946, 955–56 (Del.1985), or accepting a tender offer, *see* Williams Act, 15 U.S.C.A. §§ 78m(d)–(e), 78n(d). Appellants' legal theory would allow creditors to seek to portray that maximization as evidence supporting a crushing liability. A legal rule substantially undermining those goals of state and federal regulation—again, one akin to eliminating limited liability—is a systemic risk.

It is also argued that the Bankruptcy Code has many different purposes and that Section 546(e) does not clearly "trump[ ] all [the] other[s]." *In re Tribune Co. Fraudulent Conveyance Litig.,* 499 B.R. 310, 317 (S.D.N.Y.2013). The pertinent—and "trumping"—"other" purpose of the Code is said to be the maximization of assets available to creditors. *Id.* Courts customarily accommodate statutory provisions in tension with one another where the principal purpose of each is attainable by limiting each in achieving secondary goals. *See, e.g.,* *In re Colonial Realty Co.,* 980 F.2d 125, 132 (2d Cir.1992). However, Section 546(e) is in full conflict with the goal of maximizing the assets available to creditors. Its purpose is to protect a national, heavily regulated market ***123** by limiting creditors' rights. Conflicting goals are not accommodated by giving value with the right hand and taking it away with the left. Section 546(e) cannot be trumped by the Code's goal of maximizing the return to creditors without thwarting the Section's purposes.

5. Additional Considerations Regarding Congressional Intent

We therefore conclude that Congress intended to protect from constructive fraudulent conveyance avoidance proceedings transfers by a debtor in bankruptcy that fall within Section 546(e)'s terms. As discussed *supra,* appellants' theory hangs on the ambiguous use of the word "trustee," has no basis in the language of the Code, leads to substantial anomalies, ambiguities and conflicts with the Code's procedures, and, most importantly, is in irreconcilable conflict with the purposes of Section 546(e). In this regard, we do not ignore Section 544(b)(2), which prohibits avoidance of a transfer to a charitable contribution by a trustee but also expressly preempts state law claims by creditors. It states: "Any claim by any person to recover a transferred contribution described in the preceding sentence under Federal or State law in a Federal or State March 14, 2016 court shall be preempted by the commencement of the case." 11 U.S.C. § 544(b)(2). Appellants rely heavily upon this provision to argue that, while Congress knew how to explicitly preempt state law in the Bankruptcy Code, it chose not to do so in the context of Section 546(e).

Appellants' argument suffers from a fatal flaw, however. In *Arizona v. United States,* the Supreme Court made clear that "the existence of an express pre-emption provisio[n] does *not* bar the ordinary working of conflict pre-emption principles or impose a special burden that would make it more difficult to establish the preemption of laws falling outside the clause." – — U.S. ——, 132 S.Ct. 2492, 2504–05, 183 L.Ed.2d 351 (2012) (quotation marks and citations omitted); *see also* *Hillman,* 133 S.Ct. at 1954 ("[W]e have made clear that the existence of a separate pre-emption provision does *not* bar the ordinary working of conflict pre-emption principles.") (internal quotation marks and citations omitted). Section 544(b)(2) does not, therefore, undermine our conclusion as to Congress's intent.

Next, appellants argue that Congress's failure to amend Section 546(e) over the years that it has existed in pertinent form reflects a congressional intent to allow their actions to proceed. In support, they point only to requests for an amendment by the Chair of the CFTC and by Comex, *see* Bankruptcy Act Revision: Hearings on H.R. 31 and H.R. 32 Before the Subcomm. on Civil & Constitutional Rights of the H. Comm. on the Judiciary, 94th Cong., Supp.App. Pt. 4, 2406 (1976); Bankruptcy Reform Act: Hearings on S. 2266 and H.R. 8000 Before the Subcomm. on Improvements in Judicial Machinery of the S. Comm. on the Judiciary, 95th Cong. 1297 (1978), the enactment of Section 544(b)(2) with an express preemption provision, and a decision in the District of Delaware, *PHP Liquidating, LLC v. Robbins,* 291 B.R. 603, 607 (D.Del.2003), *aff'd sub nom. In re PHP Healthcare Corp.,* 128 Fed.Appx. 839 (3d Cir.2005).

To be sure, a history of relevant practice may support an inference of congressional acquiescence. *See, e.g.,* *Fiero v. Fin. Indus. Regulatory Auth.,* 660 F.3d 569, 577 (2d Cir.2011) (noting that FINRA's "longstanding reliance" on enforcement mechanisms other than fines—and Congress's failure to alter FINRA's enforcement powers—"indicates that FINRA is not authorized to enforce the collection of its fines through the courts"); *Am. Tel.* ***124** *& Tel. Co. v. M/V Cape Fear,* 967 F.2d 864, 872 (3d Cir.1992) ("The Supreme Court in the past has implied private causes of action where Congress, after a 'consensus of opinion concerning the existence of a private cause of action' had developed in the federal courts, has amended a statute without mentioning a private remedy.") (*quoting* *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran,* 456 U.S. 353, 380, 102 S.Ct. 1825, 72 L.Ed.2d 182 (1982)). However, the effect or meaning of legislation is not to be gleaned from isolated requests for more protective, but possibly redundant, legislation. The impact of Section 544(b)(2) is discussed immediately above and need not be repeated here.

Finally, the failure of Congress to respond to court decisions is of interpretive significance only when the decisions are large in number and universally, or almost so, followed. *See* *Merrill Lynch,* 456 U.S. at 379, 102 S.Ct. 1825 ("holding that congressional amendment of the Commodity Exchange Act that was silent on the subject of private judicial remedies did not overturn federal court decisions *routinely and consistently* [ ] recogniz[ing] an implied private cause of action") (emphasis added); *see also* *Touche Ross & Co. v. Redington,* 442 U.S. 560, 577 n. 19, 99 S.Ct. 2479, 61 L.Ed.2d 82 (1979) (holding that the Supreme Court's implication of a private right of action under § 10(b) of the Securities and Exchange Act of 1934 was simply acquiescence in "the 25–year–old acceptance by the lower federal courts of an implied action"). The present decision is far from a departure from a generally accepted understanding. The district court decision in this very case and the bankruptcy court decision in *Lyondell* are in fact the sole extensive judicial discussions of the issue. Indeed, our present decision does not even constitute a split among the circuits. As or more telling with regard to the existence of a general understanding or a need for action, we find no history of the use of state law, constructive fraudulent conveyance actions to unwind settled securities transactions, either after a bankruptcy or in its absence.

The Constitution's establishment of two legislative branches that must act jointly and with the executive's approval was designed to render hasty action possible only in circumstances of widely perceived need. Congress's failure to act must be viewed in that context, and reliance upon an inference of satisfaction with the *status quo* must at least be based on evidence of a long-standing and recognized *status quo.* In the present matter, we cannot draw the suggested inference on the basis of the skimpy evidence submitted while the inference of a preemptive intent is easily drawn.

CONCLUSION

For the reasons stated, we affirm the dismissal of the complaint, on preemption rather than standing grounds. We resolve no issues regarding the rights of creditors to bring state law, fraudulent conveyance claims not limited in the hands of a trustee *et al.* by Code Section 546(e) or by similar provisions such as Section 546(g) which is at issue in an appeal heard in tandem with the present matter, *see Whyte v. Barclays Bank.*

All Citations

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Footnotes

* The Clerk of the Court is instructed to conform the caption in accordance with this opinion.

** The Honorable Alvin K. Hellerstein, of the Southern District of New York, sitting by designation.

1 In a typical LBO, a target company is acquired with a significant portion of the purchase price being paid through a loan secured by the target company's assets.

2 Because the issue has no effect on our disposition of this matter, we do not pause to consider whether a cross-appeal was necessary for appellees to raise the preemption issues in this court, but, for convenience purposes, we sometimes refer to those issues by the term cross-appeal.

3 The term "standing" has been used to describe issues arising in bankruptcy proceedings when individual creditors sue to recover funds from third parties to satisfy amounts owed to them by the debtor, and that action is defended on the ground that the recovery seeks funds that are recoverable under the Code only by a representative of all creditors. *St. Paul Fire & Marine Ins. Co. v. PepsiCo, Inc.,* 884 F.2d 688, 696–97 (2d Cir.1989), *disapproved of on other grounds by* *In re Miller,* 197 B.R. 810 (W.D.N.C.1996). The use of the term "standing" is based on the suing creditors' need to demonstrate an injury other than one redressable under the Code only by the trustee *et al.* *Id.* at 704.

4 The implications of applying the automatic stay to fraudulent conveyance actions are discussed *infra.*

5 We see no need for a full discussion of various modes of analysis used to determine federal preemption, i.e., "express" preemption, *Chamber of Commerce v. Whiting,* 563 U.S. 582, 131 S.Ct. 1968, 1977, 179 L.Ed.2d 1031 (2011), "field" preemption, *Arizona v. United States,* ––– U.S. ––––, 132 S.Ct. 2492, 2502, 183 L.Ed.2d 351 (2012), or even that branch of "implied" preemption that requires a showing of "impossibility" of complying with both state and federal law, *id.* at 2501. The only relevant analysis in the present matter is preemption inferred from a conflict between state law and the purposes of federal law, as discussed in the text.

6 Our task of determining how a contemporaneous reader would have read Section 546(e) does not depend on the caselaw of one particular circuit.

7 Under the "Collapsing Doctrine," "[c]ourts analyzing the effect of LBOs have routinely analyzed them by reference to their economic substance, 'collapsing' them, in many cases, to consider the overall effect of multi-step transactions." *In re Lyondell Chem. Co.,* 503 B.R. 348, 354, 379 (Bankr.S.D.N.Y.2014) *as corrected* (Jan. 16, 2014). Monies passed through intermediaries are deemed to be the property only of the ultimate recipients, here the cashed out shareholders.

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946 F.3d 66
United States Court of Appeals, Second Circuit.

IN RE: TRIBUNE COMPANY FRAUDULENT CONVEYANCE LITIGATION
Note Holders, Deutsche Bank Trust Company Americas, Law Debenture Trust Company of New York, Wilmington Trust Company, Individual Retirees, William A. Niese, on behalf of a putative class of Tribune Company retirees, Plaintiffs-Appellants-Cross-Appellees, Mark S. Kirschner, as Litigation Trustee for the Tribune Litigation Trust, Plaintiff, Tendering Phones Holders, Citadel Equity Fund Ltd., Camden Asset Management LLP and certain of their affiliates, Plaintiffs-Intervenors,
v.
Large Private Beneficial Owners, Financial Institution Holders, Financial Institution Conduits, Merrill Lynch, Pierce, Fenner & Smith, Inc., on behalf of a putative class of former Tribune Company shareholders, Pension Funds, including public, private, and Taft Hartley Funds, Individual Beneficial Owners, Mario J. Gabelli, on behalf of a putative class of former Tribune Company shareholders, Mutual Funds, At-Large, Estate of Karen Babcock, Phillip S. Babcock, Douglas Babcock, Defendants Listed on Exhibit B, Defendants-Appellees-Cross-Appellants, Current and Former Directors and Officers, Betsy D. Holden, Christopher Reyes, Dudley S. Taft, Enrique Hernandez, Jr., Miles D. White, Robert S. Morrison, William A. Osborn, Harry Amsden, Stephen D. Carver, Dennis J. FitzSimons, Robert Gremillion, Donald C. Grenesko, David Dean Hiller, Timothy J. Landon, Thomas D. Leach, Luis E. Le, Mark Hianik, Irving Quimby, Crane Kenney, Chandler Bigelow, Daniel Kazan, Timothy Knight, Thomas Finke, Sam Zell and Affiliated Entities, EGI-TRB, LLC, Equity Group Investments, LLC, Sam Investment Trust, Samuel Zell, Tower CH, LLC, Tower DC, LLC, Tower DL, LLC, Tower EH, LLC, Tower Gr, Large Shareholders, Chandler Trusts and their representatives, Financial Advisors, Valuation Research Corporation, Duff & Phelps, LLC, Morgan Stanley & Co. Inc. and Morgan Stanley Capital Services, Inc., GreatBanc Trust Company, Citigroup Global Markets, Inc., CA Public Employee Retirement System, Calpers, University of CA Regents, T. Rowe Price Associates, Inc., Morgan Keegan & Company, Inc., NTCA, Diocese of Trenton-Pension Fund, First Energy Service Company, Maryland State Retirement and Pension System, T Bank LCV QP, T Bank-LCV-PT, Japan Post Insurance, Co., Ltd., Servants of Relief for Incurable Cancer (AKA Dominican Sisters of Hawthorne), New Life International, New Life International Trust, Salvation Army, Southern Territorial Headquarters, City of Philadelphia Employees, Ohio Carpenters' Midcap (AKA Ohio Carpenters' Pension Fund), Tilden H. Edwards, Jr., Malloy and Evans, Inc., Bedford Oak Partners, LP, Duff and Phelps LLC, Durham J. Monsma, Certain Tag-Along Defendants, Michael S. Meadows, Wirtz Corporation, Defendants.

Nos. 13-3992-cv; 13-3875-cv; 13-4178-cv; 13-4196-cv
|
August Term, 2014
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Argued: November 5, 2014
|
Decided: March 29, 2016
|
Amended: December 19, 2019

Synopsis
Background: Adversary proceeding was brought to avoid, as actually fraudulent transfers, payments that were made to corporate Chapter 11 debtor's former shareholders in connection with prepetition leveraged buyout of its stock. After conditional stay relief was granted, individual creditors brought actions asserting state law constructive fraudulent transfer claims to unwind these same transactions, and defendants filed motion to dismiss the claims asserted by individual unsecured creditors. The United States District Court for the Southern District of New York, Richard J. Sullivan, J., 499 B.R. 310, granted dismissal motion, and appeal was taken.

Holdings: The Court of Appeals, Winter and Droney, Senior Circuit Judges, held that:

automatic stay, having been lifted as to unsecured creditors on three separate occasions, did not serve to deprive these creditors of standing to pursue state law constructive fraudulent conveyance claims;

corporate Chapter 11 debtor, as party making challenged payments, qualified as covered entity under "safe harbor" provision of the Bankruptcy Code;

all of the payments made in connection with prepetition leveraged buyout of corporate Chapter 11 debtor's stock, including payments connected to redemption of shares, were made "in connection with a securities contract"; and

creditors' claims were preempted by "safe harbor" provision of the Bankruptcy Code.

Affirmed.

Procedural Posture(s): On Appeal; Motion to Dismiss.

***70** Appeal from the United States District Court for the Southern District of New York, No. 1:11-md-02296 (Richard J. Sullivan, Judge)

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Before: Winter, Droney, Circuit Judges, and Hellerstein, District Judge. [*]

Opinion

Winter and Droney, Circuit Judges:

***71** Representatives of certain unsecured creditors of the Chapter 11 debtor Tribune Company appeal from Judge Sullivan's grant of a motion to dismiss their state law, constructive fraudulent conveyance claims brought against Tribune's former shareholders. Appellants seek to recover an amount sufficient to satisfy Tribune's debts to them by avoiding (recovering) payments by Tribune to shareholders that purchased all of its stock. The payments occurred in a transaction commonly called a leveraged buyout ("LBO"), [1] soon after which Tribune went into Chapter 11 bankruptcy. Appellants appeal the district court's dismissal for lack of statutory standing, and appellees cross-appeal from the district court's rejection of their argument that appellants' claims are preempted. [2]

We address two issues: (i) whether appellants are barred by the Bankruptcy Code's automatic stay provision from bringing state law, constructive fraudulent conveyance claims while avoidance proceedings against the same transfers brought by a party exercising the powers ***72** of a bankruptcy trustee on an intentional fraud theory are ongoing; and (ii) if not, whether the creditors' state law, constructive fraudulent conveyance claims are preempted by Bankruptcy Code Section 546(e).

On issue (i), we hold that appellants are not barred by the Code's automatic stay because they have been freed from its restrictions by orders of the bankruptcy court and by the debtors' confirmed reorganization plan. On issue (ii), the subject of appellees' cross-appeal, we hold that appellants' claims are preempted by Section 546(e). That Section shields certain transactions from a bankruptcy trustee's avoidance powers, including, inter alia, transfers by or to a financial institution in connection with a securities contract, except through an intentional fraudulent conveyance claim. [3]

We therefore affirm.

BACKGROUND

a) The LBO

Tribune Media Company (formerly known as "Tribune Company") is a multimedia corporation that, in 2007, faced deteriorating financial prospects. Appellee Samuel Zell, a billionaire investor, proposed to acquire Tribune through an LBO. In consummating the LBO, Tribune borrowed over $11 billion secured by its assets. The $11 billion plus, combined with Zell's $315 million equity contribution, was used to refinance some of Tribune's pre-existing bank debt and to cash out Tribune's shareholders for over $8 billion at a premium price –- above its trading range –- per share.

It is undisputed that Tribune transferred the over $8 billion to a "securities clearing agency" or other "financial institution," as those terms are used in Section 546(e), acting as intermediaries in the LBO transaction. [4] Those intermediaries in turn paid the funds to the shareholders in exchange for their shares that were then returned to Tribune. Appellants seek to satisfy Tribune's debts to them by avoiding Tribune's payments to the shareholders. Appellants do not seek money from the intermediaries. See Note 15, infra.

b) Bankruptcy Proceedings

On December 8, 2008, with debt and contingent liabilities exceeding its assets by more than $3 billion, Tribune and nearly all of its subsidiaries filed for bankruptcy under Chapter 11 in the District of Delaware. A trustee was not appointed, and Tribune and its affiliates continued to operate the businesses as debtors in possession. See 11 U.S.C. § 1107(a) ("Subject to any limitations on a trustee ... a debtor in possession shall have all the rights ..., and powers, and shall perform all the functions and duties ... of a trustee ...."). In discussing the powers of a bankruptcy trustee that can be exercised by a trustee or parties designated by a bankruptcy court, we shall refer to the trustee or such parties as the "trustee et al."

The bankruptcy court appointed an Official Committee of Unsecured Creditors ***73** (the "Committee") to represent the interests of unsecured creditors. In November 2010, alleging that the LBO-related payments constituted intentional fraudulent conveyances, the Committee commenced an action under Code Section 548(a)(1)(A) against the cashed out Tribune shareholders, various officers, directors, financial advisors, Zell, and others alleged to have benefitted from the LBO. An intentional fraudulent conveyance is defined as one in which there was "actual intent to hinder, delay, or defraud" a creditor. 11 U.S.C. § 548(a)(1)(A).

In June 2011, two subsets of unsecured creditors filed state law, constructive fraudulent conveyance claims in various federal and state courts. The plaintiffs, the appellants before us, were: (i) the Retiree Appellants, former Tribune employees who hold claims for unpaid retirement benefits and (ii) the Noteholder Appellants, the successor indenture trustees for Tribune's pre-LBO senior notes and subordinated debentures. A constructive fraudulent conveyance is, generally speaking, a transfer for less than reasonably equivalent value made when the debtor was insolvent or was rendered so by the transfer. See Picard v. Fairfield Greenwich Ltd., 762 F.3d 199, 208-09 (2d Cir. 2014).

Before bringing these actions, appellants moved the bankruptcy court for an order stating that: (i) after the expiration of the two-year statute of limitations period during which the Committee was authorized to bring avoidance actions under 11 U.S.C. § 546(a), eligible creditors had regained the right to prosecute their creditor state law claims; and (ii) the automatic stay imposed by Code Section 362(a) was lifted solely to permit the immediate filing of their complaint. In support of that motion, the Committee argued that, under Section 546(a), the "state law constructive fraudulent conveyance transfer claims ha[d] reverted to individual creditors" and that the "creditors should consider taking appropriate actions to preserve those claims." Statement of the Official Committee of Unsecured Creditors in Supp. of Mot. at 3, In re Tribune Co., No 08-13141 (KJC) (Bankr. D. Del. Mar. 17, 2011).

In April 2011, the bankruptcy court lifted the Code's automatic stay with regard to appellants' actions. The court reasoned that because the Committee had elected not to bring the constructive fraudulent conveyance actions within the two-year limitations period following the bankruptcy petition imposed by Section 544, fully discussed infra, the unsecured creditors "regained the right, if any, to prosecute [such claims]." J. App'x at 373. Therefore, the court lifted the Section 362(a) automatic stay "to permit the filing of any complaint by or on behalf of creditors on account of such Creditor [state law fraudulent conveyance] Claims." Id. The court clarified, however, that it was not resolving the issues of whether the individual creditors had statutory standing to bring such claims or whether such claims were preempted by Section 546(e).

On March 15, 2012, the bankruptcy court set an expiration date of June 1, 2012 for the remaining limited stay on the state law, fraudulent conveyance claims. In July 2012, the bankruptcy court ordered confirmation of the proposed Tribune reorganization plan. The plan terminated the Committee and transferred responsibility for prosecuting the intentional fraudulent conveyance action to an entity called the Litigation Trust. The confirmed plan also provided that the Retiree and Noteholder Appellants could pursue "any and all LBO-Related Causes of Action arising under state fraudulent conveyance law," except for the federal intentional fraudulent conveyance and other LBO-related claims pursued by the Litigation Trust. J. App'x ***74** at 643. Under the plan, the Retiree and Noteholder Appellants recovered approximately 33 cents on each dollar of debt. The plan was scheduled to take effect on December 31, 2012, the date on which Tribune emerged from bankruptcy.

c) District Court Proceedings

Appellants' various state law, fraudulent conveyance complaints alleged that the LBO payments, made through financial intermediaries as noted above, were for more than the reasonable value of the shares and made when Tribune was in distressed financial condition. Therefore, the complaints concluded, the payments were avoidable by creditors under the laws of various states. These actions were later consolidated with the Litigation Trust's ongoing federal intentional fraud claims in a multi-district litigation proceeding that was transferred to the Southern District of New York. In re: Tribune Co. Fraudulent Conveyance Litig., 831 F. Supp. 2d 1371 (J.P.M.L. 2011).

After consolidation, the Tribune shareholders moved to dismiss appellants' claims. The district court granted the motion on the ground that the Bankruptcy Code's automatic stay provision deprived appellants of statutory standing to pursue their claims so long as the Litigation Trustee was pursuing the avoidance of the same transfers, albeit under a different legal theory. In re Tribune Co. Fraudulent Conveyance Litig., 499 B.R. 310, 325 (S.D.N.Y. 2013). The court held that the bankruptcy court had only "conditionally lifted the stay." Id. at 314.

The district court rejected appellees' preemption argument based on Section 546(e). That Section bars a trustee et al. from exercising its avoidance powers under Section 544 to avoid certain transactions including, inter alia, transfers "by or to ... a financial institution ... in connection with a securities contract," except through an intentional fraudulent conveyance claim. 11 U.S.C. § 546(e). The district court held that Section 546(e) did not bar appellants' actions because: (i) Section 546(e)'s prohibition on avoiding the designated transfers applied only to a bankruptcy trustee et al., id. at 315-16; and (ii) Congress had declined to extend Section 546(e) to state law, fraudulent conveyance claims brought by creditors, id. at 318.

d) Appellate Proceedings

Appellants appealed the dismissal for lack of statutory standing, and appellees cross-appealed the rejection of their argument that appellants' claims are preempted. In a prior opinion, In re Tribune Co. Fraudulent Conveyance Litig. ("Tribune I"), 818 F.3d 98 (2d Cir. 2016), we affirmed the dismissal of appellants' claims on the ground that Section 546(e) preempts "fraudulent conveyance actions brought by creditors whose claims are [ ] subject to Section 546(e)." Id. at 118, 123-24. At the time, it was the law in this Circuit, under In re Quebecor World (USA) Inc. ("Quebecor"), 719 F.3d 94, 100 (2d Cir. 2013), that the payments at issue fell within Section 546(e) because entities covered by Section 546(e) had served as intermediaries. See Tribune I, 818 F.3d at 120 ("Section 546(e)'s language clearly covers payments, such as those at issue here, by commercial firms to financial intermediaries to purchase shares from the firm's shareholders.").

Appellants petitioned for rehearing en banc, which was denied, and we issued the mandate. Appellants then petitioned for certiorari, presenting the following question, among others: "Whether the Second Circuit correctly held ... that a fraudulent transfer is exempt ... under 11 U.S.C. § 546(e) when a financial institution acts as a mere conduit for fraudulently transferred ***75** property." Petition for a Writ of Certiorari, Deutsche Bank Trust Co. Ams. v. Robert R. McCormick Found., No. 16-317 (U.S. Sept. 9, 2016), 2016 WL 4761722, at *1.

While that petition was pending, the Supreme Court in Merit Mgmt. Grp., LP v. FTI Consulting, Inc., ––– U.S. ––––, 138 S. Ct. 883, 200 L.Ed.2d 183 (2018), rejected Quebecor's interpretation of Section 546(e)'s scope, holding that Section 546(e) does "not protect transfers in which financial institutions served as mere conduits." Merit Mgmt., 138 S.Ct. at 892. The question presented in Merit Mgmt. was whether, "in the context of a transfer that was executed via one or more transactions," such as a transfer from Party A to Party D that included Parties B and C as intermediaries, the relevant transfer for purposes of Section 546(e) is the overarching transfer from Party A to Party D or "any component part[ ] of the overarching transfer," such as the transfer from Party B to Party C. Id. at 888. The Court concluded, based on the "plain meaning" of Section 546(e), that the relevant transfer is the overarching transfer, and therefore abrogated the relevant portion of Quebecor. Id. at 888, 897; see also id. at 892 n.6 (identifying Quebecor as one of the decisions in conflict with its holding).

Soon thereafter, Justices Kennedy and Thomas issued a statement suggesting that this Court might wish to recall its mandate or provide other relief in light of Merit Mgmt. See Statement of Justice Kennedy and Justice Thomas Respecting the Petition for Certiorari, Deutsche Bank Trust Co. Ams., ––– U.S. ––––, 138 S.Ct. 1162, 200 L.Ed.2d 735 (2018). Appellants subsequently filed a motion to recall the mandate, and we recalled the mandate in anticipation of further panel review.

We have since agreed on changes to our prior opinion, which are reflected in this amended opinion. Upon the filing of this amended opinion, the original opinion is vacated. See, e.g., Brown v. City of Oneonta, New York, 221 F.3d 329, 336 (2d Cir. 2000), amending and superseding 195 F.3d 111 (2d Cir. 1999).

DISCUSSION

We review de novo the district court's grant of appellees' motion to dismiss. See Mary Jo C. v. N.Y. State & Local Ret. Sys., 707 F.3d 144, 151 (2d Cir. 2013). The relevant facts being undisputed for purposes of this proceeding, only issues of law are before us. [5]

a) Statutory Standing to Bring the Claims

We first address the district court's dismissal of appellants' claims on ***76** the ground that they lacked standing to bring them because of Section 362(a)(1). [6] In re Tribune, 499 B.R. at 325. When a bankruptcy action is filed, any "action or proceeding against the debtor" is automatically stayed by Section 362(a). The purpose of the stay is "to protect creditors as well as the debtor," Ostano Commerzanstalt v. Telewide Sys., Inc., 790 F.2d 206, 207 (2d Cir. 1986) (per curiam), by avoiding wasteful, duplicative, individual actions by creditors seeking individual recoveries from the debtor's estate, and by ensuring an equitable distribution of the debtor's estate. See In re McMullen, 386 F.3d 320, 324 (1st Cir. 2004) (noting that Section 362(a)(1), among other things, "safeguard[s] the debtor estate from piecemeal dissipation ... ensur[ing] that the assets remain within the exclusive jurisdiction of the bankruptcy court pending their orderly and equitable distribution among the creditors"). Although fraudulent conveyance actions are against third parties rather than a debtor, there is caselaw, discussed infra, stating that the automatic stay applies to such actions. [7] See In re Colonial Realty Co., 980 F.2d 125, 131 (2d Cir. 1992).

The district court ruled that Section 362's automatic stay provision deprived appellants of statutory standing to bring their claims because the Litigation Trustee was still pursuing an intentional fraudulent conveyance action challenging the same transfers under Section 548(a)(1)(A). In re Tribune, 499 B.R. at 322-23. We disagree. The Bankruptcy Code empowers a bankruptcy court to release parties from the automatic stay "for cause" shown. In re Bogdanovich, 292 F.3d 104, 110 (2d Cir. 2002) (quoting 11 U.S.C. § 362(d)(1)). Once a creditor obtains "a grant of relief from the automatic stay" under Section 362(d), it may "press its claims outside of the bankruptcy proceeding." St. Paul Fire & Marine Ins. Co. v. PepsiCo, Inc., 884 F.2d 688, 702 (2d Cir. 1989), disapproved of on other grounds by In re Miller, 197 B.R. 810 (W.D.N.C. 1996).

In the present matter, the bankruptcy court granted appellants relief from the automatic stay on three occasions. On April 25, 2011, the bankruptcy court granted appellants relief "to permit the filing of any complaint by or on behalf of creditors on account of such Creditor [state law fraudulent conveyance] Claims." J. App'x at 373. A second order, entered on June 28, 2011, clarified that "neither the automatic stay of [Section 362] nor the provisions of the [original lift-stay order]" barred the parties in the state law actions from consolidating and coordinating these actions. J. App'x at 376. And the bankruptcy court's third order, entered on March 15, 2012, set an expiration date of June 1, 2012, for the "stay imposed on the state law constructive fraudulent conveyance actions." J. App'x at 521. None of the Tribune shareholders filed objections to these orders.

Finally, the reorganization plan, confirmed by the bankruptcy court and in all ***77** pertinent respects an order of that court, expressly allowed appellants to pursue "any and all LBO-Related Causes of Action arising under state fraudulent conveyance law." J. App'x at 643. Section 5.8.2 of the plan provided that "nothing in this Plan shall or is intended to impair" the rights of creditors to attempt to pursue disclaimed state law avoidance claims. J. App'x at 695.

Thus, under both the bankruptcy court's orders and the confirmed reorganization plan, if appellants had actionable state law, constructive fraudulent conveyance claims, assertion of those claims was no longer subject to Section 362's automatic stay. See, e.g., In re Heating Oil Partners, LP, 422 F. App'x 15, 18 (2d Cir. 2011) (holding that the automatic stay terminates at discharge); United States v. White, 466 F.3d 1241, 1244 (11th Cir. 2006) (similarly recognizing that the automatic stay terminates when "a discharge is granted").

For the foregoing reasons, we hold that appellants' claims are not barred by Section 362.

b) Section 546(e) and Preemption

We turn now to the issue raised by the cross-appeal: whether appellants' claims are preempted because they conflict with Code Section 546(e).

1. The Scope of Section 546(e)

The threshold question in our preemption inquiry is whether, in the aftermath of Merit Mgmt., — U.S. ——, 138 S. Ct. 883, Tribune's payments to the shareholders remain subject to Section 546(e). As discussed above, it was previously the law in this Circuit that the payments were subject to Section 546(e) because entities covered by Section 546(e) had served as intermediaries. See Tribune I, 818 F.3d at 120; Quebecor, 719 F.3d at 100. Now, however, the parties agree that Merit Mgmt. "forecloses" that basis for finding the payments covered by Section 546(e). Appellees' Opposition to Appellants' Motion to Recall the Mandate at 16; see also Merit Mgmt., 138 S. Ct. at 892 (holding that Section 546(e) does "not protect transfers in which financial institutions served as mere conduits"). Accordingly, we must determine whether there is an alternative basis for finding that the payments are covered. For the reasons that follow, we find that such a basis exists.

(i) Tribune is a Covered Entity

Under Merit Mgmt., the payments at issue can be subject to Section 546(e) only if (1) Tribune, which made the payments, was a covered entity; or (2) the shareholders, who ultimately received the payments, were covered entities. See Merit Mgmt., 138 S. Ct. at 893 ("[T]he relevant transfer for purposes of the § 546(e) safe-harbor inquiry is the overarching transfer[.]"). According to appellees, that requirement is satisfied because appellants' complaints, transaction documents that are integral to those complaints, and materials subject to judicial notice establish that Tribune was a "financial institution" for the purposes of Section 546(e).[8] See Appellees' Opposition to Appellants' Motion to Recall the Mandate at 16-20. Tribune was a "financial institution," appellees maintain, because it was a "customer" of Computershare Trust Company, N.A. ("Computershare"), and Computershare was its agent in the LBO transaction. Id. at 17-18. We agree with appellees that Tribune was ***78** a "financial institution" and therefore a covered entity.

Section 546(e) provides in relevant part that "the trustee may not avoid ... a transfer made by or to (or for the benefit of) a ... financial institution, ... in connection with a securities contract, as defined in section 741(7)," except through an intentional fraudulent conveyance claim. 11 U.S.C. § 546(e). Section 101(22) of the Code defines "financial institution," to include, inter alia, "an entity that is a commercial or savings bank, ... trust company, ... and, when any such ... entity is acting as agent or custodian for a customer (whether or not a 'customer', as defined in section 741) in connection with a securities contract (as defined in section 741) such customer."[9] 11 U.S.C. § 101(22)(A) (emphasis added).

Here, Tribune retained Computershare to act as "Depositary" in connection with the LBO tender offer. See Tribune Offer to Purchase at 13, 113, In re Tribune Co., No. 08-13141 (KJC) (Bankr. D. Del. Aug. 20, 2010), ECF Nos. 5437-5, 5437-6. Computershare is a "financial institution" for the purposes of Section 546(e) because it is a trust company and a bank. See Office of the Comptroller of the Currency, Trust Banks Active as of November 30, 2019, at https://www.occ.treas.gov/topics/charters-and-licensing/financial-institution-lists /trust-by-name.pdf; Office of the Comptroller of the Currency, National Banks Active as of November 30, 2019, at https://www.occ.treas.gov/topics/charters-and-licensing/financial-institution-lists /national-by-name.pdf. Therefore, Tribune was likewise a "financial institution" with respect to the LBO payments if it was Computershare's "customer," and Computershare was acting as its agent. See 11 U.S.C. § 101(22)(A).

In its role as Depositary, Computershare performed multiple services for Tribune. First, Computershare received and held Tribune's deposit of the aggregate purchase price for the shares. See Examiner's Report, Vol. 1, at 206, In re Tribune Co., No. 08-13141 (KJC) (Bankr. D. Del. Aug. 3, 2010), ECF No. 5247. Then, Computershare received tendered shares, retained them on Tribune's behalf, and paid the tendering shareholders. Id.; see also Tribune Offer to Purchase at 81, In re Tribune Co., No. 08-13141 (KJC) (Bankr. D. Del. Aug. 20, 2010), ECF Nos. 5437-5, 5437-6.

Given these facts, we conclude that Tribune was Computershare's "customer" with respect to the LBO payments. Although Section 741 of the Code provides a specialized definition of "customer" for certain purposes, see 11 U.S.C. § 741(2), the relevant section for these purposes, Section 101(22), plainly states that its definition of "customer" is not limited by Section 741's definition, see 11 U.S.C. § 101(22)(A) (defining "financial institution" to include certain entities when such entities are "acting as agent ... for a customer (whether or not a 'customer,' as defined in section 741)"). Moreover, Section 101(22) does not provide any alternative specialized definition. Thus, we must give the term its "ordinary meaning." [10] *79 Ransom v. FIA Card Servs., N.A., 562 U.S. 61, 69, 131 S.Ct. 716, 178 L.Ed.2d 603 (2011). We have previously recognized that the "core" ordinary definition of "customer" is "someone who buys goods or services." UBS Fin. Servs., Inc. v. W. Virginia Univ. Hosps., Inc., 660 F.3d 643, 650 (2d Cir. 2011) (citing multiple dictionary definitions). Black's Law Dictionary, which provides more granular definitions, defines "customer" to include "a person ... for whom a bank has agreed to collect items." Black's Law Dictionary (10th ed. 2014). Regardless of which definition we apply, Tribune would qualify as Computershare's customer. Computershare agreed to collect items for Tribune by receiving the tendered shares and retaining them, and Tribune bought Computershare's services by retaining Computershare to act as Depositary.

It is likewise plain that Computershare was Tribune's agent. "[S]tatutes employing common-law terms," such as agent, "are presumed ... 'to incorporate the established meaning of th[o]se terms,' " absent a contrary indication. U.S. ex rel. O'Donnell v. Countrywide Home Loans, Inc., 822 F.3d 650, 657 (2d Cir. 2016) (quoting Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 322, 112 S.Ct. 1344, 117 L.Ed.2d 581 (1992)). Here, the parties have not identified any reason why the term "agent," for the purposes of Section 101(22), should be given anything other than its common-law meaning, and we have identified none. Thus, we will apply its common-law meaning.

At common law, "[a]gency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act." Restatement (Third) of Agency § 1.01 (2006); see also Commercial Union Ins. Co. v. Alitalia Airlines, S.p.A., 347 F.3d 448, 462 (2d Cir. 2003) ("Establishment of [an agency] relationship requires facts sufficient to show (1) the principal's manifestation of intent to grant authority to the agent, and (2) agreement by the agent. In addition, the principal must maintain control over key aspects of the undertaking.") (internal citations omitted). Generally, "[w]hether an agency relationship exists is a mixed question of law and fact." Commercial Union Ins., 347 F.3d at 462. However, the existence of an agency relationship can be resolved "as a matter of law" if: "(1) the facts are undisputed; or (2) there is but one way for a reasonable jury to interpret them." *80 Garanti Finansal Kiralama A.S. v. Aqua Marine & Trading Inc., 697 F.3d 59, 71 (2d Cir. 2012).

Here, Tribune manifested its intent to grant authority to Computershare by depositing the aggregate purchase price for the shares with Computershare and entrusting Computershare to pay the tendering shareholders. Computershare, in turn, manifested its assent by accepting the funds and effectuating the transaction. Then, as the transaction proceeded, Tribune maintained control over key aspects of the undertaking. See Tribune Offer to Purchase at 81, In re Tribune Co., No. 08-13141 (KJC) (Bankr. D. Del. Aug. 20, 2010), ECF Nos. 5437-5, 5437-6 ("For purposes of the Tender Offer, [Tribune] will be deemed to have accepted payment ... shares that are properly tendered and not properly withdrawn only when, as and if we give oral or written notice to [Computershare] of our acceptance of the shares for payment pursuant to the Tender Offer ..."). Accordingly, the undisputed facts establish that Computershare was Tribune's agent, [11] and we conclude that Tribune was a "financial institution" with respect to the LBO payments.

That conclusion does not end our assessment of whether the payments are subject to Section 546(e), however, because we must also determine whether all of the payments were made "in connection with a securities contract." See Appellees' Opposition to Appellants' Motion to Recall the Mandate at 20; Appellants' Reply in Support of Motion to Recall the Mandate at 10.

(ii) The Payments were Made in Connection with a "Securities Contract"

As stated above, Section 546(e) covers transfers "made by or to (or for the benefit of) a ... financial institution, ... in connection with a securities contract, as defined in section 741(7)[.]" [12] 11 U.S.C. § 546(e). Appellants do not dispute that "approximately half" of the payments were made in connection with a securities contract because they involved the purchase of shares. See Appellants' Reply in Support of Motion to Recall the Mandate at 10 (acknowledging that the term "securities contract," for these purposes, "encompasses contracts 'to purchase shares' ") (emphasis removed).

However, they contend that the remaining payments were not made in connection with a securities contract because they involved the redemption, rather than the purchase, of shares. See id.

We disagree with appellants. The term "redemption," in the securities context, means "repurchase." See Quebecor, 719 F.3d at 99 ("Generally, 'to redeem is defined as to purchase back; to regain possession by payment of a stipulated price; to repurchase; to regain, as mortgage property, by paying what is due; to receive ***81** back by paying the obligation.' ") (quoting In re United Educ. Co., 153 F. 169, 171 (2d Cir. 1907)); Merriam-Webster's Collegiate Dictionary 1042 (11th ed. 2003) (defining "redeem" as "to buy back" or "repurchase"). Section 741(7) defines "securities contract" capaciously to include, inter alia, a "contract for the purchase [or] sale ... of a security, ... including any repurchase ... transaction on any such security," 11 U.S.C. § 741(7)(A)(i) (emphasis added), as well as "any other agreement or transaction that is similar to an agreement or transaction referred to in this subparagraph." 11 U.S.C. § 741(7)(A)(vii); see also In re Bernard L. Madoff Inv. Sec. LLC, 773 F.3d 411, 417 (2d Cir. 2014) (observing that Section 741(7)"defines 'securities contract' with extraordinary breadth"). Thus, we have no trouble concluding, based on Section 741(7)'s plain language, that all of the payments at issue, including those connected to the redemption of shares, were "in connection with a securities contract."

(iii) Conclusion

For the foregoing reasons, we agree with appellees that the payments at issue remain subject to Section 546(e) following Merit Mgmt.

2. Conflict-Preemption Law

Under the Supremacy Clause, Article VI, Clause 2 of the Constitution, federal law prevails when it conflicts with state law. Arizona v. United States, 567 U.S. 387, 132 S. Ct. 2492, 2500, 183 L.Ed.2d 351 (2012).

As discussed throughout this opinion, Section 546(e)'s reference to limiting avoidance by a trustee provides appellants with a plain language argument that only a trustee et al., and not creditors acting on their own behalf, are barred from bringing state law, constructive fraudulent avoidance claims. However, as discussed infra, we believe that the language of Section 546(e) does not necessarily have the meaning appellants ascribe to it. Even if that meaning is one of multiple reasonable constructions of the statutory scheme, it would not necessarily preclude preemption because a preemptive effect may be inferred where it is not expressly provided.

Under the implied preemption doctrine, [13] state laws are "pre-empted to the extent of any conflict with a federal statute. Such a conflict occurs ... when [ ] state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hillman v. Maretta, 569 U.S. 483, 133 S. Ct. 1943, 1949-50, 186 L.Ed.2d 43 (2013) (citations and internal quotation marks omitted); accord In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig., 725 F.3d 65, 97 (2d Cir. 2013) cert. denied sub nom. Exxon Mobil Corp. v. City of New York, 572 U.S. 1080, 134 S. Ct. 1877, 188 L.Ed.2d 948 (2014) (courts will find implied preemption when "state law directly conflicts with the structure and purpose of a federal statute") (citation and internal quotation marks omitted). Appellants argue that a recognized presumption against preemption limits the implied preemption doctrine. They argue that Section 546(e) ***82** preempts creditors' state law, fraudulent conveyance claims only if the claims would do " 'major damage' to 'clear and substantial' federal interests." Resp. & Reply Br. of Pls.-Appellants-Cross-Appellees 45 (quoting Hillman, 569 U.S. 483, 133 S. Ct. 1943, 1950, 186 L.Ed.2d 43 (2013) (citation omitted)). The presumption against inferring preemption is premised on federalism grounds and, therefore, weighs most heavily where the particular regulatory area is "traditionally the domain of state law." Hillman, 133 S. Ct. at 1950; see also Madeira v. Affordable Hous. Found., Inc., 469 F.3d 219, 241 (2d Cir. 2006) ("The mere fact of 'tension' between federal and state law is generally not enough to establish an obstacle supporting preemption, particularly when the state law involves the exercise of traditional police power."). According to appellants, the presumption against preemption fully applies in the present context because fraudulent conveyance claims are "among 'the oldest [purposes] within the ambit of the police power.' " Resp. & Reply Br. of Pls.-Appellants-Cross-Appellees 36 (quoting California v. Zook, 336 U.S. 725, 734, 69 S.Ct. 841, 93 L.Ed. 1005 (1949)).

Preemption is always a matter of congressional intent, even where that intent must be inferred. See Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 516, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992) (congressional intent is the "ultimate touchstone of pre-emption analysis") (quoting Malone v. White Motor Corp., 435 U.S. 497, 504, 98 S.Ct. 1185, 55 L.Ed.2d 443 (1978)) (internal quotation marks omitted); N.Y. SMSA Ltd. P'ship v. Town of Clarkstown, 612 F.3d 97, 104 (2d Cir. 2010) ("The key to the preemption inquiry is the intent of Congress."). As in the present matter, the presumption against preemption usually goes to the weight to be given to the lack of an express statement overriding state law.

The presumption is strongest when Congress is legislating in an area recognized as traditionally one of state law alone. See Hillman, 133 S. Ct. at 1950 (stating that because "[t]he regulation of domestic relations is traditionally the domain of state law ... [t]here is [ ] a presumption against pre-emption") (internal quotation marks and citation omitted). However, the present context is not such an area. To understate the proposition, the regulation of creditors' rights has "a history of significant federal presence." United States v. Locke, 529 U.S. 89, 90, 120 S.Ct. 1135, 146 L.Ed.2d 69 (2000).

Congress's power to enact bankruptcy laws was made explicit in the Constitution as originally enacted, Art. 1, § 8, cl. 4, and detailed, preemptive federal regulation of creditors' rights has, therefore, existed for over two centuries. Charles Jordan Tabb, The History of the Bankruptcy Laws in the United States, 3 Am. Bankr. Inst. L. Rev. 5, 7 (1995). Once a party enters bankruptcy, the Bankruptcy Code constitutes a wholesale preemption of state laws regarding creditors' rights. See Eastern Equip. and Servs. Corp. v. Factory Point Nat. Bank, Bennington, 236 F.3d 117, 120 (2d Cir. 2001) ("The United States Bankruptcy Code provides a comprehensive federal system of penalties and protections to govern the orderly conduct of debtors' affairs and creditors' rights."); In re Miles, 430 F.3d 1083, 1091 (9th Cir. 2005) ("Congress intended the Bankruptcy Code to create a whole scheme under federal control that would adjust all of the rights and duties of creditors and debtors alike ....").

Consider, for example, the present proceeding. While the issue before us is often described as whether Section 546(e) preempts state fraudulent conveyance laws, Resp. & Reply Br. of Pls.-Appellants-Cross-Appellees ***83** 33, that is a mischaracterization. Appellants' state law claims were preempted when the Chapter 11 proceedings commenced and were not dismissed. Appellants' own arguments posit that those claims were, at the very least, stayed by Code Section 362. Whether, as appellants argue, they were restored in full after two years, see 11 U.S.C. § 546(a)(1)(A), or by order of the bankruptcy court, see 11 U.S.C. § 349(b)(3), is hotly disputed. But if they were restored, it was by force of federal law.

Once Tribune entered bankruptcy, the creditors' avoidance claims were vested in the federally appointed trustee et al. 11 U.S.C. § 544(b)(1). A constructive fraudulent conveyance action brought by a trustee et al. under Section 544 is a claim arising under federal law. See In re Intelligent Direct Mktg., 518 B.R. 579, 587 (E.D. Cal. 2014); In re Trinsum Grp., Inc., 460 B.R. 379, 387-88 (S.D.N.Y. 2011); In re Sunbridge Capital, Inc., 454 B.R. 166, 169 n.16 (Bankr. D. Kan. 2011); In re Charys Holding Co., Inc., 443 B.R. 628, 635-36 (Bankr. D. Del. 2010). Although such a claim borrows applicable state law standards regarding avoiding the transfer in question, see Universal Church v. Geltzer, 463 F.3d 218, 222 n.1 (2d Cir. 2006), the claim has its own statute of limitations, 11 U.S.C. § 546(a)(1)(A), measure of damages, see 11 U.S.C. § 550, and standards for distribution, 11 U.S.C. § 726. A disposition of this federal law claim extinguishes the right of creditors to bring state law, fraudulent conveyance claims. See St. Paul Fire, 884 F.2d at 701 disapproved of on other grounds by In re Miller, 197 B.R. 810 (W.D.N.C. 1996) (noting that "creditors are bound by the outcome of the trustee's action"); see also In re PWS Holding Corp., 303 F.3d 308, 314-15 (3d Cir. 2002) (barring creditor's state law, fraudulent transfer claims after trustee released § 544 claims). And, if creditors are allowed by a bankruptcy court, trustee, or, as appellants argue, by the Bankruptcy Code, to bring state law actions in their own name, that permission is a matter of grace granted under federal authority. The standards for granting that permission, moreover, have everything to do with the Bankruptcy Code's balancing of debtors' and creditors' rights, In re Coltex Loop Cent. Three Partners, L.P., 138 F.3d 39, 44 (2d Cir. 1998), or rights among creditors, United States v. Ron Pair Enters., Inc., 489 U.S. 235, 248, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989), and nothing to do with the vindication of state police powers.

We also note here, and discuss further infra, that the policies reflected in Section 546(e) relate to securities markets, which are subject to extensive federal regulation. The regulation of these markets has existed and grown for over eighty years and reflects very important federal concerns.

In the present matter, therefore, there is no measurable concern about federal intrusion into traditional state domains. Our bottom line is that the issue before us is one of inferring congressional intent from the Code, without significant countervailing pressures of state law concerns.

3. The Language of Section 546(e)

Section 544(b) empowers a trustee et al. to avoid a "transfer ... [by] the debtor ... voidable under applicable law by a[n] [unsecured] creditor." Section 548(a) also provides the trustee et al. with independent federal intentional, 11 U.S.C. § 548(a)(1)(A), and constructive fraudulent conveyance claims, 11 U.S.C. § 548(a)(1)(B).

Section 546(e) provides in pertinent part:

> Notwithstanding sections 544, ... 548(a)(1)(B) ... of this title, the trustee may not avoid a transfer that is a ... ***84** settlement payment ... made by or to (or for the benefit of) a ... stockbroker, financial institution, financial participant, or securities clearing agency, or that is a transfer made by or to (or for the benefit of) a ... stockbroker, financial institution, financial participant, or securities clearing agency, in connection with a securities contract ... except under section 548(a)(1)(A)....

Id. § 546(e). Section 546(e) thus expressly prohibits trustees et al. from using their Section 544(b) avoidance powers and (generally) Section 548 against the transfers specified in Section 546(e). However, Section 546(e) creates an exception to that prohibition for claims brought by trustee et al. under Section 548(a)(1)(A) that, as noted, establishes a federal avoidance claim to be brought by a trustee et al. based on an intentional fraud theory. As discussed supra, the Litigation Trust brought a Section 548(a)(1)(A) claim against the same transfers challenged by appellants' actions before us on this appeal, which was still pending when appellants' claims were dismissed.

The language of Section 546(e) covers all transfers by or to covered entities that are "settlement payment[s]" or "in connection with a securities contract." Transfers in which either the transferor or transferee is not a covered entity are clearly included in the language, so long as one of the two is a covered entity. The Section does not distinguish between kinds of transfers, e.g., settlements of ordinary day-to-day trading, LBOs, or mergers in which shareholders of one company are involuntarily cashed out. So long as the transfer sought to be avoided is within the language quoted above, the Section includes avoidance proceedings in which the covered entity would escape a damages judgment. But see In re Lyondell Chem. Co., 503 B.R. 348, 372-73 (Bankr. S.D.N.Y. 2014), as corrected (Jan. 16, 2014) (holding that Section 546(e) does not include "LBO payments to stockholders at the very end of the asset transfer chain, where the stockholders are the ultimate beneficiaries of the constructively fraudulent transfers, and can give the money back to injured creditors with no damage to anyone but themselves").

4. Appellants' Legal Theory

Appellants' state law, constructive fraudulent conveyance claims purport to be brought under mainstream bankruptcy procedures directly mandated by the Code. However, an examination of the Code as a whole, in contrast with an isolated focus on the word "trustee" in Section 546(e), reveals that appellants' theory relies upon adhering to statutory language only when opportune and resolving various ambiguities in a way convenient to that theory. Even then, their legal theory results in anomalies and inconsistencies with parts of the Code. The consequence of those ambiguities, anomalies, and conflicts is that a reader of Section 546(e), at the time of enactment, would not have necessarily concluded that the reference only to a trustee et al. meant that creditors may at some point bring state law claims seeking the very relief barred to the trustee et al. by Section 546(e). Its meaning, therefore, is not plain.

(i) Appellants' Theory of Fraudulent Conveyance Avoidance Proceedings

Appellants' theory goes as follows. When a debtor enters bankruptcy, all "legal or equitable interests of the debtor in property," 11 U.S.C. § 541(a)(1), vest in the debtor's bankruptcy estate. This property includes legal claims that could have been brought by the debtor. See U.S. ex rel. Spicer v. Westbrook, 751 F.3d 354, 361-62 (5th Cir. 2014) ("The phrase 'all legal or equitable interests' includes legal claims–whether ***85** based on state or federal law."). Therefore, "the Trustee is conferred with the authority to represent all creditors and the Debtor's estate and with the sole responsibility of bringing actions on behalf of the Debtor's estate to marshal assets for the estate's creditors." In re Stein, 314 B.R. 306, 311 (D.N.J. 2004). However, fraudulent conveyance claims proceed on a theory that an insolvent debtor may not make what are essentially gifts that deprive creditors of assets available to pay debts. See Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 322, 119 S.Ct. 1961, 144 L.Ed.2d 319 (1999). Therefore, before a bankruptcy takes place, fraudulent conveyance claims belong to creditors rather than to the debtor. As a consequence, Section 544(b)(1) provides that a bankruptcy trustee may avoid "any transfer of an interest of the debtor ... that is voidable under applicable law by a creditor holding an unsecured claim." 11 U.S.C. § 544(b)(1). The responsibility of the trustee et al. is to "step into the shoes of a creditor under state law and avoid any transfers such a creditor could have avoided." Univ. Church v. Geltzer, 463 F.3d 218, 222 n.1 (2d Cir. 2006).

The trustee et al., however, is subject to a statute of limitations that requires such claims to be brought within two years of the commencement of the bankruptcy proceeding. See 11 U.S.C. § 546(a)(1)(A). Appellants infer from this statute of limitations that if the trustee et al. fails to act to enforce such claims during that two-year period, the claims revert to creditors who may then pursue their own state law, fraudulent conveyance actions. Resp. & Reply Br. of Pls.-Appellants-Cross-Appellees 1. This position assumes that, although the power to bring such actions is clearly vested in the trustee et al. when the bankruptcy proceeding begins, if the power is not exercised, it returns in full flower to the creditors after the bankruptcy ends or after two years.

Appellants' theory also is that their fraudulent conveyance claims were only stayed under Section 362(a), rather than extinguished when assumed by the trustee on behalf of the bankrupt estate by the trustee et al. under Section 544, and could be asserted by them as creditors when the Section 362(a) stay was lifted. Accordingly, appellants argue, when the Committee did not bring constructive fraudulent conveyance actions against the LBO transfers by December 8, 2010, appellants regained the right to bring their own state law actions. See Resp. & Reply Br. of Pls.-Appellants-Cross Appellees 6. Moreover, they correctly note that Section 362's automatic stay was, as discussed supra, lifted. In either case -- automatically after two years or by the bankruptcy court's lifting of the stay -- appellants assert that the right to bring state law actions has reverted to them.

(ii) Ambiguities, Anomalies, and Conflicts

When appellants' arguments and their relation to the Code are viewed, as we must view them, in their entirety, In re Boodrow, 126 F.3d 43, 49 (2d Cir. 1997) ("The Supreme Court has thus explained ... 'we must not be guided by a single sentence or [part] of a sentence [of the Code], but look to the provisions of the whole law, and to its object and policy.' ") (quoting Kelly v. Robinson, 479 U.S. 36, 43, 107 S.Ct. 353, 93 L.Ed.2d 216 (1986)), they reveal material ambiguities, anomalies, and outright conflicts with the purposes of Code Sections 544, 362, and 548, not to mention the outright conflict with Section 546(e) discussed infra.

A critical step in the logic of appellants' theory finds no support in the language of the Code. In particular, the inference that fraudulent conveyance actions revert to ***86** creditors if either the two-year statute of limitations passes without an exercise of the trustees' et al. powers under Section 544 or the Section 362(a) stay is lifted by the bankruptcy court has no basis in the Code's language. To begin, the language of the automatic stay provision applies only to actions against "the debtor." 11 U.S.C. § 362. To be sure, there are cases barring fraudulent conveyance actions brought by creditors before the passing of the limitations period or lifting of the stay. See, e.g., In re Crysen/Montenay Energy Co., 902 F.2d 1098, 1101 (2d Cir. 1990). The rationales of these cases vary. Some rely on Section 362(a) on the theory that the fraudulent conveyance claims are the property of the debtors' estate. See In re MortgageAmerica Corp., 714 F.2d 1266, 1275-76 (5th Cir. 1983); Matter of Fletcher, 176 B.R. 445, 452 (Bankr. W.D. Mich. 1995), rev'd and remanded on other grounds sub nom. In re Van Orden, No. 1:95-CV-79, 1995 WL 17903731 (W.D. Mich. Sept. 5, 1995). Some do not mention Section 362(a) and rely on the need to protect trustees' et al. powers to bring Section 544 avoidance actions. See In re Van Diepen, P.A., 236 F. App'x. 498, 502-03 (11th Cir. 2007); In re Clark, 374 B.R. 874, 876 (Bankr. M.D. Ala. 2007); In re Tessmer, 329 B.R. 776, 780 (Bankr. M.D. Ga. 2005). All the caselaw agrees that the trustee et al.'s powers under Section 544 are exclusive, at least until the stay is lifted or the two-year period expires.

Equally important is the fact that the inference of a reversion of fraudulent conveyance claims to creditors drawn from Section 544's statute of limitations is not based on the language of the Code, which says nothing about the reversion of claims vested in the trustee et al. by Section 544. Statutes of limitation usually are intended to limit the assertion of stale claims and to provide peace to possible defendants, Converse v. Gen. Motors Corp., 893 F.2d 513, 516 (2d Cir. 1990), and not to change the identity of the authorized plaintiffs without some express language to that effect. A decisive part of appellants' legal theory thus has no support in the language of the Code.

Even if this gap is assumed not to exist, or can be otherwise traversed, appellants' theory encounters other serious problems. Section 544, vesting avoidance powers in the trustee et al., is intended to simplify proceedings, reduce the costs of marshalling the debtor's assets, and assure an equitable distribution among the creditors. See In re MortgageAmerica Corp., 714 F.2d 1266, 1275-76 (5th Cir. 1983) (noting that "[t]he 'strong arm' provision of the [Bankruptcy] Code, 11 U.S.C. § 544, allows the bankruptcy trustee to step into the shoes of a creditor for the purpose of asserting causes of action under state fraudulent conveyance acts for the benefit of all creditors, not just those who win a race to judgment" and Section 362 helps prevent "[a]ctions for the recovery of the debtor's property by individual creditors under state fraudulent conveyance laws [that] would interfere with [the bankruptcy] estate and with the equitable distribution scheme dependent upon it"). However, these purposes are hardly consistent with the process hypothesized by appellants.

Accepting for purposes of argument appellants' view of the applicable process, Section 362, at the very least, prevented appellants (for a time) from bringing their state law, fraudulent conveyance claims, while Section 546(e) barred the Committee from seeking to enforce or, necessarily, to settle them. Appellants' argument thus seems to posit that their claims are on hold until the trustees et al. decide whether to bring an action they are powerless to bring or to pass on to creditors a power they do not have. In short, it assumes that, when ***87** creditors' avoidance claims are lodged in the trustee et al. and are diminished in that hand by the Code, they reemerge in undiminished form in the hands of creditors after the statute of limitations governing actions by the trustee et al. has run or the bankruptcy court lifts the automatic stay.

In the context of the Code, however, any such process is a glaring anomaly. Section 548(a)(1)(A) vests trustees with a federal claim to avoid the very transfers attacked by appellants' state law claims — but only on an intentional fraud theory. There is little apparent reason to limit trustees et al. to intentional fraud claims while not extinguishing constructive fraud claims but rather leaving them to be brought later by individual creditors. In particular, enforcement of the intentional fraud claim is undermined if creditors can later bring state law, constructive fraudulent conveyance claims involving the same transfers. Any trustee would have grave difficulty negotiating more than a nominal settlement in the federal action if it cannot preclude state claims attacking the same transfers but not requiring a showing of actual fraudulent intent. Unable to settle, a trustee et al. will be reluctant to expend the estate's resources on vigorously pursuing the federal claim while awaiting the stayed state claims to revert and to be litigated by creditors. As happened in the present matter, the result is that the trustee et al.'s action awaits the pursuit of piecemeal actions by creditors. This is precisely opposite of the intent of the Code's procedures. While a bankruptcy court can reduce the delay by an early lifting of the automatic stay with regard to constructive fraudulent conveyance actions, that action would underline the anomaly of applying the stay to the bringing of claims that are barred to trustees et al.

Staying ordinary state law, constructive fraudulent conveyance claims by individual creditors while the trustee deliberates is a rational method of avoiding piecemeal litigation and ensuring an equitable distribution of assets among creditors. See MBNA Am. Bank, N.A. v. Hill, 436 F.3d 104, 108 (2d Cir. 2006) ("The objectives of the Bankruptcy Code ... include ... 'the need to protect creditors and reorganiz[e] debtors from piecemeal litigation ....' ") (quoting Ins. Co. of N. Am. v. NGC Settlement Trust & Asbestos Claims Mgmt. Corp., 118 F.3d 1056, 1069 (5th

Cir. 1997)). However, the scheme described by appellants does not resemble this method either in simplicity or in the equitable treatment of creditors.

To rationalize these anomalies, appellants speculate as to -- more accurately, imagine -- a deliberate balancing of interests by Congress. They argue that Congress wanted to balance the need for certainty and finality in securities markets, recognized in Section 546(e), against the need to maximize creditors' recoveries, recognized in various other provisions. Congress did so, they argue, by limiting only the avoidance powers of trustees et al., not those of individual creditors (save for the stay), in Section 546(e) because actions by trustees et al. are a greater threat to securities markets than are actions by individual creditors. Resp. & Reply Br. of Pls.-Appellants-Cross-Appellees 71. That greater threat results from the fact that a trustee's power of avoidance is funded by the debtor's estate, see 11 U.S.C. §§ 327, 330, supported by national long-arm jurisdiction, see Fed. R. Bankr. P. 7004(d),(f), and can be used to avoid the entirety of a transfer, Tronox Inc. v. Anadarko Petroleum Corp. (In re Tronox Inc.), 464 B.R. 606, 615-17 (Bankr. S.D.N.Y. 2012) (citing Moore v. Bay, 284 U.S. 4, 52 S.Ct. 3, 76 L.Ed. 133 (1931)). Creditors, in turn, have no such funding, are limited by ***88** state jurisdictional rules, and can sue only for their individual losses. See In re Integrated Agri, Inc., 313 B.R. 419, 428 (Bankr. C.D. Ill. 2004). Therefore, appellants argue that a deliberate "balance" was struck by protecting securities markets from trustees' et al. actions while subjecting them to the lesser disruption individual creditors' actions might cause after a two-year stay. Resp. & Reply Br. of Pls.-Appellants-Cross-Appellees 83-85. For a court to upset this delicate balance would constitute judicial intrusion on policy decisions rightfully left to the Congress.

However, the balance described above is an ex post explanation of a legal scheme that appellants must first construct, and then justify as rational, because it is essential to their claims. Although they argue that the scheme was deliberately constructed by Congress, that argument lacks any support whatsoever in the legislative deliberations that led to Section 546(e)'s enactment.

Moreover, appellants' arguments understate the number of creditors who would sue, if allowed, and the corresponding extent of the danger to securities markets. Creditors may assign their claims and various methods of aggregation can lead to billions of dollars of claims, as here.

(iii) No Plain Meaning

These issues reflect ambiguities as to exactly what is transferred to trustees et al. by Section 544(b)(1). It is clear that trustees et al. own the debtors' estates, which include the debtors' property and legal claims. See 11 U.S.C. § 541(a)(1) (Among other things, the "estate is comprised of ... all legal or equitable interests of the debtor in property as of the commencement of the case"); U.S. ex rel. Spicer v. Westbrook, 751 F.3d 354, 361-62 (5th Cir. 2014) ("The phrase 'all legal or equitable interests' includes legal claims -- whether based on state or federal law."). Avoidance claims belong to creditors, however, and whether they become the property of the debtors' estates is a debated, and somewhat metaphysical, issue. The issue does have a limited practical bearing on the present matter, however. If the claims asserted by appellants became the property of the debtor's estate upon Tribune's bankruptcy and were thereby limited in the hands of the Committee, their reversion in an unaltered form, whether occurring automatically or by act of the Committee or bankruptcy court, might seem counterintuitive.

Appellants' reliance on the applicability of the automatic stay to their claims would arguably support the "property" view. The stay is intended in part to protect the property rights of the trustee et al. in the debtor's estate. Subjecting avoidance actions by creditors to the stay has been supported by various courts on the ground that such claims are either the property of the debtor's estate or have an equivalent legal status. See In re MortgageAmerica Corp., 714 F.2d 1266, 1275-76 (5th Cir. 1983); In re Swallen's, Inc., 205 B.R. 879, 882 (Bankr. S.D. Ohio 1997); Matter of Fletcher, 176 B.R. 445, 452 (Bankr. W.D. Mich. 1995).

Whether, and to what degree, fraudulent conveyance claims become the property of a bankrupt estate was, at the time of Section 546(e)'s enactment, and now, anything but clear. The principal Supreme Court precedent held that such claims are the property of the debtor's estate. Trimble v. Woodhead, 102 U.S. 647, 649, 26 L.Ed. 290 (1880). It is a very old decision but has not been expressly overruled. Subsequent court of appeals decisions are bountiful in contradictory statements regarding the property issue. Compare In re Cybergenics Corp., 226 F.3d 237, 241, 246 (3d Cir. 2000) (stating that "fraudulent transfer ***89** claims have long belonged to a transferor's creditors, whose efforts to collect their debts have essentially been thwarted as a consequence of the transferor's actions" but also noting that the debtor's " 'assets' and 'property of the estate' have different meanings, evidenced in part by the numerous provisions in the Bankruptcy Code that distinguish between property of the estate and property of the debtor, or refer to one but not the other"), and Picard v. Fairfield Greenwich Ltd., 762 F.3d 199, 212 (2d Cir. 2014) ("Our case law is clear that assets targeted by a fraudulent conveyance action do not become property of the debtor's estate under the Bankruptcy Code until the Trustee obtains a favorable judgment."), with Cumberland Oil Corp. v. Thropp, 791 F.2d 1037, 1042 (2d Cir. 1986) (noting that causes of action alleging violation of fraudulent conveyance laws would be property of the estate), and Nat'l Tax Credit Partners v. Havlik, 20 F.3d 705, 708-09 (7th Cir. 1994) ("[T]he right to recoup a fraudulent conveyance, which outside of bankruptcy may be invoked by a creditor, is property of the estate that only a trustee or debtor in possession may pursue once a bankruptcy is underway.").

Use of the term "property" as a short-hand way of suggesting exclusivity has merit, Henry E. Smith, Property and Property Rules, 79 N.Y.U. L. Rev. 1719, 1770-74 (2004), but Section 544(b)(1) does not expressly state whether the bundle of rights transferred can revert. However, we need not resolve either the "property" or the reversion issues. Whether the statutory language has a plain meaning turns on whether a consensus would have existed among reasonable, contemporaneous readers as to meaning of that language in the particular statutory context. See Pettus v. Morgenthau, 554 F.3d 293, 297 (2d Cir. 2009) ("[W]e attempt to ascertain how a reasonable reader would understand the statutory text, considered as a whole."); Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist., 541 U.S. 246, 252-53, 124 S.Ct. 1756, 158 L.Ed.2d 529 (2004) (noting that "[s]tatutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose") (quoting Park 'N Fly, Inc. v. Dollar Park & Fly, Inc., 469 U.S. 189, 194, 105 S.Ct. 658, 83 L.Ed.2d 582 (1985)). If differing views as to meaning were reasonable at the time of Section 546(e)'s enactment, its meaning is less than plain. See, e.g., Rodriguez v. Cuomo, 953 F.2d 33, 39-40 (2d Cir. 1992).

Appellants' arguments on meaning rely not only on the reference to a trustee's et al. powers but equally, or more so, on a claim of settled law at the time of Section 546(e)'s enactment that creditors' avoidance rights not only revert to creditors but also revert in their original breadth. However, whether fraudulent conveyance claims revert as a matter of law upon a trustee's failure to act was, both at the time Section 546(e) was passed as well as now, unclear, as discussed supra. A contemporaneous reader would not, therefore, necessarily have believed it plain that Section 546(e)'s reference only to a trustee's et al. avoidance claim meant that creditors could bring their own claims. [14]

A contemporaneous reader would also notice that the language of the automatic stay provision does not literally apply to appellants' actions and that no provision for the reversion of claims vested in the trustee et al. by Section 544 exists. As explained supra, having to draw an inference of reversion of rights from that provision's ***90** statute of limitations might well have appeared as a leap several bridges too far to such a reader. Indeed, the vesting of avoidance claims in the trustee et al., the lack of applicable language in the automatic stay provision, and the lack of a statutory basis for reversion might well have suggested to such a reader that Section 544's vesting of avoidance proceedings in the trustee et al. cut off creditors from any avoidance rights other than a share of the proceeds in bankruptcy.

Even passing these obstacles, the structure of the Code and the relationship of its pertinent sections might have suggested to a contemporaneous reader that altered rights do not revert to creditors unaltered, or to put it another way, a trustee et al. cannot pass on, or "allow" to revert through passivity, a right the trustee et al. does not have. To be sure, contemporaneous readers might have taken other views, including those of appellants, but that is the very definition of ambiguity.

(iv) Conclusion

We need not resolve these issues or even hold that the lack of statutory support, ambiguities, anomalies, or conflicts with purposes of the Code are sufficient to support a preemption holding. They are sufficient, however, to dispel the suggestions found in some discussions of these issues of a clear textual basis for appellants' theory in the Code and an overall consistency with congressional purpose. See In re Lyondell Chem. Co., 503 B.R. 348, 358-59 (Bankr.

S.D.N.Y. 2014) as corrected (Jan. 16, 2014); In re Tribune Co. Fraudulent Conveyance Litig., 499 B.R. at 315. We also need not issue a decision that affects fraudulent conveyance actions brought by creditors whose claims are not subject to Section 546(e). Our ensuing discussion concludes that the purposes and history of that Section necessarily reflect an intent to preempt the claims before us. We turn now to the conflict between those claims and Section 546(e).

5. Conflict with Section 546(e)

As discussed supra, the meaning of Section 546(e) with regard to appellants' rights to bring the actions before us is ambiguous. We must, therefore, look to its language, legislative history, and purposes to determine its effect. Marvel Characters, Inc. v. Simon, 310 F.3d 280, 290 (2d Cir. 2002). Every congressional purpose reflected in Section 546(e), however narrow or broad, is in conflict with appellants' legal theory. Their claims are, therefore, preempted.

Section 546(e) was intended to protect from avoidance proceedings payments by and to commodities and securities firms in the settlement of securities transactions or the execution of securities contracts. The method of settlement through such entities is essential to securities markets. Payments by and to such entities provide certainty as to each transaction's consummation, speed to allow parties to adjust the transaction to market conditions, finality with regard to investors' stakes in firms, and thus stability to financial markets. See H.R. Rep. No. 97-420 (1982); H.R. Rep. No. 95-595 (1977). Unwinding settled securities transactions by claims such as appellants' would seriously undermine - - a substantial understatement -- markets in which certainty, speed, finality, and stability are necessary to attract capital. To allow appellants' claims to proceed, we would have to construe Section 546(e) as achieving the opposite of what it was intended to achieve.

Allowing creditors to bring claims barred by Section 546(e) to the trustee et al. only after the trustee et al. fails to exercise powers it does not have would increase the disruptive effect of an unwinding ***91** by lengthening the period of uncertainty for covered entities and investors. Indeed, the idea of preventing a trustee from unwinding specified transactions while allowing creditors to do so, but only later, is a policy in a fruitless search of a logical rationale.

The narrowest purpose of Section 546(e) was to protect other commodities and securities firms from avoidance claims seeking to unwind a bankrupt commodities or securities firm's transactions that consummated transfers between customers. See H.R. Rep. No. 97-420, at 1 (1982) ("The commodities and securities markets operate through a complex system of accounts and guarantees. Because of the structure of the clearing systems in these industries and the sometimes volatile nature [of] the markets, certain protections are necessary to prevent the insolvency of one commodity or security firm from spreading to other firms and possibl[y] threatening the collapse of the affected market."). It must be emphasized that appellants' legal theory would clearly allow such claims to be brought (later) by creditors of the bankrupt firm. Even the narrowest purpose of Section 546(e) is thus at risk.

Some judicial and other discussions of these issues avoid addressing the full effects of adopting appellants' arguments. See In re Lyondell Chem. Co., 503 B.R. 348, 359-78 (Bankr. S.D.N.Y. 2014) as corrected (Jan. 16, 2014). Such analysis always begins by reliance on the "trustee" language, id. at 358, but then narrows the scope of the transfers covered by Section 546(e)'s language. For example, appellants argue that the concerns of the amicus curiae Securities and Exchange Commission regarding the effect of the district court's decision on the securities markets are misplaced, because appellants are not seeking money from the intermediaries. [15] Resp. & Reply Br. of Pls.-Appellants Cross-Appellees 78-82. In doing so, they rely upon the Lyondell opinion, which, after relying on the "trustee" language, held that Section 546(e) is not preemptive of state law, fraudulent conveyance actions involving LBOs because such actions do not implicate the purposes of Section 546(e). 503 B.R. at 372-73.

There is no little irony in putting lynchpin reliance on the word "trustee" while ignoring the language that follows. In any event, for the reasons stated above, Section 546(e)'s language is broad enough under certain circumstances to cover a bankrupt firm's LBO payments even where, as here, that firm's business was primarily commercial in nature. 11 U.S.C. § 546(e) (limitations on avoidance of transfers made by a "customer" of a financial institution "in connection with a securities contract"). A search for legislative purpose is heavily informed by language, and analyzing all the language of a provision and its relationship to the Code as a whole is preferable to using literalness here and perceived legislative purpose (without regard to language) where as needed to reach particular results. See King v. Burwell, ––– U.S. ––––, 135 S. Ct. 2480, 2489, 192 L.Ed.2d 483 (2015) ("[O]ftentimes the meaning -- or ambiguity -- of certain words or phrases may only become evident when placed in context. So when deciding whether the language is plain, we must read the words in their context and ***92** with a view to their place in the overall statutory scheme. Our duty, after all, is to construe statutes, not isolated provisions.") (internal quotation marks and citations omitted).

We do not dwell on this because we perceive no conflict between Section 546(e)'s language and its purpose. Section 546(e) is simply a case of Congress perceiving a need to address a particular problem within an important process or market and using statutory language broader than necessary to resolve the immediate problem. Such broad language is intended to protect the process or market from the entire genre of harms of which the particular problem was only one symptom. The legislative history of Section 546(e) clearly reveals such a purpose. That history (confirmed by the broad language adopted) reflects a concern over the use of avoidance powers not only after the bankruptcy of a commodities or securities firm, but also after a "customer" or "other participant" in the securities markets enters bankruptcy. See H.R. Rep. No. 97-420 (1982). To be sure, the examples used by the Section's proponents focused on the immediate concern of creditors of bankrupt brokers seeking to unwind payments by the bankrupt firm to other brokers. Id. Such actions were perceived as creating a danger of "a ripple effect," id., a chain of bankruptcies among brokers disrupting the securities market generally. From these examples, appellants, and others, have argued that when monetary damages are sought only from shareholders, or an LBO is involved, the purposes of Section 546(e) are not implicated. See Resp. & Reply Br. of Pls.-Appellants-Cross-Appellees 79; In re Lyondell, 503 B.R. at 358-59. Even apart from using the oil and water mixture of applying a narrow literalness to the word "trustee" and disregarding the rest of the Section's language, we disagree.

As courts have recognized, Congress's intent to "minimiz[e] the displacement caused in the commodities and securities markets in the event of a major bankruptcy affecting those industries," Quebecor, 719 F.3d at 100 (quoting Enron Creditors Recovery Corp. v. Alfa, S.A.B. de C.V., 651 F.3d 329, 333 (2d Cir. 2011)), reflected a larger purpose memorialized in the legislative history's mention of bankrupt "customers" or "other participant[s]" and in the broad statutory language defining the transactions covered. That larger purpose was to "promot[e] finality ... and certainty" for investors, by limiting the circumstances, e.g., to cases of intentional fraud, under which securities transactions could be unwound. In re Kaiser Steel Corp., 952 F.2d 1230, 1240 n.10 (10th Cir. 1991) (quoting H. Rep. No. 484, 101st Cong. 2d Sess. 2 (1990), reprinted in 1990 U.S.C.C.A.N. 223, 224).

The broad language used in Section 546(e) protects transactions rather than firms, reflecting a purpose of enhancing the efficiency of securities markets in order to reduce the cost of capital to the American economy. See Bankruptcy of Commodity and Securities Brokers: Hearings Before the Subcomm. on Monopolies and Commercial Law of the Comm. on the Judiciary, 47th Cong. 239 (1981) (statement of Bevis Longstreth, Commissioner, SEC) (explaining that, without 546(e), the Bankruptcy Code's "preference, fraudulent transfer and stay provisions can be interpreted to apply in harmful and costly ways to customary methods of operation essential to the securities industry"). As noted, central to a highly efficient securities market are methods of trading securities through commodities and securities firms. Section 546(e)'s protection of the transactions consummated through these entities was not intended as protection of politically favored special interests. Rather, it was ***93** sought by the SEC –- and corresponding provisions by the CFTC, see Bankruptcy Act Revision: Hearings on H.R. 31 and H.R. 32 Before the Subcomm. on Civil & Constitutional Rights of the H. Comm. on the Judiciary, 94th Cong., Supp. App. Pt. 4, 2406 (1976) -- in order to protect investors from the disruptive effect of after-the-fact unwinding of securities transactions.

A lack of protection against the unwinding of securities transactions would create substantial deterrents, limited only by the copious imaginations of able lawyers, to investing in the securities market. The effect of appellants' legal theory would be akin to the effect of eliminating the limited liability of investors for the debts of a corporation: a reduction of capital available to American securities markets.

For example, all investors in public companies would face new and substantial risks, if appellants' theory is adopted. At the very least, each would have to confront a higher degree of uncertainty even as to the consummation of securities transfers. The risks are not confined to the consummation of securities transactions. Pension plans, mutual funds, and similar institutional investors would find securities markets far more risky if exposed to substantial liabilities derived from investments in securities sold long ago. If appellants were to prevail, a pension plan whose position in a firm was cashed out in a merger might have to set aside reserves in case the surviving firm went bankrupt and triggered avoidance actions based on a claim that the cash out price exceeded the value of the shares. Every economic downturn could expose such institutional investors not only to a decline in the value of their current portfolios but also to claims for substantial monies received from mergers during good times.

Given the occasional volatility of economic events, any transaction buying out shareholders would risk being attacked as a fraudulent conveyance avoidable by creditors if the firm faltered. Appellants' legal theory could even reach investors who, after voting against a merger approved by other shareholders, were involuntarily cashed out. Tender offers, which almost always involve a premium above trading price, Lynn A. Stout, Are Takeover Premiums Really Premiums? Market Price, Fair Value, and Corporate Law, 99 Yale L.J. 1235, 1235 (1990), would imperil cashed out shareholders if the surviving entity encountered financial difficulties.

If appellants' theory was adopted, individual investors following a conservative buy-and-hold strategy with a diversified portfolio designed to reduce risk might well decide that such a strategy would actually increase the risk of crushing liabilities. Such a strategy is adopted because it involves low costs of monitoring the prospects of individual companies and emphasizes the offsetting of unsystematic risks by investing in multiple firms. See Leigh v. Engle, 858 F.2d 361, 368 (7th Cir. 1988). Appellants' legal theory might well require costly and constant monitoring by investors to rid their portfolios of investments in firms that might, under then-current circumstances, be subject to mergers, stock buy-backs, or tender offers (and would otherwise be good investments). Investing in multiple companies, the essence of diversification, would increase the danger of avoidance liability.

The threat to investors is not simply losing a lawsuit. Given the costliness of defending such legal actions and the long delay in learning their outcome, exposing investors to even very weak lawsuits involving millions of dollars would be a substantial deterrent to investing in securities. The need to set aside reserves to meet the costs of litigation -- not to mention costs of ***94** losing -- would suck money from capital markets.

As noted, concern has been expressed that LBOs are different from other transactions in ways pertinent to the Bankruptcy Code. In re Lyondell Chem. Co., 503 B.R. 348, 354, 358-59 (Bankr. S.D.N.Y. 2014), as corrected (Jan. 16, 2014). However, the language of Section 546(e) clearly covers the LBO payments at issue here for the reasons stated above.

Moreover, securities markets are heavily regulated by state and federal governments. The statutory supplements used in law school securities regulation courses are thick enough to rival Kevlar in stopping bullets. Mergers and tender offers are among the most regulated transactions. See, e.g., Williams Act, 15 U.S.C.A. §§ 78m(d)-(e), 78n(d). Much of the content of state and federal regulation is designed to protect investors in such transactions. Much of that content is also designed to maximize the payout to shareholders cashed out in a merger, see, e.g., Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986); Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955-56 (Del. 1985), or accepting a tender offer, see Williams Act, 15 U.S.C.A. §§ 78m(d)-(e), 78n(d). Appellants' legal theory would allow creditors to seek to portray that maximization as evidence supporting a crushing liability. A legal rule substantially undermining those goals of state and federal regulation –- again, one akin to eliminating limited liability –- is a systemic risk.

It is also argued that the Bankruptcy Code has many different purposes and that Section 546(e) does not clearly "trump[ ] all [the] other[s]." In re Tribune Co. Fraudulent Conveyance Litig., 499 B.R. 310, 317 (S.D.N.Y. 2013). The pertinent -- and "trumping" -- "other" purpose of the Code is said to be the maximization of assets available to creditors. Id. Courts customarily accommodate statutory provisions in tension with one another where the principal purpose of each is attainable by limiting each in achieving secondary goals. See, e.g., In re Colonial Realty Co., 980 F.2d 125, 132 (2d Cir. 1992). However, Section 546(e) is in full conflict with the goal of maximizing the assets available to creditors. Its purpose is to protect a national, heavily regulated market by limiting creditors' rights. Conflicting goals are not accommodated by giving value with the right hand and taking it away with the left. Section 546(e) cannot be trumped by the Code's goal of maximizing the return to creditors without thwarting the Section's purposes.

6. Additional Considerations Regarding Congressional Intent

We therefore conclude that Congress intended to protect from constructive fraudulent conveyance avoidance proceedings transfers by a debtor in bankruptcy that fall within Section 546(e)'s terms. As discussed supra, appellants' theory hangs on the ambiguous use of the word "trustee," has no basis in the language of the Code, leads to substantial anomalies, ambiguities and conflicts with the Code's procedures, and, most importantly, is in irreconcilable conflict with the purposes of Section 546(e). In this regard, we do not ignore Section 544(b)(2), which prohibits avoidance of a transfer to a charitable contribution by a trustee but also expressly preempts state law claims by creditors. It states: "Any claim by any person to recover a transferred contribution described in the preceding sentence under Federal or State law in a Federal or State court shall be preempted by the commencement of the case." 11 U.S.C. § 544(b)(2). Appellants rely heavily upon this provision to argue that, while Congress knew how to explicitly ***95** preempt state law in the Bankruptcy Code, it chose not to do so in the context of Section 546(e).

Appellants' argument suffers from a fatal flaw, however. In Arizona v. United States, the Supreme Court made clear that "the existence of an express pre-emption provisio[n] does not bar the ordinary working of conflict preemption principles or impose a special burden that would make it more difficult to establish the preemption of laws falling outside the clause." 567 U.S. 387, 132 S. Ct. 2492, 2504-05, 183 L.Ed.2d 351 (2012) (quotation marks and citations omitted); see also Hillman, 133 S. Ct. at 1954 ("[W]e have made clear that the existence of a separate pre-emption provision does not bar the ordinary working of conflict pre-emption principles.") (internal quotation marks and citations omitted). Section 544(b)(2) does not, therefore, undermine our conclusion as to Congress's intent.

Next, appellants argue that Congress's failure to amend Section 546(e) over the years that it has existed in pertinent form reflects a congressional intent to allow their actions to proceed. In support, they point only to requests for an amendment by the Chair of the CFTC and by Comex, see Bankruptcy Act Revision: Hearings on H.R. 31 and H.R. 32 Before the Subcomm. on Civil & Constitutional Rights of the H. Comm. on the Judiciary, 94th Cong., Supp. App. Pt. 4, 2406 (1976); Bankruptcy Reform Act: Hearings on S. 2266 and H.R. 8000 Before the Subcomm. on Improvements in Judicial Machinery of the S. Comm. on the Judiciary, 95th Cong. 1297 (1978), the enactment of Section 544(b)(2) with an express preemption provision, and a decision in the District of Delaware, PHP Liquidating, LLC v. Robbins, 291 B.R. 603, 607 (D. Del. 2003), aff'd sub nom. In re PHP Healthcare Corp., 128 F. App'x 839 (3d Cir. 2005).

To be sure, a history of relevant practice may support an inference of congressional acquiescence. See, e.g., Fiero v. Fin. Indus. Regulatory Auth., 660 F.3d 569, 577 (2d Cir. 2011) (noting that FINRA's "longstanding reliance" on enforcement mechanisms other than fines -- and Congress's failure to alter FINRA's enforcement powers -- "indicates that FINRA is not authorized to enforce the collection of its fines through the courts"); Am. Tel. & Tel. Co. v. M/V Cape Fear, 967 F.2d 864, 872 (3d Cir. 1992) ("The Supreme Court in the past has implied private causes of action where Congress, after a 'consensus of opinion concerning the existence of a private cause of action' had developed in the federal courts, has amended a statute without mentioning a private remedy.") (quoting Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 380, 102 S.Ct. 1825, 72 L.Ed.2d 182 (1982)). However, the effect or meaning of legislation is not to be gleaned from isolated requests for more protective, but possibly redundant, legislation. The impact of Section 544(b)(2) is discussed immediately above and need not be repeated here.

Finally, the failure of Congress to respond to court decisions is of interpretive significance only when the decisions are large in number and universally, or almost so, followed. See Merrill Lynch, 456 U.S. at 379, 102 S.Ct. 1825 (holding that congressional amendment of the Commodity Exchange Act that was silent on the subject of private judicial remedies did not overturn federal court decisions routinely and consistently [ ] recogniz[ing] an implied private cause of action") (emphasis added); see also Touche Ross & Co. v. Redington, 442 U.S. 560, 577 n.19, 99 S.Ct. 2479, 61 L.Ed.2d 82 (1979) (holding that the Supreme Court's implication of a private right of action under § 10(b) of the Securities and Exchange Act of 1934 was ***96** simply acquiescence in "the 25-year-old acceptance by the lower federal courts of an implied action"). The present decision is far from a departure from a generally accepted understanding. The district court decision in this very case and the bankruptcy court decision in Lyondell are in fact the sole extensive judicial discussions of the issue. Indeed, our present decision does not even constitute a split among the circuits. As or more telling with regard to the existence of a general understanding or a need for action, we find no history of the use of state law, constructive fraudulent conveyance actions to unwind settled securities transactions, either after a bankruptcy or in its absence.

The Constitution's establishment of two legislative branches that must act jointly and with the executive's approval was designed to render hasty action possible only in circumstances of widely perceived need. Congress's failure to act must be viewed in that context, and reliance upon an inference of satisfaction with the status quo must at least be based on evidence of a long-standing and recognized status quo. In the present matter, we cannot draw the suggested inference on the basis of the skimpy evidence submitted while the inference of a preemptive intent is easily drawn.

7. The Relevance of Merit Mgmt. to this Preemption Holding

Appellants finally contend that this preemption holding "cannot be reconciled" with the Supreme Court's decision in Merit Mgmt. Appellants' Motion to Recall the Mandate at 10. Again, we disagree. As an initial matter, the Merit Mgmt. Court was not tasked with assessing Section 546(e)'s preemptive force, and it did not address preemption. Instead, the sole issue in Merit Mgmt. was whether, "in the context of a transfer that was executed via one or more transactions," the relevant transfer for the purposes of Section 546(e) was the overarching transfer or any of its component transfers. Merit Mgmt., 138 S. Ct. at 888. Accordingly, Merit Mgmt. does not control our disposition of the preemption issue.

Nor have we located anything in Merit Mgmt.'s reasoning that contradicts our assessment of Congress's preemptive intent. Appellants suggest that the Supreme Court rejected a primary premise upon which we have relied here: that Section 546(e) was intended to promote " 'finality' in the securities markets." Appellants' Motion to Recall the Mandate at 10-11. The Court did no such thing, however. Instead, it merely concluded that, to the extent the policies animating Section 546(e) were relevant for determining the safe harbor's scope, those policies did not supply a basis for "deviat[ing] from the plain meaning of the language used in § 546(e)." Merit Mgmt., 138 S. Ct. at 897; see also id. at 888 ("The Court concludes that the plain meaning of § 546(e) dictates that the only relevant transfer for purposes of the safe harbor is the [overarching] transfer that the trustee seeks to avoid.").

Also, the failures of the "purposivist arguments" in Merit Mgmt., id. at 897, are not particularly instructive here due to the distinctions between the inquiries here and there. The Supreme Court has repeatedly held that where, as in Merit Mgmt., courts are interpreting the meaning of a statutory provision, they should not allow extrinsic evidence of Congressional purpose to alter the plain meaning of the statute. See, e.g., Henson v. Santander Consumer USA Inc., ––– U.S. ––––, 137 S. Ct. 1718, 1725, 198 L.Ed.2d 177 (2017) ("[I]t is quite mistaken to assume ... that whatever might appear to further the statute's primary objective must be the law.") (internal quotation marks and alterations omitted); ***97** Dodd v. United States, 545 U.S. 353, 357, 125 S.Ct. 2478, 162 L.Ed.2d 343 (2005) ("We must presume that the legislature says in a statute what it means and means in a statute what it says there.") (internal quotation marks and alterations omitted). But where, as here, we are assessing whether a statute preempts certain claims, we have been directed to consult evidence of Congressional purpose to ascertain whether the statute has a preemptive effect beyond that provided by its plain terms. See, e.g., Altria Grp., Inc. v. Good, 555 U.S. 70, 76, 129 S.Ct. 538, 172 L.Ed.2d 398 (2008) ("Congress may indicate pre-emptive intent through a statute's express language or through its structure and purpose. [Even where] a federal law contains an express pre-emption clause, it does not immediately end the inquiry because the question of the substance and scope of Congress' displacement of state law still remains.") (internal citations omitted) (emphasis added). Thus, in light of these different directives, it is clear that a "purposivist" argument should carry far more weight in this case than in Merit Mgmt.

Finally, it bears emphasizing that the other reasons underpinning our preemption holding are not implicated by Merit Mgmt. in any way. Specifically, Merit Mgmt. does not contradict our findings that appellants' legal theory has no support in the language of the Code; leads to substantial anomalies and conflicts with the Code's procedures; and requires reading Section 546(e)'s reference to a trustee et al. avoidance claim to mean that creditors could bring their own claims –- a reading that is less than plain.

For these reasons, we find that our preemption holding is consistent with Merit Mgmt.

CONCLUSION

For the reasons stated, we affirm the dismissal of appellants' claims, on preemption rather than standing grounds. We resolve no issues regarding the rights of creditors to bring state law, fraudulent conveyance claims not limited in the hands of a trustee et al. by Code Section 546(e) or by similar provisions such as Section 546(g), which was at issue in an appeal heard in tandem with the present matter, see Whyte v. Barclays Bank PLC, 644 F. App'x 60, 60 (2d Cir. 2016) (affirming the district court's dismissal of state law, fraudulent conveyance claims limited by Section 546(g) "for substantially the reasons stated in [Tribune I]"), cert. denied, ––– U.S. ––––, 137 S. Ct. 2114, 198 L.Ed.2d 220 (2017).

All Citations

946 F.3d 66

Footnotes

* Judge Alvin K. Hellerstein, of the Southern District of New York, sitting by designation.

1 In a typical LBO, a target company is acquired with a significant portion of the purchase price being paid through a loan secured by the target company's assets.

2 Because the issue has no effect on our disposition of this matter, we do not pause to consider whether a cross-appeal was necessary for appellees to raise the preemption issues in this court, but, for convenience purposes, we sometimes refer to those issues by the term cross-appeal.

3 As discussed infra, after we previously issued an opinion in this appeal, In re Tribune Co. Fraudulent Conveyance Litig. ("Tribune I"), 818 F.3d 98 (2d Cir. 2016), the Supreme Court clarified the test for determining whether a transaction falls within Section 546(e), see Merit Mgmt. Grp., LP v. FTI Consulting, Inc., ––– U.S. ––––, 138 S. Ct. 883, 200 L.Ed.2d 183 (2018), causing us to recall the mandate and issue this amended opinion.

4 Appellees contend that, with respect to the LBO transaction, Tribune also qualified as a "financial institution," but appellants disagree. We describe the facts relevant to that dispute infra.

5 Appellants argue that one of the issues we address infra -- whether Tribune's payments to shareholders remain subject to Section 546(e) following Merit Mgmt. -- requires resolving two factual disputes "never before tested in this case," thus precluding a determination as a matter of law and necessitating a remand to the district court. Appellants' Reply in Support of Motion to Recall the Mandate at 9-11. Neither of the disputes identified by appellants is factual in nature, however. Appellants first contend that certain documents cited by appellees do not suffice to establish that Computershare Trust Company, N.A. was Tribune's "agent" in connection with the LBO payments. But that argument does not present a factual dispute about the content or accuracy of those documents; instead, it only challenges the legal significance of the documents, raising a pure question of law. Second, appellants argue that a contract to redeem shares is not a "securities contract" within the meaning of 11 U.S.C. § 101(22)(A). But that argument, too, is plainly legal. Thus, there are no factual disputes precluding our consideration of whether Tribune's payments to shareholders remain subject to Section 546(e) following Merit Mgmt., and a remand is unnecessary.

6 The term "standing" has been used to describe issues arising in bankruptcy proceedings when individual creditors sue to recover funds from third parties to satisfy amounts owed to them by the debtor, and that action is defended on the ground that the recovery seeks funds that are recoverable under the Code only by

a representative of all creditors. St. Paul Fire & Marine Ins. Co. v. PepsiCo, Inc., 884 F.2d 688, 696-97 (2d Cir. 1989), disapproved of on other grounds by In re Miller, 197 B.R. 810 (W.D.N.C. 1996). The use of the term "standing" is based on the suing creditors' need to demonstrate an injury other than one redressable under the Code only by the trustee et al. Id. at 704.

7 The implications of applying the automatic stay to fraudulent conveyance actions are discussed infra.

8 Appellees also argue that Tribune was a covered entity because it was a "financial participant," and that the shareholders were likewise covered entities. Having agreed with appellees that Tribune was a "financial institution," we do not reach either of appellees' alternative arguments.

9 As the Court noted in Merit Mgmt., "[t]he parties [t]here d[id] not contend that either the debtor or petitioner in th[at] case qualified as a 'financial institution' by virtue of its status as a 'customer' under § 101(22)(A). Petitioner Merit Management Group, LP, discussed th[at] definition only in footnotes and did not argue that it somehow dictate[d] the outcome in th[e] case." Merit Mgmt., 138 S. Ct. at 890 n.2. The Court "therefore d[id] not address what impact, if any, § 101(22)(A) would have in the application of the § 546(e) safe harbor." Id.

10 Appellants suggest that we should apply the specialized definition of "customer" given in Section 761(9), see Appellants' Reply in Support of Motion to Recall the Mandate at 10-11, which appears in a subchapter dealing with commodity broker liquidations. See 11 U.S.C. § 761(9). Section 761(9)'s definition, unlike the definition of "customer" from Section 741(2), is not explicitly disclaimed in Section 101(22). Nonetheless, we believe it is clear that the definitions from Section 761(9) and Section 101(22) are not intended to be coextensive. First, there is no indication in Section 101(22)'s text that Section 761(9)'s limited definition of "customer" should apply. Moreover, Section 101(22)'s explicit disclaimer of Section 741(2)'s definition suggests that "customer" should be given a broad meaning, so it would be odd to hold – without any textual indication – that the definition in Section 761(9) circumscribes Section 101(22). In addition, other subsections of Section 101 explicitly incorporate definitions from Section 761, including its definition of "customer" specifically. See, e.g., 11 U.S.C. § 101(6) ("The term 'commodity broker' means futures commission merchant, foreign futures commission merchant, clearing organization, leverage transaction merchant, or commodity options dealer, as defined in section 761 of this title, with respect to which there is a customer, as defined in section 761 of this title."). Thus, if Congress had intended to import Section 761(9)'s definition into Section 101(22), it clearly knew how (yet declined) to do so.

11 The decision cited by appellants, Manufacturers Hanover Tr. Co. v. Yanakas, 7 F.3d 310 (2d Cir. 1993), see Appellants' Reply in Support of Motion to Recall the Mandate at 10, is inapposite. That decision involved the application of the rule that, under normal circumstances, a creditor-debtor relationship does not amount to a fiduciary relationship. Manufacturers Hanover Tr., 7 F.3d at 319. Tribune and Computershare were not in a creditor-debtor relationship.

12 Section 546(e) also covers certain "settlement payments," which need not be "in connection with a securities contract," see 11 U.S.C. § 546(e), but appellees' theory is that the payments are covered because they were transfers made in connection with a securities contract. See Appellees' Opposition to Appellants' Motion to Recall the Mandate at 20. Thus, we are not deciding whether the payments at issue qualify as "settlement payments" under Section 546(e).

13 We see no need for a full discussion of various modes of analysis used to determine federal preemption, i.e., "express" preemption, Chamber of Commerce v. Whiting, 563 U.S. 582, 131 S. Ct. 1968, 1977, 179 L.Ed.2d 1031 (2011), "field" preemption, Arizona v. United States, 567 U.S. 387, 132 S. Ct. 2492, 2502,

183 L.Ed.2d 351 (2012), or even that branch of "implied" preemption that requires a showing of "impossibility" of complying with both state and federal law, id. at 2501. The only relevant analysis in the present matter is preemption inferred from a conflict between state law and the purposes of federal law, as discussed in the text.

14 Our task of determining how a contemporaneous reader would have read Section 546(e) does not depend on the caselaw of one particular circuit.

15 Under the "Collapsing Doctrine," "[c]ourts analyzing the effect of LBOs have routinely analyzed them by reference to their economic substance, 'collapsing' them, in many cases, to consider the overall effect of multi-step transactions." In re Lyondell Chem. Co., 503 B.R. 348, 354, 379 (Bankr. S.D.N.Y. 2014) as corrected (Jan. 16, 2014). Monies passed through intermediaries are deemed to be the property only of the ultimate recipients, here the cashed out shareholders.

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Only the Westlaw citation is currently available.
United States Court of Appeals, Second Circuit.

IN RE: TRIBUNE COMPANY FRAUDULENT CONVEYANCE LITIGATION
Marc S. Kirschner, as Litigation Trustee for the Tribune Litigation Trust, Plaintiff-Appellant,
v.
Large Shareholders, Financial Advisors, Financial Institution Holders, Financial Institution Conduits, Pension Funds, Individual Beneficial Owners, Mutual Funds, Defendants-Appellees.
Marc S. Kirschner, as Litigation Trustee for the Tribune Litigation Trust, Plaintiff-Appellant,
v.
Citigroup Global Markets Inc., Merrill Lynch, Pierce, Fenner & Smith Incorporated, Defendants-Appellees.

Docket Nos. 19-3049-cv; 19-449-cv
|
August Term 2020
|
Argued: August 24, 2020
|
Decided: August 20, 2021

Synopsis
Background: Litigation trustee appointed under Chapter 11 debtor-newspaper company's confirmed plan brought fraudulent conveyance and other claims on behalf of creditors against shareholders who sold their stock in debtor's leveraged buyout (LBO) less than one year prior to debtor's bankruptcy filing, and against financial advisors that helped debtor navigate and complete the LBO. The United States District Court for the Southern District of New York, Richard J. Sullivan and Denise L. Cote, JJ., entered judgment and orders dismissing claims, and denied leave to file sixth amended complaint. Litigation trustee appealed.

Holdings: The Court of Appeals, Chin, Circuit Judge, held that:

trustee failed to plausibly allege that fraudulent intent of debtor's senior management should be imputed to special committee created by board of directors to evaluate LBO;

trustee failed to plead "badges of fraud" sufficient to raise strong inference of actual fraudulent intent on the part of special committee;

debtor's LBO structured in two steps was not a unitary transaction such that steps could be collapsed into one for purposes of fraudulent conveyance claims;

trustee failed to sufficiently allege that debtor was insolvent as required to support claims that controlling shareholders breached their fiduciary duties by pushing for LBO;

exceptions to in pari delicto doctrine did not apply to permit trustee to pursue aiding and abetting breach of fiduciary duty and professional malpractice claims;

factual question whether two financial advisors provided reasonably equivalent value for success fee was not appropriate to determine on motion to dismiss; and

District Court did not abuse its discretion in denying trustee leave to amend claims.

Affirmed in part, vacated in part, and remanded.

Procedural Posture(s): On Appeal; Motion to Dismiss for Failure to State a Claim; Motion to Amend the Complaint.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, (Sullivan and Cote, *JJ.*)

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Before: Raggi and Chin, Circuit Judges. [*]

Opinion

Chin, Circuit Judge:

***1** In 2007, the Tribune Company ("Tribune"), then-publicly traded, executed a leveraged buyout (the "LBO") to go private. Less than a year later, Tribune filed for Chapter 11 bankruptcy. Plaintiff-appellant Marc Kirschner, the bankruptcy litigation trustee (the "Trustee"), brought fraudulent conveyance and other claims on behalf of creditors against shareholders who sold their stock in the LBO and against the financial advisors that helped Tribune navigate and complete the LBO. In several orders and decisions, the district court dismissed the Trustee's claims for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

For the reasons set forth below, we **AFFIRM in part, VACATE in part**, and **REMAND** for further proceedings.

BACKGROUND

I. *The Facts*

The facts alleged in the operative complaints are assumed to be true for purposes of this appeal. [2]

Prior to its bankruptcy in 2008, Tribune was a media company that owned numerous radio and television stations and major national newspapers, including *The Chicago Tribune*, *The Los Angeles Times*, and *The Baltimore Sun*. In 2005, the newspaper publishing industry faced severe decline and, by 2006, Tribune, which derived approximately 75% of its total revenues from such publishing, started faltering financially. In September 2006, Tribune's board of directors (the "Board") created a special committee (the "Special Committee") to consider ways to return value to Tribune's shareholders. The Special Committee was comprised of all seven of the Board's independent directors (the "Independent Directors").

A. *Tribune Retains Advisors*

Before the formation of the Special Committee, the Board hired two financial advisors, defendant-appellee Merrill, Lynch, Pierce, Fenner, and Smith, Inc. ("Merrill Lynch") on October 17, 2005 and defendant-appellee Citigroup Global Markets, Inc. ("Citigroup") on October 26, 2005, to conduct a strategic review and to recommend possible responses to the ongoing changes in the media industry. Both Merrill Lynch and Citigroup signed engagement letters, which promised each a "Success Fee" of $12.5 million if a "Strategic Transaction" was completed. The engagement letters also allowed each firm to play a role in helping to finance any such "Strategic Transaction," despite the potential conflict of interest inherent in the firms' distinct roles in any such deal. The engagement letters further specified that neither Merrill Lynch nor Citigroup was a fiduciary.

On October 17, 2006, the Special Committee hired Morgan Stanley & Co. LLC f/k/a Morgan Stanley & Co. Inc. ("Morgan Stanley") to serve as its independent financial advisor. Morgan Stanley's engagement letter specified that the firm owed no fiduciary duty to Tribune.

B. *Proposed LBO*

***2** In early 2007, Sam Zell, an investor, proposed to take Tribune private. At this time, defendants-appellees Chandler Trust No. 1, Chandler Trust No. 2, and certain Chandler sub-trusts (collectively, the "Chandler Trusts") held approximately 20% of Tribune's publicly-held shares. The Robert R. McCormick Foundation and the Cantigny Foundation (collectively, the "Foundations") held another 13% of shares. The Special Committee sought the views of the Chandler Trusts and the Foundations (together, the "Large Shareholders") on Zell's proposal. Concerned that Tribune's stock price would fall before they could sell their shares, the Large Shareholders indicated that they would only vote for a two-step LBO that allowed them to cash out during the first step. In response, Zell suggested a two-step LBO, in which, at Step One, Tribune would borrow money to buy back roughly half of its shares and, at Step Two, Tribune would borrow more money to purchase all remaining shares. Tribune would then merge with a specially created shell corporation. The new entity would become an S Corporation, resulting in nearly $1 billion in anticipated tax savings. In considering whether to approve the LBO, the Board consulted Citigroup and Merrill Lynch.

To secure financing for the LBO, Tribune needed an opinion stating that it would be solvent after each step of the proposed LBO. On February 13, 2007, the Board hired Duff & Phelps to provide such a solvency opinion. Toward that end, Tribune gave Duff & Phelps financial projections predicting that Tribune would fare better in the second half of 2007 as compared to the same period from the year prior (the "February Projections"). These figures were created by Tribune's management team, which, according to the Trustee, had a conflict of interest because its members stood to cash out Tribune shares worth $36 million and reap other gains if an LBO were executed.

After conducting its analysis, Duff & Phelps concluded it could not provide a solvency opinion without considering the $1 billion in tax savings that Tribune expected at Step Two. Duff & Phelps, however, also determined that considering such tax savings in a solvency opinion was not appropriate. Accordingly, on April 1, 2007, Duff & Phelps instead provided a "viability opinion," which concluded that the fair market value of Tribune's assets would exceed its liabilities after the close of the LBO.

The same day, Morgan Stanley and Merrill Lynch issued fairness opinions that the price to be paid for Tribune's stock was fair. These opinions were filed with the SEC as proxy statements. Also, on April 1, 2007, the Special Committee unanimously voted to recommend the two-step LBO, which the Board ultimately approved.

C. *Implementation of LBO*

Still in need of a solvency opinion to secure financing for the approved LBO, Tribune approached Houlihan Lokey, which declined, on March 29, 2007, to bid for the engagement. On April 11, 2007, Tribune retained Valuation Research Company ("VRC") to provide two solvency opinions, one for Step One and one for Step Two. To secure the engagement, VRC, "a virtually unknown firm," agreed to use a non-standard approach in formulating its solvency opinions. 3049 Appellant's Br. at 12–13.[3] VRC charged Tribune $1.5 million -- VRC's highest fee ever for such an engagement -- to issue the solvency opinions.

On May 24, 2007, VRC issued an opinion that Tribune would be solvent after completing Step One. According to the Trustee, however, after VRC issued this solvency opinion, Tribune's management team realized that the February Projections, upon which VRC's opinion was based, were no longer an accurate forecast of Tribune's 2007 second half performance. No one alerted VRC that Tribune was unlikely to meet the February Projections. Indeed, the Trustee alleges that Citigroup and Merrill Lynch reviewed VRC's solvency analysis but "failed to fulfill their responsibilities as 'gatekeepers' retained to objectively analyze the LBO." 449 Appellant's Br. at 8.

Despite the issue with VRC's solvency opinion, Tribune delivered it to the financing banks on June 4, 2007. That same day, Step One closed. Tribune borrowed $7 billion to pay off its existing bank debt and to complete a tender offer, buying back just over half of its publicly held shares. The Large Shareholders sold all their shares, and the members of the Board appointed by those shareholders resigned. After Step One, Tribune issued a proxy statement, which explained that while the LBO was in the company's best interest, it was risky and might not create the anticipated value.

***3** In October 2007, management again updated its financial projections (the "October Projections") in preparation for Step Two. The October Projections still forecasted that Tribune's performance would improve, but not as quickly as the February Projections had predicted.

Even with the October Projections, VRC was reluctant to author a second solvency opinion because it did not appear that Tribune would be able to repay its debts without refinancing its existing debts. Tribune management represented to VRC that Morgan Stanley -- the Special Committee's financial advisor -- believed that Tribune would be able to refinance its debts, even though Morgan Stanley had not drawn that conclusion. On December 18, 2007, VRC issued a solvency opinion stating that Tribune would be solvent after Step Two.

The Board's retained financial advisors did not agree with VRC's second solvency opinion. In fact, analyses from Citigroup and Merrill Lynch showed that, at the close of Step Two, Tribune would be insolvent by more than $1.4 billion and $1.5 billion respectively, but neither advisor tried to stop the transaction. On December 20, 2007, Step Two closed, and Tribune borrowed an additional $3.7 billion, which it used to buy back its remaining publicly held shares.

After the close of Step Two, Tribune had roughly $13 billion in debt. Tribune's directors and officers received approximately $107 million from selling their stock and from bonuses. Citigroup and Merrill Lynch were each paid their $12.5 million success fee because they helped effectuate a "Strategic Transaction." A group of pension funds (the "Pension Funds"), who are defendants-appellees in this case, also received cash proceeds in connection with the LBO.

II. *Procedural History*

On December 8, 2008 -- less than one year after Step Two closed -- Tribune filed for Chapter 11 bankruptcy in Delaware. Claims were eventually filed in the Delaware Bankruptcy Court on behalf of creditors, including for fraudulent conveyance. Tribune emerged from bankruptcy in 2012; pursuant to Tribune's plan of reorganization, the claims were transferred to the Tribune Litigation Trust, and the Trustee was appointed to pursue the claims on behalf of Tribune's creditors.

In the meantime, some seventy-four federal and state lawsuits asserting fraudulent conveyance and related claims were filed around the country by Tribune's creditors. Eventually, the Judicial Panel on Multidistrict Litigation transferred the bankruptcy claims as well as the federal and state actions to the Southern District of New York, where they were consolidated on the basis that the claims all arose out of the LBO and Tribune's 2008 Chapter 11 bankruptcy filing. *See In re: Tribune Co. Fraudulent Conv. Litig.*, 831 F. Supp. 2d 1371, 1372 (J.P.M.L. 2011).

On September 23, 2013, the district court (Sullivan, *J.*) dismissed several state law constructive fraudulent conveyance claims that were brought against Tribune. The parties appealed, and on March 29, 2016, this Court affirmed the district court's dismissal of the state law fraudulent conveyance claims. *See In re Tribune Co. Fraudulent Conv. Litig.*, 818 F.3d 98, 105 (2d Cir. 2016) ("*Tribune I*"). After further proceedings in this Court and the Supreme Court, we issued an amended opinion on December 19, 2019, affirming the district court's dismissal of the state law constructive fraudulent conveyance claims on the basis that these claims were preempted by section 546(e) of the Bankruptcy Code, which provides that a trustee may not avoid a transfer made by or to a "financial institution" in connection with "a securities contract." *In re Tribune Co. Fraudulent Conv. Litig.*, 946 F.3d 66, 78, 96 (2d Cir. 2019) ("*Tribune II*"). [4]

***4** In the meantime, the district court proceeded to consider defendants' motions to dismiss the remaining claims. On January 6, 2017, the district court (Sullivan, *J.*) dismissed the Trustee's intentional fraudulent conveyance claims with prejudice because it found that the complaint failed to allege that Tribune had the actual intent to defraud its creditors when it bought back shares from shareholders at both steps of the LBO. In particular, the district court concluded that the intent of the Tribune officers who created the February and October Projections could not be attributed to the Special Committee, which approved the LBO. The district court also declined to grant the Trustee leave to amend its complaint in the *FitzSimons* action, "without prejudice to renewal in the event of an intervening change in the law." 3049 S. App'x at 28.

On November 30, 2018, the district court (Sullivan, *J.*) dismissed the Trustee's state law claims for breach of fiduciary duty asserted in the *FitzSimons* Complaint and certain "tag-along" actions. In particular, the district court declined to collapse the two-step LBO into a unitary transaction, thereby concluding that (1) Tribune was solvent at Step One, and (2) the Large Shareholders were not liable at Step Two because they had relinquished their board seats and Tribune stock by that point.

On December 1, 2018, the case was reassigned to Judge Cote. On January 23, 2019, the district court (Cote, *J.*) granted Citigroup and Merrill Lynch's motions to dismiss certain claims in the *FitzSimons* and *Citigroup* actions. As relevant here, the district court dismissed the aiding-and-abetting and professional malpractice claims under the *in pari delicto* doctrine and it dismissed the fraudulent conveyance claims on the ground that the advisory fees received did not constitute actual or constructive fraudulent conveyances. On April 23, 2019, the district court denied the Trustee's request to amend his complaint in the *FitzSimons* action, denying leave to file what would have been a Sixth Amended Complaint.

These appeals followed.

DISCUSSION

Three categories of claims are at issue: (1) intentional fraudulent conveyance claims against the shareholders based on the buy-back of their shares; (2) breach of fiduciary duty and aiding and abetting breach of fiduciary claims against the allegedly controlling shareholders; and (3) aiding and abetting breach of fiduciary duty, professional malpractice, intentional fraudulent conveyance, and constructive fraudulent conveyance claims against Citigroup, Merrill Lynch, Morgan Stanley, and VRC (collectively, the "Financial Advisors"). We discuss these claims in turn, as well as the district court's denial of leave to amend.

We review *de novo* a district court's grant of a motion to dismiss under Rule 12(b)(6) for failure to state a claim, "accepting the complaint's factual allegations as true and drawing all reasonable inferences in the plaintiff's favor." *Carpenters Pension Tr. Fund of St. Louis v. Barclays PLC*, 750 F.3d 227, 232 (2d Cir. 2014) (internal quotation marks omitted). "We review the district court's denial of leave to amend for abuse of discretion." *Broidy Cap. Mgmt. LLC v. Benomar*, 944 F.3d 436, 447 (2d Cir. 2019) (internal quotation marks omitted). If, however, "the denial was based on futility, ... we review that legal conclusion *de novo*." *City of Pontiac Policemen's & Firemen's Ret. Sys. v. UBS AG*, 752 F.3d 173, 188 (2d Cir. 2014).

I. *Intentional Fraudulent Conveyance Claims*

We first consider whether the district court erred in dismissing the Trustee's intentional fraudulent transfer claims against the shareholders based on the buy-back of their shares.

A. *Applicable Law*

The Bankruptcy Code allows a bankruptcy trustee to recover fraudulent transfers where a transfer has been made with "actual intent to hinder, delay, or defraud" creditors. 11 U.S.C. § 548(a)(1)(A). An intentional fraudulent conveyance claim must be pled with specificity, as required by Fed. R. Civ. P. 9(b). *See* *In re Sharp Int'l Corp.*, 403 F.3d 43, 56 (2d Cir. 2005). The alleged fraud must relate to the specific payment or transfer the plaintiff is seeking to avoid, rather than to the overall course of business. *See* *id.* (differentiating between alleged fraud in obtaining funding from noteholders and subsequent payment of some proceeds to defendant). And by "actual intent," the statute contemplates intent "existing in fact or reality" and not merely the imputed intent that would suffice for a constructive fraudulent conveyance claim. *Intel Corp. Inv. Pol'y Comm. v. Sulyma*, ––– U.S. ––––, 140 S. Ct. 768, 776, 206 L.Ed.2d 103 (2020) (holding, in context of ERISA, that "actual" means "existing in fact or reality," more than "potential, possible, virtual, conceivable, theoretical, hypothetical, or nominal") (citations and internal quotation marks omitted); *compare* 11 U.S.C. § 548(a)(1)(A) (intentional fraudulent conveyance) *with id.* § 548(a)(1)(B) (constructive fraudulent conveyance); *see also* *United States v. Finkelstein*, 229 F.3d 90, 95 (2d Cir. 2000) ("[T]he should-have-known alternative connotes a concept more akin to negligence than to knowledge.").

***5** Because of the difficulties in proving intent to defraud, a pleader may rely on "badges of fraud," *i.e.*, circumstances so commonly associated with fraudulent transfers that their presence gives rise to an inference of intent. *In re Kaiser*, 722 F.2d 1574, 1582 (2d Cir. 1983). Courts have inferred intent to defraud from the "concealment of facts and false pretenses by the transferor," "reservation by [the transferor] of rights in the transferred property," the transferor's "absconding with or secreting the proceeds of the transfer immediately after their receipt," "the existence of an unconscionable discrepancy between the value of property transferred and the consideration received therefor," the oppressed debtor's creation "of a closely-held corporation to receive the transfer of his property," as well as the oppressed debtor's transfer of property while insolvent. *Id.* (citation omitted); *see also* *Sharp*, 403 F.3d at 56.

A corporation can only act through its directors and officers, and we look to state law to determine who has the authority to act on behalf of a corporation (and therefore whose actions to review to see whether there was fraudulent intent or badges of fraud). *See* *Burks v. Lasker*, 441 U.S. 471, 478, 99 S.Ct. 1831, 60 L.Ed.2d 404 (1979) ("[T]he first place one must look to determine the powers of corporate directors is in the relevant State's corporation law."). Under Delaware law -- Tribune's state of incorporation -- only the board of directors (or a committee to which the board has delegated its authority) has the power to approve an extraordinary transaction such as a merger or consolidation. *See* Del. Gen. Corp. Law §§ 141(a), (c), 160(a), 251(b). Here, the Board delegated its authority to approve a merger and redemption of Tribune's stock to the Special Committee, and thus the Trustee was required to plead allegations that gave rise to a strong inference that the Special Committee had the "actual intent to hinder, delay, or defraud" Tribune's creditors, as required by 11 U.S.C. § 548(a)(1)(A).

The Trustee does not argue that the members of the Special Committee had "actual intent" to harm Tribune's creditors but instead contends that Tribune's senior management had the necessary fraudulent intent, and that this intent must be imputed to the Special Committee. The issue of whether a company's officers' intent to defraud creditors can be imputed to an independent special committee for purposes of a fraudulent conveyance claim under the Bankruptcy Code is a question of first impression in this Circuit. The First Circuit has addressed the issue and applied a "control" test -- a court "may impute any fraudulent intent of [an actor] to the transferor ... [if the actor] was in a position to control the disposition of [the transferor's] property." *In re Roco Corp.*, 701 F.2d 978, 984 (1st Cir. 1983). The district court here applied the control test, holding that "this test appropriately accounts for the distinct roles played by directors and officers under corporate law, while also factoring in the power certain officers and other actors may exercise over the corporation's decision to consummate a transaction." 3049 S. App'x at 9.

The Trustee argues that the district court erred in applying the control test, and that the correct standard is either a scope-of-employment agency standard or a "proximate cause" standard. We are not persuaded. In the circumstances here, we affirm the district court's use of a "control" test for imputation.

We agree that for an intentional fraudulent transfer claim, which requires "actual intent," a company's intent may be established only through the "actual intent" of the individuals "in a position to control the disposition of [the transferor's] property." *Roco*, 701 F.2d at 984; *see also* *In re Lehman Bros. Holdings, Inc.*, 541 B.R. 551, 576 (S.D.N.Y. 2015) ("[T]he Court's analysis regarding imputation must turn on *actual control* of [the debtor]."). [5]

B. ***Application***

***6** The Trustee makes two arguments in support of his intentional fraudulent transfer claims. First, he argues that Tribune's senior management possessed actual intent to defraud, and that intent should be imputed to the Special Committee. Second, even assuming the imputation argument fails, the Trustee maintains that Independent Directors on the Special Committee had the required intent as demonstrated by "badges of fraud."

1. ***Imputation of Intent***

We conclude that the Trustee failed to plausibly allege that the intent of Tribune's senior management should be imputed to the Special Committee because the Trustee failed to allege that Tribune's senior management controlled the transfer of the property in question.

As discussed above, the Board created an independent Special Committee to evaluate the LBO. The Special Committee, in turn, hired Morgan Stanley to serve as its independent financial advisor. As the district court observed, the Trustee failed to allege that senior management inappropriately pressured the Independent Directors -- who included former senior officers of major corporations -- to approve the transactions or that senior management dominated the Special Committee.

The Trustee failed to allege any financial or personal ties between senior management and the Independent Directors that could have affected the impartiality of the Special Committee. And to the extent that the officers misled the Special Committee by presenting it with the February Projections and a flawed viability and solvency opinions, Morgan Stanley and the Special Committee itself checked these figures. Therefore, to impute the officers' intent onto the Special Committee, which was working independently with an outside financial advisor and independently reviewed opinions provided by Duff & Phelps and VRC, would stretch the "actual intent" requirement as set forth in § 548(a)(1)(A) to include the merely possible or conceivable or hypothetical as opposed to existing in fact and reality.

2. *The Badges of Fraud*

On appeal, the Trustee contends that five of the traditional "badges of fraud" weigh in favor of finding actual intent -- (1) lack of consideration for the shareholder transfers; (2) Tribune's financial condition; (3) the relationship among the parties; (4) the "pattern of transactions"; and (5) the "general chronology" of the events. 3049 Appellant's Br. at 37–38. While some of these factors arguably weigh in favor of the Trustee, in the end we conclude that the district court correctly held that the Trustee failed to plead "badges of fraud" sufficient to raise a strong inference of actual fraudulent intent on the part of the Special Committee. *See* *Kaiser*, 722 F.2d at 1582–83.

The Trustee's assertion that Independent Directors stood to earn $6 million for selling their shares if they approved the LBO is insufficient to satisfy the stringent pleading standard of Rule 9(b). First, it would be unreasonable to assume actual fraudulent intent whenever the members of a board of directors (or a committee created by that board) stood to profit from a transaction they recommended or approved. *See, e.g.,* *Kalnit v. Eichler*, 264 F.3d 131, 139 (2d Cir. 2001) ("Motives that are generally possessed by most corporate directors and officers do not suffice [to demonstrate fraud]. ... Insufficient motives, we have held, can include (1) the desire for the corporation to appear profitable and (2) the desire to keep stock prices high to increase officer compensation."). Second, the Independent Directors owned only a small fraction (0.08%) of Tribune's shares, and the Independent Directors' shares were sold at a price only slightly above the price at which Tribune stock had been trading. These assertions, even assuming they are true, do not give rise to a strong inference of actual fraudulent intent.

***7** The Trustee's arguments that the Independent Directors "knew that Tribune was falling far short of projections and thus was unlikely to generate enough cash to service its debt" and the risky nature of the proposed LBO were indications of fraud are also unpersuasive. 3049 Appellant's Br. at 38. Even assuming the Independent Directors were wrong in believing that Tribune's financial condition would improve, their approval of a risky transaction when Tribune and other newspaper companies were struggling would arguably support a negligence or constructive fraud claim but not, in the circumstances here, an intentional fraudulent transfer claim. *See, e.g.,* *In re Lehman Bros. Holdings, Inc.*, 541 B.R. at 577 ("Indeed, there is nothing unlawful about a company transacting business during unusually difficult financial times in an attempt to prevent its own collapse. To find otherwise would place in question any contract executed during a financial downturn and invite upheaval in the financial markets."). Moreover, Tribune's contemporaneous public filings warned that its projections could fall short, and the Independent Directors had an obligation to try to achieve the highest price for Tribune's shareholders. *See, e.g.,* *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986) (directors have duty to obtain highest price for shareholders).

Again, the Trustee was required to plausibly allege *actual* fraudulent intent on the part of the members of the Special Committee. We agree with the district court that the Trustee failed to do so.

II. *State Law Fiduciary Duty Claims*

We next consider the Trustee's claims that the Large Shareholders breached their fiduciary duties under Delaware law by pushing for the LBO based on projections they knew to be false and by causing Tribune to incur debt they knew would leave the company insolvent. The Trustee also alleges that through this conduct the Large Shareholders aided and abetted senior management's own breach of fiduciary duty and were unjustly enriched. The Trustee argues that Steps One and Two of the LBO should be collapsed so that the LBO is viewed as a single unitary transaction. The Trustee contends that, if the LBO is so viewed and Tribune's Step Two obligations taken into account at the start, Tribune was insolvent as of April 1, 2007, the day that Tribune's Board originally voted to approve the LBO. The Trustee alleges that the Large Shareholders were controlling shareholders with attendant fiduciary duties before Step One and that these fiduciary duties were breached by advocating for and executing the LBO.

The district court dismissed Trustee's claims, holding that Steps One and Two could not be collapsed into a unitary transaction and that Tribune's purported insolvency had to be analyzed separately at each of the LBO's two steps. The district court concluded that the Trustee's allegations failed at Step One because he could not plausibly allege that Tribune was insolvent at that point. While the district court concluded that the Trustee had adequately pleaded Tribune's insolvency at Step Two, it held that the fiduciary duty claims nevertheless failed because, after Step One, the Large Shareholders no longer owned any Tribune stock and their appointed directors had resigned from the Board.

The principal issue with respect to these claims is thus whether the Trustee's pleadings support collapsing Step One and Step Two into one event.

A. *Applicable Law*

Under Delaware law, a shareholder owes the company a fiduciary duty "only if it owns a majority interest in or exercises control over the business affairs of the corporation." *Ivanhoe Partners v. Newmont Mining Corp.*, 535 A.2d 1334, 1344 (Del. 1987). If such a fiduciary duty exists, a shareholder breaches that duty if, for its own benefit, it approves a transaction that renders the corporation insolvent. *See, e.g.*, *In re Tropicana Entm't, LLC*, 520 B.R. 455, 471 (Bankr. D. Del. 2014) (holding that creditor must allege either that corporation was or became insolvent as result of fiduciary's misconduct to bring suit for breach of fiduciary duty); *see also* *Crawford v. Franklin Credit Mgmt. Corp.*, 758 F.3d 473, 482 (2d Cir. 2014) (noting this Court may "affirm the judgment on any basis that is supported by the record"). [6]

***8** To determine whether the two steps should be viewed as a single transaction, the district court applied the *Sabine* factors, which consider (i) "[w]hether all of the parties involved had knowledge of the multiple transactions"; (ii) "[w]hether each transaction would have occurred on its own"; and (iii) "[w]hether each transaction was dependent or conditioned on other transactions." *In re Sabine Oil & Gas Corp.*, 547 B.R. 503, 541 (Bankr. S.D.N.Y.), *aff'd*, 562 B.R. 211 (S.D.N.Y. 2016).

In performing this analysis, Delaware courts have sometimes applied a "step-transaction doctrine," under which collapse is warranted if a party can satisfy any one of three tests: (1) the "end result test," which authorizes collapse "if it appears that a series of separate transactions were prearranged parts of what was a single transaction, cast from the outset to achieve the ultimate result"; (2) the "interdependence test," which authorizes collapse if "the steps are so interdependent that the legal relations created by one transaction would have been fruitless without a completion of the series"; and (3) the "binding-commitment test," which allows collapse "only if, at the time the first step is entered into, there was a binding commitment to undertake the later steps." *Bank of N.Y. Mellon Tr. Co. v. Liberty Media Corp.*, 29 A.3d 225, 240 (Del. 2011) (internal quotation marks omitted).

Delaware courts have also noted that, regardless of the test to be applied, the substance of the transaction is what matters, not the form. *See* *Gatz v. Ponsoldt*, 925 A.2d 1265, 1280 (Del. 2007). Further, they have noted that "courts have found that a set of transactions may be viewed as one integrated transaction if the transactions reasonably collapse into a single integrated plan and either defraud creditors or leave the debtor with less than equivalent value post-exchange." *In re Hechinger Inv. Co. of Del.*, 274 B.R. 71, 91 (D. Del. 2002) (internal quotation marks omitted). In *Hechinger*, the court denied a motion to dismiss and noted that it was "reluctant to conclude that because the defendants structured the set of transactions in a certain manner, they [were] immune from a claim of breach of fiduciary duty, especially where the [complaint] allege[d] that the harms it complain[ed] of were foreseeable results of the acts of the defendants." *Id.*

B. *Application*

1. *Was the LBO a Unitary Transaction?*

Although we must accept as true all plausible allegations set forth in the complaint, we need not accept "threadbare recitals of a cause of action's elements" that are "supported by mere conclusory statements." *Ashcroft v. Iqbal*, 556 U.S. 662, 663, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). Here, the Trustee failed to sufficiently allege that the two steps should be collapsed into one.

First, it is undisputed that there were several obstacles that Tribune needed to clear after Step One and before completing Step Two. At Step One, Tribune borrowed approximately $7 billion and executed a tender offer, by which the company repurchased half of Tribune's outstanding common stock and refinanced its existing debt. Even if Step Two were never consummated, Step One would have amounted to a standalone recapitalization plan -- similar to transactions Tribune had engaged in prior to the LBO. [7]

***9** Additionally, the "knowledge and intent of the parties" weigh heavily against the Trustee's collapse argument as neither Tribune nor the Large Shareholders knew for certain whether both steps would be completed. Step Two required shareholder approval, which was not received until months after Step One closed, and the Trustee does not allege that the Large Shareholders had anything to do with the "pie-in-the-sky" February Projections. 3049 J. App'x at 146–47. Similarly, Tribune never knew that Step Two was a foregone conclusion, as its merger would need government approval.

Further, the complaint acknowledges that there were several additional hurdles Tribune had to clear to effectuate Step Two, including receiving a solvency opinion, and that the Large Shareholders were concerned that the deal would not actually close. Indeed, Tribune's July 13, 2007 proxy statement warned that there was a "risk that the conditions to the [Step Two] Merger will not be met, including the conditions requiring receipt of FCC approval, the receipt of financing and receipt of a solvency opinion." 3049 J. App'x at 1740. Finally, as the Large Shareholders point out, the two-step transaction was designed to guard against the possibility that the second step might not close if conditions precedent were not satisfied. The Trustee even acknowledges that the LBO was structured in two steps *because* the Board "express[ed] concerns regarding the delays and completion risk associated with Zell's [initial single-step] proposal." 3049 J. App'x at 191. Therefore, the Board decided instead on the two-step LBO to "provide an upfront distribution to Tribune's stockholders," even if Step Two were never consummated. *Id*.

The parties do not dispute that *Sabine* applies federally, though ultimately we conclude that, regardless of whether *Sabine* or Delaware's "step-transaction doctrine" applies, the two steps of this LBO should not be collapsed. As the facts alleged in the complaint make clear, the third *Sabine* factor weighs against collapse. Further, collapse is inappropriate under all three of the step-transaction tests, because the parties intended to structure the two steps as independent transactions, Step One was able to stand alone, and there was no binding commitment to undertake Step Two. Accordingly, we affirm the district court's conclusion that the two steps must be considered independently.

2. *Was Tribune Insolvent at Step One?*

The Trustee argues that even if the two steps are not treated as a unitary transaction, he sufficiently alleged Tribune's insolvency at Step One, to support a claim that the Large Shareholders breached their fiduciary duties when approving of a transaction that resulted in insolvency. The district court held that the Trustee failed to sufficiently allege that Tribune was insolvent at Step One of the LBO under either the "balance sheet" or the "inability to pay debt when due" tests. We agree.

In Delaware, "[u]nder the balance sheet test, an entity is insolvent if it has liabilities in excess of a reasonable market value of assets held." *Quadrant Structured Prods. Co. v. Vertin*, 102 A.3d 155, 176 (Del. Ch. 2014) (internal quotation marks omitted). We are not persuaded by the Trustee's argument that the district court erred in failing to take into account "the commitments Tribune had *already* made -- notably to borrow an additional $3.7 billion of debt and to make an additional $4 billion distribution to its shareholders -- for which performance was due at Step Two." 3049 Appellant's Br. at 65. This argument rests on the same logic undergirding the Trustee's argument in favor of collapsing the two steps, which we have rejected for the reasons outlined above. Moreover, the Trustee himself admits that he "did not allege that the $8 billion borrowed at Step One, standing alone, rendered Tribune insolvent." *Id.* at 62.

***10** As to the "inability to pay debts when due" test, the Trustee's argument again hinges upon his assertion that the district court should have considered whether Tribune was able to pay upcoming debts or raise additional capital in the future -- *i.e.*, by taking "Step Two into account, along with Tribune's ability to access additional funds." *Id.* at 70. In other words, the Trustee argues that courts should not limit their consideration to past debt payments and instead also consider whether companies will be able to pay upcoming debts or raise additional capital in the future.

There appears to be no consensus in Delaware courts, however, as to whether this test is forward-looking. *See, e.g.*, Robert J. Stearn, Jr. & Cory D. Kandestin, *Delaware's Solvency Test: What Is It and Does It Make Sense? A Comparison of Solvency Tests Under the Bankruptcy Code and Delaware Law*, 36 Del. J. Corp. L. 165, 182 (2011) ("The [inability to pay debts when due] test is not entirely clear: the unanswered question is whether the test is present or forward-looking. ... The case law does not answer this question definitively."). The Trustee cites several Delaware cases, *see* 3049 Appellant's Br. at 69, but they are inapposite as none definitively establishes that courts *must* consider future debts to be incurred as part of its insolvency analysis. Moreover, as the district court observed, this Court offered a definitive answer in *Pereira v. Farace*, 413 F.3d 330 (2d Cir. 2005). There, we rejected a forward-looking approach, noting that such a test would "project[ ] into the future to determine whether capital will remain adequate over time while the Delaware [inability to pay debts when due] test looks solely at whether the corporation has been paying bills on a timely basis." *Id*. at 343. We see no reason to overturn that holding here.

Accordingly, we conclude that the district court did not err in dismissing the Trustee's state law claims against the Large Shareholders. We additionally conclude that the district court did not abuse its discretion in dismissing these claims with prejudice, as the Trustee has not explained what specific facts he would plead to salvage these claims.

III. *Claims Against Financial Advisors*

We next consider whether the district court erred in dismissing the following claims against the Financial Advisors: (1) aiding and abetting breaches of fiduciary duty and professional malpractice [8]; (2) intentional fraudulent conveyance; and (3) constructive fraudulent conveyance. For the reasons set forth below, we affirm the district court's dismissal of the aiding and abetting and professional malpractice claims as to all Financial Advisors; we affirm the district court's dismissal of the intentional fraudulent conveyance claims as to Morgan Stanley, Citigroup, and Merrill Lynch, and vacate the dismissal of these claims as to VRC; and we affirm the dismissal of the constructive fraudulent conveyance claims as to Morgan Stanley and VRC and vacate the dismissal of these claims as to Citigroup and Merrill Lynch.

A. *Aiding and Abetting Breach of Fiduciary Duty and Professional Malpractice Claims*

1. *Applicable Law*

***11** Under Delaware law, [9] a third party may be liable for aiding and abetting a breach of fiduciary duty if there is "(i) the existence of a fiduciary relationship, (ii) a breach of the fiduciary's duty, (iii) knowing participation in that breach by the defendants, and (iv) damages proximately caused by the breach." *RBC Cap. Mkts., LLC v. Jervis*, 129 A.3d 816, 861 (Del. 2015).

The *in pari delicto* doctrine acts as an affirmative defense to an aiding and abetting claim by barring a plaintiff "from recovering damages if his losses are substantially caused by activities the law forbade him to engage in." *Stewart v. Wilmington Tr. SP Servs., Inc.*, 112 A.3d 271, 301–02 (Del. Ch.), *aff'd,* 126 A.3d 1115 (Del. 2015) (internal quotation marks omitted). In other words, a plaintiff can generally only sue for aiding and abetting a breach of fiduciary duty if the plaintiff's hands are clean. As applied to corporations, the illegal actions of a corporation's officers and directors are imputed to the corporation itself. *Id.* at 303. There are, however, exceptions that render the *in pari delicto* doctrine inapplicable and therefore permit a plaintiff to sue, even if its hands are not clean.

First, under the adverse interest exception, a corporation is permitted to sue those alleged to have aided an agent's wrongdoing when "the corporate agent responsible for the wrongdoing was acting *solely* to advance his own personal financial interest, rather than that of the corporation itself." *In re Am. Int'l Grp., Inc., Consol. Derivative Litig.*, 976 A.2d 872, 891 (Del. Ch. 2009) ("*AIG II*"), *aff'd sub nom. Teachers' Ret. Sys. of La. v. Gen. Re Corp.*, 11 A.3d 228 (Del. 2010) (emphasis added). The adverse interest exception, however, does not enable a plaintiff to recover if the wrongdoing benefits the corporation. *Stewart*, 112 A.3d at 309.

Further, the exception does "not apply even when the 'benefit' enjoyed by the corporation is ultimately outweighed by the long-term damage that is done when the agent's mischief comes to light"; instead, it only covers the "unusual" case where allegations support a reasonable inference of "total abandonment of the corporation's interests." *Id.* at 303, 309 (describing "siphoning corporate funds or other outright theft" as such "unusual" cases); *see also* *In re Am. Int'l Grp., Inc.*, 965 A.2d 763, 827 (Del. Ch. 2009) ("*AIG I*") (holding that the adverse interest test is directed at insiders who are "essentially stealing from the corporation as opposed to engaging in improper acts that, even if also self-interested, have the effect of benefiting the corporation financially"), *aff'd sub nom. Teachers' Ret. Sys. of La. v. PricewaterhouseCoopers LLP*, 11 A.3d 228 (Del. 2011).

Second, the fiduciary/insider exception to the *in pari delicto* doctrine allows a suit to be brought against corporate fiduciaries who "knowingly caused the corporation to commit illegal acts and, as a result, caused the corporation to suffer harm." *AIG II*, 976 A.2d at 889. The *AIG II* court appeared, on public policy grounds, to limit the application of the fiduciary exception to "gatekeepers," third parties employed by a corporation to help ensure the lawful operation of the corporation. *Id.* at 890 n.49, 892–93; *see also* *RBC Cap. Mkts.*, 129 A.3d at 865 n.191 (rejecting the proposition that financial advisors are inherently "gatekeepers," explaining that "the role of a financial advisor is primarily contractual in nature" and defined by its engagement letter). Similarly, the fiduciary exception precludes application of the *in pari delicto* doctrine to aiding and abetting claims against "non-fiduciaries ... who occupy a position of trust and materially participate in the traditional insiders' discharge of their fiduciary duties." *Stewart*, 112 A.3d at 320 (holding that the auditor defendants played a "gatekeeper" role).

***12** The *in pari delicto* doctrine also applies to the Trustee's professional malpractice claims. Under both New York law and Illinois law, [10] professional malpractice claims are viewed as a species of negligence. *See* *Hydro Invs., Inc. v. Trafalgar Power Inc.*, 227 F.3d 8, 15 (2d Cir. 2000); *Hassebrock v. Bernhoft*, 815 F.3d 334, 341 (7th Cir. 2016).

It is settled in both New York and Illinois that the *in pari delicto* doctrine bars claims against co-conspirators for negligence. *See, e.g.,* *Kirschner v. KPMG LLP*, 15 N.Y.3d 446, 464, 912 N.Y.S.2d 508, 938 N.E.2d 941 (2010) ("The justice of the in pari delicto rule is most obvious where a willful wrongdoer is suing someone who is alleged to be merely negligent."); *Peterson v. McGladrey & Pullen, LLP*, No. 10 C 274, 2010 WL 4435543, at *4 (N.D. Ill. Nov. 3, 2010) ("[T]he *in pari delicto* principles that preclude plaintiff from seeking redress for [the trustee's] alleged negligence ... apply equally to plaintiff's claims against [the defendant auditor.]"), *vacated on other grounds*, 676 F.3d 594 (7th Cir. 2012). Thus, the *in pari delicto* doctrine precludes a corporation engaged in wrongdoing from suing its co-conspirators on the grounds of negligence.

2. Application

As an initial matter, accepting the Trustee's factual assertions to be true, he plausibly alleges that the Financial Advisors aided and abetted Tribune's directors and officers in breaching their fiduciary duties when they hid Tribune's true financial state to complete the LBO. In particular, the Trustee's complaint alleges that Citigroup and Merrill Lynch reviewed VRC's solvency analysis and failed to alert anyone that the February Projections, which formed the bedrock of VRC's first solvency opinion, were no longer accurate. Instead, they allowed VRC's analysis to be delivered to the financing banks at Step One of the LBO. Likewise, the Trustee contends that Citigroup's analysis showed that Tribune was insolvent by more than $1.4 billion before the close of Step Two, and Merrill Lynch's analysis showed that Tribune was insolvent by more than $1.5 billion. Still, neither tried to stop the LBO.

Indeed, for purposes of these appeals, Citigroup and Merrill Lynch do not challenge the allegations of wrongdoing or negligence. Instead, they contend that any aiding and abetting breach of fiduciary duty and malpractice claims must be dismissed based on the *in pari delicto* doctrine. And for his part, the Trustee does not argue on appeal that the *in pari delicto* doctrine is inapplicable; instead, he argues that two exceptions to that doctrine should apply to allow the claims to go forward -- the adverse interest exception, which it argued below to the district court, and the fiduciary/insider exception, which it argues for the first time on appeal. This Court has discretion to consider arguments waived below where necessary to avoid a manifest injustice. *In re Nortel Networks Corp. Sec. Litig.*, 539 F.3d 129, 133 (2d Cir. 2008). In circumstances where those arguments were available to the party below and no reason is proffered for their failure to raise them, such an exercise of discretion is not favored. *Id.*

a. *Adverse Interest Exception*

***13** Here, the adverse interest exception does not apply because the LBO conferred at least some "benefit" on Tribune. *AIG II*, 976 A.2d at 891. Tribune received over $300 million in additional capital from Zell's investment, and there was also the potential for $1 billion in tax savings. Even putting aside the tax savings -- which Moody's called a "key assumption" for the LBO, 449 J. App'x at 112, but which were ultimately never realized -- the transaction still infused hundreds of millions of dollars of capital into the business at a time when Tribune was struggling, provided value to many shareholders by helping cash them out, and gave Tribune a chance to continue as a going concern by allowing it to pay off at least some existing debt. Indeed, Tribune itself explained in a proxy statement that the LBO was in its best interest.

The Trustee also makes no specific allegations that support an inference that Tribune received *no* benefit from the LBO; instead, it contends that the net effect of the LBO was negative. But the net effect is not relevant when considering whether the adverse interest exception will apply. *Stewart*, 112 A.3d at 303. Therefore, despite any "long-term damage," *id.*, the adverse interest exception to the *in pari doctrine* does not apply in this case. [11]

b. *Fiduciary/Insider Exception*

The Delaware Chancery Court has explained that for the fiduciary/insider exception to apply, the party must "occupy a position of trust and materially participate in the traditional insiders' discharge of their fiduciary duties," thereby playing a " 'gatekeeper' role vis-à-vis the [corporation]." *Stewart*, 112 A.3d at 319. Here, the Trustee has failed to sufficiently allege that any of the Financial Advisors played such a role.

While a corporation's auditors "assume[ ] a public responsibility transcending any employment relationship," *United States v. Arthur Young & Co.*, 465 U.S. 805, 817–18, 104 S.Ct. 1495, 79 L.Ed.2d 826 (1984) (emphasis omitted), and act as the gatekeepers of standards designed to avoid damage to corporations, the Delaware Supreme Court has emphasized that "the role of a financial advisor is primarily contractual in nature" and that a financial advisor's "engagement letter typically defines the parameters of the financial advisor's relationship and responsibilities with its client," *RBC Cap. Mkts.*, 129 A.3d at 865 n.191. Here, the engagement letters between Tribune and Citigroup and between Tribune and Merrill Lynch expressly provide that they did not create fiduciary relationships and that Citigroup and Merrill Lynch were not acting as Tribune's agents. The letters instead made clear that Tribune would "make an independent analysis and decision regarding any Transaction based on [their] advice." 449 J. App'x at 366. Citigroup and Merrill Lynch were financial advisors, not "gatekeepers," *AIG II*, 976 A.2d at 890 n.49, and, further, neither Citigroup nor Merrill Lynch "materially participate[d]" in the discharge of fiduciary duties, *Stewart*, 112 A.3d at 320.

Moreover, the Delaware Supreme Court has cautioned against "inappropriately ... suggest[ing] that any failure by a financial advisor to prevent directors from breaching their duty of care gives rise to an aiding and abetting claim against the advisor." *RBC Cap. Mkts.*, 129 A.3d at 865 n.191. Instead, such a claim may arise where "the [financial advisor] knows that the board is breaching its duty of care and participates in the breach by misleading the board or creating [an] informational vacuum." *Id.* at 862.

***14** Here, although the Trustee lodges numerous allegations of misconduct on the Financial Advisors' part, there is little to suggest that their conduct created an " 'informational gap[ ]' ... l[eading] to the Board's breaches of fiduciary duties," as occurred in *Stewart*, 112 A.3d at 322, much less the "fraud on the Board" and "intentional[ ] dup[ing]" of directors that warranted liability of the financial advisor in *RBC Cap. Mkts.*, 129 A.3d at 865. Rather, the Trustee alleges that Tribune's officers and advisors conspired with their financial advisors (among others) to carry out the LBO.

Accordingly, the district court did not err in dismissing the Trustee's aiding and abetting breach of fiduciary duty and professional malpractice claims against the Financial Advisors.

B. *Intentional Fraudulent Conveyance Claims*

As discussed above, the Bankruptcy Code allows a bankruptcy trustee to recover transfers made with "actual intent to hinder, delay, or defraud" creditors. 11 U.S.C. § 548(a)(1)(A). The complaint does not sufficiently allege that the transfers to Citigroup, Merrill Lynch, and Morgan Stanley as financial advisors were made with an "actual intent to hinder, delay, or defraud" creditors. *Id.* It does, however, sufficiently plead such an actual intent as to VRC.

As to Morgan Stanley, the complaint alleges that Tribune paid the firm $10 million for a fairness opinion, but the complaint then barely mentions the fairness opinion again, much less suggest that payment for the opinion was motivated by fraudulent intent. Without additional allegations, the Trustee cannot satisfy Rule 9(b)'s heightened pleading standard as to Morgan Stanley.

As to Citigroup and Merrill Lynch, the Trustee's allegations -- that these firms "were incentivized to promote the LBO over other proposals being considered by [Tribune]," 3049 J. App'x at 59, and that they "purported to rely on the unrealistic February 2007 Projections even as each month's below-projection performance showed conclusively that they could not be achieved," 3049 J. App'x at 118 -- are insufficient to support an inference of intent to defraud as to the payment of their financial advisory fees. Kaiser, 722 F.2d at 1582.

Specifically, the Trustee maintains that "multiple badges of fraud" support the requisite strong inference of fraudulent intent against Citigroup and Merrill Lynch, including that (1) the advisory fees were paid to these firms in December 2007, following the close of Step Two when Tribune was insolvent; (2) Tribune received less than reasonably equivalent value for the fees paid; (3) the fees were not paid in the ordinary course of Tribune's business; and (4) Tribune's management engaged in deceptive conduct by concealing the February and October Projections from certain others in management, and induced Citigroup and Merrill Lynch to use those projections to bring the LBO to a close. 449 Appellant's Br. at 53.

Regarding this first alleged badge of fraud, payments to Citigroup and Merrill Lynch when Tribune was insolvent weigh in favor of finding actual fraudulent intent. As to the second badge of fraud, whether Tribune received reasonably equivalent value for these payments is a disputed factual question, which also weighs in the Trustee's favor at this stage.

As to third badge of fraud, nothing in the pleadings supports the notion that fees paid to Citigroup and Merrill Lynch pursuant to their respective engagement letters were outside the ordinary course of Tribune's business. Rather, the pleadings on these payments relate to the tortious performance of financial advisory services and the alleged fraudulent nature of the LBO transaction as a whole. They do not admit an inference of fraudulent intent as to Tribune's specific payment of the advisory fees, *see* Sharp, 403 F.3d at 56, which occurred pursuant to engagement letters entered into with Citigroup and Merrill Lynch in October 2005, long before the LBO was proposed.

***15** As to the fourth badge of fraud, the Trustee's allegations of deceptive conduct by Tribune's management are too attenuated from the advisory fee payments to Citigroup or Merrill Lynch to indicate Tribune's intent as to those payments. At most, the Trustee's allegations indicate that Citigroup and Merrill Lynch did not report Tribune's management's concealment of facts. But other checks on such behavior existed as Morgan Stanley and the Special Committee independently reviewed the relevant figures.

In sum, the Trustee's highlighted badges of fraud fail to raise a strong inference of fraudulent intent. In the absence of other common badges of fraud -- reserving rights in the property, hiding funds, and paying an unconscionable price, *Kaiser*, 722 F.2d at 1582 -- the Trustee has not satisfied the heightened pleading standard for demonstrating an actual fraudulent conveyance as to Citigroup and Merrill Lynch.

The Trustee contends that these same "multiple badges of fraud" also support the requisite strong inference of fraudulent intent as to VRC. The first alleged badge of fraud weighs against finding actual fraudulent intent because VRC received the majority of its payment before Step Two closed and, therefore, prior to Tribune's insolvency.

As to the second alleged badge of fraud, whether Tribune received reasonably equivalent value for these payments is again a disputed factual question, weighing in the Trustee's favor at this stage.

The third alleged badge of fraud favors a finding of actual fraudulent intent for the payments made to VRC. Specifically, the Trustee alleges that: Tribune hastily hired VRC after Duff & Phelps, the company initially hired to perform a solvency analysis, informed Tribune that it could not provide a favorable solvency opinion, and after another "prominent" valuation firm rebuffed Tribune, 3049 J. App'x at 211; VRC charged Tribune the highest fee it had ever charged for a solvency opinion; and VRC agreed, among other things, to define "fair value," *id.* at 212, inconsistently with the industry standard upon which VRC had relied for its previous solvency opinions. These allegations are sufficient to admit an inference that the VRC payments were outside the ordinary course of Tribune's business. *See* *In re Lehman Bros. Holdings Inc.*, 469 B.R. 415, 447–49 (Bankr. S.D.N.Y. 2012) (concluding that actual intent was sufficiently pled where allegations included, *inter alia*, that "each transaction ... was unprecedented in the prior course of business between the parties, and the industry generally").

As to the fourth badge of fraud, the Trustee persuasively argues that Tribune's management's manipulation of the definition of "fair value" in its engagement letter with VRC was deceptive conduct that was (1) necessary for the LBO to proceed and (2) directly tied to Tribune's payments to VRC, in that VRC was retained precisely because it was willing to employ such a definition in formulating a solvency opinion. Further, the questionable nature of the "fair value" definition is highlighted by VRC's charge of an unprecedented fee to take the assignment.

In sum, as to Morgan Stanley, Citigroup, and Merrill Lynch, we agree with the district court that the pleaded badges of fraud are insufficient to create a strong inference of actual fraudulent intent. As to VRC, however, we conclude that the Trustee has sufficiently pleaded actual fraudulent intent.

C. *Constructive Fraudulent Conveyance Claims*

A trustee may recover "constructive" fraudulent transfers where "the debtor ... received less than a reasonably equivalent value in exchange for such transfer or obligation" and: (1) "was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation"; (2) "was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital"; (3) "intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured"; or (4) "made such transfer to or for the benefit of an insider, or incurred such obligation to or for the benefit of an insider, under an employment contract and not in the ordinary course of business." *See* 11 U.S.C. § 548(a)(1)(B).

***16** The Bankruptcy Code does not define "reasonably equivalent value," only defining "value" as the "satisfaction ... of a present or antecedent debt of the debtor." *Id.* § 548(d)(2)(A). This court, however, has stated that "reasonably equivalent value is determined by the value of the consideration exchanged between the parties *at the time of the conveyance or incurrence of debt* which is challenged." *In re NextWave Pers. Commc'ns, Inc.*, 200 F.3d 43, 56 (2d Cir. 1999) (internal quotation marks omitted). Hence, in determining whether the debtor received "reasonably equivalent value," the court "need not strive for mathematical precision" but "must keep the equitable purposes of the statute firmly in mind, recognizing that any significant disparity between the value received and the obligation assumed ... will have significantly harmed the innocent creditors." *Rubin v. Mfrs. Hanover Tr. Co.*, 661 F.2d 979, 994 (2d Cir. 1981) (discussing § 67(d) of the Bankruptcy Act of 1898, predecessor to § 548 of the Bankruptcy Code); *see also* *United States v. McCombs*, 30 F.3d. 310, 326 (2d Cir. 1994) ("[T]he concept [of fair consideration] can be an elusive one that defies any one precise formula." (discussing N.Y. Debt. & Cred. Law § 272)).

To determine whether reasonably equivalent value was provided, "the Court must ultimately examine the totality of the circumstances, including the arms-length nature of the transaction; and ... the good faith of the transferee." *In re Bernard L. Madoff Inv. Sec. LLC*, 454 B.R. 317, 334 (Bankr. S.D.N.Y. 2011) (internal quotation marks omitted).

Where the reasonably equivalent value analysis requires "more than a simple math calculation," such a computation usually should not be made at the motion to dismiss stage. *Id.*; *see also In re Agape World, Inc.*, 467 B.R. 556, 571 (Bankr. E.D.N.Y. 2012). Still, while the determination of whether reasonably equivalent value was exchanged is "largely a question of fact," *Am. Tissue Inc. v. Donaldson, Lufkin & Jenrette Secs. Corp.*, 351 F. Supp. 2d 79, 105 (S.D.N.Y. 2004) (internal quotation marks omitted); *accord In re Jesup & Lamont, Inc.*, 507 B.R. 452, 470 (Bankr. S.D.N.Y. 2014), courts have dismissed constructive fraudulent transfer claims where the complaint does not plausibly allege that the debtor received less than reasonably equivalent value, *see, e.g.*, *In re Trinsum Grp., Inc.*, 460 B.R. 379, 388–89 (Bankr. S.D.N.Y. 2011) (dismissing constructive fraudulent transfer claims due to the trustee's failure to sufficiently plead the less than reasonably equivalent value requirement); *In re Bernard L. Madoff Inv. Sec. LLC*, 458 B.R. 87, 113–15 (Bankr. S.D.N.Y. 2011) (dismissing certain of Trustee's claims that failed to meet the particularity requirement and relied on transfers outside the applicable time period).

Here, the various Financial Advisors are differently situated. Upon *de novo* review, we conclude that the constructive fraudulent conveyance claims against Citigroup and Merrill Lynch cannot be dismissed on the pleadings, but those against Morgan Stanley and VRC were properly dismissed.

As to Citigroup and Merrill Lynch, the Trustee alleges that the $12.5 million success fee paid to each firm upon consummation of the LBO was a constructive fraudulent conveyance. We first consider "the time of the conveyance or incurrence of debt" to determine whether there was reasonably equivalent value. *NextWave*, 200 F.3d at 56 (emphasis and citation omitted). The district court found that the debt was incurred when Citigroup's and Merrill Lynch's engagement letters were signed, years before the LBO's completion, thus rendering the success fees that the Trustee seeks to claw back unavoidable antecedent debt. We conclude otherwise.

The pleadings record indicates that Citigroup's and Merrill Lynch's success fees were not debts incurred or owed until December 2007 when the LBO closed at Step Two, at which point a triggering "Strategic Transaction" took place. Indeed, under their engagement letters, Citigroup and Merrill Lynch were entitled to payment of their success fees only "upon consummation of a Transaction involving" Tribune. 449 J. App'x at 368. Accordingly, the financial firms were only paid their success fees after the completion of Step Two and the closure of the LBO. Further, the engagement letters required Tribune to reimburse Citigroup and Merrill Lynch for all reasonable expenses incurred in providing financial advisory services prior to the consummation of the LBO, "[r]egardless of whether any [t]ransaction [was] proposed or consummated." 449 J. App'x at 368; *see also id.* at 376. This suggests that Tribune's obligations to pay the two $12.5 million success fees were separate, additional debts that were only payable in the event of a successful transaction. Accordingly, because the success fees were only incurred upon consummation of the LBO, they were not antecedent debt constituting categorically reasonably equivalent value.

***17** Because the Trustee has adequately pleaded Tribune's insolvency upon the completion of Step Two, it is plausible that Tribune: (1) was "insolvent on the date" that the success fees were paid; (2) was engaged in the transaction of paying the success fees while it retained "unreasonably small capital"; and/or (3) "incurred" the success fees, which may have been "beyond [its] ability to pay." Therefore, the issue of whether Citigroup's and Merrill Lynch's success fees constitute a constructive fraudulent transfer hinges on whether the services that Tribune received in exchange were of "reasonably equivalent value." 11 U.S.C. § 548(a)(1)(B).

Turning then to the question of "reasonably equivalent value," we note that according to Citigroup and Merrill Lynch's engagement letters, Tribune owed success fees only if the advisors performed satisfactorily. Specifically, Citigroup's engagement letter states that it will "perform such financial advisory and investment banking services for [Tribune] in connection with the proposed Transaction as are customary and appropriate in transactions of this type." Merrill Lynch's engagement similarly states that it "will perform such financial advisory and investment banking services for [Tribune] as are customary and appropriate in transactions of this type." The Trustee alleges that Citigroup and Merrill Lynch fell short of "customary and appropriate" industry standards, were grossly negligent in carrying out their responsibilities, and rendered their services in bad faith. Thus, according to the Trustee, because these firms provided "no value" to Tribune, consummation of the LBO would not trigger the contractual obligation to pay fees and the success fees should be clawed back.

On a motion to dismiss, we must accept factual allegations as true as long as they are not "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *Nielsen v. Rabin*, 746 F.3d 58, 62 (2d Cir. 2014) (alteration and internal quotation marks omitted).

The complaint alleges plausible facts that Citigroup and Merrill Lynch knew or should have known the February Projections would not be met and that each firm thought Tribune was insolvent by over $1 billion, and that they yet failed to act.

To determine whether the Financial Advisors' guidance met the standard of reasonably equivalent value, courts evaluate the totality of the circumstances, considering, *inter alia*, the number of hours worked, industry standards, fees paid compared to the overall size of the transaction, when the engagement letters were signed, and opportunity costs. Here, the determination of whether the Citigroup and Merrill Lynch provided reasonably equivalent value likely requires more than "a simple math calculation." *Madoff*, 454 B.R. at 334. Unlike in *In re Old Carco LLC*, where the trustee's allegations simply "appl[ied] implausible values" or "omit[ted] other key assets," 509 F. App'x 77, 79 (2d Cir. 2013) (summary order), the Trustee in this case alleges, amongst other failings, that Citigroup and Merrill Lynch failed to advise Tribune about the flaws in VRC's Step One solvency analysis, which stemmed from the February Projections that the firms knew would not be met. The Trustees also alleges that both Citigroup's and Merrill Lynch's analyses showed Tribune was insolvent by more than $1 billion before the close of Step Two. How much, if at all, this ought to detract from the fees they were paid should not have been decided on a motion to dismiss. *See* *In re Actrade*

Fin. Techs. Ltd., 337 B.R. 791, 804 (Bankr. S.D.N.Y. 2005) ("[T]he question of 'reasonably equivalent value' and 'fair equivalent' is fact intensive, and usually cannot be determined on the pleadings."); *see also* *In re Andrew Velez Const., Inc.*, 373 B.R. 262, 271 (Bankr. S.D.N.Y. 2007) (declining to dismiss constructive fraudulent transfer claim given the complexities of the factual background giving rise to the issue of "reasonably equivalent value").

***18** While it is a close call, because we are required to accept the allegations in the Trustee's complaint as true, we conclude the factual question of whether Citigroup and Merrill Lynch provided reasonably equivalent value for their success fees cannot be decided without first assessing whether the banks satisfactorily performed their duties. Thus, dismissal of the constructive fraudulent conveyance claims against these parties was premature.

In contrast, we find no error in the dismissal of these claims against Morgan Stanley and VRC. While these firms adopt the arguments set forth by Citigroup and Merrill Lynch, their actions differ in several important respects. First, Morgan Stanley was hired as advisor for and was responsive to a different part of Tribune -- the Special Committee. Second, Morgan Stanley and VRC did not have the same incentives as Citigroup and Merrill Lynch. Because both Morgan Stanley and VRC earned their respective fees upon delivery of their contracted-for opinions, they had no financial stake in the LBO's consummation. Finally, and most important, the Morgan Stanley and VRC payments were in large part due *before* Step One closed. Because there is hardly an allegation that Tribune was insolvent before the first step, the constructive fraudulent transfer claims against Morgan Stanley and VRC must fail.

VI. *Leave to Amend*

The Trustee sought leave to amend his complaint as to the shareholders in two respects: first, to provide additional allegations in support of his intentional fraudulent conveyance claims and, second, to add a constructive fraudulent conveyance claim. The district court denied both requests.

"[L]eave [to amend] shall be freely given when justice so requires." *Ronzani v. Sanofi S.A.*, 899 F.2d 195, 198 (2d Cir. 1990) (citing Fed. R. Civ. P. 15(a)(2)). A court may deny leave to amend, however, for a "valid ground," *id.*, such as futility or undue prejudice, *see* *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962). "Futility is a determination, as a matter of law, that proposed amendments would fail to cure prior deficiencies or to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure." *Empire Merchs., LLC v. Reliable Churchill LLLP*, 902 F.3d 132, 139 (2d Cir. 2018). To determine whether granting leave to amend would be futile, we consider the proposed amendments and the original complaint. *See* *Pyskaty v. Wide World of Cars, LLC*, 856 F.3d 216, 225–26 (2d Cir. 2017).

A. *Intentional Fraudulent Conveyance Claims*

In denying the Trustee leave to amend his intentional fraudulent conveyance claims, the district court noted that the Trustee gave "no clue as to how the complaint's defects would be cured." 3049 S. App'x at 26 (alteration omitted). On appeal, the Trustee argues that if given the opportunity to amend, he would have been able to satisfy the imputation standard applied by the district court.

We are not persuaded. The Trustee had ample opportunity to plead a viable claim in the district court -- indeed, the operative pleading was the *Fifth* Amended Complaint -- but he failed to propose any amendments that would cure the pleading defects. Nor has he identified on appeal any additional factual allegations that would give rise to a strong inference of fraudulent intent on the part of the Special Committee. Accordingly, we find no abuse of discretion in the district court's denial of leave to amend the Trustee's intentional fraudulent transfer claims.

B. *Constructive Fraudulent Conveyance Claims*

***19** The Trustee did not initially assert a constructive fraudulent transfer claim against the shareholders but sought leave to file a Sixth Amended Complaint to add such a claim. On April 23, 2019, the district court (Cote, *J.*) denied the request, on two independent grounds: (1) the shareholders would suffer substantial prejudice; and (2) the proposed amendments to the constructive fraudulent transfer claim would be futile.

Under the Bankruptcy Code, certain transactions fall within a safe harbor and the payments that are part of those transactions cannot be clawed back via a federal constructive fraudulent transfer claim. *See* 11 U.S.C. §§ 544, 546(e). These include a payment made "in connection with a securities contract" if that payment was made by "a financial institution." *Id.* at § 546(e). As we held in *Tribune II*, however, Tribune's payments to its shareholders fell within this safe harbor. *See* 946 F.3d at 77–81, 90–97 (holding that Tribune was a "financial institution" within meaning of safe harbor provision and that payments to shareholders were payments "in connection with a securities contract"). On appeal, the Trustee argues that the district court and the *Tribune II* panel improperly concluded that Tribune was a financial institution, first by incorrectly taking judicial notice of certain documents and second by misinterpreting those documents. We are not persuaded.

As an initial matter, we are bound by the *Tribune II* panel's decision that Computershare Trust Company ("CTC"), a financial institution for purposes of § 546(e), was Tribune's agent when it served as a depository to help effectuate the LBO, which was a securities contract. *Tribune II*, 946 F.3d at 78-81; *see also* *4 Pillar Dynasty LLC v. New York & Co., Inc.*, 933 F.3d 202, 211 n.8 (2d Cir. 2019) ("We are bound by the decision of prior panels until such time as they are overruled either by an en banc panel of our Court or by the Supreme Court." (internal quotation marks omitted)).

The Trustee takes issue with how the district court took judicial notice of certain documents to conclude that CTC was Tribune's agent. That argument is without merit, as "[w]e have recognized ... that in some cases, a document not expressly incorporated by reference in the complaint is nevertheless 'integral' to the complaint and, accordingly, a fair object of consideration on a motion to dismiss." *Goel v. Bunge, Ltd.*, 820 F.3d 554, 559 (2d Cir. 2016). "A document is integral to the complaint where the complaint relies heavily upon its terms and effect." *Id.* (internal quotation marks omitted). Here, the documents the district court relied on were the contracts that set forth the relationship between Tribune and CTC, and they were therefore integral to the complaint.

Similarly, the Trustee's argument that CTC was not Tribune's agent because it was given no discretion and was not a fiduciary lacks merit. Here, Tribune entered into an agreement with CTC whereby CTC was hired to be a steward of Tribune's money and its shareholders' stock. It was clearly acting on behalf of Tribune, which is enough to satisfy § 546(e). Accordingly, even on *de novo* review, the district court did not err when it denied the Trustee leave to amend its complaint as futile.

Separately, the district court did not abuse its discretion when it alternatively refused to grant leave to amend because doing so would be unduly prejudicial. There are thousands of shareholders who have been impacted by this ongoing litigation, all of whom relinquished control of their stock more than twelve years ago. As both this Court and the district court pointed out, allowing another amended complaint would prevent "certainty, speed, finality, and stability" in the market. 3049 S. App'x at 27 (citing *Tribune II*); *see also* *Trs. of Upstate N.Y. Eng'rs Pension Fund v. Ivy Asset Mgmt.*, 843 F.3d 561, 568 (2d Cir. 2016) (discussing the importance of finality).

***20** Accordingly, we conclude that the district court did not abuse its discretion in denying the Trustee leave to amend his complaint to add a constructive fraudulent claim under federal law.

CONCLUSION

For the foregoing reasons, the judgment and orders of the district court are **AFFIRMED in part** and **VACATED in part** as follows:

1. the district court's dismissal of the intentional fraudulent conveyance claims against the shareholders based on the buy-back of their shares is **AFFIRMED**;

2. the district court's dismissal of the breach of fiduciary duty and aiding and abetting breach of fiduciary claims against the allegedly controlling shareholders is **AFFIRMED**;

3. (a) the district court's dismissal of the aiding and abetting breach of fiduciary duty and professional malpractice claims against the Financial Advisors is **AFFIRMED**;

(b) the district court's dismissal of the actual fraudulent conveyance claims is **AFFIRMED** as to Morgan Stanley, Citigroup, and Merrill Lynch and **VACATED** as to VRC; and

(c) the district court's dismissal of the constructive fraudulent conveyance claims is **AFFIRMED** as to Morgan Stanley and VRC and **VACATED** as to Citigroup and Merrill Lynch; and

4. the district court's denial of the Trustee's motion for leave to amend to amplify his intentional fraudulent conveyance claim

against the shareholders and to add a constructive fraudulent conveyance claim against the shareholders is **AFFIRMED**.

The case is hereby **REMANDED** for further proceedings in accordance with the above.

All Citations

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Footnotes

* Our late colleague Judge Ralph K. Winter was originally assigned to this panel. The two remaining members of the panel, who are in agreement, have decided this case in accordance with Second Circuit Internal Operating Procedure E(b). *See* 28 U.S.C. § 46(d); *United States v. Desimone*, 140 F.3d 457, 458–59 (2d Cir. 1998).

2 In Appeal No. 19-3049, the operative complaint is the Fifth Amended Complaint in No. 12-CV-2652, referred to by the district court as the *FitzSimons* action. In Appeal No. 19-449, the operative complaint is the First Amended Complaint in No. 12-CV-6055, referred to by the district court as the *Citigroup* action.

3 References to "3049 Appellant's Br." and "449 Appellant's Br." refer to the Trustee's briefs in Appeal Nos. 19-3049 and 19-449, respectively.

4 On July 22, 2016, this Court denied rehearing *en banc*, and our mandate issued on August 1, 2016. On September 9, 2016, the Trustee petitioned for certiorari to the Supreme Court. In April 2018, the Supreme Court advised the parties that their petition for certiorari as to *Tribune I* would be deferred to allow this Court to consider whether to recall the mandate in light of the Supreme Court's decision in *Merit Mgmt. Grp., LP v. FTI Consulting, Inc.*, ––– U.S. ––––, 138 S. Ct. 883, 892, 200 L.Ed.2d 183 (2018), which held, *inter alia*, that Section 546(e) does not protect transfers in which financial institutions served as mere conduits. *See Deutsche Bank Tr. Co. Americas v. Robert R. McCormick Found.*, ––– U.S. ––––, 138 S. Ct. 1162, 1163, 200 L.Ed.2d 735 (2018) (statement of Justices Kennedy and Thomas). As a result, this Court recalled its mandate and eventually issued *Tribune II*.

5 In arguing for a lesser imputation standard, the Trustee relies heavily on *Staub v. Proctor Hospital*, 562 U.S. 411, 131 S.Ct. 1186, 179 L.Ed.2d 144 (2011). That case, however, applied a "motivating factor" standard under the Uniformed Services Employment and Reemployment Rights Act, *id.* at 417–18, 131 S.Ct. 1186, and we are not persuaded that it carries much weight in a case requiring "actual intent" under the Bankruptcy Code.

6 We assume, without deciding, that the Large Shareholders had a fiduciary duty to Tribune. We note, however, that together the Chandler Trusts and the Foundations owned only 33% of Tribune's publicly held shares. *See Kahn v. Lynch Commc'n Sys., Inc.*, 638 A.2d 1110, 1114 (Del. 1994) ("[A] shareholder who owns less than 50% of a corporation's outstanding stocks does not, without more, become a controlling shareholder of that corporation, with a concomitant fiduciary status.") (quoting *Citron v. Fairchild Camera & Instrument Corp.*, 569 A.2d 53, 70 (Del. 1989)).

7 In May 2006, Tribune engaged in a leveraged recapitalization by which it purchased 55 million shares of outstanding stock for $1.8 billion in May 2006. In March 2007, Tribune again considered a "more modest recapitalization plan." 3049 J. App'x at 198.

8 Additionally, the Trustee asserted a breach of fiduciary claim, but against only Morgan Stanley. The district court did not explicitly address this claim in its January 23, 2019 opinion. In a February 13, 2019 order, however, the district court stated that this claim was "barred for the same reasons discussed in the January 23 Opinion with respect to the other common law claims asserted against Morgan Stanley ... namely, the doctrine of *in pari delicto*." 3049 S. App'x at 180.

9 The parties agree that Delaware law governs the Trustee's aiding and abetting claim.

10 In the district court, the parties disputed whether New York (where Citigroup and Merrill Lynch are headquartered) or Illinois (where Tribune was headquartered) law governed the Trustee's professional malpractice claim. This argument has been largely abandoned, likely because, as the district court explained, the states' laws are nearly the same.

11 Notwithstanding the Trustee's argument to the contrary, the district court did not resolve any issues of fact by holding that the adverse interest exception did not apply here. Instead, it simply observed that the infusion of $300 million in capital stated in the Complaint conferred some benefit on Tribune, and therefore, the defendants had not acted "*solely* to advance [their] own personal financial interest." *AIG,* 976 A.2d at 891 (emphasis added).

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