13-3992-cv(L)

13-3875-cv, 13-4178-cv, 13-4196-cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

IN RE TRIBUNE COMPANY
FRAUDULENT CONVEYANCE LITIGATION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF AMICI CURIAE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION ("SIFMA"), INTERNATIONAL SWAPS AND DERIVATIVES ASSOCIATION, INC. ("ISDA"), AND THE NYSE EURONEXT ("NYSE") IN SUPPORT OF DEFENDANT-APPELLEES-CROSS-APPELLANTS

KEVIN CARROLL
SECURITIES INDUSTRY
AND FINANCIAL MARKETS
ASSOCIATION
1101 New York Avenue, NW
Washington, D.C. 20005
(202) 962-7382

Counsel for SIFMA

HOLLY K. KULKA
NYSE EURONEXT
11 Wall Street
New York, New York 10005
(212) 656-3000

Counsel for NYSE Euronext

MARSHALL H. FISHMAN
TIMOTHY P. HARKNESS
DAVID Y. LIVSHIZ
FRESHFIELDS BRUCKHAUS
DERINGER US LLP
601 Lexington Avenue, 31st Floor
New York, New York 10022
(212) 277-4000

Counsel for SIFMA and ISDA

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 29(c) and 26.1(a), the Securities Industry and Financial Markets Association ("SIFMA"), the International Swaps and Derivatives Association, Inc. ("ISDA"), and NYSE Euronext ("NYSE") hereby state as follows:

Amicus curiae SIFMA is a non-profit corporation. It has no parent corporation and no publicly held corporation owns 10% or more of its stock.

Amicus curiae ISDA is a non-profit corporation. It has no parent corporation and no publicly held corporation owns 10% or more of its stock.

Amicus curiae NYSE is a wholly owned subsidiary of IntercontinentalExchange Group, Inc. ("ICE"). Both ICE and NYSE are incorporated under the laws of Delaware. No publicly held corporation owns 10% or more of ICE's stock.

SIFMA, ISDA, and the NYSE Euronext (collectively, the "*Amici*") respectfully submit this brief as *amici curiae* in support of the Defendants–Appellees–Cross–Appellants. The Appellees and Appellants have consented to the filing of this brief.[1]

INTERESTS OF AMICI CURIAE

SIFMA brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association.

ISDA represents over 820 derivatives dealers, service providers, and end users. ISDA's central mission is protecting the efficiency and stability of global over-the-counter derivative markets.

NYSE Euronext is a wholly owned subsidiary of IntercontinentalExchange Group, Inc. ("ICE"). ICE operates the leading network of regulated securities exchanges and clearing houses for financial and commodity

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[1] The *Amici* state that no party's counsel authored this brief in whole or in part; that no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and that no person other than the *Amici*, their members, and their counsel contributed money that was intended to fund the preparation or submission of this brief.

markets, including the New York Stock Exchange (the world's largest cash equities exchange by issuer market capitalization). NYSE has strong interests in the stability of the financial markets, and the certainty and sanctity of completed securities transactions.

As representatives of the leading institutions in the securities markets, *Amici* have an interest in promoting the stability of financial markets and the certainty of completed securities transactions—goals advanced by 11 U.S.C. § 546(e) ("Section 546(e)" or the "Safe Harbor"). If upheld, the District Court's holding that Section 546(e) does not apply to, and does not preempt, state law constructive fraudulent conveyance claims ("SLCFC Claims") brought by individual creditors will undermine the goals the Safe Harbor was designed to protect. From the perspective of financial market participants, it matters little whether a long-settled securities transaction is attacked by a bankruptcy trustee, an individual creditor or anyone else. The result is the same. Permitting settled securities transactions to be undone undermines the certainty and finality that is key to the orderly functioning of the financial markets and results in increased borrowing costs and general market instability. Accordingly, the *Amici* have an acute interest in ensuring that the Safe Harbor is interpreted in light of its legislative history and purpose of preventing the extended and wide-spread harm that undoing long-settled securities transactions can exact on the market.

The *Amici* agree with all points made in Defendants–Appellees–Cross–Appellants' briefs, including that the District Court's holding on the standing issue should be affirmed. They write separately to highlight an issue of particular importance to them—the proper interpretation of Section 546(e).

PRELIMINARY STATEMENT

The Safe Harbor is critically important to the *Amici* and their members. Recognizing the Safe Harbor's importance to preventing the instability of financial markets caused by large-scale avoidance actions against financial market participants in the event of a bankruptcy, courts have consistently rejected efforts to narrow the Safe Harbor's scope. Undeterred, Plaintiffs try to do so here.

The Safe Harbor prohibits a bankruptcy trustee from asserting a SLCFC Claim to "avoid a transfer that is a . . . settlement payment." Recognizing that the trustee cannot avoid the transfers at issue here, Plaintiffs seek to escape the Safe Harbor's reach, arguing that because the representative of Tribune's bankruptcy estate—as part of his agreement with Tribune's creditors—has "disclaimed" these claims, creditors can assert them directly and the Safe Harbor therefore does not apply. That is not, and cannot be, the case.

First, the Safe Harbor's plain terms, considered in light of other Bankruptcy Code provisions and legislative history, make clear that Congress barred all constructive fraudulent transfer claims seeking to undo transfers used to settle securities transactions, no matter who the plaintiff. *Second*, permitting individual creditors to use SLCFC Claims to unwind long-settled securities transactions would undermine Congress's clear intent to promote the stability and liquidity of financial markets, the very object and purpose of Section 546(e). Accordingly, such claims are barred by well-established principles of implied preemption.

At bottom, this case presents the same issue as posed in *Whyte v. Barclays Bank PLC*, the case being heard in tandem with this appeal: whether an estate and its creditors can invoke procedural tricks to escape the Safe Harbor's restrictions. As the court in *Whyte* correctly held: permitting Plaintiffs to do so would lead to the "absurd result" that would render the Safe Harbor "a nullity." Therefore, the *Whyte* court appropriately dismissed the plaintiffs' SLCFC Claims as preempted by Section 546(e). This Court should also so hold.

The rationale and policy considerations underlying the District Court's holding in *Whyte* apply with equal force here. Accordingly, as they did in *Whyte*, the *Amici* urge this Court to reject the Plaintiffs' end-run effort and instead continue to protect the soundness and vitality of the financial markets as Congress intended. If Plaintiffs can avoid the Safe Harbor through this procedural maneuver, they would open every settled securities, commodities, repo, swap and derivative transaction to avoidance, essentially repealing the Safe Harbor—a result that, itself, should be avoided.

ARGUMENT

In this action, Plaintiffs, unsecured creditors of the Tribune Company, assert SLCFC Claims purportedly disclaimed by the Tribune bankruptcy estate, seeking to avoid billions of dollars in payments made to Tribune's shareholders as part of Tribune's leveraged buyout ("LBO") in December 2007. Plaintiffs' claims here are just one example of the recent procedural maneuvering engaged in by debtors and unsecured creditors in an effort to find a way around the Safe Harbor. *See, e.g.*, *Whyte v. Barclays Bank PLC*, 494 B.R. 196 (S.D.N.Y. 2013) (trustee asserting SLCFC Claims); *Weisfelner v. Fund 1 (In re Lyondell Chemical Co.)*, 503 B.R. 348 (Bankr. S.D.N.Y 2014) (plan of reorganization establishes several trusts to pursue claims, with one trust empowering the trustee to pursue creditors' SLCFC Claims). Plaintiffs' SLCFC Claims here—like those of the plaintiffs in the *Whyte* and *Lyondell* litigations—undermine essential federal policies served by the Safe Harbor.

In passing the Safe Harbor, Congress knew that when a company commences bankruptcy proceedings, fraudulent conveyance litigation is likely. Congress also knew that avoidance lawsuits, like the present action, could have drastic systemic consequences when the challenged transactions are long settled financial market transactions that—with years of hindsight—are alleged to have been exchanged for less than equivalent value. Through an avoidance action, the bankruptcy of one company could beget another's bankruptcy. For example, a company that had substantial dealings with a bankrupt company could find large volumes of its transactions unraveled, placing that company in a precarious financial position. Recognizing that such a chain reaction in the financial sector could quickly spread, destabilizing the financial markets and the nation's economy as a whole, Congress immunized certain financial transactions from the kind of avoidance claims that may otherwise be brought in bankruptcy proceedings. It did so by passing the Safe Harbor, which bars the Plaintiffs' claims here.

I. The Safe Harbor Is Key To The Stability Of The Financial Markets Because It Provides Certainty To Financial Transactions

Congress enacted Section 546(e) to protect transfers made to settle securities transactions in order to ensure the stability of the financial markets. Thus, when a transfer is made to settle a securities transaction, the Safe Harbor immunizes the transfer from all constructive fraudulent conveyance claims, including SLCFC Claims. *See* 11 U.S.C. § 546(e). Moreover, the immunity afforded to transfers made to settle securities transactions permits financially challenged companies to obtain financing or restructure by entering into a transaction. Absent such protection, market participants would be unlikely to do business with a financially challenged company, thereby hastening its demise.

As this and other Courts of Appeal have recognized, in passing the Safe Harbor, Congress exercised its legislative judgment to determine that, except in the exceedingly rare cases of actual fraud, the finality and certainty of settled securities transactions and the stability of financial markets had to be preserved even at the expense of reducing creditors' recoveries. *See Enron Creditors Recovery Corp. v. Alfa, S.A.B. de C.V. (In re Enron Creditors Recovery Corp.),* 651 F.3d 329, 334 (2d Cir. 2011) ("By restricting [the] power to recover payments that are otherwise avoidable under the Bankruptcy Code, the Safe Harbor stands 'at the intersection of two important national legislative policies . . . the policies of bankruptcy and securities law.'"); *Hutson v. E.I. du Pont de Nemours and Co. (In re Nat'l Gas Distribs., LLC),* 556 F.3d 247, 259 (4th Cir. 2009) (through the Safe Harbor "Congress intended to serve a countervailing policy of protecting financial markets and therefore favoring an entire class of instruments and participants.").

A. The Safe Harbor Promotes Market Stability

As this Court has explained:

> Congress enacted § 546(e)'s safe harbor in 1982 as a means of 'minimiz[ing] the displacement caused in the commodities and securities markets in the event of a major bankruptcy affecting those industries.' If a firm is required to repay amounts received in settled securities transactions, it could have insufficient capital or liquidity to meet its current securities trading obligations, placing other market participants and the securities markets themselves at risk.

See Enron, 651 F.3d at 334 (quoting *Kaiser Steel Corp. v. Charles Schwab & Co., Inc.,* 913 F.2d 846, 849 (10th Cir. 1990) (quoting H.R. Rep. 97-420, at 2 (1982), *reprinted in* 1982 U.S.C.C.A.N. 583, 583)). Congress intended the Safe Harbor to limit "the potentially massive losses and chain reactions" that could result from the avoidance of securities transactions." H.R. Rep. No. 97-420, at 1-2; *Enron*, 651 F.3d at 334. Additionally, through the Safe Harbor, Congress sought to "promot[e] finality . . . and certainty for investors," by limiting the circumstances under which securities transactions could be unwound years after they occurred. *Kaiser Steel Corp. v. Pearl Brewing Co.*, 952 F.2d 1230, 1240 n.10 (10th Cir. 1991).

The Safe Harbor accomplishes these purposes by, in the absence of actual fraud, immunizing transfers received in connection with financial and securities contracts from fraudulent conveyance claims. *See* H.R. Rep. No. 97-420, at 2 (1982) ("The amendments will ensure that the avoiding powers of a trustee are not construed to permit margin or settlement payments to be set aside except in the case of fraud."). Thus, Congress sought to give market participants, which include *Amici's* members and their customers, legal certainty that avoidance actions would not interfere with their long-settled transactions. *See Enron*, 651 F.3d at 334; *Nat'l Gas*, 56 F.3d at 259.

Through a series of amendments that expanded the Safe Harbor, Congress made clear its intent that the Safe Harbor be interpreted and applied broadly. *See Contemporary Indus. Corp. v. Frost*, 564 F.3d 981, 986 (8th Cir. 2009) (analyzing Congressional intent and agreeing "with our sister circuits that the [the Safe Harbor] was designed to sweep broadly" and that the definition of "settlement payment" was "intended to underscore the breadth of the § 546(e) exemption."); *Picard v. Katz*, 462 B.R. 447, 452 n.3 (S.D.N.Y. 2011) ("[T]here is no reason to ignore the breadth of the statutory language [of Section 546(e)]."). Thus, the original 1978 provision protecting commodities markets was replaced in 1982 by Section 546(e) to "clarify and, in some instances, broaden the commodities market protections and expressly extend similar protections to the securities market." H.R. Rep. No. 97-420 (1982). In 2006, the scope of the Safe Harbor was further expanded, *inter alia*, by making clear that any transfers made "in connection with a securities contract" were protected by the Safe Harbor. *See* Financial Netting Improvements Act of 2006, Pub. L. No. 109-390, § 5, 120 Stat. 2692, 2697-98 (2006).[2] By continuously expanding the scope of the Safe Harbor, Congress has reiterated its intent that the nation's securities markets remain stable and settled securities transactions remain undisturbed, even when one of the parties to the transaction is forced to declare bankruptcy.

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[2] Nor has the Financial Crisis undermined Congressional support for the Safe Harbor. Indeed, Senator Nelson's 2010 proposal to repeal the Safe Harbor failed to even receive a floor vote due to lack of support. *See* Steven Lubben, *No Safe Harbor Reform Yet,* (May 20, 2010, 5:09 PM) http://www.creditslips.org/creditslips/2010/05/no-safe-harbor-reform-yet.html.

B. The Safe Harbor Promotes Market Liquidity

The legal certainty offered by the Safe Harbor also serves to enhance market liquidity, allowing financially challenged companies to obtain financing or otherwise restructure themselves through out-of-court transactions. *See* H. R. Rep. No. 109-648 (2006), *reprinted in* U.S.C.C.A.N. 1585, 1591-92 (Safe Harbor encompasses "credit extended for the execution, clearance and settlement of securities transactions, which provide important liquidity to the securities markets.").

Without the confidence offered by the Safe Harbor's protection, market participants—fearful that any collateral or security that they obtained in exchange for providing liquidity will be clawed back—will choose not to transact with companies experiencing a liquidity challenge. *See Bankruptcy Law and Repurchase Agreements: Hearings on H.R. 2852 and H.R. 3418 Before the Subcommittee on Monopolies and Commercial Law of the H. Comm. on the Judiciary,* 98th Cong., 2d Sess., at 24-25 (1984) (statement of Rep. Walter E. Fauntroy) (noting Congressional concern that absent Safe Harbor's protections institutional investors would refuse to participate in the financial markets, reducing market liquidity). Aware that the potential consequences of decreased liquidity may be particularly dramatic in the financial sector, where financial institutions sometimes rely on short-term securities transactions called Repurchase Agreements to obtain financing, Congress specifically expanded the scope of the Safe Harbor and related provisions to reassure market participants that their settled securities transactions would not be unwound in bankruptcy. *See* 11 U.S.C. § 546(f) (an analogue to Section 546(e) that immunizes transfers received in connection with repurchase agreements). Consistent with Congress's concerns, in the aftermath of the financial crisis, market participants stressed that if the Safe Harbor is not enforced, it would be difficult or impossible for financial institutions to provide critical support to troubled market participants, making it more likely that they will need to seek bankruptcy protection.[3]

Furthermore, refusing to honor the Safe Harbor will also undermine the ability of struggling companies to participate in out-of-court restructuring transactions, such as LBOs. "LBOs are generally seen as economically desirable" in part because they allow the transfer of control to investors who may be in a "better position to undertake management responsibility and realize the potential of the business." Angelo Guisado, *Revisiting the Leveraged Buyout: Is Constructive*

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3 *See* Mem. Of Law In Supp. Of Mot. To Dismiss Of Def. JPMorgan Chase Bank, N.A., *Lehman Brothers Holding Inc. v. JPMorgan Chase Bank, N.A.*, Dkt. No. 10-03266 (Bankr. S.D.N.Y. Aug. 25, 2010) at 26. These concerns underscore the danger inherent in Plaintiffs' position. If Plaintiffs' "work around" is accepted it would apply in *all* bankruptcy proceedings, not only in the case of an LBO, and would substantially increase the risks faced by financial institutions that transact with financially struggling companies resulting in decreased market liquidity.

Fraud Going Too Far?, 46 J. Marshall L. Rev. 429, 432-33 (2013); *see also* Shourun Guo, Edith S. Hotchkiss & Weihong Song, *Do Buyouts (Still) Create Value?,* 66 J. of Fin. 479-517 (2011) (empirical evidence that LBOs provide increased value for the acquired business and its creditors). However, if shareholders are unable to depend on the Safe Harbor to protect settlement payments they received in the transaction from being unwound years later, they are unlikely to participate in the transaction—resulting in an outcome worse for both the company and its creditors.

Overall, allowing settled securities transactions to be unwound is likely to result in decreased liquidity and increased market instability—two evils Congress attempted to prevent by adopting the Safe Harbor.

II. Courts Have Interpreted the Safe Harbor Broadly

Recognizing the paramount importance of the goals Congress tried to achieve through the Safe Harbor, several Courts of Appeal, including this Court, have concluded that the Safe Harbor should be interpreted broadly. *See, e.g.*, *Enron*, 651 F.3d at 334-39 (Safe Harbor should be broadly interpreted to promote market certainty and predictability); *Grayson Consulting, Inc. v. Wachovia Securities, LLC. (In re Derivium Capital LLC)*, 716 F.3d 355, 366 (4th Cir. 2013); *Contemporary Indus.*, 564 F.3d at 986; *Lowenschuss v. Resorts Int'l, Inc.*, 181 F.3d 505, 515-16 (9th Cir. 1999) (denying avoidance of payments to a shareholder during the leveraged buyout, because "including payments made during LBOs within the scope of the definition [of "settlement payment"] is consistent with the broad meaning" of Section 546(e)).[4]

Moreover, courts have stressed the importance of "promot[ing] stability in the[] [financial] markets" when interpreting the Safe Harbor. *In re Quebecor World (USA) Inc,* 719 F.3d 94, 99-100 (2d Cir. 2013). Accordingly, courts have consistently rejected attempts to evade the Safe Harbor's application where doing so would "result in commercial uncertainty and unpredictability at odds with the safe harbor's purpose and in an area of law where certainty and predictability are at a premium." *Enron,* 651 F.3d at 336; *see also QSI Holdings, Inc. v. Alford (In re QSI Holdings, Inc.)*, 571 F.3d 545 (6th Cir. 2009) (rejecting argument that transaction in privately held securities are not protected by the Safe Harbor); *Munford v. Valuation Research Corp. (In re Munford, Inc.)*, 98 F.3d 604, 610 n.4 (11th Cir. 1996) ("even granting trustees avoidance powers under limited circumstances in the LBO context has the potential to lessen confidence in the commodity market as a whole"); *Katz*, 462 B.R. at 452 (rejecting narrow interpretation of the Safe Harbor where there is "no reason to think that undoing

[4] *Katz*, 462 B.R. at 452 n.3; *AP Services LLP v. Silva,* 483 B.R. 63, 69 (2012) ("The plain language of Section 546(e), coupled with the general understanding among the courts of appeal that the definition of 'settlement payment' should be construed 'extremely broad[ly],' indicates that the [LBO payment] fits within the safe harbor.").

such large transfers . . . would not also have a substantial and similarly negative effect on the financial markets").

In the context most notable for the case at hand, courts have rejected attempts to circumvent the Safe Harbor by seeking to avoid settlement payments through state law causes of action such as unjust enrichment. *See, e.g.*, *Contemporary Indus.*, 564 F.3d at 983-84; *Silva,* 483 B.R. at 71; *U.S. Bank N.A. v. Verizon Commc'ns Inc.*, No. 3:10-CV-1842, 2012 WL 4050088, at *18-19 (N.D. Tex. Sept. 14, 2012); *Official Comm. of Unsecured Creditors of Hechinger Inv. Co. of Del., Inc. v. Fleet Retail Fin. Group (In re Hechinger Inv. Co. of Del., Inc.*), 274 B.R. 71, 96 (D. Del. 2002).[5]

III. The Safe Harbor Bars Plaintiffs' SLCFC Claims

Recognizing that the Safe Harbor bars the estate's representative from avoiding transfers made as part of the LBO, the estate and Tribune's creditors agreed to "work around" Section 546(e).[6] As part of this arrangement, Tribune's

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[5] In a recent decision on a motion to dismiss, a bankruptcy court in the Southern District of New York found that the Safe Harbor did not preempt certain common law claims brought by a debtor that were more analogous to claims grounded in actual fraudulent intent than constructive fraud. *See In Re Lehman Bros. Holdings Inc.*, 469 B.R. 415 (S.D.N.Y. 2012). Because of its reliance on the plaintiffs' allegations of actual fraudulent intent, which is not protected by the Safe Harbor, *Lehman Brothers* is inapposite.

[6] *See* Submission of Report of Kenneth N. Klee, as Examiner, and Notice Thereof Vol. II at 241, *In re Tribune*, No. 08-13141 (Bankr. D. Del July 27, 2010) (No. 5130-334) ("Examiner's Report") (describing creditors' strategy as an attempted "work around" Section 546(e)).

bankruptcy plan "disclaims" SLCFC Claims, which otherwise belong exclusively to the estate, purportedly allowing individual creditors (Plaintiffs in this action) to bring these very same claims. Through these claims, Plaintiffs seek to avoid and recover billions of dollars paid to thousands of financial institutions and public shareholders who sold their stock in Tribune as part of the LBO. The Bankruptcy Code's plain language, structure and legislative history compel the conclusion that such claims should fail.

Section 546(e) bars constructive fraudulent transfer claims, whether under federal or state law, when, *inter alia*, such claims seek to avoid transfers made to a financial institution to settle a securities transaction. *See* 11 U.S.C. § 546(e). In this case, there is no serious dispute that the transfers in questions are "settlement payments" that were made to a "financial institution." Therefore, even the independent examiner appointed to identify potential claims held by Tribune and its creditors concluded that the estate's SLCFC Claims are barred by the Safe Harbor. *See* Examiner's Report at 241.

Seeking to escape the Safe Harbor's restrictions, the Plaintiffs argue that Section 546(e)'s plain language only prohibits the "trustee," not individual creditors, from bringing avoidance claims. However, when considered in light of other provisions of the Bankruptcy Code, such as Section 544, which provides that *only* the trustee can bring SLCFC Claims once a bankruptcy occurs, the Plaintiffs' argument fails. *See John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank,* 510 U.S. 86, 96 (1993) (statutory provisions should be interpreted in light of the statute's broader scheme); *Smith v. United States*, 508 U.S. 223, 233 (1993) (statutory interpretation is a "holistic" endeavor).

Section 544 of the Bankruptcy Code and the overwhelming majority of case law makes clear that upon a company's filing for bankruptcy, the trustee becomes the creditor's statutory successor for the purpose of asserting state-law fraudulent conveyance claims. *See* 11 U.S.C. § 544(b) (". . . the trustee may avoid any transfer of an interest of the debtor in property . . . that is voidable under applicable law by a creditor holding an unsecured claim. . ."); *see also* 28 U.S.C. § 1409(c) (venue for proceedings commenced by "trustee" "as statutory successor" to "creditors under section" 544(b)). Thereafter, *only* the trustee can bring the SLCFC Claims. *See* 11 U.S.C. § 544(b); *United Feature Syndicate, Inc. v. Miller Features Syndicate, Inc.*, 216 F. Supp. 2d 198, 222 (S.D.N.Y. 2002) ("the estate trustee has exclusive authority" to maintain fraudulent conveyance claims based on the debtor's pre-bankruptcy transfers). Accordingly, upon the filing of a bankruptcy, the creditors' right to bring SLCFC Claims is extinguished, and, it is the trustee, *and only the trustee*, that has the standing to assert SLCFC Claims after that point. And, because the trustee is the creditors' "successor," the "creditors are bound by the outcome" of the trustee's conduct of any subsequent fraudulent conveyance litigation—including, the trustee's decision not to assert such claims. *St. Paul Fire & Marine Insurance Co. v. Pepsi Co., Inc.*, 884 F.2d 688, 701 (2d Cir. 1989); *In re PWS Holding Corp.*, 303 F.3d 308 (3d Cir. 2002) (creditors' state-law claims barred after trustee released Section 544 claims).

Moreover, even the trustee's right to bring SLCFC Claims is not absolute. Rather, the trustee's ability to bring such claims is further limited by other provisions of the Bankruptcy Code. In particular, the Safe Harbor bars the trustee from asserting SLCFC Claims to claw back transfers used to settle securities transactions. *See* 11 U.S.C. § 546(e). Therefore, even if the estate's representative could permit creditors to bring SLCFC Claims by disclaiming his right to bring those claims himself, his ability to do so is limited: the estate's representative cannot disclaim rights he does not have. *See New Haven Projects Ltd. Liab. Co. v. City of New Haven (In re New Haven Projects Ltd. Liab. Co.)*, 225 F.3d 283, 289 n.4 (2d Cir. 2000) (noting that "an assignee takes all of the rights of the assignor, no greater and no less."); *Exchange Nat'l Bank v. A.J. Rackers, Inc. (In re A.J. Rackers, Inc.)*, 167 B.R. 168, 172 (W.D. Mo. 1994) ("[T]he statutory trustees could not delegate the authority to take an action that they themselves could not do.").[7] Thus, to the extent the Bankruptcy Code limits

[7] While a few courts have permitted individual creditor to assert SLCFC Claims if the trustee abandons them, these cases addressed the inapposite issue of

the estate's representative's rights to bring a SLCFC Claim, the creditors who inherit the rights the estate's representative abandons are limited to the right that the estate's representative had in the first instance. In other words, where as here, Section 546(e) bars the estate's representative from bringing SLCFC Claims, it also bars the creditors—the successors to the estate's representative's rights—from bringing those claims themselves.

This result is consistent with the Safe Harbor's legislative history which reflects Congressional desire to promote the stability of financial markets by immunizing transfers used to settle securities transactions from being avoided as a fraudulent conveyance. *See*, *supra*, Part I; *Enron,* 651 F.3d at 334. The District Court reasoned that because the legislative history "refer[s] only to [Section 546(e)'s] effect on the trustee," SA-6, it does not support reading Section 546(e) as barring SLCFC Claims brought by creditors. This is a misreading of the Safe Harbor's legislative history.

In considering the Safe Harbor, Congress was aware of the other provisions of the Bankruptcy Code—including Section 544—which bar creditors

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whether a creditor can bring a claim that the trustee could have, but chose not to, bring. *See, e.g. Hatchett v. United States*, 330 F.3d 875 (6th Cir. 2003).

from bringing SLCFC Claims and only allow the trustee to do so.[8] It is hardly surprising that in analyzing the effect of the Safe Harbor, Congress focused its attention on the *only* party it believed could bring SLCFC Claims: the trustee. Moreover, Appellees have not identified anything in the legislative history to support their contention that Congress intended SLCFC Claims, when brought by creditors, to be outside the Safe Harbor.

A review of the legislative history makes clear the following: Congress intended for the Safe Harbor to bring order and stability to the commodities and securities markets by barring SLCFC Claims from being brought to undo long-settled securities transactions. *See*, *supra*, Part I. Nothing in Section 546(e)'s legislative history supports the novel contention that Congress meant to nullify its own efforts by permitting creditors to do precisely that which it barred the trustee from doing—undoing long settled securities transactions. *See United States v. Aleskerova*, 300 F.3d 286, 301 (2d Cir. 2002) (a statute should not be interpreted to indirectly permit something which the statute directly prohibits).

IV. Section 546(e) Preempts Plaintiffs' SLCFC Claims

Even if this Court concludes that Plaintiffs' SLCFC Claims are not directly barred by the Safe Harbor, it should nevertheless conclude that they are

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[8] Section 544 was first enacted Bankruptcy Reform Act of 1978, P.L. No. 95-598 Title I, § 101, 92 Stat. 2596, whereas the Safe Harbor of 546(e) was added in 1982. H.R. Rep. 97-420 (1982).

preempted by it. As the Supreme Court recently reaffirmed, where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," the state law must yield. *Arizona v. United States*, 132 S. Ct. 2492, 2505 (2012) (internal quotations omitted); *see also Grier v. Am. Honda Motor Co.*, 529 U.S. 861, 873 (2000) (state law causes of action that "stand[] as an obstacle to the accomplishment and execution of the full purpose and objects of Congress" are preempted); *Pac. Capital Bank v. Connecticut*, 542 F.3d 341, 351 (2d Cir. 2008) (same).

A. Plaintiffs' SLCFC Claims Will Undermine the Important Federal Policies Underlying Section 546(e)

There can be no dispute that the Safe Harbor bars the estate from seeking to unwind settlement payments by asserting SLCFC Claims. Congress limited the estate's representative's ability to do so because it determined that, once a bankruptcy commences, the creditor protection policies underlying SLCFC Claims must give way to the critical federal policy of "protect[ing] the nation's financial market from the instability caused by the reversal of settled securities transactions." *Kaiser Steel Corp.*, 913 F.2d at 848; *see also Nat'l Gas*, 556 F.3d at 259 ("[e]ven though an overarching policy of the Bankruptcy Code is to provide equal distribution among creditors, in enacting [the Safe Harbors] Congress intended to serve a countervailing policy of protecting financial markets and therefore favoring an entire class of instruments and participants.").

In passing Section 546(e), Congress attempted to prevent market instability caused by undoing settled financial transactions years after the transactions had been completed. *See*, *supra*, Part I. Since then, Congress has on several occasions expanded the Safe Harbor and has resisted efforts to repeal it. *Id.* However, permitting the Plaintiffs to assert SLCFC Claims would do *de facto* what Congress refused to do *de jure*: repeal the Safe Harbor. *See Contemporary Indus.*, 564 F.3d at 988 (permitting state law claims would render Section 546(e) "meaningless"); *Whyte*, 494 B.R. at 199 ("The trouble with [permitting SLCFC Claims] is that it would, in effect, render section 546(g) a nullity."); *see also*, *supra*, pg. 10 n.2.[9]

The risk posed by SLCFC Claims is the same whether the claims are brought by the bankruptcy trustee, the individual creditors or anyone else. The Safe Harbor promotes market stability by providing market participants, including *Amici*'s members, with legal certainty that, except in the exceedingly rare case of actual fraud, transfers that they receive in settlement of securities transactions will be immune from claw back claims, including SLCFC Claims. There is "no reason to think" that permitting individual creditors to bring defendant class actions to

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[9] In *Whyte*, the court considered whether 11 U.S.C. § 546(g) ("Section 546(g)") of the Bankruptcy Code preempted SLCFC Claims and concluded that it did. Because Sections 546(e) and 546(g) are analogues that share the same legislative purpose, *Whyte's* conclusion applies with equal force here.

undo transfers to thousands of defendants made more than five year ago "would not also have a substantial and similarly negative effect on the financial markets" as they would if those very same claims had been brought by the bankruptcy trustee. *See Katz,* 462 B.R. at 452 (quoting *Enron*, 651 F.3d at 339).

B. Plaintiffs' SLCFC Claims Conflict with Section 546(e) And Are Preempted

Given clear Congressional intent that settled securities transactions remain undisturbed in the absence of evidence of actual fraud, courts have rejected efforts to recover settlement payments through state law claims. Thus, the Eighth Circuit rejected an attempt to undo settlement payments made in the context of an LBO through the assertion of state law causes of action. *Contemporary Indus.,* 564 F.3d at 989. In *Contemporary Industries*, the trustee sought to recover payments made to shareholders in a LBO by asserting that these transfers represented improper dividends and resulted in the selling shareholders being unjustly enriched. The Eighth Circuit first concluded that the trustee's bankruptcy claims were barred by Section 546(e). The court then considered whether the trustee could "through its state law claims" recover "the same payments [the Eighth Circuit had] already held . . . unavoidable under Section 546(e)." *Id.* at 988. Concluding that permitting the trustee to recover such transfers through state law claims would "frustrate the purpose" behind the Safe Harbor, the Eighth Circuit determined that the trustee's state law claims were preempted. *Id.*

Since then, four district courts that have confronted similar fact patterns have likewise concluded that state law claims seeking to unwind settled securities transactions conflicted with Section 546(e) and were therefore preempted. *See Silva*, 483 B.R. at 71 ("The Court could not permit the unjust enrichment claim to go forward without frustrating the purpose of Section 546(e)"); *Verizon Commc'ns Inc.*, 2012 WL 4050088, at *18-19 (allowing plaintiff to recover "under state unlawful dividend statute would render Section 546(e) meaningless"); *Hechinger Inv. Co. v. Fleet Retail Fin. Grp.*, 274 B.R. 71, 96-98 (D. Del. 2002) (Section 546(e) preempts unjust enrichment claim to recover payments received by shareholders in a LBO because otherwise Section 546(e) "would be rendered useless").

In an analogous case pending in this Circuit, the district court concluded that SLCFC Claims were preempted by the Safe Harbor. *See Whyte,* 494 B.R. 196. In *Whyte*, individual creditors assigned their SLCFC Claims to a liquidation trustee who then brought suit to avoid certain transfers that the defendant received in connection with a swap agreement it entered into with the debtor. 494 B.R. 198. After defendants moved to dismiss the SLCFC Claims as barred by Section 546(g) of the Bankruptcy Code, plaintiff argued that "Section 546(g) should not apply to claims asserted by [individual] creditors." *Id.* Describing the argument as a "clever" attempt to escape the Safe Harbor's reach, the court nevertheless concluded that accepting this argument would "render Section 546(g) a nullity." Noting that "[b]oth the facial breadth of the [Safe Harbor], and the corresponding legislative history, ma[de] plain that Congress intended to place [financial contracts] beyond the inherently destabilizing effects of a bankruptcy and its attended litigation," the court held that permitting creditors to bring SLCFC Claims would "make a mockery of Congress's purpose of minimizing the volatility" of the financial markets and found the SLCFC Claims preempted. *Id.* at 200-01.

The District Court distinguished *Whyte* on the basis that the claims in *Whyte* were brought by a trustee on behalf of individual creditors, not the creditors directly. SA-8. This is a meaningless distinction.

Plaintiffs' efforts to directly assert their SLCFC Claims are part of a trend emerging in large bankruptcy cases: recognizing that Section 546(e)'s broad language, endorsed by this Court in *Enron* and *Quebecor*, has made avoidance claims directed at securities transactions difficult, debtors and creditors in recent bankruptcies have thought to escape the Safe Harbor through procedural maneuvers. Thus, in *Whyte*, individual creditors "assigned" their SLCFC Claims to the litigation trustee and in *Lyondell* the plan of reorganization created a litigation trust to pursue creditor's SLCFC Claims. *See Whyte,* 494 B. R. at 198; *Lyondell,* 503 B.R. at 355-56. Here, of course, the representative of Tribune's estate and Tribune's creditors developed a choreographed dance pursuant to which the estate's representative first disclaimed SLCFC Claims, and the creditors then brought those very same claims directly by means of lawsuits against thousands of former shareholders and a defendant class action.

While each plan has its procedural nuances, these nuances do not alter the simple fact that—for the purposes of preemption analysis—they are distinctions without a difference. The purpose of Section 546(e) is to promote market stability by assuring market participants that, except in cases of actual fraud, transfers they receive as part of a securities transaction will not be clawed back. Permitting SLCFC Claims to go forward, whether they are asserted by a bankruptcy trustee or an individual creditor, would undermine these goals in at least two ways.

First, permitting creditors to assert SLCFC Claims would substantially increase the likelihood that a settlement payment would be undone—especially in the context of an LBO transaction. *See* Guisado, *Revisiting, supra,* at 433 (noting that while actual fraud is very difficult to prove, a constructive fraud claim may be easier to establish in the case of leveraged buyouts). Such a reversal of payments—at least a portion of which may have already been reinvested—is likely to impact the national financial markets in the exact same way as would a clawback action brought by a bankruptcy trustee. *See Contemporary Indus.*, 564 F.3d at 987.

Second, permitting individual creditors to bring SLCFC Claims would create uncertainty as to when a market participant could deem a transfer safe from avoidance. Different states have different statutes of limitations for bringing fraudulent conveyance claims. *Compare* N.Y.C.P.L.R. § 213(1) (McKinney 2013) (six year statute of limitations) *with* Mass. Gen. Laws. ch. 109A § 10 (1996) (four year statute of limitation). Thus, whether a transfer received by a particular market participant is "safe" from "claw back" may depend on the state in which the plaintiff bringing the action resides—resulting in "commercial uncertainty and unpredictability at odds with the Safe Harbor's purpose and in an area of law where certainty and predictability are at a premium." *Enron*, 651 F.3d at 336.

In short, from the perspective of financial market participants, whom the Safe Harbor is designed to protect, there is no difference whether settlement payments are clawed back as a result of an action brought by a trustee or one brought by individual creditors. In both cases, transactions which have been settled for years are unwound en masse, forcing the market participants to pay back proceeds from long-closed transactions. *See Enron*, 651 F.3d at 338-39 (applying the Safe Harbor where "avoidance of the transaction in either scenario would present the same threat of systemic risk in the marketplace. . .").

Accordingly, Plaintiffs' procedural maneuvers designed to make an end run around the Safe Harbor should be rejected in favor of the federal policy of promoting the stability of the financial markets. *See, e.g., Grochowski v. Phoenix Constr.*, 318 F.3d 80, 86 (2d Cir. 2003) (rejecting state law claim to indirectly enforce wage tables contained in the Davis Bacon Act as "clearly an impermissible "end run" around the DBA); *Police & Fire Ret. Sys. of City of Detroit v. IndyMac MBS, Inc.*, 721 F.3d 95, 101 (2d Cir. 2013) ("proposed interveners may not circumvent . . . statue of repose" through tolling or relation back amendment under Rule 15(c)).[10]

V. The Safe Harbor Applies To Transfers Used To Settle a Securities Transaction Irrespective Of The Nature Of The Transaction

Finally, a recent bankruptcy court decision in the Southern District of New York held that the Safe Harbor does not protect payments received by selling shareholders in an LBO. *Lyondell*, 503 B.R. 348. On the issue of the Safe Harbor's applicability, *Lyondell* relies heavily on the District Court's reasoning below, *id*. at 358-78, and should be rejected for all of the same reasons.

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[10] The District Court concluded that the Plaintiffs' claims were not preempted by Section 546(e), because the Bankruptcy Code, as a whole, serves purposes other than promoting the stability of the financial markets. *See* SA-6. While the Bankruptcy Code surely serves multiple goals, this is of no help to Plaintiffs. As multiple Courts of Appeals have held, in passing the Safe Harbor, Congress determined that where the goal of protecting the stability of the financial markets conflicts with the goal of promoting creditor recovery, the former prevails. *See Nat'l Gas*, 56 F.3d at 251.

Amici write here only to address the *Lyondell*'s court's skepticism as to whether the Safe Harbor should ever apply in the context of an LBO transaction. *Id*. at 72-73. As an initial matter, *Lyondell*'s reasoning flies in the face of this Court's repeated holdings that the Safe Harbor should be read literally according to its plain language, *Enron*, 651 F.3d at 340, *Quebecor*, 719 F.3d at 99-100, and should be rejected for that reason alone.

Furthermore, the *Lyondell*'s court's view that undoing transfers made in an LBO transaction does not pose a threat to the stability of the financial markets has been considered, and rejected, by numerous Courts of Appeal. *See, e.g.*, *Kaiser,* 913 F.2d at 849 ("The danger of a 'ripple effect' on the entire market is at least as inherent in the avoidance of an LBO as it is in the avoidance of a routine stock sale."); *Munford,* 98 F.3d at 610 n.4 (11th Cir. 1996) ("Even granting trustees avoidance powers under limited circumstances in the LBO context has the potential to lessen confidence in the commodity market as a whole."); *Contemporary Indus.,* 564 F.3d 981; *QSI Holding,* 571 F.3d 545; *Brandt v. B.A. Capital Co. (In re Plassein Intern. Corp.),* 590 F.3d 252 (3d Cir. 2009). The mere fact that the transferees in LBO transactions may be "ultimate beneficiaries" of the securities transaction, *Lyondell*, 503 B.R. at 373, does not mean that undoing those transfers will not promote market instability. To the contrary, in rejecting an argument similar to *Lyondell's*, the Eighth Circuit observed that it was hard to believe that undoing millions of dollars in transfers—let alone billions as is the case here—a "portion of which were probably [already] reinvested … would in no way impact the nation's financial markets." *Contemporary Indus.,* 564 F.3d at 987.[11]

Refusing to afford LBO transfers the Safe Harbor's protections will undermine the very viability of such transactions. Shareholders are unlikely to approve LBOs absent the confidence that the payments they receive through the transaction are insulated from the risk of litigation. The shareholders' unwillingness to enter into leveraged transactions will, in turn, reduce market liquidity, increasing the challenges faced by financially struggling companies and resulting in further market instability. Congress sought to avoid such instability by passing the Safe Harbor and this Court should not undermine this effort by creating an "LBO exception" to its otherwise broad reading of the Safe Harbor.

CONCLUSION

Amici urge that the Safe Harbor be recognized and applied in all situations where protected transactions are sought to be avoided following a bankruptcy filing. If the Court allows the Plaintiffs to proceed, then all subsequent

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[11] Even if one accepts *Lyondell's* reasoning that LBOs of privately held companies does not create systemic risk because their securities are not publicly traded, such reasoning does not apply here, where thousand of Tribune's public shareholders sold their shares as part of the transaction.

plans of reorganization will be drafted to have the trustee disclaim SLCFC Claims in favor of the creditors who will then bring avoidance actions directly, thereby eviscerating the Safe Harbor protections in absolute violation of Congressional intent and reintroducing the harms that the Safe Harbor was designed to bar.

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Respectfully submitted,

NYSE EURONEXT

By: /s/ Holly K. Kulka

Holly K. Kulka
11 Wall Street
New York, NY 10005
212-656-3000

Counsel for NYSE Euronext

FRESHFIELDS BRUCKHAUS DERINGER US LLP

By: /s/ David Y. Livshiz

Marshall H. Fishman
Timothy P. Harkness
David Y. Livshiz
601 Lexington Avenue
New York, New York 10022
212-277-4000
marshall.fishman@freshfields.com
timothy.harkness@freshfields.com
david.livshiz@freshfields.com

Counsel for SIFMA and ISDA

SECURITIES INDUSTRY AND FINANCIAL MARKETS ASS'N

Kevin Carroll
1101 New York Avenue, NW
Washington, D.C. 20005
202-962-7382

Counsel for SIFMA

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and 29(d) because it contains 6,987 words, excluding the parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I also certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(A) and the type-style requirements of Fed. R. App. P. 329(a)(6) because it has been prepared in a proportionally spaced typeface, Times New Roman 14 points.

Date: March 7, 2014

/s/ David Y. Livshiz

David Y. Livshiz

CERTIFICATE OF SERVICE

I certify that on March 7, 2014, I caused to be served via this Court's electronic filing system the foregoing brief of *Amici Curiae* Securities Industry and Financial Markets Association and International Swaps and Derivatives Association, Inc. in Support of Defendant-Appellees-Cross-Appellants.

I further certify that Counsel for Defendants-Appellees-Cross-Appellants has agreed, in accordance with a Case Management Order dated November 21, 2013, to serve the *Amicus Curiae* brief by email to 1) members of the Appellate Liaison Committee and 2) defendants who have not filed a notice of appearance in the District Court but who have provided their email addresses to the Appellate Liaison Committee. Per this same Case Management Order, Counsel for Defendants-Appellees-Cross-Appellants has agreed to post the *Amicus Curiae* brief on the Tribune Defendants' website.

/s/ David Y. Livshiz

David Y. Livshiz