13-2653-cv

IN THE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BETTINA M. WHYTE, AS TRUSTEE OF THE SEMGROUP LITIGATION TRUST,

Plaintiff-Appellant,

vs.

BARCLAYS BANK PLC, BARCLAYS CAPITAL, INC.,

Defendants-Appellees.

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") AND INTERNATIONAL SWAPS AND DERIVATIVES ASSOCIATION, INC. ("ISDA") IN SUPPORT OF BARCLAYS BANK PLC AND BARCLAYS CAPITAL, INC., APPELLEES, SUPPORTING AFFIRMANCE

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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) and the International Swaps and Derivatives Association, Inc. (ISDA) 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.

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The Securities Industry and Financial Markets Association (SIFMA) and the International Swaps and Derivatives Association, Inc. (ISDA) respectfully submit this brief as *amici curiae* in support of the Appellee. The appellee has consented to this brief and the appellant has stated she will not object to *amici's* motion for leave to file 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 (GFMA). For more information, visit www.sifma.org.

ISDA is the global trade association representing leading participants in the derivatives industry. Since 1985, ISDA has worked to make the global over-the-counter (OTC) derivatives markets safer and more efficient. Today, ISDA has over 800 member institutions from 60 countries. These members include a broad range

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[1] SIFMA and ISDA 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 SIFMA, ISDA, their members, and their counsel contributed money that was intended to fund preparing or submitting this brief.

of OTC derivatives market participants including corporations, investment managers, government and supranational entities, insurance companies, energy and commodities firms, and international and regional banks. In addition to market participants, members also include key components of the derivatives market infrastructure including exchanges, clearinghouses and repositories, as well as law firms, accounting firms and other service providers. Information about ISDA and its activities is available on the Association's web site: www.isda.org.

Both SIFMA and ISDA often appear as *amici curiae* in cases raising issues of importance to the derivatives and securities markets and the commercial banking industry, and courts frequently have relied on their views. *See, e.g.*, *Eternity Global Master Fund Ltd. v. Morgan Guar. Trust Co.*, 375 F.3d 168, 173–74 (2d Cir. 2004); *Merrill Lynch Int'l v. XL Cap. Assur. Inc.*, 564 F. Supp. 2d 298, 300 (S.D.N.Y. 2008) (both citing ISDA *amicus* briefs); *Brookfield Asset Mgmt. v. AIG Fin. Prods. Corp.*, No. 09 Civ. 8252, 2010 WL 3910590, at *6 n.3 (S.D.N.Y. Sept. 29, 2010); *Eternity Global*, 375 F.3d at 181–82 & n.24; *Fin. One Pub. Co. v. LBSF*, 215 F. Supp. 2d 395, 400 (S.D.N.Y. 2002) (both citing ISDA *User's Guides*); *Arnold Chase Family, LLC v. UBS AG*, No. 3:08cv00581, 2008 WL 3089484, at *1 (D. Conn. Aug. 4, 2008); *Bevill, Bresler & Schulman Asset Mgmt. Corp. v. Spencer Sav. & Loan Ass'n*, 878 F.2d 742, 745 (3d Cir. 1989); *RTC v. Harris Trust & Sav. Bank*, No. 90 C 7330, 1992 WL 223807, at *6 & n.13 (N.D.

Ill. Sept. 2, 1992) (all citing SIFMA or PSA *amicus* briefs).[2] The memberships of SIFMA and ISDA have brought the two organizations together in a joint *amici* presentation out of a deep concern that the issues in this case threaten fundamental market protections.

PRELIMINARY STATEMENT

The Bankruptcy Code safe harbor provisions at issue in this appeal are critically important to the members of SIFMA and ISDA. Courts have repeatedly rejected efforts to constrict the safe harbor, recognizing its importance to avoid a domino effect of financial meltdown caused by large-scale avoidance actions against financial market participants. The latest effort, at issue here, is to contend that bankruptcy plan-appointed trustees may pursue causes of action transferred by plan provisions that they would be foreclosed from bringing when standing in the shoes of creditors under Bankruptcy Code § 544. They claim that pursuing their claims under the *SemGroup* Plan is not bankruptcy litigation and therefore steers around the bankruptcy safe harbor. This is both intuitively and substantively wrong for the reasons explained by appellee Barclays and other *amici* (including the preemption arguments that SIFMA and ISDA have endeavored not to repeat),

[2] The Public Securities Association (PSA) was a predecessor to The Bond Market Association, which in turn was a predecessor to SIFMA.

and because the Litigation Trustee would not have standing to pursue creditor causes of action but for them becoming property of the bankruptcy estate.

This is the first circuit court case to address the new strategy of attempting to circumvent the Bankruptcy Code safe harbor of Section 546(g) (or related sections 546(e), (f) or (j)), by assignment of individual creditor claims to a litigation trust. In other cases pending at the bankruptcy court level, attempted circumvention through abandonment and assignment of such claims under reorganization plans to creditor trusts and to groups of debentureholders through an indenture trustee are at issue, and the ruling in this case will likely serve as precedent. *Amici* SIFMA and ISDA urge the Court to reject the *SemGroup* end-run effort and instead continue to protect the soundness and vitality of financial markets as Congress intended. Were the *SemGroup* Litigation Trustee to succeed, it would open every securities, commodities, repo, swap and derivatives transaction to avoidance on a massive scale through the new procedural loophole of a bankruptcy plan assignment of creditor claims, essentially repealing the Section 546(e), (f), (g), and (j) safe harbor provisions. *Amici* also urge the Court to write its opinion in a manner that will discourage other efforts to accomplish the same result through similar contrivances.

ARGUMENT

The *SemGroup* Litigation Trustee is seeking to unwind a transaction involving positions amounting to 20% of the United States' crude oil inventory and some $143 million through a bankruptcy court-appointed trustee's fraudulent conveyance lawsuit. Complaint ¶¶ 4, 9, at A243-44; Dist. Ct. Op. at A284. Congress knew that when a company files for bankruptcy protection, fraudulent conveyance litigation is likely, quite possibly on a very broad scale by a bankruptcy trustee aggregating and consolidating all creditors' fraudulent conveyance claims under Bankruptcy Code § 544.

Congress knew that avoidance lawsuits on the kind of scale sought by the Litigation Trustee here could have drastic systemic consequences when the challenged transactions are financial market transactions that, with years of hindsight, are alleged to have been exchanges for less than equivalent value. When the target institution is financially tenuous, such avoidance actions can even result in insolvency. Given the interrelatedness of financial market transactions and institutions, this can generate enormous ripple effects throughout the industry. The consequences of the Lehman Brothers failure illustrate well the legitimacy of Congress' concerns. Congress accordingly protected financial market transactions from being unwound through fraudulent conveyance lawsuits when companies file bankruptcy cases.

I. The Bankruptcy Safe Harbor Is Crucial to the Financial Health and Operation of American Financial Markets.

Bankruptcy Code Sections 546(e), (f), (g), and (j) were enacted to protect the integrity and efficiency of U.S. financial markets from the systemic risk of avoidance actions that are concentrated and expanded on behalf of all creditors by a bankruptcy trustee. The impact on defendant financial institutions can be significant because hundreds of millions of dollars of shares, future contracts, repos, swaps, and other financial instruments and transactions worth billions of dollars are traded, cleared, and settled every day.

This Court recognized in the *Enron Creditors Recovery* case that "[i]f 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." *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).

As one study explained more than two decades ago, the inability of one participant to meet major obligations can jeopardize the financial health of the clearing organizations to which it belongs. This is so because clearing organizations guarantee the settlement of matched trades and are responsible for fulfilling the financial obligations of failed members. Failure of a clearing organization would mean that healthy clearing members may not get paid promptly for stocks they delivered or receive stocks for money they paid, potentially leading to their failure as well, and resulting in a rippling effect on parties and markets not directly involved with the failed member. Group of Thirty, *Clearance and Settlement Reform, The Stock, Options, and Futures Markets Are Still At Risk*, GAO/GGD-90-33, at 14, 15 (Apr. 1990).

Sections 546(e), (f), (g), and (j) protect participants in the financial market from "the potentially massive losses and chain reactions" that could result from the damage to any single market participant from having to reverse and cover settled transactions. H.R. Rep. No. 97-420, at 2 (1982). These Bankruptcy Code sections accomplish this by insulating financial contracts payments from preference and fraudulent conveyance actions on the scale arising in bankruptcy cases, where all creditors' fraudulent conveyance claims can be focused and pursued in a single lawsuit, as long as there is no outright fraud. *Id*. ("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 cases of fraud.").

When enacting these provisions, Congress repeatedly recognized the importance of protecting the critical financial markets from the upheaval that would result from subjecting settled transactions to avoidance in bankruptcy cases, through Bankruptcy Code amendments in 1982, 1984, 1990, and 2005.[3] These amendments show that Congress has provided over and over that except for the rare cases of actual fraud, all types of financial market transactions are protected from avoidance actions once a company files a bankruptcy case.

Congress intended to provide market participants, including *amici's* members, with legal certainty by providing a safe harbor from bankruptcy interference with completed transactions. H.R. Rep. No. 101-484, at 1 (1990) (safe harbors added and expanded "to ensure that the swap and forward contract financial markets are not destabilized by uncertainties regarding the treatment of their financial instruments under the Bankruptcy Code"). Congress intended to immunize market participants from the legal risks of bankruptcy and thereby

[3] *See* H.R. Rep. No. 97-420, at 1 ("[C]ertain protections are necessary to prevent the insolvency of one commodity or security firm from spreading to other firms and possibly threatening the collapse of the affected market."); 1982 Amendments to Bankruptcy Code, Pub. L. No. 97-222, § 4, 96 Stat. 235, 236; H.R. Rep. No. 97-420, at 1 ("[S]everal of the amendments are included to minimize the displacement caused in the commodities and securities markets in the event of a major bankruptcy affecting those industries."); *In re Bevill, Bresler & Schulman Asset Mgmt. Corp.*, 878 F.2d at 748 ("The certainty and fluidity needed by professionals on both sides of the transactions is of such importance that one debtor's filing of a petition should not be permitted to impair the functioning of the market as a result of the Code's automatic stay, or have the integrity of contract relationships upset by the Code's avoidance provisions."); *Kaiser Steel Corp. v. Charles Schwab & Co.*, 913 F.2d 846, 849 (10th Cir. 1990) ("Congress's purpose was to minimize the displacement caused in the commodities and securities markets in the event of a major bankruptcy affecting those industries." (internal quotation marks and citation omitted)).

preclude the systemic damage to financial markets that would be caused by avoidance of settled transactions on a massive scale. *Thrifty Oil Co. v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 322 F.3d 1039, 1050 (9th Cir. 2003) ("The legislative history of the Swap Amendments plainly reveals that Congress recognized the growing importance of interest rate swaps and sought to immunize the swap market from the legal risks of bankruptcy."); *see also Hutson v. E.I. du Pont de Nemours & Co.* (*In re Natural Gas Distribs., LLC*), 556 F.3d 247, 259 (4th Cir. 2009) (Congress intended to serve policy of protecting financial markets, superseding policy of bankruptcy distributions to creditors, by enacting § 546(g) to "favor[] an entire class of instruments and participants").

II. Courts Have Repeatedly Rejected Novel Attempts to Circumvent the Safe Harbor.

Courts have repeatedly recognized the broad scope of Sections 546(e), (f), (g), and (j) and refused to allow bankruptcy debtors, trustees, committees, or creditors to limit that scope through their various creative arguments, including:

- Claims that leveraged buyouts were not protected because the exchange was not made between two shareholders. *Kaiser Steel Corp. v. Charles Schwab & Co.*, 913 F.2d 846, 849 (10th Cir. 1990) ("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." (citation omitted)); *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").

- Claims that only transactions in publicly traded shares and not private securities transactions are protected. *QSI Holdings, Inc. v. Alford* (*In re QSI Holdings, Inc.*), 571 F.3d 545, 550 (6th Cir. 2009), *cert. denied*, 130 S. Ct. 1141 (2010); *Brandt v. B.A. Capital Co. L.P.* (*In re Plassein Int'l Corp.*), 590 F.3d 252, 259 (3d Cir. 2009), *cert. denied*, 130 S. Ct. 2389 (2010); *Contemporary Indus. Corp. v. Frost*, 564 F.3d 981, 986 (8th Cir. 2009).

- Contending that the redemption of commercial paper is outside the scope of 546(e). *In re Enron Creditors Recovery Corp.*, 651 F.3d at 335.

- Most notably for this case, using state law unjust enrichment claims to accomplish the same result as bankruptcy avoidance under the guise of a different cause of action based upon the same facts. *Contemporary Indus. Corp.*, 564 F.3d at 983-84, 988; *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).

A similar result must be reached here to protect the operation of our financial markets—markets vital to the American economy as a whole. As Appellees and their other *amici* argue, the safe harbor impliedly preempts state law fraudulent transfer claims brought by creditors during or after bankruptcy because these claims have the same potential to cause "the insolvency of one commodity or security form [to] spread[] to other firms" and "threaten[] the collapse of the affected industry." H.R. Rep. 97-420, at 2.

This risk is heightened, and the applicability of the safeguards in 546(e), (f), (g), and (j) is even more clear, when the claims are brought by a bankruptcy litigation trustee as they are here. The Litigation Trustee seeks to sanction a procedural loophole of having creditors' avoidance actions assigned under a plan in addition to (or even instead of) having them automatically transferred to the trustee's control under Bankruptcy Code § 544, eviscerating these important safeguards entirely.

If this Court were to allow circumvention of the financial market safe harbor through this device, reorganization plans with such terms will become the norm. The safe harbor will be rendered meaningless and no longer reliable in any respect. The resulting threat to financial market stability created by the uncertainty that settled transactions may not really be final will drastically impair the ability of American financial institutions and corporations to continue engaging in such transactions cost-effectively. Market participants will foresee being subjected to extended litigation over the propriety of their initial pricing of transactions, requiring complex expert analysis of stale pricing data. They will also lose confidence in measurements of hedged credit exposure, which are critical to implementing prudent risk management procedures, undermining the effectiveness of such procedures with far-reaching effects on other institutions and markets. ISDA & the Public Securities Ass'n, *Financial Transactions in Insolvency: Reducing Legal Risk Through Legislative Reform*, at 2 (Apr. 2, 1996).

Financing costs will dramatically increase as parties compensate for additional risks, inhibiting economic growth.[4] Market participants will be discouraged from continuing to trade with any party perceived as financially unstable to any degree, or be obliged to adopt draconian collateral requirements, contrary to Congress' intent to ensure that rights under protected agreements would be respected if the weak parties fail. The uncertainty of eroding safe harbor provisions will disrupt the efficient and globally competitive working of our

[4] *See, e.g.*, Michael J. Herbert, *The Trustee Versus The Trade Creditor II: The 1984 Amendment to Section 547(c)(2) of the Bankruptcy Code*, 2 BANK. DEV. J. 201, 205 (1985) (In regards to trade creditors who extend credit to a debtor, the author states, "To the extent that the preference laws enter into the trade creditor's calculation of whether to do business with the debtor or not, they provide a disincentive to deal, because they increase the risk of eventual non-payment."). Even in the absence of an adverse court decision, the financial jitters caused by Enron's collapse resulted in a temporary but severe tightening of the market for commercial paper. In February 2002, Sprint, which had been relying on the commercial paper market for $3 billion of working capital, was forced to take on long-term debt that cost the company almost $200 million in additional annual borrowing costs. Gregory Zuckerman, *Sinking Commercial Paper Market Broadens Effects of Enron Troubles*, WALL ST. J., Mar. 28, 2002.

financial markets. Market participants will face the undoing of thousands of settled transactions, which is precisely what Congress sought to avoid.

III. Congress Intended for the Safe Harbor to Encompass State Law Fraudulent Conveyance Claims, to Meet its Goal of Protecting Financial Markets.

The *SemGroup* Litigation Trustee argues that creditor state law fraudulent conveyance causes of action are not expressly referenced in Sections 546(e), (f), (g), and (j), and says Congress deliberately chose not to cover them. But Congress did intend to insulate market participants from state fraudulent conveyance claims in bankruptcy cases as shown by its inclusion of Bankruptcy Code § 544 in the list of precluded avoidance actions in Section 546.

A. Creditors' State Law Fraudulent Conveyance Claims Become Property of the Estate, Controlled by the Trustee

While there is some case law to the contrary, the strong majority view is that Section 544 transfers creditors' state law fraudulent conveyance claims to the bankruptcy estate as a matter of law. *See Cumberland Oil Corp. v. Thropp*, 791 F.2d 1037, 1042 (2d Cir. 1986) ("claims [for] . . . violation of the fraudulent conveyance laws . . . would … be property of the estate"); *Rajala v. Gardner*, 709 F.3d 1031, 1039 (10th Cir. 2013) ("Both parties agree that fraudulent transfer claims are included in the bankruptcy estate" although fraudulently transferred property is not itself property of the estate); *Cadle Co. v. Mims* (*In re Moore*), 608 F.3d 253, 259–61 (5th Cir. 2010) (Section 544(b) fraudulent transfer claims are property of the estate); *Morley v. Ontos, Inc.* (*In re Ontos, Inc.*), 478 F.3d 427, 431 (1st Cir. 2007) ("It is well established that a claim for fraudulent conveyance is included within [property of the estate]."); *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 under way."). *Contra Cybergenics Corp. v. Chinery* (*In re Cybergenics Corp.*), 226 F.3d 237, 242–45 (3d Cir. 2000) (creditor fraudulent transfer claims do not become property of the estate); *see FDIC v. Hirsch* (*In re Colonial Realty Co.*), 980 F.2d 125, 131 (2d Cir. 1992) (fraudulently transferred *property* is not property of the estate; decision does not address whether fraudulent conveyance *causes of action* are estate property).[5]

In any event, whether or not creditor state law fraudulent conveyance claims technically become property of the estate, it is absolutely clear that the Bankruptcy Code makes the bankruptcy trustee (or debtor-in-possession) the creditors' "successor" with exclusive standing to pursue creditors' state law fraudulent conveyance claims once the company is in bankruptcy. *See* 11 U.S.C. § 544(b).

[5] A recent district court opinion in *Tribune* reads *Colonial Realty* to hold that fraudulent conveyance claims are not property of the estate. *In re Tribune Co.*, No. 1:12-mc-02296-RJS, 2013 WL 5311439, at *8 (S.D.N.Y. Sept. 23, 2013). But *Colonial Realty* only held that the estate has no interest in property that was

Indeed, this Court has so held. *Colonial Realty*, 980 F.2d at 131–32 (Bankruptcy Code stays creditors from bringing fraudulent transfer actions); *see also United Feature Syndicate, Inc. v. Miller Features Syndicate, Inc.*, 216 F. Supp. 2d 198, 222 (S.D.N.Y. 2002) (the "trustee has exclusive authority to maintain" "fraudulent conveyance claims based upon pre-bankruptcy petition transfers by a debtor").

B. Congressional Intent to Insulate Financial Markets from Fraudulent Conveyance Claims Is Shown by the Express Reference to Section 544

At the same time Congress placed state law fraudulent conveyance suits in the control of the trustee, it limited the type of transactions that could be avoided by that trustee as statutory representative of the creditors, excluding multiple types of financial market transactions, with initial limitations that were expanded over the years. 11 U.S.C. § 546(e), (f), (g) and (j) ("…the trustee may not avoid a transfer…."). [6] Those subsections of Section 546 operate to place such transactions squarely within the safe harbor, preventing such claims from being pursued.

Appellant focuses on the fact that Congress did not expressly refer to state law claims asserted by individual creditors for causes of action otherwise falling

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fraudulently conveyed until it is recovered and did not decide whether the claim itself was property of the estate. *See In re Colonial Realty Co.*, 980 F.2d at 130-31.

[6] The Section 546(e) safe harbor was originally enacted in 1978 as Section 764(c), *see* 11 U.S.C. § 764(c) (repealed 1982), was expanded and moved to Section 546(d) in 1982, Act of July 27, 1982, Pub. L. No. 97-222, §§ 4, 17(c), 96 Stat. 235, and moved to Section 546(e) in 1984, Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 351(2), 98 Stat. 333.

under the safe harbor when stating that the safe harbor applies "[n]otwithstanding sections 544, 545, 547, 548(a)(1)(B) and 548(b)." 11 U.S.C. § 546(e), (f), (g) and (j). But because Section 544 restricts creditors from suing and only allows the trustee to do so, Congressional intent to encompass all state law fraudulent conveyance suits is evidenced by its reference to Section 544. The safe harbor was drafted to place limits on the only party authorized to bring such suits. Congress knew that these state law fraudulent conveyance actions would be dismissed if they were attempted.

Some courts have held that individual creditors can pursue their own fraudulent conveyance causes of action after a trustee abandons them or otherwise closes the case without pursuing such litigation under Section 544, but (A) these cases have not involved actions otherwise covered by the safe harbor, and (B) they do not address Supreme Court holdings that once a bankruptcy case is filed, only the trustee can pursue fraudulent conveyances, and creditors cannot do so after the bankruptcy concludes with no avoidance suit filed by the trustee. *Compare Hatchett v. United States*, 330 F.3d 875, 885–86 (6th Cir. 2003), *with Moyer v. Dewey*, 103 U.S. 301, 303 (1880), *and Trimble v. Woodhead*, 102 U.S. 647, 649–50 (1880).[7] They do not address preemption of state law claims that effectively

[7] The recent *Tribune* case says these are Bankruptcy Act cases, and the Act provided that fraudulently conveyed property was vested in the trustee. *Tribune Co.*, 2013 WL 5311439, at *8. As noted above, fraudulent conveyance causes of

duplicate fraudulent conveyance suits for the express purpose of circumventing Bankruptcy Code restrictions on such litigation. *Contemporary Indus. Corp.*, 564 F.3d at 983-84, 988; *In re Hechinger Inv. Co. of Del., Inc.*, 274 B.R. at 96.

Even if some courts have allowed individual creditors to pursue individual avoidance actions a trustee declines to pursue – in cases without safe harbor protection – it does not alter the important point that Congress intended and expected the safe harbor provisions to block the consequences of the kind of large-scale litigation brought by the *SemGroup* Litigation Trustee.

Congress, like anyone, can see the world of difference between an individual creditor seeking to recover its own individual damages when its debtor has not filed for bankruptcy and a concerted assault concentrating and aggregating all creditors' claims in a bankruptcy case. Individual creditors must use their own resources to finance attorneys' fees, and the cases often are not cost-effective and not pursued. In any instance where significant financial market losses have been incurred, a bankruptcy case is likely, though. During the bankruptcy case or under a plan through a litigation trustee, fraudulent conveyance defendants are faced with the equivalent of a class actions—millions of dollars of bankruptcy estate assets may be used to collectively finance the actions.

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action are property of the estate under the Bankruptcy Code, and the Supreme Court's principles remain valid.

Congress intended to prevent just such large-scale avoidance actions challenging settled financial market transactions. As this Court has explained, the safe harbor was designed to "'minimiz[e] the displacement caused in the commodities and securities markets in the event of a major bankruptcy affecting those industries.'" *Official Comm. of Unsecured Creditors of Quebecor World (USA) Inc. v. Am. United Life Ins. Co.*, (*In re Quebecor World (USA) Inc.*), 480 B.R. 468, 471 (2d Cir. 2012) (quoting *In re Enron Creditors Recovery Corp.*, 651 F.3d at 334). And the concerns leading to the 1990 expansion of the safe harbor that introduced 546(g) "closely parallel" these concerns. H.R. Rep. No. 101-484, at 3. Considered in the aggregate, these actions produce similar ripple effects on financial markets and thus stand as an obstacle to Congress' goals. For these reasons, the district court quite properly held that Section 546(g) preempts the Contributing Lenders' fraudulent conveyance claims.

IV. The Litigation Trustee, Acting for the Benefit of the Estate, is Subject to the Safe Harbor.

The Litigation Trustee contends that she can merely switch hats to be the holder of written assignments of identical causes of action that would otherwise fall squarely within the safe harbor under Section 544 and wreak the same financial havoc on financial markets that Congress sought to avoid. That notion is outlandish and would have disastrous consequences. No cases have held that a trustee can abandon the causes of action and then pursue them as assignee of the creditors under plan provisions or written assignments in lieu of the Section 544 assignments made by operation of law.

A. The *SemGroup* Litigation Trustee Is a Bankruptcy Plan Trustee

The *SemGroup* Litigation Trustee is seeking to wield the same type of dangerous club that Section 544 initially authorizes, but the safe harbor then protects. She is asserting claims to avoid the entire Barclays transaction. Complaint ¶¶ 14, 87-145, at A265-73. She purports not to be taking advantage of procedural benefits of bankruptcy litigation like nationwide service of process by mail. Op. Br. 25. But make no mistake; she is a bankruptcy plan trustee.

The *SemGroup* Litigation Trust was established and funded under a confirmed reorganization plan. Plan §§ 8.4, 8.6, 8.8, 9.1, 11.1–11.13, at A75, A76, A78, A82-A88. The Plan and confirmation order provided for court approval of the Litigation Trustee. Plan §§ 1.87, 11.6(b) at A35, A85; Conf. Order ¶¶ 1, 2, 13 at A132-33, A139. She must use any litigation recovery in accordance with the Plan and make Plan distributions to all members of identified classes of creditors, not just those assigning state law claims. Plan §§ 5.8, 5.9, 5.10, 11.1, 13.1(e), (f), at A0, A71, A83 A90. The Litigation Trustee enjoys the benefit of $15 million of "Plan Cash" to fund litigation expenses. Plan §§ 1.84, 1.85, 1.107, 11.3, at A35, A36, A83.

The *SemGroup* Plan transfers to the Litigation Trust all debtors' causes of action. Plan §§ 9.1, 11.1, at A78, A82-83. Litigation Trust Agreement § 1.2(a), at A185-86. It provides for transfer to the Trust of all creditors' fraudulent conveyance claims under the control of the bankruptcy estate through Section 544. Plan §§ 1.7, 1.83, 9.1, at A27, A34, A78. It also assigns all Contributing Lenders' claims irrevocably and without any further action or writing upon such Lenders' votes for the Plan. Plan § 1.2(b), at A186. Only the Trustee can pursue such causes of action; the Lenders are enjoined from acting on their own. *Id.*; Plan § 11.1, at A83; Conf. Order ¶ 37, at A152-53.

The Litigation Trustee is designated as the "representative of the Debtors" under Bankruptcy Code § 1123(b)(3) with all rights and powers of a bankruptcy trustee. Plan § 1.7, at A190. Section 1123(b)(3) empowers a person designated in a plan, including a trustee under a plan-created trust agreement, to act for the bankruptcy estate. *See Torch Liquidating Trust v. Stockstill*, 561 F.3d 377, 387 (5th Cir. 2009) ("Section 1123(b)(3) therefore allows a plan to transfer to a trustee of a liquidating trust the authority to enforce an estate's claims…and to distribute the proceeds of successful suits.").

The *SemGroup* Plan expressly provides that the Litigation Trustee is authorized "to perform the duties, exercise the powers, and assert the rights of a trustee under sections 704 and 1106 of the Bankruptcy Code." Plan § 3.12(b), at

A198. The Plan further provides that the Contributing Lenders' assigned claims vest in the Trustee "consistent with Section 1123(b)(3) of the Bankruptcy Code, for the benefit of the Litigation Trust Beneficiaries." Plan § 1.2(b), at A186; *see also* Plan § 11.4, at A84 ("Litigation Trustee shall be deemed to have been designated as a representative of the Reorganized Debtors or the Contributing Lenders, as applicable, pursuant to section 1123(b)(3)(B)"); Litigation Trust Agreement Recital at A185 ("The Litigation Trustee was duly appointed as a representative of the Debtors' estates pursuant to section 1123(a)(5), (a)(7) and (b)(3)(B) of the Bankruptcy Code."); Litigation Trust Agreement § 1.2(b), 1.3, at A186, A188.

Bottom line: The *SemGroup* Litigation Trust was established under the confirmed Plan, with estate causes of action, including those assigned by Contributing Lenders, transferred to the Litigation Trust pursuant to the Plan and litigation proceeds distributed to creditors under that Plan, and with the Litigation Trustee prosecuting all the causes of action as estate representative under the Plan.

B. If the Litigation Trustee Were not Suing for the Benefit of all Estate Creditors – Acting as a Bankruptcy Trustee Subject to the Safe Harbors - She Would Lack Standing to Sue.

The *SemGroup* Plan and Litigation Trust provisions for Litigation Trustee authority as a bankruptcy trustee and as the Section 1123(b)(3) representative of the bankruptcy estates are undoubtedly not accidental. If the Litigation Trustee lacked this authority and was not suing for the benefit of all creditors of the estate, like any other bankruptcy trustee, she would lack standing to sue. Put simply, either the Litigation Trustee is a bankruptcy trustee within the meaning of Section 546(g), in which case the safe harbor unquestionably blocks her claims, or, if she is not, she lacks standing to sue. Either way, her claims fail and the district court should be affirmed.

As noted, the Bankruptcy Code vests a bankruptcy trustee or debtor-in-possession as representative of the estate with authority to bring certain avoidance actions that otherwise belong to creditors and not the debtor, including fraudulent transfer claims. 11 U.S.C. §§ 548, 544. This Court and others have allowed a bankruptcy trustee to pursue a creditor's cause of action, and considered it property of the estate, if it is a "general claim" common to all creditors. *St. Paul Fire & Marine Ins. Co. v. Pepsico, Inc.*, 884 F.2d 688, 701 (2d Cir. 1989) ("If a claim is a general one, with no particularized injury arising from it, and if that claim could be brought by any creditor of the debtor, the trustee is the proper person to assert the claim, and the creditors are bound by the outcome of the trustee's action."); *Kalb, Voorhis & Co. v. Am. Fin. Corp.*, 8 F.3d 130, 132 (2d Cir. 1993) (same); *Koch Refin. v. Farmers Union Century Exch., Inc.*, 831 F.2d 1339, 1348–49 (7th Cir. 1987) ("allegations that could be asserted by any creditor could be brought by the trustee . . . a single creditor may not maintain an action on his own behalf against a corporation's fiduciaries if that creditor shares in an injury common to all creditors and has personally been injured only in an indirect manner"). Indeed, as noted above, the creditors' fraudulent conveyance claims asserted in this case are general causes of action with no allegations of uniquely-defrauded individual creditors.

In contrast, it has long been the law that a bankruptcy trustee <u>cannot</u> pursue individual claims of creditors against third parties. *Caplin v. Marine Midland Grace Trust Co.*, 406 U.S. 416, 434 (1972); *see Picard v. JPMorgan Chase & Co.* (*In re Bernard L. Madoff Inv. Sec. LLC*), 721 F.3d 54, 67 (2d Cir. 2013) (distinguishing *St. Paul Fire* on that basis).

This Court held that trustee standing to pursue creditor causes of action <u>cannot</u> be accomplished by a simple assignment of creditor claims. *Breeden v. Kirpatrick & Lockhart LLC*, (*In re Bennett Funding*), 336 F.3d 94, 102 (2d Cir. 2003) ("even when defrauded creditors assigned to the trustee their claims against another for aiding and abetting the fraud the trustee lacked capacity to sue" (quoting *Shearson Lehman Hutton, Inc. v. Wagoner*, 944 F.2d 114, 120 (2d Cir. 1991)) (in turn citing *Barnes v. Schatzkin*, 215 A.D. 10, 13, 212 N.Y.S. 536, 537 (N.Y. App. Div. 1925), *aff'd*, 152 N.E. 424, *cert. denied*, 273 U.S. 709 (1926)); *see also Williams v. Cal. 1st Bank*, 859 F.2d 664, 666-67 (9th Cir. 1988) (same).

But the Court has held that individual creditors <u>can</u> assign their causes of action to the bankruptcy trustee when such claims thereby become property of the bankruptcy estate under Section 541(a)(7). *Bankr. Servs. Inc. v. Ernst & Young* (*In* *re CBI Holding Co., Inc.*), 529 F.3d 432, 456-59 (2d Cir. 2008); *Bogdan v. JKV Real Estate Servs.* (*In re Bogdan*), 414 F.3d 507, 511-13 (4th Cir. 2005) (trustee has standing due to unconditional assignments from mortgage lenders after commencement of the bankruptcy case made their causes of action "property of the estate" with the recovery shared by creditors generally as estate assets). These principles apply to litigation trustees under reorganization plans as well as trustees appointed during the bankruptcy case. *CBI Holding Co.*, 529 F.3d at 437, 456-57 (agent under a plan); *Semi–Tech Litig., L.L.C. v. Ting*, 13 A.D.3d 185, 187 (N.Y. App. Div. 2004) (litigation trustee under a plan).

The Litigation Trustee and her *amici* point to the *PHP* case, where a Delaware district court said in *dicta* that Section 546(e) would not bar individual creditors' avoidance claims. *PHP Liquidating, LLC v. Robbins*, 291 B.R. 603, 607 (D. Del. 2003), *aff'd on other grounds*, 128 F. App'x 839 (3d Cir. 2005). But the *PHP* court held that the creditors did not hold individual claims that could be assigned because the damages alleged in their complaint applied generally to all creditors. For that reason, the avoidance actions were held to be within the scope of Section 544 and property of the estate assertable by the *PHP* plan liquidator in his capacity as representative of the estate. *Id*. at 609–10. As Section 544 causes of action, the avoidance causes of action were transferred from the estate by the debtor to the *PHP* liquidating company under the plan, and individual creditors accordingly did not possess them and could not assign them to the plan liquidator to pursue as assignee. *Id.* at 610–11. The Third Circuit affirmed on the grounds that because the purportedly assigned state law claims were general, the plan liquidator lacked standing to pursue them. 128 F. App'x at 845–46.

In short, the *SemGroup* Litigation Trustee is acting like a bankruptcy trustee, asserting state law fraudulent transfer claims for the benefit of the entire estate, just like a bankruptcy trustee under Section 544. As such, she is subject to the safe harbor of Section 546(g). Indeed, if she is not acting as a bankruptcy trustee, then she lacks standing to sue, as even the Trustee's own authority, *PHP*, makes clear

V. The Vital Protections Offered to Financial Markets in Sections 546(e), (f), (g), and (j) Cannot be Thwarted Though Procedural Posturing.

The Litigation Trustee's focus on assignment of creditor fraudulent conveyance claims is a procedural artifice. She should not be allowed to circumvent the Bankruptcy Code safe harbor by that ruse, just like the Enron trustee was not allowed to evade it in a suit to avoid and recover payments Enron made to redeem its commercial paper prior to maturity in *Enron Creditors Recovery*:

> It is difficult to see, however, why this transaction should warrant safe harbor protection while a transaction identical in every respect, except that the commercial paper's terms did not prohibit early redemption, should not. Avoidance of the transactions in either scenario would present the same threat of systemic risk in the marketplace, and limiting safe-harbor protection to transactions in the

> first scenario would not prevent an issuer from making payments to reacquire commercial paper during the preference period.
> …
> We see no reason to think that undoing Enron's redemption payments, which involved over a billion dollars and approximately two hundred noteholders, would not also have a substantial and similarly negative effect on the financial markets.

651 F.3d at 338-39; *see also Grochowski v. Phoenix Constr.*, 318 F.3d 80, 86–87 (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" and rejecting "attempt to use the [Fair Labor Standards Act] to circumvent the [Davis-Bacon Act]"); *Police & Fire Ret. Sys. of City of Detroit v. IndyMac MBS, Inc.*, 721 F.3d 95, 101 (2d Cir. 2013) ("proposed intervenors may not circumvent . . . statute of repose" through tolling or relation-back amendment under Rule 15(c)); *Broder v. Cablevision Sys. Corp.*, 418 F.3d 187, 201 (2d Cir. 2005) ("New York courts . . .frown on 'artful pleading to circumvent [a] bar against private actions'" (alteration in original) (quoting *Walts v. First Union Mortg. Corp.*, 259 A.D.2d 322, 322 (N.Y. 1999))).

Using a comparable but different cause of action to attempt circumvention of the Bankruptcy Code's safe harbor was rejected by the Eighth Circuit in *Contemporary Indus. Co.*:

> Through its state law claims, CIC seeks to recover the same payments we have already held are unavoidable under § 546(e). Allowing recovery on these claims would render the § 546(e) exemption

> meaningless, and would wholly frustrate the purpose behind that section. Thus, CIC's state law claims must fail.

564 F.3d at 988.

Here, the assignment of fraudulent conveyance causes of action by operation of Plan terms that supplement the assignment by operation of law in Section 544, with both assigned to the Litigation Trustee under the Plan, is an even clearer example of a gimmick to thwart the law. It would result in the same huge, focused pursuit of multiple creditor avoidance claims in a single action, resulting in the same unwinding of substantial transactions and domino of effects that Congress sought to avoid by its safe harbor from bankruptcy pursuit of such actions assigned by operation of law in Section 544.

In other pending bankruptcy cases, lawyers have been even more creative in purporting to abandon the fraudulent conveyance claims entrusted to the bankruptcy trustee/debtor-in-possession under Section 544, and providing under bankruptcy court orders for such causes of action to be transferred to vast numbers of creditors through a creditors trust or indenture trustees. Provisions in reorganization plans for creditors to collectively litigate avoidance actions as part of a plan's treatment of their claims, whether through an indenture trustee or other creditors' representative or a litigation trustee, risks the same deleterious consequences on financial market transactions as fraudulent conveyance litigation pursuing all creditors' claims under Section 544, especially when pursued under a well-financed plan. This is precisely what Congress sought to avoid when enacting the safe harbor.

CONCLUSION

Amici SIFMA and ISDA urge that that the Section 546(e), (f), (g), and (j) 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 *SemGroup* Litigation Trustee to proceed, then all plans will be drafted to have creditor claims assigned to a plan trustee or creditor groups, eviscerating the safe harbor protections in absolute violation of Congressional intent and reintroducing the harms that the safe harbor was designed to alleviate.

Respectfully submitted, this 9th day of October, 2013.

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CERTIFICATE OF FILING AND SERVICE

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that pursuant to FRAP 29(d) and 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached Answering Brief is proportionally spaced, has typeface of 14 or more points, and contains 6,780 words.

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