No. _____

IN THE

Supreme Court of the United States

JOSEPH STAFINIAK, ET AL.,

Petitioners,

—v.—

MARK S. KIRSCHNER, ET AL.,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

HOWARD SEIFE
NORTON ROSE FULBRIGHT US LLP
1301 Avenue of the Americas
New York, New York 10019
(212) 318-3000
howard.seife@nortonrosefulbright.com

Of Counsel:
WILLIAM P. BARR
PATRICK F. PHILBIN
TORRIDON LAW PLLC
1155 F Street NW, Suite 750
Washington, DC 20004
(202) 249-6900
pphilbin@torridonlaw.com

Y. DAVID SCHARF
Counsel of Record
MORRISON COHEN LLP
909 Third Avenue,
27th Floor
New York, New York 10022
(212) 735-8600
dscharf@morrisoncohen.com

Counsel for Petitioners Joseph Stafiniak, Kathleen Nedorostek Kaswell, Mary E. Belle, Wayne Kulkin, Irene A. Koumendouros, Ira Margulies, John D'Souza, Jack Gross, Patricia Kenny, Vincent Morales, Daniel Fishman, Frances Lukas, Mitchel Levine, Nicoletta Palma, Stephen C. Troy, Gregg Marks and Whitney L. Smith

QUESTION PRESENTED

Whether Section 101(22)(A) of the Bankruptcy Code, which defines a "financial institution," should be interpreted on a contract-by-contract basis or a transfer-by-transfer basis when determining whether a transfer is exempt from avoidance under 11 U.S.C. § 546(e).

RULE 14.1(b)(i) STATEMENT

Petitioners are Joseph Stafiniak, Kathleen Nedorostek Kaswell, Mary E. Belle, Wayne Kulkin, Irene A. Koumendouros, Ira Margulies, John D'Souza, Jack Gross, Patricia Kenny, Vincent Morales, Daniel Fishman, Frances Lukas, Mitchel Levine, Nicoletta Palma, Stephen C. Troy, Gregg Marks, and Whitney L. Smith, who were defendants in the district court and appellees in the court of appeals.

Respondents are Marc S. Kirschner, as Trustee for the NWHI Litigation Trust, and Wilmington Savings Fund Society, FSB, as Successor Indenture Trustee for the 6.875% Senior Notes due 2019, the 8.25% Senior Notes due 2019, and the 6.125% Senior Notes due 2034 of Nine West Holdings, Inc. Respondents were plaintiffs in the district court and appellants in the court of appeals.

The other respondents, made up of certain other defendants and appellees in this action, are set forth in the appendix. The former public shareholders who were also defendants and appellees below, are not affected by the question of law presented by this Petition. (*See* Pet. App. 104a-122a.)

RELATED PROCEEDINGS

Pursuant to Supreme Court Rule 14.1(b)(iii), a list of proceedings directly related to this case is set forth in the appendix. (*See* Pet. App. 123a-127a.)

TABLE OF CONTENTS

APPENDIX TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE(S)

Cases

Statutes

Other Authorities

PETITION FOR A WRIT OF CERTORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

INTRODUCTION

This case concerns the interpretation of important Bankruptcy Code provisions that limit the power of bankruptcy trustees to unwind pre-bankruptcy transactions connected to the execution of a securities contract.

Section 546(e) of the Bankruptcy Code prohibits bankruptcy trustees from avoiding transfers "by or to (or for the benefit of) . . . [a] financial institution . . . in connection with a securities contract." The purpose of this safe harbor is to "minimize the displacement caused in the commodities and securities markets in the event of a major bankruptcy affecting those industries," and to "promote finality and certainty for investors." *See In re Tribune Co. Fraudulent Conveyance Litig.*, 946 F.3d 66, 92 (2d Cir. 2019) (examining legislative purpose and history of Section 546(e)).

The scope of Section 546(e)'s safe harbor is significantly affected by the definition of a "financial institution." This definition is set forth in Section 101(22) of the Bankruptcy Code. Under Section 101(22)(A), a "financial institution" is not only a traditional entity like a bank, savings and loan association, and trust company, but a "financial institution" can also include those entities' "customers," so long as the enumerated entity is

"acting as [the customer's] agent . . . in connection with a securities contract." Thus, in certain circumstances, any kind of company can qualify as a "financial institution" in connection with a securities contract.

Given the above, the definition of a "financial institution" leaves open a key question: If a company qualifies as a "financial institution" under Section 101(22)(A), does the safe harbor shield all transfers that the company makes as part of its securities contract? Or must a company's status as a "financial institution" be determined for each transfer required to execute the securities contract?

Here, this question has arisen in the wake of a leveraged buyout (LBO) of The Jones Group, Inc. ("Jones Group"), which was effectuated by a merger agreement. Under this merger agreement, an entity affiliated with Sycamore Partners Management, L.P. ("Sycamore") merged with and into Jones Group, leaving a surviving entity renamed Nine West Holdings, Inc. ("Nine West"). To execute this merger, the common and restricted shares of Jones Group were cancelled in exchange for $15.00 per share, plus any accumulated dividends on the restricted shares.

Wells Fargo Bank, N.A. ("Wells Fargo") served as the paying agent for the merger, and was responsible for cancelling the common and restricted shares. However, Wells Fargo only paid the share compensation to Jones Group's common shareholders. The restricted shareholders, which included former officers, directors and employees of the Jones Group and its affiliates, were paid through the company's payroll system.

The parties below disputed whether these payroll payments (hereinafter, the "Payroll Transfers") were made by a "financial institution." Though Nine West

was Wells Fargo's customer in connection with the merger agreement, the bankruptcy litigation trustees argued that because Wells Fargo did not make the Payroll Transfers, the Payroll Transfers were not made by a "financial institution." The district court rejected this argument. It held that Section 101(22)(A) required a contract-by-contract analysis, and concluded that because Wells Fargo acted as Nine West's agent in connection with the merger agreement, all the transfers made to execute the merger agreement were protected by Section 546(e)'s safe harbor, including the Payroll Transfers.

The Second Circuit reversed the district court, by a 2-1 split. The Second Circuit majority held that Section 101(22)(A) should instead be interpreted on a transfer-by-transfer basis, where a bank's role as agent is not measured by the securities contract at issue, but rather its role with respect to each particular transfer. The majority concluded that, because Wells Fargo had not made the Payroll Transfers, Nine West was not a "financial institution" for the Payroll Transfers and they were not protected by the safe harbor. The Second Circuit dissent disagreed with the majority's interpretation, however. The dissent preferred the district court's contract-by-contract interpretation of Section 101(22)(A), which it felt was more consistent with the section's plain meaning.

Ultimately, the district court and the dissent were correct. The plain meaning of Section 101(22)(A), which ties a customer's status as a "financial institution" to the "securities contract" in question, requires a contract-by-contract interpretation of Section 101(22)(A), not a transfer-by-transfer interpretation. The Second Circuit majority's error threatens the certainty and finality of investors and

shareholders, as portions of securities contracts now may be unwound even where a bank served as an agent in connection with the securities contract. The safe harbor, meant to provide stability to the securities markets, has been unsettled.

This Court has not yet addressed how to properly interpret Section 101(22)(A). This definition was raised by the petitioner in connection with this Court's decision *Merit Management Group, LP v. FTI Consulting, Inc.*, 583 U.S. 366, 381 (2018), but because the issue was not dispositive, this Court left open how Section 101(22)(A) was to be interpreted and applied. As a result, Section 101(22)(A) has become the new frontier of bankruptcy trustee actions, and the scope of Section 101(22)(A) has been litigated extensively since *Merit*.

This Court should intervene and resolve how to correctly interpret Section 101(22)(A). Its proper interpretation will effectively define the scope of Section 546(e)'s safe harbor, an important and recurring question of federal law. The Second Circuit majority's interpretation is also plainly erroneous, as it is inconsistent with Section 101(22)(A)'s plain meaning and Section 546(e)'s purpose. This Court should grant this petition for a writ of certiorari.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 40a-95a) is reported at 87 F.4th 130. The opinion of the United States District Court for the Southern District of New York (Pet. App. 1a-39a) is reported at 482 F. Supp. 3d 187.

JURISDICTION

The court of appeals entered judgment on November 27, 2023. That court denied rehearing *en banc* on January 3, 2024. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

11 U.S.C. 101(22)(A) defines a "financial institution" as:

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

In relevant part, 11 U.S.C. 546(e) provides:

> Notwithstanding sections 544, 545, 547, 548(a)(1)(B), and 548(b) of this title, the trustee may not avoid a transfer that is . . . made by or to (or for the benefit of) a . . . financial institution . . . in connection with a securities contract, as defined in section 741(7) . . . .

STATEMENT

This case arises out of efforts by Marc S. Kirschner, as Trustee for the NWHI Litigation Trust, and Wilmington Savings Fund Society, FSB, as Successor Indenture Trustee for the 6.875% Senior Notes due 2019, the 8.25% Senior Notes due 2019, and the 6.125% Senior Notes due 2034 of Nine West Holdings, Inc. ("Respondents") to avoid shareholder transfers made in connection with the 2014 LBO of Jones Group. In particular, this petition concerns those payments made to innocent former employees of Jones Group or its affiliates, allegedly received in exchange for the cancellation of their shares of Jones Group stock. The Second Circuit's application of Section 546(e)'s safe harbor to these payments hinged on the fact that these former employees allegedly received their payments "through the payroll and by other means."

Respondents filed their complaints in 2020, alleging, among other things, that the shareholder transfers were fraudulent conveyances. (Pet. App. 53a.) The district court dismissed Respondents' fraudulent conveyance claims in their entirety, holding that because Nine West was a customer of Wells Fargo at the time of the LBO, all the shareholder transfers were made by a "financial institution" and "in connection with a securities contract," as required by Section 546(e)'s safe harbor. (Pet. App. 13a-36a.) Relevant here, the district court concluded that because Section 101(22)(A)'s definition of "financial institution" placed emphasis on the securities contract at issue, Nine West was a "financial institution" for the purposes of all the shareholder transfers for the LBO, even those paid to employees by "payroll and by other means." (Pet. App. 32a-36a.)

The Second Circuit, by a 2-1 decision, reversed the district court in part, holding that the district court's contract-by-contract interpretation of Section 101(22)(A) was incorrect. (Pet. App. 63a-67a.) The Second Circuit instead endorsed a transfer-by-transfer interpretation, which makes a customer's status as a "financial institution" dependent on whether a bank or similar entity acted as its agent for a specific transfer, not in connection with a specific securities contract. (*Id.*) The Second Circuit concluded that because the transfers to employees were alleged to have been made by "payroll and by other means," Nine West was not a "financial institution" under Section 101(22)(A) for those particular transfers. (Pet. App. 68a-73a.) The Second Circuit's decision reinstated Respondents' fraudulent conveyance claims only against former employees of Jones Group or its affiliates, including Petitioners, who were allegedly paid through payroll. (Pet. App. 73a.) The Second Circuit, however, upheld the dismissal of Respondents' fraudulent conveyance claims against public shareholders, who were allegedly paid by Wells Fargo. (Pet. App. 67a-68a, 73a-75a.)

A. Statutory Framework

A bankruptcy trustee has several means to unwind pre-bankruptcy transactions for the benefit of creditors. *See* 11 U.S.C. §§ 544(a)-(b), 545, 547, 548(a)-(b). However, a bankruptcy trustee's avoidance powers are constrained by Section 546(e)'s statutory safe harbor, which protects from avoidance,[1] among

[1] Section 546(e) does not protect transfers made "with actual intent to hinder, delay, or defraud" a creditor. *See* 11 U.S.C. 546(e), 548(a)(1)(A).

other things, margin payments, settlement payments, or certain transfers "made by or to (or for the benefit of)" certain entities, including a "financial institution." In the case of transfers made by or to (or for the benefit of) a "financial institution," Section 546(e) requires that the transfer be made "in connection with a securities contract" for the safe harbor to apply.

The safe harbor was first added to the Bankruptcy Code in 1982. In its original formulation, it only protected margin payments and settlement payments made by or to a commodity broker, forward contract merchant, stockbroker, or securities clearing agency. *See* Act of July 27, 1982, Pub. L. No. 97-222, sec. 4, 96 Stat. 235, 236. Financial institutions were added as a protected entity in 1984. *See* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, sec. 460(d), 98 Stat. 333, 377. And in 2006, the safe harbor was broadened to protect securities contracts, commodity contracts, and forward contracts. *See* Financial Netting Improvements Act of 2006, Pub. L. No. 109-390, sec. 5(b)(1), 120 Stat. 2692, 2697-98. The safe harbor's purpose is to "minimize the displacement caused in the commodities and securities markets in the event of a major bankruptcy affecting those industries," and to "promote finality and certainty for investors." *See In re Tribune Co. Fraudulent Conveyance Litig.*, 946 F.3d 66, 92 (2d Cir. 2019) (examining legislative purpose and history of Section 546(e)); *see also* H.R. REP. 101-484, 2, 1990 U.S.C.C.A.N. 223, 224 (noting that "Congress has amended the 1978 Bankruptcy Code to keep pace in promoting speed and certainty in resolving complex financial transactions.").

When the definition of "financial institution" was added to the Bankruptcy Code in 1984, it not only protected entities such as banks and trust companies,

but also their customers, so long as the bank or similar entity was "acting as agent or custodian for a customer in connection with a securities contract." *See* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub L. No. 98-353, tit. III.H, sec. 421, 98 Stat. 333, 368. This is still maintained today. *See* 11 U.S.C. § 101(22)(A).

B. Factual Background

Jones Group was a wholesale footwear and apparel company. In 2014, Sycamore acquired Jones Group in a leveraged buyout pursuant to a merger agreement (the "Merger Agreement"). (Pet. App. 54a-55a.) In connection with the LBO, an entity affiliated with Sycamore merged with and into Jones Group and the surviving entity was renamed Nine West Holdings, Inc. (*Id.*)

Pursuant to the Merger Agreement, shares of Jones Group's common stock ("Common Shares") and restricted stock ("Restricted Shares") were to be cancelled and converted into the right to receive $15.00 per share in cash, plus any accumulated dividends on Restricted Shares. (Pet. App. 55a-56a.) The Merger Agreement required that a "paying agent" be engaged "pursuant to a paying agent agreement in customary form." (Pet. App. 55a.) Accordingly, Jones Group and an affiliate of Sycamore entered into a "Paying Agent Agreement" with Wells Fargo. (*Id.*)

The Paying Agent Agreement provided, in part, that "[Nine West] desires that [Wells Fargo] act as its special agent for the purpose of distributing the Merger Consideration." (*Id.*) The Paying Agent Agreement instructed and authorized Wells Fargo to cancel the Common Shares and Restricted Shares. (Pet. App. 25a.) Wells Fargo's actions were contingent

on Nine West's delivery of lists instructing it which shareholders should be paid and which shares should be cancelled. (*Id.*)

On April 8, 2014, NWHI allegedly paid Jones Group's shareholders $1.183 billion for their Common Shares and Restricted Shares. (Pet. App. 4a.) Of that amount, an alleged $78 million consisted of payments to the directors, officers and employees of Jones Group and its affiliates, in respect of Restricted Shares, which were processed "through the payroll and by other means." (Pet. App. 4a-6a.) These were the Payroll Transfers, which were not paid by Wells Fargo. Pursuant to the Paying Agent Agreement, Wells Fargo was responsible for cancellation of both the Common Shares and Restricted Shares. (Pet. App. 25a.)

Four years later, in 2018, Nine West filed a bankruptcy petition in New York. (Pet. App. 6a.) The bankruptcy court confirmed a plan of reorganization that created a litigation trust. (*Id.*) Nine West's potential claims arising out of the LBO were contributed to that trust. (Pet. App. 6a-7a.) Respondents are the trustee of the litigation trust and an indenture trustee of certain Nine West notes.

C. Proceedings in the District Court

In 2020, Respondents filed seventeen actions across seven different district courts. (Pet. App. 53a, 123a-127a.) These actions were consolidated in the Southern District of New York, and included constructive and intentional fraudulent conveyance claims against Nine West's former shareholders. (Pet. App. 53a.) Various defendants, including Petitioners, moved to dismiss Respondents' fraudulent conveyance claims on the grounds that the transfers to

shareholders were protected by Section 546(e)'s safe harbor. (Pet. App. 7a-8a, 53a.)

The district court held that Section 546(e) applied to the LBO's shareholder transfers and dismissed with prejudice Respondents' fraudulent conveyance claims. (Pet. App. 38a-39a.) The district court concluded that Nine West was a "financial institution" during the LBO because it was a customer of Wells Fargo, who acted as its paying agent. (Pet. App. 19a-27a, 32a-36a.) It also found that the LBO was a qualifying transaction for the safe harbor, as it involved settlement payments and transfers "made in connection with a securities contract." (Pet. App. 15a-19a, 30a-32a.) Consequently, the safe harbor applied.

Crucially, when the district court determined that Nine West was a "financial institution," it did so with respect to all of the LBO's shareholder transfers. (Pet. App. 33a-36a.) The district court concluded that because Section 101(22)(A)'s plain meaning compelled a contract-by-contract interpretation, all the shareholder transfers "made in connection with [the] securities contract" (i.e. the LBO's Merger Agreement) had to be safe harbored, even the Payroll Transfers. (Pet. App. 34a-35a.) The district court rejected Respondents' transfer-by-transfer interpretation of Section 101(22)(A), which sought to determine Nine West's status as a "financial institution" on the basis of the mechanics of each particular transfer. The district court observed that Respondents' construction would have effectively rewritten Section 101(22)(A) to read "in connection with a securities transfer." (*Id.*) The district court also observed that Respondents' transfer-by-transfer interpretation ran into tension with this Court's decision in *Merit*, which rejected conduit theories of the safe harbor that focused on the agency role played by a bank in a particular transfer.

(Pet. App. 35a.) All told, the district court concluded that the Payroll Transfers were made by a "financial institution" and therefore protected by Section 546(e)'s safe harbor.

D. The Second Circuit's Opinions

The Second Circuit reversed the district court in part, by a 2 to 1 vote. The majority concluded that the district court's contract-by-contract interpretation of Section 101(22)(A) was incorrect. (Pet. App. 63a-67a.) The majority's analysis began by taking a different view of the statutory language. Whereas the district court had focused on the fact that Section 101(22)(A) explicitly tied a customer's status as a "financial institution" to a "securities contract," the majority found that Section 101(22)(A)'s focus on when a bank is "acting as agent" required courts to look at each particular transfer. (Pet. App. 65a-66a.) The majority did not address how or to what extent the phrase "acting as agent" was modified by the phrase "in connection with a securities contract."

Nevertheless, the majority set forth three rationales for its transfer-by-transfer interpretation. First, the majority concluded that a contract-by-contract interpretation could lead to absurd results, as a securities contract would be protected under the safe harbor even if a bank only acted as an agent for one transfer. (Pet. App. 65a-66a.) Second, the majority concluded that a contract-by-contract interpretation would "undermine the avoidance power" of trustees. (Pet. App. 66a.) Finally, the majority concluded that a contract-by-contract interpretation would incorrectly broaden the safe harbor even where the financial system was not at risk. (Pet. App. 66a-67a.) In support of this conclusion, the majority stated that

transfers paid through payroll would not implicate Congress's concerns about the settlement of securities transactions. (Pet. App. 67a.)

On the basis of this transfer-by-transfer interpretation, the majority concluded that because the Payroll Transfers were not allegedly paid by Wells Fargo, the former employees of Jones Group or its affiliates could not establish that Nine West was a "financial institution" for those payments, even if Wells Fargo was responsible for canceling their shares and acted as agent in connection with the merger agreement more broadly. (Pet. App. 68a-73a.) However, the majority dismissed Respondents' claims against public shareholders, holding that those payments were protected by the safe harbor because Wells Fargo allegedly made those payments. (Pet. App. 67a-68a.)

The dissent disagreed with the majority's interpretation of Section 101(22)(A). The dissent found that the district court's interpretation "better comport[ed] with the plain meaning of section 101(22)(A)'s text." (Pet. App. 83a.) In particular, the dissent observed that Congress's insertion of the phrase "in connection with a securities contract" resolved any ambiguity as to how "acting as agent" was to be applied. (Pet. App. 87a-88a.) Moreover, given that the definition of "securities contract" itself is expansive, the dissent rejected the majority's notion that Congress intended the definition of "financial institution" to be construed narrowly. (Pet. App. 88a-89a.) The dissent concluded that the majority had "effectively rewrit[ten]" Section 101(22)(A). (Pet. App. 89a.)

The dissent then addressed the non-textual arguments advanced by the majority. Highlighting

that Congress had intended the safe harbor to promote finality and certainty for investors and to enhance the efficiency of the securities market, the dissent observed that the majority's analysis "appear[ed] to be driven by policy concerns" about how a contract-by-contract interpretation could affect future bankruptcies arising out of leveraged buyouts. (Pet. App. 90a-92a.) But, even so, the dissent argued that the majority had failed to explain why unwinding payments made by payroll introduced less risk to securities markets than unwinding transfers made by banks. (Pet. App. 92a.) Both threatened the finality of securities transactions, which would undermine confidence in the securities markets.

Ultimately, the dissent concluded that because Section 101(22)(A) required a contract-by-contract interpretation, all of the shareholder transfers, not just those paid by Wells Fargo, should have been protected by Section 546(e)'s safe harbor. (Pet. App. 93a-94a.)

The court of appeals denied Petitioners' request for panel rehearing and rehearing *en banc*. The court of appeals granted Petitioners' motion to stay the mandate pending this petition.

REASONS FOR GRANTING THE PETITION

I. THE CORRECT INTERPRETATION OF SECTION 101(22)(A) IS AN IMPORTANT AND RECURRING QUESTION OF LAW THAT SHOULD BE SETTLED BY THIS COURT

1. This case presents an unsettled but important question of law: how should Section 101(22)(A)'s definition of a "financial institution" be interpreted? The Second Circuit majority held that Section

101(22)(A) must be interpreted on a transfer-by-transfer basis, with a bank customer's status as a financial institution being examined for each particular transfer. The dissent and district court, however, concluded that Section 101(22)(A)'s plain meaning required a contract-by-contract interpretation.

The correct interpretation of Section 101(22)(A) is an important question of law because it affects the scope of Section 546(e)'s safe harbor. Section 546(e) protects from avoidance transfers made "by or to (or for the benefit of) . . . [a] financial institution . . . in connection with a securities contract." As defined by Section 101(22)(A), however, a customer of a bank is a "financial institution" where the bank is acting as the customer's agent "in connection with a securities contract." This means that any kind of company can be a "financial institution" in the context of a securities contract. Consequently, even a transfer between two corporations is protected by the safe harbor if one of the corporations qualifies as a "financial institution" at the time of the transfer.

Because Section 101(22)(A)'s "customer" language provides a basis to protect a wide variety of transfers under Section 546(e), it is potentially implicated whenever a bankruptcy trustee seeks to avoid transfers made in connection with a securities contract. And the scope of Section 546(e)'s safe harbor is important. The safe harbor's purpose is to "minimize the displacement caused in the commodities and securities markets in the event of a major bankruptcy affecting those industries," and to "promote finality and certainty for investors." *See Tribune*, 946 F.3d at 92. This is why Section 546(e) protects certain financial or securities transfers (e.g. settlement payments) from avoidance. Thus, however Section 101(22)(A) is interpreted, it will affect the Bankruptcy

Code's balance between creditor's rights and the interests of securities markets.

This Court has previously granted certiorari to address the scope of Section 546(e)'s safe harbor. In *Merit*, this Court considered whether a transfer was "made by or to (or for the benefit of)" a financial institution where the financial institution only acted as an intermediary for a challenged transfer. 583 U.S.C. at 882-85. Ultimately, this Court held that, under Section 546(e), only the transfer challenged by the trustee was relevant and that its "component parts" were "irrelevant." *Id.* at 882.

In *Merit*, however, this Court left open the interpretation of Section 101(22)(A). Section 101(22)(A) had been raised by the petitioner in support of its arguments, but neither party contended that the debtor or petitioner were "financial institution[s]," or that the definition affected the outcome of the case. *Id.* at 373 n.2. Consequently, this Court declined to address the impact of Section 101(22)(A) on Section 546(e)'s safe harbor. *Id.*

This case, however, demonstrates the stark impact of the competing interpretations of Section 101(22)(A) on Section 546(e)'s safe harbor. The transfer-by-transfer interpretation endorsed by the Second Circuit led it to conclude that only the Payroll Transfers to holders of Restricted Shares (alleged to total $78 million) were exposed to potential avoidance by Respondents, while transfers to holders of Common Shares as part of the same integrated transaction (alleged to total $1.105 billion) were not. The Second Circuit's sole basis for allowing Respondents to pursue avoiding the Payroll Transfers is that they were allegedly processed through payroll, instead of by Wells Fargo (even though Wells Fargo was responsible

for canceling those Restricted Shares). On the other hand, the dissent and district court's interpretation would have safe harbored all transfers made pursuant to the LBO's securities contract, including the Payroll Transfers. These divergent outcomes were the result of the courts' varied interpretations of Section 101(22)(A).

Given Section 101(22)(A)'s impact on Section 546(e), it is unsurprising that this is not the only case where its importance has arisen. Numerous courts have had to analyze Section 101(22)(A)'s application in the wake of *Merit*, to differing results. *See Tribune*, 946 F.3d at 80 (concluding that Tribune Company was a "financial institution" during its LBO and safe harboring all payments made in connection with the LBO), *cert. denied sub nom. Deutsche Bank Tr. Co. v. Robert R. McCormick Found.*, No. 20-8 (Apr. 19, 2021); *Kelley v. Safe Harbor Managed Account 101, Ltd.*, 31 F.4th 1058, 1068 (8th Cir. 2022) (concluding that customer of Wells Fargo was a "financial institution"); *In re Fairfield Sentry Ltd.*, Case No. 10-13164, 2020 Bankr. LEXIS 3489, *20 (S.D.N.Y. Br. Dec. 14, 2020); *Holliday v. Credit Suisse Sec. (USA) LLC*, 20-cv-5404, 2021 U.S. Dist. LEXIS 173359, *25 (S.D.N.Y. Sep. 10, 2021); *In re Greektown Holdings, LLC*, Case No. 08-53104, 2020 Bankr. LEXIS 2938, *103 (E.D. Mich. Oct. 19, 2020) (finding that defendants failed to establish "financial institution" status).

Notably, the *Tribune* case analyzed and applied Section 101(22)(A) after the Second Circuit recalled its mandate at the suggestion of this Court. *See Deutsche Bank Trust Co. Ams. v. Robert R. McCormick Found.*, No. 16-317, 584 U.S. 926, 926 (2018). After the Second Circuit held that Tribune was a "financial institution" at the time of its LBO and concluded that all of the LBO transfers were protected by the safe harbor, *see*

Tribune, 946 F.3d at 80, the plaintiffs sought this Court's review, arguing that the Second Circuit's contract-by-contract construction and application of Section 101(22)(A) was incorrect. This Court denied that petition, leaving in place the contract-by-contract interpretation adopted by *Tribune*. *Deutsche Bank Tr. Co. v. Robert R. McCormick Found.*, No. 20-8 (Apr. 19, 2021).

Although *Merit* partly resolved the scope of Section 546(e), Section 101(22)(A)'s interpretation represents the new, unsettled frontier of the safe harbor. Consequently, whether Section 101(22)(A) is interpreted on a transfer-by-transfer or contract-by-contract basis will have a significant impact on bankruptcy trustee actions going forward. Whichever interpretation is adopted will effectively determine the scope of Section 546(e). This Court should intervene to settle this important and recurring issue of law.

2. The Second Circuit's majority opinion is wrong in at least two respects: (i) it disregards the plain meaning of Section 101(22)(A), and (ii) it misconstrues the Congressional intent behind the safe harbor's protection of financial institutions and their customers.

First, it has long been recognized by this Court that the Bankruptcy Code should be interpreted in accordance with its plain meaning. *See Merit*, 583 U.S. at 386; *United States v. Ron Pair Enters., Inc.* 489 U.S. 235, 242 (1989); *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 7 (2000); *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 649 (2012). The Second Circuit majority did not follow this approach. Although the majority claimed that Section 101(22)(A)'s focus on the bank "acting as agent" required a transfer-by-transfer

interpretation, the majority did not acknowledge that this same language is modified by the phrase "in connection with a securities contract." Thus, the majority ignored the most ordinary reading of Section 101(22)(A): that a customer of a bank is a financial institution whenever a bank is acting as its agent for a securities contract. This plain meaning interpretation would have focused on the securities contract at issue, protecting each and every transfer made pursuant to that contract.

The majority's reading of Section 101(22)(A), however, rewrites the statutory language, as the dissent correctly observed. Rather than focus on the securities contract at issue, the majority's interpretation asks whether a bank acted as agent "in connection with a securities [transfer]." This alteration to Section 101(22)(A), seemingly driven by the majority's policy concerns, impermissibly supplants Congress's judgment with that of the majority. *See Azar v. Allina Health Services*, 587 U. S. ___, ___, 139 S. Ct. 1804, 1815 (2019) ("[C]ourts aren't free to rewrite clear statutes under the banner of our own policy concerns.").

The majority's interpretation also narrows Section 101(22)(A)'s "customer" language considerably. Even though Section 101(22)(A) on its face contemplates a bank's customer making transfers protected by the safe harbor, the majority's interpretation does not allow room for that. Instead, following the majority's logic, a customer would only be a "financial institution" where a bank or similar entity makes the transfer. If that had been Congress's intent, it would have defined a customer to be a financial institution only where a bank makes a transfer on its behalf, rather than the much broader "acting as agent . . . in connection with a securities contract." Thus, the majority's

interpretation fails to give proper effect to the broad language chosen by Congress. *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) ("In construing a statute we are obliged to give effect, if possible, to every word Congress used."). The majority's narrow interpretation is also inconsistent with Congress's use of "securities contract" in Section 101(22)(A), which itself is broadly defined. *See* 11 U.S.C. § 741(7).

Statutory language aside, the majority also justified its transfer-by-transfer by interpretation by noting that the Payroll Transfers do not implicate Congress's concerns about the settlement of securities. This is incorrect. Courts have previously recognized that the intent behind Section 546(e)'s safe harbor was to enhance the securities market by promoting finality and certainty for investors. *See, e.g.*, *Tribune*, 946 F.3d at 92 (finding the larger purpose of Section 546(e) was to "promote finality and certainty for investors, by limiting the circumstances, e.g., to cases of intentional fraud, under which securities transactions could be unwound.").

But unwinding a securities transaction paid out by a bank's customer still undermines investors' certainty. The dissent recognized as much. In fact, the majority's interpretation will force investors and shareholders to understand the role of a bank or similar entity in any securities transaction to evaluate the risk of their transaction being unwound in the future. This will create obvious inefficiencies in the securities markets and cause shareholders to fear bankruptcies more than ever. And in this case, the majority's interpretation results in inequitable and inconsistent results for otherwise similarly situated shareholders. The majority's interpretation not only misreads Section 101(22)(A), but it is bad policy.

3. The majority's interpretation is inconsistent with this Court's decision in *Merit*. In *Merit*, this Court rejected policy concerns in the face of unambiguous statutory language. 583 U.S. at 385-86. The Second Circuit, however, has done the opposite, ignoring the plain meaning of Section 101(22)(A) in favor of a strained, policy-first interpretation.

The decisions are substantively incompatible too. In *Merit*, this Court rejected a construction of Section 546(e) that caused courts to dissect transfers into their "component parts" to judge whether a transfer should be safe harbored. 583 U.S. at 382. This rejected mode of analysis hinged on whether some portion of a transfer was made "by or to (or for the benefit of)" a "financial institution," even if the financial institution was a "mere conduit." *Id.* at 377.

But this is precisely the type of analysis demanded by the majority's interpretation of Section 101(22)(A). Under a transfer-by-transfer interpretation, courts will have to dissect any challenged securities transaction into its component transfers to evaluate the bank's involvement in each one. This will revive a fact-intensive inquiry concerning the banks' precise actions that will largely mirror the analysis rejected by *Merit*.

This will have consequences. By making the application of the safe harbor more fact-intensive and less predictable for shareholders, transferees, and others, the Second Circuit majority's interpretation undermines the very purpose of Section 546(e), which is to provide finality and certainty to investors who engage in securities transactions. *See also* H.R. REP. 101-484, 2, 1990 U.S.C.C.A.N. 223, 224 (noting that "Congress has amended the 1978 Bankruptcy Code to

keep pace in promoting speed and certainty in resolving complex financial transactions.").

This Court should grant review to ensure that Section 101(22)(A)'s interpretation is harmonized with *Merit*.

4. Finally, this case is an ideal vehicle to resolve how Section 101(22)(A) should be interpreted. The Second Circuit majority and dissent (as well as the district court) have presented dueling interpretations of the statutory language and each has explained their reasoning in depth. By contrast, the other court of appeals decisions analyzing Section 101(22)(A) have not done so in this amount of detail. *See Kelley v. Safe Harbor Managed Account 101, Ltd.*, 31 F.4th 1058, 1068 (8th Cir. 2022)

This case would also be a good vehicle for review because the dueling interpretations led to disparate and detrimental outcomes for Petitioners (and many other former employees who received the Payroll Transfers), but did not affect public shareholders, whose payments were safe harbored under both interpretations. There are no facts present that would complicate this Court resolving this recurring and important question of law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: April 2, 2024

Respectfully submitted,

Y. DAVID SCHARF
Counsel of Record
MORRISON COHEN LLP
909 Third Avenue, 27th Floor
New York, New York 10022
(212) 735-8600
dscharf@morrisoncohen.com

HOWARD SEIFE
NORTON ROSE FULBRIGHT US LLP
1301 Avenue of the Americas
New York, New York 10019
(212) 318-3000
howard.seife@nortonrosefulbright.com

Of Counsel:
WILLIAM P. BARR
PATRICK F. PHILBIN
TORRIDON LAW PLLC
1155 F Street NW, Suite 750
Washington, DC 20004
(202) 249-6900
pphilbin@torridonlaw.com

Counsel for Petitioners Joseph Stafiniak, Kathleen Nedorostek Kaswell, Mary E. Belle, Wayne Kulkin, Irene A. Koumendouros, Ira Margulies, John D'Souza, Jack Gross, Patricia Kenny, Vincent Morales, Daniel Fishman, Frances Lukas, Mitchel Levine, Nicoletta Palma, Stephen C. Troy, Gregg Marks, and Whitney L. Smith

APPENDIX

Appendix A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

OPINION AND ORDER

---

20 MD. 2941 (JSR)

IN RE: NINE WEST LBO SECURITIES LITIGATION

Pertains to All Associated Actions

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

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

arising out of the bankrupting, and bankruptcy, of the company in connection with the LBO.

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

Pursuant to the Court's June 12, 2020 scheduling order, now before the Court are two motions to dismiss – one on behalf of the shareholder defendants and the other on behalf of the director and officer defendants (the "D&O defendants") – relating to those claims arguably affected by the safe harbor found in 11 U.S.C. § 546(e). Both the shareholder defendants and the D&O defendants argue that certain payments made to them in connection with the LBO are shielded from the fraudulent conveyance and unjust enrichment claims under the § 546(e) "safe harbor."

These motions are litigated in the shadow of In re Tribune Company Fraudulent Conveyance Litigation, 946 F.3d 66 (2d Cir. 2019), petition for cert. filed, 2020 WL 3891501 (U.S. July 6, 2020), a recent Second Circuit opinion that examined the scope of the § 546(e) safe harbor in the context of a leveraged buyout. There, the Second Circuit held that when a bank serves as a paying agent to help a company effectuate payments to its shareholders in connection with a securities contract, all payments made in

connection with that securities contract are safe harbored from a bankruptcy trustee's avoidance powers with respect to certain fraudulent conveyance claims. Id. at 72. Despite plaintiffs' best efforts to distinguish Tribune's holding from the issues presented by the instant motions, the Court holds that Tribune largely controls these issues, and therefore grants both motions to dismiss.

I. Factual Background[1]

A. The Merger and the Shareholder Payments

Prior to the merger, Jones Group was a publicly traded global footwear and apparel company. Compl. ¶ 45. In 2014, Sycamore, a private equity firm, acquired Jones Group through an LBO transaction.[2] Id. ¶¶ 52-60. Sycamore effectuated the transaction by creating a new subsidiary – Jasper Parent – into

---

[1] Plaintiffs in this multidistrict litigation have filed seventeen virtually identical complaints. After the motions to dismiss were briefed, amended complaints were filed in certain actions pursuant to Fed. R. Civ. P. 15(a)(1)(B). The amendments were mostly technical. Because plaintiffs do not object to the pending motions being treated as addressed to the amended pleadings, Plaintiffs' Memorandum of Law in Opposition to Former Director and Officer Defendants' Motion to Dismiss Under 11 U.S.C. § 546(e) ("Pls' D&O Mem."), Dkt. No. 272, at 5 n.5, the Court cites, unless otherwise noted, to the amended complaint filed in Kirschner, et al. v. McClain et al., No. 20-cv-4262, Dkt. No. 110. Each cited allegation is also found in the other operative complaints, and every reference to the "Complaint" hereinafter effectively refers to each of the complaints in these actions.

[2] "In a typical LBO, a target company is acquired with a significant portion of the purchase price being paid through a loan secured by the target company's assets." Tribune, 946 F.3d at 71 n.

which Jones Group was merged and ultimately renamed Nine West Holdings, Inc. ("Nine West"). Id. ¶ 132.

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

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

With respect to the common shares, plaintiffs allege the payments "were made by a non-agent contractor that performed the ministerial function of processing share certificates and cash, and whose rights and obligations were governed solely by

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

---

[3] Plaintiffs acknowledge that the Merger Agreement is incorporated in the Complaint. See Plaintiffs' Memorandum of Law in Opposition to Public Shareholder Defendants' Motion to Dismiss Under 11 U.S.C. § 546(e) ("Pls' Shareholder Mem."), Dkt. No. 271, at 6. In any event, as discussed below, the Court holds that certain documents central to the transaction at issue here – viz., the Merger Agreement and the Paying Agent Agreement – are "integral" to the Complaint and therefore appropriate for the Court to consider at the 12(b)(6) stage. Chambers v. Time Warner, Inc., 282 F.3d 147, 153 (2d Cir. 2002). Accordingly, the Court relies on those documents in the statement of facts.

[4] Plaintiffs also acknowledged the identity of Wells Fargo in the Status Report they filed with this Court on June 10, 2020. See 20-md-2941, Dkt. No. 10 at 8.

the payments were for book-entry securities or certificate securities.[5] Id. § 1.3.

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

A. Procedural History

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

---

[5] Book-entry securities are investments whose ownership is recorded electronically. By contrast, certificate securities are investments whose ownership is recorded with a stock certificate.

[6] The Complaint does not contain any allegations with respect to how the change in control payments were effectuated, although plaintiffs suggest in their briefing that they were processed in the same manner as the restricted shares, share equivalent units, and accumulated dividends. See Pls' D&O Mem. at 2. Because the D&O defendants have not yet moved to dismiss the claims relating to the change in control payments, this question is ultimately beyond the scope of the instant motions.

claims against former shareholders of Jones Group. Id. ¶¶ 15-16.

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

Now before the Court are two motions to dismiss certain of these claims. First, the public shareholder defendants[7] move to dismiss plaintiffs' intentional and constructive fraudulent conveyance claims. Dkt. No. 88. Second, the D&O defendants[8] move to

---

[7] The moving shareholder defendants are identified in the signature pages to their memo in support of their motion to dismiss. Others have joined in that motion. See 20-md-2941, Dkt. Nos. 95, 100, 101, 108, 112, 115, 135, 143, 149, 155, 157, 159, 178, 181, 184, 189, 192, 195, 202, 204, 205, 210, 214, 218, 225, 231, 240, 243, 251, 264, 268, 276, 282, 300, 309, 314, and 316.

[8] The Director Defendants who have moved to dismiss are Gerald C. Crotty, John D. Demsey, Robert L. Mettler, Mary Margaret Hastings Georgiadis, Matthew H. Kamens, Sidney Kimmel, Ann Marie C. Wilkins, James A. Mitarotonda, Jeffrey Nuechterlein, and Lowell W. Robinson. The Officer Defendants who have moved to dismiss are Christopher R. Cade, Wesley R. Card, Ira M. Dansky, Richard L. Dickson, Cynthia DiPietrantonio,

dismiss the plaintiffs' intentional and constructive fraudulent conveyance claims and the Litigation Trustee's unjust enrichment claims with respect to payments made in connection with restricted shares, share equivalent units, and accumulated dividends.[9] Dkt. No. 93.

Joseph T. Donnalley, Tami Fersko, John T. McClain and Aida Tejero-DeColli. In addition, the following former directors, officers, and employees who are alleged to have received payments in connection with restricted shares, share equivalent units, and unpaid dividends have joined in the D&O defendants' motion to dismiss: Irene A. Koumendouros, Ira Margulies, John D'Souza, Jack Gross, Patricia Kenny, Vincent Morales, Daniel Fishman, Frances Lukas, Mitchel Levine, Nicoletta Palma and Stephen C. Troy, Dkt. No. 101; Janet Carr, Dkt. No. 105; Kathleen Nedorostek Kaswell, Joseph Stafiniak, and Mary E. Belle, Dkt. No. 108; Nicola Guarna and Robert Rodriguez, Dkt. No. 112; Lynne Bernstock, Jeffery Erisman, Janice Brown, Katherine Butler, James Capiola, Gregory Clark, Eric Dauwalter, Mark DeZao, Beth Dorfsman, Eileen Dunn, Rosa Genovesi, Laurie Gentile, Bryan Gilligan, Ninive Giordano, Stacey Harmon, Richard Hein, Gerald Hood, Linda Kothe, Arundhati Kulkarni, Suzanne Maloney, Zine Mazouzi, Susan McCoy, Thomas Nolan, Pamela Paul, Charles Pickett, Amy Rapawy, Joseph Rosato, Mahmood Hassani-Sadi, Arlene Starr, Larissa Sygida, Kimberly Thomas, and Norman Veit, Dkt. No. 115; Whitney L. Smith, Dkt. No. 135; Heather Harlan and George Sharp, Dkt. No. 143; Jamie Cygielman, Harvest Street Capital, LLC, and Robyn Mills, Dkt. No. 189; Stefani Greenfield, Dkt. No. 218; Wayne Kulkin, Dkt. No. 235; and Kathleen O'Brien Gibber and Thomas Murray, Dkt. No. 264.

[9] As confirmed at oral argument, the D&O defendants do not move to dismiss plaintiff's fraudulent conveyance claims with respect to the change in control payments. See Transcript of Oral Argument, August 13, 2020 ("Tr."), at 23:15-20.

II. Legal Analysis

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

A. Considering Documents Outside the Complaint

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

A threshold question the Court must resolve is whether the Court may consider on these motions to dismiss the Paying Agent Agreement (the "PAA"), which is the agreement between the Jones Group,

Jasper Parent, and Wells Fargo that lays out the terms under which Wells Fargo would effectuate the $1.105 billion in payments made to the public shareholders in the merger.

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

Tulczynska v. Queens Hosp. Ctr., No. 17-cv-1669, 2019 WL 6330473, at *6-7 (S.D.N.Y. Feb. 12, 2019)).

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

The leading case on the issue in the Second Circuit is Chambers v. Time Warner, 282 F.3d 147 (2d Cir. 2002). The Chambers court affirmed the district court's decision to consider written contracts between plaintiffs and defendants, because "[t]he Amended Complaint is replete with references to the contracts and requests judicial interpretation of their terms." Id. at 153 n.4. The Chambers court disapproved, however, of the district court's decision to consider

---

[10] Relying on Goldman v. Belden, 754 F.2d 1059, 1066 (2d Cir. 1985), plaintiffs also argue that limited quotations of a document are not enough "to make the document integral to the complaint." Id. This argument, however, is meritless. Goldman discusses whether a particular document had been incorporated in a complaint, 754 F.2d at 1066, not whether it was integral to the complaint, which is a separate inquiry. Indeed, "[e]ven where a document is not incorporated by reference, the court may nevertheless consider it where the complaint relies heavily upon its terms and effect, which renders the document integral to the complaint." Chambers, 282 F.3d at 153.

certain unsigned codes laying out standard terms for contracts with members of plaintiffs' union because "[t]he Amended Complaint does not refer to the Codes, plaintiffs apparently did not rely on them in drafting it, and none of the Codes submitted to the court were signed by the [defendants]," and also because "the parties disagree as to whether and how the Codes relate to or affect the contractual relationships at issue." Id. at 154.

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

What is more, the Tribune courts, faced with a similar set of allegations, deemed the paying agent agreement integral to the complaint. There, the Tribune shareholders submitted transaction documents, including the relevant paying agent

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

B. Payments to the Shareholder Defendants

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

In broad strokes, the purpose of that provision, as the Second Circuit recently observed, is to "promote finality and certainty for investors, by limiting the circumstances . . . under which securities transactions could be unwound," and thereby "enhancing the efficiency of securities markets" and reduc[ing] the cost of capital to the American economy." Tribune, 946 F.3d at 92. As explained

below, the Court holds that plaintiffs' attempts to claw back payments made to the shareholder defendants in connection with an LBO that closed more than four years ago are foreclosed by § 546(e).

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

1. General Legal Standard

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

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

[11] Section 546(e) applies to all fraudulent transfer claims, except for intentional fraudulent transfer claims brought under § 548(a)(1)(A). Such claims may be brought only as to transfers made within two years prior to the bankruptcy. See 11 U.S.C. § 548(a)(1)(A). Because the transfers at issue here occurred nearly four years before Nine West filed for bankruptcy, Compl.

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

2. Qualifying Transaction

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

a. In Connection with a Securities Contract

The Second Circuit has observed that the Bankruptcy Code defines "securities contract" with "extraordinary breadth" to include, inter alia, a "contract for the purchase or sale of a security, including any repurchase transaction on any such security," as well as "any other agreement or transaction that is similar to an agreement or transaction referred to in this subparagraph." Tribune, 946 F.3d at 81 (first quoting In re Bernard

---

¶¶ 1, 7, the Litigation Trustee cannot and does not bring his intentional fraudulent conveyance claims under Section 548(a)(1)(A). As a result, the shareholder defendants invoke the § 546(e) safe harbor against all of the Litigation Trustee's fraudulent conveyance claims.

L. Madoff Inv. Sec. LLC, 773 F.3d 411, 417 (2d Cir. 2014) and then quoting 11 U.S.C. § 741(7)(A)(i), (vii)). In Tribune, the Second Circuit held that Tribune's payments for the redemption of shares from its public shareholders were "in connection with a securities contract." Id.

Here, just as in Tribune, the shareholder defendants argue, Nine West's payments to the public shareholders were for the redemption of shares and thus made in connection with a securities contract. Shareholder Defs' Mem. at 13.

Plaintiffs attempt to distinguish Tribune. They argue that, unlike in Tribune, the common shares were not "redeemed" by Nine West; instead, they were "cancelled and converted into the right to receive $15 per share in cash." Pls' Shareholder Mem. at 22 (quoting Complaint ¶ 132). After the closing, plaintiffs contend, "the former shareholders' stock certificates became nothing more than pieces of paper evidencing their respective rights to payment pursuant to the [Merger Agreement]." Id. And because the shares ceased to exist after the merger, the Merger Agreement did not – and, indeed, could not – involve their purchase. Id. at 22-23.

For two reasons, the Court rejects plaintiffs' argument and finds that the public shareholder transfers were made in connection with a securities contract. First, plaintiffs' attempt to distinguish Tribune is unsuccessful. Tribune involved a two-step LBO transaction: first, there was a tender offer, which involved the redemption of shares from public shareholders, and second there was, as here, a merger, which involved the cancelation and conversion of the remaining shares into the right to receive cash. See Declaration of Andrew G. Devore In

Support of Reply Memorandum of Law in Further Support of Public Shareholder Defendants' Motion to Dismiss Under the Safe Harbor Act of 11. U.S.C. § 546(e), Dkt. No. 280-1. While the Second Circuit did not specifically discuss this distinction between redemption and cancellation, it had "no trouble concluding, based on Section 741(7)'s plain language, that all of the payments at issue, including those connected to the redemption of shares, were 'in connection with a securities contract.'" Tribune, 946 F.3d at 81.

Second, as the shareholder defendants persuasively argue, § 741(7)(A)(vii) covers not only contracts for the repurchase of securities but also any other "similar" contract or agreement. As noted above, the Second Circuit has given this provision wide scope, observing that "few words in the English language are as expansive as 'any' and 'similar'" and defining "similar" to "mean[] 'having characteristics in common,' or 'alike in substance or essentials.'" Madoff, 773 F.3d at 419. There is no substantive or essential difference between an LBO that is effectuated through share redemption and one effectuated through share cancellation. Therefore, regardless of how the transaction is characterized, the Court finds that Nine West, at the least, entered into a transaction "similar" to a repurchase, and that the payments to the public shareholders in connection with the Merger Agreement fall within the catch-all of § 741(7)(A)(vii).[12]

---

[12] Plaintiffs further argue that the cancelation and conversion of shares is not similar to the redemption of shares (or to any other agreement or transaction listed in § 741) because the cancellation of shares does not involve "a security changing hands," something they deem to be a crucial element

b. Settlement Payment[13]

Under the Bankruptcy Code, a "settlement payment" means "a preliminary settlement payment, a partial settlement payment, an interim settlement payment, a settlement payment on account, a final settlement payment, or any other similar payment commonly used in the securities trade." 11 U.S.C. § 741(8). The Second Circuit has held that a "settlement payment" includes a "transfer of cash made to complete a securities transaction." Enron Creditors Recovery v. Alfa, S.A.B. de C.V., 651 F.3d 329, 334-35 (2d Cir. 2011); see also In re Quebecor World (USA) Inc., 453 B.R. 201, 215 (Bankr. S.D.N.Y. 2011) ("[T]he direction given by the Enron majority with respect to that definition is both uncomplicated and crystal clear – a settlement payment, quite simply, is a transfer of cash made to complete a securities transaction.").

In light of the Second Circuit's capacious interpretation of § 741(8), the Court holds, in the alternative, that the payments made to the shareholder defendants were "settlement payments"

---

of any "transaction." Even if that were right (which the Court doubts), plaintiffs ignore that § 741(7)(A)(vii) covers not just transactions but agreements. If nothing else, the cancelation and conversion of shares constitutes an agreement that is sufficiently similar to a redemption of shares to fall within the statute's definition of a "securities contract."

[13] Because the Tribune court found that the payments at issue were transfers in connection with a securities contract, it declined to reach whether those same payments would also "qualify as 'settlement payments' under Section 546(e)." 946 F.3d at 80 n.12.

– that is, transfers of cash made to complete the merger.[14]

3. Qualifying Participant

After determining that the shareholder payments are qualifying transactions, the Court must next determine whether those transactions involved a qualifying participant – that is, whether the transfer was "made by or to (or for the benefit of) a . . . financial institution." § 546(e). Here, the shareholder defendants make two arguments: First, that Nine West counts as a qualifying participant and therefore all of the public shareholder payments are safe harbored by § 546(e); and second that certain public shareholders independently count as qualifying institutions either because they are registered under the Investment Company Act of 1940 or because they are themselves commercial banks. The Court again agrees with the shareholder defendants in both respects.

a. Whether Nine West is Qualifying Participant

The shareholder defendants' primary argument is that Nine West qualifies as a "financial institution" under the relevant provisions of the Bankruptcy Code. As discussed above, § 546(e) safe harbors qualifying transactions that are made by or to (or for the benefit of) a . . . financial institution. Section 101(22) of the Bankruptcy Code, in turn, defines a "financial institution" as, in relevant part:

---

[14] Plaintiffs do not address whether the payments were settlement payments in their briefs and did not take up the Court's invitation to address the issue at oral argument. Tr. at 34:16-22.

> [A]n entity that is a commercial or savings bank . . . and, when any such . . . entity is acting as agent or custodian for a customer (whether or not a 'customer', as defined in section 741) in connection with a securities contract (as defined in section 741) such customer.

11 U.S.C. § 101(22)(A). In other words, when a bank is acting as an agent for a customer in connection with a securities contract, that customer counts as a "financial institution," for the purposes of the § 546(e) safe harbor. In Tribune, the Second Circuit announced and applied this interpretation of § 546(e) for the first time. It held that Tribune was a financial institution because, during that merger, Tribune was a "customer" of Computershare, a bank, and that Computershare acted as Tribune's "agent" in that merger by serving as its paying agent to effectuate the redemption payments made to the Tribune's former shareholders. 946 F.3d at 77-80.

The shareholder defendants argue that this case is on all fours with Tribune. That is, Nine West qualifies as a financial institution under § 101(22)(A) because, during the merger, Nine West was a "customer" of Wells Fargo, a "commercial bank", and that Wells Fargo acted as Nine West's "agent" in the merger by serving as its paying agent to effectuate the payments to the shareholder defendants. Shareholder Defs' Mem. at 14. In response, plaintiffs dispute only whether Wells Fargo served as Nine West's "agent."

i. Legal Standard for Agency

In finding that Computershare was Tribune's agent, the Second Circuit looked to common law,

where the establishment of an agency relationship requires: (1) "the principal's manifestation of intent to grant authority to the agent"; (2) "agreement by the agent"; and (3) "the principal['s] . . . mainten[ance] [of] control over key aspects of the undertaking." Tribune, 946 F.3d. at 79.

First, the Tribune court found that Tribune manifested its intent to grant authority to Computershare by "depositing the aggregate purchase price for the shares with Computershare and entrusting Computershare to pay the tendering shareholders." Id. at 80. Second, it found that Computershare "manifested its assent by accepting the funds and effectuating the transaction." Id. And finally, it found that Tribune maintained control over key aspects of the undertaking as the transaction proceeded. Id. Specifically on this last point, the Tribune court observed that Tribune had to give Computershare notice of its acceptance of the shares before Computershare was to pay the tendering shareholders. Id.

ii. Whether Wells Fargo was Nine West's Agent

The shareholder defendants argue that here, as in Tribune, all three elements of agency are satisfied, for substantially the same reasons that the Tribune court relied on. Plaintiffs make two arguments in response: (1) that Wells Fargo was not an agent but merely a "non-agent service provider"; and (2) that, to

the extent Wells Fargo was anyone's agent, it was Jasper Parent's agent, not Nine West's agent.[15]

1. Whether Wells Fargo Was a "Non-agent Contractor"

Plaintiffs first argue, as they allege in the Complaint, that Wells Fargo was not an agent at all, but merely a "non- agent contractor." Pls' Shareholder Mem. at 17; Complaint ¶ 135. In essence, plaintiffs claim that Wells Fargo was not an agent because it did not have a fiduciary relationship with either Jasper Parent or Nine West. Pls' Shareholder Mem. at 18. Specifically, plaintiffs cite to two Second Circuit cases that, they contend, show that where a service provider is performing specified tasks in accordance with a contract, that contractual arrangement does not mean the service provider is an agent for its customer. Id. (citing, inter alia, Bridgestone/Firestone, Inc. v. Recovery Credit Servs., Inc., 98 F.3d 13, 20 (2d. Cir. 1996)). Plaintiffs note that while Wells Fargo had specific contractual duties involving the holding and disbursing funds, maintaining records, and complying with specific directions, plaintiffs conclude, it "had no independence or decision-making authority," no "discretion as to whom it would pay or how much it would pay per share," and "no say over how to invest the money it held." Id. at 19-20.

But, as the shareholder defendants argue, plaintiffs are confusing cause and effect. A relationship of agency gives rise to a fiduciary

---

[15] Plaintiffs also make the threshold argument that the Court should not consider the Paying Agent Agreement at the 12(b)(6) phase. For the reasons discussed above, the Court disagrees.

relationship, see Tribune, 946 F.3d at 79; but a fiduciary relationship is not itself a necessary prerequisite to establishing agency. See Shareholder Reply at 7 (citing Restatement (Third) of Agency § 1.01 cmt. e). In any event, the shareholder defendants contend that plaintiffs' argument is foreclosed by Tribune, where the Second Circuit squarely held that a paying agent that had accepted the funds and effectuated the transaction was an agent of the customer. 946 F.3d at 80.

Plaintiffs attempt to circumvent Tribune by arguing that there are "significant differences between the facts in this case compared to Tribune." Pls' Shareholder Mem. at 21. As discussed below, however, while the factual wrinkles here might lead the Court to conclude that Wells Fargo was someone else's agent, what is clear is that Wells Fargo, to at least some customer, was an agent.

2. Whether Wells Fargo was Only Jasper Parent's Agent

Plaintiffs next argue that the terms of the merger Agreement and the PAA make clear that, if Wells Fargo was anyone's agent, it was Jasper Parent's agent, not Nine West's agent. Here, unlike in Tribune, the LBO was effectuated by merging the target company (Nine West) and a shell company (Jasper Parent). As a result, the PAA was not a bilateral agreement between Nine West and Wells Fargo but a trilateral agreement between Nine West, Jasper Parent, and Wells Fargo. See PAA at 2. Plaintiffs contend that, even assuming the Court considers the PAA, that document makes clear that Wells Fargo was acting on behalf of, and subject to

the control of, Jasper Parent, not Nine West. Pls' Shareholder Mem. at 11.[16]

Looking to Tribune, plaintiffs argue that in finding that Computershare was acting as Tribune's agent, the Second Circuit explained that: (1) Tribune had deposited the aggregate purchase price with Computershare and (2) Computershare could not issue payments until Tribune provided notice of its acceptance. Pls' Shareholders Mem. at 11. Here, plaintiffs point out, it was Jasper Parent, not Nine West, that was tasked with depositing the funds and accepting the shares. See PAA § 1.4 ("Parent shall deposit (or cause to be deposited) with the Paying Agent . . . cash in immediately available funds . . . sufficient to pay the Merger Consideration . . . ."); id. ("The Paying Agent agrees that it will not release or pay any funds from the Payment Fund to or for the account of any of the Shareholders . . . unless and until Parent has notified the Paying Agent that the Effective Time of the Merger has occurred.").[17] In addition, plaintiffs point out that, under the Merger Agreement, it was Jasper Parent, not Nine West, that directed Wells Fargo how to invest the funds until they are paid out. Merger Agreement § 4.2(a). By

---

[16] In support of this point, plaintiffs also cite to the Jones Group Proxy, which advised shareholders that Wells Fargo would pay them "on behalf of Parent." Pls' Shareholder Mem. at 11. Because the proxy statement is neither incorporated in nor integral to the Complaint, the Court declines to consider the document at the 12(b)(6) stage – nor would consideration of the document change the Court's analysis.

[17] The shareholder defendants unsuccessfully attempt to elide this point by using the name "Nine West" to refer collectively to Jasper Parent and Nine West. See Shareholder Defs' Mem. at 6 n.8. As a result, every time the PAA mentions "Jasper Parent," the defendants swap in "Nine West."

contrast, plaintiffs argue, Nine West's role in the PAA ranged from "trivial" to "nonexistent."[18] Pls' Shareholder Mem. at 13.

In response, the shareholder defendants argue that even if Wells Fargo was an agent of Jasper Parent, Wells Fargo also served as Nine West's agent for the purposes of distributing the payments to the shareholder defendants. Shareholder Reply at 6. In particular, the shareholder defendants point to the following features of the PAA as evidence of agency relationship between Nine West and Wells Fargo: (1) the PAA expressly provides that Nine West "desires that the Paying Agent act as its special agent for the purpose of distributing the Merger Consideration"; (2) Nine West was tasked with delivering to Wells Fargo a list of the owners of common shares who were to receive payment; (3) Nine West instructed and authorized Wells Fargo to cancel the shares upon delivery; (4) Nine West was responsible for paying Wells Fargo; (5) Nine West was responsible for indemnifying Wells Fargo; and (6) upon completion of the merger, Wells Fargo was instructed to deliver to Nine West "any and all funds which had been

---

[18] Plaintiffs also argue that § 101(22)(A)'s analysis should proceed transfer-by-transfer, rather than contract-by-contract. And plaintiffs therefore conclude that to the extent Wells Fargo was Nine West's agent, it was only so with respect to the transfers for the certificate securities not the book-entry securities because to the extent Nine West exercised meaningful control over the payments, it was only with respect to the former. As discussed at greater length below, the Court rejects plaintiffs' proffered interpretation of § 101(22)(A) and holds that the analysis of whether a bank is an agent under the statute must proceed contract-by-contract. Plaintiffs' attempt to distinguish between the payments made in connection with the book-entry securities and certificate securities, therefore, is unavailing.

made available" to Wells Fargo. Shareholder Reply at 4-5.[19]

The Court agrees with the shareholder defendants and holds that Wells Fargo was Nine West's agent with respect to the Merger Agreement. Ultimately, the money belonged to Nine West and was paid to its shareholders. While plaintiffs try to use Jasper Parent's involvement to confuse the matter, the district court's analysis in Tribune ably resolves the issue: "[Wells Fargo] was entrusted with [millions] of dollars of [Nine West] cash and was tasked with making payments on [Nine West's] behalf to Shareholders upon the tender of their stock certificates to [Wells Fargo]. This is a paradigmatic principal-agent relationship." 2019 WL 1771786, at *11. While Nine West may have had less control over the shareholder transfers than did Tribune, it nevertheless had enough control over key elements of the transaction so as to establish an agency relationship with Wells Fargo.

---

[19] The shareholder defendants also contend that plaintiffs' argument undermines plaintiffs' fraudulent conveyance claims, which requires that the transfer sought to be avoided have been made by the debtor-transferor – that is, by Nine West. Because plaintiffs purport to act on behalf of Nine West's (not Jasper Parent's) creditors, the shareholder defendants argue plaintiffs have no standing to seek to avoid transfers made by or on behalf of Jasper Parent. Shareholder Reply at 4-5. Ultimately, then, shareholder defendants conclude, one of two things must be true: Either Wells Fargo made the payments on behalf of Nine West, in which case the payments are safe harbored under § 546(e) or Wells Fargo made the payments only on behalf of Jasper Parent, in which case the transfers were not made by Nine West and are therefore not subject to avoidance. Id. It is unnecessary, however, for the Court to reach this argument.

In sum, then, the Court holds that Nine West, in virtue of its relationship with Wells Fargo, is a financial institution under § 101(22)(A) and all of the payments made to the public shareholders pursuant to the Merger Agreement were settlement payments and/or transfers made in connection with a securities contract under § 546(e). Accordingly, the Court holds that all of the payments made to the public shareholders are safe harbored under § 546(e).

b. Whether Certain Shareholder Defendants Independently Count as Qualifying Participants

In the alternative, the Court also finds that certain shareholder defendants independently count as qualifying participants, irrespective of Nine West's status. Section 101(22)(A) does not contain the statute's only definition of a "financial institution." Rather, § 101(22)(B) further defines "financial institution" to include "in connection with a securities contract . . . an investment company registered under the Investment Company Act of 1940." 11 U.S.C. 101(22)(B).

The shareholder defendants maintain, and submit SEC documents to prove,[20] that at least 82 of them are registered under the 1940 Act and therefore independently qualify as "financial institutions" under § 546(e).[21] In addition, one shareholder

---

[20] The Court can take judicial notice of the SEC filings establishing such status. See Paulsen v. Stifel, Nicolaus & Co., 2019 WL 2415213, at *6 (S.D.N.Y. Jun. 4, 2019).

[21] While Plaintiffs do not dispute that public shareholders registered under the 1940 Act are qualifying participants, they do dispute whether one particular defendant – Gabelli Global Series Fund Inc. ("Gabelli") (originally sued as "Defendant NY-8") – has

defendant – Natixis S.A. – is independently a financial institution because it is simply a "commercial bank," pursuant to 11 U.S.C. § 101(22). See Joinder and Supplement of Defendant Natixis S.A. to Public Shareholder Defendants' Motion to Dismiss Under the Safe Harbor of 11 U.S.C. § 546(e) ("Natixis Joinder"), Dkt. No. 243.[22] Because the payments to these shareholders, which allegedly

---

proffered any judicially noticeable evidence of its status as an investment company registered under the 1940 Act. See Joinder of Defendant NY-8 to Public Shareholder Defendants' Motion to Dismiss, Dkt. No. 149; Pls' Shareholder Mem. at 24 n.18. But Gabelli submitted the requisite documents along with its supplemental reply. See Supplemental Reply of Gabelli Global Series Fund Inc. In Further Support of Public Shareholder Defendants' Motion to Dismiss, Dkt. No. 282. Therefore, the Court holds that Gabelli independently qualifies as a financial institution.

[22] As above, plaintiffs do not question whether commercial banks qualify as financial institutions under the statute but dispute whether Natixis has submitted judicially noticeable documentation of its status as such. Pls' Shareholder Mem. at 24 n.18. To establish its status as a commercial bank, Natixis submitted public documents, including: (1) an excerpt from the French Financial Agents Register; and (2) a copy of the Natixis's amended articles of incorporation, with a certified English translation of the relevant portions. Natixis Joinder at 2; see also Declaration of Joseph Cioffi in Support of Joinder and Supplement of Defendant Natixis S.A. To Public Shareholder Defendants' Motion to Dismiss Under the Safe Harbor of 11 U.S.C. § 546(e), Dkt. No. 244. Plaintiffs contend that the Court should not take judicial notice of these documents because they are "foreign documents, whose accuracy is not apparent on their face." Pls' Shareholder Mem. at 24 n.18. But plaintiffs cite no authority for the proposition that courts cannot take judicial notice of publicly filed foreign documents with certified English translations. Indeed, courts in this district have taken judicial notice of such documents. E.g., In re Enron Corp., 323 B.R. 857, 869 (Bankr. S.D.N.Y. 2005). Therefore, the Court holds that Natixis independently qualifies as a financial institution.

totaled over $338 million, were part of a qualifying transaction (for the reasons discussed above), they independently qualify for the § 546(e) safe harbor.

ii. Whether § 546(e) Preempts the Indenture Trustee's State Law Fraudulent Conveyance Claims Against the Shareholder Defendants

In addition to the Litigation Trustee's fraudulent conveyance claims brought under § 544 of the Bankruptcy Code, the Indenture Trustee asserts the same claims against the same defendants but without invoking § 544. In Tribune, however, the Second Circuit held that § 546(e) impliedly preempts state law fraudulent conveyance claims by individual creditors that would be barred by the safe harbor if brought by a bankruptcy trustee. 946 F.3d at 90-97. Because the Court holds that the § 546(e) safe harbor applies, the Court also holds that the Indenture Trustee's claims against the shareholder defendants are preempted by that provision.

C. Director and Officer Payments

To the extent the D&O defendants received common shares as public shareholders, the foregoing analysis applies equally to them. In addition, the D&O defendants also move to dismiss plaintiffs' fraudulent conveyance claims and the Litigation Trustee's unjust enrichment claims as to payments made in connection with restricted shares, share equivalent units, and accumulated dividend payments.

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

As discussed above, the § 546(e) safe harbor applies where two requirements are met: (1) there is a qualifying transaction; and (2) there is a qualifying participant.

1. Qualifying Transaction

The D&O defendants argue that the payments for restricted shares, share equivalent units, and accumulated dividends all qualify as both (1) "settlement payments" and (2) transfers "in connection with a securities contract." Memorandum of Law in Support of Former Director and Officer Defendants' Motion to Dismiss Under the Section 546(e) Securities Safe Harbor ("D&O Defs' Mem."), Dkt. No. 94, at 8; Reply Memorandum of Law of Former Director and Officer Defendants in Support of Their Motion to Dismiss the Complaint ("D&O Reply"), Dkt. No. 281, at 6. Plaintiffs concede that, if the Court finds that the payments for the common shares count as qualifying transactions, then so must the payments for restricted shares and share equivalent units. Pls' D&O Mem. at 10. But plaintiffs contend that the accumulated dividend payments still should not count as qualifying transactions because they did not involve the purchase, sale, loan, or even cancellation of any security. Id. The only question for the Court to resolve here, thus, is whether the accumulated dividend payments count as qualifying transactions.

As discussed above, the Second Circuit construes broadly both "settlement payments" and "transfers in

connection with a securities contract." The D&O defendants make two arguments for why the accumulated dividend payments should count as qualifying transactions.

First, the D&O defendants contend that the Complaint itself concedes that accumulated dividends were transfers "made from the cancellation of Jones Group shares in connection with the LBO." D&O Defs' Mem. at 7 (quoting Compl. ¶ 40). But the D&O defendants are taking the Complaint out of context. In full, that sentence reads: "First, all the Directors and Officers knew that they would receive, individually or through family members, affiliated entities, or trusts, material amounts from the cancellation of Jones Group shares in connection with the LBO." Compl. ¶ 40. That sentence could just as well refer to the money the directors and officers would receive in connection with the restricted share and share equivalent units. The Court therefore rejects this first argument.

Second, the D&O defendants point out that other courts have held that dividend payments made as part of an integrated transaction where the shareholder gives up her equity count as qualifying transactions. On point here is In re Boston Generating, -- B.R. --, 2020 WL 3286207, at *38 (S.D.N.Y. June 18, 2020). In that case, the court held that dividend payments may count as "settlement payments" when they are made in exchange for the holder's equity interest. Specifically, the court homed in on the fact that the dividend payments were made "as part of an integrated transaction . . . that comprised the use of more than $1 billion to redeem equity interests in [the target company], redeem

warrants, and pay a dividend to equity."[23] Id. By contrast, where a dividend is paid in the ordinary course to shareholders who retain their equity following the dividend, such payments are not "settlement payments." Id.

While In re Boston Generating is not precedent binding on this Court, the Court finds its reasoning persuasive, especially in light of the wide berth that the Second Circuit has afforded the "qualifying transaction" prong of the analysis. Here, as in In re Boston Generating, the accumulated dividend payments were tied to the restricted shares and paid as part of the settlement of the Merger Agreement. See Merger Agreement § 4.3 (holders of restricted shares shall receive "an amount in cash, for each Restricted Share, equal to the Per Share Merger Consideration plus any unpaid dividends that have accumulated on such Restricted Share . . . ."). All of the cases on which plaintiffs rely are cases in which dividend payments were made for securities that the transferees continued to hold, exactly the sort of situation that is distinguished in In re Boston Generating. See Pls' D&O Mem. at 11. Accordingly, the Court holds that the accumulated dividend payments were both settlement payments and transfers made in connection with a securities contract.

2. Qualifying Participant

To satisfy the "qualifying participant" prong of the analysis, the D&O defendants argue that Nine West

[23] For similar reasons, the court concluded that the dividend payments also counted as "transfers made in connection with a securities contract." In re Boston Generating, 2020 WL 3286207, at *38.

should be considered a "financial institution" with respect to all payments made in connection with the Merger Agreement, even those payments with respect to which Wells Fargo played no role.

As discussed above, the Court holds that Nine West qualifies as a financial institution under § 101(22)(A) because, during the merger, it was a customer of Wells Fargo, which acted as its agent in that merger by serving as its paying agent to effectuate the payments to the public shareholders. Unlike the common share payments, however, which were effectuated through Wells Fargo, plaintiffs allege that the payments for restricted shares, share equivalent units, and accumulated dividends "were processed through the payroll and by other means." Compl. ¶ 135. The question here, then, is whether Nine West's status as a "financial institution" extends to these other payments, which were made in connection with the merger, but that weren't themselves processed by Wells Fargo.

At bottom, this is a question of statutory interpretation. As quoted above, § 101(22)(A) defines a financial institution as, in relevant part:

> [A]n entity that is a commercial or savings bank . and, when any such . . . entity is acting as agent or custodian for a customer (whether or not a 'customer', as defined in section 741) in connection with a securities contract (as defined in section 741) such customer.

Ultimately, the parties disagree over "when" Wells Fargo is acting as Nine West's agent in connection with a securities contract. Advocating for a "contract-by-contract" approach, the D&O defendants argue that a customer of a bank is a "financial institution"

under § 101(22)(A) with respect to a securities contract. Accordingly, once the Court finds that Nine West is a "financial institution" as a customer of Wells Fargo in connection with the Merger Agreement, § 546(e) protects all "settlement payments" or transfers "in connection with" the Merger Agreement made "by or to (or for the benefit of)" Nine West, regardless whether Wells Fargo itself processed or otherwise served as an agent with respect to these payments. D&O Reply at 4.

Plaintiffs offer an alternative reading. Taking a "transfer-by-transfer" approach, plaintiffs argue that a customer of a bank is a "financial institution" under § 101(22)(A) with respect to particular transfers. On this reading, even if Wells Fargo served as Nine West's agent in connection with the Merger Agreement, § 546(e) protects only those payments with respect to which Wells Fargo played an agency role. Pls' D&O Mem. at 8-9. Where, as here, certain payments made in connection with the securities contract were not processed by the paying agent, those payments are not safe harbored. In support of their position, plaintiffs stress that, under the statute, a customer of a bank only counts as a financial institution "when [a bank] is acting as agent." Id. at 8. Thus, "customer status as a financial institution is . transitory and transactional in nature and exists only when and to the extent the bank is playing an agency role with respect to a specific transfer." Id. 8-9.

For two reasons, the Court adopts the "contract-by-contract" interpretation of § 101(22)(A). First, the reading is more consistent with the text of the statute. The statute provides that a customer of a bank qualifies as a financial institution "when [the bank] is acting as agent . . . in connection with a

securities contract." If plaintiffs' reading were right, the statute should have read: "when [the bank] is acting as agent . . . in connection with a transfer." Indeed, § 101(22)(A), which simply defines the term "financial institution," does not even mention the word "transfer."

Second, plaintiffs' proposed reading runs into tension with the Supreme Court's decision in Merit Mgmt. Grp., LP v. FTI Consulting, Inc., 138 S. Ct. 883, 892 n.6 (2018). In that case, the Supreme Court held that "the relevant transfer for purposes of the § 546(e) safe-harbor inquiry is the overarching transfer that the trustee seeks to avoid," and "not any component part of that transfer." Id. at 893. In so holding, the Court rejected an interpretation that some lower courts had given to § 546(e) that "transfers in which financial institutions served as mere conduits" are safe harbored, just because the money passed through a financial institution. Id. at 892. But plaintiffs' reading effectively asks the Court to revive a version of that conduit theory, affording safe harbor only where "the bank is playing an agency role with respect to a specific transfer." Pls' D&O Mem. at 9. In light of Merit, such a narrow focus on the mechanics of each individual transfer is misplaced.

In sum, then, the Court holds that the relevant inquiry under Tribune and in light of Merit is not whether the bank had a role in a specific payment or transfer but whether that bank was acting as an agent in connection with a securities contract. When, as here, a bank is acting as an agent in connection with a securities contract, the customer qualifies as a financial institution with respect to that contract, and all payments made in connection with that contract are therefore safe harbored under § 546(e). For that

reason, the payments made to the D&O defendants – viz., payments in connection with restricted shares, share equivalent units, and accumulated dividends – are safe harbored under § 546(e), even if, as plaintiffs allege, they were not themselves processed by Wells Fargo.

ii. Whether § 546(e) Preempts the Indenture Trustee's State Law Fraudulent Conveyance Claims Against the D&O Defendants

As explained above, because the Court holds that the § 546(e) safe harbor applies to the payments made in connection with the restricted shares, share equivalent units, and accumulated dividends, the Court also holds that the Indenture Trustee's fraudulent conveyance claims against the D&O defendants are preempted by that provision.

iii. Whether § 546(e) preempts the Litigation Trustee's Unjust Enrichment Claims Against the D&O Defendants[24]

Finally, the D&O defendants argue that the Litigation Trustee's unjust enrichment claims against certain former directors and officers are preempted

---

[24] The Litigation Trustee brings the unjust enrichment claims only against the former directors and officers who are alleged to have played "a key role in advocating for and/or approving the Merger," namely: Kimmel, Demsey, Kamens, Mitarotonda, Nuechterlein, Robinson, and Donnalley, see 20-cv-4287, Dkt. No. 130; McClain, Crotty, and Fersko, see 20-cv-4262, Dkt. No. 110 Cade and Dansky, see 20-cv-4265, Dkt. No. 53; Georgiadis, see 20-cv-4292, Dkt. No. 1; Card and Wilkins, see 20-cv-4346, Dkt. No. 1; and Dickson and Mettler, 20-cv-4436, Dkt. No. 134.

by § 546(e)'s safe harbor. Here, the Litigation Trustee is seeking "disgorgement and restitution of, and a judgment against [certain defendants] in the amount of, the payments, benefits, incentives, and other things of value [those defendants] received in connection with the 2014 Transaction." Compl. § 191.

Where an unjust enrichment claim "seeks to recover the same payments held unavoidable under § 546(e)," it would "render the § 546(e) exemption meaningless, and would wholly frustrate the purpose behind that section." AP Servs. LLP v. Silva, 483 B.R. 63, 71 & n.64 (S.D.N.Y. 2012). The D&O defendants argue that because the Litigation Trustee is seeking to recoup money that these defendants received in connection with transfers that have been safe harbored, those claims are preempted by § 546(e).

In response, the Litigation Trustee argues that the D&O defendants are misframing the doctrine: unjust enrichment claims are only preempted where they are "substantially identical" to the avoidance claims barred by § 546(e). Pls' D&O Mem. at 13 (quoting In re Contemporary Indus Corp., No. A99-8135, 2007 WL 5256918, at *5 (Bankr. D. Neb. June 29, 2007), aff'd, No. 8:07CV288, 2008 WL 11450766 (D. Neb. Jan. 8, 2008), aff'd, 564 F.3d 981 (8th Cir. 2009), abrogated in part by Merit Mgmt. Grp., LP v. FTI Consulting, Inc., 138 S. Ct. 883, 892 n.6 (2018). Here, the Litigation Trustee argues, the unjust enrichment claims "are based not on the allegations that [Nine West] engaged in intentional and constructive fraudulent conveyance, but on the allegations that the former directors and officers of Jones Group breached their fiduciary duties and engaged in other personal wrongdoing." Id. at 12-13. In other words, because the unjust enrichment claims sound in breach of fiduciary duty, not fraudulent conveyance,

the Litigation Trustee insists they are not preempted by § 546(e).

But, as the D&O defendants persuasively respond, it is the remedy sought, rather than the allegations pled, that determines whether § 546(e) preempts a state law claim. See, e.g., Contemporary Industries Corp. v. Frost, 564 F.3d 981, 988 (8th Cir. 2009) (Beam, J.) abrogated on other grounds by Merit, 138 S.Ct. 883 (2018). This rule also promotes the purpose of § 546(e), which is to "to limit[] the circumstances . . . under which securities transactions could be unwound." Tribune, 946 F.3d at 92.

Therefore, because the Court holds that the payments made in connection with the restricted shares, share equivalent units, and accumulated dividends are safe harbored under § 546(e), the Court likewise dismisses the Litigation Trustee's unjust enrichment claims as to those payments. The Court notes, however, that the unjust enrichment claims are not dismissed with respect to the change in control payments, which, as discussed above, the D&O defendants have not yet moved to dismiss.

* * * * *

For the foregoing reasons, the Court hereby dismisses all fraudulent conveyance and unjust enrichment claims with respect to payments made in connection with common shares, restricted shares, share equivalent units, and accumulated dividends.[25]

---

[25] In particular, the Court dismisses the following claims in their entirety: Counts V and VI in the amended complaint in 20-cv-4262, Dkt. No. 110; Counts IV and V in the amended complaint in 20-cv-4265, Dkt. No. 53; Counts I and II in the amended complaint in 20-cv-4267, Dkt. No. 45; Counts I and II in the complaint in 20-cv-4286, Dkt. No. 1; Counts V and VI in the amended complaint in 20-cv-4287, Dkt. No. 130; Counts I

The Clerk of the Court is directed to close docket entries 88 and 93 in 20-md-2941. In addition, because all of the claims in the complaints in the following actions have now been dismissed, the Clerk is to enter judgment in favor of defendants in 20-cv-4286, 20-cv-4289, 20-cv-4299, 20-cv-4434, 20-cv-4440, 20-cv-4479, and 20-cv-4480.

SO ORDERED.

Dated: New York, NY
August 27, 2020

/s/ Jed. S. Rakoff
JED. S. RAKOFF, U.S.D.J.

---

and II in the complaint in 20-cv-4289, Dkt. No. 1; Counts IV, V, and VI in the complaint in 20-cv-4292, Dkt. No. 1; Counts I and II in the complaint in 20-cv-4299, Dkt. No. 1; Counts I and II in the complaint in 20-cv-4335, Dkt. No. 1; Counts V and VI in the complaint in 20-cv-4346, Dkt. No. 1; Counts I and II in the amended complaint in 20-cv-4433, Dkt. No. 100; Counts I and II in the complaint in 20-cv-4434, Dkt. No. 4; Counts V and VI in the amended complaint in 20-cv-4436, Dkt. No. 134; Counts I and II in the complaint in 20-cv-4440, Dkt. No. 1; Counts I and II in the complaint in 20-cv-4479, Dkt. No. 1; Counts I and II in the complaint in 20-cv-4480, Dkt. No. 1; and Counts I and II in the amended complaint in 20-cv-4569, Dkt. No. 112.

The Court also dismisses the following unjust enrichment claims only with respect to the payments made in connection with common shares, restricted shares, share equivalent units, and accumulated dividends, but not with respect to the change in control payments: Count IV in the amended complaint in 20-cv-4262; Count III in the amended complaint in 20-cv-4265; Count IV in the amended complaint in 20-cv-4287; Count IV in the complaint in 20-cv-4346; and Count IV in the amended complaint in 20-cv-4436.

Appendix B

20-3257-cv (L)
In re: Nine West LBO Sec. Litig.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2021
(Argued: March 10, 2022
Decided: November 27, 2023)

Docket Nos. 20-3257-cv (L), 20-3290-cv, 20-3315-cv, 20-3326-cv, 20-3327-cv, 20-3334-cv, 20-3335-cv, 20-3941-cv, 20-3952-cv, 20-3959-cv, 20-3961-cv, 20-3964-cv, 20-3969-cv, 20-3980-cv, 20-3981-cv, 20-3992-cv, 20-3998-cv

---

IN RE: NINE WEST LBO SECURITIES LITIGATION

MARC S. KIRSCHNER, AS TRUSTEE FOR THE NWHI LITIGATION TRUST, WILMINGTON SAVINGS FUND SOCIETY, FSB, AS SUCCESSOR INDENTURE TRUSTEE FOR THE 6.875% SENIOR NOTES DUE 2019, THE 8.25% SENIOR NOTES DUE 2019, AND THE 6.125% SENIOR NOTES DUE 2034 OF NINE WEST HOLDINGS, INC.,

Plaintiffs-Appellants,

ABC,

Plaintiff,

V.

ROBECO CAPITAL GROWTH FUNDS - ROBECO BP U.S. PREMIUM EQUITIES, FKA BOSTON PARTNERS U.S. PREMIUM EQUITY FUND, DFA INVESTMENT DIMENSIONS GROUP INC. U.S. CORE EQUITY 1 PORTFOLIO, DFA INVESTMENT DIMENSIONS GROUP INC. U.S. CORE EQUITY 2 PORTFOLIO, DFA INVESTMENT DIMENSIONS GROUP INC., U.S. MICRO CAP PORTFOLIO, DFA INVESTMENT DIMENSIONS GROUP INC. U.S. SMALL CAP PORTFOLIO, DFA INVESTMENT DIMENSIONS GROUP INC. U.S. SMALL CAP VALUE PORTFOLIO, DIMENSIONAL FUNDS PLC GLOBAL TARGETED VALUE FUND, DFA INVESTMENT DIMENSIONS GROUP INC. U.S. TARGETED VALUE PORTFOLIO, AKA NATIONWIDE U.S. TARGETED VALUE STRATEGY, DIMENSIONAL FUNDS PLC U.S. SMALL COMPANIES FUND, AKA IRISH U.S. SMALL CAP FUND, DFA AUSTRALIA LIMITED GLOBAL CORE EQUITY TRUST, AKA DEFENDANT TX-1, DFA INVESTMENT DIMENSIONS GROUP INC. TA U.S. CORE EQUITY 2 PORTFOLIO, AKA DEFENDANT TX-2, DFA INVESTMENT DIMENSIONS GROUP INC. TAX-MANAGED U.S. SMALL CAP PORTFOLIO, AKA DEFENDANT TX-3, DFA INVESTMENT DIMENSIONS GROUP INC. TAX-MANAGED U.S. TARGETED VALUE PORTFOLIO, AKA DEFENDANT TX-4, DFA INVESTMENT DIMENSIONS GROUP INC. U.S. SOCIAL CORE EQUITY 2 PORTFOLIO, AKA DEFENDANT TX-5, DFA INVESTMENT DIMENSIONS GROUP INC. U.S. VECTOR EQUITY PORTFOLIO, AKA DEFENDANT TX-6, DFA INVESTMENT TRUST COMPANY TAX-MANAGED U.S. MARKETWIDE VALUE SERIES, AKA DEFENDANT TX-7, DFA U.S. CORE EQUITY FUND, AKA DEFENDANT TX-8, DFA U.S. VECTOR EQUITY FUND, AKA DEFENDANT TX-9, AMERICAN BEACON SMALL CAP VALUE FUND, AKA DEFENDANT TX-10, HBK MASTER FUND L.P., AKA DEFENDANT TX-11, HBK QUANTITATIVE STRATEGIES MASTER FUND L.P., AKA DEFENDANT TX-12, KENNY ALLAN TROUTT SEPARATE TRUST

ESTATE, AKA DEFENDANT TX-13, MICRO CAP SUBTRUST, AKA DEFENDANT TX-14, SMALL CAP VALUE SUBTRUST, AKA DEFENDANT TX-15, TAX-MANAGED U.S. EQUITY SERIES, AKA DEFENDANT TX-16, U.S. SMALL CAP SUBTRUST, AKA DEFENDANT TX-17, USAA EXTENDED MARKET INDEX FUND, VARIABLE ANNUITY LIFE INSURANCE COMPANY I - SMALL CAP INDEX FUND, VARIABLE ANNUITY LIFE INSURANCE COMPANY I - SMALL CAP SPECIAL VALUES FUND, MARY MARGARET HASTINGS GEORGIADES, FLEXSHARES MORNINGSTAR UNITED STATES MARKET FACTOR TILT INDEX FUND, DEFENDANT IL-1, TELENDOS, LLC, HFR ASSET MANAGEMENT, L.L.C., NORTHERN SMALL CAP CORE FUND, NORTHERN SMALL CAP INDEX FUND, NORTHERN SMALL CAP VALUE FUND, NUVEEN SMALL CAP INDEX FUND, PEAK6 INVESTMENTS LLC, FKA PEAK6 INVESTMENTS, L.P., STATE FARM SMALL CAP INDEX FUND, STATE FARM VARIABLE PRODUCTS TRUST, SMALL CAP EQUITY INDEX FUND, VOYA RUSSELL SMALL CAP INDEX PORTFOLIO, CNH MASTER ACCOUNT, L.P., AQR ABSOLUTE RETURN MASTER ACCOUNT, L.P., AQR DELTA MASTER ACCOUNT, L.P., AQR DELTA SAPPHIRE FUND, L.P., AQR DELTA XN MASTER ACCOUNT, L.P., AQR FUNDS - AQR MULTI-STRATEGY ALTERNATIVE FUND, CNH OPPORTUNISTIC PREMIUM OFFSHORE FUND, L.P., AQR FUNDS - AQR DIVERSIFIED ARBITRAGE FUND, SCHWAB CAPITAL TRUST, SCHWAB FUNDAMENTAL U.S. SMALL COMPANY INDEX FUND, SCHWAB SMALL-CAP INDEX FUND, SCHWAB TOTAL STOCK MARKET INDEX FUND, WELLS FARGO DISCIPLINED SMALL CAP FUND, FKA WELLS FARGO SMALL CAP OPPORTUNITIES FUND, DEFENDANT IL-2,

Defendants-Appellees,

JOHN T MCCLAIN, GERALD C. CROTTY, TAMI FERSKO, ADVANCED SERIES TRUST ACADEMIC STRATEGIES ALLOCATION PORTFOLIO, ADVANCED SERIES TRUST

SMALL CAP VALUE PORTFOLIO, JEFF BRISMAN, MARK DEZAO, CYNTHIA DIPIETRANTONIO, JOHN D'SOUZA, NINIVE GIORDANO, JACK GROSS, ALISON HEMMING, PATRICIA KENNY, IRENE A. KOUMENDOUROS, ARUNDHATI KULKARNI, DEFENDANT NJ-1, DEFENDANT NJ-2, SUZANNE MALONEY, IRA MARGULIES, SUSAN M. MCCOY, VINCENT MORALES, NINE CHAPTERS CAPITAL MANAGEMENT LLC, PAMELA M. PAUL, CHARLES JOSEPH PICKETT, PGIM QMA SMALL-CAP VALUE FUND, DEFENDANT NJ-3, PRUDENTIAL FINANCIAL, INC., THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, PRUDENTIAL RETIREMENT INSURANCE AND ANNUITY CO., QUANTITATIVE MANAGEMENT ASSOCIATES LLC, ARLENE STARR, DEFENDANT NJ-4, ARTHUR E. LEE, NANCY L. LEE, PRIAC FUNDS, CHRISTOPHER R. CADE, IRA M. DANSKY, IRA MARTIN DANSKY REVOCABLE TRUST, MAHMOOD HASSANI-SADI, THOMAS NOLAN, PENTWATER CAPITAL MANAGEMENT LP, RICHARD H. HEIN, TRUSTEE, RICHARD H. HEIN REV. TRUST U/A 06/12/95, CYNTHIA FOY RUPP, TRANSAMERICA ASSET MANAGEMENT, INC., WOLVERINE ASSET MANAGEMENT LLC, WESLEY R CARD, ANN MARIE C WILKINS, ARBOR PLACE LTD. PARTNERSHIP, BOSTON PARTNERS ALL-CAP VALUE FUND, BOSTON PARTNERS ASSET MANAGEMENT, LLC, BOSTON PARTNERS GLOBAL INVESTORS INC., BOSTON PARTNERS, LLC, BRIGHTHOUSE FUNDS TRUST II, FKA BRIGHTHOUSE FUNDS TRUST MET-SERIES, COLUMBIA MANAGEMENT INVESTMENT ADVISERS LLC, COLUMBIA MULTI-MANAGER ALTERNATIVE STRATEGIES FUND, DWS INVESTMENT MANAGEMENT AMERICAS, INC., FKA DEUTSCHE ASSET MANAGEMENT (SCUDDER), DWS SMALL CAP INDEX VIP, GEODE DIVERSIFIED FUND, A SEGREGATED ACCOUNT OF GEODE CAPITAL MASTER FUND LTD. FORMERLY KNOWN AS GDF1, A SEGREGATED ACCOUNT OF GEODE CAPITAL MASTER FUND LTD., JHF II STRATEGIC EQUITY ALLOCATION FUND, JHVIT SMALL CAP INDEX TRUST, FKA JHT SMALL

CAP INDEX TRUST, JHVIT SMALL CAP OPPORTUNITIES TRUST, FKA JHT SMALL CAP INDEX TRUST, JHVIT STRATEGIC EQUITY ALLOCATION TRUST, AKA JOHN HANCOCK VARIABLE INSURANCE TRUST SEA SMALL CAP, JOHN HANCOCK II STRATEGIC EQUITY ALLOCATION SMALL CAP FUND, AKA JOHN HANCOCK II SEA SMALL CAP, JOHN HANCOCK U.S. TARGETED VALUE FUND, JOHN HANCOCK U.S. TARGETED VALUE TRUST, LINCOLN INSTITUTE OF LAND POLICY, LONGFELLOW INVESTMENT MANAGEMENT CO., LLC, MANULIFE FINANCIAL, MANULIFE INVESTMENT MANAGEMENT (NORTH AMERICA) LTD., FKA MANULIFE ASSET MANAGEMENT NORTH AMERICA LTD., PANAGORA ASSET MANAGEMENT INC., RHUMBLINE ADVISERS LP, STATE STREET BANK MAYA ACCOUNT HOLDER, STATE STREET GLOBAL ADVISORS, STATE STREET GLOBAL ADVISORS RUSSELL 1000 VALUE FUND CTF, STATE STREET GLOBAL ADVISORS RUSSELL 2000 INDEX FUND, STATE STREET GLOBAL ADVISORS RUSSELL 2000 VALUE FUND CTF, STATE STREET GLOBAL ADVISORS RUSSELL 3000 INDEX FUND CTF, STATE STREET GLOBAL ADVISORS RUSSELL 3000 INDEX FUND, STATE STREET GLOBAL ADVISORS RUSSELL 3000 INDEX FUND SL SER A, STATE STREET GLOBAL ADVISORS RUSSELL SMALL CAP FUND COMPLETE S/L A, STATE STREET GLOBAL ADVISORS RUSSELL SPECIAL SMALL COMPANY FUND, STATE STREET GLOBAL ADVISORS RUSSELL SPECIAL SMALL COMPANY FUND CTF, STATE STREET GLOBAL ADVISORS TOTAL ETF, STATE STREET GLOBAL ADVISORS U.S. EXTENDED MARKET INDEX FUND, AKA U.S. EXTENDED MARKET FUND SL, STATE STREET BANK AND TRUST COMPANY, DIANNE CARD, FIAM LLC, AKA FIDELITY INSTITUTIONAL ASSET MANAGEMENT, FKA PYRAMIS GLOBAL ADVISORS, FIDELITY ASSET ALLOCATION CURRENCY NEUTRAL PRIVATE POOL, FIDELITY ASSET ALLOCATION PRIVATE POOL, FIDELITY BALANCED CURRENCY NEUTRAL PRIVATE POOL, FIDELITY BALANCED

INCOME CURRENCY NEUTRAL PRIVATE POOL, FIDELITY BALANCED INCOME PRIVATE POOL, FIDELITY BALANCED PRIVATE POOL, FIDELITY CONCORD STREET TRUST-FIDELITY EXTENDED MARKET INDEX FUND, FIDELITY CONCORD STREET TRUST-FIDELITY TOTAL MARKET INDEX FUND, FIDELITY INCOME ALLOCATION FUND, FKA FIDELITY MONTHLY HIGH INCOME FUND, FIDELITY INVESTMENTS, FIDELITY INVESTMENTS CHARITABLE GIFT FUND, FIDELITY MONTHLY INCOME FUND, FIDELITY NORTHSTAR FUND, FIDELITY SMALL CAP INDEX FUND, FIDELITY TOTAL MARKET INDEX FUND, SPDR S&P MIDCAP 400 ETF TRUST, THE BANK OF NEW YORK MELLON, TRUSTEE, AKA BNY MELLON MIDCAP SPDRS, THE BANK OF NEW YORK MELLON, TRUSTEE, AKA BNY MELLON MIDCAP SPDRS, SIDNEY KIMMEL, THE SIDNEY KIMMEL REVOCABLE INDENTURE OF TRUST, JOHN D. DEMSEY, MATTHEW H. KAMENS, JAMES A. MITAROTONDA, BARINGTON COMPANIES EQUITY PARTNERS, L.P., BARINGTON COMPANIES INVESTORS, LLC, JEFFREY D. NUECHTERLEIN, LOWELL W. ROBINSON, JOSEPH T. DONNALLEY, AIDA TEJERO-DECOLLI, AMERICAN FAMILY MUTUAL INSURANCE CO., AMERICAN INTERNATIONAL GROUP INC., BARBARA KREGER, BLUECREST CAPITAL MANAGEMENT LTD., CALVERT VARIABLE PRODUCTS, INC., (CALVERT VP RUSSELL 2000 SMALL CAP INDEX PORTFOLIO), CHI OPERATING INVESTMENT PROGRAM, LP, CHRYSLER WORLD IMI EQUITY INDEX - ND, CREF EQUITY INDEX ACCOUNT, DANIEL FISHMAN, DONNA F. ZARCONE, DREMAN CONTRARIAN FUNDS, (DREMAN CONTRARIAN SMALL CAP VALUE FUND), EILEEN DUNN, EMERSON ELECTRIC CO., EQ ADVISORS TRUST (ATM SMALL CAP MANAGED VOLATILITY PORTFOLIO), EQ ADVISORS TRUST (EQ/2000 MANAGED VOLATILITY PORTFOLIO), ERIC DAUWALTER, FEDERATED EQUITY FUNDS (FEDERATED CLOVER SMALL VALUE FUND), FRANCES LUKAS, FRANCIS X CLAPS,

GABELLI INVESTOR FUNDS INC. (THE GABELLI ABC FUND), GABELLI 787 FUND, INC. (ENTERPRISE MERGERS AND ACQUISITIONS FUND), GEORGE SHARP, GERALD HOOD, GREGG MARKS, GREGORY CLARK, HEATHER HARLAN, HEATHER ROUSSEL, JAMES CAPIOLA, JAMES CHAN, JAMES T. OSTROWSKI, JAMIE CYGIELMAN, JANET CARR, JANICE BROWN, JODI G. WRIGHT, JOSEPH A. ROSATO, JOSEPH STAFINIAK, JPMORGAN SYSTEMATIC ALPHA FUND, KATHERINE BUTLER, KATHLEEN NEDOROSTEK KASWELL, KBC EQUITY FUND - FALLEN ANGELS, KBC EQUITY FUND - LEISURE AND TOURISM, KBC EQUITY FUND - STRATEGIC SATELLITES, LARISSA SYGIDA, LINCOLN VARIABLE INSURANCE PRODUCTS TRUST, (LVIP SSGA SMALL-CAP INDEX FUND), LYNNE BERNSTOCK, MARY E. BELLE, METROPOLITAN LIFE INSURANCE CO, MITCHEL LEVINE, MULTIMANAGER SMALL CAP VALUE PORTFOLIO, NATIONWIDE MUTUAL FUNDS, (NATIONWIDE SMALL CAP INDEX FUND), NATIONWIDE MUTUAL FUNDS, (NATIONWIDE U.S. SMALL CAP VALUE FUND), NATIONWIDE VARIABLE INSURANCE TRUST, (NVIT MULTI-MANAGER SMALL CAP VALUE FUND), NATIXIS SA, NICOLETTA PALMA, NORMAN R. VEIT, JR., ODIN HOLDINGS LP, OPPENHEIMER GLOBAL MULTI STRATEGIES FUND, PINEBRIDGE INVESTMENTS LP, PRINCIPAL FUNDS INC., (SMALLCAP VALUE FUND II), PRINCIPAL VARIABLE CONTRACTS FUNDS INC., (SMALLCAP VALUE ACCOUNT I), PROSHARES TRUST, (PROSHARES MERGER ETF), QUANTITATIVE MASTER SERIES LLC, (MASTER EXTENDED MARKET INDEX SERIES), RBB FUND, INC., (WPG PARTNERS SMALL/MICRO CAP VALUE FUND), ROBYN WHITNEY MILLS, ROSA GENOVESI, ROY CHAN, ROYCE INSTITUTIONAL, LLC, (OPPORTUNITY PORTFOLIO), RUSSELL U.S. SMALL CAP EQUITY FUND, SCOTT BOWMAN, SECURIAN LIFE INSURANCE CO., FKA MINNESOTA LIFE INSURANCE CO., SEI INSTITUTIONAL INVESTMENTS TRUST, (SIIT SMALL CAP FUND), SEI INSTITUTIONAL

MANAGED TRUST, (SIMT SMALL CAP VALUE FUND), SHARON HARGER, STEFANI GREENFIELD, STEPHEN C. TROY, STUART WEITZMAN, SUSAN DUFFY, SUSQUEHANNA INTERNATIONAL GROUP LLP, SUZANNE KARKUS, TALCOTT RESOLUTION LIFE INSURANCE CO., TFS CAPITAL LLC, THE ARBITRAGE EVENT-DRIVEN FUND, THE GDL FUND, TIAA-CREF FUNDS, TIAA-CREF FUNDS (TIAA-CREF EQUITY INDEX FUND), TIAA-CREF FUNDS (TIAA-CREF SMALL-CAP BLEND INDEX FUND), TOUCHSTONE FUNDS GROUP TRUST (TOUCHSTONE ARBITRAGE FUND), (TOUCHSTONE CREDIT OPPORTUNITIES II FUND), TWO SIGMA INVESTMENTS LP, UNIFIED SERIES TRUST (SYMONS SMALL CAP INSTITUTIONAL FUND), VALUED ADVISERS TRUST (FOUNDRY PARTNERS FUNDAMENTAL SMALL CAP VALUE FUND), VANGUARD INDEX FUNDS (VANGUARD EXTENDED MARKET INDEX FUND), VANGUARD INDEX FUNDS (VANGUARD SMALL-CAP INDEX FUND), VANGUARD INDEX FUNDS (VANGUARD SMALL-CAP VALUE INDEX FUND), VANGUARD INDEX FUNDS (VANGUARD TOTAL STOCK MARKET INDEX FUND), VANGUARD INSTITUTIONAL INDEX FUNDS (VANGUARD INSTITUTIONAL TOTAL STOCK MARKET INDEX FUND), VANGUARD INSTITUTIONAL TOTAL STOCK MARKET INDEX TRUST, VANGUARD INTERNATIONAL EQUITY INDEX FUNDS (VANGUARD TOTAL WORLD STOCK INDEX FUND), VANGUARD RUSSELL 2000 VALUE INDEX TRUST, VANGUARD SCOTTSDALE FUNDS (VANGUARD RUSSELL 2000 INDEX FUND), VANGUARD SCOTTSDALE FUNDS (VANGUARD RUSSELL 2000 VALUE INDEX FUND), VANGUARD VALLEY FORGE FUNDS (VANGUARD BALANCED INDEX FUND), VANGUARD WORLD FUND (VANGUARD CONSUMER DISCRETIONARY INDEX FUND), WAYNE KULKIN, ZINE MAZOUZI, COMMUNITY INSURANCE COMPANY, PRINCIPAL FUNDS INC. (GLOBAL MULTI-STRATEGY FUND), RICHARD DICKSON, ROBERT L. METTLER, BLUE CROSS OF CALIFORNIA, DIVERSIFIED ALPHA GROUP TRUST, DT DV MARKET COMPLETION

FUND, NICOLA GUARNA, HAWAII DE LLC, GEORGE M. KLABIN, LITMAN GREGORY MASTERS ALTERNATIVE STRATEGIES FUND, MASTER SMALL CAP INDEX SERIES OF QUANTITATIVE MASTER SERIES LLC, AKA ISHARES RUSSELL 2000 SMALL-CAP INDEX FUND, PG AND E CO. NUCLEAR FACILITIES QUALIFIED CPUC DECOMMISSIONING MASTER TRUST, RESEARCH AFFILIATES EQUITY U.S. LARGE, L.P., FKA ENHANCED RAFI U.S. LARGE LP, ROBERT RODRIGUEZ, VERICIMETRY U.S. SMALL CAP VALUE FUND, ROBERT AND SUSAN METTLER FAMILY TRUST U/A 3/27/06, ROBERT L. METTLER, SUSAN T. METTLER, TRUSTEES, BAM ADVISOR SERVICES, DBA LORING WARD, BLACKROCK MSCI USA SMALL CAP EQUITY INDEX FUND, BLUE SHIELD OF CALIFORNIA, DAGT SMALL CAP OUTLIERS, EXTENDED EQUITY MARKET FUND, AKA BLACKROCK INSTITUTIONAL TRUST COMPANY, N.A., EXTENDED EQUITY MARKET MASTER FUND B, ISHARES EUROPE, ISHARES MORNINGSTAR SMALL-CAP VALUE ETF, ISHARES MSCI USA SMALL CAP UCITS ETF, ISHARES RUSSELL 2000 ETF, ISHARES RUSSELL 3000 ETF, GEORGE M PACIFIC SELECT FUND-PD SMALL-CAP VALUE INDEX PORTFOLIO, PACIFIC SELECT FUND-SMALL-CAP EQUITY PORTFOLIO, PACIFIC SELECT-FUND-SMALL-CAP INDEX PORTFOLIO, RUSSELL 2000 ALPHA TILTS FUND B, RUSSELL 2000 INDEX FUND, RUSSELL 2000 INDEX NON-LENDABLE FUND, BLACKROCK RUSSELL 2000 INDEX NON-LENDABLE FUND, RUSSELL 2000 VALUE FUND B, RUSSELL 2500 INDEX FUND, AKA ISHARES RUSSELL SMALL/MID-CAP INDEX FUND, RUSSELL 3000 INDEX FUND, AKA ISHARES TOTAL U.S. STOCK MARKET INDEX FUND, SA U.S. SMALL COMPANY FUND, STATE STREET NORTH AMERICA CONFIDENTIAL CLIENT 1 DOMESTIC EQUITIES, STATE STREET NORTH AMERICA CONFIDENTIAL CLIENT 1 DOMESTIC ISHARES 405, STATE STREET NORTH AMERICA CONFIDENTIAL CLIENT 1 FOF, U.S. EQUITY MARKET FUND, U.S. EQUITY MARKET FUND B, MSCI U.S.

IMI INDEX FUND B2, AKA BLACKROCK MSCI U.S. IMI INDEX FUND B2, MERRILL LYNCH PIERCE FENNER AND SMITH INCORPORATED, STATE STREET BANK AND TRUST CO., PACIFIC SELECT FUND - PD SMALL-CAP VALUE INDEX PORTFOLIO, RUSSELL 3000 INDEX NON-LENDABLE FUND, SCHWAB TOTAL STOCK M, U.S. SMALL COMPANY FUND, THE ARBITRATE FUND, DEF, ADVISORS SERIES TRUST (KELLNER MERGER FUND), DEFENDANT NY-1, BETH B. DORFSMAN, BROWN BROTHERS HARRIMAN AND CO. CLIENT NO. 2, BROWN BROTHERS HARRIMAN AND CO. CLIENT NO. 3, BRYAN R. GILLIGAN, CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., DYNAMIC CAPITAL MANAGEMENT, LLC, DYNAMIC OFFSHORE FUND LTD., FEDEX CORPORATION, DEFENDANT NY-8, GARDNER LEWIS EVENT DRIVEN FUND, L.P., GOTHAM ABSOLUTE RETURN FUND, GTE INVESTMENT MANAGEMENT CORP., HALLADOR BALANCED FUND LLC, HARTFORD MUTUAL FUNDS II INC. (HARTFORD SCHRODERS U.S. SMALL CAP OPPORTUNITIES FUND), HARVEST STREET CAPITAL LLC, DEFENDANT NY-18, DEFENDANT NY-19, LAURIE J. GENTILE, LEGG MASON ROYCE U.S. SMALL CAP OPPORTUNITY FUND, LINDA V. KOTHE, LORI L. GRACE, MFO MANAGEMENT COMPANY (TOWLE FUND), MICHAEL G. DEMKO, DEFENDANT NY-24, MINNESOTA MINING AND MANUFACTURING CO., PILLSBURY, PINNACLE WEST CORP., PRELUDE OPPORTUNITY FUND, LP, ROYCE FUND (ROYCE OPPORTUNITY FUND), STACEY A. HARMON, THE ARBITRAGE FUND, WISDOM TREE ASSET MANAGEMENT INC., WHITNEY L. SMITH, WCFS INC., VIRTU AMERICAS LLC, TUDOR TRADING I, LP, TRADITION SECURITIES AND DERIVATIVES INC., TOWLE CAPITAL PARTNERS II LP, TOWLE CAPITAL PARTNERS LP, THOMAS M. MURRAY PO N. MURRAY JT TEN, THE HARTFORD LIFE INSURANCE COMPANY, ALLIANZ GLOBAL INVESTORS OF AMERICA L.P, GARDNER LEWIS MERGER ARBITRAGE FUND, L.P., GARDNER LEWIS MERGER ARBITRAGE FUND II, L.P.,

ANTHEM HEALTH PLANS OF VIRGINIA, INC., DIMENSIONAL FUNDS PLC U.S. SMALL COMPANIES FUND, AKA IRISH U.S. SMALL CAP FUND, INVESTMENT MANAGERS SERIES TRUST (TOWLE DEEP VALUE FUND), CALIFORNIA PHYSICIANS' SERVICE, DBA BLUE SHIELD OF CALIFORNIA, TOWLE DEEP VALUE FUND, ALLIANZ ASSET MANAGEMENT OF AMERICA L.P., FKA ALLIANZ GLOBAL INVESTORS OF AMERICA LP, COLLEGE RETIREMENT EQUITIES FUND (CREF EQUITY INDEX ACCOUNT), TOUCHSTONE FUNDS GROUP TRUST (TOUCHSTONE MERGER ARBITRAGE FUND), TOUCHSTONE FUNDS GROUP TRUST (TOUCHSTONE CREDIT OPPORTUNITIES II FUND), WISDOMTREE U.S. SMALLCAP DIVIDEND FUND, FKA WISDOMTREE SMALLCAP DIVIDEND FUND, WISDOMTREE U.S. SMALLCAP FUND, FKA WISDOMTREE SMALLCAP EARNINGS FUND, JOHN W. DEEM,

Defendants.

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

Before: CHIN, SULLIVAN, and BIANCO, *Circuit Judges*.

Consolidated appeals from a judgment and orders of the United States District Court for the Southern District of New York (Rakoff, *J.*), dismissing claims arising from the leveraged buyout of an apparel and footwear company in 2014 and the bankruptcy filing of its successor in 2018. The bankruptcy trustees brought suit against defendants-appellees -- officers, directors, and shareholders of the company --

claiming breach of fiduciary duty, aiding and abetting breach of fiduciary duty, fraudulent conveyance, unjust enrichment, and various state law violations. The bankruptcy trustees allege that the officers and directors arranged for the original company to merge with an affiliate of a private equity company and sold off its most valuable businesses to the private equity company's other affiliates at a fraction of their value, leaving the surviving company with over $1.5 billion in debt, of which more than $1 billion was prior debt, and without its most successful product lines. The district court dismissed the claims on the ground that the relevant transactions were shielded by the Bankruptcy Code's § 546(e) safe harbor provision.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

Judge Sullivan concurs in part and dissents in part in a separate opinion.

EDWARD A. FRIEDMAN (Robert J. Lack, Stan Chiueh, *on the brief*), Friedman Kaplan Seiler & Adelman LLP, New York, New York, *for Plaintiffs-Appellants Marc S. Kirschner and Wilmington Savings Fund Society, FSB, in all appeals except Docket Numbers 20-3334 and 20-3335.*

ALLAN B. DIAMOND *and* RYAN M. LAPINE, Diamond McCarthy LLP, Dallas, Texas and Los Angeles, California, *for Plaintiffs-Appellants Marc S. Kirschner and Wilmington Savings Fund Society, FSB, in Docket Numbers 20-3257, 20-3290, 20-3334, 20-3335, 20-3964, and 20-3980.*

GREGG L. WEINER (Adam M. Harris and Andrew G. Devore, *on the brief*), Ropes & Gray LLP, New York, New York and Boston, Massachusetts, *for Defendants-Appellees Public Shareholders (Robeco Capital Growth Funds, et al.*).

Y. DAVID SCHARF (Danielle C. Lesser, *on the brief*), Morrison Cohen LLP, New York, New York, f*or Defendants-Appellees Individual Shareholders Mary E. Belle, Kathleen Nedorostek Kaswell,* and *Joseph Stafiniak.*

HOWARD SEIFE, Norton Rose Fulbright US LLP, New York, New York, *for Defendant-Appellee Individual Shareholder Wayne Kulkin.*

STUART KAGEN *and* CHRISTOPHER GREENE, Kagen, Caspersen & Bogart, PLLC, *for Defendants-Appellees Individual Shareholders Katherine Butler, Linda Kothe, Richard Hein, Richard H. Hein Rev. Trust U/A 06/12/95, Mark DeZao, Janice Brown, Eric Dauwalter, Rosa Genovesi, Charles Pickett, Susan McCoy, Stacey Harmon, Kathleen O'Brien, James Capiola, Laurie Gentile,* and *Robyn Mills.*

KEVIN J. O'CONNOR *and* SHANNON D. AZZARO, Peckar & Abramson, P.C., New York, New York, *for Defendants-Appellees Individual Shareholders Heather Harlan* and *George Sharp*.

CHIN, *Circuit Judge*:

These cases arise from the leveraged buyout and subsequent bankruptcy of apparel and footwear company Jones Group, Inc. ("Jones Group"), which housed brands such as Nine West, Anne Klein, Stuart Weitzman, and Kurt Geiger. In 2014, private equity firm Sycamore Partners ("Sycamore") acquired Jones Group through a merger with one of its subsidiaries and renamed the surviving company Nine West Holdings, Inc. ("Nine West"). At the close of the merger, Sycamore sold three of Nine West's brands to newly formed Sycamore affiliates. A few years later, Nine West declared bankruptcy.

Plaintiffs-appellants Marc Kirschner, as the Litigation Trustee for the Nine West Litigation Trust representing unsecured creditors, and Wilmington Savings Fund, FSB, as successor Indenture Trustee for various notes issued by Nine West (together, the "Trustees"), brought seventeen actions in different states against Jones Group's former directors and officers for unjust enrichment and against its former public shareholders for fraudulent conveyance, claiming that the directors and officers arranged the merger and sold the company's most valuable assets at a fraction of their value to consolidate debt with Nine West and place Jones Group's most successful product lines outside the reach of Nine West's creditors. The Judicial Panel on Multidistrict Litigation transferred the cases to the Southern District of New York for coordinated or consolidated pretrial proceedings. Both the public shareholders and the directors and officers moved to dismiss the claims against them, arguing that payments made to them in connection with the merger are shielded by the Bankruptcy Code's § 546(e) safe harbor. On August 27, 2020, the district court (Rakoff, *J.*)

granted both motions to dismiss, holding that the payments were shielded by the safe harbor, as interpreted by *In re Tribune Co. Fraudulent Conv. Litig. (Tribune II)*, 946 F.3d 66, 72 (2d Cir. 2019), *cert. denied sub nom. Deutsche Bank Tr. Co. Americas v. Robert R. McCormick Found.*, 141 S. Ct. 2552 (2021). Plaintiffs appeal.

We AFFIRM in part, VACATE in part, and REMAND for further proceedings.

BACKGROUND

When reviewing a district court's grant of a motion to dismiss, we accept the material facts alleged in the complaint as true and draw all reasonable inferences in favor of the plaintiff -- here, the Trustees. *Altimeo Asset Mgmt. v. Qihoo 360 Tech. Co.*, 19 F.4th 145, 147 (2d Cir. 2021).

I. The Facts

The following facts are drawn from the Trustees' seventeen complaints, the exhibits attached thereto, and documents integral to and referenced in them. *See Cohen v. Rosicki, Rosicki & Assocs., P.C.*, 897 F.3d 75, 80 (2d Cir. 2018). We cite, as the district court did, specifically to the amended complaint filed in *Kirschner et al. v. McClain et al.*, No. 20-cv-4262, Dkt. No. 110 (the "Complaint"), though all cited allegations are also found in the other operative complaints.

A. The Merger

In 2013, Sycamore proposed to acquire Jones Group through a leveraged buyout ("LBO") transaction (the "Merger"). In preparation for the

Merger, Sycamore created a holding company called Jasper Parent LLC ("Jasper Parent") and another entity called Jasper Merger Sub, Inc. ("Jasper Merger Sub"), a wholly owned subsidiary of Jasper Parent.

On December 19, 2013, Jones Group, Jasper Parent, and Jasper Merger Sub entered into an agreement (the "Merger Agreement"), which governed the terms of the Merger. Pursuant to the Merger Agreement, Jones Group merged with Jasper Merger Sub and continued as the surviving corporation -- Nine West.

1. The Certificate and DTC Transfers

The Merger Agreement outlined the terms for public shareholders to receive payments upon cancelation of their shares in Jones Group. Jones Group's former public shareholders (the "Public Shareholders") received $15 for each share of common stock they owned when the Merger closed. To implement those payments, the Merger Agreement called for a "paying agent" to be hired "pursuant to a paying agent agreement in customary form." J. App'x at 383 § 4.2(a). Jasper Parent and Jones Group hired Wells Fargo to act as a paying agent. The Paying Agent Agreement (the "PAA") stated that the surviving corporation -- Jones Group -- "desires that the Paying Agent act as its special agent for the purpose of distributing the Merger Consideration" to the Public Shareholders. J. App'x at 217.[1]

The Merger Agreement further provided that Jasper Parent would deposit with the Paying Agent --

[1] Although the PAA identifies Jones Group as the surviving corporation, Jones Group thereafter merged with subsidiaries and eventually became Nine West.

Wells Fargo -- the aggregate amount of the merger consideration to be paid to the Public Shareholders. The paying agent was to distribute these payments to the Public Shareholders. A majority of Jones Group shares were held as of record by Depository Trust Company ("DTC") or in electronic book-entry form, although some shareholders held physical certificates. Accordingly, we refer to these payments as the as the "DTC Transfers" and the "Certificate Transfers," respectively.

Pursuant to the PAA, Nine West deposited $1.101 billion in an account at Wells Fargo for the purpose of paying the DTC Transfers and $4 million for the purpose of paying the Certificate Transfers. The PAA outlined in detail how Wells Fargo was to effectuate the payments. Wells Fargo ultimately distributed the payments to the Public Shareholders.

2. The Payroll Transfer

The Merger Agreement also set forth the terms for former directors, officers, and employees of Jones Group (the "Individual Shareholders") to receive payment for their restricted shares, share-equivalent units, and accumulated dividends on restricted stock at the close of the merger (the "Payroll Transfer"). Pursuant to the Merger Agreement, Jones Group paid $78 million to the Individual Shareholders for those shares "through the payroll and by other means." J. App'x at 166 ¶ 135; *see also id.* at 385. Wells Fargo was not involved in these transactions.

B. The Alleged Fraudulent Conveyances

At the close of the Merger, Sycamore sold three of the brands housed by newly-renamed-Nine West -- Stuart Weitzman, Kurt Geiger, and Jones Apparel

(the "Carveout Assets") -- to then-recently formed Sycamore affiliates (the "Carveout Transactions"). The Trustees contend that, in doing so, Sycamore "transferred some of Jones Group's most valuable assets to Sycamore's affiliates -- beyond the reach of Jones Group's creditors -- for substantially below fair market value." J. App'x at 142 ¶ 61(e). These transactions rendered the remaining Nine West business insolvent and "guaranteed that [Sycamore] would profit handsomely . . . no matter what happened to the post-LBO [Nine West]." J. App'x at 142 ¶ 62; *see also id.* at 164 ¶ 130.[2]

C. The Bankruptcy

On April 6, 2018, Nine West and several affiliate debtors filed a Chapter 11 petition in the United States Bankruptcy Court for the Southern District of New York. On February 27, 2019, the Bankruptcy Court confirmed a reorganization plan (the "Plan").

Pursuant to the Plan, Sycamore paid Nine West's estate $120 million, which covered the Carveout Transactions and thus the fraudulent transfer claims.

II. The Proceedings Below

A. The Consolidated Cases

Beginning in February 2020, Trustees commenced nineteen actions against more than 175 of Jones

---

[2] As the Public Shareholders highlight in their briefing, the Trustees "do not allege that the Public Shareholders were in any way involved in these Carveout Transactions, which were approved by the post-LBO board *after* ownership of the company transferred to Sycamore." Appellee's Br. at 10 (citing J. App'x at 143 ¶ 66, 166 ¶ 136).

Group's former directors, officers, and shareholders in various jurisdictions, seeking, in part, to avoid allegedly fraudulent payments made to them in connection with the LBO. Two of the nineteen actions were voluntarily dismissed without prejudice, and are not part of this appeal. The suits were transferred in multidistrict proceedings to the Southern District of New York, where they were consolidated.

B. The Motions to Dismiss

On June 29, 2020, pursuant to a two-phase briefing schedule set by the district court, the Public Shareholders filed motions to dismiss all fraudulent conveyance claims under the Bankruptcy Code's "safe harbor" provision. *See* 11 U.S.C. § 546(e). The Individual Shareholders joined the motions. The safe harbor defense limits a Chapter 11 bankruptcy trustee's power to avoid a transfer that is a settlement payment, as defined by the Code, made by or to (or for the benefit of) a financial institution, except in cases relating to actual fraudulent conveyance claims under § 548(a)(1)(A). *See* 11 U.S.C. § 546(e).

On August 27, 2020, the district court dismissed seven of the seventeen actions, including the Trustees' fraudulent conveyance and unjust enrichment claims, relying in part on this Court's decision in *Tribune II*, 946 F.3d 66 (2d Cir. 2019).[3] It found that 11 U.S.C. § 546(e) barred plaintiffs' fraudulent conveyance claims and, consequently,

---

[3] The dismissed actions were: 20-cv-4286, 20-cv-4289, 20-cv-4299, 20-cv-4434, 20-cv-4440, 20-cv-4479, and 20-cv-4480. Ten of the seventeen actions remain pending because each includes claims against directors, officers, or employees that have not been dismissed.

preempted their unjust enrichment claims.[4] On November 18, 2020, the district court granted certification pursuant to Federal Rule of Civil Procedure 54(b) for entry of partial final judgment dismissing the claims. These consolidated appeals followed.

STANDARD OF REVIEW

We review *de novo* a district court's grant of a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), accepting all factual allegations in the complaint as true and drawing all reasonable inferences in favor of the plaintiff. *Giunta v. Dingman*, 893 F.3d 73, 78-79 (2d Cir. 2018). We also review *de novo* a district court's Rule 12(b)(6) dismissal based on an affirmative defense. *See Force v. Facebook, Inc.*, 934 F.3d 53, 62 (2d Cir. 2019).

A district court may grant a motion to dismiss for failure to state a claim on the basis of an affirmative defense only when facts supporting the defense appear on the face of the complaint. *See, e.g.*, *Sewell v. Bernardin*, 795 F.3d 337, 339 (2d Cir. 2015) ("Dismissal under Fed. R. Civ. P. 12(b)(6) is appropriate when a defendant raises a statutory bar . . . as an affirmative defense and it is clear from the face of the complaint, and matters of which the court may take judicial notice, that the plaintiff's claims are barred as a matter of law.") (citation omitted). For purposes of this standard, "the complaint is deemed to include any written instrument attached to it as an exhibit or any statements or documents incorporated

---

[4] The district court dismissals were limited to the payments associated with common shares, restricted shares, share equivalent units, and accumulated dividends. It did not dismiss the unjust enrichment claims related to the change in control payments.

in it by reference." *Dixon v. von Blanckensee*, 994 F.3d 95, 101 (2d Cir. 2021) (citation omitted).

DISCUSSION

The Trustees contend that the payments they seek to avoid are not protected by the Bankruptcy Code's safe harbor and thus they ask this Court to reverse the district court's judgment dismissing their claims.

These cases present two main questions. First, the parties disagree as to the scope of the term "financial institution" as defined in 11 U.S.C. § 101(22)(A). The Trustees argue that the definition encompasses bank customers only in transactions where the bank is acting as their agent, while defendants argue that it applies to any transaction related to a securities contract so long as the bank acted as their agent at one point in connection with that contract. Second, the parties dispute whether Wells Fargo acted as Nine West's agent in the transactions at issue. There are three relevant transactions:

(1) the Certificate Transfers -- Nine West deposited approximately $4 million with Wells Fargo, which, pursuant to the PAA, distributed checks or wire transfers to the paper stock shareholders in exchange for their shares;

(2) the DTC Transfers -- Nine West deposited approximately $1.101 billion with Wells Fargo, which, pursuant to the PAA, distributed checks or wire transfers to the book-entry shareholders in exchange for their shares; and

(3) the Payroll Transfers -- Nine West paid $78 million to Jones Group's directors, officers,

> and employee shareholders through its payroll program.

We hold that, for these purposes, "financial institution" includes bank customers only in transactions where the bank is acting as their agent and that Wells Fargo acted as Nine West's agent in the Certificate and DTC Transfers but not in the Payroll Transfers. We conclude, further, that under the transfer-by-transfer interpretation of § 101(22)(A), Nine West was a "financial institution" with respect to the Certificate and DTC Transfers and those payments are therefore safe harbored under § 546(e). The Payroll Transfers, however, are not so shielded.

I. Statutory Background

The Bankruptcy Code identifies "circumstances under which a trustee" may set aside (or avoid) "certain types of transfers and recapture the value of those avoided transfers for the benefit of the estate." *Merit Mgmt. Grp., LP v. FTI Consulting, Inc.*, 138 S. Ct. 883, 888 (2018) (citing 11 U.S.C. §§ 544-53) (cleaned up). It also provides, however, "a number of limits on the exercise of these avoiding powers." *Id.* at 889.

Section 546(e) of Chapter 11 of the Bankruptcy Code precludes avoidance of "settlement payment[s] . . . made by or to (or for the benefit of) a . . . financial institution, . . . or . . . transfer[s] made by or to (or for the benefit of) a . . . financial institution . . . in connection with a securities contract . . . ." 11 U.S.C. § 546(e). The Code defines "financial institution" to include not only banks, but also a customer of a bank "when [the bank] is acting as agent or custodian for a

customer . . . in connection with a securities contract." *Id.* § 101(22)(A).[5]

The two leading cases interpreting the safe harbor provision are *Merit Management*, 138 S. Ct. 883 (2018), and *Tribune II*, 946 F.3d 66 (2d Cir. 2019). The Supreme Court held in *Merit Management*, 138 S. Ct. at 892, and we recognized in *Tribune II*, 946 F.3d at 77, that § 546(e) does "not protect transfers in which financial institutions served as mere conduits." In *Tribune II*, however, we concluded that an agency relationship provided an "alternative basis for finding that the payments [were] covered." 946 F.3d at 77; *see also* 11 U.S.C. § 101(22)(A). There, we held that Computershare Trust Company ("Computershare"), a trust company and bank that the Tribune Company had hired as a depositary and paying agent, acted as the Tribune Company's "agent" in connection with the underlying LBO securities contract, rendering the Tribune Company a "financial institution" and triggering the safe harbor for payments made in the LBO to the Tribune Company's public shareholders. 946 F.3d at 77-81.

Section 546(e) has been uniformly recognized as an affirmative defense, though not yet by this Court.[6] We have, however, held that safe harbors in other statutory schemes are affirmative defenses.[7]

---

[5] 11 U.S.C. § 741(7) defines the term "securities contract" broadly.

[6] *See* 3 Howard J. Steinberg & Roy S. Geiger, Bankruptcy Litigation § 17:128, *Responsive pleadings: Affirmative defenses* (Oct. 2022), Westlaw BKRLIT (collecting cases); *see also In re Tronox Inc.*, 503 B.R. 239, 339 (Bankr. S.D.N.Y. 2013) ("Cases construing § 546(e) have uniformly treated it as an affirmative defense.").

[7] *See, e.g.*, *Capitol Records, LLC v. Vimeo, LLC*, 826 F.3d 78, 94 (2d Cir. 2016) (holding that the Digital Millennium Copyright

Accordingly, we hold today that 11 U.S.C. § 546(e) is an affirmative defense.

Defendants therefore bear the burden of demonstrating that the transfers fall within the safe harbor. *See, e.g.*, *Capitol Records*, 826 F.3d at 94. Plaintiffs are under no obligation to plead facts supporting or negating an affirmative defense in the complaint. *See, e.g.*, *Picard v. Citibank N.A. (In re Bernard L. Madoff Inv. Sec. LLC)*, 12 F.4th 171, 195 (2d Cir. 2021) (first citing Fed. R. Civ. P. 8(c); and then citing *Perry v. Merit Sys. Prot. Bd.*, 137 S. Ct. 1975, 1987 n.9 (2017) ("An affirmative defense to a plaintiff's claim for relief is not something the plaintiff must anticipate and negate in her pleading." (cleaned up))), *cert. denied sub nom. Citibank, N.A. v. Picard*, 142 S. Ct. 1209 (2022).

II. Qualifying Participant

The payments at issue are safe harbored only if (1) Nine West, which made the payments, was a covered entity; or (2) the shareholders, who ultimately received the payments, were covered entities. *See Tribune II*, 946 F.3d at 77. Nine West is a covered entity if it is considered a "financial institution" under § 101(22)(A). 11 U.S.C. § 101(22)(A).

Act's service provider safe harbor is an affirmative defense that "must be raised by the defendant" and explaining "[t]he defendant undoubtedly bears the burden of raising entitlement to the safe harbor and of demonstrating that it has the status of a service provider"); *Saks v. Franklin Covey Co.*, 316 F.3d 337, 350 (2d Cir. 2003) (holding that "ERISA preemption of state contract claims in a benefits-due action is an affirmative defense that is . . . subject to waiver, if not pleaded in the defendant's answer.").

The district court interpreted section 546(e) of Chapter 11 of the Bankruptcy Code to mean that "when a bank is acting as an agent for a customer in connection with a securities contract, that customer counts as a 'financial institution,' for the purposes of the § 546(e) safe harbor." 482 F. Supp. 3d 187, 199 (S.D.N.Y. 2020). It therefore held that Nine West qualified as a "financial institution" and that all the transfers at issue were protected by the safe harbor. *Id.*

The Trustees take issue with the district court's interpretation of 11 U.S.C. § 101(22)(A). The district court found that Wells Fargo acted as Nine West's agent with respect to the Certificate Transfers and did not analyze the other transfers. Rather, it employed a "contract-by-contract" interpretation of § 101(22)(A) and concluded that, because Wells Fargo acted as Nine West's agent in the Certificate Transfers, and those transfers were made in connection with the Merger Agreement, Wells Fargo must be considered Nine West's agent for every transfer made in connection with that contract and therefore any transfer made in connection with the LBO. Accordingly, it found that § 546(e) insulated all transfers made in connection with the LBO from avoidance, including (1) the DTC Transfers, in which Wells Fargo had a limited role; and (2) the Payroll Transfers, in which Wells Fargo played no role whatsoever. The Trustees and amici argue that this Court's holding in *Tribune II* does not support such a reading of § 101(22)(A). We agree that the district court erred in applying a "contract-by-contract" analysis, and conclude that the safe harbor applies only to the Certificate and DTC Transfers and not to the Payroll Transfers.

We hold that § 101(22)(A) must be interpreted using a "transfer-by- transfer" approach based on: (1) the language of the statute, (2) the statutory structure, and (3) the purpose of the safe-harbor provision.

First, the Bankruptcy Code defines a "financial institution" to include a "customer" of a bank or other such entity "when" the bank or other such entity "*is acting as agent*" for the customer "in connection with a securities contract," 11 U.S.C. § 101(22)(A) (emphasis added). It does not provide that a customer is covered when a bank has *ever* acted as a customer's agent in connection with a securities contract. In other words, the text creates a link between a bank "acting as agent" and its customer with respect to a transaction. To satisfy that link, the plain language of § 101(22)(A) indicates that courts must look to each transfer and determine "when" a bank "*is acting as agent*" for its customer for a transfer, assuming, of course, the transfer is made in connection with a securities contract.

To the extent the language of the statute is ambiguous, the transfer- by-transfer approach is the more logical and reasonable interpretation. A contract-by-contract interpretation of § 101(22)(A) would lead to the absurd result of insulating every transfer made in connection with an LBO, as long as a bank served as agent for at least one transfer. Courts should interpret statutes to avoid absurd results. *See United States v. Wilson*, 503 U.S. 329, 334 (1992); *United States v. Dauray*, 215 F.3d 257, 264 (2d Cir. 2000). Indeed, at oral argument, counsel for the Individual Shareholders did not provide a clear answer when asked when, if ever, a transaction would fall outside the scope of § 546(e). Likewise, if this were indeed the law, we cannot imagine a

circumstance in which a debtor would choose to structure an LBO without involving a bank, even in only a purely ministerial capacity.[8] Under the contract-by-contract approach, the Payroll Transfers in this case would be covered by the safe-harbor provision even though Wells Fargo had nothing to do with the $78 million in transfers paid through the payroll program.

Second, the structure of the Bankruptcy Code supports the transfer- by-transfer interpretation. As described above, the Code grants trustees the authority to set aside or avoid certain transfers and recoup their value for the estate. *Merit Mgmt.*, 138 S. Ct. at 888. While these general avoidance powers "help implement the core principles of bankruptcy," they are not unfettered. *See id.* (citation omitted). One limitation on trustees' avoidance powers is § 546(e)'s safe harbor provision. *Id.* To interpret that limitation broadly under the contract-by-contract interpretation would be to undermine the avoidance powers that are so crucial to the Bankruptcy Code.

Third, the purpose of the safe harbor provision further supports the transfer-by-transfer interpretation. Congress enacted the safe harbor in 1982 to shield certain transfers that, if avoided by trustees, could trigger systemic risk in financial markets. *See* Brubaker, *supra*, at 1, 13; *see also Merit Mgmt.*, 138

---

[8] For examples of parties "'structur[ing]' their way out of liability under avoiding power statutes," *see* Ralph Brubaker, *Understanding the Scope of the § 546(e) Securities Safe Harbor Through the Concept of the "Transfer" Sought To Be Avoided*, 37 Bankr. L. Letter 1 n.4 (July 2017) (quoting Jonathan M. Landers & Sandra A. Riemer, *A New Look at Fraudulent Transfer Liability in High Risk Transactions*, BUS. L. TODAY, 1, 3 (Dec. 2016)).

S. Ct. at 889-90 (citing Brubaker and providing more historical context). Interpreting the safe harbor as broadly as defendants suggest would limit the avoidance power even where it would not threaten the financial system -- an expansion of the safe harbor provision likely not intended by Congress. As we noted in *Tribune II*, "[t]he broad language used in Section 546(e) protects *transactions* rather than firms, reflecting a purpose of enhancing the efficiency of securities markets in order to reduce the cost of capital to the American economy." 946 F.3d at 92 (emphasis added) (citation omitted). Here, the Payroll Transfers were not paid through Wells Fargo and Congress's concerns about the settlement of securities transactions are not implicated. *See id.* at 90.

The district court erred in adopting a "contract-by-contract" approach to hold that once Wells Fargo acted as Nine West's agent in one transaction, it is considered Nine West's agent in all the transactions. Applying the transfer-by-transfer interpretation of 11 U.S.C. § 101(22)(A), we conclude that the Certificate and DTC Transfers are protected by the safe harbor, but the Payroll Transfers are not.

A. Certificate and DTC Transfers

The Public Shareholders argue that the Trustees' own pleading and documents demonstrate that Nine West hired Wells Fargo as an agent to effectuate payments to its shareholders in an LBO, the same role that Computershare played in *Tribune II*, thereby triggering the safe harbor for all payments made in the LBO to the Public Shareholders. We agree, but only as to the Certificate and DTC Transfers.

The Complaint alleges and related documents show that Wells Fargo made payments to, and received information from, the Public Shareholders during the Certificate and DTC Transfers. It did so on behalf of Nine West, and Nine West maintained control over the transactions. Thus, under *Tribune II*, Wells Fargo acted as Nine West's agent during those transactions as a matter of law. *See* 482 F. Supp. 3d at 202 ("Wells Fargo was entrusted with millions of dollars of Nine West cash and was tasked with making payments on Nine West's behalf to Shareholders upon the tender of their stock certificates to Wells Fargo.") (cleaned up). In other words, facts supporting the applicability of the § 546(e) defense to the Certificate and DTC Transfer claims appear on the face of the Complaint, and the district court was correct in dismissing those claims.

B. Payroll Transfers

The same cannot be said of the Payroll Transfers. As to those transfers, the Complaint suggests that Wells Fargo did not make any payments on behalf of Nine West. The Complaint alleges that the Payroll Transfers "were processed through the payroll and by other means." J. App'x at 166 ¶ 135 (alleging that the Payroll Transfer payments "were processed through the payroll and by other means"); 482 F. Supp. 3d at 205 ("Unlike the common share payments, . . . which were effectuated through Wells Fargo, plaintiffs allege that the payments for restricted shares, share equivalent units, and accumulated dividends 'were processed through the payroll and by other means.'"). In any event, it is undisputed that Jones Group's payroll processor, Automated Data Processing, Inc. ("ADP") -- not Wells Fargo -- made the payments,

which totaled $78 million.[9] Two questions are thus presented: first, whether Wells Fargo took any other relevant action that created an agency relationship with Nine West during that transaction; and second, whether any such action rendered it Nine West's agent as a matter of law.

The parties disagree about the mechanism by which the restricted shares and share-equivalent units were canceled and, therefore, about the role Wells Fargo played in that transaction. The Trustees argue that Wells Fargo played little or no role in the Payroll Transfers because (1) ADP made the payments and (2) the shares were automatically canceled by operation of law under the Merger Agreement.[10] In contrast, the Individual Shareholders argue that Wells Fargo completed a "critical element" that was "inherent" to the transaction by canceling the shares and thus that it acted as Nine

---

[9] At oral argument, counsel for the Individual Shareholders conceded that ADP in fact made the payments. *See* Oral Argument at 24:52-25:00, *In re Nine West LBO Sec. Litig.* (No. 20-3257 (L)), https://ww3.ca2.uscourts.gov/oral_arguments.html; *see also* Appellants' Br. at 8 ("Discovery obtained while the motions to dismiss were pending confirmed that these transfers were processed by ADP, a payroll processor, which is neither a bank nor an agent.").

[10] *See* Appellants' Br. at 10 ("The Merger Agreement gave the paying agent no authority to make any payment on account of restricted stock, accumulated dividends on restricted stock, or share equivalent units that were the subject of the Payroll Transfers."), 13-14 (Wells Fargo "played no role" in the Payroll Transfer), 49 ("[T]he shares were canceled and simply ceased to exist."). At oral argument, plaintiffs' counsel argued Wells Fargo's role as a transfer agent -- what he described as stamping the word "canceled" on a certificate -- is not indicative of Nine West controlling Wells Fargo as a paying agent. *See* Oral Argument at 33:02-32.

West's agent during that transaction.[11] They do not elaborate on what that role entailed.

We agree with the Trustees that the face of the Complaint and relevant documents, viewed in a light most favorable to them, do not demonstrate the existence of an agency relationship between Wells Fargo and Nine West during the Payroll Transfers. To the extent Wells Fargo played any role in that transaction, the Complaint plausibly alleges the role was purely ministerial because the shares were canceled automatically under, for example, the Merger Agreement provision that "all Restricted Shares and Share Equivalent Units . . . shall automatically cease to exist" at the close of the Merger. J. App'x at 386 § 4.3(c).

The Individual Shareholders ask us to ignore the Complaint and the Merger Agreement and look instead to the PAA. They first cite PAA § 1.3, which provides that Nine West "instructs and authorizes [Wells Fargo] to cancel all" restricted shares upon delivery and at the close of the merger. J. App'x at 218 § 1.3. They then point to other provisions of the PAA that indicate Wells Fargo acted as Nine West's agent during the Certificate and DTC Transfers. Appellee's Br. at 36-37. For example, PAA § 4.2 provides that Nine West will reimburse Wells Fargo for expenses incurred in connection with its duties as *paying agent*, § 4.6 provides that Nine West will indemnify Wells Fargo for damages arising from its role as *paying agent*, and § 5.3 outlines Wells Fargo's responsibilities in handling confidential data.[12] The

---

[11] Oral Argument at 25:40, 26:11.

[12] The Individual Shareholders do not cite PAA § 2.10, which provides that Wells Fargo "shall maintain" certain records related to cancelation of the shares, as "required by

Individuals Shareholders do not acknowledge, however, that Wells Fargo acted not as a paying agent with respect to the Payroll Transfers, as it did in the Certificate and DTC Transfers, but as a transfer agent only. [13]

The Individual Shareholders argue that because the PAA (1) "instructs" Wells Fargo "to cancel" the shares involved in the Payroll Transfers, and (2) establishes that Wells Fargo acted as Nine West's agent during the Certificate and DTC Transfers, it also establishes that Wells Fargo acted as Nine West's agent during the Payroll Transfers. We disagree. The PAA does not preclude the shares' automatic cancelation under the Merger Agreement, and it is at least plausible that cancelation was automatic. At best, Wells Fargo's role in canceling the shares, if any, is unclear. And to the extent Wells Fargo played any role, the record suggests that it was purely ministerial.

Even assuming, however, the Complaint and related documents establish that Wells Fargo played even a ministerial role in canceling the shares, the next question is whether that action rendered it Nine West's agent as a matter of law. The answer is no, at least at this juncture of the case.

The common law meaning of "agent" applies to 11 U.S.C. § 101(22)(A). *Tribune II*, 946 F.3d at 79. At common law, an agency relationship is created when a principal manifests assent to an agent that the

---

applicable law and regulation," J. App'x at 221, but that section arguably supports their position that Wells Fargo's role was more than purely ministerial.

[13] *See, e.g.*, J. App'x at 217 (specifically excluding the Restricted Shares when defining Wells Fargo's responsibilities as paying agent).

agent will act on the principal's behalf and be subject to the principal's control, and the agent manifests assent to the same. *Id.* (citing Restatement (Third) of Agency § 1.01 (2006)). In *Tribune II*, we held that an agency relationship was created when Tribune entrusted Computershare to pay its tendering shareholders, among other things. *Id.* at 79. Here, Wells Fargo took some undefined ministerial action to cancel shares and, pursuant to PAA § 2.10, maintained related records as "required by applicable law and regulation." J. App'x at 221 (PAA § 2.10). The parties undoubtedly agreed that Wells Fargo would act on Nine West's behalf, but, at this stage, it is not clear Nine West had any authority to control Wells Fargo's actions in canceling the shares. Because the control element is lacking, Wells Fargo's role as a transfer agent in the Payroll Transfers is more accurately understood as that of an independent contractor, not an agent, as required by § 101(22)(A).

Congress enacted the § 546(e) safe harbor to promote finality and certainty for investors by limiting the circumstances under which securities transactions could be unwound by, for example, a successful fraudulent conveyance action.[14] This Court's decision in *Tribune II* has already been criticized as broadening *Merit*'s[15] interpretation of the safe harbor.[16] Affirming the district court's dismissal of the Payroll Transfer claims based on Wells Fargo's

---

[14] *See Tribune II*, 946 F.3d at 92 (citing H.R. Rep. No. 101-484 (1990), *reprinted in* 1990 U.S.C.C.A.N. 223, 224).

[15] 138 S. Ct. at 888.

[16] *See, e.g.*, Amicus Br. at 3 (characterizing *Tribune II*'s holding as a "broad construction" of § 546(e) and § 101(22)(A), as explained in *Merit*).

role in canceling the shares would have even more drastic implications.

To further ex the scope of § 546(e) and § 101(22)(A) and immunize transactions in which a bank took only purely ministerial action, made no payments, and had no discretion would not further Congress's purpose. Rather, it would introduce inefficiency into the securities market. As amici explain in their Brief, such a decision would incentivize "large banks to aid and abet corporate looters" in LBOs because they could take little-to-no action on behalf of the debtor, "handsomely profit by collecting large structuring fees," and rest assured they remain immune from liability.[17]

Accordingly, we vacate the district court's judgment to the extent it dismissed the Payroll Transfer claims.

III. Qualifying Transaction

As we have determined that Nine West is a qualifying participant pursuant to § 546(e) with respect to the Certificate and DTC Transfers, we must next determine whether these payments are qualifying transactions under the safe harbor. A payment constitutes a qualifying transaction if it is a "settlement payment" or a "transfer made . . . in

---

[17] Amicus Br. at 29; *see also id.* ("If the District Court's decision is affirmed, it would make it virtually impossible for a Trustee to ever bring a [fraudulent conveyance claim] against shareholders in the context of a high-risk LBO, unless the purchaser walks into the closing with a giant bag of cash to pay the selling shareholders. Such a result would not only lead to the proliferation of risky and disastrous LBO's -- it would encourage them!").

connection with a securities contract." 11 U.S.C. § 546(e).

The district court found "that the public shareholder transfers were made in connection with a securities contract" for two reasons: (1) *Tribune II*, which similarly involved a two-step LBO transaction, controls; and (2) the safe harbor "covers not only contracts for the repurchase of securities but also any other 'similar' contract or agreement." 482 F. Supp. 3d at 198. We agree.

Plaintiffs' argument that the Merger Agreement is not a "securities contract" because it provided for the cancelation of Jones Group shares is without merit. First, the merger agreement in the Tribune LBO similarly provided for the cancelation of shares and, there, this Court had "no trouble" concluding that the payments were made "in connection with a securities contract." *Tribune II*, 946 F.3d at 81. Second, the Bankruptcy Code defines "securities contract" with "extraordinary breadth" to include, for example, a "contract for the purchase or sale of a security, including any repurchase transaction on any such security," as well as "any other agreement or transaction that is similar to an agreement or transaction referred to in this subparagraph." *Tribune II*, 946 F.3d at 81 (cleaned up); *see also* 11 U.S.C. § 741(7)(A)(i), (vii).

The district court also correctly held, in the alternative, "that the payments made to the shareholder defendants were 'settlement payments' -- that is, transfers of cash made to complete the merger." 482 F. Supp. 3d at 199.

Under the Bankruptcy Code, a "settlement payment" is "a preliminary settlement payment, a partial settlement payment, an interim settlement

payment, a settlement payment on account, a final settlement payment, or any other similar payment commonly used in the securities trade." 11 U.S.C. § 741(8). This Court has held that a settlement payment includes a "transfer of cash made to complete a securities transaction." *Enron Creditors Recovery Corp. v. Alfa, S.A.B. de C.V.*, 651 F.3d 329, 339 (2d Cir. 2011) (cleaned up). Here, the Certificate and DTC Transfers were made pursuant to the Merger Agreement and for the purpose of effectuating the LBO. Therefore, the district court was correct to hold that these transfers qualified as settlement payments within the scope of § 546(e).

IV. Preemption

The Litigation Trustee brought unjust enrichment claims against the former directors and officers who allegedly played a key role in advocating for or approving the Merger. The district court found these claims were preempted by § 546(e) because they seek the same remedy as the Trustees' fraudulent conveyance claims, which it found were safe harbored under that provision. The Litigation Trustee argues that the district court erred because the "unjust enrichment claims -- which are asserted only against certain former Jones Group directors and officers -- differ in nature from [the Trustees'] fraudulent conveyance claims asserted against all shareholder defendants." Appellants' Br. at 51.

In *Tribune II*, this Court addressed whether state law constructive fraudulent conveyance claims were preempted by § 546(e). 946 F.3d at 72. We analyzed § 546(e)'s plain language and legislative history, as well as its scope after the Supreme Court's holding in *Merit Management*. 946 F.3d at 77-98. We reasoned

that § 546(e) "was intended to protect from avoidance proceedings payments by and to commodities and securities firms in the settlement of securities transactions or the execution of securities contracts" and, therefore, state law claims that conflict with this purpose are preempted. 946 F.3d at 90.

Here, the Trustees' unjust enrichment claims that arise from the Certificate and DTC Transfers conflict with the purpose of § 546(e). The claims that arise from the Payroll Transfers, however, do not similarly conflict with the statute because these payments do not fall under the safe harbor. As a result, we hold that the Trustees' unjust enrichment claims arising from the Payroll Transfers are not preempted.

CONCLUSION

For the reasons stated above, we VACATE the district court's judgment as to the Payroll Transfer claims, AFFIRM the remainder of the judgment, and REMAND for further proceedings consistent with this Court's decision.

United States Court of Appeals
for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

DEBRA ANN LIVINGSTON
CHIEF JUDGE

Date: November 27, 2023
Docket #: 20-3257, 20-3290, 20-3315, 20-3326, 20-3327, 20-3334, 20-3335, 20-3941, 20-3952, 20-3959, 20-3961, 20-3964, 20-3969, 20-3980, 20-3981, 20-3992, 20-3998
Short Title: In Re: Nine West LBO Securities

CATHERINE O'HAGAN WOLFE
CLERK OF COURT

DC Docket #: 20-md-2941

DC Court: SDNY (NEW YORK CITY)DC Docket #: 20-cv-4479 DC Court: SDNY (NEW YORK CITY)DC Docket #: 20-cv-4299 DC Court: SDNY (NEW YORK CITY)DC Docket #: 20-cv-4286 DC Court: SDNY (NEW YORK CITY)DC Docket #: 20-cv-4434 DC Court: SDNY (NEW YORK CITY)DC Docket #: 20-cv-4289 DC Court: SDNY (NEW YORK CITY)DC Docket #: 20-cv-4440 DC Court: SDNY (NEW YORK CITY)DC Docket #: 20-cv-4480 DC Court: SDNY (NEW YORK CITY)DC Docket #: 20-cv-4433 DC Court: SDNY (NEW YORK CITY)DC Docket #: 20-md-2941 DC Court: SDNY (NEW YORK CITY)DC Docket #: 20-cv-4292 DC Court: SDNY (NEW YORK CITY)DC Docket #: 20-cv-4267 DC Court: SDNY (NEW YORK CITY)DC Docket #: 20-cv-4265 DC Court: SDNY (NEW YORK CITY)DC Docket #: 20-cv-4569 DC Court: SDNY (NEW YORK CITY)DC Docket #: 20-cv-4262 DC Court: SDNY (NEW YORK

CITY)DC Docket #: 20-cv-4436 DC Court: SDNY (NEW YORK CITY)DC Docket #: 20-cv-4287 DC Court: SDNY (NEW YORK CITY)DC Docket #: 20-cv-4335 DC Court: SDNY (NEW YORK CITY)DC Docket #: 20-cv-4346 DC Court: SDNY (NEW YORK CITY)DC Judge: Rakoff

BILL OF COSTS INSTRUCTIONS

The requirements for filing a bill of costs are set forth in FRAP 39. A form for filing a bill of costs is on the Court's website.

The bill of costs must:
* be filed within 14 days after the entry of judgment;
* be verified;
* be served on all adversaries;
* not include charges for postage, delivery, service, overtime and the filers edits;
* identify the number of copies which comprise the printer's unit;
* include the printer's bills, which must state the minimum charge per printer's unit for a page, a cover, foot lines by the line, and an index and table of cases by the page;
* state only the number of necessary copies inserted in enclosed form;
* state actual costs at rates not higher than those generally charged for printing services in New York, New York; excessive charges are subject to reduction;
* be filed via CM/ECF or if counsel is exempted with the original and two copies.

United States Court of Appeals
for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

DEBRA ANN LIVINGSTON
CHIEF JUDGE

Date: November 27, 2023
Docket #: 20-3257, 20-3290, 20-3315, 20-3326, 20-3327, 20-3334, 20-3335, 20-3941, 20-3952, 20-3959, 20-3961, 20-3964, 20-3969, 20-3980, 20-3981, 20-3992, 20-3998
Short Title: In Re: Nine West LBO Securitie

CATHERINE O'HAGAN WOLFE
CLERK OF COURT

DC Docket #: 20-md-2941
DC Court: SDNY (NEW YORK CITY)DC Docket #: 20-cv-4479 DC Court: SDNY (NEW YORK CITY)DC Docket #: 20-cv-4299 DC Court: SDNY (NEW YORK CITY)DC Docket #: 20-cv-4286 DC Court: SDNY (NEW YORK CITY)DC Docket #: 20-cv-4434 DC Court: SDNY (NEW YORK CITY)DC Docket #: 20-cv-4289 DC Court: SDNY (NEW YORK CITY)DC Docket #: 20-cv-4440 DC Court: SDNY (NEW YORK CITY)DC Docket #: 20-cv-4480 DC Court: SDNY (NEW YORK CITY)DC Docket #: 20-cv-4433 DC Court: SDNY (NEW YORK CITY)DC Docket #: 20-md-2941 DC Court: SDNY (NEW YORK CITY)DC Docket #: 20-cv-4292 DC Court: SDNY (NEW YORK CITY)DC Docket #: 20-cv-4267 DC Court: SDNY (NEW YORK CITY)DC Docket #: 20-cv-4265 DC Court: SDNY (NEW YORK CITY)DC Docket #: 20-cv-4569 DC Court: SDNY (NEW YORK CITY) DC Docket #: 20-cv-4262 DC Court: SDNY (NEW YORK

CITY)DC Docket #: 20-cv-4436 DC Court: SDNY (NEW YORK CITY)DC Docket #: 20-cv-4287 DC Court: SDNY (NEW YORK CITY)DC Docket #: 20-cv-4335 DC Court: SDNY (NEW YORK CITY)DC Docket #: 20-cv-4346 DC Court: SDNY (NEW YORK CITY) DC Judge: Rakoff

VERIFIED ITEMIZED BILL OF COSTS

Counsel for

_____

respectfully submits, pursuant to FRAP 39 (c) the within bill of costs and requests the Clerk to prepare an itemized statement of costs taxed against the

_____

and in favor of

_____

for insertion in the mandate.

Docketing Fee _____

Costs of printing appendix (necessary copies _____)
_____

Costs of printing brief (necessary copies) _____)
_____

Costs of printing reply brief (necessary copies) _____)
_____

(VERIFICATION HERE)

_____
Signature

RICHARD J. SULLIVAN, *Circuit Judge*, dissenting in part:

I agree with the majority that the safe harbor created by section 546(e) of the Bankruptcy Code applies to Wells Fargo's payments to common-stock owners under the merger agreement that facilitated Nine West's leveraged buyout (the "Merger Agreement"). I write separately to explain why, in my view, the safe harbor should also apply to transfers that Nine West itself made to holders of restricted shares under the Merger Agreement. In reaching this conclusion, I reject the majority's "transfer-by-transfer" approach for assessing whether "customers" of "banks" are "financial institutions" under section 101(22)(A), which is central to determining whether the qualifying-participant requirement under section 546(e) is met. Instead, I believe that the district court's "contract-by-contract" approach better comports with the plain meaning of section 101(22)(A)'s text and more faithfully gives effect to Congress's purpose in enacting section 546(e). I would therefore affirm the district court's ruling in all respects.

I.

Under the Bankruptcy Code, trustees possess broad powers to avoid fraudulent conveyances – that is, transfers an insolvent debtor makes for little to no consideration to certain parties – so that fraudulently transferred property can be recaptured for the benefit of the bankruptcy estate and its creditors. *See* 11 U.S.C. §§ 548, 550(a), 551. Nevertheless, Bankruptcy Code section 546 contains provisions – known as safe harbors – that insulate from avoidance certain transfers made by a debtor. Of particular significance here is section 546(e), which creates a safe harbor for

margin payments, settlement payments, and transfers made in connection with securities contracts. Section 546(e) provides, in relevant part, that "the trustee may not avoid a transfer that" (1) "is a . . . settlement payment . . . made by or to (or for the benefit of) a . . . financial institution" or (2) "is . . . made by or to (or for the benefit of) a . . . financial institution . . . in connection with a securities contract." *Id.* § 546(e). Thus, to invoke the section 546(e) safe harbor, a transferee must identify both a qualifying transaction (*i.e.*, a settlement payment or a transfer made in connection with a securities contract) and a qualifying participant (*i.e.*, a financial institution). *See id.* § 546(e).

The Trustees seek to claw back to the bankruptcy estate a series of payments that Nine West made to its shareholders, directors, and officers under the Merger Agreement. *First*, the Trustees try to avoid transfers made to holders of common- stock shares – held either in electronic book-entry form or as physical certificates – that were cancelled and converted into the right to receive $15 per share (the "DTC and Certificate Transfers"). *Second*, the Trustees attempt to avoid payments for shares of restricted stock and stock equivalent units that were held by the company's directors, officers, and employees, which were also cancelled and converted into the right to receive $15 per share, plus any unpaid dividends (the "Restricted Shares Transfers").[1] The issue we must decide on appeal is whether these

[1] Relatedly, Nine West also paid approximately $71 million in change-in-control payments to its directors and officers. The Trustees concede that their claims relating to these change-in-control payments are "not a subject of this appeal." Trustees Br. at 6 & n.2.

transfers that Nine West and its agent Wells Fargo made to company shareholders are shielded by section 546(e) from the Trustees' avoidance powers.

II.

To begin, the majority and I agree that the *qualifying-transaction* requirement under section 546(e) is satisfied for *all* of the DTC, Certificate, and Restricted Shares Transfers, since they were "transfer payment[s] . . . made in connection with a securities contract" or "settlement payment[s]." *Id.* § 546(e). Indeed, the Merger Agreement from the Nine West leveraged buyout was, in all relevant respects, identical to the "securities contract" in *Tribune*, which similarly cancelled shares and converted them into rights to cash payments. *See In re Trib. Co. Fraudulent Conv. Litig.*, 946 F.3d 66, 80–81 (2d Cir. 2019); *compare also* J. App'x at 488–89 (Tribune Merger Agreement § 2.1(a)), *with id.* at 383 (Nine West Merger Agreement § 4.1(a)). The transfers were also "settlement payments," since they involved "transfer[s] of cash . . . made to complete a securities transaction." *Enron Creditors Recovery v. Alfa, S.A.B. de C.V.*, 651 F.3d 329, 334–35 (2d Cir. 2011) (alteration omitted). This is true for not only the DTC and Certificate Transfers, *see* J. App'x at 383–85 (Merger Agreement §§ 4.1, 4.2), but the Restricted Shares Transfers as well, *see id.* at 385–86 (Merger Agreement § 4.3).

III.

But the *qualifying-participant* inquiry is not so clear-cut. To identify a qualifying participant, courts look to whether the transfer was "made by or to (or for the benefit of) a . . . financial institution." 11

U.S.C. § 546(e). In turn, a "financial institution" is defined as (1) "a Federal reserve bank, or an entity that is a commercial or savings bank, industrial savings bank, savings and loan association, trust company, federally[ ]insured credit union, or receiver, liquidating agent, or conservator for such entity" or (2) a "customer" of one of these entities "when [the] entity is acting as agent or custodian for [the] customer . . . in connection with a securities contract (as defined in section 741)." *Id.* § 101(22)(A).[2]

The majority and I agree that the qualifying-participant inquiry is straightforward for the DTC and Certificate Transfers. That is, these transfers were carried out by Nine West's agent, Wells Fargo, which was a qualifying participant for the simple reason that a "bank" is an enumerated entity under the first clause of section 101(22)(A). And since these transfers were also qualifying transactions, as discussed above, they are safe from the Trustees' avoidance powers under the section 546(e) safe harbor.

We disagree, however, as to whether Nine West itself was a qualifying participant when it made the Restricted Shares Transfers. This disagreement stems from our conflicting readings of the "customer clause" of section 101(22)(A), which states that a customer is a "financial institution" when an enumerated covered entity under that subsection is acting as an agent for the customer in connection with a securities contract. Put another way, we must

---

[2] Section 101(22)(B) also identifies a third type of "financial institution" – namely, "an investment company registered under the Investment Company Act of 1940" that is acting "in connection with a securities contract," 11 U.S.C. § 101(22)(B) – which is not relevant for purposes of this dissent.

decide whether a customer's status as a "financial institution" turns on whether its agent is acting in connection with the securities contract (the "contract-by-contract" approach) or whether its agent is acting in connection with the specific transfer made by the customer (the "transfer-by-transfer" approach).[3]

A.

As is the case with statutory interpretation, the relevant inquiry begins – and ends – with the plain meaning of the statutory text. *See Ret. Bd. of the Policemen's Annuity & Ben. Fund of Chi. v. Bank of N.Y. Mellon*, 775 F.3d 154, 165 (2d Cir. 2014); *see also Spadaro v. United States Customs & Border Prot.*, 978 F.3d 34, 46 (2d Cir. 2020) ("[W]hen the language of a statute is unambiguous, judicial inquiry is complete." (internal quotation marks omitted)). It is appropriate then to start where the district court did by noting that section 101(22)(A) provides that "a customer of a bank qualifies as a financial institution 'when [the bank] is acting as agent . . . in connection with a securities contract.'" Sp. App'x at 39 (quoting 11 U.S.C. § 101(22)(A) (alteration in original)). Under the plain meaning of this statutory language,

---

[3] To be clear, there are *two* "in connection with a securities contract" requirements at play here. One is found under the qualifying-transaction prong of section 546(e) itself. *See* 11 U.S.C. § 546(e). The other is found in the customer clause of section 101(22)(A), which implicates the qualifying-participant prong of section 546(e). *See id.* § 101(22)(A). The "contract-by-contract" versus "transfer-by-transfer" dispute relates to the interpretation of section 101(22)(A). It stands to reason, of course, that the securities contract for both sections must be the same for the safe harbor to apply, and here there is no question that all of the transfers were made pursuant to the same Merger Agreement.

it follows that once a customer is deemed a "financial institution" because a bank is acting as its agent in connection with a securities contract (under the qualifying-participant prong), each and every transfer the customer makes pursuant to that securities contract (under the qualifying- transaction prong) is shielded by the section 546(e) safe harbor.

Indeed, it is telling that Congress elected to limit the scope of a customer's status as a "financial institution" by inserting the "in connection with a securities contract" language into the statute. 11 U.S.C. § 101(22)(A). Had Congress simply omitted this language, so that a customer of a bank is a "financial institution" "when" the "bank" "is acting as agent" of the customer, then there would be ambiguity as to whether "is acting as agent" should be construed broadly (*i.e.*, any agency relationship will suffice) or narrowly (*i.e.*, the agency relationship must pertain to a particular transfer). Here, Congress chose to pair "is acting as agent" with "in connection with a securities contract," thereby limiting a customer's "financial-institution" status to when its agent is acting in precisely that capacity. *See United States v. Butler*, 297 U.S. 1, 65 (1936) ("The[] words [of a statute] cannot be meaningless, else they would not have been used.").

It also bears noting that, out of all the terms at its disposal, Congress settled on the phrase "securities contract (as defined in section 741)." This defined term is set forth in capaciously broad language under section 741(7). *See* 11 U.S.C. § 741(7)(A)(i), (vii) (defining "securities contract" as, among other things, "*any* . . . agreement . . . that is *similar* to" an agreement "for the . . . sale[] . . . of a security" (emphasis added)); *see also Tribune*, 946 F.3d at 81 (2d Cir. 2019) (acknowledging the "extraordinary breadth" of

this definition (internal quotation marks omitted)). This indicates to me that, by incorporating this definition of "securities contract," Congress intended for the customer clause to be interpreted in an expansive manner.

The majority disputes this interpretation, opting instead for a narrower transfer-by-transfer approach to the customer clause. According to the majority, if Congress truly intended to enact the broad reading endorsed by the district court, it would have instead drafted section 101(22)(A) to say that a customer of a bank qualifies as a financial institution "when a bank has *ever* acted as a customer's agent in connection with a securities contract." Maj. Op. at 27. But Congress had no obligation to use the majority's proffered language, and in any event, the language it did use – "is acting as agent . . . in connection with a securities contract," 11 U.S.C. § 101(22)(A) – is broad enough to reach the disputed transfers in this case, without being as boundless as the majority implies. In fact, it is the majority that effectively rewrites section 101(22)(A) so that a "customer" qualifies as a "financial institution" only "when [the bank] is acting as agent . . . in connection with a securities *transfer*." Sp. App'x at 39 (emphasis added and alteration in original). Tellingly, section 101(22)(A) makes no mention of the word "transfer," and instead grants "financial[-]institution" status to a customer when a bank is acting as agent "in connection with a securities *contract*." 11 U.S.C. § 101(22)(A) (emphasis added). By substituting "transfer" for "contract," the majority impermissibly "alter[s], rather than . . . interpret[s], the [text of section 101(22)(A)]." *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2381 (2020).

Practically speaking, the majority's transfer-by-transfer approach renders section 101(22)(A)'s entire customer clause meaningless when read in conjunction with section 546(e), since it would cover no ground not already covered by the first enumerated-entities clause. Under the view espoused by the majority, the section 546(e) safe harbor only protects transfers that are made by a bank. It is evident, however, that sections 546(e) and 101(22)(A) contemplate that *some* transfers "made by" the "customer" of a "bank" are also covered by the safe harbor. 11 U.S.C. §§ 546(e), 101(22)(A). After all, if section 546(e) covered only transfers "made by" a "financial institution" in the form of a "bank," what would be the point of section 101(22)(A)'s language specifying that a "financial institution" can *also* be "a customer" of a "bank" in certain circumstances? *Id.* The majority's reading – which would read the entire customer clause out of the statute – cannot be right. *See Reiter v. Sototone Corp.*, 442 U.S. 330, 339 (1979) ("In construing a statute[,] we are obliged to give effect, if possible, to every word Congress used.").

What's more, even if we were to delve into "Congress's intent" in enacting section 546(e), the majority's arguments overlook the fact that Congress clearly balanced the goal of protecting creditors' rights through the trustees' avoidance powers against the competing goal of "minimiz[ing] the displacement caused in the commodities and securities markets in the event of a major bankruptcy affecting those industries." *Tribune*, 946 F.3d at 92 (internal quotation marks and alteration omitted). As this Court has recognized, the former "cannot . . . trump[]" the latter. *Id.* at 94. Indeed, we have acknowledged that "the legislative history's mention of bankrupt 'customers' or 'other participants' and . . . the broad

statutory language defining the transactions covered" "reflected [Congress's] larger purpose" in enacting the statute – namely, "to promote finality and certainty for investors, by limiting the circumstances . . . under which securities transactions could be unwound." *Id.* (internal quotation marks and alterations omitted). Against this legislative backdrop reflecting Congress's intended goal of "enhancing the efficiency of securities markets in order to reduce the cost of capital to the American economy," I see no reason to limit the reach of the section 546(e) safe harbor by ignoring section 101(22)(A)'s customer clause in its entirety. *Id.* at 92 (quoting Bankruptcy of Commodity and Securities Brokers: Hearings Before the Subcomm. on Monopolies and Commercial Law of the Comm. on the Judiciary, 47th Cong. 239 (1981)); *see also* H. R. Rep. No. 101-484, at 2 (1990), *reprinted in* 1990 U.S.C.C.A.N. 223, 224.

To be sure, the majority's narrow reading of section 101(22)(A) would be more plausible if Congress had expressed a limited intent to protect only "commodities and securities *firms* in the settlement of securities transactions or the execution of securities contracts." *Tribune*, 946 F.3d at 90–91 (emphasis added). But this Court has squarely rejected such an interpretation of section 546(e). *See id.* at 91–92 (explaining that the "broad language" of section 546(e) – *i.e.*, "limitations on avoidance of transfers made by a 'customer' of a financial institution 'in connection with a securities contract'" – indicates that Congress "intended to protect the [securities] process or market" as a whole, "rather than [just] firms" (citation omitted)).

In actuality, the majority's analysis appears to be driven by policy concerns about how a textual reading of the statute might affect creditors, shareholders,

and other bankruptcy stakeholders in future bankruptcies that occur in the wake of leveraged buyouts. *See* Maj. Op. at 27–30 & n.8. But the Supreme Court has warned, in this very context, that concerns over matters of policy cannot be used to justify "deviat[ions] from the plain meaning of the language used in [section] 546(e)." *Merit Mgmt. Grp., LP v. FTI Consulting, Inc.*, 138 S. Ct. 883, 897 (2018).

At any rate, the majority fails to explain why unwinding securities payments made by corporate entities *themselves* introduces any less "systemic risk," Maj. Op. at 29–30, than the voiding of transfers made by firms or other market intermediaries. Each threatens the finality of securities transactions, thereby undermining confidence in the entire securities market. *See Tribune*, 946 F.3d at 92 ("The broad language used in [s]ection 546(e) protects *[securities] transactions rather than [just] firms*, reflecting a purpose of enhancing the efficiency of securities *markets* in order to reduce the cost of capital to the American economy." (emphasis added)). And there is no doubt that if companies, institutional investors, or large shareholders face financial instability because securities transactions are undone years after leveraged buyouts are consummated, this would pose significant "threat[s] [to] the financial system." Maj. Op. at 29–30. Likewise, the majority opinion's cursory *ipse dixit* about a broad section 546(e) safe harbor "introduc[ing] *inefficienc[ies],*" *id.* at 37 (emphasis added), is accompanied by no reasoning as to how a textual reading of section 546(e) yields an outcome that is less pareto efficient than the majority's approach. All told, the majority opinion's vague gestures at market effects cloak what are, in reality, nothing more than its subjective views of what is "reasonable." Maj. Op. at 28. But it is not

the prerogative of this Court to disturb the delicate balance struck by Congress between creditors' interests and those of shareholders based on what we perceive to be fair or reasonable. *See Anderson v. Wilson*, 289 U.S. 20, 27 (1933) ("We do not pause to consider whether a statute differently conceived and framed would yield results more consonant with fairness and reason. We take the statute as we find it.").

B.

Having settled on the contract-by-contract approach to defining "financial institutions" under section 101(22)(A)'s customer clause, I would hold that the qualifying-participant prong under section 546(e) is satisfied for not only the DTC and Certificate Transfers, but also the Restricted Shares Transfers.

Like the majority, I have no trouble concluding that Wells Fargo was acting as Nine West's "agent" with regard to the DTC and Certificate Transfers. *See Tribune*, 946 F.3d at 77–79 (holding that depositary that received and made payments for tendered shares on company's behalf in connection with a leveraged buyout was an "agent" under section 101(22)(A)). There is no dispute that these transfers were made by Wells Fargo, which acted as Nine West's "agent" given the role it played in cancelling shares and making payments to shareholders. Specifically, the Merger Agreement provided that payments for cancelled shares would be effectuated by a "paying agent . . . pursuant to a paying agent agreement in customary form." J. App'x at 383. And in turn, the paying agent agreement designated Wells Fargo as the paying agent and empowered it to "act as [Nine

West's] special agent for the purpose of distributing the Merger Consideration," hold funds that Nine West deposited for the shareholder transfers, and ultimately cancel the company's common stock. *Id.* at 217, 218, 221.

Unlike the majority, I am convinced that the qualifying-participant prong is also satisfied for the Restricted Shares Transfers. Given Wells Fargo's role in effectuating the DTC and Certificate Transfers, Nine West meets the definition of a "financial institution" by virtue of its status as a "customer" of a "bank" that "is acting as agent" "in connection with a securities contract" – in this case, the Merger Agreement. Because Nine West meets the requirements of a qualifying participant, and because the transfers in question satisfy section 546(e)'s qualifying-transaction prong, there can be no doubt that the Restricted Shares Transfers are sheltered by the safe harbor.[4]

IV.

For all of these reasons, I dissent from the majority's opinion to the extent that it permits the Trustees to claw back the Restricted Shares Transfers under the Merger Agreement as avoidable fraudulent conveyances. While I agree with the majority that sections 546(e) and 101(22)(A) bar the

---

[4] Given my view that the DTC, Certificate, and Restricted Shares Transfers are protected from the Trustees' avoidance powers under section 546(e), it follows that all state-law constructive and intentional fraudulent conveyance claims brought by creditors or noteholders (and thereby the Trustees representing these individuals) and all unjust-enrichment claims against the company's directors and officers must be preempted. *See Tribune*, 946 F.3d at 90–97.

Trustees from avoiding the payments made to shareholders via the DTC and Certificate Transfers, I cannot agree with the majority's interpretation of "financial institution" under section 101(22)(A), which improperly strips the Restricted Shares Transfers of section 546(e) immunity from the Trustees' avoidance powers. To my mind, Congress spoke with unmistakable clarity in fashioning the section 546(e) safe harbor, which applies to a customer of a bank when that bank is acting as agent "in connection with a securities contract." 11 U.S.C. §§ 546(e), 101(22)(A). Because the securities contract in this case – the Merger Agreement – makes clear that Wells Fargo was acting as Nine West's agent in connection with that contract, Nine West meets the definition of a "financial institution" under section 101(22)(A) and its payments for the Restricted Shares Transfers are properly subject to section 546(e)'s safe harbor. As a result, I would affirm the judgment of the district court in all respects.

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 3rd day of January, two thousand twenty-four.

ORDER

Docket Nos. 20-3257-cv (L), 20-3290-cv,
20-3315-cv, 20-3326-cv, 20-3327-cv,
20-3334-cv, 20-3335-cv, 20-3941-cv,
20-3952-cv, 20-3959-cv, 20-3961-cv,
20-3964-cv, 20-3969-cv, 20-3980-cv,
20-3981-cv, 20-3992-cv, 20-3998-cv

In Re: Nine West LBO Securities Litigation

Appellees filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk
/s/ Catherine O'Hagan Wolfe

[SEAL]

Appendix D

RELEVANT STATUTORY PROVISIONS

---

11 U.S.C.A. § 101(22)

Effective: June 21, 2022

(22) The term "financial institution" means--

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

(B) in connection with a securities contract (as defined in section 741) an investment company registered under the Investment Company Act of 1940.

(22A) The term "financial participant" means--

(A) an entity that, at the time it enters into a securities contract, commodity contract, swap agreement, repurchase agreement, or forward contract, or at the time of the date of the filing of the petition, has one or more agreements or transactions described in paragraph (1), (2), (3), (4), (5), or (6) of section 561(a) with the debtor or any other entity (other than an affiliate) of a

total gross dollar value of not less than $1,000,000,000 in notional or actual principal amount outstanding (aggregated across counterparties) at such time or on any day during the 15-month period preceding the date of the filing of the petition, or has gross mark-to-market positions of not less than $100,000,000 (aggregated across counterparties) in one or more such agreements or transactions with the debtor or any other entity (other than an affiliate) at such time or on any day during the 15-month period preceding the date of the filing of the petition; or

(B) a clearing organization (as defined in section 402 of the Federal Deposit Insurance Corporation Improvement Act of 1991).

11 U.S.C.A. § 546

Effective: December 12, 2006

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

(1) the later of--

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

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

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

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

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

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

(2) If--

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

(B) such property has not been seized or such an action has not been commenced before the date of the filing of the petition; such interest in such property shall be perfected, or perfection of such interest shall be maintained or continued, by giving notice within the time fixed by such law for such seizure or such commencement.

(c)(1) Except as provided in subsection (d) of this section and in section 507(c), and subject to the prior rights of a holder of a security interest in such goods or the proceeds thereof, the rights and powers of the trustee under sections 544(a), 545, 547, and 549 are subject to the right of a seller of goods that has sold goods to the debtor, in the ordinary course of such seller's business, to reclaim such goods if the debtor

has received such goods while insolvent, within 45 days before the date of the commencement of a case under this title, but such seller may not reclaim such goods unless such seller demands in writing reclamation of such goods--

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

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

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

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

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

(2) the court may deny reclamation to such a producer or fisherman with a right of

reclamation that has made such a demand only if the court secures such claim by a lien.

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

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

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

(h) Notwithstanding the rights and powers of a trustee under sections 544(a), 545, 547, 549, and 553, if

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

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

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

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

Appendix E

LIST OF PARTIES TO THE PROCEEDINGS

LIST OF RESPONDENT-PLAINTIFFS

ABC

LIST OF RESPONDENT-DEFENDANTS

Aida Tejero-Decolli

Alison Hemming

Amy Rapawy

Ann Marie C. Wilkins

Arlene Starr

Arundhati Kulkarni

Barbara Kreger

Beth B. Dorfsman

Bryan R. Gilligan

Charles Joseph Pickett

Christopher R. Cade

Cynthia DiPietrantonio

Dianne Card

Eileen Dunn

Eric Dauwalter

George Sharp

Gerald C. Crotty

Gerald Hood

Gregory Clark
Heather Harlan
Heather Roussel
Ira M. Dansky
James A. Mitarotonda
James Capiola
James Chan
James T. Ostrowski
Jamie Cygielman
Janet Carr
Janice Brown
Jeff Brisman
Jeffrey D. Nuechterlein
Jodi G. Wright
John D. Demsey
John T McClain
John W. Deem
Joseph A. Rosato
Joseph T. Donnalley
Katherine Butler
Kimberly Thomas
Larissa Sygida
Laurie J. Gentile
Linda V. Kothe
Lowell W. Robinson
Lynne Bernstock

Mahmood Hassani-Sadi
Mark DeZao
Mary Margaret Hastings Georgiades
Matthew H. Kamens
Michael G. Demko
Nicola Guarna
Ninive Giordano
Norman R. Veit, Jr.
Pamela M. Paul
Richard Dickson
Robert L. Mettler
Robert Rodriguez
Robyn Whitney Mills
Rosa Genovesi
Roy Chan
Scott Bowman
Sharon Harger
Sidney Kimmel
Stacey A. Harmon
Stefani Greenfield
Stuart Weitzman
Susan Duffy
Susan M. McCoy
Suzanne Karkus
Suzanne Maloney
Tami Fersko

Thomas Nolan

Wesley R. Card

Zine Mazouzi

LIST OF PARTIES TO BELOW PROCEEDINGS UNAFFECTED BY THIS PETITION

Advanced Series Trust Academic Strategies Allocation Portfolio

Advanced Series Trust Small Cap Value Portfolio

Advisors Series Trust (Kellner Merger Fund)

Allianz Asset Management of America L.P. f/k/a Allianz Global Investors of America LP

Allianz Global Investors of America L.P

American Beacon Small Cap Value Fund a/k/a Defendant TX-10

American Family Mutual Insurance Co.

American International Group Inc.

Anthem Health Plans of Virginia, Inc.

AQR Absolute Return Master Account L.P.

AQR Delta Master Account L.P.

AQR Delta Sapphire Fund L.P.

AQR DELTA XN Master Account L.P.

AQR Funds - AQR Diversified Arbitrage Fund

AQR Funds - AQR Multi- Strategy Alternative Fund

Arbor Place Ltd. Partnership

Arthur E. Lee

Bam Advisor Services d/b/a Loring Ward

Barington Companies Equity Partners, L.P.

Barington Companies Investors, LLC

BlackRock MSCI USA Small Cap Equity Index Fund

Blackrock Russell 2000 Index Non-Lendable Fund

Blue Cross of California

Blue Shield of California

Bluecrest Capital Management Ltd.

Boston Partners All-Cap Value Fund

Boston Partners Asset Management, LLC

Boston Partners Global Investors Inc.

Boston Partners, LLC

Brighthouse Funds Trust II f/k/a Brighthouse Funds Trust Met-Series

Brown Brothers Harriman and Co. Client No. 2

Brown Brothers Harriman and Co. Client No. 3

California Physicians' Service d/b/a Blue Shield of California

Calvert Variable Products, Inc. (Calvert VP Russell 2000 Small Cap Index Portfolio)

Chi Operating Investment Program, LP

Chrysler World IMI Equity Index - ND

CNH Master Account L.P.

CNH Opportunistic Premium Offshore Fund L.P.

College Retirement Equities Fund (CREF Equity Index Account)

Columbia Management Investment Advisers LLC

Columbia Multi-Manager Alternative Strategies Fund

Community Insurance Company

Consolidated Edison Company of New York, Inc.

CREF Equity Index Account

Cynthia Foy Rupp

DAGT Small Cap Outliers

Defendant IL-1

Defendant IL-2

Defendant NJ-1

Defendant NJ-2

Defendant NJ-3

Defendant NJ-4

Defendant NY-1

Defendant NY-18

Defendant NY-19

Defendant NY-24

Defendant NY-8

DFA Australia Limited Global Core Equity Trust a/k/a Defendant TX-1

DFA Investment Dimensions Group Inc. TA U.S. Core Equity 2 Portfolio a/k/a Defendant TX-2

DFA Investment Dimensions Group Inc. Tax-Managed U.S. Small Cap Portfolio a/k/a Defendant TX-3

DFA Investment Dimensions Group Inc. Tax-Managed U.S. Targeted Value Portfolio a/k/a Defendant TX-4

DFA Investment Dimensions Group Inc. U.S. Core Equity 1 Portfolio

DFA Investment Dimensions Group Inc. U.S. Core Equity 2 Portfolio

DFA Investment Dimensions Group Inc. U.S. Micro Cap Portfolio

DFA Investment Dimensions Group Inc. U.S. Small Cap Portfolio

DFA Investment Dimensions Group Inc. U.S. Small Cap Value Portfolio

DFA Investment Dimensions Group Inc. U.S. Social Core Equity 2 Portfolio a/k/a Defendant TX-5

DFA Investment Dimensions Group Inc. U.S. Targeted Value Portfolio a/k/a Nationwide U.S. Targeted Value Strategy

DFA Investment Dimensions Group Inc. U.S. Vector Equity Portfolio a/k/a Defendant TX-6

DFA Investment Trust Company Tax-Managed U.S. Marketwide Value Series a/k/a Defendant TX- 7

DFA U.S. Core Equity Fund a/k/a Defendant TX-8

DFA U.S. Vector Equity Fund a/k/a Defendant TX-9

Dimensional Funds PLC Global Targeted Value Fund

Dimensional Funds plc U.S. Small Companies Fund a/k/a Irish U.S. Small Cap Fund

Dimensional Funds plc U.S. Small Companies Fund a/k/a Irish U.S. Small Cap Fund

Diversified Alpha Group, Trust

Donna F. Zarcone

Dreman Contrarian Funds (Dreman Contrarian Small Cap Value Fund)

DT DV Market Completion Fund

DWS Investment Management Americas, Inc. f/k/a Deutsche Asset Management (Scudder)

DWS Small Cap Index VIP

Dynamic Capital Management, LLC

Dynamic Offshore Fund Ltd.

Emerson Electric Co.

EQ Advisors Trust (ATM Small Cap Managed Volatility Portfolio)

EQ Advisors Trust (EQ/2000 Managed Volatility Portfolio)

Extended Equity Market Fund a/k/a Blackrock Institutional Trust Company, N.A.

Extended Equity Market Master Fund B

Federated Equity Funds (Federated Clover Small Value Fund)

Fedex Corporation

FIAM LLC a/k/a Fidelity Institutional Asset Management f/k/a Pyramis Global Advisors

Fidelity Asset Allocation Currency Neutral Private Pool

Fidelity Asset Allocation Private Pool

Fidelity Balanced Currency Neutral Private Pool

Fidelity Balanced Income Currency Neutral Private Pool

Fidelity Balanced Income Private Pool

Fidelity Balanced Private Pool

Fidelity Concord Street Trust-Fidelity Extended Market Index Fund

Fidelity Concord Street Trust-Fidelity Total Market Index Fund

Fidelity Income Allocation Fund f/k/a Fidelity Monthly High Income Fund

Fidelity Investments

Fidelity Investments Charitable Gift Fund

Fidelity Monthly Income Fund

Fidelity Northstar Fund

Fidelity Small Cap Index Fund

Fidelity Total Market Index Fund

Flexshares Morningstar United States Market Factor Tilt Index Fund

Francis X Claps

Gabelli 787 Fund Inc. (Enterprise Mergers and Acquisitions Fund)

Gabelli Investor Funds Inc. (The Gabelli ABC Fund)

Gardner Lewis Event Driven Fund, L.P.

Gardner Lewis Merger Arbitrage Fund II, L.P.

Gardner Lewis Merger Arbitrage Fund, L.P.

Geode Diversified Fund, A segregated account of Geode Capital Master Fund Ltd. formerly known as GDF1, a segregated account of Geode Capital Master Fund Ltd.

George M Pacific Select Fund-PD Small-Cap Value Index Portfolio

George M. Klabin

Gotham Absolute Return Fund

GTE Investment Management Corp.

Hallador Balanced Fund LLC

Hartford Mutual Funds II Inc. (Hartford Schroders U.S. Small Cap Opportunities Fund)

Harvest Street Capital LLC

Hawaii DE LLC

HBK Master Fund L.P. a/k/a Defendant TX-11

HBK Quantitative Strategies Master Fund L.P. a/k/a Defendant TX-12

HFR Asset Management, L.L.C.

Investment Managers Series Trust (Towle Deep Value Fund)

Ira Martin Dansky Revocable Trust

iShares Europe

iShares Morningstar Small-Cap Value ETF

iShares MSCI USA Small Cap UCITS ETF

iShares Russell 2000 ETF

iShares Russell 3000 ETF

JHF II Strategic Equity Allocation Fund

JHVIT Small Cap Index Trust f/k/a JHT Small Cap Index Trust

JHVIT Small Cap Opportunities Trust f/k/a JHT Small Cap Index Trust

JHVIT Strategic Equity Allocation Trust a/k/a John Hancock Variable Insurance Trust Sea Small Cap

John Hancock II Strategic Equity Allocation Small Cap Fund a/k/a John Hancock II Sea Small Cap

John Hancock U.S. Targeted Value Fund

John Hancock U.S. Targeted Value Trust

Joseph R. Gromek

JPMorgan Systematic Alpha Fund

KBC Equity Fund - Fallen Angels

KBC Equity Fund - Leisure and Tourism

KBC Equity Fund - Strategic Satellites

Kenny Allan Troutt Separate Trust Estate a/k/a Defendant TX-13

Legg Mason Royce U.S. Small Cap Opportunity Fund

Lincoln Institute of Land Policy

Lincoln Variable Insurance Products Trust (LVIP SSGA Small Cap Index Fund)

Litman Gregory Masters Alternative Strategies Fund

Longfellow Investment Management Co., LLC

Lori L. Grace

Manulife Financial

Manulife Investment Management (North America) Ltd. f/k/a Manulife Asset Management North America Ltd.

Master Small Cap Index Series of Quantitative Master Series LLC a/k/a iShares Russell 2000 Small-Cap Index Fund

Merrill Lynch Pierce Fenner and Smith Incorporated

Metropolitan Life Insurance Co

MFO Management Company (Towle Fund)

Micro Cap Subtrust a/k/a Defendant TX-14

Minnesota Mining and Manufacturing Co.

MSCI U.S. IMI Index Fund B2 a/k/a BlackRock MSCI U.S. IMI Index Fund B2

Multimanager Small Cap Value Portfolio

Nancy L. Lee

Nationwide Mutual Funds (Nationwide Small Cap Index Fund)

Nationwide Mutual Funds (Nationwide U.S. Small Cap Value Fund)

Nationwide Variable Insurance Trust (NVIT Multi-Manager Small Cap Value Fund)

Natixis SA

Nine Chapters Capital Management LLC

Northern Small Cap Core Fund

Northern Small Cap Index Fund

Northern Small Cap Value Fund

Nuveen Small Cap Index Fund

Odin Holdings LP

Oppenheimer Global Multi Strategies Fund

Pacific Select Fund - PD Small-Cap Value Index Portfolio

Pacific Select Fund-Small-Cap Equity Portfolio

Pacific Select- Fund-Small-Cap Index Portfolio

Panagora Asset Management Inc.

Peak6 Investments LLC f/k/a PEAK6 Investments L.P.

Pentwater Capital Management LP

PG and E Co. Nuclear Facilities Qualified Cpuc Decommissioning Master Trust

PGIM QMA Small-Cap Value Fund

Pillsbury

Pinebridge Investments LP

Pinnacle West Corp.

Prelude Opportunity Fund, LP

Priac Funds

Principal Funds Inc. (Global Multi-Strategy Fund)

Principal Funds Inc. (Smallcap Value Fund II)

Principal Variable Contracts Funds Inc. (Smallcap Value Account I)

Proshares Trust (Proshares Merger ETF)

Prudential Financial Inc. (The Prudential Insurance Company of America)

Prudential Retirement Insurance & Annuity Co.

Quantitative Management Associates LLC

Quantitative Master Series LLC (Master Extended Market Index Series)

RBB Fund, Inc. (WPG Partners Small/Micro Cap Value Fund)

Research Affiliates Equity U.S. Large, L.P. f/k/a Enhanced Rafi U.S. Large LP

Rhumbline Advisers LP

Richard H. Hein Rev. Trust U/A 06/12/95

Richard H. Hein, Trustee

Robeco Capital Growth Funds - Robeco BP U.S. Premium Equities f/k/a Boston Partners U.S. Premium Equity Fund

Robert and Susan Mettler Family Trust U/A 3/27/06, Robert L. Mettler and Susan T. Mettler, as Trustees

Royce Fund (Royce Opportunity Fund)

Royce Institutional, LLC, (Opportunity Portfolio)

Russell 2000 Alpha Tilts Fund B

Russell 2000 Index Fund

Russell 2000 Index Non-Lendable Fund

Russell 2000 Value Fund B

Russell 2500 Index Fund a/k/a iShares Russell Small/Mid-Cap Index Fund

Russell 3000 Index Fund a/k/a iShares Total U.S. Stock Market Index Fund

Russell 3000 Index Non-Lendable Fund

Russell U.S. Small Cap Equity Fund

SA U.S. Small Company Fund

Schwab Capital Trust

Schwab Fundamental U.S. Small Company Index Fund

Schwab Small-Cap Index Fund

Schwab Total Stock M

Schwab Total Stock Market Index Fund

Securian Life Insurance Co. f/k/a Minnesota Life Insurance Co.

SEI Institutional Investments Trust (SIIT Small Cap Fund)

SEI Institutional Managed Trust (SIMT Small Cap Value Fund)

Small Cap Equity Index Fund

Small Cap Value Subtrust a/k/a Defendant TX-15

SPDR S&P MIDCAP 400 ETF Trust

State Farm Small Cap Index Fund

State Farm Variable Products Trust

State Street Bank and Trust Co.

State Street Bank and Trust Company

State Street Bank Maya Account Holder

State Street Global Advisors

State Street Global Advisors Russell 1000 Value Fund CTF

State Street Global Advisors Russell 2000 Index Fund

State Street Global Advisors Russell 2000 Value Fund CTF

State Street Global Advisors Russell 3000 Index Fund

State Street Global Advisors Russell 3000 Index Fund CTF

State Street Global Advisors Russell 3000 Index Fund SL SER A

State Street Global Advisors Russell Small Cap Fund Complete S/L A

State Street Global Advisors Russell Special Small Company Fund

State Street Global Advisors Russell Special Small Company Fund CTF

State Street Global Advisors Total ETF

State Street Global Advisors U.S. Extended Market Index Fund a/k/a U.S. Extended Market Fund SL

State Street North America Confidential Client 1 Domestic Equities

State Street North America Confidential Client 1 Domestic iShares 405

State Street North America Confidential Client 1 FOF

Susquehanna International Group LLP

Talcott Resolution Life Insurance Co.

Tax-Managed U.S. Equity Series a/k/a Defendant TX-16

Telendos, LLC

TFS Capital LLC

The Arbitrage Event- Driven Fund

The Arbitrage Fund

The Arbitrate Fund, DEF

The Bank of New York Mellon, Trustee a/k/a BNY Mellon MIDCAP SPDRS

The Bank of New York Mellon, Trustee a/k/a BNY Mellon MIDCAP SPDRS

The GDL Fund

The Hartford Life Insurance Company

The Sidney Kimmel Revocable Indenture of Trust

Thomas M. Murray PO N. Murray Jt Ten

TIAA-CREF Funds

TIAA-CREF Funds (TIAA-CREF Equity Index Fund)

TIAA-CREF Funds (TIAA-CREF Small-Cap Blend Index Fund)

Touchstone Funds Group Trust (Touchstone Arbitrage Fund) (Touchstone Credit Opportunities II Fund)

Touchstone Funds Group Trust (Touchstone Credit Opportunities II Fund)

Touchstone Funds Group Trust (Touchstone Merger Arbitrage Fund)

Towle Capital Partners II LP

Towle Capital Partners LP

Towle Deep Value Fund

Tradition Securities and Derivatives Inc.

Transamerica Asset Management, Inc.

Tudor Trading I, LP

Two Sigma Investments LP

U.S. Equity Market Fund

U.S. Equity Market Fund B

U.S. Small Cap Subtrust a/k/a Defendant TX-17

U.S. Small Company Fund

Unified Series Trust (Symons Small Cap Institutional Fund)

USAA Extended Market Index Fund

Valued Advisers Trust (Foundry Partners Fundamental Small Cap Value Fund)

Vanguard Index Funds (Vanguard Extended Market Index Fund)

Vanguard Index Funds (Vanguard Small Cap Index Fund)

Vanguard Index Funds (Vanguard Small-Cap Value Index Fund)

Vanguard Index Funds (Vanguard Total Stock Market Index Fund)

Vanguard Institutional Index Funds (Vanguard Institutional Total Stock Market Index Fund)

Vanguard Institutional Total Stock Market Index Trust

Vanguard International Equity Index Funds (Vanguard Total World Stock Index Fund)

Vanguard Russell 2000 Value Index Trust

Vanguard Scottsdale Funds (Vanguard Russell 2000 Index Fund)

Vanguard Scottsdale Funds (Vanguard Russell 2000 Value Index Fund)

Vanguard Valley Forge Funds (Vanguard Balanced Index Fund)

Vanguard World Fund (Vanguard Consumer Discretionary Index Fund)

Variable Annuity Life Insurance Company I - Small Cap Index Fund

Variable Annuity Life Insurance Company I - Small Cap Special Values Fund

Vericimetry U.S. Small Cap Value Fund

Virtu Americas LLC

Voya Russell Small Cap Index Portfolio

WCFS Inc.

Wells Fargo Disciplined Small Cap Fund f/k/a Wells Fargo Small Cap Opportunities Fund

Wisdom Tree Asset Management Inc.

WisdomTree U.S. SmallCap Dividend Fund

WisdomTree U.S. SmallCap Fund

Wolverine Asset Management

Appendix F

LIST OF RELATED CASES

United States Court of Appeals for the Second Circuit

Case Name	Case Number	Date of Entry of Judgment	Docket Number
Kirschner et al. v. Robeco Capital Growth Funds – Robeco BP U.S. Premium Equities et al.	20-3257	November 27, 2023	364
Kirschner et al. v. DFA Investment Dimensions Group Inc. U.S. Core Equity 1 Portfolio	20-3290	November 27, 2023	167
Wilmington Savings Fund Society, FSB v. Georgiadis et al.	20-3315	November 27, 2023	191
Kirschner v. Voya Russell Small Cap Index Portfolio	20-3326	November 27, 2023	152
Kirschner v. AQR Funds (AQR Diversified Arbitrage Fund)	20-3327	November 27, 2023	148

Case Name	Case Number	Date of Entry of Judgment	Docket Number
Kirschner et al. v. Los Angeles Capital Management & Equity Research Inc. et al.	20-3334	November 27, 2023	164
Kirschner et al. v. Schwab Capital Trust	20-3335	November 27, 2023	159
Kirschner et al. v. Advisors Series Trust (Kellner Merger Fund) et al.	20-3941	November 27, 2023	326
Kirschner v. Georgiadis et al.	20-3952	November 27, 2023	158
Wilmington Savings Fund Society, FSB v. Cade et al.	20-3959	November 27, 2023	152
Kirschner v. Cade et al.	20-3961	November 27, 2023	149
Wilmington Savings Fund Society, FSB v. Dickson et al.	20-3964	November 27, 2023	170
Kirschner et al. v. McClain et al.	20-3969	November 27, 2023	147
Kirschner v. Dickson et al.	20-3980	November 27, 2023	169

Case Name	Case Number	Date of Entry of Judgment	Docket Number
Kirschner et al. v. Kimmel et al.	20-3981	November 27, 2023	181
Wilmington Savings Fund Society, FSB v. Card et al.	20-3992	November 27, 2023	159
Kirschner v. Card et al.	20-3998	November 27, 2023	167

United States District Court
for the Southern District of New York

Case Name	Case Number	Date of Entry of Judgment	Docket Number
In re: Nine West LBO Securities Litigation	20-md-02941	August 28, 2020 November 19, 2020	318 390
Kirschner v. Cade et al.	20-cv-04265	November 19, 2020	72
Wilmington Savings Fund Society, FSB v. Cade et al.	20-cv-04267	November 19, 2020	64
Kirschner et al. v. McClain et al.	20-cv-04262	November 19, 2020	133
In re: Wilmington Savings Fund Society, FSB	20-cv-04286	August 28, 2020	88

Case Name	Case Number	Date of Entry of Judgment	Docket Number
In re: Marc S. Kirschner	20-cv-04292	November 19, 2020	105
Kirschner et al. v. DFA Investment Dimensions Group Inc US Core Equity 1 Portfolio et al.	20-cv-04299	August 28, 2020	67
Wilmington Savings Fund, FSB v. Card et al.	20-cv-04335	November 19, 2020	180
Kirschner v. Card et al.	20-cv-04346	November 19, 2020	172
Kirschner v. Card et al.	20-cv-04360	Not Entered	N/A
ABC v. DEF	20-cv-04433	November 19, 2020	134
Wilmington Savings Fund Society, FSB v. Card et al.	20-cv-04404	Not Entered	N/A
Kirschner et al. v. Kimmel et al.	20-cv-04287	November 19, 2020	217
Kirschner v. AQR Funds (AQR Diversified Arbitrage Fund)	20-cv-04289	August 28, 2020	28
Kirschner et al. v. Los Angeles Capital and Equity Research Inc. et al.	20-cv-04440	August 28, 2020	62

Case Name	Case Number	Date of Entry of Judgment	Docket Number
Kirschner v. Dickson et al.	20-cv-04436	November 19, 2020	154
Kirschner et al. v. Robeco Capital Growth Funds-Robeco BP U.S. Premium Equities	20-cv-04479	August 28, 2020	43
Kirschner et al. v. Schwab Capital Trust	20-cv-04480	August 28, 2020	39
Wilmington Savings Fund Society, FSB v. Dickson et al.	20-cv-04569	November 19, 2020	130
Kirschner v. Voya Russell Small Cap Index Portfolio et al.	20-cv-04434	August 28, 2020	24