No. __-____

IN THE

Supreme Court of the United States

IN RE: BOSTON GENERATING, LLC,

Debtor.

MARK HOLLIDAY, THE LIQUIDATING TRUSTEE OF THE BOSGEN LIQUIDATING TRUST,

Petitioner,

v.

CREDIT SUISSE SECURITIES (USA), *et al,*

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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December 18, 2024

QUESTIONS PRESENTED

1. In *Merit Management Group, LP* v. *FTI Consulting, Inc.*, 583 U.S. 366 (2018), this Court held that the "safe harbor" in § 546(e) of the Bankruptcy Code, which protects certain securities-related payments from a trustee's avoidance powers, applies only to the initial transfer from the debtor to the transferee. This Court referred to that initial transfer as the "overarching transfer" to ensure that the focus of the § 546(e) inquiry is on the substantive transfer the trustee seeks to avoid. The Second Circuit, however, completely misread *Merit* to hold that the relevant "overarching transfer" was a combination of the initial and subsequent transfers, what it called the "end-to-end transaction." Thus, with respect to the Second Circuit"s holding that the subject transfer is within the scope of § 546(e), the Question Presented is:

Does the Second Circuit's holding that courts may collapse an initial transfer with subsequent transfers to bring an initial transfer within the § 546(e) safe harbor conflict with this Court's decision *Merit* and expand § 546(e) well beyond the limits imposed by Congress?

2. A bankruptcy trustee may use § 548(a)(1)(A) of the Bankruptcy Code to avoid a transfer made with the actual intent to defraud creditors. The safe harbor in § 546(e) insulates certain constructive fraudulent transfers from avoidance under other sections of § 548(a), but it does not shield actual-

intent transfers under § 548(a)(1)(A). The Second Circuit, which oversees many of the nation's largest bankruptcies, holds that § 546(e) impliedly preempts *all* state-law fraudulent transfer claims by creditors, including state laws that closely resemble § 548(a). Thus, even if the Second Circuit did not err on the first question presented and the transfer was within the scope of 546(e), the Question Presented is:

Did the Second Circuit err in holding that state laws allowing creditors to recover actual-intent fraudulent transfers stand as an obstacle to the accomplishment of the full purposes and objectives of Congress set forth in § 546(e) when the § 546(e) safe harbor itself does not apply to actual-intent claims under § 548(a)(1)(A)?

PARTIES TO PROCEEDING

Petitioner Mark Holliday, plaintiff-appellant below, is the liquidating trustee of the BosGen Liquidating Trust. The BosGen Liquidating Trust was created in connection with the bankruptcy cases of Boston Generating, LLC, EBG Holdings LLC, Fore River Development, LLC, Mystic I, LLC, Mystic Development, LLC, BG New England Power Services, Inc., and BG Boston Services, LLC (collectively, the "Debtor Entities"). In accordance with the Final Cumulative Joint Plan of Liquidation of Boston Generating, LLC et al., all of the Debtor Entities have been dissolved and each of their cases has been closed.

Respondents, defendants-appellees below, are the following former equity holders in EBG Holdings LLC:

Credit Suisse Securities (USA) LLC

Credit Suisse (USA), Inc.

D. E. Shaw & Co., L.P.

D. E. Shaw Laminar Portfolios, L.L.C.

Goldman Sachs & Co. LLC

J.P. Morgan Securities LLC

Mason Capital Ltd.

Mason Capital Management LLC

Morgan Stanley & Co. LLC

RBS Holdings USA, Inc.

Taconic Capital Partners 1.5 LP

The Raptor Global Portfolio Ltd.

The Tudor BVI Global Portfolio L.P.

Tudor Proprietary Trading, L.L.C.

Tudor Investment Corporation

Ex Orbit, Ltd

Satellite Senior Income Fund, LLC

CMI Holdings Investments Ltd.

Castlerigg Partners, LP

Satellite Asset Management, LP

Sandell Asset Management Corporation

Satellite Overseas Fund Ltd.

The Apogee Fund, Ltd.

Satellite Fund IV, LP

Satellite Overseas Fund V, Ltd.

Satellite Overseas Fund VI, Ltd.

Satellite Overseas Fund VIII, Ltd.

Satellite Overseas Fund IX, Ltd.

Satellite Fund I, LP

Satellite Fund II, LP

EX Orbit Group, Ltd.

Satellite Overseas Fund VII, Ltd.

Anchorage Capital Master Offshore, Ltd.

Stonehill Institutional Partners, L.P.

Anchorage Capital Group, L.L.C.,
AKA Anchorage Advisors, LLC

Anchorage Capital Master Offshore II, Ltd.

Stonehill Capital Management LLC

Boston Generating Offshore Holdings, Ltd.

Cedarview Capital Management LP

Citigroup Alternative Investments LLC,
as successor in interest to Epic Asset
Management LLC

Epic Distressed Debt Opportunities
Fund Ltd.

Longacre Capital Partners (QP) LP

Longacre Master Fund, Ltd.

Harbinger Capital Partners, LLC

Boston Harbor Power LLC

Power Management Financing LLC

Harbinger Capital Partners Master Fund I,
Ltd., FKA Harbert Distressed Investment
Master Fund, Ltd.

Scottwood Capital Management LLC

Scottwood Fund, Ltd.

Trade Claim Acquisition LLC

Seneca Capital International Ltd.

Greenwich International Ltd.

Seneca Capital LP

DB Holdings Inc.

Epic Distressed Debt Holdings, Inc.

Latigo Master Fund, Ltd.

Cedarview EBG Holdings, Ltd.

Guggenheim Portfolio Co. XII LLC

Latigo Partner LP

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, the undersigned counsel for Petitioner certifies that Petitioner is an individual who is the Trustee of the BosGen Liquidating Trust. The BosGen Liquidating Trust does not have any parent corporations and no publicly held company owns 10% or more of its stock.

The Debtor Entities have been dissolved. None of them has any parent corporations and no publicly held company owns 10% or more of their stock.

RELATED PROCEEDINGS

United States Bankruptcy Court (S.D.N.Y.):

Holliday v. K Road Power Mgmt., No. 12-01879 (Opinion entered June 18, 2020)

Holliday v. K Road Power Mgmt., No. 12-01879 (Order entered June 19, 2020)

United States District Court (S.D.N.Y.):

Holliday v. Credit Suisse Sec. (USA) LLC, No. 20 CIV. 5404 (Sept. 13, 2021)

United States Court of Appeals (2d Cir.):

Holliday v. Credit Suisse Sec. (USA) LLC, No. 21-2543-BR (Sept. 19, 2024)

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The summary order of the Second Circuit (Pet. App. 1a-13a) is not published in the Federal Reporter but is available at 2024 WL 4234886. The memorandum decision and order of the district court (Pet. App. 14a-43a) is not published in the Federal Supplement but is available at 2021 WL 4150523. The memorandum opinion of the bankruptcy court (Pet. App. 44a-163a) is reported at 617 B.R. 442.

JURISDICTION

The Second Circuit's judgment was entered on September 19, 2024. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 546(e) of Title 11 of the United States Code provides:

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

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

Section 550(a) of Title 11 of the United States Code provides:

> Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b), or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from--
>
> > (1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or
> >
> > (2) any immediate or mediate transferee of such initial transferee.

Sections 544 and 548 of Title 11 of the United States Code are reproduced in the appendix (Pet. App. 166a-173a). The relevant provisions from the New York Uniform Fraudulent Conveyance Act, as set forth in the former sections 276 and 278 of the Debtor and Creditor Law applicable until April 3,

2020, are also reproduced in the appendix (Pet. App. 174a-175a).

STATEMENT OF THE CASE

This case arises from a leveraged recapitalization transaction in which Boston Generating LLC ("BosGen") ultimately collapsed into bankruptcy, leaving its creditors holding the proverbial bag. Prior to BosGen's bankruptcy, the insiders stripped over $700 million from the company by making a one-way distribution to BosGen's sole owner, EBG Holdings, LLC ("EBG"). The transfer from BosGen to EBG (the "BosGen Transfer") for no consideration constituted both an actual and constructive fraud on BosGen's creditors. EBG did not retain the proceeds of the fraudulent transfer. Instead, it used the $700 million to pay its own unitholders as part of an almost one-billion-dollar tender offer.

Because EBG also filed for bankruptcy, BosGen's creditors' only meaningful remedy was to pursue their state-law rights to unwind the fraudulent transfer to EBG and once unwound, recover the value of that transfer from EBG's equity owners who ultimately received the funds from EBG.[1] BosGen's creditors assigned their claims against

[1] The Trust pursues this action in the Bankruptcy Court as the assignee of certain claims of BosGen's and EBG's creditors to recover fraudulent transfers under the New York Debtor & Creditor Law.

EBG's equity holders to the BosGen Liquidating Trust for that purpose.

BosGen's creditors' state-law claims arise from deeply rooted law protecting creditors from fraudulent transfers; in fact, their claims are based on principles of Anglo-American law dating back almost 500 years. *See BFP v. Resol. Tr. Corp.*, 511 U.S. 531, 540 (1994); *Husky Int'l Elecs., Inc. v. Ritz*, 578 U.S. 355, 361 (2016) ("The principles of the Statute of 13 Elizabeth—and even some of its language—continue to be in wide use today.").

Section 546(e) is a limitation on a bankruptcy trustee's broad so-called "avoidance" powers under federal law. The limitation in § 546(e) generally prevents a trustee from avoiding otherwise fraudulent transfers that are securities-related payments made by or to an enumerated list of protected entities, including financial institutions (collectively, "Protected Entities"). 11 U.S.C. § 546(e).

The Second Circuit held that § 546(e) of the Bankruptcy Code impliedly preempted the creditors' state-law claims in this case. In doing so, the Second Circuit erroneously found, based on its misapplication of clear precedent from this Court, that the BosGen Transfer was both made to a Protected Entity and in connection with a securities contract. The court thus held that BosGen's creditors' state law claims were barred.

To reach this result, the Second Circuit fundamentally misinterpreted this Court's holding in

Merit Management Group., LP v. FTI Consulting, Inc., 583 U.S. 366 (2018) ("*Merit*"). In *Merit*, this Court resolved a circuit split regarding application of § 546(e). *Id.* at 377. The 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." *Id.* at 378. The Court referred to this "relevant transfer" as the "overarching transfer" to distinguish a transfer subject to avoidance under the substantive avoidance provisions of the Bankruptcy Code from such a transfer's "component parts," which are *not* subject to avoidance. *Id.*

The Eight Circuit, as well as several district courts in other circuits, have correctly understood this Court's holding in *Merit*. As these courts have recognized, the *Merit* decision never held that courts can, in applying the § 546 safe harbors, conflate the *initial* transfer the trustee seeks to avoid, which is relevant transfer under *Merit*, with *subsequent* transfers—a different type of transfer under the Bankruptcy Code that can be *recovered* if the initial transfer is avoided. Yet, the Second Circuit quoted *Merit*'s "overarching transfer" out of its context and interpreted it to mandate an analysis of what it referred to as the "end-to-end transaction," including any transfers subsequent to the initial transfer, in applying the § 546 safe harbors. The Second Circuit's holding finds no support in either *Merit* or the Bankruptcy Code and expands the safe harbor well beyond what Congress intended.

In addition to its complete misinterpretation of *Merit*, the Second Circuit held, without proper analysis, that Congress intended to preempt state-law claims to recover actual-intent fraudulent transfers, even though § 546(e) does not apply to similar transfers brought under substantially identical federal-law fraudulent-transfer provisions in the Bankruptcy Code. Because "any understanding of the scope of a preemption statute must rest primarily on "a fair understanding of congressional purpose," the Second Circuit should have considered that Congress exempted actual fraud from the reach of the safe harbor when deciding whether congress intended to bar similar state-law claim in the hands of creditors. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485–86 (1996).

The preemption issue in this case raises a distinct and more important policy question than *Deutsche Bank Trust Company Americas v. Robert R. McCormick Found.*, 141 S. Ct. 2552 (2021). In that case, which arose out of the Tribune bankruptcy, this Court declined to review the court's holding that § 546(e) preempted state-law constructive fraudulent-transfer claims, where § 546(e) applies to their federal bankruptcy law counterparts. 11 U.S.C. § 546(e). But here, the Second Circuit held that although Congress specified that intentionally fraudulent transfers are not safe harbored, Congress nevertheless somehow intended to impliedly preempt—and thus shield from liability—state law statutes that impose liability for the very same actual-intent transfers.

Most cases that concern securities-related transactions arise in the Second Circuit. Waiting for further "percolation" of the preemption issue would only serve to continue to permit recipients of actual fraudulent transfers to retain ill-gotten proceeds. This case presents a good vehicle to address the important question under the implied-preemption doctrine: Whether permitting creditors to recover actual-intent fraudulent transfers under state law creates an unacceptable "obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in passing the safe harbor in § 546(e). *See Wyeth v. Levine*, 555 U.S. 555, 563–64 (2009).

A. Statutory Framework

1. State law has historically given creditors the right to recover fraudulent transfers.

Every state has enacted a statute that gives creditors the power to unwind fraudulent transfers. The state-law creditor claims here arise under New York law, from the version of New York's fraudulent-transfer statute in place at the time of the relevant transfers. That statute contained the following provision regarding actual-intent fraudulent transfers: "Every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors."

N.Y. Debt. & Cred. Law § 276 (McKinney 2019). The statute provided that creditors can seek recovery of a fraudulent transfer from either the initial transferee (*i.e.*, the person or entity who receive the transfer from the debtor) or subsequent transferees (i.e., persons or entities to who receive traceable proceeds of the fraudulent transfer from the initial transferee). N.Y. Debt. & Cred. Law § 278 (McKinney 2019).

The most recent uniform act on fraudulent transfers, the Uniform Voidable Transactions Act, has now been passed in twenty-four states. Similar to the New York statute at issue here, that act contains provisions giving creditors the ability to unwind, or "void," both actual-intent and constructive fraudulent transfers as against the transferee of the *initial* transfer, and recover those transfers or their value from either *initial* transferees or *subsequent* transferees. *See generally* Unif. Voidable Transactions Act ("UVTA") §§ 7(a)(1), 8(b). The distinction between initial and subsequent transfers is important because, among other reasons, recipients of subsequent transfers are entitled to additional defenses. *Id.* § 8(b).

2. The Bankruptcy Code's "avoidance" and "recovery" provisions give bankruptcy trustees broad powers to recover transfers for the benefit of creditors.

The Bankruptcy Code creates additional, federal powers to avoid fraudulent transfers and vests them in the bankruptcy trustee. 11 U.S.C. §§ 544(b), 548(a). The Bankruptcy Code's own fraudulent-transfer provisions largely track state-law statutes. Specifically, the Bankruptcy Code gives a trustee the power to avoid both actual and constructive fraudulent transfers. *Id.* § 548(a). The Bankruptcy Code provision governing avoidance of transfers based on actual fraud provides, in pertinent part, that the "trustee may avoid any transfer . . . that was made or incurred on or within 2 years before the date of the filing of the petition, if the debtor voluntarily or involuntarily—made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted." *Id.* § 548(a)(1)(A).

The Bankruptcy Code further gives trustees the right to avoid any transfer that would have been avoidable by a creditor under otherwise "applicable law." *Id.* § 544(b). "This provision effectively enables the trustee to do in a bankruptcy proceeding what a creditor would have been able to do outside of bankruptcy—except the trustee will recover the

property for the benefit of the estate." *In re Equip. Acquisition Res., Inc.*, 742 F.3d 743, 746 (7th Cir. 2014). The "applicable law" is usually state fraudulent-transfer statutes (such as New York one at issue here), but it may also be federal law is certain cases. *See Kittay v. Korff (In re Palermo)*, 739 F.3d 99, 101–02 (2d Cir. 2014) ("The 'applicable law' in determining which obligations are voidable under Section 544(b)(1) is often state law."); *In re Graven*, 936 F.2d 378, 383 n.7 (8th Cir. 1991) ("Subsection 544(b) grants the trustee the power to avoid certain transfers of the debtor to the extent that a creditor with an allowable claim might avoid them under applicable state or federal law."); *see also In re Gaither*, 595 B.R. 201, 208 (Bankr. D.S.C. 2018) (holding that the majority of courts have "concluded that § 544(b) does permit a trustee to step into the shoes of the IRS and avail herself of federal law").

Whether under § 548(a) or § 544(b), only an initial transfer from the debtor to an initial transferee is subject to avoidance. But the Bankruptcy Code, like most state-law statutes, allows the plaintiff to recover the value of an avoided transfer from either an initial transferee or subsequent transferee. *Id.* § 550(a)(1), (2). Similar to state laws, recipients of subsequent transfers are entitled to additional defenses not available to initial transferees. *See id.* § 550(b). Although a bankruptcy trustee must bring an avoidance claim within two years of the debtor's bankruptcy, such trustees are given additional time to bring claims against subsequent transfer-

ees, further evidencing Congress's decision to treat initial and subsequent transfers differently from each other under the Bankruptcy Code. 11 U.S.C. §§ 546(a), 550(f).

3. The § 546 "safe harbor" provisions exempt certain securities-related transfers from a trustee's broad avoidance powers.

Congress enacted the predecessor to § 546(e), 11 U.S.C. § 764(c), to overrule the decision rendered by the district court in *Seligson v. New York Produce Exchange*, 394 F. Supp. 125 (S.D.N.Y. 1975). *See Merit*, 583 U.S. at 372. In *Seligson*, the plaintiff was the bankruptcy trustee of a commodities broker that brokered futures trades on the New York Produce Exchange. *Id.* The bankruptcy trustee brought an action to set aside payments of over $12 million in margin payments made to a clearing association by the debtor, alleging that the association was a fraudulent transferee. *Id.* The clearing association argued that it was not a "transferee" of the margin payments and thus could not be subject to fraudulent transfer liability. *Id.* The district court, however, found that factual issues existed that precluded a determination of the issue on a motion. As such, a market middleman became directly potentially liable as a recipient of a large fraudulent transfer.

Congress enacted the safe harbors in response to this decision to avoid the uncertainty of how the

courts would resolve this fact-intensive question by giving financial participants and intermediaries in the commodities markets a clear defense to actions brought against them as initial transferees.

Over the years, Congress expanded the safe harbor to include additional market participants, including those that participate in the securities industry, to address the same concerns as the original safe harbor. *See* Pub. L. No. 109-390, § 5(b), 120 Stat. 2692 (2006); Pub. L. No. 109-8, § 907(e), (o), 119 Stat. 23 (2005); Pub. L. No. 101-311, § 203, 104 Stat. 267 (1990); Pub. L. No. 98-353, § 351(2), 98 Stat 333 (1984); Pub. L. No. 97-222, § 4, 96 Stat. 235 (1982). But, as further described below, the text and structure of safe harbors demonstrates that Congress intended for them to apply solely to claims brought by bankruptcy trustees under the Bankruptcy Code.

In addition, the text and structure of the safe harbors show that Congress did not intend for the protections in those safe harbors to extend to subsequent transfers in cases where the initial transfer from the debtor was not subject to the safe harbors. Specifically, the safe harbors, including § 546(e), are within the section of the Bankruptcy Code on "[l]imitations on avoiding powers," not within § 550, the section governing "[l]iability of transferee of avoided transfer." Moreover, the safe harbors apply "notwithstanding" various avoidance provisions of the Bankruptcy Code rather than "notwithstanding § 550." *See* 11 U.S.C. § 546(e)

("Notwithstanding sections 544, 545, 547, 548(a)(1)(B), and 548(b) of this title . . . .").

B. Background

As a merchant seller of electricity, BosGen was subject to various market forces, and by early 2006, those forces, coupled with the expiration of BosGen's favorable contracts, signaled a dismal future, if not disaster, for BosGen. Thus, by mid-2006, the entities in control of BosGen were scheming to sell their interests in EBG (BosGen's parent) before everything collapsed. Pet App. 73a. Realizing that a sale would reveal the impending crisis, BosGen's controllers improvised, creating two sets of books for the companies. Pet App. 73a-74a. They then used the false set's inflated figures along with baseless projections to lure lenders into funding a transaction that would allow them and EBG's other owners to sell their LLC interests in EBG. Pet App. 74a.

BosGen's and EBG's respective lenders, however, did not realize they had been misled regarding the risk profile, expected performance, and solvency of BosGen and EBG. *See id.* As a result, the lenders were defrauded out of a total of $2.1 billion. *See id.*

Certain of the lenders provided $1.8 billion to BosGen via two credit facilities. *Id.* BosGen used $708 million of the funds it received to make an LLC distribution—*i.e.*, the "BosGen Transfer"—to EBG. *Id.* The BosGen Transfer rendered BosGen balance-sheet insolvent (*i.e.*, its liabilities exceeded

its assets), unable to pay its debts when they came due, and left it with unreasonably small capital. *Id.*

EBG received the proceeds of the $708 million BosGen Transfer into its general operating account at Bank of America. Pet. App. 65a. Thereafter, EBG funded a tender offer to those of its LLC unit holders who had opted to participate in the tender offer (the "EBG Tender Offer"). Pet. App. 65a-66a. To do so, EBG gave its cash, including the cash received from BosGen, to its agent for the tender offer, Bank of New York ("BONY"), which deposited the funds in EBG's segregated securities account. *Id*. BONY was responsible for accepting tendered LLC units and distributing the appropriate amount of cash to each EBG unit holder that tendered its LLC units pursuant to the terms of the EBG Tender Offer (the "EBG Settlement Payments"). Pet. App. 67a.

The transfers from BosGen to EBG had numerous badges of fraud. Pet. App. 50a, 75a, 107a. The only reason that BosGen had the ability to make the conveyances was because of the fraud its insiders had committed against the lenders. Pet. App. 75a. The transfers left BosGen hopelessly insolvent.

The Bankruptcy Court confirmed the Plan, which allowed the respective creditors of EBG and BosGen, including the lenders, to assign claims to the Trust. The Trust was created in 2011, and all creditors eligible to assign their claims to it did so. Pet. App. 70a. As relevant here, the Trust, on be-

half of BosGen's creditors, asserted claims under New York law to recover the BosGen Transfer. Pet. App. 72a-73a (*see* descriptions of Counts II and IV asserted on behalf of BosGen's creditors).

C. Procedural History

The U.S. Bankruptcy Court for the Southern District of New York had jurisdiction over this proceeding under 28 U.S.C. § 1334. On June 18, 2020, it entered a decision dismissing the Trustee's claims on the basis that they were preempted by § 546(e) of the Bankruptcy Code (Pet. App. 44a-163a), and on June 19, 2020, entered an order dismissing the claims (Pet. App. 164a-165a). On September 13, 2021, the U.S. District Court for the Southern District of New York affirmed. Pet. App. 14a-43a.

The Second Circuit issued its Summary Order on September 19, 2024, that affirmed the district court's decision on the ground that § 546(e) of the Bankruptcy Code preempted the state-law claims asserted in this case. Pet. App. Pet. App. 1a-13a.

REASONS FOR GRANTING THE PETITION

The safe harbor in § 546(e) "stands 'at the intersection of two important national legislative policies on a collision course-the policies of bankruptcy and securities law.'" *Enron Creditors Recovery Corp. v. Alfa, S.A.B. de C.V.*, 651 F.3d 329, 334 (2d Cir. 2011) (quoting *In re Resorts Int'l, Inc.*, 181

F.3d 505, 515 (3rd Cir.1999)). The Second Circuit is the epicenter of this collision course between those two important policies because most cases concerning securities-related fraudulent transfers arise in the circuit. Because the Second Circuit fundamentally misinterpreted *Merit* and its preemption analysis is seriously flawed, its erroneous decision should be corrected.

I. The Court Should Grant Certiorari Because the Second Circuit's Application of the Safe Harbor Is Irreconcilable with *Merit*.

In *Merit*, this Court was asked "to determine how the safe harbor operates in the context of a transfer that was executed via one or more transactions, *e.g.,* a transfer from A → D that was executed via B and C as intermediaries, such that the component parts of the transfer include A → B → C → D." 583 U.S. at 369–70. The Court held that if the trustee seeks to avoid the A → D transfer, courts should "look to the transfer that the trustee seeks to avoid (*i.e.,* A → D) to determine whether that transfer meets the safe-harbor criteria" rather than "to any component parts of the overarching transfer (*i.e.,* A → B → C → D)." *Id.* The Court "conclude[d] that the plain meaning of § 546(e) dictates that the only relevant transfer for purposes of the safe harbor is the transfer that the trustee seeks to avoid." *Id.* at 370. In doing so, the Court overruled several courts of appeals' decisions that a transfer was made "by" or "to" a "financial institution" be-

cause a party to a relevant transfer used a bank to make or receive the payment. *Id*. at 377 n.6.

Thus, when the Court referred to the "overarching transfer" it was deliberately referring to the relevant transfer from the debtor–transferor to the initial transferee of the alleged fraudulent transfer that is subject to avoidance pursuant to the substantive avoidance provisions of the Bankruptcy Code. In *Merit*, that transfer was from Valley View Downs (the debtor) to Merit Management (the initial transferee). *Id.* at 382, 386. There was no "relevant transfer" from Valley View Downs to an intermediary bank, Credit Suisse, or from Credit Suisse to a second intermediary, Citizens Bank. Thus, as the Court explained, "the Credit Suisse and Citizens Bank component parts are simply irrelevant to the analysis under § 546(e). The focus must remain on the transfer the trustee sought to avoid." *Id.* at 382. The trustee in *Merit* did not—and could not have—used the substantive avoiding powers to unwind either of those intermediary "transfers." This makes sense because a component part of transfer is not something that can be avoided and recovered for the benefit of creditors. Indeed, the intermediaries never had dominion and control over the transferred funds and thus, were not transferees under the Bankruptcy Code. Simply put, the intermediaries never received a "transfer" that could have been avoided. The "overarching transfer" in *Merit* was the transfer from the *debtor* to the *initial transferee—i.e.*, the transfer the trustee sought to avoid and the only transfer subject to

avoidance under Chapter 5 of the Bankruptcy Code.

The Second Circuit quoted the "overarching transfer" language from *Merit* out of context, and ignored *Merit's* holding that the relevant transfer is the one the trustee seeks to avoid, which under *Merit's* facts, happened to be the "overarching transfer." Completely misinterpreting the holding in *Merit*, the Second Circuit examined what it deemed the "end-to-end transaction to determine whether the safe harbor applies." (Pet. App. 12a-13a. But the so-called "end-to-end transaction" here was not an initial transfer subject to a trustee's avoidance powers or the transfer the Trustee sought to avoid.

Rather, the "end-to-end transaction" the Second Circuit examined was a "transfer" the Second Circuit completely made up—a "transfer" from BosGen to EBG's members. Pet. App. 13a. But BosGen did *not* make a transfer to EBG's members. Rather, as pleaded by the Trustee, transactions occurred as follows: First, BosGen (the debtor) transferred approximately $708 million to EBG (the initial transferee). Pet. App. 6a, 65a. Like in *Merit*, this transfer was effectuated through two intermediary banks—*i.e.*, BosGen wired the funds from its account at Bank of America to EBG's account at US Bank. *Id.* Upon completion of this transfer, EBG had dominion and control of the transferred funds, rendering it the initial transferee and subjecting the transfer to avoidance under the substantive avoidance provisions of both state law and the

Bankruptcy Code. This is the transfer the Trustee seeks to avoid on behalf of BosGen's creditors. What EBG did with the funds after it received this transfer is irrelevant to the Trustee's claims to avoid that initial transfer.

Second, demonstrating its dominion and control over the funds, EBG moved the funds from its US Bank account to an account it held it its name at BONY (along with some additional funds). Pet. App. 6a, 65a. This intracompany movement of funds is not a "transfer" that anyone could have avoided as fraudulent because EBG retained the funds both before and after the funds switched accounts. In other words, it was not a "transfer" as defined by either state law or the Bankruptcy Code because the "transfer" did not result in EBG disposing of or parting with any property or an interest in any property. *See* 11 USC § 101(54) (defining transfer).

Third, EBG made multiple transfers (*i.e.*, it disposed of or parted with property) from its BONY account to Defendants, which, from the perspective of BosGen and its creditors, were not initial transfers of BosGen's property but rather *subsequent* transfers of such property made by EBG. Pet. App. 67a-68a, 71a. Thus, the only transfer from BosGen —and the only relevant transfer for purposes of § 546(e) was the transfer from BosGen to EBG.

More specifically, to determine whether § 546(e) would have applied had this case been brought under the Bankruptcy Code, and thereby answer the

question of whether § 546(e) preempts Petitioner's state-law claims, the case must be analyzed under the paradigm set forth in the Bankruptcy Code. Had Petitioner, acting as BosGen's bankruptcy trustee, sued under the Bankruptcy Code (*i.e.,* under §544(b) or §548), there would have been only a single transfer subject to avoidance: the transfer from BosGen to EBG. This means that the BosGen-to-EBG transfer was the "overarching transfer" under *Merit*.

Here, BosGen's creditors had no ability to recover from EBG as the recipient of the relevant initial transfer because EBG subsequently transferred the funds to its members. But under the Bankruptcy Code (like many states' laws), a trustee does not need to directly sue an initial transferee to seek recovery from a subsequent transferee. *See In re Int'l Admin. Servs., Inc.*, 408 F.3d 689, 706 (11th Cir. 2005) ("In short, once the plaintiff proves that an avoidable transfer exists he can then skip over the initial transferee and recover from those next in line."). Thus, had this case proceeded under the Bankruptcy Code, Petitioner could and would have sought recovery (not avoidance) of the value of the transfer under § 550 from Defendants as *subsequent* transferees.

Because the § 546 safe harbors plainly do not apply to § 550, the subsequent transfers by EBG to Defendants are irrelevant for purposes of applying the safe harbor. The only question must be whether the initial transfer implicates a safe harbor. By in-

terpreting the "overarching transfer" as being the so-called "end-to-end transaction," the Second Circuit improperly conflated initial transfers and subsequent transfers and incorrectly held that § 546 bars an initial transfer if the subsequent transfer involved a securities-related transaction. The Second Circuit's holding finds no support in either the Bankruptcy Code or this Court's decision in *Merit*.

One other circuit court of appeals has considered the meaning of "overarching transfer." In *Kelley as Trustee of PCI Liquidating Trust v. Safe Harbor Managed Account 101, Ltd.*, the Eight Circuit recognized that the "overarching transfer" was the initial transfer, and not the subsequent transfer or a combination thereof. 31 F.4th 1058, 1065 (8th Cir. 2022). *Kelly* considered a claim "arising from the multi-billion-dollar fraud perpetuated by former Minnesota businessman Thomas Petters" *Id.* at 1061. The bankruptcy trustee obtained a default judgment against the initial transferee. *Id.* at 1063. The trustee then sought to recover that transfer from a subsequent transferee, which had made equity investments in the initial transferee. *Id.*

Unlike the Second Circuit, the Eighth Circuit correctly recognized that "the focus of the § 546(e) analysis is the *initial transfers*." *Id.* at 1064 n.5 (emphasis added) ("Hence, a subsequent transferee is protected indirectly to the extent that the initial transfer is not avoidable because of the safe harbor."). The Eighth Circuit thus held that *Merit* "clarifies that the relevant transfers for purposes of

§ 546(e) are the transfers from [the debtor] to [the initial transferee]." *Id.* at 1065.

In addition, opinions from district courts reveal that the Second Circuit's flawed decision has, at the very least, created unnecessary confusion regarding this Court's holding in *Merit*. In fact, in a recent case, a district court within the Second Circuit even struggled to reconcile *Merit* with the Second Circuit's opinion below. *See See In re IIG Glob. Trade Fin. Fund Ltd.*, No. 20-10132 (MEW), 2024 WL 4751276, at *17 (Bankr. S.D.N.Y. Nov. 8, 2024). In that case, the bankruptcy court could only reconcile *Merit* with the Second Circuit's decision below by assuming—incorrectly—that Petitioner had not pleaded "that a separate transfer had occurred (either a dividend or an intercompany transfer) from Boston Generating to EBG" and attacked [that separate transfer] as a fraudulent transfer." *Id.* at *17.[2] Of course, that is exactly what Petition-

[2] The experienced bankruptcy judge specifically noted the misinterpretation of *Merit* that persisted throughout the decisions below:

> There are points in the various *Boston Generating* decisions that discuss *Merit Management* as though it prohibits its courts from focusing on the "component" parts of a transaction, but that is not what *Merit Management* held. The Supreme Court held in *Merit Management* that if a trustee attacks a "component" part of a transaction the trustee must establish that the elements of a fraudulent transfer are established, but otherwise it held that courts should look no further than the transfer that a trustee seeks to challenge.

er did. The bankruptcy court then proceeded to effectively ignore the Second Circuit's decision, holding that "is not a proper reading of *Merit*" to say that the reference to the "overarching transfer" "compels me to collapse the entire series of transfers that occurred in this case, and compels me to ignore all of the separate sets of transfers that are alleged, in order to decide if section 546(e) applies." *Id.* at *14.

The bankruptcy court's decision is not a justification to allow further "percolation" of the issue. Instead, it is evidence that the Second Circuit fundamentally misinterpreted *Merit*, and that the decision needs to be corrected.

It is critical that courts correctly apply *Merit* when considering whether the safe harbor applies. In this case, the Second Circuit concluded that the BosGen Transfer fell within § 546(e) because it analyzed the wrong transfer. Had the Second Circuit analyzed the correct transfer—the *initial* transfer from BosGen to EBG—then it would have found that the transfer was neither made in connection with a securities contract nor made by or to a Protected Entity.

In particular, had the Second Circuit analyzed the correct transfer, precedent from that circuit demonstrates that the BosGen Transfer was not

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In re IIG Glob. Trade Fin. Fund Ltd., 2024 WL 4751276, at *17.

made by or to a financial institution or other Protected Entity. In *In Re Nine West LBO Securities Litigation,* the Second Circuit considered the definition of "financial institution" in the Bankruptcy Code, which, in pertinent part, defines such in institution as a "an 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." *Kirschner v. Robeco Capital Growth Funds (In Re: Nine W. LBO Sec. Litig.),* 87 F.4th 130, 145 (2d Cir. 2023) ("Nine West"), *cert. denied sub nom. Stafiniak v. Kirschner as Tr. of NWHI Litig. Tr.*, 144 S. Ct. 2551 (2024); 11 U.S.C. 101(22)(A) (defining "financial institution"). The Second Circuit held that a customer, such as BosGen here, is deemed a "financial institution" under the Bankruptcy Code only when (1) a bank is acting as the customer's agent in connection with the customer's securities contract and (2) that bank sends or received the relevant transfer (i.e., the transfer the trustee is seeking to avoid) in its capacity as an agent. *Nine West,* 87 F.4th at 145–46. The Nine West court referred to this reading of the definition of "financial institution" in the context § 546(e) as the "transfer-by-transfer" approach. *Id.*

Yet, because the Second Circuit here considered what it deemed the entire "end-to-end transaction"—as opposed to solely the relevant transfer—it effectively applied a "contract-by-contract" rather

than a transfer-by-transfer approach. Instead, contrary to the *Nine West* decision, the Second Circuit here considered additional transfers and purported agency relationships beyond the relevant transfer to conclude that § 546(e) applied to the BosGen Transfer.

In the present case, the only bank that acted as an agent in connection with a securities contract was BONY. Pet. App. 11a. BONY, however, did not send or receive the BosGen Transfer. Pet. App. 6a. Thus, under the transfer-by-transfer approach, neither BosGen nor EBG were financial institutions with respect to BosGen-to-EBG transfer. The panel concluded otherwise by considering the ultimate "end-to-end" transaction, including transfers subsequent to the on ethe Trustee seeks to avoid, in direct violation of *Merit*'s holding that the only relevant transfer is the one subject to avoidance—*i.e.*, the initial transfer and that transfer alone.

In summary, the Second Circuit's interpretation of the § 546(e) is irreconcilable with *Merit*. Accordingly, review is necessary.

II. Even If The Transfer Was Within the Scope of the Safe Harbor, The Second Circuit Further Erred When It Held that the Safe Harbor Impliedly Preempts State-Law Actual Fraud Claims.

1. Conflict preemption exists only where state law presents an obstacle to the "full purposes and objectives of Congress."

Congress may preempt state law through federal legislation. It may do so through express language in a statute. Congress may also implicitly preempt state law either through "field" preemption or "conflict" preemption. This case concerns purported conflict preemption.

Under precedent from this Court, conflict preemption exists only where "compliance with both state and federal law is impossible," or where "the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 376–77 (2015).[3]

[3] Justices Thomas and Gorsuch have urged abandoning the "conflict preemption" doctrine altogether. *Kansas v. Garcia*, 589 U.S. 191, 213 (2020) (Thomas, J., concurring); *Virginia Uranium, Inc. v. Warren*, 587 U.S. 761, 779 (2019) (opinion of Gorsuch, J.).

2. Congress did not intend to preempt state-law fraudulent-transfer claims because it specifically limited § 546(e) to claims arising under federal bankruptcy law.

Congress granted bankruptcy trustees powers to recover assets transferred by a debtor that far exceed those granted to creditors under state law. Indeed, whereas state law allows a creditor to recover a fraudulent transfer only to the extent necessary to satisfy its claim, the Bankruptcy Code permits a trustee to recover the entire transfer for the benefit of all creditors regardless of whether any single creditor (or creditors) would have been able to do so. *Acequia v. Clinton (In re Acequia, Inc.*,) 34 F.3d 800, 809 (9th Cir. 1994) ("[A] transaction that is voidable by a single, actual unsecured creditor may be avoided in its entirety, regardless of the size of the creditor's claim."); *see also Moore v. Bay*, 284 U.S. 4, 5 (1931).

As the breadth of a trustee's avoidance powers began to encroach upon and threaten other national policy concerns, Congress began placing certain limits on those powers. For instance, to protect certain charities from a trustee's avoidance powers, Congress enacted § 548(a)(2) and § 544(b)(2). Further, with respect to charitable contributions, Congress enacted an express preemption provision, which states that "[a]ny claim *by any person*" to recover such contributions "under Federal or State law . . . shall be preempted." 11 U.S.C. § 544(b)(2).

With respect to the securities and related industries, Congress enacted § 546(e) through § 546(g). Unlike the protections given to charities in § 544(b)(2), all these provisions expressly limit the avoidance powers granted to trustees under federal law. *See, e.g.*, § 546(e). There is no preemption provision. Simply put, nothing in the language of § 546, or the Bankruptcy Code as a whole, evinces an intent by Congress to have the safe harbors apply to the fraudulent-transfer rights granted to creditors under state law.

Nevertheless, the Second Circuit's analysis here is informed by its holding in *Tribune* that § 546(e) impliedly preempts state-law claims owned by individual creditors. To reach this extra-textual conclusion, the Second Circuit first found "ambiguities" in the language and structure of the Bankruptcy Code concerning the post-petition rights of creditors to pursue their pre-petition fraudulent transfer claims. *See In re Trib. Co. Fraudulent Conv. Litig.,* 946 F.3d 66, 88 (2d Cir. 2019) ("*Tribune II*") ("Whether, and to what degree, fraudulent conveyance claims become the property of a bankrupt estate was, at the time of Section 546(e)'s enactment, and now, anything but clear."); *id.* at 90 ("[T]he meaning of Section 546(e) with regard to appellants' rights to bring the actions before us is ambiguous. We must, therefore, look to its language, legislative history, and purposes to determine its effect."); *id.* at 94 (stating that the word "trustee" in the Bankruptcy Code is ambigu-

ous); *see also Nine West*, 87 F.4th at 150 (discussing *Tribune II*'s preemption holding).

But no such ambiguities exist, and this holding, which serves as the fundamental premise to the Second Circuit's preemption analysis, conflicts with the jurisprudence of numerous courts across the country. *See In re Vandevort*, No. BAP CC-09-1078-MOPAR, 2009 WL 7809927, at *6 (B.A.P. 9th Cir. Sept. 8, 2009) ("[T]he filing of a bankruptcy petition does not strip creditors of state-created rights to avoid transfers, it merely shifts that right to the creditors' representative."); *Nat'l Am. Ins. Co. Hatchett v. United States*, 330 F.3d 875, 886 (6th Cir. 2003) ("Though the trustee has the exclusive right to bring an action for fraudulent conveyance during the pendency of the bankruptcy proceedings, the Bankruptcy Code does not extinguish the right of the Government to bring a state law action for fraudulent conveyance after the debtor receives a discharge in bankruptcy."); *Nat'l Am. Ins. Co. v. Ruppert Landscaping Co.*, 187 F.3d 439, 441 (4th Cir. 1999) ("Until the trustee has abandoned his potential fraudulent conveyance action, the Sureties cannot proceed with their claims in district court. In fact, this circuit has explicitly held that until there is an 'abandonment' by the trustee of his claim the individual creditor has no standing to pursue it."); *Unisys Corp. v. Dataware Prod., Inc.*, 848 F.2d 311, 314 (1st Cir. 1988) ("It is clear to us that the right of action to sue DPI [the fraudulent transferee] and its principal officers, once aban-

donment by the trustee took place, reposed in Unisys [the creditor] free of any stay.").[4]

The context of other exceptions to avoidance powers further shows that Congress intended to limit § 546(e) to trustees. In fact, as stated above, Congress knew how to preempt state-law fraudulent-transfer claims and expressly did so for other types of transfers. Section 544(b)(2) exempts charitable contributions from the trustee's avoidance powers. But that section, unlike § 546(e), adds that "[a]ny claim by any person" to recover such contributions "under Federal or State law . . . shall be preempted." 11 U.S.C. § 544(b)(2) (emphasis added).

Because there are no ambiguities in the Bankruptcy Code regarding the meaning of the word "trustee' or whether creditors' fraudulent-transfer

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[4] *See also In re Integrated Agri, Inc.*, 313 B.R. 419, 427–28 (Bankr. C.D. Ill. 2004) ("A creditor regains standing to pursue a state law fraudulent conveyance action, in its own name and for its own benefit, once the statute of limitations expires on the bankruptcy trustee's right to bring the claim."); *In re Kampen*, 190 B.R. 99, 103–04 (Bankr. N.D. Iowa 1995) ("[T]here is support for the proposition that when a bankruptcy case closes without the trustee having pursued a state law claim under 11 U.S.C. § 544(b), the right to pursue that claim reposes once again in whomever is able to assert it." (internal quotations omitted)); *In re Leopard*, No. 2:13-CV-02251-RDP, 2014 WL 2740320, at *4 (N.D. Ala. June 17, 2014) (same); *In re Manton*, 585 B.R. 630, 636 (Bankr. N.D. Ga. 2018) (same); *In re Manchester Heights Assocs., L.P.*, 165 B.R. 42, 45 (Bankr. W.D. Mo. 1994) (same).

claims become property of the estate, the premise underlying the Second Circuit's preemption holding is wrong. A proper analysis and application of this Court's preemption jurisprudence would show that state-law fraudulent-transfer statutes do not stand "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in enacting the § 546(e) limitation on a trustee's avoidance powers under federal law.

3. At most, Congress intended to preempt state-law fraudulent-transfer claims based on constructive fraud, leaving creditors free to pursue transfers based on actual fraud.

The Second Circuit's holding below extends its incorrect implied preemption analysis to apply a safe harbor statute to state-law claims where even corresponding claims under federal are not safe harbored. A claim under federal bankruptcy law to avoid an actual fraudulent transfer is not protected by the safe harbors if asserted under § 548(a)(1)(A). *E.g.*, 11 U.S.C § 546(e); *see also Picard v. Ida Fishman Revocable Trust (In re Bernard L. Madoff Inv. Sec. LLC)*, 773 F.3d 411, 416 (2d Cir. 2014) (recognizing that "§ 546(e) is expressly inapplicable to claims of actual fraud brought under § 548(a)(1)(A)"). Congress's decision to exclude claims under § 548(a)(1)(A) from the safe harbors evidences a congressional belief that the policy reasons underlying the safe harbors did not extend to cases of transfers made with actual fraudulent in-

tent. *See Grede v. FCStone, LLC*, 746 F.3d 244, 253–54 (7th Cir. 2014) ("By enacting § 546(e), Congress chose finality over equity for most pre-petition transfers in the securities industry—*i.e.*, those not involving actual fraud."). The fact that a claim under § 548(a)(1)(A) is immune from the safe harbors dispels any notion that a similar state-law claim is repugnant to the purposes and objectives of Congress.

Congress's decision to have the safe harbor apply to all claims brought under § 544(b) does not clearly signal an intent to preempt all state-law claims in the hands of creditors when those claims are based on actual fraud. As set forth above, § 544(b) grants a bankruptcy trustee the far-reaching power to avoid "any transfer of an interest of the debtor in property . . . that is voidable under applicable law by a creditor holding an unsecured claim." Because "applicable law" is undefined, Congress made the decision to have 546(e) apply to it wholesale. There is some rational basis to include all claims under § 544(b) because, among other reasons, although most states have adopted a version of the UFTA or UVTA, there are significant variances among some states' laws. For instance, under South Carolina law, a creditor can avoid any transfer made without consideration so long as the debtor fails to repay the creditor, regardless of whether or not the debtor was solvent at the time of the transfer. *Vieira v. Think Tank Logistics LLC (In re Levesque)*, 661 B.R. 731, 768 (Bankr. D.S.C. 2024) (setting forth elements for a fraudulent-transfer

claim based on constructive fraud under South Carolina law). South Carolina law is thus vastly different from most states' laws and the Bankruptcy Code's own avoidance provisions.

Because there is potentially wide-ranging "applicable law" § 544(b)—including state law that does not resemble modern fraudulent-transfer statutes—Congress could reasonably have chosen to place all such claims within the § 546(e) harbor. But the decision to prevent trustees from relying on unspecified, potentially broad "applicable law" to avoid fraudulent transfers under the Bankruptcy Code does not clearly indicate that a creditor's state-law fraudulent-transfer claim with essentially the same elements as a claim under § 548(a)(1)(A) offends the policies underlying § 546(e).

Further, because § 548 is limited to transfers made "within 2 years before the date of the filing of the petition," the exception for cases of intentional fraud only applies to transfers made within two years of the debtor's bankruptcy. If creditors' state-law claims are preempted, then fraudulent transfers made more than two years prior to a debtor's bankruptcy cannot be recovered. There is simply no reasonable economic, policy-based, or equitable justification for the Bankruptcy Code to place a two-year clock on the protection of creditors from intentional fraudulent transfers. Unlike the Bankruptcy Code, most states' laws give creditors at least four

years to seek to unwind fraudulent transfers. *E.g.*, N.Y. Debt. & Cred. Law § 278.

In summary, because a claim pursuant to § 548(a)(1)(A) is nearly identical to a claim brought under New York state law here, there is no clearly articulated congressional purpose or objective that would preempt the BosGen's creditors' claims. Thus, even if § 546(e) preempted Petitioner's state-law constructive fraud claims, the Second Circuit erred in holding that Congress intended to preempt all state-law claims, including those based on actual fraud.

CONCLUSION

The Court has enough information available to correct the Second Circuit's fundamental misreading of *Merit*. There is little reason to await the views of additional courts when the decision is so clearly erroneous. And, with respect to the preemption issue, a lopsided percentage of cases concerning § 546(e), including the preemption question, arise in the Second Circuit. Further "percolation" is unlikely to result in new arguments. For all the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: December 18, 2024

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APPENDIX

UNITED STATES COURT OF APPEALS,
SECOND CIRCUIT.

21-2543-br

September 19, 2024

IN RE: BOSTON GENERATING, LLC,

Debtor.

Mark Holliday, the Liquidating Trustee of the BosGen Liquidating Trust,

Appellant,

v.

Credit Suisse Securities (USA) LLC, Credit Suisse (USA), Inc., D. E. Shaw & Co., L.P., D. E. Shaw Laminar Portfolios, L.L.C., Goldman Sachs & Co. LLC, J.P. Morgan Securities LLC, Mason Capital Ltd., Mason Capital Management LLC, Morgan Stanley & Co. LLC, RBS Holdings USA, Inc., Taconic Capital Partners 1.5 LP, the Raptor Global Portfolio Ltd., the Tudor BVI Global Portfolio L.P., Tudor Proprietary Trading, L.L.C., Tudor Investment Corporation, Ex Orbit, Ltd., Satellite Senior Income Fund, LLC, CMI Holdings Investments Ltd., Castlerigg Partners, LP, Satellite Asset Management, LP, Sandell Asset Management Corporation, Satellite Overseas Fund Ltd., the Apogee Fund, Ltd., Satellite Fund IV, LP, Satellite Overseas Fund V, Ltd., Satellite Overseas Fund VI,

Ltd., Satellite Overseas Fund VIII, Ltd., Satellite Overseas Fund IX, Ltd., Satellite Fund I, LP, Satellite Fund II, LP, Ex Orbit Group, Ltd., Satellite Overseas Fund VII, Ltd.,

Transferee Defendants,

Anchorage Capital Master Offshore, Ltd., Stonehill Institutional Partners, L.P., Anchorage Capital Group, L.L.C., a/k/a Anchorage Advisors, LLC, Anchorage Capital Master Offshore II, Ltd., Stonehill Capital Management LLC, Boston Generating Offshore Holdings, Ltd., Cedarview Capital Management LP, Citigroup Alternative Investments LLC, as Successor in Interest to Epic Asset Management LLC, Epic Distressed Debt Opportunities Fund Ltd., Longacre Capital Partners (QP) LP, Longacre Master Fund, Ltd., Harbinger Capital Partners, LLC, Boston Harbor Power LLC, Power Management Financing LLC, Harbinger Capital Partners Master Fund I, Ltd., f/k/a Harbert Distressed Investment Master Fund, Ltd., Scottwood Capital Management LLC, Scottwood Fund, Ltd., Trade Claim Acquisition LLC, Seneca Capital International Ltd., Greenwich International Ltd., Seneca Capital LP, DB Holdings Inc., Epic Distressed Debt Holdings, Inc., Latigo Master Fund, Ltd., Cedarview EBG Holdings, Ltd., Guggenheim Portfolio Co. XII LLC, Latigo Partner LP,

Appellees.

Appeal from a judgment of the United States District Court for the Southern District of New York (George B. Daniels, *Judge*), affirming the order of the Bankruptcy Court (Robert E. Grossman, *Bankruptcy Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court, entered on September 13, 2021, is **AFFIRMED.**

Attorneys and Law Firms

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Ginzburg, Herrick, Feinstein LLP, New York, New York, for Ex Orbit, Ltd., Satellite Senior Income Fund, LLC, CMI Holdings Investments Ltd., Castlerigg Partners, LP, Highland Crusader Offshore Partners, LP, Satellite Asset Management, LP, Sandell Asset Management Corporation, Satellite Overseas Fund Ltd., The Apogee Fund, Ltd., Satellite Fund IV, LP, Satellite Overseas Fund V, Ltd., Satellite Overseas Fund VI, Ltd., Satellite Overseas Fund VIII, Ltd., Satellite Overseas Fund IX, Ltd., Satellite Fund I, LP, Satellite Fund II, LP, EX Orbit Group, Ltd., and Satellite Overseas Fund VII, Ltd. William H. Gussman, Jr. and Frank W. Olander, Schulte Roth & Zabel LLP, New York, New York, for Anchorage Capital Master Offshore, Ltd., Stonehill Institutional Partners, L.P., Anchorage Capital Group, L.L.C. a/k/a Anchorage Advisors, LLC, Anchorage Capital Master Offshore II, Ltd., Stonehill Capital Management LLC, Boston Generating Offshore Holdings, Ltd., Cedarview Capital Management LP, Citigroup Alternative Investments LLC, as successor in interest to Epic Asset Management LLC, Epic Distressed Debt Opportunities Fund Ltd., Longacre Capital Partners (QP) LP, and Longacre Master Fund, Ltd. Ramsey Hinkle and Brian D. Linder, Clayman & Rosenberg LLP, New York, New York, for Sandell Asset Management Corp., CMI Holdings Investments, Ltd., and Castlerigg Partners, L.P. Matthew D. McGill, Gibson, Dunn & Crutcher LLP, Washington, District of Columbia; Dean A. Ziehl, Pachluski Stang Ziehl & Jones LLP, New York, New York, for Harbinger Capital Part-

ners, LLC, Boston Harbor Power LLC, Power Management Financing LLC, and Harbinger Capital Partners Master Fund I, Ltd., f/k/a Harbert Distressed Investment Master Fund, Ltd.

PRESENT: SUSAN L. CARNEY, JOSEPH F. BIANCO, ALISON J. NATHAN, Circuit Judges.

SUMMARY ORDER

Plaintiff-Appellant Mark Holliday, the Liquidating Trustee of the BosGen Liquidating Trust (the "Trustee"), appeals from the district court's affirmance of an order of the Bankruptcy Court for the Southern District of New York that dismissed the Trustee's fraudulent conveyance claims on the ground that the Bankruptcy Code's securities safe harbor provision, 11 U.S.C. § 546(e), pre-empted such state-law claims.

Where, as here, a district court conducts appellate review of a bankruptcy court's decision in the first instance, "we engage in plenary, or de novo, review of the district court decision" and "then apply the same standard of review employed by the district court to the decision of the bankruptcy court." *In re Anderson*, 884 F.3d 382, 387 (2d Cir. 2018). Thus, "we review the bankruptcy court's findings of fact for clear error and its legal determinations de novo." *Id.* In applying those principles here, we assume the parties' familiarity with the underlying

facts, procedural history, and issues on appeal, to which we refer only as necessary to explain our decision to affirm for substantially the same reasons articulated by both the district and bankruptcy courts. *See generally In re Bos. Generating LLC*, 617 B.R. 442 (Bankr. S.D.N.Y. 2020), *aff'd sub nom. Holliday v. Credit Suisse Sec. (USA) LLC*, No. 20-cv-5404 (GBD), 2021 WL 4150523 (S.D.N.Y. Sept. 13, 2021).

This case arises out of a leveraged recapitalization transaction by EBG Holdings LLC ("EBG") and its wholly-owned subsidiary Boston Generating LLC ("BosGen"), several years prior to BosGen's bankruptcy filing, under which EBG's members received cash distributions in exchange for their equity interests in EBG (the "Leveraged Recap Transaction"). The Leveraged Recap Transaction included a $925 million tender offer (the "Tender Offer") and a $35 million dividend distribution (the "Dividend"), which were financed in large part using two credit facilities entered into by BosGen. Specifically, BosGen's lenders disbursed proceeds from the credit facilities into a BosGen account at U.S. Bank, and within a matter of days, BosGen transferred approximately $708 million to an EBG account at Bank of America (the "BosGen Transfer"), and EBG sent the proceeds to Bank of New York ("BONY") to execute the Leveraged Recap Transaction. The Trustee now seeks to claw back the $708 million BosGen Transfer from Defendants-Appellees ("Defendants"), who received pay-

ments for their equity securities pursuant to the Leveraged Recap Transaction.

Defendants maintain that the Bankruptcy Code's safe harbor provision shields those payments from the power of avoidance vested in the Trustee. The Bankruptcy Code provides that "[n]otwithstanding [the substantive avoidance powers set forth in] this title, the trustee may not avoid a transfer that is a . . . settlement payment . . . or . . . transfer made by or to (or for the benefit of) a . . . financial institution . . . in connection with a securities contract[.]" 11 U.S.C. § 546(e). Section 546(e) is an affirmative defense; thus, Defendants "bear the burden of demonstrating that the transfers fall within the safe harbor." *In Re: Nine W. LBO Sec. Litig.*, 87 F.4th 130, 144 (2d Cir. 2023) ("*Nine West*"), *cert. denied sub nom. Stafiniak v. Kirschner as Tr. of NWHI Litig. Tr.*, 144 S. Ct. 2551 (2024).

The Trustee argues, *inter alia*, that the safe harbor provision does not apply to the BosGen Transfer because: (1) it was neither a settlement payment nor a transfer made in connection with a securities contract because it preceded execution of the Tender Offer and BosGen was not a party to the Tender Offer; and (2) neither BosGen nor EBG was a financial institution at the time of the BosGen Transfer under Section 101(22)(A), because neither was a customer of BONY in connection with the Tender Offer. We disagree.

First, for substantially the same reasons stated by the district court in its thorough and wellreasoned

decision, we conclude that the bankruptcy court did not err in finding that the BosGen Transfer was executed in connection with a securities contract. BosGen's credit facility agreements, which the Trustee attached to its complaint, expressly contemplated that the proceeds from the loans would be used "to fund the Distribution and Tender Offer of EBG" and that BosGen would transfer the proceeds to EBG for that express purpose. App'x at 339 (First Lien Credit and Guaranty Agreement); *see also id.* at 460 (Second Lien Credit and Guaranty Agreement). BosGen effectuated the transfer of $708 million to EBG's Bank of America account accordingly, with instructions that the funds be "use[d]" for EBG's "Distribution, Unit Buyback and Warrants Repurchases." App'x at 613; *see also id.* at 616.

"Congress signaled [in drafting and amending Section 546(e)] that the exception applies to the *overarching* transfer that the trustee seeks to avoid, not any component part of that transfer." *Merit Mgmt. Grp., LP v. FTI Consulting, Inc.*, 583 U.S. 366, 379 (2018) (emphasis added). As the district court and bankruptcy court correctly determined, the credit facility agreements establish that "all the parties to the Leveraged Recap Transaction, including the lenders for the first and second credit facilities, knew that [BosGen] would transfer a portion of its loan proceeds to achieve the goal of the Leveraged Recap Transaction, funding the Tender Offer," 2021 WL 4150523, at *3, and that "BosGen and EBG clearly intended for the proceeds from the

Credit Facilities to be used, in part, to fund the Distribution and the Tender Offer," 617 B.R. at 456 (internal quotation marks omitted). Thus, the bankruptcy court was correct in rejecting the Trustee's contention that the elements of the safe harbor protection should be analyzed independently with respect to each "component part of" the Leveraged Recap Transaction. *See Merit Mgmt. Grp.*, 583 U.S. at 379.

Moreover, the Trustee's argument that the BosGen Transfer was not made in connection with a securities contract because BosGen was not a party to the tender offer is unavailing.[1] Even assuming *arguendo* that Section 546(e) requires that the debtor be a party to the securities contract,[2] the plain text of EBG's Offer to Purchase for the Tender Offer makes clear that BosGen was party to the contract as an EBG subsidiary. App'x at 644 (stating that "[t]he valid tender of Units by you . . . will constitute a binding agreement between you and us"); *id.* at 626 (defining "we" or "us" to mean "EBG . . .

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[1] There is no dispute that the Tender Offer constitutes a securities contract under the Bankruptcy Code.

[2] The Trustee cites no case law to support its argument that a debtor must be a party to a securities contract in order for the safe harbor provision to apply. Indeed, such a proposition is contrary to this Court's precedent. *See In re Bernard L. Madoff Inv. Sec. LLC*, 773 F.3d 411, 421–22 (2d Cir. 2014) (concluding that, under Section 546(e), "a transfer is 'in connection with' a securities contract if it is 'related to' or 'associated with the securities contract' " and that Section 546(e) "sets a low bar for the required relationship between the securities contract and the transfer sought to be avoided").

together with its subsidiaries"). As the bankruptcy court correctly determined, "[t]he Tender Offer was a contract among BosGen, EBG, and EBG's members." 617 B.R. at 486. Furthermore, the Trustee does not dispute that the Tender Offer was effectuated pursuant to that contract as written or that BosGen provided funds specifically for the purpose of making payments to EBG members tendering their units in connection with that contract.[3]

Second, the bankruptcy court did not err in finding that BosGen and EBG each constitute a "financial institution" under Section 101(22)(A). "[T]he 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.'" *Nine West*, 87 F.4th at 145 (emphasis omitted) (quoting 11 U.S.C. § 101(22)(A)). We have previously held that a debtor is a "customer" of a bank with respect to a transaction when that bank "received and held [the debtor's] deposit of the aggregate purchase price for the shares. . . . , received tendered shares, retained them on [the debtor's] behalf, and paid the tendering shareholders." *In re Trib. Co. Fraudulent Conv. Litig.*, 946 F.3d 66, 78 (2d Cir. 2019). In *Nine West*, we reaffirmed that a sufficient agency relationship under Section 101(22)(A) is established as

[3] Because we decide that the BosGen Transfer was made "in connection with a securities contact," we need not discuss the district court's alternative holding that it was also a "settlement payment." *See* 11 U.S.C. § 741(8).

a matter of law where "[t]he Complaint alleges and related documents show that [a bank] made payments to, and received information from, [a debtor's shareholders] during the" relevant transactions. 87 F.4th at 146.

Here, BosGen and EBG retained BONY as their agent "to act as Depository in connection with the [Tender] Offer." App'x at 663. As depository, BONY received the required documentation from members who sought to tender their units, and made payments to the tendering members with funds from the BosGen Transfer on behalf of EBG and BosGen. *See In re Trib. Co. Fraudulent Conv. Litig.*, 946 F.3d at 78–80. Indeed, the Tender Offer explained that EBG and BosGen "will pay for Units purchased pursuant to the Offer by depositing the aggregate determined purchase price for the Units with the Depository, which will act as agent for tendering [m]embers for the purpose of receiving payment from [EBG and BosGen] and transmitting payments to the tendering [m]embers." App'x at 648. In addition, BosGen, together with EBG, "maintained control over the transactions" performed by BONY in connection with the Tender Offer, *Nine West*, 87 F.4th at 146, because the tendered units were deemed "accepted" for payment and purchase only if BosGen and EBG gave "notice to [BONY] of [their] acceptance." App'x at 648. Under these facts, BONY indisputably acted as an agent for BosGen and EBG in connection with their Tender Offer. *Cf. Nine West*, 87 F.4th at 147–48 (finding no agency relationship between debtor and

bank with respect to transaction in which "shares were canceled automatically" and "it [was] not clear [the debtor] had any authority to control [the bank's] actions in canceling the shares"). Accordingly, the bankruptcy court did not err in finding that BosGen and EBG are each a "financial institution" as a matter of law with respect to the BosGen Transfer that the Trustee seeks to avoid. These facts, which the lower courts drew from the complaint and its exhibits, establish that Defendants are entitled to the safe harbor as a matter of law.

Our rejection of the district court's "contract-by-contract" approach in *Nine West* does not change this analysis. To be sure, we determined in that case that the district court erred in holding that "once Wells Fargo acted as Nine West's agent in one transaction, it is considered Nine West's agent in all the transactions" made in connection with the relevant leveraged buyout, including those in which the bank played no role. *Nine West*, 87 F.4th at 146. Accordingly, we held that the safe harbor applied only when Nine West's bank "made payments to, and received information from, the Public Shareholders during the" relevant transactions "on behalf of" Nine West, and Nine West "maintained control over the transactions." *Id.* However, this does not impact *Merit*'s mandate that we look to the character of the "overarching transfer" to assess the applicability of Section 546(e). *See* 583 U.S. at 379. Thus, even under *Nine West*'s transfer-by-transfer approach, we look to the end-to-end

transaction to determine whether the safe harbor applies.

In sum, because the BosGen Transfer constitutes a "transfer made . . . in connection with a securities contract" by a qualifying financial institution, it is entitled as a matter of law to the protection of Section 546(e)'s safe harbor, which pre-empts the Trustee's state-law fraudulent conveyance claims. *Nine West*, 87 F.4th at 150 (holding that state-law claims that conflict with Section 546(e)'s purpose are pre-empted).

* * *

We have considered the Trustee's remaining arguments and find them to be without merit. Accordingly, we **AFFIRM** the judgment of the district court.

UNITED STATES DISTRICT COURT,
S.D. NEW YORK.

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20 Civ. 5404 (GBD)

Signed 09/10/2021

Filed 09/13/2021

Mark HOLLIDAY, the Liquidating Trustee of the BosGen Liquidating Trust,

Plaintiff-Appellant,

v.

CREDIT SUISSE SECURITIES (USA) LLC, et al.,

Defendants-Appellees.

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MEMORANDUM DECISION AND ORDER

GEORGE B. DANIELS, United States District Judge:

Plaintiff-Appellant Mark Holliday, liquidating trustee of the Boston Generating, LLC ("Boston-Gen") Liquidating Trust, initiated the above-captioned matter before this Court, appealing a dismissal of the Third Amended Complaint ("Complaint") by the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court"). Specifically, Plaintiff-Appellant appeals Judge Robert E. Grossman's (1) June 18, 2020 Memorandum Opinion and (2) June 19, 2020 Order (together, the "June Opinion and Order"), dismissing Plaintiff-Appellant's fraudulent conveyance claims.[1] (Appellant's Br., Appendix ("Appellant's App."), ECF No. 6, A721, A803.) Judge Grossman's dismissal is hereby AFFIRMED.

I. FACTUAL BACKGROUND

A. The Leveraged Recapitalization Transaction.

In October 2006, EBG Holdings LLC's ("EBG") board of directors approved a leveraged recapitalization transaction, which consisted of EBG, a holding company with no significant independent business operations, and its main operating entity,

[1] The Bankruptcy Court also dismissed Plaintiff-Appellant's unjust enrichment claim but Plaintiff-Appellant does not appeal that dismissal. (Appellant's Br. at 2 n.7.)

Boston Generating, LLC ("BostonGen"), borrowing funds from lenders to, *inter alia*, fund a $925 million tender offer and a $35 million dividend (the "Leveraged Recap Transaction"). (Appellees' App., ECF No. 7-1, AA0005, AA003; Appellants' App. at A165 ¶1, A172 ¶27, A206 ¶117, A209 ¶125.) Pursuant to the Leveraged Recap Transaction, EBG redeemed member equity units and warrants and paid a dividend to EBG members (the "Tender Offer"). (Appellant's App. at A165.) Notably, the Tender Offer was conditioned upon EBG and BostonGen's receipt of financing as contemplated by the Leveraged Recap Transaction. (*Id.* at A700, A703.)[2]

B. The Credit Facilities.

On December 4, 2006, BostonGen presented the Leveraged Recap Transaction to a group of lenders, informing them that BostonGen and EBG "intend[ed] to enter into $2.1 billion of credit facilities in connection with the proposed recapitalization" and that "$1.025 billion will be used to fund 'Unit Buyback Distribution and Warrants Repur-

[2] Plaintiff-Appellant appeals the Bankruptcy Court's determination that EBG and BostonGen were parties to the "Offer to Purchase" dated November 16, 2006, contending that BostonGen was not a party because the Offer to Purchase explicitly states that EBG "is offering to purchase" member units. (Appellant's Br. at 24 (citing Appellant's App., at A681).) Since this Court finds below that BostonGen is a "financial institution" as that term is defined in Section 101(22), regardless of whether BostonGen was a party to the Tender Offer, it need not reach the issue.

chase.'" (Decl. of William H. Gussman, Jr., *In re Boston Generating*, *LLC*, *et al.*, AP Case No. 12-01879 (Bankr. S.D.N.Y. Nov. 1, 2013), ECF No. 152-4 ("Lender Presentation"), at 1–2; *see also* Appellant's App. at A729.)[3]

On December 21, 2006, BostonGen entered into two credit facility agreements that required BostonGen to use a portion of the proceeds from each to "fund the Distribution and Tender Offer of EBG Holdings." (Appellants' App., at A208 ¶ 122; *id.* at A390 § 2.14(a), A511 § 2.14.) Thereafter, US Bank National Association ("US Bank") acted as "Depositary" for BostonGen in connection with the receipt and disbursement of proceeds from the credit facilities. (*Id.* at A660.) Indeed, in the "Closing Date Funds Flow Memorandum" dated December 21, 2006 that it sent to US Bank (the "FFM"), BostonGen instructed US Bank to, *inter alia*, accept the proceeds from the credit facilities on the closing date and disburse the funds in accordance with the disbursements listed in the FFM. (*Id.*) US Bank, then, "transferred approximately $708 million to fund the unit buyback, warrant redemption and member distribution" and "approximately $50 million [ ] to pay fees and expenses incurred in connection with the closing of the" credit facilities. (*Id.* at A209 ¶ 124, A664.) Regarding the $708 million

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[3] "A court may [ ] take judicial notice of 'relevant matters of public record.'" *In re Trib. Co. Fraudulent Conv. Litig.*, No. 12 Civ. 2652 (DLC), 2019 WL 1771786, at *5 (S.D.N.Y. Apr. 23, 2019) (quoting *Giraldo v. Kessler*, 694 F.3d 161, 164 (2d Cir. 2012)).

transfer, US Bank distributed those funds to EBG's Bank of America ("BofA") account (the "BofA transfer"). (*Id.* at A663–A665.) EBG then caused the funds to be transferred to its BONY account, (the "BONY transfer," but together with the BofA transfer, the "BostonGen Transfer"), for distribution in connection with the "Distribution, Unit Buyback and Warrants Repurchase." (*Id.*)

EBG then entered the "Mezzanine Credit Facility," which similarly required EBG to use a portion of the proceeds to fund its distribution and Tender Offer. (*Id.* ¶ 123; Appellant's App. at A620 § 2.13.) On December 26, and December 28, 2006, EBG disbursed these proceeds, together with the BostonGen Tranfer, as follows: to pay "dividends on EBG's members' equity interests" (the "$35 Million Distribution"), "to redeem EBG's members' equity units," and to pay "for the redemption of warrants." (*Id.* at A209 ¶ 125.)

C. The Bankruptcy Proceedings.

On August 18, 2010, Debtors[4] filed a "[v]oluntary [p]etition for relief under Chapter 11 of Title 11 of the United States Code" in the Bankruptcy Court. (*Id.* at A165 ¶ 1 n.1, A181–A182 ¶ 59.) On August 31, 2011, the Bankruptcy Court confirmed the "Final Cumulative Joint Plan of Liquidation of

[4] The Debtors are BostonGen, EBG, Fore River Development, LLC, Mystic I, LLC, Mystic Development, LLC, BG New England Power Services, Inc., and BG Boston Services, LLC. (Appellant's App. at A165 n.1.)

Boston Generating, LLC et al." (the "Plan"), which created a liquidating trust and appointed a liquidating trustee. (*Id.* at A165 ¶ 1 n.1, A181–A182 ¶ 59.) Plaintiff-Appellant alleges that the liquidating trustee is the assignee of the "Class 4B claim holders" unsecured claims related to the Leveraged Recap Transaction. (*Id.* at A737; *see also id.* A167 ¶ 4, A181–A182 ¶ 59–60.) "The claims and causes of action of such creditors are Liquidating Trust Assets. . . ." (*Id.* at A1 82–A183 ¶ 61.)

On August 17, 2012, the first liquidating trustee filed an adversary proceeding in the Bankruptcy Court. (*Id.* at A19.) On August 1, 2013, Mark Holliday, successor liquidating trustee, filed an amended complaint. (*Id.* at A28, A181–A182 ¶ 59.) On January 10, 2014, the Trustee sought leave to file a second amended complaint which the Bankruptcy Court denied. (*Id.* at A36–A37.) On April 3, 2019, the Trustee sought leave to file a third amended complaint and, after Defendants-Appellees consented, the Bankruptcy Court granted Plaintiff-Appellant's motion on April 24, 2019. (*Id.* at A46.) Defendants-Appellees moved to dismiss the Complaint. After hearing oral argument twice, the Bankruptcy Court entered the June Opinion and Order, dismissing the Complaint. (*Id.* at A801–A802.)

Particularly relevant to the present appeal, the Bankruptcy Court (i) dismissed Plaintiff-Appellant's state law fraudulent conveyance claims (counts one to four of the Complaint), concluding that the BostonGen Transfer and the $35 Million

Distribution are safe harbored by Section 546(e), and (ii) concluded that Section 546(e) preempts those claims. (*Id.*) Plaintiff-Appellant timely filed an appeal on July 14, 2020. (Notice of Appeal, ECF No. 1.)

II. LEGAL STANDARD

A. Review of Bankruptcy Court Orders.

This Court has jurisdiction over appeals from bankruptcy court judgments, orders or decrees pursuant to 28 U.S.C. § 158(a). This Court reviews a bankruptcy court's findings of law *de novo* and its findings of fact for clear error. *See In re AMR Corp.*, 764 F. App'x 88, 89 (2d Cir. 2019); *In re Vebeliunas*, 332 F.3d 85, 90 (2d Cir. 2003). In reviewing the bankruptcy court's determinations, this Court may rely upon any ground supported by the record—it need not rely solely upon those relied upon by the Bankruptcy Court. *See Krakowski v. Am. Airlines, Inc.*, 610 B.R. 714, 720 (S.D.N.Y. 2019); *Freeman v. Journal Register Co.*, 452 B.R. 367, 369 (S.D.N.Y. 2010).

III. THE BOSTONGEN TRANSFER IMPLICATES THE SECTION 564(e) SAFE HARBOR

A. The Relevant Transfer.

Plaintiff-Appellant contends that the BofA transfer is the relevant transfer because that is the transfer he seeks to avoid in Counts II and IV of the Com-

plaint. (Appellant's Br. at 20; Appellant's App. at A233 ¶ 164, A228 ¶ 186.) He further argues that the Bankruptcy Court misapplied *Merit* and, instead of "analyzing the transfer as pleaded," the court concluded that the relevant transfer included the BONY transfer. (Appellant's Br., at 21–22 (citing Appellant's App., at A733–34).) Defendants-Appellees, on the other hand, contend that the "'overarching transfer' was the payment by the Debtors of nearly $1 billion . . . to their shareholders in satisfaction of their equity interests." (Appellees' Br., at 25.)

The analysis must begin with the Supreme Court's holding in *Merit*. There, the Court addressed "how the [§ 546(e)] safe harbor operates in the context of a transfer that was executed via one or more transactions." *Merit Mgmt. Grp., LP v. FTI Consulting, Inc.*, 138 S. Ct. 883, 888 (2018). Specifically, to accomplish a stock acquisition, the acquiring entity caused its lender to wire the purchase price to a third-party escrow agent, who then disbursed payment to the target entity's shareholders and in exchange collected their stock certificates. *Id.* at 891.

The 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" —the "end-to-end" transfer from the acquiring entity to the defendant-shareholder—as opposed to "any component part of that transfer"—the transfer between the intermediaries. *Merit*, 138 S. Ct. at 893. Thus, in the present case, this Court must

determine what is the relevant transfer for the § 546(e) safe harbor inquiry in accordance with *Merit's* holding.

Contrary to Plaintiff-Appellant's contention, *Merit* does not support the proposition that a court must analyze a transfer divorced from its context. While *Merit* does instruct that the relevant transfer is the one "that the trustee seeks to avoid," a court need not rely on a trustee's definition of the relevant transfer if that definition is challenged. (*Id.*) Indeed, *Merit* instructs that "the trustee is not free to define the transfer that it seeks to avoid in any way it chooses." *Merit*, 138 S. Ct. at 894, A court must instead refer to "the substantive avoiding power" which provides guidance for determining the relevant transfer. As *Merit* explains, the relevant transfer is the one "that the trustee seeks to avoid as an exercise of" the substantive avoiding power. *Id.* at 893. Here, Plaintiff-Appellant pursues New York fraudulent conveyance claims. Thus, the relevant transfer is defined by reference to New York law. (Appellant's App. at A216–A228.)

"[A]n allegedly fraudulent conveyance must be evaluated in context; '[w]here a transfer is only a step in a general plan, the plan must be viewed as a whole with all its composite implications.'" *Orr v. Kinderhill Corp.*, 991 F.2d 31, 35 (2d Cir. 1993) (citations omitted). At the heart of this case is the Leveraged Recap Transaction, the purpose of which was to complete a unit buyback, warrant redemption and member distribution, (Appellant's App. at A165 ¶ 1.) The BostonGen Transfer was an integral

transfer in the Leveraged Recap Transaction. (Appellant's App. at A209 ¶¶ 124-25, A220 ¶¶ 159–60, A226 ¶ 178.) Plaintiff-Appellant, however, challenges the BostonGen Transfer in a piecemeal fashion by seeking to avoid one component, the BofA Transfer, but the context of the Leveraged Recap Transaction cannot be ignored. That context informs that the overarching transfer that Plaintiff-Appellant seeks to avoid is the BostonGen Transfer.

Indeed, all the parties to the Leveraged Recap Transaction, including the lenders for the first and second credit facilities, knew that BostonGen would transfer a portion of its loan proceeds to achieve the goal of the Leveraged Recap Transaction, funding the Tender Offer. (*See*, *e.g.*, Appellant's App., at A390 § 2.14, A511 § 2.14, A620 § 2.13; Lender Presentation at 1.) Plaintiff-Appellant would have this Court ignore these facts and, instead, analyze the BofA transfer in a vacuum.[5] Such an approach, however, would permit a trustee

[5] Plaintiff-Appellant contends that viewing the transfer as part of an integrated transaction would deprive the BostonGen creditors of their rights because the harm to them occurred when. BostonGen transferred the funds as opposed to using it to pay its debt. (Appellant's Reply at 7.) Yet, Plaintiff-Appellant's own allegations in the Complaint, demonstrate that the harm complained of is BostonGen's use of the $708 million in accordance with the overall plan for the Leveraged Recap Transaction and the terms of BostonGen's credit facility agreements; to fund the Tender Offer, Moreover, this Court need not hypothesize how the Section 546(e) inquiry would change had EBG used the funds for purposes other than the tender offer. (*Id.* at 8.)

to circumvent the safe harbor by carving up an integrated securities transaction consisting of multiple component parts. That would unnecessarily restrict the safe harbor and "seriously undermine . . . markets in which certainty, speed, finality, and stability are necessary to attract capital." *In re Tribune Co. Fraudulent Conv. Litig.*, 946 F.3d 66, 90 (2d Cir. 2019), *cert. dismissed in part sub nom. Deutsche Bank Tr. Co. v. Robert R. McCormick Found*, 141 S. Ct. 728 (2020), and *cert. denied sub nom. Deutsche Bank Tr. Co. Americas v. Robert R. McCormick Found.*, No. 20-8, 2021 WL 1521009 (Apr. 19, 2021). Accordingly, the overarching transfer challenged here is the BostonGen Transfer.[6] Any safe harbor inquiry that focuses on a component part of that transfer would be contrary to the holding in *Merit*, which instructs that the relevant transfer is not limited to "any component part." *Merit*, 138 S. Ct. at 893.

B. The BostonGen Transfer is a Settlement Payment.

The BostonGen transfer is a settlement payment protected by the safe harbor. "[T]he trustee may not avoid a transfer that is a . . . settlement payment, as defined in section 101 or 741 of this title,

[6] The Bankruptcy Court concluded that the overarching transfer was the transfer from BostonGen to BONY. (Appellant's App. at A792–94; *see also id.* at A733–34.) Even if this Court were to adopt this more limited transfer, Plaintiff-Appellant's claims would still be precluded by Section 546(e)'s safe harbor.

made by or to (or for the benefit of) a . . . financial institution. . . .” 11 U.S.C.A. § 546. 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). A “settlement payment” is a “transfer of cash or securities 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). As the Bankruptcy Court correctly determined, the BostonGen Transfer was a transfer of cash made to complete a securities transaction—specifically, the Tender Offer. (*See e.g.*, Appellant's App. at A209 ¶¶ 124–25.)

Plaintiff-Appellant contends, however, that the BostonGen Transfer is a simple dividend and not a settlement payment because BostonGen “must have given some value in exchange for a security.” (Appellant's Br. at 46; Reply at 9.) He further argues that the inquiry does not consider EBG's intent or what it did with the $708 million but considers whether the BofA transfer “was, itself a settlement payment.” (*Id.* at 47 (citing *Merit*, 138 S. Ct. at 894).) At bottom, these arguments pertain to Plaintiff-Appellant's request that this Court ignore the context of the BofA transfer. That request is denied for the reasons set forth above. The factual allegations of the Complaint demonstrate that the BostonGen Transfer was not “a simple dividend” but a “transfer of cash [ ] made to complete [a] secu-

rities transaction." *Enron*, 651 F.3d at 334–35. Irrespective of EBG's intent[7] and facts not before this Court, the Complaint makes clear that the Leveraged Recap Transaction entailed BostonGen and EBG borrowing funds to complete a Tender Offer. BostonGen did in fact borrow funds and distributed $708 million in accordance with the terms of the Leveraged Recap Transaction and its credit facility agreements. The BostonGen Transfer meets the definition of a settlement payment. Accordingly, the Section 546(e) safe harbor for settlement payments applies.

C. The BostonGen Transfer was Made in Connection with a Securities Contract.

A "trustee may not avoid a transfer that is . . . a transfer made by or to (or for the benefit of) a . . . financial institution . . . in connection with a securities contract, as defined in section 741(7), . . ." 11 U.S.C.A. § 546. Section 741(7) defines a "securities contract" expansively to include "a contract for the purchase [or] sale [] of a security, . . . including any repurchase . . . transaction on any such security," 11 U.S.C.A. § 741(7)(A)(i), and "any other agreement or transaction that is similar to an

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[7] Nevertheless, contrary to Plaintiff-Appellant's contention, a court is not precluded from considering intent. *See In re Bernard L. Madoff Inv. Sec. LLC*, 773 F.3d 411, 422 (2d Cir. 2014) (finding that payments were settlement payments even though there was no actual securities trading because customers *intended* for debtor to dispose of securities and remit payment).

agreement or transaction referred to in this subparagraph." 11 U.S.C. § 741(7)(A)(vii); *In re Bernard L. Madoff Inv. Sec. LLC*, 773 F.3d 411, 418 (2d Cir. 2014) ("[T]he term 'securities contract' expansively includes . . . any agreements that are *similar* or *related* to contracts for the purchase or sale of securities,"). "This concept is broadened even farther because § 546(e) also protects a transfer that is 'in connection' with a securities contract." *Madoff*, 773 F.3d at 418. "[A] transfer is 'in connection with' a securities contract if it is 'related to' or 'associated with' the securities contract." *Id.* at 421 (citations omitted). Certainly, borrowing and, subsequently, distributing loan proceeds to fund a Tender Offer is a transfer that is "associated with" or "related to" a securities contract. Accordingly, the Bankruptcy Court did not err when it concluded that the BostonGen Transfer was made in connection with the Tender Offer. (Appellant's App. at A784–85.)

Plaintiff-Appellant does not seem to dispute that the transfer meets the definition outlined in *Madoff* but, instead, argues that the Second Circuit's definition "provides no guidance" and requires a "limiting principle." (Appellant's Br. at 49–50 (citing *Maracich v. Spears*, 570 U.S. 48, 60 (2013).)) He contends that "in connection with a securities contract" should only include those "transfers made by a debtor that was purchasing, selling, or otherwise transacting in securities." Even if this Court were to adopt this limiting principle, it is not entirely clear how Plaintiff-Appellant could argue that

BostonGen does not meet the requirement whereas here it is a customer of a financial institution, US Bank, who "transact[ed] in securities," funding the Tender Offer.

Plaintiff-Appellant also contends that "Congress was concerned about protecting financial institutions or customers of financial institutions that had entered into a securities contract or related agreements." (Appellant's Br. at 53–54.) To the extent Plaintiff-Appellant argues that the limiting principle should be a requirement that financial institutions and customers be parties to a securities contract or agreement to be safe harbored, such a limitation finds no support in Section 546(e)'s text. It is, therefore, rejected. Plaintiff-Appellant relies on the definitions of "forward contract merchant," "financial participant," "swap participant" and "repo participant," arguing that the definitions demonstrate congressional intent to define "financial institution" to exclusively cover a party to a securities contract.[8] (Appellant's Br. at 53.) This argument is unavailing. Indeed, the definitions relied upon further dispel any argument that Congress intended to impose Plaintiff-Appellant's proposed limitation. If Congress intended to restrict the Section 546(e) safe harbor to only protect parties to a securities contract, "it clearly knew how

[8] While this contention appears to pertain to Plaintiff-Appellant's arguments regarding a proposed limit to the term "financial institution," discussed below, as opposed to the phrase "in connection with," this Court will address it here since Plaintiff-Appellant raises it here.

(yet declined) to do so." *In re Trib.*, 946 F.3d at 79 n.10; *compare* 11 U.S.C. §§ 101(22A) ("financial participant" means an "entity that, . . . *has* . . . *agreements or transactions*" with a debtor or defined entity) (emphasis added), 101(26) (defining "forward contract merchant," not as a party to any particular contract, but as an entity *in the business of entering into* forward contracts) (emphasis added), 101(46) ("repo participant" means an entity that "*has a [] repurchase agreement with* the debtor") (emphasis added), 101(53C) ("swap participant" defined as an entity that "*has a[] swap agreement with* the debtor") (emphasis added), *with* 101 (22) (defining "financial institution" as a "commercial or savings bank" or its customer, when such bank acts as the customer's "agent or custodian . . . *in connection with* a securities contract") (emphasis added).

Likewise, Plaintiff-Appellant's reliance on Sections 555, 546(f) and (g) is similarly unavailing. As with the definitions above, those sections (or the defined terms therein) expressly reference an agreement or contract. The absence of similar text in Section 546(e) and the definition of "financial institution" leads to the conclusion that Congress did not intend to impose such a requirement. As the Second Circuit concluded, Congress intended for "in connection with a securities contract" to be interpreted expansively. *Madoff*, 773 F.3d at 418. Consequently, this Court rejects Plaintiff-Appellant's proposed limit to the definition of "in connection with." To be sure, this case is not one where the

transfer has just "any tangential connection to" a securities contract. (Appellant's Br. at 52.) BostonGen made the BostonGen Transfer for the very purpose of funding the Tender Offer.

Accordingly, the Bankruptcy Court correctly determined that the BostonGen Transfer is protected as a transfer made in connection with a securities contract.

D. BostonGen is a Covered Entity.

Plaintiff-Appellant contends that the Bankruptcy Court erred when it concluded that BostonGen is financial institution "[b]ecause no bank acted as an agent or custodian to" BostonGen "in connection with" the BostonGen Transfer. (Appellant's Br. at 31–32.) Defendants-Appellees do not provide much on this point regarding BostonGen, except a citation to the Bankruptcy Court's opinion. (Appellees' Br. at 33.)

BostonGen is a financial institution within the meaning of Section 101(22). A trustee may not avoid "a transfer made by or to (or for the benefit of) a . . . financial institution, . . . in connection with a securities contract, as defined in section 741(7). . . ." 11 U.S.C. § 546(e). "Section 101(22) of the Code defines 'financial institution,' to include, *inter alia*, 'an entity that is a commercial or savings bank, . . . trust company, . . . and, when any such . . . entity is acting as agent or custodian for a customer (whether or not a 'customer', as defined in section 741) in connection with a securities con-

tract (as defined in section 741) such customer.' " *In re Trib.*, 946 F.3d at 78 (citing 11 U.S.C. § 101(22)(A)). Thus, BostonGen qualifies as a financial institution if it is a customer of a bank or trust company that acted as BostonGen's agent in connection with a securities contract. BostonGen meets this definition.

First, U.S. Bank is a financial institution for purposes of Section 546(e)'s safe harbor because it is a bank and trust company. Office of the Comptroller of the Currency, Trust Banks Active as of June 30, 2021, at https://www.occ.treas.gov/topics/charters-and-licensing/financial-institution-lists/trust-by-name.pdf; Office of the Comptroller of the Currency, National Banks & Federal Branches and Agencies Active as of June 30, 2021, https://www.occ.treas.gov/topics/charters-and-licensing/financial-institution-lists/national-by-name.pdf.

Second, BostonGen was U.S. Bank's customer in connection with the Tender Offer. The term "customer" referenced in the definition of "financial institution" is "defined as 'someone who buys goods or services' or 'a person . . . for whom a bank has agreed to collect items.'" *Tribune*, 946 F,3d at 78–79 (quoting *UBS Fin. Servs., Inc. v. W. Virginia Univ. Hasps., Inc.*, 660 F.3d 643, 650 (2d Cir. 2011); Black's Law Dictionary (10th ed. 2014)). It "is not limited to the specialized definition in Section 741." *In re Trib.*, 946 F.3d at 78–79, In *Tribune*, the Second Circuit found that the entity there was a customer because it bought the bank's services by retaining it to "act as Depositary" and,

in return, the bank agreed to collect the purchase price and tendered shares, and pay the tendering shareholders. *Tribune*, 946 F.3d at 79. Here, BostonGen retained US Bank as Depositary and, in return, US Bank agreed to collect deposits and "make such allocations, transfers, and payments in accordance with the" funds flow memorandum. (Appellant's App. at A660–61.) Specifically, BostonGen instructed US Bank to disburse proceeds to fund the Tender Offer. Accordingly, as the Second Circuit found in *Tribune*, BostonGen is a customer under Section 101(22).

Third, US Bank was BostonGen's agent. "'[A]gency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act.'" *In re Trib.*, 946 F.3d at 79 (citations omitted). Generally, "[w]hether an agency relationship exists is a mixed question of law and fact." *Trib.*, 946 F.3d at 79. "However, the existence of an agency relationship can be resolved 'as a matter of law' if: '(1) the facts are undisputed; or (2) there is but one way for a reasonable jury to interpret them.'" *In re Trib.*, 946 F.3d at 79. Here, BostonGen manifested its assent to US Bank's agency by authorizing the bank to receive funds from the lenders and entrusting it to make the necessary distribution in connection with the Tender Offer. (Appellant's App. at A660–61; *see also id.* at AA664–65 (evidencing the flow of funds distributed

by US Bank for distribution in connection with the Tender Offer)). U.S. Bank manifested its acceptance of the agency relationship by receiving and distributing the funds in connection with the Tender Offer as BostonGen instructed. Finally, BostonGen maintained control over key aspects of the undertaking. (*Id.* at A660–61.) Thus, an agency relationship existed between BostonGen and US Bank.

Plaintiff-Appellant, however, argues that BostonGen is not a covered entity because "in connection with" must be interpreted such that a customer is a financial institution only when a bank "make[s] or receive[s] the relevant transfer on behalf of the customer." (Appellant's Br. at 34.) Even if this Court were to adopt Plaintiff-Appellant's proposed interpretation, BostonGen would satisfy it. US Bank made the relevant transfer of $708 million on behalf of BostonGen, as instructed, in order to fund the Tender Offer. Yet, Plaintiff-Appellant doubles down and argues that if BostonGen is a financial institution, it "effectively" signifies that "having any relationship to a securities contract is sufficient to bring a customer within the definition." (Appellant's Br. at 36.) This is not so. Plaintiff-Appellant's argument, again, focuses on the BofA Transfer and ignores its context. The relevant transfer, however, is the BostonGen Transfer. Pursuant to the Recap Transaction, the very purpose of which was to fund the unit buyback, warrant redemption and member distribution, BostonGen made the BostonGen Transfer for disbursement to

EBG's members. Contrary to Plaintiff-Appellant's contention, this case is one in which the relevant transfer is directly related to or associated with the securities contract. The very type of transfer that Congress intended to protect under Section 546(e).

Lastly, Plaintiff-Appellant's contention that US Bank must be "identified in the Tender Offer as an agent" and that the transfer must "satisfy an[] obligation [BostonGen] had under the Tender Offer" is rejected. (Appellant's Br. at 37.) There is no requirement that a financial institution be identified in a securities contract for it to serve as agent of a customer. As the Second Circuit explained, the test for agency is informed by common law. US Bank meets that test here irrespective of whether it is identified in the Tender Offer. Additionally, the BostonGen Transfer was made to meet the funding requirements of the Tender Offer. Indeed, regardless of whether BostonGen was a party to the Tender Offer, the Tender Offer was conditioned on the receipt of funds from the three credit facilities—BostonGen entered two of the three credit facilities. (Appellant's App. at A700, A703.) BostonGen satisfied its obligations pursuant to the Leveraged Recap Transaction.

Accordingly, BostonGen is a qualifying entity entitled to the protection of the Section 546(e) safe harbor.[9]

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[9] Since this Court finds that BostonGen is a protected entity under Section 546(e) because U.S. Bank acted as agent for BostonGen in connection with the Tender Offer, it need not address the issue of whether BONY is also an agent of BostonGen.

IV. THE $35 MILLION DIVIDEND IMPLICATES THE SECTION 564(e) SAFE HARBOR

Plaintiff-Appellant appeals the Bankruptcy Court's holding that the $35 Million Distribution was a protected transfer. (Appellant's Br. at 56.) He argues that the transfer was not "made in connection with the Tender Offer" because EBG made the transfer prior to its purchase of any member units and paid the distribution to all members, regardless of whether they tendered any units. (Appellant's Br. at 56; Reply at 22–23.) Thus, he argues, because it is not a qualifying payment, "no bank acted as EBG's agent or custodian" in connection with this transfer. (*Id.* at 57.) Conversely, Defendants-Appellees contend the distribution is a protected transfer because it was integral to the Tender Offer. (Appellees' Br. at 37.) They contend that it was paid "in anticipation" of the purchase in order to "return value" to EBG's equity members and enhance benefits relating to tax liability and planning under the Recap Transaction. (*Id.*)

The Bankruptcy Court did not err when it concluded that the $35 Million Distribution was (i) a settlement payment and (ii) a payment made "in connection with" the Tender Offer. (Appellant's App. at A796–97.) The statutory text makes clear that a transfer is protected if it is made to complete a securities transaction or made in relation to or in association with a securities contract. *Enron*, 651 F.3d at 334–35; *Madoff*, 773 F.3d at 421 (citations

omitted). As the Bankruptcy Court properly concluded, the $35 Million Distribution was a transfer of cash made to complete the Tender Offer pursuant to the Leveraged Recap Transaction. (Appellant's App. at A165 ¶ 1.) Accordingly, it was a settlement payment. Likewise, the transfer was directly related to and associated with the Tender Offer, The Tender Offer contemplated a $35 Million Distribution, "prior to the purchase of [u]nits," in order to "return value to Members in a manner consistent with the [Leveraged Recap Transaction]." (Appellant's App. at A708.) Therefore, the distribution also meets, if not exceeds, the "low bar" set by Congress and is a transfer made "in connection with" the Tender Offer.

Contrary to Plaintiff's contention, that the distribution occurred prior to the purchase of units or was a dividend to all members, is of no import. Indeed, Section 546(e) "does not distinguish between kinds of transfers . . . [s]o long as the transfer sought to be avoided is within the language" of the safe harbor. *In re Trib.*, 946 F.3d at 84. Accordingly, the $35 Million Distribution is within the language of the safe harbor.

Since Plaintiff-Appellant's remaining challenges depend upon its rejected argument above, those challenges are similarly rejected.[10]

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[10] To the extent Plaintiff-Appellant argues that Section 546(e) is only applicable where the transfer is between parties to a securities contract, that argument finds no support in the text, as discussed *supra* III.C. Accordingly, it is rejected.

V. PLAINTIFF-APPELLANT'S STATE LAW FRAUDULENT CONVEYANCE CLAIMS ARE PREEMPTED

The Bankruptcy Court properly concluded that Section 546(e) preempts Plaintiff-Appellant's state law fraudulent conveyance claims. (Appellant's App. at A770–A775.) As an initial matter, "it is axiomatic that a district court cannot simply take a position contrary to that of its circuit court and regard the circuit court's interpretation of a given statute as not binding." *In re Quebecor World* (*USA*) *Inc.*, 480 B.R. 468, 477 (S.D.N.Y. 2012), *aff'd*, 719 F.3d 94 (2d Cir. 2013) (quoting *United States v. Russotti*, 780 F. Supp. 128, 131 (S.D.N.Y. 1991)). Accordingly, *Tribune* is binding, and Plaintiff-Appellant's constructive fraudulent conveyance claims are preempted and, thereby, dismissed.

Regarding the creditors' intentional fraudulent conveyance claims, Plaintiff-Appellant contends that there is no "evidence in the text and structure of § 546(e) that Congress intended to preempt state-law claims to recover transfers made with [] actual intent. . . ." (Appellant's Br. at 58–59.) Plaintiff-Appellant's intentional fraudulent conveyance claims, however, are preempted. Contrary to his contention, *Tribune's* holding extends to intentional fraudulent conveyance claims.[11] As the

[11] Plaintiff-Appellant contends that *Tribune* is distinguishable "because two of the transfers at issue here are outside the scope of the § 546(e) safe harbor. . . ." (Appellant's Br. at 58.) As discussed above, however, the transfers at issue in this case are within the scope of the safe harbor.

Second Circuit explained, "'Congress intended the Bankruptcy Code to create a whole scheme under federal control that would adjust all of the rights and duties of debtors and creditors alike. . . .'" *In re Trib.*, 946 F.3d at 82 (citing *In re Miles*, 430 F.3d 1083, 1091 (9th Cir. 2005)). Thus, once the Debtors entered bankruptcy, the "creditors' avoidance claims," both constructive and intentional, "vested in the" trustee under Section 544(b)(1). *In re Trib.*, 946 F.3d at 82–83; *see also id.* at 84 (Section 544 "allows the bankruptcy trustee to step into the shoes of a creditor for the purpose of asserting causes of action under state fraudulent conveyance acts for the benefit of all creditors") (quoting *In re Mortgage America Corp.*, 714 F.2d 1266, 1275-76 (5th Cir. 1983)); 11 U.S.C. § 544(b)(1) ("the trustee may avoid any transfer . . . that is voidable under applicable law by a creditor holding an unsecured claim").

The Section 544 avoiding power is limited by Section 546(e)'s safe harbor, which bars the avoidance of a transfer that is a "settlement payment" or made "in connection with a securities contract, [] except under section 548(a)(1)(A) []." 11 U.S.C. § 546(e). By its plain language, a trustee may not exercise the vested state law intentional and constructive fraudulent conveyance claims to avoid a transfer within the scope of Section 546(e). Permitting the creditors here to pursue claims barred by Section 546(e) would fly in the face of Congress's intent to limit the disruption to the securities mar-

ket. Section 546(e) bars a creditors' state law intentional fraudulent conveyance claim.

Plaintiff-Appellant, nevertheless, contends that Section 546(e)'s exclusion of Section 548(a)(1)(A) claims "evidences a congressional belief that the policy reasons underlying the safe harbors did not extend to cases of actual fraud." (Appellant's Br. at 59.) Thus, he argues, because a § 548(a)(1)(A) claim "is nearly identical to a" DCL § 276 claim, "there is no clearly articulated congressional purpose or objective that would preempt the Trust's claims under DCL § 276." (Appellant's Br. at 59–60.) This contention is rejected for several reasons. First, there is no support in the text or legislative history to support Plaintiff-Appellant's position. Second, "Section 548(a)[(1)(A)] . . . provides the trustee [] with [an] *independent* federal intentional [] fraudulent conveyance claim[]." *In re Trib.*, 946 F.3d at 83 (emphasis added). It does not follow that because Congress excepted one, it excepted another. Indeed, as the Bankruptcy Court stated, Congress did not draft the Section 548 exception with New York state's fraudulent conveyance law, or any other state's law, in mind. Third, contrary to Plaintiff-Appellant's contention, reading the exception such that it includes a state law intentional fraudulent conveyance claim would undermine the congressional purpose and objective of Section 546(e).

Assuming for purposes of argument that Plaintiff-Appellant's position prevails, securities market participants will not only be subject to liability for

federal intentional fraudulent conveyance claims but for state intentional fraudulent conveyance claims as well. Undoubtedly, such piecemeal litigation undermines the purposes of Section 546(e). *In re Trib.*, 946 F.3d at 87. As the Bankruptcy Court explained, this would create "instability in the securities markets." (Appellant's App. at A774.) Such a result irreconcilably conflicts with Congress's intent that market participants have certainty, finality, and predictability in the securities market, all of which are necessary to attract capital. *In re Trib.*, 946 F.3d at 90 (citing H.R. Rep. No. 97-420 (1982); H.R. Rep. No. 95-595 (1977)). That stability is further undermined if the market participant is subject to state law intentional fraudulent conveyance claims after the statute of limitations expires for a Section 548 claim.

Section 546(e)'s "purpose is to protect a national, heavily regulated market by limiting creditors' rights." *In re Trib.*, 946 F.3d at 94. Even Section 544's purpose is to "simplify proceedings," and "assure the equitable distribution among the creditors," *Id.* at 86. Reading into Section 546(e)'s language an exception for state intentional fraudulent conveyance claims conflicts with those purposes. Thus, the text controls and Congress's decision to only provide an exception for a claim under Section 548(a)(1)(A) from Section 546(e) stands.

Accordingly, because "[u]nder the Supremacy Clause, Article VI, Clause 2 of the Constitution, federal law prevails when it conflicts with state law, Plaintiff-Appellant's state law, intentional

fraudulent conveyance claims are preempted and, thus, dismissed. *In re Trib.*, 946 F.3d at 81 (citing *Arizona v. United States*, 567 U.S. 387 (2012)).[12]

VI. CONCLUSION

Judge Grossman's June Opinion and Order are AFFIRMED. The Clerk of Court is hereby directed to close the above-captioned bankruptcy appeal.

SO ORDERED.

[12] Since this Court affirms the Bankruptcy Court's dismissal of counts one through four of the Complaint pursuant to Section 546(e) of the Bankruptcy Code, it need not address Defendants-Appellees' alternative grounds for affirmance. (Appellees Br. at 41–54.)

UNITED STATES BANKRUPTCY COURT,
S.D. NEW YORK.

Case No. 10-14419 (SCC)

Adv. Proc. No. 12-01879 (RG)

Signed June 18, 2020

IN RE: BOSTON GENERATING LLC, et al.,

Post-Confirmation Debtors.

Mark Holliday, as the Liquidating Trustee of the BosGen Liquidating Trust,

Plaintiff,

v.

K Road Power Management, LLC, et al.,

Defendants.

Synopsis

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

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

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

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

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

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

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

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

Motion granted.

Procedural Posture(s): Motion to Dismiss.

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MEMORANDUM OPINION RESOLVING MOTION TO DISMISS THIRD AMENDED COMPLAINT

Honorable Robert E. Grossman, United States Bankruptcy Judge

I. Introduction[1]

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

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

all the legal issues raised by the parties in their papers. The legal conclusions the Court reaches were shaped by an analysis of *all* the legal issues presented and therefore warrant explanation.

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

Second, the Defendants ask this Court to find that the Trustee's pleadings fail to satisfy the threshold

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

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

incur debt under the Credit Facilities and thereafter, transfer the monies to EBG's members for no consideration.

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

Finally, the Defendants ask the Court to dismiss the TAC because the Lenders ratified the transfers at issue. In answering this question, the parties call upon the Court to address the split of authority on whether the ratification defense requires the Lenders' knowledge of the material facts related to the fraudulent transfer—namely, the fraud itself. In other words, does ratification require the Lenders' full knowledge of the Debtors' intent and financial condition, or, is it sufficient that the Lenders had mere knowledge of the transferees'

identity and approved the transaction. The Court adopts the Material Facts Test and holds that for purposes of the instant motion the Lenders cannot be found to have ratified the transfers at issue because the scope of the Lenders' knowledge concerning the material facts of the Leveraged Recap Transaction is unclear.

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

II. Background[2]

Boston Generating LLC ("BosGen") and EBG Holdings LLC ("EBG"), both Delaware limited liability companies, constituted with their subsidiaries "a wholesale power generation company that own[ed]

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

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

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

a. Background of the Leveraged Recapitalization Transaction

i. The Tender Offer

In an "Offer to Purchase," dated November 16, 2006, EBG and BosGen offered "to purchase for cash up to $925,000,000 in value of Class A and Class B units of limited liability company interests in the Company ('Units') now outstanding . . . ."[3]

[3] The Tender Offer defines the term "Company" as EBG "(together with its subsidiaries . . . ." BosGen is an EBG

Decl. of Philip D. Anker, AP Case No. 12-01879 (Bankr. S.D.N.Y. July 18, 2019), ECF No. 290-1, at 1 (the "Tender Offer"). Three points are made abundantly clear in the Tender Offer that are relevant in determining the issues before the Court.

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

Second, EBG and BosGen condition the Tender Offer on receipt of $2.1 billion in "new financing." The Tender Offer states, the "Company [including BosGen and EBG] is negotiating with prospective lenders with respect to the New Financing." *Id.* at 23. Further, BosGen and EBG "will not be required to accept for payment, purchase or pay for any Units tendered . . . [if] any of the following events has occurred . . . : The New Financing is not consummated . . . or the Company does not receive proceeds thereof sufficient to enable the Company to carry out the Recapitalization . . . ." *Id.* at 20. According to the Tender Offer, the "New Financing" will consist of: (i) up to $1.4 billion in senior

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subsidiary and thus, the term "Company" encompasses, among other subsidiaries, both EBG and BosGen. *See* Hunter Decl. ¶ 12. Additionally, the Tender Offer provides the term "Company" may be used interchangeably with "EBG," "we," or "us."

secured first lien credit facilities, (ii) up to $400 million in senior secured second lien term loan facilities, and (iii) up to $300 million in a senior unsecured term loan facility. *See id.* at 23. Without all three credit facilities described above (and discussed in further detail below), the Tender Offer fails.

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

Thus, the Tender Offer demonstrates that both EBG and BosGen were in an agency relationship with BONY for purposes of transmitting monies to tendering EBG LLC members. On several additional occasions throughout the Tender Offer, BONY is

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

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

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

ii. The Lenders' Presentation

On December 4, 2006, BosGen presented the proposed Leveraged Recap Transaction in New York to a group of lenders. *See* Decl. of William H. Gussman, Jr., AP Case No. 12-01879 (Bankr. S.D.N.Y. Nov. 1, 2013), ECF No. 152-4 (the "Lenders' Presentation"). The Lenders' Presentation states that "Boston Generating LLC ('BostonGen' or the 'Company') and EBG Holding LLC ('EBG') intend to enter into $2.1. billion of credit facilities in connection with the proposed recapitalization of the Company and EBG." Lenders' Presentation, at 1. Further, prospective lenders are informed the "proceeds [from the credit facilities] will be primarily used to repay outstanding indebtedness and to purchase outstanding units of EBG Holdings pursuant

to a recapitalization." *Id.* More precisely, prospective lenders are informed $1.025 billion will be used to fund "Unit Buybacks Distributions and Warrants Repurchase." *Id.* at 2. As to timing, the Lenders' Presentation called for lender commitments by December 15, 2006 and closing and funding of the credit facilities to occur on December 22, 2006. *Id.* at 35.

iii. The Confidential Information Memorandum

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

Specifically, the CIM provides that Credit Suisse and Goldman Sachs have been retained by *EBG and BosGen* to arrange $2.1 billion of credit facilities in connection with the proposed recapitaliza-

tion of *EBG and BosGen*. *See id.*, at 24 (emphasis added). The CIM goes on to address how proceeds from the $2.1 billion in credit facilities will be used by BosGen and EBG and states,

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

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

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

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

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

Suisse as "Second Lien Collateral Agent, Credit Suisse as "Administrative Agent," Credit Suisse Securities (USA) LLC and Goldman Sachs Credit Partners L.P. as "Co-Syndication Agents" and as "Co-Documentation Agents," and Credit Suisse Securities (USA) LLC and Goldman Sachs Credit Partners L.P. as "Joint Lead Arrangers" and as "Joint Book Running Managers") (the "Second Lien Credit Agreement")); TAC Ex. G ($300,000,000 Credit Agreement, dated December 21, 2006, by and among EBG as the "Borrower," the "Initial Lenders," Credit Suisse as "Administrative Agent," Credit Suisse Securities (USA) LLC and Goldman Sachs Credit Partners L.P. as "Co-Syndication Agents" and as "Co-Documentation Agents," and Credit Suisse Securities (USA) LLC and Goldman Sachs Credit Partners L.P. as "Joint Lead Arrangers" and as "Joint Book Running Managers") (the "Mezz Agreement")). To fund the Tender Offer for EBG member units worth up to $925 million, money infused into BosGen from the First Lien Credit Agreement and the Second Lien Credit Agreement had to be transferred to EBG—i.e., $300 million that went into EBG from the Mezz Agreement would be insufficient to meet the capital requirements for the Tender Offer.

The Credit Facilities indicate that proceeds from the First Lien Credit Agreement and the Second Lien Credit Agreement would be transferred by BosGen to EBG and used by EBG with the proceeds from the Mezz Agreement to fund the Tender Offer. The "Preliminary Statement" to the First Lien

Credit Agreement provides, among other things, "the Borrower [defined as Bos Gen only, not EBG] has requested that the Lender Parties lend to the Borrower . . . to fund in part the Distribution and the Tender Offer . . ." TAC Ex. E., at 1(1) (the "First Lien Preliminary Statement"). More specifically, section 2.14 of the First Lien Credit Agreement provides:

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

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

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

The First Lien Credit Agreement and the Second Lien Credit Agreement define "Tender Offer" as follows, "(a) the offer by EBG Holdings to purchase outstanding Units of limited lia-

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

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

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

Finally, the "Preliminary Statement" to the Mezz Agreement provides, "Simultaneously with the entering into of this Agreement, [Bos Gen] and the Guarantors . . . are entering into that certain . . . [First Lien Credit Agreement and Second Lien

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bility company interest in EBG Holdings pursuant to the Offer to Purchase dated November 16, 2006 . . . and (b) the repurchase of warrants and the cashless exercise of warrants referred to in such Offer of Purchase." TAC Ex. E, at 34, and Ex. F, at 30. The Mezz Agreement defines Tender Offer substantially the same. *See* TAC Ex. G, at 27-28. Thus, the Tender Offer encompasses the Unit Redemptions and the Warrant Redemptions (as both terms are defined below).

Credit Agreement] . . . the proceeds of which shall be used to . . . (ii) fund the Distribution and the Tender Offer . . .” TAC Ex. G, at 1(3) (the “Mezz Preliminary Statement”). Further, the Mezz Agreement provides:

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

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

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

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

i. The Two-Step Inter-Company Transfer

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

ii. The Funds Flow Memorandum

BosGen delivered the "Closing Date Funds Flow Memorandum," to US Bank on December 21, 2006 wherein BosGen authorizes US Bank to act as its agent in connection with: (i) the receipt of funds from the Lenders pursuant to the First Lien Credit

Agreement and the Second Lien Credit Agreement; and (ii) the BosGen Transfer. *See* TAC Ex. H (the "FFM") (Instructional Letter introducing the FFM).

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

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

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

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

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

iv. The EBG Transfers to its LLC Members

On December 26, 2006 and December 28, 2006, EBG caused BONY to disburse from the BONY Account to EBG's LLC members more than $1 billion (the "EBG Transfers"), "consisting of the $708 million that BostonGen had transferred to it, the $300 million of Mezzanine Debt, and certain of its own cash . . ." *Id.* The EBG Transfers by BONY on EBG's behalf to EBG's LLC members was composed of the following: (i) $34,996,291.24 as a divi-

dend to EBG members' equity interests (the "Distribution"); (ii) $925,017,940 to redeem EBG's members' equity units pursuant to the Tender Offer (the "Unit Redemptions"); and (iii) $50,359,12713 to redeem warrants held by K Road (the "Warrant Redemptions"). *See id.*

d. BosGen's Chapter 11 Cases

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

i. Chapter 11 Confirmed Plan

A liquidating plan was subsequently confirmed, under which the Lenders pursuant to the First Lien Credit Agreement received $1,005,902,449.94 of the sale proceeds in satisfaction of virtually all of their claims. *See* Disclosure Statement § III.F., at 27, Case No. 10-14419 (Bankr. S.D.N.Y. July 20, 2011), ECF No. 868 (the "Disclosure Statement");

see also First Mod. to Second Am. Joint Plan of Liquidation § 502, Case No. 10-14419 (Bankr. S.D.N.Y. Aug. 26, 2011), ECF No. 904 (confirmed Aug. 31, 2011 (ECF No. 915)) (the "Plan"). The Debtors' estates were substantively consolidated pursuant to the Plan. *See id.*

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

ii. Liquidating Trust Created

The Plan created a liquidating trust to pursue claims on behalf of the Debtors' general unsecured creditors (the "Trust"). *See* Plan §§ 7.02, 8.01. Those creditors, whose claims are classified in Class 4B of the Plan, consist almost entirely of the Lenders who financed the Leveraged Recap Transaction. The Disclosure Statement estimates that there are $820,571,000 in Class 4B general unsecured claims, consisting of (1) the Lenders' $25,000,000 deficiency pursuant to the First Lien

Credit Agreement, (2) the Lenders' $346,500,000 claim pursuant to the Second Lien Credit Agreement, (3) the Lenders' $426,911,567 claim pursuant to the Mezz Agreement, and (4) miscellaneous other claims totaling approximately $22 million. *See* Disclosure Statement § I.A., at 9-10, n.8.

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

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

Craig R. Jalbert ("Jalbert"), the first liquidating trustee appointed pursuant to the Plan and the Trust, commenced the above-captioned adversary proceeding on August 17, 2012. Mark Holliday succeeded Jalbert as the Trustee and on August 1, 2013 amended Jalbert's original complaint. *See*

Am. Compl., AP Case No. 12-01879 (Bankr. S.D.N.Y. Aug. 1, 2013), ECF No. 96 (the "Amended Complaint"). The Amended Complaint asserted six causes of action to avoid and recover the Unit Redemptions, the Warrant Redemptions, and the Distribution that the Defendants received as a result of, or in exchange for, their membership interests in EBG. *See id.* The Trustee then sought leave to file a Second Amended Complaint, purportedly to address arguments raised in Defendants' motions to dismiss, but the Court did not grant permission for the filing. *See* AP Case No. 12-01879 (Bankr. S.D.N.Y. Jan. 10, 2014), ECF Nos. 181, Ex. 1, and (Bankr. S.D.N.Y. May 27, 2012), ECF No. 212, at 276:13-20. When the Trustee retained new counsel in March 2019, counsel sought leave to file the TAC. *See* Mot. to Amend and File Third Am. Compl., AP Case No. 12-01879 (Bankr. S.D.N.Y. Apr. 3, 2019), ECF No. 272 (the "Motion for Leave"). The Defendants consented to the Trustee filing the TAC so they could move to dismiss on the merits. *See* Defendants.' Consent to Relief Requested in Motion for Leave, AP Case No. 12-01879 (Bankr. S.D.N.Y. Apr. 23, 2019), ECF No. 277. Whereas the complaints filed prior to the TAC treated the BosGen Transfer and the EBG Transfers together, the Trustee now seeks to avoid as intentional and constructive fraudulent conveyances what he characterizes as two "sets" of transfers: an "initial transfer" of the $708 Million from BosGen to EBG, and the "subsequent transfer" of those and additional funds from EBG to its members.

III. Summary of the TAC[6]

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

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

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

fraudulent conveyance claims against the Defendants on behalf of EBG's creditors to avoid and recover the Unit Redemptions, the Warrant Redemptions, and the Distribution pursuant to sections 273-75, and 278 of the DCL), ¶¶ 176-186 (Count IV: asserting a constructive fraudulent conveyance claim against the Defendants on behalf of BosGen's creditors to avoid and recover the BosGen Transfer pursuant to sections 273-75, and 278 of the DCL), ¶¶ 187-196 (Count V: asserting an unjust enrichment claim against the Defendants on behalf of both BosGen and EBG's creditors for recovery of the BosGen Transfer, the Unit Redemptions, the Warrant Redemptions, and the Distribution).

In support of Counts I through V, the Trustee alleges two entities separate and apart from BosGen and EBG, K Road and Harbinger, by and through their officers and employees, assumed control of BosGen and EBG in October 2005 and devised a scheme to defraud the Lenders into entering the Credit Facilities to BosGen and EBG's peril. *See* TAC ¶¶ 66-84. According to the TAC, as a merchant seller of electricity, BosGen was subject to various market forces, and by early 2006, those forces, coupled with the expiration of contracts granting BosGen favorable energy prices, signaled a dismal future for the Debtors. *See id.* ¶¶ 1, 86. Thus, by mid-2006, K Road and Harbinger allegedly schemed to sell their EBG LLC member interests before the electricity market collapsed. *See id.* ¶¶ 78-79. According to the Trustee, realizing that a sale or initial public offering would reveal the

impending crisis, K Road created two sets of books for the Debtors. *See id.* ¶¶ 1, 80–81. Then, K Road used the false set's inflated figures along with baseless projections to lure banks into funding the Leveraged Recap Transaction that would allow it, Harbinger, and EBG's other owners to sell their EBG LLC member interests back to EBG and leave the Lenders holding the proverbial bag. *See id.* ¶¶ 1–3, 81, 83–93, 99.

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

According to the Trustee, EBG used proceeds from the BosGen Transfer, together with the $300 Million from the Mezz Agreement, to fund the Tender

Offer to its unit holders. *See id.* ¶¶ 125–26. Following the First BONY Transfer and the Second BONY Transfer, EBG had BONY effectuate the Unit Redemptions to the Defendants, which the Trustee alleges, left EBG hopelessly insolvent. *See id.* ¶¶ 125-26,129-133, 136-145, Ex. H at 503, 506. Further, the Trustee asserts EBG added to its insolvency woes by making the Distribution and effectuating the Warrant Redemptions. *See id.* ¶ 125, Ex. H at 506.

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

Three and a half years following the BosGen Transfer and the EBG Transfers, the Debtors collapsed.

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

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

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

a. The MTD

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

First, the Defendants insist the Trustee's claims are implausible and not plead with sufficient particularity. Namely, the Defendants argue the TAC states claims for fraud on behalf of the Lenders challenging the Leveraged Recap Transaction and it's implausible fraud existed in securing the loans for the Leveraged Recap Transaction because (i) some of the world's most sophisticated lenders

financed the transaction, and (ii) the Credit Facilities expressly disclosed and required the Debtors to use the loan proceeds in connection with the Tender Offer to fund the Unit Redemptions, the Warrant Redemptions, and the Distribution. Based on the implausibility of a fraud where sophisticated lenders were involved and the Debtors' full disclosure as to the use of the funds from the Credit Facilities, along with the failure to plead with particularity, the Defendants request dismissal of the TAC.

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

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

Fourth, the unjust enrichment claims against the Defendants should be dismissed because, in addi-

tion to being "safe-harbored," the Trustee's claim fails as a matter of New York state law.

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

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

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

b. The Trustee's Opposition

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

First, the Trustee believes his state law fraudulent-transfer claims are well plead. Namely, the Trustee asserts claims under New York law

against entities that received, directly and indirectly, almost $1 billion in cash from BosGen and EBG while providing no consideration in return. The gravamen of the complaint is that the parties in control of BosGen and EBG—K Road and Harbinger, among others—engaged in a scheme to hinder, delay, and defraud the Lenders and these insiders alone received a windfall of hundreds of millions of dollars while simultaneously placing BosGen and EBG on a foreseeable path to bankruptcy.

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

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

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

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

c. The Defendants Reply to the Opposition and Supplemental Filings

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

Following the end of briefing, the Defendants and the Trustee filed a total of three (3) letters on the docket. From the Defendants, the first letter brought an additional statutory provision related to Delaware's three-year statute of repose to the Court attention, which the Defendants claim is dispositive in their favor. *See* Letter to Judge Lane, AP Case No. 12-01879 (Bankr. S.D.N.Y. Dec. 16, 2019), ECF No. 299 (the "First Letter"). Four-days

later, the Trustee filed the second letter responding to the substance of the First Letter. *See* Letter to Judge Lane, AP Case No. 12-01879 (Bankr. S.D.N.Y. Dec. 23, 2019), ECF No. 302 (the "Second Letter"). Finally, the Defendants filed a third letter bringing to the Court's attention the recent decision issued by the United States Court of Appeals for the Second Circuit (the "Second Circuit") in *Tribune*. *See* Letter to Judge Lane, AP Case No. 12-01879 (Bankr. S.D.N.Y. Dec. 24, 2019), ECF No. 303 (the "Third Letter").

d. Oral Argument

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

V. Timeliness of the Trustee's Claims

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

a. Applicable Statutory Provisions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Claims brought pursuant to the DCL are subject to a six-year statute of limitations. *See* N.Y. Civ. Practice Law & R. ("NYCPLR") § 213(8); *In re Bernard L. Madoff Inv. Securities*, *LLC*, 458 B.R. 87, 109 (Bankr. S.D.N.Y. 2011) (applying six-year statute of limitations to DCL claims). The BosGen Transfer and EBF Transfers occurred in December

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> distribution that the distribution violated subdivision (a) of this section, shall not be liable for the amount of the distribution. Subject to subdivision (c) of this section, this subdivision shall not affect any obligation or liability of a member under the operating agreement or other applicable law for the amount of a distribution.

NYLLCL §§ 508(a)-(b).

2006 and the Trustee brought this action in August 2012. Thus, the Trustee's DCL claims are timely under New York's six-year limitation period unless another applicable law, such as the Delaware Statute of Repose, applies to shorten the limitations period. The Defendants ask the Court to hold that the Delaware Statute of Repose: (i) applies to suits brought by creditors to recover a Delaware LLC's member distributions; and (ii) trumps New York's six-year limitation period for DCL claims. In contrast, the Trustee asks the Court to hold that: (i) the Delaware Statute of Repose does not apply to creditor suits to recover a Delaware LLC's distribution to its members, leaving the Court to apply New York's six-year limitations period for DCL claims; and (ii) even if the Delaware Statute of Repose could be applied to creditor suits against a Delaware LLC's members, it should give way to New York law and its six-year limitations period because New York has a greater interest in seeing its law applied in this proceeding. After evaluating how another jurisdiction has interpreted the Delaware Statute of Repose and analyzing the interpretation New York courts have ascribed to the virtually identical NY Statute of Repose, the Court concludes the Delaware Statute of Repose does not apply to creditor suits brought to recover a Delaware LLC's distribution to its members. Therefore, New York's six-year limitations period for DCL claims governs.

i. New York's Choice of Law Standard

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

First, the Court must determine whether the Delaware Statute of Repose applies to creditor suits, thus potentially shortening the limitations period to three-years for the Trustee's DCL claims and creating a conflict between New York and Delaware substantive law.[11] Second, only if the

[11] To be sure, the Delaware Statute of Repose is more than a procedural limitations period. In *Vivaro Corp.*, this Court addressed whether the NY Statute of Repose overtook the six year limitations period for DCL claims and held the New York "statute of repose overrides the six year statute of limitations normally applied to NYDCL fraudulent conveyance claims, provided that the transfers at issue were in

Delaware Statute of Repose can be applied to creditor suits against a Delaware LLC's members, will the Court then engage in the "interest analysis" to resolve whether Delaware or New York has the greater interest in seeing its law applied. Because the Delaware Statute of Repose does not apply to creditor suits, there is no conflict of law present and the Court need not delve into which jurisdiction has the greatest interest in seeing its law applied.

ii. The NY Foreign LLC Law

Reading their papers, the Trustee and the Defendants take divergent paths at the outset applying New York law. According to the Defendants, the NY Foreign LLC Law applies, it directs the Court to the Delaware Statute of Repose, which also applies, and therefore the Trustee's DCL claims are time barred. The Trustee argues, the NY Foreign LLC Law does not apply to fraudulent conveyance claims (only to claims regarding the LLC's internal affairs). Further, the Trustee posits that even if the NY Foreign LLC law applies here, the Delaware Statute of Repose is inapplicable to creditor suits thus leaving the Court to apply New York's six-

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fact distributions made by the *LLC to LLC members*." *In re Vivaro Corp.*, 524 B.R. 536, 548 (Bankr. S.D.N.Y. 2015) (emphasis added). Here, the Delaware Statute of Repose, were it applicable to creditor suits, would not automatically override the DCL's six-year limitations period. Were the Delaware Statute of Repose applicable to creditor suits, it would lead to the "interest analysis" referenced above.

year limitations period for DCL claims. Step one of the analysis must be whether the NY Foreign LLC Law applies only narrowly to claims involving an LLC's internal affairs or whether it applies more broadly to fraudulent conveyance claims against a foreign LLC's members.

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

Repose applies to *creditor* suits against a Delaware LLC's members.[12]

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

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

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

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

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by New York law. *See* TAC ¶¶ 5-6, 8-15, 205-06, Ex. B (list of lenders); Ex. E § 9.17, Ex. F § 9.16, Ex. G § 8.12. Were there a conflict of laws present, the Court expresses no opinion on how it might have decided which jurisdiction has the greater interest in seeing its law applied.

construction, whether the Delaware Statute of Repose applies to the Trustee's claims.

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

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

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

> Section 18–607 contains three subsections and *sets forth limitations on distributions from a limited liability company to a member*. . .

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

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

The NY Statute of Repose provides, "a member who receives a wrongful distribution from a limited liability company shall have no liability under this article or other applicable law for the amount of the

distribution after the expiration of three years from the date of the distribution." NYLLCL § 508(c). Courts have applied this three-year time limit to avoidance actions under 11 U.S.C. § 544 and the DCL. *See Geron v. Craig (In re Direct Access Partners, LLC)*, 602 B.R. 495, 517-18 (Bankr. S.D.N.Y. 2019) (applying the NY Statute of Repose to claims asserted by the chapter 7 trustee standing in the debtor's shoes); *O'Connell v. Shallo (In re Die Fliedermaus LLC)*, 323 B.R. 101, 108 (Bankr. S.D.N.Y. 2005) (same). However, other courts have concluded, and this Court agrees, that there is a distinction between a trustee standing in a debtor's shoes suing for the *benefit of creditors* versus suing *as a creditor*. Given the virtually identical language used in the Delaware Statute of Repose to that used in the NY Statute of Repose, it's instructive by analogy for this Court to determine whether the NY Statute of Repose applies to creditor claims to recover a distribution to a New York LLC's members. It does not.

The three-year limitation imposed by the NY Statute of Repose does not apply to fraudulent transfers claims brought by creditors against a New York LLC's members. *See Lyman Commerce Solutions, Inc. v. Lung*, Case No. 12-civ-4398, 2015 WL 1808693, at *5 (S.D.N.Y. Apr. 20, 2015) ("Section 508, by its terms, applies to amounts owed by a member to 'the limited liability company'—*not* to outside creditors."). The Court agrees with *Lyman's* reasoning because "[t]o hold that outside creditors are subject to Section 508's limitations period when

bringing claims for fraudulent conveyances to corporate members would be to hold that fraudulent transfers to a corporate insider could be challenged for only half as long as transfers to persons outside the corporate entity. Such a holding would turn the purposes of the fraudulent conveyance statute on its head . . .” *Id.*

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

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[13] There are three cases from New York State courts which support the view that both the NY Statute of Repose and the Delaware Statute of Repose apply to creditor claims against an LLC’s members. *See Peckar & Abramson*, *P.C. v. Lyford Holdings*, *Ltd.*, 135 A.D.3d 108, 115, 20 N.Y.S.3d 41, 46 (1st Dep’t 2015) (applying three-year limitations period under analogous New York LLP law to creditor’s claim); *Bd. of Managers of Chocolate Factory Condo. v. Chocolate Partners*, *LLC*, 992 N.Y.S.2d 157, 2014 WL 1910237, at * 12 (Sup. Ct. Kings County 2014) (holding the three-year limitations period contained in the NY Statute of Repose “applies both to claims by the limited liability company against its members

iv. Conclusion

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

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

The Trustee's unjust enrichment claim is time-barred under New York law because such claim seeks monetary recovery. Under New York law, the statute of limitations applicable to an unjust enrichment claim depends on the nature of the substantive remedy the plaintiff seeks. *See Loengard v. Santa Fe Indus., Inc.*, 514 N.E.2d 113, 519 N.Y.S.2d 801, 70 N.Y.2d 262, 266 (1987). The limitations period is six years where a plaintiff seeks an equitable remedy, but three years where a plaintiff seeks monetary damages. *See Ingrami v. Rovner*, 45 A.D.3d 806, 808, 847 N.Y.S.2d 132 (2d

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and by third party creditors."); *Mostel v. Petrycki*, 885 N.Y.S.2d 397, 399, 25 Misc.3d 929, 932 (Sup. Ct. N.Y. County 2009). However, *Chocolate Factory*, *Mostel*, and *Peckar* were decided pre-*Setters* and this Court considers those decisions overruled and/or unpersuasive in light of *Setters*.

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

Dep't 2007); *see Lia v. Saporito*, 909 F.Supp.2d 149, 167 (E.D.N.Y. 2012); *Kermanshah v. Kermanshah*, 580 F. Supp.2d 247, 261 (S.D.N.Y. 2008); *Grynberg v. Eni S.p.A.*, Case No. 06-civ-6495, 2007 WL 2584727, at *3 (S.D.N.Y. Sept. 5, 2007). The applicable limitations period begins "upon the occurrence of the wrongful act giving rise to a duty of restitution and not from the time the facts constituting the fraud are discovered." *Cohen v. S.A.C. Trading Corp.*, 711 F.3d 353, 364 (2d Cir. 2013) (quoting *Coombs v. Jervier*, 74 A.D.3d 724, 724, 906 N.Y.S.2d 267 (2d Dep't 2010)).

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

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

> Transferee Defendants . . . were unjustly enriched . . . [plus pre-judgment and post judgment interest with fees and costs].

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

d. New York's Borrowing Statute

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

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

CPLR § 202 (the "Borrowing Statute"). Under the Borrowing Statute, "when a nonresident plaintiff sues upon a cause of action that arose outside of New York, the court must apply the shorter limita-

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

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

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

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

Id. The Defendants have not demonstrated in their papers that they would be amenable to suit in another foreign jurisdiction and that alone under *Stafford* and *Cuccolo* is sufficient to deny Defendants' request to apply the Borrowing Statute.

Additionally, as further support of the Court's conclusion, the Defendants have not identified a jurisdiction in which the Trustee's claims are untimely. Thus, the Borrowing Statute cannot be applied here.

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

a. Standard for Motion to Dismiss

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

First, the tenet that a court must "accept all factual allegations as true" is limited to factual allegations and does not apply to legal conclusions listed in the

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

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

Determining whether a complaint states a plausible claim is "context specific, requiring the court to draw on its experience and common sense." *Ashcroft v. Iqbal*, 556 U.S. at 668, 129 S.Ct. 1937. However, the "pleadings must create the possibility

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

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

b. Heightened Pleading Standard for Intentional Fraud

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

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

i. Allegations Necessary to Sustain Counts I and II

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

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

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

> of the consideration . . . and retention of control of the property by the transferor after the conveyance.

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

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

The Trustee sufficiently plead intentional fraud pursuant to section 276 of the DCL. Taken together, all of the allegations in the TAC plead: (i) that the K Road Insiders, which included the CEO and Chairman of EBG's board of directors, were agents of BosGen and EBG; (ii) the K Road Insiders' knowledge, by virtue of their dominance and control of the EBG's operations, was imputed to BosGen and EBG; (iii) the K Road Insiders omitted and/or misrepresented the Debtors' financial condition to the Lenders; (iv) the K Road Insiders intended to defraud the Lenders and the Other Claimants; and (v) the BosGen Transfer and the EBG Transfers provided value to the Defendants with no value to BosGen and/or EBG in return. The specific fraud allegedly committed by the K Road Insiders was concealing and misrepresenting BosGen and EBG's true financial condition from the Lenders. *See* TAC ¶¶ 17-27, 74-77, 83, 88, 104, 106, 117 (alleging the K Road Insiders caused the board of directors to approve the Leveraged Recap Transaction, which the Trustee alleges was fraudulent), ¶¶ 17-24, 74-76 (alleging K Road directly

appointed and controlled two members of EBG's seven-member board of directors and all of EBG's senior management was comprised of K Road Insiders), ¶ 26 (alleging the remaining five of the seven directors on EBG's board were controlled by K Road because, as K Road internally acknowledged, the "EBG Board of Directors would approve whatever K Road told them to, as long as the Nominating Committee was in agreement").

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

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

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

In *Weisfelner v. Fund 1 (In re Lyondell Chem. Co.)*, 503 B.R. 348, 388 (Bankr. S.D.N.Y. 2014), Judge Gerber held that where board approval is required, a plaintiff must plead that a "critical mass" of directors acted with the requisite intent *or otherwise explain how actors with fraudulent intent otherwise caused the disposition of property. See id.* (emphasis added). Here, the Trustee has alleged *how actors with fraudulent intent otherwise caused the disposition of property*. The TAC alleges that K Road: (i) was EBG's agent; (ii) had fraudulent intent based on the badges of fraud discussed above; and (iii) through manipulation, dominance, and control of EBG's operations, caused BosGen and EBG to incur debt under the Credit Facilities and thereafter, transfer the monies to EBG's members for no consideration. *See* TAC ¶¶ 74-76 (alleging K Road directly appointed and controlled two members of EBG's seven-member board of directors and all of EBG's senior management was comprised of K Road Insiders), ¶ 26 (alleging the remaining five of the seven directors on EBG's

board were controlled by K Road because, as K Road internally acknowledged, the "EBG Board of Directors would approve whatever K Road told them to, as long as the Nominating Committee was in agreement"). The Trustee may not be able to prove these facts following discovery. Nevertheless, he has plead facts sufficient to withstand the MTD under the Bankruptcy Court's decision in *Lyondell*.

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

Notwithstanding the District Court's decision in *Lyondell*, the Defendants argue the Bankruptcy Court's reasoning should still apply for two reasons. First, because Judge Sullivan, sitting on the District Court, agreed that Judge Gerber's holding that the "critical mass" test "appropriately accounts for the distinct roles played by directors and officers under corporate law." Reply, at 5 (quoting Judge Sullivan in *Tribune*). However, Judge Sullivan's full quotation provides that the "critical mass" test "appropriately accounts for the distinct roles play by directors and officers under corporate law, *while also factoring in the power certain offi-*

cers and other actors may exercise over the corporation's decision to consummate a transaction." (quoting *Kirschner v. Fitzsimons (In re Tribune Co. Fraudulent Conveyance Litigation)*, Case No. 12-civ-2652, 2017 WL 82391, at *6 (S.D.N.Y. Jan. 6, 2017) (emphasis added) (noting Judge Cote's reversal of *Lyondell*, disagreeing with Judge Cote, concluding her decision in *Lyondell* was not binding in *Tribune*, and holding, "Specifically, the Court agrees with . . . [Judge Gerber] that the intent of the debtor's officers may be imputed to the debtor if the officers were 'in a position to control the disposition of [the transferor's] property,' thereby effectuating the underlying offense."))); *see In re Adler*, *Coleman Clearing Corp.*, 263 B.R. 406 (S.D.N.Y. 2001) (cited with approval by Judge Sullivan for the proposition that that a transferee's intentional fraudulent intent may be ascribed to the transferor corporation where transferee "dominated or controlled [transferor's] disposition" of its property). As discussed above, the Trustee has alleged such domination of BosGen and EBG by the K Road Insiders.

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

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

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

i. Allegations Necessary to Sustain Counts III and IV

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

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

[15] Certainly, the TAC satisfies the less stringent standard for imputation adopted by Judge Cote in *Lyondell*, which accounts for a distinction in cases addressing "the imputation of a transferee's intent" from those addressing imputation of an agent's intent. *Lyondell*, 554 B.R. at 649. Under Judge Cote's approach, when a single corporate officer's conduct falls within the scope of his authority as an agent, everything such agent knows or does is imputed to their principals. *See Kirschner v. KPMG LLP*, 15 N.Y.3d 446, 465, 912 N.Y.S.2d 508, 938 N.E.2d 941 (2010).

constitutes unreasonably small capital, DCL § 274; or (iii) the transferor believes that it will incur debt beyond its ability to pay, DCL § 275.

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

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

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

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

Pursuant to New York state law, "unjust enrichment is not a catchall cause of action to be used when others fail. It is available only in unusual situations when, though the defendant has not breached a contract nor committed a recognized

tort, circumstances create an equitable obligation running from the defendant to the plaintiff." *Corsello v. Verizon N.Y., Inc.*, 967 N.E.2d 1177, 18 N.Y.3d 777, 790–91 (2012). "Typical cases are those in which the defendant, though guilty of no wrongdoing, has received money to which he or she is not entitled." *Eidelman v. Sun Products Corp.*, Case No. 16-civ-3914, 2017 WL 4277187, at *6 (S.D.N.Y. Sep. 25, 2017) (quoting *Corsello v. Verizon N.Y., Inc.*, 18 N.Y.3d at 790, 944 N.Y.S.2d 732, 967 N.E.2d 1177).

Here, the Trustee alleges a wrongdoing—the same wrongdoing that underlies his intentional and constructive DCL fraudulent transfer claims—and that this wrongdoing is the source of the Defendants' "equitable obligation" to pay the same damages that the Trustee plead in connection with his other tort claims under the DCL. "Although a plaintiff 'may plead unjust enrichment in the alternative to his other claims,' " the unjust enrichment claim will not survive a motion to dismiss where the plaintiff " 'fail[s] to explain how [it] is not merely duplicative of [his] other causes of action.' " *Nelson v. MillerCoors, LLC*, 246 F.Supp.3d 666, 679 (E.D.N.Y. 2017). The Trustee's unjust enrichment claim duplicates his claims pursuant to the DCL. Further, the Trustee has not offered the Court any explanation as to why the unjust enrichment claim is not merely duplicative of the DCL claims. Therefore, the unjust enrichment claim fails under New York law and must be dismissed pursuant to Rule 12(b)(6). *See Corsello v. Verizon*

N.Y., *Inc.*, 18 N.Y.3d at 790, 944 N.Y.S.2d 732, 967 N.E.2d 1177 (unjust enrichment claim is "not available" where its underlying allegations "simply duplicate" plaintiffs' legal causes of action); *Ebin v. Kangadis Food Inc.*, Case No. 13-civ-2311, 2013 WL 6504547, at *7 (S.D.N.Y. Dec. 11, 2013) (dismissing unjust enrichment claims under New York and New Jersey law where plaintiffs "failed to explain" how it is "not merely duplicative of their other causes of action.").

f. Plausibility

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

The lynchpin of the TAC is that the K Road Insiders actively concealed from, and misrepresented information to, the Lenders. The TAC alleges the K Road Insiders controlled the flow of information to the Lenders by, among other things, concealing the terms of material hedge contracts from those who could have identified errors in BosGen's cash flow projections and maintaining two sets of books so the Lenders would not identify the misinformation.

See TAC ¶¶ 85-102, 110-16. Additionally, the Trustee alleged the K Road Insiders concealed the same information from the financial firms retained by the Debtors to provide consulting services and issue opinions in connection with the Leveraged Recap Transaction, and those financial firms disclaimed any responsibility for BosGen's financial projections. *See* TAC ¶¶ 2, 78, 96-97, 105, 107, 120.

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

The Defendants note, however, that the Debtors were able in June 2007—only six months after the closing—to effect a sale by merger to another major company in which the Debtors were valued at more

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

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

g. Conclusion

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

VII. The Safe Harbor

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

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

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

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

Recently, the Second Circuit held that section 546(e)'s safe harbor preempts state-law construc-

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

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

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

As discussed in *Tribune I* and *II*, the safe harbor's scope is not limited to avoidance actions brought by a "trustee." The safe harbor's coverage extends to suits brought by a debtor's creditors. *See Tribune I*, 818 F.3d at 119-124. The Second Circuit reasoned

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

that if the safe harbor would preclude the bankruptcy trustee from avoiding a transfer, the debtor's creditors cannot do an end-run around that safe harbor by causing a bankruptcy trustee to abandon his standing to sue, thereby allowing creditors to sue free and clear of the safe harbor. *See id.* The Second Circuit's reasoning applies equally to the Trustee's state law *intentional* fraudulent transfer claims asserted on behalf of the Lenders and the Other General Claimants.

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

Preemption is always a matter of congressional intent, even where that intent must be inferred. *See Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992). As in the present matter, the presumption against preemption usually goes to the weight to be given to the lack of an express statement overriding state law. *See Tribune I*, 818 F.3d at 111-12. The presumption is strongest when Congress is legislating in an area recognized as traditionally one of state law alone. *See id.* However, the present context is not such an area. To be sure, the regulation of creditors' rights has "'a history of significant federal presence.'" *Id.* (quoting *United States v. Locke*, 529 U.S. 89, 90, 120 S.Ct. 1135, 146 L.Ed.2d 69 (2000)). Congress's power to enact bankruptcy laws was

made explicit in the Constitution as originally enacted, Art. 1, § 8, cl. 4. Once a party enters bankruptcy, the Bankruptcy Code constitutes a wholesale preemption of state laws regarding creditors' rights. *See id.*; *Eastern Equip. and Servs. Corp. v. Factory Point Nat. Bank*, *Bennington*, 236 F.3d 117, 120 (2d Cir. 2001) ("The United States Bankruptcy Code provides a comprehensive federal system of penalties and protections to govern the orderly conduct of debtors' affairs and creditors' rights."); *In re Miles*, 430 F.3d 1083, 1091 (9th Cir.2005) ("Congress intended the Bankruptcy Code to create a whole scheme under federal control that would adjust *all* of the rights and duties of creditors and debtors alike . . ."). The Court in *Tribune I* held, "[w]hile the issue before us is often described as whether Section 546(e) preempts state fraudulent conveyance laws, that is a mischaracterization. Appellants' state law claims were preempted when the Chapter 11 proceedings commenced and were not dismissed." *Tribune I*, 818 F.3d at 112 (internal citations omitted). Thus, section 546(e) preempts the Trustee's intentional fraudulent transfer claims under the DCL. Next, the Court must examine whether, despite the safe harbor's preemption of state law, section 546(e) creates an exception from its coverage for state law intentional fraudulent transfer claims. It does not.

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

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

Section 548(a)(1)(A) of the Bankruptcy Code empowers a trustee to avoid a transfer made with actual intent to hinder, delay or defraud any entity. Section 276 of the DCL requires a showing of actual intent to hinder, delay, or defraud creditors. Fundamentally, there is no difference between a claim brought pursuant to the DCL compared to one under the Bankruptcy Code for avoidance and recovery of an intentional fraudulent transfer. *See In re Actrade Fin. Tech. Ltd.*, 337 B.R. 791, 799 n.5 (Bankr. S.D.N.Y. 2005) ("A cause of action under DCL § 276 is substantially similar to that under § 548(a)(1)(A) but has a six-year statute of limitations as opposed to the one-year reach back period

provided for under the Bankruptcy Code."). However, Congress did not act with only New York in mind and this Court is bound by the plain language of section 546(e), which provides an exception only for intentional fraudulent transfer claims brought under the Bankruptcy Code and no more. *See US Bank Nat'l Assoc. v. Verizon Communications*, *Inc.*, 892 F. Supp.2d 805, 816-17 (N.D. Tex. 2012) (rejecting an argument similar to the one advanced here by the Trustee because "it conflict[s] with the clear language of [section] 546(e), which operates notwithstanding all of [section] 544"; "that Congress did expressly exclude [section] 548(a)(1)(A) implies that it did not want to exclude state 'actual intent' fraudulent transfer claims.").

In fact, Congress may well have had its reasons for not excepting state law intentional fraudulent transfer claims from the safe harbor. While it's true that sections 548(a)(1)(A) and 546(e) apply to all cases brought under the Bankruptcy Code, that is not the case for intentional state law fraudulent transfer claims that may be brought through section 544 of the Bankruptcy Code. As Judge Holwell held in *Drenis*, some states have adopted the Uniform Fraudulent Conveyance Act (the "UFCA") and other have adopted the Uniform Fraudulent Transfer Act (the "UFTA"). While the UFCA and the UFTA are similar in most respects, there are differences between the two. *See Drenis v. Haligiannis*, 452 F. Supp.2d 418, 426-27 (S.D.N.Y. 2006). *Compare*, Del. Code Ann. tit. 6 § 1308 (providing good faith on part of transferee or exchange of reason-

ably equivalent value as a defense to intentional fraudulent conveyance under § 1304(a)(1), as distinguished from constructive fraudulent conveyance), *with* DCL § 276 (providing that every conveyance with actual intent to defraud present or future creditors is fraudulent, irrespective of transferee's good faith (or lack thereof) or exchange of fair consideration).

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

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

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

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

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

iv. Preemption Conclusion

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

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

i. Statutory Provisions

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

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

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

(e) Notwithstanding sections 544, 545, 547, 548(a)(1)(B), and 548(b) of this title, the trustee may not avoid a

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

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

> (a) (i) a contract for the purchase, sale, or loan of a security . . . , or option on any of the foregoing, including an option to purchase or sell

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> transfer that is a margin payment, as defined in section 101, 741, or 761 of this title, *or settlement payment*, as defined in section 101 or 741 of this title, *made by or to (or for the benefit of)* a commodity broker, forward contract merchant, stockbroker, *financial institution*, financial participant, or securities clearing agency, *or* that is a transfer *made by or to (or for the benefit of)* a commodity broker, forward contract merchant, stockbroker, *financial institution*, financial participant, or securities clearing agency, *in connection with a securities contract*, as defined in section 741(7), commodity contract, as defined in section 761(4), or forward contract, that is made before the commencement of the case, except under section 548(a)(1)(A) of this title.

Id. (emphasis added).

> any such security . . and including any repurchase . . transaction on any such security . . . (whether or not such repurchase . . . transaction is a "repurchase agreement", as defined in section 101).

11 U.S.C. § 741(7)(a)(1).

The Bankruptcy Code defines "financial institution" as:

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

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

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

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

On October 29, 2007, the agent under the Credit Agreement wired approximately $426 million to QWUSA's main operating account at Bank of America, N.A. ("Bank of America"). Bank of America then wired approximately $376 million of this amount to CIBC Mellon Trust Co. ("CIBC Mellon"),

the trustee for the notes (the "Disputed Transfer"). CIBC Mellon, in turn, wired to each noteholder its portion of that amount. *See id.*

Judge Peck held:

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

> Disputed Transfer. The third element is present because the cash was transferred for securities in "completion" of the transaction.

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

iii. *Tribune I*

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

Tribune transferred over $8 billion to a securities clearing agency (or financial institution as used in section 546(e)), acting as an intermediary in the leveraged buyout transaction. *See id.* In turn, the intermediary paid the funds to the shareholders in exchange for their shares that were then returned

to Tribune. *See id.* In short, *Tribune I* held safe harbor protections did, in fact, apply to any transaction that passed through a financial intermediary, regardless of whether the banks and brokers at issue received any of the funds themselves. *See id.* at 112.

iv. *Merit*

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

Thereafter, FTI Consulting filed a lawsuit against Merit Management to claw back $16.5 million in funds that Merit Management had received as a stockholder in Bedford Downs. *See id.* As part of the stock acquisition agreement, Valley View had arranged for Credit Suisse to finance the transaction. *See id.* Credit Suisse wired the purchase price

to the Citizens Bank of Pennsylvania, which agreed to serve as the third-party escrow agent for the transaction. *See id.* Merit Management, along with other Bedford Downs shareholders, deposited its stock certificates into escrow, and Citizens Bank of Pennsylvania distributed the purchase proceeds to stockholders including Merit Management. *See id.*

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

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

bor. *See id.* In light of *Merit*, the Second Circuit recalled *Tribune I.*

v. *Tribune II*

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

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

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

> Computershare to act as 'Depositary' in connection with the LBO tender offer. Computershare is a 'financial institution' for the purposes of Section 546(e) because it is a trust company and a bank [pursuant to the Office of

> the Comptroller of the Currency website]. Therefore, Tribune was likewise a 'financial institution' with respect to the LBO payments if it was Computershare's 'customer,' and Computershare was acting as its agent. In its role as Depositary, Computershare performed multiple services for Tribune. First, Computershare received and held Tribune's deposit of the aggregate purchase price for the shares. Then, Computershare received tendered shares, retained them on Tribune's behalf, and paid the tendering shareholders. Given these facts, we conclude that Tribune was Computershare's 'customer' with respect to the LBO payments.

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

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

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

The BosGen Transfer meets the statutory requirements for safe harbor because a financial institu-

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

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

i. The BosGen Transfer was a "Settlement Payment"

Simply put, a transfer of cash to a financial institution made to repurchase and cancel securities—in other words, to complete a securities transaction—qualifies for the safe harbor as a settlement payment. *See Enron*, 651 F.3d 329, 334 (2d Cir. 2011).

The first part of the formulation—that the "settlement payment" be a transfer of cash—is demonstrated by the wiring of funds from BosGen's US Bank Account to EBG's BoA Account. *See* FFM (providing also that BoA would thereafter wire the funds to BONY). The second component, that the transfer be made by or to a financial institution, is addressed below. The third element is met because the BosGen Transfer was made to EBG to fund the Unit Redemptions, the Warrant Redemption, and the Distribution, i.e., to complete a securities transaction (the Tender Offer).

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

First, the Court must determine whether EBG repurchased "securities." Thereafter, the Court turns to whether the BosGen Transfer was made to complete the repurchase of "securities." Though the Bankruptcy Code's definition of "security" does not expressly include the LLC member units and warrants that are the subject of the Tender Offer. The definition of security is broad and includes, among other things, any "other claim or interest commonly known as 'security.'" 11 U.S.C. § 101(49)(A)(xiv).

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

BosGen made the BosGen Transfer to complete a securities transaction. The Credit Facilities expressly say in the First Lien Funding Provisions, the Second Lien Funding Provisions, and the Mezz Funding Provisions that the monies loaned to Bos Gen and EBG pursuant to the First Lien Credit Agreement, the Second Lien Credit Agreement, and the Mezz Agreement will be made available to fund the Tender Offer. Put another way, of course

the $708 Million was transferred to EBG to complete the repurchase of securities—without it, EBG would not have had enough money from the Mezz Agreement (providing for the $300 Million) to fund the Unit Redemptions, the Warrant Redemptions, and the Distribution which required over $900 million.

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

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

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

tract." *Id.* at 422. Here, the BosGen Transfer had a substantial relationship to the Tender Offer.

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

By analogy, in *Tribune II*, the Court held the securities contract was the tender offer repurchase and redemption of Tribune's shares from its shareholders. *See Tribune II*, 946 F.3d 66, 78-80 (2d Cir. 2019). As "shares" are securities under the Bankruptcy Code, so too are the units and warrants that were redeemed pursuant to the Tender Offer. *See* Section VI(c)(i). The *Tribune* Court had "no trouble concluding, based on Section 741(7)'s plain lan-

guage, that all of the payments at issue, *including those connected to the redemption of shares*, were "in connection with a securities contract." *Id.* at 81 (emphasis added). Likewise, this Court concludes that the BosGen Transfer funded the Unit Redemptions, the Warrant Redemptions, and the Distribution and thus, were made in connection with a securities contract.

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

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

As a preliminary matter, the Court notes at the outset that US Bank is a "financial institution" for purposes of section 546(e) of the Bankruptcy Code because it is a bank pursuant to the Office of the

Comptroller of the Currency website. *See* Office of the Comptroller of the Currency, Office of the Comptroller of the Currency at https://www.occ.treas.gov/topics/charters-and-licensing/financial-institution-lists. The next two inquiries are whether: (i) BosGen was US Bank's customer; and (ii) US Bank served as BosGen's agent in connection with a securities contract. If the answer to both of those questions is yes, the BosGen Transfer is safe harbored.

1. BosGen Was US Bank's Customer

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

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

An agency relationship is typically established by "written or spoken words *or other conduct of the principal which*, *reasonably interpreted*, *causes the agent to believe that the principal desires him so to act on the principal's account.*" *Itel Containers Int'l Corp. v. Atlanttrafik Express Service Ltd.*, 909 F.2d

698, 702 (2d Cir. 1990) (emphasis added) (quoting Restatement (Second) of Agency § 26 (1958)). The elements of an agency relationship are: (1) "a manifestation by the principal that the agent shall act for him," (2) "accept [ance of] the undertaking" by the agent, and (3) "an understanding between the parties that the principal is to be in control of the undertaking." *In re Rubin Bros. Footwear*, *Inc.*, 119 B.R. 416, 422 (S.D.N.Y. 1990). Of these, the critical element is control of the agent by the principal. *In re Shulman Transp. Enterprises*, *Inc.*, 744 F.2d 293, 295 (2d Cir. 1984).

The agency test's first requirement is satisfied. In the FFM, BosGen manifested an intent for US Bank to act on its behalf in connection with a securities contract. Therein, BosGen authorizes US Bank to act in connection with: (i) the receipt of funds from the Lenders pursuant to the First Lien Credit Agreement and the Second Lien Credit Agreement; and (ii) the BosGen Transfer. *See* TAC Ex. H (the "FFM") (Instructional Letter introducing the FFM). As evidence that BosGen manifested an intent for US Bank to serve as its agent, the FFM provides "the deposits listed on the third page . . . of the FFM will be transferred to the Depository [US Bank] on the Closing Date." *Id.* at 1(i). Thereafter, the "disbursements listed on the third page of the FFM will be disbursed by the Depository on the Closing Date . . ." *Id.* at 2(ii). The FFM goes on to state, "[t]he Depository [US Bank] is hereby authorized and instructed to accept such deposits and to make such allocations, transfers

and payments in accordance with the FFM." *See id.* at 2. The FFM further demonstrates that US Bank sent the $708 Million, on behalf of BosGen, from the US Bank Account to EBG's BoA Account and that those funds would be used for "Distribution, Unit Buyback and Warrant Repurchases," along with "Transaction Fees and Expenses." FFM, at 503. Thus, US Bank served as BosGen's agent for the BosGen Transfer, which the FFM demonstrates was an upstream transfer of monies to EBG in connection with the Tender Offer to fund the Unit Redemptions, the Warrant Redemptions, and the Distribution.

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

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

Tribune's reasoning further supports the conclusion that US Bank served as BosGen's agent in con-

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

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

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

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

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

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

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

1. BosGen and EBG Were BONY's Customers

The Tender Offer provides that "[w]e [defined to include BosGen and EBG] have retained The Bank

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

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

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

The agency test's first requirement is satisfied. BosGen and EBG manifested their intent for BONY to act as their agent in connection with the Tender Offer *prior to the Step One Transfer* (as early as November 16, 2006, the date of the Tender Offer). The Court's conclusion that BONY acted as both BosGen and EBG's agent in connection with the Tender Offer is supported by: (i) the procedures articulated in the Tender Offer for unit redemptions, (ii) BosGen and EBG's reservation of authority to accept or reject a tendering member's units;

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

As to (ii), BosGen and EBG controlled BONY, their agent, in connection with the Tender Offer. The

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

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

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

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

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

Transfer was in connection with a securities contract.

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

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

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

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

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

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

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

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

Institution," or other covered entity, the transfer fell outside the section 546(e) safe harbor. *See id.* Unlike in *Merit*, the parties to the overarching transfer (BosGen and EBG) both qualify as "financial institutions" for the BosGen Transfer because of their relationship with BONY in connection with the Tender Offer. *Merit*'s holding does not instruct the Court to confine its inquiry to the Step One Transfer. In fact, *Merit* requires the opposite.

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

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

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

In light of *Tribune II*, the Trustee concedes his constructive fraudulent transfer claim to recover the Unit Redemptions and the Warrant Redemptions made by EBG to its members fails. *See* Opposition, at 25-26 (conceding Count III survives only to the extent it seeks to avoid the Distribution). Further, the Trustee concedes: (ii) the Tender Offer was a securities contract between EBG and its members, *see id.* at 30; (ii) that "[t]here was . . . [a] settle-

ment payment here—the transfer from EBG to its members," *id.* at 31; and (iii) that EBG "transferred funds to BONY for that bank to act as EBG's agent in connection with the subsequent settlement payments," *id.* at 30—i.e., that EBG was a financial institution as BONY's (its agent's) customer.

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

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

iii. Conclusion

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

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

The Trustee asserts next that the Distribution falls outside section 546(e) because dividend payments

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

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

payments"—i.e., "transfers . . . made to complete [a] securities transaction." *See Enron*, 651 F.3d 329, 334-35 (2d Cir. 2011).

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

Accordingly, those portions of Counts I and III that seek to recover the Distribution from the Defen-

dants are dismissed pursuant to section 546(e) of the Bankruptcy Code.

VIII. Ratification

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

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

The Trustee believes that the appropriate question to ask is whether the Lenders "had full knowledge of all material facts" surrounding the transaction (the "Material Facts Test"). *See ASARCO LLC v. Americas Mining Corp.*, 396 B.R. 278, 427 (S.D. Tex. 2008). "Ratification 'is the act of knowingly giving sanction or affirmance to an act which would otherwise be unauthorized and not binding.'" *PAH Litigation Trust v. Water Street Healthcare Partners, L.P. (In re Physiotherapy Holdings Inc.)*, Case No. 13-12965, 2016 WL 3611831, at * 12 (Bankr. D. Del. June 20, 2016) (quoting 57 N.Y. Jur.2d Estoppel, Ratification and Waiver § 87 (2007)). This defense "implies assent, express or implied, and a change of position on the part of one who acts in reliance on such assent." *Id.* With regard to transactions such as the Leveraged Recap Transaction, courts have noted that "[w]here the allegedly ratifying party's silent acquiescence to a transaction credibly appears to have resulted from the complexity of the situation rather than intent, ratification does not occur." *Adelphia Recovery Trust v. HSBC Bank USA (In re Adelphia Recovery Trust)*, 634 F.3d 678, 693-94 (2d Cir. 2011) (citing *King v. Ionization Int'l, Inc.*, 825 F.2d 1180, 1187 (7th Cir. 1987)). Other courts have held that the ratification defense is applicable "only if [the creditor] actually participated in structuring the transaction that damaged creditors." *Tronox Inc. v. Kerr McGee Corp. (In re Tronox, Inc.)*, 503 B.R. 239, 276 (Bankr. S.D.N.Y. 2013). *See also In re Refco, Inc. Sec. Litig.*, No. 07 MDL 1902 GEL, 2009 WL 7242548, at *11 (S.D.N.Y. Nov. 13, 2009), report

adopted, 2010 WL 5129027 (S.D.N.Y. Jan. 12, 2010) (noting that the transferee was "heavily involved in structuring the transaction for the purchase of PlusFunds shares). In *Tronox*, the Court held that because the defendants "did not establish that the bondholders *knowingly gave sanction to the fraudulent conveyances complained of* in this case," a finding of ratification was inappropriate. *In re Tronox*, 503 B.R. at 276.

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

> [c]ompanies rely on cash flow to service their debts. A firm with poor cash flows may find itself unable to pay its debts as they come due. Clearly, this information is highly pertinent to a reasonable investor's decision to lend money to a company. Simply put, the Trustee has advanced sufficient allegations to suggest that the Senior Noteholders may have been misled

> into lending money to a company whose financial health was poorer than represented. Because intent is the central element of ratification, it is far from certain that the Senior Noteholders intended to extend credit to an insolvent company. Rather, the bondholders 'simply bought into [the transaction] based on the information available to them.'

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

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

TAC based on the Lenders' ratification of the Leveraged Recap Transaction is denied.

IX. Claims Against Defunct Entities

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

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

Ch. Feb. 21, 2012). Here, the same holds true for Defendant Epic Distressed Debt Holdings, Inc. ("Epic"), a Delaware corporation that was dissolved as of September 3, 2009. *See* Anker Decl., Ex. 3; *Citadel Indus.*, 423 A.2d at 503.

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

X. Conclusion

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

dants are directed to submit an Order to the Court consistent with this opinion.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

Chapter 11

Case No. 10-14419 (SCC)

Jointly Administered

Adv. Proc. No. 12-01879 (RG)

In re

BOSTON GENERATING LLC, *et al.,*

Debtors.

MARK HOLLIDAY, the Liquidating Trustee of the BosGen Liquidating Trust,

Plaintiff,

v.

K ROAD POWER MANAGEMENT, LLC, *et al.,*

Defendants.

ORDER DISMISSING THIRD AMENDED COMPLAINT

For the reasons set forth in the Court's June 18, 2020 Opinion [ECF No. 314], the Trustee's Third Amended Complaint [ECF No. 272-1] is hereby dismissed.

SO ORDERED.

Dated: June 19, 2020
New York, New York

[SEAL]

/s/ ROBERT E. GROSSMAN
Robert E. Grossman
United States Bankruptcy Judge

11 U.S.C.A. § 544

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

Effective: June 19, 1998
Currentness

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

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

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

(3) a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser and has perfected such transfer

at the time of the commencement of the case, whether or not such a purchaser exists.

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

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

11 U.S.C.A. § 548

§ 548. Fraudulent transfers and obligations

Currentness

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

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

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

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

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

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

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

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

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

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

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

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

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

(2) In this section—

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

(B) a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency that receives a margin payment, as defined in section 101, 741, or 761 of this title,

or settlement payment, as defined in section 101 or 741 of this title, takes for value to the extent of such payment;

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

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

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

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

(A) is made by a natural person; and

(B) consists of—

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

(ii) cash.

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

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

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

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

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

(B) such transfer was by the debtor;

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

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

(2) For the purposes of this subsection, a transfer includes a transfer made in anticipation of any money judgment, settlement, civil penalty, equi-

table order, or criminal fine incurred by, or which the debtor believed would be incurred by—

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

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

McKinney's Debtor and Creditor Law § 276

§ 276. Conveyance made with intent to defraud

Effective: [See Text Amendments] to April 3, 2020

Every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors.

McKinney's Debtor and Creditor Law § 278

§ 278. Rights of creditors whose claims have matured

Effective: [See Text Amendments] to April 3, 2020

1. Where a conveyance or obligation is fraudulent as to a creditor, such creditor, when his claim has matured, may, as against any person except a purchaser for fair consideration without knowledge of the fraud at the time of the purchase, or one who has derived title immediately or mediately from such a purchaser,

a. Have the conveyance set aside or obligation annulled to the extent necessary to satisfy his claim, or

b. Disregard the conveyance and attach or levy execution upon the property conveyed.

2. A purchaser who without actual fraudulent intent has given less than a fair consideration for the conveyance or obligation, may retain the property or obligation as security for repayment.