The Current State of Play: the Bankruptcy Code "Safe Harbor" After *Merit Management*

By Oscar Garza, Douglas Levin, and Matthew Bouslog

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I. Introduction

The "safe harbor" provision in section 546(e) of the Bankruptcy Code protects certain types of transfers involving securities settlement payments and securities contracts from being "avoided" (or undone) as a constructive fraudulent transfer.[1] A claim for constructive fraudulent transfer seeks to avoid a transfer on the basis that the debtor: (1) received less than "reasonably equivalent value" in exchange for the transfer; and (2) made the transfer when the debtor was insolvent, had "unreasonably small capital," or intended to incur debts that would be beyond its ability to pay as such debts matured.[2] Unlike a claim for actual (or intentional) fraudulent transfer, which requires proof of an intent to "hinder, delay, or defraud" a debtor's creditors,[3] a constructive fraudulent transfer is deemed to be fraudulent if both of the requirements above are met.

Section 546(e) provides that a "settlement payment" or "transfer made . . . in connection with a securities contract" may not be avoided as a constructive fraudulent transfer under the Bankruptcy Code if such transfer was "by or to (or for the benefit of)" certain entities (each a "***Qualifying Participant***") including a "financial institution" and a "financial participant."[4] Until a few years ago, the majority of circuits held that section 546(e) protected transfers made ***through*** a Qualifying Participant, even if the Qualifying Participant only acted as a conduit and had no beneficial interest in the transfer. In 2018, the U.S. Supreme Court in Merit Management Group, LP v. FTI Consulting, Inc., 138 S. Ct. 883, 200 L. Ed. 2d 183, 65 Bankr. Ct. Dec. (CRR) 92, Bankr. L. Rep. (CCH) P 83219 (2018), rejected that theory, holding that section 546(e) only protects a transfer if the transferor or transferee is itself a Qualifying Participant.

This article summarizes the state of play regarding the safe harbor in the wake of *Merit Management*.

Courts accept the "customer-as-financial-institution" argument.

Most notably, the Second Circuit in In re Tribune Company Fraudulent Conveyance Litigation, 946 F.3d 66 (2d Cir. 2019) ("***Tribune***"), held that section 546(e) protected tender offer and merger payments by Tribune Company to thousands of shareholders because Tribune was a "financial institution" pursuant to the Bankruptcy Code's definition of that term, which includes the "***customer***" of a financial institution when the institution acts as its "agent or custodian" "in connection with a securities contract."[5] *Tribune* was the first, and is currently the only, circuit-level decision to address the "customer-as-financial-institution" issue left open by the Supreme Court in *Merit Management*. That decision is currently before the U.S. Supreme Court on a petition for *certiorari*, as to which the Supreme Court has requested the views of the Solicitor General. The safe harbor is thus at another potentially significant juncture as the Supreme Court decides whether to revisit the provision.

At least three lower courts in the Second Circuit (*Boston Generating*, *Nine West*, and *Fairfield Sentry*) followed *Tribune* in extending safe harbor

protection to transfers involving the customer of a financial institution.[6] Those decisions have the effect of re-expanding the scope of the safe harbor after *Merit Management*. However, one bankruptcy court outside the Second Circuit (*Greektown*) criticized *Tribune* for applying a lax standard for an agency relationship and treating "any intermediary hired to effectuate a transaction . . . as its customer's agent," thus permitting "a complete workaround of *Merit Management.*"[7]

Although these courts all sought to follow the plain language of the Bankruptcy Code's definition of a "financial institution," they reached different outcomes based on their respective interpretations of that language, namely the appropriate standard for establishing that a financial institution acted as "agent" for its customer in connection with a securities contract. Thus, litigation regarding the customer-as-financial-institution argument will likely continue to be focused on the appropriate standard for establishing an agency relationship.

Courts reject attempts to circumvent the safe harbor.

Recent decisions also have addressed arguments, mostly by counsel for litigation trusts established pursuant to a chapter 11 plan, attempting to circumvent the limitations imposed by the safe harbor. Plaintiffs sought to avoid safe harbored transfers by bringing fraudulent transfer claims directly under state law based on the argument that section 546(e) only expressly bars claims brought under the Bankruptcy Code. In *Tribune*, the Second Circuit rejected that attempted end run, holding that section 546(e) preempted (or barred) constructive fraudulent transfer claims under state law. Lower courts in the Southern District of New York in *Boston Generating*, *Nine West*, and *Fairfield Sentry* subsequently extended that ruling to preempt claims for intentional fraudulent transfer under state law and avoidance claims under foreign law.

Additionally, plaintiffs in *Boston Generating* and *SunEdison* sought to effectively undo a safe harbored transfer by avoiding an allegedly unprotected transfer that occurred before a safe harbored transfer (e.g., the transfer of cash to fund a tender offer) and then recovering that earlier transfer from recipients of the safe harbored transfer (e.g., recipients of tender offer payments) as "subsequent transferees" of the earlier transfer.[8] That strategy was based on the fact that avoidance and recovery of a transfer are distinct concepts under the Bankruptcy Code, and the safe harbor only bars the avoidance of protected transfers. Thus, the plaintiffs argued that they were not seeking to avoid the subsequent, safe harbored transfer. Both courts rejected that argument, holding that the earlier transfer was closely related to the subsequent transfer and thus protected as a settlement payment and/or "transfer made . . . in connection with a securities contract."

Courts hold that section 546(e) protects dividends under certain circumstances.

Boston Generating and *Nine West* also held that dividend payments, which section 546(e) does not protect when they are "true dividends" paid in the

ordinary course of business, were protected because they were paid pursuant to safe-harbored tender offer and merger transactions and were thus transfers "made . . . in connection with a securities contract."

Protection of transactions involving a "financial participant."

With *Merit Management* having foreclosed the "conduit theory" and *Tribune*'s customer-as-financial-institution holding currently on appeal in the Supreme Court, increased attention has been paid to the protection of a "financial participant," which is a market participant that meets significant thresholds specified in the Bankruptcy Code. Although there is limited authority discussing the protection of financial participants, trial courts have begun to address that issue. Most notably, a split has arisen whereby two lower courts (*Tribune* and *Samson Resources*) interpreted the Bankruptcy Code's definition of "financial participant" and reached opposite conclusions regarding whether section 546(e) may protect a transfer on the grounds that the debtor qualifies as a financial participant.[9]

The main takeaway.

As one bankruptcy court recently explained with respect to the Bankruptcy Code's venue provision: "A party seeking to defeat the plain meaning of Bankruptcy Code text bears an exceptionally heavy burden" and, "[i]f the text of a statute is found to be unambiguous, the Court need not undertake further inquiry" because "Congress conferred authority in bankruptcy judges to serve as judicial officers, not legislators."[10] The decisions discussed herein illustrate that while courts have been pursuing the same goal of adhering to the language of the safe harbor and corresponding definitions in the Bankruptcy Code, the meanings of those terms remain unsettled.

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

The Bankruptcy Code permits a trustee to bring claims to avoid, for the benefit of the bankruptcy estate, certain prepetition transfers or obligations, including claims to avoid a preference (11 U.S.C.A. § 547) or fraudulent transfer (11 U.S.C.A. § 548(a)). The safe harbor of section 546(e) limits those avoidance powers by providing that:

> Notwithstanding sections 544, 545, 547, 548(a)(1)(B), and 548(b) of this title, ***the trustee may not avoid*** a transfer that is [1] a . . . ***settlement payment*** . . . ***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 [2] 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*** . . . except under section 548(a)(1)(A) of this title.[11]

Courts have simplified the foregoing language by explaining that section 546(e) requires proof of: (1) a "qualifying transaction," meaning a "settlement payment" or "transfer made . . . in connection with a securities contract" ("***Qualifying Transaction***"); and (2) a "[Q]ualifying [P]articipant," meaning a "financial institution, financial participant," or other entity listed in section 546(e).[12] The sole exception to the safe harbor is a claim for

actual fraudulent transfer under section 548(a)(1)(A).

The Second Circuit has held that the purpose of the safe harbor is to " 'promot[e] finality . . . and certainty' for investors, by limiting the circumstances, e.g., to cases of intentional fraud, under which securities transactions could be unwound," thereby "enhancing the efficiency of securities markets" and "reduc[ing] the cost of capital to the American economy."[13]

A. Qualifying Transaction

The Bankruptcy Code defines the first type of Qualifying Transaction, a "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."[14] "[M]ost courts agree that the Code's understanding of a settlement payment is extremely broad and encompasses most ***transfers of money or securities made to complete a securities transaction***."[15]

The other Qualifying Transaction is a "transfer made . . . in connection with a securities contract."[16] One court explained that the definition of "securities contract" in section 741(7)(A) of the Bankruptcy Code is "very broad in its application and encompasses virtually ***any contract for the purchase or sale of securities***, any extension of credit for the clearance or settlement of securities transactions, and a wide array of related contracts, including security agreements and guarantee agreements."[17] The definition of "securities contract" also includes " 'any other agreement or transaction that is ***similar to***' " another agreement or transaction in section 741(7)(A).[18]

A transfer is " 'in connection with' a securities contract if it is '***related to***' or '***associated with***' the securities contract," thus "set[ting] 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."[19]

B. Qualifying Participant

Section 546(e) identifies a Qualifying Participant as a "commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency."[20] Because section 546(e) is phrased in the disjunctive and protects a Qualifying Transaction that was "made by ***or*** to (or for the benefit of)" a Qualifying Participant, it is only necessary to prove that a Qualifying Participant was on either side of a transfer.[21]

Prior to *Merit Management*, the Second Circuit and the majority of other circuits took a broad approach when determining whether section 546(e) protected a transfer, holding that it protected transfers made ***through*** a Qualifying Participant, acting as a "conduit," even if the transferor and transferee (or beneficiary) of the transfer were not Qualifying Participants.[22] Consequently, the safe harbor was held to protect a wide array of securities transactions, so long as they were Qualifying Transactions, because it was sufficient that the transfers were made through an intermediary that was a

Qualifying Participant. However, *Merit Management* rejected the "conduit theory" and narrowed the scope of the safe harbor to transactions in which the transferor or transferee is itself a Qualifying Participant.

III. The Supreme Court's Decision In *Merit Management*

A. Background

Merit Management involved the acquisition of a horse racing and casino business by its competitor. To consummate the transaction, the buyer's bank wired $55 million to another bank that acted as a third-party escrow agent, which disbursed the funds to the seller's shareholders in exchange for their stock in the seller. The buyer subsequently filed for chapter 11 bankruptcy protection and a litigation trust was established pursuant to the confirmed chapter 11 plan. The trustee sued one of the selling shareholders that received $16.5 million from the debtor, alleging that the transaction was a constructive fraudulent transfer under section 548(a)(1)(B) because the debtor was insolvent at the time of the purchase and "significantly overpaid" for the stock.[23]

The district court adopted the "conduit theory" and held that the safe harbor barred the fraudulent transfer claim because the transaction was undisputedly a securities settlement payment involving intermediate transfers "by" and "to" the banks, which were Qualifying Participants. The Seventh Circuit reversed, diverging from the majority of circuits to accept the "conduit theory," holding that the safe harbor did not apply because the banks only acted as conduits and neither the debtor nor the shareholder was itself a Qualifying Participant. The Supreme Court granted certiorari to settle the circuit split.

B. The Supreme Court rejects the "conduit theory" and holds the transfer was not protected for lack of a Qualifying Participant, but avoids adjudicating whether the transfer involved a protected customer of a financial institution

The Supreme Court affirmed the Seventh Circuit's decision, holding that the safe harbor does not protect a transfer when a Qualifying Participant is neither the transferor nor transferee and merely acts as a conduit. The crux of the decision is that a safe harbor analysis must focus on whether the "***relevant transfer***," meaning the "***overarching . . . transfer that the trustee seeks to avoid***," was by, to, or for the benefit of a Qualifying Participant.[24] Whether an intermediate or "component" transfer was made by or to a Qualifying Participant is "simply irrelevant to the analysis under § 546(e)."[25] The Supreme Court reasoned that, as an express limitation on the trustee's avoidance powers, section 546(e) must be applied in relation to the trustee's exercise of those powers with respect to the transfer that the trustee seeks to avoid, not component transfers that the trustee does not seek to avoid.

In the case before it, because the trustee sought to avoid the "end-to-end" transfer from the debtor to the shareholder, and neither was a Qualifying Participant, the safe harbor was inapplicable. As a result of *Merit Management*, a securities or commodities transaction is no longer protected merely because it was routed through a Qualifying Participant.

The shareholder noted in its briefing in the Supreme Court, but did not argue in the lower courts, that the debtor and shareholder were both Qualifying Participants because they were customers of the banks that facilitated the transaction, and the definition of "financial institution" in section 101(22)(A) of the Bankruptcy Code includes a "customer" of a financial institution when the institution "is acting as agent or custodian" for the customer. Amici raised the same point. During oral argument, Justice Breyer indicated that he might have been receptive to that potentially dispositive argument.[26] However, the decision expressly avoided adjudicating the argument on the basis that the shareholder raised it "only in footnotes and did not argue that it somehow dictates the outcome in this case."[27] As a result, *Merit Management* left open the question and the potential viability of the argument which has become the focus of several decisions since then: whether a transferor or transferee may be deemed a Qualifying Participant because it is a customer of a financial institution in connection with a Qualifying Transaction.

IV. Significant Decisions Regarding The Safe Harbor After *Merit Management*

As previously noted, the Bankruptcy Code definition of "financial institution" includes, in addition to the financial institution itself, the "customer" of a financial institution (e.g., bank or trust company) if the financial institution acts as "agent or custodian" for the "customer . . . in connection with a securities contract."[28] After *Merit Management*, the Second Circuit and lower courts in the Second Circuit have held that section 546(e) protects transfers where the transferor and/or transferee constituted a protected "customer" of a financial institution. Those courts also restricted plaintiffs' ability to circumvent the safe harbor, holding that section 546(e) preempted (or barred) avoidance claims under state and foreign law, and protected certain preliminary and ancillary transfers (e.g., transfers to fund a securities transaction, dividends) in connection with a securities contract.

A. In *Tribune*, the Second Circuit holds that Tribune Company constituted a Qualifying Participant as the customer of a financial institution, and that section 546(e) preempts constructive fraudulent transfer claims under state law

1. Background

Tribune Company, a publicly owned publishing and broadcasting company, consummated a tender offer in June 2007 and then went private through a merger six months later in December 2007. In the tender offer, Tribune borrowed funds and transmitted the cash required to repurchase approximately 50% of its outstanding shares to Computershare Trust Company, N.A. ("***Computershare***"), which acted as "Depository." Computershare, on Tribune's behalf, then accepted and held tendered shares and paid out $34 per share to tendering shareholders. In the merger, Computershare acted as an "Exchange Agent" and performed essentially the same function.

One year after the merger, Tribune and various subsidiaries commenced chapter 11 bankruptcy cases. A litigation trust was established pursuant to

the chapter 11 plan, and the trustee pursued a claim to recover the tender offer and merger payments from Tribune's former shareholders, alleging that the payments constituted an actual fraudulent transfer under section 548(a)(1)(A). The trustee did not bring a claim for constructive fraudulent transfer because he acknowledged that, based on controlling Second Circuit law at the time (i.e., the conduit theory), the safe harbor barred the claim because the payments went through Computershare.

Additionally, individual creditors commenced their own lawsuits against former Tribune shareholders seeking to avoid the same payments as constructive fraudulent transfers under state law. The creditors' claims were based on the theory that section 546(e), which expressly bars claims brought by "the trustee" and references avoidance claims brought under the Bankruptcy Code, would not bar claims brought by creditors under state law, and thus they could seek to avoid the same payments that the trustee was barred from avoiding as constructive fraudulent transfers under the Bankruptcy Code.

After the Supreme Court decided *Merit Management*, the trustee of the litigation trust filed a motion for leave to amend his complaint to add a claim for constructive fraudulent transfer under section 548(a)(1)(B). The trustee argued the claim was no longer barred because *Merit Management* rejected the conduit theory upon which safe harbor protection (specifically, the involvement of a Qualifying Participant) depended. Defendants opposed the motion, arguing that the payments were still safe harbored because Tribune and all shareholder defendants were Qualifying Participants as the customers of a financial institution, Computershare.

2. District court decision

On April 23, 2019, Judge Denise Cote of the District Court for the Southern District of New York denied the trustee's motion for leave to amend on grounds including futility, holding that the safe harbor bars the trustee's proposed claim, notwithstanding *Merit Management*, because Tribune was a "financial institution" as defined in the Bankruptcy Code.[29] That conclusion rested on four premises: (1) it was "undisputed" that Computershare was a "financial institution" because it was a "bank" and "trust company"; (2) Tribune was Computershare's "customer" based on the "ordinary meaning" of that term because "Tribune engaged [Computershare's] services as depositary in exchange for a fee" and "was a 'purchaser' of [Computershare's] 'services' "; (3) Computershare acted as Tribune's "agent," based on the "well-settled meaning of th[at] common-law term[]," because "[Computershare] was entrusted with billions of dollars of Tribune cash and was tasked with making payments on Tribune's behalf to Shareholders upon the tender of their stock certificates to [Computershare]," which "is a paradigmatic principal-agent relationship"; and (4) "[Computershare] acted 'in connection with a securities contract,' " which is broadly defined to include any agreement to repurchase securities, as Tribune had done.[30]

The trustee argued that "reading the definition of 'financial institution' to cover an entity like Tribune would run counter to the spirit of the Supreme

Court's decision in *Merit Management*, which rejected the idea that a bank or trust company acting as a 'mere conduit' can be sufficient ground to invoke the safe harbor provision."[31] Rejecting the trustee's argument, Judge Cote noted that "the Supreme Court specifically declined to address the scope of the definition of 'financial institution,' " and "[t]he text of Section 101(22)(A) compels the conclusion that Tribune itself was a 'financial institution.' "[32] Judge Cote's decision denying the trustee's motion to amend the complaint is currently on appeal in the Second Circuit.[33]

3. Second Circuit affirms the dismissal of the creditor actions

Prior to *Merit Management*, when it was accepted that section 546(e) protected the shareholder payments based on the "conduit theory," the Second Circuit affirmed the dismissal of the creditor actions on the grounds that section 546(e) preempted the creditors' state law claims.[34] The court reasoned that "[e]very congressional purpose reflected in Section 546(e), however narrow or broad, is in conflict with appellants' legal theory," because "[u]nwinding settled securities transactions by claims such as appellants' would seriously undermine—a substantial understatement—markets in which certainty, speed, finality, and stability are necessary to attract capital."[35]

A petition for certiorari was pending in the Supreme Court when *Merit Management* was decided. After *Merit Management*, two justices on the Supreme Court issued a "statement" suggesting that the Second Circuit might wish to recall the mandate in order to evaluate the effect, if any, of *Merit Management* on its earlier decision. The mandate was ultimately recalled, and, on December 19, 2019, the Second Circuit issued a decision reaffirming the dismissal of the creditors' claims for substantially the same reasons stated in the district court decision, holding that each required element had been established.[36]

"Financial institution." The court held that Computershare was a "financial institution" because it appeared on the Office of the Comptroller of the Currency's list of trust companies and banks.[37]

"Customer." In determining whether Tribune was the "customer" of Computershare, the court applied the "ordinary meaning" of that term, which is not defined in the Bankruptcy Code for purposes of section 546(e).[38] It considered definitions of "customer" including " 'someone who buys goods or services' " and " 'a person . . . for whom a bank has agreed to collect items.' "[39] The court concluded that "[r]egardless of which definition we apply, Tribune would qualify as Computershare's customer" because "Computershare agreed to collect items for Tribune by receiving the tendered shares and retaining them, and Tribune bought Computershare's services by retaining Computershare to act as Depositary."[40]

"Agent or custodian." The court held that "[i]t is likewise plain that Computershare was Tribune's agent."[41] Applying the "common-law meaning" of the term "agent," the court explained that " '[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.' "[42] The court concluded that Computershare acted as Tribune's "agent" because: (1) "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"; (2) "Computershare, in turn, manifested its assent by accepting the funds and effectuating the transaction"; and (3) "as the transaction proceeded, Tribune maintained control over key aspects of the undertaking."[43]

"In connection with a securities contract." Finally, the court held that Computershare acted as agent "in connection with a securities contract."[44] The plaintiffs argued that, unlike the tender offer payments, which constituted a repurchase of shares, the merger payments constituted a "redemption" of shares pursuant to which the shares were cancelled and converted to a right to payment.[45] Rejecting that argument, the court held that "[t]he term 'redemption,' in the securities context, means 'repurchase,' "[46] and the Bankruptcy Code "defines 'securities contract' capaciously to include, inter alia . . . 'any other agreement or transaction that is similar to [a contract for the purchase or sale of a security].' "[47]

Having held that Tribune constituted a financial institution for purposes of section 546(e), the court concluded that the safe harbor would bar a claim to avoid the shareholder payments as a constructive fraudulent transfer claim under the Bankruptcy Code because the payments constituted a Qualifying Transaction made by a Qualifying Participant (i.e., Tribune). Although the creditors brought claims under state law, the court reaffirmed its previous holding that the creditors' claims were preempted by section 546(e). It thought that the "reasons underpinning our [previous] preemption holding are not implicated by *Merit Mgmt.* in any way," and the creditors' claims would undermine the goals of ensuring "certainty, speed, finality, and stability" in securities markets:

> A lack of protection against the unwinding of securities transactions would create substantial deterrents, limited only by the copious imaginations of able lawyers, to investing in the securities market. The effect of appellants' legal theory would be akin to the effect of eliminating the limited liability of investors for the debts of a corporation: a reduction of capital available to American securities markets.[48]

Thus, the court affirmed the dismissal of the creditors' claims.

4. Creditors file a petition for certiorari

The creditors appealed from the Second Circuit's decision, filing a petition for certiorari in the Supreme Court arguing that the decision undermines *Merit Management* by essentially restoring the "conduit theory" that the Supreme Court rejected under the new customer-as-financial-institution theory.[49] On October 5, 2020, the Supreme Court invited the Solicitor General to file a brief in the case expressing the views of the United States, indicating the possibility that the Supreme Court may grant certiorari to ad-

dress the customer-as-financial-institution theory.[50] As of this publication, the Solicitor General has not submitted its views and the Supreme Court has not ruled on the petition for certiorari.

B. Lower courts in the Second Circuit expand upon *Tribune* by accepting the customer-as-financial-institution argument, extending *Tribune*'s preemption holding to additional avoidance claims under state and foreign law, and broadly protecting all transfers "in connection with" a securities contract

Subsequent to the Second Circuit's decision in *Tribune*, at least three lower courts in the Southern District of New York followed *Tribune* in holding that section 546(e) protected a Qualifying Transaction involving a protected "customer" of a financial institution.[51] Additionally, courts in the Second Circuit extended *Tribune*'s preemption holding, determining that section 546(e) also bars claims for intentional fraudulent transfer under state law and avoidance claims under foreign law. They also held that section 546(e) protected various transfers "in connection with" a securities contract, including preliminary transfers to fund a settlement payment and dividends paid in connection with a securities contract, thus rejecting plaintiffs' efforts to isolate and avoid transfers related to a safe-harbored transfer.

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

In *Boston Generating*, a power-generating company consummated a leveraged recapitalization pursuant to which a subsidiary borrowed funds and transferred $708 million to its parent as a dividend, and the parent then used those funds and additional borrowed funds to repurchase $925 million of its LLC membership units pursuant to a tender offer. The parent also distributed $35 million in dividends to all of its members regardless of whether they tendered their units. To effectuate the tender offer, the parent sent its members an "Offer to Purchase" advising that the parent would purchase up to $925 million of outstanding membership units, and that members could tender their units by submitting a Letter of Transmittal and required documentation to The Bank of New York ("***BNY***").

The parent and subsidiary commenced chapter 11 cases nearly four years after the transaction closed. Pursuant to the confirmed chapter 11 plan, a liquidating trust was established to pursue claims assigned by the debtors' general unsecured creditors, who predominantly consisted of the lenders that financed the transaction. The trustee of the liquidating trust brought claims under state law for intentional and constructive fraudulent transfer seeking to avoid and recover the payments to unit holders. The trustee did not bring fraudulent transfer claims under the Bankruptcy Code because the transfers occurred nearly four years before the bankruptcy and such claims would have been barred under the Bankruptcy Code's two-year statute of limitations, whereas the state law claims were subject to a longer four-year statute of limitations.

The Trustee conceded that *Tribune* would bar avoidance of the tender of-

fer payments (but not the dividend payments) from the parent to its members because the tender offer constituted a Qualifying Transaction and the parent was a Qualifying Participant because BNY acted as "agent" for the parent as its "customer." Therefore, the trustee sought to plead around section 546(e) and *Tribune*.

Under the Bankruptcy Code and state law, the avoidance of a fraudulent transfer is a distinct concept from recovery of that transfer once it has been avoided, and recovery is permitted from either the "initial transferee" or "any immediate or mediate transferee of such initial transferee."[52] Further, section 546(e) expressly bars the avoidance of a protected transfer of property but does not expressly bar the recovery of such property if it was involved in a different, non-safe harbored transfer.

The trustee sought to divide the leveraged recapitalization into two "sets" of transfers—an "initial transfer" of $708 million from the subsidiary's account at U.S. Bank to the parent's account at Bank of America, which the parent transferred to its BNY account a few days later, and the "subsequent transfer" of those and additional funds from the parent's BNY account to its members. The trustee argued that it could avoid the "initial transfer" of $708 million from the subsidiary to the parent, and then recover those proceeds from the parent's members as the "subsequent transferees" of that "initial transfer," without ever avoiding the tender offer. The trustee also argued that no Qualifying Participant was involved in the "initial transfer" because BNY played no role in consummating that transfer. On June 18, 2020, the bankruptcy court granted the defendants' motion to dismiss the claims based on section 546(e).

a) Held that section 546(e) preempts constructive and intentional fraudulent transfer claims under state law

The *Boston Generating* court held as a threshold matter that, pursuant to *Tribune*, section 546(e) would preempt the trustee's constructive fraudulent transfer claims under state law if section 546(e) would otherwise protect the challenged transfers.[53]

The court further held "[*Tribune*'s] reasoning applies equally to the Trustee's state law *intentional* fraudulent transfer claims."[54] The trustee had argued the safe harbor does not bar those claims because they are substantially similar to an actual fraudulent transfer claim under the Bankruptcy Code, which is expressly excepted from section 546(e). Rejecting that argument, the court followed U.S. Bank Nat. Ass'n v. Verizon Communications Inc., 892 F. Supp. 2d 805, 816–17 (N.D. Tex. 2012), aff'd, 761 F.3d 409, 59 Bankr. Ct. Dec. (CRR) 235 (5th Cir. 2014), as revised, (Sept. 2, 2014), in holding that "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."[55] That holding was significant because, as previously noted, the trustee could not bring a claim under the Bankruptcy Code due to the statute of limitations.

Thus, the issue was limited to whether section 546(e) would protect the transfers, in which case the trustee's state law claims would be barred.

b) Held that section 546(e) protected the "initial transfer" because it was a Qualifying Transaction made by and to a protected customer of a financial institution

The court rejected the trustee's attempt to isolate the transfer from the subsidiary's account at U.S. Bank to the parent's account at Bank of America for purposes of section 546(e), which disregarded the parent's subsequent transfer of the funds from its Bank of America account to its BNY account. The court viewed that as a component of the "relevant" or "overarching" transfer from the subsidiary to the parent's BNY account, which the court was required to examine under *Merit Management*.[56]

Focusing on that transfer, the court held that it was a Qualifying Transaction as both a "settlement payment" and a transfer "in connection with a securities contract" because the purpose of that transfer was to fund the tender offer. It explained that a "settlement payment" is "[s]imply put, a transfer of cash to a financial institution made to repurchase and cancel securities—in other words, to complete a securities transaction."[57] The court held that the transfer was made "to complete a securities transaction" because the various loan agreements expressly required that the transfer would fund the tender offer and dividend payments, and "of course the $708 Million was transferred to [the parent] to complete the repurchase of securities—without it, [the parent] would not have had enough money from [its own borrowing] . . . to fund the [payments] which required over $900 million."[58]

The court further determined that the transfer was made "in connection with a securities contract," which sets a " 'low bar for the required relationship between the securities contract and the transfer sought to be avoided,' " because the transfer "funded" and thus "had a substantial relationship to the Tender Offer."[59]

Next, the court held that the transfer was made both "by" and "to" protected customers of a financial institution (i.e., Qualifying Participants) based on two alternative grounds. First, the subsidiary qualified as a "financial institution" because U.S. Bank acted as its agent when the bank transferred the subsidiary's funds to the parent's account at Bank of America. Following the steps outlined in *Tribune*, the court held that: (1) "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"; (2) a "[flow of funds memorandum] and its terms demonstrate [the subsidiary] was US Bank's customer" because the subsidiary provided instructions to U.S. Bank regarding the disbursement of funds; and (3) U.S. Bank acted as "agent," according to a common law test for agency, because (a) the subsidiary "manifested an intent for US Bank to act on its behalf in connection with a securities contract," (b) "US Bank accepted the task of serving as [the subsidiary's] agent," and (c) "[the subsidiary] remained in control of the undertaking."[60]

Second, the subsidiary and parent were both "financial institutions" by virtue of their relationship with BNY because: (1) BNY "is a bank pursuant to the Office of the Comptroller of the Currency website"; (2) the subsidiary

and parent were both BNY's "customers" because the Tender Offer stated that both entities had retained BNY to consummate the transaction; and (3) BNY acted as "agent" by acting as Depository with authorization to act on behalf of the parent and subsidiary (e.g., accepting tendered units and transmitting payments to members) subject to their "ultimate decision-making authority" regarding whether to accept tendered units.[61] Although BNY was not involved in the transfer from the subsidiary to the parent's account at Bank of America, the court held that BNY had manifested its intent to serve as agent in connection with the tender offer well before that transfer, and was thus acting as agent for the subsidiary and the parent in connection with that transfer.[62]

c) Held that section 546(e) also protected the dividend payments because they were part of an integrated transaction, not a "true dividend"

Finally, the court held that the dividend payments were protected for the same reasons as the tender offer payments. The court reasoned that they were not a "true dividend," meaning "an isolated dividend paid in the ordinary course."[63] Instead, the dividends were paid "as part of a single, integrated transaction to settle [the parent's] repurchase of its members' shares," thus constituting settlement payments and "transfer[s] made . . . in connection with a securities contract."[64]

d) Analysis

There are three significant takeaways from *Boston Generating*. Most notably, the subsidiary constituted a protected customer of U.S. Bank because U.S. Bank transferred the loan proceeds to the parent to fund (i.e., "in connection with") the tender offer, even though U.S. Bank was not involved in consummating the tender offer. *Boston Generating*'s acceptance of the customer-as-financial-institution argument thus goes a step further than *Tribune*, where the underlying financial institution (Computershare) itself consummated the tender offer and merger. If *Boston Generating* stands for the proposition that section 546(e) protects a transfer made by a bank, acting as agent for its customer, to fund the customer's purchase of securities, then it appears the court, if presented with the question, may have held that section 546(e) protected the transfers in *Merit Management*.[65]

The court also rejected the trustee's effort to circumvent section 546(e) by isolating the "initial transfer" from the subsidiary's account at U.S. Bank to the parent's account at Bank of America. The court characterized that as a component of the overarching transfer from the subsidiary to the parent's BNY account, which was the relevant transfer under *Merit Management*. *Boston Generating* thus signals that, even if a plaintiff seeks to avoid a transfer that constitutes an avoidable "transfer" under the Bankruptcy Code,[66] a court may look to the "overarching" transfer for purposes of section 546(e).

The court's holding that section 546(e) protected the dividend payments is also significant because it signals that the safe harbor may protect other types of payments, that are otherwise unprotected, so long as they are ap-

proved and paid as part of (i.e., "in connection with") an integrated securities transaction.

2. *In re Nine West LBO Securities Litigation*, 482 F. Supp. 3d 187 (S.D.N.Y. 2020)

In 2014, a private equity firm acquired Jones Group, a publicly traded footwear and apparel company, through a leveraged buyout. To consummate the transaction, Jones Group merged into a new subsidiary of the private equity firm, which was renamed Nine West Holdings, Inc. ("***Holdings***"), and Holdings incurred new debt to fund distributions to Jones Group stakeholders. The distributions included $1.1 billion to shareholders for the redemption of their shares. Wells Fargo acted as "paying agent" and distributed the merger consideration to shareholders. The distributions also included $78 million paid to officers and directors for the cancellation of their restricted stock and stock equivalent units, plus any unpaid dividends that had accumulated on the restricted shares.

Holdings commenced a chapter 11 bankruptcy case almost four years after the transaction closed. A litigation trustee appointed pursuant to the confirmed chapter 11 plan, exercising its ability to bring state law avoidance claims pursuant to the "strong arm" provision in 11 U.S.C.A. § 544(b), and the indenture trustee for certain noteholders, both brought fraudulent transfer claims under state law against the shareholders, officers, and directors, seeking to avoid and recover the payments they received. The litigation trustee also brought claims seeking to recover the payments under a theory of unjust enrichment. On August 27, 2020, Judge Jed Rakoff in the Southern District of New York granted the defendants' motion to dismiss the claims under section 546(e), holding that "*Tribune* largely controls these issues" and also following *Boston Generating*.[67]

a) Held that section 546(e) preempts claims for fraudulent transfer and unjust enrichment under state law

Following *Tribune*, the court held that section 546(e) preempted the intentional and constructive fraudulent transfer claims.[68] It also held that the unjust enrichment claims were preempted, rejecting the trustee's argument that the claims were not preempted because they "sound in breach of fiduciary duty, not fraudulent conveyance."[69] The court reasoned that "it is the remedy sought, rather than the allegations pled, that determines whether § 546(e) preempts a state law claim."[70] It further explained that, "[w]here an unjust enrichment claim 'seeks to recover the same payments held unavoidable under § 546(e),' it would 'render the § 546(e) exemption meaningless, and would wholly frustrate the purpose behind that section.' "[71]

Thus, the issue was whether section 546(e) protects the payments, in which case the plaintiffs' claims would be barred.

b) Held that section 546(e) protects the merger payments because they were made by (and in some instances, to) protected customers of a financial institution

The court determined that the merger payments to shareholders were Qualifying Transactions as both settlement payments and transfers made "in connection with a securities contract."[72] They were settlement payments, "[i]n light of the Second Circuit's capacious interpretation of § 741(8)," because they were "transfers of cash made to complete the merger."[73] Following *Tribune*, the court held that it made no difference that the merger involved the cancellation of shares instead of a repurchase of the shares.[74]

Next, the court found that Holdings was a "financial institution" because it was the customer of Wells Fargo, which acted as its agent in distributing the merger payments.[75] Rejecting the plaintiffs' argument that Wells Fargo was a "non-agent contractor" that did not owe a fiduciary duty to Holdings, the court explained that "plaintiffs are confusing cause and effect" because "[a] relationship of agency gives rise to a fiduciary relationship . . . but a fiduciary relationship is not itself a necessary prerequisite to establishing agency."[76] Further, the "plaintiffs' argument [was] foreclosed by *Tribune*, where the Second Circuit squarely held that a paying agent that had accepted the funds and effectuated the transaction was an agent of the customer."[77]

The court also rejected the plaintiffs' argument that, pursuant to the Paying Agent Agreement, Wells Fargo only acted as agent for a shell company involved in the merger, not Holdings, holding that it was a "trilateral agreement between [Holdings], [the shell company], and Wells Fargo."[78] The court found that "the money belonged to [Holdings] and was paid to its shareholders," and "[w]hile [Holdings] may have had less control over the shareholder transfers than did Tribune, it nevertheless had enough control over key elements of the transaction so as to establish an agency relationship with Wells Fargo."[79]

The payments to all defendants were thus protected, on a global basis, because they were made "by" Holdings, a Qualifying Participant. Although it was not necessary to determine whether any defendant constituted a Qualifying Participant, the court held that the payments "independently qualify for the § 546(e) safe harbor" with respect to 82 shareholder defendants that submitted SEC documents to prove they were registered under the Investment Company Act of 1940, thus constituting "financial institutions" under 11 U.S.C.A. § 101(22)(B), and an additional defendant that was a bank.[80]

c) Held that section 546(e) protected the dividend payments because they were paid pursuant to the Merger Agreement, even though Wells Fargo did not distribute those payments

The court further held that section 546(e) barred the plaintiffs' claims seeking to avoid the payments of accumulated dividends on the officers and directors' restricted shares.[81] Plaintiffs had argued those payments were not a Qualifying Transaction because they did not involve the purchase, sale, or

cancellation of any security, and they did not involve a Qualifying Participant because those payments were allegedly processed by payroll rather than Wells Fargo.

As "in *In re Boston Generating*, the accumulated dividend payments were tied to the restricted shares and paid as part of the settlement of the Merger Agreement."[82] Thus, the payments constituted a Qualifying Transaction as "both settlement payments and transfers made in connection with a securities contract."[83]

Next, the court held that Holdings' status as a "financial institution" by virtue of the role played by Wells Fargo extended to the dividend payments even though Wells Fargo did not distribute those payments:

> [T]he relevant inquiry under *Tribune* and in light of *Merit* is not whether the bank had a role in a specific payment or transfer but whether that bank was acting as an agent in connection with a securities contract. **When, as here, a bank is acting as an agent in connection with a securities contract, the customer qualifies as a financial institution with respect to that contract, and all payments made in connection with that contract are therefore safe harbored under § 546(e)**.[84]

The court explained that "this is a question of statutory interpretation," and that "reading is more consistent with the text of the statute," which "provides that a customer of a bank qualifies as a financial institution 'when [the bank] is acting as agent . . . in connection with a securities contract,' " not " 'in connection with a transfer.' "[85]

d) Analysis

As previously discussed, *Boston Generating* held that the subsidiary constituted a financial institution based on its relationship to U.S. Bank, which transferred loan proceeds to fund a tender offer, even though U.S. Bank had no role in consummating the tender offer. *Nine West* went a step further as Wells Fargo apparently played no role in transferring the funds for the dividend payments or distributing the payments, which were allegedly processed by payroll. However, the dividends were protected because once Holdings was found to be a Qualifying Participant by virtue of its relationship with Wells Fargo in connection with the Merger Agreement, "all payments made in connection with that contract [by Holdings] are therefore safe harbored under § 546(e)."[86] *Nine West* and *Boston Generating* thus reflect that section 546(e) still offers significant protection in the Second Circuit as a result of courts' acceptance of the customer-as-financial-institution argument and broad interpretations given to its requirements.

3. *SunEdison Litigation Trust v. Seller Note, LLC*, 620 B.R. 505 (Bankr. S.D.N.Y. 2020)

SunEdison involved fraudulent transfer claims arising from the acquisition of a wind and solar power generation project in 2015. A subsidiary of SunEdison, Inc. ("***SunEdison Parent***") owned stock in TerraForm Power, Inc. and units in operating subsidiary TerraForm Power, LLC (collectively, the "***Securities***"). In November 2014, SunEdison Parent and TerraForm

Power, LLC entered into a Purchase and Sale Agreement with various sellers to purchase the sellers' equity interests in a renewable energy company. To fund the transaction, SunEdison Parent formed a special purpose entity ("***SPE***"), the subsidiary transferred the Securities to the SPE, and the SPE issued $350 million of exchangeable notes to the sellers. To secure the repayment of the notes, the SPE pledged the Securities to Wilmington Trust, N.A., which held a first lien on the Securities and could sell the Securities for the benefit of the sellers in the event of a default under the notes.

SunEdison Parent's financial condition deteriorated in 2015 and certain pledged Securities were eventually transferred to the sellers. In April 2016, SunEdison Parent, the subsidiary, and various affiliates commenced chapter 11 bankruptcy cases.

The liquidating trustee appointed pursuant to the chapter 11 plan brought claims to avoid, as a constructive fraudulent transfer, the subsidiary's transfer of the Securities to the SPE. The trustee did not attempt to avoid the subsequent pledge of the Securities, apparently because it was safe-harbored as a transfer made in connection with a securities contract, the Purchase and Sale Agreement (i.e., a Qualifying Transaction), to Wilmington Trust, a financial institution (i.e., a Qualifying Participant).[87] Therefore, similar to *Boston Generating*, the trustee sought to circumvent the safe harbor by suing the sellers (as noteholders) as the "subsequent transferees" (or, alternatively, the beneficiaries) of the initial transfer of the Securities to the SPE.[88] The trustee argued that section 546(e) did not protect the initial transfer because Wilmington Trust had no role in that transfer.[89]

On November 2, 2020, the court granted the defendants' motion to dismiss based on section 546(e).

a) Held that the transfer was protected as part of an integrated transaction protected by section 546(e)

Following *Boston Generating*, the court rejected the trustee's effort to isolate and avoid the initial transfer of the Securities to the SPE. It held that under *Merit Management* the "relevant transfer" for purposes of the safe harbor was "the overarching transfer" that included the subsequent pledge of the Securities to Wilmington Trust as collateral for the notes.[90] The court reasoned that "[t]his was an integrated transaction" because the "[initial transfer] would not have occurred without agreement on the [pledge of the Securities to Wilmington Trust] as well as the other components of the purchase and sale."[91] Because the overarching transfer was made "in connection with" a "securities contract" and the transfer was made to Wilmington Trust, a "financial institution," the court concluded that section 546(e) protected each of the "component steps" of the transaction.[92]

b) Analysis

SunEdison is significant because, as in *Boston Generating*, the court looked to the "overarching transfer" for purposes of section 546(e) even though the trustee had sought to avoid a transfer that constituted an avoidable "transfer" under the Bankruptcy Code. It explained that "[w]hile *Merit*

defined the relevant transfer as the overarching transfer that the trustee seeks to avoid, it does not follow that the trustee can escape the reach of the safe harbor by seeking to avoid an intermediate transfer between non-qualifying participants and sue the qualifying participants of the true overarching transfer as subsequent transferees."[93] *SunEdison* and *Boston Generating* thus present a meaningful obstacle to circumventing the safe harbor through that tactic.

4. *Fairfield Sentry Limited v. Theodoor GGC Amsterdam*, 2020 WL 7345988 (Bankr. S.D.N.Y. Dec. 14, 2020)

Fairfield Sentry arose from the collapse of Bernard Madoff's investment firm as a Ponzi scheme. Certain "feeder funds" ("***Funds***"), by which investors made their investments with Madoff's entity, were organized under the laws of the British Virgin Islands. The Funds had retained Citco Group Limited and its affiliates, including Citco Bank Nederland N.V. Dublin Branch ("***Citco Bank***"), to perform administrative and custodial functions for the Funds including the consummation of redemption payments.

After Madoff's entity was placed into liquidation pursuant to the Securities Investor Protection Act, the Funds' creditors and shareholders commenced insolvency proceedings against the Funds in a BVI court. The liquidators appointed by the BVI court commenced an ancillary proceeding in the United States Bankruptcy Court for the Southern District of New York under chapter 15 of the Bankruptcy Code to obtain assistance with the BVI liquidation as a "foreign main proceeding."

The liquidators commenced adversary proceedings in the bankruptcy court against various defendants that allegedly redeemed their interests in the Funds when they knew the prices were inflated because they were based on fictitious account statements. The lawsuits included claims under BVI law to recover "unfair preferences" and "undervalue transactions," and common law claims seeking to impose a constructive trust over the proceeds from the redemptions. On December 14, 2020, the court granted the defendants' motion to dismiss under section 546(e) with respect to the "unfair preferences" and "undervalue transactions" claims, but denied their motion to dismiss the constructive trust claims.

a) Held that section 546(e) bars avoidance claims under BVI law because the Funds were protected customers of a financial institution

The court had previously determined that the "unfair preference claims under BVI Insolvency Act § 245 resemble preference claims under 11 U.S.C.A. § 547(b) and the undervalue transaction claims under BVI Insolvency Act § 246 are similar to constructive fraudulent transfer claims under state and federal law."[94] Because section 546(e) is expressly made applicable in a chapter 15 proceeding "to the same extent as in a proceeding under chapter 7 or 11" pursuant to 11 U.S.C.A. § 561(d), and "section 561(d) is necessarily referring to avoidance powers available under non-U.S. law because a chapter 15 foreign representative cannot exercise the avoidance

powers available to a trustee in a chapter 7 or chapter 11 case," the court held that "the BVI Avoidance Claims will be barred by the Safe Harbor if they meet its strictures."[95]

The liquidators did not dispute that the redemptions constituted Qualifying Transactions as "settlement payments made in connection with securities contracts."[96] Thus, the issue was whether the redemptions were by or to (or for the benefit of) a Qualifying Participant.

The court held that section 546(e) protected the redemptions because Citco Bank, a financial institution, acted as agent for the Funds as its customers.[97] The court began by holding that "Citco Bank qualifies as a 'financial institution' because it has been a bank regulated by the De Nederlandsche Bank ('DNB') (the central bank of the Netherlands) since December 31, 1985."[98] The court took "judicial notice of bank registration information provided by DNB's website as its accuracy cannot reasonably be questioned."[99] That is significant because, whereas courts in the cases discussed above took judicial notice of the Office of the Comptroller of the Currency's list of financial institutions in the United States, *Fairfield Sentry* signals that section 546(e) may also protect customers of foreign financial institutions.

Next, the court followed *Tribune* in holding that the Funds were "customers" of Citco Bank according to the "ordinary meaning of customer" as " 'someone who buys goods or services.' "[100] It reasoned that "the Funds held accounts with Citco Bank from which the redemptions were paid," "[a]n account holder is a 'customer' of the bank under U.S. law," and the liquidators did not dispute that the Funds were customers of Citco Bank.[101]

Finally, the court held that "Citco Bank acted as the Funds' agent in connection with the securities contract underlying the redemptions," pursuant to which "the Funds paid to shareholders, for each Share tendered for redemption, an amount that was based on each of the respective Funds' purported Net Asset Value, as it was then calculated."[102] The court considered the common law test for an agency relationship applied in *Tribune*.[103] It concluded that Citco Bank's payment of the redemptions "establishes the necessary agency" because "[i]t is implausible to infer that Citco Bank made the redemption payments to specific redeemers in specific amounts absent the Funds' directions to do so," and "Citco Bank accepted those directions by executing the redemption payments."[104]

The court rejected the liquidators' argument that the claims were analogous to an actual fraudulent transfer claim under section 548(a)(1)(A), which is expressly excepted from section 546(e).[105] It held that "the Intentional Fraud Exception ***only*** applies to intentional fraudulent transfer claims under Bankruptcy Code § 548(a)(1)(A)," which the liquidators could not assert as "foreign representatives" in a chapter 15 case, and even if the liquidators' claims were "sufficiently analogous to a state law fraudulent transfer claim that is barred."[106] *Fairfield Sentry* thus expanded upon previous decisions involving avoidance claims under state law by holding that avoidance claims under foreign law may also be preempted.

b) Held that section 546(e) does not preempt constructive trust claims under foreign law

The court held that section 546(e) does not preempt the constructive trust claims under BVI law even though they "seek to unwind safe harbored redemption payments" as to which the BVI avoidance claims are barred.[107] It reasoned that the Supremacy Clause in the United States Constitution, upon which the preemption of state law avoidance claims is based, " 'is inapplicable to considerations of federal law versus foreign law,' " and "[c]ourts do not assume that otherwise applicable foreign law is preempted absent express statutory language to that effect."[108] Thus, the court denied the motion to dismiss the constructive trust claims because defendants did not identify any statute that expressly preempted those claims.[109]

c) Analysis

Fairfield Sentry is significant because it extended the preemptive scope of section 546(e) to avoidance claims under foreign law. However, the most notable holding was that the constructive trust claims were not preempted. Although the relevance of that holding is limited to cases where there is a viable common law claim under foreign law to avoid a safe harbored transfer, *Fairfield Sentry* identifies a potential "loophole" whereby safe harbored transfers may potentially be avoided under foreign common law so long as the claim is not deemed analogous to an avoidance claim barred by section 546(e).

C. At least one court has rejected the customer-as-financial-institution argument

On October 21, 2020, the United States Bankruptcy Court for the Eastern District of Michigan in In re Greektown Holdings, LLC, 621 B.R. 797 (Bankr. E.D. Mich. 2020), issued the first decision rejecting the customer-as-financial-institution argument. There, the debtor issued $182 million in unsecured senior notes which it sold to Merrill Lynch pursuant to a Note Purchase Agreement to be syndicated to other institutional purchasers. Merrill Lynch distributed proceeds from the sale, on behalf of the debtor, to the debtor's equity owners in furtherance of a reorganization transaction. The debtor and certain affiliates subsequently commenced chapter 11 bankruptcy cases. The litigation trustee appointed pursuant to the chapter 11 plan sued the equity owners seeking to avoid the payments they received as constructive fraudulent transfers under Michigan state law via the strong-arm statute in 11 U.S.C.A. § 544.

Defendants moved for summary judgment, arguing that section 546(e) barred the claims because the debtor was a protected customer of a financial institution, Merrill Lynch, which acted as its agent by distributing the proceeds of the sale of notes (a Qualifying Transaction) to the defendants. The court denied the motion.

1. Appearing to apply a stricter standard for agency than *Tribune*, the court held that the debtor was not a Qualifying Participant because Merrill Lynch did not act as its agent

The court held that Merrill Lynch did not act as agent for the debtor when it made the payments to the equity holders on the debtor's behalf. It held that under Michigan law an agency relationship depends on requirements similar to those considered in *Tribune*, but "for the first requirement, '**to act on the principal's behalf' means to be 'a business representative' with the ability 'to bring about, modify, affect, accept performance of, or terminate contractual obligations between his principal and third persons**.' "[110] The court concluded that "after reviewing the documents" the debtor did not authorize Merrill Lynch to "act on its behalf" because Merrill Lynch "was merely authorized to perform contractual services" and "was never authorized to conduct business on behalf of [the debtor]."[111] In fact, the relevant agreements with Merrill Lynch expressly disclaimed the existence of an agency relationship and any fiduciary duties that would result from such a relationship.[112]

The court explained that it was "not persuaded by the agency analysis in *In re Tribune Co.* as it does not distinguish between mere intermediaries contracted for the purpose of effectuating a transaction and agents who are authorized to act on behalf of their customers in such transactions," explaining:

> [B]y merely authorizing Computershare to accept funds as part of the securities transaction and further effectuating the transaction, the *Tribune* court found the first requirement of agency satisfied. . . . **Under *Tribune*'s analysis any intermediary hired to effectuate a transaction would qualify as its customer's agent. And consequently, if such an intermediary would be a financial institution, the debtor's status would transform to one of a financial institution itself. This would result in a complete workaround of *Merit Management***, which opined that the safe harbor provision does not insulate a transfer simply because a qualified intermediary acted as a mere conduit . . . To establish common law agency, there must be a finding that a principal authorized the agent to act on its behalf. Otherwise, any service provider would qualify as an agent.[113]

2. Analysis

Greektown is distinguishable from *Tribune* because Merrill Lynch's agreements expressly stated it was ***not*** acting as an "agent" for the debtor, thus rendering it difficult for the court to find that Merrill Lynch was the debtor's agent. Further, Merrill Lynch's role, as a note purchaser that agreed to distribute the proceeds of the sale to the debtor's equity holders on behalf of the debtor, is distinguishable from the roles played by financial institutions that acted as depositaries (or similar roles) for large tender offer and merger transactions in *Tribune*, *Boston Generating*, and *Nine West*, and that fulfilled stock redemptions in *Fairfield Sentry*.

Yet, the court in *Greektown* suggested it would have ruled differently in *Tribune* because Computershare lacked the ability to "conduct business" on Tribune's behalf and was more akin to an "intermediary" or "service

provider."[114] *Greektown* is thus important because only a few courts (mostly in the Second Circuit) have adjudicated the customer-as-financial-institution argument, and it remains to be seen whether courts outside of the Second Circuit will construe its requirements like *Tribune* or more narrowly like *Greektown*. *Greektown* indicates that the applicable standard for agency is a significant factor that could affect the outcome in a given case.

V. The Safe Harbor's Protection Of "Financial Participants"

As a result of *Merit Management* having foreclosed the "conduit theory," and the uncertainty regarding application of the nascent customer-as-financial-institution argument in a given case, defendants are paying closer attention to the safe harbor's protection of another type of Qualifying Participant, a "financial participant." The Bankruptcy Code defines a "financial participant" as a market participant that meets significant thresholds specified in section 101(22A) of the Bankruptcy Code:

> The term "financial participant" means . . . an entity that, at the time it enters into a securities contract, commodity contract, swap agreement, repurchase agreement, or forward contract, or at the time of the date of the filing of the petition, has one or more agreements or transactions described in paragraph (1), (2), (3), (4), (5), or (6) of section 561(a) [including **securities contracts, commodity contracts, forward contracts, repurchase agreements, swap agreements and master netting agreements**] with the debtor or any other entity (other than an affiliate) of a **total gross dollar value of not less than $1,000,000,000 in notional or actual principal amount outstanding** (aggregated across counterparties) at such time or on any day during the 15-month period preceding the date of the filing of the petition, **or** has **gross mark-to-market positions of not less than $100,000,000** (aggregated across counterparties) in one or more such agreements or transactions with the debtor or any other entity (other than an affiliate) at such time or on any day during the 15-month period preceding the date of the filing of the petition[.][115]

There is little case law discussing the requirements to constitute a financial participant.[116] That may be because Congress only added financial participants to the list of Qualifying Participants in section 546(e) in 2005, and prior to *Merit Management* the issue was often moot because it was sufficient that a transfer passed through a Qualifying Participant. After *Merit Management*, however, courts have begun to address the protection of financial participants.

A. Origin of the protection of financial participants

The term "financial participant" was added to the Bankruptcy Code pursuant to the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.[117] It was added to limit the potential impact of an insolvency on "other major market participants" so that such a participant could close out netting contracts (i.e., contracts to pay or receive the net—rather than the gross—payment due) with insolvent entities even if it would not otherwise constitute a Qualifying Participant.[118] Sections 362(b)(6), 555, and 556 of the Bankruptcy Code permit a "financial participant" to exercise netting and related rights.

The definition of "financial participant" was derived from the threshold

tests contained in Regulation EE promulgated by the Federal Reserve Board in implementing the netting provisions of the Federal Deposit Insurance Corporation Improvement Act ("***FDICIA***") of 1991. The FDICIA provides certainty that netting contracts will be enforced in the event of the insolvency of one of the parties, and its netting provisions were designed to promote efficiency and reduce systemic risk within the banking system and financial markets.[119] The Board of Governors of the Federal Reserve System believed that, consistent with the purposes of the FDICIA, the netting provisions should extend to all financial market participants that regularly enter into financial contracts, both as buyers and sellers, where the failure of the participant could create systemic risk in the financial markets.[120] Accordingly, the Board of Governors proposed that individuals and entities meeting certain requirements would qualify as "financial institutions" under the FDICIA, which are substantially similar to the thresholds now stated in the Bankruptcy Code's definition of "financial participant."[121]

B. Recent case law discussing the protection of "financial participants"

In the *Tribune* litigation, defendants argued that Tribune Company constituted a financial participant by virtue of certain swap agreements between Tribune Company and Barclays Bank. The district court held that a debtor cannot be a financial participant for purposes of section 546(e) because that would render redundant the phrase "with the debtor" in the definition of "financial participant."[122] The court in In re Samson Resources Corp., 2020 WL 7700693, at *7 (Bankr. D. Del. 2020), expressly disagreed with that interpretation, "conclud[ing] that the plain text and structure of the Code's definition of financial participant does not exclude debtors."[123] However, the court held that the record was not adequately developed to adjudicate the defense and that discovery was required regarding "the amount of the requisite agreements and transactions on the appropriate dates," and "whether and when such agreements were liquidated, terminated, or accelerated and the impact, if any, of those actions on the amount of the requisite agreements and transactions."[124]

These decisions are important because the issue of whether a debtor may constitute a financial participant affects whether the safe harbor could protect transfers "by" the debtor to all defendants in a given case (e.g., thousands of public shareholders in the *Tribune* litigation), or whether the protection is limited to individual defendants as transferees (or beneficiaries) of such transfers. The protection of financial participants is also significant because it is unaffected by *Merit Management* and the various obstacles to the customer-as-financial-institution argument (e.g., establishing an agency relationship). Given the lack of precedent considering financial participants with respect to section 546(e), courts may look for guidance to interpretive letters addressing whether entities met the same thresholds under the FDICIA and Regulation EE.[125]

It is also notable that *Samson Resources* required further discovery to determine whether the debtor constituted a financial participant despite

defendants having provided declarations that purportedly demonstrated the debtor met the thresholds. The court reasoned that the plaintiff had argued the "declarations do not contain the factual information necessary to support" a grant of summary judgment, there was a "genuine dispute," and "[t]he Trustee is entitled to depose [the declarant] and probe his calculations and his conclusions."[126] Whereas courts have taken judicial notice of a defendant's status as a "financial institution" at the motion to dismiss stage, *Samson Resources* signals that the issue of whether a party meets the thresholds to constitute a financial participant could be susceptible to a dispute that precludes dismissal.

VI. Conclusion

Although courts in most jurisdictions have not addressed the safe harbor since *Merit Management*, the landscape regarding section 546(e) is evolving quickly in the Second Circuit as a result of *Tribune*'s acceptance of the customer-as-financial-institution argument. The safe harbor is at an important juncture because the Supreme Court is currently weighing the petition for *certiorari* in *Tribune* and has requested the views of the Solicitor General, presumably with respect to *Tribune*'s impact (if any) on *Merit Management*. Additionally, many of the lower court decisions discussed herein are currently on appeal.

If the Supreme Court grants *certiorari* in *Tribune*, then its ruling, especially if it reverses the outcome in *Tribune*, could significantly narrow the application of the customer-as-financial-institution argument going forward. The Supreme Court may also address the extent to which section 546(e) preempts state law avoidance claims. If the Supreme Court denies *certiorari*, then the customer-as-financial-institution argument will continue to "percolate" in the circuits as courts address its application under different circumstances ranging from large public securities transactions such as *Tribune* and *Nine West* to smaller private transactions such as *Merit Management*.

Case law addressing the customer-as-financial-institution argument reflects that the analysis is fact intensive and is affected by the role played by the underlying financial institution, its relationship with its customer, and whether the agreements governing their relationship state that it is an agency relationship. *Greektown* indicates that the legal standard for an agency relationship applied in a given case, which courts have held is determined by applicable state law, could affect the outcome and may generate the most litigation.

The jurisdiction in which claims are brought is also a significant factor. It remains to be seen whether courts outside the Second Circuit will give broad application to the customer-as-financial-institution argument or narrower application as in *Greektown*. Courts may also weigh in on whether a debtor may (as *Samson Resources* held) or may not (as *Tribune* held) constitute a financial participant for purposes of section 546(e). These "splits" may affect where plaintiffs choose to file claims.

In contrast to the protection of financial institutions and their customers, very few courts have addressed the protection of financial participants. It

may be clear in some instances that a major financial player meets the requisite thresholds. However, borderline cases may present new challenges such as determining the amount and type of proof required to establish that a party constitutes a financial participant at the motion to dismiss stage, if the plaintiff disputes such status and argues that discovery is required.

If the recent past is any indication, the next few years should be eventful as courts continue to navigate the safe harbor's protections and limitations in the wake of *Merit Management*.

NOTES:

[1]11 U.S.C.A. § 546(e).

[2]11 U.S.C.A. § 548(a)(1)(B).

[3]11 U.S.C.A. § 548(a)(1)(A).

[4]11 U.S.C.A. § 546(e).

[5]11 U.S.C.A. § 101(22)(A) (emphasis added). The law firm to which the authors of this article belong represents defendants in the *Tribune* and *Boston Generating* matters discussed herein.

[6]In re Boston Generating LLC, 617 B.R. 442 (Bankr. S.D. N.Y. 2020); In re Nine West LBO Securities Litigation, 482 F. Supp. 3d 187 (S.D. N.Y. 2020); In re Fairfield Sentry Limited, 2020 WL 7345988 (Bankr. S.D. N.Y. 2020).

[7]In re Greektown Holdings, LLC, 621 B.R. 797, 827 (Bankr. E.D. Mich. 2020).

[8]In re Boston Generating LLC, 617 B.R. 442 (Bankr. S.D. N.Y. 2020); In re SunEdison, Inc., 620 B.R. 505 (Bankr. S.D. N.Y. 2020).

[9]In re Tribune Company Fraudulent Conveyance Litigation, 2019 WL 1771786 (S.D. N.Y. 2019) ("**Tribune II**"); In re Samson Resources Corp., 2020 WL 7700693 (Bankr. D. Del. 2020).

[10]Mendelsohn v. Central Garden & Pet Co., Case No. 20-08088-reg (Bankr. E.D.N.Y. Jan. 26, 2021) (citations omitted).

[11]11 U.S.C.A. § 546(e) (emphases added).

[12]See Nine West, 482 F.Supp. 3d at 196–97; SunEdison, 620 B.R. at 512–13.

[13]Tribune, 946 F.3d at 92 (quoting In re Kaiser Steel Corp., 952 F.2d 1230, 1240 n.10, 26 Collier Bankr. Cas. 2d (MB) 443, Bankr. L. Rep. (CCH) P 74387 (10th Cir. 1991) and H.R. Rep. No. 484, 101st Cong. 2d Sess. 2 (1990)); see also Nine West, 482 F. Supp. 3d at 196 (same). For further discussion regarding the legislative history regarding the safe harbor, see I. Fox, Back to Square One: How Tribune Revived the Settlement Payment Safe Harbor to Trustee Avoidance Powers in the Context of Leveraged Buyouts, 29 No. 4 J. Bankr. L. & Prac. NL Art. 2 (Aug. 2020).

[14]11 U.S.C.A. § 741(8).

[15]Crescent Resources Litigation Trust ex rel. Bensimon v. Duke Energy Corp., 500 B.R. 464, 472 (W.D. Tex. 2013) (emphasis added) (internal quotation marks omitted); see also Bos. Generating, 617 B.R. at 485 (describing a "settlement payment" as "a transfer of cash . . . made to repurchase and cancel securities—in other words, to complete a securities transaction") (citing Enron Creditors Recovery Corp. v. Alfa, S.A.B. de C.V., 651 F.3d 329, 334, 55 Bankr. Ct. Dec. (CRR) 12, 65 Collier Bankr. Cas. 2d (MB) 1833 (2d Cir. 2011)).

[16]11 U.S.C.A. § 546(e).

[17]In re Lehman Bros. Holdings Inc., 469 B.R. 415, 438, 56 Bankr. Ct. Dec. (CRR) 94, 67 Collier Bankr. Cas. 2d (MB) 1077 (Bankr. S.D. N.Y. 2012) (emphasis added).

[18]11 U.S.C.A. § 741(7)(A)(vii) (emphasis added).

[19]In re Bernard L. Madoff Inv. Securities LLC, 773 F.3d 411, 421–22, 60 Bankr. Ct. Dec. (CRR) 106, 72 Collier Bankr. Cas. 2d (MB) 1295, Bankr. L. Rep. (CCH) P 82737 (2d Cir. 2014) (emphases added).

[20]11 U.S.C.A. § 546(e).

[21]11 U.S.C.A. § 546(e) (emphasis added).

[22]See, e.g., In re Tribune Co. Fraudulent Conveyance Litigation, 818 F.3d 98, 112 (2d Cir. 2016) ("**Tribune I**") ("The language of Section 546(e) covers all transfers by or to financial intermediaries that are 'settlement payment[s]' or 'in connection with a securities contract.' Transfers in which either the transferor or transferee is not such an intermediary are clearly included in the language."); In re Quebecor World (USA) Inc., 719 F.3d 94, 99, 58 Bankr. Ct. Dec. (CRR) 12, 69 Collier Bankr. Cas. 2d (MB) 1253, Bankr. L. Rep. (CCH) P 82505 (2d Cir. 2013); In re QSI Holdings, Inc., 571 F.3d 545, 551, 51 Bankr. Ct. Dec. (CRR) 222, Bankr. L. Rep. (CCH) P 81528 (6th Cir. 2009); Contemporary Industries Corp. v. Frost, 564 F.3d 981, 987, 51 Bankr. Ct. Dec. (CRR) 157, Bankr. L. Rep. (CCH) P 81473 (8th Cir. 2009); In re Resorts Intern., Inc., 181 F.3d 505, 516, 34 Bankr. Ct. Dec. (CRR) 736, Bankr. L. Rep. (CCH) P 77952 (3d Cir. 1999); Kaiser Steel, 952 F. 2d at 1240.

[23]Merit Mgmt., 138 S. Ct. at 891.

[24]138 S. Ct. at 888, 893 (emphases added).

[25]138 S. Ct. at 895.

[26]Merit Management Group, LP v. FTI Consulting, Inc., No. 16-784, Nov. 6, 2017 Tr. at 15–16 (Breyer, J.) ("[W]hy are we hearing this case? . . . [I]t seems to me that Citizens Bank is acting [as] agent or custodian of a customer, namely VVD, and it seems to me that Credit Suisse is acting as—as an agent or custodian for VVD. So why doesn't that cover it?").

[27]Merit Mgmt., 138 S. Ct. at 890 n.2.

[28]11 U.S.C.A. § 101(22)(A) ("The term 'financial institution' means . . . a Federal reserve bank, or an entity that is a commercial or savings bank, industrial savings bank, savings and loan association, trust company, federally-insured credit union, or receiver, liquidating agent, or conservator for such entity and, **when any such Federal reserve bank, receiver, liquidating agent, conservator or entity is acting as agent or custodian for a customer** (whether or not a 'customer', as defined in section 741) **in connection with a securities contract** (as defined in section 741) **such customer**[.]") (emphases added).

[29]In re Tribune Company Fraudulent Conveyance Litigation, 2019 WL 1771786 (S.D. N.Y. 2019).

[30]2019 WL 1771786 at *9–11.

[31]2019 WL 1771786 at *12.

[32]2019 WL 1771786 at *12.

[33]See In re Tribune Co. Fraudulent Conveyance Litig., Case No. 19-3049-cv (2d Cir. 2019).

[34]Tribune I, 818 F.3d at 98.

[35]818 F.3d at 119.

[36]Tribune, 946 F.3d 66.

[37]946 F.3d at 78.

[38]946 F.3d at 78 (noting that "customer" is defined in 11 U.S.C.A. § 741(2), but the definition of "financial institution" in 11 U.S.C.A. § 101(22) "plainly states that its definition of

'customer' is not limited by Section 741's definition").

[39]946 F.3d at 78–79 (quoting UBS Financial Services, Inc. v. West Virginia University Hospitals, Inc., 660 F.3d 643, 650 (2d Cir. 2011) and Black's Law Dictionary (10th ed. 2014)) (internal quotation marks omitted).

[40]946 F.3d at 79.

[41]946 F.3d at 79.

[42]946 F.3d at 79 (quoting Restatement (Third) of Agency § 1.01 (2006)) (internal quotation marks omitted).

[43]946 F.3d at 79.

[44]946 F.3d at 79.

[45]946 F.3d at 79.

[46]946 F.3d at 79. (citing Quebecor, 719 F.3d at 99, In re United Educational Co., 153 F. 169, 171 (C.C.A. 2d Cir. 1907), and Merriam-Webster's Collegiate Dictionary 1042 (11th ed. 2003)).

[47]946 F.3d at 79. (quoting 11 U.S.C.A. § 741(7)(A)(vii)).

[48]946 F.3d at 90, 93, 97.

[49]Deutsche Bank Tr. Co. Americas v. Robert R. McCormick Found., Case No. 20-8, Petition for a Writ of Certiorari (July 6, 2020).

[50]Deutsche Bank Trust Company Americas v. Robert R. McCormick Foundation, 141 S. Ct. 232, 208 L. Ed. 2d 13 (2020).

[51]At least one court outside of the Second Circuit has also accepted the argument. See Kelley v. Safe Harbor Managed Account 101, Ltd., Bankr. L. Rep. (CCH) P 83576, 2020 WL 5913523 (D. Minn. 2020) (held that § 546(e) protected transfer made by debtor to investment fund because Wells Fargo acted as the fund's "custodian" in connection with a Note Purchase Agreement, which was a "securities contract").

[52]See 11 U.S.C.A. § 550(a) (addressing the recovery of a transfer avoided under § 548 and other provisions of the Bankruptcy Code).

[53]Bos. Generating, 617 B.R. at 477–78.

[54]617 B.R. at 478.

[55]617 B.R. at 479.

[56]617 B.R. at 492.

[57]617 B.R. at 485 (citing Enron, 651 F.3d at 334).

[58]617 B.R. at 486.

[59]617 B.R. at 486–87 (quoting Madoff, 773 F.3d at 421).

[60]617 B.R. at 487–88.

[61]617 B.R. at 489–491.

[62]617 B.R. at 491–92.

[63]617 B.R. at 493.

[64]617 B.R. at 493.

[65]See 617 B.R. at 492 ("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 . . . **Because the parties did not assert that either Valley View or Merit Management was a 'financial Institution,' or other covered entity, the transfer fell outside the section 546(e) safe harbor**. . . . 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.") (emphasis added).

[66]See 11 U.S.C.A. § 548(a)(1) ("The trustee may avoid any ***transfer*** . . . of an interest of the debtor in property" as an actual or constructive fraudulent transfer) (emphasis added); 11 U.S.C.A. § 101(54)(D) ("The term 'transfer' means . . . each mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with (i) property; or (ii) an interest in property.").

[67]Nine West, 482 F. Supp. 3d at 191.

[68]482 F. Supp. 3d at 203.

[69]482 F. Supp. 3d at 207–08.

[70]482 F. Supp. 3d at 207 (citing Contemporary Industries Corp. v. Frost, 564 F.3d 981, 988, 51 Bankr. Ct. Dec. (CRR) 157, Bankr. L. Rep. (CCH) P 81473 (8th Cir. 2009)).

[71]482 F. Supp. 3d at 207 (quoting AP Services LLP v. Silva, 483 B.R. 63, 71, Bankr. L. Rep. (CCH) P 82377 (S.D. N.Y. 2012)).

[72]482 F. Supp. 3d at 196–99.

[73]482 F. Supp. 3d at 198–99.

[74]482 F. Supp. 3d at 198 ("[A]s the shareholder defendants persuasively argue, § 741(7)(A)(vii) covers not only contracts for the repurchase of securities but also any other 'similar' contract or agreement. . . . There is no substantive or essential difference between an LBO that is effectuated through share redemption and one effectuated through share cancellation.").

[75]482 F. Supp. 3d at 199–202.

[76]482 F. Supp. 3d at 200–01.

[77]482 F. Supp. 3d at 200.

[78]482 F. Supp. 3d at 201.

[79]482 F. Supp. 3d at 202.

[80]482 F. Supp. 3d at 202–03.

[81]482 F. Supp. 3d at 204–06.

[82]482 F. Supp. 3d at 205.

[83]482 F. Supp. 3d at 205.

[84]482 F. Supp. 3d at 205–06 (emphasis added).

[85]482 F. Supp. 3d at 205–06.

[86]482 F. Supp. 3d at 206.

[87]SunEdison, 620 B.R. at 516 (noting the trustee did not dispute that the pledge of the Securities was in connection with the Purchase and Sale Agreement).

[88]620 B.R. at 511.

[89]620 B.R. at 516–17.

[90]620 B.R. at 514–15.

[91]620 B.R. at 515, 517.

[92]620 B.R. at 517.

[93]620 B.R. at 515.

[94]In re Fairfield Sentry Limited, 2020 WL 7345988, at *5 (Bankr. S.D. N.Y. 2020).

[95]2020 WL 7345988, at *5. (internal quotations omitted).

[96]2020 WL 7345988, at *6.

[97]2020 WL 7345988, at *6–7.

[98]2020 WL 7345988, at *6.

[99]2020 WL 7345988, at *6.

[100]2020 WL 7345988, at *7 (quoting Tribune, 946 F.3d at 79 and UBS Fin. Servs., 660 F.3d at 650).

[101]2020 WL 7345988, at *7.

[102]2020 WL 7345988, at *6–7.

[103]2020 WL 7345988, at *7.

[104]2020 WL 7345988, at *7.

[105]2020 WL 7345988, at *8.

[106]2020 WL 7345988, at *8 (emphasis added).

[107]2020 WL 7345988, at *4, *9 (emphasis added).

[108]2020 WL 7345988, at *10 (quoting Al-Kurdi v. U.S., 25 Cl. Ct. 599, 601 n.3, 37 Cont. Cas. Fed. (CCH) P 76288, 1992 WL 62895 (1992)).

[109]2020 WL 7345988, at *10.

[110]Greektown, 621 B.R. at 828 (quoting St. Clair Intermediate School Dist.t v. Intermediate Educ. Association/Michigan Educ. Ass'n, 458 Mich. 540, 557–58, 581 N.W.2d 707, 127 Ed. Law Rep. 1048, 159 L.R.R.M. (BNA) 2409 (1998) and Restatement (Third) of Agency § 1.01 (2006)) (emphasis added).

[111]621 B.R. at 830.

[112]621 B.R. at 834.

[113]621 B.R. at 827 (emphasis added).

[114]621 B.R. at 826, 830.

[115]11 U.S.C.A. § 101(22A) (emphases added).

[116]See, e.g., In re Lehman Bros. Holdings Inc., 469 B.R. 415, 437 (Bankr. S.D.N.Y. 2012) (noting that JPMorgan Chase, "as one of the leading financial institutions in the world, quite obviously is . . . a 'financial participant' . . . because it is a party to outstanding safe harbor contracts totaling at least $1 billion in gross notional or principal dollar amount," which was not in dispute).

[117]Pub. L. No. 109-8, 119 Stat. 23 (2005); Merit Mgmt., 138 S. Ct. at 890 ("In 2005, Congress again expanded the list of protected entities to include a 'financial participant' (defined as an entity conducting certain high-value transactions)." (citing § 907(b), 119 Stat. 181–182)).

[118]H.R. Rep. No. 109-31(I), at 130.

[119]Netting Eligibility for Financial Institutions, 59 Fed. Reg. 4,780 (Feb. 2, 1994) (citing Pub. L. No. 102-242, §§ 401-07, 105 Stat. 2236, 2371–75 (1991) (codified at 12 U.S.C.A. §§ 4401 to 07)).

[120]59 Fed. Reg. 4,780.

[121]See 12 C.F.R. § 231.3.

[122]See In re Tribune Company Fraudulent Conveyance Litigation, 2019 WL 1771786, at *9 (S.D. N.Y. 2019) ("If the 'entity' described in the first part of the definition could include the 'debtor,' the inclusion of the term 'debtor' in the second part would be puzzling. It would be unusual if not impossible for the debtor to enter into the covered transactions with itself, and the Shareholders have not identified an example of a covered transaction in which that

may occur. Further, if the term 'entity' is meant to include the debtor, then it would be redundant to refer to the 'the debtor,' distinguishing it from 'any other entity' in the second part of the definition. 'It is one of the most basic interpretive canons that a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.' '') (quoting Hedges v. Obama, 724 F.3d 170, 189, 41 Media L. Rep. (BNA) 2221 (2d Cir. 2013)).

[123]See also In re Taylor, Bean & Whitaker Mortgage Corporation, 2017 WL 4736682, *6 (Bankr. M.D. Fla. 2017) (same).

[124]In re Samson Resources Corp., 2020 WL 7700693, at *10 (Bankr. D. Del. 2020).

[125]See, e.g., FRB Interpretive Letter, 1994 WL 904307 (determining that the Student Loan Marketing Association, or "Sallie Mae," met the relevant requirements); FRB Interpretive Letter, 1994 WL 904308 (same as to Farm Credit System Banks); FRB Interpretive Letter, 1994 WL 862592 (same as to Federal National Mortgage Association, or "Fannie Mae"); FRB Interpretive Letter, 1997 WL 162436 (same as to Federal Home Loan Mortgage Corporation, or "Freddie Mac"); FRB Interpretive Letter, 1998 WL 1120492 (same as to Federal Home Loan Banks).

[126]In re Samson Resources Corp., 2020 WL 7700693, at *8–9 (Bankr. D. Del. 2020).