No. ________

In The
Supreme Court of the United States

MERIT MANAGEMENT GROUP, LP,

Petitioner,

v.

FTI CONSULTING, INC., as Trustee of the Centaur, LLC Litigation Trust,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 546(e) of the Bankruptcy Code prohibits a trustee from avoiding a transfer that, among other things, is made "by or to (or for the benefit of)" a financial institution. The payment at issue in this case was made by one financial institution to another financial institution, but the benefit and detriment of this transfer ultimately impacted companies that are not financial institutions.

The question presented is thus:

Whether the safe harbor of 11 U.S.C. § 546(e) prohibits avoidance of a transfer made by or to a financial institution, without regard to whether the institution has a beneficial interest in the property transferred, consistent with decisions from the Second, Third, Sixth, Eighth, and Tenth Circuits, but contrary to decisions from the Eleventh Circuit and now the Seventh Circuit.

PARTIES AND RULE 29.6 STATEMENT

Petitioner Merit Management, LP was the defendant in the district court and the appellee in the court of appeals. Petitioner has no corporate parent, and no publicly held company owns 10% or more of its partnership interests.

Respondent FTI Consulting, Inc., in its capacity as Trustee of the Centaur, LLC Litigation Trust, was the plaintiff in the district court and the appellant in the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Merit Management, LP respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-18) is reported at 830 F.3d 690. The memorandum opinion of the United States District Court for the Northern District of Illinois (Pet. App. 19-39) is reported at 541 B.R. 850.

JURISDICTION

The court of appeals entered judgment on July 28, 2016. That court denied rehearing en banc on August 30, 2016 (Pet. App. 40). By order entered November 17, 2016 (No. 16A492), the time for filing this petition was extended to December 19, 2016. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

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

> 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 . . . 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), . . . that is made before the commencement of the case, except under section 548(a)(1)(A) of this title.

Relevant portions of Sections 101, 544, 548, and 741 of the Bankruptcy Code are reproduced in the Appendix (Pet. App. 41-45).

STATEMENT

This case arises from the exchange of cash and stock certificates by which one company purchased the stock of another. Petitioner owned 30.07% of the stock in the acquired company, and it received approximately $16.5 million in two installments from the escrow agent that closed the transaction. Respondent is the successor in interest to the buyer, which commenced a Chapter 11 bankruptcy case in Delaware two years after the transaction closed.

Respondent commenced this litigation in Illinois, seeking to avoid and recover the payment of $16.5 million as a fraudulent transfer. The following fundamental issues are undisputed:

- The transfer involved here either was a settlement payment, or it was made in connection with a securities contract, as those terms are used in Section 546(e).
- The purchase price was disbursed by a financial institution that financed the transaction.
- The purchase price was paid to another financial institution that served as escrow agent.
- The escrow agent paid Petitioner its *pro rata* portion of the purchase price after Petitioner deposited its stock certificates into escrow.
- Neither the purchaser (Respondent's precedessor) nor Petitioner is itself a financial institution or one of the other types of entities discussed in Section 546(e).

The district court granted judgment on the pleadings to Petitioner, holding that Respondent's fraudulent-transfer claim was barred by the Section 546(e) safe harbor (Pet. App. 39). The Seventh Circuit reversed, concluding that the safe harbor does not apply when a financial institution "acts as a conduit" (Pet. App. 18). In its opinion, the court of appeals acknowledged that five other circuits had reached contrary conclusions (Pet. App. 16).

A. Statutory Framework.

A bankruptcy trustee has several means of unwinding pre-bankruptcy transactions and collecting funds for redistribution to other creditors. They include the following:

- Avoiding certain transfers and obligations, such as unperfected liens, that would be voidable under non-bankruptcy law by judicial lien creditors or bona fide purchasers. *See* 11 U.S.C. § 544(a).
- Avoiding transfers and obligations that would be voidable by unsecured creditors under non-bankruptcy law, such as state fraudulent-transfer law. *See* 11 U.S.C. § 544(b).
- Avoiding certain statutory liens. *See* 11 U.S.C. § 545.
- Avoiding preferential transfers. *See* 11 U.S.C. § 547; *Begier v. IRS*, 496 U.S. 53, 56-57 (1990).
- Avoiding transfers and obligations under the Bankruptcy Code's own fraudulent-transfer provisions. *See* 11 U.S.C. § 548; *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 535 (1994).

In a Chapter 11 case, these powers normally may be exercised by the debtor in possession. *See* 11 U.S.C.

§ 1107(a). And it is common for these claims to pass from the debtor's bankruptcy estate to a liquidating trustee (such as Respondent) or a similar successor upon confirmation of a plan of reorganization or liquidation. *See* 11 U.S.C. § 1123(b)(3)(B); *In re MPF Holdings US LLC*, 701 F.3d 449, 453-54 (5th Cir. 2012).

But with one limited exception, these avoiding powers are subject to the statutory safe harbor of Section 546(e).[1] That statute protects from avoidance transfers "made by or to (or for the benefit of)" several types of entities, including financial institutions, arising from several types of transactions, including settlement payments and securities contracts. 11 U.S.C. § 546(e).

The original version of the safe harbor was added to the Bankruptcy Code in 1982.[2] It was limited to margin payments and settlement payments among commodity brokers, forward contract merchants, stockbrokers, and securities clearing agencies. *See* Act of July 27, 1982, Pub. L. No. 97-222, sec. 4, 96 Stat. 235,

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[1] The safe harbor does not apply to claims "under section 548(a)(1)(A)." 11 U.S.C. § 546(e). That section addresses transfers made "with actual intent to hinder, delay, or defraud" creditors and is not at issue in this case. *Id.* § 548(a)(1)(A).

[2] The 1982 legislation also repealed a subsection of the Bankruptcy Reform Act of 1978 that was in some respects a precursor of today's Section 546(c). *See* 11 U.S.C. § 764(c) (repealed 1982). Because the 1978 language was located in Subchapter IV of Chapter 7, it governed only in cases in which the debtor was a commodity broker. *See* 11 U.S.C. § 103(d). Section 764(c) was thus much narrower in scope than the 1982 and subsequent versions of the safe harbor in Section 546(e).

236. Two years later, Congress added financial institutions to the safe harbor. *See* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, sec. 460(d), 98 Stat. 333, 377.

A 2006 amendment further broadened the safe harbor to include securities contracts, commodity contracts, and forward contracts. *See* Financial Netting Improvements Act of 2006, Pub. L. No. 109-390, sec. 5(b)(1), 120 Stat. 2692, 2697-98. That same legislation modified the phrase "by or to a . . . financial institution" to its current form: "by or to (*or for the benefit of*) a . . . financial institution." *Id.* (emphasis added).

As discussed above, there is no dispute that this case involves financial institutions and either a settlement payment or a securities contract. Liability thus turns on whether the transfer at issue was made "by or to (or for the benefit of)" a financial institution.

B. Factual Background.

In the early 2000s, Valley View Downs, LP and Bedford Downs Management Corporation were in competition to obtain the last available harness-racing license in Pennsylvania. Valley View, which wanted to open a racetrack-casino, agreed in 2007 to purchase the stock of Bedford Downs, in which Petitioner had a 30.07% ownership interest, for $55 million.

The purchase price was funded by the Cayman Islands branch of Credit Suisse, which financed the acqusition for Valley View. As part of a larger transaction totaling $850 million, Credit Suisse paid the $55 million purchase price for Bedford Downs to Citizens Bank of Pennsylvania, which served as the escrow agent under an escrow agreement dated September 4, 2007. Petitioner and other shareholders in Bedford Downs deposited their stock certificates into escrow with Citizens as well. After the transaction closed, Citizens disbursed Petitioner's portion of the proceeds in two installments, one in October 2007 and another more than three years later, in November 2010. Petitioner received approximately $16.5 million from Citizens.

Valley View obtained the harness-racing license it had sought, but it failed to procure a gaming license. The failure of Valley View's business strategy led it to file a bankruptcy petition in Delaware in October 2009. The bankruptcy court confirmed a plan of reorganization for Valley View and several affiliates that created a litigation trust. Valley View's causes of action against Petitioner and others were contributed to that trust. Respondent serves as trustee.

C. Proceedings in District Court.

Respondent commenced this suit in the Northern District of Illinois in 2011, seeking to avoid the transfer of $16.5 million to Petitioner, either under Pennsylvania fraudulent-transfer law, by way of Section 544(b) of the Bankruptcy Code, or under the Code's own fraudulent-transfer statute, Section 548. Respondent's theory was that Valley View did not receive reasonably equivalent value for the Bedford Downs purchase price, and Valley View was insolvent at the time of the purchase. *See* 12 Pa. Cons. Stat. § 5105; 11 U.S.C. § 548(a)(1)(B)(ii)(I).

Petitioner moved to dismiss for lack of standing, or for a transfer of venue to Delaware, but the district court denied both motions.

Petitioner's motion for judgment on the pleadings, however, was successful. The district court noted that the essential facts were undisputed, including the presence of financial institutions and either a settlement payment or a securities contract in the underlying transaction (Pet. App. 20, 24). Relying on Seventh Circuit precedents that emphasized the broad text and plain meaning of Section 546(e), the district court concluded that Petitioner was entitled to the benefit of the safe harbor and granted judgment in Petitioner's favor (Pet. App. 39).

D. The Court of Appeals' Decision.

The Seventh Circuit reversed. It concluded that the phrase "by or to" in Section 546(e) is ambiguous and that the more recent addition "(or for the benefit of)" is ambiguous as well (Pet. App. 5-6). The court thus turned to what it perceived to be "the statute's purpose and context" (Pet. App. 6). Drawing on other provisions of the Bankruptcy Code that it believed were analogous, the court of appeals concluded that "it is the economic substance of the transaction that matters" (Pet. App. 12).

The Seventh Circuit also looked to the legislative history of the 1982 and 1984 iterations of the safe harbor, perceiving a fundamental goal of protecting the market from systemic risk (Pet. App. 13-15). Describing Valley View and Merit as "simply corporations that wanted to exchange money for privately held stock," the court dismissed the notion that its narrow view of Section 546(e) could produce "any potential ripple effect through the financial markets" (Pet. App. 15).

The court of appeals acknowledged that it was disagreeing with five other circuit courts (Pet. App. 16). But it concluded that "[i]f Congress had wanted to say that acting as a conduit for a transaction" involving entities that are not identified in the statute "is enough to qualify for the safe harbor, it would have been easy to do that" (Pet. App. 18).

The court of appeals denied Petitioner's request for rehearing en banc.

REASONS FOR GRANTING THE PETITION

I. THE COURTS OF APPEALS ARE DEEPLY DIVIDED OVER THE SCOPE OF THE SAFE HARBOR IN SECTION 546(e) OF THE BANKRUPTCY CODE.

1. As the Seventh Circuit acknowledged, its decision deepened a longstanding circuit split on the breadth of the Section 546(e) safe harbor (Pet. App. 16-17).

This issue was first addressed by the Tenth Circuit in *In re Kaiser Steel Corp.*, 952 F.2d 1230 (10th Cir. 1991). The plaintiff in that case argued that a payment *by* a stockbroker, financial institution, or clearing agency is not protected by the safe harbor unless the payment also is *to* a similar entity. *See id.* at 1240. The court rejected that argument, seeing "no reason to replace the unambiguous language of the provision with clues garnered from the legislative history." *Id.* at 1240-41.

A divided panel of the Eleventh Circuit disagreed in *In re Munford, Inc.*, 98 F.3d 604 (11th Cir. 1996). As in this case, *Munford* involved a financial institution that collected and disbursed funds and stock certificates in connection with one company's purchase of another company's stock. *See id.* at 610. The majority concluded that because the financial institution "never acquired a beneficial interest in either the funds or the shares," the transaction was not within the safe harbor. *Id.* Judge Hatchett dissented, arguing that the majority "chose to disregard the plain language of section 546(e) in order to create a new exception to its application." *Id.* at 614 (Hatchett, C.J., dissenting).[3]

Until the Seventh Circuit decided this case, every other court of appeals to address this issue agreed with Judge Hatchett.

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[3] Because the language "(or for the benefit of)" was not added to Section 546(e) until 2006, the Eleventh Circuit had no opportunity to consider the significance of that phrase.

The Third Circuit – home to the underlying transaction and Valley View's bankruptcy case – was the first to criticize *Munford* for applying a beneficial-interest requirement that "is not explicit in section 546." *In re Resorts Int'l, Inc.*, 181 F.3d 505, 516 (3d Cir. 1999). That court also addressed one of the lines of reasoning used by the Seventh Circuit in this case – that a corporate acquisition is somewhat outside the core of securities transactions that motivated the enactment of the safe harbor in 1982 – and concluded that that argument did not justify a departure from the plain language of the statute. *See id.* The Third Circuit adhered to *Resorts International* ten years later, confirming that the safe harbor applies to transactions involving privately held companies. *See In re Plassein Int'l Corp.*, 590 F.3d 252, 258 (3d Cir. 2009).

The Eighth Circuit agreed with *Resorts International*, as well as with Judge Hatchett's dissent in *Munford*, in deciding that the safe harbor "does not expressly require that the financial institution obtain a beneficial interest in the funds" involved in a challenged transfer. *Contemporary Indus. Corp. v. Frost*, 564 F.3d 981, 987 (8th Cir. 2009). That court also rejected the debtor-plaintiff's argument that a plain-language interpretation of the safe harbor would be absurd, recognizing that "Congress might have thought it prudent to extend protection to payments such as these." *Id.*

Next, the Sixth Circuit considered a case in which a bank served as exchange agent, collecting and distributing stock and cash in an acquisition transaction.

See In re QSI Holdings, Inc., 571 F.3d 545, 548 (6th Cir. 2009). Citing *Resorts International* and *Contemporary Industries*, the court rejected the beneficial-interest requirement of *Munford* and concluded that the bank's role "was sufficient to satisfy the requirement that the transfer was made to a financial institution." *Id.* at 551.

The Second Circuit has agreed with these courts in a series of decisions, including one that is now before this Court on a petition for a writ of certiorari. In the first of these cases, the Second Circuit held that a transfer may be a "settlement payment" even if it does not involve "a financial intermediary that takes title to the securities during the course of the transaction." *Enron Creditors Recovery Corp. v. Alfa, S.A.B. de C.V.*, 651 F.3d 329, 339 (2d Cir. 2011). Two years later, the court clarified that its reasoning in *Enron* applied specifically to the "to or for (or for the benefit of)" language in Section 546(e). *See In re Quebecor World (USA) Inc.*, 719 F.3d 94, 99 (2d Cir. 2013). The Second Circuit held that the plain language of the statute demonstrates that "a transfer may be either 'for the benefit of' a financial institution or 'to' a financial institution, but need not be both." *Id.* at 100.

More recently, the Second Circuit followed *Quebecor* in a decision addressing the preemptive effect of Section 546(e) on fraudulent-transfer claims asserted by creditors. *See In re Tribune Co. Fraudulent Conveyance Litig.*, 818 F.3d 98, 112, 122 (2d Cir. 2016), *petition for cert. filed* (Sept. 9, 2016) (No. 16-317). In its decision, the court anticipated and rejected one of the Seventh

Circuit's arguments in this case, pointing out that Section 546(e) is an example of "Congress perceiving a need to address a particular problem within an important process or market and using statutory language broader than necessary to resolve the immediate problem." *Id.* at 120. The petitioners in *Tribune* have requested this Court to review both the preemption question, which is not presented in this case, and the beneficial-interest question, which is.[4]

2. The breadth of the Section 546(e) safe harbor is a recurring and important question. The courts have struggled with the application of the safe harbor in some of the largest Chapter 11 cases filed during recent economic downturns, including the cases of Enron Corporation, the Tribune Company, and others.[5] But the question is equally important in cases of more modest size, in which a claim to unwind an unsuccessful pre-bankruptcy transaction may be one of the most significant assets of a bankruptcy estate, at least if the claim can be asserted in a circuit with a narrow view of the safe harbor.

[4] A companion case presents only the preemption question. *See Whyte v. Barclays Bank PLC*, 664 F. App'x 60 (2d Cir. 2016), *petition for cert. filed* (Aug. 24, 2016) (No. 16-239).

[5] *See also In re Bernard L. Madoff Inv. Sec. LLC*, 773 F.3d 411 (2d Cir. 2014) (addressing massive Ponzi scheme involving fictitious securities); *In re Lyondell Chem. Co.*, 503 B.R. 348 (Bankr. S.D.N.Y. 2014) (considering $12.5 billion leveraged buyout), *abrogated by Tribune*, 818 F.3d at 118, 122; Petition for Writ of Certiorari at 4, *Whyte v. Barclays Bank PLC*, No. 16-239 (Aug. 24, 2016) (describing transaction by debtor SemGroup as involving loss of $2.1 billion).

Consistency of interpretation is fundamentally important in matters of bankruptcy. Business bankruptcies in particular often involve debtors and creditors from throughout the United States. Inconsistent interpretations of the Bankruptcy Code in different circuits distort the incentives and expectations of debtors, trustees, creditors, and shareholders. In addition, uncertainty about the application of a safe harbor may alter investment decisions and may cause individuals and companies to refuse to deal with a distressed business because of concerns about potential liability.

This case demonstrates one difficulty arising from the circuit split. Respondent could have filed a single lawsuit against all of Bedford Downs' former shareholders in Pennsylvania, where the underlying transaction was centered, or in Delaware, where Valley View's bankruptcy case was filed. *See* 28 U.S.C. §§ 1391(b)(2), 1409(a). But this case would have been a dead letter if it had been commenced within the Third Circuit. Instead, Respondent brought suit against a subset of the former shareholders in jurisdictions where a claim was not obviously barred by controlling precedent. As a result, only those former shareholders that are subject to personal jurisdiction in particular parts of the country have potential exposure to Respondent's claims.

The importance of uniformity has led this Court to grant review in many cases involving circuit splits on bankruptcy issues. *See, e.g.*, *Czyzewski v. Jevic Holding Corp.*, No. 15-649 (permissibility of "structured dismissal" of Chapter 11 case); *Bullard v. Blue Hills Bank*, 135 S. Ct. 1686, 1691 (2015) (appealability of order denying confirmation of plan); *Florida Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 38 (2008) (breadth of tax exemption in Bankruptcy Code); *Lamie v. United States Trustee*, 540 U.S. 526, 533 (2004) (right to attorneys' fees after conversion to Chapter 7); *Bank of America Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 443 (1999) (absolute-priority rule for plan confirmation); *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 238 (1989) (secured creditor's right to interest).

3. The Seventh Circuit's decision is wrong in at least three respects: it disregards the plain language of the safe harbor; it mistakes breadth for ambiguity; and it substitutes the court's understanding of Congress' principal goals for the language that Congress chose to implement its goals.

This Court has long emphasized the importance of interpreting the Bankruptcy Code in accordance with its plain meaning. *See, e.g.*, *Ron Pair*, 489 U.S. at 242; *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 7 (2000); *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2073 (2012); *Puerto Rico v. Franklin California Tax-Free Trust*, 136 S. Ct. 1938, 1946 (2016). And the language of Section 546(e) could not be clearer: a transfer is protected if it is made by, to, *or* for the benefit of a financial institution. Whatever else may be said about Valley View's transfer of the funds that eventually made their way to Petitioner, there is no question that the transfer was made *to* Citizens Bank, a financial institution that acted as escrow agent and held some of the funds for more than three years before disbursing them.

The Seventh Circuit perceived ambiguity in the statutory language "by or to (or for the benefit of)" (Pet. App. 5-6). But this conclusion was based on the court's understanding that a particular transfer might be characterized as made by or to (or for the benefit of) more than one person (*Id.*). That is possible, at least for some transfers, but it does not demonstrate that Congress was confused or imprecise when it drafted the safe harbor. Rather, it shows that Congress began with a broadly protective statute in the 1980s and then made it even more comprehensive in 2006.[6]

The Seventh Circuit's view that Congress was not primarily concerned about "corporations that wanted to exchange money for privately held stock" when it enacted the safe harbor is misguided (Pet. App. 15). This Court has recognized that "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79 (1998);

[6] Moreover, the Seventh Circuit's solution to the ambiguity it perceived was to interpret "by or to (or for the benefit of) . . . a financial institution" to mean "by or to (*and* for the benefit of) . . . a financial institution." If Congress had intended to narrow the safe harbor in 2006 – which is the implication of the Seventh Circuit's construction – it is extraordinarily unlikely that it would have done so by adding a disjunctive parenthetical to an already disjunctive phrase.

see also DiPierre v. United States, 564 U.S. 70, 85 (2011).[7]

Similarly problematic is the assertion by the court below that avoidance of the transfer would not produce a "ripple effect through the financial markets" (Pet. App. 15). The court may be correct that a judgment for Respondent in this case would not have systemic impact. But that also would be true if Citizens Bank or another financial institution had been the ultimate beneficiary of the transfer, and there is no question that the safe harbor would apply in that scenario.[8] In any event, a court may not "rewrite the statute so that it covers only what we think is necessary to achieve what we think Congress really intended." *Lewis v. City of Chicago*, 560 U.S. 205, 215 (2010).

Nor can the Seventh Circuit's interpretation be justified by its perception of the equities. This Court has held repeatedly that an outcome that appears inequitable in a particular case cannot justify an interpretation of the Bankruptcy Code that contravenes a policy decision of Congress. *See, e.g.*, *RadLAX*, 132

[7] The Seventh Circuit recognized as much in an earlier case involving Section 546(e). *See Peterson v. Somers Dublin Ltd.*, 729 F.3d 741, 749 (7th Cir. 2013) ("Statutes often are written more broadly than their genesis suggests.").

[8] It is possible to imagine situations similar to those in this case but involving larger amounts of money, or more complex financial arrangements, or unusual contractual commitments by "conduit" financial institutions. Avoidance of transfers in these situations might well produce ripple effects through the markets, but it is unclear whether the Seventh Circuit's interpretation of the safe harbor would protect the transferees.

S. Ct. at 2073 ("[T]he pros and cons of credit-bidding are for the consideration of Congress, not the courts."); *Law v. Siegel*, 134 S. Ct. 1188, 1197-98 (2014) (although interpretation "may produce inequitable results for trustees and creditors in other cases . . . , it is not for courts to alter the balance struck by the statute"); *United States v. Noland*, 517 U.S. 535, 543 (1996) ("[T]he circumstances that prompt a court to order equitable subordination must not occur at the level of policy choice at which Congress itself operated in drafting the Code."); *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 209 (1988) ("[R]elief from current farm woes cannot come from a misconstruction of the applicable bankruptcy laws, but rather, only from action by Congress.").[9]

For these reasons, this Court should grant review to resolve the circuit split regarding the scope of the Section 546(e) safe harbor.

II. IF THE COURT GRANTS REVIEW IN THE *TRIBUNE* CASE, THIS PETITION SHOULD BE HELD.

The second Question Presented in the certiorari petition filed by the *Tribune* plaintiffs is essentially the same as the question presented here. If the Court

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[9] The Seventh Circuit cited *Law* for this proposition in another recent case interpreting Section 546(e) broadly. *See Grede v. FCStone, LLC*, 746 F.3d 244, 254 (7th Cir. 2014) ("[C]ourts may not decline to follow [Congress'] policy choices on equitable grounds, however powerful they may be in a particular case.").

grants the *Tribune* petition, the disposition of that case may control in this one. But it also is possible that the resolution of other Questions Presented in *Tribune*, a settlement, or other developments may preclude the Court from deciding the conduit issue in that case. Thus, if the Court grants review in *Tribune*, it should hold this petition pending the disposition of that case.

CONCLUSION

The petition for a writ of certiorari should be granted. Alternatively, this petition should be held pending the disposition of the petition for certiorari in the *Tribune* case.

Respectfully submitted,

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United States Court of Appeals,
Seventh Circuit.

FTI Consulting, Inc., Plaintiff-Appellant,

v.

Merit Management Group, LP, Defendant-Appellee.

No. 15-3388
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Rehearing En Banc Denied Aug. 30, 2016.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 11 C 7670 – **Joan B. Gottschall**, *Judge*.

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Before Wood, Chief Judge, and Posner and Rovner, Circuit Judges.

Opinion

Wood, Chief Judge.

This case requires us to examine section 546(e) of the Bankruptcy Code, which provides a safe harbor protecting certain transfers from being undone by the bankruptcy trustee. (We considered a different aspect of that statute in *Peterson v. Somers Dublin Ltd.*, 729 F.3d 741 (7th Cir. 2013), which focused on what counts as a settlement payment made in connection with a securities contract, questions that do not arise in our case.) The safe harbor prohibits the trustee from avoiding transfers that are "margin payment[s]" or "settlement payment[s]" "made by or to (or for the benefit of)" certain entities including commodity brokers, securities clearing agencies, and "financial institutions." 11 U.S.C. § 546(e). It also protects transfers "made by or to (or for the benefit of)" the same types of entities "in connection with a securities contract." *Id.*

Ultimately, we find it necessary to answer only one question: whether the section 546(e) safe harbor protects transfers that are simply conducted *through* financial institutions (or the other entities named in section 546(e)), where the entity is neither the debtor nor the transferee but only the conduit. We hold that it does not, and accordingly we reverse the judgment of the district court.

I

This question has arisen in the bankruptcy proceeding of Valley View Downs, LP, owner of a Pennsylvania racetrack. In 2003, Valley View Downs was in competition with another racetrack, Bedford Downs, for the last harness-racing license in the state. Both racetracks wanted to operate "racinos" – combination horse track and casinos – and both needed the license to do so. Rather than fight over one license, Valley View and Bedford agreed to combine and conquer: Valley View would acquire all Bedford shares in exchange for $55 million. The exchange of the $55 million for the shares was to take place through Citizens Bank of Pennsylvania, the escrow agent. Valley View borrowed money from Credit Suisse and some other lenders to pay for the shares. After the transfer, Valley View obtained the harness-racing license, but it failed to secure the needed gambling license. This led it to file for Chapter 11 bankruptcy.

FTI Consulting, Inc., as Trustee of the *In re Centaur, LLC et al.* Litigation Trust, which includes Valley View Downs as one of the debtors, brought this suit against Merit Management Group ("Merit"), a 30% shareholder in Bedford Downs. FTI alleges that Bedford's transfer to Valley View and thence to Merit of approximately $16.5 million (30% of the $55 million), is avoidable under Bankruptcy Code sections 544, 548(a)(1)(b), and 550, and the money is properly part of Valley View's bankruptcy estate and thus the Litigation Trust.

There is no question that the transfer at issue is either a "settlement payment" or a payment made "in connection with a securities contract." Merit maintained that the transfer was "made by or to (or for the benefit of)" an entity named in section 546(e) and therefore protected under the safe harbor. It did not rely on its own status for this argument, because it is undisputed that neither Valley View nor Merit is a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency (the entities named in section 546(e)). Instead, Merit argued eligibility for the safe harbor based on the minor involvement of Citizens Bank and Credit Suisse. The district court agreed with Merit, finding that the transfers were "made by or to" a financial institution because the funds passed *through* Citizens Bank and Credit Suisse. It granted judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c) in Merit's favor, thereby preventing FTI from avoiding the transfer and recovering the $16.5 million. FTI appeals.

II

We review the district court's Rule 12(c) judgment on the pleadings *de novo*. *Buchanan-Moore v. Cnty. of Milwaukee*, 570 F.3d 824, 827 (7th Cir. 2009). There are no contested facts.

A

In order to resolve this case, we must ascertain the meaning of section 546(e). We begin at the obvious place, with its text:

> [T]he trustee may not avoid a transfer that is a margin payment . . . or 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 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. . . .

(Emphasis added.) It is impossible to say in the abstract what the italicized words, "by or to," mean here. As FTI points out, a postcard sent through the U.S. Postal Service could be said to have been sent "by" the Postal Service or "by" the sender who filled it out. When a person pays her bills using an electronic bank transfer, the funds could be said to be sent "by" the owner of the account or by the bank. Similarly, a transfer through a financial institution as intermediary could reasonably be interpreted as being "made by or to" the financial institution or "made by or to" the entity ultimately receiving the money. The plain language does not clarify whether, under the statute, the transfer of the $16.5 million was made by Valley View to Merit; by Valley View to Citizens Bank; by Citizens

Bank to Credit Suisse; or by Citizens Bank or Credit Suisse to Merit. These multiple plausible interpretations require us to search beyond the statute's plain language. (We reject Merit's argument that FTI has waived the right to argue that the statute is ambiguous; it urged the district court to consider the purpose and context of the statute, which implicitly indicates that the meaning is not immediately clear.)

The phrase "for the benefit of," which was added to the safe harbor in a 2006 amendment, is also ambiguous. It could refer to a transaction made *on behalf of* another entity, or it could mean a transaction made merely *involving* an entity receiving an actual financial or beneficial interest. The latter reading suggests that transactions between parties other than the named entities receiving a financial interest (but related to those entities) are also included in the safe harbor – otherwise the additional parenthetical would be redundant. If the former interpretation is used, FTI's argument that the whole phrase refers only to named entities receiving a financial interest – whether or not that entity received the actual transfer of property – is plausible.

The language of the statute, standing alone, does not point us in one direction or the other. In particular, it is unclear whether the safe harbor was meant to include intermediaries, or if it is limited to what we might think of as the real parties in interest – here, the first and the final party possessing the thing transferred. We therefore turn to the statute's purpose and context for further guidance. *See Food & Drug Admin.*

v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000) (courts must interpret a "statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into an harmonious whole") (internal quotation marks and citations omitted); *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809, 109 S.Ct. 1500, 103 L.Ed.2d 891 (1989) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.").

B

1

Section 546(e) appears in Subchapter III of Chapter 5 of the Bankruptcy Code, which deals with what property is included within the estate. While section 546 covers limitations on a trustee's avoidance powers, other sections – in particular sections 544, 547, and 548 – set out types of transfers that a bankruptcy trustee can avoid. Section 550 describes how to recover the funds from transfers that are avoidable. The trustee's avoidance powers serve the broad purpose of ensuring the equitable distribution of a debtor's assets.

Section 544 gives the trustee the power to avoid transfers that would be voidable by a creditor extending credit to the debtor at the commencement of the case, if that creditor had a judicial lien or an unsatisfied execution against the debtor, or by a bona fide purchaser. 11 U.S.C. § 544(a). It allows the trustee to act as such a creditor or bona fide purchaser. *Id*. Section 547 allows the trustee to avoid any transfer of any interest of the debtor "to or for the benefit of a creditor," made within 90 days before the filing (or longer if the creditor was an insider) and the transfer was more than the creditor would otherwise have received. *Id.* § 547(b). Section 548(a) allows avoidance of transfers done with fraudulent intent and transfers that rendered a debtor insolvent.

FTI argues that because these other Chapter 5 sections establish that only transfers "made by the debtor" prior to the bankruptcy petition are avoidable, transfers "made by" a named entity in section 546(e) ought also to refer to a transfer of property by the debtor. Additionally, FTI argues that because sections 544, 547, and 548 refer to avoidance of transfers to or for the benefit of entities subject to fraudulent-transfer liability, section 546(e)'s safe harbor must refer only to transfers made to a named entity that is a creditor.

We agree with FTI. Chapter 5 creates both a system for avoiding transfers and a safe harbor from avoidance – logically these are two sides of the same coin. It makes sense to understand the safe harbor as applying to the transfers that are eligible for avoidance in the first place.

Merit responds that sections 544, 547, and 548 implicate obligations "incurred by" a debtor, as opposed to transfers "made by" a debtor, and therefore Chapter 5 read as a whole does not support the argument that only transfers made by a debtor that constitute obligations incurred by a debtor are within 546(e)'s safe harbor. We see it differently. If anything, the "incurred by" language in the other sections supports FTI's position. Because the safe harbor is meant to protect covered entities against avoidance where it might occur, the fact that sections 544, 547, and 548 permit avoidance only where the transfer represents an actual obligation means that 546(e) provides a safe harbor only where the debtor has incurred an actual obligation to the covered entity.

Merit also argues that Chapter 5 allows avoidance of transfers other than those made directly by the debtor, because "indirect transfers made by third parties to a creditor on behalf of the debtor may also be avoidable." *Warsco v. Preferred Technical Grp.*, 258 F.3d 557, 564 (7th Cir. 2001). Therefore, Merit concludes, FTI's "attempt to simplify section 548(a)(1) to avoidance only of 'transfers made by a debtor' is simply not supported." But *Warsco* is irrelevant to FTI's position, as it does not speak to avoiding transfers involving financial intermediaries. The $16.5 million transfer to Merit was not a transfer made on behalf of a debtor by a third party; rather, it was one made by the debtor using a bank as a conduit.

2

Section 548(a)(1) allows a trustee to avoid transfers "of an interest of the debtor in property, or any obligation . . . incurred by the debtor" within two years of bankruptcy if the debtor made the transfer with either (A) the "actual intent to hinder . . . or defraud" an entity to which the debtor was indebted, or where (B) the debtor received less money for the transfer than its value, or was insolvent on the date of transfer or became insolvent because of the transfer, or made the transfer to benefit an insider. 11 U.S.C. § 548.

Section 548(c) exempts from avoidance a transferee or obligee that "takes for value and in good faith has a lien on or may retain any interest transferred or may enforce any obligation incurred . . . to the extent that such transferee or obligee gave value to the debtor in exchange for such transfer or obligation." *Id.* § 548(c). Section 548(d)(2) adds that a commodity broker or financial institution or other protected entity that receives a margin or settlement payment "takes for value to the extent of such payment" within the meaning of subsection (c).

FTI points out that section 548(d)(2)'s protections apply only where the defendant in a fraudulent-transfer action is one of the types of entities listed in section 546(e). It reasons that Congress cannot have intended to give an entity not listed under section 548(d)(2)(B) a defense simply because it deposited its funds in a bank account. It is the receipt of the value that gives a fraudulent-transfer defendant the protections of section 548(d)(2)(B), and it should similarly be the receipt of value that gives an entity the safe-harbor protections of 546(e).

Merit responds that 548(c) creates a transferee-specific affirmative defense, unlike section 564(e), which addresses the transfer and not the transferee. But we see no reason to differentiate between the two. Merit's preferred interpretation would be so broad as to render any transfer non-avoidable unless it were done in cold hard cash, and that conflicts with section 548(c)'s good faith exception.

3

FTI also finds support in the charitable-contribution safe harbor found in section 548(a)(2), as well as in section 555's safe harbor from enforcement of the Bankruptcy Code's automatic stay. Section 548(a)(2) shields charitable contributions made "by a natural person" "to a qualified" charity from avoidance by a trustee. FTI contends that the "by" and "to" language in section 548(a)(2) should be read consistently with section 546(e), because doing otherwise would lead to an absurd result: charitable contributions made via wire transfer, or perhaps even with an old-fashioned paper check, through a bank would be avoidable.

Section 555 allows the same entities as those named in section 546(e), where they are counterparties to a securities contract with the debtor, to enforce an *ipso facto* clause in a securities contract despite the Code's general prohibition on non-debtor counterparties enforcing those clauses. *See id.* §§ 555, 365(e), 362(a). FTI argues that we should read these sections consistently. Because section 555 focuses on the economic substance of the transaction, applying only where the named entity is a counterparty as opposed to a conduit or bank for a counterparty, section 546(e)'s safe harbor should apply in the same manner. We agree with FTI that it is the economic substance of the transaction that matters.

4

Section 550 describes how the trustee is to recover avoidable transfers. The trustee can recover the property or its value from the "initial transferee" or "any immediate or mediate transferee." *Id.* § 550. It protects good faith transferees who did not know of the voidability of the transfer, and "any immediate or mediate good faith transferee of such transferee." *Id.*

Although Section 550 allows recovery from a "mediate" transferee, the question *how* money may be recovered is different from the question *from whom* money may be recovered. Although mediate transferees may be required to return funds to which they are not entitled under the Bankruptcy Code's avoidability provisions, mediate transferees are not eligible for the safe harbor because they lack a financial stake comparable to that of a debtor or a party to whom a debt is owed. Section 550 also contains a good-faith exception to protect unknowing mediate transferees, and so such transferees should not need the safe harbor.

In *Bonded Financial Services, Inc. v. European American Bank*, we defined "transferee" as an entity with "dominion over the money" or "the right to put the money to one's own purposes." 838 F.2d 890, 893 (7th Cir. 1988). We found that a bank that "acted as a financial intermediary" and "received no benefit" was not a "transferee" within the meaning of Chapter 5 of the Bankruptcy Code. *Id*. Although we did not address the 546(e) safe harbor specifically, we now extend our reasoning in *Bonded* to find that transfers "made by or to (or for the benefit of)" in the context of 546(e) refer to transfers made to "transferees" as defined there. We reject Merit's argument that *Bonded* does not apply because, rather than providing a defense, section 546(e) renders a transfer unavoidable. We see no reason why the unavoidability provisions should be broader than defenses to recovery; if anything, the opposite should be true.

C

The history of section 546(e) also supports the position we take here, and illustrates why our holding will not give rise to problems in the financial-services markets. Congress first enacted the safe harbor in response to a New York federal district court decision: *Seligson v. New York Produce Exchange*, 394 F.Supp. 125 (S.D.N.Y. 1975). In *Seligson*, the trustee of a commodity broker's bankruptcy estate sued the New York Produce Exchange and the New York Produce Exchange Clearing Association to recover payments the broker made to the Association in connection with cottonseed oil futures, which declined in value drastically. 394 F. Supp. at 126-27. The court denied summary judgment, finding a triable issue of fact on the questions whether the Association was a "transferee" within the meaning of the Bankruptcy Code's avoidability provisions, and whether the Exchange could be held liable because of its relationship with the Association. *Id*. at 134, 136-37.

Congress responded in 1982 by creating the safe harbor, which enabled financial institutions that were recipients of transfers of the kind that took place in *Seligson* to invoke a safe harbor from avoidance. Pub. L. No. 97-222, § 4, 96 Stat. 235 (1982). Congress later expanded the safe harbor to other types of actors in the securities industry, including financial institutions. *See* Pub. L. No. 98-353, § 441, 98 Stat. 333 (1984). Nothing it did, however, indicated that the safe harbor applied to those institutions in their capacity as intermediaries. The safe harbor has ample work to do when an entity involved in the commodities trade is a debtor or actual recipient of a transfer, rather than simply a conduit for funds.

Our interpretation is consistent with this understanding of the law. As we explained in *Grede v. FCStone, LLC*, the safe harbor's purpose is to "protect[] the market from systemic risk and allow[] parties in the securities industry to enter into transactions with greater confidence" – to prevent "one large bankruptcy from rippling through the securities industry." 746 F.3d 244, 252 (7th Cir. 2014). Congress's discussion of the 2005 amendments to the Code, passed as part of the Bankruptcy Abuse Prevention and Consumer Protection Act, reemphasized the safe harbor's purpose as reducing "systemic risk in the financial marketplace." H.R. Rep. 109-31(I), at 3, *reprinted in* 2005 U.S.C.C.A.N. 88, 89.

Although we have said that section 546(e) is to be understood broadly, *see Grede*, 746 F.3d at 246 ("[t]he code has a broad exception from avoidance or clawback . . . for payments made to settle securities transactions"), that does not mean that there are no limits. While Valley View's settlement with Bedford resembled a leveraged buyout, and in that way touched on the securities market, neither Valley View nor Merit were "parties in the securities industry." They are simply corporations that wanted to exchange money for privately held stock.

We are not troubled by any potential ripple effect through the financial markets from returning the funds to FTI. The safe harbor addresses cases in which the debtor-transferor or transferee is a financial institution or other named entity. *See* H.R. Rep. 97-420, at 1, *reprinted in* 1982 U.S.C.C.A.N. 583 (discussing the extension of the 546(e) safe harbor to the securities market to avoid "the insolvency of one commodity or security firm spreading to other firms and possibl[y] threatening the collapse of the affected market"). Valley View's bankruptcy will not trigger bankruptcies of any commodity or securities firms. Even if Valley View's bankruptcy were to "spread" to Merit after avoidance of the transfer, there is no evidence that it would have any impact on Credit Suisse, Citizens Bank, or any other bank or entity named in section 546(e). Nor are we persuaded that the repercussions of undoing a deal like this one outweigh the necessity of the Bankruptcy Code's protections for creditors. We will not interpret the safe harbor so expansively that it covers any transaction involving securities that uses a financial institution or other named entity as a conduit for funds.

D

We recognize that we are taking a different position from the one adopted by five of our sister circuits, which have interpreted section 546(e) to include the conduit situation. *See In re Quebecor World (USA) Inc.*, 719 F.3d 94 (2d Cir. 2013) (finding safe harbor applicable where financial institution was trustee and actual exchange was between two private entities); *Contemporary Indus. Corp. v. Frost*, 564 F.3d 981, 987 (8th Cir. 2009) (finding § 546(e) not limited to public securities transactions, and exempting from avoidance Chapter 11 debtor's payments that were deposited in a national bank in exchange for shareholders' privately-held stock during leveraged buyout, as settlement payments made to financial institution); *In re QSI Holdings, Inc.*, 571 F.3d 545, 551 (6th Cir. 2009) (finding HSBC's role in a leveraged buyout "sufficient to satisfy the requirement that the transfer was made to a financial institution" although it was only the exchange agent); *In re Resorts Int'l, Inc.*, 181 F.3d 505, 516 (3d Cir. 1999) (noting that "the requirement that the 'commodity brokers, forward contract merchants, stockbrokers, financial institutions, and securities clearing agencies' obtain a 'beneficial interest' in the funds they handle . . . is not explicit in section 546"); *In re Kaiser Steel Corp.*, 952 F.2d 1230, 1240 (10th Cir. 1991) (rejecting Kaiser's argument that "even if the payments were settlement payments, § 546(e) does not protect a settlement payment 'by' a stockbroker, financial institution, or clearing agency, unless that payment is to another participant in the clearance and settlement system and not to an equity security holder").

One circuit, however – the Eleventh – agrees with us. In *Matter of Munford, Inc.*, the Eleventh Circuit found section 546(e) inapplicable to payments made by Munford to shareholders because financial institutions were involved only as conduits. 98 F.3d 604, 610 (11th Cir. 1996). Merit contends that Congress disapproved *Munford* by passing the 2006 Amendment adding "(or for the benefit of)," *see* H.R. Rep. 109-648, at 23, *reprinted in* 2006 U.S.C.C.A.N. 1585, 1593, and that Congress was responding to the Eleventh Circuit's language in *Munford* that "[t]he bank never acquired a beneficial interest in either the funds or the shares." 98 F.3d at 610. Merit would interpret the amendment as listing acquiring a beneficial interest as only one way of several to satisfy the requirements (the other way being making or receiving a transfer). The Second Circuit has agreed with this position. *See Quebecor*, 719 F.3d at 100 n. 3.

We do not believe that Congress would have jettisoned *Munford*'s rule by such a subtle and circuitous route. Its addition of an alternate way to meet the safe harbor criteria says nothing about the method already in the statute. If Congress had wanted to say that acting as a conduit for a transaction between non-named entities is enough to qualify for the safe harbor, it would have been easy to do that. But it did not.

III

Because we find that section 546(e) does not provide a safe harbor against avoidance of transfers between non-named entities where a named entity acts as a conduit, we REVERSE the judgment of the district court and REMAND for proceedings consistent with this opinion.

541 B.R. 850
United States District Court,
N.D. Illinois, Eastern Division.

FTI Consulting, Inc., Trustee of the Centaur, LLC Litigation Trust, Plaintiff,
v.
Merit Management Group, LP., Defendant.

Case No. 11 C 7670
|
Signed October 2, 2015

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MEMORANDUM OPINION AND ORDER

Joan B. Gottschall, United States District Judge

FTI Consulting, Inc., as Trustee of the Centaur, LLC Litigation Trust, sued Merit Management Group, LP, in an attempt to avoid an allegedly fraudulent transfer of $16,503,850 to Merit. Merit's motion for judgment on the pleadings pursuant to Fed. R. Civ. P.

12(c) is before the court. For the following reasons, the motion is granted.

I. BACKGROUND

The essential facts in this case are undisputed. This case arises out of efforts by an entity named Valley View Downs to develop a "racino" (a race track with a casino, which requires both racing and gaming licenses) in Pennsylvania. In 2002, Valley View and Bedford Downs Management Corporation both applied for Pennsylvania's last available harness-racing license. The Pennsylvania State Harness Racing Commission initially denied their applications, but after litigation in Pennsylvania state court, the Commission allowed Valley View and Bedford Downs to reapply.

To strengthen its chances at securing the racing license, Valley View decided to buy out the competition. Thus, Valley View, Bedford Downs, and others entered into a settlement agreement dated August 14, 2007 (the "Settlement Agreement"). (Dkt. 60-2 through 60-7.) The Settlement Agreement required Valley View to pay Bedford Downs $55 million in exchange for all of Bedford Downs's stock. On September 4, the parties to the Settlement Agreement entered into an escrow agreement (the "Escrow Agreement" or, collectively with the Settlement Agreement, the "Securities Contracts"). (Dkt. 60-8.)

Because Merit was a 30.007% owner of Bedford Downs, Valley View ultimately transferred $16,503,850 to it (the "Transfers"). Valley View's financial arrangements relating to the Transfers were complex and involved multiple entities. As is relevant here, Valley View made the Transfers through Credit Suisse and Citizens Bank of Pennsylvania ("Citizens Bank"). Credit Suisse acted as an escrow agent on behalf of Valley View and distributed the funds pursuant to the terms of (1) certain credit agreements between Valley View and Credit Suisse and (2) the Escrow Agreement. Citizens Bank held the Transfers in escrow pursuant to the terms of the Escrow Agreement until the transaction closed and then distributed the funds to Merit.

With Bedford Downs out of the running, the Racing Commission granted Valley View's application for a harness-racing license. Valley View's desire to open a "racino," however, faltered at the gate as Valley View was unable to secure a gaming license. Without the gaming license, Valley View could not go the distance and thus sought relief under Chapter 11 of the Bankruptcy Code.

The bankruptcy court ultimately confirmed Valley View's Chapter 11 plan. The Centaur, LLC Litigation Trust was created pursuant to the confirmed plan, and FTI Consulting, Inc. was selected to serve as the Litigation Trustee. The confirmed plan contemplated that the Trustee would pursue certain claims – the "Designated Avoidance Actions" – to benefit certain creditors of Valley View. After convoluted proceedings before multiple bankruptcy courts, the flag is raised to determine Merit's motion for judgment on the pleadings, which is based on Merit's contention that § 546(e) of the Bankruptcy Code bars the Trustee's attempt to avoid the Transfers pursuant to the Bankruptcy Code.[1]

II. LEGAL STANDARD

In ruling on a motion for judgment on the pleadings pursuant to Rule 12(c), when the movant seeks "to dispose of the case on the basis of the underlying substantive merits . . . . the appropriate standard is that applicable to summary judgment, except that the court may consider only the contents of the pleadings." *Alexander v. City of Chi.*, 994 F.2d 333, 336 (7th Cir. 1993). The pleadings include the complaint, the answer, and any documents attached as exhibits, such as affidavits, letters, and contracts. *N. Ind. Gun & Outdoor Shows, Inc. v. City of S. Bend*, 163 F.3d 449, 452-53 (7th Cir. 1998). The court may also take judicial notice of "documents that are critical to the complaint and referred to in it." *Geinosky v. City of Chi.*, 675 F.3d 743,

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[1] The Trustee's complaint appears to seek relief under state fraudulent transfer law. For example, Count II is entitled "avoidance of fraudulent transfer (11 U.S.C. § 544 & Pennsylvania Uniform Transfer Act § 5105." (Compl., Dkt. 1.) In that count, the Trustee alleges that the Transfers are "avoidable under Pennsylvania law by actual creditors holding allowable unsecured claims against Valley View Downs." (*Id.* ¶ 55.) Nevertheless, in its opposition to the motion for judgment on the pleadings, the Trustee states that it "has not asserted any state law claims on behalf of creditors, but rather debtor claims under § 544." (Trustee Resp., Dkt. 65, at 1.) Based on this position, the Trustee did not address Merit's arguments about preemption of any state law claim. Given the Trustee's abandonment of any state law claims, the court considers them withdrawn and thus will not address preemption.

745 n. 1 (7th Cir. 2012). The court should grant a Rule 12(c) motion for judgment on the pleadings only if "no genuine issues of material fact remain to be resolved" and the movant "is entitled to judgment as a matter of law." *Alexander*, 994 F.2d at 336.

Merit has provided the court with documents relating to the sale of Bedford Downs' shares to Valley View, including transactional documents showing the conduits through which the transaction was made. Merit contends that these documents are properly before the court as the Trustee's complaint repeatedly refers to the transaction. (Merit's Memo., Dkt. 60, at 5, n.3.) The Trustee disagrees but does not dispute that certain documents relating to the transaction (discussed above) are admissible and relevant. Given that no party objects to the court's consideration of these documents, the court will do so.

III. DISCUSSION

"The Bankruptcy Code allows a trustee to avoid and recover pre-petition fraudulent and preference transfers made by a debtor." *In re MCK Millennium Ctr. Parking, LLC*, 532 B.R. 716, 726-27 (Bankr. N.D. Ill. 2015). Section 546(e) of the Bankruptcy Code, however, provides a "safe harbor" by barring a trustee from avoiding certain transfers. 11 U.S.C. § 546(e). The "safe harbor" protects, among other transfers:

- "a transfer that is 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
- 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 . . . .

11 U.S.C. § 546(e).[2]

The Trustee does not dispute that the Transfers were "settlement payments" or that they were made "in connection with a securities contract." (Trustee Resp., Dkt. 65, at 1.) Commercial banks such as Credit Suisse and Citizens Bank are financial institutions.

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[2] 11 U.S.C. § 546(e) provides in full 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 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.

See In re MCK Millennium Ctr. Parking, LLC, 532 B.R. 716, 727 (Bankr. N.D. Ill. 2015) (citing 11 U.S.C § 101(22)(A)). Thus, the applicability of § 546(e) in this case turns on the meaning of the phrase "by or to (or for the benefit of) . . . a financial institution."

Merit (the recipient of the Transfers that the Trustee seeks to avoid) argues that the Transfers were made "by or to" a financial institution (here, Credit Suisse and Citizens Bank) because financial institutions transferred and received funds in connection with the Transfers. In contrast, the Trustee asserts that § 546(e)'s requirement that a transfer be "by or to" a financial institution applies only to a financial institution that is (1) a debtor-transferor; (2) a transferee that is not a mere conduit; or (3) an entity on whose behalf the transfer was made. The Trustee contends that the financial institutions had no beneficial interest in the funds; Valley View was the debtor-transferor and the entity on whose behalf transfer was made, Merit was the transferee, and neither Valley View nor Merit is "a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency." Thus, the Trustee concludes that § 546(e)'s "safe harbor" does not shield the Transfers.

A. Guidance From The Seventh Circuit

The circuits are split on the issue presented in this case. The Seventh Circuit has not weighed in on § 546(e)'s requirement that a transaction be "by or to (or for the benefit of) . . . a financial institution" but has construed other language in § 546(e). It has held that "Congress enacted § 546(e) to ensure that honest investors will not be liable if it turns out that a leveraged buyout (LBO) or other standard business transaction technically rendered a firm insolvent." *Peterson v. Somers Dublin Ltd.*, 729 F.3d 741, 748 (7th Cir. 2013). As the Seventh Circuit has explained, without § 546(e):

> one firm's bankruptcy could cause a domino effect as its clients could similarly default on their obligations, which in turn would trigger further bankruptcies, and so on. By preventing one large bankruptcy from rippling through the securities industry in this way, the § 546(e) safe harbor protects the market from systemic risk and allows parties in the securities industry to enter into transactions with greater confidence.

Grede v. FCStone, LLC, 746 F.3d 244, 252 (7th Cir. 2014).

In interpreting § 546(e), the Seventh Circuit has followed what it views as the statute's plain language; "[t]he text is what it is and must be applied whether or not the result seems equitable." *Peterson*, 729 F.3d at 748 (citing *Freeman v. Quicken Loans, Inc.*, ___ U.S. ___, 132 S.Ct. 2034, 2044, 182 L.Ed.2d 955 (2012)); *Grede*, 746 F.3d at 253. The Seventh Circuit has emphasized that this reliance on the statutory language does not mean that it has "appl[ied] a wooden textualism to the issue." *Grede*, 746 F.3d at 253. Instead, it has declined "to depart from the deliberately broad text of § 546(e)" because:

> [s]ection 546(e) applies only to the securities sector of the economy, where large amounts of money must change hands very quickly to settle transactions. Those dealing in securities have an interest in knowing that a deal, once completed, is indeed final so that they need not routinely hold reserves to cover the possibility of unwinding the deal if a counter-party files for bankruptcy in the next 90 days. Also, even a short term lack of liquidity can prove fatal to a commodity broker or other securities business.

Id.

With these precepts in mind, the court turns to decisions from other circuits, a decision by a bankruptcy judge in this district, and decisions of other district courts that address the meaning of the phrase "by or to (or for the benefit of) . . . a financial institution."

B. The Minority Position

The court begins with the Eleventh Circuit's decision in *Matter of Munford, Inc.*, 98 F.3d 604, 610 (11th Cir. 1996). In that case, the Eleventh Circuit considered whether § 546(e) protected payments made to selling shareholders in connection with a leveraged buyout when the financial institutions involved in the transactions did not have a beneficial interest in the payments. A divided panel of the Eleventh Circuit held that § 546(e) is inapplicable if a financial institution involved in a transaction is a "intermediary or conduit" because a trustee may only avoid a transfer to a "transferee" that is a protected entity listed in § 546(e) and has a beneficial interest in the assets at issue.[3] *Id.* (citing 11 U.S.C. § 550, which addresses a transferee's liability for an avoided transfer). The dissenting judge in *Munford*, however, stated that the requirement that a financial institution have a beneficial interest in a settlement payment "created a new exception to [the] application [of § 546(e)]." *Id.* (Hatchett, C.J., dissenting in part).

C. The Majority Position

Numerous courts have rejected the *Munford* majority's interpretation of "by or to (or for the benefit of) . . . a financial institution" and have held that a financial intermediary involved in a transaction implicates the safe harbor protection in § 546(e) even if it acts as an intermediary or conduit. Specifically:

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[3] Presumably, Credit Suisse and Citizens Bank, the banks involved in the transactions at issue in this case, are for-profit entities. The parties have not addressed whether a bank that obtains a financial benefit due to, for example, float, has a beneficial interest in that transaction that is sufficient to invoke § 546(e). The court will not consider this issue further as it is unremarked by the parties, but notes that it is unclear if Credit Suisse and Citizens Bank in fact obtained no benefit from their roles in transactions totaling millions of dollars.

- **Second Circuit**

Enron Creditors Recovery Corp. v. Alfa, S.A.B. de C.V., 651 F.3d 329, 338-39 (2d Cir. 2011) – Enron argued that a financial intermediary that acted as a record keeper and conduit was outside the scope of § 546(e) because it did not take title to the securities at issue during the transaction. Enron thus reasoned that the transaction "did not implicate the systemic risks that motivated Congress's enactment of the safe harbor." The Second Circuit disagreed, holding that § 546(e)'s safe harbor was available because "undoing Enron's redemption payments, which involved over a billion dollars and approximately two hundred noteholders," would have "a substantial and similarly negative effect on the financial markets." *Id.* at 338. The Second Circuit also held that a financial intermediary that does not take title to securities during a transaction is entitled to safe harbor protection. *Id.* at 339.

In re Quebecor World (USA) Inc., 719 F.3d 94, 99-100 (2d Cir. 2013) – In *Quebecor*, the Second Circuit reaffirmed *Enron*'s holding that a financial intermediary need not have a beneficial interest in a transfer to be protected by § 546(e). It focused on the statute's plain language and held that to prevent portions of the statute from becoming superfluous, "a transfer may be either 'for the benefit of' a financial institution or 'to' a financial institution, but need not be both." *Id.* It also found that this construction furthered the purpose behind

§ 546(e)'s safe harbor because transactions involving financial intermediaries acting as a [sic] conduits necessarily involve at-risk markets. *Id.* at 100. Finally, it stated that the protected entities listed in § 546(e) typically facilitate transfers. For this reason, "[a] clear safe harbor for transactions made through these financial intermediaries promotes stability in their respective markets and ensures that otherwise avoidable transfers are made out in the open, reducing the risk that they were made to defraud creditors." *Id.*

- **Third Circuit**

In re Resorts Int'l, Inc., 181 F.3d 505, 515 (3d Cir. 1999) – In *Resorts*, Merrill Lynch, a broker, and Chase Manhattan, a bank, were involved in a securities transaction. The Third Circuit held that Merrill Lynch and Chase were "financial institutions" that were within the ambit of § 546(e) "[u]nder a literal reading of [that statute]." *Id.* The Third Circuit held that [sic] the dissent in *Munford* was more persuasive that the majority opinion because § 546(e) does not specify that the safe harbor is available only when the financial institution has a "beneficial ownership" in the funds at issue. *Id.* at 516.

In re Plassein Int'l Corp., 590 F.3d 252, 257 (3d Cir.2009) – In *Plassein*, the Third Circuit again rejected *Munford*, reaffirmed *Resorts*, and held that a bank that acts as a conduit is protected by § 546(e)'s safe harbor.

- **Sixth Circuit**

  In re QSI Holdings, Inc., 571 F.3d 545, 550 (6th Cir. 2009) – In *QSI Holdings*, the plaintiffs argued that a transaction was not "made by or to a . . . financial institution" because the bank "never had dominion or control over [the] funds." The Sixth Circuit adopted *Resorts'* rejection of *Munford* and held that § 546(e) protects financial institutions that do not have a beneficial interest in the funds at issue.

- **Eighth Circuit**

  Contemporary Indus. Corp. v. Frost, 564 F.3d 981 (8th Cir. 2009) – In *Contemporary Industries*, the Eighth Circuit acknowledged *Munford* but adopted the Third Circuit's reasoning in *Resorts* and held that "the holding in Munford cannot be squared with § 546(e)'s plain language." *Id.* at 987. The Eighth Circuit based this conclusion on, among other things, "a literal reading of the relevant statutory language" and the fact that a bank was involved in the transaction. *Id.* The Eighth Circuit also noted that the statutory language "plainly and unambiguously encompasse[d]" the payments at issue. *Id.* Finally, the Eighth Circuit rejected the plaintiff's contention that reversing the payments at issue would not impact the stability of the financial markets and that following the Third Circuit's approach would lead to an absurd result. *Id.* at 987-88. In support, the Eighth Circuit explained that it could "see how Congress might have believed undoing" a transaction involving $26.5 million would affect the financial markets and "why Congress might have thought it prudent to extend protection to payments such as these." *Id.* Thus, the Eighth Circuit found that the payments at issue were shielded by § 546(e)'s safe harbor.

- **Tenth Circuit**

  In re Kaiser Steel Corp., 952 F.2d 1230 (10th Cir. 1991) – In *Kaiser Steel*, the party challenging the application of § 546(e)'s safe harbor for financial institutions argued that § 546(e) did not protect settlement payments "by a stockbroker, financial institution, or clearing agency, unless that payment is to another participant in the clearance and settlement system," as opposed to shareholders who are not protected parties. *Id.* at 1240. The Tenth Circuit held that the statutory language clearly and unambiguously exempted payments made "by or to" a protected party and that this interpretation was neither absurd nor otherwise unreasonable. *Id.* at 1240-41. It also declined to "replace the unambiguous language of the provision with clues garnered from the legislative history" stating that '[c]ertainly, we cannot say that the clear application is absurd, given the fact that disruption in the securities industry – an inevitable result if leveraged buyouts can freely be unwound years after they occurred – is also a harm the statute was designed to avoid." *Id.* at 1241.

D. District and Bankruptcy Court Decisions

Most district and bankruptcy court decisions interpreting "made by or to a . . . financial institution" are in accord with the majority position and disagree with the Eleventh Circuit's decision in *Munford*. *See In re D.E.I. Sys., Inc.*, 996 F. Supp. 2d 1142, 1146 (D. Utah 2014) (following the Tenth Circuit's decision in *Kaiser Steel* and concluding that " 'by or to' means just that – payments made either by or to a financial institution. The understanding and application of the phrase does not generally require careful parsing or close semantic scrutiny."); *In re Refco, Inc. Sec. Litig.*, No. 07 MDL 1902 GEL, 2009 WL 7242548, at *8 (S.D.N.Y. Nov. 13, 2009), report and recommendation adopted by 2010 WL 5129072 (S.D.N.Y. Jan. 12, 2010) ("The predominant view in the Circuits – that 'financial institution' means what it says and covers financial institutions even when they act only as a conduit for a settlement payment – is cogent and persuasive."); *In re Hechinger Inv. Co. of Delaware*, 274 B.R. 71, 87 (Bankr. D. Del. 2002) (disagreeing with *Munford* and following binding authority in *Resorts International* holding that the plain language of § 546(e) "does not require the financial institution to acquire a beneficial interest; rather, it broadly protects from trustee's avoidance powers settlement payments made "by . . . a financial institution").

A bankruptcy court in this circuit has considered the precise issue before this court – whether a financial institution that serves as a conduit or intermediary is entitled to safe harbor protection. *MCK Millennium Ctr. Parking*, 532 B.R. at 728. In *MCK Millennium*, the court recognized the circuit split and held that the majority position was "the better view" because § 546(e) does not contain "the additional requirement that the financial institution receive some financial benefit or acquire the funds for its own use." *Id.* It then "[applied] the text as written" and concluded that § 546(e)'s safe harbor applied to a $5M transaction where the funds were transferred to a financial institution which then transferred the funds to a trust. *Id.*

Finally, a bankruptcy decision from Massachusetts issued shortly before the Eleventh Circuit's decision in *Munford* supports the minority view. *In re Healthco Int'l, Inc.*, 195 B.R. 971, 982 (Bankr. D. Mass. 1996). This decision is consistent with *Munford*.

E. The Trustee's Arguments

First, the Trustee contends that the court must consider the language in § 546(e) "within the context of both its purpose and Chapter 5 of the Bankruptcy Code."[4] (Trustee Resp., Dkt. 65, at 4.) It then argues that the legislative history shows that the safe harbor

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[4] "Chapter 5 of the Bankruptcy Code gives trustees certain avoidance powers and enables them to recover assets for the benefit of creditors." *In re Bilis*, No. 12 B 39161, 2014 WL 3697541, at *7 (Bankr. N.D. Ill. July 22, 2014).

does not protect a financial institution unless unraveling the transaction would expose the securities market to systemic risk. (*Id.* at 4-7.) It also contends that the legislative history shows that Congress meant to protect participants in the commodities and securities markets, not other potential fraudulent transfer defendants, such as financial institutions that facilitate transactions. (*Id.* at 11-12.)

These arguments are at odds with the Seventh Circuit's teaching that unambiguous statutory language is controlling. The Transfers here were "by or to" a financial institution because two financial institutions transferred or received funds in connection with a "settlement payment" or "securities contract." *See Kaiser Steel*, 952 F.2d at 1240-41; *Resorts Int'l.*, 181 F.3d at 515; *Enron Creditors Recovery Corp.*, 651 F.3d at 338-39; *Contemporary Indus.*, 564 F.3d at 987-88; *QSI Holdings*, 571 F.3d at 550; *Plassein Int'l*, 590 F.3d at 257; *Quebecor World*, 719 F.3d at 99-100; *see also MCK Millennium Ctr. Parking*, 532 B.R. at 728; *D.E.I. Sys., Inc.*, 996 F. Supp. 2d at 1146; *Refco, Inc. Sec. Litig.*, 2009 WL 7242548, at *8; *Hechinger Inv. Co.*, 274 B.R. at 87.

The Seventh Circuit's observation, when parsing a different clause in § 546(e), that "a court can't say 'this statute is ambiguous, so we will implement the legislative history unencumbered by enacted text'" is apropos. *Peterson*, 729 F.3d at 748 (citing *Freeman v. Quicken Loans, Inc.*, ___U.S. ___, 132 S.Ct. 2034, 2044, 182 L.Ed.2d 955 (2012)). Legislative history can be helpful when interpreting ambiguous language, but should be "used to decipher the ambiguous language, not to replace it." *Id.*; *see also Grede*, 746 F.3d at 253 (describing the district court's reliance on policy grounds when interpreting § 546(e) as "powerful and equitable" but reversing because the district court's "reasoning runs directly contrary to the broad language of § 546(e)"). The court agrees that the clear statutory text is unambiguous and, therefore, must control. Thus, it rejects the Trustee's policy arguments.

Second, the Trustee contends that Chapter 5 of the Bankruptcy Code "gives trustees the right to avoid pre-petition transfers made by a debtor to a transferee or an entity for whose benefit such transfer was made." (Trustee Resp., Dkt. 65, at 10.) The Trustee argues that Chapter 5's purpose supports its own purportedly plain language reading of "by, to, and for the benefit of": that § 546(e) only protects "(i) the debtor-transferor, (ii) a transferee, or (iii) an entity for whose benefit the transfer was made." (*Id.* at 8.) The Trustee asserts that any other reading of "by or to" would render the words "commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency" in § 546(e) superfluous because "it is difficult to imagine circumstances where a 'settlement payment' or 'a transfer in connection with a securities contract' does not somehow involve . . . the debtor's or tranferee's [sic] bank." (*Id.* at 10.) The Trustee concludes that "if Congress wanted to protect all settlement payments and transfers made in connection with a securities contract from avoidance (which it did not), it would have been unnecessary to specifically identify" entities covered by § 546(e.) (*Id.*)

This court finds the Trustee's suggested "plain meaning" strained. At the risk of being obvious, a transfer that is "by or to" a financial institution is just that: a transfer where a financial institution sends or receives funds. The court will not repeat its summary of the majority position cases above regarding "by or to" but finds them sensible and, more to the point, solidly grounded in the statutory language. Even if the court agreed with the Trustee's reading of "by or to" (which is not the case), the court cannot use its own assessment of Congressional intention to rewrite the words in § 546(e). *See Peterson*, 729 F.3d at 748; *Grede*, 746 F.3d at 253.

Third, the Trustee approaches the statutory issue from a different angle, focusing on the word "transfer" in § 546(e). 11 U.S.C. § 546(e) ("the trustee may not avoid a transfer that is 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 . . . "). The Trustee posits that the financial institutions here cannot have engaged in covered transfers because they are not "transferees" or "transferors" as those terms are used in the Bankruptcy Code since they lacked an interest in the funds. *See Munford*, 98 F.3d at 610-11; *Healthco Int'l*, 195 B.R. at 981-82.

The word "transfer" in the context of § 546(e) appears to refer to the movement of assets. *See Grede*, 746 F.3d at 246 (stating that "[t]hese appeals focus on two transfers of assets" that the trustee is seeking to avoid under § 546(e)). Moreover, the Seventh Circuit has held that § 546(e) reflects Congress' decision to favor "finality over equity for most pre-petition transfers in the securities industry – *i.e.*, those not involving actual fraud." *Grede*, 746 F.3d at 253. Section 546(e) thus "reflects a policy judgment by Congress that allowing some otherwise avoidable pre-petition transfers in the securities industry to stand would probably be a lesser evil than the uncertainty and potential lack of liquidity that would be caused by putting every recipient of settlement payments in the past 90 days at risk of having its transactions unwound in bankruptcy court." *Id.* at 254. The court adheres to the Seventh Circuit's use of "transfer" as a verb, as opposed to the Trustee's reading, which saddles § 546(e) with a pecuniary interest requirement. *See id.*

Finally, the Trustee argues that the circuit split is "largely" based on the majority courts' rejection of unnecessary dicta in *Munford* rather than an in-depth analysis of § 546(e)'s language. (Trustee Resp., Dkt. 65, at 13.) According to the Trustee, courts that espouse the minority position (*Munford* and *Heathco Int'l*) based their decision on a finding that § 546(e) did not bar an avoidance action because "[a]lthough financial intermediaries were necessarily involved in the transaction[s], . . . the transfers were made "by [the debtor] to shareholders." (*Id.* at 14.) The Trustee contends that the minority courts' additional statement that the entities seeking the safe harbor were not "transferees" or "transferors" because they had no beneficial interest in the transferred funds was dicta that caused the circuit split. (*Id.*)

This argument is a non-starter. The majority position relies on, among other things, a plain language reading of § 546(e) (with which the court agrees) and sides with the *Munford* dissent. The Trustee's view that the majority position fails to take a "holistic" view of § 546(e) is simply another iteration of its legislative history arguments, which rely on the Trustee's interpretation of congressional intent rather than the statutory language.

In sum, Merit is entitled to § 546(e)'s safe harbor. This means that the Trustee cannot avoid the Transfers. Merit's motion for judgment on the pleadings is, therefore, granted.

IV. CONCLUSION

For the above reasons, Merit's motion for judgment on the pleadings [58] is granted. The clerk is directed to enter final judgment accordingly.

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

August 30, 2016

Before

DIANE P. WOOD, *Chief Judge*

RICHARD A. POSNER, *Circuit Judge*

ILANA DIAMOND ROVNER, *Circuit Judge*

No. 15-3388

FTI CONSULTING, INC., as Trustee of the Centaur, LLC Litigation Trust, *Plaintiff-Appellant,*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
v.	No. 1:11-cv-07670
MERIT MANAGEMENT GROUP, LP, *Defendant-Appellee.*	Joan B. Gottschall, *Judge.*

ORDER

Defendant-Appellee filed a petition for rehearing *en banc* on August 11, 2016. No judge in regular active service has requested a vote on the petition for rehearing *en banc,* and all members of the original panel have voted to deny rehearing. Accordingly,

IT IS ORDERED that the petition for rehearing *en banc is* DENIED.

Relevant Statutory Provisions

11 U.S.C. § 101

In this title the following definitions shall apply:

. . . .

(22) The term "financial institution" means –

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

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

. . . .

(51A) The term "settlement payment" means, for purposes of the forward contract provisions of this title, 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.

. . . .

11 U.S.C. § 544

. . . .

(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. § 548

(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 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 or 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.

. . . .

11 U.S.C. § 741

In this subchapter –

. . . .

(7) "securities contract" –

(A) means –

(i) a contract for the purchase, sale, or loan of a security, a certificate of deposit, a mortgage loan, any interest in a mortgage loan, a group or index of securities, certificates of deposit, or mortgage loans or interests therein (including an interest therein or based on the value thereof), or option on any of the foregoing, including an option to purchase or sell any such security, certificate of deposit, mortgage loan, interest, group or index, or option, and including any repurchase or reverse repurchase transaction on any such security, certificate of deposit, mortgage loan, interest, group or index, or option (whether or not such repurchase or reverse repurchase transaction is a "repurchase agreement", as defined in section 101);

. . . .

(B) does not include any purchase, sale, or repurchase obligation under a participation in a commercial mortgage loan;

(8) "settlement payment" means a preliminary settlement payment, a partial settlement payment, an interim settlement payment on account, a final settlement payment, or any other similar payment commonly used in the securities trade; . . .

. . . .