No. 16-784

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

REPLY BRIEF FOR PETITIONER

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Respondent does not deny that the breadth of Section 546(e) of the Bankruptcy Code is an important and recurring issue. Nor does Respondent suggest any reason why this case would not be an appropriate vehicle for the resolution of that question.

Respondent also does not truly dispute that there is a significant disagreement among the courts of appeals as to the proper interpretation of the Section 546(e) safe harbor. The Seventh Circuit, after all, acknowledged that its decision in this case deepened a longstanding circuit split (Pet. App. 16-17). And the petitioners in the *Tribune* case, who are situated similarly to Respondent in this case, agree. They argue in their reply brief that "the circuit split is entrenched and merits this Court's review." Reply Br. at 2 n.1, *Deutsche Bank Trust Co. Americas v. Robert R. McCormick Found.*, No. 16-317 (Nov. 4, 2016).

Respondent nevertheless claims that the five courts of appeals with which it disagrees "failed to perform the proper analysis necessary to divine congressional intent" (Br. in Opp. 13). But one party or the other could have made the same argument in any of the cases in which this Court granted certiorari to resolve disagreements about the interpretation of the Bankruptcy Code or other federal statutes. A circuit split is no less substantial because some courts conclude that the meaning of a statute is obvious from its

plain language, while others find it appropriate to engage in lengthy explorations of secondary indicators of meaning.

Regardless of *why* the courts of appeals are divided on the scope of the safe harbor, there is no dispute that the courts of appeals, and lower courts bound by their precedents, are disposing of disputes involving millions or billions of dollars in an inconsistent manner. This Court's intervention is necessary and appropriate to harmonize the law.

I. THE CIRCUIT SPLIT IS ENTRENCHED AND REQUIRES NO FURTHER PERCOLATION.

Respondent does not seriously contend that this lawsuit could have survived summary judgment in many courts across the United States. Indeed, Respondent acknowledged in response to Petitioner's motion for a change of venue to Delaware that the safe harbor would effectively end the litigation in that forum. The Seventh Circuit also understood that "we are taking a different position from the one adopted by five of our sister circuits" (Pet. App. 16).

Respondent's principal argument against this Court's review is that the courts of appeals in those other circuits should be given an opportunity to consider the Seventh Circuit's analysis and overturn their precedents in en banc proceedings. There is no reason to believe that such an outcome will ever occur. Nor would it be appropriate for this Court to forgo an

opportunity to resolve the question now, which would require others to litigate the issue for years into the future. Respondent's suggested approach is not likely to solve anything. It is instead a recipe for endless delay and the inefficient use of judicial resources.

The courts of appeals have staked out their positions on the scope of Section 546(e) over a period of more than twenty years. The Eleventh Circuit majority in *Munford* opined that the involvement of a financial institution is irrelevant unless the institution has a beneficial interest in the transaction. *See In re Munford, Inc.*, 98 F.3d 604, 610, 614 (11th Cir. 1996).[1] The Second and Third Circuits, which are home to a large percentage of U.S. corporate bankruptcy filings, have declined prior opportunities to reconsider or distinguish their precedents on the breadth of the safe harbor. *See In re Quebecor World (USA) Inc.*, 719 F.3d 94, 99 (2d Cir. 2013) (adhering to and clarifying *Enron Creditors Recovery Corp. v. Alfa, S.A.B. de C.V.*, 651 F.3d 329 (2d Cir. 2011)); *In re Plassein Int'l Corp.*, 590 F.3d 252, 259 (3d Cir. 2009) (adhering to *In re Resorts Int'l, Inc.*, 181 F.3d 505 (3d Cir. 1999)). Indeed, the plain-language interpretation of the safe harbor is so firmly established in the Second Circuit that the *Tribune* plaintiffs chose to devote their recent petition for rehearing en banc to other issues. *See* Pet. for Reh'g, *In*

[1] Respondent cryptically suggests that the *Munford* court's concept of a "beneficial interest" and the language "for the benefit of" in the statute are somehow not congruent (Br. in Opp. 15). If a transfer in which a financial institution has a beneficial interest is not for the benefit of that institution, or vice versa, Respondent does not explain why that is so.

re Tribune Co. Fraudulent Conveyance Litig., No. 13-3992 (2d Cir. Apr. 12, 2016).

Respondent's approach to this case also is telling. It could have brought suit against all of Bedford Downs' former shareholders in the Delaware court where Valley View's bankruptcy case was filed. *Resorts International* and *Plassein* would have presented obstacles, but the Third Circuit might have overruled them if presented with Respondent's arguments in an en banc proceeding. Instead of embracing the approach that it now suggests would be fruitful, Respondent elected to sue Petitioner in Illinois, where it believed the law was unsettled. Respondent also chose to abandon any possible recovery against other former shareholders that were subject to jurisdiction only in the Second and Third Circuits.

In short, the circuit split on the scope of the safe harbor is real, substantial, and unlikely to be resolved by the courts of appeals. This Court should grant review in this case so that debtors, trustees, and creditors may organize their affairs and their litigation efforts around a uniform interpretation of the law.

II. THE COURT SHOULD NOT PERMIT INCONSISTENT OUTCOMES IN THIS CASE AND *TRIBUNE*.

Both this case and *Tribune* present the question of the scope of the Section 546(e) safe harbor. The parties agree that if the Court grants the petition in *Tribune*,

the Court's decision in that case might, but would not necessarily, control in this one.

Respondent cites Justice Brennan's opinion in *Straight* for the principle that like cases should be treated alike (Br. in Opp. 17). Petitioner agrees, but Respondent's suggested application of that principle does not make sense: "deny Merit's petition and send the case back to the District Court regardless of whether it grants or denies the petition in *Tribune*" (Br. in Opp. 17). Justice Brennan also stated that a "hold" is appropriate when "the disposition of the granted case may have an effect on the merits of the case which is to be held." *Straight v. Wainwright*, 476 U.S. 1132, 1135 (1986) (Brennan, J., dissenting from denial of stay). That description fits this case.[2]

To avoid the possibility of inconsistent results, if the Court grants review in *Tribune* but not in this case, the Court should hold this petition pending the disposition of the *Tribune* case.

[2] By contrast, Justice Powell explained that a stay was not appropriate in *Straight* because Straight's case would not be affected by any possible decision in a pending case. *See id.* at 1133 n.2 (Powell, J., concurring in denial of stay). That is not true here.

CONCLUSION

The petition for a writ of certiorari should be granted. Alternatively, if the Court grants the petition for certiorari in the *Tribune* case, it should hold this petition.

Respectfully submitted,

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