No. 16-784

In The

Supreme Court of the United States

MERIT MANAGEMENT GROUP, LP,

Petitioner,

v.

FTI CONSULTING, INC.,

Respondent.

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

BRIEF *AMICUS CURIAE* OF OPPORTUNITY PARTNERS, L.P. IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*[1]

Amicus curiae, Opportunity Partners L.P., submits this brief in support of petitioner and defendant Merit Management Group, LP ("Merit"). *Amicus* is one of thousands of defendants in *In re Tribune Co. Fraudulent Conveyance Litig.*, 818 F.3d 98 (2d Cir. 2016), *petition for cert.* (filed as *Deutsche Bank Trust Company Americas v. Robert R. McCormick Foundation* (Sept. 9, 2016) (No. 16-317)). Like the present case, the plaintiff in the *Tribune* case seeks to avoid pre-petition payments made to passive equity holders of a company in connection with an arm's-length purchase of that company. There is no allegation in either case that a defendant engaged in misconduct. *Amicus* has been unable to find any case in which a court determined that establishing the causation element of constitutional standing does not require an allegation of misconduct. Since none of the briefs by the parties has addressed this threshold issue, this brief attempts to fill that void.

[1] The parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae* made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

If (1) a company is purchased for a price reached through arm's-length negotiations, and (2) the transaction is not intended to hinder, delay, or defraud any creditor of the purchaser, an equity investor in the acquired company, by receiving its *pro rata* share of the purchase price, has not caused an injury in fact to the purchaser. This conclusion does not change if the purchaser files a petition for bankruptcy within two years after such purchase even if (1) the purchaser was insolvent at the time of the transaction, or (2) the purchase rendered the purchaser insolvent. Hence, the purchaser's estate lacks Article III standing to avoid such payments.

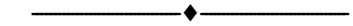
RELEVANT BACKGROUND

Respondent and plaintiff FTI Consulting Inc. ("FTI") is the trustee of the Centaur, LLC Litigation Trust (the "Litigation Trust"), which is entitled to pursue claims on behalf of Valley View Downs, LP ("VVD"), a Chapter 11 debtor (the "Debtor"). Before VVD filed for bankruptcy, it and Bedford Downs Management Corporation ("Bedford") were competitors for Pennsylvania's last available harness license. VVD's intention was to obtain harness and gaming licenses and to develop a "racino," i.e., a race track with a casino in Lawrence County, Pennsylvania. Toward that end, VVD

and Bedford entered into an agreement (the "Settlement Agreement") whereby VVD would acquire Bedford for $55 million if Bedford withdrew its application and VVD obtained the harness racing license.

The Commission awarded VVD the harness license and, on October 30, 2007, VVD transferred $55 million to Bedford, including $16,503,850 representing Merit's equity interest in Bedford. On July 10, 2008, the Gaming Board denied VVD's request for a conditional gaming license. On October 28, 2009, VVD filed a voluntary Chapter 11 petition with the Bankruptcy Court and on July 28, 2011, the Bankruptcy Court entered an order establishing the Litigation Trust.

On October 27, 2011, FTI filed a complaint in which it sought to avoid the $16,503,850 received by Merit as an alleged fraudulent conveyance. FTI's complaint did not allege that Merit did anything wrong, that the Settlement Agreement was intended to hinder, delay, or defraud any creditor, or that it was not negotiated in good faith and at arm's-length.



ARGUMENT

I. Every Plaintiff in Federal Court Must Establish Constitutional (Article III) Standing.

A. Every Federal Court has a Duty to Determine Whether a Plaintiff has Standing.

"The federal courts are under an independent obligation to examine their own jurisdiction, and standing is perhaps the most important of [the jurisdictional] doctrines." *United States v. Hays*, 515 U.S. 737, 742 (1995) (quoting *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 230-231 (1990)) (internal quotation marks omitted). This "special obligation [of every federal court] to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review' [is not waived] even though the parties are prepared to concede it." *FW/PBS*, *supra*, at 231 (internal citations omitted).

B. Neither the District Court nor the Circuit Court Determined that FTI had Constitutional Standing.

Merit submitted a motion to dismiss in which it asserted, among other things, that FTI failed to establish constitutional standing:[2]

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[2] In its motion to dismiss, Merit also contested FTI's statutory standing. The District Court ruled against Merit on that point and Merit did not appeal it. *Amicus curiae* takes no position as to whether FTI has statutory standing.

> To establish constitutional standing, a plaintiff must show that "(1) it personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant; (2) the injury fairly can be traced to the challenged action; and (3) the injury is likely to be redressed by a favorable decision in the suit." *Nat'l Council on Compensation Ins., Inc.*, 2009 WL 2588902 at *2; *see also Perry*, 222 F.3d at 313. FTI as Plaintiff cannot establish even the first element – neither FTI as Plaintiff nor the Litigation Trust suffered any injury as a result of any conduct by Merit. *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91 (1979).

FTI did not dispute Merit's contention. Despite the District Court's "special obligation" to determine that FTI had constitutional standing to sue Merit, it did not expressly make such a finding. On appeal, Merit did not raise the issue of constitutional standing and the Circuit Court, like the District Court, did not address it.

II. The Litigation Trust lacks Constitutional Standing.

A. To Establish Constitutional Standing, a Plaintiff Must Establish Three Elements: (1) Injury in Fact, (2) Causation, and (3) Redressability.

In its motion to dismiss, Merit correctly stated the three requirements necessary to establish a plaintiff's Article III standing: (1) injury in fact, i.e., an invasion

of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) a causal connection between the injury and the challenged conduct, i.e., that the injury can fairly be traced to the challenged action of the defendant and did not result from the independent action of some third party not before the court; and (3) a likelihood that the injury will be redressed by a favorable decision, i.e., that the prospect of obtaining relief from the injury as a result of a favorable ruling is not speculative. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

"[A] plaintiff [does not] automatically satisf[y] the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016).

B. FTI has not Established That the Litigation Trust Suffered a Legally Cognizable Injury in Fact Caused by Merit.

As noted, an injury in fact is "an invasion of a legally protected interest." *Lujan*, 504 U.S. at 560. It has been posited that even an innocent fraudulent transfer "infringes" on a creditor's right to maximize its recovery on a claim against a bankrupt debtor's estate. *Jack F. Williams, Revisiting the Proper Limits of Fraudulent Transfer Law*, 8 Bankr. Dev. J. 55 (1991). However, FTI did not allege that Merit did anything other than receive payment for its equity interest in Bedford, which

is certainly not illegal or improper. Moreover, FTI did not allege that the Settlement Agreement was intended to hinder, delay, or defraud any creditor of VVD or that it was not the result of arm's-length negotiation.

To be legally cognizable, an injury in fact must be one that is "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." *Lujan*, 504 U.S. at 560. See also *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 41 (1976) ("Although the law of standing has been greatly changed in (recent) years, we have steadfastly adhered to the requirement that, at least in the absence of a statute expressly conferring standing, federal plaintiffs must allege some threatened or actual injury resulting from the putatively illegal action before a federal court may assume jurisdiction." *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91 (1979) ("In order to satisfy Art. III, the plaintiff must show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant.").

A passive shareholder of a corporation, by receiving payment for its shares pursuant to an arm's-length transaction, does nothing wrong. *Elliott v. Glushon*, 390 F.2d 514 (9th Cir. 1967) ("The actions legislated against are not 'prohibited'; those persons whose actions are rendered 'null and void' are not made 'liable'; and terms such as 'damages' are not used. The legislative theory is cancellation, not the creation of liability

for the consequences of a wrongful act."). Indeed, with respect to the Settlement Agreement, FTI did not allege that Merit engaged in concealment, collusion, willful blindness, negligence or any other wrongdoing.

The Litigation Trust (and VVD's creditors) may have buyer's remorse due to VVD's failure to achieve its goal of developing a racino. However, buyer's remorse is not a cognizable injury and, even if it was, FTI does not allege that Merit caused it. Here, the undisputed facts suggest that VVD became insolvent because its application for a gambling license was denied.[3] However, that denial was not caused by anything Merit did. Whether VVD was insolvent prior to or after Merit received payment for its investment in Bedford does not change the fact that no injury to the Litigation Trust is fairly traceable to Merit's actions.

CONCLUSION

Section 548(a)(1) of the Bankruptcy Code authorizes the trustee of an insolvent debtor's estate to avoid certain transfers made within two years prior to the date of filing a petition for bankruptcy. That does not mean that the estate automatically satisfies Article III's standing requirements. *Spokeo*, 136 S. Ct. at 1549.

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[3] Since VVD's petition for bankruptcy was filed (1) two years after it acquired Bedford and, (2) more than fifteen months after its gaming license was denied, one can infer that the FTI's claim is nothing more than "fraud by hindsight."

To establish Article III standing, the trustee must credibly allege (and ultimately prove) that the bankrupt's estate was injured because the defendant (1) did something it should not have done, or (2) did not do something it should have done.[4] Here, however, FTI did not allege that Merit did anything wrong. Neither buyer's remorse nor a fallacious claim of fraud by hindsight satisfies the causation element of constitutional standing. Therefore, FTI has failed to meet its burden. Consequently, the courts below lacked subject matter jurisdiction and this Court should vacate their orders and direct dismissal of this lawsuit with prejudice.

Dated: July 18, 2017

Respectfully submitted,

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[4] More generally, it is axiomatic that an injury cannot be fairly traceable to a defendant if the injury was not reasonably foreseeable, i.e., if there is nothing a reasonable similarly situated defendant could have done to prevent the injury.