No. 13-455

IN THE

Supreme Court of the United States

OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF QUEBECOR WORLD (USA) INC.,
Petitioner,

v.

AMERICAN UNITED LIFE INSURANCE COMPANY, ET AL.,
Respondents.

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

SUPPLEMENTAL BRIEF IN OPPOSITION

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RULE 29.6 STATEMENT

Respondents refer the Court to the Brief in Opposition for corporate disclosure information.

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Pursuant to Rule 15.8, Respondents submit this Supplemental Brief to call this Court's attention to a decision issued after the filing of Respondents' Brief in Opposition: *Rushton v. Bevan (In re D.E.I. Sys., Inc.)*, Nos. 2:11-cv-00343 (CW), Bankr. No. 07-24224 (A.P. 09-02082), 2014 WL 257431 (D. Utah Jan. 23, 2014) ("*D.E.I. II*"). *D.E.I. II*, which Petitioner failed to mention in the Reply Brief, overruled the only decision since 2005 that supports Petitioner's interpretation of Section 546(e).

ADDITIONAL ARGUMENT

In the petition, Petitioner asserted that "[c]ourts around the country … are reaching different results" as to the Eleventh Circuit's 1996 *Munford* decision, on which the petition is based. Pet. at 35.[1] In the Brief in Opposition, Respondents noted that all four circuit courts to consider *Munford* had rejected its reasoning, and that the *only* decision to follow *Munford* since Congress amended the pertinent clause in Section 546(e) in 2006 was an opinion from the Utah Bankruptcy Court that was both "not for publication" and contrary to Tenth Circuit law. Opp.

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[1] *See In re Munford, Inc.,* 98 F.3d 604, 610 (11th Cir. 1996). *Contra,* App. 11-12; *In re Enron Creditors Recovery Corp.*, 651 F.3d 329, 338-39 (2d Cir. 2011); *In re Plassein Int'l Corp.*, 590 F.3d 252, 257-59 (3d Cir. 2009); *In re QSI Holdings, Inc.*, 571 F.3d 545, 550-51 (6th Cir. 2009); *Contemporary Indus. Corp. v. Frost*, 564 F.3d 981, 986-87 (8th Cir. 2009); *(In re Resorts Int'l Inc.)*, 181 F.3d 505, 516 (3d Cir. 1999); *In re Kaiser Steel Corp.,* 952 F.2d 1230, 1240-41 (10th Cir. 1991).

Br. at 13 n.3; *see In re D.E.I. Sys., Inc.*, Bankr. No. 07-2442 (Adv. Pro. No. 09-02082), 2011 WL 1261603 (Bankr. D. Utah Mar. 31, 2011) ("*D.E.I. I*").

On the day after Respondents filed the Brief in Opposition, the Utah District Court overruled *D.E.I. I. D.E.I. II,* 2014 WL 257431, at *4.[2] Rejecting the Bankruptcy Court's reasoning and conclusions, the District Court enforced the "plain language of the safe harbor exception" and held, in relevant part, that the disputed redemption payments to the debtor's shareholders fell within Section 546(e) because they "were made both by and to at least one financial institution." *Id.* at *4-5.

The District Court noted that the Tenth Circuit had previously "held that 'by or to' means just that -- payments made either by or to a financial institution." *Id.* at *4 (citing *Kaiser Steel Corp. v. Pearl Brewing Co. (In re Kaiser Steel Corp.),* 952 F.2d 1230, 1240-41 (10th Cir. 1991)).[3] The District Court followed *Kaiser Steel* and the "persuasive" precedent of the Second, Third, Sixth and Eighth Circuits, which undisputedly "would apply the safe harbor even if the financial institution is merely a conduit." *D.E.I. II* at *5; *see* App. 10-11.

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[2] The District Court had "accepted a complete withdrawal of the reference, agreeing to hear the case *de novo*," and decided anew the same summary judgment motions that were at issue in *D.E.I. I. D.E.I. II,* 2014 WL 257431, at *1.

[3] This is precisely the precedent that Respondents cited in asserting that *D.E.I. I* was contrary to Tenth Circuit law. Opp. Br. at 13 n.3.

The District Court expressly faulted the Bankruptcy Court for following "authority from the Eleventh Circuit" (i.e., *Munford*) and relying on the "conduit theory" applicable to a "transferee" under Section 550 instead of the "statutory definition of transfer" applicable to Section 546(e). *D.E.I. II* at *6; *id.* n.11; *see* Opp. Br. at 19-20.[4]

Moreover, the Utah District Court, like the Second Circuit below, expressly addressed the 2006 amendments to Section 546(e) -- which resulted in the clause "made by or to (or for the benefit of) …" -- and concluded that the initial phrase, "by or to," "cannot be read to include [a] requirement" of a beneficial interest in the transfer. *D.E.I. II* at *6; *see* App. 10-11. Indeed, the District Court concluded that the amended language "must mean that Congress rejected the argument that the bank must have some beneficial interest at stake." *D.E.I. II* at *6; *see* App. 10-11 n.3.

Surprisingly, Petitioner failed to mention *D.E.I. II* in the Reply Brief. Instead, Petitioner persisted in relying exclusively on the now overruled *D.E.I. I* for the proposition that "[l]ower courts have certainly viewed [the 2006 amendments] as non-substantive, as they continue to reach different results on the 'mere conduit' question even after the amendments." Reply Br. at 5. Now that *D.E.I. II* has corrected *D.E.I. I*, this proposition has *no* support.

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[4] Likewise, the District Court expressly rejected the trustee's argument that the disputed payments "were not made *to*, but rather *through* the financial institutions." *D.E.I. II,* 2014 WL 257431, at *5 (emphasis in original); *see* Opp. Br. at 18 n.5.

Given the other circuit courts' unanimous rejection of *Munford* and the absence of any final decision that follows *Munford* notwithstanding the 2006 amendments to Section 546(e), this Court should decline to address a stale dispute that appears to have been resolved by Congress and the courts.

CONCLUSION

For the foregoing additional reason, the petition should be denied.

Respectfully submitted,

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