NO. _____

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

PETITION FOR WRIT OF CERTIORARI

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October 8, 2013

QUESTION PRESENTED

In order to "facilitate the prime bankruptcy policy of equality of distribution among creditors of the debtor," *Union Bank v. Wolas*, 502 U.S. 151, 161 (1991), section 547(b) of the Bankruptcy Code, 11 U.S.C. § 547(b), authorizes a bankruptcy trustee to avoid certain property transfers made by a debtor within 90 days before bankruptcy. Section 546(e) of the Code, however, carves out a limited exception to this power: A trustee may not avoid a transfer that (1) is a "settlement payment" or is made "in connection with a securities contract," and (2) is "made by or to (or for the benefit of) a … financial institution." 11 U.S.C. § 546(e).

Here, a group of noteholders collectively agreed that they would leverage certain conditions of the notes to obtain hundreds of millions of dollars in payments on the eve of bankruptcy. Recognizing that allowing these machinations by relatively junior creditors threatened both fundamental policies of bankruptcy and the rights of other creditors, petitioner sought to avoid these payments during subsequent bankruptcy proceedings. The Second Circuit rejected that effort because the payments to the noteholders, like virtually any security-related payment, were made using a financial institution as conduit. The question presented is:

Whether section 546(e) eliminates the statutory power to avoid payments related to a securities transaction when a financial institution acts as a mere conduit for the transferred property, as the Second, Third, Sixth, and Eighth Circuits have held, or whether the financial institution must have a

beneficial interest in the transferred property, as the Eleventh Circuit has held.

PARTIES TO THE PROCEEDING

Petitioner Official Committee of Unsecured Creditors of Quebecor World (USA) Inc. was the plaintiff in the bankruptcy court and appellant in the district court and court of appeals. Pursuant to sections 6.11 and 13.6 of the Third Amended Plan of Reorganization as confirmed by order of the bankruptcy court dated July 2, 2009, the Quebecor World Litigation Trust is the successor-in-interest to the Official Committee of Unsecured Creditors of Quebecor World (USA) Inc.

Respondents are the following entities, who were defendants in the bankruptcy court and appellees in the district court and court of appeals: American United Life Insurance Company; AUSA Life Insurance Company; Barclays Bank PLC; Deutsche Bank AG; Deutsche Bank Securities Inc.; Life Investors Insurance Company of America; Midland National Life Insurance Company Annuity; Modern Woodmen of America; North American Company for Life And Health Insurance/Annuity; North American Company for Life And Health Insurance of New York; Provident Life and Accident Insurance Company; Northwestern Mutual Life Insurance Company; Paul Revere Life Insurance Company; Symetra Life Insurance Company; Transamerica Financial Life Insurance Company; Transamerica Life Insurance Company; Wachovia Capital Markets, LLC; Wilton Reassurance Life Company of New York; and John Does 1–50.

The debtor in the bankruptcy proceeding is Quebecor World (USA) Inc.

RULE 29.6 STATEMENT

Petitioner Official Committee of Unsecured Creditors of Quebecor World (USA) Inc. has no parent company, and no publicly held company owns 10% or more of its stock.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Official Committee of Unsecured Creditors of Quebecor World (USA) Inc. respectfully petitions this Court for a writ of certiorari to the United States Court of Appeals for the Second Circuit to review the judgment in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1-12) is reported at 719 F.3d 94. The opinion of the district court (App. 13-36) is reported at 480 B.R. 468. The opinion of the bankruptcy court (App. 37-74) is reported at 453 B.R. 201.

JURISDICTION

The judgment of the court of appeals was entered on June 10, 2013. On August 12, 2013, Justice Ginsburg extended the time within which to file a petition for certiorari to and including October 8, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 546, 547, and 550 of the Bankruptcy Code, 11 U.S.C. §§ 546, 547, 550, are reproduced at App. 75-89.

STATEMENT OF THE CASE

A. Statutory Background

One of the most important tools given to a bankruptcy trustee is the power of "avoidance," which refers to the power of a bankruptcy trustee to "undo certain voluntary or involuntary transfers of the debtor's interests in property in order to bring the property back into the bankruptcy estate for

distribution purposes." Robert E. Ginsberg et al., Ginsberg & Martin on Bankruptcy § 8.01 (2013). This power is critical because, among other things, relatively junior creditors have powerful incentives to procure payments when they see a potential bankruptcy on the horizon, even if such payments will hasten the bankruptcy. *See Union Bank v. Wolas*, 502 U.S. 151, 160-61 (1991). The avoidance power is thus integral to deterring and remedying such efforts that are antithetical to fundamental bankruptcy policies, including rules about priority. *See id.*; Ginsberg & Martin, *supra*, § 8.02[A].

The issue presented in this case is whether the virtually inevitable happenstance that a securities-related payment is made through a financial institution is sufficient to defeat the trustee's critical power. The question—one that has divided the federal circuits—arises out of the interplay among three related sections of the Bankruptcy Code concerning a bankruptcy trustee's avoidance authority.

Section 547 of the Code provides in relevant part that the trustee "may avoid any transfer of an interest of the debtor in property" if the transfer was:

> (1) to or for the benefit of a creditor;
>
> (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
>
> (3) made while the debtor was insolvent; [and]
>
> (4) made … on or within 90 days before the date of the filing of the petition[.]

11 U.S.C. § 547(b). This section addresses what are known as "preferential transfers" and is one of several Code provisions describing the types of transfers that a bankruptcy trustee may avoid. *See also, e.g.*, *id.* §§ 544, 545, 548.

Section 546 sets forth limitations on a trustee's avoidance powers. It provides that certain presumptively avoidable transfers nonetheless come within an exception to the trustee's avoidance authority that states in relevant part:

> 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 … made by or to (or for the benefit of) a … financial institution … or that is a transfer made by or to (or for the benefit of) a … financial institution … in connection with a securities contract[.]

Id. § 546(e).

Finally, section 550 provides in relevant part:

> [T]o the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b), or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from—
>
> (1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or
>
> (2) any immediate or mediate transferee of such initial transferee.

Id. § 550(a).

B. Factual Background

This case involves the question whether certain payments made by Quebecor World (USA) Inc. (QWUSA) to a group of noteholders before its 2008 bankruptcy filing should be returned to the bankruptcy estate. QWUSA was the principal United States subsidiary of Quebecor World Inc. (QWI), a Canadian corporation, which was once the second-largest commercial printer in North America. App. 45.

In July 2000, another Quebecor affiliate, Quebecor World Capital Corp. (QWCC), raised $371 million by issuing a series of private notes to various investors, largely insurance companies, through a private placement. App. 45-46. The $371 million was transferred to QWUSA, and QWI and QWUSA guaranteed the notes' payment obligations. App. 46.

The terms of the note purchase agreements allowed QWCC to prepay all or part of the notes at any time for any reason. *Id.* In the event of prepayment, the noteholders would receive a make-whole premium, and any prepaid note would be "surrendered to [QWCC] and cancelled" and would "not be reissued." App. 47. The note purchase agreements also expressly recognized the possibility that a prepayment could be avoided if QWI or its affiliates filed for bankruptcy. *Id.*

The note purchase agreements further provided that an event of default would occur if QWI's debt-to-capitalization ratio exceeded a certain ratio. App. 47-48. If this "capitalization covenant" were breached, the notes could become immediately due and owing to the noteholders. App. 48. A breach of that

covenant would also cause a breach of a separate credit agreement that QWI and QWUSA had entered into with a syndicate of banks providing a $1 billion revolving credit facility. App. 49.

As a result of these various provisions, when Quebecor's financial condition began to worsen in mid-2007, the noteholders "were able to exercise considerable leverage" over Quebecor because they "were in a position to destabilize Quebecor's capital structure." *Id.* For example, in August 2007, in an effort to avoid breaching the capitalization covenant and triggering a default of the revolving loan, Quebecor offered to purchase 50.1% of the notes in exchange for the noteholders' consent to increase the permissible debt-to-capitalization ratio. *Id.* Not only did the noteholders refuse; they collectively entered into a "Noteholder Cooperation Agreement" and "Right of First Refusal Agreement" in which they agreed "not to sell their Notes to anyone but an existing noteholder." App. 4, 50.

On September 28, 2007, as QWI's financial condition further deteriorated, QWI and QWUSA and their credit facility lenders amended the credit agreement by reducing the amount of credit available but removing the provision by which a breach of the capitalization covenant constituted a breach of the credit agreement. App. 50. That same day, QWCC sent each noteholder a "Notice of Redemption" stating that it would "redeem" all outstanding notes on October 29, 2007 and instructing noteholders to "surrender" the notes to QWI's Canadian headquarters "for cancellation." App. 50-51.

Shortly thereafter, for internal tax reasons, QWCC assigned to QWUSA the obligation to make the redemption payments to the noteholders. App. 51. The assignment agreement provided that upon such "payment of the Redemption Price" by QWUSA, the notes would "be surrendered to QWCC for cancellation." *Id.* (brackets omitted). QWUSA accordingly informed the noteholders that the "Redemption Price will be paid by QWUSA," which would "result in the purchase of the Notes by QWUSA." *Id.* (brackets and internal quotation marks omitted). On October 29, 2007, pursuant to the Notice of Redemption, QWUSA paid the noteholders approximately $376 million, consisting of approximately $316 million in principal, $6 million in interest, and $53 million in make-whole premium. App. 52.

The mechanics of QWUSA's transfer of these funds to the noteholders would later prove pivotal with respect to the courts' treatment of petitioner's efforts to avoid these payments. In a single transfer, the $376 million was wired from QWUSA to the noteholders via CIBC Mellon Trust Co. ("CIBC Mellon"), with each noteholder receiving its pro rata share. *Id.* The noteholders subsequently surrendered their notes by mailing them directly to QWI's headquarters. *Id.* CIBC Mellon did not take title to the funds or the notes or utilize any type of clearing mechanism to complete the transaction. App. 19. After the transfer, several noteholders privately expressed concerns that a Quebecor bankruptcy filing could result in the transfer's avoidance. App. 53.

C. Proceedings Below

1. On January 21, 2008, QWUSA and its affiliates filed for protection under chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York. App. 53-54.[1] Shortly thereafter, petitioner commenced an adversary proceeding against respondents to avoid the $376 million transfer of October 29, 2007 as a preferential transfer under section 547(b) of the Code. App. 54.[2] Petitioner took no action against CIBC Mellon, which was a mere conduit of the transfer from QWUSA to the noteholders, but instead identified the transfer to respondents as avoidable under section 547(b). In a motion for summary judgment, respondents argued that the transfer qualified for exemption from avoidance under section 546(e) of the Code.

The bankruptcy court granted respondents' motion for summary judgment. App. 37-74. At the outset, the court acknowledged that this case "illustrates the tension that exists between an exemption that promises full immunity … and the broader objective of the Code to collect assets for the

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[1] QWI, QWUSA, and their affiliates had filed under Canada's bankruptcy laws one day earlier. App. 53.

[2] Avoidance actions may be commenced by a trustee, debtor-in-possession, or, as here, creditors' committee; the distinctions between these parties are immaterial for purposes of the issues raised here. *See* Ginsberg & Martin, *supra*, § 9.07[A]; *In re Housecraft Indus. USA, Inc.*, 310 F.3d 64, 70-72 (2d Cir. 2002). Respondents are insurance companies and banks that either are original noteholders or subsequently acquired the notes via private transactions.

benefit of all unsecured creditors." App. 40. The court observed that the original note issuance had been "a relatively routine private financing transaction in which the Noteholders advanced unsecured credit to Quebecor" and that the noteholders had not cited section 546(e) in structuring either the original note purchase or the redemption; respondents had raised section 546(e) "only after the fact in anticipation of litigation." App. 41-42.

Thus, the court remarked, "the situation presented here is an example of behavior that the law generally would seek to discourage (ganging up on a vulnerable borrower to obtain clearly preferential treatment in the months leading up to a bankruptcy) rather than reward with the grant of complete immunity." App. 42. The court added that "[s]imilarly situated creditors" in the Quebecor bankruptcy proceedings had been "relegated to percentage distributions … amounting to only a fraction of" their claims, while respondents "reaped the benefits of an unimpaired total return." *Id.*

Nevertheless, the court reluctantly concluded that the disputed transfer could not be avoided. Focusing on section 546(e), the court viewed the payments as qualifying as both a "settlement payment" and a transfer made "in connection with a securities contract," *see* App. 57-65 & n.7, and stated the payments were "'made by or to (or for the benefit of) a … financial institution,' *i.e.*, CIBC as trustee for the Notes." App. 58-59. The court acknowledged that CIBC Mellon "simply received the wire transfer in its capacity as trustee and then made individual

payments to each Noteholder," and that it "dealt solely with the cash side of the transaction and had no role with respect to the Notes that were to be surrendered." App. 70 n.12. But the court observed that the Second Circuit in *In re Enron Creditors Recovery Corp. v. Alfa, S.A.B. de C.V.*, 651 F.3d 329 (2d Cir. 2011), had indicated that a settlement payment need not "pass[] through a financial intermediary serving as a clearing agency" in order to qualify for the section 546(e) exception. App. 73. And the court rejected petitioner's argument relying on *In re Munford, Inc.*, 98 F.3d 604 (11th Cir. 1996), that because CIBC Mellon "was a mere 'conduit' for funds," the relevant transfer was to the noteholders who do not qualify for the section 546(e) exception. App. 59 n.8.

2. The district court affirmed. The court agreed that the payments were "settlement payments," and it also agreed, though on different grounds from the bankruptcy court, that the payments were made "in connection with a securities contract." App. 26-27, 33-35. The court then relied on *Enron* in rejecting petitioner's contention that section 546(e) does not apply to a transfer to a creditor where a financial institution acts merely as a conduit. App. 28-29. It expressly acknowledged, however, that the circuits are divided on the question. *Id.*

3. The Second Circuit affirmed. Declining to address whether the payments were "settlement payments," it held that the payments were made "in connection with a securities contract." App. 9-10.[3]

[3] The court rejected petitioner's contention that the transfer was merely a redemption of the notes that would not qualify for

The court of appeals then rejected petitioner's argument that "because CIBC Mellon was merely a conduit" in the transfer, section 546(e) did not apply. App. 10. The court acknowledged that "[t]here is a split of authority regarding what role a financial institution must play in the transaction for it to qualify for the section 546(e) safe harbor." App. 7. Nevertheless, it observed that *Enron* had rejected a "similar argument" and indicated that a financial intermediary "need not have a beneficial interest in the transfer." App. 10. The court then reiterated that "a transfer may qualify for the section 546(e) safe harbor even if the financial intermediary is merely a conduit." *Id.* Thus it was sufficient that QWUSA's transfer to respondents passed through CIBC Mellon, "even though CIBC Mellon did not take title to the transferred funds." App. 12.

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari because the Second Circuit's erroneous decision deepens an intractable split among the federal courts of appeals over an exceptionally important question involving the federal Bankruptcy Code. The circuits have taken diametrically opposing positions over the role that a financial institution must play for an otherwise avoidable transfer to be exempt from avoidance under section 546(e) of the Bankruptcy Code. The Eleventh Circuit has held that where a

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the "securities contract" exemption of section 546(e). In the court's view, "QWUSA made the transfer to 'purchase,'" not redeem, the notes, because QWUSA was "not 'regaining' its own Notes" but "acquiring for the first time the securities of another corporation, QWCC." App. 9.

financial institution serves only as a conduit—and does not take a beneficial interest in the transferred property—its involvement is not sufficient to bring an otherwise avoidable transfer to a creditor within the terms of section 546(e). The Second, Third, Sixth, and Eighth Circuits have held that a financial institution need not have a beneficial interest in the transferred property; it is sufficient that the financial institution merely acts as a conduit in the transfer.

The split is stark. Had this case proceeded in the Eleventh Circuit, petitioner would have recovered millions of dollars in payments to otherwise relatively junior noteholders who colluded to receive substantial payments on the eve of bankruptcy. The all-but-inevitable fact that the payments to the noteholders were made via a financial institution would have been irrelevant. But in the Second Circuit that detail was dispositive; because CIBC Mellon was a conduit in transferring funds from QWUSA to the noteholders, that otherwise avoidable transfer was untouchable. The result in cases like this should not turn on the happenstance of where the bankruptcy petition is filed. This Court frequently grants certiorari to resolve competing interpretations of Bankruptcy Code provisions, and it should do so here as well.

The Second Circuit's decision, moreover, is incorrect. The Second Circuit's reasoning turns a narrow exception designed to eliminate concerns with financial institutions being left holding the bag while completing securities transactions into a gaping hole in a bankruptcy trustee's avoidance authority. Virtually every securities-related transaction

involves a financial institution as a conduit. Congress could not have rationally intended to exempt every securities transaction from the reach of the trustee's avoidance authority, and if Congress had intended that result it would have written a very different statute.

The Second Circuit, like the Third, Sixth and Eighth Circuits, nonetheless reached this counterintuitive result by focusing on section 546(e) in isolation. Under that view, as long as a transaction involves a payment "by or to (or for benefit of)" a financial institution, the trustee has no avoidance power. But that analysis ignores section 546(e)'s role in the statutory scheme. Section 546(e) is a limited exception for certain otherwise avoidable transfers. That exception cannot be interpreted in isolation, but must be read in light of the antecedent question of what transfer the trustee is attempting to avoid. When the trustee seeks to use section 547 avoidance power to avoid the transfer from the debtor to the noteholder, as opposed to seeking recoupment of the transfer to the financial institution itself, section 546(e)'s exception is inapplicable. That result is reinforced by section 550, which has been uniformly interpreted to provide that there is only an avoidable transfer when the recipient is an eligible "transferee" with dominion and control from whom the trustee may recover property. It is no accident that the Eleventh Circuit considered section 546(e)'s role and function within the broader statutory scheme, while the conflicting constructions of the other circuits mistakenly viewed 546(e) in isolation.

The question presented here is undeniably important. As the bankruptcy court recognized, the conduct at issue here—a collective and coordinated effort by relatively junior creditors to "gang[] up on a vulnerable borrower to obtain clearly preferential treatment in the months leading up to a bankruptcy"—is precisely the kind of conduct that the avoidance power is designed to combat. Such (mis)conduct is both powerfully tempting and extremely pernicious: it permits noteholders to jump ahead of equally situated or more senior creditors, while precipitating bankruptcies in the process. It seems well-nigh inconceivable that Congress intended to make such conduct immune from avoidance simply because a financial intermediary served as a conduit for a securities-related transaction. But the court of appeals in the Nation's financial center and three other circuits have now reached that profoundly counterintuitive conclusion and given a green light to similar machinations. That result conflicts with common sense, congressional intent, and the best reading of the statute as a whole, not to mention with the contrary holding of the Eleventh Circuit. This Court should grant certiorari to resolve this consequential split of authority.

I. The Decision Below Deepens An Intractable Division Among The Courts Of Appeals Over The Role A Financial Institution Must Play For A Transfer To Be Exempt From Avoidance Under Section 546(e).

As both the district court and court of appeals expressly recognized, "[t]here is a split of authority regarding what role a financial institution must play" for a transfer to qualify for section 546(e)'s exception to an otherwise avoidable transfer. App. 7, 28-29. Reading section 546(e) in light of its statutory context and function, the Eleventh Circuit has held that a trustee's effort to avoid a transfer from the debtor to a creditor is not frustrated merely because a financial institution served as a passive conduit for the transfer. By contrast, the Second, Third, Sixth, and Eighth Circuits have analyzed section 546(e) in isolation, and treated the financial institution's all-but-inevitable role as a conduit for funds in securities-related payments as sufficient to immunize not just the financial institution but the creditors who benefitted from the otherwise avoidable transfer. This intractable divide warrants the Court's resolution.

1. The Eleventh Circuit was the first circuit to address whether section 546(e) applies when a financial institution does no more than passively transfer property from the bankrupt entity to other parties. *See In re Munford, Inc.*, 98 F.3d 604 (11th Cir. 1996). There, a company executed a leveraged buyout by purchasing the outstanding stock of its shareholders. It did so by depositing the necessary funds with a financial institution, which then

disbursed the funds to shareholders, thereby extinguishing the shareholders' ownership. *Id.* at 607. When the company later filed for bankruptcy, the bankruptcy trustee sought to avoid the payments made by the company to its shareholders. *Id.* In response, the shareholders argued that the payments were exempt from avoidance under section 546(e). *Id.* at 608.

The Eleventh Circuit held that section 546(e) did not allow the shareholders to defeat the trustee's ability to recoup an otherwise avoidable transfer. *Id.* at 610. That was the case because "the transfers/payments were made *by* [the company] *to* shareholders," and "[n]one of the entities listed in section 546(e)," including a financial institution, "made or received a transfer/payment." *Id.* The court recognized that a financial institution was "presumptively involved," but it pointed out that the bank "was nothing more than an intermediary or conduit." Funds "were deposited with the bank and when the bank received the shares from the selling shareholders, it sent funds to them in exchange." *Id.* The bank "never acquired a beneficial interest in either the funds or the shares." *Id.*

The Eleventh Circuit found that fact to be critical, noting that under the Bankruptcy Code, "a trustee may only avoid a transfer to a 'transferee.'" *Id.* (citing 11 U.S.C. § 550). And since the bank "never acquired a beneficial interest in the funds," it "was not a 'transferee'" in the transaction. *Id.* (citing *In re Chase & Sanborn Corp.*, 848 F.2d 1196, 1200 (11th Cir. 1988)). The only "transferees" of the funds were the shareholders, for whom "section 546(e)

offers no protection from the trustee's avoiding powers." *Id.* Because the transfer that the trustee sought to avoid was not "a transfer to one of the listed protected entities," the court concluded, section 546(e) "is not applicable." *Id.*

2. Three years later, the Third Circuit rejected the Eleventh Circuit's reading of section 546(e), holding that the language of section 546(e) applies even when a financial institution acts solely as a conduit for the transferred property. *See In re Resorts Int'l, Inc.*, 181 F.3d 505 (3d Cir. 1999). There, the Third Circuit faced factual circumstances similar to those in *Munford*: A company that later went bankrupt, and whose trustee sought avoidance, had wired funds through two banks in order to purchase a shareholder's outstanding stock. *Id.* at 508-09, 515. The Third Circuit concluded that because two banks were "involved in th[e] transfer" by virtue of forwarding the funds from the company to the shareholder, the settlement payment had been "made by … a financial institution." *Id.* at 515. In so holding, the Third Circuit explicitly declined to adopt the reasoning of *Munford*, declaring that the Eleventh Circuit's requirement that a financial institution have a beneficial interest in the transferred property "is not explicit in section 546." *Id.* at 516. The Third Circuit's discussion of the statutory context was limited to a terse and opaque footnote stating that the beneficial interest requirement did not "logically follow" from section 550. *Id.* at 516 n.11.

Recently, the Sixth and Eighth Circuits have joined the Third Circuit's position expressly declining

to adopt the Eleventh Circuit's contrary view. In *In re Contemporary Industries Corp.*, 564 F.3d 981 (8th Cir. 2009), another leveraged buyout case, the Eighth Circuit held that because an intermediary bank "received the payments from [the company] and then distributed the payments to [the shareholders]," the settlement payments were "first made to, and then by, a financial institution," thereby satisfying section 546(e). *Id.* at 987. The Eighth Circuit rejected the trustee's reliance on *Munford*, stating that section 546(e) "does not expressly require that the financial institution obtain a beneficial interest in the funds." *Id.* at 986-87. The Sixth Circuit likewise held in *In re QSI Holdings, Inc.*, 571 F.3d 545 (6th Cir. 2009), that the "financial institution" requirement is satisfied even when a bank is a mere conduit for a payment. After reviewing *Munford* and *Resorts*, it sided with *Resorts* in holding that a financial institution need not have a beneficial interest in the transferred funds for section 546(e) to apply. *Id.* at 550-51. Neither the Eighth Circuit nor the Sixth Circuit discussed any related Code provisions in their respective holdings.

In the decision below, the Second Circuit likewise chose to follow the path set by the Third Circuit. The court acknowledged the "split of authority" concerning the role a financial institution must play for a transaction to qualify for section 546(e), citing the foregoing decisions, App. 7, but it also noted that its previous decision in *Enron* had addressed a "similar argument." The Second Circuit stated that "[t]o the extent *Enron* left any ambiguity," the court would "expressly follow the Third, Sixth, and Eighth Circuits in holding that a transfer may qualify for the section 546(e) safe harbor even if the financial

intermediary is merely a conduit." App. 10. As a result, because QWUSA's payments to the noteholders were accomplished via wire transfer through CIBC Mellon, respondents satisfied section 546(e), "even though CIBC Mellon did not take title to the transferred funds." App. 12. In so holding, the Second Circuit did not mention, let alone discuss, the related provisions of sections 547 and 550.

3. There can be no question that the circuits are in square conflict over this issue, *viz.*, whether a financial institution's role as a mere conduit in a securities transaction is sufficient to defeat the trustee's effort to avoid a transfer from the debtor to a creditor on the eve of bankruptcy.[4] Nor can it seriously be disputed that had this case proceeded in the Eleventh Circuit, the noteholders' machinations would be remedied and millions of dollars in payments to the noteholders would be available to the estate, where they would be properly distributed instead of benefitting only a handful of relatively junior creditors. As in *Munford*, petitioner here seeks to avoid a transfer from the debtor to security holders. As in *Munford*, those payments happened to pass through a financial institution en route from the company to the security holders. As in *Munford*, the

[4] Lower courts in circuits that have not addressed the issue are also in conflict. Like the Eleventh Circuit, courts in the First and Tenth Circuits have required a beneficial interest in the transferred funds. *See In re D.E.I. Sys., Inc.*, 2011 WL 1261603, at *3-4 (Bankr. D. Utah Mar. 31, 2011); *In re Healthco Int'l, Inc.*, 195 B.R. 971, 981-83 (Bankr. D. Mass. 1996). Courts in the Fifth Circuit, by contrast, have not. *See U.S. Bank Nat'l Ass'n v. Verizon Commc'ns Inc.*, 892 F. Supp. 2d 805, 816 (N.D. Tex. 2012).

financial institution—here, CIBC Mellon—did not take title to the funds passing through it. In the Eleventh Circuit, the transfer would be avoidable. But in the Second Circuit, the all-but-inevitable detail that a financial institution was involved as a conduit for the transfer of funds was sufficient to defeat the trustee's avoidance power and to vindicate the noteholders' concerted scheme.[5]

This Court frequently intervenes where the federal courts of appeals have adopted differing views of a Bankruptcy Code provision. *See, e.g.*, *Bullock v. BankChampaign, N.A.*, 133 S. Ct. 1754, 1758 (2013) (resolving "long disagree[ment]" over scienter requirement of 11 U.S.C. § 523(a)(4)); *Schwab v. Reilly*, 130 S. Ct. 2652, 2659 (2010) (resolving split over "claim of exemption" under 11 U.S.C. § 522(*l*)); *Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co.*, 547 U.S. 651, 656 (2006) (resolving split over priority status of workers' compensation premiums under 11 U.S.C. § 507(a)(5)); *Cohen v. de la Cruz*, 523 U.S. 213, 216 (1998) (resolving split over discharge of fraud-related treble-damage debts under 11 U.S.C. § 523(a)(2)(A)); *Kawaauhau v. Geiger*, 523 U.S. 57, 59 (1998) (resolving split over discharge of debts arising from negligent malpractice judgment under 11 U.S.C. § 523(a)(6)). That has been true even when the stakes implicated by the underlying circuit split are relatively low. *See Lamie v. U.S. Trustee*, 540 U.S.

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[5] Because some of the respondents are themselves financial institutions who acquired a beneficial interest in the payments they received, petitioner would not be entitled to avoid those payments so long as the other requirements of section 546(e) were met.

526, 532-33 (2004) (resolving split over award of attorney's fees under 11 U.S.C. § 330(a)(1) in case involving $1,000). Indeed, the Court has not hesitated to grant review of issues specifically bearing on, as here, a trustee's avoidance power under section 547(b)—including, also as here, exemptions to avoidance under that section. *See, e.g.*, *Fid. Fin. Servs., Inc. v. Fink*, 522 U.S. 211, 214 (1998); *Barnhill v. Johnson*, 503 U.S. 393, 396 (1992); *Union Bank v. Wolas*, 502 U.S. 151, 152-53 (1991).

II. The Decision Below Is Erroneous.

The Second Circuit held that a transfer qualifies for section 546(e)'s exception for an otherwise avoidable transfer even when a financial institution intermediary is a mere conduit. App. 10-12. Like the decisions of the other courts of appeals reaching the same conclusion, that holding is incorrect.

1. The Second Circuit interpreted section 546(e) in a vacuum. But that provision does not stand alone. It expressly cross-references other provisions of the Bankruptcy Code, and clearly operates as an exception to avoidance powers granted elsewhere. Thus, section 546(e) states in relevant part that "[n]otwithstanding 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 … made by or to (or for the benefit of) a … financial institution" or "that is a transfer made by or to (or for the benefit of) a … financial institution … in connection with a securities contract." 11 U.S.C. § 546(e). Sections "544, 545, 547, 548(a)(1)(B), and 548(b)" are Code provisions that give the bankruptcy trustee the authority to avoid various types of

transfers, including fraudulent transfers, *id.* § 548, transfers voidable under state law, *id.* § 544(b)(1), and, as here, preferential transfers, *id.* § 547(b). By its own terms, therefore, section 546(e) applies only to an otherwise avoidable "transfer." And it is impossible to interpret 546(e) without reference to the particular "transfer" the trustee seeks to avoid.

Section 550 of the Code provides further guidance on the meaning of transfer and transferee. That section makes clear that an avoidable transfer involves an eligible "transferee" from whom the trustee may recover property. 11 U.S.C. § 550(a). And, while the Code does not define the term "transferee," every court of appeals to address the question has held that, to be a "transferee," an entity must have dominion or control over—not just custody of—the property at issue. *See, e.g.*, *Bonded Fin. Servs., Inc. v. European Am. Bank*, 838 F.2d 890, 893 (7th Cir. 1988) (holding that "the minimum requirement of status as a 'transferee' is dominion over the money or other asset, the right to put the money to one's own purposes"); *In re Bullion Reserve of North Am.*, 922 F.2d 544, 548-49 (9th Cir. 1991) (adopting "the reasoning of Judge Easterbrook in *Bonded*" and holding that party "would not become a transferee unless and until he gained [a] beneficial interest in" property at issue); *In re First Sec. Mortg. Co.*, 33 F.3d 42, 43-44 (10th Cir. 1994) (finding "the reasoning of the *Bonded* court to be persuasive"); *In re Hurtado*, 342 F.3d 528, 534 (6th Cir. 2003); *In re Finley, Kumble, Wagner, Heine, Underberg, Manley, Myerson & Casey*, 130 F.3d 52, 57-58 (2d Cir. 1997); *In re Se. Hotel Props. Ltd. P'ship*, 99 F.3d 151, 156 (4th Cir. 1996); *In re Coutee*, 984 F.2d 138, 140-41

(5th Cir. 1993); *In re Chase & Sanborn Corp.*, 848 F.2d at 1199-1200. Indeed, this Court has held that in an avoidance action under section 547(b), a transfer does not occur until the debtor relinquishes "full control" over the property transferred. *Barnhill*, 503 U.S. at 401.

Accordingly, section 546(e) cannot be interpreted without reference to the logically antecedent questions of what transfer the trustee seeks to avoid and who is the relevant transferee. If a trustee were to seek to recoup money from a financial institution, then the relevant transfer is from the debtor to the financial institution. Such an effort directed at a financial institution that served as a mere conduit for funds subsequently distributed would face multiple problems. The financial institution would not qualify as a transferee and in all events the plain terms of section 546(e) would apply. But when the trustee targets the transfer from the debtor to the creditor, the analysis is very different. There, the relevant transfer is from the debtor to the creditor, and the inevitable, but unimportant, detail that the funds flowed through a financial institution as a conduit is insufficient to trigger the section 546(e) exception.

This result follows from the text of 546(e), when that provision is interpreted in light of the surrounding provisions and section 546(e)'s role in the statute, namely, as an exception to an otherwise avoidable transfer. Section 546(e) unambiguously makes the focus of the inquiry the "transfer" that the trustee seeks to invalidate under one of his avoidance powers conferred elsewhere in the statute, here by section 547(b). But it is the trustee who gets to

identify that transfer, which must in turn satisfy the requirements for a presumptively avoidable transfer under the provision granting avoidance power. In this case, for example, section 547(b) requires, *inter alia*, that the transfer be "to or for the benefit of the creditor." 11 U.S.C. § 547(b)(1). Here, the trustee identified the transfer from the debtor to the noteholders as the relevant transfer he sought to avoid. Thus, the question under section 546(e) is whether the transfer from the debtor to the creditor is one "made by or to (or for the benefit of) a … financial institution." And it clearly is not. It is a transfer by the debtor, to the creditor, and for the benefit of the creditor (the latter two points reinforcing the applicability of section 547(b)). It is concededly a transfer made "through" a financial institution, but section 546(e) does not extend that far.

To be sure, the transfer from the debtor to the creditor could be understood as two transfers—one made by the debtor to the financial institution and another made by the financial institution to the creditor—but that approach ignores multiple features of the statutory scheme. First, it ignores that section 546(e) is an exception to the trustee's ability to avoid certain transfers, and the statutory scheme allows the trustee to identify the avoidable "transfer" and only then asks whether that transfer comes within the terms of section 546(e). The statute does not permit the courts to bifurcate that transfer or analyze a different transfer. Second, the uniform interpretation of section 550 makes clear that in analyzing "transfers" and "transferees," entities that exercise dominion and control count; mere conduits

do not. In other words, section 550 reinforces the conclusion that carving up the transfer from the debtor to the noteholders to emphasize the role of a financial institution that served only as a conduit is as artificial as it sounds. The avoidable "transfer" for purposes of sections 547(b) and 546(e) is between the entity that relinquished dominion or control over the funds (the transferor), and the entity that subsequently exercised dominion or control over the funds (the "transferee" under section 550). A passive intermediary through which the funds happened to flow en route from transferor to transferee is immaterial to the avoidance and exemption analysis.

Applying those principles here, therefore, it is of no moment that the payment from QWUSA to respondents happened to pass through CIBC Mellon, which never exercised control or dominion over the funds. The operative "transfer" for section 546(e) purposes was the one the trustee identified as satisfying the terms of 547(b)—namely, the transfer between QWUSA (the transferor) and respondents (the transferees). It is that "transfer" that section 546(e) precludes petitioner from avoiding, if the transferees are "financial institutions" (or other entities named in section 546(e)). Where, as here, there are transferees who are not financial institutions (or any other entity named in section 546(e)), they receive no protection from the section 546(e) exception.

This reading of section 546(e) fits squarely with Congress' intended purpose, while the Second Circuit's contrary reading inexplicably opens up a gaping hole in the trustee's avoidance authority.

Congress added section 546(e) not to immunize all non-cash transactions related to securities payments from the trustee's avoidance authority, but to address a much more targeted concern. Specifically, Congress enacted section 546(e) out of a concern that the bankruptcy of one party in the clearance and settlement system used for trading many commodities and securities could spread to other parties in that chain:

> The commodities and securities markets operate through a complex system of accounts and guarantees. Because of the structure of the clearing systems in these industries and the sometimes volatile nature of the markets, certain protections are necessary to prevent the insolvency of one commodity or security firm from spreading to other firms and possibly threatening the collapse of the affected market.

H.R. Rep. No. 97-420, at 1 (1982), *reprinted in* 1982 U.S.C.C.A.N. 583, 583; *see also In re Grafton Partners, L.P.*, 321 B.R. 527, 537 (B.A.P. 9th Cir. 2005); *Wieboldt Stores, Inc. v. Schottenstein*, 131 B.R. 655, 664 (N.D. Ill. 1991).

Congress thus enacted section 546(e) to counteract a particular kind of risk. In the clearance and settlement system, parties "use intermediaries to make trades of [securities] which are instantaneously credited, but in which the actual exchange of [securities] and consideration therefor takes place at a later date." *Zahn v. Yucaipa Capital Fund*, 218 B.R. 656, 675 (D.R.I. 1998). In this system, the intermediaries' role is "critical" because of the lapse

of time in between the date of a trade (when the intermediary credits and debits the counterparties' accounts) and the date of settlement (when the securities and consideration are actually exchanged). *Id.* at 676. The system "depends upon a series of guarantees, made by all parties of the chain," including the intermediary, "that they will live up to their obligations regardless of a default by another party in the chain." *Id.* If the "pre-bankruptcy trades by a bankrupt intermediary could be set aside" through avoidance, then "the guarantees that allow the system to function would be threatened," and "a bankruptcy by one party in the chain could spread to other parties in the chain, threatening a collapse of the entire industry." *Id.*

Those concerns simply have no relevance in situations like the one presented in this case. Here, petitioner seeks nothing from the intermediary financial institution (CIBC Mellon) that served as the conduit for those funds. That effort would indeed impact the concerns that led Congress to enact section 546(e). But here, petitioner seeks to recover the transfer from the debtor to the noteholders under circumstances in which CIBC Mellon has long ago discharged its incidental function as a conduit for the funds. Thus, focusing on the transfer that the trustee seeks to avoid is critical both to a proper construction of the statute and to achieving Congress' purposes without creating a massive gap in the trustee's authority. An effort to recoup a transfer to CIBC Mellon is very different from an effort to avoid the transfer from the creditor to the noteholders. The former implicates Congress' concern, the latter does not. But the Second Circuit's mistaken reading

of section 546(e) in isolation treats those two very different transfers as indistinguishable and immunizes every non-cash securities transaction in the process.

2. In the decision below, the Second Circuit purported to rest its decision on the "plain language" of section 546(e). App. 10. The other circuits that have diverged from the Eleventh Circuit have held likewise. *See In re QSI*, 571 F.3d at 551; *In re Contemporary Indus.*, 564 F.3d at 986-87; *In re Resorts Int'l*, 181 F.3d at 516. But as explained above, those courts have misread the "plain language" of section 546(e) by interpreting that provision in a vacuum and ignoring the antecedent role of section 547(b) and the clarifying language of section 550. With one trifling exception—a cursory footnote by the Third Circuit—not one of the courts of appeals accepting the "mere conduit" theory, including the Second Circuit, has even remotely grappled with the broader statutory context.

This Court, however, has warned against "construe[ing] statutory phrases in isolation" and has urged courts to "read statutes as a whole." *Samantar v. Yousuf*, 130 S. Ct. 2278, 2289 (2010) (quoting *United States v. Morton*, 467 U.S. 822, 828 (1984)). Reading the statute as a whole to determine how various provisions relate and inform each other is not an excuse for ignoring "plain meaning." It is a mechanism for getting the textualist, plain meaning correct. Thus, even the most ardent textualists have recognized that statutory construction "is a holistic endeavor" and that statutory context matters. *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest*

Assocs., Ltd., 484 U.S. 365, 371 (1988); *Regions Hosp. v. Shalala*, 522 U.S. 448, 466 (1998) (Scalia, J., dissenting); *see also FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000) (stating that "a reviewing court should not confine itself to examining a particular statutory provision in isolation," because "[t]he meaning—or ambiguity—of certain words or phrases may only become evident when placed in context").

That is particularly true of a provision, like section 546(e), which operates as an exception to a power granted elsewhere in the statute. Indeed, this Court has suggested that such exceptions should be narrowly construed. *See, e.g.*, *Maracich v. Spears*, 133 S. Ct. 2191, 2200 (2013). But at a bare minimum, such exceptions need to be read *in pari materia* with the statutory provisions granting the power to which they provide an exception, particularly where, as here, those provisions are expressly cross-referenced. In similar ways, section 546(e) must be construed in light of section 550, which informs the avoidable "transfer" in section 546(e) and compels the conclusion that the section 546(e) exception is not satisfied when a financial institution is a mere conduit.

Likewise, although policy considerations are no excuse for ignoring "plain text," the superiority of the Eleventh Circuit's reading of the statute is confirmed by the absurd results produced by the Second Circuit's reasoning. Among other things, the Second Circuit's decision renders the ostensibly limiting principle that a transfer be made "by or to (or for the benefit of)" a financial institution essentially

limitless; there is hardly any securities transaction that is *not* accomplished with the use of an intermediary financial institution—for example, as here, to effect a wire transfer between parties. It is highly doubtful that Congress intended for section 546(e) to cover all payments except those made with a briefcase full of cash. At the very least, the "mere conduit" approach encourages savvy investors and counsel to funnel all payments for securities through banks, thereby immunizing the payments from later avoidance in bankruptcy. *See, e.g.*, Irving E. Walker & G. David Dean, *Structuring A Sale of Privately-Held Stock to Reduce Fraudulent-Transfer Claims Risk*, 28 Am. Bankr. Inst. J. 16, 72 (2009) (advising practitioners to use "a financial institution, instead of a law firm," as escrow agent so that "an otherwise fraudulent transfer of funds … may be exempted from avoidance"). This can hardly be the result Congress intended. And because section 546(e) applies not just to section 547(b) but numerous other avoidance provisions, the Second Circuit's interpretation of section 546(e) not only renders the "financial institution" requirement effectively superfluous, but dilutes many other Bankruptcy Code sections authorizing the trustee's general avoidance powers.[6]

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[6] The Second Circuit's speculation "that Congress intended to resolve the split" on this question by adding the phrase "(or for the benefit of)" to section 546(e) in 2006 is meritless. App. 11 n.3; *see* Financial Netting Improvements Act of 2006, § 5(b)(1), Pub. L. No. 109-390, 120 Stat. 2692, 2697-98. The FNIA made only "technical changes" to the Bankruptcy Code, H.R. Rep. No. 109-648, at 1-2 (2006), *reprinted in* 2006 U.S.C.C.A.N. 1585, 1585-86. Indeed, it added "(or for the benefit of)" to four

III. The Question Presented Is An Important And Recurring One That Warrants The Court's Review In This Case.

1. The proper interpretation and application of section 546(e) is a question of exceptional importance. As an initial matter, one can hardly dispute the compelling need for uniformity in interpretation and application of the federal bankruptcy laws. The bankruptcy laws are "intended to have uniform application throughout the United States." *McKenzie v. Irving Trust Co.*, 323 U.S. 365, 369-70 (1945). Indeed, the Framers considered the creation of a uniform bankruptcy system so important that the Bankruptcy Clause of the Constitution "contains an affirmative limitation or restriction upon Congress' power: bankruptcy laws must be uniform throughout the United States." *Ry. Labor Executives' Ass'n v. Gibbons*, 455 U.S. 457, 468 (1982) (citing U.S. Const. art. I, § 8, cl. 4 (granting Congress authority to "establish … uniform Laws on the subject of Bankruptcies throughout the United States")). Reflecting that significance and the attendant need to deter forum-shopping, the Court routinely grants certiorari to resolve conflicting interpretations of Bankruptcy Code provisions, even when the stakes implicated by a specific provision are not particularly high. *See* pp. 19-20, *supra*.

But here both the stakes and the need for uniformity are high indeed: the provisions involved

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different subsections of section 546. *See* FNIA § 5(b)(1)-(4). And the change has not prevented the lower courts from continuing to reach different results as to the "financial institution" question. *See* n.4, *supra*.

in this case go to the heart of the bankruptcy system, and the court in the heart of the Nation's financial center has opened a gaping hole in the trustee's avoidance authority. "Congress intended a broad range of property to be included" in a bankruptcy estate because a larger pool of property permits creditors to recover more on their respective claims against the debtor. *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 204 (1983); *see* 11 U.S.C. § 541(a)(1) (defining estate property as "all legal or equitable interests of the debtor in property"). Avoidance provisions like section 547(b) allow the bankruptcy trustee to recapture property properly belonging to the estate that was distributed before the bankruptcy filing. As this Court has recognized, section 547(b) serves two important policies. First, it discourages creditors from "racing to the courthouse to dismember the debtor during his slide into bankruptcy," thereby enabling the debtor "to work his way out of a difficult financial situation through cooperation with all of his creditors." *Union Bank v. Wolas*, 502 U.S. 151, 161 (1991). Second, it "facilitate[s] the prime bankruptcy policy of equality of distribution among creditors of the debtor," for "[a]ny creditor that received a greater payment than others of his class is required to disgorge so that all may share equally." *Id.* In short, section 547(b) "empowers the trustee to restore equal status to all creditors." *Id.*; *see also Begier v. IRS*, 496 U.S. 53, 58 (1990) (observing that "creditors of equal priority should receive pro rata shares of the debtor's property.").

These fundamental policies—maximizing the size of the bankruptcy estate, deterring the

"dismember[ing]" of a debtor in the months before a bankruptcy filing, and ensuring equitable distribution to similarly situated creditors—are squarely implicated here. Indeed, one need look no further than the facts of this case to appreciate the dire threat to fundamental bankruptcy policies posed by the decision below. As the bankruptcy court aptly observed, the noteholders' pre-bankruptcy machinations—such as the "Noteholder Cooperation Agreement"—smacked of "ganging up" on Quebecor during its "slide into bankruptcy." App. 42; *Union Bank*, 502 U.S. at 161. The temptation for that "ganging up" is profound. When creditors perceive the possibility of bankruptcy, where they may receive only pennies on the dollar, they have every incentive to collude to force early payment, even if, as was the case here, doing so actually precipitates the bankruptcy. As the bankruptcy court recognized, this is the kind of (mis)conduct that the Bankruptcy Code generally discourages and that the avoidance power specifically redresses. Yet the majority rule in the circuits gives a green light for this mischief based on the detail that noteholders were paid through a financial institution, which will always be the case. The lesson provided by the decision below will not be lost on other security holders of companies in precarious financial circumstances.

Of course, section 546(e) reflects an important policy objective of its own: protection against the disruption of markets that rely on the clearance and settlement system. *See* pp. 25-26, *supra*. But this competing policy only highlights the significance of the interplay between avoidance provisions like section 547(b) and the section 546(e) exception.

Indeed, as the courts of appeals have acknowledged, the two provisions stand "'at the intersection of two important national legislative policies on a collision course—the policies of bankruptcy and securities law.'" *Enron*, 651 F.3d at 334 (quoting *In re Resorts Int'l*, 181 F.3d at 515); *see also* App. 40 (bankruptcy court observing that this case "illustrates the tension that exists between an exemption that promises full immunity … and the broader objective of the Code to collect assets for the benefit of all unsecured creditors"). And since the "financial institution" requirement applies to both section 546(e) exemptions—the "settlement payment" exemption and the "securities contract" exemption—clarifying the role a financial institution must play will resolve uncertainty as to both of those critical exemptions.

2. The importance of the question presented is further underscored by the lower courts' overly expansive readings of other conditions in section 546(e). For example, the courts of appeals have defined "settlement payment" to include *any* "'transfer of cash made to complete a securities transaction.'" *Enron*, 651 F.3d at 339 (quoting *In re Contemporary Indus.*, 564 F.3d at 985 (quoting *In re Resorts Int'l*, 181 F.3d at 515)) (brackets and ellipsis omitted). As a result of this "extremely broad" definition, *id.* at 334 (quoting *In re QSI*, 571 F.3d at 549 (quoting *In re Contemporary Indus.*, 564 F.3d at 985)), the courts of appeals have extended section 546(e) coverage to circumstances far beyond those contemplated by Congress when it enacted the provision—*viz.*, the protection of markets implicating the clearance and settlement system for publicly-traded securities and commodities. Section 546(e)

has been applied to payments for privately-held securities, *see In re QSI*, 571 F.3d at 548; *In re Contemporary Indus.*, 564 F.3d at 983, payments for commercial paper, *see Enron*, 651 F.3d at 330, and, here, payments for private notes—which are essentially nothing more than private loans from one party to another.

Commentators have observed that these decisions have expanded section 546(e) "well beyond its intended scope," Irina V. Fox, *Settlement Payment Exception to Avoidance Powers in Bankruptcy: An Unsettling Method of Avoiding Recovery from Shareholders of Failed Closely Held Company LBOs*, 84 Am. Bankr. L.J. 571, 609 (2010), and that such expansive interpretations of the term do "not make sense," Walker & Dean, *supra*, at 72. But in all events, the ever-expanding definition of "settlement payment" increases the need to read section 546(e) in light of its surrounding provisions to ensure that it does not swallow avoidance powers whole and undermine the fundamental purpose of the bankruptcy system. As explained, "requiring" that a settlement payment merely be wired through a financial institution is no requirement at all. At the least, the broad approach the courts of appeals have taken regarding one condition of section 546(e)—the "settlement payment" definition—further militates in favor of this Court's review of the scope of another condition of that same provision, given the far-reaching consequences of an overly expansive construction of section 546(e).

Similarly, the decision below also applied an unduly broad reading to the "securities contract"

prong of section 546(e), resulting in a patently incorrect determination that this condition was satisfied. Although the Bankruptcy Code defines "securities contract" as "a contract for the purchase, sale, or loan of a security," 11 U.S.C. § 741(7)(A)(i), the Second Circuit extended the reach of that language to include a *redemption* of securities by glossing over critical distinctions between a redemption and a "purchase." That broadening of the term "securities contract" resulted in perhaps the most extreme application of section 546(e) to date. While that is itself a serious error, a proper interpretation of a financial institution's necessary role would at least have limited the damage, placing an important limit on the reach of an exemption that, on both the law and the facts, the courts here applied in far-reaching fashion.

3. This case constitutes an excellent vehicle to resolve the clear circuit split on the important issue of the role a financial institution must play for the section 546(e) safe harbor to apply. The relevant facts are undisputed. Resolution of the question presented in petitioner's favor will permit the return of millions of dollars for equitable distribution to creditors. Thus, this case cleanly presents the issue, and the Court's disposition will be material.

Finally, there is no reason for this Court to wait any further before intervening. Courts around the country continue to address this frequently recurring issue and are reaching different results in cases involving millions—if not billions—of dollars. *Compare, e.g.*, *U.S. Bank Nat'l Ass'n v. Verizon Commc'ns Inc.*, 892 F. Supp. 2d 805, 815-16 (N.D.

Tex. 2012) (rejecting reliance on *Munford* and precluding $2.4 billion avoidance), *with In re D.E.I. Sys., Inc.*, 2011 WL 1261603, at *3-4 (Bankr. D. Utah Mar. 31, 2011) (accepting reliance on *Munford* and permitting avoidance). Five federal courts of appeals have now weighed in on the question. In the decision below, the Second Circuit thoroughly addressed and reviewed the conflicting authorities from other circuits and has now definitively set the rule that will govern in the Nation's financial center. Further percolation is unnecessary. As it has routinely done in similar circumstances, the Court should grant certiorari and resolve this important and unsettled question concerning the federal Bankruptcy Code.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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October 8, 2013

APPENDIX

TABLE OF APPENDICES

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 12-4270-bk

IN RE QUEBECOR WORLD (USA) INC.,

Debtor.

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

Appellant,

v.

AMERICAN UNITED LIFE INSURANCE COMPANY, AUSA LIFE INSURANCE COMPANY, BARCLAYS BANK PLC, DEUTSCHE BANK SECURITIES INC., LIFE INVESTORS INSURANCE COMPANY OF AMERICA, MIDLAND NATIONAL LIFE INSURANCE COMPANY ANNUITY, MODERN WOODMEN OF AMERICA, NORTH AMERICAN COMPANY FOR LIFE AND HEALTH INSURANCE/ANNUITY, NORTH AMERICAN COMPANY FOR LIFE AND HEALTH INSURANCE OF NEW YORK, PROVIDENT LIFE AND ACCIDENT INSURANCE COMPANY, THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, THE PAUL REVERE LIFE INSURANCE COMPANY, SYMETRA LIFE INSURANCE COMPANY, TRANSAMERICA FINANCIAL LIFE INSURANCE COMPANY, TRANSAMERICA LIFE INSURANCE COMPANY, WACHOVIA CAPITAL MARKETS, LLC, WILTON REASSURANCE LIFE COMPANY OF NEW YORK, JOHN DOES, 1–50, DEUTSCH BANK AG,

Appellees.

August Term 2012
Argued: May 13, 2013
Decided: June 10, 2013

Before: Chin and Lohier, *Circuit Judges,* and Swain, *District Judge*.*

OPINION

CHIN, *Circuit Judge*:

In this case, appellant Official Committee of Unsecured Creditors of Quebecor World (USA) Inc. (the "Committee") sought to avoid and recover certain payments made by debtor Quebecor World (USA) Inc. ("QWUSA") to the appellee noteholders in exchange for private placement notes that had been issued by one of QWUSA's affiliates.[1] The bankruptcy court granted appellees' motion for summary judgment, holding that the payments were exempt from avoidance because they were both "settlement payment[s]" and "transfer[s] made . . . in connection with a securities contract," within the meaning of section 546(e) of the Bankruptcy Code. 11 U.S.C. § 546(e). The district court affirmed both holdings. We need not decide whether the payments fall within

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* The Honorable Laura Taylor Swain, United States District Judge for the Southern District of New York, sitting by designation.

[1] The parties dispute whether the payments at issue in this case were made to purchase, redeem, or extinguish these notes. For the reasons set forth below, we conclude that, in the circumstances of this case, QWUSA purchased the notes.

the "settlement payments" safe harbor because we conclude that they clearly fall within the safe harbor for "transfers made . . . in connection with a securities contract." Accordingly, we affirm the district court's judgment.

BACKGROUND

The relevant facts are undisputed and may be summarized as follows:

QWUSA and Quebecor World Capital Corp. ("QWCC") are subsidiaries of Quebecor World, Inc. ("QWI"), a Canadian printing company. In 2000, QWCC raised $371 million for the Quebecor entities by issuing private placement notes (the "Notes") to the appellees pursuant to two nearly identical Note Purchase Agreements (the "NPAs"). QWI and QWUSA guaranteed the Notes and the funds were eventually transferred, at least in part, to QWUSA.

Section 8.2 of the NPAs gave QWCC the option to prepay the Notes so long as QWCC paid the outstanding principal, accrued interest, and a specified "Make-Whole Amount." Section 8.6 prohibited any Quebecor affiliate from purchasing the Notes unless they, *inter alia*, complied with the prepayment provisions in section 8.2. Once the Notes were paid in full, section 8.5 required that they be surrendered to QWCC for cancellation.

The NPAs also provided for the acceleration of the Notes' maturity if QWI's debt-to-capitalization ratio fell below a certain threshold. Pursuant to the terms of QWI's separate $1 billion revolving credit facility, any default with respect to the Notes would have in turn triggered a default under the credit facility agreement, with calamitous results for

Quebecor. When QWI began having financial difficulty in May 2007, it offered to purchase just over half of the Notes in exchange for increasing the debt-to-capitalization ratio, but the appellees rejected this offer. Instead, they entered a Noteholder Cooperation Agreement and Right of First Refusal Agreement (the "Cooperation Agreement"), in which they agreed not to sell their Notes to anyone but an existing noteholder.

In September 2007, QWI approved the prepayment of all the Notes and QWCC issued a notice of its intent to redeem the Notes early. After realizing redemption would have severe tax implications under Canadian law, however, QWI restructured the prepayment so that first QWUSA would purchase the notes from the appellees for cash and then QWCC would redeem the notes from QWUSA in exchange for forgiveness of debt QWUSA owed to QWCC. QWUSA issued a new notice to appellees indicating that it—not QWCC—would pay the "Redemption Price" set out in the NPAs, and that the payment would "result in the purchase of the Notes by Quebecor World (USA) Inc."

On October 29, 2007, QWUSA transferred approximately $376 million to the appellees' trustee, CIBC Mellon Trust Co. ("CIBC Mellon"). CIBC Mellon distributed the funds to appellees and the appellees eventually surrendered the Notes directly to QWI in Canada. QWUSA filed for bankruptcy in the Southern District of New York on January 21, 2008, less than ninety days after making the payment for the Notes.

The Committee then commenced this adversary action, seeking to avoid and recover the October 29 transfer pursuant to section 547 of the Code. Appellees moved for summary judgment, arguing that the transfer was exempt from avoidance under section 546(e). Before that motion was resolved, this Court decided *Enron Creditors Recovery Corp. v. Alfa, S.A.B. de C.V.* (*In re Enron Creditors Recovery Corp.*), 651 F.3d 329 (2d Cir. 2011), in which we held that payments made to redeem commercial paper before its maturity date were "settlement payments," within the meaning of section 546(e), because they were "transfer[s] of cash made to complete a securities transaction." *Id.* at 339 (quotation and alteration omitted).

After additional briefing, the bankruptcy court granted appellees' motion, holding primarily that QWUSA's payment fit the definition of "settlement payment" announced in *Enron*. Furthermore, because *Enron* had applied section 546(e) to redemptions of commercial paper, the bankruptcy court held that the payment also qualified as a "transfer made . . . in connection with a securities contract" regardless of whether QWUSA "redeemed" or "purchased" the Notes. The district court affirmed, agreeing that QWUSA's payment was a "settlement payment" under *Enron*. The court did not agree that a transfer to "redeem" securities could qualify as a "transfer made . . . in connection with a securities contract" because the Code defines a "securities contract" as one "for the purchase, sale, or loan of a security." 11 U.S.C. § 741(7)(A)(i). Nevertheless, the district court affirmed the bankruptcy court's

alternative holding on the basis that the transaction was in fact a "purchase," not a "redemption."

The Committee appeals.

DISCUSSION

A. Applicable Law

"We exercise plenary review over a district court's rulings in its capacity as an appellate court in bankruptcy," independently reviewing the bankruptcy court's factual findings for clear error and its legal conclusions *de novo*. *Super Nova 330 LLC v. Gazes*, 693 F.3d 138, 141 (2d Cir. 2012) (quotation omitted).

Under section 547 of the Code, the bankruptcy trustee may avoid any transfer of a debtor's property interest that is:

> (1) to or for the benefit of a creditor;
>
> (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
>
> (3) made while the debtor was insolvent;
>
> (4) made . . . [*inter alia*] on or within 90 days before the date of the filing of the petition . . . .

11 U.S.C. § 547(b). Section 546(e) exempts some transfers, however, if they fall within certain safe harbors:

> Notwithstanding section[] . . . 547 . . . of this title, the trustee may not avoid a transfer [1] that is a margin payment . . . or settlement payment . . . made by or to (or for the benefit of) a . . . financial institution, . . .

> or [2] that is a transfer made by or to (or for the benefit of) a . . . financial institution . . . in connection with a securities contract, as defined in section 741(7), commodity contract, . . . or forward contract . . . that is made before the commencement of the case . . . .

Id. § 546(e). In *Enron*, we defined a "settlement payment" as a "transfer of cash made to complete a securities transaction." *In re Enron*, 651 F.3d at 339 (quotation and alterations omitted). Section 741(7) of the Code defines a "securities contract" as "a contract for the purchase, sale, or loan of a security . . . including any repurchase or reverse repurchase transaction on any such security." 11 U.S.C. § 741(7)(A)(i).

There is a split of authority regarding what role a financial institution must play in the transaction for it to qualify for the section 546(e) safe harbor. Three circuit courts have concluded that the plain language includes any transfer to a financial institution, even if it is only serving as a conduit or intermediary. *See QSI Holdings, Inc. v. Alford* (*In re QSI Holdings, Inc.*), 571 F.3d 545, 550-51 (6th Cir. 2009); *Contemporary Indus. Corp. v. Frost*, 564 F.3d 981, 987 (8th Cir. 2009); *Lowenschuss v. Resorts Int'l, Inc.* (*In re Resorts Int'l, Inc.*), 181 F.3d 505, 516 (3d Cir. 1999). Only the Eleventh Circuit has held that the financial institution must acquire a beneficial interest in the transferred funds or securities for the safe harbor to apply. *See Munford v. Valuation Research Corp.* (*In re Munford, Inc.*), 98 F.3d 604, 610 (11th Cir. 1996) (per curiam). In *Enron*, we cited

the Third, Sixth, and Eighth Circuits' decisions with approval and concluded that "the absence of a financial intermediary that takes title to the transacted securities during the course of the transaction is [not] a proper basis on which to deny safe-harbor protection." *In re Enron*, 651 F.3d at 338.

B. Application

We need not reach the "settlement payments" issue because, based on the undisputed facts, QWUSA's payment on October 29 fits squarely within the plain wording of the securities contract exemption, as it was a "transfer made by or to (or for the benefit of) a . . . financial institution . . . in connection with a securities contract."[2] 11 U.S.C. § 546(e).

QWUSA transferred funds to appellee's trustee CIBC Mellon, in the amount and manner prescribed by the NPAs for purchasing the Notes. The parties agree that CIBC Mellon is a financial institution. The NPAs were clearly "securities contracts" because they provided for both the original purchase and the "repurchase" of the Notes. *Id.* § 741(7). Accordingly, this was a transfer made to a financial institution in

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[2] We note that the Court in *Enron* had no occasion to consider the "securities contract" safe harbor, which was added after Enron filed for bankruptcy and after the adversary proceeding commenced. *See* Financial Netting Improvements Act of 2006 § 5(b)(1)(B), Pub. L. No. 109-390, 120 Stat. 2692; *Enron Creditors Recovery Corp. v. Alfa, S.A.B. de C.V.* (*In re Enron Creditors Recovery Corp.*), 651 F.3d 329, 331-32 (2d Cir. 2011) (noting that Enron filed for bankruptcy in 2001 and adversary proceeding commenced in 2003).

connection with a securities contract that is exempt from avoidance.

We need not decide whether the transfer would still be exempt if QWUSA had "redeemed" its own securities because we agree with the district court that QWUSA made the transfer to "purchase" the Notes. Generally, "[t]o redeem is defined as to purchase back; to regain possession by payment of a stipulated price; to repurchase; to regain, as mortgage property, by paying what is due; to receive back by paying the obligation." *In re United Educ. Co.*, 153 F. 169, 171 (2d Cir. 1907) (quotation omitted). Here, QWUSA was not "regaining" its own Notes; it was acquiring for the first time the securities of another corporation, QWCC. In fact, under the terms of the NPAs, only QWCC had the right to "pre-pay" or redeem the Notes; its affiliates could only "purchase" the Notes if they complied with the pre-payment provisions. Therefore, QWUSA was not "redeeming" its affiliate's Notes, but "purchasing" them.

The Committee contends that QWUSA could not have "purchased" the Notes for two reasons. First, it points to evidence in the record showing that some of the appellees believed the transaction was a redemption, not a purchase. But it made no difference to appellees at the time of the transfer whether QWUSA was "redeeming" or "purchasing" the Notes because, from their perspective, the NPAs treated both the same way and appellees received the same "pre-payment" price. Thus, their subjective understanding of the transaction at the time is not dispositive.

Second, the Committee argues that the Cooperation Agreement prohibited appellees from selling the Notes, and therefore QWUSA could not have "purchased" the Notes. But the Cooperation Agreement explicitly allowed for the sale of the Notes to a "Constituent Company Guarantor" like QWUSA pursuant to an amended offer to purchase the Notes. Moreover, neither QWUSA nor any other Quebecor entity was a party to the Cooperation Agreement. Thus, nothing prohibited the noteholders as a group from selling—and QWUSA from purchasing—all of the Notes in a single transaction. Even if appellees had breached the Cooperation Agreement by selling to QWUSA, that would only mean that appellees are liable to each other; the breach would have no effect on the validity of the transaction with QWUSA.

Finally, the Committee argues that even if QWUSA "purchased" the Notes, not all of the transfers are exempt because CIBC Mellon was merely a conduit and some of the appellees are not financial institutions. *Enron* rejected a similar argument, holding that the financial intermediary need not have a beneficial interest in the transfer. *See In re Enron*, 651 F.3d at 338-39. To the extent *Enron* left any ambiguity in this regard, we expressly follow the Third, Sixth, and Eighth Circuits in holding that a transfer may qualify for the section 546(e) safe harbor even if the financial intermediary is merely a conduit. *See In re QSI Holdings, Inc.*, 571 F.3d at 551; *Frost*, 564 F.3d at 987; *In re Resorts Int'l, Inc.*, 181 F.3d at 516.

The plain language of the statute refers to transfers made "by or to (*or* for the benefit of)" a

financial institution. 11 U.S.C. § 546(e) (emphasis added).[3] Because we generally prefer a construction that does not render parts of a statute superfluous, *see Marx v. Gen. Revenue Corp.*, 133 S. Ct. 1166, 1177-78 (2013), we conclude that a transfer may be either "for the benefit of" a financial institution or "to" a financial institution, but need not be both.

Finally, we note that this construction furthers the purpose behind the exemption. As we explained in *Enron*, in the context of the "settlement payment" prong of section 546(e):

> Congress enacted § 546(e)'s safe harbor in 1982 as a means of 'minimiz[ing] the displacement caused in the commodities and securities markets in the event of a major bankruptcy affecting those industries.' If a firm is required to repay amounts received in settled securities transactions, it could have insufficient capital or liquidity to meet its current securities trading obligations, placing other market participants and the securities markets themselves at risk.

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[3] The phrase "(or for the benefit of)" was added by the 2006 amendments to section 546(e). *See* Financial Netting Improvements Act of 2006 § 5(b)(1), Pub. L. No. 109-390, 120 Stat. 2692. Because this change was made after the circuit split arose, it is arguable that Congress intended to resolve the split with the 2006 Amendments. *See, e.g.*, *United States v. Mele*, 117 F.3d 73, 75 (2d Cir. 1997). But the legislative history does not mention, let alone explain the reasoning behind, this change. *See* H.R. Rep. No. 109-648 (Part I) at 8 (2006), *reprinted in* 2006 U.S.C.C.A.N. 1585, 1593. We need not, however, rely on this legislative history, as the words of the statute are unambiguous.

In re Enron, 651 F.3d at 334 (quoting *Kaiser Steel Corp. v. Charles Schwab & Co.*, 913 F.2d 846, 849 (10th Cir. 1990)). A transaction involving one of these financial intermediaries, even as a conduit, necessarily touches upon these at-risk markets. Moreover, the enumerated intermediaries are typically facilitators of, rather than participants with a beneficial interest in, the underlying transfers. 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.[4] Accordingly, it was sufficient that QWUSA's transfer was made to CIBC Mellon as appellees' trustee, even though CIBC Mellon did not take title to the transferred funds.

CONCLUSION

For the foregoing reasons, we conclude QWUSA's payment was a "transfer made . . . in connection with a securities contract" and is exempt from avoidance pursuant to section 546(e) of the Bankruptcy Code. Accordingly, we AFFIRM the judgment of the district court.

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[4] Of course, the "securities contract" safe harbor is not without limitation, and, for example, mere structuring of a transfer as a "securities transaction" may not be sufficient to preclude avoidance. *See, e.g.*, 11 U.S.C. § 546(e) (providing safe harbor relief from avoidance under section 548(a)(1)(B) but not from avoidance under section 548(a)(1)(A)).

Appendix B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 11-7530 (JMF)

IN RE QUEBECOR WORLD (USA) INC.,

Debtor.

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

Plaintiff/Appellant,

v.

AMERICAN UNITED LIFE INSURANCE COMPANY, ET AL.,

Defendants/Appellees.

Filed: September 28, 2012

OPINION AND ORDER

JESSE M. FURMAN, United States District Judge:

In October 2007, shortly before it filed for bankruptcy, Quebecor World (USA) Inc. ("QWUSA") paid more than $376 million to purchase and redeem a series of private placement notes that an affiliated company had issued years earlier. The question in this case is whether those payments can be "avoided" —that is, recaptured as part of the bankruptcy estate —on the ground that they were "preferential" transfers, or whether they are protected from avoidance as either "settlement payments" or

transfers "in connection with a securities contract." Appellant Official Committee of Unsecured Creditors of Quebecor World (USA) Inc. ("Appellant") appeals from an order of the United States Bankruptcy Court for the Southern District of New York (James M. Peck, B.J.), entered on August 17, 2011, granting Appellees' motion for summary judgment. *See Official Comm. of Unsecured Creditors of Quebecor World (USA) Inc. v. Am. United Life Ins. Co. (In re Quebecor World (USA) Inc.),* 453 B.R. 201 (Bankr. S.D.N.Y. 2011) *("Quebecor").* Relying on the Second Circuit's decision in *In re Enron Creditors Recovery Corp. v. Alfa, S.A.B. de C.V.*, 651 F.3d 329 (2d Cir. 2011) ("*Enron*"), the Bankruptcy Court held that the payments at issue were protected as both settlement payments and transfers in connection with a securities contract. *Quebecor*, 453 B.R. at 215-19. For the reasons stated below, this Court agrees and, accordingly, the Bankruptcy Court's order is AFFIRMED.

BACKGROUND

A. The Statutory Scheme

As noted, this case concerns the authority of a bankruptcy trustee to avoid and thus recapture "preferential" transfers. To the extent relevant here, Section 547(b) of the Bankruptcy Code provides that a trustee may recover money or property transferred by an insolvent debtor on account of an antecedent debt in the ninety days preceding bankruptcy. *See* 11 U.S.C. § 547(b). This "avoidance" authority serves two important functions. First, it deters creditors from racing to the courthouse and hastily forcing troubled businesses into bankruptcy. *See, e.g.*, *Union*

Bank v. Wolas, 502 U.S. 151, 160-61 (1991); *In re Roblin*, 78 F.3d 30, 40 (2d Cir. 1996). Second, it promotes equitable treatment of creditors by allowing a trustee to recapture for the benefit of all creditors preferential payments or transfers made in the months leading up to the bankruptcy. *See Wolas*, 502 U.S. at 160-61.

Section 546(e) of the Bankruptcy Code carves out limited exceptions to this avoidance authority, two of which are relevant to this case. First, a trustee "may not avoid a transfer that is a . . . settlement payment . . . made by or to (or for the benefit of) a . . . financial institution." 11 U.S.C. § 546(e). Section 741 of the Code, in turn, defines a settlement payment as "a preliminary settlement payment, a partial settlement payment, an interim settlement payment, a settlement payment on account, a final settlement payment, or any other similar payment commonly used in the securities trade." *Id.* § 741(8).[1] Second, a trustee "may not avoid . . . a transfer made by or to (or for the benefit of) a . . . financial institution . . . in connection with a securities contract." *Id.* § 546(e). To the extent relevant here, Section 741 defines "securities contract" to mean "a contract for the purchase, sale, or loan of a security, . . . including any repurchase . . . transaction on any such security." *Id.* § 741(7)(A)(i).

Congress enacted the Section 564(e) safe harbors "to minimize the displacement caused in the commodities and securities markets in the event of a

[1] Another provision of the Code defines settlement payment in the context of forward contract trades, *see* 11 U.S.C. § 101, but that definition is irrelevant to this case.

major bankruptcy affecting those industries." H.R. Rep. No. 420, 97th Cong., 2d Sess. 2 (1982), *reprinted in* 1982 U.S. Code Cong. & Admin. News 583, 583. As the Court explained in *Enron*, "[i]f a firm is required to repay amounts received in settled securities transactions, it could have insufficient capital or liquidity to meet its current securities trading obligations, placing other market participants and the securities markets themselves at risk." 651 F.3d at 334. "By restricting a bankruptcy trustee's power to recover payments that are otherwise avoidable under the Bankruptcy Code, the safe harbor stands 'at the intersection of two important national legislative policies on a collision course—the policies of bankruptcy and securities law.'" *Id.* (quoting *In re Resorts Int'l, Inc.*, 181 F.3d 505, 515 (3rd Cir. 1999)).

B. Facts

The facts relevant to this case are undisputed. Quebecor World Inc. ("QWI") is a Canadian corporation that used to be the second largest commercial printer in the world. *See Quebecor*, 453 B.R. at 206. In July 2000, an entity in the Quebecor corporate family, Quebecor World Capital Corp. ("QWCC"), raised $250 million by issuing a series of private placement notes to a small group of lenders (the "Noteholders") pursuant to a Note Purchase Agreement. (JA-23 Ex. A1).[2] In September 2000, QWCC issued another $121 million in private placement notes (together with the July 2000 notes, the "Notes") pursuant to a nearly identical Note

[2] In addition to their briefs, the parties have submitted a Joint Appendix, comprised of forty-seven documents. "JA-[NUMBER]" refers the relevant document in this Appendix.

Purchase Agreement (together with the July 2000 Note Purchase Agreement, the "NPA"). (JA-23 Ex. A2). The Notes were guaranteed by QWI and its primary subsidiary in the United States, QWUSA. (JA-23 Ex. C2 ¶ 94).

Under Section 8.2 of the NPA, QWCC was entitled to redeem or prepay all or part of the Notes at any time and for any reason. (JA-23 Exs. A1, A2 § 8.2). Upon prepayment, the Noteholders would receive the aggregate principal owed, accrued interest, and a "make-whole" premium designed to compensate the Noteholders for the early payment of the Notes. (*Id.*). Section 8.5 of the NPA specified that "[a]ny Note paid or prepaid in full shall be surrendered to the Company and cancelled and shall not be reissued, and no Note shall be issued in lieu of any prepaid principal amount of any Note." (JA-23 Exs. A1, A2 § 8.5). Section 8.6 of the NPA further provided that QWI and any controlled affiliates were prohibited from purchasing, redeeming, prepaying or otherwise acquiring the Notes except "(a) upon the payment or prepayment of each series of the Notes in accordance with the terms of this Agreement and the Notes or (b) pursuant to an offer to purchase" made by QWI or a controlled affiliate "pro rata to the holders of all Notes at the time outstanding at the same time and upon the same terms and conditions." (JA-23 Exs. A1, A2 § 8.6).

The NPA also included a limitation on QWI's debt-to-capitalization ratio, which provided that if that ratio exceeded 55% on the last day of any fiscal quarter ending after December 31, 2000, all outstanding Notes would be immediately due to the

Noteholders, including principal owed, accrued interest, and the make-whole premium. (JA-23 Exs. A1, A2 §§ 10.1, 13.1(a), (c)). By May of 2007, QWI and its subsidiaries were in financial distress and at risk of breaching this covenant. (Appellant's Br. at 8; Appellees' Br. at 8-9). To avoid the potentially catastrophic consequences of such a breach, QWI attempted to modify the covenant through a partial tender offer to just over half of the Noteholders in exchange for their support in raising the debt-to-capitalization ratio to 65%. (Appellant's Br. at 9; Appellees' Br. at 9). The Noteholders, however, unanimously rejected the tender offer and instead signed a Noteholder Cooperation Agreement and Right of First Refusal Agreement, pursuant to which they agreed not to sell the Notes outside the then-existing group of Noteholders. (Appellant's Br. at 10; Appellees' Br. at 9). It appears that these agreements were intended to prevent QWI from dividing the Noteholders with a partial tender offer, thereby forcing an early prepayment of the Notes—including the make-whole premium—to all Noteholders. (Appellant's Br. at 10).

In September 2007, the QWI Board of Directors approved prepayment of all the Notes to avoid breaching the debt-to-capitalization ratio covenant, using cash raised from a separate bank credit facility. (JA-23 Exs. B1-B4 at 53). On September 28, 2007, QWCC sent each Noteholder a "Notice of Redemption" stating that, on October 29, 2007, it intended to "redeem" in full all outstanding Notes under Section 8.2 of the NPA. (*E.g.*, JA-23 Exs. B5-11 at 16). The notice directed each Noteholder to "surrender" the Notes "for cancellation, pursuant to

Section 8.5 of the [NPA]." (*E.g.*, *id*. at 17). Several weeks later, however, QWI realized that QWCC's redemption of the Notes would result in unwanted tax liabilities under Canadian law. At the last minute, therefore, QWI restructured the transaction as a purchase of the Notes by QWUSA, which would then surrender the Notes to QWCC for redemption. (Appellant's Br. at 11). On October 25, 2007, QWUSA provided a second notice to the Noteholders that it would pay the "Redemption Price" set forth in the Notice of Redemption, which would "result in QWUSA purchasing the Notes." (*E.g.*, JA-23 Exs. B12-18 at 1).

On October 29, 2007, QWUSA instructed Bank of America to wire transfer $376,298,061.81—the sum of the principal, accrued interest, and the make-whole premium—from its main operating account to the trustee for the Noteholders, CIBC Mellon ("CIBC"). (JA-23 Exs. B12-18 at 53). CIBC then transferred to each Noteholder its portion of the prepayment; it did not, however, take title to the securities or utilize any type of clearing mechanism to complete the transaction. (JA-23 Exs. D1-D7 at 9). Regardless, according to the Noteholders, the payment from QWUSA to them was part of a securities transaction that "settled." (JA-6-22 ¶ 9 & Exs. C.). Moreover, at least some contemporaneous documents describe the transfer as "settle[d]," occurring on a "settlement date," or the like. (*E.g.*, JA6-22 Ex. C; JA-30 Ex. C, JA-31 Ex. C; JA-39 Exs. 27-36 at 25). Following the prepayment, the Noteholders returned the Notes by mailing them directly to QWI in Montreal—a process that dragged on for some months. (Appellees' Br. at 11). When

returned, two of the fifteen Notes were stamped "PAID IN FULL." (Appellant's Br. at 12 (citing JA-39 Exs. 64, 81); Appellees' Br. at 13 (citing JA-6-9, 11-16, 18-22)).

On January 21, 2008, QWUSA filed for Chapter 11 bankruptcy protection in the United States Bankruptcy Court for the Southern District of New York. Voluntary Petition (Chapter 11), *In re Quebecor World (USA)*, No. 08-bk-10152 (JMP) (Bankr. S.D.N.Y. Jan. 21, 2008) (Docket No. 1). On September 19, 2008, Appellant commenced this adversary proceeding seeking to avoid the $376 million prepayment of the notes on the ground that it was a "preferential" transfer within the meaning of Section 547(b). Complaint, *Official Comm. of Unsecured Creditors of Quebecor World (USA), Inc. v. Am. United Life Ins. Co.* (*In re Quebecor World (USA) Inc.*), No. 08-ap-1417 (JMP) (Bankr. S.D.N.Y. Sept. 19, 2008) (Docket No. 1). On October 29, 2010, the Noteholders moved for summary judgment, contending that the payment fell within the safe harbor of Section 546(e). (08-ap-1417 (JMP), Docket No. 32). The Bankruptcy Court heard oral argument on January 19, 2011, and held a limited evidentiary hearing on May 4 and 5, 2011. (08-ap-1417 (JMP), Docket Nos. 70, 73-74). Shortly thereafter, the Court of Appeals issued its decision in *Enron* and the Bankruptcy Court ordered supplemental briefing on the case. *See Quebecor*, 453 B.R. at 211.

In a thorough opinion dated July 27, 2011, Judge Peck granted the Noteholders' motion for summary judgment. *See Quebecor*, 453 B.R. at 219. Judge Peck held that the transfers at issue fell within Section

546(e) safe harbor for two independent reasons. First, relying heavily on *Enron*, Judge Peck concluded that the payments qualified as settlement payments, defined as a transfer of cash to a financial institution to complete a securities transaction. *See id.* at 215. Second, Judge Peck held—albeit in a footnote—that the payment qualified "as a safe-harbored 'transfer made by or to (or for the benefit of) a . . . financial institution . . . in connection with a securities contract, as defined in section 741(7).'" *Id.* at 212 n.7 (quoting 11 U.S.C. § 546(e)). Citing the "comprehensive language used to define the term 'securities contract' in section 741(7) of the Code (i.e., 'a contract for the purchase, sale, or loan of a security . . .')," Judge Peck concluded that the NPA is a "securities contract" and that the disputed transfer "[p]lainly" occurred in connection with it. *Id.* Further, relying on *Enron*, he rejected Appellant's argument that the clause did not apply to the redemptions of securities. *See id.*

This appeal followed.

DISCUSSION

A. Jurisdiction and Standard of Review

This Court has jurisdiction pursuant to Title 28, United States Code, Section 158(a)(1) and Rule 8001(a) of the Federal Rules of Bankruptcy Procedure. In general, a district court reviews a bankruptcy court's findings of fact for clear error and its legal conclusions *de novo*. *See, e.g.*, *In re Layo*, 460 F.3d 289, 292 (2d Cir. 2006); *In re Madoff*, 848 F. Supp. 2d 469, 476 (S.D.N.Y. 2012); FED. R. BANKR. P. 8013. As noted, however, the relevant facts in the present case are undisputed; the parties' dispute

turns instead on the scope and meaning of terms in the safe harbor provision of the Bankruptcy Code. These are "matter[s] of statutory construction and thus . . . question[s] of law [the Court] review[s] de novo." *Enron,* 651 F.3d at 334.

B. The Safe Harbor for Settlement Payments

The first question on appeal is whether the payments at issue qualify as settlement payments within the meaning of Section 546(e). As the Bankruptcy Court concluded, to answer to that question requires analysis of *Enron*, in which the Court of Appeals considered "whether the § 546(e) 'safe harbor' . . . extends to transactions in which commercial paper is redeemed by the issuer prior to maturity, using the customary mechanism of the Depository Trust Company." *Enron*, 651 F.3d at 334-34 (quoting *In re Enron Creditors Recovery Corp.*, 422 B.R. 423, 424 (S.D.N.Y. 2004)). Shortly before filing for bankruptcy, Enron made the payments at issue—totaling more than one billion dollars—to holders of the commercial paper through broker-dealers via the Depository Trust Company (the "DTC"), which served as a "conduit and recordkeeper rather than a clearing agency that takes title to the securities during the course of the transaction." *Id.* at 338. After Enron filed for bankruptcy, a creditors committee initiated an adversary proceeding to avoid the redemption payments as preferential under Section 547(b) of the Bankruptcy Code. The Bankruptcy Court held that the payments were subject to avoidance because they did not fall within the definition of "settlement payments" in Section 546(e), *see In re Enron*

Creditors Recovery Corp., 407 B.R. 17 (Bankr. S.D.N.Y. 2009), but the District Court reversed, *see In re Enron Creditors Recovery Corp.*, 422 B.R. 423 (S.D.N.Y. 2009).

Over a dissent by Judge Koeltl (sitting by designation), the Second Circuit affirmed, holding that the redemption payments did qualify as settlement payments within the meaning of Section 546(e). The majority acknowledged that Section 741(8) of the Bankruptcy Code, which Section 546(e) incorporates, "defines 'settlement payment' rather circularly." *Enron*, 651 F.3d at 334. Nevertheless, following other courts of appeals, the majority adopted an "extremely broad" definition of the term, instructing courts to interpret it, "in the context of the securities industry, as the transfer of cash or securities made to complete a securities transaction." *Id.* at 334 (internal quotation marks and brackets omitted); *see also id.* at 336-37. Applying that definition, the majority easily concluded that the redemption at issue fell within the safe harbor of Section 546(e): "The payments at issue were made to redeem commercial paper, which the Bankruptcy Code defines as a security. They thus constitute the transfer of cash . . . made to complete a securities transaction and are settlement payments within the meaning of § 741(8)." *Id.* at 339 (internal quotation marks, brackets, footnote, and citation omitted).

Significantly, in reaching that conclusion, the majority rejected three limitations urged by the creditors committee. First, the majority rejected the committee's argument that the final clause of the Section 741(8)'s definition, "commonly used in the

securities trade," limits the safe harbor to those payments that are "commonly used in the securities trade." *See* 651 F.3d at 335-36. That phrase, the majority concluded, "is properly read as modifying only the term 'any other similar payment.' The phrase is not a limitation on the definition of settlement payment, but rather . . . it is a catchall phrase intended to underscore the *breadth* of the § 546(e) exemption." *Id.* at 336 (emphasis in original) (internal quotation marks omitted). In addition, the majority reasoned, the committee's "proposed reading would make application of the safe harbor in every case depend on a factual determination regarding the commonness of a given transaction." *Id.* That, in turn, "would result in commercial uncertainty and unpredictability at odds with the safe harbor's purpose and in an area of law where certainty and predictability are at a premium." *Id.*

Second, the Court rejected the committee's argument that in order to qualify for the "settlement payment" safe harbor, there had to be a purchase or sale of securities. *See id.* at 336-38. The majority agreed that "settlement," in the context of the securities industry, "refers to the completion of a securities transaction," but found no support in the Bankruptcy Code for "a requirement that title to the securities changes hands." *Id.* at 337 (internal quotation marks omitted). The majority was unswayed by Judge Koeltl's argument in dissent that, without a purchase-or-sale requirement, the safe harbor would apply to "any payment on account of a debt evidenced by a writing," thereby "imperil[ing] decades of cases that allow the avoidance of debt-related payments." *Id.* at 347

(Koeltl, J., dissenting). These cases, the majority explained, "involve[d] non-tradeable bank loans, not widely issued debt securities." *Id.* at 337 (majority opinion) (citing cases). Thus, "[c]oncluding that the safe harbor protects payments made to redeem tradeable debt securities does not contradict caselaw permitting avoidance of payments made on ordinary loans. Interpreting the term 'settlement payment' in the context of the securities industry will exclude from the safe harbor payments made on ordinary loans." *Id.*

Finally, the panel majority rejected the committee's argument that a transfer qualifies as a "settlement payment" only if it involved a financial intermediary that took a beneficial interest in the securities during the course of the transaction, thereby implicating the systemic risks that motivated Congress's enactment of the safe harbor. *See id.* at 338-39. In doing so, the Court relied on the decisions of three other courts of appeals, which had applied Section 546(e) to payments involving "financial intermediaries who served only as conduits." *Id.* at 338 & n.3 (citing *In re Plassein Int'l Corp.*, 590 F.3d 252, 257-59 (3d Cir. 2009); *In re QSI Holdings, Inc.*, 571 F.3d 545, 549-50 (6th Cir. 2009); *Contemporary Indus. Corp. v. Frost*, 564 F.3d 981, 986 (8th Cir. 2009)). Analogizing to those decisions, the Court found "no reason to think that undoing Enron's redemption payments, which involved over a billion dollars and approximately two hundred noteholders, would not" have a "substantial impact on the stability of the financial markets"—merely because the Depository Trust Company "acted as a conduit and recordkeeper rather than a clearing agency that

takes title to the securities during the course of the transaction." *Id.* at 338. Moreover, the Court continued, Section 546(e) applies on its face, and without limitation, to settlement payments made "by or to (or for the benefit of)" various participants in the financial markets. 11 U.S.C. § 546(e). "It would appear inconsistent with this language for courts to limit the safe harbor circuitously by interpreting the definition of 'settlement payment' to exclude payments that do not involve a financial intermediary that takes title to the securities during the course of the transaction." *Id.* at 339.[3]

In light of the Circuit's holding and analysis in *Enron*, this case is easily decided. As Judge Peck correctly held, the Circuit's test for whether a payment qualifies for the safe harbor "is both uncomplicated and crystal clear—a settlement payment, quite simply, is a 'transfer of cash [to a financial institution] . . . made to complete [a] securities transaction.'" *Quebecor*, 453 B.R. at 215 (quoting *Enron*, 651 F.3d at 334); *accord Secs. Investor Prot. Corp. v. Bernard L. Madoff Invest. Secs. LLC*, — B.R. —, 2012 WL 1505349, at *4 (S.D.N.Y. Apr. 30, 2012). "Under this easy-to-apply formulation," the payments at issue in this case plainly fall within the safe harbor. *Quebecor*, 453 B.R. at 215. First, QWUSA transferred cash—more than $376 million of it—to purchase the Notes. Second, QWUSA wired the money from its account at Bank of America to the trustee for the Noteholders,

[3] The Second Circuit denied the Enron Creditors Committee's petition for rehearing or for rehearing *en banc* on December 2, 2011. (*See* Annex to Appellees' Br.)

CIBC, which qualifies as a "financial institution" for purposes of Section 546(e). *See* 11 U.S.C. § 101(22) (defining "financial institution"). Finally, the payment was made to "complete" a securities transaction, as the Notes indisputably qualify as "securities" under the Bankruptcy Code. *See id.* § 101(49)(A)(i) (defining the "term 'security'" to include a "note"). Put simply, "[t]he payments at issue were made to [purchase] or redeem [notes], which the Bankruptcy Code defines as a security. They thus constitute the transfer of cash . . . made to complete a securities transaction and are settlement payments within the meaning of § 741(8)." *Enron*, 651 F.3d at 339 (internal quotation marks, brackets, footnote, and citation omitted).

Appellant's arguments to the contrary are unavailing. First, noting that the payments in this case did not involve a formal settlement process using broker-dealers and the DTC to effect the immediate exchange of payment and securities, Appellant contends that *Enron* is distinguishable. (Appellant's Br. at 15-16). Admittedly, this argument finds some support in the way the *Enron* Court framed the question presented. *See* 651 F.3d at 333-34 ("Here, we review only the issue the district court agreed to hear on appeal: 'whether the § 546(e) "safe harbor" . . . extends to transactions in which commercial paper is redeemed by the issuer prior to maturity, using the customary mechanism of the Depository Trust Company.'") (quoting *In re Enron,* 422 B.R. at 424). It finds no support, however, in the Court's ultimate holding that, in the context of the securities industry, a settlement payment means simply "the transfer of cash or securities made to

complete a securities transaction." *Id.* at 334 (internal quotation marks and brackets omitted). Moreover, the *Enron* Court concluded that Section 546(e) must be interpreted by looking to its plain language, *see id.* at 335, 339, and nothing in the statute suggests that application of the safe harbor turns on the involvement of broker-dealers, customary mechanisms of settlement such as the DTC, or an immediate exchange of securities. In fact, the *Enron* Court adopted the reasoning of a line of cases that have "expressly rejected the argument that 'settlement payments' must travel through the settlement system." *Plassein Int'l Corp.*, 590 F.3d at 258 (characterizing an early case in that line), *cited in Enron*, 651 F.3d at 338-39.

Second, Appellant contends that the Bankruptcy Court erred in holding that the payments at issue were made to a "financial institution," as required (in the context of this case) to qualify for the safe harbor. (Appellant's Br. at 24-25). Appellant does not dispute that CIBC, the actual recipient of the transfer, qualifies as a "financial institution" for purposes of the Bankruptcy Code.[4] Instead, relying on the Eleventh Circuit's decision in *In re Munford*, 98 F.3d 604, 610 (11th Cir. 1996), it argues that CIBC "was 'nothing more than [an] intermediary or conduit,' and thus cannot be used to satisfy the requirement under Section 546(e) that the transfer be made by or to a financial institution." (Appellant's Br. at 24 (quoting *Munford*, 98 F.3d at 610)). At least three courts of appeals, however, have expressly rejected *Munford*,

[4] Nor does Appellant dispute that some of the Noteholders would qualify as financial institutions in their own right.

holding that "the plain language of § 546(e) simply does not require a 'financial institution' to have a 'beneficial interest' in the transferred funds." *QSI Holdings, Inc.*, 571 F.3d at 551; *accord Contemporary Indus. Corp.*, 564 F.3d at 986-87; *In re Resorts Int'l, Inc.*, 181 F.3d 505, 516 (3d Cir. 1999). And while the Second Circuit did not explicitly discuss *Munford* in *Enron*, it followed these other courts in holding that Section 546(e) may not be limited "circuitously by interpreting the definition of 'settlement payment' to exclude payments" to "financial intermediaries who served only as conduits." 651 F.3d at 338 (citing *Plassein Int'l Corp.*, 590 F.3d at 257-59; *QSI Holdings, Inc.*, 571 F.3d at 549-50; *Contemporary Indus. Corp.*, 564 F.3d at 986)). *See generally* Christopher W. Frost, *The Continued Expansion of Section 564(e): Has the Safe Harbor Swallowed the Rule?*, 31 No. 10 BANKR. L. LETTER 1, 2 (Oct. 2011) (citing *Enron* as the latest in a "large, and growing, number of cases" that "find a settlement payment anytime a financial institution serves as an intermediary to conclude a sale and purchase of a security"). In light of *Enron* and the plain language of Section 546(e)—which requires only that a payment be made "by or to (or for the benefit of)" a financial institution—Appellant's argument fails.

Finally, noting that Congress intended for Section 546(e) to protect against systemic threats to the marketplace, Appellant contends that the payments at issue here are not within the ambit of those that Section 546(e) was designed to protect because they did not involve a central counterparty. (Appellant's Br. at 19-21). Relatedly, Appellant contends that if Judge Peck's decision is affirmed,

Section 546(e) would apply to "the prepayment of any ordinary loan evidenced by the private note." (Appellant's Br. at 21). In the abstract, these arguments have some force given, among other things, the circularity of the definition of "settlement payment" in Section 741(8); indeed, were this Court writing on a blank slate, it might well conclude that they called for a narrower definition of "settlement payment" that excluded the payments here. *See also Quebecor*, 453 B.R. at 217 (noting that because the definition given to "settlement payment" in *Enron* "is so general in its application (as noted by the dissent with reference to the impact on recovering preferential payments of unsecured loans), does not advert to Congressional intent (except to say that to do so would not change the result) and applies to any qualifying transfer, even one with no demonstrated connection to the securities markets," it "may extend protection to transfers that Congress never intended to immunize and may lead to unintended consequences"); Frost, 31 No. 10 BANKR. L. LETTER at 3 ("[T]he net effect of *Enron* may be allow the parties to insulate most debt held by financial institutions from the reach of the preference laws—a result seemingly far afield from that intended by Congress.").

The Court is not writing on a blank slate, however, but is bound to follow the Second Circuit's decision in *Enron*. *See, e.g.*, *United States v. Russotti*, 780 F. Supp. 128, 131 (S.D.N.Y. 1991) ("[I]t is axiomatic that a district court cannot simply take a position contrary to that of its circuit court and regard the circuit court's interpretation of a given statute as not binding."). And in relying on the plain

language of Section 546(e) to adopt an "extremely broad" definition of "settlement payment," the Second Circuit squarely rejected the precise arguments made by Appellant here (most, if not all, of which were made forcefully by Judge Koeltl in his dissent). *Enron*, 651 F.3d at 334 (internal quotation marks omitted); *see id.* at 337 (rejecting the dissent's argument that a narrower definition of settlement payment was warranted to avoid its application to prepayment of ordinary loans); *id.* at 338-39 & n.3 (rejecting "a restriction on the safe harbor that would limit it to transactions involving central counterparties"); *id.* at 339 (declining to look at legislative history in light of the plain language of Section 546(e)); *see also Secs. Investor Prot. Corp.*, 2012 WL 1505349, at *5 (relying on "the broad and literal interpretation given § 546(e) in *Enron*" to reject an argument that the statute should be read, in light of its purpose, to exclude fraudulent brokerage firms and transactions).[5] If the broad definition given by the *Enron* Court to the term "settlement payment" is to be narrowed, it must come

[5] Even if Section 546(e) could be limited to payments that, if avoided, might trigger systemic risks to the marketplace, the payments in this case might well qualify. As the Bankruptcy Court explained, the Noteholders are large financial institutions that "customar[ily] participa[te] in the secondary market for private placements notes," a market in which "holdings routinely are traded from one institution to another." *Quebecor*, 453 B.R. at 217. Thus, the prepayment of the Notes—totaling approximately $376 million—was arguably "sufficiently material in amount as to be potentially significant from a systemic point of view, and avoiding a transaction such as this conceivably could impact the original issue or secondary markets for private placement indebtedness." *Id.*

from the Circuit itself or from the Supreme Court, not from this Court.

C. The Safe Harbor for Payments in Connection with a Securities Contract

The Court's conclusion that the payments at issue qualify as "settlement payments" within the meaning of Section 546(e) is sufficient to decide this appeal. Nevertheless, out of an abundance of caution, and because the issue has been fully briefed by the parties (Appellant's Br. at 21-24; Appellees' Br. at 22-24), the Court will address the Bankruptcy Court's alternative basis for granting Appellees' summary judgment—namely, that the transfers in question were "made by to (or for the benefit of) a . . . financial institution . . . in connection with a securities contract." *Quebecor*, 453 B.R. at 212 n.7. As noted, citing the "comprehensive language" of the statute—which defines "securities contract" to include "a contract for the purchase, sale, or loan of a security, . . . including any repurchase . . . transaction on any such security," 11 U.S.C. § 741(7)(A)(i) — Judge Peck held in a footnote that the NPA was a securities contract and concluded that the transfers at issue "[p]lainly" occurred "in connection with" them. *Quebecor*, 453 B.R. at 212 n.7. Further, in doing so, he rejected Appellant's argument that the definition of "securities contract" should not be read to include a contract for the redemption—as opposed to purchase, sale, or repurchase—of a security. "*Enron*," Judge Peck reasoned, "makes clear that the safe harbor applies to redemptions and has destroyed that argument." *Id.*

As Appellant argues on appeal (Appellant's Br. at 22), this reasoning is flawed. Contrary to the Bankruptcy Court's conclusion, the *Enron* Court did not hold broadly that the safe harbor—that is, Section 546(e) itself—applies to redemptions in all respects. It merely interpreted and applied the meaning of the term "settlement payment" in Section 546(e), holding that, because there is no purchase-or-sale requirement on the face of the statute defining *that* term, it extends to redemptions of securities. *See Enron*, 651 F.3d at 336-37. That holding, however, does not extend to the "securities contract" prong of Section 546(e), as "securities contract" is defined separately.[6] In fact, if anything, the *Enron* decision actually supports Appellant's argument rather than "destroy[ing]" it, *Quebecor*, 453 B.R. at 212 n.7, as the case stands for the proposition that Section 546(e) and the definitional provisions incorporated therein should be interpreted according to their plain terms. *See* 651 F.3d at 339 (declining to address legislative history and bankruptcy policy arguments). That is, to the extent relevant here, Section 741(7) *does* include a purchase-or-sale requirement, as it expressly defines "securities contract" to mean a contract "for the purchase, sale, or loan" of a security. 11 U.S.C. § 741(7)(A)(i). "[L]ooking to the statute's plain language," as *Enron* instructs, 651 F.3d at 339, it follows that the definition of "securities contract" is limited to contracts "for the purchase, sale, or loan of

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[6] Moreover, the "securities contract" prong of Section 546(e) was only added to the statute in 2006, five years after Enron filed its Chapter 11 petition. *See* Financial Netting and Improvement Act, Pub. L. No. 109-360 (2006).

a security" and does not extend to contracts for the redemption of a security, as the Bankruptcy Court held.

Nevertheless, for different reasons, this Court concludes that the payments at issue do in fact qualify as transfers in connection with a securities contract. *See, e.g.*, *Freeman v. Journal Register Co.*, 452 B.R. 367, 369 (S.D.N.Y. 2010) (noting that a district court, on appeal from a bankruptcy court, "may affirm on any ground that finds support in the record, and need not limit its review to the bases raised or relied upon in the decisions below"). That is because, as it was ultimately structured, the transaction at issue was in fact a "purchase" (or "repurchase") of the Notes rather than a "redemption." To be sure, QWCC initially sent a "Notice of Redemption" to the Noteholders stating that, on October 29, 2007, it intended to "redeem" in full all outstanding Notes under Section 8.2 of the NPA. (*E.g.*, JA-23 Exs. B5-11 at 16). Prior to that date, however, QWI decided for tax reasons to restructure the deal as a "purchase" of the Notes by QWUSA, which it was permitted to do pursuant to Section 8.6 of the NPA. (Appellant's Br. at 11-12). Thus, on October 25, 2007, QWUSA provided notice to the Noteholders that it would pay the "Redemption Price" set forth in the earlier Notice of Redemption, which would "result in QWUSA purchasing the Notes." (*E.g.*, JA-23 Exs. B12-18 at 1).[7] QWUSA's

[7] Strictly speaking, although the amended notices stated that QWUSA was purchasing the Notes pursuant to Section 8.2 of the NPA, that provision governs redemptions by QWI. Section 8.6 allowed QWI or an affiliate such as QWUSA to purchase the

"purchase" was indisputably made "in connection with" the NPA—specifically, it was made pursuant to Sections 8.2 and 8.6 of the NPA—and the NPA plainly qualifies as a contract. Further, for the reasons stated above, the transfers at issue were made to a financial institution, namely CIBC.

Thus, the transfer at issue was a "transfer made by to (or for the benefit of) a . . . financial institution . . . in connection with a securities contract." 11 U.S.C. § 546(e).[8]

Notes "(a) upon the payment or prepayment of . . . the Notes in accordance with the terms of this Agreement and the Notes or (b) pursuant to an offer to purchase made . . . pro rata to the holders of all Notes at the time outstanding at the same time and upon the same terms and conditions." (JA-23 Exs. A1, A2 § 8.6). The fact that the amended notice cited Section 8.2 rather than Section 8.6, however, does not change the essential fact that the deal was ultimately structured as a purchase. Nor does the fact—emphasized by Appellants (Appellant's Br. at 23)—that some Noteholders treated the transaction as a redemption rather than a purchase, by, for example, stamping "PAID IN FULL" on the Notes returned to QWI.

[8] It could be argued that the transfers qualify for the safe harbor whether or not they were redemption or purchase payments because, either way, they were made in connection with the NPA and the NPA qualifies as a "securities contract" because it governed the *initial* purchase of the Notes from QWI. After all, on its face, Section 546(e) requires only that the transfer be made "in connection with a securities contract," defined as a contract that governs the purchase or sale of a security; it does not require that the transfer be made in connection with the purchase or sale itself. Moreover, as courts in this district have explained, "[i]t is proper to construe the phrase 'in connection with' broadly to mean 'related to.'" *In re Lehman Bros. Holdings Inc.,* 469 B.R. 415, 442 (Bankr. S.D.N.Y. 2012). In light of the conclusion above, however, the Court need not reach this argument.

CONCLUSION

For the reasons discussed above, the order of the Bankruptcy Court is AFFIRMED. The Clerk of Court is directed to close this case.

SO ORDERED.

Dated: September 28, 2012
New York, New York

JESSE M. FURMAN
United States District Judge

Appendix C

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

Chapter 11
Case No. 08-10152 (JMP)
(Jointly Administered)

IN RE QUEBECOR WORLD (USA) INC., ET AL.,

Debtors.

Adversary Proceeding No. 08-01417 (JMP)

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

Plaintiff,

v.

AMERICAN UNITED LIFE INSURANCE COMPANY, ET AL.,

Defendants.

Filed: July 27, 2011

MEMORANDUM DECISION GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDMENT

JAMES M. PECK
United States Bankruptcy Judge

Introduction

Defendants in their motion for summary judgment (the "Motion") contend that prepetition payments totaling approximately $376 million received from Quebecor World (USA) Inc. ("QWUSA", and with its various debtor and non-debtor affiliates, "Quebecor") during the preference period are exempt from avoidance as a matter of law by virtue of section 546(e) of title 11 of the United States Code (the "Code"). The question presented calls for examination of this "safe harbor" provision with particular emphasis on the proper application of the term "settlement payment" as defined in section 741(8) of the Code[1] when used in reference to a repurchase and subsequent cancellation of privately-placed notes.

Deciding this question requires careful consideration of the recent opinion of the Court of Appeals for the Second Circuit in *In re Enron Creditors Recovery Corp. v. Alfa, S.A.B. de C.V.*, __ F. 3d __, 2011 WL 2536101 (2d Cir. June 28, 2011) ("*Enron*").[2] Judge Walker, writing for the *Enron* majority, concluded that prepetition payments made by Enron to redeem its commercial paper prior to

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[1] The definition itself is not particularly helpful and brings to mind Gertrude Stein's often quoted tautological reference to the essential nature of a rose. It provides as follows: "'settlement payment' means a preliminary settlement payment, a partial settlement payment, an interim settlement payment, a settlement payment on account, a final settlement payment, or any other similar payment commonly used in the securities trade." 11 U.S.C. § 741(8). In short, a "settlement payment" is a settlement payment.

[2] *Enron* was issued on June 28, 2011 following the completion of briefing and argument on the Motion.

maturity constituted "settlement payments" within the meaning of the safe harbor of section 546(e). By looking to the statute's plain language, the opinion concludes that payments made to redeem commercial paper constitute the transfer of cash made to complete a securities transaction and thus are protected settlement payments as defined in section 741(8). In a separate dissenting opinion, Judge Koeltl disagreed with the majority, observing that the holding is not required by the opaque definition of "settlement payment" in section 741(8) and that the breadth of the decision potentially could threaten routine avoidance proceedings.

The matter before the Court is an example of litigation that, as Judge Koeltl anticipated in his dissent, is threatened due to the broad impact of this controlling precedent. As a result of the guidance provided by the *Enron* decision, the Court no longer needs to evaluate conflicting testimony regarding usage of the term "settlement payment" within the private placement sector of the securities industry or to decide whether the prepetition transfers of value to the defendants should be characterized as a redemption of private placement notes rather than a repurchase.

That distinction, to the extent it once had significance, no longer matters, and the analytical task for the Court has been simplified by precedent making clear that the transfers at issue in this litigation fit the statutory definition of settlement payments and may not be avoided. For the reasons stated in this decision, the prepetition payments made to the defendants are settlement payments

that qualify for safe harbor treatment under section 546(e) of the Code because they involve a transfer of cash to complete a securities transaction, and the defendants, therefore, are entitled to entry of summary judgment in their favor.

Preliminary observations regarding immunity from preference exposure under section 546(e)

The "safe harbor" sections of the Code were enacted to exempt certain specified financial contracts from the reach of the automatic stay and the avoidance powers of the Code. These immunities are intended to contain the spread of economic contagion and protect the markets from systemic risk. The safe harbors, including the settlement payment exemption that is the focus of this decision, are a means to override bankruptcy remedies that ordinarily would be used to pursue the recovery of prepetition payments that are exposed to preference risk. As a policy matter, Congress has declared that when the securities markets are involved, it is better not to disturb certain prepetition transfers than it is to collect assets for equitable distribution to creditors.

This litigation illustrates the tension that exists between an exemption that promises full immunity from preference exposure for settlement payments and the broader objective of the Code to collect assets for the benefit of all unsecured creditors. The ability to avoid such payments is ingrained in the notion of fairness in bankruptcy. The pursuit of preference litigation is an established mechanism to add value to the estate and to equalize recoveries among similarly-situated creditors by redistributing the

recovered payments to creditors within the same class.

The complaint in this adversary proceeding brought by the Official Committee of Unsecured Creditors of Quebecor World (USA) Inc. (the "Committee" or "Plaintiff") seeks to recover approximately $376 million paid to the defendant institutional holders (the "Noteholders" or "Defendants") of private placement notes (the "Notes"). It is undisputed that these substantial payments were made by QWUSA to the Noteholders on October 29, 2007 within the ninety-day period before the date that Quebecor's Canadian affiliates commenced insolvency proceedings in the Superior Court of Quebec and QWUSA and its U.S. subsidiaries filed companion chapter 11 cases in the Southern District of New York. The Defendants deny any liability to return the prepetition payments and claim total immunity from all preference exposure under the authority of section 546(e).

Interestingly, neither Quebecor nor the Noteholders appears to have relied on the existence of safe harbors in structuring either their original Note purchase transaction or the transaction that resulted in the repurchase of the Notes.[3] This started as a relatively routine private financing transaction

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[3] Certain of the safe harbors are geared to specific financial contracts (for example, a repurchase agreement or a swap agreement). Parties to such contracts know at the time of entering into them that the subject transactions are covered by an applicable safe harbor and are protected from bankruptcy risks. Such agreements are structured and priced with that immunity in mind.

in which the Noteholders advanced unsecured credit to Quebecor under terms of a note purchase agreement. Years later, at a time when Quebecor's financial condition had deteriorated, the Noteholders agreed to work together in their shared economic interest, demanded and accepted payments that even included a "make-whole" amount in consideration of cancellation of their Notes and then went through a period of watchful waiting after receiving payment in full from Quebecor. The safe harbor defense appears to have been identified only after the fact in anticipation of litigation. Thus, the situation presented here is an example of behavior that the law generally would seek to discourage (ganging up on a vulnerable borrower to obtain clearly preferential treatment in the months leading up to a bankruptcy) rather than reward with the grant of complete immunity from having to return any portion of payments that are exposed to preference challenges.

Similarly situated creditors represented by the Committee have participated in the bankruptcy process and have been relegated to percentage distributions from Quebecor under a confirmed plan of reorganization amounting to only a fraction of their allowed claims while the Noteholders have reaped the benefits of an unimpaired total return. It is only natural that the Committee seeks to restore the now-disputed payments to the estate.

Purely from an equitable perspective, the disparity in relative recoveries between the Noteholders and Quebecor's other creditors almost cries out for a remedy *unless* the payments fall

within an appropriately more favored category of transfers that logically fits the definition of settlement payments under the Code. *Enron* clarifies the process of classifying these payments and compels the conclusion that the payments made by Quebecor on the private placement Notes are substantially the same as the redemption payments that were found to be settlement payments in *Enron.*

The Committee tries hard to distinguish what has become indistinguishable as a result of the holding of the majority opinion in *Enron*. Certainly there are some differences. The repurchase of the private placement Notes by QWUSA was rather informal from a settlement perspective, especially when compared with a typical trade of public securities that clears through the Depository Trust Company (the "DTC") in which cash is paid for securities as part of a substantially simultaneous exchange of value.

The repurchase or redemption of the Notes was different and involved unilateral payments made by QWUSA to all of the Noteholders in consideration of their return of the Notes for cancellation at some point thereafter. The arrangements lacked a strict settlement protocol for ensuring that the Notes were being delivered in a timely and disciplined manner as a condition to receiving payment. Payments were made by QWUSA on the same date directly to a financial institution that was acting as agent for the Noteholders without passing through the DTC or any other clearing agency while the Notes were delivered later, in certain instances weeks or months later.

As the Committee's expert witness has explained, settlement risk relating to the exchange of cash for securities was not part of the transaction because each of the Noteholders received its payments directly and simultaneously without attention to the timing of delivery of the Notes that were being repurchased by QWUSA. That explanation, however, is not part of the definition of settlement payment under *Enron* and has been neutralized as a distinguishing characteristic by that holding.

The transactional differences are worth noting but are only of marginal importance. They are variations in the details of the settlement process that distinguish the note repurchase and cancellation procedures followed in Quebecor from the open market redemption of commercial paper in *Enron*, but these are distinctions without a real difference in light of the holding of the *Enron* majority that focuses on the generally applicable statutory language rather than specific procedures that may be involved in a particular securities transaction.

The majority opinion leaves no room for doubt that the payments made to the Noteholders are settlement payments because, consistent with the plain language of the Code, they involve the transfer of cash to complete a securities transaction. The test has become quite simple and all-encompassing and does not lend itself easily to the formulation of nuanced exceptions. In this instance, the transaction was completed by the payment of cash followed by the delivery of securities rather than by means of a simultaneous exchange of cash for securities. That

timing difference does not alter the fundamental character of what inescapably is a securities transaction. As explained in more detail in the following sections, the transfers in question are settlement payments protected under section 546(e) and may not be avoided.

Relevant Facts and Procedural History

Quebecor was at one time the second-largest commercial printing business in North America. *See* Declaration of Dina R. Kaufman in Support of Defendants' Motion for Summary Judgment, dated Nov. 1, 2010, Adv. Pro. 08-01417, ECF Nos. 36-41 (together, the "Kaufman Decl."), Ex. C1 (Declaration of Jeremy Roberts Pursuant To Local Bankruptcy Rule 1007-2 and in Support of the Debtors' Petitions and First Day Motions) ¶¶ 7, 9. QWUSA was the company's principal subsidiary in the United States. *Id.* ¶ 8. QWUSA oversaw cash management, operations, and employee matters for Quebecor's printing facilities in the United States. *Id.*

I. Issuance of the Notes

In July 2000, another Quebecor entity, Quebecor World Capital Corp. ("QWCC") raised $371 million by issuing a series of private notes comprised of (i) $175 million in Series A senior notes and $75 million in Series B senior notes issued pursuant to that certain Note Purchase Agreement dated July 12, 2000, and (ii) $91 million in Series C senior notes and $30 million in Series D senior notes pursuant to that certain Note Purchase Agreement dated September 12, 2000 (together, the Series A, B, C and D notes constitute the Notes). *See* Kaufman Decl. Ex. A1 (July 12, 2000 Note Purchase Agreement), Ex. A2

(September 12, 2000 Note Purchase Agreement) (together, the "Note Purchase Agreement"). The Notes were issued through a private placement to a group composed primarily of insurance company investors. The $371 million raised by the issuance of the Notes was transferred within the Quebecor corporate family, with the funds ultimately being advanced to QWUSA. *See* Kaufman Decl. Ex. C2 (Ernst & Young, Inc., 11th Report of the Monitor, dated July 21, 2008) ¶ 93. QWUSA and Quebecor World Inc. ("QWI") guaranteed the payment obligations under the Notes. *See* Note Purchase Agreement § 2.2.

Several provisions of the Note Purchase Agreement are relevant to this litigation. Most critically, section 8.2 permits QWCC to prepay all or part of the Notes at any time for any reason. *See* Note Purchase Agreement § 8.2 ("Upon notice as provided below, the Company shall have the privilege at any time and from time to time of prepaying all or any part of the Notes … "). Section 8.6 appears to permit an affiliate of QWCC to "purchase, redeem, [or] prepay" the Notes from the Noteholders. *See id.* § 8.6 ("The Parent Corporation will not and will not permit any Affiliate … to purchase, redeem, prepay … any series of the outstanding Notes … except (a) upon the payment or prepayment of each series of the Notes in accordance with the terms of this Agreement…"). Section 8.7, in turn, defines the make-whole premium (the "Make-Whole Premium") to be paid to the Noteholders in connection with a prepayment of the Notes under section 8.2. *See id.* § 8.7 ("The term 'Make-Whole Amount' means, with respect to any Note, an amount equal to the excess, if

any, of the Discounted Value of the Remaining Scheduled Payments with respect to the Called Principal of such Note over the amount of such Called Principal …"). Following such a prepayment, section 8.5 provides that "[a]ny Note paid or prepaid in full shall be surrendered to the Company and cancelled and shall not be reissued, and no Note shall be issued in lieu of any prepaid principal amount of any Note." *Id.* § 8.5. Section 11.4 recognized the possibility that a prepayment could be avoided under the Code as a preferential transfer. *See id.* § 11.4 ("[should a payment on the notes be] subsequently … declared to be fraudulent or preferential … the obligation … shall be revived and continued in full force and effect with respect to [QWI's] obligations hereunder, as if said payment had not been made …").

Importantly, the Note Purchase Agreement contains a negative covenant that QWI, as the parent company of QWUSA and QWCC, would not permit its quarter-end debt-to-capitalization ratio to exceed 55% after December 31, 2000 (the "Capitalization Covenant"). *See id.* § 10.1 ("*Leverage Ratio.* (a) [Subject to exception], the Parent Corporation will not at any time permit the ratio of Consolidated Indebtedness to Consolidated Total Capitalization to exceed … (ii) .55 to 1.00 as of the last day of any fiscal quarter ending after December 31, 2000") (italics in original). Section 12, in turn, provides that a breach of the Capitalization Covenant constitutes an event of default under the Note Purchase Agreement. *Id.* § 12(c) ("An '*Event of Default*' shall exist if any of the following conditions or events shall occur and be continuing: … (c) the Parent

Corporation defaults in the performance of or compliance with any term contained in [s]ections 10.1 through 10.4 …") (italics in original). Section 13 provides that an event of default arising from a breach of the Capitalization Covenant[4] could render the Notes immediately due and owing to the Noteholders. *Id.* § 13.1(b) ("*Acceleration* … (b) If any other Event of Default has occurred and is continuing, any holder or holders of more than 50% in principal amount of the Notes at the time outstanding may at any time at its or their option … declare all the Notes then outstanding to be immediately due and payable") (italics in original).

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[4] Some confusion exists as to whether a breach of the Capitalization Covenant would have immediately accelerated the maturity of the Notes or would have simply permitted the Noteholders to declare an early maturity. Notwithstanding the plain language of sections 12 and 13 of the Note Purchase Agreement, Quebecor and the Committee's counsel interpret the Note Purchase Agreement to provide that a breach of the Capitalization Covenant would have immediately accelerated the maturity of the Notes. *See, e.g.,* Declaration of Erin S. Levin In Opp. To Defendants' Mot. For Summary Judgment, dated Nov. 23, 2010, Adv. Pro. 08-01417, ECF No. 60 (the "Levin Decl.") Ex. 9 (Internal Quebecor Mem. dated June 29, 2007) ("A breach of [the Capitalization Covenant] *would trigger immediate repayment* of the $316.5M …") (emphasis added); Plaintiff's Mem. of Law In Opp'n to Defendants' Mot. for Summary Judgment, dated Nov. 23, 2010, Adv. Pro. 08-01417, ECF No. 60 (the "Response") ("The debt-to-capitalization covenant was critical because section 13 of the Note Purchase Agreements provided that if QWI breached the covenant, then all of the outstanding Private Notes … *would be immediately due and owing* to the Noteholders") (emphasis added). The distinction is immaterial to the legal issue presented by the adversary proceeding and does not impact this decision.

II. The Disputed Transfer

QWI and QWUSA were borrowers under a credit agreement with a syndicate of banks as lenders and Royal Bank of Canada as Administrative Agent for a revolving credit facility in the aggregate amount of $1 billion. *See* Kaufman Decl. Ex. A3 (Amended and Restated Credit Agreement, dated as of Dec. 15, 2005) (as amended, the "Credit Agreement"). Among its other provisions, the Credit Agreement contains a "cross-default" provision providing that acceleration of the maturity of the Notes arising from a breach of the Capitalization Covenant in the Note Purchase Agreement would constitute a breach of the Credit Agreement. *See* Credit Agreement § 15.1.8 (the "Cross-Default Provision"). Because of the Cross-Default Provision, the Noteholders were able to exercise considerable leverage as Quebecor's financial condition worsened in mid-2007, and, due to an impending breach of the Capitalization Covenant in the Note Purchase Agreement, were in a position to destabilize Quebecor's capital structure. *See* Levin Decl. Ex. 9 (Internal Quebecor Mem. dated June 29, 2007). To lower its debt-to-capitalization ratio and avoid breaching the Capitalization Covenant, Quebecor initiated a partial tender offer to the Noteholders on August 3, 2007. *See* Kaufman Decl. Ex. B2 (Offer to Purchase and Consent Solicitation) (the "Partial Tender Offer"). Under this Partial Tender Offer, Quebecor offered to purchase 50.1% of the outstanding Notes upon the participating Noteholders' consent to amend the Capitalization Covenant in the Note Purchase Agreement to raise the permissible debt-to-capitalization ratio from 55% to 65%. *See id.*

On August 15, 2007, the Noteholders executed that certain noteholder cooperation agreement memorializing their intent to reject the Partial Tender Offer. *See* Levin Decl. Ex. 13 (the "Noteholder Cooperation Agreement"); Kaufman Decl. Ex. B3 (Letter from Debevoise & Plimpton LLP, counsel to the Noteholders) (rejecting Partial Tender Offer). That same day, the Noteholders also entered into that certain right of first refusal agreement, whereby the Noteholders agreed to provide each holder with a right of first refusal prior to selling any Notes outside of the then-existing group of Noteholders. *See* Levin Decl. Exs. 14, 15 (the "Right of First Refusal Agreement").

After the failure of the Partial Tender Offer, QWI's financial condition continued to deteriorate. On September 28, 2007, QWUSA and QWI entered into an amendment to the Credit Agreement. *See* Kaufman Decl. Ex. A5 (Fourth Amending Agreement to the Amended and Restated Credit Agreement). Among other changes, this amendment immediately reduced the maximum amount available under the credit facility to $750 million, waived any default under the Cross-Default Provision, and permitted Quebecor to draw on its line of credit under the credit facility for purposes of redeeming the Notes. *Id.* §§ 2.2, 3.2, 3.4.

That same day, QWCC sent each Noteholder a notice of redemption designating October 29, 2007 as the date on which it would redeem all outstanding Notes pursuant to section 8.2 of the Note Purchase Agreement. *See* Kaufman Decl. Ex. B7 (Notice of Redemption dated Sept. 28, 2007) (the "Redemption

Notice") ¶ 1 ("Pursuant to Section 8.2 of each of the Note Purchase Agreements … [QWCC] has called for redemption on October 29, 2007 …"). The Redemption Notice further instructed the Noteholders to mail the canceled Notes directly to QWI's headquarters in Montreal. *Id*. ¶ 4 ("Upon your receipt of the Redemption Price for the Notes that you hold … please surrender such Notes for cancellation, pursuant to Section 8.5 of the Note Purchase Agreements, to [QWCC] at the address set forth below: 612 Saint-Jacques Street, Montreal, Quebec, Canada, H3C 4M8 …").

For corporate tax reasons, QWCC thereafter assigned its obligation to make the redemption payment to QWUSA, and QWUSA agreed to "purchase" the Notes and then surrender the Notes to QWCC for "cancellation." *See* Kaufman Decl. Ex. A6 (Assignment and Assumption Agreement dated as of September 28, 2007) ¶ 3 ("*Purchase and Cancellation of the Notes*. [QWCC] and [QWUSA] agree that upon payment of the Redemption Price by [QWUSA] the Notes will be purchased [by QWUSA] … following the payment of the Redemption Price the Notes will be surrendered to [QWCC] for cancellation pursuant to section 8.5 of the Note Purchase Agreements … ") (emphasis in original). QWUSA then informed the Noteholders that the "Redemption Price will be paid by [QWUSA] … This will result in the purchase of the Notes by [QWUSA]" and provided the Noteholders with an attached certificate describing its calculation of the Make-Whole Premium. *See* Kaufman Decl. Ex. B12 (Untitled notice from QWUSA dated Oct. 25, 2007).

On October 29, 2007, the agent under the Credit Agreement wired approximately $426 million to QWUSA's main operating account at Bank of America, N.A. ("Bank of America"). *See id*. Ex. B21 (E-mail chain dated Oct. 29, 2007 between employees of Quebecor and agent) (confirming wire transfer). Bank of America then wired approximately $376 million of this amount to CIBC Mellon Trust Co. ("CIBC Mellon"), the trustee for the Notes (the "Disputed Transfer"). *Id.* Ex. B13 (Bank of America internal report recording a transfer of $376,298,061.81 to an account at CIBC Mellon). CIBC Mellon, in turn, wired to each Noteholder its portion of that amount. *Id.* Ex. D1 (Transcript of deposition of Roland Ribotti, dated Mar. 24, 2010) (the "Ribotti Dep. Tr.") 210:1-212:21. The Disputed Transfer consisted of approximately $316 million in principal, $6 million in accrued interest, and $53 million in Make-Whole Premium. *Id.* Ex. B18 (E-mail chain dated Oct. 25, 2007 with employees of Quebecor showing calculation of accrued interest and Make-Whole Premium).

The Noteholders subsequently surrendered the Notes by mailing them directly to QWI's Montreal headquarters. *See, e.g., id.* Ex. D7 (Transcript of deposition of Peter Pulkkinen, dated July 10, 2009) 156:15-157:4 (testifying that Deutsche Bank A.G., a Noteholder, returned the Notes by federal express to "some entity in Canada"); Ribotti Dep. Tr. 166:1-12. Although this was a requirement of the transaction, compliance was lax. Several Noteholders did not immediately mail the Notes and instead waited days, or in certain instances, months before mailing the Notes to Montreal as instructed. *See, e.g.*, Decl. of

Ben Vance in Support of Motion of Defendants for Summary Judgment, dated Oct. 28, 2010 (Provident Investment Management, LLC), Adv. Pro. 08-01417, ECF No. 58 ¶ 11 (stating that Notes were not mailed until "on or about" April 4, 2008); Decl. of Michael Bullock in Support of Motion of Defendants for Summary Judgment, dated Oct. 23, 2010 (American United Life Insurance Company), Adv. Pro. 08-01417, ECF No. 42 ¶ 11 (stating that Notes were not mailed until "on or about" November 16, 2007).

In the period immediately following the Disputed Transfer, at least some Noteholders expressed concern that a chapter 11 filing by Quebecor could result in the avoidance of the Disputed Transfer as a preferential transfer. *See, e.g.,* Levin Decl. Ex. 50 (Transcript of deposition of Nicholas Griffiths of Noteholder Barclays, dated Aug. 13, 2009) 161:7-163:15 (recalling conversations with other Noteholders anxious about potential preference exposure); *Id.* Ex. 47 (E-mail chain between Peter Pulkkinen of Deutsche Bank and Michael Bullock of One America Financial Partners, dated Jan. 21, 2008) (expressing concern over potential preference exposure).

III. The Chapter 11 cases

On January 20, 2008, QWI, QWUSA, and their affiliates filed for protection under the Canadian Companies' Creditors Arrangement Act in the Superior Court in Montreal. *See* Initial Order, dated Jan. 21, 2008, issued by the Honorable Robert Monjeon, J.S.C. of the Quebec Superior Court of Justice, attached as Ex. B to the Notice of Filing, Case No. 08-10152, ECF No. 31. The next day,

QWUSA and a number of its affiliates filed for protection under chapter 11 in the United States Bankruptcy Court for the Southern District of New York. *See* Voluntary Petition dated Jan. 21, 2008, Case No. 08-10152, ECF No. 1.

Thereafter, the Committee commenced this action to avoid and recover the Disputed Transfer and disallow the Defendants' claims (as subsequently amended, the "Amended Compl."). *See* Amended Compl., dated Feb. 10, 2009, Adv. Pro. 08-01417, ECF No. 8 (Counts I-III). On February 11, 2009, the Court approved a stipulated protective order between the parties requiring that any discovery material designated as "highly confidential" or "confidential" be filed with the Court under seal.[5] *See* Stipulated Protective Order, Adv. Pro. 08-01417, ECF No. 9, ¶¶ 8-11. On October 29, 2010, the Defendants filed the Motion under seal pursuant to the stipulated protective order. *See* Motion, Adv. Pro. 08-01417, ECF No. 34.

After extensive briefing, the Court heard oral argument on the Motion on January 19, 2011 and

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[5] In retrospect, the Court now questions whether the parties truly needed to designate so many of the documents in this litigation as "confidential". The Court believes that these designations were used here excessively and that it was not necessary to file so many of the pleadings under seal. The parties are directed to meet and confer with the objective of formulating a further stipulation that will lead to an unsealing of those pleadings that are still subject to the Stipulated Protective Order with such redactions as may be needed to preserve genuine confidentiality concerns.

held a limited evidentiary hearing[6] on May 4 and 5, 2011 (the "Evidentiary Hearing"). Following the Evidentiary Hearing, the parties provided supplemental submissions. *See* Plaintiff's Post Hearing Mem. in Opp'n to Defendants' Mot. for Summary Judgment, dated June 10, 2011, Adv. Pro. 08-01417, ECF No. 76; Defendants' Post-Hearing Brief, dated June 10, 2011, Adv. Pro. 08-01417, ECF No. 77 (the "Noteholders' Post-Hearing Brief").

On June 28, 2011, after submission by the parties of their respective post-hearing briefs, the Second Circuit issued the *Enron* decision interpreting section 546(e) of the Code in reference to the redemption of commercial paper. In light of that development, at the Court's request, on July 13, 2011, the parties provided additional letter briefs addressing *Enron* and its impact on the issues presented.

Standard

Summary judgment is appropriate when there is "no genuine dispute as to any material fact," such that the moving party is entitled to "judgment as a matter of law." *See* Fed. R. Civ. P. 56(a). In evaluating a motion for summary judgment, the court must resolve ambiguities and draw all

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[6] At the Evidentiary Hearing, the Court heard live testimony from the Committee's expert witness (Professor Jonathan R. Macey), two of the Defendants' fact witnesses (Michael Bullock, Vice President of American United Life Insurance Company and Mark Ponder, Managing Director, Wells Fargo Securities LLC), and the Defendants' expert witness (Christopher T. Nicholls, Senior Managing Director, FTI Consulting, Inc. and FTI Capital Advisors).

inferences against the moving party. *See Coach Leatherware Co., Inc. v. AnnTaylor, Inc.*, 933 F.2d 162, 167 (2d Cir. 1991) (citations omitted). In determining whether to grant a motion for summary judgment, the court is not to "weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

At oral argument on the Motion, the Court determined that the Evidentiary Hearing should be scheduled to further explore and develop facts and expert testimony relevant to "the Court's exercise of discretion to construe the term 'settlement payment' … for purposes of [section] 546(e) [of the Code]." 1/19/11 Tr. 82:6-15 (Peck, J.). Although expert witnesses called by the parties offered conflicting opinions as to whether the Disputed Transfer should be construed as a settlement payment, the facts are not in dispute, and it is appropriate to determine the legal issues under the summary judgment standard.

It is appropriate to resolve a dispute over the legal application of a safe harbor provision in the context of a dispositive motion such as a motion for summary judgment. *See, e.g., Contemporary Indus. Corp. v. Frost*, 564 F.3d 981 (8th Cir. 2009) (affirming a lower court's granting of summary judgment in a section 546(e) safe harbor dispute). Indeed, concluding as a general matter that all safe harbor disputes must proceed to trial would effectively undermine the objective of legal certainty in securities transactions that motivated Congress' adoption of the safe harbor provisions. *See, e.g.,*

Kaiser Steel Corp. v. Charles Schwab & Co., 913 F.2d 846, 849 (10th Cir. 1990) (noting that Congress intended the safe harbor to minimize instability and displacement) (quotation omitted).

Discussion

The Disputed Transfer may not be avoided as a preference because it constitutes a "settlement payment" made to a "financial institution" as those terms are used within section 546(e) of the Code.[7]

I. Section 546(e) of the Code

In this litigation, the Committee seeks to avoid the Disputed Transfer as a preferential transfer under section 547 of the Code. Section 547(b) provides that the trustee of a bankruptcy estate may recover, among other things, money or property

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[7] In addition to being a "settlement payment" exempt from avoidance, the Disputed Transfer also qualifies as a safe-harbored "transfer made by or to (or for the benefit of) a … financial institution … in connection with a securities contract, as defined in section 741(7) …" *See* 11 U.S.C. § 546(e). Given the comprehensive language used to define the term "securities contract" in section 741(7) of the Code (*i.e.*, "a contract for the purchase, sale, or loan of a security …"), the Note Purchase Agreement is a contract that qualifies as a "securities contract" for purposes of this alternative statutory ground. Plainly, the Disputed Transfer was made "in connection with" the Note Purchase Agreement, notwithstanding the Plaintiff's position that the clause should be interpreted as requiring that a transfer "be made in connection with *the purchase, sale, or repurchase* [*i.e.,* not the redemption] of a security." *See* Response pp. 29-33 (emphasis in original). *Enron* makes clear that the safe harbor applies to redemptions and has destroyed that argument. Thus, the Disputed Transfer also is exempt from avoidance under section 546(e) because it is a transfer made in connection with a securities contract.

transferred by an insolvent debtor in the ninety days preceding bankruptcy, where the transfer (1) was made to or for the benefit of a creditor; (2) was made for or on account of an antecedent debt owed by the debtor; and (3) enabled the creditor to receive more than it otherwise would have under the provisions of the Code. *See* 11 U.S.C. § 547(b).

Section 546(e), for purposes of the Disputed Transfer, carves out a limited exception to section 547(b):

> Notwithstanding section[] … 547 … of this title, [which empowers the trustee to avoid preferential transfers,] the trustee may not avoid a transfer that is a … settlement payment, as defined in section … 741 of this title, made by or to (or for the benefit of) a … financial institution … that is made before the commencement of the case …

11 U.S.C. § 546(e). Section 741(8) defines a "settlement payment" as "a preliminary settlement payment, a partial settlement payment, an interim settlement payment, a settlement payment on account, a final settlement payment, or any other similar payment commonly used in the securities trade." 11 U.S.C. § 741(8).

In determining that the transfer in question qualifies for the exemption, the Court must find that a "settlement payment" has been made to a "financial institution." Despite attempts by the Committee to disregard the undisputed involvement of a financial institution, without question the Disputed Transfer was "made by or to (or for the benefit of) a … financial institution," *i.e.*, CIBC Mellon as trustee for

the Notes.[8] The greater analytical challenge involves finding whether the Disputed Transfer properly fits the definition of a "settlement payment" for purposes of section 546(e).[9]

II. Enron resolved significant uncertainty by clarifying the meaning of "settlement payment" for purposes of section 546(e) of the Code

The uncertainty surrounding the definition of "settlement payment" in section 741(8) of the Code is readily apparent and has been the subject of extensive recent litigation. Litigants seeking to claim bankruptcy immunities have attempted to ascertain the outer boundaries of these ostensibly broad

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[8] CIBC Mellon, a "financial institution," was the immediate recipient of the Disputed Transfer. *See* Noteholders' Supplemental Brief Concerning the Second Circuit's *Enron* Decision, dated July 13, 2011, Adv. Pro. 08-01417, ECF No. 80, p.8. The Committee argues that CIBC Mellon was a mere "conduit" for funds, however, and that the Noteholders should be deemed the true recipients for purposes of satisfying the "financial institution" requirement of section 546(e). *See* Response pp. 33-36. The Court rejects this argument because the plain language of section 546(e) only requires payment to a "financial institution" without any qualification as to the capacity of that recipient.

[9] In addition to arguing that the entire amount of the Disputed Transfer is safe harbored from avoidance by section 546(e), the Noteholders also contend that, in any event, approximately $241 million of the $376 million Disputed Transfer is protected from avoidance under the earmarking doctrine. *See* Motion pp. 25-28. Because the entire Disputed Transfer is a "settlement payment" for purposes of section 546(e) under the controlling precedent of the majority opinion in *Enron,* it is unnecessary for the Court to address this alternative argument.

provisions and have asked courts to construe section 546(e) to insulate from avoidance certain transactions that would appear to fall outside the most obvious boundaries of the Code's safe harbor regime. *Compare, e.g., QSI Holdings, Inc. v. Alford (In re QSI Holdings, Inc.)*, 571 F.3d 545 (6th Cir. 2009) (declining to limit section 546(e) to the context of publicly traded securities), *with, e.g., Buckley v. Goldman, Sachs & Co.*, 2005 U.S. Dist. LEXIS 9626 (D. Mass. May 20, 2005) (finding LBO payments outside of the scope of section 546(e)).

A very recent bankruptcy court decision by my colleague Judge Robert Drain reviewed the legislative history of section 546(e) and declined to extend the protection of "settlement payments" to relatively inconsequential private transactions that, if avoided, would have only a modest impact on the broader securities markets. *See Geltzer v. Mooney (In re MacMenamin's Grill, Ltd.)*, Adv. Pro. 09-8266, 2011 Bankr. LEXIS 1461 (Bankr. S.D.N.Y. Apr. 21, 2011) ("*MacMenamin*").

In *MacMenamin*, a trustee sought to avoid three payments, each in an amount exceeding $300,000, made to individual owners of a bar and grill as part of a private leveraged buyout. The shareholder defendants moved for summary judgment, arguing that the payments were exempt from avoidance as "settlement payments" under section 546(e) of the Code. Judge Drain began by noting that the context of section 546(e) "is in fact tied to the securities markets" and is intended to address the "business of engaging in securities transfers." *Id.* at *18-20. Given this context, he concluded that the plain text of

section 741(8) was "circular" and "unhelpful" and referred to the legislative history of section 546(e) to better understand the statute's meaning. *Id.* at *19-20, 30-31. That legislative history demonstrates that Congress intended section 546(e) to shield from avoidance transfers that involve an "entity in its capacity as a participant in any securities market" or that "pose any danger to the functioning of any securities market." *Id.* at *31. According to *MacMenamin*, the statutory safe harbor scheme created by Congress aims to reduce systemic risk to the financial markets—an objective that is not threatened by the avoidance of such a small scale private stock transaction. *See id.* at *13.

Unlike the bankruptcy court in *MacMenamin*, however, the Second Circuit in *Enron* ruled that courts construing section 546(e) need not examine its legislative history in light of its unambiguous plain language. In that case, the Second Circuit considered whether pre-petition payments made by Enron to retire unsecured commercial paper prior to its maturity were avoidable as preferential transfers. The payments redeeming the commercial paper were funneled to individual holders through certain broker-dealers via their respective accounts at the DTC. Enron commenced the adversary proceeding before the bankruptcy court to avoid and recover the redemption payments as preferential and constructively fraudulent transfers under sections 547 and 548 of the Code. The bankruptcy court found that the redemption by Enron of its commercial paper did not fall within the safe harbor of section 546(e). *In re Enron Creditors Recovery Corp.*, 407 B.R. 17 (Bankr. S.D.N.Y. 2009). The district court

reversed. *In re Enron Creditors Recovery Corp.*, 422 B.R. 423 (S.D.N.Y. 2009).

On appeal, Enron argued that the redemption payments did not constitute "settlement payments" protected by section 546(e) because (i) the final phrase of the definition in section 741(8) encompassing payments "commonly used in the securities trade" does not apply to unusual redemption payments, (ii) that definition applies only to purchase-and-sale transactions that, unlike the redemption payments, involve a transfer of title to securities, and (iii) the redemption payments do not implicate the policy concerns underlying the safe harbor provisions because the payments were not "cleared" through a systemically-critical financial intermediary such as the DTC. *Enron,* 2011 WL 2536101, at *6.

The Second Circuit rejected each of these arguments and limited its analysis to the plain language of section 741(8) of the Code. First, it concluded that the unique nature of the redemption payments does not render them ineligible from being "settlement payments" because "the grammatical structure" of section 741(8) "strongly suggests that the phrase 'commonly used in the securities trade' modifies only the term immediately preceding it …" *Id.* at *6. Second, the Court declined to adopt a rule excluding redemption payments from the definition of "settlement payment" under section 741(8), concluding instead that neither the statute nor case law requires payment to be made in connection with a purchase or sale. *Id.* at *7-8. Third, the Court held that a payment may qualify for safe harbor

protection even if not cleared through a financial intermediary. *Id.* at *9.

These determinations made by the Second Circuit, taken together, clarify the safe harbor protection available under section 546(e) and resolve uncertainty as to the meaning of the term "settlement payment." The practical effect of the opinion is to make it more difficult for a plaintiff such as the Committee to maintain a viable cause of action for avoidance in relation to prepetition transfers made to complete a transaction involving a security. Because the definition of the term "security" in section 101(49) of the Code covers such a long list of debt and equity instruments, the impact of the decision on avoidance actions may be quite far reaching.[10]

III. The Disputed Transfer is exempt from avoidance as a "settlement payment" under section 546(e)

The *Enron* opinion has significantly influenced the Court's deliberations. The reasoning adopted by the majority blunts the effectiveness of many of the Committee's legal arguments in opposition to the Motion. Of particular importance in deciding the Motion is the clarity and consistency that has been given to the term "settlement payment." The gloss to the meaning provided by the Court of Appeals does not depend upon an examination and interpretation of the legislative history, does not restrict application

[10] Section 101(49)(B)(vii) excludes from the definition of security "debt or evidence of indebtedness for goods sold and delivered or services rendered." This means that the decision in *Enron* has no effect on preference litigation involving trade creditors.

of this safe harbor provision to purchases and sales of securities and does not require a formal settlement process as advocated by the Committee. The definition in the Code may be self-referential and circular, but the direction given by the *Enron* majority with respect to that definition is both uncomplicated and crystal clear—a settlement payment, quite simply, is a "transfer of cash … made to complete [a] securities transaction." *Enron,* 2011 WL 2536101, at *9 (quotations omitted).

Under this easy-to-apply formulation, the Court concludes that the Disputed Transfer qualifies for the exemption under section 546(e). The transaction in question involves three elements that together support this conclusion—(i) the transfer by QWUSA of cash (ii) to a financial institution that was acting as agent for the Noteholders (iii) made to repurchase and cancel securities, *i.e.*, to complete a securities transaction. The first part of the formulation—that the "settlement payment" be a "transfer of cash"—is demonstrated by the wiring of funds from QWUSA to CIBC Mellon. The second required component, consistent with section 546(e), is that the transfer be made to a financial institution. This requirement is satisfied by the involvement of CIBC Mellon, a financial institution, in receiving the Disputed Transfer. The third element is present because the cash was transferred for securities in "completion" of the transaction.

The Notes are expressly defined as securities in the Code. *See* 11 U.S.C. § 101(49)(A)(i) ("The term 'security'— (A) includes— (i) note …"). The repurchase of the Notes was the means chosen by

Quebecor to complete what in essence is the redemption of the Notes. The transaction, therefore, is comparable to the redemption of commercial paper that occurred in *Enron*. QWUSA made the Disputed Transfer in connection with the "completion" of a transaction to cancel its own outstanding securities that it both structured and executed. *Enron,* 2011 WL 2536101, at *7-9 (holding that Enron's redemption of commercial paper constituted the "completion" of a securities transaction).

A. Implicit systemic significance

The elements of the transaction summarized above do not entail any consideration of the benefits to the securities markets associated with finding this immunity from avoidance liability. In that respect, this is a formula that appears to embrace every qualifying transfer that completes a securities transaction regardless of any systemic significance. Implicit in the *Enron* definition of settlement payment is the concept that the securities markets are benefited by protecting all settled trades of securities from avoidance and preserving the finality of these completed trades.

Although it is not necessary to consider the impact of avoidance of a claimed settlement payment on the securities markets, the Court of Appeals in *Enron* did view the redemption of commercial paper held by two hundred investors to be a public market transaction with the potential to be systemically significant. For that reason, the opinion includes the comment that the result would have been the same even if the Court had taken into consideration Congressional intent in enacting this safe harbor.

Enron, 2011 WL 2536101, at *9. This context (*i.e.*, the recognition that the transaction in question fits within the spectrum of systemic consequences) is not an essential part of the holding of the Second Circuit.

Accordingly, even though the legislative history points to the policy objective of protecting the securities markets, a transfer will still qualify for exemption from avoidance under the language of section 546(e) without having to show anything more than that the transfer in question was made to a financial institution to complete a securities transaction. Thus, while systemic significance may have been implicit in the facts presented to the *Enron* court, this Court does not need to consider context or to find an impact on the securities markets in applying the *Enron* definition.

Even though an examination of context and market impact is not required, the Court is satisfied that the payments made by QWUSA to the Noteholders come within both the letter and spirit of the exemption and that systemic consequences could be demonstrated if that were necessary. The Noteholders were participants in a secondary market in which private placement investments regularly traded. They impacted that market by entering into the Noteholder Cooperation Agreement and the Right of First Refusal Agreement that constrained their trading in the secondary market in connection with the proposed redemption of the Notes. Moreover, Quebecor itself at the time of the Disputed Transfer was a vast multi-national, multi-billion dollar business enterprise and was the second-largest commercial printer in North America with significant

operations in Europe. Its customers included many of the world's largest publishers of magazines and catalogues. Although not a financial participant itself, Quebecor was large enough to be a source of significant financial exposure to its lenders, the Noteholders and other financial counterparties.

Congress enacted section 546(e) "to minimize the displacement caused in the commodities and securities markets in the event [of] a major bankruptcy affecting those industries," and "to prevent the ripple effect created by the insolvency of one commodity or security firm from spreading to other firms and possibly threatening the collapse of the affected industry." *Official Comm. of Unsecured Creditors v. Lattman (In re Norstan Apparel Shops, Inc.)*, 367 B.R. 68, 76 (Bankr. E.D.N.Y. 2007) (citations and internal quotation marks omitted). That policy continued to motivate the 2006 Amendments to section 546(e), which aimed to "help reduce systemic risk in the financial markets." H.Rep. 109-648 (Part I) at 1.

From the perspective of Quebecor, the repurchase of the Notes was part of a survival strategy calculated to prevent a breach of the Capitalization Covenant contained in the Note Purchase Agreement. Any breach of the Capitalization Covenant, in turn, could have led to the acceleration of the maturity of the Notes and a corresponding breach of the Cross-Default Provision in the Credit Agreement. In short, Quebecor made the Disputed Transfer at a time when it had limited options to forestall the collapse of its entire capital structure. While not systemically significant in the

sense of protecting the financial markets, the Disputed Transfer was a significant transaction that benefited Quebecor and helped it to achieve financial stability for a period of time and was also most significant from the perspective of the Noteholders who received hundreds of millions of dollars in exchange for their Notes.

Given the sheer size of the transaction with the Noteholders, the repurchase by Quebecor of its private Notes more closely resembles the public commercial paper redemptions considered by the Court of Appeals in *Enron* than the small, private transfer considered in *MacMenamin*. The Noteholders themselves, a group primarily consisting of large financial institutions, are customary participants in the secondary market for private placement notes in which holdings routinely are traded from one institution to another.[11] This market is unregulated but still active and systemically significant in its own right. The Disputed Transfer is not a secondary market transfer between institutions, and any impact on this market from avoiding the Disputed Transfer is speculative and

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[11] It is instructive, although not dispositive, that some of the Noteholders, as experienced participants in the market for private placement notes, considered the Disputed Transfer to be an unscheduled "settlement." *See, e.g.*, 5/4/11 Tr. 32:5-7 (Bullock); *Id.* at 108:24-109:12 (Ponder). The expectations of market participants such as the Noteholders are important factors in determining the scope of activity that should be protected by the safe harbor provisions of the Code, including section 546(e). *See* 1/19/11 Tr. 16:11-18 (Peck, J.) (Safe harbors "are to function in part based upon the way in which market participants would expand a definition through practice").

hard to quantify. However, regardless of any measurable market impact that may be shown, the scale of the repurchase by Quebecor of the private Notes necessarily places the Disputed Transfer in a category that differs from the one discussed by Judge Drain in *MacMenamin* and brings it more closely into alignment with the commercial paper transactions considered by the Court of Appeals in *Enron*. The Disputed Transfer is sufficiently material in amount as to be potentially significant from a systemic point of view, and avoiding a transaction such as this conceivably could impact the original issue or secondary markets for private placement indebtedness.

However, not all transfers that fit the *Enron* definition of a settlement payment involve this much money or a business enterprise of such obvious importance in its relevant market. One of the challenges in applying the *Enron* holding on a case-by-case basis is that the definition may extend protection to transfers that Congress never intended to immunize and may lead to unintended consequences. Because the pronouncement regarding the definition of settlement payment is so general in its application (as noted by the dissent with reference to the impact on recovering preferential payments of unsecured loans), does not advert to Congressional intent (except to say that to do so would not change the result) and applies to any qualifying transfer, even one with no demonstrated connection to the securities markets (*e.g.*, *MacMenamin*), the difficult question becomes how properly to draw the line as to those transfers that should and should not be exempt from avoidance.

Under the *Enron* construction of the term settlement payment, every transfer of cash to a financial institution for a security to complete a securities transaction within ninety days prior to commencement of a bankruptcy filing is exempt from avoidance liability, even, it seems, a transfer such as the one at issue in *MacMenamin*. Implicit in this formulation is the unstated premise that an unwinding of the transaction will negatively impact the securities markets. Additional cases regarding the extent and scope of the 546(e) exemption may lead to further clarifications regarding the scope of this safe harbor provision, particularly in instances involving relatively small private transactions having no foreseeable impact on the securities markets.

B. Comparing the Circumstances in Enron with those in Quebecor

Given the general application of the *Enron* holding discussed above, the differences in settlement procedures that distinguish the repurchase of the Notes from the commercial paper redemption in *Enron* are no longer meaningful factors in deciding the Motion. Nonetheless, the Court will address these differences. Quebecor and Enron followed different procedures when transferring cash for securities. *See* Plaintiff's Supplemental Brief, dated July 13, 2011, Adv. Pro. 08-01417, ECF No. 79. Quebecor, for its part, wired the Disputed Transfer directly to the trustee for the Noteholders without involving any clearing agency or formal settlement system.[12] In that respect, the

[12] Notwithstanding the Noteholders' arguments to the contrary, the role of CIBC Mellon as trustee for the Notes does

repurchase of the Notes did not implicate traditional notions of settlement risk. The Noteholders received payment regardless of the timing of delivery of their Notes for cancellation. The commercial paper redemption in *Enron*, on the other hand, involved brokers and the DTC acting as an intermediary or conduit to facilitate the settlement of trades by approximately two hundred separate investors in the commercial paper market.

The Committee repeatedly has stressed these factual differences in its briefs and at the Evidentiary Hearing. The Committee's expert witness, Professor Jonathan Macey of Yale Law School, examined the process followed by Quebecor to repurchase its Notes and expressed the opinion that (i) there was no settlement risk involved in this process and (ii) the payments in question were not settlement payments as understood within the securities industry. He stated that central clearing agencies typically are engaged in settling securities trades to reduce systemic financial risk inherent in securities transactions between counterparties. *See* 5/5/11 Tr. 56:4-8 (Macey) (centralized clearing agencies evolved

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not resemble that of a true intermediary for purposes of exposure to settlement risk. *See* Noteholders' Post-Hearing Brief pp. 5-6 (the Disputed Transfer "was made to CIBC Mellon … in its capacity as an intermediary…"); *Id.* at 21 ("[CIBC Mellon] performed services for the Noteholders similar to those of a clearing agency"). The commercial reality is that CIBC Mellon simply received the wire transfer in its capacity as trustee and then made individual payments to each Noteholder. CIBC Mellon dealt solely with the cash side of the transaction and had no role with respect to the Notes that were to be surrendered by the Noteholders to Quebecor for cancellation.

to reduce "the risk that somebody will buy securities and pay their money, and the securities will never show up, or vice versa, someone will deliver the securities and the money won't show up"); *Id.* at 58:13-15 (Macey) ("the more that settlement can become centralized, the more we can reduce systemic risk").

As explained by Professor Macey, the use of the term "settlement payment" in section 546(e) of the Code describes the "process," usually occurring through a central intermediary such as the DTC, by which "securities are delivered against payment in connection with a securities transaction."[13] According to Professor Macey, such a "settlement process" is an essential component of a "settlement payment" because the process essentially serves to mitigate the same risk that led to the adoption by Congress of the safe harbor in the first place, namely, the risk that a

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[13] 5/5/11 Tr. 55:18-22, 57:15-20 (Macey). Macey's testimony was consistent with his prior testimony as an expert on behalf of defendant Goldman, Sachs & Co. in *In re Enron Creditors Recovery Corp.*, 407 B.R. 17 (Bankr. S.D.N.Y. 2009), *rev'd*, 422 B.R. 423 (S.D.N.Y. 2009), *aff'd Enron*. In that case, Macey testified that a series of payments from Enron to Goldman constituted "settlement payments" for purposes of section 546(e). The Noteholders have criticized Macey's testimony in the present litigation as being inconsistent with his prior testimony in *Enron*. *See* Noteholders' Post-Hearing Brief p. 16. As Macey explained at the Evidentiary Hearing, however, the transfers in *Enron* were "settlement payments" because, unlike the Disputed Transfer, he understood them to involve a classic "delivery versus payment" settlement structure. 5/5/11 Tr. 70:5-71:12 (Macey). Under the *Enron* holding "delivery versus payment" may be part of the structure of a settlement payment but is not a requirement.

party to a securities transaction could fail to receive the benefit of its bargain. *See* 5/5/11 Tr. 55:23-56:22 (Macey).

In the wake of *Enron*, however, such arguments that seek to categorize the Disputed Transfer as something other than a "settlement payment" on the basis of an unusual or atypical delivery process are no longer persuasive. Simply put, Professor Macey's views on the subject have been superseded by the majority opinion in *Enron* that relies on the plain language of the Code and explicitly rejects the position espoused by the Committee that a transfer may only qualify as a "settlement payment" if it passes through a financial intermediary serving as a clearing agency. *See Enron,* 2011 WL 2536101, at *9. In so ruling, the Second Circuit agreed with several recent decisions by other Courts of Appeals that addressed the issue. *Id.* at *9; *Brandt v. B.A. Capital Co. L.P. (In re Plassein Int'l Corp.)*, 590 F.3d. 252, 257-59 (3d Cir. 2009) (holding that a transfer in connection with a private leveraged buyout was a "settlement payment" notwithstanding lack of a true "settlement process" involving a clearinghouse intermediary); *In re QSI Holdings, Inc.*, 571 F.3d at 549-50 (6th Cir. 2009) (same); *Contemporary Indus. Corp. v. Frost*, 564 F.3d 981, 985-86 (8th Cir. 2009) (same).

The cumulative effect of this consistent circuit authority is to remove from consideration any mandated set of procedures or participants and to focus instead on applying the literal language of the statutory exemption to the facts presented. Departures from certain common settlement

procedures in the securities industry (*e.g.*, the absence of an intermediary) are not critical provided that the transfer at issue satisfies the definition of a settlement payment that completes a securities transaction.

Conclusion

The ruling in *Enron* effectively eliminates the need for any inquiry into the legislative history of section 546(e) or close attention to any distinguishing circumstances relating to settlement risk associated with the Disputed Transfer. Stripped to its most essential facts, the Disputed Transfer involved the "completion" of a securities transaction by Quebecor in which the Notes were repurchased and canceled (effectively redeemed) and cash was paid to a single financial institution as paying agent for the Noteholders with the proceeds to be subsequently distributed to each of them. Such a transfer fits the definition of a "settlement payment" and is protected from avoidance by section 546(e) of the Code. Therefore, the Motion is granted, and counsel for the Noteholders is directed to submit an order consistent with this decision granting the Motion and entering judgment in favor of the Defendants.

Dated: New York, New York
July 27, 2011

s/James M. Peck
Honorable James M. Peck
United States Bankruptcy Judge

Appendix D

Relevant Statutes

11 U.S.C. § 546

Limitations on avoiding powers

(a) An action or proceeding under section 544, 545, 547, 548, or 553 of this title may not be commenced after the earlier of—

(1) the later of—

(A) 2 years after the entry of the order for relief; or

(B) 1 year after the appointment or election of the first trustee under section 702, 1104, 1163, 1202, or 1302 of this title if such appointment or such election occurs before the expiration of the period specified in subparagraph (A); or

(2) the time the case is closed or dismissed.

(b) (1) The rights and powers of a trustee under sections 544, 545, and 549 of this title are subject to any generally applicable law that—

(A) permits perfection of an interest in property to be effective against an entity that acquires rights in such property before the date of perfection; or

(B) provides for the maintenance or continuation of perfection of an interest in property to be effective against an entity that acquires rights in such property before the date on which action is taken to effect such maintenance or continuation.

(2) If—

(A) a law described in paragraph (1) requires seizure of such property or commencement of an action to accomplish such perfection, or maintenance or continuation of perfection of an interest in property; and

(B) such property has not been seized or such an action has not been commenced before the date of the filing of the petition;

such interest in such property shall be perfected, or perfection of such interest shall be maintained or continued, by giving notice within the time fixed by such law for such seizure or such commencement.

(c) (1) Except as provided in subsection (d) of this section and in section 507(c), and subject to the prior rights of a holder of a security interest in such goods or the proceeds thereof, the rights and powers of the trustee under sections 544(a), 545, 547, and 549 are subject to the right of a seller of goods that has sold goods to the debtor, in the ordinary course of such seller's business, to reclaim such goods if the debtor has received such goods while insolvent, within 45 days before the date of the commencement of a case under this title, but such seller may not reclaim such goods unless such seller demands in writing reclamation of such goods—

(A) not later than 45 days after the date of receipt of such goods by the debtor; or

(B) not later than 20 days after the date of commencement of the case, if the 45-day period expires after the commencement of the case.

(2) If a seller of goods fails to provide notice in the manner described in paragraph (1), the seller still may assert the rights contained in section 503(b)(9).

(d) In the case of a seller who is a producer of grain sold to a grain storage facility, owned or operated by the debtor, in the ordinary course of such seller's business (as such terms are defined in section 557 of this title) or in the case of a United States fisherman who has caught fish sold to a fish processing facility owned or operated by the debtor in the ordinary course of such fisherman's business, the rights and powers of the trustee under sections 544(a), 545, 547, and 549 of this title are subject to any statutory or common law right of such producer or fisherman to reclaim such grain or fish if the debtor has received such grain or fish while insolvent, but—

(1) such producer or fisherman may not reclaim any grain or fish unless such producer or fisherman demands, in writing, reclamation of such grain or fish before ten days after receipt thereof by the debtor; and

(2) the court may deny reclamation to such a producer or fisherman with a right of reclamation that has made such a demand only if the court secures such claim by a lien.

(e) 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.

(f) Notwithstanding sections 544, 545, 547, 548(a)(1)(B), and 548(b) of this title, the trustee may not avoid a transfer made by or to (or for the benefit of) a repo participant or financial participant, in connection with a repurchase agreement and that is made before the commencement of the case, except under section 548(a)(1)(A) of this title.

(g) Notwithstanding sections 544, 545, 547, 548(a)(1)(B) and 548(b) of this title, the trustee may not avoid a transfer, made by or to (or for the benefit of) a swap participant or financial participant, under or in connection with any swap agreement and that is made before the commencement of the case, except under section 548(a)(1)(A) of this title.

(h) Notwithstanding the rights and powers of a trustee under sections 544(a), 545, 547, 549, and 553, if the court determines on a motion by the trustee made not later than 120 days after the date of the

order for relief in a case under chapter 11 of this title and after notice and a hearing, that a return is in the best interests of the estate, the debtor, with the consent of a creditor and subject to the prior rights of holders of security interests in such goods or the proceeds of such goods, may return goods shipped to the debtor by the creditor before the commencement of the case, and the creditor may offset the purchase price of such goods against any claim of the creditor against the debtor that arose before the commencement of the case.

(i) (1) Notwithstanding paragraphs (2) and (3) of section 545, the trustee may not avoid a warehouseman's lien for storage, transportation, or other costs incidental to the storage and handling of goods.

(2) The prohibition under paragraph (1) shall be applied in a manner consistent with any State statute applicable to such lien that is similar to section 7–209 of the Uniform Commercial Code, as in effect on the date of enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, or any successor to such section 7–209.

(j) Notwithstanding sections 544, 545, 547, 548(a)(1)(B), and 548(b) the trustee may not avoid a transfer made by or to (or for the benefit of) a master netting agreement participant under or in connection with any master netting agreement or any individual contract covered thereby that is made before the commencement of the case, except under section 548(a)(1)(A) and except to the extent that the trustee could otherwise avoid such a transfer made under an

individual contract covered by such master netting agreement.

11 U.S.C. § 547

Preferences

(a) In this section—

(1) "inventory" means personal property leased or furnished, held for sale or lease, or to be furnished under a contract for service, raw materials, work in process, or materials used or consumed in a business, including farm products such as crops or livestock, held for sale or lease;

(2) "new value" means money or money's worth in goods, services, or new credit, or release by a transferee of property previously transferred to such transferee in a transaction that is neither void nor voidable by the debtor or the trustee under any applicable law, including proceeds of such property, but does not include an obligation substituted for an existing obligation;

(3) "receivable" means right to payment, whether or not such right has been earned by performance; and

(4) a debt for a tax is incurred on the day when such tax is last payable without penalty, including any extension.

(b) Except as provided in subsections (c) and (i) of this section, the trustee may avoid any transfer of an interest of the debtor in property—

(1) to or for the benefit of a creditor;

(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

(3) made while the debtor was insolvent;

(4) made—

(A) on or within 90 days before the date of the filing of the petition; or

(B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and

(5) that enables such creditor to receive more than such creditor would receive if—

(A) the case were a case under chapter 7 of this title;

(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

(c) The trustee may not avoid under this section a transfer—

(1) to the extent that such transfer was—

(A) intended by the debtor and the creditor to or for whose benefit such transfer was made to be a contemporaneous exchange for new value given to the debtor; and

(B) in fact a substantially contemporaneous exchange;

(2) to the extent that such transfer was in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee, and such transfer was—

(A) made in the ordinary course of business or financial affairs of the debtor and the transferee; or

(B) made according to ordinary business terms;

(3) that creates a security interest in property acquired by the debtor—

(A) to the extent such security interest secures new value that was—

(i) given at or after the signing of a security agreement that contains a description of such property as collateral;

(ii) given by or on behalf of the secured party under such agreement;

(iii) given to enable the debtor to acquire such property; and

(iv) in fact used by the debtor to acquire such property; and

(B) that is perfected on or before 30 days after the debtor receives possession of such property;

(4) to or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave new value to or for the benefit of the debtor—

(A) not secured by an otherwise unavoidable security interest; and

(B) on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor;

(5) that creates a perfected security interest in inventory or a receivable or the proceeds of either, except to the extent that the aggregate of

all such transfers to the transferee caused a reduction, as of the date of the filing of the petition and to the prejudice of other creditors holding unsecured claims, of any amount by which the debt secured by such security interest exceeded the value of all security interests for such debt on the later of—

(A) (i) with respect to a transfer to which subsection (b)(4)(A) of this section applies, 90 days before the date of the filing of the petition; or

(ii) with respect to a transfer to which subsection (b)(4)(B) of this section applies, one year before the date of the filing of the petition; or

(B) the date on which new value was first given under the security agreement creating such security interest;

(6) that is the fixing of a statutory lien that is not avoidable under section 545 of this title;

(7) to the extent such transfer was a bona fide payment of a debt for a domestic support obligation;

(8) if, in a case filed by an individual debtor whose debts are primarily consumer debts, the aggregate value of all property that constitutes or is affected by such transfer is less than $600; or

(9) if, in a case filed by a debtor whose debts are not primarily consumer debts, the aggregate value of all property that constitutes or is affected by such transfer is less than $5,000.

(d) The trustee may avoid a transfer of an interest in property of the debtor transferred to or for the benefit of a surety to secure reimbursement of such a surety that furnished a bond or other obligation to dissolve a judicial lien that would have been avoidable by the trustee under subsection (b) of this section. The liability of such surety under such bond or obligation shall be discharged to the extent of the value of such property recovered by the trustee or the amount paid to the trustee.

(e) (1) For the purposes of this section—

(A) a transfer of real property other than fixtures, but including the interest of a seller or purchaser under a contract for the sale of real property, is perfected when a bona fide purchaser of such property from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest that is superior to the interest of the transferee; and

(B) a transfer of a fixture or property other than real property is perfected when a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the transferee.

(2) For the purposes of this section, except as provided in paragraph (3) of this subsection, a transfer is made—

(A) at the time such transfer takes effect between the transferor and the transferee, if such transfer is perfected at, or within 30 days after, such time, except as provided in subsection (c)(3)(B);

(B) at the time such transfer is perfected, if such transfer is perfected after such 30 days; or

(C) immediately before the date of the filing of the petition, if such transfer is not perfected at the later of—

(i) the commencement of the case; or

(ii) 30 days after such transfer takes effect between the transferor and the transferee.

(3) For the purposes of this section, a transfer is not made until the debtor has acquired rights in the property transferred.

(f) For the purposes of this section, the debtor is presumed to have been insolvent on and during the 90 days immediately preceding the date of the filing of the petition.

(g) For the purposes of this section, the trustee has the burden of proving the avoidability of a transfer under subsection (b) of this section, and the creditor or party in interest against whom recovery or avoidance is sought has the burden of proving the nonavoidability of a transfer under subsection (c) of this section.

(h) The trustee may not avoid a transfer if such transfer was made as a part of an alternative repayment schedule between the debtor and any creditor of the debtor created by an approved nonprofit budget and credit counseling agency.

(i) If the trustee avoids under subsection (b) a transfer made between 90 days and 1 year before the date of the filing of the petition, by the debtor to an

entity that is not an insider for the benefit of a creditor that is an insider, such transfer shall be considered to be avoided under this section only with respect to the creditor that is an insider.

11 U.S.C. § 550

Liability of transferee of avoided transfer

(a) Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b), or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from—

(1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or

(2) any immediate or mediate transferee of such initial transferee.

(b) The trustee may not recover under section (a)(2) of this section from—

(1) a transferee that takes for value, including satisfaction or securing of a present or antecedent debt, in good faith, and without knowledge of the voidability of the transfer avoided; or

(2) any immediate or mediate good faith transferee of such transferee.

(c) If a transfer made between 90 days and one year before the filing of the petition—

(1) is avoided under section 547(b) of this title; and

(2) was made for the benefit of a creditor that at the time of such transfer was an insider;

the trustee may not recover under subsection (a) from a transferee that is not an insider.

(d) The trustee is entitled to only a single satisfaction under subsection (a) of this section.

(e) (1) A good faith transferee from whom the trustee may recover under subsection (a) of this section has a lien on the property recovered to secure the lesser of—

(A) the cost, to such transferee, of any improvement made after the transfer, less the amount of any profit realized by or accruing to such transferee from such property; and

(B) any increase in the value of such property as a result of such improvement, of the property transferred.

(2) In this subsection, "improvement" includes—

(A) physical additions or changes to the property transferred;

(B) repairs to such property;

(C) payment of any tax on such property;

(D) payment of any debt secured by a lien on such property that is superior or equal to the rights of the trustee; and

(E) preservation of such property.

(f) An action or proceeding under this section may not be commenced after the earlier of—

(1) one year after the avoidance of the transfer on account of which recovery under this section is sought; or

(2) the time the case is closed or dismissed.