21-487-cv

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CITIBANK, N.A.,
Plaintiff-Appellant,
v.

BRIGADE CAPITAL MANAGEMENT, LP, ET AL.,
BRIGADE CAPITAL MANAGEMENT, LP, HPS INVESTMENT PARTNERS, LLC, SYMPHONY ASSET MANAGEMENT LLC, BARDIN HILL LOAN MANAGEMENT LLC, GREYWOLF LOAN MANAGEMENT LP, ZAIS GROUP LLC, ALLSTATE INVESTMENT MANAGEMENT COMPANY, MEDALIST PARTNERS CORPORATE FINANCE LLC, TALL TREE INVESTMENT MANAGEMENT LLC, NEW GENERATION ADVISORS LLC,
Defendants-Appellees,

INVESTCORP CREDIT MANAGEMENT US LLC, HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS LP,
Defendants

On Appeal from the United States District Court
for the Southern District of New York, No. 20-cv-6539 (Furman, J.)

BRIEF FOR *AMICUS CURIAE* SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Amicus curiae has no parent corporation. No publicly held corporation owns more than ten percent of stock in *amicus*.

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INTEREST OF *AMICUS CURIAE*[1]

The Securities Industry and Financial Markets Association ("SIFMA") is a securities industry trade association that represents the interests of hundreds of securities firms, banks, and asset managers. SIFMA is also the United States regional member of the Global Financial Markets Association.

SIFMA's mission is to support a strong financial industry, while promoting investor opportunity, capital formation, job creation, economic growth, and trust and confidence in the financial markets. To further that mission, SIFMA regularly files *amicus curiae* briefs in cases such as this one that raise issues of vital concern to its members and to the industry as a whole.

[1] The parties to this appeal have consented to the filing of this brief. Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), amicus states that no party's counsel authored this brief in whole or in part, and that no party or person other than amicus or its counsel contributed money toward the preparation or filing of this brief.

INTRODUCTION

If a party receives a transfer of money as a result of a mistake, under New York law that party is required to return the money in most circumstances. In *Banque Worms v. BankAmerica International*, 77 N.Y.2d 362 (1991), the New York Court of Appeals adopted a narrow exception to that principle in a case in which the mistakenly transferred sum was in fact due from an obligor to the recipient on the very day of the transfer and the recipient provided "value" in discharging the underlying debt, thus justifying the recipient's retention of the money.

In the decision below, the district court professed itself to be bound by that decision, and by the federal court decisions in the *Banque Worms* matter, to apply the so-called "discharge for value" exception in a case in which the mistakenly transferred money was not presently due to be paid and the recipients took no action to discharge the underlying debt for value by crediting the debtor's account. The district court was wrong. *Banque Worms* does not dictate that result, and nothing in the reasoning of that decision justifies the district court's unwarranted expansion of the discharge-for-value exception. In particular, the district court over-weighted the policy interest in the finality of transactions—which, while significant, is only one of many important policy considerations and cannot justify the scope of the exception that the district court adopted.

Because the district court changed New York law rather than simply applying it, the court's decision destabilizes significantly the procedures governing wire transfers and other transfers of money, and if left undisturbed is likely to have serious negative consequences. The court's expanded application of the discharge-for-value exception would increase the costs of transfers, thus giving rise to various forms of economic harm, without eliminating the possibility that mistakes in transferring funds will continue to occur. It would create disuniformity in the law across various jurisdictions, which is especially problematic given the cross-jurisdictional nature of wire transfers and the very high volume of such transactions. And it would give opportunistic actors an opening to engage in commercially unreasonable behavior in the hopes of being granted a windfall: money in their pockets to which they have no present entitlement and to which other entities have a much stronger claim.

For all of those reasons, this Court should reverse.

ARGUMENT

I. The District Court's Interpretation of *Banque Worms* Is Overbroad

A. *Banque Worms* Does Not Support The District Court's Conclusion That The Discharge-For-Value Exception Applies When The Debt Is Not Yet Due Or When The Recipient Of The Funds Has Taken No Action To Discharge The Debt

According to the district court, the decision of the New York Court of Appeals in *Banque Worms v. BankAmerica International*, 77 N.Y.2d 362 (1991), compels the conclusion that defendants are entitled to keep the money that Citibank erroneously transferred to them. In the district court's view, the discharge-for-value exception discussed in *Banque Worms*, which displaces in certain limited circumstances the background principle that a transferring party is entitled to the return of erroneously transferred funds, necessarily applies even though (1) Revlon had no present obligation to pay the relevant amounts to the defendants, *In re Citibank August 11, 2020 Wire Transfers*, 2021 WL 606167, at *3 (S.D.N.Y. Feb. 16, 2021) (explaining that the principal of the Revlon loan was not due, at the earliest, until well after the money at issue here was transferred), and (2) the defendants took no action on receipt of the money to discharge Revlon's debt for value—that is, to provide value in exchange for the money by wiping any debt off of their books.

That understanding of New York law is incorrect. *Banque Worms* cannot be read to dictate application of the discharge-for-value exception where a debt to the recipient of mistakenly transferred funds is not presently due or where the recipient did not take action to discharge the debt for value. In fact, the district court expanded the reach of the decision in *Banque Worms* considerably, to cover ground that the New York Court of Appeals never contemplated. That expansion significantly and unjustifiably restricts the default legal rule, which requires a return of mistakenly transferred funds where such a return makes the transferor whole and leaves the transferee exactly where it bargained to be—that is, no worse off than it was before the mistaken transfer occurred.

1. *New York law on return of mistakenly transferred money*. As *Banque Worms* explains, New York law provides as a general matter that the recipient of mistakenly transferred money must return it to the transferor except in limited circumstances in which the recipient has "changed its position to its detriment . . . so that requiring that it refund the money paid would be 'unfair.'" 77 N.Y.2d at 366 (citation omitted); *see* 2021 WL 606167, at *1-2; *see also, e.g.*, UCC § 4-A-303(1) ("The bank is entitled to recover from the beneficiary of the erroneous order the excess payment received to the extent allowed by the law governing mistake and restitution."). That mistake-of-fact rule reflects bedrock principles of unjust enrichment and restitution, which operate to avoid the unfairness of a windfall that occurs because of an error. It is therefore not surprising that many of the entities to which Citibank mistakenly transferred money on August 11, 2020, returned that money when notified of Citibank's mistake—and that even some of the defendants here were initially inclined to follow that course of action. *See* 2021 WL 606167, at *8-9; Citibank Pre-Trial Br. 17; Citibank Pretrial Reply Br. 1, 12.

In *Banque Worms*, the New York Court of Appeals answered a question certified to it by this Court about the applicability of a limited exception to that general rule: the discharge-for-value exception.[2] In that case, as a result of a mistaken transfer "a beneficiary receive[d] money to which it [wa]s entitled," because the money was due and payable on the very day of the transfer, and also "ha[d] no knowledge that the money was erroneously wired." 77 N.Y. 2d at 373. The court concluded that the recipient had given "value" for the money—by discharging the debt that the money repaid—and therefore was not required to return the money to the transferor. The court relied in part on Restatement (First) of Restitution § 14(1), which states that "[a] creditor of another . . . who has received . . . any benefit in discharge of the debt" may retain mistakenly transferred funds. *Id.* at 367 (quoting Restatement (First) of Restitution § 14(1)); *see also* Restatement (Third) of Restitution and Unjust Enrichment § 62 (2011).

2. *The district court's misinterpretation of* Banque Worms. Contrary to the district court's analysis, *Banque Worms* does not resolve this case in defendants' favor. Rather, the district court's reading of *Banque Worms* is an overbroad one that expands beyond recognition the narrow discharge-for-value exception set forth in that decision.

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[2] In that matter, a federal district court ruled for Banque Worms; this Court then certified the discharge-for-value question to the New York Court of Appeals; and, after receiving the New York court's answer to the certified question, this Court ruled for Banque Worms.

First, *Banque Worms* does not hold that a transferee with no present entitlement to mistakenly transferred money is entitled to keep that money. In that case, Banque Worms received mistakenly transferred money from a bank (Security Pacific) and was told that the money constituted a payment by an entity that had a commercial relationship with Banque Worms (Spedley). The receipt of the money was not a surprise to Banque Worms, because Spedley was obligated to pay that very amount of money to Banque Worms on that very day. *See Banque Worms v. BankAmerica Int'l*, 928 F.2d 538, 539-40 (2d Cir. 1991) ("Banque Worms sent a telex to Spedley indicating it would not renew the agreement and demanding payment of the outstanding debt on April 10, 1989, the due date. . . . At 11:30 a.m. [on April 10, 1989,] . . . Security Pacific mistakenly wire transferred $1,974,267.97 . . . for the account of Banque Worms.").

There is thus no question that the disputed money was "money to which" Banque Worms was "entitled," 77 N.Y. 2d at 373, and not simply money to which it was going to become entitled at some point in the future. Indeed, this Court has understood *Banque Worms* in exactly that way, explaining that "[i]n *Banque Worms,* the New York Court of Appeals applied the 'discharge for value' rule to allow the recipient of a mistakenly sent payment order to retain the funds in discharge of a debt *already owed* the recipient by the sender." *Banca Commerciale Italiana, New*

York Branch v. N. Tr. Int'l Banking Corp., 160 F.3d 90, 94 (2d Cir. 1998) (emphasis added).

The New York Court of Appeals' decision did not reach beyond the facts before that court to opine about whether the discharge-for-value rule might displace the normal restitution rule in a situation in which a party *not* presently entitled to payment receives money well before it is due to be paid. *See generally Cohens v. Virginia*, 19 U.S. 264, 399 (1821) (Marshall, J.). That is particularly apparent given the narrow and highly fact-based nature of the question that this Court certified to the New York Court of Appeals, which asked "[w]hether *in this case*, where a concededly mistaken wire transfer by [Security Pacific] was made to [Banque Worms], a creditor of Spedley, New York would apply the 'Discharge for Value' rule . . . or, in the alternative, whether *in this case* New York would apply the rule that holds that money paid under a mistake may be recovered." *Banque Worms*, 77 N.Y.2d at 366 (emphasis added).

Moreover, the situation presented in the instant case involves a host of significant considerations not present in *Banque Worms*. A transferee that has a present entitlement to be paid money may be less on its guard against the possibility that a transfer constitutes a mistake, since there may be reason in that circumstance to believe that the payment is an intended one. In addition, a transferee with a present entitlement may well have a strong claim to the money. After all, if the obligor were properly fulfilling its obligations, the money would already be in the transferee's hands. *See generally* Andrew Burrows, *Restitution of Mistaken Enrichments*, 92 B.U. L. Rev. 767, 774-79 (2012). But where, as here, a payment is made before it is due, there may well be others whose entitlement is far stronger—for instance, parties who are, in fact, presently owed the money in question or to whom the money otherwise rightfully belongs. Accordingly, application of the discharge-for-value rule in those circumstances is in significantly greater tension with the background legal rule requiring restitution of mistakenly transferred money. *Amicus* is not aware of any decision (other than the decision below) in which the discharge-for-value exception has been applied where the recipient was not presently entitled to such money—and lack of such entitlement therefore should be the end of the inquiry.

In ruling to the contrary, the district court did not identify any statement in *Banque Worms* that the discharge-for-value exception should apply when a mistaken transfer occurs before any payment to the recipient of a mistaken transfer is due. Rather, the district court relied primarily on its assessment that "the Second Circuit and the New York Court of Appeals appear to focus on the recipient's status as a *bona fide* creditor that 'entitles' it to the funds at issue, not on when the transfer occurred in relation to the payment schedule." 2021 WL 606167, at *18. But that simply begs the question of what it means to be a creditor with an entitlement to funds for purposes of the doctrine at issue. *Banque Worms* provides no basis for believing that a creditor without a present entitlement to the money falls into that category.

Second, *Banque Worms* does not suggest that the discharge-for-value exception should apply in a circumstance in which the transferee has not, at the point at which it receives notice that the transfer was in error, taken action to provide value by discharging any debt. Indeed, *Banque Worms* refers to the "discharge of the debt" as a precondition to application of the exception. 77 N.Y.2d at 367 (citation omitted).

It is true that the decision in *Banque Worms* does not make clear what, if any, affirmative action Banque Worms may have taken to provide value after receiving the mistaken payment. But *Banque Worms* certainly does not dictate the conclusion that an immediate discharge for value necessarily occurs at the moment that the mistaken payment takes place, even absent any steps by the transferee to provide such value. Rather, as the Sixth Circuit has recognized, the New York Court of Appeals simply did not focus on the issue of how and when a discharge for value must be effected. *See In re Calumet Farm, Inc.*, 398 F.3d 555, 559 (6th Cir. 2005) (stating that *Banque Worms* does not resolve "the point in time by which notice of the mistake must be received"); *see id.* (stating that "the question" in *Banque Worms* was whether the discharge-for-value defense applies" to wire transfers, not "how it applies" (emphasis omitted)).

As is true of the extension of *Banque Worms* to cases in which the recipient of a mistaken transfer has no present entitlement to the money, extension of *Banque Worms* to a circumstance in which in which the transferee has not credited the debtor's account creates a number of highly problematic issues. That expansion of the discharge-for-value exception would be punitive; it would mean that there is no opportunity at all for a transferor who makes a payment mistake to inform the transferee of the existence of the mistake, because the discharge for value would be deemed to occur at the very instant that the money changes hands. For that reason (among others), courts that have directly addressed the issue have correctly rejected that expansion and limited the discharge-for-value exception to cases in which the recipient has affirmatively provided value in discharging the debt. For instance, the Sixth Circuit, having taken the Restatement provision on which *Banque Worms* relied into account and having found no definitive guidance there or in *Banque Worms* itself, held that the discharge-for-value exception is inapplicable where "the beneficiary receives notice of a mistake *before* the beneficiary of the transfer credits the debtor's account" and "give[s] value for the mistaken payment." *Calumet*, 398 F.3d at 560 (emphasis added); *see, e.g.*, *Qatar Nat'l Bank v. Winmar, Inc.*, 650 F.

Supp. 2d 1, 10 (D.D.C. 2009) (exception does not apply unless there is some "evidence" that the transferee "credited [the] account").

In rejecting that well-considered approach, the district court here overread a single paragraph of the federal district court's decision in *Banque Worms*. According to the court below, the federal district court in that case "dismissed Security Pacific's argument that notice received before the close of the business day would suffice to defeat the discharge-for-value defense," stating that the "'final settling of the accounts' at the end of the day' . . . is 'mere bookkeeping.'" 2021 WL 606167, at *20 (citing *Banque Worms v. Bank Am. Int'l*, 726 F. Supp. 940, 942 (S.D.N.Y. 1989)). The court below also stated that this Court "adopted" that view "on appeal," *id.*, when this Court concluded without any elaboration that Security Pacific's arguments were "without merit," *Banque Worms v. BankAmerica Int'l*, 928 F.2d 538, 542 (2d Cir. 1991).

But a close examination of the paragraph of the *Banque Worms* district court decision to which the court below cited reveals that the paragraph does not, in fact, address whether the discharge-for-value exception applies even where a recipient has taken no steps to discharge the debt for value before receiving notice that the transfer of money was in error. Rather, that paragraph addresses and rejects a distinct argument: that the wire-transfer transaction by means of which Banque Worms received the disputed money should not itself be considered "final" until the close of business on the day of the transaction, and therefore should be deemed readily reversible at any time before the end of the business day. *See* 726 F. Supp. at 942 (rejecting the argument that "the transfer was not complete at 1:45 P.M. because a wire transfer on the Clearing House Interbank Payments System (CHIPS) is not complete and final until the close of the business day" and ruling that "a CHIPS transaction is irrevocable and final once the transfer takes place"). The views of the district court, and even this Court, on the issue of when a wire transfer should be considered complete simply have no bearing on the entirely separate question of whether a recipient of a mistaken transfer should be allowed to keep that transfer under the discharge-for-value exception when the recipient has done nothing whatsoever to apply the money to the indebtedness that it claims the money is satisfying. Certainly, those views should not be considered in any way binding for purposes of resolving that question in this case.

In short, rather than construing the *Banque Worms* exception narrowly, the district court construed that exception quite broadly—and did so while erroneously professing to have no freedom under New York law to reach a different judgment. That analytical approach is the opposite of the one that a federal court should apply when deciding the reach of a limited exception to a state-law doctrine. *Cf. United States v. Scharton*, 285 U.S. 518, 521-22 (1932) (an "excepting clause" in a statute is "to be narrowly construed").

B. The District Court's Reliance On Finality As A Justification For Expanding The Discharge-For-Value Exception Is Misplaced

The district court relied heavily on an asserted need for finality in payment transactions as a basis for expanding the discharge-for-value exception to cover situations in which a debt is not presently due and the recipient does not provide value through a discharge. *See, e.g.*, 2021 WL 606167, at *17, 21-23, 41. But the court put too much weight on the interest in finality and too little weight on the competing interests that animate the mistake-of-fact doctrine to which the discharge-for-value principle is only an exception. Although an interest in finality obviously exists, *see Banque Worms*, 77 N.Y.2d at 373, that interest cannot justify the expanded version of the discharge-for-value rule that the district court erroneously adopted.

As an initial matter, taken to an extreme the interest in finality of transactions would eliminate the basic rule that requires return of mistakenly transferred funds in most circumstances. It is plain that, standing alone, "[c]onsiderations of finality and commercial convenience would tend to support" a rule "denying restitution of *any* mistaken payment that was received in good faith and without notice of the mistake." Andrew Kull, *Rationalizing Restitution*, 83 Cal. L. Rev. 1191, 1238 (1995) (emphasis added). Indeed, "the goal of finality would best be served by a rule of no restitution at all," no matter whatthesurrounding circumstances. *Id.*; *see* Restatement (Third) of Restitution and Unjust Enrichment § 67, cmt. h (2011) (noting that the "end" of "'finality' of payment transactions . . . would better be served by denying restitution altogether").

That is very far from the law as it actually exists. There are numerous areas involving mistaken or wrongful payments in which the law eschews finality of a transaction in favor of restitution. The basic mistake-of-fact rule, to which the discharge-for-value principle serves as an exception, is the most salient of those. *See* p. 5, *supra*. Article 4A of the UCC recognizes situations in which finality should yield to other considerations—for instance, UCC § 4-A-303 states that a "bank is entitled to recover from the beneficiary of" an erroneous transfer of funds "the excess payment received to the extent allowed by the law governing mistake and restitution." *See HSBC Bank USA, N.A. v. A.T.A. Constr. Corp.*, 2009 WL 1456529, at *3 (E.D.N.Y. May 26, 2009) (applying Section 4-A-303 to order return of erroneous transfer of money). Under federal securities law, executives' compensation is clawed back by companies in certain circumstances where there has been a financial restatement and the payment was therefore based on a mistaken premise. *See generally, e.g.*, David I. Walker, *Executive Pay Clawbacks and Their Taxation* (Feb. 19, 2021), https://corpgov.law.harvard.edu/2021/02/19/executive-pay-clawbacks-and-their-taxation/. And under bankruptcy law, there are doctrines permitting clawbacks of preferential or fraudulent transfers and of certain post-petition transfers. *See generally Merit Mgmt. Grp., LP v. FTI Consulting, Inc.*, 138

S. Ct. 883, 887-88 (2018). None of those exceptions to finality interferes with the smooth working of day-to-day business operations.[3]

It is thus clear that finality is not the be-all and end-all of the analysis, and that the scope of the discharge-for-value exception must be assessed with "equitable" as well as "commercial" goals in mind. Kull, *supra*, at 1237. After all, when an entity "that has applied a mistaken payment in satisfaction of a third party's preexisting obligation points to its release of the debt as offsetting value," that entity is, at bottom, "den[ying] . . . that it has been enriched" unjustly "by the transaction when viewed as a whole." *Id.* at 1238-39. In other words, drawing the line between what falls within the discharge-for-value exception and what does not necessarily "depends on what we identify as the baseline for measuring enrichment and on the balance of justice between the parties," *id.* at 1239; *see id.* at 1234, and not just on some overarching desire that any commercial transaction be deemed final as soon as the money changes hands.

As the mistake-of-fact doctrine and the other exceptions to finality discussed above unambiguously demonstrate, "the avoidance of unjust enrichment" can often

[3] Indeed, even in the absence of statutory or regulatory compulsion, private actors not infrequently choose to reject rules requiring finality of transactions. *See, e.g.*, Depository Trust & Clearing Co., *The Role of DTCC in Mitigating Systemic Risk* 22 (Sept. 2011) (discussing "clawback process" for "agents that may themselves advance funds in anticipation of issuer funding").

justify the cost of "reopen[ing] a transaction that would otherwise be over and done with." Kull, *supra*, at 1234; *see* Andrew Burrows, *Restitution of Mistaken Enrichments*, 92 B.U. L. Rev. 767, 774-79 (2012); *see also generally* Chaim Saiman, *Restating Restitution: A Case of Contemporary Common Law Conceptualism*, 52 Vill. L. Rev. 487, 523-25 (2007); Hanoch Dagan, *Mistakes*, 79 Tex. L. Rev. 1795, 1836 (2001). The district court was therefore wrong to contend that any retreat from absolute finality of a transaction would risk "introduc[ing] confusion and danger into all commercial dealings." 2021 WL 606167, at *21 (citation omitted).

In addition to equitable concerns, "the need for certainty" about the governing legal rule is "paramount" in this area, *Banca Commerciale Italiana, New York Branch*, 160 F.3d at 96; *see id.* (noting that wire transfers are a "peculiar context" involving a huge number of daily transactions and enormous sums of money)—and it was given equally short shrift by the district court. The district court's decision, while favoring finality, cuts against certainty. When the baseline expectation is return of incorrectly transferred money and the exception to that rule is narrow, actors can be relatively certain that mistakes will be rectified, and they are incentivized to rectify others' mistakes with the expectation of receiving similar treatment themselves if necessary. But when the exception to that rule is changed and broadened, the relevant actors will feel much less certain about how their own mistakes will be treated and how to treat others' mistakes. The court should have been more cautious about unsettling a critical area of New York law in that fashion.

In short, New York law does not pursue the goal of finality in payment transactions to its uttermost. *Cf. Freeman v. Quicken Loans, Inc.*, 566 U.S. 624, 637 (2012) ("No legislation pursues its purposes at all costs." (internal quotation marks and alterations omitted)). In mapping the contours of the discharge-for-value rule, the district court was therefore wrong to treat finality as an overriding concern and to give insufficient weight to several other important principles that shape the law of mistaken transfers.

II. The District Court's Overbroad Reading of *Banque Worms* Would Have Harmful Policy Consequences

According to the district court, the "equitable and policy" considerations raised by its ruling need not be taken into consideration because they are "squarely foreclosed by *Banque Worms*," which has been the law of New York for some time without "disastrous consequences." 2021 WL 606167, at *39-40. But that approach assumes that *Banque Worms* settled the issues in dispute in this case—and, as discussed above, that assumption is incorrect. Because the district court's decision actually changes the legal landscape so as to increase the risks associated with a mistaken transfer of money, that decision in fact gives rise to very serious policy concerns. If it were left in place, it would have a number of harmful consequences for businesses operating under or otherwise affected by New York law.

First, contrary to the district court's decision, it is impossible for banks or other transferors of money to eliminate all risk that some mistake will occur. But a broad interpretation of the discharge-for-value exception would likely spur transferors to take extraordinary measures—and that, in turn, would give rise to tremendous economic inefficiencies that would negatively affect business operations.

Payment mistakes can happen for a variety of different reasons. Some mistakes are due to a "software or hardware malfunction." Richard F. Dole, Jr., *Receiving Bank Liability for Errors in Wholesale Wire Transfers*, 69 Tul. L. Rev. 877, 878-79 (1995). That can include a malfunction in the automated processes that direct payments—meaning that the mistake can (as here) involve premature payment of the full amount of an underlying debt. Other mistakes are due to human errors such as clerical mistakes, duplicate payments, or misunderstandings of pay orders or underlying legal obligations. *See* Maytal Gilboa & Yotam Kaplan, *The Mistake About Mistakes: Rethinking Partial and Full Restitution*, 26 Geo. Mason L. Rev. 427, 451 (2018) (collecting cases); *see also, e.g.*, *Calumet*, 398 F.3d at 561; *In re T.R. Acquisition Corp.*, 309 B.R. 830, 838-39 (Bankr. S.D.N.Y. 2003).

Transferors already make strenuous efforts to guard against the possibility of such mistakes. For instance, the mistake at issue here occurred despite controls put in place by Citibank, including a "six eyes" procedure that required multiple personnel to sign off on the transfer of the money. *See* 2021 WL 606167, at *5. But if the discharge-for-value exception were interpreted as broadly as the district court interpreted it in this case, thus meaningfully expanding the circumstances in which a mistaken transfer cannot be recovered, then many transferors would likely go to even more extreme lengths to try to guard against any possibility of error. After all, a mistake could conceivably be so large as to threaten the financial viability of the transferor and even have broader market-disruptive effects.

Although it is important for transferors to work to eliminate errors in transferring funds, it is simply not possible to eliminate *every* error given the speed at which transfers need to be made and the extraordinary number of daily transfers (a number that has increased since *Banque Worms* was decided decades ago). But a reduced ability to recoup a mistaken transfer would likely cause payment transactions to become both slower and more expensive. The associated costs would be passed on, at least in part, to customers seeking to transfer funds, and ultimately to other market participants. *See Gen. Elec. Cap. Corp. v. Cent. Bank*, 49 F.3d 280, 285 (7th Cir. 1995). That would, in turn, create an economic drag that would have broad-reaching effects, since so many businesses depend on wire transfers like the one in this case in their regular operations and the volume of daily wire transfers is staggeringly high. *See, e.g.*, Adam D. Gold, *The Calm After the Storm? UCC Article 4a,* Jaldhi*, and the Future of Rule B Attachment in the Second Circuit*, 2 Geo. Mason

J. Int'l Com. L. 14 (2010) (wire transfers have a "central role in business transactions," "represent the dominant payment system in the United States," and are "vital to the U.S. and world economies"); Janine S. Hiller & Don Lloyd Cook, *From Clipper Ships to Clipper Chips: The Evolution of Payment Systems for Electronic Commerce*, 17 J.L. & Com. 53, 82-83 (1997); https://www.theclearinghouse.org/-/media/new/tch/documents/payment-systems/chips-volume-and-value.pdf. Certain entities that currently provide wire transfer services might even decide to decline to do so in some or all circumstances, thus further increasing the costs and economic inefficiencies associated with such transfers and negatively affecting commerce.[4]

The district court suggested that the long-standing existence of *Banque Worms* constituted proof that none of these negative effects would come to pass. *See* 2021 WL 606167, at *42. But, as discussed above, the district court did not simply apply long-settled doctrine; rather, the court destabilized the law by expanding the reach of the discharge-for-value exception in unwarranted ways. Empirical

[4] In contrast, the "costs of rectification" of the occasional mistake through the return of mistakenly transferred funds are low. Kull, *supra*, at 1242. Where (for instance) the recipient of the funds has only a future claim to them, such that retaining them amounts to a windfall and returning them leaves the recipient no worse off than it was before, returning the funds costs very little, *see, e.g.*, Gilboa & Kaplan, *supra*, at 446-47—which is no doubt why such return has long been industry-standard procedure.

experience under the rule established in *Banque Worms* is thus no guide to the consequences that would result from leaving the district court's decision in place.

Second, the expansion of the discharge-for-value exception effected by the district court creates disuniformity in the law governing mistaken transfers of money—and such disuniformity is both costly and disruptive.

There is no question that uniformity in the law governing mistaken transfers of money is "important." *Gen. Elec. Cap. Corp.*, 49 F.3d at 285; *see Banque Worms*, 77 N.Y.2d at 372 (acknowledging the "important goal" of "[n]ational uniformity in the treatment of electronic fund transfers"). After all, "[f]unds transfers cross state and national borders, and, because New York is the nation's (and the world's) largest financial center, many transfers go through banks in New York." *Gen. Elec. Cap. Corp.*, 49 F.3d at 285. If the law "governing these transactions" is "[u]niform" and "known," transferors can "tailor their practices accordingly, and it produces lower costs for all customers." *Id.*; *see id.* ("Uncertainty serves no one's interests."). But if different law governs in different jurisdictions, that produces confusion, uncertainty, higher costs, and unfair geographic disparities. And that is particularly true where the jurisdiction that is out of step with the others is New York, given New York's immense significance as a center of finance.

As the district court acknowledged, the version of the discharge-for-value exception that it applied is markedly different than the version applied in some other jurisdictions. For instance, as to whether the discharge-for-value exception applies when a recipient of mistakenly transferred money has not taken any action to actually credit the debtor's account and discharge the underlying debt, the rule adopted by the district court is plainly different from the rule that has been applied elsewhere. *See* 2021 WL 606167, at *21 (citing, *e.g.*, *Calumet*, 398 F.3d at 559). Once again, because the district court's rule is not mandated by *Banque Worms* itself, the fact that *Banque Worms* has governed New York law for several decades, *see* 2021 WL 606167, at *42, does nothing to ameliorate that harmful conflict in the law.

Finally, the broad version of the discharge-for-value exception adopted by the district court is deeply inequitable, and is therefore likely to encourage undesirable behavior in those who receive mistakenly transferred money.

As discussed above, bedrock principles of equity dictate the legal rule that mistaken payments should be returned in most circumstances, and counsel strongly in favor of interpreting the discharge-for-value exception narrowly rather than broadly. If the recipient of a mistaken transfer is actually owed the money at the relevant moment in time and gives value by crediting a debtor's account without being on notice that a mistake has occurred, then the recipient has a strong claim to the money, its return may be a deprivation of the recipient's present rights, and the recipient may have had little reason to realize that the transfer was made in error in the first place. *See* pp. 8-9, *supra*. It is no doubt for those reasons that, as the district court here observed, appeals to equity made by Security Pacific in *Banque Worms* failed to "carry the day." 2021 WL 606167, at *39. But outside of those circumstances, there is no justification for giving the recipient an unmerited windfall even though there may well be others who have a greater, more present claim to the money in question, and that result ignores the deep equitable tug that underlies the doctrine of unjust enrichment (as well as other closely related doctrines).

A legal regime that permits that kind of windfall could well encourage opportunistic actors to attempt to affirmatively create conditions under which they might be allowed to keep erroneously transferred money. Such actors might, for instance, as a matter of internal policy decide to shut their eyes to any communications or other circumstances that might alert them to the fact that a mistake has been made. That kind of gamesmanship should not be encouraged.

It is true that even the district court's overbroad version of the discharge-for-value exception cannot apply in the first place unless there is some existing commercial relationship whereby the transferee has a claim to be paid at least some of the transferred money at some point in the future. But mistaken transfers will often take place in the context of such existing relationships—most notably, where, as here, the transferor intends to transfer some money to the transferee but erroneously transfers an amount that is too large. It is precisely when that kind of mistake occurs that recipients of mistaken transfers have the greatest incentive to behave in a commercially unreasonable fashion in order to try to hold onto money to which they have no present entitlement.

CONCLUSION

Amicus respectfully requests that this Court reverse the district court's judgment.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 29(b)(4) and 32(a)(7)(B).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(f), the brief contains 5,878 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font. As permitted by Fed. R. App. P. 32(g)(1), the undersigned has relied on the word count feature of this word processing system in preparing this certificate.

Dated: May 6, 2021

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