UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FAIRFIELD SENTRY LIMITED (IN LIQUIDATION) Plaintiffs/Appellees, Against CITIBANK NA LONDON, Defendants/Appellants	Appeal No. 21-cv-3530-VSB
In re: FAIRFIELD SENTRY LIMITED, et al. Debtors in Foreign Proceedings	Chapter 15 Case No. 10-13164-CGM
This document is also being filed in the appeals listed in Appendix A.	

BRIEF OF AMICI CURIAE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION AND STRUCTURED FINANCE ASSOCIATION IN SUPPORT OF DEFENDANTS' MOTION FOR LEAVE TO APPEAL

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CORPORATE DISCLOSURE STATEMENT

The Securities Industry and Financial Markets Association ("**SIFMA**") is a non-profit corporation. It has no parent corporation and no publicly held corporation owns more than 10% of its stock.

The Structured Finance Association ("**SFA**") is a non-profit association. It has no parent corporation and no publicly held corporation owns more than 10% of its stock.

STATEMENT OF INTEREST[1]

SIFMA and SFA (collectively, the "**Amici**") respectfully submit this brief as amici curiae in support of Defendants' Motion for Leave to Appeal. Plaintiffs and Defendants have consented to Amici filing this brief.

SIFMA is a securities industry trade association representing the interests of hundreds of securities firms, banks, and asset managers. SIFMA champions policies and practices that foster a strong financial industry, while promoting investor opportunity, capital formation, job creation, economic growth, and trust and confidence in the financial markets. SIFMA regularly files amicus curiae briefs in cases that raise important questions of commercial and securities law.

SFA is a member-based trade industry advocacy group focused on improving and strengthening the broader structured finance and securitization market. SFA has over 370 members from all sectors of the structured finance and securitization market, including investors; issuers; financial intermediaries; accounting, law and technology firms; rating agencies; servicers; and trustees. SFA's core mission is to support a robust and liquid securitization market, recognizing that securitization is

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[1] Amici curiae state that no party's counsel authored this brief in whole or in part; that no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief; and that no person, other than the amici curiae, their members or their counsel, contributed money that was intended to fund the preparation or submission of this brief.

an essential source of funding for the economy. SFA's members have diverse economic interests in the various transactions to which they are parties.

PRELIMINARY STATEMENT

As representatives of the leading institutions in the financial and securities markets, Amici have a keen interest in promoting and protecting the stability of financial markets and the finality of settled transactions. As relevant here, the financial industry—represented by SIFMA, SFA, and their predecessors—has for many years stressed the need to ensure that commencement of bankruptcy proceedings by a market participant does not undermine the stability of the financial system as a whole. The safe harbor codified in 11 U.S.C. § 546(e) (the "**Safe Harbor**" or "**Section 546(e)**") and its application to cases under Chapter 15 of the U.S. Bankruptcy Code through the express provisions of 11 U.S.C. § 561(d) ("**Section 561(d)**" and, together with Section 546(e), the "**Safe Harbors**") further those goals by ensuring that settled transactions are not unwound years after the fact.

The Bankruptcy Court erred by permitting Plaintiffs, who are liquidators in an insolvency proceeding (the "**Liquidators**") pending under the laws of the British Virgin Islands ("**BVI**"), to assert common law constructive trust claims under BVI law in an effort to unwind settled market transactions years after those transactions were settled. In re Fairfield Sentry Ltd., No. 10-13164 (SMB), 2020 WL 7345988, at *10 (Bankr. S.D.N.Y. Dec. 14, 2020), reconsideration denied, No. 10-13164 (SMB), 2021 WL 771677 (Bankr. S.D.N.Y. Feb. 23, 2021) (collectively, the "**Decision**"). The Bankruptcy Court conceded (as it had to) that Plaintiffs' claims to

unwind the transfers settling these transactions would be barred by the Safe Harbor if they were asserted under the laws of any U.S. state. Nevertheless, the Bankruptcy Court improperly permitted the Plaintiffs' BVI law constructive trust claims to proceed. In doing so, the Bankruptcy Court ignored express congressional intent regarding the breadth and scope of the Safe Harbors as well as controlling precedent from the Second Circuit, holding that common law equitable claims should be dismissed when they seek the very same remedy as avoidance claims barred by the Safe Harbors.

Contrary to Second Circuit law, the Bankruptcy Court's Decision improperly permits foreign liquidators to circumvent the Safe Harbors merely by re-labelling an avoidance claim as a common law equitable claim (e.g., constructive trust claim) even though that claim seeks the very same remedy as an avoidance claim barred by the Safe Harbor.

The Second Circuit has firmly prohibited such end-runs around the Safe Harbor. It has long held in several cases (discussed below) that the Safe Harbor's broad language should be interpreted to give effect to Congress' intent to protect the finality of settled transactions and the stability of financial markets. The Decision fails to heed the Second Circuit's guidance with respect to the Safe Harbors and also fails to account for Sections 1506 and 1522 of the Bankruptcy Code, which separately compel reversal.

That failure has consequences. If permitted to stand, the Decision risks upending the securities markets in a number of ways. First, the Decision will result in other foreign debtors seeking to unwind long-settled securities transactions under the guise of various non-U.S. statutory, common law, and equitable claims. Foreign liquidators will be incentivized to assert foreign common law claims to bring additional funds into foreign bankruptcy estates by asserting these claims, and there is no doubt that they will seek to do so. And because the limitation periods of those claims could far exceed those of statutory avoidance claims, the Decision will expose financial institutions to the risk of having transactions consummated years ago being unwound. As the Second Circuit cautioned, "[a] lack of protection against the unwinding of securities transactions would create substantial deterrents, limited only by the copious imaginations of able lawyers, to investing in the securities market. The effect . . . would be akin to the effect of eliminating the limited liability of investors for the debts of a corporation: a reduction of capital available to American securities markets." In re Trib. Co. Fraudulent Conv. Litig., 946 F.3d 66, 93 (2d Cir. 2019), cert. denied sub nom. Deutsche Bank Tr. Co. v. Robert R. McCormick Found., No. 20-8, 2021 WL 1521009 (Apr. 19, 2021).

Second, the "threat to investors is not simply losing a lawsuit." See id. Exposure to frivolous lawsuits could create unease and impact market behavior. The Second Circuit has also cautioned that, "[g]iven the costliness of defending such

legal actions and the long delay in learning their outcome . . . exposing investors to even very weak lawsuits involving millions of dollars would be a substantial deterrent to investing in securities. The need to set aside reserves to meet the costs of litigation—not to mention costs of losing—would suck money from capital markets." Id. at 93–94.

Third, recognizing the risk of litigation, offshore markets could become more treacherous than U.S. markets, contrary to Congress' objective in enacting Section 561(d), specifically, and Chapter 15 more generally. Investors may incur greater transaction costs in assessing these new risks and pass on those increased costs by charging risk premiums.

Permitting the Decision to stand will result in a lack of finality in the financial markets, causing uncertainty and instability—undermining the very goals advanced by the Safe Harbors. Nor should this Court defer the review of the Bankruptcy Court's Decision until a final judgment is rendered. Not only is that review likely years away but, in fact, it may never come as it is possible that armed with the Bankruptcy Court's Decision the Plaintiffs will seek to settle their claims. This would then result in the Bankruptcy Court's defective ruling remaining intact, with all of its negative consequences. The Decision flouts congressional intent, ignores Second Circuit authority, and introduces "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." Enron Creditors Recovery Corp. v. Alfa, S.A.B. de C.V., 651 F.3d 329, 336 (2d Cir. 2011). The Court should grant leave to appeal to have an opportunity to review the Decision and ultimately prevent such risks from materializing.

ARGUMENT

The Bankruptcy Code allows a trustee or debtor to bring claims to avoid (i.e. unwind) certain transactions that occurred before the commencement of the bankruptcy case. But those avoidance powers are not without limits. The Bankruptcy Code contains provisions, known as safe harbors, that explicitly restrict the debtor's ability to avoid transfers. One of those safe harbors is Section 546(e), which provides that:

> [T]he trustee may not avoid a transfer that is a margin payment . . . or settlement payment . . . 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) [such entities] in connection with a securities contract . . . that is made before the commencement of the case, except under section 548(a)(1)(A) of this title [i.e., intentional fraudulent transfer].

11 U.S.C. § 546(e).

Importantly, Section 561(d) of the Bankruptcy Code mandates that this Safe Hrbor apply to foreign debtors and their representatives in cases, such as this one,

pending under Chapter 15 of the Bankruptcy Code.[2] Section 561(d) states that the Safe Harbor,

> [S]hall apply in a case under chapter 15 . . . to limit avoidance powers to the same extent as in a proceeding under chapter 7 or 11 of [the Bankruptcy Code].

11 U.S.C. § 561(d).

In interpreting these Safe Harbors, the Bankruptcy Court correctly held that the Safe Harbors preclude the BVI Liquidators from asserting avoidance claims under the BVI Insolvency Act.[3] In re Fairfield Sentry Ltd., 2020 WL 7345988, at *7. The Bankruptcy Court also recognized that the Safe Harbors bar Plaintiffs from recasting their BVI avoidance claims under New York common law equitable theories, such as unjust enrichment or constructive trust, because doing so would "frustrate the purpose of Section 546(e)." In re Fairfield Sentry Ltd., 2021 WL 771677, at *3.

Notwithstanding the Bankruptcy Court's determination that Plaintiffs could not unwind settled securities transactions by asserting avoidance claims based on

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[2] A Chapter 15 case is an ancillary proceeding brought by a foreign representative in aid of a foreign insolvency proceeding, typically brought in the debtor's home country. 11 U.S.C. § 1504. Here, the foreign insolvency proceeding is the liquidation of the Fairfield funds in the BVI and the foreign representatives here are the liquidators in those proceedings. In re Fairfield Sentry Ltd., 2020 WL 7345988, at *1.

[3] The Bankruptcy Code also bars the Liquidators from asserting avoidance claims under U.S. bankruptcy law. 11 U.S.C. § 1521(a)(7).

U.S. law, state law, or foreign law, and that Plaintiffs could not unwind settled securities transactions by asserting common law claims based on state law, the Bankruptcy Court erroneously held that Plaintiffs could assert common law claims based on BVI law. In so doing, the Bankruptcy Court committed legal error which requires immediate correction.

I. EXCEPTIONAL CIRCUMSTANCES WARRANT GRANTING LEAVE TO APPEAL IN THIS CASE

The exceptional—and unique—circumstances of this case warrant the exercise of the Court's discretionary power to grant leave to appeal. 28 U.S.C. § 158(a); see also In re Kassover, 343 F.3d 91, 94 (2d Cir. 2003).

The narrow question before the Court is whether the Bankruptcy Court erred in refusing to dismiss constructive trust claims asserted under foreign law seeking to unwind settled securities transactions years after the fact, even though such claims would have been barred under Section 546(e) had they been asserted under U.S. federal or state law. As noted above—and as described in greater detail below—should this Court decline to review the Decision, the ripple effects on the securities and financial markets will be significant and extensive. The Safe Harbors were carefully designed to avoid putting the financial system of the United States under stress because one market participant fell insolvent by undoing—years after the fact—settled securities transactions and, in so doing, potentially causing the contagion of the financial system where the bankruptcy of one participant causes the

insolvency of others. This is precisely what the Decision permits—so long as the claims seeking to unwind settled financial transactions are asserted under foreign non-bankruptcy law. This is an outcome that poses significant risk to the stability of the financial markets and the securities industry.

However, should the Court reverse the ruling by properly applying the governing precedent in this Circuit to the case at hand, it would not only give effect to the Safe Harbors and reduce the risk of instability in the financial and securities markets, but also would dispose of all related pending actions before the Bankruptcy Court. And given the Bankruptcy Court's departure from Second Circuit authority and failure to apply the prevailing approach in this district, see infra Part II.C, this issue is particularly appropriate for review on appeal.

The correction of the Bankruptcy Court's Decision will also materially advance the litigations in which the constructive trust claims have been asserted. In evaluating the BVI avoidance claims, the Bankruptcy Court has already determined correctly that the transactions fit within the strictures of the Safe Harbor. In re Fairfield Sentry Ltd., 2020 WL 7345988, at *9. Therefore, if the Court concludes that the Safe Harbors apply to foreign common law claims, no further analysis would be required to dismiss the BVI constructive trust claims.

Considerations of judicial efficiency further warrant granting leave to appeal here, as the Court is already considering the Plaintiffs' appeal of the Bankruptcy

Court's decision to dismiss their BVI-law avoidance claims as barred by the Safe Harbor. By any measure, the two related questions of the Safe Harbor's application to BVI law claims—whether they sound in bankruptcy law or common law—should be litigated and decided together, rather than in piecemeal litigation years apart. Accordingly, because the Defendants' proposed appeal "(1) involve[s] a controlling issue of law (2) over which there is substantial ground for difference of opinion" and (3) will "materially advance the ultimate termination of the litigation," an immediate appeal is warranted. In re Hawker Beechcraft, Inc., No. 12-11873(SMB), 2013 WL 6673607, at *4 (S.D.N.Y. Dec. 18, 2013) (internal quotation marks and citations omitted); see also Secs. Inv. Prot. Corp. v. Bernard L. Madoff Inv. Secs. LLC, No. 17-cv-4952(GHW), 2017 WL 4838575, at *2 (S.D.N.Y. Oct. 24, 2017) (citing Picard v. Estate of Madoff, 464 B.R. 578, 582 (S.D.N.Y. 2011)).

Moreover, given the uncertainty that the Bankruptcy Court's ruling introduced into the financial market and the concomitant threat to the stability of both domestic and international markets, this question presents precisely those "'exceptional circumstances that overcome the general aversion to piecemeal litigation and justify departing from the basic policy of postponing appellate review until after the entry of a final judgment.'" Rothenberg v. Oak Rock Fin., LLC, No. 14-cv-3700, 2015 WL 10663413, at *15 (E.D.N.Y. Mar. 31, 2015) (quoting Picard, 464 B.R. at 582–83).

II. THE BANKRUPTCY COURT'S DECISION IS CONTRARY TO SECOND CIRCUIT PRECEDENT AND UNDERMINES LONG-STANDING CONGRESSIONAL POLICY OF PROMOTING THE FINALITY OF SETTLED SECURITIES TRANSACTIONS

A. The Second Circuit Has Interpreted the Safe Harbors Broadly to Promote Transactional Finality and Market Stability

Congress enacted the Safe Harbors to protect transfers made to settle securities transactions from being unwound years after they were made because one of the parties to the transaction became insolvent. The animating goal behind that congressional effort was to ensure the stability of the financial markets. Accordingly, when a transfer is made to settle a securities transaction, the Safe Harbors immunize the transfer from being subsequently challenged or unwound if insolvency proceedings begin. 11 U.S.C. § 546(e).

Recognizing the Safe Harbors' purpose, for the past ten years, the Second Circuit has repeatedly instructed that they must be interpreted broadly. In Enron Creditors Recovery Corp. v. Alfa, S.A.B. de C.V., 651 F.3d 329, 336 (2d Cir. 2011), the Second Circuit concluded that, because Section 546(e) was intended to "minimiz[e] the displacement caused in the commodities and securities markets in the event of a major bankruptcy affecting those industries," it would not adopt a narrow "reading of the statute [that] would result in commercial uncertainty and unpredictability at odds with the safe harbor's purpose." Id. at 334–36. Similarly, in In re Bernard L. Madoff Inv. Secs. LLC, 773 F.3d 411, 419–20 (2d Cir. 2014), the Second Circuit refused to unwind transfers allegedly made in connection with

Bernie Madoff's Ponzi scheme years after the transfers were made—the very thing the Plaintiffs seek to do here—because doing so "would likely cause the very 'displacement' that Congress hoped to minimize in enacting § 546(e)."

Most recently, the Second Circuit held that Section 546(e) bars state law clawback claims brought by creditors, notwithstanding that the plain language of Section 546(e) is phrased in terms of limiting the powers of the "trustee," not creditors. In re Trib. Co. Fraudulent Conv. Litig., 946 F.3d 66, 90–94 (2d Cir. 2019), cert. denied sub nom. Deutsche Bank Tr. Co. v. Robert R. McCormick Found., No. 20-8, 2021 WL 1521009 (Apr. 19, 2021). Rejecting the debtor's proposed "end-run" around the Safe Harbor by transferring their avoidance claims to creditors to be asserted under state law, the Second Circuit noted that, "[e]very congressional purpose reflected in Section 546(e), however narrow or broad, is in conflict with appellants' legal theory." Id. at 90. The Second Circuit's holding was informed by its determination that unwinding securities transactions years after the fact "would seriously undermine—a substantial understatement—markets in which certainty, speed, finality, and stability are necessary to attract capital." Id. The Second Circuit observed that such an outcome would be "the opposite of what [Section 546(e)] was intended to achieve." Id. at 92. The "broad language" of Section 546(e)," the Second Circuit reasoned, was incompatible with an interpretive approach that called

for "narrow literalness." Id. This interpretive approach ultimately accords with Congress' intent in enacting the Safe Harbors.

B. The Legislative History of the Safe Harbors Supports a Broad Interpretation of Those Provisions

The Second Circuit's reading of the Safe Harbors is consistent with the broad reading that Congress intended. In re Trib. Co. Fraudulent Conv. Litig., 946 F.3d at 92. From its inception, a "basic objective" of the Safe Harbor has been to protect "market stability" and provide courts with clear guidance when it came to financial markets. S. Rep. 95-989, at 8 (1978), as reprinted in 1978 U.S.C.C.A.N. 5787, 5794.

Since then, Congress has repeatedly expanded the scope of the Safe Harbor to cover additional types of transactions in additional markets. First, in 1982, leading up to the adoption of the provision that became Section 546(e), Congress recognized that the "structure" and "sometimes volatile nature" of securities markets required the same protections as those already available in the commodities market. H.R. Rep. 97-420, at 1 (1982), as reprinted in 1982 U.S.C.C.A.N. 583, 583. That extension was "necessary," according to a House Report, in order "to prevent the insolvency of one commodity or security firm from spreading to other firms and possibl[y] threatening the collapse of the affected market." Id. Congress therefore amended the Safe Harbor to include securities transactions to "ensure" that a bankruptcy trustee could not "set aside" or unwind "settlement payments. . . except in cases of [actual] fraud." Id.; 96 Stat. 236 § 4 (codified at 11 U.S.C. § 546(d))

(amending the provision to include transactions "made by or to a commodity broker, forward contract merchant, stockbroker, or securities clearing agency.")).

Congress has since expanded the Safe Harbor three times—in 1984, 2005 and 2006. § 461(d), 98 Stat. 377 (codified at 11 U.S.C. § 546(e) (adding "financial institution" to the list of protected entities); § 907(b), 119 Stat. 181–82 (adding "financial participant" to the list of protected entities); § 5(b)(1), 120 Stat. 2697–98 (expanding the Safe Harbor to cover transfers "for the benefit of" protected entities and adding to the list of protected transactions). Each expansion of the Safe Harbor was intended to further reduce "systemic risk" in the markets by ensuring that, as relevant here, financial transfers used to settle securities transactions cannot be unwound in connection with insolvency proceedings. H.R. Rep. 109-648, at 5 (2006), as reprinted in 2006 U.S.C.C.A.N. 1585, 1590.

The legislative history of Section 561(d) reflects a similar imperative. Section 561(d) was part of a suite of bankruptcy reforms implemented in connection with Chapter 15 of the Bankruptcy Code. Chapter 15 was designed to facilitate the ability of foreign representatives of non-U.S. debtors to obtain relief in U.S. bankruptcy courts. Chapter 15 thus enabled the foreign representative of a foreign debtor to commence a proceeding under Chapter 15 that would be ancillary to and in aid of the non-U.S. insolvency proceeding.

Chapter 15, however, was never designed to give a foreign representative a "blank check." Rather, in enacting Chapter 15, Congress put a number of restrictions on a foreign liquidator's authority. Among these limits, Congress took steps to ensure that Chapter 15 would not be used to usher into the U.S. financial and securities markets the very same uncertainty and instability that Congress had sought to minimize through the adoption of the Safe Harbor. To accomplish this objective, Congress enacted Section 561(d), which expressly provides that the Section 546(e) Safe Harbor for settlement payments and securities contracts shall apply in a case under Chapter 15 and that the power of a foreign representative to unwind settled financial transactions shall be limited "to the same extent" as in a case under Chapter 7 or 11 of the Bankruptcy Code. 11 U.S.C. § 561(d); see also In re Fairfield Sentry Ltd., 596 B.R. 275, 311 (Bankr. S.D.N.Y. 2018). Through its adoption of Section 561(d), Congress eliminated any distinction for Safe Harbored claims brought under Chapter 11 and Safe Harbored claims brought under Chapter 15. In short, if the claim would be barred in connection with a Chapter 11 case, then it would likewise be barred in a case under Chapter 15.

The Bankruptcy Court acknowledged that, read together, Sections 546(e) and 561(d) "reflect Congressional intent to provide broad protection to avoid the spread of financial contagion" even when the debtor's primary insolvency proceeding is outside the U.S. In making this observation, the Bankruptcy Court stated: "[N]either

the statute nor the legislative history suggests that the safe harbors are limited to U.S. creditors or U.S. markets." In re Fairfield Sentry Ltd., 596 B.R. at 314.

C. The Bankruptcy Court's Failure to Apply Second Circuit Precedent Increases Uncertainty and Decreases Finality and Liquidity

Although the Bankruptcy Court correctly observed that the Safe Harbors precluded the Liquidators from asserting equitable claims under state law, it erroneously held that those very same claims could proceed if grounded in foreign law, notwithstanding the express prescription in Section 561(d) that the Safe Harbors apply "to the same extent" in Chapter 15 as they would in Chapter 11. In re Fairfield Sentry Ltd., 2021 WL 771677, at *3-4 (Bankr. S.D.N.Y. Feb. 23, 2021). The Bankruptcy Court's Decision was in error and undermines the dual policies of transactional finality and market stability that the Safe Harbors were designed to promote.

The Second Circuit and courts in this district have consistently held that the Safe Harbors and their broad scope do not permit debtors (or their representatives) to unwind settled transactions by asserting common law claims any more than they could unwind these transactions by asserting avoidance claims. See, e.g., In re Trib., 946 F.3d at 90; In re Nine W. LBO Sec. Litig., 482 F. Supp. 3d 187, 207-08 (S.D.N.Y. 2020) (Rakoff, J.) (precluding unjust enrichment claims), appeal docketed, No. 20-03941 (2d Cir. Nov. 23, 2020); AP Servs. v. Silva, 483 B.R. 63, 71 (S.D.N.Y.

2012) (Kaplan, J.) (same); see also In re Hechinger Inv. Co., 274 B.R. 71, 96 (D. Del. 2002) (same); U.S. Bank Nat. Ass'n v. Verizon Commc'ns Inc., 892 F. Supp. 2d 805, 825 (N.D. Tex. 2012) (same), aff'd, 761 F.3d 409 (5th Cir. 2014); cf. Lehman Bros. Special Fin. v. Branch Banking & Tr. Co. (In re Lehman Bros. Holdings, Inc.), 970 F.3d 91 (2d Cir. 2020) (dismissing state law claims after applying Section 560's safe harbor to the bankruptcy claims).

The prevailing approach of these cases is to examine "the remedy sought, rather than the allegations pled," when "determin[ing] whether § 546(e) preempts" the claim. In re Nine W. LBO Sec. Litig., 482 F. Supp. 3d at 207 (citing Contemp. Indus. Corp. v. Frost, 564 F.3d 981, 988 (8th Cir. 2009)). In other words, if the state law claim seeks the same remedy that would be sought through an avoidance action, the courts universally bar the claim. See AP Servs., 483 B.R. at 71 (granting motion to dismiss unjust enrichment claim because claim sought to recover same payments that were held unavoidable under § 546(e)).

The Second Circuit was acutely mindful of this point in Tribune, where it held that creditors could not bring state law constructive fraudulent conveyance claims because those claims would result in the very same harm that Congress sought to prevent through the Safe Harbors. Critically, the Second Circuit determined that the broad language of Section 546(e) is "intended to protect the process or market from

the entire genre of harms of which the particular problem was only one symptom." In re Trib., 946 F.3d at 90–92 (emphasis added).

These established judicial authorities all require an inquiry that "promotes the purpose of § 546(e), which is . . . to limit the circumstances under which securities transactions could be unwound." In re Nine W., 482 F. Supp. 3d at 208 (internal quotation marks and citations omitted). The rationale underlying these decisions is that a state law claim should not be permitted to proceed if it "would implicate the same concerns regarding the unraveling of settled securities transactions . . . which is precisely the result that section 546(e) precludes." AP Servs., 483 B.R. at 71 (quoting In re Hechinger Inv. Co., 274 B.R. at 96).

Rather than follow the established jurisprudence in the Second Circuit and courts in this district, the Bankruptcy Court concluded that claims asserted under foreign law warrant a different approach. That conclusion was in error.

In reaching its Decision, the Bankruptcy Court ignored the plain language of Section 561(d), which mandates that the Safe Harbor shall apply in Chapter 15 cases "to the same extent" as in Chapter 11 cases, and declined to apply the Safe Harbor to the constructive trust claim asserted here. The Bankruptcy Court erred because the BVI constructive trust claim would have failed had it been asserted in a Chapter 11 case. See In re Trib., 946 F.3d at 90; In re Nine W., 482 F. Supp. 3d at

207-08; AP Servs., 483 B.R. at 71. And the claim should likewise fail here because the claim can only survive in Chapter 15 "to the same extent" as in Chapter 11.[4]

The Bankruptcy Court even went so far as to reject the remedy-focused approach favored by the Second Circuit, noting that while "the two sets of claims may ultimately lead to the same result" they "proceed on different theories and different proof." In re Fairfield Sentry Ltd., 2021 WL 771677, at *3 (emphasis added). As such, contrary to the plain language in Section 561(d) and the Second Circuit's instruction in Tribune, the Bankruptcy Court's ruling serves as an invitation for plaintiffs to advance their avoidance claims under the guise of equitable common law claims in order to sidestep the limitation of Section 546(e). This is precisely the "end-run" around the Safe Harbors that the Second Circuit has repeatedly sought to prevent. See e.g., In re Trib., 946 F.3d 66 at 91; Lehman, 970 F.3d 91; see also In re Nine W., 482 F. Supp. 3d at 207-8; AP Servs., 483 B.R. at 71.

As described above, permitting foreign liquidators to assert avoidance claims dressed up as claims under foreign law has substantial negative consequences.

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4 The court below based its decision on an erroneous application of the Supremacy Clause's preemption doctrines, reasoning that these doctrines do not apply to foreign law claims and thus Congress must speak clearly to displace foreign law claims. In re Fairfield Sentry Ltd., No. 10-13164 (SMB), 2021 WL 771677, at *2 (Bankr. S.D.N.Y. Feb. 23, 2021). But the Bankruptcy Court overlooked Section 561(d)'s "to the same extent" phrase. Congress could not have been clearer: the text of this provision was meant to displace foreign common law claims in Chapter 15 as it intended to displace state law claims in Chapter 11. Moreover, other provisions of Chapter 15—Sections 1506 and 1522—dictate a different result from that reached by the Bankruptcy Court.

Simply put, there is no doubt that in permitting foreign liquidators to challenge the finality of settled securities transactions years after those transactions were consummated, the Decision undermines the finality of transactions that the Safe Harbors were designed to protect. First, from the perspective of financial market participants, it matters not whether the claims seeking to undo a securities transaction after the fact are based in bankruptcy law, common law of a U.S. state, or non-U.S. common law because the effect is the same: reduced certainty about the finality of financial transactions, resulting in market dislocation and instability.

Second, the incompatibility of the Decision with established precedent and congressional intent invites opportunistic foreign litigants to commence a tsunami of litigation in U.S. courts, seeking to challenge (in derogation of the Safe Harbors) financial transactions settled long ago. Aware that the Decision enables litigants to dress up avoidance claims in the garb of a common law claim based on foreign law in order to circumvent the Safe Harbors, offshore liquidators and other parties will obviously do just that, thereby undermining the policies of finality and stability that the Safe Harbors are designed to protect.

Finally, the Decision will destabilize the financial and securities markets by creating uncertainty regarding the consequences of transacting with offshore counterparties.

D. The Bankruptcy Court's Ruling Runs Contrary to Other Material Provisions of the Bankruptcy Code

In addition to the Bankruptcy Court's failure to properly interpret the Safe Harbors, Sections 1506 and 1522 of the Bankruptcy Code provide additional, and independent bases for granting leave to appeal and concluding that the Bankruptcy Court erred.[5] First, Chapter 15 permits courts to refuse to take an action under the Bankruptcy Code "if the action would be manifestly contrary to the public policy of the United States." 11 U.S.C. § 1506. Although the "statutory wording requires a narrow reading," In re Fairfield Sentry Ltd., 714 F.3d 127, 139 (2d Cir. 2013) (holding that confidentiality of BVI proceedings was not manifestly contrary to U.S. policy), "it should be invoked when fundamental policies of the United States are at risk." In re Gold & Honey, Ltd., 410 B.R. 357, 372 (Bankr. E.D.N.Y. 2009) (citing In re Iida, 377 B.R. 243 (9th Cir. BAP 2007); In re Atlas Shipping A/S, 404 B.R. 726 (Bankr. S.D.N.Y. 2009); In re Ernst & Young, Inc., 383 B.R. 773, 781 (Bankr. D.Colo. 2008)).

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[5] The Bankruptcy Code also confers bankruptcy courts with the power to "issue any order, process, or judgment that is necessary or appropriate to carry out" its provisions. 11 U.S.C. § 105(a). Section 105(a) empowers courts with the "authority to fill the gaps left by the statutory language and to exercise equity in carrying out the provisions of the Bankruptcy Code." In re Miszko, No. 18-36702 (CGM), 2021 WL 1575423, at *3 (Bankr. S.D.N.Y. Apr. 22, 2021) (quoting In re Greenwich Sentry, L.P., 534 F. App'x 77, 80 (2d Cir. 2013)); see also In re Smart World Techs., LLC, 423 F.3d 166, 183 (2d Cir. 2005) ("Section 105 grants the bankruptcy court equitable powers to implement the provisions of the Bankruptcy Code."). To the extent the Bankruptcy Court identified a gap in Section 546(e) for foreign law claims, it has the authority to fill that gap by exercising its equitable powers under Section 105(a).

The Bankruptcy Code's Safe Harbors reflect the U.S.'s hallowed policy—as expressed by Congress repeatedly over the course of nearly half a century—that the return of funds by market participants to a debtor (whether foreign or domestic) should not trump the stability of the financial and securities markets. Enron, 651 F.3d at 334. Allowing the Liquidators to proceed with common law claims based on foreign law when the Safe Harbors would bar the same claims if they were asserted as federal, state or foreign avoidance claims, or as federal or state common law claims, derogates this clearly expressed goal and runs "manifestly contrary" to U.S. public policy."

In addition, Section 1522 of the Bankruptcy Code also preclude Plaintiffs' assertion of claims unless the interests of creditors and other interested entities "are sufficiently protected." 11 U.S.C. §§ 1522 and 1521(a)(5). Under Section 1522, courts must "ensure the protection of both the creditors and the debtor" by "balancing the respective interests based on the relative harms and benefits in light of the circumstances presented." Jaffé v. Samsung Elecs. Co., 737 F.3d 14, 27–28 (4th Cir. 2013); accord In re Vitro S.A.B. de CV, 701 F.3d 1031, 1060 (5th Cir. 2012).

The Fourth Circuit's decision in Samsung is particularly instructive here. In Samsung, the foreign representative of a German debtor sought to deploy Chapter 15 to reject certain intellectual property licenses held by, among others, U.S. technology

companies. The affected technology companies pointed to Section 365(n) of the Bankruptcy Code, which permits entities licensing a debtor's technology to retain the license, even when doing so "result[s] in less value" for the debtor. Samsung, 737 F.3d at 30. The Fourth Circuit affirmed the Bankruptcy Court's denial of the German debtor's application, stating that while Chapter 15 "represents a full commitment of the United States to cooperate with foreign insolvency proceedings," that "commitment is not untempered." Id. at 31-32. The Court noted that Section 365(n) protects important policy considerations—the ability of technology companies to develop and innovate without the risk of litigation—and that those considerations could not be overcome merely because German law permitted the German debtor to reject such licenses. Instead, the Fourth Circuit explained that "Chapter 15 does not require" a U.S. court "to blind itself to the costs that awarding" relief under foreign law "would impose on others under the rule provided by the substantive law of the State [*i.e.* Germany] where the foreign insolvency proceeding is pending." Id. at 29. Thus, the Fourth Circuit acknowledged the risk of harm to the U.S. technology industry posed by destabilization of the intellectual property licensing regime that would occur if Section 365(n) was not extended to Chapter 15 and denied the relief sought by the German debtor. See id. at 32.

So too here. Failure to extend the protections of the Safe Harbor to the Plaintiffs' BVI law claims undermines considerations of transactional finality and

market stability that are key to the United States' securities industry—the very policy outcome that Congress sought to avoid when it enacted the Safe Harbors.

The Bankruptcy Court's ruling fails to meet the requirements of Section 1522 by failing to protect the Defendants or even to consider whether the Defendants, as potential creditors of the Plaintiffs, are properly protected. If the Decision ultimately results in the unwinding of the redemption payments to Defendants, then Defendants will become creditors of Fairfield Sentry, which would leave Defendants with no recourse except a claim in the BVI liquidation proceedings, substantially impairing their potential recovery. Furthermore, the Decision leaves Defendants exposed to the precise risks that Congress intended the Safe Harbors to prevent, and upon which Defendants relied in transacting with the debtor. This result should be avoided.

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CONCLUSION

For the foregoing reasons, Amici urge the Court to grant Defendants leave to appeal in order to review and reverse the Bankruptcy Court's ruling.

Dated: May 10, 2021

Respectfully submitted,

FRESHFIELDS BRUCKHAUS DERINGER US LLP

By: /s/ Madlyn Gleich Primoff

Madlyn Gleich Primoff
David Y. Livshiz
Dana Roizen
Henry V. Hutten

601 Lexington Avenue, 31st Floor
New York, New York 10022
(212) 277-4000
madlyn.primoff@freshfields.com
david.livshiz@freshfields.com
dana.roizen@freshfields.com
henry.hutten@freshfields.com

Counsel for SIFMA and SFA

SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION

Kevin Carroll
1099 New York Avenue, NW
Washington, DC 20001
(202) 962-7382

STRUCTURED FINANCE ASSOCIATION

Kristi Leo
1776 I Street NW Suite 501
Washington, DC 20006
(917) 415-8999

CERTIFICATE OF COMPLIANCE

I hereby certify that the enclosed brief complies with the length requirement of Fed. R. Bankr. P. 8017(a)(5) because the brief contains 5,944 words, which is less than one-half of the type-volume limitation for a party's principal brief (which is 13,000 words pursuant to Rule 8015(a)(7)(B)). The enclosed brief also complies with the typeface requirements of Fed. R. Bankr. P. 8015(a)(5) and the type style requirements of Fed. R. Bankr. P. 8015(a)(6) because it was prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font, except for footnotes and electronic signatures.

Date: May 10, 2021

Respectfully submitted,

FRESHFIELDS BRUCKHAUS
DERINGER US LLP

/s/ David Y. Livshiz

David Y. Livshiz
601 Lexington Avenue, 31st Floor
New York, New York 10022
Telephone: (212) 277-4000
david.livshiz@freshfields.com

APPENDIX A
Appeals

	Case No. (S.D.N.Y. Bankr.)	Case Name	Appeal Docket No.[1]
1.	Adv. Pro. 10-3622	*Fairfield Sentry Ltd. (In Liquidation), et al. v. Citibank NA London, et al.*	21-3530
2.	Adv. Pro. 10-3626	*Fairfield Sentry Ltd. (In Liquidation), et al. v. BNP Paribas Luxembourg SA a/k/a BGL BNP Paribas*	21-3538
3.	Adv. Pro. 10-3627	*Fairfield Sentry Ltd. (In Liquidation), et al. v. BNP Paribas Securities Services Luxembourg, et al.*	21-3544
4.	Adv. Pro. 10-3630	*Fairfield Sentry Ltd. (In Liquidation), et al. v. HSBC Securities Services (Luxembourg) SA, et al.*	21-3550
5.	Adv. Pro. 10-3633	*Fairfield Sentry Ltd. (In Liquidation), et al. v. HSBC Private Bank Suisse SA, et al.*	21-3563
6.	Adv. Pro. 10-3634	*Fairfield Sentry Ltd. (In Liquidation), et al. v. Zurich Capital Markets Company, et al.*	
7.	Adv. Pro. 10-3635	*Fairfield Sentry Ltd. (In Liquidation), et al. v. ABN AMRO Schweiz AG, et al.*	
8.	Adv. Pro. 10-3636	*Fairfield Sentry Ltd. (In Liquidation), et al. v. ABN AMRO Schweiz AG, et al.*	
9.	Adv. Pro. 10-3780	*Fairfield Sentry Ltd. (In Liquidation), et al. v. UBS AG New York, et al.*	21-3576
10.	Adv. Pro. 10-4098	*Fairfield Sentry Ltd. (In Liquidation), et al. v. BNP Paribas Arbitrage SNC, et al.*	21-3637
11.	Adv. Pro. 10-4099	*Fairfield Sentry Ltd. (In Liquidation), et al. v. BNP Paribas Private Bank and Trust Cayman Ltd., et al.*	21-3653

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[1] As of the time of filing of this motion, dockets for certain interlocutory appeals have not yet been opened and therefore are listed as blank in this table. Amici will re-file this brief on those dockets once available.

	Case No. (S.D.N.Y. Bankr.)	**Case Name**	**Appeal Docket No.[1]**
12.	Adv. Pro. 11-1250	*Fairfield Sentry Ltd. (In Liquidation), et al. v. UBS Europe SE, Luxembourg Branch, et al.*	21-3676
13.	Adv. Pro. 11-1463	*Fairfield Sentry Ltd. (In Liquidation), et al. v. Merrill Lynch International, et al.*	21-3741
14.	Adv. Pro. 11-1579	*Fairfield Sentry Ltd. (In Liquidation), et al. v. BNP Paribas Securities Nominees Ltd., et al*	21-3751
15.	Adv. Pro. 11-1617	*Fairfield Sentry Ltd. (In Liquidation), et al. v. Fortis Bank SA/NV, et al.*	
16.	Adv. Pro. 11-2770	*Fairfield Sentry Ltd. (In Liquidation), et al. v. Citigroup Global Markets Limited, et al.*	
17.	Adv. Pro. 12-1551	*Fairfield Sentry Ltd. (In Liquidation), et al. v. BNP Paribas Espana f/k/a Fortis Bank (Espana), et al.*	21-3502
18.	Adv. Pro. 19-1122	*Fairfield Sentry Ltd. (In Liquidation), et al. v. Citco Global Custody NV, et al. (In re Fairfield Sentry Ltd.)*	21-3302