UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PHILIP VON KAHLE, in his capacity as assignee for the benefit of the creditors of Coex Coffee International, Inc.,

Plaintiff,

v.

CARGILL, INC.,

Defendant.

Case No. 1:21-cv-8532(AT)

BRIEF OF THE INTERNATIONAL SWAPS AND DERIVATIVES ASSOCIATION AND THE FUTURES INDUSTRY ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT CARGILL, INC.'S MOTION TO DISMISS

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(continued)

Page(s)

Constitutional Provisions and Statutes

Other Authorities

INTEREST OF THE *AMICI CURIAE*

The International Swaps and Derivatives Association (ISDA) and the Futures Industry Association (FIA) are leading trade associations in the financial industry. ISDA is the global trade association representing leading participants in the swaps and derivatives industries. Its member institutions comprise a broad range of derivatives market participants and key components of the derivatives market infrastructure. FIA is the leading global trade organization for the futures, options, and centrally cleared derivatives markets. Its membership includes market participants as well as technology vendors, lawyers, and other professionals serving the industry.[1]

Amici have a strong interest in promoting the stability of financial markets and ensuring the certainty of completed settlements and transfers. Those also are the goals of the safe harbors for swap, commodity futures, and other financial agreements, 11 U.S.C. § 546(e)-(g) and (j), which prevent federal bankruptcy trustees from avoiding transfers related to those agreements. *Amici*'s view is that the swap agreement safe harbor at issue preempts state-law fraudulent-conveyance claims brought by Plaintiff, an assignee in state insolvency proceedings. A contrary rule would directly undermine the safe harbors, destabilizing the swap, futures, and other markets. *Amici* file this brief to underscore the critical importance of the safe harbors to the financial markets.

INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiff, an assignee in a state insolvency proceeding, seeks to undo payments made by a debtor to Cargill pursuant to swap agreements, so that he can distribute the proceeds to other creditors. His fraudulent-transfer claims are conflict preempted by 11 U.S.C. § 546(g), the swap agreement safe harbor. That safe harbor protects transfers made in connection with swap agreements from a bankruptcy trustee's power to avoid fraudulent transfers, by preventing the trustee from

---

[1] No person other than *amici*, their members, and their counsel funded the preparation or submission of this brief.

attempting to unwind those transfers. Congress enacted that provision (and related safe harbors) because many companies depend on financial agreements such as swap agreements to lower borrowing costs and to manage risks, and allowing payments to be unwound would reduce market liquidity and destabilize financial markets, to the detriment of the broader economy.

Here, Plaintiff is just like a bankruptcy trustee who is seeking to avoid swap payments. The only difference is that he is acting as an assignee in a state insolvency proceeding, as opposed to a trustee in a federal bankruptcy proceeding. The Second Circuit has held that the safe harbors preempt state-law claims just like Plaintiff's when brought in the context of a bankruptcy, because those claims directly conflict with Congress's purposes in enacting the safe harbors. *See In re Tribune Co. Fraudulent Conveyance Litig.*, 946 F.3d 66, 90-91 (2d Cir. 2019); *Whyte v. Barclays Bank PLLC*, 494 B.R. 196, 200 (S.D.N.Y. 2013), *aff'd*, 644 F. App'x 60 (2d Cir. 2016). The Second Circuit's rationale applies equally to state-law claims brought in the context of a state insolvency proceeding. From the perspective of market participants, it does not matter whether a long-settled transaction is attacked by a federal bankruptcy trustee or a state assignee. Either way, unwinding settled transactions undermines the certainty and finality that is critical to the orderly functioning of financial markets. That would increase the costs of entering into financial agreements like swaps and futures, reducing companies' ability to use these critical tools to lower borrowing costs and manage risk. The Court should dismiss the complaint on preemption grounds.

ARGUMENT

I. THE SAFE HARBORS ARE ESSENTIAL TO THE STABILITY OF THE FINANCIAL MARKETS AND ENSURING LIQUIDITY

A. Swap Agreements Are Fundamental To Financial Markets

Swap agreements are a type of financial agreement in which two entities agree to exchange (or swap) cash flows for a set period of time. *See Thrifty Oil Co. v. Bank of Am. Nat'l Tr. & Sav.*

Ass'n, 322 F.3d 1039, 1042 (9th Cir. 2003). For example, suppose a company has a loan with a variable rate of interest but would prefer to pay a fixed rate. It can achieve that by agreeing to swap interest payments with another company that has an equivalent loan with a fixed rate but would prefer to pay a variable rate. *Id.* at 1042-43. Other types of swaps are based on foreign exchange rates or commodity prices, instead of interest rates. *See* ISDA, *Economic Sanctions Programs & Derivatives* § 3 (Dec. 18, 2019), https://bit.ly/35OAs4A (ISDA, *White Paper*). Today, rather than swapping cash flows directly with another company, companies typically enter into swap agreements with swap dealers, which either find matching transactions or act as counterparties on their own account. *See id.* § 3.4.

Swap agreements serve many economically beneficial purposes. They allow companies to reduce their cost of borrowing, alter their risk exposure, and hedge risks associated with cross-border trade or commodity prices. *Thrifty Oil*, 332 F.3d at 1043; *see* H.R. Rep. No. 101-484, at 3 (1990); ISDA, *White Paper* § 3.1. In the underlying transactions in this case, for example, Coex Panama and Cargill entered into swap agreements to hedge against fluctuations in coffee prices. *See* Compl. ¶ 22, ECF No. 1.

The swap market is enormous – swap agreements worth billions of dollars are traded, cleared, and settled every day. The market value of all swaps is about $13 trillion – more than half the GDP of the United States. Bank of Int'l Settlements, *OTC Derivative Statistics at End-June 2021*, at 1 (Nov. 15, 2021), https://bit.ly/3GsazE6. Nearly all of the world's largest corporations use swap agreements. *See, e.g.*, ISDA, Press Release, *Over 94% of the World's Largest Companies Use Derivatives to Help Manage Their Risks, According to ISDA Survey* (Apr. 23, 2009), https://bit.ly/3GjLUBO. And many major financial institutions are swap dealers, meaning they are counterparties in a large number of agreements. *See* 7 U.S.C. § 1a(49)(A).

Because of the volume of swap agreements and the interconnectedness of the major financial institutions involved in those agreements, disrupting the operation of the swap market can have far-reaching and devastating effects. ISDA, *White Paper* § 3.2. Like other financial markets, the swap market depends on "certainty and predictability" with regard to the finality of the transactions. *In re Enron Creditors Recovery Corp.*, 651 F.3d 329, 336 (2d Cir. 2011). Any uncertainty about the finality of settled transactions – for example, due to attempts to claw back payments – will destabilize the market, deter participation and reduce market liquidity, which ultimately impairs the ability of companies to engage in swap agreements cost effectively.

B. Congress Enacted The Safe Harbors To Protect The Stability Of Financial Markets And Enhance Liquidity

Congress has recognized that insolvencies can pose special threats to financial markets. Because market conditions can change very quickly, if one party's insolvency prevents a financial transaction from promptly closing out, its counterparty could face substantial losses. H.R. Rep. No. 101-484, at 2. And because the markets are so interconnected, even one insolvency can have a "ripple effect" that threatens the entire market. H.R. Rep. No. 97-420, at 1 (1984).

Congress took steps to protect financial markets, including the swap and commodity futures markets, from the systemic risk posed by insolvencies. Relevant here, it enacted broad safe harbors that prevent a bankruptcy trustee from avoiding transfers related to key financial instruments (including swap agreements and commodity futures contracts). *See* 11 U.S.C. § 546(e)-(g) and (j).[2] That ensures the finality of payments and other transfers under those instruments. Section 546(e) is the safe harbor for securities and commodity contracts, including futures and forward

---

[2] A futures contract is an agreement for a buyer to buy and a seller to sell a specific asset, at a specific price, for delivery on a specific date. *See Leist v. Simplot*, 638 F.2d 283, 287-88 (2d Cir. 1980). As with swaps, companies use futures to hedge risks relating to interest rate, currency, and commodity price fluctuations. *See id.*

contracts; Section 546(g) is the safe harbor for swap agreements. Section 546(g) provides: "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." "[T]he obvious purpose of Section 546(g), fully confirmed by the legislative history, is to protect securities markets from the disruptive effects that unwinding such transactions would inevitably create." *Whyte*, 494 B.R. at 200.

Congress's paramount concern in enacting the safe harbors was to "minimize volatility" in the financial markets. H.R. Rep. No. 101-484, at 2-3. The committee report recognized that swaps and similar agreements are critically important to companies for "minimiz[ing] borrowing costs" and "hedg[ing] against fluctuations" in rates and commodity prices. *Id.* at 3-4. And it recognized that insolvencies pose systemic threats to financial markets, particularly from the threat of payments being unwound in bulk. *Id.* at 2-3. Since enacting the first safe harbors in 1980, Congress has only ever expanded them, by (for example) creating new safe harbors (including the one for swaps) and by updating the definitions of the agreements covered. *See In re Nat'l Gas Distribs.*, 556 F.3d 247, 252-54 (4th Cir. 2009) (documenting that history).

Given this history, the Second Circuit and other courts of appeals have recognized that Congress intended the safe harbors to apply broadly. *See, e.g.*, *Enron*, 651 F.3d at 334-35; *In re Derivium Capital LLC*, 716 F.3d 355, 366 (4th Cir. 2013); *Kaiser Steel Corp. v. Charles Schwab & Co.*, 913 F.2d 846, 849 (10th Cir. 1990). They understand that the paramount goal of the safe harbors is to protect market stability and enhance liquidity, even if it reduces the assets available for distribution to creditors. *Tribune Co.*, 946 F.3d at 94; *Nat'l Gas*, 556 F.3d at 259. Thus, "the language of the safe harbors is to be strictly interpreted even when the outcome may be prejudicial to the interests of the estate and its creditors." *In re Lehman Bros. Holdings Inc.*, 469 B.R. 415, 436 (Bankr. S.D.N.Y. 2012).

In sum, Congress recognized that insolvency proceedings can massively destabilize financial markets including the swap and futures markets, particularly if payments or collateral transfers are sought to be unwound. Congress enacted safe harbors to protect the market from that risk.

II. THE SWAP AGREEMENT SAFE HARBOR PREEMPTS PLAINTIFF'S CLAIMS

A. The Second Circuit Has Held That The Safe Harbor Preempts State-Law Fraudulent-Conveyance Claims That Would Destabilize The Swap Market

Congress has broad powers under the Bankruptcy Clause to establish a uniform allocation and distribution of payments to creditors. *See* U.S. Const. art. I, § 8, cl. 4; *Int'l Shoe Co. v. Pinkus*, 278 U.S. 261, 268 (1929); *Sherwood Partners, Inc. v. Lycos, Inc.*, 394 F.3d 1198, 1203-04 (9th Cir. 2005). It also has broad powers under the Commerce Clause to regulate financial markets, including the swap and commodity futures markets. *See, e.g.*, Dodd-Frank Wall Street Reform & Consumer Protection Act, Pub. L. No. 111-203, tit. VII, § 701 *et seq.*, 124 Stat. 1376 (2010). Congress has exercised those powers in enacting the safe harbors.

Federal law can preempt application of state law expressly, or by implication through field preemption or conflict preemption. Field preemption applies when Congress has so pervasively regulated a particular area that there is no room for state regulation. *In re MTBE Prods. Liab. Litig.*, 725 F.3d 65, 97 (2d Cir. 2013). Conflict preemption applies when a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* (internal quotation marks omitted). As Cargill's brief explains, both field and conflict preemption bar Plaintiff's claims. ECF No. 50, at 10-16. This brief focuses on conflict preemption, to explain how the Second Circuit's decisions in *Tribune Co.* and *Whyte* apply to this case.

Tribune Co. involved the safe harbor for securities and commodity futures contracts, Section 546(e). The debtor entered into bankruptcy proceedings, and creditors sought to bring state-law fraudulent-conveyance claims to claw back payments the debtor had made under settlement contracts. 946 F.3d at 73. The Second Circuit held that the claims were preempted because they conflicted with "[e]very congressional purpose reflected in" the Section 546(e) safe harbor. *Id.* at 90. The court acknowledged the presumption against preempting laws in areas traditionally regulated by States, but found the presumption inapplicable because both "creditors' rights" and financial markets are "subject to extensive federal regulation." *Id.* at 82-83. The court then explained that the safe harbor "was intended to protect from avoidance proceedings payments [related to] the settlement of securities transactions" because the "speed," "certainty," and "finality" of those payments are essential to ensure "stability to financial markets." *Id.* at 90-91. Attempting to unwind those payments "would seriously undermine" those markets – the "opposite" of what the safe harbor "was intended to achieve" – so the creditors' claims were preempted. *Id.*

In *Whyte*, the Second Circuit applied the reasoning of *Tribune Co.* to the swap agreement safe harbor, the provision at issue here. There, the debtor entered into bankruptcy, and some creditors assigned their claims to a litigation trust, which in turn was appointed as the bankruptcy trustee. 494 B.R. at 198. The trust sought to bring state-law fraudulent-conveyance claims to claw back payments made under a swap agreement, not in its capacity as trustee (because that would be barred by the safe harbor), but in its capacity as the *assignee* (like Plaintiff here) of the creditors' claims. *Id.* at 199. The district court rejected this attempt to "nulli[fy]" the safe harbor, holding that the safe harbor preempted the trust's claims. *Id.* It explained that the safe harbor "protect[s] securities markets from the disruptive effects of unwinding" settled swap transactions by placing those "transactions totally beyond the inherently destabilizing effects of a bankruptcy and its attendant litigation." *Id.* at 200. Allowing the trust to proceed with state-law claims "as the functional equivalent of a bankruptcy trustee" would "make a mockery of Congress's purpose of minimizing volatility in the swap markets." *Id.* at 200-01. The Second Circuit then affirmed "for substantially the reasons stated in" *Tribune Co.* 644 F. App'x at 60. (After affirming *Whyte*, the Second Circuit revised its opinion in *Tribune Co.* in light of intervening Supreme Court precedent, but did not change its preemption holding. *See* 946 F.3d at 75, 96-97.)

Thus, in this Circuit, it is settled that the safe harbors preempt a state-law claim that would have the same destabilizing effects as a trustee's avoidance action.

B. Allowing Plaintiff's Claims To Proceed Would Lead To The Very Destabilization That Congress Sought To Prevent

The only difference between *Tribune Co.* and *Whyte* and this case is that those cases arose in federal bankruptcies and this case arises out of a state insolvency proceeding. For that reason, Plaintiff argues that the holdings of those cases do not apply here – and even suggests that *Tribune Co.* affirmatively held that the safe harbors do not apply to claims asserted outside of federal bankruptcies. *See* ECF No. 40, at 2-3. But the Second Circuit's reasoning applies equally to fraudulent-conveyance claims asserted in connection with state insolvency proceedings, and the court did not say anything to the contrary. Critically, the preemption analyses in *Tribune Co.* and *Whyte* did not depend on any unique aspect of a *federal* bankruptcy. What mattered was that the plaintiffs threatened the stability of the financial markets by seeking to claw back settled transactions, contrary to Congress's objective in enacting the safe harbors – just what Plaintiff proposes to do here.

Plaintiff is the assignee in a state insolvency proceeding – a Florida assignment for the benefit of creditors (ABC) proceeding. *See* Fla. Stat. § 727.101 *et seq.* That proceeding is similar in many ways to, and can serve as an "alternative to," a Chapter 7 bankruptcy. *In re Nica Holdings, Inc.*, 810 F.3d 781, 789 (11th Cir. 2015). In both proceedings, a third party (in an ABC proceeding, an assignee such as Plaintiff; in bankruptcy, the trustee) takes possession of the debtor's estate and liquidates it for the benefit of its creditors. *See id*. And in both proceedings, the third party can avoid fraudulent transfers, clawing back money to redistribute to creditors. *See* 11 U.S.C. § 548;

Smith v. Effective Teleservices, Inc., 133 So.3d 1048, 1050-51 (Fla. Dist. Ct. App. 2014). The principal difference between a bankruptcy and a state-law ABC proceeding is that the latter may not grant a discharge or condition distribution on the release of any remaining debts. *See Int'l Shoe Co.*, 278 U.S. at 268. But nothing in *Tribune Co.* or *Whyte* depended on that difference.

In this context, Plaintiff is much more than an individual litigant; he has the same potential effect on the financial markets as a bankruptcy trustee. Like a bankruptcy trustee, an ABC assignee can aggregate all creditors' claims and pursue them in a single lawsuit, *see* Fla. Stat. § 727.108(1)(a) – unlike an individual litigant, who might seek to challenge only a particular fraudulent transfer. Further, like a bankruptcy trustee, an ABC assignee can use the debtor's estate to finance the litigation, *see id.* §§ 727.108(6)-(7), 727.114(1)(b) – again unlike an individual litigant, who must individually finance the litigation. In short, Plaintiff is the state-law "functional equivalent of a bankruptcy trustee." *Whyte*, 494 B.R. at 199.

Allowing Plaintiff to proceed with his state-law claims thus would lead to the very instability in the financial markets that Congress sought to avoid. From the perspective of the markets, there is no difference if payments are clawed back by a bankruptcy trustee or an ABC assignee. In both cases, transactions that have been settled for years are unwound in bulk, with market participants forced to pay back proceeds from long-closed transactions. *See Whyte*, 494 B.R. at 200. That could have ripple effects far beyond any individual debtor, particularly if it leads to additional insolvencies which in turn trigger additional claw backs. *See* H.R. Rep. No. 97-420, at 1. It is "difficult to see" why Congress would have barred a bankruptcy trustee from attempting to avoid key financial transactions, but would have intended to permit a state assignee to pursue claims "identical in every respect," when "[a]voidance of the transactions in either scenario would present the same threat of systemic risk in the marketplace." *Enron*, 651 F.3d at 338.

Plaintiff's argument, if accepted, could have far-reaching consequences for financial markets. It would provide a blueprint for state-law assignees to attack the finality of practically *every* type of financial transaction. If assignees could routinely unwind transfers related to swap, futures, or other financial agreements, that would increase the risk of entering into those agreements because it could call into question the finality of any transfer. Counterparties will not know whether or when an assignee might come to seek to undo a long-settled transfer. Even if the assignee ultimately is unsuccessful, the cost and uncertainty of litigation alone "would be a substantial deterrent" to entering into financial agreements. *Tribune Co.*, 946 F.3d at 93-94.

The result would be to reduce liquidity, particularly for potentially troubled companies. The safe harbors give counterparties to those companies the confidence to maintain their positions, by ensuring that the counterparties can rely on their collateral and guarantee arrangements. Weakening the safe harbors would encourage the counterparties to promptly terminate their positions at the first sign of financial trouble, exacerbating stress on the troubled company. Weakening the safe harbors also would impair financial institutions' ability to recycle collateral to cover margin obligations, because that collateral might be clawed back, reducing the liquidity of those critical cornerstones of the markets. And the risk that settled transactions could be clawed back could upend financial institutions' compliance with regulatory capital and risk management requirements. That would make it more difficult for those institutions to offer swaps and futures to companies that rely on those agreements to manage risk, ultimately increasing the costs of borrowing, operating businesses, and buying goods for companies and individuals across the U.S. economy.

Allowing Plaintiff's claims to proceed risks the very market instability that Congress sought to prevent by enacting the safe harbors. His claims therefore are preempted.

CONCLUSION

The Court should dismiss Plaintiff's claims on federal preemption grounds.

Respectfully submitted,

MAYER BROWN LLP

By: /s/ *Christopher J. Houpt*

Nicole A. Saharsky (*pro hac vice* pending)
1999 K Street, N.W.
Washington, D.C. 20006
(202) 263-3135
nsaharsky@mayerbrown.com

Christopher J. Houpt
Curtis A. Doty (*pro hac vice* pending)
1221 Avenue of the Americas
New York, N.Y. 10020
(212) 506-2380
(212) 506-2224
choupt@mayerbown.com
cdoty@mayerbrown.com

Counsel for the International Swaps and Derivatives Association and the Futures Industry Association

Dated: February 22, 2022

CERTIFICATE OF SERVICE

I hereby certify that on February 22, 2022, I electronically filed this document with the Clerk of the Court using the ECF System, which will send notification to the ECF counsel of record.

By: /s/ *Christopher J. Houpt*
Christopher J. Houpt