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May 31, 2023

BY EMAIL AND ECF

Hon. Analisa Torres
United States District Judge for the Southern District of New York
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street
New York, NY 10007-1312

Re: *Kahle v. Cargill Inc.*, No. 1:21-cv-08532 (AT)

Dear Judge Torres:

We represent the International Swaps and Derivatives Association (ISDA), the Futures Industry Association (FIA), the Securities Industry and Financial Markets Association (SIFMA), and the Managed Funds Association (MFA). They file this letter as *amici curiae* to urge the Court to grant Cargill's motion to certify the Court's May 9, 2023, order for interlocutory appeal under 28 U.S.C. § 1292(b) (Dkt. 139).

Amici are leading trade associations in the financial industry.[1] ISDA is the global trade association representing leading participants in the derivatives industry. ISDA's members comprise a broad range of derivatives market participants, including corporations, investment managers, government and supranational entities, insurance companies, energy and commodities firms, and international and regional banks. In addition to market participants, members also include key components of the derivatives market infrastructure, such as exchanges, intermediaries, clearing houses and repositories, as well as law firms, accounting firms, and other service providers.

FIA is the leading global trade organization for the futures, options, and centrally cleared derivatives markets. FIA represents a wide array of market participants from around the world that depend on these markets including exchanges, clearinghouses, executing brokers, software vendors, specialized legal firms, proprietary trading firms, and commodity specialists. FIA's mission is to support open, transparent, and competitive markets, protect and enhance the integrity of the financial system, and promote high standards of professional conduct.

SIFMA is a securities industry trade association representing the interests of hundreds of securities firms, banks, and asset managers. On behalf of the industry's one million employees, 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 financial markets. SIFMA serves as an industry

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

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coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency.

MFA represents the global alternative asset management industry. MFA's mission is to advance the ability of alternative asset managers to raise capital, invest, and generate returns for their beneficiaries. MFA advocates on behalf of its membership and convenes stakeholders to address global regulatory, operational, and business issues. MFA has more than 170 member firms, including traditional hedge funds, credit funds, and crossover funds, that collectively manage nearly $2.2 trillion across a diverse group of investment strategies. Member firms help institutional investors to diversify their investments, manage risk, and generate attractive returns over time.

Amici submit this letter to provide their unique perspective on the issues in this case. *Amici*'s members have a substantial interest in the legal standards governing payments, collateral transfers, and credit support arrangements related to swaps, futures, forwards, and other financial contracts. These contracts are critical to ensuring liquidity for many companies and financial institutions that use the contracts to lower financing costs, manage risk, and implement investment objectives.

Plaintiff is an assignee in a state-law insolvency proceeding who seeks to unwind payments made by the debtor to Cargill in connection with swap agreements. Cargill moved to dismiss Plaintiff's claims on the ground that the claims are preempted by 11 U.S.C. § 546(g), the swap agreement safe harbor. *See* Dkt. 49. That provision prevents bankruptcy trustees from unwinding transfers made in connection with swap agreements. *See* 11 U.S.C. § 546(g). Congress enacted it (and related safe harbors for other financial instruments) to protect the liquidity and stability of the financial markets. *See In re Tribune Co. Fraudulent Conveyance Litig.*, 946 F.3d 66, 90-91 (2d Cir. 2019). ISDA and FIA filed an *amicus* brief in support of Cargill's motion to dismiss. *See* Dkt. 56. The Court denied the motion to dismiss, holding that the swap agreement safe harbor applies only to trustees in federal bankruptcies, and not assignees in state insolvency proceedings. Dkt. 121. Cargill has asked the Court to certify its order for interlocutory appeal.

Amici respectfully urge the Court to grant certification. The Court's order satisfies the statutory criteria for certification. First, the order "involves a controlling question of law." 28 U.S.C. § 1292(b). The dispositive question is whether the swap agreement safe harbor preempts Plaintiff's claims, and "[t]he question of preemption is predominantly legal." *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 201 (1983). The question also is controlling, because a reversal would result in dismissal of the claims and thus "would terminate the action." *Klinghoffer v. S.N.C. Achille Lauro*, 921 F.2d 21, 24 (2d Cir. 1990).

Second, and relatedly, an "immediate appeal" would "materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). If the Court of Appeals were to reverse, that would immediately end the litigation, sparing the Court and the parties

from expending resources on litigating claims that fail as a matter of law. Even if the Court of Appeals were only to vacate and remand on the preemption question, an immediate appeal would spare the Court and the parties from litigating the claims twice.

Third, "there is substantial ground for difference of opinion" on the preemption question. 28 U.S.C. § 1292(b). "A substantial ground for difference of opinion exists where . . . the issue is particularly difficult and of first impression for the Second Circuit." *SEC v. Rio Tinto PLC*, No. 17-cv-7994, 2021 WL 1893165, at *2 (S.D.N.Y. May 11, 2021) (internal quotation marks omitted). It is undisputed that if Plaintiff were a federal bankruptcy trustee, the swap agreement safe harbor would preempt his claims. Dkt. 121, at 5; *see Whyte v. Barclays Bank PLLC*, 644 F. App'x 60, 60 (2d Cir. 2016). The only question is whether the result should be different when the plaintiff is the assignee in a state insolvency proceeding, rather than a federal bankruptcy trustee. No court of appeals has addressed that question.

In its order, the Court reasoned that the swap agreement safe harbor does not apply because by its language it covers only federal bankruptcies. Dkt. 121, at 5-6. The Court also observed that state insolvency proceedings can have different purposes from federal bankruptcy proceedings, and it found insufficient reason to believe that Congress intended the safe harbors to apply to state insolvency proceedings. *Id.* at 6.

It also would be reasonable to conclude that the swap agreement safe harbor preempts Plaintiff's claims. Even if the plain language of the provision does not cover an assignee in a state insolvency proceeding, the claim here still is preempted if it stands as an "obstacle to the accomplishment and execution" of Congress's purposes and objectives. *In re MTBE Prods. Liab. Litig.*, 725 F.3d 65, 97 (2d Cir. 2013) (internal quotation marks omitted). Indeed, because a state insolvency proceeding can function as an "alternative" to federal bankruptcy, *In re Nica Holdings, Inc.*, 810 F.3d 781, 789 (11th Cir. 2015), the Supreme Court has warned that a state insolvency proceeding may not intrude on the "essential features" of federal bankruptcy, *Pobreslo v. Joseph M. Boyd Co.*, 287 U.S. 518, 525 (1933).

Here, Congress enacted the safe harbor "to protect from avoidance proceedings payments" related to swap agreements because the "speed," "certainty," and "finality" of those payments are essential to ensure "stability to financial markets." *Tribune*, 946 F.3d at 90-91. Attempting to unwind those transactions "would seriously undermine" those markets. *Id.* The safe harbor thus reflects Congress's considered balancing between the interests of creditors and those of global financial markets. That balancing is an essential feature of federal bankruptcy law; from the perspective of the markets, there is no difference if payments are clawed back in a federal bankruptcy proceeding or in a state insolvency proceeding.

The Court also should grant certification because of the importance of the issue. The preemption issue "is of special consequence" to the global financial markets.

Balintulo v. Daimler AG, 727 F.3d 174, 186 (2d Cir. 2013) (quoting *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 111 (2009)). 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. 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).

Allowing Plaintiff to proceed with his claims is likely to encourage troubled companies to opt for state insolvency proceedings, so that they can favor certain creditors or increase their bargaining leverage over others. That would severely disrupt the swap market – precisely contrary to Congress's intent in enacting the safe harbor. Transactions that have been settled for years would be unwound in bulk, and market participants would be forced to pay back proceeds from long-closed transactions. Further, the effect of one unwound transaction would not be limited to the individual debtor; one unwound transaction may lead to another, leading to more insolvencies and more claw backs.

The Court's reasoning is not limited to the swap agreement safe harbor, but could fundamentally undermine the safe harbors protecting other types of financial transactions. *See* 11 U.S.C. 546(e)-(f), (j). Assignees in state insolvency proceedings could unwind transfers related to swaps, futures, and other financial agreements that *amici*'s members enter into on a daily basis. That would seriously damage financial markets by reducing liquidity, especially for potentially troubled companies. Counterparties would be more likely to terminate their positions at the first sign of financial trouble rather than risk facing a claw back in insolvency proceedings. That would further exacerbate the stress on troubled companies.

Circumventing the safe harbors also would reduce financial institutions' liquidity. Financial institutions would be impaired in their ability to recycle collateral to cover margin obligations, because that collateral might be clawed back one day. The risk that settled transactions could be clawed back threatens to upend the institutions' compliance with regulatory capital and risk management requirements. To avoid that risk, financial institutions are likely to limit their dealings in swaps and futures to large corporations that are unlikely to enter state insolvency proceedings. Ultimately, that would increase the costs of borrowing, hedging, and investing for all other companies across the United States.

Because all three requirements for certification are met, and the question presented is exceptionally important to the global financial markets, *amici* respectfully urge the court to certify its order for interlocutory appeal. If it would be helpful to the Court, *amici* would be happy to submit additional briefing on these issues.

Sincerely,

/s/ *Nicole A. Saharsky*

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