21-487-cv

IN THE

United States Court of Appeals
For the Second Circuit

CITIBANK, N.A.,

Plaintiff-Appellant,

V.

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.

Appeal from the United States District Court
for the Southern District of New York

BRIEF OF *AMICI CURIAE* AMERICAN BANKERS ASSOCIATION, BANK POLICY INSTITUTE, AND THE CLEARING HOUSE PAYMENTS COMPANY LLC AND THE CLEARING HOUSE ASSOCIATION LLC, IN SUPPORT OF PLAINTIFF-APPELLANT'S APPEAL

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May 6, 2021

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

American Bankers Association hereby certifies that it is not a subsidiary or affiliate of any publicly owned corporation, and no publicly held company has 10% or greater ownership in the Association.

Bank Policy Institute hereby certifies that it is not a subsidiary or affiliate of any publicly owned corporation, and no publicly held company has 10% or greater ownership in the Institute.

The Clearing House Payments Company LLC hereby certifies that it is not a subsidiary or affiliate of any publicly owned corporation, and no publicly held company has 10% or greater ownership in the Association.

The Clearing House Association LLC hereby certifies that it is not a subsidiary or affiliate of any publicly owned corporation, and no publicly held company has 10% or greater ownership in the Association.

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

American Bankers Association ("ABA") is the principal national trade association and voice of the banking industry in the United States. Its members, located in each of the fifty states and the District of Columbia, include banks, savings associations, and nondepository trust companies of all sizes. ABA's members hold a substantial majority of the U.S. banking industry's domestic assets and are leaders in all forms of consumer financial services.

Bank Policy Institute is a nonpartisan public policy, research, and advocacy group, representing the nation's leading banks and their customers. Its members include universal banks, regional banks, and major foreign banks, doing business in the United States. Collectively, they employ almost two million Americans, make nearly half of the nation's small business loans and are an engine for financial innovation and economic growth.

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[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), counsel for the *amici curiae* states that no counsel for a party that authored this brief in whole or in part, and no person—other than the *Amici* and their counsel—made a monetary contribution intended to fund the preparation or submission of this brief. Citibank is one of approximately three hundred members of the American Bankers Association, one of forty-one members of the Bank Policy Institute, one of twenty-three members of The Clearing House Association LLC, and one of twenty-six members of The Clearing House Payments Company LLC. The submission of this *amicus* brief was approved by the membership of each *amicus curiae*, without objection by any members.

The Clearing House Payments Company LLC is the oldest payments company in the United States. It is regulated as a systemically important financial market utility, owns and operates U.S. payments networks that provide safe, sound, and efficient payment clearing and settlement services to financial institutions, and promotes innovation and thought leadership for the development of future generations of payments systems, products, and services. The Payments Company is the only private-sector automated clearing house ("ACH") and wire operator in the United States, clearing and settling more than $2 trillion in U.S. dollar payments each day, representing half of all commercial ACH and wire volume. The Clearing House Association LLC (the "Association"), established in 1853, is the oldest banking association in the United States. The Association is a nonpartisan advocacy organization that represents the interests of its member banks by developing and promoting policies to support a safe, sound, and competitive banking system that serves customers, communities, and economic growth. The Association participates as an *amicus* in cases that are important to the payments industry and financial sector.

Amici and their members have a substantial interest in the matter now before this Court. *Amici* submit this brief to highlight the reasons of particular significance to the banking and business communities why this Court should reverse the judgment below.

SUMMARY OF ARGUMENT

It is a matter of general commercial practice that, consistent with the principles of restitution and mistake of fact incorporated into Article 4-A of the Uniform Commercial Code, recipients who are not entitled to erroneously transferred funds, like Defendants-Appellees, are obligated to return them. Thirty years ago, in *Banque Worms v. BankAmerica International*, the New York Court of Appeals applied a narrow exception to this general rule, in holding that the discharge-for-value defense was available under a specific set of unique circumstances. In *Banque Worms*, the lender who received the erroneous payment terminated the loan facility at issue and declared the payment date. The facts presented to the Court of Appeals in *Banque Worms* matched its description of the discharge-for-value defense, applying where a lender "receives money to which it *is entitled*" in the "regular course of business" and without notice that the money had been erroneously wired. 77 N.Y.2d 362, 368, 373 (1991) (emphasis added).

The Citibank N.A. ("Citibank") case presents very different circumstances, and *Amici* respectfully request that the Court reverse the district court's expansion of the holding in *Banque Worms* and the resulting $500 million unbargained-for windfall to the Defendants. Here, no principal was due on the date of the mistaken

transfer.[2] As such, the district court's decision in this case expands the applicability of the discharge-for-value defense beyond the scope in *Banque Worms*. Affirming the expansion would upset well-settled industry custom and practices utilized since *Banque Worms* was decided thirty years ago. Indeed, since that time, the daily volume and size of wire transfers executed by banks have increased exponentially. Banks should not solely bear the risk of human error vis-à-vis lenders who, in this case, would suffer no injury if the mistakenly transferred funds were returned.

By comparison, limiting the discharge-for-value defense to the circumstances in *Banque Worms* is more consistent with industry norms and the important policy goals of speed, efficiency, certainty, uniformity, and finality in wire transfers and, in this case, would prevent an unjust financial windfall. Whether a debt is rightfully owed to a recipient of the funds is an objective and concrete analysis that honors the contractual expectations of the parties. Applied here, it plainly results in the recognition of Citibank's entitlement to the return of the funds in question and avoids the need for a burdensome notice analysis involving questions of law and fact. As to that inquiry, the mistaken transfer, apart

[2] *Amici* take no position regarding the veracity of the facts alleged in this case; the facts stated herein were either asserted in the parties' pretrial submissions or findings of the district court and are assumed to be true solely for purposes of this brief.

from not being due and owing, was also not in the ordinary course of business, and Defendants-Appellees were on constructive notice of that reality.

Amici agree with the arguments in Plaintiff-Appellant's brief submitted to this Court on April 29, 2021 and, for the reasons stated there and below, respectfully request that the Court reverse the district court's decision.

ARGUMENT

I. THE DISTRICT COURT MISAPPLIED *BANQUE WORMS* TO THIS CASE.

A. *Banque Worms* does not apply given that Defendants had no present entitlement to the erroneously transferred funds.

It is well-settled that for a case to be binding precedent, "the prior case must address the same legal questions as applied to similar facts. The higher the degree of factual similarity, the more weight the judge gives the prior case when deciding the present matter." *See* John M. Walker, Jr., The Role of Precedent in the United States: How Do Precedents Lose Their Binding Effect?, STANFORD LAW SCHOOL CHINA GUIDING CASES PROJECT, Feb. 29, 2016, http://cgc.law.stanford.edu/commentaries/15-John-Walker. The district court's application of the discharge-for-value defense to this case represented an unsupported expansion of the defense considering the facts before the Court of Appeals in *Banque Worms*.

In *Banque Worms*, the lender, Banque Worms, indicated it would not renew a revolving loan, terminated the loan, and demanded payment from Spedley Securities of the remainder of the outstanding debt by April 10 of that year. *Banque Worms v. BankAmerica Int'l*, 928 F.2d 538, 539 (2d Cir. 1991). On April 10, Spedley Securities told its bank to make a payment to Banque Worms in the exact amount due, but then later canceled that wire, instructing the sending bank to make an identical payment to another entity instead. *Id.*; *Banque Worms*, 77 N.Y.2d at 364. The bank failed to cancel the payment, and Banque Worms received the expected repayment on the due date, unaware that Spedley Securities had revoked its authorization of the repayment. *Banque Worms*, 928 F.2d at 539-40; *Banque Worms*, 77 N.Y.2d at 364-65. Litigation ensued to determine whether Banque Worms or Spedley Securities' bank was entitled to retain the mistakenly transferred funds.

The question ultimately reached this Court, which certified to the New York Court of Appeals the question of whether the discharge-for-value defense could apply to the circumstances of the case. *Banque Worms*, 928 F.2d at 541. Analyzing that question, the New York Court of Appeals began with the "long recognized" rule of restitution and mistake requiring the return of erroneously transferred funds:

> [I]f A pays money to B upon the erroneous assumption of the former that he is indebted to the latter, an action may

> be maintained for its recovery. The reason for the rule is obvious. Since A was mistaken in the assumption that he was indebted to B, the latter is not entitled to retain the money acquired by the mistake of the former, even though the mistake is the result of negligence.

77 N.Y.2d at 366 (internal citations and quotations omitted). By contrast, as an exception to the general rule, the *Restatement (First) of Restitution* "established the 'discharge for value' rule." *Banque Worms*, 77 N.Y.2d at 366. The Court of Appeals concluded that the discharge-for-value defense was appropriately applied to "the circumstances here presented,"[3] when, among other things, "a beneficiary receives money to which it *is entitled*." 77 N.Y.2d at 373 (emphasis added).

Here, however, Defendants and the other lenders were not entitled to $500 million in August 2020, when the erroneous payment was received. The loan principal was not scheduled to mature for another three years, and Revlon Consumer Products Corporation ("Revlon") had not taken the necessary steps to trigger prepayment under the Credit Agreement. Findings of Fact And Conclusions of Law at 5-7, *In re Citibank Aug. 11, 2020 Wire Transfers*, Case No. 20-CV-06539 (S.D.N.Y Feb. 16, 2021), ECF No. 243 (hereinafter "Dist. Ct.

[3] *Banque Worms*, 77 N.Y.2d at 373; *see also id*. at 366 ("[W]e conclude that, *under the circumstances of this case*, the 'discharge for value' rule should be applied.") (emphasis added); *id.* at 376 ("Application of the 'discharge for value' rule to the circumstances presented here is particularly appropriate."); *id.* ("[W]e conclude, in answer to the certified question, that the 'discharge for value' rule as set forth at section 14 of the Restatement of Restitution, should be applied in the circumstances in this case.").

Findings of Fact And Conclusions of Law"); *id.* at 43 ("it is undisputed that the 2016 Term Loan was not 'due' on August 11, 2020" and "was not set to mature for another three years").

The parties' Credit Agreement confirms as much. Syndicated loan documentation, as in this case, sets forth how and when the debtor will pay interest and principal, including the principal maturity date, as well as the conditions under which acceleration may occur. Dist. Ct. Findings of Fact And Conclusions of Law at 5-6; Revlon, Annual Report (Form 8-K) Exhibit 10.1, at § 8.1(a) (Sept. 7, 2016) (hereinafter "Revlon Exhibit 10.1"). Short of Revlon electing to trigger a prepayment obligation, the only way for Defendants to be paid early was to accelerate the loan upon a default by Revlon. Dist. Ct. Findings of Fact And Conclusions of Law at 5-7; Revlon Exhibit 10.1, § 8.1(j)(ii) (upon an Event of Default, the lenders may "declare the Loans hereunder (with accrued interest thereon) and all other amounts owing under this Agreement and the other Loan Documents to be due and payable forthwith"). Defendants had taken no action to accelerate at the time they received the erroneous payment. Dist. Ct. Findings of Fact And Conclusions of Law at 6, 26.

Similarly, Revlon had not triggered its exclusive right to prepay principal. Section 2.11 of the Credit Agreement permitted Revlon to elect to make early prepayments, but only Revlon held that right subject to the requisite advance notice

period. Dist. Ct. Findings of Fact And Conclusions of Law at 7; Revlon Exhibit 10.1, § 2.11 ("The Borrower may . . . prepay . . . .").[4] In order to prepay, Revlon was required to provide irrevocable written notice to Citibank by no later than noon within a certain number of days before the prepayment of principal. Findings of Fact And Conclusions of Law at 5-7. Citibank in turn was required to "promptly" notify Defendants of the notice. *Id.* None of these conditions that would have rendered the principal due had occurred when Defendants received the erroneous payment, nor did they occur at any time thereafter. *Id.* at 85-86.

The undisputed fact that the principal was not due is consistent with other areas of law—*e.g.*, application of the statute of limitations—where courts similarly look to the underlying contractual obligation to determine whether a party's right to payment has actually become "due," thereby triggering the running of the statute. *See*, *e.g.*, *Phoenix Acquisition Corp. v. Campcore, Inc*., 81 N.Y.2d 138, 141-42, (1993) ("The fact that [the creditor] had a bargained-for, exclusive acceleration option to call the entire indebtedness due immediately upon any default does not, by operation of law, trigger the accrual of a cause of action for

[4] Section 2.12 also provided certain actions that Revlon could take (but did not) that would trigger a mandatory prepayment, such as incurring additional debt or selling collateral. *Id.*

portions of the indebtedness which neither the debtor nor the guarantor were then liable to pay.").

Accordingly, the district court wrongly applied the discharge-for-value defense beyond the circumstances set forth in *Banque Worms*. The mistaken payment in *Banque Worms* was made on the same date the outstanding debt on the revolving loan was declared due by the lender, rendering it money the lender was entitled to receive. By contrast, here, no principal was due on August 11, 2020 when the erroneous transfer occurred. The district court's holding that *Banque Worms* dictated a ruling for Defendants[5] does not withstand scrutiny given the stark difference in the circumstances here and the New York Court of Appeals' consistent practice of judicial restraint in extending its rulings beyond express holdings and the facts previously before the Court. *See, e.g.*, *Ajdler v. Province of Mendoza*, 33 N.Y.3d 120, 128 (2019) (N.Y. Court of Appeals holding that its prior decision in *NML Capital v. Argentina*, 17 N.Y.3d 250 (2011), did not set forth a statute of limitations rule given statute not at issue in the case); *Motorola Credit Corp. v. Standard Chartered Bank*, 24 N.Y.3d 149, 161 (2014) (N.Y. Court of Appeals holding that its prior decision in *Koehler v. Bank of Bermuda Ltd.*, 12

[5] *See* Dist. Ct. Findings of Fact And Conclusions of Law at 99 ("Were the Court writing on a blank slate, it is far from clear that it would reconcile these principles in a way that allowed the Non-Returning Lenders to keep the money . . . [b]ut the Court . . . is bound by the decisions . . . in *Banque Worms*.").

N.Y.3d 533 (2009), did not *sub silentio* overrule a longstanding New York separate entity rule and was not irreconcilable with the rule). The result of the district court's decision is an expanded defense allowing for acceleration of the debt, not under the terms of the loan but by virtue of an honest mistake, granting Defendants an unexpected financial windfall of full payment on debt currently trading below par.

Declining to expand the discharge-for-value defense beyond the circumstances of *Banque Worms* is not only fair under the circumstance here, but also consistent with long-standing articulations of the defense limiting its application to when a debt is presently due: "If payment is made to the wrong person, and the payor in fact owes that person a debt *which is due*, the amount of which is equal to or in excess of the mistaken payment, no recovery is available." 82 N.Y. Jur. 2d, Payment and Tender § 107 (emphasis added); 1 Commercial Damages: Remedies in Business Litig. ¶ 3.09.[2] (2021) ("[Discharge-for-value] defense arises where there is a *preexisting liquidated debt owed* to the beneficiary by the originator of the payment.") (emphasis added).

B. The sources relied upon in *Banque Worms* further support that the discharge-for-value defense does not apply here.

In *Banque Worms*, the Court of Appeals observed "no provision of [the then-new Article 4-A of the Uniform Commercial Code ("Article 4-A")] calls, in express terms, for the application of the 'discharge for value' rule." 77 N.Y.2d at

373. It nevertheless recognized the defense as consistent with Article 4-A's "statutory scheme and the language of various pertinent sections" and with "the policy goal of finality in business transactions." *Id*. However, the same Comment to Article 4-A that the Court of Appeals relied on also supports that "normally" recovery is allowed in the case of erroneous wire overpayments like that here.

Article 4-A-303(a) expressly incorporates the rules of mistake and restitution under the circumstance here, when "[a] receiving bank . . . executes the payment order of the sender by issuing a payment order in an amount greater than the amount of the sender's order." The statute provides that "[t]he 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." *Id.*

In *Banque Worms,* the Court of Appeals considered Comment 2 to this provision, which explains that, in the case of a payment order in an amount greater than the amount of the sender's order, the bank that sent the erroneous order "is entitled to recover the overpayment from Beneficiary to the extent allowed by the law governing mistake and restitution" and "would normally have a right to recover the overpayment from Beneficiary." However:

> [I]n unusual cases the law of restitution might allow Beneficiary to keep all or part of the overpayment. For example, if Originator *owed* $2,000,000 to Beneficiary and Beneficiary received the extra $1,000,000 in good faith in discharge of the debt, Beneficiary may be allowed to keep it. In this case Originator's Bank has paid an

> *obligation* of Originator and under the law of restitution, which applies through Section 1-103, Originator's Bank would be subrogated to Beneficiary's rights against Originator on the obligation paid by Originator's Bank.

Article 4-A-303, Comment 2 (emphasis added). *Banque Worms* was that "unusual case" where on the date of the mistaken payment the transferred amount "owed" to the recipient satisfied an "obligation" of the originator of the order—which is not true in this case.

Consistent with Article 4-A-303(a), courts have continued to apply restitution principles other than the discharge-for-value defense to wire transfer overpayments since *Banque Worms*. *See HSBC Bank USA, N.A. v. A.T.A. Constr. Corp.*, No. 09-CV-529, 2009 WL 1456529, at *3 (E.D.N.Y. May 26, 2009) (relying on Section 4-A-303, "[p]laintiff clearly is permitted to recover the erroneous [duplicate] payment from defendant under New York law. New York courts have long recognized the principle that a party who pays money, under a mistake of fact, *to one who is not entitled to it*, should, in equity and good conscience, be permitted to recover it") (citations omitted) (emphasis added).

Likewise, *Ball v. Shepard*—also relied on by the New York Court of Appeals in *Banque Worms*—recognized that, in the context of erroneous payments, only certain circumstances justify "taking such a case out of the general rule permitting a recovery." 202 N.Y. 247, 254 (1911). The Court of Appeals explained the general rule favoring recovery and the discharge-for-value defense are "divided by

a line which is very narrow and yet well defined." *Id.* at 256. Endorsing this part of the discussion in *Ball v. Shepard*, the Court of Appeals in *Banque Worms* acknowledged that the general rule includes cases where "the defendant was *not*, in the first instance, *entitled to receive* the money," while in discharge-for-value cases the "payee . . . receives the money in good faith *in the regular course of business*." *Banque Worms*, 77 N.Y.2d at 368 (citing *Ball*, 202 N.Y. at 256) (emphasis added).

The circumstances here satisfy the requirements for the general rule because Defendants' lender clients had no present entitlement to the funds. Moreover, Defendants' lender clients' filing of a complaint to accelerate the debt and compel payment on the principal after the erroneous payment, Compl., *UMB Bank, Nat'l Ass'n v. Revlon*, Case No. 20-CV-06352 (S.D.N.Y Aug. 12, 2020), ECF No. 1, further supports that they were not presently entitled to the principal on August 11 and that they intended to compel acceleration and payment that was not "in the regular course of business."[6]

[6] *Amici* also question the district court's rejection of the need for "valuable consideration" for the discharge-for-value defense to apply. Dist. Ct. Findings of Fact And Conclusions of Law at 46-54. Mere receipt of the funds by the transferee should not constitute value; rather, the crediting of the debtor's account is the "valuable consideration" in exchange for the erroneously transferred funds. *See also In re Awal Bank, BSC*, 455 B.R. 73, 93 (S.D.N.Y. Bankr. 2011) ("As the rule has been adopted in New York, a creditor can retain erroneously received funds if it accepted such funds 'in good faith in the ordinary course of business and for a valuable consideration.'") (quoting *Banque Worms*, 77 N.Y.2d at 372). If a

II. APPLICATION OF THE DISCHARGE-FOR-VALUE DEFENSE HERE LEADS TO AN UNJUST AND ANOMALOUS RESULT.

If affirmed, the holding of the district court would substantially expand the discharge-for-value defense and increase risks to banks and other financial institutions.

Members of the *Amici* provide wire transfer services to customers as a convenient, rapid, and cost-effective payment mechanism, one that has grown significantly in the last several decades. The high volume and size of daily wire transfers—over a million transactions exceeding $5.4 trillion a day[7]—reflect their critical role as a payment mechanism facilitating commerce in the domestic and international markets. The global economy relies on the widespread use of these wire transfers as a convenient and cost-effective payment mechanism. And it is

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transferee knows the transfer was erroneous *before* crediting the debtor's account, the discharge for value defense should not be available.

[7] Wire transfers are generally made over the two principal wire payment systems: the Fedwire Funds Service, operated by the Federal Reserve Banks, and CHIPS, the funds transfer system operated by Payments Company. Currently, daily wire transfers through Fedwire average $3.6 trillion, based on more than 773,000 transactions each day. *See* Fed. Res., *Fedwire Funds Serv. Vol. and Value Stats*, https://www.frbservices.org/resources/financial-services/wires/volume-value-stats/index.html (statistics as of February 2021). In addition, daily wire transfers through CHIPS currently exceed $1.7 trillion and almost 500,000 daily transactions. The Clearing House, *CHIPS Annual Statistics from 1970 to 2020*, https://www.theclearinghouse.org/-/media/new/tch/documents/payment-systems/chips-volume-and-value.pdf.

universally understood that instances of human or technological error will inevitably occur, even with precautions in place.

Given these realities, banks effecting wire transfers should not be left holding the bag (especially not a $500 million bag) when an error occurs and the recipient of the funds had no present entitlement to payment, regardless of the reason for the error. Of course, here the Defendants did not, and cannot, claim any harm by returning the payment.

Banks provide wire transfer services at a low cost based on the above understanding that, as a general matter, erroneous wire transfer payments will be repaid in accordance with generally accepted industry practice, as well as subject to applicable legal doctrines relating to restitution. The industry's reaction to the decision—drafting so-called Revlon claw-back language[8]—clearly reveals the industry's understanding that the district court's decision was something to be corrected, and not consistent with how the industry understood such loan agreements worked. Upon learning of the potential judicial response to the mere mis-click of a button, the practical consequence of which was the acceleration of a loan by an entity that did not have the unilateral authority to do so, the industry

[8] Matt Levine, *Money Stuff: Citi Won't Misplace $500 Million Again,* Bloomberg (Mar. 3, 2021), https://www.bloomberg.com/news/newsletters/2021-03-03/money-stuff-citi-won-t-misplace-500-million-again.

immediately responded to what was seen as an anomalous and unfair result counter to industry norms. Notably, revisions to contracts are not a perfect solution. They cannot account for wire recipients that are not parties to the loan or retroactively modify the many billions of dollars of existing loans that—in reliance on until-now-settled industry custom—contain no terms regarding the return of mistaken wires.[9] Affirming the district court's decision would disrupt those norms and increase the costs of wire transfers in order to reflect the risk of future unjust results.

In considering the equities of the case, the district court noted that similar arguments about the inevitability of mistakes and consequences for the loan market had also been made and disregarded in *Banque Worms*. Dist. Ct. Findings of Fact And Conclusions of Law at 94. But the equities that might have supported application of the discharge-for-value defense in *Banque Worms* do not support the broader application of the defense to cases like this one for at least three reasons.

First, the amount of risk to the banks today vastly exceeds the risk at the time *Banque Worms* was decided when the industry was only transferring an

[9] Bridget Marsh & Tess Virmani, *Loan Syndications and Trading: An Overview of the Syndicated Loan Market*, *in* LENDING & SECURED FINANCE 2021 (9th ed.) ("In 2020, total corporate lending in the United States was approximately $1.5 trillion. This figure encompasses all three subsectors of the syndicated loan market: the investment grade market; the leveraged loan market; and the middle market.").

average of $1 trillion on a daily basis, *Banque Worms*, 77 N.Y.2d at 370. There are currently over a million transactions exceeding $5.4 trillion a day. *See supra* n.7. Further expanding the defense under these circumstances has the potential to have a significantly larger impact than that of *Banque Worms*.

Second, as noted above, applying the defense here would upset the expectations of the parties to the syndicated loan agreements at the heart of this case. As discussed *supra*, the right to prepayment of the principal on the loans had simply not been triggered as of the date the mistaken transfers were made by Citibank. And indeed, recipients of approximately $398 million of the mistakenly transferred funds returned the funds to Citibank, including a few of Defendants' lender clients. *See* Dist. Ct. Findings of Fact And Conclusions of Law at 5 & 5n.5, 19-26.

Finally, application of the discharge-for-value defense to the circumstances here is in tension with the stated purpose of Article 4-A that the various parties to funds transfers need to be able to predict risk with certainty, to insure against risk, to adjust operational and security procedures, and to price funds transfers appropriately:

> A deliberate decision was [] made to use precise and detailed rules to assign responsibility, define behavioral norms, allocate risks and establish limits on liability, rather than to rely on broadly stated, flexible principles. In the drafting of these rules, a critical consideration was that the various parties to funds transfers need to be able to predict

> risk with certainty, to insure against risk, to adjust operational and security procedures, and to price funds transfer services appropriately. This consideration is particularly important given the very large amounts of money that are involved in funds transfers.

Official Commentary to U.C.C. Sec. 4A-102. In contrast to these purposes, the approach espoused by Defendants has led to extensive litigation and uncertainty, the very result the New York Court of Appeals (and the drafters of Article 4-A) wanted to avoid. *Banque Worms*, 77 N.Y.2d at 373 ("the beneficiary should not have to wonder whether it may retain the funds"). The mistaken payment was made on August 11, 2020, but the litigation (even though expedited) has required months to resolve, numerous declarations, depositions, and circumstance-specific investigations, and a legal analysis extending over a 105-page opinion. Avoiding the application of the discharge-for-value defense here, where a debt is not presently due, would provide a more clear-cut rule that also comports with industry expectations and distributions of risk.

III. A LIMITED DISCHARGE-FOR-VALUE DEFENSE ENSURES SPEED, EFFICIENCY, CERTAINTY, AND UNIFORMITY, CONSISTENT WITH THE GOALS OF ARTICLE 4-A.

The general rule of restitution protects parties that make an innocent error and avoids unjust financial windfalls. As an exception to that rule, the discharge-for-value defense should not be extended beyond circumstances like those present in the *Banque Worms* case.

A determination of whether a party is entitled to money is an objective and concrete analysis that can be more easily and consistently applied than any notice inquiry. In cases like this one, the analysis is grounded in the clear terms of the contracts. As demonstrated above, contracting parties carefully negotiate and articulate in the loan documents when the funds are due and the steps a borrower must take in order to make the funds due, *i.e.*, through the prepayment notice requirements. *See, supra*, I.B. These provisions are clear—leading to speedy, efficient, and predictable results. To eschew the parties' agreement in favor of a broader application of the discharge-for-value defense only drags out the inquiry and introduces uncertainty.

In addition, limiting the application of the discharge-for-value defense to cases in which the recipient is presently entitled to the funds also simplifies, or eliminates, the factual and legal notice analysis, which in turn allows for a more consistent and predictable application. Uniformity in the law was a driving factor behind the creation of Article 4-A. *See* Discussion of Uniform Commercial Code, Article 4-A - Funds Transfers, in 66 A.L.I. PROC. 400 (1989) (remarks of Professor Jordan); *Donmar Enters., Inc. v. S. Nat. Bank of N.C.*, 64 F.3d 944, 949 (4th Cir. 1995) ("It is apparent from the U.C.C. commentary that a uniform and comprehensive national regulation of Fedwire transfers was the goal of the Board in adopting Article 4-A"). A broadly applicable discharge-for-value defense runs

counter to that goal and will lead to inconsistent results, as the more expansive the defense, the more involved the circumstance-intensive inquiry and assessment of whether those circumstances would excite suspicion and the nature of the resulting inquiry.[10]

Here, given the lack of present entitlement, the district court could have forgone the constructive notice analysis entirely. Regardless, the circumstances supported the inference that Defendants were on inquiry notice of the error, particularly given their awareness that they were not presently entitled to $500 million.

- Revlon was the only entity that could approve an early payment. *See* Dist. Ct. Findings of Fact And Conclusions of Law at 7. But Revlon gave no such approval, which left the district court to weigh the plausibility of competing conjectures about the Defendants' beliefs at the time of the mistaken payment. *See id.* at 66-70.

- Citibank was contractually obligated as the Administrative Agent of the Credit Agreement to "promptly notify each relevant Lender" of the receipt of any prepayment notice from Revlon. *Id.* at 7. But the district court rejected the lack of prepayment notice as evidence of a mistaken payment because it found that "promptly" under the Credit Agreement could have meant that Citibank could notify the lenders *after* the prepayment was made and still satisfy the notice requirement. *See id.* at 85-86. This is contradicted by the fact that at least one Defendant did request a notice[11] and also the regular practice as reported by *Amici* members who would typically request a notice from an agent bank if they

[10] While limiting the discharge-for-value defense would avoid the constructive notice inquiry here, the district court rightly held that constructive notice of an erroneous transfer bars application of the defense.

[11] *See id.* at 71.

received a large wire transfer without a prepayment notice. If the agent bank does not respond, it is typical to escalate the issue, and sometimes the wire is even returned if there is no response from the agent bank.

- The lenders only had one mechanism by which they could advance the payment date for the loan: the narrowly tailored terms of the acceleration clause. *See id.* at 5-7; Revlon Exhibit 10.1, § 8.1(a). Defendants had not exercised that right as of the date of the mistaken transfer, but the district court nevertheless concluded—incorrectly—that Defendants reasonably believed the erroneous payment was a prepayment of all the outstanding principal. *See* Dist. Ct. Findings of Fact And Conclusions of Law at 65.

Ironically, the decision below effectively minimized the key issue in the case, whether Defendants' lender clients were presently entitled to the $500 million in the first place, by giving little weight in the notice analysis to the facts that established that no debt was due.

Beyond whether Defendants' lender clients had any entitlement to the erroneous payment, the district court also failed to adequately weigh the suspicious circumstances that support Defendants were on inquiry notice of the error. The magnitude of the transfer was enough that a reasonable person should have questioned whether the payment was made in error, especially given all the circumstances supporting that Defendants were not yet entitled to the principal. *See* Dist. Ct. Findings of Fact And Conclusions of Law at 86-87.

Citibank's practice, including with Defendants, was to provide a calculation statement reflecting the amount to be paid, and the calculation statement here did not indicate any payment of the principal. *See id.* at 12-16; Citibank's Proposed

Findings of Fact And Conclusions of Law at 46, *In re Citibank Aug. 11, 2020 Wire Transfers*, Case No. 20-CV-06539 (JMF) (S.D.N.Y. Nov. 14, 2020), ECF No. 143. Where recipient banks receive a large wire transfer for an amount different from what was listed in a calculation statement or similar document, or without a prepayment notice, *Amici* members have reported that the regular practice is to reach out to the bank providing the payment for clarity.

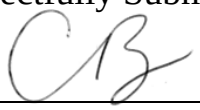
And, finally, Defendants' lender clients' filing of the *UMB Bank, Nat'l Ass'n v. Revlon* lawsuit the day after they received payment demonstrated that Defendants understood that Revlon could not have (and did not) prepay the full principal the day before. The district court wrongly discounted these important facts, which the majority of members in the industry would have considered in totality circumstances odd enough that they would, at a minimum, have inquired for clarification.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment below.

Dated: May 6, 2021

Respectfully Submitted,

By: 

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of FED. R. APP. P. 29 and FED. R. APP. P. 5(c) because the brief contains 5,603 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(f). This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

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