NO. 11-11071

In the United States Court of Appeals for the Eleventh Circuit

IN RE: TOUSA, INC.

OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF TOUSA, INC., *et al*.,

Plaintiff–Appellant,

v.

SENIOR TRANSEASTERN LENDERS,

Defendants–Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF FOR PLAINTIFF-APPELLANT OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF TOUSA, INC., *ET AL.*

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CASE NO. 11-11071
OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF TOUSA, INC.
V.
SENIOR TRANSEASTERN LENDERS

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rules 26.1-1, 26.1-2, and 26.1-3, Appellant Official Committee of Unsecured Creditors of TOUSA, Inc., et al., ("the Committee") submits this list, which includes the trial judge and first-level appellate judges, and all attorneys, persons, associations of persons, firms, partnerships or corporations that have an interest in the outcome of this review: [‡]

1. 3V Capital Management, LLC, Senior Transeastern Lenders (Group 1)
2. 3V Capital Master Fund Ltd., Senior Transeastern Lenders (Group 1)
3. AG CNG Fund, L.P., Senior Transeastern Lenders (Group 1)
4. AG Eleven Partners, LP, Senior Transeastern Lenders (Group 1)

‡ A large number of creditors of TOUSA, Inc. and the Conveying Subsidiaries have submitted claims in the bankruptcy proceedings. A full list of those creditors is available at http://kccllc.net/tousa.

5. AG Garden Partners, L.P., Senior Transeastern Lenders (Group 1)
6. AG MM, L.P., Senior Transeastern Lenders (Group 1)
7. AG Princess, LP, Senior Transeastern Lenders (Group 1)
8. AG Super Fund International Partners, LP, Senior Transeastern Lenders (Group 1)
9. AG Super Fund, LP, Senior Transeastern Lenders (Group 1)
10. AGCR V Master Account, L.P, Senior Transeastern Lenders (Group 1)
11. AIG Annuity Insurance Company, Second Lien Term Loan Lenders
12. Akerman Senterfitt
13. Akin Gump Strauss Hauer & Feld, LLP
14. Alemany, Joaquin J., Holland & Knight
15. Alexandra Global Master Fund, Ltd., Second Lien Term Loan Lenders
16. Allianz SE (Ticker Symbol: AZSEY), Senior Transeastern Lenders (Group 1)
17. Altman, Jennifer Gertrude, Boies Schiller & Flexner, LLP

18. American General Life Insurance Company, Second Lien Term Loan Lenders
19. American International Group, Inc., Second Lien Term Loan Lenders
20. Assouline & Berlowe, P.A.
21. Assouline, Eric N., Assouline & Berlowe, P.A.
22. Atascosa Investments, LLC, Senior Transeastern Lenders (Group 1)
23. Aurum CLO 2002-1, Ltd., Senior Transeastern Lenders (Group 1)
24. Avenue Investments LP, Second Lien Term Loan Lenders
25. Avron, Paul A., Berger Singerman, P.A.
26. BAC North America Holding Company, Senior Transeastern Lenders (Group 1)
27. Baena, Scott L., Bilzin Sumberg Baena Price & Axelrod LLP
28. BANA Holding Corporation, Senior Transeastern Lenders (Group 1)
29. Bank of America Corporation (Ticker Symbol: BAC), Senior Transeastern Lenders (Group 1)

30. Bank of America, N.A., Senior Transeastern Lenders (Group 1) and First Lien Term Loan Lenders
31. Barclays Bank PLC, Senior Transeastern Lenders (Group 1)
32. Barclays PLC (Ticker Symbol: BCS), Senior Transeastern Lenders (Group 1)
33. Basta, Paul M., Kirkland & Ellis, LLP
34. Bear Stearns Investment Products Inc., Senior Transeastern Lenders (Group 1)
35. Beirne, Andrew T., Milbank, Tweed, Hadley & McCloy, LLP
36. Berger, Eyal, Akerman Senterfitt
37. Berger Singerman, P.A.
38. Berman, Ceci Culpepper, Fowler White Boggs, P.A.
39. Bilzin Sumberg Baena Price & Axelrod LLP
40. Boies Schiller & Flexner, LLP
41. Bracewell & Guiliani LLP
42. Brenner, Eric J., Boies Schiller & Flexner, LLP
43. Burnet Partners, LLC, Senior Transeastern Lenders (Group 1)
44. Busey, Stephen D., Smith Hulsey & Busey
45. Capital Research and Management Company

46. Carman, Daynor M., Bracewell & Guiliani LLP
47. Castlerigg Master Investments, Ltd., First Lien Term Loan Lenders
48. Centurion CDO 8, Limited, Senior Transeastern Lenders (Group 2)
49. Centurion CDO 9, Ltd., Senior Transeastern Lenders (Group 2)
50. Centurion CDO 10, Ltd., Senior Transeastern Lenders (Group 2)
51. Centurion CDO II, Ltd., Senior Transeastern Lenders (Group 2)
52. Centurion CDO VI, Ltd., Senior Transeastern Lenders (Group 2)
53. Centurion CDO VII, Ltd., Senior Transeastern Lenders (Group 2)
54. Centurion CDO XI, Ltd., Senior Transeastern Lenders (Group 2)
55. CFIP Master Fund, Ltd., First Lien Term Loan Lenders
56. CGDO, LLC (as agent for Chilton Global Credit Opportunities Master Fund, LP), First Lien Term Loan Lenders
57. Chadbourne & Parke LLP

58. Cieri, Richard M., Kirkland & Ellis, LLP
59. Citibank, N.A., First Lien Term Loan Lenders and Second Lien Term Loan Lenders
60. Citicorp North America, Inc., First Lien Term Loan Lenders and Second Lien Term Loan Lenders
61. Copperthwaite, Nancy A., Akerman Senterfitt
62. Cyrus SPV I LLC, First Lien Term Loan Lenders
63. Deutsche Bank AG (Ticker Symbol: DBK in Germany) (Ticker Symbol: DB in the US), Senior Transeastern Lenders (Group 1) and Second Lien Term Loan Lenders
64. Deutsche Bank Trust Company Americas, Senior Transeastern Lenders (Group 1)
65. Deutsche Bank Trust Corporation, Senior Transeastern Lenders (Group 1)
66. Donovan, Daniel T., Kirkland & Ellis, LLP
67. Draigh, David P., White & Case LLP
68. Dublin, Philip C., Akin Gump Strauss Hauer & Feld, LLP
69. Eaton Vance Credit Opportunities Fund, Senior Transeastern Lenders (Group 2)

70. Eaton Vance Floating-Rate Income Trust, Senior Transeastern Lenders (Group 2)
71. Eaton Vance Grayson & Co., Senior Transeastern Lenders (Group 2)
72. Eaton Vance Limited Duration Income Fund, Senior Transeastern Lenders (Group 2)
73. Eaton Vance Senior Debt Portfolio, Senior Transeastern Lenders (Group 2)
74. Eaton Vance Senior Floating-Rate Trust, Senior Transeastern Lenders (Group 2)
75. Eaton Vance Senior Income Trust, Senior Transeastern Lenders (Group 2)
76. Eaton Vance VT Floating-Rate Income Fund, Senior Transeastern Lenders (Group 2)
77. Engle Homes Commercial Construction, LLC, Debtor
78. Engle Homes Delaware, Inc., Debtor
79. Engle Homes Residential Construction, LLC, Debtor
80. Engle Sierra Verde P4, LLC, Debtor
81. Engle Sierra Verde P5, LLC, Debtor

82. Engle/Gilligan LLC, Debtor
83. Engle/James LLC, Debtor
84. Esperance c/o Scotiabank, First Lien Term Loan Lenders
85. Faegre & Benson, LLP
86. Farfante, Darren D., Fowler White Boggs, P.A.
87. Fidelity Fixed Income Trust: Fidelity Strategic Real Return Fund, First Lien Term Loan Lenders
88. Fidelity REOI Cayman Ltd., First Lien Term Loan Lenders
89. Flagship CLO III, Senior Transeastern Lenders (Group 1)
90. Flagship CLO IV, Senior Transeastern Lenders (Group 1)
91. Flagship CLO V, Senior Transeastern Lenders (Group 1)
92. Flaschen, Evan D., Bracewell & Guiliani LLP
93. Fortress Credit Investments I Ltd, First Lien Term Loan Lenders
94. Fortress Credit Investments II Ltd, First Lien Term Loan Lenders
95. Fowler White Boggs, P.A.
96. GAM Arbitrage Investments, Inc., Senior Transeastern Lenders (Group 1)

97. Geotek, Inc./Geotek Insite, Inc.

98. Gleneagles CLO Ltd., Senior Transeastern Lenders (Group 1)

99. Gold, Hon. Alan S., United States District Court for the Southern District of Florida, first-level appeal judge

100. Goldberg, Michael I., Akerman Senterfitt

101. Golden, Daniel H., Akin Gump Strauss Hauer & Feld, LLP

102. Goldman Sachs & Co. LLC, Senior Transeastern Lenders (Group 1)

103. Goldman Sachs Bank USA, Senior Transeastern Lenders (Group 1)

104. Goldman Sachs Credit Partners, L.P., Senior Transeastern Lenders (Group 1), First Lien Term Loan Lenders and Second Lien Term Loan Lenders

105. Goldman Sachs Global Holdings L.L.C., Senior Transeastern Lenders (Group 1)

106. Goldman Sachs Lending Partners LLC, Senior Transeastern Lenders (Group 1)

107. Grand Central Asset Trust, CED Series, Senior Transeastern Lenders (Group 1)

108. Grand Central Asset Trust, Gaia Series, First Lien Term Loan Lenders
109. Grand Central Asset Trust, HLD Series, Senior Transeastern Lenders (Group 1)
110. Grand Central Asset Trust, SIL Series, First Lien Term Loan Lenders
111. Grand Central Asset Trust, SOH Series, Senior Transeastern Lenders (Group 1)
112. GSCP (DEL) Inc., Senior Transeastern Lenders (Group 1)
113. GSCP (DEL) LLC, Senior Transeastern Lenders (Group 1)
114. Hall, Thomas J., Chadbourne & Parke LLP
115. Harris, Amy Denton, Stichter, Riedel, Blain & Prosser, P.A.
116. Hartford Financial Services Group, Inc. (Ticker Symbol: HIG), Senior Transeastern Lenders (Group 1)
117. Hartford Holdings, Inc, Senior Transeastern Lenders (Group 1)
118. Hartford Life and Accident Ins. Co., Senior Transeastern Lenders (Group 1)
119. Hartford Life and Annuity Ins. Co., Senior Transeastern Lenders (Group 1)

120. Hartford Life Ins. Co., Senior Transeastern Lenders (Group 1)

121. Hartford Life, Inc., Senior Transeastern Lenders (Group 1)

122. Hartford Mutual Funds, Inc., on behalf of the Hartford Floating Rate Fund by Hartford Investment Management Company, their Sub-Advisor, Senior Transeastern Lenders (Group 1)

123. HBK Master Fund L.P., First Lien Term Loan Lenders and Second Lien Term Loan Lenders

124. Helios Funding LLC, First Lien Term Loan Lenders

125. Highland CDO Opportunity Fund, Ltd., Senior Transeastern Lenders (Group 1)

126. Highland Credit Opportunities CDO Ltd., Senior Transeastern Lenders (Group 1)

127. Highland Crusader Offshore Partners, LP, Senior Transeastern Lenders (Group 1)

128. Highland Floating Rate Advantage Fund, Senior Transeastern Lenders (Group 1)

129. Highland Floating Rate LLC, Senior Transeastern Lenders (Group 1)

130. Highland Legacy Limited, Senior Transeastern Lenders (Group 1)
131. Highland Loan Funding VII, LLC, Senior Transeastern Lenders (Group 1)
132. Highland Offshore Partners, L.P., Senior Transeastern Lenders (Group 1)
133. Hille, David G., White & Case LLP
134. Hiller, Mark A., Robbins, Russell, Englert, Orseck, Untreiner & Sauber, LLP
135. Holland & Knight
136. HSBC Bank USA, N.A.
137. Investment CBNA Loan Funding LLC, First Lien Term Loan Lenders
138. Jasper CLO, Ltd., Senior Transeastern Lenders (Group 1)
139. Jordan, Hon. Adalberto J., United States District Court for the Southern District of Florida, first-level appeal judge
140. JPMorgan Chase & Co, Senior Transeastern Lenders (Group 1)

141. JPMorgan Chase Bank, N.A., Senior Transeastern Lenders (Group 1), First Lien Term Loan Lenders and Second Lien Term Loan Lenders
142. JP Morgan Whitefriars Inc., First Lien Term Loan Lenders
143. Kellogg, Lawrence A., Levine Kellogg Lehman Schneider & Grossman, LLP
144. Kirkland & Ellis, LLP
145. Korologos, Philip C., Boies Schiller & Flexner, LLP
146. Labovitz, M. Natasha, Kirkland & Ellis, LLP
147. Landau, Philip J., Shraiberg, Ferrara & Landau
148. LB/TE #1, LLC, Debtor
149. LeBlanc, Andrew M., Milbank, Tweed, Hadley & McCloy, LLP
150. Levine, David M., Levine Kellogg Lehman Schneider & Grossman, LLP
151. Levine Kellogg Lehman Schneider & Grossman, LLP
152. Levit, Joan M., Akerman Senterfitt
153. Liberty CLO, Ltd., Senior Transeastern Lenders (Group 1)

154. LL Blue Marlin Funding LLC, Senior Transeastern Lenders (Group 1)
155. Longacre Capital Partners QP, LP, Second Lien Term Loan Lenders
156. Longacre Master Fund LTD., Second Lien Term Loan Lenders
157. Lorton South Condominium, LLC, Debtor
158. Marathon Financing I, B.V., First Lien Term Loan Lenders
159. Marecki, Patrick, Milbank, Tweed, Hadley & McCloy, LLP
160. MatlinPatterson Global Opportunities Partners (Cayman) III L.P. (MatlinPatterson), First Lien Term Loan Lenders
161. MatlinPatterson Global Opportunities Partners III L.P. (MatlinPatterson), First Lien Term Loan Lenders
162. McCormack, Thomas J., Chadbourne & Parke LLP
163. McCurdy, Meghan, White & Case LLP
164. McDonnell Loan Opportunity Ltd., First Lien Term Loan Lenders
165. McKay Landing LLC, Debtor

166. M.D. Sass Re/Enterprise Portfolio Company, L.P. (Resurgence), First Lien Term Loan Lenders and Second Lien Term Loan Lenders
167. Merrill Lynch & Co., Inc., Senior Transeastern Lenders (Group 1)
168. Merrill Lynch Credit Products LLC, Senior Transeastern Lenders (Group 1)
169. Merrill Lynch Diversified Investments, LLC, Senior Transeastern Lenders (Group 1)
170. Merrill Lynch Group, Inc., Senior Transeastern Lenders (Group 1)
171. Merrill Lynch Pierce Fenner & Smith Inc., First Lien Term Loan Lenders and Second Lien Term Loan Lenders
172. Mertz, Stephen M., Faegre & Benson, LLP
173. Milbank, Tweed, Hadley & McCloy, LLP
174. Miller, Atara, Milbank, Tweed, Hadley & McCloy, LLP
175. MLQ, L.L.C., Senior Transeastern Lenders (Group 1)
176. Monarch Cayman Fund Limited, Senior Transeastern Lenders (Group 1)

177. Monarch Debt Recovery Master Fund Ltd, Senior Transeastern Lenders (Group 1)
178. Monarch Income Master Fund Ltd, Senior Transeastern Lenders (Group 1)
179. Monarch Master Funding Ltd (f/k/a Quadrangle Master Funding Ltd.), Senior Transeastern Lenders (Group 1), First Lien Term Loan Lenders and Second Lien Term Loan Lenders
180. Monarch Opportunities Master Fund Ltd, Senior Transeastern Lenders (Group 1)
181. Morgan Stanley Senior Funding, Inc., First Lien Term Loan Lenders and Second Lien Term Loan Lenders
182. MTGLQ Investors, L.P., Senior Transeastern Lenders (Group 1)
183. NB Holdings Corporation, Senior Transeastern Lenders (Group 1)
184. Newmark Homes Business Trust, Debtor
185. Newmark Homes Purchasing, L.P., Debtor
186. Newmark Homes, L.L.C., Debtor
187. Newmark Homes, L.P., Debtor

188. Nutmeg Partners, L.P., Senior Transeastern Lenders (Group 1)

189. Nye, Gregory W., Bracewell & Guiliani LLP

190. Oakford MF Limited, Senior Transeastern Lenders (Group 1)

191. Ocean Bank, Senior Transeastern Lenders (Group 1)

192. Ocean Bankshares, Inc., Senior Transeastern Lenders (Group 1)

193. Olson, Hon. John K., United States Bankruptcy Court for the Southern District of Florida, trial judge

194. Papez, Matthew E., Kirkland & Ellis, LLP

195. Perry Principals, L.L.C., First Lien Term Loan Lenders

196. PHS Bay Colony Fund, LP, Senior Transeastern Lenders (Group 1)

197. PHS Patriot Fund, L.P., Senior Transeastern Lenders (Group 1)

198. Pollack, David C., Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A.

199. Powell, Jeffrey S., Kirkland & Ellis, LLP

200. Preferred Builders Realty, Inc., Debtor

201. Prosser, Richard Craig, Stichter, Riedel, Blain & Prosser, P.A.

202. Q Funding III, LLP, Second Lien Term Loan Lenders

203. Redmond, Patricia A., Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A.
204. Reflection Key, LLC, Debtor
205. Riedel, Harley Edward, Stichter, Riedel, Blain & Prosser, P.A.
206. Rivera, Seven R., Chadbourne & Parke LLP
207. RiverSource Floating Rate Fund, Senior Transeastern Lenders (Group 2)
208. Robbins, Lawrence S., Robbins, Russell, Englert, Orseck, Untreiner & Sauber, LLP
209. Robbins, Russell, Englert, Orseck, Untreiner & Sauber, LLP
210. Rockwall CDO, Ltd., Senior Transeastern Lenders (Group 1)
211. Royal Bank of Canada (Ticker Symbol: RY), First Lien Term Loan Lenders
212. Rubens, Robin J., Levine Kellogg Lehman Schneider & Grossman, LLP
213. Ruha, Gabrielle, Milbank, Tweed, Hadley & McCloy, LLP
214. Russell, Donald J., Robbins, Russell, Englert, Orseck, Untreiner & Sauber, LLP

215. Schneider, Jeffrey C., Levine Kellogg Lehman Schneider & Grossman, LLP
216. Schneiderman, Steven D., United States Trustee
217. SelectBuild Arizona
218. Sequils-Centurion V, Ltd., Senior Transeastern Lenders (Group 2)
219. Shraiberg, Ferrara & Landau
220. Silver Oak Capital, LLC, Senior Transeastern Lenders (Group 1)
221. Silverlake Interests, L.L.C., Debtor
222. Singerman, Paul Steven, Berger Singerman, P.A.
223. SMH Capital Advisors, Inc.
224. Smith Hulsey & Busey
225. Smolinsky, Joseph H., Weil Gotshal
226. Snyder, Jeffrey I., Bilzin Sumberg Baena Price & Axelrod LLP
227. SOF Investments, L.P., First Lien Term Loan Lenders
228. Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A.
229. Stedman CBNA Loan Funding, LLC, Senior Transeastern Lenders (Group 1)

230. Stichter, Riedel, Blain & Prosser, P.A.
231. Stone, Alan J., Milbank, Tweed, Hadley & McCloy, LLP
232. Stonehill Institutional Partners LP, Second Lien Term Loan Lenders
233. Strasser, Alan D., Robbins, Russell, Englert, Orseck, Untreiner & Sauber, LLP
234. SunAmerica Income Funds – Sun America High Yield Bond Fund, Second Lien Term Loan Lenders
235. Sun America Series Trust – High Yield Bond Portfolio, Second Lien Term Loan Lenders
236. Taconic Capital Partners 1.5 L.P., First Lien Term Loan Lenders
237. Taconic Opportunity Fund L.P., First Lien Term Loan Lenders
238. Taunus Corporation, Senior Transeastern Lenders (Group 1)
239. The Bear Stearns Companies LLC, Senior Transeastern Lenders (Group 1)
240. The Foothill Group, Inc., Senior Transeastern Lenders (Group 1) and First Lien Term Loan Lenders

241. The Goldman Sachs Group, Inc., Senior Transeastern Lenders (Group 1)
242. The Master Trust Bank of Japan, Ltd., Second Lien Term Loan Lenders
243. The Variable Annuity Life Insurance Company, Second Lien Term Loan Lenders
244. Third Point Loan LLC, Second Lien Term Loan Lenders
245. TOI, LLC, Debtor
246. TOUSA Associates Services Company, Debtor
247. TOUSA Delaware, Inc., Debtor
248. TOUSA Funding, LLC, Debtor
249. TOUSA Homes Arizona, LLC, Debtor
250. TOUSA Homes Colorado, LLC, Debtor
251. TOUSA Homes Florida, L.P., Debtor
252. TOUSA Homes Investment # 1, Inc., Debtor
253. TOUSA Homes Investment # 2, Inc., Debtor
254. TOUSA Homes Investment # 2, LLC, Debtor
255. TOUSA Homes Mid-Atlantic Holding, LLC, Debtor
256. TOUSA Homes Mid-Atlantic, LLC, Debtor

257. TOUSA Homes Nevada, LLC, Debtor
258. TOUSA Homes, Inc., Debtor
259. TOUSA Investment # 2, Inc., Debtor
260. TOUSA Mid-Atlantic Investment, LLC, Debtor
261. TOUSA Realty, Inc., Debtor
262. TOUSA, Inc. (Ticker symbol: TOUSQ.PK), Debtor
263. TOUSA, LLC, Debtor
264. TOUSA/West Holdings, Inc., Debtor
265. Trilogy Capital LLC, First Lien Term Loan Lenders
266. Trilogy Portfolio Company LLC, First Lien Term Loan Lenders and Second Lien Term Loan Lenders
267. VALIC Company II High Yield Bond Fund, Second Lien Term Loan Lenders
268. Van Kampen Dynamic Credit Opportunities Fund, Senior Transeastern Lenders (Group 1) and First Lien Term Loan Lenders
269. Van Kampen Senior Income Trust, Senior Transeastern Lenders (Group 1) and First Lien Term Loan Lenders

270. Van Kampen Senior Loan Fund, Senior Transeastern Lenders (Group 1) and First Lien Term Loan Lenders
271. Van Oort, Aaron D., Faegre & Benson, LLP
272. Waldman, Michael J., Robbins, Russell, Englert, Orseck, Untreiner & Sauber, LLP
273. WCP Real Estate Strategies Fund (Cayman), L.P., First Lien Term Loan Lenders
274. WCP Real Estate Strategies Fund, L.P., First Lien Term Loan Lenders
275. Weil Gotshal
276. Wells Fargo & Company (Ticker Symbol: WFC), Senior Transeastern Lenders (Group 1)
277. Wells Fargo Bank, N.A., Senior Transeastern Lenders (Group 1) and Second Lien Term Loan Lenders
278. White & Case LLP
279. Whiteley, Richard, Bracewell & Guiliani LLP
280. Williams, Beth A., Kirkland & Ellis, LLP
281. Wilmington Trust Company
282. Wulbern, Allan E., Smith Hulsey & Busey

STATEMENT REGARDING ORAL ARGUMENT

Appellant respectfully requests oral argument. The Court's decisional process would benefit from the opportunity for the Court to discuss the case with counsel.

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REFERENCES TO THE RECORD

Lower court decisions, pleadings, and other documents included in the record on appeal in this case are referenced herein as follows:

Bankruptcy Court

- Items docketed in the bankruptcy court adversary proceeding (No. 08-1435-JKO (Bankr. S.D. Fla.)) are cited as "Bankr.E.C.F. __"
- The bankruptcy court's Amended Findings of Fact and Conclusions of Law (Bankr.E.C.F. 722) is cited as "Bankr.Op. __"
- The Joint Stipulated Facts (Bankr.E.C.F. 542) is cited as "Stip. ¶ __"
- Trial exhibits are cited as "Ex. __"
- Trial transcripts are cited as "Tr. __"
- Deposition transcripts designated by stipulation of the parties as evidence at trial (see Bankr.E.C.F. 545 (Joint Order)) are cited as "[Name] Dep. __"

District Court

- Items docketed in the district court in the Transeastern Lenders' main appeal (No. 10-60017-ASG (S.D. Fla.)) are cited as "D.C.E.C.F. __"
- The district court's Opinion And Order On Appeals By The Transeastern Lenders (D.C.E.C.F. 131) is cited as "Op. __"
- Items docketed in the district court in related appeals arising from the adversary proceeding are cited as "D.C.E.C.F.(district court docket number) __"

STATEMENT OF JURISDICTION

The bankruptcy court's jurisdiction rested on 28 U.S.C. §§ 157(b)(2)(F), (H) and 1334. The district court exercised appellate jurisdiction under 28 U.S.C. § 158(a)(1). This Court has jurisdiction under 28 U.S.C. § 158(d)(1).

PRELIMINARY STATEMENT

On July 31, 2007, the major Subsidiaries of TOUSA, Inc. – at the time a prominent national homebuilder – granted liens on their assets in order to borrow $500 million to discharge a debt that TOUSA Parent, but not the Subsidiaries, owed to the Transeastern Lenders (Appellees here). The Official Committee of Unsecured Creditors of TOUSA, Inc. (Appellant here) brought this action under 11 U.S.C. § 548 to challenge that transaction as a fraudulent transfer.

Following a 13-day trial, the Hon. John Olson found that the Committee had proved both elements of its section 548 claim. First, Judge Olson found that the Subsidiaries were insolvent before granting liens on their assets, and were more deeply so after the Transaction. Second, he found that the Subsidiaries did not receive "reasonably equivalent value" in return for the $400+ million of new obligations they incurred. The Subsidiaries, he found, secured no *direct* benefits: Every dollar they borrowed went to discharge a debt they did not owe. As for any "indirect benefits" of the deal, the bankruptcy court found that, if these had value at all, they came nowhere close to the crushing new $400+ million debt the Subsidiaries assumed. Because the Subsidiaries did not receive reasonably equivalent value, the Transaction diminished their net worth, leaving them with far fewer assets with which to pay their pre-Transaction creditors, represented by the Committee. Finally, the bankruptcy court held that the Subsidiaries could recover the value of the unlawfully transferred property, pursuant to 11 U.S.C. § 550(a)(1), from the Transeastern Lenders, as the "entities for whose benefit" the fraudulent transfer had been executed.

On appeal to the district court, Judge Gold "quashed" the bankruptcy court's ruling. In his view, the July 31 Transaction provided the Subsidiaries an array of indirect benefits – principally, by improving (by some unstated degree) the odds that the Subsidiaries would avoid or delay (for some unstated period) the prospect of bankruptcy. This Bankruptcy Avoidance benefit, Judge Gold held, had such inherently immense value that it need not even be quantified. The district court also held that the Transeastern Lenders were not liable, under 11 U.S.C. § 550(a)(1), as entities "for whose benefit" the deal was done. Judge Gold so held even though the July 31 Transaction documents expressly required that the borrowed money be paid directly to the Transeastern Lenders.

The district court's analysis upends settled bankruptcy principles and common sense: The mere chance to avoid bankruptcy cannot "inherently" be worth *whatever* the debtor pays. (Here, bankruptcy ensued anyway, barely six months after the transaction, as TOUSA management expected.) Judge Gold's contrary view cannot be squared with the text of section 548 or this Court's cases construing it. Nor can Judge Gold's interpretation of section 550(a)(1) be squared with that statute's plain language or with this Court's dispositive decisions applying the statute.

But the district court's errors are more basic. Sitting in an *appellate* capacity, Judge Gold was required to accept the bankruptcy court's fact findings unless they were *clearly erroneous*. Mistakenly believing that Judge Olson had simply rubber-stamped the Committee's proposed findings, Judge Gold concluded that he was free to apply a "relaxed" standard of clear-error review. So apply it he did. He set aside virtually every finding of fact below, without ever addressing – indeed, without even citing – any of the voluminous evidence on which Judge Olson had relied. Instead, the district court made its own appellate fact findings, often taken verbatim from the defendants' submissions. And when Judge Gold finished making those substitute findings, he declared them so impregnable that no remand to the bankruptcy court was warranted.

Even on its own terms, the district court's decision is riddled with error. More than once, Judge Gold chastised the bankruptcy court for adopting positions that defendants themselves had advocated – or, what's worse, that Judge Gold had *himself* adopted elsewhere in his own decision. But as we show below, the district court's most basic error was its misapprehension of what it means to act in an *appellate capacity*. Appellate courts ask whether the record supported the trial court's fact findings. Judge Gold didn't. Appellate courts don't make their own fact findings. Judge Gold did. Judge Gold did not simply make fundamental errors of bankruptcy law. He misconceived his role as an appellate judge.

STATEMENT OF THE ISSUES

1. Did the bankruptcy court clearly err in finding that the Conveying Subsidiaries did not receive "reasonably equivalent value," under 11 U.S.C. § 548, when they incurred obligations and granted liens to the New Lenders in order to pay a $421 million debt to the Transeastern Lenders that the Subsidiaries did not themselves owe?

2. Did the bankruptcy court correctly hold that, under 11 U.S.C. § 550(a)(1), the Transeastern Lenders were entities "for whose

benefit" the Conveying Subsidiaries transferred liens to secure the New Loans?

STATEMENT OF THE CASE

This appeal arises from an adversary proceeding in the administratively consolidated bankruptcy cases of TOUSA, Inc. ("TOUSA Parent") and certain of its subsidiaries (the "Conveying Subsidiaries" or "Subsidiaries"). Plaintiff (Appellant here), the Official Committee of Unsecured Creditors ("the Committee"), asserted claims against three sets of defendants – the "Transeastern Lenders" (Appellees here); and the "First Lien Lenders" and "Second Lien Lenders" (together, the "New Lenders," Intervenors here). The bankruptcy court entered final judgments in favor of the Committee and against each of the defendant groups. Bankr.E.C.F. 986, 1037. On February 11, 2011, the district court (Gold, J.) "quashed" the judgment as to the Transeastern Lenders. D.C.E.C.F. 131 ("Op."). The district court appeals by the New Lenders (before Jordan, J.) have been stayed pending the disposition of this appeal. D.C.E.C.F. 129 (No. 10-60018); D.C.E.C.F. 138 (No. 10-60019). Judge Gold authorized the New Lenders to intervene in the Transeastern Lenders' appeal. D.C.E.C.F. 160.

STATEMENT OF FACTS

1. The TOUSA enterprise was once the nation's thirteenth largest homebuilder. The company grew rapidly, chiefly by acquiring independent homebuilders and folding their operations into the Conveying Subsidiaries, which owned most of the enterprise's assets and generated virtually all of its revenue. To finance this growth, TOUSA Parent borrowed more than $1 billion through the issuance of public bonds. That debt was unsecured, but was guaranteed by the Subsidiaries. TOUSA also borrowed funds under a revolving line of credit ("the Revolver") administered by Citicorp North America, Inc. ("Citi"). The Subsidiaries and TOUSA Parent were jointly and severally liable for repayment of the Revolver loans, which were secured by liens. Stip. ¶¶ 1-16. The Subsidiaries individually owed debts to a host of smaller unsecured creditors.

In 2005, TOUSA Parent invested in an ill-fated joint venture (the "Transeastern JV"). Once again, TOUSA Parent financed this investment by borrowing. But this time, there was a crucial difference. *These* lenders – the Transeastern Lenders – did *not* receive guarantees or liens from the Conveying Subsidiaries. Although TOUSA Parent provided certain guarantees on the loans, the deal was carefully structured so that the

Subsidiaries incurred *no* obligations to the Transeastern Lenders.[1] As a result, the Transeastern Lenders – unlike the bondholders and the Revolver lenders – could not seek repayment from the Subsidiaries if the borrowers defaulted. Stip. ¶¶ 18-24.

When the housing market turned, the Transeastern JV foundered. In late 2006, the Transeastern Lenders sued TOUSA Parent on the guarantees. To settle the litigation, TOUSA Parent offered to pay the Transeastern Lenders in full – some $421 million. Stip. ¶¶ 25-35. But TOUSA Parent lacked sufficient resources of its own. To fund the settlement, it had to borrow *more* money, and it could borrow more money only by dragging the Subsidiaries into the fray.

TOUSA Parent turned to Citi, which agreed to syndicate two new term loans (the "New Loans") to TOUSA Parent and the Subsidiaries: a $200 million loan from the First Lien Lenders, to be secured by first-priority liens on the assets of the Subsidiaries and TOUSA Parent; and a $300 million loan from the Second Lien Lenders, to be secured by second-priority liens. Stip. ¶¶ 39-41. In short, the Subsidiaries would incur $500 million in

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1 TOUSA Homes LP, a subsidiary that is *not* one of the Conveying Subsidiaries, also provided guarantees to the Transeastern Lenders.

new obligations, secured by liens, to settle the Transeastern Lenders' claims against TOUSA Parent, *on which the Subsidiaries had no liability*.

2. TOUSA's management harbored no illusions that incurring $500 million in new debt would avoid bankruptcy for the company. TOUSA was already in severe financial distress in 2006; it reported losses of $323 million in the second half of 2006. Bankr.Op. 117. As housing markets continued to deteriorate in early 2007, TOUSA's position grew increasingly desperate.

TOUSA's management realized that the company needed an infusion of equity. In February 2007, David Kaplan (a senior TOUSA advisor) wrote to Tony Mon (TOUSA's CEO), "I would recommend, strongly, that you prepare the owners for the possible/likely need for an equity infusion – perhaps $150 mm, perhaps more." Ex. 2053 at 1. Mon agreed, but TOUSA's controlling shareholders (the Stengos family) directed him to terminate his discussions with potential investors. Tr. 140:11-22; Ex. 243; Bankr.Op. 14.

With no new equity in sight, and crushing new secured debt in the offing, TOUSA began to analyze bankruptcy options as early as February 2007. Bankr.Op. 13. As its financial position continued to decline, the company's advisors sounded alarms about the proposed Transeastern settlement. One of those advisors, Larry Young, wrote in April, "[W]hy rush to restructure in a down market with a bad set of terms just to file [for bankruptcy] in 3 months. If we need to file due to the lenders/shareholder issues, then lets do it now and save ourselves about $50 million in transaction cost!" Ex. 246 at 1. Stephen Wagman, the CFO, agreed. Tr. 458:15-17.

On May 1, Kaplan sent a lengthy analysis to Mon, beseeching him not to pay off the Transeastern Lenders too quickly. "[A]lthough we can agree to pay Creditors in full and with interest if payments are postponed . . . we cannot afford to borrow to pay them cash up front." Ex. 497 at 2. "It is very simple," Kaplan wrote. "We cannot incur excessive leverage in 2007 and 2008 . . . ." *Id*. 3.

TOUSA nevertheless pressed forward with the settlement. In late May, Wagman wrote that TOUSA "will fail" to satisfy covenants in its bond indentures "into late 2008 or 2009. Not even close." Ex. 2113 at 1. His colorful – and candid – words anticipated the devastating effects of the forthcoming New Loans:

> As CFO, and in light of all of this market uncertainty, I have absolutely no desire to fly this plane too close to the ground, achieve some from [sic] of consensual settlement today and crash within the upcoming year. That would be a clusterfuck. I

> am the bad guy – pushed damn hard for no debt in the settlement, much to the disappointment of the Stengos Family.

Id. 2.

By June, with the Transaction barely a month away, TOUSA's CEO described in stark terms the likely consequences of the New Loans. Mon advised the controlling shareholders that:

> The TE settlement leaves TOUSA in a very difficult position:
>
> - Over-leveraged
> - In the middle of a serious housing correction
> - Forced to reduce assets at the "wrong time"
> - Unable to participate in the eventual upturn
> - Without access to the capital markets
> - With depleting equity base from lack of profitability and the forced sale of assets at a loss
> - At significant risk of talent flight with poor prospects to replenish it
> - Reputationaly [sic] injured
> - In need of a significant equity infusion
> - Unable to survive should housing conditions degrade further or the housing correction lengthen appreciably

Ex. 496 at 2. If the company pressed forward with the Transaction – an option he called the "Stay the Course" strategy – Mon predicted an "[i]ncreased risk of failure and inability to withstand worsening business conditions" (*id*. 3) and "liquidation or bankruptcy risk." *Id*. 4.[2]

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2 An earlier draft of the memo, exchanged between Mon and Tommy McAden (TOUSA's executive vice president), was more blunt. It observed that the "Stay the Course" strategy was the "ABSOLUTELY HIGHEST RISKED ALTERNATIVE." Ex. 495 at 3. After reading Mon's analysis,

In July, the major bond-rating agencies downgraded TOUSA's bonds, concluding that TOUSA was "not likely" to meet its financial obligations. TOUSA bonds sold for $0.45 on the dollar. Bankr.Op. 20; Ex. 2145, 2146, 2332.

3. The Subsidiaries' unsecured creditors strongly objected to the proposed settlement. In April 2007, a major bondholder warned TOUSA that it was "simply exchanging one group of aggrieved creditors for another, and imperiling its long run survival prospects in the process." See Bankr.Op. 95, 118; Ex. 239 at 4. That warning was vehemently reiterated in July. Bankr.Op. 28; Ex. 2158.

The bondholders also warned that the Transaction could be a "fraudulent transfer." Ex. 2158 at 2.[3] They understood that, under the bond indentures, a judgment against TOUSA Parent in the Transeastern litigation could trigger defaults, creating a risk that the unsecured creditors might not be *fully* repaid. But the Subsidiaries' valuable assets ensured that the unsecured creditors would at least receive *substantial* repayment. See

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McAden wondered why the company was engaging in the Transaction at all. McAden Dep. 236:18-237:3.

[3] The fraudulent transfer statute, 11 U.S.C. § 548, authorizes avoidance of property transfers by an insolvent debtor, if the debtor does not receive "reasonably equivalent value" in exchange. The statute seeks to protect creditors by preventing the depletion of the debtor's assets in the period leading up to bankruptcy.

Bankr.Op. 33. The proposed Transeastern settlement posed a stark threat to the unsecured creditors. The settlement would saddle the Subsidiaries with $500 million of new debt and, because the new debt would be secured by liens, the unsecured creditors would be pushed to the back of the creditors' line. They would be repaid only after the New Lenders were repaid in full. The bondholders had lent more than $1 billion, backed by guarantees from the Subsidiaries – but the proposed settlement would drastically reduce the Subsidiaries' ability to honor those guarantees.

Despite these objections, TOUSA's management never considered whether the settlement was in the best interests of the Subsidiaries or their creditors. The financial position of TOUSA Parent was dramatically different from that of the Subsidiaries, largely because TOUSA Parent faced very large liabilities to the Transeastern Lenders, while the Subsidiaries did not. But management never analyzed what benefits, if any, the *Subsidiaries* would derive from the settlement. Bankr.Op. 107-08. It never asked whether, even if a bankruptcy of TOUSA Parent was inevitable, the *Subsidiaries* might avoid bankruptcy. It never investigated whether the *Subsidiaries* could pledge their assets – which were unencumbered, save for the Revolver liens – to obtain independent financing. *Id*. 109-10. As TOUSA's chief of staff, Paul Berkowitz, explained, "[I]t just wasn't part of the thinking." Tr. 1824:9-1826:8. Or, as CFO Wagman put it, the TOUSA board spent "[i]f not zero, close to zero" minutes discussing the value the Subsidiaries might receive from the Transaction. Tr. 574:21.

4. The Transaction closed on July 31, 2007 (the "July 31 Transaction" or "Transaction"). The Subsidiaries incurred new obligations and granted liens; the Transeastern Lenders received \$421 million.[4] Within a few weeks, the "whole house of cards" – as Citi's lead banker described TOUSA (Tr. 3791:7-9) – came down. See Bankr.Op. 24. TOUSA's CFO determined that he could not issue a solvency representation and that TOUSA was already in violation of covenants. The company reported inventory impairments and abandonment costs, and issued a "going concern" statement. TOUSA and the Subsidiaries filed bankruptcy petitions in January 2008 – a mere six months after the July 31 Transaction. Bankr.Op. 28-29.

5. In July 2008, the Committee instituted this adversary proceeding, alleging two separate fraudulent transfers. First, it sought to avoid the New Lenders' liens and claims pursuant to 11 U.S.C. § 548,

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[4] The entire \$500 million in New Loans, plus an additional \$22 million, was paid immediately to other parties – \$421 million to the Transeastern Lenders, \$57 million to TOUSA Parent's joint venture partners, and \$44 million in transaction costs. Bankr.Op. 8 n.3.

alleging that the Subsidiaries were insolvent and that they did not receive reasonably equivalent value when they incurred obligations and granted liens to the New Lenders in the July 31 Transaction. The loan proceeds did not constitute reasonably equivalent value, the Committee alleged, because the Transaction required immediate payment of the proceeds to the Transeastern Lenders. The Committee also sought recovery from the Transeastern Lenders, pursuant to 11 U.S.C. § 550(a)(1), as entities "for whose benefit" the liens were transferred to the New Lenders.

Second, and alternatively, the Committee alleged that, if the Subsidiaries could be said to have received property worth $500 million (*i.e.*, the loan proceeds) from the New Lenders, then the transfer of those funds to the Transeastern Lenders was a section 548 violation in its own right. Under this "direct transferee" theory, the Subsidiaries transferred $421 million to the Transeastern Lenders but did not receive reasonably equivalent value from the Transeastern Lenders in return.[5]

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[5] The Committee asserted two other claims: (1) a claim against the New Lenders under 11 U.S.C. § 547, seeking to avoid the liens with respect to a federal income tax refund and (2) a fraudulent transfer claim against the Revolver Lenders. The bankruptcy court ultimately entered judgment for the Committee on the preference claim; the New Lenders' appeal from that judgment is pending before Judge Jordan. The bankruptcy court granted pretrial motions to dismiss the Revolver claim. The district court affirmed that dismissal, and the Committee elected to take no further appeal.

6. The case was tried over thirteen days before the Hon. John K. Olson. Because the Subsidiaries did not receive *direct* benefits from the New Lenders (under the principal liability theory, predicated on the view that the loan proceeds were not the Subsidiaries' property) or from the Transeastern Lenders (under the alternative "direct transferee" theory), "reasonably equivalent value" turned on whether the Transaction conferred *indirect* benefits on the Subsidiaries. The testimony of TOUSA's senior management confirmed that TOUSA had never even *considered* whether the Transaction would provide "reasonably equivalent value" to the Subsidiaries. Bankr.Op. 107-08; Tr. 564:3-565:13; 573:13-574:21; 1788:24-1791:8; 357:3-8. Two of the defendants' nine trial experts addressed the issue of reasonably equivalent value, but both analyzed only the benefits received by the TOUSA enterprise *as a whole*, and made no attempt to quantify separately any value received by the Subsidiaries. Bankr.Op. 114-15.

In October 2009 – after hearing 21 fact and expert witnesses, receiving deposition testimony from another 26 witnesses, and admitting 1800 exhibits – the bankruptcy court issued its findings of fact and conclusions of law. Adopting the Committee's submissions with significant modifications, the bankruptcy court found that the Subsidiaries had unreasonably small capital, were unable to pay their debts when due, and were insolvent before and after the Transaction (Bankr.Op. 9-104, 130-38); that they did not receive value reasonably equivalent to the $403 million[6] of obligations they incurred (*id*. 104-15; 143-49);[7] and that the Transeastern Lenders were entities "for whose benefit" the Subsidiaries granted liens to the New Lenders (*id*. 151-52).

The bankruptcy court outlined a remedy designed to unwind the Transaction and to restore the Subsidiaries (and, to the extent possible, the defendants) to the position they would have occupied without the Transaction. *Id*. 171-179. It ordered the Transeastern Lenders to disgorge $403 million (plus prejudgment interest) and permitted them to reassert their claims against TOUSA Parent. After further remedial proceedings, it entered a final judgment against the Transeastern Lenders (pursuant to Fed. R. Civ. P. 54(b)) on May 28, 2010 (Bankr.E.C.F. 986), and against the New Lenders on July 13, 2010 (Bankr.E.C.F. 1037).

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[6] The bankruptcy court, recognizing that TOUSA Parent would be responsible for some portion of the $500 million obligations to the New Lenders, attributed $403 million of those obligations to the Conveying Subsidiaries. Bankr.Op. 104. The defendants did not dispute that allocation.

[7] Relying on the definition of "value" in 11 U.S.C. § 548(d)(2)(A), the bankruptcy court ruled that some of the putative indirect benefits were not legally cognizable, but found that those benefits, even if cognizable, had "value (if any) that falls well short of 'reasonably equivalent' value." Bankr.Op. 149.

7. The New Lenders and the Transeastern Lenders appealed from the bankruptcy court's October 2009 order, resulting in three separately docketed appeals in the district court, assigned to three different judges. The Committee moved to stay briefing or to dismiss the appeals because the bankruptcy court had not yet issued a final judgment. Judge Gold, presiding in the Transeastern Lenders' appeal, denied the motion. D.C.E.C.F. 66. The Committee also requested consolidation of the three appeals. Judge Gold declined to consolidate, as well. *Id.* 11. Briefing in the appeals therefore began before the bankruptcy court had completed its work on remedies. After the bankruptcy court entered final judgments against all defendants, additional appeals were taken to the district court. In all, there were nine separately docketed appeals in the district court. After multiple transfers, five appeals by the Transeastern Lenders were assigned to Judge Gold; four appeals by the New Lenders were assigned to Judge Jordan.

On February 11, 2011, Judge Gold issued his opinion in the Transeastern Lenders' appeals. The Court first held that the clear-error standard of review for factual findings "is relaxed in circumstances where a lower court adopted one party's proposed order verbatim." Op. 44. Applying that "relaxed" standard, the district court held that the Subsidiaries had in fact received reasonably equivalent value in exchange for granting liens to the New Lenders. The district court stated that the "decisive inquiry can be simplified" to a single question: "[B]ut for the transfer, was there a realistic risk that the Conveying Subsidiaries and the enterprise would not financially continue to survive?" *Id*. 78. Because, in his view, the Transaction improved the odds that the Subsidiaries would avoid bankruptcy for some indefinite period of time, Judge Gold found that the Subsidiaries had received reasonably equivalent value. The district court also held that, even if the July 31 Transaction *was* a fraudulent transfer, the Transeastern Lenders could not be held liable under 11 U.S.C. § 550(a)(1) as entities "for whose benefit" the transfer had been made. Although the New Loan agreements expressly "directed that the [loan] proceeds . . . be used to satisfy the Transeastern Settlement" (*id*. 49), the district court held that section 550(a)(1) does not apply "where the 'benefit' is not the immediate and necessary consequence of the initial transfer." *Id*. 100.

The district court accordingly "quashed" the bankruptcy court's October 2009 Order "as it relates to the liability of the Transeastern Lenders" and declared all remedies against the Transeastern Lenders "null and void." *Id.* 112. It declined to remand to the bankruptcy court for any further proceedings. *Id*. 111-12.

STANDARD OF REVIEW

"As the second court to review the bankruptcy court's judgment," this Court will "examine the bankruptcy court's order independently of the district court." *Westgate Vacation Villas, Ltd. v. Tabas (In re Int'l Pharmacy & Disc. II, Inc.)*, 443 F.3d 767, 770 (11th Cir. 2005). The Court will "review determinations of law made by either the district or bankruptcy court de novo, while reviewing the bankruptcy court's findings of fact for clear error." *Ibid.*

The bankruptcy court's factual findings are not clearly erroneous unless, in light of all the evidence, this Court is "left with the definite and firm conviction that a mistake has been made." *Ibid*. Neither this Court nor the district court may make independent factual findings – that is the function of the bankruptcy court. *Equitable Life Assurance Society v. Sublett (In re Sublett)*, 895 F.2d 1381, 1384 (11th Cir. 1990); Fed. R. Bankr. P. 7052, 8013.

SUMMARY OF ARGUMENT

"No answer is what the wrong question begets." ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 103 (2d ed. 1986). At every turn, the district court asked the wrong question. Not surprisingly, its answers are indefensibly wrong.

To begin with, the district court – erroneously convinced that the bankruptcy court had simply rubber-stamped the Committee's submissions – adopted a "relaxed" standard of clear-error review that this Court has repeatedly repudiated. As a result, the district court never asked whether Judge Olson's abundant findings on reasonably equivalent value had solid record support. They manifestly do. And although the district court acknowledged the governing standard for reasonably equivalent value – whether the transfer "preserve[d] the debtor's net worth by conferring realizable commercial value on the debtor" (Op. 78) – it never actually answered that question. Instead, it held that, so long as the Transaction "left the Conveying Subsidiaries in a better position to remain as going concerns than they would have been without the settlement," that "is enough" to constitute value reasonably equivalent to $400 million. *Id.* 80.

Even if the record supported that unprecedented conclusion, it would run afoul of 11 U.S.C. § 548. "The purpose of voiding transfers unsupported by 'reasonably equivalent value' is to protect creditors against the depletion of a bankrupt's estate." *G.E. Credit Corp. v. Murphy (In re Rodriguez)*, 895 F.2d 725, 727 (11th Cir. 1990). Can it really be that *any* additional probability (no matter how small) of staving off bankruptcy (no matter how long) is worth $400 million? The district court assumed so but never said why.

And the premise of the district court's conclusion is false. The bankruptcy of TOUSA Parent was virtually inevitable, with or without the Transaction. TOUSA's CEO, its Executive Vice President, its CFO, and its most senior financial advisors said so before the Transaction, in exhibits that were never cited in the district court's 113-page ruling. And the Transaction actually increased, rather than reduced, the likelihood of the *Subsidiaries*' bankruptcy. The Transaction left the Subsidiaries more deeply insolvent, and eliminated any opportunity for them to restructure their debts to avoid bankruptcy.

No more persuasive is the district court's alternative holding – that the Transeastern Lenders are not entities "for whose benefit" the transfer was effected. Section 550(a)(1) asks a straightforward question: "For whose benefit" was the fraudulent transfer made? The district court never addressed that question, and never even cited the Transaction documents that made clear, on their face, that the Transaction was undertaken to pay $400+ million to the Transeastern Lenders. Concluding that the statute lacks a plain meaning, the court recurred to snippets of legislative history and reached a result that flatly contravenes this Court's dispositive decisions applying section 550(a)(1).

This Court should reverse the district court's judgment and affirm the bankruptcy court's determination that the Subsidiaries did not receive reasonably equivalent value in exchange for granting liens to the New Lenders. It should also sustain the bankruptcy court's conclusion that the Transeastern Lenders are entities for whose benefit those transfers were made.

ARGUMENT

I. THE BANKRUPTCY COURT CORRECTLY FOUND THAT THE SUBSIDIARIES DID NOT RECEIVE REASONABLY EQUIVALENT VALUE

A. The District Court Improperly Applied A "Relaxed" Standard Of Clear-Error Review

Section 548(a)(1) of the Bankruptcy Code authorizes the avoidance of certain transfers of property and obligations incurred by a debtor in financial distress[8] if the debtor "received less than a reasonably equivalent value in exchange for such transfer or obligation." 11 U.S.C. § 548(a)(1)(B)(i). That plain language "requires the court to determine the value of what was

[8] The statute describes three different measures of financial distress, any one of which may provide the predicate for avoidance. See 11 U.S.C. § 548(a)(1)(B)(ii)(I)-(III). The bankruptcy court found that plaintiff had proved all three; the district court did not overturn those findings.

transferred and to compare it to what was received." *Barber v. Golden Seed Co.*, 129 F.3d 382, 387 (7th Cir. 1997). This is a factual question, and "considerable latitude must be allowed to the trier of the facts." *Nordberg v. Arab Banking Corp. (In re Chase & Sanborn Corp.)*, 904 F.2d 588, 593 (11th Cir. 1990) (quotation marks omitted). Indeed, as the Third Circuit has explained, a bankruptcy court's factual findings on reasonably equivalent value are "largely immune from attack on appeal. But this is as it should be; the bankruptcy court, with its unique expertise, is in far better position than either the district courts, sitting as appellate tribunals, or the courts of appeals to make such determinations." *Mellon Bank, N.A. v. Official Committee of Unsecured Creditors of R.M.L., Inc. (In re R.M.L., Inc.)*, 92 F.3d 139, 154 (3d Cir. 1996).

In this case, the bankruptcy court made detailed factual findings, supported by extensive citations to the trial exhibits and testimony, Bankr.Op. 104-15, 143-49, and concluded that the Subsidiaries did not receive reasonably equivalent value for the liens they transferred. But, far from deferring to those findings, the district court substituted its own. It did so because it believed that "[t]he 'clearly erroneous' standard of review for factual findings *is relaxed* in circumstances where a lower court adopted one party's proposed order verbatim." Op. 44 (emphasis added). That profoundly wrong turn led the district court far astray.

The decisions of the Supreme Court and of this Court could not be clearer: "[E]ven when the trial judge adopts proposed findings verbatim, the findings are those of the court and may be reversed only if clearly erroneous." *Anderson v. City of Bessemer City*, 470 U.S. 564, 572, 105 S.Ct. 1504, 1511 (1985); *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 656, 84 S.Ct. 1044, 1047 (1964) ("findings, though not the product of the workings of the district judge's mind, are formally his . . . and they will stand if supported by evidence."); *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1373 n.46 (11th Cir. 1997) (adoption of a draft order "nearly verbatim does not affect our standard of review"); *Lykes Bros., Inc. v. U.S. Army Corps of Engineers*, 64 F.3d 630, 634 n.4 (11th Cir. 1995) ("The clear error standard does not change when the district court adopts verbatim the findings of one of the parties.").[9]

[9] The only case the district court cited for its "relaxed" standard of review makes the same point: "[T]he 'clearly erroneous' rule of Fed. R. Civ. P. 52(a) applies to a trial judge's findings of fact whether he prepared them or they were developed by one of the parties and mechanically adopted by the judge." *Amstar Corp. v. Domino's Pizza, Inc.*, 615 F.2d 252, 258 (5th Cir. 1980).

Moreover, as Judge Wisdom has explained, even if findings are taken predominantly from one party's submission, they "will carry more of a badge of personal determination when the trial judge has selected certain of the proposed findings but written others himself or when he has revised and edited the proposed findings, than they will when he has adopted a slate of findings verbatim." *James v. Stockham Valves and Fittings Co.*, 559 F.2d 310, 314 n.1 (5th Cir. 1977). Here, the findings carry that "badge of personal determination." For example, although the Committee argued that the Transeastern Lenders should disgorge the entire $421 million they received, the bankruptcy court ordered disgorgement of only $403 million. Bankr.Op. 177; D.C.E.C.F. 20-2 & 20-3, at 189, 193. The bankruptcy court rejected legal arguments advanced by the Committee, sometimes without comment (D.C.E.C.F. 20-2 & 20-3 at 166-67), sometimes with extended discussion (*id*. 184-86). The bankruptcy court modified many of the Committee's proposed findings and wrote findings of its own. See, *e.g.*, *id*. 18-19, 24, 53, 58-59, 68 n.28, 104, 111, 162 n.56. And it made specific findings on the credibility of witnesses. See, *e.g.*, *id*. 32, 38, 45 n.12, 47, 49, 64, 68 n.28, 71, 84 n.31, 92, 94, 95 & n.32, 124 n.39, 125.[10] On this record,

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[10] The bankruptcy court also dismissed the Committee's claim against the Revolver lenders, further refuting any notion that the court

there is “no reason to doubt that the findings . . . represent the judge’s own considered conclusions.” *Bessemer*, 470 U.S. at 573, 105 S.Ct. at 1511.

Ironically, after harshly criticizing the bankruptcy court for adopting findings that were drafted by the Committee and for failing to address cases that were cited only by the defendants (Op. 44), the district court did the same thing, in reverse. The 48 pages of its opinion devoted to the central issues in this case (*id.* 62-110) contain at least 47 passages taken verbatim or near-verbatim from defendants’ submissions. The Committee cited 195 cases that were not cited by the defendants; the district court discussed or cited only two of them.

We want to be clear: The district court’s decision should be reversed because it is wrong, not because much of its language was drafted by the defendants. Although we vehemently disagree with Judge Gold’s decision, we respect that the decision reflected his own judgment, even though he often used the defendants’ words. The bankruptcy judge was and is entitled to the same respect.

B. The Defendants’ “Indirect Benefits” Theory

The Conveying Subsidiaries did not *directly* receive *any* value from the July 31 Transaction. Indeed, the Subsidiaries never even touched the

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unquestioningly accepted the Committee’s arguments. Bankr.E.C.F. 268.

loan proceeds; that money was immediately distributed to others – mostly to the Transeastern Lenders, which received a $421 million cash payment to discharge a debt the Subsidiaries did not owe.[11] The defendants nevertheless contended at trial that the Subsidiaries had reaped various "indirect benefits" from the Transaction.[12] The principal such indirect benefit, the defendants

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[11] The Transeastern Lenders have consistently argued that the Subsidiaries had no property interest in the New Loan proceeds, and the district court agreed. Op. 48-55. The New Lenders have argued otherwise. We do not press on appeal the "direct transferee" theory (which assumes that the Subsidiaries *did* have a property interest in the loan proceeds) that the district court rejected. However, if the New Lender intervenors seek to revive their defense that the Subsidiaries received reasonably equivalent value in the form of the New Loan proceeds, we reserve the right to address that alternative theory in reply.

[12] The Second Lien Lenders, alone, contended that the Subsidiaries need not actually receive a benefit, so long as a benefit was received by an affiliate with an "identity of interest." The district court, while opining that the bankruptcy court had erroneously disregarded this "identity of interest" argument, explained in the next breath that it would not rely on that argument either. Op. 63. Correctly so. This Court has expressly repudiated the doctrine for cases like this. *Nordberg v. Arab Banking*, 904 F.2d at 594 n.12. And the facts, as well as the law, preclude application of the doctrine here. The Subsidiaries and TOUSA Parent (and their respective creditors) did *not* share an "identity of interest." Although they shared liability for *some* debts (the bond debt and the Revolver), each corporate entity *individually* owed other debts for which the others were *not* liable, including, most significantly, TOUSA Parent's liability to the Transeastern Lenders, which the Subsidiaries did not share. Judge Olson's finding that TOUSA Parent and the Subsidiaries were not just a single entity for purposes of reasonably equivalent value (Bankr.Op. 107-15, 147) was well grounded in the record, as well as the text of section 548, which asks whether each "debtor" (and here, each individual Subsidiary was a "debtor") received reasonably equivalent value.

claimed, was that the Transaction gave the Subsidiaries some chance of avoiding bankruptcy. Defendants also advanced a hodgepodge of other supposed indirect benefits, including tax benefits, increased borrowing limits under the Revolver, and relief from the reputational harm caused by the Transeastern litigation against TOUSA Parent.

The bankruptcy court held that most of these indirect benefits were not "property" and therefore did not fall within the definition of "value" in section 548(d)(2)(A). The Bankruptcy Code defines "*property* of the estate" as "*legal or equitable interests* of the debtor in property as of the commencement of the case" (11 U.S.C. § 541(a)(1) (emphasis added)). There is no "legal or equitable interest" in avoiding bankruptcy, as the bankruptcy court explained. Bankr.Op. 146-48; see also D.C.E.C.F. 111 at 97-105. But even apart from that threshold problem, defendants' indirect-benefits defense faced two other hurdles – one legal, one factual.

The legal hurdle was that, under the governing cases, defendants bore the burden of *producing evidence* that the Subsidiaries had in fact received indirect benefits – that the benefits were *real* – and of *quantifying* those benefits with reasonable precision. *E.g.*, *Braunstein v. Walsh (In re Rowanoak Corp.)*, 344 F.3d 126, 131 (1st Cir. 2003) (although plaintiff has burden of proving transfer was fraudulent, the "duty of going forward with evidence . . . may shift from side to side as the case progresses") (quotation marks omitted); *In re Fruehauf Trailer Corp.*, 444 F.3d 203, 217 (3d Cir. 2006) (same); *Pummill v. Greensfelder, Hemker & Gale (In re Richards & Conover Steel, Co.)*, 267 B.R. 602, 614 (B.A.P. 8th Cir. 2001) ("The party claiming to have delivered value must quantify it.").[13]

The factual hurdle for the defendants was even more daunting. When evaluating the Transaction, TOUSA's management did not even consider, much less quantify, the benefits (if any) the Subsidiaries would receive. Bankr.Op. 112-14; see also, *e.g.*, Tr. 34:15-35:7, 356:20-357:2; 573:1-574:21, 580:6-13, 583:14-584:2; Berkowitz Dep. 162:24-163:22. Citi also

[13] The district court characterized the bankruptcy court's ruling to that effect (Bankr.E.C.F. 513 at 5-6) as an improper shift in the burden of proof. Op. 62. That is wrong. As the bankruptcy court explained, the burden of production and burden of proof are distinct concepts. Bankr.E.C.F. 513 at 6; Bankr.Op. 143-45. For indirect benefits, the burden of *production* rests with the defendants (although the plaintiff retains the ultimate burden of persuasion) because it would pose a near-insurmountable burden on plaintiffs to identify and affirmatively disprove every conceivable indirect benefit a defendant might assert. See, *e.g.*, *Allstate Fin. Corp. v. Zimmerman*, 330 F.2d 740, 744 (5th Cir. 1964) (discussing burden of production by party that has peculiar knowledge or control of the evidence). In all events, the defendants waived appellate review of the burden of production when they did not challenge it in their opening brief in the district court appeal. *Bank of America, N.A. v. Mukamai* (*In re Egidi*), 571 F.3d 1156, 1163 (11th Cir. 2009) ("Arguments not properly presented in a party's initial brief . . . are deemed waived.").

failed to consider that question. Bankr.Op. 112 n.38.[14] Given those derelictions, the defendants mounted no serious "indirect benefits" defense. Their fact and expert witnesses discussed only the putative benefits for the TOUSA enterprise *as a whole*.[15]

When all the proof was in, the "indirect benefits," if they existed at all, did not amount to anything close to the $403 million in new debt incurred by the Subsidiaries. The bankruptcy court found that "Plaintiff has demonstrated that the Conveying Subsidiaries did not receive reasonably equivalent value, whether directly or indirectly." Bankr.Op. 146. That was true, the bankruptcy court added, "regardless of where the burdens of production or proof lie." *Ibid*. As we show below, that finding is fully supported by the record.

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[14] The district court stated that the corporate resolutions executed by the Subsidiaries were "[o]f critical importance." Op. 28. In light of the undisputed testimony that TOUSA management never considered what benefits (if any) the Subsidiaries would receive, however, the bankruptcy court was justified in not crediting those *pro forma* assertions.

[15] One trial witness, TOUSA Treasurer Russell Devendorf, ventured an opinion on the Subsidiaries' benefits, after professing in his deposition to have had no such opinion. The bankruptcy court rejected that testimony for multiple reasons, including credibility grounds. Bankr.Op. 113-14.

C. The Bankruptcy Court Correctly Found That The Transaction Did Not Provide Reasonably Equivalent Value By Increasing The Likelihood That The Subsidiaries Would Avoid Bankruptcy

The principal "indirect benefit," the defendants claimed, arose from what we might call the Bankruptcy Avoidance Theory: (1) The Transaction improved (by some degree) the odds that TOUSA Parent would avoid bankruptcy, which in turn (2) improved (by some degree) the odds that the *Subsidiaries* would avoid bankruptcy, which in turn (3) provided enormous *value* to the Subsidiaries. The district court enthusiastically endorsed that theory. Indeed, in the district court's view, if the Transaction improved by any degree the Subsidiaries' opportunity to avoid (or delay) bankruptcy, that opportunity was inherently so valuable that a court need not and should not quantify its value, much less compare it to the $403 million the Subsidiaries gave up.

By contrast, the bankruptcy court – relying on the actual proof at trial – found as fact that the evidence refuted *all three* legs of the Bankruptcy Avoidance Theory. First, although it was undisputed that TOUSA Parent's bankruptcy was inevitable without the Transaction, the bankruptcy court found that it was also inevitable *with* the Transaction. Second, although the Subsidiaries were at risk of bankruptcy with or without the Transaction, the bankruptcy court found that the Transaction did not *reduce* their risk of bankruptcy – if anything it *increased* the risk. Third, the bankruptcy court found that, even if the Transaction had improved the Subsidiaries' chances of avoiding bankruptcy to some degree, the Subsidiaries still did not receive "reasonably equivalent" value because any marginal improvement in their odds of avoiding bankruptcy *was not worth anything close to the $403 million they paid*.

The bankruptcy court got it exactly right. Judge Gold erred by not accepting the well-supported findings of the bankruptcy court; and, standard of review aside, Judge Gold got it exactly wrong.[16]

1. The bankruptcy court first found "no reason to believe that the replacement of [TOUSA Parent's] contingent litigation liability with a massive amount of secured debt rendered TOUSA *better* able to weather the extreme downturn in the housing market." Bankr.Op. 108. The Transaction "at most" merely "delayed the inevitable – it could not have given rise to any purported benefits to the Conveying Subsidiaries predicated on the avoidance of such a bankruptcy." *Id*. 108-109.

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[16] Of course, even if the bankruptcy court "had failed to make findings of fact essential to a proper resolution of the legal question," the district court "should have remanded to the [bankruptcy court] to make those findings." *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714, 106 S.Ct. 1527, 1530 (1986). "But it should not simply have made factual findings on its own." *Ibid*.

Those factual findings were supported by the bankruptcy court's detailed findings that TOUSA Parent was deeply insolvent both before and immediately after the Transaction. *Id*. 9-95. Indeed, upon consummation – after eliminating *all* liabilities to the Transeastern Lenders, and assuming that the Subsidiaries would pay the vast majority of the debts to the New Lenders, the Revolver Lenders, and the bondholders – TOUSA Parent was still insolvent by more than $40 million. *Id*. 69. The bankruptcy court's findings were also supported by a host of documents written *before* the Transaction by TOUSA's senior management and financial advisors, a small sampling of which we have previously recounted. The bankruptcy court found as fact that the Transaction left "no way out of a hopeless financial squeeze *which TOUSA's management recognized months, weeks, and days before the closing*." *Id*. 95 (emphasis added). The court observed that it "would be hard to imagine" "[a] more complete and prescient prediction" than Mon's ***pre***-Transaction analysis, which stated that proceeding with the July 31 Transaction (the so-called "Stay the Course" strategy) entailed an "[i]ncreased risk of failure and inability to withstand worsening business conditions." *Id.* 18. And the bankruptcy court noted that, after Mon's prediction in mid-June, "both the general business conditions in which

TOUSA operated and its specific situation worsened significantly in the intervening six weeks leading up to the July 31st closing." *Ibid.*

Those findings were not clear error; they were supported by *overwhelming* evidence.

Without citing any of the evidence on which the bankruptcy court had relied, the district court found that the Transaction *did* substantially improve TOUSA Parent's chances of avoiding bankruptcy. In its view, the bankruptcy court's contrary findings were based on "retrospection" only – the mere fact that "bankruptcy ultimately was not avoided." Op. 85.

Not so. It required no "retrospection" to know that the Transaction left virtually no opportunity for TOUSA Parent to avoid bankruptcy. That conclusion followed from TOUSA Parent's financial condition at the time of the Transaction, and the private pre-Transaction statements of TOUSA's CEO, its CFO, its Executive Vice President, and its most trusted financial advisors. The district court (which was supposed to be acting in an appellate capacity) made no effort – none – to reconcile its substitute finding with any of this evidence.[17]

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[17] Crediting the testimony of the defense experts (whom it never saw) over the testimony of the Committee's experts, numerous fact witnesses, and contemporaneous TOUSA documents (which it never cited), the district court made an appellate finding that a "Black Swan" event caused TOUSA's

2. Even if the Transaction left some opportunity for TOUSA Parent to avoid bankruptcy, the bankruptcy court found that the Transaction did not enhance any opportunity for the *Subsidiaries* to avoid bankruptcy. Their odds of avoiding bankruptcy would have been better – and certainly no worse – if the Transaction had not occurred. Bankr.Op. 108-111.

That finding should not be surprising, because the Subsidiaries were much more deeply insolvent *after* the Transaction than *before*. In substance, the Transaction paid the Transeastern debt (for which the Subsidiaries were *not* liable) by taking on New Loans (for which the Subsidiaries *were* liable). It cannot be true that the Transaction thereby *reduced* the Subsidiaries' risk of bankruptcy.

Moreover, although the Subsidiaries faced the threat of bankruptcy under any scenario, the Transaction foreclosed their only opportunity to escape that risk. In particular, the bankruptcy court found that if they had not participated in the Transaction, and even if TOUSA Parent had declared bankruptcy, the Subsidiaries might have been able to avoid bankruptcy by obtaining independent financing and restructuring their debt. Bankr.Op.

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collapse. Op. 31. The bankruptcy court's well-supported findings reject that explanation. Bankr.Op. 49-51.

109-11.[18] The two principal Subsidiaries held assets worth $772 million and $324 million, respectively, just before the Transaction. *Id*. 33. Those assets were unencumbered, except for the Revolver liens securing only $224 million of debt. Without the Transaction, the Subsidiaries could have pledged those assets to obtain independent financing. The Transaction foreclosed that possibility, because the Subsidiaries encumbered their assets with new liens to secure the $500 million New Loans.

The bankruptcy court's factual findings rested, in part, on the testimony of William Derrough, an expert who, over ten years as the head of recapitalization and restructuring groups of major investment banks, had participated in scores of similar transactions. See Ex. 633 at 1-2. Derrough testified that the Subsidiaries might have been able to secure independent financing, pointing out that subsidiaries frequently avoid bankruptcy and continue operating even if their parent is in bankruptcy. Tr. 1301:10-1302:24. Another expert, Charles Hewlett, with more than 25 years experience with the real estate and homebuilding business, also opined that the Subsidiaries might have been able to obtain independent financing, in

[18] The district court characterized the TOUSA enterprise as "highly integrated" (Op. 82) but did not address the bankruptcy court's contrary findings that the Subsidiaries were "distinct, individual entities" (Bankr.Op. 88; see also *id*. 136) that had recently operated as independent entities and that could have done so again (*id*. 110).

light of their size and number of home deliveries. Tr. 854:7-855:2.[19] And TOUSA's chief of staff, Paul Berkowitz, said the same thing. Asked if the Subsidiaries had the ability to obtain independent financing, Berkowitz testified:

> Well, I guess if you have assets you can go out and you can borrow money. On the other hand, as we spoke before, the subs were guarantors on the bond debt. These subs had their assets pledged to Citi. So it would have been necessary to work out arrangements with everyone. . . . So there would have been consent solicitations there, there would have been workouts with Citi, and yeah, if you could have freed up the assets, I'm sure you could have borrowed money.

Id. 1680:2-21. This was not a situation in which the Subsidiaries tried, but failed, to secure independent financing. As Berkowitz conceded, they did not even investigate that possibility. *Id*. 1824:9-1826:8.[20]

Once again, the district court rejected the bankruptcy court's findings. Op. 88-91. First, it emphasized that the bankruptcy court had "hedged" its

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[19] The district court suggested that the bankruptcy court had failed to determine that Derrough and Hewlett were qualified to testify as experts and that their opinions were reliable. Op. 90. In fact, the bankruptcy court made both determinations, both before trial (Bankr.E.C.F. 473 at 2) and after observing their trial testimony (Bankr.Op. 109, 182).

[20] Wagman likewise testified that he didn't recall "going into a subsidiary-level analysis relative to them obtaining individual financing." Tr. 575:16-18. The district court wrongly attributed this testimony to Hewlett (Op. 90 n.55), thereby suggesting that the testimony of the Committee's expert lacked an adequate factual basis, when the testimony in fact undermined the factual basis for the *defendants*' claim that independent financing was impossible.

finding when it stated that the Subsidiaries could "possibly" avert bankruptcy, as opposed to finding that the Subsidiaries "could" avoid bankruptcy. But this "hedge" merely indicated that the bankruptcy court, unlike the district court, was asking and answering the right question.

The bankruptcy court had already found (correctly) that, *with* the Transaction, bankruptcy was a near certainty. From that baseline, even a small possibility of averting bankruptcy *without* the Transaction would negate any "value" from the Transaction. If, for example, the Subsidiaries had a 5% chance of avoiding bankruptcy immediately upon consummation of the Transaction, but also would have had a 5% chance of avoiding bankruptcy if the Transaction had not occurred, they received no value at all. The relevant question was *not* (as the district court mistakenly believed) whether the Subsidiaries were at risk of bankruptcy without the Transaction; it was whether they were *more* likely to avoid bankruptcy *with* the Transaction than *without* it, *i.e.*, whether the Transaction *improved* their financial prospects. The bankruptcy court's "hedged" findings correctly addressed that question, by finding a possibility that the Subsidiaries could have avoided bankruptcy without the Transaction, after finding *no* possibility that they could have avoided bankruptcy *with* the Transaction.

Next, the district court asserted that there was a "direct conflict" between the bankruptcy court's finding that the Subsidiaries might have obtained new financing to restructure their debt, and its concurrent finding that the Subsidiaries were insolvent. Op. 88. Those findings are not in conflict at all. Indeed, the Transaction itself was an example of lenders that provided $500 million to insolvent borrowers, in the expectation that liens would assure repayment of their loans, even if the borrowers could not pay their unsecured creditors. The bankruptcy court merely accepted the logical proposition that, if the Subsidiaries could borrow $500 million from the New Lenders to pay parties to whom the Subsidiaries owed no obligations, the Subsidiaries plausibly could have borrowed on similar terms and used the proceeds for their own benefit.

Finally, the district court opined that the Subsidiaries could not have obtained new financing because they "needed consents from the Revolver lenders to take on new debt and encumber assets on which the Revolver lenders already had security interests." Op. 90-91. That assertion entirely missed the point. The bankruptcy court was not addressing the possibility of new financing *in addition to* the Revolver financing; it was addressing the possibility of "transitioning ***to an alternative source of financing***" – *i.e.*, "***re***financing" – by obtaining *new* loans that would be secured by the

Subsidiaries' substantial assets, while simultaneously repaying the Revolver debt and *canceling* the Revolver liens. Bankr.Op. 111 (emphasis added).[21] The district court also thought refinancing was impossible because the Subsidiaries' assets were already pledged "to secure up to $800 million of existing Revolver debt." Op. 88 n.54.[22] But there was no "$800 million of existing Revolver debt." At the time of the Transaction, the "existing Revolver debt" was $224 million. Bankr.Op. 32-33, 69. And the Revolver Lenders also held liens on TOUSA Parent's assets, so a significant portion of that debt presumably could have been paid by TOUSA Parent (even if TOUSA Parent was forced into bankruptcy).

The bankruptcy judge, drawing on 30 years of bankruptcy experience (*id.* 167 n.63), did not clearly err in finding that a TOUSA Parent bankruptcy "would not necessarily have caused the Conveying Subsidiaries to declare

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[21] What is more, the district court offered no support for its assumption (Op. 91) that the Revolver Lenders would have refused to consent to the grant of additional liens. They did exactly that in the July 31 Transaction, when they permitted the Subsidiaries to grant additional liens to secure the $500 million debt to the New Lenders.

[22] The district court asserted that the bankruptcy court clearly erred by supposedly finding that the Subsidiaries' assets were unencumbered, when in fact those assets were encumbered by the Revolver Lenders' liens. But the bankruptcy court expressly found that the Subsidiaries had granted liens to the Revolver Lenders. Bankr.Op. 6, 8. Its subsequent statement that the Subsidiaries' assets were unencumbered (*id*. 113), read in context, clearly refers to the fact that their assets were unencumbered by obligations *to the Transeastern Lenders*.

bankruptcy." *Id.* 109. "[T]he bankruptcy court, with its unique expertise, is in far better position than . . . the district courts . . . to make such determinations." *In re R.M.L.*, 92 F.3d at 154.

3. Even if (contrary to fact) the Transaction *did* improve the Subsidiaries' odds of avoiding bankruptcy, section 548 requires a further inquiry: Was the value of that benefit "reasonably equivalent" to the $403 million the Subsidiaries paid for it? The bankruptcy court found it was not.

To begin with, the evidence showed that the Transaction, *at best*, merely delayed bankruptcy for some brief period of time, in the hope (but not expectation) that some miracle might occur. TOUSA's management recognized that fact before the Transaction, and the actual events confirmed their expectations. TOUSA's desperate gamble failed almost before the ink on the Transaction documents was dry, leaving the Subsidiaries far more deeply insolvent. By saddling the Subsidiaries with new debt, and by granting liens that required the New Lenders to be repaid before the unsecured creditors, the Transaction depleted the assets that were available to pay the Subsidiaries' pre-Transaction creditors.

"The purpose of voiding transfers unsupported by 'reasonably equivalent value' is to protect creditors against the depletion of a bankrupt's estate." *In re Rodriguez*, 895 F.2d at 727; *Rubin v. Manufacturers Hanover*

Trust Co., 661 F.2d 979, 992 (2d Cir. 1981) (statutory purpose is to "conserv[e] the debtor's estate for the benefit of creditors"). For that reason, the touchstone of reasonable equivalence is whether "the debtor's net worth has been preserved" and whether "the interests of the creditors will not have been injured by the transfer." *In re Rodriguez*, 895 F.2d at 727. From the pre-Transaction creditors' perspective, a Transaction that depleted the Subsidiaries' net worth by more than $400 million could not possibly have delivered reasonably equivalent value.

Judge Gold did not suggest that there was any evidence that the purported bankruptcy avoidance had an *actual* value of approximately $400 million. Instead, he held that such evidence was unnecessary. In the district court's view, "the decisive inquiry" for assessing reasonably equivalent value is whether, "*but for the transfer* . . . there [was] a realistic risk that the Conveying Subsidiaries and the enterprise would not financially continue to survive[.]" Op. 78. If so, "no further proof of 'quantification' was required to establish reasonably equivalent value, and the Bankruptcy Court further erred as a matter of law in requiring the same." *Id*. 84. "[I]t is enough that the July 31 Transaction left the Conveying Subsidiaries in a better position to remain as going concerns than they would have been without the settlement." *Id*. 80. "[A] debtor's opportunity to avoid default, to facilitate its rehabilitation, and to improve its prospects of avoiding bankruptcy" are benefits that "[i]nherently . . . have immense economic value." *Id*. 84, 85.

The notion that *all* opportunities to avoid bankruptcy "[i]nherently . . . have immense economic value" (*id.* 85) – or that this *particular* opportunity did – is nonsense. Even if *actual* bankruptcy avoidance *always* had "immense" value (which is not true), every *opportunity* to avoid bankruptcy does not "inherently" have the same value. Some opportunities hold promise, others do not. It is "well established" that, to determine the value of a contingent asset or liability, "'it is necessary to discount it by the probability that the contingency will occur.'" *Nordberg v. Arab Banking*, 904 F.2d at 594 (quoting *In re Xonics Photochemical, Inc*., 841 F.2d 198, 200 (7th Cir. 1988)). The same discounting is required to measure the value of an "opportunity" to avoid bankruptcy. Thus, *In re R.M.L*. held that a bank's contingent commitment to make a loan to the debtor (which could have averted the debtor's bankruptcy) had *some* value. 92 F.3d at 152. Because the commitment was highly conditional, however, there was a "substantial probability" that the loan would not close, and the "minimal value" of the loan commitment was not reasonably equivalent to the fees paid by the debtor. *Id*. 154.

It is likewise impossible to determine reasonable equivalence without considering the *cost* that the debtor incurs in exchange for the "opportunity." A debtor would certainly prefer to be insolvent by, *e.g.*, $2 million, rather than $200 million. A successful reorganization might be likely in the first case, but impossible in the second. For that reason, even if a debtor might reasonably pay, *e.g.*, $1 million for an opportunity to avoid bankruptcy, it might be wholly unreasonable to pay $199 million for the same opportunity.[23] That an "opportunity" may be worth *some* amount does not mean it is worth *any* amount.

For creditors, the analysis is similar. Creditors care deeply about how insolvent the debtor is; the answer will determine whether the creditor receives full payment, no payment, or some intermediate amount. If, as the district court believed, an opportunity to avoid bankruptcy (no matter how small) "inherently" has "immense economic value," creditors would *always* allow a debtor to restructure its financial obligations, if doing so would yield *any* possibility of avoiding bankruptcy. But of course, creditors do not value fool's gold. They agree to restructure debt only if the likelihood of the

[23] "[T]here is no reason to treat bankruptcy as a bogeyman, as a fate worse than death. . . . The bankruptcy process . . . probably reduces rather than increases the cost of a financial restructuring." *Olympia Equipment Leasing Co. v. Western Union Telegraph Co.*, 786 F.2d 794, 802 (7th Cir. 1986) (Easterbrook, J., concurring).

debtor's rehabilitation is sufficiently high, and the risk of additional loss (if bankruptcy ensues) is sufficiently low. Here, the unsecured creditors made exactly that kind of pragmatic, quantitative judgment. They emphatically told TOUSA, before the Transaction, that it should *not* proceed, because the opportunity (if any) was not worth the cost. Bankr.Op. 28, 95.

The district court's proposition – that, if a debtor receives an "opportunity" to avoid bankruptcy, "no further proof of 'quantification' [i]s required to establish reasonably equivalent value" (Op. 84) – reflects a fundamental legal error. The notion that an "opportunity" to avoid bankruptcy (no matter how small or for how long) is reasonably equivalent *as a matter of law* to the value (no matter how large) of the property the debtor transferred conflicts with the plain language of the statute and upends decades of settled law. This legal error, standing alone, would require reversal, even if the district court had been right about everything else.

Section 548, after all, does not ask whether the debtor received *any* value; it asks whether the debtor received value "reasonably equivalent" to the value of the transferred property. That plain language "requires the court to determine the value of what was transferred and to compare it to what was received." *Barber*, 129 F.3d at 387. The statutory text provides no exception merely because the putative benefit is an opportunity to avoid bankruptcy.

A multitude of cases confirms what the statute clearly says. The purpose of section 548 is to protect creditors from the depletion of estate assets. See, *e.g.*, *In re Rodriguez*, 895 F.2d at 727; *Walker v. Treadwell (In re Treadwell)*, 699 F.2d 1050, 1051 (11th Cir. 1983); *Rubin*, 661 F.2d at 992. That purpose "requires that, in determining reasonably equivalent value, the court must focus on what the debtor received in return for what he surrendered." *Bundles v. Baker (In re Bundles)*, 856 F.2d 815, 824 (7th Cir. 1988). The reasonably equivalent value inquiry "proceeds in two, discrete steps." *In re R.M.L.*, 92 F.3d at 152. First, the court must determine whether a purported indirect benefit has *any* value; second, assuming *some* value, the court must determine whether the value was reasonably equivalent. *Ibid.*; accord, *e.g.*, *Leibowitz v. Parkway Bank & Trust Co. (In re Image Worldwide, Ltd.)*, 139 F.3d 574, 582 (7th Cir. 1998) (avoiding transfer because, "while [debtor] received an indirect benefit from the transaction, it did not receive reasonably equivalent value"); *HBE Leasing Corp. v. Frank*, 48 F.3d 623, 638-639 (2d Cir. 1995) (fact-finder "must first attempt to measure the economic benefit that the debtor indirectly received . . . then compare that benefit to the value of the property the debtor transferred”); *Mellon Bank, N.A. v. Metro Communications, Inc.*, 945 F.2d 635, 647 (3d Cir. 1991) (“indirect economic benefits must be measured and then compared to the obligations that the bankrupt incurred”); *Harman v. First American Bank of Maryland (In re Jeffrey Bigelow Design Grp., Inc.)*, 956 F.2d 479, 485 (4th Cir. 1992) (“the focus is whether the net effect of the transaction has depleted the bankruptcy estate”).

4. Here, instead of asking (as the law requires) whether the Subsidiaries’ pre-Transaction *creditors* would be harmed, the district court improperly viewed the Transaction exclusively from the perspective of TOUSA *shareholders.*

For example, the district court correctly observed that the touchstone of reasonably equivalent value is whether the debtor’s net worth has been preserved, and repeatedly asserted that the opportunity to avoid bankruptcy preserved that “net worth.” See, *e.g.*, Op. 74, 78, 81, 83, 85. That claim makes no sense from the perspective of the Subsidiaries’ creditors. The Subsidiaries’ net worth was *not* preserved; it was reduced by more than $400 million. Only the TOUSA Parent *shareholders*’ net worth could possibly have been preserved by the Transaction, because their shares would have been worthless in the event of bankruptcy.[24]

The sole focus on shareholder interests was evident, as well, in the district court's reliance on the opinion that Lehman Brothers provided to TOUSA. See Op. 22. The district court omitted any reference to the critical point in that opinion. Lehman repeatedly emphasized that it was asking whether the settlement would maximize value for TOUSA's *shareholders* (Ex. 187 at 060891, 060920, 060925, 060930, 060940, 053091), a question that virtually answered itself after Lehman concluded that "TOUSA's shareholders would lose all of their equity interests in the event of a TOUSA bankruptcy." *Id*. 060932. Lest the point be missed, Lehman explained that it had "not been requested to consider, nor has it considered and nor does it express any opinion as to, whether the Global Settlement is the best

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[24] The district court's elevation of shareholder interests over creditors' interests is also evidenced by its view that bankruptcy is equivalent to corporate death. See, *e.g.*, Op. 78 ("Conveying Subsidiaries' very existence" was at stake); *id*. 86 (subsidiaries' "survival" was at stake); *id*. 89 (questioning whether "Conveying Subsidiaries could survive"). Shareholders' equity investments may not survive bankruptcy, but the claims of creditors surely do. "It's not as though the filing of a bankruptcy petition closes the firm and heaves its workers into the streets. A firm with positive cash flows will continue operating in bankruptcy; the court simply sorts out the financial claims to the enterprise." *Levit v. Ingersoll Rand Financial Corp*., 874 F.2d 1186, 1198 (7th Cir. 1989).

alternative . . . to maximize value for TOUSA's creditors." *Id*. 060888, 060940, 053091.

The distinction between shareholder interests and creditor interests is critical. If a business faces near-certain bankruptcy, *any* chance of averting that fate may be desirable from the shareholders' perspective, whatever the price. If the gamble succeeds, their shares retain some value. If their gamble fails, it costs them nothing. See Scott F. Norberg, *Debtor Incentives, Agency Costs, and Voting Theory in Chapter 11*, 46 U. KAN. L. REV. 507, 520 (1998) ("[S]hareholders of an insolvent firm may profit from firm investments, but have nothing to lose."); Steven L. Schwarcz, *Rethinking A Corporation's Obligations To Creditors*, 17 CARDOZO L. REV. 647, 669 (1996) ("[S]hareholders of corporations near insolvency have nothing to lose and everything to gain by the corporation's engaging in risky ventures"); see also *Kham & Nate's Shoes No. 2, Inc. v. First Bank of Whiting*, 908 F.2d 1351, 1360 (7th Cir. 1990) ("Creditors effectively own bankrupt firms."). That is why the bankruptcy court described the Transaction as "betting with the creditors' money." Bankr.Op. 15 n.5. The reasonable equivalence standard in section 548 is designed to *prevent* such desperate gambles. The district court failed to appreciate that fundamental reality.

D. The Bankruptcy Court Correctly Found That The Subsidiaries Did Not Receive Reasonably Equivalent Value From The Other Putative Indirect Benefits

1. The bankruptcy court found that any tax benefits that might have resulted from the Transaction belonged to TOUSA Parent, not to the Subsidiaries (a point never disputed by the defendants). It also found that all of the substantial loss-generating events giving rise to tax benefits "would have happened with or without" the settlement. Bankr.Op. 106-107 (quoting testimony of TOUSA's tax consultant and citing supporting testimony from TOUSA's tax auditor).

The district court made no reference to those findings, or to the evidence supporting them. Instead, it made its own appellate finding, stating that, by engaging in the Transaction, TOUSA and the Subsidiaries obtained "the right to future tax benefits totaling approximately $74.8 million." Op. 29. The district court lifted those words from the First Liens' proposed findings of fact (Bankr.E.C.F. 728-1 at 70), but omitted the very next sentence – which acknowledged that the value of those tax benefits, *as of July 31, 2007*, was only $38-54.8 million. *Ibid*. Those tax benefits are not properly credited at all, for the reasons described above; but, even if they were, $38-55 million obviously falls far short of reasonably equivalent value.[25]

2. The district court found that the Subsidiaries received value because the Transaction raised their borrowing limits by increasing the Revolver "Borrowing Base." Op. 82. The district court ignored the bankruptcy court's finding that "there is no evidence that the Conveying Subsidiaries' cash requirements exceeded the capacity of the pre-transaction borrowing base." Bankr.Op. 111. In support of its own finding (which, of course, it was not supposed to make), the district court cited only the definition of "Borrowing Base" in the loan agreement, and the testimony of TOUSA's CFO, Wagman. See Op. 82. But Wagman did *not* testify that the Subsidiaries' projected borrowing needs exceeded (or even came close to) the pre-Transaction limits, much less attempt to quantify the value (if any) of the ability to borrow money that the Subsidiaries did not need. He merely agreed that additional liquidity was "of value," "[p]articularly in a

[25] The district court's finding on future tax benefits was derived from the defendants' expert, William Lenhart, who the bankruptcy court found was "not a credible expert witness." Bankr.Op. 84. See Fed. R. Bankr. P. 8013 ("due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses."); *Owens v. Wainwright*, 698 F.2d 1111, 1113 (11th Cir. 1983) (requiring "particular deference to credibility determinations of a fact-finder who had the opportunity to see live testimony").

downturn." Tr. 546:1-5. That vague testimony is hardly sufficient to demonstrate clear error by the bankruptcy court, or to support the district court's improper finding.

3. The defendants claimed at trial that the Transeastern settlement provided indirect benefits by eliminating the supposed harm that the Transeastern litigation inflicted on the Subsidiaries' day-to-day business of selling homes. The bankruptcy court correctly rejected that claim, finding that it was not supported by the evidence. Bankr.Op. 107-108; see Kypreos Dep. 74:1-10, 75:1-7; Mulac Dep. 84:3-24; Cobb Dep. 93:20-94:8. The district court did not advert to any evidence supporting that claim, but asserted that testimony the bankruptcy court excluded on hearsay grounds would have "strongly supported" the defendants' position. Op. 84 n.53.

The district court was wrong. To begin with, the exclusion of the hearsay testimony was proper. The witness (Berkowitz) was asked about out-of-court statements by unidentified TOUSA employees; the defendants argued that such statements were party admissions, admissible under Fed. R. Evid. 801(d)(2)(D). Not so. The TOUSA employees were not agents of a party-opponent; the *Committee*, not TOUSA, is the plaintiff here. *Calhoun v. Baylor*, 646 F.2d 1158, 1162 (6th Cir. 1981); *Anaconda-Ericsson, Inc. v. Hessen (In re Teltronics Servs., Inc.)*, 29 B.R. 139, 165 (Bankr. E.D.N.Y.

1983) (rejecting the argument that a debtor's statements are admissible against the trustee under Rule 801(d)(2)(D)).

Moreover, the Transeastern Lenders failed to make an offer of proof or otherwise ensure that "the substance of the evidence was made known to the court." Fed. R. Evid. 103(a)(2). For that reason, it is hard to fathom how the district court could have intuited that Berkowitz's testimony would have "strongly supported that the Conveying Subsidiaries did, in fact, receive substantial indirect benefits from TOUSA's payment of the New Loan proceeds to the Transeastern Lenders." Op. 84 n.53. Those words were taken, verbatim, from the Transeastern Lenders' brief (D.C.E.C.F. 75 at 23) and, like the brief, cited no record support. In any event, "this circuit will not even consider the propriety of the decision to exclude the evidence at issue, if no offer of proof was made at trial." *United States v. Winkle*, 587 F.2d 705, 710 (5th Cir. 1979). Finally, the Transeastern Lenders failed, on appeal, to show that the exclusion of the evidence was anything but harmless. See Fed. R. Evid. 103(a); Fed. R. Civ. P. 61 (incorporated by Fed. R. Bankr. P. 9005).[26]

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[26] The district court also suggested that the Subsidiaries benefited from the acquisition of Transeastern JV assets (Op. 23-24), but ignored the bankruptcy court's well-grounded finding (which no defendant challenged on appeal) that the Transaction yielded negative value, because the

II. THE BANKRUPTCY COURT PROPERLY AUTHORIZED RECOVERY FROM THE TRANSEASTERN LENDERS AS ENTITIES "FOR WHOSE BENEFIT" THE LIENS WERE TRANSFERRED

A. The Text Of Section 550(a)(1) Is Dispositive

If a transfer is avoided under section 548 (or other provisions of the Bankruptcy Code), section 550(a)(1) authorizes recovery of the property transferred, or its value, from the initial transferee or from an "entity for whose benefit such transfer was made."

The plain language of section 550(a)(1) asks a straightforward question: "For whose benefit" did the Subsidiaries transfer liens to the New Lenders? The answer is equally straightforward. The New Loans were undertaken for the undisputed purpose of paying $421 million to the Transeastern Lenders. The loan agreements expressly *required* the loan proceeds "to be used in satisfying the Transeastern Settlement" (see, *e.g.*, Op. 53; Ex. 360 at 66 ¶ 4.12; Ex. 361 at 65 ¶ 4.12), and they were (Op. 30).

The district court never addressed the plain meaning of section 550(a)(1). It concluded that the text was too ambiguous to admit of a straightforward interpretation, and it therefore embarked on a detour through unilluminating snippets of legislative history. But this Court has declared

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acquisition of Transeastern assets worth $28 million was accompanied by the assumption of $32 million in Transeastern liabilities. Bankr.Op. 106.

that "the statutory language is *not* ambiguous." *Grissom v. Johnson (In re Grissom)*, 955 F.2d 1440, 1449 n.8 (11th Cir. 1992) (emphasis added), *abrogated on other grounds*, *BFP v. Resolution Trust Corp*., 511 U.S. 531, 114 S.Ct. 1757 (1994). In light of the plain meaning of the statute, this Court need go no further to hold that section 550(a)(1) authorizes recovery from the Transeastern Lenders. See, *e.g*., *United States v. Mount Sinai Med. Ctr. of Fla., Inc*., 486 F.3d 1248, 1251-52 (11th Cir. 2007).

B. *Air Conditioning* and *Grissom* Control

The case law confirms the plain meaning of the text. In *American Bank of Martin County v. Leasing Service Corp. (In re Air Conditioning, Inc. of Stuart)*, 845 F.2d 293 (11th Cir. 1988), the debtor owed money to a creditor, LSC. The debtor executed a promissory note to its bank, backed by a security interest in a $20,000 certificate of deposit. The bank, in turn, issued a letter of credit to LSC. This Court held that the debtor's transfer of the security interest to the bank was a preferential transfer, avoidable under section 547. It then held that, under section 550(a)(1), this preferential transfer was "'for the benefit' of LSC" because LSC "induced [the bank] to issue the letter of credit." 845 F.2d at 296. Accordingly, this Court held, the value of the security interest could be recovered from the beneficiary, LSC.

In this case, as in *Air Conditioning*, the debtors (the Subsidiaries) transferred a security interest (the liens) to banks (the New Lenders), to induce the banks to provide funds to the entities for whose benefit the security interest was transferred (the Transeastern Lenders). Just as in *Air Conditioning*, the transfer of the security interest to the banks was an avoidable transfer, and the recipients of funds from the banks were entities "for whose benefit" the security interest was transferred. And, as in *Air Conditioning*, the bankruptcy court ruled that the value of the unlawfully transferred property could be recovered from the beneficiaries.

Grissom makes the same point. There, the debtor's home was sold in foreclosure for a price equal to the unpaid mortgage balance but allegedly less than fair market value. The debtor alleged that the sale was a fraudulent transfer and invoked section 550(a)(1) to recover from the foreclosing bank the difference between the sale price and the fair market value. This Court held that recovery was permissible because the bank "clearly benefitted by satisfying the note for which the Grissoms would otherwise have been liable." 955 F.2d at 1449 n.8.

The district court's reasoning cannot be squared with *Air Conditioning* or *Grissom*. The district court asserted that *Air Conditioning* involved a preferential transfer challenged under section 547, not a fraudulent transfer challenged under section 548. But *Grissom* involved a challenge to a fraudulent transfer under section 548. In any event, section 550(a)(1) authorizes recovery from beneficiaries of transfers that are avoided under any of seven different provisions of the Code, including *both* section 547 and section 548. Nothing in the statutory language suggests that recovery is authorized from the beneficiary of a preferential transfer, but not from the beneficiary of a fraudulent transfer. And the district court's suggestion that the "focus" in *Air Conditioning* "was on Section 547 – not Section 550" (Op. 109) is simply wrong. *Air Conditioning* was clear: "We therefore affirm the district court's ruling that the trustee can recover the transfer under section 550(a)." 845 F.2d at 299.

The district court also suggested that section 550(a)(1) did not apply because the Transeastern Lenders received their benefit through a transfer (of loan proceeds, by the New Lenders) *other* than the transfer that was avoided (of liens, by the Subsidiaries). Op. 99. But the beneficiaries in *Air Conditioning* and *Grissom* – just like the Transeastern Lenders – received their benefits via a transfer *from* the initial transferee, not from the transfer *to* the initial transferee. The plain language of the statute also refutes the district court's reasoning; the text makes clear that an entity for whose benefit a transfer is made, by definition, is someone *other than* the transferee of an avoidable transfer. See *Bonded Financial Services, Inc. v. European American Bank*, 838 F.2d 890, 896 (7th Cir. 1988) ("§ 550 distinguishes transferees . . . from entities that get a benefit").

The district court's gloss on the statute – that the benefit must be "the immediate and necessary consequence of the initial transfer" (Op. 100) – is both unnecessary and irrelevant. For one thing, the text needs no such gloss. For another, the benefit in this case *was* "immediate and necessary." The Transaction documents leave no doubt that *immediate* payment to the Transeastern Lenders was *required* – that was the *purpose* of the Transaction. The benefit here was at least as "immediate and necessary" as the benefit in *Air Conditioning* and *Grissom*, and far *more* "immediate and necessary" than the benefit (lucrative employment by the transferee) in *In re B.S. Livingston & Co.*, 186 B.R. 841 (D.N.J. 1995), which this Court has described as "direct, ascertainable and quantifiable" and therefore within the reach of section 550(a)(1). *Reily v. Kapila (In re Int'l Management Assoc.)*, 399 F.3d 1288, 1293 (11th Cir. 2005).[27]

[27] The district court also observed that this case differs from the "paradigm case" of a guarantor that benefits from the payment of a debt it has guaranteed. Op. 94. But the beneficiaries in *Air Conditioning* and *Grissom* were not guarantors. The insight afforded by the paradigm of a guarantor, this Court has explained, is that section 550(a)(1) encompasses entities that receive a "quantifiable benefit or one bearing the necessary

C. There Is No "Good Faith" Exception To Section 550(a)(1), And In Any Event The Transeastern Lenders Did Not Prove Good Faith

The district court also held that the bankruptcy court erred by failing to credit the Transeastern Lenders' "good faith" defense under section 550(b). Op. 101-08. That conclusion is flawed at every turn.

First and foremost, there simply is no "good faith" defense to recovery from initial transferees or beneficiaries under section 550(a)(1). The good-faith defense provided in section 550(b)(1), by its express terms, prevents only "recover[y] under section (a)(2) of this section," and subsection (a)(2) addresses only recovery from *subsequent* transferees, *i.e.*, "any immediate or mediate transferee." 11 U.S.C. § 550(a)(2). Indeed, the Transeastern Lenders *conceded* that "entities encompassed within Section 550(a)(1) [*i.e.*, initial transferees and entities for whose benefit a transfer was made] cannot use the value-and-good-faith defense made available in Section 550(b)(1) to subsequent transferees." Bankr.E.C.F. 713-3 at 10.

The district court hypothesized, however, that perhaps the Transeastern Lenders *were* subsequent transferees and, as such, might be

correspondence to the value of the property transferred or received." *In re Int'l Management Assoc.*, 399 F.3d at 1293 (internal quotation marks omitted). So here.

entitled to a good-faith defense. Op. 101. This holding is simply inexplicable, and for multiple reasons.

First, the Transeastern Lenders vigorously argued to the bankruptcy court that they were *not* subsequent transferees, and the Committee did not dispute that assertion. Bankr.E.C.F. 584 at 18-19; Op. 97 n.58. On appeal, the Transeastern Lenders reiterated that position. D.C.E.C.F. 75 at 27. In the face of those assertions, it is passing strange that the district court surmised otherwise.

It gets stranger still. The district court *itself* had rejected the notion that the Transeastern Lenders were subsequent transferees. The district court explained that it was "undisputed that the liens remained at all times with the New Lenders and were never transferred to the Transeastern Lenders. *Therefore, the Transeastern Lenders could not qualify as 'subsequent transferees.'*" Op. 97 (emphasis added). That conclusion is manifestly correct, but the district court forgot the point only four pages later.

Even that is not the end of the district court's confusion. If the Transeastern Lenders were somehow subsequent transferees, the district court misapprehended how a good-faith defense is established. It asserted that "the Committee offered no evidence that sufficiently established that the

Transeastern Lenders acted in bad faith." Op. 102. But that inverts the burden of proof. Section 550(b) provides an affirmative defense (see *IBT Int'l, Inc. v. Northern (In re Int'l Admin. Servs., Inc.)*, 408 F.3d 689, 703 (11th Cir. 2005)), and the *defendant* must prove that it acted in *good faith*. *Hayes v. Palm Seedlings Partners-A (In re Agric. Research & Tech. Grp., Inc.)*, 916 F.2d 528, 535 (9th Cir. 1990); *Redwood Raevine Corp. v. Hayes (In re Hannover Corp.)*, 310 F.3d 796, 799 (5th Cir. 2002). The district court then ignored the bankruptcy court's findings (Bankr.Op. 116-24), well rooted in the record, that the Transeastern Lenders had not established their good faith.

In the *coup de grâce*, the district court harshly criticized the bankruptcy court's conclusion that the good-faith defense required the Transeastern Lenders to establish that they had performed due diligence regarding the July 31 Transaction (Op. 103-04). Yet the Transeastern Lenders themselves had told the bankruptcy court that the good faith defense *does* require diligent inquiry if a transferee has inquiry notice of insolvency. Bankr.E.C.F. 713-3 at 12; Bankr.E.C.F. 584 at 19.

III. THE TRANSEASTERN LENDERS' APPEALS SHOULD BE REMANDED TO JUDGE JORDAN AND CONSOLIDATED WITH THE NEW LENDERS' APPEALS BEFORE HIM

Because Judge Gold reversed on liability grounds, he did not reach any aspect of the bankruptcy court's remedial order. Those issues must therefore be resolved on remand. But by whom? Because the appeals from the bankruptcy court were artificially divided between two district judges, the New Lenders' challenges to the remedy are already pending before Judge Jordan. The remaining remedial issues in the Transeastern Lenders' appeals are inextricably intertwined with the remedial issues before Judge Jordan. And Judge Jordan must decide other issues in the New Lenders' appeals that are not involved in Judge Gold's cases. Those issues include the New Lenders' liability on the Committee's preferential transfer claim, and a variety of issues concerning the New Lenders' disgorgement obligations.

In light of the large overlap between the New Lender and Transeastern Lender appeals, this Court, pursuant to its remand authority under 28 U.S.C. § 2106, should instruct Judge Gold to transfer the Transeastern Lenders' appeals to Judge Jordan, so that they can be consolidated with the New Lenders' appeals. The remedial issues pending before Judge Jordan cannot sensibly be resolved in isolation from the remedial issues that Judge Gold left open, and Judge Jordan must also decide other liability issues. Judicial efficiency counsels a transfer to Judge Jordan.

Fundamental fairness counsels the same directive. Throughout his opinion, Judge Gold makes clear that he has prejudged matters that he claims not to have actually decided. Time after time, he catalogs the defendants' complaints about the bankruptcy court proceedings (but never the Committee's responses), even as to issues he did not address on the merits.[28] Time after time, he harshly criticizes the bankruptcy court for rulings that the defendants supported in the bankruptcy court proceedings.[29] More disturbingly, at the conclusion of his opinion, Judge Gold saw fit to catalog the Transeastern Lenders' laundry list of complaints about the bankruptcy judge's supposed bias and, while stating "I must not address these issues," proceeded nonetheless to find their complaints "persuasive." Op. 111 n.65. In these unique circumstances – where two district judges have the same or inextricably related legal issues before them, but one of

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[28] See, *e.g.*, Op. 36 n.37, 63 n.43.

[29] See, *e.g.*, Op. 34 n.34 (criticizing summary judgment dismissing affirmative defenses after defendants disavowed any reliance on those defenses, Bankr.E.C.F. 513 at 4-6); Op. 101 (criticizing failure to consider Transeastern Lenders' putative status as subsequent transferees after Transeastern Lenders asserted they were *not* subsequent transferees, Bankr.E.C.F. 584 at 18-19); Op. 103 (criticizing bankruptcy court's adoption of good-faith standard urged by Transeastern Lenders, Bankr.E.C.F. 713-3 at 12).

them (Judge Jordan) has extra issues that the other does not, and the other judge has shown signs of inappropriate prejudgment – remand and consolidation before Judge Jordan is the appropriate directive.

CONCLUSION

This Court should reverse the district court and affirm the bankruptcy court's determinations that the Subsidiaries did not receive reasonably equivalent value in exchange for transferring property to the New Lenders, and that the Transeastern Lenders are entities for whose benefit the transfers were made. The case should be remanded to the district court, and consolidated with the appeals of the New Lenders that are pending before Judge Jordan. At a minimum, if this Court concludes that there remain material findings of fact still unresolved, it should direct the district court to remand to Judge Olson, rather than finding those facts as an appellate court.

Dated: May 6, 2011

Respectfully submitted,

By: ______________________

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitations set forth in Fed. R. App. P. 32(a)(7)(B). This brief contains 13,988 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated: May 6, 2011

ADDENDUM

RELEVANT STATUTORY PROVISIONS

11 U.S.C. § 548. Fraudulent transfers and obligations.

(a) (1) The trustee may avoid any transfer (including any transfer to or for the benefit of an insider under an employment contract) of an interest of the debtor in property, or any obligation (including any obligation to or for the benefit of an insider under an employment contract) incurred by the debtor, that was made or incurred on or within 2 years before the date of the filing of the petition, if the debtor voluntarily or involuntarily--

(A) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or

(B) (i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

(ii) (I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

(II) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital;

(III) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured; or

(IV) made such transfer to or for the benefit of an insider, or incurred such obligation to or for the benefit of an insider, under an employment contract and not in the ordinary course of business.

(2) A transfer of a charitable contribution to a qualified religious or charitable entity or organization shall not be considered to be a transfer covered under paragraph (1)(B) in any case in which--

(A) the amount of that contribution does not exceed 15 percent of the gross annual income of the debtor for the year in which the transfer of the contribution is made; or

(B) the contribution made by a debtor exceeded the percentage amount of gross annual income specified in subparagraph (A), if the transfer was consistent with the practices of the debtor in making charitable contributions.

(b) The trustee of a partnership debtor may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within 2 years before the date of the filing of the petition, to a general partner in the debtor, if the debtor was insolvent on the date such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation.

(c) Except to the extent that a transfer or obligation voidable under this section is voidable under section 544, 545, or 547 of this title, a transferee or obligee of such a transfer or obligation that takes for value and in good faith has a lien on or may retain any interest transferred or may enforce any obligation incurred, as the case may be, to the extent that such transferee or obligee gave value to the debtor in exchange for such transfer or obligation.

(d) (1) For the purposes of this section, a transfer is made when such transfer is so perfected that a bona fide purchaser from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest in the property transferred that is superior to the interest in such property of the transferee, but if such transfer is not so perfected before the commencement of the case, such transfer is made immediately before the date of the filing of the petition.

(2) In this section—

(A) “value” means property, or satisfaction or securing of a present or antecedent debt of the debtor, but does not include an unperformed promise to furnish support to the debtor or to a relative of the debtor;

(B) a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency that receives a margin payment, as defined in section 101, 741, or 761 of this title, or settlement payment, as defined in section 101 or

741 of this title, takes for value to the extent of such payment;

(C) a repo participant or financial participant that receives a margin payment, as defined in section 741 or 761 of this title, or settlement payment, as defined in section 741 of this title, in connection with a repurchase agreement, takes for value to the extent of such payment;

(D) a swap participant or financial participant that receives a transfer in connection with a swap agreement takes for value to the extent of such transfer; and

(E) a master netting agreement participant that receives a transfer in connection with a master netting agreement or any individual contract covered thereby takes for value to the extent of such transfer, except that, with respect to a transfer under any individual contract covered thereby, to the extent that such master netting agreement participant otherwise did not take (or is otherwise not deemed to have taken) such transfer for value.

(3) In this section, the term “charitable contribution” means a charitable contribution, as that term is defined in section 170(c) of the Internal Revenue Code of 1986, if that contribution—

(A) is made by a natural person; and

(B) consists of—

(i) a financial instrument (as that term is defined in section 731(c)(2)(C) of the Internal Revenue Code of 1986); or

(ii) cash.

(4) In this section, the term “qualified religious or charitable entity or organization” means—

(A) an entity described in section 170(c)(1) of the Internal Revenue Code of 1986; or

(B) an entity or organization described in section 170(c)(2) of the Internal Revenue Code of 1986.

(e) (1) In addition to any transfer that the trustee may otherwise avoid, the trustee may avoid any transfer of an interest of the debtor in property that was made on or within 10 years before the date of the filing of the petition, if—

(A) such transfer was made to a self-settled trust or similar device;

(B) such transfer was by the debtor;

(C) the debtor is a beneficiary of such trust or similar device; and

(D) the debtor made such transfer with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made, indebted.

(2) For the purposes of this subsection, a transfer includes a transfer made in anticipation of any money judgment, settlement, civil penalty, equitable order, or criminal fine incurred by, or which the debtor believed would be incurred by—

(A) any violation of the securities laws (as defined in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47))), any State securities laws, or any regulation or order issued under Federal securities laws or State securities laws; or

(B) fraud, deceit, or manipulation in a fiduciary capacity or in connection with the purchase or sale of any security registered under section 12 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78l and 78o(d)) or under section 6 of the Securities Act of 1933 (15 U.S.C. 77f).

11 U.S.C. § 550. Liability of transferee of avoided transfer.

(a) Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b), or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from—

(1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or

(2) any immediate or mediate transferee of such initial transferee.

(b) The trustee may not recover under section (a)(2) of this section from—

(1) a transferee that takes for value, including satisfaction or securing of a present or antecedent debt, in good faith, and without knowledge of the voidability of the transfer avoided; or

(2) any immediate or mediate good faith transferee of such transferee.

(c) If a transfer made between 90 days and one year before the filing of the petition—

(1) is avoided under section 547(b) of this title; and

(2) was made for the benefit of a creditor that at the time of such transfer was an insider; the trustee may not recover under subsection (a) from a transferee that is not an insider.

(d) The trustee is entitled to only a single satisfaction under subsection (a) of this section.

(e) (1) A good faith transferee from whom the trustee may recover under subsection (a) of this section has a lien on the property recovered to secure the lesser of—

(A) the cost, to such transferee, of any improvement made after the transfer, less the amount of any profit realized by or accruing to such transferee from such property; and

(B) any increase in the value of such property as a result of such improvement, of the property transferred.

(2) In this subsection, “improvement” includes—

(A) physical additions or changes to the property transferred;

(B) repairs to such property;

(C) payment of any tax on such property;

(D) payment of any debt secured by a lien on such property that is superior or equal to the rights of the trustee; and

(E) preservation of such property.

(f) An action or proceeding under this section may not be commenced after the earlier of—

(1) one year after the avoidance of the transfer on account of which recovery under this section is sought; or

(2) the time the case is closed or dismissed.

CERTIFICATE OF SERVICE

I hereby certify that on May 6, 2011, I caused the original and six copies of the Brief For Plaintiff-Appellant Official Committee Of Unsecured Creditors of TOUSA, Inc., *et al.* ("Appellant's Brief") to be filed by dispatching to the clerk of the court by commercial carrier for overnight delivery. In addition, I hereby certify that on May 6, 2011, I caused a true and correct copy of Appellant's Brief to be served via personal service on each party, through hand delivery to the individuals listed on the attached Service List whose names are marked by asterisk. In addition, I caused copies to be sent via first class mail to all other individuals listed on the attached Service List.

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