21-487-cv

IN THE
United States Court of Appeals
for the Second Circuit

CITIBANK, N.A.,

Plaintiff-Appellant,

v.

BRIGADE CAPITAL MANAGEMENT, LP, HPS INVESTMENT PARTNERS, LLC, SYMPHONY ASSET MANAGEMENT LLC, BARDIN HILL LOAN MANAGEMENT LLC, GREYWOLF LOAN MANAGEMENT LP, ZAIS GROUP LLC, ALLSTATE INVESTMENT MANAGEMENT COMPANY, MEDALIST PARTNERS CORPORATE FINANCE LLC, TALL TREE INVESTMENT MANAGEMENT LLC, NEW GENERATION ADVISORS LLC,

Defendants-Appellees,

INVESTCORP CREDIT MANAGEMENT US LLC, HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS LP,

Defendants.

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

FINAL BRIEF FOR PLAINTIFF-APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Plaintiff Citibank, N.A. is a wholly owned subsidiary of Citicorp LLC. Citicorp LLC is a wholly owned subsidiary of Citigroup, Inc. Citibank is not aware of any publicly held corporation that holds 10% or more of the stock of Citigroup, Inc.

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IN THE

United States Court of Appeals for the Second Circuit

No. 21-487-cv

FINAL BRIEF FOR PLAINTIFF-APPELLANT

JURISDICTIONAL STATEMENT

Plaintiff-Appellant Citibank, N.A. filed this suit to recover money mistakenly paid to funds managed by Defendants. The District Court had diversity jurisdiction under 28 U.S.C. § 1332(a) and federal-question jurisdiction under 28 U.S.C. § 1331 and the Edge Act, 12 U.S.C. § 632. *See* SPA28-34 [Op. 28-34].

The District Court entered judgment for Defendants on all claims on February 16, 2021. JA106-108 [Judgment]. Citibank timely appealed on February 26, 2021. JA1361 [Notice of Appeal]. This Court has jurisdiction under 28 U.S.C. § 1291.

INTRODUCTION

Last August, Citibank wired over $500 million of its own money by mistake. Ordinarily, the recipient of such a mistaken transfer must return the money. Yet the District Court held that, in this case, Citibank is not entitled to restitution because another entity—Revlon Consumer Products Corporation—was supposed

to pay the recipients the same sum of money three years later—in 2023. That extraordinary result is as wrong as it sounds.

Citibank is the administrative agent on a loan that Revlon secured in 2016. Citibank's role as administrative agent is, among other things, to distribute periodic interest payments from Revlon to the lenders in exchange for a small fee. On August 11, 2020, Citibank intended to send an interest payment to the lenders. No principal was due that day, and Revlon had not authorized any to be paid. But Citibank by accident sent an amount equal to the entire outstanding principal on the loan: nearly one *billion* dollars. That amount was not due until 2023, and Citibank paid with its own funds, rather than Revlon's. Within a day, Citibank discovered the error and told the lenders about it.

The industry expectation—long reflected in New York's law of restitution—is that the recipient of mistaken transfers should pay back the money. And, indeed, most of Revlon's lenders did—about half of the principal was returned.

Defendants, who managed some lenders' investments in the Revlon loans, did not. They kept the money and claimed the windfall for their clients. Most of the Defendants had no idea that the payments had even occurred until they received Citibank's recall notice. The few that noticed realized something strange had happened. After all, they thought Revlon was on the cusp of insolvency, and

neither Revlon nor Citibank had given any indication that a principal payment was on its way. Yet Defendants directed their clients not to return the funds.

So Citibank sought restitution, and Defendants invoked the "discharge for value" affirmative defense. Discharge for value is a narrow exception to the restitution requirement for a creditor who "is entitled" to the funds at the time of the mistaken transfer and accepts them, in good faith and without notice of the error, for the "valuable consideration" of surrendering an existing debt. *Banque Worms v. BankAmerica Int'l*, 570 N.E.2d 189, 195-196 (N.Y. 1991).

The decision below applied the discharge-for-value defense here, expanding it far beyond its historical bounds. The District Court held that the defense applies regardless of whether a creditor is entitled to the funds when they arrive. The District Court held that a creditor may invoke the defense regardless of whether it has given valuable consideration by crediting the debtor's account. And—even though Defendants had every reason to suspect a mistake had occurred—the District Court held that a reasonably prudent inquiry would not have led Defendants to discover that Citibank's payment was a mistake.

These errors led the District Court to the inequitable result below: Defendants' clients received over $500 million three years ahead of schedule from Citibank, which owed no money to any of the lenders on Revlon's loan. The District Court's decision has sent shockwaves through the markets and generated

outcry across the financial industry. It has no grounding in precedent or equity. This Court should reverse.

ISSUES PRESENTED

1. Whether the District Court erred in concluding that a lender can retain a mistaken wire transfer as payment for a third party's debt when the debt is not due at the time of the transfer.

2. Whether the District Court erred in concluding that a lender can retain a mistaken wire transfer as payment for a third-party's debt when the lender has not given value for the payment.

3. Whether the District Court erred in concluding that a reasonably prudent person's duty to inquire about an unexpected and unexplained payment could be satisfied by hypothesizing why the funds might have been sent.

STATEMENT OF THE CASE

A. Revlon Issues The Syndicated Term Loan In 2016.

In 2016, Revlon purchased Elizabeth Arden, Inc., a consumer cosmetics brand. *See* JA1112 [DX 1034 at 2]. To finance the purchase, Revlon borrowed $1.8 billion through a syndicated loan backed in part by Revlon's intellectual property, known as the "2016 Term Loan." *See id.*

In a syndicated loan, multiple lenders lend a borrower funds under the terms of the same credit agreement. In exchange for a small annual fee, an

administrative agent—in this case, Citibank—sends payments from the borrower to the lenders and manages administrative aspects of the loan. *See* JA1258 [PX 485 at 2]. Revlon borrowed money from many private investors. Though the lenders employ different corporate forms, each shares a key attribute: It contracts with a portfolio manager that makes investment decisions for the lender. *See, e.g.*, JA281, 327 [Beals Dep. 31:5-32:5; Greene Dep. 35:6-9, 14-20]. The Defendants here manage over 100 of Revlon's lenders.

Under the credit agreement, Revlon would pay the lenders periodic interest payments and pay almost all of the principal in 2023, when the loan's "term" was up. *See* JA1267 (§ 2.15(a)); JA1260 (§ 1.1 – "Term Maturity Date"); JA1261-1262 (§ 2.3) [PX 485 at 76, 58, 65-66]. But the agreement also contains an "accelerated maturity." If another of Revlon's debts—known as the "2021 Notes"—remained outstanding on November 16, 2020, the maturity on the 2016 Term Loan and another outstanding Revlon loan would "accelerate" and the principal would be due on November 16, 2020, three years early. *See* JA1258 (§ 1.1) [PX 485 at 2 – "Accelerated Maturity Date"].

The credit agreement also permits Revlon to prepay the loan's principal—but only if Revlon gives notice to Citibank three business days in advance. *See* JA1263 (§ 2.11(a)) [PX 485 at 72]. Citibank, in turn, must "promptly" notify the lenders of Revlon's decision to prepay. *Id.* Except in limited circumstances not

relevant here, the agreement also requires Revlon to treat the lenders equally: Any voluntary principal prepayments have to be made on a pro-rata basis to all lenders. *See* JA1264 (§ 2.11(c)) [*Id*. at 73]. And the credit agreement permits Revlon and the lenders to amend most parts of the agreement with a simple majority of the lenders' consent. *See* JA1259 (§ 1.1 – "Required Lenders"); JA1278 (§ 10.1(a)) [*Id*. at 52, 157].

B. Revlon And Its Lenders Amend The 2016 Term Loan In May 2020.

In early 2020, Revlon experienced a severe liquidity crisis. In the first quarter, the company suffered over $200 million in losses and saw an 18.1% annualized drop in sales. *See* JA174 [Compl. ¶ 167, *UMB Bank, N.A. v. Revlon, Inc.*, No. 1:20-cv-06352 (S.D.N.Y. Aug. 12, 2020) ("UMB Compl.")]. Revlon decided it again needed to raise capital by borrowing money secured by its intellectual property. To do so, Revlon needed approval from the existing 2016 lenders, who had already loaned money secured by some of the same assets.

Revlon proposed amending the 2016 Term Loan's credit agreement so that any 2016 lender who participated in Revlon's 2020 refinancing would be entitled to "roll-up rights" on their 2016 Term Loan. SPA8 [Op. 8]. These rights allowed lenders to exchange their position in the 2016 Term Loan for a different position in the new 2020 loan, "rolling up" their portion of the old 2016 Term Loan into the newer one. *Id.*

A roll-up was cash-neutral for Revlon. JA869 [Tr. 922]. To effectuate the roll-up, the amended agreement allowed Revlon to synthetically "prepay" the loans held by the rolling-up lender. *See* JA1124 (§ 2.3(a)) [DX 1044 at 75]; JA869 [Tr. 922]. The rolling-up lender loaned Revlon an identical amount of repaid funds under the terms of the new 2020 loan, plus the additional funds the lender was contributing to Revlon's refinancing. But when a lender rolled-up its 2016 Term Loan, Revlon paid the lender the periodic interest that had accrued to date. SPA8 [Op. 8].

Defendants all unsuccessfully opposed amending the credit agreement. After the amendment, Defendants began planning a lawsuit against Revlon, Citibank, and others that would allege that Revlon had improperly manipulated the vote and was chronically insolvent. *See* JA167-168, 174-178 [UMB Compl. ¶¶ 10-11, 166-174].

C. Citibank Mistakenly Pays—With Its Own Money—An Amount Equal To The Outstanding Principal On The 2016 Term Loan.

On August 11, 2020, five lenders decided to roll-up $35 million of the 2016 Term Loan into the new one. *See* JA869 [Tr. 922]. As part of that transaction, Revlon was to pay the rolling-up lenders accrued periodic interest. But Citibank's

software made it difficult for Citibank to pay only five lenders. So Revlon agreed to send *all* necessary lenders accrued interest. *See* JA863 [Tr. 897-898].[1]

Late afternoon on August 11, an analyst at Citibank's subcontractor Wipro prepped Revlon's wire transfer in "Flexcube," Citibank's loan-processing payment software. *See* JA427-428 (¶¶ 7, 11) [ECF 198 at 2, 3]. Executing a roll-up transaction in Flexcube was complicated: Citibank had to fictitiously "pay off" the original Revlon loan and create new versions of the loans in Flexcube accounting for the changes. *See* JA405 (¶ 22) [ECF 196 at 7]. To prevent actual principal payments from going to the lenders, the Wipro analyst was supposed to have Flexcube set the principal to an internal "wash account" that is not a real bank account and "does not contain any funds." *See* JA405 (¶ 23) [*Id*. at 7]. This required inputting certain information in three boxes in Flexcube: one labeled "Principal," and two others labeled "Fund" and "Front." *See* JA428-429 (¶ 12) [ECF 198 at 3-4].

On August 11, the Wipro analyst incorrectly input information into only the "Principal" box. *See* JA429 (¶ 12) [*Id*. at 4]. Two others reviewed the transaction, but neither spotted the error. *See* JA430 (¶ 14) [*Id*. at 5]; JA420-421 (¶ 17) [ECF

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[1] Technically, the lenders who received payments on August 11 do not represent all lenders under the 2016 credit agreement—only those who are in the "tranche" maturing in September 2023. *See* SPA8-9 [Op. 8-9]. In practice, this tranche constituted the "vast majority of the 2016 term loan." JA861 [Tr. 888].

197 at 4-5]; JA409 (¶ 32) [ECF 196 at 11]. As a result, Citibank sent Revlon's lenders an amount equal to principal on the 2016 Term Loan out of Citibank's own money.

Before wiring the funds, Citibank sent each lender a calculation statement showing the amount of interim interest it would receive. The statement informed the lender of the amount that would be paid based on the appropriate interest rate and the outstanding principal. *See, e.g.*, JA1163-1165 [PX 123 at 5-7]. The statement did not show any principal being paid, and Citibank did not notify the lenders that Revlon was prepaying the loan because Revlon was not.

The wire transfers occurred at the close of business on August 11. The next morning, Wipro personnel quickly realized that the Revlon loan's principal had been mistakenly wired to the lenders. *See* JA423 (¶ 25) [ECF 197 at 7]. At 2:25 p.m. on August 12, Citibank sent recall notices informing the fund managers and the over 300 lenders of the error. *See* JA395 (¶ 39) [ECF 195 at 9]. Additional notices followed. *See* JA395-396 (¶¶ 40-42) [*Id.* at 9-10]. Citibank also called Defendants to notify them of its mistake. *See* JA396-397 (¶ 45) [*Id.* at 10-11].

D. All Managers Learn About The Mistake, But Only Defendants Refuse To Return Citibank's Funds.

Managers representing approximately 200 lenders honored Citibank's recall notices and returned about $385 million to Citibank. JA1208-1251 [PX 346A]. The ten Defendants in this case—representing over 100 lenders—did not. Instead,

Defendants withheld over $500 million of Citibank's money, sometimes reversing initial instructions to return Citibank's funds.

Employees for six Defendants testified that no one at their companies even knew about Citibank's transfer until after Citibank's first recall notices on August 12. *See* JA836, 841, 848, 855, 875, 923 [Tr. 788, 811, 838, 865, 867, 947, 1138]. After receiving Citibank's first recall notice, three of those six began to return the mistakenly transferred funds. *See* JA849, 856, 876 [Tr. 841, 868, 950]. As the CEO of one Defendant admitted in an internal email, the employee who had directed the return of Citibank's money "was just trying to do the right thing." JA1302 [PX 1251 at 1]. But these Defendants participated in a call with other managers and outside counsel on August 13. Afterward, the Defendants reversed course and kept Citibank's money. *See* JA850, 856, 876 [Tr. 845, 871, 951].

The other four Defendants noticed the unexpected principal payments just before Citibank informed them of the error on August 12. The discovery led to a flurry of internal correspondence. At one, an employee emailed another "[s]o strange—could this be a mistake?" and another employee observed that Citibank's calculation statement referenced an interim interest payment but not a principal payment. JA1151-1152 [PX 13 at 1-2]. Defendants consulted in-house counsel, *see, e.g.*, JA724, 909 [Tr. 347, 1081], and searched for a principal-prepayment statement that did not exist, *see, e.g.*, JA1151 [PX 13 at 1]. In one case, a manager

purchased an additional portion of the Revlon 2016 Term Loan. JA913 [Tr. 1098]. In two cases, third-party firms who work with Defendants contacted Citibank to inquire about the calculation statements. *See* JA974, 983 [DX 483 at 1; DX 489 at 5]. But beyond that—and beyond discussing the matter internally—none of the Defendants asked Citibank or Revlon about the unexpected money.

Each of the Defendants directed that the funds not be returned to Citibank. SPA21-26 [Op. 21-26]. Contemporaneous communications chronicled that process. For instance, an employee of one Defendant emailed another on August 14: "take the money and run." JA1295 [PX 1188 at 1]. The response: "We have not paid the money back :)." *Id.* An employee for another Defendant praised himself for reversing the return of Citibank's money, saying he "thankfully" was able stop a colleague who "was about to return it." JA1311 [PX 1311 at 2]. Yet another—immediately after meeting with outside counsel on August 13—emailed "WE DON'T WANT THIS PAID BACK YET." JA1319 [PX 1541 at 2].

Three of the four Defendants who learned of the transfer before the error notice did not credit Revlon's accounts to show that Revlon had paid off the loan, *see* SPA20-23 [Op. 20-23], and the one firm whose lenders had given credit ordered the credit reversed, *see* SPA24-25 [*Id.* at 24-25]. At the time of trial, none of Defendants had applied the funds to Revlon's balance. *See* JA290, 328-329, 324, 319, 315, 285, 283, 294, 288, 296 [McCoy Dep. 73 (Allstate); Greene Dep.

129-130 (Bardin Hill); Frusciante Dep. 219-220 (Brigade); Josephson Dep. 158-159 (Greywolf); Xanthakys Dep. 183-185 (HPS); Phipps Dep. 191 (Medalist); Beals Dep. 78 (New Generation); Vaughan Dep. 154 (Symphony); Lenga Dep. 158 (Tall Tree); Meneses Dep. 23 (ZAIS)].

The day after Citibank's mistaken payment, Defendants' lawsuit was filed against Revlon, Citibank, and others. The 117-page complaint presumed that the principal on Revlon's loan remained outstanding and alleged Revlon was "insolvent," in a "weak financial position," and "struggling from its inability to compete with more modern brands and marketing techniques." JA166-167, 170 [UMB Compl. ¶¶ 8, 17-18]. Defendants estimated that Revlon was insolvent by $1.71 billion. *See* JA175 [*Id.* ¶ 170].

E. Citibank Seeks Return Of The Mistakenly Transferred Funds.

When it became apparent that Defendants would not return Citibank's money, Citibank sued. The District Court froze Citibank's funds and entered an expedited discovery schedule. Following a bench trial, the District Court ruled for Defendants. The court recognized that, were it "writing on a blank slate, it is far from clear that it would" allow the lenders "to keep the money that Citibank indisputably transferred by mistake." SPA99 [Op. 99]. But the court believed it was "bound by the decisions of the New York Court of Appeals and the Second Circuit" to rule for Defendants. *Id.*

The District Court recognized the general rule of return: New York "law generally treats a failure to return money that is wired by mistake as unjust enrichment or conversion and requires that the recipient return such money to its sender." SPA3 [*Id.* at 3]. But in *Banque Worms v. BankAmerica International*, 570 N.E.2d 189 (N.Y. 1991), the New York Court of Appeals recognized discharge for value as an affirmative defense, under which a creditor who receives funds mistakenly "in discharge of the debt or lien, is under no duty to make restitution therefor," "if the transferee made no misrepresentation and did not have notice of the transferor's mistake." *Id.* at 192 (quoting *Restatement (First) of Restitution* § 14(1) (1937) (*First Restatement*)).

Banque Worms came to the New York Court of Appeals on a certified question from this Court. Security Pacific International Bank mistakenly wired funds to Banque Worms, a French bank. *Id.* at 190. Banque Worms was a creditor of one of Security Pacific's clients, Spedley Securities, and had called its existing debt due on the date of payment. *Banque Worms v. Bank Am. Int'l*, 726 F. Supp. 940, 940 (S.D.N.Y. 1989). Spedley initially instructed Security Pacific to pay Banque Worms. 570 N.E. at 190. Shortly thereafter, Spedley directed Security Pacific to send the same sum elsewhere instead. *Id.* But Security Pacific did not follow the second instruction and mistakenly wired the funds to Banque Worms, which claimed it was entitled to keep the funds under the discharge-for-value

defense. *Id.* at 190-191. Security Pacific resisted, claiming the defense should not be applied to electronic-funds transfers. *See id.* at 192-193. This Court certified a question to the New York Court of Appeals, which confirmed that New York recognizes the discharge-for-value defense and held that the defense applies to mistaken wire transfers. *Id.* at 191-198. This Court then determined that, in light of the Court of Appeals' decision, Banque Worms was entitled to keep the funds. *Banque Worms v. BankAmerica Int'l*, 928 F.2d 538, 541 (2d Cir. 1991).

In deciding whether the discharge-for-value defense applied here, the District Court identified three threshold disputed legal issues: (1) whether the discharge-for-value defense "applies only when a debt is actually due; (2) whether the issue of notice is evaluated at the moment the payment is received or when it is formally credited in some way; and (3) whether 'notice' means actual notice or constructive notice." SPA37 [Op. 37].

On the first question, the District Court recognized that the Revlon "loan was not set to mature for another three years." SPA43 [Op. 43]. Thus, if the discharge-for-value defense requires the debt to be due at the time of the transfer, Defendants could not claim discharge for value. *Id.* But the District Court held that a creditor can retain mistakenly transferred funds even if the creditor is not presently entitled to them and will not be for years. SPA46 [*Id*. at 46].

According to the District Court, no present-entitlement requirement appeared in the *First Restatement* or the "leading cases applying the discharge-for-value rule." SPA44 [*Id*. at 44]. The District Court acknowledged that *Banque Worms* had cited an earlier New York case, *Carlisle v. Norris*, 109 N.E. 564, 569 (N.Y. 1915), which stated that transferors cannot recover their money if their creditor "*credited them on an indebtedness due them*." SPA45 [Op. 45] (emphasis added by District Court). But the District Court concluded that *Banque Worms*'s citation was "hardly a wholesale adoption" of *Carlisle*. *Id*. The District Court instead noted that the *First Restatement* and *Banque Worms* do not "focus" on whether the creditor was entitled to the funds at the time of transfer. SPA44 [*Id*. at 44]. From this silence, the court inferred that creditors need not be presently entitled to a debt to claim discharge for value.

On the second question, the District Court concluded that the discharge-for-value defense does not require the creditor to have given value for the payment. SPA46-48 [*Id*. at 46-48]. Instead, so long as the creditor lacked notice of the transferor's mistake at the moment of transfer, the creditor could claim the defense. *Id.* Though the District Court acknowledged that this Court had "not address[ed] the timing question . . . explicitly," it believed based on its reading of the parties' appellate briefing in *Banque Worms* that the Court had reached an implicit ruling that was "binding" "for purposes of this case." SPA48 [*Id*. at 48].

Finally, the District Court held that "the relevant standard is constructive, not actual, notice." SPA58 [*Id*. at 58]. The court explained that "an actual notice standard would, at least in the wire transfer context, effectively render the notice exception to the discharge-for-value defense a dead letter and lead to perverse results" because wire transfers are nearly instantaneous. SPA61 [*Id*. at 61]. "Additionally, applying a subjective, actual knowledge standard would reward wire transfer recipients who stuck their heads in the sand" and refused to investigate suspicious transfers. SPA62 [*Id*. at 62].

The court acknowledged that "a constructive notice standard" could "take different forms." SPA63 [*Id*. at 63]. Constructive notice could require the defendants to know sufficiently suspicious facts that "would make it prudent to conduct further inquiry that would reveal the mistake," known as inquiry notice. *Id*. (internal quotation marks omitted). Or constructive notice could mean that the Defendants "reasonably should have known" the payments were sent by mistake. *Id*. (internal quotation marks omitted). But the court declined to determine which flavor of constructive notice applied here because it found that "Defendants did not have constructive notice of Citibank's mistake under either standard." SPA64 [*Id*. at 64].

The District Court acknowledged that, at the same time Defendants claimed to believe that Revlon made nearly $1 billion in principal payments, they had also

filed a lawsuit alleging that Revlon was insolvent. SPA89-90 [*Id*. at 89-90]. And the District Court acknowledged that because "a debtor's inability to fund a payment that the creditor then receives would undoubtably raise a red flag in most instances," Citibank's argument that Defendants had notice of the mistake—or at least needed to inquire further—"is not without some force." SPA90 [*Id.* at 90].

The District Court also concluded that some of the Defendants' explanations for believing Revlon had paid down the 2016 Term Loan were objectively unreasonable. For instance, "[s]everal" witnesses testified that they believed Revlon paid nearly $1 billion in principal on August 11 to avoid potentially paying the same loan on November 16 under the loan's accelerated-maturity provision. SPA92 [*Id*. at 92 n.41]. The District Court found that this theory was not "rational" because if Revlon had sought "to avoid the [accelerated] maturity," it could have simply paid off the other, linked debts that triggered the maturity—a far smaller amount than the nearly $1 billion in principal outstanding on the 2016 Term Loan. *Id.* Similarly, "[s]everal" witnesses believed that Revlon had selectively paid some "troublemaking" lenders. *Id*. But the District Court found this theory hard to square with the plain language of the credit agreement, which required Revlon to treat all lenders equally. *Id*.

Nevertheless, the District Court concluded it was reasonable to believe that Revlon—a company that Defendants believed to be insolvent—had paid off nearly

$1 billion in outstanding debts based on three points. First, Revlon had been able to pay off some debt as part of its May 2020 refinancing. SPA90 [*Id*. at 90]. Second, Defendants believed that "Revlon was known to have the financial backing" of billionaire Ronald Perelman, who may have "bailed Revlon out." SPA90-91 [*Id*. at 90-91]. And third, Defendants could have reasonably thought that Revlon had paid the lenders in an effort to preempt the nascent lawsuit. SPA91-92 [*Id*. at 91-92].

The District Court entered judgment for Defendants. This appeal followed.[2]

STANDARD OF REVIEW

Following a bench trial, this Court reviews a district court's conclusions of law *de novo* and its findings of fact for clear error. *Mango v. BuzzFeed, Inc.*, 970 F.3d 167, 170 (2d Cir. 2020). "[R]esolutions of mixed questions of fact and law are reviewed *de novo* to the extent that the alleged error is based on the misunderstanding of a legal standard, and for clear error to the extent that the alleged error is based on a factual determination." *Diebold Found., Inc. v. Comm'r*, 736 F.3d 172, 182 (2d Cir. 2013).

[2] Citibank sought an injunction pending appeal to keep its money frozen. That motion remains pending.

SUMMARY OF ARGUMENT

Under New York law, a party who transfers money by mistake is generally entitled to get the money back. *See Ball v. Shepard*, 95 N.E. 719, 721 (N.Y. 1911) (stating the "well[-]recognized principle of law" that a person "is not entitled to retain the money acquired by the mistake of the former"); *Blue Cross of Cent. N.Y., Inc. v. Wheeler*, 461 N.Y.S.2d 624, 626 (App. Div. 1983) ("the principle of unjust enrichment" permits "a person to recover for monies paid by mistake"). This common-sense rule recognizes it is unjust to keep someone else's money. *See Blue Cross*, 461 N.Y.S.2d at 626.

The discharge-for-value defense is a narrow exception to this general rule. It excuses a party from its restitution obligations when it "receives money to which it is entitled," "in the ordinary course of business and for a valuable consideration," and "in good faith." *Banque Worms*, 570 N.E.2d at 195-196.

The decision below dramatically expanded the exception's scope in three ways. *First*, the District Court held that a creditor may rely on the defense even when the creditor is *not* entitled to the funds when it receives them. That expansive application is at odds with how New York courts and others have articulated the exception for over a century and bears no relationship to the rule's purposes.

Second, the District Court held that the discharge-for-value defense applies before a creditor has given value for the payment, including by crediting the debtor's account. That expansion is inconsistent with the rule's equitable origins and places the District Court at odds with every other court to have confronted the issue.

Third, the District Court held that the defense applies in the face of highly suspicious circumstances that would have led a reasonably prudent person to investigate: Revlon—a company Defendants believed was insolvent—supposedly paid nearly $1 billion, three years before the debt was due. Meanwhile, Citibank's calculation statement never mentioned a principal payment, nor did the lenders receive prompt notice of prepayment, as required by the credit agreement. Nevertheless, the District Court held that a reasonable person could hypothesize how Revlon pulled a billion-dollar rabbit out of its hat and why the calculation statements failed to match the sudden payment. But a prudent investigation must be one designed to answer the questions raised, which requires a reasonable person to seek out answers, not speculate.

Banque Worms did not compel any of the District Court's conclusions. The debt in that case was due, the transferor did not ask either the Court of Appeals or this Court to consider what steps a transferee must take to give value before it can claim the defense, and neither the Second Circuit nor the Court of Appeals

addressed what circumstances would put a creditor on notice of a mistake. Each of the District Court's errors thus carried the defense into uncharted waters, and each independently warrants reversal.

ARGUMENT

I. THE DISCHARGE-FOR-VALUE DEFENSE IS INAPPLICABLE BECAUSE DEFENDANTS WERE NOT ENTITLED TO THE FUNDS AT THE TIME OF TRANSFER.

As the District Court recognized, "it is undisputed that the 2016 Term Loan was not 'due' on August 11, 2020" and "was not set to mature for another three years." SPA43 [Op. 43]. That should have been the end of the matter: The discharge-for-value defense is not available to creditors who have only a future entitlement to the funds at issue. That limitation flows from the values underlying the defense: Creditors with no present entitlement lack the finality interest that justifies the defense. And the defense is not necessary to allocate a loss between transferor and creditor because a creditor required to return funds not yet due suffers no loss—it is merely restored to the bargain to which it agreed.

A. The Discharge-For-Value Defense Requires A Present Entitlement.

Courts have long recognized that a creditor's present entitlement to the funds is an element of the discharge-for-value defense. *Banque Worms* itself spoke of the eligible recipient as someone who "*is* entitled" to the "money," not someone who will be entitled to the money only on some future date. 570 N.E.2d at 196

(emphasis added). Pre-*Banque Worms* cases are even clearer. They have repeatedly formulated the rule as applying when the defendant "credited [funds] on an indebtedness *due them*." *Carlisle*, 109 N.E. at 569 (emphasis added); *see also N.Y. Title & Mortg. Co. v. Title Guarantee & Tr. Co.*, 201 N.Y.S. 529, 532 (App. Div. 1923) (quoting *Carlisle*), *aff'd* 143 N.E. 769 (N.Y. 1924) (mem.) (per curiam).

This focus on "an indebtedness *owing*" reflects that money need not be returned if it arrives "in the usual course of business." *Nassau Bank v. Nat'l Bank of Newburgh*, 54 N.E. 66, 67 (N.Y. 1899) (emphasis added). Under those circumstances, the recipient has no reason to question the funds' arrival. *Banque Worms* also recognized this aspect of the defense, describing an eligible payment as one that arrives "in due course of business"—that is, at the expected or normal time. 570 N.E.2d at 196 (quoting *Stephens v. Bd. of Educ. of Brooklyn*, 79 N.Y. 183, 187 (1879)). This common-law doctrine, like others, "reflects the fair conduct and expectations of fair, reasonable persons." *State Tax Comm'n v. Shor*, 371 N.E.2d 523, 528 (N.Y. 1977).

Notably, every decision *Banque Worms* cited that refused restitution on grounds "arguably . . . embrac[ing] the 'discharge for value' rule" or reflecting its principles involved a present entitlement. *Banque Worms*, 570 N.E.2d at 193-196; *see Carlisle*, 109 N.E. at 569 ("no question that [the debtor] owed defendants much

more than the amount of the payment *when the latter was made*" (emphasis added)); *N.Y. Title*, 201 N.Y.S. at 530 (foreclosure judgment that was "then due"); *State Farm Mut. Auto. Ins. Co. v. Stokos*, 317 N.Y.S.2d 706, 707 (Civ. Ct. 1970) (payment for services rendered); *Southwick v. First Nat'l Bank of Memphis*, 84 N.Y. 420, 426 (1881) (negotiable instrument payable on delivery); *Stephens*, 79 N.Y. at 185 (debtor owed money "wrongfully converted" from defendant "and appropriated to [debtor's] own use"). Cases since *Banque Worms* have likewise reflected this understanding. *See, e.g.*, *Credit Lyonnais N.Y. Branch v. Koval*, 745 So. 2d 837, 841 (Miss. 1999) (one "condition[] precedent" for applying discharge for value is that "the beneficiary receiving the funds transfer must be entitled to receive money in payment of a debt"); *A.I. Trade Fin., Inc. v. Petra Bank*, No. 89 CIV. 7987(JFK), 1997 WL 291841, at *4 (S.D.N.Y. June 2, 1997) ("The discharge for value rule contemplates that at the time of the erroneous transfer the transferee/beneficiary have some present entitlement to the funds.").

The present-entitlement requirement derives from the principles underlying the discharge-for-value defense. *Banque Worms* recognized that the defense serves two equitable functions. The first is reinforcing "finality" in commercial transactions. *Banque Worms*, 570 N.E.2d at 195. The second is establishing "rules of convenience for determining which of two innocent persons should bear a loss which must be borne by someone." 3 George E. Palmer, *Law of Restitution*

§§ 16.5(b), 16.6 (3d ed. 2020); *see also Banque Worms*, 570 N.E.2d at 197 (discussing the allocation of "[r]isk of loss").

Banque Worms explained why the discharge-for-value defense furthers these goals in the context of a presently due debt. With respect to finality, the defense recognizes that "[w]hen a beneficiary receives money to which it *is entitled* and has no knowledge that the money was erroneously wired, the beneficiary should not have to wonder whether it may retain the funds." *Banque Worms*, 570 N.E.2d at 196 (emphasis added). This ensures that "business operations" do not face a level "of risk and uncertainty which no enterprise could bear" by subjecting routine, expected transactions to potential recall. *Id.* at 195 (quoting *Hatch v. Fourth Nat'l Bank*, 41 N.E. 403, 404 (N.Y. 1895)).

As for risk allocation, when both the transferor and creditor can claim an immediate right to the funds, there is a loss that must be borne by someone: Either the creditor will lose the use of money he is presently entitled to or the transferor will lose money that is rightly hers. Under those circumstances, it makes more sense to allocate the "loss" to the transferor, who is better positioned to "minimiz[e]" the possibility of error. *Id.* at 197. Or, in situations where neither party could have averted the loss, it may be that "the law can do very little to improve matters" and it is simply "better to leave the loss where it falls." Dan B. Dobbs & Caprice L. Roberts, *Law of Remedies* 472 (3d ed. 2018).

None of this is true when the creditor has no present entitlement to the money. The creditor would have no expectation of receiving the money "in the ordinary course of business." *Banque Worms*, 570 N.E.2d at 195. The transfer therefore does not carry with it the kind of "certainty" that the concern for finality is meant to protect. *Id.* at 195-196. Instead, the creditor would necessarily have to "wonder," at least initially, "whether it may retain the funds." *Id.* at 196.

There is also no need to allocate loss. A creditor with no present entitlement does not "lose" anything when the transfer is reversed. The creditor is merely restored to the expectancy interest he bargained for and enjoyed prior to the erroneous transfer. Indeed, under these circumstances, *denying* restitution actually creates a loss where none would otherwise exist because the transferor must suffer a loss that would otherwise fall on no one. There is no suggestion, in *Banque Worms* or elsewhere, that New York would allow the defense to create inefficiency in this way.

Here, there is no dispute that the Defendants were not entitled to the money on August 11, 2020, SPA43 [Op. 43]: The loans were not due until 2023, and Revlon had not authorized a prepayment. Defendants therefore cannot invoke the discharge-for-value defense.

B. The District Court's Contrary Position Lacks Support.

The District Court accepted Defendants' argument that a creditor whose debt is not yet due may invoke the defense. *See* SPA43-46 [Op. 43-46]. But the court's holding finds no affirmative support in the case law and cannot be reconciled with the discharge-for-value defense's purposes.

The District Court primarily reasoned from silence: Because the *First Restatement* and a number of discharge-for-value cases do not mention the present-entitlement requirement, it must not exist. *See* SPA44 [*Id.* at 44]. Many cases, however, *do* speak in present-entitlement terms. *Supra* pp. 22-23. And all of the District Court's cited authorities are consistent with a present-entitlement requirement. Start with the *First Restatement*. Although it does not expressly address the timing issue, its illustrations all contemplate a transferee with a present entitlement to the funds or are consistent with one. *See First Restatement* § 14 illus. 1-7 (listing sales transactions, tax payments, checks payable immediately, a promise to pay, and chattel and land mortgages).

The same goes for the cases the District Court cited (SPA44 [Op. 44]) as not mentioning the present-entitlement requirement: Each involved a creditor presently entitled to the funds. *See In re Calumet Farm, Inc.*, 398 F.3d 555, 557 (6th Cir. 2005) (principal overdue); *Gen. Elec. Cap. Corp. v. Cent. Bank*, 49 F.3d 280, 281 (7th Cir. 1995) (proceeds from sales of boats due to be paid into account

that "belonged to" creditor); *Qatar Nat'l Bank v. Winmar, Inc.*, 650 F. Supp. 2d 1, 3-4 (D.D.C. 2009) (overdue contractual balance); *NBase Commc'ns, Inc. v. Am. Nat'l Bank & Tr. Co. of Chicago*, 8 F. Supp. 2d 1071, 1072 (N.D. Ill. 1998) (receivables to be paid directly to secured lender). There is no reason to expect those cases to have discussed the present-entitlement requirement; indeed, three of the four refused to apply the defense on other grounds. *See Calumet*, 398 F.3d at 561; *Qatar*, 650 F. Supp. 2d at 10; *NBase*, 8 F. Supp. 2d at 1076-77; *see also infra* p. 31.

As for New York's case law, the District Court did not deny that multiple cases speak in present-entitlement terms, including *Banque Worms*. The court instead suggested that the *Banque Worms* opinions "appear to" imply that merely being a "*bona fide* creditor" is what "entitles" a creditor to mistakenly transferred funds. SPA44 [Op. 44]. But, on *Banque Worms*' facts, the creditor *had* a present entitlement. The debt was due. 726 F. Supp. at 940. There was no reason to further discuss the creditor's entitlement.

Moreover, *Banque Worms* did not question or displace the discharge-for-value test adopted by multiple prior New York decisions, which discuss an "indebtedness due" or "owing." *Carlisle*, 109 N.E. at 569; *Nassau*, 54 N.E. at 67; *see N.Y. Title*, 201 N.Y.S. at 530. The District Court minimized these cases, stating that *Banque Worms* did not expressly adopt this particular formulation.

SPA45 [Op. 45]. But precedent need not be adopted anew in every later decision—particularly when the latter case does not present the relevant issue. Rather, precedent is precedent until it is *displaced* by future authority. It is therefore irrelevant that *Banque Worms* did not restate the standard in the exact way that prior New York decisions had.

The District Court cited (SPA45 [Op. 45]) one case, from outside New York, that it believed involved a recipient with no "legal entitlement" to the funds: *Chase Manhattan Bank v. Burden*, 489 A.2d 494, 497 (D.C. 1985). But *Burden* involved a present entitlement—just not a "legal" one. The recipient of the mistaken transfer was a limited partner who accepted the funds as a distribution of partnership money from the general partner. *Id*. at 494-495. The court determined that the limited partner "had no *legal* claim" because the general partner "had complete discretion under the partnership agreement to distribute partnership capital." *Id.* at 497 (emphasis added). But the court still held that the limited partner had "an *equitable* claim to that anticipated disbursement" based on his "contribution of capital, coupled with [the] decision to disburse." *Id.* (emphasis added). Once the decision to disburse had been made, the limited partner's equitable claim was ripe and he had a present entitlement to the disbursement.

That leaves the District Court with no cases applying the discharge-for-value defense in the absence of a present entitlement. The New York Court of Appeals

would not approve the District Court's decision to break this new ground. *See Banque Worms*, 570 N.E.2d at 195 (citing "[n]ational uniformity" as an "important goal"). Neither should this Court.

II. THE DISCHARGE-FOR-VALUE DEFENSE IS INAPPLICABLE BECAUSE DEFENDANTS DID NOT GIVE VALUE.

Defendants' invocation of the discharge-for-value defense faces a second fatal obstacle: Defendants have not credited Revlon's account—and one, in fact, *reversed* initial steps doing so. Defendants therefore did not satisfy a critical element of the discharge-for-value defense—they had not, in fact, given "valuable consideration." *Id.*

A. A Defendant Must Give Value To Invoke The Discharge-For-Value Defense.

At its core, the discharge-for-value defense is "a specific application of the underlying principle of bona fide purchase," *id.* at 192 (internal quotation marks omitted), which denies restitution to a transferor when the transferee "has received title to or a legal interest in the subject matter . . . and has given value therefor without notice of the circumstances," *First Restatement* § 13(a). In cases involving money payments and a valid debt, "the defenses overlap." 3 Palmer, *Law of Restitution* § 16.5(a).[3] Thus, as the name suggests, "the discharge-for-value

[3] The discharge-for-value defense likely came to be known under a separate label because, in many jurisdictions, discharge of an antecedent debt was *not* considered

defense" does not apply unless "the creditor has given value for the mistaken payment." *In re Calumet*, 398 F.3d at 560.

1. A defendant gives value by crediting the debtor's account.

To give value, a defendant must "credit[] the debtor's account" as it normally would reflect the debtor's balance on its books. *Id.* This ensures that the money has not just been "received" by the defendant—it has been "received . . . *in satisfaction of, or as security for,* a valid claim against a third person." 3 Palmer, *Law of Restitution* § 16.6 (emphasis added and footnotes omitted). Like the present-entitlement requirement, the need to give value reflects that the discharge-for-value defense protects those who accept money "in the ordinary course of business." *Banque Worms*, 570 N.E.2d at 195. A creditor who does not give value by crediting the debtor's account has not treated the transfer "as a final and complete transaction, not subject to revocation." *Id.* at 196. The creditor lacks the finality expectation that is at the heart of the defense. *See id.*

Calumet illustrates the point. When the creditor there discovered a transfer that exceeded the amount it expected to receive, it did not immediately "apply [the

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"value" with respect to certain non-monetary transactions, such as sales of land. 3 Palmer, *Law of Restitution* § 16.5(c); *see also* 3 John Norton Pomeroy, *Equity Jurisprudence* §§ 748-749b (5th ed. 1941) (discussing when discharging antecedent debt qualified as "value" at equity). A similar question arose with respect to the surrender of legally *invalid* debts. *See First Restatement* §§ 13-14 Reporters' Notes.

excess] amount to reduce" the "debt." 398 F.3d at 561. It instead "immediately transferred the" surplus to a "segregated" account. *Id.* The creditor credited the funds to the debtor's account later in the day, but by then had learned of the error. *See id.* The Sixth Circuit recognized that it would be wrong for the discharge-for-value defense to bar recovery when the creditor had not surrendered the debtor's obligation before receiving notice of the error. *See id.* at 560-561.

Until the decision below, courts squarely addressing this issue uniformly reached the same conclusion: discharge-for-value requires giving value by crediting the debtor's account. *Id.* at 561; *Qatar*, 650 F. Supp. 2d at 10; *NBase*, 8 F. Supp. 2d at 1077; *see also* 3 Palmer, *Law of Restitution* § 16.6 (discharge for value requires "value given by the defendant in connection with the receipt of a payment for which the plaintiff seeks restitution"). Other courts—though not directly presented with the issue—have recognized that the debtor's decision to "retire" the debt is what prevents the payment from being "gratuitous." *Equilease Corp. v. Hentz*, 634 F.2d 850, 854 (5th Cir. 1981); *see also Commw., Dep't of Gen. Servs. v. Collingdale Millwork Co.*, 454 A.2d 1176, 1180 (Pa. Commw. Ct. 1983) ("The rationale for [the discharge-for-value] rule is that the judgment creditor who by definition has an entitlement, is a bona fide purchaser for value *in giving up his claim* and is therefore not unjustly enriched." (emphasis added)).

The District Court's contrary rule would put New York out of step with every other jurisdiction to have considered this issue, contrary to the Court of Appeals' admonition in *Banque Worms* to strive for "[n]ational uniformity in the treatment of electronic funds transfers." 570 N.E.2d at 195. Indeed, it would be unusual for New York to position itself as an outlier, given the State's status as "the national and international center for wholesale wire transfers." *Id.* at 194.

Limiting the defense to recipients who give value also avoids anomalous results. If receipt alone triggers the defense, a transferee may invoke it regardless of whether it had knowledge of the payment before notice of the mistake arrived. Such a transferee lacks an interest in treating the payment "as a final and complete transaction." *Id.* at 196. Without knowledge of the payment, the recipient will spend no time "wonder[ing] whether it may retain the funds." *Id.* This case's facts vividly illustrate the problem: Six of the ten Defendants did not know of the transfer until after Citibank had sent its first recall notice. SPA20-26 [Op. 20-26].

2. Banque Worms *does not compel a different conclusion.*

The District Court nevertheless thought *Banque Worms* "compelled" this puzzling result. SPA47 [*Id.* at 47]. It did not. The giving-value issue was not raised in the district court, the Court of Appeals, or this Court. On the contrary, this Court stated in its *Banque Worms* opinion that the "sole issue presented" was

"whether New York ha[d] adopted the *Restatement of the Law of Restitution*'s Discharge for Value rule." 928 F.2d at 540.

The *Banque Worms* district court opinion likewise nowhere suggests that the transferor, Security Pacific, argued that Banque Worms should not be allowed to keep the mistaken transfer because Banque Worms had not yet credited the debtor's account or otherwise failed to give value. The only timing issue the district court discussed was entirely different: Security Pacific's claim that, as a matter of payment law, the transfer was not final until the end of the business day because it had been sent through the Clearing House Interbank Payments System (CHIPS). 726 F. Supp. at 942. The district court rejected that argument because this Court's caselaw foreclosed it. *See id.* (citing *Delbrueck & Co. v. Mfrs. Hanover Tr. Co.*, 609 F.2d 1047, 1049-51 (2d Cir. 1979)). Later on, the court again invoked *Delbrueck* to support its conclusion that CHIPS wire transfers were sufficiently similar to cash that New York's older cases adopting the discharge-for-value defense would apply. *See id.* at 943.

On appeal, Security Pacific's briefs were not entirely clear. The portion of Security Pacific's brief to this Court that the District Court cited below contended that the analogy between cash and wire transfers was inapposite and that the discharge-for-value defense should not apply to wire transfers, in part because wire transfers should not be considered final at the moment of transfer. *See* JA116-119

[Br. of Third-Party Defendant-Appellant Security Pacific International Bank at 44-47, *Banque Worms*, 928 F.2d 538 (No. 90-7106) ("Security Pacific C.A.2 Opening Br.")] (attacking claim that "payment was final when made and could not be revoked" and "[t]he notion that wire transfers are in any way analogous to check stop-payment cases"). But Security Pacific's argument shifted in the Court of Appeals, and it contended that "the issue here no matter how phrased is what is New York's law on mistake and restitution, not whether the transfer is final." JA154-155 [Reply Br. of Third-Party Defendant-Appellant Security Pacific International Bank at 24-25, *Banque Worms*, 570 N.E.2d 189 (No. 254)]. Security Pacific mentioned *Delbrueck*, but only in a footnote responding to Banque Worms' suggestion that the Uniform Commercial Code had abrogated the common law of restitution. *See* JA154 [*Id.* at 24 n.19].

Thus, although it is hard to follow exactly what Security Pacific argued on appeal, it is clear that Security Pacific never argued that the transferee had to give value in order to invoke the discharge-for-value defense. That is why neither this Court nor the Court of Appeals "adopt[ed]" any relevant position on that issue in *Banque Worms*. SPA48 [Op. 48]. True, Security Pacific's brief in this Court complained that the district court's result left it no "window" to give notice of an error. *See* JA119 [Security Pacific C.A.2 Opening Br. 47]. But that argument was not in service of a claim that Banque Worms had to credit the debtor's account.

Security Pacific was making a policy argument, not a doctrinal one. Its briefing is devoid of any argument that the law required value to be given to invoke the defense.

This Court's summary rejection of Security Pacific's policy argument in the final line of its *Banque Worms* opinion does not control the entirely different issue Citibank raises here. *See* SPA48 [Op. 48] (relying on that summary disposition). A summary disposition does not resolve issues that "merely lurk in the record, . . . and no resolution of them may be inferred." *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 183 (1979) (internal quotation marks omitted). That policy is sound: It is impractical to suggest that future litigants should divine what constitutes controlling circuit precedent by scouring decades' old briefs—including briefs, like these, available only in archives—to see what issues could potentially have been resolved in a summary disposition. There is nothing in this Court's opinion or the Court of Appeals' that is "binding" on whether a defendant must give value before invoking the discharge-for-value rule.

The District Court suggested that two "other courts"—*NBase* and *General Electric*—had understood *Banque Worms* the same way. But *NBase* merely recognizes that isolated "language" in *Banque Worms* mentioned the time of receipt, and then proceeds on the assumption that this language reflected the *Banque Worms* court's position on timing without further examining the opinion's

full context. 8 F. Supp. 2d at 1076. And *General Electric* assumed creditors claiming the defense as described in *Banque Worms* would think "that their debts had been paid off," not just that they had passively received the funds. 49 F.3d at 284.

3. The District Court's other considerations do not support excusing a defendant from the requirement to give value.

The District Court's considerations beyond *Banque Worms* likewise do not support allowing a defendant who has not surrendered a debt to claim the discharge-for-value defense. The District Court invoked the "common understanding" of the word "value." SPA49 [Op. 49]. The District Court's cited case recognizes that *making* a payment can constitute "valuable consideration" for purposes of becoming a holder in due course of an I.O.U. *Alden Auto Parts Warehouse, Inc. v. Dolphin Equip. Leasing Corp.*, 682 F.2d 330, 333 (2d Cir. 1982) (per curiam) (citing *First Restatement* § 14 illus. 9). But it does not hold that merely *receiving* a payment is sufficient to trigger discharge for value when the I.O.U. is paid; in the cited illustration, the creditor presents the I.O.U. to the payor. *See First Restatement* § 14 illus. 9. Had the payee retained the I.O.U. after collecting payment, he would not have given value.[4]

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[4] The court also considered the meaning of "discharge." SPA49 [Op. 49]. But the credit to the account matters because it satisfies the "value" component of "discharge-for-value"; the "discharge" is beside the point.

The District Court was also reluctant to adopt the consensus position because it was concerned that doing so would impose under a different name the detrimental-reliance requirement *Banque Worms* rejected. SPA50-51 [Op. 50-51]. But whether a creditor has detrimentally relied on the transfer is different from whether it has given value for the transfer. New York courts have rejected the argument that merely "giving credit" on a defendant's books is a sufficient "change in position" to constitute detrimental reliance because the "credit may be canceled" and thus the "defendant restored to its original position." *Herlihy v. Indep. State Bank*, 185 N.E. 393, 394-395 (N.Y. 1933). But *Banque Worms* recognized that, even if giving a credit is not detrimental reliance, it is sufficient "valuable consideration" to be "a specific application of the underlying principle of bona fide purchase." 570 N.E.2d at 192, 195 (internal quotation marks omitted).

Finally, the District Court was concerned that discerning what constitutes the relevant credit would be "fact-intensive." SPA53 [Op. 53]. But courts that have adopted this rule have had no trouble applying it. *Calumet*, 398 F.3d at 561; *Qatar*, 650 F. Supp. 2d at 10; *NBase*, 8 F. Supp. 2d at 1077. The inquiry is relatively simple: When the creditor receives notice of the transferor's error, has it yet credited the debtor's account in the usual manner? The inquiry may be more time-intensive than usual in this case because the number of lenders involved, but that quirk is no reason to reject a generally applicable rule. And, in any event,

discharge-for-value is an affirmative defense to restitution; the exception rather than the rule. Its purpose is not to streamline litigation. *See Banque Worms*, 570 N.E.2d at 195-196; *see also Banca Commerciale Italiana, N.Y. Branch v. N. Tr. Int'l Banking Corp.*, 160 F.3d 90, 94 (2d Cir. 1998) ("Significantly, however, the [*Banque Worms*] court applied the 'discharge for value' rule as a *defense* to the sender's claim that it was entitled to recover the funds because they were sent in error." (emphasis added)).

B. Defendants Did Not Credit Revlon's Account Or Otherwise Give Value.

In the District Court, Defendants did not seriously contend that they had credited Revlon's account. Instead, they primarily argued that *Citibank* had done so. *See* JA381-386 [ECF 145 at 60-65]. The District Court rightly rejected that argument as "nonsensical": "Citibank was . . . the transferor that made the payment by mistake," and it "cannot be that the transferor dictates when the transferee does or does not give value in exchange for the payment for the purposes of notice of mistake." SPA52 [Op. 52 n.27].[5]

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[5] In any event, Defendants are wrong to assert that Citibank credited Revlon's account. In making that argument, Defendants pointed to a document, called an "OC Report." At the relevant time, however, the OC Report did not reflect the official record of the loan maintained by Citibank, called "the Register." *See* JA389-391 (¶¶ 16, 19-22) [ECF 195 at 3-5] (describing relationship of OC Report to Register and manual process of updating the record of the loan); JA1180-1187 [PX 283 at 7-14] (letter from Revlon directing Citibank to update the Register to reflect the roll-up transaction).

It is what *Defendants*, as investment managers for the lenders, did that counts for purposes of assessing whether value was given. The vast majority of them took no steps to credit Revlon's account before notice of Citibank's error arrived. Six did not even know of the payment before Citibank told them it was an error. *See supra* p. 10; SPA20-26 [Op. 20-26] (Bardin Hill, Greywolf, Medalist, New Generation, Tall Tree, ZAIS). Three of the other four did not credit Revlon's account before receiving Citibank's recall notice. *See* SPA20-23 [Op. 20-23] (Allstate, Brigade, HPS). And the last, Symphony, "learned that some custodians had, on their own initiative, already applied the funds as paydown in their records" and "directed at least one such custodian . . . to do the same." SPA25 [Op. 25]. But after learning of Citibank's mistake, and before asserting discharge for value as a defense, Symphony reversed that instruction. *Id.* And, the very same day Citibank sent its recall notices, a lawsuit Defendants authorized and their current counsel filed asserted that the Revlon debt was still outstanding, JA169-170 [UMB Compl. ¶¶ 16, 18], confirming Defendants had not credited Revlon.

Defendants thus did not receive Citibank's funds "in good faith . . . for a valuable consideration." *Banque Worms*, 570 N.E.2d at 195. They therefore cannot invoke the discharge-for-value defense. But even if the Court concludes that defendants need not credit a debtor's account to claim the discharge-for-value defense, it should at least hold—consistent with *Restatement (Third) of Restitution*

("*Third Restatement*") § 67 cmt. h (2011)—that a creditor may not claim the defense if it did not know of the payment before it received notice of the error. Thus, although the District Court's judgment should be reversed as to all Defendants, it should at the very least be reversed as to the six Defendants who learned of Citibank's payment and error simultaneously.

III. DEFENDANTS WERE ON NOTICE OF CITIBANK'S MISTAKE.

Finally, when the lenders received Citibank's mistaken payments, it was obvious *something* was amiss and a prudent person would have conducted an inquiry to resolve the suspicion. That inquiry would have revealed the error, meaning Defendants were on constructive notice of the error.

Consider the undisputed red-flags: Defendants were convinced that Revlon was insolvent. They then receive funds apparently paying off a nearly $1 billion dollar debt, three years early and without warning. They did not receive the prompt notice required by the credit agreement for a prepayment and none of the calculation statements reflected a prepayment. Under "the totality of the circumstances," a reasonable person would have investigated the otherwise inexplicable paydown. *Diebold*, 736 F.3d at 188. And the most obvious way—indeed, an easy and therefore prudent way—was to contact Citibank or Revlon, which would have revealed the error.

But Defendants' *entire* inquiry—if it can be called that—was self-focused. They simply hypothesized on thin facts that Revlon had paid off the 2016 Term Loan. After that, Defendants engaged in—and the District Court held sufficient—speculation about how Revlon might have pulled this billion-dollar-rabbit out of a hat. Their top explanation: Maybe Revlon received an unexpected infusion from Ronald Perelman, the company's majority shareholder. *See* SPA90-91 [Op. 90-91]. Even if Defendants' musings were subjectively sincere as a matter of fact, speculation cannot negate suspicion or be an objectively prudent inquiry as a matter of law. Otherwise, mistaken transferees could always keep an accidental transfer as long as they have sufficiently fertile imaginations—and so long as they do not seek out true facts that might resolve the underlying suspicion.

A. A Transferee Cannot Claim Discharge For Value If The Transferee Had Reason To Be Suspicious And A Prudent Investigation Would Reveal The Error.

The District Court correctly held that a mistaken transferee must lack both actual and constructive notice of the transferor's mistake to claim discharge for value. *See* SPA57-63 [Op. 57-63]. Under New York law, constructive notice is inquiry notice: If a person "has knowledge of facts that would excite the suspicion of an ordinarily prudent person," he or she is presumed to also know what a "reasonable inquiry, as suggested by the facts, would have revealed." *U.S. Bank Nat'l Ass'n v. Jordan*, 111 N.Y.S.3d 746, 749 (App. Div. 2019) (internal quotation

marks omitted); *see also Fid. & Deposit Co. of Md. v. Queens Cnty. Tr. Co.*, 123 N.E. 370, 373 (N.Y. 1919).

Four lines of authority confirm that inquiry notice applies in the discharge-for-value context. *First*, the Appellate Division has applied a constructive notice standard in a discharge-for-value case. In *Golden Door V & I, Inc. v. TD Bank*, 999 N.Y.S.2d 510 (App. Div. 2014), the court held that the recipient had notice of a mistake when the transfer—for the precisely correct amount—came from someone other than the recipient's putative customer. It turned out that "criminals had hacked into [the transferor's] account" and "ordered the transfer" *Id*. at 511. The Appellate Division imputed knowledge of the hack to the recipient because the "transfer order indicated that the transferor was . . . not [the recipient's] 'customer,' was not indebted to Golden Door, and had no apparent relationship with it or its 'customer.' " *Id*. at 512. Even though the payment matched a precise, expected amount, the recipient was presumed to have notice that it was fraudulent because of the suspicious circumstances.

Second, New York courts recognize that constructive notice extends to inquiry notice in bona fide purchaser cases. *See, e.g.*, *436 Franklin Realty, LLC v. U.S. Bank Nat'l Ass'n*, 137 N.Y.S.3d 88, 90 (App. Div. 2020) ("The status of good faith purchaser for value cannot be maintained by a purchaser . . . with knowledge of facts that would lead a reasonably prudent purchaser to make inquiries

concerning such." (internal quotation marks omitted)); *Jordan*, 111 N.Y.S.3d at 748-749 (applying inquiry-notice standard to bona fide purchaser rule); *In re Brainard Hotel Co.*, 75 F.2d 481, 483 (2d Cir. 1935) (L. Hand, J.) ("Were the circumstances such as to put him on inquiry as to the source of the money?"). And *Banque Worms* considers discharge-for-value to be an application of the bona fide purchaser rule. *See* 570 N.E.2d at 192; *First Restatement* § 14 cmt. a.

Indeed, the bona fide purchaser rule turns in part on whether the purchaser acts in "good faith." *Jordan*, 11 N.Y.S.3d at 748-749 (quoting *Panther Mountain Water Park, Inc. v. County of Essex*, 836 N.Y.S.2d 374, 376 (App. Div. 2007)); *see Irwin v. Regal 22 Corp.*, 108 N.Y.S.3d 57, 58 (App. Div. 2019); *see also Banque Worms*, 570 N.E.2d at 195-196 (noting that a purchaser in due course must act in "good faith"). As the *Third Restatement* explains, " 'good faith' in this context *means* 'without notice,' once it is understood that 'notice' extends to facts that an appropriate inquiry would have revealed." *Third Restatement* § 69 cmt. f; *see also First Restatement* § 174 cmt. a (endorsing inquiry notice for bona fide purchaser rule).

Third, persuasive authority outside New York agrees that inquiry notice applies. The Mississippi Supreme Court, in an opinion citing *Banque Worms*, has concluded that inquiry notice applies to discharge-for-value cases by analogy to bona fide purchaser precedent. *See Credit Lyonnais*, 745 So. 2d at 841-842

("[W]here the purchaser has knowledge of facts which would cause a reasonable person to inquire, he is charged with inquiry notice of those facts which could be uncovered by diligent investigation.").

Fourth, inquiry notice squares with the policies underlying the discharge-for-value defense. Once a recipient of funds knows or should know of a red flag, the recipient will necessarily "wonder whether it may retain the funds." *Banque Worms*, 570 N.E.2d at 196; *see also supra* p. 25. Additionally, setting the bar at actual notice encourages wire-transfer recipients to take a "see-no-evil" approach and refuse to investigate suspicious transactions. That perverse incentive would lead to the unstable and inefficient marketplace *Banque Worms* warned against. 570 N.E.2d at 195-196.

B. The Undisputed Facts Should Have Raised Suspicions, And A Prudent Inquiry Would Have Uncovered Citibank's Mistake.

The undisputed facts amply reveal that Defendants saw enough red flags that—as a matter of law—should have "excite[d] the suspicion of an ordinarily prudent person" and placed them on inquiry notice of Citibank's mistake. *Jordan*, 111 N.Y.S.3d at 749 (internal quotation marks omitted). Defendants believed that Revlon, which they thought was insolvent, had paid off a nearly $1 billion debt, three years early, without any advance notice. The debt was not close to due. The calculation statements showed only interest, and no prepayment notice, required under the credit agreement, was provided. At that point, a reasonable portfolio

manager would have conducted a prudent investigation, meaning an investigation actually designed to resolve the suspicion. That inquiry would not have been onerous: It could be satisfied by contacting the bank that wired the funds—Citibank—or the putative payor—Revlon.

This Court should hold that a reasonable person would, as a matter of law, inquire under these circumstances. Constructive notice "is a mixed question of law and fact, assessing whether based upon the facts as determined by" the District Court, the lenders "had constructive or actual knowledge as a matter of law." *Diebold*, 736 F.3d at 187. This Court thus decides *de novo* any ultimate "determination that the [lenders] did not have constructive knowledge" and need only defer to "the factual findings that underpin the determination." *Id.*; *see* 81 N.Y. Jur. 2d *Notice and Notices* § 4 (2d ed. 2021) ("The question whether circumstances that are undisputed, or are found by the jury, are sufficient to put a person on inquiry and thereby charge him with constructive notice, is for the court."); *cf. Banque Worms*, 570 N.E.2d at 197 n.5 ("Whether or not a particular security procedure is commercially reasonable is a question of law for the court, while whether the procedure was complied with is a question of fact.").

1. Under the totality of the undisputed facts, Defendants had a legal duty to inquire.

Start with the most obvious—and undisputed—fact triggering inquiry: Defendants believed that Revlon was insolvent. *See, e.g.*, JA767 [Tr. 517]

(testifying that Revlon was "insolvent"); JA779 [Tr. 562] (testifying that Revlon's liquidity remained tight); JA784 [Tr. 581] (Revlon "didn't have the liquidity to necessarily make the full payoff"); JA815 [Tr. 706] ("Revlon was likely insolvent"). Defendants' lengthy complaint claimed that Revlon was "struggling," "insolvent," and "in a weak financial position." JA166-167, 170 [UMB Compl. ¶¶ 8, 17, 18]. According to their allegations, Revlon lost $213.9 million in the first quarter of 2020, saw an 18.1% annualized decrease in net sales, and announced that it would cut 1,000 jobs. *See* JA174 [*Id.* ¶¶ 167-168]. And Defendants estimated that Revlon was insolvent by as much as $1.71 billion. *See* JA175 [*Id.* ¶ 170]. Yet from the Defendants' perspective, Revlon also appeared to have paid off a nearly $1 billion loan. This development was "surprising"—to say the least. JA768 [Tr. 521]. And it is the kind of surprise that, as a matter of law, requires inquiry. *See Jordan*, 111 N.Y.S.3d at 749.

What's more, the 2016 Term Loan was then trading between 20-30 cents on the dollar. *See* JA778, 815, 890 [Tr. 559, 704, 1004-05]. Under those circumstances, a reasonable person—and certainly Defendants, some of the most sophisticated actors in the industry—would expect the company to pay down the debt at a discount rather than face value. In fact, that was exactly what Revlon was doing, publicly, with the $387 million in 2021 Notes. *See* JA820-821 [Tr. 726-728]. None of Revlon's disclosures for the 2021 Notes transaction mentioned a

simultaneous effort to raise additional capital to pay the 2016 Term Loan, though disclosure of such an effort would be expected as a matter of securities law. *See* JA867-868 [Tr. 915-917]. And given that Revlon was publicly trying to pay off the much smaller 2021 Notes to avoid paying the 2016 Term Loan in November 2020, any reasonable person would have been suspicious if Revlon simultaneously paid off the nearly $1 billion 2016 Term Loan.

Meanwhile, the calculation statements Defendants received indicated that the lenders would receive only a periodic interest payment. They said not one word about a sudden and years-early principal prepayment. *See, e.g.*, JA1163-1165 [PX 123 at 5-7]. And despite the credit agreement requiring Citibank to "promptly" notify the lenders of Revlon's decision to prepay, JA1263 (§ 2.11(a)) [PX 485 at 72], Defendants never received any such notice.

The four Defendants who learned about the payment before Citibank informed them of the mistake realized something was amiss. They searched for missing calculation statements about the principal payment, and wondered "could this be a mistake?" JA1152 [PX 13 at 2]. They reached out to internal and external counsel. *See* JA724, 730, 908 [Tr. 347, 368, 1077-1078]. In at least two cases, a third-party firm that tracks cash-flow and conducts reconciliation on the 2016 Term Loan *actually contacted* Citibank to request the missing notices. JA974, 983 [DX 483 at 1; DX 489 at 5]. And one Defendant claimed it even

purchased an additional portion of the Revlon 2016 Term Loan in the market after the August 11 payment to "find information as to what exactly was going on." JA913-914 [Tr. 1098-1100]. In short, applying the legal standard to these undisputed facts, an objectively reasonable person would have been suspicious that something was wrong. *See Jordan*, 111 N.Y.S.3d at 749.

2. *As a matter of law, a prudent inquiry must be designed to resolve suspicions—including contacting Citibank or Revlon.*

The law requires a reasonable person to conduct an inquiry designed to efficiently resolve its suspicion. Here, that would have been simple: Contact the sender (Citibank) or the ultimate source of funds (Revlon) to resolve any red flags. Instead, Defendants essentially asked *themselves* "What happened?" and were satisfied with their hypothetical answers.

An inquiry-notice standard presumes someone knows the facts that a "prudent" investigation would uncover, and a prudent investigation is one designed to answer "the suspicion" that triggered the "investigation" in the first place. *Third Restatement* § 69(3)(c); *Jordan*, 111 N.Y.S.3d at 749 (internal quotation marks omitted); *see also Majer v. Schmidt*, 564 N.Y.S.2d 722, 725 (App. Div. 1991) (describing inquiry notice as inquiry "to ascertain the true facts"); *In re Bohenko's Est.*, 4 N.Y.S.2d 420, 427 (App. Div. 1938) (a "reasonable inquiry" means "an inquiry prosecuted with a degree of diligence adapted to the circumstances which prompted it"). "The object is . . . to discover . . . positive facts which would allay

the suspicion already aroused." *Ward v. City Tr. Co. of N.Y.*, 84 N.E. 585, 588 (N.Y. 1908). After all, if an inquiry is not designed to undercover "the truth" then the inquirer "shuts his eyes to the facts which call for investigation," and inquiry notice imputes knowledge to the lackluster inquirer. *CIFG Assurance N. Am., Inc. v. Credit Suisse Sec. (USA) LLC*, 11 N.Y.S.3d 563, 564 (App. Div. 2015) (internal quotation marks omitted).

In this case, a prudent inquiry would at least be designed to resolve the core red flags: A seemingly insolvent Revlon had inexplicably paid off a nearly $1 billion dollar loan, without notice, and none of the associated calculation statements included a principal payment. To resolve this discrepancy, at least in a case involving a high-profile company, a prudent inquirer might look to public records or media reports. *Cf. Aozora Bank, Ltd. v. Deutsche Bank Sec. Inc.*, 29 N.Y.S.3d 10, 14 (App. Div. 2016) ("[T]here was a wealth of public information that should have put [plaintiff] on inquiry notice of the alleged fraud."). But—especially if those sources failed to resolve the suspicion—a prudent inquirer would "go to the source" and have contacted either the financial institution that sent the payment or the purported source of the funds. *See* JA930, 940-941 [Tr. 1167, 1207-08].

In contrast, the *only* inquiry Defendants conducted—which the District Court found met what the law requires of a reasonable person—was designed to

confirm that an amount necessary to pay off the 2016 Term Loan was transferred. Defendants "checked to see if other Lenders had also received a full paydown," and determined that their "clients . . . had the entirety of their loans prepaid." SPA79 [Op. 79]. In other words, Defendants investigated the suspicious payment by asking *themselves* how much money had been transferred.

That investigation fails to address what made the transaction so strange in the first place: a distressed debtor suddenly flush with nearly a billion dollars cash. Nor did this investigation resolve the discrepancy that Citibank's calculation statements never mentioned a principal payment. And Defendants could not have resolved those suspicions without contacting someone who *does* have more information—such as the sender or the source of the funds. In fact, with every additional piece of data the Defendants accumulated showing that Revlon had apparently paid off the loans, a reasonable person's confusion would have grown, not diminished.

Resolving this suspicion would not have been difficult or resource intensive. Indeed, precisely because contacting either Citibank or Revlon was so easy, contacting them was an obvious and prudent choice. *See Fid. & Deposit Co. of Md.*, 123 N.E. at 373 ("In the case at bar a simple inquiry, by the bank of the trustee, for the reason of the countersignatures, would have revealed the existence of the general order and of its provisions.").

To be sure, there was tension among Defendants, Citibank, and Revlon. Defendants' lawsuit named Citibank as a defendant, and contemporaneous communications reflected hostility. *See, e.g.*, JA1299 [PX 1236 at 1] ("I see no good reason to return funds to Citi group [sic]. They are getting a taste of their own medicine."). But a prudent person is dispassionate. *Cf. In re Sentinel Mgmt. Grp., Inc.*, 809 F.3d 958, 962 (7th Cir. 2016) (an actual "recipient's obtuseness" is no defense to whether a reasonable person would investigate). A reasonable person would not have asked a *recipient* "why were these unexpected funds sent?" Instead, she would look beyond her own, limited universe and contact the sender or the putative source of the funds. *See, e.g.*, JA674-675 [Tr. 148-149] (Citibank witness testifying that, after receiving a payment that did not match calculation statement, he would "assume" nothing and would seek "clarifying details from the sender").

C. Speculation About How Revlon Might Have Paid Its Debt Does Not Negate Suspicion Or Constitute A Prudent Inquiry.

The inquiry that Defendants conducted—and which the District Court accepted as prudent—fell short of what the law requires. Defendants' investigation was not designed to resolve the discrepancies that triggered suspicion in the first place: How could a borderline insolvent company pay off nearly $1 billion three years early? Where were the missing calculation statements and prepayment notices? And to answer *those* questions, Defendants (and the District

Court) turned to speculation: Maybe a billionaire benefactor bailed Revlon out? *See* SPA90-93 [Op. 90-93]. Maybe Revlon breached the credit agreement and paid off some (but not other) lenders? Maybe the calculation statements and prepayment notices were simply missing?

As a matter of law, such speculation cannot negate suspicion and substitute for prudent inquiry. In deciding otherwise, the District Court committed legal error. The possibility of an innocent explanation does not and cannot dispel a concern. Instead, suspicion is a warning sign warranting further investigation. *See Jordan*, 111 N.Y.S.3d at 749. In other words, *whenever* someone is on inquiry notice, that person can always cite various possible explanations. But it is the lack of certainty which leads a reasonable person to investigate further.

That Defendants (and the District Court) cited multiple, mutually exclusive theories to explain the unexpected payment shows why speculation cannot resolve a suspicion. Some theories assumed Revlon had paid in full; others assumed Revlon had paid off just a few lenders in violation of the credit agreement. Far from clearing up the confusion, these competing rationales created yet more discrepancies, demanding more investigation. *Cf. Diebold*, 736 F.3d at 188 (constructive notice considers all circumstances).

Even when considered separately, each conjecture is unconvincing. For instance, according to the District Court, a prudent person could have assumed

without further inquiry that investor Ronald Perelman and his holding company, which owned approximately 85% of Revlon's equity, "could have and would have bailed Revlon out." SPA90-91 [Op. 90-91]. But "a belief" that Perelman *might* have bailed Revlon out was just that—a belief—and did not resolve the underlying suspicion. SPA91 [*Id*. at 91].

Nor did the fact that Revlon had successfully retired some debts as part of its May 2020 refinancing nudge this theory beyond speculation. SPA90 [*Id*. at 90]. For one thing, Perelman did not provide capital for Revlon's May 2020 refinancing. For another, the May 2020 analogy left unanswered just *how* Revlon had succeeded in raising nearly an additional $1 billion just three months later. Indeed, the May 2020 transaction was publicly disclosed in advance and discussed in the press—something that never happened with the unexpected August payment. *See* JA171-173 [UMB Compl. ¶¶ 82, 86]. And, regardless, Defendants believed the May 2020 refinancing was improper, so that analogy would have *increased* their suspicions.

Similarly, the District Court stated that a prudent person in Defendants' position could hypothesize that Revlon paid off some lenders, and not others, in an effort to undermine Defendants' nascent lawsuit. *See* SPA91-92 [Op. 91-92]. This theory required a prudent person to assume that Revlon had ignored the express terms of the loan agreement, which "provided that optional prepayments had to be

made on a pro rata basis." SPA92 [*Id*. at 92 n.41] (internal quotation marks omitted) (deeming this theory "arguably unreasonable"). According to the District Court, however, this belief was reasonable because the Defendants' lawsuit was about to accuse Revlon of violating an entirely unrelated portion of the agreement. *See* SPA91-92 [*Id.* at 91-92].

Spelling out that chain-of-logic shows how tenuous it is: It equates the lenders' initial complaint against Revlon—which involved the intricacies of the voting and amendment procedures of the credit agreement—with an entirely different issue concerning prepayment of the loan's principal. But not all legal arguments are the same. Even assuming Defendants' convoluted lawsuit presented colorable arguments, the credit agreement's plain language clearly states that "prepayments shall be applied on a pro rata basis to the then outstanding Term Loans being prepaid." JA1264 (§ 2.11(c)) [PX 485 at 73]. It would have taken particular chutzpah to ignore this explicit directive. Besides, Defendants never inquired to see if other lenders, who had not objected to the May 2020 transaction, had been paid off or otherwise attempted to confirm this theory.

Even the District Court rejected another of Defendants' rationales as too far-fetched: that a reasonable person could believe Revlon somehow paid the lenders in August to avoid paying the same lenders if the accelerated maturity was triggered in November due to the outstanding 2021 Notes. *See* SPA92 [Op. 92

n.41]. This explanation was irrational: There were just $387 million in outstanding 2021 Notes that would have triggered the accelerated maturity on the 2016 term Loan, far less than the face value of the outstanding 2016 Term Loan. *Supra* pp. 46-47. As the District Court correctly observed, had Revlon wanted to avoid the accelerated maturity, it could have paid that much smaller amount. SPA92 [Op. 92 n.41]. Moreover, retiring the 2016 Term Loan would still have left millions in additional debt that would have come due if the 2021 Notes remained outstanding. *See* JA1294 [PX 934 at 88]. All of this explains why Revlon was, in fact, raising capital to pay off the 2021 Notes at a substantial discount—an effort disclosed in securities filings that made no mention of a simultaneous campaign to pay off the much larger 2016 Term Loan. *See supra* pp. 46-47. The irrationality of this explanation highlights the dangers of replacing prudent inquiry with speculation: Speculation tempts recipients and their lawyers to come up with reasons to ignore a suspicion instead of picking up the phone.

Nor does speculation became more prudent—or the need for inquiry somehow decrease—if it seems more "plausible" than the truth. SPA68 [Op. 68]. A person on inquiry notice has an obligation to resolve "the suspicion." *Jordan*, 111 N.Y.S.3d at 749 (internal quotation marks omitted). When faced with an array of unlikely events, the reasonably prudent person should not be allowed to seize on one which she claims is marginally more likely.

The District Court also erred as a matter of law in thinking that speculation could resolve the twin mysteries of the missing prepayment statements and the payments not matching the calculation statements. The court held that a reasonable person needed only "confirm[]" that unexpected "payments were made with respect to" an identified loan "and match[] the outstanding principal and interest" on that loan. SPA79 [Op. 79]. After that, the court concluded, a reasonable person could assume the payment was intentional—even though the calculation statement did not match the payment and the required prepayment notices were not given.

The District Court thus endorsed Defendants' guess that the problem was the paperwork, not the payment. Here, again, the District Court permitted an investigation to conclude without resolving the discrepancies that required inquiry in the first place. *See supra* pp. 45-48. Moreover, the Court failed to take into account "the totality of the circumstances." *Diebold*, 736 F.3d at 188. Missing calculation statements are suspicious in-and-of-themselves. But they become even more suspicious when combined with a seemingly insolvent debtor wiring a massive, unexpected payment. By viewing each fact in isolation—and dismissing each fact through speculation—the District Court missed the forest for the trees. *Cf. Stansbury v. Wertman*, 721 F.3d 84, 87 (2d Cir. 2013) (reversing and directing

judgment where "district court analyzed each piece of evidence in the case *seriatim* and in isolation" without "[a]nalyzing the evidence in its totality").

In short, Defendants may have believed that Citibank's payment was simply too large to be erroneous, but that was not an objectively prudent conclusion as a matter of law: Mistakes occur with wire transfers "every single day." JA936 [Tr. 1189]; *see also* JA629 [ECF 226 at 8] ("erroneous payments are a regular occurrence"). They occur in all kinds of transactions. *See* JA936 [Tr. 1191] ("There is partial payment errors, there is full payment errors, there is errors that go beyond syndicated loans, there is corporate products, there is equity products."). They occur in quantities large and small. *See, e.g.*, JA935 [Tr. 1186] ("[I]n the last couple of weeks . . . one of my clients paid out $9 million on a redemption two weeks prior to the redemption date."). They occur for any number of reasons, from innocent operator error, *see supra* pp. 7-9, to malevolent hackers, *see Golden Door*, 999 N.Y.S.2d at 512. And when they occur, recipients investigate the transaction and return the money—as nearly 200 lenders did in this case. JA629 [ECF 226 at 8] ("Because error payments are a frequent fact, there are established industry norms governing how to address them.").[6] In fact, Defendants admitted

[6] Indeed, the public record is replete with mistakes even larger than the one in this case. *See, e.g.*, *Deutsche Bank Mistakenly Transferred $24 Billion in 2014*, Reuters (May 24, 2018), https://tinyurl.com/2j2ks2xt; Joseph Adinolfi, *Deutsche Bank Accidentally Sent Hedge Fund $6 Billion In 'Fat Finger' Mistake*, Market

that when mistakes have occurred in the past, they have had their own money returned to them or have returned mistakenly transferred funds. *See* JA795-796, 853, 882-883, 896-897 [Tr. 628-629, 859, 974-977, 1030-1032].

There are especially strong reasons for the inquiry-notice standard to require contacting the sending bank or the funds' putative source. Prudence is a common law standard, and so reflects "policy considerations." *Banque Worms*, 570 N.E.2d at 373. From a public-policy perspective, it makes sense to encourage loan-industry actors to investigate suspicious payments in an efficient manner by contacting the institution that sent the funds or the funding source. Indeed, this occurs within the industry, every day. *Supra* p. 57. The law should reflect and foster that commonsense practice. *See Shor*, 371 N.E.2d at 528. And even if this industry practice could be preserved by contract in the future, that is no solution for all of the trillions of dollars in existing lending arrangements that do not account for the novel rule announced below. And often, the mistaken recipients may not even be parties to the contracts, or may be abroad. It is inefficient for the common law to force correction through contract in this way. *Id.* (common law does not

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Watch, (Oct. 19, 2015), https://tinyurl.com/srrnmk9d; Eyk Henning, *Bank Known for Lehman Gaffe Moves Over $5.4 Billion in Error*, Bloomberg | Quint (updated Apr. 3, 2017), https://tinyurl.com/vrpmwwvx.

"drag unwillingly the people it serves into a rigidly fenced corral, kicking, but reflects the fair conduct and expectations of fair, reasonable persons").

* * *

Any one of the District Court's three legal errors suffices to reverse the judgment below. The three errors are sufficiently clear from *Banque Worms* and other persuasive precedent that this Court can resolve them in Citibank's favor. *See McCarthy v. Olin Corp.*, 119 F.3d 148, 154 (2d Cir. 1997) ("Because it is our job to predict how the forum state's highest court would decide the issues before us, we will not certify questions of law where sufficient precedents exist for us to make this determination.").

But if the Court should find any of these issues doubtful, or believe—as the District Court did—that its hands are tied by stray language in *Banque Worms*, it should follow the *Banque Worms* Court's lead and certify questions to the Court of Appeals. *See* Local R. 27.2(a). The questions here are foundational to New York's financial markets, just as the one in *Banque Worms* was. If New York is to be an outlier in its application of the discharge-for-value rule, *see supra* pp. 28-29, 31-32, the Court of Appeals should be the one to make that choice.

CONCLUSION

For the foregoing reasons, the District Court's judgment should be reversed.

Respectfully submitted,

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I hereby certify that the foregoing was filed with the Clerk using the appellate CM/ECF system on July 22, 2021. All counsel of record are registered CM/ECF users, and service will be accomplished by the CM/ECF system.

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