21-0487-cv

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.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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June 21, 2021

CORPORATE DISCLOSURE STATEMENT

Defendant Brigade Capital Management, LP is a limited partnership with no parent corporation. No publicly held corporation owns 10% or more of Brigade Capital Management, LP's interests.

Defendant HPS Investment Partners, LLC is a limited liability company with no parent corporation. No publicly held corporation owns 10% or more of HPS Investment Partners, LLC's interests.

Defendant Bardin Hill Loan Management LLC is a limited liability company that is a direct subsidiary of Bardin Hill Investment Partners LP, a limited partnership. On a pass-through basis, Navigator Global Investments Ltd, a publicly held corporation, owns 10% or more of Bardin Hill Loan Management LLC's interests.

Defendant Greywolf Loan Management LP is a limited partnership with no parent corporation. No publicly held corporation owns 10% or more of Greywolf Loan Management LP's interests.

Defendant ZAIS Group LLC is a limited liability company whose sole member is ZAIS Group Holdings, Inc. No publicly held corporation owns 10% or more of ZAIS Group LLC's interests.

Defendant Symphony Asset Management LLC is a limited liability company which has merged with and into Nuveen Asset Management, LLC, also a limited

liability company. Nuveen Asset Management, LLC's sole member is Nuveen Fund Advisors, LLC. No publicly held corporation owns 10% or more of Nuveen Asset Management, LLC's interests.

Defendant Allstate Investment Management Company is a wholly-owned subsidiary of Allstate Non-Insurance Holdings, Inc. Allstate Non-Insurance Holdings, Inc. is a wholly-owned subsidiary of The Allstate Corporation. The stock of The Allstate Corporation is publicly traded. No publicly held entity owns 10% or more of the stock of The Allstate Corporation.

Defendant Medalist Partners Corporate Finance LLC is a limited liability company with no parent corporation. No publicly held corporation directly owns 10% or more of Medalist Partners Corporate Finance LLC's interests. JMP Holdings LLC is a member of Medalist Partners Corporate Finance LLC and JMP Holdings LLC is wholly owned by JMP Group LLC, which is publicly traded.

Defendant Tall Tree Investment Management LLC is a limited liability company with no parent corporation. No publicly held corporation owns 10% or more of Tall Tree Investment Management LLC's interests.

Defendant New Generation Advisors LLC is a limited liability company with no parent corporation. No publicly held corporation owns 10% or more of New Generation Advisors LLC's interests.

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PRELIMINARY STATEMENT

This appeal arises from a thoroughly reasoned 101-page decision after bench trial by the District Court for the Southern District of New York (Furman, J.). SPA__-__[Dkt.243("Op.")]. That decision correctly applies the discharge-for-value rule set forth by the New York Court of Appeals in *Banque Worms v. BankAmerica International*, 77 N.Y.2d 362 (1991), on a certified question from this Court. In *Banque Worms*, as here, a bank transferred funds to a creditor in an amount owed on an outstanding debt. In *Banque Worms*, as here, the bank advised the creditor after the transfer that it had wired the funds by mistake. And in *Banque Worms*, the Court of Appeals concluded in a unanimous opinion by Judge Alexander that a creditor in such circumstances is entitled to keep the mistakenly transferred funds. This Court then readily applied the Court of Appeals decision to rule in the creditor's favor in *Banque Worms v. BankAmerica International*, 928 F.2d 538 (2d Cir. 1991). The district court faithfully applied that precedent here, and this Court should affirm.

Specifically, the Court of Appeals in *Banque Worms* embraced the "Discharge for Value" rule set forth in Section 14 of the then-current Restatement of Restitution. 77 N.Y.2d at 376. That rule provides that "a creditor of another" that receives mistakenly transferred funds from a "third person," in discharge of a debt, has no duty to return the funds "if the transferee made no misrepresentation and did not have notice of the transferor's mistake." *Id*. at 367. Describing the Court of

Appeals' certification decision as "thorough and well reasoned," this Court found it a "facile task" to rule in the creditor's favor in the federal appeal. 928 F.2d at 540. *Banque Worms* has remained good New York law for the 30 years since and is now itself restated in Section 67 of the Restatement (Third) of Restitution and Unjust Enrichment. And this Court has never narrowed or questioned its own application of the discharge-for-value rule in *Banque Worms*.

This case involves a textbook application of that rule, as the district court correctly found. Appellees are fund managers ("Managers") for more than one hundred lenders ("Lenders") on a term loan issued by Revlon ("Term Loan"). On August 11, 2020, Lenders received payment from appellant Citibank, N.A. ("Citibank"), acting as Revlon's agent, in the exact amounts they were owed in principal and accrued interest. Late the next day, Citibank announced it had repaid the principal by mistake and demanded return of the funds. Lenders declined, and Citibank responded by filing this action.

After a six-day bench trial, at which it heard testimony from 18 fact and two expert witnesses and admitted over 2,300 exhibits, the district court entered judgment for Managers. The court concluded that *Banque Worms* governs and that here, as in *Banque Worms*, Lenders were paid what they were owed on an outstanding debt without notice of mistake, and thus that here, as in *Banque Worms*, Lenders are entitled to retain the wire transfers as "'final and complete

transactions[s], not subject to revocation.'" SPA__[Op.100] (quoting *Banque Worms*, 77 N.Y.2d at 373).

Citibank seeks to escape the controlling force of *Banque Worms* by asking this Court to engraft new requirements onto New York's discharge-for-value defense, by disregarding the district court's factual findings, and by making policy arguments (echoed by its *amici*) that amount to a thinly veiled suggestion that *Banque Worms* was wrongly decided. Those arguments fail. The New York Court of Appeals is the relevant policymaker here and the district court is the relevant trier of fact. The judgment below is legally correct, involves no clear factual error, and should be readily affirmed.

First, Citibank proposes that a loan must be "due" at the time of a mistaken payment for the defense to apply. But the Court of Appeals did not even mention the due date of the loan in *Banque Worms*, much less treat any "present entitlement" as necessary to its holding. And the Restatement provision the Court adopted as New York law applies where a creditor receives payment on an outstanding "debt," with no requirement that the debt be due.

Second, Citibank proposes that a creditor who receives a mistaken transfer must credit the debtor's account on its books before the discharge-for-value defense can apply. But *Banque Worms* rejected that requirement, as even Citibank's cited authorities recognize.

Third, Citibank asserts that Lenders should have suspected a mistake had occurred. But the district court properly found the opposite, concluding based on extensive factual findings that Lenders reasonably believed, when they were paid exactly what they were owed, that their loans had been repaid. The record amply supports those findings, which involve no error much less any clear error.

Finally, Citibank and its *amici* err in suggesting that *Banque Worms* was wrongly decided as a matter of policy. Thirty years of experience belie their sky-is-falling rhetoric about the supposed harm the discharge-for-value rule causes to financial markets. The Court of Appeals placed the onus of mistaken wire transfers on the banks that make them rather than on the innocent creditors who receive payment on their outstanding loans. The Court of Appeals stressed the importance of "finality in business transactions" as "a significant policy consideration" under New York law, 77 N.Y.2d at 372, and sought to ensure that creditors may treat wire transfers in repayment of loans as final upon receipt absent notice of error. For three decades since, the financial markets in New York have thrived, not suffered, under this rule. And that is no surprise, for the rule incentivizes banks to adopt internal controls that minimize mistaken transfers. The fact that Citibank made a rare and jaw-dropping mistake here—what the district court called "the proverbial 'Black Swan' event," SPA__[Op.69]—provides no reason for this Court to upset settled

New York law and relieve banks of their well-settled responsibility to prevent their own mistakes. This Court should affirm.

COUNTER-STATEMENT OF THE ISSUES ON APPEAL

1. Whether, under New York law, the discharge-for-value defense applies irrespective of an outstanding debt's due date.
2. Whether, under New York law, a loan is discharged when it is repaid and not later when the recipient makes a bookkeeping entry to reflect the payment.
3. Whether the district court correctly held based on its extensive factual findings that Lenders were not on notice of error when they received payment on their outstanding loans.

COUNTER-STATEMENT OF THE CASE

A. The Underlying Facts

This case arises in the syndicated loan industry, where "the vast majority" of loans are prepaid, and, indeed, it is the "normal course" for syndicated loans to be paid years before maturity. JA__-__[Trial.Tr.568:19-569:19] (Perkal (Brigade)); *see also* JA__[Trial.Tr.35:10-15] (Farrell (Citi)). The Term Loan here is governed by a credit agreement that specifically provides that Revlon "may at any time and from time to time prepay any Tranche of … Loans," JA__[DX-1044.at.-0105] (§2.11(a)), and that, if principal is prepaid, accrued interest is paid as well, JA__[DX-1044.at.-0063] (§1.1).

Managers are 10 fund managers whose clients include 126 Lenders on the Term Loan issued by Revlon. JA__-__[Case.No.1:20-cv-06539,Dkt.144-1,Ex.A.to.Joint.Pre-trial.Order.at.12-15]. Citibank was Revlon's administrative agent, and, in that capacity, made all principal and interest payments on Revlon's behalf. SPA__[Op.4].

On August 11, 2020, Citibank paid approximately $558 million to Lenders. SPA__-__[Op.9-16]. As the district court noted and "Citibank's own witnesses acknowledged," "the amounts received matched—to the penny—the amounts of principal and interest outstanding" on the Term Loan for each Lender. SPA__[Op.66]. Transaction confirmations accompanying each payment accurately listed the total amount each Lender was paid, and a separate calculation statement reported an amount of interest that was then "due." SPA__-__[Op.15-16]. Given that August 11 was not a scheduled interest payment date, interest would have been due under the terms of the credit agreement only if the transfer were a prepayment of principal. SPA__[Op.69].

The day after the payments, Citibank determined it had sent the principal amounts by mistake. SPA__-__[Op.16-18]. Several hours after it identified its mistake, Citibank sent recall notices to Lenders, notifying them that the "principal" payments had been made in error, and demanding the funds be returned. SPA__-__[Op.18-19]. Lenders declined to return the funds. SPA__-__[Op.19-26].

B. The Proceedings Below

Citibank filed three complaints, later consolidated for trial, asserting common law causes of action against Managers for unjust enrichment, conversion, money had and received, and payment by mistake, and sought restitution. JA__, __, __[Case.No.1:20-cv-06539,Dkt.1;Case.No.1:20-cv-06617,Dkt.1;CaseNo.1:20-cv-06713,Dkt.1]. In answering, Managers invoked the discharge-for-value defense. JA__, __, __[Case.No.1:20-cv-06539,Dkts.128,129,130]. Shortly after the first complaint was filed, the district court granted Citibank's request for a temporary restraining order ("TRO"), reasoning that "discharge for value" is an affirmative defense that defendants had yet to prove. JA__, __, __[Case.No.1:20-cv-06539,Dkt.25,Order.Granting.TRO;Aug.19,2020.Hr'g.Tr.at.4,8].

At trial, Citibank's witnesses, including five operations people involved in the August 11 wire transfer or its aftermath, described Citibank's mistake. They testified they were intending to execute a "roll-up" transaction for a group of Term Loan lenders managed by Angelo, Gordon and Co. ("Angelo Gordon")—not including Lenders here.[1] Because of a limitation in its technology system, Citibank decided to also pay "interim interest" to all other lenders. SPA__-__[Op.9-10].

[1] A May 20 amendment to the credit agreement had led Revlon and Citibank to give certain lenders, like Angelo Gordon (but not Lenders in this case), the option to have their loans repurchased, or "rolled up," as an incentive for their support of the amendment. SPA__-__[Op.7-9].

Lenders were unaware of either the roll-up transaction or Citibank's decision to pay interim interest. SPA__[Op.67]. While Citibank planned to send the principal amounts to an internal "wash account," all the funds were instead sent to the lenders directly. SPA__, __[Op.11,16]. Citibank thus paid the entire amount of principal and interest then outstanding, a total of $893,944,008.52, with approximately $558 million going to Lenders here. SPA__, __[Op.5,18].[2] An employee at Wipro—a Citibank contractor involved in executing the wire transfers—first discovered the mistake on the morning of August 12, 2020, and that afternoon, Citibank began sending recall notices. SPA__-__[Op.16-19].

"Every defense fact witness testified that (to the extent he or she knew about the transfers before learning of the recall notices) he or she believed in good faith that the payments were an intentional full paydown of the outstanding principal and interest on the 2016 Term Loan." SPA__[Op.65]; *see* SPA__-__[Op.71-72]. The district court found this testimony "strikingly consistent" and "both credible and persuasive," based "in no small part on its assessment of the witnesses' demeanor at

[2] Certain lenders returned funds after Citibank issued recall notices, but the district court ruled that no inference may be drawn from that fact. JA__[Case.No.1:20-cv-06539,Dkt.123]. Managers sought discovery as to whether those lenders had concluded the wire transfers were by mistake only after the recall notices and not at the time of payment, and to determine whether Citibank had exerted commercial pressure to secure return of the funds, such as discontinuing key banking services. The trial court declined to order such discovery but prohibited Citibank—given the absence of discovery—from arguing that any inference could be drawn from the actions of those lenders. *Id.*

trial." SPA__[Op.66]. Managers' witnesses testified, for example, they had never seen a mistaken payment in the exact amount owing on an outstanding loan. SPA__[Op.67]. Several testified that they considered it inconceivable that Citibank could have made the August 11 transfers by mistake. SPA__[Op.65]. Several of Managers' witnesses also testified that Revlon was known to have the financial backing of its principal shareholder, billionaire Ronald Perelman, and that he had a reputation for raising substantial capital to pay off the company's debts and avoid bankruptcy. SPA__-__[Op.90-91].

Citibank's own witnesses corroborated that the August 11 wire transfer reasonably appeared to its recipients to be a prepayment of the Term Loan and not a mistake. SPA__-__[Op.70-71]. Citibank's witnesses conceded that, unlike "a so-called 'fat finger' mistake," the amount Citibank paid to Lenders was the same amount as if the Term Loan were being prepaid. SPA__-__[Op.66-67]. And "not one fact witness, on either side of this case" could recall any instance in which a bank ever mistakenly paid the exact amount outstanding on a loan. SPA__[Op.67]. Nor could Citibank's witnesses identify any instance where Citibank or any bank "had made an error of similar magnitude." SPA__[Op.68]. Moreover, Citibank's witnesses conceded Lenders were never notified that Citibank intended to make an interest-only payment in connection with a roll-up transaction for Angelo Gordon. SPA__[Op.67]. Finally, the calculation statements "characterized the interest

payments as 'due,'" SPA__[Op.69], which would have been true under the terms of the credit agreement only if the Term Loan were being prepaid, and nowhere indicated the payments had been made in error, SPA__-__[Op.83-84].

Citibank's own witnesses therefore acknowledged Lenders had no reason to conclude that the funds were sent by mistake. They called the mistake "shocking" and "not an obvious mistake," SPA__[Op.84], and testified that Citibank sent the recall notices only because Citibank did not expect Lenders would have otherwise concluded that the payments were sent by mistake, SPA__-__[Op.70-71].

C. The District Court Decision

The district court ruled in Managers' favor after trial, setting forth its findings and conclusions in a meticulous and carefully reasoned 101-page order. SPA__-__[Op.1-101]. The court concluded that *Banque Worms* applies, the transfers are irrevocable, and Lenders are entitled to keep the funds. SPA__[Op.100]. Because the discharge-for-value defense is a "complete defense to each of Citibank's causes of action," the court did not separately decide whether Citibank made out the *prima facie* elements of its claims. SPA__[Op.36].[3]

The district court explained that *Banque Worms* applies because:

> it is undisputed that, as of August 11, 2020, the Non-Returning Lenders were *bona fide* creditors of Revlon. It is also undisputed that, on that

[3] Thus, Citibank would still have to prove its claims on any remand. JA__-__[Case.No.1:20-cv-06539,Dkt.280("Stay.Order").10-11] ("[A] judgment in Citibank's favor … would require more than mere reversal.").

> date, each of them was owed – in principal and interest – the exact amount of money received from Citibank. And finally, it is undisputed that [Managers] and their clients made no misrepresentations to induce the mistaken wire transfers.

SPA__[Op.64] (citations omitted). The district court also determined, based on extensive factual findings, that Managers and Lenders were reasonable in not knowing that the transfer had been by mistake. SPA __-___[Op.64-93]. And the district court specifically rejected each argument Citibank now presses on appeal.

First, the district court rejected Citibank's argument that the discharge-for-value defense applies "only when a debt is 'due.'" SPA__-__[Op.43-46]. The court observed there is no language imposing such a requirement in "Section 14 of the *Restatement*, which was explicitly adopted by the New York Court of Appeals in *Banque Worms*"; that the state and federal decisions in *Banque Worms* focused not on the due date of the loan but rather on the fact that the fund recipient was a "*bona fide* creditor"; and that there is no precedent describing a "present entitlement" requirement, while courts have applied the defense even where "the recipient of the funds did *not* have a legal entitlement to them at the time of receipt." SPA __-__[Op.44-45] (citing authority).

Second, the district court rejected Citibank's argument that the discharge-for-value defense attaches, not at the time of payment, but only later when the recipient credits the payment in its books. SPA__-__[Op.46-47]. The court observed that its ruling was "compelled" by *Banque Worms*, which rejected a similar "bookkeeping"

requirement. SPA__[Op.47] (quoting *Banque Worms v. Bank America Int'l*, 726 F. Supp. 940, 942 (S.D.N.Y. 1989)). The court also distinguished Citibank's cited authority, including *NBase Commc'ns, Inc. v. Am. Nat'l Bank & Trust Co. of Chi.*, 8 F. Supp. 2d 1071 (N.D. Ill. 1998), which "explicitly 'disagree[d] with *Banque Worms*[]' on this point." SPA__-__[Op.49-50] (alterations in original).

Third, the district court held that Managers and Lenders were not on constructive notice that Citibank had transferred funds by mistake under any formulation of the constructive notice standard. SPA__-__[Op.63-93]. The court credited testimony that, at the time the payments were received, they appeared to be "an intentional full paydown of the outstanding principal and interest on the 2016 Term Loan," and detailed numerous facts supporting the conclusion that such an inference was reasonable, SPA__-__, __-__[Op.65-66, 71-77].

After briefing and argument, the district court denied Citibank's motion for an injunction pending appeal. JA__-__[Stay.Order].

SUMMARY OF ARGUMENT

The district court correctly held that this case is governed by the discharge-for-value rule set forth by the New York Court of Appeals and applied by the district court and this Court in *Banque Worms*. That rule provides that a creditor that receives an amount owed on an outstanding debt is entitled to keep those funds, even if they were mistakenly transferred, "if the transferee made no misrepresentation and

did not have notice of the transferor's mistake." It is undisputed that Lenders were *bona fide* Revlon creditors, that they made no misrepresentations, and that each was paid the exact amount it was owed. And the trial court correctly held, based on its factual findings at trial, that no Lender would have reasonably believed that the payments were a billion-dollar mistake rather than loan prepayments. Citibank's arguments that the trial court erred are unavailing.

First, Citibank errs as a matter of New York law in seeking to engraft onto *Banque Worms* a new requirement that the discharge-for-value defense applies only if a mistaken payment occurs on or after a loan's due date. The district court correctly rejected this "present entitlement" argument. In *Banque Worms*, the Court of Appeals never mentioned the loan's due date, much less treated it as dispositive or even relevant to its analysis. The Court of Appeals and the district court and this Court instead focused in *Banque Worms* on the fact that the lender there was a "*bona fide* creditor," just as Lenders were here. Moreover, the Court of Appeals' two main policy rationales for adopting the discharge-for-value rule preclude any "present entitlement" requirement. Those rationales are to ensure finality in financial transactions and to place the onus of mistaken wire transfers on the banks that make them rather than on innocent creditors. And those rationales apply equally whether a loan is outstanding or presently due.

Second, Citibank errs as a matter of New York law in seeking to engraft onto *Banque Worms* a new requirement that the discharge-for-value rule applies only when the recipient of a mistaken transfer "credits" the payment in its books, rather than at the time of payment. The district court in *Banque Worms*, affirmed by this Court, rejected such a requirement as "mere bookkeeping." Citibank cites contrary precedent, but that precedent expressly rejects the New York law that governs here. And as the district court recognized, Citibank's proposed standard would be difficult to apply as a practical matter, and would lead to arbitrary results, turning on if and when and how individual creditors or custodians happened to make book entries.

Third, the clear error standard of review precludes Citibank's attempt to overturn the district court's factual findings underpinning its holding that Managers and Lenders were not on constructive notice of Citibank's mistake. Those findings are amply supported by the record, which makes clear that no bank has ever made a mistake of the kind Citibank made here; the transfers were in the exact amount of a prepayment of the loan owed to each Lender; and the calculation statements said interest was "due," which would have been true, per the credit agreement, only if, as often occurs in the syndicated loan business, the loans were being prepaid. Citibank's own witnesses admitted there was no basis to conclude, at the time of the transfers, that there had been a mistake.

Finally, Citibank and its *amici* err in advancing the same policy arguments the New York Court of Appeals rejected in *Banque Worms*. The Court of Appeals settled on a rule that imposes the cost of a mistaken wire transfer on the bank that makes it, not on the *bona fide* creditor that receives it. That policy judgment has proven sound in the thirty years since *Banque Worms* was decided. By adopting a rule that places the onus of mistaken transfers on banks rather than on innocent creditors, the Court of Appeals created incentives for the banking industry to have strong controls in place to avoid errors, a salutary result that helps explain why Citibank's error here was so aberrant. There is no reason to change this settled state law, even if a federal court sitting in diversity could do so.

ARGUMENT

The district court correctly applied the discharge-for-value defense as set forth in *Banque Worms*, a case in which the Southern District of New York, the New York Court of Appeals, and this Court all agreed that a *bona fide* creditor could keep, in discharge of a debt, funds that a bank mistakenly wired on behalf of a third party to one of its creditors. In *Banque Worms*, a bank (Security Pacific International Bank) mistakenly wired funds on behalf of its accountholder (Spedley Securities, Ltd.) in payment of a loan outstanding to Spedley's *bona fide* creditor (Banque Worms). *Banque Worms*, 726 F. Supp. at 940. Security Pacific notified BankAmerica, which had received the funds for its accountholder Banque Worms, of its mistake only after

the transfer was completed (two hours later, on the same day). *Id.* at 942. Neither BankAmerica nor Banque Worms made any misrepresentation or otherwise induced the mistaken transfer. *Id.*

On these facts, the district court held that Banque Worms was entitled to keep the funds, relying on the discharge-for-value defense as set out in Section 14 of the then-current Restatement of Restitution. *Id.* at 941-43. That section provides that a "creditor" who receives funds from a third party is entitled to retain those funds in discharge of an outstanding "debt," where the payment was by mistake, "if the transferee made no misrepresentation and did not have notice of the transferor's mistake." Restatement (First) of Restitution §14. On appeal, this Court, recognizing that its holding would "undoubtedly have a significant impact on banks," certified to the New York Court of Appeals the question of whether New York law follows Restatement Section 14. *Banque Worms*, 928 F.2d at 541 (Altimari, J., joined by Mahoney, J. and Pollak, D.J., sitting by designation). The Court of Appeals issued a detailed opinion answering the certified question "yes," *Banque Worms*, 77 N.Y.2d at 376 (Alexander, J., joined by Wachtler, C.J., and Simons, Kaye, Titone, Hancock and Bellacosa, JJ.), and this Court then readily affirmed the district court, holding that the defense was satisfied because there was a "mistaken[] transfer[]" to a "*bona fide* creditor" that "did not have notice of the transferor's error," *Banque Worms*, 928 F.2d at 541.

The facts here closely track the facts in *Banque Worms*. Just as in *Banque Worms*, a bank (Citibank) mistakenly wired funds on behalf of a borrower (Revlon); Citibank transferred the funds to Revlon's *bona fide* creditors (Lenders); Citibank wired each Lender the exact amount it was owed in principal and accrued interest on the Term Loan; Citibank first notified Lenders of its mistake after the transfers were completed (twenty hours later, on the next day); and neither Managers nor any Lender made any misrepresentation or otherwise induced the mistaken transfers. Thus, just as in *Banque Worms*, the "undisputed facts" that the bank transferor sent funds by mistake to "creditor[s]," who made no "misrepresentation" and were notified of the error only after it occurred, makes application of the discharge-for-value rule "particularly appropriate." 77 N.Y.2d at 376.

The district court's decision is thus a faithful application of binding New York precedent, and not, as Citibank wrongly asserts (Br. 20), an "expansion" of it. None of Citibank's arguments for avoiding application of the discharge-for-value defense set forth in *Banque Worms* is persuasive. Citibank asks this Court (Br. 21, 29) to manufacture new "element[s]" that have never been adopted as New York law. "[T]he proper function of the [] federal court," however, "is to ascertain what the state law is, not what it ought to be." *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 497 (1941). And New York law is clear: *Bona fide* creditors are entitled to

retain third-party wire transfers, in satisfaction of an outstanding debt, where there was no notice of a mistake. This Court should affirm.

I. THE DISTRICT COURT CORRECTLY HELD THE DISCHARGE-FOR-VALUE DEFENSE DOES NOT REQUIRE A "PRESENT ENTITLEMENT" TO MISTAKENLY TRANSFERRED FUNDS

Citibank contends the discharge-for-value defense includes, as an "element" (Br. 21), that a creditor must have a "present entitlement" to the funds it receives. There is no such element and creating one would be inconsistent with the rationales the Court of Appeals gave for its holding in *Banque Worms*.

A. There Is No "Present Entitlement" Requirement In *Banque Worms* Or The Restatement

Citibank would read into *Banque Worms* a requirement that does not exist. The Court of Appeals stated the requirements for application of the discharge-for-value defense: "[a] creditor of another" who, without notice of a mistake, receives payment on a "debt … is under no duty to make restitution therefor." 77 N.Y. 2d at 367 (quoting Restatement (First) of Restitution § 14). The Court did not say the debt must be due or mention any "present entitlement" requirement. The Court did not even mention that the loan in that case was due at the time of the mistaken transfer, much less treat that fact as necessary to its holding. Nor did the district court or this Court suggest this fact was relevant to the analysis. It is implausible that the New York Court of Appeals, in its decision setting out the requirements for the discharge-

for-value defense, intended to include as a necessary "element" a due-date requirement that it never even mentioned.

Citibank cannot derive such a requirement from its strained reliance (Br. 21) on *Banque Worms*' reference to "someone who 'is entitled' to the 'money.'" All creditors are entitled to be repaid on their loans, regardless of the due date for repayment,[4] and that is exactly how *Banque Worms* used that language. Indeed, the Court of Appeals said Banque Worms was "entitled" to the funds "*as a creditor of Spedley*"—not because payment was due. 77 N.Y.2d at 376 (emphasis added). Likewise, this Court held that Banque Worms was "entitled to retain the mistakenly transferred funds," again, not because payment was then due, but because "Banque Worms was Spedley's *bona fide* creditor." 928 F.2d at 541. Lenders here too were "*bona fide* creditors" and thus "entitled" to the amounts owing on their outstanding loans on the same basis that the Court of Appeals and this Court held that Banque Worms was entitled to the amounts it received.

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[4] If a creditor is paid early on a debt, she has not been given money she was not entitled to. She has simply been given that money before the deadline for payment. The credit agreement here expressly provided for prepayment, JA__[DX-1044.at.-0105], and Lenders were therefore entitled to be repaid on or before the maturity date on the Term Loan. Thus, Citibank's argument is not really that Lenders were not entitled to the funds because they were paid early; it is that Lenders were not entitled to the funds because they were paid by mistake. And that is the exact argument *Banque Worms* rejected.

Nor can Citibank conjure a due date "element" from Section 14 of the Restatement on which *Banque Worms* relied. Citibank admits (Br. 14) that section does not "expressly address the timing issue" but asserts (Br. 26) that its illustrations "all contemplate a transferee with a present entitlement to the funds or are consistent with one." That characterization is wrong. *See* Restatement (First) of Restitution § 14, Illustrations. There is nothing about reference to a "tax payment[]" or "promise to pay" (Br. 26), for instance, that suggests anything about the due date for payment. Moreover, at least two of the illustrations—those involving payments to satisfy outstanding mortgages in order to free up collateral—would most naturally involve loans not yet due. *See id*., Illustrations 1, 6. And none of the illustrations, which all describe scenarios in which the discharge-for-value rule would apply, specifies that the subject loan was due, providing strong indication that application of the rule does not silently turn on that fact.

Citibank tellingly ignores the current version of the Restatement, which is not silent on this issue at all. *See* Restatement (Third) of Restitution and Unjust Enrichment § 67 (2011) (restating the dominant rule that a *bona fide* creditor may retain mistaken transfers under the discharge-for-value defense, citing *Banque Worms*, *see* Illustration 1 & cmt. b). Comments to the relevant section say the defense applies where a creditor has "something short of an enforceable right," *id*. cmt. c. This principle applies to payments a recipient is eligible to receive, even if

payment is not required at the time made. *See, e.g.*, *Chase Manhattan Bank v. Burden*, 489 A.2d 494, 497 (D.C. 1985) (rejecting restitution claim by bank that made mistaken transfer, notwithstanding that "Burden may have had no legal claim to the $15,000, since Williams, as the general partner, had complete discretion under the partnership agreement to distribute partnership capital"). That, of course, describes the situation in which a creditor is paid on an outstanding loan before maturity. Citibank strains (Br. 28) to distinguish *Burden* as involving "a present entitlement—just not a 'legal' one." Even assuming there is such a thing as a non-legal "entitlement," the fact remains that the payment in *Burden* was entirely discretionary, meaning there was no amount due.

In sum, Citibank proposes a due date exception to the discharge-for-value defense that the Restatement rejects and New York law has never adopted. "A federal court … is not free to engraft onto [] state rules exceptions or modifications which may commend themselves to the federal court, but which have not commended themselves to the State in which the federal court sits." *Day & Zimmermann, Inc. v. Challoner*, 423 U.S. 3, 4 (1975).

B. A "Present Entitlement" Requirement Contradicts *Banque Worms*' Stated Rationales

Even if this Court could rewrite New York law, Citibank's proposed "due date" requirement should be rejected as contrary to the policy rationales on which the New York Court of Appeals relied for its holding in *Banque Worms*.

First, as Citibank recognizes (Br. 23), the Court of Appeals emphasized the need for finality in commercial transactions. *Banque Worms* called finality a "singularly important" goal that "has long been a significant policy consideration in this State." 77 N.Y.2d at 372. The Court of Appeals explained that a creditor who receives payment on an outstanding debt, without knowledge "that the money was erroneously wired," "should not have to wonder whether it may retain the funds." *Id*. at 373; *see also Gen. Elec. Capital Corp. v. Central Bank*, 49 F.3d 280, 284 (7th Cir. 1995) ("*GECC*") (Easterbrook, J.) ("Exposing creditors who thought that their debts had been paid off to a lengthy period of uncertainty during which they might be required to reverse the transfer would be the equivalent of pouring molasses on the payments system."). Under Citibank's proposed standard, a creditor who receives payment on an outstanding loan before it comes due would have to do exactly what *Banque Worms* seeks to avoid—*i.e.*, "wonder whether it may retain the

funds," 77 N.Y.2d at 373, and delay in using those funds until resolving that uncertainty.[5]

Citibank tries to avoid this problem by arguing (Br. 22, 25) that early payment on a loan does not occur in the "usual" or "ordinary course of business," and that such a transfer "therefore does not carry with it the kind of 'certainty' that the concern for finality is meant to protect." But the discharge-for-value defense is not meant to "protect" certainty that already exists; it is meant to provide certainty to creditors who would otherwise be left to wonder whether a payment that appears valid was sent by mistake. *Banque Worms*, 77 N.Y.2d at 373. More important, Citibank's premise that early payment on a loan is not the "usual" course of business is false. The district court heard testimony that "the vast majority" of syndicated loans are prepaid, often years before they come due, in the "normal course" of business, JA__-__[Trial.Tr.568:19-569:19] (Perkal (Brigade)). Even Citibank's witnesses agreed prepayment is not uncommon, JA__[Trial.Tr.35:10-15] (Farrell (Citi)). The credit agreement for the Term Loans expressly provides for prepayment,

[5] Although Citibank seeks to change the result here, banks often benefit from rules promoting finality. *See, e.g.*, *Chem. Bank of Rochester v. Haskell*, 51 N.Y.2d 85, 93 (1980) (finality in commercial paper transactions); *Targoff v. Wells Fargo Bank, N.A.*, 67 Misc. 3d 504, 506-07 (N.Y. Sup. Ct. 2020) (finality in account names).

JA__[DX-1044.at.-0105] (§2.11(a)), as do credit agreements generally.[6] Thus, early payments on outstanding loans cannot be excluded from the discharge-for-value defense on the basis that such payments do not occur in the "ordinary course of business"—frequently they do.

Further, Citibank's concern that the defense should not apply where early payment on a loan does not seem "ordinary" or "usual" is already fully addressed by the requirement that discharge does not occur where the recipient of a transfer is on notice of a mistake. *Banque Worms*, 77 N.Y.2d at 376. Indeed, any transferor bank is free to argue, as Citibank does here, that an early payment on a loan appeared mistaken on the particular facts of the case. *See infra* Part III. But there is no reason that a creditor who receives payment before a loan is due should be categorically excluded from invoking the defense, particularly where prepayment is a standard feature of syndicated lending.

Second, the Court of Appeals held that risk should be allocated to the bank transferor responsible for a mistaken transfer, and not to the innocent transferee. The Court of Appeals reasoned that placing the onus of mistaken transfers on the banks

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[6] *See, e.g.*, S&P Global Market Intelligence, Leveraged Loan Primer, https://tinyurl.com/4sr8sfh2 (last visited June 18, 2021) ("Unlike most bonds, which have long no-call periods and high-call premiums, most loans are prepayable at any time," and "an issuer's behavior is unpredictable. It may repay a loan early because a more compelling financial opportunity presents itself or because the issuer is acquired, or because it is making an acquisition and needs a new financing.").

that make them would incentivize those banks to "utiliz[e] … 'commercially reasonable' security procedures." *Banque Worms*, 77 N.Y.2d at 375; *see also GECC*, 49 F.3d at 284 (agreeing with *Banque Worms* that the "[c]osts of errors should be borne by those who make errors (the better to induce them to take care) rather than by innocent beneficiaries"). Citibank cannot plausibly deny the district court's observation, SPA__[Op.98], that "[h]ere, there is no doubt that the party best positioned to avoid the error that occurred was Citibank."

Citibank errs in responding (Br. 25) that "a creditor with no present entitlement does not 'lose' anything when the transfer is reversed," leaving "no need to allocate loss." The "loss" *Banque Worms* was allocating is not limited to the loss of the specific amount of a mistaken transfer; it encompasses the transaction costs that must be borne by some party whenever mistaken transfers occur or might occur. The Court was choosing whether, absent notice of error, the recipient of a transfer or the transferor should bear the burdens of guarding against the possibility of a mistake. *Banque Worms* chose the transferor. 77 N.Y.2d at 372-73. In any event, Citibank is wrong to assert (Br. 25) that the district court's holding "creates a loss where none would otherwise exist." Citibank has represented in its SEC filings that it has stepped into the shoes of Lenders and "now has rights as a creditor" on the Term Loan. JA__[Dkt.255.Ex.A.Citigroup.Inc.Annual.Report at.116] (Form 10-K); *see GECC*, 49 F.3d at 286 ("Even the absence of indemnity does not necessarily

leave Central Bank with a loss. On paying GECC, Central Bank will be subrogated to all of GECC's rights against Duchow.").

C. No Precedent Supports Citibank's Proposed New Requirement And Many Cases Refute It

Citibank fails to identify a single case, anywhere in its survey of precedent going back more than one hundred years, in which a court rejected the discharge-for-value defense on grounds that a loan was outstanding, but not due. Citibank is also wrong in its sweeping claim (Br. 28) that there are "no cases applying the discharge-for-value defense in the absence of a present entitlement." There are multiple examples. *See, e.g.*, *Burden*, 489 A.2d at 497 (no restitution required where bank mistakenly used its own funds to pay partnership distribution notwithstanding that the recipient had "no legal claim" to payment since distributions were at the "complete discretion" of the general partner); *Ericsson Inc. v. Corefirst Bank & Trust*, No. 2017 WL 3053646, at *5 (D. Kan. July 19, 2017) (holding that defendant bank was under no obligation to return mistaken overpayment by plaintiff to bank's accountholder, where bank used the funds to set off amounts owing on its accountholder's credit cards);[7] *Nat'l Bank v. FCC Equip. Fin., Inc.*, 801 N.W.2d 17, 21-22 (Iowa Ct. App. 2011) (affirming summary judgment for defendant on

[7] *Ericsson* involved credit card debt set off on December 26, 2013, but which was not due to be paid until January 25, 2014. *Ericsson Inc. v. Corefirst Bank & Trust*, No. 2:15-CV-09301 (D. Kan.), Ex. 9 to Mot. for Summ. J. at 1 (Dkt. 32-11).

discharge-for-value defense where bank attempted to pay off a lien on an outstanding loan to facilitate a new loan, secured by the same collateral, by another lender).

Citibank is also wrong to suggest (Br. 22) that "every decision" cited in *Banque Worms* where restitution was denied "involved a present entitlement." One cited case involved payment on a loan not yet due, *N.Y. Title & Mortg. Co. v. Title Guarantee & Trust Co.*, 206 A.D. 490 (1st Dep't 1923);[8] one said nothing about the payment due date, *State Farm Mut. Auto. Ins. Co. v. Stokos*, 317 N.Y.S.2d 706 (Civ. Ct. Queens Cty. 1970) (denying restitution where insurer paid garage for car repairs on mistaken understanding that the driver was insured, with no indication whether service invoice was past due); and another did not involve a loan or due date at all, *Stephens v. Bd. of Educ. of Brooklyn*, 79 N.Y. 183, 185 (1879) (denying restitution in case involving "wrongful[] conver[sion]"). Citibank also relies on *Carlisle v. Norris*, 109 N.E. 564 (N.Y. 1915), which referred only to a payment being "due them," *i.e.*, due to the recipient, *id*. at 569. And as the district court observed (JA__[Stay.Order.7]), a payment is due to the recipient regardless of whether it must

[8] Contrary to Citibank's description, the loan in *N.Y. Title* that was "then due" (Br. 23) was not the loan repaid by the disputed transfer. Rather, that language referred to a loan paid off on December 2, 1909, when the borrower "completed the payment of the amount then due upon the foreclosure judgment." 206 A.D. at 492. The borrower then borrowed an additional $8,000 on a mortgage on January 15 and 19, 1910, *id.*, and it was that new loan that the plaintiff paid, less than one month later, on February 17, 1910, in the disputed transfer. It is exceedingly unlikely that a full mortgage was due 29 days after the money was lent, and, indeed, the payment was "voluntary." *Id*. at 493, 498.

be paid on that particular date. *See* BLACK'S LAW DICTIONARY (11th ed. 2019) ("due" can mean either "[i]mmediately enforceable" or "[o]wing or payable; constituting a debt").

Citibank's effort to cobble a due date requirement from pre-*Banque Worms* precedent fails for the added reason that the Court of Appeals in *Banque Worms* did not treat that precedent as stating the modern governing standard under New York law. Rather, the Court cited *Carlisle* as an example of one of two "divergent" lines of historical authority. *Banque Worms*, 77 N.Y.2d at 368.[9] The Court then adopted the defense in the modern context of wire transfers as set out in the Restatement, which provides that a "bona fide" creditor (like Lenders here) is entitled to retain payment on a "debt" (like the Term Loan here), where there was no notice of a mistake. *Banque Worms*, 77 N.Y.2d at 373.

The only modern New York authority Citibank relies on (Br. 23) highlights the defect in its argument. In *A.I. Trade Finance, Inc. v. Petra Bank*, 1997 WL 291841 (S.D.N.Y. June 2, 1997), the discharge-for-value defense did not apply because the party invoking the defense held an order of attachment that would entitle it to payment only if another party prevailed in a pending lawsuit. *Id*. at *4. Thus,

[9] Citibank's insistence (Br. 27-28) that *Carlisle* provided clear precedent establishing the parameters of the discharge-for-value defense prior to *Banque Worms* ignores that "the lack of clear precedent" was the very reason this Court certified. 928 F.2d at 540.

the reason there was no "present entitlement" was not because payment was not yet due, but because *there was no confirmed right to be paid at all*. A "*bona fide* creditor" has that right and is therefore "entitled" to what it is owed. *Banque Worms*, 77 N.Y.2d at 376; *Banque Worms*, 928 F.2d at 541.

In sum, there is no due date requirement under New York law, and no reason this Court should create one.[10]

II. THE DISTRICT COURT CORRECTLY HELD THAT THE DISCHARGE-FOR-VALUE DEFENSE APPLIES UPON PAYMENT

Citibank also errs in arguing (Br. 29-30) that a loan is not discharged at the time payment is received, but only later when the recipient "credit[s] the debtor's account" by entering the payment "on its books," thereby giving "valuable consideration." As the district court recognized, *Banque Worms* rejected this "mere bookkeeping" requirement. SPA__[Op.47] (quoting 726 F. Supp. at 942). Citibank is therefore left to rely (Br. 30-31) on non-New York precedent, but even its own cited authority—which declined to follow the New York law that governs here—recognizes that *Banque Worms* forecloses the same argument Citibank is now making.

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[10] If a loan needs to be due for the defense to apply, that condition is satisfied here. Even if the Term Loan was not discharged when paid on August 11, it was accelerated on August 12, before Citibank sent its recall notices, pursuant to a notice of default, under Section 8.1 of the credit agreement, that rendered it "immediately due and payable." JA__[PX-172]. Such evidence would need to be considered on remand if the Court adopted Citibank's "due date" argument.

A. New York Law And The Restatement Have Rejected Citibank's Proposed Bookkeeping Requirement

All three courts in *Banque Worms* applied the discharge-for-value defense based on receipt of the disputed funds, without regard to whether or when the recipient later credited the debtor's account. *See Banque Worms*, 726 F. Supp. at 942 (rejecting as "mere bookkeeping" any requirement that discharge must await a "final settling of the accounts"); *Banque Worms*, 928 F.2d at 541 (discharge occurred "[a]t the time [the creditor] received the mistaken payment"); *Banque Worms*, 77 N.Y.2d at 373 (discharge occurred "when [the creditor] receive[d] money"). As the district court in *Banque Worms* ruled, "any awareness by [Banque Worms] of SPIB's mistake two hours after the funds were transferred by wire is not material." 726 F. Supp. at 942. This Court, by affirming that ruling, demonstrated that it too "viewed the relevant time as the moment of payment." SPA__[Op.48].

Citibank's own cited authorities recognize that New York law rejects its proposed bookkeeping requirement. It cites (Br. 31) *NBase*, which adopted a bookkeeping requirement under Illinois law because it expressly "decline[d]" to follow New York law. 8 F. Supp. 2d 1071, 1076 (N.D. Ill. 1998). And contrary to Citibank's suggestion (Br. 35-36), *NBase* did not "assume" *Banque Worms* rejected that requirement. Rather, *NBase* examined *Banque Worms*, explaining that New York's "policy goal of finality in business transactions" prompted the Court of Appeals to hold that "creditors should be able to keep mistaken payments upon

receipt." *NBase*, 8 F. Supp. 2d at 1076. And *NBase* "disagree[d] with *Banque Worms'* approach" specifically because "it protects creditors who have done nothing more than receive a mistaken payment." *Id*. The Sixth Circuit precedent (applying Kentucky law) Citibank relies on itself relies primarily on *NBase*, and thus also contradicts New York law. *In re Calumet Farm, Inc.*, 398 F.3d 555, 560-61 (6th Cir. 2005).[11]

Citibank's reliance on the Restatement (Br. 29) is equally misplaced. The current Restatement addresses this issue squarely, and, siding with *Banque Worms* over *Calumet* and *NBase*, rejects the very bookkeeping requirement Citibank asks this Court to impose. Restatement (Third) of Restitution and Unjust Enrichment § 67 cmt. h (rejecting requirement, attributed to *NBase* and *Calumet*, that a creditor must "give value" by "crediting the debtor's account" as "arbitrary, difficult to verify, and subject to manipulation" (citing *Banque Worms*, 77 N.Y.2d at 373)).

Citibank's own authorities also reject its premise that booking a payment is necessary to provide value to the transferor. One of Citibank's cited treatises

[11] *Calumet* acknowledged language by the Court of Appeals in *Banque Worms* that "the notice must occur before the funds arrive," but dismissed it on grounds that the Court of Appeals was focused on "whether the discharge-for-value rule applies … , not how it applies." *Calumet*, 398 F.3d at 559. As the district court observed, however, *Calumet* failed to acknowledge the federal decisions in *Banque Worms*, both of which "necessarily did consider how the discharge-for-value rule applied—including a determination that the point the funds were received was the critical moment—in holding that Banque Worms successfully invoked it." SPA__[Op.50].

explains that "receipt of the plaintiff's funds in payment of … the debt of a third person is value." 3 Palmer, Law of Restitution § 16.6. A New York statute on point and other authorities agree. N.Y. Debt. & Cred. Law § 272 ("Value is given for a transfer … if, in exchange for the transfer … an antecedent debt is … satisfied"); *Greenwald v. Chase Manhattan Mortg. Corp.*, 241 F.3d 76, 79 (1st Cir. 2001) ("[T]he discharge of the antecedent debt is value."); Restatement (First) of Restitution § 173 ("Value") ("[A] transfer of property … in satisfaction of … a pre-existing debt or other obligation is a transfer for value."). Thus, there is no requirement that Lenders take any steps to provide "value" beyond simply accepting the funds in discharge of the Term Loan. *Id.*; *see McCrea v. Purmort*, 16 Wend. 460, 474 (N.Y. 1836) ("The payment of the money discharges or extinguishes the debt; a receipt for the payment does not pay the debt, it only evidences that it has been paid.").

In the face of New York's widely recognized rejection of a bookkeeping requirement, Citibank's critique of the appellate briefing in *Banque Worms* as "not entirely clear" (Br. 33) is beside the point. But to the extent relevant, Security Pacific did clearly challenge the district court's ruling in *Banque Worms* that discharge is determined at the time of payment, and not later when accounts are "settled." Indeed, Security Pacific argued against such a standard because it affords the transferring bank no "window" to provide notice of the error and secure return of its

funds. JA__-__[Case.No.20-cv-06539,Dkt.Nos.142-1,42-2("Brief.of.Third.Party-Defendant.Appellant.Security.Pacific.International.Bank")]. And regardless of how crisply argued in *Banque Worms*, the question of timing was not "lurk[ing] in the record" (*contra* Br. 35), and there is no need to wade through old briefs to "divine" what this Court meant. The district court placed the issue front and center when it held it was "not material" that the bank transferor provided notice of its mistake two hours after the transfer because the discharge defense does not turn on "mere bookkeeping." *Banque Worms*, 726 F. Supp. at 942. And this Court affirmed in full, holding that all arguments not expressly discussed were "without merit." *Banque Worms*, 928 F.2d at 542.

Finally, Citibank's position is incompatible with *Banque Worms* for the added reason that it would, in essence, impose the very "detrimental reliance" requirement *Banque Worms* rejected. Citibank responds (Br. 37) that its bookkeeping requirement would not necessarily be a "sufficient 'change in position'" to constitute reliance. But there is no reason to think that the New York Court of Appeals had such a fine distinction in mind. The Court squarely rejected any requirement of "such a change in the position of the receiving party that it would be unjust to require the party to refund," 77 N.Y.2d at 366, with no suggestion of any affirmative obligation on the part of the creditor receiving payment on its loan.

B. Citibank's Proposed New Requirement Would Be Unworkable And Lead To Arbitrary Results

The district court was also right that Citibank's bookkeeping requirement would "introduc[e] confusion and danger into all commercial dealings." SPA__[Op.51] (quoting *Banque Worms*, 77 N.Y.2d at 373). Citibank responds (Br. 37) that its proposed standard would be "relatively simple" to implement. But as the district court found, Citibank's own shifting positions in this case show the opposite: that its standard in fact "would be a recipe for litigation." SPA__[Op.54]; *see* SPA__-__[Op.51-54]. Citibank at one time argued the relevant inquiry under its proposed bookkeeping standard would be whether, as administrative agent on the Term Loan, Citibank itself had accounted for the payments in its books.[12] When Citibank abandoned that view, it never clarified what form its proposed required bookkeeping would need to take in order to provide "value." There is no clear answer, and Citibank offers none.

Citibank tries to avoid these difficulties by asserting (Br. 38) that Managers "did not seriously contend that they had credited Revlon's account." That is not

[12] Citibank misleadingly suggests (Br. 38) it was Managers that took that position. In fact, it was Citibank that argued that, because it maintains the "official register" for the Term Loan, the defense turns on whether it recorded the loan as discharged. JA__[Aug.18,2020.Hr'g.Tr.18:6-16]; *see also* JA__, __[Case.No.1:20-cv-06539,Dkt.1,Complaint,¶¶13,22]. Citibank abandoned its own "nonsensical" position only when "inconvenient facts emerg[ed] during discovery" showing that Citibank actually had recorded the loans as discharged in its own books. SPA__[Op.52n.27].

true. Managers presented evidence that several fund managers credited certain Lender accounts in the managers' books (*see, e.g.*, JA__[Vaughan.Decl.]¶17 (Vaughan (Symphony)); JA__[DX-0964—DX-1001] (Symphony); JA__[DX-1129] (HPS)); and that other Lenders had custodians, trustees or administrators who credited the payments on their behalf (*see, e.g.*, JA__[DX-0483] (Brigade); JA__[Greene.Decl.]¶16 (Greene (Bardin Hill))). Thus, it would not be "simple" to discern which payments were and were not credited, and by whom. More important, any such determination would invite arbitrary results. Many Lenders would be held to have had their loans discharged, and others not, depending on the fortuity of the timing and manner in which the payment was booked, despite the fact that all Lenders were paid at the same time, in the same manner, on the full amounts outstanding on their portion of the same Term Loan.

Citibank's proposed standard would also create perverse incentives, as apparent from Citibank's argument (Br. 29) targeting one Manager that "reversed [its] initial steps" in crediting Revlon's account and sent the funds to a segregated account. Citibank fails to mention that this Manager, Symphony, took those measures only because it recognized, once Citibank sent recall notices demanding return of the funds, that there was a dispute between the parties that would likely become the subject of litigation. JA__[Vaughan.Decl.]¶23 (Vaughan (Symphony)).

Lenders should not be penalized for being prudent by setting funds aside so that a court could resolve their proper disposition.

In sum, New York has rejected Citibank's proposed bookkeeping requirement, and its introduction would lead to the very sort of "anomalous results" Citibank professes (Br. 32) it wishes to avoid.

Finally, Citibank asks the Court (Br. 39-40), "at the very least," to reverse judgment as to those Managers that were not aware of the wire transfer until after Citibank sent recall notices. Citibank did not seek this alternative relief before the district court and thus has waived the argument here. *Terkildsen v. Waters*, 481 F.2d 201, 204 (2d Cir. 1973). Further, New York law does not require that a recipient know of a fund transfer for a debt to be discharged. *Nassau Bank v. Nat'l Bank of Newburgh*, 159 N.Y. 456, 460-61 (1899) ("It is argued that the mere deposit by Taylor of the money, without the knowledge of, or the acceptance by his creditor, could not constitute payment within the rule. I am unable to recognize the force of the contention."). It appears Banque Worms itself was unaware it had been paid until after its bank returned the funds to Security Pacific. *Banque Worms*, 928 F.2d at 540 ("BankAmerica debited Banque Worms' account and, subsequently, asked Banque Worms whether it would assent to the debit.").[13]

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[13] Additionally, Managers were not Lenders' only agents, and there was evidence that other personnel, including custodians overseeing Lenders' accounts, were immediately aware of the August 11 transfer, even in those instances where

III. THE DISTRICT COURT CORRECTLY HELD THAT MANAGERS AND LENDERS WERE NOT ON NOTICE OF A MISTAKE

The district court held, based on exhaustive factual findings, that Lenders were not on notice of Citibank's mistake under any formulation of constructive notice—whether such notice means "should have known" or "should have inquired further." SPA__-__[Op. 63-64] (referencing factual findings at SPA__-__[Op.64-93]). The court accordingly had no need to decide between those formulations. Citibank appears to concede there was no reason Lenders "should have known" of Citibank's mistake at the time of the transfers, for it stakes its entire "notice" argument (Br. 40-51) on its insistence that the applicable standard is inquiry notice; that, under that standard, there were enough "red flags" to trigger a duty to investigate; and that a reasonable investigation would have revealed Citibank's mistake. Citibank is wrong at each turn.

A. *Banque Worms* Rejects An "Inquiry Notice" Standard

Citibank's preferred "inquiry notice" standard is irreconcilable with *Banque Worms*. The New York Court of Appeals explained that the discharge-for-value defense "furthers the policy goal of finality" precisely because "the beneficiary should not have to wonder whether it may retain the funds" when it "receives money

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Managers were not. *See, e.g.*, JA__[Green.Decl.]¶16 (Green (Bardin Hill)); JA__[DX-0596] (ZAIS); JA__[Trial.Tr.1144] (Lenga (Tall Tree)). Such evidence would need to be considered on remand if the Court adopted Citibank's belated argument that knowledge of the transfer is required.

to which it is entitled and has no knowledge that the money was erroneously wired." *Banque Worms*, 77 N.Y.2d at 373. Instead, "such a beneficiary should be able to consider the transfer of funds as a final and complete transaction, not subject to revocation." *Id*. Drawing on authority from a " different but pertinent context," the Court of Appeals went so far as to state that it would "disorganize all business operations" to "permit in every case of the payment of a debt an inquiry as to the source from which the debtor derived the money." *Id*. at 372; *see GECC*, 49 F.3d at 286 ("Requiring receiving banks to inquire into the source of the funds … would raise the costs of funds transfers and slow down a mechanism that is designed to allow the movement of huge sums within minutes.").

The only form of constructive notice compatible with *Banque Worms* is thus a standard that looks to whether, at the time of the transfer, the recipient should have known that the wire transfer was erroneous. An inquiry notice standard would impose the exact duty on creditors *Banque Worms* rejected: it would require them to "wonder" and "inquire" upon receipt of a payment, rather than being able to treat the payment as "final and complete." That would not promote "speed, efficiency, certainty [or] finality," *Banque Worms*, 77 N.Y.2d at 372, but would give rise to the very delays and uncertainties in business transactions the Court of Appeals sought to prevent.

Citibank's remaining purported lines of authority (Br. 42-44) cannot overcome *Banque Worms*' rejection of an inquiry notice standard. Citibank cites *Golden Door V & I, Inc. v. TD Bank*, 123 A.D.3d 976 (2d Dep't 2014), but that opinion held that the discharge-for-value defense did not apply because the defendant "had notice that the transfer … was given by 'mistake,'" *not* because the defendant had a duty to inquire. *Id*. at 978 (holding jeweler was on notice payment was invalid where it sold luxury watches to "Feodor Prochorov/JAH Enterprises, Inc.," but received a wire transfer from "Massachusetts Housing Investment Corporation").

Citibank also relies on *bona fide* purchaser cases involving real estate transactions. *See, e.g.*, *436 Franklin Realty, LLC v. U.S. Bank Nat'l Ass'n*, 188 A.D.3d 960, 961 (2d Dep't 2020); *U.S. Bank Nat'l Ass'n v. Jordan*, 176 A.D.3d 1523, 1524-26 (3d Dep't 2019). But New York courts have rejected an inquiry notice standard for cases involving monetary transactions, citing the "strong public interest in maintaining the finality of payments of money in business transactions." *First Union Nat'l Bank v. A.G. Edwards & Sons, Inc.*, 262 A.D.2d 106, 107 (1st Dep't 1999) (rejecting inquiry notice standard where plaintiff banks sought to recover funds from defendant brokers on grounds they were on inquiry notice of an underlying fraud); *cf. Hartford Accident & Indem. Co. v. Am. Express Co.*, 74 N.Y.2d 153, 165 (1989) (rejecting inquiry notice standard to "promote[] the policy

favoring ready negotiability of commercial paper, assur[e] that good-faith purchasers need not stand as insurers of the honest of a drawer corporation's employees, … and [to] allocat[e] liability to the party best able to prevent them").[14]

B. The District Court Had Overwhelming Factual Support For Its Holding That There Was No Constructive Notice

Contrary to Citibank's suggestion, the district court's notice holding cannot be overturned without second-guessing extensive factual findings that, as Citibank concedes (Br. 45), merit this Court's deference on appeal under any formulation of the constructive notice standard. *See, e.g.*, *Soliman v. Subway Franchisee Advert. Fund Tr., Ltd.*, 2021 WL 2324549, at *3, *5 (2d Cir. June 8, 2021) (affirming finding of lack of constructive notice, noting its "fact-intensive" nature) (quotation marks omitted). Citibank's argument depends on the notion that "it was obvious something was amiss" (Br. 40), but the district court's factual findings, based substantially on its "assessment of the witnesses' demeanor at trial," SPA__[Op.66], indicate the opposite. Those findings refute any argument that there were "red flags" that

[14] Citibank misplaces reliance (Br.43) on the inquiry notice standard in the Third Restatement. *Banque Worms* adopted Section 14 of the First Restatement. Comment "a" to section 14 incorporates comment "a" to the *bona fide* purchaser provision, at Section 13. Comment "b" to Section 13, which was not adopted, is the comment that incorporates the inquiry notice provision, Section 174, into the *bona fide* purchaser rule. Thus, Section 14 does not incorporate an inquiry notice standard into the discharge-for-value rule, and there is nothing in that provision contradicting *Banque Worms*' holding that the discharge-for-value defense eliminates any duty to "wonder" or "inquire."

triggered a duty of inquiry or that Lenders should have made greater inquiry than they did.

First, the district court found "credible and persuasive" the uniform testimony of the Managers' witnesses who knew about the transfers before learning of the recall notices that "he or she believed in good faith that the payments were an intentional full paydown of the outstanding principal and interest on the 2016 Term Loan." SPA__-__[Op.65-66]. That all Managers, each with years of experience in syndicated lending, believed in good faith that the August 11 transfer appeared to be an intentional paydown of the Term Loan—and Citibank identified none who believed otherwise—is itself compelling evidence that an "ordinarily prudent" lender would reach that same conclusion. *Cf. Kuberski v. N.Y. Cent. R.R. Co.*, 359 F.2d 90, 93 (2d Cir. 1966) (while "industry practice is not always the measure of proper diligence," to conclude otherwise requires "some evidence that the general practice of the industry is not a reasonably prudent practice").

But the district court did not stop there: It identified numerous "compelling" factual considerations confirming that these witnesses' "good faith beliefs" were objectively reasonable. SPA__-__[Op.66-70]. For example, the amounts paid to each lender "matched—to the penny—the amounts of principal and interest outstanding on the 2016 Term Loan for each Lender as of August 11, 2020," which is the "hallmark" of an intentional loan prepayment. SPA__[Op.66]. Moreover, it

was not just Managers' witnesses who thought that circumstance showed an intentional prepayment; the district court expressly found that "not one fact witness, on either side of this case, could recall a single other instance in which a bank had accidentally paid the exact amounts owing on outstanding loans." SPA__[Op.67]. In addition, the calculation statements Citibank sent with the August 11 transfer reported interest on the Term Loans was "due," which would have been accurate, under the terms of the credit agreement, only "[i]f Revlon was prepaying principal." SPA__[Op.69]. As the court concluded, "[g]iven that early paydowns do happen, and a mistaken total paydown had perhaps never happened before, it was natural and reasonable for Defendants and their clients to conclude that the August 11th wire transfers were an intentional early paydown by Revlon …. In fact, ***it might even be* un*reasonable to assume otherwise***." SPA__-__[Op.67-68] (emphasis altered).

Second, the district court looked to the testimony of Citibank's own witnesses, which corroborated that the transfer did not appear to be by mistake. SPA__-__[Op.70-71]. Among key admissions: The head of the Citibank team responsible for making payments on the Term Loan agreed that "one of the reasons [he] thought it was necessary to send notices telling lenders that they had received money by mistake is because [he] did not expect that the lenders would reach that conclusion unless they were notified," JA__[Trial.Tr.173:10-14] (Fratta (Citi)); the Citibank employee who signed the credit agreement saw nothing on the face of the payment

notices that suggested the payments had been made in error, JA__, __[Tichauer.Dep.Tr.112:13-113:10, 124:15-21] (Tichauer (Citi)) (deposition admitted into evidence, JA__-__[Trial.Tr.1212:4-1213:2]); and Citibank's own expert testified he was not aware of "'anything that put the lenders on notice prior to receiving Citibank's recall notice,'" JA__[Trial.Tr.1204:2-23] (Byrne (Citi's expert)). Multiple Citibank witnesses also acknowledged that they would not have assumed anything at the time of the August 11 transfer, and, as the district court observed, "assuming nothing is not the same as being on notice of something." SPA__[Op.71].

Third, the court looked to the documentary evidence, identifying a "slew of communications evidencing a contemporaneous belief on the part of Lenders that the payments were a full paydown of the 2016 Term Loan." SPA__-__[Op.71-72]. These included internal emails observing that the transfer "appear[s] to tie to a full paydown with interest"; "we see an amount … which would indicate a full principal [sic] repayment"; "[a] wire for this paydown and interest was received yesterday"; "revlon paid down in full today"; and more. SPA__[Op.71-72]. The court also observed that "conspicuously *absent*" from the communications that preceded Citibank's circulation of recall notices on August 12 was any "communication[] reflecting a belief that the payments were made by mistake"—communications that surely would have occurred if Managers or Lenders had reason to think, at that time,

that Citibank had paid hundreds of millions of dollars by mistake. SPA__[Op.73]. That is a stark contrast to the "colorful" messages referencing Citibank's mistake that began to circulate only after Citibank announced its error. SPA__[Op.73].

In sum, the court had ample basis to conclude that, under any standard of constructive notice, Managers and Lenders "did not, and had no reason to, know that the August 11th wire transfers were made by mistake." SPA__[Op.77]. For Lenders to have concluded that, instead of the wire transfer having been the prepayment it appeared to be, "Citibank, one of the most sophisticated financial institutions in the world, had made a mistake that had never happened before, to the tune of nearly $1 billion[,] ***would have been borderline irrational***." SPA__[Op.100] (emphasis added).

C. There Were Not Sufficient "Red Flags" To Trigger Any Duty Of Inquiry And Any Such Duty Was Satisfied

Even if inquiry notice were the standard (and it is not), Citibank lacks support in the record for its argument (Br. 45-48, 51-59) that there were sufficient red flags to trigger a duty of inquiry here. Even Citibank's own preferred authority (an inapposite real estate case) states there can be no such duty without "knowledge of facts that would excite the suspicion of an ordinarily prudent person." *Jordan*, 176 A.D.3d at 1524 (internal quotation marks omitted). And the existence of something wrong with the transaction must be "probable, not merely possible." *Newman v. Warnaco Grp., Inc.*, 335 F.3d 187, 193 (2d Cir. 2003) (interpreting inquiry notice

under federal securities laws); *see Armstrong v. McAlpin*, 699 F.2d 79, 88 (2d Cir. 1983) (explaining that this rule of "probability" for inquiry notice derives from New York law).

The district court was thus right to be skeptical that any duty of inquiry was even triggered here in the first place. SPA__[Op.78]. The court's factual findings, culminating in its observation that it would have been "borderline irrational" for Lenders to think Citibank had mistakenly paid nearly $1 billion in the exact amount outstanding on the Term Loan, permit only one conclusion: that an "ordinarily prudent" lender would not have "susp[ected]," much less viewed as probable, that Citibank had made the extraordinary mistake that occurred here. *Jordan*, 176 A.D.3d at 1524. Indeed, Citibank's own witnesses called the bank's mistake "shocking," not "obvious," and not one anyone would "expect." JA__-__, __[Trial.Tr.145:21-146:1,169:16-18] (Fratta (Citi)); JA__[Trial.Tr.209:1-3] (Zeigon (Citi)). This is particularly so because there was a far more plausible explanation for the wire transfers—namely, that Citibank paid the amount outstanding on the Term Loan because the loan was being repaid.

Citibank asserts (Br. 40) that the district court failed to consider the "totality of the circumstances," but Citibank glosses over the uniform evidence, SPA__[Op.67], that there had never, in history, been a mistaken payment of the exact amount owing on an outstanding loan like the one that occurred here. Citibank and

its *amici* try to muddy that point by asserting (*e.g.*, Br. 57; Clarke Br. 5-6) "mistakes occur with wire transfers 'every single day.'" But that is a canard. The mistakes they conjure are completely unlike the black-swan mistake at issue here. They represent the kind of obvious "fat finger" mistakes the district court described in its opinion where the discharge-for-value defense would not apply. SPA__[Op.66]. None of their cited examples involved the mistaken payment of the exact amounts outstanding on a loan, and all involved mistakes that would have been immediately apparent to the recipient—for example, because they involved amounts not owed, the wrong recipient, the identical payment multiple times, or the transposition of a ten-digit account number with a ten-figure amount.[15] The situation here is fundamentally different: Every Citibank fact witness, and every Manager witness, testified they had never seen "an instance in which a bank had accidentally paid the

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[15] *See 'This Was an Operational Error.' Deutsche Bank Accidentally Transferred $35 Billion It Didn't Owe*, Yahoo! Finance (Apr. 20, 2018), https://yhoo.it/3aWTrtn (mistaken €28 billion transfers by Deutsche Bank in 2018 that exceeded the amounts owed to the recipients); Joseph Adinolfi, *Deutsche Bank Accidentally Sent Hedge Fund $6 Billion in "Fat Finger" Mistake*, MarketWatch (Oct. 19, 2015), https://on.mktw.net/3ucURro ($6 billion mistaken overpayment by Deutsche Bank in 2015 because a banker processed the "gross value" rather than the "net value" of the order); Eyk Henning, *Bank Known for Lehman Gaff Moves Over $5.4 Billion in Error*, Bloomberg (Mar. 24, 2017), https://bit.ly/3aV5yXL (mistaken transfers by KfW in 2017 that "repeated single payments multiple times"); *Man Returns 1.2 billion Yuan Mistakenly Sent by Bank*, China Daily (Jan. 19, 2017), https://bit.ly/3aSzfZO (mistaken ¥1.2 billion transfer by a bank in China to an individual who was not owed those funds because a new bank employee mistook his 10-digit account number for a transfer amount).

exact amounts owing on outstanding loans," which is powerful reason Lenders would not reasonably have suspected such a mistake here. *See* SPA__[Op.67] (citing testimony).

Citibank errs in asserting (Br. 47) that the calculation statements told the Lenders they "would receive only a periodic interest payment." "Only" is a word that appears in Citibank's brief, not in the calculation statements themselves. Citibank also ignores the language that did appear—each statement said, six or more times, that interest was "due." SPA__, __[Op.69,80]. Given that August 11 was not a scheduled interest payment date, that would have been true only if principal was being prepaid. SPA__[Op.69]. And when Citibank had in the past intended to make interest payments without also paying principal, it issued calculation statements that—unlike the calculation statements here—specifically indicated that no principal payment was being made. JA__[PX-1629F].

Citibank also errs in suggesting (Br. 44) Lenders should have perceived a problem because they did not receive notice of a principal payment in advance of the August 11 wire transfer. The credit agreement does not require such notice to Lenders. It provides for advance notice only from Revlon to Citibank. JA__[DX-1044,at,-0105] (§2.11(a)) (requiring Revlon to provide three days' notice to Citibank prior to prepayment). Citibank must then give "prompt[]" notice to Lenders. The Citibank officer who signed the credit agreement acknowledged not knowing what

would constitute such notice (JA__[Tichauer.Dep.Tr.60:9-21]) (Tichauer (Citi)) or whether it would have to arrive in advance of payment, (JA__[Tichauer.Dep.Tr.64:7-9,64:12-13]).

Even if Citibank were right that the calculation statements here somehow signaled an intent to pay only interest (and they did not), Citibank is wrong to suggest (Br. 56) that the district court "endorsed Defendants' guess that the problem was the paperwork, not the payment." There was no "guess": Citibank's own witness called it a "fair assumption" that "mistakes with notices" are "far more common than the mistak[en] payment of the exact amount outstanding on principal on a term loan." JA__[Trial.Tr.96:6-11] (Farrell (Citi)). The same Citibank witness who testified he had never once seen a mistaken wire transfer this large or in the exact amount outstanding on a loan also testified that mistakes in calculation statements are common. *E.g.*, JA __-__, __-__[Trial.Tr.108:12-109:12, 125:17-126:5] (Raj (Wipro)).

Citibank devotes much of its argument to Revlon's financial condition last August, which it contends (Br. 46) would have made payment on the loan "surprising," triggering a duty of inquiry. That something is surprising does not mean it looks like a mistake. As the court explained, "as surprising as an apparent early paydown from Revlon may (or should) have been … , that explanation for the wire transfers was *far more* plausible than the alternative explanation (accurate

though it turned out it be): that Citibank or Revlon had wired nearly $1 billion by mistake." SPA__[Op.68].

That was especially true because Revlon was not just any company—it was headed by a billionaire investor, Ronald Perelman, with a well-earned reputation for raising capital to pay off its debts, notwithstanding its financial difficulties. It was not just Managers' and Lenders' "belief" (Br. 53) that he was prone to do so: Revlon had a track record of raising capital to pay its debts at par and prior to maturity, and had done so multiple times in the months before the August 11 transfer. JA__[Perkal.Decl.]¶40 (first three sentences) (Perkal (Brigade)); JA__-__[DX-1052.at.-0030-31]; JA__-__[DX-1052.at.-0060-62]. Moreover, as the district court pointed out (SPA__-__[Op.91-92]), the fact that Managers had been threatening to sue Citibank and Revlon for months prior to the August 11 wire transfers, in connection with the May amendment to the credit agreement, was added reason for Managers to reasonably believe that Revlon, rather than face suit and possible bankruptcy as a result, had relented and paid the Term Loan. JA__[Trial.Tr.939:19-25] (Warren (Revlon)). Thus, it was more than reasonable for Lenders to believe that Revlon, as it had in the past, managed to clear its debts. *See In re Brainard Hotel Co.*, 75 F.2d 481, 483 (2d Cir. 1935) (Hand, J.) (holding that hotel employee was not on notice that another employee, Taggerty, used stolen funds to repay debt, despite fact that Taggerty was a "known … thief" and a person of "no resources," in

part because "he had once before borrowed a substantial sum" and "had friends who would support him at a pinch").

In sum, there were no red flags sufficient to trigger any duty of inquiry. There is simply no reason Lenders should have suspected, in real time, that a payment from one of the most sophisticated financial institutions in the world, in the exact amounts outstanding on the Term Loan, was an unprecedented $1 billion mistake.

Finally, even if any duty of inquiry had been triggered (and it was not), the district court was correct that it was satisfied. SPA__-__[Op.78-80]. Citibank argues (Br. 48-51) Lenders should have contacted Citibank directly. But Citibank does not get to prescribe the specific form of inquiry sufficient to satisfy any duty that might exist. The only requirement is to exercise "reasonable diligence." *Cohen v. S.A.C. Trading Corp.*, 711 F.3d 353, 362-63 (2d Cir. 2013). Citibank's own expert testified that professionals in syndicated lending could reasonably rely on their own "wisdom" and "in-house" data, and that outreach to Citibank would be warranted only "if" those tools were insufficient. SPA__-__[Op.78-79] (citing JA__[Trial.Tr.1167:6-12]). And the trial court credited witnesses from each Manager, some with twenty years' experience or more, who all testified that in their experience, a payment of all amounts outstanding on a term loan has ***always*** meant the loan was prepaid. SPA__[Op.79] (citing testimony). It was therefore reasonable for these professionals to draw on their wisdom and experience to conclude, based

on their in-house data confirming that the administrative agent responsible for all principal and interest payments on the Term Loan had paid Lenders exactly what they were owed, that the Term Loan had been prepaid.

The district court further credited the testimony of Managers' witnesses demonstrating that a reasonable inquiry, on the facts here, did not need to include outreach to Citibank. SPA__[Op.79-80]. The court, for example, cited the testimony of an Allstate witness who, after receiving a report that one Lender had received payment, sought confirmation the funds were in fact received, and then that the other six Lenders Allstate managed had been paid as well. Having made those inquiries and collected that information, and drawing on her own experience that full payment across lenders on an outstanding loan means prepayment, that witness reasonably concluded that the Term Loan had been paid down. SPA__[Op.78] (citing JA___[McCoy.Decl.]¶¶17-23). In light of Citibank's own expert's admissions and such Manager testimony, the district court committed no error in concluding that any duty of inquiry a reasonable investor might have had did not require "contact[ing] Citibank for confirmation." SPA__[Op.80].

IV. *BANQUE WORMS* REJECTED CITIBANK'S AND ITS *AMICI*'S POLICY ARGUMENTS

The *amicus* briefs in support of Citibank underscore that Citibank's position, regardless of its claimed adherence to *Banque Worms*, is in fact an attack on that binding precedent. Certain *amici* openly admit to advancing policy arguments the

New York Court of Appeals rejected. *E.g.*, LTSA Br. 8 ("As the district court recognized, the New York Court of Appeals rejected a parallel argument against adoption of the discharge-for-value rule in *Banque Worms* itself."). Those arguments should not be given any greater credence now than the New York Court of Appeals gave them thirty years ago.

Several *amici* complain, for example, that requiring banks to absorb the costs of their mistaken payments threatens the stability of the wire transfer system by imposing massive costs on banks operating on "thin margins." LSTA Br. 4-5, 7; *see* ABA Br. 16; Professors' Br. 23-24; Clarke Br. 13. The bank transferor made the same argument in *Banque Worms*, urging that adoption of the discharge-for-value defense would impose "enormous risks" on banks, thereby preventing them from providing essential services at "minimal costs." SPA__[Op.96] (quoting Security Pacific brief). The Court of Appeals rejected that argument, concluding that the discharge-for-value doctrine would not "undermine" electronic banking, but would instead encourage banks to keep mistakes to "a minimum" by implementing available "security features in effecting wire transfers." *Banque Worms*, 77 N.Y.2d at 375. As the district court observed "[e]mpirically, the disastrous consequences predicted by Security Pacific nearly three decades ago—and predicted again here by Citibank and amici—have not come to pass." SPA__[Op.97]. Even *amici* agree

that financial markets have thrived: "[T]he daily volume and size of wire transfers has increased exponentially" since *Banque Worms*. ABA Br. 4.

Several *amici* argue the discharge-for-value defense creates far greater risk to banks, and is therefore much more disruptive to markets, if applied to payments before a loan's due date. *See, e.g.*, ABA Br. 13-14; SIFMA Br. 9, 20; LSTA Br. 9-11. Here again, all evidence is to the contrary. By every account, this was the prototypical black swan event. SPA__[Op.69]. Citibank's own fact witnesses—*every one of them*—testified they were not aware of a bank ever mistakenly paying the outstanding principal on a loan. *See* SPA__[Op.67].[16] There is no floodgate problem here: Experience shows that the discharge-for-value defense, whether applied to loans outstanding or due, is still available in only "narrow and unusual circumstances." LSTA Br. 14. That leaves no policy-based imperative—no looming problem in need of being addressed—that could justify this Court

[16] Citibank and its *amici* try to get around the district court's factual finding that the testimony on this point was unanimous by citing a Citibank expert declaration describing "another instance in which an agent 'by mistake [paid] an amount equal to the entire amount of principal and interest.'" Clarke Br. 6 n.11 (citing JA__[Byrne.Decl.]¶24). But that statement collapsed at trial, where the expert admitted this forty-year-old incident involved written checks mailed as payment on a sovereign bond (not wire transfers on an outstanding loan), with the mailing successfully recalled before any creditor actually got paid. JA__-__[Trial.Tr.1179:7-1186:2]. That Citibank's best example was so far wide of the mark only serves to highlight that neither Citibank nor their *amici* can identify a single mistaken payment since *Banque Worms* resembling the one here.

introducing a new "due date" or "bookkeeping" limitation into New York law, simply for the benefit of Citibank in this case.

A number of *amici* question the importance of "finality" as a policy objective, arguing that it is not "the be-all and end-all of the analysis," SIFMA Br. 16, and that the district court failed to consider "equally (if not more) important" policy considerations like "catalyzing collaboration," Professors' Br. 30; *see id.* 21-22 (citing "contract theory literature"). But New York's Court of Appeals has given its view of the matter, under which "finality" is a "singularly important policy goal," whereas "catalyzing collaboration" is not something the Court even mentioned. Regardless of how *amici* might prioritize finality, the Court of Appeals viewed finality as a paramount concern, and the district court was right to respect that consideration here.

Several *amici* point to the industry's "surprise[] and disappoint[ment]," and the measures banks are taking to "correct" the district court's decision. *See, e.g.*, LSTA Br. 15; ABA Br. 16. Of course, if surprise and disappointment by the losing side were the measure of an incorrect holding, virtually no judgment would withstand appeal. In any event, banks are doing more than implementing "Revlon blocker" provisions; they are also improving their wire transfer systems. *See, e.g.*, JA__[Dkt.255-1,Citigroup.Inc.Annual.Report(Form.10-K),at.116] (reporting that Citibank, following the August 11 transfer, is "embarking on a major upgrade of [its]

loan infrastructure and controls"). Such improvements will serve to prevent mistaken payments before and after loans come due, and will thus help avoid those mistakes that even Citibank acknowledges *Banque Worms* covers. Thus, contrary to *amici*'s suggestion, the industry is not taking measures to address "new" and "surpris[ing]" potential exposure, but is taking measures to address exposure that all parties agree already existed. That is exactly the kind of prudent risk management *Banque Worms* meant to promote.

Finally, some *amici* complain the result below is "inequitable" or "unfair." Clarke Br. 11; SIFMA Br. 23. This is another argument the Court of Appeals rejected in *Banque Worms*. The bank defendant in that case argued that a ruling for Banque Worms would constitute a "windfall" and award "opportunism" (SPA__[Op.94] (quoting JA__[Case.No.20-cv-06539,Dkt.Nos.142-1,142-2("Brief.of.Third.Party.Defendant.Appellant.Security.Pacific.International.Bank")]), the same argument—and same words—*amici* use here. LSTA Br. 10, 13; Clarke Br. 12-13; ABA Br. 4, 11. There is no reason this argument would apply any differently to a mistaken payment by a third party on a loan that is outstanding, as opposed to a mistaken payment by a third party on a loan that is due.[17] In that sense, this is yet another refusal to accept controlling precedent. The district court,

[17] The district court explained that, if anything, the equities here favor Defendants even more so than in *Banque Worms*. SPA__[Op.94-95].

however, understood this case cannot be decided on "first principles"; it must be decided based on state law. JA__[Stay.Order.9]; *see Greenwald*, 241 F.3d at 81 ("[R]estitution 'rules' have been adopted despite the fact that in a particular situation they might lead to what could arguably be a less equitable outcome. … The Greenwald firm's equitable arguments cannot displace the specifically articulated principle at work in section 14 of the *Restatement*.").

* * *

Citibank concludes by suggesting (Br. 59) that, if this Court believes "its hands are tied" by *Banque Worms*, it should "certify questions to the Court of Appeals." But this Court already sought and obtained any necessary guidance when it certified in *Banque Worms*, where the Court of Appeals set standards with a "significant impact" across cases involving mistaken wire transfers. 928 F.2d at 541. This is one such case governed by that precedent. Indeed, what Citibank dismisses as "stray language" (Br. 59) by the Court of Appeals is actually the Court's holding—*i.e.*, that a *bona fide* creditor, upon receiving a mistaken payment on a "debt" without notice of a mistake, "is under no duty to make restitution." 77 N.Y.2d at 367. That holding fully resolves this case.

Further, the notion of certifying again to the New York Court of Appeals is especially unwarranted because the issues before this Court are exceedingly unlikely to "recur." *Krohn v. N.Y.C. Police Dep't*, 341 F.3d 177, 180 (2d Cir. 2003)

("[Q]uestions 'are not to be routinely certified to highest court[] of New York … simply because a certification procedure is available.'" (quoting *Kidney by Kidney v. Kolmar Labs., Inc.*, 808 F.2d 955, 957 (2d Cir. 1987)) (alterations in original)). Citibank's own witnesses made clear they had never seen a mistake like this one, and do not expect to again. *See, e.g.*, JA__-__[Trial.Tr.145:15-146:1] (Fratta (Citi)). Citibank is seeking to avoid the consequence of a once-ever mistake by asking the Court to adopt standards that have never been recognized under New York law. That does not warrant certification, but instead warrants affirmance of the decision below, which faithfully applied New York law.

Finally, there is no basis for Citibank's request (Br. 60) that the district court decision be "reversed" if Citibank were somehow to prevail on its arguments here. The trial court, having held that the discharge-for-value defense applies, made no finding as to whether Citibank satisfied the *prima facie* elements of its claims; and, even if this Court were to impose a "due date" or "bookkeeping" requirement, there are factual disputes, not resolved at trial, as to whether such requirements would be satisfied. *See supra* at 10 n.3, 29 n.10, and 35. Thus, while this Court should affirm in full, the most Citibank has any basis to seek is vacatur, not reversal.

CONCLUSION

The district court's judgment should be affirmed.

Dated: June 21, 2021

Respectfully submitted,

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The undersigned hereby certifies that on June 21, 2021, I electronically filed the foregoing PAGE PROOF BRIEF FOR DEFENDANTS-APPELLEES with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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