ORDERED.

Dated: March 14, 2017

Jerry A. Funk
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

IN RE:

TAYLOR, BEAN & WHITAKER	Chapter 11	
MORTGAGE CORPORATION,	Case No.	3:09-bk-07047-JAF
REO SPECIALISTS, LLC, and	Case No.	3:09-bk-10022-JAF
HOME AMERICA MORTGAGE, INC.	Case No.	3:09-bk-10023-JAF

Debtor,

(Jointly Administered Under
Case No. 3:09-bk-07047-JAF)

_______________________________________/

NEIL F. LURIA, as Trustee for the TAYLOR,
BEAN & WHITAKER PLAN TRUST,

Plaintiff, Adv. Pro. No. 3:11-ap-0674-JAF

v.

JAMES GREGORY HICKS,

Defendant.
_______________________________________/

ORDER GRANTING DEFENDANT'S RENEWED MOTION FOR
<u>PARTIAL SUMMARY JUDGMENT, PURSUANT TO 11 U.S.C. § 546(e)</u>

This proceeding is before the Court on: 1) Defendant JAMES GREGORY HICKS'S ("Hicks") Renewed Motion for Partial Summary Judgment (the "Motion") (Doc. 117); 2) Plaintiff

NEIL F. LURIA'S, as Trustee for the TAYLOR, BEAN & WHITAKER PLAN TRUST (the "Trustee") Response to the Renewed Motion (Doc. 120); 3) Hick's Reply to Trustee's Response to the Renewed Motion (Doc. 123); 4) Trustee's Sur-Reply to the Renewed Motion (Doc. 124); and 5) Hick's Response to Trustee's Sur-Reply to the Renewed Motion (Doc. 128). For the reasons stated herein, the Motion is granted.

JURISDICTION

The Court has jurisdiction over this proceeding, arising under §§ 544, 547, and 548 of the Bankruptcy Code, pursuant to 28 U.S.C. §§ 1334(b) and 157(a), and the standing order of reference. This is a core proceeding under 28 U.S.C. §§ 157(b)(2)(F) & (H).

FACTUAL BACKGROUND

Taylor, Bean & Whitaker Mortgage Corporation ("Taylor Bean") filed its Chapter 11 petition on August 24, 2009, case number 3:09-bk-07047. Taylor Bean's bankruptcy case was procedurally consolidated with two other cases. (Doc. 921 in 3:09-bk-07047).[1] The other two debtors are Reo Specialists, LLC and Home America Mortgage, Inc. ("Home America"). The Court confirmed Taylor Bean's Chapter 11 plan and appointed the Trustee on July 21, 2011. (Doc. 3420 ¶ 68, in 3:09-bk-07047).

<u>The Complaint</u>

The Trustee filed this adversary proceeding on August 23, 2011. (Doc. 1). The Third Amended Complaint (the "Complaint") is the operative complaint. (Doc. 100). The Complaint alleges all species of transfer-avoidance claims. The allegations in this proceeding are detailed and myriad; however, the ones pertinent to the present issue are as follows.

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[1] All record citations to documents in the lead case will contain the case's number in the following form: (Doc. *x* in 3:09-bk-07047). All record citations to documents in the instant adversary proceeding will not contain a proceeding number and will be in the following simpler form: (Doc. *x*).

Hicks had a close relationship with Lee Farkas, the former chairman of Taylor Bean. Hicks used Taylor Bean for his own personal interests between 2002 and 2009. (Doc. 100 ¶¶ 4-24). Hicks owned 90% of the stock of Home America. (Doc. 100 ¶ 5). Taylor Bean owned the remaining 10% of Home America's stock. (Doc. 79 at 26 ¶ 12). No Home America shares were publicly traded or listed on a public exchange.

On January 6, 2009, Taylor Bean bought Hicks's interest in Home America for approximately $20.8 million. (Doc. 100 ¶¶ 26-27). The purchase price was to be paid in three parts: a) Taylor Bean would pay $2,894,448 in cash but would "hold back" $1 million of this money to pay taxes owed by Home America and, then, return any remaining holdback funds after taxes were satisfied; b) $9 million of the purchase price would satisfy a previously-existing promissory note from Hicks to Taylor Bean which was given in the original principal amount of $9 million; and c) the remaining $9 million of the purchase price would be paid in the form of an unsecured promissory note from Taylor Bean to Hicks. (Doc. 100 ¶ 28); see also (Doc. 79 at 48-49) (the "Stock Purchase Agreement"). The Trustee seeks to avoid approximately $4.1 million in related transfers made prior to the petition date.

Preference claims: As to Count 1, the Trustee seeks to avoid, as a preference under 11 U.S.C. § 547(b)(1), a cash payment of approximately $1.2 million from Taylor Bean to Hicks, on the outstanding $9 million promissory note. (Doc. 100 ¶ 33). As to Count 2, the Trustee seeks to avoid, as a preference under § 547(b)(1), $414,512 in tax payments made by Taylor Bean (on behalf of Home America) as partial payment of the debt owed to Hicks. (Doc. 100 ¶¶ 42-45).

Fraud claims: As to Count 3, the Trustee seeks to avoid, as a constructively fraudulent transfer under 11 U.S.C. § 548(a)(1)(B), all payments made regarding the purchase of Home America, which total $4,111,722.44 (this includes both transfers described in Counts 1 and 2).

(Doc. 100 at 12). As to Count 4, also under a constructive-fraud theory pursuant to section 726.105(1)(b), Florida Statutes, and 11 U.S.C. § 544, the Trustee seeks to avoid all payments described in Count 3. (Doc. 100 at 14). As to Count 5, the Trustee pursues an actual-fraud theory under § 548(a)(1)(A), though this count is not addressed by this Order. As to Count 6, under an actual-fraud theory pursuant to section 726.105(1)(a), Florida Statutes, and § 544, the Trustee seeks to avoid all payments described in Count 3. (Doc. 100 at 17-18).

Finally, Count 7 is simply for recovery of the proceeds, under § 550, of any transfers that are successfully avoided. Count 7 only applies to the extent that any transfer is actually avoided.

Hicks's Renewed Motion for Partial Summary Judgment

Defendant Hicks filed the Motion, on May 31, 2016, to which the Response, Reply, Sur-Reply, and Response to Sur-Reply were filed. (Doc. 117); (Doc. 120); (Doc. 123); (Doc. 124); (Doc. 128). Hicks seeks summary judgment as to Counts 1, 2, 3, 4, and 6 on the basis that the transfers are protected by the safe-harbor provision of § 546(e).[2]

In opposition to the Motion, the Trustee argues two points. First, the Trustee contends Taylor Bean is not a "financial participant" for purposes of § 546(e), as defined by 11 U.S.C. § 101(22A), on the basis that a debtor can never be a financial participant. (Doc. 120). Second, the Trustee contends § 546(e) does not apply to private transactions of non-public securities because such private transactions do not impact the broader financial system. (Doc. 124).

The Stock Purchase Agreement

It is undisputed that the sale of the Home America stock, from Hicks to Taylor Bean, was made pursuant to the Stock Purchase Agreement. (Doc. 79 at 41). The Stock Purchase Agreement

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[2] Hicks concedes that Count 5 is not protected by § 546(e) and must be dealt with in a separate motion or trial. (Doc. 117 at 3, n. 2). This Order, of course, does not preclude further argument on Count 5 as may be appropriate.

provided that Hicks would sell all of his "right, title and interest in and to (i) all of the issued and outstanding shares of capital stock of [Home America] owned, held or controlled by [Hicks], which consists of 90 shares of common stock, $0.01 par value, and (ii) one-third of the issued and outstanding shares of capital stock of [Home America Insurance Corp.] owned, held or controlled by [Hicks], which consists of 83 shares of common stock, without par value." (Doc. 79 at 46). In return, Taylor Bean would pay roughly $20.8 million. (Doc. 79 at 4, Request No. 2).

As stated in the complaint, the Stock Purchase Agreement broke the purchase price into three parts. (Doc. 79 at 48-49). Hicks filed an declaration, pursuant to 28 U.S.C. § 1746, which describes the Stock Purchase Agreement in, essentially, the same material terms as the operative complaint. See (Doc. 79 at 25-27).

Taylor Bean's Securitized Mortgage Loans

During the course of discovery, Hicks filed several requests for admissions. The Trustee responded, in pertinent part, as follows:

> Request No. 2: Admit that Taylor Bean's primary business operations were to originate, underwrite, process, and fund residential mortgage loans, sell residential mortgage loans in the secondary market, and mortgage-payment processing and loan servicing, as stated on page 27 of the Disclosure Statement.
>
> RESPONSE: Admitted.
>
> . . .
>
> Request No. 6: Admit that these [mortgage] loan sales were governed by agreements with the mortgage investors, as previously stated on page 31 of the Disclosure Statement.
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> RESPONSE: Admitted.
>
> Request No. 7: Admit that Taylor Bean typically retained the servicing rights relating to loans that it originated, as previously stated on page 31 of the Disclosure Statement.

> RESPONSE: Admitted.
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> Request No. 8: Admit that Taylor Bean's servicing portfolio had grown to in excess of 512,000 loans having an aggregate UPB [unpaid principle balance] totaling in excess of $80 billion prior to the Petition Date as previously stated on page 34 of the Disclosure Statement and paragraph 21 on page 14 of the Fina[l] Reconciliation Report.
>
> RESPONSE: Admitted.

(Doc. 79 at 14-15).

Pages 30-31 of the Second Amended Disclosure Statement provided, in part:

> Loan Sales
>
> [Taylor Bean]'s business model was based on the premise that the mortgage loans it originated or purchased would be sold within days or weeks of origination. . . . [Taylor Bean] assimilated pools of loans for sale to investors, which were [ ] to be used to support mortgage-backed securities. . . .
>
> . . . [After securitizing and selling the mortgage loans], [Taylor Bean] typically retained the servicing rights relating to loans that it originated, but on occasion [Taylor Bean] sold loans along with their servicing rights, and on occasion sold servicing rights in bulk.
>
> [Taylor Bean]'s loan sales were governed by agreements with the mortgage investors. These agreements established an ongoing program under which investors purchased or securitized certain loans, as long as the loans offered for sale met agreed-upon underwriting standards. In the case of conventional loans (i.e., a mortgage loan that is not guaranteed or insured by the federal government), [Taylor Bean] was generally at risk for any mortgage loan default until the loan was sold, subject to [mortgage insurance]. Once the loan was sold, the risk of loss from default and foreclosure generally passed to the purchaser or insurer of the loan.

(Doc. 2,144-1 at 30-31, in 3:09-bk-07047) (footnote 9 omitted, which describes the securitization structure, the special purpose entities owned by Taylor Bean, and the two-tiered process of sale via the cash window of the purchasing agency or private purchaser).

The affidavit of Lee Farkas was filed, and discusses Taylor Bean's business operations as well as its securitized mortgage-loan sales. (Doc. 79 at 78). Farkas's affidavit also provides:

> 13. Based on my independent knowledge, [Taylor Bean] had gross mark-to-market positions in excess of $100,000,000 in mortgage loans and/or repurchase agreements on January 6, 2009, the day of [Taylor Bean]'s purchase of [Home America].
>
> 14. Based on my independent knowledge, [Taylor Bean] had gross mark-to-market positions in excess of $100,000,000 in mortgage loans and/or repurchase agreements on the majority of days from May 24, 2008 through August 24, 2009.

(Doc. 79 at 78).

THE SUMMARY-JUDGMENT STANDARD

Summary judgment is appropriate if the pleadings and discovery show there is no genuine issue of material fact to be tried and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); Fed. R. Bankr.P. 7056. In determining whether a genuine issue of material fact exists, the court must construe the evidence in a light most favorable to the non-movant. <u>In re Delco Oil, Inc.</u>, 599 F.3d 1255, 1257 (11th Cir. 2010). The movant bears the initial burden of demonstrating the absence of a triable issue. <u>Id.</u> Once the moving party satisfies the initial burden, the burden shifts to the non-movant to come forward with specific record evidence, beyond its pleadings, showing there is a genuine fact-question to be tried. <u>Id.</u> Summary judgment is mandated against any party who fails to produce record evidence establishing a triable fact-question on any element essential to that party's claim or defense, and on which that party bears the burden of proof at trial. <u>See</u> <u>id.</u>; Fed. R. Civ. P. 56(a).

DISCUSSION

Statutory interpretation is a pure question of law. Kehoe v. Fid. Fed. Bank & Trust, 421 F.3d 1209, 1212 (11th Cir. 2005). "In construing a statute we must begin, and often should end as well, with the language of the statute itself . . . because we presume that Congress said what it meant and meant what it said." Id. Absent any patent or latent ambiguity, the Court cannot go beyond the plain language in construing the meaning of statutory language. Id. "Any ambiguity in the statutory language must result from the common usage of that language, not from the parties' dueling characterizations of what Congress 'really meant.'" Id.

In applying transfer-avoidance powers, generally, "a three-part analysis is required." 4 Norton Bankr. L. & Prac. § 63:2 (3d ed. 2015). First, the Court must "determine whether the substantive conditions established to recover property or reverse the transfer of a property interest are present." Id. "Secondly, [the court] must determine whether any defenses or exemptions protect the questioned transfer." Id. Third, the court "must determine to what extent a specific entity is liable as a result of the avoidance of the transfer and liability of, or recovery from, the transferee." Id.

For summary-judgment purposes, the Court presumes the first part of the three-part analysis is satisfied and that the substantive preferential/fraudulent conditions exist for the avoidances sought by the Trustee. This leaves the second part as the sole focus of this Order—i.e., whether Hicks's safe-harbor defense applies as a matter of law to the undisputed facts.

Turning to the safe-harbor provision at issue, § 546(e) of the Bankruptcy Code provides an exemption to a trustee's power of avoidance, as follows:

> Notwithstanding sections 544, 545, 547, 548(a)(1)(B), and 548(b) of this title, the trustee may not avoid a transfer that is a margin payment, as defined in section 101, 741, or 761 of this title, or settlement payment, as defined in section 101 or 741 of this title, made by or to (or for the benefit of) a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency, **<u>or</u>** that is a transfer made by or to (or for the benefit of) a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency, in connection with a securities contract, as defined in section 741(7), commodity contract, as defined in section 761(4), or forward contract, that is made before the commencement of the case, except under section 548(a)(1)(A) of this title.

11 U.S.C. § 546(e) (2011) (emphasis added); 5 Collier on Bankruptcy ¶ 546.06 (16th 2016). This statutory language is not as well-organized as might be preferred, and there are a variety of ways to organize the elements of the safe-harbor provision. For purposes of this Order, the Court analyzes the elements as follows.

There are essentially two prongs (or clauses in the provision) through which a court may apply § 546(e). Under both prongs, the defendant must demonstrate the relevant transfer was made "by or to (or for the benefit of)" a "commodity broker," "forward contract merchant," "stockbroker," "financial institution," "financial participant," or "securities clearing agency." 11 U.S.C. § 546(e) (2011). Next, the defendant must show either: a) the transfer was a "margin payment" or "settlement payment;" *or* b) the transfer was made "in connection with" a "securities contract," a "commodity contract," or a "forward contract." 11 U.S.C. § 546(e) (2011).

Applying this framework to the instant proceeding, the Court first addresses whether Taylor Bean was a "financial participant" at the subject time. The Court then addresses whether the relevant transfers either: i) were made "in connection with" a "securities contract" or ii) constituted a "settlement payment."

A. Whether Taylor Bean was a "financial participant" at the subject time.

In pertinent part, a "financial participant" is:

> (A) **an entity** that, at the time it enters into a securities contract, commodity contract, swap agreement, repurchase agreement, or forward contract, or at the time of the date of the filing of the petition, has one or more agreements or transactions described in paragraph (1), (2), (3), (4), (5), or (6) of section 561(a) **with the debtor or any other entity** (other than an affiliate) of a total gross dollar value of not less than $1,000,000,000 in notional or actual principal amount outstanding (aggregated across counterparties) at such time or on any day during the 15-month period preceding the date of the filing of the petition, or has gross mark-to-market positions of not less than $100,000,000 (aggregated across counterparties) in one or more such agreements or transactions **with the debtor or any other entity** (other than an affiliate) at such time or on any day during the 15-month period preceding the date of the filing of the petition; or . . . .

11 U.S.C. § 101(22A)(A) (2011) (emphasis added).

Here, there is no dispute that Taylor Bean had more than $1 billion of principal value in transactions described in § 561(a)(1) (i.e., securitized mortgage loans) and/or more than $100 million gross mark-to-market positions at the subject time. The Trustee has presented no record evidence nor argument refuting these facts.

The Trustee's only argument in opposition is that a debtor can never be a "financial participant," given the plain language of § 101(22A)(A); though, the Trustee concedes a debtor may be any of the other entities listed in § 546(e). (Doc. 120 at 9). Specifically, the Trustee contends: "[i]n order for [Taylor Bean] to be a financial participant . . . the definition would [have to] read 'an entity' that has outstanding agreements or transactions 'with ~~the debtor or~~ any other entity.'" (Doc. 120 at 4). The Trustee argues Hicks's interpretation requires the Court to omit the words "the debtor or" from § 101(22A)(A). The Trustee's argument, however, is incorrect.

The Trustee relies on Sec. Inv'r Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC, 505 B.R. 135 (S.D.N.Y. 2013). In Madoff, the question presented was whether "the relevant transfers occurred 'in connection with' a swap agreement and were made 'for the benefit of' a 'financial participant.'" Madoff, 505 B.R. at 137. The Madoff trustee contended the debtor had to be a party to the swap agreement[3] for the § 546(g) safe-harbor provision to apply. Id. at 144. Ultimately, the Madoff court ruled against that trustee and concluded the transfers were made "in connection with" the swap agreements despite the debtor not being a party to the swap agreements. Id. at 150.

The instant Trustee focuses on the following language from Madoff:

> Moreover, the addition of the term "financial participant" to "swap participant" in the 2005 amendment to section 546(g) implies that Congress intended to give section 546(g) a broad meaning—one that in no way turns on the relationship of the debtor to the swap agreement. Specifically, the Bankruptcy Code defines "financial participant" to include entities that have "gross mark-to-market positions of not less than $100,000,000 (aggregated across counterparties) in one or more agreements or transactions with the debtor *or any other entity*." By contrast, the Code defines a "swap participant" as "an entity that, at any time before the filing of the petition, has an outstanding swap agreement *with the debtor*." If the application of section 546(g) were to turn on the intent or involvement of the debtor in the swap agreement at issue, the addition of "financial participant" to section 546(g)'s protection would be rendered meaningless.

Id. at 145 (italics in original, citations omitted); see also (Doc. 120 at 6).

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[3] Broadly speaking, a "swap" is "[a] financial transaction between two parties . . . in which payments or rates are exchanged over a specified period and according to specified conditions." Black's Law Dictionary (10th ed. 2014); see also 11 U.S.C. § 101(53B) (defining "swap agreement" for Title 11 purposes). In Madoff, the swap agreements were for the swap of the cash flow of one asset for the cash flow of another asset; these swaps operated as a hedge for the leverage provider in the financial engineering of synthetic funds designed to mirror (or "reference") the Madoff Securities funds.

With this language, the Madoff court says that, while the definition of "swap participant" requires the debtor to be a counterparty to the swap agreement, the definition of "financial participant" has no such requirement and, if it did, the 2005 amendment adding "financial participant" to § 546(g) would be meaningless. Id. The Trustee asserts the Madoff court's "reading is clear that 'financial participant' means an entity *other than* a debtor." (Doc. 120 at 6) (italics added). However, the Trustee reads a premise into Madoff's holding that was simply not expressed nor was impliedly necessary to reach the holding. The key failure of the Trustee's argument is that there is no express language in § 101(22A)(A) indicating the definition includes only entities other than the debtor.

Put directly, a "financial participant" is "an entity" that has sufficient qualifying transactions "with the debtor or any other entity." 11 U.S.C. § 101(22A)(A) (2011). Taylor Bean meets this definition. The Trustee asks the Court to impute language that does not exist, but the Court is without authority to do so. Puerto Rico v. Franklin California Tax-Free Trust, 136 S. Ct. 1938, 1949 (2016) ("The dissent concludes that 'the government and people of Puerto Rico should not have to wait for possible congressional action to avert the consequences' of the Commonwealth's fiscal crisis. But our constitutional structure does not permit this Court to 'rewrite the statute that Congress has enacted.'") (construing § 101(52) of the Bankruptcy Code).

B. Whether the relevant transfers were either made "in connection with" a "securities contract" or were a "settlement payment."

1. In connection with a securities contract.

There is no dispute that the relevant transfers were made "in connection with" the Stock Purchase Agreement or that the Stock Purchase Agreement was a "securities contract." A "securities contract" is, *inter alia*, "a contract for the purchase, sale, or loan of a security." 11 U.S.C. § 741(7) (2011). The term "security" includes "stock." 11 U.S.C. § 101(49)(A)(ii) (2011).

Here, as the complaint alleges, the transfers were payments in partial fulfillment of the Stock Purchase Agreement and, therefore, were made "in connection with" the Stock Purchase Agreement. The Stock Purchase Agreement is a securities contract because it was a contract for the purchase/sale of stock in Home America. (Doc. 79 at 46). The Trustee has presented no record evidence or argument contradicting these facts. See (Doc. 120 at 2).

Having determined the relevant transfers were made "in connection with" a "securities contract" and were made by a "financial participant," the Court has thereby determined the § 546(e) safe-harbor provision applies to the relevant transfers in this proceeding. This is the end of the necessary analysis. However, for completeness and purposes of review, the Court addresses the "settlement payment" issue, next.

2. Settlement payment.[4]

Section 741(8) of the Bankruptcy Code defines "settlement payment" as "a preliminary settlement payment, a partial settlement payment, an interim settlement payment, a settlement payment on account, a final settlement payment, or any other similar payment commonly used in the securities trade." 11 U.S.C. § 741(8) (2011). Although the Eleventh Circuit[5] "has not yet addressed the scope of § 741(8)'s definition, other circuits have held it to be 'extremely broad.'" Enron Creditors Recovery Corp. v. Alfa, S.A.B. de C.V., 651 F.3d 329, 334 (2d Cir. 2011).

[4] The Court addresses the "settlement payment" question because of the manner in which the Trustee argues that § 546(e) "should not apply to private transactions." (Doc. 124 at 6). The Trustee fails to address this "private transaction" argument in terms of whether the transfers constitute "settlement payments," but instead generally argues § 546(e) can never apply to any private transaction. Yet, the case law cited by the Trustee deals with this same question only in the context of the definition of "settlement payment." The Court addresses it in the same context. Nevertheless, no matter the appropriate context, the intent of this Order is to show that the plain language of § 546(e) applies to both private and non-private transactions—just as every circuit court to address the issue has concluded.

[5] See Matter of Munford, Inc., 98 F.3d 604, 610 (11th Cir. 1996) ("The court concludes that whether the LBO payments qualify as section 546(e) settlement payments is not dispositive of the dispute—in fact, the court will presume that the LBO payments were settlement payments.").

"Specifically, 'settlement' refers to 'the completion of a securities transaction,' and a 'settlement payment is generally the transfer of cash or securities made to complete [the] securities transaction.'" Contemporary Indus. Corp. v. Frost, 564 F.3d 981, 985 (8th Cir. 2009) (citations omitted); Kaiser Steel Corp. v. Charles Schwab & Co., 913 F.2d 846, 848 (10th Cir. 1990) ("The definition in section 741(8), while somewhat circular, is 'extremely broad,' in that it clearly includes anything which may be considered a settlement payment.").

The Trustee contends "that 11 U.S.C. § 546(e) should not apply to private transactions" because "[t]here is simply no systemic risk and as such the purpose and intent of § 546(e) is not advanced by applying it to private transactions." (Doc. 124 at 6-7). For support, Trustee cites three opinions: In re MacMenamin's Grill Ltd., 450 B.R. 414 (Bankr. S.D.N.Y. 2011), Buckley v. Goldman, Sachs & Co., 2005 WL 1206865 (D. Mass. May 20, 2005), and Zahn v. Yucaipa Capital Fund, 218 B.R. 656 (D.R.I. 1998). The Trustee does not explicitly define the contours of what he means by the term "private transaction." Yet, based on his argument and the case law he cites, it is clear the Trustee equates the term "private transaction" with non-public "off-exchange transaction" or the private exchange of non-publicly listed securities. For purposes of this Order, the Court uses the term "private transaction" to mean an exchange of non-publicly listed securities and/or a transaction that occurs without the use of a regulated public exchange.

MacMenamin's Grill involved a textbook leveraged buyout of a debtor restaurant. The trustee sought to avoid transfers made by the leverage provider, on behalf of the debtor, to the defendant-shareholders. MacMenamin's Grill, 450 B.R. at 418. The defendant-shareholders moved for summary judgment under § 546(e), and the court denied the motion on the basis that the transfers were not "settlement payments." Id. at 425. The court reasoned that the leveraged buyout did not implicate the broader securities markets. Id. The MacMenamin's Grill opinion, however, was published prior to and did not have the benefit of the Second Circuit's opinion in Enron Creditors, 651 F.3d at 334 (cited above).

While Enron Creditors did not directly overrule MacMenamin's Grill, it broadly and literally interpreted § 741(8) by applying the "last-antecedent rule" and holding that §§ 741(8) and 546(e) include settlement payments that are not commonly used in the securities trading industry as well as ones that are common in the securities trading industry. Enron Creditors, 651 F.3d at 335-36 ("Accordingly, we hold that the phrase 'commonly used in the securities industry' limits only the phrase immediately preceding it; it does not limit the other transactions that § 741(8) defines as settlement payments."). In other words, the Second Circuit took a very broad view of the definition, following MacMenamin's Grill's very narrow application.

Turning to the other opinions relied on by the Trustee, Buckley relies heavily on Zahn.[6] Zahn discussed the framework of the American equity-securities[7] exchange clearing system. Zahn, 218 B.R. at 675 ("The securities industry utilizes a 'clearance and settlement' system, wherein parties use intermediaries to make trades of public stock which are instantaneously credited, but in which the actual exchange of stock and consideration therefor takes place at a later date."). The court goes on to explain the roles of intermediaries and the central clearing house, in regulated equity transactions. Id. at 676. Zahn found that the "need to preserve the stability of this system led Congress to create the § 546(e) exception to the trustee's avoidance powers." Id. The Zahn court conceded the subject "transfers 'settled' a purchase and sale of securities," but

[6] Zahn was decided in 1998 and interpreted an earlier version of § 546(e). All of the language that existed in the old version still remains today, but the current version adds additional language not present in Zahn. Compare 11 U.S.C. § 546(e) (1996) with 11 U.S.C. § 546(e) (2011).

[7] As discussed below, "settlement payments" to "commodity brokers" and "forward contract merchants" were included in § 546(e) at the time of Zahn, yet Zahn did not address these derivative (i.e., non-equity) aspects of the financial universe encompassed by § 546(e).

found the transfers "had no connection whatsoever to the clearance and settlement system, and allowing avoidance would have no impact at all on that system." Id. Therefore, the court concluded the subject transfers were not "settlement payments" as envisioned by § 546(e). Id.

Importantly, Zahn also stated: "Even if the transfers were 'settlement payments,' however, § 546(e) does not apply because they were not made 'by or to a commodity broker, forward contract merchant, stockbroker, financial institution, or securities clearing agency.'" Id. at 677. This reasoning was the court's most direct analytical path to its result. In other words, like the instant proceeding, the result in Zahn did not solely hinge on whether the transfers were "settlement payments" for purposes of § 546(e).

Further, going to the Trustee's generalized argument that § 546(e) can never apply to private transactions, it is necessary to point out the inclusion of "forward contract merchant" in the clause interpreted by Zahn and the addition of "forward contract" in the second clause of § 546(e) in 2006. These express, plain-language inclusions are telling in determining Congress's intent for whether § 546(e) should apply to private transactions.

A forward contract[8] is like a futures contract (or "commodity contract" under Title 11),[9] but the key difference is that a forward contract is—by definition—a private contract that is not traded on a public exchange. In re Olympic Nat. Gas Co., 294 F.3d 737, 741 (5th Cir. 2002) ("The commodities market is divided into only two categories: (1) on-exchange futures transactions; and (2) **off-exchange** forward contracts." (emphasis added)).

[8] The term "forward contract" means, *inter alia*, "a contract (**other than a commodity contract**, as defined in section 761) for the purchase, sale, or transfer of a commodity, as defined in section 761(8) of this title, or any similar [asset] which is presently or in the future becomes the subject of dealing in the forward contract trade." 11 U.S.C. § 101(25)(A) (2011) (emphasis added).

[9] The term "commodity contract" means, *inter alia*, "with respect to a futures commission merchant, contract for the purchase or sale of a commodity for future delivery **on, or subject to the rules of**, a contract market or board of trade." 11 U.S.C. § 761(4)(A) (2011) (emphasis added).

A "forward contract merchant" [10] acts as a market maker or liquidity provider for forward contract purchases/sales, but without a centralized exchange or clearing house. 11 U.S.C. § 101(26) (2011). A "forward contract merchant" functions as an independent clearing entity and engages in settlement payments when clearing/settling forward-contract transactions. Put differently, forward contracts, by definition, are only sold, purchased, and settled through private "over the counter" transactions without the use of a public exchange. Most importantly, § 546(e) plainly applies to "settlement payments" made by or to a "forward contract merchant"—i.e., to private transactions of non-publicly listed contracts that occur off-exchange.

Thus, it appears illogical to conclude that Congress intended for § 546(e) *not* to apply to private transactions where Congress specifically included forward contracts and forward contract merchants in the plain language of § 546(e). This is particularly so where the plain language evidences no such intent. Finally, if Congress wanted § 546(e) to apply to only non-private transactions, it has the constitutional authority to rewrite the statute. The judiciary, however, does not. Franklin California Tax-Free Trust, 136 S. Ct. at 1949 ("[O]ur constitutional structure does not permit this Court to 'rewrite the statute that Congress has enacted.'") (construing § 101(52) of the Bankruptcy Code).

CONCLUSION

In sum, the Court concludes there are no genuine disputes of material fact as to the application of the safe-harbor provision found in § 546(e). Taylor Bean meets the statutory

[10] Classically, most forward contracts are forward currency contracts (or forward foreign exchange contracts) traditionally used to hedge against foreign exchange-rate risk. Forward contracts are used for this because, among other reasons, there is no centralized public trading exchange for *spot* foreign exchange transactions. Plus, forward contracts provide tailoring that standardized, publicly-trade futures contracts do not provide. Congress's knowledge of the significance of forward currency contracts is borne out by the express inclusion of the twelve Federal Reserve Banks in Title 11's definition of "forward contract merchant." 11 U.S.C. § 101(26) (2011).

definition of financial participant. The transfers sought to be avoided were made by and for the benefit of Taylor Bean to Hicks. These transfers were made in connection with the Stock Purchase Agreement, which is a securities contract for purposes of this safe-harbor provision. Additionally, the Court is bound by the plain language of the statute as it does not find § 546(e) to be facially ambiguous nor ambiguous as applied to the facts and circumstances of this proceeding. The plain language of § 546(e) does not evidence any intent for the provision to apply to *only* non-private transactions that occur through the use of a regulated public exchange.

Accordingly, it is hereby ORDERED that summary judgment is GRANTED, in favor of Defendant Hicks, as to Counts 1, 2, 3, 4, and 6. Count 5 remains outstanding as to all relevant transfers, and Count 7 remains to the extent any such transfer is avoided. The parties shall proceed accordingly.