SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

UMB BANK, N.A., AS TRUSTEE FOR THE 8% SENIOR CASH PAY NOTES DUE 2021 AND FOR THE 8.750%/9.500% SENIOR PIK TOGGLE NOTES DUE 2021, Plaintiff, v. NEIMAN MARCUS GROUP, INC.; MARIPOSA INTERMEDIATE HOLDINGS LLC; NEIMAN MARCUS GROUP LTD., LLC; MYT PARENT CO.; MYT HOLDING CO.; THE NEIMAN MARCUS GROUP LLC; ARES PARTNERS HOLDCO LLC; ACOF OPERATING MANAGER III, LLC; ACOF OPERATING MANAGER IV, LLC; ARES CORPORATE OPPORTUNITIES FUND III, L.P.; ARES CORPORATE OPPORTUNITIES FUND IV, L.P.; ACOF MARIPOSA HOLDINGS LLC; and JOHN DOES 1-10, Defendants.	Index No. 654509/2019 Hon. Jennifer G. Schecter IAS Part 54 **Motion Seq. 003**

BRIEF OF THE CREDIT ROUNDTABLE AS *AMICUS CURIAE* IN OPPOSITION TO THE NEIMAN MARCUS DEFENDANTS' MOTION TO DISMISS

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INTEREST OF AMICUS CURIAE

The Credit Roundtable ("CRT") was formed in 2007 by a group of large institutional fixed-income managers. It currently has thirty member firms, which include investment advisors, insurance companies, pension funds, and mutual funds, representing more than $3.5 trillion of fixed-income assets under management. The object of CRT's efforts is to benefit all bond market participants through increased transparency, efficiency, and liquidity. To that end, CRT advocates for and facilitates improvements in the market for investment-grade corporate bonds by, among other things, strengthening bondholder covenant protections and promoting reforms in the underwriting and distribution of new issues, as well as in the tender offer and consent process. CRT regularly submits *amicus* briefs in proceedings that bear on its interests. [1]

The issue presented by the Neiman Marcus Defendants'[2] Motion to Dismiss is of great importance to CRT members. Holders of corporate bonds, like any other creditors, depend on the law of fraudulent conveyance to protect their interests against debtors. Indeed, the right to void fraudulent transfers is a bedrock principle of debtor-creditor law, one that dates back to the earliest days of the common law and has been recognized as a fundamental and even moral precept. Yet bondholders depend on the trustee, as their representative, to protect their interests. Indenture trustees therefore must be able to enforce bondholders' rights, including the right to avoid fraudulent conveyances, whether they do so pursuant to their duties upon an event of default, or otherwise at the holders' direction.

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[1] The European Leveraged Finance Association (ELFA), a trade association comprised of European leveraged finance investors that seeks to support the growth and resilience of the leveraged finance market while acting as the voice of its investor community, has advised CRT that it joins in the views set forth herein.

[2] Defendant Neiman Marcus Group, LTD, LLC; Neiman Marcus Group, Inc.; Mariposa Intermediate Holdings, LLC; MYT Parent Co.; and MYT Holding, Co.

Under the Neiman Marcus Defendants' proposed rule, indenture trustees would be categorically precluded from bringing fraudulent conveyance claims prior to an event of default. That rule would not only harm bondholders' interests; it would also eliminate fraudulent transfer as a remedy for corporate bondholders in many circumstances, contrary to the longstanding and universal recognition of courts and legislatures alike. And it would disable trustees from acting to protect the interests of bondholders based on provisions that were intended to do the opposite.

There is no ground in law or policy for the Neiman Marcus Defendants' proposal to strip indenture trustees—and thus creditors—of these deep-rooted rights. The Court should deny the motion to dismiss and allow the Trustee[3] to pursue the fraudulent conveyance claims on behalf of the bondholder-creditors.

ARGUMENT

I. The Right to Avoid Fraudulent Transfers is a Cornerstone of Debtor-Creditor Law

"The relation between debtors and creditors is as old as civilization" and "has always occupied a substantial portion of the resources of legal systems." Robert Charles Clark, *The Duties of the Corporate Debtor to its Creditors*, 90 Harv. L. Rev. 505, 510 n.17 (1977). Fraudulent conveyance law has existed for much of that time.

The first codification in English law dates back more than four centuries, to the 1571 Statute of 13 Elizabeth. 13 Eliz., ch. 5 (1571) (Eng.). That statute declared "clearly and utterly void" any transfer made with fraudulent intent that "in anywise disturbed, hindered, delayed or defrauded" the interests of the creditor. *Id.* Yet even the 1571 Statute of 13 Elizabeth and other early statutes were considered to reflect the common-law protections against fraud. *See*

[3] U.M.B. Bank, N.A., as Trustee for the 8% Senior Cash Pay Notes Due 2021 and for the 8.750%/9.500% Senior PIK Toggle Notes Due 2021.

Cadogan v. Kennett, 2 Cowp. 434 (K.B. 1776) (Mansfield, L.C.J.) ("[T]he principles and rules of the common law, as now universally known and understood, are so strong against fraud in every shape, that the common law would have attained every end proposed[.]"); *see also Hamilton v. Russell*, 5 U.S. 309, 316 (1803) (the principles underlying the Elizabeth statutes were only declaratory of "the principles of the common law").

Today, the substance of the Statutes of Elizabeth forms the basis of the fraudulent intent avoidance provisions of the federal Bankruptcy Code, as well as a core part of the uniform law fraudulent disposition laws enacted in nearly every state. 5 Collier on Bankruptcy ¶ 548.12(1) (Richard Levin & Henry J. Sommer eds., 16th ed.); *see also* Uniform Voidable Transactions Act (2014) ("UVTA") at 1 ("The Uniform Fraudulent Conveyance Act was a codification of the 'better' decisions applying the Statute of 13 Elizabeth."). In the states, fraudulent conveyance law has been adopted through the Uniform Fraudulent Conveyance Act (1918), and its successor, the Uniform Fraudulent Transfer Act (1984), with updates, the UVTA.[4]

The ancient and elemental role of fraudulent conveyance in debtor-creditor law has given it a civic and moral component as well. As Justice Story stated, "[i]t must be a fundamental policy of all enlightened nations to protect and subserve the rights of creditors." Joseph Story, Commentaries on Equity Jurisprudence, as Administered in England and America § 350 (1886). More recent commentators have described fraudulent conveyance as a principle that embodies "the debtor's *moral* duties to his creditors." Clark, *supra* at 2, at 515 (emphasis added). The debtor's obligations to the creditor are not merely legal, but "standards of right and

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[4] A handful of states have not adopted the uniform laws but have statutes based on the Elizabeth statutes. *See, e.g.*, Douglas C. Michael, *The Past and Present of Kentucky's Fraudulent Transfer and Preference Laws*, 86 Ky. L.J. 937, 954-55 & n.116 (1998). Governor Cuomo signed into law the UVTA on December 6, 2019. New York had previously adopted, promulgated, and employed the UFCA as Article 10 of its Debtor and Creditor Law.

wrong . . . that have endured over many centuries and have governed extremely common transactions," and, given their venerable past, "are . . . not really perceived as *imposed* by the statutes and cases which reflect them—as are many modern legal obligations—but are perceived to be a part of normative custom." *Id.* at 510 n.17. Others have said that fraudulent conveyance law is not about consequences, but rather is deontological, "exist[ing] to express disapproval of debtors and their friends when they divert assets that should be used to repay debt." David Gray Carlson, *Is Fraudulent Conveyance Law Efficient?*, 9 Cardozo L. Rev. 643, 644 n.5 (1987) (citing John Rawls, A Theory of Justice (1971)).

Any effort to eliminate the right of creditors to avoid fraudulent transfers must be judged in light of this background.

II. The Corporate Bondholder and the Indenture Trustee

Corporate bondholders are creditors who provide one of the primary sources of corporate funds. *See, e.g.*, R. Landau & R. Peluso, Corporate Trust Administration and Management 23-24 (7th ed. 2015). Together with stocks, bonds are the most commonly issued corporate securities.[5] In contrast to shareholders, who elect a board of directors to protect their interests, bondholders' rights are protected by a trustee who acts on the bondholders' behalf. The bond indenture defines the trustee's role, as well as the corporation's contractual obligations as debtor, and the manner in which the rights and remedies of the bondholders as creditors may be exercised.

The first corporate bond indentures, known as corporate mortgages, originated in the 1830s in connection with the building of the early railroads, and were essentially unregulated. *See* Churchill Rodgers, *The Corporate Trust Indenture Project*, 20 Bus. Law. 551, 552 (1965);

[5] *See* Bd. of Governors of the Fed. Reserve Sys., Financial Accounts of the United States: Flow of Funds, Balance Sheets, and Integrated Macroeconomic Accounts, Second Quarter 2019, at 122 tbl. L213 (at end of second quarter of 2019, approximately $14 trillion worth of corporate bonds were outstanding), https://www.federalreserve.gov/releases/z1/20190920/z1.pdf.

Frederica R. Orbzut, *The Trust Indenture Act of 1939: The Corporate Trustee as Creditor*, 24 U.C.L.A. L. Rev. 131, 134-35 (1976) ("*The Trust Indenture Act*"). They continued that way for nearly a century, until the stock market crash of 1929 provided "a grim lesson showing how little protection" they had afforded to investors. Henry F. Johnson, *The Forgotten Securities Statute: Problems in the Trust Indenture Act*, 13 U. Tol. L. Rev. 92, 96 (1981).[6] Determined to restore investor confidence in the markets and prevent another depression, Congress instructed the newly formed Securities and Exchange Commission to investigate whether regulation of corporate bond indentures was necessary. *Id.* at 93; *The Trust Indenture Act*, *supra* at 5, at 135 Rodgers, *supra* at 4, at 555.

The result was the Trust Indenture Act of 1939 ("TIA"). 15 U.S.C. § 77aaa *et seq.* Passed alongside a handful of historic statutes also aimed at regulating the markets in light of the problems of the past,[7] the TIA declares that the "national public interest, and the interest of investors" are "adversely affected" when the minimum obligations of the trust or trustee are not met, and that unregulated corporate bonds are "injurious to the capital markets, to investors, and to the general public." *Id.* § 77bbb(a)-(b). Citing the SEC's findings, Congress specifically declared that such interests had been and are undermined "when the obligor fails to provide a trustee to protect and enforce the rights and to represent the interests of such investors," and "when the trustee does not have adequate rights and powers[.]" *Id.* § 77bbb(a)(1)-(2).

To that end, the TIA requires that all corporate bond indentures (with limited exceptions) provide for the appointment of a trustee, *id.* § 77jjj(a)(1), and incorporate various default and

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[6] Many considered the severe losses to investors to be at least partially the fault of indenture trustees. *See, e.g.*, *The Trust Indenture Act*, *supra* at 5, at 135.

[7] The Securities Act of 1933, 15 U.S.C. §§ 77a *et seq.*, the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a *set seq.*, the Investment Company Act of 1940, 15 U.S.C. §§ 80a-1 *et seq.*, and the Investment Advisors Act of 1940, 15 U.S.C. §§ 80b-1 *et seq.*

mandatory terms, *id.* § 77rrr(c) ("The provisions of sections 310 to and including 317 [15 USCS §§ 77jjj–77qqq] that impose duties on any person (including provisions automatically deemed included in an indenture unless the indenture provides that such provisions are excluded) are a part of and govern every qualified indenture . . . ."). The inclusion of these terms was intended to provide minimum protections to bondholders, who are not part of the indenture negotiations between the obligor, whose interest is generally in obtaining "a bare minimum of restrictions on its activity"; the underwriter, who "care[s] only about the immediate marketability of the debt securities"; and the trustee, whose principal aim is to "assure its own protection from liability." *See, e.g.*, *The Trust Indenture Act*, *supra* at 5, at 135. "In effect, the TIA would be the investor's silent representative during the drafting of the indenture." *Id.*

The standard corporate indenture today is based on the Model Simplified Indenture, which was first drafted in 1983 and revised in 1999. *See Revised Model Simplified Indenture*, 55 Bus. Law. 1115 (2000); *Model Simplified Indenture*, 38 Bus. Law 741 (1983). The Model Simplified Indenture, in turn, necessarily incorporates the required provisions from the TIA. 15 U.S.C. § 77rrr(c). All the relevant provisions in the indentures at issue here substantially track the Model Simplified Indenture.

III. Corporate Bondholders Must be Able to Protect Their Interests Against Fraudulent Conveyance

The Neiman Marcus Defendants argue that an indenture trustee may not assert a fraudulent conveyance claim in the absence of an event of default under the indenture, even if the requisite threshold of bondholders direct it to do so in order to protect their interests. *See* NYSCEF 57, Neiman Marcus Defs.' Br. at 12. That extreme position should be rejected as contrary to the longstanding and foundational role of fraudulent conveyance in debtor-creditor law, and contrary to the purpose of the provisions on which the Neiman Marcus Defendants rely.

The Neiman Marcus Defendants focus upon Section 6.3, which provides that "the Trustee may pursue any available remedy" "[i]f an Event of Default occurs and is occurring." *Id.* at 11. Because an event of default has not occurred, they argue, the Trustee may not bring a fraudulent conveyance claim. As the Trustee observes, however, Section 6.5 unambiguously provides that the Trustee may seek "any remedy available" at the direction of a majority of bondholders, and that section is not conditioned on whether there has been an event of default. NYSCEF 67, Trustee's Br at 13-14. Here, the Trustee brought suit pursuant to a direction of holders. NYSECF 1, Compl. ¶ 44. Its actions are thus authorized by the plain terms of the indenture.

That construction of the indenture finds support from the drafters of the Model Simplified Indenture on which the indentures here are based. As the drafters recognized, the existence of an event of default simply allocates the *trustee's duties*; it does not affect the *bondholders' rights*, including their fundamental right as creditors to be free from fraudulent conveyances. *See Revised Model Simplified Indenture*, *supra* at 6, §§ 7.01/7.02 notes ("The Model Simplified Indenture does not alter the very limited duties imposed under the TIA upon the Trustee prior to a Default[.] . . . The law is well established that prior to an event of default, the trustee's duties are limited to those explicitly set forth in the Indenture (the 'Four Corners Rule'). The trustee assumes broader duties only after an event of default.").[8] Likewise, the TIA, which governs the Model Simplified Indenture, ties an event of default solely to the trustee's duties. *See* 15 U.S.C. § 77ooo(a)-(a)(1) (indenture must "provide that, prior to default," "the indenture trustee shall not be liable except for the duties such as are specifically set out in such indenture").[9]

[8] The numbering of the Model Simplified Indenture and the indentures here differ slightly, for instance, 6.03 as opposed to 6.3.

[9] To be sure, in defining the trustee's duties, the event of default does affect the bondholders' rights *vis-à-vis* the trustee. But it does not in any way purport to alter their rights as creditors against the debtor-issuer.

The drafters of the Model Simplified Indenture also recognized that the virtually identical phrase "any available remedy" that appears in Section 6.3 is expansive: "In authorizing the Trustee to 'pursue any available remedy' for collection on the Securities or enforcement of the Indenture, the Model Simplified Indenture subsumes all of the customary phraseology: 'actions, suits or proceeding,' 'at law or in equity,' under this Indenture or otherwise by law.' etc." *Revised Model Simplified Indenture*, *supra* at 6, § 6.03 notes. The Court of Appeals recently reached the same conclusion, holding that "any available remedy" "by its terms . . . includes all remedies available at law and in equity." *Cortland St. Recovery Corp. v. Bonderman*, 31 N.Y.3d 30, 40 (2018); *see also id.* at 44-45 (finding "the plain language of the indenture is dispositive"). That expansive construction of course includes a claim for fraudulent conveyance, as the Neiman Marcus Defendants acknowledge. *See* Neiman Marcus Defs.' Br. at 12 (citing *Cortland St.*, 31 N.Y.3d at 40-41). By contrast, the Neiman Marcus Defendants' argument, relying as it does on a standard term in the Model Simplified Indenture, would preclude trustees acting pursuant to indentures based on this form from *ever* bringing a claim prior to default, an interpretation which flies in the face of the plain terms of the indentures and the Model Simplified Indentures' drafters' commentary, and would subvert the expectation of corporate bondholders that they may direct the trustee to enforce their rights against fraudulent conveyance, regardless of whether an event of default has occurred.

The Neiman Marcus Defendants' proposed rule is also inconsistent with the history of the TIA, which governs the Model Simplified Indenture and the indentures here. As noted, Congress passed the provision that underlies Section 6.3 in the wake of the greatest financial crisis the country had ever seen, premised on findings by the SEC that the lack of protection for bond investors was harmful to the national interest and was in part to blame for the crash. *See* 15

U.S.C. § 77bbb(a)(1)-(2); *id.* § 77ooo(a)-(a)(1); *id.* § 77ooo(c); *see also The Trust Indenture Act*, *supra* at 5, at 135. It is absurd to suggest that Congress, in enacting various protections for bondholder creditors in the TIA to renew investor confidence and regulate the market, in fact *stripped* bondholder creditors of core protections in debtor-creditor law that date back to the early days of the common law, particularly when New York law explicitly provides a creditor with a remedy for the debtor's fraudulent conveyance even *before* the debtor defaults on any obligation. Section 279 of New York's Debtor-Creditor Law allows "a court of competent jurisdiction" to "[s]et aside [a] conveyance" when "a conveyance made . . . is fraudulent as to a creditor whose claim has not matured." It is contrary to basic interpretive principles to construe a provision that affirmatively states the indenture trustee's duties upon an event of default to remove bondholders' core rights as creditors prior to the same. Congress does not "hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'n, Inc.*, 531 U.S. 457, 468 (2001). Had Congress meant to effect such a monumental shift in the debtor-creditor relationship in this important context, it would have said so. The same holds for the drafters of the Model Simplified Indenture and the indentures here that are governed by the TIA.

Finally, the role of fraudulent conveyance law has been a central and unquestioned part of our legal system since its beginning. If there is anything that creditors should reasonably expect based on that history, it is that they will have recourse against debtors who fraudulently and wrongly transfer their property in a way that harms their interests. Indeed, the functioning of our system of law and justice depends on it. *See* Story, *supra* at 3, § 350. The Court should not adopt a rule that would deprive creditors of this critical remedy contrary to their reasonable expectations unless there is every irresistible reason that it must do so. Every reason—law, policy, and contractual text—favors the Trustee here.

CONCLUSION

For the foregoing reasons, The Credit Roundtable respectfully requests that this Court deny the Neiman Marcus Defendants' Motion to Dismiss the Trustee's Complaint.

Dated: New York, New York
January 8, 2020

Respectfully submitted,

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