

19-3049-cv; 19-449-cv

*In re: Tribune Co. Fraudulent Conv. Litig.*

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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August Term 2020

(Argued: August 24, 2020      Decided: August 20, 2021)

Docket Nos. 19-3049-cv; 19-449-cv

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IN RE: TRIBUNE COMPANY FRAUDULENT CONVEYANCE LITIGATION

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MARC S. KIRSCHNER, AS LITIGATION TRUSTEE FOR THE TRIBUNE LITIGATION TRUST,  
*Plaintiff-Appellant,*

*- against -*

LARGE SHAREHOLDERS, FINANCIAL ADVISORS, FINANCIAL INSTITUTION HOLDERS,  
FINANCIAL INSTITUTION CONDUITS, PENSION FUNDS, INDIVIDUAL BENEFICIAL  
OWNERS, MUTUAL FUNDS,  
*Defendants-Appellees.*

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MARC S. KIRSCHNER, AS LITIGATION TRUSTEE FOR THE TRIBUNE LITIGATION TRUST,  
*Plaintiff-Appellant,*

- *against* -

CITIGROUP GLOBAL MARKETS INC., MERRILL LYNCH, PIERCE, FENNER & SMITH  
INCORPORATED,  
*Defendants-Appellees.*

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

Before:

RAGGI and CHIN, *Circuit Judges.*\*

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Appeals from a judgment and orders of the United States District Court for the Southern District of New York (Sullivan and Cote, *JJ.*) dismissing claims arising out of the leveraged buyout of the Tribune Company in 2007 and its bankruptcy filing in 2008. The bankruptcy litigation trustee contends on

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\* Our late colleague Judge Ralph K. Winter was originally assigned to this panel. The two remaining members of the panel, who are in agreement, have decided this case in accordance with Second Circuit Internal Operating Procedure E(b). *See* 28 U.S.C. § 46(d); *United States v. Desimone*, 140 F.3d 457, 458–59 (2d Cir. 1998).

appeal that the district court erred in dismissing his claims against the Tribune Company's shareholders and financial advisors for fraudulent transfer, breach of fiduciary duty, and related causes of action. The bankruptcy litigation trustee also contends that the district court erred in denying leave to amend his complaint.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

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LAWRENCE S. ROBBINS (Roy T. Englert, Jr., *on the brief*), Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP, Washington, DC; Robert J. Lack, Jeffrey R. Wang, Friedman Kaplan Seiler & Adelman LLP, New York, New York; David M. Zensky, Akin Gump Strauss Hauer & Feld LLP, New York, New York, *for Plaintiff-Appellant*.

DOUGLAS HALLWARD-DRIEMEIR, (Jonathan Ference-Burke *on the brief*), Ropes & Gray LLP, Washington, DC; Andrew Devore, Joshua Sturm, Ropes & Gray LLP, Boston, MA; Philip D. Anker, Alan E. Schoenfeld, Ryan Chabot, Wilmer Cutler Pickering Hale & Dorr LLP, New York, New York; Joel W. Millar, Wilmer Cutler Pickering Hale & Dorr LLP, Washington, DC; Matthew L. Fornshell, Ice Miller LLP, Columbus, Ohio; Andrew J. Entwistle, Entwistle & Cappucci LLP, New York, New York; Mark A. Neubauer, Carlton Fields, LLP, Los Angeles, California; P. Sabin Willett, Michael C. D'Agostino, Morgan, Lewis & Bockius LLP, Boston, Massachusetts;

Michael S. Doluisio, Dechert LLP, Philadelphia, Pennsylvania, *for Defendants-Appellees Pension Funds, Financial Institution Holders, Individual Beneficial Owners, Mutual Funds, Certain Large Shareholders, and Financial Institution Conduits.*

ERIN E. MURPHY, Kirkland & Ellis LLP, Washington, DC; Gabor Balassa, Brian Borchard, Kirkland & Ellis LLP, Chicago, Illinois; Oscar Garza, Douglas G. Levin, Gibson, Dunn & Crutcher LLP, Irvine, California; Matthew D. McGill, Gibson, Dunn & Crutcher LLP, Washington, D.C., *for Defendants-Appellees Large Shareholders.*

KANNON K. SHANMUGAM (Masha G. Hansford, Joel S. Johnson, *on the brief*), Paul, Weiss, Rifkind, Wharton & Garrison LLP, Washington, D.C.; Andrew G. Gordon, Kira A. Davis, Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York, New York; Daniel L. Cantor, Daniel S. Shamah, O'Melveny & Myers LLP, New York, New York, *for Defendants-Appellees Citigroup Global Markets, Inc. and Merrill Lynch, Pierce, Fenner & Smith Inc.*

JONATHAN D. POLKES (Gregory Silbert, Stacy Nettleton, *on the brief*), Weil, Gotshal & Manges LLP, New York, New York; George E. Mastoris, Winston & Strawn LLP, New York, New York, *for Defendants-Appellees Financial Advisors.*

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CHIN, *Circuit Judge*:

In 2007, the Tribune Company ("Tribune"), then-publicly traded, executed a leveraged buyout (the "LBO") to go private. Less than a year later, Tribune filed for Chapter 11 bankruptcy. Plaintiff-appellant Marc Kirschner, the bankruptcy litigation trustee (the "Trustee"), brought fraudulent conveyance and other claims on behalf of creditors against shareholders who sold their stock in the LBO and against the financial advisors that helped Tribune navigate and complete the LBO. In several orders and decisions, the district court dismissed the Trustee's claims for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

For the reasons set forth below, we **AFFIRM in part, VACATE in part**, and **REMAND** for further proceedings.

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