

No. 14-710

In the Supreme Court of the United States

JAMES W. GIDDENS, AS TRUSTEE FOR THE SIPA
LIQUIDATION OF LEHMAN BROTHERS INC., PETITIONER

v.

BARCLAYS CAPITAL INC., ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT*

**BRIEF FOR THE UNITED STATES SECURITIES
AND EXCHANGE COMMISSION**

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QUESTION PRESENTED

Whether, consistent with Section 363(b)(1) of the Bankruptcy Code and the Due Process Clause, a subsequent written agreement that materially changes the terms of a sale presented to and approved by a bankruptcy court can supersede the contemporaneous representations made to and relied on by that court during the Section 363 hearing.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-20) is reported at 761 F.3d 303. The amended opinion of the district court (Pet. App. 23-77) is reported at 478 B.R. 570. The opinion of the bankruptcy court (Pet. App. 78-206) is reported at 445 B.R. 143.

JURISDICTION

The judgment of the court of appeals was entered on August 5, 2014. A petition for rehearing was denied on September 23, 2014 (Pet. App. 21-22). The petition for a writ of certiorari was filed on December 15, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On September 15, 2008, Lehman Brothers Holdings Inc. (LBHI) filed a bankruptcy petition in the Bankruptcy Court for the Southern District of New York. See Pet. App. 3; 08-13555 Docket entry No. 1, at 1. On September 19, 2008, the Securities Investor Protection Corporation (SIPC), as authorized by the Securities Investor Protection Act of 1970 (SIPA), 15 U.S.C. 78aaa *et seq.*, applied to the District Court for the Southern District of New York for appointment of a trustee to oversee the liquidation of Lehman Brothers Inc. (LBI), LBHI's North American broker-dealer subsidiary. See 15 U.S.C. 78eee(a)(3) and (b)(1); Pet. App. 26; 08-cv-08119 Docket entry No. 1, at 1, 5-11 (Sept. 19, 2008). Later that day, the district court appointed petitioner James W. Giddens as trustee and removed the liquidation proceeding to the bankruptcy court where LBHI's bankruptcy petition was pending. See 08-cv-08119 Docket entry No. 3, at 1-8; see also 15 U.S.C. 78eee(b)(3); see generally *Securities Inv. Prot. Corp. v. Barbour*, 421 U.S. 412, 415-418 (1975).

Within hours of the district court's order, the bankruptcy court commenced a sale hearing under Section 363 of the Bankruptcy Code to consider the sale to Barclay's Capital Inc. (Barclays) of various business assets belonging to LBI. See 11 U.S.C. 363; Pet. App. 3-4, 93; SIPC Br. 15. At the end of the hearing, the bankruptcy court entered an order approving the sale of assets under a "Purchase Agreement," which included an "Asset Purchase Agreement, as modified, clarified, and/or amended by the First Amendment," and a yet-to-be finalized letter agreement further "clarifying and supplementing the Asset Purchase Agreement." 08-13555

Docket entry No. 258, at 1, 12-24 (Sept. 20, 2008); see Pet. App. 6-7, 27-28.

2. Approximately one year later, a disagreement developed between Barclays and petitioner about whether Barclays was entitled to receive certain classes of LBI assets as part of the sale transaction. See Pet. App. 2, 118. Three classes of assets were in dispute: (i) the “Margin Assets,” consisting of “cash and cash equivalents held by third parties to secure LBI’s exchange-traded derivatives * * * business”; (ii) the “Clearance Box Assets,” consisting of securities held by the Depository Trust Clearing Corporation; and (iii) the “Rule 15c3-3 Assets.” *Id.* at 2 & n.1. The “Rule 15c3-3 Assets” consisted of \$769 million in securities deposited in LBI’s Reserve Bank Account as required by Exchange Act Rule 15c3-3, and \$507 million in assets used by LBI “as a debit item in calculating the amount required to be held in the Reserve Bank Account.” *Ibid.*; see *id.* at 173, 182, 190; see also 17 C.F.R. 240.15c3-3a (setting forth a formula to determine the amount of customer assets that a broker-dealer must deposit into a Reserve Bank Account); 50 Fed. Reg. 41,337, 41,337-41,338 (Oct. 10, 1985).

a. To resolve various motions and adversary complaints arising from that dispute, the bankruptcy court held a month-long trial at which Barclays and petitioner presented their cases. See Pet. App. 7-8, 118-121. Acting pursuant to Section 5(c) of SIPA, which authorizes the Securities and Exchange Commission (Commission) to “participate as a party” in any proceeding under that statute, 15 U.S.C. 78eee(c), the Commission filed a post-hearing brief that addressed only whether Barclays was entitled to the Rule 15c3-3 Assets, see 08-13555 Docket entry No. 12,961, at 1 (Nov. 22, 2010). In that brief, the Commission noted its “strong interest in ensuring that

its broker-dealer Customer Protection Rule, Rule 15c3-3, * * * is properly interpreted.” *Ibid.* The Commission’s brief further explained that transferring the Rule 15c3-3 Assets to Barclays would violate the Rule if the transfer would increase the deficiency in the Reserve Bank Account and leave LBI’s trustee with insufficient funds to satisfy all claims of remaining customers. See *id.* at 3-13.

On February 22, 2011, the bankruptcy court issued its decision. The court ruled that Barclays’s claim to the Rule 15c3-3 Assets was “contingent upon the Trustee having sufficient customer property to satisfy all allowed customer claims filed in the SIPA liquidation.” Pet. App. 8, 172-182. The court also ruled that Barclays was not entitled to the Margin Assets but was entitled to the Clearance Box Assets. See *id.* at 8, 182-198.

b. Barclays and the trustee both appealed to the district court. See Pet. App. 8; see also 28 U.S.C. 158(a). In that court, the Commission again participated solely with respect to issues relating to the Rule 15c3-3 Assets. The Commission filed a brief contending that the bankruptcy court was correct to conclude that Barclays had only a contingent claim to those assets. See 11-cv-06052, Docket entry No. 23, at 1-3 (Dec. 22, 2011) (“The Commission addresses only the operation of Rule 15c3-3, and does not address any other issues raised by the parties.”).

On July 16, 2012, the district court affirmed the bankruptcy court’s decision in part and reversed it in part. See Pet. App. 76-77. The district court affirmed the ruling that Barclays had only a contingent claim to the Rule 15c3-3 Assets, as well as the ruling that Barclays was entitled to the Clearance Box Assets. See *id.* at 8, 67-76. With respect to the Margin Assets, however, the district court concluded that the bankruptcy court had erred in interpreting the parties’ agreements. The

district court awarded the Margin Assets to Barclays. See *id.* at 8, 47-67.

c. Petitioner appealed the district court's decision awarding Barclays the Margin Assets and the Clearance Box Assets. See Pet. App. 2 & n.1, 3, 8. Barclays cross-appealed to challenge the district court's decision with respect to the Rule 15c3-3 Assets. See *ibid.* The Commission intervened in the court of appeals. See 12-2322 Docket entry No. 113, at 1 (Sept. 25, 2012). The Commission's brief defended the district court's ruling as to the Rule 15c3-3 Assets and explained why Barclays' attack on that ruling misinterpreted Rule 15c3-3. See 12-2322 Docket entry No. 183, at 1-3, 13-23 (Mar. 4, 2013). The brief stated that the Commission took "no position on" any other issue "raised by the parties, including questions concerning the [other] two categories of assets." *Id.* at 3.

After completion of briefing but before oral argument in the Second Circuit, Barclays and petitioner reached a settlement as to the Rule 15c3-3 Assets, and petitioner informed the court of the settlement. See 12-2322 Docket entry No. 240, at 1-2 (May 10, 2013). Because the settlement resolved the only issue addressed in the Commission's brief, the court of appeals inquired whether the Commission would "waive" participation in oral argument, and the Commission agreed to do so. 12-2322 Docket entry No. 243, at 1-2 (May 21, 2013).

On August 5, 2014, the Second Circuit issued a published opinion resolving various issues relating to the Margin Assets and the Clearance Box Assets. See Pet. App. 1-20; *id.* at 2 ("This appeal involves a dispute * * * over the entitlement to two sets of LBI assets."). The court noted that "Barclays cross-appealed from the Rule 15c3-3 Assets ruling but the settlement has disposed of

that issue and cross-appeal.” *Id.* at 3; see *id.* at 2. In light of the settlement, the court did not discuss the Commission’s interpretation of Rule 15c3-3 or otherwise address the proper disposition of the Rule 15c3-3 Assets.

DISCUSSION

The Commission takes no position on whether the petition for a writ of certiorari should be granted or denied. In the courts below, the Commission participated in this case solely to address the proper interpretation of Rule 15c3-3 as it related to disposition of the Rule 15c3-3 Assets. Because that issue was resolved by settlement, the court of appeals did not address it, and it is not within the scope of the question presented by the petition, which concerns the separate issue of whether the sale of LBI assets to Barclays included the Margin Assets. See Pet. i-ii, 15-19, 29-30; see also SIPC Br. 2-3, 10-11.

CONCLUSION

The Commission takes no position on whether the petition for a writ of certiorari should be granted or denied.

Respectfully submitted.

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