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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

- X

IN RE

LYONDELL CHEMICAL COMPANY, ET AL.,

Debtors.

Chapter 11

Case No. 09-10023 (REG)

(Jointly Administered)

EDWARD S. WEISFELNER, AS TRUSTEE OF THE LB CREDITOR TRUST,

Plaintiff,

-against-

MORGAN STANLEY & CO., INCORPORATED, SOLELY IN ITS CAPACITY AS CUSTODIAN, TRUSTEE, AGENT, REPRESENTATIVE OR NOMINEE, MORGAN STANLEY / RETAIL, SOLELY IN ITS CAPACITY AS CUSTODIAN, TRUSTEE, AGENT, REPRESENTATIVE OR NOMINEE, BENEFICIAL HOLDERS OF ACCOUNTS HELD IN THE NAME OF MORGAN STANLEY & CO., INCORPORATED, BENEFICIAL HOLDERS OF ACCOUNTS HELD IN THE NAME OF MORGAN STANLEY / RETAIL, STATE STREET BANK & TRUST, FIDUCIARY – STATE STREET BANK, STATE STREET BANK – TRUST CUSTODY, STATE STREET BANK – IBT/BGI, STATE STREET BANK – SPDR'S, STATE STREET BANK & TRUST CO/IBT, TRANSFEREES OF STATE STREET BANK & TRUST, TRANSFEREES OF FIDUCIARY – STATE STREET BANK, TRANSFEREES OF STATE STREET BANK – TRUST CUSTODY, TRANSFEREES OF STATE STREET BANK – IBT/BGI, TRANSFEREES OF STATE STREET BANK – SPDR'S, TRANSFEREES OF STATE STREET BANK & TRUST CO/IBT, CREDIT SUISSE SECURITIES US, SOLELY IN ITS CAPACITY AS CUSTODIAN, TRUSTEE, AGENT, REPRESENTATIVE OR NOMINEE, CREDIT SUISSE SECURITIES/IA, SOLELY IN ITS CAPACITY AS CUSTODIAN, TRUSTEE, AGENT,

Adv. Pro. 10-04609 (REG)

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE COMPLAINT

REPRESENTATIVE OR NOMINEE, BENEFICIAL :
HOLDERS OF ACCOUNTS HELD IN THE NAME :
OF CREDIT SUISSE SECURITIES US, :
BENEFICIAL HOLDERS OF ACCOUNTS HELD :
IN THE NAME OF CREDIT SUISSE :
SECURITIES/IA, BEAR STEARN SECURITIES :
CORP, TRANSFEREES OF BEAR STEARN :
SECURITIES CORP, DEUTSCHE BANK :
SECURITIES, SOLELY IN ITS CAPACITY AS :
CUSTODIAN, TRUSTEE, AGENT, :
REPRESENTATIVE OR NOMINEE, BENEFICIAL :
HOLDERS OF ACCOUNTS HELD IN THE NAME :
OF DEUTSCHE BANK SECURITIES, INC., JPM :
CHASE BANK, N.A., SOLELY IN ITS CAPACITY :
AS CUSTODIAN, TRUSTEE, AGENT, :
REPRESENTATIVE OR NOMINEE, BENEFICIAL :
HOLDERS OF ACCOUNTS HELD IN THE NAME :
OF JPM CHASE BANK, N.A., JP MORGAN :
SECURITIES, SOLELY IN ITS CAPACITY AS :
CUSTODIAN, TRUSTEE, AGENT, :
REPRESENTATIVE OR NOMINEE, BENEFICIAL :
HOLDERS OF ACCOUNTS HELD IN THE NAME :
OF JP MORGAN SECURITIES, NATIONAL :
FINANCIAL SERVICES, TRANSFEREES OF :
NATIONAL FINANCIAL SERVICES, BROWN :
BROTHERS HARRIMAN, TRANSFEREES OF :
BROWN BROTHERS HARRIMAN, JPMORGAN :
CHASE BK/IA, SOLELY IN ITS CAPACITY AS :
CUSTODIAN, TRUSTEE, AGENT, :
REPRESENTATIVE OR NOMINEE, BENEFICIAL :
HOLDERS OF ACCOUNTS HELD IN THE NAME :
OF JPMORGAN CHASE BK/IA, NORTHERN :
TRUST COMPANY, TRANSFEREES OF :
NORTHERN TRUST COMPANY, BNP PARIBAS :
SEC CORP, TRANSFEREES OF BNP PARIBAS :
SEC CORP, JPM BNK/CORR CL SVCS, SOLELY :
IN ITS CAPACITY AS CUSTODIAN, TRUSTEE, :
AGENT, REPRESENTATIVE OR NOMINEE, :
BENEFICIAL HOLDERS OF ACCOUNTS HELD :
IN THE NAME OF JPM BNK/CORR CL SVCS, :
PNC BANK, N.A., TRANSFEREES OF PNC BANK, :
N.A., TD AMERITADE CLEAR, TRANSFEREES :
OF TD AMERITRADE CLEAR, FIRST CLEARING, :
LLC, TRANSFEREES OF FIRST CLEARING, LLC, :
CALYON SECURITIES (USA), TRANSFEREES OF :
CALYON SECURITIES (USA), BARCLAYS :

CAPITAL INC., SOLELY IN ITS CAPACITY AS :
CUSTODIAN, TRUSTEE, AGENT, :
REPRESENTATIVE OR NOMINEE, BENEFICIAL :
HOLDERS OF ACCOUNTS HELD IN THE NAME :
OF BARCLAYS CAPITAL INC., SG AMERICAS :
SEC LLC, SOLELY IN ITS CAPACITY AS :
CUSTODIAN, TRUSTEE, AGENT, :
REPRESENTATIVE OR NOMINEE, BENEFICIAL :
HOLDERS OF ACCOUNTS HELD IN THE NAME :
OF SG AMERICAS SEC LLC, BEAR STEARNS :
SECURITIES CORP. F/A/O FNY SEC/HLW :
GROUP, CIBC WORLD MARKETS, :
TRANSFEREES OF CIBC WORLD MARKETS, :
JPM/PUBLIC EMP RET., SOLELY IN ITS :
CAPACITY AS CUSTODIAN, TRUSTEE, AGENT, :
REPRESENTATIVE OR NOMINEE, BENEFICIAL :
HOLDERS OF ACCOUNTS HELD IN THE NAME :
OF JPM/PUBLIC EMP RET., WELLS FARGO :
BANK, N.A., SOLELY IN ITS CAPACITY AS :
CUSTODIAN, TRUSTEE, AGENT, :
REPRESENTATIVE OR NOMINEE, WELLS :
FARGO INVESTMENT LLC, SOLELY IN ITS :
CAPACITY AS CUSTODIAN, TRUSTEE, AGENT, :
REPRESENTATIVE OR NOMINEE, BENEFICIAL :
HOLDERS OF ACCOUNTS HELD IN THE NAME :
OF WELLS FARGO BANK, N.A., BENEFICIAL :
HOLDERS OF ACCOUNTS HELD IN THE NAME :
OF WELLS FARGO INVESTMENT LLC, :
COMERICA BANK, TRANSFEREES OF :
COMERICA BANK, SCOTTRADE, INC., :
TRANSFEREES OF SCOTTRADE, INC., AG :
EDWARDS & SONS, SOLELY IN ITS CAPACITY :
AS CUSTODIAN, TRUSTEE, AGENT, :
REPRESENTATIVE OR NOMINEE, BENEFICIAL :
HOLDERS OF ACCOUNTS HELD IN THE NAME :
OF AG EDWARDS & SONS, JP MORGAN SEC :
INC WF, SOLELY IN ITS CAPACITY AS :
CUSTODIAN, TRUSTEE, AGENT, :
REPRESENTATIVE OR NOMINEE, BENEFICIAL :
HOLDERS OF ACCOUNTS HELD IN THE NAME :
OF JP MORGAN SEC INC WF, U.S. TRUST :
COMPANY NA, TRANSFEREES OF U.S. TRUST :
COMPANY NA, WACHOVIA BANK N.A., :
SOLELY IN ITS CAPACITY AS CUSTODIAN, :
TRUSTEE, AGENT, REPRESENTATIVE OR :
NOMINEE, BENEFICIAL HOLDERS OF :

ACCOUNTS HELD IN THE NAME OF :
WACHOVIA BANK N.A., EDWARD D. JONES, :
TRANSFEREES OF EDWARD D. JONES, :
SUMITOMO TRUST & BANKING, :
TRANSFEREES OF SUMITOMO TRUST & :
BANKING, SWISS AMERICAN SECURITIES, :
TRANSFEREES OF SWISS AMERICAN :
SECURITIES, ROBERT W. BAIRD & CO., :
TRANSFEREES OF ROBERT W. BAIRD & CO., :
BGC INTERNATIONAL BROKER DEALER :
CREDIT ACCOUNT, AMALGAMATED BANK, :
AMALGAMATED BANK CRGO, TRANSFEREES :
OF AMALGAMATED BANK, TRANSFEREES OF :
AMALGAMATED BANK CRGO, TD :
WATERHOUSE CANADA, TRANSFEREES OF TD :
WATERHOUSE CANADA, H&R BLOCK :
FINANCIAL ADVISORS, TRANSFEREES OF H&R :
BLOCK FINANCIAL ADVISORS, DOFT & CO., :
INC. FIRM ACCOUNT, ELISABETH H. DOFT, :
KDC MERGER ARBITRAGE MASTER, JMS LLC, :
SCOTIA CAPITAL, TRANSFEREES OF SCOTIA :
CAPITAL, LINSCO/PRIVATE CORP., :
TRANSFEREES OF LINSCO/PRIVATE CORP., :
PENSON FIN SERV INC., TRANSFEREES OF :
PENSON FIN SERV INC., MUGC MTBJ PT33, :
NATIONAL CITY BANK, TRANSFEREES OF :
NATIONAL CITY BANK, CANTOR CLEARING :
SERVICES, TRANSFEREES OF CANTOR :
CLEARING SERVICES, JPM/PCS SHARED SVCS, :
SOLELY IN ITS CAPACITY AS CUSTODIAN, :
TRUSTEE, AGENT, REPRESENTATIVE OR :
NOMINEE, BENEFICIAL HOLDERS OF :
ACCOUNTS HELD IN THE NAME OF JPM/PCS :
SHARED SVCS, MJR PARTNERS, TRACK DATA :
CORPORATION, SOUTHWEST SECURITIES, :
INC., TRANSFEREES OF SOUTHWEST :
SECURITIES, INC., BEAR STEARNS & CO. F/A/O :
GABELLI ASSOCIATES, MORGAN KEEGAN & :
CO., TRANSFEREES OF MORGAN KEEGAN & :
CO., SUNTRUST BANK, TRANSFEREES OF :
SUNTRUST BANK, THE FIFTH THIRD BANK, :
TRANSFEREES OF THE FIFTH THIRD BANK, :
BEAR STEARNS SECURITIES CORP. – FIRST NY :
SECURITIES / BRITALLY CAPITAL, BMO :
NESBITT BURNS, BMO NESBITT BURNS SA, :
TRANSFEREES OF BMO NESBITT BURNS, :

TRANSFEREES OF BMO NESBITT BURNS SA, :
BANK OF NOVA SCOTIA TAX, BANK OF NOVA :
SCOTIA WMF/CDS, TRANSFEREES OF BANK :
OF BANK OF NOVA SCOTIA TAX, :
TRANSFEREES OF BANK OF NOVA SCOTIA :
WMF/CDS, BAR/CAP EQUITY FINAN, SOLELY :
IN ITS CAPACITY AS CUSTODIAN, TRUSTEE, :
AGENT, REPRESENTATIVE OR NOMINEE, :
BENEFICIAL HOLDERS OF ACCOUNTS HELD :
IN THE NAME OF BAR CAP/EQUITY FINAN, :
MTBJ PT 13, JP MORGAN SEC INC SL, SOLELY :
IN ITS CAPACITY AS CUSTODIAN, TRUSTEE, :
AGENT, REPRESENTATIVE OR NOMINEE, :
BENEFICIAL HOLDERS OF ACCOUNTS HELD :
IN THE NAME OF JP MORGAN SEC INC SL, :
CROWELL WEEDON AND CO. OMNIBUS :
ACCOUNT, CROWELL WEEDON & CO., STERN :
AGEE & LEACH, TRANSFEREES OF STERN :
AGEE & LEACH, WEDBUSH MORGAN :
SECURITIES, TRANSFEREES OF WEDBUSH :
MORGAN SECURITIES, BANK OF TOKYO – :
MITSUBISHI, TRANSFEREES OF BANK OF :
TOKYO – MITSUBISHI, D.A. DAVIDSON & CO., :
TRANSFEREES OF D.A. DAVIDSON & CO., :
PRIMEVEST FINANCIAL SERVICES, :
TRANSFEREES OF PRIMEVEST FINANCIAL :
SERVICES, CHARLES SCHWAB & CO. INC. :
REORGANIZATION, BELLSOUTH :
HEALTHCARE S&P 400, OPTIONSXPRESS, INC., :
TRANSFEREES OF OPTIONSXPRESS, INC., :
STIFEL NICOLAUS, AS CUSTODIAN FOR JOHN :
J. SAUERACKER, KEYBANK NATIONAL :
ASSOCIATION, TRANSFEREES OF KEYBANK :
NATIONAL ASSOCIATION, STEPHENS INC., :
TRANSFEREES OF STEPHENS INC., DENIS P. :
KELLEHER, RBC DOMINION SECURITIES, :
TRANSFEREES OF RBC DOMINION :
SECURITIES, CDS CLEARING DEPOSIT, :
TRANSFEREES OF CDS CLEARING DEPOSIT, :
ABBEY NATIONAL SECURITIES, :
TRANSFEREES OF ABBEY NATIONAL :
SECURITIES, CUSTODIAL TRUST COMPANY, :
SOLELY IN ITS CAPACITY AS CUSTODIAN, :
TRUSTEE, AGENT, REPRESENTATIVE OR :
NOMINEE, BENEFICIAL HOLDERS OF :
ACCOUNTS HELD IN THE NAME OF :

CUSTODIAL TRUST COMPANY, ALPINE ASSOCIATES, REGIONS BANK, TRANSFEREES OF REGIONS BANK, PULSE TRADING INC., AMERICAN ENTERPRISE INVESTMENT SERVICES, TRANSFEREES OF AMERICAN ENTERPRISE INVESTMENT SERVICES, MIZOHO TRUST & BANKING CO., TRANSFEREES OF MIZOHO TRUST & BANKING CO., UNION BANK OF CALIFORNIA NA, TRANSFEREES OF UNION BANK OF CALIFORNIA NA, TRUSTMARK NATIONAL BANK, TRANSFEREES OF TRUSTMARK NATIONAL BANK, NBCN INC., TRANSFEREES OF NBCN INC., OP&F / INTECH, DAVID R. JOHNSEN AND AMALIA G. JOHNSEN (JT TEN WROS), COMM. BANK OF KANSAS, TRANSFEREES OF COMM. BANK OF KANSAS, OHIO CARPENTERS MIDCAP, FTB/TEACHERS OF OHIO, SERS/SSGA PASS, SACRAMENTO EMPLOYEES RETIREMENT SYSTEM RUSSELL, TIMBER HILL LLC, TRANSFEREES OF TIMBER HILL LLC, INTERNATIONAL BROKERAGE RETAIL EQUITY, TRANSFEREES OF INTERNATIONAL BROKERAGE RETAIL EQUITY, A&B DB - ANCHOR, FOLIO (FN) INVESTMENTS, INC., TRANSFEREES OF FOLIO (FN) INVESTMENTS, INC., IRA FBO, JANET F. ROSS VFTC AS CUSTODIAN, RICKERT C. HENRIKSEN AND ZHEYLA M. HENRIKSEN COMMUNITY PROPERTY, KERMIT R. MEADE, FERRIS, BAKER WATTS, TRANSFEREES OF FERRIS, BAKER WATTS, THE ANTI- CRUELTY SOCIETY, ROOFER'S LOCAL 9 PENSION FUND – HARRIS, WALTER E. HENDRICKS, BURL SWAFFORD AND RUTH SWAFFORD JT TEN, CATO ENTERPRISES LLC ARBITRAGE ACCOUNT, GULF STREAM MARKETING INC., VINCENT DE CICCO, AND JOHN DOES 1-500, :

Defendants.

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The undersigned Defendants[1] respectfully submit this memorandum of law in support of their motion, pursuant to Fed. R. Civ. P. 9(b), 12(b)(1) and 12(b)(6) as incorporated in Fed. R. Bank. P. 7009(b) and 7012(b), to dismiss the Complaint filed by Edwards S. Weisfelner, as Trustee of the LB Creditor Trust ("Trustee").

PRELIMINARY STATEMENT

This is an action that should never have been filed.

The Trustee asserts fraudulent transfer claims, purportedly under state law, to avoid and recover payments that were made more than three years ago to shareholders of Lyondell Chemical Company ("Lyondell") in connection with the acquisition of Lyondell by Basell AF S.C.A. ("Basell"). But those payments are precisely the sorts of transfers—payments made to

[1] The Defendants are: Morgan Stanley & Co. Incorporated; State Street Bank & Trust Company (improperly sued as "State Street Bank & Trust, Fiduciary – State Street Bank, State Street Bank – Trust Custody, State Street Bank – IBT/BGI, State Street Bank – SPDR's, State Street Bank & Trust Co/IBT"); Credit Suisse Securities (USA) LLC (improperly sued as "Credit Suisse Securities US" and "Credit Suisse Securities/IA"); J.P. Morgan Clearing Corp. (f/k/a Bear Stearns Securities Corp. and improperly sued as "Bear Stearn Securities Corp"); Deutsche Bank Securities Inc. (improperly sued as "Deutsche Bank Securities"); JPMorgan Chase Bank, N.A. (improperly sued as "JPM Chase Bank, N.A."); J.P. Morgan Securities LLC (f/k/a J.P. Morgan Securities Inc., f/k/a Bear, Stearns & Co.) (improperly sued as "JPMorgan Securities"); National Financial Services LLC; Brown Brothers Harriman & Co. (improperly sued as "Brown Brothers Harriman"); BNP Paribas Securities Corp.; TD Ameritrade Clearing, Inc. (improperly sued as "TD Ameritade Clear"); PNC Bank, N.A. (in its capacity as PNC Bank, N.A. and as successor-by-merger to National City Bank); Barclays Capital, Inc.; SG Americas Securities, LLC (improperly sued as "SG Americas SEC LLC"); Edward D. Jones & Co., L.P. (improperly sued as "Edward D. Jones"); Amalgamated Bank; Scotia Capital Inc. (improperly sued as "Scotia Capital"); Doft and Co., Inc.; Elisabeth H. Doft; Mitsubishi UFJ Trust & Banking Corporation (U.S.A.) (improperly sued as "MUGC MTBJ PT33" and "MTBJ PT 13"); MJR Partners; SunTrust Bank; BMO Nesbitt Burns Inc. (improperly sued as "BMO Nesbitt Burns"); BMO Nesbitt Burns Trading Corp. S.A. (improperly sued as "BMO Nesbitt Burns SA"); Bank of Tokyo-Mitsubishi UFJ Trust Company (improperly sued as "Bank of Tokyo – Mitsubishi"); RBC Dominion Securities; Union Bank, N.A. (f/k/a Union Bank of California, N.A.); Ferris, Baker Watts, Incorporated (improperly sued as "Ferris, Baker Watts"); Swiss American Securities, Inc. (improperly sued as "Swiss American Securities"); CIBC World Markets Corp. and CIBC World Markets Inc. (improperly sued as "CIBC World Markets"); TD Waterhouse Canada (improperly sued as "TD Waterhouse Canada"); and Custodial Trust Company.

settle the purchase and sale of securities—that cannot be avoided under state law where, as here, the putative transferor files for bankruptcy, causing the Bankruptcy Code and its safe harbor under Section 546(e) to apply.

Indeed, this is exactly the kind of action that Congress sought to bar through Section 546(e). It threatens to unravel numerous securities transactions that were completed well in the past and that involved massive sums and countless parties. The amounts involved are staggering: the Trustee seeks to avoid and recover $5.9 billion in alleged transfers, with the Trustee also purporting to reserve his right to seek to claw-back an even larger share of the aggregate $12.5 billion that was paid in 2007 to the former shareholders of Lyondell, a public company whose stock traded widely on national securities markets. Compl. ¶ 194 & n.5. The number of potentially affected parties could be similarly enormous. The case caption alone takes up six pages simply to name the defendants (including John Does 1-500) sued by the Trustee, many of which have been named solely in their capacity as custodians or nominees for even more underlying, unspecified beneficial holders. Thousands, if not tens of thousands, of former Lyondell shareholders and their record holders and nominees—including national banks, domestic and foreign financial institutions, and individuals—have acted in reliance on the required exchange of their (and their customers') Lyondell stock for cash more than three years ago. The Trustee, however, now seeks to undo these long-settled securities transactions under state law in direct contravention of Section 546(e).

The law does not countenance the contrivances engaged in by the Trustee and its predecessor, the Official Committee of Unsecured Creditors (the "Committee"), in an effort to circumvent the Bankruptcy Code—having the Debtors' estates purport to "abandon" their fraudulent transfer claims under Section 544(b), so that those claims supposedly can be asserted

free from the protections afforded by Section 546(e) by a "Creditor Trust" (which just so happens to be run by the same Trustee, for the same beneficiaries, as the "separate" Trust created to bring the claims of the Debtors' estates). As every other court to consider the issue has held, the Bankruptcy Code preempts state law in these circumstances, and no trustee or other creditor representative appointed in a bankruptcy case can disregard Congress' policy judgment that settlement payments allegedly made by a debtor in bankruptcy cannot be avoided under state law. To hold otherwise would undermine Congress' intent to ensure settlement finality and securities market stability. *See* Argument Section I.

The Trustee's claims fail for additional reasons as well. The purpose of fraudulent transfer law is to prevent an insolvent debtor from depleting its assets to which its creditors may look for repayment. But where, as here, the payments at issue are funded entirely through money loaned by third-party banks (the "Lenders") that the Lenders require the applicable Debtor to pass on to the shareholders, those funds are not assets to which any creditor of the Debtor could have looked for repayment, they are accordingly not property of the Debtor's estate, and their transfer to the shareholders is not avoidable. The payment of the loaned funds to the shareholders did not strip Lyondell or Basell of a penny that those Debtors otherwise would have had and could have used to pay their creditors. *See* Argument Section II.

The Trustee's claims against most, if not all, of the Defendants likewise fail because there is no allegation that they owned a single share of Lyondell stock for their own benefit. The Complaint specifically acknowledges that many Defendants are named solely in their capacities as financial intermediaries or conduits for underlying beneficial holders of the Lyondell stock. As to other Defendants, the Complaint does not allege that they had any beneficial ownership interest in Lyondell stock. Rather, the Complaint alleges that those Defendants were "holders"

and "held" Lyondell stock, and then purports to name the "Transferees" of those Defendants as the beneficial owners of the shares. It is black-letter law that such conduits or nominees are not "transferees" and, hence, have no liability for the supposed fraudulent transfers of the cash exchanged for Lyondell stock in which they never held any beneficial interest. *See* Argument Section III.

The Trustee also lacks standing to sue for the principal creditor group on whose behalf he purports to sue: the Lenders. According to the Complaint itself, those Lenders loaned the money to finance the payments to the Lyondell shareholders. They thus participated in and ratified the very payments the Trustee now seeks to "undo" for their benefit. Under settled law, neither they, nor anyone suing for them, may seek to avoid and recover the payments. *See* Argument Section IV.

Finally, the Trustee's state-law intentional fraudulent transfer claim (Count II) fails for the independent reason that the Complaint contains no allegations, let alone particularized ones sufficient to satisfy Rule 9(b), that Lyondell or Basell made the payments for the purpose of hindering, delaying or defrauding their creditors, the *sine qua non* of an intentional fraudulent transfer claim. The Trustee's intentional fraudulent transfer claim is no more than a constructive fraudulent transfer claim masquerading as something it is not. Indeed, the few allegations that speak to Lyondell's and Basell's intent in entering into the merger at issue undermine any suggestion that either of those Debtors acted for the purpose of hindering, delaying or defrauding its creditors, and render any such claim implausible. *See* Argument Section V.

BACKGROUND

The following is a recitation of the pertinent facts as set forth in the Complaint and documents referenced therein, as well as a description of the relevant events that have occurred in the Lyondell bankruptcy cases and this adversary proceeding.[2]

A. Financier Leonard Blavatnik Seeks to Acquire a Major Petrochemicals Producer.

The Trustee's claims against the Defendants arise out of the December 2007 leveraged buyout (the "Merger") of Lyondell by Basell, an international chemicals company controlled by "strategic investor" Leonard Blavatnik, one of the world's "wealthiest individuals." Compl. ¶ 229.

Beginning in 2005, Blavatnik sought to capitalize on the "cheap money" available in the credit markets to acquire a major petrochemicals producer. *Id.* ¶ 234. By the spring of 2006, he had identified Lyondell among several other potential acquisition targets. *Id.* ¶ 240. Blavatnik's initial offer to purchase Lyondell for around $27 per share was rebuffed by Lyondell's board as too low. *Id.* ¶¶ 251-52. But several months later, as Lyondell's stock price climbed past $30 per share, Blavatnik became "concern[ed] that an opportunity was being lost" and asked his advisors to prepare models based on an acquisition price of as high as $38 per share. *Id.* ¶ 254. Those advisors told Blavatnik that a deal in that range would have a "meaningfully higher equity risk," but also that "the upside potential was enormous." *Id.* ¶ 259.

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[2] Although the Court generally must accept as true all well-pleaded factual allegations for the purposes of this motion, it need not accept conclusory allegations that are contradicted, or rendered implausible by, more specific allegations in the Complaint. *See Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). The Court may take judicial notice of filings from the Lyondell bankruptcy cases, as well as the pleadings in this and related litigation pending in this Court. *See First Capital Asset Mgmt., Inc. v. Brickellbush, Inc.*, 219 F. Supp. 2d 576, 585 (S.D.N.Y. 2002), *aff'd*, 385 F.3d 159 (2d Cir. 2004). The Court may also consider, on this motion to dismiss, documents that are referenced in the Complaint. *See In re Refco, Inc. Sec. Litig.*, 503 F. Supp. 2d 611, 623 (S.D.N.Y. 2007).

In May 2007, Blavatnik acquired nearly 21 million shares of Lyondell stock and disclosed, in the Schedule 13D he filed with the Securities and Exchange Commission ("SEC"), that he might seek to acquire all of Lyondell's outstanding stock. *Id.* ¶¶ 269-70. Lyondell CEO Dan Smith "saw this as his opportunity to cash out" his interest in Lyondell and to "maximize shareholder (and management) profits from a buyout." *Id.* ¶ 275.

In the meantime, however, Blavatnik was exploring other acquisition opportunities, including the potential purchase of Huntsman International, another major petrochemicals company. *Id.* ¶ 304. But after that deal fell through in June 2007, Blavatnik renewed his focus on Lyondell, offering $40 per share for Lyondell in July 2007, which at the time was only around 80 cents over the stock's market price. *Id.* ¶ 310. Smith told Blavatnik that—as is common in leveraged buyouts or other strategic transactions[3]—Lyondell's board was looking for a meaningful premium of 20% over the market. Blavatnik then raised his offer to $48 per share. *Id.* ¶¶ 310, 312.

Lyondell's board convened several times over the subsequent days. After reviewing "refreshed" projections, after obtaining a fairness opinion, and after a group of leading investment banks, including Citibank, Goldman Sachs, and Merrill Lynch (the Lenders), offered to provide $21 billion of financing, Lyondell agreed to the Merger. *Id.* ¶¶ 323, 344-45.

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[3] *See, e.g.*, *Gotham Partners, L.P. v. Hallwood Realty Partners*, 855 A.2d 1059, 1081 (Del. Ch. 2003) ("It is . . . typical . . . to find a merger for control occurring at a 'premium' to the pre-announcement market price."), *aff'd*, 840 A.2d 641 (Del. 2003); *Kindt v. Lund*, No. 17751-NC, 2003 WL 21453879, at *5 (Del. Ch. May 30, 2003) ("A twenty-percent control premium in the financial analysis of a merger is not unusual"); *Cinerama, Inc. v. Technicolor*, 663 A.2d 1134, 1143 (Del. Ch. 1994) ("The components of value in an acquisition might be considered to be two: the going concern value of the firm as currently organized and managed and the 'synergistic value' to be created by the changes that the bidder contemplates . . . . It is the expectation of such synergies that allows a rational bidder to pay a premium when he negotiates an acquisition."), *aff'd*, 663 A.2d 1156 (Del. 1995).

B. Pursuant to the Merger Agreement, Lyondell Shareholders Are Paid $48 Per Share for Their Lyondell Stock.

Basell's purchase of Lyondell occurred pursuant to an Agreement and Plan of Merger dated as of July 16, 2007 (the "Merger Agreement") between and among Basell, wholly-owned Basell subsidiary BIL Acquisition Holdings Limited ("BIL"), and Lyondell. Under the Merger Agreement, Basell "contractually bound itself to buy Lyondell for $48 per share." Compl. ¶ 351. Once the requisite number of Lyondell shareholders voted to approve the Merger, each shareholder—including those who voted against the transaction or did not vote at all—had no choice but to accept the cash consideration in exchange for its shares of Lyondell stock. *See id.* ¶ 341 ("Upon the merger, each outstanding share of Lyondell common stock would be converted into the right to receive $48 in cash."); *id.* ¶ 396 ("pursuant to the Merger Agreement . . . all of Lyondell's 253,535,778 outstanding shares of common stock, including restricted stock, were converted into the right to receive $48 in cash").

In accordance with the Merger Agreement, Basell entered into an agreement with a "Paying Agent" (Citibank, N.A.) to act as the escrow agent for the thousands of holders of Lyondell stock entitled to receive the cash consideration of $48 per share (the "Merger Consideration"). Merger Agreement § 2.6(a) (Jan. 11, 2010 Declaration of Ross E. Firsenbaum ("Firsenbaum Decl.") Ex. A); *see also* Paying Agent Agreement (Firsenbaum Decl. Ex. B). On December 20, 2007, the Merger closed, and Basell acquired Lyondell. Compl. ¶ 396. The former Lyondell shareholders received approximately $12.5 billion, through the Paying Agent, "as payment of the cash due to them upon conversion of their shares" effected through the Merger. *Id.* ¶ 401.

The Merger Consideration transferred to the holders of Lyondell stock was financed entirely through borrowings on credit facilities (the "Facilities") entered into by the Lenders,

Basell, Lyondell and certain Basell and Lyondell affiliates. Compl. ¶ 397. Indeed, "[e]very dollar that went to shareholders . . . was funded with debt leveraged against the assets of Lyondell and its operating subsidiaries." Compl. ¶ 1. Approximately $20.7 billion in loan proceeds were drawn from the Facilities in connection with the Merger, of which approximately $12.5 billion was transferred from the Lenders, nominally to Basell, and immediately to the Paying Agent, which was required "pursuant to irrevocable instructions" to deliver the $12.5 billion in Merger Consideration to the holders of Lyondell stock. *Id.* ¶¶ 397, 401; Merger Agreement § 2.6(a) (Firsenbaum Decl. Ex. A).[4] This transfer was also mandated by the terms of the Senior Secured Credit Agreement (the "Credit Agreement") between the Lenders and Basell, which prohibited Basell from using the funds for any purpose other than its purchase of all outstanding Lyondell stock. Credit Agreement §§ 5.19, 6.15 (Firsenbaum Decl. Ex. C). As a result of the Merger, Basell changed its name to Lyondell BasellIndustries AF S.C.A. ("LBI") and became the corporate parent of Lyondell. Compl. ¶ 396.

C. LBI Files for Bankruptcy Protection, and the Creditors Committee Files Suit on Behalf of the Debtors' Estates to Avoid the Merger Payments to Lyondell's Former Shareholders as Fraudulent Transfers.

For more than a year following the Merger, LBI and its affiliates continued to operate. However, when its earnings declined as part of the extraordinary worldwide economic and financial distress in 2008, LBI became unable to meet its obligations as they became due. *Id.* ¶ 452. Accordingly, LBI and numerous affiliates (collectively, the "Debtors") filed for bankruptcy protection in January, April and May 2009. *Id.* ¶ 403; Third Am. Disclosure Statement, *In re Lyondell Chemical Co.*, No. 09-10023 (Bankr. S.D.N.Y.), at 42 [Docket No. 3988].

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[4] Of the remaining funds drawn from the Facilities, Basell used approximately $7.1 billion to refinance existing Lyondell debt. Compl. ¶ 401.

In July 2009, the Committee appointed in the Debtors' Chapter 11 case, represented by Edward S. Weisfelner as outside counsel from Brown Rudnick, brought suit (the "Committee Action") against, *inter alia*, many of Lyondell's and LBI's former directors and officers (the "D&O Defendants"), Blavatnik and related individuals and entities (the "Blavatnik Defendants"), and the Lenders that financed the Merger. Compl. in *Official Comm. of Unsecured Creditors v. Citibank, N.A.*, Adv. Proc. No. 09-01375 (Bankr. S.D.N.Y. July 22, 2009) [Docket No. 1] (the "Committee Complaint"). With respect to the Lenders, the Committee alleged, among other things, that they were anything but victims of the Merger. The Committee asserted that the Lenders had not only ratified the Merger, but also had "pump[ed] up the purported valuation of Lyondell" and "abdicat[ed] [] their due diligence obligations" in the face of "obvious risks." *Id.* ¶¶ 147, 149. Indeed, according to the Committee, it was "[b]y reason of the conduct of the . . . Lender[s] [that] the Debtors became insolvent, undercapitalized, and were unable to satisfy their obligations to their general creditors." *Id.* ¶¶ 147, 149, 151, 303, 310, 338.

In the same action, the Committee also asserted, "on behalf of the Debtors' estates," constructive fraudulent transfer claims under Sections 544 and 548 of the Bankruptcy Code and applicable state law against Barclays Global Investors, N.A. ("BGI") "individually and as Class Representative of the Shareholder Class." *Id.* ¶¶ 288-93 (Count IV). In that count, the Committee sought to avoid the Merger Consideration that had been paid to Lyondell's shareholders—the same money that is the subject of the present adversary proceeding. *Id.* ¶ 289.

BGI advised the Court that it intended to move to dismiss Count IV on the ground that the transfers of Merger Consideration to Lyondell's shareholders were "settlement payments which may not be avoided pursuant to 11 U.S.C. § 546(e)" of the Bankruptcy Code. *See*

Preliminary Statement of Position, *Weisfelner v. Blavatnik*, Adv. Pro. No. 09-01375, (Aug. 3, 2009) ¶ 8 [Docket No. 20]. Soon thereafter, however, the Court entered a case management order dividing the litigation into three phases (Phase I, Phase I-A, and Phase II), with the claim against BGI and the purported shareholder class to be deferred for adjudication as part of Phase II. Case Management Order, *Weisfelner v. Blavatnik*, Adv. Pro. No. 09-01375, (Sept. 24, 2009) [Docket No. 124].

While Phase I was still ongoing, and while various motions to dismiss were *sub judice*, including a motion by many of the Lenders pursuant to Section 546(e) of the Bankruptcy Code to dismiss the Committee's fraudulent transfer claims to avoid the liens they had been granted in connection with the Merger,[5] the Court ordered certain parties in that suit to engage in mediation. *See* Third Am. Disclosure Statement at 54. In December 2009, the Debtors agreed to a settlement whereby the Lenders would pay $300 million to settle all claims asserted against them. *Id.* The Committee and other creditors objected to the settlement, which ultimately was revised to provide for a $450 million payment by the Lenders, in exchange for releases and allowance of the Lenders' liens and claims. *Id.*; Settlement Agreement § 3.1, *Weisfelner v. Blavatnik*, Adv. Pro. No. 09-01375 (Mar. 11, 2010) [Docket No. 369]. The Court approved the settlement in March 2010.[6]

The next month, the Court confirmed the Debtors' plan of reorganization (the "Plan"). *See* Third Amen. & Restated Joint Ch. 11 Plan of Reorganization for the LyondellBasell

[5] *See* Mem. of Law in Support Financing Party Defendants' Joint Mot. to Dismiss Counts I, II, XX and XXI of the Compl. of the Official Comm. of Unsecured Creditors, *Official Comm. of Unsecured Creditors v. Citibank, N.A.*, Adv. Proc. No. 09-01375 (Aug. 26, 2009) [Docket No. 80].

[6] *See* Order Approving Revised Settlement with Financing Party Defendants in Committee Litigation Pursuant to Bankruptcy Rule 9019, Adv. Proc. No. 09-01375 (Mar. 11, 2010) [Docket No. 371].

Debtors, *In re Lyondell Chemical Co.*, No. 09-10023 (Bankr. S.D.N.Y. Mar. 12, 2010) [Docket No. 3990]. The Committee thereafter filed an amended complaint in the Committee Action, reasserting its claims against the D&O Defendants and the Blavatnik Defendants, but dropping the claim against BGI and the purported shareholder class. *See* Am. Compl., *Weisfelner v. Blavatnik*, Adv. Proc. No. 09-01375 (July 23, 2010) [Docket No. 381].

D. The Debtors' Estates Purport to "Abandon" the State Law Avoidance Claims Against the Lyondell Shareholders, and a Creditor Trust Is Created to Prosecute Those Claims.

With a single exception, the Plan provided for all of the Debtors' pending avoidance and other claims in the Committee Action against the remaining, non-settling defendants to be "assigned" to a "Litigation Trust" formed under the Plan. *See* Plan § 5.7(b). In addition, the Plan specified that all of the Debtors' other potential avoidance actions—again with a single exception—also would be "assigned" to the Litigation Trust or retained by the reorganized Debtors. *See id.* §§ 11.9, 11.11. The Plan authorized the Litigation Trust to prosecute the assigned claims for the benefit of the Debtors' creditors—the general unsecured creditors, the 2015 Noteholders, and the Lenders—and to distribute any recoveries to those creditors. *See id.* § 5.7(b), (c). Mr. Weisfelner, who had served as lead counsel for the Committee, was named trustee of the Litigation Trust, with his firm Brown Rudnick continuing to serve as counsel for the Litigation Trust.

The one exception was the Committee's avoidance claims under Section 544 of the Bankruptcy Code and applicable state law against the former Lyondell shareholders. Solely as to those claims, the Plan provided that the "Debtors shall be deemed to have abandoned, pursuant to section 554 of the Bankruptcy Code, any and all right to pursue" them. *See id.* § 5.8(b). These "Abandoned Claims" were limited to "the claims and causes of action brought on behalf of the Debtors' estates pursuant to section 544 of the Bankruptcy Code against former

shareholders of Lyondell (but solely in their capacity as such) pursuant to Count IV of the complaint in the Committee Litigation"—*i.e.*, the state-law fraudulent-transfer claim against BGI as purported representative of Lyondell's shareholders. *Id.* § 1.1.

The same Plan section then provided that "[u]pon the effectiveness of . . . [such] abandonment," "each holder of Allowed 2015 Notes Claims, General Unsecured Claims, and holders of Deficiency Claims [of the Lenders] shall contribute to the Creditor Trust any and all State Law Avoidance Claims." *See id.* § 5.8(b). The Plan defined the "State Law Avoidance Claims" to mean "any and all claims . . . arising under state law against former shareholders of Lyondell . . . based on the receipt by any such Persons of Merger Consideration." *See id.* § 1.1.

The "Creditor Trust" to which those claims were automatically transferred was, like the Litigation Trust, thus formed pursuant to the Plan. *See id.* § 5.8(a). And like the Litigation Trust, it was authorized to prosecute the claims contributed to it for the benefit of the Debtors' creditors—the same creditors that are beneficiaries of the Litigation Trust, namely, the general unsecured creditors, the 2015 Noteholders, and the Lenders—and to distribute any recoveries to those creditors in accordance with the Plan. *See id*. § 5.8(b). Mr. Weisfelner, former Committee counsel and trustee of the Litigation Trust, was again named Trustee of the Creditor Trust. In short, the Creditor Trust was and is, for all intents and purposes, the alter ego of, indeed the same as, the Litigation Trust—except that the Creditor Trust can litigate only a single claim: the "abandoned" state law avoidance action against the former Lyondell shareholders. *See* LB Creditor Trust Agreement at 1 (Firsenbaum Decl. Ex. D) (the "sole purpose" of the Creditor Trust is "taking title to, protecting, conserving and distributing any recoveries from the State Law Avoidance Claims.").

E. The Trustee Asserts the State Law Avoidance Claims Against the Defendants Through the Creditor Trust.

In October 2010, Mr. Weisfelner, as Trustee "for and on behalf of the beneficiaries of the LB Creditor Trust," filed this lawsuit in New York Supreme Court seeking recovery of the Merger Consideration paid to the Defendants. Compl. ¶ 2. The Defendants removed the action pursuant to 28 U.S.C. § 1452—bankruptcy jurisdiction—and 12 U.S.C. § 632 to the District Court, which referred the action to this Court under the standing order of referral for bankruptcy proceedings. *See* Notice of Removal [Docket No. 1]. The Trustee has not moved for remand.

As contemplated by the Creditor Trust Agreement, the Complaint asserts only state-law fraudulent conveyance claims: one count for constructive fraudulent transfer (Count I), and one count for intentional fraudulent transfer (Count II), both under "applicable state fraudulent transfer law." The Complaint goes on at much length with the grist of a constructive fraudulent transfer case, describing why the financial projections that underlay the Merger were supposedly "unreasonable," how the capital structure for LBI following the Merger was allegedly "extremely leveraged" and "reckless," and how the Merger supposedly rendered LBI "insolvent" and with "unreasonably small capital." *Id.* ¶¶ 6, 221-453. But the Complaint contains no additional factual details to support its intentional fraudulent transfer claim, other than to parrot the statute that the payment of Merger Consideration to the former Lyondell shareholders was made "with the intent to hinder, delay or defraud creditors" *Id.* ¶¶ 13, 461.

The principal beneficiaries of any recovery in this action would be the Lenders that funded the transfers at issue on the express condition that those transfers be made to effect the Merger. Indeed, the Lenders' claims against the Debtors for financing the Merger constitute more than 80% of the aggregate amount of all allowed claims held by the creditor beneficiaries of the Creditor Trust. *See* Plan § 5.8(b); Third Am. Disclosure Statement at 6, 8.

The Complaint names over 175 defendants, as well as John Does 1-500, all of which are alleged to have been shareholders of Lyondell that received cash in the Merger for their shares of stock. Compl. ¶¶ 15-194. At least 20 of the Defendants are named "solely in [their] capacity as custodian, trustee, agent, representative or nominee on behalf of beneficial owners of Lyondell shares."[7] Similarly, other institutional defendants are alleged only to have "held" Lyondell shares for "Transferees" that had "a beneficial interest in the Lyondell shares."[8] The Complaint conspicuously fails to allege that either the "solely in [their] capacity as" Defendants or the "holder" Defendants were the beneficial owners of any Lyondell stock. Several of the Defendants are national, state or foreign banks. *Id.* ¶¶ 25, 41, 58, 60, 68, 70, 81, 83, 110, 112, 117, 121, 140, 154, 161, 163. And many of the other defendants are individuals and other former Lyondell stockholders, all of whom exchanged their shares for the Merger Consideration, as they were required to do, more than three years ago. *Id.* ¶¶ 144, 168, 183-84, 189-90, 193.

Although this is the only pending lawsuit brought by the Trustee in the name of the Creditor Trust, in his separate capacity as trustee of the LB Litigation Trust, the Trustee continues to file hundreds of preference and fraudulent-transfer actions under the avoidance provisions of the Bankruptcy Code "in the names of the Debtors."[9] Indeed, after learning that

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[7] *Id.* ¶¶ 15 (Morgan Stanley), 19 (Credit Suisse), 21 (Bear Stearns), 23 (Deutsche Bank), 25 (JPM Chase Bank), 27 (JP Morgan Securities), 33 (JPMorgan Chase), 39 (JPM BNK/CORR CL SVCS), 43 (Ameritrade), 49 (Barclays), 51 (SG Americas), 56 (JPM Public Emp Ret.), 58 (Wells Fargo), 64 (AG Edwards), 66 (JP Morgan Sec Inc WF), 70 (Wachovia), 101 (JPM/PCS Shared SVCS), 119 (BAR CAP/Equity Finan), 122 (JP Morgan Sec Inc SL), 151 (Custodial Trust).

[8] *See, e.g.*, *id.* ¶¶ 17-18 (asserting claims against State Street entities alleged to have "held" Lyondell shares "in several accounts," but also asserting claims against "Transferees of State Street" that had "a beneficial interest in the Lyondell shares"); *see also id.* ¶¶ 29, 31, 37, 41, 54, 72, 76, 81, 83, 90, 110, 115, 129, 145, 161, 185.

[9] *See, e.g.*, *Weisfelner v. KCIC LLC*, Adv. Proc. No. 10-05344 (Bankr. S.D.N.Y. Dec. 8, 2010) (REG) (Complaint to Avoid and Recover Transfers Pursuant to 11 U.S.C. §§ 547, 548 and 550 and for Other Relief) [Docket No. 1]. Over the last month alone, the Trustee has filed some 670

the Defendants intended to move to dismiss this adversary proceeding as barred by Section 546(e), the Trustee, acting on behalf of the LB Litigation Trust, last month purported to file a new action against most of the same Defendants, again claiming that the payments made to the former Lyondell shareholders in connection with the Merger were fraudulent transfers; the only significant difference is this time the Trustee asserted his fraudulent transfer claims under Section 548 of the Bankruptcy Code.[10] And, as noted, the Trustee is continuing to pursue the Committee Action—in which he asserts another set of fraudulent transfer claims under the Bankruptcy Code arising out of the same Merger—against (among others) the Blavatnik Defendants.

ARGUMENT

I. SECTION 546(e) OF THE BANKRUPTCY CODE BARS THE TRUSTEE'S PURPORTED STATE LAW CLAIMS.

This is the quintessential case that Congress enacted Section 546(e) of the Bankruptcy Code to prevent. The Trustee seeks to avoid and recover cash payments—at least $5.9 billion—paid to thousands of shareholders who exchanged their common stock in Lyondell pursuant to a merger that occurred more than three years ago. These are classic "settlement payments"—payments made to settle a securities transaction—protected from avoidance by Section 546(e). Courts have routinely applied Section 546(e) to bar the avoidance of transfers of merger

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such adversary proceedings in his capacity as Trustee of the LB Litigation Trust. Adv. Pro Nos. 10-4609, 10-5291, 10-5292, 10-5298 - 10-5300, 10-5302 - 10-5307, 10-5324, 10-5326, 10-5329, 10-5334, 10-5335, 10-5337, 10-5339 - 10-5341, 10-5344, 10-5347, 10-5349, 10-5350, 10-5352, 10-5357 - 10-5368, 10-5446, 10-5464, 10-5467 - 10-5523, 10-5525 - 10-5785, 10-5790 - 10-5855, 10-01000 - 10-01237.

[10] *See* Complaint, *Edward S. Weisfelner, as Litigation Trustee of the LB Litigation Trust v. A Holmes & H Holmes TTEE*, Adv. Pro. No. 10-05525 (REG) (Bankr. S.D.N.Y. Dec. 23, 2010) [Docket No. 1]; E-Mail from Philip D. Anker to Sigmund S. Wissner-Gross, dated Dec. 8, 2010 (Firsenbaum Decl. Ex. E). The Defendants reserve all defenses to and rights with respect to this new adversary proceeding.

consideration, like those at issue here, made to selling shareholders in a leveraged buyout. *See, e.g.*, *QSI Holdings, Inc. v. Alford (In re QSI Holdings, Inc.)*, 571 F.3d 545, 550 (6th Cir. 2009), *cert. denied*, 130 S. Ct. 1141 (2010); *Contemporary Indus. Corp. v. Frost,* 564 F.3d 981, 986-88 (8th Cir. 2009); *Brandt v. B.A. Capital Co. LP* (*In re Plassein Int'l Corp.*), 590 F.3d 252, 258-59 (3d Cir. 2009), *cert. denied*, 130 S. Ct. 2389 (2010); *Lowenschuss v. Resorts Int'l (In re Resorts Int'l)*, 181 F.3d 505, 514-15 (3d Cir. 1999); *Kaiser Steel Corp. v. Pearl Brewing Co. (In re Kaiser Steel Corp.)*, 952 F.2d 1230, 1240 (10th Cir. 1991).

Evidently recognizing as much, the Trustee has sought to circumvent the Bankruptcy Code altogether by purporting to bring fraudulent transfer claims under state law, as the putative "successor" to the Debtors' creditors, rather than under the Bankruptcy Code as the representative of the Debtors' bankruptcy estates. The legal gymnastics in which the Trustee and his predecessor, the Committee, have engaged to attempt to avoid the Bankruptcy Code's bar and Congress' policy judgment reflected in Section 546(e) is a tacit admission that, had the Trustee continued to prosecute these same "state law" claims when he brought them on behalf of the Debtors' estates as counsel for the Committee, the claims would have been barred by Section 546(e). The Trustee's cynical efforts to circumvent Section 546(e) cannot change the result. The claims are barred.

A. The Payments to the Former Lyondell Shareholders in Connection with the Merger Were Settlement Payments, and Transfers in Connection with a Securities Contract, by or to a Financial Institution or Other Entity Protected by Section 546(e).

Section 546(e) of the Bankruptcy Code, entitled "Limitations on avoiding powers," provides a safe harbor that precludes the avoidance of settlement payments under state law as incorporated by Section 544 of the Bankruptcy Code. Section 546(e) states:

> ***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, or 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) (emphasis added).

Under the plain wording of the statute, the Trustee's purported state-law fraudulent transfer claims are precluded by Section 546(e) on two independent bases, either of which would suffice. First, the transfers of cash that the Trustee seeks to avoid are unavoidable "settlement payments" "by or to" a financial institution. Second, the transfers were "in connection with a securities contract" and were "made by or to a . . . financial institution."

For these reasons, the entire Complaint should be dismissed. *See Miller v. CSFB (In re Refco Sec. Litig.)*, No. 09 Civ. 2885, 2010 WL 5129072, at *1 (S.D.N.Y. Jan. 12, 2010) (adopting in full Report and Recommendation of Special Master, No. 09 Civ. 2885, 2009 WL 7242548 (S.D.N.Y. Nov. 13, 2009), and granting motion to dismiss state law fraudulent transfer claims pursuant to Section 546(e) where trustee sought to avoid payments to shareholders in connection with acquisition of private company). Indeed, the Trustee has acknowledged that "the question of the application of 546(e)" is "a pure legal issue" that can be "address[ed] as a matter of law" on a motion to dismiss. Tr. of Hearing, *Weisfelner v. Blavatnik*, Adv. Pro. No. 09-01375 (Oct. 29, 2009), at 59-60 [Docket No. 374]; *see also Alfa, S.A.B. de C.V. v. Enron Creditors Recovery Corp. (In re Enron Creditors Recovery Corp.)*, 422 B.R. 423, 435-36, 442

(S.D.N.Y. 2009) (concluding that applicability of Section 546(e) is a question of law), *appeal argued*, No. 09-5142 (2d Cir. Nov. 3, 2010).

1. The Payments to the Lyondell Shareholders Were Settlement Payments Made by or to a Financial Institution or Other Protected Entity.

a) The Payments to the Lyondell Shareholders Were "Settlement Payments."

The transfers of Merger Consideration to the Defendants in exchange for their shares of Lyondell stock constituted "settlement payments," which the Bankruptcy Code broadly defines as "a preliminary settlement payment, a partial settlement payment, an interim 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).

Every Circuit Court that has addressed the issue has concluded that payments made to acquire securities, such as those made to the Lyondell shareholders here, are "settlement payments" within the plain language of Section 546(e). *See In re QSI Holdings,* 571 F.3d at 550 (6th Cir. 2009); *Contemporary Indus. Corp.*, 564 F.3d at 986-88 (8th Cir. 2009); *In re Plassein*, 590 F.3d at 258-59 (3d Cir. 2009); *In re Resorts Int'l*, 181 F.3d at 514-15 (3d Cir. 1999); *In re Kaiser Steel Corp.*, 952 F.2d at 1240 (10th Cir. 1991). So too have the overwhelming majority of other courts, including those in the Southern District of New York within the past year. *See In re Refco*, 2009 WL 7242548, at * 3-8, *adopted*, 2010 WL 5129072, at *1; *In re Enron Creditors Recovery Corp.*, 422 B.R. at 435-36; *see also Official Comm. of Unsecured Creditors of The IT Group, Inc. v. Acres of Diamonds, L.P.* (*In re IT Group, Inc.*), 359 B.R. 97 (Bankr. D. Del. 2006); *Loranger Mfg. Corp. v. PNC Bank* (*In re Loranger Mfg. Corp.*), 324 B.R. 575, 586 (Bankr. W.D. Pa. 2005); *Official Comm. of Unsecured Creditors of Nat'l Forge Co. v. Clark* (*In re Nat'l Forge Co.*), 344 B.R. 340 (W.D. Pa. 2006). Consistent with these authorities, this Court has held that Section 546(e) is "extremely broad," encompassing virtually all transfers of money

made to complete a securities transaction. *See Global Crossing Estate Representative v. Alta Partners LDC (In re Global Crossing Ltd.)*, 385 B.R. 52, 57 n.1 (Bankr. S.D.N.Y. 2008) (Gerber, J.) (noting that a settlement payment is any "transfer of cash or securities made to complete a securities transaction").[11]

Nevertheless, the Trustee has argued that "in connection with an LBO," Section 546(e) "does not operate and shouldn't operate as a borrower safe haven for payments that are made to shareholders who are cashed out in connection with a merger." Tr. of Hearing, *Official Comm. of Unsecured Creditors v. Citibank, N.A.*, Adv. No. 09-01375 (Oct. 29, 2009), at 58 [Docket No. 374]. Rather, relying on *In re Norstan Apparel Shops, Inc.*, 367 B.R. 68, 76-77 (Bankr. E.D.N.Y. 2007), he contends that Section 546(e) is "correctly circumscrib[ed] . . . to securities trading transactions."[12] *See* Mem. of Law, *Official Comm. of Unsecured Creditors v. Citibank, N.A.*, Adv. No. 09-01375 (Sept. 25, 2009), at 15 n.12 [Docket No. 130]; *see also* Mem. of Law, *Official Comm. of Unsecured Creditors v. Citibank, N.A.*, Adv. No. 09-01375 (Nov. 24, 2009), at 19-20 [Docket No. 224] (arguing that none of the Circuit courts or other courts to address this issue "address[] the fundamental distinction between payments made in consideration of a bilateral securities trade and payments by an issuer in respect of its outstanding securities.").

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[11] To be sure, in *Global Crossing* this Court held that the issuance of a dividend did not constitute a settlement payment under Section 546(e). *In re Global Crossing Ltd.*, 385 B.R. at 57 n.1. But, unlike that case, the payments here were not dividends paid to shareholders who continued to retain their shares. On the contrary, the payments here were "for the purchase, sale or loan of securities." *See id.* After they received the Merger Consideration, the former Lyondell shareholders no longer held shares in Lyondell; they had exchanged them as part of the Merger. Compl. ¶ 401.

[12] *In re Norstan* held that payments to shareholders that did "not involve publicly traded securities or otherwise implicate the public securities markets" were not settlement payments because they were not "commonly used in the securities trade." 367 B.R. at 77. Even if that view of Section 546(e) were right—and, as discussed below, it has repeatedly been rejected—it would be of no help to the Trustee here. Lyondell was a public company, and its shares traded on a public market.

The simple answer is that Congress has rejected the Trustee's policy argument. The Bankruptcy Code's definition of "settlement payment" does not distinguish between securities transactions made in an LBO or other merger and those made in day-to-day trading; indeed, the terms "leveraged buyout," "merger" and "bilateral securities trade" nowhere appear in the definition. And, while the definition does include as a catchall at the end of a list of other types of settlement payments "any other similar payment commonly used in the securities trade," 11 U.S.C. § 741(8), that catchall expands, rather than narrows, the definition of settlement payment under the Bankruptcy Code. *See In re QSI Holdings, Inc.,* 57l F.3d at 549-50 (concluding that the phrase "any other similar payment commonly used in the securities trade" does not qualify the other types of settlement payments described in the statute, but rather, is "a catchall phrase intended to underscore the *breadth* of the §546(e) exemption") (emphasis in original); *Contemporary Indus.,* 564 F.3d at 986 ("the phrase follows a long list of various kinds of settlement payments and so we think it is most naturally read as a catchall phrase intended to underscore the breadth of the § 546(e) exemption."); *In re Refco*, 2009 WL 7242548, at *5 ("The phrase 'or any other similar settlement payment commonly used in the securities trade' is a catch-all provision at the end of the Section 741(8) . . . Section 741(8) therefore cannot be read to impose a 'commonly used' limitation on a final settlement payment."), *adopted*, 2010 WL 5129072, at *1.[13]

Accordingly, in the last year alone, two cases in this District have rejected the Trustee's argument and the reasoning in *In re Norstan*. In one case, relying on "20 years of decisions from at least five circuit courts of appeal," the District Court concluded that the term "settlement

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[13] The SEC has also rejected the Trustee's position. It has expressed the view that "the consummation of an LBO is a 'settlement payment' exempted from avoidance by section 546(e)." *In re Kaiser Steel Corp.*, 913 F.2d at 849-50.

payment" includes public and private transactions not made in the ordinary course and is not restricted to transactions that are "run-of-the-mill." *In re Enron Creditors Recovery Corp.*, No. 01-16034, 2009 WL 3349471, at *6-*7 (S.D.N.Y. Oct. 16, 2009) (granting motion for leave to appeal). In the other case, the District Court adopted the Refco MDL Special Master's "thorough and well-reasoned" conclusion that "nothing in the legislative history indicates that Congress intended to limit the safe harbor protection to public trades only" and rejected the argument that Section 546(e) applies only to transactions "commonly used in the securities trade." *See In re Refco*, 2009 WL 7242548, at *3, *5, *adopted*, 2010 WL 5129072, at *1.

In short, the transfers of Merger Consideration to the former Lyondell shareholders were unquestionably "settlement payments" within the meaning of the Bankruptcy Code.

b) The Payments to the Lyondell Shareholders Were "Made by or to" a Financial Institution or Other Entity Protected by Section 546(e).

The settlement payments to the Lyondell shareholders also satisfy the second (and final) requirement under Section 546(e), both because they were made "by," and because they were also made "to," financial institutions.

The settlement payments clearly were made "by . . . [a] financial institution": the Paying Agent, Citibank. *See* Paying Agent Agreement § 1(a) ("Parent hereby appoints Citi to act as Paying Agent in connection with the . . . Merger Agreement") (Firsenbaum Decl. Ex. B).[14]

[14] The Merger documents referenced in the Complaint make clear that Citibank transferred the Merger Consideration to the Lyondell shareholders. Merger Agreement § 2.6(a) ("Merger Sub shall enter into an agreement with an entity . . . to act as agent for the holders of Company Common Stock . . . in connection with the Merger (the 'Paying Agent')") (Firsenbaum Decl. Ex. A); Paying Agent Agreement § 1(e) ("Citi is authorized to . . . pay cash for Shares to the Company's stockholders" and "will . . . remit to each stockholder who has properly surrendered Shares . . . by check, an amount equal to the Merger Consideration for each Share submitted by such stockholder . . . .") (Firsenbaum Decl. Ex. B). The Trustee has, in fact, acknowledged as much in the Committee Action. *See* Mem. of Law, *Official Comm. of Unsecured Creditors v. Citibank, N.A.*, Adv. No. 09-01375 (Nov. 23, 2010) at 16 [Docket No. 454] (noting that the

Citibank fits squarely within the Bankruptcy Code's definition of a "financial institution" as "a Federal reserve bank, or an entity that is a commercial or savings bank . . ." 11 U.S.C. § 101(22)(A).[15] And it is also well established that transfers of settlement payments by a bank acting as an escrow agent (or "paying agent") in connection with payments to selling shareholders are made "by . . . [a] financial institution" for purposes of Section 546(e). *See In re Resorts*, 181 F.3d at 516 (payments made through debtor's bank to shareholders were "settlement payments"); *In re Plassein*, 366 B.R. 318, 323-25 (Bankr. D. Del. 2007) (same), *aff'd*, 590 F.3d 252 (3d Cir. 2009); *In re Loranger*, 324 B.R. at 585-86 (same). Indeed, just last year, a court in this District concluded that payments made through an escrow agent (The Bank of New York) in an offer to purchase privately held shares were "made by . . . [a] financial institution." *See In re Refco,* 2009 WL 7242548, at *6-8, 10, *adopted*, 2010 WL 5129072, at *1.

Again, however, the Trustee has made an argument in the Committee Action that Circuit courts and courts in this District have rejected. The Trustee has argued that an escrow agent is not a "financial institution" for purposes of Section 546(e) because it is a mere conduit with no beneficial interest in the transferred funds. *See* Mem. of Law, *Official Comm. of Unsecured*

Merger Consideration payments to the shareholders were made "via a Paying Agent"); Committee Compl. ¶ 199 (alleging that "[o]n the closing of the Merger Agreement, a total of approximately $20.2 billion of the proceeds from the funding of the Facilities was transferred to the designated paying agent for the Merger (the 'Paying Agent')" and that "[o]f such amount, approximately $11.3 billion received by the paying agent was held by it for payment of the Merger Consideration to former shareholders of Lyondell who, in accordance with the Merger Agreement, surrendered their shares"); *see id.* ¶ 204 ("*unlike* the merger compensation due to other holders of Lyondell shares, the merger compensation for Blavatnik's Toe-Hold Position was *not* funded through the Paying Agent") (emphasis added).

[15] The Court can take judicial notice that Citibank is a financial institution within the meaning of Section 546(e). *See Enron Corp. v. Int'l Fin. Corp. (In re Enron Corp.)*, 341 B.R. 451, 458 (Bankr. S.D.N.Y. 2006) (taking judicial notice that Chase Manhattan Bank was a financial institution for purposes of Section 546(e)); *In re Refco*, 2009 WL 7242548, at *6-8, *adopted,* 2010 WL 5129072 (same, with respect to The Bank of New York).

Creditors v. Citibank, N.A., Adv. No. 09-01375 (Nov. 24, 2009), at 21 [Docket No. 224]. Although an earlier case from the Eleventh Circuit supports that argument, *Munford v. Valuation Research Corp. (In re Munford, Inc.)*, 98 F.3d 604 (11th Cir. 1996) (per curiam), that case has been discredited and rejected by every other Court of Appeals to examine the issue, including three separate decisions in 2009 alone, all of which have squarely held that "the plain language of § 546(e) simply does not require a 'financial institution' to have a 'beneficial interest' in the transferred funds." *In re QSI Holdings,* 571 F.3d at 551 (6th Cir. 2009); *see also Contemporary Indus. Corp.*, 564 F.3d at 987 (8th Cir. 2009); *In re Plassein*, 590 F.3d at 259 (3d Cir. 2009); *In re Resorts Int'l,* 181 F.3d at 516 (3d Cir. 1999). And, adopting the Report and Recommendation of the Refco Special Master, a District Court in this District recently came to the same conclusion: "[t]he predominant view in the Circuits—that 'financial institution' means what it says and covers financial institutions even when they act only as a conduit for a settlement payment—is cogent and persuasive." *See In re Refco,* 2009 WL 7242548, at *8, *adopted*, 2010 WL 5129072, at *1. The settlement payments were thus made "by" a "financial institution"—Citibank—within the meaning of the Bankruptcy Code.

Even if that were not the case, the payments at issue would be protected from avoidance against the Defendants by Section 546(e) because they were made "to" a "commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency" and thus fall within the safe-harbor for that reason as well. *See* 11 U.S.C. § 546(e). Nearly all of the Defendants—including, but not limited to, entities or affiliates of Morgan Stanley & Co. Incorporated; State Street Bank & Trust Company; Credit Suisse Securities (USA) LLC; Deutsche Bank Securities Inc.; JPMorgan Chase Bank, N.A.; BNP

Paribas Securities Corp.; TD Ameritrade Clearing, Inc.; PNC Bank, N.A.; and Barclays Capital, Inc.—meet one or more of these criteria.[16]

Thus, the settlement payments that the Trustee seeks to avoid were made "by or to" a protected institution, and may not be avoided under the plain terms of Section 546(e).

2. The Payments to the Lyondell Shareholders Were Transfers in Connection with a Securities Contract.

While the Court need not reach the issue, the transfers of Merger Consideration to the Lyondell shareholders pursuant to the Merger Agreement also fall within Section 546(e)'s safe-harbor on the separate and independent ground that they were "transfer[s] made . . . in connection with a securities contract." 11 U.S.C. § 546(e). Section 741(7) of the Bankruptcy Code sets forth an expansive definition of "securities contract," including any "contract for the purchase, sale, or loan of a security." *Id.* § 741(7)(A)(i). The payments at issue here fall within that definition on either one of two independent bases.

First, on the Trustee's own allegations, the Paying Agent paid the Merger Consideration "in connection with a securities contract," namely, the Merger Agreement. According to the Complaint, Basell "contractually bound itself to buy Lyondell for $48 per share" when it entered into the Merger Agreement. Compl. ¶ 351. The Merger Agreement provided that the Paying Agent for the Merger shall "receive the Merger Consideration . . . to which [Lyondell shareholders] shall become entitled." Merger Agreement §2.6 (Firsenbaum Decl. Ex. A); *see also id.* § 2.6 ("Parent shall deposit, or cause to be deposited, with the Paying Agent, for the benefit of the holders of shares of the Company Common Stock, . . ., cash in an amount

[16] Indicative of Section 546(e)'s broad scope, these terms are, like "financial institution," defined expansively in the Bankruptcy Code. *See* 11 U.S.C. § 101(6) ("commodity broker"); *id.* § 101(22A) ("financial participant"); *id.* § 101(26) ("forward contract merchant"); *id.* §101(53A)) ("stockbroker"); *id.* § 101(48) ("securities clearing agency").

sufficient to permit payment of the aggregate Merger Consideration," and "[t]he Paying Agent shall, pursuant to irrevocable instructions, deliver the Merger Consideration . . . out of the Payment Fund" to Lyondell shareholders).[17]

Second, the Lyondell shareholders' exchange of their stock for the Merger Consideration itself constituted a "securities contract." *See In re Plassein*, 366 B.R. at 323. Under the terms of that securities contract, the Paying Agent transferred to the shareholders $48 in consideration for the transfer of each share of their Lyondell stock.

B. The Trustee Cannot Circumvent Controlling Federal Law.

Faced with the Bankruptcy Code's clear bar against the avoidance of the transfers of Merger Consideration to the former Lyondell shareholders, the Trustee concocts a novel theory to circumvent Section 546(e). The Trustee's argument apparently is that Section 546(e) does not

[17] The Trustee has, nevertheless, argued in the Committee Action that the Merger Agreement was not a "securities contract." Mem. of Law, *Official Comm. of Unsecured Creditors v. Citibank, N.A.*, Adv. Pro. No. 09-01375 (Sept. 25, 2009) at 10-16 [Docket No. 130]. Again, the law is to the contrary. After the Trustee claimed that no court had addressed the issue (*id.* at 15), the Refco Special Master and a District Judge in this District did so, rejecting the Trustee's position. Both the Special Master and the District Court concluded (albeit in dicta) that payments of cash to shareholders in exchange for their shares of stock constituted transfers "in connection with a securities contract." *See In re Refco*, 2009 WL 7242548, at *3 n.4, *adopted*, 2010 WL 5129072, at *1. While determining that he need not finally decide the issue (because he concluded that the "settlement payment" prong of Section 546(e) barred the state-law fraudulent transfer claims in any event), the Special Master noted that "[t]he term 'securities contract' is broadly defined in Section 741(7)," "clearly cover[ing] the purchase of the [stock] shares" at issue, and thus "there is a strong argument that under the plain meaning of its text, Section 546(e) provides a safe harbor for a purchase of [the] shares because [the sale] was a transfer in connection with a securities contract." *Id.* The District Court "adopt[ed] . . . in full" the Special Master's "thorough and well-reasoned" Report and Recommendation, noting that the court was in "complete agreement" with its analysis. *See In re Refco*, 2010 WL 5129072, at *1. Other courts that have considered the recently expanded definition of the term "securities contract" pursuant to the 2006 amendments to the Bankruptcy Code have similarly applied the plain language of the statute to protect a wide range of financial transactions. *See, e.g., Am. Home Mortg. Inv. Corp. v. Lehman Bros. (In re Am. Home Mortg. Holdings, Inc.)*, 388 B.R. 69, 84 (Bankr. D. Del. 2008) (holding that repurchase agreements for the sale and repurchase of subordinated notes secured by mortgage loans constitute protected securities contracts under Section 741(7)(A)(i)).

preclude this action because the Debtors "abandoned" the state-law avoidance claims against the former Lyondell shareholders, and the Trustee therefore is purportedly not bringing this action on behalf of the Debtors' estates under Section 544(b), but rather as the assignee of the claims of the Debtors' creditors to avoid those payments under state fraudulent-transfer law.

It is difficult to imagine a more brazen machination seeking to evade Congress' will. Every other estate avoidance action was retained by the Reorganized Debtors or "assigned"—not "abandoned"—to the separate Litigation Trust, also run by the same Trustee, who in that capacity has filed hundreds of post-confirmation adversary proceedings "in the names of the Debtors" under the Bankruptcy Code's avoidance provisions. Two of those actions assert fraudulent transfer claims arising out of the very same Merger under the Bankruptcy Code, including one against the same former shareholders of Lyondell seeking to avoid and recover the payments made to them for their Lyondell stock. The *only* avoidance claim the Debtors' estates purported to "abandon" was the single count the Committee had brought in the Committee Action under Section 544(b) of the Bankruptcy Code to avoid the payments to the former Lyondell shareholders.

The Committee "abandoned" that claim only after the shareholder-class-defendant BGI had asserted it would move to dismiss under Section 546(e), and on the heels of decisions making clear that courts in this District, like the Courts of Appeals throughout the country, will apply Section 546(e) in accordance with its plain language. Even more transparently, the "abandoned" claim was transferred right back to the Trustee (the creditors were not given any right under the Plan to retain the claim for themselves), who simply switched hats from Committee counsel to Trustee of the Creditor Trust and proceeded to re-file virtually the identical Committee complaint against the Defendants.

The Trustee's attempt to nullify the Bankruptcy Code fails as a matter of law. In Section 546(e), Congress imposed federal limits on the avoidance of pre-bankruptcy settlement payments that cannot be contravened. To the extent that the Trustee seeks to avoid the payments to the Defendants under state laws that do not respect those limits, those state laws are preempted.

1. <u>The State Law Claims Are Preempted.</u>

Under the Supremacy Clause, state laws that interfere with or are contrary to federal law are preempted. *See* U.S. Const. art. VI, § 2. Congress may preempt state law explicitly, or may do so implicitly under (1) "field preemption, where Congress has legislated so comprehensively that federal law occupies an entire field of regulation and leaves no room for state law," or (2) "conflict preemption, where local law conflicts with federal law such that it is impossible for a party to comply with both or the local law is an obstacle to the achievement of federal objectives." *N.Y. SMSA Ltd. P'ship v. Town of Clarkstown*, 612 F.3d 97, 104 (2d Cir. 2010) (internal quotation marks omitted). Preemption is particularly appropriate in areas that traditionally are of national interest and for which there is a need for nationwide uniformity. *Hines v. Davidowitz*, 312 U.S. 52, 67-68, 72 (1941).

The federal character and need for national uniformity of bankruptcy law is clear. The Constitution provides that Congress shall have Power "to establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." U.S. Const. art. I, § 8, cl. 4. The Supreme Court has explained the preemptive effect of the federal bankruptcy statute:

> In respect of bankruptcies the intention of Congress is plain. The national purpose to establish uniformity necessarily excludes state regulation. … States may not pass or enforce laws to interfere with or complement the Bankruptcy Act or to provide additional or auxiliary regulations.

Int'l Shoe Co. v. Pinkus, 278 U.S. 261, 265 (1929). Accordingly, because the "Bankruptcy Code provides a comprehensive federal system of penalties and protections to govern the orderly

conduct of debtors' affairs and creditors' rights," it "preclude[s] enforcement of state laws on the same subject." *See Eastern Equip. & Servs. Corp. v. Factory Point Nat'l Bank*, 236 F.3d 117, 120 (2d Cir. 2001) (per curiam).

This Court applied this rule of law in the *General Motors* case. Noting that "provisions of the Code can and do sometimes trump state law," the Court held that "section 363(f) . . . is exactly such a provision" and authorized the sale of GM's assets to the purchaser "free and clear" of state-law successor liability. *See In re General Motors Corp.*, 407 B.R. 463, 499-506 & n.99 (Bankr. S.D.N.Y. 2009); *id.* at 515 (stating that state franchise laws that "impair the ability to reject, or to assume and assign [executory contracts], . . . must be trumped by federal bankruptcy law"), *aff'd*, 428 B.R. 43 (S.D.N.Y. 2010); *id.* (citing *In re Old Carco LLC*, 406 B.R. 180, 199-206 (Bankr. S.D.N.Y. 2009), where "Judge Gonzalez found that the state franchise laws at issue, like those at issue here, frustrated the purposes of (and, thus, were preempted by) section 365" of the Bankruptcy Code).

The same principles apply with respect to the Bankruptcy Code's avoidance provisions. Upon the commencement of a bankruptcy case, the Bankruptcy Code provides the exclusive framework for avoiding pre-petition transfers of the debtor's property. Congress has established through numerous detailed provisions of the Bankruptcy Code an intricate and comprehensive remedial scheme for the avoidance and recovery of fraudulent transfers in bankruptcy proceedings. *See* 11 U.S.C. §§ 544(b), 548 (avoiding powers and defenses); §§ 550, 551 (avoidance remedies); § 502(d), (h) (interplay with creditor claims); § 522(g)-(j) (interplay with debtor's exemption); §§ 546, 555-56, 559-561 (limitations on avoiding powers).

Indeed, the Code vests the power to avoid fraudulent transfers exclusively in the debtor's trustee, who is authorized to pursue such actions on behalf of the debtor's creditors for the

benefit of the estate. *See id.* §§ 544(b), 548, 550. Thus, upon the commencement of a bankruptcy case, it is "axiomatic" that "creditors of the estate have no right to proceed independently" to pursue fraudulent transfer actions under state law. *In re Daniele Laundries, Inc.*, 40 B.R. 404, 408 (Bankr. S.D.N.Y. 1984); *see FDIC v. Hirsch (In re Colonial Realty Co.)*, 980 F.2d 125, 131-32 (2d Cir. 1992) (Bankruptcy Code stays creditors from bringing fraudulent-transfer actions); *United Feature Syndicate, Inc. v. Miller Features Syndicate, Inc.*, 216 F. Supp. 2d 198, 222 (S.D.N.Y. 2002) (the "trustee has exclusive authority to maintain" "fraudulent conveyance claims based upon pre-bankruptcy petition transfers by a debtor").

Moreover, Congress has made clear the degree to which state fraudulent-transfer law will be recognized, and circumscribed, in bankruptcy. In crafting the federal avoiding powers, Congress incorporated elements of state law, authorizing the trustee to avoid pre-petition transfers of the debtor's property that are "voidable under applicable law by a creditor" of the debtor. *See* 11 U.S.C. § 544(b). But it also placed clear limits on that authority, mandating that "[n]otwithstanding section[] 544"—and its authorization to avoid transfers "voidable under applicable law by a creditor"—settlement payments cannot be avoided in bankruptcy. *Id.* § 546(e). Congress thereby preempted any state law that would permit the debtor's creditors to avoid settlement payments protected by Section 546(e).

Congress did so because it determined that, when a debtor files for bankruptcy, the creditor-protection policies underlying fraudulent transfer law—whether state or federal—must give way to the paramount national policy of protecting the "nation's financial markets from the instability caused by the reversal of settled securities transactions." *See Kaiser Steel Corp. v. Charles Schwab & Co.*, 913 F.2d 846, 848 (10th Cir. 1990). Given the volatile and highly interconnected nature of those markets, Congress was concerned that the avoidance of securities

transactions could present a "danger of a 'ripple effect' [] on the entire market." *Id.* at 849. That danger could be amplified in the bankruptcy context, where a single trustee, debtor-in-possession or committee presiding over the collapse of potentially enormous corporate enterprises (such as Lyondell and its subsidiaries) would be armed with the full range of the Bankruptcy Code's avoiding powers, to pursue for the collective benefit of all of the debtor's creditors. Congress thus recognized that "the broad avoidance power given to a trustee in bankruptcy led to the potential risk that the avoidance of a major transfer" could have a "potentially devastating effect," "requir[ing] the undoing of possibly thousands of settled securities transactions." *Official Comm. of Unsecured Creditors v. Fleet Retail Fin. Grp. (In re Hechinger Inv. Co.)*, 274 B.R. 71, 88 (D. Del. 2002).

Congress responded to this threat to the securities markets by enacting Section 546(e) as an absolute bar on the avoidance of settlement payments. It sought to "ensure settlement finality, and therefore market stability," and thereby "'minimize the displacement caused in the commodities and securities markets in the event of a major bankruptcy affecting those industries.'" *See In re Enron Creditors Recovery Corp.*, 422 B.R. at 429 (quoting H.R. Rep. 97-420, at 2 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 583)).

In light of this manifest Congressional intent, courts have rejected efforts by creditors' committees and other representatives of a debtor's creditors to circumvent Section 546(e) by bringing claims to recover settlement payments under state law. Thus, in a case like this one concerning a leveraged buyout, the Eighth Circuit held that Section 546(e) preempts state law claims for unjust enrichment and illegal shareholder distributions to recover settlement payments that are protected from avoidance as fraudulent transfers under Section 544(b). *See Contemporary Indus. Corp.*, 564 F.3d at 988. The Court of Appeals' reasoning could not be

more apt here: "[a]llowing recovery on these [state law] claims would render the § 546(e) exemption meaningless, and would wholly frustrate the purpose behind that section." *Id.*

In still another case involving a leverage buyout, the Delaware District Court similarly held that Section 546(e) preempts state law unjust enrichment claims to recover payments to shareholders that "Congress deemed unavoidable under sections 544(b) and 546(e)." *See Hechinger Inv. Co.*, 274 B.R. 71, 96-98 (D. Del. 2002). Again, using words that could hardly be more cogent here, it rejected the attempt to "circumvent section 546(e)," since permitting recovery on the state law claims would "directly conflict[] with the remedial exemption set forth in Code section 546(e)," and "implicate the same concerns regarding the unraveling of settled securities transactions" underlying that remedial scheme. *Id.* at 96. Because "the Bankruptcy Code, particularly sections 544 and 546(e), provides an exclusive framework for addressing claims that seek to avoid [pre-petition] transfers," "section 546(e) completely occupies the field of proceedings within bankruptcy," "displac[ing] inconsistent state law claims and remedies." *Id.* at 97.

The Second Circuit and lower courts in this Circuit have applied these same principles in other contexts where parties have asserted state-law claims that would circumvent the Bankruptcy Code's enforcement and remedial scheme. Thus, the Second Circuit has held that state-law tort claims for violations of the automatic stay "are completely preempted by federal bankruptcy law," because Congress established a "comprehensive federal system" in a "lengthy, complex and detailed Bankruptcy Code," which sets forth the substantive standards "govern[ing] . . . debtors' affairs and creditors' rights" in bankruptcy cases and the corresponding "remedies" available to achieve those ends. *See Eastern Equip. & Servs. Corp.*, 236 F.3d 117, 120-21 (2d Cir. 2001) (per curiam) (citing *MSR Exploration, Ltd. v. Meridian Oil, Inc.*, 74 F.3d 910, 913-16

(9th Cir. 1996)). Because the "broad scope of bankruptcy preemption" recognized by the Second Circuit in *Eastern Equipment* "relate[s] to all aspects of the bankruptcy process," *Astor Holdings v. Roski*, 325 F. Supp. 2d 251, 262-63 (S.D.N.Y. 2003), courts in this Circuit have held that a wide variety of state-law claims are preempted by the Bankruptcy Code.[18]

Indeed, just as the Eighth Circuit and Delaware District Court held with respect to Section 546(e), courts in this District have held that other Bankruptcy Code avoidance provisions are exclusive and preempt state-law claims that would contravene the limits Congress established under those provisions. For example, the District Court has determined that creditor claims against a debtor's banks to recover pre-petition transfers of the debtor's property under state-law theories of unjust enrichment, conversion and restitution are "preempt[ed]" to the extent of any "conflict" with the Bankruptcy Code because they "fall[] squarely within the ambit of Section[] 547(b)" and "stand as an obstacle to the accomplishment and execution of the full purposes and

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[18] *See id.* (holding that state-law tort claims for "bad faith" bankruptcy filings are preempted, since "remedies for 'the misuse of the . . . process' . . . [are] governed exclusively by th[e] Code"); *Simmons v. Roundup Funding, LLC*, No. 08 Civ. 6263, 2009 WL 3049586, at *4 (S.D.N.Y. Sept. 23, 2009) (state law claims for filing fraudulent proof of claim preempted), *aff'd in part and vacated in part on other grounds*, 622 F.3d 93 (2d Cir. 2010); *Diamante v. Solomon & Solomon, P.C.*, No. 99 Civ. 1339, 2001 WL 1217226, at *3 (N.D.N.Y. Sept. 18, 2001) (state law claims for violation of discharge injunction were preempted because "Plaintiff [wa]s, in effect, attempting to circumvent the enforcement and remedial scheme of the Bankruptcy Code, which provides a remedy for any violation of § 524 in the form of possible contempt sanctions," and "[t]o permit such claims would thwart Congress' intent in promulgating the Bankruptcy Code to create a singular federal system to adjust all of the rights and duties of both creditors and debtors"); *accord Bessette v. Avco Fin. Servs.*, 230 F.3d 439, 447 (1st Cir. 2000) ("Congress' intent in enacting the remedial provisions of the Bankruptcy Code" demonstrates a "federal statutory scheme … so pervasive that Congress clearly intended to 'occupy the field' to the exclusion of state law."); *see also, e.g.*, *Perez v. Campbell*, 402 U.S. 637, 649-51 (1971) (Bankruptcy Code's discharge provisions preempted state statute suspending drivers license for non-payment of discharged judgment); *Stolz v. Brattleboro Housing Auth. (In re Stolz)*, 315 F.3d 80, 87, 92-94 (2d Cir. 2002) (Bankruptcy Code's bar against bankruptcy-discrimination under 11 U.S.C. § 525 prohibited enforcement of state-law eviction remedies for non-payment of discharged rent).

objectives of Section[] 547(b)." *Pereira v. United Jersey Bank, N.A.*, 201 B.R. 644, 676-80 & n.25 (S.D.N.Y. 1996).[19]

Under this authority, the Trustee's attempt to circumvent Section 546(e) fails as a matter of law. Because the payments to Lyondell's former shareholders in exchange for their shares were settlement payments protected under Section 546(e), Congress has mandated as a matter of federal law that those payments cannot be avoided where, as here, the debtor filed for bankruptcy. The Trustee's claims to avoid those payments are therefore barred, regardless of whether the Trustee purports to bring those claims independently of Section 544(b), as a purported assignee of the claims of the Debtors' creditors under state law. Indeed, because the Trustee is bringing the very types of state-law fraudulent transfer claims that are expressly addressed in Section 544(b)—in fact, the very same claims that the Trustee *did* bring (as Committee counsel) under Section 544(b)—Congress' intent to preempt those claims under Section 546(e) could not be more clear.

2. <u>The Trustee Cannot Avoid Preemption Through the Stratagem of "Abandonment."</u>

Finally, Congress' clear and absolute prohibition on the avoidance of settlement payments cannot be evaded through the Trustee's contrivance of abandonment. Once a debtor becomes the subject of a federal bankruptcy proceeding, Section 546(e) applies, irrespective of whether the debtor's estate purports to "abandon" the estate's Section 544 rights.

[19] Other courts have reached the same conclusion. *See, e.g.*, *In re Flagstaff Foodservice Corp.*, 56 B.R. 899, 908-09 (Bankr. S.D.N.Y. 1986) (creditor fraud claim to recover goods from debtor preempted by "exclusive remedy for reclaiming creditors" under Section 546(c) of the Bankruptcy Code); *In re Hecht*, 41 B.R. 701, 706 (Bankr. S.D.N.Y. 1984) (state law governing creditor setoff rights preempted by avoidance provisions of Section 553(b) of the Bankruptcy Code to extent state law "would . . . frustrate[]" "Congress['s] inten[t] to limit the amount a creditor can offset"); *see also, e.g.*, *Smith v. Am. Founders Fin., Corp.*, 365 B.R. 647, 675-79 (S.D. Tex. 2007) (Bankruptcy Code Section 546(a) limitations period preempted state-law fraudulent-transfer statute of repose).

Congress did not enact Section 546(e) as a mere personal limitation on "the trustee," to be cast aside any time a trustee chooses to "abandon" its statutory avoiding powers. Indeed, Congress did not contemplate that a trustee *could* abandon its statutory avoiding powers at all. Section 554 of the Bankruptcy Code authorizes a trustee to abandon only "property of the estate," *see* 11 U.S.C. § 554(a), and Congress made clear that "property of the estate" does not include the trustee's avoiding powers under Section 544, but rather only the property the trustee recovers through the successful exercise of those avoiding powers under Section 550 of the Bankruptcy Code. *See* 11 U.S.C. § 541(a)(3) (defining property of the estate to include "[a]ny interest in property that the trustee recovers under section 329(b), 363(n), 543, 550, 553, or 723 of this title").[20]

Congress would have accomplished very little through Section 546(e) if it had provided that Section 546(e) would not apply to fraudulent transfer actions that satisfy the nominal requirements for abandonment under Section 554 of the Bankruptcy Code. After all, those requirements would be satisfied in every case in which Section 546(e) would bar a fraudulent-transfer action, since, by definition, a barred action would be of "inconsequential value and benefit to the estate." *See* 11 U.S.C. 554(a) (authorizing trustee to abandon "any property of the estate that is … of inconsequential value and benefit to the estate"). Thus, if a debtor and its creditors could escape Section 546(e)'s restrictions by "abandoning" fraudulent transfer actions,

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[20] *See In re Colonial Realty Co.*, 980 F.2d at 131 (Section 541(a)(3) "reflects the congressional intent that [fraudulently transferred] property is not to be considered property of the estate until it is recovered"); *In re Feringa*, 376 B.R. 614, 624 (Bankr. W.D. Mich. 2007) (holding that avoidance action under Section 547 was not abandoned by operation of Section 554 because "[t]he avoiding powers are not 'property' but a statutorily created power to recover property" (internal quotation marks omitted)); 5 *Collier on Bankruptcy* ¶ 541.14(1), at 541-84.6 n.1 (15th ed. rev. 2009) ("The avoiding powers of a debtor in possession granted in chapter 5 of the Code are not property of the estate but statutorily created powers to recovery property.").

as the Trustee has attempted to do here, the same end-run of Section 546(e) could be accomplished in *every* case. Such a reading of the Bankruptcy Code would render Section 546(e) virtually a nullity, contravening the "cardinal" rule of statutory construction that Congress is not presumed to have enacted toothless, meaningless legislation. *See, e.g., Duncan v. Walker*, 533 U.S. 167, 174 (2001) (It is a "cardinal principle of statutory construction" that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.") (internal quotation marks omitted); *Garcia-Villeda v. Mukasey*, 531 F.3d 141, 147 (2d Cir. 2008) ("There is a presumption against construing a statute as containing superfluous or meaningless words or giving it a construction that would render it ineffective.") (internal citations omitted). Moreover, the market-protection policies underlying Section 546(e) are no less at issue today, merely because the Trustee purports to bring this action as an assignee of the Debtors' creditors under state law, than when the Trustee brought these same claims a year-and-a-half ago on behalf of the Committee under Section 544 of the Bankruptcy Code. Put simply, Congress did not enact Section 546(e) only to repeal it in another section of the same Chapter of the same statute. Because the Trustee's claims are barred by Section 546(e), the Complaint should be dismissed.

II. THE TRUSTEE CANNOT RECOVER THE TRANSFERRED FUNDS FROM THE DEFENDANTS BECAUSE THOSE FUNDS WERE NOT PROPERTY OF THE DEBTORS.

The Trustee's fraudulent conveyance claims also fail as a matter of law because they seek the recovery of funds that merely passed through the Debtors from the Lenders to the beneficial holders of the Lyondell stock and never became property of any Debtor.

A. A Trustee Cannot Recover Funds over Which the Debtor Had No Control.

The Bankruptcy Code provides that a trustee may avoid only a "transfer of an interest *of the debtor* in property." 11 U.S.C. § 544(b)(1) (emphasis added); *accord id.* § 548(a)(1)(A)-(B)

(emphasis added). Thus, if the transfer in question was not a transfer of the debtor's property, the trustee may not seek to avoid and recover it. *See Begier* v. *I.R.S.,* 496 U.S. 53, 59 (1990) (holding that "[b]ecause [a] debtor does not own an equitable interest in property he holds in trust for another, that interest is not . . . 'property of the debtor' for purposes of section 547(b)"); *Stevenson* v. *J.C. Bradford & Co. (In re Cannon),* 277 F.3d 838, 851 (6th Cir. 2002) (dismissing Chapter 7 trustee's fraudulent transfer claim to recover funds held in trust by the debtor, because the funds were not part of the bankruptcy estate and thus not subject to the trustee's avoidance powers).

In this regard, the Bankruptcy Code provides that property held by the debtor at the commencement of a bankruptcy case as a mere pass-through or conduit does not become property of the bankruptcy estate. Section 541(d) thus excludes property from the estate where the bankrupt entity is only a delivery vehicle and lacks any equitable interest in the property it delivers:

> Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest . . . becomes property of the estate . . . only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.

11. U.S.C. § 541(d); *City of Springfield v. Ostrander (In re Lan Tamers, Inc.)*, 329 F.3d 204, 210 (1st Cir. 2003). The legislative history of the Bankruptcy Code reinforces that this plain reading is consistent with Congress' intent. *See In re Lan Tamers*, 329 F.3d at 210 (noting legislative history where Congress concluded that "property is excluded from the estate where the debtor merely receives property in order to deliver it to its intended recipient without any control or ownership over it").

Accordingly, courts have dismissed fraudulent transfer claims where, as here, the Trustee seeks to recover funds that flowed through the debtor as a mere "pass-through" to effect what

was in substance a transfer between third parties. For example, in *Nordberg* v. *Sanchez (In re Chase* & *Sanborn Corp.),* 813 F.2d 1177 (11th Cir. 1987), the Eleventh Circuit held that "the debtor corporation was a mere conduit" for a transfer of funds between non-debtors, that accordingly those funds were "not the 'property' of the debtor corporation," and that the "transfer of the funds thus is not subject to avoidance." *Id.* at 1178-79 (dismissing claim under 11 U.S.C. § 548). The Court of Appeals explained that "the funds were not the property of the debtor," even though it had brief possession of the money transferred to its bank account by a non-debtor, because the debtor did not "control the funds" or have the ability to use them for any purpose other than transferring them to a third party as directed by the non-debtor. *Id.* at 1182.[21]

The common theme in these cases is that the debtor is a pass-through, or mere conduit, where the debtor lacks discretion regarding how it may use the property at issue. *See In re*

[21] The fraudulent transfer analysis in *Chase & Sanborn* is similar to that in preference cases in which courts treat funds loaned by a new creditor for the purpose of enabling the debtor to pay an existing creditor of the debtor as "earmarked," and not property of the debtor, precluding the avoidance of the payment of those funds to the existing creditor under Section 547. *See, e.g., Cadle Co. v. Mangan (In re Flanagan)*, 503 F.3d 171, 184 (2d Cir. 2007) (where a new creditor lends money to the debtor for the purpose of paying a pre-existing creditor of the debtor, "the loan funds are said to be 'earmarked' and the payment is held not to constitute a voidable preference."); *Glinka v. Bank of Vermont (In re Kelton Motors)*, 97 F.3d 22, 25 (2d Cir. 1996) (earmarking doctrine bars recovery because, "where a third party lends money to a debtor for the purpose of paying a specific creditor, . . . the third party simply is substituted for the original creditor," and thus, the earmarked funds were never property of the debtor's bankruptcy estate). While the earmarking doctrine has most frequently been applied to bar preference claims, it has also been extended to preclude fraudulent transfer claims where, as here, the debtor had no discretion on the use of the funds that were loaned to it. *See In re Kelton Motors*, 188 B.R. 125, 128-29 (D. Vt. 1995) (holding that earmarking defense barred fraudulent transfer claim), *aff'd on other grounds*, 97 F.3d 22 (2d Cir. 1996); *In re Eerie World Entm't, L.L.C.,* No. 00-13708, 2006 WL 1288578, at *6 (Bankr. S.D.N.Y. Apr. 28, 2006) (acknowledging that earmarking defense could be extended to fraudulent transfer claims); *see also Northen v. Centennial Healthcare Corp. (In re Oxford Health Investors, LLC)*, No. 00-80676C-7D, 2002 WL 31031631, at *7 (Bankr. M.D. N.C. Sept. 3, 2002) (holding transfers not avoidable as fraudulent transfers under the earmarking doctrine); *Kapila v. Espirito Santo Bank (In re Bankest Capital Corp.)*, 374 B.R. 333, 342 (Bankr. S.D. Fla. 2007) (conducting earmarking analysis with respect to fraudulent transfer claims).

Joliet-Will Cnty. Cmty. Action Agency, 847 F.2d 430, 432 (7th Cir. 1988) (funds granted by government agencies to debtor not property of the estate where debtor had little discretion regarding use of funds). Thus, if the debtor receives funds under contracts restricting its use of those funds to paying them over to third parties, the funds are not treated as property of the debtor for purposes of the Bankruptcy Code. *See Branch v. Hill, Holliday, Connors, Cosmopoulos, Inc. Advertising (In re Bank of New England Corp.)*, 165 B.R. 972, 978 (Bankr. D. Mass. 1994) (payments by banks to debtor to fund obligations to defined group of creditors were not property of the estate because debtor's use of funds was so restricted that it could not control their use); *T&B Scottdale Contractors, Inc. v. United States*, 866 F.2d 1372, 1376 (11th Cir. 1989) (funds not part of subcontractor's bankruptcy estate because debtor's contracts specified how the debtor had to use the funds).

This result is both sensible and fair. The purpose of fraudulent transfer law is to prevent an insolvent debtor from depleting its existing assets to which its creditors may look for repayment. *Chase & Sanborn*, 813 F.3d at 1181. But where the debtor receives funds that it is legally obligated to pass on to a third party, those funds are not assets the debtor could have used to pay its creditors in any event, and the transfer of those funds to the third party does not diminish the assets available to satisfy the debtor's creditors. Were a court to allow the debtor's trustee to

avoid and recover such funds, this "would confer on the creditors a windfall at the expense of the [] defendants" who received the funds merely passed through the debtor. *Id.* at 1181-82.[22]

B. The Debtors Never Had Control over the Merger Consideration.

Here, the Lyondell Debtors did not have discretion to retain, or how to use, the funds that the Trustee seeks to recover for the Debtors' creditors. *See Kapila v. Espirito Santo Bank (In re Bankest Capital Corp.)*, 374 B.R. 333, 338 (Bankr. S.D. Fla. 2007) ("The dispositive question is whether the Debtor had control over the subject funds"); *Tolz v. Barnett Bank (In re Safe-T-Brake)*, 162 B.R. 359, 365 (Bankr. S.D. Fla. 1993). To the contrary, the Credit Agreement entered into by the Lenders, Lyondell and Basell obligated the Debtors to ensure that the funds were passed on to the Lyondell shareholders for their shares. It mandated, in the section of the agreement entitled "Use of Proceeds," that "[t]he Borrowers *will* use the proceeds of Loans made on the Closing Date *solely to finance the Transaction*." Credit Agreement § 5.19 (emphasis added) (Firsenbaum Decl. Ex. C). Indeed, the Trustee has previously conceded this very point,

[22] In *In re Refco*, the Special Master applied this principle and recommended dismissal of the trustee's initial complaint without prejudice because "[w]here the debtor's interests do not animate the transaction, courts are more likely to find that there was no transfer of property of the debtor," and "it would appear from the Complaint that the transaction did not primarily serve the interests of the debtor"—a recommendation the District Court adopted in its entirety. *In re Refco*, 2009 WL 7242548, at *14-*15; *adopted*, 2010 WL 5129072, at *1. In an amended complaint, however, the trustee alleged that the debtor had sufficient control over the transaction at issue because its principals "coerced" or "blackmailed" the lender's (Refco's) Chief Executive Officer to participate in the transaction. *Miller v. PF Saleco LLC (In re Refco)*, No. 09 Civ. 2866 (S.D.N.Y. Aug. 26, 2010) (Report and Recommendation of the Special Master), at 16 (Firsenbaum Decl. Ex. F), *adopted*, 2010 WL 5158115, at *1 (S.D.N.Y. Dec. 14, 2010). The Special Master concluded that this allegation was sufficient at the pleading stage to show that Suffolk had control over the transaction and thus was not a conduit—a conclusion that the District Court adopted. *Id.* In this case, in contrast, there are no allegations of "coercion" or "blackmail." To the contrary, the Complaint alleges that the Lenders ratified the transaction on their own accord, and participated in the Merger for their own benefit "with the expectation that, after being paid approximately $260 million in transaction fees (in addition to other substantial fees), they could, in accordance with the then prevailing practice, quickly syndicate virtually all of the 'junk' obligations being incurred and unload them off their own books." Compl. ¶ 11; *see id.* ¶¶ 330, 344, 379.

arguing that "[p]ublic documents conclusive[ly] demonstrate that . . . the proceeds of [the Lenders'] loans were to be used for a purpose, e.g., the payment of Lyondell shareholders" and that "a single integrated transaction would occur upon the closing of the Merger" under which the Lenders "knew precisely how the funds from the Merger financing would be used"—i.e., to pay the the Lyondell stockholders for their shares. Letter, *Official Comm. of Unsecured Creditors v. Citibank, N.A.*, Adv. Pro. No. 09-01375 (Oct. 26, 2009), at 3 [Docket No. 170].

The mechanics of the Merger underscore that the Debtors lacked any discretion over the use of the loan proceeds. The Lenders transferred the funds, nominally to Basell, which immediately deposited the funds (as it was required to do) in the escrow account held by the Paying Agent, which then transferred the funds to the Defendants on the very same day. The Trustee thus admits that, at the closing of the Merger on December 20, 2007, approximately $20.2 billion was funded under the Lender's Credit Facilities of which in excess of $12.5 billion "***was immediately paid***" to the Lyondell shareholders to purchase their outstanding shares of stock. Committee Complaint ¶¶ 199, 204.[23]

Indeed, precisely because the Debtors had no discretion but to allow the proceeds to be transferred to the Defendants, the Trustee has argued that the loans provided no benefit to the

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[23] The Trustee has also acknowledged that the Merger Consideration was "funded entirely with Merger Financing" and that the payments to the shareholders were made "via a Paying Agent," not via an account over which any Debtor had any discretion. Mem. in Opp. to Mot. of Nell Ltd. and Leonard Blavatnik to Dismiss Count II of Am. Compl., *Official Comm. of Unsecured Creditors v. Citibank, N.A.*, Adv. Pro. No. 09-01375 (Nov. 23, 2010), at 16 [Docket No. 454]; *see* Compl. ¶ 1 ("Every dollar that went to shareholders and every dollar used to pay the approximately $1 billion in transaction fees charged by affiliates, advisors, and professionals in connection with the Transaction, was funded with debt leveraged against the assets of Lyondell and its operating subsidiaries"); ¶ 401 ("The proceeds of the Merger Financing were applied to fund the transactions contemplated in connection with the Merger as follows: <u>Shareholder Payments</u>. Approximately $12.5 billion to former shareholders of Lyondell as payment of the cash due to them upon conversion of their shares into the right to receive cash . . .").

Debtors. The Trustee has asserted that the Debtors "obtained no economic benefits" from the loans they received because, "although funding for the acquisition may have been initially made to the [D]ebtor[s], ***the [D]ebtor[s] [are] not deemed to have received value*** to the extent that loan proceeds were then paid out to third parties, such as the [D]ebtor[s'] shareholders."[24] The Trustee cannot have it both ways. If the loans provided no benefit to the Debtors because the Debtors had no control over the funds—and, in particular, no ability to use those funds to pay their creditors—then the transfer of those funds could not have been a fraudulent transfer of property of the Debtors otherwise available to satisfy the Debtors' creditors. *See Dzikowski v. NASD Regulation, Inc. (In re Scanlon)*, 239 F.3d 1195, 1199 (11th Cir. 2001) ("[T]he fact that . . . funds experienced a temporary layover in an [escrow] account . . . while *en route* to compensating others without any oversight by the Debtor hardly converts them into property of the bankruptcy estate."); *In re Chase & Sanborn*, 813 F.2d at 1177 (where third party deposits funds into debtor's account for the purpose of paying a non-creditor of the debtor, the debtor does not have control over the funds).

In short, the transfers of cash from the Lenders through the Paying Agent to the Lyondell shareholders did not involve the Debtors' own, pre-existing assets and hence did not cause any injury to the Debtors' creditors. The day before the closing of the Merger Agreement and Credit Agreement, the Debtors did not have any Merger Consideration. And at the closing, every dollar of Merger Consideration paid to the shareholders came from the Lenders. The Debtors were not

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[24] Mem. of Law, *Official Comm. of Unsecured Creditors v. Citibank, N.A.*, Adv. Pro. No. 09-01375 (Sept. 25, 2009) at 24, 11 n.11 (emphasis added) [Docket No. 130]; *see also* Letter, *Official Comm. of Unsecured Creditors v. Citibank, N.A.*, Adv. Pro. No. 09-01375 (Oct. 26, 2009) at 2 ("it is undisputed that the Debtors received no value or consideration for the approximately $12 billion of loan proceeds that flowed out to Lyondell's shareholders upon the Merger") [Docket No 170].

harmed—and their ability to pay their creditors was not reduced—by the transfer of the funds to their shareholders because the Debtors would not have received the funds in the first place from their Lenders if they had not bound themselves to use the funds to pay the shareholders for their stock.

Indeed, the Trustee's predecessor, the Committee, previously argued that what harmed the Debtors and their creditors was the Debtors' agreement to repay the Lenders for the loans (and the liens on the Debtors' property granted to the Lenders to secure that repayment), not the payments to the shareholders financed with the Lenders' funds. *See* Committee Complaint ¶ 267 ("To the extent that the Senior Credit Facility Obligations were incurred to fund the payment of: (i) the Merger Consideration, . . . (collectively, the "Merger Related Payments"), the Senior Credit Facility Obligors did not receive reasonably equivalent value or fair consideration in exchange for the incurrence of such obligations."). But the Trustee settled that claim against the Lenders for $450 million. Thus, the creditors for whose benefit the Trustee brings this action have already been compensated for the only obligations and transfers that the Trustee alleges harmed them (or such creditors are the Lenders themselves who obviously were not defrauded by the payments to the shareholders they directed; *see infra* Section IV). The Trustee's claims against the Defendants fail for this reason as well.

III. THE TRUSTEE CANNOT RECOVER FROM DEFENDANTS THAT ARE SUED AS CONDUITS, OR AS MERE "HOLDERS," AND NOT AS THE BENEFICIAL OWNERS OF LYONDELL STOCK.

Under both the Bankruptcy Code and state law, an allegedly fraudulent transfer may not be recovered from a defendant who was a mere conduit in the transfer. *See, e.g.*, *Christy v. Alexander & Alexander of NY Inc. (In re Finley)*, 130 F.3d 52, 58 (2d Cir. 1997) (adopting the "'mere conduit' test for determining who is an initial transferee" from whom a fraudulent conveyance may be recovered, and observing that "[e]very Court of Appeals to consider th[e]

issue has squarely rejected" the notion that "mere receipt" of assets from the debtor results in liability); *Tese-Milner v. Moon (In re Moon)*, 385 B.R. 541, 552 (Bankr. S.D.N.Y. 2008) (following *In re Finley*); *Geltzer v. D'Antona (In re Cassandra Group)*, 312 B.R. 491, 496-97 (Bankr. S.D.N.Y. 2004) (granting summary judgment on state law fraudulent conveyance claims brought against agent where funds at issue "were deposited into [agent's] . . . account for the benefit of [agent's principal]"); *Newsome v. Charter Bank Colonial*, 940 S.W.2d 157, 166 (Tex. App. 1996) (bank that did not own funds at issue or have discretion as to funds' use was not a transferee from whom recovery could be obtained under Texas state fraudulent conveyance law).

The rule is based on fundamental fairness. "[I]t would be inequitable to impose the strict liability reserved for an initial transferee on a conduit simply because he or she was the first to physically hold the money or property." *SIPC v. Stratton Oakmont, Inc.*, 234 B.R. 293, 313 (Bankr. S.D.N.Y. 1999); *see also Carson v. Fed. Reserve Bank,* 254 N.Y. 218, 236 (1930) (Cardozo, C.J.) ("The person to be charged with liability, if he has parted before the bankruptcy with title and possession, must have been more than a mere custodian, an intermediary or conduit between the bankrupt and the creditor.").

Under this well-established rule, the Complaint should at a minimum be dismissed as against (i) those Defendants whom the Trustee acknowledges he is suing "solely in [their] capacity as custodian, trustee, agent, representative or nominee on behalf of beneficial owners of Lyondell shares," *see supra* note 7, and (ii) those Defendants who are identified only as "holders" of Lyondell stock, *see supra* note 8 (the "Acknowledged Custodian Defendants"). Nowhere in the Complaint does the Trustee allege that these Defendants were themselves the beneficial owners of Lyondell stock or otherwise benefitted from the Merger Consideration. To the contrary, the Trustee alleges that *other defendants*—referenced in the Complaint in the

paragraph following every paragraph identifying an Acknowledged Custodian Defendant—were the "beneficial owners" of the shares of Lyondell stock "on whose behalf" the Acknowledged Custodian Defendants were acting when they received the Merger Consideration.[25]

Courts have rejected fraudulent conveyance claims in precisely these circumstances—where a custodian received funds from the purchaser in a leveraged buyout, only to pass those funds to the selling shareholders. *See, e.g.*, *Kaiser Steel Res. v. Jacobs (In re Kaiser Steel Corp.)*, 110 B.R. 514, 520-21 (D. Colo. 1990) (concluding that Charles Schwab & Co. was a "financial intermediary" between purchaser in leveraged buyout and selling shareholders, and therefore was not an "initial transferee" against whom a fraudulent conveyance claim could be brought), *aff'd*, 913 F.2d 846 (10th Cir. 1990). This Court should do the same here.

IV. THE TRUSTEE LACKS STANDING TO SUE ON BEHALF OF THE LENDERS.

A transfer of property by the debtor may be avoided as a fraudulent transfer only for the benefit of those creditors of the debtor that were defrauded by the transfer. Thus, it is well settled in this Circuit that a bankruptcy trustee lacks standing to bring avoidance actions under either Section 544 or 548 of the Bankruptcy Code where no benefit will accrue to uninvolved creditors of the debtor.[26]

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[25] Many of the other Defendants that are not identified as mere custodians in the Complaint held Lyondell shares and received any Merger Consideration, in whole or substantial part, as custodians or nominees for other, beneficial holders. If the Complaint survives this Motion to Dismiss as against those Defendants—and it should not—any discovery should initially be limited to this gating issue.

[26] *See Adelphia Recovery Trust v. Bank of Am., N.A.*, 390 B.R. 80, 95 (S.D.N.Y. 2008) *aff'd*, 39 Fed. Appx. 10 (2d Cir. 2010); *Whiteford Plastics Co. v. Chase Nat'l Bank*, 179 F.2d 582, 584 (2d Cir. 1950); *Vintero Corp. v. Corporacion Venezolana De Fomento (In re Vintero Corp.)*, 735 F.2d 740, 742-43 (2d Cir. 1984) (holding that debtor had right to avoid unperfected security interest only to the extent that avoidance benefitted third party creditors); *Balaber-Strauss v. Murphy (In re Murphy)*, 331 B.R. 107, 126 (Bankr. S.D.N.Y. 2005) (holding that trustee has the right to avoid a fraudulent transfer only to the extent necessary to satisfy claims of those legally harmed by the transfer).

Likewise, it is well established that a transfer may not be avoided for the benefit of a creditor that authorized or ratified the transfer. Fraudulent transfer law is designed to prevent a debtor from secretly transferring its assets to third parties in fraud of its creditors, who expected to look to those assets for repayment of their claims. *See, e.g.*, *Eberhard v. Macu*, 530 F.3d 122, 131 (2d Cir. 2008) (the "object" of New York fraudulent transfer law "is to enable a creditor to obtain his due despite efforts on the part of a debtor to elude payment" (internal quotation marks omitted)); 5 *Collier on Bankruptcy*, 548.01 (15th ed. rev. 2009) ("A fraudulent transfer can essentially be defined as an act which has the effect of improperly placing assets beyond the reach of creditors"). But where a creditor authorizes the debtor to transfer those assets to third parties, it is in no sense defrauded by the transfer, and fraudulent transfer law may not be invoked for that creditor's benefit.

Accordingly, a trustee lacks standing to assert a fraudulent transfer claim on behalf of such a creditor. *See, e.g.*, *HSBC Bank USA, N.A. v. Adelphia Commc'ns Corp.*, No. 07 Civ. 553A, 2009 WL 385474, at *6-7 (W.D.N.Y. Feb. 12, 2009) (affirming dismissal of fraudulent transfer claims under §§ 544(b) and 548 because "Adelphia ratified the very transactions . . . that Adelphia and the Committee now contend should be avoided"); *In re Best Prods. Co.*, 168 B.R. 35, 57 (Bankr. S.D.N.Y. 1994) ("A fraudulent transfer is not void, but voidable; thus, it can be ratified by a creditor who is then estopped from seeking its avoidance."); *Harris v. Huff (In re Huff)*, 160 B.R. 256, 261 (Bankr. M.D. Ga. 1993) (dismissing § 544(b) claim that would benefit only a creditor that consented to transfer); *cf. QSI Holdings, Inc. v. Alford*, 382 B.R. 731, 742 (W.D. Mich. 2007) ("[O]ne of the creditors seeking the benefit of avoidance in fact provided financing for the LBO of [the debtor], and thus would have been fully aware of the financial context of the LBO. This undermines any argument that the equities rest with creditors as

opposed to the approximately 170 shareholders, many of whom are mid- and lower-level [] employee-shareholders, whose stock payments would be voided in favor of the creditors"), *aff'd*, 571 F.3d 545 (6th Cir. 2009) (internal citation omitted).

Consistent with these authorities, a District Court in this District twice held during the last year that a trustee lacked standing to bring a fraudulent transfer action to recover payments to a debtor's shareholders for the benefit of a lender that had authorized those very payments. *In re Refco,* 2009 WL 7242548, at *9-11, *adopted*, 2010 WL 5129072, at *1; *In re Refco*, No. 09 Civ. 2866 (Report and Recommendation of the Special Master) (Firsenbaum Decl. Ex. F), *adopted*, 2010 WL 5158115, at *1 (S.D.N.Y. Dec. 14, 2010). In that case, the trustee sought to recover payments made to shareholders as part of a tender offer. The trustee alleged that the funds used by the debtor to fund the offer had come from a lender (Refco) that had extended the loan to the debtor for the very purpose of financing the offer. Under these circumstances, the court adopted the Special Master's conclusion that the trustee could not seek to recover the payments to the shareholders as fraudulent transfers for the benefit of the lender:

> "Any realistic assessment . . . leads to the conclusion that Refco was heavily involved in structuring the transaction for the purchase of PlusFunds shares . . . The Credit Agreement provides that the funds from Refco could be used only for the purchase of PlusFunds shares …. Refco was thus intimately involved with and voluntarily participated in what the Plaintiff readily asserts was a fraudulent transaction. . . . Therefore, Refco cannot be the triggering creditor, because it was a material participant in the alleged fraudulent transaction."

In re Refco, 2009 WL 7242548, at *11, *adopted*, 2010 WL 5129072, at *1.

The District Court reached the same conclusion after the trustee filed an amended complaint alleging that Refco had not orchestrated the transaction, but rather had participated in

the transaction because it supposedly had been coerced by the debtor to do so. Once again, the Special Master recommended dismissal of the complaint (this time with prejudice):

> [T]he following conclusion from the prior Report and Recommendation applies in equal measure to the Amended Complaint: Given the reasonable inferences to be drawn from the Plaintiff's own Complaint, it would be wasteful and it would blink reality to allow the action to proceed on the ground that the Plaintiff might be able to prove that Refco is a legitimate creditor of the Suffolk Estate that had nothing to do with the purchase of PlusFunds shares. Therefore, Refco cannot be the triggering creditor, because it was a material participant in the alleged fraudulent transaction.

In re Refco, No. 09 Civ. 2866 (Report and Recommendation of the Special Master) at 12 (Firsenbaum Decl. Ex. F); *see generally id.* at 10-12. And, once again, the District Court was "in complete agreement with Special Master Capra's thorough and well-reasoned Report and Recommendation." *In re Refco*, 2010 WL 5158115, at *1 (S.D.N.Y. Dec. 14, 2010) Indeed, the court stressed that "the new theory of the Amended Complaint, referred to . . . as 'the blackmail scenario' . . ., fails to cure the defect identified in the original Complaint, namely that plaintiff has not adequately alleged the existence of a valid creditor." *Id.*

This same analysis applies here. The Trustee seeks to recover $5.9 billion in transfers to various Lyondell shareholders (and their nominees) on behalf of three groups of creditors. Compl. ¶¶ 2-3. Two groups of alleged creditors—trade creditors and bondholders—purportedly hold claims totaling approximately $2.4 billion, some portion of which have already been paid under the Plan. Third Am. Disclosure Statement at 9-10. But the third group of alleged creditors—by far the largest in terms of dollar amount, purportedly holding claims totaling more than $10 billion (nearly twice the amount the Trustee seeks to recover here)—consists of those entities holding "unpaid, senior secured deficiency claims and unpaid, subordinated secured deficiency claims against LyondellBasell"—*i.e.*, the Lenders that financed the Merger. Third

Am. Disclosure Statement at 6, 8; Compl. ¶¶ 2-3; *id.* ¶ 12 ("Obligations to repay the acquisition financing were secured by, *inter alia*, first and second liens on substantially all of the assets of the obligors in favor of the lenders providing the Merger Financing."); *see id.* ¶¶ 347, 397-400.

The Trustee lacks standing to sue on behalf of those Lenders (and thus to recover amounts in excess of the unpaid, valid claims held by the other purported creditors) because the Complaint alleges that the Lenders authorized and ratified the very payments that the Trustee now seeks to avoid for their benefit. The Complaint asserts that the Lenders provided the financing knowing full well—indeed intending—that the funds they loaned would be used to pay the Defendants for their Lyondell stock. *See, e.g.,* Compl. ¶ 344 (alleging that the Lenders provided the financing "to enable Blavatnik to amass his global petrochemical company"); *id.* ¶ 379 (noting that the lead arranging banks solicited other Lenders "to participate in senior secured facilities that would be used to finance the Merger"). And, as noted previously, the Lenders' Credit Agreement ***required*** Lyondell and Basell to use the loan proceeds to pay the Defendants for their stock. Indeed, in the Committee Complaint, the Trustee explicitly alleged that the Lenders ratified the transfers he now seeks to avoid: "[t]he conduct ***authorized, directed, approved or acquiesced in*** by the Lead Arrangers resulted in the insolvency of LBI, the insufficiency of its capitalization and its inability to pay its debts when they became due." Committee Compl. ¶ 338 (emphasis added).

Accordingly, under the Trustee's own theory of the case, the Lenders were not defrauded by the transfers to the Defendants. Rather, they authorized and ratified those very payments. The Trustee lacks standing to assert (and is estopped from asserting) fraudulent transfer claims to recover such payments on their behalf. The claims therefore should be dismissed under Rule

12(b)(1) (lack of subject-matter jurisdiction) and 12(b)(6) (failure to state a claim) to the extent they seek recovery on behalf of the Lenders.

V. THE TRUSTEE'S INTENTIONAL FRAUDULENT TRANSFER CLAIM SHOULD BE DISMISSED FOR FAILURE ADEQUATELY, AND WITH SPECIFICITY, TO ALLEGE INTENT TO DEFRAUD CREDITORS.

Like federal law embodied in the Bankruptcy Code, the law of New York and Texas distinguishes between constructive and intentional fraudulent transfers.[27] "Constructive" focuses on whether the debtor received reasonably equivalent value in the transaction and on its financial condition—did the transaction leave the debtor insolvent, with inadequate capital or unable to pay its debts as they came due? "Intentional" asks a very different question: did the debtor act with actual intent to hinder, delay or defraud its creditors? The statutory language makes this clear:

> Every conveyance ***made . . . with actual intent,*** as distinguished from intent presumed in law, ***to hinder, delay, or defraud*** either present or future creditors, is fraudulent as to both present and future creditors.

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[27] The Complaint does not specify under which state's law the Trustee purports to sue. But the Trustee's predecessor-in-interest, the Committee, has asserted that Texas law governs fraudulent transfer claims arising out of the Merger. *See Pre-trial Statement of the Legal Contentions of the Official Comm. of Unsecured Creditors with Respect to the Phase I Trial*, Adv. Pro. No. 09-01375 (Dec. 21, 2009), at 11 n.15 ("[T]he Committee suggests that Texas law is likely the most appropriate law to apply on a consolidated basis, where Lyondell headquarters are located in Texas and where the transaction was ultimately approved by Lyondell's shareholders in Texas.") [Docket No. 277]. According to the Complaint, however, many of the key Merger-related events took place in New York. *See, e.g.*, Compl. ¶ 228 (alleging that Blavatnik is based on New York); ¶¶ 243, 310, 327, 330 (alleging that Merger negotiations and meetings took place in New York). In either case, the Trustee cannot prevail on Count II unless he alleges specific facts demonstrating an actual intent to hinder, delay or defraud creditors. *See, e.g.*, *GPR Holdings, LLC v. Duke Energy Trading & Mktg., LLC (In re GPR Holdings, L.L.C.)*, No. 03-3430, 2005 WL 3806042, at *11 (N.D. Tex. May 27, 2005); *Official Comm. of Unsecured Creditors of M. Fabrikant & Sons, Inc. v. JP Morgan Chase Bank, N.A.* (*In re M. Fabrikant & Sons, Inc.)*, 394 B.R. 721, 733 (Bankr. S.D.N.Y. 2008).

N.Y. DEBTOR AND CREDITOR LAW § 276 (2005) (emphasis added); Texas Uniform Fraudulent Transfer Act § 24.0005 (2005) ("A transfer made . . . is fraudulent. . ., if the debtor made the transfer or incurred the obligation . . . with actual intent to hinder, delay, or defraud any creditor of the debtor.")[28]

The courts have construed the statutory language to mean what it says. As the Second Circuit has put it in considering New York's version of the law, "[t]o prove actual fraud under § 276, a creditor must show intent to defraud on the part of the transferor." *Sharp Int'l Corp. v. State Street Bank & Trust Co. (In re Sharp Int'l Corp.)*, 403 F.3d 43, 56 (2d Cir. 2005) (*quoting HBE Leasing Corp. v. Frank*, 61 F.3d 1054, 1059 n.5 (2d Cir. 1995)). A claim for intentional fraudulent transfer lies only where the transferor made the transfer with the specific "purpose of placing a debtor's assets out of the reach of creditors." *See Sharp Int'l Corp. v. State St. Bank & Trust Co. (In re Sharp Int'l Corp.)*, 302 B.R. 760, 784 (E.D.N.Y. 2003) (emphasis omitted),

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[28] To the extent that New York law controls, the Complaint's intentional fraudulent transfer claim fails for an additional reason. While there is contrary authority, several courts in this District have held that New York's intentional fraudulent conveyance statute—Section 276 of New York's Debtor and Creditor Law—requires the plaintiff to allege with particularity that both the transferor ***and the transferee*** acted with fraudulent intent. *See Nisselson v. Softbank AM Cop. (In re MarketXT Holding Corp.)*, 361 B.R. 369, 396 (Bankr. S.D.N.Y. 2007); *Andrew Velez Constr. v. Consol. Edison Co. of N.Y. (In re Andrew Velez Constr.)*, 373 B.R. 262, 276 (Bankr. S.D.N.Y. 2007); *Picard v. Taylor (In re Park S. Sec., LLC)*, 326 B.R. 505, 517 (Bankr. S.D.N.Y. 2005); *Gredd v. Bear, Stearns Sec. Corp. (In re Manhattan Inv. Fund Ltd.)*, 310 B.R. 500, 508 (Bankr. S.D.N.Y. 2002). *But see, e.g.*, *Bayou Accredited Fund, LLC v. Redwood Growth Partners, L.P. (In re Bayou Group LLC)*, 396 B.R. 810, 826-27 (Bankr. S.D.N.Y. 2008), *aff'd in part, rev'd in part on other grounds*, 439 B.R. 284 (S.D.N.Y. 2010); *see also Picard v. Merkin (In re Bernard L. Madoff Inv. Sec., LLC)*, No. 09-1182, 2010 WL 4643102, at *8 (Bankr. S.D.N.Y. Nov. 17, 2010) (observing that "some courts have held that section 276 requires a plaintiff to show intent to 'hinder, delay, or defraud' simply on the part of the transferor," but that "the proposition that a plaintiff must also plead a transferee's fraudulent intent is likewise supported by caselaw"). Here, the Complaint contains no allegations concerning the intent of the Defendants (or of any beneficial holder of Lyondell stock). Accordingly, insofar as the governing law is that of New York, Count II should be dismissed for this reason as well.

aff'd, 403 F.3d 43 (2d Cir. 2005). Accordingly, "intentional fraudulent conveyance claims should be relegated to their proper sphere, *i.e.*, where there is a knowing intent on the part of the defendant to damage creditors." *Silverman v. Actrade Capital, Inc. (In re Actrade Fin. Techs. Ltd.)*, 337 B.R. 791, 809 (Bankr. S.D.N.Y. 2005).

An intentional fraudulent transfer claim thus requires proof of actual fraud. And, for that very reason, such a claim must be pled with specificity, as required by Fed. R. Civ. P. 9(b). *See Sharp Int'l Corp.*, 403 F.3d at 56 (affirming dismissal of intentional fraudulent transfer claims for failure adequately to allege fraud with respect to the transaction sought to be voided); *Pereira v. Equitable Life Ins. Soc'y of the United States (In re Trace Int'l Holdings, Inc.)*, 289 B.R. 548, 556-57 (Bankr. S.D.N.Y. 2003) (New York state law fraudulent conveyance claims subject to Rule 9(b)'s pleading requirements); *Indiana Bell Tel. Co. v. Lovelady*, No. 05-CA-285, 2006 WL 485305, at *2 (W.D. Tex. Jan. 11, 2006) (dismissing intentional fraudulent transfer claim under Texas law for failure to satisfy Rule 9(b)'s requirements).[29]

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[29] In the Committee Action, the Trustee acknowledged that Rule 9(b) normally applies to claims of intentional fraudulent transfer. But he argued that a "relaxed standard" should apply where the complaint is filed by a trustee who was not involved in the underlying transaction. Mem. of Law, *Weisfelner v. Blavatnik*, Adv. Pro. No. 09-01375 (Nov. 23, 2010) at 17-18 [Docket No. 458]. In fact, the courts have rejected that contention where, as here, the Trustee has had ample opportunity to take discovery before filing his Complaint:

Thus, to avoid dismissal, the Complaint must set forth specific factual allegations that make it "at least as compelling as any opposing inference" to conclude that the Merger Consideration was paid to the Defendants "in order to hinder, delay or defraud" the Debtors' creditors. *See, e.g.*, *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 324 (2007). The Complaint does not come close to satisfying this demanding, "particularized standard." *Old Carco*, 435 B.R. at 192.

To the contrary, the Complaint contains no allegations, let alone particularized allegations, of fraudulent intent. While it goes on for page after page about the supposed financial condition of the Debtors following the Merger—how they allegedly were left with an

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> The Trust argues that it should be allowed to avail itself of the more relaxed standard for pleading fraud that is sometimes afforded bankruptcy trustees who are strangers to the transaction at issue and who, therefore, do not have inside knowledge. The circumstances of this case, however, do not support such relief. Prior to the filing [of] the Complaint, there was a period in which Rule 2004 discovery was conducted that allowed access to numerous documents, as well as the depositions of many witnesses. Moreover, there was access to other interested parties. Thus, there was ample opportunity to investigate any potential claims prior to filing the Complaint. There is no justification to relax the particularized standard required for intentional fraud claims.

Liquidation Trust v. Daimler AG (In re Old Carco LLC), 435 B.R. 169, 192 (Bankr. S.D.N.Y. 2010). The same analysis, adopted in *Old Carco*, applies with even greater force in this case. Before filing this Complaint, the Trustee had the benefit not only of Rule 2004 document and deposition discovery taken in Lyondell's bankruptcy case by the Committee, including discovery from BGI, the entity named in the Committee Complaint as the class representative for the shareholder defendants (*e.g.*, Motion for 2004 Discovery, *In re Lyondell Chemical Co.*, No. 09-10023 (Bankr. S.D.N.Y.) [Docket No. 1128]; Orders, *In re Lyondell Chemical Co.*, No. 09-10023 (Bankr. S.D.N.Y.) [Docket Nos. 1361, 1394, 1488]), but also of the extensive discovery that the Trustee obtained in the Committee Action (*see, e.g.*, Mem. of Law, *Weisfelner v. Blavatnik*, Adv. Pro. No. 09-01375 (Dec. 23, 2010), at 30-31 (noting that the Trustee took thirty-five depositions and discovered more than two million pages of documents before filing an amended complaint in July 2010) [Docket No. 477]).

"extremely leveraged capital structure" (Compl. ¶ 6) that caused them to be "insufficiently capitalized to continue operations through a downturn" (*id.* ¶ 10)—it says essentially nothing about any Debtor's intent, other than to quote the statutory language. *See id.* ¶ 461 ("LyondellBasell approved the Merger and entered into and executed the transactions in connection therewith, including the making of the Shareholder Transfers to the Shareholder Defendants[,] with knowledge of the effect such payments would have on the creditors of LyondellBasell, and with the intent to hinder, delay or defraud the creditors of LyondellBasell.").[30]

Such a conclusory, bare-bones regurgitation of the statute does not satisfy Rule 8, let alone Rule 9(b). *See, e.g. Ashcroft v. Iqbal*, 129 S. Ct. at 1949 ("[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory

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[30] Indeed, the very headings of the Complaint—those set forth in the "FACTUAL BACKGROUND"—evidence how little the Complaint speaks to actual (as distinguished from constructive) fraudulent transfer:

I. Lyondell Shareholders Are Cashed Out in a Highly Leveraged Acquisition. Compl. p. 52

II. The Merger Occurs Amid Signs of Deteriorating Economic and Industry Conditions. *Id.* p. 97

III. The Merger Closes. *Id.* p. 118

IV. As a Result of the Merger, LyondellBasell Was Left with Unreasonably Small Capital. *Id.* p. 122

V. LyondellBasell's Liquidity Failure Upon the Merger. *Id.* p. 129

VI. Upon the Merger, LyondellBasell Was Insolvent. *Id.* p. 136

VII. Upon the Merger, LyondellBasell Incurred Debts That Were Beyond Its Ability to Repay. *Id.* p. 139.

statements, do not suffice."); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) ("a formulaic recitation of the elements of a cause of action will not do").

The Trustee cannot plead a claim for *intentional* fraudulent transfer by alleging, at most, a case of *constructive* fraudulent transfer. *See Savage & Assocs., P.C. v. Mandl (In re Teligent, Inc.)*, 346 B.R. 73, 77 (Bankr. S.D.N.Y. 2006) (noting the "stark differences between the elements of a constructive fraudulent transfer claim and a claim sounding in intentional fraud"). The very words of the New York statute "distinguish[]" between constructive and fraudulent transfer. *See* N.Y. DEBTOR AND CREDITOR LAW § 276 (2005) ("Every conveyance made . . . with actual intent, *as distinguished from intent presumed in law*, to hinder, delay or defraud either present or future creditors, is fraudulent . . .") (emphasis added).[31]

The Trustee's failure to plead specific facts demonstrating fraudulent intent is all the more problematic because the Trustee fails even to identify the Debtor that it claims made the

[31] Moreover, the whole purpose of Section 546(e) of the Bankruptcy Code—to create an absolute "safe harbor" for settlement payments that stops cases such as this one in their tracks—would be nullified if a trustee or creditor could plead a case of intentional fraudulent transfer, and impose enormous litigation costs on shareholders (and also impose the *in terrorem* effect of a prayer for relief amounting to several billions of dollars), simply by alleging facts sufficient to establish (if proven) that the transfer left the transferor insolvent, with inadequate capital, or unable to pay its debts as they came due. After all, that safe harbor extends to all constructive fraudulent transfer claims, but not to intentional fraudulent transfer claims under Section 548(a)(1)(A) of the Bankruptcy Code (*see* 11 U.S.C. § 546(e)), evidencing Congress' judgment, like that of the New York and Texas legislatures, that to survive a motion to dismiss, an intentional fraudulent transfer claim must contain allegations that are qualitatively different from those for a constructive fraudulent transfer claim. *See, e.g.*, *In re Refco*, 2009 WL 7242548, at *8 ("The *safe harbor* of Section 546(e) applies to the purchase of PlusFunds shares because the purchase involved a settlement payment to and by a financial institution") (emphasis added); *In re Enron Creditors Recovery Corp.*, 422 B.R. at 434 ("In 1982, Congress broadened the scope of the *safe harbor*, in part to capture transactions *beyond* the ordinary course of business.") (emphasis added in part and internal citation omitted); *Merrill Lynch, Pierce Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 81-82 (2006) (concluding that the Congress created a safe harbor from liability for forward looking statements in the PSLRA because of "perceived abuses" "in litigation involving nationally traded securities" for the express purpose of "deter[ring] *or at least quickly dispos[ing]* of those suits whose nuisance value outweighs their merits") (emphasis added).

transfers and supposedly acted with "intent to hinder, delay or defraud" its creditors. The Trustee refers to an amorphous "LyondellBasell" (Compl. ¶ 461)—a vaguely defined term in the Complaint that apparently includes all 94 Debtors in the Lyondell bankruptcy cases (*id.* ¶ 1)—rather than by setting forth particularized allegations that *the specific Debtor that allegedly made the transfers* of Merger Consideration actually intended to defraud *that Debtor's* creditors. The statutory language, and Rule 9(b), require the Trustee to plead that the particular *transferor* intended to defraud *its* creditors. *Cf. Adelphia Recovery Trust*, 390 B.R. at 94-95 (holding that trustee lacked standing to bring fraudulent transfer claims on behalf of creditors of debtor entities that did not make the transfers at issue). Thus, if the transfers were allegedly made by Basell, the Trustee cannot plead an intentional fraudulent transfer by alleging that Lyondell (or any other Debtor) intended to defraud its creditors, and vice versa. But not surprisingly, given that those transfers were funded by the Lenders (*see* Argument Section II), the Complaint fails to plead facts showing that Basell, Lyondell, or any other specific Debtor allegedly made the transfers to the Defendants, much less that any such Debtor did so with actual intent to defraud its creditors. Such generalized and amorphous pleading is insufficient. *Cf. Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1175 (2d Cir. 1993) ("Rule 9(b) is not satisfied where the complaint vaguely attributes the alleged fraudulent statements to 'defendants'"); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Young*, No. 91-Civ-2923, 1994 WL 88129, at *7 (S.D.N.Y. Mar. 15, 1994) ("Sweeping references to the collective fraudulent actions of multiple defendants will not satisfy the particularity requirements of Rule 9(b).").

In any event, the few factual allegations that bear on Lyondell's or Basell's intent undermine, rather than support, the Trustee's claim of intentional fraudulent transfer. The Complaint asserts that the goal of Lyondell's management in entering into the Merger was not to

defraud that company's creditors, but instead "[t]o maximize shareholder (and management) profits." Compl. ¶ 275; *see also id.* ¶ 287 (management supposedly inflated the company's projections "to justify a high price for Lyondell"). Moreover, while the Complaint focuses on the alleged intent of Lyondell's CEO Dan Smith, applicable state law required that the Merger be approved by Lyondell's board of directors, not its management. *See* Del. Code Ann. tit. 8, § 251(b). There are no allegations that Lyondell's board of 11 directors, which included 10 directors in addition to Smith,[32] acted with intent to defraud Lyondell's creditors in approving the Merger. Compl. ¶¶ 323-324, 326, 341 (Lyondell's board considered the proposed merger at several meetings before unanimously approving it).

Moreover, it was Basell, not Lyondell, that acquired the stock of the former Lyondell shareholders. Accordingly, if any Debtor transferred its property to acquire the shares (and, as discussed in Section II above, it was the Lenders who transferred their funds to do so), it was presumably Basell, rather than Lyondell, that did so. The alleged intent of Smith and Lyondell's management says nothing about the intent of Basell. And, as to Basell, the Complaint's allegations of intent are even more threadbare. While the Complaint describes the Merger as a "gamble," it also admits that Blavatnik and his advisors thought it had "enormous" upside potential for Basell. *See id.* ¶¶ 259, 261. This is a far cry from alleging that Basell entered into the Merger, with the expectation that it would defraud—indeed, for the the very purpose of defrauding—its creditors.

Nor does the fact that the Basell and Lyondell ended up in bankruptcy more than a year after the transaction closed—during one of the worst economic slumps in history—raise an inference that either company *intended* from the outset that the transaction defraud its creditors.

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[32] Committee Compl. ¶¶ 43-53.

To the contrary, any such suggestion would be implausible.[33] The transfers at issue were the payments made to the Defendants—third-party, public shareholders unaffiliated with Lyondell or Basell management. Those payments were funded by loans made by the Lenders, loans that were made for the very purpose of funding those payments. It would be nonsensical to suggest that Lyondell or Basell allegedly made those transfers in order to put the loaned funds beyond the reach of their creditors, when Lyondell and Basell would not have had the money in the first place had they not agreed to use the proceeds to cash out the Lyondell shareholders in the Merger. And it would also be nonsensical to claim that Lyondell or Basell made the transfers to the shareholders with the intent of defrauding its creditors, when the principal creditors were the Lenders that funded those very transfers on the express condition that the money be used to acquire the shareholders' stock.

Moreover, the participation of the Lenders—major, sophisticated financial institutions such as Citibank, Goldman Sachs, and Merrill Lynch—renders implausible any claim that the Merger was undertaken with knowledge that it would inevitably lead to Lyondell's or Basell's failure. The Complaint alleges that, in accordance with common practice, those Lenders expected to be able to syndicate the loans. *See* Compl. ¶ 11. The expectation of the Lenders that even more banks would be interested in participating, and the Lenders' willingness to underwrite more than $20 billion in loans in any event, speaks volumes that those Lenders must not have thought that Lyondell's or Basell's demise was likely, let alone inevitable. "The involvement of sophisticated and independent market participants shows the implausibility of the allegations of

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[33] *See Iqbal*, 129 S. Ct. at 1949 ("To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face") (internal quotation marks and citation omitted); *Twombly*, 550 U.S. at 547 (requiring that Plaintiff "nudge[] [his] claims across the line from conceivable to plausible").

intentional fraud." *In re Old CarCo*, 435 B.R. at 193; *see also Official Comm. of Unsecured Creditors v. JP Morgan Chase Bank, N.A. (In re M. Fabrikant & Sons, Inc.),* 394 B.R. 721, 738-39 (Bankr. S.D.N.Y. 2008) (concluding that plaintiffs' various explanations for why banks "would knowingly mak[e] uncollectible loans" are "no more than an effort to bolster an implausible theory with rank speculation").

Finally, the so-called "badges of fraud" do not save the Complaint. Recognizing that direct evidence of fraud is often missing, courts have sometimes allowed a trustee or creditor to plead a claim of intentional fraudulent transfer by alleging "circumstances that accompany fraudulent transfers so commonly that their presence gives rise to an inference of intent." *MFS/Sun Life Trust-Hight Yield Series v. Van Dusen Airport Serv. Co.*, 910 F. Supp. 913, 935 (S.D.N.Y. 1995). But the Trustee has himself admitted that "the proper focus is not on whether the Trustee has pled 'recognized' badges of fraud . . . but rather, whether the . . . Complaint includes factual allegations that, under the particular circumstances alleged, permit an inference of the requisite intent to be drawn." Mem. of Law, *Weisfelner v. Blavatnik*, Adv. Pro. No. 09-01375 (Nov. 23, 2010) at 28 [Docket No. 458]. In any event, the Complaint is just as deficient of allegations of the supposed "badges of fraud," as it is of direct evidence demonstrating that Lyondell or Basell acted with the intent of defrauding its creditors.

For example, there was no familial or other close relationship between Lyondell or Basell and the transferees from whom the Trustee seeks to recover in this action, comprised of thousands of shareholders of a publicly-traded stock that changed hands every day. *See, e.g., MFS/Sun Life Trust-Hight Yield Series*, 910 F. Supp. at 935 ("There was no close relationship among the parties to the LBO; rather, it was an arm's-length transaction by sophisticated businesspeople"). The Merger likewise did not occur in haste or in secret; rather, it was

negotiated over the course of nearly a year, and its terms were the subject of public filings with and disclosures to the SEC. *See* Compl. ¶¶ 243, 254, 415; *see also MFS/Sun Life Trust-Hight Yield Series*, 910 F. Supp. at 935 ("The transaction was not secretive, nor was it structured in a manner unusual for an LBO"); *Old CarCo.*, 435 B.R. at 192-93 (The transaction "was not hasty. Instead, it was part of a business plan that was fully developed by financial advisors, and that plan played out over the course of several months. . . . The sale of the Chrysler Companies was open and highly publicized, with financial information concerning the valuation of the Chrysler Companies readily available to the investors and the lenders").

There was also no use of fictitious or dummy companies in the Merger. Just the opposite: Lyondell and Basell were pre-existing, well-known corporations. *See* Compl. ¶¶ 221-23, 233. And neither Lyondell nor Basell retained any control over the cash proceeds paid to the Defendants, after the Merger closed. *See MFS/Sun Life Trust-Hight Yield Series*, 910 F. Supp. at 936 ("VDAS certainly had no residual control over the money that flowed to the sellers"); *Old CarCo.*, 435 B.R. at 192 ("CarCo was the transferor of the assets and it did not retain any control over the assets transferred, nor were the transfers kept secret"); *Actrade*, 337 B.R. at 809 ("There is no allegation that Actrade or Allou retained an interest in the other's business").

In short, the Complaint pleads no direct, circumstantial or other evidence remotely suggesting that Lyondell, Basell, or any other Debtor made the payments at issue to Lyondell's third-party shareholders for the purpose of defrauding its creditors. Count II should be dismissed for this reason as well.

CONCLUSION

For the foregoing reasons, the Complaint should be dismissed in its entirety, with prejudice.

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Respectfully Submitted,

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