HEARING DATE: July 12, 2011

Sigmund S. Wissner-Gross
May Orenstein
Marek P. Krzyzowski
BROWN RUDNICK LLP
Seven Times Square
New York, NY 10036
(212) 209-4800

Steven D. Pohl
BROWN RUDNICK LLP
One Financial Center
Boston, MA 02111
(617) 856-8200

Counsel for Edward S. Weisfelner,
as Litigation Trustee of the LB Litigation Trust

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re: LYONDELL CHEMICAL COMPANY, *et al.*,	Case No. 09-10023 (REG)
Debtors.	Chapter 11
EDWARD S. WEISFELNER, AS LITIGATION TRUSTEE OF THE LB LITIGATION TRUST,	(Jointly Administered)
Plaintiff,	Adv. Pro. No. 10-05525 (REG)
v.	
A HOLMES & H HOLMES TTEE, *et al.*,	
Defendants.	

MEMORANDUM IN OPPOSITION TO
DEFENDANTS' MOTIONS TO DISMISS THE COMPLAINT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes **Page(s)**

Rules **Page(s)**

Plaintiff Edward S. Weisfelner, in his capacity as Trustee (the "**Litigation Trustee**") of the LB Litigation Trust (the "**Litigation Trust"**), respectfully submits this Memorandum of Law in Opposition to Defendants' motions to dismiss the complaint (the "**548 Complaint**") in the above-captioned action (the "**548 Action**"), 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).[1]

PRELIMINARY STATEMENT

In this action, the Litigation Trustee re-asserts as Count Two a claim against the former shareholders of Lyondell for constructive fraudulent conveyance under Section 548 of the Bankruptcy Code that was previously asserted by the Official Committee of Unsecured Creditors (the "**Committee**") in the litigation initiated by the Committee on June 22, 2009 (the "**Committee Litigation**"). In addition, based upon the robust record of intentional fraudulent conduct that was developed subsequent to the filing of the initial complaint in the Committee Litigation, the Litigation Trustee asserts as Count One a claim for intentional fraudulent conveyance under Section 548(a)(1)(A). Both claims seek recovery of the billions of dollars in Merger Consideration that the Lyondell shareholders walked away with as a direct result of the now well-documented Merger-related fraud that drove the combined LyondellBasell Industries AF S.C.A. ("**LBI**") into bankruptcy and deprived LBI creditors of billions of dollars in value.

Defendants move to dismiss the action based upon the contention that the Section 548 claims asserted here (the "**Section 548 Claims**") were not assigned to the Litigation Trust but were retained by the Reorganized Debtors. This contention is utterly ridiculous.

[1] The Litigation Trustee is filing a single Memorandum of Law in response to all 44 motions to dismiss (the "**Motions**"). Except where otherwise indicated, all references to arguments advanced by Defendants are to the Memorandum of Law submitted by Wilmer Cutler Pickering Hale and Dorr LLP ("**Wilmer Hale**") ("**Mot.**") [Case No. 10-05525, Docket No. 163]. Two defendants also moved to dismiss for lack of *in personam* jurisdiction; their *in personam* jurisdiction motion is addressed in Part VII below.

First, Defendants' proposed interpretation of the assignment provisions in the Plan would, in contravention of bedrock principles of contract construction, defeat the very purpose of those provisions, as well as the provisions of the settlement agreement with the Financing Party Defendants (the "**Final FPD Settlement**"), the terms of which were implemented through the Plan. Reflecting the terms of the bargain struck between the Committee, the Debtors and the settling parties in the Final FPD Settlement, the purpose of the Plan's assignment provisions was to provide a means to maximize creditor recovery through, *inter alia*, the continued prosecution of the unresolved claims asserted in the Committee Litigation. This was primarily achieved by assigning to the Litigation Trust the claims asserted in the Committee Litigation, except for (i) claims against the Financing Party Defendants that were settled in the Final FPD Settlement and (ii) state law claims brought under Section 544, which were relinquished to the creditors and were assigned by the creditors to the Creditor Trust (as defined in the Plan) under the "abandonment" provisions. As all participants in the settlement and Plan confirmation process understood, none of the claims in the Committee Litigation were to be retained by the Reorganized Debtors (as defined in the Plan). Indeed, given the publicly-documented battle between the Committee and Debtors' counsel prior to the Final FPD Settlement over issues concerning prosecution of the Committee Litigation, it is incomprehensible that anyone having any familiarity with the Committee Litigation, and the course of events that resulted in the Final FPD Settlement, would suggest that the Committee would ever agree to a settlement in which any of the claims asserted in the Committee Litigation would be retained by the Reorganized Debtors.

Second, Defendants' tortured analysis ignores the plain language of the operative provision "Non-Settling Defendant Claims," and instead fixates on the use of the word

"defendant" in the related but non-operative definition—"Non-Settling Defendant"—incorrectly arguing that the use of that word precludes the assignment of claims asserted against unnamed members of a defendant shareholder class. However, under the plain language of the Plan, identification of claims being assigned does not turn on the technical status of the parties against whom claims were asserted in the Committee Litigation. In other words, contrary to Defendants' arguments, the use of the term "defendants" does not require the Court to import into the assignment provisions of the Plan a complex and variable body of case law concerning the party status of absent class members under the Federal Rules. The plain language of other provisions of the Plan (including the operative definition) explicitly contradicts Defendants' proposed reading. Unsurprisingly, read as a whole rather than in confused and isolated fragments, the unambiguous language of the assignment provisions of the Plan regarding the Section 548 Claims is consistent with their purpose—all Section 548 Claims were assigned to the Litigation Trust.

Third, in an effort to shore up their dubious "plain language" analysis, Defendants, who were not involved in nor at the table for any of the settlement negotiations that resulted in the Final FPD Settlement or the Plan, offer a selection of extrinsic evidence that they believe supports their case. As they must be aware, however, extrinsic evidence cannot be used to create ambiguity in an otherwise unambiguous contract, nor can it be offered to resolve contractual ambiguities on a motion to dismiss. Moreover, their presentation of extrinsic evidence is almost comically selective. For example, they ignore the most important type of extrinsic evidence, the performance of the parties under the contract, failing to explain why the Reorganized Debtors neither raised any issue when the Litigation Trustee asserted the Section 548 Claims months ago, nor ever advised anyone after the Plan was confirmed that the Reorganized Debtors (and not the

Litigation Trustee) held such Section 548 claims post-confirmation. And even the limited extrinsic evidence that Defendants do cite is distorted, as discussed below. In any event, the evidence that Defendants cite at most raises only the question of whether counsel for the Committee anticipated at the time of Plan confirmation that the Litigation Trust would later re-assert the Section 548 claim against the shareholders as part of an Amended Complaint in the successor adversary proceeding to the Committee Litigation, Adv. Pro. No. 09-1375 (the "**Blavatnik Action**"), or separately as a freestanding lawsuit against former Lyondell shareholders. But the question of whether or not counsel at the time the Plan was confirmed had made a decision on whether to reassert the Section 548 claim against shareholders in the Blavatnik Action or in a freestanding lawsuit is an entirely different question than whether that claim was assigned to the Litigation Trust under the Plan. Indeed, the language of the Plan makes this point explicit: the definition of "Non-Settling Defendant Claim" expressly preserves and assigns to the Litigation Trust claims that had developed and may develop based upon the evolving discovery record, such as an intentional fraud claim under Section 548. *See* Plan § 1.1 at 19 ("or arise from the same transaction or occurrences as alleged in").

It is evident that Defendants' cynical goal here is simply to attempt to construe the Plan to defeat the very purpose of the assignment provisions: to enable the continued prosecution, post-confirmation, of the claims asserted in the Committee Litigation. Indeed, lead defense counsel's position here, as in the action brought by the Creditor Trust (the "**Creditor Trust Action**"), is that his clients should be able to walk away free and clear with the billions of dollars they obtained through the fraud that occurred at Lyondell and Basell. But with Section 546(e) explicitly inapplicable to the Section 548 intentional fraud claim, and faced with the prospect that federal preemption does not apply to the claims asserted in the Creditor Trust Action (which

arise under state fraudulent transfer law), Defendants' counsel has resorted to manufacturing an interpretation of the Plan that is simply dead wrong. The Motions should be denied.[2]

PROCEDURAL BACKGROUND

I. The Committee Litigation, the FPD Settlement and the Plan.

A. The Committee Litigation.

Lyondell and most of its major operating subsidiaries filed for relief under Chapter 11 of the Bankruptcy Code on January 6, 2009, with additional debtors filing on April 24, 2009 and May 8, 2009. [Case Nos. 09-10023, 09-12518, 09-12519, 09-12956] On July 21, 2009, the Court granted the Official Committee of Unsecured Creditors (the "**Committee**") standing to pursue the claims stated in a proposed complaint submitted by the Committee (the "**Committee Complaint**"). Wissner-Gross Decl., Ex. A, July 21, 2009 Tr. 190:25-191:16.[3] The following day, the Committee initiated the adversary proceeding *Official Committee of Unsecured Creditors, on Behalf of The Debtors' Estates v. Citibank, N.A., et al.* (the "**Committee Litigation**").

Among the defendants named in the Committee Complaint were the lending parties to the Merger whose identities were known to the Committee at that time (the "**Named Financing Parties**"), Access Industries, Inc., the private equity firm owned and controlled by Blavatnik that sponsored the Merger and various of its affiliates (the "**Access Defendants**") and officers and directors of Lyondell.

In addition to the claims stated against named defendants, the Committee Complaint included two counts asserted as defendant class actions against parties whose identities were

[2] As set forth herein in Parts Two through Six, Defendants' rote incorporation of other defective arguments from the Creditor Trust Action is unavailing.

[3] References to exhibits to the accompanying declaration of Sigmund S. Wissner-Gross, dated May 23, 2011 (the "**Wissner-Gross Declaration**") shall be as follows: "Wissner-Gross Decl., Ex. __".

unknown at the time of filing. Count One (the "**Lender Class Action**") was asserted against LeverageSource III S.à.r.l. ("**LeverageSource**"), both individually as a holder through purchase of obligations incurred by the Debtors under the senior credit facility that was entered into to fund the Merger (the "**Senior Facility**") and as Class Representative for all other holders through purchase of such obligations (the "**Lender Class**").

The other class action claim, Count Four (the "**Shareholder Class Action**"), was asserted "By the Debtors Against Barclays Global Investors, N.A. ["**BGI**"], individually and as Class Representative of the Shareholder Class" under "11 U.S.C. §§ 544, 548 and 550 and Applicable State Fraudulent Transfer Law." Comm. Complaint ¶¶ 288-293.[4] The proposed shareholder class represented by BGI was defined to include "All of the holders of Lyondell Common Stock who received proceeds from the Merger Consideration in payment for the purchase of their respective shares in connection with the Merger" (the "**Shareholder Class**"). *Id.* ¶ 257. The Committee Complaint alleged that as of the record date for the special meeting of Lyondell shareholders in connection with the Merger, there were 253,625,523 shares of Lyondell common stock outstanding, *see* Comm. Complaint ¶ 256, and made further class action allegations in support of class certification. *See id.* at ¶¶ 258-263. In Count Four, the fact that a claim was being asserted, *inter alia*, under Section 548 against *all* former Lyondell shareholders was explicit: "The transfers of the Merger Consideration to Lyondell *shareholders* should be recovered pursuant to 11 U.S.C. §§ 544(b), 548, and 550(a), and under applicable state fraudulent transfer law." Comm. Complaint ¶ 293 (emphasis added). In addition, the Prayer for Relief for Count Four sought "pursuant to 11 U.S.C. §§ 544 and 548 and under applicable state fraudulent transfer law, avoiding the transfers of the Merger Consideration to Barclays and *to the*

[4] Count Four alleged that "The transfers of the Merger Consideration to Lyondell shareholders should be recovered pursuant to 11 U.S.C. §§ 544(b), 548, and 550(a) and under applicable state fraudulent transfer law." Comm. Complaint ¶ 293.

members of the Shareholder Class." Comm. Complaint, Prayer for Relief at p. 127 (emphasis added).

Pursuant to the then-governing case management order (the "**CMO**"), the Committee Litigation was bifurcated into two phases, with Phase One to include among other Counts, Counts asserted against the Named Financing Parties and Count One against LeverageSource both in its individual capacity and as class representative. Litigation of Count Four against BGI and the Shareholder Class was reserved for Phase Two. [Final Case Management Order – Adv. Pro. Docket No. 124][5]. Also pursuant to the CMO, certification issues regarding both the Lender Class and the Shareholder Class were deferred to Phase Two.[6]

B. The Original Financing Party Defendant Settlement.

On December 4, 2009, the Debtors advised the Court of a proposed partial settlement of Phase One claims (the "**Original FPD Settlement**"). The proposed partial settlement included not only the Named Financing Parties but also settled and released claims asserted against entities who were members of the Lender Class, some of whom (larger holders) had formally intervened in the Adversary Action, but many of whom had not. Wissner-Gross Decl., Ex. B, Dec. 4, 2009 Tr. 17:24-18:24. On the same day, the Bankruptcy Court adjourned the Phase One Trial scheduled to commence on December 10, 2009, *see id.* Dec. 4, 2009 Tr. 104:18-107:10.

[5] References to pleadings from Adversary Proceeding No. 09-01375 shall be as follows: "Adv. Pro. Docket No. _".

[6] Since many of the larger senior lenders (known as the "CAM" holders) intervened as party defendants through counsel (Milbank Tweed Hadley McCloy LLP) in the Committee Action, the need for class certification of the defendant class in Count One became less important for purposes of the adjudication at trial of Phase One issues. *See* July 30, 2009 Notice of Hearing on Motion of Ad Hoc Group of Senior Secured Lenders to Intervene [Adv. Pro. Docket No. 8]; Aug. 28, 2009 Answer of Ad Hoc Group of Senior Secured Lenders [Adv. Pro. Docket No. 90].

BGI's counsel advised the Committee's counsel shortly after commencement of the Committee Litigation that notwithstanding the filing by BGI of a Form 13K prior to the Merger referencing Lyondell stockholdings, BGI was not the economic beneficiary of Lyondell stock held at the time of the Merger. However, since pursuant to the CMO, Count Four issues were deferred to Phase Two, resolution of BGI's status and the related shareholder class certification issues were not to be adjudicated in Phase One. At the time the Plan was confirmed, BGI remained the class representative in Count Four on behalf of all the former Lyondell shareholders sued in Count Four of the Committee Litigation.

On December 11, 2009, the Debtors filed the First Amended Chapter 11 Plan of Reorganization and First Amended Disclosure Statement Accompanying First Amended Joint Chapter 11 Plan of Reorganization, reflecting the terms of the Original FPD Settlement. [Docket Nos. 3431, 3432]

Under the Original FPD Settlement, "all causes of action asserted in the Committee Litigation against the Non-Settling Defendants" were to be assigned to the Litigation Trust for prosecution. Original FPD Settlement § 2.3 [Adv. Pro. Docket No. 284] "Non-Settling Defendant" was defined in the Original FPD Settlement to include "any defendant in the Committee Litigation other than the Financing Party Defendants and the Secured Lenders." *Id.* § 1.30. [*See* First Amended Disclosure Statement III. K., Docket No. 3432] The term "Secured Lenders" was defined in the Original FPD Settlement in a manner such that it was in effect coterminous with those in the alleged Lender Class. Since BGI was a named defendant in the Committee Litigation at the time of the Original FPD Settlement, and since it was neither a "Financing Party Defendant" nor a "Secured Lender" as such terms were defined under the Original FPD Settlement, all causes of action asserted against it, in either its individual capacity or as a class representative, including both claims under Section 544 and 548 asserted against it in the Committee Complaint, would have been assigned to the Litigation Trust under the Original FPD Settlement. On December 24, 2009, the Debtors filed the Second Amended Plan of Reorganization and formally sought approval of the Original FPD Settlement by filing a motion pursuant to Bankruptcy Rule 9019 seeking a hearing and Court approval of the Original FPD Settlement (the "**9019 Motion**"). [Adv. Pro. Docket Nos. 284-288].

C. The 9019 Motion and Its Resolution.

On January 29, 2010, the Committee and certain other parties filed objections to the 9019 Motion. [Adv. Pro. Docket Nos. 322, 323, 327, 330] On February 16, 2010, the Debtors, the

Committee and other parties objecting to the 9019 Motion reached a settlement in principle that would require certain amendments to the Original FPD Settlement, and on that date, the Debtors advised the Court of such amendments. On March 10, 2010, the Debtors, Committee, the Named Financing Parties, interveners in the Committee Litigation and other entities against whom the Committee's Lender Class Action had been asserted, executed an amendment to the Original FPD Settlement (such amended agreement, the "**Final FPD Settlement**") [Adv. Pro. Docket No. 369]; the Debtors and Committee had filed a joint amendment to the 9019 Motion on March 6, 2010 seeking approval of the Final FPD Settlement [Adv. Pro. Docket No. 365]. On March 11, 2010, the Court held a hearing on the 9019 Motion. The same day, the Bankruptcy Court entered an Order approving the Final FPD Settlement. [Adv. Pro. Docket No. 371].[7]

The Final FPD Settlement includes various negotiated terms agreed to by the parties to the Final FPD Settlement (the "**Settlement Parties**"), which were added to secure the agreement of the Committee to the withdrawal of its objections. Among those changes were provisions concerning the post-confirmation prosecution of claims not released pursuant the Final FPD Settlement. As was the case under the Original FPD Settlement, the Final FPD Settlement provided for a litigation trust to pursue claims, such as the Section 548 claim against BGI and the shareholder class set forth in Count Four of the Committee Complaint, that were not settled or released pursuant to the Final FPD Settlement. However, whereas under the Original FPD Settlement, all claims and causes of action in the Committee Litigation were to be assigned to a Litigation Trust, under the Final FPD Settlement, standing to pursue any state law avoidance claims asserted against former shareholders of Lyondell pursuant to Section 544 of the

[7] The Court observed in the context of the 9019 Motion regarding the complexity of settlement that the Debtors' "exit from bankruptcy has been forestalled by monstrous inter-creditor disputes which have come close to exceeding if they did not, in fact, exceed those I encountered in the Chapter 11 cases of Adelphia Communications Corporation described at 368 B.R. 140, Chapter 11 case that I then described as among the most challenging and contentious in bankruptcy history." Wissner-Gross Decl., Ex. C, Mar. 11, 2010 Hearing Tr. 131:3-11.

Bankruptcy Code, was relinquished. This relinquishment of standing to pursue state law fraudulent transfer claims enabled creditors to pursue state law avoidance claims they owned themselves through an assignment of such state law claims to the Creditor Trust to be established under the Plan, the creation and funding of which was one of the added features distinguishing the Original FPD Settlement from Final FPD Settlement.[8]

Two key definitions were added in the Final FPD Settlement to effectuate the objective of discontinuing the prosecution of Section 544 claims against the former shareholders and enabling state law avoidance claims owned by the creditors to be assigned to a creditor trust. One of these definitions functioned by defining those estate claims that would be discontinued and abandoned upon Plan confirmation, and accordingly, would not be assigned to the Litigation Trust. Under a provision of the Final FPD Settlement, "Abandoned Claims" were defined to include:

> "[T]he claims and causes of action brought on behalf of the Debtors' estates p*ursuant to section 544 of the Bankruptcy Code* against former shareholders of Lyondell Chemical (but solely in their capacity as such) pursuant to Count Four of the Committee Complaint[.]."

Final FPD Settlement § 2.11 (emphasis added).

"Abandoned Claims" thus did not include any Section 548 claims asserted against former shareholders pursuant to Count Four. Also excluded from the Abandoned Claims definition were any of the claims arising under either Section 544 or Section 548 that were asserted against certain persons who were members of the putative Shareholder Class but who were also named defendants in the Complaint (i.e., defendants who in separate counts in the Committee Complaint were subject to clawback claims against them). Thus, carved out from the "Abandoned Claims" definition were:

[8] The mechanism by which such assignment of the creditors' state law claims to the Creditor Trust was accomplished has been described in the papers filed by the Creditor Trust in its own separate action and by counsel to the Creditor Trust at the hearing held on May 12, 2011.

> (i) claims against Access, Nell Limited, or any of their respective affiliates (as that term is defined in section 101(2) of the Bankruptcy Code, replacing "debtor" with "Access" or "Nell Limited," as applicable, and replacing "corporation" with "entity"), which claims shall continue to be prosecuted as contemplated by the Committee Litigation or the Litigation Trust, (ii) claims against those parties that are released by the Debtors hereunder or under the Lender Litigation Settlement, and (iii) claims against the Directors, Officers, and Subsidiary Directors (as defined in the complaint commencing the Committee Litigation).

Final FPD Settlement § 2.11. Thus, as defined and giving effect to the exclusions of these named defendants, the "Abandoned Claims" consisted exclusively of those claims asserted pursuant to Section 544 against unnamed members of the defendant class—the former shareholders of Lyondell.

The second key definition added to the Final FPD Settlement to implement the parties' intended treatment of estate claims was a definition of "Non-Settling Defendant Claims." It was the Non-Settling Defendant Claims (together with "Assigned Preference Claims," as defined) that would be assigned to the Litigation Trust. Whereas the Original FPD Settlement had no such defined term and provided more simply that all causes of action asserted against the "Non-Settling Defendants" would be assigned to the Litigation Trust, the term "Non-Settling Defendant Claims" was defined to exclude from assignment, *to the extent asserted under Section 544*, the causes of action asserted in the Committee Litigation against the members of the shareholder class consisting of the former shareholders of the Lyondell. This exclusion was effected through the use in the newly-added definition of "Non-Settling Defendant Claims" of a carve out of Abandoned Claims. Thus, Non-Settling Defendant Claims were defined as follows:

> [A]ll claims and causes of action *(other than Abandoned Claims)* that have been asserted in (or arise from the same transaction or occurrences as alleged in) the Committee Litigation against one or more Non-Settling Defendants, to the extent such claims and causes of action are not released pursuant to the Plan.

Final FPD Settlement § 2.75. (emphasis added).

In addition to the Abandoned Claims exclusion, the Non-Settling Defendant Claims definition contains a clause expanding Non-Settling Defendant Claims to encompass not only those claims and causes of action asserted against "one or more" Non-Settling Defendants, but also to include other claims and causes that "arise from the same transaction or occurrences as alleged in" the Committee Litigation. Final FPD Settlement § 2.75. This permitted the assertion in an Amended Complaint (or a new complaint) after confirmation of the Plan and creation of the Litigation Trust of additional claims that had not been asserted in the initial Committee Litigation, but which "arose from the same transaction or occurrences" as those claims. As the Court is aware, due to the streamlined trial scheduled in Phase One of the Committee Litigation, which had a trial date in early December 2009, the Committee did not have an opportunity to substantively amend its July 2009 Complaint to add further claims based on the substantial discovery taken in the Fall of 2009 relating to the transaction and occurrences alleged in the Committee Litigation.[9]

Relying upon these definitions, the Final FPD Settlement provides for the assignment of claims to the Litigation Trust as follows: "Pursuant to the Revised Plan or an Alternative Plan, on the Payment Date, the Non-Settling Defendant Claims and the Assigned Preference Claims shall be assigned to the Litigation Trust." Final FPD Settlement, § 3.3.

[9] Indeed, after the Plan was confirmed and the Litigation Trust formed, the Litigation Trustee filed, on July 23, 2010, an Amended Complaint in the Blavatnik Action asserting additional claims, including a claim under Section 548(a)(1)(A) of the Bankruptcy Code for intentional fraud. As the Court is aware, multiple hearings were held in the Blavatnik Action prior to and after the filing of the Amended Complaint (including for example, a conference on the amendment itself on July 14, 2010, and a ten-hour hearing on March 10, 2011 on multiple motions to dismiss), and at no time have defendants in the Blavatnik Action ever disputed, nor did they have any basis to dispute, that the Litigation Trustee had the clear right to add a Section 548(a)(1)(A) claim.

D. The Plan

On March 15, 2010, the Debtors filed the Plan. [Docket No. 3990] The Plan incorporates the definitions of "Abandoned Claims" and "Non-Settling Defendant Claims" essentially verbatim[10] and provides for the assignment of the Non-Settling Defendant Claims to the Litigation Trust as follows:

> On the Effective Date, the Non-Settling Defendant Claims and the Assigned Preference Claims shall be assigned to the Litigation Trust. The Litigation Trust will be authorized under the Plan to prosecute the Non-Settling Defendant Claims for the benefit of holders of Allowed General Unsecured Claims and Allowed 2015 Notes Claims who shall receive a Settlement Pro Rata Share of any net recoveries on Non-Settling Defendant Claims (subject to Section 5.7(c) hereof with respect to any Excess Recoveries).

Plan § 5.7(b). To effectuate the assignment of claims arising under state law to the Creditors Trust, the Plan provides:

> On the Effective Date, the Abandoned Claims shall be discontinued by the Debtors without prejudice and the Debtors shall be deemed to have abandoned, pursuant to section 554 of the Bankruptcy Code, any and all right to further pursue the Abandoned Claims. Upon the effectiveness of the aforesaid discontinuance and abandonment, each holder of Allowed 2015 Notes Claims, General Unsecured Claims, and holders of the Deficiency Claims on account of the Senior Secured Claims and Bridge Loan Claims (but excluding the Senior/Bridge Guarantee Claims), shall contribute to the Creditor Trust any and all State Law Avoidance Claims. The Creditor Trust shall be authorized to prosecute the State Law Avoidance Claims that are contributed to the Creditor Trust for the benefit of Creditor Trust Beneficiaries who contribute State Law Avoidance Claims to the Creditor Trust, who shall receive any recoveries on account of the State Law Avoidance Claims transferred to the Creditor Trust shall be distributed to Creditor Trust Beneficiaries in accordance with the Plan and the Creditor Trust Agreement, subject to Section 5.8(c) with respect to any amounts that constitute Excess Recoveries.

Plan § 5.8(b).

[10] The operative provisions of the Plan are set forth in the Argument section below.

The Plan was confirmed by an order of this Court dated April 23, 2010 and became effective on April 30, 2010. [Docket Nos. 4418, 4468].

On December 23, 2010, the Litigation Trustee filed 548 Complaint, timely asserting the Section 548 Claims.

On April 7, 2011,[11] Defendants brought the Motions, moving to dismiss the Section 548 Claims. For the reasons set forth herein, the Motions should be denied.

ARGUMENT

I. THE SECTION 548 CLAIMS WERE ASSIGNED TO THE LITIGATION TRUST UNDER THE PLAN.

Defendants argue that the Section 548 Claims were not assigned to the Litigation Trust under the Plan. *See* Mot. at 5-19. Defendants are wrong. The Plan is a contract between the Reorganized Debtors and their creditors—a contract to which Defendants are neither parties nor the intended beneficiaries. *See In re Victory Mkts., Inc.*, 221 B.R. 298, 303 (2d Cir. 1998) ("a confirmed plan holds the status of a binding contract as between the debtor and its creditors"). As explained below in Parts I-A through I-C, pursuant to the Plan, consistent with the intentions of the parties to the Plan, the Section 548 Claims were assigned to the Litigation Trust, thereby implementing a material term of the deal that was negotiated by the Committee in the Final FPD Settlement. By its unambiguous terms, the Plan accomplishes the purposes of those who drafted it, namely to assign to the Litigation Trust all non-settled claims that had been asserted in the Committee Litigation and claims that had not yet been asserted that "arose from the same transaction or occurrences" as alleged in the Committee Litigation, including any claims to be asserted in an amended complaint in the Blavatnik Action or other complaint (such as this Action), except for "abandoned" Section 544 claims. In any event, as explained below in Part I-

[11] Motions to dismiss filed in this Action after April 7, 2011 are included in the "Motions" and responded to herein as well.

D, to the extent that there is any ambiguity about that assignment (and the Litigation Trustee submits there is none), the issue may not be resolved on a motion to dismiss.

A. The Plan Unambiguously Assigns the Section 548 Claims to the Litigation Trust.

The construction of disputed language in a plan of confirmation presents an issue of contract interpretation. *See Victory Mkts.*, 221 B.R. at 303; *accord Rahl v. Bande*, 328 B.R. 387, 400 (S.D.N.Y. 2005). Defendants acknowledge this point. *See* Mot. at 6.

In interpreting a contract, a court must first determine whether the provision at issue is unambiguous or ambiguous; this is to be determined as a matter of law. *See Greenfield v. Philles Records*, 98 N.Y.2.d. 562, 569 (N.Y. 2002); *South Road Assocs. v. Int'l Bus. Machines Corp.*, 793 N.Y.S.2d 835, 838 (N.Y. App. Div. 2005).[12]

An agreement is unambiguous if "on its face [it] is reasonably susceptible of only one meaning." *Greenfield*, 98 N.Y.2d at 570. A contract is ambiguous "if it is reasonably susceptible to more than one meaning." *Maniolos v. United States*, 741 F. Supp. 2d 555, 567 (S.D.N.Y. 2010). Where a contract is unambiguous, the analysis ends with application of the

[12] Regarding governing law, the Plan provides:

> Governing Law. Except to the extent the Bankruptcy Code or Bankruptcy Rules are applicable, or to the extent an exhibit to the Plan or Plan Supplement provides otherwise (in which case the governing law specified therein shall be applicable to such exhibit), the rights, duties and obligations arising under the Plan shall be governed by, and construed and enforced in accordance with, the federal laws of the United States and, to the extent there is no applicable federal law, the laws of the State of New York (without giving effect to the principles of conflicts of law thereof).

Plan § 13.13. The Final FPD Settlement provides:

> This Settlement Agreement shall be construed in accordance with, and governed by, the laws of the State of New York, excluding and without regard to the conflict of laws rules thereof.

Final FPD Settlement § 7.1. Accordingly, the Litigation Trust cites applicable Federal and New York cases. *See Midwest Fin. Acceptance Corp. v. FDIC*, 93 F. Supp. 2d 327, 330 (W.D.N.Y. 2000) (looking to both Texas and federal law in analyzing contract, where contract provided it would be interpreted under federal law except to extent federal law did not speak to some aspect, in which case Texas law would apply); *see also Rodriguez-Abreu v. Chase Manhattan Bank, N.A.*, 986 F.2d 580, 584 (1st Cir. 1993) ("Because state law provides the richest source of contract interpretation, we have incorporated state law principles in the process of developing a body of federal common law.").

plain meaning of the contract. *See In re Victory Mkts., Inc.*, 221 B.R. at 303.[13] "[E]xtrinsic evidence may not be used to create an ambiguity in an otherwise unambiguous agreement." *Consarc Corp. v. Marine Midland Bank, N.A.*, 996 F.2d 568, 573 (2d Cir. 1993).

1. The Plain Language of the Plan Unambiguously Provides for the Assignment of the Section 548 Claims to the Litigation Trust.

The Plan provides that "On the Effective Date, the Non-Settling Defendant Claims . . . shall be assigned to the Litigation Trust." Plan § 5.7(b). Thus, the inquiry into whether a claim was assigned to the Plan begins with that definition. "Non-Settling Defendant Claims" are defined as:

> all claims and causes of action (other than Abandoned Claims) that have been asserted in (or arise from the same transaction or occurrences as alleged in) the Committee Litigation against one or more Non-Settling Defendants, to the extent such claims and causes of action are not released pursuant to the Plan.

Plan § 1.1 at 19.

Under this definition, Non-Settling Defendant Claims include, but are not limited to, any claim asserted in the Committee Litigation against "one or more Non-Settling Defendants." Non-Settling Defendants include "any defendant in the Committee Litigation . . . other than Settling Defendant Releasees and the Secured Lender Releasees." *Id.* Count Four of the

[13] Defendants' reliance upon the outcome in *Rahl*, 328 B.R. at 387, does not support their position here. In *Rahl*, the plan at issue unambiguously assigned to the trustee the right to bring certain claims only "against the Debtors' current or former directors and officers." *Id.* at 401. The trustee attempted to bring such claims against a defendant that was not a debtor's current or former director or officer. The court found that because the Plan unambiguously did not assign the right to bring claims against such a defendant, the trustee lacked standing. Here, as demonstrated, the Plan unambiguously does assign the right to assert the Section 548 Claims against the former shareholders who were members of the defendant class described in Count Four. Similarly, in *Trenwick Am. Litig. Trust v. Ernst & Young, L.L.P.*, 906 A.2d 168, 190-91 (Del. Ch. 2006), the Plan at issue did not assign the creditor claim that the trustee attempted to assert; rather it merely contemplated "the possibility that creditors may assign their direct claims to the Trust"; but the creditors at issue did not do so. *Id.* In addition, the court in *Trenwick* found that any such assignment would be invalid in any case, as such claims were direct creditor claims that could not be properly assigned to the trustee under applicable law. *Id.* at 191. Here, there is no dispute that the claims assigned, arising under Section 548, were estate claims. *See In re Colonial Realty*, 980 F.2d 125, 131 (2d Cir. 1992) ("Section 550 authorizes a trustee to recover transferred property for the benefit of the estate to the extent that a transfer is avoided, *inter alia*, as fraudulent under . . . § 548.").

Committee Complaint was a cause of action for fraudulent transfer under Section 548 (as well as Sections 544, 550 and applicable state law) against BGI individually and as Class Representative of the Shareholder Class. Comm. Complaint ¶¶ 288-293. The Committee Complaint expressly sought to recover "transfers of the Merger Consideration to [all] Lyondell shareholders" pursuant to, *inter alia*, Section 548. Because BGI was thus a "defendant in the Committee Litigation," and because it was not a "Settling Defendant Releasee" or "Secured Lender Releasee," it was a "Non-Settling Defendant." Therefore, the Section 548 fraudulent transfer claim in Court Four was asserted against a "Non-Settling Defendant," and constitutes a "Non-Settling Defendant Claim," unless it constitutes an "Abandoned Claim." Under the Plan, Abandoned Claims consist of, and are expressly limited to only, claims arising under Section 544 asserted against members of the Shareholder Class defined in Count Four, the former shareholders of Lyondell. As the Plan explicitly provides that only Section 544 claims asserted against the former Lyondell shareholders can be "Abandoned Claims," *see* Plan § 1.1, the Section 548 claims against shareholders asserted in the Committee Litigation as Count Four were not "abandoned," and Count Four (to the extent it asserts a claim under Section 548) is a "Non-Settling Defendant Claim" as defined in the Plan.

Defendants, apparently unconcerned with maintaining a baseline level of credibility, attempt to deny that BGI was a Non-Settling Defendant even in its individual capacity. First they describe BGI as having only been "purportedly" sued in the Committee Litigation, *see* Mot. at 12, n.9, although they provide no explanation or basis for disputing what the docket, complaint and affidavit of service indicate: BGI was sued by the Committee. Comm. Complaint ¶ 30. They then attempt to further confuse the matter by stating that BGI is not named as a defendant in what they refer to nonsensically as "the now-operative amended complaint in the Committee

Litigation." *See* Mot. at 10, n.7. Of course, the Committee Litigation has long since been superseded by the Litigation Trust action, but apparently Defendants' argument is that because the Section 548 Claims were not included in the Amended Complaint filed by the Litigation Trust following Plan confirmation, they were never "asserted in the Committee Litigation." *See* Mot. at 10, 12. This is nonsense. Count Four was indisputably "asserted in the Committee Litigation," and as of the time of Plan confirmation, BGI had been named in the Committee Litigation, and the Section 548 Claims asserted against it and other former shareholders named in this Action were never released, discontinued or abandoned. Indeed, the Plan specifically provided that "[o]n the Effective Date, the Abandoned Claims shall be discontinued by the Debtors without prejudice . . .", Plan § 5.8(b), but there was no similar provision discontinuing the Section 548 claims asserted under Count Four against the former shareholders.

As the Court is aware, prior to the confirmation of the Plan, the Committee in April 2010 engaged in discovery to attempt to identify the former beneficial stockholders of Lyondell, who were "cashed out" in the Merger. That discovery process was, at the time of Plan Confirmation, an ongoing process. After the Plan was confirmed, the Litigation Trustee determined that as a practical matter, it made sense to separately file a Section 548 defendants' class action (prior to the potential expiration of the two year statute of limitations applicable to Section 548 claims, *i.e.*, January 6, 2011)[14] rather than to include a defendants' class claim against all the former non-released Lyondell shareholders (whose identities it was in the process of obtaining) as part of an amended complaint in the Blavatnik Action. The relevant considerations were practical: the Blavatnik Action was well along in discovery, and if Count Four of the Committee Litigation were included in the Amended Complaint in the Blavatnik Action, adding hundreds of individual

[14] As the Court may recall, LBI filed its bankruptcy petition on April 24, 2009 (Case No. 09-12518). The Litigation Trustee reserves its right to argue that the statute of limitations for any claims that it is permitted to pursue does not run until April 24, 2011, two years from the date of LBI's bankruptcy filing.

named shareholder defendants would create a risk of significant delay in completion of discovery (*e.g.*, such shareholder defendants might want to re-depose many of the scores of fact and expert witnesses deposed in Phase One of the Committee Litigation) and would likely cause a material delay of the trial of the claims in the Blavatnik Action, which is slated for late October 2011. So long as the Section 548 Action was timely filed, proceeding as a separate litigation was fully consistent with the Plan.

In any event, whether claims against the former shareholders of Lyondell were re-asserted in the Blavatnik Action or asserted as part of a separate lawsuit is irrelevant to whether they were assigned to the Litigation Trust. There is absolutely no basis for the notion that the Litigation Trustee's choice to defer the post-confirmation re-assertion of the claims under Section 548 until such action was required to prevent such claims from becoming time-barred and to do so in a separate action (rather than in the Amended Complaint in the Blavatnik Action) is evidence that the later asserted claims were not among those assigned to the Litigation Trust.[15]

B. Defendants' Proposed Interpretation of the Assignment Provisions is Unreasonable and Completely Contrary to the Purpose and Reasonable Expectation of the Parties, As Well As the Text of the Plan.

The principal basis upon which Defendants argue that the Section 548 Claims asserted in the Committee Litigation against the former shareholders of Lyondell are not "Non-Settling Defendant Claims" is their contention that because the Shareholder Class had not yet been certified at the time of Plan confirmation, the "Non-Settling Defendant Claims" definition does not extend to the class action claims asserted in Count Four of the Committee Litigation. *See* Mot. at 11-14. That is, Defendants contend that only claims asserted against named defendants

[15] It also is worth noting that when Wilmer Hale filed papers on February 25, 2011 opposing the unsealing of the names of certain defendants in this Action, it nowhere claimed that the Litigation Trustee lacked standing to assert these claims, further illustrating that Defendants' argument is of a recent litigation-concocted vintage, and entirely without merit.

were assigned to Litigation Trust and thus claims asserted pursuant to Count Four were assigned only to the extent asserted against BGI in its individual capacity. *Id.* This strained and nonsensical limitation of the Plan's claims assignment provisions, which is not supported by the language of the Plan, can only be achieved in disregard of basic principles of contract construction. In adherence to these principles, courts seek to achieve a practical interpretation of the parties' language in order to give effect to their intentions and allow for the achievement of their contractual purposes and reasonable expectations. Thus, the legitimate objectives of contract construction are the exact opposite of the motives that animate Defendants' interpretative effort here, which is to defeat the parties' purposes by depriving the Litigation Trust of valuable claims assigned to it under the Plan.

1. Defendants' Interpretation Would Defeat the Parties' Purpose.

Defendants come to the interpretive issues they raise with a very specific agenda: to avoid the prosecution of any and all claims against them, on any grounds they can invent. Contract construction, however, is not an exercise in finding unintended and nonsensical loopholes.

As explained above, the Plan provisions pertaining to claims assignments were taken, largely verbatim, from the Final FPD Settlement and thus reflect the bargain that the Committee struck with the Debtors and the other Settlement Parties.[16] The Litigation Trustee, as successor to the Committee, is entitled to the benefit of its bargain with the Debtors and is thus entitled to a fair, reasonable interpretation of the Plan language made with the primary objective of giving effect to the intentions of the contracting parties to the Final FPD Settlement. Indeed, Defendants (non-parties to that deal) seek to cynically deprive the Litigation Trustee and the

[16] This point is made explicit in the March 12, 2010 letter by Committee counsel to the creditors recommending a favorable vote on the Plan, which states that the "Plan incorporates an extensively negotiated settlement of the [Committee's] claims against the secured lenders." Wissner-Gross Decl. Ex. D at 1-2.

creditors of a key aspect of that deal, the right to pursue clawback claims against the former shareholders under Section 548.

Courts routinely stress that the "plain language rule" should be informed by "due consideration of 'the surrounding circumstances [and] apparent purpose which the parties sought to accomplish.'" *Thompson v. Gjivoje*, 896 F.2d 716, 721 (2d Cir. 1990) (*citing William C. Atwater & Co. v. Panama R.R. Co.*, 246 N.Y. 519, 524 (N.Y. 1927)) ("Particular words should be considered, not as if isolated from the context, but in the light of the obligation as a whole and the intention of the parties as manifested thereby. Form should not prevail over substance and a sensible meaning of words should be sought"). Moreover, "[t]he intention of the parties must be gleaned from all corners of the documents, rather than from sentences or clauses viewed in isolation." *In re Lasercad Reprographics, Ltd.*, 106 B.R. 793, 799 (Bankr. S.D.N.Y. 1989); *see also Flores v. Am. Seafoods Co.*, 335 F.3d 904, 910 (9th Cir. 2003) ("[a] written contract must be read as a whole and every part interpreted with reference to the whole, with preference given to reasonable interpretations"); *United States of America v. Cmty. Health Sys., Inc.*, 575 F. Supp. 2d 1367, 1385 (S.D. Ga. 2008) (construing contract in order to achieve the "most natural construction of the words used by the parties to the contract"). The court's aim in contract construction is a practical interpretation that will realize the parties' reasonable expectations. *Rentways, Inc. v. O'Neill Milk & Cream Co.*, 308 N.Y. 342, 347 (N.Y. 1955). "When interpreting a contract, the court should arrive at a construction that will give fair meaning to all of the language employed by the parties to reach a practical interpretation of the expressions of the parties so that their reasonable expectations will be realized." *Petracca v. Petracca*, 756 N.Y.S. 2d 587, 588 (2d Dep't 2003). "Words in a contract are to be construed to achieve the apparent purpose of the parties." *Szalkowski v. Asbestospray Corp*., 259 A.D. 2d 867, 868, 686

N.Y.S.2d 243, 246 (3d Dep't 1999). The corollary to that rule is that contracts are not to be read in a manner which defeats their purposes. *Lee v. Marvel Enters., Inc.*, 386 F. Supp. 2d 235, 244 (S.D.N.Y. 2004); *Tracy v. NVR, Inc.*, 737 F. Supp. 2d 129, 132 (W.D.N.Y. 2010) ("Where a contractual interpretation would nullify or frustrate the purpose of some of its provisions, the court may properly reject it."). The intent and objectives of the parties, and the nature of the rights created or granted therein, should be ascertained by a reasonable construction of the contracts language. *Wuestenhoefer v. Friedlander/Wuestenhofer*, 213 A.D. 2d 632, 633 (2d Dep't 1995). In determining the parties' intentions, a court should consider the circumstances surrounding the transaction as well as the actual language of the contract. *Subaru Distributors Corp. v. Subaru of America*, Inc., 425 F.3d 119, 124 (2d Cir. 2005). In addition, agreements entered into to effectuate an integrated transaction "will be read and interpreted together." *Ameritrust Co. Nat'l Ass'n v. Chanslor*, 803 F. Supp. 893, 896 (S.D.N.Y. 1992), (*quoting Liamuiga Tours v. Travel Impressions, Ltd.*, 617 F. Supp. 920, 927 (E.D.N.Y. 1985)). Courts are to avoid constructions that lead to absurd results. *See Axis Reinsurance Co. v. HLTH Corp.*, 993 A.2d 1057, 1063 (Del. 2010) ("the controlling rule of construction is that where a contract provision lends itself to two interpretations, a court will not adopt the interpretation that leads to unreasonable results, but instead will adopt the construction that is reasonable and that harmonizes the affected contract provisions") (applying New York law); *accord Ross v. Thomas*, No. 09 Civ. 5631 (SAS), 2010 WL 3952903 (S.D.N.Y. Oct. 7, 2010); *Towl v. Estate of Block*, 546 N.Y.S.2d 924, 925 (N.Y. Sup. Ct. 1989) ("no unreasonable or absurd results should result from the interpretation").

In their quest for loopholes, Defendants' proposed interpretation of the Plan disregards these bedrock precepts of contract construction. Indeed, the interpretation Defendants suggest

not only does not effectuate the apparent purpose of the claims assignment provisions, but utterly subverts it. Reading Defendants' textual exegesis of the assignment provisions, one might conclude that the intended beneficiaries of the Plan's assignment provisions were those against whom the Committee held claims, rather than the Committee's creditor constituency. Yet the purpose of the Litigation Trust and Creditor Trust provisions was not to narrow the scope of the Committee Litigation, but to enable and provide for the continued prosecution, post-confirmation, of the claims that were a part of that litigation to the extent that they had not been settled, and to allow for the assertion of additional claims that "arise from the same transaction or occurrences" as alleged in the Committee Litigation. Consistent with that purpose, the claims that were asserted in the Committee Complaint are treated under the Plan in one of only three possible ways. They are (i) released by settlement, (ii) abandoned to the creditors or (iii) transferred to the Litigation Trust.

Underscoring the fallacy of Defendants' interpretation, even if, *arguendo*, Defendants are correct that the Section 548 Claims were not transferred to the Litigation Trust, then the right to pursue them would lie with the Reorganized Debtors; indeed, Defendants make this point in their brief. *See* Mot. at 6. But Defendants can point to no provision of the Plan (or any other source) contemplating that the Reorganized Debtors would retain or pursue the Section 548 Claims against the shareholders. Defendants, who are not hesitant to proffer isolated or out-of-context extrinsic evidence even while they know it cannot be considered to resolve any claimed ambiguities on this motion, have provided none suggesting that any party to the Plan contemplated the Reorganized Debtors' retention of the claims against former shareholders of Lyondell in the Committee Litigation.

2. Defendants' Fixation on the Term "Defendant" Should Not Obscure the Plain Meaning of the Operative Term "Non-Settling Defendant Claims."

In support of their agenda to deprive the Litigation Trust of the very claims assigned to it, Defendants fixate upon the term "defendant," which is used (but not independently defined) in the Plan definition "Non-Settling Defendants." Defendants urge that distinctions concerning the party status of absent class members developed by courts required to address issues (not presently having any relevance to the current proceedings) arising at different procedural junctures in class action litigation should be imported into this definition and, from there, into the operative contractual definition—Non-Settling Defendant Claims—to restrict the scope of that definition to claims asserted against named defendants and to exclude claims asserted against the unnamed members of a defendant class. Contrary to these arguments, principles of contract construction do not require, or even permit, the Plan's assignment provisions to be interpreted in reliance on these distinctions (which in any event are far from clear under the case law) derived from class action case law, regardless of whether the resulting contractual interpretation would effectuate the parties' contractual intent. In interpreting a contract, a court reads it "as a whole to ensure that undue emphasis is not placed upon particular words and phrases . . . and to safeguard against adopting an interpretation that would render any individual provision superfluous." *Law Debenture Trust Co. of New York v. Maverick Tube Corp.*, 595 F.3d 458, 468 (2d Cir. 2010) (citations omitted). "Where the parties dispute the meaning of particular contract clauses, the task of the court is to determine whether such clauses are ambiguous when read in the context of the entire agreement . . . and where consideration of the contract as a whole will remove the ambiguity created by a particular clause, there is no ambiguity." *Id.* at 467 (citations and quotations omitted); *see also Queens Best, LLC v. Brazal South Holdings, LLC*, 826 N.Y.S.2d 684, 686-87 (2d Dep't 2006) (courts must read the document as a whole to determine

the parties' purpose and intent, giving practical interpretation to the language employed so that the parties' reasonable expectations are realized); *Rentways, Inc.*, 308 N.Y. at 347. Here, the Plan itself refutes Defendants' argument and makes resort to speculation about the party status of absent class members under the Federal Rules irrelevant.

First, the use of the exclusion "other than Abandoned Claims" in the definition of Non-Settling Defendant Claims, to carve out "Abandoned Claims" from "Non-Settling Defendant Claims," *see* Plan § 1.1 at 19, is a clear expression of the parties' agreement that "Non-Settling Defendant Claims" included both individual claims and claims asserted against former shareholders of Lyondell as members of the putative Shareholder Class. This is because there is only one explanation for why Abandoned Claims were carved out from the Non-Settling Defendant Claims definition: such claims would otherwise be encompassed by that definition and they would, therefore, flow to the Litigation Trust. The parties therefore understood that "Non-Settling Defendant Claims" would, but for the exclusion, include the state law clawback claims against the shareholders; otherwise, there would be no need to exclude Abandoned Claims. When the definition of "Abandoned Claims" is read into the Non-Settling Defendant Claims definition, as it must be, it conclusively disposes of Defendants' contentions that the parties did not fully contemplate and intend the assignment of the Section 548 Claims to the Litigation Trust.

Second, to the extent that a focus upon the question of who the parties considered to be "defendants" was necessary to determine the scope of the intended claims assignments, the Plan itself directly contradicts Defendants' proposed answer. Specifically, the definition of "Abandoned Claims" under the Plan evidences the drafters' intent by actually identifying the

former shareholders of Lyondell as the parties against whom the Count Four claim had been asserted:

> "Abandoned Claims" means 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 Chemical* (but solely in their capacity as such) *pursuant to Count Four* of the complaint in the Committee Litigation, other than . . .

Plan § 1.1 (emphasis added). This language makes clear that, *for purposes of the Plan*, the "former shareholders" of Lyondell were understood to be parties to the Committee Litigation to the same extent as the named defendants, including BGI.[17] This is a critical point, and one that is ignored by Defendants. For purposes of the Plan, all the "former shareholders" of Lyondell were to be treated as parties against whom claims were asserted to the same extent as BGI. Moreover, Defendants' reading of these provisions requires the Court to conclude that "claims" that the parties described as having been "brought against" a defendant class were not intended to have been included in the definition of claims asserted in the Committee Litigation. Any such interpretation simply fails as a practical and reasonable effort to discern the true contractual intentions of the parties.

Finally, even if the caselaw regarding the party status of absent class members were uniform and clear (which it is not),[18] there is no controversy that parties to a contract are free to

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[17] In addition, the Plan explains that the "Committee Litigation" is "described more fully in Section III.K of the Disclosure Statement." *See* Plan § 1.1. Section III.K of the Disclosure Statement describes the Committee Litigation as having been brought "against certain prepetition secured lenders . . . agents, *shareholders* and certain officers and directors arising out of or related to the 2007 Merger" (emphasis added).

[18] While the language of the Plan itself, for the reasons described above, makes resort to the Federal Rules analogy unnecessary (and such examination of extrinsic evidence regarding the parties' intent would in any event be improper upon a motion to dismiss), Defendants' assumption based upon citations to *Employers-Teamsters Local Nos. 175 & 505 Pension Trust Fund v. Anchor Cap. Advisors*, 498 F.3d 920, 923 (9th Cir. 2007), *Feathers v. Chevron USA, Inc.* 141 F.3d 264, 269 n.2 (6th Cir. 1998) and *MDCM Holdings, Inc. v. Credit Suisse First Boston Corp.*, 205 F. Supp. 2d 158, 161 (S.D.N.Y. 2002), that members of a not-yet-certified class are simply not "defendants" under the Rules and case law is overly simplistic. For example, in *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 549 (1974), the Court stated:

use terms in a way that may not conform to usages under the Federal Rules or case law. *See, e.g., Delmar Bank v. Fid.*, 428 F.2d 32, 35 (8th Cir. 1970) ("There is no legal obstacle to the parties giving forgery a broader definition than is given to the term in the Uniform Commercial Code."); *Assured Guar. (UK) Ltd v. J.P. Morgan Inv. Mgmt. Inc.*, 915 N.Y.S. 2d 7, 15 (1st Dep't 2003) (holding that parties to a contract "may agree to a statute of limitations shorter than that set

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> A federal class action is no longer "an invitation to joinder" but a truly representative suit designed to avoid, rather than encourage, unnecessary filing of repetitious papers and motions. Under the circumstances of this case, where the District Court found that the named plaintiffs asserted claims there were "typical of the claims or defenses of the class" and would "fairly and adequately protect the interests of the class," Rule 23(a) (3), (4), *the claimed members of the class stood as parties to the suit until and unless they received notice thereof and chose not to continue.* Thus, the commencement of the action satisfied the purpose of the limitation provision as to all those who might subsequently participate in the suit as well as for the named plaintiffs.

Id. (emphasis added). Indeed, the Seventh Circuit has also applied the rule of *American Pipe* to toll the statute of limitations as to claims asserted against a putative class of defendants—even though the absent potential class members had not been served with process. *See Appleton Elec. Co. v. Graves Truck Line, Inc.*, 635 F. 2d 603, 608 (7th Cir. 1980). In addition, the Class Action Fairness Act looks to the citizenship of putative class members as of the filing of the complaint (not as of class certification) to determine whether the class action is sufficiently diverse to justify federal court jurisdiction. 28 U.S.C. § 1332 (d) (7) and (8).

Even though nothing in the relevant provisions requires that the unnamed members of the defendant class defined in Count Four need have been "parties" for purposes of the Federal Rules for the claims asserted against them to have been assigned, Defendants appear to suggest that an assignment would have occurred had the class been certified prior to confirmation of the Plan. *See* Mot. at 12. This suggestion ignores the fact that even after class certification, absent class members are not for all purposes treated as parties under the case law. For example, a District Court in considering an issue regarding computation of damages recently stated in the post-certification context that "[a]bsent class members whose interests are represented by a Plaintiff are not parties to the lawsuit. Congress when it uses terms of art such as 'plaintiff' should be deemed to denote exactly that, and not non-party class members." *In re Oxford Health Plans, Inc. Sec. Litig.*, 244 F. Supp. 2d 247, 251 (S.D.N.Y. 2003). Similarly, in the context of seeking relief under Rule 60(b), a court observed that certain entities "at the time of the global settlement . . . were . . . absent class members in the class actions in which they filed their Rule 60(b) motions" and therefore were not "a party to those underlying class actions for the purposes of Rule 60(b)." *Federman v. Artzt*, 339 Fed. Appx. 31, 33 (2d Cir. 2009). Thus, given Defendants' approach of attributing to the parties the intention of conforming their contractual terminology to the usages found in class action case law, there can be no doubt that even if Plan confirmation had occurred after class certification, Defendants would still be arguing that somehow the Section 548 Claims were not assigned. While it is unclear exactly what language could have been explicit enough to actually have resulted in Defendants foregoing the kind of argument made by them here, the case law is clear that the fact that an issue of interpretation could have been avoided through a different drafting choice does not in and of itself render the contract ambiguous. *See K. Bell & Assocs. v. Lloyd's Underwriters*, 97 F.3d 632, 639 (2d Cir. 1996), *aff'd by*, 129 F.3d 113 (2d Cir. 1997) ("[A] clause may be general without being ambiguous, and even a vague clause may be ambiguous only at its edges."); *see also Integral Ins. Co. v. Lawrence Fulbright Trucking, Inc.*, No. 90 Civ. 2137 (LMM), 1990 WL 160674, at *2 (S.D.N.Y. Oct. 17, 1990), *aff'd by*, 930 F.2d 258 (2d Cir. 1991) (concluding insurer was liable under endorsement in insurance policy where endorsement was "merely general" in its wording and court had no basis upon which to make it more specific); *Flair Broad. Corp. v. Powers*, 733 F. Supp. 179, 184 (S.D.N.Y. 1990) (applying South Carolina law and noting that "[m]ere lack of clarity on casual reading is not the standard for determining whether a contract is afflicted with ambiguity").

forth in the CPLR, provided that the agreement is in writing and the shortened period is reasonable"). Consequently, what is controlling is the fact that the Plan clearly treats all former shareholders as having been sued in the Committee Litigation, not Defendants' arguments concerning case law interpreting defendant-party status under Fed. R. Civ. P. 23.

The Plan therefore makes clear that the Count Four clawback claims against the shareholders are Non-Settling Defendant Claims unless abandoned, and only Section 544 claims were abandoned. Thus, the Section 548 Claims are Non-Settling Defendant Claims.

3. The Plan Supplement Does Not Displace the Operative Provisions of the Plan.

Defendants argue that a memorandum in the Plan Supplement that describes categories of claims and dollar amounts and outlines anticipated logistical challenges relating to the State Law Avoidance Claims proves that the Section 548 Claims were not assigned to the Litigation Trust. *See* Mot. 15-16. This argument is entirely baseless, and upon examination, the Plan Supplement in fact supports the Litigation Trustee's position.

As an initial matter, the memo in no way purports to alter the operative provisions of the Plan. By its terms, it is intended to "provide . . . information" regarding the claims described therein. To the extent that Defendants succeed in arguing (which they should not) that the memo should be read as an abrogation of the relevant provisions of the Plan under which the 548 Claims were assigned to the Litigation Trust, or as raising an ambiguity in those provisions (if Defendants' argument had any merit, which it does not), they would only succeed in making resolution on a motion to dismiss inappropriate. *See* Part I-D, *infra*.

Moreover, the memo does not purport to be a comprehensive description of anticipated post-confirmation course of the litigation to be continued by the Litigation Trust. In listing Non-Settling Defendant Claims, it uses the term "include," and merely provides a summary of some, but not all claims that were not being settled under the Settlement Agreement, for the benefit of

creditors voting upon the Plan, and does not refer to all defendants in the Committee Litigation. The memo does not even list all Non-Settling Defendants. If, as Defendants appear to argue, the memo had the status of a free-standing contract, it would be well-understood that clauses beginning with the word "including" are illustrative of what is intended to be encompassed, and not as excluding that which is not specifically identified. *See, e.g., Red Hook Cold Storage Co. v. Dep't of Labor*, 295 N.Y. 1, 7-8 (N.Y. 1945) (rejecting argument that the word "including" was intended to limit preceding word, and holding that the word "including" was intended for illustrative purposes, and thereby broadened the previously expressed concept); *Brooklyn Bridge Park Coal. v. Port Auth. of N.Y. & N.J.*, 951 F. Supp. 383, 389 (E.D.N.Y. 1997) (same).

For example, the memo in the Plan Supplement did not mention that the Litigation Trust would be filing an Amended Complaint adding new claims and allegations based on discovery taken in Phase One, although all the non-settling parties knew that an Amended Complaint would be filed and that additional claims would be asserted, and they ultimately consented to the filing of the Amended Complaint in the Blavatnik Action. Similarly, the fact that the Plan Supplement did not recite the possibility that the Litigation Trustee would elect to not proceed with the Section 548 shareholder class claim in the Blavatnik Action (*e.g.*, not substituting another shareholder defendant for BGI as a class representative) is of no moment. At the time the Plan was confirmed, the Committee was obtaining, through discovery, information as to the identity of beneficial holders, and a decision was not made until after the Plan was confirmed as to how to proceed with the Section 548 shareholder class claim.

Most fundamentally, however, with their citation of the memo's reference to logistical challenges that could arise in the Creditor Trust Action, Defendants raise only the question of whether counsel for the Committee anticipated at that time whether and how the Litigation Trust

would later re-assert the Section 548 claims against the shareholders. But whether or not counsel at the time the Plan was confirmed had made a decision on whether to reassert Count Four of the Committee Complaint under Section 548 is a different question than whether that claim was assigned under the Plan. The language of the Plan makes this explicit: the definition of "Non-Settling Defendant Claim" reflects that the drafters explicitly preserved and assigned to the Litigation Trust claims that had been identified (or asserted) or could be identified (or asserted) based upon the evolving discovery record, such as an intentional fraud claim under Section 548. *See* Plan § 1.1 at 19 ("or arise from the same transaction or occurrences as alleged in"). In fact, even the memo Defendants rely upon makes explicit the point that the assignment included more than claims actually asserted in the Committee Litigation, stating that the Litigation Trust will pursue not only claims asserted in the Committee Litigation, but also claims that "could have been asserted" in the Committee Litigation. Defendants' reliance upon the memo is unavailing.

C. Claims Not Asserted in the Committee Litigation Are "Non-Settling Defendant Claims" to the Extent they Arise from the Transactions and Occurrences Alleged in the Committee Complaint.

The Plan provides that not only claims asserted in the Committee Litigation, but also those that "arise from the same transaction or occurrences as alleged in" the Committee Litigation, are Non-Settling Defendant Claims. Plan § 1.1. While Count Four of the Committee Complaint asserted a claim for constructive fraudulent conveyance under Section 548, the claim for intentional fraudulent conveyance under Section 548 is also a Non-Settling Defendant Claim, because it arises out of the same transaction or occurrence alleged in the Committee Litigation, i.e. the hundreds of paragraphs of allegations regarding underlying course of conduct that gave rise to the Committee Litigation. *Compare, e.g.*, Comm. Complaint ¶¶ 75-160, 161-192, 193-203, 218-244, 245-253 with 548 Complaint ¶¶ 99-153, 182-228, 229-273, 274-279, 280-294,

295-331. Moreover, what the Litigation Trustee has done in this action is, as in the Blavatnik Action, to assert, based upon additional evidence that arose during Phase One subsequent to the filing of the Committee Complaint, additional claims that arise out of the same transaction or occurrences as alleged in the Committee Complaint. For example, the 548 Action Complaint, like the Amended Complaint in the Blavatnik Action, asserts allegations concerning the reverse-engineering and fabrication of Lyondell earnings projections under the direction of Lyondell CEO and Chairman Dan Smith. *Compare, e.g.*, 548 Complaint ¶¶ 154-181 with Amended Complaint ¶¶ 134-162.

Defendants frivolously suggest a narrow definition of the phrase "same transaction or occurrences." They argue that claims against the shareholders involve different payments than claims against the current defendants in the Blavatnik Action (payments of Merger Consideration in respect of the shares held by members of the defendant class rather than, e.g., Merger Consideration payments to former directors and officers of Lyondell), and therefore do not arise out of "the same transaction or occurrence." *See* Mot. at 9-10. This proposed definition, however, achieves nothing for Defendants.

First, even under Defendants' contorted interpretation, the intentional fraud claim would qualify as arising out of the same transaction or occurrence as the constructive fraud claim. That is, because a claim for constructive fraudulent intent involving payments to former shareholders was asserted in the Committee Litigation under Count Four, even under Defendants' proposed definition of "transaction or occurrence" the Section 548 intentional fraudulent transfer claim here, which arises out of the same payments to former shareholders, arises "out of the same transaction or occurrence" as Count Four asserted in the Committee Litigation and constitutes a Non-Settling Defendant Claim. *See* Comm. Complaint ¶¶ 288-293.

Second, Defendants' argument that reliance on the "same transaction or occurrence" test is necessary to assert a claim against any Defendant who was not named as a defendant in the Committee Litigation is incorrect; as explained in Part I-A, *supra*, the Section 548 constructive fraudulent transfer claim for recovery against the former shareholders of Lyondell is a Non-Settling Defendant Claim because it explicitly satisfies that definition, which includes "claims and causes of action (other than Abandoned Claims) that have been asserted in . . . the Committee Litigation against one or more Non-Settling Defendants."

Third, although unnecessary to reach this point, Defendants' proposed construction of the phrase "transaction or occurrence" is inconsistent with the common understanding of that term under case law. Here, the phrase obviously refers to an amended or new pleading that includes claims that arise out of the same transaction or occurrences as alleged in the Committee Litigation. To the extent applicable law should be examined in this issue, Fed. R. Civ. P. 15 applies. The phrase "transaction or occurrence" is commonly used in various bodies of case law, including "relation back" under Federal Rule 15(c), and that case law makes clear that the phrase is ordinarily understood to refer to the factual allegations underlying the cause of action. As the Second Circuit has explained, "Rule 15(c)(2) provides that '[a]n amendment of a pleading relates back to the date of the original pleading when . . . the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading'. . . . For example, where an initial complaint alleges a 'basic scheme' of defrauding investors by misrepresenting earnings . . . an allegation of accounts receivable manipulation . . . will relate back because it is a 'natural offshoot' of that scheme." *Slayton v. Am. Express Co.*, 460 F.3d 215, 228 (2d Cir. 2006), *aff'd by* 604 F.3d 758 (2d Cir. 2010). Similarly, a court in the Southern District explained that "[i]n analyzing a Rule 15(c) argument,

the court must inquire 'whether the facts provable under the amended complaint arose out of the conduct alleged in the original complaint'", and "where a revised pleading contains alternative theories based on the same core facts as presented in a prior pleading, the alternative pleadings relate back to the original." *The Am. Med. Assoc. v. United Healthcare Corp.*, No. 00 Civ. 2800 (LMM) 2006 WL 3833440, at *11-12 (S.D.N.Y. Dec. 29, 2006) (*citing Slayton*, 460 F.3d at 227 (2d Cir. 2006)). Likewise, "Rule 15(c) of the Federal Rules of Civil Procedure provides, 'Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading . . . . In fact, the argument for relation back is especially strong in the instant case because the factual allegations underlying the Section 10(b) claim in the amended complaint . . . are nearly identical to the factual assertions made in support of the common law fraud claim in the original complaint." *Sperber Adams Assocs. v. Jen Mgmt. Assocs. Corp.*, No. 90 Civ. 7405 (JSM), 1992 WL 28444, at *2-3 (S.D.N.Y. Feb. 7, 1992). That definition is clearly satisfied here, as the factual allegations in the Committee Complaint are nearly identical (for the purposes relevant here) to those asserted here. Even if it were relevant whether the definition of "same transaction or occurrence" in the Plan is narrow or broad, nothing in the Plan suggests that parties to the Settlement or Plan intended to adopt the narrow reading proposed by Defendants.[19]

[19] Citing *Riel v. Morgan Stanley*, No. 06 Civ. 5801, 2009 WL 2431497 (S.D.N.Y. Aug. 6, 2009), Defendants also argue that because the Litigation Trustee settled a claim against Deutsche Bank Securities Inc. ("**Deutsche Bank**") in the Blavatnik Action but asserted a claim against Deutsche Bank in the present action, the two actions must not arise from the "same transaction or occurrence," because under principles of res judicata a party may not sue another party twice for the same "transaction." *See* Mot. at 11, n.8. This argument is without merit. *Riel* is a case concerning the application of res judicata in one action following a dismissal in a separate action that arose from the same "transaction," where one party had argued that a claim-splitting exception to res judicata should apply. *Riel*, 2009 WL 2431497 at *4. As an initial matter, even if there were any indication that the drafters of the Plan intended for "same transaction and occurrence" to mean the same thing as "transaction" in the context of res judicata jurisprudence (which there is not), the Deutsche Bank settlement does not purport to alter the Plan, so Defendants are at most suggesting a potential res judicata argument that Deutsche Bank perhaps could have attempted based

D. Defendants' Reliance Upon Selected Extrinsic Evidence Is Unavailing.

In an effort to buttress their frivolous textual arguments, Defendants, who were not parties to any of the Plan negotiations, offer extrinsic evidence that they speciously claim supports their asserted interpretation of the Plan. Reliance upon extrinsic evidence to resolve contractual ambiguities is not proper on a motion to dismiss. As an initial matter, however, the extrinsic evidence that Defendants present is distorted by them and presented out of context.

1. Defendants Distort the Extrinsic Evidence.

Defendants distort the limited extrinsic evidence that they present. For example, Defendants argue that several statements of Committee counsel indicate an intent that any shareholders claims were to be abandoned for pursuit under state law, and none were to be transferred to the Litigation Trust. *See* Mot. at 16-17. Specifically, Defendants note statements by Committee counsel at the February 16, 2010 settlement hearing to the effect that the shareholder claims would be pursued by the Creditor Trust, not the Litigation Trust. *See* Mot. at 16. Defendants also note the statement by Mr. Weisfelner at the March 11, 2010 status conference that "the claims against selling shareholders will be pursued as a matter of state law." *See* Mot. at 17. But Mr. Weisfelner's comments cannot be reasonably understood to have been intended as an exhaustive recitation of every action and pleading the Creditor Trust and Litigation Trust would file. Nor was Mr. Weisfelner purporting to report on all the terms of the Final FPD Settlement and Plan. Moreover, as explained above, whether or not counsel at that time anticipated reasserting a claim from the Committee Complaint is an entirely different question than whether that claim was assigned under the Plan. The definition of "Non-Settling

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upon *Riel* or other res judicata case law—but did not make. Suffice it to say, the Litigation Trustee believes such an argument, if it had been made by Deutsche Bank, would have been without merit. It should be noted, in any event, that the claims against Deutsche Bank in this action have been dismissed without prejudice. More fundamentally, as set forth in Part I-D, extrinsic evidence may not be used to vary the terms of an unambiguous contract, and to the extent a contract is ambiguous, extrinsic evidence may not be considered to resolve that ambiguity on a motion to dismiss.

Defendant Claim" itself reflects that the drafters explicitly preserved and assigned to the Litigation Trust both already asserted claims and other claims that had not yet been asserted such as an intentional fraud claim under Section 548. *See* Plan § 1.1 ("or arise from the same transaction or occurrences as alleged in").

Similarly, Defendants assert frivolously that the fact that the Litigation Trustee filed the 548 Action after a phone call from counsel for Defendants disclosing his intention to move to dismiss the Creditor Trust action under Section 546(e) demonstrates that the idea to assert a Section 548 shareholder action first occurred to the Litigation Trustee at that time. *See* Mot. at 18-19. The factual argument advanced by Defendants is false. In any event, Defendants' counsels' unwarranted, mistaken inferences about decisions made by the Litigation Trustee have no place in contract construction. Again, the drafters explicitly preserved and assigned claims that could develop based upon the record. *See* Plan § 1.1 ("or arise from the same transaction or occurrences as alleged in"). The *sole* constraint on the Litigation Trustee was the two-year statute of limitations applicable to Section 548 Claims; counsel to the Litigation Trustee was under no professional obligation to disclose to Defendants' counsel any plan regarding the filing of the 548 Action. The Creditor Trust Action and the 548 Action were asserted within mere months of each other and both included, based upon the discovery record that had been obtained in Phase One of the Committee Litigation, robust intentional fraud claims that had not been asserted in the initial Committee Complaint, but had been asserted in the Amended Complaint in the Blavatnik Action.

Finally, Defendants make much of and misinterpret a statement by counsel for the Creditor Trustee concerning notice to members of the state law shareholder class, arguing that counsel "recommended to the Court at a hearing last month that a proposed notice to putative

class members advising them of the lawsuit should 'make[] clear they're not a defendant, per se.'" Mot. at 14. As explained above, however, the scope of the claims assignment was not intended by the parties to the Plan to turn on distinctions drawn at various stages of class action litigation about the status of class members. In any case, when the comments are viewed in context, counsel was clearly addressing the use of information sought to be obtained in discovery regarding former shareholders and whether, upon obtaining further discovery regarding such persons, these parties would be formally named as defendants in the 548 Action (as Defendants' counsel professed would occur). In the context of a specific discussion regarding what use the Litigation Trustee would make of such discovery, counsel for the Litigation Trustee was pointing out that, for present purposes, the information would be used only to notify class members regarding the claims asserted against them. *See* Wissner-Gross Decl., Ex. E, Mar 8, 2011 Tr. 56:15-60:12. Counsel was not referring to the meanings of any defined term in the Plan. Indeed, counsel was not even discussing the Plan.

2. Reliance on Extrinsic Evidence Inappropriate at Motion to Dismiss Stage.

In any event, the use of extrinsic evidence to resolve contractual ambiguities is not proper at the motion to dismiss stage. "[W]hen the language of a contract is ambiguous, its construction presents a question of fact, which of course precludes summary dismissal on a Rule 12(b)(6) motion." *Maniolos*, 741 F. Supp. 2d at 567 (citations and quotations omitted); *see also Houbigant, Inc. v. ACB Mercantile, Inc. (In re Houbigant, Inc.)*, 914 F. Supp. 964, 987 (S.D.N.Y. 2005), *reargued on other grounds*, 914 F. Supp. 997 (S.D.N.Y. 1996) ("Finding that the contract as a whole is subject to more than one reasonable interpretation regarding the intent to assign claims not known, the motion to dismiss on the basis of assignment is denied."); *Subaru Distribs. Corp. v. Subaru of Am., Inc.*, 425 F.3d 119, 122 (2d Cir. 2005) (court "should resolve any contractual ambiguities in favor of the plaintiff" on a motion to dismiss); *Consarc*

Corp. v. Marine Midland Bank, N.A., 996 F.2d at 574 ("Resolving an ambiguous term in a written contract through extrinsic evidence remains squarely within the province of the trier of fact"); *Crowley v. VisionMaker, LLC*, 512 F. Supp. 2d 144, 152 (S.D.N.Y. 2007) (ambiguous contract presents a question of fact precluding dismissal on a motion to dismiss); *Psenicska v. Twentieth Century Fox Film Corp.*, 07 Civ. 10972, 2008 WL 4185752 at *4 (S.D.N.Y. Sept. 3, 2008), *aff'd by*, 409 Fed. Appx. 368 (2d Cir. 2009) ("Where there are alternative, reasonable interpretations of a contract term rendering it ambiguous, the issue should be submitted to the trier of fact and is not suitable for disposition on a motion to dismiss."); *Subaru Distrib. Corp.*, 425 F.3d at 122 (court "should resolve any contractual ambiguities in favor of the plaintiff" on a motion to dismiss); *D.C. USA Operating Co. v. Indian Harbor Ins. Co.*, 07 Civ. 0116, 2007 WL 945016, at *8 (S.D.N.Y. Mar. 27, 2007) ("[W]hen considering a motion to dismiss, courts should resolve any contractual ambiguities in favor of the plaintiff without resorting to parol evidence.") Therefore, even if the contract here is ambiguous, that ambiguity must be resolved at a later stage.

The Litigation Trustee submits that Defendants' "assignment" argument must be rejected based on a review of the plain language of the Plan itself. However, if the Court were to conclude that any ambiguity exists, resolution of the issue at a later stage could not be based solely upon the largely irrelevant extrinsic evidence offered by Defendants. That is, Defendants offer only a very limited and incomplete sampling of what may be considered extrinsic evidence of the parties' contractual intentions. To give but one example, Defendants omit the most important kind of extrinsic evidence—that concerning the parties' behavior under the contract. *See Federal Ins. Co. v. Americas Ins. Co.*, 691 N.Y.S.2d 508, 512 (1st Dep't 1999) ("The parties to an agreement know best what they meant and their action under it is often the strongest

evidence of their meaning.") (*citing* Restatement Second, Contracts, § 202, cmt. g). Specifically, the conduct of the actual parties to the Plan reflects their understanding that the Section 548 Claims were assigned to the Litigation Trust, not retained by the Reorganized Debtors. The Reorganized Debtors made no effort to bring an action against former shareholders under Section 548. Nor did any Reorganized Debtor, upon the Trustee's filing of the 548 Complaint, protest the assertion by the Trustee of the Section 548 Claims and indicate that those claims remained with the Reorganized Debtors. The reason for that is simple: everyone understands that they did not. The only suggestion to the contrary comes from Defendants (who are not beneficiaries under the Plan), manufacturing an issue for the purposes of their Motion in order to avoid liability.

Defendants also make no mention of another frequently relied upon type of extrinsic evidence, that of parties' negotiations as reflected in draft forms of a final agreement, correspondence regarding contractual negotiations and the recollection of the contracting parties regarding such negotiations. *See, e.g., Roberts v. Cons. Rail Corp.*, 893 F.2d 21, 24-25 (2d Cir. 1989); *R. Dwight Harris v. Royal Chrysler/Oneonta Inc.*, 657 N.Y.S.2d 847 (3d Dep't 1997). Were it ever to become necessary to conduct a full hearing on the extrinsic evidence, defense counsel's self-serving re-telling of events he knows nothing about would be displaced by extrinsic evidence reflecting the intent of those who actually drafted the Final FPD Settlement and the Plan. As the Court can surmise and as the parties to the Final FPD Settlement are well-aware, the process of amending the Original FPD Settlement to achieve the Final FPD Settlement, including the assignment provisions, left an ample documentary trail of drafts and emails and involved in-person and telephonic negotiations involving scores of attorneys. The Trustee submits that the Court need never consider such material, because the Plan

unambiguously assigns the Section 548 Claims to the Litigation Trustee. But to the extent that, *arguendo*, there is any ambiguity, the extrinsic evidence that would shed further light on the parties' intentions (as opposed to the purposes of the Defendants) is not currently before the Court, and in any event could not properly be examined on a motion to dismiss. Defendants' standing argument fails.

II. SECTION 546(E) SHOULD NOT BE HELD TO BAR THE CONSTRUCTIVE FRAUDULENT TRANSFER CLAIM.

The Section 546(e) issues have previously been briefed and set for argument. In particular, the defendants in the Creditor Trust Action argued that the fraudulent transfer claims asserted there were barred by Section 546(e), and Defendants here have incorporated those arguments by reference. *See* Mot. at 20-21. The Creditor Trustee, for his part, incorporated by reference arguments made by the Litigation Trustee in papers submitted previously in opposition to various defendants' motions to dismiss and for summary judgment in the Committee Litigation arguing that the payments here at issue were neither "settlement payments" nor payments "in connection with a securities contract" and were not made by or to a financial institution; the Litigation Trustee incorporates the same arguments. *See* Comm. Opp. to D&O Summ. J. Mot. at 6-25 [Adv. Pro. Docket No. 224]; Comm. Opp. to Financing Party Defendants' Mot. to Dismiss at 10-16 [Adv. Pro. Docket No. 130]; Comm. Opp. to Nell Mot. for Summ. J. at 12-31 [Adv. Pro. Docket No. 226].[20] While some discussion of whether Section 546(e) would apply to the payments here at issue arose at oral argument in the Creditor Action on May 12,

[20] The Litigation Trustee also notes, as did the Creditor Trustee, that the reliance by defendants upon two decisions issued in this District subsequent to the filing of the above-referenced Committee Litigation briefing is misplaced, and that the appeal in the *Enron* decision has been briefed and was argued on Nov. 3, 2010, such that the Litigation Trustee submits that the Court should either reject Defendants' 546(e) arguments or defer a decision pending a ruling by the Second Circuit in the *Enron* case. *See* Creditor Trustee Opp. at 44-45.

2011 on the preemption issues, a separate oral argument regarding the Section 546(e) issues is to be held at a later date in that action.

In addition, one point here is beyond controversy and perhaps underscores why Defendants have advanced a frivolous argument that the Section 548 Claims were somehow not assigned to the Litigation Trust: the intentional fraudulent transfer claim asserted under Section 548(a)(1)(A) is not barred by Section 546(e). *See* 11 U.S.C. § 546(e) (excluding Section 548(a)(1)(A) claims from its coverage). Defendants' argument regarding Section 546(e) therefore concerns only the constructive fraudulent transfer claim.

In the event Defendants, on reply, advance any substantive argument on this issue, the Litigation Trust reserves the right to formally reply.

III. THE COMPLAINT ALLEGES THAT PROPERTY OF THE DEBTORS WAS TRANSFERRED TO DEFENDANTS.

These issues have been previously briefed and argued. Specifically, defendants in the Creditor Action argued that the transfers here at issue did not involve property of the Debtors, and Defendants here incorporate that argument. *See* Mot. at 21. The Creditor Trustee in his briefing demonstrated that such argument was without merit, *see* Creditor Trust Opposition at 45-62, and the Litigation Trustee adopts those arguments here. The issue was argued before the Court in the Creditor Trust Action on May 12, 2011. In addition, similar issues arose in the Blavatnik action in connection with certain Access Defendants' motion to dismiss Count Two of the Amended Complaint in that action. Those issues were fully briefed and argued at length in that action on March 10, 2011.

In the event Defendants, on reply, advance any substantive argument on this issue, the Litigation Trust reserves the right to formally reply.

IV. DEFENDANTS' "MERE CONDUIT" ARGUMENT IS WITHOUT MERIT.

This issue need not occupy the Court's time. As explained at the May 12, 2011 argument of this issue in the Creditor Trust Action, the Litigation and Creditor Trustees have since the commencement of this action offered to dismiss any defendant that could demonstrate that they held solely on behalf of beneficial holders upon the provision of information regarding the identity of such holders.[21] The Litigation Trustee notes, however, that Defendants' argument, *see* Mot. at 22, ignores the fact that many of the financial institutions defendants at issue are alleged to have held shares on their own account, and a fact issue concerning whether such defendants were actually "mere conduits" precludes dismissal. *See* Creditor Trust Opp. at 66-68.

In the event Defendants, on reply, advance any substantive argument on this issue, the Litigation Trust reserves the right to formally reply.

V. DEFENDANTS' "RATIFICATION" ARGUMENT IS WITHOUT MERIT.

This issue has been previously briefed, and argued in the Creditor Action on May 12, 2011. Defendants in the Creditor Trust Action argued that recovery from the lenders is improper because they "ratified" the transaction, and Defendants here incorporate those arguments. *See* Mot. at 22. Defendants cast this argument as a "standing" issue in their Creditor Action briefing, but after the Creditor Trustee demonstrated that the fact that a defendant may have a potential defense available to it does not mean that plaintiff therefore lacks standing, *see* Creditor Trust Trust Opp. at 63-65, Defendants here excised the word "standing" from their argument. *See* Mot. at 22. However, Defendants still incorporate by reference the ratification argument and fail to explain how the potential availability of a defense involving factual issues provides a ground

[21] The Litigation Trustee has already dismissed without prejudice several defendants in this Action and awaits the provision of information regarding beneficial holders by any other defendant that claims to be a "mere conduit."

for dismissal on a motion to dismiss. At most, Defendants raise an issue regarding recovery and the extent of damages.

In the event Defendants, on reply, advance any substantive argument on this issue, the Litigation Trust reserves the right to formally reply.

VI. FRAUDULENT INTENT IS ADEQUATELY PLED.

This issue has been briefed and argued several times. First, the issue was briefed in the Blavatnik Action and argued before the Court at length on March 10, 2011. Then, the issue was argued before the Court in the Creditor Action on May 12, 2011. Now, Defendants incorporate their misguided argument from the Creditor Trustee Action that actual fraudulent intent is not adequately pled. *See* Mot. at 22-23. But for the same reasons as presented at argument on March 10, 2011 and May 12, 2011, as set forth in the Litigation Trustee's prior briefing in the Blavatnik Action and the Creditor Trustee's briefing in the Creditor Action, the Complaint here more than adequately alleges actual fraudulent intent on the part of both Lyondell and Basell debtors. *See* Litigation Trustee's Opp. to the Mot. to Dismiss Count Four at 18-44; Litigation Trustee's Opp. to the Mot. to Dismiss Count Two at 16-29; Creditor Trust Opp. at 72-74. While the record supports further amendment to buttress the allegations of actual fraudulent intent, the current Complaint far surpasses the standard established by the case law.

In the event Defendants, on reply, advance any substantive argument on this issue, the Litigation Trust reserves the right to formally reply.

VII. THE COURT MAY EXERCISE JURISDICTION OVER THE BOSWELLS.

Two defendants, William Luke Boswell and Agnes Hafner Boswell (the "**Boswells**"), seek dismissal based on lack of personal jurisdiction.[22] This defense is without merit, as these defendants rely upon the wrong standard for establishing personal jurisdiction in bankruptcy court. Rule 7004(f) permits a bankruptcy court to "exercise personal jurisdiction over a defendant who has been properly served under Rule 7004(d)." *Bickerton v. Bozel S.A. (In re Bozel S.A.),* 434 B.R. 86, 97 (Bankr. S.D.N.Y. 2010). Moreover, "[b]ecause valid service of process pursuant to Rule 7004(d) is sufficient to establish personal jurisdiction, state long-arm statutes are inapplicable, and the only remaining inquiry for a bankruptcy court is whether exercising personal jurisdiction over the defendant would be consistent with the Due Process Clause of the Fifth Amendment." *Id.*

The Due Process analysis requires that: "(1) the defendant has sufficient 'minimum contacts' with the United States as a whole; and (2) the exercise of jurisdiction is 'reasonable' such that it would not offend 'traditional notions of fair play and substantial justice.'" *Id.* The reasonableness inquiry involves evaluating: (1) "the burden on the defendant;" (2) "the forum['s] . . . interest in adjudicating the dispute;" and (3) "the plaintiff's interest in obtaining convenient and effective relief." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980).

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[22] Based on the Litigation Trustee's review of the pleadings, the Boswells are the only defendants to raise a jurisdiction defense. To the extent other defendants have, or will, raise a similar defense, this argument applies to them as well.

In addition, at least one defendant, Sacramento County Employees' Retirement System ("**SCERS**") has purported to seek dismissal based on insufficiency of service of process. *See* Mot. to Dismiss Compl. and Joinder of Sacramento County Employees' Retirement System in Mot. of the Defs. to Dismiss the Compl. at 2 (the "**Service of Process Motion**") [Case No. 10-05525, Docket No. 174]. However, any objection to service of process must be specific and identify the defect in the service of process. *See Koulkina v. City of New York*, 559 F. Supp. 2d 300, 312 (S.D.N.Y. 2008) Here, SCERS has failed to assert any specific defect in service of process and instead states in conclusory fashion: "In addition, [SCERS] moves to dismiss the complaint on the ground of insufficient service of process pursuant to Fed. R. Civ. P. 12(b)(5), incorporated by Fed. R. Bankr. P. 7012(b)(5). In fact, SCERS cannot allege any specific defects in service of process, because SCERS was properly served on January 28, 2011. *See* Wissner-Gross Decl., Ex. G, Affidavit of Service, dated April 21, 2011. Accordingly, SCERS' motion to dismiss for insufficient service of process must be denied.

Here, the Boswells do not contest that they have minimum contacts with the United States, as they admit that they are citizens of Cincinnati, Ohio. *See* Boswell Mot. to Dismiss at 6. Therefore, the first prong of the Due Process analysis is met. With respect to the "reasonableness" of asserting jurisdiction over the Boswells, this Court clearly has an interest in adjudicating the dispute, as the Plan contains a clear reservation of jurisdiction over the claims asserted by the Trustee in the 548 Complaint. *See* Plan § 12.1. Furthermore, it would be more efficient to litigate the claims against the Boswells before this Court as part of this Action, rather than as a separate litigation in Ohio. Accordingly, all Due Process concerns are satisfied giving this Court jurisdiction over the Boswells, and therefore, the Boswells' motion to dismiss for lack of personal jurisdiction should be denied.

CONCLUSION

For the foregoing reasons, the Trustee respectfully requests that the Court deny the Motions. In the alternative, Plaintiff should be granted leave to replead.[23]

Dated: May 23, 2011
New York, New York

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

By: _/s/ Sigmund S. Wissner-Gross____
Sigmund S. Wissner-Gross
May Orenstein
BROWN RUDNICK LLP
Seven Times Square
New York, NY 10036
(212) 209-4800

Steven D. Pohl
BROWN RUDNICK LLP
One Financial Center
Boston, MA 02111
(617) 856-8200

Counsel for Edward S. Weisfelner, as Litigation Trustee of the LB Litigation Trust

[23] Rule 15(a) of the Federal Rules of Civil Procedure, applicable to adversary proceedings pursuant to Rule 7015 of the Federal Rules of Bankruptcy Procedure, provides that "when justice so requires," leave to amend should be "freely granted." *See* Fed. R. Civ. P. 15(a)(2). Under Rule 15(a), leave to amend a complaint should not be denied absent undue delay, bad faith, undue prejudice to the non-movant, or futility. *Foman v. Davis*, 371 U.S. 178, 182 (1962). Defendants cannot establish any of these grounds for denial. *See also Barr v. Charterhouse Grp. Int'l., Inc. (In re Everfresh Beverages, Inc.)*, 238 B.R. 558, 584 (Bankr. S.D.N.Y. 1999) (party opposing a motion for leave to amend has a "weighty burden") (quoting Fed. R. Civ. P. 15(a)); *Official Comm. of Unsecured Creditors v. JP Morgan Chase Bank, N.A. (In re M. Fabrikant & Sons, Inc.)*, 394 B.R. 721, 746 (Bankr. S.D.N.Y. 2008) (permitting leave to amend to correct two pleading deficiencies: (i) particularization of transfers that were contended to have been made with fraudulent intent; and (ii) pleading of facts necessary to support inference of transferees' actual or constructive knowledge of fraudulent scheme); *Angell v. First Eastern, LLC (In re Caremerica, Inc.)*, Adv. Pro. No. L-08-00157-8-JRL, 2009 WL 225324, at *7 (Bankr. E.D.N.C. July 28, 2009) (permitting leave to file second amended complaint and re-plead intentional and constructive fraudulent transfer claims).

Notably, the mere fact that discovery preceded the initial complaint does not conclusively demonstrate undue delay and prejudice. *See e.g. Del Rosario v. New York City Dep't of Corr.*, 07 Civ. 2027, 2009 U.S. Dist. LEXIS 66018, at *2-*3 (S.D.N.Y. May 15, 2009) (permitting amendment of complaint after fact discovery closed). Moreover, while the Complaint more than satisfies the pleading standard, the Litigation Trustee anticipates amending the Complaint in the 548 Action to add further factual details supporting his claims based upon discovery obtained in the Blavatnik Action after the commencement of the 548 Action.