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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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

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PRELIMINARY STATEMENT

This is the second of two nearly identical lawsuits that the Trustee has brought in an effort to claw back billions of dollars paid to shareholders (the "Shareholders") of Lyondell Chemical Company ("Lyondell") for their stock in connection with the December 2007 buyout of Lyondell (the "Merger") by Basell AF S.C.A. ("Basell"). The first lawsuit, brought by the Trustee on behalf of the Lyondell *Creditor* Trust, asserts two claims: a constructive fraudulent transfer claim and an intentional fraudulent transfer claim, purportedly under state law (the "Creditor Trust Action" or "Creditor Trust Complaint").

After learning that the same defendants that are submitting this brief (the "Defendants"), as well as others, intended to move to dismiss the Creditor Trust Action on the ground, among others, that the claims asserted in that case are preempted by Section 546(e) of the Bankruptcy Code, the Trustee filed this additional lawsuit, on behalf of the separate Lyondell *Litigation* Trust. Here, the Trustee asserts the same two claims: a constructive fraudulent transfer claim and an intentional fraudulent transfer claim based on the same transfers of the same funds (the "Merger Consideration"), but this time pursuant to federal law—Section 548 of the Bankruptcy Code (the "Litigation Trust Action" or the "Litigation Trust Complaint"). In nearly all other respects, the complaints are identical,[1] and for the same reasons already briefed by the Defendants in connection with their pending motion to dismiss the Creditor Trust Action, the Litigation Trust Complaint should also be dismissed.

But there is an even more basic flaw with the Litigation Trust Complaint: the Litigation Trust lacks standing to bring it. Under the confirmed plan of reorganization (the "Plan") of

[1] A redline showing the few differences and substantial similarities between the Creditor Trust Complaint and the Litigation Trust Complaints is attached as Exhibit A to the Declaration of Jeremy S. Winer filed herewith ("Winer Decl.").

LyondellBasell Industries AF S.C.A. ("LBI") and its affiliated debtors (collectively, the "Debtors"), only two sets of claims were assigned to the Litigation Trust: (1) claims under the Bankruptcy Code to avoid and recover preferences; and (2) fraudulent transfer and other claims that had already been asserted (or that are based on the same "transaction" or "occurrences" at issue) in the pending lawsuit (the "Committee Litigation") brought by the Litigation Trust's predecessor, the Official Committee of Unsecured Creditors (the "Committee") appointed in the Debtors' Chapter 11 cases, against the "Non-Settling Defendants" named in that action—principally the former Lyondell directors and officers (the "Lyondell Directors and Officers") and Leonard Blavatnik and other persons and entities associated with Basell (the "Blavatnik Parties").

The claims now asserted in the Litigation Trust Action against the Defendants and other supposed former Shareholders of Lyondell are neither. They are fraudulent transfer, not preference, claims to recover payments allegedly made well outside the normal 90-day clawback period for preferences or even the one-year period for preferential payments made to insiders. And, not only do the claims not arise out of the same transaction or occurrences as the claims in the Committee Litigation, but the Defendants here were not named parties in that action and hence are not "Non-Settling Defendants" as that term is defined in the Plan. Indeed, counsel for the Committee, now representing the Litigation Trust, repeatedly represented to this Court and parties in interest in the Debtors' Chapter 11 cases—including in the Plan Supplement that was incorporated in the Plan—that the only claims against any non-insider Lyondell Shareholders that were being assigned under the Plan to either Trust were the supposed state-law claims later asserted by the Creditor Trust, not the federal-law claims now asserted by the Litigation Trust.

Under the terms of the Plan, the express provisions of the Bankruptcy Code, and settled case-law, the Litigation Trust lacks standing to bring any claims against the Defendants. Those claims should, accordingly, be dismissed under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, as incorporated by Rule 7012 of the Federal Rules of Bankruptcy Procedure.

But even if the Plan allowed the Trustee to bring the Litigation Trust Complaint, it would be subject to dismissal for the same reasons as the nearly identical Creditor Trust Complaint. Rather than repeat the arguments already made by the Defendants in their brief in support of their motion to dismiss the Creditor Trust Action (the "Creditor Trust Dismissal Brief" or "Dismissal Br.")[2], the Defendants incorporate those arguments herein. For the convenience of the Court, Defendants have attached a copy of that brief as Exhibit B to the Winer Declaration submitted herewith. As described in greater detail below, with references to the relevant sections and pages of the Creditor Trust Dismissal Brief:

- The Liquidation Trust's constructive fraudulent transfer claim under Section 548(a)(1)(B) of the Bankruptcy Code is barred by the safe harbor for settlement payments set forth in Section 546(e) of the Code. Indeed, even if it had any merit (and it does not), the principal argument made by the Creditor Trust to circumvent Section 546(e)—that the claims in the Creditor Trust Action are not brought by the successor to the Debtors' bankruptcy estates but rather by creditors of the Debtors outside of bankruptcy—would have no applicability to the claims brought by the Litigation Trust as successor to the Debtors' estates under the Bankruptcy Code. *See* Dismissal Br. at 15-25 (Winer Decl. Ex. B).

- Both the intentional and constructive fraudulent transfer claims fail because the Merger Consideration that the Trustee seeks to recover merely passed through the Debtors on its way from the third-party banks that financed the Merger (the "Lenders") to the beneficial owners of Lyondell stock ("Beneficial Owners"). At no time did the Debtors have any discretion to use the Merger Consideration, including to pay creditor claims, and therefore the funds were not property of the Debtors. As a result, the Debtors' estates cannot, under the Bankruptcy Code, avoid the transfers to the Beneficial Owners. *See* Dismissal Br. at 35-42 (Winer Decl. Ex. B).

[2] *See* Memorandum of Law in Support of Defendants' Motion to Dismiss the Complaint in *Weisfelner v. Morgan Stanley & Co.*, Adv. Pro. No. 10-4609 (filed Jan. 11, 2011) [Docket No. 72] (Winer Decl. Ex. B)).

- The Litigation Trust complaint acknowledges that most of the Defendants were mere record holders ("Conduits") for the Lyondell stock, and it contains no factual allegations demonstrating that any of them were Beneficial Owners of those securities. Under black-letter law, as acknowledged by counsel for the Litigation Trust, the Merger Consideration cannot be recovered from Conduits through whom the funds simply passed on their way to the Beneficial Owners. *See* Dismissal Br. at 42-44 (Winer Decl. Ex. B).

- The Trustee cannot recover the payment of the Merger Consideration for the benefit of the Lenders, which hold by far the largest claims to be paid out of the Litigation Trust (just as they do in connection with the Creditor Trust). On the Trustee's own allegations, the Lenders authorized and ratified the very payments that the Trustee seeks to avoid. *See* Dismissal Br. at 45-49 (Winer Decl. Ex. B).

- The Trustee's intentional fraudulent transfer claim fails because the Litigation Trust fails to plead any facts, let alone facts sufficient to satisfy Rule 9(b) of the Federal Rules of Civil Procedure and to create a strong inference that, even if any Debtor (rather than the Lenders) made the transfers of the Merger Consideration, it acted with fraudulent intent. This is especially so because the Merger documents incorporated in the Litigation Trust Complaint make clear that, if any Debtor paid the Merger Consideration, it was a Basell entity, not a Lyondell entity, and there is no allegation in the Litigation Trust Complaint that Basell, which put billions of dollars at risk in the Merger, did so expecting that the Merger would fail and that its equity in Lyondell would be entirely wiped out. *See* Dismissal Br. at 49-59 (Winer Decl. Ex. B).

* * *

Like the Creditor Trust Action, this is a lawsuit that never should have been brought. The Trustee lacks standing to assert these claims, which are, in any event, deficient as a matter of law in numerous other respects. The Litigation Trust Complaint should be dismissed with prejudice.

BACKGROUND

The Creditor Trust Dismissal Brief describes the history of events that led to the Litigation Trust Action as well as the Creditor Trust Action. *See* Dismissal Br. at 5-15 (Winer Decl. Ex. B).

ARGUMENT

I. THE TRUSTEE LACKS STANDING TO ASSERT CLAIMS AGAINST THE DEFENDANTS.

The Trustee has standing to bring only those claims that were assigned to the Litigation Trust pursuant to the Plan. The claims asserted against the Defendants were not assigned to the Litigation Trust, and therefore the Trustee lacks standing to bring them.

A. A Litigation Trustee Can Assert Only Those Claims That Are Assigned to the Trust Under the Debtor's Bankruptcy Plan.

"Except as otherwise provided in [a Chapter 11] plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor." 11 U.S.C. § 1141(b). As a result, a post-confirmation litigation trust created under a plan can pursue only those claims that the plan expressly assigns to it and allows it to pursue. *See id.* § 1141(a) (a confirmed plan "binds" not only the debtor and all creditors of the debtor, but also any "entity acquiring property under the plan"); *see also Rahl v. Bande*, 328 B.R. 387, 400 (S.D.N.Y. 2005) ("plaintiff's authority to maintain the present action derives from the Reorganization Plan and the Litigation Trust Agreement"); 11 U.S.C. § 1123(b)(3) (plan of reorganization may provide for enforcement of a particular claim by an estate representative only if the representative is "appointed for such purpose").

Accordingly, such a trust lacks standing to bring claims not assigned to it under the plan. Where, for example, a post-confirmation trust "was assigned claims only against former or current directors or officers" of the debtor, that trust "does not have standing to maintain an action" against defendants "unless they are deemed to be former or current directors or officers" of the debtor. *Rahl*, 328 B.R. at 401; *see also Trenwick Am. Litig. Trust v. Ernst & Young, L.L.P.*, 906 A.2d 168, 190-91 (Del. Ch. 2006) (plaintiff litigation trustee lacked standing to pursue claims that were not "expressly assigned to the Litigation Trust"), *aff'd*, 931 A.2d 438 (Del. 2007).

The question in this case, therefore, is whether the Debtors' Plan assigned to the Litigation Trust the claims that it purports to assert in this action. It did not.

B. The Trustee's Claims Against the Defendants Are Neither "Assigned Preference Claims" nor "Non-Settling Defendant Claims," and Therefore the Trustee Lacks Standing to Bring Them.

A Chapter 11 plan is a contract. *See In re Victory Mkts., Inc.*, 221 B.R. 298, 303, 307 (B.A.P. 2d Cir. 1998). As with any contract, "the starting point for review of a plan is its plain language." *Id.* at 303.

Here, the "plain language" of the Plan is clear. Consistent with the Bankruptcy Code, the Plan specified that, except for those claims assigned to the Litigation Trust or "abandoned" to the Creditor Trust, "all property of each Debtor's estate, including all claims and causes of action . . . that arise prior to or after the [bankruptcy petition filing date], shall vest in the respective Reorganized Debtor . . . ." Plan § 11.1(a) (Winer Decl. Ex. C). And the Plan made equally clear that two, and only two, categories of claims were assigned to the Litigation Trust: "Assigned Preference Claims" and "Non-Settling Defendant Claims." *See id.* § 5.7(a) ("On or before the Effective Date, the Litigation Trust Agreement shall be executed, and the Non-Settling Defendant Claims and the Assigned Preference Claims shall be assigned to the Litigation Trust").[3] The claims that the Litigation Trust has filed in this lawsuit are neither.

[3] The agreement establishing the Litigation Trust is to the same effect. It specifies that "[p]ursuant to the Plan, as of the Effective Date . . . Debtors hereby transfer, assign and deliver to the Litigation Trust, without recourse, all of their respective rights, title and interests in and to the Contributed Claims . . . ." Litigation Trust Agreement § 2.2(a) (Winer Decl. Ex. D). The agreement defines "Contributed Claims" to mean "the Non-Settling Defendant Claims, the Assigned Preference Claims and all Causes of Action with respect thereto." *Id.* at 29.

1. <u>The Claims Are Not "Assigned Preference Claims."</u>

The Plan defines "Preference Claims" to mean "any and all claims of the Debtors' estates that could be brought under Section 547 of the Bankruptcy Code or in the alternative based upon the same underlying facts under Section 548 of the Bankruptcy Code," as well as "the right to recover on account of any such claim under Section 550 of the Bankruptcy Code." Plan at 20 (Winer Decl. Ex. C). The Plan, in turn, defines "Assigned Preference Claims" to be those Preference Claims other than any Non-Settling Defendant Claim or any Preference Claim that the Debtors release under the Plan or waive or settle. *Id.* at 4.

Thus, the Plan makes clear—both through its use of the word "Preference" and its reference to Section 547 of the Bankruptcy Code—that an Assigned Preference Claim must concern a transfer of the Debtors' property made "on or within 90 days before the date of the filing of the petition" or "between ninety days and one year before the date of the filing of the petition" if it was made to an insider. *See* 11 U.S.C. § 547(b)(4)(A), (B). Here, the payments of Merger Consideration that the Trustee seeks to avoid and recover were made on December 20, 2007, which was not only more than 90 days before the first of the Debtors filed for bankruptcy in January 2009, but also more than a year before that filing.[4] For this reason (among others),[5] the Litigation Trust's claims against the Defendants cannot be Assigned Preference Claims.

That the Trustee's claims against the Defendants are not Assigned Preference Claims is confirmed by a memorandum (the "Plan Supplement Memo" or the "Memo") that counsel for the Litigation Trust—then acting as counsel for the Committee, the Litigation Trust's predecessor in interest—sent to the Debtors' creditors shortly before Plan confirmation as part of the "Plan Supplement," "an integral part of the Plan" that was "incorporated" therein.[6] The Plan Supplement Memo described the Assigned Preference Claims as "preference claims," arising out of alleged "preferential transfers" that were "made by the Debtors within the 90 days prior to filing for bankruptcy." *Id.* at 2. Moreover, the Memo represented that "the maximum possible recovery on the Assigned Preference Claims is no more than $200 million," *id.*—a far cry from

[4] The extended one-year clawback period for preferential payments made to "insiders" would not apply in any event. The Litigation Trust Complaint does not allege that any of the Defendants were insiders of Lyondell or any of the other Debtors, and for good reason. The Defendants were largely Conduits, and there is no suggestion that even any of the Beneficial Owners—mere passive investors—were officers, directors, or held 20% or more of the stock in (or were otherwise in "control" of) Lyondell. *See* Committee Litigation Compl. ¶ 256 ("As of October 9, 2007, the record date for the special meeting of Lyondell's shareholders in connection with the Merger, there were 253,625,523 shares of Lyondell common stock outstanding, and more than 79% of those shares were widely held by shareholders holding less than 5% of the outstanding stock"), *Official Comm. of Unsecured Creditors v. Citibank, N.A.*, Adv. Pro. No. 09-01375 (Bankr. S.D.N.Y. July 22, 2009) [Docket No. 1]. Accordingly, neither the Defendants nor the Beneficial Owners were insiders of Lyondell or any of the other Debtors. 11 U.S.C. § 101(31).

[5] The Trustee also asserts that the payments of Merger Consideration to the Shareholders were in exchange for their shares of stock in Lyondell, not "for or on account of antecedent debt," as would have been required for the transfers to be avoidable as preferences. 11 U.S.C. § 547(b)(2).

[6] *See* Plan Supplement to Third Am. Joint Plan of Reorganization for LyondellBasell Debtors, Tab 6-A, *In re Lyondell Chem. Co.* (No. 09-10023) (filed Apr. 5, 2010) [Docket No. 4142] (Winer Decl. Ex. E); Plan at 20 (definition of "Plan Supplement"), § 13.16 (Winer Decl. Ex. C); *see also* Plan at 20 (defining "Plan" to include "exhibits and schedules annexed [t]hereto or associated [t]herewith (including the Plan Supplement)"). The Committee explained that the purpose of the Plan Supplement Memo was to "provide [the creditors] with information related to the claims to be pursued" by the Litigation Trust and the Creditor Trust, as well as to "recommend that [the creditors] vote to accept" the Plan. Memo at 1 (Winer Decl. Ex. E).

the "substantially in excess of $6 *billion*" the Trustee now claims to be entitled to recover in this lawsuit. Compl. at 2 n.2 (emphasis added). If the Assigned Preference Claims had included the claims subsequently asserted against the Defendants in the Litigation Trust Action, the Trustee and his counsel could not have described them as claims to avoid "preferential transfers," nor would they have estimated the "maximum possible recovery" on the claims as $200 million.

In short, the Plan, including the Plan Supplement incorporated therein, makes clear that the fraudulent transfer claims asserted by the Trustee in this Litigation Trust Action are not "Assigned Preference Claims."

2. The Claims Are Not "Non-Settling Defendant Claims."

The Plan also defines "Non-Settling Defendant Claims" in a way that does not encompass the fraudulent transfer claims asserted against the Defendants and other supposed Shareholders in this suit. "Non-Settling Defendant Claims" are "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 at 19 (Winer Decl. Ex. C). A "Non-Settling Defendant," in turn, is "any defendant in the Committee Litigation (including each of its direct and indirect parent companies, subsidiaries, Affiliates, members, partners and joint ventures, each of their respective predecessors, successors, general partners, and assigns, and all of each of their respective past and present employees, officers, directors and managers) other than Settling Defendant Releasees and Secured Lender Releasees." *Id.*

At the outset, the claims against the Defendants in this lawsuit do not arise from the "same transaction or occurrences" that are the subject of the Committee Litigation. The only claims that remain in the Committee Litigation are those against the Lyondell Directors and

Officers and the Blavatnik Parties. Although some of those claims seek to avoid payments made to those parties as fraudulent transfers, the "transaction or occurrences" at issue in those claims are, by definition, the payments made to the Lyondell Directors and Officers and the Blavatnik Parties, not the separate payments allegedly made to the Defendants, who were not insiders at Lyondell or Basell.[7] And, while the Committee Litigation also asserted other claims relating to the Merger, the Trustee recently settled one such claim against one of the Defendants—a fraudulent transfer claim—while purporting to bring and preserve its separate fraudulent transfer claims against the same Defendant in the Creditor Trust and Litigation Trust Actions, something that would have been legally impossible if the claim in the Committee Litigation arose out of the "same transaction or occurrences" as the claims in the Creditor Trust and Litigation Trust

[7] The Committee Litigation initially also contained a single claim for constructive fraudulent transfer against one alleged Shareholder, Barclays Global Investors, N.A. ("BGI"), which the Committee purported to sue both individually and as a "Class Representative" of a putative class of all Lyondell Shareholders that had received Merger Consideration "in respect of their beneficial ownership" of Lyondell stock. Committee Litigation Compl. ¶ 30, *Official Comm. of Unsecured Creditors v. Citibank, N.A.*, Adv. Pro. No. 09-1375 [Docket No. 1]. But, after confirmation of the Plan, the Litigation Trust, acting as the Committee's successor, dropped that claim. It then filed the now-operative amended complaint in the Committee Litigation, which asserts no claim at all against BGI.

Actions.[8] In short, the newly-asserted intentional and constructive fraudulent transfer claims in the Litigation Trust Action seeking to recover Merger Consideration from the Defendants do not arise out of the same "transaction or occurrences" as the claims asserted in the Committee Litigation, and therefore are not Non-Settling Defendant Claims.

But even if they did arise out of the same transaction or occurrences, the claims in the Litigation Trust Action would still not be "Non-Settling Defendant Claims" because the Defendants are not, and never were, "Non-Settling Defendants." As noted, under the express terms of the Plan, a "Non-Settling Defendant" is a "defendant in the Committee Litigation." With the exception of Deutsche Bank, as to which the claims asserted in the Litigation Trust Action are not Non-Settling Defendant Claims for other reasons (*see supra* note 8), the

[8] In the Committee Litigation, the fraudulent transfer claim against that Defendant—Deutsche Bank Securities Inc. ("Deutsche Bank")—related *not* to Deutsche Bank's alleged receipt of Merger Consideration (as do the claims in this lawsuit), but instead to fees paid to Deutsche Bank for its provision of advisory services. *See* Committee Litigation Compl. ¶¶ 201-02, *Official Comm. of Unsecured Creditors v. Citibank, N.A.*, Adv. Pro. No. 09-1375 [Docket No. 1]. If the claims against Deutsche Bank in the Committee Litigation and the Litigation Trust Action arose out of the "same transaction or occurrences," the Litigation Trust could not have brought two separate actions against Deutsche Bank with respect to the "same transaction or occurrences." *See Riel v. Morgan Stanley*, No. 06 Civ. 5801, 2009 WL 2431497, at *4 (S.D.N.Y. Aug. 6, 2009) (parties to an action "are barred from raising in a subsequent proceeding any claim they could have raised in the prior one, where all the claims arise from the same underlying transaction or series of transactions"). Nor, if the two sets of claims arose out of the "same transaction or occurrences," could the Litigation Trust now purport to maintain in the Litigation Trust Action a claim against Deutsche Bank to recover the Merger Consideration allegedly paid to Deutsche Bank, since it has settled the claim against Deutsche Bank in the Committee Litigation and given Deutsche Bank a subject-matter release. *See* So Ordered Stipulation of Dismissal with Prejudice in *Weisfelner v. Blavatnik*, Adv. Pro. No. 09-1375 (Bankr. S.D.N.Y. Mar. 23, 2011) [Docket No. 526] (dismissing with prejudice "any claims of the Trustee arising out of or relating to the claims against [Deutsche Bank] set forth in the Amended Complaint" in the Committee Litigation). Thus, the Litigation Trust cannot dispute that the claims asserted against Deutsche Bank in the Litigation Trust Action were not asserted, and do not arise from the "same transaction or occurrences" as alleged, in the Committee Litigation. Accordingly, the Litigation Trustee's claims against Deutsche Bank in this lawsuit are not Non-Settling Defendant Claims.

Defendants were not at the time of confirmation of the Plan, and indeed have never been, defendants in the Committee Litigation. Accordingly, the claims against them cannot constitute Non-Settling Defendant Claims.

It makes no difference that the original complaint in the Committee Litigation purported to assert a constructive fraudulent transfer claim against BGI as a representative of a putative class of all "persons who received Merger Consideration *in respect of their beneficial ownership*" of Lyondell stock. Committee Compl. ¶ 30 (emphasis added). As an initial matter, the Litigation Trust dropped that claim. *See supra* note 7 and *infra* note 9. Moreover, to the extent that the Defendants were mere Conduits, not Beneficial Owners, of the Lyondell Stock through whom the Merger Consideration passed as it went to the actual Beneficial Owners, the Defendants were not even part of the putative class of "beneficial owner[s]" in the Committee Litigation.

In any event, even if any of the Defendants had been Beneficial Owners of the Lyondell stock and hence had been part of the putative class, that class was never certified. The Plan defines a "Non-Settling Defendant" to be just that: a "*defendant*" named in the Committee Litigation and not a mere member of a putative, never-certified class. Plan at 19 (emphasis added) (Winer Decl. Ex. C). The law is clear that members of such a proposed class are not "parties" to, and therefore cannot be deemed "defendants" in, the lawsuit.[9]

[9] As for BGI itself, while it purportedly was sued in the Committee Litigation both individually and as the putative representative of the never-certified class, neither BGI nor any affiliate thereof appears (based on a review of the redacted version of the Litigation Trust Complaint) to be named as a Defendant in the Litigation Trust Action. In any event, as the Trustee has acknowledged, the Committee dropped its claim against BGI in the Committee Litigation. *See* Mem. of Law in Opp. to Defs.' Mot. to Dismiss the Compl. at 16 n.12 ("BGI was in fact dropped as a defendant" in the Committee Litigation), *Weisfelner v. Morgan Stanley & Co.*, Adv. Pro. No. 10-04609 (Bankr. S.D.N.Y. Mar. 25, 2011) [Docket No. 142]. Accordingly, BGI is also not a "Non-Settling Defendant" within the meaning of the Plan.

An alleged member of an uncertified plaintiff class, for example, lacks standing to appeal the dismissal of the complaint because it was not a party to the underlying action. *See Employers-Teamsters Local Nos. 175 & 505 Pension Trust Fund v. Anchor Cap. Advisors*, 498 F.3d 920, 923 (9th Cir. 2007) (concluding that appellants, who were purported members of a plaintiff class, lacked standing to appeal dismissal of putative class complaint "because the class was never certified," and therefore "Appellants were not parties to the district court action"); *Feathers v. Chevron USA, Inc.* 141 F.3d 264, 269 n.2 (6th Cir. 1998) (appellant, a purported member of a plaintiff class action litigated in the district court, "was not a party to th[at] case" because it "was disposed of on summary judgment before any class could be certified"). Likewise, "every court that has addressed th[e] issue" has concluded that a judge who is a putative member of an uncertified class need not disqualify herself under 28 U.S.C. § 455(b)(5)(i) as a "party to the proceeding." *MDCM Holdings, Inc. v. Credit Suisse First Boston Corp.*, 205 F. Supp. 2d 158, 161 (S.D.N.Y. 2002); *see also* Charles A. Wright, Federal Practice & Procedure § 3548 n.5 ("Members of a putative class are not 'parties' for purposes of 28 U.S.C. § 455(b)(5)").[10]

[10] At a recent status conference in the Litigation Trust and Creditor Trust Actions, the Court inquired about *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), and its progeny, which provide that, in some circumstances, the filing of a putative plaintiff class action tolls the statute of limitations for claims by members of the proposed class. *See* Transcript of Initial Pretrial Conferences at 45, *Weisfelner v. A Holmes & H Holmes*, Adv. Pro. No. 10-5525 (Bankr. S.D.N.Y. Mar. 8, 2011) [Docket No. 120] (Winer Decl. Ex. F). But whether or not *American Pipe* supports the tolling of the limitations period against members of a putative defendant class, the basis for the rule is *not* that members of a putative class are parties to the litigation. Indeed, if putative class members were in fact "plaintiffs" or "defendants," there would be no need to for the *American Pipe* rule. Rather, *American Pipe* recognized that "potential class members [of a proposed class that has not been certified] are mere passive beneficiaries of the action brought on their behalf." 414 U.S. at 552. But, for equitable and docket management reasons, the Court held that the commencement of a class action should suspend the limitations period "as to all asserted members of the class *who would have been parties*" had the class been certified. *Id.* at

Indeed, if the Defendants in the Litigation Trust Action truly had been defendants in the Committee Litigation (and not, at most, members of a putative, not-certified class), the Federal Rules would have required the Committee to serve each of them with a summons and a copy of the complaint in the Committee Litigation. *See* Fed. R. Civ. P. 4(a)(1) (providing that "[a] summons must: . . . be directed to the defendant," "state the time within which the defendant must appear and defend," and "notify the defendant that a failure to appear and defend will result in a default judgment against the defendant for the relief demanded in the complaint"); Fed. R. Bankr. P. 7004(a)(1) ("Rule 4(a) . . . F.R.Civ.P. applies in adversary proceedings."). The Committee never served a summons or copy of the complaint on any of the Defendants during the course of the Committee Litigation.

Counsel for the Trustee has recently admitted what the law makes clear. Although he purports to assert his claims in this lawsuit against "a class" of all Shareholders who "received Merger Consideration," Compl. ¶ 2, he 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[.]" Transcript of Initial Pretrial Conferences at 60, *Weisfelner v. A Holmes & H Holmes TTEE*, No. 10-5525 (Bankr. S.D.N.Y. Mar. 8, 2011) [Docket No. 120] (Winer Decl. Ex. F).

It is thus clear—indeed, admitted by the Trustee—that the Defendants were not parties to the Committee Litigation, and hence are not "Non-Settling Defendants," even if they were members of the putative class in that case. But, if there were any doubt at all, again, the Plan

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554 (emphasis added). Thus, *American Pipe* undermines, rather than supports, any suggestion that the Defendants and other supposed Shareholders in the never-certified class once proposed in the Committee Litigation were "defendants" in that action.

Supplement Memo that is "an integral part of the Plan," *see supra* note 6\h |6}, confirms this plain reading of the Plan. The Memo explained that the Litigation Trust:

> will pursue (i) Claims asserted, or which could have been asserted, in the Committee Litigation and that were not released in the Lender Litigation Settlement (including certain Claims against directors and officers of the Debtors and against Access Industries and certain of its affiliates) (the "Non-Settling Defendant Claims") and (ii) Certain Claims to recover preferential payments made to creditors prior to the bankruptcy filings (the "Assigned Preference Claims").

Memo at 1-2 (footnote omitted) (Winer Decl. Ex. E). The Memo went on to describe the Non-Settling Defendant Claims as claims against the Blavatnik Parties and the Lyondell Directors and Officers, including claims against the Blavatnik Parties for the "approximately $1.2 billion representing cash consideration paid in the Merger" to the Blavatnik Parties (as defined in the Memo, the so-called "Toe-Hold Transfers"). *Id.* at 3.[11] The Memo nowhere suggested that the Litigation Trust would pursue federal-law claims against the Defendants or any non-insider Shareholders or anyone else based on their alleged receipt of "cash consideration paid in the Merger." On the contrary, the Memo confirmed that the separate Creditor Trust would "pursue

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[11] The Memo thus specified that "[t]he Non-Settling Defendant Claims":

> include Claims against Access Industries and related entities including: (i) Claims for approximately $1.2 billion representing cash consideration paid in the Merger [to the Blavatnik Parties] . . . , (ii) a $300 million preference claim based on the repayment . . . of amounts drawn by one of the Debtors under a revolving line of credit . . . , (iii) a claim against Nell Limited for recovery of $125 million in purported advisory fees in connection with the Merger, and (iv) a breach of contract claim for failure to fund under the Access Revolver . . . . The Non-Settling Defendant Claims also include Claims against former directors and officers of Lyondell entities for recovery of approximately $270 million in Change of Control Payments associated with the Merger as well as claims for breach of fiduciary duty and mismanagement against former directors and officers of Lyondell Entities and of [LBI].

Id. at 3.

Claims of creditors of the Debtors arising under state law against the former shareholders of Lyondell Chemical Company on account of their receipt of cash consideration pursuant to the 2007 merger transaction involving certain of the Debtors (the 'Merger')," claims that the Memo defined as the "State Law Avoidance Claims." *Id.* at 2.

Moreover, the Plan Supplement Memo explained that the claims to be pursued by the Creditor Trust "involve a very large number of defendants, [and] will involve significant legal and logistical challenges, including the initial identification of the shareholders potentially liable." *Id.* at 3. "Accordingly," prosecution of the "[Creditor Trust] Claims can be expected to follow a different schedule than the claims to be pursued by the Litigation Trust." *Id.* That statement, contrasting the Creditor Trust's claims to the Litigation Trust's claims, would have made no sense if the Plan allowed the Litigation Trust also to pursue the same fraudulent transfer claims seeking the same relief against the same "very large number" of non-insider Shareholders that received Merger Consideration on a virtually identical complaint to that filed by the Creditor Trust.

Finally, at a February 2010 hearing to announce the settlement of the claims against the Lenders in the Committee Litigation (the "Settlement Hearing"), as well as at a status conference the next month, the Trustee (then acting as counsel for the Committee) informed this Court that the only "shareholder claims" were those arising under state, not federal, law and that they would be assigned to the Creditor Trust, not to the Litigation Trust. "There is the creditor trust," he explained, that is "the beneficiary, if you will, of the shareholder claims," and there is "the litigation trust, the beneficiary of all other claims and causes of action[.]" Transcript of Hr'g on Proposed Settlement at 19, *In re Lyondell Chem. Co.*, No. 09-10023 (Bankr. S.D.N.Y. Feb. 16, 2010) [Docket No. 5011] (Winer Decl. Ex. G). The "estate's claims and causes of action against the Lyondell Chemical shareholders," the Trustee elaborated, are "going to be abandoned by the debtors under its plan of reorganization, abandoned to those creditors that, but for the advent of bankruptcy, would have had the ability to pursue those claims . . . pursuant to state fraudulent conveyance law." *Id.* at 18. The "shareholder claims" would then "be returned back to creditors, in effect, or abandoned by the estate to those creditors [and] will find their way into a creditor trust." *Id.* By contrast, the Trustee explained, the "second distinct trust"—the Litigation Trust—will pursue "[t]he other litigation claims that were not settled" in the Committee Litigation, as well as "the estate's preference claims." *Id.*

Counsel for the Trustee told this Court the same thing only a month later. *See* Transcript of Status Conference at 41-42, *C.A. Baldwin v. Lyondell Chem. Co.*, Adv. Pro. No. 09-01504 (Bankr. S.D.N.Y. Mar. 11, 2010) [Docket No. 11] ("through the mechanism of abandonment, the claims against selling shareholders will be pursued as a matter of State law") (Winer Decl. Ex. H). Again, the Trustee could not have represented to the Court that "the shareholder claims" or "the claims against selling shareholders" were to be pursued only by the Creditor Trust if the Plan had provided for federal-law fraudulent transfer claims against Lyondell's Shareholders to be assigned to the Litigation Trust.

C. The History of the Committee Litigation, the Litigation Trust Action, and the Creditor Trust Action Also Demonstrates that the Claims Asserted in this Action Were Not Assigned to the Litigation Trust.

The Trustee's actions speak as loudly as his and the Plan's words. A few months after Plan confirmation, the Litigation Trustee—taking the place of the Committee—filed an amended complaint in the Committee Litigation. As contemplated by the Plan, and consistent with the Trustee's statements at the Settlement Hearing, the amended complaint asserted virtually the same claims against the same defendants (minus the Lenders, which had settled) as the initial complaint in the Committee Litigation, with a notable exception: the Litigation Trustee did not re-assert the claim against BGI or the putative class of Shareholders based on their alleged receipt of Merger Consideration. A few months later, however—again, as contemplated by the Plan and as the Trustee advised the Court he would do—the Trustee initiated the Creditor Trust Action on behalf of the Creditor Trust, by filing a complaint asserting two counts purportedly under state law against *only* the shareholders that allegedly received Merger Consideration. Just as the Trustee had advised in the Memo, this separate Creditor Trust Action "involve[s] a very large number of defendants" and is on a "different schedule"—indeed, limited discovery has just begun—from that for the claims to be pursued by the Litigation Trust in the Committee Litigation (which is currently scheduled for trial in October of this year).

This history, as well as the plain language of the Plan and the Plan Supplement, make perfect sense in context. In April 2010, when this Court confirmed the Plan, the only fraudulent transfer claims pending in the Committee Litigation against any party—the Lenders, the Lyondell Directors and Officers, the Blavatnik Parties, BGI, and service providers that were paid fees in connection with the Merger—asserted constructive, not intentional, fraud. Committee Litigation Compl. Counts 1-5, 16, 20-21.[12] Because the Committee evidently did not believe at the time that it could, consistent with Rule 11 of the Federal Rules of Civil Procedure and Rule 7011 of the Federal Rules of Bankruptcy Procedure, assert an intentional fraudulent transfer claim against the Defendants relating to the Merger, it did not seek to have any possible claims under Section 548 against the Defendants transferred to the Litigation Trust. A constructive

[12] It was only later, after the Trustee supposedly obtained discovery in the Committee Litigation from the Lyondell Directors and Officers and the Blavatnik Parties that the Trust first asserted any intentional fraudulent transfer claims, amending its complaint against those parties in that action to allege that they had received intentional fraudulent transfers. *See* Trustee's Opposition to Motion to Dismiss at 3 n.3 in *Weisfelner v. Blavatnik*, Adv. Pro. No. 09-1375 (Bankr. S.D.N.Y. Nov. 23, 2010) [Docket No. 458] ("Significant discovery and analysis of features of the fraudulent scheme . . . occurred only after the filing of the initial complaint in this action").

fraudulent transfer claim under Section 548 would have, if anything, been even more clearly subject to the safe harbor under Section 546(e) than the state-law claims that the Creditor Trust has sought to assert in the Trustee's attempted "work around" Section 546. And the Committee plainly did not believe there were any viable intentional fraudulent transfer claims under Section 548(a)(1)(A) that would be outside the Section 546(e) safe harbor; indeed, there had never been any mention, in the Plan or otherwise, of any possible actual fraudulent transfer claim against any Shareholder to recover the Merger Consideration. So, the Plan did not purport to assign any federal-law fraudulent transfer claims—intentional or constructive—to the Litigation Trust.

It was only in December 2010, after Defendants informed the Trustee that they intended to move to dismiss the Creditor Trust Action on the ground (among others) that Section 546(e) of the Bankruptcy Code preempted the Creditor Trust's purported state-law fraudulent transfer claims,[13] that the Trustee filed this additional lawsuit, purporting to assert intentional and constructive fraudulent transfer claims under federal law. But, by then, the Plan had been confirmed and gone effective, and it provided in no uncertain terms that no claims against the Defendants to avoid and recover any Merger Consideration that may have been paid to them were assigned to the Litigation Trust.

The Trustee cannot at this late date unscramble that egg. *See* 11 U.S.C. § 1127(b) (a confirmed plan cannot be modified after its "substantial consummation"). The Litigation Trust lacks standing under the Plan to assert the fraudulent transfer claims in this action against the Defendants. The claims should be dismissed.

[13] *See* E-mail from Philip D. Anker to Sigmund S. Wissner-Gross, dated Dec. 8, 2010 (Winer Decl. Ex. I).

II. SECTION 546(e) OF THE BANKRUPTCY CODE BARS THE TRUSTEE'S CONSTRUCTIVE FRAUDULENT TRANSFER CLAIM.

As described in the Creditor Trust Dismissal Brief, Section 546(e) of the Bankruptcy Code bars a trustee from avoiding "settlement payments" and "transfers in connection with a securities contract" that are made by or to a financial institution, with a single exception for intentional fraudulent transfer claims brought under Section 548(a)(1)(A) of the Code. Dismissal Br. at 15-35 (Winer Decl. Ex. B). In the Creditor Trust Action, the Trustee attempts to circumvent that bar by purporting to bring state-law fraudulent transfer claims, supposedly not as a representative of the Debtors' bankruptcy estates, but instead as the putative successor to the Debtors' creditors. For the reasons set forth in the Creditor Trust Dismissal Brief, that scheme to end-run Congress' clear mandate in Section 546(e) fails as a matter of law, and the claims in that case should be dismissed.

But, in any event, in this case, the Trustee is unquestionably acting as a representative of the Debtors' bankruptcy estates, asserting claims under Section 548 of the Bankruptcy Code. As described in the Creditor Trust Dismissal Brief (18-25), the payments the Trustee seeks to avoid and recover are prototypical settlement payments made in connection with a securities contract—payments made in exchange for the Shareholders' stock in Lyondell pursuant to the Merger—and those payments were made both by and to financial institutions. As the Trustee has acknowledged in the Creditor Trust Action, "courts in this District have issued decisions" in the last two years "that adopt broad readings of the term 'settlement payments,'" dismissing constructive fraudulent transfer claims pursuant to Section 546(e). Mem. of Law in Opp. to Defs.' Mot. to Dismiss the Compl. at 45 n.39, *Weisfelner v. Morgan Stanley & Co.*, Adv. Pro. No. 10-04609 (Bankr. S.D.N.Y. Mar. 26, 2011) [Docket No. 142] (Winer Decl. Ex. J).

Accordingly, the Trustee's constructive fraudulent transfer claim brought under Section 548(a)(1)(B) here (Count 2) should likewise be dismissed.

III. THE TRUSTEE CANNOT RECOVER THE TRANSFERRED FUNDS FROM THE DEFENDANTS BECAUSE THOSE FUNDS WERE NOT PROPERTY OF THE DEBTORS AVAILABLE TO SATISFY THEIR CREDITORS' CLAIMS.

The funds that the Trustee seeks to recover in this lawsuit are the same sums, relating to the same transfers of Merger Consideration, that he seeks to recover in the Creditor Trust Action. Those funds, however, were not the property of any of the Debtors, but instead merely passed through the Debtors on their way from the Lenders to the Beneficial Owners of Lyondell stock. The Debtors' creditors never could have looked to those funds for payment of their debts; indeed, the monies were funded by the Lenders into an escrow account with the restriction that the funds could be used only to complete the Merger, not to pay the Debtors' creditors. And, to the extent that the creditors of any of the Debtors allegedly were harmed by such Debtor's incurrence of loan obligations and grant of liens to secure those obligations, the Debtors' estates have already sued the Lenders that obtained the benefit of those obligations and liens, and settled with them. Thus, for the reasons set forth in the Creditor Trust Brief (Winer Decl. Ex. B at 35-42), the Trustee's claims in this lawsuit should also be dismissed.

IV. THE TRUSTEE CANNOT RECOVER FROM DEFENDANTS THAT WERE MERE CONDUITS, NOT THE BENEFICIAL OWNERS OF THE LYONDELL STOCK.

An allegedly fraudulent transfer cannot be recovered from a defendant that was a mere conduit in the transfer. The Trustee, in fact, appears to acknowledge this settled principle of law, as he has advised the Court of his intention to dismiss both the Litigation Trust Action and the Creditor Trust Action (albeit without prejudice) as against Defendants who were "pure conduit[s]." Mar. 8, 2011 Hr'g Tr. at 16 (Winer Decl. Ex. F); *see also* Mem. of Law in Opp. to Defs.' Mot. to Dismiss the Compl. at 3, *Weisfelner v. Morgan Stanley & Co.* (Winer Decl. Ex. J) ("the Creditor Trustee has offered to dismiss claims asserted against any true 'mere conduit'"). Like the Creditor Trust Complaint, the Litigation Trust Complaint contains no factual allegations demonstrating that the Defendants were Beneficial Owners of the Lyondell stock and, indeed, admits the opposite as to many of the Defendants. Compl. ¶¶ 62-65. Thus, for the reasons set forth in the Creditor Trust Dismissal Brief (Winer Decl. Ex. B at 42-44), the Trustee's claims in this lawsuit should be dismissed insofar as the Defendants were Conduits, not Beneficial Owners of the Lyondell stock, and simply passed on to the actual Beneficial Owners the payments made for that stock that the Trustee now seeks to recover.

V. THE TRUSTEE CANNOT RECOVER ON BEHALF OF THE LENDERS.

An allegedly fraudulent transfer cannot be avoided for the benefit of creditors who authorized or ratified the transfer at issue. *See, e.g., In re Best Prods. Co.*, 168 B.R. 35, 57 (Bankr. S.D.N.Y. 1994) ("A fraudulent transfer . . . can be ratified by a creditor who is then estopped from seeking its avoidance."), *aff'd*, 68 F.3d 26 (2d Cir. 1995). Here, the payments of the Merger Consideration were financed by Lenders that—on the Trustee's own allegations—provided the funds knowing, indeed intending, that the funds would be transferred to Lyondell's Shareholders in exchange for their stock. Those Lenders hold claims totaling more than $10 billion and, as with the Creditor Trust, are beneficiaries of the Litigation Trust on whose behalf the Trustee seeks to avoid the transfers of Merger Consideration. *See* Plan § 5.7(b) (Winer Decl. Ex. C). Thus, for the reasons set forth in the Creditor Trust Dismissal Brief (Winer Decl. Ex. B at 44-49), the Trustee cannot recover as assignee and on behalf of the Lenders.

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

Congress could not have intended, when it enacted the Section 546(e) "safe harbor," that it would not provide a safe harbor from suit at all—that a trustee could circumvent Section

546(e) merely by parroting the language of the statute and alleging in conclusory terms that the transfers at issue were made "with actual intent to hinder, delay or defraud" creditors, 11 U.S.C. § 548(a)(1)(A), and hence were intentional fraudulent transfers not subject to Section 546(e). As described in the Creditor Trust Dismissal Brief (Winer Decl. Ex. B at 49-59), the Trustee has failed to allege facts sufficient under Rule 8 of the Federal Rules of Civil Procedure, let alone under the applicable, more-demanding standard of Rule 9(b), that any Debtor made the payments with fraudulent intent. This is especially so because the Merger documents incorporated into the Complaint make clear that if any Debtor (rather than the Lenders) can be deemed to have made the payments, that Debtor was Basell (or an affiliate thereof), not Lyondell. The Litigation Trust Complaint, like the complaint in the Creditor Trust Action, contains no particularized allegations that Basell acted with fraudulent intent, and any such suggestion would be implausible since Basell agreed to become jointly and severally liable on billions of dollars in loans from the Lenders, something no rational actor would do if it knew and intended that the Merger would fail, Basell's creditors would not be paid, Basell's investment in Lyondell would be wiped out, and Basell would be forced into bankruptcy.

CONCLUSION

For the foregoing reasons, the complaint should be dismissed with prejudice.

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