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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) **REPLY MEMORANDUM IN FURTHER SUPPORT OF DEFENDANTS' MOTION TO DISMISS**

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PRELIMINARY STATEMENT

The only claims against former Lyondell shareholders that were assigned under the Debtors' Plan to any trust for post-confirmation prosecution are the state-law avoidance claims that were assigned to the Creditor Trust.[1] The federal-law claims, under Section 548 of the Bankruptcy Code, subsequently asserted against former shareholders in this lawsuit were not assigned to the Litigation Trust. This is evident from the plain words of the Plan.

The state-law fraudulent transfer claims to be pursued by the *Creditor Trust* are identified in the Plan as claims "against former shareholders of Lyondell." The "Non-Settling Defendant Claims" to be pursued by the *Litigation Trust* are, by contrast, defined only as claims against a *defendant* in the Committee Litigation that were pending or that arose out of the same transaction at issue in that action. At the time of Plan confirmation, the former shareholders were not *defendants* in the Committee Litigation. The Litigation Trust therefore lacks standing to bring these claims.

Substituting rhetoric for analysis, the Trustee contends that it is "incomprehensible" and "utterly ridiculous" to suggest that Section 548 claims against former Lyondell shareholders were not assigned to the Litigation Trust. Opp. at 1, 2. In fact, this makes perfect sense. When the Litigation Trust was created, the Official Committee of Unsecured Creditors did not believe there was an *intentional* fraudulent transfer claim to bring. The Court recently remarked that "the great bulk of LBO cases are constructive fraudulent conveyance cases,"[2] and the Committee

[1] Capitalized terms not otherwise defined herein shall have their respective meanings as set forth in the Memorandum of Law in Support of Defendants' Motion to Dismiss ("Opening Brief" or "Defs.' Op. Br."), available at Docket No. 163.

[2] Transcript of Hr'g on Motions to Dismiss at 88:20-24, *Weisfelner v. Morgan Stanley & Co., Inc.*, Adv. Pro. No. 10-04609 (Bankr. S.D.N.Y. May 12, 2011) [Docket No. 287].

Litigation—the Committee's then-pending lawsuit against the former Lyondell Directors and Officers, the Blavatnik Parties, and others—was just such a case; it asserted *only* constructive fraud claims. The Trustee also knew at the time that a constructive fraudulent transfer claim against the former shareholders of Lyondell under Section 548(a)(1)(B) would be barred by Section 546(e)'s safe harbor for both settlement payments and payments made as part of a securities contract. It was for this reason, not "administrative convenience,"[3] that the Committee insisted that the Plan provide for the abandonment of the Debtors' state-law fraudulent transfer claims and for the Debtors' creditors then to assign those claims to the Creditor Trust. The Committee's obvious goal was to try to work around Section 546(e) by creating a "Creditor Trust" to bring state-law avoidance claims that are supposedly immune from Section 546(e)'s safe harbor.

With no intentional fraudulent transfer claim to bring under Section 548(a)(1)(A), and with any claim under Section 548(a)(1)(B) barred by Section 546(e), the Committee had no reason to demand that Section 548 claims against former shareholders be assigned to the Litigation Trust. This was a deliberate, not inadvertent, omission. Now that the Trustee has supposedly uncovered evidence that (he asserts) supports an intentional fraudulent transfer claim, and now that he realizes that his Creditor Trust claims are at risk of dismissal as preempted by the Bankruptcy Code, the Trustee may wish that the Plan had assigned Section 548 claims to the Litigation Trust. But the Plan simply does not so provide. For this reason, as well as for the

[3] *Id.* at 59:5-11 (statement by counsel for the Trustee). The cause of "administrative convenience" is hardly served by the creation of two separate trusts that are prosecuting two separate lawsuits seeking to recover the same Merger Consideration from the same former shareholders of Lyondell on behalf of the same beneficiaries.

reasons set forth in the Creditor Trust Dismissal Brief and Defendants' reply brief in the Creditor Trust Action (the "Creditor Trust Reply Brief"), the claims should be dismissed.

ARGUMENT

I. THE TRUSTEE LACKS STANDING TO BRING THESE CLAIMS.

A. The Plan Did Not Assign Section 548 Claims Against Former Shareholders to the Litigation Trust.

1. The plain words of the Plan make this clear.

The Trustee devotes nearly 40 pages of his Opposition Brief trying to show that the Plan "unambiguously" (Opp. at 15) assigned Section 548 claims to the Litigation Trust. The sheer length to which the Trustee needs to go to try to establish what he maintains is the "plain meaning" (*id.* at 24) of the Plan evidences the weakness of his argument.

By its terms, the Plan assigned to the Litigation Trust two, and only two, categories of claims: "Assigned Preference Claims" and "Non-Settling Defendant Claims." Plan § 5.7(a) (Winer Decl. Ex. C). The Trustee does not even contend that the Section 548 claims are Assigned Preference Claims. And his contention that they are Non-Settling Defendant Claims is at war with the actual words of the Plan.

The Plan defines Non-Settling Defendant Claims 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 . . . ." Plan at 19. In turn, the Plan defines Non-Settling Defendant as "any defendant in the Committee Litigation . . . ." *Id.* The former Lyondell shareholders against whom the Trustee has brought the Litigation Trust Action were *not* "defendant[s] in the Committee Litigation." None had been named or served with process. And, while the Committee had initially filed the Committee Litigation as a putative defendant class action, with

the proposed class consisting of all former Lyondell shareholders that had received Merger Consideration, the Committee abandoned that claim. It is well established that a member of a putative, non-certified class is *not* a plaintiff or defendant in the action. *See* Defs.' Op. Br. at 12-14. The few cases cited by the Trustee are not to the contrary.[4] Just the opposite, they recognize this bedrock principle of law.[5]

Faced with all of this, the Trustee is left to argue that the term "defendant" has an entirely different—indeed, opposite—meaning under the Plan as under the law. *See* Opp. at 24 ("principles of contract construction do not require, or even permit, the Plan's assignment provisions to be interpreted in reliance on" legal distinctions between parties and non-parties).

That argument makes no sense. The Plan does not define the term "defendant" or otherwise suggest that it has some unique meaning in the Plan contrary to its common usage and understanding under the law. Accordingly, the term "defendant" as used in the Plan must be construed in accordance—not in conflict—with the law. As the Supreme Court has stated, "[l]aws which subsist at the time and place of the making of a contract . . . form a part of it, as fully as if they had been expressly referred to or incorporated in its terms." *Norfolk & W. Ry. Co. v. American Train Dispatchers Ass'n*, 499 U.S. 117, 130 (1991) (citation omitted). The law

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[4] As noted in Defendants' Opening Brief (at 13 n.10), the Supreme Court in *American Pipe* held that, in some circumstances, the filing of a putative class action tolls the statute of limitations period as to putative class members who were *not* but "who *would have been* parties in the litigation" had the class been certified. *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 552 (1974) (emphasis added); *see also Appleton Elec. Co. v. Graves Truck Line, Inc.*, 635 F.2d 603, 610 (7th Cir. 1980) (cited in Opp. at 26-27 n.18) (concluding, not that unnamed members of a putative class are actual parties to the case, but rather that failure to toll limitations period against unnamed, putative defendant class members "would have a potentially devastating effect on the federal courts" due to the likely filing of a "staggering number" of protective suits).

[5] *See* Opp. at 26-27 n.18 (*citing Federman v. Artzt*, 339 F. App'x 31, 33 (2d Cir. 2009) (unnamed class members were not "a party to . . . underlying class actions for purposes of Rule 60(b)"); *In re Oxford Health Plans, Inc. Sec. Litig.*, 244 F.Supp.2d 247, 251 (S.D.N.Y. 2003) ("Absent class members . . . are not parties to the lawsuit.")).

of New York, which governs the construction of the Plan, is to the same effect. *See Ronnen v. Ajax Elec. Motor Corp.*, 671 N.E.2d 534, 536 (N.Y. 1996) ("it is presumed that the parties [to a contract] had [existing] law in contemplation when the contract was made and the contract will be construed in the light of such law"). This basic rule of contract construction has even greater force here where the term of art to be construed—"defendant"—refers to parties in a *lawsuit* and, hence, cannot, in the absence of an express definition in the Plan to the contrary, be interpreted inconsistently with its well-established meaning in the law.

The Trustee's other principal argument is, from his standpoint, at best irrelevant and at worst harmful. The Trustee contends that the Plan contemplates that the former shareholders were defendants in the Committee Litigation because a *different* term of the Plan—the definition of Abandoned Claims—specifically refers to claims against the "former shareholders of Lyondell." Opp. at 25-26 (citing Plan at 2). That language undercuts, rather than supports, the Trustee's position.

Abandoned Claims are the *state-law* claims that were assigned to the *Creditor Trust*, not any federal-law (or other) claims to be assigned to the Litigation Trust. Plan at 2. Indeed, the reference to Abandoned Claims within the definition of Non-Settling Defendant Claims—the claims assigned to the Litigation Trust—*excludes* the abandoned claims against the former shareholders of Lyondell from that definition. *See* Plan at 19 (defining Non-Settling Defendant Claims to be claims "other than Abandoned Claims . . ."). Thus, the Trustee has it exactly backwards when he contends that the reference to Abandoned Claims within the definition of Non-Settling Defendant Claims supports the notion that the Non-Settling Defendant Claims include claims against former shareholders of Lyondell.

The disparate inclusion and exclusion of the phrase "against former shareholders of Lyondell" in the definitions of Abandoned Claims and Non-Settling Defendant Claims demonstrates that, where the Plan intends to encompass potential claims against the former shareholders of Lyondell, it, not surprisingly, describes those claims as claims "against former shareholders of Lyondell," not as claims "against one or more Non-Settling Defendants." If the former shareholders of Lyondell were considered defendants in the Committee Litigation, then the Abandoned Claims would have been defined as state-law claims "against Non-Settling Defendants." Instead, the Plan defined Abandoned Claims as state-law claims "against former shareholders of Lyondell." The Plan thus distinguishes between, rather than treats as the same, "Non-Settling Defendants" and "former shareholders."

Indeed, the Plan uses the phrase "against former shareholders of Lyondell" twice, and in both instances it does so to describe the *state-law* claims to be pursued by the *Creditor* Trust, not to describe federal-law (or any other) claims to be pursued by the Litigation Trust. First, as noted, it defines Abandoned Claims as state-law claims that could otherwise be asserted by the Debtors' estates, pursuant to Section 544 of the Bankruptcy Code, "against former shareholders of Lyondell Chemical . . . " and then provides for such Abandoned Claims to be abandoned to the Debtors' creditors. Plan at 2, § 5.8(b). Second, it defines State Law Avoidance Claims as claims under state law "against former shareholders of Lyondell Chemical and their respective successors and assigns (based on the receipt by any such Persons of Merger Consideration[)]" and then provides for such State Law Avoidance Claims to be contributed to the Creditor Trust, which "shall be authorized to prosecute" them. *Id.* at 25, § 5.8(b). The Plan does not use that

same language—"against former shareholders of Lyondell"—to describe any of the claims assigned to the Litigation Trust.[6]

Given all of this, the Trustee's tortured reading of the Plan cannot be credited. As the Trustee acknowledges, in interpreting a provision in a contract such as the Plan, the contract "must be read as a whole," with "every part interpreted with reference to the whole." Opp. at 21 (quoting *Flores v. American Seafoods Co.*, 335 F.3d 904, 910 (9th Cir. 2003)). Language that appears in one place in a contract "should be read in common with" language that appears elsewhere in the contract. *Alan, Sean & Koule, Inv. v. SV/CORSTA V*, 286 F. Supp. 2d 1367, 1378 n.10 (S.D. Ga. 2003) (citation omitted). Where, for example, several provisions in a contract use a particular term, it is presumed that the same term will be used to describe the same thing elsewhere in the agreement; if instead a different term is used elsewhere, it is presumed to have a different meaning. *See Harco Nat'l Ins. Co. v. Arch Specialty Ins. Co.*, No. 06 Civ. 2928, 2008 WL 1699755, at *8-9 (S.D.N.Y. Apr. 9, 2008) (rejecting argument that "automobile" in coverage provision was limited to passenger vehicles where contract elsewhere uses the descriptive term "passenger vehicle automobiles"), *aff'd*, 328 F. App'x 678 (2d Cir. 2009); *see*

[6] In this regard, the Trustee ignores the obvious when he contends that "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." Opp. at 27 n.18. It is not at all unclear. The Plan could have simply added, for example, the same language that is used in the course of defining the State Law Avoidance Claims that were assigned to the Creditor Trust. Thus, it could have changed the defined term from "Non-Settling Defendant Claims" to "Non-Settling Defendant and Former Shareholder Claims" and defined that term as follows (with the added language underlined):

> "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 or against the former shareholders of Lyondell Chemical, to the extent such claims and causes of action are not released pursuant to the Plan."

also SV/CORSTA V, 286. F. Supp. 2d at 1378 n.10 (concluding that "[h]ad the parties intended 'completion of the work' to refer to the time of invoicing, the parties would have used the same language ['presentment of invoice' that is] used later in the contract").[7] The Trustee's proposed interpretation of the Plan disregards these fundamental rules of contract interpretation.

In short, that the Section 548 claims are not Non-Settling Defendant Claims is evident not merely from the words that *were* used to define those claims—claims against a "defendant" in the Committee Litigation—but also from the words that *were not* used—claims against "former shareholders of Lyondell."

2. The "circumstances surrounding the transaction" so confirm.

All of this makes sense in context. As the Trustee acknowledges, in construing the Plan's assignment provisions, the Court "should consider the circumstances surrounding the transaction as well as the actual language of the contract." Opp. at 22 (citing *Subaru Distrib. Corp. v. Subaru of Am., Inc.*, 425 F.3d 119, 124 (2d Cir. 2005)).[8] Under the circumstances that existed at the time of Plan confirmation, it is understandable that the Committee would not have pressed for the Plan to assign Section 548 claims against the former shareholders of Lyondell to the Litigation Trust.

[7] These principles of contract interpretation parallel a basic rule of statutory construction: "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion and exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (citation omitted); *see also Hartford Underwriters Ins. Co. v. Planters Bank, N.A.*, 530 U.S. 1, 7 (2000).

[8] This acknowledgement by the Trustee of the law of this Circuit shows why he cannot sweep under the rug as "extrinsic evidence" not to be considered on a motion to dismiss (Opp. at 34) his own representations to this Court regarding the Plan, made when the Court was considering confirmation. *See infra* note 9.

When the Plan was confirmed, the Committee did not think there was an intentional fraudulent transfer claim to bring. The then-pending Committee Litigation had asserted only constructive, not intentional, fraudulent transfer claims. At the hearing on settlement of the Committee's claims against the Lenders—which occurred shortly before Plan confirmation, and during which the Trustee (acting as counsel for the Committee) described the planned abandonment of the Debtors' Section 544 claims so that state-law fraudulent transfer claims against the former shareholders could be pursued by the Creditor Trust—there was again no mention of any federal-law intentional fraudulent transfer claims to be pursued by the Debtors' estates (or their successor-in-interest, the Litigation Trust). *See* Transcript of Settlement Hearing (Winer Decl. Ex. G). Moreover, the Committee knew that any constructive fraudulent transfer claims against the former shareholders under Section 548 of the Bankruptcy Code would be subject to the safe harbor of Section 546(e).

Accordingly, there was no reason at the time to try to preserve any claims under the Bankruptcy Code—whether for intentional or constructive fraudulent transfers—against the former Lyondell shareholders. Instead, as a "means to maximize creditor recovery" (Opp. at 2), the Plan provided for the Debtors to abandon their state-law fraudulent transfer claims and for those claims to be transferred to a Creditor Trust, supposedly free and clear of Section 546(e).

The Plan Supplement Memo—which became part of the Plan—so confirms. It states that the Creditor Trust will "pursue 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." Plan Supplement Memo at 2 (Winer Decl. Ex. E). In contrast, it states that the Litigation Trust will pursue the "Non-Settling Defendant Claims" as against the Blavatnik Parties and the Lyondell Directors and Officers. *Id.*

at 1-2. It contains no suggestion that the Litigation Trust will have any right to pursue, let alone will pursue, Section 548 claims against the former Lyondell shareholders.[9]

The Trustee's response is unavailing. The Trustee suggests that the Litigation Trust *must* have been assigned the Section 548 claims against shareholders because the Committee would not have intended for such claims to be retained by the reorganized Debtors. *See, e.g.*, Opp. at 2 ("it is incomprehensible" 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"); *id.* at 23 ("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"). This is a red herring. At the time the Plan was confirmed, the Committee did not think that any Section 548 claims existed, and thus it did not contemplate that any such claims would be pursued by the Litigation Trust, the reorganized Debtors, or anyone else.

Whether the Trustee wishes, with the benefit of hindsight, that Section 548 claims had been assigned to the Litigation Trust, or whether it would have been wise for such claims to have been assigned to the Litigation Trust, is irrelevant. *See First Nat'l Bank, Abilene Tex. v. American States Ins. Co.*, 134 F.3d 382. 1998 WL 30246, at *3 (10th Cir. 1998) (unpublished table decision) ("Whether it would have been wise" for a provision to be included in a contract "is irrelevant to the task" of interpreting the contract; "[t]he function of the court is to enforce an

[9] These provisions are consistent with the Trustee's contemporaneous statements, when he was counsel for the Committee, about the creation of the separate Litigation and Creditor Trusts. "[T]he estate's claims and causes of action against the Lyondell Chemical shareholders"—what the Plan defines as the Abandoned Claims—are "abandoned by the debtors under its plan of reorganization." Transcript of Settlement Hearing at 18:5-9 (Winer Decl. Ex. G). The claims "abandoned by the estate to th[e] creditors," the Trustee explained, "will find their way into a creditor trust." *Id.* at 18:15-18. "The other litigation claims that were not settled"—what the Plan defines as the Non-Settling Defendant Claims—"are going into a second distinct trust referred to as the litigation or plan trust." *Id.* at 18:19-24.

unambiguous contract as made, not to make another contract"). The claims were not assigned, and therefore the Trustee lacks standing to bring them.

B. The Plan Is Binding on the Trustee and Enforceable in a Suit Against Defendants.

With a Plan that fails to assign any Section 548 claims against the former shareholders of Lyondell to the Litigation Trust, the Trustee is left to argue that Defendants cannot enforce the Plan because it is a contract to which they supposedly are not parties. *See* Opp. at 14 ("The Plan is a contract between the Reorganized Debtors and their creditors—a contract to which Defendants are neither parties nor the intended beneficiaries"). This argument has no merit, whether as a matter of bankruptcy law or otherwise.

Under the Bankruptcy Code, "the provisions of a confirmed plan bind . . . any entity acquiring property under the plan" such as the Litigation Trust. 11 U.S.C. § 1141(a). Nowhere does the Code state that a plan's provisions are binding only in certain circumstances, or that such binding provisions are not enforceable except by debtors or creditors. The courts have interpreted the Code accordingly and, as a result, have dismissed claims for lack of standing where trusts created under confirmed plans have attempted to assert, as against third parties, claims that were not assigned to them under those plans.

In *Rahl v. Bande*, for example, the trustee of the "Flag Litigation Trust," created in connection with the reorganization plan of Flag Telecom, brought suit against, among others, Flag's former auditor Arthur Andersen. 328 B.R. 387, 399-400 (S.D.N.Y. 2005). The trustee alleged that Arthur Andersen had breached fiduciary duties to Flag by, among other things, "deepening Flag's insolvency" and "issuing false financial statements." *Id.* at 398. Arthur Andersen and other non-insider defendants moved to dismiss for lack of standing, arguing that "the plain and unambiguous language of the [Flag] Reorganization Plan and [Flag Litigation]

Trust Agreement demonstrate that the Trustee was assigned all potential claims only against Flag's current or former directors and officers," but in no way "confer[s] standing to the Trustee to bring claims against third parties[.]" *Id.* at 400.[10]

In addressing the non-insiders' motion to dismiss, the court began by observing that "[i]t is undisputed that plaintiff's authority to maintain the present action derives from the Reorganization Plan and the Litigation Trust Agreement." *Id.* The court did not suggest that the terms of the Plan or the Litigation Trust Agreement were unenforceable by Arthur Andersen or the other non-insider defendants because they had not participated in drafting those documents or because they were neither debtors nor creditors. Instead, the court concluded that, because the Plan "[b]y no stretch of its meaning" assigned "the Trustee the right, title and interest to claims and causes of action against third parties," the claims against Arthur Andersen and the other non-insider defendants should be dismissed for lack of standing. *Id.* at 400-01.[11] Other cases are in accord. *See, e.g.*, *Mukamal v. Bakes*, 383 B.R. 798, 810 (S.D. Fla. 2007) (granting auditor's motion to dismiss claims for lack of standing where bankruptcy plan assigned only claims "against Debtors or their current or former directors and officers" to plaintiff litigation trust); *Zahn v. Yucaipa Capital Fund (In re Almac's, Inc.*), 202 B.R. 648, 652, 656 (D.R.I. 1996) (dismissing trustee's breach of fiduciary duty claim against corporation's directors for lack of standing because plan assigned only "avoidance claims" to the plaintiff trust).

[10] The Flag Reorganization Plan provided, in relevant part, that "the Debtors shall transfer and assign any choses in action then in existence possessed by the Debtors against any of their officer and directors, together with all insurance coverage applicable . . ., to the Litigation Trust[.]" 328 B.R. at 400 n.6.

[11] The Trustee's only response to *Rahl* is to say that it "does not support [Defendants'] position," because "the Plan [in *Rahl*] unambiguously did not assign the right to bring claims" against Andersen and the other non-insider defendants. Opp. 16 n.13. Here, too, the Plan "unambiguously did not assign" the claims at issue to the Litigation Trust, and therefore the Trustee, like the trustee in *Rahl*, lacks standing.

This same rule applies even outside of bankruptcy. Where a plaintiff asserts claims that purportedly were assigned to him, the defendant is entitled to argue that the claims were not so assigned and that, as a result, the lawsuit should be dismissed for lack of standing. *See, e.g.*, *W.R. Huff Asset Mgmt. Co., LLC v. Deloitte & Touche LLP*, 549 F.3d 100, 109 (2d Cir. 2008) (concluding that investment advisor lacked standing to assert claims on behalf of its clients because the clients "have not transferred ownership of, or title to, their claims"); *Advanced Magnetics, Inc. v. Bayfront Partners, Inc.*, 106 F.3d 11, 18 (2d Cir. 1997) (affirming dismissal of claims brought by corporation on behalf of shareholders where agreements purportedly assigning shareholders' claims to corporation "were insufficient to transfer to [the corporation] ownership of the claims"); *see also Picture Patents, LLC v. Aeropostale, Inc.*, No. 07 Civ. 5567, 2011 WL 1496347, at *8 (S.D.N.Y. Apr. 18, 2011) (granting alleged patent infringers' motions to dismiss for lack of standing where purported assignment of patent to plaintiff was invalid). Indeed, because a plaintiff's standing is a threshold question that affects a court's subject matter jurisdiction, the court may raise the issue *sua sponte*. *See, e.g.*, *In re Teligent, Inc.*, No. 01-12974, 2005 WL 267956, at *8 (Bankr. S.D.N.Y. Feb. 3, 2005).

In interpreting the Plan's assignment provisions, it is therefore irrelevant whether Defendants participated in drafting the Plan or were parties to the confirmation proceedings. The Plan is binding on the Litigation Trust and its representative, the Trustee.

II. THE CLAIMS ARE SUBJECT TO DISMISSAL FOR THE REASONS SET FORTH IN THE CREDITOR TRUST DISMISSAL BRIEF AND THE CREDITOR TRUST REPLY BRIEF.

The Trustee's claims are also subject to dismissal for the independent reasons set forth in Sections I-V of the Creditor Trust Dismissal Brief and the Creditor Trust Reply Brief. Rather than repeat those arguments here, Defendants incorporate them by reference.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Opening Brief, the complaint should be dismissed with prejudice.

Dated: June 13, 2011

Respectfully Submitted,

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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) **REPLY MEMORANDUM IN FURTHER SUPPORT OF DEFENDANTS' MOTION TO DISMISS**

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of June 2011, a copy of the foregoing Reply Memorandum in Further Support of Defendants' Motion to Dismiss was filed with the Court through the CM/ECF system. The foregoing was served on all counsel of record via the Court's CM/ECF system and by email.

/s/ Jeremy Winer
Jeremy Winer