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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 TRUSTEE OF THE LB CREDITOR TRUST, Plaintiff, v. MORGAN STANLEY & CO., INC., et al., Defendants.	(Jointly Administered) Adv. Pro. No. 10-04609 (REG) **REPLY MEMORANDUM IN FURTHER SUPPORT OF DEFENDANTS' MOTION TO DISMISS**

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 1

ARGUMENT 4

I. SECTION 546(e) OF THE BANKRUPTCY CODE BARS THE TRUSTEE'S PURPORTED STATE LAW CLAIMS 4

  A. The Trustee Cannot Circumvent Controlling Federal Law. 6

  B. The Trustee's Arguments That Section 546(e) Does Not Preempt the Trustee's Claims Lack Merit. 13

II. THE TRUSTEE CANNOT RECOVER THE TRANSFERRED FUNDS FROM THE DEFENDANTS BECAUSE THOSE FUNDS WERE NOT PROPERTY OF THE DEBTORS AVAILABLE TO PAY THEIR CREDITORS. 23

  A. The Proceeds From the Lenders Could Not Have Been Used to Pay Any Debtor's Creditors, But Rather Were to Be Used Only to Pay the Merger Consideration. 24

  B. The Collapsing Doctrine Does Not Change the Analysis. 26

III. THE TRUSTEE CANNOT RECOVER FROM DEFENDANTS THAT ARE SUED AS CONDUITS, OR AS MERE "HOLDERS," AND NOT AS THE BENEFICIAL OWNERS OF LYONDELL STOCK. 29

IV. THE TRUSTEE CANNOT RECOVER BY STANDING IN THE SHOES OF THE LENDERS, WHICH RATIFIED THE TRANSFERS THE TRUSTEE SEEKS TO AVOID. 31

V. THE TRUSTEE'S INTENTIONAL FRAUDULENT TRANSFER CLAIM SHOULD BE DISMISSED FOR FAILURE ADEQUATELY, AND WITH SPECIFICITY, TO ALLEGE INTENT TO DEFRAUD CREDITORS. 35

  A. The Trustee Has Failed to Allege That Basell Intended to Defraud Its Creditors. 36

  B. The Trustee Has Failed to Allege That Lyondell Intended to Defraud Its Creditors. 39

CONCLUSION 40

TABLE OF AUTHORITIES

CASES

Adelphia Recovery Trust v. Bank of Am., N.A.,
379 Fed. Appx. 10 (2d Cir. 2010), *aff'g*, 390 B.R. 80, 95 (S.D.N.Y. 2008), *cert. dismissed*, 131 S. Ct. 896 (2011) 33

Aldrich v. Randolph Cent. Sch. Dist.,
963 F.2d 520 (2d Cir. 1992), *cert. denied,* 506 U.S. 965 (1992) 14

Amorosa v. AOL Time Warner Inc.,
No. 09-5270, 2011 WL 310316 (2d Cir. Feb. 2, 2011) 31

Anderson v. Sara Lee Corp.,
508 F.3d 181 (4th Cir. 2007), *appeal after remand*, 383 Fed. Appx. 279 (4th Cir. 2010) 20

Banque Arabe et Internationale D'Investissement v. Maryland Nat'l Bank,
850 F. Supp. 1199 (S.D.N.Y. 1994), *aff'd*, 57 F.3d 146 (2d Cir. 1995) 33

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2009) 38

Bessette v. Avco Fin. Servs.,
230 F.3d 439 (1st Cir. 2000), *cert. denied,* 532 U.S. 1048 (2001), *on remand*, 279 B.R. 442 (D.R.I. 2002) 12

Boggs v. Boggs,
520 U.S. 833 (1997), *reh'g denied*, 521 U.S. 1138 (1997), *on remand,* 121 F.3d 168 (5th Cir. 1997) 12

Bonito Boats, Inc. v. Thunder Craft Boats, Inc.,
489 U.S. 141 (1989) 11

Boyer v. Crown Stock Distrib.,
587 F.3d 787 (7th Cir. 2009) 28

Bruesewitz v. Wyeth LLC,
131 S. Ct. 1068 (2011) 15

Casey Nat'l Bank v. Roan,
668 N.E.2d 608 (Ill. App. Ct. 1996), *appeal denied*, 675 N.E.2d 631 (Ill. 1996) 19

Cen-Pen Corp. v. Hanson,
58 F.3d 89 (4th Cir. 1995) 23

Contemporary Indus. Corp. v. Frost,
564 F.3d 981 (8th Cir. 2009) 8, 9, 10

Cox v. Roth,
348 U.S. 207 (1955)...14

Cox v. Zale Del., Inc.,
239 F.3d 910 (7th Cir. 2001) 12

Crosby v. Nat'l Foreign Trade Council,
530 U.S. 363 (2000)...11, 16

Crowthers McCall Pattern, Inc. v. Lewis,
129 B.R. 992 (S.D.N.Y. 1991)...28

Driscoll v. City of New York,
No. 82 Civ. 8497, 1987 WL 26799 (S.D.N.Y. Nov. 25, 1987) 12

Duncan v. Walker,
533 U.S. 167 (2001)...14

E. Equip. & Servs. Corp. v. Factory Point Nat'l Bank,
236 F.3d 117 (2d Cir. 2001)...12

Fadem v. Ford Motor Co.,
352 F. Supp. 2d 501 (S.D.N.Y. 2005), *aff'd,* 157 Fed. Appx. 398 (2d Cir. 2005) 31

FDIC v. Ernst & Young,
967 F.2d 166 (5th Cir. 1992), *reh'g denied*, 976 F.2d 732 (5th Cir. 1992).......................39

Garcia-Villeda v. Mukasey,
531 F.3d 141 (2d Cir. 2008)...14

Geier v. Am. Honda Motor Co.,
529 U.S. 861 (2000)...6

HBE Leasing Corp. v. Frank,
48 F.3d 623 (2d Cir. 1995), *motion granted*, 882 F. Supp. 60 (S.D.N.Y. 1995).........26, 27

Hatchett v. United States,
330 F.3d 875 (6th Cir. 2003), *cert. denied*, 541 U.S. 1029 (2004), *on remand*,
2005 WL 4705862 (E.D. Mich. June 10, 2005), *adopted*, 2006 WL 798970 (E.D.
Mich. Mar. 27, 2006) 19

Hines v. Davidowitz,
312 U.S. 52, 67 (1941) 16

In re Actrade Fin. Techs. Ltd.,
337 B.R. 791 (Bankr. S.D.N.Y. 2005) 40

In re Adbox, Inc.,
488 F.3d 836 (9th Cir. 2007) 30

In re Adelphia Commc'ns Corp.,
365 B.R. 24 (Bankr. S.D.N.Y. 2007), *aff'd in part*, 390 B.R. 64 (S.D.N.Y. 2008), *adhered to on reconsideration*, 2008 WL 1959542 (S.D.N.Y. May 5, 2008) 39

In re Adelphia Recovery Trust,
No. 09-799, 2011 WL 420428 (2d Cir. Feb. 8, 2011) 32, 34

In re AlphaStar Ins. Grp., Ltd.,
383 B.R. 231 (Bankr. S.D.N.Y. 2008) 36

In re Bernard L. Madoff Inv. Sec. LLC,
No. 09-1172, 2010 WL 5841402 (Bankr. S.D.N.Y. Feb. 24, 2011) 40

In re Best Prods. Co.,
168 B.R. 35 (Bankr. S.D.N.Y. 1994) 28, 32

In re Bogdanovich,
301 B.R. 129 (Bankr. S.D.N.Y. 2003) 34

In re Boynewicz,
No. 02-30250, 2002 WL 33951315 (Bankr. D. Conn. Nov. 27, 2002), a*ff'd*, 2003 WL 25285649 (D. Conn. Apr. 15, 2003) 19

In re Delta Air Lines, Inc.,
386 B.R. 518 (Bankr. S.D.N.Y. 2008) 33

In re Enewally,
368 F.3d 1165 (9th Cir. 2004), *cert. denied*, 543 U.S. 1021 (2004) 23

In re Enron Creditors Recovery Corp.,
422 B.R. 423 (S.D.N.Y. 2009) 1, 5, 14

In re General Motors,
407 B.R. 463 (Bankr. S.D.N.Y.), *cert. denied,* 409 B.R. 24 (Bankr. S.D.N.Y.), *stay denied*, 2009 WL 2033079 (S.D.N.Y. July 9, 2009), *aff'd*, 428 B.R. 43 (S.D.N.Y. 2010), *aff'd*, 430 B.R. 65 (S.D.N.Y. 2010), *motion to vacate denied*, 2010 WL 3565494 (S.D.N.Y. Sept. 10, 2010)..10, 11, 12

In re Hamilton Taft & Co.,
176 B.R. 895 (Bankr. N.D. Cal.), *aff'd*, 196 B.R. 532 (N.D. Cal. 1995), *aff'd*, 114 F.3d 991 (9th Cir. 1997) 18

In re Healthco Int'l, Inc.,
201 B.R. 19 (Bankr. D. Mass. 1996), *partial summary judgment granted*, 203 B.R. 515 (Bankr. D. Mass. 1996) 28

In re Hechinger Inv. Co.,
274 B.R. 71 (D. Del. 2002)..8, 9, 10, 13

In re Heitkamp,
137 F.3d 1087 (8th Cir. 1998) 30

In re Incomnet, Inc.,
463 F.3d 1064 (9th Cir. 2006) 29

In re Integrated Agri, Inc.,
313 B.R. 419 (Bankr. C.D. Ill. 2004), *summary judgment denied*, 2007 Bankr. LEXIS 546 (Bankr. C.D. Ill. Feb. 26, 2007)..19

In re Livent, Inc. Noteholders Sec. Litig.,
151 F. Supp. 2d 371 (S.D.N.Y. 2001), *motion denied*, 174 F. Supp. 2d 144 (S.D.N.Y. 2001), *subsequent appeal*, 161 Fed. Appx. 116 (2d Cir. 2005)........................31

In re Loranger Mfg. Corp.,
324 B.R. 575 (Bankr. W.D. Pa. 2005) 18

In re Magnesium Corp. of Am.,
399 B.R. 722 (Bankr. S.D.N.Y. 2009)...39

In re Metro. Elec. Mfg. Co.,
295 B.R. 7 (Bankr. E.D.N.Y. 2003)..19

In re Nat'l Forge Co.,
344 B.R. 340 (W.D. Pa. 2006)...18

In re Norstan Apparel Shops, Inc.,
367 B.R. 68 (Bankr. E.D.N.Y. 2007)...28

In re Old Carco LLC,
406 B.R. 180 (Bankr. S.D.N.Y. 2009) 10, 11, 12

In re OODC, LLC,
321 B.R. 128 (Bankr. D. Del. 2005) 28

In re Pasian,
No. 94-31563, 2010 WL 935598 (Bankr. N.D. Cal. Mar. 15, 2010)...................................19

In re Piper Aircraft Corp.,
244 F.3d 1289 (11th Cir.), *cert. denied sub nom. TDY Indus. Inc. v. Kaiser Aerospace & Elecs. Corp.,* 534 U.S. 827 (2001), ...23

In re Refco Inc. Sec. Litig.,
No. 09 Civ. 2885, 2009 WL 7242548 (S.D.N.Y. Nov. 13, 2009), *adopted by* No. 09 Civ. 2885, 2010 WL 5129072 (S.D.N.Y. Jan. 12, 2010) 5

In re Sunpoint Sec., Inc.,
377 B.R. 513 (Bankr. E.D. Tex. 2007), *aff'd sub nom. Richardson v. Cheshier & Fuller, L.L.P.,* No. 07-cv-256, 2008 WL 5122122 (E.D. Tex. Dec. 8, 2008) 39

In re TOUSA, Inc.,
No. 10-60017, 2011 WL 522008 (S.D. Fla. Feb. 11, 2011) 25, 29

Int'l Paper Co. v. Ouellette,
479 U.S. 481 (1987), *on remand*, 823 F.2d 545 (2d Cir. 1987), *on remand*, 666 F. Supp. 58 (D. Vt. 1987)...11

John Deere Deferred Sav. Plan for Wage Emps. v. Propst,
No. 06-C-1235, 2007 WL 4594681 (E.D. Wis. Dec. 28, 2007) 12

Kaiser Steel Corp. v. Charles Schwab & Co.,
913 F.2d 846 (10th Cir. 1990) 1, 14

Kirschner v. KPMG LLP,
15 N.Y.3d 446 (2010), *answer to question conformed to,* 626 F.3d 673 (2d Cir. 2010) 39

Klingman v. Levinson,
158 B.R. 109 (N.D. Ill. 1993), *stay granted in part,* 1997 U.S. Dist. LEXIS 2297 (N.D. Ill. 1997), *subsequent appeal*, 114 F.3d 620 (7th Cir. 1997), *reh'g denied,* 1997 U.S. App. LEXIS 14180 (7th Cir. June 11, 1997) 19

Levine v. AtriCure, Inc.,
594 F. Supp. 2d 471 (S.D.N.Y. 2009)..30

Nordberg v. Sanchez (In re Chase & Sanborn Corp.),
813 F.2d 1177, 1181-82 (11th Cir. 1987) 23

PHP Liquidating v. Robbins,
291 B.R. 603 (D. Del. 2003), *aff'd*, 128 Fed. Appx. 839 (3d Cir. 2005) 19

Pac. Capital Bank v. Conn.,
542 F.3d 341 (2d Cir. 2008)....................6, 12

Pani v. Empire Blue Cross Blue Shield,
152 F.3d 67 (2d Cir. 1998), *cert. denied*, 525 U.S. 1103 (1999)....................30

Pertuso v. Ford Motor Credit Co.,
233 F.3d 417 (6th Cir. 2000) 12

SIPC v. Stratton Oakmont, Inc.,
234 B.R. 293 (Bankr. S.D.N.Y. 1999)....................30

Unisys Corp. v. Dataware Prods., Inc.,
848 F.2d 311 (1st Cir. 1988)....................19

United States v. Belmont,
301 U.S. 324 (1937)....................11

United States v. Doyle,
276 F. Supp. 2d 415 (W.D. Pa. 2003)....................19

United States v. Naftalin,
441 U.S. 768 (1979), *on remand*, 606 F.2d 809 (8th Cir. 1979) 14

Wieboldt Stores, Inc. v. Schottenstein,
94 B.R. 488 (N.D. Ill. 1988), *on recons. in part, on other grounds*, 1989 WL 18122 (N.D. Ill. Mar. 2, 1989), *motion to certify allowed*, 1989 WL 51068 (N.D. Ill. May 5, 1989), ...27, 28

STATUTES

11 U.S.C. § 524(e) 21, 22

11 U.S.C. §§ 544.................... 1, 5-9, 13, 15, 19

11 U.S.C. § 546(e) 1, 4-11, 13-16, 18-23

11 U.S.C. § 548(a)(1)(A) 18, 36

11 U.S.C. § 1123(b)(3) 5

Del. Code Ann. tit. 8, § 251(b) 39

Dodd-Frank Wall Street Reform and Consumer Protection Act,
Pub. L. 111-203, § 210(c)(8)(C)(i), (a)(12), 124 Stat. 1376 17

Federal Deposit Insurance Act, 12 U.S.C. § 1821(e)(8)(C)(i) 17

H.R. Rep. 97-420 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 583) 14

Tex. Bus. & Com. Code Ann. § 24.005(a)(1) 36

PRELIMINARY STATEMENT

The Creditor Trust's Opposition ("Opposition" or "Opp.") reveals why the Trustee's claims fail as a matter of law[1]:

Section 546(e) Preemption. The Trustee all but concedes that if the Debtors or the Litigation Trust (as the successor to the rights of the Debtors' bankruptcy estates following Plan confirmation) had brought these fraudulent transfer claims under Section 544 of the Bankruptcy Code, the claims would have been barred by Section 546(e). But the Opposition argues that Section 546(e) is entirely "irrelevant" (Opp. 44) simply because the Debtors' Plan provided for these claims to be given to a Creditor Trust—a trust administered by the same Trustee for the same creditors of the Debtors—rather than the Litigation Trust, an end-run of Section 546(e) that the Opposition touts can be replicated in every bankruptcy case. If the Trustee is right, Section 546(e) will not be a safe harbor; it will be a dead letter. Congress' purpose—protecting the "nation's financial markets from the instability caused by the reversal of settled securities transactions," *Kaiser Steel Corp. v. Charles Schwab & Co.*, 913 F.2d 846, 848 (10th Cir. 1990), and "minimiz[ing] the displacement caused in the commodities and securities markets in the event of a major bankruptcy," *In re Enron Creditors Recovery Corp.*, 422 B.R. 423, 429 (S.D.N.Y. 2009)—will be thwarted by simply having a bankruptcy trustee arrange for otherwise prohibited claims to be litigated by the trustee's alter ego. Settled law prohibits this sort of gamesmanship.

Lack of Property of the Estate Available to Pay Creditors. The Trustee acknowledges that the Lenders funded 100% of the Merger Consideration paid to the Lyondell Shareholders for their stock; that the Lenders insisted that their funds be used for this purpose only and, indeed,

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[1] Capitalized terms not otherwise defined herein shall have their respective meanings as set forth in Defendants' opening brief [Docket No. 72] on their motion to dismiss ("Opening Brief" or "Defs' Br.").

required that the money be transferred into escrow to ensure that it went to the Shareholders; and that, accordingly, none of these funds would have been available, in the absence of the Merger, to any Debtor to pay any of its creditors (or for any other use). Nevertheless, the Trustee argues that the payment of the Merger Consideration to the Shareholders should be treated as a transfer of property of one or more unspecified Debtors because Lyondell and/or other Debtors granted liens on their assets to secure repayment of the Lenders. In effect, the Trustee argues that this Court should engage in a legal fiction, treating two different transfers—the payment of cash to the Shareholders with the Lenders' money, and the grant of liens on the Debtors' property in favor of the Lenders—as if they were one and the same. But none of the so-called "collapsing" cases cited by the Trustee supports such an artifice, especially where, as here, the Shareholders were mere passive investors, not controlling insiders of Lyondell or any of the other Debtors that caused the Debtors to grant liens on their property. On the contrary, the lead case on which the Trustee relies—*Wieboldt*—expressly refused to collapse the transfer of the cash to non-insider shareholders and the grant of the lien to the banks, dismissing the fraudulent transfer claims against those shareholders. Other cases are in accord.

Defendants as Conduits. The Trustee concedes as well that, to the extent Defendants were mere record holders or otherwise conduits and not beneficial owners of Lyondell stock, and therefore did not receive Merger Consideration for their own accounts, they could not have been "transferees" with any potential liability. The Trustee argues, however, that whether a particular Defendant was or was not a conduit is a question of fact that cannot be decided on a motion to dismiss. But the Complaint admits that most of the Defendants are sued "solely in [their] capacity as custodian, trustee, agent, representative or nominee," and it alleges no facts demonstrating that any of the Defendants were beneficial owners of Lyondell stock, asserting

merely that some of them were "registered holders" of those securities. This is fatal to the Complaint. As part of its case-in-chief, the Trustee had to plead that the Defendants—parties it has elected to sue—were "transferees" from whom the Trustee could seek to recover. And even if a defendant's status as a "mere conduit" were an affirmative defense, such a defense can be the basis for a motion to dismiss where, as here, the plaintiff makes out the defense on the face of its own complaint.

<u>Inability to Pursue Recovery on the Lenders' Claims.</u> The Trustee does not dispute that the Lenders are among the creditors of (indeed, the creditors with the largest claims against) the Debtors that are beneficiaries of the Trust and on whose behalf the Trustee is suing; that those Lenders' deficiency claims arise out of the loans they made to finance the Merger; that those Lenders expected—indeed, insisted—that the Merger Consideration would be paid to the Shareholders; and that, under Second Circuit law, a creditor that ratifies a transfer cannot subsequently seek to avoid it. The Trustee nevertheless argues that his claims as assignee of the Lenders should not be dismissed because there are also other creditors whose claims the Trustee is also pursuing, and that, in any event, whether the Lenders ratified the payment of the Merger Consideration to the Shareholders supposedly requires discovery and the development of a full factual record. But motions to dismiss the claims of some, but not all, plaintiffs, as well as motions to dismiss some, but not all, claims of a single plaintiff are allowed under the Federal Rules, precisely because they simplify any further litigation. And it is indisputable—the Trustee has himself so alleged (after taking extensive discovery in the Committee Action), and the transaction documents incorporated in the Complaint so confirm—that the Lenders made their loans for the very purpose of funding the payments of Merger Consideration to the Shareholders.

This is the only fact needed to establish that the Lenders ratified those payments and were not expecting the Debtors to retain the funds to pay the Lenders' claims.

No Particularized, Plausible Allegations of Fraudulent Intent. The Trustee argues that it has adequately alleged that members of Lyondell's management team developed projections for Lyondell's financial performance that they knew were not likely to be achieved, in order to induce Basell to enter into the Merger. But even if those allegations were adequate to establish those individuals' fraudulent intent (and they are not), the Merger had to be approved, not by those managers, but rather by Lyondell's board of directors. There are no allegations that those directors acted with intent to defraud Lyondell's creditors (let alone Basell's creditors). Under well-established law, Lyondell cannot therefore be deemed to have acted with fraudulent intent. And, in any event, the transaction documents incorporated into the Complaint make clear that, if any Debtor could have claimed that the cash used to pay the Merger Consideration was its property (and none could have), that Debtor was the acquirer, Basell, and not Lyondell. The Complaint portrays Basell as a victim, not a perpetrator, of any fraud committed by Lyondell management, and it is implausible to suggest that Basell would have made itself jointly and severally liable on some $20 billion in bank debt incurred in connection with the Merger if it knew and intended that the Merger would leave Basell and the other Debtors unable to pay their creditors, rendering Basell's equity investment in Lyondell (and Leonard Blavatnik's equity in Basell) worthless.

ARGUMENT

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

The Trustee makes no serious effort to dispute that, if Section 546(e) applies, the claims asserted in this action are barred. As set forth in Defendants' Opening Brief, the plain language

of the statute and the overwhelming weight of the case law establish that the payments of Merger Consideration to the Defendants in exchange for their stock in Lyondell were "settlement payments" (or payments made in connection with a "securities contract") protected from avoidance by Section 546(e). Defs' Br. 15-25. The Trustee's one-paragraph response simply refers to briefs that the Trustee (wearing his Litigation Trust hat) filed in the Committee Action, while acknowledging that since those briefs were filed, courts in this District have issued two decisions that "adopt[ed] broad readings of the term 'settlement payments.'" Opp. 44-45 & n.39 (citing *In re Enron Creditors Recovery Corp.*, 422 B.R. 423 (S.D.N.Y. 2009), and *In re Refco Inc. Sec. Litig.*, No. 09 Civ. 2885, 2009 WL 7242548 (S.D.N.Y. Nov. 13, 2009), *adopted by* No. 09 Civ. 2885, 2010 WL 5129072 (S.D.N.Y. Jan. 12, 2010).

The Trustee's argument thus boils down to this: If the Plan had provided for the Debtors' estates to assign the state-law claims asserted in this action to the Litigation Trust to pursue under Section 544 as the successor to the estate appointed under Section 1123(b)(3) of the Bankruptcy Code, then those claims would have been barred by Section 546(e). But because the Plan instead provided for the Debtors' estates to "abandon" those claims and for the Debtors' creditors to contribute those same claims to the Creditor Trust—a trust run by the same Trustee for the benefit of the same creditors—Section 546(e) has no application at all. Through pure manipulation, Section 546(e) becomes "irrelevant," Opp. 44, and the Trustee, whom (wearing his Litigation Trust hat) Congress prohibited from unraveling settled securities transactions due to concerns about the havoc it could wreak on the securities marketplace, is magically able to attack those very same transactions and cause the very same harm that Congress sought to prevent simply by putting on a different hat. To state the proposition is to make clear how, if accepted, it would frustrate congressional legislation.

It is settled law that state-law causes of action that "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" must give way. *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 873 (2000) (internal citations omitted). "State law is in 'irreconcilable conflict' with federal law, and hence preempted by federal law, when compliance with the state statute would frustrate the purposes of the federal scheme." *Pac. Capital Bank v. Conn.*, 542 F.3d 341, 351 (2d Cir. 2008).

The state-law claims here most assuredly "stand as an obstacle to the accomplishment and execution" of Section 546(e), and would "frustrate the purposes" of that federal legislation. Indeed, it is difficult to imagine a more stark conflict between federal and state law. This is not a case in which state law is merely *different* from federal law, such as a state law that regulates conduct that federal law leaves unregulated, or that regulates such conduct in a different way. This is a case in which the state-law claims the Trustee asserts are *precisely* those that federal law prohibits the Debtors and the Litigation Trust from bringing under Section 546(e). Plainly, it would frustrate the purposes of Section 546(e)—to protect the stability of the financial markets—if those same prohibited state-law claims could be brought by the alter ego of the parties already prohibited from asserting those claims, in an effort to avoid billions of dollars in settlement payments made to countless shareholders of a company that ended up, years later, in bankruptcy. *See* Defs' Br. 25-35. The Trustee's state-law claims are preempted and should be dismissed.

A. The Trustee Cannot Circumvent Controlling Federal Law.

Simply put, this case is an attempt to nullify Section 546(e). If a debtor and its creditors could escape Section 546(e)'s safe harbor by "abandoning" Section 544 avoidance actions, as the Trustee has attempted to do here, the same end-run of Section 546(e) could be accomplished in *every* case. In any case in which a trustee or other estate representative would be barred by Section 546(e) from bringing an action under state law pursuant to Section 544 to avoid

settlement payments, the estate and its creditors could simply bypass Section 546(e) by doing the same thing they did here: "abandon" the estate's rights to bring such claims under Section 544 and let the creditors nominally pursue those very same claims under "state law" through a so-called "creditor trust" run by the same trustee that is acting as estate representative in the bankruptcy. The same "abandonment" language included in the Plan here could be inserted in every plan.

Indeed, the Trustee argues that formal "abandonment" under Section 554 is not even required; all that is necessary is that the trustee or other estate representative simply not prosecute or release the creditors' state-law avoidance actions during the case. Opp. 43. A mere statement "relinquishing" the estate's right to pursue state-law avoidance actions under Section 544 would suffice. *See id.* 43 n.36. Such "relinquishment" need not wait for a plan; it could be done by motion or otherwise, at any time during any Chapter 11 or, for that matter, Chapter 7 case.[2]

Thus, if a "creditor trust" is permitted to seek to avoid the settlement payments made to shareholders under "state law" as a result of the bankruptcy estate's "abandonment" or "relinquishment" of the right to pursue such claims under Section 544, Section 546(e) will, for all intents and purposes, become a nullity. The very same causes of action that a bankruptcy trustee would not otherwise be permitted to bring on behalf of creditors pursuant to Section 544 of the Bankruptcy Code and state fraudulent transfer law to avoid a settlement payment would

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[2] In fact, a similar end-run of Section 546(e) is already being attempted in the *Tribune* bankruptcy in which bondholders have moved (prior to plan confirmation) for relief from the automatic stay to bring state-law fraudulent transfer claims to avoid $8 billion paid to Tribune shareholders in a leveraged buyout, after the estate declined to bring an action under Section 544 to avoid those payments, which an examiner had determined would be barred by Section 546(e). *See* Report of Kenneth N. Klee, as Examiner (Volume II) at 241-43, *In re Tribune Co.*, No. 08-13141 (Bankr. D. Del. July 26, 2010) [Docket No. 5131]; Mot. of Aurelius Cap. Mgmt. et al., Mar. 1, 2011 [Docket No. 8201]; *see also infra* note 9.

nonetheless go forward. There would simply be a nominally different plaintiff bringing the action for the same beneficiaries asserting the same claims; indeed, as this case illustrates, the very same person could be the trustee of the creditor trust as of the trust that has the right to assert the bankruptcy estate's claims. Congress' objective in enacting the safe harbor would be thwarted.

That cannot be. As every court to consider the issue has held, Section 546(e) preempts state-law claims that seek to circumvent that provision's bar against the avoidance of settlement payments. *See Contemporary Indus. Corp. v. Frost*, 564 F.3d 981, 988 (8th Cir. 2009); *In re Hechinger Inv. Co.*, 274 B.R. 71, 96-98 (D. Del. 2002); Defs' Br. 30-31. Contrary to the Trustee's arguments, those cases are directly on point.

In those cases, just as in this one, Section 546(e) barred the avoidance of payments made to shareholders in merger transactions as fraudulent transfers under Section 544 (as the courts so held). And there, as here, the debtors and their creditors sought to get around that bar by seeking to recover the same payments under "state law" (there, the state law of "unjust enrichment").

Thus, the *Hechinger* creditors' committee argued that Section 546(e) did not apply because it was not asserting a creditor avoidance action under section 544, but rather a state-law "claim for unjust enrichment on behalf of Hechinger [the debtor], … [which] itself was impoverished by the payments to the defendants," a claim presumably brought under Section 541 of the Bankruptcy Code. *See Hechinger*, 274 B.R. at 94. Since the express terms of Section 546(e) only bar the trustee from "avoid[ing]" a settlement payment "[n]otwithstanding section[] 544," it argued Section 546(e) simply did not apply to the state-law unjust enrichment claims.

But the courts rejected that argument. They did not dispute that Section 546(e), by its terms, literally did not apply. But they held that the state-law unjust enrichment claims were

preempted because, if that "work around" succeeded, Section 546(e) would be a dead letter. As the Eighth Circuit explained, permitting the state-law unjust enrichment claims to go forward "would wholly frustrate the purpose behind [Section 546(e)]," precisely because, just as here, "[a]llowing recovery on these claims would render the § 546(e) exemption meaningless." *Contemporary Indus.*, 564 F.3d at 988.

The Delaware District Court reached the same conclusion, holding that "the purpose of Section 546(e) would be frustrated" if the creditors' committee were allowed "to circumvent section 546(e) by asserting a state law claim for unjust enrichment," because "the exemption set forth in section 546(e) would be rendered useless." *Hechinger*, 274 B.R. at 96. As it explained, permitting settlement payments that "Congress deemed unavoidable under sections 544(b) and 546(e)" to be avoided nonetheless "by simply re-labeling avoidance claims" as claims under state law would "directly conflict[] with the remedial exemption set forth in Code section 546(e)" and "implicate the same concerns regarding the unraveling of settled securities transactions," "which is precisely the result that section 546(e) precludes." *Id.*

The Trustee contends that these decisions are distinguishable because the state-law claims in *Contemporary Industries* and *Hechinger* were brought by "estate representatives exercising the avoidance powers." Opp. 33-34. That is wrong. The whole point of those cases was that the representatives were *not* exercising any avoidance powers of the debtors' creditors under Section 544 through their unjust enrichment claims; if they had been, the claims would have been barred by the express terms of Section 546(e), and there would have been no need for the courts to reach the question of implied, conflict preemption. Rather, the representatives sought to recover settlement payments by asserting state-law claims of the debtors under Section 541, claims that fell outside the literal terms of Section 546(e). Nevertheless, the courts held that

those claims were preempted, not because they were brought by an "estate representative exercising the avoidance powers," but because if they were permitted to go forward, Section 546(e)'s bar against the avoidance of settlement payments would be rendered "meaningless."

Although the particular "work around" at issue in this case is slightly different—bringing state-law avoidance claims by a "non-estate representative," instead of an estate representative bringing "non-avoidance" state-law claims—the principles applied in *Contemporary Industries* and *Hechinger* apply fully here. If anything, this case is even more compelling: the same Trustee, who happens to be wearing a different hat, is seeking to bring the very state-law avoidance claims that are expressly prohibited by Section 546(e).

Contemporary Industries and *Hechinger* are not only on point; they are right. The analysis applied in those cases is in accord with well-established law, including law applied by this very Court. In *General Motors*, this Court held that state auto-dealer franchise laws "must be trumped by federal bankruptcy law" "[t]o the extent that [those] laws … impair the ability to reject, or to assume and assign [auto-dealer contracts]" under the Bankruptcy Code. *In re General Motors*, 407 B.R. 463, 515 (Bankr. S.D.N.Y. 2009), *aff'd*, 428 B.R. 43 (S.D.N.Y. 2010). In so holding, this Court applied the same principles applied by other bankruptcy courts in this District, including the court in the Chrysler bankruptcy, which this Court explained held "that the state franchise laws at issue, like those at issue here, frustrated the purposes of (and, thus, were preempted by) section 365." *Id.* (citing *In re Old Carco LLC*, 406 B.R. 180, 199-206 (Bankr. S.D.N.Y. 2009)). As Judge Gonzalez put it in *Old Carco*, "state law protections cannot be used to negate the Debtors' rejection powers under § 365." *In re Old Carco*, 406 B.R. at 206 n.32.

That same rule of law compels the dismissal of the Trustee's claims here. The Trustee's attempt to circumvent Section 546(e) by simply assuming a new title while bringing the same

state-law claims Section 546(e) prohibits would similarly "negate" the Bankruptcy Code's safe harbor for settlement payments. The Trust's only response—that *General Motors* and *Old Carco* did not "involve the preemptive effect of Section 546(e)" (Opp. 34 n.30)—misses the point: those cases applied the very same preemption principles that apply, for the same reasons, here.

Those principles reflect settled law. As the Supreme Court has held time and time again, state law conflicts with federal law, and is preempted, where, as here, state law would render federal law ineffective. "If the purpose of the [federal] act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—the state law must yield . . . ." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000); *see also, e.g.*, *United States v. Belmont*, 301 U.S. 324, 331 (1937) (state law preempted if otherwise it would render federal law "ineffective"). Legions of cases so hold.

Thus, in *Geier*, the Supreme Court held that state-law tort claims brought against a carmaker for failing to install airbags were preempted because state law would compel all carmakers to include airbags, defeating the purpose of a federal safety regulation to promote a mix of restraint alternatives in the market. 529 U.S. at 881-82. Similarly, in *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989), the Court held that a state law providing patent-like protections conflicted with federal patent law because—in words equally applicable here—the "offer of federal protection from competitive exploitation of intellectual property *would be rendered meaningless* in a world where substantially similar state law protections were readily available." *Id.* at 151 (emphasis added). And in *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987), the Supreme Court held that state-law nuisance claims were preempted because they would "circumvent" the Clean Water Act by allowing neighboring states to regulate polluters' activities in other states, and thus "do indirectly what they could not do

directly"—just as the Trustee's end-run around Section 546(e) attempts to accomplish here. *See id.* at 489-90, 494-95.

These same principles have been applied in dozens of bankruptcy cases, including *General Motors* and *Old Carco*, holding that state-law claims are preempted where, as here, they would circumvent the Bankruptcy Code's remedial scheme. *See, e.g.*, *Eastern Equip. & Servs. Corp. v. Factory Point Nat'l Bank*, 236 F.3d 117, 120-21 (2d Cir. 2001) (per curiam) (state-law tort claims for violation of automatic stay preempted); *Bessette v. Avco Fin. Servs.*, 230 F.3d 439, 447-48 (1st Cir. 2000) (state-law unjust enrichment claims for violations of discharge injunction preempted); *Pertuso v. Ford Motor Credit Co.*, 233 F.3d 417, 425-26 (6th Cir. 2000) (same); *Cox v. Zale Del., Inc.*, 239 F.3d 910, 913 (7th Cir. 2001) (same); *see also* Defs' Br. 31-33 & n.18-19 (citing additional cases). Numerous other cases involving a wide variety of other federal statutes are in accord.[3]

[3] *See, e.g.*, *Boggs v. Boggs*, 520 U.S. 833, 844 (1997) (holding that state law was preempted to the extent it would permit children to recover pension benefits that ERISA guaranteed surviving spouse because "[i]t would undermine the purpose of ERISA's mandated survivor's annuity"); *Pac. Capital Bank v. Conn.*, 542 F.3d at 354 (applying "conflict preemption" principles and holding that, even though state statute did not regulate national banks on its face, statute's regulation of national-bank service providers would "indirectly[] curtail authorized national bank activities and would thereby conflict with federal law"); *Driscoll v. City of New York*, No. 82 Civ. 8497, 1987 WL 26799, at *2 (S.D.N.Y. Nov. 25, 1987) (holding that plaintiffs could not circumvent federal law exempting municipalities from damage suits under federal antitrust laws by bringing damage suits under state antitrust law, because doing so would "thwart congressional intent" to prevent "threat[s] [to] the ability of municipalities to act in the public interest"; "[t]o the taxpayers who would ultimately pay the financial costs, and to the municipal decisionmakers whose ability to govern in the public interest would be impaired, it does not matter whether antitrust damages are paid out under a statute entitled Sherman, Clayton or Donnelly"); *John Deere Deferred Sav. Plan for Wage Emps. v. Propst*, No. 06-C-1235, 2007 WL 4594681, at *7 (E.D. Wis. Dec. 28, 2007) (finding preemption where "a state common law . . . would *circumvent* ERISA's spousal waiver requirements and *thus render those provisions meaningless*, would conflict with and frustrate ERISA's objectives, and would preclude the uniform implementation of this federal statutory scheme" (emphasis added)).

In the final analysis, whether Congress' decision to create a safe harbor for settlement payments was a necessary or even a wise choice is not the question here. The question is whether Congress' indisputable choice to do so can be nullified through the assertion of state-law claims. As the overwhelming authority demonstrates, the answer is that it cannot, and that the Trustee's state-law avoidance claims are preempted.[4]

B. The Trustee's Arguments That Section 546(e) Does Not Preempt the Trustee's Claims Lack Merit.

Faced with this body of settled law, the Trustee is left to argue that his state-law claims would not frustrate Congress' purpose even though they would permit the avoidance under state law of settlement payments (and payments made in connection with a securities contract), precisely what Section 546(e) bars. The Trustee's arguments fail.

1. The Trustee argues that this action would not frustrate the purpose of Section 546(e) because Congress' goal in enacting the safe harbor was purportedly limited to "*partially* carving out for protection certain markets from a *trustee* invested with *federal* avoidance powers." Opp. 25-35 (emphasis added). But if the Trustee were right, the "safe harbor" of Section 546(e) would provide no safety at all. The "trustee" would never exercise the "federal" avoidance powers under Section 544 to seek to avoid a settlement payment, precisely because any such effort would be barred by Section 546(e); instead, the trustee would simply "abandon" or "relinquish" the right to do so and let the creditors (through a creditor trust with the same trustee) pursue the very same claims under state law. The Trustee's argument thus reduces to the proposition that Congress' "purpose" in enacting Section 546(e) was to address a circumstance

[4] Although conflict preemption is the most clearly applicable doctrine here given the direct conflict between the Trustee's state-law claims and federal law, field preemption also applies. Section 546(e) "completely occupies the field of proceedings within bankruptcy," "displac[ing] inconsistent state-law claims and remedies. *Hechinger Inv. Co.*, 274 B.R. at 97.

that would almost surely never continue to arise: the retention and assertion by a bankruptcy estate of claims that are barred when asserted by the estate, but not when "abandoned" or "relinquished" to creditors.

The United States Supreme Court and Second Circuit have repeatedly held, however, that Congress should not be presumed to have wasted its time by enacting meaningless legislation that achieves no practical purpose. It is a "cardinal principle of statutory construction" that a statute should not be interpreted to "be superfluous, void, or insignificant," *Duncan v. Walker*, 533 U.S. 167, 174 (2001), to "result in the emasculation or deletion of a provision," *Cox v. Roth*, 348 U.S. 207, 209 (1955), to "render [itself] ineffective," *Garcia-Villeda v. Mukasey*, 531 F.3d 141, 147 (2d Cir. 2008), or to "create a loophole in the statute that Congress simply did not intend to create." *United States v. Naftalin*, 441 U.S. 768, 777 (1979); *accord Aldrich v. Randolph Cent. Sch. Dist.*, 963 F.2d 520, 525 (2d Cir. 1992).

Section 546(e) is no exception to this rule. Congress enacted Section 546(e) to address what it perceived to be a serious concern. As the Trustee acknowledges (Opp. 26-27, 30-31), Congress sought to protect the "nation's financial markets from the instability" that would result from the "reversal of settled securities transactions." *Kaiser Steel*, 913 F.2d at 848. Congress intended Section 546(e)'s "broad protection" to "ensure settlement finality, and therefore market stability," in order to "'minimize the displacement caused in the commodities and securities markets in the event of a major bankruptcy affecting those industries.'" *Enron*, 422 B.R. at 429 (quoting H.R. Rep. 97-420, at 2 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 583, 583)). Such displacement would be realized whether a lawsuit seeking to unwind billions of dollars in securities transactions that settled years ago is commenced by a Litigation Trust or by a Creditor Trust, administered by the same Trustee for the same creditors of the same Debtors.

In short, Congress mandated that settlement payments could not be avoided "[n]otwithstanding section[] 544" precisely because it intended that language to *do* something: protect financial markets from the unwinding under state law of settled securities transactions involving debtors in bankruptcy. Under the Trustee's argument, however, that language would achieve nothing, since the same claims could always go forward through the trustee's "abandonment" or "relinquishment" of Section 544 claims. The Trustee's reading of Section 546(e) would thus render the statute impotent, making it wholly ineffective in achieving Congress' purpose.[5]

2. The Trustee argues that the text of Section 546(e) demonstrates that Congress merely sought to bar the use of "federal avoidance powers," since Section 546(e) provides only that "[n]otwithstanding section[] 544," the "trustee" may not avoid a settlement payment. The Opposition notes that the legislative history likewise refers to the "avoiding powers" of the "trustee." Opp. 27-32. This argument is also unavailing.

When a company files for bankruptcy, the only party expressly authorized by the Bankruptcy Code to pursue state-law creditor claims to avoid pre-bankruptcy transfers by the debtor is the "trustee" acting pursuant to "section 544." *See* 11 U.S.C. §§ 544(b). It is not surprising, therefore, that when Congress sought to limit the avoidance of such transfers in Section 546(e), it placed those limits on the one party expressly authorized to avoid such transfers in the first place: the "trustee" acting pursuant to "section 544." The Trustee cites nothing in the text or legislative history that remotely suggests that Congress intended, by thus

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[5] *See Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068, 1075 (2011) (rejecting construction of federal statute, which barred tort liability for injuries that "were unavoidable even though the vaccine was properly prepared and was accompanied by proper directions and warnings," to permit state-law product design-defect claims to proceed; "[i]f a manufacturer could be held liable for failure to use a different design, the word 'unavoidable' would do no work. A side effect of a vaccine could *always* have been avoidable by use of a differently designed vaccine not containing the harmful element" (emphasis in original)).

referring to the "trustee," to authorize *creditors* to pursue the very same state-law fraudulent-transfer actions the "trustee" is barred from bringing but which the trustee "abandons" or "relinquishes" to the creditors supposedly free from Section 546(e)'s restrictions.

More fundamentally, the Trustee's contention that Section 546(e) does not, by its express terms, bar the Trustee's state-law claims is no more than an argument that Section 546(e) does not *expressly* preempt those claims. That argument is especially weak because Section 546(e) *does* expressly preempt those state-law claims when asserted by the bankruptcy estate, leaving the Trustee merely to argue that those same claims are not expressly preempted when the bankruptcy plan provides for their prosecution by a nominally different plaintiff. And, even in that limited context, the argument goes nowhere since, by definition, in all cases of *implied* preemption, the federal statute does not provide for *express* preemption.

"Even without an express provision for preemption" in the federal legislation, courts "will find preemption where . . . state law . . . stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Crosby*, 530 U.S. at 372-73 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). "A failure to provide for preemption expressly may reflect nothing more than the settled character of implied preemption doctrine that courts will dependably apply." *Id.* at 387-88. And "in any event, the existence of conflict cognizable under the Supremacy Clause does not depend on express congressional recognition that federal and state law may conflict." *Id.* at 388. Simply put, while Congress may not always anticipate and expressly address every action that a state legislature—let alone creative lawyers—might take to circumvent federal law, courts will not allow state law to contravene what Congress has enacted.

3. The Trustee argues that the claims asserted in this action would not frustrate Congress' purpose because Congress has not enacted a bar against creditor class actions outside

of bankruptcy that seek to avoid settlement payments. Opp. 2, 35-36. But the Trustee's hypothetical class action is surely just that—a hypothetical. A company like Lyondell that was the subject of a merger involving $20 billion in bank debt inevitably ends up in bankruptcy if it cannot service that debt. And that will assuredly be the case where a $20 billion merger is challenged as a fraudulent transfer by creditors seeking to avoid all of the banks' liens and debt, and all of the payments to the shareholders.

Thus, while Congress may not have enacted legislation barring every last avoidance action that might be brought by a single creditor of a company that never goes into bankruptcy, Congress has acted to bar avoidance actions in those circumstances where the most significant threats to the financial markets are sure to arise—when the debtor becomes insolvent and is required to file for bankruptcy. Indeed, Congress has enacted similar safe harbors against avoidance claims involving securities contracts in the statutes governing bank insolvencies and the newly enacted liquidation authority for other systemically important financial companies,[6] reflecting Congress' persistent desire to protect the securities markets from state-law avoidance

[6] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, § 210(c)(8)(C)(i), 124 Stat. 1376, 1481.82 ("Notwithstanding subsection [210](a)(11), (a)(12), or (c)(12), section 5242 of the Revised Statutes of the United States, or any other provision of Federal or State law relating to the avoidance of preferential or fraudulent transfers, the Corporation, whether acting as the Corporation or as a receiver for a covered financial company, may not avoid any transfer of money or other property in connection with any qualified financial contracts with a covered financial company"); *id.* § 210(c)(8)(C)(ii) (exception where transferee had fraudulent intent); *id.* § 210(c)(8)(D)(i)-(ii) (defining "qualified financial contract" to include a "securities contract" "for the purchase, sale, or loan of a security . . ."); Federal Deposit Insurance Act, 12 U.S.C. § 1821(e)(8)(C)(i) ("Notwithstanding paragraph (11), section 5242 of the Revised Statutes of the United States [12 U.S.C. § 91] or any other Federal or State law relating to the avoidance of preferential or fraudulent transfers, the Corporation, whether acting as such or as conservator or receiver of an insured depository institution, may not avoid any transfer of money or other property in connection with any qualified financial contract with an insured depository institution"); *id.* § 1821(e)(8)(C)(ii) (exception where transferee had fraudulent intent); *id.* § 1821(e)(8)(D)(i)-(ii) (defining "qualified financial contract" to include a "securities contract" "for the purchase, sale, or loan of a security . . .").

actions arising out of large corporate failures. In contrast to fraudulent-transfer litigation outside of bankruptcy, which typically involves an individual creditor seeking to recover its own relatively minor claim, companies filing for bankruptcy generally have substantial debt they cannot repay, and the resulting avoidance claims are brought for the collective benefit of substantial numbers of creditors. And, of course, that is exactly the situation here: this "creditor" action under "state law" seeks to avoid billions of dollars of long-settled transactions in the public securities markets apparently for the benefit of all of the creditors of all the Debtors. It was to prevent precisely that kind of threat to the stability of the financial markets that Congress enacted Section 546(e).

4. The Trustee argues that Congress did not intend to bar all avoidance actions, since Section 546(e) does not apply to intentional fraudulent transfer actions under Section 548 of the Bankruptcy Code. Opp. 32, 35. But that limited exception undermines, rather than supports, the Trustee's position. Congress considered whether there should be any exceptions to Section 546(e) and concluded that there should be only one—intentional fraudulent transfer actions under federal law, Section 548(a)(1)(A). Congress determined that all state-law fraudulent transfer actions, including intentional fraudulent transfer claims, should be barred.[7]

5. The Trustee cites cases that have permitted a creditor to pursue a state-law fraudulent transfer claim in circumstances where the trustee or other estate representative failed to prosecute or settle such claim pursuant to Section 544 during the bankruptcy case. Opp. 22-

[7] *See* 11 U.S.C. § 546(e); *In re Nat'l Forge Co.*, 344 B.R. 340, 370 (W.D. Pa. 2006) (Section 546(e) bars all state law claims, including intentional fraudulent transfer claims); *accord In re Loranger Mfg. Corp.*, 324 B.R. 575, 583-86 (Bankr. W.D. Pa. 2005); *In re Hamilton Taft & Co.*, 176 B.R. 895, 901-02 (Bankr. N.D. Cal.), *aff'd*, 196 B.R. 532 (N.D. Cal. 1995), *aff'd*, 114 F.3d 991 (9th Cir. 1997).

23.[8] That argument misses the point. The Defendants are not contending that a state-law fraudulent transfer claim can never "revert" to a debtor's creditors once a bankruptcy case is filed. But to the extent those creditors (here, via the Trustee) then seek to avoid *settlement payments* under state fraudulent transfer laws that would permit their avoidance, those claims are preempted by Section 546(e). None of the cases cited by the Trustee holds that—or even addresses whether—creditors bringing an avoidance action "relinquished" by the bankruptcy estate may seek to avoid a *settlement payment* free from Section 546(e)'s safe harbor.[9]

[8] The sole case the Trustee cites (Opp. 23, 28) as authority that Section 546(e) does not preempt these claims, *PHP Liquidating v. Robbins*, 291 B.R. 603 (D. Del. 2003), *aff'd*, 128 Fed. Appx. 839 (3d Cir. 2005), says nothing of the kind. Unlike here, the creditor claims assigned to the plan trust there did not include any avoidance claims "abandoned" under Section 544 (those claims were instead assigned to an estate-successor). *See id.* at 594. The court thus held that the trust, as assignee of the creditors, lacked standing to bring any such avoidance claims, and therefore the court's unadorned statement that Section 546(e) would not have literally applied and barred such an avoidance action was pure dicta. *See id.* at 596, 600. More importantly, the court did not address the question presented here—whether Section 546(e) would, in any event, preempt such a claim. *See id.* at 596.

[9] *See Hatchett v. United States*, 330 F.3d 875, 885-87 (6th Cir. 2003) (government had standing to bring state-law fraudulent transfer action to avoid transfer of real property after trustee declined to pursue action because government's tax lien against property would have left no excess recovery for unsecured creditors); *Unisys Corp. v. Dataware Prods., Inc.*, 848 F.2d 311, 313-14 (1st Cir. 1988) (automatic stay did not bar sole creditor of chapter 7 debtor from bringing fraudulent transfer action to avoid transfer of business assets to alter ego corporation after trustee declined to pursue the action); *In re Metropolitan Elec. Mfg. Co.*, 295 B.R. 7, 13-16 (Bankr. E.D.N.Y. 2003) (denying trustee's motion to sell section 544 claims to bidder); *In re Boynewicz*, No. 02-30250, 2002 WL 33951315, at *3-4 (Bankr. D. Conn. Nov. 27, 2002) (same), *aff'd*, 2003 WL 25285649 (D. Conn. Apr. 15, 2003); *In re Integrated Agri, Inc.*, 313 B.R. 419, 428-29 (Bankr. C.D. Ill. 2004) (dismissing as time-barred trustee's section 544 action to avoid funds loaned to corporate insiders); *Klingman v. Levinson*, 158 B.R. 109, 112-13 (N.D. Ill. 1993) (government and second creditor could resume prosecution of fraudulent transfer action they had commenced before individual debtor's bankruptcy to avoid transfer of real property after case was closed); *United States v. Doyle*, 276 F. Supp. 2d 415, 428-29 (W.D. Pa. 2003) (creditor had standing to bring fraudulent transfer action to avoid transfer of real property after individual debtors' chapter 7 cases were closed); *Casey Nat'l Bank v. Roan*, 668 N.E.2d 608, 614 (Ill. App. Ct. 1996) (same); *In re Pasian*, No. 94-31563, 2010 WL 935598, at *2 (Bankr. N.D. Cal. Mar. 15, 2010) (same).

6. The Trustee similarly argues that the avoidance claims authorized by Section 544 are causes of action owned by the creditors, and that Section 544 merely grants a bankruptcy trustee standing to assert those claims on the creditors' behalf during the bankruptcy. Opp. 18-21. That is true, but the Trustee reaches exactly the wrong conclusion from that fact. The point is that by restricting a trustee's authority in Section 546(e), Congress limited *creditor* claims.

There is no question that Congress generally intended to afford creditors of a bankrupt company the benefit of the fraudulent transfer claims they could bring outside of bankruptcy under state law to avoid the debtor's pre-bankruptcy transfers. But Congress vested exclusive authority to bring those *creditor* claims in bankruptcy in the "trustee" under Section 544. *See* Defs' Br. 28-29; Opp. 21-22. And, critically, Congress placed clear limits on that authority, mandating in Section 546(e) that settlement payments cannot be avoided "[n]otwithstanding section[] 544" and any contrary state law that would permit creditors the right to avoid such payments as fraudulent transfers. Thus, Congress unquestionably barred avoidance claims belonging to the debtor's creditors. To the extent the Trustee now seeks to pursue the same creditor claims under state law by virtue of the "abandonment" of the estate's right to bring those claims under Section 544, those claims are preempted by Section 546(e). *Cf. Anderson v. Sara Lee Corp.*, 508 F.3d 181, 194 (4th Cir. 2007) (holding that Congress intended remedies in federal minimum-wage statute to be exclusive where that statute provided that an employee's right to

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Similarly, in *Tribune* (cited in Opp. 23 n.18), a Delaware bankruptcy court stated that it was only "willing to say … [that due to] the failure of the estate to pursue [state law fraudulent transfer] claims, that creditors have regained the right, *if any*, to prosecute [those] claims." (Wissner-Gross Decl., Ex. F at 103:12-15 (emphasis added).) The court did not address whether, if those claims sought to avoid settlement payments, the claims would be preempted by Section 546(e). On the contrary, Judge Carey made clear that "I'm not disposing of substantive rights," and "I'm not making a determination of what happens to state law fraudulent conveyance claims upon the expiration of the estate's ability to pursue them." *Id.* at 102:22-25.

sue was terminated if the government sued on the employee's behalf under federal statute's remedial provisions, and that employee state-law claims were preempted to the extent those claims sought to circumvent the federal statute's remedial limitations).

7. The Trustee argues that the doctrine of preemption should not be used to alter the policy choices Congress made in balancing the competing interests of maximizing creditor recoveries and protecting the nation's financial markets. Opp. 35-37. Defendants agree. But it is the Trustee's position, not the Defendants', that would do violence to Congress' policy choices reflected in the Bankruptcy Code. In Section 546(e), Congress determined that "[n]otwithstanding section[] 544," the general policy of maximizing creditor recoveries underlying that provision must give way to the national interest in protecting the stability of financial markets where, as here, state-law fraudulent transfer claims are brought to avoid settlement payments (or other payments made in connection with a securities contract) allegedly made by a debtor in bankruptcy. *See* Defs' Br. 29-30. By urging a construction that would nullify Section 546(e), the Trustee's argument seeks to reverse that policy judgment.

8. The Trustee argues that the Defendants' position would "release" non-debtors in contravention of Section 524(e) of the Bankruptcy Code. (Opp. 21, 31, 37-41.) That contention is mystifying. Section 524(e) has no application here. It provides that the "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." 11 U.S.C. § 524(e). The Defendants are not guarantors of or otherwise "liab[le] on," the Debtors' debts, but instead are allegedly former holders of Lyondell stock. In any event, Defendants are not arguing that the Debtors' "discharge" relieved the Defendants of liability for any such debts. Rather, the Defendants are arguing that Section 546(e) preempts the state-law claims that the Trustee seeks to bring to avoid settlement payments. If Section 546(e) has the

effect of "immuni[zing]" a non-debtor from state-law fraudulent transfer liability (Opp. 37), that is an "immunity" that Congress expressly granted in Section 546(e) of the Bankruptcy Code. There is no conflict between Sections 546(e) and 524(e).

Likewise, the case law cited by the Trustee has no application here. That line of cases limits the ability of parties to write provisions into a Chapter 11 plan that purport to grant non-consensual releases of creditor claims against non-debtors, because the Bankruptcy Code provides no express authority for such relief (except under Section 524(g) in asbestos cases). But, again, the Defendants are not arguing that the Trustee's claims are released by a provision in the Debtors' Plan. They are arguing that those claims are preempted by Section 546(e), a provision that (unlike a plan) Congress mandated in the Bankruptcy Code.

9. Finally, the Trustee argues that the Defendants cannot vacate the Plan and Confirmation Order. Opp. 41-44. The Defendants are not seeking to do anything of the kind. Although many of the Defendants were not even on notice when the provisions at issue were considered at the confirmation hearing, they are not contending in this motion that the Trustee, by virtue of the Plan's "abandonment" provisions, lacks authority to file and litigate the claims asserted in this action. But nothing in the Plan or Confirmation Order purported to adjudicate the merits of those claims—or the merits of any defenses to those claims based on the preemptive effect of Section 546(e). Indeed, the Plan and Confirmation Order, which were entered in a

contested matter before the service of a complaint and summons on the Defendants in this adversary proceeding, could not have precluded the Defendants' substantive defenses to those claims.[10]

In short, the Trustee's claims are preempted by Section 546(e). They should be dismissed with prejudice.

II. THE TRUSTEE CANNOT RECOVER THE TRANSFERRED FUNDS FROM THE DEFENDANTS BECAUSE THOSE FUNDS WERE NOT PROPERTY OF THE DEBTORS AVAILABLE TO PAY THEIR CREDITORS.

As the Trustee acknowledges, a plaintiff asserting a fraudulent transfer claim must establish that the defendant was the recipient of a transfer of property *of the debtor*. Opp. 46. The Trustee also concedes that, where the funds at issue merely passed through the debtor—where the debtor "lacked a property interest in [those] funds [even though they] flowed through its account"—the funds were not property of the debtor and their transfer cannot be avoided for the benefit of the debtor's creditors. *Id.* at 56 (citing *Nordberg v. Sanchez (In re Chase & Sanborn Corp.)*, 813 F.2d 1177, 1181-82 (11th Cir. 1987)). Numerous cases also so hold. *See* Defs' Br. 36-38 (collecting cases).

Here, the Complaint and the Merger documents referenced therein make clear that the Merger Consideration paid to the Shareholders: (1) originated with the Lenders; (2) never passed through Lyondell; (3) passed instead through the buyer, Basell, which was prohibited from doing anything with the funds other than passing them on to the Paying Agent; and (4) also passed through the Paying Agent, which was required "pursuant to irrevocable instructions" to deliver

[10] *See, e.g.*, *In re Piper Aircraft Corp.*, 244 F.3d 1289, 1304 (11th Cir. 2001) ("confirmation of a … plan is res judicata only as to issues that can be raised in the less formal procedure for contested matters"; "confirmation generally cannot have [a] preclusive effect as to [matters] which must be raised in an adversary proceeding" (quoting *Cen-Pen Corp. v. Hanson*, 58 F.3d 89, 93 (4th Cir. 1995)); *In re Enewally*, 368 F.3d 1165, 1173 (9th Cir. 2004) ("confirmed plan has no preclusive effect on issues that must be brought by an adversary proceeding").

the funds to the Shareholders. Def's Br. 39-42.[11] None of the Merger Consideration was ever available to any Debtor to use to pay its creditors. Nevertheless, the Trustee maintains that there is an issue of fact as to whether any Debtor had sufficient control over the loan proceeds that were used to fund the payment of Merger Consideration so as to make that payment avoidable for the benefit of that Debtor's creditors. Opp. 56-57. Moreover, the Trustee asserts that, under the so-called "collapsing" doctrine, it does not even matter whether the funds transferred to Lyondell's Shareholders originated with any of the Debtors or whether any Debtor could—at any time—have used those funds to pay its creditors; rather, the Trustee contends that the Merger Consideration should be deemed to have been property of "the Debtors" because, in a separate transfer, "the Debtors" granted a lien on their assets in order to secure repayment of the Lenders. Opp. § II.A. Neither of these arguments has merit.

A. The Proceeds From the Lenders Could Not Have Been Used to Pay Any Debtor's Creditors, But Rather Were to Be Used Only to Pay the Merger Consideration.

Even if "most cases" cannot be decided on the pleadings, Opp. 56, in *this* case there can be no doubt that no borrower had control over, and thus no borrower had a property interest in, the funds that were transferred to the shareholders as Merger Consideration. According to the Trustee himself, "[p]ublic documents conclusive[ly] demonstrate that . . . the proceeds of [the Lenders'] loans were to be used for a purpose, e.g., the payment of Lyondell shareholders[.]" Letter, *Official Comm. of Unsecured Creditors v. Citibank, N.A.*, Adv. Pro. No. 09-1375 (Oct. 26, 2009), at 3 [Docket No. 170]. These public documents demonstrate that "payment of Lyondell shareholders" was the *only* purpose to which the funds provided by the Lenders were allowed to be used. *See* Defs' Br. 39 (citing Credit Agreement § 5.19 ("The Borrowers will use

[11] The Trustee does not dispute that the Merger documents referenced in the Complaint may be considered by the Court on Defendants' motion to dismiss. *See* Defs' Br. 5 n.2.

the proceeds of the Loans made on the Closing Date *solely* to finance the Transaction" (emphasis added))).[12]

When a debtor neither "receive[s] the proceeds" of a loan nor "ha[s] power to distribute them, or designate who would receive [them]," the debtor "as a matter of law" does not have a property interest in those loan proceeds. *See In re TOUSA, Inc.*, No. 10-60017, 2011 WL 522008, at *23 (S.D. Fla. Feb. 11, 2011). That is the case here, where—even after all the discovery the Trustee has obtained in the Committee Action—the Trustee cannot and does not allege that any of the Debtors had any control over how the funds from the Lenders would be used.[13] Although the Trustee devotes 18 pages of his brief to arguing that the funds transferred to the Shareholders somehow were the property of unspecified "Debtors," Opp. 45-62, he does not—and cannot—dispute that no Debtor had any control over the funds.

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[12] The Trustee characterizes the Defendants' focus on this "Use of Proceeds" provision in the Credit Agreement as "myopic." Opp. 58. But he elsewhere concedes that under that provision, "the borrowers under the Credit Agreement committed to use the Facilities Proceeds 'solely to finance the Transaction.'" Opp. 47. In fact, under the "earmarking" doctrine, courts have viewed as dispositive, in determining that a transfer did not involve the debtor's property, that a lender's contract required the debtor to use the loaned money to pay a third party. *See* Defs' Br. 37 n.21.

[13] The Trustee (Opp. 59 n.48) suggests that *TOUSA* does not support the Defendants' argument because the district court in *TOUSA* concluded that *one* of the debtors—"the primary borrower" that received the funds under the credit facility—had the authority to "control the loan proceeds' distribution." *TOUSA*, 2011 WL 522008, at *25. But the Trustee misses the point: the court held that *only* that particular debtor—and not any other debtor that granted liens on its assets to secure the borrowings—could set aside the transfer. *See id.* Thus, under *TOUSA*, the only Debtor here whose creditors conceivably could have avoided the payment of the Merger Consideration would have been the borrower under the Credit Agreement, Basell, and not Lyondell or any of the other Debtors that merely granted liens on their assets. And, even as to Basell, the payment could be avoided only if Basell had control over the disposition of the loan proceeds (which it did not) and only to the extent of Basell's (not Lyondell's) unpaid debt and the value of the liens granted by Basell (not Lyondell). *See id.*

B. The Collapsing Doctrine Does Not Change the Analysis.

Unable to establish that the Debtors had any property interest in the loaned funds paid as Merger Consideration to the shareholders, the Trustee contends that the funds should nonetheless be treated *as if* they were the Debtors' property because "the Debtors" separately transferred their own property (liens on their assets) to the Lenders to secure repayment of the loans—*i.e.*, that the two transfers should be "collapsed" into a single transfer. For several reasons, the "collapsing" doctrine on which the Trustee relies is inapposite and does not change the fundamental fact that no assets that belonged to any of the Debtors, or that any of the Debtors could have used to pay their creditors, were transferred to the Defendants.

First, the "collapsing" doctrine is not typically used to determine whether the transferred property belonged to the debtor, but rather to determine whether the debtor received reasonable value in exchange. As the Trustee acknowledges, the doctrine is "more frequently used" in fraudulent transfer cases against lenders that provided financing in a leveraged buyout or other secured transaction, not against shareholders. Opp. 49 (collapsing "finds its most frequent application to lenders who have financed leveraged buyouts of companies that subsequently become insolvent") (citing *HBE Leasing Corp. v. Frank*, 48 F.3d 623, 635 (2d Cir. 1995)). And it is employed in this context not to determine whether the payment to the shareholders entailed property of the debtor, but rather to answer an entirely different question: whether the debtor received reasonably equivalent value for the liens it granted the lenders. In such cases, the debtors actually transferred *their* assets to the defendant lenders—*i.e.*, they granted the lenders liens on their assets in order to secure the financing. *See, e.g.*, *HBE Leasing*, 48 F.3d at 635. But, insofar as the lenders argue that they provided value in exchange for those transfers (the cash they loaned), the courts sometimes "collapse" the two separate transfers—the grant of liens on the debtors' assets to the lenders, and the transfer of the loan proceeds to the shareholders—

because the "value" (*i.e.*, the loan proceeds) did not remain with the debtors, but rather was immediately transferred to the shareholders or other third parties. *See, e.g.*, *id.*

The doctrine is *not*, in such cases, used in the manner that the Trustee asks that it be used here—*i.e.*, to treat a transfer of non-debtor assets to non-insiders who played no role in orchestrating the transaction at issue *as though* it were a transfer of the debtors' assets. On the contrary, these cases recognize that funds that a debtor obtains from lenders are not the debtor's property (and thus do not represent "value" to the debtor) where the funds cannot be used as the debtor sees fit, including to pay the debtor's creditors, but instead are earmarked for payment to third parties.

Second, in the rare instances where courts have entertained the collapsing doctrine to hold that money provided by lenders for the purpose of paying the debtor's shareholders nevertheless entailed a transfer of property of the debtor, they have done so only to the extent the claims were against the lenders or controlling shareholders that orchestrated the transaction. Indeed, in the principal case cited by the Trustee—*Wieboldt Stores, Inc. v. Schottenstein*, 94 B.R. 488 (N.D. Ill. 1988), *on recons. in part, on other grounds*, 1989 WL 18122 (N.D. Ill. 1989)—the court expressly *declined* to treat a payment of merger consideration to non-insider shareholders as a transfer of the debtor's assets. *Id.* at 503. Thus, *Wieboldt* concluded that "the LBO transfers must be collapsed into one transaction" "[a]t least as regards the liability of the controlling shareholders, the LBO lenders, and the insider shareholders" because those defendants "knew that [the acquiring company] intended to finance its acquisition of Wieboldt through an LBO" and "knew that Wieboldt was insolvent"; but the court also made clear that it was "*not* willing to 'collapse' the transaction in order to find that the [non-insider] shareholders also received the debtor's property in the transfer." *Id.* at 502-03 (emphasis added); *see also HBE Leasing*, 48 F.3d at 635-36 ("'In deciding whether to collapse the transaction and impose liability on

particular defendants, the courts have looked frequently to *the knowledge of the defendants of the structure of the entire transaction* and to whether its components were part of a single scheme'" (quoting *In re Best Prods. Co.*, 168 B.R. 35, 56-57 (Bankr. S.D.N.Y. 1994) (emphasis added))).[14]

Here, the Defendants against whom the Trustee seeks to claw-back the Merger Consideration were, unlike the Lyondell Directors and Officers and the Blavatnik Parties that are defendants in the Committee Action, simply passive investors in Lyondell (or mere conduits who passed the funds on to such investors). The Complaint does not and cannot allege that they were insiders who directed the Merger.

Finally, even in the limited, inapposite circumstances in which *Wieboldt* applied the collapsing doctrine, the decision has been criticized, precisely because it entertained the fiction that cash that came from lenders, and that the debtor never had discretion to use to pay its creditors, was nevertheless the debtor's property simply because the debtor granted a lien on its assets to secure repayment of the lenders. *See In re Healthco Int'l, Inc.*, 201 B.R. 19, 22 (Bankr. D. Mass. 1996) (remarking that the *Wieboldt* court "failed to explain how a collapsing theory can result in a transfer by a debtor when the debtor made no actual transfer"). The *Healthco* court rejected the plaintiff trustee's argument—like the Trustee's here—"that the Debtor should be treated as having 'indirectly'" made the transfer of merger proceeds merely because the transferred funds "came from the proceeds of a loan for which the Debtor became liable once the

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[14] Likewise, in none of the other "collapsing" cases cited by the Trustee, Opp. 50-53, did a court apply the doctrine to payments made to non-insider shareholders. *See In re Norstan Apparel Shops, Inc.*, 367 B.R. 68 (Bankr. E.D.N.Y. 2007) (no discussion of collapsing doctrine or whether allegedly fraudulent transfer was of debtor's property); *In re OODC, LLC*, 321 B.R. 128 (Bankr. D. Del. 2005) (addressing whether transaction involved a scheme by insiders and lenders to defraud debtor's creditors); *Boyer v. Crown Stock Distrib.*, 587 F.3d 787 (7th Cir. 2009) (discussing collapsing in relation to payments to insiders of family-owned corporation); *Crowthers McCall Pattern, Inc. v. Lewis*, 129 B.R. 992 (S.D.N.Y. 1991) (applying collapsing doctrine to claims against lender).

merger was effective." *Id.*; *see also Tousa*, 2011 WL 522008, at *25 (payment of loaned funds to creditors of parent debtor did not entail transfer of property of subsidiary debtors, even though the latter granted liens on their property to secure the loan, because the subsidiaries did not receive the funds and could not use them "for their own purposes").

In short, there is no factual or legal basis in this action for treating the Merger Consideration as property of any Debtor.

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

The Trustee does not dispute that under state law, just as under the Bankruptcy Code, an allegedly fraudulent transfer cannot be recovered from a defendant that was a mere conduit with respect to the transferred property. Opp. 66 n.55 (conceding that the "'mere conduit'" rule "applies under federal, New York and Texas law"). Indeed, by his own admission, the Trustee has already dismissed—and will continue to dismiss—claims against defendants that were "mere conduits" and thus did not have a beneficial interest in the Merger Consideration, the transfer of which the Trustee seeks to avoid and recover. *Id.* 67 n.56; *see* also Transcript of Initial Pretrial Conferences at 9-10, 16, *In re Weisfelner v. Morgan Stanley & Co.*, No. 10-4609 (Bankr. S.D.N.Y. Mar. 8, 2011) [Docket No. 145]. Nevertheless, the Trustee contends that this issue "cannot or should not be assessed on a motion to dismiss" because none of the Defendants has "establish[ed] an evidentiary record" demonstrating that it was a mere conduit. Opp. 66.

As an initial matter, that each Defendant was the recipient of a transfer of a Debtor's property—*i.e.*, that it was a "transferee"—is an element of the Trustee's fraudulent transfer claims, and he therefore bears the burden of pleading that element. *See, e.g.*, *In re Incomnet, Inc.*, 463 F.3d 1064, 1073 n.8 (9th Cir. 2006) (rejecting argument that the "mere conduit" rule is

"an equitable affirmative defense" that an alleged transferee bears the burden of proving).[15] Here, the Trustee has not alleged that the Defendants had a beneficial interest in the Lyondell shares that were tendered in exchange for the Merger Consideration, and thus he has failed to allege that any Defendant is a "transferee." Courts have dismissed avoidance claims in these same circumstances. *See SIPC v. Stratton Oakmont, Inc.*, 234 B.R. 293, 314-15 (Bankr. S.D.N.Y. 1999) (dismissing claims on the pleadings where "[n]owhere has the Trustee alleged that [the defendant] received any of or benefitted from" the transfers at issue, but merely that "he was a mere conduit" who "moved the funds" from the debtor to other defendants).[16]

But even if the "mere conduit" rule were, as the Trustee suggests, an affirmative defense, an affirmative defense may be raised by a pre-answer motion to dismiss under Rule 12(b)(6), without resort to summary judgment procedure, "if the defense appears on the face of the complaint." *Pani v. Empire Blue Cross Blue Shield,* 152 F.3d 67, 74 (2d Cir. 1998). "[A] litigant may plead itself out of court" if he "alleg[es] facts (taken as true) that establish an affirmative defense." *Levine v. AtriCure, Inc.*, 594 F. Supp. 2d 471, 474 (S.D.N.Y. 2009); *see also* Wright & Miller, *Fed. Prac. & Proc.* Civ. § 1357, at 708-13 (3d ed. 2004) (complaint is

[15] The issue under the "mere conduit" doctrine—whether the alleged transferee had an interest in the property after that property was allegedly transferred to it—is analogous to the issue in earmarking cases: did the putative transferor, the debtor, have an interest in that property before the transfer occurred. The vast majority of courts, including all federal courts of appeal to consider the question, have held that the trustee bears the burden to plead and prove that the debtor had such an interest. *See, e.g., In re Adbox, Inc.*,488 F.3d 836, 841-42 (9th Cir. 2007) ("Properly understood, the earmarking doctrine is not an affirmative defense under Rule 8, but rather a challenge to the trustee's claim that particular funds are part of the bankruptcy estate"); *In re Heitkamp*, 137 F.3d 1087, 1089 (8th Cir. 1998) (same).

[16] The Trustee maintains that *Stratton Oakmont* "is not relevant" because "defendant there sought dismissal based on a failure to plead fraud with particularity." Opp. 68 n.58. In fact, the court dismissed the claims for a different reason; the trustee had failed to allege that the defendant had a beneficial interest in the funds at issue. *Stratton Oakmont* is thus entirely on point.

subject to dismissal on the pleadings if "the plaintiff's own allegations show that a defense exists that legally defeats the claim for relief").[17]

That is what the Trustee has done here. According to the Complaint, at least 20 of the Defendants are sued "*solely* in [their] capacity as custodian, trustee, agent, representative or nominee *on behalf of beneficial owners of Lyondell shares*." Compl. ¶¶ 15, 19, 21, 23, 25, 27, 33, 39, 43, 49, 51, 56, 58, 64, 66, 70, 101, 119, 122, 151 (emphasis added). Other Defendants are alleged only to have been a "holder" of such shares on behalf of other, unnamed "Transferees" that owned the "*beneficial interest*" in those shares. *See, e.g.*, *id.* ¶¶ 17-18, 147-48 (emphasis added). These allegations refute the Opposition's contention that the claims against these Defendants relate to transfers made "for their own benefit." Opp. 66.[18] This is not a "misreading of the Complaint," *id.* 69; it is exactly, verbatim, what the Complaint says. The Complaint should be dismissed as to those Defendants.

IV. THE TRUSTEE CANNOT RECOVER BY STANDING IN THE SHOES OF THE LENDERS, WHICH RATIFIED THE TRANSFERS THE TRUSTEE SEEKS TO AVOID.

A fraudulent transfer cannot be recovered by or on behalf of a creditor that ratified the transfer. Indeed, just a few weeks after Defendants filed their Opening Brief, the Second Circuit reaffirmed this principle, stating that a fraudulent transfer "'can be ratified by a creditor who is

[17] The Second Circuit recently reaffirmed this principle in a securities fraud case, remarking that while "[t]he absence of loss causation is an affirmative defense," it is "a proper basis on which to dismiss the claim" on appeal if "it is . . . apparent from the face of the complaint." *Amorosa v. AOL Time Warner Inc.*, No. 09-5270, 2011 WL 310316, at *3 (2d Cir. Feb. 2, 2011).

[18] A plaintiff may not amend its complaint through its brief in opposition to a motion to dismiss, let alone do so by asserting precisely the opposite of what it alleged in the complaint. *See, e.g., See Fadem v. Ford Motor Co.*, 352 F. Supp. 2d 501, 516 (S.D.N.Y. 2005) ("It is long-standing precedent in this circuit that parties cannot amend their pleadings through issues raised solely in their briefs."), *aff'd* 157 Fed. Appx. 398 (2d Cir. 2005); *In re Livent, Inc. Noteholders Sec. Litig.*, 151 F. Supp. 2d 371, 432 (S.D.N.Y. 2001) ("The complaint cannot, of course, be amended by the briefs in opposition to a motion to dismiss.").

then estopped from seeking its avoidance.'" *In re Adelphia Recovery Trust*, No. 09-799, 2011 WL 420428, at *10 (2d Cir. Feb. 8, 2011) (citing *In re Best Prods.*, 168 B.R. at 57). This rule makes sense. The purpose of fraudulent transfer law is to prevent a debtor from transferring assets to which its creditors otherwise could have looked for repayment. But when a lender loans the debtor money for the express purpose of enabling the debtor to give the funds to someone else, that lender could not have been looking to the money for repayment, and therefore was in no way defrauded by the transfer.

The Trustee does not contend that the law is otherwise. His response, in fact, is most notable for what he does *not* dispute. The Trustee does not dispute that, to the extent a creditor ratifies a debtor's transfer of assets, that creditor cannot later seek to avoid the transfer, nor can someone else avoid the transfer on the creditor's behalf. Opp. 63 (acknowledging that the Lenders' ratification of the Merger is relevant to the "ability of [the Trustee] to recover with respect to [its] claims on behalf of the Lenders"). Nor does the Trustee dispute that, in this case, the Lenders that financed the Merger—that loaned the Debtors the funds used to pay the Merger Consideration—are one of the "three groups of Creditor Trust Beneficiaries" on whose behalf he purports to sue. *Id.* Indeed, the Trustee does not dispute that of the three groups of beneficiaries of the Creditor Trust, the Lenders' claims are, by far, the largest, totaling in excess of $10 billion (whereas the claims of the other two groups total less than a quarter of that amount). *See* Plan § 5.8(b) [Docket No. 3990]; Third Am. Disclosure Statement at 6-8 [Docket No. 3988].

Nevertheless, the Trustee maintains that his claims on behalf of the Lenders should not be dismissed because "ratification is an affirmative defense," and, moreover, that the defense "should simply be disregarded" at the motion to dismiss stage because not all of the trust beneficiaries ratified the payment of Merger Consideration. Opp. 63, 65. Neither argument has merit.

First, the Second Circuit has dismissed for want of standing fraudulent transfer claims brought by a post-confirmation trust where the trust's beneficiaries had no right to avoid the transfers. *See Adelphia Recovery Trust v. Bank of Am., N.A.*, 379 Fed. Appx. 10 (2d Cir. 2010), *aff'g*, 390 B.R. 80, 95 (S.D.N.Y. 2008) (dismissing billions of dollars in fraudulent transfer claims on the pleadings), *cert den'd*, 131 S. Ct. 896 (2011). Standing is, of course, not an affirmative defense to be established by the Defendants, but rather the Trustee's burden to plead and prove. *See In re Delta Air Lines, Inc.*, 386 B.R. 518, 528 (Bankr. S.D.N.Y. 2008).[19]

But, even if ratification were an affirmative defense, an affirmative defense, as the Trustee acknowledges, can be the basis for a motion to dismiss "if the defense 'is obvious from the pleadings and papers before the court.'" Opp. 63 (citation omitted); *see also supra* at 30-31. That is the case here, where it is indisputable from both the allegations in the Complaint, and the documents referenced therein (documents that this Court may consider on this motion; *see* Defs' Br. 2 n.2), that the Lenders provided the funds at issue for the express—and sole—purpose of consummating the Merger, by paying the Shareholders for their Lyondell stock. The Complaint, for example, alleges that the lead arranging banks solicited other Lenders to participate in credit facilities "that would be used to finance the Merger." Compl. ¶ 379. The Credit Agreement itself expressly prohibited the use of the loan proceeds for any other purpose. Indeed, the very

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[19] *Banque Arabe et Internationale D'Investissement v. Maryland Nat'l Bank*, 850 F. Supp. 1199 (S.D.N.Y. 1994), *aff'd*, 57 F.3d 146 (2d Cir. 1995), cited by the Trustee (Opp. 63), is not to the contrary. That case involved a claim for rescission of a contract, not a fraudulent transfer action. In addressing the defense that the plaintiff claiming rescission had ratified the contract by accepting its benefits, the court remarked that ratification in this context is an affirmative defense that may require inquiry into the level of the party's knowledge of the fraud. *Id.* at 1212-14. Here, the only inquiry that is required is whether the Lenders knew that the funds they provided would be used to pay the Merger Consideration; that they did—indeed, that they intended and required that their money be so used—is established by the Trustee's own allegations, as well as by the Merger documents incorporated into the Complaint.

first page of the Agreement stated that the loan proceeds would "be used to pay the consideration for the Acquisition[.]" Credit Agreement at 1 (Firsenbaum Decl. Ex. C). The Agreement went on to provide that "[t]he Borrowers will use the proceeds of the Loans made on the Closing Date *solely* to finance the Transaction." *Id.* § 5.19 (emphasis added). And, among the "Affirmative Covenants," the borrower under the Agreement, Basell, agreed that it "*shall*, and *shall* cause each of its Restricted Subsidiaries to: . . . [u]se the proceeds of the Loans *only* for the purposes set forth in Section 5.19"—*i.e.*, to finance the Merger. *Id.* § 6, 6.15 (emphasis added)).

The Trustee's only response is to state that the Defendants "mak[e] no effort to distinguish among" the Lenders, and to argue that "[e]ach Lender's level of knowledge is an issue of fact unsuitable for a motion to dismiss." Opp. 64. But the only "knowledge" that matters here is that the Lenders knew that the funds they were loaning would be used to pay the Shareholders for their Lyondell stock. "[R]atification may be express or implied"; it is "the act of knowingly giving sanction or affirmance to an act." *Adelphia Recovery Trust*, 2011 WL 420428, at *10. The "act" at issue in this fraudulent transfer case—the transfer that the Trustee seeks to avoid—is the payment to the Shareholders of the Merger Consideration. Each and every one of the Lenders obviously knew that payment was going to occur, and they most assuredly "sanctioned" or "affirmed" that payment by insisting in their own Credit Agreement, to which each of them was a party, that their funds be used to fund the payment and for no other purpose.

Second, the Defendants' ratification argument is not "pointless" merely because it does not apply to *all* of the beneficiaries that would share in any recovery by the Creditor Trust. Opp. 63 n.52. Courts routinely grant partial motions to dismiss, including by dismissing some (but not all) claims, or all claims by some (but not all) plaintiffs. *See, e.g.*, *In re Bogdanovich*, 301 B.R. 129, 150 (Bankr. S.D.N.Y. 2003) (granting motion to dismiss "insofar as it might be deemed to

assert claims on [] behalf" of one of three plaintiffs, but concluding that claims can proceed on behalf of other two plaintiffs).

Here, it is particularly appropriate not to "disregard[]" the Trustee's attempt to recover on behalf of the Lenders. Whereas the maximum recovery on any claims on behalf of the trade creditors and bondholders is approximately $2.4 billion, Opp. 65, the Trustee seeks to recover approximately $5.9 billion in this lawsuit, Compl. ¶ 2. It would be a strange rule of law indeed that would prevent the Court from dismissing at least some $3.5 billion in fraudulent transfer claims that the Trustee seeks to pursue as assignee of the very Lenders to whom the Trustee claims that "the value of Lyondell" was "pledged" in connection with the Merger, Opp. 49, and whom the Trustee himself previously sued to recover those "pledged" assets as fraudulent transfers.

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

The Trustee deems it "frivolous" to suggest that he has failed to plead his intentional fraudulent transfer claim with particularity. Opp. 69. Rhetoric is no substitute for analysis. Even in his Opposition, the Trustee fails to specify which Debtor or Debtors supposedly intended to "hinder, delay or defraud" their creditors. This is no mere oversight. Defendants' Opening Brief made the same point, noting that the Complaint repeatedly refers to the alleged transferor as "LyondellBasell," defined broadly to include "LyondellBasell Industries AF S.C.A. ('LBI'), LyondellBasell Finance Company, Lyondell Chemical Company," and "many of the respective direct and indirect subsidiaries of LBI and Lyondell, including all of Lyondell's major operating subsidiaries." Defs' Br. 44-45 (citing, *e.g.,* Compl. ¶ 1). Yet, the Trustee continues to obfuscate, refusing to identify the relevant Debtor or Debtors.

That failure matters. Under both the Bankruptcy Code, as well as state fraudulent transfer law, a plaintiff asserting an intentional fraudulent transfer claim must allege that the very

debtor that made the transfer—not some other one—acted with intent to hinder, delay or defraud its—not some other entities'—creditors. *See, e.g.*, 11 U.S.C. § 548(a)(1)(A) ("The Trustee may avoid any transfer . . . of an interest of *the debtor* in property . . . if *the debtor* . . . made such transfer . . . with actual intent to hinder, delay or defraud any entity to which *the debtor* was or became . . . indebted") (emphasis added); Tex. Bus. & Com. Code Ann. § 24.005(a)(1) ("A transfer made or obligation incurred by a *debtor* is fraudulent as to a creditor . . . if the *debtor* made the transfer. . . with actual intent to hinder, delay, or defraud any creditor of the *debtor*") (emphasis added). Here, prior to the Merger, Lyondell and Basell were two wholly-independent, distinct sets of companies, each with its own separate management, board of directors, and creditors.

The Trustee's failure—in his Complaint and even in his Opposition—to specify the Debtor or Debtors that, he claims, made the transfers at issue and acted with intent to defraud is reason enough to dismiss the Trustee's intentional fraudulent transfer claim. *See In re AlphaStar Ins. Grp., Ltd.*, 383 B.R. 231, 269 n.18 (Bankr. S.D.N.Y. 2008) (plaintiff's failure to allege "which of [several] Goldman Sachs Entities did what[ ] violates the rules against group pleading"). But, in any event, the Trustee has failed adequately to allege that either Basell or Lyondell intended to defraud its creditors.

A. The Trustee Has Failed to Allege That Basell Intended to Defraud Its Creditors.

The Trustee's reasons for his stubborn refusal to specify the relevant Debtor or Debtors are evident. Read most generously, the Complaint alleges that, to entice Basell to go forward with the Merger, Dan Smith and a few, more-junior officers or employees at Lyondell developed "refreshed" projections for Lyondell that they knew, or should have known, were unrealistic. *See* Compl. ¶¶ 285-303. But even if those allegations were sufficiently particularized under Rule 9(b) to make out a case that Smith and his colleagues in Lyondell management acted with

fraudulent intent (and they are not; *see* Defs' Br. 52-59), it was Basell—not Lyondell—that acquired the stock of the Lyondell Shareholders. To the extent that any Debtor could be deemed to have used its own property to pay for that stock—and as discussed in Section II above, none really did—that Debtor was thus Basell, not Lyondell. Indeed, the funds loaned by the Lenders to finance the payment of the Merger Consideration to the Shareholders at least passed through Basell, the entity purchasing the stock, albeit only for a moment (and only with instructions that the funds were to be turned over to the Paying Agent for payment to the Shareholders); they never passed through Lyondell, even for an instant in time.[20]

The Complaint is devoid of any allegations that Basell intended to defraud its creditors. To the contrary, to the extent there are *any* allegations of fraudulent intent in the Complaint, those allegations are that Smith "and his inner circle" (Opp. 70) inflated Lyondell's projections in order to obtain a "'blowout price'" *from Basell*. Compl. ¶ 5; *see also* Opp. 71 ("Lyondell management fabricated projections *in order to deceive Blavatnik*" (emphasis added)); Opp. 70 (Smith and his "inner circle of senior Lyondell management "manipulate[d] earnings projections *in order to induce Blavatnik* to enter into the Merger Agreement" (emphasis added)). The alleged intent of Smith and his "inner circle" at Lyondell cannot, of course, be imputed to *Basell*—which was on the other side of the Merger transaction. Indeed, if Lyondell's

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[20] Indeed, counsel for the Trustee acknowledged that the non-insider Shareholders "receive[ed] [their] merger consideration from the merger sub," which the Merger Agreement specifies was a Basell entity, not a Lyondell entity. See Transcript of Motions to Dismiss at 103, *In re Weisfelner v. Blavatnik*, Adv. Pro. No. 09-1375 (Mar. 10, 2011) [Docket No. 520]; Merger Agreement at A-1 (Firsenbaum Decl. Ex. A); *see also id.* § 2.6(a) (providing that on the Closing Date, "Parent"—defined as Basell—"shall deposit, or cause to be deposited, with the Paying Agent, for the benefit of" Lyondell's shareholders "cash in an amount sufficient to permit payment of the aggregate Merger Consideration").

management truly did intend to "deceive Blavatnik" into having Basell purchase Lyondell at a "blowout price," that would suggest that Basell was a casualty of the fraud, not one of its culprits.

It is, moreover, simply implausible to suggest that Blavatnik was aware that Lyondell was trying to "deceive" him with "fabricated projections," but went ahead with the transaction anyway. Pursuant to the Merger Agreement, Basell became jointly and severally liable on billions of dollars in debt to the Lenders; Basell entities were among the "obligor entities" that "became liable for the repayment of the Merger Financing." Compl. ¶ 12; Credit Agreement § 11.01 ("Each Guarantor hereby jointly and severally with the other Guarantors guarantees, as a primary obligor, . . . the prompt payment in full when due . . . of the principal of and interest . . . on the Loans made by the Lenders") (Firsenbaum Decl. Ex. C); *id.* Schedule 1.01H (listing Basell guarantors). These were real entities with real value, not "shell" companies that did not put any of their own assets on the line. Indeed, only two years earlier, Blavatnik had paid roughly a billion dollars of his own cash, and caused another of his companies to incur more than an additional $5 billion in debt, to purchase Basell. Compl. ¶ 233. The notion that Blavatnik would, shortly thereafter, enter into a Merger that he knew and intended would fail, leaving Basell unable to pay its creditors and wiping out his equity in Basell, as well as Basell's equity in Lyondell, and requiring Basell itself to file for bankruptcy,[21] is beyond comprehension. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2009) (complaint must contain "enough facts to state a claim that is plausible on its face").

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[21] After the Merger, Basell became Lyondell BasellIndustries AF S.C.A. ("LBI"). Because it had agreed to become jointly and severally liable on the bank debt, LBI, as well as other Basell entities, were later required to file for bankruptcy, along with the Lyondell entities. LBI's equity in Lyondell was wiped out when the Plan was confirmed. *See* Plan § 4.15.

B. The Trustee Has Failed to Allege That Lyondell Intended to Defraud Its Creditors.

Even if the transfers at issue were of Lyondell's assets (and they were not), the Complaint also fails adequately to allege that Lyondell intended to hinder, delay or defraud its creditors. As the Trustee acknowledges, it was the "board of directors of Lyondell," and not Smith or any "inner circle" of management, that was required to, and did, "authorize[] [the] cash out merger." Compl. ¶ 1. Under applicable law, the Merger could not have been consummated without the board's approval.[22] Thus, it is the board's—and not merely Smith's or anyone else's—intent that matters. *See, e.g.*, *In re Adelphia Commc'ns Corp.*, 365 B.R. 24, 54-55 (Bankr. S.D.N.Y. 2007), *aff'd in part*, 390 B.R. 64 (S.D.N.Y. 2008) (declining to impute misconduct of some members of management and board where other, innocent board members had the power and authority to prevent the allegedly fraudulent transactions). This case is therefore unlike those cited by the Trustee involving corporations that were wholly-owned by the alleged wrongdoers, who had the power and authority on their own to take whatever actions they chose. *See* Opp. 70 n.59 (citing *FDIC v. Ernst & Young*, 967 F.2d 166 (5th Cir. 1992); *Kirschner v. KPMG LLP*, 15 N.Y.3d 446 (2010)).

Under both New York and Texas law, the knowledge and intent of a company's officer is not imputed to the company where, as here, the officer allegedly acted adversely to the company, and there were innocent insiders who could have stopped the alleged misconduct. *See In re Magnesium Corp. of Am.*, 399 B.R. 722, 766 (Bankr. S.D.N.Y. 2009); *In re Sunpoint Sec., Inc.*, 377 B.R. 513, 564 (Bankr. E.D. Tex. 2007), *aff'd sub nom. Richardson v. Cheshier & Fuller, L.L.P.*, 2008 WL 5122122 (E.D. Tex. Dec. 8, 2008). Here, the Trustee has alleged—in his Complaints both in this case and in the Committee Action (in which he sues Smith and the rest of

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[22] Lyondell was a Delaware company. Under Delaware law, the Merger required approval of Lyondell's board. *See* Del. Code Ann. tit. 8, § 251(b).

his "inner circle" for allegedly breaching their fiduciary duties to Lyondell; *see* Committee Action Compl., Count 20 (pp. 136-37))—that the Merger was contrary to Lyondell's interests because it supposedly left the company with too much debt, and the borrowed money went to the Shareholders, not to Lyondell itself. *See, e.g.*, Compl. ¶¶ 272-74. The Trustee cannot have it both ways: He cannot allege that Smith knowingly and intentionally acted in a manner adverse to Lyondell's interests and, at the same time, argue that these same actions should be imputed to Lyondell.

As for Lyondell's board, it consisted of 10 directors in addition to Smith (including, among others, the former CEO of Mercedes-Benz USA and the former CFO of Georgia-Pacific Corporation). Committee Compl. ¶¶ 43-53; *see also* Lyondell Chemical Company Schedule 14A (filed Mar. 8, 2007). The Trustee has not alleged that any of the other directors acted with intent to defraud Lyondell's creditors. The Complaint is, in fact, devoid of any reference whatsoever to nine of those directors. And, while the Trustee maintains in his Opposition Brief that Lyondell's outside directors "should have known" about the allegedly inflated projections, Opp. 70 n.59, that is not a sufficient allegation of actual fraudulent intent. *See, e.g.*, *In re Actrade Fin. Techs. Ltd.*, 337 B.R. 791, 809 (Bankr. S.D.N.Y. 2005) (intentional fraudulent transfer claims require a "knowing intent" to "damage creditors").[23]

CONCLUSION

For these reasons, as well as those set forth in Defendants' Opening Brief, the Complaint should be dismissed, with prejudice.

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[23] The Trustee's intentional fraudulent transfer claim also fails under New York law because the Complaint contains no allegation that the non-insider Shareholders acted with fraudulent intent. Contrary to the Trustee's argument, Opp. 72-73, there is substantial (albeit not uniform) authority that in New York, an intentional fraudulent transfer claim requires that the transferee, and not merely the transferor, act with fraudulent intent, as Judge Lifland has noted. *See In re Bernard L. Madoff Inv. Sec. LLC*, No. 09-1172, 2010 WL 5841402, at *6 (Bankr. S.D.N.Y. Feb. 24, 2011).

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Respectfully Submitted,

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