IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

In re HECHINGER INVESTMENT COMPANY OF DELAWARE, et al.,	)	Chapter 11 Case Nos. 99-2261-PJW to 99-2283 (Jointly Administered)
Debtors.	)	
THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF HECHINGER INVESTMENT COMPANY OF DELAWARE, et al., on behalf of HECHINGER INVESTMENT COMPANY OF DELAWARE, et al.,	)	
Plaintiff,	)	
v.	)	Civil Action No. 00-840-RRM
FLEET RETAIL FINANCE GROUP, et al.,	)	
Defendants.	)	

REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS
OF DEFENDANTS CATHERINE S. ENGLAND,
RICHARD ENGLAND, JR., AND LOIS ASSOCIATES L.P.

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INTRODUCTION

Plaintiff's opposition confirms precisely what we argued in our opening brief – that Catherine S. England, Richard England, Jr., and Lois Associates L.P. (collectively, the "England Family Defendants"), are defendants by afterthought. Although plaintiff's opposition brief totals 47 pages, only four of those pages separately address the England Family Defendants. And that is hardly surprising: the England Family Defendants had no role – *none* – in the transactions at issue in this litigation. As we explained, a full *eight years* before the transactions at issue here, the England Family Defendants entered into a voting trust, under which they irrevocably gave up all voting rights in their Hechinger stock. They did not even vote for the transactions at issue.

Plaintiff obscures this crucial but indisputable fact. In response to our contention that the England Family Defendants were not anyone's "fiduciaries" at the time of the transaction, plaintiff characterizes the voting trust as if it were nothing more than the grant of a proxy; from that flawed premise, plaintiff attributes to the England Family Defendants a type of "vicarious" fiduciary duty arising from the acts of the three Hechinger Family defendants to whom the England Family Defendants ceded their voting rights years before. On its fraudulent conveyance claim, plaintiff advances a theory that is, by its own admission, foreclosed by the Third Circuit's dispositive decision in *In re Resorts International, Inc.*, 181 F.3d 505 (3d Cir.), cert. denied, 528 U.S. 1021 (1999). And with respect to its unjust enrichment claim, plaintiff makes two independent legal errors. First, it claims (contrary to its own complaint) that it has standing to assert this claim not as a creditor, but as the debtor – yet even under this new theory plaintiff lacks standing and its claim fails as a matter of law. And in response to our arguments that the claim is preempted by the Bankruptcy Code, plaintiff simply ignores the cases cited in our opening memorandum and, again, ignores the clear import of *Resorts*. Because each of these arguments fails as a matter of law, the England Family

Defendants' motion to dismiss should be granted and the case against them dismissed with prejudice.[1]

ARGUMENT

I. THE ENGLAND FAMILY DEFENDANTS DID NOT HAVE A FIDUCIARY RELATIONSHIP WITH HECHINGER OR ITS CREDITORS

As we explained in our opening brief (at 6-8), the 1989 Voting Trust and the 1997 Shareholders' Agreements (attached as Exs. A and B to our motion to dismiss) confirm that the England Family Defendants did not have a fiduciary relationship with either Hechinger, its shareholders, or its creditors. See, *e.g.*, *PBGC* v. *White Consol. Indus.*, 998 F.2d 1192, 1196 (3d Cir. 1993) (in addressing a motion to dismiss, a court may rely both on documents cited in a complaint and on documents that are publicly filed).

Sensibly, plaintiff does not question the operative facts established by these documents. There is no dispute that, at the time of the transactions at issue, none of the England Family Defendants was an officer or director of Hechinger. There is no dispute that, at the time of the transactions at issue, the England Family Defendants did not own a majority of the stock in Hechinger. See Opp. 35 n.15. There is no dispute that, *eight years before the transactions at issue*, the England Family Defendants entered into a ten-year voting trust pursuant to which they irrevocably gave away the right to vote their shares. There is no dispute that the England Family Defendants did not (and could not) vote for the transactions at issue. And plaintiff seems to concede

[1] The England Family Defendants also moved to dismiss the cross-claims originally filed against them by Back Bay Capital Funding LLC and Fleet Retail Finance, Inc. Back Bay and Fleet have since dismissed their cross-claims voluntarily.

as well that (absent being an officer or director) a defendant must own or control the voting of a majority of a corporation's shares in order to owe a fiduciary duty. Opp. 38.

Plaintiff nevertheless would have this Court ignore these crucial documents. According to plaintiff, because the complaint lumps the England Family Defendants together as part of a monolith called the "Hechinger Family," this Court must therefore assume, for purposes of this motion, that every member of the Hechinger Family was, indeed, a controlling shareholder. Opp. 38. But the 1989 and 1997 shareholder agreements cannot be ignored. As the case law makes clear, where documents integral to the complaint contradict allegations in the complaint, courts should and do rely on them in resolving motions to dismiss. *E.g.*, *ALA, Inc.* v. *CCAIR, Inc.*, 29 F.3d 855, 859 n.8 (3d Cir. 1994) ("Where there is a disparity between a written instrument annexed to a pleading and an allegation in the pleading based thereon, the written instrument will control."). And here, the governing documents dispositively refute the allegation that the England Family Defendants were part of a Hechinger voting bloc. In the face of the voting trust documents, the bare allegations of the complaint have no force.

Apparently recognizing as much, plaintiff makes an alternative – and unprecedented – claim. It contends that, even though they entered into a voting trust and completely gave up their right to vote on Hechinger transactions, the England Family Defendants nevertheless remained bound, as "principals," by the acts of their "agents" – the three Hechinger Family defendants to whom they ceded their voting power. Opp. 35-39. In substance, plaintiff advocates a theory of "vicarious fiduciary liability," under which the beneficiaries of the voting trust – shareholders who have irrevocably ceded their right to vote – remain liable, albeit vicariously, for the acts taken by the trustees (who are voting not only the beneficiaries' shares, but other entities' shares as well).

Plaintiff misconceives the law regarding fiduciary duties in connection with voting trusts. It may well be that, by entering into the voting trust, the voters (John Hechinger, John Hechinger, Jr., and S. Ross Hechinger) became the fiduciaries of the trust beneficiaries (the England Family Defendants and the other shareholders depositing their stock in the trust). But the beneficiaries do not *themselves* become fiduciaries, simply because the *voters* may have certain fiduciary duties. Nor is it true that the grant of a proxy under a voting trust creates a principal-agent relationship between the beneficiaries and the voters, under which the beneficiaries become liable for the acts of their agents. A voting trust, after all, involves not simply the grant of a proxy – it is the creation of a *trust*. See, *e.g.*, 5 William Meade Fletcher, *et al.*, FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 2075 (perm. ed. 1996). As the case law makes clear, a party who enters into a voting trust does not just grant a right to vote his stock on one or more specific occasions, pursuant to the directions and wishes of the stockholder. To the contrary, he completely gives up any control over the affairs of the corporation. *Foye* v. *New York Univ.*, 269 A.2d 63, 69 (Del. 1970) ("A 'beneficiary' of a voting trust . . . is the stockholder concerned with, and relieved of, the vote and control of the corporation."). Indeed, voting trusts are governed by a provision of the Delaware Code, Del. Code Ann. tit. 8, § 218, that is not applicable to simple proxies (which are governed by *id.* § 212).

Accordingly, Delaware law treats voting trusts differently from grants of proxies. (For this reason, the cases discussed in plaintiff's opposition (at 36), which discuss proxies, but not voting trusts, are inapposite.) It is a "well-settled rule that a voting trust is a true trust and subject to the rules of equity in respect of trusts." *Adams* v. *Clearance Corp.*, 121 A.2d 302, 307 (Del. 1956). And, under the basic principles of the law of trusts, "[t]he beneficiary as such is not personally

subject to liabilities to third persons incurred in the administration of the trusts." RESTATEMENT (SECOND) OF TRUSTS § 274; see also *id.* § 276 ("The beneficiary as such is not personally liable to third persons for torts committed by the trustee in the course of the administration of the trust."). Indeed, how could the law be otherwise? If by entering into a voting trust one exposed oneself to liability while at the same time giving up the right to vote, it is difficult to imagine why anyone would bother.

The England Family Defendants cannot be liable for the acts of the voters taken pursuant to the voting trust, and plaintiff's claim for breach of fiduciary duty should be dismissed.

II. THE PAYMENTS TO THE ENGLAND FAMILY DEFENDANTS WERE "SETTLEMENT PAYMENTS" UNDER § 546(E) AND THUS NOT AVOIDABLE THROUGH § 544

As we noted in our opening brief, the Third Circuit held in *In re Resorts International, Inc.*, 181 F.3d 505, 516 (3d Cir. 1999), that "payments to shareholders in an LBO" are "settlement payments" under Section 546(e) of the Bankruptcy Code. See generally 181 F.3d at 514-16. Thus, as we explained, the payments made to the England Family Defendants in the Hechinger LBO were "settlement payments" within Section 546(e) and therefore exempt from the avoidance provisions of Section 544. In response, plaintiff offers four arguments, arguments that become progressively more audacious, and less substantial.

First. Plaintiff argues that Section 546(e) does not apply because, it says, the settlement payments were not *really* made to the England and Hechinger Family Defendants by Chase Mellon Shareholders Services LLC, but rather by BSQ Acquisition. In support of this argument, plaintiff says that Chase Mellon was only an "intermediary" for BSQ Acquisition, having never obtained a "legal or beneficial interest" in the payments. Opp. 14. And in support of the argument that the

financial institution that makes the payments must obtain a "legal or beneficial interest," plaintiff cites several cases involving checking accounts and principals and agents, though not, curiously, cases involving Section 546(e). Opp. 15-16.

The problem with plaintiff's argument – and the problem is a rather big one – is that *the Third Circuit rejected that very argument in* Resorts International *on virtually indistinguishable facts*. Indeed, in *Resorts* the Third Circuit went out of its way to take issue with *Munford* v. *Valuation Research Corp.*, 98 F.3d 604 (11th Cir. 1996), which had advanced the "legal or beneficial interest" requirement that plaintiff advances here and on which plaintiff mainly relies. Rather than adopt that rule, the Third Circuit concluded that the straightforward and unadorned language of Section 546(e), which makes no mention of any "legal or beneficial interest" requirement, could not bear the Eleventh Circuit's reading. See *Resorts*, 181 F.3d at 514-16. Given that *Resorts* is directly controlling precedent from the governing court of appeals in this jurisdiction, it is surprising – or perhaps not so surprising – that plaintiff spends eight pages arguing the very point that *Resorts* rejected before bothering to cite the case, while featuring as its chief support a citation to the very case whose reasoning the Third Circuit specifically refused to follow. Nor does plaintiff's attempt to distinguish *Resorts* have any merit. Plaintiff claims that the Third Circuit "did *not* hold that the transfer was protected" because of payments made by the *transfer agent* (Opp. 18 (emphasis added)), which played precisely the same role in *Resorts* that Chase Mellon played in the Hechinger LBO. Plaintiff's claim is demonstrably false: that is *exactly* what the Third Circuit held. See 181 F.3d at 516.

Second. Plaintiff claims that there remains an issue of fact over the question whether the disbursing agent, Chase Mellon Shareholders Services LLC, is a financial institution. (Note that

Section 546(e) applies not only to payments made by or to a financial institution, but also to payments made by or to a commodity broker, forward contract merchant, stockbroker, or securities clearing agency.) According to plaintiff, the fact that *plaintiff itself* did not allege that Chase Mellon is a financial institution means that plaintiff should be allowed discovery on whether it is. Plaintiff notes, in particular, that "Chase Mellon Shareholders Services" doesn't have the words "bank" or "savings and loan" in its name (Opp. 16), an argument that would certainly be news to such other financial institutions as "Morgan Guaranty Trust Co." Whether plaintiff itself used the words "financial institution" in describing Chase Mellon in its complaint obviously has no bearing on whether Chase Mellon *is* a financial institution. See *Resorts Int'l*, 181 F.3d at 515. Chase Mellon, which is now called Mellon Investor Services, is part of the Mellon Financial Corporation, the 24th largest bank holding company in the United States, ranked by assets, as of June 30, 2001. See <http://www.ffiec.gov/nic/default.htm> (website for the National Information Center of the Federal Reserve System).

Third. After spending eight pages making all the arguments that the Third Circuit rejected in *Resorts*, plaintiff finally acknowledges, in a footnote, that *Resorts* governs this case – and then "respectfully submits" that *Resorts* was "erroneous" and should not be applied here. Opp. 18 n.8. Obviously, this Court is not free to disregard controlling Circuit case law.

Fourth. Plaintiff's last, and boldest, argument is that Section 546(e) of the Bankruptcy Code works an unconstitutional violation of equal protection – this, under rational basis review, no less. The offending irrational or "arbitrary" distinction, according to plaintiff, is the distinction between "creditors whose debtors have filed bankruptcy proceedings and those debtors who have not" (Opp. 19) and "whether [or not] a debtor eventually files for bankruptcy protection" (Opp. 22).

That is an obvious makeweight. After all, the distinction between debtors who have filed for bankruptcy and debtors who have not *is the entire point of the federal Bankruptcy Code*, indeed *the entire point of the provision in the Constitution granting Congress the power to make "uniform Laws on the subject of Bankruptcies*," U.S. CONST. art. I, § 8, cl. 4. If, for equal protection purposes, this distinction is "irrational," then under plaintiff's reasoning the entire Bankruptcy Code violates the Fourteenth Amendment and the Fourteenth Amendment impliedly repealed the Bankruptcy Clause of Article I. All of which seems fairly unlikely.

III. THE COURT SHOULD DISMISS PLAINTIFF'S UNJUST ENRICHMENT CLAIM

Plaintiff's opposition fails to take on, let alone refute, our arguments that plaintiff lacks standing to assert an unjust enrichment claim, and that, in any event, the claim is preempted by the Bankruptcy Code.

A. Plaintiff Lacks Standing To Bring Its Unjust Enrichment Claim On Behalf Of Either Hechinger's Creditors Or Hechinger Itself

In our opening memorandum, we showed that plaintiff lacks standing to assert an unjust enrichment claim on behalf of the unsecured creditors. Plaintiff can bring only those claims that a trustee in bankruptcy could bring, and it is settled law that (with the exception of avoidance claims under Section 544, which are expressly barred here by Section 546(e) and *Resorts International*) bankruptcy trustees may not assert claims on behalf of the creditors of a bankruptcy estate. England Family Mem. at 12 (citing *Caplin* v. *Marine Midland Grace Trust Co.*, 406 U.S. 416 (1972)). Plaintiff nowhere disputes this fundamental point. Instead, plaintiff tacitly admits that it lacks standing to assert an unjust enrichment claim on behalf of the creditors, arguing instead that it may

assert such a claim on behalf of Hechinger itself and seeking to distinguish *Caplin* and its progeny on this ground. Opp. 40 & n.21.

Plaintiff therefore tries to salvage its failed unjust enrichment claim by asserting that the debtor Hechinger, rather than the creditors, has standing to assert such a claim. Plaintiff's last-minute contention that it was Hechinger – not the unsecured creditors – that was impoverished as a result of the supposed unjust enrichment (Opp. 39) bears no resemblance to the allegations of the complaint. There, plaintiff alleges that the leveraged buy-out "shifted *all* the risk of the Debtors' troubled operations *to their unsecured creditors*," Am. Compl. ¶ 5 (emphasis added), and was ultimately "decidedly unfair *to unsecured creditors*," *id.* ¶ 69 (emphasis added); see also *id.* ¶¶ 3, 82, 83, 94. And plaintiff's opposition is no different; it too identifies the unsecured creditors as the injured entities in the LBO – that is, until its incongruous argument about unjust enrichment. *E.g.*, Opp. 6-7, 8 (the transaction "was decidedly unfair to," caused "substantial harm to," and had a "deleterious effect on," unsecured creditors).

Even if plaintiff's newly-articulated theory were taken at face value, an unjust enrichment claim brought on behalf of Hechinger fails as a matter of law. Plaintiff now contends, standing in Hechinger's shoes, that the England Family Defendants and Hechinger's other shareholders were wrongfully enriched at Hechinger's expense when they sold the company. But Hechinger existed for the benefit of the shareholders, who owned it. An unjust enrichment claim on behalf of Hechinger thus runs afoul of some of the most basic principles of Delaware corporate law. (All of the Hechinger companies are Delaware corporations. See Am. Compl. ¶¶ 33-55.)

The Supreme Court of Delaware has held that "each stockholder represents himself and his own interests solely and in no sense acts as a trustee or representative of others." *Tanzer* v.

International Gen. Indus., Inc., 379 A.2d 1121, 1124 (Del. 1977) (citations and quotations omitted), overruled on other grounds by *Weinberger* v. *UOP, Inc.*, 457 A.2d 701, 715 (Del. 1983) (rejecting requirement that shareholders act out of valid business purpose). Such a shareholder "may vote contrary to what other stockholders deem to be the best interest of the corporation, *or even detrimental to it*." *Id.* (emphasis added). Indeed, "[i]t is not objectionable that [a stockholder's] motives may be for personal profit, or determined by whim or caprice so long as they violate no duty owed to other shareholders." *Bershad* v. *Curtis-Wright Corp.*, 535 A.2d 840, 845 (Del. 1987); see also 11 Fletcher, *supra*, § 5318 ("The purpose of modern business corporations is to earn money for their shareholders."); *Norte & Co.* v. *Manor Healthcare Corp.*, Nos. 6827 & 6831, 1985 WL 44684, at *3 (Del. Ch. Nov. 21, 1985) ("Stockholders are the equitable owners of the corporation's assets with a right to share in the profits of the company and in the distribution of its assets on liquidation.") Indeed, the shareholders of a Delaware corporation may dissolve it, causing all of its assets to be distributed to them; while such shareholders would potentially be liable to unpaid creditors of the company for claims "against the corporation," there is no basis for the corporation itself to complain. Del. Code Ann. tit. 8 § 282. If Hechinger's shareholders were this entitled to vote detrimentally to the corporation's interest, and therefore to merge, sell, or even dissolve the corporation for profit or caprice, Hechinger, or anyone standing in its shoes, cannot be heard to claim that its own shareholders' decision to sell the company unjustly impoverished Hechinger.[2]

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[2] The few cases plaintiff cites are inapposite. *In re Financial Mgmt. Services, Inc.*, 261 B.R. 150 (Bankr. W.D. Pa. 2001), did not even concern claims against shareholders, and the court never addressed any issue of standing, or for that matter, preemption. Indeed, that court *rejected* the very sort of fraudulent conveyance claim asserted by plaintiff here, finding that Congress barred such a claim under Section 546(e). *Id.* at 155-56. And *In re Healthco Int'l*, 195 B.R. 971 (Bankr. D. Mass. 1996) – which squarely conflicts with *Resorts* – recognized the basic rule that a trustee in bankruptcy cannot enforce a claim belonging to a creditor (*id.* at 986), and permitted an unjust

Indeed, when plaintiff's claim is viewed for what it really is – a fraudulent transfer action disguised as an unjust enrichment claim in an effort to circumvent Section 546(e) and *Resorts* – it is evident that Hechinger could have no cause of action against its own shareholders. The gravamen of plaintiff's complaint is that Hechinger allegedly made payments to its shareholders for inadequate consideration – *i.e.*, made a fraudulent conveyance. But it is black letter law that the debtor that makes the allegedly fraudulent transfer may not sue to recover it. Del. Code Ann., tit. 6, § 1307 (only a creditor, not a debtor, has a remedy for a fraudulent transfer by a debtor).

B. Plaintiff's Unjust Enrichment Claim Is Preempted By The Bankruptcy Code

Plaintiff does not dispute that its unjust enrichment claim, just like its fraudulent transfer claim, seeks to avoid the transactions and recover payments that were made in exchange for the tender of Hechinger shares by Hechinger shareholders. In our opening memorandum we established that such a claim is preempted by the Bankruptcy Code for two reasons: first, federal bankruptcy law occupies the field, providing the exclusive remedy for avoiding transactions; and, second, plaintiff's unjust enrichment claim conflicts with Section 546(e).

Plaintiff argues that field preemption does not apply because of the "gaping voids" supposedly left by Congress in the application of Section 546(e). Opp. 39. But the only alleged "void" that Plaintiff identifies is that Section 546(e) applies only to claims asserted in bankruptcy cases, and not to fraudulent transfer claims asserted before a bankruptcy. *Id.* It is hardly surprising that Congress, in enacting the *Bankruptcy* Code, chose to regulate *bankruptcy* proceedings and claims asserted therein. And, of course, the inapplicability of Section 546(e) to proceedings *outside*

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enrichment claim to go forward only against controlling shareholders, directors, and officers (which the England Family Defendants are not) that had breached fiduciary duties. *Id*. at 989.

of bankruptcy is irrelevant to whether Section 546(e) completely occupies the field of proceedings *within* bankruptcy.

If plaintiff were correct, then Congress could never be deemed to have occupied the field in enacting the Bankruptcy Code because, by definition, the Code governs only bankruptcy proceedings, not proceedings under state law outside of bankruptcy. Yet the courts have routinely found that the Code occupies the field of claims that can be asserted, as in this case, in bankruptcy or bankruptcy related proceedings, and that it accordingly preempts state law causes of action, including unjust enrichment claims. See, *e.g., Cox* v. *Zale Delaware, Inc.*, 239 F.3d 910, 913 (7th Cir. 2001); *Pertuso* v. *Ford Motor Credit Co.*, 233 F.3d 417, 426 (6th Cir. 2000); *Bessette* v. *Avco Fin. Servs., Inc.*, 230 F.3d 439, 447 (1st Cir. 2000), cert. denied, 121 S. Ct. 2016 (2001).[3] Indeed, where, as here, Congress has provided for, or circumscribed, the remedy for the specific conduct complained of, courts uniformly hold that Congress has occupied the field and rejected other possible remedies. See, *e.g.*, *MSR Exploration Ltd.* v. *Meridian Oil, Inc.*, 74 F.3d 910, 914 (9th Cir.

[3] Plaintiff attempts to distinguish these and the legion of additional cases that have found unjust enrichment and other state law claims preempted by the Bankruptcy Code on the ground that these cases supposedly dealt exclusively with conduct by the defendant occurring during bankruptcy proceedings. See Opp. 43-44. Plaintiff is wrong on the facts and on the law. As a factual matter, most of these cases concerned actions allegedly taken by creditors after a bankruptcy case was completed, *i.e.*, outside of the bankruptcy case, to collect a discharged debt. See, *e.g.*, *Cox*, 239 F.3d at 913; *Diamante* v. *Solomon & Solomon, P.C.*, No. 1:99CV1339, 2001 WL 1217226 (N.D.N.Y. Sept 18, 2001). As a matter of law, by their very terms, Section 546(e) and many other sections of the Code (see, *e.g.*, 11 U.S.C. §§ 544, 547, 548) govern the potential avoidance in bankruptcy proceedings of transactions that occurred before – *i.e.*, outside of – bankruptcy. In Section 546(e) and these other provisions, Congress chose to circumscribe the claims that could be asserted in bankruptcy concerning conduct that occurred pre-bankruptcy. The Constitution expressly gave Congress the power to do so. U.S. CONST. art. I, § 8. And there is nothing in the language of the Code or the Supremacy Clause of the Constitution that limits the preemptive effect of the Code to alleged conduct by a defendant during a bankruptcy case, and not to claims asserted, as in this case, in a bankruptcy proceeding concerning conduct that occurred before bankruptcy.

1996) ("Congress's authorization of certain sanctions for [a specific wrongful act] should be read as an implicit rejection of other penalties") (citations and quotations omitted); see also *Bessette*, 230 F.3d at 447, 448.

Plaintiff's arguments with respect to conflict preemption are equally without merit. Plaintiff contends that Congress has expressly excepted from Section 546(e) intentional fraudulent transfer claims arising under Section 548(a)(1), and accordingly, that Congress demonstrated an intent to permit claims against a transferee under the facts alleged here. Opp. 41-42. But plaintiff's claims do not arise under Section 548(a)(1) because that section permits the avoidance only of transfers made less than one year before the debtor files for bankruptcy, while the payments at issue here occurred nearly two years before Hechinger filed for bankruptcy. Instead, plaintiff asserts its claims under Section 544, the only section of the Code that provides for the avoidance of transactions that occurred more than a year before bankruptcy. See Am. Compl. ¶¶ 140, 145. But Congress has *not* excepted from Section 546(e) transfers that are challenged under Section 544. As one court explained in rejecting the very argument plaintiff makes here: "It is clear Congress intended to prohibit recovery of settlement payments received by stockbrokers more than one year prepetition." *In re Hamilton Taft & Co.*, 176 B.R. 895, 901 (Bankr. N.D. Cal.), aff'd, 196 B.R. 532 (N.D. Cal. 1995), aff'd, 114 F.3d 991 (9th Cir. 1997). Thus, plaintiff's unjust enrichment claim directly conflicts with Section 546(e) because it would permit the upending and recovery of settlement payments that Congress chose not to allow to be set aside.

Plaintiff's only other argument for why its unjust enrichment claim supposedly does not conflict with Section 546(e) is that Congress intended to protect only stockbrokers and other financial intermediaries – not shareholders. But that argument is contrary to controlling Third

Circuit law. *Resorts* holds that Section 546(e) precludes recovery of settlement payments from shareholders, such as the England Family Defendants. 181 F.3d at 515-16. And even if Congress's goal behind Section 546(e) were as narrow as plaintiff asserts – to prevent a ripple effect in the securities market (see Opp. 42) – the fact remains that Congress chose to advance this "goal" by barring the recovery from shareholders of settlement payments like those at issue in this case. *Resorts*, 181 F.3d at 516; see also *Kaiser Steel Corp.* v. *Pearl Brewing Co.*, 952 F.2d 1230, 1241 (10th Cir. 1991) (rejecting claim that section 546(e)'s exemption should only extend to intermediaries, not shareholders).

Simply put, Plaintiff's unjust enrichment claim would render Section 546(e) and *Resorts* a nullity; it would permit the avoidance of a settlement payment that Congress and the Third Circuit have said may not be avoided. The grounds for both field and conflict preemption could not be stronger. Plaintiff's unjust enrichment claim should be dismissed.

CONCLUSION

The claims against the England Family Defendants should be dismissed with prejudice.

Dated: November 16, 2001

Respectfully submitted,

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