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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re **ENRON CORP., et al.,** **Debtors.**	**Chapter 11** **Case No. 01-16034 (AJG)** **Jointly Administered**
ENRON CORP., **Plaintiff,** **v.** **UBS AG** **and** **UBS SECURITIES LLC, f/k/a UBS WARBURG LLC (a/k/a UBS WARBURG),** **Defendants.**	**Adv. Pro. No. 03-93373 (AJG)**

MEMORANDUM OF LAW OF INTERNATIONAL SWAPS AND DERIVATIVES ASSOCIATION, INC., SECURITIES INDUSTRY ASSOCIATION, AND THE BOND MARKET ASSOCIATION AS AMICI CURIAE IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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The International Swaps and Derivatives Association, Inc. ("ISDA"), the Securities Industry Association ("SIA") and The Bond Market Association ("TBMA") respectfully submit this amicus brief in support of defendants' motion for summary judgment in *Enron Corp. v. UBS AG, et al.,* Adv. No. 03-93373 (AJG).

PRELIMINARY STATEMENT

The plaintiff in this proceeding, Enron Corporation ("Enron" or the "Debtor"), has filed this adversary action and three related adversary proceedings[1/] seeking to avoid and recover payments made in connection with over-the-counter ("OTC") equity derivatives transactions. As momentous and historic as these unprecedented bankruptcy cases are, from the perspective of the global financial community the dispositions of this and the three related particular adversary proceeding are among the most significant decisions that will be made in the cases.

Over 10% of the world's 500 largest companies rely on OTC equity derivatives to manage their equity price risk, and the notional outstandings for this market currently exceed $2.74 *trillion*. Congress repeatedly has recognized the national interest in assuring the efficient functioning of this important and necessary market, and has acted to protect this market from the fundamental upheaval that would result if the contractual relationships governing OTC equity derivatives transactions were subject to the Bankruptcy Code's avoidance provisions. For this reason, Congress repeatedly and expressly has provided that except for cases of actual fraud, OTC equity derivatives transactions are not subject to the avoidance power in bankruptcy.

Specifically, to prevent any single bankruptcy from leading to a cascade of insolvencies in the financial markets, Congress included certain protections in the Bankruptcy Code—

[1/] *Enron Corp. v. Credit Suisse First Boston Int'l*, Adv. Pro. No. 03-93371 (AJG); *Enron Corp. v. Lehman Bros. Fin. S.A.*, Adv. Pro. No. 03-93383 (AJG); and *Enron Corp. v. Bear, Stearns Int'l, Ltd.*, Adv. Pro No. 03-93388 (AJG).

codified at Sections 546(e), (f) and (g)—designed to exempt payments made under financial contracts from preference and fraudulent conveyance actions. Beginning with the 1982 amendments to the bankruptcy laws, and again in 1984 and 1990, Congress has thus safeguarded the financial markets by preventing any bankruptcy filing from interfering with the fluidity of funds or the certainty of financial contracts.

The OTC equity derivatives transactions at issue here fall within the ambit of two provisions of the Bankruptcy Code that exempt such transactions from the trustee's avoidance power. *First*, Section 546(e) exempts "settlement payments" made in the securities and forward contract trades. OTC equity derivatives contracts, which can be cash-settled, "net share"-settled or physically-settled,[2/] are simply derivatives where the underlying reference items include a specified equity instrument. They are used to hedge against the risks of equity price fluctuations. Accordingly, the Section 546(e) protections afforded to both the securities and forward contract trades apply to OTC equity derivatives transactions.

Second, Section 546(g) provides protection to transfers made under a "swap agreement." Although "equity swaps" are not specifically included in the list of transactions set forth in the definition of "swap agreement," Congress recognized at the time the statute was enacted that financial products developed rapidly, and to ensure that future-developed products fall within the realm of this statutory protection, Congress expressly provided that "any other similar

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2/ A cash-settled equity derivatives transaction is a contract providing for cash payments based on the performance of a specified equity index, a single equity security or a basket of equity securities. A "net share"-settled equity derivatives contract resembles a cash-settled transaction, except that one or both parties may have the option to satisfy balances due by delivery of a sufficient quantity of a designated security in lieu of cash. A physically-settled equity derivatives transaction is a contract providing for the physical delivery of certain securities at a future date in exchange for a fixed payment.

agreement" be included within the statutory definition. The equity swaps at issue here fall within the core of this protection.

In addition to asserting preference and fraudulent conveyance theories under the federal bankruptcy laws, the Debtor also attempts to unwind payments under re-labeled theories of state law. Because federal bankruptcy laws provide the exclusive framework for addressing avoidance claims in bankruptcy, and because the Debtor's imaginatively pleaded state law claims directly conflict with the safe harbor protections of Sections 546(e) and (g), they are preempted.

Congress deliberately amended the Bankruptcy Code so as to avoid creating turmoil in the financial markets in the event that a party to various securities agreements were to seek bankruptcy protections. Permitting this adversary proceeding to go forward would undermine precisely the objectives Congress sought to accomplish in enacting these amendments. There can be no doubt that Congress intended to create a safe harbor for OTC equity derivatives agreements, immunizing them from exactly the challenge that Debtor seeks to bring here. Because Congress's purpose and the language of the Bankruptcy Code are clear, these adversary proceedings must be dismissed.

STATEMENT OF INTEREST

ISDA is the global trade association representing leading participants in the OTC derivatives industry. Since its inception, ISDA has pioneered efforts to identify and reduce the sources of risk in the derivatives and risk management business. ISDA was chartered in 1985, and is comprised of more than 600 member institutions from forty-six countries on six continents. These members include most of the world's major institutions that deal in privately negotiated derivatives, as well as many of the businesses, governmental entities and other end users that rely on OTC derivatives to manage efficiently the financial market risks inherent in their core economic activities. ISDA publishes the ISDA Master Agreement, which serves as the contractual foundation for more than 90% of derivatives transactions globally, and distributes market-specific definitional booklets, such as the 1996 and 2002 ISDA Equity Derivatives Definitions, which supplement the Master Agreement.

Because of its role in the development and maintenance of derivatives markets, including equity derivatives, ISDA is uniquely positioned to evaluate and comment on the application of the safe harbor provisions set forth in Section 546(e) and Section 546(g) of the Bankruptcy Code to the OTC equity derivative transactions at issue in this adversary proceeding. Indeed, ISDA actively participated in the enactment of the 1990 amendments to the Bankruptcy Code which were intended "to ensure that the swap and forward contract financial markets are not destabilized by uncertainties regarding the treatment of their financial instruments under the Bankruptcy Code." H.R. Rep. No. 101-484, at 1 (1990).

SIA, established in 1972 through the merger of the Association of the Stock Exchange Firms and the Investment Banker's Association, brings together the shared interests of nearly 600 securities firms to accomplish common goals. SIA member firms (including investment banks, broker-dealers and mutual fund companies) are active in all United States and foreign markets and in all phases of corporate and public finance. According to the Bureau of Labor Statistics, the United States securities industry employs more than 800,000 individuals. Industry personnel manage the accounts of nearly 93 million investors directly and indirectly through corporate, thrift and pension plans. In 2003, the industry is projected to generate $142 billion in domestic revenue and $283 billion in global revenues.

TBMA is a global trade organization that represents approximately 200 securities firms and banks that underwrite, trade, and distribute approximately $22 trillion in debt in the United States and international markets. TBMA's members deal in a wide variety of public and fixed-income securities. Its member firms collectively represent in excess of 95% of the initial distribution and secondary market trading of municipal bonds, corporate bonds, mortgage, and other asset-backed securities and other fixed-income securities.

Preference and fraudulent conveyance actions that would unwind payments made in connection with OTC equity derivatives transactions jeopardize the efficient working of the United States financial markets and place the competitive position of the United States in the global financial market at risk. This adversary proceeding threatens to undermine the legal certainty afforded by Congress to OTC equity derivatives market participants, including amici members, and must be dismissed.

STATUTORY, FACTUAL AND PROCEDURAL BACKGROUND

1. *Preference and Fraudulent Conveyance Law.* In order to promote the fair and equitable treatment of creditors, bankruptcy law generally allows a trustee in bankruptcy to avoid and recover certain transfers made and obligations incurred by the debtor prior to bankruptcy. *See, e.g.*, 11 U.S.C. §§ 547, 548, 550. Specifically, in order to promote the principle of equal treatment among creditors, the Bankruptcy Code permits a trustee in bankruptcy to avoid and recover certain payments (subject to various defenses) made to certain creditors prior to the bankruptcy filing.

These avoiding powers, however, are subject to various exceptions. Specifically, Congress repeatedly has affirmed that capital market transactions must be exempted from these and other provisions of the Bankruptcy Code, so that no single bankruptcy disrupt the functioning of the capital markets.

> U.S. bankruptcy law has long accorded special treatment to transactions involving financial markets, to minimize volatility. Because financial markets can change significantly in a matter of days, or even hours, a non-bankrupt party to ongoing securities and other financial transactions could face heavy losses unless the transactions are resolved promptly and with finality.

H.R. Rep. No. 101-484, at 2. Over the past 25 years, "[a]s new financial instruments have developed, Congress has amended the 1978 Bankruptcy Code to keep pace in promoting speed and certainty in resolving complex financial transactions." *Id.*[3/]

2. *The 1982 Amendments: Section 546(e).* After hearing testimony from, among others, a Commissioner of the Securities and Exchange Commission, the General Counsel of the Securities Investor Protection Corporation[4/] and representatives of numerous commodities and

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3/ "[The 1978 Bankruptcy Reform Act] recognized that certain complex, time sensitive obligations warranted a degree of finality at the outset of a bankruptcy in order to prevent uncertainty in a marketplace where trading is continuous and often transitional in character. In 1982 and 1984, new amendments were added that exempted other types of arrangements that appeared to fall into the same category of financial agreements deserving expeditious treatment following a bankruptcy filing." *Bankruptcy Treatment of Swap Agreements and Forward Contracts: Hearing on H.R. 2057 and H.R. 1754 Before the Subcomm. on Economic and Commercial Law of the House Comm. on the Judiciary*, 101st Cong. 1 (1990) (statement of Rep. Jack Brooks, Chairman, Subcomm. on Economic and Commercial Law) (discussing enactment of the 1990 amendments to the Bankruptcy Code); *see also* 136 Cong. Rec. S7535 (1990) (statement of Sen. DeConcini) ("Since 1978, Congress has seen the need to provide protection for certain financial instruments . . . .").

4/ The Securities Investor Protection Corporation ("SIPC") was created by Congress as part of the Securities Investor Protection Act of 1970. *See* 15 U.S.C. §§ 78aaa *et seq*. Its purpose is to afford certain protections against loss to customers resulting from broker-dealer failure and, thereby, promote investor confidence in the securities markets. SIPC works to restore funds to investors with assets in the hands of bankrupt and otherwise financially troubled brokerage firms. It is a nonprofit, membership corporation whose members are, with some exceptions, all persons registered as brokers or dealers under Section 15(b) of the Securities Exchange Act of 1934 and all persons who are members of a national securities exchange. *See generally* http://www.sipc.org.

securities brokers, Congress determined that "certain protections are necessary to prevent the insolvency of one commodity or security firm from spreading to other firms and possibly threatening the collapse of the affected market." H.R. Rep. No. 97-420, at 1 (1982).[5/] Specifically, Congress concluded:

> The certainty and fluidity needed by professionals on both sides of the transactions is of such importance that one debtor's filing of a petition should not be permitted to impair the functioning of the market as a result of the Code's automatic stay, *or have the integrity of contract relationships upset by the Code's avoidance provisions*.

Bevill, Bresler & Schulman Asset Mgmt. Corp. v. Spencer Savings & Loan Ass'n, 878 F.2d 742, 748 (3d Cir. 1989) (citation omitted and emphasis added).

Seeking to insulate the financial markets from a "ripple effect" that could result if prepetition transfers made by debtors to securities and commodities firms were avoidable in bankruptcy, Congress added what is today Section 546(e)—then Section 546(d)—to the Bankruptcy Code, exempting payments made in the securities, commodities and forward contracts trades from the avoidance power in bankruptcy, except in cases of actual fraud. *See* 1982 Amendments to Bankruptcy Code, Pub. L. No. 97-222, 96 Stat. 235.

3. *The 1984 Amendments: Section 546(f).* Congress acted again, in 1984, to clarify that the market safeguards enacted two years earlier were intended to be flexible enough to

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5/ *See also Kaiser Steel Corp. v. Charles Schwab & Co.*, 913 F.2d 846, 849 (10th Cir. 1990) ("Congress's purpose was to minimize the displacement caused in the commodities and securities markets in the event of a major bankruptcy affecting those industries." (internal quotation marks and citation omitted)); *Bevill, Bresler & Schulman Asset Mgmt. Corp. v. Spencer Savings & Loan Ass'n*, 878 F.2d 742, 747 (3d Cir. 1989) ("Congress was concerned about the volatile nature of the commodities and securities markets, and decided that certain protections were necessary to prevent 'the insolvency of one commodity or security firm from spreading to other firms and possibly threatening the collapse of the affected market.'" (citation omitted)).

extend to all types of financial contracts.[6] When a judicial decision injected an element of uncertainty as to whether the 1982 amendments guaranteed the enforceability of repurchase agreements[7] in the event of bankruptcy,[8] Congress acted quickly to "assure that the objective of the [1982 amendments] to minimize the displacement caused in the commodities and securities markets in the event of a major bankruptcy [was] carried out by expressly providing the repo market the same protection." S. Rep. No. 98-65, at 49 (citation omitted).

6/ *See Bevill, Bresler & Schulman Asset Mgmt Corp.,* 878 F.2d at 747 ("After the 1982 amendments were in effect, Congress became concerned that the amendments did not adequately [] protect liquidations of repos in the event of the insolvency of a dealer or other participant in the repo market, even though the principal objective of Public Law 97-222 [the 1982 amendments] was to prevent the insolvency of one commodities or securities firm from spreading to other firms and possibly threatening the stability of the affected market." (brackets in original) (internal quotation and citation omitted)).

7/ Repurchase agreements or "repos" are a principal means of financing in the capital markets. *See* S. Rep. No. 98-65, at 44 (1983). "A repo represents a transfer of a financial instrument—often government securities—by one party to another party for payment, with a simultaneous agreement by the second party to retransfer securities to the first party on demand or on a date certain against payment which reflects a rate of interest. A reverse repo is the mirror image of a repo, generally initiated by the party initially transferring the securities." *Id*. at 44 n.1. "The repo market is as complex as it is crucial. It is built upon transactions that are highly interrelated. A collapse of one institution involved in repo transactions could start a chain reaction, putting at risk hundreds of billions of dollars and threatening the solvency of many additional institutions." *Id*. at 47.

8/ In *In re Lombard-Wall, Inc.*, No. 82 B 11556 (Bankr. S.D.N.Y. Sept. 16, 1982), this Court (per Judge Ryan) held that transfers made under repurchase agreements were not exempt from the automatic stay of the Bankruptcy Code. *See* S. Rep. No. 98-65, at 47. The *Lombard-Wall* proceedings "had an adverse impact on the financial markets and undermined the primary purposes of [the 1982 Amendments] because the repo market is subject to the same ripple effect as other securities markets." *Id*. "Congress, the Board of Governors of the Federal Reserve, the Public Securities Association, the Investment Company Institute and others, were concerned that if *Lombard-Wall* became the law governing repo transactions, the failure of one repo dealer, and the consequent inability of repo participants to promptly liquidate their investments to obtain cash to meet obligations, could have a ripple effect throughout the country's financial markets, causing an otherwise isolated financial problem to spread to many other entities." *Bevill, Bresler & Schulman Asset Mgmt. Corp.*, 878 F.2d at 748.

> The ability of the repo market to serve all of its functions in the money market depends upon a high level of certainty about the ability of the various repo participants to close out repo transactions in the event of insolvency of the other party to the transaction, and to assure that repo transaction payments previously received from that party will not be reclaimed by the trustee under the Bankruptcy Code.

Bevill, Bresler & Schulman Asset Mgmt. Corp., 878 F.2d at 749 (quoting testimony of Robert C. Brown, Chairman, Public Securities Association (now TBMA) to House Committee on the Judiciary). Congress thus added Section 546(f) to the Bankruptcy Code to make explicit that the Section 546(e) protection from preference and fraudulent conveyance actions, adopted in 1982, extended to repurchase agreements. *See* 1984 Amendments to Bankruptcy Code, Pub. L. 98-353, § 393, 98 Stat. 333, 365; *see also* S. Rep. No. 98-65, at 49 ("The proposed amendments are intended to afford participants in the repo market with the same treatment with respect to the stay and avoidance provisions of the [Bankruptcy] Code.").

4. *The 1990 Amendments: Section 546(g).* Just as Congress was acting in 1984 to amend the Bankruptcy Code to protect the repo market from bankruptcy challenge, OTC derivatives products, or "swaps," were being developed by the financial markets as a way to hedge or reduce various kinds of risk in a particular business.

> A "swap" is a contract between two parties ("counterparties") to exchange ("swap") cash flows at specified intervals, calculated by reference to an index. Parties can swap payments based on a number of indices including interest rates, currency rates and security or commodity prices.

Thrifty Oil Co. v. Bank of Am. Nat'l Trust Sav. Ass'n, 322 F.3d 1039, 1042 (9th Cir. 2003).[9/] The counter parties to a swap agreement do not actually pay the full amount of each payment stream

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9/ *See also In re Interbulk, Ltd.*, 240 B.R. 195, 201 (Bankr. S.D.N.Y. 1999) ("[A] swap is a bilateral agreement, frequently between a commercial entity involved with commodities or subject to interest rate, currency or equity price fluctuations and a financial intermediary, to each other. Instead, the counter parties periodically "net" their obligations against one another so that only the net amount due from one party to the other actually changes hands. *See generally* John C. Dugan, *Derivatives: Netting, Insolvency, and End Users*, 112 Banking L.J. 638 (1995). Some of these transactions provide for payments of cash by both parties (*i.e.*, cash-settled), some provide for satisfaction of outstanding balances by transfer of a sufficient quantity of a designated security (*i.e.*, "net share"-settled), while others provide for one party to deliver cash and the other party to deliver equity shares, bonds, or commodities (*i.e.*, physically-settled). OTC derivatives transactions are generally documented and governed by the ISDA Master Agreement which "includes provisions generally applicable to all swap transactions including: payment netting, events of default, cross-default provisions, early termination events and close out netting." *Thrifty Oil Co.*, 322 F.3d at 1043.

As with repurchase agreements, there was an element of uncertainty in the financial markets as to whether courts would interpret the Section 546(e) safe harbor as upholding the enforceability of OTC derivatives arrangements against an insolvent party. Echoing the concerns that drove Congress to act in 1982 and 1984, Senator Heflin explained that "[t]here is concern that if one of the parties to a swap agreement files for bankruptcy under the current Bankruptcy Code, the non-defaulting party is left with a substantial risk and, depending on the size of the swap agreement, could cause a rippling effect which would undermine the stability of

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whereby cash payments are exchanged periodically (or a lump sum at termination) between the parties based upon changes in the price of the underlying asset or index as determined by an agreed-upon benchmark." (citation omitted)).

the financial markets." *Interest Swap: Hearing on S. 396 Before the Subcomm. on Courts and Administrative Practices of the Senate Comm. on the Judiciary*, 101st Cong. 1 (1989).[10]

In hearings before Congress, the financial industry stressed that "it is important to eliminate any concern that Bankruptcy Code provisions could be read to preclude the exercise of contractual rights of prebankruptcy netting or setoff." *Id.* at 31-32 (statement of Mark C. Brickell, Chairman, ISDA); *see also id.* at 52-53 (statement of William J. Perlstein, Counsel to ISDA) ("Unlike ordinary prebankruptcy setoff, netting is the ordinary course of dealing in a swap transaction. Ordinary netting and marking to market of collateral should not be subject to later preference challenge").

Congress thus added the 1990 Amendments to the Bankruptcy Code, which was designed to provide certainty to the OTC derivatives markets by protecting swap transactions from the effects of bankruptcy. *See* 1990 Bankruptcy Amendments, Pub. L. No. 101-311, 104 Stat. 267; *see also* S. Rep. No. 101-285, at 1 (the purpose of the bill is "to clarify U.S. bankruptcy law with respect to treatment of swap agreements and forward contracts. The bill would provide certainty for swap transactions in the case of a default in bankruptcy . . . ."); H.R. Rep. No. 101-484, at 1 (the purpose of the bill "is to ensure that the swap and forward contract financial markets are not destabilized by uncertainties regarding the treatment of their financial instruments under the

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[10] "The bankruptcy of a swap market participant could cause significant market disruption. This arises from the risk that an outstanding swap transaction would be held open during the bankruptcy, despite contractual provisions for its termination. Also, there is the risk that a defaulting party or a trustee in bankruptcy could assume favorable swap transactions and reject unfavorable ones—so-called cherry picking—even though the swap contract calls for liquidation of these obligations by netting. The exposure created by these risks takes on special significance in a volatile market." 136 Cong. Rec. S7536 (1990) (statement of Sen. Grassley); *see also Interest Swap: Hearing on S. 396*, 101st Cong. 16 (statement of Mark C. Brickell, Chairman, ISDA) ("Participants in the swap market are concerned that, if a counterparty files for bankruptcy, the automatic stay and other provisions of the Bankruptcy Code could be interpreted to bar the implementation of [] critical contractual provisions.").

Bankruptcy Code"). Included among the revisions was Section 546(g) which "protect[s] a swap participant against a trustee's avoiding power for payments and other transfers under a swap agreement." 136 Cong. Rec. S7535 (1990) (statement of Sen. DeConcini).

5. *Enron's Equity Derivatives Transactions.* During 2000 and 2001, Enron entered into a number of OTC equity derivatives transactions with Bear, Stearns International, Ltd., UBS AG ("UBS"), Credit Suisse First Boston International, and Lehman Brothers Finance S.A.. These transactions—which appear to have been documented on the ISDA Master Agreement form—provided that Enron could either (a) purchase a certain number of shares of Enron stock at a designated future date for a designated future price, (b) settle through a cash payment reflecting the change in the market price of Enron stock during that time or (c) make settlement by transferring a number of shares of Enron stock equal in value to the cash payment that otherwise would be necessary.[11/] Enron entered into these common and legitimate transactions, at least in part, in order to hedge its incentive-based employee compensation plans from the risk of fluctuations in the price of Enron stock.[12/] Enron made various payments in connection with these OTC equity derivatives arrangements in the period prior to its bankruptcy.

11/ *See* Compl. ¶¶ 12-13, *Enron Corp.* v. *Credit Suisse First Boston Int'l*, Adv. Pro. No. 03-93371 (AJG); Compl. ¶¶ 12-13, *Enron Corp.* v. *UBS AG*, Adv. Pro. No. 03-93373 (AJG); Compl. ¶¶ 14-15, *Enron Corp.* v. *Lehman Bros. Fin. S.A.*, Adv. Pro. No. 03-93383 (AJG); and Compl. ¶ 11, *Enron Corp.* v. *Bear, Stearns Int'l, Ltd.,* Adv. Pro No. 03-93388 (AJG). A copy of the ISDA Master Agreement between Enron and UBS is annexed as Exhibit 1 to the Declaration of Rupert Hilmi, executed May 18, 2004, submitted in support of UBS's motion for summary judgment.

12/ *See* 2000 Enron Corp. 10-K, at F-8, Section 3 (Price Risk Management Activities and Financial Instruments) *available at* http://www.sec.gov/Archives/edgar/data/1024401/000102440101500010/0001024401-01-500010.txt ("At December 31, 2000, Enron had entered into Enron common stock swaps, with an aggregate notional amount of $121 million, to hedge certain incentive-based compensation plans"); Report of Harrison J. Goldin, the Court-Appointed Examiner in the Enron North America Bankruptcy Proceeding, Respecting His Investigation of the Role of Certain Entities in Transactions Pertaining to Special Purpose Entities 178-79 (Nov.

6. *The Adversary Complaint*. On December 2, 2001, Enron and various of its subsidiaries filed a voluntary petition for bankruptcy protection under Chapter 11 of the Bankruptcy Code. On November 21, 2003, Enron initiated this adversary proceeding, seeking to avoid and recover payments made in connection with the OTC equity derivatives agreements it entered into with UBS.

I. SECTION 546(e) PROTECTS PAYMENTS MADE UNDER OTC EQUITY DERIVATIVES CONTRACTS FROM PREFERENCE AND FRAUDULENT CONVEYANCE ACTIONS.

OTC equity derivatives qualify for the protections afforded by Section 546(e) of the Bankruptcy Code.

> Notwithstanding sections 544, 545, 547, 548(a)(1)(B), and 548(b) of this title, the trustee may not avoid a transfer that is a margin payment, as defined in section 101, 741, or 761 of this title, *or settlement payment, as defined in section 101 or 741 of this title*, made by or to a commodity broker, forward contract merchant, stockbroker, financial institution, or securities clearing agency, that is made before the commencement of the case, except under section 548(a)(1)(A) of this title.

11 U.S.C. § 546(e) (emphasis added).[13/] As discussed above, *supra* at 6-7, Section 546(e) was added to the Bankruptcy Code in 1982 to exempt payments made in connection with the securities, commodities and forward contracts trade from preference and fraudulent conveyance actions. *See* 1982 Amendments to Bankruptcy Code, Pub. L. No. 97-222, § 4, 96 Stat. 235, 236; H.R. Rep. No. 97-420, at 1 (1982) ("several of the amendments are included to minimize the

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14, 2003) ("UBS executed equity forward contracts for which it was a counterparty in transactions designed too hedge Enron's obligations under its employee stock ownership program").

[13/] The safe harbor does not exempt transfers that are made with "actual intent to hinder, delay, or defraud any entity" 11 U.S.C. § 548(a)(1)(A). In the adversary complaint, Enron includes a Count alleging that certain of the transactions were intentionally fraudulent in violation of Section 548(a)(1)(A). This amicus brief does not address those allegations.

displacement caused in the commodities and securities markets in the event of a major bankruptcy affecting those industries.").

To be sure, uncertainty as to whether Section 546(e)'s protections extended to repurchase agreements and derivatives transactions generally led to enactment of Sections 546(f) and (g), but there is no ambiguity as to Section 546(e)'s applicability to equity transactions of *any type*, including OTC equity derivatives. Moreover, the fact that Congress has acted twice—in 1984 and 1990—to clarify that Section 546(e) was originally meant to exempt payments under all financial contracts confirms that OTC equity derivatives are no exception.

A. The Transfers Are Protected "Settlement Payments" In The Forward Contracts Trade.

Payments made under an OTC equity derivatives contract satisfy the conditions for protection under the forward contract trade provisions.[14/] "Forward contracts play a central role in the movement of commodities among producers and users, *as well as in the hedging of risks associated with these and other transactions*." S. Rep. No. 101-285, at 2 (emphasis added). "The primary purpose of a forward contract is to hedge against possible fluctuations in the price of a commodity. This purpose is financial and risk-shifting in nature, as opposed to the primary purpose of an ordinary commodity contract, which is to arrange for the purchase and sale of the commodity." H.R. Rep. No. 101-484, at 4.

The Bankruptcy Code defines "forward contract" as:

14/ As with "settlement payments" in the securities context (*see infra* 17 n.17), "settlement payments" in the forward contract market are broadly construed. *See* 11 U.S.C. § 101(51A) (providing definition of "settlement payment" that tracks Section 741(8) except instead of referencing the "securities trade," it includes "any other similar payment commonly used in the forward contract trade"); *In re Olympic Natural Gas Co.*, 294 F.3d 737, 742 (5th Cir. 2002) ("settlement payment" in connection with "forward contract" should be read broadly).

> a contract (other than a commodity contract) for the purchase, sale, or transfer of a *commodity, as defined in section 761(8) of this title, or any similar good, article, service, right, or interest which is presently or in the future becomes the subject of dealing in the forward contract trade*, or product or byproduct thereof, with a maturity date more than two days after the date the contract is entered into, including, but not limited to, a repurchase transaction, reverse repurchase transaction, consignment, lease, *swap, hedge transaction,* deposit, loan, option, allocated transaction, unallocated transaction, or any combination thereof or option thereon.

11 U.S.C. § 101(25) (emphasis added).

Common stock falls within the broadly stated definition of a "commodity."[15/] And as extensive as the Commodities Exchange Act's definition of commodity is, the Bankruptcy Code's definition of "forward contract" is even more expansive, including "*any similar good, article, service, right, or interest which is presently or in the future becomes the subject of dealing in the forward contract trade*." *Id.* (emphasis added).[16/]

In keeping with Congress's intent of insulating the financial markets from a chain reaction of insolvencies,[17/] the definition of "forward contract" is intentionally open-ended, so that it encompasses contracts, such as OTC equity derivatives contracts, that are financial and

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15/ The Commodity Exchange Act, which is cross-referenced in Section 761(8), *see* 11 U.S.C. § 761(8), defines a "commodity" to include, in addition to various specified commodities, "all other goods and articles . . . and all services, rights, and interests in which contracts for future delivery are presently or in the future dealt in." 7 U.S.C. § 1a(4).

16/ *See also* S. Rep. No. 101-285, at 8 ("The CEA definition covers a broad array of commodities, but does not cover all of the commodities that are the subject of forward contract."); *id.* ("the term 'similar' is intended to be interpreted broadly to include items similar in nature or traded in a manner similar to those commodities included in the CEA definition.").

17/ *See id.* at 2 ("The principle purpose of the Code's forward contract provisions is to prevent the insolvency of one party to a forward contract from threatening the solvency of the other party to the contract and, in doing so, the solvency of some or all of the other participants in the market in which the second party does business.").

risk-shifting in nature. "This amendment is intended to clarify that these exemptions in the Bankruptcy Code apply to genuine forward contracts regarding a commodity not currently listed in the Commodity Exchange Act, but that the exemptions do not apply to ordinary supply-of-goods contracts, which are not essentially financial in character." H.R. Rep. No. 101-484, at 6. OTC equity derivatives, of course, are swaps used to hedge risk. They are purely financial in nature. In fact, "swaps" and "hedge transactions" are specifically enumerated in the definition of "forward contract." *See* 11 U.S.C. § 101(25).

B. The Transfers Are Protected "Settlement Payments" In The Securities Trade.

OTC equity derivatives can be complex, but this should not obscure what is plainly obvious. The underlying reference item in an equity derivatives transaction is, after all, equity—be it stock, equity puts or calls, or an index of stocks (like the Standard and Poor's 500). Congress sought to protect the securities markets from the domino effect of insolvencies that could arise if finality were not provided to securities transactions, notwithstanding the bankruptcy of a party to the transaction. "The prompt closing out or liquidation of [the open accounts of insolvent customers or brokers] freezes the status quo and minimizes the potentially massive losses and chain reactions that could occur if the market were to move sharply in the wrong direction." H.R. Rep. No. 97-420, at 2. Accordingly, Section 546(e) was enacted to "ensure that the avoidance powers of a trustee are not construed to permit margin or settlement payments to be set aside except in cases of fraud." *Id.*

> Section 546(e) thus represents Congress's determination that the type of transfer at issue here—settlement payments to shareholders, made by or to a financial institution—should remain unavoidable in order to insulate the clearing and settlement system of the nation's securities industry, and participants in that system, from the potentially devastating effect of a substantial recovery by a trustee that would require the undoing of possibly thousands of settled securities transactions.

In re Hechinger Inv. Co. of Del., 274 B.R. 71, 88 (D. Del. 2002).

Section 741(8) defines a "settlement payment" to mean "a preliminary settlement payment, a partial settlement payment, an interim settlement payment, a settlement payment on account, a final settlement payment, or any other similar payment commonly used in the securities trade." 11 U.S.C. § 741(8). "The definition in section 741(8), while somewhat circular, is 'extremely broad' in that it clearly includes anything which may be considered a settlement payment." *Kaiser Steel Corp.*, 913 F.2d at 848 (citations omitted).[18/] "Generally, a settlement is 'the completion of a securities transaction.'" *In re Comark*, 971 F.2d 322, 325 (9th Cir. 1992) (citation omitted). The payments made pursuant to an OTC equity derivatives contract are easily encompassed by this definition. There is no meaningful distinction to be drawn between a payment in a more traditional (for lack of a better term) securities account and a payment under an equity derivatives contract. "Such an interpretation is consistent with the legislative intent behind § 546 to protect the nation's financial markets from the instability caused by the reversal of settled securities transactions." *Kaiser Steel Corp.*, 913 F.2d at 848 (internal quotation marks and citation omitted). Indeed, the likelihood of a "ripple effect" of

18/ *See also Kaiser Steel Corp. v. Pearl Brewing Co.*, 952 F.2d 1230, 1237 (10th Cir. 1991) ("As a natural reading suggests, and as we and others have noted, this definition is 'extremely broad'" (citation omitted)); *In re Resorts Int'l, Inc.*, 181 F.3d 505, 515 (3d Cir. 1999) ("the term 'settlement payment' is a broad one that includes almost all securities transactions"); *Bevill, Bresler & Schulman Asset Mgmt. Corp v. Spencer Sav. & Loan Ass'n*, 878 F.2d 742, 751 (3d Cir. 1989) (same); *In re Hechinger*, 274 B.R. at 85 ("the term 'settlement payments' within section 546(e) should be read broadly"); *In re Hamilton Taft & Co.*, 176 B.R. 895, 899 (Bankr. N.D. Cal. 1995) (same), *aff'd*, 196 B.R. 532 (N.D. Cal. 1995), *aff'd*, 114 F.3d 991 (9th Cir. 1997).

insolvencies is significantly magnified in the OTC equity derivatives context, if only by the sheer volume of equity shares that are potentially affected by such transactions.[19]

Under both the securities and forward contract provisions of the Bankruptcy Code, Section 546(e) exempts OTC equity derivatives from preference and fraudulent conveyance actions, except in cases of actual fraud.

II. SECTION 546(g) PROTECTS PAYMENTS MADE IN CONNECTION WITH OTC DERIVATIVES TRANSACTIONS FROM PREFERENCE AND FRAUDULENT CONVEYANCE ACTIONS.

Section 546(g) specifically was enacted to provide safe harbor protection to OTC derivatives transactions, including equity derivatives.[20] Section 546(g) provides:

> Notwithstanding sections 544, 545, 547, 548(a)(1)(B) and 548(b) of this title, the trustee may not avoid a transfer under a swap agreement, made by or to a swap participant, in connection with a swap agreement and that is made before the commencement of the case, except under section 548(a)(1)(A) of this title.

11 U.S.C. § 546(g).[21] "Swap agreement" is defined as:

> (A) an agreement (including terms and conditions incorporated by reference therein) which is a rate swap agreement, basis swap, forward rate agreement, commodity swap, interest rate option, forward foreign exchange agreement, spot foreign exchange

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[19] *Compare Kaiser Steel Corp.*, 913 F.2d at 849 ("The danger of a 'ripple effect' on the entire market is at least as inherent in the avoidance of an LBO as it is in the avoidance of a routine stock sale." (citation omitted)).

[20] The protections of Section 546(g) and Section 546(e) are non-exclusive. Indeed, Section 546(g) was added to make explicit that the same protections afforded by Section 546(e) (securities and commodities) and Section 546(f) (repurchase agreements) applied to swap agreements. *See, e.g.*, 136 Cong. Rec. S7536 (statement of Sen. Grassley) ("the bill follows an approach that was adopted as fair and reasonable in 1982 for securities, futures and commodities contracts, and in 1984 for repurchase agreements"); *see also In re Hamilton Taft & Co.*, 176 B.R. at 900 ("section 546(f) was intended to supplement rather than narrow section 546(e)"), *aff'd*, 196 B.R. 532 (N.D. Cal. 1995), *aff'd*, 114 F.3d 991 (9th Cir. 1997).

[21] *See supra* 13 n.12.

> agreement, rate cap agreement, rate floor agreement, rate collar agreement, currency swap agreement, cross-currency rate swap agreement, currency option, *any other similar agreement* (including any option to enter into any of the foregoing); (B) any combination of the foregoing; or (C) a master agreement for any of the foregoing together with all supplements.

11 U.S.C. § 101(53B) (emphasis added). Based on its experience in 1982, 1984 and 1990, and well-aware of the innovation inherent in the financial markets, Congress included a catch-all phrase to capture "any other similar agreement." *See id*. "This [was] intended to recognize that these agreements evolve over time and to provide that all such similar agreements are entitled to the protections of this bill." S. Rep. No. 101-285, at 8.

When Section 546(g) was enacted, the OTC derivatives market was at its infancy. *See Interest Swap: Hearing on S. 396*, 101st Cong. 8 (statement of Sen. Grassley) ("The swap market has experienced sharp growth during this 'infant' stage of development."). At that time, ISDA "estimated that in excess of $1 trillion in swap transactions [was] currently outstanding." *Id.* at 14 (statement of Mark C. Brickell, Chairman, ISDA). Today, that number has increased to over $125 trillion. *See* ISDA 2003 Mid-year Summary, *available at* http://www.ISDA.org/statistics /index.html.

As Congress anticipated, there has also been a natural evolution in the complexity and types of OTC derivatives transactions in the marketplace. It would have been impossible for Congress to guess the vast array of OTC derivatives transactions, including, for example, OTC credit derivatives, that have been developed since the definition of "swap agreement" was codified almost 15 years ago. OTC equity derivatives, the types of transaction most relevant to this adversary proceeding, are no different.[22/] They are exactly the kind of transaction Congress

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[22/] Some of the OTC equity derivatives that are prevalent today include:

had in mind when it included "any other similar agreement" language in the definition of "swap agreement." *See, e.g.*, *In re Interbulk, Ltd.*, 240 B.R. 195, 200-01 (Bankr. S.D.N.Y. 1999) (holding that forward freight agreements qualify as a swap agreement under the catch-all); *see also Collier on Bankruptcy* ¶ 560.02 (15th ed. 2003) (the "any other similar agreement" language should be "construed to cover what is generally understood in the swap market from time to time to be a swap agreement.").[23/]

Equity swap: a transaction in which one party pays periodic amounts of a given currency based on a fixed price or a fixed rate and the other party pays periodic amounts of the same currency or a different currency based on the performance of a share of an issuer or a basket of shares of several issuers.

Equity forward: a transaction in which one party agrees to pay an agreed price for a specified quantity of shares of an issuer, a basket of shares of several issuers or an equity index at a future date and the other party agrees to pay a price for the same number of shares of an issuer to be set on a specified date in the future. The payment calculation is based on the number of shares of an issuer and can be physically-settled (where delivery occurs in exchange for payment), or cash-settled (where settlement occurs based on the difference between the agreed forward price and the prevailing market price at the time of settlement), or "net-share"-settled (where the difference between the agreed forward price and the prevailing market price at the time of settlement is paid using a designated security as "currency").

Equity index option: a transaction in which one party grants the other party (in consideration of a premium payment) the right to receive a payment equal to the amount by which an equity index either exceeds (in the case of a call) or is less than (in the case of a put) a specified strike price.

Equity option: a transaction in which one party grants to the other party (in consideration for a premium payment) the right, but not the obligation, to purchase (in the case of call) or sell (in the case of a put) a shares of an issuer, or a basket of shares of several issues at a specified strike price. The option can be settled by physical delivery of the shares in exchange for the strike price or may be cash settled based on the difference between the market price of the shares on the exercise date and the strike price.

Equity index swap: a transaction in which one party pays periodic amounts of a given currency based on a fixed price or a fixed rate and the other party pays periodic amounts of the same currency or a different currency based on the performance of an equity index, such as the Standard and Poor's 500.

[23/] The Securities and Exchange Commission has repeatedly recognized the extent to which OTC equity derivatives have been integrated into the capital markets, blessing their use to buy

OTC equity derivatives use the same building blocks (*i.e.*, forwards and options) as those derivatives transactions that are specifically enumerated in Section 101(53B). They are also documented and governed by the exact same ISDA Master Agreement, which is used to govern many different types of transactions in one agreement. Originally published in 1987, and revised in 1992 and 2002, the ISDA Master Agreement establishes important international contractual standards and is used to document a wide variety of transactions based on many different underlying products, including interest rates, currencies, equities, commodities, energy and credit. *See generally* Daniel P. Cunningham, *An Introduction To OTC Derivatives*, 848 PLI/Corp. 121, 138-142 (1994). The publication of the 1994 ISDA Equity Option Definitions, the 1996 ISDA Equity Derivatives Definitions and the 2002 ISDA Equity Derivatives Definitions have led to further standardization in the OTC equity derivatives market.

On December 21, 2000, the Commodities Futures Modernization Act of 2000 ("CFMA"), Pub. L. No. 106-554, 114 Stat. 2763, was signed into law. The CFMA clarified the status of OTC derivatives under the commodities and securities laws, including, for example, amending the securities laws to clarify that certain individually negotiated swap agreements between eligible contract participants would not be considered "securities." *See generally* Edward J. Rosen and Geoffrey B. Goldman, *The Commodity Futures Modernization Act of 2000*, 1280 PLI/Corp. 573, 575, 578 (2001).[24/] Ten years after codifying the definition of "swap agreement"

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back stock and to raise or dispose of capital. *See Goldman, Sachs & Co.*, SEC No-Action Letter, 2003 WL 22358822 (Oct. 9, 2003); *Goldman, Sachs & Co.*, SEC No-Action Letter, 1999 WL 1244018 (Dec. 20, 1999); *Chicago Bd. Options Exchange*, SEC No-Action Letter, Fed. Sec. L. Rep. ¶ 79,665 (Feb. 22, 1991).

24/ Swap agreements based on securities prices, yields or volatilities are, however, subject to certain anti-fraud requirements. *Id.*

in the Bankruptcy Code (*see* 11 U.S.C. § 101(53B)), Congress included a more-modernized definition in the CFMA which specifically includes:

> any such agreement, contract, or transaction commonly known as an interest rate swap, including a rate floor, rate cap, rate collar, cross-currency rate swap, basis swap, currency swap, *equity index swap*, *equity swap*, debt index swap, debt swap, credit spread, credit default swap, credit swap, weather swap, or commodity swap.

Pub. L. No. 106-102, Title II, § 206A, as added Pub. L. 106-554, § 1(a)(5) [Title III, § 301(a)], Dec. 21, 2000, 114 Stat. 2763, 2763A-449 (emphasis added); *see also* Notes, 15 U.S.C.A. § 78c (2004). The fact that equity swaps were specifically enumerated in the CFMA's "swap agreement" definition in 2000, makes clear that these were exactly the types of transactions Congress had in mind when it included "any other similar agreement" in the 1990 Bankruptcy Code definition in order "to recognize that [swap] agreements evolve over time and to provide that all such similar agreements are entitled to the protections of this bill." S. Rep. No. 101-285, at 8.[25/]

Until the signing of the CFMA, use of OTC equity derivatives was limited because their treatment under the securities and commodities regulations was unsettled. Thus, while it is true that OTC equity derivatives transactions essentially were non-existent in 1990, today they are a significant and growing component of the swap market. A 2003 ISDA survey found that 11% of the world's 500 largest companies use this important tool to help manage equity price risk. *See* ISDA Press Release, Apr. 9, 2003, *available at* http://www.ISDA.org. The size of the OTC

25/ Legislation has been introduced in Congress to clarify the treatment of certain financial contracts in bankruptcy. That bill includes a technical amendment to the Bankruptcy Code's definition of "swap agreement" clarifying that the term includes a broad array of financial instruments, including an equity index or equity swap, option, future, or forward agreement. *See Financial Contract Netting Improvement Act of 2001*, H.R. 11 § 2(f), 107th Cong. (2001).

equity derivatives market today is significant, with notional outstandings for equity derivatives currently exceeding $2.74 trillion.[26/] If OTC equity derivatives are not afforded the same protection from preference and fraudulent conveyance actions as those transactions specifically incorporated in the Section 101(53B) definition, it could cause precisely the type of rippling effect throughout the global financial community that Congress sought to avoid when it enacted Section 546(g).

If the language of the statute extending the protection to "any other similar agreement" is to have any meaning at all, it surely must cover the transactions at issue here, which represent precisely the type of evolution in the market for financial products that Congress predicted when it included this statutory language.[27/]

III. STATE LAW CLAIMS THAT CIRCUMVENT THE PROTECTIONS AFFORDED TO THE FINANCIAL MARKETS BY THE FEDERAL BANKRUPTCY LAWS ARE PREEMPTED.

In addition to relying on federal bankruptcy law theories of preference and fraudulent conveyance, the adversary complaints also fall back on a number of state law causes of action, such as unjust enrichment and certain state statutory provisions, in their attempt to unwind payments made as part of the OTC equity derivatives transactions. Were these efforts to succeed, the protections afforded to the financial markets by Sections 546(e), (f) and (g) would be completely eviscerated: Questions about the enforceability of financial contracts against insolvent debtors that Congress sought to quell with the 1982, 1984 and 1990 amendments to the Bankruptcy Code would remain; the dangerous scenario of a judgment that would force the

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26/ *See* http://www.ISDA.org/statistics/index.html.

27/ In addition, because Enron stock is a "commodity," as defined by the Bankruptcy Code (*see infra* Section I.A), equity derivatives transactions can also be characterized as "commodity swaps," which are specifically listed in Section 101(53B).

undoing of possibly thousands of settled securities transactions would persist; and the threat of a major bankruptcy causing a chain reaction of insolvencies that unravel the fabric of the international financial markets would linger.

But because Congress has spoken directly to this question and provided specific safe-harbor protection to these transactions, any state law claim that would undermine the effectiveness or frustrate the purpose of Congress's action is preempted. *See International Shoe Co. v. Pinkus*, 278 U.S. 261, 263-64 (1929) ("A state is without power to make or enforce law governing bankruptcies that . . . conflicts with the national bankruptcy laws."); *In re Nation*, 236 B.R. 150, 155 n.7 (Bankr. S.D.N.Y. 1999) (areas in Bankruptcy Code where preemption does not apply "are extremely limited").

First, conflict preemption occurs "where the state law and federal law directly conflict such that the two together cannot coexist either because compliance with both federal and state regulations is a physical impossibility or there is an inevitable collision between the two schemes of regulation." *In re Hechinger*, 274 B.R. at 96 (internal quotation marks and citation omitted).[28/] Sections 546(e), (f) and (g) protect the financial markets from the "ripple effect" that could occur if debtors were allowed to bring avoidance actions against major market players, thereby reversing settled transactions. These safe harbor provisions would be soundly defeated if a state law claim grounded in the same facts, making the same claims, and seeking the same relief were allowed to proceed. Accordingly, in a case directly on-point, the Delaware district court in *In re Hechinger* rejected an attempt to circumvent Section 546(e) by alleging a state law

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28/ *See also Curtin v. Port Auth.*, 183 F. Supp. 2d 664, 668 (S.D.N.Y. 2002) ("conflict preemption arises where (1) 'compliance with both federal and state regulations is a physical impossibility' or (2) the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" (quoting *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992)).

unjust enrichment claim. The court explained that "[c]laims that Congress deemed unavoidable under sections 544(b) and 546(e) of the Bankruptcy Code can not be avoided by simply re-labeling claims as unjust enrichment claims; if they could, the exemption set forth in section 546(e) would be rendered useless." 274 B.R. at 96.[29/] The court held that the unjust enrichment claim was a thinly disguised fraudulent conveyance claim that "directly conflicts with the remedial exemption" in Section 546(e), *id.,* and was therefore preempted.[30/]

Second, field preemption arises when a "federal law so thoroughly occupies a legislative field 'as to make reasonable inference that Congress left no room for the States to supplement it.'" *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (citations omitted). "[T]he complex, detailed, and comprehensive provisions of the lengthy Bankruptcy Code demonstrates Congress's intent to create a whole system under federal control which is designed to bring together and adjust all of the rights and duties of creditors and embarrassed debtors alike." *MSR Exploration, Ltd. v. Meridian Oil, Inc.*, 74 F.3d 910, 914 (9th Cir. 1996) (citations omitted).[31/]

29/ *Compare Penn Terra Ltd. v. Department of Envtl. Res.*, 733 F.2d 267, 275 (3d Cir. 1984) ("the legislative intent behind subsection 362(b)(5) should not be defeated by artful pleading that depends on form rather than substance").

30/ *See also Cox v. Zale Del., Inc.*, 239 F.3d 910, 913 (7th Cir. 2001) (unjust enrichment claims rejected because remedies sought "are a matter exclusively of federal bankruptcy law"); *Bessette v. Avco Fin. Serv., Inc.*, 230 F.3d 439, 447 (1st Cir. 2000) (alternative state court remedy for unjust enrichment is "inevitably in conflict with Congress's plan" for federal enforcement of Code provisions); *Pereira v. First N. Am. Nat'l Bank*, 223 B.R. 28, 31-32 (N.D. Ga. 1998) ("Congress clearly intended violations of the Bankruptcy Code provisions relating to the automatic stay and post-discharge injunction to be addressed in the bankruptcy court rather than in state law actions for an accounting or for unjust enrichment."); *In re Century Glove*, 151 B.R. 327, 336 (Bankr. D. Del. 1993) (Section 547 of Code "reveals a precise standard for defining when a creditor has been unjustly enriched within the context of a bankruptcy proceeding" and debtor "should not be allowed to avoid these explicit requirements here through a general unjust enrichment claim").

31/ *See also Bessette*, 230 F.3d at 447 ("the broad enforcement power under the Bankruptcy Code preempts virtually all alternative mechanisms for remedying [the] violations"); *Pertuso v.*

Federal bankruptcy laws "provide[] an exclusive framework for addressing claims that seek to avoid transfers made more than one year before bankruptcy," and supplemental state remedies are precluded. *In re Hechinger*, 274 B.R. at 97. That the debtor's avoidance powers are limited by the safe harbors in Sections 546(e), (f) and (g) does not mean that the debtor is free to pursue state law remedies as an alternative; instead the safe harbors operate to protect payments made under financial contracts from both state *and* federal actions. *See In re Hechinger*, 274 B.R. at 97 (no "gaping voids" were left by Congress in the application of Section 546(e); the statute "compels its application to every transaction that constitutes a 'settlement payment' without exception").

Concerned about the volatile nature of the commodities and securities markets, Congress decided that certain protections were necessary to prevent the insolvency of one commodity or security firm from spreading to other firms and possibly threatening the collapse of the financial markets. Over the past 25 years, Congress has acted repeatedly to provide certainty to the financial markets and to prevent any single bankruptcy from cascading into a global financial meltdown. The doctrines of conflict and field preemption prevent artfully pleaded state law claims from undermining those efforts.

Ford Motor Credit Co., 233 F.3d 417, 426 (6th Cir. 2000) ("[p]ermitting assertion of a host of state law causes of action to redress wrongs under the Bankruptcy Code would undermine the uniformity the Code endeavors to preserve and would stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.") (internal quotation marks and citation omitted)); *Diamante v. Solomon & Solomon, P.C.*, No. 1:99CV1339 (FJS/DRH), 2001 WL 1217226, at *2 (N.D.N.Y. Sept. 18, 2001).

CONCLUSION

For the foregoing reasons, the safe harbor provisions set forth in Sections 546(e) and 546(g) exempt the payments made as part of the OTC equity derivatives transactions at issue from the avoidance provisions of the bankruptcy laws and, accordingly, the adversary action should be dismissed.

Respectfully submitted,

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