SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

NEXTERA ENERGY, INC.	:	Index No. 652484/2017
Plaintiff,	:	
	:	Justice Shirley Werner Korneich
-against-	:	IAS Part 54
GREENBERG TRAURIG, LLP	:	
	:	Motion Seq. No. 2
Defendant.	:	

GREENBERG TRAURIG'S
MEMORANDUM OF LAW
IN SUPPORT OF THE MOTION TO DISMISS

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Defendant Greenberg Traurig, LLP ("GT" or "Defendant") submits this memorandum in support of its motion to dismiss Plaintiff NextEra Energy, Inc.'s ("NextEra" or "Plaintiff") Complaint pursuant to CPLR 3211(a)(1) and (a)(7). The sole claim asserted in the Complaint for legal malpractice is deficient as a matter of law.

I.

SUMMARY OF THE MOTION

NextEra, having prevailed in an underlying action at trial, now sues its former litigation counsel, GT, for fees and expenses allegedly incurred for the trial. NextEra was sued by the Bankruptcy Trustee of Adelphia Communications Corp. for having received money in an allegedly fraudulent transfer. GT initially represented NextEra; but after several years, GT was replaced by Skadden Arps. That case went to trial with Skadden Arps as NextEra's successor counsel. NextEra prevailed, but now sues GT claiming that GT was negligent in not asserting a defense based on §546(e) of the Bankruptcy Code in NextEra's Answer to the Trustee's Complaint. NextEra claims that if a dispositive motion had been filed by GT based on §546(e), it would have been granted and NextEra would have avoided the legal fees incurred in successfully trying the case.

NextEra's action is deficient as a matter of law for the following two independent reasons. Each reason is ground for, and requires, the dismissal of the action.

First, given the negative state of the law as to the §546(e) defense at the time, it was reasonable as a matter of law for GT not to assert the defense in the Answer. An attorney cannot be held liable for malpractice for failing to raise a defense where the law is negative or unsettled. *Darby & Darby, P.C. v. VSI Int'l., Inc.*, 95 N.Y.2d 308 (2000) (where the relevant jurisdictions have rejected a legal theory and it being largely unrecognized elsewhere, an attorney has no duty

to raise the theory). Because the §546(e) defense did not apply to the Trustee's claim, GT had no duty to assert that defense for NextEra. *Id.*; *Lichtenstein v. Willkie Farr & Gallagher LLP*, 120 A.D.3d 1095 (1st Dep't 2014) (same). The fact that the law as to §546(e) changed several years after the Answer was filed does not provide a legal basis for a malpractice action. *Darby & Darby*, 95 N.Y.2d at 315 ("the perfect vision and wisdom of hindsight is an unreliable test for determining the past existence of legal malpractice"); *Lichtenstein*, 120 A.D.3d at 1098 (attorney cannot be held liable for not anticipating appellate ruling after advice was given); *Sklover & Donath, LLC v. Eber-Schmid*, 71 A.D.3d 497 (1st Dep't 2010) (same).

Similarly, GT's advice that §546(e) is a jurisdictional defense which can be asserted at any time also does not provide a basis for malpractice because the advice was a matter of judgment, consistent with appellate precedents and the basic principle that challenges to a federal court's subject matter jurisdiction may be raised at any time. *Rosner v. Paley*, 65 N.Y.2d 736, 738 (1985) (an "error of judgement … does not rise to the level of malpractice"); *Brookwood Companies v. Alston & Bird LLP*, 146 A.D.3d 662, 667 (1st Dep't 2017) ("an attorney is not held to the rule of infallibility and is not liable for an honest mistake of judgment where the proper course is open to reasonable doubt" and "selection of one among several reasonable courses of action does not constitute malpractice").

Second, NextEra's contention that it would have avoided a trial if the §546(e) defense had been asserted is speculation, based on several impermissible assumptions. NextEra first assumes that §546(e) barred the Trustee's claim against it; in actuality, the opposite was true when the Answer was filed. Indeed, the law remained negative for seven years thereafter.

NextEra also assumes that the judge presiding over the underlying action would have dismissed the action without a trial based on §546(e). In actuality, the trial judge had already

expressed a negative view as to the applicability of a §546(e) defense in another case; and, when successor counsel sought to present the possible defense, the judge told him that a §546(e) defense was "not a likely winner." Exh. B, pp. 9-10.

NextEra therefore cannot show that its litigation expenses were damages resulting from GT's alleged negligence, and cannot establish the requisite element that but-for the alleged negligence NextEra would have avoided the expenses. *Brookwood*, 146 A.D.3d at 667-68; *Ambase Corp. v. Davis Polk & Wardwell*, 8 N.Y.3d 428, 346 (2007).

In *Brookwood*, decided earlier this year, a law firm client made the same contention that NextEra is making here, *i.e.*, that it would have prevailed without a trial but-for the alleged negligence of its counsel in failing to assert a particular defense. The First Department dismissed the action which, like here, sought to recover the client's litigation expenses of its trial, holding:

> Brookwood's negligence claim is wholly speculative and depends on too many uncertainties to support a conclusion that there would have been a more favorable, that is quicker, outcome in the underlying litigation. Having prevailed in the underlying patent action and having otherwise failed to plead negligence, Brookwood has also failed to show that its litigation expenditures were damages proximately caused by A & B's [the law firm's] alleged negligence.

Brookwood, 146 A.D.3d at 667-68. The same is true here. *Ambase*, 8 N.Y.3d 428 at 346 ("any effect of … lack of advice is purely speculative and cannot support a legal malpractice claim").

In sum, this action is an effort at malpractice-by-hindsight, lacking a legally sufficient basis and impermissibly premised on speculation. Courts have routinely dismissed such actions as legally insufficient on motions to dismiss. Indeed, all of the cases cited above dismissed malpractice claims on motions to dismiss like this one.[1]

[1] *See also*: *Estate of Feder v. Winnie, Banta, Hetherington, Basralian & Kahn, P.C.*,117 A.D.3d 541 (1st Dep't 2014) (dismissing malpractice action on motion to dismiss, on the grounds that attorney conduct was a matter of judgment and that the damages claim was speculative); *Hashmi v. Messiha,* 65 A.D.3d

II.

PERTINENT FACTS[2]

As noted, this action concerns GT's representation of NextEra in an action filed by the Bankruptcy Trustee of Adelphia Communications Corp. in the U.S. Bankruptcy Court for the Southern District of New York ("Bankruptcy Action"). GT represented NextEra from the inception of the action in 2004 through the end of 2010, when it was replaced by Skadden Arps. Cplt. ¶¶ 2-4, 85. The action was tried before Judge Robert Gerber of the Bankruptcy Court in 2012; he rendered its decision in favor of NextEra in May 2014. Cplt. ¶¶ 106-07; *Adelphia Recovery Trust v. FPL Group, Inc.*, 512 B.R. 447 (Bankr. S.D.N.Y. 2014).[3] The decision was affirmed on appeal. Cplt. ¶ 108.

A. The Adelphia/NextEra Transaction

On January 28, 1999, NextEra and Adelphia Communications Corp. ("Adelphia") entered into and closed a private securities transaction ("Transaction"). Cplt. ¶ 22. The Transaction was governed by a private agreement between NextEra and Adelphia, pursuant to which Adelphia purchased shares of its stock held by NextEra for $149,213,130. *Id.*; Exh. B.

1193 (2d Dep't 2009) (dismissing malpractice action, based on attorney's failures to file a motion to dismiss, as conclusory and speculative).

[2] The facts relied on by GT in this motion are drawn from the Complaint (Exh. A) and court documents filed in the underlying action, which are annexed to this motion as exhibits and may be considered by the Court on this motion. *MJD Construction Inc. v. Woodstock Lawn & Home Maintenance*, 299 A.D.2d 459, 460 (2d Dep't 2002) ("Supreme Court was entitled to take judicial notice of its prior decision in this matter and the record in the related bankruptcy matter"); *Alliance Network, LLC v. Sidley Austin LLP*, 43 Misc.3d 848, 873 n.1 (Sup. Ct. N.Y. Cnty. 2014) (Bransten, J) ("It is well established that a court may take judicial notice of undisputed court records and files [on a motion to dismiss]"). *Accord*: *Brookwood Companies v. Alston & Bird LLP*, 146 A.D.3d 622 (1st Dep't 2017) (relying on proceedings in the underlying action in dismissing legal malpractice action on motion to dismiss).

[3] During the relevant time, NextEra was then known as FPL Group, Inc. For ease of reference, we refer to the company as NextEra throughout this memorandum.

No securities market intermediaries such as stockbrokers or clearing agents were involved, as would have been in a public market transaction. *Id.*

B. **The Bankruptcy Action**

In June 2002, Adelphia filed a petition for relief under chapter 11 of the Bankruptcy Code. Cplt. ¶ 24. In June 2004, the Bankruptcy Trustee filed the Bankruptcy Action, asserting a single claim under 11 U.S.C. §544(b), seeking to avoid the Transaction and a return of the money Adelphia paid to NextEra. Cplt. ¶¶ 2, 25; Exh. C. The Trustee alleged that the Transaction (and payment to NextEra for the stock) was a constructively fraudulent transfer, voidable under §544(b). Cplt. ¶ 25; Exh. C. The Trustee contended that the payment was a fraudulent transfer because Adelphia supposedly (a) was insolvent at the time of the Transaction, (b) did not receive equivalent value for the payment to NextEra, and (c) was left with an unreasonably small capital by virtue of the Transaction. Cplt. ¶ 26; Exh. C.

GT filed the Answer for NextEra in September 2004, asserting several defenses, including that Adelphia was solvent at the time of the Transaction, but not a §546(e) defense. Cplt. ¶ 36; Exh. D. After the filing of the Answer, GT requested permission from the Court to file a motion for summary judgment on the ground that Adelphia was solvent at the time of the Transaction. Judge Gerber denied the request since solvency was an issue in other actions the Trustee filed against various banks and Judge Gerber wanted to resolve the solvency issue in those actions. He told the parties that they would have to await the resolution of that issue in the bank actions. As a result and because NextEra wished to avoid litigation costs, the Bankruptcy Action remained in a hiatus until 2010 when the bank actions settled. Cplt. ¶¶ 73, 76.

C. **The §546(e) Defense**

§546(e) limits the avoidance power of a bankruptcy trustee, providing (in pertinent parts) that he/she cannot avoid "settlement payments" in certain securities transactions. As of the time of the filing of NextEra's Answer in 2004, §546(e) provided that:

> Notwithstanding sections 544, . . . the trustee may not avoid a transfer that is a . . . 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 . . .

Exh. E. "Settlement payment" was defined as "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); Exh. F.[4]

The term financial institution was also defined, and restricted to "when any such . . . entity is acting as agent or custodian for a customer in connection with a securities transaction." 11 U.S.C. §101(22); Exh. G.

D. **The State Of The Law Was Negative When The Answer Was Filed**

When the Answer was filed in 2004, courts within the Second Circuit held that §546(e) applied *only* to public transactions involving intermediaries in the securities market such as a broker and a clearing agent. The courts held that §546(e) did not apply unless reversing a transaction would have a negative impact on the "national clearance and settlement system" that threatens a collapse of the public securities market. *Jackson v. Mishkin,* 263 B.R. 406, 479 (S.D.N.Y. 2001); *American Tissue, Inc. v. DLJ*, 351 F.Supp.2d 79, 107 (S.D.N.Y. 2004).

[4] The courts have found the definition confusing. *See, e.g., Jackson v. Mishkin,* 263 B.R. 406, 475 (S.D.N.Y. 2001) ("definition of settlement payment defies plain meaning", "it is circular", and "opaque as it is circular", and citing several decisions stating same).

In *Jackson*, the Court delineated several factors to determine whether §546(e) applied, emphasizing on whether reversing a transaction would cause a chain reaction that would threaten the collapse of the securities market. *Jackson,* 263 B.R. at 479-80:

> (1) [whether] the transactions have long settled by means of actual transfers of consideration, so that subsequent reversal of the trade may result in disruption of the securities industry, creating a potential chain reaction that could threaten collapse of the affected market;
>
> (2) [whether] the transfers were made to financial intermediaries involved in the national clearance and settlement; [and]
>
> (3) [whether] the transaction implicated participants in the system of intermediaries and guarantees which characterize the clearing and settlement process of public markets and therefore would create the potential for adverse impacts on the functioning of the securities market if any of those guarantees in the chain were invoked.

Id. Applying these factors, the court held that §546(e) was inapplicable to the securities trades at issue and did not provide a basis to void the trades. *Id.* at 480.

The court in *American Tissue,* focusing on those factors, declined to apply §546(e) to a private securities transaction because the requisite negative impact on the market and the system of intermediaries and guarantees was not demonstrated. *American Tissue*, 351 F.Supp.2d at 107. *See also*: *Ames Department Stores v. Wertheim Schroder*, 161 B.R. 87, 92 (Bankr. S.D.N.Y 1993) (declining to apply § 546(e) since the statutory purpose of "prevent[ing] the insolvency of one commodity or security firm from spreading to other firms and possibly threatening the collapse of the affected markets" was not demonstrated).[5]

[5] These decisions are in accord with §546(e) legislative purpose. As Congress stated in enacting §546(e), the statute was enacted to "prevent the insolvency of one commodity or security firm from spreading to other firms and possibly threaten the collapse of the affected market." House Report No. 97-420 (Jan. 25, 1982). Exh. H.

These decisions made and make clear that, when the Answer was filed in the Bankruptcy Action, the courts in the Second Circuit applied §546(e) *only if* avoiding a transfer would risk a chain reaction which would threaten a collapse of the market. The private transaction between Adelphia and NextEra undeniably did not meet this overarching requirement.

Many courts outside of the Second Circuit similarly held. *See, e.g., Jewel Recovery, LP v. Gordon*, 196 B.R. 348, 352 (N.D. Tex. 1996) (§546(e) only protects those transactions involving "settlement payments in the clearance and settlement process in the public market," and does not reach private transactions in a tender offer of publicly held stock); *Wieboldt Stores, Inc. v. Schottenstein*, 131 B.R. 655, 663-65 (N.D. Ill. 1991) (same); *Munford, Inc. v. Munford*, 98 F.3d 604, 610 (11th Cir. 1996) (§546(e) not applicable because financial institution involved acted only as a conduit and did not acquire direct interest in the securities at issue).

The Bankruptcy Appellate Panel of the Ninth Circuit, which surveyed the law throughout the country, aptly summarized the state of the law as it existed in 2005 as follows:

> The decisions that actually have found protected settlement payments to exist have involved publicly traded securities in public markets in which an intermediary played a role.
>
> . . .
>
> The boundary that emerges from such decisions approximates the line between public transactions that involve the clearance and settlement process and non-public transactions that do not involve that process.

Kipperman v. Circle Trust, 321 B.R. 527, 539 (9th Cir. BAP. 2005).[6]

That § 546(e) applied only to public transactions involving market intermediaries was the view within the Second Circuit, and in particular the view of the judge presiding over the

[6] Some courts disagreed. *See Lowenschuss v. Resorts Int'l*, 181 F.3d 505, 515 (3d Cir. 1999) (payment in a leveraged buyout is protected by §546(e)); *Kaiser Steel v. Pearl Brewing Co.*, 952 F.2d 1230 (10th Cir. 1991) (same). However, even in those cases, as the Bankruptcy Appellate Panel observed, the transactions "involved publicly traded securities in public markets in which an intermediary played a role." *Kipperman*, 321 B.R. at 539. In contrast, the Transaction was between Adelphia and NextEra *without* the participation of a market intermediary.

Bankruptcy Action, even after GT had been replaced by successor counsel in 2010. *See Geltzer v. Mooney*, 450 B.R. 414 (Bankr. S.D.N.Y. 2011) (declining to apply §546(e) to a private stock sale) and discussions below.

E. **Judge Gerber's Negative View On §546(e)**

Judge Gerber, who presided over the Bankruptcy Action, made clear that he viewed §546(e) narrowly as had the other judges in the Second Circuit.

In 2008, Judge Gerber held in another case that the §546(e) defense did *not* extend to dividend payments because they have no effect on the securities markets or market intermediaries such as clearing agents or brokers. *Global Crossing v. Alta Partners*, 385 B.R. 52, 56 n.1 (Bankr. S.D.N.Y. 2008). Judge Gerber agreed that the purpose of §546(e) is to "prevent the insolvency of one … security firm from spreading to other firms and possibly threaten the collapse of the affected market" and to "minimize the displacement caused in the … securities markets in the event of a major bankruptcy." *Id.* He therefore held that "recovery of an improper dividend payment from the ultimate recipient—as contrasted to a clearing agent or broker that might have been a conduit or counterparty to dealings with others in the securities industry – raises no risks to the stability of the securities market." *Id.*

Applying Judge Gerber's decision in *Global Crossing* to the Bankruptcy Action would have meant that §546(e) would not have extended to the Transaction since it was a private transaction between Adelphia and NextEra, with no involvement of a clearing agent or broker.

Judge Gerber's negative view on §546(e) continued after GT had been replaced by successor counsel, as discussed in detail next.

F. **Judge Gerber's Antipathy Toward NextEra's §546(e) Defense**

During the fall of 2010, NextEra began consulting with other outside counsel concerning the Bankruptcy Action. Cplt. ¶¶ 77-78. On or about December 14, 2010, NextEra replaced GT

with Skadden Arps. Cplt. ¶ 85. Skadden Arps thereafter moved to amend NextEra's Answer, seeking to add §546(e) as a defense. Cplt. ¶¶ 88-89. Judge Gerber heard the motion in February 2011. Cplt. ¶ 98-99. Skadden Arps contended at the oral argument that, if the Court granted the motion to amend to assert the §546(e) defense, the claim against NextEra should be dismissed under that section, so that the Court and parties would avoid having to try the action. Exh. I, p. 9. Judge Gerber forcefully disagreed, stating:

> [I]f I were to arbitrage the likelihood of success of you winning on the 546(e) defense, I wouldn't be considering that a material factor.
>
> * * *
>
> I've already read what you've said on the merits [of the §546(e) defense]. It's not a likely winner.

Exh. I, pp. 9-10.

Expanding on that view, Judge Gerber added: "Your 546(e) position … would effectively destroy fraudulent conveyance litigation in any case in which a bank makes a payment." *Id.* at 10. Judge Gerber also squarely disagreed with successor counsel's contention that the language of §546(e) was clear and applied without exceptions, stating (*Id.* at 11):

> I'm not going to put a sock in your month. … I know what those [statutory] definitions, as circular as they are, say.

These statements by Judge's Gerber show that he viewed §546(e) narrowly and was not likely to apply it to the Transaction. His view was also consistent with his previous opinion in *Global Crossing* and the state of the law in the Second Circuit at the time.

G. **The Second Circuit's Later Decision On §546(e)**

In June 2011, *seven years after* GT filed an Answer in the Bankruptcy Action, the Second Circuit *for the first time* opined on the application of the §546(e) defense; and it significantly changed the law. *Enron Creditors Recovery Corp. v. Alfa, S.A.B. de C.V.*, 651 F.3d 329 (2d Cir. 2011). In a 2 to 1 split decision, the Court expanded the scope of §546(e) to hold that a market

intermediary taking title to the securities is not necessary for application of the statute in a redemption of commercial paper. *Id.* at 338-39. In doing so, the Court declined to look at the legislative purpose stated by Congress and the history underpinning the prior case law on §546(e).

As noted, the *Enron* decision was not unanimous. In a detailed and lengthy opinion, the dissent objected that the majority had departed from well-established law. *Id.* at 339-47 and 347 at n.2 ("the decision will in fact undo decades of well-established law").

H. **The Decision On The Motion To Amend And Trial**

In July 2011, approximately a month after the *Enron* decision, Judge Gerber denied NextEra's motion to amend. *Adelphia Recovery Trust v. FPL Group, Inc.*, 452 B.R. 484 (Bankr. S.D.N.Y. 2011).[7]

The Trust's claim against NextEra was tried to the bench in May 2012, with closing arguments in July 2012. In May 2014, Judge Gerber decided the case in NextEra's favor, finding that the Trust had failed to prove insolvency. 512 B.R. 447 (Bankr. S.D.N.Y. 2014). Both the District Court and the Court of Appeals affirmed. Cplt. ¶ 108.

I. **The Instant Action**

NextEra's Complaint here asserts a single claim for malpractice against GT. Exh. A. NextEra alleges that GT was negligent in not including the §546(e) defense in the Answer in the Bankruptcy Action and by advising NextEra that §546(e) presented a jurisdictional defense which could be raised at any time. Cplt. ¶¶ 6-7. NextEra contends that but-for GT's alleged

[7] In his ruling, Judge Gerber made comments regarding GT's conduct in answering the Trustee's Complaint, without GT being heard or having an opportunity to respond. We therefore respectfully submit that the comments are unwarranted and, in any event, not pertinent on this motion.

malpractice, it would have won the Bankruptcy Action without the trial and avoided the costs associated with it. Cplt. ¶¶ 11-12, 117-19, 138-42.

III.

ARGUMENT

NextEra's malpractice action is deficient as a matter of law. First, GT was not negligent in not asserting the §546(e) defense and advising NextEra that §546(e) was a jurisdictional defense which could be raised at any time. Second, NextEra's contention that but-for GT's conduct, it would have avoided a trial is mere speculation and which cannot be proven.

A. GT Acted Reasonably In Not Asserting The §546(e) Defense

To sustain its malpractice action, NextEra must show that GT failed to exercise "the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession." *Darby & Darby*, 95 N.Y. 2d at 313. Moreover, what constitutes ordinary and reasonable skill must be "measured at the time of the representation." *Id.* "The perfect vision and wisdom of hindsight is an unreliable test for determining the past existence of legal malpractice." *Id.* at 315.

GT cannot be held liable for not asserting the §546(e) defense because an attorney cannot be held liable for malpractice for failing to raise a defense based on a theory that was "unsettled or debatable." *Darby & Darby,* 95 N.Y. 2d at 315. In *Darby & Darby*, the client contended that the law firm hired to defend patent infringement claims in New York and Florida had a duty to advise the client that its general liability insurance policy might cover the litigation costs. The claim of coverage was not recognized in New York or Florida at the time of the law firm's representation, and the law was largely undeveloped in other jurisdictions. Only a handful of courts in other states found a duty to defend.

The Court of Appeals affirmed the dismissal of the malpractice action, explaining that attorneys "should not be held liable for failing to advise [their clients] about a novel and questionable theory" and where the law is "unsettled and debatable." *Id.* at 314-15. The Court broadly concluded that:

> With Florida and New York, the two most relevant states, having rejected coverage, and the theory of coverage being largely unrecognized elsewhere, plaintiff [law firm] had no duty to advise defendants [former clients] of possible coverage for patent infringement claims.
>
> * * *
>
> Because plaintiff [law firm] acted in a manner that was reasonable and consistent with the law as it existed at the time of representation, it had no duty to inform defendants [clients] about possible "advertising liability" insurance coverage for their patent infringement litigation expenses.

95 N.Y.2d at 315.

Similarly here, GT cannot be held liable because it acted in a manner that was consistent with the law as it existed at the time when the Answer was filed in the Bankruptcy Action in 2004 and throughout the period during its representation of NextEra. As demonstrated above, the law within the Second Circuit at the time was that the §546(e) defense was not applicable to the private transaction between NextEra and Adelphia. Rather, the defense applied only to public transactions that involved market intermediaries such as clearing agents or brokers. See pp. 6-10, *supra*. That was also largely true outside of the Second Circuit. See p. 8, *supra*, and in particular the apt summary of the law in 2005 by the Bankruptcy Appellate Panel of the Ninth Circuit:

> The decisions that actually have found protected settlement payments to exist have involved publicly traded securities in public markets in which an intermediary played a role.
>
> . . .
>
> The boundary that emerges from such decisions approximates the line between public transactions that involve the clearance and settlement process and non-public transactions that do not involve that process.

Kipperman, 321 B.R. at 539. The law was therefore decidedly negative and against NextEra. At best, the law was unsettled and debatable. In either case, GT did not commit malpractice in not asserting the §546(e) defense.

The fact that the Second Circuit departed from well-established law on §546(e) in 2011, fully seven years after the Answer was filed, does not support the conclusion that GT committed malpractice. *Darby & Darby*, 95 N.Y.2d at 315 ("the perfect vision and wisdom of hindsight is an unreliable test for determining the past existence of legal malpractice"). *See also*: *Mignott v. Kreidman*, 65 A.D3d 972 (1st Dep't 2009) ("attorneys were not negligent for failing to anticipate an appellate development"); *Gabrielli v. Dobson & Pinci*, 51 A.D.3d 571, 572 (1st Dep't 2008) (granting motion to dismiss since "failure to anticipate the [later] 2005 appellate ruling … would not have constituted a departure from the professional standard of care"); *Lichtenstein*, 120 A.D.3d at 1098 (granting motion to dismiss, holding that an attorney cannot be held liable based on an appellate ruling two years after advice was given); *Sklover & Donath*, 71 A.D.3d at 498 (granting motion to dismiss, since negligence cannot be based on hindsight).

B. GT's Advice Is A Matter of Judgment, Not Malpractice

GT's advice that §546(e) is a jurisdictional defense which could be asserted at any time is a matter of judgment, consistent with appellate and other precedents, and one of reasonable strategic advices that could have been given. That is not malpractice. *Rosner*, 65 N.Y.2d at 738 (neither "error of judgment" nor "selection of one among several reasonable courses of action" constitutes malpractice); *Brookwood*, 146 A.D.3d at 667 (same). Here, GT's advice is consistent with the law then existing as discussed below.

A fundamental requirement for a federal court to exercise its limited jurisdiction under the Constitution is that the plaintiff demonstrates its constitutional standing to invoke the jurisdiction of the court. This "constitutional standing [requirement is] in addition to any other

applicable standing requirements." *Adelphia Recovery Trust v. Bank of America, N.A.*, 2010 WL 20977214, *3 (S.D.N.Y. May 14, 2010). Like all plaintiffs in a federal action, a bankruptcy trustee must demonstrate its constitutional standing before the court could assume jurisdiction. *Id.* at *5 ("standing is a threshold question in every federal case, determining the power of the court to entertain the suit").

Because a bankruptcy trustee is a creature of the Bankruptcy Code, its power is prescribed thereunder. Under the Code, a trustee "stand[s] in the shoes of the bankrupt corporation and has standing to bring any suit that the bankrupt corporation could have instituted …," but "a bankruptcy trustee has no standing generally to sue third parties on behalf of the estate's creditors." *Shearson Lehman Hutton, Inc. v. Wagoner*, 944 F.2d 114, 118 (2d Cir. 1991). Here, although the Adelphia Trustee was permitted to pursue certain claims on behalf of Adelphia's creditors, §546(e) expressly prohibits the Trustee from bringing claims in connection with the types of transaction specified therein. Under similar circumstances, courts have held that a trustee lacks standing necessary to invoke the federal court's judicial power to decide a matter. *Wagoner*, 944 F.2d at 118; *Hirsch v. Arthur Andersen & Co.*, 72 F.3d 1085 (2d Cir. 1995). As the Second Circuit explained in *Hirsch* (72 F.3d at 1091):

> The Constitution confines the judicial power of the federal courts to deciding cases or controversies. U.S. Const. art. III, § 2, cl. 1. The doctrine of standing is derived directly from this constitutional provision. It focuses upon the party seeking to invoke federal jurisdiction, rather than upon the justiciability of the issue at stake in the litigation. We have held that the Article III "'case or controversy' requirement coincides with the scope of the powers the Bankruptcy Code gives a trustee."

Applying this principle, Judge Lawrence McKenna held in another avoidance action filed by the Adelphia trustee, the same trustee that sued NextEra, where the trustee lacked standing to pursue certain claims, federal jurisdictional issues are implicated. Judge McKenna therefore

dismissed those claims for lack of subject matter jurisdiction. *Adelphia Recovery Trust v. Bank of America, N.A.*, 2010 WL 20977214 (S.D.N.Y. May 14, 2010). As Judge McKenna explained:

> Standing is the threshold question in every federal case, determining the power of the court to entertain the suit. ... A plaintiff must have constitutional standing in addition to any other applicable standing requirements.
>
> . . .
>
> To the extent that the Court held that ART [the Adelphia trustee] failed to demonstrate that ACC [the Adelphia company] had standing to pursue these claims, Rule 12(b)(1) jurisdictional issues were implicated. Although standing challenges have sometimes been brought under Rule 12(b)(6), as well as Rule 12(b)(1), the proper procedural route is a motion under Rule 12(b)(1) [for lack of subject matter jurisdiction].

2010 WL 20977214, at *3 and 5.[8] *Accord*: Fed.R.Civ.P. 12(b)(1) ("lack of subject-matter jurisdiction" is ground for dismissal).

Similarly here, the power given to a trustee does not extend to avoiding the types of transaction specified in §546(e). Indeed, the statute prohibits a trustee from bringing an action in those circumstances. The Adelphia Trustee therefore lacked the constitutional standing to invoke the limited subject matter jurisdiction of the federal courts if §546(e) applied to the Transaction, thus allowing this defense to be asserted at any time. *Groupo Dataflux v. Atlas Global Group, LP*, 124 S.Ct. 1920, 1924 (2004) ("challenges to subject matter jurisdiction can of course be raised at any time prior to final judgment").

Thus, GT's advice that §546(e) is a jurisdictional defense which could be asserted at any time and which is non-waivable is a matter of judgment, and consistent with appellate and other precedents. As a result, even if the advice turned out to be incorrect, it cannot be a basis for a malpractice claim. *Rosner*, 65 N.Y.2d at 738 ("an error of judgment … does not rise to the level

[8] *See also*: *Salven v. Mendez*, 2008 WL 597280 (Bankr. E.D.Ca., Feb. 29, 2008) (a bankruptcy trustee must demonstrate "standing under §546" to bring an action).

of malpractice", and affirming the grant of a motion to dismiss). As the First Department recently explained in affirming the grant of a motion to dismiss a malpractice action:

> An attorney is not held to the rule of infallibility and is not liable for an honest mistake of judgment where the proper course is open to reasonable doubt. Moreover, an attorney's selection of one among several reasonable courses of action does not constitute malpractice. [citations omitted].

Brookwood, 146 A.D.3d at 667; *see also*: *Pacesetter Comm. Corp.*, 150 A.D.2d 232, 236 (1st Dep't 1989) (same).

C. That NextEra Would Have Avoided A Trial Is Mere Speculation

NextEra's allegation that "but for" GT's alleged failure to advance the §546(e) defense it would have avoided the trial is mere speculation, and cannot support a malpractice claim. *Brookwood*, 146 A.D.3d at 667 (action claiming that former client would have won without a trial properly dismissed on motion to dismiss because it is "speculative and depends on too many uncertainties"); *Ambase*, 8 N.Y.3d 428 at 346 (malpractice claim dismissed on motion to dismiss because "any effect of lack of ... advice is purely speculative and cannot support a legal malpractice claim" and "there is no way to know whether the advice not given ... would have altered the duration of the underlying action"). The speculative nature of NextEra's claim is self-evident and indisputable.

First, NextEra's claim necessarily assumes that the §546(e) defense would have applied to and barred the claim against it in the Bankruptcy Action. But there is no certainty that it would. Indeed, as demonstrated above, courts within the Second Circuit and many courts elsewhere held that the §546(e) defense did not apply to private transactions such as the one between NextEra and Adelphia. See pp. 6-10, *supra*. That was the state of the law at the time when the Answer was filed in the Bankruptcy Action in 2004, and it remained negative for seven years until 2011 when the Second Circuit rendered its decision in *Enron*.

Second, NextEra's claim also necessarily assumes that Second Circuit would have changed the law on the applicability of the §546(e) defense. But it is and was not clear that the Court would do so. Rather, the Second Circuit rendered a 2-1 split decision, with a lengthy dissent objecting to the majority's departure from established law. *Enron*, 651 F.3d at 339-47.[9]

Third, NextEra's claim further necessarily assumes that the trial would have been scheduled after the change in the law on the applicability of the §546(e) defense, instead of when the law was decidedly negative. But there is no certainty that the trial would have been scheduled after a change in the law, which occurred seven years after the Answer was filed. The trial judge was well within his discretion to schedule the trial during any of the seven years before the law was changed. Both the timing of the trial and the timing of the Second Circuit's decision in *Enron* are fortuitous. NextEra's claim is impermissibly premised on the assumptions the trial would have been scheduled after the Second Circuit's decision in *Enron*.

Fourth, NextEra's claim also necessarily assumes that the trial judge presiding over the Bankruptcy Action would have applied the §546(e) defense and dismissed the action without a trial. This speculative assumption cannot be reconciled with the judge's overall negative view on the §546(e) defense and express statement to NextEra's trial counsel that the proffered §546(e) defense was "not a likely winner." Exh. I, pp. 9-10; p. 10, *supra*. As Judge Gerber stated (*Id.)*:

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[9] The speculative nature of NextEra's claim is further illustrated by the Seventh Circuit's recent decision in 2016, several years after the Second Circuit's decision in *Enron*, holding that §546(e) does not apply to private securities transactions. *FTI Consulting, Inc. v. Merit Management Group LP*, 830 F.3d 690, 691 (7th Cir. 2016) ("§546(e) … [does not] protect[] transfers that are simply conducted through financial institutions (or other entities named in section §546(e)), where the entity is neither the debtor nor the transferee but only a conduit"). In so holding, the Seventh Circuit followed the Eleventh Circuit. As noted above, the Eleventh Circuit's decision was decided before the Answer was filed in the Bankruptcy Action. See discussion of the Eleventh Circuit's decision in *Munford* at p. 8, *supra*. Because of the disagreements between the federal Circuits, the Supreme Court has recently granted *certiorari* to hear this issue. ____ S.Ct. ____, 2017 WL 1540513 (May 1, 2017).

> But if I were to arbitrage the likelihood of success of you winning on the 546(e) defense, I wouldn't be considering that a material factor.
>
> * * *
>
> I've already read what you've said on the merits [of the §546(e) defense]. It's not a likely winner.

Thus, any attempt to determine whether a trial would have been avoided could only be the subject of mere speculation, rather than a factual determination. GT therefore cannot be held liable for the expenses of the trial and related costs. *Brookwood*, 146 A.D.3d at 667; *Ambase*, 8 N.Y.3d at 436. In *Brookwood*, the former client made the same contention that NextEra is making here, *i.e.*, it would have prevailed without a trial but-for the alleged negligence of counsel in failing to assert a defense. As aptly explained by the First Department in dismissing the action seeking to recover litigation expenses of the trial:

> Brookwood's negligence claim is wholly speculative and depends on too many uncertainties to support a conclusion that there would have been a more favorable, that is quicker, outcome in the underlying litigation. Having prevailed in the underlying patent action and having otherwise failed to plead negligence, Brookwood has also failed to show that its litigation expenditures were damages proximately caused by A & B's [the law firm's] alleged negligence.

Brookwood, 146 A.D.3d at 667.

Similarly, the Court of Appeals in *Ambase* affirmed the grant of a motion to dismiss a malpractice action where the former client alleged that the underlying action could have been resolved more expeditiously and with less litigation expenses had the attorney considered and advised the client of an additional defense. *Ambase*, 8 N.Y.3d at 436. The Court held that the claim is speculative. In particular, the Court held that short of speculation, "there is no way to know whether the advice not given … would have altered the duration of the underlying action." *Id.* The Court further explained that "any effect of such lack of advice is purely speculative and cannot support a legal malpractice claim." *Id.* *See also*: *Dupree v. Voorhees,* 68 A.D.3d 810,

812 (2d Dep't 2009) (contention that "additional attorneys' fees sought would not have been incurred" is "mere speculation about a loss resulting from an attorney's alleged omission [and] is insufficient to sustain a prima facie case of legal malpractice").

Here, NextEra's claim is similarly speculative and based on multiple uncertainties and assumptions. Short of speculation, there is no way to determine that the judge would have dismissed the Bankruptcy Action without a trial. Indeed, the trial judge expressly indicated that §564(e) was not applicable.[10] Hence, as a matter of law, NextEra's claimed damages were not proximately caused by GT's alleged negligence.

* * *

The fundamental question here is whether NextEra *would have* avoided a trial, and that a reasonable lawyer *had* to assert the §546(e) defense in the Answer. It is not sufficient to merely assert that NextEra might have or could have avoided a trial by asserting this defense, or that a reasonable lawyer might have or could have asserted this defense. As demonstrated above, NextEra cannot meet this standard under the facts alleged in the Complaint. GT's conduct in not asserting the §546(e) defense in the Answer and advising NextEra that §546(e) is a jurisdictional defense which can be asserted at any time cannot, as a matter of law, constitute malpractice.

[10] Unlike New York state practice, there is no right to interlocutory appeal of a Bankruptcy Court judge's decisions. 28 U.S.C. §158. A decision by Judge Gerber that §546(e) is not applicable to the Transaction could only have been appealed after trial and a final judgment is entered.

IV.

CONCLUSION

The Complaint should be dismissed with prejudice for the reasons explained above.

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