AMERICAN BANKRUPTCY INSTITUTE

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Long Claw of the Law: The Limits of Clawback Actions

Hosted by the Bankruptcy Litigation and Young and New Members Committees

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CONCURRENT SESSION

2017

The Long Claw of the Law? Some Limits on Trustees' Recovery Actions

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I. There are many limitations on trustees' rights to claw back sums or recover damages for bankruptcy estates, including statutes of limitations, limits on "extraterritorial" reach, standing and *in pari delicto*.

II. This presentation focuses on some current issues concerning the last two limitations: Trustees' standing relative to estate creditors and *in pari delicto*. These issues are complex, unsettled and the subject of current litigation.

III. Standing has been a much-litigated issue in the Second Circuit, in part because Madoff victims who are not "net losers" have been denied recovery. Nevertheless, key standing issues remain unresolved.

IV. Consider the following hypothetical:

A. Izzy, an investor in a defunct investment fund, alleges that the fund's manager Martin owed him individual fiduciary duties in addition to the duties that Martin owed to the fund as a whole. Martin was a friend of Izzy's who promised that he would take good care of Izzy's money. Afterwards, Martin invested all of the fund's money – including Izzy's share – in his brother's production of a movie.

B. The movie was a flop, causing the fund to lose $100 million and file a bankruptcy petition. The fund's trustee sued Martin for its $100 million loss, which it blamed on Martin's self-interested breach of fiduciary duty. Izzy too sued Martin, alleging that Martin fraudulently induced him to invest, that Martin breached his fiduciary duties to Izzy, and that Martin's misconduct caused Izzy to lose his $20 million investment in the fund.

C. The issue: Who has standing to sue Martin for Izzy's $20 million piece of the fund's overall loss? Izzy? The fund? Both?

D. The "trilemma": The issue of who has standing is particularly difficult because it creates a "trilemma" – at least one of the three parties will necessarily incur prejudice. Either:

1. Izzy has to give up his individual claim against Martin and recover solely through a distribution by the fund, or
2. The fund has to reduce the amount of its claim against Martin to carve out Izzy's individual claim, or
3. Martin will have to pay for the same loss twice: $100 million to the fund as a whole to compensate it for its loss, and $20 million to Izzy to compensate him for his individual share of that loss.

B. Two Preliminary Comments:

1. The issue as just presented is not limited to investors. Lenders and creditors may have similar issues if a debtor's manager fraudulently induces reliance on a company's ability to pay its debts.
2. If a bankrupt company or fund has standing to sue its managers, either on its own or concurrently with individual creditors or investors, it can seek to enforce the automatic stay to protect its pursuit of its claims. This may or may not resolve the "trilemma," depending on whether the investor's suit is temporarily or permanently stayed.

V. Resolving the Standing Issue Part 1: Choice of law

A. State law standing and the "internal affairs" doctrine

B. Additional policies of bankruptcy law

VI. Resolving the Standing Issue Part 2: Some Alternative Solutions

A. The "individual harm" rule – Any party who is individually harmed can sue

B. The "individual duty" rule – Any party who is both individually harmed and individually wronged can sue

C. The Second Circuit's "secondary harm" rule – Only a party who suffers "particularized injury," and not indirect or "secondary harm," can sue. *See* the *Marshall* case.

D. The "common impact" rule – Only a party who is harmed separately can sue. *See* the *Tronox* case.

E. The British "reflective loss" rule – A party can only sue for "non-reflective" loss

VII. Resolving the Standing Issue Part 3: Comparing the Alternative Solutions

A. Choosing between the competing rules amounts to deciding which of the three parties should incur a loss: the defendant manager, the bankrupt fund, or the individual investor.

1. If one believes in the policies underlying the automatic stay, such as ensuring an efficient, collective adjudication in a single forum that treats similar losses similarly, then the investor's interests should yield to the fund's.

2. If one believes that individual rights should not have to yield just because others are similarly situated, then either the fund should be required to give up part of its claim – thereby increasing its proportional litigation costs – or the defendant should be required to pay twice.
3. And if one believes that defendants should not be required to pay twice, then either the fund or the investor will have to reduce its claim.
4. This issue is currently *sub judice* in the S.D.N.Y. Bankruptcy Court, where, in the interests of full disclosure, I represent the investment fund's trustee. We will have to see how it comes out.

VIII. Some Current Issues Concerning *In Pari Delicto*

A. Background: Under the traditional doctrine of *in pari delicto*, courts decline to resolve disputes between two wrongdoers. The doctrine is intended to deter illegality and avoid "entangling the courts" in disputes between wrongdoers.

B. Choice of law: Federal and bankruptcy courts typically look to the law that provides the cause of action. However, if the doctrine is intended to avoid "entangling the Courts," should the adjudicating court apply its own version of the *in pari delicto* doctrine instead of, or in addition to, state law? This issue comes up, to some extent, in the *Flaxer* case.

C. Does *in pari delicto* apply in avoidance actions?

D. Is *in pari delicto* a doctrine of relative fault or absolute fault?

E. Does *in pari delicto* only bar suits against outside professionals, or against a debtors' managers as well? If there is an "insider exception" to *in pari delcito*, what is its scope? *See* the *Flaxer* and *Hosking* cases.

IX. Standing and In Pari Delicto: If *in pari delicto* applies to the trustee, should individuals have standing even if they would not otherwise?

Hosking v. Hellas Telcoms. (Lux.) II SCA (In re Hellas Telcoms. (Lux.) II SCA)

United States Bankruptcy Court for the Southern District of New York

January 29, 2015, Decided

Chapter 15, Case No. 12-10631 (MG), Adv. Proc. No. 14-01848 (MG)

Reporter

524 B.R. 488; 2015 Bankr. LEXIS 278; 73 Collier Bankr. Cas. 2d (MB) 78

In re: HELLAS TELECOMMUNICATIONS (LUXEMBOURG) II SCA, Debtor in a Foreign Proceeding. ANDREW LAWRENCE HOSKING and SIMON JAMES BONNEY, in their capacity as joint compulsory liquidators and duly authorized foreign representatives of HELLAS TELECOMMUNICATIONS (LUXEMBOURG) II SCA, Plaintiffs, -against- TPG CAPITAL MANAGEMENT, L.P., et al., Defendants.

Subsequent History: Adhered to, Reargument granted by *In re Hellas Telecomms. (Lux.) II SCA, 526 B.R. 499, 2015 Bankr. LEXIS 715 (Bankr. S.D.N.Y., Mar. 9, 2015)*

Core Terms

liquidator, Plaintiffs', Redemption, fraudulent conveyance, transfers, Insolvency, unjust enrichment, general jurisdiction, contacts, proceeds, pari delicto, Defendants', Declaration, personal jurisdiction, citations, Reply, motion to dismiss, subject matter jurisdiction, choice of law, entities, parties, principal place of business, internal quotation marks, requirements, adversary proceeding, bankruptcy court, constructive, allegations, vested, cases

Case Summary

Overview

HOLDINGS: [1]-Two individuals who were appointed by the High Court of Justice of England and Wales to liquidate the assets of a Luxembourg telecommunications company, who obtained recognition of the foreign proceeding under Chapter 15 of the U.S. Bankruptcy Code, had personal jurisdiction over U.S. businesses in an adversary proceeding they filed in the U.S. bankruptcy court which sought recovery on theories of fraud and unjust enrichment, but did not have personal jurisdiction over foreign businesses that were not domiciled and did not do business in the U.S.; [2]-The liquidators did not have standing under United Kingdom law to pursue claims alleging that the U.S. businesses committed fraud in violation of *N.Y. Debt. & Cred. Law §§ 273* and *276*, but did have standing to pursue their claims against the U.S. businesses for unjust enrichment.

Outcome

The court dismissed all claims the liquidators filed against non-U.S. businesses, dismissed the liquidators' claims alleging that U.S. businesses committed actual fraud and constructive fraud in violation of New York law, and denied the U.S. businesses' motion to dismiss the liquidators' claims seeking recovery on a theory of unjust enrichment.

LexisNexis® Headnotes

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Evidence > Burdens of Proof > Allocation

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN1 On a motion to dismiss under *Fed. R. Civ. P. 12(b)(2)*, a plaintiff bears the burden of making a prima facie showing through its own affidavits and supporting materials that personal jurisdiction exists. The plaintiff must make legally sufficient allegations of jurisdiction, including an averment of facts that, if credited, would suffice to establish jurisdiction over the defendant. When personal jurisdiction is averred on affidavits or declarations, all allegations are construed in the light most favorable to the plaintiff and doubts are resolved in the plaintiff's favor, notwithstanding a controverting presentation by the moving party.

Civil Procedure > ... > Service of Process > Service of Summons > General Overview

Bankruptcy Law > Procedural Matters > Adversary Proceedings > Commencement of Adversary Proceedings

HN2 Fed. R. Bankr. P. 7004(f) provides that if the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons or filing a waiver of service in accordance with Rule 7004 is effective to establish personal jurisdiction over the person of any defendant with respect to a case under the Bankruptcy Code or a civil proceeding arising under the Bankruptcy Code, or arising in or related to a case under the Bankruptcy Code. Pursuant to Fed. R. Bankr. P. 7004(d), a summons and complaint and all other process except a subpoena may be served anywhere in the United States.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Minimum Contacts

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Due Process

HN3 To establish personal jurisdiction over a defendant, due process requires a plaintiff to allege (1) that a defendant has certain minimum contacts with the relevant forum, and (2) that the exercise of jurisdiction is reasonable in the circumstances. In assessing the sufficiency of a defendant's ″minimum″ contacts, courts distinguish between ″general″ and ″specific″ personal jurisdiction. General, or ″all-purpose,″ jurisdiction over a foreign defendant allows a court to hear any and all claims against such defendant. Specific jurisdiction over a foreign defendant allows a court to hear claims that arise out of or relate to the defendant's contacts with the forum. A determination of the reasonableness of exercising personal jurisdiction over a defendant entails inquiring whether the exercise of jurisdiction would offend traditional notions of fair play and substantial justice.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Domicile

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Doing Business

HN4 Only a narrow set of affiliations with a forum will subject a defendant to general jurisdiction in that forum. An individual's paradigm basis for general jurisdiction is his or her domicile. With respect to a corporation, the place of incorporation and principal place of business are paradigm bases for general jurisdiction. These paradigms are sufficient, but not exclusive, bases for general jurisdiction. At the same time, however, engaging in a substantial, continuous, and systematic course of business in a forum is not alone sufficient to render a defendant subject to general jurisdiction in such forum. Rather, beyond the paradigm bases for general jurisdiction over a corporation, general jurisdiction exists where such corporation's affiliations with a state are so continuous and systematic as to render it essentially at home in the forum state.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Minimum Contacts

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Due Process

Bankruptcy Law > Procedural Matters > Adversary Proceedings > Commencement of Adversary Proceedings

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

HN5 In federal question cases, no inquiry into a defendant's ″minimum contacts″ with the forum state is needed to exercise jurisdiction pursuant to *Fed. R. Bankr. P. 7004*; rather, only a federal ″minimum contacts″ test is required, whereby the *Fifth Amendment's Due Process Clause* limits a bankruptcy court's exercise of personal jurisdiction over a defendant. The rationale for this holding is that the sovereign exercising jurisdiction under *28 U.S.C.S. § 1334* is the United States, not the particular state in which a federal court is situated.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Due Process

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Minimum Contacts

HN6 Nationwide contacts satisfy due process requirements where a court has federal jurisdiction and nationwide service of process is authorized under an applicable federal statute. Indeed, courts have routinely held that a nationwide ″minimum contacts″ test applies where nationwide service of process is authorized by federal law.

Bankruptcy Law > Procedural Matters > Jurisdiction > General Overview

Bankruptcy Law > Procedural Matters > Jurisdiction > Federal District Courts

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

HN7 Jurisdiction in a bankruptcy court is based on *28 U.S.C.S. § 1334* and is intended to permit a single bankruptcy court (or a federal district court) to deal with all claims that arise under the Bankruptcy Code, or arise in or are related to a bankruptcy case. A plaintiff would still have to show that the exercise of jurisdiction is reasonable under the circumstances.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Domicile

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Substantial Contacts

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Doing Business

HN8 While the United States Supreme Court's decision in Daimler AG v. Bauman suggests that a corporate defendant's place of incorporation and principal place of business are two paradigm forums where it would be subject to general jurisdiction, the Supreme Court did not hold that such paradigm forums represent the only places where a defendant may be subject to general jurisdiction.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Minimum Contacts

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Purposeful Availment

HN9 The inquiry whether a forum state may assert specific jurisdiction over a nonresident defendant focuses on the relationship among the defendant, the forum, and the litigation. A defendant's suit-related conduct with a forum must form the basis for specific jurisdiction. Where a claim arises out of, or relates to, a defendant's contacts with a forum—i.e., specific jurisdiction is asserted—minimum contacts necessary to support such jurisdiction exist where the defendant purposefully availed itself of the privilege of doing business in the forum and could foresee being haled into court there.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Minimum Contacts

HN10 The United States courts of appeals have adopted different approaches for determining whether a claim ″arises from or relates to″ a defendant's contacts with a forum for purposes of evaluating the existence of specific jurisdiction. Under one approach, jurisdiction over a defendant is proper only when the defendant's conduct within the forum is the ″proximate cause″ of the plaintiff's injury. Under an alternative approach, sufficient minimum contacts exist when a defendant's forum-related conduct is merely a ″but for″ cause of the plaintiff's injury. The United States Court of Appeals for the Second Circuit has adopted a third, more flexible standard: where a defendant has had only limited contacts with a state, it may be appropriate to say that he will be subject to suit in that state only if the plaintiff's injury was proximately caused by those contacts. Where a defendant's contacts with the jurisdiction that relate to the cause of action are more substantial, however, it is not unreasonable to say that the defendant is subject to personal jurisdiction even though the acts within the state are not the proximate cause of the plaintiff's injury.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Minimum Contacts

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Due Process

Evidence > Burdens of Proof > Burden Shifting

HN11 In determining the reasonableness of exercising jurisdiction over a defendant, the defendant's contacts with the forum state must be such that maintenance of the suit does not offend traditional notions of fair play and substantial justice. Courts must take into account five factors in this inquiry: (1) the burden that the exercise of jurisdiction will impose on the defendant; (2) the interests of the forum state in adjudicating the case; (3) the plaintiff's interest in obtaining convenient and effective relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of the controversy; and (5) the shared interest of the states in furthering substantive social policies. Where constitutional minimum contacts have been established, often the interests of the plaintiff and the forum in the exercise of jurisdiction will justify even the serious burdens placed on an alien defendant. In such instances, the burden shifts to the defendant to present a compelling case that establishing personal jurisdiction would be unreasonable.

Bankruptcy Law > Ancillary & Other Cross Border Cases

HN12 By enacting Chapter 15 of the Bankruptcy Code, Congress exhibited a clear intent for the United States to participate in a coordinated manner with insolvency proceedings taking place in foreign nations.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Evidence > Burdens of Proof > Preponderance of Evidence

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

HN13 In ruling on a motion to dismiss for lack of subject matter jurisdiction pursuant to *Fed. R. Civ. P. 12(b)(1)*, a federal district court must take all uncontroverted facts in the complaint (or petition) as true, and draw all reasonable inferences in favor of the party asserting jurisdiction. A motion to dismiss for lack of subject matter jurisdiction is properly granted where a court lacks the statutory or constitutional power to adjudicate it. Where the parties dispute jurisdictional facts, the court must decide issues of fact by reference to evidence beyond the pleadings, including affidavits. In the event of such a dispute, the party asserting subject matter jurisdiction has the burden of proving by a preponderance of the evidence that it exists.

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Bankruptcy Law > Procedural Matters > Jurisdiction > Federal District Courts

Bankruptcy Law > Procedural Matters > Jurisdiction > Noncore Proceedings

Bankruptcy Law > Procedural Matters > Jurisdiction > Core Proceedings

HN14 28 U.S.C.S. § 1334 provides federal district courts with jurisdiction over all civil proceedings arising under Title 11 of the United States Code, or arising in or related to cases under Title 11. 28 U.S.C.S. § 1334(b). District courts may refer any or all cases under Title 11, and any or all proceedings arising under Title 11 or arising in or related to a case under Title 11, to the bankruptcy judges for the district. 28 U.S.C.S. § 157(a). Section 157 also divides matters referred to a bankruptcy court into two categories: core and non-core proceedings.

Bankruptcy Law > Procedural Matters > Jurisdiction > General Overview

Bankruptcy Law > Procedural Matters > Jurisdiction > Core Proceedings

Bankruptcy Law > Procedural Matters > Jurisdiction > Noncore Proceedings

Constitutional Law > The Judiciary > Congressional Limits

HN15 While the United States Supreme Court's decision in Stern v. Marshall and its progeny limit the authority of a bankruptcy judge to enter final orders or judgment on core claims that would not be resolved as part of the claims allowance process, the bankruptcy court's jurisdiction remains unaffected, and the court may submit proposed findings of fact and conclusions of law. As the Supreme Court stated in Stern, 28 U.S.C.S. § 157 allocates the authority to enter final judgment between a bankruptcy court and a district court, but that allocation does not implicate questions of subject matter jurisdiction. With respect to a proceeding that is not a core proceeding but that is otherwise related to a case under Title 11 of the United States Code, a bankruptcy judge may submit proposed findings of fact and conclusions of law to the district court. 28 U.S.C.S. § 157(c)(1).

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Bankruptcy Law > Procedural Matters > Jurisdiction > Federal District Courts

Bankruptcy Law > Procedural Matters > Jurisdiction > Noncore Proceedings

HN16 28 U.S.C.S. § 1334(b) provides that federal district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under Title 11 of the United States Code, or arising in or related to cases under Title 11. In the Second Circuit, the test for determining the existence of "related to" jurisdiction under § 1334 is whether the outcome of a proceeding might have any "conceivable effect" on a debtor's bankruptcy estate, or whether the proceeding has a "significant connection" with a debtor's bankruptcy estate.

Bankruptcy Law > Procedural Matters > Jurisdiction > Noncore Proceedings

Bankruptcy Law > Ancillary & Other Cross Border Cases

HN17 Commencement of a case under Chapter 15 of the Bankruptcy Code does not create an "estate" as that term is used in the Bankruptcy Code. However, in the context of a case under former 11 U.S.C.S. § 304—the precursor to Chapter 15—the United States Court of Appeals for the Second Circuit noted that the fact a § 304 proceeding, by definition, involves a bankruptcy estate located abroad does not short circuit the "related to" analysis. In Parmalat Capital Fin. Ltd. v. Bank of Am. Corp., the Second Circuit held that the district court properly exercised removal jurisdiction over the foreign debtors' state law civil action filed in state court, finding that the foreign debtors' civil action seeking damages might have a conceivable effect on their bankruptcy estates, and therefore the district court had "related to" jurisdiction over the state law action.

Constitutional Law > The Judiciary > Congressional Limits

Bankruptcy Law > Procedural Matters > Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

HN18 In Exec. Benefits Ins. Agency v. Arkison, the United States Supreme Court held that when, under the Court's reasoning in Stern v. Marshall, the Constitution does not permit a bankruptcy court to enter final judgment on a bankruptcy-related claim, the relevant statute nevertheless permits a bankruptcy court to issue proposed findings of fact and conclusions of law to be reviewed de novo by the district court.

Bankruptcy Law > Procedural Matters > Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

HN19 Whether a particular proceeding is core or non-core—whether a bankruptcy court may enter a final order or judgment therein—has no impact on whether there is federal bankruptcy jurisdiction over the proceeding.

Evidence > Judicial Notice > Legislative Facts > Laws of Foreign States

HN22 In determining foreign law, a court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law. *Fed. R. Civ. P. 44.1*.

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > Forum & Place

Bankruptcy Law > Procedural Matters > General Overview

HN20 Where no significant federal policy calling for the imposition of a federal conflicts rule exists, a bankruptcy court must apply the choice of law rules of the forum state.

Bankruptcy Law > Procedural Matters > General Overview

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > General Overview

HN21 Under New York choice of law rules, the United States Bankruptcy Court for the Southern District of New York must first determine whether there is an ″actual conflict″ between the relevant laws of the implicated jurisdictions. An actual conflict exists where such laws provide different substantive rules; such differences must be relevant to the issue to be determined and have a significant possible effect on the outcome of the trial. However, if no actual conflict exists, and if New York is among the relevant jurisdictions, the court may simply apply New York law.

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > Governmental Interests

HN23 Upon the identification of an actual conflict among fraudulent conveyance laws, the New York choice of law analysis requires the United States Bankruptcy Court for the Southern District of New York to apply an ″interest analysis.″ New York's interest analysis requires that the law of the jurisdiction having the greatest interest in the litigation will be applied, and the only facts or contacts which obtain significance in defining state interests are those which relate to the purpose of the particular law in conflict. Given that fraudulent conveyance laws are ″conduct regulating,″ the law of the jurisdiction where the tort occurred will generally apply because that jurisdiction has the greatest interest in regulating behavior within its borders.

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > Governmental Interests

HN24 New York choice of law rules do not require a blind adherence to the "interest analysis" rule, and when alleged wrongful conduct occurs in a place different from the place of injury, the United States Court of Appeals for the Second Circuit has dictated that it is the place of the allegedly wrongful conduct that generally has superior interests in protecting the reasonable expectation of the parties who relied on the laws of that place to govern their primary conduct and in the admonitory effect that applying its law will have on similar conduct in the future.

International Law > ... > Comity Doctrine > Areas of Law > Bankruptcy

Bankruptcy Law > Ancillary & Other Cross Border Cases

HN25 Article 4 of the European Union Insolvency Regulation indicates that the law of a debtor's Centre of Main Interests ("COMI") continues to govern aspects of that entity's bankruptcy throughout the European Union, including the choice of which avoidance law will control. Article 4 thus establishes a default rule that the law of a debtor's COMI governs the avoidance of antecedent transactions. Article 13 of the European Union Insolvency Regulation provides an exception to the default rule, enabling the disapplication of the default rule where a person who benefitted from an impugned transaction can prove that the law of another member state governs the transaction and that the transaction is valid under that law.

International Law > Dispute Resolution > Conflict of Law > Choice of Law

HN26 It is settled law that New York courts look to New York and not foreign conflicts provisions in order to avoid the prospect of renvoi.

Civil Procedure > ... > Justiciability > Standing > General Overview

HN27 Standing is a jurisdictional requirement that must be met in order to have claims litigated in federal court.

Civil Procedure > ... > Justiciability > Standing > General Overview

Evidence > Burdens of Proof > Allocation

HN28 Because standing is a jurisdictional matter, it is the burden of the party who seeks the exercise of jurisdiction in his favor to clearly allege facts demonstrating that he is a proper party to invoke judicial resolution of a dispute. A court may base its finding regarding a plaintiff's standing on the complaint, the complaint supplemented by undisputed facts, or the complaint and any disputed factual issues resolved by the court.

Civil Procedure > ... > Justiciability > Standing > General Overview

Contracts Law > Standards of Performance > Creditors & Debtors

Real Property Law > Purchase & Sale > Fraudulent Transfers

HN29 It is well settled that in order to set aside a fraudulent conveyance under *N.Y. Debt. & Cred. Law § 276*, one must be a creditor of the transferor; those who are not injured by a transfer lack standing to challenge it. Standing to assert an actual fraudulent conveyance claim under New York's Debtor and Creditor Law, however, is not necessarily limited to creditors only; other plaintiffs vested with the authority to assert claims on behalf of creditors have standing.

Bankruptcy Law > Ancillary & Other Cross Border Cases

Bankruptcy Law > Case Administration > Bankruptcy Court Powers

HN30 Upon recognition of a foreign proceeding, foreign representatives are entitled to certain mandatory relief pursuant to *11 U.S.C.S. § 1520*, as well as the assistance of a United States bankruptcy court in administering the foreign main proceeding. In addition to the mandatory provisions under § 1520, two other provisions in Chapter 15 of the Bankruptcy Code allow a bankruptcy court, in its discretion, to grant further relief to a foreign representative. 11 U.S.C.S. § 1521(a) outlines the discretionary relief a court may order upon recognition of a foreign proceeding, whether main or non-main. The discretion that is granted is "exceedingly broad" since a court may grant "any appropriate relief" that would further the purposes of Chapter 15 and protect a debtor's assets and the interests of creditors. The exercise of discretion is, however, circumscribed by the Bankruptcy Code. 11 U.S.C.S. § 1522(a) provides that a court may only grant discretionary relief under § 1521 if the interests of creditors are sufficiently protected. Standards that inform the analysis of § 1522 protective measures in connection with discretionary relief emphasize the need to tailor relief and conditions so as to balance the relief granted to a foreign representative and the interest of those affected by such relief, without unduly favoring one group of creditors over another.

Bankruptcy Law > Case Administration > Bankruptcy Court Powers

Bankruptcy Law > Ancillary & Other Cross Border Cases

HN31 See 11 U.S.C.S. § 1521(a).

Bankruptcy Law > Ancillary & Other Cross Border Cases

Bankruptcy Law > ... > Prepetition Transfers > Voidable Transfers > General Overview

Civil Procedure > ... > Justiciability > Standing > General Overview

HN32 11 U.S.C.S. § 1521(a)(7) expressly precludes a court from granting a foreign representative relief that may be available to a bankruptcy trustee under 11 U.S.C.S. § 544. In the context of a grant of recognition of a foreign proceeding under Chapter 15 of the United States Bankruptcy Code, a foreign representative has standing to initiate a fraudulent transfer action only in a case concerning a debtor pending under another chapter of the Bankruptcy Code.

Bankruptcy Law > Ancillary & Other Cross Border Cases

HN33 It is clear from paragraph 4 of the United Kingdom Insolvency Act that a liquidator under United Kingdom law is vested with the authority to bring actions in the name and on behalf of a company. U.K. Insolvency Act, 1986, ch. 45, §§ 165, 167, sch. 4, para. 4. It is also clear that under paragraph 3A, a liquidator may assert a claim under the proffered United Kingdom equivalent to a fraudulent conveyance claim under the New York Debtor and Creditor Law—U.K. Insolvency Act, 1986, ch. 45, § 423—the only creditor-like standing that a liquidator appears to have under United Kingdom law. Generally, a victim of a transaction, or a creditor, has standing to bring a claim under U.K. Insolvency Act § 423. U.K. Insolvency Act, 1986, ch. 45, § 424(1)(c). But in the event that a company is bankrupt or undergoing a winding up proceeding, an action may be brought by the official receiver, by the trustee of the bankrupt's estate or the liquidator or administrator of the body corporate, or with leave of the court, by a victim of the transaction. U.K. Insolvency Act, 1986, ch. 45, § 424(1)(a). Regardless of which plaintiff under § 424(1) files the action, the action is to be treated as made on behalf of every victim of the transaction. U.K. Insolvency Act, 1986, ch. 45, § 424(2).

Bankruptcy Law > Ancillary & Other Cross Border Cases

HN34 See U.K. Insolvency Act, 1986, ch. 45, § 423(1).

Bankruptcy Law > Ancillary & Other Cross Border Cases

HN35 Although liquidators have express authority to bring a claim under U.K. Insolvency Act, 1986, ch. 45, § 423 on behalf of a company's creditors, it does not follow that liquidators have the authority to bring any or all claims on behalf of a company's creditors.

Real Property Law > Purchase & Sale > Fraudulent Transfers

Contracts Law > Standards of Performance > Creditors & Debtors

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Statutory Awards

HN37 See *N.Y. Debt. & Cred. Law § 276-a*.

Contracts Law > Standards of Performance > Creditors & Debtors

Real Property Law > Purchase & Sale > Fraudulent Transfers

Civil Procedure > ... > Justiciability > Standing > General Overview

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Statutory Awards

HN36 Although *N.Y. Debt. & Cred. Law § 276-a* contemplates the ability of plaintiffs other than actual creditors to assert a claim under *N.Y. Debt. & Cred. Law § 276*, the United States Bankruptcy Court for the Southern District of New York is not convinced that *§ 276-a* on its own confers standing upon each of those potential plaintiffs.

Bankruptcy Law > Ancillary & Other Cross Border Cases

Bankruptcy Law > Case Administration > Bankruptcy Court Powers

HN38 While a bankruptcy court is authorized in its discretion to grant broad relief to a foreign representatives before it, the court's discretion is not without limitation, nor is it so broad as to stretch the laws of a foreign jurisdiction—certainly without any basis grounded in that foreign jurisdiction's laws.

Bankruptcy Law > Ancillary & Other Cross Border Cases

Civil Procedure > ... > Justiciability > Standing > General Overview

Bankruptcy Law > ... > Examiners, Officers & Trustees > Duties & Functions > Capacities & Roles

HN39 With the exception of the relief available under the Bankruptcy Code's avoidance powers, foreign representatives of a debtor may be granted any relief available to a bankruptcy trustee. *11 U.S.C.S. § 1521(a)(7)*. As a general matter, a trustee stands in the shoes of a debtor and has standing to bring any action the debtor could have instituted pre-petition. While a trustee has standing to bring claims belonging to a debtor, it does not have standing to assert claims on behalf of individual creditors. Whether a claim belongs to a debtor or to individual creditors is determined by state law.

Bankruptcy Law > Estate Property > Avoidance > Limitations on Trustee Powers

Civil Procedure > ... > Justiciability > Standing > General Overview

HN40 In Shearson Lehman Hutton, Inc. v. Wagoner, the United States Court of Appeals for the Second Circuit developed a prudential standing rule referred to as the "Wagoner rule." The Wagoner rule provides that when a bankrupt corporation has joined with a third party in defrauding its creditors, a bankruptcy trustee cannot recover against the third party for the damage to the creditors. Post-Wagoner, courts in the Second Circuit have consistently held that bankrupt corporations, and trustees standing in the shoes of a bankrupt corporation, lack standing to assert claims against third parties for assisting in defrauding the company where corporate management conducted the alleged fraud.

Civil Procedure > ... > Justiciability > Standing > General Overview

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Unclean Hands

Civil Procedure > ... > Equity > Maxims > Clean Hands Principle

HN41 The doctrine of in pari delicto is a well-established principle of New York law that is based on the notion that one wrongdoer may not recover against another. In pari delicto is an equitable defense similar to the unclean hands doctrine, which exists because, as a matter of equity, courts should not help plaintiffs profit from their wrongdoings. Although, under New York State law, in pari delicto is an affirmative defense, in federal court, prudential considerations deprive a bankruptcy trustee of standing to even bring a claim that would be barred by in pari delicto.

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Unclean Hands

Civil Procedure > ... > Justiciability > Standing > General Overview

Bankruptcy Law > Estate Property > Avoidance > Limitations on Trustee Powers

HN42 Both the Wagoner rule and the in pari delicto doctrine are grounded in common law agency principles. Because a trustee in bankruptcy may assert whatever claims a debtor corporation may have brought pre-petition, subject to all available defenses, any wrongdoing imputed to a corporation under a theory of agency also taints the trustee's claims. Because management's misconduct is imputed to a corporation, and because a trustee stands in the shoes of the corporation, the Wagoner rule bars a trustee from suing to recover for a wrong that he himself essentially took part in. Likewise, under the in pari delicto doctrine, traditional agency principles play an important role in an in pari delicto analysis.

Business & Corporate Law > ... > Management Duties & Liabilities > Fiduciary Duties > General Overview

Business & Corporate Law > ... > Duties & Liabilities > Knowledge & Notice > Duty of Agent to Disclose

Business & Corporate Law > ... > Duties & Liabilities > Negligent Acts of Agents > Liability of Principals

HN43 It is a fundamental principle of agency that the misconduct of managers within the scope of their employment will normally be imputed to the corporation. This principle is premised on a presumption that agents communicate all information to their principals and thereby receive tacit consent for their actions, and a presumption that a principal is generally better suited than a third party to control an agent's conduct, which at least in part explains why the common law has traditionally placed the risk of loss on the principal.

Business & Corporate Law > ... > Directors & Officers > Management Duties & Liabilities > General Overview

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Unclean Hands

HN44 The in pari delicto doctrine does not apply to the actions of fiduciaries who are insiders in the sense that they either are on a board or in management, or in some other way control a corporation. The rationale for not extending the in pari delicto defense to insiders is that in such cases, the element of mutual fault (in pari delicto) is not present, thereby rendering the defense unavailable.

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Unclean Hands

HN45 General partners, sole shareholders, and sole decisionmakers are paradigmatic insiders for purposes of the in pari delicto doctrine under New York law. However, even a third-party professional, typically the quintessential outsider, may surrender an in pari delicto defense where it exerts sufficient domination and control over the guilty corporation to render itself an insider.

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

Governments > Legislation > Statute of Limitations > Time Limitations

HN46 Under New York law, the six-year limitations period for unjust enrichment accrues upon the occurrence of the wrongful act giving rise to a duty of restitution and not from the time the facts constituting the fraud are discovered.

Bankruptcy Law > Procedural Matters > General Overview

Bankruptcy Law > Procedural Matters > Adversary Proceedings > Commencement of Adversary Proceedings

Governments > Legislation > Statute of Limitations > Tolling

HN47 See *11 U.S.C.S. § 108(a)*.

Bankruptcy Law > Procedural Matters > Adversary Proceedings > Commencement of Adversary Proceedings

Bankruptcy Law > Procedural Matters > General Overview

Bankruptcy Law > Ancillary & Other Cross Border Cases

Governments > Legislation > Statute of Limitations > Tolling

HN48 While there is no dispositive case law addressing whether relief under *11 U.S.C.S. § 108* is automatically applicable in cases under Chapter 15 of the Bankruptcy Code, that question is squarely addressed by *11 U.S.C.S. § 103(a)*, which incorporates *§ 108* into a Chapter 15 proceeding. *Section 103(a)* provides that Chapter 1 of the Bankruptcy Code and *11 U.S.C.S. §§ 307*, *362(o)*, *555 through 557*, and *559 through 562* apply in a case under Chapter 15. *Section 108*'s tolling provision therefore applies in a Chapter 15 case by virtue of *§ 103(a)*.

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN49 In order to adequately plead an unjust enrichment claim, a plaintiff must allege that (1) another party was enriched, (2) at the plaintiff's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered. The New York Court of Appeals has clarified that a plaintiff cannot succeed on an unjust enrichment claim unless it has a sufficiently close relationship with the other party. The relationship between a plaintiff and another party must be one that is "not too attenuated," and the plaintiff's complaint must indicate a relationship between the parties that could have caused reliance or inducement.

Counsel: **[**1]** For Plaintiffs as against all Defendants except Deutsche Bank AG: Howard Seife, Esq., Andrew Rosenblatt, Esq., Marc D. Ashley, Esq., CHADBOURNE & PARKE LLP, New York, New York.

For Plaintiffs as against Deutsche Bank AG: Alexander H. Schmidt, Esq., Alan McDowell, Esq., Jeremy Cohen, Esq., WOLF HALDENSTEIN ADLER FREEMAN & HERZ LLP, New York, New York.

For the TPG Defendants: Paul M. O'Connor III, Esq., Andrew K. Glenn, Esq., KASOWITZ, BENSON, TORRES & FRIEDMAN LLP, New York, New York.

For the Apax Defendants, Robert S. Fischler, Esq., Stephen C. Moeller-Sally, Esq., ROPES & GRAY LLP, New York, New York.

For Defendant Deutsche Bank AG: Charles A. Gilman, Esq., Kevin J. Burke, Esq., Philip V. Tisne, Esq., CAHILL GORDON & REINDEL LLP, New York, New York.

For the TCW Defendants: Wayne S. Flick, Esq. (pro hac vice), Amy C. Quartarolo, Esq. (pro hac vice), Thomas Rickeman, Esq. (pro hac vice), LATHAM & WATKINS LLP, Los Angeles, California.

Judges: MARTIN GLENN, United States Bankruptcy Judge.

Opinion by: MARTIN GLENN

Opinion

[*495] **MEMORANDUM OPINION AND ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTIONS TO DISMISS**

MARTIN GLENN

UNITED STATES BANKRUPTCY JUDGE

Pending before the Court are four motions to dismiss (the ″Motions **[**2]** to Dismiss″) the adversary proceeding complaint (the ″Complaint,″ ECF Doc. # 1)[1] filed by Andrew Lawrence Hosking and Bruce Mackay[2] (the ″Plaintiffs″), in their capacity as Joint Compulsory Liquidators of Hellas Telecommunications (Luxembourg) II SCA (″Hellas II″ or the ″Debtor″).

The Plaintiffs seek to avoid and recover initial transfers of approximately €1.57 billion made by Hellas II from bank accounts outside the United States (the ″U.S.″) to parent entities, and to avoid and recover subsequent transfers of approximately €973.7 million made to the defendants in this case. The defendants allegedly played various roles in an orchestrated restructuring, whereby Hellas II and its related entities issued over €1 billion in debt securities to fund the redemption of convertible equity securities issued by Hellas II's parent and held by special purpose vehicles controlled **[**3]** by many of the defendants. The Plaintiffs also seek to recover certain amounts paid by Hellas II as consulting fees to two groups of defendants based on an unjust enrichment claim.

The foreign main proceeding underlying the Debtor's chapter 15 case, in which Hosking and Mackay were appointed as liquidators, is pending in the United Kingdom (the ″U.K.″); however, Hellas II and several of its related companies were previously based in Luxembourg, and Hellas II's underlying business was a Greek telecommunications company. Some, but not all, of the money transferred from accounts outside the U.S. found its way to transferees in the U.S.; some, but not all, of that money found its way to transferees in New York.

[*496] The 27 named defendants in this case include 16 entities and individuals that are organized and have their principal places of business or residences in the U.S., but not in New York.[3] One Defendant—who allegedly marketed the Hellas II debt issued to fund the challenged transfers—is a bank organized and headquartered in Germany, but with a large office and numerous employees in New York. Nine Defendants are organized and have their principal places of business outside the U.S., with **[**4]** no offices in

[1] Unless otherwise indicated, all citations to the docket are to Adv. Proc. No. 14-01848.

[2] The Court recognized Mr. Mackay's predecessor, Carl Jackson, as one of the foreign representatives in the chapter 15 case. (*See* Case No. 12-10631, ECF Doc. # 17.) Mr. Jackson was succeeded by Mr. Bonney, who was then succeeded by Mr. Mackay.

[3] The moving defendants (the ″Defendants″) consist of four groups of related entities and individuals: (i) Apax Partners Europe Managers Ltd., Apax Europe VI GP Co. Ltd., Apax Europe VI GP, L.P., Apax Europe VI-A, L.P., Apax Europe VI-1, L.P. (collectively, ″Apax Europe VI″), Apax Partners LLP (″Apax Partners″), Apax Partners, L.P. (″Apax NY″), Apax WW Nominees Ltd. (″Apax Nominees″), and Martin Halusa (″Halusa″ and, together with Apax Europe VI, Apax Partners, Apax NY, and Apax Nominees, ″Apax″); (ii) TPG Capital Management, L.P. (″TPG Capital″), David Bonderman (″Bonderman″), James Coulter (″Coulter″), TPG Capital, LLP (″TPG London″), TPG Advisors IV, Inc., TPG GenPar IV, L.P., TPG Partners IV, L.P. (″TPG IV″), T^3 Advisors II, Inc., T^3 GenPar II, L.P., T^3 Partners II, L.P., and T^3 Parallel II, **[**5]** L.P. (″TPG T^3 II″ and, together with TPG Capital, Bonderman, Coulter, TPG London, and TPG IV, ″TPG″); (iii) Deutsche Bank Aktiengesellschaft (″DB″); and (iv) The TCW Group, Inc., TCW Asset Management Company, TCW/Crescent Mezzanine III, LLC, TCW/Crescent Mezzanine Partners III L.P., TCW/Crescent Mezzanine Trust III, and TCW/Crescent Mezzanine Partners III Netherlands, L.P. (collectively, ″TCW″).

New York or the U.S., although some of their affiliates are organized and have their principal places of business in the U.S. All but one Defendant—the only one organized and with its principal place of business in New York—move to dismiss the complaint for lack of personal jurisdiction. A separate Motion to Dismiss the Complaint on other grounds was also filed by the Defendants.[4]

The Plaintiffs allege actual and constructive fraudulent transfer claims against all of the named Defendants and an unnamed class of transferees (the ″Transferee Class″) based *only* on the application of the New York Debtor and Creditor Law (″NYDCL″).[5] The avoidance claims asserted under the NYDCL, where all of the initial transfers were made from outside the U.S., raise a host of issues: whether the Plaintiffs can obtain personal jurisdiction over each Defendant and hale domestic or foreign-based Defendants, that are not organized under New York law and are not ″at home″ in New York, into the bankruptcy court in New York; whether under applicable choice of law principles, New **[**6]** York law or foreign law should apply to the transfers if the NYDCL could be given extraterritorial effect; whether the avoidance claims can be brought in an adversary proceeding related to a chapter 15 case in light of *section 1521(a)(7) of the Bankruptcy Code*; whether the Plaintiffs, as Joint Compulsory Liquidators of the Debtor, have standing to bring the avoidance claims (which are ″creditor″ claims); and whether the NYDCL has extraterritorial effect to reach the transfers. With respect to the unjust enrichment claim, the Defendants assert that the Plaintiffs do not have standing to bring this claim because the so- called *Wagoner* rule and *in pari delicto* doctrine deny standing to a trustee to assert claims against third-parties on behalf of a debtor if the debtor was complicit in the alleged wrongdoing. Several other issues are presented as well.

Resolution of these issues requires considerable analysis and results in this **[*497]** lengthy opinion. As explained below, not all of the issues need to be resolved to dispose of the pending Motions to Dismiss. The Court concludes that the Plaintiffs have established a sufficient basis to assert personal jurisdiction against some, but not all, **[**7]** of the Defendants; choice of law principles require dismissal of the NYDCL constructive fraudulent conveyance claim, because an actual conflict exists between the laws of New York, on the one hand, and of U.K. and Luxembourg (which do not recognize a constructive fraudulent conveyance cause of action), on the other hand, and those two foreign jurisdictions have a more significant interest in applying their laws in this case; the Plaintiffs lack standing under New York law and U.K. law to bring the NYDCL actual fraudulent conveyance claim; and it is unnecessary to decide whether the NYDCL may be given extraterritorial effect to the transfers, or whether the Plaintiffs may bring the avoidance claims in light of *Bankruptcy Code section 1521(a)(7)*, because the NYDCL avoidance claims must be dismissed on other grounds. The Court also concludes that the Complaint sufficiently alleges that the Defendants named in the unjust enrichment claim should be treated as ″insiders″ that controlled Hellas II and directed or authorized the transfers, such that at this stage the Complaint overcomes the asserted prudential standing challenges.

For the reasons detailed below, the Motions to Dismiss for lack of personal jurisdiction are granted **[**8]** in part and denied in part. The Motions to Dismiss on all other grounds are granted in part and denied in part.

I. BACKGROUND

A. Factual Background

4 The Motion to Dismiss filed by TCW also seeks dismissal on the basis of grounds other than lack of personal jurisdiction.

5 N.Y. Debt. & Cred. Law § 270 *et seq*. (McKinney 2010).

In June 2005, eight investment funds (the "Sponsors"), allegedly created by TPG Capital and Apax Partners, acquired approximately 80% of the equity in TIM Hellas Communications S.A. ("TIM Hellas"), a Greek telecommunications services provider, through a special purpose vehicle ("Troy GAC") in a leveraged transaction. (*See* Compl. ¶¶ 84-89.) In preparation for the acquisition of TIM Hellas, in March 2005 TPG and Apax allegedly organized a group of entities under Luxembourg law, including Hellas Telecommunications, S.à.r.l. ("Hellas"), Hellas Telecommunications I, S.à.r.l. ("Hellas I"), Hellas II, Hellas Telecommunications Finance SCA ("Hellas Finance"), and other related entities. (*See* Compl. ¶ 86.) Hellas II and Hellas Finance were wholly owned by Hellas I, which in turn was wholly owned by Hellas. (*Id.* ¶ 87.) Hellas, the ultimate parent of the Hellas entities, was wholly owned by the Sponsors. (*Id.*) The Sponsors acquired the remaining shares of TIM Hellas in November 2005 through Troy GAC, and the acquisition was principally funded by debt **[**9]** issued by the Hellas entities. (*See id.* ¶ 91.) Subsequently, the Sponsors' equity interests in TIM Hellas were cancelled and TIM Hellas merged into Troy GAC; the surviving entity became a wholly owned subsidiary of Hellas II. (*See id.* ¶ 92.)

Also in mid-June 2005, Hellas issued 490,000 convertible preferred equity certificates ("CPECs") to the Sponsors with a par value of €49 million. (*Id.* ¶ 97.) At the same time, Hellas I—the direct subsidiary of Hellas and direct parent of Hellas II—issued 490,000 CPECs to Hellas, and Hellas II issued an equivalent number of CPECs to Hellas I. (*Id.*)

TPG and Apax allegedly used Hellas and its related entities to acquire Q-Telecom, a business unit of a large mobile network operator in Greece, in a stock purchase deal that closed on January 31, 2006. (*See id.* ¶ 104.) The acquisition was principally financed with debt issued by a **[*498]** subsidiary of Hellas II and cash contributed by certain other Hellas II subsidiaries. (*See id.* ¶ 105.) In exchange for the transfer of €28.3 million from the Sponsors to Hellas, Hellas issued an additional 282,681 CPECs to the Sponsors.[6] (*Id.* ¶ 106.)

The Plaintiffs allege that TPG and Apax "put in motion plans to dispose of [Hellas II]'s subsidiaries in a sale to a third party" in June 2006. (*Id.* ¶ 112.) However, the sale process purportedly did not generate interest at the prices sought by TPG and Apax, and subsequently "they instead took steps to extract those returns from [Hellas II] under the guise of a purported 'refinancing' of its debt." (*Id.* ¶ 116.)

In December 2006, through a multi-step transaction (the "December 2006 Transaction"), (i) Hellas II issued €960 million and $275 million of Floating Rate Subordinated Notes due 2015 (the "Sub Notes"); (ii) Hellas Finance and certain subsidiaries of Hellas issued additional series of notes, the proceeds of which were transferred or loaned to Hellas II; and (iii) Hellas II transferred a total of approximately €1.57 billion to its parent, Hellas I, of which approximately €978.7 million was paid to redeem CPECs issued by Hellas II. (*Id.* ¶¶ 117-118.) Subsequently, Hellas I paid approximately €973.7 million to Hellas to redeem CPECs issued by **[**11]** Hellas I, and Hellas then paid the Sponsors approximately €973.7 million to redeem CPECs issued by Hellas (the "December 2006 CPEC Redemption"). (*Id.* at 118.) The remaining portion of the €1.57 billion transferred from Hellas II to Hellas I was allegedly used to retire other outstanding debt issued by the Hellas entities and to pay costs associated with the December 2006 Transaction. (*See id.*)

In February 2007, TPG and Apax sold Hellas and its subsidiaries to Weather Investments S.p.A.,

[6] Cash was allegedly transferred from Hellas to Hellas I, and then to Hellas II; **[**10]** in exchange, corresponding CPECs were then issued up the corporate structure from Hellas II to Hellas I, and then to Hellas. (*See id.* ¶ 106.)

later renamed WIND Telecom S.p.A. ("Weather Investments"), a stock corporation organized under the laws of Italy. (*Id.* ¶ 143.) Weather Investments purchased 100% of the equity of Hellas for €500 million, €6,435,736 of which was allocated toward the purchase of the remaining CPECs previously issued by Hellas to the Sponsors at the par value of €1 per CPEC. (*Id.* ¶ 145.) Hellas II's financial statements for the year ending December 31, 2007 indicated that its debt-service obligations grew and resulted in a net financial loss of more than €259.5 million; its "leverage remained high at 12.4x EBIT, while its cash interest coverage declined to 1.2x EBIT." (*Id.* ¶ 148.) On or about June 5, 2008, Apax Partners paid €500 **[**12]** million to Weather Investments for a 5% equity stake in the company. (*Id.* ¶ 149.) Additionally, Hellas II "paid a minimum of €1.22 million in additional 'consulting fees' to Hellas I and, directly or indirectly, Hellas I then paid approximately those same amounts to TPG and Apax (the "Consulting Fees Transfer")." (*Id.* ¶ 142.)

In 2009, Hellas II began considering a potential restructuring of its capital structure. (*See id.* ¶ 151.) Accordingly, in August 2009 Hellas II "moved its center of main interests from Luxembourg to the United Kingdom, including among other steps by moving its head office and operating office to London, England." (*Id.*) On November 26, 2009, the High Court of Justice of England and Wales (the "High Court") approved placing Hellas II into administration in England and appointed joint administrators (the "Administrators"). (*Id.*) On December 1, 2011, the High Court discharged the Administrators **[*499]** and ruled that Hellas II should be instead wound-up through a compulsory liquidation. (*Id.* ¶ 152.) The Plaintiffs were thereafter appointed as Joint Compulsory Liquidators. (*See id.* ¶ 18.)

The Plaintiffs allege that Hellas II was insolvent at the time of the December 2006 CPEC **[**13]** Redemption and that the Defendants received portions of the proceeds of such transaction from one or more Sponsors. (*See id.* ¶¶ 23-74, 118.) The Plaintiffs seek to avoid the initial transfer of €1.57 billion from Hellas II to Hellas I as an actual or constructive fraudulent transfer under the NYDCL, and to recover the alleged subsequent transfers to the Defendants. (*See id.* ¶¶ 155-168.) The initial transfers were made from accounts maintained in London, England. (*See* Lestelle Decl. Ex. A at 10, ECF Doc. # 93-1.) Also pursuant to the NYDCL, the Plaintiffs seek to avoid and recover the Consulting Fees Transfer allegedly paid to TPG and Apax.[7] (*See id.*) Finally, the Plaintiffs assert an unjust enrichment claim against TPG and Apax for their receipt of payments they received in connection with the December 2006 Transaction, the December 2006 CPEC Redemption, and the Consulting Fees Transfer. (*See id.* ¶¶ 169-173.)

B. Procedural [14] History**

On February 16, 2012, the Debtor filed a chapter 15 petition for recognition of its foreign proceeding in this Court. (*See* ECF Doc. # 1, Case No. 12-10631.) The Court entered an order granting recognition of the Debtor's foreign main proceeding on March 14, 2012. (*See* ECF Doc. # 17, Case No. 12-10631.) This adversary proceeding was commenced nearly two years later, on March 13, 2014. (*See* ECF Doc. # 1.)

The Motions to Dismiss include: (1) the motion to dismiss for lack of personal jurisdiction filed by Apax[8] and TPG (the "Apax/TPG Motion," ECF

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[7] The parties do not provide information regarding where this transfer originated from; however, in light of the fact that Hellas I's offices and bank accounts were located in Europe, this transfer likely originated from accounts maintained outside the United States.

[8] Notably, Apax NY is not a moving Defendant under the Apax/TPG Motion and does not move for dismissal for lack of personal jurisdiction. (*See* Apax/TPG Mot. at 1 n.1, ECF Doc. # 37; Dec. 3, 2014 Hr'g. Tr. 36:14-17, ECF Doc. # 127.)

Doc. # 37);[9] (2) the motion to dismiss on all other grounds filed by Apax and TPG (the ″Defendants' Motion,″ ECF Doc. # 41),[10] which is joined in part by DB and TCW;[11] (3) DB's motion to dismiss for lack of personal jurisdiction (the ″DB Motion,″ ECF Doc. # 46);[12] and (4) TCW's motion **[*500]** to dismiss (the ″TCW Motion,″ ECF Doc. # 50).

The Plaintiffs filed two memoranda of law in opposition to the Motions to Dismiss for lack of personal jurisdiction: an opposition to both the Apax/TPG Motion and **[**16]** the TCW Motion (the ″PJ Opposition,″ ECF Doc. # 83), and a separate opposition to the DB Motion (the ″DB Opposition,″ ECF Doc. # 79).[13] The Plaintiffs also filed a memorandum of law in opposition to the Defendants' Motion (the ″Opposition,″ ECF Doc. # 84).[14]

In response, (1) Apax and TPG filed a reply in support of the Apax/TPG Motion (the ″Apax/TPG Reply,″ ECF Doc. # 91)[15] and a reply in support of the Defendants' Motion (the ″Defendants' Reply,″ ECF Doc. # 94);[16] (2) DB filed a reply in support of the DB Motion (the ″DB Reply,″ ECF Doc. # 98);[17] and (3) TCW filed a reply in support of the TCW Motion (the ″TCW Reply,″ ECF Doc. # 90, and together with the Apax/TPG Reply, the Defendants' Reply, and the DB Reply, the ″Reply Briefs″).

The Plaintiffs filed a supplemental memorandum of law in opposition to the DB Motion (the ″DB Supplemental Opposition,″ ECF Doc. # 104),[18] and DB filed a surreply (the ″DB Surreply,″ ECF Doc. # 106).[19]

Pursuant to the Court's *Order Scheduling Oral Argument and Directing Supplemental Briefing* (the ″Supplemental Briefing Order,″ ECF Doc. # 115), the Court scheduled a hearing on the Motions to Dismiss and directed the parties to submit supplemental briefs on choice of law issues. In response to the Supplemental Briefing Order, the

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[9] TCW joins in part the Apax/TPG Motion, including the factual background section, the legal standards **[**15]** section, and ″those portions [of the argument section] that address the constitutionality of exercising jurisdiction over a defendant based on its contacts with the United States (as opposed to its contacts with the State of New York).″ (TCW Mot. at 2 n.2, ECF Doc. # 50.)

[10] The Apax/TPG Motion and the Defendants' Motion are supported by the declarations of Andrew K. Glenn (the ″Glenn Declaration,″ ECF Doc. # 42) and Barry Isaacs QC (the ″Isaacs Declaration,″ ECF Doc. # 44), a purported expert on English law.

[11] Specifically, (1) DB joins in the arguments made in the Defendants' Motion, with the exception of the arguments related to the Plaintiffs' unjust enrichment claim against Apax and TPG (*see* DB Reply at 1, ECF Doc. # 98); and (2) TCW joins in the arguments made in the Defendants' Motion, with the exception of the sections regarding subsequent transferee liability and unjust enrichment (*see* TCW Mot. at 1, ECF Doc. # 50).

[12] The DB Motion is supported by the declaration of Philip V. Tisne (the ″Tisne Declaration,″ ECF Doc. # 45).

[13] The Plaintiffs submitted the declaration of Marc D. Ashley (the ″Ashley Declaration,″ ECF Doc. # 81) in support of the PJ Opposition and the DB Opposition.

[14] The Opposition is supported by the declaration of Gabriel Moss QC (the ″Moss Declaration,″ ECF Doc. # 82), a purported expert on English law and European Insolvency law.

[15] The Apax/TPG Reply is supported by the declaration of Evan P. Lestelle (the ″Lestelle Reply Declaration,″ ECF Doc. # 93).

[16] The Defendants' Reply is **[**17]** supported by the declaration of Barry Isaacs QC (the ″Isaacs Reply Declaration,″ ECF Doc. # 95), an expert on English law.

[17] The DB Reply is supported by the declaration of Philip V. Tisne (the ″Tisne Reply Declaration,″ ECF Doc. # 99).

[18] The DB Supplemental Opposition is supported by the supplemental declaration of Alan A.B. McDowell (the ″McDowell Supplemental Declaration,″ ECF Doc. # 105).

[19] The DB Surreply is supported by the Supplemental Declaration of Philip V. Tisne (the ″Tisne Supplemental Declaration,″ ECF Doc. # 107).

Defendants filed a supplemental memorandum of law (the ″Defendants' Supplemental Brief,″ ECF Doc. # 122),[20] and the Plaintiffs likewise filed a supplemental **[**18]** memorandum of law (the ″Plaintiffs' Supplemental Opposition,″ ECF Doc. 121).[21]

On December 3 and 16, 2014 (together, the ″Hearing″) the Court heard oral argument on the Motions to Dismiss and took the matter under submission. This Opinion follows.

[*501] C. The Parties' Positions

1. Personal Jurisdiction

All of the Defendants except for Apax NY argue that the Complaint should be dismissed for lack of personal jurisdiction pursuant to *Federal Rule of Civil Procedure (″FRCP″) 12(b)(2)*, arguing that the Plaintiffs have failed to adequately allege that either general (i.e. all-purpose) or specific jurisdiction exists over these Defendants. Apax, TPG, and TCW all contend that the applicable **[**19]** forum by which their minimum jurisdictional contacts are to be assessed is New York, rather than the U.S. (*See* Apax/TPG Mot. at 2; TCW Mot. at 8.) They argue that, following the Supreme Court's recent decision in *Daimler AG v. Bauman, 134 S. Ct. 746, 187 L. Ed. 2d 624 (2014)*, a defendant is generally only subject to general jurisdiction in its place of incorporation, principal place of business, or domicile; general jurisdiction exists over a foreign defendant only when its contacts with the forum state ″are so 'continuous and systematic as to render [it] essentially at home' in the forum state.″ (Apax/TPG Mot. at 5 (citing *Daimler, 134 S. Ct. at 761* (alteration in original) (citation omitted)); *see* TCW Mot. at 7.) Since New York is not the state of incorporation, principal place of business, or domicile of any of the Defendants moving to dismiss for lack of personal jurisdiction, and the Plaintiffs have not otherwise sufficiently alleged that such Defendants are ″at home″ in New York, the Defendants argue that they are not subject to general jurisdiction. (*See* Apax/TPG Mot. at 7-17; TCW Mot. at 9-14.) DB also argues that it is not subject to general jurisdiction even if the relevant forum for assessing its minimum contacts is the U.S., because it was neither incorporated **[**20]** in the U.S. nor is the U.S. where its principal place of business is located. (*See* DB Mot. at 3 n.1.) According to all of the Defendants, the Plaintiffs have also failed to adequately allege that the Court has specific jurisdiction over the Defendants, because none of the Defendants' suit-related conduct bears a sufficient nexus to New York or the U.S. (*See* Apax/TPG Mot. at 2; TCW Mot. at 14; DB Mot. at 6-7.)

In response, the Plaintiffs argue that the U.S.—not New York—is the pertinent forum with respect to which a defendant's minimum jurisdictional contacts are to be assessed where, as here, nationwide service of process is authorized by a federal statute. (*See* Apax/TPG Mot. at 11-12.) According to the Plaintiffs, all of the Defendants' contacts with the U.S. are sufficient to subject them to personal jurisdiction. (*Id.* at 17; DB Supp. Opp. at 1.) The Apax, TPG, and TCW Defendants with their residence, principal place of business, or place of incorporation in the U.S. are subject to general jurisdiction; the remaining foreign Apax and TPG Defendants are subject to specific jurisdiction based on their suit-related conduct purposefully directed at the U.S. (*See* Apax/TPG Mot. at 17-18.) DB is subject to general **[**21]** jurisdiction because its New York operations are so substantial and of such a nature as to render it

[20] The Defendants' Supplemental Brief is supported by the declarations of Professor André Prüm (the ″Prüm Declaration,″ ECF Doc. # 120), a purported expert on Luxembourg law, and Barry Isaacs QC (the ″Supplemental Isaacs Declaration,″ ECF Doc. # 118).

[21] The Plaintiffs' Supplemental Opposition is supported by the declarations of Marc D. Ashley (the ″Supplemental Ashley Declaration,″ ECF Doc. # 119), Gabriel Moss QC (the ″Supplemental Moss Declaration,″ ECF Doc. # 117), and Marc Thewes (the ″Thewes Declaration,″ ECF Doc. # 116).

at home in New York. (*See* DB Supp. Opp. at 1.) The Plaintiffs contend that DB is also subject to specific jurisdiction because, through its wholly-owned and controlled subsidiary, Deutsche Bank Securities Inc. ("DBSI"), DB marketed and sold Sub Notes to U.S. investors, and proceeds from the Sub Notes were used to fund the December 2006 CPEC Redemption. (*Id.* at 2-12.)

2. Other Grounds

The Defendants also collectively move to dismiss the Complaint for lack of subject matter jurisdiction and failure to state a claim pursuant to FRCP 12(b)(1) and (6), respectively. (*See* Defs.' Mot. at 1.) First, the Defendants argue that the Complaint **[*502]** should be dismissed on the basis that "the Court lacks core subject matter jurisdiction over this dispute." (*Id.* at 35.) Specifically, the Defendants contend that this adversary proceeding is not a core proceeding within the meaning of 28 U.S.C. § 157, and therefore the Court cannot finally adjudicate the Plaintiffs' claims. (*See id.* at 35-39.) Second, the Defendants argue that Count II of the Complaint, which asserts a constructive fraudulent conveyance claim under the NYDCL, must be dismissed because, under New York choice of law rules, **[**22]** Luxembourg or U.K. law has the greatest interest in regulating the December 2006 CPEC Redemption, and the law of either jurisdiction does not recognize a claim for constructive fraudulent conveyance. (*See* Defs.' Supp. Br. at 1.) The Defendants do not argue that any actual conflict between New York law and either Luxembourg or U.K. law exists with respect to the Plaintiffs' actual fraudulent conveyance claim (Count I of the Complaint) or unjust enrichment claim (Count III of the Complaint). (*See id.*) However, the Defendants contend that the Plaintiffs lack standing to assert these claims. (*See* Defs.' Mot. at 9-10, 18.) With respect to the Plaintiffs' actual fraudulent conveyance claim, the Defendants argue that the Plaintiffs "lack standing because (i) Section 1521(a)(7) of the Bankruptcy Code prohibits them from obtaining relief under Section 544—the only mechanism by which a debtor or trustee may assert state law fraudulent conveyance claims belonging to creditors, . . . (ii) the [Plaintiffs] represent Hellas II, not its creditors, and (iii) Section 1521(a)(7)'s bar preempts state law." (*Id.* at 10.) Defendants also argue that the Plaintiffs lack standing to assert their unjust enrichment claim under the *Wagoner* rule, which "bars a trustee from suing to recover **[**23]** for a wrong that he himself essentially took part in." (*Id.* at 18 (citing *O'Connell v. Arthur Anderson, LLP (In re Alphastar Ins. Grp. Ltd.), 383 B.R. 231, 272 (Bankr. S.D.N.Y. 2008)* (citations and internal quotations omitted)).)

Finally, the Defendants argue that the Complaint fails to state a claim for five separate reasons.[22] First, the Defendants argue that the Plaintiffs' claims are barred by the applicable statutes of limitations. (*Id.* at 19.) Second, the Defendants contend that there is a well-settled presumption against the extraterritorial application of the NYDCL to avoid a foreign transaction lacking a close nexus to New York because the drafters of the NYDCL did not clearly indicate that it should apply extraterritorially. (*See id.* at 21-24.) Third, the Plaintiffs fail to adequately allege subsequent transferee liability against TPG or Apax because they assert no facts "to plausibly show that any portion of the [December 2006 CPEC Redemption] was actually received by any TPG or Apax Defendant." (*Id.* at 30.) Fourth, the Defendants argue that the Plaintiffs' NYDCL claims are barred by section 546(e) of the Bankruptcy Code because the December 2006 CPEC Redemption constitutes a settlement payment made by, to, or for the benefit of a financial institution. (*See id.* at 39-41.)

[22] The Defendants also assert as an affirmative defense that the Plaintiffs' NYDCL claims must be dismissed because the holders of the Sub Notes consented to the December 2006 CPEC Redemption, and therefore the Plaintiffs cannot now seek to avoid the December 2006 CPEC Redemption on their behalf. (*Id.* at 24.)

Alternatively, *Bankruptcy Code section 546(e)* preempts the Plaintiffs' state law claims.[23](*See id.* at 42-44.) **[*503]** Lastly, Apax and TPG argue that **[**24]** the Complaint fails to allege an unjust enrichment claim against them, because the Plaintiffs do not plead that a sufficiently close relationship existed between Apax and TPG and the holders of the Sub Notes. (*Id.* at 33.)

The Plaintiffs contend that the Court has subject matter jurisdiction over their claims under *section 1334 of title 28 of the U.S. Code*. (Opp. at 48.) According to the Plaintiffs, "whether this action falls within this Court's 'core' or 'non-core' jurisdiction is irrelevant to whether this Court possesses subject matter jurisdiction, which it plainly does." (*Id.* at 48-49.) The Plaintiffs also **[**25]** argue that New York law, rather than Luxembourg or U.K. law, governs their claims. (*See* Pls.' Supp. Opp. at 1.) However, even if the Court were to apply Luxembourg or U.K. law to their claims, the Plaintiffs contend that they would still have standing to pursue their claims.[24](*See id.* at 15-16.) According to the Plaintiffs, they have standing to bring their claims by virtue of their status as liquidators of the Debtor, and "English law—which defines the scope of the [Debtor's] foreign insolvency estate—vests [them] with authority to bring actions on behalf of the [Debtor's] creditors." (Opp. at 26-27.)

The Plaintiffs also maintain that they have adequately alleged their claims at this pleading stage and therefore the Motions to Dismiss should be denied.[25](*Id.* at 1.) First, the Plaintiffs argue that their claims are timely because *section 108(a) of the Bankruptcy Code* extends the time within which a foreign representative may commence adversary proceedings in a chapter 15 case, and the Plaintiffs' claims vested with **[**26]** the Plaintiffs prior to the commencement of the Debtor's chapter 15 case. (*See id.* at 42-44.) Second, the Plaintiffs argue that the NYDCL may be applied extraterritorially to reach the transfers at issue, regardless of whether they have a close nexus to New York. (*See id.* at 13-15 (citing cases).) Third, the Plaintiffs contend that they satisfied their pleading requirements under *FRCP 8(a)* in alleging that the Defendants received proceeds from the December 2006 CPEC Redemption. (*See id.* at 9.) Fourth, the Plaintiffs argue that *Bankruptcy Code section 546(e)*'s safe harbor with respect to settlement payments is not applicable in a chapter 15 case. (*Id.* at 44-45.) Nor does *Bankruptcy Code section 546(e)* implicitly preempt the Plaintiffs' state law claims. (*Id.* at 45-48.) Finally, the Plaintiffs contend that the Complaint adequately alleges that Apax and TPG had a sufficiently close relationship with Hellas II for purposes of stating an unjust enrichment claim, noting that the Complaint sets forth that the December 2006 CPEC Redemption was planned, approved, and executed by Apax and TPG executives. (*See id.* at 26.)

II. DISCUSSION

A. Personal Jurisdiction

HN1 On a motion to dismiss under **[**27]** *FRCP 12(b)(2)*, a plaintiff bears the burden of making "a *prima facie* showing 'through its own affidavits and supporting materials' **[*504]** that personal jurisdiction exists." *Picard v. Cohmad Sec. Corp.*

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[23] Because the NYDCL claims are dismissed on other grounds, the Court does not reach the merits of the Defendants' remaining arguments regarding these claims, including that the NYDCL does not apply extraterritorially, the Complaint fails to allege subsequent transferee liability, the holders of the Sub Notes consented to the December 2006 CPEC Redemption, and section 546(e) bars or preempts the NYDCL claims.

[24] Alternatively, the Plaintiffs argue that the Court should decline to make a choice of law determination at this stage in the adversary proceeding, because such a determination is fact intensive and discovery is ongoing. (Pls.' Supp. Opp. at 17-18.)

[25] n 25 In the event any claims are dismissed, however, the Plaintiffs contend that they should be granted leave to amend their Complaint. (*See* Opp. at 49.)

(In re Bernard L. Madoff Inv. Sec. LLC), 418 B.R. 75, 79 (Bankr. S.D.N.Y. 2009) (citing *Marine Midland Bank, N.A. v. Miller, 664 F.2d 899, 904 (2d Cir. 1981))*; *see also* *Metro. Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560, 566 (2d Cir. 1996)* ("On a Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of showing that the court has jurisdiction over the defendant." (citation omitted)). The plaintiff must make "legally sufficient allegations of jurisdiction, including an averment of facts that, if credited[,] would suffice to establish jurisdiction over the defendant." *Penguin Grp. (USA) Inc. v. Am. Buddha, 609 F.3d 30, 35 (2d Cir. 2010)* (alteration in original) (citations and internal quotation marks omitted). When personal jurisdiction is averred on affidavits or declarations, "all allegations are construed in the light most favorable to the plaintiff and doubts are resolved in the plaintiff's favor, notwithstanding a controverting presentation by the moving party." *A.I. Trade Fin., Inc. v. Petra Bank, 989 F.2d 76, 79-80 (2d Cir. 1993)* (citations omitted).

HN2 *Rule 7004(f) of the Federal Rules of Bankruptcy Procedure* (the "Bankruptcy Rules") provides:

> [i]f the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons or filing a waiver of service in accordance with this rule . . . is effective to establish personal jurisdiction over the person of any defendant with respect **[**28]** to a case under the Code or a civil proceeding arising under the Code, or arising in or related to a case under the Code.

Fed. R. Bankr. P. 7004(f). Pursuant to Bankruptcy Rule 7004(d), "[t]he summons and complaint and all other process except a subpoena may be served anywhere in the United States." *Id. 7004(d)*. The Defendants were served pursuant to Bankruptcy Rule 7004 (PJ Opp. at 17), and they do not object to service (*see* "Response Extension Stipulation," ECF Doc. 7, ¶ 1 ("The Defendants waive any objection to the manner or validity of service of process in the above-captioned action.")). Accordingly, the Defendants are subject to personal jurisdiction so long as constitutional due process requirements are met. *See* *Bickerton v. Bozel S.A. (In re Bozel S.A.), 434 B.R. 86, 97 (Bankr. S.D.N.Y. 2010)* ("Since [the defendant] does not contend that service of process was improper [under Bankruptcy Rule 7004], he is subject to personal jurisdiction in this Court so long as the Due Process requirements are satisfied.").

HN3 "To establish personal jurisdiction over a defendant, due process requires a plaintiff to allege (1) that a defendant has 'certain minimum contacts' with the relevant forum, and (2) that the exercise of jurisdiction is reasonable in the circumstances." *In re Terrorist Attacks on Sept. 11, 2001*, *714 F.3d 659, 673 (2d Cir. 2013)* (citing *Int'l Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945)*; *World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980))*.

In assessing the sufficiency of a defendant's **[**29]** "minimum" contacts, courts distinguish between "general" and "specific" personal jurisdiction. *Id.* General, or "all-purpose," jurisdiction over a foreign defendant allows a court to hear any and all claims against such defendant. *Daimler, 134 S. Ct. at 754* (citing *Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. ___, ___, 131 S. Ct. 2846, 2851, 180 L. Ed. 2d 796 (2011))*. Specific jurisdiction over a foreign defendant allows a court to hear claims that "aris[e] out of or relate[] to the defendant's contacts with the forum . . . ." *Helicopteros Nacionales de Colom.,* **[*505]** *S.A. v. Hall, 466 U.S. 408, 414 n.8, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (1984)* (citation omitted). A determination of the reasonableness of exercising personal jurisdiction over a defendant entails inquiring whether the exercise of jurisdiction "would offend 'traditional notions of fair play and substantial justice.'" Asahi Metal Indus. Co., Ltd. v. Superior Ct. of Cal., Solano Cnty., 480 U.S. 102, 113, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987) (quoting Int'l Shoe, 326 U.S. at 316).

1. General Jurisdiction

HN4 Only a narrow set of affiliations with a forum will subject a defendant to general jurisdiction in that forum. Daimler, 134 S. Ct. at 760. An individual's paradigm basis for general jurisdiction is his or her domicile. *Id.* "With respect to a corporation, the place of incorporation and principal place of business are 'paradig[m] . . . bases for general jurisdiction.'" *Id.* (citing Lea Brilmayer et al., *A General Look at General Jurisdiction*, 66 Tex. L. Rev. 723, 735 (1988)). These paradigms are sufficient, but not exclusive, bases for general jurisdiction. *See id.* ("*Goodyear* did **[**30]** not hold that a corporation may be subject to general jurisdiction *only* in a forum where it is incorporated or has its principal place of business; it simply typed those places paradigm all-purpose forums."). At the same time, however, "engag[ing] in a substantial, continuous, and systematic course of business" in a forum is not alone sufficient to render a defendant subject to general jurisdiction in such forum. *Id.* at 761. Rather, beyond the paradigm bases for general jurisdiction over a corporation, general jurisdiction exists where such corporation's "affiliations with the State are so 'continuous and systematic' as to render [it] essentially at home in the forum State." *Id.* (quoting Goodyear, 564 U.S. at ___, 131 S. Ct. at 2851)).

Central to the determination of whether the Defendants are subject to general jurisdiction is the issue whether their minimum contacts are to be assessed with respect to New York or the U.S. If the pertinent forum for assessing minimum jurisdictional contacts is the U.S., then each Defendant who is "at home" in the U.S. is subject to general jurisdiction; however, if minimum contacts must be assessed with respect to New York, then each Defendant's contacts with New York must be evaluated in order to determine whether **[**31]** it is "essentially at home" in New York. *See id.* at 761.

The Plaintiffs contend that a nationwide minimum contacts test is all that is required where a federal statute provides for nationwide service of process, and here, Bankruptcy Rule 7004(d)—a federal rule implicitly authorized by Congress and thus tantamount to a statute— authorizes nationwide service of process. (PJ Opp. at 12-13.) In support for their position, the Plaintiffs cite to several cases holding that a national minimum contacts standard applies to cases implicating Bankruptcy Rule 7004, adversary proceedings asserting purely state law claims, and even to an adversary proceeding related to a chapter 15 case. (*Id.* at 13-15 (collecting cases).)

The Defendants argue that the "Plaintiffs ignore Bankruptcy Rule 7004(f) which expressly requires that personal jurisdiction under this rule be 'consistent with the Constitution and laws of the United States.'" (Apax/TPG Mot. at 12 (quoting Fed. R. Bankr. P. 7004(f)).) The Defendants contend that nationwide service of process does not subject a defendant to personal jurisdiction in any bankruptcy court in the country in light of *Daimler*, particularly where, as here, the suit is based solely on state law claims arising out of foreign transactions and therefore has **[*506]** no connection to the U.S. **[**32]** (*See id.* at 12-14.)

HN5 "[I]n federal question cases . . . no inquiry into a defendant's 'minimum contacts' with the forum state is needed to exercise jurisdiction pursuant to Bankruptcy Rule 7004; rather, only a federal 'minimum contacts' test is required, whereby the Fifth Amendment's Due Process Clause limits a bankruptcy court's exercise of personal jurisdiction over a defendant." Enron Corp. v. Arora (In re Enron Corp.), 316 B.R. 434, 444 (Bankr. S.D.N.Y. 2004) (citing cases); *see also* Bozel, 434 B.R. at 99 (finding that, in the context of an adversary proceeding commenced in a bankruptcy proceeding, "the minimum contacts analysis should evaluate the defendant's contacts with the United States as a whole, not merely contacts with the forum state" (citation omitted)); *British Am. Ins. Co. Ltd. v. Fullerton (In re British Am. Ins. Co. Ltd.), Adv. Proc. No. 11-03118 (EPK), 2013 Bankr. LEXIS 1755, 2013 WL 1881712, at *2 (Bankr. S.D. Fla. Apr. 16, 2013)* (applying nationwide minimum contacts test to evaluate defendant's jurisdictional contacts in an adversary proceeding commenced in a chapter 15 proceeding). The rationale for this holding is that the sovereign exercising jurisdiction under *28 U.S.C. § 1334* is the U.S., not the particular state in which the federal court is situated. *See Diamond Mortg. Corp. of Ill. v. Sugar, 913 F.2d 1233, 1244 (7th Cir. 1990)* ("Since *section 1334* provides federal question jurisdiction, the sovereign exercising its authority over the [defendants] is the United States, not the State of Illinois. Hence, whether there exist sufficient minimum contacts between the [defendants] and the State of Illinois has no **[**33]** bearing upon whether the United States may exercise its power over the [defendants] pursuant to its federal question jurisdiction."); *see also Owens-Illinois, Inc. v. Rapid Am. Corp. (In re Celotex Corp.), 124 F.3d 619, 630 (4th Cir. 1997)* ("[W]hen an action is in federal court on 'related to' jurisdiction, the sovereign exercising authority is the United States, not the individual state where the federal court is sitting." (citing *Diamond, 913 F.2d at 1244*; *Am. Freight Sys., Inc. v. W.A. Walker & Assocs., Inc. (In re Am. Freight Sys., Inc.), 153 B.R. 316, 321 (D. Kan. 1993)*; *J.T. Moran Fin. Corp. v. Am. Consolidated Fin. Corp. (In re J.T. Moran Fin. Corp.)*, 124 B.R. 931, 943 (S.D.N.Y. 1991)).

Despite having been served pursuant to *Bankruptcy Rule 7004(f)*, the Defendants argue that a nationwide minimum contacts test is inappropriate where, as here, the Plaintiffs' claims are all based on state law and the Plaintiffs' only jurisdictional hook to federal court is the Debtor's chapter 15 proceeding. (*See* Apax/TPG Mot. at 12; TCW Mot. at 8.) However, the fact that the Plaintiffs' claims are grounded in state law is not dispositive. *See Diamond, 913 F.2d at 1244* (holding that nationwide minimum contacts test applies to non-core bankruptcy proceedings involving state law claims, where service has been made pursuant to *Bankruptcy Rule 7004(d)*); *see also J.T. Moran*, 124 B.R. at 942-43 (noting in dicta that nationwide minimum contacts continue to satisfy due process requirements even after withdrawal of the reference of non-core state law claims). ***HN6*** Nationwide contacts satisfy due process requirements where the court has federal jurisdiction and nationwide **[**34]** service of process is authorized under an applicable federal statute. Indeed, courts have routinely held that a nationwide minimum contacts test applies where nationwide service of process is authorized by federal law. *See, e.g., Enron, 316 B.R. at 444* (noting that, after the 1996 amendments to the Bankruptcy Rules, "courts have recognized in federal question cases **[*507]** that no inquiry into a defendant's 'minimum contacts' with the forum state is needed to exercise jurisdiction pursuant to *Bankruptcy Rule 7004*; rather, only a federal 'minimum contacts' test is required, whereby the *Fifth Amendment's Due Process Clause* limits a bankruptcy court's exercise of personal jurisdiction over a defendant" (citations omitted)). Accordingly, each Defendant's contacts with the U.S. as a whole, rather than with New York specifically, should be evaluated for purposes of personal jurisdiction.

With the exception of TPG London, which the Plaintiffs allege is organized under U.K. law and has a principal place of business in England (*see* Compl. ¶ 31), all TPG Defendants are subject to general jurisdiction because the U.S. is their domicile, place of incorporation, or principal place of business. *See Daimler, 134 S. Ct. at 760*. The Plaintiffs allege, and TPG admits, that Bonderman resides in Fort Worth, Texas **[**35]** and that Coulter resides in San Francisco, California.[26] (*See* Compl. ¶¶ 27, 29; Apax/TPG Mot. at 16.) Additionally, the Plaintiffs allege, and TPG admits, that ″[e]ach TPG Advisors IV Defendant, T[3] II Defendant, and TPG Capital [Management, L.P.] is . . . a company or limited partnership organized under the laws of Texas or Delaware with their principal place of business in Fort Worth, Texas.″ (*See* Apax/TPG Mot. at 11; Compl. ¶¶ 23, 49-51, 53-56.) Thus, the Complaint sufficiently alleges the paradigm bases for general jurisdiction described in *Daimler* with respect to each TPG Defendant, with the exception of TPG London.

The paradigm bases for general jurisdiction are similarly alleged with respect to each TCW Defendant.[27] The Plaintiffs allege, and TCW admits, that each TCW Defendant is organized under the laws of Nevada, California, or Delaware and has principal places of business in those states. (*See* Compl. ¶¶ 65-70; TCW Mot. at 9-13.) **[**36]**

By contrast, the Plaintiffs do not allege that the U.S. is the domicile, place of incorporation, or principal place of business for any Apax Defendant moving under the Apax/TPG Motion. Nor do the Plaintiffs allege facts establishing that any Apax Defendant's contacts with the U.S. are sufficiently continuous and systematic so as to render it ″at home″ in the U.S. *See Daimler, 134 S. Ct. at 761*. Thus, no Apax Defendant moving under the Apax/TPG Motion is subject to general jurisdiction.

As to DB, for which an alleged **[**37]** paradigm basis of general jurisdiction in the U.S. is also lacking, the analysis is more nuanced. ***HN8*** While *Daimler* suggests that a corporate defendant's place of incorporation and principal place of business are two paradigm forums where it would be subject to general jurisdiction, the Supreme Court did not hold that such paradigm forums represent the only places where a defendant **[*508]** may be subject to general jurisdiction. *Id. at 760*. Here, the Plaintiffs rely on allegations that DB has substantial contacts with the U.S., including a principal location ″in New York, where it has $5 billion in assets and operates out of a massive 1.6 million square foot Regional Head Office at 60 Wall Street that employs some 1,600 personnel, including 1,000 executives.″ (DB Supp. Opp. at 1; *see* McDowell Supp. Ex. 18.) But unlike in *Daimler*, the Plaintiffs do not allege that DB's New York office belongs to a subsidiary or affiliate. *See id. at 751* (″Jurisdiction over the lawsuit was predicated on the California contacts of Mercedes—Benz USA, LLC (MBUSA), a subsidiary of Daimler incorporated in Delaware with its principal place of business in New Jersey.″) Rather, they allege that DB's New York office is the North American Regional Head Office for DB itself, which **[**38]** ″serves as a critical hub of [DB's] core banking operations, and physically spans over 1.6 million square feet of space, for which [DB] pays some $67 million annually in rent, pursuant to a 15-year lease.″ (DB Opp. at 6 (citing McDowell Decl. Ex. 7 at 7).) These allegations portray DB's presence in the U.S. as more than merely transitory, but rather ″so 'continuous and systematic' as to render [it] essentially at home [here].″ *Daimler, 134 S. Ct. at 761* (quoting *Goodyear, 564 U.S. at __, 131 S. Ct. at 2851*). The Plaintiffs allegations establish that DB maintains a substantial, longterm presence in

[26] While the Plaintiffs do not use the term domicile, the additional allegations that Bonderman and Coulter conduct business in the cities in which they reside support the Court's finding that their place of domicile is adequately alleged. (*See* Compl. ¶¶ 27, 29.)

[27] This conclusion results in a seeming anomaly. If the Plaintiffs filed the same claims less than one mile away in New York Supreme Court, minimum contacts with New York rather than with the United States would be the applicable test for general jurisdiction. But ***HN7*** jurisdiction in the bankruptcy court is based on ***28 U.S.C. § 1334*** and is intended to permit a single bankruptcy court (or district court) to deal with all claims that arise under the Bankruptcy Code, arise in or are related to a bankruptcy case. The Plaintiffs would still have to show ″that the exercise of jurisdiction is reasonable in the circumstances.″ *In re Terrorist Attacks*, 714 F.3d at 673. As explained below, the Court concludes on the facts here that the exercise of jurisdiction is reasonable.

the U.S. and in New York; DB's contacts with the U.S. are not limited to the instate operations of its affiliate as in *Daimler*. The Plaintiffs therefore adequately allege that DB is subject to general jurisdiction.

In sum, all Defendants are subject to general jurisdiction, with the exception of TPG London and each Apax Defendant moving under the Apax/TPG Motion (collectively, the ″Non-U.S. Defendants″). The Court considers whether these Non-U.S. Defendants are subject to specific jurisdiction below.

2. Specific Jurisdiction

The Plaintiffs allege that specific jurisdiction exists over the Non-U.S. Defendants by virtue of their suit-related conduct directed at the U.S., including **[**39]** (i) their role in orchestrating the marketing and sale of U.S. dollar-denominated Sub Notes in order to partially fund the December 2006 CPEC Redemption; and (ii) their subsequent transfer of proceeds of the December 2006 CPEC Redemption to the U.S. (*See* PJ Opp. at 4-10.) More specifically, the Plaintiffs assert that, in light of diminished interest in an auction of Hellas II's subsidiaries to potential bidders, in an October 27, 2006 presentation to Apax and TPG, DB proposed ″an aggressive recapitalization that will allow shareholders to realize a significant dividend.″ (*Id*. at 5 (quoting Ashley Decl. Ex. 8 at 07190) (internal quotation marks omitted).) In support of this allegation, the Plaintiffs point to a December 8, 2006 email in which TPG London's ″Philippe Costeletos reported to TPG President David Bonderman that 'we decided to move ahead with a recap' and 'w[e] are issuing a 2nd unsecured € 1.1 billion FRN [*i.e*., Sub Notes].'″ (*Id*. at 6 (alterations in original) (quoting Ashley Decl. Ex. 11 at 10661).) This email indicates that proceeds of the recapitalization would ″'repay the current € 540 million PIK and distribute € 900 million to shareholders,' including '€ 400 million to TPG (on an initial investment **[**40]** of € 194 million).'″ (*Id*. (quoting Ashley Decl. Ex. 11 at 10661).) The email further indicates that if all went according to plan, TPG London ″anticipated wiring funds to Fort Worth on December 19th.″ (*Id*. (quoting Ashley Decl. Ex. 11 at 10661).)

[*509] According to the Plaintiffs, TPG, Apax, and DB subsequently endeavored to issue a dollar-denominated tranche of Sub Notes to target investors in the U.S. (*See id*. at 7.) The Plaintiffs allege that these Defendants developed an ″agreed storyline for what [they] w[ould] tell the debt markets . . . for why [they] . . . decided to go down the recap route.″ (*Id*. (quoting Ashley Decl. Ex. 19 at 14999).) The alleged ″storyline″ originated with an Apax employee and set forth that ″the auction was 'a limited process to test the market,' and that they 'received offers to refinance the company at attractive valuations, which would enable [them] to . . . support the [company's] future growth.'″ (*Id*. at 7-8 (alterations in original) (quoting Ashley Decl. Ex. 19 at 14999).) An Apax employee later sent an email to a DB employee, providing ″the story line as promised.″ (*Id*. at 8 (quoting Ashley Decl. Ex. 19 at 14998).)

The Plaintiffs allege that after the fully subscribed Sub Notes were issued, **[**41]** proceeds from the dollar-denominated tranche of Sub Notes were held in a New York bank account maintained by DB, and such proceeds were subsequently transferred to Hellas II. (*Id*. (citing Ashley Decl. Ex. 21 at 1942).) According to the Plaintiffs, Apax and TPG then announced an ″outsized dividend″ (*id*.), collectively received € 800 million in proceeds of the December 2006 CPEC Redemption (*see id*. at 9 (citing Compl. ¶¶ 26, 36-38, 40-43, 49-63; Ashley Decl. Exs. 30-34), and transferred approximately € 516 million of those proceeds to the U.S. (*id*. (citing Compl. ¶¶ 26, 36-38, 40-43, 49-63; Ashley Decl. Exs. 30-34)). Specifically, the Plaintiffs assert that ″Apax Europe VI GP Co. Ltd., Apax Europe VI GP, L.P., Apax Europe VI-A, L.P., and Apax Europe VI-1, L.P. acknowledge receipt of Apax's

€ 400 million share, of which on December 29, 2006 they distributed € 115 million to 57 investors in the U.S. (with € 16 million distributed in New York)." (*Id.* at 10 (citing Ashley Decl. Ex. 37).) The Plaintiffs allege that "TPG acknowledges that the full amount of its € 400 million share of the proceeds was transferred to the U.S. on December 27, 2006, of which $296 million was distributed that same day to 150 investors **[**42]** in the U.S. (with $45 million distributed in New York)." (*Id.* (citing Ashley Decl. Ex. 38).)

Apax and TPG argue that the Plaintiffs improperly group the various Apax and TPG Defendants together, referring to them collectively as "Apax or "TPG" in the Complaint. (Apax/TPG Reply at 1.) As such, Apax and TPG contend that the Complaint fails to adequately allege that specific jurisdiction exists over any Non-U.S. Defendant individually. (*See id.*) In any event, Apax and TPG argue that DB's contacts with the U.S. do not support the exercise of specific jurisdiction over any Non-U.S. Defendant because the Plaintiff's claims are not sufficiently related to DB's alleged U.S. contacts. (*See id.* at 2.) Because the Plaintiffs' claims are premised on an initial fraudulent conveyance between Hellas II and Hellas I, and on subsequent transfers to the Non-U.S. Defendants, all of which "occurred entirely overseas," Apax and TPG contend that the "potential 'transferee' liability of the Non-U.S. Defendants does not depend on how or to whom DB marketed Sub Notes in the U.S." (*Id.* ("[T]his case is about the transfers, not the Sub Notes sales." (citation omitted)).) Apax and TPG also argue that the dollar-denominated **[**43]** Sub Notes sales and the transfers underlying the Plaintiffs' claims are too attenuated to support the exercise of specific jurisdiction over the Non-U.S. Defendants in light of the fact that (i) "the U.S. tranche represented only 18% of the Sub Notes offering, which primarily was marketed in Europe" (*id.* at 3 (emphasis omitted)); and **[*510]** (ii) the Plaintiffs "have made no showing . . . that any proceeds raised in the U.S. were transferred to or otherwise touched any Non-U.S. Defendant . . . ." (*id.* (emphasis omitted)). Apax and TPG further assert that the Plaintiffs have not shown that DB acted as an agent of any Non-U.S. Defendant in marketing and selling Sub Notes in the U.S. (*Id.* at 4.) To the contrary, pursuant to the applicable purchase agreement between Hellas II and DB and other underwriters, TPG and Apax argue that DB engaged in a "firm commitment underwriting" of the Sub Notes whereby it purchased the Sub Notes from Hellas II for its own account.[28] (*See id.* (citing Lestelle Decl. Ex. B § 1, at 2).)

Moreover, Apax and TPG argue that transfers of proceeds of the December 2006 CPEC Redemption from the Non-U.S. Defendants to the U.S. are not sufficiently connected to the Plaintiffs' claims because the "[P]laintiffs seek to impose *transferee*, not *transferor*, liability on the Non-U.S. Defendants based solely on transfers made *to* them, not *by* them." (*Id.* at 6 (emphasis in original).) Accordingly, any Non-U.S. Defendant's transfer of proceeds made subsequent to its receipt thereof bears no relationship to the Plaintiffs' claims and is therefore irrelevant to a determination of whether specific jurisdiction may be exercised over such Non- U.S. Defendant.[29] (*See id.* at 6-7.)

[28] "Indeed, in the Purchase Agreement between Hellas II and the Initial Purchasers (*i.e.*, the underwriters, including DB), Hellas II acknowledged that 'the Initial Purchasers have acted at arm's length, *are* **[**44]** *not agents of* . . . the Issuer *or any other person*.'" (*Id.* (emphasis in original) (quoting Lestelle Decl. Ex. B § 12, at 22).)

[29] Apax and TPG also contest the accuracy of the Plaintiffs' allegations regarding the Non-U.S. Defendants' transfers of redemption proceeds to the United States. First, they state that the Non-U.S. Defendants only transferred € 115 million of redemption proceeds to the United States, not the € 516 million alleged by the Plaintiffs. (*Id.* at 6 (citing Ashley Decl. Ex. 37, Nos. 7-62, 64).) Second, they maintain that the Non-U.S. Defendants **[**45]** did not make "[m]ore than 200 bank transfers totaling $296 million and € 115 million," as alleged by the Plaintiffs. (*Id.* (citing PJ Opp. at 19).) "In fact, two Apax Moving Defendants made a total of 56 such transfers totaling € 115 million." (*Id.* (citing Ashley Decl. Ex. 37, Nos. 7-62, 64).)

HN9 "The inquiry whether a forum State may assert specific jurisdiction over a nonresident defendant focuses on the relationship among the defendant, the forum, and the litigation." *Walden v. Fiore, 134 S. Ct. 1115, 1121, 188 L. Ed. 2d 12 (2014)* (quoting *Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 775, 104 S. Ct. 1473, 79 L. Ed. 2d 790 (1984))* (internal quotation marks omitted). The defendant's suit-related conduct with the forum must form the basis for specific jurisdiction. *See id. at 1121*; *Picard, 418 B.R. at 80* ("Specific personal jurisdiction exists where a foreign defendant 'purposefully direct[s] his activities at residents of the forum,' and the underlying cause of action 'arise[s] out of or relate[s] to those activities.'" (quoting *Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985)))*. "Where the claim arises out of, or relates to, the defendant's contacts with the forum—i.e., specific jurisdiction [is asserted]—minimum contacts [necessary to support such jurisdiction] exist where the defendant purposefully availed itself of the privilege of doing business in the forum and could foresee being haled into court there." *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL, 732 F.3d 161, 170 (2d Cir. 2013)* (alteration in original) (quoting *Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez, 305 F.3d 120, 127 (2d Cir. 2002))*.

HN10 **[*511]** The circuit courts **[**46]** have adopted different approaches for determining whether a claim "arises from or relates to" a defendant's contacts with a forum for purposes of evaluating the existence of specific jurisdiction. *Del Ponte v. Universal City Dev. Partners, Ltd., No. 07-CV-2360 (KMK) (LMS), 2008 U.S. Dist. LEXIS 3528, 2008 WL 169358, at *9 (S.D.N.Y. Jan. 16, 2008)*. Under one approach, "jurisdiction over a defendant is proper only when the defendant's conduct within the forum is the 'proximate cause' of the plaintiff's injury." *Id.* (citing *Chew v. Dietrich, 143 F.3d 24, 29 (2d Cir. 1998))*. Under an alternative approach, sufficient minimum contacts exist when a defendant's forum-related conduct is merely a "but for" cause of the plaintiff's injury. *Id.* (citation omitted). The Second Circuit has adopted a third, more flexible standard:

> Where the defendant has had only limited contacts with the state it may be appropriate to say that he will be subject to suit in that state only if the plaintiff's injury was proximately caused by those contacts. Where the defendant's contacts with the jurisdiction that relate to the cause of action are more substantial, however, it is not unreasonable to say that the defendant is subject to personal jurisdiction even though the acts within the state are not the proximate cause of the plaintiff's injury. **[**47]**

Chew, 143 F.3d at 29 (citations and internal quotation marks omitted).

In this case, the alleged contacts between the Non-U.S. Defendants and the U.S. are not sufficiently related to the Plaintiffs' claims such that specific jurisdiction over the Non-U.S. Defendants exists. The Plaintiffs allege that "[t]hrough the December 2006 Transaction and the December 2006 CPEC Redemption, [Hellas II] transferred approximately € 1.57 billion in cash proceeds to its parent Hellas I, of which at minimum € 973,657,610 was transferred" ultimately to the Defendants. (Compl. ¶¶ 156, 162). The remainder of the approximately € 1.57 billion transferred to Hellas I was used to pay other outstanding debt and transaction costs associated with the December 2006 Transaction. (*Id.*) Of the € 1.57 billion transferred from Hellas II to Hellas I, only 13% was comprised of the $275 million attributable to the dollar-denominated Sub Notes. (DB Reply at 7 n.6.) The dollar-denominated Sub Notes only constituted a fraction of the entire Sub Notes offering, which in turn was "only one series of three separate notes issuances used to fund the ultimate transfer from

Hellas II . . . to Hellas I, of which '€ 978,659,712 was paid to Hellas I in redemption **[**48]** of outstanding CPECs.'" (*Id*. at 7 (citations omitted).)

No cause of action is asserted in this case challenging the sale of the Sub Notes; nor is it clear that the Plaintiffs, as foreign representatives (as opposed to the trustee under the note indenture or the note holders), would have standing to challenge that sale.[30] Instead, the Plaintiffs' claims arise from challenged transfers, including the December 2006 CPEC Redemption and the Consulting Fees Transfer. (*See* Compl. ¶¶ 155-168.) They are also premised on Apax and TPG unjustly retaining benefits belonging to Hellas II by virtue of their receipt of proceeds from the December 2006 CPEC Redemption and the Consulting Fees Transfer. (*Id*. ¶¶ 169-173.) However, the Non-U.S. Defendants' alleged **[*512]** U.S. contacts relating to the challenged transfers were not "but for" causes of such transfers. The proceeds generated from the issuance of dollar-denominated Sub Notes were not required to fund the December 2006 CPEC Redemption. Nor was the Non-U.S. Defendants' transfer of December 2006 CPEC Redemption proceeds to the U.S., after the fact, a cause of the challenged transfers underlying the Plaintiffs' claims. To contend that these subsequent transfers from **[**49]** the Non-U.S. Defendants to the U.S. in any way *caused* the December 2006 CPEC Redemption or the Consulting Fees Transfer is to put the cart before the horse.

To be sure, the December 2006 CPEC Redemption could have been accomplished if Hellas II never even issued the dollar-denominated Sub Notes. Hellas II possessed over €1 billion before accounting for the proceeds from the dollar-denominated Sub Notes, an amount greater than the amount allegedly transferred to the Defendants. (*See* Compl. ¶ 18 (alleging that approximately €200 million was transferred to Hellas II from a subsidiary, and €960 million of proceeds were received by Hellas II from the issuance of the euro-denominated Sub Notes).) Accordingly, the Plaintiffs fail to allege that the sale of the dollar-denominated Sub Notes was the proximate, let alone "but for," cause of the December 2006 CPEC Redemption.

Additionally, any attempt of the Plaintiffs to implicate the **[**50]** Non-U.S. Defendants by way of the transfer of the December 2006 CPEC Redemption proceeds is unpersuasive because (1) the Non-U.S. Defendants were the recipients, not the transferors of such proceeds, and (2) the Non-U.S. Defendants' receipt of those proceeds occurred abroad, not in the U.S. (*See* Ashley Decl. Ex. 37 (flow of funds document indicating a foreign country of origin for each transfer of redemption proceeds made by an Apax Defendant); *id*. Ex. 38 (flow of funds document indicating no transfers from TPG London to the U.S.).) Any subsequent transfer of redemption proceeds made by the Non-U.S. Defendants to recipients in the U.S. is irrelevant to their liability as transferees and therefore cannot constitute sufficient minimum contacts for purposes of establishing specific jurisdiction. The Apax/TPG Motion is therefore **GRANTED** in part and all claims against the Non-U.S. Defendants are **DISMISSED**.

3. Reasonableness of Exercising Personal Jurisdiction

HN11 In determining the reasonableness of exercising jurisdiction over a defendant, "the defendant's contacts with the forum State must be such that maintenance of the suit does not offend traditional notions of fair play and substantial

[30] Indeed, the Hellas transactions at issue in this case have been the source of other litigation in the district court and this Court. *See* *Cortlandt St. Recovery Corp. v. Aliberti*, No. 12-CV-8686 (JPO), 2014 U.S. Dist. LEXIS 170277, 2014 WL 6907548 (S.D.N.Y. Dec. 9, 2014); *TCS Capital Mgmt., LLC v. Apax Partners, L.P.*, No. 06-CV-13447 (CM), 2008 U.S. Dist. LEXIS 19854, 2008 WL 650385 (S.D.N.Y. Mar. 7, 2008); *In re TPG Troy, LLC*, 492 B.R. 150 (Bankr. S.D.N.Y. 2013).

[51]** justice." World-Wide Volkswagen, 444 U.S. at 292 (internal quotation marks omitted) (quoting Int'l Shoe, 326 U.S. at 316). "The Court must take into account five factors in this inquiry: (1) the burden that the exercise of jurisdiction will impose on the defendant; (2) the interests of the forum state in adjudicating the case; (3) the plaintiff's interest in obtaining convenient and effective relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of the controversy; and (5) the shared interest of the states in furthering substantive social policies." Schutte Bagclosures Inc. v. Kwik Lok Corp., 48 F. Supp. 3d 675, 687, 2014 U.S. Dist. LEXIS 139370, *18, 2014 WL 4802917, at *7 (S.D.N.Y. 2014) (citations omitted). Where constitutional minimum contacts have been established, "often the interests of the plaintiff and the forum in the exercise of jurisdiction will justify even the serious burdens placed on the alien defendant." Bozel, 434 B.R. at 100 (quoting Asahi, 480 **[*513]** U.S. at 114) (internal quotation marks omitted). In such instance the burden shifts to the defendant "to present a 'compelling case' that establishing personal jurisdiction would be unreasonable." *Id.* (citations omitted).

The Defendants subject to general jurisdiction do not satisfy their burden of making a compelling case that the exercise of general jurisdiction would be unreasonable. The TPG Defendants raised this argument for **[**52]** the first time in their Reply Brief, stating in a conclusory fashion that "it would be unreasonable to exercise personal jurisdiction over [them] because none of them had reason to expect being haled into court in New York in relation to the claims in this litigation, and neither the [Plaintiffs] nor any Moving Defendant has meaningful ties to the forum." (Apax/TPG Mot. at 17 n.9.) Neither TCW nor DB address whether it would be unreasonable for the Court to exercise personal jurisdiction over them.

The burden on these Defendants to litigate in this Court is not great, as each such Defendant is "at home" in the U.S. and is represented by counsel in the U.S. The U.S. has a significant interest in adjudicating this adversary proceeding, since it facilitates the foreign Plaintiffs' efforts to maximize the value of the Debtor's estate. *See* In re British Am. Ins. Co. Ltd. v. Fullerton (In re British Am. Ins. Co. Ltd.), Adv. Proc. Nos. 11-03118, 11-03117 (EPK), 2012 Bankr. LEXIS 4528, 2012 WL 4508611, at *5 (Bankr. S.D. Fla. Sept. 28, 2012) (***HN12*** "By enacting chapter 15 of the Bankruptcy Code, Congress exhibited a clear intent for the United States to participate in a coordinated manner with insolvency proceedings taking place in foreign nations."). The Plaintiffs also have an interest **[**53]** in obtaining convenient and effective relief. Finally, at this time, there does not appear to be another more efficient forum for resolving the Plaintiffs' claims, as they arise under New York law with which this Court is familiar. Accordingly, with respect to the TPG, DB, and TCW Defendants subject to general jurisdiction, the exercise of personal jurisdiction over such Defendants is reasonable under the circumstances. The Apax/TPG Motion is therefore **DENIED** in part as to all TPG Defendants other than TPG London, and the DB Motion and the TCW Motion are both **DENIED**.

B. Subject Matter Jurisdiction

HN13 In ruling on a motion to dismiss for lack of subject matter jurisdiction pursuant to *FRCP 12(b)(1)*, "the district court must take all uncontroverted facts in the complaint (or petition) as true, and draw all reasonable inferences in favor of the party asserting jurisdiction." *Tandon v. Captain's Cove Marina of Bridgeport, Inc.*, 752 F.3d 239, 243 (2d Cir. 2014) (citing Amidax Trading Grp. v. S.W.I.F.T. SCRL, 671 F.3d 140, 145 (2d Cir. 2011) (per curiam)). A motion to dismiss for lack of subject matter jurisdiction is properly granted where the court "lacks the statutory or constitutional power to adjudicate it." Mastafa v. Chevron Corp., 770 F.3d 170, 177 (2d Cir. 2014) (quoting Makarova v. United States, 201 F.3d 110, 113 (2d Cir. 2000)) (internal quotation marks omitted). Where the parties dispute jurisdictional facts, the court must decide issues of fact by reference to **[**54]** evidence beyond the pleadings, including affidavits. *Tandon*, 752 F.3d at 243 (quoting *APWU v. Potter*, 343 F.3d 619, 627 (2d Cir. 2003)). In the event of such a dispute, "the party asserting subject matter jurisdiction 'has the burden of proving by a preponderance of the evidence that it exists.'" *Id.* (quoting *Makarova*, 201 F.3d at 113).

According to the Defendants, the Complaint should be dismissed on the basis that "the Court lacks core subject matter **[*514]** jurisdiction over this dispute." (Defs.' Mot. at 35.) They contend that the Plaintiffs' claims neither arise under title 11 nor arise in proceedings under the Bankruptcy Code, because unlike claims asserted under section 544 of the Bankruptcy Code, the Plaintiffs' NYDCL and unjust enrichment claims "unquestionably exist outside of bankruptcy." (*Id.* at 36 (citation omitted).) Additionally, while 28 U.S.C. § 157(b)(2)(P) provides for core jurisdiction over chapter 15 recognition proceedings, "only that recognition itself is core; whether another proceeding in [c]hapter 15 is core must be determined elsewhere." (*Id.* (citing *In re Fairfield Sentry Ltd.*, 458 B.R. 665, 674 (S.D.N.Y. 2011)).) The Defendants assert that the Plaintiffs' claims do not fall within 28 U.S.C. § 157(b)(2)(P) because such section applies only to chapter 5 claims, which may not be brought in a chapter 15 proceeding. (*See id.* at 37.) The Defendants emphasize that the Court cannot render a final judgment on the Plaintiffs' claims **[**55]** where, as here, the Defendants did not file proofs of claim; however, they admit that the Court's inability to finally adjudicate the Plaintiffs' claims is not determinative of whether the Court has subject matter jurisdiction. (*Id.* at 38.)

According to the Plaintiffs, the Defendants do not contest the Court's subject matter jurisdiction over the claims at issue in this adversary proceeding pursuant to 28 U.S.C. § 1334; rather, the Defendants conflate the concepts of "subject matter jurisdiction" and "core proceedings" by asserting that "the Court lacks core subject matter jurisdiction over this dispute." (Opp. at 48 (quoting Defs.' Mot. at 45).) The Plaintiffs maintain that the U.S. Code's division of proceedings into "core" and "non-core" has nothing to do with subject matter jurisdiction, but instead "allocates the authority to enter final judgment between the bankruptcy court and the district court." (*Id.* (quoting *Stern v. Marshall*, 131 S. Ct. 2594, 2607, 180 L. Ed. 2d 475 (2011)) (internal quotation marks omitted).) The Plaintiffs argue that the determination of whether their adversary proceeding is "core" or "non-core" is irrelevant to the Court's subject matter jurisdiction, which exists. (*Id.*)

HN14 Section 1334 of title 28 of the U.S. Code provides federal district courts with jurisdiction over "all civil proceedings arising **[**56]** under title 11, or arising in or related to cases under title 11." 28 U.S.C. § 1334(b). District courts may refer "any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 . . . to the bankruptcy judges for the district." *Id.* § 157(a). Section 157 also divides matters referred to the bankruptcy court into two categories: core and non-core proceedings. *See generally id.* § 157.

HN15 While *Stern v. Marshall*, 131 S. Ct. 2594, 180 L. Ed. 2d 475 (2011), and its progeny limit the authority of a bankruptcy judge to enter final orders or judgment on core claims that would not be resolved as part of the claims allowance process, the bankruptcy court's jurisdiction remains unaffected, and the court may submit proposed findings of fact and conclusions of law. As the Supreme Court stated in *Stern*, "[s]ection 157 [of title 28] allocates the authority to enter final judgment between the bankruptcy court and the district court. That allocation does not implicate questions of subject matter jurisdiction." *Stern*, 131 S. Ct. at 2607; *see also* Residential Funding

Co. v. UBS Real Estate Sec., Inc., 515 B.R. 52, 62 (Bankr. S.D.N.Y. 2014) (concluding that *Stern* did not alter the subject matter jurisdiction of the bankruptcy courts); Geron v. Peebler (In re Pali Holdings, Inc.), 488 B.R. 841, 848 n.26 (Bankr. S.D.N.Y. 2013) ("*Stern*, **[*515]** which affects the constitutional power of a bankruptcy judge to issue a final judgment in a matter as to which the bankruptcy **[**57]** court already has subject matter jurisdiction, does not in any way deprive bankruptcy courts of subject matter jurisdiction."). With respect to "a proceeding that is not a core proceeding but that is otherwise related to a case under title 11," a bankruptcy judge may submit proposed findings of fact and conclusions of law to the district court. 28 U.S.C. § 157(c)(1).

This Court has "related to" subject matter jurisdiction over this adversary proceeding under 28 U.S.C. § 1334. ***HN16*** Section 1334(b) provides that "district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. § 1334(b). In the Second Circuit, the test for determining the existence of related to jurisdiction under 28 U.S.C. § 1334 is whether the outcome of a proceeding might have any "conceivable effect" on the bankrupt estate, or whether the proceeding has a "significant connection" with the bankrupt estate. *See* Publicker Indus. Inc. v. United States (In re Cuyahoga Equip. Corp.), 980 F.2d 110, 114 (2d Cir. 1992).

HN17 "[C]ommencement of a chapter 15 case does not create an 'estate' as that term is used in the Bankruptcy Code." In re JSC BTA Bank, 434 B.R. 334, 341 (Bankr. S.D.N.Y. 2010). However, in the context of a case under former Bankruptcy Code section 304—the precursor to chapter 15—the Second Circuit noted that "[t]he fact that a § 304 proceeding, by definition, involves a bankruptcy estate located abroad **[**58]** does not short circuit the 'related to' analysis." Parmalat Capital Fin. Ltd. v. Bank of Am. Corp., 639 F.3d 572, 579 (2d Cir. 2011). In *Parmalat*, the Second Circuit held that the district court properly exercised removal jurisdiction over the foreign debtors' state law civil action filed in state court, finding that the foreign debtors' civil action seeking damages might have a conceivable effect on their bankruptcy estates, and therefore the district court had "related to" jurisdiction over the state law action. See id. n.7 ("State law claims are 'related to' § 304 proceedings so long as they satisfy [the] 'related to' test set forth in Cuyahoga, 980 F.2d at 114. Nothing more is required.").

The outcome of this adversary proceeding would clearly have an effect on the Debtor's foreign estate, as it could potentially recover approximately €1 billion for the benefit of the estate. *See* Cuyahoga, 980 F.2d at 114 (holding that certain section 502 and 506(c) claims were related to the debtors' bankruptcy cases where such "claims bring into question the very distribution of the estate's property"). Notwithstanding that the Plaintiffs' claims are all state law claims brought in an adversary proceeding related to a chapter 15 proceeding, this adversary proceeding is related to a case under title 11. *See* Parmalat, 639 F.3d at 579.

The Court will assume for purposes of **[**59]** this decision that it would not have authority to finally adjudicate the Plaintiffs' claims without the consent of the parties. The Court would still have authority to issue proposed findings of fact and conclusions of law, regardless of whether the claims are core or non-core. *See* ***HN18*** Exec. Benefits Ins. Agency v. Arkison, 134 S. Ct. 2165, 2168, 189 L. Ed. 2d 83 (2014) ("We hold today that when, under *Stern's* reasoning, the Constitution does not permit a bankruptcy court to enter final judgment on a bankruptcy-related claim, the relevant statute nevertheless permits a bankruptcy court to issue proposed findings of fact and conclusions of law to be reviewed *de novo* by the district court.") And, as already discussed, whether **[*516]** this Court has the authority to enter a final judgment on the Plaintiffs' claims does not affect the Court's jurisdiction to consider the claims and enter a non-final judgment. *See* British Am. Ins. Co. Ltd. v. Fullerton (In re British Am. Ins. Co. Ltd.), 488 B.R. 205, 221 (Bankr. S.D. Fla. 2013) (***HN19*** "Whether a particular proceeding is core or non-core—whether the bankruptcy court may enter a final order or judgment therein—has no impact on whether there is federal bankruptcy jurisdiction over the proceeding."). The Defendants' Motion is therefore **DENIED** to the extent it seeks dismissal for lack of subject matter jurisdiction.

C. Choice of Law

There are three jurisdictions' **[**60]** laws potentially implicated in this case: New York law, U.K. law, and Luxembourg law.[31] To determine which of these laws applies to the substance of the causes of action asserted in the Complaint, the parties agree that the Court must employ New York choice of law rules. (*See* Defs.' Supp. Br. at 3; Pls.' Supp. Opp. at 3.) *See also* Geron v. Seyfarth Shaw LLP (In re Thelen LLP), 736 F.3d 213, 219 (2d Cir. 2013) (***HN20*** "[W]here no significant federal policy, calling for the imposition of a federal conflicts rule, exists, a bankruptcy court must apply the choice of law rules of the forum state." (alteration in original) (citations and internal quotation marks omitted)). ***HN21*** Under New York choice of law rules, the Court must first determine whether there is an "actual conflict" between the relevant laws of the implicated jurisdictions. GlobalNet Financial.com, Inc. v. Frank Crystal & Co., 449 F.3d 377, 382 (2d Cir. 2006) (citing In re Allstate Ins. Co. v. Stolarz, 81 N.Y.2d 219, 613 N.E.2d 936, 937, 597 N.Y.S.2d 904 (N.Y. 1993); Zurich Ins. v. Shearson Lehman Hutton, Inc., 84 N.Y.2d 309, 642 N.E.2d 1065, 618 N.Y.S.2d 609 (N.Y. 1994)). An actual conflict exists where such laws provide different substantive rules; such differences must be relevant to the issue to be determined and have a "significant *possible* effect on the outcome of the trial." Fin. One Pub. Co. Ltd. v. Lehman Bros. Special Fin., Inc., 414 F.3d 325, 331 (2d Cir. 2005) (emphasis in original) (citations and internal quotation marks omitted). However, "[i]f no actual conflict exists, and if New York is among the relevant jurisdictions, the court may simply apply New York law." Licci ex rel. Licci v. Lebanese Canadian Bank, SAL, 672 F.3d 155, 157 (2d Cir. 2012) ("Licci I") (citations **[**61]** omitted).

The Complaint alleges three causes of action: Count I of the Complaint asserts an actual fraudulent conveyance claim against all the Defendants and the Transferee Class under NYDCL section 276; Count II asserts a constructive fraudulent conveyance claim against all Defendants and the Transferee Class under NYDCL sections 273, 274, 275, and 277; and Count III asserts an unjust enrichment claim against Apax and TPG only. (Compl. ¶¶ 155-173.) With respect to Counts I and III, the parties purport to agree that there is no actual conflict between New York law on the one hand and either U.K. law or Luxembourg law on the other. (*See* Defs.' Supp. Br. at 1 ("Defendants are not at this time aware of an actual conflict between New York law and either Luxembourg law or U.K. law that would require the Court to engage in a choice of law analysis regarding the First Cause of Action or the Third Cause of Action in the Complaint."); **[*517]** Dec. **[**62]** 3, 2014 Hr'g. Tr. 118:21-23 (Plaintiffs' counsel stating "we would have actually fraudulent transfer claims and unjust enrichment claims under with [sic] English or Luxembourg [law].").) New York law therefore applies to Counts I and III of the Complaint. *See* Licci I, 672 F.3d at 157; *see also* Park Place Entm't Corp. v. Transcon. Ins. Co., 225 F. Supp. 2d 406, 408 (S.D.N.Y. 2002) ("If the party advocating a choice of law analysis fails

[31] As an initial matter, ***HN22*** "[i]n determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law." ***FED. R. CIV. P. 44.1***.

to demonstrate an actual conflict between New York and another state's laws, no choice of law analysis need be undertaken." (citations omitted)).[32]

With respect to Count II of the Complaint—the Plaintiffs' constructive fraudulent conveyance claim—the parties agree that there are differences between New York law and the laws of U.K. and Luxembourg. (*See* Defs.' Supp. Br. at 2-3; Pls.' Supp. Opp. 6.) The Plaintiffs, however, dispute the impact of such differences, arguing that the conflicts among the laws are not sufficiently material to constitute "actual conflict[s]" triggering the next inquiry of a New York choice of law analysis. (Pls.' Supp. Opp. at 6-7.) The Court disagrees.

Under *NYDCL sections 273*, *274*, *275*, and *277*, as cited in the Complaint (*see* Compl. ¶¶ 161-168), "a transfer made without fair consideration constitutes a fraudulent conveyance, regardless of the intent of the transferor." *Sharp Int'l Corp. v. State St. Bank & Trust Co. (In re Sharp Int'l Corp.), 403 F.3d 43, 53 (2d Cir. 2005)* (quoting *HBE Leasing Corp. v. Frank, 48 F.3d 623, 633 (2d Cir. 1995)* (acknowledging that New York follows the Uniform Fraudulent Conveyance Act, which identifies several types of constructive fraud)). By contrast, the proffered U.K. and Luxembourg law equivalents to the NYDCL require proof of some degree of purpose or intent.[33] **[*518]** First, under U.K. law, section 423(3) of the Insolvency Act requires a creditor to prove that the "'actual subjective purpose' of the transferor in entering into the transaction **[**65]**

[32] The twist here is that while the Defendants' counsel state that there is no conflict with respect to the actual fraudulent conveyance claim, they separately argue that the NYDCL does not have extraterritorial application to the transfers challenged in this case, while U.K. or Luxembourg law might apply. The NYDCL's lack of extraterritorial effect may indeed create an actual conflict requiring a further choice of law analysis. *See* Meyers v. Kallestead, No. 91 C 20362,1992 U.S. Dist. LEXIS 15126, 1992 WL 280450, at *4 (N.D. Ill. Sept. 30, 1992) (holding that an actual conflict triggering a choice of law analysis existed between the Illinois Dram Shop Act, which does not apply extraterritorially, and the Iowa Dram Shop Act, which does apply extraterritorially); *see also* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 815-18, 113 S. Ct. 2891, 125 L. Ed. 2d 612 (1993) (discussing extraterritorial reach of statutes as a choice-of-law **[**63]** and/or comity principle); Parkcentral Global Hub Ltd. v. Porsche Auto. Holdings SE, 763 F.3d 198, 220 (2d Cir. 2014) ("The question whether the application of [a securities fraud statute] to a particular set of transnational facts would be impermissibly extraterritorial has much in common with the choice-of-law question that arises when a court must determine which state or nation's law most appropriately governs a case involving interstate or transnational facts."); *see also Maxwell Commc'n Corp. plc v. Barclays Bank plc (In re Maxwell Commc'n Corp. plc)*, 170 B.R. 800, 809-10 (Bankr. S.D.N.Y. 1994) (recognizing the view that extraterritoriality should be construed as a sub-genre of choice of law), *aff'd*, 186 B.R. 807 (S.D.N.Y. 1995), *aff'd*, 93 F.3d 1036, 1055 (2d Cir. 1996) (affirming lower courts on basis of international comity while declining to decide whether presumption against extraterritorial application of Bankruptcy Code avoidance provisions would "compel a conclusion that the Bankruptcy Code does not reach the pre-petition transactions at issue"). Despite this, the Court will assume, as the parties purport to do, that no conflict exists and that New York law therefore applies to Count I. As explained below, the Court concludes that the NYDCL actual fraudulent conveyance claim must be dismissed for lack of standing, making it further unnecessary to reach the issue **[**64]** of the extraterritorial effect of the statute.

[33] The Plaintiffs' expert opines that section 238 of the U.K. Insolvency Act 1986 (the "Insolvency Act") is analogous to the NYDCL's provisions governing constructive **[**66]** fraudulent conveyances in that section 238 does not require proof of an "actual subjective purpose," (*see* Pls.' Supp. Opp. at 6 (citing Supp. Moss. Decl. PP 12, 15)), but both parties' experts agree that the Plaintiffs are not entitled to bring a claim pursuant to section 238 of the Insolvency Act under the circumstances of this case (*see id.* ("[W]hile England's Section 238 is analogous to a claim for a constructive fraudulent conveyance, it appears that such a claim is only available where insolvency proceedings have been commenced within two years of the challenged transfer (which was not the case here)."); Supp. Isaacs Decl. P 7 ("The [December 2006] CPEC Redemption Transaction occurred on 21 December 2006. Hellas II entered administration on 26 November 2009. It follows that the [December 2006] CPEC Redemption Transaction did not take place at a 'relevant time' within the meaning of section 240. Accordingly, no order could now be made under section 238 . . . .").) The Plaintiffs also conceded at the hearing that they could not assert this U.K. constructive fraudulent conveyance claim. (*See* Dec. 16, 2014 H'rg. Tr. 28:4-29:18.) Accordingly, the parties, and in turn the Court, focus the analysis with respect to U.K. law on section 423 of the Insolvency **[**67]** Act for purposes of determining the applicable law for Count II of the Complaint.

was to (i) put assets beyond the reach of a person who is making or may make a claim against him; or (ii) to otherwise prejudice the interests of such person in relation to the claim which he is making or may make." (Pls.' Supp. Opp. at 3 (citing Supp. Isaacs Decl. PP 12.2, 16).) Second, article 1167 of the Luxembourg Civil Code, also known as the "*Actio Pauliana*," requires a plaintiff-creditor to prove the transferor's "actual intent to defraud." (*See* Defs.' Supp. Br. at 2 (citing Prüm Decl. P 7).) Since other causes of action under the NYDCL require a showing of "an intent to defraud," these foreign laws are clearly different from the constructive fraudulent transfer claim asserted in Count II of the Complaint. *See, e.g.*, *N.Y. DEBT. & CRED. L. § 276*. Indeed, the Plaintiffs plead a separate actual fraudulent conveyance claim under the applicable NYDCL provisions that require a showing of an intent to defraud, evincing an acknowledgement that there is a distinction between constructive and actual fraudulent conveyance claims under New York law. (*See* Compl. PP 155-168.)

The Court therefore concludes that an "actual conflict" exists between New York law on the one hand and U.K. and Luxembourg law on the other as to Count II of the Complaint. *See, e.g.*, *Lyman Commerce Solutions, Inc. v. Lung, No. 12-cv-4398 (TPG), 2014 U.S. Dist. LEXIS 15282, 2014 WL 476307, at *3 (S.D.N.Y. Feb. 6, 2014)* (discussing the court's prior holding that an actual conflict exists between New York constructive fraudulent conveyance law, under which "a plaintiff need not prove [fraudulent] intent," and Iowa and Delaware law, under which "a plaintiff must still prove actual fraudulent intent" (citations and internal quotation marks omitted)); *Fireman's Fund Ins. Co. v. Great Am. Ins. Co., 10 F. Supp. 3d 460, 495 (S.D.N.Y. 2014)* (finding an actual conflict between Mississippi and Texas laws governing rescission of an insurance policy based on a misrepresentation of material fact because Mississippi law does not require a finding of an "intent to deceive," whereas "under Texas law, [the plaintiff] must prove intent to deceive and reliance, and any ambiguity will be construed in favor of coverage").

HN23 Upon the identification of an "actual conflict" among fraudulent conveyance laws, the New York choice of law analysis requires the Court to apply the "interest-analysis." **[**68]** *See, e.g.*, *Drenis v. Haligiannis, 452 F. Supp. 2d 418, 427 (S.D.N.Y. 2006)* (characterizing fraudulent **[*519]** conveyance laws as conduct-regulating laws subject to New York's choice of law rules' "interest analysis"); *Lyman, 2014 U.S. Dist. LEXIS 15282, 2014 WL 476307, at *3* (citing cases finding that fraudulent conveyance laws are conduct-regulating for purposes of applying New York's "interest analysis"). "New York's interest analysis requires that 'the law of the jurisdiction having the greatest interest in the litigation will be applied and . . . the [only] facts or contacts which obtain significance in defining State interests are those which relate to the purpose of the particular law in conflict.'" *Thelen, 736 F.3d at 219* (alterations in original) (quoting *GlobalNet, 449 F.3d at 384*). "[G]iven that fraudulent conveyance laws are 'conduct regulating,' the law of the jurisdiction where the tort occurred will generally apply because that jurisdiction has the greatest interest in regulating behavior within its borders." *Lyman, 2014 U.S. Dist. LEXIS 15282, 2014 WL 476307, at *3*; *see also* *United Feature Syndicate, Inc. v. Miller Features Syndicate, Inc., 216 F. Supp. 2d 198, 215-16 (S.D.N.Y. 2002)* (finding that Canadian law applied to plaintiffs' fraudulent conveyance claim because "the conveyance alleged by [the plaintiffs] to be fraudulent—the transfer of funds held by [one defendant] to the [other defendants]—took place in Canada").

HN24 New York choice of law rules do not require a blind adherence to this rule. *See* *Golden Archer Invs., LLC v. Skynet Fin. Sys., 908 F. Supp. 2d 526, 539 (S.D.N.Y. 2012)* (noting that **[**69]** the court "do[es] not blindly follow the *lex loci* rule" in applying the interest analysis to conduct-regulating laws (citations and internal quotation marks omitted)). But when the alleged wrongful conduct occurs in a place different from the place of injury, the Second Circuit dictates that "it is the place of the allegedly wrongful conduct that generally has superior 'interests in protecting the reasonable expectation of the parties who relied [on the laws of that place] to govern their primary conduct and in the admonitory effect that applying its law will have on similar conduct in the future.'" *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL, 739 F.3d 45, 50-51 (2d Cir. 2013)* ("Licci II") (quoting *Schultz v. Boy Scouts of Am., Inc., 65 N.Y.2d 189, 480 N.E.2d 679, 684-85, 491 N.Y.S.2d 90 (N.Y. 1985))*; *see also* *Lyman, 2014 WL 476307, at *3* (concluding that for fraudulent conveyance claims, "the location of injury does not control; instead, it is the location of the defendant's conduct that controls." (citation omitted)).

The Plaintiffs argue that New York has the greatest interest in seeing its law applied to their claims. (Pls.' Supp. Opp. at 9-15.) According to the Plaintiffs, (i) securities clearing house reports indicate that a greater number of Sub Notes were held by U.S. custodians than Luxembourg custodians (*see* Supp. Ashley Decl. Exs. 22-23, 42); (ii) the majority of U.S. custodians holding **[**70]** Sub Notes were located in New York (*see id.*); (iii) the offering memorandum and indenture for the dollar-denominated Sub Notes were governed by New York law, provided for Hellas II's consent to New York jurisdiction, and appointed a New York trustee, registrar, and paying agent for the Sub Notes (*see* Compl. P 122); (iv) the Sub Notes were aggressively "marketed and sold to investors located in . . . New York and elsewhere in the [U.S.]" (*id.* P 121; Pls.' Supp. Opp. at 13-14); and (v) a greater sum of the December 2006 CPEC Redemption proceeds obtained by both Apax and TPG was ultimately distributed in New York than in Luxembourg (Pls.' Supp. Opp. at 14-15 (citing Compl. PP 118-19; Ashley Decl. Exs. 37-38, 50)).

By contrast, the Defendants assert that Luxembourg has a superior interest in seeing its laws applied to Count II be **[*520]** cause: (i) the "conveyances" at issue in Count II are the redemptions of CPECs, not the sale of Sub Notes (*see* Defs.' Supp. Br. at 4-5); (ii) the "principal steps" of the December 2006 CPEC Redemption were carried out in Luxembourg, by Hellas entities formed under Luxembourg law and located in Luxembourg (*see id.* at 4 (citing Compl. P 118)); (iii) Hellas II's principal place of **[**71]** business was located in Luxembourg (*see id.* (citing Glenn Decl. Ex. A at ii; *Thelen, 736 F.3d at 221* (indicating that for fraudulent conveyance claims, the "principal place of business is certainly relevant in deciding the law applicable to actions taken in the course of that business")); (iv) each series of CPECs was redeemed by Luxembourg-based Hellas entities, and each of the redemption agreements governing those transactions was governed by Luxembourg law (*see id.* at 5 (citing Glenn Decl. Ex. B § 5.6)); and (v) the corporate resolutions authorizing the CPEC redemptions were adopted by Hellas, a Luxembourg entity, in its capacity as the "sole manager and general partner" of Hellas II (*id.* (citing Compl. P 127)).

Applying the Second Circuit's holding in *Licci II*, if the Court only had to choose between New York and Luxembourg law, Luxembourg appears to have a greater interest than New York. According to the parties' arguments, the allegedly wrongful conduct occurred more substantially in Luxembourg, whereas the alleged injury occurred more substantially in New York.[34] However, the Court is also faced with the laws of the U.K., which may have a countervailing interest pursuant

[34] The argument that the injury sustained occurred in New York is questionable. The Plaintiffs are the liquidators appointed by a U.K. court—recognized in this Court as foreign representatives—seeking to avoid and recover transfers initially made from London or Luxembourg. The alleged injury appears to have been suffered in Luxembourg, where Hellas II was based, or in the U.K., where the Debtor's insolvency proceeding is pending.

to the European Union's Council Regulation [**72] (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings (the "EU Insolvency Regulation").[35]

HN25 Article 4 of the EU Insolvency Regulation indicates that the law of a debtor's Centre of Main Interests ("COMI") "continues to govern aspects of that entity's bankruptcy throughout the [European Union], including the choice of which avoidance law will control." Segaal Schorr, Comment, *Avoidance Actions under Chapter 15: Was Condor Correct*?, 35 FORDHAM INT'L L.J. 350, 360 (2011) (citations omitted). This article thus establishes a default rule that the law of the debtor's COMI governs the avoidance of antecedent transactions. *See* Nigel John Howcroft, *Universal vs. Territorial Models for Cross-Border Insolvency: The Theory, the* [**73] *Practice, and the Reality that* Universalism Prevails, 8 U.C. DAVIS BUS. L.J. 366, 414-15 (2008) [hereinafter Howcraft, *Universal vs. Territorial*]. Since August 2009, the Debtor's COMI is the U.K. (Compl. P 151.) The Plaintiffs assert that the EU Insolvency Regulation's default rule effectively displaces the applicability of Luxembourg law and Luxembourg's interests in the instant case. (*See* Pls.' Supp. Opp. at 7-9.) However, the Plaintiffs ignore article 13 of the EU Insolvency Regulation, which provides an exception to the default rule, "enabl[ing] the disapplication of the [default rule] where the person who benefitted from the impugned transaction can prove that the law of another member state governs the transaction and that the transaction is valid under that law." Howcraft, Universal vs. Territorial, at 415.

[*521] The Defendants assert that, in light of the EU Insolvency Regulation, both Luxembourg and the U.K. arguably have interests superior to that of New York in seeing their laws applied to Count II, but that the Court need not apply the EU Insolvency Regulation to determine which of the two foreign laws apply. (*See* Dec. 3, 2014 Hr'g. Tr. 100:13-17, 19-25, 106:2-8.) According to the Second Circuit, ***HN26*** "[i]t is settled law that 'New York courts look to New York and not foreign conflicts provisions' [**74] in order to avoid the prospect of *renvoi*." *Weiss v. La Suisse, 141 F. App'x 31, 34 (2d Cir. 2005)* (summary order) (citations omitted). Since the EU Insolvency Regulation constitutes a foreign choice of law rule in these circumstances, rather than a substantive law, it is not applicable here. *Id.*

In any event, the Court need not go further in determining which law applies to Count II of the Complaint. The Court concludes that either Luxembourg or U.K. law applies to Count II, not New York law. The Plaintiffs only pleaded Count II under New York law in their Complaint. Count II of the Complaint is therefore **DISMISSED**.[36]

D. Count I - NYDCL Section 276

The Plaintiffs' standing to assert Count I poses a threshold issue. *See Official Comm. of Unsecured Creditors of the Debtors v. Austin Fin. Serv. (In re KDI Holdings, Inc.), 277 B.R. 493, 502-03 (Bankr. S.D.N.Y. 1999)* (***HN27*** "Standing is a jurisdictional requirement that must be met in order to have claims litigated in federal court." (citing *Shearson Lehman Hutton, Inc. v. Wagoner, 944 F.2d 114, 117 (2d Cir. 1991)*)). ***HN28*** Because standing is a jurisdictional matter, "it is the burden of the 'party who seeks the exercise of jurisdiction in his favor,' . . . 'to [clearly] allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute.'" *Thompson v. Cnty. of Franklin, 15 F.3d 245, 249 (2d Cir. 1994)* (quoting *FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 231, 110 S. Ct. 596, 107 L. Ed. 2d 603 (1990)*). The [**75] court may base its finding regarding a plaintiff's standing on the complaint, the complaint

[35] Council Regulation 1346/2000, On Insolvency Proceedings, 2000 O.J. (L 160) 1 (EC).

[36] As explained below, the Court also concludes that the foreign representatives lack standing to bring this claim, which is an independent ground for dismissal.

supplemented by undisputed facts, or the complaint and any disputed factual issues resolved by the court. *See* id. at 249.

HN29 "It is well settled that in order to set aside a fraudulent conveyance [under NYDCL section 276], one must be a creditor of the transferor; those who are not injured by the transfer lack standing to challenge it." Eberhard v. Marcu, 530 F.3d 122, 131-35 (2d Cir. 2008) (concluding that the history and plain language of NYDCL section 276 dictate that creditors have standing to assert an actual fraudulent conveyance claim under New York law). Standing to assert a NYDCL actual fraudulent conveyance claim, however, is not necessarily limited to *creditors* only—other plaintiffs vested with the authority to assert claims on behalf of creditors, for example, have standing. *See, e.g.,* id. at 132 (recognizing that other courts have held that "receivers [appointed by the Securities and Exchange Commission (the "SEC")] have standing to pursue fraudulently conveyed assets . . . when one of the entities in receivership is a creditor of the transferor" (citing Troelstrup v. Index Futures Grp., Inc., 130 F.3d 1274 (7th Cir. 1997); Scholes v. Lehmann, 56 F.3d 750 (7th Cir. 1995))); Barnet v. Drawbridge Special Opportunities Fund LP, No. 14-cv-1376 (PKC), 2014 U.S. Dist. LEXIS 124410, 2014 WL 4393320, at *15 (S.D.N.Y. Sept. 5, 2014) ("In general, the **[*522]** issue of standing does not arise when bankruptcy **[**76]** trustees . . . seek to avoid a fraudulent transfer made by the insolvent entity. This is because section 544(b) of the Bankruptcy Code confers upon [bankruptcy] trustees the ability to stand in the shoes of the bankruptcy estate's unsecured creditors and 'avoid any transfer of an interest of the debtor in the property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim . . . .'" (quoting 11 U.S.C. § 544(b)(1))).

Here, the Plaintiffs are liquidators in the Debtor's U.K. insolvency proceeding, and foreign representatives before this Court under chapter 15 of the Bankruptcy Code pursuant to the Court's prior order granting recognition of the Debtor's U.K. insolvency proceeding. (*See* ECF Doc. # 17, Case No. 12-10631.) They are *not* creditors of the Debtor. The parties therefore dispute whether the Plaintiffs have standing to assert their NYDCL section 276 claim by way of some other authority vested in them as foreign representatives or U.K. liquidators.

HN30 Upon recognition of a foreign proceeding, foreign representatives are entitled to certain mandatory relief pursuant to section 1520 of the Bankruptcy Code as well as the assistance of the U.S. Bankruptcy Court in administering the foreign main proceeding. *See* In re Atlas Shipping A/S, 404 B.R. 726, 738-39 (Bankr. S.D.N.Y. 2009).

> In addition to the mandatory **[**77]** provisions under § 1520, two other provisions in chapter 15 . . . allow the Court, in its discretion, to grant further relief to the foreign representative. Section 1521(a) outlines the discretionary relief a court may order upon recognition of a foreign proceeding, whether main or non-main. The discretion that is granted is "exceedingly broad" since a court may grant "any appropriate relief" that would further the purposes of chapter 15 and protect the debtor's assets and the interests of creditors.
>
> The exercise of discretion is, however, circumscribed by the Bankruptcy Code. Section 1522(a) provides that the court may only grant discretionary relief under § 1521 if the interests of creditors are sufficiently protected. . . . Standards that inform the analysis of § 1522 protective measures in connection with discretionary relief emphasize the need to tailor relief and conditions so as to balance the relief granted to the foreign representative and the interest of those affected by such relief, without unduly favoring one group of creditors over another.

Id. at 739 (citations and internal quotation marks omitted). In pertinent part, *section 1521(a) of the Bankruptcy Code* states:

> . . . ***HN31*** the court may, at the request of the foreign representative, grant any appropriate relief, including— **[**78]**
>
> . . .
>
> (5) entrusting the administration or realization of all or part of the debtor's assets within the territorial jurisdiction of the United States to the foreign representative or another person, including an examiner, authorized by the court;
>
> . . .
>
> (7) granting any additional relief that may be available to the trustee, except for relief available under sections 522, 544, 545, 547, 548, 550, and 724(a).

11 U.S.C. § 1521(a).

The parties agree that the Plaintiffs, as foreign representatives in the Debtor's chapter 15 proceeding, do not have standing to assert Count I if the Plaintiffs need to rely on *section 544* to provide that standing because *section 1521(a)(7) of the Bankruptcy Code* does not permit a foreign **[*523]** representative to utilize *section 544* to gain standing in a chapter 15 case. (Defs.' Mot. at 10-15; Opp. at 27.) *See also 11 U.S.C. § 1521(a)(7)* (granting a foreign representative access to only certain relief available to a bankruptcy trustee); *Barnet, 2014 U.S. Dist. LEXIS 124410, 2014 WL 4393320, at *15* (***HN32*** "[S]ection *1521(a)(7) of the Bankruptcy Code* expressly precludes a court from granting for a foreign representative "relief that may be available to a trustee . . . under *section . . . 544* . . . .' In the context of a grant of recognition of a foreign proceeding under Chapter 15, a foreign representative has standing to initiate a fraudulent transfer action only 'in a case concerning the debtor pending under another chapter of [Title 11] **[**79]** . . . .'" (alterations in original) (internal citations omitted)). The question remains, however, whether the Plaintiffs are entitled to bring their NYDCL actual fraudulent conveyance claim under *section 1521(a)(5)* (i.e. without using *section 544*) consistent with New York law's standing requirements.[37] Resolving this issue requires an examination of the Plaintiffs' authority as liquidators under U.K. law. *See Barnet, 2014 U.S. Dist. LEXIS 124410, 2014 WL 4393320, at *15-17* (examining whether the plaintiffs, who were foreign representatives in an ancillary chapter 15 proceeding and liquidators in an Australian insolvency proceeding, were vested with authority under Australian law to assert a NYDCL fraudulent conveyance claim consistent with New York law's standing requirements); *see also Koreag, Controle et Revision S.V. v. Refco F/X Assocs. (In re Koreag, Controle et Revision S.A.), 961 F. 2d 341, 348 (2d Cir. 1992)* (holding

[37] The Court does not decide the issue whether the Plaintiffs have standing to assert avoidance claims under applicable state or foreign law pursuant to section 1521(a)(7) without invoking section 544 to provide such standing. *See* 11 U.S.C. § 1521(a)(7) (authorizing a court to "grant[] any additional relief that may be available to the trustee"). This Court has previously recognized and the Fifth Circuit has held that section 1521(a)(7)'s restrictions on a foreign representative's use of certain provisions of chapter 5, such as section 544, do not necessarily bar a foreign representative from asserting an avoidance claim under the applicable foreign law. *See Fogerty v. Petroquest Resources, Inc. (In re Condor Ins. Ltd.)*, 601 F.3d 319, 322-29 (5th Cir. 2010) (holding that the exceptions listed in section 1521(a)(7) to the relief available to a foreign representative in a chapter 15 ancillary proceeding do not exclude avoidance actions brought pursuant to domestic law of the foreign main proceeding); *In re Atlas Shipping A/S*, 404 B.R. at 743-45, & n.16 (noting that "it is unclear whether chapter 15's replacement of § 304 precludes a foreign representative from bringing an avoidance action **[**81]** under foreign law"); *In re Metzeler*, 78 B.R. 674, 677 (Bankr. S.D.N.Y. 1987) (holding "that a foreign representative may assert, under § 304 [or chapter 15's predecessor], only those avoiding powers vested in him by the law applicable to the foreign estate"). The key to this issue, however, is whether the plaintiff-foreign representative has standing to assert such claims *without* reliance on section 544 of the Bankruptcy Code. Although the Plaintiffs argue that New York law, in conjunction with U.K. law, provides them with standing to assert their NYDCL claims without relying on section 544 (*see, e.g.*, Dec. 16, 2014 H'rg. Tr. 9:15-19:25), it is unnecessary for the Court to reach this section 1521(a)(7) issue here because the Court finds that the Plaintiffs fail to establish that they have standing under the applicable New York and U.K. laws.

that for purposes of section 304, the predecessor to chapter 15, "the estate of a foreign debtor is defined by the law of the jurisdiction in which the foreign proceeding is pending, with other applicable law serving to define the estate's interest in particular property." (emphasis omitted) (citation omitted)); In re Atlas Shipping, 404 B.R. at 741 ("[T]he legislative history confirms that Congress expected courts to interpret the provisions [of chapter **[**80]** 15 of the Bankruptcy Code] consistently with prior law under § 304."). The Plaintiffs' standing, then, turns on whether U.K. law vests the Plaintiffs, as liquidators, with the authority to assert causes **[*524]** of action on behalf of the Debtor's creditors.

The Plaintiffs assert, by way of a four-pronged argument, that they are vested with such authority. (*See* Dec. 16, 2014 Hr'g. Tr. at 15:8-19:25.) The Plaintiffs focus the first two prongs of their argument on the Debtor's U.K. insolvency proceeding. First, the Plaintiffs cite to the U.K. High Court's judgment converting the Debtor's prior U.K. administration into liquidation. (Dec. 16, 2014 Hr'g. Tr. 16:15-17:22.) According to the Plaintiffs, in this judgment, the High **[**82]** Court (1) converted the Debtor into a compulsory liquidation due to the request of "a significant portion of the unsecured creditors . . . unopposed by any other creditor;" and (2) contemplated the role of the liquidators as including the investigation into the transactions now at issue before this Court to determine whether there were any viable claims that could be pursued. (*Id.*) Second, the Plaintiffs cite to a resolution of the U.K. Liquidation Committee comprised of certain of the Debtor's creditors that sanctioned the Plaintiffs to pursue this lawsuit in the U.S. (*Id.* at 18:9-25.)

Neither the judgment nor the resolution, however, provides evidence establishing that the Plaintiffs were granted express authority in the Debtor's U.K. insolvency proceeding to assert claims on behalf of the Debtor's creditors. The Plaintiffs ignore that the judgment does not specify that the Plaintiffs have standing to assert any or all of the potentially "viable claims," let alone claims on behalf of the Debtor's creditors. (*See* Pls.' Dec. 16, 2014 Hr'g. Binder, Tab 20, *In the Matter of Hellas Telecommunications (Luxembourg) II SCA (in administration)*, [2011] EXHC 3176 (Ch) ¶ 91.) The Plaintiffs further **[**83]** ignore that the resolution does not specifically sanction the Plaintiffs to pursue claims on behalf of the Liquidation Committee (i.e. creditors). (*See* Pls.' Dec. 16, 2014 Hr'g. Binder, Tab 21, Resolutions Considered at the Second Meeting of the Liquidation Committee Held on 20 February 2014 at 25 Farrington Street London EC4A 4AB, dated 28 February 2013.)

The second two prongs of the Plaintiffs' argument focus on U.K. statutory law. First, the Plaintiffs argue that they have authority to bring their NYDCL actual fraudulent conveyance claim outside of the U.K. and under New York law. (Moss. Decl. ¶¶ 30-44.) According to the Plaintiffs' expert, Moss, the Plaintiffs' assertion of the NYDCL actual fraudulent conveyance claim is "within the express powers granted liquidators by Article 5" of the U.K.'s chapter 15 equivalent, the Cross-Border Insolvency Regulations (the "CBIR"). (*Id.* ¶¶ 15, 34.) Article 5 of the CBIR provides that "[a] British insolvency officeholder [which includes U.K. liquidators] is authorized to act in a foreign State on behalf of a proceeding under British insolvency law, as permitted by the applicable foreign law." The Cross-Border Insolvency Regulations, 2006, No. 1030, art. 5; *see also* **[**84]** *id.* art. 2, ¶ (b) (defining "British insolvency officeholder"). Moss asserts that the Plaintiffs' NYDCL claim is brought "on behalf of" the Debtor's U.K. insolvency proceeding and that the only U.K. law restriction on the avoidance action is that it be in accordance with New York law. (Moss. Decl. ¶ 32.) The Plaintiffs assert that nothing in New York law prevents them from asserting their NYDCL actual fraudulent conveyance claim. According to the Plaintiffs, NYDCL section 276-a confers standing upon them to assert the NYDCL section 276 claim, and the Seventh Circuit's decision in Scholes v. Lehmann, 56 F.3d 750 (7th Cir. 1995), holding that the SEC receiver had standing to assert a claim under Illinois's then-equivalent version of a NYDCL section 276 claim, further supports **[*525]** the Plaintiffs' standing under New York law. (*See* Dec. 16, 2014 Hr'g. Tr. at 9:22-15:20.)

Second, the Plaintiffs argue that the U.K.'s Insolvency Act vests the Plaintiffs, as liquidators, with the authority to assert claims not just on behalf of the company, but also on behalf of the company's creditors more broadly. (*See* Dec. 16, 2014 Hr'g. Tr. at 19:9-25.) The Plaintiffs primarily rely on paragraph 13 of schedule 4 of the Insolvency Act ("Paragraph 13"), which states that the liquidator has the "[p]ower to do all such other things as may be necessary **[**85]** for winding up the company's affairs and distributing its assets." Insolvency Act, 1986, c. 45, §§ 165, 167, sch. 4 ¶ 13. Moss explains that Paragraph 13 is known as a "sweep-up" provision and is to be interpreted broadly so as to "authori[ze] expressly anything 'necessary' for the winding up" of a company. (Moss Decl. ¶ 39.) Moss opines that the NYDCL fraudulent conveyance claim is "undoubtedly 'necessary' in order to reconstitute the estate for the creditors and to distribute the assets to creditors, which in turn is a 'necessary' aspect of winding up the company." (*Id.*) Moss concludes that, "despite there being no specific mention of this in Schedule 4, liquidators have power under the Insolvency Act 1986 inter alia to take proceedings abroad in their own name and under a local statute, and not just to take proceedings in the name of or on behalf of the debtor company." (*Id.* ¶ 43.) In essence, Moss opines that the Plaintiffs have authority to bring their NYDCL fraudulent conveyance claim pursuant to this "sweep-up" provision of the Act. (*Id.* ¶¶ 39-41.)

By contrast, the Defendants' expert, Isaacs, disagrees with both of Moss's conclusions, opining that neither Article 5 of the CBIR nor Paragraph 13 of the Insolvency Act **[**86]** empowers a U.K. liquidator to bring claims outside of the U.K. and under New York law that belong to creditors. (Isaacs Reply Decl. ¶¶ 4, 11.) As to Article 5 of the CBIR, Isaacs underscores Moss's concession that the NYDCL claim may only be brought if permitted by the applicable foreign law. (*Id.* ¶ 6.) Isaacs opines that Article 5 does not vest a liquidator with the substantive authority to override foreign law—instead, it merely authorizes a liquidator to act in accordance with New York law. (*Id.* ¶¶ 9-10; *see also id.* ¶ 6 ("[i]f the Liquidators are not permitted by the [NY]DCL to bring fraudulent conveyance claims which belong to creditors, Article 5 does not authorize them to do so.").) The Defendants argue that because U.K. liquidators cannot act as or on behalf of creditors under U.K. law, it follows that the Plaintiffs are not permitted to assert their actual fraudulent conveyance claim under the NYDCL. (Defs.' Reply at 7-8.)

With regard to Paragraph 13, Isaacs opines that in spite of its function as a "sweep-up" provision, Paragraph 13 should not be read to confer substantive rights upon the liquidator that do not already exist via other U.K. statutes. (Isaacs Reply Decl. ¶ 11.4 (discussing *Re Phoenix Oil & Transport* **[**87]** *Co Ltd (No 2)* [1958] Ch 565 (rejecting liquidators' contention that the distribution of surplus assets is one of the "other things" which the liquidator had power to do under Paragraph 13, because the provision was properly regarded as a mopping-up provision at the end of a list of functions which the liquidator is enabled to perform in connection with the administration of the particular company's affairs and no more); *Re MF Global Ltd* [2013] 1 BCLC 552 at 565 ("While an administrator has power 'to do all other things incidental to the exercise of the foregoing powers' (para 23 of Sch 1), the equivalent power of a liquidator is limited to doing 'all such other things as may be necessary for winding **[*526]** up the company's affairs and distributing its assets.'″)).) Isaacs explains that other provisions of schedule 4 of the Insolvency Act, which lists the powers of a U.K. liquidator, are more specific than Paragraph 13 and do not ″empower the liquidator to bring a claim which is not already vested in him or the company″; as such, Paragraph 13 should not be interpreted to do so either. (*Id.* ¶ 11.) Even if Paragraph 13 could confer non-existent substantive rights upon a U.K. liquidator, Isaacs **[**88]** opines that the NYDCL actual fraudulent conveyance claim should not be considered ″necessary″ under Paragraph 13, as Moss suggests. (*Id.* ¶ 11.2 (citing *Re Wreck Recovery & Salvage Co* [1880] 15 Ch D 353, 361 (holding that the word ″necessary″ in Schedule 4's statutory predecessor means more than merely beneficial)).) According to Isaacs, the proceeds of such avoidance proceedings are not assets of the company, but rather are assets of the company's creditors. (*Id.*) Although obtaining those assets would be serving interests beneficial to creditors, Isaacs opines that the assets themselves are not in fact ″necessary″ to the administration of the company's estate in the U.K. within the meaning of the Insolvency Act. (*Id.*) Isaacs also explains that Hellas II's creditors have the right to bring the actions themselves—meaning the U.K. liquidators cannot be construed as the only or ″necessary″ plaintiff. (*See id.* ¶ 11.3.)

Based on the parties' arguments and the expert declarations, the Court concludes that U.K. law does not vest a liquidator with standing to assert claims on behalf of creditors broadly, despite there being clear authority vested in a liquidator to assert claims on behalf of **[**89]** the insolvent company. *See* Insolvency Act, 1986, c. 45 §§ 165, 167 sch. 4 ¶ 4; *see also* GOODE, PRINCIPLES OF CORPORATE INSOLVENCY LAW ¶ 5-04 (4th ed. 2011) (″On behalf of the creditors, the [U.K.] liquidator can bring proceedings in the name of the company in respect of causes of action vested in the company *but he has no locus standing to pursue claims vested in persons qua creditors*.″ (emphasis added)).

The parties agree that under the Insolvency Act, a liquidator involved in a winding up of a company by a U.K. court has the power to exercise any powers listed in parts I and II of schedule 4 of the Act ″with the sanction of the court or liquidation committee,″ and to exercise any powers listed in part II of schedule 4 ″with or without that sanction.″ Insolvency Act, 1986, c. 45, § 167; *see also id.* c. 45, §§ 165, 167, sch. 4. Here, only three of the enumerated powers in schedule 4 are potentially relevant to the question of a liquidator's standing: (i) ″[p]ower to bring legal proceedings under section 213, 214, 238, 239, 242, 243 or 423″ of the Act, *id.* c. 45, §§ 165, 167, sch. 4 ¶ 3A (″Paragraph 3A″); (ii) ″[p]ower to bring or defend any action or other legal proceeding in the name and on behalf of the company,″ *id.* c. 45, §§ 165, 167, sch. 4 ¶ 4 (″Paragraph 4″); **[**90]** and (iii) ″[p]ower to do all such other things as may be necessary for winding up the company's affairs and distributing its assets,″ *id.* c. 45, §§ 165, 167, sch. 4 ¶ 13.

HN33 It is clear from Paragraph 4 that a liquidator under U.K. law is vested with the authority to bring actions ″in the name and on behalf of the company.″ *Id.* c. 45, §§ 165, 167, sch. 4 ¶ 4. It is also clear that under Paragraph 3A, a liquidator may assert a claim under the proffered U.K. equivalent to a NYDCL fraudulent conveyance claim, section 423 of the Insolvency Act—the only creditor-like standing that a liquidator appears to have under U.K. law.[38] Generally, ″a victim of the transaction,″ **[*527]** or a creditor, has standing to bring a claim under section 423. *Id.* § 424(1)(c). But in the event that a company is bankrupt or

[38] Section 423 states in part:

> ***HN34*** (1) This section relates to transactions entered **[**91]** into at an undervalue; and a person enters into such a transaction with another if —

undergoing a winding up proceeding, the action may be brought ″by the official receiver, by the trustee of the bankrupt's estate or the liquidator or administrator of the body corporate or (with leave of the court) by a victim of the transaction[.]″ *Id.* § 424(1)(a). Regardless of which plaintiff under section 424(1) files the action, the action ″is to be treated as made on behalf of every victim of the transaction.″ *Id.* § 424(2).

HN35 Although liquidators have express authority to bring a section 423 claim on behalf of the company's creditors, it does not follow that liquidators have the authority to bring *any or all* claims on behalf of the company's creditors. Nothing in schedule 4 of the Insolvency Act, the CBIR, or any U.K. law presented to the Court by the parties leads to such a conclusion. Indeed, the Plaintiffs' expert concedes that the Plaintiffs' actual fraudulent conveyance claim was not brought under section 423 of the Insolvency Act, leaving open the question of the **[**92]** Plaintiffs' standing. (Moss Decl. ¶ 30.) Moss further concedes that the CBIR requires that actions brought by a U.K. liquidator abroad be ″permitted by the applicable foreign law.″ (*Id.* ¶ 34 (citing CBIR, 2006, No 1030, art. 5).) The ″applicable foreign law″ in this case is New York law, and the Second Circuit has clearly set forth the standing requirements for plaintiffs seeking to assert a NYDCL section 276 claim. *See* Eberhard, 530 F.3d at 129-35. The Plaintiffs fail to satisfy their burden in establishing that they meet these requirements. *See* Thompson, 15 F.3d at 249 (holding that the ″party who seeks the exercise of jurisdiction in his favor″ bears the burden in establishing that he or she is the proper party to do so (citation omitted)).

First, the Plaintiffs cannot argue that they have standing under New York law without looking to U.K. law for supplemental vested authority. In light of the Second Circuit's (1) extensive examination of the history and plain language of NYDCL section 276, and (2) ultimate conclusion that section 276's standing restrictions stem from the section's purpose of affording relief to creditors, Eberhard, 530 F.3d at 129-35, the Court finds the Plaintiffs' reliance on NYDCL section 276-a—which merely authorizes a court to award attorney's fees to a successful section 276 plaintiff—unpersuasive.[39] ***HN36*** Although **[**93]** NYDCL section 276-a **[*528]** contemplates the ability of plaintiffs other than actual creditors to

. . . .

(c) he enters into a transaction with the other for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by himself.

(2) Where a person has entered into such a transaction, the court may, if satisfied under the next subsection, make such order as it thinks fit for —

(a) restoring the position to what it would have been if the transaction had not been entered into, and

(b) protecting the interests of persons who are victims of the transaction.

Insolvency Act, 1986, c. 45, § 423.

[39] NYDCL section 276-a states:

HN37 In an action or special proceeding brought by *a creditor, receiver, trustee in bankruptcy, or assignee for the benefit of creditors* to set aside a conveyance by a debtor, where such conveyance is found to have been made by the debtor and received by the transferee with actual intent, as distinguished from intent presumed in law, to hinder, delay or defraud either present or future creditors, in which action or special proceeding the creditor, receiver, trustee in bankruptcy, or assignee for the benefit of creditors shall recover judgment, the justice or surrogate presiding at the trial shall fix the reasonable attorney's fees of the creditor, receiver, trustee in bankruptcy, or assignee for the benefit of creditors in such action or special proceeding, and the creditor, receiver, trustee in bankruptcy, or assignee for the benefit of creditors shall have judgment assert a NYDCL section 276 claim, the Court is unconvinced that *section 276-a* on its own confers standing upon each of those potential plaintiffs. Moreover, the Plaintiffs mischaracterize the Seventh Circuit's holding in *Scholes* in an unsuccessful attempt to circumvent the Second Circuit's detrimental holding in *Eberhard*. At oral argument, the Plaintiffs argued that unlike the Second Circuit in *Eberhard*, the Seventh Circuit found that the SEC receiver in *Scholes* "had a somewhat broader role" such that he had standing to pursue a state law actual fraudulent conveyance claim, "because the receiver, like [the Plaintiffs, as liquidators, was] acting for the benefit of all creditors." (*See* Dec. 16, 2014 Hr'g. Tr. at 11:9-13:6.) The Seventh Circuit, however, did not base its finding of the SEC receiver's standing upon the fact that the receiver was "acting for the benefit of all creditors," but rather on the fact that three creditors were entities subject to the receivership, meaning the SEC receiver was tasked with acting on those creditors' behalves. *See* *Scholes, 56 F.3d at 753-55*. Indeed, the Second Circuit distinguished the holding in *Scholes* and a similar Seventh Circuit **[**94]** case, because no creditors were subject to the receivership in *Eberhard*. *See* *Eberhard, 530 F.3d at 132-35* (distinguishing *Scholes, 56 F.3d at 753-55*, and *Troelstrup, 130 F.3d at 1275-76*). Without demonstrating under U.K. law that the Plaintiffs are authorized to act on behalf of the Debtor's creditors, the Plaintiffs' reliance on *Scholes* is inapposite.

Second, the Plaintiffs' reliance on a broad interpretation of the Insolvency Act's "sweep-up" provision, Paragraph 13, is wholly unsubstantiated. The Plaintiffs could not produce a single case supporting their argument and their expert's opinion that Paragraph 13 confers standing on U.K. liquidators to assert causes of action on behalf of a company's creditors.[40] ***HN38*** **[*529]** While this Court is authorized in its discretion to grant broad relief to the foreign representatives before it, *see* *In re Atlas Shipping, 404 B.R. at 738-39* (discussing a bankruptcy court's discretion to grant relief under *sections 1521* and *1522 of the Bankruptcy Code*), the Court's discretion is not without limitation, nor is it so broad as to stretch the laws of a foreign jurisdiction—certainly without any basis grounded in that foreign jurisdiction's laws.

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therefor against the debtor and the transferee who **[**95]** are defendants in addition to the other relief granted by the judgment. The fee so fixed shall be without prejudice to any agreement, express or implied, between the creditor, receiver, trustee in bankruptcy, or assignee for the benefit of creditors and his attorney with respect to the compensation of such attorney.

N.Y. Debt. & Cred. Law § 276-a (emphasis added).

[40] At oral argument, the Plaintiffs provided the Court with a U.K. court case purportedly in support **[**96]** of their argument. (*See* Dec. 16, 2014 Hr'g. Tr. at 20:1-22:22; Pls.' Dec. 16, 2014 Hr'g. Binder, Tab 2, *The Connaught Income Fund, Series 1 (in liquidation) v. Capita Fin. Managers Ltd.*, [2014] EWHC 3619 (Comm).) As the Court indicated at the hearing, the case is insufficient to take the leap the Plaintiffs seek to make with respect to a liquidator's authority to act on behalf of creditors. (*See* Dec. 16, 2014 Hr'g. Tr. at 21:16-22:19 ("COURT: I see where [the case] says [Paragraph 13] is standalone, but I still don't see how it authorizes a liquidator to pursue claims that belong to somebody else. . . . [Standalone] may mean nothing more than the liquidator can pursue all rights that belong to the *estate*, . . . I see this as saying [Paragraph 13] is standalone, it is authority for a liquidator to pursue whatever rights the *estate* may have . . . even if there isn't some other section of the insolvency statute that says you can do it." (emphasis added)).)

Although the Defendants could not provide a case directly on point to the contrary, the Defendants' expert did provide case law holding that Paragraph 13 was not broadly construed in other circumstances. (*See* Isaacs Decl. ¶ 11.4 (discussing **[**97]** *Re Phoenix Oil & Transport Co Ltd (No 2)* [1958] Ch 565 (rejecting liquidators' contention that the distribution of surplus assets is one of the "other things" which the liquidator had power to do under Paragraph 13 because the provision is merely a sweep-up provision at the end of a list of functions which the liquidator is enabled to perform in connection with the administration of a company's affairs and no more); *Re MF Global Ltd* [2013] 1 BCLC 552 at 565 ("While an administrator has power 'to do all other things incidental to the exercise of the foregoing powers' (para 23 of Sch 1), the equivalent power of a liquidator is *limited* to doing 'all such other things as may be necessary for winding up the company's affairs and distributing its assets.'" (emphasis added))).)

The Court concludes that the Plaintiffs fail to meet their burden in establishing that they have standing to assert their NYDCL section 276 claim. Count I is therefore **DISMISSED**.[41]

E. Count III - Unjust Enrichment Claim

Apax and TPG argue that Count III of the Complaint, asserting an unjust enrichment claim against Apax and TPG must be dismissed for three reasons: (1) the Plaintiffs lack standing to assert the unjust enrichment claim (Defs.' Mot. at 18-19); (2) the unjust enrichment **[**99]** claim is not timely (*id*. at 19-21); and (3) the Complaint fails to state a claim for unjust enrichment (*id*. at 33-35). As set forth below, the Court finds that at this stage in the pleadings, the Plaintiffs have adequately alleged standing to bring their unjust enrichment claim against the Apax and TPG Defendants over which the Court has personal jurisdiction (collectively, the "U.S. Apax/TPG Defendants"). The Court also concludes that the unjust enrichment claim is not barred by the applicable statute of limitations and that the Complaint adequately pleads the claim. Therefore, the Defendants' Motion to Dismiss Count III is **DENIED**.

1. Standing

Apax and TPG argue that the Plaintiffs lack standing to bring their unjust enrichment claim under the Second Circuit's *Wagoner* rule, which holds that "[a] claim against a third party for defrauding a corporation with the cooperation of management accrues to creditors, not to the guilty corporation." (Defs.' Mot. at 18 (quoting *Giddens v. D.H. Blair & Co. (In re A.R. Baron & Co.), 280 B.R. 794, 800 (Bankr. S.D.N.Y. 2002)*).) They contend that "[i]n federal court, prudential considerations deprive a bankruptcy trustee of standing even to bring a claim that would be barred **[*530]** by the affirmative defense of *in pari delicto*." (*Id*. at 18-19 (citing *O'Connell v. Pension Fin. Servs. (In re Arbco Capital Mgmt., LLP), 498 B.R. 32, 45 (Bankr. S.D.N.Y. 2013)*).) Apax and TPG base this argument on **[**100]** the following allegation in the Complaint: "The December 2006 CPEC Redemption and the Consulting Fees Transfer were made by the Company, by and through its sole manager Hellas and the members of the Board of Managers of Hellas, with actual intent to hinder, delay, and/or defraud the present and future creditors of the company . . . ." (*Id*. at 19 (quoting Compl. P 158).) According to Apax and TPG, this allegation illustrates that the unjust enrichment claim is based on misconduct that Hellas II "essentially took part in," and the Plaintiffs lack standing as a result. (*Id*. at 18-19.)

The Plaintiffs contend that Apax and TPG may not rely on an *in pari delicto* defense because they are not third parties; rather they are insiders who "advised and managed" Hellas II. (Opp. at 25.) According to the Plaintiffs, the *in pari delicto* defense may not be raised by insiders (*id*. (citing *KDI Holdings, 277 B.R. at 518*; *Picard v. Madoff (In re Bernard L. Madoff Inv. Sec. LLC), 458 B.R. 87, 124 (Bankr. S.D.N.Y. 2011)*), and Hellas II's management "was comprised of TPG and Apax executives" (*id*. (citing Compl. PP 95, 125-27)).

[41] While Count II is dismissed under the Court's choice of law analysis, the claim is also barred for lack of standing for the same reasons articulated as to Count I. *See* Tommy Lee Handbags Mfg. Ltd. v. 1948 Corp., 971 F. Supp. 2d 368 (S.D.N.Y. 2013) ("In order to bring a fraudulent conveyance claim, the plaintiff must therefore be a creditor **[**98]** of the transferor [as] [n]on creditors can find no relief in a statute whose object . . . is to enable a creditor to obtain his due despite efforts on the part of a debtor to elude payment." (quoting *Harris v. Coleman*, 863 F. Supp. 2d 336, 341 (S.D.N.Y. 2012)) (conducting a standing analysis for a NYDCL constructive fraudulent conveyance claim). Since Counts I and II are dismissed on standing and/or choice of law grounds, it is unnecessary for the Court to resolve whether the NYDCL provisions asserted by the Plaintiffs in their Complaint should be afforded extraterritorial effect.

Even though the Court concludes that both Counts I and II asserted under the NYDCL are dismissed with prejudice, the Court does not decide whether, on a motion for leave to amend the Complaint to assert fraudulent conveyance claims under U.K. or other foreign law, the Plaintiffs would have the requisite standing to assert such foreign law claims or the merits of such claims.

Specifically, the Plaintiffs assert that "[w]here, as alleged here, 'controlling shareholder[s] forced the corporation to act for the benefit of the shareholder[s],' the *in pari delicto* defense is 'unavailable.'" (*Id.* (citing KDI Holdings, 277 B.R. at 518; Krys v. Sugrue (In re Refco Inc. Sec. Litig.), 2010 U.S. Dist. LEXIS 132778, 2010 WL 6549830, at *15 (S.D.N.Y. Dec. 6, 2010) ("[I]t would be absurd to allow a wrongdoing insider to rely **[**101]** on the imputation of his own conduct to the corporation as a defense."), *adopted in relevant part by* 779 F. Supp. 2d 372 (S.D.N.Y. 2011)).)

In response, Apax and TPG contend that only "[g]eneral partners, sole shareholders, and sole decision makers" are considered insiders barred from asserting an *in pari delicto* defense (Defs.' Reply at 17 (quoting Picard, 458 B.R. at 124)); however, the Plaintiffs have not alleged that any Apax or TPG Defendants had such a relationship to Hellas II (*id.* (citing Compl. P 40)). To the contrary, "the Complaint concedes that the Sponsors, only one of which is a Defendant . . . were the shareholders of Hellas II's ultimate parent." (*Id.* (citing Compl. P 40)). Moreover, Apax and TPG argue that the Plaintiffs do not allege that any Apax or TPG Defendant was an officer or director of Hellas II; instead, they make "conclusory allegations that unspecified TPG and Apax Defendants 'controlled' Hellas II . . . ." (*Id.* at 17-18 (citing Compl. P 95).) At the Hearing, counsel for Apax and TPG elaborated on this point, arguing that the allegations in the Complaint improperly lumped the Apax and TPG Defendants together, without specifying which such Defendants engaged in conduct amounting to any requisite degree of control. (*See* Dec. 16, 2014 **[**102]** Hrg. Tr. 49:21-50:3, 52:11-20.)

As discussed above, ***HN39*** with the exception of the relief available under the Bankruptcy Code's avoidance powers, the Plaintiffs, as foreign representatives of the Debtor, may be granted any relief available to a trustee. 11 U.S.C. § 1521(a)(7). "As a general matter, a trustee stands in the shoes of the debtor and has standing to bring any action that the debtor could have instituted prepetition." Giddens, 280 B.R. at 799 (quoting Wagoner, 944 F.2d at 118). While a trustee has standing to bring claims belonging to the debtor, it does not have standing to assert claims on behalf of individual creditors. *Id.* (citations omitted); *see* Picard v. Taylor (In re **[*531]** Park S. Sec., LLC), 326 B.R. 505, 514 (Bankr. S.D.N.Y. 2005) ("[A]bsent another basis for standing, the Trustee may not pursue a claim on the estate's behalf if it is particular only to certain creditors." (citation omitted)). Whether a claim belongs to the debtor or to individual creditors is determined by state law. *Id.* (citing Mediators, Inc. v. Manney (In re Mediators, Inc.), 105 F.3d 822, 826 (2d Cir. 1997); Hirsch v. Arthur Andersen & Co., 72 F.3d 1085, 1093 (2d Cir. 1995)).

HN40 In *Wagoner*, the Second Circuit developed a prudential standing rule referred to as the *Wagoner* rule. *McHale v. Citibank, N.A. (*In re 1031 Tax Grp., LLC), 420 B.R. 178, 189-90 (Bankr. S.D.N.Y. 2009) (citing Wight v. BankAmerica Corp., 219 F.3d 79, 86-87 (2d Cir. 2000)). The *Wagoner* rule provides that "when a bankrupt corporation has joined with a third party in defrauding its creditors, the trustee cannot recover against the third party for the damage to the creditors." **[**103]** Wagoner, 944 F.2d at 118; *see* Picard v. JPMorgan Chase & Co. (In re Bernard L. Madoff Inv. Sec. LLC), 721 F.3d 54, 63 (2d Cir. 2013) ("The debtor's misconduct is imputed to the trustee because, innocent as he may be, he acts as the debtor's representative." (citations omitted)). Post-*Wagoner*, "courts in this Circuit have consistently held that bankrupt corporations, and trustees standing in the shoes of the bankrupt corporation, lack standing to assert claims against third parties for assisting in defrauding the company where corporate management conducted the alleged fraud." McHale, 420 B.R. at 197 (collecting cases).

HN41 "The doctrine of *in pari delicto* is a well-established principle of New York law based on the notion that 'one wrongdoer may not recover against another.'" *Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC, 987 F. Supp. 2d 311, 314 (S.D.N.Y. 2013)* (citation omitted). *In pari delicto* is an "equitable defense similar to the unclean hands doctrine," *McHale, 420 B.R. at 197* (citation omitted), which "exists because, as a matter of equity, courts should not help plaintiffs profit from their wrongdoings," *id.* (citing *Ross v. Bolton, 904 F.2d 819, 824 (2d Cir. 1990))*. "Although, under New York State law, *in pari delicto* is an affirmative defense, in federal court prudential considerations deprive a bankruptcy trustee of standing to even bring a claim that would be barred by *in pari delicto*." *Picard v. HSBC Bank PLC, 454 B.R. 25, 29 (S.D.N.Y. 2011)* (citations omitted).

HN42 Both the *Wagoner* rule and the *in pari delicto* doctrine are "grounded **[**104]** in common law agency principles." *Id.* (citations omitted). Because a trustee in bankruptcy may assert whatever claims the debtor corporation may have brought prepetition, subject to all available defenses, "any wrongdoing imputed to the corporation under a theory of agency also taints the trustee's claims." *Id. at 198-99*. "Because management's misconduct is imputed to a corporation, and because a trustee stands in the shoes of the corporation, the *Wagoner* rule bars a trustee from suing to recover for a wrong that he himself essentially took part in." *Id.* (citing *Wight, 219 F.3d at 87*). Likewise, under the *in pari delicto* doctrine, "[t]raditional agency principles play an important role in an *in pari delicto* analysis." *Kirschner v. KPMG LLP, 15 N.Y.3d 446, 938 N.E.2d 941, 950, 912 N.Y.S.2d 512 (N.Y. 2010)* (emphasis added).

HN43 "It is a 'fundamental principle of agency that the misconduct of managers within the scope of their employment will normally be imputed to the corporation.'" *McHale, 420 B.R. at 199* (citing *Wight, 219 F.3d at 86*); *see Kirschner, 938 N.E.2d at 951* ("[A] corporation 'is **[*532]** represented by its officers and agents, and their fraud in the course of the corporate dealings [] is in law the fraud of the corporation.'" (citations omitted)). This principle is premised on a presumption that agents communicate all information to their principals and thereby receive tacit consent for **[**105]** their actions, *McHale, 420 B.R. at 199* (citing *Bankr. Servs., Inc. v. Ernst & Young, Ernst & Young LLP (In re CBI Holding Co.), 529 F.3d 432, 448 (2d Cir. 2008))*, and a presumption that "the principal is generally better suited than a third party to control the agent's conduct, which at least in part explains why the common law has traditionally placed the risk [of loss] on the principal," *Kirschner, 938 N.E.2d at 951*.

Because both the *Wagoner* rule and *in pari delicto* doctrine "are grounded in substantive agency law, and identical tests appear to apply to both doctrines," this Court will analyze the parties' *in pari delicto* and *Wagoner* rule arguments together.[42] *McHale, 420 B.R. at 198* (citations omitted).

HN44 The *in pari delicto* doctrine "does not apply to the actions of fiduciaries who are insiders in the sense that they either are on the board or in management, *or in some other way control the corporation*." *In re Optimal U.S. Litig., 813 F. Supp. 2d 383, 400 (S.D.N.Y. 2011)* (emphasis in original) (quoting *Refco, 2010 U.S. Dist. LEXIS 132778, 2010 WL 6549830, at *15)* (internal quotation marks omitted); *see Mediators, 105 F.3d at 826-27* (noting that the *Wagoner* rule and the *in pari delicto* doctrine do not prevent "a bankruptcy trustee, suing on behalf of the debtor under New York law, [from] pursu[ing] an action for breach of **[**106]** fiduciary duty against the debtor's fiduciaries" (citing *Keene Corp. v.*

[42] Because the Court applies New York law to the Plaintiffs' unjust enrichment claim, the Court takes no position whether the *in pari delicto* doctrine would apply to an unjust enrichment claim asserted under U.K. law.

Coleman (In re Keene Corp.), 164 B.R. 844, 853 (Bankr. S.D.N.Y. 1994))); Global Crossing Estate Representative v. Winnick, No. 04 Civ. 2558 (GEL), 2006 U.S. Dist. LEXIS 53785, 2006 WL 2212776, at *15 (S.D.N.Y. Aug. 3, 2006) ("[T]o the extent plaintiff can establish that defendants' alleged control and domination of [the debtor] rendered them corporate insiders and fiduciaries, *Wagoner* and the "in pari delicto" rules will not bar plaintiff's fiduciary duty claims."); *see also* Teras Int'l Corp. v. Gimbel, No. 13-CV 6788 (VEC), 2014 U.S. Dist. LEXIS 174328, 2014 WL 7177972, at *10 (S.D.N.Y. Dec. 17, 2014) (holding that breach of fiduciary duty claims against defendants alleged to be directors of bankrupt corporation were not barred by the *in pari delicto* doctrine). The rationale for not extending the *in pari delicto* defense to insiders is that "[i]n such cases, the element of mutual fault [*in pari delicto*] is not present, thereby rendering the defense unavailable." KDI Holdings, 277 B.R. at 518; *see* Kalb, Voorhis & Co. v. Am. Fin. Corp., 8 F.3d 130, 133 (2d Cir. 1993) ("[W]here the parties do not stand on equal terms and one party controls the other, the *in pari delicto* doctrine does not apply." (citing Ross, 904 F.2d at 824 (2d. Cir. 1990))).

HN45 "General partners, sole shareholders, and sole decision makers" are paradigmatic insiders for purposes of the *in pari delicto* doctrine under New York law. Picard, 458 B.R. at 124 (citing Devon Mobile Commc'ns Liquidating Trst v. Adelphia Commc'ns Corp. (In re Adelphia Commc'ns Corp.), 322 B.R. 509, 529 n.18 (Bankr. S.D.N.Y. 2005); Granite Partners, L.P. v. Bear, Stearns & Co., 17 F. Supp. 2d 275, 308 (S.D.N.Y. 1998)). However, "[e]ven a third-party professional, typically the quintessential outsider, may surrender **[*533]** an *in pari delicto* defense where it exerts sufficient domination and control over the guilty corporation to render itself an **[**107]** insider." *Id.* (citing KDI Holdings, 277 B.R. at 518; In re IDI Constr. Co., 345 B.R. 60, 67 (Bankr. S.D.N.Y. 2006)).

In *KDI Holdings*, the bankruptcy court rejected the defendants' *in pari delicto* defense, finding that the complaint sufficiently alleged that the defendants "may have gained control over the [d]ebtors," thereby rendering them insiders. 277 B.R. at 512. Specifically, the complaint alleged that the defendants, through a partnership with a family member that held an interest in certain unsecured creditors, were granted security interests in the debtors' assets in exchange for certain loans made by the defendants. *See* id. at 499. As a result of the defendants extending such loans, an entity formed by one of the defendants' family members gained control of the each of the debtors' voting stock. *See id*. Thereafter, individuals connected to the defendants were appointed as directors and managers of the debtors, "obtain[ing] unfettered control over the assets of the . . . [d]ebtors and the performance of such [d]ebtors' massive pre-petition obligations." *Id.* (citation and internal quotation marks omitted). The court found that the plaintiff "alleged sufficient facts with regard to [the defendants'] insider status through domination and control to render the *in pari delicto* defense in applicable . . . ." Id. at 518-19.

Here, the Complaint **[**108]** is replete with allegations that Apax and TPG dominated and controlled the management of Hellas II and exercised their control to accomplish the December 2006 CPEC Redemption. (*See* Compl. PP 95, 125-129.)

First, the Complaint alleges that "[a]t all relevant times, TPG and Apax directed and controlled the actions of the Sponsors, the Hellas Entities, [Hellas II], and [Hellas II]'s subsidiaries." (*Id.* P 95.) The Plaintiffs allege that each of the eight Sponsors were formed, owned, and controlled by Apax and TPG. (*See* Compl. PP 40-47.) The Sponsors "collectively held all of the CPECs and common stock issued by Hellas," and through the Sponsors Apax and TPG "owned and controlled [Hellas II] and its affiliates and obtained proceeds from the December 2006 CPEC Redemption." (*Id.* P 40.)

Apax and TPG ″install[ed] certain key personnel on the board of directors of TIM Hellas.″ (*Id.* P 95 (noting that the six of the ten directors of TIM Hellas were employees of Apax and TPG, including three employees of Apax and three employees of TPG).) ″Many of those same TPG and Apax personnel (and others) held overlapping positions of authority on the Board of Managers of Hellas (the sole manager of the Company) and in the management of the **[**109]** Sponsors,″ TPG, and Apax. (*Id.*)

Second, the Plaintiffs allege that Apax and TPG exercised their control in accomplishing the December 2006 CPEC Redemption. Specifically, the Plaintiffs allege that the applicable redemption agreement authorizing Hellas II's initial redemption of CPECs issued to Hellas I was executed by Giancarlo Aliberti and Matthias Calice—members of Apax Partners and TPG London, respectively—on behalf of both Hellas entities. (*Id.* P 125.) A separate redemption agreement authorizing Hellas's redemption of CPECs issued to the Sponsors was also executed by Aliberti and Calice on behalf of Hellas and each of the eight Sponsors. (*Id.* P 126.) Both redemption agreements recited that the applicable redemption price per CPEC had been ″determined by the Board of Managers on the basis of the equity value of [Hellas II] and its Subsidiaries by resolutions adopted on December 18, 2006.″ (*Id.* P 125-126.) **[*534]** According to the Plaintiffs, these referenced resolutions adopted by Hellas, as sole manager and general partner of Hellas II, ″were executed by the members of the Board of Managers of Hellas, including Maurizio Bottinelli, Giancarlo Aliberti, Matthias Calice, Philippe Costeletos, Guy Harles, and Benoit **[**110]** Duvieusart (all or nearly all of whom were affiliated with TPG or Apax).″ (Compl. P 127.)

At this stage in the pleadings, the Court concludes that Apax's and TPG's group pleading argument fails and that the Plaintiffs have sufficiently alleged their standing to bring their unjust enrichment claim, as the allegations in the Complaint plausibly suggest that the U.S. Apax/TPG Defendants, through their affiliates, controlled Hellas II, thereby rendering them insiders. (*See* Compl. PP 23-32, 40 (describing the relationship among the TPG Defendants, and Bonderman and Coulter's degree of influence over TPG Defendants that allegedly owned and controlled the Sponsors and Hellas II); *id.* PP 33-40 (describing the relationship among the Apax Defendants. and Apax NY's chairman's degree of influence over the strategies and operations of the Apax Defendants generally).) Whether the U.S. Apax/TPG Defendants specifically exercised a requisite degree of control such that the *Wagoner* rule and *in pari delicto* doctrine do not apply to them raises factual issues that cannot be resolved on a motion to dismiss.[43]

2. Timeliness

HN46 ″Under New York law, the six-year limitations period for unjust enrichment accrues upon the occurrence of the wrongful act giving rise to a duty of restitution and not from the time the facts constituting the fraud are discovered.″ *Cohen v. S.A.C. Trading Corp., 711 F.3d 353, 364 (2d Cir. 2013)* (citation and internal quotation marks omitted); *see also* *N.Y. C.P.L.R. § 213(1)* (McKinney 2014) (providing a statute of limitations of six years for claims ″for which no limitation is specifically prescribed by law″).

With regard to such claims, *section 108(a) of the Bankruptcy Code* provides:

[43] Because the Court finds that the Plaintiffs have alleged sufficient facts to support a plausible inference that **[**111]** the U.S. Apax/TPG Defendants were insiders of Hellas II, the Court need not consider exceptions to the *in pari delicto* doctrine applicable to non-insiders. *See, e.g.,* *Official Comm. of Unsecured Creditors of Verestar, Inc. v. Am. Tower Corp. (In re Verestar, Inc.), 343 B.R. 444, 479 (Bankr. S.D.N.Y. 2006)* (″Misconduct by a corporation's fiduciaries will not be imputed to the corporation, and the doctrine of *in pari delicto* will not apply, where the fiduciaries were acting outside the scope of their employment or engaged in self-dealing and according had an interest 'adverse to the corporation.'″ (citations omitted)).

> ***HN47*** [i]f applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period within which the debtor may commence an action, and such period has not expired before the date of the filing of the petition, **[**112]** the trustee may commence such action only before the later of—
>
> > (1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or
> >
> > (2) two years after the order for relief.

11 U.S.C. § 108(a). ***HN48*** "While there is no dispositive case law addressing whether *[s]ection 108* relief is automatically applicable in . . . chapter 15 cases, this question is squarely addressed by *section 103(a)* of the Code, which incorporates *[s]ection 108* into a chapter 15 proceeding." *In re Fairfield Sentry Ltd., 452 B.R. 52, 57 (Bankr.* **[*535]** *S.D.N.Y. 2011)*. *Section 103(a) of the Bankruptcy Code* provides that chapter 1, "*sections 307*, *362(o)*, *555 through 557*, and *559 through 562* apply in a case under chapter 15." *11 U.S.C. § 103(a)*. *Section 108*'s tolling provision therefore "appl[ies] in a [c]hapter 15 case by virtue of *§ 103(a)*." *In re Fairfield Sentry Ltd., 452 B.R. at 61* (quoting Alesia Ranney-Marinelli, *Overview of Chapter 15 Ancillary and Other Cross-Border Cases*, *82 Am. Bankr. L.J. 269, 313 (2008)*).

The challenged transfers underlying the Plaintiffs' unjust enrichment claim occurred in December 2006, well over six years ago. However, the Debtor's chapter 15 petition was filed in February 2012, before the expiration of the six-year limitations period. Pursuant to *section 108 of the Bankruptcy Code*, made applicable to this case through *section 103(a)*, the statute of limitations was tolled as of the filing of the chapter 15 petition. Consequently, the Plaintiff's unjust enrichment claim is therefore timely.

3. Sufficiency of **[**113]** *Pleadings*

TPG and Apax argue that the Plaintiffs fail to state a claim as a result of the same pleading deficiencies that plague their NYDCL claims. (*See* Defs.' Mot. at 33.) Specifically, they contend that the Plaintiffs do not plead a sufficiently close relationship between TPG and Apax and the holders of the Sub Notes required to allege a claim for unjust enrichment under New York law. (*Id.* at 33.) Additionally, they argue that "the unjust enrichment claim fails because Plaintiffs have not alleged that it would be against 'equity and good conscience' for the Defendants to retain any transfers made to them." (*Id.* at 34.)

HN49 In order to adequately plead an unjust enrichment claim a plaintiff must allege "that (1) the other party was enriched, (2) at [the plaintiff's] expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered." *Ga. Malone & Co. v. Rieder, 19 N.Y.3d 511, 973 N.E.2d 743, 746, 950 N.Y.S.2d 333 (N.Y. 2012)* (quoting *Mandarin Trading Ltd. v. Wildenstein, 16 N.Y.3d 173, 944 N.E.2d 1104, 1110, 919 N.Y.S.2d 465 (N.Y. 2011))*. The New York Court of Appeals has clarified that "a plaintiff cannot succeed on an unjust enrichment claim unless it has a sufficiently close relationship with the other party." *Id.* (citation omitted). The relationship between the plaintiff and the other party must be one that is "not too attenuated," **[**114]** *id. at 747* (citation and internal quotation marks omitted). and the plaintiff's complaint must indicate "a relationship between the parties that could have caused reliance or inducement," *id.* (quoting *Mandarin, 944 N.E.2d at 1111*) (internal quotation marks omitted).

Here, the Plaintiffs have adequately alleged that a sufficient relationship exists between TPG and Apax, on the one hand, and Hellas II, on the other.[44] Indeed, the Complaint sets forth that "[b]y their wrongful acts, statements and omissions, and through the wrongful diversion and receipt of proceeds from the December 2006 Transaction, the December 2006 CPEC Redemption, and the Consulting Fees Transfer, TPG and Apax have unjustly retained benefits that belong to the **[*536]** Company, and their retention of those benefits violates fundamental principles of justice, equity and good conscience." (Compl. P 170.) The Plaintiffs need not allege that privity exists between Hellas II and TPG and Apax, nor do they need to allege that TPG and Apax were the direct transferees of the diverted funds. "[T]he fact that money was transferred directly from [plaintiff's possession] to [defendant's] (albeit by a third party) is enough to sustain a claim for unjust enrichment." *T.D. Bank, N.A. v. JP Morgan Chase Bank, N.A., No. 10-CV-2843 (JG), 2010 U.S. Dist. LEXIS 109471, 2010 WL 4038826, at *5 (E.D.N.Y. Oct. 14, 2010)* (quoting *Newbro v. Freed, No. 06-1722-CV, 2007 U.S. App. LEXIS 4769, 2007 WL 642941, at *2 (2d Cir. Feb. 27, 2007))*.

III. CONCLUSION

For the foregoing reasons, the Motions to Dismiss are granted in part and denied in part. The Apax/TPG Motion is **GRANTED** as to the Non-U.S. Defendants, but **DENIED** as to the U.S. Apax/TPG Defendants.[45] The DB Motion and the TCW Motion are **DENIED**. The Motions to Dismiss are **GRANTED** as to Counts I and II, but **DENIED** as to Count III.

/s/ Martin Glenn

MARTIN GLENN

United States Bankruptcy Judge

Dated: January 29, 2015

New York, New York

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[44] The Defendants **[**115]** appear to argue that the relevant relationship must be alleged between TPG and Apax and Hellas II at times, and between TPG and Apax and holders of the Sub Notes at other times. Because the Plaintiffs purport to bring their unjust enrichment claim on behalf of the Debtor, the Defendants' relationship with Hellas II is the applicable focal point.

[45] For the avoidance of doubt, the Apax/TPG Motion is granted as to Apax Europe VI, Apax Partners, Apax Nominees, Halusa, and TPG London. The Apax/TPG Motion is denied as to TPG Capital, Bonderman, Coulter, TPG IV, and TPG T[3] II.

Tronox Inc. v. Anadarko Petro. Corp. (In re Tronox Inc.)

United States District Court for the Southern District of New York

February 1, 2016, Decided; February 1, 2016, Filed

14-cv-5495 (KBF)

Reporter
549 B.R. 21; 2016 U.S. Dist. LEXIS 11513; 46 ELR 20027

IN RE ***TRONOX*** INCORPORATED; ***TRONOX*** INCORPORATED, et al., Plaintiffs, -v- ANADARKO PETROLEUM CORPORATION, et al., Defendants.

Prior History: *Tronox Inc. v. Anadarko Petro. Corp. (In re Tronox Inc.), 2014 U.S. Dist. LEXIS 158767 (S.D.N.Y., Nov. 10, 2014)*

Core Terms

Injunction, entity, Plaintiffs', adversary proceeding, piercing, Plant, veil, Settlement, alter ego, allegations, Chemical, theories, derivative claim, parties, oral argument, bankruptcy court, derivative, predecessors, non-debtor, corporate veil, injuries, treatment plant, affiliate, movant, indirect, respondeat superior, particularized, bankrupt estate, cause of action, operations

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Judges: KATHERINE B. FORREST, United States District Judge.

Opinion by: KATHERINE B. FORREST

Opinion

[*26] OPINION & ORDER

KATHERINE B. FORREST, District Judge:

In November 2014, this Court approved a settlement resolving two lawsuits in which ***Tronox***, Incorporated and affiliated entities (collectively, "***Tronox***")—all of which had filed chapter 11 bankruptcy petitions in the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court")—and the United States government asserted fraudulent transfer and other claims against **[**4]** Kerr-McGee Corporation (referred to herein, for purposes of clarity, as "(new) Kerr-McGee Corp.") and its parent company, Anadarko Petroleum Corporation ("Anadarko"). See *Tronox Inc. v. Anadarko Petroleum Corp. (In re Tronox Inc.) ("Anadarko"), No. 14-CV-5495 KBF, 2014 U.S. Dist. LEXIS 158767, 2014 WL 5825308 (S.D.N.Y. Nov. 10, 2014)*. As part of its approval of the settlement, this Court also issued a permanent injunction (the "Injunction") that prohibited creditors in ***Tronox***'s bankruptcy action and others from pursuing certain claims.

Now pending before the Court is a motion by (new) Kerr-McGee Corp. to enforce that Injunction against roughly 4,300 individuals (collectively, the "Avoca Plaintiffs") who have sought to restore to the active calendar of the Court of Common Pleas of Luzerne County, Pennsylvania (the "Pennsylvania **[*27]** Court"), a number of actions (referred to collectively as the "PA State Action") first filed in 2005 and then stayed pending resolution of ***Tronox***'s bankruptcy proceedings. The PA State Action alleges tort claims arising from the operation of a wood treatment plant (the "Avoca Plant") formerly owned and operated by the predecessor of a ***Tronox*** affiliate. (ECF No. 37.) (New) Kerr-McGee Corp. asserts that the Injunction forecloses further litigation **[**5]** by the Avoca Plaintiffs of these claims; the Avoca Plaintiffs take a contrary position.[1]

(New) Kerr-McGee Corp.'s motion raises various issues that require consideration of the complicated corporate history of ***Tronox*** and (new) Kerr-McGee Corp., the nature of the claims barred by the Injunction, the issues resolved (and claims extinguished) in ***Tronox***'s bankruptcy, and the nature of any remaining live claims in the PA State Action.

The dispute between the parties concerns whether the Avoca Plaintiffs' sole remedy for their injuries in the PA State Action must come from proceeds of a litigation trust established as part of ***Tronox***'s plan of reorganization, or whether they may seek to supplement such recovery by pursuing claims against (new) Kerr-McGee Corp. (New) Kerr-McGee Corp. was not itself a debtor in ***Tronox***'s bankruptcy, but had once been the ultimate parent of certain ***Tronox*** debtors. The Avoca Plaintiffs have acknowledged that, as a result of **[**6]** ***Tronox***'s bankruptcy, any direct or indirect claims they may have against the ***Tronox*** debtors have been extinguished; but they vigorously assert that their PA State Action claims—filed more than a decade ago—against the non-debtor, (new) Kerr-McGee Corp., were unaffected by the bankruptcy or the Injunction.

The PA State Action alleges generally that the Avoca Plaintiffs suffered injuries as the result of operations at the Avoca Plant between the years 1956 and 1996. The Avoca Plaintiffs' complaint asserts tortious conduct by the entities which operated that plant—all of which became debtors in the bankruptcy—as well as their parent entities. The most direct parent entity (referred to herein as "(old) Kerr-McGee Corp.") ultimately became ***Tronox*** debtor entity ***Tronox*** Worldwide LLC; the ultimate, indirect parent of the Avoca Plant operator was (new) Kerr-McGee Corp., the movant herein. Again, (new) Kerr-McGee Corp. was not a bankruptcy debtor. In their PA State Action, the Avoca Plaintiffs assert both direct and indirect claims as to all parent entities (both the direct parent debtor and ultimate parent non-debtor).

As discussed below, the Avoca Plaintiffs' theories as to the nature of their **[**7]** claims against (new) Kerr-McGee Corp., and their position as to which claims remain live, have shifted in various filings to this and the Pennsylvania Court, and at oral argument on this motion. In sum, they now concede (as they must) that all claims asserted against any entity in existence during the period of tortious conduct—notably,

[1] The parties agree that this Court has jurisdiction to interpret and enforce the Injunction. (December 3, 2015 Oral Arg. Tr. ("Arg. Tr.") at 13:5-16, ECF No. 62); see *Travelers Indem. Co. v. Bailey, 557 U.S. 137, 151, 129 S. Ct. 2195, 174 L. Ed. 2d 99 (2009)* (recognizing a court's ability to interpret and enforce its own prior orders).

between 1956 and 1996—have been extinguished in ***Tronox***'s bankruptcy. It is both clear and uncontested that those entities became the ***Tronox*** debtor entities. The Avoca Plaintiffs argue, however, that their complaint also asserts direct and indirect claims against (new) Kerr-McGee Corp. which were not extinguished—based on theories of vicarious liability, respondeat superior, alter ego, and veil piercing.

[*28] A key task necessary to resolution of this motion is therefore to decipher the nature of any claims asserted against the sole possible remaining defendant, (new) Kerr-McGee Corp. The Court puts to one side an important fact, which is that all of the tortious conduct set forth in the Avoca Plaintiffs' complaint relates to actions occurring within a time period predating the conceded date of existence of (new) Kerr-McGee Corp.; the Court will return to **[**8]** that later in this Opinion. The task of deciphering the claims is complicated by the fact that the Avoca Plaintiffs' complaint treats as a single entity (under the general name "Kerr-McGee Corp.") what were in fact three separate entities who were—at various times—the parent entities of the Avoca Plant's operator: (1) the original parent of the operating company, Kerr-McGee Corp. (i.e. (old) Kerr-McGee Corp.), (2) that entity's successor, Kerr-McGee Operating Corp. (which became the debtor ***Tronox*** Worldwide LLC), and (3) an entity also confusingly called "Kerr-McGee Corp." that did not come into existence until 2001 (originally as an entity named "Kerr-McGee HoldCo, Inc.", and renamed "Kerr-McGee Corp." in 2005). This third entity is (new) Kerr-McGee Corp., the movant herein. The Avoca Plaintiffs' complaint does not distinguish between these three entities.

At oral argument on this motion, counsel for the Avoca Plaintiffs conceded that the key allegations in the PA State Action against the movant herein are set forth in paragraph 21 of the complaint. In that paragraph, the Avoca Plaintiffs allege that "Kerr-McGee Corp." "provided environmental policies, legal counsel, hydrological services **[**9]** and laboratory technical services in connection with the operation of the wood treatment plant," "communicated with environmental agencies and approved and controlled environmental budgets and expenditures," and directed personnel in connection with, inter alia, emission controls and toxic waste handling. (Decl. of Donald A. Soutar, Ex. A ("Master Complaint") ¶ 21, ECF No. 44.) The counts setting forth the causes of action—of which there are 37—refer to claims such as battery, negligence, wrongful death, fraudulent misrepresentation, ultra-hazardous activity, trespass, nuisance, and the Pennsylvania Hazardous Sites Cleanup Act. There is no separate claim against any of the parent defendants, nor is there a prayer for relief which seeks separate relief against them. In short, the liability of any of the three parent entities—two of whom were bankruptcy debtors and one of whom (the movant herein) was not—requires a determination of liability on a specific tort claim against the operating company debtor entity.

The Avoca Plaintiffs contend that the debtors' underlying liability for operating the Avoca Plant has been established by prior arbitrations in the PA State Action and findings **[**10]** of fact made by United States Bankruptcy Judge Allan L. Gropper in the adversary proceeding against (new) Kerr-McGee Corp. As discussed below, however, the arbitrations did not reach the issues necessary to a final adjudication of the claims in the PA State Action, and Judge Gropper's findings in the adversary proceeding are of no help as they were superseded by a settlement and thus never became final and binding.

All of this takes some time to sort through, but at the end of the day the answer to the core question posed to this Court is clear: ***Tronox***'s bankruptcy proceeding has extinguished the Avoca Plaintiffs' claims in the PA State Action. No plausible claim is left for the Avoca Plaintiffs to pursue against (new) Kerr-McGee Corp. While the Avoca Plaintiffs evinced an intent to carve out such claims during settlement discussions in ***Tronox***'s bankruptcy, **[*29]** intent alone cannot breathe life into that which has ceased to exist. There are several separate paths to this conclusion.

First, as a matter of law, no plausible direct claim can exist for assault, battery, negligence, and other claims (including within those claims the allegations of direct parental control of policies and decision-making), **[**11]** by a corporate entity, (new) Kerr-McGee Corp., that did not exist until several years after the events at issue.

Second, to the extent that the Avoca Plaintiffs believe that the concepts of alter ego, veil piercing, or respondeat superior allow them to make claims solely against (new) Kerr-McGee Corp., without involving the ***Tronox*** debtors, they are mistaken. The concepts of alter ego, veil piercing and respondeat superior are remedial—they are designed to enable a plaintiff who would not be able to obtain a remedy from the direct corporate actor to seek it from a controlling parent whose legal separateness was, in actuality, a fiction. The doctrines ensure that plaintiffs who obtain a liability determination are not left without a remedy as a result of corporate shenanigans; as pled here, they are decidedly not a stand-alone cause of action against a parent. Those theories require the predicate establishment of liability against a subsidiary or affiliate, but here that predicate is specifically and finally foreclosed.

Here, the Avoca Plaintiffs settled their claims against ***Tronox***—they accepted a share of the proceeds obtained by the "Anadarko Litigation Trust"[2] as their sole recourse **[**12]** against the ***Tronox*** debtors. That settlement meant that the Avoca Plaintiffs could not pursue avenues of recovery for ***Tronox***'s liability beyond their share of the trust proceeds.

Third, the Injunction prohibits pursuit of the Avoca Plaintiffs' alter ego, veil piercing, and respondeat superior claims. As explained below, the Injunction prohibits ***Tronox***'s creditors from asserting any claims that were or could have been asserted by ***Tronox***'s trustee in the adversary proceeding against (new) Kerr-McGee Corp. The scope of claims that could have been brought in that adversary proceeding includes any claims that could have been brought against **[**13]** (new) Kerr-McGee Corp. by the trustee of the ***Tronox*** estate. The trustee, in turn, had the power to assert, on behalf of ***Tronox***'s creditors, claims that arise from liabilities that are derived from or through ***Tronox*** that are generalized and common to all creditors. The Avoca Plaintiffs' theories of liability against (new) Kerr-McGee Corp.—insofar as they seek to hold that entity responsible for ***Tronox***'s conduct as the alter ego of, or based on a theory of veil piercing—are generalized and common to all creditors, and are therefore barred by the Injunction. In this regard, the Avoca Plaintiffs' focus on the nature of their injuries versus the theory by which they seek to obtain redress from (new) Kerr-McGee Corp. is misguided.

Fourth, the Avoca Plaintiffs' own admissions as to how they would intend to prove their claims against (new) Kerr-McGee Corp. shows that their claims are barred by the Injunction. At oral argument, the Avoca Plaintiffs conceded that they would seek to rely on liability findings in the PA **[*30]** State Action against the ***Tronox*** debtors, as well Judge Gropper's findings of fact in the adversary proceeding against (new) Kerr-McGee Corp., to prove their alter ego and veil piercing **[**14]** claims. According to the Avoca Plaintiffs, their theories of getting to a non-debtor require steps necessarily involving debtors. As a first step (after establishing liability for the tort claim, which has its own issues), they would seek to pierce the corporate veil at the initial step between the debtor operating company of the Avoca Plant (***Tronox*** LLC), and its direct parent, also a debtor (***Tronox*** Worldwide LLC). But, the Injunction released any such claim for veil piercing as between these two entities. The necessary next step—in which debtor ***Tronox*** Worldwide LLC pierces the veil between it and its former parent, non-debtor (new) Kerr-McGee Corp.—is similarly prohibited by the Injunction. It does not help if the veil piercing claim is pursued by the Avoca Plaintiffs instead of by debtor ***Tronox*** Worldwide LLC. To succeed, such a claim still requires litigated veil piercing at both levels. And veil piercing assumes an underlying liability—but that underlying liability is not established. Judge Gropper's findings are of little assistance as they relate to entirely different legal claims (actual and constructive fraudulent conveyance versus alter ego or veil piercing) and were in any **[**15]** event never entered as a final appealable order because the adversary action was ultimately settled. Judge Gropper's findings are, in short, not preclusive or binding as a matter of law.

Accordingly, for the reasons set forth below, Kerr-McGee's Corp.'s motion to enforce the Injunction is therefore GRANTED. The Avoca Plaintiffs are ORDERED to abide by the terms of the Injunction, and to therefore dismiss their actions in the Pennsylvania Court against (new) Kerr-McGee Corp. (and the ***Tronox*** debtors) with prejudice, and make no attempt to file any actions making similar claims against (new) Kerr-McGee Corp. (or the ***Tronox*** debtors) in any other forum.

I. BACKGROUND

A. Corporate History of ***Tronox*** / Kerr-McGee Corp.

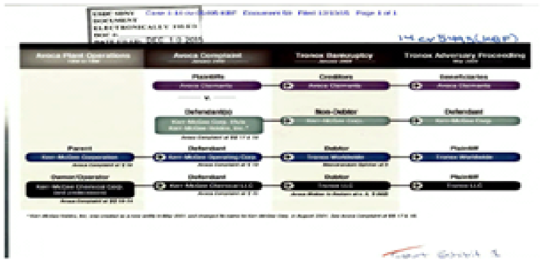
Before turning to the specifics of the Avoca Plaintiffs' allegations, it is necessary to lay out the relationship and relevant roles played by the four defendants in the PA State Action. To understand each defendant's role, the Court must explain certain aspects of Kerr-McGee Corp.'s and ***Tronox***'s complex corporate history. Although tedious, this exercise is an important one. The purpose of the below factual recitation is to explain why—based on the Avoca Plaintiffs' own concessions—it **[**16]** is not theoretically possible for the movant herein to have had any role or have taken any action with respect to the operation of the wood treatment plant (i.e. the Avoca Plant) that serves as the basis for the Avoca Plaintiffs' injuries.

As detailed below, the Avoca Plaintiffs' own concessions show that (new) Kerr-McGee Corp. did not exist at the time the Avoca Plant was in operation; it therefore could not have taken direct actions alleged in the Avoca Plaintiffs' complaint.[3] To assert otherwise is **[*31]** not plausible.[4]

[2] The Anadarko Litigation Trust was created as part of the ***Tronox*** debtors' bankruptcy reorganization plan, the First Amended Joint Plan of Reorganization of ***Tronox***, Inc. (the "Plan"). The Plan transferred the ***Tronox*** debtors' interest in and obligation to pursue the claims asserted in ***Tronox***'s adversary proceeding against (new) Kerr-McGee Corp. and the other defendants in that proceeding. As explained below, ***Tronox***'s Plan provided the tort claimants in ***Tronox***'s bankruptcy a right to a share of the proceeds ultimately recovered by the Anadarko Litigation Trust.

[3] The sources for the Court's factual recitation are the Master Complaint, the Avoca Plaintiffs' motion to restore jurisdiction to the Pennsylvania Court, and the "Amended Joint Fact Stipulations of the Parties" in ***Tronox***'s adversary proceeding against (new) Kerr-

Instead, predecessors of debtors ***Tronox*** LLC (which at one time was known as Kerr-McGee Chemical, LLC) and ***Tronox*** Worldwide LLC (whose predecessor names included Kerr-McGee Corporation and Kerr-McGee Operating Corp.) were responsible for all relevant conduct relating to the operation and oversight of the Avoca Plant. Apparent ambiguity and confusion on this point was created by the fact that two distinct entities have operated under the name "Kerr McGee Corporation." The following chart, which, as noted, was provided by (new) Kerr-McGee Corp. at oral argument and conceded to be accurate by the Avoca Plaintiffs, serves as a helpful visual aid to the Court's succeeding factual **[**17]** recitation.[5]



There are several important points to note from this chart. First, that the movant herein is the defendant entity listed in the second row in the second column: Kerr-McGee Corp. f/k/a Kerr-McGee Holdco, Inc. This is the entity this Court refers to as (new) Kerr-McGee Corp. The chart clearly shows it did not exist during the period of the Avoca Plant's operations. (Old) Kerr-McGee Corp., as well as its successor Kerr-McGee Operating Corp., which are listed in the third row of the first and second columns, are shown as having existed at the time of the Avoca Plant's operations, and becoming one of the debtors, ***Tronox*** Worldwide (LLC). The actual operators of the Avoca Plant are listed in the bottom row, starting out as Kerr-McGee Chemical Corp., then Kerr-McGee Chemical LLC, and then finally becoming debtor ***Tronox*** LLC.

The key facts leading to this corporate history are agreed:

[*32] On November 1, 1965, Kerr-McGee Oil Industries, Inc., which by then had acquired the entity that owned the Avoca **[**19]** Plant, changed its name to Kerr-McGee Corporation (i.e. the (old) Kerr-McGee Corporation). (Decl. of Stephen Scotch-Marmo, Ex. 1 ("Amended Joint Fact Stipulations") ¶ 14, ECF No. 48-1; Master Complaint ¶¶ 10-12.) On or about September 1, 1974, Kerr-McGee Chemical Corporation, a wholly owned subsidiary of (old) Kerr-McGee Corporation, became the direct owner and operator of the Avoca Plant. (Master Complaint ¶¶ 13-14.) On or about January 1, 1998, Kerr-McGee Chemical Corporation merged into Kerr-McGee Chemical, LLC. (Master Complaint ¶ 15.)

On May 13, 2001, (old) Kerr-McGee Corporation and HS Resources, Inc. entered into an Agreement and Plan of Merger pursuant to which (old) Kerr-McGee Corporation would acquire HS Resources, Inc. (Amended Joint Fact Stipulations ¶ 34.) On May 24, 2001, (old) Kerr-McGee Corporation engaged in a series of corporate restructurings to effectuate the acquisition, including by the creation of two new entities called Kerr-McGee Merger Sub, Inc. and Kerr-McGee Holdco, Inc. (Amended Joint Fact Stipulations ¶¶ 35-38.) On August 1, 2001, (old) Kerr-McGee Corporation was merged into Kerr-McGee Merger Sub, Inc., with (old) Kerr-McGee Corporation surviving as a wholly-owned **[**20]** subsidiary of Kerr-McGee Holdco, Inc. under the name Kerr-McGee Operating Corporation. (Amended Joint Fact Stipulations ¶ 39.) Kerr-McGee Holdco, Inc. became the new ultimate parent company of the organization. (Amended Joint Fact Stipulations ¶ 39.) Also on August 1, 2001, Kerr-McGee Holdco, Inc. was renamed Kerr-McGee Corporation (i.e. the (new) Kerr-McGee Corp., the movant herein). (Amended Joint Fact Stipulations ¶ 40.)

As they only came into existence in 2001, neither Kerr-McGee Holdco, Inc. nor (new) Kerr-McGee Corp. existed during the time that other Kerr-McGee entities operated the wood treatment plant whose operations gave rise to the PA State Action.

Through a series of mergers and name changes, Kerr-McGee Operating Corporation (the successor of (old) Kerr-McGee

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McGee Corp. and the Bankruptcy Court's resulting trial decision, both of which the Avoca Plaintiffs accept as accurate for purposes of this motion. The Court also relies on the helpful chart used by (new) Kerr-McGee Corp. at oral argument (Court Ex. 1, ECF No. 59), which the Avoca Plaintiffs also accepted as accurate (see Arg. Tr. at 59:9-16).

[4] As discussed below, the Avoca Plaintiffs contend that this Court is not the proper forum to make such a finding, and that doing so is akin to summary judgment and should be left to the Pennsylvania Court. It is well within this Court's jurisdiction to determine whether a claim asserted to be (1) released in bankruptcy and (2) a derivative claim, states a different, plausible claim. See *Luan Inv. S.E. v. Franklin 145 Corp. (In re Petrie Retail, Inc.), 304 F.3d 223, 229 (2d Cir. 2002)* (stating that bankruptcy jurisdiction exists after a plan of reorganization has become effective when the proceeding is "not independent of the reorganization"); *Savoy Senior Housing Corp. v. TRBC Ministries, LLC, 401 B.R. 589, 596-97 (S.D.N.Y. 2009)*; **[**18]** *In re Charter Communs, 09-11435(JMP), 2010 Bankr. LEXIS 288, 2010 WL 502764, at *3 (Bankr. S.D.N.Y. Feb. 8, 2010)*.

[5] The one change suggested by the Avoca Plaintiffs' counsel was that (new) Kerr-McGee Corp. was both a non-debtor and creditor in the ***Tronox*** bankruptcy. (Arg. Tr. at 28:21-23.)

Corporation) ultimately became ***Tronox*** Worldwide LLC on September 12, 2005. (Amended Joint Fact Stipulations ¶ 42.) Similarly, through a series of mergers and name changes, Kerr-McGee Chemical, LLC ultimately became ***Tronox*** LLC on September 15, 2005. (Amended Joint Fact Stipulations ¶ 43.) From at least December 31, 2002 through November 28, 2005, ***Tronox*** LLC was a wholly-owned subsidiary of ***Tronox*** Worldwide LLC. (Amended **[**21]** Joint Fact Stipulations ¶ 43.)

The explanation for the above series of corporate restructurings and name changes is that, in or about 2002, (new) Kerr-McGee Corp. began a process of severing its chemical businesses (including the Avoca Plant) and all associated legacy tort and environmental liabilities from its much more profitable oil and gas businesses. *Tronox Inc. v. Kerr McGee Corp. (In re Tronox Inc.), 503 B.R. 239, 253 (Bankr. S.D.N.Y. 2013)*. In 2005, (new) Kerr-McGee Corp. and Kerr-McGee Operating Corporation (which had been (old) Kerr-McGee Corp. and subsequently became ***Tronox*** Worldwide LLC) entered into a series of agreements that documented the terms of separation, which ultimately resulted in a formal split of their properties. *Id. at 253-54*. The spin-off of ***Tronox*** was finally completed on March 30, 2006, when the (new) Kerr-McGee Corp. divested itself of all outstanding ***Tronox*** stock. *Id. at 258-59*.[6] **[*33]** Anadarko acquired (new) Kerr-McGee Corp. in May 2006 after the ***Tronox*** spin-off was completed. (Decl. of Duke K. McCall, Ex. 1 ("Avoca Motion") ¶ 71, ECF No. 46-1; see Arg. Tr. at 25:16-17 ("[T]here was a legal spinoff of these entities in '06 and as far as I know everything went with them.").)

B. PA State Action

The Avoca Plaintiffs are 4,357 individuals who resided and/or worked near the Kerr-McGee Wood Treatment Plant in Avoca, Luzerne County, Pennsylvania, which was in operation from 1956 until 1996 (i.e. the Avoca Plant). (Avoca Motion ¶¶ 1, 3, 10.) Beginning on January 3, 2005, the Avoca Plaintiffs filed complaints against four entities—Kerr-McGee Chemical, LLC, Kerr-McGee Operating Corp., "Kerr-McGee Corporation", and Kerr-McGee Holdco—alleging tort claims based on the operation of the Avoca Plant. (Avoca Motion ¶ 2.)[7] The Avoca Plaintiffs' complaints were ultimately consolidated into a single action (the aforementioned PA State Action); the "Master Complaint" pertains to a subset of their claims. (Avoca Motion ¶¶ 8-9; see Master Complaint.)[8]

The Master Complaint alleges that from 1956 through 1996, the operations at the Avoca Plant resulted in the intentional, negligent and otherwise tortious release of dangerous chemicals into the environment, which harmfully and continuously contacted the Avoca Plaintiffs, causing cancer and other illnesses. (Master Complaint ¶¶ 2-3.) As discussed above, the Master Complaint lumps various "Kerr-McGee" parent entities together and then alleges that "Kerr-McGee Corp." is liable for the Avoca Plaintiffs' injuries based on theories of both indirect liability due to its relationship with affiliates, and based on its own conduct. (Master Complaint ¶¶ 19-21.) The pertinent allegations are as follows:

> Defendant, Kerr-McGee Chemical Corporation, was one of many companies that were/are wholly owned subsidiaries of Defendant, Kerr-McGee Corporation. Defendant, Kerr-McGee Chemical Corporation, and its predecessors were all corporate shells and/or alter egos of Defendant, Kerr-McGee **[**24]** Corporation, and in all instances herein acted as the agent of Defendant, Kerr-McGee Corporation. Kerr-McGee Chemical Corporation and its predecessors, like a number of their other sister companies, have never maintained sufficient control over their own entities. Defendant, Kerr-McGee Corporation so dominated Kerr-McGee Chemical Corporation and its predecessors that Kerr-McGee Chemical Corporation and its predecessors had no separate existence, but merely were conduits for Defendant, Kerr-McGee Corporation.
>
> ***
>
> Since 1956, all actions taken in respect to the wood treatment plant were taken by Kerr-McGee Chemical Corporation and its predecessors, acting in conjunction **[*34]** with Defendant, Kerr-McGee Corporation as a single economic entity. Defendant, Kerr-McGee Corporation, engaged in deliberate and purposeful misuse of the corporate forms of Kerr-McGee Chemical Corporation and its predecessors. The corporate veils of Kerr-McGee Chemical Corporation and its predecessors have been disregarded by Defendants. The corporate

[6] This separation was the core issue in the fraudulent conveyance claims litigated in the adversary proceeding **[**22]** in the ***Tronox*** bankruptcy. See *id. at 266*.

[7] The complaint also names Jeffrey F. Snyder, Joseph P Cottone and T.P. Corporation as defendants. Those defendants are irrelevant to the pending motion and therefore the Court does not discuss these defendants further.

[8] At least for purposes of this motion, the Avoca Plaintiffs have not argued that the Master Complaint differs in any material way from the other complaints relating to other injuries that **[**23]** remain active in the Pennsylvania Court. Thus, although the Court at times refers only to the "Master Complaint" going forward, the Court's reasoning applies equally to all of the active complaints in the PA State Action.

> veils of Kerr-McGee Chemical Corporation and its predecessors must be pierced to avoid unfairness, injustice and further injury to Plaintiffs.

(Master Complaint ¶ 19.) The **[**25]** Master Complaint alleges an additional basis for indirect liability based on a theory of vicarious liability, as follows:

> Alternatively, Kerr-McGee Chemical Corporation and its predecessors acted as agents and/or servants of Defendant, Kerr-McGee Corporation. Therefore, Defendant, Kerr-McGee Corporation, is vicariously liable for the actions of Kerr-McGee Chemical Corporation and its predecessors and/or is liable under the doctrine of respondeat superior.

(Master Complaint ¶ 20.)

The Master Complaint also alleges that "Kerr-McGee Corp." is directly liable for the Avoca Plaintiffs' injuries, stating:

> Defendant, Kerr-McGee Corporation, provided environmental policies, legal counsel, hydrological services and laboratory technical services in connection with the operation of the wood treatment plant. Furthermore, Defendant, Kerr-McGee Corporation, communicated with environmental agencies and approved and controlled environmental budgets and expenditures in connection with the wood treatment plant. Defendant, Kerr-McGee Corporation, controlled the wood treatment plant's facility's environmental changes and monitoring and also directed the Plaintiffs' managers as to environmental policies and **[**26]** decisions, including emission controls, regulatory compliance issues, regulatory reporting and toxic waste handling.

(Master Complaint ¶ 21.) The Master Complaint further alleges:

> Defendant, Kerr-McGee, was aware of the environmental damage caused by their wood treatment plant and related work product and the resulting contamination to the air, water and soil, which led to and/or caused serious and permanent health impairment, disease, illness and death to individuals who came in direct and/or indirect contact with the same.

(Master Complaint ¶ 22.)

All of the allegations in the Master Complaint relate to conduct occurring during the time period from 1956 through 1996. And, while (new) Kerr-McGee Corp. is specifically mentioned in paragraph 18 (Master Complaint ¶ 18), there are no allegations of wrongful conduct initiated in the period following its creation in 2001.

In 2007, the PA State Action was stayed while two groups of the Avoca Plaintiffs arbitrated their claims and obtained binding arbitration awards, including (apparently) against (new) Kerr-McGee Corp. (See Avoca Motion ¶¶ 17-26.) In finding the defendants liable, the arbitrator necessarily concluded that their conduct had caused **[**27]** or contributed to the Avoca Plaintiffs' injuries. (Avoca Motion ¶¶ 22, 25.)

C. ***Tronox*** Bankruptcy

On January 12, 2009, ***Tronox*** LLC and ***Tronox*** Worldwide LLC, along with their affiliates, filed a Voluntary Petition for reorganization under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York. (Avoca Motion ¶ 29.) **[*35]** On January 20, 2009, the defendants in the PA State Action filed a Suggestion of Bankruptcy in the Pennsylvania Court, resulting in a stay of that action and all related arbitration proceedings. (Avoca Motion ¶¶ 29-31.) As part of its bankruptcy, in May 2009 ***Tronox*** filed an adversary proceeding (the "Adversary Proceeding") against (new) Kerr-McGee Corp. and its parent Anadarko, alleging that the transactions resulting in the ***Tronox*** spin-off amounted to an actual and constructive fraudulent conveyance. (Avoca Motion ¶ 32); see also *Anadarko, 2014 U.S. Dist. LEXIS 158767, 2014 WL 5825308, at *2*. A few weeks later, the United States filed a complaint-in-intervention, asserting claims under the Federal Debt Collection Procedures Act, *28 U.S.C. §§ 3301 et seq*. *Anadarko, 2014 U.S. Dist. LEXIS 158767, 2014 WL 5825308, at *2*. Every one of the Avoca Plaintiffs filed proofs of claim in the bankruptcy (Avoca Pls.' Opp. Br. at 1, 21, ECF No. 43), but explicitly asserted **[**28]** that they reserved all rights with respect to claims against any non-debtors (see Decl. of Duke K. McCall, Ex. 2, ECF No. 46-2).

On or about November 5, 2010, the Bankruptcy Court confirmed the First Amended Joint Plan of Reorganization of ***Tronox***, Inc. (Avoca Motion ¶ 34.)[9] Among other things, the Plan created and transferred ***Tronox***'s interest in and obligation to pursue the fraudulent conveyance claims in the Adversary Proceeding to the "Anadarko Litigation Trust." (Avoca Motion ¶ 35; see also Plan at Art. IV(C)(5).) The Plan provided that, among others, "representatives of the holders of Tort Claims will have certain agreed rights concerning the pursuit" of the Adversary Proceeding. (Plan at Art. IV(C)(5).)

The Plan also created a "Tort Claims Trust" to serve as the Avoca Plaintiffs' (and other tort claimants') sole recourse for claims against the ***Tronox*** estate. (Avoca Motion ¶ 35; see also Plan at Art. IV(C)(4).) The Plan initially funded the Tort

[9] The Plan is filed in the Bankruptcy Court as Dkt. No. 2567-1 in Case No. 09-10156.

Claims Trust with certain assets, but provided that, in addition, it was entitled to a percentage of any recovery by the Anadarko Litigation Trust in the Adversary [**29] Proceeding. The Plan also contained a release with regard to creditors' claims, and an injunction applicable to creditors prohibiting pursuit of claims against the ***Tronox*** debtors. (Avoca Motion ¶¶ 36-37.) The Plan also specified that nothing in it "shall in any way release any claim against or liability of . . . [(new)] Kerr-McGee Corporation and Anadarko." (Avoca Motion ¶ 38.) The Plan became effective on February 14, 2011. (Avoca Motion ¶ 39.)

Thereafter, the Anadarko Litigation Trust and the United States jointly pursued the Adversary Proceeding in the Bankruptcy Court. *Anadarko, 2014 U.S. Dist. LEXIS 158767, 2014 WL 5825308, at *2.* (New) Kerr-McGee Corp. and its parent, Anadarko, were defendants in this proceeding. After over two years of further litigation, on December 12, 2013, Judge Gropper issued a Memorandum of Opinion in which he held, inter alia, that (new) Kerr-McGee Corp. and the other defendants in the Adversary Proceeding had "acted with intent to 'hinder and delay' [***Tronox***'s] creditors when they transferred out and then spun off the oil and gas assets, and that the transaction, which left [***Tronox***] insolvent and undercapitalized, was not made for reasonably equivalent value." *In re **Tronox** Inc., 503 B.R. at 249*. At the time of issuance, this decision did not constitute [**30] a final judgment as damages remained to be determined. See *id. at 347*. Judge Gropper indicated that the measure of damages was between $5.15 billion and $14.16 billion; he reserved decision on the precise measure of damages [*36] pending additional submissions and briefing by the parties. (Avoca Motion ¶ 72.)

On April 3, 2014, prior to the Bankruptcy Court taking further action on the issue of damages, and importantly, before final judgment was entered, the parties settled the Adversary Proceeding for $5.15 billion (the "Settlement Agreement").[10] (Avoca Motion ¶ 73.) The Settlement Agreement was conditioned on, inter alia, entry of an injunction (the relevant terms of which are set forth below) barring certain claims against Anadarko and its affiliates. Parties potentially affected by the injunction, including the Avoca Plaintiffs, received notice of the settlement and opportunity to object. *Anadarko, 2014 U.S. Dist. LEXIS 158767, 2014 WL 5825308, at *3*. None of the Avoca Plaintiffs did so.

On May 30, 2014, the Bankruptcy Court entered a Report & Recommendation in which it recommended approval of the Settlement Agreement and entry of an Order approving it by this Court. [**31] (Avoca Motion ¶ 74.) On November 10, 2014, this Court issued an Opinion & Order approving the Settlement Agreement and issuing the requested injunction. See *Anadarko, 2014 U.S. Dist. LEXIS 158767, 2014 WL 5825308*. In relevant part, the Injunction stated:

> (i) any Debtor(s), (ii) any creditor of any Debtor who filed or could have filed a claim in the Chapter 11 Cases, (iii) any other Person whose claim (A) in any way arises from or is related to the Adversary Proceeding, (B) is a Trust Derivative Claim, or (C) is duplicative of a Trust Derivative Claim, and (iv) any Person acting or purporting to act as an attorney for any of the preceding is hereby permanently enjoined from asserting against any Anadarko Released Party (I) any Trust Derivative Claims or (II) any claims that are duplicative of Trust Derivative Claims, whether or not held or controlled by the Litigation Trust, or whether or not the Litigation Trust could have asserted such claims against any Anadarko Released Party.
>
> The injunction herein shall not apply to or bar the following: . . . (v) any liability that an *Anadarko* Released Party might have that does not arise from or through a liability of a Debtor; . . .

*2014 U.S. Dist. LEXIS 158767, [WL] at *10*. Certain terms used in the Injunction are defined in the Settlement [**32] Agreement, including the terms "Debtors", "Anadarko Released Party" and "Trust Derivative Claim." Id. The term "Debtors" is defined to include, inter alia, ***Tronox*** LLC and ***Tronox*** Worldwide LLC. (Settlement Agreement § 1.29.) The Settlement Agreement also defined the terms "Adversary Proceeding", "Anadarko Released Party", and "Trust Derivative Claims", as follows:

> § 1.2. "'Adversary Proceeding' shall mean the adversary proceeding pending in the Bankruptcy Court captioned ***Tronox*** Incorporated, et al. v. Anadarko Petroleum Corporation, et al., Adversary Proceeding No. 09-1198 (ALG), including the claims asserted in the Second Amended Adversary Complaint, all claims and/or remedies that a Debtor transferred to the Litigation Trust that were asserted or could have been asserted in this adversary proceeding, and the claims asserted in the Complaint-in-Intervention and that could have been asserted in the Complaint-in-Intervention relating to the subject matter of this adversary proceeding.
>
> § 1.9. "'Anadarko Released Parties' shall mean Anadarko and each of its Affiliates [including Kerr-McGee Corp.], [*37] and each of their respective predecessors,

[10] The Settlement Agreement is filed in the Bankruptcy Court as Dkt. No. 2983-1 in Case No. 09-10156.

successors, and assigns, all of their past, present, and future [**33] officers, directors, employees, managers, members, agents, attorneys and other representatives.

§ 1.82. "'Trust Derivative Claims' shall mean any and all claims and/or remedies that are held and/or controlled by, and which were or could have been asserted by, the Litigation Trust against any Anadarko Released Party, seeking relief or recovery arising from harm to any Debtor or any Debtor's estate, based on any legal theory including, without limitation, such claims and/or remedies under federal or state law, statutory or common law, in equity or otherwise, arising out of or in any way related to (i) the Adversary Proceeding; (ii) the Chapter 11 Cases; (iii) the Bankruptcy Claims; (iv) the Covered Sites; and/or (v) any Anadarko Released Party's ownership, management, operation, status, tenure, conduct, omission, action or inaction at any time as a stockholder, affiliate, owner, partner, member, manager, director, officer, employee, servant, agent, representative, attorney, creditor, successor, assign or other relationship with a Debtor and/or any of its predecessors, in each case, including, without limitation, such claims and/or remedies that are actions, causes of action, lawsuits, suits, [**34] claims, counterclaims, cross-claims, liabilities, interests, judgments, obligations, rights, demands, debts, damages, losses, grievances, promises, remedies, liens, attachments, garnishments, prejudgment and post-judgment interest, costs and expenses (including attorneys' fees and costs incurred or to be incurred), including Unknown Claims to the maximum extent allowed under the law, whether pled or unpled, fixed or contingent, choate or inchoate, matured or unmatured, foreseen or unforeseen, accrued or unaccrued, past, present or future for fraudulent transfer, fraudulent conveyance, preference, turnover, breach of fiduciary duty, negligence, gross negligence, mismanagement, civil conspiracy, aiding and abetting, unjust enrichment, constructive trust, equitable subordination, equitable disallowance, agency, joint venture, alter ego, corporate veil piercing, usurpation of corporate opportunity, successor liability, breach of contract, fraud, intentional, reckless or negligent misrepresentation, contribution, indemnity, and all other such claims and/or remedies.

(Settlement Agreement §§ 1.2, 1.9, 1.82 (emphasis added).)

The Court stated that it and the Bankruptcy Court would "retain jurisdiction over [**35] any and all disputes arising under or otherwise relating to this Opinion & Order." *2014 U.S. Dist. LEXIS 158767, [WL] at *11*. The parties' settlement became final on January 20, 2015, when the period for filing an appeal of the decision approving the Settlement Agreement expired. (Avoca Motion ¶ 77.)

D. Post-Injunction Litigation

On September 4, 2015, the Avoca Plaintiffs filed a motion in the Pennsylvania Court seeking that court's acknowledgment of jurisdiction, restoration of the consolidated cases to the active docket, and a case management conference establishing deadlines. (See Avoca Motion.) The Avoca Motion provides a detailed history of the PA State Action, the ***Tronox*** bankruptcy, and the Adversary Proceeding, and then requests that the Pennsylvania Court return the PA State Action to the active docket on the ground that the automatic stay has been lifted and the Adversary Proceeding has concluded. (Avoca Motion ¶¶ 91, 94.) The Avoca Motion does not indicate the Avoca Plaintiffs' view as to the extent to which their case was narrowed [*38] by the ***Tronox*** bankruptcy and the Settlement Agreement, nor does it contain any explicit request for leave to amend the complaints (for instance, to alter the nature of allegations against [**36] (new) Kerr-McGee Corp.). (See Avoca Motion ¶¶ 104-24.)

That being said, an even cursory review of the Avoca Motion—let alone the close reading undertaken by the Court—shows that the Avoca Plaintiffs' claims in the PA State Action depend entirely on allegations relating to the direct liability of the ***Tronox*** debtor defendants. Such direct claims are foreclosed by the release of claims in the Plan. As the Court explained at the outset of oral argument on (new) Kerr-McGee Corp.'s motion, the Avoca Motion leaves the impression that the Avoca Plaintiffs seek to reopen the entirety of their case, including against the ***Tronox*** debtor defendants. (Arg. Tr. at 4:20-24.) The Court further observed that the Avoca Motion appears as if it was "written by a different person than that person who is litigating the case right now" and that "it is clearly the case that the motion to restore is written as if somebody thinks they can go back after ***Tronox***, LLC and ***Tronox*** Worldwide." (Arg. Tr. at 7:13-18.) The Court added that only a single paragraph in the Avoca Motion, paragraph 51, "saves the [Avoca Motion] from being entirely directed towards [***Tronox***] Worldwide." (Arg. Tr. at 8:1-3.) Although, as discussed [**37] below, the Court considers all of the parties' filings in consideration of (new) Kerr-McGee Corp.'s motion, the Court's view as to the Avoca Plaintiffs' position with respect to that litigation, and their intent, is informed by the Avoca Motion. The statements made in those papers are revealing.

On October 9, 2015, (new) Kerr-McGee Corp. filed the instant motion in this Court to enforce the Injunction issued as part of the settlement of the Adversary Proceeding, a settlement to which the Avoca Plaintiffs agreed and from which they receive certain benefits. (ECF No. 37.) The motion seeks, inter alia, an Order from this Court enjoining the Avoca Plaintiffs and their counsel from further pursuing claims against (new) Kerr-McGee Corp. and directing them to dismiss the PA State Action with prejudice against (new) Kerr-McGee Corp. (Kerr-McGee Corp.'s Opening Br. at 14, ECF No. 38.)[11] The Avoca Plaintiffs opposed the motion on October 26, 2015. (ECF No. 43.) Kerr-McGee Corp. filed a reply on November 2, 2015. (ECF No. 47.) With leave of the Court (ECF No. 55), the Avoca Plaintiffs filed a sur-reply on November 20, 2015 (ECF No. 56). On December 3, 2015, the Court held oral argument on the motion. **[**38]** (See Arg. Tr., ECF No. 62.)

At oral argument, this Court learned that the Pennsylvania Court held a hearing on the Avoca Motion on October 30, 2015, and informed the parties that it would wait to take any further action pending a decision in this Court. (Arg. Tr. At 69:13-21.)[12]

[*39] II. LEGAL STANDARDS

A. Scope of Bankruptcy Jurisdiction

"Generally, a discharge in bankruptcy relieves a debtor from all pre-petition debt, and [11 U.S.C.] § 524(a) permanently enjoins creditor actions to collect discharged debts." *In re Kalikow, 602 F.3d 82, 94 (2d Cir. 2010)*. The Code defines a "creditor" as an "entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor." *11 U.S.C. § 101(10)(A)*. A confirmation order of a Chapter 11 reorganization plan discharges the debtor from all pre-confirmation claims. *In re Kalikow, 602 F.3d at 94* (citing *11 U.S.C. § 1141(d)(1)(A)*). *Section 524(a)(2)* provides that a discharge "'operates as an injunction against . . . an act to collect, recover or offset any such debt as a personal liability of the debtor, **[**40]** whether or not discharge of such debt is waived.'" Id. (quoting *11 U.S.C. § 524(a)(2)*). A discharge injunction does not, however, affect the liability of any entity other than the debtor. *11 U.S.C. § 524(e)*; *Green v. Welsh, 956 F.2d 30, 33 (2d Cir. 1992)*.

While confirmation of a bankruptcy plan does not by itself release any claims against any non-debtor, bankruptcy jurisdiction encompasses certain claims against non-debtors. Whether bankruptcy jurisdiction exists over a non-debtor's claim is determined by "whether its outcome might have any 'conceivable effect' on the bankruptcy estate." *Marshall v. Picard (In re Bernard L. Madoff Inv. Secs. LLC) ("Madoff"), 740 F.3d 81, 88 (2d Cir. 2014)* (alterations omitted).[13] The bankruptcy estate includes "all legal or equitable interests of the debtor in property as of the commencement of the case." *11 U.S.C. § 541(a)(1)*. "Such interests include causes of action possessed by the debtor at the time of filing, and any interest in property that the trustee recovers under specified Bankruptcy Code provisions." *Madoff, 740 F.3d at 88* (alterations, quotation marks and citations omitted). "Every conceivable interest of the debtor, future, nonpossessory, contingent, speculative, and derivative, is within the reach of the bankruptcy estate." *Id.* (quotation marks and alterations omitted). The Court here has bankruptcy **[**41]** jurisdiction, as the issue raised goes directly to establishing additional liability of the debtors and/or seeking to increase assets available to creditors by seeking to pierce the veil between debtors and the movant herein.

B. Derivative vs. Individual Creditor Claims

On this motion, the parties have expended a fair amount of effort arguing whether the claims alleged in the PA State Action against the movant herein are derivative claims. As set forth above, if the claims are properly characterized as such, they are covered by the Injunction in the **[*40]** Settlement Agreement. The law regarding what constitutes a "derivative"

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[11] In its opening brief, (new) Kerr-McGee Corp. also sought an "order to show cause why the Avoca Plaintiffs and their counsel should not be held in contempt for violating the Injunction . . . ." (Kerr-McGee's Opening Br. at 14.) Because (new) Kerr-McGee Corp. provided no legal standards or argument in support of that request, and it did not renew its request for an order to show cause in its reply brief or at oral argument, the Court deems this request abandoned.

[12] On January 26, 2016, ***Tronox*** LLC and ***Tronox*** Worldwide Pty. Ltd. (formerly known as ***Tronox*** Worldwide LLC)—the ***Tronox*** debtor entities named as defendants in the PA State Action—filed a brief informing the Court that the Avoca Plaintiffs have refused to sign a stipulation of dismissal in the PA State Action as to them. (***Tronox*** Br. at 3-4, ECF No. 64.) The ***Tronox*** debtors ask this Court to clarify that "any claims that the Avoca Plaintiffs may have against ***Tronox*** **[**39]** have been discharged, and the Avoca Plaintiffs should dismiss their claims against ***Tronox*** . . . immediately." (***Tronox*** Br. at 4.) The Avoca Plaintiffs vigorously contested the facts asserted in the ***Tronox*** brief in a January 27, 2016 letter. (ECF No. 66.) (New) Kerr-McGee Corp. filed a response to the Avoca Plaintiffs' letter on January 28, 2016. (ECF No. 68.) The Avoca Plaintiffs filed a response to that letter on January 29, 2016. (ECF No. 70.) This decision grants the ***Tronox*** debtors the relief that they seek. The PA State Action is over.

[13] Although this Court's Article III power exceeds the authority of a bankruptcy court, see *Stern v. Marshall, 564 U.S. 462, 131 S.Ct. 2594, 180 L. Ed. 2d 475 (2011)*, because the Court's jurisdiction to enter the Injunction was predicated on ***28 U.S.C. § 1334***, the Court believes—and the parties do not argue otherwise—that the scope of the Injunction should be interpreted no broader than would be consistent with the limits of bankruptcy jurisdiction as established by Second Circuit precedent.

claim is instructive. "A claim based on rights 'derivative' of, or 'derived' from, the debtor's typically involves property of the estate." Id. In the bankruptcy context, "derivative claims" [**42] are those that "arise from harm done to the estate and that seek relief against third parties that pushed the debtor into bankruptcy." Id. at 89; see also Koch Ref. v. Farmers Union Cent. Exch., Inc., 831 F.2d 1339, 1349 (7th Cir. 1987) ("If the liability is to all creditors of the corporation without regard to the personal dealings between such officers and such creditors, it is a general claim."). To determine if a claim is derivative, the court must "inquire into the factual origins of the injury and . . . into the nature of the legal claims asserted." Madoff, 740 F.3d at 89; see Johns-Manville Corp. v. Chubb Indem. Ins. Co. (In re Johns-Manville Corp.) ("Manville III"), 517 F.3d 52, 67 (2d Cir. 2008), rev'd and remanded sub nom. on other grounds Travelers Indem. Co. v. Bailey, 557 U.S. 137, 129 S. Ct. 2195, 174 L. Ed. 2d 99 (2009). A court must not rely on the labels that a plaintiff attaches to its complaint, as a plaintiff may not plead around a bankruptcy. Madoff, 740 F.3d at 91-92. Claims which seek to increase the size of the bankruptcy estate—the bucket of assets from which creditors may seek recovery—are classic derivative claims. See In re Quigley, Inc., 676 F.3d 45, 56 (2d Cir. 2012) (stating that "the derivative/non-derivative inquiry [is] a means to assess whether the suits at issue would affect the bankruptcy estate").

In contrast to a derivative claim, over which a bankruptcy court has jurisdiction, "a bankruptcy court generally has limited authority to approve releases of a non-debtor's independent [**43] claims." Madoff, 740 F.3d at 88. "'[W]hen creditors . . . have a claim for injury that is particularized as to them, they are exclusively entitled to pursue that claim, and the bankruptcy trustee is precluded from doing so.'" Id. (quoting Hirsch v. Arthur Andersen & Co., 72 F.3d 1085, 1093 (2d Cir. 1995)); see also Picard v. JPMorgan Chase Bank & Co. (In re Bernard L. Madoff Inv. Sec. LLC) ("JPMorgan"), 721 F.3d 54, 67 (2d Cir. 2013) ("Nowhere in the statutory scheme is there any suggestion that the trustee in reorganization is to assume the responsibility of suing third parties on behalf of creditors." (quotation marks and alterations omitted)); Steinberg v. Buczynski, 40 F.3d 890, 893 (7th Cir. 1994) ("When a third party has injured not the bankrupt corporation itself but a creditor of that corporation, the trustee in bankruptcy cannot bring suit against the third party."). "While a derivative injury is based upon 'a secondary effect from harm done to [the debtor],' an injury is said to be 'particularized' when it can be 'directly traced to [the third party's] conduct.'" Madoff, 740 F.3d at 89 (quoting St. Paul Fire & Marine Ins. Co. v. PepsiCo, Inc., 884 F.2d 688, 704 (2d Cir. 1989)); see also Fox v. Picard, 531 B.R. 345, 349 (S.D.N.Y. 2015).

As the Court discusses "derivative" claims below, it has in mind both the particular nature of the claims that the Avoca Plaintiffs seek to pursue and the result they seek to achieve with respect to the movant herein. As described above, the Avoca Plaintiffs' claims against [**44] non-debtor (new) Kerr-McGee Corp. are based on theories of alter ego, veil piercing, and respondeat superior. Such claims require a liability determination against the ***Tronox*** debtors combined with an inability or unwillingness for those debtors to meet their obligations, or, at least, a direct connection between the liability of the debtor and non-debtor former parent. The effect of such claims is to make the ultimate parent responsible to pay what is owed by its affiliate. Put differently, the Avoca Plaintiffs seek to obtain recovery from the non-debtor [*41] former parent to increase the bucket of assets from which they would seek to recover for injuries caused directly by the debtor(s).

In determining whether the Avoca Plaintiffs' claims against (new) Kerr-McGee Corp. constitute derivative claims, this Court is guided principally by three recent Second Circuit decisions, Manville III, JPMorgan, and Madoff. In each, the Court of Appeals confronted questions regarding the extent to which third-party claims against a non-debtor could properly be enjoined consistent with a bankruptcy court's jurisdiction and the extent to which a debtor has the authority to pursue claims on behalf of its creditors. [**45]

Manville III arose out of the bankruptcy of Johns-Manville Corp., the largest manufacturer of asbestos-containing products and the largest supplier of raw asbestos in the United States from the 1920s until the 1970s. 517 F.3d at 55-56. Pursuant to the confirmation of Johns-Manville's bankruptcy plan, the bankruptcy court entered an injunction prohibiting all persons from commencing any action against any of the debtor's insurance companies that had settled the Johns-Manville estate's insurance policy claims against them. Id. at 57. Despite the injunction, asbestos victims subsequently sought recovery against Travelers Insurance, one of Johns-Manville's insurers, alleging that Travelers itself engaged in misconduct by influencing Johns-Manville's purported failure to disclose its knowledge of asbestos hazards, breaching an independent duty owed to the plaintiffs. Id. at 57-58. The Second Circuit concluded that the plaintiffs' claims against Travelers could proceed and that the bankruptcy court had no jurisdiction to enjoin their claims because plaintiffs sought to recover directly from the insurer for its own independent wrongdoing, the plaintiffs made no claim against an asset of the bankruptcy estate, and their actions [**46] did not affect the estate. Id. at 65, 68.

In JPMorgan, the Second Circuit was faced with the question of whether the SIPA liquidation trustee for the estate of Bernard L. Madoff Investment Securities LLC ("BLMIS") had standing to bring claims against various financial institutions to recover BLMIS customer property for aiding and abetting Madoff's fraud by providing financial services while ignoring obvious warning signs of the fraud. See 721 F.3d at 64-66. The Court again concluded that such claims were not derivative because they were asserted "on behalf of thousands of customers against third-party financial institutions for their independent handling of individual investments made on various dates in varying amounts." Id. at 71. The claims therefore belonged to those individual customers.

In Madoff, a more recent case combining aspects of Manville III and JPMorgan, the Second Circuit considered whether a creditor's claims against a non-debtor were properly barred as derivative of earlier claims asserted and settled by the BLMIS trustee. There, while settlement talks regarding an adversary proceeding alleging fraudulent transfer, avoidable preferences, and turnover that the trustee asserted against the estate of Jeffrey **[**47]** Picower (one of Madoff's alleged co-conspirators) and related defendants were ongoing, BLMIS customers filed a putative class action against the Picower defendants in the Southern District of Florida alleging claims for, inter alia, civil conspiracy and conversion. Madoff, 740 F.3d at 85. The trustee and the Picower defendants subsequently settled the adversary proceeding, pursuant to which the bankruptcy court issued a permanent injunction that barred any BLMIS customer or creditor from asserting any claim against the Picower defendants **[*42]** "duplicative or derivative of the claims brought by the Trustee, or which could have been brought by the Trustee." Id. at 86-87. In contrast to the result in Manville III, the Second Circuit in Madoff ruled that although the plaintiffs alleged different causes of action than the trustee, the injunction nevertheless barred their claims. Id. at 91. The Court reasoned that the plaintiffs' claims derived from the estate because they did not allege that the Picower defendants took any particularized actions aimed at BLMIS customers (such as making misrepresentations to them). Id. at 93. The Court did, however, allow plaintiffs leave to amend their complaints as there was "conceivably some particularized **[**48]** conspiracy claim [that plaintiffs] could assert that would not be asserted by the Trustee," a question that the Court left to the Southern District of Florida in the first instance. Id. at 94.

Taken together, Manville III, JPMorgan, and Madoff stand for several propositions. First, that a claim belongs to the trustee—and not to individual creditors—either when the claim alleges harm to the debtor itself or when the harm alleged was generalized to all creditors of the debtor (e.g. a harm caused by the debtor), such that any liability for its acts is directly related to the bankrupt estate. Second, that the particularized nature of the harm caused by the debtor is not dispositive—the nature of harms can be different for any type of action. The core issue is, instead, whether creditors are impacted similarly. The classic case in which that would be so is when a fraudulent conveyance or undercapitalization has had a common impact on the debtor's creditors by rendering the debtor unable to satisfy its debts. That action—to recover for the harm to the debtor caused by leaving it with fewer assets to meet its obligations to creditors—is an action properly pursued by the debtor's trustee, rather than **[**49]** individual creditors, to allow for an efficient and orderly proceeding to resolve that issue once and for all. These cases also teach that a claim belongs to individual creditors—and not to a debtor's trustee—when the harm suffered was particularized to those creditors, rather than to all creditors as a whole in their efforts to satisfy their claims against the debtor. In other words, if the action by the trustee would not and could not have resolved the creditors' claims, the claim is individualized. By the same token, where (for instance) a larger recovery on the very claim pursued by the trustee (as, here, with the Adversary Proceeding) would have led to a larger recovery by the creditor, that is certainly a strong indication that the claim is shared and derivative.

In addition, the nature of the claim is relevant to this question; some claims may be pursued only by one entity and not another. Who has standing to pursue a claim is a question of state law. JPMorgan, 721 F.3d at 63 n.10; Kalb, Voorhis & Co. v. Am. Fin. Corp., 8 F.3d 130, 132 (2d Cir. 1993) (citing St. Paul Fire, 884 F.2d at 700). For instance, "[i]f under governing state law the debtor could have asserted an alter ego claim to pierce its own corporate veil, that claim constitutes property of the bankrupt estate and can only be asserted by the trustee **[**50]** or the debtor-in-possession." Kalb, Voorhis & Co., 8 F.3d at 132; see also Maney v. Fischer, No. 96 CIV. 0561 (KMW), 1998 U.S. Dist. LEXIS 4077, 1998 WL 151023, at *2 (S.D.N.Y. Mar. 31, 1998) ("Where plaintiffs are harmed because of the injury the alter ego does to the controlled corporation, the alter ego claim belongs to the bankruptcy estate."). Courts have held that state law causes of action for successor liability and veil-piercing are properly characterized as property of the bankruptcy estate. In re Emoral, Inc., 740 F.3d 875, 880 [*43] (3d Cir. 2014) (applying New York or New Jersey law).

As discussed below, successful pursuit of the Avoca Plaintiffs claims requires an initial finding of tort liability (which the Court puts to the side for the moment) and two predicate veil piercings (or, two predicate findings of alter-ego or respondeat superior liability). To succeed, the Avoca Plaintiffs must first demonstrate that one ***Tronox*** debtor (***Tronox*** LLC, the former operator of the Avoca Plant) was merely the alter ego of another (***Tronox*** Worldwide LLC, the former direct parent of the plant operator). To resolve the motion before it, this Court must determine whether this claim is held by the estate or not. The same question is repeated with regard to the second veil piercing (or alter ego or respondeat superior finding) necessary to any recovery by the Avoca Plaintiffs: to prevail, after **[**51]** having succeeded in piercing the veil between the two debtor entities, the Avoca Plaintiffs must then pierce the veil between the former direct parent (a ***Tronox*** debtor) and the non-debtor ultimate parent, (new) Kerr-McGee Corp. The Court discusses below why these state law claims are owned by the ***Tronox*** estate.[14]

C. Alter Ego / Veil Piercing Theories of Liability

"Delaware law permits a court to pierce the corporate veil of a company where there is fraud or where it is in fact a mere instrumentality or alter ego of its **[**53]** owner." *Fletcher v. Atex, Inc., 68 F.3d 1451, 1457 (2d Cir. 1995)* (quotation marks and alterations omitted). Veil piercing "may be done only in the interest of justice, when such matters as fraud, contravention of law or contract, public wrong, or where equitable consideration among members of the corporation require it, are involved." *Pauley Petroleum v. Continental* **[*44]** *Oil Co., 43 Del. Ch. 516, 239 A.2d 629, 633 (Del. 1968)*; accord *PSG Poker, L.L.C. v. DeRosa-Grund, No. 06 CIV. 1104 (DLC), 2008 U.S. Dist. LEXIS 4225, 2008 WL 190055, at *10 (S.D.N.Y. Jan. 22, 2008)*. Delaware courts allow the corporate form to be disregarded, and the corporate veil to be pierced, only in exceptional circumstances. E.g., *eCOMMERCE Indus. v. MWA Intelligence, Inc., No. CV 7471-VCP, 2013 Del. Ch. LEXIS 245, 2013 WL 5621678, at *27 (Del. Ch. Sept. 30, 2013)*; see *Paradigm Biodevices, Inc. v. Centinel Spine, Inc., No. 11 CIV. 3489 JMF, 2013 U.S. Dist. LEXIS 62602, 2013 WL 1830416, at *2 (S.D.N.Y. May 1, 2013)*. "The terms 'alter ego theory' and 'piercing the corporate veil' are used interchangeably in Delaware law." *Winner Acceptance Corp. v. Return on Capital Corp., No. CIV.A. 3088-VP, 2008 Del. Ch. LEXIS 196, 2008 WL 5352063, at *5 n.32 (Del. Ch. Dec. 23, 2008)*.

Delaware courts look to several factors to determine whether to pierce the corporate veil, including: "whether the corporation was adequately capitalized for the corporate undertaking; whether the corporation was solvent; whether dividends were paid, corporate records kept, officers and directors functioned properly, and other corporate formalities were observed; whether the dominant shareholder siphoned **[**54]** corporate funds; and whether, in general, the corporation simply functioned as a facade for the dominant shareholder." *Mason v. Network of Wilmington, Inc., No. CIV.A. 19434-NC, 2005 Del. Ch. LEXIS 99, 2005 WL 1653954, at *3 (Del. Ch. July 1, 2005)*; see *Kertesz v. Korn, 698 F.3d 89, 91 (2d Cir. 2012)* (applying Delaware law and stating that alter ego claim "turns on the facts of the owner's operation of the corporation and its relationship to the alleged victim").

Under Delaware law, veil piercing is a doctrine of equity. *Sonne v. Sacks, 314 A.2d 194, 197 (Del. 1973)* (holding that piercing the corporate veil could only be done in the Court of Chancery); see *Medi-Tec of Egypt Corp. v. Bausch & Lomb Surgical, No. 19760-NC, 2004 Del. Ch. LEXIS 21, 2004 WL 5366102, at *2 (Del. Ch. Mar. 4, 2004)* (stating that it is "not necessarily clear under Delaware law whether veil piercing is an equitable right or an equitable remedy"). Veil piercing has been described as a form of "derivative liability." *United States v. Bestfoods, 524 U.S. 51, 65, 118 S. Ct. 1876, 141 L. Ed. 2d 43 (1998)*; cf. *PSG Poker, 2008 U.S. Dist. LEXIS 4225, 2008 WL 190055, at *10* ("[I]t has been recognized that the fraud, injustice, or unfairness supporting a claim under

[14] The parties dispute which state's law governs here. (New) Kerr-McGee Corp. contends that Delaware law applies because it and the ***Tronox*** entities were Delaware corporations or organized under the laws of Delaware; the Avoca Plaintiffs, citing no authority, counter that Pennsylvania's choice of law principles dictate that Pennsylvania law applies. (New) Kerr-McGee Corp. is correct. Because the underlying PA State Action is proceeding in Pennsylvania state court, Pennsylvania choice of law rules apply. Under Pennsylvania choice of law rules, Delaware law applies to a claim relating to the internal affairs of a corporation, such as an assertion of alter ego or veil piercing liability. *15 Pa.C.S.A. § 4145(a)* ("[T]he court having jurisdiction of the action or proceeding shall apply the law of the jurisdiction under which the foreign domiciliary corporation was incorporated."); see *In re Estate of Hall, 1999 PA Super 119, 731 A.2d 617, 622 (Pa. Super. Ct. 1999)*; see also *In re Adelphia Communs. Corp. Secs. & Derivative Litig., No. 03 MDL 1529 JMF, 2013 U.S. Dist. LEXIS 180771, 2013 WL 6838899, at *4 n.3 (S.D.N.Y. Dec. 27, 2013)* **[**52]** . "[U]nder Delaware law, a trustee possesses standing to bring—and by logical extension, settle and release—an alter ego claim on behalf of a creditor of the debtor, as long as the claim qualifies as a 'general' claim." *In re Alper Holdings USA, Inc., 398 B.R. 736, 759 (S.D.N.Y. 2008)*; see also *Rosener v. Majestic Mgmt., Inc. (In re OODC, LLC), 321 B.R. 128, 137 (Bankr. D. Del. 2005)*.

Nevertheless, the "test for piercing the corporate veil is similar under both Pennsylvania and Delaware law." *Advanced Tel. Sys., Inc. v. Com-Net Professional Mobile Radio, LLC, 2004 PA Super 100, 846 A.2d 1264, 1278 (Pa. Super. 2004)*. For purposes of the Court's analysis as to what the Avoca Plaintiffs would have to do to establish their alter ego / veil piercing theories of liability, the result would be no different if the Court applied Pennsylvania law. The Court does not believe, furthermore, that the outcome of the analysis would change if Pennsylvania law, rather than Delaware law, applied to the question of whether the trustee could assert a veil piercing claim on behalf of the debtor. See *In re Jamuna Real Estate LLC, 365 B.R. 540, 562-63 (Bankr. E.D. Pa. 2007)* (finding that trustees could assert alter ego and veil piercing theories against affiliates and owners in accordance with Pennsylvania law).

this prong of the alter ego analysis must be distinct from the allegations of the underlying cause of action." (citing *Mobil Oil Corp. v. Linear Films, Inc., 718 F. Supp. 260, 268 (D. Del. 1989))*. Veil piercing is thus not a purely independent cause of action. Instead, piercing the corporate veil effectively amounts to the imposition of joint and several liability between a direct actor and its corporate affiliate for some underlying wrong committed by the direct actor. Cf. **[**55]** *Matter of Seagroatt Floral Co., 78 N.Y.2d 439, 450, 583 N.E.2d 287, 576 N.Y.S.2d 831 (1991)* (suggesting that imposition of joint and several liability on two closely-held corporations effectively amounted to piercing corporate veil).

Together, these principles require an initial determination of liability against the Avoca Plant's operator in an amount certain, and a subsequent litigated determination of the availability of theories of alter ego, veil piercing or respondeat superior against its debtor parent. All of this is required before the Avoca Plaintiffs even reach the non-debtor entity, (new) Kerr-McGee Corp. The non-debtor's parent's liability is entirely secondary to the liability of the debtor entities. These principles set the stage for the discussion below.

III. DISCUSSION

To resolve (new) Kerr-McGee Corp.'s motion to enforce the Injunction, the Court **[*45]** must undertake a multi-step analysis. First, the Court identifies the claims that the Avoca Plaintiffs seek to pursue in the Pennsylvania Court. To do so, the Court must determine the slice of claims and/or theories that the Avoca Plaintiffs now assert in light of the events that have occurred since they filed the Master Complaint (i.e. the ***Tronox*** bankruptcy and the settlement reached in the Adversary Proceeding).[15]

As discussed below, even if the Avoca Plaintiffs' claims were cognizable as a matter of law (a question which the Court determines against the Avoca Plaintiffs), the Injunction bars any such claim.

A. The Avoca Plaintiffs' Remaining Claims

1. Overview of Claims

As discussed above, the Avoca Plaintiffs allege that the operations at the Avoca Plant from 1956 through 1996 resulted in the intentional, negligent and otherwise tortious release of several dangerous chemicals, which caused them a variety of harms. (Master Complaint ¶¶ 2-3.) They allege claims against four defendant-entities relevant **[**57]** to the pending motion: (1) Kerr-McGee Chemical, LLC (which became ***Tronox*** LLC), (2) Kerr-McGee Operating Corp. (which became ***Tronox*** Worldwide LLC), (3) Kerr-McGee Holdco (which became (new) Kerr-McGee Corp.), and (4) (new) Kerr-McGee Corp. As discussed above, the Master Complaint at times uses the generic term "Kerr-McGee" to refer to several different entities that the Avoca Plaintiffs allege took various actions that caused them harm. (See Master Complaint ¶ 25.)

The Master Complaint broadly alleges three theories of liability relating to the entity it calls "Kerr-McGee Corp." First, the Avoca Plaintiffs allege that "Kerr-McGee Corp." is liable under an alter ego or veil piercing theory on the ground that Kerr-McGee Chemical Corp. (i.e. the owner and operator of the Avoca Plant) was a corporate shell and/or alter ego of "Kerr-McGee Corp." such that they misused corporate forms and constituted a single economic entity. (Master Complaint ¶ 19.) Second, the Avoca Plaintiffs allege that "Kerr-McGee Corp." is vicariously liable under the doctrine of respondeat superior on the ground that Kerr-McGee Chemical Corp. acted as "Kerr-McGee Corp.'s" agent. (Master Complaint ¶ 20.) Third, the Avoca **[**58]** Plaintiffs allege that "Kerr-McGee Corp." itself engaged in conduct relating to the Avoca Plant that makes it directly liable for their injuries. (Master Complaint ¶ 21.) Specifically, they allege that "Kerr-McGee Corp." "provided environmental policies, legal counsel, hydrological services and laboratory technical services in connection with the operation of the wood treatment plant" and that "Kerr-McGee Corp." controlled and directed the Avoca Plant's environmental policies and managerial decisions as to emission controls, regulatory compliance issues, regulatory reporting and toxic waste handling. (Master Complaint ¶ 21.)

While the Avoca Plaintiffs' motion to restore before the Pennsylvania Court did not identify which, if any, portions of the theories included in the Master Complaint **[*46]** they now abandon,[16] they have subsequently made concessions before

[15] **[**56]** At oral argument, the Avoca Plaintiffs' counsel repeatedly represented to this Court that the Avoca Plaintiffs were not seeking to pursue any claims against any ***Tronox*** debtor. (Arg. Tr. at 5:9-10, 6:21-22. 53:4-7, 54:5-6, 62:15-16, 64:17-22.) As noted above, according to a brief submitted on January 26, 2016 by ***Tronox*** LLC and ***Tronox*** Worldwide Pty. Ltd. (formerly known as ***Tronox*** Worldwide LLC), the Avoca Plaintiffs have refused to sign a stipulation of dismissal as to the ***Tronox*** debtors in the PA State Action. (ECF No. 64.) The Avoca Plaintiffs vigorously dispute the ***Tronox*** debtors' position. (ECF No. 66.)

[16] The Avoca Motion's recitation of the history of the litigation suggest that, at least at the time that motion was filed, the Avoca Plaintiffs sought to hold (new) Kerr-McGee Corp. liable based on a theory of fraudulent restructuring and failure to follow corporate formalities with respect to ***Tronox***. (See, e.g., Avoca Motion ¶¶ 40-41, 51.) As discussed above, at oral argument, the Court observed that "the motion to restore is written as if somebody thinks they can

this Court that narrow the scope of the claims and/or theories they seek to pursue. In their opposition and sur-reply briefs, and particularly at oral argument, the Avoca Plaintiffs conceded that their remaining claims are narrower than a facial review of the Master Complaint—which was filed over ten years ago and prior to a substantial **[**59]** amount of litigation—suggests.

The Avoca Plaintiffs concede that (new) Kerr-McGee Corp. is the only defendant against whom they continue to pursue claims. (Arg. Tr. at 6:21-22.)[17] They concede that any claims against ***Tronox*** were discharged by the Bankruptcy Court's confirmation of the Plan. (See Arg. Tr. at 5:9-10, 53:4-8, 64:17-22.) The Avoca Plaintiffs also concede that ***Tronox*** LLC is the entity that succeeded the operator of the Avoca Plant, and that ***Tronox*** Worldwide LLC is the successor to the parent of that entity. (See Arg. Tr. at 59:7-16.) The Avoca Plaintiffs concede that (new) **[**60]** Kerr-McGee Corp. (and its predecessor, Kerr-McGee Holdco, Inc.) did not come into existence until 2001, five years after the Avoca Plant ceased operations. (Arg. Tr. at 19:19-23, 59:9-16; see also Master Complaint ¶¶ 17-18.) Finally, the Avoca Plaintiffs concede that to the extent the Master Complaint alleges that (new) Kerr-McGee Corp. is liable for harm done to the ***Tronox*** estate, such claims fall within the scope of the Injunction. (See Arg. Tr. 49:1-11.)

Along with making the above concessions, the Avoca Plaintiffs have, as explained below, modified their theories as to how (new) Kerr-McGee Corp. may be held liable despite the Injunction. The Court must therefore identify exactly what theories of liability the Avoca Plaintiffs continue to pursue. This task is not entirely straightforward; the Avoca Plaintiffs' position as to which slices of their claims remain has been a **[**61]** moving target, as they have revised their theories at each opportunity. Although oral argument helped clarify their most recent position, the Avoca Plaintiffs did not clearly articulate which, if any, of the potential bases for holding (new) Kerr-McGee Corp. liable they agree are no longer tenable as a result of the release obtained as part of ***Tronox***'s bankruptcy. To cover all bases, the Court identifies each of the theories that the Avoca Plaintiffs have advanced in opposing the pending motion, and then explains why none may proceed.

First, in the Avoca Plaintiffs' opposition brief filed in this Court, they described their remaining claim as alleging that (new) Kerr-McGee Corp. injured them directly through the imposition of, and acquiescence in, unconscionable environmental policies at the Avoca Plant. (Avoca Pls.' Opp. Br. at 11.) Following (new) Kerr-McGee Corp.'s response as to why that theory was flawed,[18] in their sur-reply **[*47]** brief the Avoca Plaintiffs next asserted that they seek to hold movant (new) Kerr-McGee Corp. liable for the particularized and direct conduct of (old) Kerr-McGee Corp. based on a veil piercing theory. (Avoca Pls.' Sur-reply Br. at 2-3, ECF No. 56.) They argued **[**62]** that the veil piercing claim falls outside the scope of the Injunction because such a claim was not asserted in the Adversary Proceeding and does not involve allegations of harm to ***Tronox***. Finally, at oral argument, the Avoca Plaintiffs again shifted their focus by—at times inconsistently—asserting that (new) Kerr-McGee Corp. is liable for its own direct and particularized conduct, as well as for the conduct of the debtors based on theories of "veil piercing" or "reverse veil piercing." (E.g., Arg. Tr. at 50:4-7, 54:1-4, 55:20-23, 59:18-21.) Thus, at various points during oral argument, and in their written submissions, the Avoca Plaintiffs advanced both direct and indirect theories of liability. The Court addresses these two forms of liability in turn.

2. Direct Liability

To the extent that the Avoca Plaintiffs argue that they may pursue direct claims against (new) Kerr-McGee Corp., it is clear that such claims have not been plausibly pled. Indeed, at oral argument, the Avoca Plaintiffs' counsel gave no indication that any additional facts indicated (new) Kerr-McGee Corp.'s direct involvement. (See Arg. Tr. at 55:20-56:20.) The causes of action in the Master Complaint asserted as to all defendants include, inter alia, assault, battery, negligence, trespass, nuisance and other similar claims. (See Master Complaint.) The factual allegations supporting those claims include, inter alia, that "Kerr-McGee Corp." exerted direct parental control of policies and decision-making that harmed the Avoca Plaintiffs. (Master Complaint ¶ 21.) But, at oral argument, the Avoca Plaintiffs conceded that this

go back after ***Tronox***, LLC and ***Tronox*** Worldwide." (Arg. Tr. at 7:16-18.) The Court has previously identified its concerns as to this discrepancy.

[17] Although, at least as a technical matter, the Avoca Plaintiffs have not conceded their claims against Kerr-McGee Holdco, they do not dispute that Kerr-McGee Holdco, Inc. was renamed Kerr-McGee Corporation in 2001 (Master Complaint ¶ 18), and as such currently has no existence independent of (new) Kerr-McGee Corp.

[18] In its reply, (new) Kerr-McGee Corp. pointed out that to the extent the Avoca Plaintiffs' claims are predicated on its having taken actions involving the Avoca Plant, such claims are, as pled, not viable because (new) Kerr-McGee Corp. did not come into existence until 2001, five years after the Avoca Plant ceased operations. (Kerr McGee Corp.'s Reply Br. at 4, ECF No. 47.) (New) Kerr-McGee Corp. argued that the Avoca Plaintiffs conflated **[**63]** the different corporate identities of it and (old) Kerr-McGee Corp., the predecessor of ***Tronox*** Worldwide LLC and the parent of the operator of the Avoca Plant. The Court suspects that this argument led the Avoca Plaintiffs to subsequently modify their position.

reference to "Kerr-McGee Corp." could not have meant (new) Kerr-McGee Corp., as (new) Kerr-McGee **[**64]** Corp. did not come into existence until 2001, whereas the Avoca Plant ceased operations in 1996. (Arg. Tr. at 59:9-16, 62:17-63:1; see Court Ex. 1.) The Avoca Plaintiffs admit that the last acts relating to the Avoca Plant that could have caused their injuries occurred at least five years before (new) Kerr-McGee Corp. came into existence. In this regard, they conceded that the chart used by (new) Kerr-McGee Corp. at oral argument (which the Court has incorporated into this decision) setting forth such history is accurate. (See Arg. Tr. at 59:9-16.)

Having made these admissions, there is no conceivable basis upon which the Avoca Plaintiffs can proceed on a theory of direct liability against (new) Kerr-McGee Corp. (New) Kerr-McGee Corp. could simply not have directly implemented or acquiesced in policies relating to the operation of a wood treatment plant that ceased operations years before it came into existence. General statements by the Avoca Plaintiffs, in which they refer to evidence that "Kerr-McGee Corp." engaged in particularized conduct relating to the operations of the Avoca Plant, cannot refer to conduct engaged in by the movant herein, (new) Kerr-McGee Corp. (See Avoca Pls.' **[**65]** Opp. Br. at 13-16; Arg. Tr. at 20:17-20 ((New) Kerr-McGee Corp.'s counsel stating, **[*48]** "[W]hen [Kerr-McGee Corporation] shows up in the master complaint it means one thing. When we talk about it, it means another. Therein lies the confusion."); Arg. Tr. at 24:7-12 ((New) Kerr-McGee Corp.'s counsel stating, "The rub is that whatever policies were drafted, reviewed, approved, managed, supervised could not have happened by this entity because it didn't exist when this was going on. And that's the fundamental disconnect between their own allegations and whether or not they can bring a complaint in Luzerne County.").) The Avoca Plaintiffs instead must be referring to (old) Kerr-McGee Corporation, which ultimately became debtor ***Tronox*** Worldwide LLC.

3. Indirect Liability

The Avoca Plaintiffs attempt to sidestep the obvious infirmities of their direct liability theory by arguing that the concepts of indirect liability—specifically, theories of "alter ego," "veil piercing" and "respondeat superior"—nonetheless remain. This reasoning is flawed. Fundamental to establishing indirect liability under the Avoca Plaintiffs' theories is the predicate establishment of direct liability against the ***Tronox*** debtors. **[**66]** This they cannot do.

Based on the facts included in the background section of the Avoca Plaintiffs' motion to restore jurisdiction to the Pennsylvania Court, the Avoca Plaintiffs seek to avoid the scope of the Injunction by relying significantly on Judge Gropper's findings in the Adversary Proceeding relating to (new) Kerr-McGee Corp.'s failure to adhere to corporate formalities and the intermingling of corporate affairs. (See Avoca Motion ¶¶ 58-59; Arg. Tr. at 31:13-16 ((New) Kerr-McGee Corp.'s counsel stating, "[The Avoca Plaintiffs] basically told Judge Amesbury in Luzerne County that they could prove their state case against Kerr-McGee Corp. using Judge Gropper's findings in the adversary proceeding.").) Essentially, they contend that Judge Gropper's findings render it unnecessary for the ***Tronox*** debtors to participate in any further litigation, meaning that pursuit of their claims would not violate the release of claims against the debtors. The Avoca Plaintiffs confirmed this view at oral argument when they agreed that they envisioned that, as a result of existing findings, there would be no need for the ***Tronox*** debtors to participate in the PA State Action. (Arg. Tr. at 52:22-53:14.) **[**67]**

This position, basic to how the Avoca Plaintiffs believe they can pursue their alter ego and veil piercing claims without the need for participation by the ***Tronox*** debtors, fundamentally misapprehends the legal effect of Judge Gropper's findings. Put otherwise, the Avoca Plaintiffs argue that they need not involve the ***Tronox*** debtors in the PA State Action because there has already been an adjudication that alter ego and/or veil piercing is appropriate against (new) Kerr-McGee Corp. This is akin to an issue preclusion argument, and is an incorrect statement of the law under the circumstances here.

The doctrine of issue preclusion holds that, subject to certain exceptions, "'when an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.'" *B & B Hardware, Inc. v. Hargis Indus., Inc., 135 S. Ct. 1293, 1303, 191 L. Ed. 2d 222 (2015)* (quoting *Restatement (Second) of Judgments § 27*, p. 250 (1980) (alterations omitted)). Judge Gropper's findings of liability against Kerr-McGee Corp. in the Adversary Proceeding clearly do not qualify. First, because the parties settled before Judge Gropper made a damages determination, **[*49]** no **[**68]** final judgment was even entered in the Adversary Proceeding. Second, the issue of whether Kerr-McGee Corp. was an alter ego of the ***Tronox*** debtors was not actually litigated and necessarily determined in the Adversary Proceeding. Judge Gropper was faced with claims for actual and constructive fraudulent conveyance, *In re **Tronox**, Inc., 503 B.R. at 266*, which involve different elements than claims for alter ego and/or veil piercing under Delaware law, compare *id. at 277, 291* (stating that key questions for actual and constructive fraudulent conveyance were whether spinoff transactions were made with actual intent to hinder, delay or defraud, and whether reasonably equivalent value was paid and if the result was insolvency or inadequate capitalization) with *Mason, 2005 Del. Ch. LEXIS 99, 2005 WL 1653954, at *3* (describing relevant factors for veil piercing claim, which focus on maintenance of corporate formalities). Therefore, to the extent that the Avoca Plaintiffs rest their argument on the idea that the ***Tronox*** debtors would be excluded from participation in any further litigation, they are mistaken.

Put in terms of this case, the only basis for asserting an indirect claim against (new) Kerr-McGee Corp. based on one of these theories is as follows. The Avoca Plaintiffs would have to first **[**69]** make a claim (and eventually establish liability) against the Avoca Plant operating company (a released debtor), and then make a claim (and establish liability) against (old) Kerr-McGee Corp. (another released debtor) based on its implementation and acquiescence in policies relating to the Avoca Plant. Finally, the Avoca Plaintiffs would have to show that (new) Kerr-McGee Corp. is the alter ego of the released ***Tronox*** debtor entity, or pierce the corporate veil between the two. Put otherwise, (new) Kerr-McGee Corp. could be liable only by virtue of its relationship to (old) Kerr-McGee Corp., which, as discussed previously, became ***Tronox*** Worldwide LLC.[19] (New) Kerr-McGee highlighted this point at oral argument (see Arg. Tr. at 34:14-25), using the following graphic (Court Ex. 3, ECF No. 61), which quoted from the Avoca Plaintiffs' sur-reply:

[*50] Furthermore, as explained above, the concepts of alter ego and veil piercing are largely remedial and derivative of the liability of another entity—they do not serve as independent causes of action. These doctrines are most commonly used where a plaintiff is unable to fully satisfy its claim against the direct wrongdoer, whose liability is established. Here, when the Avoca Plaintiffs settled their claims against the ***Tronox*** debtors as part of the confirmation of ***Tronox***'s bankruptcy plan (pursuant to which they received a share of the proceeds of the Tort Claims Trust, which in turn received a share of the proceeds of the Anadarko Litigation Trust), their right to pursue further satisfaction for their claims against the ***Tronox*** debtors was extinguished. The Avoca Plaintiffs provided an unambiguous release to the debtors. Having settled and released their claims against the ***Tronox*** debtors, the Avoca Plaintiffs may not now seek to assert claims fundamentally dependent on liability which may not proceed.

B. Claims Barred by the Injunction

Even if the Avoca Plaintiffs' claims were not otherwise unavailable as a matter **[**71]** of law, the Injunction separately bars any claim against the movant herein that they seek to assert. This discussion requires a clear understanding of the scope of claims proscribed by the Injunction.

Terms of an injunction are construed according to the general interpretive principles of contract law. *Mastrovincenzo v. City of New York, 435 F.3d 78, 103 (2d Cir. 2006)*. This Court must defer to the plain meaning of the language and the normal usage of the terms selected. *Id.*; see also *In re Kalikow, 602 F.3d at 94-95*. In this regard, the terms of the Settlement Agreement (which contains the definitions of several of the terms used in the Injunction), must be interpreted in accordance with New York law. (Settlement Agreement § 13.3.) Pursuant to New York law, the Court interprets the Settlement Agreement "so as to give effect to the intention of the parties as expressed in the unequivocal language they have employed." **[*51]** *Terwilliger v. Terwilliger, 206 F.3d 240, 245 (2d Cir. 2000)*.

The Injunction in the Settlement Agreement bars ***Tronox***'s creditors (and their attorneys) from asserting against any "Anadarko Released Party" any "Trust Derivative Claims" or "any claims that are duplicative of "Trust Derivative Claims," whether or not held or controlled by the Anadarko Litigation Trust, or whether or not it could have asserted such claims against any "Anadarko **[**72]** Released Party." *Anadarko, 2014 U.S. Dist. LEXIS 158767, 2014 WL 5825308, at *10*.[20]

The term "Trust Derivative Claims" was defined in the Settlement Agreement to include any claims that the Anadarko Litigation Trust asserted or could have asserted "seeking relief or recovery arising from harm to any Debtor or

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[19] The Avoca Plaintiffs' argument could also be construed as seeking to "double pierce" the corporate veil, first from the operator of the plant (which became ***Tronox*** LLC) to its direct parent (which became ***Tronox*** Worldwide LLC), and then to pierce the corporate veil a second time from that entity up to (new) Kerr-McGee Corp. That theory is not viable for **[**70]** the same reasons as the single-level veil piercing theory described above.

[20] The Avoca Plaintiffs do not dispute that they were creditors of ***Tronox*** based on the state law claims they filed against the predecessors of ***Tronox*** LLC and ***Tronox*** Worldwide LLC in the PA State Action. The Avoca Plaintiffs also do not dispute that (new) Kerr-McGee Corp. qualifies as an "Anadarko Released Party." (Settlement Agreement § 1.9.)

any Debtor's estate, based on any legal theory" including claims "arising out of or in any way related to (i) the Adversary Proceeding; (ii) the Chapter 11 Cases; (iii) the Bankruptcy Claims; (iv) the Covered Sites; and/or (v) any [released party's] ownership . . . or other relationship with a Debtor and/or any of its predecessors . . . ." (Settlement Agreement § 1.82.) The definition explicitly includes claims for "alter ego," "corporate veil piercing," and "successor liability." Id. The key concept is that where the action is intended to increase the basket of assets for creditors regarding the Covered Sites, or based **[**73]** on prior ownership of a debtor, the claims asserted in the action are "Trust Derivative Claims."

This is even clearer here as the Injunction at issue arose out of a settlement of the Adversary Proceeding; the purpose of the Injunction is to prevent attempts to pursue claims that were or could have been part of an adversary proceeding by ***Tronox*** against (new) Kerr-McGee Corp. See *Fed. R. Bankr. P. 7001* (listing ten categories of adversary proceedings); *In re Dynegy, Inc., 770 F.3d 1064, 1069 (2d Cir. 2014)* ("An adversary proceeding must fall within one of the ten categories defined in *Bankruptcy Rule 7001*.").

Finally, while the Injunction does not bar any liability that such released parties "might have that does not arise from or through a liability of a Debtor," *Anadarko, 2014 U.S. Dist. LEXIS 158767, 2014 WL 5825308, at *10*, that provision does not assist the Avoca Plaintiffs. Given the Avoca Plaintiffs' theories of indirect liability, this "arise from or through a liability of a Debtor" language is key; only by establishing liability of a debtor (twice) can the Avoca Plaintiffs proceed.

The Avoca Plaintiffs argue that their personal injury claims cannot be "Trust Derivative Claims" covered by the Injunction because the Anadarko Litigation Trust never possessed and could not have asserted their personal claims against a non-released party, **[**74]** (new) Kerr-McGee Corp. The Avoca Plaintiffs assert that their claims do not arise from any harm to ***Tronox***, but rather to personal injuries they separately suffered. (Arg. Tr. 63:14-16.) As support, they assert that "Trust Derivative Claims" only include claims that arose "from harm to any Debtor or any Debtor's estate" (Settlement Agreement § 1.82 (emphasis added)). This argument is flawed. It misunderstands the nature of their indirect claims, and their interpretation of the scope of claims alleging harm to a debtor's estate is unduly narrow.

In certain places in their papers, the Avoca Plaintiffs appear to pursue this argument based on theories of direct liability **[*52]** of (new) Kerr-McGee Corp. to them. But this is not how their claim is or could be alleged and is not plausible. Their admissions in this Court alone dispose of any theory of direct liability. The Master Complaint (which, of course, was drafted without the benefit of the subsequent ten years of litigation and the factual development as to the relevant corporate history that the Court has previously detailed) does allege that "Kerr-McGee Corp." was directly responsible for the Avoca Plaintiffs' personal injuries based on its own **[**75]** conduct, including, in particular, the imposition of, and acquiescence in, unconscionable environmental policies at the Avoca Plant. (Master Complaint ¶ 21.) At oral argument, the Avoca Plaintiffs argued at one point that their theory of direct liability is that "the parent is responsible due to negligence in proximately causing personal injury" to the Avoca Plaintiffs; that (new) Kerr-McGee Corp. is "directly responsible for the policies that led to the harm" that the Avoca Plaintiffs suffered; and that the claim survives because "no other creditor . . . is making any claim that arises from any decisions made by Kerr-McGee Corporation having to do with the environmental policies in the Avoca wood treatment plant." (Arg. Tr. At 50:5-7, 55:20-22, 61:12-15.) But this mixes the issues of direct claims (which they do not have) with whether their indirect claims can constitute "Trust Derivative Claims" given their personal nature. These arguments must be separated.

As to direct claims, it is not that no direct claim could be possible. If the Avoca Plaintiffs had alleged that (new) Kerr-McGee Corp. was directly liable because it instructed its subsidiaries to not clean up the Avoca Plant **[**76]** site, causing further injuries, such a claim would not constitute a Trust Derivative Claim or be duplicative of one. Therefore, if viable, such a claim would fall outside the scope of the Injunction. (New) Kerr-McGee Corp. has effectively conceded as much. (See Arg. Tr. at 41:1-6, 41:19-25, 66:4-12.) Such allegations would present a claim based on alleged tortious conduct of (new) Kerr-McGee Corp. itself that was directed at the Avoca Plaintiffs, and not at ***Tronox*** or its creditors in general. This is an independent and particularized claim that resembles the claims that belonged to individual creditors in JPMorgan and Manville III. See *JPMorgan, 721 F.3d at 71*; *Manville III, 517 F.3d at 65, 68*. The harm alleged would have been suffered directly by these plaintiffs and no other creditors of the ***Tronox*** estate.

The Avoca Plaintiffs have foreclosed this claim. They have conceded that there are no facts that would allow such a theory, as (new) Kerr-McGee Corp. could not have directly implemented or acquiesced in policies relating to the operation of a wood treatment plant that ceased operations years before it came into existence, and they have never once proffered a single fact that supports an instruction as to clean up of the Avoca Plant site. **[**77]**

Turning to the argument that the personal nature of the claims removes them from any "derivative" category, that argument misunderstands bankruptcy law. "Trust Derivative Claims," as understood in bankruptcy law, include the universe of claims alleging harm to a debtor's estate; such a universe is broader than claims that a debtor could have brought prior to its entrance into bankruptcy.[21]

[*53] The bankruptcy estate includes "[e]very conceivable interest of the debtor, future, nonpossessory, contingent, speculative, and derivative." *Madoff, 740 F.3d at 88*. It includes not only the causes of action possessed by the debtor at the time it filed for bankruptcy protection, but also property that the trustee may recover on behalf of the estate. *Id.* Most pertinent here, a trustee may recover, on behalf of the creditors of the estate, liabilities that are derived from the debtor that are generalized and common to all creditors. See *Madoff, 740 F.3d at 89, 93*; see also *Koch Ref., 831 F.2d at 1349* ("[A] single creditor may not maintain an action on his own behalf against a corporation's fiduciaries if that creditor shares in an injury common to all creditors and has personally been injured only in an indirect manner."). The rationale for conferring on the trustee, to the exclusion of individual creditors, the right to recover for derivative, generalized claims is that only the estate is capable of ensuring equitable distribution **[**79]** of the proceeds, preventing individual creditors from chasing limited assets that should be shared collectively. See *Retired Partners of Coudert Bros. Trust v. Baker & McKenzie LLP (In re Coudert Bros. LLP), No. 11-2785 CM, 2012 U.S. Dist. LEXIS 168492, 2012 WL 1267827, at *6 (S.D.N.Y. Apr. 12, 2012)* (If individual creditors "can rely on a theory of successor liability to recover from [third parties], then so can every other . . . creditor, and who recovers depends merely on who sues the [third parties] first. This is precisely the sort of result the Bankruptcy Code exists to forestall, by placing exclusive standing over estate claims in the bankruptcy trustee or plan administrator."); see also *Koch Ref., 831 F.2d at 1343* ("Historically one of the prime purposes of the bankruptcy law has been to bring about a ratable distribution among creditors of a bankrupt's assets; to protect the creditors from one another." (alterations omitted)).

Inquiry into the factual origins of the Avoca Plaintiffs' indirect liability claims, see *Madoff, 740 F.3d at 89-92*, shows that these claims are generalized to all ***Tronox*** creditors and do not allege individualized harm. The Avoca Plaintiffs' bases for asserting theories of alter ego, veil piercing, or respondeat superior are unrelated to the operations of the Avoca Plant and the personal injuries **[**80]** the Avoca Plaintiffs suffered. The indirect liability allegations are that "Kerr-McGee Corporation", inter alia, "dominated", "had no separate existence from", was a "conduit" of, and had "common boards of directors, officers and employers" with, its subsidiaries. (Master Complaint ¶ 19.) These allegations are generalized to all creditors because they could be equally asserted (if they were not barred by the release) by any creditor of the ***Tronox*** debtor entities whose claim has been left partially unsatisfied by recovery efforts from the ***Tronox*** debtors themselves. In other words, claims based on allegations such as these—a general failure to adhere to corporate formalities and abuse of the corporate form—are equally capable of increasing the basket of assets that could be used to satisfy any and all liabilities owed by the ***Tronox*** debtors. This enlargement of the pool of assets that **[*54]** may be reached to satisfy liabilities for which the ***Tronox*** debtors are directly responsible is plainly to the benefit of all of ***Tronox***'s creditors in proportion to their claims against the ***Tronox*** debtors. In short, because the Avoca Plaintiffs' theories of indirect liability are generalized to all creditors, **[**81]** they belonged to the ***Tronox*** estate and thus fell within the scope of "Trust Derivative Claims" as defined in the Injunction.

1. Expectations of the Parties

The Avoca Plaintiffs further argue that their claims must fall outside the scope of the Injunction because barring these claims violates the expectations of the parties to the Settlement Agreement. The Avoca Plaintiffs reason that the claims they seek to pursue against (new) Kerr-McGee Corp. must have survived the settlement because—through the Tort Claims Trust and its Advisory Committee—they explicitly rejected Anadarko and (new) Kerr-McGee Corp.'s request for a broad release as to them as part of a settlement of the Adversary Proceeding. (Avoca Pls.' Opp. Br. at 22-23; see also Arg. Tr. at 68:4-11.) This view is misguided. A belief that claims are retained is trumped by contractual language that clearly states they are not. *Mastrovincenzo, 435 F.3d at 103* (court must defer to plain terms of injunction).

In a similar vein, the Avoca Plaintiffs also argue that their claims must survive because (new) Kerr-McGee Corp. waived

[21] This understanding is buttressed by the proceedings and litigation history that led to this Court's entry of the Injunction. In particular, the Court's view is informed by the nature and scope of the Adversary Proceeding and the Settlement Agreement. The Adversary Proceeding (and the resulting Settlement Agreement) encompassed any and all claims that the ***Tronox*** trustee could pursue against (new) Kerr-McGee Corp. The Adversary Proceeding was brought by the ***Tronox*** estate (and then continued by the Anadarko Litigation Trust) to recover funds transferred to (new) Kerr-McGee Corp. through fraudulent intra-corporate shenanigans. The Anadarko Litigation Trust Agreement gave the Litigation Trust the power to institute any other actions that could have been brought by ***Tronox*** against (new) Kerr-McGee Corp. (Stephen **[**78]** Scotch-Marmo Decl., Ex. 2, ECF No. 48-2.) Thus, any claims that could be asserted by the ***Tronox*** trustee against the defendants in the Adversary Proceeding may properly fall within the scope of the Settlement Agreement and the Injunction.

its right to contest its responsibility for the policies at the Avoca Plant. Their argument rests on (new) Kerr-McGee Corp.'s decision not to **[**82]** argue that it was the wrong entity to the Pennsylvania Court despite the several years of litigation that preceded the ***Tronox*** bankruptcy. (Arg. Tr. 50:21-51:8, 64:5-10.) But the fact that (new) Kerr-McGee Corp. did not seek dismissal of the suit prior to the ***Tronox*** bankruptcy—and thus prior to the release of claims against ***Tronox***, and entry of the Settlement Agreement and the Injunction—does not mean that (new) Kerr-McGee Corp. would have proceeded in the same fashion if it were the sole remaining defendant and the only potential claims against it were based on its direct liability. The Court does not believe, under the circumstances, that anything should be read into (new) Kerr-McGee Corp.'s decision not to advance this argument when the case was very different back in 2009.

2. Prior History as Guide

The Avoca Plaintiffs also argue that their claims are not "Trust Derivative Claims" based on the Bankruptcy Court's decision in *Mount Canaan Full Gospel Church Inc. v. Kerr-Mcgee Ref. Corp. (In re **Tronox** Inc.) ("Mt. Canaan"), Bankruptcy No. 09-10156 (ALG), 2011 Bankr. LEXIS 441, 2011 WL 482724 (Bankr. S.D.N.Y. Feb. 4, 2011)*. There, plaintiff Mount Canaan Full Gospel Church brought an action in Alabama state court alleging state law claims relating to the **[**83]** operation of a petrochemical facility owned by an affiliate of (new) Kerr-McGee Corp. *2011 Bankr. LEXIS 441, [WL] at *1*. The complaint did not name any ***Tronox*** entity as a defendant, and no ***Tronox*** entity entered the case until one of (new) Kerr-McGee Corp.'s co-defendants filed a cross-claim naming ***Tronox*** Inc., its affiliate Triple S Refining Corporation, and (new) Kerr-McGee Corp. as cross-claim defendants. Id.

The case was automatically stayed when ***Tronox*** filed for bankruptcy in January 2009; at that time, (new) Kerr-McGee Corp. filed a notice of removal asserting the existence of bankruptcy jurisdiction and seeking transfer of venue to the Bankruptcy Court. Id. In February 2011—prior to the issuance of the Injunction—the Bankruptcy Court granted the plaintiff's motion to remand to state court on the basis that the litigation was not closely related to the ***Tronox*** bankruptcy. *2011 Bankr. LEXIS 441, [WL] at [*55] *3*. The Bankruptcy Court reasoned that remand was appropriate because the Adversary Proceeding was "concerned with the corporate transactions that gave rise to the [***Tronox***] spin-off," whereas the Mt. Canaan suit was based solely on Alabama law (involving claims of negligence, trespass, nuisance and strict liability for contamination) and related **[**84]** only to events and property located in Alabama. *2011 Bankr. LEXIS 441, [WL] at *1, 3*. The Bankruptcy Court concluded that there was no reason to keep the case, as the plaintiff had released the ***Tronox*** debtors from any liability and the cross-claims and potential third-party claims against ***Tronox*** had been quantified or liquidated. *2011 Bankr. LEXIS 441, [WL] at *2-4*. Here, the Avoca Plaintiffs chose to participate in the bankruptcy, and to agree to the settlement in the Adversary Proceeding (notwithstanding their reservations).

The plaintiff in Mt. Canaan was not subject to the Settlement Agreement or the Injunction, nor was it a claimant in ***Tronox***'s bankruptcy. (Kerr McGee Corp.'s Reply Br. at 10.) There is, moreover, no indication in Judge Gropper's decision that the plaintiff sought to hold (new) Kerr-McGee Corp. indirectly liable for the conduct of a ***Tronox*** debtor, as the Avoca Plaintiffs do here.[22] Finally, to the extent that any inconsistencies between this Court's decision and Judge Gropper's decision in Mt. Canaan, Judge Gropper's decision, which was not appealed from, is not preclusive of (new) Kerr-McGee Corp.'s motion here.

C. The Relief

(New) Kerr-McGee Corp. seeks an order requiring the Avoca Plaintiffs to cease litigating the PA State Action against them, and to dismiss it as to the released ***Tronox*** debtors. (Kerr-McGee Corp.'s Opening Br. at 14.) The Avoca Plaintiffs counter that, as this in part requires a determination as to the viability of the direct claims and the meaning and scope of their indirect claims, (new) Kerr-McGee Corp. is essentially seeking a summary judgment ruling from this Court—a ruling that should be left to the Pennsylvania Court. (Avoca Pls.' Sur-reply Br. at 5-8.) In the context here, which involves the enforcement of this Court's own prior orders, and based on the law applicable to such situations, the Avoca Plaintiffs are incorrect. It is within this Court's discretion and power to enforce the Injunction and, if to do that it is required to order parties to take appropriate actions in that regard, so be it. This Court also has tremendous interest in preventing litigation **[**86]** the pursuit of which is violative of an injunction previously issued by this Court.

In their sur-reply, the Avoca Plaintiffs ask that, to the extent this Court determines that their claims are barred, they should be allowed an opportunity to seek leave from the Pennsylvania Court to amend their pleadings. (Avoca Pls.' Sur-reply Br. at 5; see also Avoca Pls.' January 27, 2016 Letter at 3, ECF No. 66.) That request is denied.

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[22] In Mt. Canaan, (new) Kerr-McGee Corp. did argue, in opposing remand, that the plaintiff incorrectly named it as the owner of **[**85]** the Alabama facility. *2011 Bankr. LEXIS 441, [WL] at *2*. There is, however, nothing in Judge Gropper's decision to suggest that the plaintiff pursued theories of indirect liability against (new) Kerr-McGee Corp. similar to those at issue here.

The Avoca Plaintiffs have already had ample opportunity to work out their theories and present their strongest possible claims. Despite specific questions at oral argument, or in any of the many submissions to this Court on this motion, they have provided no fact that would save their **[*56]** claims. The lack of any such facts distinguishes this case from Madoff, in which the Second Circuit determined that there was "conceivably some particularized conspiracy claim" that the plaintiffs could assert that would not be derivative of claims made by the trustee. *Madoff, 740 F.3d at 94*. Furthermore, the Court is concerned that the request by the Avoca Plaintiffs is in all events gamesmanship. That view is bolstered by the recent refusal of the Avoca Plaintiffs to dismiss their claims against the ***Tronox*** **[**87]** debtors—parties as to whom they have no credible arguments that any claim survives. This position greatly concerns the Court.

IV. CONCLUSION[23]

For the reasons set forth above, the Court GRANTS Kerr-McGee Corp.'s motion to enforce the Injunction. The Avoca Plaintiffs are hereby ORDERED to dismiss with prejudice their actions filed in the Court of Common Pleas of Luzerne County, Pennsylvania, against Kerr-McGee Corp. within seven days, and to make no attempt to file any actions making similar claims against (new) Kerr-McGee Corp. or any ***Tronox*** debtor in any other forum.

The Clerk of Court is directed to close the motion at ECF No. 37.

SO ORDERED.

Dated: New York, New York

February 1, 2016

/s/ Katherine B. Forrest

KATHERINE B. FORREST

United States District Judge

[23] The Court has considered the Avoca Plaintiffs' other arguments, and concludes that they are without merit.

Positive

As of: December 9, 2015 4:44 PM EST

Marshall v. Picard (In re Bernard L. Madoff Inv. Secs. LLC)

United States Court of Appeals for the Second Circuit

December 6, 2012, Argued; January 13, 2014, Decided

Nos. 12-1645-bk(L), 12-1646-bk(CON), 12-1651-bk(CON), 12-1669-bk(CON), 12-1703-bk(CON)

Reporter

740 F.3d 81; 2014 U.S. App. LEXIS 600; Bankr. L. Rep. (CCH) P82,566; 58 Bankr. Ct. Dec. 272; 2014 WL 103988

IN RE: BERNARD L. MADOFF INVESTMENT SECURITIES LLC, Debtor. SUSANNE STONE MARSHALL, individually and to the extent she purports to represent a class of those similarly situated, ADELE FOX, individually and to the extent she purports to represent a class of those similarly situated, Claimants-Appellants, v. IRVING H. PICARD, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC, Appellee, SECURITIES INVESTOR PROTECTION CORPORATION, Intervenor.*

Subsequent History: As Amended March 3, 2014.

Prior History: *Fox v. Picard (In re Madoff), 848 F. Supp. 2d 469, 2012 U.S. Dist. LEXIS 41262 (S.D.N.Y., 2012)*

Disposition: **[**1]** Appeal from the United States District Court for the Southern District of New York. No. 10 Civ. 7101 (JGK)—John G. Koeltl, Judge. Once again, we are asked to review the liquidation proceedings involving Bernard L. Madoff Investment Securities LLC ("BLMIS")—the investment enterprise created by Bernard L. Madoff to effect his now-infamous Ponzi scheme. These consolidated appeals arise out of a permanent injunction entered by the United States Bankruptcy Court for the Southern District of New York (Burton R. Lifland, Bankruptcy Judge) and affirmed by the United States District Court for the Southern District of New York (John G. Koeltl, Judge), enjoining state law tort actions brought by appellants, two of Madoff's defrauded "investors," against the estate of Jeffry M. Picower, one of Madoff's alleged co-conspirators, and related defendants (collectively, "Picower defendants"). We consider two questions: (1) whether the Bankruptcy Court had the authority under the Bankruptcy Code to enjoin appellants' actions as "derivative" of adversary proceedings brought by the trustee for the BLMIS estate, Irving Picard ("Picard" or the "Trustee"), against the Picower defendants; and, if indeed authorized **[**2]** by the Bankruptcy Code, (2) whether the exercise of such authority transgressed the limitations imposed by Article III of the United States Constitution. First, we conclude that appellants' complaints impermissibly attempt to "plead around" the Bankruptcy Court's injunction barring all claims "derivative" of those asserted by the Trustee. Although appellants seek damages that are not recoverable in an avoidance action, their complaints allege nothing more than steps necessary to effect the Picower defendants' fraudulent withdrawals of money from BLMIS, instead of "particularized" conduct directed at BLMIS customers. Second, we conclude that the Bankruptcy Court operated within the confines of Article III of the United States Constitution, as recently interpreted by the *Supreme Court in Stern v. Marshall, 131 S. Ct. 2594, 180 L. Ed. 2d 475 (2011)*. Accordingly, we hold that the Bankruptcy

* The Clerk of Court is directed to amend the official caption in this case to conform to the listing of the parties above.

Court did not exceed the bounds of its authority under the Bankruptcy Code or run afoul of Article III.

Affirmed.

Core Terms

bankruptcy court, customers, derivative, injunction, complaints, appellants', fraudulent, Trustee's, liquidation, withdrawals, particularized, Investor, fraudulent transfer, settlement, enjoining, defendants', allegations, Securities, conspiracy, insurers, permanent injunction, injuries, fraudulent conveyance, duplicative, proceedings, asbestos, internal quotation, bankrupt estate, state law, misrepresentations

Case Summary

Overview

HOLDINGS: [1]-Allegations in the Florida actions of a certain conspiracy echoed those made by the Trustee in his New York action for recovery of fraudulent transfers. The claimants' complaints here impermissibly attempted to ″plead around″ the Bankruptcy Court's injunction barring all claims ″derivative″ of those asserted by the Trustee; [2]-Although the claimants sought damages that were not recoverable in an avoidance action, their complaints alleged nothing more than steps necessary to effect certain defendants' fraudulent withdrawals of money from debtor, instead of ″particularized″ conduct directed at debtor's customers; [3]-The Bankruptcy Court operated within the confines of U.S. Const. art. III, as recently interpreted in Stern. Accordingly, the Bankruptcy Court did not exceed the bounds of its authority under the Bankruptcy Code or run afoul of U.S. Const. art. III.

Outcome

The judgment of the District Court was affirmed without prejudice to the claimants seeking leave to amend their complaints in the U.S. District Court for the Southern District of Florida.

LexisNexis® Headnotes

Bankruptcy Law > ... > Judicial Review > Standards of Review > Clear Error Review

Bankruptcy Law > ... > Judicial Review > Standards of Review > De Novo Standard of Review

HN1 On appeal from the district court's review of a bankruptcy court decision, a court of appeals review the bankruptcy court decision independently, accepting its factual findings unless clearly erroneous but reviewing its conclusions of law de novo.

Civil Procedure > Remedies > Injunctions > Permanent Injunctions

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

HN2 The standard of review for the grant of a permanent injunction, including an anti-suit injunction, is abuse of discretion. Case law has explained the term of art ″abuse of discretion″ as a ruling based on an erroneous view of the law or on a clearly erroneous assessment of the evidence, or a decision that cannot be located within the range of permissible decisions.

Civil Procedure > Remedies > Injunctions > General Overview

Civil Procedure > Appeals > Standards of Review > General Overview

HN3 The scope of an injunction turns upon the intent and effect of the bankruptcy court's order, and, thus, a bankruptcy court's interpretation of its own order warrants customary appellate deference.

Bankruptcy Law > Estate Property > Contents of Estate

Bankruptcy Law > ... > Eligibility > Exclusions > Clearing Banks, Commodity Brokers & Stockbrokers

HN4 The touchstone for bankruptcy jurisdiction over a non-debtor's claim remains whether its outcome might have any conceivable effect on the bankruptcy estate. In a Securities Investor Protection Act liquidation, the bankruptcy estate encompasses all legal or equitable interests of the debtor in property as of the commencement of the case. *11 U.S.C.S. § 541(a)(1)*. Such interests include causes of action possessed by the debtor at the time of filing and any interest in property that the trustee recovers under specified Bankruptcy Code provisions, *11 U.S.C.S. § 541(a)(3)*. Every conceivable interest of the debtor, future, nonpossessory, contingent, speculative, and derivative, is within the reach of the bankruptcy estate.

Bankruptcy Law > ... > Examiners, Officers & Trustees > Duties & Functions > Capacities & Roles

Bankruptcy Law > Estate Property > Contents of Estate

Civil Procedure > ... > Capacity of Parties > Representative Capacity > Trustees

HN5 A claim based on rights ″derivative″ of, or ″derived″ from, the debtor's typically involves property of the estate. By contrast, a bankruptcy court generally has limited authority to approve releases of a non-debtor's independent claims. As one federal appeals court has explained: The point is simply that the trustee is confined to enforcing entitlements of the debtor. He has no right to enforce entitlements of a creditor. He represents the unsecured creditors of the debtor; and in that sense when he is suing on behalf of the debtor he is really suing on behalf of the creditors of the debtor. But there is a difference between a creditor's interests in the claims of the debtor against a third party, which are enforced by the trustee, and the creditor's own direct--not derivative--claim against the third party, which only the creditor can enforce. Put another way, when creditors have a claim for injury that is particularized as to them, they are exclusively entitled to pursue that claim, and the bankruptcy trustee is precluded from doing so.

Bankruptcy Law > ... > Examiners, Officers & Trustees > Duties & Functions > Capacities & Roles

Civil Procedure > ... > Capacity of Parties > Representative Capacity > Trustees

HN6 The U.S. Court of Appeals for the Second Circuit has defined so-called ″derivative claims″ in the context of bankruptcy as ones that arise from harm done to the estate and that seek relief against third parties that pushed the debtor into bankruptcy. In assessing whether a claim is derivative, the court inquires into the factual origins of the injury and, more importantly, into the nature of the legal claims asserted. While a derivative injury is based upon a secondary effect from harm done to the debtor, an injury is said to be ″particularized″ when it can be directly traced to the third party's conduct.

Bankruptcy Law > ... > Examiners, Officers & Trustees > Duties & Functions > Capacities & Roles

Bankruptcy Law > ... > Avoidance > Fraudulent Transfers > General Overview

Civil Procedure > ... > Capacity of Parties > Representative Capacity > Trustees

HN7 Although state law typically provides creditors with the right to assert fraudulent conveyance claims, a typical fraudulent transfer claim is perhaps the paradigmatic example of a claim that is ″general″ to all creditors. It is normally the debtor's creditors, and not the debtor itself, that have the right to assert a fraudulent transfer claim outside of bankruptcy, but in bankruptcy such a claim is usually brought by the trustee, for the benefit of all creditors. This is because the claim is really seeking to recover property of the estate.

Bankruptcy Law > ... > Examiners, Officers & Trustees > Duties & Functions > Capacities & Roles

Civil Procedure > ... > Capacity of Parties > Representative Capacity > Trustees

HN8 Overlapping allegations may give rise to a multiplicity of claims. There is nothing illogical or contradictory about saying that a third-party defendant might have inflicted direct injuries on both the estate's creditors and the debtor estate during the course of dealings that form the backdrop of both sets of claims.

Bankruptcy Law > ... > Avoidance > Fraudulent Transfers > General Overview

Bankruptcy Law > ... > Prepetition Transfers > Preferential Transfers > General Overview

Bankruptcy Law > Procedural Matters > Jurisdiction > General Overview

HN9 Granfinanciera held that a fraudulent conveyance claim is a matter of private right when asserted against a person who has not submitted a claim against a bankruptcy estate. The Court reaffirmed this limitation of Granfinanciera's holding in Stern. A preferential transfer claim can be heard in bankruptcy when the allegedly favored creditor has filed a claim, because then the ensuing preference action by the trustee becomes integral to the restructuring of the debtor-creditor relationship.

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Judges: Before: CABRANES, RAGGI, and CARNEY, Circuit Judges.

Opinion by: JOSÉ A. CABRANES

Opinion

[*84] JOSÉ A. CABRANES, *Circuit Judge*:

Once again, we are asked to review the liquidation proceedings involving Bernard L. Madoff Investment Securities LLC ("BLMIS")—the investment enterprise created by Bernard L. Madoff to effect his now-infamous Ponzi scheme. These consolidated appeals arise out of a permanent injunction entered by the United States Bankruptcy Court for the Southern District of New York (Burton R. Lifland, *Bankruptcy Judge*) and affirmed by the United States District Court for the Southern **[**4]** District of New York (John G. Koeltl, *Judge*), enjoining state law tort actions asserted by appellants, two of Madoff's defrauded "investors," against the estate of Jeffry M. Picower, one of Madoff's alleged co-conspirators, and related defendants (collectively, "Picower defendants"). We consider two questions: (1) whether the Bankruptcy Court had the authority under the Bankruptcy Code to enjoin appellants' actions as "derivative" of adversary proceedings brought by the trustee for the BLMIS estate, Irving Picard ("Picard" or the "Trustee"), against the Picower defendants; and, if indeed authorized by the Bankruptcy Code, (2) whether the Bankruptcy Court transgressed the limitations on its authority imposed by Article III of the United States Constitution.

First, we conclude that appellants' complaints impermissibly attempt to "plead around" the Bankruptcy Court's injunction barring all claims "derivative" of those asserted by the Trustee. Although appellants seek damages that are not recoverable in an avoidance action, their complaints allege nothing more than steps necessary to effect the Picower defendants' fraudulent withdrawals of money from BLMIS, instead of "particularized" conduct **[**5]** directed at BLMIS customers. Second, we conclude that the Bankruptcy Court operated within the confines of Article III of the United States Constitution, as recently interpreted by the Supreme Court in *Stern v. Marshall, 131 S. Ct. 2594, 180 L. Ed. 2d 475 (2011)*. Accordingly, we hold that the Bankruptcy Court did not exceed the bounds of its authority under the Bankruptcy Code or run afoul of Article III.

BACKGROUND

Following Madoff's arrest in December 2008, the Securities and Exchange Commission filed a civil complaint against Madoff and BLMIS in the United States District Court for the Southern District of New York, alleging that they had operated a Ponzi scheme through BLMIS's investment-advisor activities. On December 15, 2008, upon an application filed by the Securities Investment Protection Corporation ("SIPC"),[1] the District Court entered a protective order placing BLMIS in liquidation under the Securities Investor Protection Act ("SIPA"), appointing Picard as the Trustee, and referring the case to the United States Bankruptcy Court for the Southern District of New York.[2] *See* Order, *SEC v. Bernard L. Madoff and Bernard* **[*85]** *L. Madoff Inv. Sec. LLC*, No. 08 Civ. 10791 (LLS) (S.D.N.Y. Dec. 15, 2008), ECF **[**6]** No. 4.

A

SIPA establishes procedures for the expeditious and orderly liquidation of failed broker-dealers, and provides special protections to their customers. A trustee's primary duty under SIPA is to liquidate the broker-dealer and, in so doing, satisfy claims made by or on behalf of the broker-dealer's customers for cash balances. *In re Bernard L. Madoff Inv. Sec. LLC, 654 F.3d 229, 233 (2d Cir. 2011)*. In a SIPA liquidation, a fund of "customer property" is established—consisting of cash and securities held by the broker-dealer for the account of a customer, or proceeds therefrom, *15 U.S.C. § 78lll(4)*—for priority distribution exclusively among customers, *id.* *§ 78fff-2(c)(1)*. The Trustee allocates the customer property so that customers "share **[**7]** ratably in such customer property . . . to the extent of their respective net equities." *Id.* *§ 78fff-2(c)(1)(B)*.

In order to calculate a customer's "net equity," Picard chose the "net investment method," under which the amount owed to each customer by BLMIS was "the amount of cash deposited by the customer into his BLMIS customer account less any amounts already withdrawn by him." *Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC (In re Bernard L. Madoff Inv. Sec. LLC), 424 B.R. 122, 125 (Bankr. S.D.N.Y. 2010)*. In other words, BLMIS customers had net equity only to the extent that their total cash deposits exceeded their total cash withdrawals. *Id. at 142*. On March 1, 2010, the Bankruptcy Court entered an order approving the "net investment method" (the "Net Equity Decision"), which we subsequently

[1] The Securities Investor Protection Corporation is "a nonprofit corporation consisting of registered broker-dealers and members of national securities exchanges that supports a fund used to advance money to a SIPA trustee." *In re Bernard L. Madoff Inv. Sec. LLC, 654 F.3d 229, 232-33 (2d Cir. 2011)*.

[2] In April 2009, Madoff was forced into an involuntary Chapter 7 bankruptcy proceeding, which was later consolidated with BLMIS's SIPA liquidation.

affirmed. *See id. at 135, 140*, *aff'd*, *654 F.3d 229 (2d Cir. 2011)*.

Following these proceedings, appellants each filed claims in the liquidation proceeding against the BLMIS estate. Picard allowed appellant Marshall's claim for $30,000, but he denied two claims filed by Fox on the grounds that she was a so-called "net winner," meaning that she had already withdrawn more than she **[**8]** deposited.

B

On May 12, 2009, Picard commenced an adversary proceeding against the Picower defendants in the United States Bankruptcy Court for the Southern District of New York (the "New York action"), alleging that they had made hundreds of improper withdrawals from BLMIS totaling $6.7 billion.[3] The complaint asserted claims for fraudulent transfers, avoidable preferences, and turnover under the Bankruptcy Code and New York's Uniform Fraudulent Conveyance Act, *N.Y. Debt. & Cred. Law §§ 270-281*.

While settlement talks were ongoing in the New York action, appellants filed complaints in the United States District Court for the Southern District of Florida on behalf of putative classes allegedly adversely affected by the Trustee's method for calculating net equity (the "Florida actions"). Marshall purported to represent the interests of BLMIS account holders who had not filed SIPA claims with the Trustee or whose SIPA claims were disallowed either in whole or in part. In her parallel suit, Fox allegedly represented the interests of BLMIS customers designated "net winners" and thus not entitled to any compensation **[**9]** in the SIPA litigation. Their complaints asserted claims for civil conspiracy, conversion, and conspiracy to **[*86]** violate the Florida Civil Remedies for Criminal Practices Act, *see Fla. Stat. § 772.101 et seq*.

On May 3, 2010, the Bankruptcy Court in New York granted the Trustee's application for a preliminary injunction, thereby enjoining the Florida actions. The Court held that the Florida actions violated the District Court's December 15, 2008 Protective Order, usurped causes of action belonging to the estate in violation of the Bankruptcy Code's automatic stay provision, *see* ***11 U.S.C. § 362(a)***,[4] and undermined the Bankruptcy Court's jurisdiction over administration of the BLMIS estate, *see* ***11 U.S.C. § 105(a)***.[5] *See Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Secs. LLC (In re Bernard L. Madoff Inv. Sec. LLC), 429 B.R. 423, 430, 433-37 (Bankr. S.D.N.Y. 2010)*.

C

On December 17, 2010, the Trustee and the Picower defendants entered into a settlement agreement (the "Settlement Agreement"), whereby the Picower defendants agreed to return $5 billion to the BLMIS estate, out of the proceeds of a $7.2 billion civil forfeiture they simultaneously agreed to make to the U.S. Attorney's Office.[6] In return, the Trustee agreed to release any other claims he

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[3] This figure was later increased to $7.2 billion to reflect additional withdrawals.

[4] The relevant provision of ***11 U.S.C. § 362(a)*** states that "an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970 [(SIPA)], operates as a stay, applicable to all entities, of . . . any act to obtain possession of property of the estate or of property from the estate or to exercise control **[**10]** over property of the estate." *Id.* ***§ 362(a)(3)***.

[5] Under ***11 U.S.C. § 105(a)***, the Bankruptcy Court has authority to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."

[6] Pursuant to 18 U.S.C. § 981(a)(1)(C), "[a]ny property, real or personal, which constitutes or is derived from proceeds traceable to . . . any offense constituting 'specified unlawful activity' . . . , or a conspiracy to commit such offense," is subject to forfeiture **[**11]** to the government. "Specified unlawful activity" is defined in 18 U.S.C. § 1956(c)(7)(A) to include any offense listed under 18 U.S.C. § 1961(1), which in turn lists, among other offenses, violations of ***18 U.S.C. §§ 1341*** (mail fraud), 1343 (wire fraud), and "fraud in the

might have had against the Picower defendants relating to BLMIS. The Trustee further agreed as part of the settlement to seek a narrowly-tailored permanent injunction from the Bankruptcy Court barring any BLMIS customer from suing the Picower defendants for certain claims arising from or related to Madoff's Ponzi scheme.

On December 17, 2010, the Trustee filed his motion for approval of the Settlement Agreement and for a permanent injunction pursuant to Rules 2002 and 9019 of the Bankruptcy Rules and section 105(a) of the Bankruptcy Code. SIPC and the government filed a statement in support of the Trustee's motion. **[**12]** On January 13, 2011, the Bankruptcy Court approved the Settlement Agreement, and issued the permanent injunction as follows:

> [A]ny BLMIS customer or creditor of the BLMIS estate who filed or could have filed a claim in the liquidation, anyone acting on their behalf or in concert **[*87]** or participation with them, or anyone whose claim in any way arises from or is related to BLMIS or the Madoff Ponzi scheme, is hereby permanently enjoined from asserting any claim against the Picower BLMIS Accounts or the Picower Releasees *that is duplicative or derivative of the claims brought by the Trustee*, or which could have been brought by the Trustee against the Picower BLMIS Accounts or the Picower Releasees . . . .

Special App'x 31 (emphasis supplied). At the January 13, 2011 motion hearing, the Bankruptcy Court made clear that, under its interpretation of the injunction, the claims in appellants' Florida actions were barred as duplicative and derivative of those asserted in the Trustee's complaint. *See* Joint App'x 309 (Bankruptcy Court stating that "[Fox and Marshall's claims] are subsumed in the prior injunctive paragraph").

On March 26, 2012, the District Court, on appeal, affirmed the January 13 **[**13]** Order, holding that the settlement was fair and reasonable, and that the issuance of the permanent injunction was a proper exercise of the Bankruptcy Court's authority under section 105(a). *See* Fox v. Picard (In re Madoff), 848 F. Supp. 2d 469, 491 (S.D.N.Y. 2012). The Court also agreed that the claims asserted in appellants' Florida actions were "duplicative or derivative" of those claims that could have been or were asserted by the Trustee in the New York action and, accordingly, were barred by the terms of the injunction. *Id. at 489*.

This timely appeal followed.

DISCUSSION

The relevant standards of review are familiar ones. ***HN1*** "On appeal from the district court's review of a bankruptcy court decision, we review the bankruptcy court decision independently, accepting its factual findings unless clearly erroneous but reviewing its conclusions of law *de novo*." *Swimelar v. Baker (In re Baker), 604 F.3d 727, 729 (2d Cir. 2010)* (internal quotations omitted). As relevant here, ***HN2*** "[t]he standard of review for the grant of a permanent injunction, including an anti-suit injunction, is abuse of discretion." *Paramedics Electromedicina Comercial, Ltda. v. GE Med. Sys. Info. Techs., Inc., 369 F.3d 645, 651 (2d Cir. 2004)*; **[**14]** *see also* *Sims v. Blot (In re Sims), 534 F.3d 117, 132 (2d Cir. 2008)* (explaining the term of art "abuse of discretion" as a ruling based on "an erroneous view of the law or on a clearly erroneous assessment of the evidence, or . . . a decision that cannot be located within the range of permissible

sale of securities." In a complaint dated December 17, 2010, the government commenced a civil action pursuant to these statutes, seeking forfeiture of $7.2 million "traceable to the Ponzi scheme orchestrated by Bernard L. Madoff ('Madoff') that was paid to Jeffry M. Picower." Joint App'x 3238. In its complaint, the government stated its intention, upon the entry of a final order of forfeiture to the government, "to request that the funds be distributed to victims of the fraud," *id.* at 3239, pursuant to 21 U.S.C. § 853(i)(1), which provides that the "Attorney General is authorized to . . . restore forfeited property to victims."

decisions." (internal quotations and citations omitted)).

At the January 13, 2011 hearing, the Bankruptcy Court stated explicitly that the Florida actions were among the claims enjoined by the permanent injunction.[7] Accordingly, the principal issue before **[*88]** us is whether the injunction, as applied to bar the Florida actions, was a proper exercise of the Bankruptcy Court's jurisdiction over non-debtor third-parties. Appellants contend that the injunction exceeded the Bankruptcy Court's powers under the Bankruptcy Code and under Article III of the United States Constitution. We consider these contentions in turn.

A.

Only recently we reaffirmed that ***HN4*** "the touchstone for bankruptcy jurisdiction [over a non-debtor's claim] remains whether its outcome might have any 'conceivable effect' on the bankruptcy estate." *Quigley Co. v. Law Offices of Peter G. Angelos (In re Quigley Co.), 676 F.3d 45, 57 (2d Cir. 2012)* (citation and internal quotation omitted). In a SIPA liquidation, the bankruptcy estate encompasses "all legal or equitable interests of the debtor in property as of the commencement of the case." *11 U.S.C. § 541(a)(1)*.[8] Such interests **[**16]** include "causes of action possessed by the debtor at the time of filing," *Jackson v. Novak (In re Jackson), 593 F.3d 171, 176 (2d Cir. 2010)*, and "[a]ny interest in property that the trustee recovers" under specified Bankruptcy Code provisions, *11 U.S.C. § 541(a)(3)*. "Every conceivable interest of the debtor, future, nonpossessory, contingent, speculative, and derivative, is within the reach of [the bankruptcy estate]." *Chartschlaa v. Nationwide Mut. Ins. Co., 538 F.3d 116, 122 (2d Cir. 2008)* (brackets and citation omitted).

HN5 A claim **[**17]** based on rights "derivative" of, or "derived" from, the debtor's typically involves property of the estate. *See* *In re Quigley, 676 F.3d at 57* ("[W]e have treated whether a suit seeks to impose derivative liability as a helpful way to assess whether it has the potential to affect the bankruptcy *res* . . . ."). By contrast, a bankruptcy court generally has limited authority to approve releases of a non-debtor's independent claims. *See* *Deutsche Bank AG v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.), 416 F.3d 136, 141-43 (2d Cir. 2005)*. As one federal appeals court has explained:

> The point is simply that the trustee is confined to enforcing entitlements of the [debtor]. He has no right to enforce entitlements of a creditor. He represents the unsecured creditors of the [debtor]; and in that sense when he is suing on behalf of the [debtor] he is really suing on behalf of the creditors of the [debtor]. But there is a difference between a creditor's interests in the claims of the [debtor] against a third party, which are enforced by the trustee, and the creditor's own direct—not derivative—claim against the third party, which only the creditor . . . can enforce.

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[7] We need not be detained by the fact that the injunction does not expressly refer to the Florida actions because it broadly enjoins "any claim . . . that is duplicative or derivative of the claims brought by the Trustee." Special App'x 31. ***HN3*** The scope of an injunction "turns upon the intent **[**15]** and effect of the bankruptcy court's" order, and, thus, "[a] bankruptcy court's interpretation of its own order warrants customary appellate deference." *Casse v. Key Bank Nat'l Ass'n (In re Casse), 198 F.3d 327, 333 (2d Cir. 1999)* (internal quotation omitted). At the January 13, 2011 hearing, the Court made clear that appellants' actions "are subsumed in the . . . injunctive paragraph." Joint App'x 309. Accordingly, the question presented is whether the injunction, *as applied by the Bankruptcy Court to bar appellants' claims*, was a proper exercise of its authority, or whether appellants' actions assert independent claims beyond the reach of the Bankruptcy Court.

[8] Although a SIPA liquidation is not a traditional bankruptcy, a SIPA trustee's authority to bring claims in administering a SIPA liquidation is coextensive with the powers of a Title 11 bankruptcy trustee. *See* 15 U.S.C. § 78fff-1(a) (SIPA trustee "vested with the same powers and title with respect to the debtor and the property of the debtor, including the same rights to avoid preferences, as a trustee in a case under Title 11"); *id.* § 78fff(b) (SIPA liquidation proceedings "shall be conducted in accordance with, and as though it were being conducted under . . . Title 11"). Accordingly, we rely on statutes and case law relating to Title 11 bankruptcy actions.

Steinberg v. Buczynski, 40 F.3d 890, 893 (7th Cir. 1994). [**18] Put another way, "when creditors . . . have a claim for injury that is particularized as to them, they are exclusively entitled to pursue that claim, and the bankruptcy trustee is precluded from doing so." Hirsch v. Arthur Andersen & Co., 72 F.3d 1085, 1093 (2d Cir. 1995).

[*89] In light of these principles, we note that the parties have not objected, nor could they have objected, to the plain text of the injunction. The injunction, by its own terms, is limited to third-party claims based on derivative or duplicative liability or claims that could have been brought by the Trustee against the Picower releasees. *See* Special App'x 31. Insofar as such claims are truly duplicative or derivative, they undoubtedly have an effect on the bankruptcy estate and, thus, are subject to the Bankruptcy Court's jurisdiction. *See* In re Quigley, 676 F.3d at 57.

HN6 We have defined so-called "derivative claims" in the context of bankruptcy as ones that "arise[] from harm done to the estate" and that "seek[] relief against third parties that pushed the debtor into bankruptcy." Picard v. JPMorgan Chase & Co. (In re Bernard L. Madoff Inv. Sec. LLC) ("JPMorgan Chase"), 721 F.3d 54, 70 (2d Cir. 2013). In assessing whether **[**19]** a claim is derivative, we inquire into the factual origins of the injury and, more importantly, into the nature of the legal claims asserted. *See* Johns-Manville Corp. v. Chubb Indem. Ins. Co. (In re Johns-Manville Corp.) ("Manville III"), 517 F.3d 52, 67 (2d Cir. 2008). While a derivative injury is based upon "a secondary effect from harm done to [the debtor]," an injury is said to be "particularized" when it can be "directly traced to [the third party's] conduct." St. Paul Fire & Marine Ins. Co. v. PepsiCo, Inc., 884 F.2d 688, 704 (2d Cir. 1989). Most of this Circuit's jurisprudence on a bankruptcy court's authority to enjoin derivative claims in liquidation proceedings stems from what has been aptly characterized as "the long saga of litigation arising from the bankruptcy of the Johns-Manville Corporation ('Manville'), a major national asbestos concern." In re Quigley, 676 F.3d at 55. A brief comparison of two cases from that saga helps illustrate the principles just described.

In MacArthur Co. v. Johns-Manville Corp. (In re Johns-Manville Corp.) ("Manville I"), 837 F.2d 89 (2d Cir. 1988), plaintiff, a distributor of Manville's asbestos products, alleged that it was coinsured under **[**20]** Manville's insurance policies. Id. at 90. As part of Manville's settlement with its insurers, the bankruptcy court entered an injunction relieving the insurers of all obligations related to the disputed policies and channeling all insurance claims to the proceeds of the settlement. *Id.* Plaintiff challenged the court's authority to issue such an order, asserting that its contract-based claims against the insurers were independent from Manville's. We rejected this contention, asserting that

> [plaintiff's] rights as an insured vendor are completely derivative of Manville's rights as the primary insured. Such derivative rights are no different in this respect from those of the asbestos victims who have already been barred from asserting direct actions against the insurers.[9] [Plaintiff] asserts contractual obligations whereas the direct action plaintiffs' claims sounded in tort; nevertheless, in both instances, third parties seek to collect out of the proceeds of Manville's insurance policies on the basis of Manville's conduct. In both cases, plaintiffs' claims are inseparable from Manville's own insurance coverage and are

[9] The "direct actions" referred to here concerned tort claims brought by asbestos workers against insurers under a Louisiana statute that afforded injured persons a cause of action against the insurers when the plaintiff has an independent cause of action against the insured. In In re Davis, 730 F.2d 176 (5th Cir. 1984), the Fifth Circuit held that the bankruptcy court had authority to stay such actions. Id. at 183-84.

> consequently well within the Bankruptcy [*90] Court's jurisdiction over [**21] Manville's assets.

Id. at 92-93 (citation omitted). In other words, the claims of both the plaintiff and the asbestos victims were "derivative" of Manville's—whether or not they sounded in tort or contract—because they all sought compensation for the same type of asbestos-related injuries caused by Manville's products. Accordingly, we held that the bankruptcy court had the authority to funnel all claims against the policies to a single proceeding in the bankruptcy court. Id. at 93.

In *Manville III*, however, we held that plaintiffs' claims against Travelers Insurance were independent of Manville's.[10] Plaintiffs alleged in this instance that Travelers had acquired knowledge regarding the dangers of asbestos, but "influenced Manville's purported failure to disclose its knowledge **[**22]** of asbestos hazards." 517 F.3d at 58 (alteration omitted). In the course of the proceedings, the bankruptcy court entered a "Clarifying Order" specifying that these lawsuits were barred by the prior injunction. Id. at 59. We held, however, that such claims were non-derivative. Whereas the *Manville I* plaintiffs sought "indemnification or compensation for the tortious wrongs of Manville," the *Manville III* plaintiffs sought "to recover directly from Travelers . . . for [Travelers'] own alleged misconduct," namely, violations under state law of "an independent legal duty in its dealing with plaintiffs." Id. at 63; *see also* Travelers Indem. Co. v. Bailey, 557 U.S. 137, 143, 129 S. Ct. 2195, 174 L. Ed. 2d 99 & n.2 (2009).

We recently had occasion to apply the distinction drawn in *Manville* **[**23]** *III* in another case arising out of the SIPA-liquidation of BLMIS. In *JPMorgan Chase*, the Trustee sued various financial institutions, alleging that they had aided and abetted Madoff's fraud. 721 F.3d at 59. In holding that the Trustee lacked standing to bring such claims on behalf of BLMIS customers, we noted that the claims were not derivative: they were brought "on behalf of thousands of customers against third-party financial institutions for their handling of individual investments made on various dates in varying amounts." Id. at 71.

In the following section, we explain why the Florida actions are predicated upon secondary harms flowing from BLMIS—as in Manville I—rather than upon a particularized injury traceable to the Picower defendants' conduct—as in Manville III and *JPMorgan Chase*.

B

(1)

The Trustee's complaint in this case asserts fraudulent conveyance claims against the Picower defendants under the Bankruptcy Code and New York law.[11] It **[*91]** alleges that the Picower defendants withdrew billions of dollars from their BLMIS accounts—funds belonging to BLMIS's defrauded customers—and, because the Picower

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[10] *Manville III* was reversed by the Supreme Court on narrow procedural grounds, *see* Travelers Indem. Co. v. Bailey, 557 U.S. 137, 129 S. Ct. 2195, 174 L. Ed. 2d 99 (2009); however, in Johns-Manville Corp. v. Chubb Indem. Ins. Co. (In re Johns-Manville Corp.) ("Manville IV"), 600 F.3d 135 (2d Cir. 2010), we reaffirmed the jurisdictional analysis, see id. at 152 (clarifying that the Supreme Court "did not contradict the conclusion of [*Manville III*'s] jurisdictional inquiry").

[11] The Bankruptcy Code authorizes the Trustee to assert claims for the recovery of so-called "fraudulent transfers" against "the initial transferee of such transfer[s]." 11 U.S.C. § 550(a)(1). A transfer is deemed to be fraudulent—and therefore "avoidable" under the Bankruptcy Code—if the transfer was made "with actual intent to hinder, delay, or defraud any entity to which the debtor was or became . . . indebted," *id.* § 548(a)(1)(A), or if the debtor "received less than a reasonably **[**25]** equivalent value in exchange for such transfer," *id.* § 548(a)(1)(B). A recipient of a transfer is entitled to a "good faith" defense upon a showing that it took the transfer "for value" and "in good faith." *Id.* § 548(c). The presence of "good faith" depends upon, *inter alia*, "whether the transferee had information that put it on inquiry notice that the transferor was insolvent or that the transfer might be made with a fraudulent purpose." In re Bayou Grp., LLC, 439 B.R. 284, 310 (S.D.N.Y. 2010).

defendants knew or should have known that they were profiting from such fraud, **[**24]** the withdrawals were thus avoidable. ***HN7*** Although state law typically provides creditors with the right to assert fraudulent conveyance claims,

> [a] typical fraudulent transfer claim is perhaps the paradigmatic example of a claim that is "general" to all creditors . . . . It is normally the debtor's creditors, and not the debtor itself, that have the right to assert a fraudulent transfer claim outside of bankruptcy, but in bankruptcy such a claim is usually brought by the trustee, for the benefit of all creditors. This is because the claim is really seeking to recover property of the estate.

Highland Capital Mgmt. LP v. Chesapeake Energy Corp. (In re Seven Seas Petroleum, Inc.), 522 F.3d 575, 589 n.9 (5th Cir. 2008).

Appellants Marshall and Fox argue that their complaints assert non-derivative conspiracy-based claims predicated upon the Picower defendants' direct participation in the theft of BLMIS customers' funds. However, the allegations in appellants' respective Florida complaints echo those made by the Trustee. With regard to the Picower defendants' knowledge of the fraud, each complaint alleges: (1) that the Picower defendants' account supposedly achieved implausibly high rates of return, *see* Joint App'x 707, 1358, 2584; (2) that, unlike other investors, the Picower defendants were sufficiently close to Madoff to be privy to BLMIS' trading records, *see id.* at 722, 1349, 2584; and (3) that the Picower **[**26]** defendants knew of fictitious and backdated trading activity in their accounts, *see id.* at 724, 1359, 2593. *See also* *Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC, 477 B.R. 351, 358-78 (Bankr. S.D.N.Y. 2012)* (chart comparing allegations in Trustee's complaint with those in the Florida complaints, appended as Exhibit A to the opinion of the Bankruptcy Court). In fact, the Florida complaints cite the factual allegations contained in the Trustee's complaint in New York's bankruptcy court multiples times in support of their claims.

Appellants rightly note that ***HN8*** overlapping allegations may give rise to a multiplicity of claims. As the Fifth Circuit has explained, "there is nothing illogical or contradictory about saying that [a third-party defendant] might have inflicted direct injuries on both the [estate's creditors] and [the debtor estate] during the course of dealings that form the backdrop of both sets of claims." *In re Seven Seas, 522 F.3d at 587*; *see, e.g.*, *Bankers Trust Co. v. Rhoades, 859 F.2d 1096, 1101 (2d Cir. 1988)* (finding that a creditor had "standing to bring a RICO claim, regardless of the fact that a bankrupt [debtor] might also have suffered an identical **[**27]** injury" because "[creditor] does not seek recovery for injuries suffered by [debtor] but for injuries it suffered directly").

We are nonetheless wary of placing too much significance on the labels appellants attach to their complaints, lest they circumvent the Net Equity Decision by "pleading around" the automatic stay and **[*92]** permanent injunction. *Cf., e.g.*, *Cabiri v. Gov't of Republic of Ghana, 165 F.3d 193, 200 (2d Cir. 1999)* ("In an effort to plead around the proviso [preserving immunity for torts of misrepresentation] the complaint is cast in terms of the intentional infliction of emotional distress. However cast, the wrongful acts alleged to have caused the injury are misrepresentations . . . ."). The only allegations of the Picower defendants' direct involvement in the Ponzi scheme are that they prepared false documentation, recorded and withdrew fictional profits, and filed false statements in connection with their tax returns. *See* Joint App'x 1366 (Marshall Complaint); *id.* at 2600-01 (Fox Complaint). Appellants characterize these allegations as "the Picower Defendants work[ing] hand-in-glove with Madoff and BLMIS to perpetrate the Ponzi scheme." Fox Br. 24; *see also* Marshall Br. **[**28]** 31. But, as Judge Richard J. Sullivan recently explained in a case predicated upon the same alleged conspiratorial acts,

> [t]he . . . Complaints plead nothing more than that the Picower Defendants traded on their *own* BLMIS accounts, knowing that such ″trades″ were fraudulent, and then withdrew the ″proceeds″ of such falsified transactions from BLMIS. All the ″book entries″ and ″fraudulent trading records″ that the Complaints allege refer to nothing more than the fictitious records BLMIS made, *for the Picower Defendants*, to document these fictitious transactions. In other words, the Complaints plead nothing more than that the Picower Defendants fraudulently withdrew money from BLMIS.

*A & G Goldman Partnership v. Picard (In re Bernard L. Madoff Inv. Sec., LLC), No. 12 CIV. 6109 RJS, 2013 U.S. Dist. LEXIS 143956, 2013 WL 5511027, at *7 (S.D.N.Y. Sept. 30, 2013)* (citation omitted).

(2)

The case law upon which appellants rely to argue that they have alleged ″particularized″ injuries directly traceable to the Picower defendants is inapposite. Appellant Marshall draws our attention to *Cumberland Oil Corp. v. Thropp, 791 F.2d 1037 (2d Cir. 1986)*, in which we held that a plaintiff's cause of action for conspiracy to defraud ″was **[**29]** not merely an artful repleading of [fraudulent conveyance] claims.″ *Id. at 1043*. But in *Cumberland Oil*, the plaintiff did not assert merely the ″right . . . to recover misappropriated assets,″ but ″alleged with particularity that misrepresentations of facts [about debtor's financial health] were made by [defendant] in furtherance of a conspiracy to defraud.″ *Id. at 1042-43*. The complaints here, however, do not allege that the Picower defendants made any such misrepresentations to BLMIS customers. Rather, as in *Manville I*, appellants' alleged injuries are inseparable from, and predicated upon, a legal injury to the estate—namely, the Picower defendants' fraudulent withdrawals from their BLMIS accounts of what turned out be other BLMIS customers' funds.

Appellant Fox relies on our decision in *Hirsch v. Arthur Anderson & Co.*, and the Fifth Circuit's in *In re Seven Seas*, to argue that her claims allege ″particularized″ injuries traceable to the Picower defendants. In *Hirsch*, the Trustee sought to sue Arthur Anderson & Co. for helping perpetuate the debtors' Ponzi scheme by distributing misleading private placement memoranda to investors. *72 F.3d at 1087-89*. And in *In re Seven Seas*, bondholders **[**30]** alleged that a secured creditor had knowingly used misleading financial information to induce them to purchase unsecured notes issued by the debtor. *522 F.3d at 578-81*. In both cases, the Courts held that the claims alleged an injury that was **[*93]** direct, and not merely derivative, of an injury to the debtor. *See Hirsch, 72 F.3d at 1094* (holding that the claims ″are the property of those investors, and may be asserted only by them and to the exclusion of [the Trustee]″); *In re Seven Seas, 522 F.3d at 586* (holding that the claims alleged ″a direct injury . . . that was independent of any injury to [the debtor]″).

As just noted, however, appellants have not alleged that the Picower defendants took any such ″particularized″ actions aimed at BLMIS customers. They have not alleged, for instance, that the Picower defendants made any misrepresentations to appellants. Appellants respond that their respective complaints allege ″that the Picower Defendants' wrongful conduct ensured the fraud's success *by inducing [them] and other customers to invest* (and remain invested) in BLMIS.″ Fox Br. 25 (emphasis supplied); *see also* Marshall Br. 31. We do not think that the complaints can reasonably be read **[**31]** in this way. Allegations that the Picower defendants knowingly reaped the benefits of

Madoff's scheme through fraudulent withdrawals, and effected such withdrawals through backdating trades and recording fictional profits, does not amount to a particularized claim that they directly participated in defrauding BLMIS customers by inducing them to invest.

(3)

Appellants' final contention is that their complaints are particularized and non-derivative because of the nature of the relief sought. Whereas the Trustee sought the recovery of assets BLMIS transferred to the Picower defendants, appellants seek damages for (1) the loss on the reasonable return on their investments, (2) taxes paid on fictitious gains, and (3) monetary losses should they be sued by the Trustee for the recovery of their own withdrawals from BLMIS—none of which is recoverable in an avoidance action under the Bankruptcy Code. *See* 11 U.S.C. § 550(a) ("[T]he trustee may recover, for the benefit of the estate, the property transferred, or . . . the value of such property . . . ."). Yet appellants' claimed damages, also suffered by all BLMIS customers, still remain mere secondary harms flowing from the Picower defendants' **[**32]** fraudulent withdrawals and the resulting depletion of BLMIS funds. *Cf.* *Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Secs. LLC, 491 B.R. 27, 36 (S.D.N.Y. 2013)* ("[Investors'] actions relate to [investment manager's] fraud on his own investors—not Madoff's fraud at the expense of his customers—and therefore are independent claims based on separate facts, theories, and duties than the Trustee's fraudulent transfer claims against [investment manager]."').

We conclude, therefore, that appellants purported conspiracy-based claims against the Picower defendants are "derivative" of those asserted by the Trustee in his fraudulent conveyance action, and, therefore, the Bankruptcy Court was authorized to enjoin those actions.[12]

[*94] We **[**34]** note that we affirm without prejudice to appellants seeking leave to amend their complaints. There is conceivably some particularized conspiracy claim appellants could assert that would not be derivative of those asserted by the Trustee. That question, however, is not properly before us, and is a question in the first instance for the United States District Court for the Southern District of Florida.

C

We turn now to whether the Bankruptcy Court, an Article I court, exceeded the jurisdictional limits established by Article III of the United States Constitution. Both appellant Fox and Marshall's arguments in this regard are premised upon the Supreme Court's recent holding in *Stern v. Marshall, 131 S. Ct. 2594, 180 L. Ed. 2d 475 (2011)*. In *Stern*, a widow filed a state law counterclaim in her Chapter 11 bankruptcy case to recover for her stepson's alleged tortious interference with an inheritance gift she expected from her deceased husband. *Id. at 2601*. The Court observed that the Constitution generally reserves the power to adjudicate such common law claims to courts

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[12] The Bankruptcy Court also articulated alternative bases for its injunction. In *In re Metromedia Fiber Network, Inc.*, we held that a bankruptcy court could permit the nonconsensual release of creditors' claims against third parties upon a finding of "truly unusual circumstances" that "render the release terms important to [the] success of the [underlying bankruptcy reorganization plan]." 416 F.3d at 143. The District Court found such circumstances present in the instant **[**33]** case on the basis of the size of the estate's recovery and on the importance of the injunction to prevent those who are not SIPA payees under the Net Equity Decision from circumventing that decision and undermining the liquidation plan. *See* *In re Madoff*, 848 F. Supp. 2d at 490. Because we hold that appellants' claims are property of the estate in that they are "derivative" of the Trustee's fraudulent conveyance action, we do not address whether this case satisfies the stringent standard laid out in *Metromedia* for injunctive relief.

In addition, because we find that appellants' claims are derivative of the Trustee's claims for fraudulent withdrawals, the fact that the Trustee lacks standing to bring *bona fide* conspiracy claims on behalf of BLMIS customers under *JPMorgan Chase* is irrelevant.

established under Article III. *Id. at 2608-09*. One exception to this principle is a category of cases involving "public rights."[13] *Id. at 2613*. **[**35]** The Court held, however, that the counterclaim at issue did not fall within any of the formulations of that exception because it neither derived from, nor was dependent upon, any agency regulatory regime, and was not limited to a particularized area of the law. *Id. at 2614-15*. Accordingly, the Court invalidated the portion of the Bankruptcy Code authorizing bankruptcy judges to enter final judgments on claims and counterclaims, such as the widow's, which are exclusively based upon some legal right guaranteed by state law. *Id. at 2620*.

Appellant Fox argues that, in light of *Stern*, "the [bankruptcy] court improperly wielded powers reserved **[**36]** for Article III courts by permanently enjoining her claims." Fox Br. 53. According to Fox, her state law conspiracy claims are akin to the widow's tortious interference counterclaims in that they are "in no way derived from or dependent upon bankruptcy law," but instead "exist[ed] without regard to any bankruptcy proceeding." *Stern, 131 S. Ct. at 2618*. As noted above, however, appellants' purported tort claims are, in essence, disguised fraudulent transfer actions, which belong exclusively to the Trustee. Accordingly, appellants' claims are distinct from those in *Stern* held to be beyond the powers of a bankruptcy court.

Appellant Marshall, in turn, argues that, in light of *Stern*, the Bankruptcy Court lacked jurisdiction to enter a final judgment on the *Trustee's* fraudulent transfer action against the Picower defendants. In *Stern*, the Supreme Court drew an analogy **[*95]** between the widow's tortious interference claim and a trustee's fraudulent conveyance action against a noncreditor, *id. at 2614*, which, under *Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 109 S. Ct. 2782, 106 L. Ed. 2d 26 (1989)*, does not fall within the "public rights" exception. *See Stern, 131 S. Ct. at 2614* ("[The debtor's] counterclaim—like the fraudulent **[**37]** conveyance claim at issue in *Granfinanciera*—does not fall within any of the varied formulations of the public rights exception in this Court's cases."). As the Court explained in *Granfinanciera*:

> There can be little doubt that fraudulent conveyance actions by bankruptcy trustees . . . are quintessentially suits at common law that more nearly resemble state-law contract claims brought by a bankrupt corporation to augment the bankruptcy estate than they do creditors' hierarchically ordered claims to a pro rata share of the bankruptcy res. They therefore appear matters of private rather than public right.

Granfinanciera, 492 U.S. at 56 (citation omitted). Therefore, according to Marshall, the Bankruptcy Court did not have authority to enter final judgment on the Trustee's fraudulent transfer claims against the Picower defendants, much less to issue the accompanying order enjoining all duplicative and derivative actions.

Yet ***HN9*** *Granfinanciera* held that a fraudulent conveyance claim is a matter of private right when asserted against *"a person who has not submitted a claim against a bankruptcy estate." Id. at 36* (emphasis supplied). The Court reaffirmed this limitation of *Granfinanciera*'s holding **[**38]** in *Stern*. *See Stern, 131 S. Ct. at 2617* ("[A] preferential transfer claim can be heard in bankruptcy when the allegedly favored creditor has filed a claim, because *then* the ensuing preference action by the trustee become[s] integral

[13] Although the contours of this exception have not been precisely delineated, the Supreme Court broadly defined cases involving a "public right" as those "in which the claim at issue derives from a federal regulatory scheme, or in which resolution of the claim by an expert government agency is deemed essential to a limited regulatory objective within the agency's authority. In other words, . . . what makes a right 'public' rather than private is that the right is integrally related to particular federal government action." Stern, 131 S. Ct. at 2613 (2011).

to the restructuring of the debtor-creditor relationship." (internal quotations omitted; brackets in original)). In this case, unlike in *Granfinanciera*, the Picower defendants filed a proof of claim against the BLMIS estate. In order to rule on that claim, the Bankruptcy Court was required to first resolve the fraudulent transfer issue. *Cf. id. at 2617* (noting that the "factual and legal determinations" the bankruptcy court was required to make "were not disposed of in passing on objections to [creditor's] proof of claim" (internal quotations omitted)).[14]

Accordingly, the Bankruptcy Court's authority under the Bankruptcy Code to approve the settlement between the Trustee and the Picower defendants and to permanently enjoin appellants' disguised fraudulent transfer claims does not run afoul of Article III of the United States Constitution.

CONCLUSION

To summarize:

> **[*96]** (1) Allegations in the Florida actions of a conspiracy between Madoff and the Picower defendants echo those made by the Trustee in his New York action for the recovery of fraudulent transfers. Although common facts can give rise to multiple claims, the Florida actions impermissibly attempt **[**40]** to "plead around" the Bankruptcy Court's injunction barring all "derivative" claims in that they allege nothing more than steps necessary to effect the Picower defendants' fraudulent withdrawals of money from BLMIS.
>
> (2) Appellants have not alleged "particularized" injuries directly traceable to the Picower defendants. The Picower defendants are alleged to have knowingly reaped the benefits of Madoff's scheme through fraudulent withdrawals, but they are not alleged to have made any misrepresentations to induce investments in BLMIS or to have taken any other actions that could reasonably be understood as aimed at BLMIS customers.
>
> (3) Although the Florida actions assert claims for damages that are not recoverable in an avoidance action under the Bankruptcy Code, appellants' claims are still "derivative" of the Trustee's: they are predicated upon mere secondary harms flowing from the Picower defendants' fraudulent withdrawals and the resulting depletion of BLMIS funds.
>
> (4) The Bankruptcy Court did not run afoul of Article III of the United States Constitution, as interpreted by the Supreme Court in *Stern v. Marshall*, in enjoining the Florida actions and approving the settlement of the Trustee's **[**41]** fraudulent transfer claims with the Picower defendants.

Accordingly, the judgment of the District Court is **AFFIRMED** without prejudice to Fox and Marshall seeking leave to amend their complaints in the United States District Court for the Southern District of Florida. Of course, we intimate no view on an appropriate disposition of any such motion for leave to amend.

[14] In addition, the Supreme Court has recently granted a petition for a writ of certiorari, in the wake of *Stern*, concerning the scope of a bankruptcy court's authority to adjudicate fraudulent conveyance claims upon a non-creditor's consent. *See Executive Benefits Ins. Agency v. Arkison*, 133 S. Ct. 2880, 186 L. Ed. 2d 908 (2013); *see also* Petition for Writ of Certiorari at I, *Arkison*, 133 S. Ct. at 2880 (2013) (No. 12-1200), **[**39]** 2013 WL 1329527 (question presented is "[w]hether Article III permits the exercise of the judicial power of the United States by bankruptcy courts on the basis of litigant consent, and, if so, whether 'implied consent' based on a litigant's conduct, where the statutory scheme provides the litigant no notice that its consent is required, is sufficient to satisfy Article III"). Depending upon the Court's ruling in *Arkison*, the Picower defendants may have consented to the Bankruptcy Court's approval of the settlement and issuance of the injunction through their course of conduct in the proceedings.

Neutral
As of: February 4, 2016 12:59 PM EST

Flaxer v. Gifford (In re Lehr Constr. Corp.)

United States District Court for the Southern District of New York

January 12, 2016, Decided; January 12, 2016, Filed

1:15-cv-4350-GHW

Reporter
2016 U.S. Dist. LEXIS 4022

In re LEHR CONSTRUCTION CORP., Debtor. JONATHAN L. FLAXER, not individually but solely in his capacity as Chapter 11 trustee for Lehr Construction Corp., Appellant, -v- PETER GIFFORD, Appellee.

Prior History: *Flaxer v. Gifford (In re Lehr Constr. Corp.), 528 B.R. 598, 2015 Bankr. LEXIS 1096 (Bankr. S.D.N.Y., 2015)*

Core Terms

pari delicto, insider, imputation, faithless, servant, bankruptcy court, Trustee's, cases, subcontractors, Appeals, adverse interest, purposes, applies, corporation's, courts, fiduciaries, convicted, gallery, bid, special master, wrongdoing, services, motion to dismiss, district court, disloyalty, employees, wrongdoer, defraud, parties

Counsel: **[*1]** For Jonathan L. Flaxer, not individually but solely in his capacity as chapter 11 trustee for Lehr Construction Corp., Appellant: Michael S Devorkin, LEAD ATTORNEY, Golenbock Eiseman Assor Bell & Peskoe LLP, New York, NY.

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Judges: GREGORY H. WOODS, United States District Judge.

Opinion by: GREGORY H. WOODS

Opinion

MEMORANDUM OPINION AND ORDER

GREGORY H. WOODS, United States District Judge:

Appellant Jonathan Flaxer, chapter 11 Trustee (the "Trustee") for Lehr Construction Corporation ("Lehr"), appeals from the Bankruptcy Court's order granting defendant Peter Gifford's motion to dismiss the Trustee's faithless servant claim against him on the grounds that it is barred by the *in pari delicto* doctrine. For the reasons that follow, I AFFIRM the Bankruptcy Court's decision dismissing the Trustee's claim.

I. Background[1]

Lehr was a large construction company that planned, designed, and oversaw interior construction projects in and around New York City. S.D.N.Y. Bankr. No. 13-01256 Dkt. 1. ("Compl.") ¶¶ 14-28.[2] Lehr competed **[*2]** for construction jobs by submitting bids, and if Lehr was hired, it, in turn, would hire subcontractors to

[1] The facts included in this section are undisputed, and are limited to those necessary to decide this appeal.

[2] As noted in the parties' briefs, the Trustee filed an amended complaint after Gifford's motion to dismiss was fully briefed and argued. Appellee's Br. 3 n.1. Because that amendment did not change the allegations against Gifford, and because the Bankruptcy Court followed the original complaint's paragraph numbering in its decision, I will do the same for ease of reference.

complete the project. Compl. ¶¶ 15-16. Lehr's purchasing department negotiated the costs of construction services with subcontractors, and was responsible for entering into purchase orders with subcontractors. Compl. ¶¶ 20, 38. Gifford worked in the purchasing department, and was supervised by Mark Martino, the head of the department. Compl. ¶¶ 37-38.

Sometime between early 2000 and August 1, 2004, Lehr began purposely including superfluous work on bid packages, so that customers were billed for more construction services than were ultimately performed. Compl. ¶¶ 33, 35-36. Rather than returning money for unperformed work to customers, Jeffrey Lazar, one of Lehr's senior officers, oversaw a scheme in which Lehr **[*3]** and its subcontractors conspired to keep money customers paid for services that were never provided. Compl. ¶ 35. Steven Wasserman, the head of the estimating department, was responsible for ensuring that bid packages contained services, and costs for such services, beyond those actually needed. The purchasing department, headed by Martino, would issue the inflated purchase orders and then negotiate with the subcontractors to agree on the lower, actual cost of the project. Compl. ¶¶ 37-38. The subcontractor would be paid the inflated purchase price, and Martino then maintained records listing those overpaid funds and money ″owed″ to Lehr by subcontractors. Compl. ¶¶ 39, 42. Lehr would recoup the funds through future bids with the same subcontractors; Martino's department would keep track of the debits and credits between Lehr and the subcontractors. Compl. ¶¶ 41-42.

Gifford, along with two other employees in the purchasing department, participated in the scheme by negotiating with subcontractors to agree upon an actual cost of a bid project as compared to the inflated bid package amount and by keeping track of the credits and debits between Lehr and the co-conspirator subcontractors. **[*4]** Compl. ¶¶ 38, 46.

In early 2010, the Manhattan District Attorney began investigating construction companies, including Lehr. Compl. ¶ 48. After a widely publicized raid at Lehr's office on March 10, 2010, some customers cancelled existing contracts with Lehr and others excluded Lehr from bidding for future work. Compl. ¶¶ 50-51, 53. Lehr filed for protection under Chapter 11 of the Bankruptcy Code in February 2011. Compl. ¶¶ 54-55.

In May 2011, Lehr—along with several now-former employees—was indicted. Bankruptcy Court Opinion (″Op.″) at 7. Lehr was convicted on thirteen counts including one count of enterprise corruption, one count of a scheme to defraud, nine counts of grand larceny, and two counts of money laundering in the first degree. Bankr. Dkt. 15-6. Lazar was indicted and convicted of a scheme to defraud in the first degree and sentenced to serve a prison term. Bankr. Dkt. 15-7. Wasserman was also indicted and convicted of grand larceny in the fourth degree and sentenced to probation. Bankr. Dkt. 15-8. Gifford was not indicted or convicted for any criminal activity relating to Lehr's criminal scheme, although he did enter into a cooperation agreement with the Manhattan District **[*5]** Attorney's Office. Compl. ¶ 61.

In February 2013, the Trustee filed the complaint seeking to recover ″all sums paid to or on behalf of Gifford as compensation″ as well as ″legal fees″ associated with the criminal investigation because Gifford was a ″faithless servant.″ Compl. ¶ 68.[3] Gifford moved to dismiss the complaint, arguing (1) that Lehr had waived its claim against him because an employee is not disloyal when his employer knows of and tolerates his conduct, and (2) that the claim was barred by the *in pari delicto* doctrine. Bankr. Dkt. 15-10. The Bankruptcy Court dismissed the Trustee's claim based on the

[3] The complaint named multiple defendants, and the Trustee has since settled all claims except the faithless servant claim against Gifford, see Appellant's Br. at 1 n.2.

in pari delicto doctrine, *Flaxer v. Gifford (In re Lehr Constr. Corp.), 528 B.R. 598 (Bankr. S.D.N.Y. 2015)*, and this appeal followed.

II. Standard of Review

A district court reviews a bankruptcy court's findings of fact for clear error and its conclusions of law *de novo*. *In re Bayshore Wine Prods. Corp., 209 F.3d 100, 103 (2d Cir. 2000)*. Because this is an appeal from a decision on a motion to dismiss, only conclusions of law are at issue and my review is *de novo*.

A motion for judgment on the pleadings under *Federal Rule of Civil Procedure 12(c)* is evaluated under the same standard as a motion to **[*6]** dismiss under *Rule 12(b)(6)*.[4] *In re Thelen LLP, 736 F.3d 213, 218 (2d Cir. 2013)*. When deciding a motion to dismiss, a court accepts "all factual allegations in the complaint as true and draw[s] all reasonable inferences in plaintiff's favor." *In re Thelen, 736 F.3d at 218* (quoting *Hayden v. Paterson, 594 F.3d 150, 160 (2d Cir. 2010)*). "To survive a *Rule 12(c)* motion . . . [a] 'complaint must contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face.'" *Id. at 218-19* (quoting *Johnson v. Rowley, 569 F.3d 40, 43 (2d Cir. 2009)*). The *in pari delicto* doctrine may be applied at the pleadings stage where the outcome is plain on the face of the pleadings. *In re Bernard L. Madoff Inv. Sec. LLC, 721 F.3d 54, 65 (2d Cir. 2013)* (citing *Kirschner v. KPMG LLP, 15 N.Y.3d 446, 459 n.3, 938 N.E.2d 941, 912 N.Y.S.2d 512 (2010)*).

In considering Gifford's motion, the Bankruptcy Court took judicial notice of several documents related to the outcome of the criminal proceedings involving Lehr, Lazar, and Wasserman. Op. at 10-11; *see* Bankr. Dkt. No. 15-1. On appeal, "matters judicially noticed by the District Court are not considered matters outside the pleadings." *In re Thelen, 736 F.3d at 219* (quoting *Staehr v. Hartford Fin. Servs. Grp., Inc., 547 F.3d 406, 426 (2d Cir. 2008)*). Accordingly, I will consider here the facts of which the Bankruptcy Court took judicial notice.

III. Discussion

A. Faithless Servant Doctrine

"Under New York law, an agent is obligated 'to be loyal to his employer and is prohibited from acting in any manner inconsistent with his agency or trust and **[*7]** is at all times bound to exercise the utmost good faith and loyalty in the performance of his duties.'" *Phansalkar v. Andersen Weinroth & Co., L.P., 344 F.3d 184, 200 (2d Cir. 2003)* (quoting *Western Elec. Co. v. Brenner, 41 N.Y.2d 291, 295, 360 N.E.2d 1091, 392 N.Y.S.2d 409 (N.Y. 1977)* (internal quotation marks omitted)). "A faithless servant forfeits all compensation earned during the period of his disloyalty even if his services benefitted the principal in some part." *Tyco Intern., Ltd. v. Kozlowski, 756 F. Supp. 2d 553, 562 (S.D.N.Y. 2010)* (citing *Phansalkar, 344 F.3d at 208*).

"New York courts have used two different standards to determine whether an employee's misbehavior warrants forfeiture." *Phansalkar, 344 F.3d at 201*. The first, and more stringent, standard—the *Turner* standard—requires "substantial" disloyalty on the part of the employee. *Phansalkar, 344 F.3d at 201* (citing *Turner v. Kouwenhoven, 100 N.Y. 115, 119, 2 N.E. 637 (1885)*). Where the disloyalty consists of a single act or where the employer knew of and tolerated the behavior, courts have found the disloyalty not to be "substantial." *Id. at 202* (citing *Bravin v. Fashion Week, Inc., 73 Misc. 2d 974, 342 N.Y.S.2d 971 (1973)* (finding no substantial violation of contract of service where employer continued employment of a person who

[4] ***Federal Rule of Civil Procedure 12(c)*** applies in adversary proceedings in bankruptcy pursuant to Federal Rule of Bankruptcy Procedure 7012(b).

was allegedly insubordinate)). The second standard, first suggested in Murray v. Beard, 102 N.Y. 505, 508, 7 N.E. 553, 2 N.Y. St. 466 (1886), and confirmed by the New York Court of Appeals in *Lamdin v. Broadway Surface Advertising Corp.*, requires only "a breach of a duty of loyalty or good faith," without inquiring into the severity of the breach. *Id.* (citing Lamdin, 272 N.Y. 133, 138, 5 N.E.2d 66 (1936)).

The tension between these two standards—whether any breach **[*8]** of a duty of loyalty or good faith warrants forfeiture, or whether such a breach must constitute "substantial" disloyalty—has not been resolved. *See* Phansalkar, 344 F.3d at 202. Because, as explained below, I uphold the Bankruptcy Court's ruling that the Trustee's claim against Lehr is barred by the *in pari delicto* doctrine, I need not decide which standard applies here.

B. *In Pari Delicto*

"The doctrine of in pari delicto mandates that the courts will not intercede to resolve a dispute between two wrongdoers." Kirschner v. KPMG LLP, 15 N.Y.3d 446, 464, 938 N.E.2d 941, 912 N.Y.S.2d 512 (N.Y. 2010). The doctrine serves two public policy purposes. "First, denying judicial relief to an admitted wrongdoer deters illegality. Second, *in pari delicto* avoids entangling courts in disputes between wrongdoers." *Id.*

> [N]o court should be required to serve as paymaster of the wages of crime, or referee between thieves. Therefore, the law will not extend its aid to either of the parties or listen to their complaints against each other, but will leave them where their own acts have placed them.

Id. (quoting Stone v. Freeman, 298 NY 268, 271, 82 N.E.2d 571 (1948)).

"The doctrine of *in pari delicto* bars a party that has been injured as a result of its own intentional wrongdoing from recovering for those injuries from another party whose equal or lesser fault contributed to the **[*9]** loss." Rosenbach v. Diversified Group, Inc., 85 A.D.3d 569, 570, 926 N.Y.S.2d 49 (N.Y. App. Div. 2011). "The defense requires intentional conduct on the part of the plaintiff or its agents." Sacher v. Beacon Assocs. Mgmt. Corp., 114 A.D.3d 655, 980 N.Y.S.2d 121, 124 (N.Y. App. Div. 2014) (citing Kirschner, 15 N.Y.3d at 474).

"Traditional agency principles play an important role in an in pari delicto analysis . . . namely, the acts of agents, and the knowledge they acquire while acting within the scope of their authority are presumptively imputed to their principles." Kirschner, 15 N.Y.3d at 465 (citing Henry v. Allen, 151 NY 1, 9, 45 N.E. 355 (1896)). Imputation is presumed "even where the agent acts less than admirably, exhibits poor business judgment, or commits fraud." *Id.* (citing Price v. Keyes, 62 N.Y. 378, 384-85 (1875)). "Like a natural person, a corporation must bear the consequences when it commits fraud." *Id.* (citing Wight v. BankAmerica Corp., 219 F.3d 79, 86-87 (2d Cir. 2000)). The presumption of imputation "fosters an incentive for a principal to select honest agents and delegate duties with care." Id. at 466.

There is a narrow exception to the presumption of imputation, the adverse interest exception, which is not at issue here.[5] *See* Kirschner, 15 N.Y.3d at 466. The adverse interest exception applies only when the agent has "*totally abandoned* his principal's interests" and is "acting *entirely* for his own or another's purposes," but does not apply where there is a benefit to both the employee and the corporation. Id. at 466 (citing Center v. Hampton Affiliates, 66 N.Y.2d 782, 784-85, 488 N.E.2d 828, 497 N.Y.S.2d 898 (1985)).

The Bankruptcy Court described an additional exception to the presumption of imputation, which I do not believe is supported by New York law.

[5] *See* Appellant's Reply Br. 8 (stating that the Trustee is not invoking the adverse **[*10]** interest or innocent insider exception).

The Bankruptcy Court held that "corporate insiders cannot rely on the *in pari delicto* defense" because their acts are not properly imputed to the corporation, citing to a number of federal district court and bankruptcy court decisions. Op. at 15. I will refer to this as "the bankruptcy insider's exception"—described in certain bankruptcy cases to preserve a bankruptcy trustee's ability to sue the debtor's insiders, despite the fact that their wrongdoing is imputed to the bankrupt corporation. *See* *Teras Int'l Corp. v. Gimbel, No. 13-cv-6788-VEC, 2014 U.S. Dist. LEXIS 174328, 2014 WL 7177972, at *10 (S.D.N.Y. Dec. 17, 2014)* ("Claims against insiders for their acts as corporate fiduciaries are not barred by *in pari delicto*, because it would be absurd to allow a wrongdoing insider to rely on the imputation of his own conduct to the corporation as a defense.") (internal quotations marks and citation omitted).

I do not see a foundation for the "insider" exception to imputation for purposes of the *in pari delicto* defense as it exists *under New York law*. In *Kirschner*, the Court of Appeals sought **[*11]** to "remove any lingering confusion" regarding "the principles of in pari delicto and imputation, with its narrow adverse interest exception . . . ." *Kirschner, 15 N.Y.3d at 477*. *Kirschner* also included a clear warning regarding the distinction between the federal *Wagoner* doctrine and New York's *in pari delicto* defense. *Id. at 459 n.3*. I linger on the point here because I am concerned that the Bankruptcy Court's description of an additional exception to imputation under New York law signals a resurgence of the confusion that *Kirschner* sought to eliminate. As described below, I think that any "insider exception" arises under the *Wagoner* doctrine, not the imputation rules applicable to the *in pari delicto* defense under New York law.

First, I note that the *in pari delicto* defense exists as a matter of federal common law, as well as under the laws of the various states. This decision involves the application of New York's law regarding *in pari delicto*. New York's version of the *in pari delicto* defense is not the same as that of all other jurisdictions. The Court of Appeals made that point quite clear in *Kirschner*, when it rejected proposals to "water down" New York's *in pari delicto* doctrine by making it more consistent with the **[*12]** defense as it existed in New Jersey and Pennsylvania. *Kirschner v. KPMG LLP, 15 N.Y.3d 446, 470-477, 938 N.E.2d 941, 912 N.Y.S.2d 512 (2010)*. *In pari delicto* is not a restatement principle, to be applied as if it existed uniformly in all jurisdictions. Here, I apply New York law.

As articulated by the Court of Appeals in *Kirschner*, the presumption of imputation under New York law, "governs in every case, except where the corporation is actually the agent's intended victim . . . ." *Kirschner, 15 N.Y.3d at 466*. New York law reserves only one exception to the broad presumption of imputation—the adverse interest exception described above—"this most narrow of exceptions." *Id.* In *Kirschner*, the Court of Appeals wrote "because the [adverse interest] exception requires adversity, it cannot apply unless the scheme that benefited the insider operated at the corporation's expense." *Id. at 467*. The Court of Appeals rejected the proposition that the acts of an insider would be exempted from imputation in situations where the adverse interest exception did not apply. *See id.* ("[T]his rule avoids ambiguity where there is a benefit to both the insider and the corporation . . . ."). Thus, under New York law, the acts of insiders are imputed to the corporation unless the adverse interest exception applies. ***Kirschner*** does not support **[*13]** the Bankruptcy Court's conclusion that New York law provides for a broad "insider" exception to the presumption of imputation.

What, then, is the source of the insider exception described by the Bankruptcy Court? As noted above, the Bankruptcy Court cited to a series of federal and federal bankruptcy court cases as support for its holding on that point. Op. at 15.

The special master's decision for In re Refco Inc. Sec. Litig., 2010 U.S. Dist. LEXIS 132778, 2010 WL 6549830 (S.D.N.Y. Dec. 6, 2010), *aff'd in part*, 779 F. Supp. 2d 372 (S.D.N.Y. 2011), seems to have been particularly influential; it was cited directly by the Bankruptcy Court, and many of the other cases relied on by the Bankruptcy Court cited to it in turn.

I believe that the special master's opinion in *In re Refco* is written in a way that makes it easy for cases relying on that decision to conflate the federal *Wagoner* doctrine with New York state law. The Second Circuit's *Wagoner* rule, established in Shearson Lehman Hutton v. Wagoner, 944 F.2d 114, 118 (2d Cir. 1991), is a prudential limitation on standing under federal bankruptcy law. The *Wagoner* rule provides that that trustees do "not have standing to seek recovery from third parties where corporate insiders engaged in the wrongdoing that caused the damages." In re Refco, 2010 U.S. Dist. LEXIS 132778, 2010 WL 6549830, at *3. Rather, "[a] claim against a third party for defrauding a corporation with the cooperation of management **[*14]** accrues to creditors, not to the guilty corporation." Wagoner, 944 F.2d at 120.[6]

The special master *In Re Refco* treated New York *in pari delicto* doctrine and *Wagoner* as substantively identical for purposes of his report and recommendation. In re Refco, 2010 U.S. Dist. LEXIS 132778, 2010 WL 6549830, at *6. He recognized that the New York Court of Appeals had stated expressly that the *Wagoner* doctrine was not the same as the state law defense of *in pari delicto*, but concluded that "[w]hile the New York court's analysis may suggest some conceptual divergence between *Wagoner* and the *in pari delicto* doctrine, there is no in fact difference as a practical matter *as applied in these cases*." *Id.* (emphasis added). The special master observed that in Kirschner v. KPMG LLP, 626 F.3d 673 (2d. Cir. 2010), the Second Circuit had applied the Court of Appeals' rulings on New York law in *Kirschner* without reservation with respect to the *Wagoner*. *Id.* The special master also noted that the Second Circuit did not "even remark about the New York Court of Appeals' conceptual differentiation of *in pari delicto* and *Wagoner*." *Id.* Having concluded that the analysis **[*15]** of *Wagoner* and *in pari delicto* was substantively the same in that particular case, the special master proceeded to discuss what he termed *"in pari delicto/Wagoner"* as an undifferentiated aggregate concept throughout the decision.

Nearly all of the cases cited by the Bankruptcy Court's in support of its conclusion that an "insider" exception to imputation exists under New York law, rely ultimately on *In Re Refco*. What In Re Refco, actually states, however, is that

> The *Wagoner* doctrine is inapplicable to claims by or on behalf of the corporation against insiders for damages caused by their misconduct as corporate insiders. The reasoning is that it would be absurd to allow a wrongdoing insider to rely on the imputation of his own conduct to the corporation as a defense. None of the Defendants disagree with the basic proposition that claims against insiders for their acts as corporate fiduciaries are not barred by *in pari delicto/Wagoner*. . . . The case law does not support the broad proposition that every breach of fiduciary claim escapes *in pari delicto/Wagoner*. Such a broad rule would be inconsistent with the rationale for imputation—which is that the corporation is responsible for the **[*16]** acts of its agents. . . . That is why the case law is narrower—it provides that *in pari delicto/Wagoner* does not apply to the actions of fiduciaries who are insiders in the sense that they either are on the board or in

[6] As the Bankruptcy Court noted, this case does not present the typical fact pattern in which the *Wagoner* rule is typically invoked, Op. 18 n.5, and the parties have not argued that it applies here.

management, or in some other way control the corporation.

In Re Refco, 2010 U.S. Dist. LEXIS 132778, [WL] at *11.

From this extensive quotation, it is apparent that the "insider" exception discussed by the special master was first framed as an exception to the *Wagoner* doctrine—the special master states that "it would be absurd to allow a wrongdoing insider to rely on the imputation of his own conduct" to explain the insider exception to the *Wagoner* rule, not an exception to imputation under New York law for purposes of the *in pari delicto* defense. "[T]he *Wagoner* rule is not part of New York law except as it reflects the in pari delicto principle," Kirschner, 15 N.Y.3d at 459 n.3, but because *In Re Refco* analyzed both concepts collectively (*"in pari delicto/Wagoner"*), the decision has been cited for the proposition that an "insider" exception also exists for purposes of imputation under New York law in addition to the adverse interest exception. I do not believe that the cases cited by *In Re Refco* support that broad conclusion.[7]

While federal courts may refer to the *in pari delicto* principle to guide our analysis of the *Wagoner* doctrine, I do not think that it is a two-way ratchet. Federal courts cannot "water down" the clear imputation rules established under New York law in Kirschner by reference to *Wagoner*, on the assumption that the doctrines are substantively the same for all purposes.

I am not taking the position that In Re Refco was wrongly decided. The special master's decision—in the context of his report and recommendation—to treat *Wagoner* and *in pari delicto* as substantive equivalents, and his resulting use of the aggregated term *"in pari delicto/Wagoner"* made perfect sense in the context of that specific decision. But the decision should not be read to support the proposition that the two doctrines are substantively identical **[*18]** under all circumstances. In my view, the special master's report, as affirmed in part by the District Court, does not provide a foundation for the Bankruptcy Court's holding that a broad insider exception to imputation, and, thus, *in pari delicto*, exists under New York law. To understand the exceptions to imputation under New York law, I look instead to the Court of Appeals decision in Kirschner, which provides only for the adverse interest exception.

C. Application of *In Pari Delicto* Defense to the Trustee's Faithless Servant Claim

As discussed above, "[t]he traditional principle that a corporation is liable for the acts of its agents and employees applies with full force to the *in pari delicto* analysis." In re MF Global Holdings Ltd. Inv. Litig., 998 F.Supp.2d 157, 189 (S.D.N.Y. 2014) (citing Kirschner, 15 N.Y.S.3d at 464-66).

The Trustee argues (1) that *in pari delicto* cannot, and should not be, permitted as a defense to faithless servant claims, and (2) that even if *in pari delicto* can apply to faithless servant claims it does not apply to Gifford because he is an insider.

The first argument is foreclosed by New York case law. As the Court of Appeals stated, *in pari delicto* "applies even in difficult cases and should not be 'weakened by exceptions.'" Kirschner, 15 N.Y.3d at 464 (citing McConnell v. Commonwealth Pictures Corp., 7 N.Y.2d 465, 470, 166 N.E.2d 494, 199 N.Y.S.2d 483 (1960)). New York courts have not recognized **[*19]** an exception for faithless servant claims. Indeed, the Appellate Division, on facts quite similar to this case, recently upheld the Supreme Court's ruling that *in pari delicto* barred a faithless servant claim. Teneyck, Inc. v. Rosenberg, 39 Misc. 3d 194, 957

[7] The discussion in *In Re Refco* **[*17]** , involved a discussion of the availability of *in pari delicto* in the context of claims for breach of fiduciary duty against insiders on behalf of a corporation. That nuance has been lost in many cases citing to *In Re Refco* as establishing a broad exception to *in pari delicto*. This case does not involve a claim for breach of fiduciary duty by the corporation against Mr. Gifford.

N.Y.S.2d 845 (N.Y. Sup. Ct.), *aff'd*, 111 A.D.3d 529, 975 N.Y.S.2d 335 (N.Y. App. Div. 2013). There, as here, the plaintiff corporation had been convicted for the criminal scheme that formed the basis of its faithless servant claim. Id. at 847. Unlike Gifford, in *Teneyck* the defendant-employee had also been convicted for his conduct in the criminal scheme; in fact, the corporation and defendant pleaded guilty to identical charges. *Id.* The Appellate Division held that where the parties were guilty of misconduct stemming from the same criminal scheme the action was barred by *in pari delicto*. 111 A.D.3d 529, 975 N.Y.S.2d 335.

The Trustee can cite no case supporting his assertion that *in pari delicto* cannot bar faithless servant claims. Neither of the cases the Trustee relies upon, Sansum v. Fioratti, 128 A.D.3d 420, 8 N.Y.S.3d 311 (N.Y. App. Div. 2015) and Mosionzhnik v. Chowaiki, 41 Misc. 3d 822, 972 N.Y.S.2d 841 (N.Y. Sup. Ct. 2013), are to the contrary.

In his brief, the Trustee cites *Sansum* for the general proposition that *in pari delicto* is inapplicable in faithless servant claims, but, as he admitted at oral argument, this is an overstatement. In *Sansum*, an employee who had embezzled funds from his former employer sued the former employer for breaches **[*20]** of fiduciary duty, and the employer counter-claimed under the faithless servant doctrine. 128 A.D.3d 420, 8 N.Y.S.3d 311, 313 (N.Y. App. Div. 2015). The Appellate Division held that the employer was entitled to summary judgment on its faithless servant claim, notwithstanding the employee's argument that the employer had originally obtained the (later embezzled) funds unlawfully and so its claims were barred by *in pari delicto. Id.* This makes sense because the employer was not an ″active, voluntary participant in the unlawful activity″—the embezzlement—that was at issue in its faithless servant claim. The facts of Sansum did not justify the application of *in pari delicto*, but the decision does not support the broad proposition that *in pari delicto* never applies to any faithless servant claim as the Trustee maintains.

The Trustee also relies on Mosionzhnik v. Chowaiki in support of his argument, but misreads the case. *Mosionzhnik* involved a former employee of an art gallery, who had committed various bad acts, including stealing money from the gallery and using clients' art as collateral for loans without the clients' consent. 972 N.Y.S.2d 814, 826 (N.Y. Sup. Ct. 2013). The Court determined that Ms. Mosionzhnik had to return the $500,000 she had stolen to the gallery, but that ″[r]ecovery on **[*21]** the remaining improprieties . . . is barred by the doctrine of *in pari delicto*″ because her bad acts that benefited the gallery were imputed to the gallery. Id. at 830. As the Trustee stresses, the Court also determined that Mosionzhnik could not claim any additional compensation from the gallery. *Id.* Again, this particular case in no way renders *in pari delicto* categorically inapplicable to faithless servant claims; Mosionzhnik, unlike Gifford, had harmed the company by stealing money from it, providing a separate basis for forfeiting compensation that was not imputed to the gallery.

Considered together, *Teneyck, Sansum*, and *Mosionzhnik* demonstrate that *in pari delicto* can apply to faithless servant claims; courts must consider the individual facts of each case to determine whether it does apply. Here, as in Teneyck, the *in pari delicto* doctrine bars the faithless servant claim. Lehr is a wrongdoer that was ultimately convicted for the unlawful activity that is the subject of the Trustee's faithless servant claim, and Lehr was more culpable than Gifford—Gifford was only one of at least half a dozen Lehr employees involved, and the others included two department heads, Wasserman and Martino (Gifford's **[*22]** supervisor), and Lazar, a senior executive, all of whose conduct is imputed to Lehr.

Lacking support in case law for his position, the Trustee resorts to public policy arguments. Appellant's Br. 10-11, 18-20. But the Trustee does not represent the public; he stands in the shoes of the debtor, a wrongdoer. Moreover, it is not true, as the Trustee claims, that the application of *in pari delicto* to faithless servant claims will eliminate the faithless servant doctrine. Corporations will still be able to recover against the prototypical faithless servant—the employee who steals from the company for his own benefit—because that employee's conduct will not be imputed to the corporation. *Kirschner, 15 N.Y.3d at 466-67*. Moreover, the Court's conclusion today does not compel the conclusion that a corporation will *never* be able to withhold or recover compensation from an employee whose bad acts benefit both the employee and corporation. As *Mosionzhnik* demonstrates, even where some of an employee's misconduct benefits a corporation, if the employee is also simultaneously acting against the corporation's interests the corporation will have a claim. But here there is no allegation that the interests advanced by the employee's **[*23]** misconduct were ever unaligned with those of the corporation. As a result, his conduct is imputed to the corporation and the *in pari delicto* defense applies.

Having determined that the *in pari delicto* doctrine is applicable, I next consider the Trustee's argument that the ″bankruptcy insider exception″ prevents the doctrine from applying to Gifford. As discussed in depth above, it is not clear to me that bankruptcy law can or does create a special ″bankruptcy″ exception to the New York state law. Nonetheless, for the sake of completeness, I evaluate the argument assuming that such an exception exists.[8] Because this exception, as framed in the cases cited by the Trustee is limited ″to the actions of fiduciaries who are insiders in the sense that they either are on the board or in management, or in some other way control the corporation,″ I conclude that any such exception would not apply. *Teras Int'l Corp., 2014 U.S. Dist. LEXIS 174328, [WL] at *10* (quoting *In re Optimal U.S. Litig., 813 F.Supp.2d 383, 400 (S.D.N.Y. 2011)*). Gifford was not an officer or director, nor did he exert control over Lehr such that he could be considered an insider.[9]

The Trustee tries to circumvent this roadblock by asserting that all employees of a corporation are ″insiders″ for the purposes of *in pari delicto* analysis and so all come within the ″bankruptcy insider exception.″ The Trustee's position, as articulated at oral argument, that ″a corporate insider″ is any employee of a corporation because all employees are insider the corporation is frivolous. He seeks precedential support for this assertion by misreading the Court of Appeals statement in *Kirschner* that:

> A corporate insider's personal interests—as an officer, employee, or shareholder of the company—are often deliberately aligned with the corporation's interests by way of, for example, stock options or bonuses, the value of which depends on the corporation's financial performance.

15 N.Y.3d at 467. The Trustee argues that this statement demonstrates that the Court of Appeals considers every employee—and presumably **[*25]** every shareholder—of a company to be an insider for the purposes of analyzing the bankruptcy insider exception to *in pari delicto*. I disagree. The only reasonable reading of this sentence is as a simple acknowledgement that a CEO or CFO, for example, who may well be an officer, and employee, and a shareholder of their company, will have a personal stake in the company's financial success. If courts were to adopt the Trustee's theory, *in pari delicto* could never apply

[8] Alternatively, if Mr. Gifford had framed his argument as an argument that the Trustee lacked standing under the *Wagoner* rule this analysis would apply.

[9] The Bankruptcy Court **[*24]** noted that two recent New York state court decisions— *Mosionzhnik* and *Teneyck*—allowed defendants, who were clearly insiders, to utilize the *in pari delicto* defense. Op. 16 n.4. This is consistent with my conclusion that there is no broad insider exception to imputation under New York state law.

to situations in which an employee's fraud on behalf of a corporation leads to bankruptcy, a result clearly contrary to the Court of Appeals' holding in *Kirschner. Id. at 464-466*.

Finally, the Trustee's contention is not supported by the cases he cites. *See Teras Int'l Corp., 2014 U.S. Dist. LEXIS 174328, [WL] at *10* (two defendants who were corporate directors were insiders, three directors who were not directors and did not control corporation were not); *In re Granite Partners, L.P., 194 B.R. 318, 331 (Bankr. S.D.N.Y. 1996)* (insider was corporation's sole decision maker, sole general partner, and only person acting on corporation's behalf); *Kirschner, 15 N.Y.3d at 458* (categorizing corporation's president, CEO, and ″other owners and senior management″ as insiders).

Because Gifford was not an insider the ″bankruptcy insider exception″ does not apply, and I affirm the Bankruptcy Court's ruling that **[*26]** the Trustee's claim against Gifford in barred by *in pari delicto*.

D. Leave to Amend

The Trustee asks that the Court grant leave to amend the complaint, in the event that the Court finds that the *in pari delicto* doctrine applies, so that he may re-plead.[10] Although a district court ″should freely give leave″ to amend ″when justice so requires,″ *Federal Rule of Civil Procedure 15(a)(2)*, it has ″discretion to deny leave for good reason, including futility . . . .″ *McCarthy v. Dun & Bradstreet Corp., 482 F.3d 184, 200 (2d Cir. 2007)*. Lehr was convicted of thirteen counts of criminal activity, including enterprise corruption, a scheme to defraud, grand larceny in the second degree, and money laundering in the first degree. Bankr. Dkt. No. 15-6. Because Lehr participated in and was at the very least Gifford's equal in fault, any amendment would be futile, and leave to amend the complaint is denied.

IV. Conclusion

For the foregoing reasons, the decision of the Bankruptcy Court is AFFIRMED. The Clerk of Court is instructed to enter judgment accordingly and to close the case.

SO ORDERED.

Dated: January 12, 2016

New York, New York

/s/ Gregory H. Woods

GREGORY H. WOODS

United States District Judge

[10] The Trustee argues that he can add allegations that Lehr's owners and most senior executives were unaware of the criminal scheme, and had they known would have put a stop to it. Setting aside the fact that this argument contradicts all of the Trustee's arguments regarding imputation, it is also foreclosed by *Kirschner*. 15 N.Y.3d at 466 (″Where the agent is defrauding someone else on the corporation's behalf, the presumption of full **[*27]** communication [between agents and principals] remains in full force and effect.″).

SECTION 544(B) AND THE IRS AS THE TRIGGERING CREDITOR

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11 U.S.C. § 544(B)(1)

- "Except as provided in paragraph (2), the trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of this title or that is not allowable only under section 502(e) of this title."
- Using this provision, the trustee may step into the shoes of an unsecured creditor to pursue the avoidance of a fraudulent transfer using the substantive state or federal law applicable to that particular creditor, known as the "triggering creditor"

THE STATUTE OF LIMITATIONS

- Under § 544(b)(1), the trustee is subject to whatever substantive law applies to the triggering creditor, and generally that includes the statute of limitations.

THE REACH BACK PERIOD

- Statutes of limitation for avoidance of fraudulent transfers under state law vary but are typically within 4 to 6 years of the transfer date.
  - *See, e.g.*, Fla. Stat. § 726.110 (1987) (4 years), 740 Ill. Comp. Stat. 160/10 (1986) (4 years), Me. Rev. Stat. tit. 14, § 3580 (1985) (6 years).
- These limitations are commonly referred to as "Reach-Back Periods"
- The *Summerlin* rule exception – a government creditor, acting in its governmental capacity, is not subject to a state law statute of limitations
  - *See United States v. Summerlin*, 310 U.S. 414, 417 (1940).

THE IRS COLLECTIONS PERIOD

- 26 U.S.C. § 6502(a) provides that "[w]here the assessment of any tax imposed by this title has been made within the period of limitations properly applicable thereto, such tax may be collected by levy or by a proceeding in court, but only if the levy is made or proceeding begun within 10 years after the assessment of the tax."
- This is the "IRS Collections Period" and merely provides that after a tax is timely assessed, the IRS has 10 years to initiate a collections action.

THE IRS COLLECTIONS PERIOD VS. THE REACH-BACK PERIOD

- § 6502(a) technically does not provide the IRS with a 10-year reach-back period
- However the majority of bankruptcy courts have interpreted § 6502(a) as providing the IRS, and thus the bankruptcy trustee under § 544(b), with a 10-year reach back period to pursue fraudulent conveyances

IN RE VAUGHAN

- Minority view
- Bankruptcy Court for the District of New Mexico found that case law, logic and policy only supported the government's right to avoid a state statute of limitations where the action was brought to vindicate a public interest.
- Where the trustee was pursuing the avoidance action for the benefit of creditors generally, that action did not involve public rights or interests and therefore the 4 year state Reach-Back Period barred the trustee's claims
- *In re Vaughan*, 489 B.R. 302, 304 (Bankr.D.N.M. 2013).

IN RE KAISER & IN RE KIPNIS

- Majority view based on principles of statutory construction, where a court will not consider policy concerns unless the plain meaning of a statute leads to an absurd result
- *In re Kaiser* specifically rejected policy concerns raised by the *Vaughan* court based on the plain language of § 544(b).
- The *Kipnis* Court specifically addressed policy concerns despite finding that § 544(b), noting that the lack of published decisions on the issue and that widespread use of § 544(b) to avoid state statutes of limitation would be a major change in existing bankruptcy practice.
- *In re Kaiser*, 525 B.R. 697, 711 (Bankr.N.D.Ill. 2014).
- *In re Kipnis*, 555 B.R. 877, 883 (Bankr.S.D.Fla. 2016).

POLICY CONCERNS – ABSURD RESULTS?

- The power to avoid a state law Reach-Back Period is powerful and could allow the IRS (and thus the trustee) to reach fraudulent transfers occurring far more than 10 years prior, leading to absurd results
- Raises concerns about sovereignty
- Example:
  - Transfer of valuable property took place in 1979
  - IRS assesses a tax liability on Jan. 1, 2000
  - Collections Period is Jan. 1, 2000 – Dec. 31, 2009
  - Can the trustee reach the 1979 transfer? If so, is that absurd?

PRACTICAL CONSIDERATIONS

- Practitioners representing debtors must consider conveyances going back at least the past 10 years, if not longer
- Review actions a debtor might have taken for financial planning or asset management purposes
- Practitioners assisting with estate planning should ensure no outstanding tax liabilities or IRS disputes at the time that any asset transfers take place

Clawbacks from non-investors in Ponzi schemes

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Investors are not the only targets of clawback claims in Ponzi schemes. As the Seventh Circuit said in a leading receivership case, "[t]he statute makes no distinction among different kinds of recipient of fraudulent conveyances. Every kind is potentially liable." *Scholes v. Lehman*, 56 F.3d 750 (7th Cir. 1995). That broad principle, however, has not been uniformly applied.

1. Clawbacks of charitable donations.

A. Some courts require charitable donations to be returned.

Scholes v. Lehman, 56 F.3d 750 (7th Cir. 1995). Transfers to charities were set aside as fraudulent. " A thief rushes into a church, and, unobserved by anyone, drops the money he has stolen from his victim into the collection plate. Does the church obtain good title as against the thief's victim? It does not. The case is only slightly more difficult if the 'thief' obtained the money by fraud rather than by larceny. A theft cannot pass good title; most frauds can. *E.g., Welch v. Cayton*, 183 W.Va. 252, 395 S.E.2d 496 (1990). The fraudulent conveyance statute, however, would enable the owner to set aside the transfer to the church and recover the money. We do not think that anyone would quarrel with this result."

Liebersohn v. Campus Crusade for Christ, Inc. (In re C.F. Foods), 280 B.R. 103 (Bankr. E.D. Pa. 2002). A debtor's transfers to a charitable organization were subject to the Ponzi scheme presumption.

Transfers need not be in cash. *In Burton W. Wiand, as Receiver v. Carolina Mountain land Conservancy,* M.D. Fla. Case No. 8:09-cv-2443-T27TBM, the receiver in the Arthur Nadel case sued to extinguish an easement granted by Nadel's company to a land conservancy. The matter settled with the conservancy vacating the easement.

B. Some courts say a transfer from a Ponzi scheme is fraudulent only if the transfer is in furtherance of the scheme. Whether a charitable contribution is in furtherance of the scheme may be a question of fact.

In re Petters Co. Inc., 495 B.R. 887 (Bankr. D. Minn 2013). Charitable donations from a Ponzi scheme may be recoverable if they are "in furtherance of" a fraudulent scheme as a matter of fact. This may be true where the giving was to cultivate customer good will by donating to a customer's favorite charity, or where it was well publicized.

C. There are statutory limitations on avoiding transfers to charities –

11 U.S.C. Section 548(a)(2): "A transfer of a charitable contribution to a qualified religious or charitable entity or organization shall not be considered to be a transfer covered under paragraph (1)(B) in any case in which— (A) the amount of that contribution does not exceed 15 percent of the gross annual income of the debtor for the year in which the transfer of the contribution is made; or (B) the contribution made by a debtor exceeded the percentage amount of gross annual income specified in subparagraph (A), if the transfer was consistent with the practices of the debtor in making charitable contributions."

548(a)(1)(B) describes constructive fraudulent transfers. This limitation does not apply to actual fraudulent transfers.

Florida passed a statue expanding the good faith defense for charities.

§726.109(7), Fla. Stat. (2013) says a transfer of a charitable contribution that is received in good faith by a qualified religious or charitable entity or organization is not a fraudulent transfer. But, it too is limited, including a limitation to constructive fraudulent transfer claims.

2. Clawbacks of political contributions.

Janvey v. Democratic Senatorial Campaign Committee, Inc., 712 F.3d 185 (5th Cir. 2013). Donations by corporations operated as a Ponzi scheme to political parties, totaling about $1.6 million, were fraudulent transfers. The fraudulent transfer claims were not preempted by federal campaign finance law.

3. Clawbacks of payment of college tuition.

DeGiacomo v. Sacred Heart Univ. Inc., (In re Palladino), Ch. 7 Case No. 14-11482, Adv. No. 150-1126, 2016 WL 4259787, *4 (Bankr. D. Mass. Aug. 10. 2016). A couple operated a Ponzi scheme. Their adult daughter had attended Sacred Heart University. The trustee sued to recover about $65,000 in tuition payments made by the parents. The Court limited the Ponzi scheme presumption to transfers made in furtherance of the Ponzi scheme, and held that payment of college tuition was not in furtherance of the scheme.

4. Clawbacks from professionals.

Klein v. Cornelius, 786 F.3d 1310 (10th Cir. 2015). A company operated as a Ponzi scheme paid $90,000 in attorneys' fees to a lawyer who represented a friend of the company's principal. The receiver sued for the return of the fees. There was no dispute that the legal services were provided and no dispute about their reasonableness. But, the legal services provided value to the client, not to the company that paid them, and thus had to be disgorged.

5. Advertisers.

Texas changed its version of the Uniform Fraudulent Transfer Act to make state law clawback claims more difficult for trustees and receivers. In the Stanford Ponzi scheme, Stanford paid $5.9 million to The Golf Channel, Inc., in exchange for advertising services aimed at recruiting additional investors. The receiver brought a fraudulent transfer action. The district court granted The Golf Channel's motion for summary judgment. The Fifth Circuit reversed, then, in response to a petition for rehearing, certified the issue to the Texas Supreme Court.

The Texas Supreme Court ruled in favor of The Golf Channel. Under Texas' statute, reasonably equivalent value can be established if the transferee (1) fully performed under a lawful, arm's-length contract for market value, provided consideration that had objective value at the time of the transaction, and (3) made the exchange in the ordinary course of the transferee's business. 487 S.W.3d 560, 564 (Tex. 2016).

The Fifth Circuit was, of course, bound by the Texas Supreme Court, but accepted the answer somewhat grudgingly. It said Texas' interpretation of value was at odds with the approach of 548(c) of the Bankruptcy Code and with other states' fraudulent transfer laws.

6. Clawbacks from financial institutions.

In two recent cases, courts have refused to apply the Ponzi scheme presumption to claims against financial institutions.

> *Finn v. Alliance Bank*, 860 N.W.2d 638 (Minn. 2015): The Minnesota Supreme Court rejected the Ponzi scheme presumption, saying that the Minnesota Uniform Fraudulent Transfer Act does not mention Ponzi schemes and is focused on individual transfers, not schemes. "The asset-by-asset and transfer-by-transfer nature of the inquiry under MUFTA requires a creditor to prove the elements of a fraudulent transfer with respect to each transfer, rather than relying on a presumption related to the form or structure of the entity making the transfer." Id. at 647.

Perkins v. Lehman Brothers, Inc., (In re International Management Associates, LLC) (Bankr. N.D. Ga, January 10, 2017). The Court distinguished between transfers to investors and transfers to others. It held that a subjective standard of good faith does not apply to transfers from a Ponzi scheme. When the transfers are to an unaffiliated third-party in an arm's-length transaction that occurs in the ordinary course of business on ordinary terms, and the debtor receives contemporaneous and exactly equivalent value, the transfers bear no indicia of fraud or wrongdoing on the part of the transferee and the transfers are taken in good faith under 548(c).

7. Clawbacks from sales agents.

A. Some courts have held that commissions to brokers cannot provide reasonably equivalent value in a Ponzi scheme.

In re Randy, 189 B.R. 425, 441 (Bankr.N.D.Ill.1995). Commissions paid pursuant to a Ponzi scheme were fraudulent transfers because "the contract that underlies the transaction is illegal, and therefore no value could have been given by the transferee to the debtor for the transfer").;

Warfield v. Byron, 436 F.3d 551, 560 (5th Cir. 2006)("It takes cheek to contend that in exchange for the payments he received, the [debtor's] Ponzi scheme benefitted from his efforts to extend the fraud by securing new investments.

B. Some courts have held that brokers are entitled to keep their commissions.

In re Churchill Mortgage Inv. Corp., 256 B.R. 664, 680 (Bankr. S.D.N.Y. 2000). A trustee's fraudulent transfer claim was dismissed because brokers hired and paid to produce mortgages or investors gave value, giving rise to a contractual obligation for payment of commissions.

In re First Commercial Mgmt. Group, 279 B.R. 230, 236 (Bankr.. N.D. Ill. 2002).

Broker provided reasonably equivalent value to Ponzi scheme.

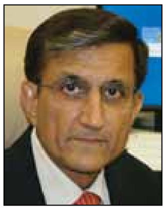
CONCLUSION

Transfers from Ponzi schemes require courts to weigh the interests of innocent parties. Comment 2 to §3 of the Uniform Fraudulent Transfer Act says "[a]ny consideration not involving utility for the creditors does not comport with the statutory definition [of reasonably equivalent value]." Victims of Ponzi schemes are often vulnerable and sympathetic. On the other hand, the recipients of transfers from a Ponzi scheme, to the extent they take in good faith, are not in the position to easily determine whether payments are from a legitimate enterprise. Courts and legislatures will continue to wrestle with this balance.

Feature

By Soneet R. Kapila and Melissa Davis[1]

Ponzi Schemes: Fiduciaries May Be the "Saving Grace"



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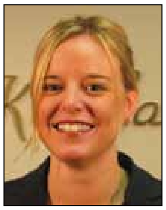

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The fiduciary's goal in a case where the assets include commingled proceeds of a mass fraud is no different than in any other case: maximize the distributions of assets to creditors, including the victims of the fraud. In a Ponzi scheme case, wherein most of the claimants had been relying on a falsely promised rate of return that was impossible for the debtor to honor, the process is complicated by equitable considerations that are not addressed by statutes. An optimal mix of effective asset administration and claims administration will enhance the victims' recoveries. The multiple sources of recovery include avoidable chapter 5 causes of actions that are front and center.

The fiduciary constantly confronts the tensions of the vetting and equitable computation of claims. A creditor's entitlement to distribution might be affected by recoveries from other sources. While the duty to effectively administer all aspects of the equation rests with the fiduciary, the process inherently requires efforts of legal counsel to address the legal analysis. This article focuses on the elements that a fiduciary has to oversee and of which a fiduciary has to be cognizant. The legal analysis is outside the scope of this article.

Clawback Recoveries

Victims of a Ponzi scheme are considered "net losers," or investors whose funds were used to satisfy earlier investors' redemptions, leaving the investor with less than his/her initial investment. Net winners, on the other hand, receive more through a combination of profit distributions and principal redemptions than their initial principal investment.

Fiduciaries in Ponzi cases are charged with maximizing the amount of funds available that can be used to pay back the net losers and other creditors. In order to equalize the losses, the fiduciary might pursue net winners and, in some instances, net losers, and subject them to clawback actions. These actions are brought pursuant to § 547 or 548 of the Bankruptcy Code and state law counterparts as actions to avoid preferential and fraudulent transfers. Nearly all courts agree that pursuant to § 547, a trustee may recover as preferential transfers the full amount of all investor withdrawals, regardless of whether it was principal or profit, made within the 90-day period prior to the bankruptcy.[2]

Under § 548, a trustee may avoid fraudulent transfers to investors of both principal and profits. There are two different types of fraudulent transfer claims. The first type is described in § 548(a)(1)(A) of the Bankruptcy Code, which allows a trustee to avoid transfers made by a debtor if the transfers were made with actual intent to hinder, delay or defraud creditors. The second type of transfer is recoverable pursuant to § 548(a)(1)(B) and is commonly referred to collectively as constructive fraud claims. These claims allow a trustee to avoid transfers made for which a debtor received less than the reasonably equivalent value while the debtor was insolvent, undercapitalized, or intended to incur debts that it could not repay. Ponzi schemes are inherently fraudulent, so as a general rule, there is a presumption that the transfer was made with the intent to hinder, delay or defraud creditors,[3] thereby satisfying the first test.

Some courts find that the "Ponzi presumption" does not apply if a plaintiff cannot demonstrate that the transfers in question were in furtherance of a fraud, particularly where the transfer was a payment to an ordinary vendor. For example, in *In re Phoenix Diversified Investment Corp.*,[4] the trustee sued Publix Super Markets for transfers that the debtor made to Publix on the basis that the transfers were made with the intent to hinder, delay or defraud a creditor of the debtor. The court found that the trustee cannot rely on a Ponzi presumption and that the "plaintiff must show that the transfers in question were in furtherance of the Ponzi scheme."[5] The investor may raise defenses, such as the for-value-in-good-faith defense of 11 U.S.C. § 548(c). An investor who gives value to the debtor in good faith might retain the transfer to the extent of the value that is given. The victim who does not know, or ignores signs of, the debtor's fraudulent dealings or the debtor's financial distress takes the payment in good faith, and the satisfaction of the principal portion of a claim is considered its value.

Fiduciaries consider several factors when evaluating whether to pursue clawback actions, including

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1 The authors extend a special thanks to **Paul J. Battista** (Genovese Joblove & Battista PA; Miami) and **Patrick S. Scott** (GrayRobinson PA; Fort Lauderdale, Fla.) for their scholarly comments on the legal theories that are discussed in this article.

2 Jessica D. Gabel, "Midnight in the Garden of Good and Faith: Using Clawback Actions to Harvest the Equitable Roots of Bankruptcy Ponzi Schemes," 62 *Case W. Res. L. Rev.* 19 (2012) at 22.

3 *Hayes v. Palm Seedlings Partners-A (In re Agricultural Research and Tech. Grp. Inc.)*, 916 F.2d 528, 535 (9th Cir. 1990).

4 Case No. 10-03005-BKC-EPK, 2011 WL 2182881 at 4 (Bankr S.D. Fla. June 2, 2011).

5 *Id.*

(1) whether the investor was a net winner or loser, (2) whether the investor lacked good faith and (3) whether other circumstances, such as whether the action would create an undue hardship, should be given weight. A net loser who lacks good faith is as susceptible to a clawback action as a net winner who lacks good faith.

The Bankruptcy Code allows for the clawback of transfers made within the two years prior to the bankruptcy petition filing, while most state fraudulent transfer laws allow the clawback of transfers made up to four years prior to the filing. Section 544(b) of the Bankruptcy Code adopts state laws for this purpose.

A typical fraudulent transfer clawback action only seeks to recoup the returns received by a good-faith investor, leaving the principal intact as it would be considered the "value" that is given. Thus, fiduciaries become a collector of "red flags" of fraud in the course of investigating the relationships and communications with the investors who profess lack of knowledge of facts suggesting the debtor's fraud or insolvency.

Assuming the fiduciary prevails, the net winner is required to return any profits that are received from the Ponzi scheme, even if taken in good faith, thereby increasing the amount of funds available for distribution to all net losers and other creditors. Clawback actions do not just affect the total funds that the fiduciary will have available for distributions; they also affect the allowable amount of claims. Unless the parties, through a court-approved settlement, agree otherwise, a creditor who fully repays an avoided transfer is entitled to a claim for the amount paid as if it were part of its pre-petition claim.[6] A creditor who does not fully pay the avoided transfers is not entitled to a claim at all, not even for the amount of the loss it sustained.[7]

Collateral Source Recoveries

Investors in Ponzi schemes occasionally recover funds from sources other than the bankruptcy case (*e.g.*, government forfeiture sources or litigation against third parties, such as insurance companies or financial institutions or professional liability lawsuits). Under Florida law, when a party seeks recovery for the same damages in two separate lawsuits, a defendant in the second lawsuit is entitled to a credit for any amount paid to the claimant in settlement for the damages.[8] The purpose of a setoff of collateral source recovery is to prevent a party from recovering twice for the same damages.

Bankruptcy courts are divided as to when to set off collateral source recoveries. Some courts have ruled that any recovery should reduce the creditor's gross claim amount. However, most have agreed with creditors that claims should not be reduced by an earlier recovery except to the extent that it permits the creditor to recover more than its possible claims. The issue is often state law-specific.

Another issue involves quantifying the amount of the setoff when the claim against the bankruptcy estate and the claim against the third party are not identical. On one hand, the amount of the setoff can be the entire amount of funds that are obtained from the collateral source. Other courts have held that the setoff should not include recoveries from a nonbankruptcy action for punitive damages' component and costs that are incurred by the creditor in obtaining the recovery, including professional fees, whereby that portion of the claimant's damages were not allowable in the bankruptcy case.

The issue was hotly contested in the *Rothstein Rosenfeldt Adler PA* (*RRA*) chapter 11 liquidation case, which was a Ponzi scheme case in which a group of investors had received a substantial settlement directly from a bank that the investors had sued in state court for largely the same loss. The tension centered around whether the investors' claims against the bankruptcy estate should be reduced by the full amount of the recovery from the bank or by an amount after deducting the professional fees and punitive damages that might be a component of the total recovery. Below are examples of alternate assumptions:

- The creditor's allowed claim in bankruptcy estate is $100,000;
- The creditor recovered $20,000 in a proceeding outside of the estate; and
- The bankruptcy estate will make a 90 percent distribution.

Under one view, the creditor's claim should be allowed in the amount of $80,000, and the creditor would only receive distributions from the bankruptcy estate of $72,000 for a total recovery from all sources of $92,000. Other viewpoints argue that the creditor should not have to set off the $20,000, but should be allowed a claim in the bankruptcy estate of $100,000 and should receive a bankruptcy distribution of only $80,000 for a total recovery from all sources capped at $100,000. The issues surrounding collateral-source recoveries and the impact on the investor's claim amounts continue to be debated in ongoing Ponzi scheme matters.

Methods of Distribution

Fair and equitable treatment to creditors in a bankruptcy case is directed by the Bankruptcy Code: *pro rata* distributions of assets that remain after the satisfaction of liens among similarly situated investors. A bankruptcy trustee is bound by the order of priorities set forth in the Bankruptcy Code, with some discretion in a chapter 11 case to vary priorities in a plan as accepted by its creditors. In a federal court receivership, a receiver may enjoy greater discretion over the choice-of-distribution method by seeking court approval for a proposed equitable-distribution method. In a Ponzi scheme case, whether in bankruptcy or in receivership, the actual method of distribution might deal with the inequities of simply distributing to claimants based on their contracted rate of return.

The starting point for any investor claim allowance methodology is the "last statement" method, using the investment account balance that was identified on the last statement that was generated on the customer's account. Once commonly used for claims of brokers'/dealers' customers under the Securities Investor Protection Act (SIPA), this method has fallen into disfavor in Ponzi scheme cases because it might serve to encourage reckless investing and would reward the investor

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6 11 U.S.C. § 502(h).
7 11 U.S.C. § 502(d).
8 Florida Statue § 738.73 (punitive damages).

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who negotiated for the highest (fictitious) return. Alternatives are the "net investment method" and the "rising tide method."[9] There may also be hybrid methods of distribution that include concepts of more than one accepted methodology.

In the *Madoff* SIPA case in bankruptcy court, trustee **Irving H. Picard** (BakerHostetler; New York) rejected the last-statement method and instead adopted the net-investment method, which was approved by the court and later affirmed by the Second Circuit Court of Appeals. That method calculates the claim as the difference between the amount of funds that were invested into the scheme and the amount that was paid back to the investor (it is also referred to the "cash in/cash out" method).[10] With the net-investment method, only investors who invested more into the scheme than they withdrew participate in the distributions.

Under the rising-tide method, the investor's percentage of loss is calculated and distributions are made first to investors with the greatest percentage of loss. After all creditors reach a plateau with distribution that brings them to the same loss percentage, funds are distributed to all creditors ratably. This method of distributions, while easier to apply in a case with a homogeneous group of creditors, might be challenging in a case that has creditors with different attributes, such as a mix of investor victims, bank and financial institutions, Internal Revenue Service claims and trade vendors. Because creditors with the largest percentages of losses are paid first, even as litigation to recover asset continues, it might be necessary to calculate multiple layers of distribution in order to determine which creditors participate in the distribution.

The way that a court may deal with another inequity (the investors' variant levels of inquiry notice), without having to engage in separate adversary proceedings to prove lack of good faith or to quantify damages for equitable subordination, is demonstrated best in a receivership case. In the *SEC v. Joseph S. Forte and Joseph Forte LP* Ponzi scheme case, the receiver proposed a hybrid of the net-investment and the rising-tide methods based on the investors' knowledge of the fraud.[11] The investors who had direct or circumstantial evidence or knowledge of the fraud at the time of their investments or who later participated in or assisted with the perpetuation of the scheme (the "culpable investors") were to receive no distribution; investors who were on "inquiry notice" of the fraud at the time of receiving payments would receive distributions only upon returning the false profits received and principal withdrawn; and investors who were not on inquiry notice would receive a full equitable distribution based on the net-investment method.

The objecting creditors argued that the receiver's approach penalized innocent investors by making them return false profits and principal. The court found that investors who by their "reckless behavior" furthered the scheme were not innocent and thereby were not entitled to the same relief as truly innocent investors, and so approved the three-tier approach.[12]

Conclusion

A fiduciary's obligation to maximize distributions can be challenging, but effective case administration might just be the "saving grace" for a Ponzi scheme victim. The challenges that are faced by a fiduciary begin with the baseline fact pattern involving a simple group of homogenous claimants, and may extend to a hybrid of Ponzi victims with a mix of financial institutions and other non-investor claimants. There can also be other factors pulled into the equation, such as collateral source recoveries (which in themselves might have multiple components such as professional fees), and punitive damages (which can have a direct effect on the return to the creditors). Although a variety of distribution methods can be added to the mix to achieve fairness and equity in the distribution schemes, there is obviously no clear path to balancing the inequities of prescribed distribution methodologies combined with unsettled case law on some of the issues. abi

9 Kathy Bazoian Phelps and Hon. Steven W. Rhodes, *The Ponzi Book, A Legal Resource for Unraveling Ponzi Schemes* § 20.04 (Lexis Nexis, 2012) .
10 *In re Bernard L. Madoff Inv. Securities LLC*, 654 F.3d 229 (2d Cir. 2011).
11 *Securities and Exchange Comm'n v. Forte*, No. 09–63-Civil, 2012 WL 1719145 (E.D. Pa. May 16, 2012).
12 *Id.*