Views from the Bench, 2018



Shrinking Safe Harbors and Expanding UFTA Immunity?

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BANKRUPTCY 2018: VIEWS FROM THE BENCH SHRINKING SAFE HARBORS AND EXPANDING UFTA IMMUNITY?

THE SAFE HARBOR OF § 546(e):

Merit Mgmt. Grp., LP v. FTI Consulting, Inc., 138 S. Ct. 883 (2018)

In 2003, Valley View Downs, LP ("Valley View"), and Bedford Downs Management Corporation ("Bedford Downs"), were in competition for the last harness-racing license in Pennsylvania to a racetrack casino, or "racino." Their applications were denied, but they were permitted to reapply. However, the parties agreed that Bedford Downs would withdraw from the competition and in exchange Valley View, after obtaining the license, would purchase 100% of Bedford Downs' stock for \$55 million, financed by the Cayman Islands Branch of Credit Suisse ("Credit Suisse"). Citizens Bank of Pennsylvania ("Citizens Bank"), served as a third-party escrow agent. The transfer at issue in the Supreme Court's decision was a payment of \$16.5 million by Valley View to Merit Management Group, LP ("Merit").

The transfer was effected through a multi-step transaction. First, Credit Suisse placed an aggregate of \$55 million into escrow with Citizens Bank. Second, the Bedford Downs shareholders, including Merit, placed their stock certificates into escrow with Citizens Bank. Third, at closing, Citizens Bank transferred the stock certificates to Valley View. Fourth, in October 2007, Citizens Bank disbursed \$47.5 million to the Bedford Downs shareholders—\$7.5 million remained in escrow with Citizens Bank pursuant to a multiyear indemnification holdback period provided for in the parties' agreement. Finally, in October 2010, Citizens Bank disbursed the remaining \$7.5 million to the Bedford Downs shareholders. Merit ultimately received \$16.5 million in exchange for the sale of its stock certificates, as stated above.

Valley View ultimately failed to secure a gaming license, resulting in its filing of a chapter 11 bankruptcy petition with affiliated entities and, upon confirmation of and pursuant to its reorganization plan, the appointment of FTI Consulting, Inc. ("FTI") as trustee of a litigation trust. FTI subsequently asserted fraudulent transfer claims against Merit to recover the \$16.5 million under Bankruptcy Code § 548(a)(1)(B), alleging Valley View was insolvent at the time of the transfer and Bedford Downs' stock was not reasonably equivalent value to support the transfer.

The district court granted Merit's motion for judgment on the pleadings, holding the § 546(e) safe harbor applied because Citizens Bank and Credit Suisse were "financial institutions" thereunder and transferred/received funds in connection with a "settlement payment" or "securities contract."

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¹ Section 546(e) provides, "[n] otwithstanding sections 544, 545, 547, 548(a)(1)(B), and 548(b) of this title, the trustee may not avoid a transfer that is a margin payment, as defined in section 101, 741, or 761 of this title, or settlement payment, as defined in section 101 or 741 of this title, made by or to (or for the benefit of) a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency, or that is a transfer made by or to (or for the benefit of) a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency, in connection with a securities contract, as defined in section 741(7), commodity contract, as defined in section 761(4), or forward contract, that is made before the commencement of the case, except under section 548(a)(1)(A) of this title." (Emphasis added.)

The Seventh Circuit reversed, holding the § 546(e) safe harbor was inapplicable to transfers in which the financial institutions served as "mere conduits."

The Supreme Court noted "[t]he parties and the lower courts put the proverbial cart before the horse" by scrutinizing the language "by or to (or for the benefit of)" as used in § 546(e) and whether the financial institution or other entity covered thereunder must have a "beneficial interest in or dominion and control over the transferred property." Rather, the question was, "[w]hen determining whether the § 546(e) securities safe harbor saves [a] transfer from avoidance, should courts look to the transfer that the trustee seeks to avoid (i.e., $A \rightarrow D$) to determine whether that transfer meets the safe-harbor criteria, or should courts look also to any component parts of the overarching transfer (i.e., $A \rightarrow B \rightarrow C \rightarrow D$)?"

Merit argued the relevant transfers were the "component parts" of the overall transaction, *i.e.*, "one transaction by Credit Suisse to Citizens Bank (*i.e.*, the transmission of the \$16.5 million from Credit Suisse to escrow at Citizens Bank), and two transactions by Citizens Bank to Merit (*i.e.*, the transmission of \$16.5 million over two installments by Citizens Bank as escrow agent to Merit)," whereas FTI argued the relevant transfer was the "overarching transfer between Valley View and Merit." Ultimately, the Court held "the relevant transfer for purposes of the § 546(e) safe-harbor inquiry is the overarching transfer that the trustee seeks to avoid under one of the substantive avoidance provisions."

In so holding, the Court found instructive the first and last clauses in § 546(e) (emphasized above), which "refer[ed] back to a specific type of transfer that falls within the avoiding power," as well as its heading: "Limitations on avoiding powers." The Court stated the text of § 546(e) also supported such interpretation because "[t]he transfer that . . . 'the trustee may not avoid' is specified to be 'a transfer that *is*' either a 'settlement payment' or made 'in connection with a securities contract.' Not a transfer that involves. Not a transfer that comprises. But a transfer that is a securities transaction covered under § 546(e)." (Citations omitted.)

Finally, the Court observed "[t]he statutory structure also reinforces our reading" because the Bankruptcy Code's avoidance and safe harbor provisions are "two sides of the same coin" such that "it is only logical to view the pertinent transfer under § 546(e) as the same transfer that the trustee seeks to avoid pursuant to one of its avoiding powers."

The Court rejected Merit's argument that a transaction merely involving transfers "by or to" a financial institution that lacks a beneficial interest in the overall transaction "is sufficient to trigger safe harbor protection" because of the use of the disjunctive "or" in the phrase "or for the benefit of." (Emphasis added.) The Court reasoned that § 546(e) was drafted with such language instead to ensure that its scope "matched the scope of the avoiding powers," many of which also included such language.

The Court also found that "Merit fail[ed] to support its purposivist arguments" that § 546(e) was intended to "advanc[e] the interests of the parties in the finality of transactions" and to apply based on "the nature of the transaction generally" rather than on "the identity of the investor and the manner in which it held its investment," and that "[t]here is no reason to believe that Congress was troubled by the possibility that transfers by an industry hub could be unwound but yet was unconcerned about trustees' pursuit of transfers made through industry hubs." Such arguments

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were "contradicted by the plain language" of § 546(e)—which expressly referenced transfers "by or to," but not "through," an industry hub—and were therefore "nothing more than an attack on the text of the statute."

Accordingly, because the transfer FTI sought to avoid was Valley View's purchase of Bedford Downs' stock, it was also the relevant transfer for the purposes of § 546(e)'s safe harbor—not the component parts thereof, *i.e.*, the transfers involving Credit Suisse and Citizens Bank. Such entities served as mere conduits in the overall transaction between Valley View and Bedford Downs and therefore did not trigger the protections of § 546(e).²

However, the Supreme Court "d[id] not address what impact, if any, § 101(22)(A) would have in the application of the § 546(e) safe harbor," because the parties "d[id] not contend that either the debtor or petitioner . . . qualified as a 'financial institution' by virtue of its status as a 'customer' under § 101(22)(A)." As a result, the full extent of *Merit's* impact on the applicability of the § 546(e) safe harbor of remains to be seen. For arguments regarding the impact of § 101(22)(A) on the application of the § 546(e) safe harbor, see the opposition and reply briefs filed in connection with the Appellants' motion to recall the mandate in *Tribune*, excerpts of which are set forth *infra* at pages 7–11.

² See "Appendix A," infra, discussing whether an entity is a transferee or a mere conduit.

³ Section 101(22)(A) defines "financial institution" as, *inter alia*, "a Federal reserve bank, or an entity that is a commercial or savings bank, industrial savings bank, savings and loan association, trust company, federally-insured credit union, or receiver, liquidating agent, or conservator for such entity *and*, *when any such Federal reserve bank*, *receiver*, *liquidating agent, conservator or entity is acting as agent or custodian for a customer* (whether or not a 'customer', as defined in section 741) *in connection with a securities contract* (as defined in section 741) *such customer*." (Emphasis added.)

CONFLICTING VIEWS ON THE PREEMPTION OF CREDITOR CLAIMS:

In re Tribune Co. Fraudulent Conveyance Litig., 818 F.3d 98 (2d Cir. 2016)

In 2007, Tribune Media Company ("Tribune") was acquired in an \$11 billion leveraged buyout, from which \$8 billion was paid to its shareholders through a securities clearing agency or other financial institution in exchange for their shares in the company, which were returned to Tribune.

Tribune initiated chapter 11 bankruptcy proceedings in December 2008. In November 2010, the Official Committee of Unsecured Creditors (the "Committee") filed an action to recover the LBO payments made to Tribune's shareholders and others as intentionally fraudulent transfers under § 548(a)(1)(A).

In April 2011, after the Committee strategically declined to assert any constructive fraudulent transfer claims within the two-year limitations period under § 544, the bankruptcy court granted two subsets of unsecured creditors, including former Tribune employees who held claims for unpaid retirement benefits and the successor indenture trustees for Tribune's pre-LBO senior notes and subordinated debentures (collectively, the "Appellants"), relief from the automatic stay to file state law constructive fraudulent transfer claims in various state and federal courts without deciding, *inter alia*, whether such claims were preempted by § 546(e).

In July 2012, the bankruptcy court confirmed a reorganization plan that terminated the Committee, transferred its intentional fraudulent transfer claims to a litigation trust (the "Litigation Trust"), and authorized the Appellants to pursue any state law fraudulent transfer claims, carving out the litigation trust's federal intentional fraudulent transfer claims. The Litigation Trust's and the Appellants' claims were subsequently consolidated into a multi-district litigation proceeding.

The Tribune shareholders moved to dismiss the Appellants' claims. The district court granted the motion, holding the Appellants' claims were barred by the automatic stay while the Litigation Trust sought to avoid the same transfers, albeit as intentionally fraudulent transfers under federal law. However, the district court rejected the Tribune shareholders' argument that the Appellants' state law constructive fraudulent transfer claims were preempted by § 546(e), holding it applied to bankruptcy trustees, but not creditors, and did not apply to state law fraudulent transfer claims. Although the Second Circuit maintained the district court's decision on dismissal, it disagreed with the district court's reasoning, holding the Appellants' claims were not barred by the automatic stay, but were preempted by § 546(e).

After a lengthy discussion in which it endorsed the view that state law fraudulent transfer claims were subject to "implied preemption" by the Bankruptcy Code, the Second Circuit rejected the

In particular, the court observed that the Appellants' claims were preempted by the automatic stay, "vested in the federally appointed trustee," subject to extinguishment if asserted by the trustee in an action under § 544 that reached a final disposition, and to the extent they reverted to the Appellants, "it was by force of federal law." Moreover, where creditors

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⁴ The court rejected the Appellants' argument that the presumption against the implied preemption of state law by conflicting federal law applied because fraudulent transfer claims are "among 'the oldest [purposes] within the ambit of the police power.'" Rather, the court stated that "the regulation of creditors' rights has 'a history of significant federal presence'" and "[o]nce a party enters bankruptcy, the Bankruptcy Code constitutes a wholesale preemption of state laws regarding creditors' rights."

proposition that, "when creditors' avoidance claims are lodged in the trustee . . . and are diminished in that hand by the Code, they reemerge in undiminished form in the hands of creditors," whether after the statute of limitations expires or the bankruptcy court lifts the automatic stay.

Rather, the Second Circuit ruled § 546(e) applies equally to claims by bankruptcy trustees and creditors because it "was intended to protect from avoidance proceedings payments by and to financial intermediaries in the settlement of securities transactions or the execution of securities contracts," which payments "provide certainty as to each transaction's consummation, speed to allow parties to adjust the transaction to market conditions, finality with regard to investors' stakes in firms, and thus stability to financial markets." A contrary rule allowing creditors' claims after the trustee failed to exercise its powers "would increase the disruptive effect of an unwinding by lengthening the period of uncertainty for intermediaries and investors." Thus, "[e]very congressional purpose reflected in Section 546(e), however narrow or broad, is in conflict with [A]ppellants' legal theory."

The court rejected the Appellants' argument that "Congress wanted to balance the need for certainty and finality in securities markets, recognized in Section 546(e), against the need to maximize creditors' recoveries by limiting only the avoidance powers of trustees . . . [but] not those of individual creditors . . . because actions by trustees . . . are a greater threat to securities markets than are actions by individual creditors" due to the funding of such trustees' avoidance powers by the debtor's estate. Such argument, the court reasoned, "lacks any support whatsoever in the legislative deliberations that led to Section 546(e)'s enactment" and "understate[s] the number of creditors who would sue, if allowed, and the corresponding extent of the danger to securities markets."

The Appellants filed a petition for a writ of certiorari, which was pending when the Supreme Court decided *Merit*. On April 3, 2018, the Supreme Court deferred consideration of the petition to "allow the Court of Appeals . . . to consider whether to recall the mandate . . . in light of this Court's decision in Merit given the possibility that there might not be a quorum in this Court."

Accordingly, the Appellants filed a motion to recall the mandate. On May 15, 2018, the Second Circuit entered an order recalling the mandate "in anticipation of further panel review." *See* Order, *In re Tribune Co. Fraudulent Conveyance Litig.*, 818 F.3d 98 (2d Cir. 2016) (No. 13-3992), ECF No. 387. Relevant excerpts from the parties' briefs are below.

Plaintiff-Appellants-Cross-Appellees' Motion to Recall Mandate, *In re Tribune Co. Fraudulent Conveyance Litig.*, 818 F.3d 98 (2d Cir. 2016) (No. 13-3992), ECF No. 376

This Court has considered four factors when determining whether to recall a mandate in light of a subsequent decision of the Supreme Court of the United States: (1) whether this Court's decision is "inconsistent with" the later Supreme Court decision; (2) whether the movant's papers "made the argument that prevailed" in the Supreme Court; (3) whether there was "a substantial lapse of time" before moving to recall the mandate; and (4) whether the equities "strongly favor" relief.

are authorized to assert state law fraudulent transfer claims, such authorization depends on "the Bankruptcy Code's balancing of debtors' and creditors' rights . . . [not] the vindication of state police powers."

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Sargent, 75 F.3d at 90; see Stevens v. Miller, 676 F.3d 62, 69 (2d Cir. 2012) (listing Sargent factors). Those factors support recalling the mandate in this case.

First, this Court's decision is "unquestionably at odds," *Sargent*, 75 F.3d at 90, with the Supreme Court's decision in *Merit Management*. This Court held that Section 546(e)'s safe harbor "clearly covers payments, such as those at issue here, by commercial firms to financial intermediaries to purchase shares from the firm's shareholders." *Tribune*, 818 F.3d at 120; see also *id.* at 112 ("Transfers in which either the transferor or transferee is not such an intermediary are clearly included in the language.")....

The Supreme Court granted certiorari in *Merit Management* "to resolve a conflict among the circuit courts as to the proper application of the § 546(e) safe harbor." 138 S. Ct. at 892.... In resolving the split against this Court's position, the Supreme Court affirmed the Seventh Circuit's contrary holding that Section 546(e) "did *not* protect transfers in which financial institutions served as mere conduits." *Id.* at 892 (emphasis added). Rather, the Supreme Court held, "the relevant transfer for purposes of the § 546(e) safe harbor is the same transfer that the trustee seeks to avoid pursuant to its substantive avoiding powers." *Id.* at 897. If *that* transfer is made by or to (or for the benefit of) a financial institution, then it falls within Section 546(e)'s scope. Where a financial institution served only as a conduit for a transfer between entities that are not financial institutions, however, Section 546(e)'s exception to a trustee's avoidance powers does not apply.

Here, the challenged transfer is from the debtor company (Tribune) to its shareholders. Because neither the debtor nor the vast preponderance of the relevant shareholders are financial institutions or other safe-harbored entities, ⁴ Section 546(e)'s safe harbor does not apply.⁵

[FN5] Although some of the Tribune shareholders are financial institutions, the vast preponderance are not. This Court should vacate its 2016 decision and allow the district court to decide in the first instance whether Section 546(e) preempts clawbacks from *any* of the shareholders. After *Merit Management*, it is clear that Section 546(e) has nothing to say about, and therefore cannot possibly preempt actions seeking to avoid, transfers in which neither the transferor nor the transferee is a financial institution. Even as to actions against financial institutions, the reasoning of *Merit Management* demonstrates why preemption does not exist, as explained in Point II below.

This Court should vacate its judgment in its entirety. *Merit Management* does not just fatally undermine this Court's basis for applying Section 546(e) to transfers in which neither the transferor nor the transferee is a financial institution. It also necessitates careful reconsideration of whether Section 546(e) preempts *any* state-law fraudulent-conveyance actions, even those directly against financial institutions. It does so because this Court's key rationale for preemption—that the policies ostensibly animating Section 546(e) warrant interpreting the section more broadly than its plain text provides—cannot be reconciled with what the Supreme Court has now said.

Courts have almost unanimously disagreed with this Court's preemption conclusion, both before and after this Court ruled. See generally Peter V. Marchetti, A Note to Congress: Amend Section 546(e) of the Bankruptcy Code to Harmonize the Underlying Policies of Fraudulent Conveyance Law and Protection of the Financial Markets, 26 Am. Bankr. Inst. L. Rev. 1, 55-62, 68-72 (2018) (collecting cases). The flaw in this Court's reasoning is that it "used a faulty intentionalist approach to interpret section 546(e)." Id. at 72....

The rationale that Merit "fail[ed] to support" was exactly the same as this Court's: "Merit contends that the broad language of § 546(e) shows that Congress took a 'comprehensive approach to securities and commodities transactions' that 'was prophylactic, not surgical,' and meant to

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'advanc[e] the interests of parties in the finality of transactions.' Brief for Petitioner 41-43." *Id.* at 896. And "Merit posits that Congress' concern was plainly broader than the risk that is posed by the imposition of avoidance liability on a securities industry entity." *Ibid.* Those contentions—rejected by the Supreme Court as "nothing more than an attack on the text of the statute," *id.* at 897—exactly parallel this Court's reasoning . . . and its repeated emphasis on the need for "finality" in the securities markets. See 818 F.3d at 119, 121.

Opposition of Defendants-Appellees-Cross-Appellants, *In re Tribune Co. Fraudulent Conveyance Litig.*, 818 F.3d 98 (2d Cir. 2016) (No. 13-3992), ECF No. 377

. . . Section 546(e) still preempts plaintiffs' claims. Contrary to plaintiffs' contention, *Merit Management* does not undermine this Court's prior holding that Section 546(e) preempts state-law claims to avoid safe-harbored transfers. That case addressed only whether a payment was within the scope of Section 546(e). It involved an avoidance claim asserted under *federal* law and raised no issue of state-law preemption. Indeed, while *Merit Management* was pending, the Supreme Court denied a certiorari petition in a companion to this case—*Whyte v. Barclays Bank PLC*—that sought review of the *preemption analysis adopted in this case*. This Court's central preemption holding, therefore, should not be vacated. *See Sargent*, 75 F.3d at 92 (scope of mandate recall must be "justified" and not on a "piggy-back basis").

And the payments at issue are still safe harbored. They were "made by" Tribune, which was a covered entity in two independent ways: as a "financial institution" and as a "financial participant." Moreover, the payments were "made ... to (or for the benefit of)" Tribune's shareholders, who were themselves "financial institutions" and thus also covered entities. This Court previously had no need to address these points, but the record supporting them is indisputable. Under this Court's prior preemption ruling in this case, Section 546(e) still preempts plaintiffs' claims.

This Court, therefore, should deny plaintiffs' motion in full and finally bring these cases to a close. Recall and vacatur would be particularly inequitable now, more than a decade after thousands of passive investors received payment for their stock as part of a transaction they played no role in arranging. See Christian Louboutin, 709 F.3d at 142 (equities and "substantial lapse[s] in time" are factors in deciding recall motions).

Although plaintiffs' certiorari petition rightly treated the scope and preemption questions as distinct, *see* Pet. i, plaintiffs now contend (at 10-12) that the two issues are linked because "this Court's key rationale for preemption—that the policies ostensibly animating Section 546(e) warrant interpreting the section more broadly than its plain text provides—cannot be reconciled with what the Supreme Court has now said."

Plaintiffs' argument rests on a misreading of the passages it quotes (at 11) from this Court's opinion and *Merit Management*. Those passages addressed Section 546(e)'s scope, not its preemptive force. *See Tribune*, 818 F.3d at 120; *Merit Management*, 138 S. Ct. at 896-897. And in rejecting the respondent's "purposivist" argument for a safe harbor whose scope would have been so broad that it would have covered nearly any payment made through a bank, the Supreme Court did not reject the proposition that Congress intended Section 546(e) to promote finality and certainty for parties to transfers *within* its scope; it rejected only the respondent's argument that that purpose expanded the scope of Section 546(e) beyond its plain text. *See Merit Management*, 138 S. Ct. at 896-897.

.... Tribune and all the shareholders were covered entities under Section 546(e): the entity "by" whom the LBO payments were "made"—Tribune—was both a "financial institution" and a

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"financial participant," and all the shareholders—"to (or for the benefit of)" whom the payments were "made"—were also "financial institutions." *See* §546(e). Consequently, plaintiffs' avoidance claims are preempted.⁴

[FN4] Many defendants are also covered entities (e.g., "financial institutions," "stockbrokers," "financial participants") for *individualized* reasons. Defendants reserve the right to raise these individualized reasons, as well as additional global reasons, in any further proceedings.

1. Tribune and all the shareholders were "financial institutions." Under the Bankruptcy Code, the term "financial institution" includes a "customer" of a "commercial or savings bank [or] trust company ... acting as agent ... for [the] customer ... in connection with a securities contract." 11 U.S.C. §101(22); see Collier on Bankruptcy ¶5-555.03 n.3 (16th ed. 2018). Although it would suffice if either Tribune or the shareholders qualifies as a financial institution, see §546(e) (safe harboring a transfer made "by or to (or for the benefit of)" a covered entity (emphasis added)), in actuality both do.

Tribune qualifies because it was a "customer" of Computershare—a trust company and a commercial or savings bank, as indicated by its full name (Computershare Trust Company, N.A.)⁵—and Computershare was its agent in the LBO transaction. Tribune "retained" Computershare "to act as Depositary in connection with the Tender Offer." Tribune Offer to Purchase ("Tribune Offer") 113, In re Tribune Co. ("Tribune Bankruptcy Case"), No. 08-13141 (Bankr. D. Del. Aug. 20, 2010) (ECF 5437-5). Computershare was to hold the tendered shares "on [Tribune's] behalf," deem them "accepted" for payment upon Tribune's "notice," and then pay the shareholders for them. Id. at 81; see "Customer," Black's Law Dictionary (10th ed. 2014) ("A person ... for whom a bank has agreed to collect items"); cf. U.C.C. §4-104(a)(5) ("Customer' means a person ... for whom a bank has agreed to collect items ...").

[FN6] Although the Bankruptcy Code defines "customer" for certain purposes, see 11 U.S.C. §741(2), Congress declined to limit the meaning of "customer" for purposes of defining "financial institution." See §101(22) ("financial institution" means a specified entity when such entity "is acting as agent ... for a customer (whether or not a 'customer,' as defined in section 741)" (emphasis added)). Thus, "customer" in this context must be given its ordinary meaning. Ransom v. FIA Card Servs., N.A., 562 U.S. 61, 69 (2011) ("Because the [Bankruptcy] Code does not define 'applicable,' we look to the ordinary meaning of the term.").

Thus, the bankruptcy examiner reported that Computershare "acted as agent for Tribune for the purpose of receiving payment from Tribune and transmitting payment to the tendering stockholders" during the first step of the LBO. Examiner's Report, vol. 1, at 206, Tribune Bankruptcy Case (Aug. 3, 2010) (ECF 5247) (emphasis added); id. ("Tribune ... disbursed \$4.284 billion to Computershare Trust Company, N.A. to consummate the Tender Offer."); Step One Flow of Funds Memorandum at 2, Tribune Bankruptcy Case (Aug. 20, 2010) (ECF 5444-4) (documenting \$4.284 billion transfer from Tribune to Computershare "to consummate the Stock Repurchase"). And Computershare played the same agent role during the second step of the LBO, when Tribune "disbursed approximately \$4 billion to [Computershare] to consummate the Merger." Examiner's Report, vol. 1, at 461; see also Agreement and Plan of Merger ("Merger") \$2.2(a), Tribune Bankruptcy Case (Aug. 20, 2010) (ECF 5442) (requiring Tribune to "deposit" merger consideration "with a U.S. bank or trust company, to act as a paying agent"); Step Two Flow of Funds Memorandum 5, Tribune Bankruptcy Case (Aug. 20, 2010) (ECF 5461-15) (documenting \$3.98 billion transfer from Tribune to Computershare "to consummate the Acquisition").

The shareholders were also the "customers" of an "agent." As plaintiffs themselves allege, Computershare agreed to collect the payments from Tribune and deliver them to the shareholders (and vice-versa with the shares), and thus the shareholders were Computershare's customers, and it was the "Shareholders' agent." N.Y. Compl. ¶¶149, 157 (ECF 1558), No. 11-md-2296 (S.D.N.Y.),

in Joint App'x JA903-905 (ECF 118) (2d Cir.); *accord*, *e.g.*, Cal. Compl. ¶147, 155 (ECF 1533), Del. Compl. ¶145, 153 (ECF 1507), Ill. Compl. ¶143, 151 (ECF 1564), Tex. Compl. ¶144, 152 (ECF 1501), No. 11-md-2296 (S.D.N.Y.). That is confirmed by the transaction documents, which state that, at both steps of the LBO, Computershare was "agent for stockholders for the purpose of receiving payment from [Tribune] and transmitting payment to the ... stockholders." Tribune Offer 82; *see also* Merger §2.2 (instructing Computershare as "Paying Agent" to hold merger consideration "in trust for the benefit of holders of the Shares").

Additionally, in concluding that Section 546(e) preempted plaintiffs' claims, this Court has already determined that the Tribune LBO transaction occurred "in connection with ... securities contract[s]" between Tribune and its shareholders. *See Tribune*, 818 F.3d 105, 120. Plaintiffs did not dispute that point, nor could they. A "securities contract" is "a contract for the purchase [or] sale ... of a security" or "any other ... similar" "agreement or transaction." 11 U.S.C. §741(7)(A)(i), (vii). Here, Tribune "purchased all of its stock" from the shareholders, 818 F.3d at 105, pursuant to a tender-offer agreement and a merger agreement, *see* Tribune Offer 1; Merger §§2.1(a), 2.2(b).

Thus, both Tribune and the shareholders were "customers" of Computershare, which served as their agent in the LBO, and hence are themselves "financial institutions" under the Bankruptcy Code. This analysis is consistent with *Merit Management*. The Supreme Court acknowledged but did "not address" (because the defendant had not raised) the possibility that the transaction at issue was safe harbored because "either the debtor or petitioner ... qualified as a 'financial institution' by virtue of its status as a 'customer.'" 138 S. Ct. at 890 n.2; *see also* Oral Tr. 15-16, No. 16-784 (Nov. 6, 2017) at 15-16 (Breyer, J.) ("[W]hy are we hearing this case? ... [I]t seems to me that Citizens Bank is acting [as] agent or custodian of a customer, namely VVD, and it seems to me that Credit Suisse is acting as—as an agent or custodian for VVD. So why doesn't that cover it?").

2. Tribune was also a "financial participant." §546(e). A "financial participant" is

an entity that, ... at the time of the date of the filing of the [bankruptcy] petition, has one or more agreements or transactions described in ... section 561(a) [which includes swap agreements] with ... any ... entity (other than an affiliate) of a total gross dollar value of not less than \$1,000,000,000 in notional ... principal amount outstanding (aggregated across counterparties) at such time or on any day during the 15 month-period preceding the date of the filing of the petition, or has gross mark-to-market positions of not less than \$100,000,000 (aggregated across counterparties) in one or more such agreements or transactions with ... any ... entity (other than an affiliate) at such time or on any day during the 15-month period preceding the date of the filing of the petition.

§101(22A)(A). Tribune qualifies in several ways. Here, it suffices to mention only one: through Tribune's swap agreements. When Tribune filed its bankruptcy petition in December 2008, it had in place three swap agreements with Barclays Bank (not a Tribune affiliate) whose total gross dollar value in notional principal amount outstanding was \$2.5 billion both on that date and throughout the preceding 15-month period, 2007 Form 10-K at 43, 51, *Tribune Bankruptcy Case* (Aug. 20, 2010) (ECF 5437-3), and whose aggregate gross mark-to-market position was about \$150 million.⁷

Plaintiff-Appellants-Cross-Appellees' Reply, *In re Tribune Co. Fraudulent Conveyance Litig.*, 818 F.3d 98 (2d Cir. 2016) (No. 13-3992), ECF No. 382

... Defendants argued that, "[i]f the avoidance claims reached Appellants at all, they did so still limited by section 546(e)." Dkt. 143 at 23. That argument, of course, assumed that Section 546(e) protected *all* transfers in which financial institutions acted as conduits. But *Merit Management* overruled that understanding. Thus, even if Defendants' argument were correct, endorsement of it by this Court would not end the case: The district court would *still* need to determine whether

Section 546(e) reaches each of the approximately 3,300 differently situated defendants in this case in light of *Merit Management*. See *infra* Part III.

. . . Defendants offer only misdirection. First, they say that Merit Management did not directly address any preemption issue. Opp. 13-14. That is true, undisputed, and irrelevant. We did not argue that Merit Management necessitates remand to consider preemption anew because the case directly addressed preemption. Rather, we showed that Merit Management necessitates reconsideration because this Court's preemption opinion rests on an understanding of Congress's purposes that has been rejected by Merit Management.

Even if Section 546(e) does preempt state law (or if Plaintiffs' claims only "revert" subject to it), the question remains whether it protects *all* of the defendants in this case. As Defendants concede, *Merit Management* "forecloses" the Court's original reason for holding that it does. Opp. 16. So instead, Defendants ask the Court to reach the same conclusion for a different reason. It should not.

A. To begin with, Defendants have never before made the argument advanced in their Opposition. The argument is that the definitions of "financial institution" and "financial participant" bring every transfer in the case within the scope of Section 546(e), regardless of *Merit Management*'s holding. Opp. 16-22. But that argument appears nowhere in Defendants' district-court briefs. *In re Tribune Co. Fraudulent Conveyance Litig. ("District Court Case")*, No. 11-MD-2296 (S.D.N.Y.), Dkt. 1671; Dkt. 2293. Nor does it appear anywhere in their briefs in this Court. No. 13-3992, Dkts. 143-145; Dkts. 229-231.

. . . . If any court is to consider those new arguments—and they should not—it should be the district court on remand. See, *e.g.*, *Bishop v. Wells Fargo & Co.*, 870 F.3d 104, 106-07 (2d Cir. 2017) (per curiam) (remanding, in an analogous posture, even a purely legal issue to district court); *Carpenter v. Republic of Chile*, 610 F.3d 776, 780 (2d Cir. 2010) (per curiam) (same).

B. Defendants' new argument is premised on factual assertions never before tested in this case—confirming that it is not ripe for review by this Court. For example, under Defendants' new theory, a bank through whose hands merger consideration was remitted must have "act[ed] as agent" for Tribune or its former shareholders. 11 U.S.C. § 101(22)(A). But "[t]he question whether an agency relationship exists is highly factual." Cleveland v. Caplaw Enters., 448 F.3d 518, 522 (2d Cir. 2006). In particular, agency is a fiduciary relationship, Johnson v. Priceline.com, Inc., 711 F.3d 271, 277 (2d Cir. 2013), which most bank-customer relationships are not, Manufacturers Hanover Tr. Co. v. Yanakas, 7 F.3d 310, 318 (2d Cir. 1993). The documents Defendants cite (at 17-20) do not suffice to determine that agency relationships existed here for any Defendant, let alone all of them

Another factual issue is whether the relationship Defendants posit is in connection with a "securities contract." 11 U.S.C. § 101(22)(A). That term's definition encompasses contracts "to purchase shares." Tribune, 818 F.3d at 120 (emphasis added). But this Court did not hold, as Defendants suggest (at 20), that it encompasses contracts to redeem shares. Indeed, this Court has expressly declined to rule on that issue. In re Quebecor World (USA) Inc., 719 F.3d 94, 99 (2d Cir. 2013). That distinction matters because the merger agreement covering approximately half of the transfers here involved the cancellation, not the purchase, of shares. Merger Agreement § 2.1(a), In re Tribune Co., No. 08-13141 (Bankr. D. Del.), Dkt. 5442 ("All Shares . . . shall be automatically canceled and shall cease to exist.").

In addition to such factual questions, Defendants' new argument embeds legal errors. For example, it requires "customer" to have "its ordinary meaning." Opp. 18 n.6. But the Bankruptcy Code gives "customer" a technical meaning. 11 U.S.C. §§ 741(2), 761(9). It does not use the word in any other way. *Id.* §§ 561(b)(2)(B), 745-749, 751, 752, 763-766, 783(a). The meaning here should be correspondingly limited. See, *e.g.*, *Hall* v. *United States*, 566 U.S. 506, 519 (2012) ("[I]dentical words and phrases within the [Bankruptcy Code] should normally be given the same meaning." (quotation marks omitted)).

Similar problems plague the distinct argument (Opp. 21-22) that Tribune was a "financial participant." For example, the swap agreements on which that argument rests were part of the very leveraged buyout we challenge. Tribune Co. 2007 Form 10-K at 6, https://bit.ly/2qSyUy8. A transferor cannot immunize challenges to a transaction simply by including certain derivatives in it. See H.R. Rep. No. 109-31(I), at 130-31 (2005), reprinted in 2005 U.S.C.C.A.N. 88, 191 (noting that the definition of "financial participant" protects "major market participants" to prevent "systemic impact upon the markets from a single failure"). Like their other new arguments, this one is indisputably fact bound—the kind of argument to be evaluated, in the first instance if at all, by the district court

PAH Litig. Tr. v. Walter Street Healthcare Partners L.P. (In re Physiotherapy Holdings, Inc.), No. 16-201, 2017 WL 6524524 (D. Del. Dec. 21, 2017)

In February 2012, Court Square Capital Partners II, L.P. ("Court Square") acquired Physiotherapy Holdings, Inc. ("Physiotherapy") in a leveraged buyout and merger in which Physiotherapy was the surviving entity. The \$510 million acquisition price—financed by an equity investment by Court Square and \$300 million of debt, \$210 million of which was issued to unsecured noteholders (the "Noteholders")—was based on fraudulent financial statements and misrepresentations regarding Physiotherapy's enterprise value and was more than double its actual enterprise value. Upon closing, \$248.6 million was transferred to Water Street Healthcare Partners, L.P., Wind Point Partners IV, L.P., and related entities (collectively, the "Defendants") in exchange for their interests in Physiotherapy.

In November 2013, Physiotherapy and its affiliates (collectively, the "Debtors") commenced chapter 11 bankruptcy proceedings, culminating in confirmation of a reorganization plan pursuant to which the Noteholders released their claims against the Debtors and transferred any fraudulent transfer claims they possessed against the Defendants in connection with the LBO and merger to a litigation trust (the "Litigation Trust") in exchange for pro rata shares of common stock issued by the reorganized Debtors (the "Equity Interest") and 50% of any recovery by the Litigation Trust (the "Litigation Interest").

In September 2015, the trustee (the "Trustee") of the Litigation Trust filed a complaint asserting fraudulent transfer claims under state and federal law. The Defendants moved to dismiss the complaint arguing, *inter alia*, § 546(e) preempted the state law fraudulent transfer claims. The bankruptcy court denied the motion and the Defendants appealed, arguing that if a transfer was subject to fraudulent transfer claims under state law notwithstanding § 546(e)'s preemption of such claims under federal law, "the exemption set forth in section 546(e) would be rendered useless." In response, the Trustee argued, *inter alia*, that § 546(e) was inapplicable to state law fraudulent transfer claims because, unlike bankruptcy trustees, "the statute is silent as to creditors."

The district court, persuaded by the statute's silence as to creditors, affirmed and largely adopted the bankruptcy court's reasoning. For example, the bankruptcy court noted that, "in other sections

of the Bankruptcy Code, Congress has explicitly stated when it intends for a provision to apply to entities other than the trustee," e.g., § 1109(b), and "expressly preempted state law by incorporating phrases like 'notwithstanding any nonbankruptcy law,'" e.g., § 541(c)(1). The bankruptcy court also distinguished the policy of § 546(e) to protect intermediaries and the market "to avoid problems of 'ripple effects,' i.e., falling dominoes," from the application proposed by the Defendants, i.e., "to protect individual investors who are beneficial recipients of insolvents' assets." For the same reason, the Second Circuit's decision in *Tribune* was not controlling, as it involved publicly-traded securities that did implicate such "ripple effects," whereas "[b]ecause the transfers here were to corporate insiders, systemic risk concerns were not at issue."

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FRAUDULENT TRANSFER CLAIMS UNCAPPED BY THE UNDERLYING DEBT UNDER THE BANKRUPTCY CODE:

PAH Litig. Tr. v. Walter Street Healthcare Partners, L.P. (In re Physiotherapy Holdings, Inc.), Bankr. No. 13-12965, Adv. No. 15-51238, 2017 WL 5054308 (Bankr. D. Del. Nov. 1, 2017)

In March 2016, after the Trustee filed its fraudulent transfer complaint, Select Medical Corporation ("Select Medical") acquired the reorganized Debtors for \$421 million, of which \$282 million was paid to the Noteholders in exchange for their Equity Interest.

The Defendants argued the Noteholders' receipt of such amount forecloses any recovery by the Litigation Trust because it exceeded the value of the Noteholders' Equity Interest—thereby offsetting the Noteholders' actual losses—and, fraudulent transfer laws being "remedial, not punitive," "[t]he intent of the law is to restore creditors to their positions immediately prior to the fraudulent transfers." Thus, the Trustee's requested recovery would create a windfall in favor of the Noteholders.

In response, the Trustee argued the amount the Noteholders received for their Equity Interest was "significantly lower" than the amount of the notes they released in exchange for their Equity Interest pursuant to the plan, which notes would have continued to accrue interest such that the unpaid principal and interest would have significantly exceeded \$300 million. The Trustee also argued the Noteholders' debt-for-equity swap was a "gamble" that allowed the Debtors to reorganize without "massive debts" and increased the value of the reorganized Debtors. "The Noteholders took a risk and are entitled to the benefits of their risk-taking." Accordingly, no windfall would accrue in favor of the Noteholders.

The bankruptcy court ruled in favor of the Trustee, noting with approval the Trustee's observation that it is empowered by § 548 to "avoid" a fraudulent transfer and by § 550 to recover the property transferred or the value of such property "for the benefit of the estate," not "to the extent" of the benefit to the estate. Although the issue appeared to be unanswered by the Third Circuit, the bankruptcy court cited "[n]umerous cases stand[ing] for the proposition that a recovery under Section 550(a) is not capped by the amount of the creditor claims." Rather, such provision codifies the Supreme Court's decision in *Moore v. Bay*, 284 U.S. 4 (1931), "that a bankruptcy trustee could avoid a fraudulent transfer in its entirety, for the benefit of the estate, and that recovery was not limited to the amount of the unsatisfied creditor's claim." Moreover, because the "estate" includes "all legal or equitable interests of the debtor in property as of the commencement of the case," "for the benefit of the estate" means more than "for the benefit of creditors."

The bankruptcy court also rejected the Defendants' argument that the Trustee's proposed recovery would create a windfall in favor of the Noteholders as inapposite because "[w]indfalls and punitive damages are not bankruptcy concepts" and "[h]ad there been no bankruptcy, the Noteholders would have received with interest \$470,332,509 at maturity or over \$380 million today."

Finally, the bankruptcy court stated that if it were to rule otherwise, "it would mean that if Defendants are in fact liable for the fraudulent transfer, they would keep most if not all of the transferred money. The Court cannot countenance such an inequitable result if liability exists."

DUFTA INAPPLICABLE TO TRANSFERS BY NON-DEBTORS:

Crystallex Int'l Corp. v. Petróleos de Venezuela, S.A., 879 F.3d 79 (3d Cir. 2018)

In 2011, Venezuela nationalized its gold mines, thereby expropriating the rights of Crystallex International Corp. ("Crystallex") in the Las Cristinas gold reserve. Asserting such expropriation violated an applicable treaty, Crystallex obtained a \$1.202 billion arbitration award against Venezuela.

At around this time, Venezuela effectuated the monetization and repatriation of its interests in its largest United States-based asset, CITGO Petroleum Corporation ("CITGO Petroleum"), which was wholly owned by CITGO Holding, Inc. ("CITGO Holding"), through a series of transfers, including:

- 1. CITGO Holding issued a \$2.8 billion dividend to PDV Holding, Inc. ("PDVH").
- PDVH issued a \$2.8 billion dividend to Petróleos de Venezuela, S.A., a Venezuelan state-owned company ("PDVSA").⁵

The net result was that CITGO Petroleum was left with negative shareholder equity and rendered insolvent and PDVSA, immune from suit under the Foreign Sovereign Immunities Act, received a \$2.8 billion dividend in Venezuela.

Crystallex filed a complaint asserting a claim against PDVH under the Delaware Uniform Fraudulent Transfer Act ("DUFTA"). PDVH moved to dismiss the complaint because the allegedly fraudulent transfer was not made "by a debtor," *i.e.*, by Venezuela or PDVSA, an alleged alter ego of Venezuela. The district court denied the motion to dismiss, noting that "DUFTA includes within its ambit 'indirect . . . mode(s) . . . of disposing of or parting with an asset or an interest in an asset" and that the transfer from PDVH to PDVSA was "executed by an 'instrumentality' of the debtor or on its 'behalf" and therefore was "a transfer made in every meaningful sense 'by a debtor,'" although PDVH was "not in fact a debtor."

On appeal, the Third Circuit stated that "[t]he question at the center of this case is quite simple: can a transfer by a non-debtor be a 'fraudulent transfer' under [DUFTA]?" The court noted that although the Delaware Supreme Court had not yet addressed the question, "the Chancery Court ha[d] answered [it] in the negative," under DUFTA and also under the Bankruptcy Code, the relevant provisions of which are nearly identical to, and interpreted and applied by Delaware courts uniformly with, their DUFTA counterparts.

The Third Circuit also stated that "reading 'by a debtor' broadly enough to allow a non-debtor subsidiary transferor . . . to be liable, simply because its parent company . . . is a debtor, would undermine a fundamental precept of Delaware corporate law: parent and subsidiary corporations are separate legal entities."

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⁵ CITGO Petroleum, CITGO Holding, and PDVH were each Delaware corporations.

Finally, it "reject[ed] Crystallex's argument that DUFTA's 'broad remedial purpose' should cause us to declare the transfer fraudulent" because "having broad latitude to craft a remedy for a DUFTA violation does not necessarily mean we have broad latitude to determine what fits within the contours of the statute in the first place."

Accordingly, the Third Circuit rejected the district court's expansion of liability under DUFTA to instrumentalities of, or other transferors acting "on behalf of," debtors. The court therefore held the transaction "lack[ed] the principal harm visited upon creditors in a fraudulent transfer, namely the debtor's alienation of an asset otherwise available to pay its debts," applied controlling precedent that "foreclosed the possibility of aiding and abetting liability under DUFTA," reversed the order denying PDVH's motion to dismiss, and remanded to the district court.

In a dissenting opinion, Judge Fuentes stated: "[A] consequence of the majority's holding is that, under the Fraudulent Transfer Act, a foreign sovereign—such as Venezuela—is free to fraudulently repatriate assets, so long as the party making the transfer is a non-debtor." Indeed, he was "hard-pressed to conceive of a scenario more worthy of a trial court's invocation of its broad equitable powers under the Fraudulent Transfer Act than this one."

RECENT DEVELOPMENTS AFFECTING THE EXTRATERRITORIAL APPLICATION OF BANKRUPTCY CODE AVOIDANCE PROVISIONS

As demonstrated by several opinions recently issued by the United States Bankruptcy Court for the Southern District of New York, courts and judges are split on when to exercise personal jurisdiction over foreign defendants and when to apply Bankruptcy Code provisions to international transactions.

In Official Committee of Unsecured Creditors of Arcapita Bank B.S.C.(c) v. Bahrain Islamic Bank (In re Arcapita Bank B.S.C.(c)), 575 B.R. 229 (Bankr. S.D.N.Y. 2017), reconsideration denied on other grounds, Bankr. No. 12-11076, Adv. No. 13-01434, 2018 WL 718399 (Bankr. S.D.N.Y. Feb. 5, 2018), the bankruptcy court's original opinion dismissing the unsecured creditors' committee's adversary proceedings asserting, inter alia, avoidance claims under section 547(b) against Bahraini defendants was remanded after the district court determined the bankruptcy court had personal jurisdiction over the defendants. At issue was the defendants' use of correspondent bank accounts in the United States to receive funds from the debtor to be invested outside the United States at a predetermined rate of return, which investments the defendants never returned. At the heart of the district court's decision that personal jurisdiction existed was its determination that such use "was purposeful and not coincidental or adventitious" and that there was an "articulable nexus" between such use and the committee's claims. The defendants' mere use of United States accounts to effectuate the transfers the committee sought to avoid was sufficient to subject them to the bankruptcy court's jurisdiction.

On remand, the bankruptcy court extended the district court's reasoning to deny the defendants' motions to dismiss the adversary proceedings based on the doctrine of international comity and the presumption against the extraterritorial application of United States laws. First, prescriptive comity, i.e., the principle that nations refrain from prescribing laws unreasonably governing activities related to other nations, was inapplicable because the use of the accounts connected the transfers and the United States as the regulating nation seeking to apply its avoidance laws which formed the "bedrock" of the protections available to creditors under the Bankruptcy Code. Second, the bankruptcy court held the committee's avoidance claims did not involve the extraterritorial application of United States law because "the focus of congressional concern," i.e., the "transactions that the statute seeks to regulate," were the initial transfers of property of the estate to the United States accounts. Conversely, the bankruptcy court held the committee's related claims for violations of the automatic stay and turnover of the investment proceeds were intended to have effect outside the United States because sections 362 and 542(b) reference and incorporate the definition of "property of the estate" under section 541(a), which includes property "wherever located and by whomever held." The bankruptcy court therefore held the doctrine of international comity and the presumption against extraterritoriality were inapplicable to the committee's claims.

In LaMonica v. CEVA Group PLC (In re CIL Limited), 582 B.R. 46 (Bankr. S.D.N.Y. 2018), the bankruptcy court employed a more conservative approach to the proposed extraterritorial application of Bankruptcy Code avoidance provisions. The trustee initiated an adversary proceeding to recover the equity interest of the debtor, a Cayman Islands holding company, in CEVA Group PLC, which was a subsidiary operating company of the debtor and its sole asset. The defendants were the transferee of the debtor's equity interests and the debtor's directors who effectuated the transfer.

The bankruptcy court held Congress did not intend the Bankruptcy Code's fraudulent transfer provisions to apply extraterritorially. It distinguished sections 548(a) and 544(b) from other Bankruptcy Code provisions, because the former references "an interest of the debtor in property" without the broader descriptor found in section 541(a), and because the latter did not have extraterritorial effect merely because it incorporated "applicable law." Thus, because the transfers "allegedly harmed foreign creditors" and were "accomplished outside the United States" by foreign entities, they could not be avoided under the Bankruptcy Code.

However, in LaMonica v. CEVA Group PLC (In re CIL Limited), Adv. No. 14-02442, Bankr. No. 13-11272, 2018 WL 3031094 (Bankr. S.D.N.Y. June 15, 2018), the bankruptcy court granted the trustee's subsequent motion for reconsideration. In its original opinion, the bankruptcy court had also found that the transfer of the debtor's equity interest was merely a single step in a five-step, integrated out-of-court restructuring transaction. On that basis, the trustee sought leave to amend the complaint, arguing such finding "alters the 'domesticity' analysis of the transaction" and alleging that the participants in the integrated transaction "incurred irrevocable liability to exchange their debt in the United States, and that title to securities bought, sold and exchanged in the . . . [t]ransaction was transferred in the United States." Accepting the doctrine that "an allegedly fraudulent conveyance must be evaluated in context; where a transfer is only a step in a general plan, the plan must be viewed as a whole with all its composite implications," the bankruptcy court could not rule out the possibility that the integrated transaction could be collapsed into a single transaction to determine the situs of the alleged fraudulent transfer for the purposes of the extraterritoriality analysis. The bankruptcy court thus granted the trustee leave to amend.

In sum, the *Arcapita* decision highlights that parties outside the United States potentially may be subject to liability in United States courts under United States laws if the court determines either (i) the statute under which suit is brought applies outside the United States' territorial jurisdiction or (ii) the specific challenged transaction was domestic rather than foreign. Although the bankruptcy court's original opinion in *CIL Limited* provides thorough analyses and arguments as to why a court should not apply Bankruptcy Code avoidance provisions to transactions outside the United States, its decision granting the trustee leave to amend might also provide debtors a vehicle to subject transactions that, in isolation, occurred outside the United States to the jurisdiction of United States courts if such transactions can be connected to other, domestic transactions.

APPENDIX A

WHETHER AN ENTITY IS A TRANSFEREE OR A MERE CONDUIT:

Bonded Fin. Servs., Inc. v. European Am. Bank, 838 F.2d 890 (7th Cir. 1988)⁶

Michael Ryan ("Ryan"), doing business as Shamrock Hill Farm, borrowed \$655,000 (the "Shamrock Loan") from European American Bank (the "Bank"). On January 21, 1983, Bonded Financial Services ("Bonded"), a currency exchange controlled by Ryan, transmitted a \$200,000 check to the Bank and directed it to deposit the check into an account Ryan maintained with it. On January 31, 1983, Ryan instructed the Bank to debit his account \$200,000 to reduce the outstanding amount of the Shamrock Loan. Ryan subsequently repaid the full amount of the Shamrock Loan.

Bonded filed a chapter 11 bankruptcy petition on February 10, 1983, and Ryan's creditors filed involuntary proceedings against him shortly thereafter. Bonded's \$200,000 check to Ryan was determined to be a fraudulent conveyance under § 548(a) and the trustee (the "Trustee") in Bonded's bankruptcy case sought to recover from the Bank, rather than Ryan, who was insolvent.

The Trustee argued the Bank was the initial transferee of the check under § 550(a)(1) or otherwise "the 'entity for whose benefit such transfer was made' because Ryan intended to pay off the loan when he caused Bonded to write the check."

The bankruptcy court granted summary judgment in favor of the Bank and the district court affirmed, holding in connection with Bonded's transfer to Ryan that the Bank was a mere conduit, rather than the initial transferee, and Ryan was the beneficiary of the transfer, because the check reduced the balance of the Shamrock Loan.

Affirming the district court, the Seventh Circuit held "the minimum requirement of status as a 'transferee' [under § 550(a)(1)] is dominion over the money or other asset, the right to put the money to one's own purposes. When A gives a check to B as agent for C, then C is the 'initial transferee.'" However, on January 21, 1983, "so far as the Bank was concerned, Ryan was free to invest the whole \$200,000 in lottery tickets or uranium stocks," whereas on January 31, 1983, "[a]s the Bank saw things . . . it was getting Ryan's money." Thus, the Bank was merely Ryan's agent until, and only achieved dominion over the \$200,000 upon, Ryan's instruction to debit his account to reduce the outstanding amount of the Shamrock Loan.

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⁶ The Seventh Circuit's opinion in *Merit* extended the definition of "transferee" it set forth in *Bonded* such that "transfers 'made by or to (or for the benefit of)' in the context of 546(e) refer to transfers made to 'transferees' as defined there [in *Bonded*]." *FTI Consulting, Inc. v. Merit Mgmt. Grp., LP*, 830 F.3d 690, 695 (7th Cir. 2016). The Supreme Court affirmed the Seventh Circuit's judgment, *see Merit*, 138 S. Ct. at 897, notwithstanding that the *Tribune* defendants filed an amicus brief with the Court citing *Bonded* in connection with their argument that the definition of "transferee" is a "judicially created body of law with uncertain application" and, moreover, the absence of any reference to a transferee in § 546(e), in contrast to § 550(a)(1), supported the inference that the safe harbor provision did not apply only to transfers in connection with which the covered entity was a transferee, but also applied where the covered entity was a mere conduit, or intermediary, *see* Brief for Various Former Tribune and Lyondell Shareholders as Amici Curiae in Support of Petitioner, *Merit Mgmt. Grp., LP v. FTI Consulting, Inc.*, 138 S. Ct. 883 (2018) (No. 16-784), 2017 WL 3098281, at *18–21, *19 n.4.

Policy concerns supported insulating the Bank from liability for Bonded's fraudulent transfer to Ryan because "[e]xposing financial intermediaries and couriers to the risk of disgorging a 'fraudulent conveyance' in such circumstances would lead them to take precautions, the costs of which would fall on solvent customers without significantly increasing the protection of creditors."

In rejecting the Trustee's alternative argument that the Bank was the beneficiary of Bonded's check, the court stated "a subsequent transferee cannot be the 'entity for whose benefit' the initial transfer was made. The structure of the statute separates initial transferees and beneficiaries, on the one hand, from 'immediate or mediate transferee[s]', on the other. The implication is that the 'entity for whose benefit' is different from a transferee, 'immediate' or otherwise. The paradigm 'entity for whose benefit such transfer was made' is a guarantor or debtor—someone who receives the benefit but not the money." Accordingly, "[i]f Bonded had sent a check to the Bank with instructions to reduce Ryan's loan, the Bank would have been the initial transferee and Ryan the 'entity for whose benefit'" the transfer was made.

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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

CRYSTALLEX INTERNATIONAL

CORPORATION,

Plaintiff,

v. : C.A. No. 17-mc-151-LPS

BOLIVARIAN REPUBLIC OF VENEZUELA, : PUBLIC VERSION

Defendant. RELEASED AUGUST 10, 2018

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OPINION

August 9, 2018 Wilmington, Delaware

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STARK, U.S. District Judge:

Smul P.

Plaintiff/Judgment Creditor Crystallex International Corporation ("Crystallex") holds a \$1.2 billion judgment against the Bolivarian Republic of Venezuela ("Venezuela" or "the Republic"). (D.I. 1) Crystallex has registered the judgment in Delaware. (*Id.*) Venezuela has not appeared in the litigation. However, Petróleos de Venezuela, S.A. ("PDVSA"), an oil company, has intervened. (D.I. 14) This is because Crystallex seeks to collect on its judgment against Venezuela by executing on property nominally owned by PDVSA, specifically shares of common stock PDVSA owns in PDV Holding Inc. ("PDVH"), a Delaware corporation. Crystallex's theory is that PDVSA is the alter ego of Venezuela, making PDVSA's property subject to execution for payment of Venezuela's debt.

Crystallex and PDVSA have each filed a motion. Crystallex moves for a writ of attachment *fieri facias* ("*fi. fa.*") pursuant to the Foreign Sovereign Immunities Act, 28 U.S.C. § 1601(c). (D.I. 2) In turn, PDVSA has filed a motion to dismiss for lack of subject matter jurisdiction. (D.I. 25) Together, the parties' motions present numerous complex questions, some of which have been addressed by no previous court, and others on which different courts have reached competing conclusions. The Court's careful consideration of the issues before it has included reviewing numerous briefs (D.I. 3-1, 26, 33), letter briefs (D.I. 51-54, 70-71), submissions of supplemental authority (D.I. 41, 46, 59-60, 63-65), six substantive declarations (D.I. 7-8, 28-29, 35-36), and hundreds of exhibits (*see, e.g.*, D.I. 4-6, 11, 27, 34, 37, 47). The Court also heard oral argument on two separate occasions. (*See* Transcript of Dec. 21, 2017 Hr'g

¹The Court will refer to Crystallex and PDVSA as "the parties," as they are the only entities who have appeared and have provided briefing and evidence to the Court.

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(D.I. 49) ("Tr."); Transcript of Aug. 3, 2018 Hr'g (D.I. 74) ("Aug. Tr."))

Having undertaken the required analysis, the Court will grant Crystallex's motion and deny PDVSA's motion.

BACKGROUND

In 2002, the Government of Venezuela awarded Crystallex, a Canadian corporation, a Mine Operating Contract ("Contract") by which Crystallex was granted the opportunity to develop the Las Cristinas gold mines. (D.I. 3-1 at 1; D.I. 26 at 4-5) Completion of the mining project was dependent on Crystallex obtaining certain permits from Venezuela. (D.I. 26 at 5) Crystallex never obtained such permits. (*Id.*) Instead, in 2011, Venezuela seized the Las Cristinas mines. (D.I. 3-1 at 5)

"In accordance with a bilateral investment treaty (BIT) between Canada and Venezuela, Crystallex pursued its grievances against Venezuela before an international arbitration tribunal " Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela, 244 F. Supp. 3d 100, 105 (D.D.C. 2017) ("Crystallex"). Specifically, in 2011, Crystallex initiated arbitration proceedings against Venezuela before the International Centre for Settlement of Investment Disputes ("ICSID") in Washington, D.C. (D.I. 3-1 at 1, 5) On April 4, 2016, an arbitration panel found that Venezuela's actions constituted an indirect expropriation of Crystallex's rights under the Contract. (D.I. 26 at 5) The ICSID awarded Crystallex \$1.2 billion plus interest. (Id.; D.I. 3-1 at 5)

Crystallex then filed suit in the United States District Court for the District of Columbia (the "D.C. Court") seeking to confirm the arbitral award. *See Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela*, C.A. No. 16-0661 (RC) D.I. 1 (D.D.C. Apr. 7, 2016). On March 25,

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2017, Judge Rudolph Contreras issued an opinion and order confirming the award. (*See* D.I. 1; D.I. 26 at 6; D.I. 4-1 Exs. 6, 7) On April 7, 2017, the D.C. Court entered judgment against Venezuela. (D.I. 1; D.I. 26 at 6) Just over two months later, on June 9, 2017, Judge Contreras found that a "reasonable period" had elapsed since entry of judgment but Venezuela had not paid its debt. *Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela*, C.A. No. 16-0661 (RC) D.I. 36 (D.D.C. June 9, 2017) (*see* D.I. 4-1 Ex. 8) ("*Crystallex II*"). Hence, pursuant to Section 1610(c) of the FSIA, the D.C. Court ruled that Crystallex could commence proceedings in aid of execution of the judgment. *Id.*²

Accordingly, on June 19, 2017, Crystallex registered the D.C. Court's judgment in this Court. (D.I. 1; *see also* 28 U.S.C. § 1963 (providing district court in which judgment is registered with same power to enforce it that is possessed by district court which issued judgment))³ Crystallex filed its pending motion for a writ of attachment on August 14, 2017, seeking to attach shares of PDVH, which are owned by PDVSA, which Crystallex alleges is an alter ego of Venezuela. (D.I. 3-1 at 1; *see also* Tr. at 36 (PDVSA stating "the PDV Holding")

²When advised that Crystallex viewed PDVSA's holdings in Delaware as attachable to satisfy Crystallex's judgment against Venezuela, and that Venezuela challenged whether PDVSA's assets would be subject to the judgment against Venezuela, Judge Contreras "decline[d] the invitation to adjudicate whether or not those assets will ultimately be attachable by Petitioner [Crystallex] because such a determination is unnecessary at this stage." (*Crystallex II* at 4) As the instant motions make plain, such a determination is necessary now.

Venezuela's appeal of the D.C. Court's orders is pending before the Court of Appeals for the D.C. Circuit. *See* C.A. No. 16-0661 (RC) D.I. 34.

³Crystallex has also filed the judgment in other courts, including the United States District Court for the Southern District of New York. (See D.I. 3-1 at 2; Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela, C.A. No. 17-mc-205-VEC) According to the parties, there has been no litigation in S.D.N.Y. that is of any relevance to any of the issues before this Court. (See Tr. at 66; Aug. Tr. at 13)

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shares they want to attach belong to PDVSA")) Thereafter, PDVSA moved to intervene for the purpose of opposing the attachment motion (D.I. 14), a request the Court granted on August 28, 2017 (D.I. 17), without objection from Crystallex (D.I. 16). Subsequently, on November 3, 2017, PDVSA filed its pending cross-motion to dismiss for lack of subject matter jurisdiction. (D.I. 25)

The parties initially completed briefing on the motions on November 22, 2017 (D.I. 3-1, 26, 33) and were scheduled for oral argument on December 5, 2017 (D.I. 23). When they appeared on December 5, Crystallex requested a continuance in light of a recent settlement reached between it and Venezuela. (*See* D.I. 40; *see also* Transcript of Dec. 5, 2017 Chambers Conference) The Court continued the argument until December 21, at which point the parties again appeared, indicated that Venezuela had not met a condition precedent to the settlement, and proceeded to present argument. (*See* D.I. 43; Aug. Tr. at 12-13)

Over the ensuing months, the parties have advised the Court of subsequent authorities and developments (see, e.g., D.I. 59-60, 63-65) and responded to the Court's orders for supplemental briefing (see D.I. 51-54, 70-71). On July 30, 2018, the Court provided the parties with a list of additional questions on which it sought their input. (See D.I. 68) Then, on August 3, the Court heard additional oral argument. (See Aug. Tr.)

APPLICABLE LAW

A. Writ Of Attachment

Pursuant to Federal Rule of Civil Procedure 69(a)(1), "[a] money judgment is enforced by a writ of execution, unless the court directs otherwise. The procedure on execution – and in proceedings supplementary to and in aid of judgment or execution – must accord with the

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procedure of the state where the court is located, but a federal statute governs to the extent it applies." Under Rule 69, "a district court has the authority to enforce a judgment by attaching property in accordance with the law of the state in which the district court sits." *Peterson v. Islamic Republic of Iran*, 876 F.3d 63, 89 (2d Cir. 2017) (internal quotation marks omitted).

Delaware law permits a judgment creditor to obtain a writ of attachment fi. fa., as set out in 10 Del. C. § 5031:

The plaintiff in any judgment in a court of record, or any person for such plaintiff lawfully authorized, may cause an attachment, as well as any other execution, to be issued thereon, containing an order for the summoning of garnishees, to be proceeded upon and returned as in cases of foreign attachment. [4] The attachment, condemnation, or judgment thereon, shall be pleadable in bar by the garnishee in any action against the garnishee at the suit of the defendant in the attachment.

As expressly provided by statute, the types of property a judgment creditor may attach include a debtor's shares in a Delaware corporation:

The shares of any person in any corporation with all the rights thereto belonging . . . may be attached under this section for debt, or other demands, if such person appears on the books of the corporation to hold or own such shares, option, right or interest.

8 Del. C. § 324(a).⁵ Delaware law further provides that judgment creditors may execute on their judgments by "the attachment of a defendant's property in the hands of a third party." *UMS Partners, Ltd. v. Jackson*, 1995 WL 413395, at *5 (Del. Super. Ct. June 15, 1995).

⁴"By its reference to cases of foreign judgment, § 5031 incorporates Chapter 35 of Title 10 of the Delaware Code. Under those provisions, '[g]oods, chattels, rights credits, moneys, effects, lands and tenements' may be attached." *LNC Invests., Inc. v. Democratic Republic of Congo*, 69 F. Supp. 2d 607, 611 (D. Del. 1999) (citing 10 Del. C. § 3508).

⁵The statute sets out specific procedural requirements for, among other things, a "public sale to the highest bidder." 8 Del. C. § 324(a).

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B. Subject Matter Jurisdiction

Federal Rule of Civil Procedure 12(b)(1) "authorizes dismissal of a complaint for lack of jurisdiction over the subject matter, or if the plaintiff lacks standing to bring his claim."
Samsung Elecs. Co., Ltd. v. ON Semiconductor Corp., 541 F. Supp. 2d 645, 648 (D. Del. 2008).
"At issue in a Rule 12(b)(1) motion is the court's very power to hear the case." Petruska v.
Gannon Univ., 462 F.3d 294, 302 (3d Cir. 2006) (internal quotation marks omitted).

Usually, a motion to dismiss for lack of subject matter jurisdiction presents either a facial or factual challenge. *See CNA v. United States*, 535 F.3d 132, 139 (3d Cir. 2008). A facial attack "concerns an alleged pleading deficiency," while a factual attack concerns the "failure of a plaintiff's claim to comport factually with the jurisdictional prerequisites." *Id.* (internal quotation marks and brackets omitted).

Where the motion presents a facial challenge to the Court's jurisdiction, or one based purely on the sufficiency of the plaintiff's allegations, the Court must accept well-pled factual allegations as true and generally may consider only the complaint and any documents referenced in or attached to it. See Lincoln Benefit Life Co. v. AEI Life, LLC, 800 F.3d 99, 105 (3d Cir. 2015); see also Mortensen v. First Fed. Sav. & Loan Ass'n, 549 F.2d 884, 891 (3d Cir. 1977) ("[T]he court must consider the allegations of the complaint as true."). "Affidavits and briefs in opposition do not fall in this category." Lincoln Benefit, 800 F.3d at 110.

"The factual attack, however, differs greatly" Mortensen, 549 F.2d at 891.

Because at issue in a factual 12(b)(1) motion is the trial court's jurisdiction... there is substantial authority that the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case. In short, no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed

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material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims. Moreover, the plaintiff will have the burden of proof that jurisdiction does in fact exist.

Id.

Occasionally, the Court must consider both facial and factual challenges to its subject matter jurisdiction. See Carrier Corp. v. Outokumpu Oyj, 673 F.3d 430, 440 (6th Cir. 2012) ("Outokumpu has presented arguments for both a facial and factual challenge to subject-matter jurisdiction, and we address each in turn."); Hopewell Valley Reg'l. Bd. of Educ. v. J.R., 2018 WL 2411616 (D.N.J. May 29, 2018) (addressing motion to dismiss presenting both types of challenges); In re PennySaver USA Publ'g, LLC, 2018 WL 3222618, at *3 (Bankr. D. Del. July 2, 2018) ("Defendant has made both factual and facial challenges in its Rule 12(b)(1) Motion. [T]he Court will review the factual and then facial challenges, in that order."). When a motion presents both types of attacks, the plaintiff must overcome both in order for its claims to proceed.

Here, PDVSA presents both a facial and factual attack to subject matter jurisdiction.

(See, e.g., D.I. 26 at 20 (discussing facial attack); id. at 22-27 (discussing factual attack); see also infra n.16)

DISCUSSION

A. Foreign Sovereign Immunity

1. The Parties' Disputes Are Governed By The FSIA

The Foreign Sovereign Immunities Act ("FSIA" or "Act"), 28 U.S.C. § 1602 et seq., "establishes a comprehensive framework for determining whether a court in this country, state or federal, may exercise jurisdiction over a foreign state." Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 610 (1992). The FSIA is the "sole basis for obtaining jurisdiction over a foreign

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state in our courts." Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 434 (1989). "[F]oreign sovereign immunity is a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution." Verlinden B.V. v. Centr. Bank of Nigeria, 461 U.S. 480, 486 (1983).

"Under the Act, a 'foreign state shall be immune from the jurisdiction of the courts of the United States and of the States' unless one of several statutorily defined exceptions applies."

Weltover, 504 U.S. at 610-11 (quoting 28 U.S.C. § 1604). Hence, "a district court has subject matter jurisdiction over a suit against a foreign state if – and only if – the plaintiff's claim falls within a statutorily enumerated exception." Odhiambo v. Republic of Kenya, 764 F.3d 31, 34 (D.C. Cir. 2014). Accordingly, the FSIA

must be applied by the District Courts in every action against a foreign sovereign since subject matter jurisdiction in any such action depends on the existence of one of the specified exceptions to foreign sovereign immunity, 28 U.S.C. § 1330(a).[6] At the threshold of every action in a District Court against a foreign state, therefore, the court must satisfy itself that one of the exceptions applies — and in doing so it must apply the detailed federal law standards set forth in the Act.

Verlinden, 461 U.S. at 493-94 (internal footnote omitted). "[T]he FSIA exceptions are exhaustive; if no exception applies, the district court has no jurisdiction." *Odhiambo*, 764 F.3d at 34; see also Verlinden, 461 U.S. at 497 ("[I]f a court determines that none of the exceptions to sovereign immunity applies, the plaintiff will be barred from raising his claim in any court in the

⁶Section 1330(a) provides: "district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any international agreement."

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United States ").

Therefore, the disputes among Crystallex, Venezuela, and PDVSA are governed by the FSIA. Unless Crystallex can meet its burden to establish the applicability of exceptions to sovereign immunity, the Court is required to dismiss this case.⁷

2. Crystallex Must Establish An Exception to Jurisdictional Immunity, Although It Need Not Show An Independent Basis For Subject Matter Jurisdiction With Respect to PDVSA

Venezuela, as a foreign sovereign state, is presumptively immune from suit in all courts in the United States. *See* 28 U.S.C. § 1604 ("Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter."). Crystallex contends, and PDVSA does not dispute, that Venezuela is subject to the Court's jurisdiction under § 1605(a)(6), the arbitration exception. Section 1605(a)(6) states, in relevant part:

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case

. . .

(6) in which the action is brought, . . . to confirm an award made pursuant to . . . an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States

The Act defines a "foreign state" to include "a political subdivision of a foreign state or

⁷The FSIA also imposes procedural requirements that must be met before a party may execute on property held by a foreign sovereign state or its agency or instrumentality, including (i) that a "reasonable period of time has elapsed following the entry of judgment" and (ii) "the giving of ... notice." 28 U.S.C. § 1610(c). It is undisputed that these procedural conditions have been satisfied here.

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an agency or instrumentality of a foreign state." 28 U.S.C. § 1603(a). In turn, an "agency or instrumentality of a foreign state" is defined as any entity:

- which is a separate legal person, corporate or otherwise, and
- (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
- (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title, nor created under the laws of any third country.

28 U.S.C. § 1603(b). It is undisputed that PDVSA is an "agency or instrumentality" of Venezuela within the meaning of the FSIA. (See D.I. 26 at 12 ("PDVSA indisputably is an 'agency or instrumentality of a foreign state' as defined in the FSIA...."); Tr. at 36 ("Where the plaintiffs and PDVSA agree is that PDVSA is an agency or instrumentality of Venezuela...."))

Where the parties' views first diverge is on the question of whether the Court must have an independent basis for subject matter jurisdiction with respect to PDVSA. PDVSA contends that because Crystallex's motion seeks to impose liability on PDVSA for Venezuela's debt, Crystallex is in effect suing PDVSA, and the Court cannot adjudicate such a suit without having a basis to exercise subject matter jurisdiction over PDVSA. (*See, e.g.*, D.I. 26 at 10-11; *see also* Tr. at 36-37) To PDVSA, the effect of Crystallex prevailing on its motion would be the same as if PDVSA were added to the judgment Crystallex holds against Venezuela, rendering PDVSA—a third party, which had no involvement in the events that harmed Crystallex and no involvement in the arbitration giving rise to the judgment against Venezuela—potentially liable for all of Venezuela's debts. Crystallex counters that once it establishes the Court has subject matter

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jurisdiction with respect to its dispute with Venezuela, and further establishes that PDVSA is the alter ego of Venezuela, it will have met its burden to show that the Court has subject matter jurisdiction with respect to PDVSA as well. To Crystallex, the crucial facts are that Crystallex has not sued PDVSA and does not seek to add PDVSA as a liable party on its judgment against Venezuela. (*See, e.g.*, D.I. 70 at 8) ("Crystallex does not seek to hold PDVSA liable for its judgment but rather seeks a more limited finding, namely that the specific property at issue on this motion – the shares of PDVH – though nominally held in the name of PDVSA, are, at this time, really the property of Venezuela.") Alternatively, if an independent basis for subject matter jurisdiction is necessary with respect to PDVSA, Crystallex argues that it, too, is present. (*See id.* at 4-5) ("[T]his Court has an independent basis for jurisdiction against PDVSA under 28 U.S.C. § 1330 and Section 1605(a)(6) of the FSIA.") On these points, the Court agrees with Crystallex.

PDVSA's position is based on the Supreme Court's decision in *Peacock v. Thomas*, 516 U.S. 349, 357 (1996), which stated, "We have never authorized the exercise of ancillary jurisdiction in a subsequent lawsuit to impose an obligation to pay an existing federal judgment on a person not already liable for that judgment." *See also Butler v. Sukhoi Co.*, 579 F.3d 1307, 1313 (11th Cir. 2009) ("Because the Butlers sought to invoke the jurisdiction of the United States courts to enter a new judgment in a separate cause of action against appellants, they bore the burden of presenting a *prima facie* case that jurisdiction [against the third party] existed.") (footnote omitted).

However, as Crystallex emphasizes, the Third Circuit has had occasion to consider the applicability of *Peacock* in the context of garnishment actions. (*See, e.g.*, Tr. at 10) (arguing

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"Peacock has no application to proper Rule 69 motions") In IFC Interconsult, AG v. Safeguard International Partners, LLC, 438 F.3d 298, 310 (3d Cir. 2006), the Third Circuit held that Rule 69 authorizes a garnishment action against an indemnitor of a judgment debtor even when there is no independent basis for federal subject matter jurisdiction — such as diversity — for a new action by the judgment creditor directly against that indemnitor. As the IFC Court stated: "Peacock itself made clear that it does not apply to Rule 69 actions." Id. at 311. IFC adds: "Although garnishment actions are new actions in the sense that there is a new party and a new theory for that party's liability, they are not new actions in the sense of a new direct claim." Id. at 314.

Crystallex brings its motion for a writ of attachment *fi. fa.* pursuant to, *inter alia*, Rule 69, contending that it, as the garnishor, "is seeking to collect its judgment against Venezuela (the judgment debtor) by stepping into Venezuela's shoes and demanding Venezuela's alter ego's shares from PDVH (the garnishee)." (D.I. 70 at 7; *see also* D.I. 3 at 1; Tr. at 82-83 ("Rule 69 actions are to be treated as part of the original suit. Therefore, if the original suit was a suit against Venezuela, and there was jurisdiction under [Section] 1330, there is jurisdiction to adjudicate rights in the property.")) According to Crystallex, "[t]he fact that this garnishment proceeding involves an alter ego theory does not change the nature of the proceeding." (D.I. 70 at 7; Tr. at 11 ("[T]he fact that you could have a broader alter-ego theory does not mean that all alter-ego theories fall under *Peacock*."))

Again, the Court agrees. Unlike the situation presented in Peacock, 516 U.S. at 317, this

⁸In reaching this conclusion, the Third Circuit reaffirmed its prior *en banc* holding in *Skevofilax* v. *Quigley*, 810 F.2d 378, 385 (3d Cir. 1987), finding that *Skevofilax* was not abrogated by *Peacock*. *See IFC*, 438 F.3d at 310.

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case is not "a subsequent lawsuit" to "impose an obligation to pay" an "existing federal judgment on a person not already liable for that judgment." To the contrary, it is part of the "same lawsuit" – that is, the action giving rise to the judgment against Venezuela, which has been registered in this District – and does not seek to impose any obligation on PDVSA to pay Venezuela's existing judgment, but, instead, seeks to attach property nominally belonging to PDVSA as truly belonging to Venezuela. (See D.I. 70 at 7-8) Rather than attempting to hold PDVSA primarily liable or shifting the judgment to PDVSA, Crystallex seeks to enforce its judgement against debtor Venezuela, "whose immunity has already been defeated on the FSIA and the arbitra[tion] exception," by attaching PDVSA property because it is "property of the debtor" under an alter ego theory. (Aug. Tr. at 31) (emphasis added)⁹

Such a theory, seeking only to collect a judgment but not to establish liability, does not require an independent basis for jurisdiction. See EM Ltd. v. Banco Cent. de la Republica Argentina, 800 F.3d 78, 91 n.56 (2d Cir. 2015) ("EM Ltd. II") ("Our precedent supports the view ... that once an instrumentality of a sovereign state has been deemed to be the alter ego of that state ... the instrumentality and the state are to be treated as one and the same for all purposes."); Transfield ER Cape Ltd. v. Indus. Carriers, Inc., 571 F.3d 221, 224 (2d Cir. 2009) (stating alter egos "are treated as one entity for jurisdictional purposes") (internal quotation marks omitted);

⁹As Crystallex acknowledges, because its theory is not based on establishing primary liability or adding PDVSA to the judgment, if the Republic were to sell PDVSA before the Court rendered its judgment, Crystallex would have no redress against PDVSA. (*See* Aug. Tr. at 33 ("If you were to rule for us and PDVSA were sold, PDVSA would not be liable in personam if sold to [e.g.] Exxon."); *id.* at 35-36 ("It's very different to get a Writ of Fi Fa against a particular asset than it is to get a judgment. If we were to get a judgment against PDVSA, . . . [w]e could then go and attach any asset of PDVSA. We could take that judgment and go to other courts. . . . What we're asking here . . . is [for] an order [that] applies only to [a] particular asset."))

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Patin v. Thoroughbred Power Boats, Inc., 294 F.3d 640, 654 (5th Cir. 2002) (alter egos "are considered to be one and the same under the law"); Epperson v. Entm't Express, Inc., 242 F.3d 100, 106 (2d Cir. 2001) ("Where the post-judgment proceeding is an effort to collect a federal court judgment, the courts have permitted judgment creditors to pursue, under the ancillary enforcement jurisdiction of the court, the assets of the judgment debtor even though the assets are found in the hands of a third party."); U.S.I. Props. Corp. v. M.D. Constr. Co., 230 F.3d 489, 496 (1st Cir. 2000) ("Where the postjudgment claim is simply a mode of execution designed to reach property of the judgment debtor in the hands of a third party, federal courts have often exercised enforcement jurisdiction. . . . Where the state procedural enforcement mechanisms incorporated by Rule 69(a) allow the court to reach assets of the judgment debtor in the hands of third parties in a continuation of the same action, such as garnishment or attachment, federal enforcement jurisdiction is clear."); Thomas, Head & Greisen Emps. Tr. v. Buster, 95 F.3d 1449, 1454 & n.7 (9th Cir. 1996) (stating that where judgment creditor "is not attempting to establish the [third party's liability for the original judgment, ... Peacock [is] inapposite. ... Peacock suggested that whether a judgment creditor's post-judgment action is within a federal district court's ancillary enforcement jurisdiction hinges on whether it seeks not merely 'to collect a judgment' but also 'to establish liability' on the part of the third party.").

The Court acknowledges that the proper resolution of this issue is not free from doubt.

This case is certainly not an "ordinary" Rule 69 garnishment action. Moreover, PDVSA directs the Court's attention to *Gambone v. Lite Rock Drywall*, 288 Fed. App'x 9, 12 (3d Cir. July 25, 2008), in which the Third Circuit described *Peacock* as holding "that ancillary jurisdiction was not intended for use as a tool for establishing personal liability on the part of a new defendant, for

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instance by designating that third party as an alter ego of the indebted party or by piercing the corporate veil" (emphasis added). Gambone, then, suggests that seeking to attach a third-party's property on the basis that the third-party is the alter ego of a judgment-debtor is an effort to impose primary liability on the third-party, an outcome requiring an independent jurisdictional basis with respect to the third party. However, the Gambone Court elaborated that "[n]othing in Peacock... precludes ancillary jurisdiction over suits involving assets already subject to the judgment; it only bars the exercise of ancillary jurisdiction over attempts to impose personal liability for an existing judgment on a new party." Id. (emphasis added).

Just as the creditor in *Gambone* was not seeking to impose personal liability on the third party transferees, and thus, the Third Circuit concluded that the district court there had ancillary jurisdiction (*see id.* at 13), here, too, Crystallex does not attempt to impose personal liability on PDVSA, but instead seeks to attach assets that it alleges belong to Venezuela – assets which belong only nominally to Venezuela's alter ego, PDVSA. Where, as here, a plaintiff "does not seek to impose personal liability on" a third party, but rather "the relief [it] seek[s] is solely to corral [the debtor's] assets in an effort to preserve [its] access to them," *id.*, an independent basis for subject matter jurisdiction is not required. Moreover, while the *Gambone* Court explained that "*Peacock* holds that ancillary jurisdiction does not extend to suits demanding that a third party use its legitimately held assets to satisfy a previously rendered judgment," *id.*, the Court finds it is appropriate – if it finds PDVSA is Venezuela's alter ego – to view the instant case as *not* involving a demand that PDVSA use *its* "legitimately held assets" to satisfy Venezuela's judgment. Rather, the issue here is whether PDVSA's assets are, in effect, *Venezuela's* assets; for if they are, then this case is not correctly characterized as one in which Crystallex is attaching

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a third-party's property.

PDVSA also directs the Court to *IFC*, 438 F.3d at 312, in which the Third Circuit described veil-piercing as a mechanism for imposing "primary liability" on a third party. *Id.* The *IFC* Court explained, "[v]eil-piercing does not make a party secondarily liable. Rather, it collapses corporate distinctions to make for joint primary liability. This contrasts with garnishment, in which there is a new party and a new theory of liability, but not a new direct claim." *Id.* Like *Gambone*, then, *IFC* seems to suggest that the Third Circuit would hold that alter ego liability is a form of "primary liability," which, pursuant to *Peacock*, requires an independent basis to exercise subject matter jurisdiction as to the third party. *See Epperson*, 242 F.3d at 106 ("Since *Peacock*, most courts have continued to draw a distinction between post-judgment proceedings to collect an existing judgment and proceedings, such as claims of alter ego liability and veil-piercing, that raise an independent controversy with a new party in an effort to shift liability.").

But the Court finds persuasive Crystallex's notion of "two different contexts" of alter ego liability. (D.I. 70 at 7-8 & n.8) (citing, for example, *First Horizon Bank v. Moriarty-Gentile*, 2015 WL 8490982, at *4 n.4 (E.D.N.Y. Dec. 10, 2015) (finding independent jurisdiction, but also noting "alternate basis for jurisdiction" based on finding that third party was alter ego of debtor); *Aioi Seiki, Inc. v. JIT Automation, Inc.*, 11 F. Supp. 2d 950, 952-54 (E.D. Mich. 1998) ("An action to pierce the corporate veil is not a new cause of action, but merely a determination of whether multiple entities exist as separate entities or as mere alter egos of each other. . . . Accordingly, [such actions are] brought supplementary to and in an effort to enforce a previous judgment of this court and should therefore be brought pursuant to Fed. R. Civ. P. 69(a).") An

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alter ego (or veil piercing) theory may be raised either as a basis for primary liability, in which "the judgment creditor seeks to establish that the alleged alter ego is liable for the original judgment, and thus obtain a new judgment against the alter ego," or alternatively as a basis for secondary liability, in which the judgment creditor "seeks a more limited finding, namely that the specific property at issue . . . though nominally held in the name of [a third party, is], at this time, really the property of the [judgment debtor]." (D.I. 70 at 7-8) For the reasons already discussed in relation to *Gambone*, the Court views the present case as involving garnishment, seeking only to establish secondary liability (by attaching certain specified property), rather than an action seeking to impose primary liability on PDVSA.

Therefore, the Court concludes that if Crystallex meets its burden to show that the Court has subject matter jurisdiction with respect to Venezuela under Section 1605(a)(6), and if Crystallex further demonstrates that PDVSA is the alter ego of Venezuela, then Crystallex will also necessarily have established that the Court may exercise subject matter jurisdiction with respect to PDVSA as well. Crystallex does not need to additionally prove that some other independent basis of subject matter jurisdiction exists with respect to PDVSA. *See Kensington Int'l Ltd. v. Republic of Congo*, 2007 WL 1032269, at *13 (S.D.N.Y. Mar. 30, 2007) ("[I]f the facts alleged in the Complaint claiming that SNPC is an alter ego of Congo are accepted as true, then SNPC is Congo, and the only immunity at issue is Congo's immunity."). ¹⁰

¹⁰Even if an independent basis for jurisdiction were required, it is present, based on § 1330 and FSIA § 1605(a)(6). (See D.I. 70 at 4-5) (Crystallex: "[T]his Court has an independent basis for jurisdiction against PDVSA under 28 U.S.C. § 1330 and Section 1605(a)(6) of the FSIA.") The Court further concludes that whether an independent basis for jurisdiction is required is a question that does not necessarily need to be answered in this case. Subject matter jurisdiction here is so intertwined with the merits of the alter ego issue that the Court must address Crystallex's alter ego contentions, one way or the other.

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3. Crystallex Must Establish An Exception to Attachment and Execution Immunity

In addition to showing that Venezuela and PDVSA are not immune from exercise of this Court's subject matter jurisdiction, Crystallex must also establish an exception to attachment and execution immunity. See Rubin v. Islamic Republic of Iran, 637 F.3d 783, 793 (7th Cir. 2011) ("The Act contains two primary forms of immunity[:]... Section 1604 provides jurisdictional immunity from suit... [while] Section 1609... codifies the related common-law principle that a foreign state's property in the United States is immune from attachment and execution..."). In order for the Court to issue the requested writ of attachment, the Court must be satisfied that the specific property on which Crystallex seeks to execute – PDVSA's shares of stock in Delaware corporation PDVH – are not immune from attachment and execution under the FSIA. See generally Rubin v. Islamic Republic of Iran, 138 S. Ct. 816, 823-25 (2018) (discussing "attachment and execution immunity" in relation to FSIA terrorism exception, 28 U.S.C. § 1605A).

"[T]he FSIA's provisions governing jurisdictional immunity, on the one hand, and execution immunity, on the other, operate independently." *Walters v. Indus. & Commercial Bank of China, Ltd.*, 651 F.3d 280, 288 (2d Cir. 2011). "[T]his means that 'a waiver of immunity from suit does not imply a waiver of immunity from attachment of property, and a waiver of immunity from attachment of property does not imply a waiver of immunity from suit." *Id.* (quoting *Restatement (Third) of Foreign Relations Law of the United States*

¹¹Because the FSIA does not specify the "circumstances and manner of attachment and execution proceedings," courts apply Rule 69(a) in attachment actions involving foreign states. *EM Ltd. v. Republic of Argentina*, 473 F.3d 463, 474 n.10 (2d Cir. 2007) ("*EM Ltd. I*").

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§ 456(1)(b) (1987)).12

Notably, "the exceptions to attachment immunity are narrower than the exceptions to jurisdictional immunity. Although there is some overlap between the exceptions to jurisdictional immunity and those for immunity from execution and attachment, there is no escaping the fact that the latter are more narrowly drawn." *Rubin*, 637 F.3d at 796 (internal quotation marks omitted). That is, all else being equal, it is easier to establish subject matter jurisdiction over a foreign sovereign entity than it is to attach and execute on the property in the United States of such an entity.

In the instant case, it is also important to understand that the scope of the exceptions to attachment and execution immunity vary depending on whether the property targeted by the plaintiff is property of the foreign sovereign itself or, instead, is property of an agency or instrumentality of the foreign sovereign. Consequently, "property owned by a foreign state's instrumentalities is generally more amenable to attachment than property owned by the foreign state itself." *Id.* at 794. As applied here, however, because of the Court's alter ego finding, Crystallex's burden is the greater of the two: as the Court is treating PDVSA as Venezuela, and therefore treating the property of PDVSA as the property of Venezuela, Crystallex must satisfy the narrower exception to execution immunity applicable to property of foreign states.

¹²Several circuits have expressly held that "[f]ederal sovereign immunity from execution does not defeat a court's jurisdiction." *Peterson v. Islamic Republic of Iran*, 627 F.3d 1117, 1125 (9th Cir. 2010); *see also Weinstein v. Islamic Republic of Iran*, 831 F.3d 470, 479, 484 (D.C. Cir. 2016) (subject matter jurisdiction can exist even where plaintiff did not establish exception to attachment immunity under FSIA); *Rubin*, 637 F.3d at 799-800 (finding FSIA § 1609 attachment and execution immunity is "not jurisdictional"). Regardless of whether this would be a correct statement of the law in the Third Circuit, the Court has decided that it must address both jurisdictional immunity and attachment/execution immunity and, accordingly, does so in this Opinion.

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4. PDVSA Is Presumptively Separate from Venezuela

It is undisputed that PDVSA is an agency or instrumentality of Venezuela, having been separately formed by Venezuela in the 1970s. (See, e.g., Tr. at 13, 36) "[D]uly created instrumentalities of a foreign state are to be accorded a presumption of independent status." First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611, 627 (1983) ("Bancec"). This is a strong presumption. See Arch Trading Corp. v. Republic of Ecuador, 839 F.3d 193, 201 (2d Cir. 2016). "Both Bancec and the FSIA legislative history caution against too easily overcoming the presumption of separateness." De Letelier v. Republic of Chile, 748 F.2d 790, 795 (2d Cir. 1984); see also EM Ltd. II, 800 F.3d at 99 ("[Bancec] sets a high bar for when an instrumentality will be deemed an alter ego of its sovereign state.").

Indeed, in *Bancec* – the leading case on how the presumption of separateness between a foreign state and its agency or instrumentality may be overcome – the Supreme Court explained that "the instrumentality's assets and liabilities must be treated as distinct from those of its sovereign in order to facilitate credit transactions with third parties." 462 U.S. at 626. "Freely ignoring the separate status of government instrumentalities would result in substantial uncertainty over whether an instrumentality's assets would be diverted to satisfy a claim against the sovereign, and might thereby cause third parties to hesitate before extending credit to a government instrumentality without the government's guarantee." *Id.* "Due respect for the actions taken by foreign sovereigns and for principles of comity between nations leads us to conclude . . . that government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such." *Id.* at 626-27 (citation omitted).

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Therefore, the Court must presume that PDVSA retains its status as separate and distinct from the nation of Venezuela. Unless Crystallex can overcome this strong presumption, the Court must dismiss this case.

5. Federal Common Law Provides The Applicable Disjunctive Test For Rebutting Presumption of Separateness

The FSIA does not address the circumstances under which an agency or instrumentality of a foreign state may be treated as the sovereign state itself for purposes of either jurisdiction or attachment and execution. Thus, to determine whether Crystallex has rebutted the strong presumption of separateness between PDVSA and Venezuela, the Court applies standards developed pursuant to federal common law. *See Bancec*, 462 U.S. at 623. "The controlling case for when an instrumentality of a foreign sovereign state becomes the 'alter ego' of that state" is, once again, *Bancec*. *EM Ltd. II*, 800 F.3d at 89; *see also Doe v. Holy See*, 557 F.3d 1066, 1080 (9th Cir. 2009) ("The *Bancec* standard is in fact most similar to the 'alter ego' or 'piercing the corporate veil' standards applied in many state courts to determine whether the actions of a corporation are attributable to its owners."). 13

In Bancec, the Supreme Court explained that the "presumption may be overcome in certain circumstances:" (1) "where a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created, we have held that one may be held liable for the actions of the other," and "[i]n addition," (2) where adhering to "the broader equitable

¹³Importantly, it is federal law, not state law, that applies. PDVSA's reliance on *Canfield v. Statoil USA Onshore Props. Inc.*, 2017 WL 1078184, at *10-11 (M.D. Pa. Mar. 22, 2017), a case applying Delaware state law, is unpersuasive. *Canfield* involved an alter ego relationship between a Delaware corporation and its foreign-sovereign-owned parent corporation. Here, the pertinent relationship is that between Venezuela and PDVSA, neither of which is a Delaware corporation.

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principle" of corporate separateness "would work fraud or injustice." *Id.* at 628-29 (emphasis added; internal quotation marks omitted). The test, then, is disjunctive. A party such as Crystallex may rebut the presumption of separateness by establishing either of the foregoing and need not establish both. *See Fed. Ins. Co. v. Richard I. Rubin & Co.*, 12 F.3d 1270, 1287 (3d Cir. 1993) ("We recognize that there are two major exceptions to the *Bancec* rule, namely, the independent corporate status of government-owned entities should be disregarded (1) 'where a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created;' *or* (2) where to give effect to the separate instrumentalities 'would work fraud or injustice.") (emphasis added); *see also Arch Trading*, 839 F.3d at 201 (stating alter ego may be shown by either extensive control "or . . . fraud or injustice"); *EM Ltd. II*, 800 F.3d at 90-91 (same); *Holy See*, 557 F.3d at 1077-80 (same).¹⁴

The Court will refer to the *Bancec* disjunctive test for whether the presumption of separateness has been rebutted as the "extensive control" and "fraud or injustice" tests (or

¹⁴PDVSA has been somewhat inconsistent on this point. After agreeing at the hearing that the applicable standard is disjunctive (see, e.g., Tr. at 50-52), it asserted in a post-hearing letter that "control alone" is not enough, as "it is well established that an alter ego theory, under Bancec or otherwise, requires evidence of both extensive control and an abuse of the corporate form resulting in an injury to the plaintiff." (D.I. 51 at 3 n.2) (emphasis in original; citing D.I. 26 at 16-18) PDVSA likewise argued in its letter that "[a]n alter ego relationship exists 'only if (1) the owner exercised complete control over the corporation with respect to the transaction at issue and (2) such control was used to commit a fraud or wrong that injured the party seeking to pierce the veil." (D.I. 51 at 1-2 (quoting BRIDAS S.A.P.I.C. v. Gov't of Turkmenistan, 447 F.3d 411, 416 (5th Cir. 2006) (emphasis added)); see also id. at 3 ("[A]n abuse of PDVSA's corporate form ... is required to establish an alter ego relationship under Bancec.") (emphasis added); D.I. 54 at 2 (PDVSA reiterating view that "abuse of PDVSA's corporate form resulting in harm to Crystallex [i]s required under Bancec") (emphasis added)) As Crystallex observes, BRIDAS did not hold that the applicable test is conjunctive; it only held that under the facts presented there, both portions of the test were satisfied. (See D.I. 53 at 1 n.1) The Court concludes - consistent with the authorities cited in the text and Crystallex's consistent position - that the applicable test is disjunctive.

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prongs), respectively.15

In "examin[ing]... the nature of government instrumentalities," the *Bancec* Court noted these entities "vary considerably, but many possess a number of common features." 462 U.S. at 623-24.

A typical government instrumentality, if one can be said to exist, is created by an enabling statute that prescribes the powers and duties of the instrumentality, and specifies that it is to be managed by a board selected by the government in a manner consistent with the enabling law. The instrumentality is typically established as a separate juridical entity, with the powers to hold and sell property and to sue and be sued. Except for appropriations to provide capital or to cover losses, the instrumentality is primarily responsible for its own finances. The instrumentality is run as a distinct economic enterprise; often it is not subject to the same budgetary and personnel requirements with which government agencies must comply.

Id. at 624. A typical government instrumentality would, normally, retain its separate juridical status. *See id.* at 633.

Still, "[d]etermination of who is and is not an agent of whom will be in great part factual, and the fact-finding should be explicit." Foremost-McKesson, Inc. v. Islamic Republic of Iran,

¹⁵While the applicable federal common law test is disjunctive, even its excessive control prong inherently assumes that some element of unfairness would result if the Court fails to treat one entity as the alter ego of the other. In this regard, the *Canfield* decision (noted at footnote 13, *supra*), is instructive (though not controlling). It observed, in discussing *Bancec*'s excessive control test, "[t]here are several alter ego tests within this circuit . . . but all seek the same purpose of holding a parent liable for the actions of a subsidiary or a corporation responsible for the actions of its shareholders. . . . In addition, there must be some overall element of injustice or unfairness present" (internal quotation marks and citations omitted). *Canfield*, 2017 WL 1078184, at *11. These generalized equitable considerations, while far from sufficient to overcome the strong immunities set out in the FSIA, have some relevance to any full and fair attempt to apply *Bancec* and distinguish the vast majority of "normal[]" cases – in which separate entities must be treated as separate – from those rare exceptional cases where the presumptions are overcome. *See* 462 U.S. at 627.

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905 F.2d 438, 448 (D.C. Cir. 1990) (internal citation and quotation marks omitted). In *Bancec*, the Supreme Court emphasized that it was not "announc[ing] [a] mechanical formula for determining the circumstances under which the normally separate juridical status of a government instrumentality is to be disregarded." *Bancec*, 462 U.S. at 63; *see also Hester Int'l Corp. v. Federal Republic of Nigeria*, 879 F.2d 170, 179 (5th Cir. 1989) (describing how "determination of whether a government instrumentality is a separate juridical entity involves the application of the law to fact-specific situations").

The burden of making the appropriate showing rests on the party seeking to rebut the presumption of separateness, which here is Crystallex. *See Hester*, 879 F.2d at 179; *see also Foremost-McKesson*, 905 F.2d at 447 ("It is further clear that the plaintiff bears the burden of asserting facts sufficient to withstand a motion to dismiss regarding the agency relationship.") (emphasis omitted). The Supreme Court has held that a plaintiff must "make out a legally valid claim" and ultimately prove the facts supporting the court's jurisdiction under the FSIA; it is insufficient simply to state a "non-frivolous" claim to that effect. *See Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1316, 1318-19 (2017) (considering jurisdictional standard under FSIA expropriation exception); *see also Owens v. Republic of Sudan*, 864 F.3d 751, 779 (D.C. Cir. 2017).

B. Crystallex Has Met Its Burden with Respect to Jurisdictional Immunity

It is undisputed that the Court has subject matter jurisdiction with respect to Crystallex's claim against Venezuela, given the FSIA's arbitration exception. Nonetheless, PDVSA has moved to dismiss Crystallex's efforts to collect on its judgment against Venezuela by attaching the property in the United States of PDVSA, on the theory that PDVSA is Venezuela's alter ego.

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In the Court's view, PDVSA's motion presents both a facial and factual attack on the Court's subject matter jurisdiction. ¹⁶

Below, after setting out the statutory basis for the Court's undisputed jurisdiction with respect to Venezuela, the Court addresses PDVSA's facial and factual challenges. As to the facial challenge to the sufficiency of Crystallex's allegations, the Court determines that Crystallex's burden is to rebut the presumption of separateness between Venezuela and PDVSA by showing probable cause. The Court then explains that, taking Crystallex's allegations as true, Crystallex has met this burden by adequately alleging that Venezuela exerts extensive control over PDVSA, including its day-to-day operations, rendering PDVSA the alter ego of Venezuela. However, Crystallex has not shown probable cause to find that recognizing the separateness of PDVSA and Venezuela would work a fraud or injustice.

Turning next to PDVSA's factual challenge, the Court concludes that Crystallex's burden is to prove its allegations by a preponderance of the evidence – not, as PDVSA contends, by clear and convincing evidence. The Court then summarizes the evidence presented by both sides and finds that Crystallex has proven, by a preponderance of the evidence, that Venezuela extensively controls PDVSA, and has, thus, proven that PDVSA is Venezuela's alter ego. With respect to the fraud or injustice prong, however, Crystallex has not met its burden.

¹⁶Among the questions the Court recently directed the parties to address were: "Is PDVSA's motion to dismiss a facial or factual challenge, or both? Is the answer the same for jurisdictional immunity and for execution immunity?" (D.I. 68 at 1) The parties' responses to these seemingly straightforward questions collectively amount to approximately three pages of single-spaced text. (See D.I. 70 at 1-2; D.I. 71 at 1-2) The Court's best assessment is that it is presented with both facial and factual challenges. To the extent this is unclear, in an abundance of caution the Court treats PDVSA's motion as if it presents both types of challenges.

1. The Court Has Undisputed Jurisdiction With Respect to Venezuela

PDVSA does not challenge the Court's subject matter jurisdiction with respect to Venezuela. It is undisputed that Crystallex has gone beyond probable cause and fully proven that Venezuela is not immune from suit due to registration of the confirmed arbitration award against Venezuela. (See D.I. 3-1 at 5-7)

As noted previously, § 1604 of the FSIA renders foreign states like Venezuela "immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607" of the Act. 28 U.S.C. § 1604. The exception Crystallex relies on to establish subject matter jurisdiction with respect to Venezuela is § 1605(a)(6), relating to arbitration:

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . .

(6) in which the action is brought . . . to confirm an award made pursuant to . . . an agreement to arbitrate, if

(A) the arbitration takes place or is intended to take place in the United States

It is undisputed that the Court has subject matter jurisdiction over Venezuela under § 1605(a)(6)(A) due to Crystallex's \$1.2 billion arbitral award against Venezuela, which was confirmed by the United States District Court for the District of Columbia, and is now registered in the District of Delaware.

2. PDVSA's Facial Attack

There is no dispute that this litigation can go forward against Venezuela. But Venezuela

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has not appeared and Crystallex has not identified any specific property directly owned by Venezuela that can be found in the District of Delaware. Instead, as noted throughout this Opinion, Crystallex seeks to execute its judgment against Venezuela by attaching and executing on property owned by PDVSA and found in Delaware; specifically, the shares of Delaware corporation PDVH, which are indisputably directly owned by PDVSA. Hence, the Court now addresses PDVSA's facial attack on the Court's subject matter jurisdiction.

a. Crystallex's burden is probable cause

As previously noted, when considering PDVSA's facial attack on the sufficiency of Crystallex's allegation that PDVSA is Venezuela's alter ego, the Court takes as true all of Crystallex's well-pled factual allegations. *See, e.g., Rong v. Liaoning Province Government*, 452 F.3d 883, 888 (D.C. Cir. 2006) ("If the defendant challenges only the legal sufficiency of the plaintiff's jurisdictional allegations, then the district court should take the plaintiff's factual allegations as true and determine whether they bring the case within any of the exceptions to immunity invoked by the plaintiff. If a foreign state argues that even if taken as true, the plaintiff's allegations are insufficient to come within the commercial activity exception, this amounts to a challenge to the legal sufficiency of the allegations.") (internal quotation marks and citations omitted); *see also Holy See*, 557 F.3d at 1073 ("[A] motion to dismiss for lack of jurisdiction under the FSIA is no different from any other motion to dismiss on the pleadings for lack of jurisdiction, and we apply the same standards in evaluating its merit.").¹⁷

¹⁷Because this miscellaneous action was initiated not by a complaint but instead by a motion, there is some uncertainty as to what materials the Court should look to for purposes of the facial challenge. The Court concludes it is appropriate to take as true all "well-pled" factual allegations contained in Crystallex's motion, briefs, letters, declarations, expert reports, exhibits, or during any hearing or teleconference with the Court. (*See* D.I. 70 at 3) There is no doubt PDVSA has

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The burden is on Crystallex to show that these allegations support a finding of at least probable cause that the *Bancec* presumption of separateness has been rebutted. *See Strick Corp.* v. *Thai Teak Prods. Co.*, 493 F. Supp. 1210, 1217 (E.D. Pa. 1980) ("The writ should issue only if on its face probable cause exists for accepting its conclusion."); *Local Union No. 626 United Bhd. of Carpenters & Joiners of Am. Pension Fund v. Delmarva Concrete Corp.*, 2004 WL 350452, at *2-3 (E.D. Pa. Feb. 24, 2004) (requiring "factual basis for satisfying" alter ego standard); *see also* 10 Del. C. § 3507 ("A writ of foreign attachment may be issued against any corporation, aggregate or sole, not created by or existing under the laws of this State upon proof satisfactory to the court that the defendant is a corporation not created by, or existing under the laws of this State, and that the plaintiff has a good cause of action against the defendant in an amount exceeding \$50."); Del. Super. Ct. Civ. R. 49(b)(1) ("The proof required for the issuance of a mesne writ of attachment under Chapter 35, Title 10, Delaware Code, will be satisfied by filing with the complaint an affidavit of plaintiff or some credible person setting forth the facts required by the applicable statute.").

Undertaking this analysis, the Court concludes that Crystallex has met its burden to

had fair notice of each of these allegations and a full opportunity to rebut them. In any event, even were the Court to take a more restrictive approach – for instance, limiting its consideration to only those factual allegations contained in Crystallex's opening brief in support of its motion – the Court would still find that Crystallex had met its burden to show probable cause.

Relatedly, both sides fault the other for purportedly fatal procedural failings. PDVSA complains that "Crystallex should have commenced a plenary action against PDVSA by filing a complaint and serving PDVSA in accordance with the procedures set forth in the FSIA." (D.I. 71 at 2) Crystallex counters that PDVSA should have "move[d] to quash the writ after issuance, as is the ordinary course," rather than intervening and "preemptively" moving to dismiss. (D.I. 70 at 3 n.5) In the Court's view, both parties had options as to how to proceed, and there is nothing deficient in how they chose to do so. Certainly, neither party can credibly contend that it has been denied due process or had an inadequate opportunity to be heard.

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overcome PDVSA's facial attack. Specifically, Crystallex has met this burden with respect to the extensive control prong of *Bancec*, but not with respect to the fraud or injustice prong.

b. Extensive control

Taking Crystallex's allegations as true, Crystallex has shown at least probable cause for a finding that PDVSA is not immune from suit. This is because Crystallex has stated sufficient allegations that, if proven, would rebut the presumption of separateness and establish that PDVSA is the alter ego of Venezuela.

In determining whether a corporate entity is "so extensively controlled" by a sovereign state, the Court considers "whether the sovereign state exercises significant and repeated control over the instrumentality's day-to-day operations." *EM Ltd. II*, 800 F.3d at 91; *see also Walter Fuller Aircraft Sales, Inc. v. Republic of Philippines*, 965 F.2d 1375, 1382 (5th Cir. 1992) ("[W]e look to the ownership and management structure of the instrumentality, paying particularly close attention to whether the government is involved in day-to-day operations, as well as the extent to which the agent holds itself out to be acting on behalf of the government."); *Holy See*, 557 F.3d at 1079-80 (requiring "day-to-day, routine involvement" to overcome *Bancec* presumption).

Considerations relevant to the fact-intensive inquiry of whether a sovereign state exercises control over an instrumentality's day-to-day operations include:

whether the sovereign nation: (1) uses the instrumentality's property as its own; (2) ignores the instrumentality's separate status or ordinary corporate formalities; (3) deprives the instrumentality of the independence from close political control that is generally enjoyed by government agencies; (4) requires the instrumentality to obtain approvals for ordinary business decisions from a political actor; and (5) issues policies or directives that cause the instrumentality to act directly on behalf of the sovereign state. These factors are relevant to answering the touchstone inquiry for

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"extensive control": namely, whether the sovereign state exercises significant and repeated control over the instrumentality's day-to-day operations.

EM Ltd. II, 800 F.3d at 91.

Crystallex makes sufficient allegations which, taken as true, establish probable cause that the presumption of separateness is rebutted. As summarized in Crystallex's briefing on the motions, Crystallex has alleged each of the factors identified above, as well as other bases for finding Venezuela exercised significant and repeated control over PDVSA's day-to-day operations. Borrowing from Crystallex's briefing, the Court sets out below the well-pled allegations that, collectively, demonstrate probable cause that Venezuela extensively controls PDVSA, rebutting the *Bancec* presumption of separateness.¹⁸

Venezuela Using PDVSA's Property As Its Own

 Venezuela uses PDVSA's property, including aircraft and tanker trucks, for its own political purposes

Ignoring PDVSA's Separate Status

- PDVSA discloses Venezuela's control and willingness to direct the company to act against its interests as risk factors in its bond offering documents
- At least for marketing purposes, including on Twitter, PDVSA regularly boasts "PDVSA es Venezuela," which translates to "PDVSA is Venezuela"

¹⁸See, e.g., D.I. 3-1 at 7-23; D.I. 33 at 10-12 (internal quotation marks, citations, and footnotes omitted). Crystallex's allegations as set out in its briefing are rearranged here in order to track more closely the recitation of factors as contained in *EM Ltd. II*. The pertinent factors are not exhaustive – the Court can (and does) consider other factors, and not every factor need be present – nor are they mutually exclusive, as many of them overlap. Reasonable minds will differ as to the category into which to place any specific allegation or evidence.

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Depriving PDVSA of Independence from Close Political Control

- Venezuela appoints PDVSA's Board of Directors, and several Government Ministers are also members of PDVSA's Board of Directors
- Venezuela's Oil Minister has almost always also been PDVSA's President and Director
- Venezuela's Oil Ministry and PDVSA share physical office space
- Venezuela including its President hires and fires, and exerts political
 pressure on, both high- and low-level PDVSA employees, including by
 requiring that PDVSA managers be trained according to the Government's
 social policies
- PDVSA's Articles of Incorporation confirm that it is required to adhere to the guidelines and policies established or agreed upon by the National Executive

Requiring PDVSA to Obtain Approvals for Ordinary Business Decisions

- Venezuela's National Executive regulates and supervises PDVSA's operations
- Venezuela instructs PDVSA to whom it must sell oil internationally and at what price
- Venezuela dictates the price at which oil is sold domestically (forcing PDVSA to subsidize gas prices)

Issuing Policies Causing PDVSA to Act Directly on Behalf of Venezuela

- PDVSA was created by presidential decree not to generate profits but as a national company to implement national policy on hydrocarbons
- From 2010 through 2016, Venezuela required PDVSA to contribute to the State directly (through taxes, royalties, and dividends in the amount of approximately \$119 billion) and indirectly (through off-budget social programs and other public expenditures that have nothing to do with the hydrocarbons industry in the amount of approximately \$82 billion)

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- Venezuela uses PDVSA to achieve its social and political goals, both domestically (e.g., through Fondo Nacional para el Desarrollo Nacional ("FONDEN"), a social development fund) and abroad (e.g., through Petrocaribe)
- Venezuela forces PDVSA to provide oil to China and Russia as repayment for loans those countries made to Venezuela
- Venezuela directs PDVSA to sell oil to other friendly nations on non-economic terms to advance Venezuela's foreign policy objectives

Additional Indications of Venezuela's Extensive Control Over PDVSA

- Venezuela manipulates PDVSA's conversion of U.S. Dollars to Venezuelan Bolivars to leverage PDVSA's revenues for the sole benefit of Venezuela and to the detriment of PDVSA
- Venezuela uses PDVSA to expropriate private investment
- PDVSA paid Venezuela's fees to the ICSID tribunal in the underlying arbitration between Venezuela and Crystallex

PDVSA's facial challenge can be summarized as follows:

[T]he facts asserted in [Crystallex's motion] and supporting memorandum of law demonstrate nothing more than ordinary shareholder control and government regulation that cannot, as a matter of law, satisfy the required showing that the shareholder exercise complete domination and control over the corporation's day-to-day operations.

(D.I. 71 at 4) The Court is not persuaded. Crystallex has shown probable cause to rebut the presumption of separateness between the Republic of Venezuela and PDVSA. PDVSA's arguments are weightier (though ultimately unsuccessful) in connection with its factual challenge, where the Court can (and does) consider PDVSA's evidence, and not just Crystallex's allegations.

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c. Fraud or injustice

Crystallex contends that it has satisfied both prongs of the disjunctive *Bancec* test: extensive control as well as fraud or injustice. While, as already explained, the Court agrees with the former assertion, it rejects the latter. Even taking Crystallex's well-pled allegations as true, there is not probable cause that giving effect to the separateness of Venezuela and PDVSA would "work a fraud or injustice" as that term is used in *Bancec* (i.e., as a stand-alone test that may be satisfied independent of whether there is extensive control). Instead, as PDVSA contends, Crystallex has not "show[n] that the Republic abused PDVSA's corporate form to perpetrate a fraud or injustice resulting in harm to Crystallex." (D.I. 71 at 5)

Crystallex alleges that the expropriation of its interest in the Las Cristinas mines "resulted in a multibillion dollar benefit to state-owned and controlled PDVSA." (D.I. 3-1 at 32) Further, Crystallex contends that "Venezuela reaps enormous benefits from owning and operating an oil refining company under the protection of Delaware law . . . in an attempt to protect Venezuela's Delaware assets from execution." (*Id.*) From these premises, Crystallex asks the Court to "deem PDVSA to be Venezuela's alter ego to avoid the obvious injustice that would result if Venezuela were permitted to violate international law by taking Crystallex's assets, transfer those assets [to] a state-owned and controlled company, PDVSA, for no consideration, and then use U.S. law to avoid paying its lawful obligations in the face of PDVSA's receipt of billions for those stolen assets." (*Id.*; see also D.I. 33 at 17 ("Venezuela uses PDVSA to generate billions of dollars in revenue in the United States through its commercial refining and oil industry subsidiaries, while

¹⁹It follows that neither has Crystallex met its higher burden of proving fraud or injustice by a preponderance of the evidence. Therefore, Crystallex's motion with respect to the fraud or injustice prong also fails to survive PDVSA's factual challenge.

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simultaneously using PDVSA to shield those same assets from creditors in the United States."))

Crystallex's allegations fail because they do not sufficiently allege that Venezuela used PDVSA as an instrument to defraud Crystallex. Everything Crystallex alleges that Venezuela did to harm Crystallex could have been done — and, indeed, was alleged to have been done — by Venezuela itself, regardless of whether PDVSA even existed. It was Venezuela, not PDVSA, which expropriated Crystallex's interests in the mines. While Venezuela may have subsequently transferred those interests to PDVSA, it did not need to do so as part of its scheme to defraud Crystallex or to engineer an unjust outcome. Crystallex does not even allege that PDVSA participated in or facilitated the expropriation. Nor does Crystallex allege in anything other than an insufficient, conclusory manner that PDVSA was created and/or is being maintained by Venezuela for the purpose of defrauding Crystallex and other creditors.

As PDVSA persuasively explains:

PDVSA had nothing to do with the underlying dispute between the parties to the arbitration. And PDVSA is not a newly created sham corporation designed to insulate the Republic from liability. PDVSA was established over 40 years ago and is one of the largest oil companies in the world. . . . [T]he mere fact that a government instrumentality benefits from the actions of the government does not demonstrate an abuse of the corporate form required to overcome the presumption of separateness under *Bancec*.

(D.I. 26 at 19-20)

Therefore, the Court concludes that Crystallex cannot meet its burden under *Bancec*'s fraud or injustice prong.

2. PDVSA's Factual Attack

As previously noted, PDVSA's motion presents both a facial and factual attack on

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Crystallex's efforts to establish subject matter jurisdiction. In evaluating the factual challenge, the Court does not assume the truth of Crystallex's allegations. Instead, the Court must consider the evidence presented by Crystallex, as well as any competing evidence presented by PDVSA, and determine, under the appropriate burden of proof, whether Crystallex's evidence meets that burden.

For the reasons set out below, the Court concludes that (1) Crystallex's burden is to prove, by a preponderance of the evidence, that Venezuela extensively controls PDVSA, and (2) Crystallex has met this burden.

a. Crystallex's burden is preponderance of the evidence

While the parties agree that Crystallex bears some burden in order to obtain its requested writ, they disagree as to the nature of that burden. Crystallex argues for the "usual...rule generally applicable to civil actions in federal courts": that the plaintiff must prove its case by a preponderance of the evidence. (D.I. 52 at 1) (quoting *Ramsey v. United Mine Workers of Am.*, 401 U.S. 302, 308 (1971)) PDVSA contends that Crystallex, as "a party seeking to rebut the strong presumption of separateness under *Bancec*, bears the heavy burden of proving an alter ego relationship by clear and convincing evidence." (D.I. 51 at 1) The Court agrees with Crystallex.

As Crystallex correctly points out, *Bancec* held there is "no mechanical formula" for assessing whether the presumption of separateness has been rebutted. 462 U.S. at 633. Nor does *Bancec* speak of a heightened burden. Neither does the FSIA address the standard of proof or suggest it is a heightened one. (*See* D.I. 52 at 1) In this situation, the Court discerns no basis to depart from the ordinarily prevailing standard in a civil case, which is the preponderance of the evidence standard. *See generally McNutt v. Gen. Motors Acceptance Corp. of Indiana*, 298 U.S.

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178, 189 (1936) ("[T]he court may demand that the party alleging jurisdiction justify his allegations by a preponderance of evidence.").

The sparse caselaw on the subject further supports this conclusion. While many cases in this area fail to state the standard of proof being applied, Crystallex cites a handful of cases that expressly apply a preponderance of the evidence standard. See, e.g., Kirschenbaum v. 650 Fifth Ave., 257 F. Supp. 3d 463, 472 (S.D.N.Y. 2017) (issuing findings of fact based on "assessment of the preponderance of the credible evidence," while also finding "massive amount of evidence" that left Court "firmly convinced . . . by far more than a preponderance of the evidence"); Kensington, 2007 WL 1032269, at *5 (applying preponderance of evidence standard). As Crystallex further notes, other courts have undertaken a "totality of the circumstances" analysis, Bridas, 447 F.3d at 417, or assessed whether claims were "well-supported" or supported by "sufficient [evidence of] control," McKesson Corp. v. Islamic Republic of Iran, 52 F.3d 346, 351-52 (D.C. Cir. 1995) – approaches which do not suggest that these courts were applying any heightened evidentiary standard. In a case involving alter ego allegations outside the sovereign immunity context, the Third Circuit (applying state law) has applied a preponderance of the evidence standard. See Plastipak Packaging, Inc. v. DePasquale, 75 Fed. App'x 86, 90 (3d Cir. 2003).

PDVSA has not cited a single case that applied a clear and convincing evidence standard to an alter ego inquiry in the context of *Bancec* and the FSIA. PDVSA's cases applying state-law

²⁰As the District Court for the District of Columbia has recognized, "[w]hile the D.C. Circuit has explained that the court must look beyond the pleadings and even conduct limited jurisdictional discovery when a foreign-sovereign defendant challenges the factual basis for subject-matter jurisdiction under the FSIA, there is no authority to direct this court as to the appropriate burden of proof." *Kilburn v. Republic of Iran*, 277 F. Supp. 2d 24, 33 n.5 (D.D.C. 2003).

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alter ego standards (like state-law cases cited by Crystallex) are unhelpful, as the Court is (by the parties' agreement) applying a federal law standard.²¹ PDVSA broadly asserts that "the clear and convincing evidence standard applies any time a party seeks to overcome a legal presumption." (D.I. 51 at 2) But this is incorrect, as Crystallex demonstrates. (*See* D.I. 53 at 2) ("That ignores decades of decisions holding that a wide range of presumptions across different subject-matter areas could be rebutted by a preponderance of the evidence.") (citing cases)

The Court does not agree with PDVSA that "a preponderance of the evidence standard is inconsistent with" *Bancec*'s "strong presumption" of separateness. (D.I. 54 at 1-2) PDVSA does not cite authority to support the view that the strength of the presumption necessarily alters the standard of proof necessary to rebut it. The "strong" characterization of the presumption helps explain the justification for it and the importance of the Court enforcing it, unless and until it is overcome by the required amount of evidence. It does not, however, dictate a clear and convincing burden of proof.

Hence, the Court will now turn to evaluating whether Crystallex has met its burden of proof by a preponderance of the evidence.

²¹As Crystallex acknowledges, "[t]he Third Circuit has also stated, without citation, that alter-ego claims that 'rely on a fraud theory' require proof by clear and convincing evidence." (D.I. 52 at 2 n.1) (quoting *Kaplan v. First Options of Chi., Inc.*, 19 F.3d 1503, 1522 (3d Cir. 1994)) Since the Court has already concluded that Crystallex failed to establish even probable cause to support application of the fraud or injustice prong of *Bancec*, and cannot prove fraud or injustice by a preponderance of the evidence, it follows that Crystallex also could not meet the clear and convincing evidence standard. Thus, there is no need for the Court to resolve which of the evidentiary standards applies to the fraud or injustice test.

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b. Extensive control

Based on the evidence presented by both parties, ²² the Court finds that Crystallex has proven by a preponderance of the evidence that PDVSA is not immune from suit. The record contains sufficient evidence to enable the Court to find – including by resolving disputed issues of fact²³ – that PDVSA is the alter ego of Venezuela. In particular, Crystallex has met its burden to show that Venezuela extensively controls PDVSA.

As noted above, while there is no mechanical formula that applies to this inquiry, the Court finds it helpful to organize its discussion based initially on factors that are commonly looked to, in the same order that the Court identified these same factors in connection with PDVSA's facial challenge. The Court then considers some additional evidence further supporting its findings.

i. Venezuela's use of PDVSA's property as its own

Crystallex has proven by a preponderance of the evidence that Venezuela regularly uses PDVSA's assets as its own. (See D.I. 3-1 at 16-17, 31) (citing evidence)

Venezuela uses PDVSA aircraft for travel by Venezuelan officials and to escort other countries' politicians who are "friendly to Venezuela," even when they are not traveling to or from Venezuela. (See D.I. 3-1 at 16-17; see also, e.g., D.I. 5-1 Ex. 54 at 1 (LaPatilla reporting,

²²Crystallex requests that the Court take judicial notice of many of the exhibits included in its appendix, particularly those which are acts and statements of various branches of the Venezuela Government as well as orders issued by or public filings made in U.S. Courts. (*See* D.I. 9) No opposition to this request has been filed. (*See generally* Tr. at 67-68) The Court will take judicial notice as requested.

²³See generally Bolivarian Republic of Venezuela, 137 S. Ct. at 1324 ("If a decision about the matter requires resolution of factual disputes, the court will have to resolve those disputes, but it should do so as near to the outset of the case as is reasonably possible.").

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"They don't try to hide it any more. It is an official policy to use the large fleet of VIP . . . airplanes of Pdvsa and the government itself not only for the private use of public officials . . . but also to make use of the Venezuelan people's money "); id. Ex. 55 (BBC reporting, "The President of Venezuela, Nicolás Maduro, stated . . . that Colombian guerilla leader Rodrigo Londoño Echeverri, alias 'Timochenko', the senior commander of the [Revolutionary Armed Forces of Columbia] . . . , traveled in an official Venezuelan airplane [owned by PDVSA] to Havana."); id. Ex. 56 (Noticias24 reporting "Venezuelan Foreign Minister Nicolás Madura . . . stated . . . that the deposed president of Honduras Manuel Zelaya has left the United States bound for his country in an airplane bearing Venezuelan registration number . . . and flown by 'a Venezuelan captain"); id. Ex. 57 (Reportero24 reporting, "Pdvsa allocates 3 luxury airplanes for the use of the Cuban regime," airplanes which "were previously utilized to serve executives of the state-owned Petróleos de Venezuela (PDVSA) company" and which "only visit Venezuela when they require maintenance")) Venezuela also uses PDVSA trucks as physical barriers to prevent anti-government demonstrators from gathering. (See id. Ex. 58) (LaPAtilla reporting PDVSA trucks were blocking central highway and being guarded by Bolivarian National Police and Bolivarian National Guard)

ii. Ignoring PDVSA's separate status

Crystallex has proven by a preponderance of the evidence that Venezuela regularly ignores PDVSA's separate status. This is evidenced in numerous statements PDVSA has made in filings associated with efforts to raise money, including bond offering documents.

For example, in a November 11, 2011 offering document, PDVSA disclosed:

[T]he Venezuelan government required us to acquire several

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electricity generation and distribution companies, as well as certain food companies The Venezuelan government has also nationalized and continues to nationalize other companies in Venezuela. . . . [T]he Venezuelan government announced the nationalization of Venoco . . . and *required* . . . us to acquire the assets of Venoco at a price to be determined in the future.

(D.I. 4-3 Ex. 40 at 16-17) (emphasis added) In September 2016, PDVSA advised its bondholders it could provide no assurances that Venezuela would not "*impose* further material commitments upon us or *intervene* in our commercial affairs in a manner that will adversely affect our operations, cash flow and financial results." (*Id.* Ex. 44 at 28) (emphasis added)

In the context of the full record developed here, the Court finds that these acknowledgments by PDVSA of actions Venezuela has "required" it to take, and material commitments Venezuela has "impose[d]" on it, are indicative of Venezuela, its sole shareholder, ignoring the separate legal status of PDVSA.

This finding is bolstered by PDVSA's repeated identification of itself, including on Twitter, as Venezuela. PDVSA has used the hashtag "#PDVSAesVenezuela," which literally means "PDVSA is Venezuela." (D.I. 4-1 Ex. 3) The Court disagrees with PDVSA that Crystallex's arguments relating to the Twitter hashtag are "frivolous." (D.I. 26 at 37 n.13) PDVSA also disseminates Venezuelan propaganda through its social media presence by regularly tweeting messages in support of the Government and portraying a photograph of former President Hugo Chávez as its banner heading. (D.I. 5-1 Exs. 67-69)

In connection with other evidence in the record, these facts constitute additional evidence that Venezuela and PDVSA regularly ignore their separate legal status.

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iii. Depriving PDVSA of independence from close political control

Crystallex has proven by a preponderance of the evidence that Venezuela has deprived PDVSA of independence from close political control.

This is illustrated by the fact that Venezuela's President, Nicolás Maduro, appoints PDVSA's directors, vice-presidents, and members of its shareholder council. (*See* D.I. 4-1 Ex. 13; *see also* D.I. 4-3 Ex. 40 at 16 (PDVSA Nov. 11, 2011 Notes Offering Circular) ("The President of Venezuela appoints our president and the members of our Board of Directors by executive decree.")) In January 2017, President Maduro also appointed Nelson Martínez, former President of Citgo (a corporate subsidiary several steps below the Government of Venezuela), as Minister of the People's Power for Oil and Mining ("Oil Minister") and President of PDVSA. (*See* D.I. 4-2 Exs. 23-24) In November, 2017, a newspaper headline announced, "President Maduro Appoints Asdrúbal Chávez As New President of Citgo." (D.I. 42-1 Ex. 110; *see also* Tr. at 30)

In 2002, then-President of Venezuela, Hugo Chávez, fired two PDVSA employees on national television, fired seven PDVSA executives, and forcibly retired 12 other PDVSA employees. (D.I. 8 at ¶ 21) In 2003, "the Government fired nearly 40% of the PDVSA's workforce at the time (approximately 18,000 PDVSA employees) because of their role in opposing the Government." (*Id.*; see also D.I. 7 at ¶ 11) As recently as July 2017, Venezuela continued to threaten to terminate PDVSA employees who were opposed to the governing regime. (See D.I. 4-2 Ex. 35 at 2 ("Political appointees are gaining clout at the expense of veteran oil executives, while employees are under mounting pressure to attend government rallies and vote for the ruling Socialists. The increasing focus on politics over performance is

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contributing to a rapid deterioration of Venezuela's oil industry "); *id.* at 3 ("Managers told workers they would be fired unless they voted in Maduro's controversial election"); *see also* D.I. 4-3 Ex. 66 (President Maduro reported as stating, "If there are 15,000 workers, all 15,000 workers must vote without any excuses"))

There is also a great deal of overlap between the leadership of Venezuela and that of PDVSA. In November 2017, President Maduro appointed a military general as Oil Minister and also as President of PDVSA. (*See* Tr. at 29-30) That individual's predecessors, Nelson Martínez, Eulogio del Pino, and Rafael Ramírez Carreño, similarly served simultaneously as both Venezuela's Oil Minister and PDVSA's President. (*See* D.I. 4-2 Exs. 23-24) In a speech to the International Assembly in 2014, former Oil Minister and PDVSA President, Rafael Ramírez, said: "today we can say with clarity that we have the full and sovereign management of our oil industry." (D.I. 4-3 Ex. 38 at 17; *see also* Tr. at 19) Given the evidence recited throughout this Opinion, the Court considers it reasonable to infer that when individuals who simultaneously hold office in the Government of Venezuela and in PDVSA confront situations in which the interests of their two "bosses" conflict, they make decisions based on what they view to be the best interests of Venezuela, even if that comes at the expense of PDVSA's interests.²⁴

While hiring and firing board members may also be "an exercise of power incidental to ownership, and ownership of an instrumentality by the parent state is not synonymous with

²⁴Among other evidence supporting this inference is, as will be described further below, how PDVSA in its own public filings warns investors that the Republic of Venezuela may force PDVSA to take actions that are not in PDVSA's own interests as a corporation, when, in the Republic's view, those actions will further policies and goals of the nation itself. (*See, e.g.*, D.I. 4-3 Ex. 40 at 16) ("As a result, we may engage in activities that give preference to the objectives of the Venezuelan government rather than our economic and business objectives.")

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control over the instrumentality's day-to-day operations," *EM Ltd. II*, 800 F.3d at 92-93, given the totality of the circumstances here the Court finds these facts to be evidence that Venezuela "interfere[d] in and dictate[d] [PDVSA's] daily business decisions," *id.*

Additionally, PDVSA's Articles of Incorporation require that it adhere to policies established by the National Executive. (See D.I. 4-1 Ex. 13; see also D.I. 8 at ¶ 20) Venezuela's National Executive, through the Oil Ministry, also "regulates and supervises PDVSA's operations, exercises control of PDVSA's production and export of oil, and grants the rights and mining areas as established under Venezuelan law." (D.I. 8 at ¶ 20) (internal quotation marks omitted)

iv. Requiring PDVSA to obtain approvals for ordinary business decisions

Crystallex has proven by a preponderance of the evidence that in addition to designating oil production levels by official decree, Venezuela also "dictates the severely discounted price at which PDVSA must sell its product to Venezuelan citizens" and "forces PDVSA to 'sell' oil to third parties for no, or *de minimis*, consideration." (D.I. 3-1 at 12) (citing evidence) In a 2011 debt offering, PDVSA explained: "[t]he Venezuelan government, rather than the international market, determines the price of products . . . sold by us through our affiliates in the domestic market." (D.I. 4-3 Ex. 40 at 14) The Government sets the prices for oil sold within Venezuela and designates oil production levels. (*Id.* Ex. 39; D.I. 7 at ¶ 38)²⁵

Venezuela's National Executive regulates and supervises PDVSA's operations. (See D.I.

²⁵Crystallex points to PDVSA's audited financial statements, which reveal that PDVSA received a government subsidy "corresponding to the difference between the cost of production and the regulated sale price of motor and diesel fuels in the national market," which KPMG called "an unusual transaction" and "key audit issue." (D.I. 3-1 at 20; D.I. 7 at ¶ 40)

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7 at ¶ 7; D.I. 4-3 Ex. 40) The Government compels PDVSA to sell oil to China, Russia, and 17 Caribbean countries at a discount in order to support Venezuela's foreign policy. (See D.I. 5-1 Exs. 72-74, 77; see also D.I. 8 at ¶¶ 49-50; D.I. 7 at ¶¶ 9, 31-37) Energy Minister Rafael Ramírez has explained that PDVSA "is not a company designed to generate profits;" instead, it "is a national company." (D.I. 7 at ¶ 39)

PDVSA observes that other oil-producing nations similarly regulate oil policies, making PDVSA no different from any other national oil company. (D.I. 26 at 8, 31) Just because PDVSA shares this feature (and perhaps others) with "typical" national oil companies does not, however, deprive this feature of all evidentiary value in assessing whether Venezuela exercises extensive control over PDVSA. Nor, of course, is this the only evidence on which the Court is relying to find an alter ego relationship.

v. Issuing policies causing PDVSA to act directly on behalf of Venezuela

The record further establishes that Venezuela causes PDVSA to achieve domestic social and political goals and to advance Venezuela's foreign policy goals. (D.I. 3-1 at 17-21) (citing evidence)

PDVSA was created by Presidential Decree, in 1975, to implement government policy.

(See D.I. 4 Exs. 11, 12; D.I. 8 at ¶ 9) The "History" section of PDVSA's website lists among the company's "Strategic guidelines" the following: "Support the geopolitical position of the country and key objectives of Venezuelan foreign policy, such as the promotion of comprehensive cooperation with strategic allies" (D.I. 4-2 Ex. 32 at 1)

In 2002, the National Executive reorganized PDVSA, expanding its corporate mission

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beyond the hydrocarbons industry to "take on a more political role." (D.I. 3-1 at 17) Under the new structure, PDVSA funds Venezuelan programs that have nothing to do with its business, causing PDVSA to take on additional debt. Such programs include PDVSA Agrícola S.A., which subsidizes Venezuela's agriculture, industrial infrastructure, and produce sectors, and PDVSA Desarrollos Urbanos S.A., which subsidizes Venezuela's housing projects. (*Id.* at 18; D.I. 8 at ¶ 41) PDVSA's total contributions to the Venezuelan budget between 2010 and 2016 were in excess of \$119 billion. (D.I. 7 at ¶ 20)²⁶ As PDVSA disclosed to investors in September 2016: "[T]he government *requires* us to make significant financial contributions to social programs, including transfers to FONDEN, as well as requiring us to fund specific projects. In 2014 and 2015, we made total contributions to FONDEN in the amounts of U.S. \$974 million and U.S. \$3,306 million, respectively." (D.I. 4-3 Ex. 44 (PDVSA Offer Sept. 16, 2016) at 29) (emphasis added); *see also* D.I. 4-2 Exs. 19, 30)

PDVSA asserts that "[t]hese taxes and currency regulations, which apply to companies other than PDVSA, are not a basis for disregarding PDVSA's legal separateness." (D.I. 26 at 33 n.9) It is true that Venezuela regulates and taxes the entire oil industry operating in the country, not just PDVSA. (See D.I. 28 at ¶ 5; see also D.I. 26 at 7-8) But that does not mean the taxation and regulation of PDVSA is inconsistent with a finding of PDVSA being Venezuela's alter ego.

Moreover, the tax and regulatory policies are only some of the Venezuelan policies that cause PDVSA to act directly on behalf of Venezuela, as already noted. Venezuela also uses PDVSA to achieve its foreign policy goals by committing PDVSA to sell oil to certain Caribbean

²⁶PDVSA points out that in this same period PDVSA had revenues of more than \$724 billion and earned a total net profit of over \$45 billion. (D.I. 27-1 Exs. 4-6)

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and Latin American nations at substantial discounts, without PDVSA's consent. (D.I. 3-1 at 21) (citing evidence) Even when those oil debts are repaid, the money is given to Venezuela, not PDVSA. (*Id.*; D.I. 5-1 Ex. 77) Venezuela has entered into agreements with China whereby PDVSA acts "on behalf of the Bolivarian Republic of Venezuela" to repay China. (D.I. 4-3 Ex. 49 at 3; *see also id.* at 5 (additional references to PDVSA taking on duties "on behalf of the Bolivarian Republic of Venezuela" or "acting on behalf of the Bolivarian Republic of Venezuela")) China has thereby paid more than \$50 billion to Venezuela (for oil) yet PDVSA itself has received nothing. (D.I. 7 at ¶ 37)

Consistent with the foregoing, PDVSA stated the following in a November 11, 2011

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We are controlled by the Venezuelan government, which ultimately determines our capital investment and other spending programs. . . . The Bolivarian Republic of Venezuela, as our sole owner, has pursued, and may pursue in the future, certain of its macroeconomic and social objectives through us. As a result, we may engage in activities that give preference to the objectives of the Venezuelan government rather than our economic and business objectives. We may make investments, incur costs and engage in sales on terms that affect our results of operations and financial condition.

(D.I. 4-3 Ex. 40 at 16)

vi. Additional indications of Venezuela's extensive control over PDVSA

The record contains additional evidence of Venezuela's extensive control over PDVSA, evidence that does not neatly fit into one or more of the categories above.

For instance, it is undisputed that PDVSA paid the administrative fees Venezuela incurred in connection with the arbitration with Crystallex, which amounted to around \$249,000.

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(See Tr. at 40-41; D.I. 6 (Fung Decl.) at ¶¶ 3-5, Exs. 1-2)²⁷

Also, Venezuela manipulates PDVSA's conversion of U.S. Dollars to Venezuelan Bolivars to leverage PDVSA's revenues for the sole benefit of Venezuela and to the detriment of PDVSA. (See D.I. 7 at ¶ 26; see also D.I. 4-3 Exs. 47-48) PDVSA is required to convert foreign currency into Venezuelan Bolivars at an artificially low U.S. Dollar to Bolivar exchange rate "(which is approximately 1/500th of the market rate)." (D.I. 7 at ¶ 26; see also D.I. 8 at ¶ 46; D.I. 4-3 Ex. 48) The Republic can then exchange that currency at more favorable rates. (D.I. 7 at ¶ 26; see also D.I. 4-3 Ex. 48)

Additionally, in November 2017, PDVSA announced: "As of today, the command of the oil industry passes into the hands of the country's first worker, Nicolás Maduro." (D.I. 42-1 Ex. 112 at 1) PDVSA has also stated that one of its objectives is to "guarantee control by the State over [PDVSA]." (D.I. 5-1 Ex. 60)

Finally, Venezuela has designated PDVSA as an expropriating entity, thereby authorizing it to exercise a sovereign power. (*Id.* Exs. 86-88, 99)

All of the foregoing is further evidence supporting the Court's conclusion.

vii. PDVSA's contrary interpretation wrongly fails to account for the totality of the evidence

PDVSA recognizes the support in the record for the Court's findings identified above. Indeed, as Crystallex notes, the evidence here is "largely undisputed," as PDVSA has instead

²⁷PDVSA insists there is "nothing untoward" about an entity paying a debt of its shareholder owner. (Tr. at 41; *see also EM Ltd. II*, 800 F.3d at 93 (stating that "repayment by [a government instrumentality] of [a foreign country's] other debts does not establish the existence of an alter ego relationship," at least where instrumentality was a national bank, as "central banks commonly perform payment functions for their governments")) That this observation is true does not mean this evidence lacks relevance or contradicts the Court's findings.

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"focus[ed] its challenges on the inferences that may be drawn from the undisputed facts." (D.I. 52 at 2) PDVSA's arguments against concluding an alter ego relationship exists rest largely on disputing the relevance of Crystallex's evidence and insisting that none of the above-listed findings individually transforms PDVSA into Venezuela's alter ego.

The Court disagrees with PDVSA's protestations that all of Crystallex's evidence is irrelevant. (See, e.g., Tr. at 47 ("extensive regulation by an oil producing state of its hydrocarbon industry" is irrelevant); id. at 54 (characterizing as irrelevant whether Venezuela itself benefitted from acts taken by PDVSA); id. at 55 (contending designation of PDVSA as expropriating entity, use by Venezuela of PDVSA property without reimbursement, and sale of oil to other countries at reduced prices are "totally irrelevant")) Based on the caselaw discussed in this Opinion, the Court concludes that all of the considerations on which the Court has relied are relevant to the issue of whether Venezuela so extensively controls PDVSA, including its day-to-day conduct, that it should be treated as Venezuela's alter ego for purposes of application of the FSIA. As has been noted repeatedly in this Opinion, Bancec did not establish a mechanical formula for courts to apply. It is appropriate for the Court to consider the totality of circumstances that either side wishes to present.

Much of PDVSA's attack on Crystallex's showing consists of dissecting the totality of Crystallex's evidence and arguing that no single piece of evidence renders PDVSA the alter ego of Venezuela. (See, e.g., D.I. 26 at 20 ("mere fact that a government instrumentality benefits from the actions of the government does not demonstrate an abuse of the corporate form"); id. at 33-34 ("mere fact that PDVSA may have been designated as an expropriating entity in certain other cases is not grounds for disregarding its separate legal personality"); id. at 35-36

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(contending that Venezuela's use of PDVSA's planes "would not support" veil piercing); *id.* at 35 (contending sale of oil to other countries on deferred payment and other favorable terms "do[es] not support a finding of alter ego liability")) Of course, no single piece of evidence in the record is sufficient on its own to enable Crystallex to meet its burden, but of course that also is not what the law requires. Again, the Court must consider all of the evidence in the record. When it does so, the Court finds that it sufficiently proves, by a preponderance of the evidence, that PDVSA is the alter ego of Venezuela.

PDVSA also characterizes itself as merely a "typical" national oil company, the type of creature that *Bancec* compels must retain its separate juridical status. (*See* Tr. at 53 ("[A]II they have shown is that it is the same as other national oil corporations that are owned by petrol states."); *see also* D.I. 26 at 2 (arguing PDVSA is "nothing more than a 'typical government instrumentality") (quoting *Bancec*)) While the Court agrees with PDVSA that it possesses many of the characteristics *Bancec*, 462 U.S. at 624, ascribed to "typical" government instrumentalities – it was created by an enabling statute, is managed by a board selected by the government, has powers to hold and sell property and sue and be sued, and is primarily responsible for its own finances – PDVSA also has numerous other characteristics, which the Court has described above in detail. Considering the totality of the evidence, the Court finds that PDVSA is not merely a "typical government instrumentality" but is the alter ego of Venezuela.

viii. The parties' declarations confirm the Court's findings

The Court's findings described above are further supported by the declarations the parties submitted. Together, Crystallex and PDVSA have filed six substantive declarations: two each from Dr. Roberto Rigobon and Professor Jose Ignacio Hernandez, who endorse Crystallex's view

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that PDVSA is the alter ego of Venezuela; and one each from Professor Luis A. Garcia Montoya and Mr. Alejandro Schmilinsky, supporting PDVSA's view that the two entities are properly viewed as separate. (See D.I. 7, 8, 28, 29, 35, 36)²⁸ While there are certainly disputes among the various declarations, to the limited extent those disputes are material, the Court resolves them in favor of Crystallex, for the reasons explained below.

Dr. Rigobon, a professor of management at the Massachusetts Institute of Technology and Research Associate of the National Bureau of Economic Research, opines on the economic realities of the relationship between PDVSA and Venezuela, specifically concluding that: (1) the Venezuelan Government exercises complete economic control over PDVSA's day-to-day operations; (2) Venezuela relies on PDVSA to sustain its economy; and (3) the Venezuelan Government uses PDVSA for political purposes. (See D.I. 7 at ¶¶ 7-9) Dr. Rigobon also explains that PDVSA was created by Presidential Decree and initially behaved "like an economically-driven company," including by setting its own budget, making its own decisions, and promoting, hiring, or firing its own staff. (See id. at ¶ 11) Then, however, in 2002 and 2003, the Government began getting involved in PDVSA's affairs, effectively converting the formerly commercial-minded PDVSA into the present State-controlled "New PDVSA." (See id. at ¶ 11-13)

This transformation was accomplished by the Government's appointment of then-President Chavez's "most trusted allies" to manage PDVSA, creating "substantial overlap between the [PDVSA] Board of Directors and senior members of the Government." (*Id.* at

²⁸Other declarations in the record (*see*, *e.g.*, D.I. 4-6, 27, 34, 42, 47) transmit documents and additional evidence to the Court.

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¶¶ 13-14) In 2002, the Government began requiring PDVSA to contribute monetarily to Venezuela, directly through oil revenues (totaling \$119 billion from 2010 to 2016) and "extraordinary taxes," and indirectly through social programs such as FONDEN (to which, PDVSA contributed more than \$34 billion from 2010 to 2016) and other programs created to subsidize consumer housing and gasoline purchases through PDVSA. (*See id.* at ¶¶ 15, 21, 23-29; *see also* D.I. 36 at ¶2)

Regarding PDVSA's day-to-day operations, Dr. Rigobon opines that "Venezuela dictates the quantity of oil that PDVSA must produce (partly through OPEC[²⁹] commitments), the parties to which PDVSA must sell its oil, and the price at which PDVSA must sell its oil." (D.I. 7 at ¶ 30) The Government does this, in part, through Petrocaribe, an agreement pursuant to which Venezuela committed PDVSA to supply oil to 17 Caribbean countries on favorable economic terms, and similar agreements Venezuela entered into with China and Russia, all to enable Venezuela to "reap[] enormous political benefits." (*Id.* at ¶¶ 31-37) Venezuela controls PDVSA's oil production levels and regulates the price at which all refined products are sold in Venezuela, often causing PDVSA to suffer a loss in profits. (*Id.* at ¶ 38)

Dr. Rigobon agrees with Professor Montoya that PDVSA is "financially autonomous" from Venezuela (see below), but persuasively opines how "[a]ll that means . . . is that the budget of Venezuela and the budgets of State-owned companies are governed differently;" it does not mean that "PDVSA operates independently from Venezuela as a practical matter (it does not)." (D.I. 36 at ¶ 3) The Court agrees with Dr. Rigobon that even if "PDVSA is on paper an independent organization from the Venezuelan Government," PDVSA is not "a de-facto

²⁹Organization of Petroleum Exporting Countries. (See D.I. 26 at 8)

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independent organization." (Id.)

Professor Hernandez, Crystallex's Venezuelan law expert, opines that "Venezuela and PDVSA are one and the same as a matter of Venezuelan law." (D.I. 8 at ¶ 7) He describes the Public Administration Organic Law, which "nominally" recognizes PDVSA's "own legal personality," but in fact allows PDVSA's "activities" to be "controlled by the National Executive Branch by 'control agencies or entities." (*Id.* at ¶¶ 13-14) Professor Hernandez further observes that the Venezuelan Supreme Court has recognized that PDVSA has all the "privileges" of the Republic, and "although PDVSA is a company constituted and organized as a corporation," as is enshrined in the country's Constitution, PDVSA nonetheless "falls within the framework of the general structure of the National Public Administration." (*Id.* at ¶ 16)

Professor Hernandez also explains how Venezuela has used PDVSA to assist in the Government's expropriation objectives. (*See id.* at ¶¶ 22-25) He opines as to the Government's formulation of PDVSA's pricing policies and management of PDVSA's employment policies (*see id.* at ¶¶ 19-21), the overlap of directors and officers between PDVSA and the Government (*see id.* at ¶¶ 28-33), the Government's increased control after the establishment of "New PDVSA" (*see id.* at ¶¶ 34-38), and the use of PDVSA to achieve Venezuela's social and political objectives (*see id.* at ¶¶ 39-50). Citing the opinions of various "learned commentators," all of whom have concluded that "PDVSA and its affiliates are considered a state company of a unique nature" (*id.* at ¶ 26), Professor Hernandez persuasively concludes that whether PDVSA has its own legal personality "has no bearing" on the reality that Venezuela and PDVSA are not, in practice, separate entities (D.I. 35 at ¶ 2).

On behalf of PDVSA, Professor Montoya, PDVSA's expert in Venezuelan law, opines

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that "PDVSA enjoys a legal personality of its own as a corporation separate and distinct from the Republic." (D.I. 28 at ¶ 4) In his view, "neither the importance of PDVSA in the national economy nor the fact that it is highly regulated changes the fact that PDVSA has all the attributes in law of separate legal personality." (*Id.*) Additionally, Professor Montoya asserts that PDVSA is "financially autonomous from the Republic," "has its own budget, and . . . is subject to a budgetary regime distinct from that of the Republic," and that various tweets and press reports cited by Crystallex carry no legal significance under Venezuelan law. (*See id.* at ¶ 28, 33)

Much of Professor Montoya's declaration emphasizes that, according to the PDVSA Bylaws, PDVSA operates as a *sociedad anónima* ("SA"), a corporate form having one or more shareholders, which makes it clear PDVSA is not a department of the Government. (*See id.* at ¶7-11, 18, 24-26) His opinion is echoed by Mr. Schmilinsky, PDVSA's litigation corporate manager, who explains PDVSA's corporate structure – naming the various directors, officers, and corporate managers – and points out that PDVSA is an SA, whose only shareholder has ever been the Republic. (D.I. 29 at ¶¶4, 8-10)³⁰ Neither of Crystallex's experts disagrees with this conclusion: Dr. Rigobon and Professor Hernandez acknowledge that PDVSA is an SA with its own legal personality. (*See* D.I. 35 at ¶5; D.I. 36 at ¶3) But the important point – which is the opinion of Crystallex's experts, as well as the finding of the Court, after considering the totality of the evidence, including the views of PDVSA's experts – is that, in practice, PDVSA operates as the alter ego of Venezuela.

Professor Montoya further discusses the distinction made in the Public Administration

 $^{^{30}}$ Mr. Schmilinsky further states that "PDVSA is a stranger to the dispute between Crystallex and the Republic." (D.I. 29 at ¶ 14)

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Organic Law between Centralized Administration departments, which do not have their own legal personalities, and the Decentralized Administration, which consists of entities, like PDVSA, which do have their own legal personalities. (See D.I. 28 at ¶¶ 16-19) Professor Montoya cites a decision by the Supreme Tribunal of Justice (Constitutional Chamber), which recognized "the legal nature of PDVSA as [an SA] and confirmed that PDVSA is part of the Public Administration, but not part of the Centralized Administration." (Id. at ¶ 18) Again, Crystallex's declarants do not challenge the facts of this conclusion, just their significance, and again the Court agrees with Crystallex's view as to their minimal importance.

ix. Conclusion as to exclusive control test

Having made the factual findings noted throughout the discussion above by a preponderance of the evidence after considering all of the record evidence cumulatively, the Court finds that Crystallex has rebutted the presumption of separateness and has shown that PDVSA may be deemed the alter ego of Venezuela pursuant to the exclusive control prong of *Bancec* and its progeny. Therefore, Crystallex has proven the applicability of an exception to PDVSA's sovereign immunity. The Court rejects PDVSA's factual challenge to the Court's subject matter jurisdiction.

C. Crystallex Has Met Its Burden with Respect to Execution Immunity

Having found that Crystallex has met its burden to rebut the presumption of separateness between PDVSA and Venezuela and proven that PDVSA is the alter ego of Venezuela, and therefore no jurisdictional immunity prevents the Court from having authority to resolve the parties' disputes, the Court must next determine whether Crystallex has also overcome the immunities embodied in the FSIA relating to attachment and execution on property held by

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foreign sovereigns in the United States. On this issue, while again PDVSA's motion can be read as raising both facial and factual attacks, the analysis essentially overlaps and, hence, can be conducted once.

Three issues are presented: (i) which statutory provision applies, (ii) has the property Crystallex seeks to attach – the shares of Delaware corporation PDVH – been used for commercial activity, and (iii) even if the shares have been so used, are they currently being used for commercial activity, which requires consideration of certain Executive Orders issued by the U.S. Treasury Department's Office of Foreign Asset Control ("OFAC"). The Court addresses each in turn.

1. The Court Applies § 1610(a), Not § 1610(b)

"[T]he FSIA codifies the common-law rule that property of a foreign state in the United States is *presumed* immune from attachment and execution. To overcome the presumption of immunity, the plaintiff must identify the particular foreign-state property he seeks to attach and then establish that it falls within a statutory exception." *Rubin*, 637 F.3d at 796. "The party in possession of the property may raise the immunity or the court may address it sua sponte." *Id.* at 801.

While "the execution immunity afforded sovereign property is broader than the jurisdictional immunity afforded the sovereign itself," *Walters*, 651 F.3d at 289, the statutory framework for attachment and execution immunity mirrors that for jurisdictional immunity.

Attachment and execution immunity are governed by FSIA § 1609, subject to specific exceptions to that immunity recited in §§ 1610 and 1611.

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Section 1609 provides:

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.

28 U.S.C. § 1609.

Section 1610 identifies exceptions to immunity based on whether the property subject to attachment is that of a foreign state, § 1610(a), or of an agency or instrumentality of a foreign state, § 1610(b). "[T]he property of an agency or instrumentality of a foreign state is afforded narrower protection from execution than the property of the foreign state itself." *Walters*, 651 F.3d at 289-90.

For property of a foreign state to be subject to attachment under § 1610(a), it must be "used for a commercial activity in the United States" and, under the subsection implicated here, § 1610(a)(6), the attachment must be in aid of a judgment "based on an order confirming an arbitral award rendered against the foreign state" (emphasis added). Under the broader exceptions to immunity under § 1610(b), attachment is proper where the agency "engaged in commercial activity in the United States," regardless of whether the particular property subject to attachment was used for commercial activity (emphasis added). Therefore, the Court must determine whether to apply § 1610(a) or § 1610(b).

Although there is no dispute that PDVSA is an agency of Venezuela (*see* D.I. 28 at 4-8, 12-14; D.I. 35 at 2, 4; D.I. 36 at 3) and, therefore, one might expect § 1610(b) to apply, because the Court concludes that PDVSA is to be treated as Venezuela's alter ego for purposes of jurisdictional immunity, PDVSA must also be treated as Venezuela's alter ego for purposes of

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execution immunity. Therefore, the property subject to attachment – PDVSA's shares in PDVH – may properly be considered property of Venezuela, implicating § 1610(a).

Moreover, Crystallex expressly moves only under § 1610(a) – and PDVSA appears to agree that only § 1610(a) applies. (See Tr. at 6 ("[W]e have filed a motion under the FSIA, Section 1610(a)."); see also D.I. 3-1 at 25 (citing § 1610(a), (c)); D.I. 33 at 7 n.6 (same); D.I. 52 at 3 (relying on § 1610(a)); D.I. 26 at 37 (PDVSA stating, "where, as here, a judgment creditor of a foreign state attempts to reach the assets of an agency or instrumentality on the theory that it is the alter ego of the state under Bancec, the judgment creditor must satisfy the more restrictive exceptions to execution immunity set forth in Section 1610(a)"); D.I. 51 at 4 (relying on § 1610(a))³¹ Thus, the Court will apply § 1610(a).

2. Used For Commercial Activity

As identified above, Crystallex proceeds under § 1610(a)(6), which recites:

- (a) The property in the United States of a foreign state . . . used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if . . .
 - (6) the judgment is based on an order confirming an arbitral award rendered against the foreign state, provided that attachment in aid of execution, or execution, would not be inconsistent with any

³¹In the event that § 1610(b) were held to apply, the Court would be required to deny the requested writ, as Crystallex cannot meet its burden to show applicability of any exception to immunity enumerated in § 1610(b), as it has failed to prove (or even allege) waiver of attachment immunity by PDVSA or jurisdiction under §§ 1605(a)(2), (3), (5), (7), 1605(b), or 1605A. Nor does Crystallex have a judgment against PDVSA.

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provision in the arbitral agreement.[32]

As it is undisputed that Crystallex's judgment is based on an order confirming an arbitral award rendered against Venezuela, PDVSA's shares in PDVH are subject to post-judgment attachment and execution if they are "used for commercial activity in the United States." 28 U.S.C. § 1610(a).³³

"[P]roperty is 'used for a commercial activity in the United States' when the property in question is put into action, put into service, availed or employed *for* a commercial activity, not *in connection* with a commercial activity or *in relation* to a commercial activity." *Af-Cap Inc. v. Chevron Overseas (Congo) Ltd.*, 475 F.3d 1080, 1091 (9th Cir. 2007). The FSIA defines a "commercial activity" as "either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C.A. § 1603(d). "[B]ecause the [Foreign Sovereign Immunity] Act provides that the commercial character of an act is to be determined by reference to its 'nature' rather than its 'purpose,' the question is not whether the foreign government is acting

³²Section 1610(c) details the procedural requirements for an attachment under § 1610(a) or (b), requiring the Court to first determine that "a reasonable period of time has elapsed following the entry of judgment" and that any required notice is given. It is undisputed that these procedural requirements have been met. (See D.I. 4 Ex. 8) (D.C. Court finding reasonable time elapsed)

³³"[A] foreign sovereign's property is subject to execution under § 1610(a) only when the sovereign itself uses the property for a commercial activity." *Rubin v. Islamic Republic of Iran*, 830 F.3d 470, 479 (7th Cir. 2016); *see also Conn. Bank of Commerce v. Republic of Congo*, 309 F.3d 240, 256 n.5 (5th Cir. 2002) ("[W]hat matters under the statute is how the foreign state uses the property, not how private parties may have used the property in the past."). As PDVSA is the alter ego of Venezuela, it follows that PDVSA's use of the PDVH assets for commercial activity can be said to be the sovereign's use.

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with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives. Rather, the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the type of actions by which a private party engages in 'trade and traffic or commerce.'" *Weltover, Inc.*, 504 U.S. at 614 (internal citation omitted).³⁴ In general, if the sovereign state is using property in the same manner as a private citizen could, then it is being used for a commercial purpose. If, alternatively, the property is being used in a manner that only a sovereign state can use it, then it is not being used for a commercial purpose and cannot be attached. *See, e.g., id.* at 614-15 ("[A] foreign government's issuance of regulations limiting foreign currency exchange is a sovereign activity, because such authoritative control of commerce cannot be exercised by a private party; whereas a contract to buy army boots or even bullets is a 'commercial' activity, because private companies can similarly use sales contracts to acquire goods....").

In determining whether property is used for a commercial purpose, the Court must "make factual findings concerning how the property was used" and "reach legal conclusions concerning whether that particular use was 'for commercial purposes.'" *Af-Cap Inc. v. Republic of Congo*, 383 F.3d 361, 368 (5th Cir.), *decision clarified on reh'g*, 389 F.3d 503 (5th Cir. 2004). This requires "a more holistic approach," requiring the Court to "examine the totality of the circumstances surrounding the property." *Id.* at 369.

³⁴While PDVSA takes issue with Crystallex's reliance on *Weltover* due to its discussion of "commercial activity" arising in the context of jurisdictional immunity, not execution activity (*see* D.I. 26 at 39 n.14), courts have noted that "in defining 'commercial activity,' [the FSIA] does not provide any different definition for § 1605 versus § 1610. Courts have therefore applied decisions concerning immunity under § 1605 to construe the scope of 'commercial activity' under § 1610." *Aurelius Capital Partners, LP v. Republic of Argentina*, 2009 WL 755231, at *13 (S.D.N.Y. Mar. 12, 2009), *rev'd and vacated on other grounds*, 584 F.3d 120 (2d Cir. 2009).

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Crystallex contends that PDVSA – and therefore, Venezuela – uses the PDVH shares for commercial activity by "exercising its rights as a shareholder" and using the shares to name directors of PDVH and to approve contracts. (D.I. 52 at 3) Crystallex further contends that PDVSA uses the PDVH shares to conduct commercial business through PDVH's wholly-owned subsidiary, CITGO, a Delaware corporation. (*Id.* at 4) PDVSA responds that "Crystallex cannot demonstrate that PDVSA uses the PDVH shares for a commercial activity in the United States" (D.I. 26 at 39) and has "presented no evidence concerning PDVSA's use of the PDVH shares" (D.I. 51 at 4).

The Court finds by a preponderance of the evidence that the PDVH shares are being "used for a commercial purpose" by PDVSA and, therefore, may be attached (and executed on) as property of Venezuela's alter ego.³⁵ The PDVH shares are used for a commercial purpose because, through them, PDVSA manages its ownership of PDVH and, consequently, CITGO,³⁶ in the United States. *See In re 650 Fifth Ave.*, 2014 WL 1516328, at *17 (S.D.N.Y. Apr. 18, 2014), *vacated on other grounds and remanded sub nom. Kirschenbaum v. 650 Fifth Ave.* & *Related Props.*, 830 F.3d 107 (2d Cir. 2016) (stating shares in company "were also used for commercial activity, because they were the mechanism through which the partners owned the Building and determined the distribution of revenue that it produced").

³⁵PDVSA insists that Crystallex has not met its burden to overcome the presumption of immunity from attachment by clear and convincing evidence. (D.I. 51 at 4) For reasons already explained in connection with exceptions to jurisdictional immunity, the Court agrees with Crystallex that its burden of proof is a preponderance of the evidence, and not clear and convincing evidence.

³⁶As PDVSA acknowledges: "PDVSA owns 100% of the shares of PDVH, a Delaware corporation, which in turn owns 100% of the shares of CITGO Holding, Inc., which in turn owns 100% of the shares of CITGO Petroleum Corp. ("CITGO"), a multi-billion dollar Delaware corporation headquartered in Texas and founded in 1910." (D.I. 26 at 9)

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Specifically, Venezuela - through PDVSA - uses the shares to appoint directors, approve contracts, and pledge assets as security for PDVSA's debt. (See, e.g., D.I. 42 Ex. 110 (news article announcing Venezuelan President Nicolás Maduro appointed Asdrúbal Chávez as new president of Citgo); D.I. 52 Ex. B at 14 (PDVSA's "main operating segments" use shares to conduct "[r]efining, trade and supply activities in the United States of America compris[ing] the administration of refineries and gasoline and refined products marketing . . . under the CITGO® brand"); D.I. 52 Ex. A at 20 (PDVH may pledge assets, including its CITGO shares, as security for PDVSA's debt)) As Crystallex states, "it is difficult to imagine property with more of a commercial use than shares of a Delaware for-profit corporation that itself owns, through an intermediate holding company, a multi-billion dollar Delaware petroleum corporation." (D.I. 33 at 18; see also H.R. Rep. No. 94-1487, at 16, 1976 U.S.C.C.A.N. 6604, at 6615 (1976) ("Activities such as a foreign government's . . . investment in a security of an American corporation . . . would be among those included within the definition of ['commercial activity']."). In sum, Venezuela is using the shares of PDVH "not as a regulator of a market, but in the manner of a private player within it," rendering its actions "commercial' within the meaning of the FSIA." Weltover, 504 U.S. at 614.

3. Can the PDVH Shares Be Used Now For Commercial Activity?

The property subject to attachment – here the PDVH shares – must also be "used for a commercial activity' at the time the writ of attachment or execution is issued." *Aurelius Capital Partners, LP v. Republic of Argentina,* 584 F.3d 120, 130 (2d Cir. 2009). It is not sufficient that a foreign state's property in the United States "will be used" or "could potentially be used" for a commercial activity in the United States. *Id.*; *see also City of Englewood v. Socialist People's*

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Libyan Arab Jamahiriya, 773 F.2d 31, 36, 37 (3d Cir. 1985) ("The determinative issue is whether [the property] is currently being used in a 'regular course of commercial conduct' [and not whether] the property was acquired by [the foreign state] in a commercial transaction.").

PDVSA contends the PDVH shares are "effectively frozen" and cannot be used for a commercial activity (D.I. 51 at 4) because Executive Order 13808, entitled "Imposing Additional Sanctions With Respect to the Situation in Venezuela," 82 Fed. Reg. 41,155 (Aug. 29, 2017), precludes the issuance of dividends (D.I. 26 at 40; D.I. 54 at 3), while Executive Order 13835, "Prohibiting Certain Additional Transactions With Respect to Venezuela," 83 Fed. Reg. 24,001 (May 24, 2018), and related OFAC guidance, together prohibit attachment and execution of the PDVH shares (D.I. 63 at 2). (See Tr. at 34) (PDVSA arguing, "what the Executive Order says is you cannot purchase equity from Venezuela in the United States" and "[t]here can't be a buyer in the United States")

Crystallex responds that "selling these shares so that a judgment of a United States Court could be satisfied is not what these sanctions are trying to prevent." (Tr. at 76) According to Crystallex, "Executive Order [13808] does not change that PDVH is a commercial enterprise and that PDVSA's shares are used for commercial activity – the management of its commercial operations in the United States. . . . PDVSA retains the ability to use the shares to name directors and approve contracts submitted to shareholders for approval. . . . PDVSA can still pledge its PDVH shares to secure its own short term debt (a commercial use)." (D.I. 52 at 5) Moreover, Crystallex contends that the PDVH shares are equity securities, and OFAC has specifically allowed such dealings in equity, notwithstanding the Executive Order. (*Id.*) (quoting D.I. 34 Ex. 107)

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The Court agrees with Crystallex. Once a foreign state has used property in commerce, that property continues to satisfy the commercial use requirement unless that property becomes "cordoned off for use of the [foreign state] in its sovereign capacity." *Af-Cap*, 383 F.3d at 370. Thus, it is presumed that the use of the property for commercial activity is continuing, in the absence of evidence to the contrary. PDVSA has presented no evidence to the contrary, other than pointing to the Executive Orders, which, for reasons now to be explained, do not preclude the possibility that the PDVH shares are continuing to be "used for a commercial activity." 37

i, Executive Order 13808

Executive Order 13808 provides, in pertinent part:

Section 1. (a) All transactions related to, provision of financing for, and other dealings in the following by a Umited States person or within the United States are prohibited:

. . .

- (iv) dividend payments or other distributions of profits to the Government of Venezuela from any entity owned or controlled, directly or indirectly, by the Government of Venezuela.
- (b) The purchase, directly or indirectly, by a United States person or within the United States, of securities from the Government of Venezuela, . . . is prohibited.

82 Fed. Reg. 41,155 (Aug. 29, 2017); see also D.I. 26 at 40.

This Executive Order, directed to dividend payments and purchases of securities, has no impact on PDVSA's ability to carry on the commercial activities based on exercise of

³⁷Notably, both Executive Orders expressly define PDVSA as the "Government of Venezuela." (D.I. 34-1 Ex. 106 at 1-2; D.I. 63 at 2; *see also* Tr. at 71-72 (PDVSA counsel admitting as much)) While this statement does not constitute a finding of fact to which the Court must defer, it appears that the Executive Branch's view is consistent with the Court's conclusions.

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shareholder rights (e.g., replacing board members, pledging assets). Section 1(a)(iv) does not render the PDVH shares non-commercial property because it does not prohibit PDVSA from exercising all ownership rights. Section 1(b) also does not render the PDVH shares non-commercial property or otherwise pose a bar to the relief Crystallex seeks. Upon attachment, the PDVH shares would not be paid or distributed to Venezuela but, eventually, to Crystallex. In fact, as Crystallex states, "PDVSA can *and does* continue to engage in a wide array of commercial uses of the shares, such as: naming directors and officers, including, for example, the president of PDVH's indirect subsidiary, CITGO Petroleum, months after sanctions were imposed; running large-scale gas refining and marketing operations in the United States; and directing PDVH (and its subsidiaries) to enter into related-party transactions for PDVSA's benefit, including the sale of PDVSA's (low quality) oil to CITGO Petroleum." (D.I. 53 at 3) (citing evidence)

Moreover, the PDVH shares are equity securities and the OFAC has instructed that "[e]ngaging in transactions related to, providing financing for, or otherwise dealing in any equity issued by, on behalf of, or for the Government of Venezuela is permissible, if the equity was issued prior to the effective date of [the Executive Order]." (D.I. 34-1 Ex. 107 at 2; see also id. ("The term equity includes stocks, share issuances, depositary receipts, or any other evidence of title or ownership.")) The shares of PDVH that Crystallex seeks to attach were issued before the Executive Order was adopted. The Court, thus, concludes that Executive Order 13808 does not pose a bar to the relief it has granted today.³⁸ The Court further notes that nothing about its

³⁸It may be that this Executive Order will have some applicability to any transaction Crystallex might seek to undertake with the PDVH shares once they are attached, but it does not, in the Court's view, prevent the attachment.

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ruling today is inconsistent with the letter or spirit of the Executive Order, which seems intended to deprive Venezuela of certain assets and opportunities, not to prevent legitimate judgment creditors in United States Courts to be made whole by Venezuela. (*See* Tr. at 25) (Crystallex stating, "the idea is that this was, put bluntly, to punish Venezuela, not to punish people who were owed money by Venezuela")

ii. Executive Order 13835

PDVSA contends that Executive Order 13835 and OFAC Frequently Asked Question ("FAQ") No. 596, issued July 19, 2018, "confirm PDVSA's argument that U.S. sanctions prohibit the attachment and execution of the shares of its wholly-owned Delaware subsidiary, PDVH." (D.I. 63 at 2; *see also* Aug. Tr. at 24 (PDVSA characterizing FAQ No. 596 as "most on point" of FAQs parties have discussed))

Executive Order 13835 states, in part:

Section 1. (a) All transactions related to, provision of financing for, and other dealings in the following by a United States person or within the United States are prohibited:

. . . .

(iii) the sale, transfer, assignment, or pledging as collateral by the Government of Venezuela of any equity interest in any entity in which the Government of Venezuela has a 50 percent or greater ownership interest.

83 Fed. Reg. 24001 (May 21, 2018); see also D.I. 63 at 1-2.

FAQ 596 provides:

596. Does E.O. 13835 prohibit me from attaching and executing against assets of the Government of Venezuela, including vessels, properties, or financial assets, if I have a

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legal judgment against the Government of Venezuela?

No, provided that the attachment does not involve (i) debt owed to the Government of Venezuela (including accounts receivable) that was pledged as collateral after the effective date of E.O. 13835 (per subsection 1(a)(ii) of the E.O.), or (ii) an equity interest in any entity in which the Government of Venezuela has a 50 percent or greater ownership interest (per subsection 1(a)(iii) of the E.O.). OFAC authorization would likely be required for attachment of equity interest in any entity in which the Government of Venezuela has a 50 percent or greater ownership interest. OFAC would consider license applications seeking to attach and execute against such equity interests on a case-by-case basis.

OFAC FAQs: Other Sanctions Programs, Venezuela Sanctions. 39

On the same day OFAC issued FAQ 596, it also issued FAQ 595, which states:

595. Why is OFAC issuing General License 5?

Subsection 1(a)(iii) of E.O. 13835 prohibits U.S. persons from being involved in the transfer by the Government of Venezuela (GOV) of any equity interest in any entity owned 50 percent or more by the GOV, as well as related transactions in the United States. Subsequent to the issuance of E.O. 13835, OFAC received inquiries about how and whether subsection 1(a)(iii) of E.O. 13835 could affect the ability to enforce bondholder rights to the CITGO shares serving as collateral for the PdVSA 2020 8.5 percent bond. Subsection 1(a)(iii) of E.O. 13835 hinders the Maduro regime's ability to dispose of interests in entities owned 50 percent or more by the GOV at terms unfavorable to the Venezuelan people. Authorizing bondholders to enforce rights related to the PdVSA 2020 8.5 percent bond prevents the Maduro regime from using the EO to default on its bond obligations without consequence. In order to provide that authorization, OFAC is issuing General License 5, which removes E.O. 13835 as an obstacle to holders of the PdVSA 2020 8.5 percent bond gaining access to their collateral, and keeps sanctions pressure where it belongs - on the Maduro regime.

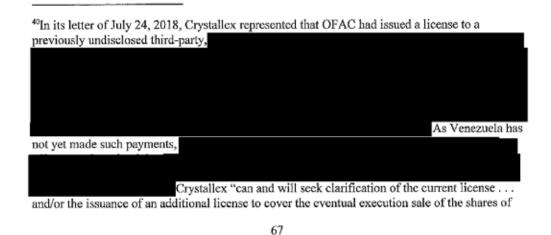
Id.

³⁹See https://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_other.aspx#venezuela.

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According to Crystallex, FAQ 596 specifically allows attachment and execution of Venezuelan assets and while FAQ 595 "addresses a specific class of creditors, the same reasoning applies to other creditors such as Crystallex." (D.I. 64 at 2) Crystallex further contends that while, in response to FAQ 596, "OFAC did advise – in a non-binding FAQ response — that a license would likely be needed before attachment and execution could be completed, . . . that has no impact on the question of whether this Court can or should authorize the relief sought by the Writ Motion in the first instance." (Id.)

The Court agrees with Crystallex. Notwithstanding PDVSA's assertion, it is not correct that "OFAC's published views confirm PDVSA's argument that the U.S. sanctions prohibit the attachment and execution of the shares of its wholly-owned Delaware subsidiary, PDVH." (D.I. 63 at 2) (emphasis added) Instead, the OFAC guidance confirms that attaching the PDVH shares "would likely . . . require[]" OFAC authorization, and that, if such authorization were sought, OFAC would evaluate it "on a case-by-case basis." OFAC FAQs: Other Sanctions Programs, Venezuela Sanctions. Accordingly, the Court concludes that Executive Order 13835 does not pose a bar to granting the relief it has granted today. 40



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D. Additional Issues Raised by PDVSA

Although most of PDVSA's arguments against granting Crystallex's requested writ have been addressed in the course of resolving the many issues discussed to this point in this Opinion, several additional contentions merit brief discussion. None, however, alters the outcome.

1. Prejudgment Attachment

PDVSA warns that granting the relief sought by Crystallex will amount to a prejudgment attachment, which is precluded by § 1610(d). (See, e.g., D.I. 71 at 3 ("[T]his Court cannot attach or otherwise restrain PDVSA's shares of PDVH unless and until it enters judgment against PDVSA..."); Tr. at 64) The Court rejects this view and instead agrees with Crystallex that it has a judgment: the confirmed and registered arbitration judgment against Venezuela. (See, e.g., Tr. at 78; Aug. Tr. at 30 ("It's not that we cleverly labeled this as a Rule 69 motion. It is that we cleverly already won our case against the Government of Venezuela and we don't have to file it again and again in every court in the land.")) Crystallex is not seeking to add PDVSA to that judgment. Provided that, as the Court has found, any sovereign immunity that would otherwise protect PDVSA and its specified property has been overcome — by the judgment against Venezuela, the finding that PDVSA is Venezuela's alter ego, and the findings with respect to the "commercial" use of the PDVH shares — then the FSIA is no bar to the relief sought by Crystallex. In this context, it is simply incorrect to call what the Court is doing an improper

PDVH once the Writ has issued." (Id. at 3) The Court agrees with PDVSA that

But these facts do not alter the Court's rulings.

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prejudgment attachment on PDVSA's property.41

2. PDVSA's Non-Involvement with Expropriation of Crystallex's Property

Throughout this litigation, PDVSA has emphasized the lack of allegations and evidence that PDVSA had anything to do with "the facts and circumstances that gave rise to [Crystallex's] claim for expropriation. It is a stranger to the entire dispute." (Tr. at 39; *see also* D.I. 51 at 3 ("[I]t is undisputed that PDVSA was a complete stranger to that transaction.")) PDVSA is correct. The only connection Crystallex even alleges between PDVSA and the harm Crystallex has suffered is that, ultimately, Crystallex's expropriated property was given to PDVSA, which then converted part of it into "billions of dollars." (Aug. Tr. at 40; *see also* Tr. at 73 ("[B]asically we had a contract to develop this mine. [Venezuela] took that contract away from us and they gave the mine without the license to PDVSA which went around and sold . . . 40 percent of it for \$2.4 billion."); *see also* D.I. 5-1 Exs. 78-82 (showing PDVSA ended up with rights to gold mines))⁴²

⁴¹Some of the weight PDVSA's contention might otherwise carry is countered by the Court's finding, as a factual matter based on the present record, that PDVSA is accurately treated as Venezuela's alter ego. Were the Court merely to have resolved PDVSA's facial challenge, and assessed only the sufficiency of Crystallex's allegations as opposed to having also weighed the evidence, the argument that Crystallex is proceeding "prejudgment" would have had more appeal (though nonetheless still lack merit). (*See, e.g.*, D.I. 54 at 2) (PDVSA arguing: "an attachment of a putative alter ego's property *in advance of an adjudication of whether the entity is an alter ego* is effectively a prejudgment attachment and would only pass constitutional muster where the judgment creditor posts a bond") (emphasis added)

⁴²It is also undisputed that PDVSA was not a party to the arbitration and its name is not mentioned in the arbitration award. (*See* D.I. 51 at 2-3) Although PDVSA has frequently emphasized this fact, too, it does not impact the pending motions, given the Court's conclusions of law and findings of fact as explained throughout this Opinion. Essentially, it is just another way of arguing that an independent basis of subject matter jurisdiction is required in order to impose primary liability on PDVSA for the arbitration judgment against Venezuela. (*See, e.g.*,

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But these facts do not undermine the Court's conclusions. *Bancec* does not require that the alter ego, whose property is being attached and executed, have been involved in the underlying conduct that harmed the judgment creditor. (*See* Tr. at 85-86) (Crystallex noting, "there was not remotely any claim that *Bancec* had been involved at all in the expropriation of the Citibank assets") To the contrary, *Bancec* shows that alter ego status is not limited to "state conduct in which the instrumentality had a key role," as there the Cuban bank – which Citibank sought to hold liable for Cuba's seizure of Citibank's assets – played no role whatsoever in Cuba's seizure of those assets. *See Bancec*, 462 U.S. at 619; *see also Kensington*, 2007 WL 1032269, at *14-16 (finding state oil company liable for nation's default even though company was not involved in underlying loan).⁴³

Although, as already noted, there is "no mechanical formula" for assessing whether the extensive control prong of *Bancec* has been satisfied, the factors that have been developed by courts applying *Bancec* have *not* included a requirement that the purportedly "separate" entity has been involved in the conduct that harmed the creditor. To the contrary, as reiterated earlier this year by the Supreme Court:

Over time, the Courts of Appeals coalesced around the following five factors (referred to as the *Bancec* factors) to aid in this analysis:

Tr. at 48) (PDVSA suggesting Court needs to ask itself "was PDVSA, as the agency or instrumentality, involved in the underlying arbitration to the extent that I, this Court, can say that it should be liable on the award") These are contentions the Court has thoroughly considered – and rejected – elsewhere in its analysis.

⁴³Notably, when the case was before the Court of Appeals, the Second Circuit did hold that instrumentality involvement in the underlying conduct was required. *See Banco Para El Comercio Exterior de Cuba v. First Nat'l City Bank*, 658 F.2d 913, 919-20 (2d Cir. 1981). The Supreme Court's contrary holding shows that it disagreed. (*See* Aug. Tr. at 39-40)

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- (1) the level of economic control by the government;
- (2) whether the entity's profits go to the government;
- (3) the degree to which government officials manage the entity or otherwise have a hand in its daily affairs;
- (4) whether the government is the real beneficiary of the entity's conduct; and
- (5) whether adherence to separate identities would entitle the foreign state to benefits in United States courts while avoiding its obligations.

Rubin, 138 S.Ct. at 822-23 (internal quotation marks omitted).⁴⁴ None of these commonly-considered factors⁴⁵ suggests that rebutting the presumption of separateness requires that both entities have been involved in the underlying conduct.⁴⁶

3. Judicial Estoppel

PDVSA has directed the Court's attention to a separate action Crystallex commenced against PDVSA in the Hague. (See D.I. 26 at 21-22) Some of the claims being pressed by Crystallex in the Hague evidently were premised on PDVSA's separateness from the Republic. (See id.) PDVSA concludes that "Crystallex should be precluded from pursuing such fundamentally inconsistent positions in different fora." (Id. at 22; see also Tr. at 69-70)

⁴⁴Notably, *Rubin* also reiterated the disjunctive nature of the *Bancec* analysis. *See* 138 S.Ct. at 822 (noting "liability would be warranted, for example," where extensive control "or" where fraud or injustice prong is satisfied).

⁴⁵The commonly-considered factors as described in *Rubin* are consistent with those the Court has considered in its analysis of PDVSA's facial and factual challenges, although they are stated somewhat differently than the Second Circuit stated them in *EM Ltd. II*.

⁴⁶The dicta in *BRIDAS*, 477 F.3d at 414-15, on which PDVSA relies (*see* D.I. 26 at 18-19, 24) cannot establish the contrary proposition.

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The Court disagrees. As an initial matter, it is not clear what law governs the Hague proceedings, and the parties have not provided the Court with evidence of (for example) Dutch law on conspiracy. Therefore, the Court does not have a clear understanding of the basis on which the Hague Court dismissed certain of Crystallex's claims. Moreover, Crystallex explains that it was initially pressing multiple theories in the Hague: some of them premised on PDVSA and Venezuela being separate entities, some premised on a different view. (See Tr. at 26-28) The Court has no basis to conclude that maintaining alternative theories, particularly at the outset of a case, is improper in the Hague Court. More importantly, doing so is expressly permitted under the Federal Rules of Civil Procedure. See Rule 8. As those rules govern this Court's procedures, it is plain that Crystallex is not judicially estopped from advocating inconsistent theories in this very Court (something it is not even accused of doing). It follows that it is also not (at this point) judicially estopped from taking inconsistent positions in different courts. Finally, as Crystallex observes, estoppel of the type PDVSA urges on the Court does not apply at least until a party is successful in persuading a tribunal of one position and then seeks to persuade another tribunal of a contradictory position. (See Tr. at 80) (citing New Hampshire v. Maine, 532 U.S. 742 (2001)) Crystallex has not prevailed on its position in the Hague. (See id.)

4. Overbreadth of Crystallex's position

PDVSA also highlights what it portrays as the vast breadth of Crystallex's position: if Crystallex is correct that PDVSA is the alter ego of Venezuela, then both entities are potentially liable for all of each other's liabilities, even where (as PDVSA contends is true here) one entity had absolutely nothing to do with the facts giving rise to the liability imposed on the other. (*See generally* Tr. at 86-87) (Crystallex responding to PDVSA's charge) The Court does not agree

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that this is the necessary outcome of granting the requested writ. The writ is directed (as it must be) to specifically-identified property, here the shares of PDVH. Were Crystallex (or any other judgment creditor of Venezuela) to wish to attach other property belonging to PDVSA, it would have to prove, by a preponderance of the evidence, that the sovereign immunity otherwise applicable to that property has been overcome—just as Crystallex has done here. That will not always be possible; for instance, the property might not be currently "used for a commercial activity," as required by § 1610(a)(6). This is an important distinction between adding PDVSA to Crystallex's judgment against Venezuela—which would allow Crystallex to attach any of PDVSA's property to satisfy the judgment, without additional proceedings, if, for example, the proceeds from the sale of the shares it is attaching are less than the full amount of its judgment—and only attaching specific property, which is the result being permitted here.

Additionally, the record which has persuaded this Court that PDVSA and Venezuela should be treated as alter egos of one another may not be the same record that is created in some other action. Indeed, even in this case, the record may be supplemented in the next stage of the proceedings (as is further described below), which could potentially lead to different findings. Other factfinders might deem the record before them to justify different findings. Further, the state law and procedures applicable in any other District may well vary from those being applied here, perhaps in material ways. (*See generally* Aug. Tr. at 36) And the collateral estoppel effect of any ruling from this Court will be a matter to be decided by whatever other court is confronted with these issues at a later time. (*See id.*)

Finally, even if PDVSA is right about the implications of the Court's holding today (and

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Crystallex insists it is not⁴⁷), the Court cannot be deterred from reaching the right conclusion, based on the facts before it and the applicable law, just because it fears the impact of its rulings.

E. Next Steps

By its decision today, the Court is holding that it will, after conferring further with the parties about additional details, direct the Clerk of Court to issue to Crystallex a writ, which Crystallex will then have the opportunity to serve and attach to PDVSA's property in Delaware, i.e., its shares in PDVH. Some aspects of the parties' dispute, however, remain unsettled. These include: (i) how quickly should the Court direct the writ to be issued, how quickly should Crystallex be directed to serve it, and how quickly must Crystallex execute on it; (ii) what is the appropriate commercially reasonable procedure by which to effectuate the sale of the PDVH shares, in order to maximize the likelihood of a fair and reasonable recovery, and how involved (if at all) does the Court need to be in that sale process; ⁴⁸ (iii) does Crystallex, or alternatively a purchaser of the PDVH shares, wish to (or need to) seek a license from OFAC to permit the sale and, if so, when will it do so; and (iv) will Venezuela, PDVSA, and/or any other entity appear and seek to supplement the factual record already developed in this litigation and, if so, will such an entity attempt to (and, if so, be permitted to) argue that additional evidence materially alters the Court's findings, and thereby seek to quash the writ? See generally Hibou, Inc. v. Ramsing, 324 A.2d 777, 783 (Del. Super. Ct. 1974) ("[O]n a motion to quash the order the Court as

⁴⁷See, e.g., Tr. at 16 ("They're not being added to the . . . judgment, they're just simply being told that the property they have needs to be turned over to satisfy the underlying judgment.").

⁴⁸The parties appear to agree that Delaware law requires execution of shares of a Delaware corporation to be completed through a "public sale." (*See D.I.* 71 at 8 (citing 8 Del. C. § 324); *see also* Aug. Tr. at 9, 20-21)

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required by 10 Del. C. § 3506 must look at the Prima facie case presented to ascertain whether the plaintiff has 'a good cause of action' against all the defendants whose property has been attached."); D.I. 3-1 at 2 (Crystallex noting, "if any party has a claim to the shares at issue, that party can raise the issue with the Court after the writ is served"); Tr. at 21, 23 (Crystallex recognizing PDVSA, as well as perhaps PDVH and Venezuela, may have right to "come back in and challenge the writ"); D.I. 70 at 2 n.4 (Crystallex noting, "PDVSA may, of course, seek to challenge the writ on non-jurisdictional grounds by a motion to quash brought after the writ has issued and before the Court allows the execution process to commence").

In a separate Order being issued today, the Court will direct the parties to provide their views as to the timing and nature of the next steps in this proceeding.

CONCLUSION

As PDVSA's counsel succinctly and correctly stated:

PDVSA is a presumptively separate sovereign instrumentality that is entitled to come to this court, invoke its own sovereign immunity, and is presumptively immune from the court['s] subject matter jurisdiction, presumptively separate from Venezuela, and its property is presumptively immune from attachment and execution.

(Aug. Tr. at 17) However, for reasons the Court has endeavored to explain, at length, throughout this Opinion, Crystallex has met its burden to rebut each of these presumptions. Therefore, the Court will grant Crystallex's motion for an order authorizing the issuance of a writ of attachment *fieri facias* (D.I. 2) and deny PDVSA's cross-motion to dismiss (D.I. 25). An appropriate Order follows.

FTI Consulting, Inc. v. Merit Management Group, LP, 830 F.3d 690 (2016)

75 Collier Bankr.Cas.2d 1855, 62 Bankr.Ct.Dec. 250, Bankr. L. Rep. P 82,972

KeyCite Yellow Flag - Negative Treatment
Affirmed and Remanded by Merit Management Group, LP v. FTI
Consulting, Inc., U.S., February 27, 2018

830 F.3d 690 United States Court of Appeals, Seventh Circuit.

FTI CONSULTING, INC., Plaintiff-Appellant,

MERIT MANAGEMENT
GROUP, LP, Defendant-Appellee.

No. 15-3388 | Argued March 30, 2016 | Decided July 28, 2016 |

Rehearing En Banc Denied Aug. 30, 2016.

Synopsis

Background: Trustee of litigation trust created pursuant to confirmed Chapter 11 plan of debtor, an entity that sought to develop a "racino" in Pennsylvania, brought adversary proceeding, seeking to avoid debtor's allegedly fraudulent transfers of \$16,503,850 to transferee, the partial owner of debtor's competitor, as part of debtor's purchase of competitor's stock. The United States District Court for the Northern District of Illinois, Joan B. Gottschall, J., 541 B.R. 850, granted motion for judgment on the pleadings in transferee's favor. Trustee appealed.

[Holding:] The Court of Appeals, Wood, Chief Judge, held that as matter of first impression, safe harbor provision in Bankruptcy Code, prohibiting bankruptcy trustees from avoiding transfers that were margin or settlement payments made by or to financial institutions, did not protect debtor's transfer conducted through financial institution that acted as the conduit.

Reversed and remanded.

West Headnotes (6)

[1] Bankruptcy

- Conclusions of law; de novo review

The Court of Appeals reviews a district court's judgment on the pleadings de novo. Fed. R. Civ. P. 12(c).

Cases that cite this headnote

[2] Bankruptcy

Presentation of grounds for review

Trustee of litigation trust created pursuant to confirmed Chapter 11 plan of debtor did not waive its right to argue on appeal that safe harbor provision in Bankruptcy Code, prohibiting bankruptcy trustees from avoiding transfers that were margin or settlement payments made by financial institutions, was ambiguous, where trustee urged district court to consider purpose and context of Code provision. 11 U.S.C.A § 546(e).

Cases that cite this headnote

[3] Bankruptcy

Avoidance rights and limits thereon, in general

Safe harbor provision in Bankruptcy Code, prohibiting bankruptcy trustees from avoiding transfers that were margin or settlement payments made by or to financial institutions, did not protect Chapter 11 debtor's prepetition transfer that was conducted through financial institution as part of debtor's purchase of competitor's stock, where financial institution was neither the debtor nor the transferee, but acted only as the conduit. 11 U.S.C.A. § 546(e).

3 Cases that cite this headnote

[4] Bankruptcy

Avoidance rights and limits thereon, in general

FTI Consulting, Inc. v. Merit Management Group, LP, 830 F.3d 690 (2016)

75 Collier Bankr.Cas.2d 1855, 62 Bankr.Ct.Dec. 250, Bankr. L. Rep. P 82,972

Transfers "made by or to or for the benefit of" in the context of safe harbor provision in Bankruptcy Code, prohibiting bankruptcy trustees from avoiding transfers that are margin payments or settlement payments made by or to financial institutions, refers to transfers made to "transferees" which are entities with dominion over the money or the right to put the money to one's own purposes. 11 U.S.C.A § 546(e).

3 Cases that cite this headnote

[5] Bankruptcy

Avoidance rights and limits thereon, in general

The safe harbor's purpose in Bankruptcy Code provision, setting forth limitations on avoiding powers, is to protect the market from systemic risk and allow parties in the securities industry to enter into transactions with greater confidence, to prevent one large bankruptcy from rippling through the securities industry. 11 U.S.C.A § 546(e).

Cases that cite this headnote

[6] Bankruptcy

Avoidance rights and limits thereon, in general

Safe harbor provision in Bankruptcy Code, which prohibits bankruptcy trustees from avoiding transfers that are margin payments or settlement payments made by or to certain named entities, does not provide a safe harbor against avoidance of transfers between nonnamed entities where a named entity acts as a conduit. 11 U.S.C.A § 546(e).

Cases that cite this headnote

*691 Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 11 C 7670—Joan B. Gottschall, *Judge*.

Attorneys and Law Firms

Gregory S. Schwegmann, Reid Collins & Tsai LLP, Austin, TX, for Plaintiff-Appellant.

Jason J. DeJonker, James B. Sowka, Seyfarth Shaw LLP, Chicago, IL, for Defendant-Appellee.

Before Wood, Chief Judge, and Posner and Rovner, Circuit Judges.

Opinion

Wood, Chief Judge.

This case requires us to examine section 546(e) of the Bankruptcy Code, which provides a safe harbor protecting certain transfers from being undone by the bankruptcy trustee. (We considered a different aspect of that statute in Peterson v. Somers Dublin Ltd., 729 F.3d 741 (7th Cir. 2013), which focused on what counts as a settlement payment made in connection with a securities contract, questions that do not arise in our case.) The safe harbor prohibits the trustee from avoiding transfers that are "margin payment[s]" or "settlement payment[s]" "made by or to (or for the benefit of)" certain entities including commodity brokers, securities clearing agencies, and "financial institutions." 11 U.S.C. § 546(e). It also protects transfers "made by or to (or for the benefit of)" the same types of entities "in connection with a securities contract." Id.

Ultimately, we find it necessary to answer only one question: whether the section 546(e) safe harbor protects transfers that are simply conducted *through* financial institutions (or the other entities named in section 546(e)), where the entity is neither the debtor nor the transferee but only the conduit. We hold that it does not, and accordingly we reverse the judgment of the district court.

I

This question has arisen in the bankruptcy proceeding of Valley View Downs, LP, owner of a Pennsylvania racetrack. In 2003, Valley View Downs was in competition with another racetrack, Bedford Downs, for the last harness-racing license in the state. Both racetracks wanted to operate "racinos"—combination horse track and casinos—and both needed the license to do so. Rather

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than fight over one license, Valley View and Bedford agreed to combine and conquer: Valley View would acquire all Bedford shares in exchange for \$55 million. The exchange of the \$55 million for the shares was to take place through Citizens Bank of Pennsylvania, the escrow agent. Valley View borrowed money from Credit Suisse and some other lenders to pay for the shares. After the transfer, Valley View obtained the harness-racing license, but it failed to secure *692 the needed gambling license. This led it to file for Chapter 11 bankruptcy.

FTI Consulting, Inc., as Trustee of the *In re Centaur, LLC et al.* Litigation Trust, which includes Valley View Downs as one of the debtors, brought this suit against Merit Management Group ("Merit"), a 30% shareholder in Bedford Downs. FTI alleges that Bedford's transfer to Valley View and thence to Merit of approximately \$16.5 million (30% of the \$55 million), is avoidable under Bankruptcy Code sections 544, 548(a)(1)(b), and 550, and the money is properly part of Valley View's bankruptcy estate and thus the Litigation Trust.

There is no question that the transfer at issue is either a "settlement payment" or a payment made "in connection with a securities contract." Merit maintained that the transfer was "made by or to (or for the benefit of)" an entity named in section 546(e) and therefore protected under the safe harbor. It did not rely on its own status for this argument, because it is undisputed that neither Valley View nor Merit is a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency (the entities named in section 546(e)). Instead, Merit argued eligibility for the safe harbor based on the minor involvement of Citizens Bank and Credit Suisse. The district court agreed with Merit, finding that the transfers were "made by or to" a financial institution because the funds passed through Citizens Bank and Credit Suisse. It granted judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c) in Merit's favor, thereby preventing FTI from avoiding the transfer and recovering the \$16.5 million. FTI appeals.

П

[1] We review the district court's Rule 12(c) judgment on the pleadings de novo. Buchanan-Moore v. Cnty. of

Milwaukee, 570 F.3d 824, 827 (7th Cir. 2009). There are no contested facts.

Α

[2] In order to resolve this case, we must ascertain the meaning of section 546(e). We begin at the obvious place, with its text:

[T]he trustee may not avoid a transfer that is a margin payment ... or settlement payment ... made by or to (or the benefit of) a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency, or that is a transfer made by or to (or for the benefit of) a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency, in connection with a securities contract....

(Emphasis added.) It is impossible to say in the abstract what the italicized words, "by or to," mean here. As FTI points out, a postcard sent through the U.S. Postal Service could be said to have been sent "by" the Postal Service or "by" the sender who filled it out. When a person pays her bills using an electronic bank transfer, the funds could be said to be sent "by" the owner of the account or by the bank. Similarly, a transfer through a financial institution as intermediary could reasonably be interpreted as being "made by or to" the financial institution or "made by or to" the entity ultimately receiving the money. The plain language does not clarify whether, under the statute, the transfer of the \$16.5 million was made by Valley View to Merit; by Valley View to Citizens Bank; by Citizens Bank to Credit Suisse; or by Citizens Bank or Credit Suisse to Merit. These multiple plausible interpretations require us to search beyond the statute's plain language. (We reject Merit's argument that FTI has waived the right to argue *693 that the statute is ambiguous; it urged the district court to consider the purpose and context of the statute, which implicitly indicates that the meaning is not immediately clear.)

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The phrase "for the benefit of," which was added to the safe harbor in a 2006 amendment, is also ambiguous. It could refer to a transaction made *on behalf of* another entity, or it could mean a transaction made merely *involving* an entity receiving an actual financial or beneficial interest. The latter reading suggests that transactions between parties other than the named entities receiving a financial interest (but related to those entities) are also included in the safe harbor—otherwise the additional parenthetical would be redundant. If the former interpretation is used, FTI's argument that the whole phrase refers only to named entities receiving a financial interest—whether or not that entity received the actual transfer of property—is plausible.

The language of the statute, standing alone, does not point us in one direction or the other. In particular, it is unclear whether the safe harbor was meant to include intermediaries, or if it is limited to what we might think of as the real parties in interest-here, the first and the final party possessing the thing transferred. We therefore turn to the statute's purpose and context for further guidance. See Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000) (courts must interpret a "statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into an harmonious whole") (internal quotation marks and citations omitted); Davis v. Michigan Dep't of Treasury, 489 U.S. 803, 809, 109 S.Ct. 1500, 103 L.Ed.2d 891 (1989) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.").

В

1

Section 546(e) appears in Subchapter III of Chapter 5 of the Bankruptcy Code, which deals with what property is included within the estate. While section 546 covers limitations on a trustee's avoidance powers, other sections —in particular sections 544, 547, and 548—set out types of transfers that a bankruptcy trustee can avoid. Section 550 describes how to recover the funds from transfers that are avoidable. The trustee's avoidance powers serve the broad purpose of ensuring the equitable distribution of a debtor's assets.

Section 544 gives the trustee the power to avoid transfers that would be voidable by a creditor extending credit to the debtor at the commencement of the case, if that creditor had a judicial lien or an unsatisfied execution against the debtor, or by a bona fide purchaser. 11 U.S.C. § 544(a). It allows the trustee to act as such a creditor or bona fide purchaser. *Id.* Section 547 allows the trustee to avoid any transfer of any interest of the debtor "to or for the benefit of a creditor," made within 90 days before the filing (or longer if the creditor was an insider) and the transfer was more than the creditor would otherwise have received. *Id.* § 547(b). Section 548(a) allows avoidance of transfers done with fraudulent intent and transfers that rendered a debtor insolvent.

[3] FTI argues that because these other Chapter 5 sections establish that only transfers "made by the debtor" prior to the bankruptcy petition are avoidable, transfers "made by" a named entity in section 546(e) ought also to refer to a transfer of property by the debtor. Additionally, FTI argues that because sections 544, 547, and 548 refer to avoidance of transfers to or for the benefit of entities subject to fraudulent-transfer liability, *694 section 546(e)'s safe harbor must refer only to transfers made to a named entity that is a creditor.

We agree with FTI. Chapter 5 creates both a system for avoiding transfers and a safe harbor from avoidance—logically these are two sides of the same coin. It makes sense to understand the safe harbor as applying to the transfers that are eligible for avoidance in the first place.

Merit responds that sections 544, 547, and 548 implicate obligations "incurred by" a debtor, as opposed to transfers "made by" a debtor, and therefore Chapter 5 read as a whole does not support the argument that only transfers made by a debtor that constitute obligations incurred by a debtor are within 546(e)'s safe harbor. We see it differently. If anything, the "incurred by" language in the other sections supports FTI's position. Because the safe harbor is meant to protect covered entities against avoidance where it might occur, the fact that sections 544, 547, and 548 permit avoidance only where the transfer represents an actual obligation means that 546(e) provides a safe harbor only where the debtor has incurred an actual obligation to the covered entity.

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Merit also argues that Chapter 5 allows avoidance of transfers other than those made directly by the debtor, because "indirect transfers made by third parties to a creditor on behalf of the debtor may also be avoidable." Warsco v. Preferred Technical Grp., 258 F.3d 557, 564 (7th Cir. 2001). Therefore, Merit concludes, FTI's "attempt to simplify section 548(a)(1) to avoidance only of 'transfers made by a debtor' is simply not supported." But Warsco is irrelevant to FTI's position, as it does not speak to avoiding transfers involving financial intermediaries. The \$16.5 million transfer to Merit was not a transfer made on behalf of a debtor by a third party; rather, it was one made by the debtor using a bank as a conduit.

2

Section 548(a)(1) allows a trustee to avoid transfers "of an interest of the debtor in property, or any obligation ... incurred by the debtor" within two years of bankruptcy if the debtor made the transfer with either (A) the "actual intent to hinder ... or defraud" an entity to which the debtor was indebted, or where (B) the debtor received less money for the transfer than its value, or was insolvent on the date of transfer or became insolvent because of the transfer, or made the transfer to benefit an insider. 11 U.S.C. § 548.

Section 548(c) exempts from avoidance a transferee or obligee that "takes for value and in good faith has a lien on or may retain any interest transferred or may enforce any obligation incurred ... to the extent that such transferee or obligee gave value to the debtor in exchange for such transfer or obligation." *Id.* § 548(c). Section 548(d)(2) adds that a commodity broker or financial institution or other protected entity that receives a margin or settlement payment "takes for value to the extent of such payment" within the meaning of subsection (c).

FTI points out that section 548(d)(2)'s protections apply only where the defendant in a fraudulent-transfer action is one of the types of entities listed in section 546(e). It reasons that Congress cannot have intended to give an entity not listed under section 548(d)(2)(B) a defense simply because it deposited its funds in a bank account. It is the receipt of the value that gives a fraudulent-transfer defendant the protections of section 548(d)(2)(B), and it should similarly be the receipt of value that gives an entity the safe-harbor protections of 546(e).

Merit responds that 548(c) creates a transferee-specific affirmative defense, unlike section 564(e), which addresses the transfer and not the transferee. But we *695 see no reason to differentiate between the two. Merit's preferred interpretation would be so broad as to render any transfer non-avoidable unless it were done in cold hard cash, and that conflicts with section 548(c)'s good faith exception.

3

FTI also finds support in the charitable-contribution safe harbor found in section 548(a)(2), as well as in section 555's safe harbor from enforcement of the Bankruptcy Code's automatic stay. Section 548(a)(2) shields charitable contributions made "by a natural person" "to a qualified" charity from avoidance by a trustee. FTI contends that the "by" and "to" language in section 548(a)(2) should be read consistently with section 546(e), because doing otherwise would lead to an absurd result: charitable contributions made via wire transfer, or perhaps even with an old-fashioned paper check, through a bank would be avoidable.

Section 555 allows the same entities as those named in section 546(e), where they are counterparties to a securities contract with the debtor, to enforce an *ipso facto* clause in a securities contract despite the Code's general prohibition on non-debtor counterparties enforcing those clauses. See *id.* §§ 555, 365(e), 362(a). FTI argues that we should read these sections consistently. Because section 555 focuses on the economic substance of the transaction, applying only where the named entity is a counterparty as opposed to a conduit or bank for a counterparty, section 546(e)'s safe harbor should apply in the same manner. We agree with FTI that it is the economic substance of the transaction that matters.

4

Section 550 describes how the trustee is to recover avoidable transfers. The trustee can recover the property or its value from the "initial transferee" or "any immediate or mediate transferee." *Id.* § 550. It protects good faith transferees who did not know of the voidability of the transfer, and "any immediate or mediate good faith transferee of such transferee." *Id.*

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Although Section 550 allows recovery from a "mediate" transferee, the question *how* money may be recovered is different from the question *from whom* money may be recovered. Although mediate transferees may be required to return funds to which they are not entitled under the Bankruptcy Code's avoidability provisions, mediate transferees are not eligible for the safe harbor because they lack a financial stake comparable to that of a debtor or a party to whom a debt is owed. Section 550 also contains a good-faith exception to protect unknowing mediate transferees, and so such transferees should not need the safe harbor.

[4] In Bonded Financial Services, Inc. v. European American Bank, we defined "transferee" as an entity with "dominion over the money" or "the right to put the money to one's own purposes." 838 F.2d 890, 893 (7th Cir. 1988). We found that a bank that "acted as a financial intermediary" and "received no benefit" was not a "transferee" within the meaning of Chapter 5 of the Bankruptcy Code. Id. Although we did not address the 546(e) safe harbor specifically, we now extend our reasoning in Bonded to find that transfers "made by or to (or for the benefit of)" in the context of 546(e) refer to transfers made to "transferees" as defined there. We reject Merit's argument that Bonded does not apply because, rather than providing a defense, section 546(e) renders a transfer unavoidable. We see no reason why the unavoidability provisions should be broader than defenses to recovery; if anything, the opposite should be true.

C

The history of section 546(e) also supports the position we take here, and illustrates *696 why our holding will not give rise to problems in the financial-services markets. Congress first enacted the safe harbor in response to a New York federal district court decision: Seligson v. New York Produce Exchange, 394 F.Supp. 125 (S.D.N.Y. 1975). In Seligson, the trustee of a commodity broker's bankruptcy estate sued the New York Produce Exchange and the New York Produce Exchange Clearing Association to recover payments the broker made to the Association in connection with cottonseed oil futures, which declined in value drastically. 394 F.Supp. at 126–27. The court denied summary judgment, finding a triable issue of fact on the questions whether the Association

was a "transferee" within the meaning of the Bankruptcy Code's avoidability provisions, and whether the Exchange could be held liable because of its relationship with the Association. *Id.* at 134, 136–37.

Congress responded in 1982 by creating the safe harbor, which enabled financial institutions that were recipients of transfers of the kind that took place in *Seligson* to invoke a safe harbor from avoidance. Pub. L. No. 97–222, § 4, 96 Stat. 235 (1982). Congress later expanded the safe harbor to other types of actors in the securities industry, including financial institutions. See Pub. L. No. 98–353, § 441, 98 Stat. 333 (1984). Nothing it did, however, indicated that the safe harbor applied to those institutions in their capacity as intermediaries. The safe harbor has ample work to do when an entity involved in the commodities trade is a debtor or actual recipient of a transfer, rather than simply a conduit for funds.

[5] Our interpretation is consistent with this understanding of the law. As we explained in *Grede v. FCStone, LLC*, the safe harbor's purpose is to "protect[] the market from systemic risk and allow[] parties in the securities industry to enter into transactions with greater confidence"—to prevent "one large bankruptcy from rippling through the securities industry." 746 F.3d 244, 252 (7th Cir. 2014). Congress's discussion of the 2005 amendments to the Code, passed as part of the Bankruptcy Abuse Prevention and Consumer Protection Act, reemphasized the safe harbor's purpose as reducing "systemic risk in the financial marketplace." H.R. Rep. 109-31(I), at 3, *reprinted in* 2005 U.S.C.C.A.N. 88, 89.

Although we have said that section 546(e) is to be understood broadly, see *Grede*, 746 F.3d at 246 ("[t]he code has a broad exception from avoidance or clawback ... for payments made to settle securities transactions"), that does not mean that there are no limits. While Valley View's settlement with Bedford resembled a leveraged buyout, and in that way touched on the securities market, neither Valley View nor Merit were "parties in the securities industry." They are simply corporations that wanted to exchange money for privately held stock.

We are not troubled by any potential ripple effect through the financial markets from returning the funds to FTI. The safe harbor addresses cases in which the debtortransferor or transferee is a financial institution or other named entity. See H.R. Rep. 97-420, at 1, reprinted in

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1982 U.S.C.C.A.N. 583 (discussing the extension of the 546(e) safe harbor to the securities market to avoid "the insolvency of one commodity or security firm spreading to other firms and possibl[y] threatening the collapse of the affected market"). Valley View's bankruptcy will not trigger bankruptcies of any commodity or securities firms. Even if Valley View's bankruptcy were to "spread" to Merit after avoidance of the transfer, there is no evidence that it would have any impact on Credit Suisse, Citizens Bank, or any other bank or entity named in section 546(e). Nor are we persuaded *697 that the repercussions of undoing a deal like this one outweigh the necessity of the Bankruptcy Code's protections for creditors. We will not interpret the safe harbor so expansively that it covers any transaction involving securities that uses a financial institution or other named entity as a conduit for funds.

D

We recognize that we are taking a different position from the one adopted by five of our sister circuits, which have interpreted section 546(e) to include the conduit situation. See In re Quebecor World (USA) Inc., 719 F.3d 94 (2d Cir. 2013) (finding safe harbor applicable where financial institution was trustee and actual exchange was between two private entities); Contemporary Indus. Corp. v. Frost, 564 F.3d 981, 987 (8th Cir. 2009) (finding § 546(e) not limited to public securities transactions, and exempting from avoidance Chapter 11 debtor's payments that were deposited in a national bank in exchange for shareholders' privately-held stock during leveraged buyout, as settlement payments made to financial institution); In re QSI Holdings, Inc., 571 F.3d 545, 551 (6th Cir. 2009) (finding HSBC's role in a leveraged buyout "sufficient to satisfy the requirement that the transfer was made to a financial institution" although it was only the exchange agent); In re Resorts Int'l, Inc., 181 F.3d 505, 516 (3d Cir. 1999) (noting that "the requirement that the 'commodity brokers, forward contract merchants, stockbrokers, financial institutions, and securities clearing agencies' obtain a 'beneficial interest' in the funds they handle ... is not explicit in section 546"); In re Kaiser Steel Corp., 952 F.2d 1230, 1240 (10th Cir. 1991) (rejecting Kaiser's argument that "even if the payments were settlement payments, § 546(e) does not

protect a settlement payment 'by' a stockbroker, financial institution, or clearing agency, unless that payment is to another participant in the clearance and settlement system and not to an equity security holder").

One circuit, however-the Eleventh-agrees with us. In Matter of Munford, Inc., the Eleventh Circuit found section 546(e) inapplicable to payments made by Munford to shareholders because financial institutions were involved only as conduits. 98 F.3d 604, 610 (11th Cir. 1996). Merit contends that Congress disapproved Munford by passing the 2006 Amendment adding "(or for the benefit of)," see H.R. Rep. 109-648, at 23, reprinted in 2006 U.S.C.C.A.N. 1585, 1593, and that Congress was responding to the Eleventh Circuit's language in Munford that "[t]he bank never acquired a beneficial interest in either the funds or the shares." 98 F.3d at 610. Merit would interpret the amendment as listing acquiring a beneficial interest as only one way of several to satisfy the requirements (the other way being making or receiving a transfer). The Second Circuit has agreed with this position. See Quebecor, 719 F.3d at 100 n. 3.

We do not believe that Congress would have jettisoned *Munford's* rule by such a subtle and circuitous route. Its addition of an alternate way to meet the safe harbor criteria says nothing about the method already in the statute. If Congress had wanted to say that acting as a conduit for a transaction between non-named entities is enough to qualify for the safe harbor, it would have been easy to do that. But it did not.

Ш

[6] Because we find that section 546(e) does not provide a safe harbor against avoidance of transfers between nonnamed entities where a named entity acts as a conduit, we REVERSE the judgment of the *698 district court and REMAND for proceedings consistent with this opinion.

All Citations

830 F.3d 690, 75 Collier Bankr.Cas.2d 1855, 62 Bankr.Ct.Dec. 250, Bankr. L. Rep. P 82,972

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In re Arcapita Bank B.S.C.(c), Slip Copy (2018)

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2018 WL 718399 United States Bankruptcy Court, S.D. New York.

IN RE ARCAPITA BANK B.S.C.

(C), et al., Reorganized Debtors. Official Committee of Unsecured Creditors of Arcapita Bank B.S.C.(c), et al., Plaintiff,

Bahrain Islamic Bank, Defendant. Official Committee of Unsecured Creditors of Arcapita Bank B.S.C.(c), et al., Plaintiff, v.

Tadhamon Capital B.S.C., Defendant.

Case No. 12–11076 (SHL)

|
Adv. No. 13–01434 (SHL), Adv. No. 13–01435 (SHL)

|
Signed February 5, 2018

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MODIFIED BENCH RULING ON DEFENDANTS' MOTIONS FOR RECONSIDERATION

SEAN H. LANE, UNITED STATES BANKRUPTCY JUDGE

*1 Before the Court is the motion of Defendants Bahrain Islamic Bank and Tadhamon Capital B.S.C. to reconsider the Court's memorandum decision issued on October 13, 2017 and the related orders entered on November 3, 2017. ¹ The memorandum decision and orders denied the Defendants' motions to dismiss their respective adversary proceedings, and held that (1) the facts of the case weighed

against this Court's abstention based on international comity, and (2) the presumption against extraterritoriality was inapplicable because the case did not involve an extraterritorial application of the statute in question.

This written decision memorializes the Court's bench ruling that was read into the record on January 16, 2018. Because of its origins as a bench ruling, this decision has a more conversational tone.

The Defendants offer two reasons for the requested relief. First, they argue that there has been an intervening change in controlling law. Second, they believe that this Court has overlooked controlling decisional authority when making its ruling. But for the reasons to be discussed, the Court denies the Defendants' motion.

The relief sought is under Rule 59 of the Federal Rules of Civil Procedure, which is made applicable to these adversary proceedings by Rule 9023 of the Federal Rules of Bankruptcy Procedure. The standard for granting a motion under Federal Rule 59(e) is "strict, and reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked." Analytical Surveys, Inc. v. Tonga Partners, L.P., 684 F.3d 36, 52 (2d Cir. 2012). "In other words, reconsideration is appropriate only where there is an intervening change of controlling law, newly available evidence, or the need to correct a clear error or prevent manifest injustice." Perez v. Progenics Pharmaceuticals, Inc., 46 F. Supp.3d 310, 314 (S.D.N.Y. 2014) (internal citations omitted). Such request for relief "is not a vehicle for relitigating old issues, presenting the case under new theories, securing a rehearing on the merits, or otherwise taking a 'second bite at the apple.' " Tonga Partners, 684 F.3d at 52 (internal citations omitted). Thus, reconsideration is "an extraordinary remedy to be employed sparingly in the interests of finality and conservation of scarce judicial resources." In re Health Management Sys. Inc. Sec. Litig., 113 F.Supp.2d 613, 614 (S.D.N.Y.2000) (internal citations omitted). The burden for such a motion rests with the movant. See In re Crozier Bros., Inc., 60 B.R. 683, 688 (Bankr. S.D.N.Y. 1986).

A. Intervening Change in Controlling Law

As to their first argument, the Defendants rely on a recent Second Circuit decision in *Bascunan v. Elsaca*, 874 F.3d 806 (2d Cir. 2017). Defendants contend that *Bascunan* represents an intervening change in law that requires this

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Court to modify its memorandum decision, which was issued before *Bascunan*.

In its memorandum decision, this Court found that the presumption against extraterritoriality was inapplicable because the case does not involve extraterritorial application of Section 547 of the Bankruptcy Code. This is because the conduct targeted by Section 547—the transfer of property—took place in the United States. Specifically, the transfers in question were made by the Debtor to the Defendant using New York correspondent bank accounts. See In re Arcapita Bank B.S.C.(C), 575 B.R. 229, 245 (Bankr. S.D.N.Y. 2017). The Defendants argue that under the holding in Bascunan, a defendant's momentary use of a U.S. correspondent bank account cannot transform a foreign transaction into a domestic one for purposes of extraterritoriality, and thus Bascunan necessitates a reversal of this Court's reliance on the use of the correspondent accounts.

*2 But the Bascunan case is quite different from the one before this Court. Bascunan interpreted the civil suit provision of the Racketeer Influenced and Corrupt Organizations Act ("RICO"). Civil RICO gives a private right of action to "[a]ny person injured in his business or property by reason of a violation of [RICO's substantive provisions, codified in Section 1962]." Bascunan, 874 F.3d at 809 (emphasis added). This "domestic injury" requirement was discussed extensively in Bascunan. The Defendants interpret this discussion in Bascunan as an independent requirement apart from its RICO origins, even appearing to suggest that it should be applied in every extraterritorial analysis regardless of the statute at issue. See Motion at 6 (characterizing the "domestic injury" requirement as "an extraterritoriality standard" set out in the RJR Nabisco case). But Defendants' position ignores that Bascunan specifically framed the question before it as "whether the plaintiffs have plausibly alleged 'a domestic injury' to their business or property within the meaning of Section 1964(c)...." Id. at 809 (emphasis added). Said another way, the court in Bascunan analyzed whether the plaintiffs had satisfied the requirements for a civil RICO claim. The court did so in light of the Supreme Court's recent ruling in RJR Nabisco v. European Community, 136 S. Ct. 2090 (2016), which held that RICO's civil suit provision did not apply extraterritorially. More specifically, the Supreme Court held that "Section 1964(c) requires a civil RICO plaintiff to allege and prove a domestic injury to business or property and does not allow recovery for foreign injuries." *Id.* at 2111 (emphasis in original). The Supreme Court stated that:

Section 1964(c) allows "[a]ny person injured in his business or property by reason of a violation of section 1962" to sue for treble damages, costs, and attorney's fees. Irrespective of any extraterritorial application of § 1962, we conclude that § 1964(c) does not overcome the presumption against extraterritoriality. A private RICO plaintiff therefore must allege and prove a domestic injury to its business or property.

Id. at 2106 (emphasis in original). Thus, it is clear that the domestic injury requirement is one embedded in the RICO statute—that is to say, it is the focus of that statute's concern. *Id.* at 2106.

Given the ruling in RJR Nabisco, the task before the Second Circuit in *Bascunan* was to determine whether the alleged injury under the civil RICO statute took place in the United States or overseas. *See Bascunan*, 874 F.3d at 809. Not surprisingly then, the Court in *Bascunan* engaged in an extensive discussion regarding what constitutes an injury under the civil RICO statute. *See id.* at 817–18. So while the Defendants assert that the Second Circuit "spoke broadly against using a defendant's mere use of the U.S. banking system as a basis for asserting the jurisdiction of U.S. courts over their transactions," Motion at 6, the passages of *Bascunan* that are cited by the Defendants all explicitly relate to where and how the alleged civil RICO "injury" in *Bascunan* took place. *See Bascunan*, 874 F.3d at 819.

In the Arcapita memorandum decision, by contrast, this Court was tasked with interpretation of Section 547 of the Bankruptcy Code, relating to avoidance of preferential transfers. The Court's inquiry was distinct from Bascunan because, as this Court stated in the memorandum decision, the "focus of the Bankruptcy Code's avoidance and recovery provisions is the initial transfer that depletes the property that would have become property of the estate." See In re Arcapita, 575 B.R. at 244 (quoting In re Ampal-American Israel Corp., 562 B.R. 601, 613 (Bankr. S.D.N.Y. 2017 (citing cases)). Similar to Bascunan, and as required by the Supreme Court decision in Morrison v. Nat'l Australia Bank Ltd., 561 U.S. 247 (2010), once the Court in the memorandum decision determined the focus of the statute, it then set about determining whether the activity that is the focus of the statute had taken place in the United States or overseas. The Court held that

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this case involved a permissible domestic application of the statute because the conduct in question—the transfers between Arcapita and the Defendants—took place in the United States. See id. at 245. This inquiry is distinct from an analysis of where the injury occurred; that later focus is a reflection of the civil RICO statute as interpreted by the Supreme Court and Second Circuit. Thus, the Second Circuit's analysis in Bascunan does not constitute an intervening change in law for purposes of this case.

*3 For similar reasons, the Court also rejects the Defendants' argument that *Bascunan* requires this Court to reverse its decision not to abstain from hearing this case on grounds of international comity. Indeed, the *Bascunan* case does not address international comity or jurisdictional abstention. Moreover, it deals with a completely distinct fact pattern and federal statute. It also does not involve a bankruptcy proceeding, a fact quite relevant to this Court's conclusion on international comity.

B. Overlooking Controlling Authority

As to its second argument, the Defendants assert that the Court has overlooked controlling authority of the Second Circuit relating to extraterritoriality. When examining whether the conduct in question took place in the United States or abroad, the Court's memorandum decision declined to follow the "component events" test of Maxwell Communication Corp. v. Societe Generale (In re Maxwell Communication Corp.), 186 B.R. 807 (S.D.N.Y. 1995). The Court noted that a similar analysis—the "conduct and effects" test-was abrogated by the later Supreme Court decision of Morrison v. Nat'l Australia Bank Ltd., 561 U.S. 247. Instead, this Court relied on the standard announced by the Supreme Court in Morrison that examines the "focus" of the statute, i.e., the "objects of the statute's solicitude" or "those transactions that the statute seeks to regulate." Id. at 267. The Defendants nonetheless argue that Second Circuit cases decided subsequent to Morrison require the Court to evaluate "all relevant conduct within a statute's focus" to determine whether the conduct was domestic or foreign, even suggesting that the Court must examine each element of Section 547 to determine if it took place in the United States. See Motion at 2.

But Defendant's second argument fares no better than the first. As an initial matter, the cases cited by the Defendants specify that the conduct to be examined for an extraterritoriality inquiry is the conduct that is the focus of the statutory provision or the object of the statute's solicitude, and that is the very test applied by this Court in the memorandum decision. See Microsoft Corp. v. U.S. (In re Warrant), 829 F.3d 197, 216 (2d Cir. 2016); Mastafa v. Chevron Corp., 770 F.3d 170, 183-84 (2d Cir. 2014); Licci v. Lebanese Canadian Bank, SAL, 834 F.3d 201, 215 (2d Cir. 2016). Moreover, the question of which test should be applied for extraterritoriality was briefed by the parties and discussed extensively by the Court in the memorandum decision. Indeed, extensive portions of the Defendants' motion simply reargue the legal standard and this Court's interpretation of it from a new viewpoint in light of the Court's ruling. See, e.g., Motion at 15 n.18. For example, the Defendants once again rely upon when they acquired full title to the funds that were transferred and when this occurred, an issue previously briefed and discussed by the Court. See Motion at 2, 16; In re Arcapita, 575 B.R. at 247 (noting Defendants' focus not on the transfers, but on component events, including financial aspects of the transaction). In the same vein, the Defendants once again cite to the number of contacts with the United States. See Motion at 12 n. 16 (citing U.S. v. Prevezon, 2017 WL 1951142 (S.D.N.Y. May 10, 2017)); In re Arcapita, 575 B.R. at 248 (specifically discussing Prevezon and Defendants' argument about number of contacts and extent of significant activity). It is inappropriate to revisit such issues now. See Griffin Indus., Inc. v. Petrojam, Ltd., 72 F. Supp. 2d 365, 368 (S.D.N.Y. 1999) ("These criteria are strictly construed against the moving party so as to avoid repetitive arguments on issues that have been considered fully by the court."); Perez, 46 F. Supp. 3d at 314 (Federal Rule 59(e) and Bankruptcy Rule 9023 "are meant to ensure the finality of decisions and to prevent the practice of a losing party examining a decision and then plugging the gaps of a lost motion with additional matters.").

*4 In addition to these two arguments, the Court notes that Defendants also raise new legal arguments not previously raised in the underlying motions. See, e.g., Motion at 9–10 (raising practical arguments about the policy implications of the Court's decision); Motion at 4 n.9, 17 n.20 (arguing that preference claims in the complaint fail to meet the *Iqbal* pleading standard for surviving a motion to dismiss). But such new arguments are not an appropriate basis for relief in a motion for reconsideration. See Liberty Media Corp. v. Vivendi Universal, S.A., 861 F. Supp. 2d 262, 265 (S.D.N.Y. 2012) ("A motion for reconsideration is not an opportunity for

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making new arguments that could have been previously advanced, nor is it a substitute for appeal.") (citations and quotation marks omitted); *Sequa Corp. v. GBJ Corp.*, 156 F.3d 136, 144 (2d Cir. 1998) (motion for reargument is not an opportunity to present the case under new theories, secure a rehearing on the merits, or otherwise take a "second bite at the apple.").

For all those reasons the reconsideration motion is denied.

All Citations

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In re CIL Limited, Slip Copy (2018)

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Only the Westlaw citation is currently available.
NOT FOR PUBLICATION
United States Bankruptcy Court, S.D. New York.

IN RE: CIL LIMITED, Debtor. Salvatore LaMonica, as Chapter 7 Trustee for CIL Limited, Plaintiff,

CEVA Group PLC, CEVA Holdings LLC, CEVA Logistics Finance B.V., Gareth Turner, and Mark Beith, Defendants.

> Case No. 13–11272–JLG | Adv. Proc. No. 14–02442–JLG | Signed June 15, 2018

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MEMORANDUM DECISION GRANTING
CHAPTER 7 TRUSTEE'S MOTION FOR
LIMITED RECONSIDERATION AND
AMENDMENT OF THE COURT'S JANUARY
23, 2018 ORDER AND FOR LEAVE TO
FILE A SECOND AMENDED COMPLAINT

*1 HON. JAMES L. GARRITY, JR., UNITED STATES BANKRUPTCY JUDGE:

Until the spring of 2013, CIL Limited, the debtor herein ("CIL or the "Debtor"), owned 100% of the stock of CEVA Group Plc ("CEVA Group"). In April 2013, CEVA Group, with CIL's authorization, issued shares of its stock (the "New CEVA Shares") to CEVA Holdings, LLC ("CEVA Holdings"). The issuance of those shares (the "CEVA Equity Transfer") left CIL and CEVA Holdings with 00.01% and 99.99% of the equity interests in CEVA Group, respectively. Salvatore LaMonica, the plaintiff herein, is the Chapter 7 trustee (the "Trustee") of CIL's bankruptcy estate. In Counts 1, 2 and 3 of his Amended Complaint, ¹ the Trustee seeks to avoid the CEVA Equity Transfer as a fraudulent transfer pursuant to sections 544, 548, and 550 of the Bankruptcy Code and, to the extent necessary, preserve and recover the New CEVA Shares pursuant to sections 550 and 551 of the Bankruptcy Code (collectively, the "Bankruptcy Code Avoidance Claims"). The CEVA Defendants 2 moved to dismiss those Counts (and others) pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. 3 By order dated January 23, 2018 (the "Rule 12 Order"), 4 the Court dismissed the Bankruptcy Code Avoidance Claims, with prejudice, except that the Court permitted the Trustee to assert an avoidance claim under Cayman law, divorced of any aspect of the Bankruptcy Code. See Rule 12 Order ¶ 4; see also Memo. Dec. at 82.

- See Chapter 7 Trustee's Amended Complaint for Fraudulent Transfer of the Debtor's Interests in CEVA Group PLC Related Tortious Acts, and Turnover of Property of the Estate, filed March 31, 2015 [ECF No. 21].
- The "CEVA Defendants" are CEVA Group, CEVA Holdings and CEVA Logistics Finance, B.V. ("CEVA Finance").
- Rule 12(b)(6) of the Federal Rules of Civil Procedure is made applicable to this adversary proceeding pursuant to Rule 7012 of the Federal Rules of Bankruptcy Procedure.
- See Order Granting in Part and Denying in Part Defendants' Motions to Dismiss Amended Complaint, dated January 23, 2018 [ECF No. 104]; see also Memorandum Decision Granting in Part and Denying in Part Defendants' Motions to

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Dismiss Amended Complaint [ECF No. 100] (the "Memorandum Decision").

The matter before the Court is the Trustee's motion (the "Motion") for an order (i) pursuant to Federal Rule of Civil Procedure 54(b), reconsidering and amending the Rule 12 Order to the extent it dismissed the Bankruptcy Code Avoidance Claims with prejudice, and (ii) pursuant to Federal Rule of Civil Procedure 15(a), granting him leave to file a second amended complaint (the "Proposed Second Amended Complaint"). ⁵ The CEVA Defendants oppose the Motion. ⁶ For the reasons discussed below, the Motion is GRANTED.

- See Chapter 7 Trustee's Motion for Limited Reconsideration and Amendment of the Court's January 23, 2018 Order and for Leave to File a Second Amended Complaint, dated February 6, 2018 [ECF No. 107]. Rules 15 and 54 of the Federal Rules of Civil Procedure are made applicable to this adversary proceeding by Rules 7015 and 7054, respectively, of the Federal Rules of Bankruptcy Procedure.
- See CEVA Defendants' Memorandum of Law in Opposition to Chapter 7 Trustee's Motion for Limited Reconsideration and Amendment of the Court's January 23, 2018 Order and for Leave to File a Second Amended Complaint [ECF No. 110] (the "Opposition"). The CEVA Defendants also filed the Declaration of Jennifer L. Woodson in Support of the CEVA Defendants' Opposition to the Chapter 7 Trustee's Motion for Limited Reconsideration and Amendment of the Court's January 23, 2018 Order and for Leave to File a Second Amended Complaint [ECF No. 111] (the "Woodson Declaration"). Gareth Turner and Mark Beith, CIL's former directors (collectively, the "Directors"), are defendants in the Amended Complaint. Turner has joined the CEVA Defendants' opposition to the Motion. See Defendant Gareth Turner's Joinder in the CEVA Defendants' Memorandum of Law in Opposition to Chapter 7 Trustee's Motion for Limited Reconsideration and Amendment of the Court's January 23, 2018 Order and for Leave to File a Second Amended Complaint [ECF No. 112]. The Court dismissed CEVA Finance and Mark Beith from this adversary proceeding for lack of personal jurisdiction. See Rule 12 Order at ¶¶ 2-3. Both are named defendants in the Proposed Second Amended Complaint, but only pro forma, for the purpose of

preserving the trustee's rights to appeal from the

Memorandum Decision and Rule 12 Order. Neither has appeared in connection with the Motion.

Jurisdiction

*2 This Court has jurisdiction pursuant to 28 U.S.C. §§ 1334(a) and 157(a) and the Amended Standing Order of Referral of Cases to Bankruptcy Judges of the United States District Court for the Southern District of New York (M–431), dated January 31, 2102 (Preska, C.J.). This is a core proceeding under 28 U.S.C. § 157(b)(2)(A).

Facts 7

The facts recited herein are intended to reflect allegations contained in the Amended Complaint. The Court is not making any findings as to the truth of any of the allegations discussed herein.

CIL is a holding company. In the spring of 2013, its sole asset consisted of its direct and indirect ownership of 100% of the shares of CEVA Group-itself a holding company that controlled a number of operating entities comprising the so-called "CEVA Enterprise." CIL was owned by funds (the "Apollo Funds") under the control of Apollo Global Management, LLC (collectively with its subsidiaries, affiliates and managed entities, "Apollo"), and CIL's debt consisted principally of unsecured payment-in-kind notes (the "PIK Notes") totaling at least €103 million. At that time, CEVA Group's secured and unsecured debt totaled approximately €2.1 billion and €575 million, respectively. The holders of that debt included the Apollo Funds, Capital Research Management L.P. ("CapRe") and Franklin Advisers, Inc. and affiliated funds ("Franklin"). In April 2013, CIL entered into a restructuring support agreement (the "CIL RSA") with, among others, CEVA Group and CEVA Holdings, a newly formed affiliate of Apollo. Pursuant to that agreement, CIL authorized CEVA Group to issue the New CEVA Shares to CEVA Holdings. CEVA Group did so, and, as a consequence, CIL's interest in CEVA Group was reduced to 00.01%, while CEVA Holdings gained a 99.99% ownership interest in CEVA Group. Shortly after CEVA Holdings received the New CEVA Shares, the Apollo Funds, CapRe, Franklin, CEVA Group and CEVA Holdings entered into a debt restructuring support agreement in which they agreed to support an exchange of €1.2 billion of CEVA Group debt for equity in CEVA

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Holdings (the "CEVA Debt Transfer"). That transfer did not close until after the commencement of CIL's bankruptcy case.

The Initial Complaint

On December 8, 2014, the Trustee commenced this action by filing a complaint (the "Initial Complaint") 8 against the CEVA Defendants and Directors. In Counts 1 and 2 of the complaint, the Trustee sought to avoid the CEVA Equity Transfer as a fraudulent transfer under sections 548(a)(1)(A) and 548(a)(1)(B) of the Bankruptcy Code, respectively, and if necessary, preserve and recover the New CEVA Shares pursuant to sections 550 and 551 of the Bankruptcy Code. See Initial Compl. ¶¶ 105–112 (Count 1); ¶¶ 113–121 (Count 2). In doing so, the Trustee challenged the CEVA Equity Transfer on a stand-alone basis. In part, he asserted that he was entitled to that relief because CEVA Holdings provided no consideration to CIL or to CEVA Group in return for the New CEVA Shares, and because CIL did not benefit from the CIL RSA, or the issuance of New CEVA Shares. See, e.g., Initial Compl. ¶ 89. 9 As an alternative to those Counts, in Count 3 the Trustee challenged the issuance of the New CEVA Shares as an integrated part of the larger restructuring transaction that included the CEVA Debt Transfer. He contended that because the CEVA Debt Transfer closed after the petition date, and the CEVA Defendants failed to get stay relief, the CEVA Equity Transfer was null and void ab initio, as having closed in violation of the automatic stay. See Initial Compl. ¶¶ 122-126.

- 8 See Chapter 7 Trustee's Complaint For Fraudulent Transfer Of The Debtor's Interests In CEVA Group PLC Related Tortious Acts And For Payment Of Intercompany Claims [ECF No. 1].
- The Trustee contended that:

CEVA Holdings gave no consideration whatsoever to CEVA or to CIL in return for the New CEVA Shares it received. CIL did not benefit from the CIL RSA or the issuance of the New CEVA Shares in any way. The issuance of the New CEVA Shares effectuated a transfer of CIL's primary asset, CEVA, to CEVA Holdings in exchange for nothing. Although the Defendants' purported objective was to use the New CEVA Shares in connection with a debt-for-equity exchange with some of CEVA's creditors, the New CEVA Shares

were transferred to CEVA Holdings in exchange for nothing in order to transfer CIL's interest in CEVA away from CIL before the PIK Holders learned of the Transaction and had an opportunity to seek judicial intervention.

Initial Compl. ¶ 89.

Motion to Dismiss Initial Complaint

*3 The CEVA Defendants filed a motion to dismiss the Initial Complaint. See ECF Nos. 12-17. In that motion, among other things, they contended that the restructuring transaction must be viewed as a multistep, integrated transaction. See Memorandum of Law in Support of Motion to Dismiss [ECF No. 13] at 11 ("All of these steps were interdependent, and the execution and performance of each was a condition to completing the fully-integrated out-of-court restructuring."). They also argued that because the allegedly fraudulent transfer (i.e., the CEVA Equity Transfer) occurred outside the United States, Counts 1 and 2 should be dismissed based on the presumption against extraterritorial application of the Bankruptcy Code's avoidance provisions, and under principles of international comity, as the Cayman Islands has the strongest connection to the fraudulent transfer. See id. at 21-29.

The Amended Complaint

In response to that motion, and with the consent of the defendants, the Trustee filed the Amended Complaint. In Counts 1 and 2 of that complaint, he seeks to avoid the issuance of the New CEVA Shares as a fraudulent transfer under sections 548(a)(1)(A) and (B) of the Bankruptcy Code, respectively, and, to the extent necessary, preserve and recover the New CEVA Shares pursuant to sections 550 and 551 of the Bankruptcy Code. See Am. Compl. ¶¶ 132-139 (Count 1); ¶¶ 140-148 (Count 2). In Count 3, he seeks to avoid and recover the CEVA Equity Transfer as a constructive and/or intentional fraudulent transfer under sections 544(b) and 551 of the Bankruptcy Code, and "applicable laws." Am. Compl. ¶ 149-162. In support of those claims for relief, the Trustee asserts that the CEVA Equity Transfer should be viewed in isolation, apart from the broader recapitalization transaction. ¹⁰ In Count 4—which he pleads in the alternative—the Trustee seeks a determination that the issuance of the New CEVA Shares is null and void, as having been effectuated in violation of the automatic stay under section 362 of the Bankruptcy Code. See Am. Compl. ¶¶ 163–167. In doing so, he accounts for the possibility that the CEVA Equity Transfer and CEVA Debt Transfer could be determined to be parts of a single, integrated transaction. See Am. Compl. ¶ 166 ("In the event that it should be adjudged that the CEVA Equity Transfer and the CEVA Debt Transaction are part of a single integrated transaction, the CEVA Equity Transfer is part of a transfer and transaction that was performed in part after the Petition Date [and in violation of section 362 of the Bankruptcy Code.]").

For example, in the Amended Complaint, the Trustee alleges the following:

CEVA Holdings gave no consideration whatsoever to CIL in return for the CEVA Equity Transfer. CIL did not benefit in any way from the CEVA Equity Transfer. Although the Defendants' purported objective was eventually to use the New CEVA Shares as currency for a debt-for-equity exchange with some of CEVA's creditors, no debtfor-equity exchange occurred prior to the Petition Date and, in any event, an exchange of CEVA's debt for New CEVA Shares provides no value whatsoever to CIL—although it did provide value to Beith and Turner because they were personally invested in an Apollo fund that participated in the exchange. To whom Apollo subsequently transfers interests in CEVA Holdings, and what CEVA Holdings or Apollo may have received in exchange for such a transfer, does not alter the facts that (i) CEVA was transferred from CIL to CEVA Holdings in exchange for nothing, and (ii) Apollo's postpetition subsequent transfers also provided no value to CIL.

Am. Compl. ¶ 111; see also id. ¶ 112 ("Not only was the subsequent debt-for-equity exchange by CEVA [Group] of no relevance to the avoidability of the CEVA Equity Transfer, if offers the Defendants no excuse or quarter from liability.").

Motion to Dismiss Amended Complaint

*4 The CEVA Defendants moved to dismiss the Amended Complaint. ¹¹ As relevant herein, they sought to dismiss Counts 1, 2 and 3, with prejudice. In granting that relief, the Court made two rulings that are central to this Motion. First, the Court found that sections 544(b), 548(a) and 550 of the Bankruptcy Code (the "Bankruptcy Avoidance Provisions") do not apply to extraterritorial transactions (*see* Memo. Decision at 24, 63, 116), and that the Trustee's allegations in the Amended Complaint failed to allege that the CEVA Equity Transfer was a domestic transaction to which the Bankruptcy Avoidance

Provisions apply. *Id.* at 24, 69, 116. Second, the Court found, in addressing the CEVA Defendants' argument that CEVA Group was solvent, that the CEVA Equity Transfer should be viewed as one step in an integrated, five-step out of court restructuring transaction. *See id.* at 87. ¹²

- See CEVA Defendants' Memorandum of Law in Support of Their Motion to Dismiss the Amended Complaint [ECF No. 35]. The Trustee opposed that motion. See Trustee's Memorandum in Opposition to Defendants' Motions to Dismiss the Complaint [ECF No. 39].
- The Court found the following integral steps:
 - a. The sub-division, reclassification, and consolidation of CIL's shares, and the CEVA Equity Transfer (the issuance of new shares by CEVA Group to CEVA Holdings);
 - b. The exchange of new equity interests in CEVA Holdings with creditors holding more than €1.2 billion of CEVA Group's Second Lien Notes and Unsecured Debt;
 - c. A CIL exchange offer that offered consideration to the holders of CIL's PIK Notes;
 - d. A rights offering to raise €200 million of new money for CEVA Group, of which CapRe agreed to fund up to €75 million or \$96.1 million, and the Apollo Funds agreed to fund up to €65 million or \$86.3 million pursuant to a backstop agreement; and
 - e. A financing commitment from Franklin to provide CEVA Group with reduced interest expense and new money.

See Memo. Dec. at 87-88.

The Trustee's Motion For Leave to Amend the Amended Complaint

The Trustee contends that the Court's determination that the CEVA Equity Transfer is part of an integrated restructuring transaction (defined by the trustee as the "CEVA Transaction") alters the "domesticity" analysis of the transaction. He says that if the Court grants him leave to amend, he can revive the Bankruptcy Code Avoidance Claims because he is now able to allege numerous additional facts which he says demonstrate that "on the whole," the CEVA Transaction is a domestic transaction subject to the reach of the Bankruptcy Avoidance Provisions. Motion ¶ 2. 13 The Trustee explains that he did not allege any of those facts in support of the Amended Complaint because they cut against what had

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been his theory of the case—i.e., that the Court should consider the CEVA Equity Transfer in isolation from the other steps of the CEVA Transaction. Id. ¶ 3. He is seeking leave to file the Proposed Second Amended Complaint to allege certain "jurisdictional facts" (and incorporate by reference the transaction documents of the CEVA Transaction). He says those facts will support his contention that the CEVA Transaction is a domestic transaction that was fraudulent as to CIL and enable him to avoid that transaction or recover damages for the benefit of CIL's estate under sections 544, and 548 through 551 of the Bankruptcy Code and/or analogous applicable local or foreign fraudulent transfer laws. The Trustee also proposes to amend his complaint "to conform it to evidence developed during discovery, to delete claims the Trustee voluntarily agreed to dismiss, and to clarify and amplify certain existing allegations." Motion ¶ 4, n.5. Further, although the Trustee did not say as much in the Motion, he is seeking leave to assert additional allegations in the Proposed Second Amended Complaint in support of his damage claims. To that end, and without limitation, the Trustee asserts that even if CEVA Group's debts exceeded its enterprise value, CEVA Group's equity "had substantial value to CIL" by reason of its sale, option, and control value. See Proposed Second Am. Compl. ¶¶ 7(k), 65. 110–12. ¹⁴

13 The Trustee asserts that those facts include that the CEVA Transaction involved U.S. creditors, credit facilities with U.S. agents, overwhelmingly (if not exclusively as to the later steps) negotiations in the U.S., professionals that negotiated and documented the CEVA Transaction in the U.S., transactional documents with U.S. choice of law and forum selection provisions, approval by CEVA Group and CEVA Holdings at a board meeting in New York, an agreement to support and accept a proposed fullynegotiated Delaware prepackaged bankruptcy plan for CEVA Group and 69 of its affiliates (including approximately 20 U.S. entities), a backstopped DIP facility for the Delaware bankruptcy case, and, in particular, a new rights offering and a new note financing that closed in New York. See Motion ¶ 3.

14 Those allegations are:

7.k. Regardless of whether CEVA Group's debts exceeded its enterprise value (they did not) CEVA Group's equity had substantial value to CIL. CIL's shares of CEVA could have been monetized by CIL, and the proceeds used to pay CIL's creditors, if CIL had been operated by an independent board

(or even an independent committee of the board) that was not beholden to Apollo.

65. The value of owning equity-level control of a business with over \$8 billion of revenues is considerable, even if that business is alleged to have excess leverage and financial challenges to overcome. In CEVA Group's case, for example, a mere 1% increase in EBITDA as a percentage of revenue would be approximately \$85 million. At a conservative 11x multiple, that amounts to an additional \$935 million of enterprise value. A 3% increase in EBITDA margins and a more optimistic, but still reasonable, 14x multiple yields \$3.570 billion of increased enterprise value. The upside potential of CIL's shares of CEVA Group was enormous. Even in January 2013, Apollo positively valued its equity interests in CIL (i.e., net of PIK Debt) for its option value. It is entirely implausible that CIL's 100% equity control of CEVA Group had no value, and that an independent board would simply give it away largely to and at the direction of its controlling shareholder, stranding over €100 million with no source of repayment.

110. Upon information and belief, the Directors never obtained an independent analysis by a qualified professional as to whether CIL's shares of CEVA Group could be sold and what value might have been realized from selling them or even their option or control value. Upon information and belief, the Directors never authorized, and CIL never conducted, any marketing or other process to determine whether CIL's shares of CEVA Group could be sold and to learn how the market valued CIL's shares of CEVA Group. EY did not even purport to analyze the value for which CIL could have sold some or all of its shares of CEVA to a third party. CEVA was an international company with revenues in the \$7 to \$8 billion range. CIL could have sold its shares of CEVA to a party that wished to control CEVA and its restructuring for significant value, regardless of whether CEVA was alleged to be insolvent. Equity securities of companies that are insolvent regularly trade for significant value.

111. If the Directors were not conflicted, they would have sought, and likely consummated, a sale of CIL's shares of CEVA rather than accept and authorize the CEVA Transaction. A sale of CIL's shares of CEVA to a third party would have deprived Apollo of its control of CEVA, its control of any recapitalization affecting Apollo's CEVA debt that CEVA might perform under

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new ownership, and Apollo's ability to retain the unlimited upside profit potential of continuing its equity ownership. Therefore, as employees of Apollo, the Directors did not make any efforts to pursue such a transaction.

112. If the Directors were not conflicted, they would have demanded, and likely obtained, a considerable amount of money in exchange for authorizing the CEVA Transaction. The Directors knew that authorizing the CEVA Transaction allowed CEVA Group and its stakeholders to avoid large losses in value that they would have suffered if CEVA Group had to recapitalize without CIL's authorization and consent, such as through a bankruptcy proceeding.

*5 The Trustee also asserts that the Court should reconsider the Rule 12 Order solely to the extent that the Court dismissed the Bankruptcy Code Avoidance Claims "with prejudice." He contends that he requires that relief so that he will be able to replead Counts 1, 2 and 3 in the Proposed Second Amended Complaint. Motion ¶ 5. In part, he maintains that dismissal with prejudice is appropriate only where it would be futile to do so, but that "the Court did not have a sufficient record before it to conclude 'futility' because the Trustee had alleged a different theory than that which the Court found—i.e., that the CEVA Equity Transfer was separate from the other steps of CEVA Group's debt restructuring." *Id.*

Discussion

Request for Reconsideration

Federal Rule of Civil Procedure 54 governs judgments in federal litigation generally, and Rule 54(b) focuses on judgments as to fewer than all the claims and parties. As relevant, it provides that a court's non-final order "may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities." Fed. R. Civ. P. 54(b). 15 A party seeking relief under Rule 54(b) must do so "within the strictures of the law of the case doctrine." Virgin Atl. Airways, Ltd. v. Nat'l Mediation Bd., 956 F.2d 1245, 1255 (2d Cir. 1992); see also Zdanok v. Glidden Co., 327 F.2d 944, 953 (2d Cir. 1964) (stating "where litigants have once battled for the court's decision, they should neither be required, nor without good reason permitted, to battle for it again."). That means to obtain such relief the party "must show an intervening change in controlling law, the availability of previously unavailable evidence, or the need to correct a clear error of law or prevent manifest injustice[.]" *Id.* (internal quotation omitted); *see also Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995) ("The standard for granting [a Rule 54(b)] motion is strict, and reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked—matters, in other words, that might reasonably be expected to alter the conclusion reached by the court.") (citations omitted); *Vornado Realty Trust v. Marubeni Sustainable Energy, Inc.*, 987 F. Supp. 2d 267, 275 (E.D.N.Y. 2013) (same); *Long v. U.S. Dep't of Justice*, 778 F. Supp. 2d 222, 228–29 (N.D.N.Y. 2011) (same).

pursuant to Bankruptcy Rule 7054. Rule 54(b) states:

(b) Judgment on Multiple Claims or Involving Multiple Parties. When an action presents more than one claim for relief—whether as a claim, counterclaim, crossclaim, or third-party claim—or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all

Rule 54 is applicable to this adversary proceeding

all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

the claims or the rights and liabilities of fewer than

The Trustee did not oppose the CEVA Defendants' request that Counts 1, 2 and 3 be dismissed with prejudice. Nor did it request leave to amend the complaint in the event the motion to dismiss was granted in whole or in part. Nonetheless, as Trustee correctly notes, as a general rule "[t]he proper time for a plaintiff to move to amend the complaint is when the plaintiff learns from the District Court in what respect the complaint is deficient." Cresci v. Mohawk Valley Cmty. College, 693 Fed. Appx. 21, 25 (2d Cir. 2017). That is because "[b]efore learning from the court what are its deficiencies, the plaintiff cannot know whether he is capable of amending the complaint efficaciously." Id.; see also Loreley Financing (Jersey) No. 3 Ltd. v. Wells Fargo Sec., LLC, 797 F.3d 160, 190 (2d Cir. 2015) (noting that "[w]ithout the benefit of a ruling, many a plaintiff will not see the necessity of amendment or be in a positon to weight the practicality and possible means of curing specific deficiencies."). The Court erred in overlooking those factors in dismissing the Bankruptcy Code Avoidance Claims, with prejudice. Accordingly, the In re CIL Limited, Slip Copy (2018)

Court grants the Trustee's request for reconsideration to enable him to seek leave pursuant to Rule 15 to file the Proposed Second Amended Complaint.

Request for Leave to Amend

*6 Rule 15(a) provides that other than for amendments as a matter of course, "a party may amend its pleading only with the opposing party's written consent or the court's leave[,]" which the court should "freely give [] when justice so requires." Fed. R. Civ. P. 15(a). Generally, "the grant of leave to amend the pleadings pursuant to Rule 15(a) is within the discretion of the trial court." Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 330 (1971) (citing Foman v. Davis, 371 U.S. 178, 182 (1962)); see also Krumme v. WestPoint Stevens, Inc., 143 F.3d 71, 88 (2d Cir. 1998) ("A decision to grant or deny a motion to amend is within the sound discretion of the trial court."). Although liberally granted, leave to amend "may properly be denied for: 'undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc." " Ruotolo v. City of New York, 514 F.3d 184, 191 (2d Cir. 2008) (quoting Foman v. Davis, 371 U.S. 178, 182 (1962)). The CEVA Defendants contend that the Court should deny the Trustee leave to amend his complaint because: (i) it is futile for the Trustee to do so, because the Trustee's proposed amendments to Counts 1, 2 and 3 do not cure the defects in those Counts; (ii) the Trustee has unduly delayed in seeking leave to replead Counts 1, 2 and 3; and (iii) the Trustee is acting in bad faith in seeking leave to assert a new theory of damages in the Proposed Second Amended Complaint. The Court considers those matters below.

Whether It Is Futile To Grant The Trustee Leave To Replead Counts 1, 2 and 3

In dismissing the Bankruptcy Code Avoidance Claims, the Court found that sections 544, 548 and 550 do not apply extraterritorially. See Memo. Dec. at 81–82. The Court also found that the factual allegations in the Amended Complaint did not support the Trustee's assertion that the CEVA Equity Transfer was a domestic transaction under either the transactional test annunciated in Morrison v. Nat'l Australia Bank, Ltd., 561 U.S. 247 (2010), or the pre-Morrison "center of gravity" or "component parts" test. See id. at 48–69. The Trustee argues that the Court should grant him leave to replead Counts 1, 2

and 3, because the additional facts that he has alleged in the Proposed Second Amended Complaint establish that under both standards, the CEVA Transaction is a domestic transaction that can be avoided and recovered under sections 544, 548 and 550 of the Bankruptcy Code.

The Morrison test for determining whether a statute is being applied domestically or extraterritorially centers on the "objects of the statute's solicitude," and what the statute "seeks to regulate." 561 U.S. at 266-267. "If the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad; but if the conduct relevant to the focus occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory." RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2101 (2016). Morrison involved the interpretation of Rule 10(b) of the Securities Exchange Act of 1934. The Court held that it applies only to "transactions in securities listed on domestic exchanges and domestic transactions in other securities." Id. at 267. In Absolute Activist Value Master Fund Ltd. v. Ficeto, 677 F.3d 60, 69 (2d Cir. 2012), the Second Circuit found that for purposes of Rule 10(b), a "domestic transaction" is one in which "the parties incur irrevocable liability to carry out the transaction within the United States or when title is passed within the United States." In contrast to the transactional focus of the Morrison test, the "center of gravity" or "components parts" test focuses on "the facts of a case to determine whether they have a center of gravity outside the United States." In re Florsheim Grp., Inc., 336 B.R. 126, 131 (N.D. III. 2005) (citations omitted). Courts applying that test "generally consider all component events of a financial transaction, rather than one dispositive factor, to determine where it took place." Id. The Trustee contends that the Proposed Second Amended Complaint satisfies the Morrison test because it contains allegations to the effect that, among other things, creditors that participated in the CEVA Transaction incurred irrevocable liability to exchange their debt in the United States, and that title to securities bought, sold and exchanged in the CEVA Transaction was transferred in the United States. See Motion ¶ 22 (identifying the allegations in the Proposed Second Amended Complaint that support the Morrison analysis). He also says that the Proposed Second Amended Complaint satisfies the "center of gravity/ component parts" test because it includes more than fifteen pages of new factual allegations detailing the steps that parties to the CEVA Transaction took in the United States in furtherance of that transaction. He contends that those facts, coupled with the facts already alleged in the Amended Complaint, prove that the United States is the "center of gravity" of the CEVA Transaction. See id. ¶ 24 (identifying the allegations in the Proposed Second Amended Complaint that support the "center of gravity/ component parts" test).

*7 Courts deny requests for leave to amend as futile where "it appears that plaintiff cannot address the deficiencies identified by the court and allege facts sufficient to support the claim." Panther Partners Inc. v. Ikanos Commc'ns, Inc., 347 Fed. Appx. 617, 622 (2d Cir. 2009) (citing Joblove v. Barr Labs., Inc., 466 F.3d 187, 220 (2d Cir. 2006)); see also Nat'l Credit Union Admin. Bd. v. HSBC Bank USA, N.A., 117 F. Supp. 3d 392, 398 (S.D.N.Y. 2015) ("Where a plaintiff inadequately pleads a claim and cannot offer additional substantive information to cure the deficient pleading, granting leave to replead is futile.") (citing Cuoco v. Moritsugu, 222 F.3d 99, 112 (2d Cir. 2000)). The CEVA Defendants do not dispute that the facts alleged in the Proposed Second Amended Complaint demonstrate that parties to the CEVA Transaction took a number of steps in the United States in furtherance of that multi-step transaction. Still, they contend that Counts 1, 2 and 3 of the Proposed Second Amended Complaint present the same deficiencies as those found in the Amended Complaint. First, they contend that many of the "new" allegations that the Trustee seeks leave to plead are merely variations on the same facts that the Trustee already pled in the Amended Complaint and in his opposition to the CEVA Defendants' motion to dismiss the Amended Complaint. In addition, they argue that the Trustee's "new" theory-that the alleged fraudulent transfer is the entire integrated CEVA Transaction, and not merely the CEVA Equity Transfer —is inconsistent with the law of extraterritoriality, which focuses on the situs of the conduct central to the statutory scheme which, in this case, is the transfer of property from the debtor's estate. See In re Ampal-American Israel Corp., 562 B.R. 601, 613 (Bankr. S.D.N.Y. 2017) ("[T]he focus of the [Bankruptcy Code's] avoidance and recovery provisions is the initial transfer that depletes the property that would have become property of the estate.") (citations omitted); accord Begier v. Internal Revenue Serv., 496 U.S. 53, 58 (1990) ("[T]he purpose of the avoidance provision is to preserve the property includable within the bankruptcy estate—the property available for distribution to creditors[.]"). They contend that although the CEVA Transaction was a multi-step process in which each step depended on the other, only the CEVA Equity Transfer involved CIL and CIL's property, and that transfer occurred outside the United States. Accordingly, they maintain that it is "completely appropriate" to focus on that step of the CEVA Transaction in determining whether United States law applies to the alleged fraudulent transfer.

It is well settled in this Circuit that "an allegedly fraudulent conveyance must be evaluated in context; where a transfer is only a step in a general plan, the plan must be viewed as a whole with all its composite implications." Orr v. Kinderhill Corp., 991 F.2d 31, 35 (2d Cir. 1993) (internal quotations and citations omitted); see also HBE Leasing Corp. v. Frank, 48 F.3d 623, 635 (2d Cir. 1995) (multilateral transactions may be collapsed and treated as phases of a single transaction for analysis under the Uniform Fraudulent Conveyance Act.). The Trustee contends that one of the implications of collapsing the multi-step CEVA Transaction into a single integrated transaction is that in assessing the situs of the alleged fraudulent transfer, the Court must focus on the transaction as a whole, and not on a particular step in the integrated transaction. In that light, he maintains that the facts alleged in support of the Proposed Second Amended Complaint establish that the CEVA Transaction is a domestic transaction. The CEVA Defendants dispute that contention. They assert that no court has applied the collapsing doctrine to determine the situs of an alleged fraudulent transfer, and that application of the doctrine in that fashion runs afoul of the Morrison "transactional" analysis. To be sure, to date, the collapsing doctrine has been employed almost exclusively in evaluating whether a transferee of an alleged fraudulent transfer provided "reasonably equivalent value" to the transferor in consideration for the transferred asset. See, e.g., In re Orr v. Kinderhill Corp., 991 F.2d at 36 ("The record is clear that Kinderhill's conveyance of the New York Property to KIC and Kinderhill's subsequent distribution of KIC shares were elements of a single restructuring plan.... So viewed, the restructuring was not supported by fair consideration..."); In re O'Day Corp., 126 B.R. 370, 394 (Bankr. D. Mass. 1991) (stating that "in analyzing the fair consideration requirement of the UFCA in the LBO context, courts not infrequently 'collapse' the discrete steps employed by the parties in structuring

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the transaction."); see also Official Comm. of Unsecured Creditors of Sunbeam Corp. v. Morgan Stanley & Co., (In re Sunbeam Corp.), 284 B.R. 355, 370 (Bankr. S.D.N.Y. 2002) ("A loan may appear to provide fair consideration because the lender provided funds to an entity in exchange for a security interest. If, however, the proceeds of that loan are transferred to a third-party for less than fair consideration, the transactions may be collapsed and the initial lender's transfer deemed fraudulent if that initial transferor was intimately involved in the formulation or implementation of the plan by which the proceeds of the loan were channeled to the third-party."). The Court is not aware of any case in which a court has considered the implications of collapsing a multi-step transaction on a determination of the situs of an alleged fraudulent transfer. However, it is clear that in directing courts analyzing fraudulent transfer claims to consider the "composite implications" in collapsing a multi-step transfer, the Second Circuit did not limit that review only to the implications for assessing reasonably equivalent value. See generally, In re Sabine Oil and Gas Corp., 547 B.R. 503, 540 (Bankr. S.D.N.Y. 2016) (noting that in Orr v. Kinderhill, the Second Circuit "refer[red] to all composite implications, not just implications for assessing reasonably equivalent value."). Indeed, in Tronox Inc. v. Kerr McGee Corp. (In re Tronox Inc.), 503 B.R. 239, 269 (Bankr. S.D.N.Y. 2013), Judge Gropper applied the collapsing doctrine in evaluating whether the plaintiff's fraudulent transfer claim was barred by the statute of limitations. On the record of the Motion, the Court cannot conclude that it would be futile to grant the Trustee leave to replead Counts 1, 2 and 3 as set forth in the Proposed Second Amended Complaint. For that reason, the Court finds no merit to this aspect of the CEVA Defendants' objection to the Motion. In so ruling, however, the Court is not adopting the Trustee's view that the CEVA Transaction is a domestic transaction or that the collapsing doctrine is applicable in determining the situs of an alleged fraudulent transfer. To the extent that the CEVA Defendants have a good faith basis for doing so, they are free to renew their motions to dismiss as to the newly pleaded Counts 1, 2 and 3. See, e.g., In re McCormick & Co., Inc., Pepper Prods. Mktg. & Sales Practices Litig., 275 F. Supp. 3d 218, 224 (D.D.C. 2017) (concluding that because court was unable to determine whether plaintiff's amended alternative theory was plausible without the benefit of additional briefing, leave to amend was allowed, but without prejudice to the defendants to renew their motions to dismiss to address

plaintiff's new theory); Chubb INA Holdings Inc. v. Chang, No. CV 16–2354–BRM–DEA, 2016 WL 6841075, at *6 (D.N.J. Nov. 21, 2016) ("In the interests of judicial economy and in the absence of undue prejudice, the Court may decline to engage in a detailed futility analysis where the Court finds that these arguments are better suited for consideration in the context of a motion to dismiss.").

Whether The Trustee Has Unduly Delayed In Seeking Leave to Amend

*8 Generally, mere delay, "absent a showing of bad faith or undue prejudice, does not provide a basis for a district court to deny the right to amend." Block v. First Blood Assocs., 988 F.2d 344, 350 (2d Cir. 1993) (quoting State Teachers Retirement Bd. v. Fluor Corp., 654 F.2d 843, 856 (2d Cir. 1981)). See also 3 MOORE'S FEDERAL PRACTICE § 15.15[2] (3d ed. 2016) (stating "the passage of time alone is usually not enough to deny leave to amend in most cases, a court will deny leave to amend only if the non-moving party is in fact prejudiced by the delay" and citing, inter alia, Rachman Bag Co. v. Liberty Mut. Ins. Co., 46 F.3d 230, 234-45 (2d Cir. 1995); United States ex rel. Maritime Admin. v. Cont'l Ill. Nat'l Bank & Trust Co. of Chicago, 889 F.2d 1248, 1254-55 (2d Cir. 1989)). The Trustee says that he filed the Motion promptly after the entry of the Rule 12 Order and that he did not delay in seeking leave to amend the Amended Complaint. The CEVA Defendants counter that under the facts here, the date that the Trustee filed the Motion is not the relevant baseline from which to assess whether he timely filed the Motion. They say that the baseline should be set no later than the date of the Amended Complaint because at that time the Trustee was in possession of all the facts he is alleging in support of Counts 1, 2 and 3 of the Proposed Second Amended Complaint and had been since at least the date that he filed the Initial Complaint. 16 They also contend that the Trustee was well aware of their contention that the CEVA Equity Transfer was part of an integrated, multistep transaction, and that the Trustee accounted for it in both the Initial and Amended Complaints by asserting a claim for violation of the automatic stay under section 362 of the Bankruptcy Code as an alternative to the Bankruptcy Code Avoidance Claims. They say that in drafting the Amended Complaint, the Trustee made a strategic decision not to plead that the CEVA Equity Transfer was part of an integrated multi-step transaction in support of the avoidance claims. They argue that it is too late for him to assert the alternative argument now.

16 There is no dispute that the Trustee filed the Initial Complaint approximately 16 months after the Court granted his motion to conduct discovery pursuant to Fed. R. Bankr. P. 2004 ("Rule 2004"). See Memo. Dec. at 19. During that period, the Trustee conducted substantial discovery of Apollo, CEVA Group, and Houlihan Lokey, CEVA Group's financial advisor. Id. In the aggregate, in response to the Trustee's Rule 2004 subpoenas, those parties produced 57,840 documents totaling 373,310 pages. Id. at 20. The Trustee also served document subpoenas on, and received production from, CIL's former directors and their legal advisors, as well as Morgan Stanley and Ernst & Young. Id. It is undisputed that pursuant to his Rule 2004 discovery, the Trustee obtained all the CEVA Group documents that he relies on in support of the Proposed Second Amended Complaint.

However, Loreley Financing No. 3 Ltd. v. Wells Fargo Sec., LLC, 797 F.3d 160 (2d Cir. 2015) completely undercuts that argument. In that case, the plaintiff had an opportunity to amend its complaint prior to the defendants' filing their Rule 12(b)(6) motion to dismiss the complaint. Although the plaintiff was aware of the defendants' arguments in support of the motion, and of the alleged defects in its complaint, it declined to amend the complaint. See id. at 169. The district court dismissed the case, with prejudice, reasoning that the complaint failed to state a claim for relief and that the plaintiff had failed to use the earlier opportunity to amend the complaint. Id. In reversing the district court's order, the Second Circuit held that it is "premature and inconsistent with the course of litigation prescribed by the Federal Rules" to require a party to a Rule 12(b)(6) motion to dismiss, to amend its complaint in the "absence of a definitive ruling." Id. at 191. The Court reasoned that without such a ruling, "many a plaintiff will not see the necessity of amendment or be in a positon to weigh the practicality and possible means of curing specific deficiencies [in their complaint]." Id. In Loreley, the Second Circuit reaffirmed that the "liberal spirit" of the Federal Rule of Civil Procedure 15 embodies a "strong preference for resolving disputes on the merits." See id. at 190-91 (quoting Williams v. Citigroup Inc., 659 F.3d 208, 212-13 (2d Cir. 2011)). In this light, there is no merit to the CEVA Defendants' assertion that by awaiting the resolution of the motion to dismiss the Amended Complaint, the Trustee unduly

delayed in seeking leave to file the Proposed Second Amended Complaint. ¹⁷

In opposing the Motion, the CEVA Defendants rely primarily on *Goldfish Shipping, S.A. v. HSH Nordbank AG,* 623 F. Supp. 2d 635 (E.D. Pa. 2009) ("*Goldfish Shipping*") and *State Trading Corp. of India Ltd. v. Assuranceforeningen Skuld,* 921 F.2d 409 (2d Cir. 1990) ("*State Trading*"). However, both cases are distinguishable.

In State Trading, the owner of cargo lost at sea ("STC") obtained a judgment equal to the value of the lost cargo against the owner of the vessel carrying the cargo ("Euroam"). 921 F.2d at 411. STC was unable to satisfy the judgment against Euroam and, thereafter, sued Euroam's insurer ("Skuld") pursuant to Connecticut's direct action statute. See id. Skuld moved for summary judgement dismissing the case on the grounds (among others) that under choice of law principles, the Connecticut direct action statute had no bearing on the litigation. The district court granted the motion. See id. Promptly thereafter, STC moved for reconsideration and for leave to amend its complaint to add two additional causes of action based on Norwegian and Panamanian law. The district court denied both motions. As to the latter, the district court found that STC had unduly delayed in seeking leave to amend the complaint. See id. at 412. On appeal, the Second Circuit upheld both determinations. In affirming the district court's denial of STC's request for leave to amend the complaint, the court found that STC had unduly delayed in seeking leave to amend, because it waited until judgment on the merits was entered dismissing its complaint. See id. at 418. The Trustee overstates the significance of this case because it predates Loreley, and here, unlike State Trading, the Court's dismissal of the Bankruptcy Code Avoidance Claims was based on the adequacy of the pleadings, not the merits of the Amended Complaint.

In Goldfish Shipping, Odin Denizcilik, A.S. ("Odin") was the owner of a vessel (the "Ship") that was subject to a first mortgage held by HSH Nordbank A.G. ("Nordbank"). 623 F. Supp. 2d at 636–37. Odin defaulted on the mortgage, Nordbank seized the Ship and a marshal sold it in a foreclosure sale to the plaintiff ("Goldfish"). Thereafter, Odin had the Ship seized twice, claiming that it still owned it. See id. Goldfish sued Nordbank seeking damages associated with Odin's two seizures of the ship. Nordbank filed an answer to the complaint. After the parties commenced discovery, the court granted Goldfish

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leave to amend the complaint. See id. at 637. In support of the first amended complaint, Goldfish asserted that Odin remained the registered owner of the Ship and, as such, Nordbank had failed to deliver the Ship to "free and clear" of Odin's claims to the Ship. Goldfish contended that Nordbank was liable for the damages that Goldfish had suffered on account of the arrest of the Ship based upon, among other things, Nordbank's alleged breach of contract, warranty and good faith and fair dealing. See id. Nordbank moved to dismiss the first amended complaint, and the district court granted the motion. In substance, the court, in part, found that all of Goldfish's claims failed because they rested on the faulty premise that the Ship had not been sold "free and clear" of all liens, claims and encumbrances. The court explained that the Ship had been sold pursuant to the Ship Mortgage Act which, by its terms, mandates that the sale is "free of all ... claims." See id. (citing 46 U.S.C. § 31326(b)). Thereafter, Goldfish sought leave to amend the amended complaint. In the proposed second amended complaint, Goldfish sought to assert the same claims it had asserted in the first amended complaint, plus additional claims for breach of duty. However, the proposed second amended complaint was premised on the ground that the ship had been sold free and clear of all claims. In denying the motion for leave to amend, the district court found that there had been undue delay in that the plaintiff had a prior opportunity to amend, but failed to do so without any defensible explanation, which "place[d] an unwarranted burden on the court and undermine[d] the interest of judicial economy and finality." See id. at 641 (internal quotation marks and citations omitted). The Goldfish Shipping court seemed particularly perturbed by what it viewed as plaintiff's deliberate withholding of its alternative theory of recovery "while [the court] invested considerable time and judicial resources evaluating" the first amended complaint. See id. Goldfish Shipping was not decided by a court in the Second Circuit and, in any event, predates Loreley. Moreover, the case is distinguishable because (i) Goldfish sought to amend the complaint to add new causes of action that were not in the first amended complaint, (ii) Goldfish sought to amend the complaint after a final order was entered dismissing the action in its entirety, and (iii) the proposed amendments were determined to be futile.

Whether The Trustee Has Acted In Bad Faith In Seeking Leave To Amend

*9 One premise underlying the allegations in the Amended Complaint is that CEVA Group was solvent at the time of the CEVA Equity Transfer. See, e.g., Am. Compl. ¶ 6 ("At the time of the CEVA Equity Transfer, CEVA's equity had substantial value (and continues to have substantial value as of the date of this Complaint)."). The CEVA Defendants dispute that assertion. As noted previously, they sought to dismiss the Bankruptcy Code Avoidance Claims on the grounds that the Trustee failed to plead factual allegations raising a plausible inference that CIL was solvent at the time of the CEVA Equity Transfer. In this Motion, the Trustee seeks leave to include damage claims in the Proposed Second Amended Complaint that account for the possibility that CEVA Group was insolvent at the time of the CEVA Transaction. He seeks leave to allege that even if CEVA Group were insolvent (i.e., even if CEVA Group's debts exceeded its enterprise value), CIL nonetheless was damaged by the CEVA Transaction because it was deprived of the sale, option and control value of CIL's interest in CEVA Group for no consideration. See Proposed Second Am. Compl. ¶ 7(k), 65, 110-112. 18 The CEVA Defendants oppose that request. They contend that the Trustee acted in bad faith in filing this Motion because he failed to disclose that the Proposed Second Amended Complaint included new allegations in support of what they say is a new theory of damages. Moreover, they say that the Trustee's alleged bad faith aside, nothing prevented the Trustee from asserting those damage claims at the outset of this adversary proceeding, or in the Amended Complaint. They claim that they will be prejudiced if the Court permits the Trustee to allege those claims now because they could have subjected those claims to motion practice, fact discovery and expert submission. The Court will not separately address those objections because it finds that they are subsumed by the CEVA Defendants' assertion that the Trustee is barred from asserting the "new" damage claims because he violated Rule 26 of the Federal Rules of Civil Procedure and an order of this Court, in failing to disclose them earlier in this action.

The Trustee has also included a new theory of how the CEVA Transaction could have occurred. See Proposed Second Am. Compl. ¶ 179 ("The CEVA Transaction could have been performed without the CEVA Equity Transfer step by converting CEVA Group debt into equity of CIL instead of CEVA Holdings".).

Rule 26(a) of the Federal Rule of Civil Procedure states, in part and with certain irrelevant exceptions, that a party must, without awaiting a discovery request, provide to the other parties:

a computation of each category of damages claimed by the disclosing party—who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered[.]

Fed. R. Civ. P. 26(a)(1)(A)(iii). 19 On June 5, 2015, the Trustee served his initial disclosures on the CEVA Defendants. See Trustee's Initial Disclosures (Ex. A to Woodson Decl.) [ECF No. 111-1]. 20 Those disclosures did not include a computation of the Trustee's money damages. The parties disputed whether the Trustee was required to provide such a computation. In resolving that dispute, the Court ordered the Trustee to supplement his initial disclosures to provide "a computation of each category of damages claimed by the Trustee." See Order dated Feb. 5, 2016 [ECF No. 67] (the "February Discovery Order"). Thereafter, the Trustee served the CEVA Defendants with the Trustee's Second Supplemental Disclosures Pursuant to Fed. R. Civ. P. 26(a)(1). See Trustee's Second Supplemental Disclosures (Ex. C to Woodson Decl.) [ECF No. 111-3]. In those disclosures, the Trustee calculated CIL's damages at €150 to €300 million, which he said represented:

[his] assessment of the value of the CEVA Group shares held by CIL ... prior to the occurrence of the restructuring transaction The damage amount was calculated ... by utilizing an expert to apply generally accepted valuation methodologies to ... compute a total enterprise valuation range for CEVA [Group], and deducting appropriate debt and making other adjustments as determined by the Trustee's expert.

Id. at 4.

- Rule 26 is made applicable to this adversary proceeding by Rule 7026 of the Federal Rules of Bankruptcy Procedure.
- In that disclosure, the Trustee requested (i) that the Court declare that "the authorization and issuance of the New CEVA Shares [] be null and void or, alternatively, avoid the transfer of CEVA Group to CEVA Holdings and recover CEVA Group's equity interests for the benefit of CIL's bankruptcy estates"; (ii) "damages, plus interest, costs and attorneys' fees based on, inter alia, the amount equal to the value of the CEVA equity"; and (iii) damages "that may be in possession of, or liable for, the CIL Cash in an amount not less than €13,991,263.58, plus interest and attorneys' fees." Trustee's Initial Disclosures at 24.

*10 In June 2016, the parties completed discovery in this action. During the course of that discovery, the parties took twenty fact depositions, produced ten expert reports, and deposed five expert witnesses. The CEVA Defendants say that none of that discovery focused on the control, option or sale value of CIL's equity in CEVA Group in the event CEVA Group itself was insolvent, or based on the alleged ability to simply demand greater value in exchange for its consent to CEVA Group's restructuring transaction. They say that is so because the Trustee's Rule 26(a) disclosure did not include a theory of damages predicated on any of those factors. The CEVA Defendants have prepared for filing a motion for summary judgement dismissing the remaining claims in the Amended Complaint that they say is tied directly to the Trustee's previously disclosed damages theorywhich assumes that the CEVA Group was solvent. In that summary judgment motion, the CEVA Defendants argue, in part, that the Trustee cannot succeed on those claims unless he can show that the CEVA Group had positive equity value. They maintain that based upon the discovery produced to date, it is clear that the Trustee will not be able to do so. 21 The CEVA Defendants contend that the Trustee is seeking leave to plead new damages theories -all of which assume that CEVA Group was insolvent and unable to pay its debts as they fell due—to construct an argument to oppose the CEVA Defendants' summary judgment motion. They say that since the Trustee failed to disclose any of those theories in his Rule 26 disclosures, he is precluded from doing so now.

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The CEVA Defendants advise that in their summary judgment motion they will argue, among other things, that in determining the solvency of CEVA Group, the Trustee's expert miscalculated the "equity hurdle" because he inappropriately subtracted €171 million from CEVA Group's debt based on cash in CEVA's bank account—i.e., its working capital, and thereby improperly deflated CEVA Group's liabilities to €2,722 million, and failed to account for a €100 million liquidity deficit that the expert conceded existed. They contend that with those errors corrected, CEVA Group was insolvent even if the expert's claims as to enterprise value are assumed, arguendo, to be true.

The Trustee denies that the Proposed Second Amended Complaint introduces a new theory of damages and that he has violated Rule 26 or the February Discovery Order. He says that his "unwavering theory of damages" is that the estate is entitled to the value of the CEVA Group shares that were stripped away from CIL in the CEVA Equity Transfer and that his Rule 26 disclosures reflect as much. See Trustee's Second Supplemental Disclosure at 3 ("The Trustee seeks an award of damages, plus interest, costs and attorneys' fees based on, inter alia, the amount equal to the value of the CEVA equity which the Defendants stripped from CIL via the CEVA Equity Transfer along with any consequential damages suffered as a result of the Defendants' actions."). Moreover, the Trustee contends (but the CEVA Defendants deny) that

matters relating to the sale, control and option values of CIL's CEVA Group shares have been the subject of discovery among the parties.

The Court finds that this aspect of the CEVA Defendants' objection to the Motion is more appropriately addressed in the context of an evidentiary motion, not as a response to the Trustee's request for leave to file the Proposed Second Amended Complaint. See, e.g., 7 MOORE'S FEDERAL PRACTICE § 37.60[2][a] (3d ed. 2013) (noting that violations of Rule 26 disclosure issues "may be brought to the court's attention by means of a motion in limine to exclude the evidence or testimony, a motion to exclude the evidence or testimony made later in the proceedings, or a motion for exclusion in combination with a motion to compel.").

Conclusion

For all of the foregoing reasons, the Motion is GRANTED. The Trustee is directed to SETTLE an ORDER consistent with this Memorandum Decision.

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In re Arcapita Bank B.S.C.(c), 575 B.R. 229 (2017)

64 Bankr.Ct.Dec. 228

575 B.R. 229 United States Bankruptcy Court, S.D. New York.

IN RE ARCAPITA BANK B.S.C.

(C), et al., Reorganized Debtors. Official Committee of Unsecured Creditors of Arcapita Bank B.S.C.(c), et al., Plaintiff,

Bahrain Islamic Bank, Defendant. Official Committee of Unsecured Creditors of Arcapita Bank B.S.C.(c), et al., Plaintiff,

v.

Tadhamon Capital B.S.C., Defendant.

Case No. 12–11076 (SHL) (Jointly Administered)

| Adv. No. 13–01434 (SHL), Adv. No. 13–01435 (SHL)

| Signed October 13, 2017

Synopsis

Background: Official committee of unsecured creditors brought adversary proceeding in Chapter 11 case filed by Bahraini bank to set aside allegedly preferential transfers and to compel defendants to turn over property of the estate and recover for defendants' alleged violations of automatic stay. Defendants moved to dismiss.

Holdings: The Bankruptcy Court, Sean H. Lane, J., held that:

[1] bankruptcy court would not exercise its discretion to abstain, in interests of international comity, from hearing preference, turnover, and stay violation claims that creditors' committee asserted against foreign entities that had received payments from debtor's New York bank account to accounts that these other entities also had in New York;

[2] conduct that was the subject of preference avoidance claims asserted by unsecured creditors' committee, involving funds transfers from debtor's bank account in New York to New York bank accounts of allegedly preferred creditors, touched on and concerned the United States in manner sufficient to displace presumption against extraterritoriality;

[3] turnover statute applied extraterritorially; and

[4] stay provisions protecting property of the estate also applied extraterritorially.

Motion denied

West Headnotes (28)

[1] Courts

Comity between courts of different countries

International Law

Public policy and comity in general

"International comity" is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to rights of its own citizens, or of other persons who are under protection of its laws.

1 Cases that cite this headnote

[2] International Law

Public policy and comity in general

Under doctrine of international comity, states normally refrain from prescribing laws that govern activities connected with another state, where the exercise of such jurisdiction is unreasonable.

1 Cases that cite this headnote

[3] International Law

Public policy and comity in general

Doctrine of international comity is concerned with maintaining amicable working relationships between nations, a shorthand for good neighborliness, common courtesy and mutual respect between those who labor in adjoining judicial vineyards.

Cases that cite this headnote

In re Arcapita Bank B.S.C.(c), 575 B.R. 229 (2017)

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[4] Courts

Comity between courts of different countries

Decision to grant comity is a matter within court's discretion, and burden of proof to establish its appropriateness is on moving party.

Cases that cite this headnote

[5] International Law

Public policy and comity in general

International comity is a form of abstention; it is not an imperative obligation of courts, but rather, is discretionary rule of practice, convenience and expediency.

Cases that cite this headnote

[6] Federal Courts

Pleadings and motions

Federal Courts

Evidence; Affidavits

When ruling on motion to abstain, court is not restricted to face of the pleadings, but may review affidavits and other evidence to resolve factual disputes concerning its jurisdiction to hear the action

Cases that cite this headnote

[7] International Law

Extraterritorial rights and jurisdiction

International Law

Public policy and comity in general

Analysis based on international comity is distinct from one under the presumption against extraterritoriality.

Cases that cite this headnote

[8] Courts

Comity between courts of different countries

International Law

Public policy and comity in general

International comity conflates two distinct doctrines, legislative or prescriptive comity, which is canon of construction that serves to shorten reach of statute, and "comity among the courts" or adjudicatory comity, which may be viewed as a discretionary act of deference by a national court to decline to exercise jurisdiction in a case property adjudicated in foreign state.

1 Cases that cite this headnote

[9] Courts

Comity between courts of different countries

Adjudicatory comity is inapplicable in the absence of parallel proceeding pending in foreign court.

Cases that cite this headnote

[10] International Law

Public policy and comity in general

When deciding whether to apply prescriptive comity, courts consider the following nonexclusive factors: (1) extent to which activity takes place within territory, or has substantial, direct, and foreseeable effect upon or in territory, of regulating state; (2) connections, such as nationality, residence or economic activity, between regulating state and person principally responsible for activity to be regulated, or between that state and those whom regulation is designed to protect; (3) character of activity to be regulated, importance of regulation to regulating state, extent to which other states regulate such activities, and degree to which desirability of such regulation is generally accepted; (4) existence of justified expectations that might be protected or hurt by regulation; (5) importance of regulation to international political, legal, or economic system; (6) extent to which regulation is consistent with traditions of international system; (7) extent to which another state may have interest in regulating activity; and (8) likelihood of conflict with regulation by another state.

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Restatement (Third) of Foreign Relations Law of the U.S. § 403(2).

Cases that cite this headnote

[11] Federal Courts

Bankruptcy

Bankruptcy court would not exercise its discretion to abstain, in interests of international comity, from hearing preference, turnover, and stay violation claims that official unsecured creditors' committee asserted in Chapter 11 case of bankrupt Bahraini bank against other foreign entities that had received payments from debtor's New York bank account to accounts that these other entities also had in New York; payment transactions that were at heart of committee's claims were conducted entirely through New York banks, such that parties should not have been surprised to be litigating in New York forum, and there was no parallel proceeding pending in Bahrain. 11 U.S.C.A. §§ 362, 542, 547(b).

Cases that cite this headnote

[12] Bankruptcy

Turnover proceedings

Claim for turnover invokes bankruptcy court's most basic equitable power to gather and manage property of the estate. 11 U.S.C.A. § 542.

Cases that cite this headnote

[13] Bankruptcy

Automatic Stay

Automatic stay is a central protection that the Bankruptcy Code affords to debtor. 11 U.S.C.A. § 362.

Cases that cite this headnote

[14] Federal Courts

Right to Decline Jurisdiction; Abstention Federal courts have a virtually unflagging obligation to exercise the jurisdiction given to them

Cases that cite this headnote

[15] Statutes

Extraterritorial operation

Presumption against extraterritoriality is longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within territorial jurisdiction of the United States.

Cases that cite this headnote

[16] Statutes

Extraterritorial operation

Presumption against extraterritoriality is not a limitation on power of Congress to legislate, but rather a presumption that such legislation ordinarily relates to domestic, and not foreign, matters.

Cases that cite this headnote

[17] Statutes

Extraterritorial operation

Presumption against extraterritoriality serves to protect against unintended clashes between laws of the United States and those of other nations, which could result in international discord.

Cases that cite this headnote

[18] Statutes

Extraterritorial operation

Presumption against extraterritoriality will apply regardless of whether there is risk of conflict between United States statute and foreign law.

Cases that cite this headnote

[19] Statutes

Burden of proof

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Party asserting that statute in question applies extraterritorially bears burden of making an affirmative showing to that effect.

Cases that cite this headnote

[20] Statutes

Extraterritorial operation

To determine whether presumption against extraterritoriality applies, court must address both whether Congress intended for the relevant statute to apply extraterritorially, and whether the litigation at issue involves an extraterritorial application of statute.

Cases that cite this headnote

[21] Statutes

Extraterritorial operation

To determine whether Congress intended for statute to apply extraterritorially, and whether the presumption against extraterritoriality has been rebutted, court looks to whether the statute gives a clear, affirmative indication that it applies extraterritorially; unless it is the clearly expressed affirmative intention of Congress to give statute extraterritorial effect, court must presume that statute is primarily concerned with domestic conditions.

Cases that cite this headnote

[22] Statutes

Extraterritorial operation

Effect of presumption against extraterritoriality is that, when statute gives no clear indication of an extraterritorial application, it has none.

Cases that cite this headnote

[23] Bankruptcy

Construction and Operation

To determine whether Congress intended provisions of the Bankruptcy Code to apply extraterritorially, court could consider the context of these provisions, including

surrounding provisions of the Bankruptcy Code.

Cases that cite this headnote

[24] Statutes

Extraterritorial operation

To determine whether litigation at issue involves an extraterritorial application of statute, court should identify the conduct proscribed or regulated by particular legislation in question, and then consider whether that conduct occurred outside borders of the United States.

1 Cases that cite this headnote

[25] Statutes

Extraterritorial operation

If conduct relevant to statute's focus occurred in the United States, then litigation involves a permissible domestic application of statute, even if other conduct occurred abroad; however, if conduct relevant to statute's focus occurred in foreign country, then litigation involves an impermissible extraterritorial application regardless of any other conduct that occurred in United States territory.

Cases that cite this headnote

[26] Bankruptcy

Nature of Transfer

Conduct that was the subject of preference avoidance claims asserted by unsecured creditors' committee, involving funds transfers from Chapter 11 debtor's bank account in New York to New York bank accounts of allegedly preferred creditors, touched on and concerned the United States in manner sufficient to displace presumption against extraterritoriality, though neither debtor, a Bahraini bank, nor creditors that received these payments were domestic entities; regardless of whether preference statute applied extraterritorially, committee's use of statute to challenge transfers that occurred between New York bank accounts

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was not extraterritorial application of statute. 11 U.S.C.A. § 547(b).

Cases that cite this headnote

[27] Bankruptcy

Collection and Recovery for Estate;
Turnover

Turnover statute, requiring parties in possession of property of the estate to turn that property over to trustee, was intended by Congress to apply to estate property, wherever located, and could be applied extraterritorially to require foreign entities that became liable to Chapter 11 debtor postpetition for payment of placement proceeds to turn those proceeds over. 11 U.S.C.A. § 542(b).

1 Cases that cite this headnote

[28] Bankruptcy

Property and claims subject to stay

Stay provisions protecting property of the estate incorporated broad definition of "property of the estate" as including property "wherever located," and could be applied extraterritorially to alleged stay violations that occurred when foreign entities indebted to Chapter 11 debtor for payment of placement proceeds set off against those proceeds. 11 U.S.C.A. § 362(a).

1 Cases that cite this headnote

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MEMORANDUM OF DECISION

SEAN H. LANE, UNITED STATES BANKRUPTCY JUDGE

Before the Court are motions to dismiss filed by defendants Bahrain Islamic Bank ("BisB") and Tadhamon Capital B.S.C. ("Tadhamon") (together, the "Defendants") in these adversary proceedings brought by the official committee of unsecured creditors in the above-captioned Chapter 11 cases (the "Committee" or the "Plaintiff"). 1 The Committee seeks the return of funds invested with the Defendants by Debtor Arcapita Bank B.S.C.(c) ("Arcapita")—a Bahraini investment bank just before Arcapita's bankruptcy filing. Given the foreign aspects of the transactions that form the basis of the complaints, the Defendants contend that these claims should be dismissed based on the presumption against extraterritoriality and the principle of international comity. For the reasons stated below, however, the Court disagrees.

Because the motions in the two cases raise the same issues, the Court will address them together.

BACKGROUND

Arcapita is licensed as an Islamic wholesale bank by the Central Bank of Bahrain. BisB Compl. ¶ 12 [Adv. No. 13–01434, ECF No. 1]; Tadhamon Compl. ¶ 12 [Adv. No. 13–01435, ECF No. 1]. Headquartered in Bahrain, Arcapita is operated as an investment bank and is a global manager of Shari'ah compliant alternative investments. BisB Compl. ¶ 12; Tadhamon Compl. ¶ 12. Defendant BisB is an Islamic commercial bank headquartered in Bahrain. BisB Compl. ¶ 13. Defendant Tadhamon is a Bahraini corporation and a subsidiary of Tadhamon International Islamic Bank ("TIIB"), a Yemeni bank that offers Islamic banking and investment services to *234 customers in Yemen and abroad. Tadhamon Compl. ¶ 13. Tadhamon serves as the investment arm of TIIB. Id

A. The Placements

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Prior to its bankruptcy filing, Arcapita made several discrete short-term investments through the Defendants (the "Placements"). BisB Compl. ¶¶ 27, 30; Tadhamon Compl. ¶¶ 27, 31. The Placements were made under two separate investment agreements between Arcapita and each of the respective Defendants (the "Placement Agreements"). BisB Compl. ¶¶ 27; Tadhamon Compl. ¶¶ 27. Both of the Placement Agreements were negotiated and signed in Bahrain and provided that the laws of the Kingdom of Bahrain govern, except to the extent that such laws conflicted with the principles of Islamic Shari'ah, in which case Shari'ah law would prevail. Rashdan Decl. ¶ 13 & Ex. A § 7.1 [Adv. No. 13–01435, ECF No. 8]; Mohammed Decl. ¶ 5 & Ex. A § 12 [Adv. No. 13–01434, ECF No. 8].

Under the Placement Agreements, Arcapita appointed the Defendants to serve as its agent in the purchase of the Placement investments on Arcapita's behalf. BisB Compl. ¶¶ 23–24; Tadhamon Compl. ¶¶ 22, 24. The Defendants were obligated to repurchase the Placements from Arcapita on a deferred payment basis for an amount equal to the original investment, plus an agreed-upon return (the "Placement Proceeds"). BisB Compl. ¶¶ 2, 24; Tadhamon Compl. ¶¶ 2, 24. The Defendants were to transfer the Placement Proceeds to Arcapita on the designated maturity date of the Placements. BisB Compl. ¶¶ 2, 24; Tadhamon Compl. ¶¶ 2, 24.

Consistent with these Placement Agreements, Arcapita entered into a Placement with BisB in the amount of \$10 million on March 14, 2012 (the "BisB Placement"). BisB Compl. ¶ 27. To execute the BisB Placement, Arcapita transferred funds from its account at JP Morgan Chase Bank in New York to a correspondent bank account maintained by BisB at JP Morgan Chase Bank in New York. BisB Compl. ¶ 15. On the same day as the transfer, BisB purchased the commodities for Arcapita through a London broker. Mohammed Decl. ¶ 10.

Arcapita entered into two Placements with Tadhamon on March 15, 2012, each for \$10 million (the "Tadhamon Placements"). Tadhamon Compl. ¶ 27. To execute the Tadhamon Placements, Arcapita transferred funds from its account at JP Morgan Chase Bank in New York to an account at HSBC Bank in New York. Tadhamon Compl. ¶ 28. The HSBC account was a correspondent bank account maintained by Khaleeji Commercial Bank B.S.C., Tadhamon's bank in Bahrain. Rashdan Decl. ¶ 7. The

funds were then immediately transferred from the HSBC account to an account held by Tadhamon at Khaleeji Commercial Bank in Bahrain. Tadhamon Compl. ¶ 28; Rashdan Decl. ¶ 7.

B. The Bankruptcy Case and Prior Proceedings in These Adversary Proceedings

Less than a month after entering into the Placements, Arcapita filed for protection under Chapter 11 of the Bankruptcy Code. Although the Placements matured within a month after Arcapita's bankruptcy filing, the Defendants failed to deliver the Placement Proceeds to Arcapita. BisB Compl. ¶¶ 31, 32, 34; Tadhamon Compl. ¶¶ 27, 35, 36, 38. Instead, the Defendants informed Arcapita that, pursuant to Bahraini law, they were setting off the Placement Proceeds against prepetition debt owed to them by Arcapita. BisB Compl. *235 ¶ 34; Tadhamon Compl. ¶ 38. The Committee alleges that the outstanding balance of Placement Proceeds due and owing to Arcapita is \$10,002,292.00 from BisB and \$18,480,269.00 from Tadhamon. ³ BisB Compl. ¶ 36; Tadhamon Compl. ¶ 40. The Committee filed these cases against the Defendants for breach of contract, turnover, the avoidance of a preferential transfer, violation of the automatic stay, and claims disallowance. BisB Compl. ¶¶ 1, 36; Tadhamon Compl. ¶¶ 1, 40. 4 The Committee seeks, among other things, to compel the Defendants to comply with their obligations under the Placement Agreements by turning over the Placement Proceeds or to avoid the Placements and recover the Placement Proceeds as an improper payment of antecedent debts. BisB Compl. ¶ 6; Tadhamon Compl. ¶ 6.

- Based on Arcapita's pre-existing relationship with the Defendants, Arcapita already owed millions in unmatured debt to each of the Defendants at the time of the Placements. Arcapita owed \$9,774,096.15 to BisB as a result of investments that BisB made with Arcapita on December 1, 2011. BisB Compl. ¶¶ 3, 16—20. Arcapita owed \$18,497,734.48 to Tadhamon as a result of multiple investments that Tadhamon made with Arcapita between September 2009 and January 2012. Tadhamon Compl. ¶¶ 17–19.
- In December 2012, Tadhamon returned to Arcapita the portion of the Placement Proceeds that exceeded its purported setoff. Tadhamon Compl. ¶ 40.

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There are five counts in the complaint. Count I of the Committee's complaints asserts breach of contract of the Placement Agreements for failure to transfer the Placement Proceeds as required under the agreements. BisB Compl. ¶¶ 38-42; Tadhamon Compl. ¶¶ 42-47. Count II asserts a cause of action pursuant to Sections 541, 542 and 550 of the Bankruptcy Code for turnover of the Placement Proceeds as estate assets wrongfully held by the Defendants. BisB Compl. ¶¶ 43-48; Tadhamon Compl. ¶¶ 48-53. Count III asserts a cause of action for avoidance of the Placements as preferential transfers under Section 547(b) of the Bankruptcy Code and recovery of the Placement Proceeds from the Defendants pursuant to Section 550(a) of the Bankruptcy Code. BisB Compl. ¶¶ 49-57; Tadhamon Compl. ¶¶ 54-62. Count IV asserts a cause of action under Sections 362(a)(3) and 362(a) (7) of the Bankruptcy Code for violation of the automatic stay due to the exercise of control over the Placement Proceeds and the setoff of antecedent debt against the Placement Proceeds. BisB Compl. ¶¶ 58–65; Tadhamon Compl. ¶¶ 63–70. Count V seeks a judgment pursuant to Section 502(d) of the Bankruptcy Code disallowing the Defendants' claims in the Debtors' bankruptcy cases. BisB Compl. ¶¶ 66-69; Tadhamon Compl. ¶¶ 71-74.

The Defendants' current motions do not take place in a vacuum. The parties have already litigated the issue of personal jurisdiction in this case. On that issue, the United States District Court for the Southern District of New York held that the Defendants' use of New York correspondent bank accounts to receive funds from Arcapita met the threshold of minimum contacts necessary to assert personal jurisdiction over the Defendants. See Official Comm. of Unsecured Creditors of Arcapita Bank B.S.C.(c) v. Bahrain Islamic Bank (In re Arcapita Bank B.S.C.(c)), 549 B.R. 56, 67–71 (S.D.N.Y. 2016), reversing Official Comm. of Unsecured Creditors of Arcapita Bank B.S.C.(c) v. Bahrain Islamic Bank (In re Arcapita Bank B.S.C.(c)), 529 B.R. 57 (Bankr. S.D.N.Y. 2015). The District Court further held that the assertion of jurisdiction was reasonable under the circumstances of the cases. See id. at 71-2. In reaching its decision, the District Court examined the issue of personal jurisdiction under both the New York long-arm statute and federal case law. See id. at 67-70.

The District Court first held that the Defendants' use of the correspondent accounts in New York was purposeful, constituted a "transaction of business" in New *236 York, and established the minimum contacts necessary to assert specific jurisdiction over the Defendants. See id. at 68-70. Given the allegations in the complaints, the District Court found that the Defendants had selected U.S. dollars as the currency for the transactions and had designated the New York correspondent bank accounts to receive the funds from Arcapita. See id. at 68-69. The District Court stated that, despite the Defendants' decision to use the funds for investments overseas, the Defendants "deliberately chose to receive Arcapita's funds in U.S. dollars and designated correspondent bank accounts in New York to receive the funds, even though they presumably could have performed the Placement transactions without ever directing the funds through New York or anywhere else in the United States." Id. at 70. The Defendants therefore made a "deliberate choice to utilize the New York correspondent bank accounts and, more generally, New York's and the United States's banking system...." Id.

Importantly for the present motions, the District Court also held that the Committee's avoidance claim under Section 547 of the Bankruptcy Code arose from the Defendants' use of the New York correspondent accounts. See id. at 69-70. The District Court stated that the Defendants' "New York contacts-i.e., the receipt of the transferred funds in New York correspondent bank accounts-are at the heart of this cause of action. The receipt of the funds in New York is precisely the conduct targeted by the Committee, and the activity that the cause of action seeks to have voided." Id. at 69. In coming to this conclusion, the District Court observed that "when a defendant purposely selects and uses a correspondent bank account to effectuate a particular transaction, and a plaintiff later files a lawsuit asserting a cause of action arising out of that transaction, the defendant can hardly claim that it could not have foreseen being haled into court in the forum in which the correspondent bank account it had selected is located." Id. at 68; see id. at 71.

The District Court also concluded that "the United States has a strong interest in adjudicating claims that arise under its Bankruptcy Code so that both creditors and debtors can obtain the remedies and relief that the United States Congress has determined are fair and equitable.... Indeed, it does not seem prudential to allow foreign creditors to potentially obtain priority over domestic creditors based simply on their foreign status." *Id.* at 71–72. The District Court observed that the Committee had "a strong interest

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in obtaining convenient and effective relief, and it is unclear whether it would be able to bring [] similar causes of action to those grounded in the United States bankruptcy code in a non-U.S. forum." Id. at 72.

Against this backdrop, the Defendants now request dismissal based on the doctrines of international comity and the presumption against extraterritorial application of federal statutes. The parties each provided supplemental briefing on those issues. See Adv. No. 13-01434, ECF Nos. 43-45, 47-53; Adv. No. 13-01435, ECF Nos. 39-41, 43-49. With respect to international comity, the Defendants argue that these cases should be dismissed because there is a conflict between U.S. bankruptcy law and the laws of Bahrain, and that it would be unreasonable to apply U.S. law in these circumstances. The Committee responds by arguing that the doctrine of international comity is inapplicable in this case due to the lack of a parallel foreign legal proceeding to which this Court should defer. As to the presumption against extraterritoriality, the Defendants argue that the transfers at issue took place overseas and that there is no clear indication *237 of congressional intent for the sections of the Bankruptcy Code at issue here to be applied extraterritorially. The Committee counters that the transfers challenged by the Committee do not require extraterritorial application because they occurred domestically and that, in any event, Congress intended the statutory sections at issue here to apply extraterritorially.

DISCUSSION

A. International Comity

which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws." Hilton v. Guyot, 159 U.S. 113, 164, 16 S.Ct. 139, 40 L.Ed. 95 (1895). Under international comity, "states normally refrain from prescribing laws that govern activities connected with another state when the exercise of such jurisdiction is unreasonable." Maxwell Comm'n Corp. v. Societe Generale (In re Maxwell Comm'n Corp.), 93 F.3d 1036, 1047-48 (2d Cir. 1996) ("Maxwell II") (quoting Restatement (Third) of Foreign Relations § 403(1)). The doctrine is "concerned with maintaining amicable working relationships between nations, a 'shorthand for good neighbourliness, common courtesy and mutual respect between those who labour in adjoining judicial vineyards.' " JP Morgan Chase Bank v. Altos Hornos de Mex., S.A. de C.V., 412 F.3d 418, 423 (2d Cir. 2005) (quoting British Airways Bd. v. Laker Airways Ltd., [1984] E.C.C. 36, 41 (Eng. C.A.)).

[5] [6] [7] "The decision to grant comity is a matter within a court's discretion and the burden of proof to establish its appropriateness is on the moving party." Duff & Phelps, LLC v. Vitro S.A.B. de C.V., 18 F.Supp.3d 375, 382 (S.D.N.Y. 2014) (quoting Maersk, Inc. v. Neewra, Inc., 2010 U.S. Dist. LEXIS 69863, at *29, 2010 WL 2836134, at *10 (S.D.N.Y. July 9, 2010)). The doctrine is a form of abstention; it "is not an imperative obligation of courts but rather is a discretionary rule of 'practice, convenience, and expediency." JP Morgan, 412 F.3d at 422-23 (quoting Pravin Banker Assocs., Ltd. v. Banco Popular Del Peru, 109 F.3d 850, 854 (2d Cir. 1997)); Sec. Inv'r Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC (In re Madoff), 2016 Bankr. LEXIS 4067, at *32 (Bankr. S.D.N.Y. Nov. 21, 2016) ("Madoff II"). "When considering a motion to abstain, a 'court is not restricted to the face of the pleadings, but may review affidavits and other evidence to resolve factual disputes concerning its jurisdiction to hear the action." Madoff II, 2016 Bankr. LEXIS 4067, at *33 (quoting Kingsway Fin. Servs. v. Pricewaterhouse-Coopers, LLP, 420 F.Supp.2d 228, 233 n.5 (S.D.N.Y. 2005)). An analysis based on international comity is distinct from one under the presumption against extraterritoriality. See Maxwell II, 93 F.3d at 1047.

The Committee argues that international comity may [2] [3] International comity is "the recognition not be invoked here given the lack of a parallel foreign proceeding. Stated another way, there is no foreign proceeding to which this Court should defer. But while the Court agrees with the Defendants that the doctrine may apply in such instances, it nonetheless concludes that comity does not preclude this lawsuit from proceeding.

> [8] When addressing this issue, it is necessary to assess the contours of the doctrine of international comity itself, which are not well-defined. Indeed, the doctrine has been described as having "borders [that] are marked by fuzzy lines of politics, courtesy, and good faith." *238 JP Morgan, 412 F.3d at 423 (quoting Harold G. Maier, Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law,

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76 Am. J. Int'l L. 280, 281 (1982)). The Second Circuit has explained that international comity conflates two distinct doctrines. See Maxwell II, 93 F.3d at 1047; S. African Apartheid Litig. v. Daimler AG, 617 F.Supp.2d 228, 283 (S.D.N.Y. 2009). The first—often referred to as legislative or prescriptive comity-is "a canon of construction" which serves to "shorten the reach of a statute." Maxwell II, 93 F.3d at 1047; see also Mujica v. Airscan Inc., 771 F.3d 580, 598 (9th Cir. 2014) ("[L]egislative or 'prescriptive comity' ... guides domestic courts as they decide the extraterritorial reach of federal statutes.") (internal citations and quotations omitted). The second, referred to as "comity among the courts" or adjudicatory comity, "may be viewed as a discretionary act of deference by a national court to decline to exercise jurisdiction in a case property adjudicated in a foreign state." Maxwell II, 93 F.3d at 1047; see also Mujica, 771 F.3d at 599 ("[A]djudicatory comity 'involves ... the discretion of a national court to decline to exercise jurisdiction over a case before it when that case is pending in a foreign court with proper jurisdiction.") (quoting JP Morgan, 412 F.3d at 424).

- [9] [10] As there is no parallel foreign proceeding in the case before the Court, adjudicatory comity is inapplicable. See Madoff II, 2016 Bankr. LEXIS 4067, at *37 (citing Royal & Sun Alliance Ins. Co. of Canada v. Century Int'l Arms, Inc., 466 F.3d 88, 92-97 (2d Cir. 2006)). To evaluate prescriptive comity, courts often refer to the factors set out in Restatement (Third) of Foreign Relations § 403. See, e.g., F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 165, 124 S.Ct. 2359, 159 L.Ed.2d 226 (2004); Hartford Fire Ins. Co. v. California, 509 U.S. 764, 818-19, 113 S.Ct. 2891, 125 L.Ed.2d 612 (1993) (Scalia, J., dissenting); Gucci America, Inc. v. Bank of China, 768 F.3d 122, 139 (2d Cir. 2014); French v. Liebmann (In re French), 440 F.3d 145, 153 (4th Cir. 2006). The Restatement "provides that states normally refrain from prescribing laws that govern activities connected with another state 'when the exercise of such jurisdiction is unreasonable.' " Maxwell II, 93 F.3d at 1047-48 (quoting Restatement (Third) of Foreign Relations Law of the U.S. § 403(1)). In determining whether the exercise of jurisdiction is reasonable, a court considers the following non-exclusive factors, where appropriate:
 - (a) the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;

- (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;
- (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;
- (d) the existence of justified expectations that might be protected or hurt by the regulation;
- (e) the importance of the regulation to the international political, legal, or economic system;
- *239 (f) the extent to which the regulation is consistent with the traditions of the international system;
- (g) the extent to which another state may have an interest in regulating the activity; and
- (h) the likelihood of conflict with regulation by another state

Restatement (Third) of Foreign Relations Law of the U.S. § 403(2). These factors "correspond to familiar choice-of-law principles," *Maxwell II*, 93 F.3d at 1048 (noting that "[t]he analysis must consider the international system as a whole in addition to the interests of the individual states, because the effective functioning of that system is to the advantage of all the affected jurisdictions.").

[11] The Court finds that these factors weigh in favor of asserting jurisdiction in this case and against abstention based on international comity. The Defendants argue that the parties expected Bahraini law to apply as provided for under the Placement Agreements and that the United States has no interest in regulating these transactions involving Bahraini parties for investments made outside of the U.S. But the link between the U.S., as the regulating state, and the regulated activity in question is sufficiently strong here given that the transfers took place through use of correspondent bank accounts in the United States. As noted by the District Court, the Defendants' "New York contacts—i.e., the receipt of the transferred funds in New York correspondent bank accounts—are at the heart of this cause of action. The receipt of the funds in New

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York is precisely the conduct targeted by the Committee, and the activity that the cause of action seeks to have voided." *In re Arcapita*, 549 B.R. at 69. Moreover, while the transferor Arcapita is a foreign entity, it created a further connection between itself and the United States by availing itself of U.S. law through its filing for bankruptcy and creating an estate pursuant to the Bankruptcy Code.

As to the existence of justified expectations of the parties, the parties cannot be surprised to be litigating in this forum. As the District Court observed, "when a defendant purposely selects and uses a correspondent bank account to effectuate a particular transaction, and a plaintiff later files a lawsuit asserting a cause of action arising out of that transaction, the defendant can hardly claim that it could not have foreseen being haled into court in the forum in which the correspondent bank account it had selected is located." In re Arcapita, 549 B.R. at 68; cf. Official Comm. of Unsecured Creditors v. Transpacific Corp. (In re Commodore Int'l, Ltd.), 242 B.R. 243, 261 (Bankr. S.D.N.Y. 1999) ("A debtor-in-possession or trustee, or by implication a committee whose authority derives from them, is not bound by a forum selection clause in an agreement provided the litigation at issue amounts to a core proceeding and is not inextricably intertwined with non-core matters."). The potential application of Bahraini law also does not mandate abstention based on comity given that the Court is competent to apply foreign law. See, e.g., Bickerton v. Bozel S.A. (In re Bozel S.A.), 434 B.R. 86, 107 (Bankr. S.D.N.Y. 2010) ("[I]t is not uncommon for U.S. courts to apply foreign law under the appropriate circumstances.") (citing Bigio v. Coca-Cola, 448 F.3d 176 (2d Cir. 2006); United States v. Schultz, 333 F.3d 393 (2d Cir. 2003); Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 313 F.3d 70 (2d Cir. 2002)); see also MicroAire Surgical Instruments, LLC v. Arthrex, Inc., 2010 WL 2757351, at *10 (W.D. Va. July 13, 2010) ("[W]hile the potential application of foreign law is a factor that weighs in favor of dismissal, the application of *240 foreign law is still a task that the courts are competent, and often called-upon, to perform.").

With regard to the nature of the regulated activity and its importance to this jurisdiction as compared to the international system, the composition of a debtor's estate is clearly central to a U.S. bankruptcy case. The laws at issue in this case—Sections 362, 542, 547 and 550 of the Bankruptcy Code—are designed to protect and pool the

assets of the Debtor's estate for the equitable benefit of all its creditors. These provisions are the bedrock of the protections afforded to creditors under the Bankruptcy Code. As the District Court noted,

the United States has a strong interest in adjudicating claims that arise under its Bankruptcy Code so that both creditors and debtors can obtain the remedies and relief that the United States Congress has determined are fair and equitable.... Indeed, it does not seem prudential to allow foreign creditors to potentially obtain priority over domestic creditors based simply on their foreign status.

In re Arcapita, 549 B.R. at 71–72; *but c.f. Maxwell II*, 93 F.3d at 1052 (stating that the Court of Appeals could not say that the United States had a significant interest in applying its own avoidance law, but noting that a different result might be warranted if there was no alternative foreign mechanism available for voiding preferences). ⁵

Congress has recognized the importance of the preference provisions of the Bankruptcy Code:

First, by permitting the trustee to avoid prebankruptcy transfers that occur within a short period before bankruptcy, creditors are discouraged from racing to the courthouse to dismember the debtor during his slide into bankruptcy.... Second, and more important, the preference provisions facilitate the prime bankruptcy policy of equality of distribution among creditors of the debtor. Any creditor that received a greater payment than others of his class is required to disgorge so that all may share equally.

H.R. Rep. No. 95–595, at 177–78 (1977), reprinted in 1978 U.S.C.C.A.N. 5787, 5963, 6138.

[12] [13] The existence of the Committee's claim of turnover and violation of the automatic stay also does not support a dismissal based on international comity. See BisB Comp. ¶¶ 58–65; Tadhamon Compl. ¶¶ 63–70 (asserting a violation of the automatic stay based on Defendants' setoff of antecedent debt against the Placement Proceeds). A claim for turnover "invokes the court's most basic equitable powers to gather and manage property of the estate." Braunstein v. McCabe, 571 F.3d 108, 122 (1st Cir. 2009); see also Cent. Va. Cmty. Coll. v.

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Katz, 546 U.S. 356, 363-64, 126 S.Ct. 990, 163 L.Ed.2d 945 (2006) ("Critical features of every bankruptcy proceeding are the exercise of exclusive jurisdiction over all of the debtor's property [and] the equitable distribution of that property among the debtor's creditors...."). Similarly, the automatic stay is a central protection afforded to a debtor. See Shieldalloy Metallurgical Corp. v. New Jersey Dep't of Envtl. Prot., 743 F.Supp.2d 429, 440 (D.N.J. 2010) ("Violating the automatic stay directly interferes with the exercise of exclusive jurisdiction over all of the debtor's property [and] the equitable distribution of that property among the debtor's creditors, critical features of every bankruptcy proceeding.") (internal citations and quotations omitted); In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig., 522 F.Supp.2d 569, 578 (S.D.N.Y. 2007) ("The automatic stay is a crucial provision of bankruptcy law. It prevents disparate actions *241 against debtors and protects creditors in a manner consistent with the bankruptcy goal of equal treatment by ensuring that no creditor receives more than an equitable share of the bankrupt's estate.") (quoting In re Parr Meadows Racing Ass'n, Inc., 880 F.2d 1540, 1545 (2d Cir. 1989)); Florsheim Grp. Inc. v. USAsia Int'l Corp. (In re Florsheim Grp. Inc.), 336 B.R. 126, 132-33 (Bankr. N.D. III. 2005).

The Defendants rely on the Second Circuit's statement that international comity is particularly "important in the context of the Bankruptcy Code." Madoff II, 2016 Bankr. LEXIS 4067, at *33 (citing Maxwell II, 93 F.3d at 1048). But the Second Circuit's international comity decisions primarily emphasize the doctrine's bankruptcy significance in the context of parallel insolvency proceedings. See Finanz AG Zurich v. Banco Economico S.A., 192 F.3d 240, 246 (2d Cir. 1999) (the Second Circuit has "repeatedly noted the importance of extending comity to foreign bankruptcy proceedings."); JP Morgan, 412 F.3d at 424 ("We have repeatedly held that U.S. courts should ordinarily decline to adjudicate creditor claims that are the subject of a foreign bankruptcy proceeding."); Allstate Life Ins. Co. v. Linter Grp. Ltd., 994 F.2d 996, 999 (2d Cir. 1993) ("[W]e have recognized that comity is particularly appropriate where, as here, the court is confronted with foreign bankruptcy proceedings."). American courts defer in such instances "[b]ecause the 'equitable and orderly distribution of a debtor's property requires assembling all claims against the limited assets in a single proceeding....' " Vitro, 18 F.Supp.3d at 383 (quoting Finanz AG, 192 F.3d at 246). But no such

parallel proceedings exist here. See Maxwell II, 93 F.3d at 1052-53 (holding that the purposes underlying the avoidance provisions of the Bankruptcy Code would not be significantly thwarted specifically because of the presence of a parallel proceeding in England with British provisions that were counterpart of U.S. avoidance provisions); id. at 1052 (noting that the principal policies underlying the avoidance provisions "are equal distribution to creditors and preserving the value of the estate through the discouragement of aggressive prepetition tactics causing dismemberment of the debtor.") (citing Union Bank v. Wolas, 502 U.S. 151, 161, 112 S.Ct. 527, 116 L.Ed.2d 514 (1991)). Importantly, the Second Circuit in Maxwell II observed that "a different result [than dismissal based on comity] might be warranted were there no parallel proceeding in England—and, hence, no alternative mechanism for voiding preferences..." Maxwell II, 93 F.3d at 1052.

Given the lack of foreign insolvency proceeding, it is questionable whether the Committee would be able to obtain relief under Bahraini law. The District Court itself observed that "it is unclear whether [the Committee] would be able to bring [] similar causes of action to those grounded in the United States bankruptcy code in a non-U.S. forum." In re Arcapita, 549 B.R. at 72; see also Memo. of Law in Support of BisB Mtn. to Dismiss at 4-5 (Case No. 13-01434, ECF No. 9) (arguing that set-off is permitted under the provisions of Bahraini law); Memo. of Law in Support of Tadhamon Mtn. to Dismiss at 6 (Case No. 13-01435, ECF No. 9) (same). That raises a grave concern that the Bankruptcy Code's "avoidance and recovery provisions [might] cease[] to be effective at the borders of the United States," thus allowing parties to do an "end run [of] the Code by 'simply arrang[ing] to have the transfer made overseas,' thereby shielding them from United States law and recovery by creditors." *242 Sec. Inv'r Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC (In re Bernard L. Madoff), 480 B.R. 501, 525 (Bankr. S.D.N.Y. 2012) (quoting Maxwell Commc'n Corp. PLC v. Societe General plc (In re Maxwell Commc'n Corp.), 186 B.R. 807, 816 (S.D.N.Y. 1995) ("Maxwell I")).

The Defendants' reliance on Sec. Inv'r Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC (In re Madoff Sec.), 513 B.R. 222 (S.D.N.Y. 2014) ("Madoff I")) is misplaced. That case involved transfers by a debtor to its foreign customers where the funds were subsequently transferred to other foreign individuals and entities. The trustee for

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the debtor's estate sought to recover these funds from the subsequent transferees as avoidable transfers under Sections 548 and 550 of the Bankruptcy Code. See id. at 231-32. In dismissing the actions, the Court noted that "given the indirect relationship between [the U.S. debtor] and the transfers at issue here, these foreign jurisdictions have a greater interest in applying their own laws than does the United States." Id. at 232. But the defendants in Madoff were subsequent transferees, one step removed from the underlying transfers of the debtor. By contrast, this case involves parties who structured their deal the way they wanted—using U.S. banks—and are merely being held accountable for the consequences of that structure. In Madoff, moreover, the foreign subsequent transferor entities were involved in parallel liquidation proceedings in their home countries, raising concerns that the relief sought in the United States might conflict with foreign court determinations. See id.

[14] For all these reasons and keeping in mind the " 'virtually unflagging obligation" of the federal courts "to exercise the jurisdiction given them," the Court rejects the Defendants' request to abstain from making a determination in this case based on international comity. Royal & Sun Alliance Ins. Co. of Can. v. Century Int'l Arms, Inc., 466 F.3d 88, 92 (2d Cir. 2006) (quoting Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976)).

B. The Presumption Against Extraterritoriality

[16] [17] [18] extraterritoriality "is a longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.' " Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 255, 130 S.Ct. 2869, 177 L.Ed.2d 535 (2010) (quoting EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248, 111 S.Ct. 1227, 113 L.Ed.2d 274 (1991) ("Aramco")). It is not a limitation on the power of Congress to legislate, but rather a presumption that such legislation ordinarily relates to domestic, and not foreign, matters. See Morrison, 561 U.S. at 255, 130 S.Ct. 2869. The presumption "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." Aramco, 499 U.S. at 248, 111 S.Ct. 1227. However, the presumption will apply "regardless of whether there is a risk of conflict between the American statute and a foreign law." Morrison, 561 U.S. at 255, 130 S.Ct. 2869. The party asserting that the statute in question applies extraterritorially has the burden of making an "affirmative showing" of the same. See Aramco, 499 U.S. at 250, 111 S.Ct. 1227.

[20] To determine whether the presumption against extraterritoriality applies, the Court addresses two questions that can be examined in either order. See Madoff II, 2016 Bankr. LEXIS 4067, at *8 (noting a two-step extraterritoriality analysis that can be examined in either order."); cf. *243 Ramasamy v. Essar Glob. Ltd., 825 F.Supp.2d 466, 467 n.1 (S.D.N.Y. 2011) (citing Sinochem Int'l Co. v. Malaysia Int'l Shipping Co., 549 U.S. 422, 431, 127 S.Ct. 1184, 167 L.Ed.2d 15 (2007) ("[A] federal court has leeway to choose among threshold grounds for denying audience to a case on the merits.")).

[21] [22] [23] Under the first inquiry, the Court examines whether Congress intended for the relevant statute to apply extraterritorially. See Spizz v. Goldfarb Seligman & Co. (In re Ampal-American Israel Corp.), 562 B.R. 601, 605 (Bankr. S.D.N.Y. 2017); Weisfelner v. Blavatnik (In re Lyondell Chem. Co.), 543 B.R. 127, 148 (Bankr. S.D.N.Y. 2016). The Court does so by examining " 'whether the presumption against extraterritoriality has been rebutted—that is, whether the statute gives a clear, affirmative indication that it applies extraterritorially." RJR Nabisco, Inc. v. European Cmty., — U.S. — 136 S.Ct. 2090, 2101, 195 L.Ed.2d 476 (2016). " '[U]nless there is the affirmative intention of the Congress clearly expressed to give a statute extraterritorial effect, we must presume it is primarily concerned with domestic [19] The presumption against onditions." Morrison, 561 U.S. at 255, 130 S.Ct. 2869 (quoting Aramco, 499 U.S. at 248, 111 S.Ct. 1227). The effect of the presumption is that "[w]hen a statute gives no clear indication of an extraterritorial application, it has none." Id. at 255, 130 S.Ct. 2869. The standard is not, however, a "clear statement rule." Id. at 265, 130 S.Ct. 2869. The context of the statute, including surrounding provisions of the Bankruptcy Code, may be consulted "to give the most faithful reading of the text...." Id. (internal citations and quotations omitted); see also In re Lyondell, 543 B.R. at 151 (citing *Madoff I*, 513 B.R. at 228). If it is determined that the statute applies extraterritorially, then the inquiry is complete. See Ampal, 562 B.R. at 605.

> [25] The second inquiry examines whether the litigation at issue involves an extraterritorial application of the statute in question. Id. at 605. This is done by " 'identifying the conduct proscribed or regulated by the

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particular legislation in question,' and [then] considering whether that conduct 'occurred outside of the borders of the U.S.' " In re Lyondell, 543 B.R. at 148 (quoting Maxwell I, 186 B.R. at 816). When determining the conduct regulated by the statute, the Court examines the "focus" of the statute, i.e., the "objects of the statute's solicitude," Madoff II, 2016 Bankr. LEXIS 4067, at *9 (quoting Morrison, 561 U.S. at 267, 130 S.Ct. 2869), or "those transactions that the statute seeks to regulate." In re Lyondell, 543 B.R. at 150 (quoting Morrison, 561 U.S. at 267, 130 S.Ct. 2869). "If the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad; but if the conduct relevant to the focus occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory." Nabisco, 136 S.Ct. at 2101.

For the reasons explained below, the Plaintiff's claims are either based on domestic conduct or based on statutes that apply extraterritorially and, therefore, the Defendants' extraterritoriality defense is rejected.

1. The Avoidance Claim

[26] Count III of the complaints asserts a cause of action for avoidance of the Placements as preferential transfers under Section 547(b) of the Bankruptcy Code and recovery of the Placement Proceeds from the Defendants pursuant to Section 550(a) of the Bankruptcy Code. BisB Compl. ¶¶ 49–57; Tadhamon Compl. ¶¶ 54–62. *244 Among other disputes, the parties disagree about whether this claim satisfies the second prong of the test, which examines whether a litigation involves extraterritorial application of the statute.

Focusing on the transfers here among correspondent bank accounts in the United States, the Plaintiffs argue that the challenged conduct in this case is domestic, not foreign. The Plaintiffs argue that this is so notwithstanding the Defendants' contention that all other aspects of the transactions occurred overseas. *See* Plaintiffs' Letter, dated May 23, 2017 [Adv. No. 13–01434, ECF No. 51; Adv. No. 13–01435, ECF No. 47] (citing *United States v. Prevezon Holdings, Ltd.*, 251 F.Supp.3d 685 (S.D.N.Y. 2017)). The Defendants disagree, arguing that the transfers in the United States by themselves are not enough. The Defendants look to not only "the location of the transfers" but also "the component events of

[the] transactions." Madoff I, 513 B.R. at 227 (quoting Maxwell I, 186 B.R. at 817). For example, the Defendants maintain that the focus should be on when the payment was "completed" so as to give the payee "full rights over the payment." Defendants' Letter, dated May 30, 2017, at 3-4 [Adv. No. 13-01434, ECF No. 52; Adv. No. 13-01435, ECF No. 48] (contending that the inquiry must determine where the defendant "acquired full title and control of the funds") (citing Madoff II, 2016 Bankr. LEXIS 4067, at *81-83); see also Maxwell I, 186 B.R. at 817 (considering "the location of the transfers as well as the component events of those transactions...."); Lyondell, 543 B.R. at 149 (identifying component events as "whether the participants, acts, targets, and effects involved in the transaction at issue are primarily foreign or primarily domestic.") (quoting French, 440 F.3d at 150).

To decide between the parties' competing positions, the Court must assess whether "the relevant conduct ... 'sufficiently touch[ed] and concern[ed] the territory of the United States.' " Prevezon, 251 F.Supp.3d 685, 692, 2017 WL 1951142, at *5 (S.D.N.Y. 2017) (quoting Licci by Licci v. Lebanese Canadian Bank, SAL, 834 F.3d 201, 215 (2d Cir. 2016)). That assessment must be done through "the lens of the charging statute." Prevezon, 251 F.Supp.3d at -, 2017 WL 1951142, at *5 (citing Mastafa v. Chevron Corp., 770 F.3d 170, 189 (2d Cir. 2014); Nabisco, 136 S.Ct. at 2101). The Supreme Court has instructed courts to "target [their] inquiry on 'the focus of congressional concern,' or, in other words, the 'transactions that the statute seeks to regulate." In re Lyondell, 543 B.R. at 150 (quoting Morrison, 561 U.S. at 266-67, 130 S.Ct. 2869). Courts in this jurisdiction have held that "the focus of the [Bankruptcy Code's] avoidance and recovery provisions is the initial transfer that depletes the property that would have become property of the estate." 6 Ampal, 562 B.R. at 613 (citing SIPA, 480 B.R. at 524; Edward R. Morrison, Extraterritorial Avoidance Actions: Lessons From Madoff, 9 Brook. J. Corp. Fin & Comm. L. 268, 271 (Fall 2014)); accord Begier v. Internal Revenue Serv., 496 U.S. 53, 58, 110 S.Ct. 2258, 110 L.Ed.2d 46 (1990) ("[T]he purpose of the avoidance provision is to preserve the property includable within the bankruptcy estate—the property available for distribution to creditors."); French v. Liebmann (In re French), 440 F.3d 145, 154 (4th Cir. 2006) ("[T]he *245 Code's avoidance provisions protect creditors by preserving the bankruptcy estate against illegitimate depletions.").

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The cases on extraterritoriality do not distinguish between Sections 547 and 548 of the Bankruptcy Code for purposes of the extraterritoriality analysis because the relevant language is the same in both. See Ampal, 562 B.R. at 612 n.11 (noting that both statutory sections "permit a trustee to 'avoid any transfer of an interest of the debtor in property.' "). Accordingly, the Court has examined cases on both statutes.

Applying these principles here, the Court concludes that the conduct here touched and concerned the United States in a manner sufficient to displace the presumption against extraterritoriality. As the District Court observed, the Defendants' "receipt of the transferred funds in New York correspondent bank accounts" is at "the heart of this cause of action." Arcapita, 549 B.R. at 69. Indeed, "[t]he receipt of the funds in New York is precisely the conduct targeted by the Committee, and the activity that the cause of action seeks to have voided." Id. 7 Thus, the District Court concluded that the transfers in New York are central to the Plaintiff's preference claim. 8 Indeed, courts have found the use of bank accounts in the United States to be sufficient to displace the presumption against extraterritoriality. For example, the court in Prevezon concluded that "[t]he use of correspondent banks in foreign transactions between foreign parties constitutes domestic conduct within" the reach of 18 U.S.C. § 2314, a statute that criminalizes the transportation of property stolen or taken by fraud. Prevezon, 251 F.Supp.3d at —, 2017 WL 1951142, at *5. Prevezon involved a civil forfeiture action relating to the laundering of proceeds derived from a fraud perpetrated in Russia. See id., at ----, 2017 WL 1951142 at *1. The scheme involved the use of foreign bank accounts by foreign companies with several transfers that were processed through correspondent bank accounts in New York. See id., at —, 2017 WL 1951142 at *5. Similarly, the court in United States v. Zarrab, 2016 WL 6820737 (S.D.N.Y. Oct. 17, 2016), found that "an international wire transfer from the U.A.E. to a Canadian Company ... which was processed by a United States bank" was a sufficient domestic tie to prosecute the defendant for a conspiracy to defraud the United States and to impede the functions of the U.S. Department of Treasury's Office of Foreign Asset Control under 18 U.S.C. § 371. Id., at -, 2017 WL 1951142 at *3. The court in Zarrab found unpersuasive the defendants' argument that the alleged conspiracy was not covered under the text of Section 371 because it had "only touched the U.S. twice, when foreign banks directed funds transfers *246 through U.S. banks en route to other foreign banks" and was therefore "overwhelmingly (if not entirely) foreign, with effects felt almost entirely abroad." *Id.*, at —————, 2017 WL 1951142 at *4–5.

- 7 The complaints characterize the transfer of funds as the operative fact upon which the Committee's preference claims are based. See BISB Compl. ¶ 50 ("Arcapita transferred the placed funds to [BISB] under the Placement (the "Placement Transfer") on March 14, 2012."); Tadhamon Compl. ¶ 55 ("Arcapita transferred \$20 million to Tadhamon under the Placements (the "Placement Transfers") on March 15, 2012."). The complaints then set forth facts to demonstrate how the Placement Transfers meet the elements of Section 547 of the Bankruptcy Code. BISB Compl. ¶¶ 51-55; Tadhamon Compl. ¶¶ 56-60. Count III of each of the complaints then concludes with the statement that "[t]he Placement Transfer constitutes a preferential transfer avoidable pursuant to [Slection 547(b) of the Bankruptcy Code and recoverable from [the Defendants] pursuant to [S]ection 550(a)." BISB Compl. ¶ 56; Tadhamon Compl. ¶ 61.
- The Defendants note that the District Court decision was on personal jurisdiction, not extraterritoriality. Of course, "the [legal] tests for personal jurisdiction and extraterritoriality are not the same." Madoff II, 2016 Bankr. LEXIS 4067, at *58 (citing Absolute Activist Value Master Fund Ltd. v. Ficeto, 677 F.3d 60, 69 (2d Cir. 2012)); cf. Morrison, 561 U.S. at 266, 130 S.Ct. 2869 ("[I]t is a rare case of prohibited extraterritorial application that lacks all contact with the territory of the United States."). But the District Court decision is nonetheless relevant to the extraterritoriality inquiry given its characterization of the alleged misconduct and how it construed the avoidance claims. Cf. United States v. Ben Zvi, 242 F.3d 89, 95 (2d Cir. 2001) (discussing the law of the case doctrine).

The Second Circuit has reached a similar conclusion in *Mastafa v. Chevron Corp.*, 770 F.3d 170 (2d Cir. 2014). In that case, the court found that a foreign bank's role in carrying out "numerous New York-based payments and 'financing arrangements' conducted exclusively through a New York bank account" maintained by the foreign bank was specific and domestic conduct that touched and concerned the U.S. "with sufficient force to displace the presumption against extraterritoriality and establish jurisdiction" under the Alien Tort Statute. *Id.* at 191. In

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Mastafa, a foreign bank was accused of illicitly diverting funds to the regime of Saddam Hussein, which was then under United Nations economic sanctions, in violation of customary international law. See id. at 174. The bank in question was an escrow bank through which payments were diverted. See id. at 175. Similarly, the New York Court of Appeals in Licci by Licci v. Lebanese Canadian Bank, SAL, 834 F.3d 201, held that a foreign bank that used "its correspondent banking account in New York to facilitate dozens of international wire transfers" on behalf of Hezbollah was a "sufficient connection[] with the United States" with respect to the Alien Tort Statute. Id. at 214–15; see also id. at 217. 9

The Defendants are correct that there was more conduct at issue in Mastafa than simply payment into an account in the United States. See Mastafa, 770 F.3d at 175-76, 189-91 (noting allegations that the defendant actually maintained the account and actively helped others disguise the payments that were being made into it). The record here does not contain information about the maintenance or use of the accounts here, which presumably could be the subject of discovery. Cf. O'Toole v. MyPlace Dev. SP. Z O.O. (In re Sledziejowski), 2016 Bankr. LEXIS 3791, at *31, 2016 WL 6155929, at *10 (Bankr. S.D.N.Y. Oct. 21, 2016) (citing Tymoshenko v. Firtash, 2013 U.S. Dist. LEXIS 43543, 2013 WL 1234943, at *7 (S.D.N.Y. Mar. 27, 2013) ("At the jurisdictional stage,'... courts enjoy broad discretion in deciding whether to order discovery.")). But given the Supreme Court's edict to focus on the issue of Congressional concern—the transfers rather than the facts and circumstances surrounding the transactions and the Defendants-such discovery is not necessary to resolve these Motions.

The Defendants cite to a number of cases that reach the opposite result in purportedly similar situations. This is not surprising given that the question of extraterritoriality depends very heavily on the specific facts of each case. But importantly, some of these cases did not involve instances where, as here, both sides of the challenged transfer used a U.S. bank to complete the transfer. ¹⁰ See BisB Compl. ¶ 15 (stating that to execute the BisB Placement, Arcapita transferred funds from its account at JP Morgan Chase Bank in New York to a correspondent bank account maintained by BisB at JP *247 Morgan Chase Bank in New York); Tadhamon Compl. ¶ 28 (stating that to execute the Tadhamon Placements, Arcapita transferred funds from its account at JP Morgan Chase Bank in

New York to an account at HSBC Bank in New York which was a correspondent bank account maintained by Khaleeji Commercial Bank B.S.C., Tadhamon's bank in Bahrain); Rashdan Decl. ¶ 7 (same); see also Kiobel v. Royal Dutch Petroluem Co., 569 U.S. 108, 133 S.Ct. 1659, 1669, 185 L.Ed.2d 671 (2013) ("[E]ven where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application.").

10 For example, two cases cited by the Defendants involve a U.S. bank on only one side of the challenged transfer. See Maxwell I, 186 B.R. at 817 n.5 (court held that transfer was not domestic where U.K. debtor made a payment from its London bank account to a U.K creditor's U.S. bank account "through which all payments made to [defendant] in dollars are routed," and then immediately credited to an overdraft account the creditor maintained in London); see also Loginovskaya v. Batratchenko, 764 F.3d 266, 275 (2d Cir. 2014) (despite Russian plaintiff transferring funds to a bank account in New York that was controlled by the defendant, the court found that "[t]hese transfers ... were actions needed to carry out the transactions, and not the transactions themselves—which were previously entered into when the contracts were executed in Russia. The direction to wire transfer money to the United States is insufficient to demonstrate a domestic transaction.").

Some of the cases cited by the Defendants appear to place a greater focus on the component events of a transaction while others appear to minimize the significance of correspondent bank accounts. See, e.g., Defendants' Supp. Brief at 6-7 [Adv. No. 13-01434, ECF No. 43; Adv. No. 13-01435, ECF No. 39], citing Madoff I, 513 B.R. at 228 n.1 ("Nor is the fact that some of the defendants here allegedly used correspondent banks in the United States to process dollar-denominated transfers sufficient to make these foreign transfers domestic."): Maxwell I. 186 B.R. at 816-817 (finding transfers occurred overseas where the debtor and transferee banks were foreign entities, whose relationship was centered abroad and the antecedent debts arose abroad pursuant to agreements governed by foreign law). These cases are more in tune with the Defendants' focus not on the transfers but on the component events of the transactions, including the nationality of the parties, the location where the antecedent debt was incurred, where negotiation and execution of the underlying agreement took place and the other financial aspects of the transaction outside of the

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transfers. See Defendants' Reply Memo. of Law at 13 [Adv. No. 13-01434, ECF No. 17; Adv. No. 13-01435, ECF No. 16]. It is not clear, however, how much of the more broad-ranging component event test suggested by the Defendants survives after the Supreme Court's decision in Morrison that instructs courts to examine the focus of the statute. The first case to assess the component events of a transaction was Maxwell I, a case still frequently cited on extraterritoriality questions. See, e.g., In re Lyondell, 543 B.R. at 149. But Maxwell I was decided before Morrison, which changed the legal landscape on this issue. See Madoff II, 2016 Bankr. LEXIS 4067, at *69 (finding irrelevant " 'where the defendants engaged in business regarding the transaction' and 'where the parties' relationship was centered when conducting the transaction underlying the debt that triggered the transfers' " and noting that such an analysis was similar to the "conduct and effects" test abrogated by the Supreme Court in Morrison) (citing Morrison, 561 U.S. at 256, 261, 130 S.Ct. 2869); see id. at *70 (noting that conduct-related component events relied on by the plaintiff call for the type of analysis rejected by Morrison). 11

Moreover, the court in Maxwell I expressed a concern that does not appear implicated here. In Maxwell I, the court observed that looking only at the location where an entity "parted with the transferred funds" for purposes of extraterritoriality

[W]ould have potentially dangerous implications for the future application of [Section] 547: a creditor—be it foreign or domestic—who wished to characterize a transfer as extraterritorial could simply arrange to have the transfer made overseas, a result made all too easy in the age of the multinational company and the information superhighway.

Maxwell I, 186 B.R. at 816. No party in this case has raised a concern about the creditors here structuring these transactions with the goal of avoiding judicial review in the United States. In fact, the parties structured their transaction to include use of U.S. bank accounts.

*248 The Defendants argue that the *Prevezon* case, and the cases cited therein, can be distinguished because they involve criminal statutes and related civil remedies, such as RICO and the Alien Tort Statute. *See* Defendants' Letter, dated May 30, 2017, at 3. The Defendants argue that the focus of Section 547 is different from these criminal statutes, and examines "the nature of the money transfer from payor to payee in the United States, rather than a

transfer by a single defendant of a specific type of property (stolen property) through the United States." Id. But the Court sees no reason why this should matter given the Supreme Court's clear instructions in Morrison to target the focus of congressional concern and the case law in this circuit that the focus of the avoidance provisions is on the transfers. As noted by the Committee, moreover, Prevezon focused on the use of a U.S. correspondent account giving rise to a claim under a statute that focuses on the transfer or transportation of property. See Committee Letter, dated June 12, 2017, at 2 [Adv. No. 13-01434, ECF No. 53; Adv. No. 13-01435, ECF No. 49]. Section 547 of the Bankruptcy Code, which provides for the avoidance of a "transfer of an interest of the debtor in property," is comparable. 11 U.S.C. § 547(b); see also Ampal, 562 B.R. at 613 ("[T]he focus of the [Bankruptcy Code's] avoidance and recovery provisions is the initial transfer that depletes the property that would have become property of the estate.").

The Defendants also argue that Prevezon and the cases it cites should be distinguished factually because they involve defendants engaging in "years-long criminal activity." See Defendants' Letter, dated May 30, 2017, at 3. With respect to Prevezon, the Defendants note that the case involved four money transfers between foreign accounts that passed through U.S. correspondent bank accounts and note that the Defendants here were "the onetime recipients" of funds. Id. at 2-3. But this focus on the number of transactions and the extent of the U.S. activity appears to conflate the personal jurisdiction inquiry, which focuses on the foreseeability of being subject to jurisdiction within the United States. The question for purposes of the extraterritoriality analysis is the focus of the statute, which in this case looks to the "transfer of an interest of the debtor in property." 11 U.S.C. § 547(b). The Defendants cite to nothing in Prevezon that suggests a numerosity requirement for activity to be considered sufficiently domestic for purposes of extraterritoriality. Indeed, no part of the criminal scheme in Prevezon, other than the use of the correspondent account, was located in the United States. See Prevezon, 251 F.Supp.3d at ----, 2017 WL 1951142 at *5 (holding use of U.S. correspondent bank accounts to make transfers defeated presumption against extraterritoriality despite the fact that the transfers were part of a Russian fraud that otherwise "occurred exclusively among foreign companies using foreign bank accounts."). 12

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12 Having concluded that the transfers here were domestic rather than foreign, the Court need not resolve whether the avoidance provisions of the Bankruptcy Code apply extraterritorially. There is a split of authority on that question. See French v. Liebmann (In re French), 440 F.3d 145, 151-52 (4th Cir. 2006) (holding that Congress intended extraterritorial application of Section 548 of the Bankruptcy Code); Emerald Capital Advisors Corp. v. Baerische Moteren Werke Aktiengesellschaft (In re FAH Liquidating Corp.), --- B.R. ---, 2017 Bankr. LEXIS 1609 at *13-14, 2017 WL 2559892 at *5-6 (Bank. D. Del. June 13, 2017) (adopting the reasoning of Lyondell and finding that Section 548 applies extraterritorially); In re Lyondell, 543 B.R. 127 (Bankr. S.D.N.Y. 2016) (adopting the reasoning of French and holding that Congress intended extraterritorial application of Section 548); Sec. Investor Prot. SIPA Liquidation Corp. v. Bernard L. Madoff Inv. Sec. LLC, 480 B.R. 501, 527-28 (Bankr. S.D.N.Y. 2012) (holding that Sections 548 and 550 apply extraterritorially); but see Madoff I, 513 B.R. at 228-29; Ampal, 562 B.R. at 612 (holding that Section 547 does not apply extraterritorially): Barclay v. Swiss Fin. Corp. Ltd. (In re Midland Euro Exchange Inc.), 347 B.R. 708, 717 (Bankr. C.D. Cal. 2006) (holding that "neither the plain language of the statute nor its reading in conjunction with other parts of the Code establish congressional intent to apply § 548 extraterritorially...."); Maxwell I, 186 B.R. at 819 ("[N]othing in the language or legislative history of § 547 expresses Congress' intent to apply the statute to foreign transfers.").

*249 Finally, the Defendants reliance on the *Madoff* cases is also misplaced. As discussed earlier, *Madoff* involved circumstances in which the U.S. debtor had made transfers to its foreign customers, which funds were subsequently transferred by those foreign customers to other foreign individuals and entities. *See Madoff I*, 513 B.R. at 225. These subsequent transferees were one step removed from the underlying domestic transfer involving the debtor, in contrast to the transfers here from the debtor Arcapita's New York bank to the Defendants' New York correspondent banks.

2. Claims Under Other Sections of the Bankruptcy Code

The Defendants contend that Counts II and IV must also be dismissed based on the presumption against extraterritoriality. Count II asserts a cause of action pursuant to Sections 541, 542 and 550 of the Bankruptcy Code for turnover of the Placement Proceeds as estate assets wrongfully held by the Defendants. BisB Compl. ¶¶ 43–48; Tadhamon Compl. ¶¶ 48–53. Count IV asserts a cause of action under Sections 362(a)(3) and 362(a)(7) of the Bankruptcy Code for violation of the automatic stay based on Defendants' exercise of control over the Placement Proceeds and the setoff of antecedent debt against the Placement Proceeds. BisB Compl. ¶¶ 58-65; Tadhamon Compl. ¶¶ 63–70. The Defendants argue that the Committee's request for turnover—upon which both Counts II and IV rest-depends on whether Arcapita's transfer of funds to the Defendants has first been avoided under Section 547 and that funds from such an avoidance action are not property of the estate under the Second Circuit's decision in In re Colonial Realty Co., 980 F.2d 125, 131 (2d Cir. 1992). The Defendants also argue that neither Section 542 (the basis of Count II) nor Section 362 (the basis of Count IV) apply extraterritorially. The Court disagrees with both of the Defendants' arguments.

First, the Court finds fault with Defendants' characterization of the Committee's claims. Contrary to the Defendants' assertion, the Committee's claims under Sections 542(b) and 362(a) are independent of the avoidance claims. Counts II and IV allege that the Defendants owe Arcapita debt in the form of matured Placement Proceeds and that, rather than pay this matured debt to Arcapita, the Defendants instead chose to retain that property of the Debtor by virtue of a setoff. See BISB Compl. ¶¶ 6, 32–33; Tadhamon Compl. ¶¶ 6, 36–37; see also Securities Investor Protection Corp. vs. Rossi (In re Cambridge Capital, LLC), 331 B.R. 47, 57 (Bankr. E.D.N.Y. 2005) (noting that the trustee's turnover claim sought the "collection rather than the creation, recognition, or liquidation of a matured debt.") (citation omitted). The avoidance claims focus on the initial transfer of funds by Arcapita to the Defendants in March 2012; the turnover and automatic stay claims focus on the maturation of the Placement Proceeds *250 after Arcapita filed bankruptcy and the Defendants' retention of such Placement Proceeds based on setoff. Of course, the right to setoff is explicitly reserved in the Bankruptcy Code. See 11 U.S.C. § 542(b) (noting "an entity that owes a debt that is property of the estate and that is matured, payable on demand, or payable on order, shall pay such debt ... except to the extent that such debt may be offset under section 553 of this title against a claim against the debtor."); see 11 U.S.C. § 553 (setting forth

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conditions for setoff). But the right of setoff presupposes the existence of a valid debt owed to the estate. *See Citizens Bank of Maryland v. Strumpf*, 516 U.S. 16, 18, 116 S.Ct. 286, 133 L.Ed.2d 258 (1995) ("The right of setoff (also called 'offset') allows entities that owe each other money to apply their mutual debts against each other, thereby avoiding 'the absurdity of making A pay B when B owes A.' ") (*quoting Studley v. Boylston Nat'l Bank*, 229 U.S. 523, 528, 33 S.Ct. 806, 57 L.Ed. 1313 (1913); *see also In re Davidson*, 901 F.2d 1533, 1537 (10th Cir. 1990) (noting that setoff requires that "each debt be valid and enforceable") (citations omitted). ¹³

Given that the Defendants do not dispute the validity of their matured debt to Arcapita arising out of the Placement Agreements, the cases relied upon by Defendants are distinguishable. See Savage & Assoc., P.C. v. Mandl (In re Teligent, Inc.), 325 B.R. 134, 137–38 (Bankr. S.D.N.Y. 2005) (in case dealing with turnover of property that was the subject of a contested avoidance action, the court found that Section 542(a) was not applicable until the transfer was avoided, and that Section 542(b) did not apply to disputed debts); Andrew Velez Contr., Inc. v. Consolidated Edison Co. of New York, Inc. (In re Andrew Velez Constr., Inc.), 373 B.R. 262, 272–73 (Bankr. S.D.N.Y. 2007) (same).

The Committee's complaints are drafted in a manner consistent with these legal principles. Unlike the Committee's avoidance claim under Section 547, the Committee alleges that the monies in question in Counts II and IV are already "property of the estate" under Section 541. See BisB Compl. ¶ 46 (stating in Court II that "[b]y virtue of the Placement, after accounting for amounts previously remitted, BIB is wrongfully in possession of property of the Arcapita Estate in the amount of \$10,002,292, plus accrued interest thereon from the Placement's maturity date."), ¶61 (stating in Count IV that "BIB has and continues to exercise control over the Placement Proceeds, which are property of the Arcapita Estate."); Tadhamon Compl. ¶ 51 (stating in Court II that "[b]y virtue of the Placement, after accounting for amounts previously remitted, Tadhamon is wrongfully in possession of property of the Arcapita Estate in the amount of \$18,480,269, plus accrued interest thereon from the Placement maturity dates."), ¶ 66 (stating in Count IV that "Tadhamon has and continues to exercise control over the Placement Proceeds, which are property of the Arcapita Estate."). 14

Indeed, the Committee's complaints assert its preference claim in the alternative, to the extent that the Court holds that the Placement was actually a disguised payment of antecedent debt. BISB Compl. ¶ 6, 32–34; Tadhamon Compl. ¶ 6, 36–37.

[27] Second, the Court rejects the Defendants' contention that Sections 542(b) and 362 do not apply extraterritoriality. Section 542(b) of the Bankruptcy Code provides that a trustee may recover "a debt that is property of the estate and that is matured, payable on demand, or payable on order...." 11 U.S.C. § 542(b). Unlike Section 547, Section 542(b) explicitly references property of the estate. Section 541 defines "property of the estate" as including all "interests of the debtor in property." 11 U.S.C. § 541(a)(1). Section 541 gives the trustee title over the debtor's *251 property "wherever located and by whomever held[,]" whether that property is located in the United States or a foreign jurisdiction. 11 U.S.C. § 541(a); see H.R. Rep. No. 82-2320, at 15 (1952), reprinted in 1952 U.S.C.C.A.N. 1960, 1976 (stating that the addition of the "wherever located" language to the statute "ma[de] clear that a trustee in bankruptcy is vested with the title of the bankrupt in property which is located without, as well as within, the United States."). Thus, it is clear that Congress intended to apply extraterritorially the provisions of the Bankruptcy Code that relate to property of the estate, such as Section 542(b). See, e.g., Thurmond v. Rajapakse (In re Rajapakse), 346 B.R. 233, 235-36 (Bankr. N.D. Ga. 2005).

[28] The same is true for Section 362. That section incorporates the definition of property of the estate provided in Section 541, which includes property "wherever located." See 11 U.S.C. § 362; 11 U.S.C. § 541; see also Sec. Inv'r Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC (Picard v. Maxam Absolute Return Fund, L.P.), 474 B.R. 76, 82 (S.D.N.Y. 2012) (noting that "the automatic stay applies extraterritorially" and that "the efficacy of the bankruptcy proceeding depends on the court's ability to control and marshal the assets of the debtor wherever located.") (internal citations and quotations omitted); In re Soundview Elite, Ltd., 503 B.R. 571, 584 (Bankr. S.D.N.Y. 2014) ("U.S. law is clear that immediately upon the filing of the Debtors' chapter 11 petition, the U.S. automatic stay became effective, both in the U.S. and extraterritorially."). 15

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15 The parties focused their briefing almost exclusively on Counts II, III and IV of these Complaints. They say very little about the two remaining counts: Count I for breach of contract and Count V based on Section 502(d) of the Bankruptcy Code. As to Count I, Defendants argue simply that this Court has no constitutional authority to enter a judgment on such a contract claim under Stern v. Marshall. 564 U.S. 462, 131 S.Ct. 2594, 180 L.Ed.2d 475 (2011). See Defendants' Memo. of Law in Support of Motion to Dismiss at 26 [Adv. No. 13-01434, ECF No. 9; Adv. No. 13-01435, ECF No. 9]. But that alone does not provide a basis for dismissal. Cf. Walker, Truesdell, Roth & Assocs. v. Blackstone Grp., L.P. (In re Extended Stay, Inc.), 466 B.R. 188 S.D.N.Y. 2011) (denying motion to withdraw the reference based on Stern); Messer v. Bentley Manhattan Inc. (In re Madison Bentley Assocs.), 474 B.R. 430 (S.D.N.Y. 2012) (same). As to Count V, the Committee seeks to disallow the Defendants' claims in the Debtors' bankruptcy cases under Section 502(d). See BisB Compl. ¶¶ 66-69; Tadhamon Compl. ¶¶ 71-74. As the Defendants never filed a proof of claim in these cases, however, it appears that Count V is directed at the Debtors' listing of the obligation to the Defendants as undisputed claims on the bankruptcy Schedules in these cases. See BisB Compl. ¶ 68 ("Arcapita included on its Schedule F liabilities in the amount of \$9,774,096.15 owing to BIB on account of the Antecedent Debt. Absent objection by a party in interest or an amendment to Schedule F, BIB will have allowed claims against Arcapita in the amount of \$9,774,096.15."); Tadhamon Compl. \P 73 ("Arcapita included on its Schedule F aggregate liabilities in the amount of \$18,497,734.48 owing to Tadhamon on account of the Antecedent Debt. Absent objection by a party in interest or an amendment to Schedule F, Tadhamon will have allowed claims against Arcapita in the amount of \$18,497,734.48."). The parties' briefing says nothing about the legal significance of this fact.

Given the Court's ruling today that rejects the Defendants' arguments on extraterritoriality for Counts II, III, and IV, the obvious overlap between all five Counts of the complaints, and the lack of briefing by the parties explicitly addressing Counts I and V, the Court declines to dismiss Counts I and V based on the presumption against extraterritoriality.

CONCLUSION

For the reasons stated above, the Court denies the Defendants' motions to dismiss based on the doctrines of international *252 comity and the presumption against extraterritoriality. The Committee is directed to settle a proposed order on seven days' notice. The proposed order must be submitted by filing a notice of the proposed order on the Case Management/Electronic Case Filing docket, with a copy of the proposed order attached as an exhibit to the notice. A copy of the notice and proposed order shall also be served upon counsel to the Defendants.

All Citations

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In re CIL Limited, 582 B.R. 46 (2018)

KeyCite Yellow Flag - Negative Treatment

Amended on Reconsideration by In re CIL Limited, Bankr.S.D.N.Y.,

June 15, 2018

582 B.R. 46 United States Bankruptcy Court, S.D. New York.

IN RE: CIL LIMITED, Debtor. Salvatore LaMonica, as Chapter 7 Trustee For CIL Limited, Plaintiff,

v.

CEVA Group PLC, CEVA Holdings LLC, CEVA Logistics Finance B.V., Gareth Turner, and Mark Beith, Defendants.

> Case No. 13–11272–JLG | Adv. Proc. No. 14–02242–JLG | Signed January 5, 2018

Synopsis

Background: Trustee of Chapter 7 estate of bankrupt Cayman Islands company brought adversary proceeding to avoid, as fraudulent transfer, a prepetition corporate restructuring that diluted debtor's equity interest in English and Wales company, as well as to recover on conversion and unjust enrichment theories. Defendants moved to dismiss for lack of personal jurisdiction, on ground that fraudulent transfer statute could not be applied extraterritorially to transaction centered outside the United States, and on ground that trustee had otherwise failed to state plausible claim for relief.

Holdings: The Bankruptcy Court, James L. Garrity, Jr., J., held that:

[1] trustee did not allege sufficient minimum contacts or facts suggesting that it would be reasonable for court to exercise jurisdiction over debtor's London-based director or over related corporate entity that was incorporated and had its principal place of business in the Netherlands;

[2] actual and constructive fraudulent transfer claims asserted by trustee to avoid prepetition corporate restructuring that stripped debtor, a Cayman Islands company, of its ownership interest in an English and Wales company were impermissible extraterritorial

application of bankruptcy fraudulent transfer avoidance and recovery statutes;

[3] strong-arm provision's use of the term "applicable law," in authorizing trustee to avoid any transfer that was voidable under applicable law by creditor holding an unsecured claim, was insufficient to overcome presumption against extraterritoriality;

[4] sufficient grounds existed to allow adjudication of fraudulent transfer claims, arising out of corporate restructuring that diluted bankrupt Cayman Islands company's equity interest in English and Wales company, to proceed in the United States, but under Cayman Islands law;

[5] trustee sufficiently alleged that debtor's equity interest in English and Wales company had value prior to restructuring, as required to state fraudulent transfer claim under Cayman Islands law that was plausible on its face;

[6] allegations in trustee's complaint, regarding corporate restructuring that stripped debtor of its equity interest in English and Wales company, not by depriving debtor of any stock that it held but by diluting that stock through the issuance of additional shares in this English and Wales company, did not state conversion claim that was plausible on its face;

[7] bankruptcy court had to apply Dutch law to conversion claim arising out of a related Dutch company's retention of cash that allegedly belonged to Chapter 7 debtor in bank account located in the Netherlands, such that conversion claim had to be dismissed on ground that Dutch law did not recognize claim for conversion; and

[8] allegations in trustee's complaint, regarding retention of cash belonging to debtor by Dutch company acting as "intercompany bank" for debtor and related corporate entities, did not state unjust enrichment claim against parent company.

Motion granted in part and denied in part.

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West Headnotes (70)

[1] Bankruptcy

Judgment or Order

Bankruptcy court is not obliged to convert a motion to dismiss for failure to state claim into one for summary judgment in every case in which defendant seeks to rely on matters outside the complaint in support of its motion; court may, at its discretion, exclude the extraneous material and construe the motion as one to dismiss for failure to state claim. Fed. R. Civ. P. 12(b)(6), 56.

Cases that cite this headnote

[2] Bankruptcy

Judgment or Order

On motion to dismiss Chapter 7 trustee's complaint as failing to state claim for relief, bankruptcy court would not consider documents that were neither incorporated in trustee's amended complaint nor integral to allegations therein in order to avoid converting defendants' motion to dismiss into one for summary judgment. Fed. R. Civ. P. 12(b)(6), 56.

Cases that cite this headnote

[3] Bankruptcy

Nonresidents, Proceedings and Actions Against

Defendant must have requisite minimum contacts, not with the particular state in which bankruptcy court sits, but with the United States at large, in order for court to exercise personal jurisdiction over defendant in bankruptcy proceeding.

Cases that cite this headnote

[4] Constitutional Law

Non-residents in general

Two requirements must both be satisfied in order for court to exercise personal

jurisdiction over defendant: (1) defendants must have the requisite "minimum contracts" with forum, such that the exercise of personal jurisdiction will not offend traditional notions of fair play and substantial justice, and (2) the exercise of jurisdiction must be reasonable under the circumstances.

Cases that cite this headnote

[5] Courts

Unrelated contacts and activities; general jurisdiction

Federal Courts

Related contacts and activities; specific jurisdiction

In deciding whether defendant has requisite "minimum contacts" with forum, as required for exercise of personal jurisdiction, courts distinguish between specific personal jurisdiction, which depends on an affiliation between the forum and the underlying controversy where the controversy relates to or arises out of defendant's contacts with the forum, and general or all-purpose personal jurisdiction.

Cases that cite this headnote

[6] Constitutional Law

Non-residents in general

In order for court to exercise specific personal jurisdiction consistently with due process, defendant's suit-related conduct must create a substantial connection with the forum state. U.S. Const. Amend. 5.

Cases that cite this headnote

[7] Federal Courts

Unrelated contacts and activities; general jurisdiction

General or all-purpose personal jurisdiction is not related to the events giving rise to suit, and thus courts impose a more stringent "minimum contacts" test, requiring plaintiff to demonstrate defendant's continuous and systematic general business contacts with the

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forum at the time the initial complaint was filed.

Cases that cite this headnote

[8] Federal Courts

Unrelated contacts and activities; general jurisdiction

If threshold "minimum contacts" requirement is met for general jurisdiction, then court must then evaluate whether exercising personal jurisdiction over defendant is reasonable based on the following factors: (1) the burden that the exercise of jurisdiction will impose on 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.

Cases that cite this headnote

[9] Bankruptcy

Particular cases

Allegations in complaint filed by trustee of bankrupt Cayman Islands company's Chapter 7 estate, regarding four-month vacation in the United States taken by company's London-based director, and regarding actions by director while on vacation in sending several e-mails and in attending solitary meeting that was only incidentally related to restructuring that trustee sought to unwind as alleged fraudulent transfer, were insufficient to allow bankruptcy court to exercise personal jurisdiction over director, at least not based on his personal contacts with the United States; trustee did not allege sufficient minimum contacts or facts suggesting that it would be reasonable for court to exercise jurisdiction.

Cases that cite this headnote

[10] Courts

Jurisdiction of Agents, Representatives, or Other Third Parties Themselves

Under New York long arm statute, court may exercise jurisdiction over defendant who acted in New York though an agent, even if that defendant never physically entered New York. N.Y. CPLR § 302(a)(1).

Cases that cite this headnote

[11] Courts

Jurisdiction of Agents, Representatives, or Other Third Parties Themselves

Under New York long arm statute, while defendant's status as corporate officer does not automatically subject defendant to personal jurisdiction in any forum where the company is subject to jurisdiction, defendant's status as employee or corporate officer does not somehow insulate him from jurisdiction. N.Y. CPLR § 302(a)(1).

Cases that cite this headnote

[12] Bankruptcy

Particular cases

Allegations in complaint filed by trustee of bankrupt Cayman Islands company's Chapter 7 estate, regarding actions that were undertaken in the United States by debtor's third-party professionals in furtherance of challenged restructuring that allegedly stripped debtor of its assets, were insufficient to allow bankruptcy court to exercise personal jurisdiction over debtor's London-based director on agency theory, as party allegedly directing the activities of these professionals, given that professionals were allegedly retained as outside service providers whose day-to-day activities would not have been subject to director's control.

Cases that cite this headnote

[13] Bankruptcy

Particular cases

Even if Chapter 7 trustee's claims to funds allegedly belonging to debtor and held by

affiliated corporate entity were in rem claims, court could not exercise jurisdiction over affiliated entity unless its contacts with the United States satisfied "minimum contacts" test.

Cases that cite this headnote

[14] Federal Courts

Corporations and business organizations For a corporation, the paradigm bases for assertion of general personal jurisdiction are the corporation's place of incorporation and principal place of business.

Cases that cite this headnote

[15] Bankruptcy

Particular cases

Allegations in Chapter 7 trustee's complaint, that corporate entity affiliated with debtor and allegedly holding its cash had at least one bank account located in the United States as well as United States counsel, failed to plead United States contacts that were sufficiently continuous and systematic to permit court to exercise general personal jurisdiction over this affiliate entity, as corporation that was incorporated and had its principal place of business in the Netherlands, nor were these alleged contacts, being unrelated in any way to matters at issue in trustee's complaint, sufficient to allow court to exercise specific personal jurisdiction.

Cases that cite this headnote

[16] Statutes

Extraterritorial operation

Absent clearly expressed Congressional intent to the contrary, federal laws will be construed to have only domestic application.

Cases that cite this headnote

[17] Statutes

Extraterritorial operation

On objection to statutory cause of action as involving an allegedly impermissible extraterritorial application of statute, court must conduct a two-part inquiry, under which it first determines whether presumption against extraterritoriality has been rebutted because the statute gives a clear, affirmative indication that it applies extraterritorially; only if court determines that the statute is not extraterritorial does it proceed to second part of the inquiry and consider whether the cause of action involves a domestic, or extraterritorial, application of statute.

Cases that cite this headnote

[18] Statutes

Extraterritorial operation

To determine whether cause of action involves an impermissible extraterritorial application of statute, court must look to the statute's focus; if the conduct relevant to the statute's focus occurred in the United States, then the cause of action involves a permissible domestic application of statute, even if other conduct occurred abroad.

Cases that cite this headnote

[19] Statutes

Extraterritorial operation

Presumption against extraterritoriality has no bearing when the conduct which Congress seeks to regulate occurs largely in the United States, that is, when the regulated conduct is domestic rather than extraterritorial.

Cases that cite this headnote

[20] Statutes

Extraterritorial operation

If statute is not extraterritorial, and if the conduct relevant to the statute's focus occurred in foreign country, then cause of action involves an impermissible extraterritorial application of statute, regardless of any other conduct that occurred in United States territory.

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Cases that cite this headnote

[21] Statutes

Extraterritorial operation

Presumption against extraterritorial application represents a canon of construction, or a presumption about a statute's meaning, rather than a limit upon Congress' power to legislate.

Cases that cite this headnote

[22] Statutes

Extraterritorial operation

While the presumption against extraterritoriality can be overcome only by a clear indication of extraterritorial effect, an express statement of extraterritoriality is not essential.

Cases that cite this headnote

[23] Statutes

Extraterritorial operation

If legislative purpose is not unmistakably clear, any ambiguity in statute must be resolved in favor of refusing to apply the statute to events occurring outside United States territory.

Cases that cite this headnote

[24] Bankruptcy

Avoidance rights and limits thereon, in general

Bankruptcy fraudulent transfer avoidance statute and separate provision of the Bankruptcy Code governing liability of transferes on avoided transfers do not apply extraterritorially to transfers occurring outside the United States. 11 U.S.C.A. §§ 548(a), 550(a).

Cases that cite this headnote

[25] Bankruptcy

Preferences and fraudulent conveyances; avoided transfers

Property that is the subject of an avoidance action is not considered "property of the estate" until it is recovered. 11 U.S.C.A. § 541(a)(3).

Cases that cite this headnote

[26] Courts

Particular questions or subject matter

When bankruptcy judge sits in a multi-judge district, judge is not bound, under principles of stare decisis, by the decision of a single judge in that district.

Cases that cite this headnote

[27] Bankruptcy

Avoidance rights and limits thereon, in general

Actual and constructive fraudulent transfer claims asserted by Chapter 7 trustee to avoid prepetition corporate restructuring that stripped debtor, a Cayman Islands company, of its principal asset, its ownership interest in an English and Wales company, were impermissible extraterritorial application of bankruptcy fraudulent transfer avoidance and recovery statutes; even assuming that this restructuring was negotiated and documented by debtor's professionals in the United States, that was not enough to transform, into a domestic transaction, a transaction which involved issuance of new stock in the English and Wales company to newly created entity located in the Marshall Islands, thereby diluting debtor's equity interest. 11 U.S.C.A. §§ 548(a)(1)(A, B), 550(a).

Cases that cite this headnote

[28] Bankruptcy

Avoidance rights and limits thereon, in general

Bankruptcy

Trustee as representative of debtor or creditors

Strong-arm provision's use of the term "applicable law," in authorizing trustee to avoid any transfer that was voidable under applicable law by creditor holding an unsecured claim, was insufficient to overcome presumption against extraterritoriality and to permit trustee, by invoking foreign fraudulent transfer law, to avoid corporate restructuring effected by transfer of stock that occurred outside the territorial boundaries of the United States. 11 U.S.C.A. § 544(b)(1).

Cases that cite this headnote

[29] Bankruptcy

Preferences and fraudulent conveyances; avoided transfers

Bankruptcy statute providing that avoided transfers are preserved for the benefit of the estate does not provide an independent cause of action, but creates a statutory effect to a transfer that has been avoided, an effect that springs into existence automatically upon a successful avoidance under another provision of the Code. 11 U.S.C.A. § 551.

Cases that cite this headnote

[30] Courts

Comity between courts of different countries

International Law

Public policy and comity in general

International comity, a separate concept from the presumption against extraterritoriality, is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.

Cases that cite this headnote

[31] International Law

- Public policy and comity in general

Doctrine of international comity is concerned with maintaining amicable working relationships between nations.

Cases that cite this headnote

[32] Courts

Comity between courts of different countries

International Law

Public policy and comity in general

Doctrine of international comity is applied, not as an imperative obligation of courts, but rather as a discretionary rule of practice, convenience and expediency.

Cases that cite this headnote

[33] Courts

Comity between courts of different countries

International Law

Public policy and comity in general

Doctrine of international comity embraces two concepts: comity of the courts and comity of nations.

Cases that cite this headnote

[34] Courts

Comity between courts of different countries

Under comity of the courts, also known as adjudicative or abstention comity, judges decline to exercise jurisdiction over matters more appropriately adjudged elsewhere.

Cases that cite this headnote

[35] International Law

Public policy and comity in general Comity of nations, or prescriptive comity, is the respect sovereign nations afford each

other by limiting the reach of their laws.

Cases that cite this headnote

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[36] Federal Courts

Federal-foreign Relations and Questions of Foreign Law;International Abstention and Comity

Pendency of parallel insolvency proceedings is a factor relevant to bankruptcy court's application of "comity of courts" doctrine; however, mere existence of adequate parallel action, by itself, does not justify dismissal of case on grounds of international comity abstention

Cases that cite this headnote

[37] Courts

Comity between courts of different countries

Abstention comity, or comity among courts, is concerned with which court should decide the parties' rights, and relatedly, whether a United States court should enforce a foreign bankruptcy court's order relating to the debtor's assets or the adjudication of a creditor's claim.

Cases that cite this headnote

[38] Federal Courts

Federal-foreign Relations and Questions of Foreign Law;International Abstention and Comity

Courts in the United States will refrain from adjudicating creditor claims that are the subject of foreign bankruptcy proceedings and, in doing so, defer to those proceedings, as long as the foreign proceedings are procedurally fair and do not contravene the laws or public policy of the United States.

Cases that cite this headnote

[39] Bankruptcy

Pendent or ancillary jurisdiction

Bankruptcy

Cases Ancillary to Foreign Proceedings

Sufficient grounds existed to allow adjudication of fraudulent transfer claims.

arising out of corporate restructuring that diluted bankrupt Cayman Islands company's equity interest in English and Wales company, to proceed in the United States, rather than in the Cayman Islands where parallel insolvency proceedings were pending; defendants had not moved to dismiss related counts of Chapter 7 trustee's complaint, which would proceed in the United States regardless of where fraudulent transfer claims were litigated, and considerations of judicial economy, the desire to foster cooperation between United States bankruptcy and Cayman Islands courts, and both courts' willingness to permit the joint liquidators and the Chapter 7 trustee to select forum in which to bring avoidance actions counseled in favor of litigation in the United States.

Cases that cite this headnote

[40] Bankruptcy

Effect of state laws in general

While sufficient grounds existed to allow adjudication of fraudulent transfer claims, arising out of corporate restructuring that diluted bankrupt Cayman Islands company's equity interest in English and Wales company, to proceed in the United States, this did not mean that United States law would govern resolution of these fraudulent transfer claims, given the Cayman Islands' greater interest in adjudication of these avoidance claims; rather, Chapter 7 trustee would be permitted to assert an actual fraudulent transfer claim under Cayman Islands law, divorced of any aspect of the Bankruptcy Code, in recognition of fact that the Cayman Islands allowed only actual fraudulent transfer, and not constructive fraudulent transfer, avoidance claims.

Cases that cite this headnote

[41] Bankruptcy

Pleading

Allegations in complaint filed by trustee of Chapter 7 estate of bankrupt Cayman Islands company, regarding corporate restructuring that stripped company of its equity interest in English and Wales company, sufficiently alleged that this equity interest had value prior to restructuring, as required to state fraudulent transfer claim under Cayman Islands law that was plausible on its face, based on the full factual picture presented by trustee's complaint; while trustee might not ultimately be able to prove solvency of English and Wales company at trial, trustee satisfied lower standard applicable at motion to dismiss stage.

Cases that cite this headnote

[42] Bankruptcy

Enforcement of Injunction or Stay

Allegations in complaint filed by trustee of Chapter 7 estate of bankrupt Cayman Islands company, regarding corporate restructuring that stripped company of its equity interest in English and Wales company, did not state plausible claim against debtor's directors for violation of automatic stay, absent allegation of any affirmative action taken by directors in connection with this restructuring after involuntary bankruptcy petition was filed. 11 U.S.C.A. § 362(a).

Cases that cite this headnote

[43] Bankruptcy

Notice to creditors; commencement

Automatic stay does not arise until the filing of voluntary or involuntary bankruptcy petition. 11 U.S.C.A. § 362(a).

Cases that cite this headnote

[44] Conversion and Civil Theft

Intangible and intellectual property in general

Conversion and Civil Theft

Consent or ratification

Allegations in complaint filed by trustee of Chapter 7 estate of bankrupt Cayman Islands company, regarding corporate restructuring that stripped company of its equity interest in English and Wales company, not by depriving company of any stock that it held but by diluting that stock through the issuance of additional shares in this English and Wales company, did not state conversion claim that was plausible on its face under either New York or United Kingdom law, especially given allegations in complaint that debtor's directors had acquiesced in this corporate restructuring, albeit in alleged breach of their fiduciary duties.

Cases that cite this headnote

[45] Bankruptcy

Application of state or federal law in general

Choice of law determination is necessary only when there is actual conflict between the laws of the potential jurisdictions involved.

Cases that cite this headnote

[46] Conversion and Civil Theft

Intangible and intellectual property in general

Neither New York nor United Kingdom law generally recognizes a cause of action for conversion of intangible property, except in the limited case of misappropriation of document that evidences a debt.

Cases that cite this headnote

[47] Conversion and Civil Theft

Assertion of ownership or control in general

Under New York law, "conversion" is the unauthorized assumption and exercise of right of ownership over goods belonging to another to the exclusion of the owner's rights.

Cases that cite this headnote

[48] Conversion and Civil Theft

In general;nature and elements

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Under New York law, "conversion" takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession.

Cases that cite this headnote

[49] Conversion and Civil Theft

In general; nature and elements

Under New York law, in order to withstand a motion to dismiss conversion claim, plaintiff must allege (1) that the property subject to conversion is a specific identifiable thing, (2) that plaintiff had ownership, possession or control over the property before its conversion, and (3) that defendant exercised unauthorized dominion over the thing in question, to the alteration of its condition or to the exclusion of plaintiff's rights.

Cases that cite this headnote

[50] Conversion and Civil Theft

Intangible and intellectual property in general

Intangible property that may be the subject of conversion claim under New York law is limited to items that bear a substantial similarity to tangible property, like electronically stored data.

Cases that cite this headnote

[51] Conversion and Civil Theft

Consent or ratification

Under New York law, actual consent or acquiescence is complete defense to claim of conversion.

Cases that cite this headnote

[52] Conversion and Civil Theft

Consent or ratification

Under New York law, the fact that property owner's consent may have been obtained by fraud or other improper means does not transform an authorized transfer into an actionable conversion.

Cases that cite this headnote

[53] Bankruptcy

Collection and Recovery for Estate;

Turnover

Turnover action under bankruptcy statute may be brought to recover only property that belongs to the estate. 11 U.S.C.A. § 542.

Cases that cite this headnote

[54] Bankruptcy

Collection and Recovery for Estate;

Turnover

Congress envisioned that turnover provision of the Bankruptcy Code would apply only to tangible property and money due to the debtor without dispute, which were fully matured and payable on demand. 11 U.S.C.A. § 542.

Cases that cite this headnote

[55] Bankruptcy

Collection and Recovery for Estate;

Turnover

Debtor cannot use turnover provisions to liquidate contract disputes or otherwise demand assets whose title is in dispute. 11 U.S.C.A. § 542.

Cases that cite this headnote

[56] Bankruptcy

Proceedings

Mere general denial by defendants of debtor's entitlement to funds that were the subject of Chapter 7 trustee's turnover complaint, without explanation or any documentary support, was insufficient grounds for court to find, for purposes of motion to dismiss trustee's complaint as failing to state plausible claim for relief, that debtor's right to these funds was subject to bona fide dispute. 11 U.S.C.A. § 542; Fed. R. Civ. P. 12(b)(6).

Cases that cite this headnote

[57] Bankruptcy

Pleading;dismissal

Allegations in complaint that are contradicted by more specific allegations or documentary evidence are not entitled to a presumption of truthfulness.

Cases that cite this headnote

[58] Federal Courts

Conflict of Laws: Choice of Law

In adjudicating state law claims, federal court applies the choice-of-law rules of the state in which it sits.

Cases that cite this headnote

[59] Action

What law governs

Under New York law, the first question that court must resolve in determining whether to undertake a choice of law analysis is whether there is an actual conflict of laws.

Cases that cite this headnote

[60] Bankruptcy

Application of state or federal law in general

If there was no material difference between the applicable laws, bankruptcy judge in New York would apply New York law, and did not need to decide the choice of law issue.

Cases that cite this headnote

[61] Action

What law governs

Actual conflict exists, of kind necessitating a choice of law analysis under New York law, when: (1) the applicable law from each jurisdiction provides different substantive rules; (2) the differences are relevant to the issues at hand; and (3) the differences have a

significant possible effect on outcome of the underlying matter.

Cases that cite this headnote

[62] Bankruptcy

Application of state or federal law in general

Under New York choice-of-law rules, bankruptcy court would apply New York law to unjust enrichment claim arising out of a related Dutch company's retention of cash allegedly belonging to Chapter 7 debtor in bank account in the Netherlands, given that there was no conflict between New York and Netherlands law of unjust enrichment, but had to engage in "interest" analysis to determine what law governed conversion claim, given that concept of conversion did not exist in the Dutch Civil Code.

Cases that cite this headnote

[63] Torts

What law governs

Under New York choice-of-law rules, relevant analytical approach to choice of law in tort actions is "interest" analysis, pursuant to which the law of the jurisdiction having the greatest interest in the litigation will be applied.

Cases that cite this headnote

[64] Torts

What law governs

Under "interest" analysis conducted by New York courts to decide what law governs tort claim, torts are divided into two types, those involving the appropriate standards of conduct, such as rules of the road, and those that relate to allocating losses that result from admittedly tortious conduct, such as those limiting damages in wrongful death actions: if conflicting conduct-regulating laws are at issue, then law of jurisdiction where tort occurred will generally be applied, but if conflict involves allocation of losses, then site

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of tort is less important, and the domicile of parties is more important factor.

Cases that cite this headnote

[65] Conversion and Civil Theft

What law governs

Conversion and Civil Theft

In general; nature and scope of remedy

Under New York choice-of-law rules, bankruptcy court had to apply Dutch law to conversion claim arising out of a related Dutch company's retention of cash that allegedly belonged to Chapter 7 debtor in bank account located in the Netherlands, such that conversion claim had to be dismissed on ground that Dutch law did not recognize claim for conversion; conduct-regulating rules were plainly at issue, and the Netherlands was place where alleged conversion took place and where the resulting injury occurred.

Cases that cite this headnote

[66] Bankruptcy

Pleading;dismissal

Corporations and Business Organizations

Domination or control by shareholder

Even assuming that, under New York choice-of-law rules, bankruptcy court could apply New York law to conversion claim arising out of Dutch company's retention of cash that allegedly belonged to Chapter 7 debtor in bank account located in the Netherlands, allegations in trustee's complaint did not state plausible claim to hold parent company liable for any such conversion based solely on parent's alleged ability to cause its Dutch subsidiary to release cash; there was no allegation that parent so dominated and controlled Dutch subsidiary's operations that corporate formalities should be disregarded.

Cases that cite this headnote

[67] Corporations and Business Organizations

Torts in general

Under New York law, liability of corporate parent for alleged torts of wholly-owned subsidiary can never be predicated solely upon the fact of parent corporation's ownership of controlling interest in shares of its subsidiary; rather, at very least, a plaintiff seeking to hold parent company so accountable must demonstrate direct intervention by parent in management of the subsidiary to such an extent that subsidiary's paraphernalia of incorporation, directors and officers' are completely ignored.

Cases that cite this headnote

[68] Implied and Constructive Contracts

Unjust enrichment

Under New York law, essence of unjust enrichment is that one party has received money or a benefit at expense of another.

Cases that cite this headnote

[69] Implied and Constructive Contracts

Unjust enrichment

To establish claim for unjust enrichment under New York law, plaintiff must show that: (1) another party was enriched, (2) at 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

Cases that cite this headnote

[70] Bankruptcy

Pleading;dismissal

Corporations and Business Organizations

Pleading

Corporations and Business Organizations

Domination or control by shareholder

Allegations in Chapter 7 trustee's complaint, regarding retention of cash belonging to debtor by Dutch company acting as "intercompany bank" for debtor and related corporate entities, did not state unjust enrichment claim against parent company; trustee did not allege how corporate parent

had been enriched, unjustly or otherwise, and did not allege that parent so dominated and controlled this Dutch company that corporate veil could be pierced, and that parent could be held accountable for any unjust enrichment of Dutch company.

Cases that cite this headnote

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MEMORANDUM DECISION GRANTING IN PART AND DENYING IN PART, DEFENDANTS' MOTIONS TO DISMISS AMENDED COMPLAINT

HON. JAMES L. GARRITY, JR., UNITED STATES BANKRUPTCY JUDGE:

Introduction

In the spring of 2013, CIL Limited ("CIL" or the "Debtor"), the chapter 7 debtor herein, was a holding company known as CEVA Logistics Limited, that *56 was controlled by several investment funds operated by Apollo (defined below). Its sole asset was its direct and indirect ownership of 100% of the equity of CEVA Group PLC ("CEVA Group"), a holding company that controlled a number of operating entities comprising the CEVA Enterprise (defined below). At that time, CIL's debt consisted of unsecured PIK Notes (defined below) totaling at least €103 million, while CEVA

Group's secured and unsecured indebtedness totaled approximately €2.1 billion and €575 million, respectively. In April 2013, CIL acquiesced to and participated in an out-of-court restructuring and recapitalization of CEVA Group (the "CEVA Restructuring"). As a part of that restructuring transaction, CIL caused CEVA Group to issue new shares of its stock (defined below as the "CEVA Equity Transfer") to a newly created entity (defined below as "CEVA Holdings"). One consequence of that transfer was that CIL was left with a 00.01% interest in CEVA Group. The newly issued shares eventually were used to equitize a portion of CEVA Group's indebtedness, including unsecured debt held by Apollo. At the end of that process, Apollo, which owned (through CIL) almost 100% of CEVA Group prior to the CEVA Restructuring, was left with a 21% ownership interest in recapitalized CEVA Group. For CIL, the CEVA Restructuring transaction was overseen by its then directors, Gareth Turner ("Turner") and Mark Beith ("Beith," and collectively with Turner, the "Directors"), who were advised by professionals in the United States and Cayman Islands.

CIL is a Cayman Islands exempted company. After the CEVA Equity Transfer, but before all steps in the CEVA Restructuring were completed, on April 2, 2013, CEVA Logistics Limited changed its name to "CIL Limited" (i.e., the Debtor) and filed a petition commencing provisional liquidation proceedings in the Grand Court of the Cayman Islands. Those proceedings are on-going. A few weeks later, on April 22, 2013 (the "Petition Date") three Cayman-based PIK Noteholders (defined below) filed an involuntary petition under chapter 7 of the Bankruptcy Code against CIL in this Court. On May 14, 2013, the Court entered an order for relief against CIL.

Salvatore LaMonica is the court-appointed chapter 7 trustee of the CIL estate (the "Trustee"). He contends that CIL's interest in the CEVA Group equity had value at the time of the CEVA Equity Transfer and that CIL received nothing in consideration for the loss of its ownership interest in CEVA Group. He says that CIL was stripped of its interests in CEVA Group at the behest of Apollo, who allegedly conceived of and orchestrated the CEVA Restructuring, including the CEVA Equity Transfer, from its offices in New York City. He maintains, in substance, that through the issuance of the new shares of CEVA Group, Apollo sought to enhance its ownership interest in CEVA Group by "leapfrogging" the PIK Noteholders

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in the CEVA capital structure. Moreover, he maintains that to make matters worse, CEVA Group or one of its controlled subsidiaries is holding nearly €14 million of cash that belongs to CIL (the "CIL Cash") and has unjustifiably refused to return it to the Debtor's estate. In this adversary proceeding, the Trustee seeks relief against the Directors, as well as CEVA Group, CEVA Holdings and a related company, CEVA Logistics Finance B.V. ("CEVA Finance," and collectively with CEVA Group and CEVA Holdings, the "CEVA Defendants," and with the Directors, the "Defendants").

Before the Court are motions by the CEVA Defendants and the Directors to dismiss miscellaneous counts of the Trustee's nineteen (19) Count amended complaint *57 [ECF No. 21 ¹] (the "Amended Complaint"). ² The CEVA Defendants seek to dismiss certain of the Counts against all or some of them, pursuant to Rules 12(b)(2) and (6) of the Federal Rules of Civil Procedure. ³ Turner seeks to dismiss certain of the Counts alleged against him pursuant to Rule 12(b)(6). Beith has moved to dismiss all Counts asserted against him for lack of personal jurisdiction under Rule 12(b)(2), and has joined Turner's motion to dismiss. ⁴ The Trustee opposes all of the motions. ⁵ For the reasons discussed below, the Court grants in part, and denies in part, the motions. ⁶

- Citations to "ECF No. ___" refer to documents filed on the Court's electronic case filing docket in this adversary proceeding. Documents filed on the electronic docket of other cases will designate the applicable case number before the "ECF No. ___."
- Annexed hereto as "Appendix I" is a list of the counts alleged in the Amended Complaint, including the parties against whom the counts are alleged.
- Fed. R. Civ. P. 12 is made applicable herein by Fed. R. Bankr. P. 7012.
- The Directors jointly filed a motion to dismiss the Amended Complaint [ECF Nos. 26–27] (the "Directors' MTD"), and a reply memorandum of law [ECF No. 44] (the "Directors' Reply"). The CEVA Defendants jointly filed a motion to dismiss the Amended Complaint [ECF Nos. 32, 35] (the "CEVA MTD"), and a reply memorandum of law [ECF No. 48] (the "CEVA Reply"). The declarations that the Directors and CEVA Defendants submitted in

- support of their motions will be identified herein, as necessary.
- The Trustee filed a memorandum of law in joint opposition to the Directors' MTD and CEVA MTD [ECF No. 39] (the "Trustee's Opposition"). The declarations that the Trustee submitted in support of his objections to the motions will be identified herein, as necessary.
- Although the CEVA Defendants, Turner and Beith filed separate motions to dismiss, the Court will address all of the motions in this Memorandum Decision.

Jurisdiction

The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334 and 157(a) and (b)(1) and the Amended Standing Order of Referral of Cases to Bankruptcy Judges of the United States District Court for the Southern District of New York, dated January 31, 2012 (Preska, C.J.). This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A).

Legal Standards and Scope of the Record

Rule 12(b)(2) provides for the dismissal of a defendant from a lawsuit based upon a lack of personal jurisdiction. As such, its focus is on the contacts between the defendant and the forum. As discussed below, in assessing the merits of a Rule 12(b)(2) motion, courts consider (i) whether the defendant has the requisite "minimum contacts" with the forum, and (ii) whether the exercise of jurisdiction over the defendant would be reasonable in the circumstances. See, e.g., Walden v. Fiore, 571 U.S. 227, 134 S.Ct. 1115, 1121, 188 L.Ed.2d 12 (2014). It is well settled that in deciding Rule 12(b)(2) motions, courts may review materials beyond the pleadings, including affidavits and other written materials. See, e.g., MacDermid v. Deiter, 702 F.3d 725, 727 (2d Cir. 2012). See also Bensusan Restaurant Corp. v. King, 937 F.Supp. 295, 298 (S.D.N.Y. 1996) (noting that "[m]atters outside the pleadings ... may also be considered in resolving a motion to dismiss for lack of personal jurisdiction pursuant to Fed. R. Civ. P. 12(b)(2) without converting it into one for summary judgment."), aff'd, 126 F.3d 25 (2d Cir. 1997); Nationwide Mut. Ins. Co. v. Morning Sun Bus Co., No. 10-cv-1777, 2011 WL 381612, at *3 (E.D.N.Y. 2011) ("In deciding a motion to dismiss for lack of personal jurisdiction, *58 the Court may rely upon materials that are outside the pleading, including any affidavits submitted by the parties.") (citation omitted). Beith and CEVA Finance have submitted declarations in support of their respective Rule 12(b)(2) motions. See Declaration of Mark Beith in support of Motion to Dismiss [ECF No. 28] (the "Beith Declaration"); Declaration of Remco Van Der Pijl [ECF No. 38] (the "Pijl Declaration"). No one disputes that those materials should be included in the record of those motions. The Court has relied on them in resolving the Rule 12(b)(2) motions.

Rule 12(b)(6) has a different focus. It provides in relevant part:

(b) Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defense[] by motion ... (6) failure to state a claim upon which relief can be granted ...

Fed. R. Civ. P. 12(b)(6). Thus, a Rule 12(b)(6) motion tests the legal sufficiency of a plaintiff's claim for relief. See Patane v. Clark, 508 F.3d 106, 112 (2d Cir. 2007). In resolving the Rule 12(b)(6) motions, the Court will "assess the legal feasibility of the complaint, not ... assay the weight of evidence which might be offered in support thereof." Cooper v. Parsky, 140 F.3d 433, 440 (2d Cir. 1998) (internal quotation marks omitted). To overcome a motion to dismiss a complaint, the plaintiff must demonstrate that the complaint "contain[s] sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). Courts employ a two-prong approach in assessing the merits of Rule 12(b) (6) motions. See Pension Benefit Guar. Corp. v. Morgan Stanley Inv. Mgmt. Inc., 712 F.3d 705, 717 (2d Cir. 2013) (noting that Iqbal "creates a 'two-pronged approach' ... based on '[t]wo working principles.' " (quoting Iqbal, 556 U.S. at 678-79, 129 S.Ct. 1937)). First, the court must "accept as true all of the factual allegations set out in the plaintiff's complaint, draw inferences from those allegations in the light most favorable to plaintiff, and construe the complaint liberally." Rescuecom Corp. v. Google Inc., 562 F.3d 123, 127 (2d Cir. 2009) (quotation marks and citation omitted). See also Boykin v. KeyCorp, 521 F.3d 202, 204 (2d Cir. 2008) (stating that "[i]n reviewing a motion to dismiss, [the court] accept[s] the allegations in the complaint as true.") (citation omitted). Second, the court must determine if those well-pleaded factual allegations state a "plausible claim for relief." Iqbal, 556 U.S. at 679, 129 S.Ct. 1937. To meet that standard, the plaintiff must "plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. at 678, 129 S.Ct. 1937; see also Kaufman v. Time Warner, 836 F.3d 137, 141 (2d Cir. 2016) (noting that the "plausibility" standard "asks for more than a sheer possibility that a defendant has acted unlawfully" (quoting Iqbal, 556 U.S. at 678, 129 S.Ct. 1937)) (internal quotations marks omitted); Twombly, 550 U.S. at 555, 127 S.Ct. 1955 (observing that "[f]actual allegations must be enough to raise a right to relief above the speculative level") (citing 5 C. Wright & A. Miller, Federal Practice and Procedure § 1216, at 235-36 (3d ed. 2004)). In approaching the second prong, the "reviewing court [is required] to draw on its experience and common sense." Igbal, 556 U.S. at 679, 129 S.Ct. 1937.

In resolving the Rule 12(b)(6) motions, the Court is limited to the facts alleged in the Amended Complaint, including (i) documents *59 attached to or incorporated by reference in the complaint; (ii) documents "integral" to or relied upon in the complaint, even if not attached or incorporated by reference, and (iii) facts of which judicial notice may properly be taken under Rule 201 of the Federal Rules of Evidence. See Chambers v. Time Warner, Inc., 282 F.3d 147, 152-53 (2d Cir. 2002); Brass v. Am Film Techs, Inc., 987 F.2d 142, 150 (2d Cir. 2002); Cortec Indus., Inc. v. Sum Holding L.P., 949 F.2d 42, 48 (2d Cir. 1991) (stating that "[w]here plaintiff has actual notice of all the information in the movant's papers and has relied upon these documents in framing the complaint the necessity of translating a Rule 12(b)(6) motion into one under Rule 56 is largely dissipated."). If materials beyond those are submitted in support of a Rule 12(b)(6) motion, the Court must either exclude them, or convert the motion to one for summary judgment under Fed. R. Civ. P. 56. See Rule 12(d) (If "matters outside the pleadings are presented to and not excluded by the court, the [Rule 12(b)(6)] motion must be treated as one for summary judgment under Rule 56.")). See also Nakahata v. N. Y.-Presbyterian Healthcare Sys., Inc., 723 F.3d 192, 202 (2d Cir. 2013) ("As indicated by the word '[must],' the conversion of a Rule 12(b)(6) motion into one for summary judgment under Rule 56 when the court considers matters outside the pleadings is strictly enforce[d] and mandatory.") (citing *Global Network Commc'ns, Inc. v. City of N. Y.*, 458 F.3d 150, 155 (2d Cir. 2006)); *Roth v. Jennings*, 489 F.3d 499, 509 (2d Cir. 2007) ("In any event, a ruling on a motion for dismissal pursuant to Rule 12(b)(6) is not an occasion for the court to make findings of fact.").

In addition to the Beith Declaration, the Directors submitted the Declarations of Michael Crystal Q.C. [ECF No. 29] and Christopher L. McCall [ECF No. 30] in support of their motions to dismiss. The McCall declaration included, as exhibits, nine (9) documents, or portions thereof. The Directors have advised that for purposes of their motions to dismiss, it is not necessary for the Court to consider any documents submitted by them, other than the Beith Declaration, and that they are not requesting to convert their motions to dismiss into motions for summary judgment. *See* Directors' MTD at 3 n.3.

In contrast, the CEVA Defendants submitted 22 documents in support of their motion to dismiss (such documents, the "CEVA Documents"), ⁷ and they contend that the Court can consider all of them in resolving their Rule 12(b)(6) motion. The Trustee did not annex any documents to the Amended Complaint, but acknowledges that five of the CEVA Documents, and a draft of another, are integral to the complaint and, as such, he agrees that they should be included in the record of the motions. Those documents are:

- MS Report/Morgan Stanley Discussion Materials.
- *60 E & Y Valuation Report, dated March 29, 2014 (Chapman Decl., Ex. D).
- Restructuring Agreement, dated April 1, 2013, by and among CEVA Group, CIL, Louis Cayman Second Holdco Limited, and CEVA Holdings (Chapman Decl., Ex. E).
- Pages F-61 and F-68 of the CEV A Investment Limited Amendment to Form F-1 Registration Statement, dated August 29, 2012 (Chapman Decl., Ex. F).
- CEVA Holdings 2012 Annual Report (Chapman Decl., Ex. I).

- Second Affidavit of Gareth Turner (Suppl. Chapman Decl., Ex. Q).
- Annexed hereto as "Appendix II" is a list of those documents. As set forth in Appendix II, most of those documents are exhibits to the Chapman Declaration or Supplemental Chapman Declaration, as those items are defined in Appendix II.
- The Trustee contends that the multiple references in the Amended Complaint to the "MS Report" do not refer to the "final version" of the report, submitted by the CEVA Defendants as Exhibit C to the Chapman Declaration, but rather to an earlier version of the report. For that reason, the Trustee objects to the inclusion of the final version of the report in the record of CEVA's motion to dismiss. See Trustee's Opp'n at 19, 40–41. The Trustee included a copy of the version of the report that he relied on in drafting the Amended Complaint in his Opposition. The parties agree that any reference to the "MS Report" or the "Morgan Stanley Discussion Materials" will be to the version utilized by the Trustee in drafting the Amended Complaint.

The CEVA Defendants contend that all of the remaining documents (the "Contested CEVA Documents") fall within one or more of the well settled exceptions to the general rule that in adjudicating Rule 12(b)(6) motions, courts do not look beyond the four corners of the complaint. See CEVA Reply at 11. They also contend that certain of those documents should be included in the record since they are part of a multi-step, fully integrated restructuring. Id. (citing Liquidation Trust v. Daimler AG (In re Old CarCo LLC), 435 B.R. 169, 183–85 (Bankr. S.D.N.Y. 2010) ("CarCo I")); Liquidation Trust v. Daimler AG (In re Old CarCo LLC), 454 B.R. 38, 46–47 (Bankr. S.D.N.Y. 2011) ("CarCo II"). The Trustee disputes those assertions.

The CEVA Defendants submitted six (6) of the CEVA Documents in support of their contention that the Court should dismiss Count 16 of the Amended Complaint. As discussed below, the Trustee has withdrawn Count 16 of the Amended Complaint, without prejudice. Accordingly, the Court will exclude those documents from the record of the motions. ⁹ As to the balance of the Contested CEVA Documents, and as explained below in Appendix III to this Memorandum Decision (which Appendix is incorporated herein), the Court finds that the following Contested CEVA Documents will be included in the

record of the Rule 12(b)(6) motions since they are either incorporated in the Amended Complaint or integral to the allegations therein:

- CEVA Holdings 2013 Annual Report (Chapman Decl., Ex. G).
- CEVA Holdings 2014 Annual Report (Chapman Decl., Ex. A).
- Debt RSA (Chapman Decl., Ex. H).
- PIK Note Debt Instrument Agreement. 10
- *61 CIL Shareholder Resolution.
- · CEVA Shareholder Resolution.

In addition, the Court will take judicial notice of the Joint Stipulation for May 13, 2013. 11

- Those documents are:
 - Account System and Cash Pooling Agreement, dated June 9, 2006, between TNT Logistics Holdings B.V. and Bank Mendes Gans N.V. (see CEVA MTD at 61; Chapman Decl., Ex. K):
 - Assignment Agreement, dated July 10, 2007, between CEVA Logistics Holdings B.V., CEVA Finance and Bank Mendes Gans N.V. (see CEVA MTD at 62; Chapman Decl., Ex. L).
 - Logistics Cash Management Agreement, dated September 27, 2007 ("Logistics Cash Management Agreement") (see CEVA MTD at 62; Chapman Decl., Ex. M);
 - Cash Pooling Agreement, dated November 28, 2008, between CEVA Finance, CEVA and Bank Mendes Gans N.V. (see CEVA Motion at 62; Chapman Decl., Ex. N);
 - RBS Cash Pooling Agreement, dated November 5, 2008, by and among ABN AMRO Bank N.V. and CEVA Finance (see CEVA MTD at 62–63; Chapman Decl., Ex. O); and
 - Amendment to RBS Cash Pooling Agreement, dated January 22, 2009, between ABN AMRO Bank N.V. and CEVA Finance (see CEVA MTD at 62–63; Chapman Decl., Ex. P).
- The PIK Note Debt Instrument Agreement was not submitted by the CEVA Defendants as an exhibit to the Chapman Declaration or Supplemental Chapman

- Declaration; instead, it was previously filed on this Court's docket in the Debtor's main chapter 7 case, in connection with the Petitioning Creditors' Motion for the Appointment of a Trustee [Case No. 13–11272, ECF No. 7, Ex. E] and Allen Investment Management, LLC's Joinder to the Involuntary Petition [Case No. 13–11272, ECF No. 28, Ex. E].
- 11 The Joint Stipulation for May 13, 2013 was not submitted by the CEVA Defendants as an exhibit to the Chapman Declaration or Supplemental Chapman Declaration; instead it was previously filed on this Court's docket in the Debtor's main chapter 7 case [Case No. 13–11272, ECF No. 28, Ex. A].
- [2] The remaining Contested CEVA Documents fall outside the scope of the record of the motions. This Court "is not obliged to convert a 12(b)(6) motion to one for summary judgment in every case in which a defendant seeks to rely on matters outside the complaint in support of a 12(b)(6) motion; it may, at its discretion, exclude the extraneous material and construe the motion as one under Rule 12(b)(6)." United States v. Int'l Longshoremen's Ass'n, 518 F.Supp.2d 422, 450 (E.D.N.Y. 2007) (collecting cases). That is what the Court will do here. See Trans-Spec Truck Serv. v. Caterpillar Inc., 524 F.3d 315, 321 (1st Cir. 2008) (noting that if a court chooses "to ignore supplementary materials submitted with the motion papers and determine the motion under the Rule 12(b)(6) standard, no conversion occurs and the supplementary materials do not become part of the record for purposes of the Rule 12(b)(6) motion."). See also Rice v. Kawasaki Heavy Indus., Ltd., No. CV-07-4031, 2008 WL 4646184, at *3 (E.D.N.Y. Oct. 17, 2008) (exercising discretion and excluding "extraneous material submitted by the ... defendants on their motion [to] decide their motion on the complaint alone" thereby declining to convert motion from one under Rule 12(b)(6) to a Rule 56 summary judgment motion).

Facts

Background

CIL is a Cayman Islands exempted company. (¶ 9). ¹² Its creditors consist overwhelmingly, if not exclusively, of certain payment-in-kind notes (the "PIK Noteholders" holding "PIK Notes") issued under a Debt Instrument Agreement, dated as of February 15, 2007, as amended and restated on June 2, 2008, among CIL, the Holders of Debt Instrument, and Credit Suisse, London Branch,

as Administrative Agent. (¶ 12). The PIK Note Debt Instrument Agreement was entered into by CIL with the London branch of Credit Suisse, as Administrative Agent, with payments (when due) to be tendered in London. *See* PIK Debt Instrument at 1–3. As of the Petition Date, the face amount of outstanding PIK Notes was approximately €103 million. (¶¶ 12, 35).

In the "Facts" section only, the parenthetical notation
"(¶ __)" refers to paragraphs in the Amended
Complaint.

Until the spring of 2013, CIL (at that time, known as "CEVA Logistics Limited") was a holding company that directly and indirectly, and through its wholly owned subsidiary, Louis Cayman Second Holdco ("Louis Cayman"), owned 100% of the shares of CEVA Group. (¶ 1, 36). 13 CEVA Group is an England and Wales public limited company that serves as a holding company for a number of operating companies which collectively conduct *62 logistics and freight management business operations from approximately 1,000 locations in 160 countries, including the United States (collectively, the "CEVA Enterprise"). (¶¶ 1, 27, 37). It has a business address in London, England (¶ 27), but maintains its corporate headquarters in Hoofddorp, the Netherlands. See 2014 Annual Report, at 69, 78 (Chapman Decl., Ex. A). At that time, CIL was owned and controlled by four funds (collectively, the "Apollo Funds") 14 under the control of private equity firm Apollo Global Management, LLC ("Apollo Global," and collectively with its subsidiaries, affiliates and managed entities, "Apollo"). (¶ 22, 33). As of March 28, 2013, the Apollo Funds collectively owned 100% of CIL's 4.4 million Class B Shares and approximately 91.5% of CIL's 4 million Class A shares. (¶ 22, 33, 47). The Class B Shares were senior to the Class A Shares and carried a €200 per share liquidation preference, for an aggregate liquidation preference of approximately €880 million. (¶ 47). In addition, an Apollo-related entity managed the CEVA Enterprise. (¶ 2, 33). At all times relevant to this litigation, Turner and Beith were CIL's sole directors. (¶¶ 23, 24).

- CIL owned all but one of those shares. Louis Cayman owned the remaining share. (¶ 36).
- The Apollo Funds are: Apollo Management VI, L.P. ("Apollo Management VI"), a limited partnership formed under the laws of the state of Delaware; AP VI

CEVA, a limited partnership formed under the laws of the Cayman Islands; AlpInvest Partners Beheer 2006, L.P. ("AlpInvest"), a limited partnership formed under the laws of the Cayman Islands; and AAA Guarantor Co–Invest VI (B), L.P. ("AAA"), a limited partnership formed under the laws of Guernsey. (¶¶ 18–21).

CEVA Restructuring

The Trustee acknowledges that in early 2013, "CEVA [Group] faced financial challenges." (¶ 1). However he maintains that "those challenges were surmountable without extraordinary measures[,]" and that a critical fact is that "the value of CEVA [Group] substantially exceeded its debts" and, as such, "CIL's shares of CEVA [Group] had substantial value." Id. At that time, CEVA Group's capital structure included approximately €2.1 billion in "opco" first and second Lien secured debt, and approximately €575 million in unsecured debt. See Restructuring Term Sheet (Ex. A) to CIL RSA, at 3-5 (Chapman Decl., Ex. E). Three parties—the Apollo Funds, Capital Research Management L.P. and affiliated funds ("CapRe") and Franklin Advisers, Inc. and affiliated funds ("Franklin"), collectively owned more than 69.5 % of CEVA Group's Second Lien Debt and 83.5% of its Senior Unsecured Debt. Id. at 1. The Apollo Funds, in particular, held \$295 million in the CEVA Group Second Lien debt. (¶ 2).

On April 1, 2013, CEVA Group, Louis Cayman, CEVA Holdings, and CIL entered into a Restructuring Agreement (the "CIL RSA"), pursuant to which, among other things, CIL authorized CEVA Group to issue new CEVA Group shares (the "New CEVA Shares") to CEVA Holdings LLC ("CEVA Holdings"), a newly formed Marshall Islands affiliate of Apollo (the "CEVA Equity Transfer"). (¶ 108). 15 CIL held the same number of shares before and after the CEVA Equity Transfer. However, as a consequence of that stock transfer, CEVA Holdings gained a 99.99% ownership interest in CEVA Group, while CIL's ownership interest in CEVA Group was reduced to 00.01%. (¶ 108, 109). The Trustee acknowledges that the Defendants' purported objective in effectuating the CEVA Equity Transfer was eventually to use the New CEVA Shares as currency *63 for a debt-forequity exchange with some of CEVA Group's creditors. (¶ 111). Indeed, on April 3, 2013, CEVA Group, the Apollo Funds, CapRe and Franklin entered into a Restructuring Support Agreement (the "Debt RSA") pursuant to which they agreed to support an exchange of €1.2 billion of CEVA Group debt for equity in CEVA Holdings (the "CEVA Debt Transfer"). (¶ 119). As of April 30, 2013, eight days after the Petition Date and the imposition of the automatic stay, the CEVA Debt Transfer had not yet closed because the deadline for accepting exchange offer tenders and voting was not due to occur until midnight that evening. (¶ 124). According to the Trustee, the "CEVA Debt Transaction" closed on or about May 2, 2013. (¶ 125). After the CEVA Debt Transfer closed, the Apollo Funds were left with a 21% ownership interest in restructured CEVA Group. (¶ 112). The Trustee contends that even with that reduced percentage ownership interest in CEVA Group, "Apollo still came out ahead" because it (i) continued owning a sizeable interest in a far more valuable and deleveraged CEVA Enterprise, (ii) continued to retain board control of CEVA Group, (iii) maintained its lucrative stream of management fees and (iv) obtained fees in connection with the restructuring transactions. (¶ 6). He says that on the other hand, CIL was left with nothing but its litigation claims. (Id.).

15 CEVA Holdings, a Republic of Marshall Islands limited liability company, was formed on March 28, 2013, by Apollo or at Apollo's directions. (¶ 28).

PIK Noteholders' Alleged Loss of Value

The Trustee asserts that the CEVA Equity Transfer did not benefit CIL at all, because CEVA Holdings gave no consideration to CIL in return for its receipt of the New CEVA Shares (¶ 111), and because the transfer left CIL insolvent, stripped of its assets and hundreds of millions of dollars of value. (¶¶ 3-4). He contends that at the time of the CEVA Equity Transfer, CEVA Group had significant value, and that the Directors and Apollo knew as much. As support, he points to a report that Morgan Stanley ("MS") prepared for Apollo, at Apollo's request, in late January 2013 (the "MS Report"), which he maintains shows that under several of MS's valuation methodologies, a sale of CEVA Group would likely pay a portion of the PIK Notes debt, and potentially all of it. (¶ 72). He also asserts that on two occasions in 2012, the Directors represented that CIL was solvent and that CIL's stock was extremely valuable. First, in May and August 2012, the Directors filed, respectively, an SEC Form F-1 and SEC Form F-1A Amendment No. 1 to Form F-1 (collectively, the "SEC Filings") with the Securities Exchange Commission (the "SEC") in connection with CIL's potential sale of up to \$400 million of additional CIL securities, and did not withdraw these filings until April 2013. (¶¶ 6, 43). He asserts that the SEC Filings expressly represented that CIL (and thus CEVA Group) was solvent by over \$1 billion earlier in 2012. (¶¶ 43, 44). He also says that in mid-September 2012, the Directors formally resolved that CIL was highly solvent and CEVA Group's equity was extremely valuable. (¶ 45). More specifically, he maintains that CIL and certain of its shareholders were parties to a Shareholder Agreement dated November 4, 2006, that required CIL's board of directors (i.e., Beith and Turner) to determine the fair market value per share of CIL's shares in a manner it deemed appropriate in good faith. He says that at a September 12, 2012 CIL board meeting, the board, after consultation with CEVA Group's Executive Committee, resolved that the CIL Class A Shares were valued at a price of €50/share. (¶¶ 45, 46). From that, he asserts that the implied value of the aggregate "Ordinary Shares" of CIL was almost €1.1 billion. (¶¶ 6, 47, 48).

The Directors Allegedly Breach Their Fiduciary Duties

The Trustee contends that the CEVA Equity Transfer was not arms-length and *64 was one-sided because Apollo devised and orchestrated the transfer from its New York headquarters for its benefit and to the detriment of the PIK Noteholders. (¶¶ 51, 110). He maintains that Apollo was able to do so because CIL and CEVA Group did not have conflict-free directors, and because, in any event, Apollo controlled CIL, the Directors, CEVA Group and CEVA Holdings. Both Directors allegedly were beholden to Apollo because each was employed by Apollo Global or an affiliate. (¶¶ 23, 24, 55). The Trustee also contends that Beith and Turner conducted business communications, including in their capacities as directors of CIL, through the email domain of "apollolp.com," and that with respect to matters relating to CIL and CEVA Group, both of them reported to and took direction from Stanley J. Parker, then a senior partner at Apollo, who also served as a director of CEVA Group. (¶ 17, 23, 24). Moreover, both allegedly were further conflicted because their personal assets were invested in the Apollo Funds that stood to benefit from the CEVA Equity Transfer because they owned CEVA Group debt and securities. (¶ 23, 24, 107, 110, 183). What's more, the Trustee says that by November 19, 2012, CIL, CEVA Group and Apollo were working together to formulate the transfers that would become the CEVA Equity Transfer and that through January 15, 2013, when the recapitalization/restructuring plans were well underway: In re CIL Limited, 582 B.R. 46 (2018)

(i) Turner simultaneously served as a director of both CIL and CEVA Group; (ii) CIL's Chief Financial Officer, Rubin McDougal ("McDougal") simultaneously served as Chief Financial Officer of one or more entities in the CEVA Enterprise; and (iii) CIL's secretary, Dawn Wetherall ("Wetherall"), was simultaneously employed as Regional General Counsel-Northern Europe at CEVA Finance. (¶ 53). McDougal is a United States citizen and served as CIL's Chief Financial Officer through December 2012, if not later. (Id.). On or about January 15, 2013, McDougal and Wetherall each resigned from their positions at CIL, and Turner resigned as a director of CEVA Group. (¶ 55). However, Beith and Turner continued to serve as CIL's directors. The Trustee maintains that "[those] personnel maneuvers not only came far too late in the CEVA [Group] restructuring process to avoid tainting the restructuring, they failed to provide CIL with a critically needed independent fiduciary to manage its affairs. CIL remained under the exclusive control of employees of Apollo." (¶ 55).

The Trustee complains that the Directors breached their fiduciary duties to CIL and CIL's creditors by working in bad faith, and in concert with Apollo, to misappropriate CIL's assets. (¶ 4). To that end, he asserts, among other things, that (i) the Directors retained one of Apollo's regular outside counsel, Mintz, Levin, Cohn, Ferris, Govsky and Popeo P.C. ("Mintz Levin") to represent CIL in connection with the potential restructuring/ recapitalization of CEVA Group, even though Mintz Levin was conflicted (¶ 50); (ii) CIL consulted with the Cayman Islands law firm of Walkers on matters relating to the Directors' fiduciary duties to CIL, while Walkers had an actual and disqualifying conflict because it was acting for CEVA Group with respect to the restructuring/ recapitalization that eventually became the CEVA Equity Transfer (¶ 49); (iii) upon advice of counsel, the Directors treated an "ad hoc" call with CEVA Group's counsel as a CIL board meeting in order to create the appearance that they were independently evaluating the CEVA Equity Transfer when they in fact were not (¶ 56); (iv) retained the Appleby law firm in the Cayman Islands, as CIL's Cayman Islands counsel to assist with the *65 restructuring of CIL, but in response to Appleby's advice that the Directors had a serious conflict of interest, did nothing to cure their conflicts or to provide CIL with an independent director, officer or manager to exercise independent judgment with regard to the CEVA Equity Transfer (¶¶ 50, 59); and (v) took steps with their professionals to create

sham evidence of having acted independently, when they had not. (¶ 106).

The Defendants Allegedly Concealed the CEVA Restructuring

The Trustee asserts that the Directors knew that they would be facing significant liability for misappropriating CIL's assets for Apollo's benefit and that the CEVA Equity Transfer would be unwound if their wrongdoing was exposed. (¶ 5). He says that the Directors and Apollo took a number of steps in an effort to conceal their alleged wrongdoing and that the Directors deliberately employed secrecy and subterfuge for the specific purpose of hindering, delaying and defrauding CIL's creditors. (¶ 4). He maintains that the Directors allegedly concealed the equity transfer from the PIK Noteholders, even as CIL and its counsel were meeting with holders of CEVA Group debt and securities, and that not only were the PIK Noteholders denied an opportunity to participate in the negotiation of the CIL RSA, but that they were not informed about the transaction until after it had been executed. (¶ 110). He also claims that immediately after the CEVA Equity Transfer was completed, the Directors, at Apollo's behest, caused the Debtor's name to be changed from "CEVA Investments Limited" to "CIL Limited" (¶ 116) and, on April 2, 2013, caused "CIL Limited" to file a petition (the "Cayman Islands Petition") commencing provisional liquidation proceedings in the Cayman Islands (the "Cayman Insolvency Proceedings"). (¶ 117). He says that the Defendants caused CIL to commence those proceedings for the expressed and sole purpose of hindering, delaying and defrauding the PIK Noteholders. (¶¶ 14, 100-02, 117). He also contends that to further ensure the secrecy of those proceedings, the Directors anonymized the underlying petition and supporting documents by filing them under the name of "ABC Limited," with a redacted version of the Cayman Islands Petition being placed on the publicly available Register of Writs. (¶ 117).

Finally, he maintains that after determining that they would authorize CIL to effect the CEVA Equity Transfer, but well in advance of the commencement of the Cayman Insolvency Proceedings, the Directors, with Apollo's assistance, retained Ernst & Young ("E & Y") to produce a report (the "E & Y Report") stating that CEVA Group's equity had no value. (¶ 96, 97, 103). The Trustee contends that the E & Y Report was wholly lacking in diligence and independence, heavily influenced by Apollo's strategic

design, and reverse-engineered to frustrate the ability of CIL and its creditors to obtain relief for the wrongs allegedly committed by the Defendants. (¶ 5). He alleges that, among other things, in reviewing drafts of the E & Y Report, the Directors and CIL's professionals proposed modifications to the report in an effort to show that the CEVA Group equity had no value (¶¶ 73–80), and that they instructed E & Y to use an EBITDA multiple that was well below the median multiple for comparable companies. (¶ 88-91). The final E & Y Report concluded: "it is our conclusion that there is no basis to expect any equity value to CEVA [Group] for CIL in any available scenario." (¶ 87). The Trustee contends that "[t]he Directors deliberately and in bad faith abandoned their fiduciary duties to CIL ... [by] obtain[ing] the patently unreliable E [& Y] Report, after controlling and manipulating *66 both the process of its creation and its ultimate conclusion, only to advance their individual interests of avoiding liability for their misconduct in causing the fraudulent transfer of CIL's shares in CEVA [Group], and not for any legitimate business purpose." (¶ 96).

The Cayman Islands Insolvency Proceedings

On April 2, 2013, CIL filed a petition commencing the Cayman Islands Insolvency Proceedings in the Grand Court of the Cayman Islands (the "Cayman Court"). (¶ 117). On May 31, 2013, those provisional liquidation proceedings were converted to Court-supervised official liquidation proceedings, and Messrs. Peter Anderson and Matthew Wright, who were the joint provisional liquidators in place as of the commencement of the proceedings, were appointed as joint official liquidators (the "Joint Liquidators" or "JOLs"). By order dated September 30, 2013, this Court (Peck, J.) approved an International Protocol among the Trustee and Joint Liquidators. See Order Approving International Protocol Respecting the Administration of the Debtor's Estate [Case No. 13-11272, ECF No. 56]. A copy of the International Protocol is annexed as Exhibit A to that order. The Cayman Court likewise sanctioned the International Protocol.

The Involuntary Chapter 7 Case and Rule 2004 Discovery

On April 22, 2013, three PIK Noteholders (the "Petitioning Creditors") filed an involuntary chapter 7 petition against CIL in this Court. (¶¶ 3, 120). All of the Petitioning Creditors—Cyrus Opportunities Master

Fund II, Ltd., Cyrus Select Opportunities Master Fund, Ltd., and Cyrus Europe Master Fund, Ltd.—are Cayman Islands entities. At a hearing on May 13, 2013, the Court granted the involuntary chapter 7 petition. On May 14, 2013, the Court entered an order for relief. (¶ 126–127).

Subsequently, on July 3, 2013, the Trustee filed a motion for an order allowing him to conduct discovery pursuant to Fed. R. Bankr. P. 2004, and on August 6, 2013, the Court granted that motion. 16 Thereafter, the Trustee served document subpoenas on CEVA Group and Apollo seeking a wide variety of documents related to, among other things, the CEVA Restructuring, CEVA Group's assets and liabilities, and the CIL Cash. On October 1, 2013, the Trustee served a subpoena on Houlihan Lokey ("Houlihan"), which had served as a financial advisor to CEVA Group in connection with the CEVA Restructuring. In total, CEVA Group, Apollo, and Houlihan produced 57,840 documents totaling 372,310 pages in response to the various subpoenas served on them. The Trustee also served document subpoenas on, and received productions from, the former directors of CIL, their legal advisors, MS, E & Y, and perhaps others.

See Motion of the Trustee for an Order Pursuant to Bankruptcy Rule 2004 Directing the Production of Documents and the Taking of Depositions [Case No. 13–11272, ECF No. 37] and Order Signed on 8/6/2013 Permitting the Trustee to Conduct Rule 2004 Discovery [Case No. 13–11272, ECF No. 55].

The Adversary Proceeding

The Trustee originally commenced this adversary proceeding on December 8, 2014 through the filing of an eleven count complaint (the "Original Complaint") against the CEVA Defendants and the Directors in the United States District Court for the Southern District of New York. See Case No. 14cv9671, ECF No. 1 (S.D.N.Y.). Under the District Court's Amended Standing Order of Reference Re: Title 11, M10-468, No. 12 Misc. 32 (S.D.N.Y. Jan. 31, 2012) (Preska, C.J.), the District Court *67 referred the proceeding to this Court (the "Adversary Proceeding") 17 by Order dated December 16, 2014. See Case No. 14cv9671, ECF No. 3 (S.D.N.Y.). On February 13, 2015, the CEVA Defendants and the Directors filed separate motions to dismiss many, but not all, of the claims asserted by the Trustee in the Original Complaint. See ECF Nos. 12-17; ECF Nos. 7-10. In response, on March 31, 2015, the Trustee filed the Amended Complaint

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against the Defendants. See Adv. Proc. No. 14-02442, ECF No. 21.

Upon referral, this Court opened an adversary proceeding numbered 14–02442. See ECF No. 1–2.

The Amended Complaint consists of 19 claims for relief asserted against some or all of the CEVA Defendants and/ or the Directors. To summarize, those claims consist of:

- A. The Trustee's claims to avoid the CEVA Equity Transfer and/or recover the value thereof: (i) as a fraudulent conveyance under state, federal and foreign law (Counts 1–3); (ii) as having been effectuated in violation of the automatic stay of section 362 of the Bankruptcy Code (Count 4); (iii) as an unauthorized post-petition transfer under section 549 of the Bankruptcy Code (Count 5); and (iv) to compel the turnover of the New CEVA Shares as estate property under section 542 of the Bankruptcy Code (Count 6).
- B. The Trustee's claims to recover damages from the Directors and all or some of the CEVA Defendants based upon: (i) the Directors' alleged breach of their fiduciary duties (Counts 7 & 12); (ii) the CEVA Defendants' alleged aiding and abetting, or otherwise assisting in, the breach of the fiduciary duties (Counts 8, 9 & 12).
- C. The Trustee's claims to recover damages from CEVA Holdings based upon its alleged conversion of the New CEVA Shares (Count 10) or its alleged unjust enrichment in retaining the CEVA Equity Transfer (Count 11).
- D. The Trustee's claims to recover from some or all of the CEVA Defendants: (i) the CIL Cash (Counts 13 & 17); (ii) damages based upon their alleged conversion of the CIL Cash (Count 14) or their alleged unjust enrichment in retaining the CIL Cash (Count 15); and (iii) damages for the alleged breach of their agreement to pay the CIL Cash to the Debtor (Count 16).
- E. To the extent the CEVA Equity Transfer is avoided as a fraudulent conveyance, the Trustee seeks to disallow the claims of CEVA Group, CEVA Holdings and CEVA Finance under section 502(d) of the Bankruptcy Code (Count 18). The Trustee also seeks to equitably subordinate the claims of

all Defendants pursuant to section 510(c) of the Bankruptcy Code (Count 19).

The Motions to Dismiss

None of the Defendants has answered the Amended Complaint. Instead, the CEVA Defendants and Directors have filed separate motions to dismiss all or select Counts of the Amended Complaint. The Trustee opposes both motions.

The CEVA Defendants' Motion to Dismiss

Briefly, the CEVA Defendants contend that select Counts of the Amended Complaint should be dismissed as to some or *68 all of them named in those Counts, pursuant to Federal Rules of Civil Procedure 12(b)(2) and/or 12(b)(6). To that end, the CEVA Defendants assert:

Counts 13–19 should be dismissed against CEVA Finance pursuant to Rule 12(b)(2) for lack of personal jurisdiction.

Counts 1, 2, and 3, alleging fraudulent transfer and avoidance under Sections 544(b), 548(a)(1)(A), 548(a) (1)(B), 550(a), and 551 of the Bankruptcy Code, should be dismissed because those claims allegedly seek the improper extraterritorial application of the Bankruptcy Code to an alleged transfer of an equity interest in a U.K. entity (CEVA Group) from a Cayman Island entity (CIL) to a Marshall Islands entity (CEVA Holdings). Alternatively, they contend that principles of international comity dictate that the fraudulent transfer claims should be dismissed because the interests of the Cayman Islands in adjudicating this dispute far outweigh those of the United States.

Counts 1, 2, 3, 5, 6, 10, 11, and 12 should all be dismissed pursuant Rule 12(b)(6) on the grounds that those Counts fail to state claims for relief because the Trustee has failed to plead factual allegations raising a plausible inference that CIL's equity interest in CEVA Group had value at the time of the CEVA Restructuring.

In addition, and in the alternative, they contend that the following claims should be dismissed pursuant to Rule 12(b)(6):

Count 6 (Turnover of CEVA equity) should be dismissed as to CEVA Holdings (only named defendant) on the ground that the shares issued to CEVA Holdings that the Trustee seeks to recover are not and never were property of the CIL estate.

Count 10 (Conversion of CEVA equity) should be dismissed as to CEVA Holdings (only named defendant) because an intangible interest in property (such as equity ownership) cannot be the subject of a conversion claim, and in any event, CIL consented to the transfer.

Count 12 (Aiding and Abetting Fraud under New York law) should be dismissed as to CEVA Group and CEVA Holdings (only named CEVA Defendants) because the Trustee has not pled any underlying "fraud," and to the extent the alleged fraudulent transfer is the "fraud," neither New York law nor the Bankruptcy Code recognizes a claim for aiding and abetting a fraudulent transfer.

Count 13 (Turnover—CIL Cash) should be dismissed as to all CEVA Defendants because there is a dispute as to whether the CIL Cash is CIL's property.

Count 14 (Conversion of CIL Cash) should be dismissed as to all the CEVA Defendants because Dutch law does not recognize the tort of conversion; alternatively, if New York law is applicable, it should be dismissed as to CEVA Group and CEVA Holdings because they are not liable for the acts of CEVA Finance, their subsidiary.

Count 15 (Unjust Enrichment—CIL Cash) should be dismissed as to CEVA Group and CEVA Holdings, because they are not liable for the acts of CEVA Finance, their subsidiary.

Count 16 (Breach of Contract—CIL Cash) should be dismissed as to all CEVA Defendants because the Trustee has not alleged any of the elements of breach of contract.

Count 17 (Injunctive Relief) should be dismissed as to all CEVA Defendants because neither New York nor Dutch law recognizes any such cause of action.

Finally, the CEVA Defendants contend that Counts 14–17 should be dismissed *69 against CEVA Finance based on *forum non conveniens*.

The Directors' Motions to Dismiss

The Directors are named only in Counts 4, 7, 12, and 19 of the Amended Complaint.

Turner moves pursuant to Rule 12(b)(6) to dismiss Counts 4 (Violation of the Automatic Stay) and 12 (Conspiracy under Cayman Islands law/Aiding and abetting fraud under New York law) for failure to state a claim. (As to the latter, Turner joins in the CEVA Defendants' assertion that the Trustee has failed to plead facts raising a plausible inference that CIL's equity interest in CEVA Group had value at the time of the CEVA Restructuring.)

Beith moves pursuant to Rule 12(b)(2) to dismiss the Amended Complaint in its entirety for lack of personal jurisdiction. In addition, Beith joins Turner's Rule 12(b) (6) motion to dismiss Counts 4 and 12 of the Amended Complaint.

Summary of the Court's Resolution of the Motions

After the motions were submitted, the Trustee agreed to:

- (i) dismiss Count 6, without prejudice;
- (ii) dismiss Count 12—only to the extent of aiding and abetting fraud under NYS law, as to all named defendants, without prejudice;
- (iii) dismiss Count 16, without prejudice; and
- (iv) dismiss Count 17.

Accordingly, to the extent that they relate to those Counts, the motions are denied, as moot. The Court summarizes the resolution of the balance of the motions, as follows:

Rule 12(b)(2) Relief

The Court lacks personal jurisdiction over Beith and CEVA Finance, and, as such all Counts alleged against Beith (Counts 4, 7, 12 & 19) and CEVA Finance (Counts 13–19) are dismissed, with leave to replead within 45 days of the entry of this Memorandum Decision.

Rule 12(b)(6) Relief

The CEVA Equity Transfer that the Trustee seeks to avoid pursuant to sections 544, 548 and 550 of the Bankruptcy Code in Counts 1, 2 and 3 was a foreign transfer and those sections of the Bankruptcy Code do not apply extraterritorially. Moreover, by application

of the principles of international comity, Cayman law is applicable to the resolution of the avoidance claims. Accordingly, Counts 1, 2 and 3 are dismissed, with prejudice, except that the Trustee will be permitted to assert an intentional fraudulent transfer claim herein, under Cayman law, divorced of any aspect of the Bankruptcy Code.

The Trustee has alleged plausibly that CEVA Group was solvent at the time of the CEVA Restructuring, thus the CEVA Defendants' motion to dismiss Counts 1, 2, 3, 5, 6, 10, 11, and 12 on that basis is denied.

Turner's motion (i) to dismiss Count 4 (Violation of Automatic Stay) is granted; and (ii) to dismiss Count 12 (Conspiracy Cayman Islands law) is denied. Those rulings apply equally to Beith, as necessary.

The motion to dismiss Count 10 (Conversion of CEVA Equity) as against CEVA Holdings is granted, without leave to replead.

The motion to dismiss Count 13 (Turnover—CIL Cash) as against all CEVA Defendants is denied.

The motion to dismiss Count 14 (Conversion—CIL Cash) against all CEVA *70 Defendants is granted, without leave to replead.

The motion to dismiss Count 15 (Unjust Enrichment—CIL Cash) against CEVA and CEVA Holdings is granted, without leave to replead.

The motion to dismiss Counts 14-17 against CEVA Finance based on *forum non conveniens* is denied.

Discussion

The Court will first address the Rule 12(b)(2) motions filed by Beith and CEVA Finance to dismiss the Amended Complaint for lack of personal jurisdiction over them. Federal Rule of Civil Procedure 12(b)(2) provides for the dismissal of a defendant in a lawsuit based upon a lack of personal jurisdiction. See Fed. R. Civ. P. 12(b)(2). To survive a 12(b)(2) motion, "a plaintiff must make a prima facie showing that jurisdiction exists." Thomas v. Ashcroft, 470 F.3d 491, 495 (2d Cir. 2006); 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). "This prima facie showing [of jurisdiction] 'must include an averment of facts that, if credited by the ultimate trier of fact, would suffice to establish jurisdiction over the defendant.' " O'Neill v. Asat Trust Reg. (In re Terrorist Attacks on September 11, 2001), 714 F.3d 659, 673 (2d Cir. 2013) (quoting Chloe v. Queen Bee of Beverly Hills, LLC, 616 F.3d 158, 163 (2d Cir. 2010)); see also Marine Midland Bank, N.A. v. Miller, 664 F.2d 899, 904 (2d Cir. 1981) (stating that "the plaintiff need make only a prima facie showing of jurisdiction through its own affidavits and supporting materials"). In determining whether the plaintiff has met this burden, the court should construe all pleadings in the light most favorable to the plaintiff and resolve all factual disputes in the plaintiff's favor, see Picard v. Cohmad Sec. Corp. (In re Bernard L. Madoff Inv. Sec. LLC), 418 B.R. 75, 80 (Bankr. S.D.N.Y. 2009), but will not draw argumentative inferences in the plaintiff's favor, nor accept as true legal conclusions couched as a factual conclusion. See In re Terrorist Attacks, 714 F.3d at 673.

[4] Rule 7004(f) provides that a bankruptcy court may exercise personal jurisdiction over a defendant properly served under Rule 7004, "[i]f the exercise of jurisdiction is consistent with the Constitution and laws of the United States." Fed. R. Bankr. P. 7004(f). Neither Beith nor CEVA Finance contests service of process. Accordingly, "the only remaining inquiry for [this Court] is whether exercising personal jurisdiction over [them] would be consistent with the Due Process Clause of the Fifth Amendment." Bickerton v. Bozel S.A. (In re Bozel S.A.), 434 B.R. 86, 97 (Bankr. S.D.N.Y. 2010) (citing Enron Corp. v. Arora (In re Enron Corp.), 316 B.R. 434, 440, 444-45 (Bankr. S.D.N.Y. 2004). That analysis has two components: (i) whether the defendants have the requisite "minimum contracts" with the relevant forum such that the exercise of personal jurisdiction "does not offend traditional notions of fair play and substantial justice," and (ii) whether the exercise of jurisdiction is reasonable in the circumstances. See Int'l Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945) (citations omitted); Asahi Metal Indus. Co. v. Superior Court of Cal., 480 U.S. 102, 113, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987). In bankruptcy cases, the relevant forum is not a particular state, but the "United States at large." See, e.g., Cruisephone, Inc. v. Cruise Ships Catering and Servs. N.V. (In re Cruisephone, Inc.), 278 B.R. 325, 331 (Bankr. E.D.N.Y. 2002) (citations *71 omitted). Cf.

Chew v. Dietrich, 143 F.3d 24, 27 (2d Cir. 1998) ("When a complaint asserts federal jurisdiction, Rule 4 of the Federal Rules of Civil Procedure now extends the reach of federal courts to impose jurisdiction over the person of all defendants against whom federal law claims are made and who can be constitutionally subjected to the jurisdiction of the courts of the United States.") (internal quotation marks and citation omitted).

[6] [7] In examining whether a defendant has the requisite "minimum contacts" with the forum, courts distinguish between "specific" and "general" personal jurisdiction. See In re Terrorist Attacks, 714 F.3d at 673 (citing Metro. Life Ins. Co., 84 F.3d at 567-68). Specific jurisdiction depends on an affiliation between the forum and the underlying controversy, where the controversy relates to or arises out of a defendant's contacts with the forum. See British Am. Ins. v. Fullerton (In re British Am. Ins. Co., Ltd.), No. 11-03118, 2013 WL 1881712, at *2 (Bankr. S.D. Fla. April 30, 2013). "For a State to exercise jurisdiction consistent with due process, the defendant's suit-related conduct must create a substantial connection with the forum State." Walden v. Fiore, 571 U.S. 277, 134 S.Ct. 1115, 1122, 188 L.Ed.2d 12 (2014). In contrast, general or all-purpose jurisdiction "is not related to the events giving rise to the suit, and thus, courts impose a more stringent minimum contacts test, requiring the plaintiff to demonstrate the defendant's 'continuous and systematic general business contacts' with the forum at the time the initial complaint was filed." In re Terrorist Attacks, 714 F.3d at 674 (quoting Helicopteros Nacionales de Colombia, S.A. 466 U.S. 408, 414-16 & n.9, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984)); see also Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919, 131 S.Ct. 2846, 180 L.Ed.2d 796 (2011) ("A court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State." (quoting Int'l Shoe, 326 U.S. at 317, 66 S.Ct. 154)).

[8] If the threshold "minimum contacts" is met, a court must then evaluate whether exercising personal jurisdiction over a defendant is "reasonable" based upon the following factors: (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. *See Asahi Metal Indus.*, 480 U.S. at 113, 107 S.Ct. 1026 (citing *World–Wide Volkswagen v. Woodson*, 444 U.S. 286, 292, 100 S.Ct. 580, 62 L.Ed.2d 490 (1980)); *see also N. Jersey Media Grp., Inc. v. Nunn*, No. 13–civ–1695, 2013 WL 5303816, at *4 (S.D.N.Y. Sept. 20, 2013) (same) (citations omitted).

Mark Beith and CEVA Finance contend that they are not subject to this Court's jurisdiction and that, as such, the Court must dismiss each of them from this lawsuit. The Court considers those matters below.

Mark Beith

[9] Beith is a U.K. citizen who resides in London. See Beith Decl. ¶ 2. He has never maintained a residence in New York or owned real property here, and was employed by Apollo Management International LLP, based in its London office. Id. ¶¶ 3-5. The Trustee does not dispute that the Court lacks general personal jurisdiction over Beith. Cf. *72 Sonera Holding, B.V. v. Cukurova Holding A.S., 750 F.3d 221, 225 (2d Cir. 2014) (noting that "[t]he paradigm forum for general jurisdiction over an individual is the individual's domicile, his home."), cert. denied, 571 U.S. 882, 134 S.Ct. 2888, 189 L.Ed.2d 837 (2014). Instead, the Trustee argues that the Court may exercise specific personal jurisdiction over Beith because (i) Beith was physically present in the United States when he allegedly breached his fiduciary duties to CIL and allegedly conspired with the other Defendants to commit the CEVA Equity Transfer, and (ii) Beith utilized and controlled agents in the United States in furtherance of the alleged misconduct. See Trustee's Opp'n at 78.

Turning first to Beith's activities in the United States, Beith concedes that in December 2012, he visited the U.S. "for a personal vacation," and that during his visit, he "spent a small amount of time working on CIL matters." Beith Decl. ¶ 14. However, he says that those matters "were, at best, only tangentially related" to his "April 1, 2013 decision, in [his] capacity as a CIL director, to authorize CEVA to issue new shares to CEVA Holdings." Id. ¶ 16. 18 The Trustee has a very different view of Beith's visit. He maintains that Beith did much more that attend to "ministerial matters" during his visit to New York, and alleges in the Amended Complaint that while he was in the

United States, Beith took the following actions in breach of his duties to CIL and in furtherance of his alleged misconduct:

- Working from New York headquarters, Beith finalized Appleby's retention as CIL's Cayman Islands counsel. Am. Compl. ¶ 50.
- Beith allegedly addressed CIL's finances, including the CIL Cash, as follows: (i) exchanged emails regarding opening a CIL bank account with (a) CEVA personnel, (b) Mintz Levin and (c) Turner; (ii) communicated with CEVA personnel concerning the CIL Cash; and (iii) discussed the CIL Cash with a senior Apollo employee at an in-person meeting in New York. Id. ¶ 129.
- Beith allegedly addressed matters relating to conflicts of interest, as follows: (i) Beith drafted correspondence to, and received correspondence from, an attorney regarding plans for McDougal's possible resignation as CFO (id. ¶ 54); (ii) on December 27, 2012, Paul Ricotta of Mintz Levin, acting for and reporting to Beith, conducted communications with Akin Gump Strauss Hauer & Feld LLP, CEVA Group's U.S. counsel, regarding the possible resignations of Turner from the board of CEVA and McDougal from CIL (id.); and (iii) on December 29, 2012, Beith requested and received advice from Mintz Levin about whether Wetherall should resign. Id.
- During the course of Beith's physical presence in the United States in December 2012, Beith met in person with Parker. *Id.* ¶ 25. ¹⁹
- *73 The Trustee asserts that those facts demonstrate that Beith's conduct in the United States related to advancing Apollo's scheme, and, further, that such conduct included one of the most critical steps in advancing the alleged scheme: removing CIL's officers (i.e., Wetherall and McDougal) and leaving CIL solely under the management of Beith and Turner, alleged "senior" Apollo employees, so that there was no one to act as an "honest broker" and objectively evaluate whether the CEVA Equity Transfer was in the best interest of CIL and its creditors. See Trustee's Opp'n at 4–5. The Trustee notes that Beith suggests that his work in the United States should be ignored when considering whether the Court has personal jurisdiction over him because the "formal restructuring

plan that would ultimately lead to the transaction at issue in this case was not proposed to Turner and me until late January or early February 2013, after I had returned to the U.K." Beith Decl. ¶ 13. The Trustee disputes that assertion and argues that Beith's actions in New York must be considered in the context of the restructuring transaction, particularly in light of Beith's admission that in late 2012, CEVA representatives advised him and Turner that CEVA was contemplating a transaction to address its balance sheet and equity issues. See Trustee's Opp'n at 80 (citing Beith Decl. ¶ 13). He maintains that the groundwork for the CEVA Equity Transfer was in progress before and during Beith's presence in the United States, and Beith was directly participating in it. ²⁰ Thus, the Trustee asserts that while the "formal restructuring plan" for the CEVA Equity Transfer may not have been solidified until a few weeks after Beith's trip to New York, that does not negate the fact that Beith and others allegedly were conspiring and working diligently to effectuate the asset strip while Beith was in New York. See Trustee's Opp'n at 80.

- Beith also denies that he was in the U.S. in January, February, March or April 2013, and asserts that he "did not visit the U.S. again until several months after the transaction at issue in the Amended Complaint took place." Beith Decl. ¶ 17–18.
- Beith "categorically den[ies]" the Trustee's allegations that he breached his fiduciary duties or otherwise engaged in misconduct, and asserts that "[his] conduct was lawful and appropriate." Beith Decl. ¶ 12. He acknowledges that, while in the U.S. in December 2012, he engaged in the following activities:
 - He exchanged emails with CEVA personnel, CIL's counsel at Mintz Levin, and Turner regarding the opening of a bank account in the U.K. for CIL, and had a telephone call with Turner regarding the same subject.
 - He exchanged emails with Mintz Levin regarding the resignations of CIL's Chief Financial Officer, Rubin McDougal, and CIL's Secretary, Dawn Wetherall.
 - He exchanged emails with CEVA personnel in an effort to obtain details regarding CIL's cash pooling arrangements with CEVA, and had one meeting with Michael Jupiter, an Apollo employee, during which we shared information and data regarding certain cash pooling arrangements.
 - He met with Stan Parker of Apollo.

- To that end, the Amended Complaint alleges the following:
 - On or about October 18, 2012, in anticipation of a restructuring transaction involving CEVA [Group], CIL obtained legal advice regarding its Directors' fiduciary duties from the Cayman law firm of Walkers. Am. Compl. ¶
 49.
 - Also in October 2012, Turner and Beith requested one of Apollo's regular outside counsel, Mintz Levin in the United States, and also Appleby, to represent CIL in connection with the restructuring/recapitalization of CEVA Group. Id. ¶ 50.
 - By November 19, 2012, CIL, CEVA [Group] and Apollo were working together to formulate the transfers that would become the CEVA Equity Transfer. Id. ¶ 53.
 - Appleby was formally retained in late December 2012, when Beith, working in the New York Headquarters, finalized Appleby's retention. *Id.* ¶ 50.
 - In late 2012, Beith failed to afford CIL with a critically needed independent fiduciary to manage its affairs. Id. ¶ 51.

The Court notes that the Trustee does not allege that Beith was in the United States in October or November 2012.

According to the Trustee, those allegations are more than sufficient to establish personal jurisdiction over Beith when compared to other cases where courts have found a prima facie showing of personal jurisdiction based upon defendants' attendance *74 at board meetings. Id. at 81 (citing Rusyniak v. Gensini, 629 F.Supp.2d 203 (N.D.N.Y. 2009) and N.F.L. Ins. Ltd. By Lines v. B & B Holdings, Inc., No. 91 CIV 8580, 1993 WL 78090, at *9 (S.D.N.Y. Mar. 18, 1993)). However, those cases do not advance the Trustee's position. In Rusyniak, the plaintiff alleged that the foreign defendants, acting in their capacity as directors, attended at least two separate board meetings in New York, at which they breached their duties by voting to take certain tortious corporate action. 629 F.Supp.2d at 229. The Court found that those allegations were sufficient to defeat a motion to dismiss for lack of personal jurisdiction. Id. Similarly, in N.F.L. Insurance, the Court summarily concluded that the allegation that the director defendants held meetings in New York and breached their fiduciary duties at such meetings, constituted prima facie evidence of personal jurisdiction over those individual defendants. 1993 WL 78090, at *9. In contrast, the Trustee's allegations in

support of personal jurisdiction over Beith are based upon Beith's singular, vacation visit to New York, not in his capacity as a director of CIL, and not for a board meeting at which he allegedly committed any tortious acts. As discussed below, the limited actions he took relating to CIL matters during that visit were only tangentially related to the CEVA restructuring transactions, and are insufficient for this Court to exercise specific personal jurisdiction over Beith.

First, the emails Beith exchanged regarding the opening of a CIL bank account have no relationship to the underlying litigation, and the Trustee does not allege any. Likewise, there are no allegations in the Amended Complaint that Beith and Parker had discussed anything related to the CEVA Group restructuring transaction during their inperson meeting. Indeed, the Trustee does not describe what Beith and Parker had discussed at their meeting. 21 Lastly, the emails Beith allegedly exchanged with CEVA Group personnel regarding the CIL Cash actually pertained to a "CIL/CEVA reimbursement agreement," not the CIL Cash. See emails dated 12/28/12 and 12/29/12 regarding CIL/CEVA reimbursement agreement (Novick Decl., Ex. M) [ECF No. 40-13]; see also Hr'g Tr. at 114:5-7 ("There are also e-mails about a reimbursement agreement between CEVA and CIL, because CEVA paid for some of CIL's expenses."). The Trustee does not allege anywhere in the Amended Complaint that there is any relationship between the CIL/CEVA reimbursement agreement and the CIL Cash. In sum, these actions taken by Beith in New York do not give rise to the causes of action asserted against him, and thus cannot form the basis of specific personal jurisdiction over him. See British Am. Ins. Co. Ltd., v. Fullerton (In re British Am. Ins. Co., Ltd.), No. 09-35888, 2013 WL 188712, at *4 (Bankr. S.D. Fla. April 230, 2013) ("For this Court to exercise specific personal jurisdiction over [defendant], the cause of action against him must relate to or arise from his contacts with the United States.").

In the Trustee's Opposition, the Trustee sought to conduct additional discovery to "ascertain the extent of Beith's activities in the United States."

Trustee's Opp'n at 87. As of the date of this Memorandum Decision, however, the parties have concluded discovery. See Letter dated June 9, 2016 [ECF No. 85] ("[W]e write to request a status conference to discuss the trial of this case now that the parties have substantially completed fact and

expert discovery."). The Court thus assumes that the Trustee's request for additional discovery as to Beith's activities in the United States, for purposes of establishing personal jurisdiction, is now moot.

*75 Beith's relevant contacts with the United States, upon which the Trustee seeks to assert personal jurisdiction, boil down to several emails Beith exchanged regarding the resignation of McDougal and Wetherall and finalizing Appleby's retention as CIL's Cayman counsel, and a meeting with Michael Jupiter that may have related to the CIL Cash, while on vacation in the United States four months prior to the CEVA restructuring transaction. Those acts do not rise to the level of "material elements" of the CEVA restructuring transaction, which, according to the Amended Complaint, involved multiple steps over an eight-month period. Moreover, it is not enough that the alleged conduct has some connection to the forum; the alleged conduct must have a substantial connection. See Walden v. Fiore, 134 S.Ct. at 1121. While Beith's email correspondence regarding the resignation of Wetherall and McDougal, and Appleby's retention, are alleged to be related to the litigation, specific personal jurisdiction also requires a defendant to "purposefully direct[] his activities toward the forum[.]" In re AstraZeneca Sec. Litig., 559 F.Supp.2d 453, 466-67 (S.D.N.Y. 2008) (citation omitted). The Trustee does not contend that Beith went to New York for the purpose of finalizing Appleby's retention and corresponding with Mintz Levin regarding the resignations of Wetherall, McDougal and/or Turner. Rather, these email exchanges were only "incidental" to the pre-existing discussion regarding the resignations and Appleby's retention. See, e.g., Visual Footcare Tech., LLC v. CFS Allied Health Educ., LLC, No. 13 Civ. 4588, 2014 WL 772215, at *8 (S.D.N.Y. Feb. 21, 2014) (explaining that individual defendant's three meetings in New York with the plaintiff were "largely incidental" to the existing contractual relationship where defendant was traveling to New York for other business, and thus concluding that there was no specific jurisdiction). As to Beith's alleged meeting with Jupiter, although the Court must accept as true the Trustee's allegation that the meeting was regarding the CIL Cash, 22 the mere fact that the CIL Cash was discussed in a meeting does not render that discussion or that meeting a tortious act. The Trustee does not allege that a decision was made, or that a transaction or other action was undertaken in respect of the CIL Cash during that meeting. See id. at *7 (finding lack of personal jurisdiction over individual defendant who had thrice traveled to New York for meetings because "the record

discloses no concrete transactions that were conducted during these meetings."). In short, it cannot be said that simply by meeting with Jupiter regarding the CIL Cash and exchanging limited emails during his vacation to the United States, that Beith had purposefully availed himself of the privileges and benefits of the forum such that he should reasonably anticipate being haled into court here. See World–Wide Volkswagen Corp., 444 U.S. at 297, 100 S.Ct. 580.

According to Beith, that meeting was regarding certain cash pooling agreements, not the CIL Cash.

[11] It is settled that under New York law, a court [10]"may exercise jurisdiction over a defendant who acted though an agent even if that defendant never physically entered New York." In re Sumitomo Copper Litig., 120 F.Supp.2d 328, 336 (S.D.N.Y. 2000) (citing Kreutter v. McFadden Oil Corp., 71 N.Y.2d 460, 469, 522 N.E.2d 40, 45, 527 N.Y.S.2d 195, 200 (1988)). It is equally the case that while the "status as a corporate officer does not automatically subject a defendant to personal *76 jurisdiction in any forum where the company is subject to jurisdiction ... a defendant's status as an employee or corporate officer "does not somehow insulate them from jurisdiction." Bickerton v. Bozel S.A. (In re Bozel S.A.), 434 B.R. 86, 99 (Bankr. S.D.N.Y. 2010) (quoting Calder v. Jones, 465 U.S. 783, 790, 104 S.Ct. 1482, 1487, 79 L.Ed. 2d 804, 813).

[12] As an alternative argument, the Trustee contends that the Amended Complaint makes a prima facie showing that the Court can exercise specific personal jurisdiction over Beith on the basis of actions taken by CIL in the United States at Beith's direction and/or through his agents. Trustee's Opp'n at 84. In support of this agency argument, the Trustee relies on Nelson A. Taylor Co., Inc. v. Tech. Dynamics Grp. Inc., No. 95-CV-0431, 1997 WL 176325, at *5 (N.D.N.Y. Apr. 7, 1997) ("Nelson Taylor"). In that case, the plaintiffs, all New York residents, sued Technology Dynamics Group, Inc. ("TDG"), a Delaware corporation and TDG's directors, David Wensley and George Grauer, for damages occasioned by their alleged breach of a loan agreement (the "Agreement") and securities fraud. Wensley and Grauer were California residents who collectively held 61.5% of TDG's stock. Among other things, the defendants moved to dismiss the complaint for lack of personal jurisdiction. In denying TDG's motion, the district court found that the complaint alleged sufficient contacts between TDG and New York

since it asserted that TDG's president, Gerald Bench, negotiated the terms of the Agreement in New York. Id. The district court also denied Wensley and Grauer's motion. There was no dispute that Wensley and Grauer had not been in New York in connection with the negotiation of the Agreement. They contended that Bench did not act at their direction and that, as such, his contact with New York could not subject them to jurisdiction in New York. Id. at *4. The district court disagreed and found that the directors were subject to jurisdiction in New York for purposes of New York's long arm statute, N.Y. Civ. Prac. L. & R. § 302(a)(1), ²³ because they benefitted from and consented to Bench's activities in New York. Id. at *5. In doing so, the district court relied on Kreutter v. McFadden Oil Corp., 71 N.Y.2d 460, 527 N.Y.S.2d 195, 522 N.E.2d 40 (1988). There, the New York Court of Appeals held that an out-of-state corporate officer who has not personally transacted business in New York, can still be subject to personal jurisdiction under § 302(a)(1) of New York's long-arm statute, if it can be shown that the corporation transacted business in New York as the officer's agent. Id. at 467, 522 N.E.2d 40, 45, 527 N.Y.S.2d 195, 200. ²⁴ The Kreutter court *77 explained that even though the plaintiff had no direct dealings with the out-ofstate officer, and dealt only with the corporation in New York:

[a] [p]laintiff need not establish a formal agency relationship between defendants and [the corporation].... He need only convince the court that [the corporation] engaged in purposeful activities in this State in relation to [plaintiff's] transaction for the benefit of and with the knowledge and consent of the [] defendants and that they exercised some control over [the corporation] in the matter.

Id. Applying that standard, the *Nelson Taylor* court found that the complaint alleged sufficient facts to defeat the directors' motion to dismiss based on the following:

- Wensley and Grauer owned 61.5% of the outstanding shares of TDG.
- At all relevant times, Wensley and Grauer had "absolute and total control" of TDG.

- The plaintiffs had "daily conversations" with Grauer regarding the exact terms and provisions of the Agreement.
- Wensley and Grauer controlled the day-to-day activities of TDG and "every detail" of TDG's relationship with the plaintiffs.
- Although both Wensley and Grauer claimed to have been ignorant of Bench's activities in New York, the plaintiff's had alleged facts showing that based upon their level of control over TDG and their control of the negotiations, Wensley and Grauer "well may have consented to Bench's activities for the benefit of [TDG] and [TDG's] controlling shareholders."

Id.

- 23 Section 302(a)(1) states:
 - As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person *or through an agent*:
 - 1. transacts any business within the state or contracts anywhere to supply goods or services in the state[.]
 - N.Y. Civ. Prac. L & R. \S 302(a)(1). (McKinney 2017) (emphasis added).
- In Kreutter, the court held that an individual defendant (Downman, a corporate officer of McFadden Oil Corporation, a Texas corporation) and a corporate defendant (Harmony Drilling Co., a Texas corporation) transacted business in New York within the meaning of § 302(a)(1), through an agent, McFadden Company, a Texas corporation that was licensed to do business in New York and had its principal place of business in New York. 71 N.Y.2d at 464, 527 N.Y.S.2d 195, 522 N.E.2d 40. The court held that personal jurisdiction could be exercised over Downman and Harmony even though the plaintiff did not deal directly with McFadden Oil, Harmony or Downman. The court also found that the plaintiff dealt with McFadden Company in New York, as the agent of the Texas defendants so that its actions were attributable to them and supported the assertion of jurisdiction over them.

The Trustee contends that "Beith's conduct easily meets [the *Nelson Taylor*] standard." Trustee's Opp'n at 83. He asserts that that CIL's fate was determined by parties

acting in the United States, and those parties were directed in material part by Beith. To that end, the Trustee asserts that:

- As one of two directors of CIL, Beith dominated the affairs of CIL, and he exploited that control to benefit himself and Apollo. Am. Compl. ¶ 11, 24, 50–56.
- From the outset of the CEVA "restructuring," Beith assembled a team of conflicted United States actors to further the objectives of the CEVA Equity Transfer. Id. ¶ 49.
- Beith retained and controlled Apollo's regular outside counsel, Mintz Levin in the United States, to play an instrumental role in transferring CEVA's equity from CIL to CEVA Holdings. *Id.* ¶¶ 50–51, 56–57.
- Beith utilized Mintz Levin to arrange and supervise vacuous negotiations between CIL and CEVA's legal representatives and a secretive board meeting to enable CIL's interest in CEVA to be wiped out. *Id.* ¶
- Beith manipulated and changed the E & Y report while it was being prepared by E & Y's New York valuation team. *Id.* ¶ 64, 76, 78.
- In the Chapter 7 Case, CIL, while it was still under the control of Beith, attempted to misuse the E & Y Report to create a misleading impression in this Court that Beith and *78 Turner relied on the E & Y Report to justify the CEVA Equity Transfer. *Id.* ¶¶ 65, 121–22.

See Trustee's Opp'n at 83–84. ²⁵ The Trustee misplaces his reliance on Nelson Taylor. First, Beith is not a controlling shareholder of CIL and CIL is not a closely held corporation. Cf. Karabu Corp. v. Gitner, 16 F.Supp.2d 319, 326 n.6 (S.D.N.Y. 1998) (Sotomayor, J.) (noting that "[c]ases finding the benefit prong of Kreutter to be satisfied typically have involved claims against the controlling shareholders of closely held corporations ... "). Next, in Nelson Taylor, the "agent" was the corporate president and the directors controlled the day-to-day activities of TDG and "every detail" of TDG's relationship with the plaintiffs. Here, in contrast, the alleged "agents" are not CIL's employees or officers. Instead, the Amended Complaint makes clear that the purported "agents" were the professionals retained as outside service providers by CIL and for CIL—namely, Paul Ricotta at Mintz Levin

and the valuation team of E & Y. See, e.g., Am. Compl. ¶ 51 (referring to CIL's counsel at Mintz Levin); ¶ 57 ("Ricotta also proposed that CEVA should file a chapter 7 case (a U.S. proceeding) for the obligor of the CIL Cash as a means of frustrating the ability of CIL-his firm's client—to recover the CIL Cash."); ¶62 ("In early January 2013, Beith spoke to representatives of E & Y about providing an opinion concerning restructuring options for CIL and the value of CEVA's shares."). Neither Mintz Levin nor E & Y were retained by Beith as his personal advisors, and Beith is not alleged to have control over the day to day activities of these third-party professionals. Even where courts have found personal jurisdiction "predicated upon activities performed in New York for a foreign corporation," by an agent or professional, the standard requires that "[t]he agent must be primarily employed by the defendant and not engaged in similar services for other clients." Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 95 (2d Cir. 2000) (citing Miller v. Surf Properties, Inc., 4 N.Y.2d 475, 481, 176 N.Y.S.2d 318, 151 N.E.2d 874 (1958)) (emphasis added). Cf. Rates Tech. Inc. v. Cequel Commc'ns, LLC, 15 F.Supp.3d 409, 416 (S.D.N.Y. 2014) (noting that "[t]he bar for a plaintiff to establish agency in the jurisdictional context is set high," and declining to find agency relationship for purposes of personal jurisdiction where plaintiff did not allege that third-party networks in New York were operated "solely at the behest of [the defendant] and not for other clients lacking network infrastructure in the area."). Here too, the Trustee has not alleged, and cannot possibly allege, that Mintz Levin was providing legal services solely to Beith, or that E & Y did not provide similar valuation services for other clients, to render them binding agents of *79 Beith in the jurisdictional context. In short, Mintz Levin and E & Y are not Beith's agents and personal jurisdiction over Beith cannot be based upon actions taken by Mintz Levin and E & Y in the forum. See Nursan Metalurji Endustrisi A.S. v. M/V TORM GERTRUD, No. 07 CV 7687, 2009 WL 536059, at *2 (S.D.N.Y. Feb. 27, 2009) ("The attorneys and the investor relations firm allegedly retained by Defendant Torm are considered independent contracts for jurisdictional purposes. Their activities may not be deemed, under agency law, to be attributable to Defendant Torm."); see also Indem. Ins. Co. of North Am. v. K-Line Am., Inc., No. 06 Civ. 0615, 2007 WL 1732435, at *4 (S.D.N.Y. June 14, 2007) (concluding that defendant's outside sales representatives and pro-staff are not defendant's employees or agents).

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25 The Trustee also asserts that "Beith was also, throughout, not just a director of CIL but a director of (and investor in) Apollo, which the [Amended] Complaint alleges to have committed numerous acts in the U.S." Trustee's Opp'n at 84. To the extent the Trustee is asserting that Beith is subject to jurisdiction in the U.S. based upon Apollo's actions in the United States, the argument fails because Apollo was Beith's employer, not Beith's agent, see Am. Compl. ¶ 24 ("Upon information and belief, at all times relevant to this Complaint: Beith was employed by Apollo Global or an affiliate thereof ..."), and the Amended Complaint fails to allege that Beith exercised any control over Apollo. See, e.g., Nelson Taylor, 1997 WL 176325, at *5 ("[A] plaintiff need not establish a formal agency relationship [Plaintiff] need only convince the court that ... [the defendants] exercised some control over [the company] in the matter" and finding that Wensley and Grauer had "absolute and total control" of TDG, and had controlled the negotiations with the plaintiff).

In any event, even beyond Beith's lack of "minimum contacts" with New York, it is plainly "unreasonable" to exercise personal jurisdiction over him. As noted above, the due process analysis consists of two parts: a minimum contacts test, and a reasonableness analysis. The latter calls for "an equitable balancing test" of the following factors: (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 social substantive policies. Tymoshenko v. Firtash, No. 11 Civ. 2794, 2013 WL 1234943, at *5 (S.D.N.Y. March 27, 2013) (internal quotation marks and citations omitted). "[T]he reasonableness prong of the due process inquiry evokes a sliding scale: the weaker the plaintiff's showing on minimum contacts, the less a defendant needs to show in terms of unreasonableness to defeat jurisdiction." Id. See also Porina v. Marward Shipping Co., No. 05 CIV. 5621, 2006 WL 2465819, at *6, 2006 U.S. Dist. LEXIS 60535, at *17 (S.D.N.Y. Aug. 24, 2006) ("[I]f a defendant's contacts with the United States are weak, the plaintiff has to make a stronger showing of reasonableness in order to show that jurisdiction over the defendant is proper.").

The Trustee argues that it is reasonable to impose personal jurisdiction over Beith because: (1) Beith has New York

counsel to represent him in CIL's bankruptcy and this Adversary Proceeding; (2) Beith has appeared in CIL's Chapter 7 Case and this Adversary Proceeding for such purposes that suit him; (3) Beith committed the acts in question while employed by one U.S.-based enterprise (Apollo) and a director of another (CIL); (4) there is no financial hardship because Beith's defense costs are funded by liability insurance and/or Apollo, and he appears to be a wealthy individual in his own right; (5) there are frequent direct flights between New York and London (and New York is far easier to travel to than the Cayman Island); (6) Beith periodically spends time in the United States because his current employer—SilverLake—lists Beith's location as New York; and (7) regardless of how the Court decides the motions to dismiss, this Adversary Proceeding will survive and proceed against Turner, who has not moved to dismiss all of the claims against him, such that Beith still would be required to give evidence in this case. See Trustee's Opp'n at 85-86.

The Trustee's arguments are unconvincing. The Trustee is incorrect about Beith's location of employment. Beith works in SilverLake's London office, not in New York. Likewise, Beith's prior employment with Apollo was out of Apollo's London office, and nothing in the record suggests *80 that Beith frequently travels to New York. ²⁶ There is also nothing in the record supporting the Trustee's speculation that Beith is a "wealthy individual" and whose costs of litigation is being borne by Apollo or insurance. In any event, Beith's financial well-being is of no moment to the reasonableness of forcing him to defend the litigation here. That Beith has New York counsel and/or has appeared in this forum in the past does not negate the burden and hardship imposed on him in being sued here. The frequency of flights between New York and London is also irrelevant. Finally, the Trustee has not articulated what interest a Court sitting in New York has, and what substantive social policies would be advanced by U.S. courts, in adjudicating a litigation between a foreign plaintiff and mostly foreign defendants over a transaction that took place almost entirely outside of the United States. While there is undoubtedly an interest in the plaintiff obtaining convenient and effective relief, the dismissal of Beith based on lack of personal jurisdiction does not mean that the Trustee would not be able to continue this Adversary Proceeding and ultimately obtain effective relief. See, e.g., Eternal Asia Supply Chain Mgmt. (USA) Corp. v. Chen, No. 12 CIV. 6390, 2013 WL 1775440, at *10 (S.D.N.Y. Apr. In re CIL Limited, 582 B.R. 46 (2018)

25, 2013) (finding that application of reasonableness factors did not favor plaintiff where it would be a weighty burden for the defendant to defend suit in New York, which has no interest in determining a dispute centered around California, and plaintiff's interests are insufficient to tip the scales). Based on the foregoing, it would be unreasonable for this Court to exercise in personam jurisdiction over Beith, particularly in light of the lack of minimum contacts Beith has with New York as discussed above. See Sherwin-Williams Co. v. Avisep, S.A. De C.V., No. 14-CV-6227, 2016 WL 354898, at *7, 2016 U.S. Dist. LEXIS 10270, at *21 (S.D.N.Y. Jan. 28, 2016) (stating that "[w]here, however, the contacts that permit the imposition of jurisdiction under a minimum contacts analysis are weak, the importance of the reasonableness factors-each of which counsels against the exercise of jurisdiction here—are enhanced" and declining to exercise jurisdiction as unreasonable, even where minimum contacts had been established (citing Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez, 305 F.3d 120, 129 (2002)).

26 It is not clear what relevance there is to the fact the Beith "committed the acts in question while employed by one U.S.-based enterprise (Apollo) and a director of another (CIL)." As noted above, Beith worked at Apollo's London location, and CIL is a Cayman Islands company. Neither of those positions supports the argument that it would be reasonable for Beith to be sued in New York for actions taken primarily outside of the United States.

In sum, the Trustee has not made a *prima facie* showing that the Court can assert personal jurisdiction over Beith. However, after the motions were submitted to and argued before the Court, the parties conducted further discovery. That additional discovery may provide details and information on matters relevant to this Court's exercise of jurisdiction over Beith. As such, the Amended Complaint is dismissed against Beith, without prejudice. The Trustee is granted leave to replead additional facts as to Beith's contacts with the United States as the basis for establishing that this Court can exercise jurisdiction over Beith, within 45 days of the entry of this Memorandum Decision.

CEVA Finance

CEVA Finance seeks to dismiss Counts 13–19 against it based on a lack of personal jurisdiction. The Trustee contends that *81 the Court has personal jurisdiction

over CEVA Finance because (i) CEVA Finance "maintains bank accounts and conducts business in the United States," and (ii) CEVA Group Global Treasure Department (which is the entity that oversees CEVA Finance's pooling agreements) and CEVA Finance's inhouse counsel are tied to Houston, Texas. *See* Trustee's Opp'n at 92.

[13] Before addressing those assertions, the Court considers the Trustee's additional contention that the Court "does not even need" personal jurisdiction over CEVA Finance, because the Trustee's claims to the CIL Cash are in rem claims. Id. That argument lacks merit because even assuming, arguendo, that this Court can exercise in rem jurisdiction over the CIL Cash, CEVA Finance will not be subject to the jurisdiction of this Court unless its contacts with the United States satisfy the International Shoe minimum contacts test. See Viacom Int'l, Inc. v. Melvin Simon Productions, Inc., 774 F.Supp. 858, 862 (S.D.N.Y. Oct. 1991) ("[U]nder Shaffer v. Heitner, 433 U.S. 186, 97 S.Ct. 2569, 53 L.Ed. 2d 683 (1977), all assertions of state court jurisdiction—in personam, in rem and quasi in rem-must be evaluated by the minimum contacts standard of International Shoe Co. v. Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945) and its progeny."); see also CME Media Enters. B.V. v. Zelezny, No. 01-CIV-1733, 2001 WL 1035138, at *3 (S.D.N.Y. Sept. 10, 2001) ("[J]urisdiction based on property is usually subject to the same minimum contacts test that is applied to in personam cases as set forth in International Shoe [].") (internal citation omitted). 27

The case relied upon by the Trustee in support of his argument—McLean Industries—is inapposite and actually included an extensive analysis by the bankruptcy court on the issue of whether in personam jurisdiction could be exercised over the defendant on an action for injunctive relief and civil contempt where there was in rem jurisdiction over property of the debtor's estate. See U.S. Lines, Inc. v. GAC Marine Fuels Ltd. (In re McLean Indus. Inc.), 68 B.R. 690, 691 (Bankr. S.D.N.Y. 1986) ("[T]he principal issue to be resolved by this Court is whether GAC Marine is subject to in personam jurisdiction before this Court."). Nowhere in McLean Industries does the court indicate that personal jurisdiction over a defendant party is not necessary where an in rem claim has been asserted as to property of the estate.

Thus, the Court must determine whether the Trustee has alleged in the Amended Complaint that CEVA Finance

has sufficient "minimum contacts" with the United States for purposes of exercising personal jurisdiction over it. CEVA Finance functions as the in-house bank and clearing house for CEVA Group. See Pijl Decl. ¶ 6. It is incorporated in the Netherlands and maintains its principal place of business there. Id. ¶ 4. It has no employees. Id. ¶ 5. Its two statutory directors are citizens of the Netherlands and they conduct CEVA Group's business from the Netherlands. Id. No document may legally bind CEVA Finance unless it is executed by one or both statutory directors. Id. On occasion, the directors must obtain approval of CEVA Group's Financial Officer, who is also located in the Netherlands. Id. However, the Trustee is correct that CEVA Finance has business contacts in the U.S. In its capacity as the CEVA Group's in-house bank and clearing house, CEVA Finance manages four cash pooling agreements. One is with Citibank in New York, where it maintains a bank account. Id. ¶ 7. Moreover, since July 2014, employees of the CEVA Group Global Treasury Department (who are not CEVA Finance employees) have been located in Houston, Texas. Id. ¶ 11. They perform an international function that relates to multiple CEVA Group subsidiaries, including oversight of CEVA Group's cash pooling arrangements. *82 Id. Finally, since 2013, CEVA Finance has occasionally obtained legal advice from a CEVA Group in-house counsel located in the United States.

[14] [15] For a corporation, the "paradigm" bases for the assertion of general jurisdiction are the corporation's place of incorporation and principal place of business. See Sonera Holding, B.V. v. Cukurova Holding A.S., 750 F.3d 221, 225 (2d Cir. 2014). No such jurisdiction exists here, since, as set forth above, CEVA Finance's place of incorporation and principal place of business is the Netherlands. CEVA Finance's contracts with Citibank in New York and CEVA Group's in house counsel and representatives of its Global Treasury Department in the U.S. do not alter that analysis because they are not so "continuous and systematic" as to "render it essentially at home in the [United States]." Daimler AG v. Bauman, 571 U.S. 117, 134 S.Ct. 746, 760-61, 187 L.Ed.2d 624 (2014). Nor do they support a finding of specific personal jurisdiction because those contacts are not related, in any way, to the matters at issue in the Amended Complaint. See, e.g., Hosking v. TPG Capital Mgmt., L.P. (In re Hellas Telecomm. (Luxembourg) II SCA, 524 B.R. 488, 511 (Bankr. S.D.N.Y. 2015) (concluding that the alleged

contacts between certain foreign defendants were not sufficiently related to the plaintiffs' claims such that specific personal jurisdiction exists and dismissing those non-U.S. defendants).

The allegations in the Amended Complaint are not enough to establish that this Court can exercise personal jurisdiction over CEVA Finance. However, as with the jurisdictional analysis for Beith, the Trustee has taken additional discovery since the submission and arguments for the motions to dismiss that may provide further details concerning the basis for this Court's exercise of personal jurisdiction over CEVA Finance. Therefore, all counts against CEVA Finance are dismissed for lack of personal jurisdiction, but without prejudice to the Trustee to replead within 45 days following the entry of this Memorandum Decision to address these jurisdictional deficiencies.

Having addressed the Rule 12(b)(2) motions, the Court now turns its attention to the Rule 12(b)(6) motions.

Motion to Dismiss Counts 1, 2 and 3

In Counts 1 and 2 of the Amended Complaint, the Trustee seeks to avoid the CEVA Equity Transfer as actually and constructively fraudulent under sections 548(a)(1)(A) and (B) of the Bankruptcy Code, respectively, and, to the extent necessary, preserve and recover the New CEVA Shares pursuant to section 550 and 551 of the Bankruptcy Code. See Am. Compl. ¶¶ 132-139 (Count 1); ¶¶ 140-148 (Count 2). To the extent relief under section 548 is not available to the Trustee, in Count 3, by application of sections 544(b), 550 and 551, the Trustee seeks to avoid the CEVA Equity Transfer under the U.K. Insolvency Act of 1986, the Cayman Islands Companies Law, and/ or New York State Debtor and Creditors Law and, to the extent necessary, preserve and recover the New CEVA Shares. Id. ¶¶ 149–162. ²⁸ The CEVA Defendants contend that those Counts must be dismissed, with prejudice, because the transfer at issue is foreign and sections 544, 548 and 550 of the Bankruptcy Code cannot be applied extraterritorially. They also contend that, in any event, international comity mandates that this *83 Court apply Cayman Islands law in resolving those claims. In that regard, the CEVA Defendants contend that, in contrast to U.S. law, Cayman law does not allow for the avoidance of constructive fraudulent transfers. Accordingly, the CEVA Defendants assert that the Court should dismiss Counts

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1, 2 and 3, with prejudice, and if anything, allow the Trustee to assert an intentional fraudulent transfer claim under Cayman law in this proceeding, divorced from any aspect of the Bankruptcy Code. The Trustee opposes the motion and contends that he has adequately pled claims for both actual and constructive fraudulent transfer under section 548 and 544(b) of the Bankruptcy Code, as well as any other applicable law. Trustee's Opp'n at 42. Moreover, he denies that either the "presumption against extraterritoriality" or principles of international comity preclude application of section 548 herein. Id. Further, he maintains that even if the Court finds that section 548 is not available to him, the Amended Complaint adequately pleads avoidance claims under both United Kingdom ("U.K.") and Cayman law, although he contends that the Court should apply U.K. law. Id. He asserts that, in any event, the fraudulent transfer claims survive the CEVA Defendants' motion to dismiss, and there is no basis for the Court to abstain from resolving them on the grounds of comity. The Court considers those arguments below.

Specifically, the Trustee alleges that the CEVA Equity Transfer can be avoided under sections 238 and 423 of the U.K. Insolvency Act of 1986, sections 146 and 147 of the Cayman Islands Companies Law, and sections 273, 274, 275 and 276 of the New York Debtor & Creditor Law. See Am. Compl. ¶ 160.

Presumption Against Extraterritoriality

[16] "It is a longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.' " EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248, 111 S.Ct. 1227, 113 L.Ed.2d 274 (1991) ("Aramco") (quoting Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285, 69 S.Ct. 575, 93 L.Ed. 680 (1949)). Accord, RJR Nabisco, Inc. v. European Cmty., — U.S. —, 136 S.Ct. 2090, 2100, 195 L.Ed.2d 476 (2016) ("Nabisco"); Morrison v. Nat'l Australia Bank, Ltd., 561 U.S. 247, 130 S.Ct. 2869, 177 L.Ed.2d 535 (2010) ("Morrison"). This principle is expressed in a "canon of statutory construction known as the presumption against extraterritoriality: Absent clearly expressed congressional intent to the contrary, federal laws will be construed to have only domestic application." Nabisco, 136 S.Ct. at 2100 (citation omitted).

[17] In assessing whether sections 544, 548, and 550 of the Bankruptcy Code apply extraterritorially, the Court must conduct a two-part inquiry, as articulated in

Morrison. First, the Court must determine "whether the presumption against extraterritoriality has been rebutted —i.e., whether the statute gives a clear, affirmative indication that it applies extraterritorially." Nabisco, 136 S.Ct. at 2101. See also Societe General plc v. Maxwell Commc'n Corp. (In re Maxwell Commc'n Corp. plc), 186 B.R. 807, 816 (S.D.N.Y. 1995) ("Maxwell I'), aff'd on other grounds, 93 F.3d 1036 (2d Cir. 1996) ("Maxwell II") (noting that "if the presumption [against extraterritoriality] is implicated, an inquiry into Congressional intent must be undertaken to determine if Congress intended to extend the coverage of the relevant statute to such extraterritorial conduct."). "'[U]nless there is the affirmative intention of Congress clearly expressed' to give a statute extraterritorial effect, 'we must presume it is primarily concerned with domestic condition." Morrison, 561 U.S. at 255, 130 S.Ct. 2869 (quoting Aramco, 499 U.S. at 248, 111 S.Ct. at 1227). Thus, "[w]hen a statute gives no clear indication of an extraterritorial application, it has none." Id. If it is determined that the statute applies extraterritorially, the inquiry ends. See *84 Spizz v. Goldfarb Seligman & Co. (In re Ampal-Am. Israel Corp.), 562 B.R. 601, 605 (Bankr. S.D.N.Y. 2017); Nabisco, 136 S.Ct. at 2101.

[20] However, "[i]f the statute is not [18] [19] extraterritorial, then at the second step [the Court must] determine whether the case involves a domestic application of the statute[.]" Nabisco, 136 S.Ct. at 2101. See also Maxwell I, 186 B.R. at 816 ("after identifying the conduct proscribed or regulated by the particular legislation in question, a court must consider if that conduct occurred outside of the borders of the U.S.") (citation omitted). To do so, the Court must look to the "focus" of the statute. Nabisco, 136 S.Ct. at 2101. That is, it must determine whether the transactions at issue are "the objects of the statute's solicitude" or are among the "transactions that the statutes seek to 'regulate.' Morrison, 561 U.S. at 266, 130 S.Ct. 2869 (citations omitted). "If the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad[.]" Nabisco, 136 S.Ct. at 2101. That is because the presumption against extraterritoriality "has no bearing when the conduct which Congress seeks to regulate occurs largely in the United States-that is when the regulated conduct is domestic rather than exterritorial." French v. Liebmann (In re French), 440 F.3d 145, 149 (4th Cir. 2006), cert. denied, 549 U.S. 815,

127 S.Ct. 72, 166 L.Ed.2d 25 (2006). (internal citations and quotations omitted). However, if the statute is not extraterritorial, and "the conduct [relevant to the statute's focus] occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory." *Nabisco*, 136 S.Ct. at 2101.

Whether The Avoidance Statutes Apply Extraterritorially [22] [23] The Court will first consider whether the Bankruptcy Code's avoidance and recovery provisions apply extraterritorially. Cf. id. ("Because a finding of extraterritoriality at step one will obviate step two's 'focus' inquiry, it will usually be preferable to proceed in [that] sequence ... we do not mean to prelude courts form staring at step two in appropriate cases.") The presumption against extraterritorial application "represents a canon of construction, or a presumption about a statute's meaning, rather than a limit upon Congress's power to legislate." Morrison, 561 U.S. at 255, 130 S.Ct. 2869 (citing Blackmer v. United States, 284 U.S. 421, 437, 52 S.Ct. 252, 76 L.Ed. 375 (1932)). "While the presumption can be overcome only by a clear indication of extraterritorial effect, an express statement of extraterritoriality is not essential." Nabisco, 136 S.Ct. at 2102. However, "[i]f the legislative purpose is not 'unmistakably clear,' any ambiguity in the statute must be resolved in favor of refusing to apply the law to events occurring outside U.S. territory." Maxwell I, 186 B.R. 807, 818 (S.D.N.Y. 1995) (quoting Labor Union of Pico Korea v. Pico Prods., 968 F.2d 191, 195 (2d Cir. 1992)). Nothing in the language of sections 544, 548 and 550 of the Bankruptcy Code suggests that Congress intended those provision to apply to foreign transfers. Cf. Barclay v. Swiss Fin. Corp. Ltd. (In re Midland Euro Exch. Inc.), 347 B.R. 708, 717 (Bankr. C.D. Cal. 2006) ("Nothing in the text of [11 U.S.C.] § 548 indicates congressional intent to apply it extraterritorially."); Maxwell I, 186 B.R. at 819 ("[N]othing in the language or legislative history of [11 U.S.C.] § 547 expresses Congress' intent to apply the statute to foreign transfers."); Sec. Inv'r Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC, 513 B.R. 222, 228 (S.D.N.Y. 2014) ("Nothing in [*85 11 U.S.C. § 550(a)] suggests that Congress intended for this section to apply to foreign transfers ...") (hereinafter "MadofflCACEIS"). Thus, the Court must examine the "context, including surrounding provisions of the Bankruptcy Code, to determine whether Congress nevertheless intended that [those] section[s] apply extraterritorially." Id. (internal

citation omitted). *See also Morrison*, 561 U.S. at 265, 130 S.Ct. 2869 (noting that, in evaluating whether a statute applies abroad, "context can be consulted as well as [the language of the statute].").

[24] Although section 548 speaks of avoiding transfers of "an interest of the debtor in property," 11 U.S.C. § 548(a), and section 550(a) authorizes the debtor to recover the "property" or "value of the property" to the extent transfers are avoided under section 548, the Bankruptcy Code does not define the term "property." The Trustee contends that in assessing the breadth of the coverage of those provisions, the Court should look to the meaning of "property of the estate" as set forth in section 541 of the Bankruptcy Code. He argues, in substance, that because the term "property of the estate" encompasses "property wherever located," as of the commencement of the case (11 U.S.C. § 541(a)(1)), including "[a]ny interest in property that the trustee recovers" under section 550 of the Bankruptcy Code (see id. § 541(a)(3)), it follows that the avoidance provisions of the Bankruptcy Code allow the Trustee to avoid and recover property that, absent unlawful transfer, would rightfully constitute estate property, including such property that is located overseas. See Trustee's Opp'n at 47. That is essentially what Judge Lifland found in Sec. Inv'r Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC (In re Bernard L. Madoff Inv. Sec. LLC), 480 B.R. 501 (Bankr. S.D.N.Y. 2012) ("MadoffIBLI"), and for that reason, the Trustee contends that this Court should be guided by that decision and find that section 548 applies extraterritorially.

In that case, the Bureau of Labor Insurance ("BLI"), a Taiwanese entity, invested in Fairfield Sentry Ltd. ("Fairfield Sentry"), a large feeder fund organized in the British Virgin Islands that invested substantially all of its assets in the SIPA debtor, Bernard L. Madoff Investment Securities LLC ("BLMIS"). That was the vehicle through which Bernard Madoff operated his Ponzi scheme. Id. at 509. In response to its customer BLI's redemption request, Fairfield Sentry withdrew funds from BLMIS that originated from a BLMIS bank account in New York, and, at BLI's direction, wired those funds to a BLI bank account in New York. Thereafter, BLI caused the redemption payment to be sent to BLI's bank account in London. Id. Following his appointment, the BLMIS trustee resolved the estate's claims against Fairfield Sentry under the avoidance and recovery provisions of the Bankruptcy Code. Thereafter, the trustee sued BLI under section 550 of the Bankruptcy Code, to recover the redeemed funds, as a subsequent transferee of those funds, on the grounds that the initial transfers from BLMIS to Fairfield Sentry were "avoidable" under section 548. Id. at 520. BLI moved to dismiss the trustee's complaint, arguing, among other things, that the presumption against extraterritoriality precluded the application of section 550 of the Bankruptcy Code. Id. at 506, 520. In accordance with Morrison, the court first considered the "focus" of the Bankruptcy Code's avoidance and recovery provisions and found that "the focus of the avoidance and recovery sections is on the initial transfers that deplete the bankruptcy estate and not on the recipient of the transfers or subsequent transfers." Id. at 524. From that, it found that the application *86 of section 550 was domestic because the depletion of the BLMIS estate occurred in New York and the fact that BLI received BLMIS's fraudulently transferred property in a foreign country did not make the trustee's application of this section extraterritorial. Id. at 524-25. The court then considered whether Congress intended for section 550 to have extraterritorial application. It found that "Congress demonstrated its clear intent for the extraterritorial application of section 550 through interweaving terminology and cross-references to relevant Code provisions." Id. at 527. In summary, the court reasoned that:

(i) "property of the estate," under Section 541, includes all property worldwide; (ii) the avoidance provisions of Sections 544(b), 547, and 548 ... incorporate the language of Section 541—"an interest of debtor in property"—to delineate the extent to which transfers can be avoided, i.e., that which would have been property of the estate but for the improper transfer can be avoided; and (iii) Section 550 explicitly authorizes the recovery of all transfers that have been avoided, which necessarily includes overseas property.

Id. at 527. In reaching that conclusion, among other things, the court noted that Congress's use of the terminology "interest of the debtor in property" in the avoidance provisions and section 541(a) "is not coincidental." Id. Relying on Begier v. I.R.S., 496 U.S. 53, 110 S.Ct. 2258, 110 L.Ed.2d 46 (1990), the court found that "property subject to avoidance is defined by 'property of the estate' in section 541," and that the term "property of the debtor," as used in the avoidance provisions, "is best understood as that property that would have been part of the estate had it not been transferred before

the commencement of the bankruptcy proceedings." Id. (quoting Begier v. Internal Revenue Serv., 496 U.S. 53, 58, 110 S.Ct. 2258, 110 L.Ed.2d 46 (1990)). Noting that the court in In re French concluded that the avoidance provisions' reference to section 541 also incorporates that section to permit the avoidance of overseas transfers, the court found that "Congress explicitly incorporated the language of Section 541 to allow a trustee to maximize recoveries for the bankruptcy estate by permitting the avoidance of any transfer that would have been property of the estate, which necessarily includes assets fraudulently transferred outside the United States." Id. at 528 (citing French, 440 F.3d at 152). 29 *87 From that, the court concluded that because section 550 "allows a trustee to recover any transfer to the extent it has been avoided[,]" and "the use of the term 'transfer' specifically refers to all transfers 'avoided under the [avoidance provisions of the Bankruptcy Codel,' by incorporating the avoidance provisions by reference ... Congress expressed intent for the application of Section 550 to fraudulently transferred assets outside the United States and the presumption against extraterritoriality does not apply." Id.

French involved the application of section 548 of the Bankruptcy Code to a transfer of a house located in the Bahamas. There, the debtor, a U.S. resident, gifted the house to her two children, both U.S. residents. Shortly after the children recorded the transfer, an involuntary chapter 7 petition was filed against the debtor by her creditors. 440 F.3d at 148. After an order for relief was entered against the debtor, the chapter 7 trustee commenced an adversary proceeding against the children to avoid the transfer of the house as a constructively fraudulent transfer under § 548(a)(1)(B). Id. The children conceded that the trustee had established a prima facie case to avoid the transfer, but they moved to dismiss arguing that the U.S. avoidance laws should not apply to the Bahamian transfer. Id. at 149. The bankruptcy court denied the motion and the district court affirmed. On appeal, the Fourth Circuit did not resolve whether the transfer was extraterritorial. Rather, it ruled that by incorporating the term "property of the estate" into the definition of in § 548 of the Bankruptcy Code, "Congress made manifest its intent that § 548 apply to all property that, absent a prepetition transfer, would have been property of the estate, wherever that property is located." Id. at 152. The Fourth Circuit reasoned that:

Section 541 defines "property of the estate" as, inter alia, all "interests of the debtor in property."

11 U.S.C. § 541(a)(1). In turn, § 548 allows the avoidance of certain transfers of such "interest[s] of the debtor in property." 11 U.S.C. § 548 (a)(1). By incorporating the language of § 541 to define what property a trustee may recover under his avoidance powers, § 548 plainly allows a trustee to avoid any transfer of property that would have been "property of the estate" prior to the transfer in questionas defined by § 541—even if that property is not "property of the estate" now. Cf. Begier v. Internal Revenue Serv., 496 U.S. 53, 58, 59 n.3, 110 S.Ct. 2258, 110 L.Ed.2d 46 (1990) (reaching a similar conclusion about another avoidance provision, § 547 of the Bankruptcy Code); Cullen Ctr. Bank & Trust v. Hensley (In re Criswell), 102 F.3d 1411, 1416 (5th Cir. 1997) ("These § 541 'property of the estate' definitions have been directly linked with the term 'interest of the debtor in property' under § 547(b).").

Id. at 152.

The CEVA Defendants contend that Madoff/BLI does not withstand scrutiny because the phrase "interest of the debtor in property" under section 541(a) is different from the language in sections 544 and 548 and provides a temporal limitation that excludes property transferred by a debtor in possession pre-petition. See CEVA Reply at 6. Specifically, they contend that although property of the estate includes "interests of the debtor in property as of the commencement of the case," a debtor does not have an interest in property transferred prepetition that is the subject of an avoidance action until the transfer is avoided and the property is recovered. Id. (citing 11 U.S.C. §§ 541(a)(1), (3)). They argue that the property at issue here does not qualify as "property of the estate" under section 541 because it was not an interest of CIL at the time of the bankruptcy filing, and it has not yet been recovered. Id. As support for that argument, they rely on Madoffl CACEIS, 513 B.R. 222 (S.D.N.Y. 2014). That case involved the BLMIS trustee's efforts to recover, as alleged fraudulent transfers, redemption payments made abroad to foreign feeder funds, which thereafter transferred those payments to certain foreign individuals and entities. The trustee sued to recover those payments from the feeder funds, as the initial transferees of the alleged fraudulent transfer, and from the foreign persons and entities, as alleged immediate and mediate transferees of the payments. Id. at 225. A number of the alleged subsequent transferees, including CACEIS Bank and CACEIS Bank Luxembourg, moved to dismiss the trustee's complaints in their respective adversary proceedings arguing that section 550(a)(2) of the Bankruptcy Code did not apply extraterritorially and therefore could not reach subsequent transfers made abroad by one foreign entity to another. Id. at 226. The District Court granted those defendants' motion to withdraw the reference so that it could consider that issue. Id. ³⁰ In applying the Morrison methodology, the court first considered the "regulatory focus" of the Bankruptcy Code's avoidance and recovery provisions, to determine whether the trustee was seeking to apply section 550 extraterritorially. The court found that "[o]n a straightforward reading of section 550(a), this recovery statute focuses on 'the property transferred' and the fact of its transfer, not the debtor[,]" and *88 that section 548 "focuses on the nature of the transaction in which property is transferred, not merely the debtor itself." Id. at 227. Accordingly, the court concluded that "[u]nder Morrison, the transaction being regulated by section 550(a)(2) is the transfer of property to a subsequent transferee, not the relationship of that property to a perhaps-distant debtor." Id. The court found that in considering both the location of the subsequent transfers and the component events of those transfers, the BLMIS trustee was seeking to apply section 550(a) (2) extraterritorially, because the foreign initial transferees were transferring assets abroad to their foreign customers. Id. at 228. Next the court considered whether Congress intended for section 550(a) to apply to foreign transfers and concluded that it did not, noting that "[n]othing in [the language of section 550(a)(2)] suggests that Congress intended for this section to apply to foreign transfers ...' Id. at 228. In seeking to rebut the presumption against extraterritoriality, the trustee argued that because section 541(a) of the Bankruptcy Code, which defines "property of the estate," is incorporated into the avoidance and recovery provisions of the Bankruptcy Code to define the transfers that may be avoided, and because section 541(a) defines "property of the estate" to include certain specified property "wherever located and by whomever held," it follows that the avoidance provisions equally apply to estate property "wherever located and by whomever held" and thus have extraterritorial application. Id. at 228–29. The court rejected that argument. Adopting the holding and logic of Fed. Deposit Ins. Corp. v. Hirsch (In re Colonial Realty Co.), 980 F.2d 125, 131 (2d Cir. 1992), the court ruled that

whether 'property of the estate' includes property 'wherever located' is irrelevant to the instant inquiry:

fraudulently transferred property becomes property of the estate only after it has been recovered by the Trustee, so section 541 cannot supply any extraterritorial authority that the avoidance and recovery provisions lack on their own.

Id. at 229. In doing so, the court noted that in Maxwell I, the District Court rejected a similar argument with regard to the extraterritorial application of the avoidance provisions under section 547. Id. at 230. The Maxwell I court likewise relied on Colonial Realty, and found that "[b]ecause preferential transfers do not become property of the estate until recovered, § 541 does not indicate that Congress intended § 547 to govern extraterritorial transfers." Maxwell I, 186 B.R. at 820. 31 Thus, the court in Madoff/CACEIS found that the trustee could not use section 550(a)(2) to reach "purely foreign subsequent transfers," because the "presumption against extraterritorial application of federal statutes ha[d] not been rebutted." 513 B.R. at 231.

- The motions to dismiss before the District Court were briefed before Judge Lifland issued the Madoff/BLI opinion, and the Madoff/CACEIS decision did not mention that opinion.
- In affirming Maxwell I, the Second Circuit did not address the issue of the extraterritorial application of the avoidance provisions. It limited its analysis to the application of the doctrine of comity. See Maxwell II, 93 F.3d at 1055 ("We decline to decide whether, setting aside considerations of comity, the 'presumption against extraterritoriality' would compel a conclusion that the Bankruptcy Code does not reach the prepetition transfers at issue.").

[25] The Trustee contends that the CEVA Defendants' reliance upon *MadofflCACEIS* is misplaced for several reasons. First, he says that the case is inapplicable on its facts because there the trustee sought to recover a subsequent transfer received abroad by a foreign transferee from a foreign transferor under section 550(a) (2), while here, the Trustee seeks to avoid an initial transfer of property of CIL, a U.S. debtor, to CEVA Holdings, an *89 initial transferee. *See* Trustee's Opp'n at 50. He also contends that *MadofflCACEIS* is inapplicable because that case is limited to the recovery of transfers under section 550, not the avoidance of the transfer. *Id.* The Court finds no merit to those contentions. The District

Court's analysis of the extraterritorial reach of § 550(a) (2) did not turn on the fact that the transferee was a subsequent, and not initial, transferee, or that the trustee only sought to recover avoided transfers. Rather, it turned on the court's interpretation of the application of § 541(a) to the avoidance provisions, in light of Second Circuit authority. See Madoff/CACEIS, 513 B.R. at 228 (noting that "section 541's definition of 'property of the estate' may be relevant to interpreting 'property of the debtor' does not necessarily imply that transferred property is to be treated as 'property of the estate under section 541 prior to recovery by the Trustee."). That rationale applies equally to sections 548 and 550(a)(1). The Trustee further asserts that while the Colonial Realty court stated that transferred property, while in the transferee's hands, is not technically property of the estate, applying that to contradict the trustee's avoidance power is circular. See Trustee's Opp'n at 49. As support, the Trustee argues that because Begier stands for the proposition that the purpose of the avoidance provisions is to recover property that would have would have belonged to the estate absent the transfer, it follows that the avoidance statutes are designed to look at property of the estate aspirationally. Id. The Court disagrees. The law in this circuit is clear—property that is the subject of an avoidance action is not considered property of the estate until it is recovered. As the Colonial Realty court explained:

In accordance with 11 U.S.C. § 541(a)(1) (1988), the property of a bankruptcy estate includes (with exceptions not presently pertinent) "all legal or equitable interests of the debtor in property as of the commencement of the case;" and pursuant to 11 U.S.C. § 541(a)(3) (1988), the property of a bankruptcy estate also includes "[a]ny interest in property that the trustee recovers" under specified Bankruptcy Code provisions, including 11 U.S.C. § 550 (1988).... "If property that has been fraudulently transferred is included in the § 541(a)(1) definition of property of the estate, then § 541(a)(3) is rendered meaningless with respect to property recovered pursuant to fraudulent transfer actions." Further, "the inclusion of property recovered by the trustee pursuant to his avoidance powers in a separate definitional subparagraph clearly reflects the congressional intent that such property is not to be considered property of the estate until it is recovered."

In re Colonial Realty Co., 980 F.2d at 131 (citation omitted) (quoting In re Saunders, 101 B.R. 303, 305 (Bankr. N.D. Fla. 1989)). Further, the Trustee may be

overstating the significance of Begier. There, a chapter 7 debtor sought to avoid and recover a transfer made by a debtor within ninety days of the petition date in satisfaction of a debt owing for trust fund taxes pursuant to sections 547 and 550 of the Bankruptcy Code. The issue before the Supreme Court was whether at the time of the transfer, the transferred funds were property of the estate as set forth in § 541 of the Bankruptcy Code. 496 U.S. at 59, 110 S.Ct. 2258. In considering that matter, the Supreme Court noted that while "[t]he reach of § 547(b)'s avoidance power ... is limited to transfers of 'property of the debtor[,]' the Bankruptcy Code does not define that term. Noting that "the purpose of the avoidance provision is to preserve the property within the bankruptcy estate[,]" the Supreme Court found that the term "property of the debtor" as used in *90 section 547(b) "is best understood as the property that would have been part of the estate had it not been transferred before the commencement of the bankruptcy proceedings." Id. For "guidance," the Supreme Court turned to section 541, "which delineates the scope of 'property of the estate' and serves as the postpetition analog to § 547(b)'s 'property of the debtor.' " Id. The Supreme Court determined that the trustee could not avoid the transfers because "the debtor does not own an equitable interest in property he holds in trust for another, that interest is not 'property of the estate.' Nor is such an equitable interest 'property of the debtor' for purposes of § 547(b)." Id. at 59, 110 S.Ct. 2258. Thus, Begier did not address issues relating to the extraterritorial application of the avoidance provisions. See In re Ampal-Am. Israel Corp., 562 B.R. at 608 ("Begier did not deal with the issue of extraterritoriality."). Its focus was on the extent of the debtor's interest in the money transferred prepetition. Id. (stating "[t]he issue before the Supreme Court [in Begier] was whether the transferred property was property of the debtor within the meaning of Bankruptcy Code § 541 at the time of the transfer.")

The Trustee raises two additional points. First, he contends that application of *MadofflCACEIS* to the facts here "would be poor public policy" and "[p]rohibiting the Trustee from recovering the CEVA Equity Transfer would "create an easy way to for the debtors to defraud their creditors," because "[a] foreign entity could transfer its assets to another foreign entity and then file a U.S. Bankruptcy case." Trustee's Opp'n at 50. However, as the *MadofflCACEIS* court noted in response to a similar argument, "the desire to avoid such loopholes

in the law 'must be balanced against the presumption against extraterritoriality, which serves to protect against unintended clashes between our laws and those of other nations which could result in international discord.' "513 B.R. at 231 (quoting In re Euro Exch. Inc., 347 B.R. 708, 718 (Bankr. C.D. Cal. 2006)). See also Morrison, 561 U.S. at 270, 130 S.Ct. 2869 (in rejecting a policy-based argument on why U.S. securities laws should apply to certain transactions occurring abroad, the Supreme Court observed that "[i]t is our function to give the statute the effect its language suggests, however modest that may be, not to extend it to admirable purposes it might be used to achieve.").

[26] Finally, the Trustee contends that, in any event, this Court is not bound by either the logic of, or conclusions reached in, Madoff/CACEIS. See Trustee's Opp'n at 51. The Court agrees with that proposition. See In re Jamesway Corp., 235 B.R. 329, 336 n.1 (Bankr. S.D.N.Y. 1999) ("[W]here the bankruptcy court sits in a multi-judge district, it is not bound by principles of stare decisis by the decision of a district judge in that district. Indeed, bankruptcy courts in this district have reached different conclusions with regard to the application of that decision. In Weisfelner v. Blavatnik (In re Lyondell Chem. Co.), 543 B.R. 127 (Bankr. S.D.N.Y. 2016), a liquidating trustee sought to avoid and recover pre-petition shareholder distributions as fraudulent transfers under sections 548 and 550 of the Bankruptcy Code. After finding that the transfers were extraterritorial, Judge Gerber, held that section 548 applied extraterritorially. Id. at 153-55. In so ruling, the court relied on, among other things, In re French, 440 F.3d 145. The court found that when read in conjunction with section 548, section 541(a)(3) demonstrates that Congress intended to apply section 548 extraterritorially. In part, the court reasoned:

Section 541(a)(3) provides that any interest in property that the trustee recovers under section 550 becomes property of *91 the estate. Section 550 authorizes a trustee to recover transferred property to the extent that the transfer is avoided under either section 544 or section 548. It would be inconsistent (such that Congress could not have intended) that property located anywhere in the world could be property of the estate once recovered under section

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550, but that a trustee could not avoid the fraudulent transfer and recover that property if the center of gravity of the fraudulent transfer were outside of the United States. It is necessary to rule as the *French* court did in order to protect the *in rem* jurisdiction of the bankruptcy courts over assets that Congress has declared become property of the estate when recovered under section 541(a)(3).

543 B.R. at 154–55. In reaching that conclusion, the court recognized that in *Colonial Realty*, the Second Circuit concluded that "fraudulently conveyed property does not become property of the estate until it is recovered." *Id.* at 153 (footnote omitted). However, the court viewed that as "just a matter of timing[,]" and reasoned that it was "not at all the same thing as finding a lack of Congressional intent to allow property to be recovered on an extraterritorial basis." *Id.* The court noted that to the extent his decision was inconsistent with *MadofflCACEIS* and *Maxwell I*, he "respectfully disagree[d]" with those decisions. *Id.* at 153 n.111.

In contrast, in In re Ampal-Am. Israel Corp., 562 B.R. 601 (Bankr. S.D.N.Y. 2017), Judge Bernstein found those decisions to be persuasive in rejecting a claim that section 547 of the Bankruptcy Code applied extraterritorially. There, a chapter 7 trustee sued to avoid and recover a single prepetition transfer made by the debtor in Israel to an Israeli law firm, as a preference pursuant to sections 547 and 550 of the Bankruptcy Code. The court dismissed the trustee's claim because it found that "Congress did not intend the avoidance provisions of the Bankruptcy Code to apply extraterritorially, and the transfer at issue occurred in Israel." Id. at 603. In considering whether section 547 applied extraterritorially, the court conducted an in depth analysis of the holdings in Maxwell I, French, Begier, Madoff/BLI, Madoff/CACEIS and Lyondell (from which this Court has benefitted) and, relying on Maxwell I and Madoff/CACEIS, found that section 547 did not. Id. at 612. Like those courts, Judge Bernstein focused, in part, on the plain language of the relevant provisions of the Bankruptcy Code and the corresponding jurisdictional sections. Accordingly, to that end, he noted that by its terms, section 541(a)(1) applies only to property of the estate or property of the debtor at the time the case is commenced, and that property that is the subject of an

avoidance action does not fall within either category, because it does not become estate property until after it is recovered. Id. ("Property transferred to a third party prior to bankruptcy in payment of an antecedent debt is neither property of the estate nor property of the debtor at the time the bankruptcy case is commenced, the only two categories of property mentioned in Bankruptcy Code § 541".). See also Maxwell I, 186 B.R. at 820 ("Because preferential transfers do not become property of the estate until recovered, § 541 does not indicate that congress intended § 547 to govern extraterritorial transfers." (citing Colonial Realty, 980 F.2d at 131)); Madoff/CACEIS, 513 B.R. at 229 ("whether 'property of the estate' includes property 'wherever located' is irrelevant to the instant inquiry: fraudulently transferred property becomes property of the estate only after it has been recovered by the Trustee. So section 541 cannot supply any extraterritorial authority that the avoidance and recovery provisions lack *92 on their own."). In a similar vein, the court noted the significance of language missing from section 547. The court found that because sections 541(a)(1) and 28 U.S.C. § 1334(e)(1) expressly encompass property "wherever located," 32 and section 547 does not, "'the presumption against extraterritoriality operates to limit [section 547] to its terms." Id. (quoting Morrison, 561 U.S. at 265, 130 S.Ct. 2869). See also Madoff/CACEIS, 513 B.R. at 230 (quoting Morrison and noting that "the fact that section 541, by virtue of its 'wherever located' language, applies extraterritorially may cut against the Trustee's argument [that section 550(a) (2) applies extraterritorially."). Finally, focusing on a different issue, the court found that the Madoff/BLI and French courts misplaced their reliance on Begier in finding that the "property of the debtor," as used in the avoidance provisions, encompasses property that would have been estate property had it not been transferred prepetition. As the court noted (and as discussed above), the focus in Begier was on whether transferred property was property of the debtor within the scope of section 541(a) (1), not whether section 547 applied extraterritorially. Accordingly, the court found that "[t]he Supreme Court read section 541(a) as a limitation on the trustee's avoiding powers, not as an expansion of those powers." Id.

32 Section 541(a)(1) of the Bankruptcy Code states that "property of the estate" includes all "legal or equitable interests of the in property as of the commencement of the case ... wherever located." 11 U.S.C. § 541(a)(1). Section 1334(e)(1) provides that

the district court shall have exclusive jurisdiction "of all of all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate." 28 U.S.C. § 1334e)(1).

Congress has not expressed an affirmative intent for sections 548 and 550 to be applied extraterritorially, and nothing in the text of those sections indicates such an intent. Like the courts in Madoff/CACEIS and Ampal, this Court finds that Congress's failure to do so, particularly in light of the fact that sections 541(a)(1) and 1334(e) expressly apply extraterritorially, operates to limit sections 548 and 550 to their terms. Moreover, the Court agrees with Maxwell I, and Madoff/CACEIS that in assessing the scope of the Bankruptcy Code's avoidance provision section 541(a)(1) is irrelevant because property that is the subject of an action does not become estate property until it is recovered. See Maxwell I, 186 B.R. at 820; Madoff/CACEIS, 513 B.R. at 229. See also In re Midland Euro Exch. Inc., 347 B.R. at 718 (holding that "allegedly fraudulent transfers do not become property of the estate until they are avoided."); Ampal, 562 B.R. at 612 ("Property transferred to a third party prior to bankruptcy in payment of an antecedent debt is neither property of the estate nor property of the debtor at the time the bankruptcy case is commenced, the only two categories of property mentioned in Bankruptcy Code."). To be sure, as the Lyondell court noted, application of section 541(a) (3) might be viewed as to give rise to a "timing" problem. 543 B.R. at 154 (observing that "it is hard to believe that Congress intended for the Code to apply extraterritorially with respect to property of the estate, but not to apply extraterritorially with respect to what would have been property of the estate but for a fraudulent transfer."). However, as the Maxwell I court noted, " '[w]hen it desires to do so, Congress knows how to place the highs seas within the jurisdictional reach of a statute." 186 B.R. at 820 (quoting Argentine Republic v. Amerada Hess Shipping Corp. 488 U.S. 428, 440, 109 S.Ct. 683, 691, 102 L.Ed.2d 818 (1989). Congress has not "clearly expressed" that sections 548 and 550 apply *93 extraterritorially and the Court finds that they do not.

Whether This Litigation Involves Extraterritorial Application of the Avoidance Statutes

[27] The Court will now consider whether the Trustee is seeking to apply the avoidance provisions extraterritorially. Because the Trustee is seeking to avoid the CEVA Equity Transfer pursuant to sections 548(a)(1)

(A) and (B) of the Bankruptcy Code, the Court "looks to the regulatory focus of the Bankruptcy Code's avoidance and recovery provisions specifically." Madoff/CACEIS, 513 B.R. at 227. In an actual fraudulent transfer under § 548(a)(1)(A), the "objects of the statute's solicitude" are transfers by a debtor seeking to "hinder, delay or defraud" its creditors. See 11 U.S.C. § 548(a)(1)(A). For constructively fraudulent transfers under section § 548(a)(1)(B), the "transactions that the statute seeks to 'regulate,' " are transfers for "less than reasonably equivalent value," by insolvent transferors, or transferors rendered insolvent by the transfer. See 11 U.S.C. § 548(a) (1)(B). Section 550 complements those provisions by providing for the recovery of an avoided transfer from an initial or subsequent transferee. See 11 U.S.C. § 550(a). In that way, sections 548 and 550 "work in tandem to further the Code's policy of maximizing the value of the bankruptcy estate by permitting a trustee to avoid certain transfers that deplete the estate and recover the payments for the benefit of creditors." Madoff/BLI, 480 B.R. at 524; see also In re French, 440 F.3d at 154 (noting that avoidance provisions "protect creditors by preserving the bankruptcy estate against illegitimate depletions."). The focus of those avoidance and recovery provisions is the initial transfer that depletes the property that would have become property of the estate. Madoff/BLI, 480 B.R. at 524; accord Begier v. Internal Revenue Serv., 496 U.S. 53, 58, 110 S.Ct. 2258, 110 L.Ed.2d 46 (1990) (stating that the purpose of "the [preference] avoidance provision is to preserve the property includable within the bankruptcy estate—the property available for distribution to creditors."); In re French, 440 F.3d at 154 ("[T]he Code's avoidance provisions protect creditors by preserving the bankruptcy estate against illegitimate depletions."); but compare Madoff/CACEIS, 513 B.R. at 227 ("[U]nder Morrison, the transaction being regulated by section 550(a)(2) is the transfer of property to a subsequent transferee, not the relationship of that property to a perhaps-distant debtor.").

At issue in the Amended Complaint is the authorization by CIL, a Cayman Islands company, of the issuance of stock in CEVA Group, an English and Wales company, to CEVA Holdings, a Marshall Islands company. See Am. Compl. ¶ 3, 9, 13, 27, 28, 133. The allegedly aggrieved Petitioning Creditors are Cayman Island entities, and the PIK Notes evidencing their claims were entered into by CIL and the London Branch of Credit Suisse, as Administrative Agent, with payments being tendered in

London. See Declaration of Howard Schub [Case No. 13-11272, ECF No. 7,], Ex. E (Debt Instrument Agreement), at 1-3. The purportedly fraudulent "transfer" that the Trustee seeks to recover is CEVA Group's issuance of additional shares to CEVA Holdings, which diluted CIL's ownership interest in CEVA Group by 99.99%. See Am. Compl. ¶ 3 (defining "CEVA Equity Transfer" as the issuance of "a massive amount of new CEVA shares to ... [CEVA Holdings] in exchange for nothing."). Not only was the transfer one among foreign entities that allegedly harmed foreign creditors, it was accomplished outside of the United States by: (i) CIL, acting through its board at a series of meetings chaired in London, consenting to *94 CEVA Group's recapitalization and restructuring; and (ii) CEVA Group issuing "New CEVA Shares" in accordance with U.K. law during a meeting of shareholders in London, attended by a representative of CIL who consented to the issuance. See Chapman Decl., Ex. E (CIL RSA), §§ 2(c), 3(a), Ex. C (Form of CEVA Group Shareholder Resolutions), at 1-2. Thus, the CEVA Defendants contend that the challenged conduct in this case is foreign, not domestic.

The Trustee disagrees. He contends that in determining where the challenged conduct took place, the Court should consider all component events of the transfers, to ascertain whether the "center of gravity" of the transfer is the United States. See Trustee's Opp'n at 44 (citing Florsheim Grp., Inc. v. USAsia Int'l Corp. (In re Florsheim Grp., Inc.), 336 B.R. 126, 130 (Bankr. N.D. III 2005) ("In analyzing preferential transfers, courts have applied a 'center of gravity' test, under which they look at the facts of the case to determine whether they have a centers of gravity outside the United States.") (internal citation and quotations omitted)). The Trustee contends that the "center of gravity" of the CEVA Equity Transfer is the United States, and, as such, the transfer is a domestic transaction to which U.S. avoidance laws apply, because the CEVA Defendants, the Directors, Apollo and their respective agents allegedly planned and hatched the scheme to divest CIL of the CEVA Equity in the United States. See Trustee's Opp'n at 43-44. 33 However, the Trustee overstates the significance of those contracts with the United States. First, the Amended Complaint is clear that *95 CIL's professionals, Appleby and E & Y were located in the Cayman Islands and that Appleby "perform[ed] significant work." See Am. Compl. ¶ 51 ("Mintz Levin and Appleby began to perform significant work regarding the potential CEVA transaction in

January 2013."); see also id. ¶¶ 58-59 (describing work performed by Appleby); ¶¶ 84-87 (same). Moreover, "it is a rare case of prohibited extraterritorial application [of a statute] that lacks all contact with the territory of the United States." Morrison, 561 U.S. 247, 266, 130 S.Ct. 2869, 177 L.Ed.2d 535 (2010). Further, courts in this district have questioned whether the "component parts test" remains relevant in light of the Supreme Court's rejection in Morrison of the "conduct and effects" test, 34 a similar test used by the Second Circuit in determining where the conduct at issue occurred. See Sec. Inv'r Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC (In re Madoff), No. 08-01789, 2016 WL 6900689, at *21 (Bankr. S.D.N.Y. Nov. 22, 2016) (finding irrelevant " 'where the defendants engaged in business regarding the transaction' and 'where the parties' relationship was centered when conducting the transaction underling the debt that triggered the transfers' " and noting that the analysis was similar to the conducts and effects test abrogated by the Morrison court). See also Official Comm. Of Unsecured Creditors of Arcapita Bank B.S.C. (c) v. Tadhamon Capital B.S.C. (In re Arcapita Bank B.S.C.(c)), 575 B.R. 229, 247 (Bankr. S.D.N.Y. 2017) (questioning the continued applicability of the component parts analysis test advocated by Maxwell I, because it "was decided before Morrison, which changed the legal landscape on this issue."). Instead, under Morrison, the focus of the inquiry is on where the challenged conduct (here the issuance of the New CEVA Shares) occurred. That is plainly outside the United States.

33 In particular, he alleges in the Amended Complaint that:

The CEVA Equity Transfer was performed for the benefit of Apollo (Am. Compl. ¶¶ 2–3, 8) and engineered and directed by Apollo in New York. (*Id.* ¶¶ 3–4, 8, 10–11.)

Apollo controlled the Debtor and each of the Defendants from the U.S. (*Id.* ¶ 2–3, 8, 27–28.) The CEVA Equity Transfer was performed for Apollo's benefit. (*Id.* ¶ 2–3, 8.)

One of CIL's two directors who enabled the CEVA Equity Transfer, Turner, resided and worked in New York. (*Id.* ¶¶ 11, 23.)

CIL's other director, Beith, performed multiple acts to advance the scheme while physically present in New York headquarters, and directed numerous communications and instructions to agents and actors in New York that were critical to the CEVA Equity Transfer. (*Id.* ¶¶ 25, 54; *see also* Beith Decl. ¶¶ 14–15.)

The final form of the CEVA Equity Transfer was negotiated between lawyers at the U.S. firms of Mintz Levin and Akin Gump, including elements deliberately designed to hinder, delay and defraud CIL's creditors. (*Id.* ¶ 97–107.)

The CIL RSA among CIL (executed by the Directors), Louis Cayman and CEVA, pursuant to which CIL agreed to the CEVA Equity Transfer, provides that it shall be governed by the internal laws of the State of New York. (*Id.* ¶ 108)

The removal of CIL's officers that left Apollo's employees in sole control of CIL was determined by Apollo in New York and effectuated by Mintz Levin. (Id. ¶ 54–55.)

The E & Y Report and the MS Report were prepared in New York, and "restructuring" advice was provided by Houlihan Lokey from its New York City office. (*Id.* ¶¶ 5, 8, 67–68, 76, 94, 121.)

Mintz Levin, in New York and Massachusetts, actively worked to help conceal the Directors' fraudulent conduct, including by furnishing misleading representations to this Court in the Chapter 7 Case. (See, e.g., id. ¶¶ 11, 51, 57, 79, 103–07.)

The CEVA Enterprise has headquarters and vast operations in the United States. (*Id.* ¶¶ 1, 8, 27.) None of the parties have employees or any substantial business operations in Cayman Islands.

The "effects" test asked "whether the wrongful conduct had a substantial effect in the United States or upon United States citizens." *Morrison*, 561 U.S. at 257, 130 S.Ct. 2869. The "conducts" test asked "whether the wrongful conduct occurred in the United States." *Id.* at 257, 130 S.Ct. 2869 (quotations omitted).

Finally, and in any event, application of the "center of gravity" test, given the allegations in the Amended Complaint, does not support the Trustee's assertion that the issuance of the New CEVA Shares was a domestic transaction. Under that test, courts "look at the facts of a case to determine whether they have a center of gravity outside the United States." *In re Florsheim Grp., Inc.*, 336 B.R. 126, 131 (N.D. Ill. 2005). In doing so, "the court considers the location of the assets as well as the component events of those transactions." *Maxwell I,* 186 B.R. at 817. *See also Florsheim Grp., Inc.*, 336

B.R. at 131 (noting the "courts generally consider all component events of a financial transaction, rather than one dispositive factor, to determine where it took place."). Here, as set forth above, the issuance of the New CEVA Stock took place outside of the United States. To be sure, the Trustee has alleged that the avoidance claims and CEVA Equity Transfer have some connection to the United States. However, the inquiry is whether these connections alleged are significant enough to render the CEVA Equity Transfer a domestic transaction. See, e.g., Weisfelner v. Blavatnik (In re Lyondell Chem. Co.), 543 B.R. 127, 150-51 (Bankr. S.D.N.Y. 2016) ("[E]ven where the claims touch and concern the territory of the United States they must do so with sufficient force to displace the presumption against extraterritorial application." (quoting Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 133 S.Ct. 1659, 185 L.Ed.2d 671 (2013))). They are not.

*96 It is undisputed that CIL retained professionals outside the United States. However, even assuming that the CEVA Equity Transfer was negotiated and documented at least in part by Turner and Beith and CIL's professionals in the United States, it is not enough to make the CEVA Equity Transfer a domestic transaction. See, e.g., Maxwell I, 186 B.R. at 817 (sale of assets that funded transfers, and even initiation of transfers in the United States, are "more appropriately characterized as a 'preparatory step' " to the extraterritorial transfers); Morrison, 561 U.S. at 271-72, 130 S.Ct. 2869 (rejecting the notion that section 10(b) claim at issue was domestic even as a significant portion of fraudulent conduct occurred in the United States); Madoff/CACEIS, 513 B.R. at 228 (chain of transfers originating in New York from a New York-based debtor insufficient to conclude that transfers occurred domestically); In re Lyondell Chem. Co., 543 B.R. at 149 (rejecting the trustee's arguments that "at least some of the decisions to make the December Distributions were made in the United States[,]" and that "the December Distribution was initiated by and occurred at the direction of Blavatnik" rendered the distribution at issue domestic); see also Official Comm. of Unsecured Creditors v. Transpac. Corp. (In re Commodore Int'l Ltd.), 242 B.R. 243, 260 (Bankr. S.D.N.Y. 1999), aff'd, 2000 WL 977681, 2000 U.S. Dist. LEXIS 9790 (S.D.N.Y. July 14, 2000) (transfer approved by board of directors and documented by professionals in United States insufficient to outweigh Bahamian interests in transactions). 35

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To the extent that the Trustee is arguing that the CIL RSA's choice of New York law renders the CEVA Equity Transfer domestic, the fraudulent transfer claims are not contract claims but tort claims that are not governed by the CIL RSA.

The CEVA Equity Transfer is the transfer that the Trustee seeks to avoid and recover under sections 548 and 550 of the Bankruptcy Code. It was not a domestic transfer and, as such, it cannot be avoided under those provisions.

Application of Sections 544 and 551

[28] As noted previously, in Count 3, the Trustee seeks to avoid the CEVA Equity Transfer pursuant to U.K., Cayman and/or New York state law by application of sections 544(b) and 550 of the Bankruptcy Code. Am. Compl. ¶160–161. In relevant part, section 544(b) states:

[T]he 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.

11 U.S.C. § 544(b)(1). Having determined that the presumption against extraterritoriality bars the extraterritorial application of section 548 of the Bankruptcy Code, and that the CEVA Equity Transfer is a foreign transfer, the Court must consider whether that ruling should extend to section 544(b). The Trustee contends that it would be "senseless" for the court to do so, because by its terms, that section incorporates whatever law may be "applicable." The Trustee maintains that because section 544(b) is unambiguous, it "must be construed according to the meaning of its words." Trustee's Opp'n at 53 (quoting Hayden v. Pataki, 449 F.3d 305, 314-15 (2d Cir. 2006)). From that, he asserts that as used in the statute, the term "applicable law" should be read to include foreign law. Thus, he maintains that by application of section 544(b), he can seek to avoid the CEVA Equity Transfer under foreign law, including U.K. law. Id. at 54. He argues *97 that he is entitled to do so, because he is not attempting "an 'extraterritorial' exportation of U.S. law[,]" but rather, through section 544(b), he is seeking to bring foreign law into a U.S. bankruptcy proceeding. Id. However,

the Trustee is still attempting to apply U.S. avoidance laws to a foreign transaction. As the Court has already found, incorporation of the "interest of the debtor in property" language does not manifest a clear intention by Congress that such provision has extraterritorial application. Furthermore, "broad, boilerplate language such as the term ["applicable law"] is insufficient to overcome the presumption against extraterritoriality." Maxwell I, 186 B.R. at 819 (finding "nothing in the language or legislative history of § 547 expresses Congress' intent to apply the statute to foreign transactions."). The Court is not persuaded that the inclusion of the phrase "voidable under applicable law" gives section 544(b) de facto extraterritorial application. The Court finds that it does not. As the Court has previously determined, the CEVA Equity Transfer was not a domestic transfer. As such, it cannot be avoided under section 544(b) of the Bankruptcy Code.

[29] In relevant part, section 551 of the Bankruptcy Code states that "[a]ny transfer avoided under [sections 544 and 548] ... is preserved for the benefit of the estate but only with respect to property of the estate." 11 U.S. C. § 551. As such, it does not provide for an independent cause of action. Rather, it creates a statutory effect to a transfer that has been avoided under, for instance, sections 544 or 548. That effect is automatic, and springs into existence upon a successful avoidance under other sections of the Code, such as sections 544 or 548. See, e.g., 5 A. Resnick & H. Sommer, COLLIER ON BANKRUPTCY ¶ 551.01 (16th ed. 2015). Based upon the foregoing, it has no application to this case.

International Comity

[32] The CEVA Defendants also contend [31] that application of the avoidance and recovery provisions of the Bankruptcy Code is precluded by principles of international comity. See CEVA MTD at 27-29. "[I]nternational comity is a separate notion from the 'presumption against extraterritoriality,' which requires a clear expression from Congress for a statute to reach non-domestic conduct." Maxwell II, 93 F.3d 1036, 1047 (2d Cir. 1996) (citation omitted). Rather, it "is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws." Hilton v. Guyot, 159 U.S. 113, 164, 16 S.Ct.

139, 40 L.Ed. 95 (1895). The doctrine "is concerned with maintaining amicable working relationships between nations, a 'shorthand for good neighbourliness, common courtesy and mutual respect between those who labour in the adjoining judicial vineyards." *JP Morgan Chase Bank v. Altos Hornos de Mex., S.A. de C.V.,* 412 F.3d 418, 423 (2d Cir. 2005) (quoting *British Airways Bd. v. Laker Airways Ltd.,* [1984] E.C.C. 36, 41 (Eng. C.A.)). The doctrine is applied not as "an imperative obligation of courts but rather [a]s a discretionary rule of practice, convenience, and expediency." *Royal & Sun Alliance Ins. Co. of Canada v. Century Int'l Arms, Inc.,* 466 F.3d 88, 92 (2d Cir. 2006) (internal quotation marks and citation omitted).

[33] [34] As a general matter, the doctrine of comity embraces two concepts: "comity of the courts" and "comity of nations." See *98 Hartford Fire Ins. Co. v. California, 509 U.S. 764, 817, 113 S.Ct. 2891, 125 L.Ed.2d 612 (1993) (Scalia, J., dissenting). By application of the former, also known as "adjudicative" or "abstention" comity, "judges decline to exercise jurisdiction over matters more appropriately adjudged elsewhere[.]" Id. See also Maxwell II, 93 F.3d at 1047 (noting that the "so-called comity among courts," "may be viewed as a discretionary act of deference by a national court to decline to exercise jurisdiction in a case properly adjudicated in a foreign state[.]"); JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V., 412 F.3d at 424 (noting that comity among courts "involves not a choice of law but rather the discretion of a national court to decline to exercise jurisdiction over a case before it when that case is pending in a foreign court with proper jurisdiction.") (citation omitted).

[35] In contrast, "comity of nations," or "prescriptive comity," is "the respect sovereign nations afford each other by limiting the reach of their laws. That comity is exercised by legislatures when they enact laws, and courts assume it has been exercised when they come to interpreting the scope of laws their legislatures have enacted. It is a traditional component of choice-of-law theory." *Hartford Fire Ins. Co.*, 509 U.S. at 817, 113 S.Ct. 2891 (Scalia, J., dissenting). *See also Maxwell II*, 93 F.3d at 1047 (prescriptive comity "is a canon of construction [that] might shorten the reach of the statute."); *Mujica v. AirScan Inc.*, 771 F.3d 580, 598 (9th Cir. 2014) ("[L]egislative or 'prescriptive comity' ... guides domestic

courts as they decide the extraterritorial reach of federal statutes.").

The CEVA Defendants assert that in filing this action, "[t]he Trustee is attempting to bypass the legitimate interests of having Cayman law govern this dispute to gain advantage of the more generous avoidance provisions of the U.S. Bankruptcy Code." CEVA MTD at 31. They contend that because CIL, a Cayman Islands domiciled company, is already a debtor in a home based parallel insolvency proceeding, the Cayman Islands has a greater interest in adjudicating the avoidance claims than the United States. They also assert that because there is an actual conflict between U.S. and Cayman fraudulent transfer law, this Court should dismiss the Trustee's avoidance claims so they can be heard by a Cayman court, or at the very least evaluate these claims strictly under the laws of the Cayman Islands. CEVA MTD at 28-29. The Trustee disputes those contentions and contends that this Court is the only suitable forum for bringing the fraudulent transfer claims. See Trustee's Opp'n at 58. He also contends that if U.S. law does not apply to the adjudication of the avoidance claims, the Court should apply U.K. law, not the law of the Cayman Islands, and that there is no conflict between U.K. and U.S. fraudulent transfer law. See id. at 51-52.

[37] [38] The pendency of parallel insolvency proceedings is a factor relevant to application of the "comity of courts" doctrine. See, e.g., Royal & Sun Alliance Ins. Co. v. Century Int'l Arms, Inc., 466 F.3d 88, 93 (2d Cir. 2006). However, "the mere existence of an adequate parallel action, by itself, does not justify the dismissal of a case on grounds of international comity abstention." Id. "Abstention comity, or 'comity among courts,' is concerned with which court should decide the parties' rights, and relatedly, whether a U.S. court should enforce a foreign bankruptcy court's order relating to the debtor's assets or the adjudication of a creditor's claim." SMP Ltd. v. SunEdison, Inc. (In re SunEdison), 577 B.R. 120, 131 (Bankr. S.D.N.Y. 2017). Under this doctrine, courts in the United States will refrain from "adjudicat[ing] creditor claims that are the subject of a foreign bankruptcy proceedings" *99 and, in doing so, defer to those proceedings, "so long as the foreign proceedings are procedurally fair and ... do not contravene the laws or public policy of the United States." JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V., 412 F.3d at 424 (citing Cunard S.S. Co. Ltd. v. Salen

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Reefer Servs, AB, 773 F.2d 452, 457–59 (2d Cir. 1985)). In that way, "[a]bstention comity aims to prevent an 'endrun' around the foreign bankruptcy proceeding[.]" In re SunEdison, 577 B.R. at 131.

[39] The Trustee argues that the International Protocol "conclusively resolves" the question of comity, and that the pendency of the Cayman Islands Proceeding is not a bar to the prosecution of Counts 1, 2 and 3 of the Amended Complaint in this Court. The purpose of that agreement is to "promote the orderly administration of the estate of the [Debtor] and avoid duplication of work and expense or conflict" by "setting forth the allocation of various duties and responsibilities to be undertaken by the JOLs and the Trustee." International Protocol § 2. The Trustee maintains that, to that end, this Court is the proper forum in which the avoidance claims should be adjudicated because under the protocol, the Cayman Court and Joint Liquidators "have each renounced interest in having the fraudulent conveyance claims heard in the Cayman Court." Trustee's Opp'n at 57 (citations omitted). As support, he cites to the following provisions of the protocol:

If, upon consultation, the JOLs and the Trustee jointly conclude that the liquidation of any assets owned by the Company should be effected by the Trustee, the JOLs and the Trustee will agree in writing the asset(s) to be liquidated by the Trustee. Similarly, if the JOLs and the Trustee jointly conclude that the liquidation of any assets owned by the Company should be effected by the JOLs, the JOLs and the Trustee will agree in writing the asset(s) to be liquidated by the Trustee. (International Protocol at ¶ 5.1.)

The approval of this Protocol by the Cayman Court shall constitute the Cayman Court's authorisation, without further order, for the JOLs to permit the Trustee to effect the liquidation of such asset(s). (*Id.* at ¶ 5.3)

The JOLs and Trustee have identified various potential claims and causes of action which may be pursued for the benefit of the Company. Following further investigation of those claims, the JOLs and the Trustee will jointly consider whether each claim is most closely connected with the US or with another territory. (*Id.* at ¶ 7.1.)

Where the JOLs and Trustee agree that such claims are most closely connected with the US, or that it is in the best interests of the Company that claims be pursued in the US, the Trustee is authorized to pursue such claims in accordance with section 5 herein. The approval of this Protocol by the Cayman Court shall (i) constitute authorization for the JOLs to leave the task of prosecuting any claims and/or causes of action to the Trustee; and (ii) constitute sanction of those claims by the Cayman Court, to the extent necessary. (*Id.* at ¶7.2)

To be sure, as set forth above, the protocol provides a process pursuant to which the Joint Liquidators and Trustee can, among themselves, and without further order of either court, select the forum in which to prosecute estate claims. Moreover, the Joint Liquidators have determined, among other things, that the Trustee's pursuit of the Amended Complaint in the United States "appears to be in the best interests of the Debtor's creditors[,]" and that it was "appropriate for the Original Complaint to be issued in the U.S., and it was in the *100 best interests of the Debtor and its estate to file and prosecute the Original Complaint in the Bankruptcy Court." See First Declaration of Matthew Wright [ECF No. 42], at ¶ 10. They have also advised that they "have no intention of prosecuting such claims before the Cayman Court[,]" because "it would probably be a breach of the terms of the International Protocol[,]" and, in any event, "the required sanction of the Cayman Court to commence separate proceedings would be difficult to obtain." Id. In this light, the Trustee contends that in invoking the doctrine of comity among the courts as grounds for dismissing Counts 1, 2 and 3, in favor of pursuing those claims in the Cayman Court, the CEVA Defendants "have it backwards" because they are "attempting to impose their wishes on foreign liquidators who do not wish to bring the claims [in the Cayman Court], and a foreign court that has long since issued an order deferring in favor of the U.S. Court." Trustee's Opp'n at 58. As such, they say that the CEVA Defendants "are attempting to disrupt an established environment of cooperation and harmonization between the two jurisdictions." Id. (emphasis original). However, the Trustee overstates both the import of the International Protocol and the significance of the Joint Liquidators' consent to the Trustee's pursuit of the Amended Complaint in this Court. The protocol does not specify the court in which particular claims will be resolved or the law that will govern resolution of the claims, and neither court has deferred to the other on any matter, let alone those relating to the resolution of claims held by the estate against third parties. Moreover, the Joint Liquidators' conclusion that the United States is the appropriate forum in which to pursue the claims set forth in the Amended Complaint is plainly not binding on the CEVA Defendants or this Court. However, there is no question that under Cayman law, the Trustee has standing to pursue this litigation. Cf. Official Comm. of Unsecured Creditors v. Transpacific Corp., Ltd. (In re Commodore Int'l Ltd.), 242 B.R. 243, 248-50 (Bankr. S.D.N.Y. 1999) (dismissing creditors' committee's complaint seeking to avoid transfers under U.S. avoidance laws where dual insolvency proceedings were pending in the United States. and The Bahamas, in part on the grounds that committee lacked standing because Bahamian court had ruled that Bahamian liquidators lacked authority under Bahamian law to consent to the committee's prosecution of the action). Moreover, the Trustee asserts that this Court is the only suitable forum in which to bring the fraudulent transfer claims because it is unlikely that the Joint Liquidators could get leave from the Cayman Court to bring suit in the Cayman Islands. To that end, they note that under Cayman law, unless the Defendants are served with process in the Cayman Islands or submit to the jurisdiction of that court, the Joint Liquidators could not sue the Defendants unless they apply for, and receive, permission from the Cayman Court to serve the Defendants outside of the Cayman Islands. See First Declaration of J. Ross McDonough [ECF No. 41], ¶ 12. The Trustee contends that it is unlikely that the Cayman Court would grant such relief because it is doubtful that under Cayman Islands law, the Cayman Court has the power to authorize the Joint Liquidators to do so, and it is unlikely that the court would grant such permission, even if it had the power to do so. Id. ¶¶ 17–21, 24. Moreover, he contends that in any event, as a condition to granting such relief, the Cayman Court would have to find that Cayman Islands is the "forum conveniens" or most appropriate forum in which to conduct that litigation. The Trustee maintains that it is unlikely that the Cayman Court would do so, especially because the CEVA Defendants have not moved to dismiss *101 all of the Counts of the Amended Complaint and, as such, there would be duplicative or parallel proceedings in the Cayman Islands and the United States. Id. ¶¶ 25–26, 29. The Court finds that those practical concerns, coupled with the Court's desire to foster the goal of cooperation among this Court and the Cayman Court, as generally contemplated by the International Protocol, particularly in light of both courts' willingness to permit the Joint Liquidators and the Trustee to select the forum in which to bring avoidance actions, provide sufficient grounds to allow the adjudication of the avoidance claims to proceed in this Court.

[40] However, it does not follow that U.S. law will govern the resolution of those claims. In determining which law to be applied, the rule is that this Court "[must] apply the law of the jurisdiction having the greatest interest in the litigation. Koreag, Controle et Revision, S.A. v. Refco F/X Assocs. (In re Koreag, Controle et Revision, S.A.), 961 F.2d 341, 350 (2d Cir.), cert, denied, 506 U.S. 865, 113 S.Ct. 188, 121 L.Ed.2d 132 (1992). To make that determination, the Court will engage in a choice-of-law analysis guided by the factors set out in the Restatement (Third) of Foreign Relations § 403. See, e.g., Hartford Fire Ins. Co. v. California, 509 U.S. 764, 818-19, 113 S.Ct. 2891, 125 L.Ed.2d 612 (1993) ("In sum, the practice of using international law to limit the extraterritorial reach of statutes is firmly established in our jurisprudence. In proceeding to apply that practice to the present cases, I shall rely on the Restatement (Third) [of Foreign Relations § 403] for the relevant principles of international law.") (Scalia, J. dissenting); Gucci America, Inc. v. Weixing Li, 768 F.3d 122, 139 (2d Cir. 2014) ("We have previously suggested that when a court order will infringe on sovereign interests of a foreign state, district courts may appropriately conduct an analysis using the framework provided by § 403 of the Restatement (Third) of Foreign Relations Law, entitled 'Limitations on Jurisdiction to Prescribe.' "). These factors "correspond to familiar choice-of-law principles." Maxwell II, 93 F.3d at 1048 (noting that "[t]he analysis must consider the international system as a whole in addition to the interests of the individual states, because the effective functioning of that system is to the advantage of all the affected jurisdictions."). Thus, in undertaking that analysis, the Court must determine whether application of U.S. law would be "reasonable" in light of the competing interests of the United States and any foreign state. See id. at 1047; Madoff/CACEIS, 531 B.R. at 231 ("Courts conducting a comity analysis must engage in a choice-oflaw analysis to determine whether application of U.S. law would be reasonable under the circumstances."). See also Restatement (Third) of Foreign Relations (1986) § 403(1) ("a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such discretion

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is unreasonable."). Whether the application of U.S. law would be reasonable turns on an evaluation of all relevant factors including "the link between the regulating state and the relevant activity, the connection between the state and the person responsible for the activity (or protected by the regulation), the nature of the regulated activity and its importance to the regulating state, the effect of the regulation on justified expectations, the significance of the regulation to the international system, the extent of other states' interests, and the likelihood of conflict of other states' regulations." *Maxwell II*, 93 F.3d at 1048 (citing the Restatement (Third) of Foreign Relations Law of the U.S. § 403(2)).

*102 The Trustee contends that this Court's connection to and interest in the litigation far outweighs that of the Cayman Court. In particular, he notes that the Amended Complaint alleges that the CEVA Equity Transfer was orchestrated in the United States while, in contrast, CIL's only material connection to the Cayman Islands is that it is registered there. See Trustee's Opp'n at 61–62. Moreover, he contends that if U.S. law is not applicable, the Court should apply the U.K. law. Id. at 60. He says this is so, because (a) CEVA Group is a U.K. entity (Am. Compl. ¶ 27); (b) CEVA Group is the asset of CIL that was misappropriated when it issued the New CEVA Shares to CEVA Holdings, which, itself is a non-Cayman entity (id. ¶¶ 3, 28); (c) virtually none of the conduct alleged in the Amended Complaint occurred in the Cayman Islands, and that which did was directed by parties outside of Cayman; (d) CIL did not conduct business in the Cayman Islands; (e) CIL was operated by non-Cayman directors; and (f) the only business person who can be found outside the United States is Beith, a citizen and alleged resident of the U.K.

The Court finds that the Cayman Islands has a greater interest in the adjudication of the avoidance claims than the United States or the U.K. First, there are plenary insolvency proceedings pending on behalf of CIL in the Cayman Islands. The Trustee purports to challenge the legitimacy of those proceedings and alleges that the Defendants put CIL into the Cayman Liquidation Proceedings in bad faith and for the sole purpose of delaying and hindering CIL's creditors. See Am. Compl. ¶ 117. For purposes of the comity analysis, the Court attaches no weight to that assertion. The Cayman Court, not this Court, is the appropriate forum for challenging the bona fides of those insolvency proceedings. Other

factors weigh heavily in support of the application of Cayman law, including: (i) CIL is a Cayman Islands entity; (ii) since its incorporation CIL's registered offices have always been located in George Town, Grand Cayman, Cayman Islands; (iii) CIL is the entity that made the CEVA Equity Transfer; (iv) to the extent CIL was injured, it suffered that injury in the Cayman Islands; (v) the Cayman Islands has a strong interest in in evaluating allegedly fraudulent transfers that involve Cayman debtors, and applying its avoidance provisions to conduct originating in the Cayman Islands and involving mostly Cayman parties, and nothing in the International Protocol detracts from that; and (vi) Cayman-domiciled companies transact business and guide their conduct based on local legal norms, not foreign norms, and such expectations should be respected. Moreover, the Court finds it significant that the PIK Noteholders who commenced this chapter 7 case, and who comprise the majority of CIL's creditors, are Cayman entities. None of those factors are relevant in the analysis of U.K. and U.S. interests in the litigation. That CEVA Group is a U.K. entity and that the Defendants and/ or their agents took actions in the U.K. in furtherance of the CEVA Equity Transfer and CEVA Restructuring is not without significance, but it does not vest the U.K. with a greater interest in this litigation than the Cayman Islands. The same holds true for the United States. Although the Defendants and their agents took actions in the United States in furtherance of the CEVA Restructuring, the Court has already determined that they were tangential to the CEVA Equity Transfer at the heart of this litigation. Those are the principal contacts with the United States. They are not enough to vest the United States with a greater interest in the litigation than the Cayman Islands. Having determined that the law of the Cayman Islands is applicable herein, the *103 Court will consider whether there is a true conflict between U.S and Cayman avoidance law. See Maxwell II, 93 F.3d at 1049 ("International comity comes into play only if there is a true conflict between American law and the law of the foreign jurisdiction.").

The CEVA Defendants have demonstrated that such a conflict exists. Under Cayman law, the avoidance and recovery of fraudulent transfers, like those asserted in Counts 1 and 2 of the Amended Complaint, are governed by sections 146 and 147 of the Cayman Islands Companies Law (as revised) (the "Companies Law"). While section 548 of the Bankruptcy Code recognizes both

"constructive" and "actual" (or intentional) fraudulent conveyance actions, the relevant provisions of the Companies Law are "narrower" because under Cayman Law, "[a]n 'intention to defraud' and/or 'fraudulent purpose' is a necessary ingredient" of a "liquidation claw back claim." See Declaration of Michael John Makridakis [ECF No. 34] at ¶ 36. In other words, "[a]ctual dishonesty is required" such that "if a liquidator or creditor (as applicable), sought to bring a fraudulent disposition or fraudulent trading claim in the Courts of the Cayman Islands on the basis of 'constructive' rather than actual, intentional or purposive fraud, the claim would ... be bound to fail." Id. It is settled that "a conflict between two avoidance rules exists if it is impossible to distribute the debtor's assets in a manner consistent with both rules." Maxwell II, 93 F.3d at 1050. Here, as in Maxwell II, "the 'intent' requirement in the [Cayman Islands] law would dictate a different distributional outcome than would United States law. Consequently, it is not possible to comply with the rules of both forums and the threshold requirement of a true conflict exists for purposes of comity analysis." 93 F.3d at 1050. Accordingly, Cayman law will be applied in resolving the avoidance claims.

In sum, the Court finds that the claims asserted under sections 544, 548 and 550 of the Bankruptcy Code should be dismissed because the CEVA Equity Transfer that the Trustee seek to avoid was a foreign transfer and sections 544, 548 and 550 do not apply extraterritorially, and because by application of the principles of international comity, the laws of the Cayman Islands are applicable to the resolution of the avoidance claims. Accordingly, Counts 1, 2 and 3 are dismissed, with prejudice, except that the Trustee will be permitted to assert an intentional fraudulent transfer claim herein under Cayman law, divorced of any aspect of the Bankruptcy Code.

Motion to Dismiss Counts 1-3, 5, 6 & 10-12

[41] The premise underlying the Trustee's complaint is that Apollo was not satisfied merely controlling CEVA Group through its ownership of CIL's stock, because it wanted to do so without the burden of CIL's PIK Note indebtedness. As such, the Trustee maintains that because "[t]he Debtor and its [€103] million of creditors stood between Apollo and the lucrative CEVA Enterprise," the Defendants—at Apollo's direction—"devised [the CEVA Restructuring] to cut the Debtor and its creditors out of the capital structure." See Trustee's Opp'n at 13. It is undisputed that the PIK Notes are unsecured obligations

of CIL that were not guaranteed by CEVA Group or any of its consolidated subsidiaries. Because CIL was a pure "holdco," the PIK Notes were structurally subordinated to the claims of CEVA Group's creditors. See, e.g., NA Gen. P'ship & Subsidiaries v. Comm'r, 103 T.C.M. (CCH) 1916, 2012 WL 2344719, at *9 (U.S. Tax Ct. June 19, 2012) ("With holding companies, any debt issued is necessarily subordinated to the creditors of its *104 operating company."). It is also uncontested that if CEVA Group was insolvent in April 2013, it follows that CIL's equity interest in CEVA Group had no value at that time, and that the Trustee cannot state a claim for relief in any of the Counts in the Amended Complaint which are based on the notion that the CEVA Equity Transfer deprived CIL of value that it otherwise possessed. Those are Counts 1, 2, 3 (relating to the fraudulent conveyance of the CEVA Group's equity), 5 (avoidance of the post-petition transfer of CEVA Group's equity), 6 (turnover of CEVA Group's equity), 10 (conversion of CEVA Group's equity), 11 (unjust enrichment by the CEVA Group equity/shares), and 12 (conspiracy under Cayman law/aiding and abetting fraud under New York law).

Rule 8 of the Federal Rules of Civil Procedure provides that a complaint seeking relief "must contain ... a short plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). 36 In accordance with the Supreme Court's decision Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), the Court will apply a "plausibility standard" in assessing whether the Amended Complaint satisfies Rule 8. Two "working principles" guide the Court's application of that standard. See Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). First, although "a court must accept as true all of the allegations contained in a complaint," that mandate "is inapplicable to legal conclusions," and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Id. "Second, only a complaint that states a plausible claim for relief survives a motion to dismiss," and "[d]etermining whether a complaint states a plausible claim for relief will ... be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Id. at 679, 129 S.Ct. 1937.

That rule is made applicable herein by Fed. R. Bankr. P. 7008.

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The CEVA Defendants contend that each of the Counts at issue must be dismissed for failing to state a claim for relief, because the facts and allegations before the Court demonstrate that (i) there plainly is an inference that CEVA Group was insolvent in April 2013 based upon, among other things, the "market behavior" of CEVA Group's stakeholders; and (ii) the Amended Complaint does not contain allegations plausibly establishing that CEVA Group was solvent. See CEVA MTD at 32. The Trustee disputes those assertions.

As a preliminary matter, the Trustee contends that the value of CEVA Group and the solvency of CIL are factual matters that likely may not be decided any time prior to trial, but in any event, cannot be decided on a motion to dismiss. See Trustee's Opp'n at 68. The CEVA Defendants do not dispute that point. See CEVA MTD at 32 ("To be clear, in no way are the CEVA Defendants asking the Court to make a finding at this stage that CEVA Group was in fact insolvent or lacked adequate capital as of April 2013."). It is well settled that "[i]nsolvency is a question of fact," see Lawson v. Ford Motor Co. (In re Roblin Indus.), 78 F.3d 30, 35 (2d Cir. 1996) (citations omitted), and that "factual issues cannot be determined on [a] motion to dismiss." Tronox Inc. v. Andarko Petroleum Corp. (In re Tronox Inc.), 429 B.R. 73, 97 (Bankr. S.D.N.Y. 2010) (finding that determination of whether a debtor received reasonably equivalent or fair value in exchange for its assets is a question of fact that could not be resolved on a motion to dismiss). Thus, in resolving this aspect of the CEVA Defendants' motion to dismiss, the Court will not determine whether *105 CIL's equity interest in CEVA Group had value in April 2013. Rather, the Court will consider only whether the Trustee has alleged facts from which the Court can reasonably infer that it is plausible that CIL was solvent at that time. See generally Spradlin v. Monday Coal, LLC (In re Licking River Mining, LLC), 571 B.R. 241, 262 (Bankr. E.D. Ky. 2017) ("To plead the constructively fraudulent transfer claims sufficiently, Trustee must allege facts to plausibly establish that a Debtor was insolvent when it made the Total Transfers, or became insolvent as a result of such a transfer."); cf. Halperin v. Moreno (In re Green Field Energy Servs., Inc.), No. 13-12783, 2015 WL 5146161, at *8 (Bankr. D. Del. Aug. 31, 2015) (noting that while reasonably equivalent value in context of constructive fraudulent transfer claims is a fact-intensive determination, the court may plausibly infer lack of reasonably equivalent value based on the trustee's

allegation that debtor had transferred an approximately \$200 million asset to defendant in return for little or no compensation).

The CEVA Defendants argue that in assessing the adequacy of the Trustee's pleadings, the Court must view the CEVA Equity Transfer as the first step in a single, fully-integrated, multi-step transaction. They say that in that light, the strong inference is that CIL's equity interest in CEVA Group had no value because: (i) Apollo would not impair its own interests by reducing its prerestructuring near-100% equity interest in CEVA Group to a 21% interest post-restructuring if there was any value to the CIL equity; and (ii) "sophisticated independent market players"—namely, CapRe and Franklin—would not have converted their debt to equity if CEVA Group was solvent. See CEVA MTD at 35-40. Thus, they contend that such a restructuring "is totally at odds with the notion that CEVA ... was solvent, adequately capitalized, and able to repay all of its creditors, much less the Trustee's allegation that CEVA Group was solvent by hundreds of millions of dollars." Id. at 32.

The Trustee disputes those contentions and argues that the Amended Complaint alleges, "with an exceptional level of detail," that (i) CIL owned CEVA Group, (ii) the Defendants caused CIL to be divested of its ownership interest in CEVA Group, and (iii) that CIL received nothing whatsoever in exchange for the transfer. See Trustee's Opp'n at 67. He contends that the CEVA Defendants challenge only whether CEVA's equity had value and that the Amended Complaint pleads that it does. Id. Further, he argues that in requesting the Court to find the allegations of solvency "implausible," the CEVA Defendants are "asking the Court to draw the farfetched inference that CEVA [Group] had no value to CIL from the fact that Apollo reduced its equity interest in the CEVA Enterprise more than a month after the challenged CEVA Equity Transfers in exchange for other value (reduced enterprise debt)." Id. at 67-68; see also id. at 75 ("the CEVA Defendants' plausibility argument is grounded upon overly-simplistic inferences that do not render implausible the Trustee's detailed, document-based allegations of CEVA equity value and damage to CIL."). The Trustee contends that any discussion about what Apollo elected to do with CEVA Holdings' equity after the CEVA Equity Transfer is irrelevant because the Amended Complaint alleges with specificity that the Defendants looted CEVA Group's equity from CIL via the CEVA Equity Transfer and CIL received nothing in return. *Id.* at 71. He maintains that the CEVA Debt Transaction, in which Apollo's equity interest in CEVA Holdings was diluted in exchange for other consideration (reduction in debt) *106 was a separate non-integrated transaction and that the CEVA Equity Transfer was not contingent upon the occurrence of the CEVA Debt Transaction. *Id.* He also contends that even if that transaction was an integrated transaction, CIL still received nothing in return for the CEVA Equity Transfer; and, in any event, once the New CEVA Shares were transferred to CEVA Holdings, Apollo was free to do whatever it wanted to do with CEVA Holdings. *See* Trustee's Opp'n at 71–73.

The Court finds CarCo I, 435 B.R. 169 (Bankr. S.D.N.Y. 2010), instructive in assessing whether the CEVA Restructuring should be viewed as being comprised of five independent transactions or as one integrated, multi-step transaction. Briefly, as previously discussed, ³⁷ in that case, the trustee under the CarCo Trust contended that prior to CarCo's bankruptcy, Daimler stripped valuable assets out of CarCo for little or no consideration before selling a controlling interest in a newly created entity, Holding, to Cerberus for \$7.2 billion. The sale to Cerberus was pursuant to a so-called "Contribution Agreement" and was preceded by a restructuring of the Chrysler Companies that was effectuated pursuant to a 48 Step-Plan. Id. at 180-82. The CarCo Trust contended that certain segments of the Step-Plan resulted in transfers that enriched Daimler at the expense of CarCo's creditors who could not reach those assets. In support of its assertion that the transfers to Daimler under the Step-Plan were voidable fraudulent conveyances, the CarCo Trust focused on discrete steps in that plan, and contended that Daimler failed to provide consideration for assets it received under the Step Plan. Id. In support of its motion to dismiss the CarCo Trust's complaint, Daimler argued, among other things, that the trust erred in focusing on isolated parts of the Step-Plan because that plan and the Contribution Agreement comprised a single integrated plan, and that when viewed in that light, it was clear that Daimler provided valuable consideration in return for the assets it received under the plan. Id. In resolving that dispute, the court looked to the terms of the "deal documents," i.e., the Contribution and Step-Plan, and read those documents to constitute a single, integrated restructuring plan. See id. at 185 ("In the instant matter, the deal documents themselves make clear that the transaction is integrated, and that Daimler intended to sell its interest in the Chrysler Companies once those companies were restructured."). When viewed in that light, the CarCo I court found that Daimler had provided valuable consideration for the assets it received under the Step–Plan. Id. at 187. Here, the CIL RSA, the Term Sheet annexed to the CIL RSA, and related documents of record prove that the CEVA Restructuring was a single, integrated five-part transaction, as follows:

- 1. Recapitalization (the new share issuance by CEVA, substantially diluting CIL's ownership of CEVA Group); ³⁸
- 2. CEVA exchange offer (the exchange of new equity interests in CEVA Holdings with creditors holding more than €1.2 billion of CEVA Group's Second Lien Debt and Unsecured Debt); ³⁹
- *107 3. CIL exchange offer (consideration offered to the CIL PIK Noteholders); 40
- 4. Rights offering (€200 million of new money raised to provide CEVA Group with adequate capital to operate its business of which the Apollo Funds agreed to contribute €65 million); ⁴¹ and
- 5. Franklin financing commitment (providing further reduced interest expense and new money). 42

Those documents show that each of the five steps was dependent upon the occurrence and satisfaction of the others. In that light, it is not true that CIL received nothing in exchange for the CEVA Equity Transfer. The CIL RSA provides that CIL's consent to the recapitalization was fully contingent on the PIK Noteholders being given "the opportunity ... to receive a distribution of certain equity interests in [CEVA] Holdings" and "participat[e] in [the] rights offering." CIL RSA at 1. 43 Further, Apollo did not obtain its 21% interest in recapitalized CEVA based upon its pre-restructuring equity interest in CEVA Group. The documents make clear that Apollo obtained that interest in consideration of the cancellation of its \$295 million unsecured debt and its infusion of new money (€65 million) into CEVA Group. See CIL RSA, Ex. A-1. Moreover, Apollo was not free to do what it wanted with CEVA Holdings after the CEVA Equity Transfer. The CIL RSA is clear: "if the CEVA Exchange is not consummated," CEVA Group must "seek to commence

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the CEVA Chapter 11 case and seek confirmation of the CEVA Chapter 11 Plan." CIL RSA at § 4(c).

- 37 See Appendix III at n.3.
- The recapitalization involved two steps: (i) the subdivision, re-classification, and consolidation of CIL's shares; and (ii) the issuance of new shares by CEVA Group to CEVA Holdings. CIL facilitated the execution of both steps by agreeing to vote in favor of various CEVA shareholder resolutions. CIL RSA §§ 2(c), 3(a).
- Three parties—certain Apollo Funds, CapRe and Franklin—collectively owned more than 69.5% of the Second Lien Debt and 83.5% of the Senior Unsecured Debt of CEVA Group. CIL RSA Restructuring Term Sheet at 1. The Apollo Funds held \$295 million in CEVA Group Second Lien and Senior Unsecured Debt, which constituted 19% of the total CEVA Group debt exchanged pursuant to the CEVA exchange offer.
- The offered value was based on the proportional value of the CIL Cash. CIL RSA, Ex. B (Consideration to PIK Noteholders under the CIL exchange offer).
- All CEVA Group and CIL creditors participating in the Exchange Offers had the opportunity to purchase up to a total of €200 million of A-1 convertible preferred shares of CEVA Holdings. See CIL RSA, Ex. A (Restructuring Term Sheet), at 7, 11. Certain Apollo Funds and CapRe agreed to "backstop" the rights offering by agreeing to fund the rights offering in the event that participants in the CEVA Group and CIL exchange offers did not subscribe for the full €200 million rights offering; CapRe agreed to fund up to €75 million and the Apollo Funds agreed to fund up to €65 million. See id. at 12–13.
- Franklin did not agree to participate in the rights offering. Instead, it agreed to lend €65 million in cash and exchange its Senior Secured Debt holdings for New First Lien Cash Pay Notes. See id. at 15.
- Both shareholder resolutions executed in connection with the recapitalization contain similar language. See CIL Shareholder Resolution (Chapman Decl., Ex. R); CEVA Group Shareholder Resolution (Chapman Decl., Ex. S).

In support of the Amended Complaint, the Trustee alleges that "the value of CEVA [Group] substantially exceeded its debts, and CIL's shares of CEVA [Group]

had substantial value." Am. Compl. ¶ 1. In assessing whether the Trustee has met his burden of alleging facts from which this Court can "reasonably infer" CIL's solvency as of April 2013, the Court will consider "the full factual picture presented by the [Amended] [C]omplaint, the particular cause of action and its elements, and the existence of alternative explanations so obvious that they render plaintiff's inferences unreasonable." L-7 Designs, Inc. v. Old Navy, LLC, 647 F.3d 419, 430 (2d Cir. 2011) (citations omitted). As the CEVA Defendants note, here, too, CarCo I is instructive. Part of the relief that the CarCo Trust sought in its complaint was to avoid the transfers to Daimler as intentional *108 fraudulent transfers under state and federal law. 435 B.R. at 175. In opposing Daimler's motion to dismiss that count of the complaint, the CarCo Trust argued that CarCo's purported insolvency at the time of the transfers was a "surrounding circumstance" that demonstrated that Daimler acted with fraudulent intent. Id. at 193 (noting further that "it is not actual insolvency that is at issue but whether the fact of insolvency, if established, should weigh against Daimler to evidence intent."). The court found that because the CarCo Trust was "seeking to utilize CarCo's putative insolvency as an accumulative factor from which to infer intentional fraud ... the market participants' perception of CarCo's solvency [was] relevant." Id. In that regard, the court noted that:

The sale of the Chrysler Companies was open and highly publicized, with financial information concerning the valuation of the Chrysler Companies readily available to the investors and lenders. Therefore, the contemporaneous actions of the independent market participants serve as a benchmark of what is plausible concerning the perception of CarCo's insolvency.

Id. After taking judicial notice of the actions of "market participants" at the time of the transaction, the court found that "[t]he involvement of sophisticated and independent market participants shows the implausibility of intentional fraud." Id. In particular, in reaching that conclusion, the court focused on the willingness of Cerberus and other third parties to invest in, or provide financing in connection with, the transaction, as follows:

FinCo financed both the dealers and consumers of the cars manufactured by CarCo. Therefore, FinCo's value depended upon CarCo's performance. It is implausible to suggest that an investor, such as Cerberus, would invest \$7 billion to acquire a controlling position in a finance company whose value depended upon the performance of a company that was poised to fail. Nor is it plausible that several sophisticated banking establishments would agree to make \$10 billion in credit available to fund the transaction. Further, one of CarCo's creditors, the United Automobile Workers union, agreed to accept warrants in the company for an obligation owed to it, an action that is not consistent with an impression that the company was being set up to fail.

Id. The bankruptcy court dismissed the intentional fraud claim, with prejudice. Id. at 194. 44 Here, the actions of the "independent *109 investors"—CapRe and Franklin -arguably were not those of investors who believed that there was value in CEVA Group. Nor was Apollo's exchange of it \$295 million in debt and cash payment of €65 million in consideration for 21% of recapitalized CEVA Group. However, that CapRe and Franklin agreed to swap their claims against CEVA Group for equity in CEVA Holdings under the RSA, does not render CIL's solvency completely "implausible" because, as the Trustee correctly notes, "it is commonplace for parties to exchange their debt for equity, and there are many valid reasons for doing so." Trustee's Opp'n at 74 (citations omitted). Moreover, CarCo is distinguishable from this case. As noted, in finding that the actions of Cerberus and others could serve as a benchmark in assessing whether the Chrysler Companies were "plausibly" insolvent at the time of the restructuring, the court took solace in the fact that the underlying sale was "open and highly publicized" and that financial information about the Chrysler entities was "readily available to lenders and investors." Here, the Trustee complains that the opposite is true. He asserts that the Defendants actively concealed the restructuring transaction from the PIK Noteholders. Specifically, he asserts that "the Defendants had determined to proceed with the CEVA Equity Transfer in the most secretive manner possible in order to prevent CIL's creditors from asserting their rights until after the Defendants had already deprived CIL of its interest in CEVA [Group]." Am. Compl. ¶ 97. To that end, the Trustee alleges, among other things, that the Defendants (i) were advised by counsel not to be "too forthcoming" with its goals, strategy and alternatives in documents describing CEVA Restructuring (id. ¶ 106); (ii) effectuated the CEVA Restructuring by shareholder resolution action so as to avoid providing notice in advance of the exchange offer to non-insiders, including CIL's other shareholders (id. ¶ 107); and (iii) changed the Debtor's name from "CEVA Investments Limited" to "CIL Limited" because "Apollo did not want the word 'CEVA' to appear on shareholder notices or documents filed in the course of the Cayman Proceeding in hopes of prolonging the secrecy of the transfer." Id. ¶ 116.

In doing so, the bankruptcy court granted leave to the CarCo Trust to replead other claims, including those seeking to avoid the transfers to Daimler as constructively fraudulent transfers. After the CarCo Trust filed the Second Amended Complaint, Daimler again moved to dismiss. In granting dismissal of the constructive fraudulent conveyance counts re-pled in the Second Amended Complaint, the court noted:

The Trust's allegations concerning the gap in the consideration given and received by CarCo in the overall transaction are not plausible. Moreover, the allegations ignore the contemporaneous market information concerning the involvement of other sophisticated parties in the transactions. Indeed, the allegations are implausible in the context of the involvement of Cerberus, who paid billions of dollars in the transaction, the United Automobile Workers union, which accepted warrants in the restructured enterprise, the PBGC, which negotiated settlements with CarCo, and the banks, which made available billions of dollars to CarCo. The Trust's allegations would require an inference that all of these parties were led astray. It is implausible that these sophisticated parties, who had access to the same financial information as Daimler, would invest and rely on the wherewithal of CarCo if it had been stripped of its assets and were unable to sustain its operations.

CarCo II, 454 B.R. 38, 59–60 (Bankr. S.D.N.Y. 2011), affd In re Old CarCo LLC, 11 Civ. 5039 (DLC), 2011 U.S. Dist. LEXIS 134539 (S.D.N.Y. Nov. 22, 2011);

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aff'd In re Old CarCo LLC, 509 Fed.Appx. 77 (2d Cir. 2013).

The CEVA Defendants assert that those contentions fail to raise any inference of plausibility concerning CEVA Group's solvency because (i) the allegations focus on CIL and the Directors and do not implicate the CEVA Defendants (aside from the allegations of secrecy); and (ii) the allegations that the restructuring was done in secret and was orchestrated to avoid advance notice to the PIK Noteholders of CIL's agreement to the CIL RSA are explainable without resort to the inferences that the Trustee asks this Court to draw. See CEVA Reply at 25. However, at this stage of the litigation, the alleged lack of transparency undermines the significance that the Court will attach to the actions of the stakeholders, especially when coupled with the following allegations in the Amended Complaint in support of the Trustee's assertion that CIL was solvent in April 2013:

- The Amended Complaint identifies U.S. SEC Filings that were signed by the Directors and filed on May 4, 2012 and August 29, 2012 (the latter just a few months before the Defendants began working on the CEVA Equity Transfer) that valued CIL at approximately *110 \$1.2 billion. (See Novick Decl., Exs. H, I.) These filings were not withdrawn until April 2, 2013. Am. Compl. ¶ 6, 41–44.
- The Amended Complaint alleges that, by formal resolution passed at a board meeting, the Directors valued CIL's equity (*i.e.*, the value of the CEVA equity plus the CIL Cash, less the PIK Note liabilities) on September 20, 2012 as €1.1 billion. This was less than three months before the Defendants began working on the CEVA Equity Transfer. *Id.* ¶¶ 6, 45–48.
- The Amended Complaint alleges that the MS Report, despite manipulation by the Defendants, showed that CEVA Group possibly had equity value in 2013. *Id.* ¶¶ 6, 68–72.
- The Complaint alleges that the E & Y Report would have shown that CEVA had material positive equity value but for the Directors' interference with E & Y's work by requiring it to use a below-median market multiple (among other interferences). Id. ¶¶ 6, 62–96.

The CEVA Defendants counter that none of those valuations "are remotely sufficient to raise a plausible inference that CIL's equity in CEVA Group had value

as of the date of the restructuring." CEVA Reply at 24. First, they contend that those are not "the allegations of solvency one would expect to see in a case like this". Id. To that end, they note that the Amended Complaint does not allege (i) that CEVA Group could have been sold for an amount sufficient to return value to CIL or that either the CEVA Group debt or the PIK Notes traded at prices consistent with CEVA Group's solvency; or (ii) that CEVA Group could have drawn down on any existing financing source or otherwise obtained financing to support its operations. See id at 24. Further, they complain that the materials that the Trustee relies on do not raise a "plausible inference" of solvency. Id. at 26. Briefly, they contend that the SEC filings were outdated, and that the Trustee cannot rely on the MS Report and the E & Y Report because in the Amended Complaint, the Trustee assails the reliability of those reports. See, e.g., Am. Compl. ¶ 69 ("The short period of time that Morgan Stanley spent preparing the MS Report indicates that Morgan Stanley performed little or no diligence in preparation of the MS Report."); ¶ 71 ("the MS Report was not suitable for CIL or CIL's professionals to rely upon in evaluating or agreeing to any restructuring or recapitalization proposals for CEVA"); ¶ 77 ("The E [&] Y Report also contained multiple errors that resulted in lower values for CEVA."); ¶ 87 ("the report was misleading in that E [&] Y stated its conclusion was for 'any available scenario' notwithstanding that E [&] Y had not analyzed whether CEVA could be sold as a going concern business and whether there would be any value for shareholders in such a sale process, or whether CEVA could raise significant funds through an IPO."). In effect, the CEVA Defendants are asking the Court to put the Trustee to his proof of solvency in response to their motion to dismiss. However, "[t]he task of the court in ruling on a Rule 12(b)(6) motion 'is merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof.' Cooper v. Parsky, 140 F.3d 433, 440 (2d Cir. 1998) (quoting Ryder Energy Distrib. Corp. v. Merrill Lynch Commodities Inc., 748 F.2d 774, 780 (2d Cir. 1984)). "The determination is not whether a claimant will ultimately prevail, but whether the claimant should be allowed to offer evidence to support the claim." CarCo II, 454 B.R. 38, 47 (Bankr. S.D.N.Y. 2011) (citing Swierkiewicz v. Sorema N.A., 534 U.S. 506, 511, 122 S.Ct. 992, 997, 152 L.Ed.2d 1 (2002)). The Court *111 finds that the Trustee has met that burden. It is settled that "plausibility" is a standard lower than "probability" and, as such, "a given set of actions may well be subject to diverging interpretations, each of which is plausible." Anderson News, L.L.C. v. Am. Media, Inc., 680 F.3d 162, 184 (2d Cir. 2012) (citation omitted). Moreover, because "[flactspecific question[s] cannot be resolved on the pleadings[,]" Todd v. Exxon Corp., 275 F.3d 191, 203 (2d Cir. 2001), "[t]he choice between two plausible inferences that may be drawn from factual allegations is not a choice to be made by the court on a Rule 12(b)(6) motion." Anderson News, L.L.C., 680 F.3d at 185. Rather, at this stage of the litigation, "the question ... is not whether there is a plausible alternative to the plaintiff's theory; the question is whether there are sufficient factual allegations to make the complaint's claim plausible." Id. at 189. The Court finds that the Trustee has met that burden. The CEVA Defendants' motion to dismiss Counts 1, 2, 3, 5, 6, 10, 11, and 12 on the grounds that the Trustee has failed to allege that CIL was plausibly solvent in April 2013, is denied.

Motions to Dismiss Counts 4, 10, 12, 13, 14 & 15

Count 4—Violation of Automatic Stay

[42] Upon the filing of a petition for bankruptcy, including an involuntary petition under section 303 of the Bankruptcy Code, section 362 of the Bankruptcy Code bars "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate." 11 U.S.C. § 362(a)(3). The automatic stay took effect upon the filing of the April 22, 2013 involuntary chapter 7 petition against CIL, and the CEVA Debt Transaction closed more than a week later, on May 2, 2013. See Am. Compl. ¶ 120, 125. The Trustee contends that the "Defendants performed the CEVA Debt Transaction after the Petition Date and with actual knowledge that the Involuntary Petition had been filed." Id. ¶ 165. From that, he asserts that "[i]n the event it should be adjudged that the CEVA Equity Transfer and the CEVA Debt Transaction are parts of a single integrated transaction, the CEVA Equity Transfer is part of a transfer and transaction that was performed in part after the Petition Date." Id. ¶ 166. Thus, the Trustee seeks an order (a) declaring that the Defendants violated the automatic stay; (b) declaring that any action taken by the Defendants in violation of the automatic stay provisions of section 362 of the Bankruptcy Code are null and void ab initio, including the conveyance of CEVA Group to CEVA Holdings; and (c) directing the Defendants immediately to take all actions necessary to restore the parties to their relative positions as they

would have existed had no violation of the automatic stay occurred. *Id.* ¶ 167.

[43] Turner and Beith seek to dismiss Count 4 because the Amended Complaint does not allege that they took any action after the Petition Date in furtherance of the CEVA Restructuring. Directors' MTD at 29-30. They are correct. In substance, the Amended Complaint alleges that CIL's component in the restructuring transaction was fully completed by April 1, 2013, when it executed the CIL RSA and, in doing so, "allow[ed] CEVA Holdings ... to obtain virtually all of the equity of CEVA [Group] without providing any value or compensation to CIL." Am. Compl. ¶ 108. The Trustee has not alleged that the Directors took any affirmative action (on behalf of CIL or otherwise) post-petition. 45 Instead, the *112 Trustee contends that if it is determined that the CEVA Equity Transfer and CEVA Debt Transaction are parts of one unified transaction that did not close until after the Petition Date, the Directors' prepetition actions "will have facilitated and caused a post-petition transfer in violation of the automatic stay." Trustee's Opp'n at 100. The Trustee cites no support for that proposition. The Court rejects it, as it flies in the face of the plain language of section 362(a) that clearly provides that the automatic stay does not arise until the filing of a voluntary or involuntary bankruptcy petition. See 11 U.S.C. § 362(a). Cf. In re Moss, 270 B.R. 333, 343-44 (Bankr. W.D.N.Y. 2001) (holding that although government's exclusion and debarrment were administrative proceedings designed to collect and recover from the debtor, such actions were fully completed pre-petition and thus do not give rise to a violation of the debtor's automatic stay where the government took no post-petition actions in connection with the debtor's exclusion and debarrment).

Indeed, the Directors would not have been able to taken any actions on behalf of CIL in connection with the CEVA Restructuring after April 2, 2013, when CIL commenced liquidation proceedings in the Cayman Court and joint provisional liquidators were appointed for CIL.

The Amended Complaint fails to state a claim for relief under section 362 of the Bankruptcy Code against Turner or Beith, and the Trustee is not able to do so. Accordingly, the Court dismisses Count 4 against Turner and Beith, without leave to replead.

Count 10—Conversion of CEVA Equity

[44] In Count 10 of the Amended Complaint, the Trustee seeks to recover damages from CEVA Holdings occasioned by its alleged conversion of the "value of CIL's interest in CEVA [Group]" through the allegedly "improper CEVA Equity Transfer." Am. Compl. ¶ 199. The Trustee asserts that the "CEVA Equity Transfer intentionally and improperly interfered with CIL's ownership and/or denied CIL's rights to 99% ownership of the equity of CEVA [Group] and wrongfully converted those rights to CEVA Holdings" (id. ¶ 200), and that he is "entitled to judgement against CEVA Holdings in an amount to be proved at trial." Id. ¶ 201. CEVA Holdings contends that this Count must be dismissed.

[46] As a preliminary matter, the Trustee does not allege what law he is relying on in support of Count 10. The CEVA Defendants note that CIL is a Cayman-domiciled entity, and that the issuance of shares that the Trustee alleges operated to convert CIL's property was made by CEVA Group, an English entity, in England, in accordance with English law, to CEVA Holdings, a Marshall Islands entity. See CIL RSA §§ 2(c), 3(a) (Chapman Decl., Ex. E); Form of CEVA Group Shareholder Resolutions at 1–2 (Chapman Decl., Ex. C): CEVA MTD at 52 n.128. Thus, they contend that U.K. law may be applicable to the conversion claim alleged in Count 10. However, as the CEVA Defendants correctly note, a choice of law determination is only necessary where there is an actual conflict between the laws of the potential jurisdictions involved. See CEVA MTD at 52 (citing Drenis v. Haligiannis, 452 F.Supp.2d 418, 426 (S.D.N.Y. 2006)). They contend, the Trustee does not dispute, and the Court finds that like New York (as discussed below), the U.K. does not generally recognize a cause of action for conversion of intangible property, except in the limited case of misappropriation of a document that evidences a debt. See OGB Ltd. v. Allan, [2008] 1 A.C. 1, 100 (H.L.) (re-affirming *113 fundamental principle that " '[t]he subject matter of conversion or trover must be specific personal property, whether goods or chattels.' "). Accordingly, the Court will apply New York law in resolving this aspect of the CEVA Defendants' motion to dismiss.

[47] [48] [49] Conversion is the "unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's rights." Vigilant Ins. Co. v. Housing Auth. of El Paso,

Tex., 87 N.Y.2d 36, 44, 637 N.Y.S.2d 342, 660 N.E.2d 1121 (1995) (internal quotation marks omitted) (quoting Emp'rs Fire Ins. Co. v. Cotten, 245 N.Y. 102, 105, 156 N.E. 629, 630 (1927)). Under New York law, "[a] conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession." Colavito v. N.Y. Organ Donor Network, Inc., 8 N.Y.3d 43, 50, 827 N.Y.S.2d 96, 860 N.E.2d 713 (2006). "To withstand a motion to dismiss in a conversion claim, a plaintiff must allege: '(1) the property subject to conversion is a specific identifiable thing; (2) plaintiff had ownership, possession or control over the property before its conversion; and (3) defendant exercised an unauthorized dominion over the thing in question, to the alteration of its condition or to the exclusion of the plaintiff's rights." Kirschner v. Bennett, 648 F.Supp.2d 525, 540 (S.D.N.Y. 2009) (quoting Moses v. Martin, 360 F.Supp.2d 533, 541 (S.D.N.Y. 2004)).

The general rule in New York is that "'an action for conversion will not normally lie' when it involves intangible property because there is no physical item that can be misappropriated." *Thyroff v. Nationwide Mut. Ins. Co.*, 8 N.Y.3d 283, 289, 832 N.Y.S.2d 873, 864 N.E.2d 1272 (2007) (quoting *Sporn v. MCA Records*, 58 N.Y.2d 482, 489, 462 N.Y.S.2d 413, 448 N.E.2d 1324 (1983)); *accord Matzan v. Eastman Kodak Co.*, 134 A.D.2d 863, 521 N.Y.S.2d 917, 918 4th Dep't 1987) ("A claim for conversion does not lie for the withholding of indefinite, intangible, and incorporeal species of property.").

That rule has a well-settled, but limited, exception. The so-called "merger doctrine" recognizes that "an intangible property right can be united with a tangible object for conversion purposes," such as a stock certificate for the ownership of a share of stock. Thyroff, 8 N.Y.3d at 289, 832 N.Y.S.2d 873, 864 N.E.2d 1272 (citing Agar v. Orda, 264 N.Y. 248, 251, 190 N.E. 479 (1934); Iglesias v. United States, 848 F.2d 362, 364 (2d Cir. 1988))). 46 See also Nelly de Vuyst, USA, Inc. v. Europe Cosmetiques, Inc., No. 11 CV 1491, 2012 WL 246673, at *8 (S.D.N.Y. January 6, 2010) ("Thyroff stands for the proposition that intangible property interests may be subject to conversion when they are represented by something that is subject to conversion—e.g., physical or electronic documents.") (citation omitted); Jin Yung Chung v. Sano, 10 CV 2301, 2011 WL 1298891, at *9 (E.D.N.Y. March 31, 2011) (noting that for purposes of stating a claim for conversion under New York law, *114 "physical representation[] of intangible property can be considered tangible property for purposes of conversion. Thus in awarding damages pursuant to a finding of conversion of stock certificates, the court could award the value of the shares of stock, which are represented by physical stock certificates that were converted.") (citation omitted). CEVA Holdings contends that Count 10 must be dismissed because in seeking damages occasioned by the diminution in the value of CIL's interest in CEVA Group resulting from the issuance of New CEVA Shares to CEVA Holdings, the Trustee has not alleged that any "physical or virtual representations of CIL's ownership interests in CEVA Group were converted by CEVA Holdings." CEVA MTD at 53.

In *Thyroff*, the Second Circuit certified to the New York Court of Appeals the question whether the common law tort of conversion applied to electronic computer records and data. 8 N.Y.3d at 284, 832 N.Y.S.2d 873, 864 N.E.2d 1272. The personal property at issue was customer information and personal information about plaintiff stored on defendant's computers. *Id.* at 285, 832 N.Y.S.2d 873, 864 N.E.2d 1272. The Court found no reason "in law or logic" why the electronic files should be treated any differently than "a paper document kept in a file cabinet[,]" and held that the plaintiff could maintain a cause of action for conversion of his intangible property. *Id.* at 292, 832 N.Y.S.2d 873, 864 N.E.2d 1272.

[50] The Trustee disputes that position. He asserts that " 'there has been a growing trend [in New York] towards recognizing certain types of intangible property as proper subjects of conversion claims.' " Trustee's Opp'n at 98 (quoting Harris v. Coleman, 863 F.Supp.2d 336, 342 (S.D.N.Y. 2012)). Moreover, the Trustee cites a number of cases in which New York courts have allowed conversion claims to proceed where the alleged conversion is of tangible property or intangible rights which have been merged into documents. See Harris v. Coleman, 863 F.Supp.2d at 345 (physical conversion of patents and trademarks was allegedly effectuated by the transfer of a "record of patent ownership"); Schron v. Grunstein, 39 Misc.3d 1213A, 975 N.Y.S.2d 369 (N.Y. Sup. Ct. 2013) (finding transfer of equity interests in entities that owned real property, rather than transfer of real property itself, could state a claim for conversion; "stock certificates are considered personal property"); Siegel v. Siegel, 98 A.D.3d 426, 949 N.Y.S.2d 662, 663 (1st Dep't

2012) (allegation that defendant had "interfered with [a] possessory interest in ... stock" sufficient to state a claim for conversion; defendant "wrongfully refused to surrender stock" in which the plaintiff had an interest); LaRosa v. Arbusman, 74 A.D.3d 601, 903 N.Y.S.2d 371, 373 (1st Dep't 2010) (finding that defendant's wrongful "remov[al] [of] funds from the corporation" constituted conversion."). However, those cases are inapposite since each involves a wrongful transfer or interference with the possessory interest of specific identifiable property. ⁴⁷ Here, the Trustee has not-and cannot-allege that the CEVA Holdings deprived the Debtor of its shares in CEVA Group. The newly issued shares did not belong to CIL, and it is undisputed that the Debtor still owns all the CEVA Group share it owned just prior to the CEVA Equity Transfer. CEVA Holdings' alleged "conversion" is that by receiving the newly issued shares of CEVA Group stock, it wrongfully diluted the value of the Debtor's shares in CEVA Group, not that CEVA Holdings wrongfully exercised dominion over the Debtor's shares. "It is clear that intangible property subject to conversion law in New York is limited to items that bear a substantial similarity to tangible property, like electronically stored data ... " Yankowitz Law Firm v. Tashlitsky (In re Tashlitsky), 492 B.R. 640, 649 (Bankr. E.D.N.Y. 2013). The "value" of the Debtor's CEVA Group shares bears no resemblance to tangible property. Instead, it is an "indefinite, intangible, and incorporeal species of property," that cannot be *115 the subject of a conversion action. See, e.g., Jin Yung Chung, 2011 WL 1298891, at *9 (noting that "stock interests" cannot be converted); In re Tashlitsky, 492 B.R. at 649 ("business opportunities cannot be converted"); Nelly de Vuyst, USA, Inc., 2012 WL 246673 at *8 (finding that allegations that defendant deprived plaintiff of marketing rights under an agreement cannot be the subject of a conversion claim because "a right to the benefits under a contract is not the type of intangible property interest which Thyroff contemplated."); Rushing v. Nexpress Solutions, Inc., 05 Civ. 6243, 2009 WL 104199, at *6 (W.D.N.Y. Jan. 14, 2009) (concluding that plaintiff failed to state a claim for conversion where the claim was that the "Defendants converted [the plaintiff's] patentable idea, not a tangible expression of that idea[.]").

For example, in *LaRosa v. Arbusman*, the allegation was not that the defendant had wrongfully appropriated equity interests in a corporation. Rather, that case involved a purported shareholder

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—who did not actually own any shares—converting funds that had been invested in the corporation. *See LaRosa*, 903 N.Y.S.2d at 602. Accordingly, *LaRosa* does not support the Trustee's position in this case.

[52] CEVA Holdings also asserts that Count 10 should be dismissed because the Trustee admits that the Debtor consented to and authorized the issuance of the new shares to CEVA Holdings (see Am. Compl. ¶ 108), and in New York, "actual consent or acquiescence" is a complete defense to a claim of conversion. See Knight v. Del. & Hudson Co., 178 A.D. 518, 165 N.Y.S. 583, 584 (1st Dep't 1917); accord B & C Realty, Co. v. 159 Emmut Props. LLC, 106 A.D.3d 653, 966 N.Y.S.2d 402, 405-06 (1st Dep't 2013) (dismissing conversion claim where complaint "tacitly concedes that possession [of the allegedly converted property] was authorized"). Although the Trustee admits in the Amended Complaint that the Debtor consented to the issuance of the new shares to CEVA Holdings, he argues that such consent was "meaningless" because it was granted by the Apolloemployed directors in breach of their duties to CIL for the benefit of CEVA Holdings and Apollo. See Trustee's Opp'n at 99. However, as the court in B & C Realty recognized, the fact that consent may have been obtained by fraud or other improper means does not transform an authorized transfer into an actionable conversion. See B & C Realty, 966 N.Y.S.2d at 405–06 (in dismissing claim that defendant converted \$2 million paid by plaintiff to the defendant in connection with a real estate transaction, the court noted that "the complaint alleges that defendants took the \$2 million under false pretenses, knowing all the while that the building did not conform to the proper zoning standards and thus might not receive a final C of O. If anything, plaintiff's allegations either duplicate the dismissed fraud claim, or they amount to a claim that defendants intentionally deprived it of the benefit of its bargain."). Thus, the Trustee's claim against CEVA Holdings for conversion of CEVA Group's shares fails as a matter of law. ⁴⁸ For the foregoing reasons, the Court finds that Count 10 fails to state a claim upon which relief can be granted and must be dismissed, without leave to replead.

The case cited by the Trustee, *Plaza Hotel*, does not compel a different result. In that case, the court held that the owners of a corporation could not effectively consent to the dual representation by the same attorney of both the debtor corporation and the guarantor owners (of the debtor). *See In re Plaza*

Hotel Corp., 111 B.R. 882, 891 (Bankr. E.D. Cal. 1990). The issue before the court in *Plaza Hotel* was the disqualification of the attorney and disgorgement of fees for, among other things, lack of disclosure of the attorney's conflict. *Plaza Hotel* did not involve a claim for conversion under New York law. *Id.*

Count 12—Conspiracy Cayman Islands

The Directors argue that Count 12 should be dismissed if the Court finds that the Amended Complaint fails to allege facts that give rise to a plausible inference that CIL's equity in CEVA Group had value. The Court has not done so and has *116 denied the CEVA Defendants' motion to dismiss several Counts on that basis. As such, the Directors' motion to dismiss Count 12 is denied.

Count 13—Turnover of CIL Cash

In Count 13 of the Amended Complaint, the Trustee seeks an order pursuant to section 542 of the Bankruptcy Code directing the CEVA Defendants to turnover the CIL Cash. The Trustee alleges that the CIL Cash represents proceeds from its sale of "minority interests in [the Debtor's] equity from 2006 onwards" that the Debtor gave to CEVA Group to hold because the Debtor did not generally maintain bank accounts. Am. Compl. ¶ 128. He says that, in turn, "CEVA and its subsidiaries and affiliates administered cash through CEVA Finance[,]" which was "in effect, the inter-company bank for the multi-billion dollar CEVA enterprise." Id. Thus, he contends that "CEVA Finance or its agent is in possession, custody or control of the CIL Cash[,]" (id. at ¶ 218), and that "[b]y reason of their direct and indirect control of CEVA Finance and the entire CEVA Enterprise, CEVA[Group] and CEVA Holdings possess and control the CIL Cash." Id. ¶ 219. The Trustee maintains that for a number of years prior to the CEVA Equity Transfer, CEVA Group and its affiliates recognized the CIL Cash as an asset on their books and records. Id. ¶ 213. Moreover, he contends that (i) in its 2012 Annual Report, CEVA Group acknowledged an intercompany payable in favor of CIL as of December 31, 2012 (i.e., the CIL Cash) and did not indicate that the amount was subject to dispute (id. ¶ 225); and (ii) in a March 23, 2013 email, a representative of E & Y, referring to the CIL Cash, advised Beith and various attorneys at Mintz Levin and Appleby that he had " 'never seen any evidence to suggest whey the intercompany amount is not a good claim.' " Id. ¶ 214. The Trustee alleges that the CIL Cash "is of substantial value and benefit to CIL's estate that may be used, sold or leased by the Trustee." *Id.* ¶ 220. Accordingly, he contends that "pursuant to section 542 of the Bankruptcy Code, the Court should enter an order directing the [CEVA Defendants] immediately to pay and turnover to the Trustee the CIL Cash, and all proceeds, products and profits thereof, with interest." *Id.* ¶ 221.

[53] [54] [55] A turnover action under section 542 of the Trustee's Opp'n at 90. Bankruptcy Code applies only to property that belongs to the estate. See, e.g., U. S. v. Inslaw, Inc., 932 F.2d 1467, 1471 (D.C. Cir. 1991), cert. denied, 502 U.S. 1048, 112 S.Ct. 913, 116 L.Ed.2d 813 (1992). "Congress envisioned the turnover provision of § 542 of the Code ... to apply to tangible property and money due to the debtor without dispute which are fully matured and payable on demand." Charter Crude Oil Co. v. Exxon Co., U.S.A. In re Charter Co.), 913 F.2d 1575, 1579 (11th Cir. 1990) (citing United States v. Whiting Pools, Inc., 462 U.S. 198, 202-03, 103 S.Ct. 2309, 76 L.Ed.2d 515 (1983)). Thus, "[i]t is settled law that the debtor cannot use the turnover provisions to liquidate contract disputes or otherwise demand assets whose title is in dispute." U. S. v. Inslaw, Inc., 932 F.2d at 1472. See also Geron v. Peebler (In re Pali Holdings, Inc.), 488 B.R. 841, 851 (Bankr. S.D.N.Y. 2013) ("When the turnover power [under § 542] is properly invoked, it is simply an effort to recover property—or on property that is already property of the estate. That, in turn, invokes the court's *in rem* jurisdiction over the bankruptcy *res.*"); Penthouse Media Grp. v. Guccione (In re Gen. Media, Inc.), 335 B.R. 66, 76 (Bankr. S.D.N.Y. 2005) ("Section 542(a) does not apply if title [to the property that is the subject of the turnover request] is disputed."); Hassett v. BancOhio Nat'l Bank (In re CIS Corp.), 172 B.R. 748, 760 (Bankr. S.D.N.Y. 1994) (stating *117 that an action should be regarded a turnover proceeding under § 542(b) "only when there is no legitimate dispute over what is owed to the debtors.").

[56] The Trustee contends that the CIL Cash is plainly within the scope of the Trustee's powers to marshal existing assets of the estate for the benefit of estate creditors. *See* Trustee's Opp'n at 89–90. As support he relies on *In re Pali Holdings, Inc.*, 488 B.R. 841. There, the chapter 7 trustee brought an action to compel turnover of the proceeds of a promissory note executed by a former employee of the debtor. Among other things, the court found that the promissory note was estate property subject to turnover, and that where "there are no serious defenses to the estate's section 542 turnover rights, a

bankruptcy judge can exercise the bankruptcy court's *in rem* jurisdiction to issue a final judgment for the turnover of the estate's property, or to monetize it." *Id.* at 853. For the Trustee, the CIL Cash and promissory note in *Pali* are indistinguishable, because "the CIL Cash is property rightfully belonging to the CIL estate which the trustee can recover and monetize for the benefit of CIL's creditors." Trustee's Opp'n at 90.

The CEVA Defendants do not contest the central premise of the Trustee's allegation, i.e., that the CIL Cash consists of the "proceeds from the CIL equity issuances," and they do not dispute that they are holding the CIL Cash. They contend that the Court should dismiss Count 13 because contrary to the allegations in ¶ 129 and 215 of the Amended Complaint, the ownership of the CIL Cash is "hotly disputed." CEVA MTD at 60. To that end, the CEVA Defendants assert that (i) each of its 2012, 2013 and 2014 annual reports includes an explicit statement that the claim to the CIL Cash is disputed; (ii) the Offering Memorandum issued in connection with the restructuring states that they "vigorously dispute" that CIL is owed the CIL Cash; and (iii) the Report to Bondholders includes a provision explaining why they have "vigorously disputed" that the CIL Cash is owed to CIL. CEVA Reply at 38. 49 Moreover, they say that the Trustee's reliance on the email sent by the E & Y representative should be accorded little weight. Id. at 39.

The CEVA Defendants also say that the Petitioning Creditors who moved for the appointment of the Trustee at the outset of this case stipulated that CIL's right to the CIL Cash was disputed by the CEVA Group. See CEVA MTD at 60. However, that is not completely accurate. To be sure, that stipulation states, in part, that "CIL's assets include ... certain intercompany claims against CEVA in the new amount of €12.6 million (which CEVA has disputed)" See Supplemental Declaration of David Friedman [ECF No. 28] Ex. A at ¶ 6. However, the stipulation goes on to provide that "[t]he Petitioning Creditors have not had the opportunity to verify the facts set forth in paragraph[] [6] of this Stipulation, and reserve the right to challenge such facts should they deem it necessary." Id. at \P 15. Moreover, the stipulation is not binding on the Trustee, and he plainly denies that the CIL Cash is the subject of a bona fide dispute.

[57] It is well settled, that "[a]llegations in a complaint that are 'contradicted by more specific allegations or

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documentary evidence' are not entitled to a presumption of truthfulness." Zaretsky v. Gemological Inst. of Am., Inc., No. 14-CV-1113, 2014 WL 1678990 (S.D.N.Y. Apr. 28, 2014) (quoting Kirkendall v. Halliburton, Inc., 707 F.3d 173, 175 n.1 (2d Cir. 2013), cert. denied, 571 U.S. 882, 134 S.Ct. 241, 187 L.Ed.2d 146 (2013)). In considering the documents cited by the CEVA Defendants to rebut the presumption of truthfulness attached to the allegations in the Amended Complaint, the Court notes, as a preliminary matter, that in contrast to the Annual *118 Reports cited by the CEVA Defendants, the Court has determined that the Offering Memorandum and Report to Bondholders are outside of the scope of the record of this motion. See Appendix III. As such, the Court will not consider them in resolving the motion. That said, each of the 2012, 2013 and 2014 Annual Reports includes an explicit statement to the effect that CEVA Group disputes CIL's claim to the CIL Cash.

However, the CEVA Defendants' mere denial of CIL's entitlement to the CIL Cash without explanation or support by any documentary evidence is insufficient grounds to find that, for purposes of the Rule 12(b) (6), CIL's right to the CIL Cash is the subject of a bona fide dispute. See, e.g., In re Legal Xtranet, 2011 WL 3236053, *1 n.1 (Bankr. W.D. Tex. July 26, 2011) (refusing to dismiss plaintiff's turnover claim and noting in dicta, "simply resisting recovery is not enough to create a legitimate dispute"). Instead, courts have found the existence of a "bona-fide" or "substantial" dispute to defeat a claim for turnover where defendants have provided specific bases in defense of turnover. See, e.g., In re W. Integrated Networks, LLC, 329 B.R. 334, 342 (Bankr. D. Colo. 2005) (citing to defendant's defense that ownership of funds were disputed because they were subject to recoupment or the right to receive them had been sold to a third party); cf. In re Zaretsky v. Gemological Inst. of Am., Inc., 2014 WL 1678990, at *4-5 (plaintiff's release letter contradicted plaintiff's allegation of defendant's entitlement to diamond, defeating plaintiff's conversion claim). Here, the CEVA Defendants have done nothing more than assert that they dispute CIL's right to the CIL Cash. That does not provide grounds for dismissing Count 13. Accordingly, the motion to dismiss Count 13 is denied.

Counts 14 & 15—Recovery of CIL Cash

In Counts 14 through 17 of the Amended Complaint, the Trustee focuses on the recovery of the CIL Cash.

In Count 14, he asserts that the CEVA Defendants have "intentionally and improperly interfered with CIL's ownership of and/or denied CIL's rights to, the CIL Cash[,]" and, as such, "they have wrongfully converted those rights to [themselves]." Am. Compl. ¶ 223. Thus, they seek a judgment against the CEVA Defendants "in the amount of the CIL Cash, plus all proceeds therefrom and interest thereon." Id. ¶ 224. In support of Count 15, the Trustee alleges that the CEVA Defendants have been "unjustly enriched" because they have "wrongfully and unconscionably benefitted from the retention of the CIL Cash." Id. ¶ 226. He asserts that "by their retention of the CIL Cash[,]" the CEVA Defendants "have been enriched at the expense of CIL and CIL's creditors[.]" Id. ¶ 227. Thus, he maintains that "[e]quity and good conscience require full restitution by [the CEVA Defendants] of the direct and indirect value of the CIL Cash together with any and all proceeds and profits of the New CEVA Shares. Id. ¶ 228. In the alternative, in Count 16, the Trustee seeks damages equal to the amount of the CIL Cash predicated on the CEVA Defendants breach of their obligation to pay the CIL Cash to the Debtor (id. ¶¶ 229–231), and in Count 17, the Trustee seeks an order directing CEVA Group and CEVA Holdings to cause the turnover and payment of the CIL Cash to CIL. Id. ¶¶ 232-237. The CEVA Defendants have moved to dismiss all of those Counts. As noted, the Trustee has withdrawn Counts 16 and 17. As such, the motion with respect to those Counts is denied as moot, and the Court will focus on Counts 14 and 15.

*119 As a preliminary matter, the CEVA Defendants contend that in resolving their motion to dismiss Counts 14 and 15, to the extent there is a conflict with New York law, Dutch law should govern the resolution of those claims. They say this is so because it is undisputed that the CIL Cash is being held by CEVA Finance, a Dutch entity, in a bank account in the Netherlands, and that the account is subject to one of two cash pooling agreements (the "Cash Pooling Agreements"), both of which are (i) governed by Dutch law and (ii) contain exclusive jurisdiction clauses requiring all disputes relating to them to be brought in the Netherlands. They also assert that, in any event, by application of the "center of gravity" or "interest analysis" tests applied by New York courts in resolving "choice of law" disputes, Dutch law applies to the resolution of the motion. See CEVA MTD at 61-63. The Trustee disputes those assertions. He argues that the Court cannot consider the Cash Pooling Agreements because they are outside the scope of the record of the motion, and, in any event, are irrelevant because he is seeking to recover an estate asset, the CIL Cash, not asserting a claim for an intercompany receivable governed by a contract or forum selection clause. See Trustee's Opp'n at 93-94. He also contends that New York law applies because "New York has an 'interest' in not allowing its citizens to park other people's money in a (possibly) offshore subsidiary and refuse to return it[,]" and because this Court "certainly has a strong interest in marshalling the assets of a debtor with a case before it, so the assets may be distributed to creditors." Id. at 95. The Court agrees that the Cash Pooling Agreements are outside the scope of the record of this motion and, otherwise are not relevant to the analysis of the conversion and unjust enrichment claims in Counts 14 and 15, respectively. ⁵⁰ Moreover, it agrees that it has a strong interest in marshalling estate assets and seeing them distributed to creditors. However, as explained below, the Court disagrees that in this case, New York's choice of law rules dictate that New York law will apply where it is in conflict with Dutch law. In resolving the motion to dismiss Count 14, the Court will apply the Dutch law of conversion, because it is in conflict with New York law. In contrast, the Court will apply New York's law of unjust enrichment in resolving the motion to dismiss Count 15, because there is no conflict between New York and Dutch law.

50 The CEVA Defendants contend that Counts 14 through 17 should be dismissed as to CEVA Finance on the grounds of forum non conveniens. See CEVA MTD at 69-71. They base that argument on the forum selection clauses in the Cash Pooling Agreements. As those agreements are not part of the record of the CEVA Defendants' motion, at this time, the Court rejects forum non conveniens as a grounds for dismissing the Amended Complaint.

federal courts apply the choice-of-law rules of the state in which it sits. See Gaetano Assocs. Ltd. v. Artee Collections, Inc., 05 Civ. 3329, 2006 WL 330322, at *3 (S.D.N.Y. Feb. 14, 2006) ("A federal court applies the choice of law of the state in which it resides to state law claims." (citing Lazard Freres & Co. v. Protective Life Ins. Co., 108 F.3d 1531, 1538-39 (2d Cir. 1997))); Drenis v. Haligiannis, 452 F.Supp.2d 418, 425 (S.D.N.Y. 2006) ("A federal court adjudicating supplemental state law claims applies the choice-of-law rules of the forum state.") (citations omitted). Thus, the Court will "look[]

to choice of law rules of New York to resolve [the] conflict of laws questions." *120 Enron Wind Energy Sys. LLC v. Marathon Elec. Mfg. Corp. (In re Enron Corp. Inc.), 367 B.R. 384, 392 (Bankr. S.D.N.Y. 2007). Under New York law, "the first question to resolve in determining whether to undertake a choice of law analysis is whether there is an actual conflict of laws." Curley v. AMR Corp., 153 F.3d 5, 12 (2d Cir. 1998) (citing Matter of Allstate Ins. Co. (Stolarz), 81 N.Y.2d 219, 223, 597 N.Y.S.2d 904, 613 N.E.2d 936 (1993)). When there is no material difference between the applicable laws, the Court will apply New York law, and need not decide the choice of law issue. See Fieger v. Pitney Bowes Credit Corp., 251 F.3d 386, 393 (2d Cir. 2001). See also McHale v. Boulder Capital LLC (In re 1031 Tax Grp., LLC), 439 B.R. 47, 59 (Bankr. S.D.N.Y. 2010) (Under New York law, "[w]here there is no material difference ... between the possible applicable laws, courts may apply New York law to the issues at bar.") (citation omitted). An actual conflict exists when (i) the applicable law from each jurisdiction provides different substantive rules; (ii) the differences are relevant to the issues at hand; and (iii) the differences have a significant possible effect on the outcome of the underlying matter. See Finance One Public. Co. Ltd. v. Lehman Bros. Special Fin., Inc., 414 F.3d 325, 331 (2d Cir. 2005) (internal quotations and omitted). See also Desarrolladora Farallon S. de R.L. de C.V. v. Cargill Fin. Servs. Int'l, Inc., 666 Fed. Appx. 17, 21 (2d Cir. 2016) ("The question whether the laws of two jurisdictions are in actual conflict turns on whether there is any substantive difference between the jurisdictions' law that is potentially relevant to the disposition of the case before the court."). The conflict need not be outcome determinative. Finance One Public. Co. Ltd. v. Lehman Bros. Special Fin., Inc., 414 F.3d at 331-32 ("This does not imply, however, that before embarking on a choice-of-law analysis a court must apply the relevant substantive rules of each jurisdiction to the facts of the case and determine [60] [61] In adjudicating state law claims, what the various results would be and whether they would differ.").

> [62] The CEVA Defendants do not contend that the elements of an action for unjust enrichment are different under New York and Dutch law. Accordingly, the Court will apply New York law in resolving the CEVA Defendants' motion to dismiss Count 15. See, e.g., In re 1031 Tax Grp., LLC, 439 B.R. at 59 (applying New York law to resolve whether the debtor was holding funds in trust, where the court found the laws of states with a possible interest in the resolution of the issue,

were not materially different from that of New York). However, as to Count 14, in contrast to New York law, it is undisputed, and the Court finds, that "[t]he legal concept of 'conversion' as such, as a legal basis for repayment of the allegedly converted amount, does not exist in the Dutch Civil Code []." See Declaration of Maurits L.S. Kalff In Support of CEVA Defendants' Motion to Dismiss the Amended Complaint [ECF No. 37] ¶ 12 (the "Kalff Declaration"). As such, there is an actual conflict-i.e., a relevant difference that has a significant possible effect on the outcome of the trial between Dutch law and New York law as it relates to the law of conversion, because application of Dutch law would have an immediate effect on this litigation as it would lead to the dismissal of Count 14. Accordingly, the Court will apply New York's choice of law rules to determine whether to apply New York or Dutch law in resolving the motion to dismiss Count 14.

approach to choice of law in tort actions" is the "interest analysis." Schultz v. Boy Scouts of Am., Inc., 65 N.Y.2d 189, 197, 491 N.Y.S.2d 90, 480 N.E.2d 679 (1985). That is, "the law of the jurisdiction *121 having the greatest interest in the litigation will be applied[.]" Id. See also Travelers Indem. Co. v. Levy, 195 A.D.2d 35, 606 N.Y.S.2d 167, 170 (1st Dep't 1993) (for choice of law matters relating to tort claims, New York focuses on which jurisdiction has the greater interest in a dispute). In GlobalNet Financial. Com, Inc. v. Frank Crystal & Co., Inc., 449 F.3d 377, 385 (2d Cir. 2006), a case involving choice of law issues under New York relating to contract and tort (alleged professional negligence) claims, the Second Circuit put a finer point on the "interest analysis" test relating to tort claims, as follows:

Under the interest-analysis test, torts are divided into two types, those involving "the appropriate standards of conduct, rules of the road, for example' " and those that relate to "'allocating losses that result from admittedly tortious conduct ... such as those limiting damages in wrongful death actions, vicarious liability rules, or immunities from suit." " Mascarella v. Brown, 813 F.Supp. 1015, 1019 (S.D.N.Y. 1993) (quoting Schultz, 65 N.Y.2d at 198, 491 N.Y.S.2d 90, 480 N.E.2d 679). "If conflicting conduct-regulating laws are at issue, 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." Cooney v. Osgood Mach., Inc., 81 N.Y.2d

66, 72, 595 N.Y.S.2d 919, 612 N.E.2d 277 (1993); see Northwestern Mut. Life Ins. Co. v. Wender, 940 F.Supp. 62, 66 (S.D.N.Y. 1996). If the conflict involves allocation of losses, the site of the tort is less important, and the parties' domiciles are more important. Cooney, 81 N.Y.2d at 72, 595 N.Y.S.2d 919, 612 N.E.2d 277.

Id. at 384-85. "Conduct-regulating" rules plainly are at issue here, because the Trustee is alleging that the CEVA Defendants converted the CIL Cash. See Am. Compl. ¶ 223. Thus, the Court will apply the law of the jurisdiction where the tort occurred. See, e.g., Kwiecinski v. John K. Renke II, Law Office, No. 11-cv-2246, 2012 WL 4344589, at *5 (E.D.N.Y. July 30, 2012) (where defendant allegedly converted funds from the plaintiff, court found that differences between the law of conversion in New York and Florida gave rise to "conflicting conduct-regulating laws" and applied Florida law because " 'the law of the jurisdiction where the tort occurred will generally [63] [64] [65] In New York, "the relevant analytical apply because that jurisdiction has the greatest interest in regulating behavior within its borders." (quoting Cooney v. Osgood Mach., Inc., 81 N.Y.2d 66, 72, 595 N.Y.S.2d 919, 612 N.E.2d 277 (1993))); Hacohen v. Bolliger Ltd., 108 A.D.2d 357, 489 N.Y.S.2d 75, 78 (1st Dep't 1985) (in analyzing choice of law governing conversion claim, stating that "[w]here, as here, it is the defendant's standard of conduct that is to be judged, 'it is appropriate to look to the place of the tort so as to give effect to that jurisdiction's interest in regulating conduct within its borders...." (quoting Bing v. Halstead, 495 F.Supp. 517, 520 (S.D.N.Y. 1980))).

> As alleged in the Amended Complaint, the CIL Cash represents approximately €14 million raised from CIL's sale of minority interests in its equity beginning in 2006. See Am. Compl. ¶ 128. CIL gave the CIL Cash to CEVA Group to hold, because CIL did not maintain its own bank accounts. In turn, CEVA Group and its subsidiaries and affiliates administered cash through CEVA Finance. See id. The CIL Cash is located in the Netherlands. See, e.g., CEVA MTD at 63 ("the disputed cash [] is held in bank accounts in the Netherlands."). The Trustee maintains that by CEVA Finance's failure to return the CIL Cash to CIL, despite demand, CEVA Finance "intentionally and improperly interfered with CIL's ownership of and/or denied CIL's rights to, the CIL *122 Cash, and wrongfully converted those rights to CEVA, CEVA Holdings, and CEVA Finance." Am. Compl. ¶ 223. Thus, the alleged act of conversion—i.e., withholding the CIL Cash (denominated in Euros) in

the Netherlands bank accounts—as well as the resulting injury—i.e., being deprived of the CIL Cash—took place in the Netherlands. See, e.g., Gerloff v. Hostetter Schneider Realty, No. 12 Civ. 9404, 2014 WL 1099814, at *9 (S.D.N.Y. Mar. 20, 2014) (finding that, "despite Plaintiff's contentions, the actions that give rise to any equitable claim [of unjust enrichment] occurred in Germany—where Escada is located and likely committed any wrongful acts.").

Count 14

Based on the foregoing, in applying New York's choice of law rules, the Court will apply Dutch law in resolving the motion to dismiss Count 14. The tort of conversion is not recognized under Dutch law. See Kalff Decl. ¶ 12. Accordingly, for that reason and because Dutch law applies to this aspect of the motion, the Court grants the CEVA Defendants' motion to dismiss Count 14 of the Amended Complaint.

[66] [67] However, even assuming, arguendo, that New York law is applicable to the resolution of the motion to dismiss Count 14, the Court finds that the claim should be dismissed. It is well settled that the liability of a parent company for alleged torts of a wholly owned subsidiary "can never be predicated solely upon the fact of a parent corporation's ownership of a controlling interest in the shares of its subsidiary." Billy v. Consol. Mach. Tool Corp., 51 N.Y.2d 152, 163, 432 N.Y.S.2d 879, 412 N.E.2d 934 (1980). Rather, "[a]t the very least," a plaintiff seeking to hold a parent company so accountable, must demonstrate "direct intervention by the parent in the management of the subsidiary to such an extent that 'the subsidiary's paraphernalia of incorporation, directors and officers' are completely ignored." Id. (quoting Lowendahl v. Baltimore & Ohio R. R. Co., 247 App. Div., 144, 155, 287 N.Y.S. 62 (1st Dep't 1936)). See also Musman v. Modern Deb, Inc., 50 A.D.2d 761, 377 N.Y.S.2d 17, 20 (1975) ("It is well settled that there must be complete domination and control of a subsidiary before the parent's corporate veil can be pierced.... The control must actually be used to commit a wrong against the plaintiff and must be the proximate cause of the plaintiff's loss."). See, e.g., Baratta v. Kozlowski, 94 A.D.2d 454, 464 N.Y.S.2d 803, 805 (2d Dep't 1983) (complaint seeking to hold parent liable for the torts of its subsidiary dismissed "because complaint fails to allege that it exercised complete domination and control over the subsidiary.") (citations omitted).

Here, the Trustee's contention that CEVA Group and CEVA Holding should be held accountable for CEVA Finance's alleged acts is based on his assertion that CEVA Group and CEVA Holdings "generally have the ability to cause CEVA Finance ... to release the CIL Cash to the Trustee." Am. Compl. ¶ 130. That falls far short of the pleading necessary to provide grounds to pierce CEVA Group's and CEVA Holdings' corporate veil. That is especially so given the fact that the Trustee seeks to hold CEVA Group's and CEVA Holdings' responsible for CEVA Finance's alleged conversion of the CIL Cash, but has made no allegations that either of them so dominated and controlled CEVA Finance's operations that corporate formalities should be disregarded. To the contrary, the Trustee acknowledges that CEVA Group and CEVA Holdings are holding companies (which are not alleged to have any operational responsibilities) (Am. Compl. ¶¶ 1, 27, 28, 37, 130), while CEVA Finance functioned as the day-to-day *123 "intercompany bank" for the entire CEVA Enterprise without any alleged interference. In this light, even if New York conversion law applies, Count 14 of the Amended Complaint should be dismissed. 51 Accordingly, Count 14 is dismissed, without leave to replead.

51 In his Opposition, the Trustee seems to tie his conversion claim against CEVA Group and CEVA Holdings to his assertion that "CEVA [Group] and CEVA Holdings, who control CEVA Finance, are directing their wholly-owned subsidiary to withhold money that belongs to the CIL estate." Trustee's Opp'n at 95. The Court finds no merit to that contention because even assuming that those entities gave that direction, which the Trustee has not alleged (cf. Am. Compl. ¶ 130), that would not rise to the level of conversion. Under New York law, "[t]he rule is clear that to establish a cause of action in conversion, the plaintiff must show legal ownership or an immediate superior right of possession to a specific identifiable thing and must show that the defendant exercised an unauthorized dominion over the thing in question, to the alteration of its condition or to the exclusion of the plaintiff's rights." Indep. Discount Corp. v. Bressner, 47 A.D.2d 756, 365 N.Y.S.2d 44, 46 (2d Dep't 1975) (citation omitted). The Trustee does not contend that CEVA Group and CEVA Holdings are in possession of the CIL Cash. The Court finds no support for the notion that a parent company's failure to direct its subsidiary to return property allegedly

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converted by the subsidiary, gives rise to a claim that the parent has converted the property.

Count 15

[68] [69] In Count 15, the Trustee asserts that the CEVA Defendants have been unjustly enriched because one or more of them received and are holding the CIL Cash, alleged by the Trustee to be property of CIL's estate, and are thereby benefitting from it having not returned it to the Trustee despite due demand. See Am. Compl. ¶¶ 128– 130, 226-228. Under New York law, "[t]he essence of unjust enrichment is that one party has received money or a benefit at the expense of another." Levin v. Kitsis, 82 A.D.3d 1051, 920 N.Y.S.2d 131, 134 (2011) (internal quotation marks omitted) (quoting Goldman v. Simon Prop. Group, Inc., 58 A.D.3d 208, 869 N.Y.S.2d 125 (2d Dep't 2008)). To establish a claim for unjust enrichment, a plaintiff must show "that (1) the other party was enriched, (2) at that party'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." Mandarin Trading Ltd. v. Wildenstein, 16 N.Y.3d 173, 182, 919 N.Y.S.2d 465, 944 N.E.2d 1104 (2011) (internal quotation marks omitted) (quoting Citibank, N.A. v. Walker, 12 A.D.3d 480, 481, 787 N.Y.S.2d 48 (2d Dep't 2004).

[70] The Trustee has failed to state a claim of unjust enrichment against CEVA Group and CEVA Holdings because the Amended Complaint does not plead facts which, if true, establish that CEVA Group and CEVA Holdings have been enriched, unjustly or otherwise, by virtue of CEVA Finance's retention of the CIL Cash. What's more, as with a claim for conversion (discussed above), a parent corporation cannot be held liable to a plaintiff under a theory of unjust enrichment for its subsidiary's possession of disputed property, unless the plaintiff can establish grounds for piercing the corporate veil. See Bigio v. Coca-Cola, 675 F.3d 163, 176-77 (2d Cir. 2012) (in rejecting unjust enrichment claim against parent, Court held that "[a]ny recovery under an unjust enrichment theory, as with any recovery on a ... conversion theory, would [] require us to pierce the veil separating" the parent company form the subsidiary holding the disputed property.). See also Levin v. Kitsis, 920 N.Y.S.2d at 134 (dismissing claim for unjust enrichment against 100% shareholder because complaint "[did] not allege any basis for piercing the corporate veil"). *124 The Trustee has failed to allege such a

claim. Accordingly, Count 15 is dismissed, without leave to replead.

Conclusion

Based upon the foregoing the Court finds and determines, as follows:

Rule 12(b)(2) Relief

The Court lacks personal jurisdiction over Beith and, as such, all Counts alleged against Beith in the Amended Complaint (Counts 4, 7, 12 & 19) are dismissed, with leave to replead within 45 days of this Memorandum Decision.

The Court lacks personal jurisdiction over CEVA Finance and, as such, all claims asserted against CEVA Finance in the Amended Complaint are dismissed, with leave to replead within 45 days of the Memorandum Decision.

Rule 12(b)(6) Relief

The CEVA Equity Transfer that the Trustee seeks to avoid pursuant to sections 544, 548 and 550 of the Bankruptcy Code in Counts 1, 2 and 3 was a foreign transfer and those sections of the Bankruptcy Code do not apply extraterritorially. Moreover, by application of the principles of international comity, Cayman law is applicable to the resolution of the avoidance claims. Accordingly, Counts 1, 2 and 3 are dismissed, without leave to replead, except that the Trustee will be permitted to assert an intentional fraudulent transfer claim herein, under Cayman law, divorced of any aspect of the Bankruptcy Code.

The Trustee has alleged plausibly that CEVA Group was solvent at the time of the CEVA Restructuring, thus the CEVA Defendants' motion to dismiss Counts 1, 2, 3, 5, 6, 10, 11, and 12 on that basis is denied.

The Directors' motion to dismiss Count 4 (Violation of Automatic Stay) is granted, without leave to replead.

The Directors' motion to dismiss Count 12 (Conspiracy Cayman Islands law) is denied.

The CEVA Defendants' motion to dismiss Count 10 (Conversion of CEVA equity) is granted as against CEVA Holdings, without leave to replead.

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The CEVA Defendants' motion to dismiss Count 13 (Turnover—CIL Cash) as against all CEVA Defendants is denied.

The CEVA Defendants' motion to dismiss Count 14 (Conversion—CIL Cash) is granted as against all CEVA Defendants, without leave to replead.

The CEVA Defendants' motion to dismiss Count 15 (Unjust Enrichment—CIL Cash) is granted as against CEVA Group and CEVA Holdings, without leave to replead.

The CEVA Defendants' motion to dismiss Count 6 (Turnover of CEVA Equity), Count 12 (Aiding/

Abetting under New York law), Count 16 (Breach of Contract—CIL Cash), and Count 17 (Injunction) are denied as moot.

The CEVA Defendants' motion to dismiss Counts 14–17 against CEVA Finance based on *forum non conveniens* is denied.

SETTLE ORDER.

All Citations

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End of Document

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KeyCite Red Flag - Severe Negative Treatment
Vacated and Remanded by Official Committee of Unsecured Creditors
of Arcapita v. Bahrain Islamic Bank, S.D.N.Y., March 30, 2016
529 B.R. 57

United States Bankruptcy Court, S.D. New York.

IN RE ARCAPITA BANK B.S.C.

(C), et al., Reorganized Debtors.

Official Committee of Unsecured Creditors of Arcapita Bank B.S.C.(c), et al., Plaintiff,

Bahrain Islamic Bank, Defendant. Official Committee of Unsecured Creditors of Arcapita Bank B.S.C.(c), et al., Plaintiff,

Tadhamon Capital B.S.C., Defendant.

Case No. 12–11076 (SHL) (Jointly Administered)

Adv. No. 13–01434 (SHL), Adv. No. 13–01435 (SHL)

Signed April 17, 2015

Synopsis

Background: Official committee of unsecured creditors for Chapter 11 debtor, a Bahraini investment bank, brought adversary proceeding seeking turnover of funds invested by debtor with two Bahraini entities just before the bankruptcy filing. Defendants moved to dismiss.

Holdings: The Bankruptcy Court, Sean H. Lane, J., held that:

- [1] bankruptcy court lacked personal jurisdiction over foreign defendants, and
- [2] jurisdictional discovery to determine whether defendants were subject to bankruptcy court's general jurisdiction was not appropriate.

Motion granted.

West Headnotes (21)

[1] Bankruptcy

Evidence

To survive a motion to dismiss for lack of personal jurisdiction, plaintiff must make a prima facie showing that jurisdiction exists, which must include an averment of facts that, if credited by the ultimate trier of fact, would suffice to establish jurisdiction over the defendant. Fed. R. Civ. P. 12(b)(2); Fed. R. Bankr. P. 7012(b).

Cases that cite this headnote

[2] Bankruptcy

Evidence

Bankruptcy

Presumptions and burden of proof

On a motion to dismiss for lack of personal jurisdiction, a court may consider materials outside the pleadings, but must credit plaintiffs' averments of jurisdictional facts as true. Fed. R. Civ. P. 12(b)(2); Fed. R. Bankr. P. 7012(b).

Cases that cite this headnote

[3] Bankruptcy

Presumptions and burden of proof

On a motion to dismiss for lack of personal jurisdiction, all pleadings and affidavits are to be construed in a light most favorable to the plaintiff and all doubts resolved in the plaintiff's favor; this is notwithstanding a controverting presentation by the moving party. Fed. R. Civ. P. 12(b)(2); Fed. R. Bankr. P. 7012(b).

Cases that cite this headnote

[4] Bankruptcy

Presumptions and burden of proof

On a motion to dismiss for lack of personal jurisdiction, where a defendant

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rebuts plaintiff's unsupported allegations with direct, highly specific, testimonial evidence regarding a fact essential to jurisdiction, and plaintiffs do not counter that evidence, the allegation may be deemed refuted. Fed. R. Civ. P. 12(b)(2); Fed. R. Bankr. P. 7012(b).

Cases that cite this headnote

[5] Bankruptcy

Presumptions and burden of proof

In determining whether a plaintiff has met its burden of making a prima facie showing that personal jurisdiction exists, court will not draw argumentative inferences in the plaintiff's favor nor must it accept as true a legal conclusion couched as a factual allegation. Fed. R. Civ. P. 12(b)(2); Fed. R. Bankr. P. 7012(b).

Cases that cite this headnote

[6] Bankruptcy

Foreign Countries, Corporations, Business Entities, and Citizens

Constitutional Law

Particular Parties or Circumstances

Court must conduct a two-part inquiry to determine whether personal jurisdiction exists over a foreign defendant: first, the court needs to examine whether the defendant has the requisite minimum contacts with the United States at large, and if such contacts are found to exist, the court must then determine the reasonableness of exercising personal jurisdiction over the defendant under the circumstances and whether doing so would offend traditional notions of fair play and substantial justice. U.S.C.A. Const.Amend. 5; Fed. R. Civ. P. 12(b)(2); Fed. R. Bankr. P. 7012(b).

1 Cases that cite this headnote

[7] Bankruptcy

Personal Jurisdiction

Constitutional Law

Particular Parties or Circumstances

When examining the question of "minimum contacts" on motion to dismiss for lack of personal jurisdiction, courts differentiate between "specific" and "general" personal jurisdiction; either is adequate to satisfy the minimum contacts requirement of the Due Process Clause. U.S.C.A. Const.Amend. 5; Fed. R. Civ. P. 12(b)(2); Fed. R. Bankr. P. 7012(b).

Cases that cite this headnote

[8] Bankruptcy

Foreign Countries, Corporations, Business Entities, and Citizens

Specific jurisdiction is established when a foreign defendant purposefully directs his activities at residents of the forum and the underlying cause of action arises out of or relates to those activities. U.S.C.A. Const.Amend. 5; Fed. R. Civ. P. 12(b)(2); Fed. R. Bankr. P. 7012(b).

Cases that cite this headnote

[9] Bankruptcy

Personal Jurisdiction

General jurisdiction is based on the defendant's general business contacts with the forum and permits a court to exercise its power in a case where the subject matter of the suit is unrelated to those contacts. U.S.C.A. Const.Amend. 5; Fed. R. Civ. P. 12(b)(2); Fed. R. Bankr. P. 7012(b).

Cases that cite this headnote

[10] Bankruptcy

- Personal Jurisdiction

Since general jurisdiction is not related to the events giving rise to the suit, courts impose a more stringent minimum contacts test, requiring the plaintiff to demonstrate the defendant's continuous and systematic general business contacts. U.S.C.A. Const.Amend. 5; Fed. R. Civ. P. 12(b)(2); Fed. R. Bankr. P. 7012(b).

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Cases that cite this headnote

[11] Bankruptcy

- Personal Jurisdiction

In determining whether the assertion of personal jurisdiction is reasonable in a given case, courts will consider the following factors: (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. U.S.C.A. Const.Amend. 5; Fed. R. Civ. P. 12(b)(2); Fed. R. Bankr. P. 7012(b).

Cases that cite this headnote

[12] Bankruptcy

Particular cases

Bankruptcy court lacked personal jurisdiction over foreign defendants in adversary proceeding brought by official committee of unsecured creditors for Chapter 11 debtor, a Bahraini investment bank, seeking turnover of funds invested by debtor with two Bahraini entities just before the bankruptcy filing, given that defendants did not maintain a correspondent account in the United States and clearly did not benefit from the privilege of doing business in the United States under those circumstances, and defendants could not have reasonably foreseen being haled into court in the United States, as they did not have or ever maintain offices, staff or telephone numbers in the United States, and they did not do business or solicit business or clients in the United States, and did not advertise in the United States. U.S.C.A. Const.Amend. 5; Fed. R. Civ. P. 12(b)(2); Fed. R. Bankr. P. 7012(b).

Cases that cite this headnote

[13] Bankruptcy

Foreign Countries, Corporations, Business Entities, and Citizens

Mere existence of a correspondent account by itself is insufficient to establish minimum contacts over a foreign bank. Fed. R. Civ. P. 12(b)(2); Fed. R. Bankr. P. 7012(b).

1 Cases that cite this headnote

[14] Bankruptcy

Personal Jurisdiction

Minimum contacts, as required to support personal jurisdiction, will be found where the defendant purposefully availed itself of the privilege of doing business in the forum and could foresee being haled into court there. U.S.C.A. Const.Amend. 5; Fed. R. Civ. P. 12(b)(2); Fed. R. Bankr. P. 7012(b).

Cases that cite this headnote

[15] Bankruptcy

Nonresidents, Proceedings and Actions Against

Unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum state, as required to support personal jurisdiction. U.S.C.A. Const.Amend. 5; Fed. R. Civ. P. 12(b)(2); Fed. R. Bankr. P. 7012(b).

1 Cases that cite this headnote

[16] Bankruptcy

- Personal Jurisdiction

Mere knowing receipt of funds at a correspondent bank account is insufficient to establish personal jurisdiction. U.S.C.A. Const.Amend. 5; Fed. R. Civ. P. 12(b)(2); Fed. R. Bankr. P. 7012(b).

1 Cases that cite this headnote

[17] Bankruptcy

Personal Jurisdiction

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Specific jurisdiction is appropriate only where the contacts proximately result from actions by the defendant himself that create a substantial connection with the forum state. U.S.C.A. Const.Amend. 5; Fed. R. Civ. P. 12(b)(2); Fed. R. Bankr. P. 7012(b).

Cases that cite this headnote

[18] Bankruptcy

Presumptions and burden of proof

Where nonresident defendant deliberately engaged in significant activities within a state or has created continuing obligations between himself and residents of the forum, he manifestly has availed himself of the privilege of conducting business there, and because his activities are shielded by the benefits and protections of the forum's laws it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well. U.S.C.A. Const.Amend. 5; Fed. R. Civ. P. 12(b)(2); Fed. R. Bankr. P. 7012(b).

Cases that cite this headnote

[19] Bankruptcy

Examination and Discovery

Jurisdictional discovery to determine whether defendants were subject to bankruptcy court's general jurisdiction was not appropriate in adversary proceeding brought by official committee of unsecured creditors for Chapter 11 debtor, a Bahraini investment bank, seeking turnover of funds invested by debtor with two Bahraini entities just before the bankruptcy filing, given that defendants asserted in declaration that they did not have and never maintained offices, staff or telephone numbers in the United States, they did not do business or solicit business or clients in the United States, and did not advertise in the United States. U.S.C.A. Const. Amend. 5; Fed. R. Civ. P. 12(b)(2); Fed. R. Bankr. P. 7012(b).

Cases that cite this headnote

[20] Bankruptcy

Examination and Discovery

At the jurisdictional stage, courts enjoy broad discretion in deciding whether to order discovery.

Cases that cite this headnote

[21] Bankruptcy

Examination and Discovery

Party cannot base their request for jurisdictional discovery on mere speculations or hopes that further connections to the forum will come to light in discovery.

Cases that cite this headnote

Attorneys and Law Firms

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MEMORANDUM OF DECISION

SEAN H. LANE, UNITED STATES BANKRUPTCY JUDGE

Before the Court are motions to dismiss filed by Bahrain Islamic Bank ("BisB") and Tadhamon Capital B.S.C. ("Tadhamon," and together with BisB, the "Defendants"), respectively, in the above-captioned adversary proceedings. The adversary proceedings were brought by the official committee of unsecured creditors for the above-captioned chapter 11 cases (the "Committee"). The cases seek the turnover of funds invested by the Debtor Arcapita Bank—a Bahraini investment bank—with the Defendants—two Bahraini

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entities—just before the bankruptcy filing. Because the motions in the two cases raise the same issues, the Court will address them together. The Defendants make several arguments for dismissal, including that the Court lacks personal jurisdiction over the Defendants. For the reasons set forth below, the motions are granted for lack of personal jurisdiction.

BACKGROUND

Arcapita Bank B.S.C.(c) ("Arcapita"), one of the above-captioned reorganized *61 debtors, is licensed as an Islamic wholesale bank by the Central Bank of Bahrain. BisB Compl. ¶12; Tadhamon Compl. ¶12. Headquartered in Bahrain, Arcapita is operated as an investment bank and is a global manager of Shari'ah compliant alternative investments. BisB Compl. ¶12; Tadhamon Compl. ¶12. Prior to its bankruptcy filing, Arcapita and its affiliates employed 268 people and, together with the debtors and their non-debtor subsidiaries, maintained offices in Bahrain, Atlanta, London, Hong Kong and Singapore. BisB Compl. ¶12; Tadhamon Compl. ¶12.

Defendant BisB is an Islamic commercial bank headquartered in Bahrain. BisB Compl. ¶ 13. BisB maintains correspondent bank accounts in the United States with Deutsche Bank, Standard Chartered Bank and JP Morgan Chase Bank. BisB Compl. ¶ 14. As required by the Patriot Act, BisB has designated an agent for service of process in the United States in connection with these accounts. BisB Compl. ¶ 14. BisB also participates in the Clearing House Interbank Payments System, located in New York. BisB Compl. ¶ 14.

Defendant Tadhamon is a Bahraini corporation and a subsidiary of Tadhamon International Islamic Bank ("TIIB"), a Yemeni bank that offers Islamic banking and investment services to customers in Yemen and abroad. Tadhamon Compl. ¶ 13. Tadhamon serves as the investment arm of TIIB. Tadhamon Compl. ¶ 13. While Tadhamon does not maintain any correspondent accounts in the United States, see Hr'g Tr. 62:19–21 (March 19, 2014), TIIB has correspondent bank accounts in the United States with Mashreq Bank and the Bank of New York Mellon. Tadhamon Compl. ¶ 14. As required by the Patriot Act, TIIB has designated an agent for service of process in the United States in connection with each of these accounts and also participates in the Clearing House

Interbank Payments System in New York. Tadhamon Compl. ¶ 14.

According to the Defendants, they do not and have never maintained offices, staff or telephone numbers in the United States. Decl. of Waleed Rashdan ¶ 2 [Tadhamon ECF No. 8]; Decl. of Mohammed Ebraim Mohammed ¶ 2 [BisB ECF No. 8]. The Defendants maintain that they do not do business in the United States, do not solicit business or clients in the United States and do not advertise in the United States. Rashdan Decl. ¶ 2; Mohammed Decl. ¶ 2. Neither Defendant has filed a proof of claim in the debtors' cases

A. The Placements

A few days prior to its bankruptcy filing, Arcapita made several discrete short-term debt investments through the Defendants (the "Placements"). BisB Compl. ¶¶ 27, 30; Tadhamon Compl. ¶¶ 27, 31. The Placements were made under two separate investment agreements between Arcapita and each of the Defendants (the "Placement Agreements"). *Id.* ¹ Both of the *62 Placement Agreements were negotiated and signed in Bahrain and provided that the laws of the Kingdom of Bahrain govern, except to the extent that such laws conflicted with the principles of Islamic Shari'ah, in which case Shari'ah law would prevail. Rashdan Decl. ¶ 13 & Ex. A, § 7.1; Mohammed Decl. ¶ 5 & Ex. A § 12.

Arcapita and BisB entered into their Placement Agreement on July 10, 2003. BisB Compl. ¶ 23. Arcapita made at least five previous investments with BisB under the terms of the Placement Agreement in the two years before the investments here were made. BisB Compl. ¶ 26. These previous transfers are not relied on by the Committee as a basis for personal jurisdiction. Indeed, the Committee states that "Arcapita did not enter into placement transactions with [BisB] as part of the ordinary course of business." BisB Compl. ¶ 25. Accordingly, the Court does not address these previous transfers as part of its jurisdictional analysis.

Arcapita and Tadhamon entered into their Placement Agreement on March 15, 2012. Tadhamon Compl. ¶¶ 22–23. The Committee does not allege that Arcapita had placed any investments with Tadhamon prior to the transactions in question. Tadhamon Compl. ¶¶ 22–23.

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Under the terms of the Placement Agreements, Arcapita appointed the Defendants to serve as its agent in the purchase of the Placement investments on Arcapita's behalf. BisB Compl. ¶¶ 23–24; Tadhamon Compl. ¶¶ 22, 24. The Defendants were subsequently obligated to repurchase the Placements from Arcapita on a deferred payment basis for an amount equal to the original investment, plus an agreed-upon return (the "Placement Proceeds"). BisB Compl. ¶¶ 2, 24; Tadhamon Compl. ¶ 2, 24. The Defendants were to transfer the Placement Proceeds to Arcapita on the designated maturity date of the Placement. BisB Compl. ¶¶ 2, 24; Tadhamon Compl. ¶ 2, 24.

Consistent with these Placement Agreements, Arcapita entered into a Placement with BisB in the amount of \$10 million on March 14, 2012 (the "BisB Placement"). BisB Compl. ¶ 27. To execute the BisB Placement, Arcapita transferred funds from its account at JP Morgan Chase Bank in New York to the correspondent bank account maintained by BisB at JP Morgan Chase Bank in New York. BisB Compl. ¶ 15. The Committee alleges that this transfer took place at the direction of BisB. BisB Compl. ¶ 15, 28. On the same day as the transfer, BisB purchased the commodities for Arcapita through a London broker. Mohammed Decl. ¶ 10.

Arcapita entered into two Placements with Tadhamon on March 15, 2012, each for \$10 million (the "Tadhamon Placements"). Tadhamon Compl. ¶ 27. To execute the Tadhamon Placements, Arcapita transferred funds from its account at JP Morgan Chase Bank in New York to an account at HSBC Bank in New York. Tadhamon Compl. ¶ 28. The HSBC account was a correspondent bank account maintained by Khaleeji Commercial Bank B.S.C., Tadhamon's bank in Bahrain. Rashdan Decl. ¶ 7. The funds were then immediately transferred from the HSBC account to an account held by Tadhamon at Khaleeji Commercial Bank in Bahrain. Tadhamon Compl. ¶ 28; Rashdan Decl. ¶ 7. The Committee asserts that the HSBC account was designated by Tadhamon as the account to which the funds were to be transferred. Tadhamon Compl. ¶ 28.

B. Bankruptcy Case

Less than a month after these Placements, Arcapita filed for protection under Chapter 11 of the Bankruptcy Code. On April 5, 2012, the U.S. Trustee appointed an official committee of unsecured creditors pursuant to Section 1102(a) of the Bankruptcy Code (the "Committee" or the "Plaintiff"). All of the Placements matured within a month after Arcapita's bankruptcy filing. 2 Both Defendants, however, failed to deliver the Placement Proceeds to Arcapita. BisB Compl. ¶¶ 32, 34; Tadhamon Compl. ¶ 35, 38. Instead, the Defendants informed Arcapita that, under *63 Bahraini law, they were setting off the Placement Proceeds against amounts owed to them by Arcapita. BisB Compl. ¶ 34; Tadhamon Compl. ¶ 38. In December 2012, Tadhamon returned to Arcapita the portion of the Placement Proceeds that exceeded its purported setoff. Tadhamon Compl. ¶ 40. The Committee alleges that the current outstanding balance of Placement Proceeds due and owing to Arcapita is \$10,002,292.00 from BisB and \$18,480,269.00 from Tadhamon. BisB Compl. ¶ 36; Tadhamon Compl. ¶ 40.

- The BisB Placement matured on March 29, 2012, and the Tadhamon Placements matured on March 30, 2012 and April 16, 2012, respectively. BisB Compl. ¶ 31; Tadhamon Compl. ¶ 27. On March 28, 2012 and April 15, 2012, respectively, Arcapita and Tadhamon reinvested the Tadhamon Placements for an additional term, resulting in new maturity dates of April 30, 2012 and May 16, 2012. Tadhamon Compl. ¶ 36.
- Based on Arcapita's pre-existing relationship with the Defendants, Arcapita already owed millions in unmatured debt to each of the Defendants at the time of the Placements. Arcapita owed \$9,774,096.15 to BisB as a result of investments that BisB made with Arcapita on December 1, 2011. BisB Compl. ¶¶ 3, 16–20. Arcapita owed \$18,497,734.48 to Tadhamon as a result of multiple investments that Tadhamon made with Arcapita between September 2009 and January 2012. Tadhamon Compl. ¶¶ 17–19.

In June 2013, the Court confirmed the proposed plan of reorganization in Arcapita's bankruptcy. See Findings of Fact, Conclusions of Law, and Order Confirming the Second Amended Joint Plan of Reorganization of Arcapita Bank B.S.C.(c) and Related Debtors With Respect to Each Debtor Other Than Falcon Gas Storage Company, Inc. Under Chapter 11 of the Bankruptcy Code [ECF No. 1262]. Later that summer, the Court entered the Order Granting Committee's Motion for Leave, Standing and Authority to Prosecute Avoidance Claims [ECF No. 1411], which granted the Committee the authority to pursue the claims asserted here against the Defendants. The Committee subsequently brought these cases against the Defendants

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for breach of contract, turnover, the avoidance of a preferential transfer, violation of the automatic stay, and claims disallowance. BisB Compl. ¶ 1; Tadhamon Compl. ¶ 1. The Committee seeks, among other things, to compel the Defendants to comply with their obligations under the Placement Agreements by turning over the Placement Proceeds. Alternatively, the Committee seeks to have the Placements avoided and recover the funds as an improper payment of antecedent debts under Sections 547(b) and 550 of the Bankruptcy Code. BisB Compl. ¶ 6; Tadhamon Compl. ¶ 6.

DISCUSSION

A. The Doctrine of Personal Jurisdiction

[1] [2] Fed. R. Civ. P. 12(b)(2), incorporated herein by Bankruptcy Rule 7012(b), provides for dismissal of a case for lack of personal jurisdiction. See Fed. R. Bankr.P. 7012(b). To survive a Rule 12(b)(2) motion, a party must make a prima facie showing that jurisdiction exists. See O'Neill v. Asat Trust Reg. (In re Terrorist Attacks on September 11, 2001), 714 F.3d 659, 673 (2d Cir.2013) (citing Penguin Grp. (USA) Inc. v. Am. Buddha, 609 F.3d 30, 34 (2d Cir.2010)). This "must include an averment of facts that, if credited by the ultimate trier of fact, would suffice to establish jurisdiction over the defendant." In re Terrorist Attacks, 714 F.3d at 673 (quoting Chloe# v. Queen Bee of Beverly Hills, LLC, 616 F.3d 158, 163 (2d Cir.2010)). "[A] court may consider materials outside the pleadings, but must credit plaintiffs' averments of jurisdictional facts as true." In re Stillwater Capital Partners Inc. Litig., 851 F.Supp.2d 556, 566-67 (S.D.N.Y.2012).

[3] [4] [5] In a Rule 12(b)(2) motion, all pleadings and affidavits are to be construed in a light most favorable to the plaintiff and all doubts resolved in the plaintiff's favor. See *64 In re Terrorist Attacks, 714 F.3d at 673 (citing Penguin Grp., 609 F.3d at 34). This is "notwithstanding a controverting presentation by the moving party." In re Stillwater Capital, 851 F.Supp.2d at 567 (quoting A.I. Trade Fin., Inc. v. Petra Bank, 989 F.2d 76, 79–80 (2d Cir.1993)). But where a "defendant rebuts plaintiffs' unsupported allegations with direct, highly specific, testimonial evidence regarding a fact essential to jurisdiction—and plaintiffs do not counter that evidence—the allegation may be deemed refuted." In re Stillwater Capital, 851 F.Supp.2d at 567 (quoting

Schenker v. Assicurazioni Generali S.p.A., Consol., 2002 WL 1560788, at *3, 2002 U.S. Dist. LEXIS 12845, at *12 (S.D.N.Y. July 15, 2002)). Furthermore, "in determining whether a plaintiff has met [its] burden, [a court] will not draw argumentative inferences in the plaintiff's favor ... nor must [it] accept as true a legal conclusion couched as a factual allegation." *In re Terrorist Attacks*, 714 F.3d at 673

[6] A court must conduct a two-part inquiry to determine whether personal jurisdiction exists over a defendant. First, the court needs to examine whether the defendant has "the requisite minimum contacts with the United States at large." Picard v. Chais (In re Bernard L. Madoff Inv. Sec. LLC), 440 B.R. 274, 278 (Bankr.S.D.N.Y.2010) (citing Cruisephone, Inc. v. Cruise Ships Catering & Servs., N.V. (In re Cruisephone, Inc.), 278 B.R. 325, 331 (Bankr.E.D.N.Y.2002)). If such contacts are found to exist the court must then determine the reasonableness of exercising personal jurisdiction over the defendant under the circumstances and whether doing so would "offend 'traditional notions of fair play and substantial justice.' " Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec., LLC, 460 B.R. 106, 117 (Bankr.S.D.N.Y.2011) (quoting Asahi Metal Indus. Co., Ltd. v. Super. Ct. Cal., 480 U.S. 102, 113, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987) (internal quotations omitted); Metro. Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560, 567 (2d Cir.1996)); Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez, 305 F.3d 120, 129 (2d Cir.2002) ("Where a plaintiff makes the threshold showing of the minimum contacts required for the first test, a defendant must present a compelling case that the present of some other considerations would render jurisdiction unreasonable.") (internal quotations omitted).

[7] [8] When examining the first question of "minimum contacts," courts differentiate between "specific" and "general" personal jurisdiction. See In re Terrorist Attacks, 714 F.3d at 673. Either is adequate to satisfy the minimum contacts requirement of the Due Process Clause. See id. at 674 (citing Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414–16, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984)). Specific jurisdiction is established when 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.' "Madoff, 460 B.R. at 117 (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472, 105

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S.Ct. 2174, 85 L.Ed.2d 528 (1985)); see also Bank Brussels Lambert, 305 F.3d at 127 ("Where the claim arises out of, or relates to, the defendant's contacts with the forum—i.e., specific jurisdiction—minimum contacts exist where the defendant 'purposefully availed' itself of the privilege of doing business in the forum and could foresee being 'haled into court' there.") (internal citations and quotations omitted).

[9] [10] In contrast, general jurisdiction "is based on the defendant's general business contacts with the forum ... and permits a court to exercise its power in a case where the subject matter of the suit is *65 unrelated to those contacts." *In re Terrorist Attacks*, 714 F.3d at 674 (quoting *Metro. Life Ins. Co.*, 84 F.3d at 568; *Helicopteros*, 466 U.S. at 414–16 & nn. 8–9, 104 S.Ct. 1868). Since "general jurisdiction is not related to the events giving rise to the suit, ... courts impose a more stringent minimum contacts test, requiring the plaintiff to demonstrate the defendant's 'continuous and systematic general business contacts.' "*In re Terrorist Attacks*, 714 F.3d at 674 (quoting *Helicopteros*, 466 U.S. at 416 & n. 9, 104 S.Ct. 1868).

[11] If minimum contacts are present, a court must then turn to the second question of whether the exercise of jurisdiction will "offend 'traditional notions of fair play and substantial justice.' " Madoff Inv. Sec., 460 B.R. at 117 (quoting Asahi Metal Indus., 480 U.S. at 113, 107 S.Ct. 1026; Metro. Life Ins. Co., 84 F.3d at 567). In determining whether the assertion of jurisdiction is reasonable in a given case, courts will consider the following factors: "(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." Bank Brussels Lambert, 305 F.3d at 129 (internal citations and quotations omitted).

B. No Specific Jurisdiction Exists Over the Defendants

[12] As to the first prong of the jurisdictional inquiry, the Defendants argue that their actions do not represent the necessary minimum contacts to comport with due process. They argue that because the transactions here took place between foreign entities under agreements negotiated, signed and performed in a foreign country and

that the one-time use of correspondent accounts in New York to receive funds from Arcapita was not significant enough to impart jurisdiction. The Committee counters that the Defendants purposefully availed themselves of the benefits of the U.S. banking system by using New York correspondent accounts and that the Committee's underlying claims arise from or relate to the use of those accounts. ⁴

The Committee states that it currently lacks the information necessary to determine whether the Defendants are subject to general jurisdiction, but reserves its right to assert such jurisdiction pending discovery. BisB Obj. 8 n.6; Tadhamon Obj. 8 n.6. The only question before the Court, therefore, is whether specific jurisdiction exists over the Defendants.

[13] Central to the Committee's jurisdictional arguments is the use of correspondent bank accounts, which are

accounts in domestic banks held in the name of foreign financial institutions. Typically, foreign banks are unable to maintain branch offices in the United States and therefore maintain an account at a United States bank to effect dollar transactions.... Without correspondent banking ... it would often be impossible for banks to provide comprehensive nationwide and international banking services —among them, the vital capability to transfer money by wire with amazing speed and accuracy across international boundaries.

Licci v. Lebanese Canadian Bank, SAL, 673 F.3d 50, 56 (2d Cir.2012) (internal citations and quotations omitted). The mere existence of a correspondent account by itself is insufficient to establish minimum contacts over a foreign bank. See Tamam, 677 F.Supp.2d at 727 (in the *66 context of discussion on CPLR § 302(a)(1), stating that "courts in this district have routinely held that merely maintaining a New York correspondent bank account is insufficient to subject a foreign bank to personal jurisdiction.") (collecting cases); Licci v. Lebanese Canadian Bank, SAL, 20 N.Y.3d 327, 336–38, 960 N.Y.S.2d 695, 984 N.E.2d 893 (2012). Rather, the issue is whether the Defendants' use of a correspondent

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account in these cases conveys specific jurisdiction upon them

[14] We begin with Tadhamon. Arcapita transferred the Tadhamon Placement funds to a correspondent bank account at HSBC Bank in New York that was maintained by Khaleeji Commercial Bank, which is Tadhamon's Bank in Bahrain. Tadhamon Compl. ¶ 28; Rashdan Decl. ¶ 7. The funds were then transferred from the HSBC account to an account held by Tadhamon at Khaleeji in Bahrain. Tadhamon Compl. ¶ 28. It did not even maintain its own correspondent account, but instead used an account maintained in the United States by another bank. But Tadhamon's use of a third party's correspondent bank account is insufficient to establish specific jurisdiction. Minimum contacts will be found "where the defendant purposefully availed itself of the privilege of doing business in the forum and could foresee being haled into court there." Bank Brussels Lambert, 305 F.3d at 127 (internal citations and quotations omitted). Tadhamon made a conscious decision to forego maintenance of a correspondent account in the United States and has clearly not benefitted from the privilege of doing business here under these circumstances. If anything, Tadhamon has accepted the inconvenience caused by its lack of a correspondent account in the United States, and therefore arranged an alternate means of payment through a third party when transacting business in U.S. currency. Thus, Tadhamon has not directed its activities towards residents of this forum in a way that supports personal jurisdiction. See Madoff, 460 B.R. at 117. 7

Many of the cases cited by the parties and discussed in this decision involve personal jurisdiction under the New York long-arm statute—specifically the first prong of CPLR 302(a)(1)—which states that "a court may exercise personal jurisdiction over any nondomiciliary ... who in person or through an agent ... transacts any business within the state or contracts anywhere to supply goods or services in the state.... " NY CPLR § 302(a)(1). The Second Circuit has stated that "despite the fact that [S]ection 302(a)(1) of New York's long-arm statute and constitutional due process are not coextensive, and that personal jurisdiction permitted under the long-arm statute may theoretically be prohibited under due process analysis, we would expect such cases to be rare." Licci v. Lebanese Canadian Bank, SAL, 732 F.3d 161, 170 (2d Cir.2013). It is not surprising, therefore, that the parties rely on such cases in their pleadings.

- connection with their maintenance correspondent accounts in the United States, BisB and TIIB (Tadhamon's parent) have designated agents for service of process in the United States as required under the Patriot Act and participate in the Clearing House Interbank Payments System in New York. Tadhamon Compl. ¶ 14; BisB Compl. ¶ 14. But courts have held that such actions do not constitute the necessary minimum contacts to satisfy due process. "If these PATRIOT Act certifications were sufficient minimum contacts to satisfy due process, every foreign bank that opens a correspondent account in the United States would be subject to jurisdiction. Clearly, that is not the case. Moreover, the fact that these PATRIOT Act certifications require foreign banks to designate a proxy to accept service of process by the U.S. Government does not indicate that Defendants should reasonably foresee being haled into a U.S. court...." Tamam v. Fransabank SAL, 677 F.Supp.2d 720, 732 (S.D.N.Y.2010).
- 7 Even if one views Khaleeji as Tadhamon's agent, the use of this correspondent bank account does not provide a basis for personal jurisdiction for the same reasons discussed below as to BisB.
- *67 Unlike Tadhamon, the BisB Placement funds were transferred to BisB's own correspondent bank account at JP Morgan Chase Bank in New York. BisB Compl. ¶ 15. 8 This one-time use of BisB's own correspondent bank account is a closer call than Tadhamon. But it too ultimately falls short given all the other facts here. The use of this correspondent bank account was neither the beginning nor the end of the Placement, but rather a transitory intermediate step. The transaction began with the negotiation and signing of the contract in Bahrain between Bahraini parties. It ended with the funds being transferred out of the country the same day for investment. So while the use of the account is admittedly a contact, it is too weak to satisfy due process requirements. See Burger King, 471 U.S. at 475, 105 S.Ct. 2174 ("[P]urposeful availment requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts.") (internal citations and quotations omitted) (emphasis added).
- BisB maintains correspondent bank accounts in the United States at Deutsche Bank, Standard Chartered Bank and JP Morgan Chase Bank. BisB Compl. ¶ 14.

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[15] support of jurisdiction, but none are persuasive. The Committee first argues that the Defendants took sufficient affirmative steps by designating the correspondent accounts where Arcapita should transfer funds. BisB Compl. ¶ 28; Tadhamon Compl. ¶ 28. The Committee reasons that these actions amount to purposeful availment of the United States banking system. But this argument is undermined by the fact that it was Arcapita that actually transferred the funds to the correspondent accounts. BisB Compl. ¶ 28 ("To execute the Placement, Arcapita, at BIB's direction, transferred \$10 million in funds from its account at JP Morgan Chase Bank in New York to BIB's account at JP Morgan Chase Bank in New York."); Tadhamon Compl. ¶ 28 ("To execute the Placements, Arcapita transferred a total of \$20 million in funds from its account at JP Morgan Chase Bank in New York to an account designated by Tadhamon at HSBC Bank in New York.") As noted by the Supreme Court,

'[t]he unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.'

Burger King, 471 U.S. at 474–75, 105 S.Ct. 2174 (quoting Hanson v. Denckla, 357 U.S. 235, 253, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958)). In any event, the mere knowing receipt of funds at a correspondent bank account is insufficient to establish jurisdiction. See, e.g., Rushaid v. Pictet & Cie, 2014 WL 4226466, at *4, 2014 N.Y. Misc. LEXIS 3888, at *8 (N.Y.Sup.Ct. Aug. 26, 2014) ("While plaintiffs submitted documents showing that defendants knew of the third-party monetary transfers from a New York correspondent account for the benefit of the Pictet accounts, this alone does not constitute purposeful conduct. This passive receipt of funds do not constitute 'volitional acts' by defendants and, as such, defendants did not avail themselves of the privilege of conduction activities within the forum State, and thereby neglect to invoke the benefits and protections of its laws.") (internal citations and quotations omitted); *68 Pramer S.C.A. v. Abaplus Int'l Corp., 76 A.D.3d 89, 907 N.Y.S.2d 154, 159 (1st Dept.2010) ("[T]he mere payment into a New York account does not alone provide a basis for

[16] The Committee raises several arguments in New York jurisdiction, especially when all aspects of the transaction occur out of state, absent more extensive native steps by designating the correspondent (internal citations and quotations omitted).

[17] [18] The Committee further argues that the Defendants instructed Arcapita to transfer the funds to the correspondent accounts, providing Arcapita with the Swift codes 9 necessary to effectuate the transfer. See Rashdan Decl., Exs. B & C; Decl. of Nicholas A. Bassett, Exs. D & E [BisB ECF No. 15]. But such acts are not a substantial connection sufficient for jurisdiction. As the Supreme Court has counseled, specific jurisdiction is appropriate only

where the contacts proximately result from actions by the defendant himself that create a 'substantial connection' with the forum State. Thus where the defendant 'deliberately' has engaged in significant activities within a State ... or has created 'continuing obligations' between himself and residents of the forum, he manifestly has availed himself of the privilege of conducting business there, and because his activities are shielded by "the benefits and protections" of the forum's laws it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well.

Burger King, 471 U.S. at 475–76, 105 S.Ct. 2174 (internal citations and quotations omitted) (emphasis added). The Defendants' instructions to Arcapita to transfer the funds to a correspondent account held by a third party are the type of "attenuated" acts that do not qualify as the basis for specific jurisdiction. Burger King, 471 U.S. at 475, 105 S.Ct. 2174. Without more, the Court finds that the Defendants use of this account is not a strong enough action on which to rest personal jurisdiction. ¹⁰

A SWIFT Code "[w]ithin the context of international payment transactions, is a code issued by the Society for Worldwide Interbank Financial Telecommunications (SWIFT) that enables banks worldwide to be identified without the need to specify

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an address or bank number. SWIFT codes are used mainly for automatic payment transactions." Khwaja Masoom, *The Entrepreneur's Dictionary of Business and Financial Terms* 525 (2013); *see also* Cambridge Dictionaries Online (April 15, 2015, 2:44 p.m.), http://dictionary.cambridge.org/us/dictionary/business-english/swift-code (defining SWIFT Code as "the number used by a particular financial organization for sending and receiving payments on the SWIFT system.")

The Defendants claim that the correspondent accounts were used to accommodate Arcapita's desire to transfer the funds in U.S. dollars, but there is no evidence of this in the record. See Tadhamon Reply at 1–2; Hr'g Tr. 62:8–16 (March 19, 2014). The Court does not need to reach that issue for purposes of this decision.

And despite the use of the correspondent bank accounts, neither Defendant would have reasonably foreseen being haled into court in the United States. Neither maintains a presence in the United States. The Defendants do not and have never maintained offices, staff or telephone numbers in the United States. Rashdan Decl. ¶ 2; Mohammed Decl. ¶ 2. They do not do business in the United States, do not solicit business or clients in the United States and do not advertise in the United States. Rashdan Decl. ¶ 2; Mohammed Decl. ¶ 2. Indeed, these Placement Agreements were executed in Bahrain and provide that they are governed by the laws of Bahrain. Rashdan Decl. ¶ 5 & Ex. A, § 7.1; Mohammed Decl. ¶ 7 & Ex. A, § 12. Given all these facts, the Defendants would reasonably assume that any suit relating to *69 the Placement Agreements would be in Bahrain under Bahraini law. Cf. Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec., LLC, 460 B.R. 106, 117 (Bankr.S.D.N.Y.2011) ("The Second Circuit has indicated that entering into a contract with a New York choice of law clause is 'a significant factor in a personal jurisdiction analysis because the parties ... invoke the benefits and protections of New York law.") (quoting Sunward Elec., Inc. v. McDonald, 362 F.3d 17, 22-23 (2d Cir.2004); AIG Fin. Prod. Corp. v. Public Util. Dist. No. 1 of Snohomish Cnty., Wash., 675 F.Supp.2d 354, 364 (S.D.N.Y.2009)); see also Budget Blinds, Inc. v. White, 536 F.3d 244, 261 (3d Cir.2008) ("[A] choice-of-law provision 'standing alone would be insufficient to confer jurisdiction,' but combined with other facts, it may reinforce a party's 'deliberate affiliation with the forum State and the reasonable foreseeability of possible litigation there.") (quoting Burger King, 471 U.S. at 482, 105 S.Ct. 2174); Atlantic Fin. Fed. v. Bruno, 698 F.Supp. 568, 573 (E.D.Pa.1988) ("A choice of law provision is only a factor to show whether defendants could reasonably foresee that their acts would have effect in Pennsylvania; it does not itself vest jurisdiction."). ¹¹

The Tadhamon Placement Agreement even provides that the parties submit to the jurisdiction of the Bahraini courts for any proceedings arising from or in connection with the contract. Rashdan Decl. Ex. A, § 7.2.

The Committee relies most heavily on three cases, but all of them are distinguishable. While courts in each of the three cases found personal jurisdiction based on the use of an account, the cases all involved a greater quality of contact with the United States than are present here. The first of these cases, Licci v. Lebanese Canadian Bank, SAL, 20 N.Y.3d 327, 960 N.Y.S.2d 695, 984 N.E.2d 893 (2012), involved the use of a correspondent bank account to make dozens of international transfers. In the case, plaintiffs from the United States, Canada and Israel brought suit against Lebanese Canadian Bank ("LCB") for injuries sustained in rocket attacks by Hisballah. Id. at 330, 960 N.Y.S.2d 695, 984 N.E.2d 893. The plaintiffs alleged that LCB had assisted Hizballah in committing the attacks by facilitating international monetary transactions through the Shahid Foundation, an entity that had been identified as the "financial arm" of Hizballah. Id. at 331, 960 N.Y.S.2d 695, 984 N.E.2d 893. LCB's sole point of contact with the United States was a correspondent bank account that it maintained with American Express Bank in New York. Id. at 332, 960 N.Y.S.2d 695, 984 N.E.2d 893. The plaintiffs alleged, in part, that LCB had used this account to make dozens of international wire transfers on behalf of Shahid. See id. Concluding that the case presented issues not previously addressed by New York state courts, the Second Circuit certified questions to the New York Court of Appeals as to whether a foreign bank's maintenance and use of a correspondent bank account at a New York financial institution established personal jurisdiction under the New York long-arm statute. See Licci v. Lebanese Canadian Bank, SAL, 673 F.3d 50, 62-63, 66, 74 (2d Cir.2012).

In answering these certified questions, the New York Court of Appeals noted that a court must "closely examine the defendant's contacts for their quality," noting that in other cases, a focus on the nature and extent of a defendant's involvement in the deposit of funds in a correspondent account was "essentially adventitious."

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Licci, 20 N.Y.3d at 338, 960 N.Y.S.2d 695, 984 N.E.2d 893. The court stated that such an analysis "may be complicated by the nature of inter-bank activity, especially *70 given the widespread use of correspondent accounts nominally in New York to facilitate the flow of money worldwide, often for transactions that otherwise have no other connection to New York, or indeed the United States." Id. Ultimately, the court found that "a foreign bank's repeated use of a correspondent account in New York on behalf of a client-in effect, a 'course of dealing'—show[s] purposeful availment of New York's dependable and transparent banking system, the dollar as a stable and fungible currency, and the predictable jurisdictional and commercial law of New York and the United States." Id. at 339, 960 N.Y.S.2d 695, 984 N.E.2d 893. The New York Court of Appeals then found that the plaintiffs' claims arose from the bank's transaction of business in New York because LCB's use of a "New York account 'dozens' of times indicate[d] desirability and a lack of coincidence." Id. at 340, 960 N.Y.S.2d 695, 984 N.E.2d 893.

After receiving this guidance from the New York Court of Appeals, the Second Circuit addressed whether the exercise of personal jurisdiction over LCB was consistent with constitutional due process. The Second Circuit focused on the connection between the wire transfers and the alleged unlawful conduct, noting that the transfers were "a part of the principal wrong at which the plaintiffs' lawsuit is directed." *Licci*, 732 F.3d at 170. While reiterating that the "mere maintenance" of a correspondent account was not enough to support personal jurisdiction, the Second Circuit stated that

in connection with this particular jurisdictional controversy—a lawsuit seeking redress for the allegedly unlawful provision of banking services for which the wire transfers are a part—allegations of LCB's repeated, intentional execution of U.S.-dollar-denominated wire transfers on behalf of Sahid, in order to further Hisballah's terrorist goals, are sufficient.

Id. at 171. Like the New York Court of Appeals, the Second Circuit focused on the fact that the transfers in *Licci* were recurring, stating that "the plaintiffs allege wire

transfers through AmEx that numbered in the dozens and totaled several million dollars, so it cannot be said that LCB's contacts with New York were 'random, isolated, or fortuitous." Id. The Second Circuit ultimately found that "the selection and repeated use of New York's banking system, as an instrument for accomplishing the alleged wrongs for which the plaintiffs seek redress, constitutes 'purposeful availment of the privilege of doing business in New York,' ... so as to permit the subjecting of LCB to specific jurisdiction within the Southern District of New York consistent with due process requirements." Id. at 170-71 (quoting Bank Brussels Lambert, 305 F.3d at 127). Unlike the Defendants' conduct here, therefore, the defendant in Licci repeatedly used a correspondent account which was integrally related to the unlawful conduct at issue in the lawsuit.

The Committee's second case fails for similar reasons. In Dale v. Banque SCS Alliance S.A., 2005 WL 2347853, 2005 U.S. Dist. LEXIS 20967 (S.D.N.Y. September 22, 2005), the court was confronted with allegations of RICO violations against a Swiss corporation. The plaintiff insurance companies alleged that the defendant had assisted a third party in defrauding them. The illegally obtained funds were laundered through a series of fraudulent wire transfers to and from the defendant's four correspondent bank account in New York and other accounts maintained outside of New York. The court preliminarily noted that under CPLR § 302(a)(1), "[a] single transaction would be sufficient to fulfill this requirement, so long as the relevant cause of action also arises from that transaction." *71 Id. at *3, 2005 U.S. Dist. LEXIS 20967, at *11 (quoting Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez, 171 F.3d 779, 787 (2d Cir.1999)). In fact, the defendant maintained several correspondent bank accounts in New York that were used to effect a number of the unlawful funds transfers. See Dale, 2005 WL 2347853, at *3, 2005 U.S. Dist. LEXIS 20967, at *12. The court therefore found that the complaint stated a prima facie case for personal jurisdiction under the New York long-arm statute, C.P.L.R. § 302(a)(1).

Finally, the Committee cites to the single use of a correspondent account to sustain personal jurisdiction in *Correspondent Services Corp. v. J.V.W. Investments Ltd.*, 120 F.Supp.2d 401 (S.D.N.Y.2000). In that case, the third-party plaintiff—a Dominican corporation—sought to recover an investment that had been transferred to

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the New York correspondent account of the third-party defendant-a Bahamian bank. The defendant argued that the court did not have personal jurisdiction under the New York long-arm statute, as it was a foreign defendant without contacts, offices, telephone listings or personnel in New York. In analyzing whether the third-party defendant was transacting business in the jurisdiction, the court recognized that "even a single action within New York is sufficient to confer jurisdiction under § 302(a) if it has a sufficient nexus with the cause of action." Id. at 404 (emphasis added). In looking at the totality of the circumstances, the court noted that the defendant acknowledged that it held securities accounts at a New York brokerage firm which it used to "facilitate international financial transactions for itself and for its clients, including the ... mutual fund purchases ... requested on behalf of [the third party plaintiff] JVW." Id. at 404. The court found that not only did the defendant maintain an account in New York to facilitate international business transactions, but it also used the account for the purchase and delivery of the securities, with the unauthorized purchase being at the very root of the action in the case. Id. at 405. Thus, it concluded that "[t]he single purposeful act of transferring JVW's funds to New York constitutes the 'transaction of business' from which this cause of action directly arises." Id. at 404-05 (emphasis added). As such, the jurisdictional conclusion in Correspondent Services was based upon the plaintiff's fraud claim directly arising from the defendant's unauthorized purchase of the stock in the context of the defendant's general use of its New York accounts for itself and various clients. By contrast, the money here passed through these correspondent bank accounts once, but only as part of a transaction that began in Bahrain between Bahraini parties under a Bahraini contract and that ended overseas. See Pramer SCA, 907 N.Y.S.2d at 159 (mere payment into New York account insufficient where all aspects of transaction occurred out of state).

Moreover, the use of the accounts was not central to the alleged wrong. For example, the Committee has alleged causes of action for breach of contract and the turnover of assets under Sections 541, 542 and 550 and violation of the automatic stay under Section 362, all of which are based upon the alleged setoff by the Defendants and their failure to transfer the Placement Proceeds to Arcapita upon the maturity dates. Thus, the alleged unlawful action was the Defendants' subsequent refusal to return money to Arcapita; it was not the Defendants' original receipt of

these transfers under the Placement Agreements, an act which no party has alleged was improper. Thus, the one-off use of the correspondent account by BisB is unrelated to the setoff issue, let alone central to its adjudication. ¹²

The Committee also asserts a cause of action for a preferential transfer under Sections 547 and 550, and one under Section 502(d), but the use of the correspondent account is not the actionable conduct in and of itself. Rather, the use of the correspondent account only gave rise to a claim due to the debtors' bankruptcy filing, assuming that United States law would apply to the dispute regarding the holdback of funds

*72 C. Jurisdictional Discovery Is Not Appropriate

[19] The Committee states that it lacks sufficient information to determine whether the Defendants are subject to the general jurisdiction of this Court, but reserves the right to assert such jurisdiction pending discovery. It initially requested discovery to find "(i) additional facts which further demonstrate that significant and numerous aspects of the Transfers involved contacts with the United States and (ii) additional contacts [the Defendant] has or has had with New York or elsewhere in the United States independent of those that are the subject matter of this lawsuit, which would subject it to the general jurisdiction of this Court." Tadhamon Obj. at 18; see BisB Obj. at 17. But the Committee offered no information to support their contention that jurisdictional discovery would yield evidence as to personal jurisdiction. The Committee subsequently narrowed its discovery request, stating that "we should be permitted to take discovery to understand the use of correspondent bank accounts in the United States, because to the extent that it's dozens and dozens of times, the Court has no evidence before it whatsoever." Hr'g Tr. 106:1-5, March 19, 2014. This request would be inapplicable to specific jurisdiction, due to a lack of connection with the transactions at issue in this case.

[20] [21] Additionally, the Committee has not shown enough to make such discovery relevant on the issue of general jurisdiction. "At the jurisdictional stage, "... courts enjoy broad discretion in deciding whether to order discovery." *Tymoshenko v. Firtash*, 2013 WL 1234943, at *7 (S.D.N.Y. March 27, 2013) (quoting *In re Terrorist Attacks on September 11, 2001*, 349 F.Supp.2d 765, 811 (S.D.N.Y.2005), *aff'd*, 538 F.3d 71 (2d Cir.2008)). While

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the failure to allege a prima facie case for jurisdiction is not necessarily a bar to jurisdictional discovery, courts have generally been unwilling to grant additional discovery on jurisdictional issues in such circumstances. See Sikhs for Justice v. Nath, 893 F.Supp.2d 598, 609 (S.D.N.Y.2012); see also Licci v. American Exp. Bank Ltd., 704 F.Supp.2d 403, 408 (S.D.N.Y.2010); Ehrenfeld v. Mahfouz, 489 F.3d 542, 550 n.6 (2d Cir.2007); Langenberg v. Sofair, 2006 WL 2628348, at *5 (S.D.N.Y. Sept. 11, 2006). In the Second Circuit, courts "have allowed jurisdictional discovery where a plaintiff has made 'a sufficient start toward establishing personal jurisdiction." Hollenbeck v. Comeq, Inc., 2007 WL 2484299, at *2, 2007 U.S. Dist. LEXIS 63547, at *8 (N.D.N.Y. Aug. 28, 2007) (quoting Uebler v. Boss Media, 363 F.Supp.2d 499, 506 (E.D.N.Y.2005)); see also Smit v. Isiklar Holding A.S., 354 F.Supp.2d 260, 263 (S.D.N.Y.2005) ("[A] court may order limited discovery targeted at the missing jurisdictional elements, if plaintiff has shown that such an exercise would serve to fill any holes in its showing."). A party cannot base their request on mere " 'speculations or hopes ... that further connections to [the forum] will come to light in discovery'...." Firtash, 2013 WL 1234943, at *7 (quoting Rosenberg v. PK Graphics, 2004 WL 1057621, at *1 (S.D.N.Y. May 10, 2004)).

*73 The need for discovery is also undermined by the declarations supplied by the Defendants stating that they do not and have never maintained offices, staff or telephone numbers in the United States. Rashdan Decl. ¶ 2; Mohammed Decl. ¶ 2. They state that they do not do business in the United States, do not solicit business or clients in the United States and do not advertise in the United States. Rashdan Decl. ¶ 2; Mohammed Decl. ¶ 2. 13 These additional facts before the Court only confirm that the requested jurisdictional discovery is inappropriate. See A. W. L. I. Group, Inc. v. Amber Freight Shipping Lines, 828 F.Supp.2d 557, 575 (E.D.N.Y.2011) ("[J]urisdictional discovery is not permitted where, as here, the defendant submits an affidavit that provides all the necessary facts and answers all the questions regarding jurisdiction.")

The Committee notes that these declarations do not address accounts held in the United States and the frequency of their usage. But the Committee cites no cases holding that use of a correspondent account is enough to confer general jurisdiction and the case law seems to suggest the opposite. See In re Terrorist Attacks, 714 F.3d at 681 (concluding that "the alleged use of correspondent bank accounts and the maintenance of a website that allows account holders to manage their accounts are insufficient to support the exercise of general personal jurisdiction" against foreign defendants.)

CONCLUSION

For the reasons stated above, the Court finds that it lacks personal jurisdiction over the Defendants due to an absence of minimum contacts with the jurisdiction. Accordingly, it is unnecessary to reach the other grounds for dismissal raised by the Defendants. ¹⁴ The Defendants should settle an order on three days' notice.

14 Thus, the Court does not address the Defendants' arguments for dismissal based on international comity and the presumption against extraterritorial application of United States law. See Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 584, 119 S.Ct. 1563, 143 L.Ed.2d 760 (1999) ("Personal jurisdiction ... is an essential element of the jurisdiction of a ... court, without which the court is powerless to proceed to an adjudication."). But those alternative arguments for dismissal raise serious concerns about the Committee's claims here. See In re Maxwell Commc'n Corp., 93 F.3d 1036 (2d Cir. 1996) (discussing whether pre-petition transfers by the debtor to certain banks should be governed by United States bankruptcy law before an American bankruptcy court or should proceed overseas and concluding that international comity supported deferring to the courts and laws of England); see also Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC, 513 B.R. 222 (S.D.N.Y.2014).

All Citations

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Official Committee of Unsecured Creditors of Arcapita v...., 549 B.R. 56 (2016)

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549 B.R. 56

United States District Court, S.D. New York.

OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF ARCAPITA,

Bank B.S.C. (c), et al., Appellant,

v.

BAHRAIN ISLAMIC BANK, Appellee. Official Committee of Unsecured Creditors of Arcapita, Bank B.S.C. (c), et al., Appellant,

v.

Tadhamon Capital B.S.C., Appellee.

15-cv-03828 (GBD) | 15-cv-03829 (GBD) | Signed March 30, 2016

Synopsis

Background: Official committee of unsecured creditors for Chapter 11 debtor, a Bahraini investment bank, brought adversary proceedings seeking, inter alia, avoidance and turnover of funds invested by debtor with two Bahraini entities just before the bankruptcy filing. Defendants moved to dismiss. The United States Bankruptcy Court for the Southern District of New York, Sean H. Lane, J., 529 B.R. 57, granted motions and dismissed proceedings for lack of personal jurisdiction. Committee appealed.

Holdings: The District Court, George B. Daniels, J., held

[1] defendants' selection of New York correspondent bank accounts constituted "minimum contacts" on which to assert personal jurisdiction, and

[2] assertion of personal jurisdiction was "reasonable."

Vacated and remanded.

West Headnotes (22)

[1] Finance, Banking, and Credit

Relation Between Institution and Depositor or Account Holder in General

"Correspondent bank account" is a domestic account held by a foreign bank, similar to a personal checking account used for deposits, payments, and transfers of funds, which facilitates the flow of money worldwide, often for transactions that otherwise have no other connection to the United States.

1 Cases that cite this headnote

[2] Bankruptcy

Conclusions of law; de novo review

District court reviews de novo the bankruptcy court's dismissal of a case for lack of personal jurisdiction over the defendant. Fed. R. Bankr. P. 7012(b); Fed. R. Civ. P. 12(b)(2).

Cases that cite this headnote

[3] Bankruptcy

Presumptions and burden of proof

To survive motion to dismiss for lack of personal jurisdiction, plaintiff must make prima facie showing that jurisdiction exists. Fed. R. Bankr. P. 7012(b); Fed. R. Civ. P. 12(b)(2).

Cases that cite this headnote

[4] Bankruptcy

Evidence

Bankruptcy

Presumptions and burden of proof

On motion to dismiss for lack of personal jurisdiction, court may consider materials outside the pleadings, but must credit plaintiffs' averments of jurisdictional facts as true. Fed. R. Bankr. P. 7012(b); Fed. R. Civ. P. 12(b)(2).

Cases that cite this headnote

[5] Bankruptcy

Presumptions and burden of proof

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On motion to dismiss for lack of personal jurisdiction, all pleadings and affidavits are to be construed in the light most favorable to plaintiff and all doubts resolved in plaintiff's favor. Fed. R. Bankr. P. 7012(b); Fed. R. Civ. P. 12(b)(2).

Cases that cite this headnote

[6] Bankruptcy

► Foreign Countries, Corporations, Business Entities, and Citizens

Determining whether bankruptcy court may exercise personal jurisdiction over foreign defendant is a two-prong inquiry: first, court must determine whether defendant has the requisite minimum contacts with the United States at large, and second, court must determine whether exercising personal jurisdiction over defendant will offend traditional notions of fair play and substantial justice.

2 Cases that cite this headnote

[7] Bankruptcy

Personal Jurisdiction

Where plaintiffs ask bankruptcy court to assert specific jurisdiction over defendants, inquiry focuses on affiliation between the forum and the underlying controversy.

Cases that cite this headnote

[8] Bankruptcy

Nonresidents, Proceedings and Actions Against

Bankruptcy

Foreign Countries, Corporations, Business Entities, and Citizens

In addition to asserting specific jurisdiction, bankruptcy court may assert general jurisdiction over foreign corporations, either sister-state or foreign-country, to hear any and all claims against them when their affiliations with the state are so "continuous and systematic" as to render them essentially at home in the forum state.

Cases that cite this headnote

[9] Bankruptcy

Foreign Countries, Corporations, Business Entities, and Citizens

For foreign defendant to have the requisite minimum contacts with the United States at large, for the bankruptcy court to exercise personal jurisdiction over defendant, defendant must have contact with the forum, and the underlying cause of action must "arise out of or relate to" that contact.

1 Cases that cite this headnote

[10] Constitutional Law

Particular Parties or Circumstances

In determining whether exercising personal jurisdiction over foreign defendant will offend traditional notions of fair play and substantial justice, for purposes of assessing whether the bankruptcy court may exercise personal jurisdiction over defendant, relevant factors include the following: (1) burden that the exercise of jurisdiction will impose on defendant, (2) interests of the forum in adjudicating the case, and (3) plaintiff's interest in obtaining convenient and effective relief. Fed. R. Bankr. P. 7012(b); Fed. R. Civ. P. 12(b)(2).

Cases that cite this headnote

[11] Bankruptcy

Foreign Countries, Corporations, Business Entities, and Citizens

Determining personal jurisdiction over foreign defendant in federal-question case requires bankruptcy court to first look to the law of the forum state to determine whether personal jurisdiction will lie.

Cases that cite this headnote

[12] Courts

Purpose, intent, and foreseeability; purposeful availment

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Under New York's long-arm statute, proof of one transaction in New York is sufficient to invoke jurisdiction, even though defendant never enters New York, so long as defendant's New York activities were purposeful and there is a substantial relationship between the transaction and the claim asserted. N.Y. CPLR § 302(a)(1).

Cases that cite this headnote

[13] Courts

Business contacts and activities; transacting or doing business

Courts

Banks and banking

Under New York law, foreign defendant's use of a correspondent bank account, even if defendant has no other contacts with New York, satisfies the first, "transaction-of-business" prong of New York's long-arm statute so long as the use was purposeful and not coincidental or adventitious. N.Y. CPLR § 302(a)(1).

3 Cases that cite this headnote

[14] Courts

Banks and banking

Under the relatively permissive second, "arise-from" prong of New York's long-arm statute, foreign defendant's use of a correspondent bank account need not be at the "very root" of plaintiff's claim; rather, as long as the use of the correspondent bank account is not completely unmoored from one of the elements of plaintiff's cause of action, the prong is satisfied. N.Y. CPLR § 302(a)(1).

1 Cases that cite this headnote

[15] Constitutional Law

Non-residents in general

Courts

Actions by or Against Nonresidents, Personal Jurisdiction In;"Long-arm" Jurisdiction Although the jurisdictional analysis under the New York long-arm statute and constitutional due process are not completely coextensive, they closely resemble one another, and so fact that specific jurisdiction may be asserted under New York law is strong evidence that the assertion of jurisdiction comports with constitutional due process. U.S. Const. Amends. 5, 14; N.Y. CPLR § 302(a)(1).

Cases that cite this headnote

[16] Courts

Banks and banking

Under New York law, when a defendant purposely selects and uses a correspondent bank account to effectuate a particular transaction, and a plaintiff later files a lawsuit asserting a cause of action arising out of that transaction, the defendant, in opposing personal jurisdiction, can hardly claim that it could not have foreseen being haled into court in the forum in which the correspondent bank account it had selected is located. N.Y. CPLR § 302(a)(1).

1 Cases that cite this headnote

[17] Bankruptcy

Particular cases

Constitutional Law

Banks, banking, finance, and securities

Bahraini banks' selection of New York correspondent bank accounts in their prepetition dealings with Chapter 11 debtor, a Bahraini investment bank, constituted "minimum contacts" on which bankruptcy court could assert personal jurisdiction over banks, in proceeding in which unsecured creditors committee sought avoidance of funds invested by debtor with banks; banks' purposeful use of the correspondent accounts was a "transaction of business" within New York, as banks, not debtor, set terms of each placement transaction and then presented terms in offers to debtor, banks selected U.S. dollars as currency in

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which to execute transactions, and banks designated the correspondent accounts to receive funds from debtor, even though they could have used accounts elsewhere in the world, avoidance action "arose from" banks' use of correspondent accounts, and fact that specific jurisdiction could be asserted under New York law was strong evidence that jurisdiction comported with due process. U.S. Const. Amend. 5; 11 U.S.C.A. § 547(b); N.Y. CPLR § 302(a)(1); Fed. R. Bankr. P. 7012(b); Fed. R. Civ. P. 12(b)(2).

2 Cases that cite this headnote

[18] Constitutional Law

Non-residents in general

Where plaintiff's claim arises out of, or relates to, defendant's contacts with the forum, that is, specific jurisdiction is asserted, minimum contacts necessary to support such jurisdiction and comport with due process exist where defendant purposefully availed itself of the privilege of doing business in the forum and could foresee being haled into court there. U.S. Const. Amends. 5, 14.

Cases that cite this headnote

[19] Constitutional Law

Non-residents in general

Only by presenting a compelling case that the presence of some other considerations would render jurisdiction unreasonable can a defendant that has purposefully directed its activities at the forum defeat jurisdiction on due process grounds. U.S. Const. Amends. 5, 14.

Cases that cite this headnote

[20] Constitutional Law

Non-residents in general

In determining whether assertion of personal jurisdiction over a foreign defendant that has purposefully directed its activities at the forum is reasonable, and so comports with due process, relevant factors include: (1) burden

that the exercise of jurisdiction will impose on the defendant, (2) interests of the forum state in adjudicating the case, and (3) plaintiff's interest in obtaining convenient and effective relief. U.S. Const. Amends. 5, 14.

Cases that cite this headnote

[21] Bankruptcy

Particular cases

unsecured creditors committee's preferential avoidance action, bankruptcy court's assertion of personal jurisdiction over foreign defendants, Bahraini banks that, in their prepetition dealings with debtor, purposefully directed their activities at the forum by directing debtor to deposit investment funds in New York correspondent bank accounts, was "reasonable"; any burden imposed on defendants from being forced to litigate far from home was substantially mitigated by the conveniences of modern communication and transportation, United States had strong interest in adjudicating claims that arose under its Bankruptcy Code so that both creditors and debtors may obtain remedies and relief that the United States Congress has determined are fair and equitable, committee had strong interest in obtaining convenient and effective relief, and it was unclear whether it would be able to bring similar causes of action to those grounded in United States Bankruptcy Code in a non-U.S. forum. U.S. Const. Amend. 5; 11 U.S.C.A. § 547(b); Fed. R. Bankr. P. 7012(b); Fed. R. Civ. P. 12(b)(2).

1 Cases that cite this headnote

[22] Constitutional Law

Non-residents in general

Fact that, if court asserted personal jurisdiction over foreign defendants, they would be required to defend themselves in a foreign legal system, alone, was not dispositive in determining whether court's assertion of personal jurisdiction was "reasonable" and comported with due

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process, otherwise a United States court could never constitutionally exercise jurisdiction over a non-U.S. entity. U.S. Const. Amends. 5, 14.

Cases that cite this headnote

Attorneys and Law Firms

*59 Dennis F. Dunne, Evan R. Fleck, Milbank, Tweed, Hadley & McCloy LLP, New York, NY, Andrew Michael LeBlanc, Nicholas Alan Bassett, Milbank, Tweed, Hadley & McCloy, LLP, Washington, DC, for Appellant.

Lani A. Adler, Eunice Rim, John Alexander Bicks, Robert T. Honeywell, K & L Gates LLP, New York, NY, for Appellee.

*60 MEMORANDUM DECISION AND ORDER

GEORGE B. DANIELS, District Judge:

Plaintiff-Appellant, the official committee of unsecured creditors for the above-captioned chapter 11 action ("Committee"), began adversary proceedings in the United States Bankruptcy Court for the Southern District of New York against Defendants-Appellees Bahrain Islamic Bank ("BisB"), and Tadhamon Capital B.S.C. ("Tadhamon," and together with BisB, "Banks"), respectively, seeking, inter alia, the avoidance of a preferential transfer. In a single decision, the Bankruptcy Court dismissed the adversary proceedings with prejudice, finding that it lacked personal jurisdiction over the Banks. It also denied the Committee's request to engage in jurisdictional discovery. The Committee appeals the dismissal, the decision to dismiss with (as opposed to without) prejudice, and the decision to deny the Committee's request to engage in jurisdictional discovery. 1 After carefully reviewing the record and the parties' briefs, and with the benefit of oral argument, this Court has concluded that the Bankruptcy Court erred when it held that it lacked personal jurisdiction over the Banks. Therefore, this Court vacates the Bankruptcy Court's orders dismissing with prejudice the underlying adversary proceedings for lack of personal jurisdiction, and remands the adversary proceedings to the Bankruptcy Court. 2

- Because each of the Banks' underlying motions to dismiss and the Committee's instant appeals raise the same issues, and because the Bankruptcy Court addressed both of the Banks' motions to dismiss in a single opinion, this Court likewise addresses both appeals together.
- Because this Court has determined that the Bankruptcy Court may exercise personal jurisdiction over the Banks, it does not opine on the Committee's appeals of the Bankruptcy Court's decisions to dismiss the actions with (as opposed to without) prejudice, or to deny the Committee's alternative request to engage in jurisdictional discovery.

I. Background Facts³

The parties agree that the facts are not in dispute. (Reply Brief for Appellant, (ECF No. 20), at 1 ("As the Banks acknowledge, the facts in this case are not in dispute." (Brackets and citation omitted)); Brief for Appellees, (ECF No. 17), at 1 ("The facts in this case are not in dispute.").)

Before filing for chapter 11 bankruptcy on March 19, 2012, Arcapita Bank B.S.C.(c) was licensed as an Islamic Wholesale bank by the Central Bank of Bahrain, and was headquartered in Bahrain. (BisB Complaint, included in Joint Appendix Vol. 1, attached to Brief for Appellant, (Case No. 15–cv–03828, ECF No. 16-1), at APP005 ¶ 12. 4)

- All citations are to the record in Case No. 15-cv-03828 unless otherwise noted. Additionally, because the ECF bates stamp numbers printed on the documents included in this record are often unreadable, this opinion often cites to the Appendix page designation found in the lower-right corner of each page.
- [1] BisB is an Islamic commercial bank also headquartered in Bahrain. (*Id.* at APP005 ¶ 13.) BisB maintains correspondent ban accounts ⁵ in the United States at Deutsche Bank, Standard Chartered Bank, and JP Morgan Chase Bank. (*Id.* at APP005 ¶ 14.)
- "A correspondent bank account is a domestic account held by a foreign bank, similar to a personal checking account used for deposits, payments and transfers of funds. Correspondent accounts facilitate the flow of money worldwide, often for transactions that

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otherwise have no other connection to ... the United States." *Licci v. Lebanese Canadian Bank, SAL,* 732 F.3d 161, 165 n. 3 (2d Cir.2013) ("*Licci IV*") (internal citations and quotation marks omitted).

*61 Tadhamon is also a Bahraini Corporation. (Tadhamon Complaint, included in Joint Appendix Vol. 1, attached to Brief for Appellant, (ECF No. 16-1), APP019 ¶ 13.) Tadhamon does not maintain any correspondent bank accounts in the United States. (See Transcript Regarding Hearing Held on March 9, 2014 re: Motion to Dismiss Adversary Proceeding, (ECF No. 16-2), at APP154:19-21.).

In March 2012, Arcapita hired BisB to make one investment, and Tadhamon to make two investments, respectively, on its behalf. (See BisB Complaint at APP008 ¶¶ 27-31; Tadhamon Complaint at APP022-023 ¶¶ 27-34.) Each transaction was executed in accordance with an agreement ("Placement Agreement") that Arcapita had entered into with each Bank. 6 (See BisB Complaint at APP007 ¶¶ 23-26; Tadhamon Complaint at APP021-022 ¶¶ 22-26.) The Placement Agreements provided that the Banks to which the agreement applied would formally initiate each investment transaction by submitting an offer to Arcapita to purchase commodities or securities on Arcapita's behalf. The Banks' offer set forth: (1) the amount, in a specific currency, of the funds Arcapita would transfer to the Bank if it accepted the Bank's offer (the "Placement"); (2) the specific bank account into which Arcapita would transfer, and the Bank would receive, the funds; (3) the commodity or securities that the Bank would purchase with the funds on Arcapita's behalf; (4) a pre-determined rate of return that Arcapita would earn on its investment; and (5) a maturity date -i.e., the date on which the Bank would transfer back to Arcapita its initial investment plus an agreed upon prof it rate, minus a fee. (See Declaration of Mohammed Ebraim Mohammed in Support of Motion to Dismiss [] Defendant Bahrain Islamic Bank ("Mohammed Decl."), (ECF No. 16-1), Exhibit A, at APP040 ¶ 4.1, id. at APP043; Declaration of Waleed Rashdan in Support of Motion to Dismiss [] Defendant Tadhamon Capital B.S.C. ("Rashdan Decl."), (ECF No. 16-1), Exhibit A, at APP063, Exhibit B, at APP069.)

Arcapita and BisB executed their Placement Agreement on or about July 10, 2003. (BisB Complaint at APP007 ¶23.) Arcapita and Tadhamon, on the other hand, executed their Placement

Agreement on March 15, 2012, the same day on which Arcapita and Tadhamon entered into the specific placement transactions at the heart of the litigation between the Committee and Tadhamon. (Tadhamon Complaint at APP021-022 ¶¶ 22-23, 27.)

On or around March 14, 2012, Arcapita accepted an investment offer from BisB. Pursuant to the terms of the offer, Arcapita transferred \$10 million to a BisBdesignated account, specifically, BisB's JP Morgan Chase correspondent bank account located in New York. (BisB Complaint at APP008 ¶¶ 27-28.) The same day that it received the money in its New York correspondent bank account, BisB purchased 14,245 troy ounces of palladium on Arcapita's behalf through a broker in London. (Mohammed Decl. at APP035 ¶ 10; Declaration of Nicholas A. Bassett in Support of the Objection of the Official Committee of Unsecured Creditors to Bahrain Islamic Bank's Motion to Dismiss the Complaint ("Bassett Decl."), (ECF No. 16-1), Exhibits A-C, at APP081-086.) The investment was set to mature on March 29, 2012. (BisB Complaint at APP008 ¶ 31.) Before Arcapita made the \$10 million Placement, it was already indebted to BisB in the amount of \$9,774,096.15. (Id. at APP006 ¶¶ 20, 22.)

On or about March 15, 2012, Arcapita accepted two investment offers from Tadhamon. (Tadhamon Complaint at APP022 ¶ 27.) Pursuant to the terms of the offers, Arcapita made two \$10 million transfers to a Tadhamon-designated New York HSBC *62 correspondent bank account maintained by Khaleeji Commercial Bank B.S.C. ("Khaleeji"), Tadhamon's bank in Bahrain. (Id. at APP022 ¶ 28.) After receiving the funds, Khaleeji transferred the funds to Tadhamon's account at Khaleeji in Bahrain. (Id.) Tadhamon then used the funds to purchase Bahranian securities on Arcapita's behalf. (Rashdan Decl. at APP054 ¶ 13.) The investments were set to mature on March 30, 2012 and April 16, 2012, respectively. 7 (Tadhamon Complaint at APP 022-023 ¶¶ 32-33.) Before Arcapita made the two Placements totaling \$20 million, it was already indebted to Tadhamon in the amount of \$18,497,734.48. (Id. at APP020-021 ¶¶ 19, 21.)

Shortly before each of these dates, Tadhamon "roll[ed]-over" each of the \$10 million Placements for an additional one-month term. The Placements' maturity dates then became April 30, 2012 and May 16, 2012, respectively. (Tadhamon Complaint at APP023 ¶ 36.)

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On March 19, 2012, less than a week after executing all three Placements, Arcapita filed for bankruptcy. (BisB Complaint at APP008 ¶ 30; Tadhamon Complaint at APP022 ¶ 31.)

On each of the applicable maturity dates, the Banks failed to remit any of the proceeds owed to Arcapita. (BisB Complaint at APP008 ¶ 32; Tadhamon Complaint at APP022-023 ¶ 32-35.) On April 30, 2012, Arcapita delivered demand letters to the Banks, informing the Banks that the funds were property of the bankruptcy estate of Arcapita. (BisB Complaint at APP008-009 ¶ 33; Tadhamon Complaint at APP023-024 ¶ 37.) In response, each Bank asserted that it was withholding all or nearly all of the funds as a setoff against the existing debts owed by Arcapita to each Bank. (BisB Complaint at APP009 ¶ 34; Tadhamon Complaint at APP024 ¶ 38.) In December 2012, Tadhamon returned to Arcapita approximately \$2 million, the difference between the antecedent debt Arcapita owed Tadhamon and the total amount that Arcapita had transferred to Tadhamon in connection with the Tadhamon Placements. (Tadhamon Complaint at APP024 ¶ 40.) BisB has failed to return any portion of the funds Arcapita transferred in connection with the Placement it made with BisB. (BisB Complaint at APP 009 ¶ 36.)

II. Procedural History

In June 2013, the Bankruptcy Court confirmed the proposed plan of reorganization in Arcapita's bankruptcy. (*See* Memorandum of Decision ("Decision"), included in Joint Appendix Vol. 2, attached to Brief for Appellant, (ECF No. 16-2), at APP273.) The Bankruptcy Court subsequently entered an order granting the Committee leave, standing, and the authority to pursue claims against the Banks. (*Id.*)

On August 26, 2013, pursuant to the authority granted by the Bankruptcy Court, the Committee commenced these adversary proceedings against the Banks to recover the funds transferred by Arcapita and received by the Banks. (See BisB Complaint; Tadhamon Complaint.) The adversary proceedings asserted that at the time Arcapita and the Banks entered into the Placements, Arcapita was insolvent, the Placements occurred less than ninety days before it filed for bankruptcy, and that the Placements were improperly made to pay off the debts Arcapita owed

each Bank. ⁸ (BisB Complaint at APP011-012 ¶¶ 49-57; Tadhamon Complaint at APP026-027 ¶¶ 54-62.)

The Committee also asserted claims for breach of contract, turnover, violation of the automatic stay, and claim disallowance. (BisB Complaint at APP003 ¶ 1; Tadhamon Complaint at APP017 ¶ 1.)

*63 On November 18, 2013, the Banks moved to dismiss the adversary complaints asserting that (i) the Bankruptcy Court lacked personal jurisdiction over the Banks; (ii) the Committee's claims were barred by the presumption against extraterritoriality; and (iii) the claims were barred by principles of international comity. (*See generally*, Motions to Dismiss the Complaint, (ECF No. 16-1), at APP031-076.)

On April 17, 2015, the Bankruptcy Court issued its decision concluding that the transfers to the New York correspondent bank accounts designated by each of the Banks was an insufficient basis on which to establish specific personal jurisdiction over the Banks. The Bankruptcy Court held that "while the use of the [correspondent bank] account[s were] admittedly a contact [with the United States,] it [was] too weak to satisfy due process requirements," because the use of the correspondent bank accounts was "neither the beginning nor the end of the Placement, but rather a transitory step." (Decision at APP278-279.) The Bankruptcy Court also emphasized that "the use of the accounts was not central to the alleged wrong" because the causes of action were all "based upon the alleged setoff by the [Banks]," and the receipt of the transfers themselves were not themselves improper at the time they occurred. (Id. at APP287-288, 288 n.12.)

III. Standard of Review

[2] [3] [4] [5] This Court reviews *de novo* the dismissal of a case for lack of personal jurisdiction over the defendant. *See Licci IV*, 732 F.3d at 167. "In order to survive a motion to dismiss for lack of personal jurisdiction, a plaintiff must make a prima facie showing that jurisdiction exists." *Thomas v. Ashcroft*, 470 F.3d 491, 495 (2d Cir.2006). In a Rule 12(b)(2) motion, "a court may consider materials outside the pleadings, but must credit plaintiffs' averments of jurisdictional facts as true." *In re Stillwater Capital Partners Inc. Litig.*, 851 F.Supp.2d 556, 566-67 (S.D.N.Y.2012). Furthermore, all pleadings and affidavits are to be construed in the light most favorable to

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the plaintiff and all doubts resolved in the plaintiff's favor. See Penguin Grp. (USA) Inc. v. Am. Buddha, 609 F.3d 30, 34 (2d Cir.2010).

[7] [8] court may exercise personal jurisdiction over a foreign defendant is a two-prong inquiry. First, the bankruptcy court must determine whether the defendant has "the requisite minimum contacts with the United States at large." Sec. Inv'r Prot. Corp. v. Bernard L. Madoff Inv. Sec., LLC (In re Bernard L. Madoff), 460 B.R. 106, 117 (Bankr.S.D.N.Y.2011) (citation omitted). Where the plaintiffs ask the court to assert specific jurisdiction over the defendants, the inquiry focuses on the "affiliation between the forum and the underlying controversy" Goodyear Dunlop Tires Operations S.A. v. Brown, 564 U.S. 915, 131 S.Ct. 2846, 2851, 180 L.Ed.2d 796 (2011) (alterations and citation omitted). 9 Thus, the defendant must have contact with the forum, and the underlying cause of action must "arise out of or relate to" that contact. *64 Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985) (citation omitted).

In addition to asserting specific jurisdiction, "[a] court may assert general jurisdiction over foreign (sisterstate or foreign country) corporations to hear any and all claims against them when their affiliations with the State are so "continuous and systematic" as to render them essentially at home in the forum State." Licci IV, 732 F.3d at 169 n.6 (quoting Goodyear, 131 S.Ct. at 2851). From the outset of the adversary proceedings, the Committee acknowledged that the Complaint failed to plead a prima facie case with regard to general jurisdiction. (See Decision at APP277 n.4.)

[10] Second, the court must determine whether exercising personal jurisdiction over the defendant will offend "traditional notions of fair play and substantial justice." Asahi Metal Indus. Co. Ltd. v. Super. Ct. Cal., 480 U.S. 102, 113, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987) (citation omitted). Factors relevant to the analysis include: "(1) the burden that the exercise of jurisdiction will impose on the defendant; (2) the interests of the forum ... in adjudicating the case; and (3) the plaintiff's interest in obtaining convenient and effective relief." Licci IV, 732 F.3d at 170 (citations, quotation marks and alterations omitted).

IV. Personal Jurisdiction and Correspondent Bank Accounts

A. The Licci Case

[9] Determining whether a bankruptcy In a series of opinions, this Court, the Second Circuit, and the New York Court of Appeals all confronted a jurisdictional dispute similar to the one now before this Court on appeal: whether the use of a correspondent bank account provides a sufficient basis to exercise personal jurisdiction over a foreign bank. See generally, Licci v. Am. Express Bank, Ltd., 704 F.Supp.2d 403 (S.D.N.Y.2010) ("Licci I"); Licci v. Lebanese Canadian Bank, SAL, 673 F.3d 50 (2d Cir.2012) ("Licci II"); Licci v. Lebanese Canadian Bank, SAL, 20 N.Y.3d 327, 984 N.E.2d 893, 960 N.Y.S.2d 695 (2012) (Licci III); Licci IV, 732 F.3d 161. Although the factual circumstances of the instant actions are not identical, the reasoning contained within the opinions guides the resolution of the instant appeal.

> In Licci, the plaintiffs alleged that Lebanase Canadian Bank, SAL ("LCB"), which was headquartered in Beirut, "intentionally and/or negligently provided Hizbollah with wire transfer services involving millions of dollars, and such transferred funds enabled and assisted Hizbollah to carry out terrorist attacks, including ... rocket attacks that harmed plaintiffs [in Israel]." Licci I, 704 F.Supp.2d at 405. The causes of action against LCB were dismissed for lack of personal jurisdiction, id. at 407-08, and the plaintiffs appealed.

[11] When the case first reached the second circuit, it undertook a fairly comprehensive review of New York case law to determine "whether a foreign bank's frequent use of a correspondent account in New York to effect international wire transfers on behalf of an overseas client is an act directed with sufficient purposefulness at New York to constitute a transaction of business in that state under the long-arm statute." 10 Licci II, 673 F.3d at 63. It concluded, however, that the scope and application of the long-arm statute's "transaction of business" test was uncertain in this context. See id. at 65-66. It also attempted to discern "whether, as a matter of New York law, the plaintiffs' ... claims, as they are alleged by the plaintiffs, 'arise from' the defendants' transaction of business in New York within the meaning of N.Y. C.P.L.R. § 302(a)(1)." Id. at 70. It found that ambiguities in the New York Court of Appeals articulation of the applicable standard also undermined the court's confidence to correctly determine whether the

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plaintiffs had satisfied the second prong of the test under § 302(a)(1). *Id.* at 70–74. Given this uncertainty, the court certified two questions to the New York Court of Appeals:

- *65 (1) Does a foreign bank's maintenance of a correspondent bank account at a financial institution in New York, and use of that account to effect "dozens" of wire transfers on behalf of a foreign client, constitute a "transaction" of business in New York within the meaning of N.Y. C.P.L.R. § 302(a)(1)?
- (2) If so, do the plaintiffs' claims under the Anti-Terrorism Act, the [Alien Tort Statute], or for negligence or breach of statutory duty in violation of Israeli law, "arise from" LCB's transaction of business in New York within the meaning of N.Y. C.P.L.R. § 302(a)(1)?

Id. at 74-75 (brackets omitted).

- "Determining personal jurisdiction over a foreign defendant in a federal-question case ... requires [a court to first] look to the law of the forum state to determine whether personal jurisdiction will lie." Licci IV, 732 F.3d at 168.
- [12] The New York Court of Appeals accepted the questions, and addressed each in turn. With regard to the first "transaction of business" question, the court engaged in an extensive analysis of Amigo Foods Corp. v. Marine Midland Bank-N. Y., 39 N.Y.2d 391, 384 N.Y.S.2d 124, 348 N.E.2d 581 (1976). 11 Licci III, 20 N.Y.3d at 335–38, 960 N.Y.S.2d 695, 984 N.E.2d 893. Amigo Foods involved the unknowing—and, therefore, unauthorized—one-time receipt of funds by a defendant's New York correspondent bank. See id. at 335-37, 984 N.E.2d 893, 960 N.Y.S.2d 695 (summarizing the facts in Amigo Foods Corp. v. Marine Midland Bank-N. Y., 61 A.D.2d 896, 402 N.Y.S.2d 406 (1st Dep't 1978), aff'd 46 N.Y.2d 855, 414 N.Y.S.2d 515, 387 N.E.2d 226 (1979)). Because the defendant had "passively and unilaterally been made the recipient of funds" by another actor, the Amigo Foods court concluded that the defendant had "not purposely availed itself of the privilege of conducting activities in New York" Id. at 337, 960 N.Y.S.2d 695, 984 N.E.2d 893 (quoting Amigo Foods, 61 A.D.2d at 897, 402 N.Y.S.2d 406 (emphasis and internal quotation marks omitted)). In other words, the defendant had not "transacted business" within the meaning of the first prong of New York's long-arm statute. See id. at 337-389, 984 N.E.2d 893, 960 N.Y.S.2d

695, 187 Misc. 34, 60 N.Y.S.2d 695. Significantly, *Amigo Foods* did not hold that jurisdiction did not lie simply because the defendant's use of the correspondent account was limited to a single instance; ¹² nor did it hold that jurisdiction did not lie because the defendant had received, rather than transferred, the funds at issue.

- The Second Circuit had also focused on *Amigo Foods* and its progeny in its initial attempt to discern how to apply the "transaction of business" prong. *Licci II*, 673 F.3d at 63–66.
- Indeed, it has long been recognized that "proof of one transaction in New York is sufficient to invoke jurisdiction, even though the defendant never enters New York, so long as the defendant's [New York] activities ... were purposeful and there is a substantial relationship between the transaction and the claim asserted." Chloe v. Queen Bee of Beverly Hills, LLC, 616 F.3d 158, 170 (2d Cir.2010) (discussing application of § 302(a)(1)) (citation omitted).

After summarizing the holding in *Amigo Foods*, the court stated that the first prong of the long-arm statute is satisfied by a "defendant's use of a correspondent bank account in New York, even if no other contacts between the defendant and New York can be established, *if* the defendant's use of that account was purposeful." *Id.* at 338, 960 N.Y.S.2d 695, 984 N.E.2d 893. The court cautioned, however, that the "jurisdictional inquiry under C.P.L.R. 302 (a) (1) necessarily requires examination of the particular facts in each case." *Id.* It reiterated that the defendant in *Amigo Foods* had not "transacted business" within the *66 meaning of the first prong of N.Y. C.P.L.R. § 302(a)(1) because its "use of the account ... was essentially adventitious—i.e., it was not even [its own] doing." *Id.*, 960 N.Y.S.2d 695, 984 N.E.2d 893.

The court then applied the proposition *Amigo Foods* stood for to the first certified question: whether use of a correspondent bank account "dozens" of times constitutes a "transaction of business" under New York's long-arm statute. The court held that "the repeated use of a correspondent account in New York on behalf of a client—in effect, a 'course of dealing'—show[s] purposeful availment of New York's dependable and transparent banking system, the dollar as a stable and fungible currency, and the predictable jurisdictional and commercial law of New York and the United States." *Id.* at 339, 960 N.Y.S.2d 695, 984 N.E.2d 893 (internal citation omitted). The court relied on LCB's repeated use

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to determine "whether [the] maintenance and use of a correspondent account [was] *purposeful or coincidental*," *id.* at 339, 960 N.Y.S.2d 695, 984 N.E.2d 893 (emphasis added), in other words, to ensure that the use was not "adventitious," *id.* at 338, 960 N.Y.S.2d 695, 984 N.E.2d 893. It did not hold that repeated use of a correspondent account was a requisite to satisfy the first prong of § 302(a) (1).

Addressing what "arises from" means, the New York Court of Appeals first stated that the defendant's transaction of business need not have caused the plaintiff's injury, and that "the inquiry under the statute is relatively permissive." Id. at 339, 960 N.Y.S.2d 695, 984 N.E.2d 893. It went on to state that so long as there is "a relatedness between the transaction and the legal claim such that the latter is not completely unmoored from the former, regardless of the ultimate merits of the claim," jurisdiction will lie. Id. at 340, 960 N.Y.S.2d 695, 984 N.E.2d 893. Furthermore, the court clarified that even if only "one element arises from the New York contacts, the relationship between the business transaction and the claim asserted supports specific jurisdiction" Id. at 341, 960 N.Y.S.2d 695, 984 N.E.2d 893. Finally, the court stated the inquiry logically focuses on the defendant's conduct, rather than the plaintiff's injuries, since "personal jurisdiction is fundamentally about a court's control over the person of the defendant" Id. at 340, 960 N.Y.S.2d 695, 984 N.E.2d 893.

The court then applied these principles to the second certified question: whether the plaintiffs' claims in Licci "ar[o]se from LCB's transaction of business in New York." The court held that they did: "the complaint alleges that LCB engaged in terrorist financing by using its correspondent account in New York to move the necessary dollars. Taken as true, LCB arguably thereby violated duties owed to plaintiffs under the various statutes asserted as a basis for subject matter jurisdiction." Id. Although "[n]ot all elements of the causes of action pleaded [we]re related to LCB's use of the correspondent account," "[a]nd the specific harms suffered by plaintiffs flowed not from LCB's alleged support of a terrorist organization, but rather from rockets," these facts did not defeat jurisdiction. Id. at 341, 960 N.Y.S.2d 695, 984 N.E.2d 893. LCB "deliberately" used its New York correspondent bank account, rather than "once or twice by mistake." Id. at 340-41, 960 N.Y.S.2d 695, 984 N.E.2d 893 (emphasis added). Accordingly, the court held that there was "an articulable nexus" between these uses and the plaintiffs' claims. The assertion of specific personal jurisdiction was appropriate. *Id.*

When the case returned to the Second Circuit, the court summarized the New *67 York Court of Appeals' analysis and holdings, and then proceeded to analyze whether exercising jurisdiction over LCB also comported with constitutional due process. *Licci IV*, 732 F.3d at 168–69. Before doing so, the court noted that although "personal jurisdiction permitted under [New York's] longarm statute may theoretically be prohibited under due process analysis," it "expect[ed] such cases to be rare." *Licci IV*, 732 F.3d at 170. The court explained that

[i]t would be unusual, indeed, if a defendant transacted business in New York and the claim asserted arose from that business activity within the meaning of section 302(a)(1), and yet, in connection with the same transaction of business, the defendant cannot be found to have purposefully availed itself of the privilege of doing business in the forum and to have been able to foresee being haled into court there, or the assertion of specific jurisdiction would somehow otherwise offend traditional notions of fair play and substantial justice.

Id. In fact, the Second Circuit stated that it was unaware of any such case where jurisdiction had lied under New York's long-arm statute, but the exercise of jurisdiction would violate constitutional due process. *Id.*

Unsurprisingly, then, the Second Circuit went on to hold that exercising personal jurisdiction over LCB was consistent with due process. The court held that LCB's use of the correspondent account as an instrument to achieve the wrong complained of satisfied the minimum contacts' component of the due process inquiry. *Id.* at 173. In reaching this conclusion, it relied on the fact that although "LCB could have ... processed U.S.-dollar-denominated wire transfers ... through correspondent accounts anywhere in the world," it instead "deliberately chose to process the ... wire transfers through [an account] in New York." *Id.* at 171. Accordingly, its "in-forum

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activity sufficiently reflect[ed] [its] 'purposeful availment' of the privilege of carrying on its activities here, ... even [though] the effects of [its] entire course of conduct [we]re felt elsewhere." *Id.* at 173. In sum, the court justified the assertion of jurisdiction over LCB by explaining that "[i]t should hardly be unforeseeable to a bank that selects and makes use of a particular forum's banking system that it might be subject to the burden of a lawsuit in that forum for wrongs related to, and arising from, that use." *Id.* at 171–72

The court then analyzed whether exercising jurisdiction over LCB would nevertheless be unreasonable because doing so would offend traditional notions of fair play and substantial justice. The court concluded that it would not. *Id.* at 174. It explained that modern communication and transportation eased any burden of defending the case in New York. *Id.* at 174. Additionally, the court explained that although the plaintiffs' injuries occurred in Israel, the United States and New York both have a n interest in monitoring banks and banking activity to ensure that their financial systems are not used for nefarious ends. *Id.* Based on a consideration of these factors, and the absence of any compelling interest that outweighed them, the court held that exercising jurisdiction over LCB in New York was not unconstitutional. *Id.*

B. The Banks' Selection of New York Correspondent Accounts are "Minimum Contacts" on which to Assert Personal Jurisdiction

[14] [15] [16] The *Licci* litigation yields several insights applicable to the instant appeal. First, the use of a correspondent bank account, even if the defendant has no other contacts with New York, satisfies the *68 first prong of New York's long-arm statute so long as the use was purposeful and not coincidental or adventitious. Licci III, 20 N.Y.3d at 338-39, 960 N.Y.S.2d 695, 984 N.E.2d 893; see Licci II, 673 F.3d at 65-66. Second, under the "relatively permissive" second prong, the defendant's use of the correspondent bank account need not be at the "very root" of the plaintiff's claim. See Licci III, 20 N.Y.3d at 339-41, 960 N.Y.S.2d 695, 984 N.E.2d 893 (stating jurisdiction lies "over those claims in some way arguably connected to the transaction [of business in New York]" (emphasis added)). Rather, as long as the use of the correspondent bank account is not "completely unmoored" from one of the elements of the plaintiff's cause of action, the prong is satisfied. Id. at 340, 984 N.E.2d 893, 960 N.Y.S.2d 695. Third, although

the jurisdictional analysis under the New York long-arm statute and constitutional due process are not completely coextensive, they closely resemble one another, and this resemblance is "particularly evident with respect to [long-arm statute subdivision] § 302(a)(1)" *Licci II*, 673 F.3d at 61 n. 11. Thus, when a defendant purposely selects and uses a correspondent bank account to effectuate a particular transaction, and a plaintiff later files a lawsuit asserting a cause of action arising out of that transaction, the defendant can hardly claim that it could not have foreseen being haled into court in the forum in which the correspondent bank account it had selected is located. *Id.* at 171–72.

[17] Although this is an adversary proceeding arising out of a chapter 11 bankruptcy reorganization, ¹³ given the striking similarities between the analysis conducted under N.Y. C.P.L.R. § 302(a)(1) and constitutional due process, whether jurisdiction lies under § 302(a)(1) is particularly probative of the ultimate inquiry. ¹⁴ *Licci II*, 673 F.3d at 61 n. 11 (noting that "[i]n many cases, the jurisdictional analysis under the New York long-arm statute may closely resemble the analysis under the Due Process Clause," and that the "similarity of state-law and constitutional standards appears particularly evident with respect to N.Y. C.P.L.R. § 302(a)(1)"); *Licci IV*, 732 F.3d at 170 (stating it would be "rare" for there to be jurisdiction under § 302(a)(1) and not under due process analysis).

- Compare Madoff, 460 B.R. at 117 (stating that due process is the only jurisdictional inquiry in bankruptcy case and citing case law for proposition that defendant need only have contact with United States, not forum state), with Licci IV, 732 F.3d at 168 ("Determining personal jurisdiction over a foreign defendant in a federal-question case such as this requires [a court to first] look to the law of the forum state to determine whether personal jurisdiction will lie")
- 14 Furthermore, as the Bankruptcy Court noted, many of the cases cited by the parties involved jurisdictional analysis under § 302(a)(1)

The Banks' purposeful use of correspondent bank accounts in New York constitutes a "transaction of business" within New York. The Banks, not Arcapita, set the terms of each placement transaction, and then presented those terms in an offer to Arcapita. (Mohammed Decl., Exhibit A, at APP040 ¶ 4.1; Rashdan

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Decl., Exhibit A, APP060 ¶ 5.1-5.2.) The Banks selected U.S. dollars as the currency in which to execute the transaction. 15 (Id. at APP043; Bassett *69 Decl., Exhibits A-C, at APP081-086.) The Banks designated New York correspondent bank accounts to receive the funds from Arcapita. (Id. at APP043; Bassett Decl., Exhibits A-C, at APP081-086.) The Banks' selection of dollars and their decision to utilize New York's banking system to effectuate the transfer was no less deliberate than LCB's use of New York's banking system in Licci. Additionally, unlike the defendant in Amigo Foods, the Banks' contacts with New York were not established passively through another entity's unilateral action. In fact, the Banks were not simply complicit, or even mere participants, in the selection of the New York correspondent bank accounts. Rather, the selection of the New York correspondent bank accounts that received the funds originated with the Banks; they actively directed the funds at issue into those New York accounts.

15 The Bankruptcy Court noted that "[t]he Banks had claimed that the correspondent accounts were used to accommodate Arcapita's desire to transfer the funds in U.S. dollars, but there was no evidence of that in the record." (Decision at APP282 n. 10.) This Court is mindful of its obligation to construe all pleadings and affidavits in the light most favorable to the plaintiff and to resolve all doubts in the plaintiff's favor. See Penguin Grp., 609 F.3d at 34. Given that the record demonstrates BisB presented the Placement offer to Arcapita, absent any contrary evidence, the decision to conduct the transaction in dollars is properly viewed as originating with, and thus attributable to, BisB. With respect to Tadhamon, the Tadhamon Placement Agreement states that Arcapita and Tadhamon would jointly determine the currency in which each Placement would be executed. (Rashdan Decl., Exhibit A, at APP061 ¶ 5.6.) Tadhamon is therefore equally responsible for this decision, and cannot claim that the decision to use U.S. dollars should not be attributed to it.

The Committee's cause of action for the avoidance of a preferential transfer "arises from" the Banks' use of the New York correspondent bank accounts. A party seeking the avoidance of a preferential transfer must show, *inter alia*, "(1) a *transfer* to or for the benefit of a creditor; (2) for or on account of an antecedent debt owed by the debtor before such *transfer* was made." 11 U.S.C. § 547(b) (emphasis added). The Banks' New York contacts —i.e., the receipt of the transferred funds in New York

correspondent bank accounts—are at the heart of this cause of action. The receipt of the funds in New York is precisely the conduct targeted by the Committee, and the activity that the cause of action seeks to have voided.

That specific jurisdiction may be asserted under N.Y.C.P.L.R. § 302(a)(1) is strong evidence that the assertion of jurisdiction comports with constitutional due process. This is so because the jurisdictional test to comport with constitutional due process is strikingly similar to the test under § 302(a)(l). *Licci II*, 673 F.3d at 61 n. 11. In fact, to this Court's knowledge, no court has yet held that § 302(a)(1) confers jurisdiction, but that asserting such jurisdiction would nonetheless violate constitutional due process. *See Licci IV*, 732 F.3d at 170 (stating that it would be "rare" for there to be jurisdiction under§ 302(a)(1), but the exercise of such jurisdiction would be unconstitutional and that to Second Circuit's knowledge, the situation had never arisen). ¹⁶

Neither party contends that the purposeful selection and use of a correspondent bank account in New York to receive millions of dollars is a particularly rare case.

[18] "Where the [plaintiff's] claim arises out of, or relates to, the defendant's contacts with the forumi.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." Id. (internal brackets omitted (quoting Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez, 305 F.3d 120, 127 (2d Cir.2002))). The Banks' selection and uses of the New York correspondent bank accounts were undoubtedly "contacts" with the United States, and the *70 Committee's preferential transfer cause of action "arise[s] out of or relate[s] to" to those contacts. 17 BisB did not purchase commodities in the United States with the funds, but instead purchased palladium through a London broker. Similarly, Tadhamon did not purchase or invest in United States securities; instead, it used the funds to make Bharaini investments. Nevertheless, both Banks deliberately chose to receive Arcapita's funds in U.S. dollars and designated correspondent bank accounts in New York to receive the funds, even though they presumably could have performed the Placement transactions without ever directing the funds through New York or anywhere else in the United States. The

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Banks are therefore similarly situated to the defendant in Licci, who also could have utilized accounts elsewhere in the world. Licci IV, 732 F.3d at 171 (the defendant "could have ... processed U.S.dollar-denominated wire transfers to [its client] through correspondent accounts anywhere in the world"). The Banks' deliberate choice to utilize the New York correspondent bank accounts and, more generally, New York's and the United States's banking system, are United States contacts attributable to them. 18, 19 Additionally, the Committee's causes of action for the avoidance of preferential transfers arise out of or relate to the Banks' contacts with the forum. In other words, if preferential transfers are found to have occurred, they occurred at the time the funds were transferred into the New York correspondent bank accounts at the Banks' direction. 20

- 17 The Banks argue that, pursuant to the terms of the Placement Agreements, they were acting as Arcapita's agent, and so the New York correspondent bank accounts are not the Banks' contacts, but Arcapita's. (Brief for Appellees at 12-14.) Although the Banks' acted as Arcapita's agent when purchasing commodities and securities on its behalf, the Banks made the decision on where to receive the funds to make those purchases in their sole discretion. They could have received the funds elsewhere and still performed their duties under the Placement Agreements and offers. The Banks' decisions to utilize New York correspondent bank accounts were made independently, and therefore properly attributable to the Banks.
- 18 The Bankruptcy Court found that "Tadhamon's use of a third party's correspondent bank account is insufficient to establish specific jurisdiction," because "Tadhamon made a conscious decision to forgo maintenance of a correspondent account in the United States and has clearly not benefitted from the privilege of doing business here under these circumstances." This Court disagrees. The fact that Tadhamon utilized Khaleeji's correspondent account, rather than its own, does not alter the fact that Tadhamon is the entity that instructed Arcapita to make two wire transfers, totaling \$20 million, to accounts located in New York. Contrary to the Bankruptcy Court's suggestion, Tadhamon sought to, and in fact, did take advantage of the United States's dependable and transparent banking system by receiving the funds into a New York account before transferring them to its own account in Bahrain.

Because Tadhamon directed the wire transfers to a specifically designated New York account for its own advantage, the receipt of the funds in New York is a "contact" properly attributed to Tadhamon. In any case, as the Bankruptcy Court noted, Khaleeji acted as Tadhamon's agent when it received the funds, and thus, Khaleeji's receipt of the funds in New York can be imputed to Tadhamon.

- The Bankruptcy Court also concluded that the Banks' "mere knowing receipt of funds at a correspondent bank account is insufficient to establish jurisdiction." (Decision at APP 280-81.) As this record makes clear, however, the Banks' did not merely knowingly receive the funds in a correspondent account, but actively selected the correspondent bank accounts in New York and directed the funds to these accounts. Thus, the Banks' connection to New York was not passive, but active and volitional.
- In a footnote, the Bankruptcy Court stated that the Banks' use of the New York correspondent bank accounts could not serve as the basis to assert jurisdiction over the Banks for the Committee's preferential transfer cause of action because "the use of the correspondent account [was] not the actionable conduct in and of itself." (Decision at APP 288.) Due process analysis, however, closely tracks N.Y. C.P.L.R. § 302(a)(1), the application of which has never been held unconstitutional, and there is undoubtedly an articulable nexus between the preferential transfer cause of action and the Banks' use of the New York correspondent accounts.
- *71 As the Second Circuit stated, "[i]t should hardly be unforeseeable to a bank that selects and makes use of a particular forum's banking system that it might be subject to the burden of a lawsuit in that forum for wrongs related to, and arising from, that use." See Licci, 732 F.3d at 171–72. Just like the defendant in Licci, the Banks deliberately chose to effectuate the Placements by directing the transfer of millions of dollars through New York. The exercise of jurisdiction over the Banks for a cause of action that relates to those transfers is constitutional.

Finally, asserting jurisdiction over the Banks does not somehow render "mere maintenance" of a correspondent account in the United States sufficient to support personal jurisdiction over the account-holder in connection with any controversy. Had the record demonstrated that Arcapita, as opposed to the Banks, selected the U.S. dollar and the New York accounts to effectuate the

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Placements, the Banks' contacts with the United States would have been adventitious, and jurisdiction would not have lied. But where, as here, the defendant's inforum activity reflects its "purposeful availment" of the privilege of carrying on its activities here, the defendant has established minimum contacts sufficient to confer a court with jurisdiction over it, even if the effects of the defendant's conduct are felt entirely outside of the United States. *Licci IV*, 732 F.3d at 173. Had the Banks wished to avoid being subject to jurisdiction in the United States in connection with these particular Placements, they could have presented Arcapita with Placement offers designating non-U.S. accounts to receive the Placement funds.

C. Assertion of Personal Jurisdiction is "Reasonable"

[19] [20] Only by presenting "a compelling case that the presence of some other considerations would render jurisdiction unreasonable" can a defendant that has purposefully directed its activities at the forum defeat jurisdiction on due process grounds. *Licci IV*, 732 F.3d at 173 (quoting *Burger King*, 471 U.S. at 477, 105 S.Ct. 2174). The Second Circuit has identified several factors relevant to determining reasonableness, including: "(1) the burden that the exercise of jurisdiction will impose on the defendant; (2) the interests of the forum state in adjudicating the case; and (3) the plaintiff's interest in obtaining convenient and effective relief." *Licci IV*, 732 F.3d at 170 (quoting *Bank Brussels*, 305 F.3d at 129).

[21] [22] These factors support the constitutional exercise of personal jurisdiction over the Banks. With regard to the first factor, courts have held that the burden imposed on a defendant forced to litigate far from home is substantially mitigated by the conveniences of modern communication and transportation. Bank Brussels, 305 F.3d at 129–30. With regard to the second factor, the United States has a strong interest in adjudicating claims that arise under its Bankruptcy Code so that both creditors and debtors can obtain the remedies and relief that the United States Congress has determined are fair and equitable. Picard v. Chais (In re Bernard

L. Madoff Investment Secs. LLC), 440 B.R. 274, 281 (Bankr.S.D.N.Y.2010) (stating that "[t]he United States has a strong interest in applying the provisions of its *72 bankruptcy code"); U.S. Lines, Inv. v. GAC Marine Fuels Ltd. (In re McLean Indus. Inc.), 68 B.R. 690, 699 (Bankr.S.D.N.Y.1986) (finding that United States had strong interest in adjudicating dispute because it arose "solely under [the United States' bankruptcy] laws and concern[ed] a vital protection provided by federal statute to those who seek to reorganize"). Indeed, it does not seem prudential to allow foreign creditors to potentially obtain priority over domestic creditors based simply on their foreign status. Third, the Committee has a strong interest in obtaining convenient and effective relief, and it is unclear whether it would be able to bring a similar causes of action to those grounded in the United States bankruptcy code in a non-U.S. forum. Although it is true that the Banks must defend themselves in a foreign legal system, and this weighs in the Banks' favor, this factor alone is not dispositive, otherwise a United States court could never constitutionally exercise jurisdiction over a non-U.S. entity. See Asahi, 480 U.S. at 114, 107 S.Ct. 1026. Given that the balance of factors weigh in the Committee's favor, the exercise of personal jurisdiction over the Banks' in this particular action comports with constitutional due process.

V. Conclusion

The Banks' selection and use of correspondent bank accounts in New York provides a sufficient basis for a court to assert personal jurisdiction over them. Accordingly, this Court vacates the Bankruptcy Court's orders dismissing with prejudice the Committee's underlying adversary proceedings against each Bank, and remands them to the Bankruptcy Court.

SO ORDERED.

All Citations

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Bonded Financial Services, Inc. v. European American Bank, 838 F.2d 890 (1988)

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KeyCite Yellow Flag - Negative Treatment
Disagreed With by In re Teleservices Group, Inc., Bankr.W.D.Mich.,
March 30, 2012

838 F.2d 890 United States Court of Appeals, Seventh Circuit.

BONDED FINANCIAL SERVICES,

INC., Debtor-Appellant, v.

EUROPEAN AMERICAN BANK, Defendant-Appellee.

No. 87-1551. | Argued Nov. 9, 1987. | Decided Jan. 19, 1988. | Rehearing and Rehearing

Rehearing and Rehearing En Banc Denied Feb. 12, 1988.

Synopsis

Debtor brought adversary proceeding against bank to recover allegedly fraudulent conveyance. The Bankruptcy Court granted summary judgment to bank and debtor appealed. The United States District Court for the Northern District of Illinois, Eastern Division, Charles R. Norgle, Sr., J., affirmed. Debtor appealed. The Court of Appeals, Easterbrook, Circuit Judge, held that: (1) bank was neither initial transferee of check, nor entity for whom such transfer was made, so as to enable trustee to recover amount of check as fraudulent conveyance, and (2) bank was subsequent transferee for value, in good faith, and without knowledge of voidability of transfer.

Affirmed.

West Headnotes (3)

[1] Bankruptcy

Avoidance Rights and Limits Thereon, in General

Bank, which received check from debtor payable to bank's order, with instructions to deposit check in depositor's account, was neither initial transferee of check nor entity for whose benefit transfer was made, so as to enable bankruptcy trustee to recover amount of check from bank as fraudulent conveyance; bank received no benefit from initial transfer, but rather, acted as financial intermediary which held check only for purpose of fulfilling an instruction to make funds available to someone else. Bankr.Code, 11 U.S.C.A. § 550.

315 Cases that cite this headnote

[2] Bankruptcy

Avoidance Rights and Limits Thereon, in General

Minimum requirement of status as "transferee", as that term is used in Bankruptcy Code section enabling trustee to recover avoidable transfers from initial transferees, is dominion over money or other asset, or right to put money to one's own purposes. Bankr.Code, 11 U.S.C.A. § 550.

370 Cases that cite this headnote

[3] Bankruptcy

Bona Fide Purchasers and Rights Thereof

Bank, which deposited debtor's check in depositor's account and was subsequently instructed by depositor to debit account and apply amount of check to reduce outstanding balance of depositor's business loan with bank, was subsequent transferee for value, in good faith, and without knowledge of voidability of transfer, and hence, trustee could not recover amount of check as fraudulent conveyance from bank; bank gave value in exchange for funds, in that it released its security interest in collateral securing business loan, and its failure to make inquiry did not permit court to attribute to it necessary knowledge of voidability of transaction. Bankr.Code, 11 U.S.C.A. § 550(b)(1).

233 Cases that cite this headnote

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Bonded Financial Services, Inc. v. European American Bank, 838 F.2d 890 (1988)

18 Collier Bankr.Cas.2d 155, 17 Bankr.Ct.Dec. 299

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Before POSNER, EASTERBROOK, and KANNE, Circuit Judges.

Opinion

EASTERBROOK, Circuit Judge.

Michael Ryan controlled a number of currency exchanges in Illinois. He also owned quite a few horses, doing business as Shamrock Hill Farm. Ryan had borrowed \$655,000 from European American Bank to run this business. One of the currency exchanges, Bonded Financial Services, put \$200,000 at Ryan's disposal in January 1983. Bonded sent the Bank a check payable to the Bank's order on January 21 with a note directing the Bank to "deposit this check into Mike [Ryan]'s account." The Bank did this. On January 31 Ryan instructed the Bank to debit the account \$200,000 in order to reduce the outstanding balance of the Shamrock loan. The Bank did this. Ryan paid off the loan in two more installments, on February 11 and 14, 1983. The Bank released its security interest in the horses.

The currency exchanges and Ryan paid visits to the judicial system. Bonded filed a petition in bankruptcy on February 10, 1983, along with about 65 other entities that Ryan controlled. Creditors later filed involuntary proceedings against Ryan. Ryan was convicted of mail fraud on account of his irregular administration of the currency exchanges (Bonded was not, for starters) and is in prison. The transfer of \$200,000 out of Bonded on January 21, 1983, was a fraudulent conveyance, see 11 U.S.C. § 548(a), and the trustee may recover for the benefit of creditors the value of such a conveyance. The trustee seeks to recover from the Bank, which unlike Ryan is solvent.

The right of recovery depends on 11 U.S.C. § 550:

(a) Except as otherwise provided in this section, to the extent that a transfer is avoided under section ... 548 ... of this title, the trustee may recover, for the benefit of

the estate, the property transferred, or, if the court so orders, the value of such property, from-

- (1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or
- (2) any immediate or mediate transferee of such initial transferee
- (b) The trustee may not recover under section (a)(2) of this section from-
 - (1) a transferee that takes for value, including satisfaction or securing of a present or antecedent debt, in good faith, and without knowledge of the voidability of the transfer avoided; or
 - (2) any immediate or mediate good faith transferee of such transferee.

Bonded's trustee contends in this adversary proceeding that the Bank is the "initial transferee" under § 550(a) (1) because it was the payee of the check it received on January 21; that the Bank is in any event the "entity for whose benefit such transfer was made" because Ryan intended to pay off the loan when he caused Bonded to write the check; that if the Bank is a subsequent transferee under § 550(a)(2) it did not give "value" under § 550(b)(1) because Bonded received nothing; and that the Bank loses even if it gave value because it should have known that something was amiss, given the substantial sum Bonded was transferring to a corporate officer. The bankruptcy court granted summary judgment to the Bank without explicitly discussing § 550. The district court affirmed on appeal under 28 U.S.C. § 158(a). It held that the Bank handled the check of January 21 as a "mere conduit" and so was not the initial transferee; that Ryan was the person "for whose benefit the transfer was made" because he got the benefit of the reduction in the balance of the loan; that the Bank's giving value to Ryan satisfied *892 § 550(b)(1); and that because the trustee presented no evidence that the Bank knew or should have known of Bonded's impending collapse, the Bank took in good faith. Our jurisdiction rests on 28 U.S.C. § 158(d). See In re Morse Electric Co., 805 F.2d 262 (7th Cir.1986); In re Cash Currency Exchange, 762 F.2d 542 (7th Cir.1985).

I

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If the note accompanying Bonded's check had said: "use this check to reduce Ryan's loan" instead of "deposit this check into [Ryan]'s account", § 550(a)(1) would provide a ready answer. The Bank would be the "initial transferee" and Ryan would be the "entity for whose benefit [the] transfer was made". The trustee could recover the \$200,000 from the Bank, Ryan, or both, subject to the rule of § 550(c) that there may be but one recovery. The trustee contends that the apparently formal difference-depositing the check in Ryan's account and then debiting that account-should not affect the outcome. In either case the Bank is the payee of the check and ends up with the money, while Ryan gets the horses free of liens and Bonded is left holding the bag. From a larger perspective, however, the two cases are different.

Fraudulent conveyance law protects creditors from lastminute diminutions of the pool of assets in which they have interests. They accordingly need not monitor debtors so closely, and the savings in monitoring costs make businesses more productive. See Douglas G. Baird & Thomas H. Jackson, Fraudulent Conveyance Law and its Proper Domain, 38 Vand.L.Rev. 829 (1985); Robert Charles Clark, The Duties of the Corporate Debtor to its Creditors, 90 Harv.L.Rev. 505, 554-60 (1977). The original rule, in 13 Eliz. ch. 5 (1571), dealt with debtors who transferred property to their relatives, while the debtors themselves sought sanctuary from creditors. The family enjoyed the value of the assets, which the debtor might reclaim if the creditors stopped pursuing him. In the last 400 years the principle has been generalized to address transfers without either sufficient consideration or bad intent, for they, no less than gifts, reduce the value of the debtor's estate and thus the net return to creditors as a group. 1 The trustee reverses, for the benefit of all creditors, un- or under-compensated conveyances within a specified period before the bankruptcy.

The fraudulent conveyance must be distinguished from a preferential transfer to a creditor, which does not diminish the total payoff for the group, but which may be undone to reduce the incentive individual creditors have to rush to dismember the debtor before rival creditors can do so. The collective bankruptcy proceeding solves the common pool problem, which otherwise may produce a reduction in the value of the productive assets taken jointly.

There have always been limits on the pursuit of transfers. If the recipient of a fraudulent conveyance uses the money to buy a Rolls Royce, the auto dealer need not return the money to the bankrupt even if the trustee can identify the serial numbers on the bills. The misfortune of the firm's creditors is not a good reason to mulct the dealer, who gave value for the money and was in no position to monitor the debtor. Some monitoring is both inevitable and desirable, and the creditors are in a better position to carry out this task than are auto dealers and the many others with whom the firm's transferees may deal. The considerations behind the holder in due course rule for commercial paper, Uniform Commercial Code § 3-302, and the bona fide purchaser rule for chattels, UCC § 2-403(1)-the waste that would be created if people either had to inquire how their transferors obtained their property or to accept a risk that a commercial deal would be reversed for no reason they could perceive at the time-also apply to subsequent holders of assets fraudulently conveyed out of bankrupts. Just as the holder in due course rule requires the transferor of commercial paper to bear the risk and burden of inquiry, increasing the liquidity of paper, so § 550(b) leaves with the initial transferee the burden of inquiry and the risk if the conveyance is fraudulent. The initial transferee is the best monitor; subsequent transferees usually do not know *893 where the assets came from and would be ineffectual monitors if they did.

The potential costs of monitoring and residual risk are evident when the transferees include banks and other financial intermediaries. The check-clearing system processes more than 100 million instruments every day; most pass through several banks as part of the collection process; each bank may be an owner of the instrument or agent for purposes of collecting at a given moment. Some of these instruments represent funds fraudulently conveyed out of bankrupts, yet the cost of checking back on the earlier transferors would be staggering. Bonded's trustee dismisses financial intermediaries on the ground that they obviously are not initial transferees, but this is not so clear. Hundreds of thousands of wire transfers occur every day. The sender of money on a wire transfer tells its bank to send instructions to the Federal Reserve System (for a Fedwire transfer) or to a correspondent bank to make money or credit available through still another bank. The Fed or the receiving bank could be called the "initial transferee" of the funds if we disregarded the function of fraudulent conveyance law. Similarly, an armored car company might be called the "initial transferee" if the bankrupt gave it valuables or specie to

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carry. Exposing financial intermediaries and couriers to the risk of disgorging a "fraudulent conveyance" in such circumstances would lead them to take precautions, the costs of which would fall on solvent customers without significantly increasing the protection of creditors.

[1] The functions of fraudulent conveyance law lead us to conclude that the Bank was not the "initial transferee" of Bonded's check even though it was the payee. The Bank acted as a financial intermediary. It received no benefit. Ryan's loan was fully secured and not in arrears, so the Bank did not even acquire a valuable right to offset its loan against the funds in Ryan's account. Under the law of contracts, the Bank had to follow the instructions that came with the check. The Uniform Commercial Code treats such instructions as binding to the extent any contract binds (see UCC § 3-119). The Bank therefore was no different from a courier or an intermediary on a wire transfer; it held the check only for the purpose of fulfilling an instruction to make the funds available to someone else.

- The instructions do not "affect the negotiability of an instrument", § 3-119(2), so that a subsequent purchaser could be a holder in due course even if the Bank had disregarded the instructions, but this qualification is unimportant here.
- [2] Although the Bankruptcy Code does not define "transferee", and there is no legislative history on the point, we think the minimum requirement of status as a "transferee" is dominion over the money or other asset, the right to put the money to one's own purposes. When A gives a check to B as agent for C, then C is the "initial transferee"; the agent may be disregarded. This perspective had impressive support under the 1898 Code, e.g., Mayo v. Pioneer Bank & Trust Co., 270 F.2d 823, 830 (5th Cir.1959) (disregarding corporate forms in order to identify the entity with control over the assets), and has been employed under the 1978 Code as well, e.g., In re Colombian Coffee Co., 75 B.R. 177, 178-79 (S.D.Fla.1987), affirming 64 B.R. 585 (Bkr.S.D.Fla.1986). See also In re Auto-Pak, Inc., 73 B.R. 52 (D.D.C.1987) (treating the IRS as a mediate rather than initial transferee when the money is washed through a second corporation's account); In re Jorges Carpet Mills, Inc., 50 B.R. 84 (Bkr.E.D.Tenn.1985) (similar). Cf. Comment, Guarantees and Section 548(a) (2) of the Bankruptcy Code, 52 U.Chi.L.Rev. 194

(1985) (advocating recharacterization of three-cornered transactions to find the real beneficiaries).

As the Bank saw the transaction on January 21, it was Ryan's agent for the purpose of collecting a check from Bonded's bank. Cf. UCC § 4-201(1) (giving a collecting bank a presumption of agency status unless "a contrary intent clearly appears"). It received nothing from Bonded that it could call its own; the Bank was not Bonded's creditor, and Ryan owed the Bank as *894 much as ever. The Bank had no dominion over the \$200,000 until January 31, when Ryan instructed the Bank to debit the account to reduce the loan; in the interim, so far as the Bank was concerned, Ryan was free to invest the whole \$200,000 in lottery tickets or uranium stocks. As the Bank saw things on January 31, it was getting Ryan's money. It would be at risk if Ryan were defrauding his other creditors or preferring the Bank, but the Bank would perceive no reason to investigate Bonded or sequester the money for the benefit of Bonded's creditors. So the two-step transaction is indeed different from the onestep transaction we hypothesized at the beginning of this discussion.

We are aware that some courts say that an agent (or a bank in a case like ours) is an "initial transferee" but that courts may excuse the transferee from repaying using equitable powers. See, e.g., Colombian Coffee Co., 75 B.R. at 179-80 (alternative holding); In re C-L Cartage Co., 70 B.R. 928 (Bkr.E.D.Tenn.1987). This is misleading. "Transferee" is not a self-defining term; it must mean something different from "possessor" or "holder" or "agent". To treat "transferee" as "anyone who touches the money" and then to escape the absurd results that follow is to introduce useless steps; we slice these off with Occam's Razor and leave a more functional rule.

There is a related, and more nettlesome, question about the use of equitable powers under § 550(a). Genuine transferees can be caught in a time warp as a result of the special treatment of inside guarantors. Suppose Firm borrows money from Lender, with Guarantor as surety. When Firm pays off the debt, Lender is the "initial transferee" and Guarantor is an "entity for whose benefit [the] transfer was made". The payment of a debt benefits the guarantor. *Paper v. Stern*, 198 F. 642 (8th Cir.1912). Each may have received a preference voidable under § 547 (and therefore recoverable under § 550). If Guarantor is a stranger to Firm, the trustee

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may recover only preferences within 90 days of the petition. 11 U.S.C. § 547(b)(4)(A). If Guarantor is an "insider" at the time of the transfer, the preference period lasts a year. 11 U.S.C. § 547(b)(4)(B). Section 547(b)(4) distinguishes according to the status of Guarantor, but § 550 does not. It says that if a transfer is recoverable by the trustee, it may be recovered from either the "initial transferee" (Lender) or the "entity for whose benefit such transfer was made" (Guarantor). This creates a situation that several courts have perceived to be "inequitable": Lender must satisfy the trustee (if Firm goes bankrupt between 91 days and a year after the preference) when Guarantor is an insider, but not when Guarantor is a stranger, yet, it seems, this has nothing to do with any proper theory of Lender's liability. Most bankruptcy courts that have addressed this question conclude that "equity" will relieve Lender from a literal construction of § 550. Commentators, whose articles collect and discuss the cases, are divided. Compare Lawrence P. King, 4 Collier on Bankruptcy ¶ 550.02 at p. 550-8 (15th ed. 1987), and Vern Countryman, The Trustee's Recovery in Preference Actions, 3 Bankruptcy Developments J. 449, 464 (1986) (equity may relieve Lender from the application of § 550), with Isaac Nutovic, The Bankruptcy Preference Laws: Interpreting Code Sections 547(c)(2), 550(a)(1), and 546(a)(1), 41 Bus.Law. 175, 186-99 (1985), and Thomas E. Pitts, Jr., Insider Guaranties And The Law of Preferences, 55 Am.Bkr.L.J. 343 (1981) (Lender should be liable in these circumstances), with Phillip J. Blumberg, The Law of Corporate Groups: Problems in Bankruptcy § 9.03 (1985) (liability should turn on Guarantor's solvency). We have serious doubts both about the amount of equity in Lender's position (for Firm may have paid Lender preferentially only to assist Guarantor, the insider, and Lender is in a good position to monitor the performance of its debtor; if Firm collects from Lender, Lender may collect in turn from Guarantor, bearing the risk of Firm's insolvency it planned to bear all along) and about the propriety of judges' declining to enforce statutes that produce inequitable results. Bankruptcy statutes are not special cases. See Boston & Maine Corp. v. *895 Chicago Pacific Corp., 785 F.2d 562, 566 (7th Cir.1986); In re Chicago, Milwaukee, St. Paul & Pacific R.R., 791 F.2d 524, 528 (7th Cir.1986). See also, e.g., Official Committee v. Mabey, 832 F.2d 299, 302 (4th Cir.1987); Guerin v. Weil, Gotshal & Manges, 205 F.2d 302, 304 (2d Cir.1953) (A. Hand, J.). We mention the problem not to resolve it (for it is not before us) but to show that this appeal to "equity"-

to deny recovery against an "initial transferee" within the statute-is different in source and scope from the way in which we have employed considerations of policy to *define* "transferee" under § 550(a)(1). Doubts about this use of equity do not imply that courts should take "transferee" for all it could be worth rather than for what a sensible policy implies it is worth.

П

If the Bank is not the "initial transferee", the trustee insists, it is at least the "entity for whose benefit such transfer was made". The Bank ultimately was paid and therefore, one might think, it got the "benefit" of the transfer-though the Bank cancelled the note and gave up a security interest in horses that, the trustee concedes, was sufficient to cover the balance. Kenneth Kortas, Bonded's day-to-day manager, filed an affidavit stating that he prepared the check in question at Ryan's request as part of Ryan's program "to put the horse business in a position where it could function and sustain itself for at least several months even if his other business ventures ran into financial difficulty.... At the request of Ryan, I routinely prepared checks payable to banks where Ryan had personal accounts and loan accounts to finance his horse business." This may show that Ryan intended all along to wash the \$200,000 through his personal account and pay the Bank; at a minimum, the argument would run, questions of intent prevent summary judgment.

The Bank responds that *it* did not "intend" to be the beneficiary of the transfer; it was not in cahoots with Ryan or Bonded and did not know of their plans. Moreover, the Bank insists that it did not receive a "benefit" because it gave value for the \$200,000. The only beneficiary on this view was Ryan, who increased his equity position in Shamrock Hill Farm and obtained clear title to the horses. As both initial transferee and ultimate beneficiary, Ryan is the only person covered by § 550(a)(1), the Bank insists. The distinction is important, because entities covered by § 550(a)(1) cannot use the value-and-good-faith defense provided by § 550(b).

This exchange seems to raise difficult questions. To what extent does "intent" matter under § 550(a)(1)? If intent matters, whose? To what extent must courts find the true economic benefits of a transaction? If the Bank were undersecured, would the transfer make the Bank

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the beneficiary by the amount of the difference between the loan and the security? Suppose Ryan planned to, and did, buy a Rolls Royce with the money; would the dealer be the beneficiary by the difference between the wholesale and retail price of the car? How are bankruptcy courts to determine "intent" and compute the benefit in transactions of this nature?

These questions need not be answered, because a subsequent transferee cannot be the "entity for whose benefit" the initial transfer was made. The structure of the statute separates initial transferees and beneficiaries, on the one hand, from "immediate or mediate transferee[s]", on the other. The implication is that the "entity for whose benefit" is different from a transferee, "immediate" or otherwise. The paradigm "entity for whose benefit such transfer was made" is a guarantor or debtor-someone who receives the benefit but not the money. In the Firm-Guarantor-Lender example at the end of Part I, when Firm pays the loan, Lender is the initial transferee and Guarantor, which no longer is exposed to liability, is the "entity for whose benefit". If Bonded had sent a check to the Bank with instructions to reduce Ryan's loan, the Bank would have been the initial transferee and Ryan the "entity for whose benefit". See In re Universal Clearing House Co., 62 B.R. 118, 128-29 (D.Utah 1986); *896 In re Day Telecommunications, Inc., 70 B.R. 904, 909 (Bkr. E.D.N. C.1987); Daniel R. Cowans, 2 Bankruptcy Law and Practice § 10.11 (1986). Section 550(a)(1) recognizes that debtors often pay money to A for the benefit of B; that B may indeed have arranged for the payment (likely so if B is an insider of the payor); that but for the payment B may have had to make good on the guarantee or pay off his own debt; and accordingly that B should be treated the same way initial recipients are treated. If B gave value to the bankrupt for the benefit, B will receive credit in the bankruptcy, see 11 U.S.C. § 547(c)(1)(A), § 548(c), and if not, B should be subject to recovery to the same extent as A-sometimes ahead of A, although § 550 does not make this distinction. Someone who receives the money later on is not an "entity for whose benefit such transfer was made"; only a person who receives a benefit from the initial transfer is within this language. 3

One who conspires with the debtor to make a fraudulent transfer, but has the transfer washed through an innocent party before reaching him, does not thereby escape. The conspirator will be a subsequent transferee under § 550(a)(2),

but subsequent transferees who lack "good faith" must stand and deliver. Section 550(b)(1); see also Countryman, 3 Bankruptcy Developments J. at 453-54, 459-63 (collecting cases distinguishing conspirators who do not receive any part of the transfer from those who do).

The legislative history of § 550(a) might show that a transferee also could be an "entity for whose benefit"-but it does not. There is no legislative history concerning the "entity for whose benefit" language and little legislative history for the rest of § 550. The section was extensively revised after the bill had been reported by the committees in both houses of Congress. Senator DiConcini and Representative Edwards read into the Congressional Record identical statements about the effect of the amendment, 124 Cong.Rec. 32400 (1978) (Edwards), 124 Cong.Rec. 34000 (DiConcini):

Section 550(a)(1) of the House amendment has been modified in order to permit recovery from an entity for whose benefit an avoided transfer is made in addition to a recovery from the initial transferee of the transfer. Section 550(c) would still apply, and the trustee is entitled only to a single satisfaction. The liability of a transferee under section 550(a) applies only "to the extent that a transfer is avoided". This means that liability is not imposed on a transferee to the extent that a transferee is protected under a provision such as section 548(c) which grants a good faith transferee for value of a transfer that is avoided only as a fraudulent transfer, a lien on the property transferred to the extent of value given.

This is the only discussion of the enacted version of § 550(a) in the legislative history of the 1978 Code, and it does not address the problems our case presents. We are left with the inference from structure: § 550 distinguishes transferees (those who receive the money or other property) from entities that get a benefit because someone else received the money or property.

To say that the categories "transferee" and "entity for whose benefit such transfer was made" are mutually exclusive does not necessarily make it easy to determine in which category a given entity falls. The method we employed in Part I of this opinion to decide that the Bank was not an "initial" transferee governs the question whether entities are subsequent transferees, too. The answer is not difficult in this case, however. The Bank did not obtain a benefit from the transfer to Ryan on January

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21; it obtained dominion over the funds on January 31. The Bank is a transferee.

Ш

[3] A trustee may not recover from a subsequent transferee who "takes for value, including satisfaction ... of a present or antecedent debt, in good faith, and without knowledge of the voidability of the transfer avoided", § 550(b)(1). The Bank took for value on January 31. It had extended \$655,000 in credit to Ryan, and the payment satisfied \$200,000 of this debt; the Bank also released a share of its security interest. Bonded's trustee contends, however, that a subsequent transferee *897 must give value to the debtor; the Bank gave value only to Ryan.

The statute does not say "value to the debtor"; it says "value". A natural reading looks to what the transferee gave up rather than what the debtor received. Other portions of the Code require value to the debtor. Section 548(c), for example, gives the initial recipient of a fraudulent conveyance a lien against any assets it hands back, "to the extent that such transferee ... gave value to the debtor in exchange for such transfer". The difference between "value" in § 550(b)(1) and "value to the debtor" in § 548(c) makes sense. Section 550(b)(1) implements a system well known in commercial law, in which a transferee of commercial paper or chattels acquires an interest to the extent he purchased the items without knowledge of a defect in the chain. These recipients receive protection because monitoring of earlier stages is impractical, and exposing them to risk on account of earlier delicts would make commerce harder to conduct. Benefits to the commercial economy, and not to the initial transferors (who may be victims of fraud), justify this approach.

Transferees and other purchasers generally deal only with the previous person in line; they give value, if at all, to their transferors (or the transferors' designees). The statute emulates the pattern of other rules protecting good faith purchasers. All of the courts that have considered this question have held or implied that value to the transferor is sufficient. E.g., Smith v. Mixon, 788 F.2d 229 (4th Cir.1986) (implication); In re Universal Clearing House, 62 B.R. at 124-26; In re Auto-Pak, 73 B.R. at 54; In re Chase & Sanborn Corp., 51 B.R. 739 (Bkr.S.D.Fla.1985). We agree with these cases. The trustee cites two cases-In re B-

F Building Corp., 312 F.2d 691 (6th Cir.1963), and Edward Hines Western Pine Co. v. First National Bank of Chicago, 61 F.2d 503 (7th Cir.1932)-for the proposition that value "must run to the debtor and not to third parties" (Br. 24), but the citations are fanciful. Neither case construes § 550; in each case the transferee was the initial rather than subsequent taker; in each case the court concluded that there had been no consideration running to anyone. Such cases do not address the problem we have just resolved.

IV

The final question is whether the Bank received the \$200,000 "in good faith, and without knowledge of the voidability of the transfer avoided". The trustee does not contend that the Bank knew of Bonded's precarious condition or Ryan's plan to use Bonded's money to pay his personal debts. He does not say that the Bank acted in bad faith-or even that there is a difference between "good faith" and "without knowledge of the voidability of the transfer". See 4 *Collier on Bankruptcy* ¶ 550.03[1] p. 550-10 (treating the two as redundant); Countryman, 3 Bankruptcy Developments J. at 475-80. (We need not decide whether there is a difference.) And the trustee does not try to show that this transaction satisfies the test suggested by the legislative history of § 550(b)(1):

The phrase "good faith" in [§ 550(b)] is intended to prevent a transferee from whom the trustee could recover from transferring the recoverable property to an innocent transferee, and receiving a transfer from him, that is, "washing" the transaction through an innocent third party. In order for the transferee to be excepted from liability ... he himself must be a good faith transferee.

H.R.Rep. No. 95-595, 95th Cong., 2d Sess. 376 (1978); S.Rep. No. 95-989, 95th Cong., 2d Sess. 90 (1978), U.S.Code Cong. & Admin.News 1978, pp. 5787, 5876, 6332. The trustee contends, instead, that the Bank should have known about Bonded's distress and Ryan's chicanery; had it investigated the deposit on January 21, it would have found out; and because it should have known, this is as good as knowledge.

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Imputed knowledge is an old idea, employed even in the criminal law. See United States v. Ramsey, 785 F.2d 184, 189-90 (7th Cir.1986). Venerable authority has it that the recipient of a voidable transfer may lack good faith if he possessed enough knowledge of the events to induce a reasonable *898 person to investigate. See Dokken v. Page, 147 F. 438 (8th Cir.1906) (knowledge that the debtor is transferring almost all of its assets); Garrard Glenn, Fraudulent Conveyances § 295 (1931). No one supposes that "knowledge of voidability" means complete understanding of the facts and receipt of a lawyer's opinion that such a transfer is voidable; some lesser knowledge will do. In re Nevada Implement Co., 22 B.R. 105 (Bkr.W.D.Mo.1982); Countryman, 3 Bankruptcy Developments J. at 476-77. Some facts strongly suggest the presence of others; a recipient that closes its eyes to the remaining facts may not deny knowledge. See Bosco v. Serhant, 836 F.2d 271, 276-78 (7th Cir.1987). But this is not the same as a duty to investigate, to be a monitor for creditors' benefit when nothing known so far suggests that there is a fraudulent conveyance in the chain. "Knowledge" is a stronger term than "notice", see Smith v. Mixon, 788 F.2d at 232. A transferee that lacks the information necessary to support an inference of knowledge need not start investigating on his own.

Nothing in the record of this case suggests that the Bank knew of Bonded's financial peril or Ryan's plan. Bonded was not the Bank's customer. The transfer from Ryan to the Bank on January 31 was innocuous. The Bank thought it got Ryan's money; its loan was fully secured; it perceived Ryan as a well-heeled horse breeder, with a balance sheet in the millions, current on his loan payments.

The transfer from Bonded to Ryan on January 21 was only slightly more problematic from the Bank's perspective. A corporation was transferring \$200,000 to one of its executives. This does not hint at a fraudulent conveyance by a firm on the brink of insolvency; for all the Bank knew, Bonded had plenty more where the \$200,000 came from. Banks frequently receive large checks from corporations to their officers; think of the annual bonus checks General

Motors issues, or the check to repurchase a bloc of shares. A \$200,000 check is not a plausible bonus for a currency exchange, however. It could hint at embezzlement. Several Illinois cases say that a bank should inquire when a firm's employee signs a large check with himself as payee. See *People ex rel. Nelson v. Peoples Loan & Trust Co.*, 285 Ill.App. 552, 2 N.E.2d 763 (1st Dist.1936); *Milano v. Sheridan Trust & Savings Bank*, 242 Ill.App. 362 (1st Dist.1926).

Since those cases were decided, Illinois adopted the Uniform Fiduciaries Act, which relieves banks of such a duty to inquire into the authority of the fiduciary signing the check on the maker's behalf. Ill.Rev.Stat. ch. 17 ¶ 2009; Johnson v. Citizens National Bank of Decatur, 30 Ill.App.3d 1066, 334 N.E.2d 295 (4th Dist. 1975). At all events, the Bank had no reason to think Ryan an embezzler. The check was accompanied by a memorandum from Kenneth Kortas, Bonded's manager, demonstrating that Ryan was not keeping other corporate officers in the dark. The Kortas memorandum would have led a reasonable bank to conclude that Bonded as a corporate entity wanted to make the transfer-and a bank drawing that inference here would have been right. Had the Bank called Kortas (or anyone else at Bonded) to inquire about the check, the Bank would have learned that the instrument was authorized by the appropriate corporate officials. Since the inquiry would have turned up nothing pertinent to voidability, the Bank's failure to make it does not permit a court to attribute to it the necessary knowledge.

The Bank is a subsequent transferee covered by § 550(b) (1). It took for value and without knowledge of the voidability of the initial transaction.

AFFIRMED.

All Citations

838 F.2d 890, 18 Collier Bankr.Cas.2d 155, 17 Bankr.Ct.Dec. 299

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Crystallex International Corp. v. Petróleos De Venezuela, S.A., 879 F.3d 79 (2018)

 $879 \; F.3d \; 79$ United States Court of Appeals, Third Circuit.

CRYSTALLEX INTERNATIONAL CORP.

v.

PETRÓLEOS DE VENEZUELA, S.A.; PDV Holding, Inc.; and CITGO Holding, Inc., f/k/a PDV America, Inc. PDV Holding Inc., Appellant

> Nos. 16-4012 & 17-1439 | Argued September 12, 2017 | (Opinion filed: January 3, 2018)

Synopsis

Background: Following the Bolivarian Republic of Venezuela's alleged unlawful expropriation of mining rights and investments belonging to creditor, a Canadian mining company, creditor brought action against state-owned Venezuelan company and two Delaware corporations that were its wholly-owned direct and indirect subsidiaries, asserting claims based on the Delaware Uniform Fraudulent Transfer Act (DUFTA) and civil conspiracy in connection with defendants' alleged participation in scheme orchestrated by Venezuela to monetize its American assets and pull the proceeds out of the United States in order to evade potential arbitration creditors. Subsidiaries moved to dismiss complaint for failure to state a claim. The United States District Court for the District of Delaware, No. 1-15-cv-01082, Leonard P. Stark, J., 213 F.Supp.3d 683, granted motion in part and denied motion in part. Subsidiary filed motion to certify order for interlocutory appeal.

Holdings: The Court of Appeals, Rendell, Circuit Judge, granted motion and held that:

[1] under Delaware law, as predicted by the federal court, transfer by a non-debtor was not a "fraudulent transfer" under DUFTA, and

[2] under Delaware law, as predicted by the federal court, claims based on aiding and abetting liability or conspiracy are not cognizable under DUFTA.

Reversed and remanded.

Fuentes, Circuit Judge, filed dissenting opinion.

West Headnotes (9)

[1] Federal Courts

Pleading

Federal Courts

Dismissal for failure to state a claim

Court of Appeals reviews de novo a district court's denial of a motion to dismiss for failure to state a claim, accepting all factual allegations as true, construing the complaint in the light most favorable to the plaintiff, and determining whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief. Fed. R. Civ. P. 12(b)(6).

Cases that cite this headnote

[2] Federal Civil Procedure

Insufficiency in general

To survive a motion to dismiss for failure to state a claim, a plaintiff must allege each "required element" of his claim. Fed. R. Civ. P. 12(b)(6).

Cases that cite this headnote

[3] Corporations and Business Organizations

Fraudulent Conveyances and Preferences Under Delaware law, as predicted by the federal court, a transfer by a non-debtor subsidiary corporation to its parent corporation, which was alleged to be debtor's alter ego, was not a "fraudulent transfer" under Delaware Uniform Fraudulent Transfer Act (DUFTA); such transaction seemed to lack the principal harm visited upon creditors in a fraudulent transfer, namely the debtor's alienation of an asset otherwise available to pay its debts. 6 Del. Code § 1304.

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Crystallex International Corp. v. Petróleos De Venezuela, S.A., 879 F.3d 79 (2018)

Cases that cite this headnote

[4] Federal Courts

Diversity jurisdiction in general

Court of Appeals' role in diversity cases is to apply state law.

Cases that cite this headnote

[5] Federal Courts

Highest court

Federal Courts

Maticipating or predicting state decision

A federal court under *Erie* is bound to follow state law as announced by the highest state court; if that state's highest court has not provided guidance, the federal court is charged with predicting how the highest state court would resolve the issue.

Cases that cite this headnote

[6] Federal Courts

Inferior courts

In predicting how a state court would resolve an issue for which the state's highest court has not provided guidance, a federal court must give "due deference" to intermediate state courts' rulings.

1 Cases that cite this headnote

[7] Fraudulent Conveyances

Statutory Provisions

Delaware courts generally recognize that state and federal fraudulent transfer statutes' principles are substantially the same. 11 U.S.C.A. § 548; 6 Del. Code §§ 1302-1306.

Cases that cite this headnote

[8] Corporations and Business Organizations

Disregarding Corporate Entity; Piercing Corporate Veil Delaware law tends to accord dignity to legal entities except in cases in which the traditional law of piercing the corporate veil is met.

1 Cases that cite this headnote

[9] Fraudulent Conveyances

Personal judgment

Under Delaware law, as predicted by the federal court, claims based on aiding and abetting liability or conspiracy are not cognizable under Delaware Uniform Fraudulent Transfer Act (DUFTA). 6 Del. Code § 1304.

Cases that cite this headnote

*81 On Appeal from the District Court for the District of Delaware, (District Court No. 1-15-cv-01082), District Court Judge: Honorable Leonard P. Stark

Attorneys and Law Firms

[ARGUED], Nathan P. Eimer, Lisa S. Meyer, Elmer Stahl LLP, 224 South Michigan Avenue, Suite 1100, Chicago, IL 60604, Kenneth J. Nachbar, Morris, Nichols, Arsht & Tunnell LLP, 1201 North Market Street, Wilmington, DE 19801, Counsel for Appellant PDV Holding, Inc.

[ARGUED], Robert L. Weigel, Jason W. Myatt, Rahim Moloo, Gibson, Dunn & Crutcher LLP, 200 Park Avenue, 47th Floor, New York, NY 10166, Raymond J. DiCamillo, Jeffrey L. Moyer, Travis S. Hunter, Richards, Layton & Finger, P.A., One Rodney Square, 920 North King Street, Wilmington, DE 19801, Counsel for Appellee Crystallex International Corp.

Before: VANASKIE, RENDELL, and FUENTES, Circuit Judges

OPINION

RENDELL, Circuit Judge:

At first glance this case appears exceedingly complex—with its tangle of debtors, creditors, parents, subsidiaries, alter egos, and complex international

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corporate transactions. But when one cuts through this morass, the question at the center of this case is quite simple: can a transfer by a non-debtor be a "fraudulent transfer" under the Delaware Uniform Fraudulent Transfer Act ("DUFTA")? The role of a federal court in this situation is to predict how the Supreme Court of Delaware would answer this question. We are constrained to conclude that a transfer by a non-debtor cannot be a "fraudulent transfer" under DUFTA. While we do not condone the debtor's and the transferor's actions, we must conclude that Crystallex has failed to state a claim under DUFTA. ¹

The District Court had jurisdiction over this case pursuant to 28 U.S.C. §§ 1330(a), 1367. This Court has jurisdiction to hear PDVH's interlocutory appeal under 28 U.S.C. § 1292(b).

I. Background

A. The Parties and Related Entities

Appellant Crystallex International Corp. ("Crystallex"), a Canadian gold producer, owned the rights to Las Cristinas gold reserve in the Bolivarian Republic of Venezuela ("Venezuela"). In 2011, Venezuela nationalized its gold mines and expropriated Crystallex's rights to Las Cristinas. Crystallex subsequently initiated an arbitration proceeding against Venezuela before the World Bank. It claimed that, by expropriating Crystallex's rights to Las Cristinas, Venezuela had violated a bilateral investment treaty with Canada. Venezuela was the sole defendant in the arbitration proceeding and the only entity claimed to be obligated to Crystallex for any resulting judgment. The arbitrators *82 found that Venezuela had breached the treaty and awarded Crystallex \$1.202 billion. Crystallex Int'l Corp. v. Bolivarian Rep. of Venezuela, 244 F.Supp.3d 100, 107 (D.D.C. 2017). The District Court for the District of Columbia confirmed the arbitration award, in accordance with the Federal Arbitration Act, 9 U.S.C.A. § 1, et seq. Crystallex, 244 F.Supp.3d at 122.

Venezuela owns 100% of the shares of Petróleos de Venezuela, S.A. ("PDVSA"). PDVSA is alleged to be Venezuela's alter ego, a "national oil company through which Venezuela implements government policies at home and abroad." A31. PDVSA owns 100% of PDV Holding, Inc. ("PDVH"), which in turn owns 100% of CITGO

Holding, Inc. ("CITGO Holding"). CITGO Holding owns 100% of CITGO Petroleum Corporation ("CITGO Petroleum"). PDVSA is a foreign corporation based in Venezuela. PDVH, CITGO Holding, and CITGO Petroleum are Delaware corporations.

B. Litigation Against PDVH

Crystallex brought this suit against PDVH ² in the District of Delaware, alleging that PDVH had violated DUFTA's prohibition against fraudulent transfers. ³ According to Crystallex, Venezuela realized that it was "facing billions of dollars in liability from the numerous arbitration proceedings arising from its repeated expropriation of foreign investments," including the Crystallex proceeding. A30. "On numerous occasions, Venezuelan government officials stated publicly that Venezuela would refuse to pay any anticipated arbitral award against it and would proactively thwart efforts to enforce such awards." A40.

- PDVSA and CITGO Holding were also named as defendants in the original suit. The District Court dismissed Crystallex's claims against PDVSA and CITGO Holding. Those rulings are not before us on appeal.
- 3 Crystallex also alleged claims of common law civil conspiracy against the three defendants. The District Court dismissed those claims against all three defendants. Those rulings are not before us on appeal.

"As part of [its] plan to thwart enforcement," Venezuela orchestrated a series of debt offerings and asset transfers among PDVSA, PDVH, CITGO Holding, and CITGO Petroleum. A30. Specifically, Venezuela sought to "monetize its interests in CITGO [Petroleum]," its largest United States-based asset, and repatriate the proceeds. A40. To this end, Venezuela "enlisted its alter ego PDVSA," who in turn "directed its wholly-owned subsidiary PDVH to direct its wholly-owned subsidiary CITGO Holding to issue \$2.8 billion in debt." 4 A31. CITGO Holding, in turn, transferred the proceeds from the issuance of debt to its parent PDVH as a shareholder "dividend." A31. PDVH then declared a dividend of the same amount to its parent PDVSA, a Venezuelan corporation and the alleged alter ego of Venezuela, thereby repatriating the money to Venezuela and shielding it from an enforcement action in the United States. Id.

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The mechanics of the \$2.8 billion debt offering were fairly complex. However, the net result was that CITGO Petroleum was left with negative shareholder equity and rendered insolvent, with most its value transferred to CITGO Holding.

These transactions formed the basis of Crystallex's DUFTA claim against PDVH. As a result of these transfers, "nearly \$2.8 billion in 'dividends' ended up in the hands of PDVSA (and therefore Venezuela) outside the United States where they could not be reached by Venezuela's creditors." A43. Under DUFTA,

A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, *83 whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation ... [w]ith actual intent to hinder, delay or defraud any creditor of the debtor. 6 Del. C. § 1304.

C. District Court Denies PDVH's Motion to Dismiss

PDVH moved to dismiss the complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). It argued that Crystallex had failed to state a claim under DUFTA because the allegedly fraudulent transfer was not made "by a debtor"—that is, by Venezuela—as required by the statute. 6 Del. C. § 1304(a). The District Court denied PDVH's motion to dismiss, concluding that there had indeed been a transfer "by a debtor." *Crystallex Int'l Corp. v. Petroleos de Venezuela, S.A.*, 213 F.Supp.3d 683 (D. Del. 2016).

PDVH's Motion to Dismiss contained two additional arguments. First, it argued that the transfer from PDVH to PDVSA did not involve property "of a debtor," as required by the statute. The District Court rejected this argument, and PDVH does not challenge this legal analysis on appeal. Second, PDVH argued that the DUFTA claim was preempted by the attachment immunity provisions of the Foreign Sovereign Immunities Act ("FSIA"). The District Court rejected this argument as well. PDVH appeals that decision. Because we will reverse the District

Court's order based on the DUFTA claim, we need not reach the FSIA issue.

In reaching this conclusion, the District Court first correctly stated that Crystallex's only potential debtors were Venezuela and its alleged alter ego PDVSA. Crystallex, 213 F.Supp.3d at 691. Therefore, "in the narrowest sense of the term," none of the transfers were "directly undertaken 'by' the 'debtor.' " Id. Nonetheless, the District Court found that PDVH-a "non-debtor transferor"-could be liable under DUFTA for its dividend transfer to PDVSA. Id. at 693. In support of this conclusion, the District Court noted that "DUFTA includes within its ambit 'indirect ... mode(s) ... of disposing of or parting with an asset or an interest in an asset." Id. at 691 (quoting 6 Del. C. § 1301(12)). It also cited Merriam-Webster's definition of the word "by," which includes "through the agency or instrumentality of" and "on behalf of." Id. Given the alleged "extensive, if not dominating, involvement" of the debtor Venezuela, the PDVH transfer was executed by an "instrumentality" of the debtor or on its "behalf." Id. Therefore, the District Court reasoned, the transfer from PDVH to PDVSA was "a transfer made in every meaningful sense 'by a debtor,'" despite the fact that PDVH was not in fact a debtor. Id. at 691-92. Finally, the District Court noted that its holding was in line with the purpose of DUFTA, which "broadly provides for the application of 'the principles of law and equity." Id. at 692.

PDVH filed a motion to certify the District Court's Order for interlocutory review pursuant to 28 U.S.C. § 1292(b), arguing that the District Court incorrectly concluded that DUFTA extends to transfers by non-debtors. After briefing and oral argument, the District Court granted PDVH's motion, and we accepted PDVH's petition for permissive review.

II. Analysis ⁶

We review a District Court's denial of a Rule 12(b) (6) motion to dismiss *de novo. F.T.C. v. Wyndham Worldwide Corp.*, 799 F.3d 236, 242 (3d Cir. 2015). We "accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." *Wyndham Worldwide*, 799 F.3d at 242.

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the District Court and *84 our dissenting colleague have expressed, we are compelled to conclude that we must reverse the District Court's Order denying PDVH's motion to dismiss, because transfers by non-debtors are not fraudulent transfers under DUFTA as it has been interpreted by the Delaware courts. To survive a motion to dismiss, a plaintiff must allege each "required element" of his claim. Phillips v. Cty. of Allegheny, 515 F.3d 224, 234-35 (3d Cir. 2008). The DUFTA statute reads, in relevant part:

> A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation ... [w]ith actual intent to hinder, delay or defraud any creditor of the debtor. 6 Del. C. § 1304 (emphasis added).

In order to withstand a motion to dismiss a claim under DUFTA, therefore, Crystallex must successfully plead three things: (1) a transfer, (2) by a debtor, (3) with actual intent to hinder, delay, or defraud a creditor. This case turns on the meaning of the second element, "by a debtor."

Chancery Court and other Delaware state law principles, we conclude that the transfer by non-debtor PDVH to PSVHA was not a fraudulent transfer under DUFTA. "Our role in diversity cases is to apply state law." Sheridan v. NGK Metals, 609 F.3d 239, 254 (3d Cir. 2010). "A federal court under Erie is bound to follow state law as announced by the highest state court." Edwards v. HOVENSA, LLC, 497 F.3d 355, 361 (3d Cir. 2007). "[I]f that state's highest court has not provided guidance, we are charged with predicting how that court would resolve the issue." In re Energy Future Holdings Corp., 842 F.3d 247, 253-54 (3d Cir. 2016). In doing so, we must give "due deference" to the intermediate state courts' rulings. In re Makowka, 754 F.3d 143, 148 (3d Cir. 2014). "This standard places a significant constraint on us[.]" Sheridan, 609 F.3d at 254 (quoting Jewelcor Inc. v. Karfunkel, 517 F.3d 672, 676 n.4 (3d Cir. 2008)). "Unlike our role in interpreting federal law, we may not 'act as a judicial

[2] While we acknowledge the appeal to equity that pioneer' in a diversity case." Sheridan, 609 F.3d at 254 (citation omitted).

> Crystallex alleges that PDVH's transfer to PDVSA was part of a scheme, designed in part by Venezuela, to transfer \$2.8 billion out of the United States, placing it out of the reach of Crystallex or other creditors attempting to enforce a judgment against Venezuela. It alleges that, "[t]ogether, [Venezuela, through its alter ego] PDVSA, PDVH, and CITGO Holding ... devised a scheme" to liquidate the value of CITGO Petroleum, Venezuela's largest United States-based asset. A31, A41. Pursuant to this "strategy concocted by PDVSA, PDVH, and CITGO Holding," CITGO Holding would transfer billions of dollars to PDVH "where, in turn, those funds would be paid as a dividend to PDVH's direct parent[,] ... moving the funds to PDVSA outside the United States." A41.

But more important is what Crystallex does not allege. It does not allege that PDVH is a debtor or otherwise liable for the arbitral judgment Crystallex has obtained against Venezuela. Absent is any allegation that Venezuela or PDVSA—the only potential debtors ⁷—transferred any *85 property. Instead, Venezuela, through its alleged alter ego PDVSA, received the \$2.8 billion in question. The transfer was clearly alleged to have been by the non-debtor PDVH. As an initial matter, this transaction seems to lack the principal harm visited upon creditors in a fraudulent transfer, namely the debtor's alienation of [3] [4] [5] [6] Based on the decisions of the Delawarean asset otherwise available to pay its debts. Here, the alienation complained of was geographical. It was not technically a transfer by the debtor but a transfer to the debtor which, by virtue of international law, resulted in the assets being out of the reach of creditors. This situation is not covered, or contemplated, by DUFTA.

> PDVSA was not involved in the arbitration proceeding. But if we accept as true Crystallex's allegation that PDVSA is the alter ego of Venezuela, it is at least theoretically possible that PDVSA could be liable for the arbitration award as well.

The allegations in the complaint raise two questions. First, can a transfer by a non-debtor such as PDVH constitute a fraudulent transfer under DUFTA? If not, we then ask whether the allegations in the complaint, whereby the debtor Venezuela devised the scheme, can state a claim for relief under DUFTA based on either an aiding and abetting or a conspiracy theory. The answer to both questions is no.

A. Non-Debtor Liability Under DUFTA

Although the Delaware Supreme Court has not had the opportunity to consider whether non-debtor transferors can commit fraudulent transfers under DUFTA, the Chancery Court has answered that question in the negative. See Edgewater Growth Capital Partners v. H.I.G. Capital, Inc., C.A. No. 3601-VCS, 2010 WL 720150, at *2 (Del. Ch. Mar. 3, 2010) ("By its own terms, the Delaware Fraudulent Transfer Act only provides for a cause of action by a creditor against debtor-transferors or transferees."); In re Wickes Trust, No. Civ. A. 2515-VCS, 2008 WL 4698477, at *7–8 (Del. Ch. Oct. 16, 2008) ("in order to have a fraudulent transfer claim, one must have a valid claim against the person ... alleged to have fraudulently made the transfer").

Although these and several other Chancery Court opinions we rely on are unpublished. Delaware courts give such opinions substantial precedential weight. See Aprahamian v. HBO & Co., 531 A.2d 1204, 1207 (Del. Ch. 1987) ("An unreported decision [is] entitled to great deference"); 1-4 Corp. and Commercial Practice in DE Court of Chancery § 4.04, Lexis (2017) ("The mere fact that a case is not reported should not be taken to suggest that unpublished decisions are without precedential value. Emphatically to the contrary, unpublished letter and memorandum opinions, and even some oral rulings from the bench, are afforded a considerable precedential weight [in Delaware], especially in view of the fact that unreported decisions often are the only authority on point where novel issues are involved"). In predicting how the Delaware Supreme Court would resolve this issue, we thus give such opinions substantial precedential weight as well.

The Chancery Court has also rejected fraudulent transfer claims against non-debtor transferors under analogous provisions in the federal Bankruptcy Code, 11 U.S.C.A. § 548. See Spring Real Estate, LLC v. EcholRT Holdings, LLC, C.A. No. 7994-VCN, 2016 WL 769586, at *3 (Del. Ch. Feb. 18, 2016), aff'd sub nom. Klauder v. EcholRT Holdings, LLC, No. 133, 2016 WL 7189917 (Del. Dec. 12, 2016) (rejecting a fraudulent conveyance claim against a non-debtor subsidiary of the debtor parent company). See also In re Plassein Int'l Corp. v. B.A. Capital Co., 366 B.R. 318, 326 (Bankr. D. Del. 2007), aff'd. 388 B.R. 46 (D. Del. 2008), aff'd 590 F.3d 252 (3d Cir. 2009) (dismissing

state and federal fraudulent transfer claims because the allegedly fraudulent transfer was made by a non-debtor).

[7] Although Crystallex's claim arises under DUFTA, not the Bankruptcy Code, *86 these decisions are instructive. The relevant DUFTA and Bankruptcy Code provisions are nearly identical, and Delaware courts have interpreted and applied them uniformly. Compare 11 U.S.C. § 548 with 6 Del. C. §§ 1302-1306. "Because Delaware has adopted the Federal UFTA, a statute that was itself modeled on Section 548 of the Bankruptcy Code ... Delaware courts generally recognize that our state and the federal fraudulent transfer statutes' principles are substantially the same." Ki-Poong Lee v. So, C.A. No. N14C-08-173 PRW, 2016 WL 6806247, at *3 (Del. Super. Ct. Nov. 17, 2016). See also In re PHP Healthcare Corp., 128 Fed. Appx. 839, 847 (3d Cir. 2005) ("We need not discuss the provisions of the Delaware Fraudulent Transfer Act ... because they are substantially the same as the relevant parts of the Bankruptcy Code"). DUFTA is "virtually a carbon copy of the fraudulent transfer law under the Bankruptcy Code" and "the result under Delaware law should be the same as the outcome under the Bankruptcy Code." In re Trace Int'l Holdings, Inc. v. Dow Chemical Co., 287 B.R. 98, 105 n.5 (Bankr. S.D.N.Y. 2002). Just as the Chancery Court has found that a non-debtor transferor is not liable under the Bankruptcy Code, a nondebtor transferor is not liable under DUFTA.

Here, Crystallex has failed to allege that PDVH is a debtor or that PDVH would otherwise be liable to Crystallex for any judgment against Venezuela. The Dissent notes that no Delaware case has specifically "held that non-debtor transferors are immune from liability under the Act." Dissenting Op. at 92. But the question here is not one of immunity. Rather, we must decide whether a transfer by a non-debtor fits within the statutory definition of a fraudulent transfer in the first place. Because relevant Delaware precedent makes it clear that the answer to this question is "no," non-debtor PDVH simply could not have committed a fraudulent transfer in violation of DUFTA.

[8] In addition, reading "by a debtor" broadly enough to allow a non-debtor subsidiary transferor (here, PDVH) to be liable, simply because its parent company (here, Venezuela, through its alter ego PDVSA) is a debtor, would undermine a fundamental precept of Delaware corporate law: parent and subsidiary corporations are

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separate legal entities. As the District Court correctly noted, "Delaware public policy does not lightly disregard the separate legal existence of corporations." Crystallex, 213 F.Supp.3d at 690 (quoting Spring Real Estate, 2016 WL 769586, at *3 n.35). "Persuading a Delaware court to disregard the corporate entity is a difficult task." Wallace ex rel. Cencom Cable Income Partners II v. Wood, 752 A.2d 1175, 1183 (Del. Ch. 1999) (internal quotation marks omitted). Delaware law "tends to accord dignity to legal entities except in cases in which the traditional law of piercing the corporate veil is met." Hart Holding Co. v. Drexel Burnham Lambert Inc., C.A. No. 11514, 1992 WL 127567, at n.11 (Del. Ch. 1992). Such cases are rare, and include situations where the subsidiary is a mere "alter ego" of the parent. See Mabon, Nugent & Co. v. Texas Am. Energy Corp., CIV A No. 8578, 1990 WL 44267 (Del. Ch. 1990) (describing possible grounds for piercing the corporate veil under Delaware law). Crystallex alleges in great detail that PDVSA is Venezuela's alter ego. But that is beside the point. Tellingly, it does not allege that PDVH is Venezuela's or PDVSA's alter ego or any other basis on which we could "pierce the corporate veil." Absent such allegations, we are unwilling to disregard PDVH's distinct corporate identity and attribute to it the actions of the debtor.

*87 Crystallex's remaining arguments for interpreting DUFTA to cover non-debtor transferors are also of no avail. First, Crystallex urges that non-debtor transferors are covered by DUFTA because § 1307(c) of the statute shows that the legislature contemplated such liability. Under § 1307(c), "a creditor shall have no right to relief against any trustee, attorney or other advisor who has not acted in bad faith on account of any transfer." 6 Del. C. § 1307(c). According to Crystallex, the inverse must be true: non-debtors—namely, trustees, attorneys, or other advisors-who have acted in bad faith can be liable under DUFTA. This argument fails. First, this section of the statute does not affirmatively authorize suits against non-debtors. Second, even if it did authorize such suits, Crystallex does not allege that PDVH was a trustee, attorney, or other advisor. Moreover, we question the continued validity of this portion of the statute. As PDVH argues, since its enactment in 1999, § 1307(c) may have been rendered "surplusage" by Delaware case law finding that DUFTA only provides a cause of action against debtors, thereby shielding advisors from liability. See Reply Br. for Appellant at 21 (citing Edgewater, 2010 WL 720150, at *2).

Similarly, Crystallex argues to no avail that § 1308 of the statute supports non-debtor liability. Section 1308 provides that transferees are not liable under the statute if they received title in good faith for equivalent value. 6 Del. C. § 1308. Crystallex seems to suggest that since good faith transferees are not liable under the statute, relief should be afforded against bad faith non-debtor transferors. See 6 Del. C. § 1308. But this is a non sequitur. Moreover, there simply is no support for subjecting bad faith non-debtor transferors to liability under the Delaware case law. We are not permitted to "act as a judicial pioneer" when applying state law, and are therefore unwilling to expand the statute to cover bad faith non-debtor transferors. Sheridan, 609 F.3d at 253.

Nor are we persuaded by Crystallex's claim that courts in other jurisdictions have found non-debtor transferors liable under similar fraudulent transfer statutes. Crystallex cites only two such cases: Gutierrez v. Givens, 1 F.Supp.2d 1077 (S.D. Cal. 1998), and In re Carousel Candy Co. v Weber, 38 B.R. 927 (E.D.N.Y. 1984). Those case are not binding on us, nor would they be binding on the Delaware Supreme Court. Regardless, these cases are inapposite. The defendant bank in Gutierrez did not argue that it was not liable under the California fraudulent transfer statute, Cal. Civil Code § 3439, based on its non-debtor status. Instead, it argued that the fraudulent transfer claim against it should be dismissed because the main remedy available under the statute did not apply to a non-transferee such as the bank. Gutierrez, 1 F.Supp.2d at 1087. The court rejected this argument, finding that if the bank was liable under the statute, the bank could still be subject to alternative remedies. Id. It did not have to determine whether the non-debtor bank could be liable under the statute. Carousel is also distinguishable. In that case, the court allowed a fraudulent transfer claim to proceed against a non-debtor, but it based its decision on the fact that the transferor was the debtor's attorney, owed the debtor a fiduciary duty, and "was de facto in control of the debtor" at the time of the transfer. 38 B.R. at 938. Those facts are not present here, nor does the Delaware case law hint at broadening the concept of "by a debtor" in such a fact pattern.

Even if we were to consider out-of-jurisdiction cases, the majority of courts that have considered the issue have rejected non-debtor transferor liability. See, e.g., *88 Ferri v. Powell–Ferri, No. MMXCV116006351S, 2012 WL

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3854425 at *4 (Conn. Super. Ct. July 30, 2012) (striking a fraudulent transfer claim against a non-debtor transferor and finding no support for the position that "a third party can be liable for making a fraudulent transfer as to a party to whom the third party is not a debtor"); Folmar & Assoc's LLP v. Holberg, 776 So.2d 112, 118 (Ala. 2000), overruled on other grounds by White Sands Grp., LLC v. PRS IILLC, 32 So.3d 5 (Ala. 2009) (rejecting a fraudulent transfer claim and finding "no case in which the provisions of the Alabama Uniform Fraudulent Transfer Act have been extended to apply to transferors other than the debtor"); cf. Healthco Int'l, Inc., 201 B.R. 19, 21 (Bankr. D. Mass. 1996) (finding that the transfers at issue were "not transfers by the Debtor and hence are immune from fraudulent transfer attack" under the federal Bankruptcy Code).

We also decline to rely on the broader dictionary definition of "by"—which includes "through the agency or instrumentality of" and "on behalf of"—to extend DUFTA to cover non-debtor transferors. First, we do not read the allegations in the complaint to actually aver that PDVH acted as an agent or "on behalf of" Venezuela. Second, we need not resort to dictionary definitions where the Delaware courts have clearly indicated that "by a debtor" means that the debtor itself must have made the transfer

Finally, we reject Crystallex's argument that DUFTA's "broad remedial purpose" should cause us to declare the transfer fraudulent. Br. for Appellant, 37. We also decline to find the non-debtor transfer here fraudulent based on equitable considerations, as our dissenting colleague suggests. Dissenting Op. at 93-94. It is true that "DUFTA grants a court 'broad latitude' for the court to craft a remedy," Lake Treasure Holdings, Ltd. v. Foundry Hill GP LLC, C.A. No. 6546-VCL, 2014 WL 5192179 (Del. Ch. Oct. 10, 2014) (citation omitted) (emphasis added), and "leaves considerable leeway for the exercise of equitable discretion" in doing so. In re Mobilactive Media, LLC, C.A. No. 5725-VCP, 2013 WL 297950 (Del. Ch. Jan. 25, 2013). See also 6 Del. C. § 1307(a)(3)(c) (courts may invoke equitable principles to craft "[a]ny [] relief the circumstances may require"). But having broad latitude to craft a remedy for a DUFTA violation does not necessarily mean we have broad latitude to determine what fits within the contours of the statute in the first place. Moreover, the Chancery Court is a court of equity. See 10 Del. C. § 341 ("The Court of Chancery shall have jurisdiction to hear and determine all matters and causes in equity."). It has had the opportunity to conclude, as an equitable matter, that DUFTA covers transfers by non-debtors. But, so far, it has not. Delaware courts have closed the door to non-debtor transferor liability under the state statute, and we are not free to open it.

Sidestepping the "by the debtor" requirement, Crystallex looks to other elements of the statute in an attempt to cover the transaction. First, Crystallex focuses on the "transfer" element. It points to the statute's broad definition of "transfer," which includes both direct and indirect transfers, and argues that the indirect transfer here is therefore covered by the statute. See 6 Del. C. § 1301(12) (" 'Transfer' means every mode, direct or indirect, ... of disposing of or parting with an asset or an interest in an asset"). The Dissent cites this language as well, arguing that our interpretation reads the term "indirect" out of the statute. Dissenting Op. at 93. But this argument conflates two separate elements of a DUFTA claim: (1) a transfer (2) made by the debtor. In other words, DUFTA may cover an indirect transfer, but that transfer must nonetheless be made "by a debtor" in order to be *89 cognizable under the statute. Nothing in the complaint suggests that Venezuela, the debtor, transferred an asset directly or indirectly. Indeed, it was the recipient of the assets.

Crystallex also understandably focuses on the intentional nature of the transaction-to remove assets from the United States to Venezuela where they would not be subject to execution by Venezuela's creditors. Crystallex points to various "badges of fraud," including the fact that several Venezuelan officials publicly said that the government would not pay any arbitral awards and that the purpose of the transfers was to shield CITGO Petroleum from potential arbitration judgments. A40-41, A62. Certainly, the intent behind this series of transactions was to hinder creditors. It may be tempting to conclude that PDVH's transfer to PDVSA was therefore a fraudulent transfer under DUFTA. But these badges of fraud go to only one of the three necessary elements of a DUFTA claim-"actual intent" to hinder, delay or defraud any creditor of the debtor. 6 Del. C. § 1304. Despite detailed allegations of intent, Crystallex's DUFTA claim against PDVH nonetheless fails because it does not allege a transfer "by a debtor."

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B. Theories of Aiding and Abetting and Conspiracy Under DUFTA

We now must decide whether Crystallex's complaint nonetheless states a DUFTA claim against PDVH, given the debtor Venezuela's alleged role in the transfer scheme. Crystallex clearly alleges that "Venezuela, through its alter ego, PDVSA, perpetrated this transfer to hinder or delay Crystallex's ability to enforce its arbitration award." A34. Venezuela "devised" the scheme and "enlisted" its alter ego PDVSA to "extract as much value as possible from CITGO." A31. PDVSA did so by "orchestrating" a series of transfers that "converted CITGO's value to cash, then removing those funds from the United States and transferring them into PDVSA's coffers in Venezuela." A31. "All of the steps in this fraudulent transfer were planned out ... and were part of a single scheme" to benefit Venezuela. A43.

[9] The issue thus becomes whether a claim under DUFTA can be stated where the debtor orchestrated a scheme whereby a non-debtor transferred assets to the debtor. Presumably, this would be based on a theory of aiding and abetting the transfer, or on a theory of conspiracy. The Dissent would find that "even though PDV Holding was not a debtor to Crystallex, it clearly facilitated the fraudulent transfer and is therefore a proper defendant in this case." Dissenting Op. at 91. However, according to Delaware courts, a DUFTA claim based on a theory of non-principal liability is not cognizable under the statute. The Chancery Court has foreclosed the possibility of aiding and abetting liability under DUFTA. Edgewater, 2010 WL 720150 at *2 ("[T]he Delaware Fraudulent Transfer Act does not create a cause of action for aiding and abetting or conspiring to commit, a fraudulent transfer."); Trenwick America Litigation Trust v. Ernst & Young, L.L.P., 906 A.2d 168, 203 (Del. Ch. 2006) ("Despite the breadth of remedies available under state and federal fraudulent conveyance statutes, those laws have not been interpreted as creating a cause of action for 'aiding and abetting.' "), Nor can Crystallex succeed on a theory of conspiracy, as the Chancery Court has specifically ruled to the contrary. See Quadrant Structured Products Co. v. Vertin, 102 A.3d 155, 203 (Del. Ch. 2014) ("Under Delaware law, a conspiracy cannot be predicated on fraudulent transfer").

We must give due deference to the Delaware courts' opinions on these issues of *90 state law, and these opinions limit DUFTA to transfers by debtors—which PDVH is not alleged to be. We cannot extend DUFTA beyond these confines. "We leave to ... the state legislatures and, where relevant, to the state courts the task of expanding or restricting liability [theories]." Wisniewski v. Johns—Manville Corp., 759 F.2d 271, 274 (3d Cir. 1985). Crystallex has failed to successfully plead a transfer "by a debtor" and thus failed to successfully plead a fraudulent transfer claim against PDVH under DUFTA.

III. Conclusion

For the foregoing reasons, we will reverse the order of the District Court and remand for further proceedings consistent with this opinion.

FUENTES, Circuit Judge, dissenting.

Crystallex, a Canadian company, owned the exclusive rights to Las Cristinas, a gold mine in the Republic of Venezuela ("Venezuela"). According to the complaint, the mine has one of the largest unmined gold reserves in the world, between 17 and 26 million ounces of gold. For nearly a decade, Crystallex invested more than \$640 million to develop the mine. However, despite Crystallex's many applications, Venezuela never issued the permits needed to extract and sell gold. Eventually, claiming that Crystallex had stalled progress on the mine's development, Venezuela terminated Crystallex's mining agreement and seized the mine. According to Crystallex, this was all part of Venezuela's scheme to expropriate its substantial investment.

Following the seizure, Venezuela transferred Crystallex's interest in the mine to Petróleos de Venezuela, S.A. ("Petróleos"), a state-owned company. Petróleos, in turn, sold 40% of that interest to the Venezuelan Central Bank for \$9.5 billion. Venezuela's seizure forced Crystallex into bankruptcy. Having lost its entire investment in the mine, Crystallex brought an arbitration against Venezuela under a treaty between Canada and Venezuela. Ultimately, the arbitration tribunal found that Venezuela's conduct violated the treaty and awarded Crystallex over \$1.2 billion in damages. ¹

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The District Court for the District of Columbia later confirmed the award and entered judgment in Crystallex's favor for over \$1.2 billion. See Crystallex Int'l Corp. v. Bolivarian Republic of Venez., 244 F.Supp.3d 100, 105 (D.D.C. 2017). As of this writing, Venezuela's appeal of that decision is pending.

While the arbitration was pending, Venezuela repeatedly, including through its former President Hugo Chávez, maintained that it would refuse to pay any arbitration award. To that end, Venezuela devised a fraudulent scheme to transfer \$2.8 billion out of the United States. It did so through a complex series of debt offerings and dividend transfers involving Petróleos and its whollyowned Delaware subsidiaries, Citgo Holding, Inc. ("Citgo Holding") and defendant PDV Holding, Inc. ("PDV Holding"). Venezuela's purpose was clear: to move its assets out of the United States to prevent judgment creditors like Crystallex from executing upon them.

Interestingly, the bond offering materials said that "no assurance can be given that any of the [t]ransactions would not be challenged as a fraudulent transfer " A-44

The following diagram depicts the flow of funds from the United States to Venezuela as alleged by Crystallex:

*91

At the direction of Petróleos, a Venezuelan state-owned company, Citgo Holding, a Delaware corporation, issued a \$2.8 billion dividend to PDV Holding.

At the direction of Petróleos, PDV Holding, a Delaware corporation, issued a \$2.8 billion dividend to Petróleos.

Petróleos, immune from suit under the Foreign Sovereign Immunities Act, received a \$2.8 billion dividend in Venezuela.

Against this background, the majority holds that Crystallex cannot assert a claim against PDV Holding—the only remaining defendant in this case—under the Delaware Uniform Fraudulent Transfer Act (the "Fraudulent Transfer Act" or the "Act") because PDV Holding, a Delaware corporation, was merely a non-debtor transferor, and not a debtor or transferee, in the fraudulent scheme. I disagree. I would affirm the District Court.

I would conclude that Crystallex has adequately pled a claim under the Fraudulent Transfer Act against PDV Holding, a direct participant in the fraudulent transfer. Specifically, as the District Court found, PDV Holding's issuance of a \$2.8 billion dividend to Petróleos, at Venezuela's direction, was a "transfer" of debtor property "by a debtor" under the Fraudulent Transfer Act. And, like the District Court, I would find that even though PDV Holding was not a debtor to Crystallex, it clearly facilitated the fraudulent transfer and is therefore a proper defendant in this case.

As I view the facts, it cannot be that the Fraudulent Transfer Act, which is firmly grounded in principles of equity, leaves Crystallex—the victim of a purposeful and complicated fraud—without any remedy for PDV

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Holding's role in transferring \$2.8 billion out of the United States to avoid Venezuela's creditors. The Fraudulent Transfer Act does not support such a result.

However, today the majority signals that a party, such as PDV Holding, may knowingly participate in a fraudulent *92 transfer so long as it is not a debtor. Indeed, a consequence of the majority's holding is that, under the Fraudulent Transfer Act, a foreign sovereign—such as Venezuela—is free to fraudulently repatriate assets, so long as the party making the transfer is a non-debtor. That result does not comport with—but rather is wholly contrary to—the Act's broad remedial purpose.

Moreover, I believe the majority is wrong as a matter of law. According to the majority, the "Delaware courts have closed the door to non-debtor transferor liability under" the Fraudulent Transfer Act. ³ I cannot agree. None of the cases cited by the majority have held that non-debtor transferors are immune from liability under the Act.

3 Maj. Op. at 88–89.

To the contrary, the committee that drafted the Uniform Fraudulent Transfer Act, the model statute on which the Fraudulent Transfer Act is based, plainly stated that its remedies are not exclusive. ⁴ Indeed, the Fraudulent Transfer Act grants courts broad latitude to craft remedies in response to fraudulent transfers. Specifically, the Act provides that courts may craft "[a]ny [] relief the circumstances may require." ⁵ What's more, as the District Court noted, the Act states that "principles of law and equity" should be used to "supplement its provisions" unless "displaced by the [Act's] provisions." ⁶

- 4 See Unif. Fraudulent Transfer Act § 7 cmt. 1 (1984) ("The remedies specified in this section are not exclusive."). The Uniform Fraudulent Transfer Act, which was promulgated by the National Conference of Commissioners on Uniform State Law in 1984, has been adopted in all but a handful of states.
- 5 6 Del. C. § 1307(a)(3)(c).
- 6 Id. § 1310.

Importantly, the Fraudulent Transfer Act does not, by its own terms, bar a claim against a non-debtor transferor such as PDV Holding. Thus, in keeping with the Act's requirement that courts "supplement its

provisions" with the "principles of law and equity," we must determine whether, assuming the fraudulent transfer scheme occurred as alleged, it was appropriate for the District Court to conclude that defendant PDV Holding's "continued presence in this action is appropriate."

7 A-13.

Because I would hold that the answer is yes, I respectfully dissent

I. Crystallex Stated a Fraudulent Transfer Act Claim

I completely agree with the District Court that Crystallex pled a Fraudulent Transfer Act claim against PDV Holding. I also agree with the District Court that PDV Holding's non-debtor status does not (and should not) shield it from liability for its fraudulent repatriation of \$2.8 billion to Petróleos, a Venezuelan state-owned company.

A. The Dividend to Petróleos Was a "Transfer"

Under the Fraudulent Transfer Act, a "transfer" includes "every mode, direct or indirect ... of disposing of or parting with an asset or an interest in an asset." ⁸ "Asset" is defined broadly as "property of a debtor." ⁹ The District Court found that PDV Holding's \$2.8 billion dividend to Petróleos involved the "property of a debtor," and therefore, was a "transfer" under the Act. I agree with that conclusion, and PDV Holding does not challenge it on appeal.

- 8 6 Del. C. § 1301(12).
- 9 *Id.* § 1301(2).

*93 B. The Transfer Was Made "By a Debtor"

The majority first holds that Crystallex's claim fails because the \$2.8 billion dividend to Petróleos was made by PDV Holding, not Petróleos itself, and thus not "by a debtor" under the Fraudulent Transfer Act. I disagree. In my view, and consistent with the Act, PDV Holding's dividend to Petróleos, as requested by Venezuela, was an *indirect* transfer "by a debtor." As such, it is a clear violation of the Act.

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A transfer must be "by a debtor" to be actionable under the Act. As the District Court noted, a "transfer" includes "every mode, direct or *indirect* ... of disposing of or parting with an asset or an interest in an asset." ¹⁰ The majority's interpretation of "by a debtor" reads the term "*indirect*" out of the Act. This result does not comport with our practice of "avoid[ing] interpretations that effectively read words out of a statute." ¹¹

- 10 Id. § 1301(12) (emphasis added).
- 11 *United States v. Taylor*, 686 F.3d 182, 193 (3d Cir. 2012).

Further, the Act does not define the phrase "by a debtor." "When words are left undefined, we have turned to 'standard reference works such as legal and general dictionaries in order to ascertain' their ordinary meaning." ¹² In fact, this approach mirrors the Delaware Supreme Court's method for interpreting undefined words in statutes. ¹³ Merriam—Webster's dictionary defines "by" to include "on behalf of." ¹⁴ As such, as the District Court did, I would hold that a transfer is made "by a debtor" under the Act when it is executed on the debtor's "behalf."

- 12 Eid v. Thompson, 740 F.3d 118, 123 (3d Cir. 2014) (quoting United States v. Geiser, 527 F.3d 288, 294 (3d Cir. 2008)).
- 13 See Cephas v. State, 911 A.2d 799, 801 (Del. 2006) ("Under well-settled case law, Delaware courts look to dictionaries for assistance in determining the plain meaning of terms which are not defined[.]" (quoting Lorillard Tobacco Co. v. Am. Legacy Found., 903 A.2d 728, 738 (Del. 2006))).
- Merriam–Webster's Collegiate Dictionary 157 (10th ed. 1996).

Here, Crystallex alleges that PDV Holding's \$2.8 billion dividend to Petróleos was part of a complex scheme directed by Venezuela. On these facts, I would find that PDV Holding's dividend to Petróleos, sent on Venezuela's behalf, was a transfer "by a debtor." I find the majority's arguments to the contrary unconvincing. ¹⁵

The majority argues that the scheme alleged "is not covered, or contemplated, by [the Act]" because the transfer went to the debtor. Maj. Op. at 85.1 disagree. As noted, under the Act, a "transfer" includes "every mode ... of disposing of or parting with an asset."

6 Del. C. § 1301(12) (emphasis added). The Act does not define "disposing of." But, in dictionary terms, "dispose of" means "to place, distribute, or arrange." Merriam-Webster's Collegiate Dictionary 335 (10th ed. 1996). Here, PDV Holding's dividend to Petróleos caused the proceeds to be "placed" in Venezuela. From this, I would hold that PDV Holding's dividend falls within the Act because it "dispose[d] of" Venezuela's property. To be sure, since "transfer" also includes "parting with an asset," the phrase "disposing of" would be redundant if it only captured the movement of property away from the debtor. See United States v. Reeves, 752 F.2d 995, 998 (5th Cir. 1985) ("A statute should be read to avoid rendering its language redundant if reasonably possible.").

C. Equity Dictates That PDV Holding is Liable Under the Fraudulent Transfer Act

Moreover, I disagree with the majority's holding that nondebtor transferors, such as PDV Holding, are immune from liability under the Act. Specifically, the majority asserts that "Delaware courts have closed *94 the door to non-debtor transferor liability under" the Act. ¹⁶

16 Maj. Op. at 88–89.

In this regard, the majority primarily relies on the Delaware Chancery Court's decision in Edgewater Growth Capital Partners L.P. v. H.I.G. Capital, Inc. 17 In Edgewater, a minority owner of a corporation sought to hold the corporation's former directors liable under the Fraudulent Transfer Act for aiding and abetting the corporation's sale of its assets to a senior lender. In support of its aiding and abetting theory, the minority owner alleged that the directors "conspired with" the senior lender to cause the corporation "to run an unfair, tainted sales process." 18 However, the Court held that the Act "does not create a cause of action for aiding and abetting a fraudulent transfer, or conspiring to commit, a fraudulent transfer." ¹⁹ In Edgewater, the Court observed that "[b]y its own terms, the [] Fraudulent Transfer Act only provides for a cause of action by a creditor against debtor-transferors or transferees." 20

- 17 C.A. No. 3601-VCS, 2010 WL 720150 (Del. Ch. Mar. 3, 2010).
- 18 *Id.* at *1.

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19 *Id.* at *2.

20 Ld

The majority interprets this to mean that *Edgewater* definitively holds that non-debtor transferors such as PDV Holding are immune from liability under the Fraudulent Transfer Act. Admittedly, reading that sentence in isolation gives this argument some facial appeal. However, *Edgewater* merely addressed whether the Act recognizes an aiding and abetting claim. In fact, it does not appear that the Delaware courts have ever held that non-debtor transferors are immune from liability under the Act.

Additionally, unlike the majority, I do not interpret Crystallex's complaint as alleging an aiding and abetting or conspiracy claim against PDV Holding. Instead, Crystallex asserts that PDV Holding *directly participated* in the fraudulent scheme. Indeed, unlike the directors in *Edgewater*, Crystallex alleges that PDV Holding directly conveyed \$2.8 billion in dividend proceeds to Petróleos in Venezuela.

The majority also relies on *In re Wickes Trust* in asserting that the Delaware Chancery Court has barred non-debtor transferor liability under the Act. ²¹ However, *In re Wickes Trust* only stands for the proposition that a plaintiff cannot bring a fraudulent transfer claim unless she is a creditor of the debtor. ²² *In re Wickes Trust* does not appear relevant to the question of whether the Act recognizes non-debtor transferor liability. ²³

- 21 C.A. No. 2515-VCS, 2008 WL 4698477 (Del. Ch. Oct. 16, 2008).
- 22 *Id.* at *7–8.
- The majority also cites Spring Real Estate, LLC v. EcholRT Holdings, LLC, C.A. No 7994-VCN, 2016 WL 769586 (Del. Ch. Feb. 18, 2016), in stating that the Delaware Chancery Court "has [] rejected fraudulent transfer claims against non-debtor transferors under analogous provisions in the federal Bankruptcy Code." Maj. Op. at 85. However, in that case, the Court rejected the claim because the assets did not belong to the debtor. Here, PDV Holding's dividend to Petróleos plainly involved debtor property.

In my view, the Fraudulent Transfer Act is meant to serve a broad remedial purpose with respect to the specific circumstances of a fraudulent transfer. As the Delaware Chancery Court has observed, the Fraudulent Transfer Act "grants a court 'broad latitude' ... to craft a remedy to 'put a creditor in the position *95 she would have been in had the fraudulent transfer not occurred.' "²⁴ Moreover, the Act states that "the principles of law and equity" should be used to "supplement its provisions" unless "displaced by the [Act's] provisions." ²⁵ To that end, the Act provides that courts may invoke equitable principles to craft "[a]ny [] relief the circumstances may require." ²⁶

- 24 Lake Treasure Holdings, Ltd. v. Foundry Hill GP LLC, C.A. No. 6546-VCL, 2014 WL 5192179, at *15 (Del. Ch. Oct. 10, 2014) (quoting August v. August, C.A. No. 3180-VCS, 2009 WL 458778, at *10 (Del. Ch. Feb. 20, 2009)); see also In re Mobilactive Media, LLC, C.A. No. 5725-VCP, 2013 WL 297950, at *32 (Del. Ch. Jan. 25, 2013) ("[The Fraudulent Transfer Act] provides broad remedies to creditors and leaves considerable leeway for the exercise of equitable discretion.").
- 25 6 Del. C. § 1310.
- 26 *Id.* § 1307(a)(3)(c).

Crystallex alleges that, after expending a substantial amount of time and money in developing the long-inoperable gold reserves at Las Cristinas, Venezuela unlawfully usurped the mine and gifted it to Petróleos, which then sold 40% of that interest for a whopping \$9.5 billion. To make matters worse, at the time Venezuela seized Las Cristinas, Crystallex had yet to receive any return on its investment because of Venezuela's purposeful delays in issuing required permits. Moreover, after Crystallex lawfully initiated an arbitration against Venezuela, Venezuela concocted a fraudulent scheme to repatriate \$2.8 billion from PDV Holding to Petróleos in Venezuela. ²⁷

The majority suggests that I conflate liability and remedies. See Maj. Op. at 88–89. Not at all. To bring a claim under the Act, a plaintiff must allege the existence of a fraudulent transfer. See 6 Del. C. § 1304(a). As explained, I believe Crystallex did so. Thus, Crystallex may bring "an action for relief against [that] transfer." Id. § 1307(a). In outlining the

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relief available in such an action, the Act enumerates remedies against debtors and transferees involved in the transfer. See id. §§ 1307(a), 1308(b). While the Act does not specify remedies against non-debtor transferors, such as PDV Holding, its directive that courts craft "[a]ny [] relief the circumstances may require" provides a clear avenue for relief here. Id. § 1307(a)(3)(c).

Altogether, I am hard-pressed to conceive of a scenario more worthy of a trial court's invocation of its broad equitable powers under the Fraudulent Transfer Act than this one. In my view, Crystallex has presented compelling and plausible facts to have its case against PDV Holding heard under the Act. I would therefore affirm the District Court. ²⁸

The majority does not reach PDV Holding's argument that, even if Crystallex stated a claim,

the Foreign Sovereign Immunities Act's restrictions on prejudgment attachment of sovereign property preempt that claim. See 28 U.S.C. §§ 1609–1611. Since I believe Crystallex stated a claim, I would reach the issue. PDV Holding is not a foreign state; it is a Delaware corporation. See id. § 1603. As such, to the extent that Crystallex seeks relief with regard to PDV Holding's property, I would hold that the restrictions on prejudgment attachment of sovereign property are inapplicable to Crystallex's claim.

II. Conclusion

For the above reasons, I respectfully dissent.

All Citations

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United States Bankruptcy Court,

D. Delaware.

IN RE PHYSIOTHERAPY HOLDINGS, INC., et al., Debtors. Pah Litigation Trust, Plaintiff,

Water Street Healthcare
Partners, L.P., et al., Defendants.

Case No. 13–12965(KG) | Adv. Proc. No. 15–51238(KG) | Signed November 1, 2017

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OPINION

KEVIN GROSS, U.S.B.J.

INTRODUCTION

*1 The Court is addressing cross-motions for partial summary judgment filed by the plaintiff, PAH Litigation Trust (the "Litigation Trust"), and the defendants in the adversary proceeding, Water Street Healthcare Partners, L.P. and related entities ("Water Street") and Wind Point

Partners IV, L.P. and related entities ("Wind Point") (collectively, the "Defendants"). The Litigation Trust and Defendants filed the cross-motions because while the Litigation Trust and Defendants were in mediation, the mediator recognized that the parties' contrary and disparate positions on the potential damages stymied their settlement discussions. The parties asked the Court for a fast decision on the cross-motions so their settlement discussions might continue. The Court agreed. ¹

The Court initially promised the decision on the cross-motions by October 20, 2017 (after hearing oral argument on September 27, 2017). However, in another case the Court had to address a motion for summary judgment before trial was to be held on October 16–20, 2017. These obligations made a decision by October 20, 2017, a near impossibility.

The issue presented is a complex one and not of the nature that would normally be quickly decided, but the Court will honor its promise to the parties. The issue is this: assuming (but not deciding) that the Court finds for the Litigation Trust on liability, what are the potential damages? The Litigation Trust says that it is entitled to receive the full measure of its damages under its claim for actual fraudulent transfer, or \$248.6 million, and at least \$228.7 million under its claim for constructive fraudulent transfer. Defendants argue that the Litigation Trust cannot recover what they view as a windfall, a recovery in excess of unpaid claims which was received from the later sale of the reorganized Debtors. With liability assumed, what makes the decision difficult is weighing what may be a windfall and the absence of mitigation, against Defendants possibly walking away with hundreds of millions of dollars obtained by actual or constructive fraudulent transfers. The Court will address the difficult issues in a somewhat abbreviated fashion with the time constraints imposed.

FACTS²

This Opinion provides a brief summary of the factual and procedural background. A more extensive discussion of such disputed facts and procedure is provided in the Court's Opinion on Defendants Motion to Dismiss, dated June 20, 2016. PAH Litigation Trust v. Water Street Healthcare Partners, L.P. (In re Physiotherapy Holdings, Inc.), 2016 WL 3611831 (Bankr. D. Del. June 20, 2016). The facts are

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not particularly germane to the Opinion, since what is presently before the Court is a legal question.

A. Pre-Bankruptcy

Water 2007. Street and acquired Physiotherapy Holdings, Inc. and affiliates ("Physiotherapy" or "Debtors"), one of the largest providers of outpatient physical therapy services in the United States. Declaration of J. Cory Falgowski, Esq., dated August 18, 2017 ("Falgowski Declaration") ¶ 7. D.I. 560. On or about February 22, 2012, Court Square Capital Partners II, L.P. ("Court Square"), Physiotherapy Merger Sub and Defendants entered into an agreement and merger plan (the "Merger Agreement") contemplating a leveraged buyout ("LBO") transaction with Physiotherapy emerging as the surviving entity. Falgowski Declaration ¶ 9–10. Court Square financed its acquisition through equity and debt, including (i) a \$100 million term loan (the "Term Loan") secured by Physiotherapy's assets; (ii) \$210 million in 11.875% senior unsecured notes due in 2019 (the "Senior Notes"); (iii) an equity investment by Court Square of approximately \$313.3 million; (iv) a management equity rollover in the amount of approximately \$3.9 million; and (v) a minority third party investment. Falgowski Declaration ¶ 11. As a result of the LBO, Physiotherapy transferred \$248.6 million of the proceeds to Defendants in exchange for their interests in the company. Def. Opening Br., page 6.

B. The Debtors' Bankruptcy

*2 On November 12, 2013, Physiotherapy filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code. In re Physiotherapy Holdings, Inc., et al., No. 13-12965-KG, D.I. 1 (Bankr. D. Del.). The Debtors, unable to pay approximately \$350 million they owed, determined that they needed bankruptcy relief to "deliver [their] capital structure" and obtain "operating liquidity" required to continue their business. Disclosure Statement, D.I. 19 at 9 (Nov. 12, 2013). Following "extensive, goodfaith negotiations" with creditors and shareholders (id.), the Debtors submitted a proposed joint prepackaged plan of reorganization (the "Plan"). See Plan, D.I. 18 (Nov. 12, 2013). The Plan significantly reduced the Company's existing debt, provided the Debtors with longterm financing, and established the Litigation Trust to pursue causes of action relating to Defendants' sale of Physiotherapy to Court Square in April 2012. D.I. 19 at 9. The Debtors lacked sufficient funds to pay unsecured creditors (the "Noteholders"), and those interests (the "Senior Notes Claims") were therefore impaired under the Plan. D.I. 18 at 17–18. At the time, the Debtors owed the Noteholders \$237,721,715, which included principal and unpaid accrued interest. Declaration of Farbod Moridani ("Moridani Decl.") ¶¶ 2, 10 & Ex. 1. The Plan provided that the "Senior Notes Claims shall be Allowed in the aggregate principal amount of \$210,000,000." D.I. 18 at 17. The Senior Notes Claims could not be satisfied. The Plan proposed to distribute to each Noteholder who chose to participate in the Plan, "in exchange for full and final satisfaction, settlement, release, and discharge of the Allowed Senior Notes Claims," (id.) (i) a pro rata share of new common stock issued by the reorganized Debtor (the "Equity Interest"), and (ii) a pro rata share of 50% of Litigation Trust recoveries (the "Litigation Interest"). D.I. 18 at 28. Almost all of the Noteholders (accounting for \$209.4 million of the \$210 million face value of the Notes) opted into the Plan. See Declaration of M. McGahan in Supp. of Chapter 11 Pets. & First Day Pleading, D.I. 16 \(\) 60 (Nov. 12, 2013). The Plan allocated the remaining 50% interest in Litigation Trust recoveries to Court Square. D.I. 18 at 28.

The Plan also placed a value on the Equity Interest in the reorganized Debtors which the Noteholders received. The Debtors' investment banker, Rothschild Inc., performed a valuation of the Debtors that approximated their post-confirmation going concern enterprise value at \$240 million. D.I. 19, Ex. J at 1. After accounting for existing debts, the Debtors' post-confirmation implied equity value was between \$76 million and \$116 million, with a midpoint of \$96 million. *Id.* In the Disclosure Statement the Debtors valued the Equity Interest received by the Noteholders at 40.3% of the value of the Allowed Senior Notes Claims, or \$84.63 million (40.3% of \$210 million). D.I. 19 at 38.

As previously stated, the Plan also created the Litigation Trust. D.I. 18 at 27–29. Pursuant to the Plan, the claims of the Debtors, Court Square, and the Noteholders (collectively, the "Contributing Claimants") were transferred to the Litigation Trust, including any avoidance claims. *Id.* at 27. The Litigation Trust was designated an estate representative authorized to retain and pursue all such causes of action. *Id.* at 28. The Disclosure Statement identified Water Street and Wind

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Point as potential targets of causes of action transferred to the Litigation Trust. *See* D.I. 19 at Ex. C.

All interested parties—including Defendants—had notice and the opportunity to object to the Plan. The Defendants acted on that opportunity, and on December 12, 2013, objected to the Plan. D.I. 128 at 2 (Dec. 12, 2013). This objection was only on the grounds that the Plan unfairly impaired their rights of indemnity against the Debtors and contained overly broad releases and exculpations that prevented Defendants from pursuing claims against third parties. Id. Defendants did not object to many terms of the Plan and Disclosure Statement including the formation of the Litigation Trust, the assignment of the Contributing Claimants' causes of action to the Litigation Trust, the distribution of new common stock in Physiotherapy to Noteholders, the determination that the equity distributed to Noteholders satisfied only 40.3% of their claims, the Noteholders' entitlement under the Plan to both the Equity Interest and 50% of Litigation Trust recoveries, Court Square's entitlement to the other 50% of Litigation Trust recoveries, or the Litigation Trust's standing to pursue the claims assigned to it for the benefit of both the Noteholders and Court Square.

*3 On December 23, 2013, the Court approved the Plan and Disclosure Statement. See Order Approving the Debtors' Disclosure Statement for, and Confirming, the Debtors' Joint Prepackaged Chapter 11 Plan, D.I. 197 (Dec. 23, 2013) (the "Confirmation Order"), including that "[t]he valuation set forth in the Disclosure Statement was prepared by the Debtors' investment banker, Rothschild Inc., in accordance with standard and customary valuation principles and practices, and is a fair and reasonable estimate of the value of the Debtors' businesses as a going concern." Id. at 27.

C. The Adversary Proceeding

The Litigation Trust filed this adversary proceeding on September 1, 2015, seeking to recover the funds that Defendants allegedly took from the Debtors in connection with Physiotherapy's LBO. Complaint, Adv. D.I. 1. The Litigation Trust's complaint (the "Complaint") purports extensive accounting manipulations that led to the alleged fraudulent sale of Physiotherapy. The "manipulations" consisted primarily of the Debtors' abandonment of the historical look-back revenue recognition method in favor of a new methodology called the "rate bridge," which allowed Physiotherapy to record revenue without

verifying that the amount recorded was consistent with past experience or was actually collected. *Id.* ¶¶ 40–42.

In the pre-bankruptcy sale, Court Square had agreed to pay \$510 million for Physiotherapy based on fraudulent financial statements and other misrepresentations, Compl. ¶ 86, which was roughly double Physiotherapy's enterprise value. *Id.* ¶ 96. The sale was structured as a LBO financed by an equity investment by Court Square and over \$300 million in debt, \$210 million of which was issued to the Noteholders in the form of senior unsecured notes (the "Notes"). *Id.* ¶¶ 81–82, 87; Moridani Decl. ¶ 3, Ex. 2. The Litigation Trust argues the Offering Memorandum drastically overstated the Debtors' net revenues and EBITDA.

The transaction closed on April 30, 2012. Upon closing, the Debtors incurred hundreds of millions of dollars in debt and distributed \$248.6 million to Defendants, leaving Debtors insolvent. Compl. ¶ 88, 96. On May 1, 2013, the Debtors failed to make a \$12,468,750 interest payment due under the Notes, thereby defaulting. *Id.* ¶ 105; Moridani Decl. ¶ 4, Ex. 3 at 9763. They also missed the next payment due, in the same amount, on November 1, 2013. Moridani Decl. ¶ 2, Ex. 1. The Debtors then filed for bankruptcy on November 12, 2013. D.I. 1.

In the adversary proceeding, Defendants moved to dismiss the Litigation Trust's Complaint. The Court resolved that motion on June 20, 2016, granting it in part but sustaining the Litigation Trust's claims for actual fraudulent transfer under 11 U.S.C. § 548 of the Bankruptcy Code and constructive fraudulent transfer under the Pennsylvania Uniform Fraudulent Transfer Account ("PUFTA"). D.I. 250. On May 25, 2017, the Litigation Trust moved for leave to amend its Complaint, including to seek punitive damages under the PUFTA claim. That motion is pending. ³

The parties have briefed and argued the motion to amend but because of the urgent nature of the crossmotions, the Court has deferred a decision on the motion to amend. The Court will issue an opinion at its earliest convenience.

D. The Subsequent Sale of Physiotherapy

In March 2016, Select Medical Corporation ("Select Medical") acquired the reorganized Debtors, in which the Noteholders held their Equity Interest. Moridani Decl. ¶

5, Ex. 4. Select Medical paid \$421 million in cash. The Noteholders who sold their equity to Select Medical in March 2016 received a total of \$282,282,590.11 through this transaction. *Id.* ¶ 6, Ex. 5. It is the Noteholders' receipt of this amount that Defendants argue forecloses recovery by the Litigation Trust. The amount is significantly higher than the Noteholders' Equity Interest under the Plan, reflecting improvements in Physiotherapy's performance created under the Noteholders' ownership. But the Litigation Trust argues that this amount is significantly lower than the value of the debt which the Noteholders agreed to release under the terms of the Plan, in exchange for the Equity Interest and Litigation Interest. *See* Moridani Decl. ¶ 8–9.

STANDARD OF REVIEW

*4 Rule 56 of the Federal Rules of Civil Procedure, made applicable by Federal Rule of Bankruptcy Procedure 7056, provides that "[a] party may move for summary judgment, identifying each claim or defense-or the part of each claim or defense—on which summary judgment is sought." Fed. R. Civ. P. 56. The court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Id.; see also Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Where, as here, there are cross-motions for summary judgment, the Court must ensure that the nonmoving party on each theory has the inferences to be drawn from the underlying facts viewed in the light most favorable to it as the party opposing the motion. Mitsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588 (1986).

Here, the Court is assuming (without deciding) that the Litigation Trust has successfully proven all of the accounting manipulations and financial misrepresentations alleged in the Complaint; that the Debtors transferred \$248.6 million to Defendants "with actual intent to hinder, delay, or defraud" creditors; and that Defendants knew about and actively concealed the fraud from Court Square and the Noteholders. See 11 U.S.C. § 548(a)(1)(A). The Court also assumes that, at the time of the transfers to Defendants, the Debtors (i) were insolvent; (ii) had unreasonably small assets in relation to the transfers to Defendants; (iii) intended to incur debts beyond their ability to pay as they became due; and (iv) received less than reasonably equivalent value in exchange

for the transfers. See 12 Pa. C.S.A. §§ 5104(a)(2), 5105. For the purposes of this Opinion only, the Court is assuming there are no material facts regarding liability.

DECISION

A. The Litigation Trust's Position

The Litigation Trust forcefully argues that it is entitled to recover the full amount of the fraudulent transfers regardless of the sale to Select Medical. The Litigation Trust points out that Section 548 of the Bankruptcy Code empowers it to "avoid" a fraudulent transfer. Further, Section 550 provides that the avoidance of a transfer under Sections 544, 545, 547, 548, 549, 553(b) or 724(a) permits that "the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property" The property "transferred" and the "value" of the property transferred are the same, the \$248.6 million which Defendants took from the Debtors.

There are cases which have addressed the issue and held that Section 550 damages are not capped to permit creditors to receive only the amount of their claims. See, e.g., In re JTS Corp., 617 F. 3d 1102, 1115–16 (9th Cir. 2010); Clinton v. Acequia, Inc. (In re Acequia, Inc.), 34 F. 3d 800, 809–11 (9th Cir. 1994); In re Tronox Inc., 464 B.R. 606, 614 (Bankr. S.D.N.Y. 2012); and Stalnaker v. DLC, Ltd., 376 F. 3d 819, 823 (8th Cir. 2004). These cases, and others, ⁴ hold that Section 550 does not limit a recovery to the amount of creditor claims. The Litigation Trust discussed the Tronox decision at length.

4 See, e.g., Lim v. Miller Parking Co., 526 B.R. 202, 214–15 (Bankr. E.D. Mich. 2015); Kipperman v. Onex Corp., 411 B.R. 805, 876–78 (N.D. Ga. 2009); MC Asset Recovery, LLC v. Southern Co., 2006 WL 5112612 at * 5, n. 11 (N.D. Ga. Dec. 11, 2006).

In *Tronox*, a defendant argued in a case brought under Section 548 that Section 550(a) imposes a cap—an absolute cap—in the amount of the claims of the creditors who would benefit from the recovery. *See generally* 464 B.R. 606. According to the defendant, more recovery would create a windfall that did not benefit the estate. *Id.* at 611. The court rejected the defendant's argument and stated that:

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*5 In other words, the "for the benefit of the estate" clause in § 550 sets a minimum floor for recovery in an avoidance action—at least some benefit to the estate—but does not impose any ceiling on the maximum benefits that can be obtained once that floor is met.

Id. at 614. Congress did not use the phrase "to the extent" of the benefit to the estate.

In *Acequia*, the defendant urged the court to limit recovery under Section 550(a) to "an amount sufficient to satisfy all unsecured claims" to prevent a windfall to the estate. 34 F. 3d at 810. The court responded that "the [estate] has a greater equitable claim to the transferred funds than does [the defendant wrongdoer]" and did not cap the recovery. *Id.* at 812.

Tronox and Acequia, as well as a number of other cases, stand for the proposition that Section 550's "for the benefit of the estate" clause is not limiting, i.e., it does not limit the amount of recovery. The crux of the Litigation Trust's argument is therefore that its recovery from Defendants is not capped. If the Litigation Trust's recovery provides "some benefit to the estate," the amount recoverable is not capped.

Then there is the Plan on which, according to the Litigation Trust, "the Noteholders took a gamble." They accepted equity in bankrupt Debtors which helped the Debtors emerge from bankruptcy without massive debts. The Noteholders took a risk and are entitled to the benefits of their risk-taking. Their sacrifice and management's efforts increased the value of Physiotherapy. In contrast, Defendants did nothing to increase Physiotherapy's value. Yet, if the Litigation Trust is correct, Defendants would benefit despite making no contribution to the increase in value. Thus, Defendants would escape the Noteholders' litigation claims and thereby enjoy asset appreciation, while allegedly defrauded creditors would bear the burden of asset depreciation. See, e.g., MC Asset Recovery, 2006 WL 5112612 * 6-7 (N.D. Ga. Dec. 11, 2006) (noting appreciation of creditors' equity did not diminish the value of their avoidance claims); In re Euler, 251 B.R. 740, 747 (Bankr. M.D. Fla. 2000) (emphasis added) (highlighting that the increase or decrease in asset value is a risk or benefit of ownership and not a windfall).

At bottom, the Noteholders argue that they accepted the risk of depreciation of their Equity Interest. Therefore, they should benefit from the appreciation of equity.

The Noteholders also argue that there will be no windfall if the Court accepts their argument. The Plan provided for the Noteholders to receive the Equity Interest and the Litigation Trust interest. If the Noteholders had not agreed to release their claims on the Notes, the Notes would have continued to accrue interest, which would have made the unpaid principal and interest worth well over \$300 million. Thus, the Noteholders would not receive a windfall from the litigation.

B. Defendants' Position

Defendants argue first that the fraudulent transfer laws are remedial, not punitive, in nature. The intent of the law is to restore creditors to their positions immediately prior to the fraudulent transfers. See, e.g., In re Best Prods. Co., Inc., 168 B.R. 35, 57 (Bankr. S.D.N.Y. 1994) (stating fraudulent transfer laws are not punitive, they are remedial); Tronox, 429 B.R. 73, 111 (Bankr. S.D.N.Y. 2010); Miller v. Dow (In re Lexington Oil & Gas Ltd.), 423 B.R. 353, 376 (Bankr. E.D. Okla. 2010) (noting an award of punitive damages is not included in Section 550 of the Bankruptcy Code). Defendants therefore complain that the Litigation Trust seeks to recover all \$248.6 million paid to Defendants which far exceeds the Noteholders' and Court Square's actual losses.

*6 Second, Defendants argue that when fraudulent transfer law was codified through the Bankruptcy Code it did not unleash an unlimited avoidance power. *See Raleigh v. Ill. Dept. of Revenue*, 530 U.S. 15, 20 (2000) (finding no reason to analyze state interests differently because of a bankruptcy proceeding).

Third, Section 550 requires a plaintiff to prove that any recoveries are "for the benefit of the estate." See Wellman v. Wellman, 933 F. 2d 215, 217–18 (4th Cir. 1991) (observing courts unanimously hold that the estate must benefit from the recovery of transferred property). However, the "benefit" means a benefit to a debtors' creditors. See, e.g., Kennedy Inn Assocs. v. Perab Realty Corp. (In re Kennedy Inn Assocs.), 221 B.R. 704, 715 (Bankr. S.D.N.Y. 1998) and P.A. Bergner & Co. v. Bank

One, Milwaukee, N.A. (In re P.A. Bergener & Co.), 140 F. 3d 1111, 1118 (7th Cir. 1998).

Fourth, a court must focus on what the bankruptcy estate lost, and not what the transferee gained. *Gill v. Maddalena* (*In re Maddalena*) 176 B.R. 551, 556–57 (Bankr. C.D. Cal. 1995).

Fifth, recovery may not be greater than the value of unpaid creditor claims, and should only be awarded to cover harm to a creditor. The recovery must benefit a creditor. *Murphy v. Town of Harrison (In re Murphy)*, 331 B.R. 107, 122 (Bankr. S.D.N.Y. 2005).

Sixth, Section 550 provides for partial avoidance because creditors are entitled to recover only what is necessary to satisfy their claim. See Slone v. Lassiter (In re Grove–Merritt), 406 B.R. 778, 811 (Bankr. S.D. Ohio 2009) ("A fraudulent transfer should be avoided only to the extent creditors were harmed."); see also In re Murphy, 331 B.R. at 114:

The bankruptcy objective of the avoidance powers in Sections 544 and 548 is to protect creditors generally from prejudice resulting from transfers of the debtor's property for less than fair consideration, resulting in diminution of the debtor's estate available to pay creditors. That objective can and must be reconciled with state law and public interest by limiting the measure of avoidance damages under Sections 548 and 550 to the amount necessary to make creditors of the debtor's estate whole.

The foregoing is designed to prevent a windfall.

Seventh, creditors are entitled to collect only what is owed and no more. *Nuveen Mun. Tr. ex rel. Nuveen High Yield Mun. Bond Fund v. Withum Smith Brown, P.C.*, 692 F. 3d 283, 295–96 (3d Cir. 2012).

Eighth, under either PUFTA or Delaware Uniform Fraudulent Transfer Acts ("DUFTA"), creditor recoveries are limited to the lesser of the value of the asset transferred or the amount necessary to satisfy

the creditor's claim. Uniform Fraudulent Transfer Act ("UFTA"), § 8(b); DUFTA § 1308(b); PUFTA, § 5108(b). ⁵ The UFTA therefore does not allow an award of punitive damages. By their terms, Sections 548(a) and 550 of the Bankruptcy Code provide only for compensatory damages not punitive damages. Here, the only creditors who have not been compensated in whole are those Noteholders who sold their common stock before Select Medical purchased the reorganized Debtors.

- The parties dispute whether PUFTA or DUFTA applies. However, DUFTA and PUFTA are nearly identical and both follow UFTA on points relevant to the dispute which the Opinion addresses. *Compare* 6 Del. C §§ 1307(a)(1) and 1308(b), 12 Pa. Const. Stat. §§ 5107(a) and 5108(b), *with* UFTA, §§ 7(a)(1) and 8(b).
- *7 The Defendants also argue that *Tronox* and *Acequia* are distinguishable. In *Tronox*, the court also ruled that:

On the other hand, [the debtor] overstates its case when it implies that there is no cap on plaintiff's potential recovery other than the value of the property fraudulently transferred. Bankruptcy Code § 550 has several provisions that explicitly limit a plaintiff's recovery

464 B.R. at 617–18. The *Tronox* court denied summary judgment, holding that trial was necessary to determine what, if anything, would reduce damages. *Id.* at 618

The Defendants distinguish *Tronox* from the present case on several grounds:

- 1. Unlike *Tronox*, the value of the property transferred is known and undisputed. It is \$248.6 million in cash.
- The Noteholders are the only unpaid creditors and have an allowed claim for a liquidated amount of \$210 million.
- The sale to Select Medical resulted in payment to the Noteholders in excess of their allowed claims.
- 4. The Litigation Trust has already settled claims for \$22 million.
- The only creditors who remain unpaid are Noteholders who sold their stock before the sale to Select Medical. Their maximum recovery is

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approximately \$21 million. Defendants' Reply Brief at 7–8.

C. Determination

The Recovery is Not Capped

The decision on the cross-motions is not as apparent as it may seem. On the one hand, there are numerous decisions, all outside of the Circuit in which the Court sits, holding that there is no cap on fraudulent transfer claim damages. On the other hand, there is in bankruptcy law the general rule that creditors are not entitled to receive more than their unpaid claims. Windfalls and punitive damages are not bankruptcy concepts.

The Court's decision on the issue presented appears to be unanswered by the Third Circuit Court of Appeals. Further, the difference between the Litigation Trust's position and Defendants' position well exceeds \$200 million. On balance, the Court is satisfied that the Litigation Trust must be awarded summary judgment on the scope of damages-not on the amount, which remains at issue, but on the concept. Numerous cases stand for the proposition that a recovery under Section 550(a) is not capped by the amount of the creditor claims. Stalnaker v. DLC, Ltd., 376 F. 3d 819 (8th Cir. 2004); In re Leonard, 125 F. 3d 543, 545 (7th Cir. 1997); Tronox, 464 B.R. at 613-14; and MC Asset Recovery, LLC, 2006 WL 5112612 at *6-7. All of these cases and others to which the Court refers above reject a cap on fraudulent transfer recoveries under circumstances like what is now before the Court. In MC Asset Recovery, the district court reviewed the cases and stated that "all have found that a trustee who brings an action to avoid or recover a fraudulent transfer may avoid or recover in its entirety, even when the value of the transfer exceeds the value of all allowed claims of unsecured creditors." 2006 WL 5112612 at * 5. Were the Court to rule otherwise, it would mean that if Defendants are in fact liable for the fraudulent transfer, they would keep most if not all of the transferred money. The Court cannot countenance such an inequitable result if liability exists. See, e.g., Adam J. Levitan, Toward a Federal Common Law of Bankruptcy: Judicial Lawmaking in a Statutory Regime, 80 AM. BANKR. L.J. 1, 1 n. 1 (collecting cases that proclaim "the bankruptcy court is a court of equity.")

*8 The Litigation Trust also points out in its Reply Brief (at page 9) that the Court's interpretation of Section 550 is in accord with the Supreme Court's decision in *Moore v*. Bay, 284 U.S. 4 (1931). There the Supreme Court held that a bankruptcy trustee could avoid a fraudulent transfer in its entirety, for the benefit of the estate, and that recovery was not limited to the amount of the unsatisfied creditor's claim. Id. at 4-5. According to In re DLC, Ltd., 295 B.R. 593, 606 (B.A.P. 8th Cir. 2003), Moore v. Bay is codified by Section 550. A trustee may thus avoid a transfer beyond the extent necessary to satisfy a creditor's claim. The Trustee may avoid the entire transfer for the "benefit of the estate." MC Asset Recovery, 2006 WL 5112612 at *4. Furthermore, and contrary to Defendants' position, "for the benefit of the estate" does not mean for the benefit of creditors. "Estate" means "all legal or equitable interests of the debtor in property as of the commencement of the case." Tronox, 464 B.R. at 613 (quoting 11 U.S.C. § 541). The estate is more than the interest of creditors. Mellon Bank, N.A. v. Dick Corp., 351 F. 3d 290, 293 (7th Cir. 2003) (emphasis omitted) ("Section 550(a) speaks of the benefit to the estate—which in bankruptcy parlance denotes the set of all potentially interested parties-rather than to any particular class of creditors."); In re Trans World Airlines, Inc., 163 B.R. 964, 972 (Bankr. D. Del. 1994) ("Section 550(a) requires a benefit to the 'estate,' not to creditors. 'Estate' is a broader term than 'creditors.' ") In fact, the Plan provides that Court Square is entitled to one-half of recoveries by the Litigation Trust. D.I. 197-1 at 3, 27, 28.

Cases which Defendants cite and rely upon are inapposite. For instance, *In re Murphy*, 331 B.R. at 107, involved property which a town foreclosed on. A trustee sought to avoid the transfer. *Id.* at 113. In the "extremely unusual" situation the bankruptcy court refused to set aside the transfer which would negate an enforceable state court judgment. *Id.* at 121–26. ⁶

In Tronox the court found that "Murphy is factually distinguishable because there is no analogous state public policy at issue here." 464 B.R. at 617.

Adelphi Recovery Trust v. Bank of Am., N.A. 390 B.R. 80 (S.D.N.Y. 2008), is another case Defendants heavily rely on. There, the court dismissed fraudulent transfer claims because any recoveries would have been paid to different creditors of a different debtor with no interest in the funds. *Id.* at 97.

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In another case that Defendants cite, ASARCO LLC v. Americas Mining Corp., 404 B.R. 150, 176 (S.D. Tex. 2009), the court set aside the transfer in its entirety. The court thereby refused the defendants' request that recovery be limited to what was necessary to make creditors whole. *Id.*

The Court is fully satisfied that any recovery by the Litigation Trust will benefit the Estate. The Noteholders are entitled to one-half of the Litigation Trust recoveries and Court Square, whose equity was eliminated and who is not a creditor, the other one-half.

Appreciation of Noteholders' Equity

The cases make it clear that the appreciation of equity from the Select Medical sale is irrelevant. The Court does not determine whether a party which received stock received too much or too little value when weighed against a claim. *Kipperman v. Onex Corp.*, 411 B.R. 805, 876 (N.D. Ga. 2009); *see also MC Asset*, 2006 WL 5112612 at *6–7, n. 12 (noting appreciation of equity does not diminish value of claim); *In re Euler*, 251 B.R. 740, 747 (Bankr. M.D. Fla. 2000) (providing that an increase in value is a benefit of owning the stock just as decrease in value is a risk).

It also cannot be assumed that the Noteholders will receive a windfall if successful in the litigation. Had there been no bankruptcy, the Noteholders would have received with interest \$470,332,509 at maturity or over \$380 million today. Moridani Decl. ¶ 8–9. Although the Noteholders in the Plan agreed to an allowed claim of \$210 million and waived interest, the Court does not see a windfall from recovery in the fraudulent transfer action.

PUFTA Recovery

The parties agree that under PUFTA, the Litigation Trust's recovery is the lesser of "the value of the asset transferred ... or the amount necessary to satisfy the creditor's claim." 12 Pa. C.S.A. § 5107(b). The question, therefore, is what the Noteholders received—actually received. The Court looks to the Disclosure Statement which provides that the Equity Interest which the Noteholders received satisfied 40.3% of the Senior Note Claims. The satisfaction of the claims of the Noteholders

will occur only when (or if) the Litigation Trust recovers \$250.8 million (\$125.4 million x 2), or \$228.7 million above the \$22.05 million the Trust received in settlement. ⁷

- The \$228.7 million figure arises from the creditors' original claim in the amount of \$210 million, of which the Noteholders took a 40.3% equity interest, leaving their new value at \$84.63 million, or a \$125.37 million deficit. Considering the Noteholders carry a 50% litigation interest, to make the whole \$125.37 million would need to be doubled, making it \$250.74 million. The Litigation Trust has recovered \$22.05 million thus far. Thus, subtracting that \$22.05 million from \$250.74 million results in final recovery of \$228.7
- *9 The Litigation Trust argues that "Defendants assert that the Plan is not binding on them" Litigation Trust's Brief in Opposition, p. 26. The Court does not think Defendants are making such an argument, which, in any event, would be wrong. Defendants do, however, argue that the "Litigation Trust and the Noteholders are similarly estopped from arguing that there was less than a 46% recovery for Noteholders." Defendants' Opening Brief, p. 10, n. 7. The Plan and the 40.3% valuation of the Equity Interest are indeed binding. Defendants both objected to the Plan and made claims on the Debtors' estate. See In re Arctic Glacier Int'l, Inc., 2016 WL 3920855, *14 (Bankr. D. Del. July 13, 2016), aff'd, 2017 WL 2573957 (D. Del. June 14, 2017) ("A confirmed plan is res judicata as to all issues decided or which could have been decided at the hearing on confirmation.") The Court again finds that the Equity Interest satisfied 40.3% of the Senior Note Claims. Were the Plan not controlling, and it is, the Noteholders would have been entitled to far more in principal and interest.

CONCLUSION

The Court therefore holds that the recovery of the Litigation Trust is not capped by the amounts received in the sale to Select Medical. Amounts received in excess of the sale consideration will not be a windfall. An Order consistent with the Opinion will issue.

All Citations

Slip Copy, 2017 WL 5054308

In re Physiotherapy Holdings, Inc., Slip Copy (2017)

Bankr. L. Rep. P 83,193

2017 WL 6524524 United States District Court, D. Delaware.

IN RE PHYSIOTHERAPY HOLDINGS, INC., et al., Debtors. PAH Litigation Trust, Plaintiff,

Water Street Healthcare Partners L.P., et al., Defendants.

Bankr. Case No. 13–12965–KG | Adv. Proc. No. 15–51238–KG | Misc. No. 16–201–LPS | Signed 12/21/2017

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MEMORANDUM ORDER

LEONARD P. STARK, UNITED STATES DISTRICT JUDGE

*1 Having reviewed the papers submitted in connection with Defendants' motion for leave to appeal (D.I. 1, 18) (the "Motion for Leave") the Bankruptcy Court's Memorandum Opinion and Order 1 (the "Interlocutory Order"), which granted in part and denied in part Defendants' motion to dismiss (Adv. D.I. 106) 2 the above-captioned adversary proceeding, and Plaintiff's opposition thereto (D.I. 13); and having reviewed the papers submitted in connection with Defendants' petition for certification of direct appeal to the United States Court of Appeals for the Third Circuit (D.I. 4, 18) (the "Petition") and the opposition thereto (D.I. 14); and having reviewed the notices of subsequent authority (D.I. 16, 20);

- 1 PAH Litig. Trust v. Water St. Healthcare Partners L.P., et al. (In re Physiotherapy Holdings, Inc.), 2016 WL 3611831 (Bankr. D. Del. June 20, 2016).
- The docket of the adversary proceeding, PAH Litig.

 Trust v. Water Street Healthcare Partners L.P., Adv.
 No. 15–51238–KG, is cited herein as "Adv. D.I. __."

 The Chapter 11 docket, In re Physiotherapy Holdings, Inc., et al., No. 13–12965–KG, is cited herein as "B.D.I. __."

IT IS ORDERED that the Motion for Leave and Petition (D.I. 1, 4) are DENIED for the reasons that follow:

- 1. Introduction. Defendants seek leave to appeal the Interlocutory Order which granted in part and denied in part their motion to dismiss an adversary proceeding initiated by the PAH Litigation Trust (the "Trust" or "Trustee"), as the authorized representative of the Debtor's estate. The Trustee's complaint asserted eight fraudulent transfer claims against numerous defendants including Water Street Healthcare Partners, L.P. ("Water Street") and Wind Point Partners IV, L.P. ("Wind Point") (collectively, the "Defendants" or the "Controlling Shareholders") and certain subsequent transferees. The complaint seeks to recover \$248.6 million in payments made to the Controlling Shareholders and other selling shareholders (the "Selling Shareholders") in exchange for their equity in Physiotherapy Holdings, Inc. ("Physiotherapy" or the "Debtor"). Trustee alleges that in order to finance the sale of Physiotherapy, the buyer's ("Court Square" or the "Purchaser") merger subsidiary issued \$210 million in senior secured notes (the "Secured Notes"). Pursuant to the terms of the transaction, the Debtor assumed the Secured Notes and certain other liabilities. Physiotherapy issued the Secured Notes pursuant to an offering memorandum (the "OM"), which the Trustee alleges fraudulently overstated the Debtor's revenue stream and its overall firm value. According to the complaint, the Purchaser ultimately acquired an insolvent company, and the Secured Noteholders received debt instruments worth far less than their face value. The Trustee alleges that this sequence of events led to the Debtor's chapter 11 petition and seeks to claw back certain payments made to the Selling Shareholders under both state and federal fraudulent transfer law.
- **2.** *Background.* The Interlocutory Order sets forth the relevant background, including allegations contained in the complaint:

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*2 The Debtor is a leading provider of outpatient physical therapy services throughout the United States. Compl. ¶ 3. 3 Defendants Water Street and Wind Point are private equity funds whose portfolio companies consist of businesses in the healthcare sector. Compl. ¶ 2. As of 2012, the Debtor operated approximately 650 clinics in 33 different states and derived the majority of its revenue from outpatient rehabilitation services. Def.'s Br. 14.4 In 2007, Defendant Water Street acquired Physiotherapy for roughly \$150 million. Id. Shortly after the transaction closed, Water Street entered into an agreement (the "2007 Merger") to merge the Debtor with Benchmark Medical, Inc. ("Benchmark"), an "outpatient physical therapy chain that Wind Point had previously acquired." Id. Following the 2007 Merger, Water Street owned 45% of the common stock of the surviving entity while Wind Point held a 35% ownership stake. Id. Throughout the next five years, the Controlling Shareholders gradually increased their ownership to approximately 90% of the Debtor's common shares. Compl. ¶ 14, 16. The Trustee alleges that during this time, Water Street and Wind Point engaged in various forms of accounting fraud in order to overstate Physiotherapy's financial health and reap a substantial profit from the sale of their shares. Id.

. .

The alleged fraud began as a result of the 2007 Merger as the Debtor was faced with numerous operational challenges arising from the Controlling Shareholders' efforts to integrate the accounting systems of Benchmark and Physiotherapy. Compl. ¶ 3. According to the Trustee, "[t]here were delays in implementing a new single accounting system to replace the various legacy systems; there were problems keeping up with cash collections; and there were almost no internal financial reporting controls." *Id.* The Complaint further alleges that the Debtor began to overstate its EBITDA, net revenue, and accounts receivable in 2010 in order to conceal these problems. Compl. ¶ 4.

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By 2009, Physiotherapy's financial condition had deteriorated significantly. Compl. ¶ 36. In response, the Controlling Shareholders allegedly began to implement new strategies in order to sell [Physiotherapy] by 2011

or 2012 and maximize the potential sales consideration. Compl. ¶ 37. One particular strategy was to abandon the "look back method" of revenue recognition and adopt the more controversial "rate bridge method." Compl. ¶ 39. Physiotherapy's board was, according to the Trustee, aware of and sanctioned the use of the rate bridge method. Compl. ¶ 43. According to the Complaint, the rate bridge method estimates revenue by calculating "a 'net rate per visit' based on the prior month's net rate per visit—hich was, at the time, based on an estimate—and adjusted upward or downward based on supposed increases and/or decreases to the published rates and assumptions about the amount Physiotherapy could charge per visit or per 'unit.' " Compl. ¶ 40. Unlike the look back method, the rate bridge method is not based on actual historical collections and may be subject to manipulation. Compl. ¶¶ 41–42. [Allegedly,] within six months of switching to the rate bridge method, the Debtor's management became aware that [Physiotherapy's] net revenue had been overstated. Compl. ¶ 44. Nonetheless, it continued to apply this revenue recognition methodology.

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The marketing process formally began in October 2011 when the Controlling Shareholders solicited bids from more than 100 potential buyers. Compl. ¶ 45. ... As participants dropped out of the auction process, Water Street and Wind Point allegedly pressured the Debtor's senior management into "manipulat[ing] Physiotherapy's net revenue and patient visit counts so that Physiotherapy could be marketed as a company that was able to grow its net revenue per visit year over year." Compl. ¶ 47. The Complaint specifically details six forms of alleged accounting fraud that enabled the Defendants to inflate Physiotherapy's earnings. Compl. ¶ 48–54.

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The Trustee also quotes numerous emails from the Debtor's billing and collections vendor indicating that the Debtor was instructing them to falsify its financial statements. Compl. ¶ 55. During this time, the Debtor began to develop substantial cash shortfalls as a result of these procedures. Compl. ¶¶ 61–70. The Complaint alleges that this growing discrepancy between revenue and cash collections was a result of Physiotherapy's switch to the rate bridge method. Compl. ¶ 72.

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*3 According to the Trustee, the Board of Directors was aware that the Debtor's use of the rate bridge method had led to inflated revenue. Compl. ¶¶ 59–61. Additionally, the Board was presented with tangible evidence that Physiotherapy was experiencing significant cash collection shortfalls. Compl. ¶¶ 61–63. ... The Trustee further alleges that various third parties presented the Board with tangible evidence that Physiotherapy had been overstating its revenue. Compl. ¶74.

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Throughout this time, the Debtor had been engaged in an extensive marketing process. Court Square, a private equity firm, emerged as the winning bidder with a cash offer of \$510 million. Def.'s Br. 20. The deal was structured as a reverse-triangular merger, and Court Square created a subsidiary to merge into Physiotherapy with Physiotherapy as the surviving entity. The subsidiary financed the transaction by issuing: "(i) a \$100 million term loan (the "Term Loan"), which was part of a larger credit facility; (ii) \$210 million in Secured Notes underwritten by Jefferies and RBC (the "Secured Notes"); (iii) a management equity rollover; and (iv) a minority investment by a third-party." Def.'s Br. 23. According to the Trustee, these Secured Notes were marketed with an OM that falsely represented Physiotherapy's pre-tax net income and unadjusted EBITDA. Compl. ¶ 82. The Trustee asserts that the OM overstated pre-tax net income by at least 936% and unadjusted EBITDA by 109% for fiscal year 2011. Compl. ¶¶ 83-84. Under the terms of the deal, the new Physiotherapy assumed this debt, and Water Street and Wind Point received \$248.6 million in exchange for their shares. Compl. ¶ 88. Allegedly, the Controlling Shareholders profited handsomely from the fraud while [Physiotherapy] was left insolvent. Compl. ¶ 89. "The sum of all of the foregoing was that Physiotherapy incurred a massive amount of new debt -predicated on false financials—the proceeds of which were transferred out to Physiotherapy's former owners without receiving anything of value in return." Id.

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Shortly after the transaction closed, [Physiotherapy's] new owner retained Deloitte to investigate a gap in accounts receivable and cash collections from the previous years. Deloitte determined that the Debtor's net income had been overstated for the years 2010 and 2012.

Physiotherapy, 2016 WL 3611831, at *2-*4.

- 3 Adv. D.I. 1.
- 4 Adv. D.I. 107.

In December 2012, eight months after the transaction closed, Court Square and the Defendants entered into an agreement containing a general release of claims ("Release"). The agreement containing the Release resolved certain "post-closing disputes" relating to the transaction. (See D.I. 1 at 16) On April 2, 2013, Physiotherapy defaulted on the Senior Notes, and, on November 12, 2013 (the "Petition Date"), it filed for relief under chapter 11 of the Bankruptcy Code. Pursuant to the confirmed Plan, the Trust was created and authorized to pursue causes of action belonging to the estate. (See B.D.I. 197-1 at 27-28) Additionally, the Secured Noteholders assigned their individual claims to the Trustee; as a result, the Trust had standing to assert claims in the capacity of both an estate representative and an assignee. See Physiotherapy, 2016 WL 3611831, at *4.

On September 1, 2015, the Trustee filed the eight-count complaint which asserted various claims for actual and constructive fraudulent transfer under the Bankruptcy Code and Pennsylvania law. Count I of the complaint seeks avoidance and recovery of actual fraudulent transfers to Defendants, as initial transferees, pursuant to section 548(a)(1)(A)⁵ of the Bankruptcy Code. Count II similarly seeks avoidance and recovery of constructive fraudulent transfers to initial transferees pursuant to section 548(a)(1)(B)⁶ of the Bankruptcy Code. Count III seeks avoidance and recovery of transfers to subsequent transferees under the foregoing sections of the Bankruptcy Code. Count IV seeks avoidance and recovery of actual fraudulent transfers from initial transferees under Pennsylvania's version of the Uniform Fraudulent Transfer Act, 12 Pa.C.S.A. § 5104(a)(1), and pursuant to section 544(b) 7 of the Bankruptcy Code. Count V similarly seeks avoidance and recovery of constructive fraudulent transfers to initial transferees pursuant to section 544(b) of the Bankruptcy Code and 12 Pa.C.S.A. §§ 5104(a)(2) and 5105. Count VI seeks avoidance and recovery of transfers to subsequent transferees under Pennsylvania law. Because the Secured Noteholders

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assigned their individual claims to the Trustee, Count VII is asserted by the Trustee as a direct assignee of unsecured creditors (and not as an estate representative) and asserts direct claims under Pennsylvania law, 12 Pa.C.S.A. § 5104(a)(2), for avoidance and recovery of constructive fraudulent transfers to initial transferees. Finally, Count VIII seeks avoidance and recovery of transfers made to subsequent transferees under 12 Pa.C.S.A. §§ 5104(a)(2) and 5105.

- Section 548(a)(1) of the Bankruptcy Code grants a trustee the power to avoid any transfer by a debtor of an interest in property made within two years before the filing of a bankruptcy petition if the transfer was actually or constructively fraudulent. See 11 U.S.C. § 548(a)(1). Pursuant to section 548(a)(1)(A), transfers or obligations incurred by a debtor may be avoided if made with actual intent to hinder, delay, or defraud a past or future creditor. The definition of "transfer" is broad, and includes "the creation of a lien," such as a security interest, and "each mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with—(i) property; or (ii) an interest in property." 11 U.S.C. § 101(54).
- Section 548(a)(1)(B) of the Bankruptcy Code allows a trustee to avoid, inter alia, "any transfer ... of an interest of the debtor in property" if the debtor "received less than reasonably equivalent value in exchange for such transfer" when the debtor was insolvent. See 11 U.S.C. § 548(a)(1)(B).
- Section 544(b) of the Bankruptcy Code authorizes the trustee to "avoid any transfer of interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law." 11 U.S.C. § 544(b). A trustee proceeding under section 544(b) may avoid a fraudulent transfer in its entirety without regard to the value of any particular creditor's claim, and the trustee's recovery is shared by all unsecured creditors, potentially including creditors who could not themselves avoid the transfer under state law. See In re Cybergenics Corp., 226 F.3d 237, 243 (3d Cir. 2000) ("Once avoidable pursuant to this provision, the transfer is avoided in its entirety for the benefit of all creditors.").
- *4 In response to the complaint, Defendants moved to dismiss on several grounds, including: (1) all of the transfers are immune from avoidance pursuant to the Bankruptcy Code's safe harbor provision, 11 U.S.C. § 546(e), ⁸ which prohibits a trustee or estate representative from avoiding transactions involving the purchase and

sale of securities, and, according to Defendants, prohibits creditors from pursuing recovery under state fraudulent transfer laws as well; (2) the claims against Defendants are barred by the Release; and (3) the Secured Noteholders ratified the transaction and are thus barred from seeking its avoidance. (See Adv. D.I. 107)

8 Section 546(e) provides that, notwithstanding section 544, "the trustee may not avoid a transfer that is a ... settlement payment, as defined by section 101 or 741 [of the Bankruptcy Code], made by or to a ... financial institution." 11 U.S.C. § 546(e). In response to Defendants' motion to dismiss, the Trustee argued that payments made to selling shareholders were not "settlement payments" in connection with a "securities contract;" because the Defendants' shares were converted into certificates redeemable for cash prior to the merger's closing, the Trustee argued that these certificates were not securities. (See Adv. D.I. 134 at 34) The Bankruptcy Court rejected the Trustee's argument, finding it inconsistent with the broad language of section 546(e) and controlling Third Circuit law on the issue. See Physiotherapy, 2016 WL 3611831, at *11.

On June 20, 2016, the Bankruptcy Court entered the Interlocutory Order, granting the Motion to Dismiss in part and denying it in part. See Physiotherapy, 2016 WL 3611831, at *15. The Bankruptcy Court granted the motion to dismiss with respect to Counts II, IV, and V of the complaint, determining that section 546(e)'s safe harbor prohibited the Trustee's assertion of constructive transfer claims under section 548(a)(1)(B) and actual and constructive fraudulent transfer claims brought under section 544(b). See id. In denying the motion to dismiss with respect to the fraudulent transfer claims brought directly under state law by the Trustee in the capacity of a creditor-assignee (Count VII), the Bankruptcy Court undertook a preemption analysis and rejected Defendants' argument that section 546(e) prohibits avoidance actions by creditors brought directly under state fraudulent transfer law. See id. at *10-*15. The Bankruptcy Court determined that neither the text nor the purpose of section 546(e) was implicated by the constructive fraudulent transfers at issue and declined to find that the safe harbor preempted state fraudulent transfer laws in this case. Specifically, the Bankruptcy Court held that "a litigation trustee may assert state law fraudulent transfer claims in the capacity of a creditor-assignee when: (1) the transaction sought to be avoided poses no threat of 'ripple effects' in the relevant securities markets; (2) the

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transferees received payment for non-public securities, and (3) the transferees were corporate insiders that allegedly acted in bad faith. When these three factors are present, a finding of implied preemption is inappropriate." Id. at *10. The Bankruptcy Court also determined that a finding of estoppel by ratification was inappropriate at this juncture and declined to dismiss the complaint on this basis. See id. at *12. The Bankruptcy Court further rejected Defendants' contention that the Trust's actual fraudulent transfer claim under section 548(A)(1)(a) 9 was barred by the Release executed by Physiotherapy before it filed its Chapter 11 petition and denied the motion to dismiss with respect to Count I. See id. at *14. Finally, the Bankruptcy Court rejected several other arguments that Defendants do not argue warrant interlocutory review. See id. at *14-15.

- Claims for actual fraudulent transfer pursuant to section 548(a)(1)(A) of the Bankruptcy Code do not fall under the safe harbor provision. See 11 U.S.C. § 546(e) ("[T]he trustee may not avoid a transfer that is a ... settlement payment ... except under section 548(a) (1)(A) of this title.").
- *5 On July 18, 2016, Defendants filed their Motion for Leave to appeal the Interlocutory Order with respect to three issues. (D.I. 1) On August 1, 2016, Defendants also filed the Petition (D.I. 4) in this Court, despite the fact that Federal Rule of Bankruptcy Procedure 8006(b) required Defendants to file the Petition in the court where the matter was then pending, and this matter was pending in the Bankruptcy Court until August 15, 2016. (See D.I. 14 at 18) At the time of briefing on these requests, discovery was underway with respect to the Trust's two remaining claims, with document production scheduled to be completed by January 2017 and depositions scheduled to be completed in June 2017. (See D.I. 13 at 3; Adv. D.I. 284) A review of the adversary docket demonstrates that discovery is scheduled to conclude by May 22, 2018, with any case dispositive motions to be served no later than June 20, 2018. (See Adv. D.I. 676 (Second Amended Scheduling Order)) 10
- There have been other recent developments as well.

 On November 1, 2017, the Bankruptcy Court entered an opinion and order (Adv. D.I. 624, 625) granting plaintiff's motion for partial summary judgment as to potential damages. Defendants have filed a notice of appeal (see Adv. D.I. 643) along with a motion for leave to appeal the interlocutory order (see

- Adv. D.I. 644; see also 17-mc-319-LPS D.I. 1). On November 6, 2017, the Bankruptcy Court entered an opinion/order (Adv. D.I. 630, 631), denying plaintiff's motion for leave to amend the complaint to: (1) add additional defendants, and (2) add a prayer for punitive damages under the Pennsylvania Uniform Fraudulent Transfer Act ("PUFTA").
- 3. Applicable Standards. This Court has jurisdiction to hear appeals "with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title." 28 U.S.C. § 158(a)(3). Section 158(a) does not identify the standard district courts should use in deciding whether to grant such an interlocutory appeal. See id. "Typically, however, district courts follow the standards set forth under 28 U.S.C. § 1292(b), which govern interlocutory appeals from a district court to a court of appeals." In re AE Liquidation, Inc., 451 B.R. 343, 346 (D. Del. 2011). 11
- See also In re Philadelphia Newspapers, LLC, 418 B.R. 548, 556 (E.D. Pa. 2009) ("Based upon the decision of the Third Circuit in Bertoli v. D'Avella (In re Bertoli), 812 F.2d 136, 139 (3d Cir. 1987), courts within this Circuit confronted with the decision whether to grant leave to allow an interlocutory appeal are informed by the criteria in 28 U.S.C. § 1292(b)").

Under the standards of section 1292(b), an interlocutory appeal is permitted only when the order at issue (1) involves a controlling question of law upon which there is (2) substantial ground for difference of opinion as to its correctness, and (3) if appealed immediately, may materially advance the ultimate termination of the litigation. See 28 U.S.C. § 1292(b); Katz v. Carte Blanche Corp., 496 F.2d 747, 754 (3d Cir. 1974). Entertaining review of an interlocutory order under § 1292(b) is appropriate only when the party seeking leave to appeal "establishes exceptional circumstances [to] justify a departure from the basic policy of postponing review until after the entry of final judgment." In re Del. and Hudson Ry. Co., 96 B.R. 469, 472-73 (D. Del. 1989), aff'd, 884 F.2d 1383 (3d Cir. 1989). In part, this stems from the fact that "[p]iecemeal litigation is generally disfavored by the Third Circuit." In re SemCrude, L.P., 2010 WL 4537921, at *2 (D. Del. Oct. 26, 2010) (citing In re White Beauty View, Inc., 841 F.2d 524, 526 (3d Cir. 1988)). Further, leave for interlocutory appeal may be denied for "entirely unrelated reasons such as the state of the appellate docket or the

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desire to have a full record before considering the disputed legal issue." *Katz*, 496 F.2d at 754.

- *6 Pursuant to section 158(d)(2), certification for direct appeal to the circuit court is required if the Court, "acting on its own motion or the request of a party," determines that:
 - (i) the judgment, order, or decree involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States, or involves a matter of public importance;
 - (ii) the judgment, order, or decree involves a question of law requiring resolution of conflicting decisions; or
 - (iii) an immediate appeal from the judgment, order, or decree may materially advance the progress of the case or proceeding in which the appeal is taken.
- 28 U.S.C. § 158(d)(2)(A)(i)—(iii). Thus, the standards for granting direct appeal certification are essentially the same as those to be applied by the district court in determining whether to grant leave to appeal under 28 U.S.C. § 1292(b). See In re Advanced Marketing Services Inc., 360 B.R. 429, 434 (Bankr. D. Del. 2007) (observing that legal analyses required in consideration of motion for leave to appeal interlocutory order and petition for certification of direct appeal are "virtually identical").
- **4.** Analysis. Defendants assert that their appeal of the Interlocutory Order involves not one but three controlling questions of law as to which substantial ground for difference of opinion exists. According to Defendants, these issues are: (i) "whether section 546(e) of the Bankruptcy Code preempts state fraudulent transfer claims," (ii) "whether a trustee can assert fraudulent transfer claims on behalf of creditors who have authorized and participated in the very transfer alleged to be fraudulent," and (iii) whether the Bankruptcy Court erred in its "determination that an otherwise valid release could later be undone through the expedient of a chapter 11 filling, notwithstanding the strong public policy favoring settlements." (D.I. 1 at 1–3)

A. Controlling Question of Law as to Which There Is Substantial Ground for Difference of Opinion

"A controlling question of law must encompass at the very least every order which, if erroneous, would be reversible

error on final appeal." Katz, 496 at 755. " '[C]ontrolling' means serious to the conduct of the litigation, either practically or legally. And on the practical level, saving of time of the district court and of expense to the litigants [has been] deemed ... to be a highly relevant factor." Id. (internal citation omitted). The "controlling question of law" also must be one as to which there is "substantial ground for difference of opinion." 28 U.S.C. § 1292(b). This calls for more than mere disagreement with the ruling of the bankruptcy court. To satisfy this standard, "the difference of opinion must arise out of genuine doubt as to the correct legal standard." Hulmes v. Honda Motor Co., 936 F. Supp. 195, 208 (D.N.J. 1996), aff'd, 141 F.3d 1154 (3d Cir. 1998); see also Patrick v. Dell Fin. Servs., 366 B.R. 378, 386 (M.D. Pa. 2007) (same). This factor is also met when "the bankruptcy court's decision is contrary to wellestablished law." In re Marvel Entm't Grp., Inc., 209 B.R. 832, 837 (D. Del. 1997).

i. Preemption

*7 With the exception of the Trustee's actual fraudulent transfer claim under section 548(a)(1)(A) (Count I), which the statute plainly carves out, Defendants argued that the section 546(e) safe harbor barred all of the Trustee's claims for avoidance under sections 544 and 548(a)(1)(B) of the Bankruptcy Code, as well as all of the fraudulent transfer claims asserted under Pennsylvania law. (See Adv. D.I. 107 at 33–42) Section 546(e) of the Bankruptcy Code provides, in relevant part:

Notwithstanding sections 544 ... [and] 548(a)(1)(B) ... of this title, the trustee may not avoid a transfer that is a ... settlement payment, as defined in section 101 or 741 of this title, made by or to (or for the benefit of) a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency, or that is a transfer made by or to (or for the benefit of) a ... financial institution, [or] financial participant ... in connection with a securities contract, as defined

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in section 741(7) ... except under section 548(a)(1)(A) of this title.

Defendants argued that the safe harbor reflects Congress's clear intention to preempt state fraudulent transfer law. According to Defendants, if an otherwise barred transfer could be recovered under state law, thereby implicating the same concerns regarding the unraveling of settled securities transactions that section 546(e) seeks to address, the exemption set forth in section 546(e) would be rendered useless. (See Adv. D.I. 107) Defendants relied primarily on the Second Circuit's decision in In re Tribune Co. Fraudulent Conveyance Litig., 818 F.3d 98, 124 (2d Cir. 2016), which resolved a divide within New York federal courts over this issue, and determined that section 546(e) preempts state fraudulent transfer law. 12 In reaching this conclusion, the Second Circuit observed that "[o]nce a party enters bankruptcy, the Bankruptcy Code constitutes a wholesale preemption of state laws regarding creditors' rights." Id. at 111. The Second Circuit also concluded that the larger purpose behind the safe harbor was "to promote finality for individual investors by limiting the circumstances, e.g., to cases of intentional fraud, under which securities transactions could be unwound." Id. at 120 (internal citations and quotation marks omitted).

12 Defendants' motion to dismiss relied on Whyte v. Barclays Bank, PLC, 494 B.R. 196 (S.D.N.Y. 2013), and the parties submitted supplemental briefing following the Second Circuit's decision in Tribune. In Barclays, the plan established a litigation trust to prosecute actions. See 494 B.R. at 198. The debtors and certain creditors assigned claims to the trust, including avoidance actions arising under the Bankruptcy Code and state law. See id. Relying on the policy underlying the section 546(g) safe harbor another limitation on a trustee's avoidance power that protects transfers made to "swap participant[s]" or financial participant[s]"—the court held that section 546(g) preempted state fraudulent claims brought by a litigation trustee as an assignee. The Barclays court concluded that permitting a litigation trustee to assert such claims would create a substantial obstacle to Congress's objective of ensuring stability in the derivatives, commodities, and swap markets. See id. at 200-01.

Conversely, the Trustee argued that section 546(e), by its express terms, only bars avoidance actions brought by a "trustee," and the Bankruptcy Code defines "trustee"

as the statutory "representative of the estate." ¹³ Because the statute is silent as to creditors, the Trustee argues that a litigation trust may assert claims directly under state fraudulent transfer law so long as such claims were assigned to the litigation trust by the creditors. (*See* Adv. D.I. 135 at 34–35) In support of this argument, the Trustee cited the *PHP* case, in which this Court concluded that:

*8 if the avoidance action were brought by a trustee or debtorin-possession (or the successor to a debtor-in-possession), the avoidance action would be barred by Section 546(e) of the Bankruptcy Code. However, in this case, PHP LLC has not asserted its claims against Movants in the capacity of a trustee or as a successor-in-interest to a trustee or debtor-in-possession. Rather, PHP LLC is bringing the instant claims as a direct assignee of the unsecured creditors. As such, Section 546(e) is not a bar to PHP LLC's claims.

In re PHP Liquidating, LLC v. Robbins, 291 B.R. 603, 607 (D. Del. 2003) (emphasis added), aff d sub nom. In re PHP Healthcare Corp., 128 Fed.Appx. 839 (3d Cir. 2005).

13 See 11 U.S.C. § 323(a) (defining role and capacity of trustee in case under Bankruptcy Code); see also Grede v. Bank of New York Mellon, 598 F.3d 899, 902 (7th Cir. 2010) (distinguishing between "trustee in bankruptcy" and "post-bankruptcy vehicle").

The Bankruptcy Court undertook a preemption analysis and determined that while section 546(e) bars fraudulent transfer claims under §§ 548(a)(1)(b) and 544 of the Bankruptcy Code (i.e., barring the Trust from asserting creditor claims in its capacity as an estate representative), it does *not* preempt state law fraudulent transfer claims brought by the Trust in its capacity as an assignee of creditors, if: (1) the transaction sought to be avoided poses no threat of "ripple effects" in the relevant securities markets; (2) the transferees received payment for nonpublic securities; and (3) the transferees were corporate insiders that allegedly acted in bad faith. See Physiotherapy, 2016 WL 3611831, at *10.

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Defendants argue that a reversal of the Bankruptcy Court's preemption decision would result in the dismissal of the Trust's sole remaining constructive fraudulent transfer claim (Count VII) and, thus, presents a controlling question of law. (See D.I. 1 at 8) Defendants characterize the Bankruptcy Court's ruling as a sweeping "holding that Section 546(e) does not preempt state fraudulent transfer claims." (D.I. 1 at 1) But Defendants' characterization ignores the fact that the Bankruptcy Court's preemption ruling turned on facts specific to this case, including the nature of the transfers at issue and the basis for the Trust's claims. The Bankruptcy Court determined that the transfers at issue did not involve publicly-traded securities, which eliminated the risk that avoidance would cause "any sort of ripple effect to the broader secondary market." Physiotherapy, 2016 WL 3611831, at *9. The Bankruptcy Court also noted that allegations that corporate insiders had acted in bad faith implicated additional policy concerns relevant to the preemption analysis, including "Congress' policy of providing remedies for creditors who have been defrauded by corporate insiders." Id. The Trustee argues that the requested interlocutory appeal does not present a controlling question of law because any implied preemption analysis is necessarily case-specific and applies only "when, 'under the circumstances of [a] particular case, [the state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (See D.I 13 at 19 (quoting DeWeese v. Nat'l R.R. Passenger Corp. (Amtrak), 590 F.3d 239, 246 (3d Cir. 2009); Hines v. Davidowitz, 312 U.S. 52, 67 (1941))

The Court agrees with the Trustee that the Bankruptcy Court's preemption analysis was specific to the facts of this case. The Court is not persuaded that Defendants have established a controlling question of law that justifies deviation from the fundamental judicial policy of deferring review until after the entry of a final judgment.

*9 Nor is the Court convinced that a substantial ground for difference of opinion exists, as the Bankruptcy Court's preemption analysis followed well-established Third Circuit and Supreme Court law. In determining whether Congress occupied the field for exclusive federal regulation, the Bankruptcy Court began with Third Circuit's statement that the "'strong presumption against inferring Congressional preemption' also applies 'in the bankruptcy context' which may be overcome when

'a Congressional purpose to preempt ... is clear and manifest.' "Rosenberg v. DVI Receivables XVII, LLC, 835 F.3d 414, 419 (3d Cir. 2016) (quoting In re Fed—Mogul Glob. Inc., 684 F.3d 355, 365 (3d Cir. 2012)); see also BFP v. Resolution Trust Corp., 511 U.S. 531, 540, 544–45 (1994) ("[T]he Bankruptcy Code will be construed to adopt, rather than to displace, preexisting state law."). "To discern the preemptive intent of Congress," the Bankruptcy Court proceeded to follow Supreme Court guidance and "look[ed] to the text, structure, and purpose of the [safe harbor] statute and the surrounding statutory framework." Rosenberg, 835 F.3d at 419 (citing Medtronic, Inc. v. Lohr, 518 U.S. 470, 486 (1996)).

The Bankruptcy Court found the plain language of the statute setting out the safe harbor cut against preemption. For example, section 546 is titled "limitations on avoidance power," and by its express terms, Congress limited the safe harbor to certain avoidance actions brought by a bankruptcy trustee under sections "544, 545, 547, 548(a)(1)(B), and 548(b)." 11 U.S.C. § 546(e) ("the trustee may not avoid ..." certain transfers) (emphasis added). The safe harbor is silent with regard to a creditor's ability to bring such claims arising under state law rather than the Bankruptcy Code. See Physiotherapy, 2016 WL 3611831, at *9.

Looking to the structure of the safe harbor, the Bankruptcy Court noted that, in other sections of the Bankruptcy Code, Congress has explicitly stated when it intends for a provision to apply to entities other than the trustee (*see, e.g.*, 11 U.S.C. § 1109(b)); moreover, other Bankruptcy Code provisions expressly preempted state law by incorporating phrases like "notwithstanding any nonbankruptcy law" (*see e.g.*, 11 U.S.C. § 541(c)(1)). *See Physiotherapy*, 2016 WL 3611831, at *9.

Finally, looking to the purpose and legislative history of the safe harbor provision, the Bankruptcy Court noted that the safe harbors were originally enacted to protect commodities clearing agencies from massive liability, based on the theory that avoidance of margin payments could present significant systemic risk in the derivatives market, causing a "ripple effect" as the failure of a clearinghouse could adversely impact all market participants. See id. at *7. The Bankruptcy Court concluded that Tribune and similar cases placed too much emphasis on policy concerns which find minimal support in the Congressional record (e.g., finality

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for individual investors), whereas the legislative history suggests "sections 546(e) and 546(g) were enacted to further augment the protections against systemic risk codified in the initial safe harbors." Id. at *8. Adopting the reasoning set forth in Lyondell that was later rejected in Tribune, the Bankruptcy Court found "[n]othing in the legislative history of the existing law evidences a desire to protect individual investors who are beneficial recipients of insolvents' assets. The repeatedly expressed concern, by contrast, has been that of protecting market intermediaries and protecting the markets—in each case to avoid problems of 'ripple effects,' i.e., falling dominos." Physiotherapy, 2016 WL 3611831, at *8 (quoting In re Lyondell Chemical Co., 503 B.R. 348, 373 (S.D.N.Y. 2014)). Ultimately, the Bankruptcy Court concluded that the legislative history did not support an interpretation of the safe harbor as a broad preemption of all state law avoidance claims, and that preemption was not appropriate in this case. See id.

*10 The Bankruptcy Court's reading of the safe harbor is supported by the plain language of the statute, and its careful preemption analysis followed controlling Third Circuit and Supreme Court precedent, which construes the Bankruptcy Code as adopting, rather than displacing, preexisting state law, absent a clear and manifest indication from Congress. See id. at *7-*10. Defendants argue there is genuine doubt as to the correct standard here based on the conflicting decision in Tribune. However, as noted by the Bankruptcy Court, the Tribune case involved publicly-traded securities, an important factual distinction that implicated the risk of "ripple effects" that Congress sought to avoid. See Physiotherapy, 2016 WL 3611831, at *9 14 Because the transfers here were to corporate insiders, systemic risk concerns were not at issue. Defendants' mere disagreement with the outcome of the Bankruptcy Court's case-specific preemption analysis is not a substantial ground for difference of opinion that justifies interlocutory appeal.

Similarly, in *Barclays*, the Trustee sought to avoid a large portfolio of swap transactions. *See* 494 B.R. at 198 (seeking avoidance of portfolio of transactions as fraudulent conveyance under New York debtorcreditor law).

ii. Ratification

Defendants argued to the Bankruptcy Court that "[b]ecause the Noteholders knowingly authorized and participated in the transfer ... they are estopped from seeking its avoidance." (Adv. D.I. 107 at 54) Specifically, Defendants argued that the noteholders ratified the fraudulent transfers when they purchased their securities because they were aware that the proceeds from the issuance would be used to cash out the Selling Shareholders. Thus, according to the Trustee, the noteholders are estopped from seeking to avoid the transfer they approved. Defendants encouraged the Bankruptcy Court to adopt the view expressed in Lyondell that creditors "who authorized or sanctioned the transaction, or, indeed participated in it themselves, can hardly claim to have been defrauded by it, or otherwise victims of it." Lyondell, 503 B.R. at 383-84. The Lyondell Court concluded that a creditor's knowledge that it was lending "for the purpose of financing an LBO, and that the LBO proceeds would go to the stockholders," was sufficient to establish a ratification defense. Id. at 385.

Conversely, the Trustee argued that the noteholders could not have knowingly authorized and participated in the transaction because they purchased the notes based on fraudulent financial statements, and the proper question is whether these creditors "had full knowledge of all material facts" surrounding the transaction. (Adv. D.I. 135 at 47) (internal quotation marks omitted) In response, Defendants denied advancing a ratification defense "in the strict sense of the word"-contending that such a defense would apply only to claims for fraud as opposed to claims for fraudulent transfer. Defendants argued that while courts have described the estoppel defense using different terms-including "ratification," "estoppel," or "material participation in the transaction"—the underlying theory, according to Defendants, remains the same: "a creditor who participates in (or consents to or ratifies) a fraudulent transfer cannot later argue that the transfer should be avoided." (Adv. D.I. 163 at 4) "The real and indisputable point is that the Noteholders provided financing knowing the funds would be used to pay [Defendants] for their shares of [the Debtor]." (Id.) Because they participated in the transaction, "[t]he Noteholders (and the Litigation Trust as their representative) are thus estopped from challenging the very transfer to which they knowingly consented." (Id.)

In evaluating the defense, the Bankruptcy Court noted that ratification "is the act of knowingly giving sanction

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or affirmance to an act which would otherwise be unauthorized or not binding." Physiotherapy, 2016 WL 3611831, at *12 (citing 57 N.Y. Jur. 2d Estoppel, Ratification and Waiver § 87 (2007)). The Bankruptcy Court relied on Tronox and Adelphia, in which courts appear to have endorsed the "material facts" test articulated in ASARCO. 15 Noting that use of proceeds is simply one piece of the entire "fraud alleged in the complaint," the Bankruptcy Court concluded that there is a material dispute as to whether the Secured Noteholders had knowledge of the material facts of the transaction. Physiotherapy, 2016 WL 3611831, at *12. As the ratification defense hinged on factual issues which remained subject to further development in discovery, "a finding of ratification would be inappropriate at this juncture," and the Bankruptcy Court declined to dismiss the fraudulent transfer action based on this defense. Id.

In *In re Tronox*, 503 B.R. 239, 276 (Bankr. S.D.N.Y. 2013), the court determined that because defendants "did not establish that the bondholders knowingly gave sanction to the fraudulent conveyances complained of in this case," a finding of ratification was inappropriate. In *Adelphia Recovery Trust v. HSBC Bank USA (In re Adelphia Recovery Trust)*, 634 F.3d 678, 693–94 (2d Cir. 2011), the Second Circuit noted: "[w]here the allegedly ratifying party's silent acquiescence to a transaction credibly appears to have resulted from the complexity of the situation rather than intent, ratification does not occur."

*11 On appeal, Defendants assert that the Bankruptcy Court incorrectly characterized their defense as "ratification," when it should have applied the "estoppel" standard. According to Defendants, the vast majority of courts have not required "full knowledge of the facts surrounding the transaction" when considering the estoppel defense; rather, application of the defense requires only "knowledge of the transfer itself." (D.I. 1 at 15-16) Conversely, the Trustee argues it is Defendants who have conflated the issues: "the question here is what the elements of their defenses are, not what the elements of the Trust's claims are," and it is firmly established in common law "that the defenses of ratification and estoppel apply only when a party acts knowingly." (D.I. 13 at 11) The Trustee contends that Defendants' pleadings and case law demonstrate that concepts of ratification and estoppel are related, and " 'no estoppel arises from the mere fact that the creditor has knowledge of the proposed transfer.' " (D.I. 13 at 10) (quoting 16A Cal. Jur. 3d § 410) Defendants have not established that the Bankruptcy Court's ratification ruling involves a controlling question of law. Defendants contend that reversal on the ratification issue would result in dismissal of the entire case, sparing both the parties and the Court the expense and burden of litigating the action. (See D.I. 1 at 14) However, the Court agrees with the Trustee that Bankruptcy Court's ruling was not a final ruling on any defense—regardless of whether the applicable defense is characterized as ratification or estoppel-but, rather, a non-final determination that application of the defense was "inappropriate at this juncture." (D.I. 13 at 12-13) The Bankruptcy Court merely determined that facts regarding the creditors' knowledge and intent were relevant and must be developed before deciding whether a defense applies. See Physiotherapy, 2016 WL 3611831, at *12.

Nor have Defendants established substantial grounds for difference of opinion. Defendants argue that whether the doctrine of estoppel requires "knowledge of all material facts" "appears to be a matter of first impression not only in this District but within this Circuit." (D.I. 1 at 14) (citing Klapper v. Commonwealth Realty Trust, 662 F. Supp. 235, 236 (D. Del. 1987) (finding that "substantial ground for difference of opinion" existed where issue presented "case of first impression")) However, again, all the Bankruptcy Court decided was that further factual development is required before applying the defense of ratification or estoppel. Moreover, it appears that the Bankruptcy Court applied well-settled tenets of law. (See D.I. 13 at 9–11)

iii. Prepetition Release

Defendants argue that all of the Trustee's claims, including the actual fraudulent transfer claim under section 548(a) (1)(A), were barred by the Release that Physiotherapy executed prior to the Chapter 11 proceedings. (See Adv. D.I. 107 at 43–49) The Release bars any "claims for losses, damages, indemnification, or other payment" against any party "for any breach, violation or inaccuracy of any of the terms, conditions, covenants, agreements or representations and/or warranties in the Merger Agreement." (Adv. D.I. 108 at Ex. 8) Additionally the parties "irrevocably waive[d] all such claims, whether in law, equity, tort or otherwise, whether or not known now, heretofore or hereafter, whether anticipated or

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unanticipated, suspected, unsuspected or claimed, fixed or contingent." (*Id.*)

In moving to dismiss, Defendants argued that the Release barred the Debtor from asserting any fraud or fraud-based claims, and bars the Trust as well, because the Trust is standing "in the shoes" of the Debtor. (*See id.* at 43) The Bankruptcy Court disagreed, noting that post-petition avoidance actions can only be brought by the trustee after the petition is filed; and just as the prepetition debtor does not own the right to pursue a fraudulent transfer claim, it follows that the prepetition debtor may not waive such claims either. *See Physiotherapy*, 2016 WL 3611831, at *14 (citing *Official Comm. of Unsecured Creditors v. UMB Bank (In re Residential Capital, LLC)*, 497 B.R. 403, 424 (Bankr. S.D.N.Y. 2013)).

*12 In concluding that the Trustee was not bound by the Release, the Bankruptcy Court relied on several Third Circuit cases. For instance, in Lafferty, the Third Circuit noted that actions that may be pursued by bankruptcy trustees generally fall into two categories: "(1) those brought by the trustee as successor to the debtor's interest included in the estate under Section 541, and (2) those brought under one or more of the trustee's avoiding powers." Official Comm. of Unsecured Creditors v. R.F. Lafferty & Co., 267 F.3d 340, 356 (3d Cir. 2001). Pursuant to section 541 of the Bankruptcy Code, the bankruptcy estate is comprised of "all legal or equitable interests of the debtor in property as of the commencement of the case," including "whatever causes of action the debtor may have possessed prior to the petition date." 11 U.S.C. § 541. Any action included in the estate under section 541 that is later pursued by a bankruptcy trustee is brought by the trustee as successor to the debtor's interest in that claim and is a "debtor cause of action." In re IH 1, Inc., et al., 2016 WL 6394296, *13 (Bankr. D. Del. Sept. 28, 2016). The Third Circuit has noted that "the trustee stands in the shoes of the debtor" when bringing such actions, and is therefore "subject to the same defenses as could have been asserted by the defendant had the action been instituted by the Debtor." Lafferty, 267 F.3d at 356.

Claims that the Bankruptcy Code authorizes a trustee to assert on behalf of creditors, which are largely avoidance actions brought pursuant to sections 544, 547, and 548 of the Bankruptcy Code, are "creditor actions." The power to pursue such claims, as exercised by an estate representative, "relate[s] to the trustee's power to resist

pre-bankruptcy transfers of property." *Id.* The Third Circuit has held that for purposes of section 548 avoidance actions, the trustee does not stand in the shoes of the debtor, as such claims are not "derivative of the bankrupt." *Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 885 F.2d 1149 (3d Cir. 1989) (holding claims under § 548 are "creditor claims" and "there is no justification for binding creditors to [an agreement's arbitration provision] with respect to claims that are not derivative from the party to it"); *see also McNamara v. PFS (In re Personal & Bus. Ins. Agency)*, 334 F.3d 239, 245 (3d Cir. 2003) ("The *Lafferty* Court made clear that its holding did not extend to actions brought under Code sections other than [section] 541").

Relying on these Third Circuit cases and other authorities, the Bankruptcy Court concluded that the Debtor had no ability to waive section 548 claims, and the Trustee was not bound by the Release. See Physiotherapy, 2016 WL 3611831, at *14. On appeal, Defendants assert the Bankruptcy Court erred in holding that "because a prepetition debtor does not own the right to pursue a fraudulent transfer claim in bankruptcy, the Release did not bar claims by the Trust brought post-petition on behalf of the Debtor." (D.I. 1 at 17)

Defendants assert that this issue presents a controlling question of law because reversal on the effect of the Release would result in dismissal of the Trustee's claim under section 548(a)(1)(A) for actual fraudulent transfer. (See id.) The Trustee disagrees, contending that because the Bankruptcy Court held that the Release did not bind the Trustee, the Bankruptcy Court did not have to decide whether the terms of the Release encompass the actual fraudulent transfer claim. (See D.I. 13 at 8-9) The Trustee argues that the Release only applies to claims for "breach, violation or inaccuracy of any terms, conditions, covenants, agreements or representations and/ or warranties in the Merger Agreement," 16 and the Trust's claim is predicated on other documents, including the OM. (D.I. 13 at 9 (emphasis added); Compl. at ¶ 82) Thus, the Release would not bar the actual fraudulent conveyance claim even if the Trustee was bound by such a prepetition waiver.

Adv. D.I. 108–8 at 2 (emphasis added).

The Court agrees with the Trustee. Because the scope of the Release may present a disputed issue of fact,

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and is subject to further development through discovery, interlocutory review is not appropriate. Defendants have not identified a controlling question of law.

*13 Nor have Defendants identified an issue on which there exists substantial grounds for disagreement. Defendants contend "precedent bearing on this matter is thin" (D.I. 1 at 19) and the Bankruptcy Court ignored observations made recently in JLL Consultants, Inc. v. Hormel Foods Corp. (In re AgFeed USA LLC), 2015 WL 9133627 (Bankr. D. Del. Dec. 15, 2015). In AgFeed, the debtors had entered into a prepetition settlement agreement with a defendant, including a release and a requirement that the debtor issue a promissory note to the defendant. See id. at *2. Following the bankruptcy filing, the trustee initiated an action alleging that the issuance of the promissory note was a fraudulent transfer. See id. The court determined that the release "contemplates and provides for the situation that arose here, i.e., a claim for fraudulent transfer," and the action was precluded by the release. Id. at *5. However, as the Bankruptcy Court determined, the decision in AgFeed was based on the specific facts of that case. The applicability, if at all, of that decision to the different facts here does not create substantial grounds for difference of opinion warranting interlocutory review. Additionally, the issue of whether a pre-petition release of claims like those involved here may be binding on a trustee was not briefed in AgFeed, nor did the defendant raise the argument. See AgFeed, 2015 WL 9133627, at *4-*5. Finally, it is well-settled that "prior to bankruptcy, a debtor may not waive bankruptcy rights that inure to the benefit of unsecured creditors not a party to that waiver." Minn. Corn Processors, Inc. v. Am. Sweeteners, Inc. (In re Sweeteners, Inc.), 248 B.R. 271, 276 (Bankr. E.D. Pa. 2000).

B. Whether Immediate Appeal Will Materially Advance Termination of Litigation

Defendants argue that if they are successful on appeal of these issues, the entire case will be resolved. (See D.I. 1 at 20) They add that, absent interlocutory appeal, the parties may be forced to litigate issues and incur costs that might turn out to have been entirely unnecessary. (See id.) The Trustee counters that Defendants would have to prevail on both the prepetition release issue, which targets the Trustee's actual fraudulent transfer claim, and either the section 546(e) or ratification issues, which target the constructive fraudulent transfer claim, in order for there to be any chance of material advancement of termination

of the litigation. (See D.I. 13 at 4) The Trustee also points to disputed issues of fact underlying the issues Defendants seek to appeal, observing that subsequent developments in the Bankruptcy Court may moot certain disputes, a further indication that immediate appeal would not materially advance the litigation. (See id. at 5)

Immediate appeal is not likely to advance the termination of this litigation. Defendants must succeed on more than one of their issues to terminate the litigation. Under the circumstances, an immediate appeal of one or all of these issues "would only promote piecemeal determination of the questions raised in the adversary action and would likely create unnecessary delay." *AE Liquidation*, 451 B.R. at 348.

C. Whether Exceptional Circumstances Justify Immediate Appeal

Because an interlocutory appeal represents a deviation from the basic judicial policy of deferring review until after the entry of final judgment, the party seeking leave to appeal an interlocutory order must also demonstrate that exceptional circumstances exist. See In re Advanced Marketing Services, Inc., 2008 WL 5680878 (D. Del. April 3, 2008). "Interlocutory appeal is meant to be used sparingly and only in exceptional cases where the interests cutting in favor of immediate appeal overcome the presumption against piecemeal litigation." AE Liquidation, 451 B.R. at 349 (internal quotation marks omitted).

Defendants' opening brief did not identify any exceptional circumstances that might warrant deviation from the final judgment rule. (See D.I. 1) In their reply brief, Defendants argue that exceptional circumstances are present based on the "conflict with Barclays and Tribune and potential for a circuit split on an important issue of bankruptcy jurisprudence involving the scope of [s]ection 546(e)," together with "the lack of any controlling Third Circuit precedent on the estoppel and release issues." (D.I. 18 at 17)

The Court is not persuaded that exceptional circumstances are presented here. Defendants have failed to point to "any circumstance or reason that distinguishes the case from the procedural norm and establishes the need for immediate review." *In re Magic Rests., Inc.*, 202 B.R. 24, 26–27 (D. Del. 1996).

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*14 5. Conclusion. For the reasons explained above, the Court will deny Defendants' Motion for Leave to appeal the Interlocutory Order. Accordingly, the Petition is also denied.

All Citations

Slip Copy, 2017 WL 6524524, Bankr. L. Rep. P 83,193

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In re Tribune Co. Fraudulent Conveyance Litigation, 818 F.3d 98 (2016)

KeyCite Yellow Flag - Negative Treatment
Declined to Follow by Chateau Foghorn LP v. Hosford, Md., August
28, 2017

818 F.3d 98 United States Court of Appeals, Second Circuit.

In re TRIBUNE COMPANY FRAUDULENT
CONVEYANCE LITIGATION.

Note Holders, Deutsche Bank Trust Company
Americas, Law Debenture Trust Company
of New York, Wilmington Trust Company,
Individual Retirees, William A. Niese, on
behalf of a putative class of Tribune Company
retirees, Plaintiffs—Appellants—Cross—Appellees,
Mark S. Kirschner, as Litigation Trustee
for the Tribune Litigation Trust, Plaintiff,
Tendering Phones Holders, Citadel Equity
Fund Ltd., Camden Asset Management LLP and
certain of their affiliates, Plaintiffs—Intervenors,

v.

Large Private Beneficial Owners, Financial Institution Holders, Financial Institution Conduits, Merrill Lynch, Pierce, Fenner & Smith, Inc., on behalf of a putative class of former Tribune Company shareholders, Pension Funds, including public, private, and Taft Hartley Funds, Individual Beneficial Owners, Mario J. Gabelli, on behalf of a putative class of former Tribune Company shareholders, Mutual Funds, At-Large, Estate of Karen Babcock, Phillip S. Babcock, Douglas Babcock, Defendants Listed on Exhibit B, Defendants-Appellees-Cross-Appellants, Current and Former Directors and Officers, Betsy D. Holden, Christopher Reyes, Dudley S. Taft, Enrique Hernandez, Jr., Miles D. White, Robert S. Morrison, William A. Osborn, Harry Amsden, Stephen D. Carver, Dennis J. FitzSimons, Robert Gremillion, Donald C. Grenesko, David Dean Hiller, Timothy J. Landon, Thomas D. Leach, Luis E. Le, Mark Hianik, Irving Quimby, Crane Kenney, Chandler Bigelow, Daniel Kazan, Timothy Knight, Thomas Finke, Sam Zell and Affiliated Entities, EGI-TRB, LLC, Equity Group Investments, LLC, Sam Investment Trust, Samuel Zell, Tower CH,

LLC, Tower DC, LLC, Tower DL, LLC, Tower EH, LLC, Tower Gr, Large Shareholders, Chandler Trusts and their representatives, Financial Advisors, Valuation Research Corporation, Duff & Phelps, LLC, Morgan Stanley & Co. Inc. and Morgan Stanley Capital Services, Inc., GreatBanc Trust Company, Citigroup Global Markets, Inc., CA Public Employee Retirement System, Calpers, University Of CA Regents, T. Rowe Price Associates, Inc., Morgan Keegan & Company, Inc., NTCA, Diocese of Trenton-Pension Fund, First Energy Service Company, Maryland State Retirement and Pension System, T Bank LCV QP, T Bank-LCV-PT, Japan Post Insurance, Co., Ltd., Servants of Relief for Incurable Cancer (aka Dominican Sisters of Hawthorne), New Life International, New Life International Trust, Salvation Army, Southern Territorial Headquarters, City of Philadelphia Employees, Ohio Carpenters' Midcap (aka Ohio Carpenters' Pension Fund), Tilden H. Edwards, Jr., Malloy and Evans, Inc., Bedford Oak Partners, LP, Duff and Phelps LLC, Durham J. Monsma, Certain Tag-Along Defendants, Michael S. Meadows, Wirtz Corporation, Defendants.

The Clerk of the Court is instructed to conform the caption in accordance with this opinion.

Docket Nos. 13–3992–cv, 13–3875–cv, 13–4178–cv, 13–4196–cv.

| Argued: Nov. 5, 2014.
| Decided: March 29, 2016.

Synopsis

Background: Unsecured creditors committee in Chapter 11 case brought adversary proceedings asserting actual fraudulent transfer claims against corporate debtor's cashed-out shareholders, officers and directors, financial advisors, and others who benefited from prepetition leveraged buyout (LBO) of debtor, and, after conditional stay relief was granted, individual creditors brought actions asserting state-law constructive fraudulent transfer claims to unwind buyouts of debtor's shareholders. Following consolidation of actions by the Judicial Panel on Multidistrict Litigation, 831 F.Supp.2d

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1371, defendants moved to dismiss individual creditor actions. The United States District Court for the Southern District of New York, Richard J. Sullivan, J., 499 B.R. 310, granted motion, and cross-appeals were taken.

Holdings: The Court of Appeals, Winter, Circuit Judge, held that:

[1] creditors were not barred by the Bankruptcy Code's automatic stay provision from bringing state-law constructive fraudulent conveyance claims while avoidance proceedings challenging the same transfers brought by a party exercising the powers of a bankruptcy trustee on an intentional fraud theory were ongoing, but

[2] creditors' state-law constructive fraudulent conveyance claims were preempted by the section of the Code barring bankruptcy trustees from avoiding, as constructively fraudulent to creditors, transfers that are settlement payments in securities transactions or made in connection with a securities contract, abrogating *In re Lyondell Chemical Company*, 503 B.R. 348.

Affirmed.

West Headnotes (37)

[1] Corporations and Business Organizations

Sale or Transfer of All or Controlling Interest of Stock

In a typical "leveraged buyout" (LBO), a target company is acquired with a significant portion of the purchase price being paid through a loan secured by the target company's assets.

1 Cases that cite this headnote

[2] Bankruptcy

Intent of debtor

"Intentional fraudulent conveyance" is one in which there was actual intent to hinder, delay, or defraud a creditor. 11 U.S.C.A. § 548(a)(1) (A).

1 Cases that cite this headnote

[3] Bankruptcy

Insolvency of debtor

Bankruptcy

"Reasonably equivalent value" in general "Constructive fraudulent conveyance" is generally a transfer for less than reasonably equivalent value made when the debtor was insolvent or was rendered so by the transfer.

1 Cases that cite this headnote

[4] Federal Courts

Dismissal or nonsuit in general

Court of Appeals reviews de novo the district court's grant of a motion to dismiss.

Cases that cite this headnote

[5] Bankruptcy

Judicial proceedings in general

When a bankruptcy action is filed, any action or proceeding against the debtor is automatically stayed. 11 U.S.C.A. § 362.

Cases that cite this headnote

[6] Bankruptcy

Automatic Stay

Purpose of the automatic stay is to protect creditors as well as the debtor by avoiding wasteful, duplicative, individual actions by creditors seeking individual recoveries from the debtor's estate, and by ensuring an equitable distribution of the debtor's estate. 11 U.S.C.A. § 362.

Cases that cite this headnote

[7] Bankruptcy

Judicial proceedings in general

Bankruptcy

Determination and relief; conditions

Bankruptcy

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Construction, execution, and performance

Creditors were not barred by the Bankruptcy Code's automatic stay provision bringing state-law constructive fraudulent conveyance claims while avoidance proceedings challenging the same transfers brought by a party exercising the powers of a bankruptcy trustee on an intentional fraud theory were ongoing; the bankruptcy court had granted creditors relief from the automatic stay on three occasions, and the confirmed reorganization plan expressly allowed creditors to pursue any and all leveraged buyout (LBO)-related causes of action arising under state fraudulent conveyance law, and provided that nothing in the plan impaired the rights of creditors to attempt to pursue disclaimed state-law avoidance claims. 11 U.S.C.A. §§ 362, 548(a) (1)(A).

1 Cases that cite this headnote

[8] Bankruptcy

- Cause; Grounds and Objections

Bankruptcy Code empowers a bankruptcy court to release parties from the automatic stay "for cause" shown. 11 U.S.C.A. § 362(d) (1).

Cases that cite this headnote

[9] Bankruptcy

Determination and relief; conditions

Once a creditor obtains stay relief, it may press its claims outside of the bankruptcy proceeding. 11 U.S.C.A. § 362(d)(1).

Cases that cite this headnote

[10] States

Conflicting or conforming laws or regulations

Under the Supremacy Clause, federal law prevails when it conflicts with state law. U.S.C.A. Const. Art. 6, cl. 2.

4 Cases that cite this headnote

[11] States

Preemption in general

Preemptive effect of federal law may be inferred where it is not expressly provided. U.S.C.A. Const. Art. 6, cl. 2.

1 Cases that cite this headnote

[12] States

Conflicting or conforming laws or regulations

Under the implied preemption doctrine, state laws are preempted to the extent of any conflict with a federal statute; such a conflict occurs when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. U.S.C.A. Const. Art. 6, cl. 2.

4 Cases that cite this headnote

[13] States

State police power

Presumption against inferring preemption is premised on federalism grounds, and so weighs most heavily where the particular regulatory area is traditionally the domain of state law. U.S.C.A. Const. Art. 6, cl. 2.

2 Cases that cite this headnote

[14] States

Congressional intent

Preemption is always a matter of congressional intent, even where that intent must be inferred. U.S.C.A. Const. Art. 6, cl. 2.

2 Cases that cite this headnote

[15] States

Preemption in general

Presumption against preemption usually goes to the weight to be given to the lack of

In re Tribune Co. Fraudulent Conveyance Litigation, 818 F.3d 98 (2016)

an express statement overriding state law. U.S.C.A. Const. Art. 6, cl. 2.

1 Cases that cite this headnote

Bankruptcy power generally

Congress's power to enact bankruptcy laws was made explicit in the Constitution as originally enacted. U.S.C.A. Const. Art. 1, § 8, cl. 4.

Cases that cite this headnote

[17] Bankruptcy

[16] Bankruptcy

Application of state or federal law in general

Once a party enters bankruptcy, the Bankruptcy Code constitutes a wholesale preemption of state laws regarding creditors' rights.

2 Cases that cite this headnote

[18] Bankruptcy

Trustee as representative of debtor or creditors

Bankruptcy

- Time limitations; computation

Constructive fraudulent conveyance action brought by a trustee under the strong-arm provision of the Bankruptcy Code is a claim arising under federal law; although such a claim borrows applicable state-law standards regarding avoiding the transfer in question, the claim has its own statute of limitations, measure of damages, and standards for distribution. 11 U.S.C.A. §§ 544, 546(a)(1)(A), 550, 726.

1 Cases that cite this headnote

[19] Bankruptcy

Judgment or order;relief

Disposition of a bankruptcy trustee's federallaw constructive fraudulent conveyance claim extinguishes the right of creditors to bring state-law fraudulent conveyance claims. 11 U.S.C.A. § 544.

2 Cases that cite this headnote

[20] Bankruptcy

Avoidance rights and limits thereon, in general

Section of the Bankruptcy Code barring bankruptcy trustees from avoiding transfers that are settlement payments in securities transactions or made in connection with a securities contract creates an exception to that prohibition for federal avoidance claims brought by trustees based on an intentional fraud theory. 11 U.S.C.A. §§ 546(e), 548(a)(1) (A).

Cases that cite this headnote

[21] Bankruptcy

Avoidance rights and limits thereon, in general

Transfers in which either the transferor or transferee is not a financial intermediary are clearly included in the language of the section of the Bankruptcy Code barring bankruptcy trustees from avoiding, as constructively fraudulent to creditors, transfers that are settlement payments in securities transactions or made in connection with a securities contract. 11 U.S.C.A. § 546(e).

2 Cases that cite this headnote

[22] Bankruptcy

Avoidance rights and limits thereon, in general

Section of the Bankruptcy Code barring bankruptcy trustees from avoiding, as constructively fraudulent to creditors, transfers that are settlement payments in securities transactions or made in connection with a securities contract does not distinguish between kinds of transfers, for example, settlements of ordinary day-to-day trading, leveraged buyouts (LBOs), or mergers in

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which shareholders of one company are involuntarily cashed out. 11 U.S.C.A. § 546(e).

Cases that cite this headnote

[23] Bankruptcy

Avoidance rights and limits thereon, in general

So long as the transfer sought to be avoided is within the language of the section of the Bankruptcy Code barring bankruptcy trustees from avoiding, as constructively fraudulent to creditors, transfers that are settlement payments in securities transactions or made in connection with a securities contract, the statute includes avoidance proceedings in which the intermediary would escape a damages judgment. 11 U.S.C.A. § 546(e).

Cases that cite this headnote

[24] Bankruptcy

Co-debtors and third persons

Language of the Bankruptcy Code's automatic stay provision applies only to actions against the debtor. 11 U.S.C.A. § 362.

Cases that cite this headnote

[25] Limitation of Actions

Nature of statutory limitation

Statutes of limitation usually are intended to limit the assertion of stale claims and to provide peace to possible defendants.

Cases that cite this headnote

[26] Bankruptcy

Trustee as representative of debtor or creditors

Strong-arm provision of the Bankruptcy Code, vesting avoidance powers in the trustee, is intended to simplify proceedings, reduce the costs of marshalling the debtor's assets, and assure an equitable distribution among the creditors. 11 U.S.C.A. § 544.

Cases that cite this headnote

[27] Statutes

Plain Language; Plain, Ordinary, or Common Meaning

Statutes

Context

Whether statutory language has a plain meaning turns on whether a consensus would have existed among reasonable, contemporaneous readers as to meaning of that language in the particular statutory context at the time of enactment.

Cases that cite this headnote

[28] Bankruptcy

Avoidance rights and limits thereon, in general

Corporations and Business Organizations

Transfer to or for the benefit of directors, officers, or shareholders

Creditors' state-law constructive fraudulent conveyance claims against Chapter 11 debtor's former shareholders and others, pursuant to which they sought to avoid payments made by debtor to financial intermediary to fund ensuing payments to shareholders for stock during prepetition leveraged buyout (LBO) of debtor, conflicted with the section of the Bankruptcy Code barring bankruptcy trustees from avoiding, as constructively fraudulent to creditors, transfers that are settlement payments in securities transactions or made in connection with a securities contract, and so were preempted; abrogating In re Lyondell Chemical Company, 503 B.R. 348. 11 U.S.C.A. § 546(e).

2 Cases that cite this headnote

[29] Bankruptcy

Avoidance rights and limits thereon, in general

Payments by and to financial intermediaries, which are protected by the section of the

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Bankruptcy Code barring bankruptcy trustees from avoiding, as constructively fraudulent to creditors, transfers that are settlement payments in securities transactions or made in connection with a securities contract, provide certainty as to each transaction's consummation, speed to allow parties to adjust the transaction to market conditions, finality with regard to investors' stakes in firms, and thus stability to financial markets. 11 U.S.C.A. § 546(e).

2 Cases that cite this headnote

[30] Statutes

Language and intent, will, purpose, or policy

Search for legislative purpose is heavily informed by statutory language.

Cases that cite this headnote

[31] Bankruptcy

Construction and Operation

In construing the Bankruptcy Code, analyzing all the language of a provision and its relationship to the Code as a whole is preferable to using literalness here and perceived legislative purpose, without regard to language, there as needed to reach particular results.

Cases that cite this headnote

[32] Bankruptcy

Avoidance rights and limits thereon, in general

Congress's purpose in enacting the section of the Bankruptcy Code barring bankruptcy trustees from avoiding, as constructively fraudulent to creditors, transfers that are settlement payments in securities transactions or made in connection with a securities contract was to promote finality and certainty for investors, by limiting the circumstances, that is, to cases of intentional fraud, under which securities transactions could be unwound. 11 U.S.C.A. § 546(e).

1 Cases that cite this headnote

[33] Bankruptcy

Avoidance rights and limits thereon, in general

Broad language used in the section of the Bankruptcy Code barring bankruptcy trustees from avoiding, as constructively fraudulent to creditors, transfers that are settlement payments in securities transactions or made in connection with a securities contract protects transactions rather than firms, reflecting a purpose of enhancing the efficiency of securities markets in order to reduce the cost of capital to the American economy. 11 U.S.C.A. § 546(e).

1 Cases that cite this headnote

[34] Bankruptcy

Avoidance rights and limits thereon, in general

Protection of the transactions consummated through financial intermediaries by the section of the Bankruptcy Code barring bankruptcy trustees from avoiding, as constructively fraudulent to creditors, transfers that are settlement payments in securities transactions or made in connection with a securities contract was not intended as protection of politically favored special interests; rather, it was sought in order to protect investors from the disruptive effect of after-the-fact unwinding of securities transactions. 11 U.S.C.A. § 546(e).

1 Cases that cite this headnote

[35] States

Congressional intent

Existence of an express preemption provision does not bar the ordinary working of conflict preemption principles or impose a special burden that would make it more difficult to establish the preemption of laws falling outside the clause. U.S.C.A. Const. Art. 6, cl. 2.

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2 Cases that cite this headnote

[36] Statutes

Legislative Construction

Although the history of relevant practice may support an inference of congressional acquiescence, the effect or meaning of legislation is not to be gleaned from isolated requests for more protective, but possibly redundant, legislation.

Cases that cite this headnote

[37] Statutes

Legislative silence, inaction, or acquiescence

For purposes of statutory construction, the failure of Congress to respond to court decisions is of interpretive significance only when the decisions are large in number and universally, or almost so, followed.

Cases that cite this headnote

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Before WINTER, DRONEY, Circuit Judges, and HELLERSTEIN, District Judge. **

** The Honorable Alvin K. Hellerstein, of the Southern District of New York, sitting by designation.

Opinion

WINTER, Circuit Judge:

[1] Representatives of certain unsecured creditors of the Chapter 11 debtor Tribune Company appeal from Judge Sullivan's grant of a motion to dismiss their state law, constructive fraudulent conveyance claims brought against Tribune's former shareholders. Appellants seek to recover an amount sufficient to satisfy Tribune's debts to them by avoiding (recovering) payments by Tribune to shareholders that purchased all of its stock. The payments occurred in a transaction commonly called a leveraged buyout ("LBO"), ¹ soon after which Tribune went into Chapter 11 bankruptcy. Appellants appeal the district court's dismissal for lack of statutory standing, and appellees cross-appeal from the district court's rejection of their argument that appellants' claims are preempted. ²

- In a typical LBO, a target company is acquired with a significant portion of the purchase price being paid through a loan secured by the target company's assets.
- Because the issue has no effect on our disposition of this matter, we do not pause to consider whether a cross-appeal was necessary for appellees to raise the preemption issues in this court, but, for convenience

purposes, we sometimes refer to those issues by the term cross-appeal.

We address two issues: (i) whether appellants are barred by the Bankruptcy Code's automatic stay provision from bringing state law, constructive fraudulent conveyance claims while avoidance proceedings against the same transfers brought by a party exercising the powers of a bankruptcy trustee on an intentional fraud theory are ongoing; and (ii) if not, whether the creditors' state law, constructive fraudulent conveyance claims are preempted by Bankruptcy Code Section 546(e).

On issue (i), we hold that appellants are not barred by the Code's automatic stay because they have been freed from its restrictions by orders of the bankruptcy court and by the debtors' confirmed reorganization plan. On issue (ii), the subject of appellees' cross-appeal, we hold that appellants' claims are preempted by Section 546(e). That Section shields from avoidance proceedings brought by a bankruptcy trustee transfers by or to financial intermediaries effectuating settlement payments in securities transactions or made in connection with a securities contract, except through an intentional fraudulent conveyance claim.

We therefore affirm.

BACKGROUND

a) The LBO

Tribune Media Company (formerly known as "Tribune Company") is a multimedia corporation that, in 2007, faced *106 deteriorating financial prospects. Appellee Samuel Zell, a billionaire investor, proposed to acquire Tribune through an LBO. In consummating the LBO, Tribune borrowed over \$11 billion secured by its assets. The \$11 billion plus, combined with Zell's \$315 million equity contribution, was used to refinance some of Tribune's pre-existing bank debt and to cash out Tribune's shareholders for over \$8 billion at a premium price above its trading range—per share. It is undisputed that Tribune transferred the over \$8 billion to a "securities clearing agency" or other "financial institution," as those terms are used in Section 546(e), acting as intermediaries in the LBO transaction. Those intermediaries in turn paid the funds to the shareholders in exchange for their shares that were then returned to Tribune. Appellants seek to satisfy Tribune's debts to them by avoiding Tribune's

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payments to the shareholders. Appellants do not seek money from the intermediaries. See Note 8, infra.

b) Bankruptcy Proceedings

On December 8, 2008, with debt and contingent liabilities exceeding its assets by more than \$3 billion, Tribune and nearly all of its subsidiaries filed for bankruptcy under Chapter 11 in the District of Delaware. A trustee was not appointed, and Tribune and its affiliates continued to operate the businesses as debtors in possession. See 11 U.S.C. § 1107(a) ("Subject to any limitations on a trustee ... a debtor in possession shall have all the rights ..., and powers, and shall perform all the functions and duties ... of a trustee...."). In discussing the powers of a bankruptcy trustee that can be exercised by a trustee or parties designated by a bankruptcy court, we shall refer to the trustee or such parties as the "trustee et al."

[2] The bankruptcy court appointed an Official Committee of Unsecured Creditors (the "Committee") to represent the interests of unsecured creditors. In November 2010, alleging that the LBO-related payments constituted intentional fraudulent conveyances, the Committee commenced an action under Code Section 548(a)(1)(A) against the cashed out Tribune shareholders, various officers, directors, financial advisors, Zell, and others alleged to have benefitted from the LBO. An intentional fraudulent conveyance is defined as one in which there was "actual intent to hinder, delay, or defraud" a creditor. 11 U.S.C. § 548(a)(1)(A).

[3] In June 2011, two subsets of unsecured creditors filed state law, constructive fraudulent conveyance claims in various federal and state courts. The plaintiffs, the appellants before us, were: (i) the Retiree Appellants, former Tribune employees who hold claims for unpaid retirement benefits and (ii) the Noteholder Appellants, the successor indenture trustees for Tribune's pre-LBO senior notes and subordinated debentures. A constructive fraudulent conveyance is, generally speaking, a transfer for less than reasonably equivalent value made when the debtor was insolvent or was rendered so by the transfer. See Picard v. Fairfield Greenwich Ltd., 762 F.3d 199, 208–09 (2d Cir.2014).

Before bringing these actions, appellants moved the bankruptcy court for an order stating that: (i) after the expiration of the two-year statute of limitations period during which the Committee was authorized to bring avoidance actions under 11 U.S.C. § 546(a), eligible creditors had regained the right to prosecute their creditor state law claims; and (ii) the automatic stay imposed by Code Section 362(a) was lifted solely to permit the immediate filing of their complaint. In support of that motion, *107 the Committee argued that, under Section 546(a), the "state law constructive fraudulent conveyance transfer claims ha[d] reverted to individual creditors" and that the "creditors should consider taking appropriate actions to preserve those claims." Statement of the Official Committee of Unsecured Creditors in Supp. of Mot. 3, *In re Tribune Co.*, No 08–13141(KJC) (Bankr.D.Del. Mar. 17, 2011).

In April 2011, the bankruptcy court lifted the Code's automatic stay with regard to appellants' actions. The court reasoned that because the Committee had elected not to bring the constructive fraudulent conveyance actions within the two-year limitations period following the bankruptcy petition imposed by Section 544, fully discussed infra, the unsecured creditors "regained the right, if any, to prosecute [such claims]." J. App'x at 373. Therefore, the court lifted the Section 362(a) automatic stay "to permit the filing of any complaint by or on behalf of creditors on account of such Creditor [state law fraudulent conveyance] Claims." Id. The court clarified, however, that it was not resolving the issues of whether the individual creditors had statutory standing to bring such claims or whether such claims were preempted by Section 546(e).

On March 15, 2012, the bankruptcy court set an expiration date of June 1, 2012 for the remaining limited stay on the state law, fraudulent conveyance claims. In July 2012, the bankruptcy court ordered confirmation of the proposed Tribune reorganization plan. The plan terminated the Committee and transferred responsibility for prosecuting the intentional fraudulent conveyance action to an entity called the Litigation Trust. The confirmed plan also provided that the Retiree and Noteholder Appellants could pursue "any and all LBO-Related Causes of Action arising under state fraudulent conveyance law," except for the federal intentional fraudulent conveyance and other LBO-related claims pursued by the Litigation Trust. J. App'x at 643. Under the plan, the Retiree and Noteholder Appellants recovered approximately 33 cents on each dollar of debt. The plan was scheduled to take effect on December 31, 2012, the date on which Tribune emerged from bankruptcy.

c) District Court Proceedings

Appellants' various state law, fraudulent conveyance complaints alleged that the LBO payments, made through financial intermediaries as noted above, were for more than the reasonable value of the shares and made when Tribune was in distressed financial condition. Therefore, the complaints concluded, the payments were avoidable by creditors under the laws of various states. These actions were later consolidated with the Litigation Trust's ongoing federal intentional fraud claims in a multi-district litigation proceeding that was transferred to the Southern District of New York. *In re: Tribune Co. Fraudulent Conveyance Litig.*, 831 F.Supp.2d 1371 (J.P.M.L.2011).

After consolidation, the Tribune shareholders moved to dismiss appellants' claims. The district court granted the motion on the ground that the Bankruptcy Code's automatic stay provision deprived appellants of statutory standing to pursue their claims so long as the Litigation Trustee was pursuing the avoidance of the same transfers, albeit under a different legal theory. *In re Tribune Co. Fraudulent Conveyance Litig.*, 499 B.R. 310, 325 (S.D.N.Y.2013). The court held that the bankruptcy court had only "conditionally lifted the stay." *Id.* at 314.

The district court rejected appellees' preemption argument based on Section 546(e). That Section bars a trustee *et al.* from exercising its avoidance powers under *108 Section 544 to avoid transfers by the debtor to specified financial intermediaries, e.g. a "securities clearing agency" or "financial institution," that is a "settlement payment" in a securities contract." The district court held that Section 546(e) did not bar appellants' actions because: (i) Section 546(e)'s prohibition on avoiding the designated transfers applied only to a bankruptcy trustee *et al.*, *id.* at 315–16; and (ii) Congress had declined to extend Section 546(e) to state law, fraudulent conveyance claims brought by creditors, *id.* at 318.

DISCUSSION

[4] We review *de novo* the district court's grant of appellees' motion to dismiss. *See Mary Jo C. v. N.Y. State & Local Ret. Sys.*, 707 F.3d 144, 151 (2d Cir.2013).

The relevant facts being undisputed for purposes of this proceeding, only issues of law are before us.

a) Statutory Standing to Bring the Claims

[5] [6] We first address the district court's dismissal of appellants' claims on the ground that they lacked standing to bring them because of Section 362(a)(1).³ In re Tribune, 499 B.R. at 325. When a bankruptcy action is filed, any "action or proceeding against the debtor" is automatically stayed by Section 362(a). The purpose of the stay is "to protect creditors as well as the debtor," Ostano Commerzanstalt v. Telewide Sys., Inc., 790 F.2d 206, 207 (2d Cir.1986) (per curiam), by avoiding wasteful, duplicative, individual actions by creditors seeking individual recoveries from the debtor's estate, and by ensuring an equitable distribution of the debtor's estate. See In re McMullen, 386 F.3d 320, 324 (1st Cir.2004) (noting that Section 362(a)(1), among other things, "safeguard[s] the debtor estate from piecemeal dissipation ... ensur[ing] that the assets remain within the exclusive jurisdiction of the bankruptcy court pending their orderly and equitable distribution among the creditors"). Although fraudulent conveyance actions are against third parties rather than a debtor, there is caselaw, discussed infra, stating that the automatic stay applies to such actions. 4 See In re Colonial Realty Co., 980 F.2d 125, 131 (2d Cir.1992).

- The term "standing" has been used to describe issues arising in bankruptcy proceedings when individual creditors sue to recover funds from third parties to satisfy amounts owed to them by the debtor, and that action is defended on the ground that the recovery seeks funds that are recoverable under the Code only by a representative of all creditors. St. Paul Fire & Marine Ins. Co. v. PepsiCo, Inc., 884 F.2d 688, 696–97 (2d Cir.1989), disapproved of on other grounds by In re Miller, 197 B.R. 810 (W.D.N.C.1996). The use of the term "standing" is based on the suing creditors' need to demonstrate an injury other than one redressable under the Code only by the trustee et al. Id. at 704.
- The implications of applying the automatic stay to fraudulent conveyance actions are discussed *infra*.
- [7] [8] [9] The district court ruled that Section 362's automatic stay provision deprived appellants of statutory standing to bring their claims because the Litigation Trustee was still pursuing an intentional fraudulent conveyance action challenging the same transfers under

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Section 548(a)(1)(A). *In re Tribune*, 499 B.R. at 322–23. We disagree. The Bankruptcy Code empowers a bankruptcy court to release parties from the automatic stay "for cause" shown. *In re Bogdanovich*, 292 F.3d 104, 110 (2d Cir.2002) (*quoting* 11 U.S.C. § 362(d)(1)). Once a creditor obtains "a grant of relief from the automatic stay" under Section 362(d), it may "press *109 its claims outside of the bankruptcy proceeding." *St. Paul Fire & Marine Ins. Co. v. PepsiCo, Inc.*, 884 F.2d 688, 702 (2d Cir.1989), *disapproved of on other grounds by In re Miller*, 197 B.R. 810 (W.D.N.C.1996).

In the present matter, the bankruptcy court granted appellants relief from the automatic stay on three occasions. On April 25, 2011, the bankruptcy court granted appellants relief "to permit the filing of any complaint by or on behalf of creditors on account of such Creditor [state law fraudulent conveyance] Claims." J. App'x at 373. A second order, entered on June 28, 2011, clarified that "neither the automatic stay of [Section 362] nor the provisions of the [original lift-stay order]" barred the parties in the state law actions from consolidating and coordinating these actions. J. App'x at 376. And the bankruptcy court's third order, entered on March 15, 2012, set an expiration date of June 1, 2012, for the "stay imposed on the state law constructive fraudulent conveyance actions." J. App'x at 521. None of the Tribune shareholders filed objections to these orders.

Finally, the reorganization plan, confirmed by the bankruptcy court and in all pertinent respects an order of that court, expressly allowed appellants to pursue "any and all LBO–Related Causes of Action arising under state fraudulent conveyance law." J. App'x at 643. Section 5.8.2 of the plan provided that "nothing in this Plan shall or is intended to impair" the rights of creditors to attempt to pursue disclaimed state law avoidance claims. J. App'x at 695.

Thus, under both the bankruptcy court's orders and the confirmed reorganization plan, if appellants had actionable state law, constructive fraudulent conveyance claims, assertion of those claims was no longer subject to Section 362's automatic stay. See, e.g., In re Heating Oil Partners, LP, 422 Fed.Appx. 15, 18 (2d Cir.2011) (holding that the automatic stay terminates at discharge); United States v. White, 466 F.3d 1241, 1244 (11th Cir.2006) (similarly recognizing that the automatic stay terminates when "a discharge is granted").

For the foregoing reasons, we hold that appellants' claims are not barred by Section 362.

b) Section 546(e) and Preemption

We turn now to the issue raised by the cross-appeal: whether appellants' claims are preempted because they conflict with Code Section 546(e).

1. Conflict-Preemption Law

[10] Under the Supremacy Clause, Article VI, Clause 2 of the Constitution, federal law prevails when it conflicts with state law. *Arizona v. United States*, — U.S. —, 132 S.Ct. 2492, 2500, 183 L.Ed.2d 351 (2012).

[11] As discussed throughout this opinion, Section 546(e)'s reference to limiting avoidance by a trustee provides appellants with a plain language argument that only a trustee *et al.*, and not creditors acting on their own behalf, are barred from bringing state law, constructive fraudulent avoidance claims. However, as discussed *infra*, we believe that the language of Section 546(e) does not necessarily have the meaning appellants ascribe to it. Even if that meaning is one of multiple reasonable constructions of the statutory scheme, it would not necessarily preclude preemption because a preemptive effect may be inferred where it is not expressly provided.

[12] Under the implied preemption *110 doctrine, ⁵ state laws are "preempted to the extent of any conflict with a federal statute. Such a conflict occurs ... when [] state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hillman v. Maretta,* — U.S. —, 133 S.Ct. 1943, 1949–50, 186 L.Ed.2d 43 (2013) (citations and internal quotation marks omitted); *accord In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*, 725 F.3d 65, 97 (2d Cir.2013) *cert. denied sub nom. Exxon Mobil Corp. v. City of New York*, — U.S. —, 134 S.Ct. 1877, 188 L.Ed.2d 948 (2014) (courts will find implied preemption when "state law directly conflicts with the structure and purpose of a federal statute") (citation and internal quotation marks omitted)

We see no need for a full discussion of various modes of analysis used to determine federal preemption, i.e., "express" preemption, *Chamber of Commerce v.* Whiting, 563 U.S. 582, 131 S.Ct. 1968, 1977, 179 L.Ed.2d 1031 (2011), "field" preemption, *Arizona v. United States*, —U.S. —, 132 S.Ct. 2492, 2502, 183 L.Ed.2d 351 (2012), or even that branch of "implied" preemption that requires a showing of "impossibility" of complying with both state and federal law, *id.* at 2501. The only relevant analysis in the present matter is preemption inferred from a conflict between state law and the purposes of federal law, as discussed in the text

[13] Appellants argue that a recognized presumption against preemption limits the implied preemption doctrine. They argue that Section 546(e) preempts creditors' state law, fraudulent conveyance claims only if the claims would do "'major damage' to 'clear and substantial' federal interests." Resp. & Reply Br. of Pls.-Appellants-Cross-Appellees 45 (quoting Hillman, U.S. —, 133 S.Ct. 1943, 1950, 186 L.Ed.2d 43 (2013) (citation omitted)). The presumption against inferring preemption is premised on federalism grounds and, therefore, weighs most heavily where the particular regulatory area is "traditionally the domain of state law." Hillman, 133 S.Ct. at 1950; see also Madeira v. Affordable Hous. Found., Inc., 469 F.3d 219, 241 (2d Cir.2006) ("The mere fact of 'tension' between federal and state law is generally not enough to establish an obstacle supporting preemption, particularly when the state law involves the exercise of traditional police power."). According to appellants, the presumption against preemption fully applies in the present context because fraudulent conveyance claims are "among 'the oldest [purposes] within the ambit of the police power." Resp. & Reply Br. of Pls.-Appellants-Cross-Appellees 36 (quoting California v. Zook, 336 U.S. 725, 734, 69 S.Ct. 841, 93 L.Ed. 1005 (1949)).

[14] [15] Preemption is always a matter of congressional intent, even where that intent must be inferred. See Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 516, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992) (congressional intent is the "ultimate touchstone of pre-emption analysis") (quoting Malone v. White Motor Corp., 435 U.S. 497, 504, 98 S.Ct. 1185, 55 L.Ed.2d 443 (1978)) (internal quotation marks omitted); N.Y. SMSA Ltd. P'ship v. Town of Clarkstown, 612 F.3d 97, 104 (2d Cir.2010) ("The key to the preemption inquiry is the intent of Congress."). As in the present matter, the presumption against preemption usually goes to the weight to be given to the lack of an express statement overriding state law.

The presumption is strongest when Congress is legislating in an area recognized as traditionally one of state law alone. *See Hillman*, 133 S.Ct. at 1950 (stating that because "[t]he regulation of domestic relations is traditionally the domain of state law ... [t]here is [] a presumption against *111 pre-emption") (internal quotation marks and citation omitted). However, the present context is not such an area. To understate the proposition, the regulation of creditors' rights has "a history of significant federal presence." *United States v. Locke*, 529 U.S. 89, 90, 120 S.Ct. 1135, 146 L.Ed.2d 69 (2000).

[16] [17] Congress's power to enact bankruptcy laws was made explicit in the Constitution as originally enacted, Art. 1, § 8, cl. 4, and detailed, preemptive federal regulation of creditors' rights has, therefore, existed for over two centuries. Charles Jordan Tabb, The History of the Bankruptcy Laws in the United States, 3 Am. Bankr.Inst. L.Rev. 5, 7 (1995). Once a party enters bankruptcy, the Bankruptcy Code constitutes a wholesale preemption of state laws regarding creditors' rights. See Eastern Equip. and Servs. Corp. v. Factory Point Nat. Bank, Bennington, 236 F.3d 117, 120 (2d Cir.2001) ("The United States Bankruptcy Code provides a comprehensive federal system of penalties and protections to govern the orderly conduct of debtors' affairs and creditors' rights."); In re Miles, 430 F.3d 1083, 1091 (9th Cir.2005) ("Congress intended the Bankruptcy Code to create a whole scheme under federal control that would adjust all of the rights and duties of creditors and debtors alike....").

Consider, for example, the present proceeding. While the issue before us is often described as whether Section 546(e) preempts state fraudulent conveyance laws, Resp. & Reply Br. of Pls.—Appellants—Cross—Appellees 33, that is a mischaracterization. Appellants' state law claims were preempted when the Chapter 11 proceedings commenced and were not dismissed. Appellants' own arguments posit that those claims were, at the very least, stayed by Code Section 362. Whether, as appellants argue, they were restored in full after two years, *see* 11 U.S.C. § 546(a)(1) (A), or by order of the bankruptcy court, *see* 11 U.S.C. § 349(b)(3), is hotly disputed. But if they were restored, it was by force of federal law.

[18] [19] Once Tribune entered bankruptcy, the creditors' avoidance claims were vested in the federally appointed trustee *et al.* 11 U.S.C. § 544(b)(1). A constructive fraudulent conveyance action brought by

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a trustee et al. under Section 544 is a claim arising under federal law. See In re Intelligent Direct Mktg., 518 B.R. 579, 587 (E.D.Cal.2014); In re Trinsum Grp., Inc., 460 B.R. 379, 387-88 (S.D.N.Y.2011); In re Sunbridge Capital, Inc., 454 B.R. 166, 169 n. 16 (Bankr.D.Kan.2011); In re Charys Holding Co., Inc., 443 B.R. 628, 635-36 (Bankr.D.Del.2010). Although such a claim borrows applicable state law standards regarding avoiding the transfer in question, see Universal Church v. Geltzer, 463 F.3d 218, 222 n. 1 (2d Cir.2006), the claim has its own statute of limitations, 11 U.S.C. § 546(a)(1)(A), measure of damages, see 11 U.S.C. § 550, and standards for distribution, 11 U.S.C. § 726. A disposition of this federal law claim extinguishes the right of creditors to bring state law, fraudulent conveyance claims. See St. Paul Fire, 884 F.2d at 701 disapproved of on other grounds by In re Miller, 197 B.R. 810 (W.D.N.C.1996) (noting that "creditors are bound by the outcome of the trustee's action"); see also In re PWS Holding Corp., 303 F.3d 308, 314-15 (3d Cir.2002) (barring creditor's state law, fraudulent transfer claims after trustee released § 544 claims). And, if creditors are allowed by a bankruptcy court, trustee, or, as appellants argue, by the Bankruptcy Code, to bring state law actions in their own name, that permission is a matter of grace granted under federal authority. The standards for granting that permission, moreover, have everything to do with *112 the Bankruptcy Code's balancing of debtors' and creditors' rights, In re Coltex Loop Cent. Three Partners, L.P., 138 F.3d 39, 44 (2d Cir.1998), or rights among creditors, United States v. Ron Pair Enters., Inc., 489 U.S. 235, 248, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989), and nothing to do with the vindication of state police powers.

We also note here, and discuss further *infra*, that the policies reflected in Section 546(e) relate to securities markets, which are subject to extensive federal regulation. The regulation of these markets has existed and grown for over eighty years and reflects very important federal concerns.

In the present matter, therefore, there is no measurable concern about federal intrusion into traditional state domains. Our bottom line is that the issue before us is one of inferring congressional intent from the Code, without significant countervailing pressures of state law concerns.

2. The Language of Section 546(e)

Section 544(b) empowers a trustee *et al.* to avoid a "transfer ... [by] the debtor ... voidable under applicable law by a[n] [unsecured] creditor." Section 548(a) also provides the trustee *et al.* with independent federal intentional, 11 U.S.C. § 548(a)(1)(A), and constructive fraudulent conveyance claims, 11 U.S.C. § 548(a)(1)(B).

[20] Section 546(e) provides in pertinent part:

Notwithstanding sections 544, ... 548(a)(1)(B) ... of this title, the trustee may not avoid a transfer that is a ... settlement payment ... made by or to (or for the benefit of) a ... stockbroker, financial institution, financial participant, or securities clearing agency, or that is a transfer made by or to (or for the benefit of) a ... stockbroker, financial institution, financial participant, or securities clearing agency, in connection with a securities contract ... except under section 548(a)(1)(A)....

Id. § 546(e). Section 546(e) thus expressly prohibits trustees et al. from using their Section 544(b) avoidance powers and (generally) Section 548 against the transfers specified in Section 546(e). However, Section 546(e) creates an exception to that prohibition for claims brought by trustee et al. under Section 548(a)(1)(A) that, as noted, establishes a federal avoidance claim to be brought by a trustee et al. based on an intentional fraud theory. As discussed supra, the Litigation Trust has brought a Section 548(a)(1)(A) claim against the same transfers challenged by appellants' actions before us on this appeal. That claim is still pending.

[21] [22] [23] The language of Section 546(e) covers all transfers by or to financial intermediaries that are "settlement payment[s]" or "in connection with a securities contract." Transfers in which either the transferor or transferee is not such an intermediary are clearly included in the language. The Section does not distinguish between kinds of transfers, e.g., settlements of ordinary day-to-day trading, LBOs, or mergers in which shareholders of one company are involuntarily cashed out. So long as the transfer sought to be avoided is within the language quoted above, the Section includes avoidance proceedings in which the intermediary would escape a damages judgment. But see In re Lyondell Chem.

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Co., 503 B.R. 348, 372–73 (Bankr.S.D.N.Y.2014), as corrected (Jan. 16, 2014), that Section 546(e) does not include "LBO payments to stockholders at the very end of the asset transfer chain, where the stockholders are the ultimate beneficiaries of the constructively fraudulent transfers, and can give the money back to injured creditors with no damage to anyone but themselves."

*113 3. Appellants' Legal Theory

Appellants' state law, constructive fraudulent conveyance claims purport to be brought under mainstream bankruptcy procedures directly mandated by the Code. However, an examination of the Code as a whole, in contrast with an isolated focus on the word "trustee" in Section 546(e), reveals that appellants' theory relies upon adhering to statutory language only when opportune and resolving various ambiguities in a way convenient to that theory. Even then, their legal theory results in anomalies and inconsistencies with parts of the Code. The consequence of those ambiguities, anomalies, and conflicts is that a reader of Section 546(e), at the time of enactment, would not have necessarily concluded that the reference only to a trustee et al. meant that creditors may at some point bring state law claims seeking the very relief barred to the trustee et al. by Section 546(e). Its meaning, therefore, is not plain.

(i) Appellants' Theory of Fraudulent Conveyance Avoidance Proceedings

Appellants' theory goes as follows. When a debtor enters bankruptcy, all "legal or equitable interests of the debtor in property," 11 U.S.C. § 541(a)(1), vest in the debtor's bankruptcy estate. This property includes legal claims that could have been brought by the debtor. See U.S. ex rel. Spicer v. Westbrook, 751 F.3d 354, 361-62 (5th Cir.2014) ("The phrase 'all legal or equitable interests' includes legal claims-whether based on state or federal law."). Therefore, "the Trustee is conferred with the authority to represent all creditors and the Debtor's estate and with the sole responsibility of bringing actions on behalf of the Debtor's estate to marshal assets for the estate's creditors." In re Stein, 314 B.R. 306, 311 (D.N.J.2004). However, fraudulent conveyance claims proceed on a theory that an insolvent debtor may not make what are essentially gifts that deprive creditors of assets available to pay debts. See Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 322, 119 S.Ct. 1961, 144 L.Ed.2d 319 (1999). Therefore, before a bankruptcy takes place, fraudulent conveyance claims belong to creditors rather than to the debtor. As a consequence, Section 544(b) (1) provides that a bankruptcy trustee may avoid "any transfer of an interest of the debtor ... that is voidable under applicable law by a creditor holding an unsecured claim." 11 U.S.C. § 544(b)(1). The responsibility of the trustee et al. is to "step into the shoes of a creditor under state law and avoid any transfers such a creditor could have avoided." Univ. Church v. Geltzer, 463 F.3d 218, 222 n. 1 (2d Cir.2006).

The trustee *et al.*, however, is subject to a statute of limitations that requires such claims to be brought within two years of the commencement of the bankruptcy proceeding. *See* 11 U.S.C. § 546(a)(1)(A). Appellants infer from this statute of limitations that if the trustee *et al.* fails to act to enforce such claims during that two-year period, the claims revert to creditors who may then pursue their own state law, fraudulent conveyance actions. Resp. & Reply Br. of Pls.—Appellants—Cross—Appellees 1. This position assumes that, although the power to bring such actions is clearly vested in the trustee *et al.* when the bankruptcy proceeding begins, if the power is not exercised, it returns in full flower to the creditors after the bankruptcy ends or after two years.

Appellants' theory also is that their fraudulent conveyance claims were only stayed under Section 362(a), rather than extinguished when assumed by the trustee on behalf of the bankrupt estate by the *114 trustee et al. under Section 544, and could be asserted by them as creditors when the Section 362(a) stay was lifted. Accordingly, appellants argue, when the Committee did not bring constructive fraudulent conveyance actions against the LBO transfers by December 8, 2010, appellants regained the right to bring their own state law actions. See Resp. & Reply Br. of Pls.-Appellants-Cross Appellees 6. Moreover, they correctly note that Section 362's automatic stay was, as discussed supra, lifted. In either case—automatically after two years or by the bankruptcy court's lifting of the stay —appellants assert that the right to bring state law actions has reverted to them.

(ii) Ambiguities, Anomalies, and Conflicts

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When appellants' arguments and their relation to the Code are viewed, as we must view them, in their entirety, *In re Boodrow*, 126 F.3d 43, 49 (2d Cir.1997) ("The Supreme Court has thus explained ... 'we must not be guided by a single sentence or [part] of a sentence [of the Code], but look to the provisions of the whole law, and to its object and policy.'") (*quoting Kelly v. Robinson*, 479 U.S. 36, 43, 107 S.Ct. 353, 93 L.Ed.2d 216 (1986)), they reveal material ambiguities, anomalies, and outright conflicts with the purposes of Code Sections 544, 362, and 548, not to mention the outright conflict with Section 546(e) discussed *infra*.

[24] A critical step in the logic of appellants' theory finds no support in the language of the Code. In particular, the inference that fraudulent conveyance actions revert to creditors if either the two-year statute of limitations passes without an exercise of the trustees' et al. powers under Section 544 or the Section 362(a) stay is lifted by the bankruptcy court has no basis in the Code's language. To begin, the language of the automatic stay provision applies only to actions against "the debtor." 11 U.S.C. § 362. To be sure, there are cases barring fraudulent conveyance actions brought by creditors before the passing of the limitations period or lifting of the stay. See, e.g., In re Crysen/Montenay Energy Co., 902 F.2d 1098, 1101 (2d Cir.1990). The rationales of these cases vary. Some rely on Section 362(a) on the theory that the fraudulent conveyance claims are the property of the debtors' estate. See In re MortgageAmerica Corp., 714 F.2d 1266, 1275-76 (5th Cir.1983); Matter of Fletcher, 176 B.R. 445, 452 (Bankr.W.D.Mich.1995), rev'd and remanded on other grounds sub nom. In re Van Orden, No. 1:95-CV-79, 1995 WL 17903731 (W.D.Mich. Sept. 5, 1995). Some do not mention Section 362(a) and rely on the need to protect trustees' et al. powers to bring Section 544 avoidance actions. See In re Van Diepen, P.A., 236 Fed.Appx. 498, 502-03 (11th Cir.2007); In re Clark, 374 B.R. 874, 876 (Bankr.M.D.Ala.2007); In re Tessmer, 329 B.R. 776, 780 (Bankr.M.D.Ga.2005). All the caselaw agrees that the trustee et al.'s powers under Section 544 are exclusive, at least until the stay is lifted or the two-year period expires.

[25] Equally important is the fact that the inference of a reversion of fraudulent conveyance claims to creditors drawn from Section 544's statute of limitations is not based on the language of the Code, which says nothing about the reversion of claims vested in the trustee *et al.* by Section 544. Statutes of limitation usually are intended to

limit the assertion of stale claims and to provide peace to possible defendants, *Converse v. Gen. Motors Corp.*, 893 F.2d 513, 516 (2d Cir.1990), and not to change the identity of the authorized plaintiffs without some express language to that effect. A decisive part of appellants' legal theory thus has no support in the language of the Code.

*115 [26] Even if this gap is assumed not to exist, or can be otherwise traversed, appellants' theory encounters other serious problems. Section 544, vesting avoidance powers in the trustee et al., is intended to simplify proceedings, reduce the costs of marshalling the debtor's assets, and assure an equitable distribution among the creditors. See In re MortgageAmerica Corp., 714 F.2d 1266, 1275–76 (5th Cir.1983) (noting that "[t]he 'strong arm' provision of the [Bankruptcy] Code, 11 U.S.C. § 544, allows the bankruptcy trustee to step into the shoes of a creditor for the purpose of asserting causes of action under state fraudulent conveyance acts for the benefit of all creditors, not just those who win a race to judgment" and Section 362 helps prevent "[a]ctions for the recovery of the debtor's property by individual creditors under state fraudulent conveyance laws [that] would interfere with [the bankruptcy] estate and with the equitable distribution scheme dependent upon it"). However, these purposes are hardly consistent with the process hypothesized by appellants.

Accepting for purposes of argument appellants' view of the applicable process, Section 362, at the very least, prevented appellants (for a time) from bringing their state law, fraudulent conveyance claims, while Section 546(e) barred the Committee from seeking to enforce or, necessarily, to settle them. Appellants' argument thus seems to posit that their claims are on hold until the trustees *et al.* decide whether to bring an action they are powerless to bring or to pass on to creditors a power they do not have. In short, it assumes that, when creditors' avoidance claims are lodged in the trustee *et al.* and are diminished in that hand by the Code, they reemerge in undiminished form in the hands of creditors after the statute of limitations governing actions by the trustee *et al.* has run or the bankruptcy court lifts the automatic stay.

In the context of the Code, however, any such process is a glaring anomaly. Section 548(a)(1)(A) vests trustees with a federal claim to avoid the very transfers attacked by appellants' state law claims—but only on an intentional fraud theory. There is little apparent reason to limit

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trustees et al. to intentional fraud claims while not extinguishing constructive fraud claims but rather leaving them to be brought later by individual creditors. In particular, enforcement of the intentional fraud claim is undermined if creditors can later bring state law, constructive fraudulent conveyance claims involving the same transfers. Any trustee would have grave difficulty negotiating more than a nominal settlement in the federal action if it cannot preclude state claims attacking the same transfers but not requiring a showing of actual fraudulent intent. Unable to settle, a trustee et al. will be reluctant to expend the estate's resources on vigorously pursuing the federal claim while awaiting the stayed state claims to revert and to be litigated by creditors. As happened in the present matter, the result is that the trustee et al.'s action awaits the pursuit of piecemeal actions by creditors. This is precisely opposite of the intent of the Code's procedures. While a bankruptcy court can reduce the delay by an early lifting of the automatic stay with regard to constructive fraudulent conveyance actions, that action would underline the anomaly of applying the stay to the bringing of claims that are barred to trustees et al.

Staying ordinary state law, constructive fraudulent conveyance claims by individual creditors while the trustee deliberates is a rational method of avoiding piecemeal litigation and ensuring an equitable distribution of assets among creditors. See *116 MBNA Am. Bank, N.A. v. Hill, 436 F.3d 104, 108 (2d Cir.2006) ("The objectives of the Bankruptcy Code ... include ... 'the need to protect creditors and reorganiz[e] debtors from piecemeal litigation....' ") (quoting Ins. Co. of N. Am. v. NGC Settlement Trust & Asbestos Claims Mgmt. Corp., 118 F.3d 1056, 1069 (5th Cir.1997)). However, the scheme described by appellants does not resemble this method either in simplicity or in the equitable treatment of creditors.

To rationalize these anomalies, appellants speculate as to—more accurately, imagine—a deliberate balancing of interests by Congress. They argue that Congress wanted to balance the need for certainty and finality in securities markets, recognized in Section 546(e), against the need to maximize creditors' recoveries, recognized in various other provisions. Congress did so, they argue, by limiting only the avoidance powers of trustees *et al.*, not those of individual creditors (save for the stay), in Section 546(e) because actions by trustees *et al.* are a greater threat to securities markets than are actions by individual creditors.

Resp. & Reply Br. of Pls.-Appellants-Cross-Appellees 71. That greater threat results from the fact that a trustee's power of avoidance is funded by the debtor's estate, see 11 U.S.C. §§ 327, 330, supported by national long-arm jurisdiction, see Fed. R. Bankr.P. 7004(d), (f), and can be used to avoid the entirety of a transfer, Tronox Inc. v. Anadarko Petroleum Corp. (In re Tronox Inc.), 464 B.R. 606, 615-17 (Bankr.S.D.N.Y.2012) (citing Moore v. Bay, 284 U.S. 4, 52 S.Ct. 3, 76 L.Ed. 133 (1931)). Creditors, in turn, have no such funding, are limited by state jurisdictional rules, and can sue only for their individual losses. See In re Integrated Agri, Inc., 313 B.R. 419, 428 (Bankr.C.D.Ill.2004). Therefore, appellants argue that a deliberate "balance" was struck by protecting securities markets from trustees' et al. actions while subjecting them to the lesser disruption individual creditors' actions might cause after a two-year stay. Resp. & Reply Br. of Pls.-Appellants-Cross-Appellees 83-85. For a court to upset this delicate balance would constitute judicial intrusion on policy decisions rightfully left to the Congress.

However, the balance described above is an *ex post* explanation of a legal scheme that appellants must first construct, and then justify as rational, because it is essential to their claims. Although they argue that the scheme was deliberately constructed by Congress, that argument lacks any support whatsoever in the legislative deliberations that led to Section 546(e)'s enactment.

Moreover, appellants' arguments understate the number of creditors who would sue, if allowed, and the corresponding extent of the danger to securities markets. Creditors may assign their claims and various methods of aggregation can lead to billions of dollars of claims, as here.

(iii) No Plain Meaning

These issues reflect ambiguities as to exactly what is transferred to trustees *et al.* by Section 544(b)(1). It is clear that trustees *et al.* own the debtors' estates, which include the debtors' property and legal claims. *See* 11 U.S.C. § 541(a)(1) (Among other things, the "estate is comprised of ... all legal or equitable interests of the debtor in property as of the commencement of the case"); *U.S. ex rel. Spicer v. Westbrook*, 751 F.3d 354, 361–62 (5th Cir.2014) ("The phrase 'all legal or equitable interests' includes legal claims—whether based on state

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or federal law."). Avoidance claims belong to creditors, however, and whether they become the property of the debtors' estates is a debated, and somewhat metaphysical, issue. See *117 Note 7, infra. The issue does have a limited practical bearing on the present matter, however. If the claims asserted by appellants became the property of the debtor's estate upon Tribune's bankruptcy and were thereby limited in the hands of the Committee, their reversion in an unaltered form, whether occurring automatically or by act of the Committee or bankruptcy court, might seem counterintuitive.

Appellants' reliance on the applicability of the automatic stay to their claims would arguably support the "property" view. The stay is intended in part to protect the property rights of the trustee *et al.* in the debtor's estate. Subjecting avoidance actions by creditors to the stay has been supported by various courts on the ground that such claims are either the property of the debtor's estate or have an equivalent legal status. *See In re MortgageAmerica Corp.*, 714 F.2d 1266, 1275–76 (5th Cir.1983); *In re Swallen's, Inc.*, 205 B.R. 879, 882 (Bankr.S.D.Ohio 1997); *Matter of Fletcher*, 176 B.R. 445, 452 (Bankr.W.D.Mich.1995).

Whether, and to what degree, fraudulent conveyance claims become the property of a bankrupt estate was, at the time of Section 546(e)'s enactment, and now, anything but clear. The principal Supreme Court precedent held that such claims are the property of the debtor's estate. Trimble v. Woodhead, 102 U.S. 647, 649, 26 L.Ed. 290 (1880). It is a very old decision but has not been expressly overruled. Subsequent court of appeals decisions are bountiful in contradictory statements regarding the property issue. Compare In re Cybergenics Corp., 226 F.3d 237, 241, 246 (3d Cir.2000) (stating that "fraudulent transfer claims have long belonged to a transferor's creditors, whose efforts to collect their debts have essentially been thwarted as a consequence of the transferor's actions" but also noting that the debtor's " 'assets' and 'property of the estate' have different meanings, evidenced in part by the numerous provisions in the Bankruptcy Code that distinguish between property of the estate and property of the debtor, or refer to one but not the other"), and Picard v. Fairfield Greenwich Ltd., 762 F.3d 199, 212 (2d Cir.2014) ("Our case law is clear that assets targeted by a fraudulent conveyance action do not become property of the debtor's estate under the Bankruptcy Code until the Trustee obtains a favorable

judgment."), with Cumberland Oil Corp. v. Thropp, 791 F.2d 1037, 1042 (2d Cir.1986) (noting that causes of action alleging violation of fraudulent conveyance laws would be property of the estate), and Nat'l Tax Credit Partners v. Havlik, 20 F.3d 705, 708–09 (7th Cir.1994) ("[T]he right to recoup a fraudulent conveyance, which outside of bankruptcy may be invoked by a creditor, is property of the estate that only a trustee or debtor in possession may pursue once a bankruptcy is underway.").

[27] Use of the term "property" as a short-hand way of suggesting exclusivity has merit, Henry E. Smith, Property and Property Rules, 79 N.Y.U. L.Rev. 1719, 1770-74 (2004), but Section 544(b)(1) does not expressly state whether the bundle of rights transferred can revert. However, we need not resolve either the "property" or the reversion issues. Whether the statutory language has a plain meaning turns on whether a consensus would have existed among reasonable, contemporaneous readers as to meaning of that language in the particular statutory context. See Pettus v. Morgenthau, 554 F.3d 293, 297 (2d Cir.2009) ("[W]e attempt to ascertain how a reasonable reader would understand the statutory text, considered as a whole."); Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist., 541 U.S. 246, 252-53, 124 S.Ct. 1756, 158 L.Ed.2d 529 (2004) (noting that "[s]tatutory construction must begin *118 with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose") (quoting Park 'N Fly, Inc. v. Dollar Park & Fly, Inc., 469 U.S. 189, 194, 105 S.Ct. 658, 83 L.Ed.2d 582 (1985)). If differing views as to meaning were reasonable at the time of Section 546(e)'s enactment, its meaning is less than plain. See, e.g., Rodriguez v. Cuomo, 953 F.2d 33, 39-40 (2d Cir.1992).

Appellants' arguments on meaning rely not only on the reference to a trustee's *et al.* powers but equally, or more so, on a claim of settled law at the time of Section 546(e)'s enactment that creditors' avoidance rights not only revert to creditors but also revert in their original breadth. However, whether fraudulent conveyance claims revert as a matter of law upon a trustee's failure to act was, both at the time Section 546(e) was passed as well as now, unclear, as discussed *supra*. A contemporaneous reader would not, therefore, necessarily have believed it plain that Section 546(e)'s reference only to a trustee's *et al.* avoidance claim meant that creditors could bring their own claims. ⁶

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Our task of determining how a contemporaneous reader would have read Section 546(e) does not depend on the caselaw of one particular circuit.

A contemporaneous reader would also notice that the language of the automatic stay provision does not literally apply to appellants' actions and that no provision for the reversion of claims vested in the trustee *et al.* by Section 544 exists. As explained *supra*, having to draw an inference of reversion of rights from that provision's statute of limitations might well have appeared as a leap several bridges too far to such a reader. Indeed, the vesting of avoidance claims in the trustee *et al.*, the lack of applicable language in the automatic stay provision, and the lack of a statutory basis for reversion might well have suggested to such a reader that Section 544's vesting of avoidance proceedings in the trustee *et al.* cut off creditors from any avoidance rights other than a share of the proceeds in bankruptcy.

Even passing these obstacles, the structure of the Code and the relationship of its pertinent sections might have suggested to a contemporaneous reader that altered rights do not revert to creditors unaltered, or to put it another way, a trustee *et al.* cannot pass on, or "allow" to revert through passivity, a right the trustee *et al.* does not have. To be sure, contemporaneous readers might have taken other views, including those of appellants, but that is the very definition of ambiguity.

(iv) Conclusion

We need not resolve these issues or even hold that the lack of statutory support, ambiguities, anomalies, or conflicts with purposes of the Code are sufficient to support a preemption holding. They are sufficient, however, to dispel the suggestions found in some discussions of these issues of a clear textual basis for appellants' theory in the Code and an overall consistency with congressional purpose. See In re Lyondell Chem. Co., 503 B.R. 348, 358-59 (Bankr.S.D.N.Y.2014) as corrected (Jan. 16, 2014); In re: Tribune Co. Fraudulent Conveyance Litig., 499 B.R. at 315. We also need not issue a decision that affects fraudulent conveyance actions brought by creditors whose claims are not subject to Section 546(e). Our ensuing discussion concludes that the purposes and history of that Section necessarily reflect an intent to preempt the claims before us. We turn now to the conflict between those claims and Section 546(e).

4. Conflict with Section 546(e)

[28] As discussed *supra*, the meaning of Section 546(e) with regard to appellants' *119 rights to bring the actions before us is ambiguous. We must, therefore, look to its language, legislative history, and purposes to determine its effect. *Marvel Characters, Inc. v. Simon*, 310 F.3d 280, 290 (2d Cir.2002). Every congressional purpose reflected in Section 546(e), however narrow or broad, is in conflict with appellants' legal theory. Their claims are, therefore, preempted.

[29] Section 546(e) was intended to protect from avoidance proceedings payments by and to financial intermediaries in the settlement of securities transactions or the execution of securities contracts. The method of settlement through intermediaries is essential to securities markets. Payments by and to such intermediaries provide certainty as to each transaction's consummation, speed to allow parties to adjust the transaction to market conditions, finality with regard to investors' stakes in firms, and thus stability to financial markets. See H.R.Rep. No. 97-420 (1982); H.R.Rep. No. 95-595 (1977). Unwinding settled securities transactions by claims such as appellants' would seriously undermine—a substantial understatement—markets in which certainty, speed, finality, and stability are necessary to attract capital. To allow appellants' claims to proceed, we would have to construe Section 546(e) as achieving the opposite of what it was intended to achieve.

Allowing creditors to bring claims barred by Section 546(e) to the trustee *et al.* only after the trustee *et al.* fails to exercise powers it does not have would increase the disruptive effect of an unwinding by lengthening the period of uncertainty for intermediaries and investors. Indeed, the idea of preventing a trustee from unwinding specified transactions while allowing creditors to do so, but only later, is a policy in a fruitless search of a logical rationale.

The narrowest purpose of Section 546(e) was to protect other intermediaries from avoidance claims seeking to unwind a bankrupt intermediary's transactions that consummated transfers between customers. *See* H.R.Rep. No. 97–420 (1982). It must be emphasized that appellants' legal theory would clearly allow such claims to be brought (later) by creditors of the bankrupt intermediary. Even the narrowest purpose of Section 546(e) is thus at risk.

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Some judicial and other discussions of these issues avoid addressing the full effects of adopting appellants' arguments. See In re Lyondell Chem. Co., 503 B.R. 348, 359-78 (Bankr.S.D.N.Y.2014) as corrected (Jan. 16, 2014). Such analysis always begins by reliance on the "trustee" language, id. at 358, but then narrows the scope of the transfers covered by Section 546(e)'s language. For example, appellants argue that the concerns of the amicus curiae Securities and Exchange Commission regarding the effect of the district court's decision on the securities markets are misplaced, because appellants are not seeking money from the intermediaries. ⁷ Resp. & Reply Br. of Pls.-Appellants Cross-Appellees 78-82. In doing so, they rely upon the Lyondell opinion, which, after relying on the "trustee" language, held that Section 546(e) is not preemptive of *120 state law, fraudulent conveyance actions involving LBOs because such actions do not implicate the purposes of Section 546(e). 503 B.R. at 372-73

Under the "Collapsing Doctrine," "[c]ourts analyzing the effect of LBOs have routinely analyzed them by reference to their economic substance, 'collapsing' them, in many cases, to consider the overall effect of multi-step transactions." In re Lyondell Chem. Co., 503 B.R. 348, 354, 379 (Bankr.S.D.N.Y.2014) as corrected (Jan. 16, 2014). Monies passed through intermediaries are deemed to be the property only of the ultimate recipients, here the cashed out shareholders.

[31] There is no little irony in putting lynchpin reliance on the word "trustee" while ignoring the language that follows. In any event, Section 546(e)'s language clearly covers payments, such as those at issue here, by commercial firms to financial intermediaries to purchase shares from the firm's shareholders. 11 U.S.C. § 546(e) (limitations on avoidance of transfers made to a financial intermediary "in connection with a securities contract"). A search for legislative purpose is heavily informed by language, and analyzing all the language of a provision and its relationship to the Code as a whole is preferable to using literalness here and perceived legislative purpose (without regard to language) there as needed to reach particular results. See King v. Burwell, — U.S. —, 135 S.Ct. 2480, 2489, 192 L.Ed.2d 483 (2015) ("[O]ftentimes the meaning—or ambiguity—of certain words or phrases may only become evident when placed in context. So when deciding whether the language is plain, we must read the

words in their context and with a view to their place in the overall statutory scheme. Our duty, after all, is to construe statutes, not isolated provisions.") (internal quotation marks and citations omitted).

We do not dwell on this because we perceive no conflict between Section 546(e)'s language and its purpose. Section 546(e) is simply a case of Congress perceiving a need to address a particular problem within an important process or market and using statutory language broader than necessary to resolve the immediate problem. Such broad language is intended to protect the process or market from the entire genre of harms of which the particular problem was only one symptom. The legislative history of Section 546(e) clearly reveals such a purpose. That history (confirmed by the broad language adopted) reflects a concern over the use of avoidance powers not only after the bankruptcy of an intermediary, but also after a "customer" or "other participant" in the securities markets enters bankruptcy. See H.R.Rep. No. 97-420 (1982). To be sure, the examples used by the Section's proponents focused on the immediate concern of creditors of bankrupt brokers seeking to unwind payments by the bankrupt firm to other intermediaries. Id. Such actions were perceived as creating a danger of "a ripple effect," id., a chain of bankruptcies among intermediaries disrupting the securities market generally. From these examples, appellants, and others, have argued that when monetary damages are sought only from shareholders, or an LBO is involved, the purposes of Section 546(e) are not implicated. See Resp. & Reply Br. of Pls.-Appellants-Cross-Appellees 79; In re Lyondell, 503 B.R. at 358-59. Even apart from using the oil and water mixture of applying a narrow literalness to the word "trustee" and disregarding the rest of the Section's language, we disagree.

[32] As courts have recognized, Congress's intent to "minimiz[e] the displacement caused in the commodities and securities markets in the event of a major bankruptcy affecting those industries," *In re Quebecor World (USA) Inc.*, 719 F.3d 94, 100 (2d Cir.2013) (quoting Enron Creditors Recovery Corp. v. Alfa, S.A.B. de C.V., 651 F.3d 329, 333 (2d Cir.2011)), reflected a larger purpose memorialized in the legislative history's mention of bankrupt "customers" or "other participant[s]" and in the broad statutory language defining the transactions covered. That larger *121 purpose was to "promot [e] finality ... and certainty" for investors, by limiting the

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circumstances, e.g., to cases of intentional fraud, under which securities transactions could be unwound. *In re Kaiser Steel Corp.*, 952 F.2d 1230, 1240 n. 10 (10th Cir.1991) (*quoting* H. Rep. No. 484, 101st Cong.2d Sess. 2 (1990), *reprinted in* 1990 U.S.C.C.A.N. 223, 224).

[33] [34] The broad language used in Section 546(e) protects transactions rather than firms, reflecting a purpose of enhancing the efficiency of securities markets in order to reduce the cost of capital to the American economy. See Bankruptcy of Commodity and Securities Brokers: Hearings Before the Subcomm. on Monopolies and Commercial Law of the Comm. on the Judiciary, 47th Cong. 239 (1981) (statement of Bevis Longstreth, Commissioner, SEC) (explaining that, without 546(e), the Bankruptcy Code's "preference, fraudulent transfer and stay provisions can be interpreted to apply in harmful and costly ways to customary methods of operation essential to the securities industry"). As noted, central to a highly efficient securities market are methods of trading securities through intermediaries. Section 546(e)'s protection of the transactions consummated through these intermediaries was not intended as protection of politically favored special interests. Rather, it was sought by the SEC-and corresponding provisions by the CFTC, see Bankruptcy Act Revision: Hearings on H.R. 31 and H.R. 32 Before the Subcomm. on Civil & Constitutional Rights of the H. Comm. on the Judiciary, 94th Cong., Supp.App. Pt. 4, 2406 (1976)—in order to protect investors from the disruptive effect of after-thefact unwinding of securities transactions.

A lack of protection against the unwinding of securities transactions would create substantial deterrents, limited only by the copious imaginations of able lawyers, to investing in the securities market. The effect of appellants' legal theory would be akin to the effect of eliminating the limited liability of investors for the debts of a corporation: a reduction of capital available to American securities markets.

For example, all investors in public companies would face new and substantial risks, if appellants' theory is adopted. At the very least, each would have to confront a higher degree of uncertainty even as to the consummation of securities transfers. The risks are not confined to the consummation of securities transactions. Pension plans, mutual funds, and similar institutional investors would find securities markets far more risky if exposed

to substantial liabilities derived from investments in securities sold long ago. If appellants were to prevail, a pension plan whose position in a firm was cashed out in a merger would have to set aside reserves in case the surviving firm went bankrupt and triggered avoidance actions based on a claim that the cash out price exceeded the value of the shares. Every economic downturn would expose such institutional investors not only to a decline in the value of their current portfolios but also to claims for substantial monies received from mergers during good times

Given the occasional volatility of economic events, any transaction buying out shareholders would risk being attacked as a fraudulent conveyance avoidable by creditors if the firm faltered. Appellants' legal theory would even reach investors who, after voting against a merger approved by other shareholders, were involuntarily cashed out. Tender offers, which almost always involve a premium above trading price, Lynn A. Stout, Are Takeover Premiums Really Premiums? Market Price, Fair Value, and Corporate Law, 99 Yale L.J. 1235, 1235 (1990), would imperil *122 cashed out shareholders if the surviving entity encountered financial difficulties.

If appellants' theory was adopted, individual investors following a conservative buy-and-hold strategy with a diversified portfolio designed to reduce risk might well decide that such a strategy would actually increase the risk of crushing liabilities. Such a strategy is adopted because it involves low costs of monitoring the prospects of individual companies and emphasizes the offsetting of unsystematic risks by investing in multiple firms. See Leigh v. Engle, 858 F.2d 361, 368 (7th Cir.1988). Appellants' legal theory might well require costly and constant monitoring by investors to rid their portfolios of investments in firms that might, under thencurrent circumstances, be subject to mergers, stock buybacks, or tender offers (and would otherwise be good investments). Investing in multiple companies, the essence of diversification, would increase the danger of avoidance liability.

The threat to investors is not simply losing a lawsuit. Given the costliness of defending such legal actions and the long delay in learning their outcome, exposing investors to even very weak lawsuits involving millions of dollars would be a substantial deterrent to investing in securities. The need to set aside reserves to meet the costs

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of litigation—not to mention costs of losing—would suck money from capital markets.

As noted, concern has been expressed that LBOs are different from other transactions in ways pertinent to the Bankruptcy Code. *In re Lyondell Chem. Co.*, 503 B.R. 348, 354, 358–59 (Bankr.S.D.N.Y.2014), *as corrected* (Jan. 16, 2014). However, the language of Section 546(e) does not exempt from its protection payments by firms to intermediaries to fund ensuing payments to shareholders for stock.

Moreover, securities markets are heavily regulated by state and federal governments. The statutory supplements used in law school securities regulation courses are thick enough to rival Kevlar in stopping bullets. Mergers and tender offers are among the most regulated transactions. See, e.g., Williams Act, 15 U.S.C.A. §§ 78m(d)-(e), 78n(d). Much of the content of state and federal regulation is designed to protect investors in such transactions. Much of that content is also designed to maximize the payout to shareholders cashed out in a merger, see, e.g., Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del.1986); Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955-56 (Del.1985), or accepting a tender offer, see Williams Act, 15 U.S.C.A. §§ 78m(d)-(e), 78n(d). Appellants' legal theory would allow creditors to seek to portray that maximization as evidence supporting a crushing liability. A legal rule substantially undermining those goals of state and federal regulation-again, one akin to eliminating limited liability—is a systemic risk.

It is also argued that the Bankruptcy Code has many different purposes and that Section 546(e) does not clearly "trump[] all [the] other[s]." In re Tribune Co. Fraudulent Conveyance Litig., 499 B.R. 310, 317 (S.D.N.Y.2013). The pertinent—and "trumping"—"other" purpose of the Code is said to be the maximization of assets available to creditors. Id. Courts customarily accommodate statutory provisions in tension with one another where the principal purpose of each is attainable by limiting each in achieving secondary goals. See, e.g., In re Colonial Realty Co., 980 F.2d 125, 132 (2d Cir.1992). However, Section 546(e) is in full conflict with the goal of maximizing the assets available to creditors. Its purpose is to protect a national, heavily regulated market *123 by limiting creditors' rights. Conflicting goals are not accommodated by giving value with the right hand and taking it away with the left. Section 546(e) cannot be trumped by the Code's goal of

maximizing the return to creditors without thwarting the Section's purposes.

5. Additional Considerations Regarding

Congressional Intent

We therefore conclude that Congress intended to protect from constructive fraudulent conveyance avoidance proceedings transfers by a debtor in bankruptcy that fall within Section 546(e)'s terms. As discussed supra, appellants' theory hangs on the ambiguous use of the word "trustee," has no basis in the language of the Code, leads to substantial anomalies, ambiguities and conflicts with the Code's procedures, and, most importantly, is in irreconcilable conflict with the purposes of Section 546(e). In this regard, we do not ignore Section 544(b) (2), which prohibits avoidance of a transfer to a charitable contribution by a trustee but also expressly preempts state law claims by creditors. It states: "Any claim by any person to recover a transferred contribution described in the preceding sentence under Federal or State law in a Federal or State March 14, 2016 court shall be preempted by the commencement of the case." 11 U.S.C. § 544(b) (2). Appellants rely heavily upon this provision to argue that, while Congress knew how to explicitly preempt state law in the Bankruptev Code, it chose not to do so in the context of Section 546(e).

[35] Appellants' argument suffers from a fatal flaw, however. In *Arizona v. United States*, the Supreme Court made clear that "the existence of an express pre-emption provisio[n] does *not* bar the ordinary working of conflict pre-emption principles or impose a special burden that would make it more difficult to establish the preemption of laws falling outside the clause." — U.S. —, 132 S.Ct. 2492, 2504–05, 183 L.Ed.2d 351 (2012) (quotation marks and citations omitted); *see also Hillman*, 133 S.Ct. at 1954 ("[W]e have made clear that the existence of a separate pre-emption provision does *not* bar the ordinary working of conflict pre-emption principles.") (internal quotation marks and citations omitted). Section 544(b) (2) does not, therefore, undermine our conclusion as to Congress's intent.

Next, appellants argue that Congress's failure to amend Section 546(e) over the years that it has existed in pertinent form reflects a congressional intent to allow their actions to proceed. In support, they point only to requests for an amendment by the Chair of the CFTC and by Comex, *see* Bankruptcy Act Revision: Hearings

on H.R. 31 and H.R. 32 Before the Subcomm. on Civil & Constitutional Rights of the H. Comm. on the Judiciary, 94th Cong., Supp.App. Pt. 4, 2406 (1976); Bankruptcy Reform Act: Hearings on S. 2266 and H.R. 8000 Before the Subcomm. on Improvements in Judicial Machinery of the S. Comm. on the Judiciary, 95th Cong. 1297 (1978), the enactment of Section 544(b)(2) with an express preemption provision, and a decision in the District of Delaware, *PHP Liquidating, LLC v. Robbins, 291* B.R. 603, 607 (D.Del.2003), *aff'd sub nom. In re PHP Healthcare Corp.*, 128 Fed.Appx. 839 (3d Cir.2005).

[36] To be sure, a history of relevant practice may support an inference of congressional acquiescence. See, e.g., Fiero v. Fin. Indus. Regulatory Auth., 660 F.3d 569, 577 (2d Cir.2011) (noting that FINRA's "longstanding reliance" on enforcement mechanisms other than fines —and Congress's failure to alter FINRA's enforcement powers-"indicates that FINRA is not authorized to enforce the collection of its fines through the courts"); Am. Tel. *124 & Tel. Co. v. M/V Cape Fear, 967 F.2d 864, 872 (3d Cir.1992) ("The Supreme Court in the past has implied private causes of action where Congress, after a 'consensus of opinion concerning the existence of a private cause of action' had developed in the federal courts, has amended a statute without mentioning a private remedy.") (quoting Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 380, 102 S.Ct. 1825, 72 L.Ed.2d 182 (1982)). However, the effect or meaning of legislation is not to be gleaned from isolated requests for more protective, but possibly redundant, legislation. The impact of Section 544(b)(2) is discussed immediately above and need not be repeated here.

[37] Finally, the failure of Congress to respond to court decisions is of interpretive significance only when the decisions are large in number and universally, or almost so, followed. See Merrill Lynch, 456 U.S. at 379, 102 S.Ct. 1825 ("holding that congressional amendment of the Commodity Exchange Act that was silent on the subject of private judicial remedies did not overturn federal court decisions routinely and consistently [] recogniz[ing] an implied private cause of action") (emphasis added); see also Touche Ross & Co. v. Redington, 442 U.S. 560,

577 n. 19, 99 S.Ct. 2479, 61 L.Ed.2d 82 (1979) (holding that the Supreme Court's implication of a private right of action under § 10(b) of the Securities and Exchange Act of 1934 was simply acquiescence in "the 25-yearold acceptance by the lower federal courts of an implied action"). The present decision is far from a departure from a generally accepted understanding. The district court decision in this very case and the bankruptcy court decision in Lyondell are in fact the sole extensive judicial discussions of the issue. Indeed, our present decision does not even constitute a split among the circuits. As or more telling with regard to the existence of a general understanding or a need for action, we find no history of the use of state law, constructive fraudulent conveyance actions to unwind settled securities transactions, either after a bankruptcy or in its absence.

The Constitution's establishment of two legislative branches that must act jointly and with the executive's approval was designed to render hasty action possible only in circumstances of widely perceived need. Congress's failure to act must be viewed in that context, and reliance upon an inference of satisfaction with the *status quo* must at least be based on evidence of a long-standing and recognized *status quo*. In the present matter, we cannot draw the suggested inference on the basis of the skimpy evidence submitted while the inference of a preemptive intent is easily drawn.

CONCLUSION

For the reasons stated, we affirm the dismissal of the complaint, on preemption rather than standing grounds. We resolve no issues regarding the rights of creditors to bring state law, fraudulent conveyance claims not limited in the hands of a trustee *et al.* by Code Section 546(e) or by similar provisions such as Section 546(g) which is at issue in an appeal heard in tandem with the present matter, *see Whyte v. Barclavs Bank*.

All Citations

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138 S.Ct. 883 Supreme Court of the United States

MERIT MANAGEMENT GROUP, LP, Petitioner

FTI CONSULTING, INC.

No. 16-784. Argued Nov. 6, 2017. Decided Feb. 27, 2018.

Synopsis

Background: Trustee of litigation trust created pursuant to confirmed Chapter 11 plan of debtor, an entity that sought to develop a "racino" in Pennsylvania, brought adversary proceeding, seeking to avoid debtor's allegedly fraudulent transfers of \$16,503,850 to transferee, the partial owner of debtor's competitor, as part of debtor's purchase of competitor's stock. The United States District Court for the Northern District of Illinois, Joan B. Gottschall, J., 541 B.R. 850, granted motion for judgment on the pleadings in transferee's favor. Trustee appealed. The Seventh Circuit Court of Appeals, Wood, Chief Judge, 830 F.3d 690, reversed. Certiorari was granted.

Holdings: The Supreme Court, Justice Sotomayor, held

[1] the only relevant transfer for purposes of the Bankruptcy Code's "securities safe harbor" provision is the transfer that the trustee seeks to avoid under a substantive avoiding power, abrogating In re Quebecor World (USA) Inc., 719 F.3d 94, In re OSI Holdings, Inc., 571 F.3d 545, Contemporary Indus. Corp. v. Frost, 564 F.3d 981, In re Resorts Int'l, Inc., 181 F.3d 505, and In re Kaiser Steel Corp., 952 F.2d 1230, and

[2] in the present case, the transfer between debtor and transferee was not "made by or to (or for the benefit of)" a financial institution and so fell outside the safe harbor.

Affirmed and remanded.

West Headnotes (11)

Bankruptcy

- Trustee as representative of debtor or creditors

Bankruptcy Code gives a trustee "avoiding powers," that is, the power to invalidate a limited category of transfers by the debtor or transfers of an interest of the debtor in property, in order to maximize the funds available for, and ensure equity in, the distribution to creditors in a bankruptcy proceeding.

1 Cases that cite this headnote

Bankruptcy [2]

Avoidance rights and limits thereon, in

Avoiding powers set forth in the Bankruptcy Code may be exercised by debtors, trustees, or creditors committees, depending on the circumstances of the case.

Cases that cite this headnote

[3] Bankruptcy

Trustee as representative of debtor or creditors

Trustee's avoiding powers help implement the core principles of bankruptcy; some deter the race of diligence of creditors to dismember the debtor before bankruptcy and promote equality of distribution, while others set aside transfers that unfairly or improperly deplete assets or dilute the claims against those assets.

Cases that cite this headnote

Public Amusement and Entertainment [4]

Horse and dog racing

Harness racing is a closely regulated industry in Pennsylvania, and the Commonwealth requires a license to operate a racetrack.

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Cases that cite this headnote

[5] Bankruptcy

Avoidance rights and limits thereon, in general

The only relevant transfer for purposes of the Bankruptcy Code's "securities safe harbor" provision is the transfer that the trustee seeks to avoid under one of the Code's substantive avoidance provisions, that is, the overarching or end-to-end transfer, not any component part of that transfer; abrogating In re Quebecor World (USA) Inc., 719 F.3d 94, In re QSI Holdings, Inc., 571 F.3d 545, Contemporary Indus. Corp. v. Frost, 564 F.3d 981, In re Resorts Int'l, Inc., 181 F.3d 505, and In re Kaiser Steel Corp., 952 F.2d 1230. 11 U.S.C.A. § 546(e).

Cases that cite this headnote

[6] Statutes

Language

Statutes

Context

In construing a statute, courts look to both the language itself and the specific context in which that language is used.

1 Cases that cite this headnote

[7] Bankruptcy

Avoidance rights and limits thereon, in general

Bankruptcy Code's "securities safe harbor" provision operates as an exception to the avoiding powers afforded to the trustee under the Code's substantive avoidance provisions; that is, when faced with a transfer that is otherwise avoidable, it provides a safe harbor notwithstanding that avoiding power. 11 U.S.C.A. § 546(e).

1 Cases that cite this headnote

[8] Statutes

- Titles, headings, and captions

Although section headings cannot limit the plain meaning of a statutory text, they supply cues as to what Congress intended.

2 Cases that cite this headnote

[9] Bankruptcy

Trustee as representative of debtor or creditors

Bankruptcy trustee, in exercising its avoidance powers, is not free to define the transfer that it seeks to avoid in any way it chooses; instead, that transfer is necessarily defined by the carefully set out criteria in the Bankruptcy Code. 11 U.S.C.A. §§ 544(a), 545, 547(b), 548(a)(1).

Cases that cite this headnote

[10] Bankruptcy

Avoidance rights and limits thereon, in general

Under the Bankruptcy Code's "securities safe harbor," if the transfer that the trustee seeks to avoid was made "by" or "to" a securities clearing agency, then the safe harbor will bar avoidance, and it will do so without regard to whether the entity acted only as an intermediary; the safe harbor will, in addition, bar avoidance if the transfer was made "for the benefit of" that securities clearing agency, even if it was not made "by" or "to" that entity. 11 U.S.C.A. § 546(e).

2 Cases that cite this headnote

[11] Bankruptcy

Avoidance rights and limits thereon, in general

Prepetition transfer by Chapter 11 debtor to transferee, the partial owner of debtor's competitor, as part of debtor's purchase of competitor's stock, fell outside the Bankruptcy Code's "securities safe harbor"; trustee sought to avoid, as constructively fraudulent, the overarching transfer between debtor and transferee, not any of the

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component transactions involving a bank and a lender by which that overarching transfer was executed, and it was undisputed that neither debtor nor transferee was a financial institution or any other covered entity. 11 U.S.C.A. §§ 546(e), 548(a)(1)(B).

Cases that cite this headnote

*885 Syllabus

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

The Bankruptcy Code allows trustees to set aside and recover certain transfers for the benefit of the bankruptcy estate, including, as relevant here, certain fraudulent transfers "of an interest of the debtor in property." 11 U.S.C. § 548(a). It also sets out a number of limits on the exercise of these avoiding powers. Central here is the securities safe harbor, which, *inter alia*, provides that "the trustee may not avoid a transfer that is a ... settlement payment ... made by or to (or for the benefit of) a ... financial institution ... or that is a transfer made by or to (or for the benefit of) a ... financial institution ... in connection with a securities contract." § 546(e).

Valley View Downs, LP, and Bedford Downs Management Corp. entered into an agreement under which Valley View, if it got the last harness-racing license in Pennsylvania, would purchase all of Bedford Downs' stock for \$55 million. Valley View was granted the license and arranged for the Cayman Islands branch of Credit Suisse to wire \$55 million to third-party escrow agent Citizens Bank of Pennsylvania. The Bedford Downs shareholders, including petitioner Merit Management Group, LP, deposited their stock certificates into escrow. Citizens Bank disbursed the \$55 million over two installments according to the agreement, of which petitioner Merit received \$16.5 million.

Although Valley View secured the harness-racing license, it was unable to achieve its goal of opening a racetrack casino. Valley View and its parent company, Centaur,

LLC, filed for Chapter 11 bankruptcy. Respondent FTI Consulting, Inc., was appointed to serve as trustee of the Centaur litigation trust. FTI then sought to avoid the transfer from Valley View to Merit for the sale of Bedford Downs' stock, arguing that it was constructively fraudulent under § 548(a)(1)(B). Merit contended that the § 546(e) safe harbor barred FTI from avoiding the transfer because it was a "settlement payment ... made by or to (or for the benefit of)" two "financial institutions," Credit Suisse and Citizens Bank. The District Court agreed with Merit, but the Seventh *886 Circuit reversed, holding that § 546(e) did not protect transfers in which financial institutions served as mere conduits.

Held: The only relevant transfer for purposes of the \S 546(e) safe harbor is the transfer that the trustee seeks to avoid. Pp. 891 – 897.

- (a) Before a court can determine whether a transfer was "made by or to (or for the benefit of)" a covered entity, it must first identify the relevant transfer to test in that inquiry. Merit posits that the relevant transfer should include not only the Valley–View–to–Merit end-to-end transfer, but also all of its component parts, *i.e.*, the Credit–Suisse–to–Citizens–Bank and the Citizens–Bank–to–Merit transfers. FTI maintains that the only relevant transfer is the transfer that it sought to avoid, specifically, the overarching transfer between Valley View and Merit. Pp. 891 895.
- (1) The language of § 546(e) and the specific context in which that language is used support the conclusion that the relevant transfer for purposes of the safe-harbor inquiry is the transfer the trustee seeks to avoid. The first clause of the provision—"Notwithstanding sections 544, 545, 547, 548(a)(1)(B), and 548(b) of this title"—indicates that § 546(e) operates as an exception to trustees' avoiding powers granted elsewhere in the Code. The text makes clear that the starting point for the § 546(e) inquiry is the expressly listed avoiding powers and, consequently, the transfer that the trustee seeks to avoid in exercising those powers. The last clause—"except under section 548(a)(1)(A) of this title"—also focuses on the transfer that the trustee seeks to avoid. Creating an exception to the exception for § 548(a)(1)(A) transfers, the text refers back to a specific type of transfer that falls within the avoiding powers, signaling that the exception applies to the overarching transfer that the trustee seeks to avoid, not any component part of that transfer. This reading

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is reinforced by the § 546 section heading, "Limitations on avoiding powers," and is confirmed by the rest of the statutory text: The provision provides that "the trustee may not avoid" certain transfers, which naturally invites scrutiny of the transfers that "the trustee ... may avoid," the parallel language used in the avoiding powers provisions. The text further provides that the transfer that is saved from avoidance is one "that is" (not one that involves) a securities transaction covered under § 546(e). In other words, to qualify for protection under the securities safe harbor, § 546(e) provides that the otherwise avoidable transfer itself be a transfer that meets the safe-harbor criteria. Pp. 893 – 894.

(2) The statutory structure also supports this reading of § 546(e). The Code establishes a system for avoiding transfers as well as a safe harbor from avoidance. It is thus only logical to view the pertinent transfer under § 546(e) as the same transfer that the trustee seeks to avoid pursuant to one of its avoiding powers. In an avoidance action, the trustee must establish that the transfer it seeks to set aside meets the carefully set out criteria under the substantive avoidance provisions of the Code. The defendant in that avoidance action is free to argue that the trustee failed to properly identify an avoidable transfer under the Code, including any available arguments concerning the role of component parts of the transfer. If a trustee properly identifies an avoidable transfer, however, the court has no reason to examine the relevance of component parts when considering a limit to the avoiding power, where that limit is defined by reference to an otherwise avoidable transfer, as is the case with § 546(e). Pp. 894 – 895.

*887 (b) The primary argument Merit advances that is moored in the statutory text—concerning Congress' 2006 addition of the parenthetical "(or for the benefit of)" to § 546(e)—is unavailing. Merit contends that Congress meant to abrogate the Eleventh Circuit decision in In re Munford, Inc., 98 F.3d 604, which held that § 546(e) was inapplicable to transfers in which a financial institution acted only as an intermediary. However, Merit points to nothing in the text or legislative history to corroborate its argument. A simpler explanation rooted in the text of the statute and consistent with the interpretation of § 546(e) adopted here is that Congress added the "or for the benefit of" language that is common in other substantive avoidance provisions to the § 546(e) safe harbor to ensure that the scope of the safe harbor and scope of the avoiding powers matched.

That reading would not, contrary to what Merit contends, render other provisions ineffectual or superfluous. Rather, it gives full effect to the text of § 546(e). If the transfer the trustee seeks to avoid was made "by" or "to" a covered entity, then § 546(e) will bar avoidance without regard to whether the entity acted only as an intermediary. It will also bar avoidance if the transfer was made "for the benefit of" that entity, even if it was not made "by" or "to" that entity.

Finally, Merit argues that reading the safe harbor so that its application depends on the identity of the investor and the manner in which its investment is held rather than on the general nature of the transaction is incongruous with Congress' purportedly "prophylactic" approach to § 546(e). But this argument is nothing more than an attack on the text of the statute, which protects only certain transactions "made by or to (or for the benefit of)" certain covered entities. Pp. 894 – 896.

(c) Applying this reading of the § 546(e) safe harbor to this case yields a straightforward result. FTI sought to avoid the Valley–View–to–Merit transfer. When determining whether the § 546(e) safe harbor saves that transfer from avoidance liability, the Court must look to that overarching transfer to evaluate whether it meets the safe-harbor criteria. Because the parties do not contend that either Valley View or Merit is a covered entity, the transfer falls outside of the § 546(e) safe harbor. Pp. 896 – 897.

830 F.3d 690, affirmed and remanded.

SOTOMAYOR, J., delivered the opinion for a unanimous Court.

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Opinion

Justice SOTOMAYOR delivered the opinion of the Court

[1] To maximize the funds available for, and ensure equity in, the distribution to creditors in a bankruptcy proceeding, the Bankruptcy Code gives a trustee the power to invalidate a limited category of *888 transfers by the debtor or transfers of an interest of the debtor in property. Those powers, referred to as "avoiding powers," are not without limits, however, as the Code sets out a number of exceptions. The operation of one such exception, the securities safe harbor, 11 U.S.C. § 546(e), is at issue in this case. Specifically, this Court is asked to determine how the safe harbor operates in the context of a transfer that was executed via one or more transactions, e.g., a transfer from $A \rightarrow D$ that was executed via B and C as intermediaries, such that the component parts of the transfer include $A \rightarrow B \rightarrow C \rightarrow D$. If a trustee seeks to avoid the A \rightarrow D transfer, and the § 546(e) safe harbor is invoked as a defense, the question becomes: When determining whether the § 546(e) securities safe harbor saves the transfer from avoidance, should courts look to the transfer that the trustee seeks to avoid (i.e., $A \rightarrow D$) to determine whether that transfer meets the safe-harbor criteria, or should courts look also to any component parts of the overarching transfer (i.e., $A \rightarrow B \rightarrow C \rightarrow D$)? The Court concludes that the plain meaning of § 546(e) dictates that the only relevant transfer for purposes of the safe harbor is the transfer that the trustee seeks to avoid.

I

Α

[2] [3] Because the § 546(e) safe harbor operates as a limit to the general avoiding powers of a bankruptcy trustee, ¹ we begin with a review of those powers. Chapter 5 of the Bankruptcy Code affords bankruptcy trustees the authority to "se[t] aside certain types of transfers ... and ... recaptur[e] the value of those avoided transfers for the benefit of the estate." Tabb § 6.2, p. 474. These avoiding powers "help implement the core principles of bankruptcy." *Id.*, § 6.1, at 468. For example, some

"deter the race of diligence of creditors to dismember the debtor before bankruptcy" and promote "equality of distribution." *Union Bank v. Wolas,* 502 U.S. 151, 162, 112 S.Ct. 527, 116 L.Ed.2d 514 (1991) (internal quotation marks omitted); see also Tabb § 6.2. Others set aside transfers that "unfairly or improperly deplete ... assets or ... dilute the claims against those assets." 5 Collier on Bankruptcy ¶ 548.01, p. 548–10 (16th ed. 2017); see also Tabb § 6.2, at 475 (noting that some avoiding powers are designed "to ensure that the debtor deals fairly with its creditors").

Avoiding powers may be exercised by debtors, trustees, or creditors' committees, depending on the circumstances of the case. See generally C. Tabb, Law of Bankruptcy § 6.1 (4th ed. 2016) (Tabb). Because this case concerns an avoidance action brought by a trustee, we refer throughout to the trustee in discussing the avoiding power and avoidance action. The resolution of this case is not dependent on the identity of the actor exercising the avoiding power.

Sections 544 through 553 of the Code outline the circumstances under which a trustee may pursue avoidance. See, e.g., 11 U.S.C. § 544(a) (setting out circumstances under which a trustee can avoid unrecorded liens and conveyances); § 544(b) (detailing power to avoid based on rights that unsecured creditors have under nonbankruptcy law); § 545 (setting out criteria that allow a trustee to avoid a statutory lien); § 547 (detailing criteria for avoidance of so-called "preferential transfers"). The particular avoidance provision at issue here is § 548(a), which provides that a "trustee may avoid" certain fraudulent transfers "of an interest of the debtor in property." § 548(a)(1). Section 548(a)(1) (A) addresses so-called "actually" fraudulent transfers, which are "made ... with actual intent to hinder, delay, or defraud *889 any entity to which the debtor was or became ... indebted." Section 548(a)(1)(B) addresses "constructively" fraudulent transfers. See BFP v. Resolution Trust Corporation, 511 U.S. 531, 535, 114 S.Ct. 1757, 128 L.Ed.2d 556 (1994). As relevant to this case, the statute defines constructive fraud in part as when

"(B)(i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

"(ii)(I) was insolvent on the date that such transfer was made or such obligation was incurred, or became

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insolvent as a result of such transfer or obligation. 11 U.S.C. § 548(a)(1).

If a transfer is avoided, § 550 identifies the parties from whom the trustee may recover either the transferred property or the value of that property to return to the bankruptcy estate. Section 550(a) provides, in relevant part, that "to the extent that a transfer is avoided ... the trustee may recover ... the property transferred, or, if the court so orders, the value of such property" from "the initial transferee of such transfer or the entity for whose benefit such transfer was made," or from "any immediate or mediate transferee of such initial transferee." § 550(a).

В

The Code sets out a number of limits on the exercise of these avoiding powers. See, *e.g.*, § 546(a) (setting statute of limitations for avoidance actions); §§ 546(c)-(d) (setting certain policy-based exceptions to avoiding powers); § 548(a)(2) (setting limit to avoidance of "a charitable contribution to a qualified religious or charitable entity or organization"). Central to this case is the securities safe harbor set forth in § 546(e), which provides (as presently codified and in full):

"Notwithstanding sections 544, 545, 547, 548(a)(1)(B), and 548(b) of this title, the trustee may not avoid a transfer that is a margin payment, as defined in section 101, 741, or 761 of this title, or settlement payment, as defined in section 101 or 741 of this title, made by or to (or for the benefit of) a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency, or that is a transfer made by or to (or for the benefit of) a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency, in connection with a securities contract, as defined in section 741(7), commodity contract, as defined in section 761(4), or forward contract, that is made before the commencement of the case, except under section 548(a)(1) (A) of this title."

The predecessor to this securities safe harbor, formerly codified at 11 U.S.C. § 764(c), was enacted in 1978 against the backdrop of a district court decision in a case called Seligson v. New York Produce Exchange, 394 F.Supp. 125 (S.D.N.Y.1975), which involved a transfer by a bankrupt commodity broker. See S. Rep. No. 95-989, pp. 8, 106 (1978); see also Brubaker, Understanding the Scope of the § 546(e) Securities Safe Harbor Through the Concept of the "Transfer" Sought To Be Avoided, 37 Bkrtcy. L. Letter 11-12 (July 2017). The bankruptcy trustee in Seligson filed suit seeking to avoid over \$12 million in margin payments made by the commodity broker debtor to a clearing association on the basis that the transfer was constructively fraudulent. The clearing association attempted to defend on the theory that it was a mere "conduit" for the transmission of the margin payments. 394 F.Supp., at 135. The District Court found, however, triable issues of fact on that question and denied summary judgment, *890 leaving the clearing association exposed to the risk of significant liability. See id., at 135-136. Following that decision, Congress enacted the § 764(c) safe harbor, providing that "the trustee may not avoid a transfer that is a margin payment to or deposit with a commodity broker or forward contract merchant or is a settlement payment made by a clearing organization." 92 Stat. 2619, codified at 11 U.S.C. § 764(c) (repealed 1982).

Congress amended the securities safe harbor exception over the years, each time expanding the categories of covered transfers or entities. In 1982, Congress expanded the safe harbor to protect margin and settlement payments "made by or to a commodity broker, forward contract merchant, stockbroker, or securities clearing agency." § 4, 96 Stat. 236, codified at 11 U.S.C. § 546(d). Two years later Congress added "financial institution" to the list of protected entities. See § 461(d), 98 Stat. 377, codified at 11 U.S.C. § 546(e). ² In 2005, Congress again expanded the list of protected entities to include a "financial participant" (defined as an entity conducting certain highvalue transactions). See § 907(b), 119 Stat. 181-182; 11 U.S.C. § 101(22A). And, in 2006, Congress amended the provision to cover transfers made in connection with securities contracts, commodity contracts, and forward contracts. § 5(b)(1), 120 Stat. 2697-2698. The 2006

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amendment also modified the statute to its current form by adding the new parenthetical phrase "(or for the benefit of)" after "by or to," so that the safe harbor now covers transfers made "by or to (or for the benefit of)" one of the covered entities. *Id.*, at 2697.

The term "financial institution" is defined as:

"(A) a Federal reserve bank, or an entity that is a commercial or savings bank, industrial savings bank, savings and loan association, trust company, federally-insured credit union, or receiver, liquidating agent, or conservator for such entity and, when any such Federal reserve bank, receiver, liquidating agent, conservator or entity is acting as agent or custodian for a customer (whether or not a 'customer', as defined in section 741) in connection with a securities contract (as defined in section 741) such customer; or "(B) in connection with a securities contract (as defined in section 741) an investment company registered under the Investment Company Act of 1940." 11 U.S.C. § 101(22).

The parties here do not contend that either the debtor or petitioner in this case qualified as a "financial institution" by virtue of its status as a "customer" under § 101(22)(A). Petitioner Merit Management Group, LP, discussed this definition only in footnotes and did not argue that it somehow dictates the outcome in this case. See Brief for Petitioner 45, n. 14; Reply Brief 14, n. 6. We therefore do not address what impact, if any, § 101(22)(A) would have in the application of the § 546(e) safe harbor.

C

[4] With this background, we now turn to the facts of this case, which comes to this Court from the world of competitive harness racing (a form of horse racing). Harness racing is a closely regulated industry in Pennsylvania, and the Commonwealth requires a license to operate a racetrack. See *Bedford Downs Management Corp. v. State Harness Racing Comm'n,* 592 Pa. 475, 485–487, 926 A.2d 908, 914–915 (2007) (*per curiam*). The number of available licenses is limited, and in 2003 two companies, Valley View Downs, LP, and Bedford Downs Management Corporation, were in competition for the last harness-racing license in Pennsylvania.

Valley View and Bedford Downs needed the harnessracing license to open a "'racino,' " which is a clever moniker for racetrack casino, "a racing facility with slot machines." Brief for Petitioner 8. Both companies were stopped before the finish *891 line, because in 2005 the Pennsylvania State Harness Racing Commission denied both applications. The Pennsylvania Supreme Court upheld those denials in 2007, but allowed the companies to reapply for the license. See *Bedford Downs*, 592 Pa., at 478–479, 926 A.2d, at 910.

Instead of continuing to compete for the last available harness-racing license, Valley View and Bedford Downs entered into an agreement to resolve their ongoing feud. Under that agreement, Bedford Downs withdrew as a competitor for the harness-racing license, and Valley View was to purchase all of Bedford Downs' stock for \$55 million after Valley View obtained the license. ³

A separate provision of the agreement providing that Bedford Downs would sell land to Valley View for \$20 million is not at issue in this case.

With Bedford Downs out of the race, the Pennsylvania Harness Racing Commission awarded Valley View the last harness-racing license. Valley View proceeded with the corporate acquisition required by the parties' agreement and arranged for the Cayman Islands branch of Credit Suisse to finance the \$55 million purchase price as part of a larger \$850 million transaction. Credit Suisse wired the \$55 million to Citizens Bank of Pennsylvania, which had agreed to serve as the third-party escrow agent for the transaction. The Bedford Downs shareholders, including petitioner Merit Management Group, LP, deposited their stock certificates into escrow as well. At closing, Valley View received the Bedford Downs stock certificates, and in October 2007 Citizens Bank disbursed \$47.5 million to the Bedford Downs shareholders, with \$7.5 million remaining in escrow at Citizens Bank under the multiyear indemnification holdback period provided for in the parties' agreement. Citizens Bank disbursed that \$7.5 million installment to the Bedford Downs shareholders in October 2010, after the holdback period ended. All told, Merit received approximately \$16.5 million from the sale of its Bedford Downs stock to Valley View. Notably, the closing statement for the transaction reflected Valley View as the "Buyer," the Bedford Downs shareholders as the "Sellers," and \$55 million as the "Purchase Price." App.

In the end, Valley View never got to open its racino. Although it had secured the last harness-racing license, it was unable to secure a separate gaming license for the

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operation of the slot machines in the time set out in its financing package. Valley View and its parent company, Centaur, LLC, thereafter filed for Chapter 11 bankruptcy. The Bankruptcy Court confirmed a reorganization plan and appointed respondent FTI Consulting, Inc., to serve as trustee of the Centaur litigation trust.

FTI filed suit against Merit in the Northern District of Illinois, seeking to avoid the \$16.5 million transfer from Valley View to Merit for the sale of Bedford Downs' stock. The complaint alleged that the transfer was constructively fraudulent under § 548(a)(1)(B) of the Code because Valley View was insolvent when it purchased Bedford Downs and "significantly overpaid" for the Bedford Downs stock. ⁴ Merit moved for judgment on the pleadings under Federal Rule of Civil Procedure 12(c), contending that the § 546(e) safe harbor barred FTI from avoiding the Valley View–to–Merit transfer. According to Merit, the safe harbor applied because the transfer was a "settlement payment *892 ... made by or to (or for the benefit of)" a covered "financial institution"—here, Credit Suisse and Citizens Bank.

In its complaint, FTI also sought to avoid the transfer under § 544(b). See App. 20–21. The District Court did not address the claim, see 541 B.R. 850, 852– 853, n. 1 (N.D.III.2015), and neither did the Court of Appeals for the Seventh Circuit.

The District Court granted the Rule 12(c) motion, reasoning that the § 546(e) safe harbor applied because the financial institutions transferred or received funds in connection with a "settlement payment" or "securities contract." See 541 B.R. 850, 858 (N.D.III.2015). The Court of Appeals for the Seventh Circuit reversed, holding that the § 546(e) safe harbor did not protect transfers in which financial institutions served as mere conduits. See 830 F.3d 690, 691 (2016). This Court granted certiorari to resolve a conflict among the circuit courts as to the proper application of the § 546(e) safe harbor. ⁶ 581 U.S. ——, 137 S.Ct. 2092, 197 L.Ed.2d 894 (2017).

The parties do not ask this Court to determine whether the transaction at issue in this case qualifies as a transfer that is a "settlement payment" or made in connection with a "securities contract" as those terms are used in § 546(e), nor is that determination necessary for resolution of the question presented.

Compare In re Quebecor World (USA) Inc., 719 F.3d 94, 99 (C.A.2 2013) (finding the safe harbor applicable where covered entity was intermediary); In re QSI Holdings, Inc., 571 F.3d 545, 551 (C.A.6 2009) (same); Contemporary Indus. Corp. v. Frost, 564 F.3d 981, 987 (C.A.8 2009) (same); In re Resorts Int'l, Inc., 181 F.3d 505, 516 (C.A.3 1999) (same); In re Kaiser Steel Corp., 952 F.2d 1230, 1240 (C.A.10 1991) (same), with In re Munford, Inc., 98 F.3d 604, 610 (C.A.11 1996) (per curiam) (rejecting applicability of safe harbor where covered entity was intermediary).

Π

[5] The question before this Court is whether the transfer between Valley View and Merit implicates the safe harbor exception because the transfer was "made by or to (or for the benefit of) a ... financial institution." § 546(e). The parties and the lower courts dedicate much of their attention to the definition of the words "by or to (or for the benefit of)" as used in § 546(e), and to the question whether there is a requirement that the "financial institution" or other covered entity have a beneficial interest in or dominion and control over the transferred property in order to qualify for safe harbor protection. In our view, those inquiries put the proverbial cart before the horse. Before a court can determine whether a transfer was made by or to or for the benefit of a covered entity, the court must first identify the relevant transfer to test in that inquiry. At bottom, that is the issue the parties dispute in this case.

On one side, Merit posits that the Court should look not only to the Valley View-to-Merit end-to-end transfer, but also to all its component parts. Here, those component parts include one transaction by Credit Suisse to Citizens Bank (*i.e.*, the transmission of the \$16.5 million from Credit Suisse to escrow at Citizens Bank), and two transactions by Citizens Bank to Merit (*i.e.*, the transmission of \$16.5 million over two installments by Citizens Bank as escrow agent to Merit). Because those component parts include transactions by and to financial institutions, Merit contends that \$ 546(e) bars avoidance.

FTI, by contrast, maintains that the only relevant transfer for purposes of the § 546(e) safe-harbor inquiry is the overarching transfer between Valley View and Merit of \$16.5 million for purchase of the stock, which is the transfer that the trustee seeks to avoid under § 548(a)(1)

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(B). Because that transfer was not made by, to, or for the benefit of a financial institution, FTI contends that the safe harbor has no application.

The Court agrees with FTI. The language of § 546(e), the specific context in *893 which that language is used, and the broader statutory structure all support the conclusion that the relevant transfer for purposes of the § 546(e) safe-harbor inquiry is the overarching transfer that the trustee seeks to avoid under one of the substantive avoidance provisions.

Α

[6] [7] Our analysis begins with the text of § 546(e), and we look to both "the language itself [and] the specific context in which that language is used...." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997). The pertinent language provides:

"Notwithstanding sections 544, 545, 547, 548(a)(1)(B), and 548(b) of this title, the trustee may not avoid a transfer that is a ... settlement payment ... made by or to (or for the benefit of) a ... financial institution ... or that is a transfer made by or to (or for the benefit of) a ... financial institution ... in connection with a securities contract ..., except under section 548(a)(1)(A) of this title."

The very first clause—"Notwithstanding sections 544, 545, 547, 548(a)(1)(B), and 548(b) of this title"—already begins to answer the question. It indicates that § 546(e) operates as an exception to the avoiding powers afforded to the trustee under the substantive avoidance provisions. See A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 126 (2012) ("A dependent phrase that begins with notwithstanding indicates that the main clause that it introduces or follows derogates from the provision to which it refers"). That is, when faced with a transfer that is otherwise avoidable, § 546(e) provides a safe harbor notwithstanding that avoiding power. From the outset, therefore, the text makes clear that the starting point for the § 546(e) inquiry is the substantive avoiding power under the provisions expressly listed in the "notwithstanding" clause and, consequently,

the transfer that the trustee seeks to avoid as an exercise of those powers.

Then again in the very last clause—"except under section 548(a)(1)(A) of this title"—the text reminds us that the focus of the inquiry is the transfer that the trustee seeks to avoid. It does so by creating an exception to the exception, providing that "the trustee may not avoid a transfer" that meets the covered transaction and entity criteria of the safe harbor, "except" for an actually fraudulent transfer under § 548(a)(1)(A). 11 U.S.C. § 546(e). By referring back to a specific type of transfer that falls within the avoiding power, Congress signaled that the exception applies to the overarching transfer that the trustee seeks to avoid, not any component part of that transfer.

[8] Reinforcing that reading of the safe-harbor provision, the section heading for § 546—within which the securities safe harbor is found—is: "Limitations on avoiding powers." Although section headings cannot limit the plain meaning of a statutory text, see *Florida Dept. of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 47, 128 S.Ct. 2326, 171 L.Ed.2d 203 (2008), "they supply cues" as to what Congress intended, see *Yates v. United States*, 574 U.S.—,—, 135 S.Ct. 1074, 1083, 191 L.Ed.2d 64 (2015). In this case, the relevant section heading demonstrates the close connection between the transfer that the trustee seeks to avoid and the transfer that is exempted from that avoiding power pursuant to the safe harbor.

The rest of the statutory text confirms what the "notwithstanding" and "except" clauses and the section heading begin to suggest. The safe harbor provides that "the trustee may not avoid" certain transfers. § 546(e). Naturally, that text invites *894 scrutiny of the transfers that "the trustee may avoid," the parallel language used in the substantive avoiding powers provisions. See § 544(a) (providing that "the trustee ... may avoid" transfers falling under that provision); § 545 (providing that "[t]he trustee may avoid" certain statutory liens); § 547(b) (providing that "the trustee may avoid" certain preferential transfers); § 548(a)(1) (providing that "[t]he trustee may avoid" certain fraudulent transfers). And if any doubt remained, the language that follows dispels that doubt: The transfer that the "the trustee may not avoid" is specified to be "a transfer that is" either a "settlement payment" or made "in connection with a securities contract." § 546(e) (emphasis added). Not a transfer that involves. Not a transfer that comprises. But

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a transfer that is a securities transaction covered under § 546(e). The provision explicitly equates the transfer that the trustee may otherwise avoid with the transfer that, under the safe harbor, the trustee may not avoid. In other words, to qualify for protection under the securities safe harbor, § 546(e) provides that the otherwise avoidable transfer itself be a transfer that meets the safe-harbor criteria.

Thus, the statutory language and the context in which it is used all point to the transfer that the trustee seeks to avoid as the relevant transfer for consideration of the § 546(e) safe-harbor criteria.

В

The statutory structure also reinforces our reading of § 546(e). See *Hall v. United States*, 566 U.S. 506, 516, 132 S.Ct. 1882, 182 L.Ed.2d 840 (2012) (looking to statutory structure in interpreting the Bankruptcy Code). As the Seventh Circuit aptly put it, the Code "creates both a system for avoiding transfers and a safe harbor from avoidance—logically these are two sides of the same coin." 830 F.3d, at 694; see also *Fidelity Financial Services, Inc. v. Fink*, 522 U.S. 211, 217, 118 S.Ct. 651, 139 L.Ed.2d 571 (1998) ("Section 546 of the Code puts certain limits on the avoidance powers set forth elsewhere"). Given that structure, it is only logical to view the pertinent transfer under § 546(e) as the same transfer that the trustee seeks to avoid pursuant to one of its avoiding powers.

[9] As noted in Part I–A, *supra*, the substantive avoidance provisions in Chapter 5 of the Code set out in detail the criteria that must be met for a transfer to fall within the ambit of the avoiding powers. These provisions, as Merit admits, "focus mostly on the characteristics of the transfer that may be avoided." Brief for Petitioner 28. The trustee, charged with exercising those avoiding powers, must establish to the satisfaction of a court that the transfer it seeks to set aside meets the characteristics set out under the substantive avoidance provisions. Thus, the trustee is not free to define the transfer that it seeks to avoid in any way it chooses. Instead, that transfer is necessarily defined by the carefully set out criteria in the Code. As FTI itself recognizes, its power as trustee to define the transfer is not absolute because "the transfer identified must satisfy the terms of the avoidance provision the trustee invokes." Brief for Respondent 23.

Accordingly, after a trustee files an avoidance action identifying the transfer it seeks to set aside, a defendant in that action is free to argue that the trustee failed to properly identify an avoidable transfer under the Code, including any available arguments concerning the role of component parts of the transfer. If a trustee properly identifies an avoidable transfer, however, the court has no reason to examine the relevance of component *895 parts when considering a limit to the avoiding power, where that limit is defined by reference to an otherwise avoidable transfer, as is the case with § 546(e), see Part II–A, *supra*.

In the instant case, FTI identified the purchase of Bedford Downs' stock by Valley View from Merit as the transfer that it sought to avoid. Merit does not contend that FTI improperly identified the Valley View—to—Merit transfer as the transfer to be avoided, focusing instead on whether FTI can "ignore" the component parts at the safe-harbor inquiry. Absent that argument, however, the Credit Suisse and Citizens Bank component parts are simply irrelevant to the analysis under § 546(e). The focus must remain on the transfer the trustee sought to avoid.

Ш

A

The primary argument Merit advances that is moored in the statutory text concerns the 2006 addition of the parenthetical "(or for the benefit of)" to § 546(e). Merit contends that in adding the phrase "or for the benefit of" to the requirement that a transfer be "made by or to" a protected entity, Congress meant to abrogate the 1998 decision of the Court of Appeals for the Eleventh Circuit in In re Munford, Inc., 98 F.3d 604, 610 (1996) (per curiam), which held that the § 546(e) safe harbor was inapplicable to transfers in which a financial institution acted only as an intermediary. Congress abrogated Munford, Merit reasons, by use of the disjunctive "or," so that even if a beneficial interest, i.e., a transfer "for the benefit of" a financial institution or other covered entity, is sufficient to trigger safe harbor protection, it is not necessary for the financial institution to have a beneficial interest in the transfer for the safe harbor to apply. Merit thus argues that a transaction "by or to" a financial institution such as Credit Suisse or Citizens Bank would meet the requirements of § 546(e), even if the financial institution is

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acting as an intermediary without a beneficial interest in the transfer.

Merit points to nothing in the text or legislative history that corroborates the proposition that Congress sought to overrule Munford in its 2006 amendment. There is a simpler explanation for Congress' addition of this language that is rooted in the text of the statute as a whole and consistent with the interpretation of § 546(e) the Court adopts. A number of the substantive avoidance provisions include that language, thus giving a trustee the power to avoid a transfer that was made to "or for the benefit of" certain actors. See § 547(b)(1) (avoiding power with respect to preferential transfers "to or for the benefit of a creditor"); § 548(a)(1) (avoiding power with respect to certain fraudulent transfers "including any transfer to or for the benefit of an insider ..."). By adding the same language to the § 546(e) safe harbor, Congress ensured that the scope of the safe harbor matched the scope of the avoiding powers. For example, a trustee seeking to avoid a preferential transfer under § 547 that was made "for the benefit of a creditor," where that creditor is a covered entity under § 546(e), cannot now escape application of the § 546(e) safe harbor just because the transfer was not "made by or to" that entity.

Nothing in the amendment therefore changed the focus of the § 546(e) safe-harbor inquiry on the transfer that is otherwise avoidable under the substantive avoiding powers. If anything, by tracking language already included in the substantive avoidance provisions, the amendment reinforces the connection between the inquiry under § 546(e) and the otherwise *896 avoidable transfer that the trustee seeks to set aside.

Merit next attempts to bolster its reading of the safe harbor by reference to the inclusion of securities clearing agencies as covered entities under § 546(e). Because a securities clearing agency is defined as, *inter alia*, an intermediary in payments or deliveries made in connection with securities transactions, see 15 U.S.C. § 78c(23)(A) and 11 U.S.C. § 101(48) (defining "securities clearing agency" by reference to the Securities Exchange Act of 1934), Merit argues that the § 546(e) safe harbor must be read to protect intermediaries without reference to any beneficial interest in the transfer. The contrary interpretation, Merit contends, "would run afoul of the canon disfavoring an interpretation of a statute that renders a provision ineffectual or superfluous." Brief for Petitioner 25.

[10] Putting aside the question whether a securities clearing agency always acts as an intermediary without a beneficial interest in a challenged transfer—a question that the District Court in Seligson found presented triable issues of fact in that case—the reading of the statute the Court adopts here does not yield any superfluity. Reading § 546(e) to provide that the relevant transfer for purposes of the safe harbor is the transfer that the trustee seeks to avoid under a substantive avoiding power, the question then becomes whether that transfer was "made by or to (or for the benefit of)" a covered entity, including a securities clearing agency. If the transfer that the trustee seeks to avoid was made "by" or "to" a securities clearing agency (as it was in Seligson), then § 546(e) will bar avoidance, and it will do so without regard to whether the entity acted only as an intermediary. The safe harbor will, in addition, bar avoidance if the transfer was made "for the benefit of" that securities clearing agency, even if it was not made "by" or "to" that entity. This reading gives full effect to the text of § 546(e).

B

In a final attempt to support its proposed interpretation of § 546(e), Merit turns to what it perceives was Congress' purpose in enacting the safe harbor. Specifically, Merit contends that the broad language of § 546(e) shows that Congress took a "comprehensive approach to securities and commodities transactions" that "was prophylactic, not surgical," and meant to "advanc[e] the interests of parties in the finality of transactions." Brief for Petitioner 41-43. Given that purported broad purpose, it would be incongruous, according to Merit, to read the safe harbor such that its application "would depend on the identity of the investor and the manner in which it held its investment" rather than "the nature of the transaction generally." Id., at 33. Moreover, Merit posits that Congress' concern was plainly broader than the risk that is posed by the imposition of avoidance liability on a securities industry entity because Congress provided a safe harbor not only for transactions "to" those entities (thus protecting the entities from direct financial liability), but also "by" these entities to non-covered entities. See Reply Brief 10-14. And, according to Merit, "[t]here is no reason to believe that Congress was troubled by the possibility that transfers by an industry hub could be unwound but yet was unconcerned about trustees' pursuit of transfers

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made *through* industry hubs." *Id.*, at 12–13 (emphasis in original).

Even if this were the type of case in which the Court would consider statutory purpose, see, e.g., Watson v. Philip Morris Cos., 551 U.S. 142, 150-152, 127 S.Ct. 2301, 168 L.Ed.2d 42 (2007), here Merit fails to *897 support its purposivist arguments. In fact, its perceived purpose is actually contradicted by the plain language of the safe harbor. Because, of course, here we do have a good reason to believe that Congress was concerned about transfers "by an industry hub" specifically: The safe harbor saves from avoidance certain securities transactions "made by or to (or for the benefit of)" covered entities. See § 546(e). Transfers "through" a covered entity, conversely, appear nowhere in the statute. And although Merit complains that, absent its reading of the safe harbor, protection will turn "on the identity of the investor and the manner in which it held its investment," that is nothing more than an attack on the text of the statute, which protects only certain transactions "made by or to (or for the benefit of)" certain covered entities.

For these reasons, we need not deviate from the plain meaning of the language used in § 546(e).

IV

[11] For the reasons stated, we conclude that the relevant transfer for purposes of the § 546(e) safe harbor is the same transfer that the trustee seeks to avoid pursuant to its substantive avoiding powers. Applying that understanding of the safe-harbor provision to this case yields a straightforward result. FTI, the trustee, sought to avoid the \$16.5 million Valley View-to-Merit transfer. FTI did not seek to avoid the component transactions by which that overarching transfer was executed. As such, when determining whether the § 546(e) safe harbor saves the transfer from avoidance liability, i.e., whether it was "made by or to (or for the benefit of) a ... financial institution," the Court must look to the overarching transfer from Valley View to Merit to evaluate whether it meets the safe-harbor criteria. Because the parties do not contend that either Valley View or Merit is a "financial institution" or other covered entity, the transfer falls outside of the § 546(e) safe harbor. The judgment of the Seventh Circuit is therefore affirmed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

All Citations

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2018 WL 3756343 Only the Westlaw citation is currently available. United States Bankruptcy Court, S.D. New York.

In re: FAIRFIELD SENTRY LIMITED, et al., Debtors in Foreign Proceedings. FAIRFIELD SENTRY LIMITED (IN LIQUIDATION), acting by and through the Foreign Representatives thereof, Plaintiffs,

THEODOOR GGC
AMSTERDAM, et al., Defendants.

Case No. 10-13164 (SMB) | Adv. Proc. No. 10-03496 (SMB)

Dated: New York, New York August 6, 2018

Attorneys and Law Firms

APPEARANCES: BROWN RUDNICK LLP, Seven Times Square, New York, NY 10036, David J. Molton, Esq., Marek P. Krzyzowski, Esq., Of Counsel, KELLOGG, HANSEN, TODD, FIGEL & FREDERICK, P.L.L.C., 1615 M. Street, N.W., Suite 400, Washington, D.C. 20036, Michael K. Kellogg, Esq. (admitted pro hac vice), Aaron M. Panner, Esq. (admitted pro hac vice), Of Counsel, Attorneys for Plaintiffs

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The listed attorneys for the Defendants participated at the oral argument; additional defense counsel are set forth in Appendix E to the Consolidated Memorandum of Law in Opposition to Plaintiffs' Motion for Leave to Amend and in Support of Defendants' Motion to Dismiss, dated Jan. 13, 2017 ("Defendants Motion") (ECF Doc. # 960).

Chapter 15 Case

Jointly Administered

Administratively Consolidated

MEMORANDUM DECISION AND ORDER REGARDING THE DEFENDANTS' MOTIONS TO DISMISS FOR WANT OF JURISDICTION

STUART M. BERNSTEIN United States Bankruptcy Judge

*1 STUART M. BERNSTEIN United States Bankruptcy Judge

Plaintiffs Kenneth M. Krys and Charlotte Caulfield (together, the "Liquidators"), 2 in their capacities as foreign representatives of Fairfield Sentry Limited ("Sentry"), Fairfield Sigma Limited ("Sigma"), and Fairfield Lambda Limited ("Lambda," and collectively, the "Funds") seek leave to amend their complaints, (see Memorandum Of Law in Support of Motion for Leave to Amend, dated Oct. 21, 2016 ("Liquidators Motion") (ECF Doc. # 923)), in 305 adversary proceedings pending in this Court in which the Liquidators seek to recover redemptions paid by the Funds to the defendants (collectively, the "U.S. Redeemer Actions"). 3 The defendants in the U.S. Redeemer Actions (collectively, the "Defendants") oppose the amendments and seek dismissal of the U.S. Redeemer Actions for lack of subject matter jurisdiction, lack of personal jurisdiction, and for failure to state a claim. (See Defendants Motion.) For the reasons set forth herein, the Defendants' motion to dismiss for lack of subject matter jurisdiction is denied, and the motion to dismiss for lack of personal jurisdiction is granted to the extent that personal jurisdiction is based solely on the forum selection clause in the Subscription Agreements (defined below). Finally, the balance of the motion to dismiss, which challenges the merits of the Liquidators' claims, must await the disposition of further proceedings discussed at the end of this opinion. The Liquidators' motion for leave to amend is deferred pending resolution of Defendants' dismissal arguments based on the failure to state a claim.

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- Different individuals have served as Liquidators of the Funds. When used in this memorandum decision, the term refers to the individuals serving in the position during the referenced time-period.
- A list of all U.S. Redeemer Actions is attached as Appendix D to the Foreign Representatives' Memorandum of Law in Opposition to Defendants' Consolidated Memorandum of Law and in Further Support of Foreign Representatives' Motion for Leave to Amend Complaints, dated Mar. 31, 2017 ("Liquidators Reply") (ECF Doc. # 1336). The U.S. Redeemer Actions were administratively consolidated for pretrial purposes. (See Amended Order Authorizing the Consolidation of Redeemer Actions Pursuant to Federal Rule of Bankruptcy Procedure 7042, signed Nov. 17, 2010 (ECF Doc. # 25).) Unless otherwise specified, references to docket entries are to documents filed on the electronic docket of the consolidated proceeding, Fairfield Sentry Limited (In Liquidation) v. Theodoor GGC Amsterdam, Adv. Proc. No. 10-03496 (SMB).

BACKGROUND

A. The Funds and the BVI Liquidation

The pre-2012 background pertaining to these proceedings is set forth in Fairfield Sentry Ltd. (In Liquidation) v. Theodoor GGC Amsterdam (In re Fairfield Sentry Ltd.), 452 B.R. 64, 69-73 (Bankr. S.D.N.Y. 2011) ("Fairfield \mathcal{I}") and In re Fairfield Sentry Ltd. Litig., 458 B.R. 665, 671-72 (S.D.N.Y. 2011) ("Fairfield II"), familiarity with which is assumed. The Court highlights only those facts relevant to the disposition of the motions before it.

*2 The Funds were organized under the laws of the British Virgin Islands ("BVI"). Fairfield II, 458 B.R. at 671. Sentry sold shares to foreign investors and invested virtually all of the proceeds with Bernard L. Madoff Investment Securities LLC ("BLMIS"). Id. Sigma and Lambda were "funds of funds." They also sold shares to investors, but invested the proceeds with Sentry which, in turn, invested those funds with BLMIS. The investors could redeem their shares at will, and the redemption payment amounts were based on a calculation of net asset value ("NAV") per share which depended, for the most part, on the value of Sentry's investment with BLMIS. Id.

In December 2008, Madoff admitted to operating the investment advisory business of BLMIS as a Ponzi

scheme, and BLMIS was placed into a liquidation proceeding pursuant to section 78eee of the Securities Investor Protection Act, 15 U.S.C. §§ 78aaa, et seq. Fairfield I, 452 B.R. at 69. In hindsight, the Funds had overpaid the earlier redemptions (and overcharged the earlier subscribers) based on an erroneous view of the value of their BLMIS investments, and after Madoff's arrest, they ceased making redemption payments. Id. Certain of the Funds' creditors and shareholders commenced insolvency proceedings against the Funds in the Commercial Division of the Eastern Caribbean High Court of Justice, British Virgin Island ("BVI Court") in February and April 2009, and the BVI Court appointed the Liquidators as the Funds' fiduciaries. Id. at 69-70. On June 14, 2010, the Liquidators commenced ancillary proceedings in this Court under Chapter 15 of the Bankruptcy Code to obtain recognition of the BVI liquidation proceedings as "foreign main proceedings" under sections 1502(4), 1515, and 1517 of the Bankruptcy Code. Id. at 70. The Court granted the Liquidators' applications on July 22, 2010. In re Fairfield Sentry Ltd., 440 B.R. 60, 63-66 (Bankr. S.D.N.Y. 2010), aff'd, No. 10 Civ. 7311(GBD), 2011 WL 4357421 (S.D.N.Y. Sept. 16, 2011), aff'd, 714 F.3d 127 (2d Cir. 2013).

B. The U.S. Redeemer Actions

In April 2010, and prior to recognition, the Liquidators began commencing numerous actions in New York state court on behalf of the Funds against a subset of the Defendants. Fairfield II, 458 B.R. at 672. Typically, the Defendants were banks that purchased shares in the Funds they thereafter resold to their customers. Id. at 671-72. The banks were the registered owners of the shares, but their customers who acquired the shares were the beneficial owners, and were also sued as Defendants. Id. at 672. The Liquidators asserted claims based on money had and received, unjust enrichment, mistaken payment, and constructive trust (the "Common Law Claims"), but the theory of each claim was the same: the Funds had miscalculated the NAV, and consequently, paid inflated redemption prices. Id.

Following recognition of the BVI liquidations under Chapter 15 of the Bankruptcy Code, the Liquidators removed the state court actions to the District Court pursuant to 28 U.S.C. § 1452(a), ⁴ and the District Court referred the actions to this Court under the standing order of referral then in effect. *See Standing Order of Referral*

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of Cases to Bankruptcy Judges, M-61 (Ward, Acting C.J.) (S.D.N.Y. July 10, 1984) (as amended, the "District Court Standing Order of Reference"). ⁵ The Liquidators filed substantially similar adversary proceedings against other Defendants under the umbrella of the Chapter 15 case, and the Court administratively consolidated the newly filed cases and the removed cases (i.e. the U.S. Redeemer Actions). Fairfield II, 458 B.R. at 672. The Liquidators also amended certain of the complaints in the U.S. Redeemer Actions to assert avoidance claims under sections 245 and 246 of the BVI INSOLVENCY ACT of 2003 ("INSOLVENCY ACT") to claw back redemptions paid with inflated prices as "unfair preferences" and/ or "undervalue transactions" (the "BVI Avoidance Claims"). Id. As noted, 305 U.S Redeemer Actions are pending and seek an aggregate recovery of over \$6 billion.

- Section 1452(a) of Title 28 states that "[a] party may remove any claim or cause of action in a civil action ... to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title."
- The 1984 standing order was superseded in early 2012 following the Supreme Court's decision in *Stern v. Marshall*, 564 U.S. 462 (2011). *See Amended Standing Order of Reference Re: Title 11*, 12 misc. 00032, M10-468(LAP) (S.D.N.Y. Jan. 31, 2012). The changes do not affect the automatic referral of the U.S. Redeemer Actions to this Court.
- *3 A group of Defendants subsequently moved to remand the removed actions to state court based, inter alia, on mandatory abstention under 28 U.S.C. § 1334(c) (2). 6 Fairfield II, 458 B.R. at 672. The Bankruptcy Court denied the motion, but the District Court reversed the Bankruptcy Court's order. Chief District Judge Preska ruled that the claims asserted in the U.S. Redeemer Actions were not subject to a bankruptcy court's "core" jurisdiction, Fairfield II, 458 B.R. at 688-89, she assumed that they were "non-core," id. at 690, and remanded the proceedings to the Bankruptcy Court to reconsider whether the cases were subject to mandatory abstention under 28 U.S.C. § 1334(c)(2). Id. at 691. The Defendants subsequently withdrew their remand request, and the U.S. Redeemer Actions are before this Court. (See Notice of Withdrawal of Motions to Remand and for Abstention, dated Jan. 13, 2017 (ECF Doc. # 954).)

6 Section 1334(c)(2) of Title 28 provides

Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

C. The BVI Redeemer Actions

Less than a month after the District Court's remand order in Fairfield II, this Court entered an order staying the U.S. Redeemer Actions, (see Amended Order Staying Redeemer Actions, dated Oct. 19, 2011 (ECF Doc. # 418)), pending further developments in suits brought by the Liquidators against redeemers in the BVI Court, a subject to which I now turn.

The procedure for purchasing and redeeming Fund shares was set forth in the Amended and Restated Articles of Association (the "Articles"). 7 Article 10 described the procedure for the redemption of shares. Upon receipt of a written redemption request, the Fund was obligated to redeem or purchase the Member's shares at the Redemption Price. (Article 10(1) & (1)(b).) The Redemption Price for each share was the NAV per share, (Article 10(2)), and the NAV per share was determined by dividing the value of the Fund's net assets by the number of outstanding shares. (Article 11(1)[b] 8.) "Any certificate as to the Net Asset Value per Share or as to the Subscription Price or the Redemption Price therefor given in good faith by or on behalf of the Directors shall be binding on the parties." (Article 11(1)[c].) ⁹ The surrender of any certificate issued in respect to the shares to be redeemed was a condition to Fairfield's obligation to pay the Redemption Price. (Article 10(3)(a).) 10

A copy of Sentry's Articles is attached as Ex. F to the Declaration of William Hare in Support of Motion for Leave to Amend, dated Oct. 21, 2016 ("Hare Declaration") (ECF Doc. # 925). The Articles for Sigma and Lambda are substantially similar to Sentry's and are attached as Exs. D and E to the Attorney Declaration of Thomas J. Moloney in Opposition to Plaintiffs' Motion for Leave to Amend

- and in Support of Defendants' Motion to Dismiss, Jan. 13, 2017 ("Moloney Declaration") (ECF Doc. # 961).
- Bracketed letters following Article 11(1) reference subparagraphs of that Article with "[a]" being the first subparagraph and so forth.
- The Subscription Price for the purchase of shares under Article 9 was also governed by the NAV per share determined under Article 11.
- The redemption obligation was subject to several other conditions, but they are not relevant to the dispute before the Court.
- *4 In late 2009 and early 2010, the Liquidators commenced actions against shareholders in the BVI Court (the "BVI Redeemer Actions") to recover other redemptions paid to shareholders based upon a mistaken NAV. (See Statement of Claim in Fairfield Sentry Ltd. (In Liquidation) v. Bank Julius Baer & Co. Ltd., dated Mar. 12, 2010, at ¶ 9 (attached as Ex. A to the Hare Declaration).) The Liquidators alleged that the actual value of the shares was nominal, and the shareholders were "unjustly enriched" and were "liable to make restitution" to the Liquidators. (Id. at ¶ 10-11.)

1. The Preliminary Issues Proceeding

In early 2011, certain defendants in the BVI Redeemer Actions filed applications requesting that the BVI Court hold a trial to determine "preliminary issues." A preliminary issues trial is a mechanism for deciding specific issues that are likely to resolve the case. (Hare Declaration at ¶ 23; Declaration of Phillip Kite in Opposition to Plaintiffs' Motion for Leave to Amend and in Support of Defendants' Motion to Dismiss, signed Jan. 12, 2017 ("Kite Declaration"), at ¶ 9 (ECF Doc. # 963).) On April 20, 2011, Judge Bannister of the BVI Court ordered a trial on two preliminary issues, (1) whether various documents issued to the investors constituted certificates of NAV within the meaning of Article 11 ("Certification Issue"), and (2) whether redeeming investors gave good consideration for the redemption payments by surrendering their shares ("Good Consideration Issue"), and stayed the BVI Redeemer Actions pending a determination of such preliminary issues.

On September 16, 2011, Judge Bannister ruled that the various communications sent to investors by the Fund's administrator, Citco Funds Services (Europe) BV ("Citco"), and/or the Fund's manager, Fairfield

Greenwich (Bermuda) Limited were not certificates as set forth in the Articles, Fairfield Sentry Ltd. (In Liquidation) v. Bank Julius Baer & Co. Ltd., Nos. BVIHC (COM) 30-2010, et al., ¶ 33 ("BVI Court PI Decision"), 11 but the redeemers had given good consideration for the redemptions by surrendering their shares. (Id. at ¶ 36.) On June 13, 2012, the Eastern Caribbean Court of Appeal ("ECCA") affirmed on both issues and dismissed the appeals. See Quilvest Fin. Ltd. v. Fairfield Sentry Ltd. (In Liquidation), Nos. HCVAP 2011/041, et al. ("ECCA PI Decision"). 12

- A copy of the *BVI Court PI Decision* is attached as Ex. B to the *Kite Declaration*.
- 12 A copy of the ECCA PI Decision is attached as Ex. G to the Kite Declaration.

The parties appealed to the Privy Council, which rendered its decision on April 16, 2014. See Fairfield Sentry Ltd. (In Liquidation) v. Migani, [2014] UKPC 9 ("Migani"). 13 Initially, the Privy Council opined that, while the lower courts had reviewed the Certification Issue and the Good Consideration Issue separately, the issues "are closely related and have to be considered together." Id. at ¶ 6. Furthermore, the claims to recover the redemptions were governed by the Articles and BVI law, id. at ¶ 17, and although the subscribers had signed subscription agreements (discussed below) that included a New York choice of law provision, "none of the questions raised by the preliminary issues depends on the terms of the Subscription Agreement. They depend wholly on the construction of the Articles, which is governed by the law of the British Virgin Islands." Id. at ¶ 20.

- A copy of the Migani decision is attached as Ex. Q to the Hare Declaration. An electronic version of the opinion without paragraph numbers can be found on the Westlaw database at 2014 WL 1219748.
- *5 The Privy Council disagreed with the lower courts' disposition of the Certification Issue. The Liquidators had taken the position that the Articles did not require the Funds to issue a certificate in connection with a redemption request. That implied that the Funds could simply compute the NAV per share without issuing a certificate, and pay the Redemption Price. In the cases before the Privy Council, the Liquidators argued that the Funds had not issued a certificate, were not bound by the NAV per share calculated at the time of the redemption,

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and could seek to recover the inflated payments that only came to light following Madoff's arrest. See id. at ¶ 22.

The Privy Council rejected the Liquidators' position based on the doctrine of finality. The Articles contemplated that the subscription and redemption prices would be "definitively ascertained" at the time of the subscription or redemption "whether or not the determination was correctly carried out in accordance with Articles 11(2) and (3)." Id. at ¶ 24. The notion that the directors had the discretion to redeem without issuing a certificate in some cases and not in other cases served no rationale purpose because the purpose of the certification was to lend finality to the purchase or redemption. Id. at ¶ 26. Furthermore, unless a certificate was issued, it would always be possible to vary the NAV per share calculated by the Directors at the time of the redemption based on subsequently acquired information. Id. at ¶ 23. Accordingly, any document intended to be a definitive determination of the NAV per share at the time of the redemption was a certificate. See id. at ¶ 29-31. Therefore, the Privy Council reversed the lower courts' holdings on the Certification Issue, and dismissed the appeal of the Good Consideration Issue. Id. at Conclusion. In 2016, the Liquidators received approval to discontinue the BVI Redeemer Actions and served notices of discontinuance on the defendants. (Hare Declaration at \P 68.)

2. The Section 273 Proceeding

Having won the preliminary issues proceeding, certain defendants from the BVI Redeemer Actions applied in the BVI Court to prevent the Liquidators from proceeding with the U.S. Redeemer Actions. They invoked section 273 of the BVI Insolvency Act, which states that "[a] person aggrieved by an act, omission or decision of an office holder [e.g., a liquidator] may apply to the Court and the Court may confirm, reverse or modify the act, omission or decision of the office holder." INSOLVENCY ACT § 273. Alternatively, the defendants sought an anti-suit injunction preventing the Liquidators from prosecuting the U.S. Redeemer Actions.

BVI Court Judge Leon denied the application on March 11, 2016, see UBS AG N.Y. v. Fairfield Sentry Ltd., Nos. BVIHC (COM) 2009/0136, et al. ("BVI Court 273 Decision"), ¹⁴ ruling that the defendants lacked standing because they were seeking to advance their interests as Defendants in the U.S. Redeemer Actions instead of

as stakeholders in the BVI liquidations of the Funds. *Id.* at ¶¶ 71-72. But even if they had standing, they had failed to sustain their burden, *id.* at ¶ 136, and an anti-suit injunction was inappropriate because the U.S. Bankruptcy Court could determine the portions of the U.S. Redeemer Actions that could proceed. *Id.* at ¶ 142. The applicants appealed to the ECCA, which affirmed the BVI Court's decision on November 20, 2017. *See ABN AMRO Fund Servs. (Isle of Man) 24 Nominees Ltd. v. Krys,* Nos. BVIHCMAP: 11-16, 23-28 of 2016, at ¶ 82 ("ECCA 273 Decision"). ¹⁵

- 14 A copy of the BVI Court 273 Decision is attached as Exhibit S to the Hare Declaration.
- A copy of the ECCA 273 Decision is attached to the Letter of David J. Molton, Esq. dated Nov. 22, 2017 (ECF Doc. # 1603).

D. The Current Motions

*6 The Liquidators now seek leave to further amend their complaints in the U.S. Redeemer Actions. (See Liquidators Motion.) They contend that discovery has yielded proof showing that Citco lacked good faith when it issued the certificates for the redemptions involved in the U.S. Redeemer Actions. (See Declaration of David J. Molton in Support of Motion for Leave to Amend, dated Oct. 21, 2016 ("Molton Declaration") at ¶ 5 (ECF Doc. #924).) They contend that if the certificates were not issued in good faith, they would not be binding under Article 11(1)[c]. (Liquidators Motion at 28-29.)

The proposed amended complaint in Fairfield Sentry Ltd. v. Citigroup Global Mkts. Ltd., Adv. Proc. No. 11-02770 (SMB) ("Proposed Citigroup Complaint") (attached as Exhibit C to the Molton Declaration) is typical. The Liquidators' theory remains unchanged: the redemption payments were based on inflated NAVs per share resulting from an erroneous belief as to the value of the Funds' investments with BLMIS. (Id. at ¶¶ 7, 10, 33-35, 93.) The key addition, as mentioned, is the allegation that Citco — as the Funds' administrator —issued the NAV certificates in bad faith for purposes of Article 11(1). (Id. at \P 41, 70.) ¹⁶ The Liquidators seek to recover the redemption overpayments from the Defendants as the registered owners of the shares and/or the Defendants' unknown clients as beneficial owners, based on (i) unjust enrichment, money had and received, mistaken payment, constructive trust, and declaratory judgment

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(*i.e.*, the Common Law Claims), (ii) unfair preferences or undervalue transactions under section 245 and 246 of the INSOLVENCY ACT, (*i.e.*, the BVI Avoidance Claims) and (iii) breach of contract and breach of the implied covenant of good faith and fair dealing (*i.e.*, the "Contract Claims"). (*Id.* at ¶ 94-209.)

The allegations describing Citco's bad faith have been filed under seal. (See Order Authorizing the Foreign Representatives to File Proposed Amended Complaints in Partially Redacted Form and Unredacted Proposed Amended Complaints Under Seal, dated Sept. 6, 2016 (ECF Doc. # 909).) The specific allegations do not need to be unsealed for purposes of this omnibus proceeding.

The Defendants oppose the amendments and seek dismissal of the U.S. Redeemer Actions in their entirety. (See Defendants Motion.) They contend that the Court lacks subject matter jurisdiction over the proceedings and personal jurisdiction over the Defendants. (Defendants Motion at 17-35.) In addition, the complaints failed to state claims upon which relief can be granted because the redemptions are protected by the safe harbor in 11 U.S.C. §§ 546(e) and 561(d), (id. at 36-44), the claims are barred by the doctrines of res judicata and/or collateral estoppel, (id. at 44-54), any bad faith on the part of Citco is imputed to the Funds and recovery is barred under the doctrine of ex turpi causa, (id. at 54-55), the Funds failed to allege the existence of an injury on the Common Law and Contract Claims, (id. at 58-61), and the BVI Avoidance Claims fail as a matter of law. (Id. at 61-70.)

Given the more than 300 U.S. Redeemer Actions, the Court entered an order scheduling oral argument on the following issues common to all U.S. Redeemer Actions:

- Does the Court have "related to" jurisdiction over these adversary proceedings under 28 U.S.C. § 1334(b)?
- Which, if any, of the plaintiffs' claims in their proposed, amended complaints are barred by 11 U.S.C. §§ 546(e) and 561(d)?
- *7 3. Did the defendants that executed subscription agreements (or are otherwise bound by the terms of the subscription agreements) consent to this Court's *in personam* jurisdiction?

- 4. What claims or issues, if any, are precluded by virtue of the prior proceedings among the parties (including proceedings involving a subset of the parties)?
- 5. Is Citco, et al.'s alleged bad faith imputed to the plaintiffs, and if so, how does the plaintiffs' bad faith affect its right to pursue the claims asserted in the proposed, amended complaints?
- 6. Is a defendant entitled to an offset to the extent it purchased shares in the Funds based on inflated NAVs resulting from BLMIS' fraud?

(See Order Scheduling Oral Argument on Motions for Leave to Amend and to Dismiss, dated Jan. 9, 2018 ("Scheduling Order") (ECF Doc. # 1609).)

The Court heard oral argument on January 25, 2018, (see Transcript of January 25, 2018 Hearing ("Hr'g Tr.") (ECF Doc. # 1648)), and took the matter under advisement.

DISCUSSION

A. Subject Matter Jurisdiction

Pursuant to section 1334(b) of title 28, the District Court has "original but not exclusive jurisdiction of all civil proceedings arising under" the Bankruptcy Code, or "arising in" or "related to" a bankruptcy case. The District Court may refer civil proceedings to the Bankruptcy Court, 28 U.S.C. § 157(a), and the District Court for Southern District of New York does so automatically under the District Court Standing Order of Reference. The District Court held that the U.S. Redeemer Actions neither "aris[e] under" the Bankruptcy Code, Fairfield II, 458 B.R. at 675-76, nor "arise in" the Funds' Chapter 15 cases, id. at 676-87, and assumed but did not decide that the actions were "related to" the Chapter 15 cases. Id. at 689

A civil proceeding is "related to" a bankruptcy case "if the action's outcome might have any conceivable effect on the bankrupt estate." SPV Osus Ltd. v. UBS AG, 882 F.3d 333, 339-40 (2d Cir. 2018) (quoting Parmalat Capital Fin. Ltd. v. Bank of Am. Corp., 639 F.3d 572, 579 (2d Cir. 2011)). When the debtor is an entity involved in a foreign insolvency proceeding, the "estate," for purposes of determining whether "related to" jurisdiction exists is the foreign estate. Parmalat, 639 F.3d at 579 ("In

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the context of § 1334(b), there is no need to distinguish between estates administered principally in foreign forums and those administered principally in domestic forums."); accord Hosking v. TPG Capital Mgmt., L.P. (In re Hellas Telecomm. (Lux.) II SCA), 524 B.R. 488, 515 (Bankr. S.D.N.Y. 2015) (applying the Parmalat ruling to a Chapter 15 debtor). Here, the "conceivable effect" of the U.S. Redeemer Actions on the Funds' BVI estates is obvious: any recovery will directly increase the size of the foreign estates. The Defendants have conceded this point. (Hr'g Tr. at 8:14-20.)

The Defendants nonetheless assert that the Court's "related to" subject matter jurisdiction in a Chapter 15 case is limited to a proceeding that seeks to recover U.S. assets, and the U.S. Redeemer Actions seek to recover foreign assets. (See Defendants Motion at 20; Consolidated Reply Memorandum of Law in Further Support of Defendants' Motion to Dismiss, dated May 26, 2017 ("Defendants Reply") at 3 (ECF Doc. # 1457).) They point out that unlike plenary bankruptcies, a bankruptcy court may only exercise territorial jurisdiction over a Chapter 15 debtor's property located in the United States. See, e.g., 11 U.S.C. § 1520(a)(1) (applying sections 361 and 362 of the Bankruptcy Code to the debtor's U.S. assets); 11 U.S.C. § 1520(a)(2) (applying sections 363, 549 and 552 of the Bankruptcy Code to transfers of the debtor's U.S. assets); 11 U.S.C. § 1521(a)(5) (permitting the entrustment of the administration or realization of the debtor's U.S. assets to the foreign representative); 11 U.S.C. § 1521(b) (allowing the foreign representative to distribute the debtor's U.S. assets upon receipt of Court-approval); 11 U.S.C. § 1528 (limiting the effect of a Chapter 15 debtor's plenary bankruptcy filing to its U.S. assets). The Defendants seek to engraft this territorial limitation to the Second Circuit's ruling in Parmalat. (Defendants Reply at 3 ("Parmalat dealt only with 'related to' jurisdiction over an action seeking to recover assets located in the United States.").)

*8 The Defendants' argument confuses subject matter jurisdiction over a proceeding with a court's *in rem* jurisdiction over property. "Subject-matter jurisdiction defines the court's authority to hear a given type of case." *United States v. Morton*, 467 U.S. 822, 828 (1984). As stated above, this Court's exercise of subject matter jurisdiction over the U.S. Redeemer Actions is governed by 28 U.S.C. § 1334(b) and, as noted above and conceded by the Defendants, the outcome of the U.S. Redeemer

Actions may have a conceivable effect on Funds' estates. The *Parmalat* ruling — that the relevant estate for a foreign debtor is the foreign estate — is not limited to the recovery of U.S. assets; all that is required for the exercise of "related to" jurisdiction is the satisfaction of the "conceivable effect" test, "[n]othing more." 639 F.3d at 579, 579 n. 7. Accordingly, the Court concludes that it has "related to" subject matter jurisdiction over the U.S. Redeemer Actions.

B. Personal Jurisdiction

"In order survive a motion to dismiss for lack of personal jurisdiction, a plaintiff must make a prima facie showing that jurisdiction exists." SPV Osus, 882 F.3d at 342 (quotation marks and citation omitted). A court has "considerable procedural leeway" when considering a pretrial motion to dismiss for lack of personal jurisdiction: "[i]t may determine the motion on the basis of affidavits alone; or it may permit discovery in aid of the motion; or it may conduct an evidentiary hearing on the merits of the motion." Dorchester Fin. Sec., Inc. v. Banco BRJ, S.A., 722 F.3d 81, 84 (2d Cir. 2013) (quoting Marine Midland Bank, N.A. v. Miller, 664 F.2d 899, 904 (2d Cir. 1981)). "Prior to discovery, a plaintiff challenged by a jurisdiction testing motion may defeat the motion by pleading in good faith, legally sufficient allegations of jurisdiction. At that preliminary stage, the plaintiff's prima facie showing may be established solely by allegations." Id. at 84-85 (quoting Ball v. Metallurgie Hoboken-Overpelt, S.A., 902 F.2d 194, 197 (2d Cir. 1990)). The Court construes the pleadings and affidavits "in the light most favorable to the plaintiffs, resolving all doubts in their favor." Chloé v. Queen Bee of Beverly Hills, LLC, 616 F.3d 158, 163 (2d Cir. 2010) (quoting Porina v. Marward Shipping Co., 521 F.3d 122, 126 (2d Cir. 2008)).

Two-hundred six defendants (referred to in the *Defendants Memo* as the "Foreign Defendants") have moved to dismiss the complaints on the ground that the Court lacks personal jurisdiction over them. (*See Defendants Motion*, Appendix B-1.) Although the question of personal jurisdiction must be decided on a defendant-by-defendant basis, the Liquidators assert that a large number of these Defendants consented to jurisdiction in New York by signing identical Subscription Agreements ¹⁷ containing a forum selection clause in favor of New York courts and a submission to jurisdiction in New York. (*Liquidators Reply* at 4-11.) ¹⁸ Further, they allege that an additional

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192 Defendants who were the beneficial owners of the shares consented to jurisdiction, (*Liquidators Reply* at 11 & Appendix D-1), because each subscriber represented that it had authority to sign on behalf of such beneficial owners. (*See* Subscription Agreement at ¶ 27.) Because this issue applied across the board, the Court carved it out for separate consideration.

- A sample Subscription Agreement is attached as Exhibit A to the *Moloney Declaration*.
- The Liquidators also assert personal jurisdiction over the Defendants based on purposeful contacts with the U.S. (*Liquidators Reply* at 11-18.) The Court did not schedule oral argument with respect to this issue because the relevant considerations vary on a case-by-case basis, and the purpose of this proceeding was to consider dismissal matters common to most or all of the U.S. Redeemer Actions.

Parties may consent to personal jurisdiction by entering into contracts with forum selection clauses, *D.H. Blair & Co., Inc. v. Gottdiener*, 462 F.3d 95, 103 (2d Cir. 2006), and a forum selection clause is enforceable "unless it imposes a venue 'so gravely difficult and inconvenient that [the plaintiff] will for all practical purposes be deprived of his day in court.' " *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*, 561 U.S. 89, 110 (2010) (quoting *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 18 (1972)). ¹⁹ The Defendants do not argue that it would be gravely difficult or inconvenient to defend these actions in New York where they are represented by experienced and able counsel. Instead, they contend that the Liquidators' claims do not come within the forum selection clause.

- New York law similarly "encourages parties to international commercial agreements to select New York as a forum regardless of other contacts with the state." Saeco Vending, S.P.A. v. Seaga Mfg., Inc., No. 15-cv-3280 (AJN), 2016 WL 1659132, at *5 (S.D.N.Y. Jan. 28, 2016) (citing N.Y. GEN. OBLIG. LAW § 5-1402)).
- *9 The Subscription Agreements contain a limited consent to the jurisdiction of New York courts:

New York Courts. Subscriber agrees that any suit, action or proceeding ("Proceeding") with respect to this Agreement and the Fund may be brought in New York. Subscriber irrevocably submits to

the jurisdiction of the New York courts with respect to any Proceeding and consents that service of process as provided by New York law may be made upon Subscriber in such Proceeding, and may not claim that a Proceeding has been brought in an inconvenient forum.

(Subscription Agreement at ¶ 19 (emphasis added).) Thus, the Subscriber consented to the forum and to personal jurisdiction in the forum.

As the emphasized language indicates, the Defendants' consent to jurisdiction was limited to any actions "with respect to this Agreement and the Fund," which the Defendants' maintain is not the case. They note that that the Privy Council ruled in *Migani* that the Subscription Agreements and New York law were irrelevant to the Liquidators' right to recover the redemption payments, and hence, the U.S. Redeemer Actions are not "with respect to" the Subscription Agreement. (*Defendants Motion* at 25-26.)

The Liquidators make two responses. First, "and," as used in the italicized clause, should be read in the disjunctive to cover proceedings "with respect to" either the Subscription Agreement or the Fund, and the Defendants do not dispute that the U.S. Redeemer Actions are "with respect to" the Funds. (Liquidators Reply at 6-7.) Second, the U.S. Redeemer Actions are "with respect to" the Subscription Agreement. (Id. at 7-8.)

1. "And" vs. "Or"

When asked to interpret contractual language, the question is "whether the contract is unambiguous with respect to the question disputed by the parties." Law Debenture Trust Co. of N.Y. v. Maverick Tube Corp., 595 F.3d 458, 465 (2d Cir. 2010) (quoting Int'l Multifoods Corp. v. Commercial Union Ins. Co., 309 F.3d 76, 83 (2d Cir. 2002)). Ambiguity presents a question of law. Maverick Tube, 595 F.3d at 465-66. A contract is ambiguous if it "could suggest more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business." Int'l Multifoods, 309 F.3d at 83 (internal quotation marks omitted); accord Cont'l

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Ins. Co. v. Atl. Cas. Ins. Co., 603 F.3d 169, 180 (2d Cir. 2010); Maverick Tube, 595 F.3d at 466. An agreement is not ambiguous if it has a definite and precise meaning, and unambiguous language does not become ambiguous because a party urges a different interpretation that strains the language beyond its ordinary meaning. Maverick Tube, 595 F.3d at 467; Seiden Assocs., Inc. v. ANC Holdings, Inc., 959 F.2d 425, 428 (2d Cir. 1992). Where the dispute concerns a provision of the contract, the Court must consider the contract "as a whole to ensure that undue emphasis is not placed upon particular words and phrases." Bailey v. Fish & Neave, 868 N.E.2d 956, 959 (N.Y. 2007); accord Maverick Tube, 595 F.3d at 468.

*10 If the contract is ambiguous, "'the court may accept any available extrinsic evidence to ascertain the meaning intended by the parties during the formation of the contract." Morgan Stanley Grp. Inc. v. New England Ins. Co., 225 F.3d 270, 275-76 (2d Cir. 2000) (quoting Alexander & Alexander Servs., Inc. v. These Certain Underwriters at Lloyd's, 136 F.3d 82, 86 (2d Cir. 1998)). "Ambiguity without the existence of extrinsic evidence of intent presents not an issue of fact, but an issue of law for the court to rule on." Williams & Sons Erectors, Inc. v. S.C. Steel Corp., 983 F.2d 1176, 1184 (2d Cir. 1993). The parties have represented that no such extrinsic evidence exists, (Hr'g Tr. at 46:13-15; 52:25-53:3), and consequently, the interpretation of the Subscription Agreement presents a pure question of law.

"Words and phrases are to be given their plain and ordinary meaning, and New York courts will commonly refer to dictionary definitions in order to determine that meaning." Summit Health, Inc. v. APS Healthcare Bethesda, Inc., 993 F. Supp. 2d 379, 390 (S.D.N.Y. 2014), aff'd, 725 F. App'x 4 (2d Cir. 2018); accord Archie MD, Inc. v. Elsevier, Inc., 16-cv-6614 (JSR), 2017 WL 3421167, at *4 (S.D.N.Y. Mar. 13, 2017). The dictionary definition of "and" is conjunctive. See WEBSTER'S THIRD INTERNATIONAL DICTIONARY (UNABRIDGED) 80 (1981) (defining "and" to mean "along with or together with ... added to or linked to ... as well as."). New York courts also interpret "and" as conjunctive. BOKF, N.A. v. Caesars Entm't Corp., 162 F. Supp. 3d 243, 246 n. 5 (S.D.N.Y. 2016) (citing Sasson v. TLG Acquisition LLC, 9 N.Y.S.3d 2, 4 (N.Y. App. Div. 2015); Progressive Ne. Ins. Co. v. State Farm Ins. Cos., 916 N.Y.S.2d 454, 456-57 (N.Y. App. Div. 2011); Maxwell v. State Farm Mut.

Auto. Ins. Co., 461 N.Y.S.2d 541, 543-44 (N.Y. App. Div. 1983)).

Furthermore, reading "and" to mean "or" would violate a basic principle of contract interpretation. In interpreting a contract under New York law, "an interpretation of a contract that has 'the effect of rendering at least one clause superfluous or meaningless ... is not preferred and will be avoided if possible.' "LaSalle Bank Nat'l Ass'n v. Nomura Asset Capital Corp., 424 F.3d 195, 206 (2d Cir. 2005) (quoting Shaw Grp., Inc. v. Triplefine Int'l Corp., 322 F.3d 115, 124 (2d Cir. 2003)); accord Olin Corp. v. OneBeacon Am. Ins. Co., 864 F.3d 130, 148 (2d Cir. 2017); Galli v. Metz, 973 F.2d 145, 149 (2d Cir. 1992). Reading the relevant clause as "with respect to this Agreement or the Fund" would render "this Agreement" superfluous because any possible dispute between a shareholder and the Fund would necessarily be "with respect to" the Fund.

Accordingly, the forum selection clause covers claims and disputes "with respect to" the Subscription Agreement and "with respect to" the Fund. The Defendants concede that the actions are "with respect to" the Funds, (see Defendants Reply at 11), and the remaining inquiry is whether they are also "with respect to" the Subscription Agreements.

2. "With Respect to" the Subscription Agreements

The Subscription Agreement refers to several different Fund-related documents. In some cases, the parties' rights are subject to all of these documents. Thus, the "Subscriber subscribes for the Shares pursuant to the terms herein, the [Confidential Private Placement] Memorandum²⁰ and the Fund's Memorandum of Association and Articles of Association (collectively, the "Fund Documents")." (Subscription Agreement ¶ 1.) "If the Fund accepts this subscription, Subscriber shall become a shareholder of the Fund and be bound by the Fund Documents." (Subscription Agreement ¶ 2.) In addition, "Subscriber understands that the Fund may compulsorily repurchase such Shares in accordance with the Fund Documents." (Subscription Agreement \P 5(a).) In other cases, those rights are defined by or they are referred for informational purposes to specific Fund Documents. For example, "Subscriber acknowledges that reoffers, resales or any transfer of the Shares is subject to the limitations imposed by the Fund's Articles of Association." (Subscription Agreement

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¶ 5(a).) Furthermore, "Subscriber is aware of the limited provisions for redemptions and has read the section in the Memorandum entitled 'Transfers, Redemptions and Terminations.' " (Subscription Agreement ¶ 9.)²¹ If a Subscriber enters into a swap with a third party based in whole or part on the Fund's performance, the Subscriber warrants that "the Third Party has received and reviewed a copy of the Memorandum and the Agreement." (Subscription Agreement ¶ 27.) Lastly, the "Subscriber has received and reviewed the country-specific disclosures in the Memorandum." (Subscription Agreement ¶ 28.)

- A copy of the Confidential Private Placement Memorandum ("Memorandum") is attached as Exhibit C to the Declaration of David J. Molton in Further Support of Motion for Leave to Amend and in Opposition to Defendants' Motion to Dismiss, signed Mar. 31, 2017 (ECF Doc. # 1337).
- 21 The referenced section in the Memorandum deals with, among other things, the mechanics of redemption. (See Memorandum at 23-25.)

*11 Certain provisions, on the other hand, refer solely to the Subscription Agreement, and do not have any bearing on the Fund Documents. For example, if the Fund rejects a subscription, it must promptly return the Subscriber's funds, "and this Agreement shall be void." (Subscription Agreement ¶2.) Obviously, the Fund Documents do not become void; rather, they don't apply to the non-Subscriber. In addition, "[t]his Agreement shall be governed and enforced in accordance with the laws of New York, without giving effect to its conflict of laws provisions." (Subscription Agreement ¶16.) Equally obvious, the reference to the Subscription Agreement does not mean that all of the Fund Documents, including the Articles, are governed by New York law.

The forum selection clause at issue falls into this last category. While the phrase "with respect to" is broad and synonymous with "in relation to," "in connection with," "associated with," and "with reference to," see Coregis Ins. Co. v. Am. Health Found., Inc., 241 F.3d 123, 128-29 (2d Cir. 2001) (Sotomayor, J); cf. Lamar, Archer & Cofrin, LLP v. Appling, 138 S. Ct. 1752, 1760 (2018) ("Use of the word 'respecting' in a legal context generally has a broadening effect, ensuring that the scope of a provision covers not only its subject but also matters relating to that subject."), the Liquidators' interpretation essentially

substitutes "Fund Documents" for "Agreement," making all disputes between a Subscriber and the Fund subject to the forum selection clause regardless of their nature. This interpretation ignores the distinctions made within the Subscription Agreement between and among the various Fund Documents, and which Fund Documents obligate or inform the Subscriber.

Furthermore, the Privy Council in *Migani* impliedly if not expressly rejected the Liquidators' argument that their claw back claims were "with respect to" the Subscription Agreements. The Liquidators argued before the Privy Council "that the effect of the contractual provisions governing redemption was not covered by the preliminary issues and ought to be referred back to the [BVI Court]," and "also suggested that at a further hearing in the [BVI Court], New York law, which is the proper law of the Subscription Agreement, might be relevant." *Migani* ¶ 20. Having concluded that the terms of the redemption of shares were found in the Articles rather than the Subscription Agreement, *id.* ¶ 10, the Privy Council "unhesitatingly reject[ed]" the Liquidators' suggestion:

Nor can the Board discern any basis on which New York law could be relevant, since none of the questions raised by the preliminary issues depends on the terms of the Subscription Agreement. They depend wholly on the construction of the Articles, which is governed by the law of the British Virgin Islands.

Id. \P 20.

In essence, the Privy Council held that the Subscription Agreement was irrelevant to actions to recover the inflated redemption payments. To nevertheless construe the Liquidators' claims in the U.S. Redeemer Actions to be "with respect to" the very agreements that the Privy Council judged to be irrelevant would lead to the same surplusage problem noted above, and more importantly, require the application of New York law to resolve the redemption dispute, an argument expressly rejected by the *Migani* court.

Finally, the Liquidators argue that the forum selection clause should apply because the Articles and the Subscription Agreement form an "integrated contract." (*Liquidators Reply* at 9-10.) "Generally,

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separate writings are construed as one agreement if they relate to the same subject matter and are executed simultaneously." Commander Oil Corp. v. Advance Food Serv. Equip., 991 F.2d 49, 53 (2d Cir. 1993) (listing cases); accord Carvel Corp. v. Diversified Mgmt. Grp., Inc., 930 F.2d 228, 233 (2d Cir. 1991) ("Under New York law, instruments executed at the same time, by the same parties, for the same purpose and in the course of the same transaction will be read and interpreted together."); cf. Ripley v. Int'l Rys. of Cent. Am., 171 N.E.2d 443, 446 (N.Y. 1960) ("The circumstance that they are different documents does not necessarily mean that they do not form a single contract (Crabtree v. Elizabeth Arden Sales Corp., 305 N.Y. 48, 110 N.E.2d 551), but it does indicate that they are separate unless the history and subject matter shows them to be unified."). Documents executed at different times may still be construed as a single contract if "the parties assented to all the promises as a whole, so that there would have been no bargain whatever if any promise or set of promises had been stricken." Commander Oil, 991 F.2d at 53 (quoting 6 SAMUEL WILLISTON, WILLISTON ON CONTRACTS § 863, at 275 (3d ed. 1970)); accord TVT Records v. Island Def Jam Music Grp., 412 F.3d 82, 90 (2d Cir. 2005) (same), cert. denied, 548 U.S. 904 (2006).

*12 This is a variation of the argument rejected in Migani. All of the Fund Documents are linked to the extent that they dealt with the Subscriber's investment in the Funds. However, while the Subscription Agreement governs subscriptions and refers to the Articles, the Articles govern redemptions and make no mention of the Subscription Agreement. If the Articles and the Subscription Agreement were an integrated, single agreement, the New York law and venue provisions would govern the redemption claims. The Migani court, however, ruled that the Articles and BVI law governed and the Subscription Agreement and New York law were irrelevant to the claw back claims. Accordingly, the Defendants' consent to the Subscription Agreement does not constitute consent to personal jurisdiction in the U.S. Redeemer Actions.

I must stop here. The issue of personal jurisdiction is traditionally treated as a threshold question that must be resolved prior to a consideration of the merits. *In re Rationis Enters.*, *Inc. of Pan.*, 261 F.3d 264, 267–68 (2d Cir. 2001). However, the practice is prudential and does not restrict a court's power to address legal issues, at least

in a case involving multiple defendants where the court indisputably has jurisdiction over some of the defendants and all of the defendants collectively challenge the legal sufficiency of the plaintiff's cause of action, particularly where the personal jurisdictional challenges are based on factual allegations that must await future development. *ONY, Inc. v. Cornerstone Therapeutics, Inc.*, 720 F.3d 490, 498 n.6 (2d Cir. 2013); *see Chevron Corp. v. Naranjo*, 667 F.3d 232, 246 n. 17 (2d Cir.), *cert. denied*, 568 U.S. 958 (2012).

The Court's disposition of the effect of the forum selection clause in the Subscription Agreement does not resolve the Foreign Defendants' jurisdictional objections. The question is whether the Court should go further at this point and reach the merits of the Liquidators' claims. On the one hand, the Defendants in the 305 adversary proceedings collectively challenge the Liquidators' claims, and the factual disputes relating to the issues of personal jurisdiction will take time to develop. On the other hand, I cannot conclude on the state of this record that I indisputably have personal jurisdiction over at least one defendant in each of the 305 adversary proceedings, and it may be that I have no personal jurisdiction over any of the Defendants in some of the adversary proceedings.

Before going any further and reaching the merits of the Liquidators' claims, the Court will hear from the parties regarding the appropriate way to proceed. Upon further analysis, I may indisputably have personal jurisdiction over at least one defendant in every adversary proceeding. If not, it may make sense to carve out the cases where at least one defendant is indisputably subject to the Court's jurisdiction, and limit the decision on the motions to those cases. A more efficient procedure may be the agreement by the Foreign Defendants to be bound by the Court's determination of the motions, without otherwise waiving any objections to personal jurisdiction. The parties may have other ideas or suggestions.

Accordingly, the parties are directed to contact chambers to schedule a hearing at which to consider the appropriate way to proceed.

So ordered.

All Citations

Slip Copy, 2018 WL 3756343

In re National Bank of Anguilla (Private Banking Trust) Ltd., 580 B.R. 64 (2018)

580 B.R. 64

United States Bankruptcy Court, S.D. New York.

IN RE: NATIONAL BANK OF ANGUILLA (PRIVATE BANKING TRUST) LTD., Debtor.

National Bank of Anguilla (Private Banking Trust) Ltd., Plaintiff,

National Bank of Anguilla, National
Commercial Bank of Anguilla and Eastern
Caribbean Central Bank, Defendants.
In re: Caribbean Commercial
Investment Bank Ltd., Debtor.
Caribbean Commercial
Investment Bank Ltd., Plaintiff,

Caribbean Commercial Bank (Anguilla) Ltd., National Commercial Bank of Anguilla Ltd., and Eastern Caribbean Central Bank, Defendants,

Case No. 16–11806 (MG)

| Adv. Pro. Case No. 16–01279 (MG)

| Case No. 16–13311 (SMB)

| Adv. Pro. Case No. 17–01058 (SMB)

| Signed January 29, 2018

Synopsis

Background: Foreign representative in two separate Chapter 15 cases, one for each of two Anguilla offshore banks that were the subject of receivership proceedings and litigation pending in Anguilla courts, filed Chapter 11 cases after recognition of the Anguilla receivership proceedings as foreign main proceedings. Foreign representative then brought avoidance claims under federal and New York law. Defendants in both proceedings filed motions to dismiss.

Holdings: In a joint opinion, the Bankruptcy Court, Stuart M. Bernstein, J., and Martin Glenn, J., held that:

[1] adversary proceedings would be stayed based on forum non conveniens, and

[2] adversary proceedings would be stayed based on international comity.

Motions granted.

West Headnotes (30)

[1] Federal Courts

Forum Non Conveniens

Doctrine of forum non conveniens is a discretionary device permitting a court in rare instances to dismiss a claim even if the court is a permissible venue with proper jurisdiction over the claim.

Cases that cite this headnote

[2] Federal Courts

Discretion in general

Federal Courts

Forum non conveniens

Whether to dismiss an action on forum non conveniens grounds is a decision that lies wholly within the broad discretion of the court and should be reversed only if that discretion has been clearly abused.

Cases that cite this headnote

[3] Federal Courts

Convenience of parties and witnesses; location of evidence

Federal Courts

Public and private interests; balancing interests

Court may dismiss an action under forum non conveniens when considerations of convenience, fairness, and judicial economy so warrant.

Cases that cite this headnote

[4] Federal Courts

Parties' choice of forum; forum-shopping

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Federal Courts

Public and private interests; balancing interests

Federal Courts

Availability and adequacy

Courts apply a three-step process to determine whether to dismiss an action for forum non conveniens: first, the court must determine the degree of deference properly accorded to the plaintiff's choice of forum, second, after determining whether the plaintiff's choice is entitled to more or less deference, the court must determine whether an adequate alternative forum exists, and third, the court must then balance a series of factors involving the private interests of the parties in maintaining the litigation in the competing fora and any public interests at stake.

Cases that cite this headnote

[5] Federal Courts

Public and private interests; balancing interests

In considering factors bearing on forum non conveniens dismissal motion, the court is necessarily engaged in a comparison between the hardships defendant would suffer through the retention of jurisdiction and the hardships the plaintiff would suffer as the result of dismissal and the obligation to bring suit in another country.

Cases that cite this headnote

[6] Federal Courts

Presumptions and burden of proof

The law presumes that the plaintiff's choice of forum is adequate, and the defense must overcome a heavy burden to have the case dismissed on forum non conveniens grounds.

Cases that cite this headnote

[7] Federal Courts

Parties' choice of forum; forum-shopping
In determining whether to dismiss an action
for forum non conveniens, courts measure the

degree of deference owed to a plaintiff's choice of forum on a sliding scale; the more it appears that the plaintiff's choice of a United States forum was motivated by forum shopping reasons, the less deference the plaintiff's choice commands.

Cases that cite this headnote

[8] Federal Courts

Parties' choice of forum; forum-shopping

Federal Courts

Convenience of parties and witnesses; location of evidence

In determining the degree of deference to be afforded to a foreign plaintiff's choice of a United States forum, upon forum non conveniens dismissal motion, courts consider various factors to ascertain whether the plaintiff's forum choice was motivated by convenience or instead by the desire to forum shop, including: (1) the convenience of the plaintiff's residence in relation to the chosen forum, (2) the availability of witnesses or evidence to the forum district, (3) the defendant's amenability to suit in the forum district, (4) the availability of appropriate legal assistance, and (5) other reasons relating to convenience or expense.

Cases that cite this headnote

[9] Federal Courts

Parties' choice of forum; forum-shopping In determining whether to dismiss an action for forum non conveniens, circumstances indicative of forum shopping include: (1) attempts to win a tactical advantage resulting from local laws that favor the plaintiff's case, (2) the habitual generosity of juries in the United States or in the forum district, (3) the plaintiff's popularity or the defendant's unpopularity in the region, or (4) the inconvenience and expense to the defendant resulting from litigation in that forum.

Cases that cite this headnote

In re National Bank of Anguilla (Private Banking Trust) Ltd., 580 B.R. 64 (2018)

[10] Bankruptcy

Cases Ancillary to Foreign Proceedings

Adversary proceedings asserting avoidance claims brought by foreign representative of two Anguilla offshore banks that were the subject of receivership proceedings in Anguilla courts would be stayed based on forum non conveniens; choice of a New York venue was an exercise in forum shopping, as foreign representative initially sued the same defendants in Anguilla, seeking the same relief for the same wrongs in the foreign forum, although Anguillan law did not recognize certain claims for which recovery was sought, and relevant evidence was primarily located in Anguilla, not New York.

Cases that cite this headnote

[11] Federal Courts

Availability and adequacy

In determining whether to dismiss an action for forum non conveniens, an alternative forum is ordinarily adequate if (1) the defendants are amenable to service of process there and (2) the forum permits litigation of the subject matter of the dispute.

Cases that cite this headnote

[12] Federal Courts

Availability and adequacy

Availability of an adequate alternative forum, for purposes of forum non conveniens dismissal motion, does not depend on the existence of the identical cause of action in the other forum.

Cases that cite this headnote

[13] Federal Courts

Availability and adequacy

Fact that the law of the alternative forum is less favorable does not weigh against dismissal of an action for forum non conveniens.

Cases that cite this headnote

[14] Federal Courts

Availability and adequacy

To be inadequate under doctrine of forum non conveniens, the remedy offered by alternative forum must be clearly unsatisfactory, such as where the alternative forum does not permit litigation of the subject matter of the dispute.

Cases that cite this headnote

[15] Federal Courts

Public and private interests; balancing interests

In determining whether the doctrine of forum non conveniens should be applied, court should consider factors of public interest and private interests of the litigant, and balancing of the private and public interest factors must tilt heavily in favor of the alternative forum.

Cases that cite this headnote

[16] Federal Courts

Public and private interests; balancing interests

In weighing the litigants' private interests, upon forum non conveniens dismissal motion, a court should consider: (1) the relative ease of access to sources of proof, (2) availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses, (3) possibility of view of the premises, if view would be appropriate to the action, and (4) all other practical problems that make trial of a case easy, expeditious and inexpensive.

Cases that cite this headnote

[17] Federal Courts

Public and private interests; balancing interests

Under doctrine of forum non conveniens, deferring to litigation in another jurisdiction is appropriate where the litigation is intimately involved with sovereign prerogative and it is important to ascertain the meaning of another

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jurisdiction's statute from the only tribunal empowered to speak definitively.

Cases that cite this headnote

[18] Courts

Comity between courts of different countries

International Law

Public policy and comity in general

Comity, in the legal sense, is neither a matter of absolute obligation, on the one hand, nor a mere courtesy and good will, upon the other, but it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

Cases that cite this headnote

[19] Courts

Comity between courts of different countries

International Law

Public policy and comity in general

International comity refers to the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states.

Cases that cite this headnote

[20] Bankruptcy

Cases Ancillary to Foreign Proceedings While a defendant's international comity defense should be assessed from the legal sense, a court must not lose sight of the broader principles underlying the doctrine.

Cases that cite this headnote

[21] International Law

Public policy and comity in general

Even where the international comity doctrine clearly applies, it is not an imperative obligation of courts, but rather, is a discretionary rule of practice, convenience, and expediency.

Cases that cite this headnote

[22] International Law

Public policy and comity in general

Under international comity, states normally refrain from prescribing laws that govern activities connected with another state when the exercise of such jurisdiction is unreasonable.

Cases that cite this headnote

[23] Bankruptcy

Cases Ancillary to Foreign Proceedings

Applying international comity, courts have the inherent power to dismiss or stay an action based on the pendency of a related proceeding in a foreign jurisdiction.

Cases that cite this headnote

[24] Bankruptcy

Cases Ancillary to Foreign Proceedings Concerns of international comity must be balanced against the virtually unflagging obligation of the federal courts to exercise the

jurisdiction given to them.

Cases that cite this headnote

[25] Bankruptcy

Cases Ancillary to Foreign Proceedings In evaluating whether to defer to a foreign proceeding under international comity, the court's task is not to articulate a justification for the exercise of jurisdiction, but rather, to determine whether exceptional circumstances exist that justify the surrender of that jurisdiction.

Cases that cite this headnote

In re National Bank of Anguilla (Private Banking Trust) Ltd., 580 B.R. 64 (2018)

[26] Bankruptcy

Cases Ancillary to Foreign Proceedings
Adversary proceedings asserting avoidance
claims brought by foreign representative
of two Anguilla offshore banks that were
the subject of receivership proceedings in
Anguilla courts would be stayed based
on international comity, pending outcome
of initial Anguilla litigation brought by
foreign representative against the same
defendants and seeking the same relief for
the same wrongs; Anguilla litigation was filed
months before the adversary proceedings, the

Anguilla courts had personal and subject

matter jurisdiction over all of the parties,

and Anguilla courts had an interest in the equitable and orderly distribution of the

Cases that cite this headnote

debtor banks' property.

[27] Courts

Comity between courts of different countries

Federal courts generally extend comity whenever the foreign court had proper jurisdiction and enforcement does not prejudice the rights of the United States citizens or violate domestic public policy.

Cases that cite this headnote

[28] Courts

Comity between courts of different countries

In applying international comity, deference to the foreign court is appropriate so long as the foreign proceedings are procedurally fair and do not contravene the laws or public policy of the United States.

1 Cases that cite this headnote

[29] Courts

Comity between courts of different countries

For two actions to be considered parallel, for purposes of international comity, the parties in the actions need not be the same, but they must be substantially the same, litigating substantially the same issues in both actions.

Cases that cite this headnote

[30] Courts

Comity between courts of different countries

Under doctrine of international comity, the inconvenience and expense associated with parallel proceedings do not constitute prejudice justifying deference to a parallel foreign litigation.

Cases that cite this headnote

Attorneys and Law Firms

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VIEWS FROM THE BENCH, 2018

In re National Bank of Anguilla (Private Banking Trust) Ltd., 580 B.R. 64 (2018)

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MEMORANDUM OPINION AND ORDER GRANTING MOTIONS TO STAY THESE ADVERSARY PROCEEDINGS BASED ON FORUM NON CONVENIENS AND INTERNATIONAL COMITY

STUART M. BERNSTEIN and MARTIN GLENN, UNITED STATES BANKRUPTCY JUDGES

I. INTRODUCTION 1

1 Capitalized terms in the Introduction are defined below.

This joint opinion addresses common issues raised by the *Motions to Dismiss* in two separate Adversary Proceedings—one pending before Judge Bernstein and the other pending before Judge Glenn. The two Adversary Proceedings were filed in connection with two separate chapter 11 cases, one for each of two Anguilla "offshore banks" (as explained below). The two Anguilla offshore banks failed between 2013 and 2016, and each Debtor Bank is the subject of a receivership proceeding and litigations pending in the Anguilla courts. The same Foreign Representative in two separate chapter 15 cases (one for each Anguilla offshore bank) filed these chapter 11 cases after recognition of Anguilla receivership proceedings as foreign main proceedings.

The two chapter 11 cases were filed to enable the Foreign Representative to bring avoidance claims under federal and *69 New York law, as 11 U.S.C. § 1521(a)(7) does not permit federal and state law avoidance claims to be brought in a chapter 15 case, and, as freely admitted by the Debtor Banks, Anguilla law does not recognize constructive fraudulent transfer claims. The Defendants in these Adversary Proceedings, for the most part, are the same, counsel to the Plaintiffs and the Defendants are the same, and the briefs and arguments relating to the Defendants' *Motions to Dismiss* the two Adversary Proceedings are substantially the same.

Because of the common issues, arguments and counsel, we heard argument on the *Motions to Dismiss* together, and we decide the common issues together. To be clear,

however, while we reach the same resolution of the Motions, this joint Opinion reflects the separate opinion of each of us in our respective Adversary Proceeding.

The Motions to Dismiss raise difficult issues of personal jurisdiction, subject matter jurisdiction, forum non conveniens, international comity, Foreign Sovereign Immunities Act defenses, extraterritorial application of federal and New York law, and the act of state doctrine. We discuss the issues below, although we find it unnecessary, at this stage of these cases, to resolve all of them

We agree that the proper disposition of each case is a stay based on *forum non conveniens* and international comity, pending decisions of issues raised or that can be raised, and more appropriately should be raised and decided by the courts in Anguilla.

II. BACKGROUND

A. The Pleadings and Motions

National Bank of Anguilla (Private Banking & Trust) Ltd. ("PBT") filed an adversary proceeding in this Court (the "PBT Adversary Proceeding," ECF Adv. Proc. No. 16-01279 (MG))² on December 16, 2016 (ECF PBT Doc. # 1), and filed an amended complaint (the "PBT Complaint," ECF PBT Doc. # 32) on March 20, 2017 against the Eastern Caribbean Central Bank ("ECCB," or the "Central Bank"), the National Bank of Anguilla Ltd. ("NBA"), and the National Commercial Bank of Anguilla Ltd. ("NCBA," and together with ECCB and NBA, the "PBT Defendants"). On April 27 and 28, 2017, the PBT Defendants filed the pending motions to dismiss the PBT Complaint (the "ECCB Motion to Dismiss the PBT Complaint," ECF PBT Doc. # 38; the "NBA Motion to Dismiss the PBT Complaint," ECF PBT Doc. #41; and the "NCBA Motion to Dismiss the PBT Complaint," ECF PBT Doc. # 44, and collectively, the "PBT Motions to Dismiss"). The PBT Motions to Dismiss are supported by memoranda of law (the "ECCB (PBT) Memo," ECF PBT Doc. # 39; the "NBA Memo," ECF PBT Doc. # 42; and the "NCBA (PBT) Memo," ECF PBT Doc. # 45) and the declarations of William Richard Hare (the "Hare PBT Decl.," ECF PBT Doc. # 47)³ and Trevor Brathwaite (the "Brathwaite PBT Decl.," ECF PBT Doc. # 40). PBT filed memoranda of law in opposition *70 to the PBT Motions to Dismiss on May 26, 2017 (the "PBT Response

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to ECCB," ECF PBT Doc. # 51; the "PBT Response to NBA," ECF PBT Doc. # 49; and the "PBT Response to NCBA," ECF PBT Doc. # 50, and collectively, the "PBT Opposition"). The PBT Opposition is supported by the declaration of Eustella Fontaine (the "Fontaine PBT Decl.," ECF PBT Doc. # 52). The PBT Defendants filed reply briefs to the PBT Opposition (the "ECCB (PBT) Reply," ECF PBT Doc. # 57; the "NBA Reply," ECF PBT Doc. # 54; and the "NCBA (PBT) Reply," ECF PBT Doc. # 55).

- For purposes of clarity, "ECF Doc. #__" refers to the electronic docket in Adv. Proc. No. 17–01058 (SMB) (as defined below), and "ECF PBT Doc. #__" refers to the electronic docket in Adv. Proc. No. 16–01279 (MG).
- Hare submitted the *Hare PBT Declaration* on May 3, 2017, as an amended declaration of one submitted on April 28, 2017 (ECF PBT Doc. # 43), without exhibits. The only difference between the two appears to be that the original declaration was unsigned and the amended declaration was executed by Hare. As all of the exhibits were attached to the initial original, the Court will continue to refer to that version with the understanding that the failure to sign it was an oversight.

Caribbean Commercial Investment Bank Ltd. ("CCIB," and together with PBT, the "Plaintiffs," or the "Debtor Banks") filed an adversary proceeding (the "CCIB Adversary Proceeding," ECF Adv. Proc. No. 17-01058 (SMB), and together with the PBT Adversary Proceeding, the "Adversary Proceedings") by filing a complaint (the "CCIB Complaint," ECF Doc. #1, and together with the PBT Complaint, the "Complaints") on May 1, 2017 against NCBA, ECCB, and the Caribbean Commercial Bank (Anguilla) Ltd ("CCB," and together with NCBA and ECCB, the "CCIB Defendants," and together with the PBT Defendants, the "Defendants," each a "Defendant"). On July 24, 2017, the CCIB Defendants filed the pending motions to dismiss the CCIB Complaint (the "CCB Motion to Dismiss the CCIB Complaint," ECF Doc. # 12; the "ECCB Motion to Dismiss the CCIB Complaint," ECF Doc. # 18; and the "NCBA Motion to Dismiss the CCIB Complaint," ECF Doc. # 15, and collectively, the "CCIB Motions to Dismiss," and together with the PBT Motions to Dismiss, the "Motions to Dismiss," or the "Motions"). The CCIB Motions to Dismiss are supported by memoranda of law (the "CCB Memo," ECF Doc. # 13; the "ECCB (CCIB) Memo," ECF Doc. # 19; and

the "NCBA (CCIB) Memo," ECF Doc. # 16) and the declarations of William Richard Hare (the "Hare CCIB Decl.," ECF Doc. # 14) and Trevor Brathwaite (the "Brathwaite CCIB Decl.," ECF Doc. # 20). CCIB filed memoranda of law in opposition to the CCIB Motions to Dismiss (the "CCIB Response to CCB," ECF Doc. # 24; the "CCIB Response to NCBA," ECF Doc. # 25; and the "CCIB Response to ECCB," ECF Doc. # 26, and collectively, the "CCIB Opposition"). The CCIB Opposition is supported by the declaration of Eustella Fontaine (the "Fontaine CCIB Decl.," ECF Doc. # 27). The CCIB Defendants filed reply briefs to the CCIB Opposition (the "CCB Reply," ECF Doc. # 30; and the "ECCB (CCIB) Reply," ECF Doc. # 33).

On October 19, 2017, the Court entered an order (the "October 19, 2017 Order) in both Adversary Proceedings authorizing the parties to file additional memoranda of law addressing (1) whether the Bankruptcy Code abrogates sovereign immunity for ECCB over bankruptcy law avoidance claims under 548 and state law avoidance claims that can be asserted under section 544, and (2) whether any authority exists under Anguillan law in support of the contention that the Debtor Banks retained an interest in funds transferred from the Debtor Banks to the Defendants (ECF Doc. # 37; ECF PBT Doc. # 76). The Debtor Banks filed a joint supplemental memorandum in response to the order (the "Debtor Banks Joint Supplemental Memo," ECF Doc. # 42, ECF PBT Doc. #81). The Defendants also filed a joint memoranda of law (the "Defendants Joint Supplemental Memo," ECF Doc. # 39, ECF PBT Doc. # 78), and ECCB filed another supplemental brief in response to the order (the "ECCB Supplemental Memo," ECF Doc. # 40, ECF PBT Doc. #

*71 B. Factual Background

The facts surrounding these related Adversary Proceedings are taken primarily from the well-pleaded allegations in the *Complaints*. ⁴ The Court assumes the veracity of well-pleaded facts when determining whether they plausibly give rise to a claim, *Pension Benefit Guar. Corp. v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 717–18 (2d Cir. 2013) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 679, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009)), and may also consider "documents attached to the complaint as exhibits, and documents incorporated

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by reference in the complaint." *DiFolco v. MSNBC Cable L.L.C.*, 622 F.3d 104, 111 (2d Cir. 2010) (citations omitted). Additionally, where, as here, defendants move to dismiss under the doctrine of *forum non conveniens*, the Court may consider affidavits and exhibits in addition to the pleadings. *Kitaru Innovations Inc. v. Chandaria*, 698 F.Supp.2d 386, 389–90 (S.D.N.Y. 2010); *accord Picard v. Estate (Succession) of Igoin*, 525 B.R. 871, 890 (Bankr. S.D.N.Y. 2015).

Because the allegations in the CCIB Complaint and the PBT Complaint substantially overlap, the Court relies primarily on the CCIB Complaint, and references to paragraphs therein are denoted with "(¶_.)" Where necessary, the Court cites to each complaint individually.

1. The Parties

CCIB and PBT were incorporated and licensed in Anguilla under the Trust Companies and Offshore Banking Act of Anguilla, (¶ 26; PBT Compl. ¶ 22), and operated as commercial offshore banks (i.e. banks that operated within Anguilla, but served only non-Anguillan customers). As offshore banks, CCIB and PBT were authorized only to accept deposits and remit withdrawals in non-Eastern Caribbean currencies to individuals who were not residents of Anguilla. (Brathwaite CCIB Decl. ¶ 12; Braithwaite PBT Decl. ¶ 12.) Approximately 120 of PBT's depositors were located in the United States, accounting for 16% of deposits made with PBT (PBT Compl. ¶ 22), and approximately 144 of CCIB's depositors were located in the United Stated, representing 43% of CCIB's deposits. (¶ 26.)

CCIB and PBT are wholly-owned subsidiaries, respectively, of CCB and NBA (collectively, the "Parent Banks"). (¶ 27; PBT Compl. ¶ 23.) NBA, which was the largest financial institution in Anguilla (Brathwaite PBT Decl. ¶ 11) and CCB are incorporated pursuant to the laws of Anguilla as private limited liability companies (¶ 27; PBT Compl. ¶ 23). NBA, as PBT's onshore parent company, managed the administrative and banking operations of PBT pursuant to an agreement dated April 1, 2005 (the "PBT Service Agreement," Braithwaite PBT Decl., Ex. D.). (Brathwaite PBT Decl. ¶ 21.) Likewise, CCB managed the day-to-day affairs of CCIB pursuant an agreement for service dated May 2010

(the "CCIB Agreement for Service," *Braithwaite CCIB Decl.*, Ex. D.).

NCBA is a newly-formed bank created in 2016, incorporated under the laws of Anguilla, and wholly owned by the government of Anguilla. (¶¶ 28, 34; Fontaine PBT Decl. ¶ 12.) On April 22, 2016, NCBA inherited NBA's and CCB's "valuable assets" as part of a "Resolution Plan" (defined below). (PBT Compl. ¶¶ 13, 52–53.) According to William Hare, NCBA is "now the only bank providing retail and commercial banking services in Anguilla." (Hare PBT Decl. ¶ 19.)

CCB, NBA, and NCBA are regulated by ECCB. ECCB was established on October 1, 1983 under the Eastern Caribbean Central Bank Agreement Act R.S.A c. E5 *72 (Anguilla) (the "ECCB Act") as the monetary authority and regulator of the domestic banking system of the territories of participating governments—Anguilla, Antigua and Barbuda, Commonwealth of Dominica, Grenada, Montserrat, Saint Lucia, St. Kitts and Nevis, St. Vincent, and the Grenadines. (¶¶ 29, 40, 48, 66, 72.) ECCB is headquartered in St. Kitts and Nevis and was established to "maintain the stability of the Eastern Caribbean Currency and the integrity of the banking system in order to facilitate the balanced growth and development of member states." (Hare PBT Decl. ¶¶ 16-18.) ECCB's regulatory authority over the participating governments is found in Part IIA, Article 5B of the ECCB Act, which states if any of the participating territory's financial system is in danger of disruption, substantial change, injury or impairment, then [ECCB] has the express right to intervene into a financial institution of any of the participating territories by assumption and control of that institution's property provided that:

- a. the interests of depositors or creditors of a financial institution are threatened;
- b. a financial institution is likely to become unable to meet its obligations or is about to suspend or has suspended payment to its creditors or depositors; or
- c. a financial institution is not maintaining high standards or financial probity or sound business practices.

(Brathwaite PBT Decl. ¶ 9 (citing ECCB Act at Art. 5B, Part IIA).) ECCB has no regulatory authority over the Debtor Banks. (¶ 40; PBT Compl. ¶ 7.) Instead, the Debtor

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Banks are regulated by the Anguillan Financial Services Commission (the "FSC"). (¶ 59; PBT Compl. ¶ 7.)

2. The Conservatorships

The 2008 global financial crisis severely stressed the Eastern Caribbean banking sector. (*Brathwaite PBT Decl.* ¶ 10.) The effects of the crisis were especially pronounced in Anguilla, where economic activity contracted and the country continued to experience negative growth through 2012. (*Id.*) Anguillan commercial banks uniformly realized significant declines in earnings and deterioration of capital levels. (*Id.*)

In October 2011, ECCB and others began monitoring the affairs of the Parent Banks in response to questions relating to the Parent Banks' viability. (¶ 47; PBT Compl. ¶ 43.) On August 12, 2013, concerned by escalating non-performing loans, the Parent Banks' failure to meet ECCB's capital requirements, and the likely inability of the Parent Banks to meet their obligations, ECCB placed each Parent Bank into conservatorship (the "Conservatorships") pursuant to powers conferred on ECCB under the ECCB Act. (¶ 48; PBT Compl. ¶ 43.) The stated aim of the Conservatorships was to stabilize and restructure the Debtor Banks. (¶ 50: PBT Compl. ¶ 46.) To accomplish that aim, ECCB appointed Conservator Directors (as defined below) to both CCB and NBA to prepare a rescue plan, and through the Conservator Directors, restricted access to CCB and NBA deposits. (¶¶ 51, 53; PBT Compl. ¶¶ 47, 49.)

Following the implementation of the Conservatorships, ECCB removed the Parent Banks' directors and appointed Martin Dinning, Hudson Carr, Shawn Williams, and, for a short period of time, Robert Miller (each a "Conservator Director," and collectively, the "Conservator Directors") as conservators of the Parent Banks. (¶ 52; *PBT Compl.* ¶ 7.) Between August 12, 2013 and March 24, 2016 (the "Relevant Period"), the Parent Banks' affairs were conducted in accordance with instructions provided by the Conservator Directors (¶ 55; *PBT Compl.* ¶ 7), several *73 of whom were or had been employees of ECCB (¶ 55), and who operated under the control and supervision of ECCB. (¶ 52.)

On or about August 15, 2013, ECCB or Dinning, as Conservator Director acting on behalf of NBA and CCB, or Miller, Conservator Director acting on behalf of CCB, dismissed the appointed directors of PBT and CCIB. (¶ 66; PBT Compl. ¶ 62.) From August 15, 2013 until February 22, 2016, the Debtor Banks had no de jure directors and allegedly acted solely under the management control of the Conservator Directors. (¶ 69; PBT Compl. ¶ 65.) According to the Plaintiffs, the Conservator Directors presumed to act as directors of the Debtor Banks and were the sole persons causing the Debtor Banks to continue conducting regular banking business. (¶ 71; PBT Compl ¶ 67.) For example, on September 10, 2013 and October 17, 2017, some of the Debtor Banks' customers received correspondence from certain Conservator Directors advising them of operational changes at the Debtor Banks due to the takeover by ECCB, but stating that the Debtor Banks' operations would remain normal. (¶ 70; PBT Complaint ¶ 66.) The Conservator Directors also determined that funds were commingled between NBA and PBT and between CCIB and CCB, and specifically determined that some funds deposited in PBT and CCIB were transferred respectively to NBA and CCB. (Brathwaite CCIB Decl. ¶ 18; Brathwaite PBT Decl. ¶ 20.)

The Conservatorships, and ECCB and the Conservator Directors' alleged control over the Debtor Banks, continued from the Conservatorships' implementation until April 22, 2016, when the Debtor Banks were placed into receivership. (¶¶ 56–57; PBT Compl. ¶¶ 50–51; see also Fontaine PBT Decl. ¶ 9.)

3. The Transfer of Funds

The *Complaints*, in the main, allege that during the Relevant Period, the Conservator Directors assumed control of the Debtor Banks and, as *de facto* director, breached their fiduciary duties to the Debtor Banks by, among other things, "procur[ing] or permit[ing]" the payment (*i.e.*, "upstream") of each Debtor Bank's customer deposits to the respective Parent Bank's Bank of America ("BofA") accounts (collectively, the "Accounts) in New York. ⁵ More specifically, CCIB alleges that between August 12, 2013 and April 22, 2016, the Conservator Directors caused CCIB to transfer the net amount of US\$4,481,394.62 in CCIB customer deposits to CCB's BofA Account. (¶95.) In addition, on November 8, 2013, the Conservator Directors liquidated US\$8,942,000 in CCIB's Morgan Stanley investment account and

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transferred those funds to CCB. (¶ 96.) Likewise, PBT alleges that a net amount of US\$9,150,168.84 in PBT customer deposits was upstreamed to NBA in the period between August 13, 2013 and March 23, 2016. (*PBT Compl.* ¶¶ 94–97.)⁶ The transferred *74 assets are referred to collectively as the "Funds."

- The Complaints imply that the customers' deposits were initially held in accounts in the name of the Debtor Banks and subsequently transferred to accounts held in the names of the Parent Banks. giving rise to the Debtor Banks' alleged claims. However, neither PBT nor CCIB actually maintained accounts in the United States in their own names into which money could be deposited. (See ¶ 11; PBT Compl. ¶ 12.) Instead, anyone seeking to deposit U.S. dollars, directed those deposits in the first instance into accounts in the names of the Parent Banks at BofA. (Transcript of 10/26/17 H'rg ("Tr.") at 79:5-8: 85:14-21; 86:19-21.) The CCIB Complaint also alleges that CCIB had US\$8,942,000 in a Morgan Stanley Smith Barney LLC ("Morgan Stanley") investment account in its own name, and that ECCB and the Conservator Directors liquidated that account and transferred the proceeds to CCB's BofA Account. (¶
- At oral argument, counsel for the Parent Banks indicated that the transfers at issue in this case from the Debtor Banks to the Parent Banks were made in accordance with the existing service agreements. (Tr. at 41:24-42:2.)

Further, while the Debtor Banks allege that legal title to the Funds transferred to the Parent Banks when such Funds were deposited into the Accounts (¶ 76; PBT Compl. ¶ 72), the Debtor Banks contend that they maintained an equitable interest in the Funds in the Accounts because the Debtor Banks had no accounts in their own names and the Accounts, although in the Parent Banks' names, were also used as the Debtor Banks' operating accounts. (¶ 76; PBT Compl. ¶ 72.) According to the Debtor Banks, the Parent Banks "knowingly made no provision for repaying" the Debtor Banks and "did not provide any reasonably equivalent value or fair consideration for the Funds." (¶ 76; PBT Compl. ¶ 72.) The Debtor Banks contend that the Funds along with millions of other dollars were subsequently transferred to ECCB. (See ¶¶ 97–100; PBT Complaint ¶¶ 98–100.)

In addition, the Debtor Banks contend that the Parent Banks, prior to and while under the management of the Conservator Directors, upstreamed millions of dollars to ECCB. CCB allegedly transferred to ECCB (a) US\$28,673,612.01 in the two years prior to CCIB's chapter 15 petition, (b) US\$67,198,261.96 in the three years prior to CCIB's chapter 15 petition, (c) US \$70,023,261.96 during the Conservatorship of CCB, and (d) US\$87,933,896.76 during the period between January 3, 2013 and April 18, 2016. (¶¶ 97-100.) Likewise, PBT alleges that NBA transferred to ECCB the net amount of (a) US\$12,120,348.30 in the two years prior to PBT's chapter 15 petition, (b) US\$11,872,446.40 during the Conservatorship of NBA, and (c) US\$27,572,446.40 in the period between January 2, 2013 and April 11, 2016, without receiving reasonably equivalent value or fair consideration in exchange. (PBT Compl. ¶¶ 98–100.)

The Plaintiffs argue that the upstreaming of the Debtor Banks' customers' deposits provided liquidity to the Parent Banks during times when the Parent Banks were insolvent on a balance sheet basis. (¶¶ 77, 80; PBT Compl. ¶¶ 74, 77.) However, the upstreaming rendered the Debtor Banks insolvent and unable to pay their depositors during the Relevant Period. (¶¶ 81–89; PBT Compl. ¶¶ 79–86.) The Debtor Banks' contemporaneous audited and unaudited financial statements showed that they were insolvent during the Relevant Period. (¶¶ 85–88; PBT Compl. ¶¶ 83–85.)

In addition, the Debtor Banks' customers were assured that any new funds deposited with the Debtor Banks after August 12, 2013 would be available for withdrawal. (¶ 91; *PBT Compl* ¶ 88.) But despite those assurances, on or around September 2, 2013, the Conservator Directors placed restrictions on the Debtor Banks' customers' ability to make withdrawals. (¶ 83; *PBT Compl*. ¶ 81.) ⁷

After his appointment, the Administrator (as defined below) sought written confirmation from ECCB and the Conservator Directors that this assurance would be honored, (¶ 92; *PBT Compl.* ¶ 90), but did not receive it despite numerous correspondence and calls among the parties. (¶ 92(a)–(y); *PBT Compl.* ¶ 90(a)–(y).)

4. The Resolution Plan of 2016

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ECCB ultimately developed a plan in 2016 to resolve the Parent Banks' financial problems (the "Resolution Plan"). The fairness of the Resolution Plan is currently the subject of a judicial proceeding pending in Anguilla, and that proceeding is discussed in greater detail below. On April 22, 2016, ECCB appointed a receiver of *75 both Parent Banks (the "Receiver"), and the Parent Banks ceased banking operations in Anguilla. (¶ 56; PBT Compl. ¶ 52.) On that same day, the Parent Banks transferred to NCBA their banking operations, including the Funds in accounts held by the Parent Banks at BofA and which are the subject of this litigation. (¶¶ 56–57; PBT Compl. ¶¶ 52– 53.) NCBA then transferred the Funds from the Accounts, in the name of the Parent Banks at BofA in New York, to another account under NCBA's control in June and July of 2016, without making any provision to repay the Debtor Banks. (¶¶ 33, 57–58; PBT Compl. ¶¶ 29, 53–54.) On July 8, 2016, the Funds held in the Account inherited by NCBA from NBA were frozen by BofA at the written request of PBT. (Hare PBT Decl. ¶ 28-29.)

As shall be seen, the Debtor Banks contend that the Funds transferred out of the Accounts to the Parent Banks and ECCB "were held in constructive trust for the Debtor" (¶ 76; PBT Compl. ¶ 73), and that the Resolution Plan unfairly discriminated against them by failing to transfer their liabilities to NCBA because, among other reasons, the Debtor Banks' depositors were non-Anguillan residents.

5. The Appointment of an Administrator of the Debtor Banks

Upon the FSC's application, the Supreme Court in the High Court of Anguilla (the "High Court") entered an order placing the operations of the Debtor Banks under administration pursuant to section 31(2)(b) of the FSC Act, R.S.A. c.F28 (the "Anguilla Administrations"). (¶ 60; PBT Compl. ¶ 56.) On February 22, 2016, the High Court appointed William Tacon of FTI Consulting as the administrator of the Debtor Banks (the "Administrator," or the "Foreign Representative"), granting the Administrator complete control of the management of the Debtor Banks. (¶ 61; PBT Compl. ¶ 57.) The High Court specifically authorized the Administrator, as an officer of the High Court, "to act in Anguilla or any foreign jurisdiction where he believes assets and property of the Offshore Banks may

be Situate[d] ... [to] commence [or] continue ... without further order of this Honorable Court any proceeding or action ... in a foreign jurisdiction for the purpose of fulfilling his duties and obligations" under the February 22, 2016 order. (¶ 62; *PBT Compl.* ¶ 58.) At the close of business on April 25, 2016, the Debtor Banks ceased accepting new deposits at the Administrator's direction. (¶ 79; *PBT Compl.* ¶ 22.)

C. Procedural Background

Several pending proceedings in the United Stated and in Anguilla are relevant to the Defendants' Motions to Dismiss. In addition to the Anguilla Administrations of the Debtor Banks pursuant to section 31(2)(b) of the FSC Act, R.S.A. c.F28, these pending proceedings include: (i) the chapter 15 and chapter 11 proceedings of the Debtor Banks before this Court (the "U.S. Proceedings"); (ii) the proceedings initiated by the Debtor Banks in Anguilla against the Parent Banks and NCBA (the "Anguilla Initial Proceedings"); (iii) the proceedings commenced by some of the Debtor Banks' depositors in Anguilla against the Conservator Directors and ECCB (the "Satay Action"); and (iv) the proceedings initiated by the Debtor Banks against ECCB and others seeking judicial review of the Defendants' conduct (the "Judicial Review," together with the Anguilla Initial Proceedings and the Satay Action, the "Anguilla Litigation").

1. The U.S. Bankruptcy Proceedings

On May 26, 2016 and October 11, 2016, pursuant to the authority granted by the Anguillan High Court, the Administrator filed chapter 15 petitions in this Court on *76 behalf of PBT (Case No. 16-11529-MG) and CCIB (Case No. 16-12844-SMB), respectively, seeking recognition of the Anguilla Administrations. By orders dated June 17, 2016 and November 15, 2016, this Court granted the petitions as to PBT (ECF Case No. 16-11529-MG) and CCIB (ECF Case No. 16-12844-SMB), respectively, thereby recognizing the Anguilla Administrations as foreign main proceedings and the Administrator as the Debtor Banks' foreign representative. At the time of the filing, the Administrator "anticipate[d] that calling for claims and subsequently admitting them to rank for dividend will take place in Anguilla as part of the Anguillan Proceeding[s] and my liquidation of [the Debtor Banks'] assets." (Declaration In re National Bank of Anguilla (Private Banking Trust) Ltd., 580 B.R. 64 (2018)

of William Tacon in Support of (I) the Verified Petition for Recognition of Foreign Proceeding and (II) Motion in Support of Verified Petition for Recognition of Foreign Proceeding and for Related Relief, dated May 26, 2016 (the "Tacon PBT Decl.," ECF Case No. 16–11529–MG Doc. # 2) ¶ 36; Declaration of William Tacon in Support of (I) the Verified Petition for Recognition of Foreign Proceeding and (II) Motion in Support of Verified Petition for Recognition of Foreign Proceeding and for Related Relief, dated Oct. 6, 2016 (ECF Case No. 16–12844–SMB Doc. # 2) ¶ 35).

PBT and CCIB subsequently filed chapter 11 petitions, respectively, on June 22, 2016 (Case No. 16-11806-MG) and October 11, 2016 (Case No. 16-13311-SMB) for the ostensible purpose of filing federal avoidance actions against the Defendants. On December 16, 2016 and May 1, 2017, PBT and CCIB filed these Adversary Proceedings. With one exception, the Complaints are identical and seek identical relief. They assert claims to (a) avoid and recover intentional or constructive fraudulent transfers under applicable provisions of the Bankruptcy Code, New York law and Anguillan law; (b) recover the avoidable transfers from NCBA and ECCB as subsequent transferees; (c) disallow claims of the Parent Banks, NCBA, and ECCB under section 502(d) of the Bankruptcy Code; and (d) impose liability against ECCB for breach of fiduciary duty, gross negligence, and aiding and abetting breach of fiduciary duty.

In addition to challenging the upstreaming of funds from the Debtor Banks to the Parent Banks and NCBA, the *CCIB Complaint* also alleges that CCIB transferred approximately US\$9 million to CCB from its Morgan Stanley account. It does not appear, however, to include this transfer in its avoidance claims which are limited to US\$4,481,394.62, the net amount upstreamed transfers effectuated through the BofA accounts. (*See CCIB Complaint*, Counts V, VIII, XI, XIV.)

2. The Anguilla Initial Proceedings

On May 6, 2016, the Debtor Banks brought suit in the High Court of Anguilla against the Parent Banks and NCBA. (See Debtor Banks' Statement of Claim, Hare CCIB Decl., Ex. B.) The Debtor Banks made the same essential allegations as in the Complaints, namely, that the Conservator Directors and ECCB breached their fiduciary duties in their capacity as de facto directors

of the Debtor Banks by transferring the Funds to the Parent Banks. More specifically, the Debtor Banks alleged that during their control, and while the Parent Banks were insolvent, the Conservator Directors "procured or permitted the payment to, respectively, NBA and CCB of all monies received by PBT and [CCIB] from depositors, and the proceeds of all assets of PBT and [CCIB] realized or collected during the Relevant Period" (id. ¶ 11), in the amounts of US \$174,959,675.75 and US \$26,983,662.05, respectively. (Id. ¶ 13.) PBT and CCIB contended *77 that the upstreamed funds "were received and held by NBA and CCB on trust for PBT and [CCIB]," remained the Debtor Banks' assets, and the Debtor Banks were entitled to the return of the funds and/or their traceable proceeds. (Id. ¶ 15, 17.) The Debtor Banks therefore sought declaratory, equitable and monetary relief aimed at restoring the wrongfully upstreamed funds and other transferred assets. (Id. at 10-11.) However, the Debtor Banks did not assert claims under the Fraudulent Dispositions Act of Anguilla (the "Fraudulent Dispositions Act") against any of the Defendants, and neither ECCB nor the Conservator Directors are parties to the Anguilla Initial Proceedings.

Because the Parent Banks were in receivership at the commencement of the Anguilla Initial Proceedings, a stay was in effect as to all legal proceedings against them under section 143(c) of the Banking Act 2015 (the "Banking Act").

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Banking Act § 143(c) provides that upon the appointment of a receiver:

All legal proceeding against the licensed financial institution or licensed financial holding company are stayed and a third party shall not exercise any right against the licensed financial institution's or licensed financial holding company's assets without the prior leave of the court unless the court directs otherwise.

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The principal reason for the dismissal was the Debtor Banks' failure to join the Conservator Directors as parties. According to the High Court, the Debtor Banks' claims "raise[d] serious questions about the source of the powers under which the conservators of the defendants (appointed by ECCB) sought to exercise the powers they are alleged to have exercised over the claimants who are offshore banks regulated by the Anguilla Financial Services Commission ["FSC"] rather than the ECCB." (Id. ¶ 93.) Although the Debtor Banks alleged that the Conservator Directors breached their fiduciary duties to them and sought a remedy against them in the form of a declaration that they had breached their fiduciary duties, the High Court noted that the Debtor Banks did not name the Conservator Directors as parties. (Id. ¶ 95.) The High Court found that "it [did] not appear ... that the claimants [could] rightfully seek or obtain a declaration against them that they acted in breach of the fiduciary duty" (id. ¶ 99(5)), and without their presence, "the claim has very poor prospects of success." (Id. ¶ 99(6); ¶¶ 107(5)–(6).) The High Court concluded that the Conservator Directors were necessary parties. (*Id.* ¶ 99.)

The High Court explained that the dismissal of the Debtor Banks' application was also justified by the Conservator Directors' possible immunity. The defendants argued that the Conservator Directors were immune from suit under Article 5F of the ECCB Act. (See id. 100.) The *78 High Court stated that Article 5F only provided immunity for acts done by the Conservator Directors in good faith and without negligence (id. 101), and explained that the Debtor Banks' Statement of Claim failed to specifically plead bad faith or negligence necessary to remove their claim from the immunity under Article 5F. (Id. 106(1).)

Article 5F of the ECCB Act provides:

The Council, or the Minister or the Bank, its directors and officers and any person appointed by the Bank under Article 5B are not subject to any action.... in respect of anything done or omitted to be done in good faith and without negligence in the performance or in connection with the performance of functions conferred on the Bank under this Part.

The defendants also argued that the Conservator Directors were employees of ECCB, and therefore immune from suit under Article 50(7)(i). ¹⁰ The High Court questioned whether Article 50(7) even covered the Conservator Directors. The immunity was not absolute, and in light of the "constitutional concept of

proportionality," the High Court had to decide whether the immunity was inapplicable because the "the reliefs being sought fall outside that section on the basis that it constitutes a civil right." (*Id.* ¶¶ 104–05.) Based on these considerations, the High Court found that these issues "do not lend themselves to the court exercising its power without giving the parties an opportunity to be heard and further detailed analysis." (*Id.* ¶ 106(2).) The Debtor Banks have appealed from the *Leave Order*. (*See Hare CCIB Decl.* ¶ 24; *Hare PBT Decl.* ¶ 24.)

Article 50(7)(i) of the ECCB Act states:

The Governor, the Deputy Governor, the appointed Directors, officers and employees of the Bank shall be immune from legal process with respect to acts performed by them in their official capacity except when the Bank waives this immunity.

3. The Satay Action

On June 28, 2016, fifty-one PBT depositors and seventeen CCIB depositors (the "Satay Claimants") brought an action in the High Court against Conservator Directors Martin Dinning, Hudson Carr, Shawn Williams, Robert Miller and ECCB (the "Satay Defendants"). (Hare PBT Decl. ¶ 32.) Their statement of claim (the "Satay Statement of Claim," Hare CCIB Decl., Ex. D) alleged the same set of facts as the Complaints and the Debtors Banks' Statement of Claim, but asserted claims belonging to the Debtor Banks' depositors rather than the Debtor Banks. In the Satay Statement of Claim, the Satay Claimants asserted that they opened bank accounts with the Debtor Banks (Satay Statement of Claim ¶ 4), and that ECCB placed the Parent Banks in conservatorship on August 12, 2013 pursuant to its emergency powers under the ECCB Act, and appointed the four individual defendants as Conservator Directors of the Parent Banks. (See id. ¶ 6.) The Satay Claimants alleged that as a result of the assumption of control over Parent Banks by the Conservator Directors, the Conservator Directors became de facto directors of the Debtor Banks and breached their duties to the Satay Claimants by, inter alia, failing to ensure the safety and security of their deposits and the Debtor Banks' property. (Id. ¶¶ 24-27.). The Satay Claimants further contended that Conservator Martin Dinning misrepresented that their deposits were safe and that they could continue to trade with their accounts. (Id. ¶ 27(h).) As a result, the Satay Claimants claimed

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that they could not access their funds deposited with the Debtor Banks (*id.* ¶ 28), and under the Resolution Plan of 2016, the assets of the Debtor Banks, including the Satay Claimants' deposits, were transferred to the newly constituted NCBA in breach of the Anguillan Constitution and the European Convention on Human Rights. (*Id.* ¶ 29.) The Satay Claimants further alleged that the Satay Defendants knowingly assisted the Government of Anguilla in depriving the *79 Satay Claimants of their money. (*Id.* ¶ 30.) The Satay Claimants sought a money judgment in the sum of US\$13,028,846.17 together with interest from August 2013 in accordance with the terms of their accounts. (*Id.* at 8.)

The Satay Defendants filed an application on August 12, 2016 seeking a declaration that the High Court lacked jurisdiction based on the Satay Defendants' statutory immunity. (See Judgment, dated Feb. 22, 2017 (the "Satay Judgment"), CCIB Compl., Ex. A ¶ 9-10.) The Satay Defendants contended that ECCB was immune from suit under Article 50(2) of the ECCB Act 11 (id. ¶ 10), and that the individual defendants were immune from suit pursuant to one or more of ECCB Act Articles 50(7), and/ or 5B(1)(vii). 12 The thrust of the individual defendants' position was that they acted under the mandate of ECCB to stabilize the Anguillan banking system, and that their actions included the management and control of the Debtor Banks. (See id. ¶¶ 11-13.) On the other hand, the Satay Claimants claimed that the defendants acted without authority in managing and controlling the Debtor Banks (see id. ¶ 14), and that they were therefore not entitled to immunity. (Id. ¶¶ 30–31.)

- 11 Article 50(2) of the ECCB Act provides:

 The Bank, its property and its assets, wherever located and by whomsoever held, shall enjoy immunity from every form of judicial process except to the extent that it expressly waives its
 - immunity from every form of judicial process except to the extent that it expressly waives its immunity for the purpose of any proceedings or by the terms of any contract.
- Article 5B(1)(vii) is part of the 1993 amendments to the ECCB Act, and is annexed to the *Braithwaite CCIB Declaration* as Exhibit B. It grants ECCB authority "to appoint such persons and to establish such companies or corporations as it considers necessary to assist in the performance of the functions conferred [under Article 5B]; and the provisions of Article 50 [e.g., immunity from suit] shall apply to such persons, companies or corporations[.]"

On February 22, 2017, the High Court issued the Satay Judgment and held that the Satay Defendants had acted ultra vires. Although ECCB could, under appropriate circumstances, exercise control over the financial institutions it regulated (e.g., the Parent Banks), the High Court found that it could only "investigate the affairs" of the affiliated financial institutions, here, the Debtor Banks. (Id. ¶¶ 33, 64, 66). The High Court found that ECCB and the individual defendants had exceeded their powers with respect to the Debtor Banks, including by hiring and laying off the Debtor Banks' officers and employees and replacing them with the Conservator Directors, and by sending letters to the Debtor Banks' depositors regarding the restrictions on their withdrawals and the revisions of the interest rates on their deposits. (Id. ¶¶ 61–62.).

Since the Satay Defendants did not possess the authority to act as they did with respect to the Debtor Banks, the High Court concluded that immunity under Article 50 did not apply. (Id. ¶ 67) The High Court further found that the applicability of Article 5F, which immunizes acts taken in good faith and without negligence, could only be determined "after a full ventilation of the facts of the case." (Id. ¶ 69.) The Satay Defendants' jurisdictional objection was therefore "refused," and they were directed to serve their defense. (Id. ¶ 70.) The Satay Judgment did not address whether the Parent Banks could have lawfully taken the challenged actions in their capacities as sole shareholders of the Debtor Banks. (Hare CCIB Decl. ¶ 31; Hare PBT Decl. ¶ 35.) ECCB and the Conservator Directors applied for leave to appeal from the Satay Judgment, and their *80 application was granted on April 11, 2017. (Hare CCIB Decl. ¶ 29; Hare PBT Decl. ¶ 33.) The appeal is pending.

4. Application for Judicial Review

On March 10, 2017, the Debtor Banks filed an application for leave to apply for judicial review (the "Judicial Review Application," Brathwaite CCIB Decl., Ex. F) against the Chief Minister of Anguilla, the Attorney General of Anguilla in his official capacity as a legal representative of the Government of Anguilla, Gary Moving, the receiver of the Parent Banks and ECCB. The Judicial Review Application alleged that as part of the Resolution Plan, in or around April 2016, ECCB and the Receiver agreed to transfer certain of the Parent Banks' liabilities (including

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their liabilities for deposits up to EC\$2.8 million) and an equal amount of assets to NCBA. (*Id.* ¶¶ 10(2)(i)–(ii).) At around the same time, the House of Assembly in Anguilla granted the Government of Anguilla money to fund two trusts (the "Trusts") to protect the Parent Banks' large depositors, defined as those depositors whose deposits exceeded EC\$4 million. (*Id.* ¶ 10(2)(iii).) The intention was to fulfill the policy under which NCBA would assume the Parent Banks' liability to their depositors up to EC\$2.8 million while the balance of the deposits would be protected by the Trusts, thereby fully protecting the Parent Banks' depositors. (*Id.* ¶¶ 11–12.)

The Judicial Review Application claimed, in substance, that the respondents unfairly discriminated against the Debtor Banks by guarantying repayment of deposits of all onshore depositors but not of offshore depositors, who are non-residents of Anguilla. More specifically, the Judicial Review Application alleged that based on the upstreaming of the funds, the Debtor Banks were depositors of the Parent Banks (id. ¶ 14), and that, accordingly, the Debtor Banks should have received similar protection for their deposits. Nevertheless, the liability for the Debtor Banks' deposits was not transferred to NCBA, and the Debtor Banks were excluded from eligibility for payments from the Trust. (Id. ¶¶ 15-24.) As a result, and through the Judicial Review Application, the Debtor Banks sought judicial review of various actions and decisions (collectively, the "Decisions") that resulted in this alleged discriminatory treatment (see id. 32-34), the cumulative effect of which excluded the Debtor Banks' deposits from the protection up to EC\$2.8 million per deposit and eligibility for protection under the Trusts. (Id. ¶ 35.) Among other things, the Debtor Banks argued that the respondents had discriminated against similarly situated creditors of the Parent Banks notwithstanding contrary expectations based on ECCB's promises and assurances to the Debtor Banks that it would protect their deposits. The Debtor Banks also claimed that the defendants mistakenly considered the legally irrelevant fact that the Debtor Banks' depositors were non-Anguillan residents, and that they ignored the fact that the Debtor Banks, as depositors of the Parent Banks, were domestic depositors." (Id. ¶¶ 37– 74.) The Debtor Banks therefore sought (1) a declaration that the Decisions were unlawful, and orders quashing the Decisions; (2) a declaration that ECCB and the Chief Minister must effect the transfer of the liability for the Debtor Banks' deposits in the sum of EC\$2.8 million per deposit to NCBA; and (3) a declaration that the Debtor

Banks' deposits with the Parent Banks must receive the same treatment and protections under the Trusts from the Chief Minister and the Receiver as the Parent Banks' other, similarly situated, depositors. (*Id.* ¶ 87–91.)

The Debtor Banks expressly requested ECCB's consent for a stay of the Judicial Review Application until the final determination *81 of these Adversary Proceedings and the U.S. Proceedings, but consent was not granted. (Fontaine PBT Decl. ¶ 35; Fontaine CCIB Decl. ¶ 34.) On May 25, 2017, the High Court dismissed ECCB's and the Receiver's application for an adjournment and ordered that they provide reasons for their opposition to a stay of the Judicial Review Application. (Fontaine PBT Decl. ¶ 35; Fontaine CCIB Decl. ¶ 34.) The Attorney General, representing himself and the Government of Anguilla, did not oppose the stay of the Judicial Review. (Fontaine PBT Decl. ¶ 35; Fontaine CCIB Decl. ¶ 34.) On June 14, 2017, the High Court stayed the Judicial Review (Hare CCIB Decl., Ex. E), until the earlier of either a "final determination" in these Adversary Proceedings or a final settlement agreement between the parties to these Adversary Proceedings.

D. The Motions to Dismiss

The Defendants seek to dismiss the Adversary Proceedings on several grounds. Some of the grounds for dismissal are asserted by all Defendants, while others are asserted independently by some Defendants only.

- 1. Dismissal Sought by All Defendants
 Under Forum Non Conveniens ¹³
- For the Defendants' Motions to Dismiss, see ECCB (PBT) Memo at 25-31; NBA Memo at 11-19; NCBA (PBT) Memo at 9-10; CCB Memo at 13-22; ECCB (CCIB) Memo at 25-31; NCBA (CCIB) Memo at 8. For the Plaintiffs' responses, see PBT Resp. to ECCB at 21-32; PBT Resp. to NBA at 31; PBT Resp. to NCBA at 10; CCIB Resp. to ECCB at 24-35; CCIB Resp. to CCB at 31; CCIB Resp. to NCBA at 9.

Each of the Defendants asserts that these Adversary Proceedings should be dismissed on grounds of *forum non conveniens* because, *inter alia*, the parties are Anguillan entities and Anguilla is the most convenient forum for the Plaintiffs' claims. The Defendants argue that the Debtor Banks are merely forum shopping by filing their

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claims in this Court in order to avoid constructive fraudulent transfers under the Bankruptcy Code, a claim not recognized under Anguillan law. In response, the Plaintiffs argue that dismissal is not warranted given, among other things, that many of the transfers at issue occurred in New York and the Anguillan High Court authorized the Plaintiffs to commence actions in foreign jurisdictions and recently issued a stay on the *Judicial Review Application* pending the outcome of the Adversary Proceedings. In addition, the Plaintiffs urge denial of the motion to dismiss precisely because Anguillan law does not recognize a claim based on a constructive fraudulent transfer.

- 2. Dismissal Sought by ECCB Under the Foreign Sovereign Immunities Act and for Lack of Personal Jurisdiction ¹⁴
- For ECCB's Motions to Dismiss, see ECCB (PBT) Memo at 19–25; ECCB (CCIB) Memo at 13–19. For the Plaintiffs' responses, see PBT Resp. to ECCB at 9–17; CCIB Resp. to ECCB at 10–20.

ECCB contends that it is immune from suit in the United States under the Foreign Sovereign Immunities Act (the "FSIA") because it is a foreign agency or instrumentality and the commercial activity exception to the FSIA does not apply. In response, the Plaintiffs allege that ECCB's activities with respect to the Debtor Banks were nothing more than ordinary banking commercial activities under the FSIA, which occurred or had a direct effect in the United States given, among other things, the transfers to and from a United States bank account and the presence of numerous injured depositors in the United States.

*82 ECCB further asserts that the Court lacks personal jurisdiction over it because the Debtor Banks have not satisfied their burden to show that ECCB has "minimum contacts" with New York. ECCB argues that the Plaintiffs have shown neither general nor specific jurisdiction because its limited involvement in the transfers to New York do not satisfy the required burden. In response, the Debtor Banks contend that minimum contacts need not be established once jurisdiction under the FSIA and proper service have been established, but that, in any event, ECCB has numerous specific contacts with New York and with the United States generally.

- Dismissal Sought by NCBA, NBA and CCB Under International Comity, Non–Extraterritoriality of the Provisions of Bankruptcy Code, the Act of State Doctrine, and for Failure to State a Claim under Sections 550 and 502(d) of the Bankruptcy Code 15
- 15 For NCBA, NBA and CCB's Motions to Dismiss, see NBA Memo at 19–27; NCBA (PBT) Memo at 9–10, 14, 18–20, 23–24; CCB Memo at 22–29; NCBA (CCIB) Memo at 8, 11–13, 16–17. For the Plaintiffs' responses, see PBT Resp. to NBA at 13–32; PBT Resp. to NCBA at 5–6, 9–11; CCIB Resp. to CCB at 13–22, 27–32; CCIB Resp. to NCBA at 5–10.

NCBA, NBA and CCB alternatively contend that concerns of international comity warrant staying the Adversary Proceedings pending the outcome of the proceedings in Anguilla. The Debtor Banks assert that a stay should not be granted because, among other things, the High Court has stayed the *Judicial Review Application* pending the outcome of these Adversary Proceedings.

NCBA, NBA and CCB further argue that the transfers that the Debtor Banks seek to avoid and recover under provisions of the Bankruptcy Code and the New York Debtor Creditor Law (the "NYDCL") are foreign, rather than domestic transfers. Because the avoidance provisions of the Bankruptcy Code and the NYDCL allegedly do not apply extraterritorially, the Plaintiffs cannot seek to avoid the foreign transfers under these provisions.

In response, the Plaintiffs assert that the focus of the Congressional concern, to which a court must look in determining whether application of a statute is extraterritorial, with regards to the avoidance and recovery provisions of the Bankruptcy Code, is on the initial transfers that deplete the bankruptcy estate, and not on the recipient of the transfers. The Plaintiffs thus assert that the focus should be on where the transfers occurred and whether, as here, title transferred in the United States. Since, as the Plaintiffs argue, the transfers are domestic, the Adversary Proceedings should not be dismissed. But the Plaintiffs further contend that should the Court find that the transfers were foreign, Congress has shown a clear intent that the Bankruptcy Code's avoidance powers apply extraterritorially, and that similar public policy reasons favor applying the provisions of the NYDCL extraterritorially. Accordingly, the Plaintiffs contend that the provisions should apply to the contested transfers.

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NCBA, NBA and CCB also assert that this Court cannot reach the merits of this case because the act of state doctrine precludes the Court from adjudicating a case based on allegations that a foreign banking regulator (*i.e.*, ECCB) violated its own laws in its own territory. The Plaintiffs, on the other hand, contend that the challenged actions occurred in the United States and are commercial in nature, and are not subject to the act of state defense.

NBA, CCB and NCBA further contend that the Plaintiffs' claims under section 550 of the Bankruptcy Code fail because there is no viable avoidance claim in these cases *83 as a basis for recovery under that section, and the disallowance claim under section 502(d) is premature because they have not filed claims that could be disallowed

In response, the Debtor Banks argue that their section 550 claims are proper because they have stated legally sufficient avoidance claims, and the section 502(d) claim is not premature because the bar date for filing claims has not passed. Indeed, it has not even been set.

4. Dismissal Sought by NCBA for Failure to State Claims for Relief Under Sections 548 and 544 of the Bankruptcy Code ¹⁶

For NCBA's Motions to Dismiss, see NCBA (PBT) Memo at 10–18; NCBA (CCIB) Memo at 8–13. For the Plaintiffs' responses, see, PBT Resp. to NCBA at 6–8; CCIB Resp. to NCBA at 6–8.

NCBA contends that the Plaintiffs fail to state claims for relief under sections 548 and 544 of the Bankruptcy Code and the NYDCL because (i) the Plaintiffs fail to allege with sufficient detail pre-petition transfers from the parent defendant (i.e., NBA and CCB, respectively) to NCBA on April 22, 2016, including their amount, and the specific funds and assets at issue; and (ii) the Plaintiffs' allege that they retained their equitable interests in the Funds both before and after the alleged transfers, and hence, fail to allege a transfer of an interest in their property. The Plaintiffs counter that they have pled the requisite details for the fraudulent transfer claims, and given the broad definition of "transfer," a transfer of the Debtor Banks' legal title in the Funds occurred when the funds were deposited into the Parent Banks' BofA accounts.

Because we conclude that these Adversary Proceedings should be stayed based on *forum non conveniens* and international comity, we decline to decide any other issues raised by the *Motions to Dismiss. See Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 425, 127 S.Ct. 1184, 167 L.Ed.2d 15 (2007) (concluding that a court may dismiss an action based on *forum non conveniens* without first deciding other threshold objections such as subject matter jurisdiction or personal jurisdiction). If these cases return here after decisions by the courts in Anguilla, those remaining arguments can be dealt with then.

III. DISCUSSION

A. These Cases Should Be Stayed Based on Forum Non Conveniens

All of the Defendants in these Adversary Proceedings move to dismiss or stay these cases based on forum non conveniens. The Plaintiffs and all of the Defendants are citizens of or domiciled in Anguilla. There is litigation pending in the courts of Anguilla between all of these parties, and, indeed, the Anguilla Initial Proceedings and the Satay Action were pending before these Adversary Proceedings were filed in New York. No one disputes that the Anguilla High Court has personal and subject matter jurisdiction over the parties. One might be inclined to ask the obvious question-why did the Plaintiffs file these cases here if all of the foregoing is true? The obvious answer is that the Plaintiffs believe that certain causes of action can be asserted here that cannot be asserted in Anguilla-specifically, the constructive fraudulent transfer claims under federal and New York law that, according to the Plaintiffs, have no counterpart and cannot be asserted under Anguilla law. The Plaintiffs' counsel nevertheless acknowledged that the remedy that the Plaintiffs seek in these cases is available through their breach of fiduciary duty and actual fraudulent transfer causes of *84 action, already pending in Anguilla. (Tr. at 107:14-24.) Assuming that the Plaintiffs' Complaints have properly stated causes of action for constructive fraudulent transfers (or, could be amended to do so), does that require that the forum non conveniens motions should be denied? The Court concludes below that the availability here of causes of action that are not available in Anguilla does not require denial of the Motions to Dismiss, but that a stay of these Adversary Proceedings rather than In re National Bank of Anguilla (Private Banking Trust) Ltd., 580 B.R. 64 (2018)

dismissal is appropriate. Depending on the disposition of the cases in Anguilla, it may be appropriate for the Plaintiffs to return to this Court to seek resolution of any of the claims in the *Complaints* that are not resolved by the Anguilla courts, are not precluded by recognition and enforcement of judgments in Anguilla, and are not subject to dismissal for the additional reasons urged by the Defendants in the *Motions to Dismiss* before the Court.

1. Legal Principles of Forum Non Conveniens

[1] [2] [3] The doctrine of forum non conveniens "is a discretionary device permitting a court in rare instances to dismiss a claim even if the court is a permissible venue with proper jurisdiction over the claim." Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 100 (2d Cir. 2000) (internal citation and quotation marks omitted). Whether to dismiss an action on forum non conveniens grounds is a decision that "'lies wholly within the broad discretion of the [] court' and should be reversed only if 'that discretion has been clearly abused.' " Peregrine Myanmar Ltd. v. Segal, 89 F.3d 41, 46 (2d Cir. 1996) (quoting Scottish Air Int'l, Inc. v. British Caledonian Grp., PLC, 81 F.3d 1224, 1232 (2d Cir. 1996)). A court may dismiss an action under forum non conveniens "when considerations of convenience, fairness, and judicial economy so warrant." Magi XXI, Inc. v. Sato della Citta del Vaticano, 714 F.3d 714, 720 n.6 (2d Cir. 2013) (citation omitted).

[6] In the Second Circuit, courts apply three-step process to determine whether to dismiss an action for forum non conveniens. Iragorri v. United Techs. Corp., 274 F.3d 65, 73-74 (2d Cir. 2001). First, the court must "determine[] the degree of deference properly accorded [to] the plaintiff's choice of forum." Norex Petroleum Ltd. v. Access Indus., Inc., 416 F.3d 146, 153 (2d Cir. 2005) (citing Iragorri, 274 F.3d at 73). Second, "after determining whether the plaintiff's choice is entitled to more or less deference," the court must determine "whether an adequate alternative forum exists." Iragorri, 274 F.3d at 73. Third, the court must "then balance a series of factors involving the private interests of the parties in maintaining the litigation in the competing fora and any public interests at stake." Wiwa, 226 F.3d at 100 (citing Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508-09, 67 S.Ct. 839, 91 L.Ed. 1055 (1947)). "In considering these factors, the court is necessarily engaged in a comparison between the hardships defendant

would suffer through the retention of jurisdiction and the hardships the plaintiff would suffer as the result of dismissal and the obligation to bring suit in another country." Iragorri, 274 F.3d at 74. The law presumes that the plaintiff's choice of forum is adequate, and the defense must overcome a "heavy burden" to have the case dismissed on forum non conveniens grounds. Sinochem, 549 U.S. at 430, 127 S.Ct. 1184; Wiwa, 226 F.3d at 100; see also Gilbert, 330 U.S. at 508, 67 S.Ct. 839 (stating that "unless the balance [of the factors] is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed"); Iragorri, 274 F.3d at 74-75 (explaining that "[a] defendant does not carry the day simply by showing the existence of an adequate alternative forum. *85 The action should be dismissed only if the chosen forum is shown to be genuinely inconvenient and the selected forum significantly preferable"). For the reasons discussed below, the Court concludes that the factors cited by the Iragorri court strongly favor staying these Adversary Proceedings on grounds of forum non conveniens.

2. Degree of Deference to the Plaintiff's Choice of Forum

[7] Courts measure the degree of deference owed to a plaintiff's choice of forum on a sliding scale; the more it appears that the plaintiff's choice of a United States forum was motivated by forum shopping reasons, the less deference the plaintiff's choice commands, see a In re Arbitration between Monegasque De Reassurances S.A.M. v. Nak Naftogaz of Ukraine, 311 F.3d 488, 498 (2d Cir. 2002); Iragorri, 274 F.3d at 71, because "it 'is much less reasonable' to presume that the choice was made for convenience." Iragorri, 274 F.3d at 71 (quoting Piper Aircraft Co. v. Reyno, 454 U.S. 235, 256, 102 S.Ct. 252, 70 L.Ed.2d 419 (1981)); see also Monegasque De Reassurances, 311 F.3d at 498 (holding that "[a] domestic petitioner's choice of its home forum receives great deference, while a foreign petitioner's choice of a United States forum receives less deference"). "In such circumstances, a plausible likelihood exists that the selection was made for forum-shopping reasons" Iragorri, 274 F.3d at 71. Even if forum shopping reasons did not inform the foreign plaintiff's decision to file an action in a U.S. court, "there is nonetheless little reason to assume that it is convenient for a foreign plaintiff." Id.

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afforded to a foreign plaintiff's choice of a United States forum, courts consider various factors to ascertain whether the plaintiff's forum choice was motivated by convenience or instead by the desire to forum shop. See Norex, 416 F.3d at 155 (citing Iragorri, 274 F.3d at 72). These include "[1] the convenience of the plaintiff's residence in relation to the chosen forum, [2] the availability of witnesses or evidence to the forum district, [3] the defendant's amenability to suit in the forum district, [4] the availability of appropriate legal assistance, and [5] other reasons relating to convenience or expense." Iragorri, 274 F.3d at 72. Circumstances indicative of forum shopping include "[1] attempts to win a tactical advantage resulting from local laws that favor the plaintiff's case, [2] the habitual generosity of juries in the United States or in the forum district, [3] the plaintiff's popularity or the defendant's unpopularity in the region, or [4] the inconvenience and expense to the defendant resulting from litigation in that forum...." Id.

[10] Here, the Plaintiffs' choice of forum was not motivated by convenience. The Debtor Banks were incorporated in Anguilla, do not operate in the United States (other than having accepted U.S. dollar deposits that were deposited in the Parent Banks' New York bank accounts), and their Administrator, Mr. Tacon resides in England. (Tacon PBT Decl. ¶ 4.) The Conservator Directors, the key witnesses in these cases, reside in Anguilla, the Eastern Caribbean or London, (Tr. at 56:12-20), and aside from banking documents in New York, access to which does not appear to present any difficulties even if the suits were pursued in Anguilla, all of the evidence and witnesses for these cases are located in the Eastern Caribbean or elsewhere, but not in the United States. Finally, the Defendants are amenable to suit in Anguilla—the Plaintiffs had already sued the Defendants in Anguilla as part of the Anguilla Initial Proceedings before they commenced these Adversary Proceedings, *86 and the all parties are represented by legal counsel

Instead, the choice of a New York venue was an exercise in forum shopping. Despite the Plaintiffs' arguments that this forum is convenient and their lawsuits have New York connections, they initially sued these same defendants in Anguilla to impress a trust, and ultimately, recover the same Funds. The Plaintiffs commenced the Adversary Proceedings only after the Anguillan High

[9] In determining the degree of deference to be Court issued the Leave Order, stymying their efforts to recover on substantially similar claims. The High Court refused to lift the stay to allow the Plaintiffs to proceed against the Parent Banks based on the Plaintiffs' failure to join the Conservator Directors, and the Plaintiffs then commenced these Adversary Proceedings in this venue rather than join the Conservator Directors in the Anguilla Initial Proceedings. Even giving the Plaintiffs the benefit of the doubt, they freely admit that they are pursuing these Adversary Proceedings because "Anguillan law does not recognize certain claims for which recovery is sought." (PBT Resp. to ECCB at 26.) Accordingly, the Plaintiffs' selection of New York as a forum is not entitled to any deference.

> The Plaintiffs' Opposition authority is distinguishable. In Skanga Energy & Marine Ltd. v. Arevenca S.A., 875 F.Supp.2d 264, 267 (S.D.N.Y. 2012), aff'd, 522 Fed.Appx. 88 (2d Cir. 2013) (summary order), the plaintiff, a Nigerian company, agreed to buy oil from the defendants, state-owned Venezuelan entities. Their agreement provided that all payments would be made in U.S. dollars to the seller's agent's bank account in New York. Id. After the plaintiff made the payments but did not receive the oil, it sued in New York federal court for a refund. Id. at 267-68. The defendants moved to dismiss, inter alia, based on forum non conveniens. The district court concluded that the plaintiff's choice of forum was entitled to considerable (but not maximum) deference. Id. at 273. The transaction had a bona fide connection to New York based on the transfer of millions of dollars to a New York bank account where it "disappeared down the rabbit hole in New York, and Skanga wishes to follow it." In addition, the plaintiff would likely have to seek discovery from the seller's New York banks and its United States operations. Id.

> In these Adversary Proceedings, while the Complaints refer to transactions between the Debtor Banks and the Defendants that have connections to New York and the United States, these connections do not overcome the Court's conclusion that the Plaintiffs' choice of a New York forum is not entitled to deference. At bottom, the New York venue was the Plaintiffs' second choice, not their first, and unlike in Skanga, the Plaintiffs were already seeking the same relief for the same wrongs in the foreign forum. In addition, and as discussed below, the Plaintiffs' detailed pleadings indicate that they know the path taken

by the Funds, and the relevant evidence is primarily located in Anguilla, not New York.

3. Existence of an Adequate Alternative Forum

[11] [12] [13] [14] "An alternative forum is ordinari adequate if (1) the defendants are amenable to service of process there and (2) the forum permits litigation of the subject matter of the dispute." Monegasque De Reassurances, 311 F.3d at 499 (citation omitted). "[T]he availability of an adequate alternative forum does not depend on the existence of the identical cause of action in the other forum." Capital Currency Exchange, N.V. v. Nat'l Westminster Bank PLC, 155 F.3d 603, 610 (2d Cir. 1998). Furthermore, the fact that the law of the alternative forum is less favorable does not *87 weigh against dismissal. Piper, 454 U.S. at 255 n.22, 102 S.Ct. 252; Cortec Corp. v. Erste Bank Ber Oesterreichischen Sparkassen AG (In re Erste Bank), 535 F.Supp.2d 403, 411-12 (S.D.N.Y. 2008) (holding that Croatian commercial law controlled and that plaintiffs' concerns that Croatia did not recognize tortious interference with business claims did not render Croatia an inadequate alternative forum); LaSala v. Bank of Cyprus Pub. Co., 510 F.Supp.2d 246, 255-56 (S.D.N.Y. 2007) (finding Cyprus to be an adequate alternate forum although claims for aiding and abetting a breach of fiduciary duty and breach of implied duty of good faith and fair dealing are not recognized by Cypriot courts); Fustok v. Banque Populaire Suisse, 546 F.Supp. 506, 514 (S.D.N.Y. 1982) ("Apart from precedent, there is a strong policy reason for rejecting plaintiff's argument that forum non conveniens does not apply whenever a plaintiff alleges a federal cause of action. If such were the rule, a plaintiff, by the simple device of alleging even a colorable federal claim, could effectively prevent consideration by the court of a forum non conveniens dismissal no matter how inconvenient plaintiff's chosen forum and regardless of how burdensome such litigation would be upon our courts and citizens. Such a per se rule would conflict with the hallmarks of the forum non conveniens doctrine-namely, its flexibility and the wide discretion which it invests in the trial judge"). To be inadequate, the remedy offered must be clearly unsatisfactory, such as where the alternative forum does not permit litigation of the subject matter of the dispute. Piper, 454 U.S. at 255 n.22, 102 S.Ct. 252.

Here, Anguilla is an adequate alternate forum. First, the parties do not contest, and this Court has previously found, that the Anguillan courts are competent to adjudicate disputes. See In re HBLS, L.P., 468 B.R. 634, 640 (Bankr. S.D.N.Y. 2012) (explaining that "the courts of Anguilla are available and competent to adjudicate these vissues. There is no need for this Court to inject itself into proceedings that have already been or can be handled in Anguilla"). Further, the Plaintiffs initially sued the Parent Banks and NCBA in Anguilla in connection with the subject matter of this dispute, and cannot, therefore, contend that the Anguillan forum is inadequate. Saud v. PIA Invs. Ltd., No. 07 Civ. 5603(NRB), 2007 WL 4457441, at *3 (S.D.N.Y. Dec. 14, 2007) ("Having already commenced a lawsuit against PIA regarding the same subject matter in the High Court of Justice of the British Virgin Islands ... plaintiff cannot suggest that the British Virgin Islands courts lack general competency") While it is true that ECCB had not been sued by the Plaintiffs in Anguilla before the filing of the PBT Adversary Proceeding on December 16, 2016, the Plaintiffs sought leave to do so on March 10, 2017 by filing the Judicial Review Application in Anguilla. By the time the CCIB Adversary Proceeding was filed on May 1, 2017, the Plaintiffs had brought suit against all of the Defendants in Anguilla, and thus, can hardly contend that the Anguillan forum is inadequate.

Second, although Anguillan law does not recognize a claim to avoid and recover a constructive fraudulent transfer, this does not render the Anguillan forum inadequate. Piper, 454 U.S. at 247, 102 S.Ct. 252 (explaining that "[t]he Court of Appeals erred in holding that plaintiffs may defeat a motion to dismiss on the ground of forum non conveniens merely by showing that the substantive law that would be applied in the alternative forum is less favorable to the plaintiffs than that of the present forum. The possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the forum non conveniens inquiry.") *88 Moreover, the Anguillan Fraudulent Dispositions Act does provide a remedy to avoid and recover intentional fraudulent transfers, 17 and the Plaintiffs can prove their cases, they will be able to recover the same remedy as if they proceeded under the Bankruptcy Code.

A copy of the Fraudulent Dispositions Act is annexed as part of Exhibit A to the *Hare CCIB Declaration*. By its terms, it applies extraterritorially

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to "every disposition of property ... whether or not the property, the subject of the disposition, is situated in Anguilla or elsewhere." (Fraudulent Dispositions Act § 2.) Thus, it would reach transfers of property within New York.

Third, other causes of action asserted by the Plaintiffs in the Anguillan Initial Proceedings also provide the same remedy that the Plaintiffs are seeking in this Court—the recovery of the upstreamed funds and transferred property. While the Plaintiffs have not asserted in Anguilla, as they have in these Adversary Proceedings, that ECCB breached its fiduciary duties to the Debtor Banks, was grossly negligent and aided and abetted the Conservator Directors' breach of fiduciary duties, these claims will presumably be governed by Anguillan law and can be asserted in Anguilla. ¹⁸ Therefore, Anguilla is an adequate alternate forum for the litigation of the subject matter of the dispute.

18 The Plaintiffs' splitting of their causes of action between the Anguillan High Court and this Court is perplexing. They did not assert fraudulent transfer claims in Anguilla, but asserted fraudulent transfer claims based on Anguilla's Fraudulent Dispositions Act in this Court. (See ¶¶ 173-99; PBT Compl. ¶¶ 189-216.) In addition, the Plaintiffs did not assert a claim that ECCB had breached its fiduciary duties to the Debtor Banks in any of the Anguillan proceedings, but asserted those claims as well as gross negligence and aiding and abetting breach of fiduciary duty claims in this Court, (see ¶¶ 244-70; PBT Compl. ¶¶ 262-85), despite the fact that these claims will likely be determined under Anguillan law, including under the ECCB Act.

4. The Balancing of Public and Private Factors

[15] In determining whether the doctrine of *forum non conveniens* should be applied, a court should also consider "factors of public interest" and the "private interest[s] of the litigant." *Gilbert*, 330 U.S. at 508, 67 S.Ct. 839. A balancing of the "private and public interest factors [must] tilt[] heavily in favor of the alternative forum." *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 189 (2d Cir. 2009); *see also Alfadda v. Fenn*, 159 F.3d 41, 45–46 (2d Cir. 1998). Here, they do.

a. The Private Factors

[16] In weighing the litigants' private interests, a court should consider

[1] the relative ease of access to sources of proof; [2] availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; [3] possibility of view of the premises, if view would be appropriate to the action; and [4] all other practical problems that make trial of a case easy, expeditious and inexpensive.

Gilbert, 330 U.S. at 508, 67 S.Ct. 839; accord Blanco v. Banco Industrial de Venezuela, S.A., 997 F.2d 974, 980 (2d Cir. 1993); Hosking v. TPG Capital Mgmt., L.P. (In re Hellas Telecommunications (Luxembourg) II SCA), 555 B.R. 323, 348 (Bankr. S.D.N.Y. 2016) ("Hellas II") (citations omitted).

As previously noted, the majority of the relevant evidence is located or accessible in Anguilla but not in New York. Difficulties in obtaining documents and witness testimony support dismissal or a stay of litigation in favor of the more convenient foreign forum. See *89 FUNB v. Arab African Int'l Bank, 48 Fed.Appx. 801, 805 (2d Cir. 2002) (summary order) (dismissing a suit by an American bank against Middle Eastern banks because most of the documents were in London, many witnesses could not be compelled to testify in New York, and the general cost of litigation was lower in London); see also Florian v. Danaher Corp., 69 Fed.Appx. 473, 475 (2d Cir. 2003) (summary order) (finding that the district court did not abuse its discretion by dismissing a products liability action on forum non conveniens grounds when virtually every fact witness was located in Canada, where the accident occurred). Here, none of the witnesses, in particular, the Conservator Directors, are located in the United States or within this Court's subpoena power. Moreover, the records of the Debtor Banks, the Parent Banks, NCBA and ECCB are presumably located in Anguilla, but are certainly not located here. The only relevant records within this jurisdiction are the various bank records that are necessary to establish the transfers and depict the flow of funds. However, the Plaintiffs In re National Bank of Anguilla (Private Banking Trust) Ltd., 580 B.R. 64 (2018)

already have this information, judging from the schedules attached to the *Complaints*, and access to this proof for use in Anguilla does not appear to present a problem. ¹⁹ *See Seidel v. Ritter (In re Kinbrace Corp.)*, Adv. Pro. No. 15-01432 (SMB), 2017 WL 1380524, at *6 (Bankr. S.D.N.Y. Apr. 17, 2017).

At oral argument, the Court questioned the Plaintiffs' counsel regarding the failure to allege the intentional fraudulent transfers with the specificity (e.g., date, amount, identity of the transferee) required by Rule 9(b) of the Federal Rules of Civil Procedure. Counsel for the Plaintiffs responded that the Defendants have the records and "should be able to figure it out," but if need be, the Plaintiffs "would be, of course, more than happy to [amend the pleadings] and set forth all of the transfers that comprised those amounts." (Tr. at 119:6–17.) It therefore appears that all parties already have the records relating to the transfers.

Conversely, while the testimony of the Conservator Directors and of ECCB is crucial to these Adversary Proceedings it would be difficult, if not impossible, to procure their attendance in this Court. This litigation is not simply a "document" case where the Plaintiffs will establish their prima facie case through the introduction of business records. The Plaintiffs assert that ECCB breached its fiduciary duties to the Debtor Banks, was grossly negligent and aided and abetted the Conservator Directors' breach of their own fiduciary duties to the Debtor Banks. (¶ 244–270; PBT Compl. ¶ 262–85.) In addition, the Anguillan High Court has ruled that the Defendants may be entitled to immunity if the Conservator Directors acted in good faith and without negligence. Furthermore, the Conservator Directors' business judgment may be an issue in connection with the actions they took on behalf of the Parent Banks as the sole shareholders of the Debtor Banks and as their servicers under the PBT Service Agreement and the CCIB Agreement for Service. All of the Conservator Directors and ECCB's actions took place in Anguilla or the Eastern Caribbean, and their availability, the ability to compel their attendance and the relative ease and access to proof weigh heavily in favor of the Anguillan forum.

b. The Public Factors

[17] In Gilbert, the court identified several public interest factors that a court should consider when faced with

a motion to dismiss based on forum non conveniens. These include (1) administrative difficulties relating to court congestion; (2) imposing jury duty on citizens of the forum; (3) having local disputes settled locally; and (4) avoiding problems associated with the application of foreign law. *90 330 U.S. at 508-09, 67 S.Ct. 839; accord Hellas II, 555 B.R. at 348 ("The public interest factors include: (1) settling local disputes in a local forum; (2) avoiding the difficulties of applying foreign law; and (3) avoiding the burden on jurors by having them decide cases that have no impact on their community") (citation omitted). "Numerous courts have found that the public interest factors often favor dismissal where there is a parallel litigation arising out of the same or similar facts already pending in the foreign jurisdiction." Argus Media Ltd. v. Tradition Fin. Servs. Inc., No. 09 Civ. 7966 (HB), 2009 WL 5125113, at *6 (S.D.N.Y. Dec. 29, 2009) (citing cases). In addition, "deferring to litigation in another jurisdiction is appropriate where the litigation is 'intimately involved with sovereign prerogative' and it is important to ascertain the meaning of another jurisdiction's statute 'from the only tribunal empowered to speak definitively.' " Figueiredo Ferraz Engenharia de Projeto Ltda. v. Republic of Peru, 665 F.3d 384, 392 (2d Cir. 2011) (quoting Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 28-29, 79 S.Ct. 1070, 3 L.Ed.2d 1058 (1959)).

Here, the private factors weigh in favor of dismissal. Parallel litigations are already pending in Anguilla, although the Anguilla Initial Proceedings is currently stayed against the Parent Banks. The Plaintiffs have appealed from the Leave Order, but it seems that they can avoid the stay simply by joining the Conservator Directors. In addition, these Adversary Proceedings arise from the bailout of two Anguillan banks authorized, and according to the Complaints, directed and controlled by ECCB, an arm of the Anguillan State. The legality of the actions taken by the Conservator Directors, including the upstreaming of customer deposits and the transfer of other property owned by the Debtor Banks to the Parent Banks, and ultimately, to NCBA and possibly ECCB, must be determined in accordance with the ECCB Act and applicable Anguillan law. Although "the need to apply foreign law ... alone is not sufficient to warrant dismissal," Piper, 454 U.S. at 260 n.29, 102 S.Ct. 252; see also Boosey & Hawkes Music Publishers, Ltd. v. Walt Disney Co., 145 F.3d 481, 492 (2d Cir.1998) ("While reluctance to apply foreign law is a valid factor favoring

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dismissal under *Gilbert*, standing alone it does not justify dismissal."), it may nevertheless be considered as part of the balancing equation. *See Monegasque de Reassurances S.A.M. v. NAK Naftogaz of Ukraine and State of Ukraine*, 158 F.Supp.2d 377, 387 (S.D.N.Y. 2001) ("Courts have a legitimate interest in avoiding the difficulty with questions of conflicts of law and the application of foreign law."), *aff'd*, 311 F.3d 488 (2d Cir. 2002).

In fact, the High Court has already addressed the Defendants' claims of immunity under Anguillan law. The Satay court held that the Conservator Directors had acted ultra vires, and were not entitled to statutory immunity under Article 50 of the ECCB Act. In addition, the applicability of Article 5F immunity presented a question of fact. The Satay Judgment is on appeal. Furthermore, the Satay court did not address the Conservator Directors' right to take the challenged actions in their capacities as directors of the Parent Banks, sole shareholders of the Debtor Banks, an issue that must also be decided under Anguillan law, as is the Conservator Directors' authority under the service agreements between the Debtor Banks and the Parent Banks.

The Anguillan High Court also addressed Article 5F in the Leave Order. It ruled that the Debtor Banks' Statement of Claim failed to allege lack of immunity under that provision because the pleading did not assert that the Conservator Directors had acted negligently and in bad *91 faith. The Leave Order also concluded that it could not determine whether immunity under Article 50(7)(i) applied without further briefing from the parties because it could not determine that "the reliefs being sought fall outside that section on the basis that it constitutes a civil right." In contrast, the Satay Court had ruled that the Article 50 immunities raised in that case did not apply because the Conservators had acted ultra vires. The Debtor Banks have appealed from the Leave Order.

The issue of the Conservator Directors' and the Defendants' immunity from suit has been a focal point of litigation in the Anguillan proceedings, the Anguillan decisions appear to be somewhat inconsistent, and the immunity issues are on appeal in Anguilla. Moreover, substantial resources have already been expended in Anguilla to litigate these issues, and the outcome of these Adversary Proceedings will depend on the overriding question of whether ECCB, Anguilla's central bank and a sovereign entity, appropriately executed a bank rescue

plan (i.e., the Resolution Plan) under Anguillan law for the purpose of preserving the Anguillan banking system. Only the Anguillan courts are authorized to speak definitively on these issues, and deference to those proceedings is appropriate.

It is true that the United States has certain connections to the Anguillan rescue plan. As alleged in the *Complaints*, the Conservator Directors "upstreamed" the Debtor Banks' funds to the Parent Banks in New York, although the Debtor Banks' counsel indicated during oral argument that the "upstreamed" funds were never in accounts maintained by the Debtor Banks. ²⁰ But even if all of the transfers were domestic, the legality of the transfers and the extent of the Defendants' liability in the face of their assertions of immunity turn on interpretations of Anguillan law. Anguilla, therefore, has an overwhelming and stronger interest in determining the legality of those actions and the extent of the Defendants' liability.

As noted, the CCIB Complaint also alleges that the Morgan Stanley transfer from CCIB to CCB was domestic, but CCIB does not appear to seek to avoid and recover that transfer through its avoidance claims.

Finally, the Plaintiffs have demanded a jury trial. When a court has very little interest in adjudicating the claims primarily due to the removed location of events and the applicability of foreign law, this could create an unnecessary burden on jurors. *Stewart v. Adidas A.G.*, 1997 WL 218431, at *7 (S.D.N.Y. Apr. 30, 1997).

While the most common disposition where a *forum non conveniens* motion is granted is dismissal of the case, a stay rather than dismissal may be more appropriate when the case may return to this Court following decisions of the foreign courts. *See Hellas II*, 555 B.R. at 330. The international comity analysis in the next section also clearly supports a stay rather than dismissal under the circumstances of this case.

B. These Cases Should Be Stayed Based on International Comity Pending the Outcome of the Anguilla Litigation

The doctrines of *forum non conveniens* and international comity are animated by many of the same concerns, and are often raised together in motions to stay or dismiss. As already explained above, the Court concludes that *forum*

non conveniens supports staying both of these Adversary Proceedings in favor of the courts in Anguilla. And as explained in this section, application of international comity leads to the same result.

*92 Even if the Court has jurisdiction over all the parties in these cases—an issue not fully resolved at this point —the Court may choose not to exercise that jurisdiction based on international comity principles. NBA and CCB are the only defendants in these Adversary Proceedings that moved to stay based on international comity in favor of the Anguilla Initial Proceedings, the Satay Action, and the Judicial Review. But international comity principles are well established and may be applied here to all of the parties before the Court. Deference to pending foreign proceedings and this Court's customary obligation to exercise jurisdiction in cases otherwise properly within its jurisdiction must be balanced. Therefore, the Court must decide whether international comity favors deferring, at least in the first instance, to the PBT and CCIB foreign main proceedings and to the Anguilla Litigation.

The question is particularly acute here because of the circumstances revolving around these Adversary Proceedings. CCIB and PBT were placed into administration in Anguilla, the same Foreign Representative was appointed in each of the Anguilla Administrations, and after the Foreign Representative filed the chapter 15 cases in this Court, the two Anguilla Administrations were recognized as foreign main proceedings. The Foreign Representative then filed chapter 11 cases for both CCIB and PBT, followed by the filing of the two Adversary Proceedings that are the subject of the pending Motions. The Anguilla Litigation involves the same parties as these Adversary Proceedings, and the causes of action in the Adversary Proceedings and the Anguilla Initial Proceedings and the Satay Action arise from the same facts. The Anguilla Initial Proceedings and the Satay Action were filed months before the Adversary Proceedings in this Court, and the Anguilla courts have personal and subject matter jurisdiction over all of the parties. For the reasons explained below, the Court concludes that international comity principles warrant a stay of these Adversary Proceedings pending the outcome of the Anguilla Litigation. Under the present circumstances, staying these cases-rather than dismissing them—is appropriate to preserve the Plaintiffs' domestic causes of action while granting proper deference to proceedings in the Anguilla courts. Depending on

the disposition of the Anguilla Litigation, it may be appropriate for the Plaintiffs to return to this Court to seek resolution of any claims in the Adversary Proceedings that are not resolved by the Anguilla courts and are not precluded by recognition and enforcement of judgments entered in Anguilla.

1. International Comity Considerations

[18] "Comity, in the legal sense, is neither a matter of absolute obligation, on the one hand, nor a mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." Hilton v. Guyot, 159 U.S. 113, 163-64, 16 S.Ct. 139, 40 L.Ed. 95 (1895). The boundaries of the international comity doctrine have been described as "amorphous" and "fuzzy." See JP Morgan Chase Bank v. Altos Hornos de Mexico, 412 F.3d 418, 423 (2d Cir. 2005) (citation omitted); see also Official Comm. of Unsecured Creditors v. Bahrain Islamic Bank (In re Arcapita Bank B.S.C.(c)), 575 B.R. 229, 237 (Bankr. S.D.N.Y. 2017).

[19] Second Circuit courts as well as the Supreme Court have taken great care to analyze and clarify the international comity doctrine, as well as its underlying *93 rationale. As the Supreme Court has noted, the international comity doctrine "is not just a vague political concern favoring international cooperation when it is in our interest to do so [but r]ather it is a principle under which judicial decisions reflect the systematic value of reciprocal tolerance and goodwill." Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for S. Dist. of Iowa, 482 U.S. 522, 555, 107 S.Ct. 2542, 96 L.Ed.2d 461 (1987). Comity "refers to the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states." Gucci America, Inc. v. Weixing Li, 768 F.3d 122, 139 (2d Cir. 2014) (quoting Société Nationale Industrielle Aérospatiale, 482 U.S. at 543 n.27, 107 S.Ct. 2542).

[20] [21] While a defendant's international comity defense should be assessed from the "legal sense," a court must not lose sight of the broader principles underlying the doctrine. See Altos Hornos, 412 F.3d at

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423 ("Whatever its precise contours, international comity is clearly concerned with maintaining amicable working relationships between nations, a 'shorthand for good neighborliness, a common courtesy and mutual respect between those who labour in adjoining judicial vineyards.' ") (citation omitted)). On the other hand, even where the comity doctrine clearly applies, it "is not an imperative obligation of courts, but rather is a discretionary rule of 'practice, convenience, and expediency.' " Royal and Sun Alliance Ins. Co. of Canada v. Century Int'l Arms, 466 F.3d 88, 92 (2d Cir. 2006) (citation and quotation marks omitted); see also Duff & Phelps, LLC v. Vitro S.A.B. de C.V., 18 F.Supp.3d 375, 382 (S.D.N.Y. 2014) (explaining that "[t]he decision to grant comity is a matter within a court's discretion and the burden of proof to establish its appropriateness is on the moving party") (citations omitted).

[22] The Second Circuit has explained that international comity "may describe two distinct doctrines" Maxwell Comm'n Corp. v. Societe Generale (In re Maxwell Comm'n Corp.), 93 F.3d 1036, 1047 (2d Cir. 1996) ("Maxwell II"). The first doctrine—often referred to as legislative or prescriptive comity, or comity among nations—is "a canon of construction" which serves to "shorten the reach of a statute." Arcapita Bank, 575 B.R. at 238 (citing Maxwell II, 93 F.3d at 1047; Mujica v. AirScan Inc., 771 F.3d 580, 598 (9th Cir. 2014) (explaining that "legislative or 'prescriptive comity' ... guides domestic courts as they decide the extraterritorial reach of federal statutes.")). "Under international comity, states normally refrain from prescribing laws that govern activities connected with another state when the exercise of such jurisdiction is unreasonable." Arcapita Bank, 575 B.R. at 237 (citations and quotation marks omitted); see also Sec. Inv'r Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC (In re Madoff), 2016 WL 6900689, at *12 (Bankr. S.D.N.Y. Nov. 21, 2016) (clarifying that "comity among nations [is] a canon of construction that limits the reach of the Bankruptcy Code's avoidance and recovery provisions") (citation omitted). It is unclear in these cases whether prescriptive comity should apply. On the one hand, to the extent that wholly domestic transfers are involved, federal and New York avoidance statutes express strong public policies protecting creditors from actual or constructive avoidable transfers. On the other hand, the alleged transfers were made exclusively between Anguillan financial institutions that were regulated by Anguillan authorities in Anguilla, which has a strong interest in regulating those institutions.

If these two regulatory regimes clash, which one should give way? As explained below, this *94 Court need not resolve that conflict at this time.

The second doctrine—referred to as adjudicative comity, or comity among courts—is "a discretionary act of deference by a national court to decline to exercise jurisdiction in a case properly adjudicated in a foreign state." Arcapita Bank, 575 B.R. at 238 (citing Maxwell II, 93 F.3d at 1047; Mujica, 771 F.3d at 599 (stating that "adjudicatory comity involves ... the discretion of a national court to decline to exercise jurisdiction over a case before it when that case is pending in a foreign court with proper jurisdiction.") (citation and quotation marks omitted)); see also Altos Hornos, 412 F.3d at 424 (finding, where the dispute involved the ownership of property a debtor claimed as part of its estate in a foreign bankruptcy proceeding, that "[i]nternational comity, as it relates to this case, involves not the choice of law but rather the discretion of a national court to decline to exercise jurisdiction over a case before it when that case is pending in a foreign court with proper jurisdiction") (citation omitted).

Because the Court concludes that comity among courts supports a stay of these Adversary Proceedings, it is unnecessary to reach the issue whether prescriptive comity supports narrowing the reach of federal and New York State avoidance statutes. ²¹ NBA and CCB argue that comity principles favor the recognition of the pending Anguilla Litigation that have yet to reach final judgment, and that proper deference to these proceedings requires abstention by United States courts. The claims in the Adversary Proceedings fall squarely within considerations of comity among courts. *See Royal and Sun Alliance*, 466 F.3d at 92.

- Although it is unclear from the current version of the *Complaints*, it appears that some or all of the challenged transfers may have occurred entirely between accounts in the United States. If these cases return to this Court after decisions of the courts in Anguilla, the Plaintiffs will need to amend the *Complaints* to more clearly allege the facts showing the transfers at issue—the who, what, where and when for each transfer.
- [23] [24] [25] Applying international comity among courts, courts "ha[ve] the inherent power to dismiss or stay an action based on the pendency of a related proceeding

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in a foreign jurisdiction." Ole Media Mgmt., L.P. v. EMI April Music, Inc., 2013 WL 2531277, at *2 (S.D.N.Y. June 10, 2013) (collecting cases). This reflects "the proper respect for litigation in and the court of a sovereign nation, fairness to litigants, and judicial efficiency." Royal and Sun Alliance, 466 F.3d at 94 (collecting cases). Nonetheless, concerns of comity must be balanced against the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given to them." Colorado River Water Conservation Dist. v. U.S., 424 U.S. 800, 817, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976). In evaluating whether to defer to a foreign proceeding, "[t]he task of a [bankruptcy] court ... is not to articulate a justification for the exercise of jurisdiction, but rather to determine whether exceptional circumstances exist that justify the surrender of that jurisdiction." Royal and Sun Alliance, 466 F.3d at 93 (emphasis in original) (citing Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 25-26, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983); Colorado River, 424 U.S. at 813, 96 S.Ct. 1236).

> 2. Comity Among Courts Warrants Staying These Adversary Proceedings

a. The Court Should Defer to the Main Insolvency Proceedings in Anguilla

[26] [27] The Court concludes that these Adversary Proceedings should be stayed in *95 deference to the main insolvency proceedings in Anguilla. "Federal courts generally extend comity whenever the foreign court had proper jurisdiction and enforcement does not prejudice the rights of the United States citizens or violate domestic public policy." CT Inv. Mgmt. Co., LLC. v. Cozumel Caribe, S.A. de C.V. (In re Cozumel Caribe, S.A. de C.V.), 482 B.R. 96, 114 (Bankr. S.D.N.Y. 2012) (citing In re Atlas Shipping, 404 B.R. 726, 733 (Bankr. S.D.N.Y. 2009)). The Second Circuit has "recognized one discrete category of foreign litigation that generally requires the dismissal of parallel district court actions—foreign bankruptcy proceedings." Royal and Sun Alliance, 466 F.3d at 92-93. A foreign nation's interest in the "equitable and orderly distribution of a debtor's property" is an interest deserving of particular respect and deference, and accordingly, the Second Circuit has followed the general practice of United States courts and regularly defers to such actions. Id. at 93 (citing cases); see also Duff & Phelps, LLC, 18 F.Supp.3d at 383 (holding that deference is warranted "[b]ecause the

equitable and orderly distribution of a debtor's property requires assembling all claims against the limited assets in a single proceeding") (quotation marks and citations omitted).

[28] "[D]eference to the foreign court is appropriate so long as the foreign proceedings are procedurally fair and ... do not contravene the laws or public policy of the United States." Cozumel Caribe, 482 B.R. at 114 (citing Altos Hornos, 412 F.3d at 424). In analyzing procedural fairness, courts have looked to the following nonexclusive factors:

(1) whether creditors of the same class are treated equally in the distribution of assets; (2) whether the liquidators are considered fiduciaries and are held accountable to the court: (3) whether creditors have the right to submit claims which, if denied, can be submitted to a bankruptcy court for adjudication; (4) whether the liquidators are required to give notice to the debtors potential claimants; (5) whether there are provisions for creditors meetings; (6) whether a foreign country's insolvency laws favor its own citizens; (7) whether all assets are marshalled before one body for centralized distribution; and (8) whether there are provisions for an automatic stay and for the lifting of such stays to facilitate the centralization of claims.

Finanz AG Zurich v. Banco Economico S.A., 192 F.3d 240, 249 (2d Cir. 1999).

Deference to the Anguilla Administrations is warranted here. On February 22, 2016, CCIB and PBT were placed under administration pursuant to section 31(b)(2) of the Financial Services Commission Act, R.S.A. c. F28, and the High Court appointed the Foreign Representative as administrator for PBT and CCIB. (¶¶ 60–61; *PBT Compl.* ¶¶ 56–57.) The Administrator subsequently filed the PBT and CCIB chapter 15 petitions in this Court on May 26, 2016 and on October 11, 2016, respectively, seeking recognition of the PBT administration and the CCIB administration in Anguilla. (¶ 64; *PBT Compl.*

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¶ 60.) On June 17, 2016 and November 15, 2016, the orders were entered in this Court, recognizing the PBT administration (Case # 16-11529 (MG), ECF Doc. # 17 ("PBT Recognition Order")) and the CCIB administration as foreign main proceedings. (Case # 16-12844 (SMB), ECF Doc. # 16 ("CCIB Recognition Order").). Given the administration of PBT and CCIB in the Anguilla foreign main insolvency proceedings, the Anguilla courts clearly have an interest in the "equitable and orderly distribution" of the Debtors Banks' property; and deference to those proceedings is appropriate. See *96 Royal and Sun Alliance, 466 F.3d at 92-93. Neither PBT nor CCIB dispute the procedural fairness of the Anguilla main proceedings, nor does the record support any such contention. See Altos Hornos, 412 F.3d 418 (noting that, in assessing the fairness of Mexican proceedings, "[n]othing in the record before us suggests that the actions taken by the Mexican bankruptcy court are not approved or allowed by American law"). This Court has already found Anguillan courts to be competent to adjudicate matters pending before them. See In re HBLS, L.P., 468 B.R. at 640 ("[T]he courts of Anguilla are available and competent to adjudicate these issues. There is thus no need for this Court to inject itself into proceedings that have already been or can be handled in Anguilla.").

NBA and CCB argue that a district court decision in *Madoff* supports staying these actions based on comity. See Sec. Inv'r Prot. Co. v. Bernard L. Madoff Inv. Sec. LLC (In re Madoff Sec.), 513 B.R. 222 (S.D.N.Y. 2014). In Madoff, the district court denied the SIPA trustee's claim over foreign transfers based on the presumption against extraterritoriality of section 550(a) of the Bankruptcy Code, but added that even if the presumption was rebutted, the SIPA trustee's claim would be precluded by concerns of international comity. Id. at 231. The district court noted that the British Virgin Islands courts had already determined that debtor could not reclaim transfers made to its customers under certain common-law theories, a determination that was in conflict with the trustee's claim. Id. at 232. As such, the district court ruled that by filing the action to avoid the transfers before United States courts, the SIPA trustee was "seeking to use SIPA to reach around such foreign liquidations." Id. at 231-32; see also Altos Hornos, 412 F.3d at 427 (explaining that "creditors may not use U.S. courts to circumvent foreign bankruptcy proceedings").

The Plaintiffs attempt to distinguish these cases from *Madoff*, arguing that a stay based on comity is inappropriate. The Plaintiffs contend that comity may be appropriate to stay the exercise of bankruptcy court jurisdiction in circumstances such as in *Madoff*, where a creditor seeks to "reach around" foreign insolvency proceedings, but further contend that is it not the case here: the "Administrator does not seek to compete with the Debtor's Anguillan estate," but "is asserting the Debtor's own claims—not 'reaching around'—the Anguillan insolvency proceeding." (*CCIB Opp'n to CCB's Mot. to Dismiss* at 27–28; *PBT's Opp'n to NBA's Mot. to Dismiss* at 28.)

"Reaching around" can take multiple shapes and forms. That the claims in these Adversary Proceedings are not brought by or in the interest of a creditor of PBT or CCIB, but by debtors in possession, does not change the analysis. Indeed, the Plaintiffs do seek to reach around the litigation in Anguilla. Because NBA and CCB are in receivership in Anguilla, the Anguilla court has stayed the actions against those two entities in Anguilla. The Plaintiffs seek to proceed against those two entities in the Adversary Proceedings—in effect, the Plaintiffs ask this Court to disregard the stay entered by a court in Anguilla. The Plaintiffs have appealed the stay order in Anguilla, but even if the stay is lifted, it is more appropriate that the Anguilla Litigation proceed to judgment before this Court needs to address whether any issues remain to be decided under federal or New York law. See also Altos Hornos, 412 F.3d at 427 (noting that the recognition sought in the United States that lender owned the disputed funds would determine how those funds were distributed to creditors and, therefore, such determination was "precisely the sort of end-run around a parallel *97 foreign bankruptcy proceeding of which we have repeatedly disapproved"). 22

Our bankruptcy courts take a dim view when parties outside the United States seek to avoid the effect of the automatic stay in our cases; so too, our courts should be reluctant to ignore the effect of a stay issued by a foreign court.

The Foreign Representative freely admits that he filed the Plaintiffs' chapter 11 cases to allow him to bring the Adversary Proceedings and to assert constructive fraudulent transfer claims under federal and New York law that, according to the Plaintiffs, have no counterpart and cannot be asserted under Anguilla law. There is little doubt that by filing these Adversary Proceeding

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in the United States, the Plaintiffs sought to litigate these cases despite the stay imposed and the appeal pending in Anguilla. Accordingly, the Court concludes, in the exercise of its discretion, that international comity warrants staying these Adversary Proceedings in deference to the Anguilla Administrations. ²³

The Court notes that the Second Circuit in Altos Hornos addressed the circumstances where it is appropriate for a United States court to defer to a foreign insolvency court to decide issues concerning the treatment of a foreign debtor's property in the United States. See Altos Hornos, 412 F.3d 418. In these Adversary Proceedings, as in Altos Hornos, the alleged transfers of funds supposedly took place in the United States between bank accounts located in New York. The Second Circuit held that "the ownership of property a debtor claims as part of its estate in a foreign bankruptcy proceeding is a question 'antecedent to the distributive rules of bankruptcy.' Local courts may resolve the question because international comity does not require deference to the parallel foreign bankruptcy proceeding in such circumstances." Altos Hornos, 412 F.3d at 420 (quoting Koreag, Controle et Revision S.A. v. Refco F/X Assocs., Inc. (In re Koreag), 961 F.2d 341, 349 (2d Cir. 1992)). The Altos Hornos court explained that this rule only applies to disputes that present a bona fide question of property ownership. Id. However, the Second Circuit's holding on federal courts' power to adjudicate a bona fide dispute of property of a foreign debtor was decided and is only applicable in the context of an ancillary bankruptcy proceeding filed in the United States, either under former Bankruptcy Code section 304 or current chapter 15 of the Bankruptcy Code, which replaced section 304. See, e.g., In re Petition of Wuthrich, 337 B.R. 262, 267 (Bankr. S.D.N.Y. 2006) (explaining that "comity is not implicated by every question presented in a § 304 proceeding," but that "U.S. courts may resolve bona fide questions of property ownership arising under local law while a foreign bankruptcy proceeding is ongoing without deferring to the parallel foreign proceeding on grounds of international comity") (citing Altos Hornos, 412 F.3d at 426). Despite recognition by this Court of the Anguilla Administrations, these Adversary Proceedings were filed in plenary chapter 11 cases, not chapter 15 cases. Further, even assuming that Altos Hornos controls in these chapter 11 cases, the Court is uncertain, and does not decide, whether the fraudulent conveyance claims brought by the Plaintiffs are bona fide claims of property which warrant adjudication by a national court. As explained elsewhere in this Opinion, it is unclear whether the Debtors have a property interest in the deposits in their parent companies' New York bank accounts sufficient to trigger application of federal or state avoidance statutes. The Complaints are unclear when and how the Debtors' customer funds were deposited in the New York bank accounts.

b. The Adversary Proceedings Should Be Stayed Pending the Resolution of the Anguilla Litigation

While deference to the main insolvency proceedings in Anguilla warrants a stay of these Adversary Proceedings, the Court also finds, in the exercise of its discretion, that deference to the related Anguilla Litigation justifies a stay of these cases pending resolution of the Anguilla Litigation.

The Second Circuit has articulated nonexclusive factors that courts should consider in evaluating a request for dismissal based on a parallel proceeding in a foreign nation. These factors include:

*98 the similarity of the parties, the similarity of the issues, the order in which the actions were filed, the adequacy of the alternate forum, the potential prejudice to either party, the convenience of the parties, the connection between the litigation and the United States, and the connection between the litigation and the foreign jurisdiction.

Royal and Sun Alliance, 466 F.3d at 94 (citations omitted). "This list is not exhaustive, and a [bankruptcy] court should examine the 'totality of the circumstances' to determine whether the specific facts before it are sufficiently exceptional to justify abstention." Id. (quoting Finova Capital Corp. v. Ryan Helicopters U.S.A., Inc., 180 F.3d 896, 900 (7th Cir. 1999)). The Supreme Court has similarly recognized that a decision to abstain from exercising jurisdiction based on the existence of parallel litigation "does not rest on a mechanical checklist, but on a careful balancing of the important factors ... as they apply in a given case, with the balance heavily weighted in favor of the exercise of jurisdiction." Id. (quoting Moses H. Cone, 460 U.S. at 16, 103 S.Ct.

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927); see also Colorado River, 424 U.S. at 818–19, 96 S.Ct. 1236 ("No one factor is necessarily determinative; a carefully considered judgment taking into account both the obligation to exercise jurisdiction and the combination of factors counselling against that exercise is required.") (citation omitted).

While Royal and Sun Alliance outlined the factors in the context of a motion to dismiss, rather than to stay the action, the analysis still applies. Tarazi v. Truehope Inc., 958 F.Supp.2d 428, 433-34 (S.D.N.Y. 2013) (collecting cases) (staying domestic actions in favor of Canadian courts). However, the factors may be weighted differently when a stay, rather than dismissal, is considered. Id. at 434 (citing Royal and Sun Alliance, 466 F.3d at 96-97 (suggesting that stay rather than dismissal might be merited); Nat'l Union Fire Ins. Co. of Pittsburgh, P.A. v. Kozeny, 115 F.Supp.2d 1243, 1248 (D. Colo. 2000) (weighting adequacy of foreign forum in light of fact that court was staying, rather than dismissing, domestic action); Goldhammer v. Dunkin' Donuts, Inc., 59 F.Supp.2d 248, 254 (D. Mass. 1999) (same)). The Court finds that the balancing of the Royal and Sun Alliance factors in these Adversary Proceedings favors a stay of the Adversary Proceedings in New York pending the outcome of the Anguilla Litigation.

i. Similarities of Parties

The similarity between the parties involved in the foreign and domestic actions favors a stay of the Adversary Proceedings. The parties to the Anguilla Initial Proceedings are PBT and CCIB as plaintiffs, and NBA, CCB and NCBA as defendants. The parties to the Judicial Review are plaintiffs PBT and CCIB, and defendant ECCB, among others. In the Satay Action, ECCB is named as defendant and is the only party in those proceedings that is also a party to the Adversary Proceedings. The Adversary Proceedings include each of those parties.

[29] "For two actions to be considered parallel, the parties in the actions need not be the same, but they must be *substantially* the same, litigating substantially the same issues in both actions." *Royal and Sun Alliance*, 466 F.3d at 94 (emphasis added); *see also Advantage Intern. Mgmt. Inc. v. Martinez*, 1994 WL 482114, at *4 (S.D.N.Y. Sept. 7, 1994) ("All that is required in this Circuit is that the parties

and issues be sufficiently similar so that when a judgment issues from the foreign court, res judicata will apply."); *Herbstein v. Bruetman*, 743 F.Supp. 184, 188 (S.D.N.Y. 1990) ("[C]omity requires that the parties and issues in both litigations *99 are the same or sufficiently similar, such that the doctrine of *res judicata* can be asserted.") (citation omitted). ²⁴

Issues of "substantial similarity" between parties for purposes of comity analysis usually arise when parties in foreign and national actions are "affiliates or have a similarly close relationship"; in those circumstances, courts deem parties similar for comity purposes.

See Tarazi, 958 F.Supp.2d at 434 (collecting cases). This is, however, not an issue in these Adversary Proceedings.

All parties in these Adversary Proceedings, other than ECCB, are parties in the Anguilla Initial Proceedings. While ECCB is a defendant in the Satay Action, neither the Debtors nor any other Defendants in these actions are parties in that proceeding. However, PBT and CCIB have sued ECCB in Anguilla as part of the Judicial Review Application. In any event, the actions pending in Anguilla revolve around the disputed issues in the present Adversary Proceedings, and even if there are minor differences in the parties in those proceedings, the judgments of the Anguilla High Court would nevertheless be instructive to this Court (or even dispositive) in resolving the issues before it, including those involving ECCB. Moreover, while ECCB's argument that it is not subject to personal jurisdiction in this Court cannot be fully resolved now, there may be no basis to keep ECCB in these Adversary Proceedings. The Foreign Representative argues that there are currently no claims pending against CCB and NBA by the Debtors in Anguilla in light of the High Court's decision to deny the application for leave to assert claims against CCB and NBA. (CCIB's Opp'n to CCB's Mot. to Dismiss at 30 n.16; PBT's Opp'n to NBA's Mot. to Dismiss at 30 n.13.) But the Plaintiffs have appealed the High Court's decision. If the Court of Appeal in Anguilla grants relief to PBT and CCIB, and the parties are allowed to litigate before the High Court, the Defendants would be faced with having to defend actions in two fora. The Court thus finds that the parties in these Adversary Proceedings and Anguilla Litigation are clearly sufficiently similar. This factor weights in favor of staying the Adversary Proceedings.

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ii. Similarities of Issues

Likewise, the similarity between the issues litigated in the foreign and domestic actions favors a stay of the Adversary Proceedings. As explained in Royal and Sun Alliance, "[f]or two actions to be considered parallel, the parties in the actions need not be the same, but they must be substantially the same, litigating substantially the same issues in both actions." 466 F.3d at 94 (emphasis added) (citations omitted). In Ole Media, the court found that there was substantial similarity between the cases because the determination of the issue presented by the Canada action would have a significant bearing and res judicata effect, on the dispute in the New York action. 2013 WL 2531277, at *4 (holding that although the New York action included an issue not present in the Canadian action, the imposition of a stay would "not prevent the additional issue from being litigated before th[e] [New York] [c]ourt. Instead, it w[ould] permit an underlying dispute to be resolved first, one which is likely ... to prove either 'instructive on the ultimate resolution' of th[e] [New York] action or largely dispositive.") (citation and footnote omitted). When the issues litigated in the foreign and domestic proceedings are not completely similar, dismissal of the action is inappropriate, but a stay may be warranted. See id. at *4 (citing Palm Bay Int'l v. Marchesi Di Barolo S.P.A., 659 F.Supp.2d 407, 414 (E.D.N.Y. 2009) (concluding that where domestic action included an issue not presented *100 by foreign dispute, dismissal of domestic action was not appropriate)).

The litigation of these Adversary Proceedings involves the same subject matter and revolves around the same issues as the actions currently being litigated before the courts in Anguilla: whether the Plaintiffs have a proprietary interest in the deposits that were allegedly upstreamed to the parent banks, NCBA and ECCB, and whether the Conservator Directors violated their fiduciary duties and Anguillan law by transferring the Debtor Banks' Funds to the Parent Banks. The resolution of the Anguilla Litigation will prove highly instructive, if not completely dispositive, on the ultimate resolution of these Adversary Proceedings. The Plaintiffs argue that the relief requested is not warranted because "[a]ll of the claims in this Adversary Proceeding could not be litigated in Anguilla because it does not recognize constructive fraudulent conveyance claims." (CCIB's Opp'n to CCB's Mot. to Dismiss at 30 n.16; PBT's Opp'n to NBA's Mot.

to Dismiss at 30 n. 13.) Yet, both United States courts and Anguilla courts provide essentially the same remedy that the Plaintiffs seek, regardless of the underlying causes of action. If intentional fraud is proven in Anguilla, the Debtor Banks' remedy would be the same as if it proceeded under either intentional or constructive fraud provisions of the Bankruptcy Code and New York law—the money the Plaintiffs allege belonged to them would be transferred back to the bankruptcy estates. It is irrelevant that Anguilla law does not recognize constructive fraudulent transfer claims, as adequate relief is available in Anguilla. The Court accordingly finds that the issues in the Adversary Proceedings and Anguilla Litigation are similar. This factor thus weights in favor of staying the Adversary Proceedings.

iii. Order of Filing

Courts "have traditionally accorded great weight to the first suit filed." Tarazi, 958 F.Supp.2d at 436 (citation omitted). However, the importance of this factor is reduced when the relevant actions were filed in close temporal proximity to one another and where the firstfiled action has not "reached a more advanced stage" than the later action. Id. (citation omitted). Additionally, "[t]he first-filed doctrine is considered, perhaps with less force, in the international cross-border context." MF Glob. Holdings Ltd. v. Allied World Assurance Co. (In re MF Glob. Holdings Ltd.), 561 B.R. 608, 628 (Bankr. S.D.N.Y. 2016), leave to appeal denied, No. 17 CIV. 106, 2017 WL 548219 (S.D.N.Y. Feb. 10, 2017); see also Taub v. Marchesi Di Barolo S.p.A., No. 09-CV-599, 2009 WL 4910590, at *6 (E.D.N.Y. Dec. 10, 2009) (analyzing principles and factors relating to international comity and parallel proceedings, and affording "minimal weight" to the temporal sequence of filings).

Here, the Anguilla Initial Proceedings was filed on May 6, 2016, and the Satay Action was filed on June 28, 2016, approximately seven to eight months and five months, respectively, before these Adversary Proceedings were filed on December 16, 2016 (before Judge Glenn) and on January 5, 2017 (before Judge Bernstein). The *Judicial Review Application* was filed on March 10, 2017, three to four months *after* these Adversary Proceedings. The fact that two of the proceedings in Anguilla were filed several months before these Adversary Proceedings, and that one was filed some months after, slightly

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supports staying the Adversary Proceedings in favor of the proceedings in Anguilla. Further, while the High Court of Anguilla already has addressed some of the parties' *101 arguments and objections, ²⁵ there is no suggestion that substantial activity has taken place in the Anguilla proceedings. See Thornton Tomasetti, Inc. v. Anguillan Dev. Corp., 2015 WL 7078656, at *4 (S.D.N.Y. Nov. 13, 2015) (observing, where the Anguillan proceeding was filed three months before the domestic one, that "[a]n appeal of the motion to dismiss in the Anguillan case has been pending ... though there is no suggestion that discovery has yet taken place. Accordingly, the Anguilla action was filed and some progress has been made in that case[]" and concluding that "[t]his factor weighs slightly in favor of a stay") (citing Vill. of Westfield v. Welch's, 170 F.3d 116, 122 (2d Cir. 1999) ("This factor does not turn exclusively on the sequence in which the cases were filed, but rather in terms of how much progress has been made in the two actions.")). On the other hand, this Court has already heard the parties' arguments on the Motion to Dismiss. On balance, the Court thus considers this factor to be neutral.

On August 24, 2016, the High Court entered the Leave Order, staying the case under section 143(c) of the Banking Act of 2015 because the parent banks were in receivership. It is currently subject to an appeal before the Court of Appeal in Anguilla. In the Satay Action, the High Court heard and addressed the defendants' application dated August 12, 2016 seeking a declaration that the High Court lacked jurisdiction based on the defendants' statutory immunity. The High Court refused the defendants' objection, and although the defendants in these cases were directed to serve their defense, the defendants filed and were granted leave to appeal that decision. On June 14, 2017, the High Court stayed the Judicial Review until the earlier of either a "final determination" in these adversary proceedings or a final settlement agreement between the parties to these cases. (Judicial Review Appl. at 5.)

iv. Adequacy of Anguilla Forum

The Court has already examined the adequacy of the Anguilla forum in the context of the *forum non conveniens* analysis above. For the reasons set forth in the *forum non conveniens* analysis, the Court holds that Anguilla is an adequate forum for the litigation of the subject matter of

the dispute. This factor thus favors staying the Adversary Proceedings.

v. Convenience of, and Potential Prejudice to, Either Party

The inconvenience of New York courts to Anguillan parties and the relative prejudice to litigate the subject matter of the litigation in a foreign country also favor a stay of these Adversary Proceedings. The Plaintiffs, discussing forum non conveniens, contend that "the documentary evidence and witnesses necessary to follow the Debtors' money will be located in the United States. and especially in New York[,]" and that "[i]n any event, Defendants are sophisticated global institutions for whom producing documents or witnesses in any forum poses no special inconvenience." (CCIB's Mem. of Law in Opp'n to ECCB's Mot. to Dismiss at 31; PBT's Mem. of Law in Opp'n to the ECCB's Mot. to Dismiss at 27–28.) However, for the reasons set forth in the forum non conveniens analysis, the Court finds that there is little reason to find that New York is a convenient forum for the Plaintiffs.

[30] Turning to the potential prejudice to the parties, NBA and CCB argue, in the context of the forum non convenience analysis, that "[i]t makes no sense for the parties to fly back and forth from Anguilla to New York and pay New York lawyers to litigate over Anguilla law when [the Plaintiffs'] claims can and should be resolved in Anguilla." (Mem. of Law in Supp. of CCB's Mot. to Dismiss at 21; Mem. of Law in Supp. of NBA's Mot. to Dismiss at 18.) However, the inconvenience *102 and expense associated with parallel proceedings do not constitute prejudice justifying deference to a parallel foreign litigation. See Tarazi, 958 F.Supp.2d at 438 (citing Kitaru Innovations Inc. v. Chandaria, 698 F.Supp.2d 386, 391 (S.D.N.Y. 2010) (noting that the burden of litigating simultaneously in two forums is not sufficient prejudice to weigh in favor of stay)); compare National Union Fire Insurance Co., 115 F.Supp.2d at 1249 (concluding that less access to discovery and unavailability of jury trial in foreign court weighs against stay), and Goldhammer, 59 F.Supp.2d at 255 (concluding that less access to discovery in foreign forum weighs against stay). Given that no party has identified any prejudice it will suffer if it does not prevail on these Motions to Dismiss, and because New York is not a convenient forum for the Plaintiffs or the Defendants, this factor weighs in favor of a stay of the Adversary Proceedings.

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vi. Connection Between the Litigation and the United States and Anguilla

The facts alleged in the Complaints implicate conduct in both Anguilla and the United States. The Plaintiffs and all Defendants are based in Anguilla, and the solvency, integrity, and regulation of the Anguilla banks in a period of dire economic circumstances are of paramount interest to Anguilla. The allegations in the Complaints about the ownership and flow of funds of the alleged transfers is unclear, and will require amendments of the Complaints if these cases are reactivated here after the decisions of the Anguilla courts. It is certainly true that New York and the United States have a strong interest in the integrity of the banking system in New York and the United States. Some or most of the transfers for which recovery is sought were allegedly made between bank accounts in New York, so it appears that the alleged damages occurred in the United States. 26 However, even if the transfers at issue are "domestic," it does not change the fact that Anguilla has an exceedingly strong interest in this case—the parties are from Anguilla, the conduct at issue was directed from Anguilla, Anguilla has a paramount interest in regulating the conduct of its banks, and Anguilla has a strong interest in having disputes involving its banking system resolved in its courts. See Gilbert, 330 U.S. at 509, 67 S.Ct. 839 (stating that under the forum non conveniens doctrine, "[t]here is a local interest in having localized controversies decided at home"); see also Thornton Tomasetti, 2015 WL 7078656, at *5 (staying the domestic action where "[t]he Anguillan case resolves virtually identical issues between identical parties, and this dispute has only a tenuous connection to the United States") (citation omitted). This factor thus favors a stay of these Adversary Proceedings.

26 Cf. Bascuñán v. Elsaca, 874 F.3d 806, 820–21 (2d Cir. 2017) (concluding that for purposes of RICO injury, injury was domestic where money was taken from bank accounts in New York even though plaintiffs and defendants were in Chile; applying Restatement (Second) of Conflicts of Laws § 147 cmt. e, "[w]here the injury is to tangible property, we conclude that, absent some extraordinary circumstance, the injury is domestic if the plaintiff's property was located in the United States when it was stolen or harmed, even if the plaintiff himself resides abroad"); RESTATEMENT (SECOND) OF CONFLICTS OF

LAWS (1971) § 147 cmt. e ("When conduct and injury occur in different states. For reasons stated in § 146, Comment e, the local law of the state where the injury occurred to the tangible thing will usually be applied to determine most issues involving the tort (see § 145, Comments d-e and §§ 156–66, 172) on the rare occasions when conduct and the resulting injury to the thing occur in different states.").

vii. Balance of Factors

Evaluating the Royal and Sun Alliance factors as a whole, the Court concludes *103 that they strongly favor staying the action in deference to the pending proceedings and litigation in Anguilla courts. Even where courts have declined to dismiss an action because of a prior parallel action in a foreign court, a stay has often been viewed as the appropriate intermediate measure. Ole Media, 2013 WL 2531277, at *6 (citing cases including Royal and Sun Alliance, 466 F.3d at 96 ("[A] measured temporary stay need not result in a complete forfeiture of jurisdiction. As a lesser intrusion on the principle of obligatory jurisdiction, which might permit the district court a window to determine whether the foreign action will in fact offer an efficient vehicle for fairly resolving all the rights of the parties, such a stay is an alternative that normally should be considered before a comitybased dismissal is entertained.")). Based on these facts, the Court concludes, in the exercise of its discretion, that these Adversary Proceedings should be stayed based on international comity pending the outcome of the Anguilla Litigation. Not only do the Anguilla courts have a superior interest in the equitable and orderly distribution of the Debtors' assets as part of the Anguilla Administrations, but deference should also be granted to the pending Anguilla Litigation.

IV. CONCLUSION

For the reasons explained above, the Court concludes, based on *forum non conveniens* and international comity, that the disputes between the parties should be adjudicated in the first instance in the courts of Anguilla. Therefore, both Adversary Proceedings are stayed.

Counsel for the parties shall file joint status reports with this Court in each of these Adversary Proceedings every

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ninety (90) days from the date of this Opinion reporting on the status of proceedings in the Anguilla courts.

All Citations

IT IS SO ORDERED.

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In re Oi Brasil Holdings Coöperatief U.A., 578 B.R. 169 (2017)

578 B.R. 169 United States Bankruptcy Court, S.D. New York.

IN RE: OI BRASIL HOLDINGS COÖPERATIEF

U.A., Debtor in a Foreign Proceeding.In re: Oi Brasil Holdings CoöperatiefU.A., Debtor in a Foreign Proceeding.In re: Oi S.A., et al., Debtorsin a Foreign Proceeding.

Case No. 17–11888 (SHL), Case No. 16–11794 (SHL), Case No. 16–11791 (SHL) (Jointly Administered)

Signed 12/04/2017

Synopsis

Background: Insolvency trustee appointed in Dutch bankruptcy proceeding for subsidiary of Brazilian telecommunications company petitioned for order recognizing Dutch proceedings as foreign main proceeding pursuant to Chapter 15, and seeking to have bankruptcy court overturn its prior recognition of Brazilian bankruptcy proceedings.

Holdings: The Bankruptcy Court, Sean H. Lane, J., held that:

- [1] judicial estoppel did not bar foreign debtor from asserting a position on center of its main interests (COMI) under Chapter 15;
- [2] bankruptcy court would not abstain pursuant to principles of international comity from determining foreign debtor's COMI;
- [3] bankruptcy court would not exercise its discretion to overturn its prior recognition order of Brazilian bankruptcy proceeding based on facts that were undisclosed at prior recognition hearing; and
- [4] bankruptcy court would not exercise its discretion to overturn its prior recognition order of Brazilian bankruptcy proceeding based on progression of Dutch insolvency proceedings.

Petition denied.

West Headnotes (47)

[1] Bankruptcy

Cases Ancillary to Foreign Proceedings

As each section of Chapter 15 is based on a corresponding article in the Model Law, if a textual provision of Chapter 15 is unclear or ambiguous, the court may then consider the Model Law and foreign interpretations of it as part of its interpretive task. 11 U.S.C.A. § 1508

Cases that cite this headnote

[2] Bankruptcy

Cases Ancillary to Foreign Proceedings While the statutory text of Chapter 15 controls, international sources may be considered to the extent they assist in carrying out the congressional purpose of achieving international uniformity in crossborder insolvency proceedings. 11 U.S.C.A. § 1508.

Cases that cite this headnote

[3] Bankruptcy

Cases Ancillary to Foreign Proceedings

Chapter 15 case is commenced by the foreign representative of a debtor filing a petition for recognition of a foreign proceeding, which must be accompanied by certain evidentiary documents that are presumed authentic in the absence of contrary evidence. 11 U.S.C.A. §§ 1504, 1515(a), 1515(b), 1516(b).

Cases that cite this headnote

[4] Bankruptcy

Cases Ancillary to Foreign Proceedings Recognition of a foreign proceeding pursuant to Chapter 15 must be identified as either a main or a nonmain proceeding. 11 U.S.C.A. § 1517(a).

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Cases that cite this headnote

[5] Bankruptcy

Cases Ancillary to Foreign Proceedings A simple recognition of a foreign proceeding pursuant to Chapter 15 without specifying more, i.e., non-declaration as to either main or nonmain, is insufficient, as there are substantial eligibility distinctions and

Cases that cite this headnote

consequences. 11 U.S.C.A. § 1517(a).

[6] Bankruptcy

Cases Ancillary to Foreign Proceedings Recognition of a foreign proceeding pursuant to Chapter 15 is not a rubber stamp exercise, and the burden of proof rests on the foreign representative. 11 U.S.C.A. § 1517.

Cases that cite this headnote

[7] Bankruptcy

Cases Ancillary to Foreign Proceedings "Public policy" exception to chapter of Bankruptcy Code governing cross-border insolvencies and grant of ancillary relief by United States bankruptcy courts is read narrowly. 11 U.S.C.A. § 1506.

Cases that cite this headnote

[8] Bankruptcy

Cases Ancillary to Foreign Proceedings
Even the absence of certain procedural or
constitutional rights in foreign proceeding
will not itself be a bar to grant of relief
in a Chapter 15 case ancillary to foreign
proceeding under narrow "public policy"
exception. 11 U.S.C.A. § 1506.

Cases that cite this headnote

[9] Bankruptcy

Cases Ancillary to Foreign Proceedings

Because "center of main interests" (COMI), for purposes of determining foreign main proceeding status, is not statutorily defined, courts are free to develop and consider the particular factors that may be relevant, dependent upon the facts and circumstances present. 11 U.S.C.A. § 1502(4).

Cases that cite this headnote

[10] Bankruptcy

Cases Ancillary to Foreign Proceedings Statutory presumption, under chapter of the Bankruptcy Code governing ancillary and other cross-border cases, that foreign debtor's registered office is also center of its main interests (COMI) is rebuttable, and is only applied for speed and convenience in instances in which the COMI is obvious and undisputed. 11 U.S.C.A. § 1516(c).

Cases that cite this headnote

[11] Bankruptcy

Cases Ancillary to Foreign Proceedings Statutory presumption, under chapter of the Bankruptcy Code governing ancillary and other cross-border cases, that foreign debtor's registered office is also center of its main interests (COMI) is especially inappropriate in a case where there is a substantial dispute. 11 U.S.C.A. § 1516(c).

Cases that cite this headnote

[12] Bankruptcy

Cases Ancillary to Foreign Proceedings Statutory presumption, under chapter of the Bankruptcy Code governing ancillary and other cross-border cases, that foreign debtor's registered office is also center of its main interests (COMI) does not tie the hands of a court to examine the facts more closely in any instances where the court regards the issues to be sufficiently material to warrant further inquiry. 11 U.S.C.A. § 1516(c).

Cases that cite this headnote

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[13] Bankruptcy

Cases Ancillary to Foreign Proceedings Foreign debtor's registered office does not shift the risk of nonpersuasion, i.e., the burden of proof, away from the foreign representative seeking recognition as a main proceeding to prove foreign debtor's center of main interest (COMI). 11 U.S.C.A. § 1516(c).

1 Cases that cite this headnote

[14] Bankruptcy

Cases Ancillary to Foreign Proceedings If foreign proceeding is in the country of foreign debtor's registered office, and if there is evidence that the center of main interests (COMI) might be elsewhere, then the foreign representative must prove that the center of main interest is in the same country as the registered office. 11 U.S.C.A. § 1516(c).

Cases that cite this headnote

[15] Bankruptcy

Cases Ancillary to Foreign Proceedings

Bankruptcy court has discretion to revisit
an earlier order recognizing a foreign
proceeding as foreign main or foreign
nonmain proceeding. 11 U.S.C.A. § 1517(d).

1 Cases that cite this headnote

[16] Bankruptcy

Construction and Operation

In resolving dispute over the meaning of a provision of the Bankruptcy Code, the court starts with the words of the statute.

Cases that cite this headnote

[17] Statutes

Superfluousness

Statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.

Cases that cite this headnote

[18] Statutes

Mandatory or directory statutes

When used in a statute, the word "shall" is ordinarily the language of a legislative command.

Cases that cite this headnote

[19] Bankruptcy

Cases Ancillary to Foreign Proceedings Rule governing relief from final judgment, order, or proceeding does not govern request to revisit an earlier order recognizing a foreign proceeding as foreign main or foreign nonmain proceeding. 11 U.S.C.A. § 1517(d); Fed. R. Civ. P. 60(b).

1 Cases that cite this headnote

[20] Estoppel

Claim inconsistent with previous claim or position in general

Doctrine of judicial estoppel prevents a party from asserting a factual position in one legal proceeding that is contrary to a position that is successfully advanced in another proceeding.

Cases that cite this headnote

[21] Estoppel

Claim inconsistent with previous claim or position in general

Judicial estoppel aims to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment.

Cases that cite this headnote

[22] Estoppel

Claim inconsistent with previous claim or position in general

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The exact criteria for invoking judicial estoppel will vary based on specific factual contexts.

Cases that cite this headnote

[23] Estoppel

Claim inconsistent with previous claim or position in general

Judicial estoppel generally requires that (1) a party's later position is clearly inconsistent with its earlier position, (2) the party's former position has been adopted in some way by the court in the earlier proceeding, and (3) the party asserting the two positions would derive an unfair advantage against the party seeking estoppel; the third requirement is sometimes couched in terms of unfair detriment to the opposing party, rather than advantage to the party to be estopped.

Cases that cite this headnote

[24] Estoppel

Claim inconsistent with previous claim or position in general

Application of judicial estoppel is limited to situations in which the risk of inconsistent results with its impact on judicial integrity is certain; this means that judicial estoppel may only apply where the earlier tribunal accepted the accuracy of the litigant's statements.

Cases that cite this headnote

[25] Estoppel

Claim inconsistent with previous claim or position in general

Silence in a prior proceeding is generally not treated as comparable to a statement for purposes of judicial estoppel.

Cases that cite this headnote

[26] Estoppel

Claim inconsistent with previous claim or position in general Silence in a prior proceeding provides a basis for judicial estoppel where it violates some affirmative duty to speak.

Cases that cite this headnote

[27] Estoppel

Claim inconsistent with previous claim or position in general

Where legal disclosure obligations are not violated, judicial estoppel based on a failure to act arises where the omission flaunts a party's fundamental procedural obligations so as to actively mislead a court.

Cases that cite this headnote

[28] Bankruptcy

Cases Ancillary to Foreign Proceedings

Estoppel

Claim inconsistent with previous claim or position in general

Judicial estoppel did not bar foreign debtor from asserting a position on center of its main interests (COMI) under Chapter 15 based upon jurisdictional statements made by debtor in Dutch bankruptcy proceeding; the COMI finding under the applicable European Insolvency Regulation in the Dutch proceeding was not the same as a COMI finding under Chapter 15 of the Bankruptcy Code. 11 U.S.C.A. § 1502(4).

Cases that cite this headnote

[29] Bankruptcy

Cases Ancillary to Foreign Proceedings

Estoppe

Claim inconsistent with previous claim or position in general

Judicial estoppel did not bar foreign debtor from asserting a position on center of its main interests (COMI) under Chapter 15 based upon its failure to legally contest or appeal any of the Dutch courts' findings regarding debtor's COMI; Dutch law expert testified that such actions were not possible, and debtor had expressed in

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subsequent submissions to the Dutch court its disagreement with the Dutch COMI finding. 11 U.S.C.A. § 1502(4).

Cases that cite this headnote

[30] Courts

Comity between courts of different countries

International comity is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.

Cases that cite this headnote

[31] International Law

Public policy and comity in general

International comity doctrine is concerned with maintaining amicable working relationships between nations, a shorthand for good neighborliness, common courtesy and mutual respect.

Cases that cite this headnote

[32] Courts

Comity between courts of different countries

Decision to grant comity is a matter within a court's discretion and the burden of proof to establish its appropriateness is on the moving party.

Cases that cite this headnote

[33] Courts

Comity between courts of different countries

International Law

Public policy and comity in general

Doctrine of international comity is a form of abstention; it is not an imperative obligation

of courts but rather is a discretionary rule of practice, convenience, and expediency.

Cases that cite this headnote

[34] Courts

Comity between courts of different countries

Judgment

Judgments of Courts of Foreign Countries

Courts generally extend comity provided the foreign court had proper jurisdiction and recognition of its judgment or proceeding does not prejudice the rights of United States citizens or violate domestic public policy.

Cases that cite this headnote

[35] Bankruptcy

Cases Ancillary to Foreign Proceedings Central tenet of Chapter 15 is the importance of comity in cross-border insolvency proceedings.

Cases that cite this headnote

[36] Bankruptcy

Cases Ancillary to Foreign Proceedings Chapter 15 imposes certain requirements and considerations that act as a brake or limitation on comity.

Cases that cite this headnote

[37] Bankruptcy

Application of state or federal law in general

Where the Bankruptcy Code provides the standard for a court's determination, comity does not enter the equation.

Cases that cite this headnote

[38] Bankruptcy

Cases Ancillary to Foreign Proceedings

Both the plain language and legislative history of Chapter 15 requires a bankruptcy court to make a factual determination with respect to recognition of a foreign proceeding before principles of comity come into play. 11 U.S.C.A. § 1517.

Cases that cite this headnote

[39] Bankruptcy

Cases Ancillary to Foreign Proceedings Objective criteria of Chapter 15's recognition procedure reflects a policy determination that the bankruptcy court should not assist a representative of a foreign action unless the debtor has a sufficient presence in the country in which the foreign action is taking place. 11 U.S.C.A. § 1517.

Cases that cite this headnote

[40] Bankruptcy

Cases Ancillary to Foreign Proceedings If debtor does not have its center of main interests (COMI) or at least an establishment in the country of the foreign proceedings, the bankruptcy court should not grant recognition and is not authorized to use its power to effectuate the purposes of the foreign proceeding. 11 U.S.C.A. §§ 1502(4), 1517.

Cases that cite this headnote

[41] Federal Courts

Bankruptcy

Bankruptcy court would not abstain pursuant to principles of international comity from determining foreign debtor's center of main interest (COMI). 11 U.S.C.A. §§ 1502(4), 1517.

Cases that cite this headnote

[42] Bankruptcy

Cases Ancillary to Foreign Proceedings
Bankruptcy court would not exercise its
discretion to overturn its prior recognition
order of Brazilian bankruptcy proceeding

based on facts that were undisclosed at prior recognition hearing, given that the absence of those facts did not mislead the court so as to result in an erroneous center of main interests (COMI) determination. 11 U.S.C.A. § 1517(d).

Cases that cite this headnote

[43] Bankruptcy

Cases Ancillary to Foreign Proceedings Bankruptcy court would not exercise its discretion to overturn its prior recognition order of Brazilian bankruptcy proceedings based on progression of Dutch insolvency proceedings and activities of insolvency trustee arising out of those proceedings, given that insolvency trustee's actions did little to change the economic realities associated with foreign debtor's status as a special purpose financing vehicle for Brazilian parent company and the related expectations of its creditors, whereas debtor's contacts in the Netherlands largely reflected the minimum requirements necessary to remain registered as a Dutch company, and there were significant legal and pragmatic limitations on the insolvency trustee. 11 U.S.C.A. § 1517(d).

Cases that cite this headnote

[44] Bankruptcy

Cases Ancillary to Foreign Proceedings Activities of foreign liquidators and administrators can be relevant to determining foreign debtor's center of main interest (COMI). 11 U.S.C.A. §§ 1502(4), 1517.

Cases that cite this headnote

[45] Bankruptcy

Cases Ancillary to Foreign Proceedings

Where a foreign representative has engaged in significant pre-United States filing work to operate or even liquidate the foreign debtor in the jurisdiction where the foreign insolvency proceeding was commenced, even if in a letterbox jurisdiction, the foreign

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debtor's center of main interest (COMI) can be found to have shifted from the its original principal place of business to the new locale. 11 U.S.C.A. §§ 1502(4), 1517.

Cases that cite this headnote

[46] Bankruptev

Cases Ancillary to Foreign Proceedings Activities of a judicial administrator must be of sufficient significance to produce a shift in the foreign debtor's center of main interest (COMI). 11 U.S.C.A. §§ 1502(4), 1517.

Cases that cite this headnote

[47] Bankruptcy

Cases Ancillary to Foreign Proceedings In circumstances involving debtors without significant operations in a jurisdiction, a foreign representative's work to operate or liquidate a foreign debtor provides a basis for United States recognition of "letterbox" jurisdiction insolvency proceedings, so long as the estate fiduciaries in those jurisdictions do enough work; but such a change in the foreign debtor's center of main interest (COMI) can only take place where material activities have been undertaken in the jurisdiction in which the foreign proceeding was filed, thus providing a meaningful basis for the expectations of third parties. 11 U.S.C.A. §§

Cases that cite this headnote

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1502(4), 1517.

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POST-TRIAL MEMORANDUM OF DECISION

SEAN H. LANE, UNITED STATES BANKRUPTCY JUDGE

Before the Court is the Verified Petition and Motion seeking an Order (I) Recognizing the Dutch Bankruptcy Proceeding as the Foreign Main Proceeding for Oi Brasil Holdings Coöperatief U.A. ("Coop" or the "Debtor"); (II) Recognizing the Insolvency Trustee as the Foreign Representative; (III) Modifying the Prior Recognition Order; (IV) Modifying the Prior Joint Administration Order and (V) Granting Certain Related Relief *175, dated July 7, 2017 (as later supplemented and modified, the "Dutch Petition") [ECF Nos. 2, 23]. The Dutch Petition was filed by Jasper R. Berkenbosch, solely in his capacity as Insolvency Trustee of Debtor Coop (the "Insolvency Trustee").

Unless otherwise specified, references to the Case Management/Electronic Case Filing ("ECF") docket are to Case No.17–11888. There is an extensive evidentiary record in this proceeding. Trial testimony is cited as "Trial Tr. [page:line], [date] ([witness])." Testimony provided by written declaration is cited

as "[Witness] Decl. ¶ __." Testimony on cross-examination provided by written declaration is cited as "[Witness] Cross ¶ __." Exhibits are cited as "TX __" for the Insolvency Trustee's exhibits, "IBCX __" for the IBC's exhibits, "SCX __" for the Steering Committee's exhibits, and "OX __" for Oi's exhibits.

The Dutch Petition presents the Court with a complex factual and procedural history. Coop is a Dutch entity that is part of a family of Brazilian telecommunications companies (the "Oi Group") that initiated bankruptcy proceedings in Brazil in the summer of 2016. In July 2016, several of these Oi Group entities—including Coop—sought and received recognition in this Court of the Brazilian bankruptcy proceedings as a foreign main proceeding under Chapter 15 of the United States Bankruptcy Code. As a basis for that recognition, the Court found Coop's center of main interests ("COMI") to be in Brazil given Coop's status as a special purpose financing vehicle for the Oi Group.

Around the same time, a number of Coop's creditors began to take action against Coop in the Netherlands, which culminated in a Dutch bankruptcy proceeding for Coop. After months of litigation in the Dutch court system, the highest national court in the Netherlands upheld the jurisdiction and propriety of Coop's bankruptcy proceedings under Dutch law. In July 2017, the Insolvency Trustee appointed in the Netherlands filed the Dutch Petition now before this Court. Contending that Coop's COMI is in the Netherlands, the Dutch Petition seeks to have the Court recognize Coop's Dutch bankruptcy proceedings as a foreign main proceeding under Chapter 15 and also to overturn the prior recognition by this Court of Coop's Brazilian bankruptcy proceedings. The Insolvency Trustee's Dutch Petition is supported by Aurelius Capital Management, LP ("Aurelius") and other like-minded creditors who make up the International Bondholder Committee (the "IBC," and together with the Insolvency Trustee, the "Movants"). The relief requested by the Movants is opposed by the debtors that previously received recognition of the Brazilian bankruptcy proceedings in this Court. These debtors are joined by a separate group of Oi Group creditors (the "Steering Committee," and, together with the debtors in the prior case, the "Objectors").

To address the numerous issues presented by the parties, this Decision is divided into sections. The first section sets forth a detailed statement of facts based on the evidence presented in the case, including at trial. The remaining sections are the Court's conclusions of law based on these facts and applicable law. They open with a brief primer on Chapter 15 of the Bankruptcy Code, focusing on recognition and the crucial concept of a debtor's COMI. The Court next turns to the parties' competing views of the applicable legal standard for evaluating the Dutch Petition and Coop's COMI. On the one hand, the Movants urge the Court to conduct a de novo review of Coop's COMI under Section 1517(a) as of the date the Dutch Petition was filed. On the other hand, the *176 Objectors advocate reviewing this case under Section 1517(d), which looks at whether a prior COMI determination should be terminated or modified because it was incorrect in the first instance or based on events after recognition. For the reasons explained below, the Court finds that Section 1517(d) provides the appropriate standard.

After addressing the applicable legal standard, the Court considers whether the doctrines of judicial estoppel and comity apply in this case. More specifically, the Court evaluates whether this Court should conduct its own determination of COMI under Chapter 15 or whether it should defer to prior rulings made by the Dutch courts. The Court ultimately concludes that judicial estoppel and comity should not apply here for a variety of reasons, including, but not limited to, the differences between the legal question now before this Court and the one decided by the Dutch courts.

Finally, the Court evaluates the two prongs of Section 1517(d) for terminating or modifying a prior recognition. The first of these prongs directs the Court to determine whether the grounds for granting recognition were lacking. This requires the Court to examine the record before the Court at the time it recognized Coop's COMI as Brazil. After determining that the Court should not modify or terminate recognition under the first prong in Section 1517(d), the Court turns to the second prong in Section 1517(d). This second prong examines whether the grounds of recognition have ceased to exist. It requires the Court to examine whether events after the prior recognition have changed Coop's COMI from Brazil to the Netherlands. In concluding that this second prong has not been met, the Court considers the economic reality of the special purpose nature of Coop, the expectations of creditors, the limitations on the Dutch Insolvency Trustee presented by the proceedings in Brazil, and allegations of impropriety against creditor Aurelius.

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After a trial and extensive submissions by the parties, the Court denies the Dutch Petition for the reasons set forth below. This decision constitutes the Court's findings of fact and conclusions of law. ²

Certain information relevant to the Court's determination in this case is sensitive commercial information or subject to confidentiality restrictions under Dutch law. See Confidentiality Stipulation and Protective Order [ECF No. 38]; Stipulation Regarding Confidential Dutch Court Proceeding Information [ECF No. 67]; see also Rule 9018 of the Federal Rules of Bankruptcy Procedure (permitting protection of, among other things, confidential commercial information). Such confidential information has been redacted from this Decision. Redactions have been kept to a minimum, however, given the interest of transparency in these proceedings. An unredacted version of this Decision has been filed under seal and provided to counsel to the parties that participated in the trial.

FINDINGS OF FACT

A. The Oi Group's Background and Structure

Incorporated under the laws of Brazil, Oi S.A. ("Oi") is the parent company of a large telecommunications conglomerate. Proposed Joint Pre-Trial Order, Ex. A Statement of Stipulated Facts (the "Stip. Facts") ¶ 1 [ECF No. 87]; Declaration of Antonio Reinaldo Rabelo Filho ("Rabelo Decl.") ¶ 6 [ECF No. 59]. The Oi Group has 140,000 direct and indirect employees in Brazil, including 45,125 full-time employees, as of December 31, 2015. Rabelo Decl. ¶ 5. The Oi Group reports significant operations and market share in a range of telecommunications-related services in Brazil, including (i) operation of 651,000 public telephones, more than one million *177 public Wi-Fi hotspots in locations such as airports and shopping malls, and 330,000 kilometers of fiber optic cables; (ii) a 34.5% market share of fixedline services including network usage, television and data transmission; and (iii) an 18.6% national market share in mobile telecommunications with 48.1 million mobile subscribers as of December 31, 2015, and network coverage of approximately 93.0% of the urban population of Brazil. Rabelo Decl. 5. Moreover, as part of its mobile business, Oi and/or its affiliates are parties to various roaming and similar contractual arrangements

with other global telecommunications companies outside of Brazil. Stip. Facts ¶ 4; Declaration of Ojas N. Shah ("Shah Decl.") ¶ 11 [Case No. 16–11791, ECF No. 4]. Specifically, Oi Móvel S.A. ("Oi Móvel") is a party to roaming agreements with approximately 352 operators in over 140 countries, including in the U.S. TX 63 ¶ 33; TX 284 ¶¶ 18, 21; Trial Tr. 289:22–290:6, Sept. 18, 2017 (Rabelo).

Coop is a subsidiary of Oi. Stip. Facts ¶ 1. Oi has other direct and indirect subsidiaries, including (i) Telemar Norte Leste S.A. ("Telemar"), a wholly-owned subsidiary of Oi that operates a legacy landline telecommunications business; (ii) Oi Móvel, a wholly-owned subsidiary of Telemar that operates the Oi Group's personal mobile and cable television services; and (iii) Portugal Telecom International Finance B.V. ("PTIF"), a wholly-owned financing subsidiary of Oi. Stip. Facts ¶¶ 1, 3; Rabelo Decl.¶ 6.

B. Coop's Background and Structure

Coop was incorporated on April 20, 2011 as a Dutch financing entity with excluded liability (coöperatie met uitgesloten aansprakelijkheid). Stip. Facts ¶ 5; Shah Decl. ¶ 30; Trial Tr. 226:11-226:14, Sept. 18, 2017 (Rabelo). Coop maintains its registered address at Strawinskylaan 3127, 1077 ZX, Amsterdam, Netherlands, which is the shared office of a trust company servicing several corporate entities. Stip. Facts ¶ 6; Trial Tr. 343:18-344:5, Sept. 18, 2017 (Rabelo); Trial Tr. 678:20-679:4, Sept. 25, 2017 (Berkenbosch). Coop's operations are very limited. Coop has no subsidiaries (Stip. Facts ¶ 8); it has never held any equity investments (Trial Tr. 682:2-14, Sept. 25, 2017 (Berkenbosch)); it has no operations and no business independent of the Oi Group (Trial Tr. 682:15-18, Sept. 25, 2017 (Berkenbosch)); and it has never held money for any entity other than a member of the Oi Group (Trial Tr. 352:10-12, Sept. 18, 2017 (Rabelo)). Coop files financial statements with the Dutch Chamber of Commerce (Revised Direct Testimony of Jasper R. Berkenbosch ("Berkenbosch Decl.") ¶ 10 [ECF No. 106]), pays taxes in the Netherlands (Trial Tr. 210:16-25, Sept. 18, 2017 (Rabelo)), and files tax returns with Dutch tax authorities in the Netherlands and as part of the Oi Group's consolidated tax filings in Brazil (Berkenbosch Decl. ¶ 10; Rabelo Decl. ¶ 13). Coop has retained various professionals and advisors in the Netherlands in support of its legal and financial obligations. Stip. Facts. ¶ 9.3

These include (i) RESOR N.V. (legal counsel); (ii) Baker Tilly Berk N.V. (auditors); (iii) KPMG (Meijburg & Co Belastingadviseurs) (tax advisors); and (iv) Vistra B.V. (registered agent). Stip. Facts ¶ 9.

Oi is and always has been Coop's sole member (i.e., shareholder). Stip. Facts ¶ 7. Accordingly, Oi has always held the sole authority to elect Coop's directors. SCX 1 § 9.3. The Coop Board of Directors (the "Coop Board") consisted of two members from the date of Coop's incorporation until April 19, 2017 (the date of the Dutch "conversion" decision, discussed below). Stip. Facts ¶ 10. Prior to early March 2016, *178 those two members included a Brazilian-based representative and, to satisfy the Dutch legal requirements for sufficient Dutch presence, Trust International Management B.V. ("T.I.M."), a Dutch corporate entity. Trial Tr. 183:21– 187:8, Sept. 18, 2017 (Rabelo). In early March 2016, Arthur José Lavatori Correa replaced T.I.M. as the second director, moving to the Netherlands to fill the role. Stip. Facts ¶ 12; Trial Tr. 187:9-20, Sept. 18, 2017 (Rabelo). Prior to serving on the Coop Board, Mr. Correa resided in Brazil. Stip. Facts ¶ 13. From the time of the Dutch "conversion" decision on April 19, 2017 until the present, the Coop Board has consisted of only one Brazilian legal entity, Bryophyta Sp Participacoes S/A. Stip. Facts ¶ 11.

From early March 2016 until late April 2017, Mr. Correa also served as Coop's sole employee. Stip. Facts ¶ 14. Mr. Correa's employment contract directed that he work at least 40 hours a week either in the Coop office or "such other place as [Coop] may instruct" (Trial Tr. 197:19–198:21, Sept. 18, 2017 (Rabelo); TX 73 ¶ 4.1), and there is no evidence that he ever worked in the Coop office, but instead completed all work either at home or in internet cafes. Trial Tr. 345:22–346:7, Sept. 18, 2017 (Rabelo). Coop has never employed anyone else other than Mr. Correa. Stip. Facts ¶ 15; Trial Tr. 345:9–13, Sept. 18, 2017 (Rabelo); Trial Tr. 679:20–679:4 (Berkenbosch).

C. Coop's Activities

Oi established Coop in the Netherlands as a tax-advantaged financing entity. Shah Decl. ¶¶ 30–31; Rabelo 30(b)(6) Dep. Tr. 108:25–110:2; *see* SCX § 10 [redacted] Through its existence, Coop has essentially performed only two functions: (i) borrowing, or issuing or assuming notes; and (ii) on-lending to the Oi Group. Trial Tr.

224:17–23; 351:20–352:4, Sept. 18, 2017 (Rabelo); Rabelo Decl. ¶ 8, 13; Shah Decl. ¶ 30, 35. Although its Articles of Association granted Coop the authority to take on a wider range of operations, ⁴ there is no evidence that it ever did so. In fact, Coop is prohibited under the provisions of one of its note indentures from engaging in any activities other than those related to borrowing and on-lending to Oi Group affiliates. *179 ⁵ TX 15 § 4.17.

- The Articles of Association provide Coop with the authority, among other things:
 - to provide in the material needs of its Members and in this respect:
 - (a) to directly or indirectly invest in, manage and dispose of interests in businesses and companies and to otherwise manage, put out and invest funds and receivables:
 - (b) to finance the Members as well as companies and legal entities affiliated with the Cooperative or a Member;
 - (c) to collect and receive risk-bearing capital from the Members;
 - (d) to borrow, to lend and to raise funds, including the issue of bonds, promissory notes or other securities or evidence of indebtedness as well as to enter in agreements in connection with aforementioned activities;
 - (e) to incorporate, to participate in any way whatsoever in, to manage, to supervise businesses and companies;
 - (f) to finance businesses and companies;
 - (g) to render advice and services to businesses and companies with which the Cooperative or a Member forms a group and to third parties;
 - (h) to grant guarantees, to bind the Cooperative and to pledge its assets for obligations of businesses and companies with which it forms a group and on behalf of third parties;
 - (i) to trade in currencies, securities and items of a property in general;
 - (j) to perform any and all activities of an industrial, financial or commercial nature, and to do all that is connected therewith or may be conducive thereto, all to be interpreted in the broadest sense.

SCX 1 § 3.

- The note indenture provides that, so long as any of the securities are outstanding, Coop as issuer shall not:
 - (a) engage in any business or enter into, or be party to, any transaction or agreement, except(i) the issuance, sale redemption, repurchase, or defeasance of the Securities (including any

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Additional Securities) and any other Indebtedness of the Issuer for the financing of the Company and its subsidiaries not otherwise prohibited by this Indenture and activities incidentally related thereto (including on-lending of funds to the Company and its subsidiaries), (ii) entering into affiliate debt transactions, including loan transactions, with regards to proceeds from the Initial Securities (including any Additional Securities) and any other Indebtedness not otherwise prohibited by this Indenture, (iii) entering into hedging agreements not for speculative purposes, (iv) as required by law, (v) in order to maintain its existence as a corporation, and (vi) in connection with any transaction not otherwise prohibited under this Indenture:

(b) acquire or own any subsidiary or other assets or properties, except (A) an interest in hedging agreements relating to its or its Affiliates' Indebtedness and instruments evidencing interests in the foregoing, (B) cash and cash equivalents, (C) any assets related to affiliate debt transactions, and (D) each series of the Securities and other Indebtedness not otherwise prohibited under this Indenture:

- (c) incur any Indebtedness other than (A) the Securities, and (B) any other Indebtedness that (x) ranks equally with the Securities or (y) is subordinated to the Securities; and
- (d) incur or suffer to exist any Lien upon any properties or assets whatsoever, except Liens imposed by law.

TX 15 § 4.17.

1. Coop Notes

Coop is presently the issuer of two series of notes: €628,112,000 of 5.625% U.S. Notes due 2021 (the "2021 Notes"), and \$1,451,413,000 of 5.75% U.S. Notes due 2022 (the "2022 Notes" and, together with the 2021 Notes, the "Coop Notes"). Stip. Facts ¶ 17. The proceeds from the issuance of the 2021 Notes were transferred directly to Coop's Itáu Nassau bank account in the Bahamas. Rabelo Decl. ¶ 22. Coop never received the 2022 Notes proceeds because it was not the original issuer, as explained below.

The 2022 Notes are governed by an indenture agreement dated February 10, 2012, and a first supplemental indenture dated July 27, 2012 (the "2022 Notes Supplemental Indenture" and, together with the prior indenture, the "2022 Notes Indenture"). Stip. Facts ¶ 18.

The 2021 Notes are governed by an indenture agreement dated June 22, 2015 (the "2021 Notes Indenture" and, together with the 2022 Notes Indenture, the "Coop Notes Indentures"). Stip. Facts ¶¶ 19, 21.

Both series of Coop Notes are guaranteed by Oi. Stip. Facts ¶ 22. While the 2021 Notes were issued by Coop, the 2022 Notes were originally issued by Oi's corporate predecessor, Brasil Telecom S.A. Stip. Facts ¶ 20. The 2022 Notes Indenture includes a provision that permits any wholly-owned subsidiary of the Oi Group to be substituted as issuer at Oi's sole discretion and without noteholder consent, so long as Oi provides the noteholders with indemnification for certain potential disadvantageous tax consequences. TX 17 § 10.01. Coop was eventually substituted as issuer of the 2022 Notes pursuant to the execution of the 2022 Notes Supplemental Indenture. Stip. Facts ¶ 21. 6 Oi provided a guarantee on the 2022 Notes in conjunction with this substitution. Stip. Facts ¶ 21.

The 2021 Notes Indenture includes a matching issuer substitution option. Stip. Facts ¶ 21; TX 15 § 10.01.

Both Coop Notes Indentures are governed by New York law, designate New York as the forum for any disputes related to the Coop Notes, and require that Coop *180 maintain an office or agency in New York City for the purpose of service of process. Stip. Facts ¶ 23–24. The Bank of New York Mellon is the indenture trustee for both series of Coop Notes. Stip. Facts ¶ 25.

The offering memoranda for both series of Coop Notes speak of the Oi Group as a single integrated operation (TX 16 at i; TX 19 at i), and the offering memorandum for the 2021 Notes extensively describes Coop's conduit role and its complete dependence on the Brazilian Oi Group entities:

[Coop], a wholly-owned subsidiary of Oi organized under the laws of the Netherlands, has no operations other than the issuing and making payments on the Notes and other indebtedness ranking equally with the Notes, and using the proceeds therefrom as permitted by the documents governing these issuances, including lending the net proceeds of the Notes and other

indebtedness incurred by [Coop] to Oi and subsidiaries of Oi. Accordingly, the ability of [Coop] to pay principal, interest and other amounts due on the Notes and other indebtedness will depend upon the financial condition and results of operations of Oi and its subsidiaries that are creditors of [Coop]. In the event of an adverse change in the financial condition or results of operations of Oi and its subsidiaries that are creditors of [Coop], these entities may be unable to service their indebtedness to [Coop], which would result in the failure of [Coop] to have sufficient funds to repay all amounts due on or with respect to the Notes.

TX 16 at 18.

The definition of "Events of Default" in the 2021 Notes Indenture includes restructuring or liquidation ("whether judicial or extrajudicial") or "any event ... under the laws of *Brazil, the Netherlands* or any political subdivision thereof [that] has substantially the same effect." TX 15 § 6.01(9) (emphasis added). In contrast, and consistent with Oi's corporate predecessor serving as the original issuer, the definition of "Events of Default" in the 2022 Notes Indenture reads similarly, but excludes reference to the Netherlands. *See* TX 17 § 6.01(8) ("any event ... under the laws of Brazil or any political subdivision thereof [that] has substantially the same effect."). In discussing default and insolvency risk, the offering memoranda for both series of Coop Notes explicitly warn of the possibility of a Brazilian bankruptcy:

[i]f we are unable to pay our indebtedness, including our obligations under the notes, then we may become subject to bankruptcy proceedings in Brazil. Brazilian bankruptcy laws are significantly different from, and may be less favorable to creditors than, those of the United States.

TX 19 at 26; see also TX 16 at 21.

In June 2015, in conjunction with the issuance of the 2021 Notes, the Coop Board approved a resolution which contained the following language:

[Coop's] centre of main interests (as referred to in Regulation (EC) No. 1346/2000 of the Council of 29 May 2000 on Insolvency Proceedings (as may be amended from time to time up to the date hereof) (the "EU Insolvency Regulation")) is located in the Netherlands and the Cooperative has not or will not have an "establishment" (as defined in the EU Insolvency Regulation) in any other member state of the European Union.

TX 150 Annex ¶6. That resolution also stated that it could be relied upon by Clifford Chance LLP, counsel to the underwriting banks and investment firms participating in the initial offering of the 2021 Notes. TX 150 Annex ¶6; TX 304 ¶¶ 1.1–1.4, 3.10. Clifford Chance subsequently *181 issued an opinion letter for the benefit of its clients which contained the same clause regarding Coop's "centre of main interest" under EU law. TX 304 ¶ 3.18; Trial Tr. 257:17–261:24, Sept. 18, 2017 (Rabelo).

2. PTIF Loan

While PTIF has a similar role to Coop as a special purpose financing vehicle in the Oi Group, it has a different origin story. PTIF was formed under the laws of the Netherlands as a private entity with limited liability. Stip. Facts ¶ 2. Between 2013 and 2014, Oi closed on the acquisition of Portugal Telecom SGPS, S.A. ("PT"), a Portuguese telecommunications company that was the then-parent of PTIF. Rabelo Decl. ¶ 18; Berkenbosch Decl. ¶ 17. This purchase included PTIF and the obligations for certain of PTIF's outstanding debts. Rabelo Decl. ¶ 18; Berkenbosch Decl. ¶ 17. In late 2014, Oi sold PT, while retaining PTIF as a wholly-owned subsidiary of Oi. Stip. Facts ¶ 2; Berkenbosch Decl. ¶ 17.

Following Oi's sale of PT, PTIF received the proceeds from the sale of PT as repayment for its intercompany loans to its former parent. Rabelo Decl. ¶ 19; Berkenbosch Decl. ¶ 17. As a result of PTIF's corporate structure and Dutch financial and banking regulations, PTIF was

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required to re-lend the PT sale proceeds to another member of the Oi Group. Rabelo Decl. ¶ 19. Accordingly, PTIF transferred the proceeds—in the amount of €4,648,887,000—to Coop (the "PTIF Loan") pursuant to a loan agreement between PTIF and Coop dated June 2, 2015 (the "PTIF Loan Agreement"). TX 5; Berkenbosch Decl. ¶ 18; Rabelo Decl. ¶¶ 19–20. Those funds were deposited and held in Coop's Itaú Nassau bank account in the Bahamas until they were on-lent to Oi in 2016. Rabelo Decl. ¶ 20; Trial Tr. 329:2–331:7, Sept. 18, 2017 (Rabelo). The PTIF Loan Agreement was amended in mid-March 2016 to divide and extend the maturity of the loan across several dates. *See* TX 6 § 1.1 and Annex A.

3. Oi Loans

Since its formation, Coop has lent money to Oi and Oi Móvel under four loan agreements (the "Coop Loan Agreements"). TX 7-14; Berkenbosch Decl. ¶ 29; Trial Tr. 218:10-219:2, Sept. 18, 2017 (Rabelo). In late August 2012, Coop and Oi executed the first loan agreement in the amount of €1.5 billion. TX 7. In mid-June 2015, Coop and Oi executed a second agreement, which provided for Coop to loan Oi €400 million. TX 8. The second agreement was amended later that same month to increase the borrowing limit to €2 billion. TX 9. The second agreement was then amended twice more in January and March of 2016 to increase the amount of indebtedness to a total of over €2.6 billion and extend the maturity dates of certain tranches, respectively. TX 10, 11. In late February 2016, Coop and Oi executed a third loan agreement that provided for Coop to loan Oi approximately €245 million. TX 12. This third agreement was amended in mid-March 2016 to (i) change the governing law from Dutch to Brazilian law; and (ii) remove a clause that provided Coop with the right to request immediate payment of the outstanding debt under the agreement 181 calendar days after the date of disbursement. TX 13. In early March 2016, Coop and Oi Móvel executed a final loan agreement in the amount of €1.56 billion. TX 14.

From June 2015 through the end of April 2016, a total of approximately €4,448,736,523 was transferred from Coop to Oi and Oi Móvel pursuant to the second, third, and fourth loan agreements. *See* Berkenbosch Decl. ¶¶ 33, 34 (totaling the loan amounts and detailing the individual *182 transfers). As of early August 2016, the aggregate principal amount outstanding under the

four intercompany loans from Coop to Oi and Oi Móvel totaled approximately €5,518,656,925. Stip. Facts ¶ 30.

On June 18, 2015, the Coop Board passed two resolutions approving two amendments to the credit facilities for the loans between (i) Coop and Oi; and (ii) Coop and PTIF, respectively. Both resolutions included the following language, similar to that used in the resolution passed in conjunction with the issuance of the 2021 Notes and Clifford Chance's related opinion letter:

[Coop's] centre of main interests (as referred to in Regulation (EC) No. 1346/2000 of the Council of 29 May 2000 on Insolvency Proceedings (as may be amended from time to time up to the date hereof) (the "EU Insolvency Regulation")) is located in the Netherlands and the Cooperative has not or will not have an "establishment" (as defined in the EU Insolvency Regulation) in any other member state of the European Union

TX 148 ¶ 6; TX 149 ¶ 6.

4. Summary of Coop's Assets and Liabilities

Coop's most valuable assets include the intercompany claims against Oi and Oi Móvel based on the loans described above, so-called "Pauliana" causes of action (described below) seeking the return of these same funds from Oi and Oi Móvel, a relatively small claim against Dutch tax authorities for a value-added tax (or VAT) refund, and other potential claims and causes of action. Stip. Facts ¶ 28–29, 69; Trial Tr. 703:16–704:23, 762:17–20, Sept. 25, 2017 (Berkenbosch).

As of July 7, 2017—the date this case was filed—Coop had no bank accounts in Brazil, and its cash assets consisted of: (i) a court-supervised account in the Netherlands with a current total balance of approximately €416,905; (ii) a bank account at Citibank in New York with approximately \$10,000 relating to a retainer payment for White & Case; and (iii) a bank account at Citibank in New York with approximately \$50,000 held in trust by Jones Day. Stip. Facts ¶ 26–27.

As of August 9, 2017, Coop's debts totaled approximately \in 5.7 billion, consisting principally of approximately \in 1.9 billion outstanding under the Coop Notes, approximately \in 3.8 billion owed to PTIF under the PTIF Loan Agreement, and approximately \in 50,000 to other creditors located in the Netherlands. Stip. Facts ¶ 16.

D. Oi's Financial Distress and the Brazilian RJ Proceeding

As early as 2015, Oi began suffering financial distress as a result of increased interest rates, "chilled foreign investment in Brazil" stemming from various national corruption scandals, increased competitive pressures, rapidly declining demand for fixed-line services ("the primary operational focus of Oi and Telemar"), and expensive government-mandated investment in negativegrowth rural-area operations. TX 63 at 3-4; Berkenbosch Decl. ¶ 27. Oi's financial concerns increased in 2016. reflected by a 168% year-over-year increase in operational losses for the January 2016 to June 2016 period, and an 1126% year-over-year increase in total loss for the same period. Berkenbosch Decl. ¶ 28. The market price for Oi's common stock declined by approximately 90% between January 2014 and August 9, 2015. Dutch Petition ¶ 32. Credit rating agencies began downgrading the financial ratings of Oi and its affiliates around the same time, and continued warning of a "high risk of impending debt restructuring initiatives *183 resulting in potential losses to creditors" in late 2015 and 2016. Dutch Petition ¶ 33.

By early June 2016, Oi retained "advisors to help address capital structure and liquidity concerns." TX 151 at 6. Around that time, Oi prepared a PowerPoint presentation for bondholders with the title "Project Ocean," which displayed the logos of the legal, financial, and restructuring advisory firms White & Case, BMA, and PJT Partners. TX 151. The presentation detailed the Oi Group's financial distress and proposed a note exchange to address its liquidity and leverage issues. TX 151. Later that month, the Oi Group publicly disclosed its negotiations with the Steering Committee, including Oi's proposed out-of-court restructuring plan and a counterproposal from the Steering Committee. Stip. Facts ¶ 31.

On June 20, 2016, Oi, Oi Móvel, Coop, PTIF, Telemar, Copart 4 Participações S.A. and Copart 5 Participações S.A. (collectively, the "Brazilian RJ Debtors") commenced a jointly administered reorganization proceeding (the "Brazilian RJ Proceeding") in the 7a Vara

Empresarial do Rio de Janeiro (Seventh Business Court of Rio de Janeiro) (the "Brazilian RJ Court"). Stip. Facts ¶ 33. The Coop Board contemporaneously approved the commencement of the Brazilian RJ Proceeding for Coop. Stip. Facts ¶ 32; TX 4 ¶ 5. The same day that the Brazilian RJ Proceeding was filed, Ojas N. Shah was appointed as the foreign representative for the Brazilian RJ Proceeding with respect to four entities—Oi, Coop, Oi Móvel, and Telemar-pursuant to resolutions and powers of attorney signed by authorized representatives of each entity. Stip. Facts ¶ 39. Later that month, the Brazilian RJ Court granted the request for the judicial reorganization of the Brazilian RJ Debtors. Stip. Facts ¶ 34. In early September 2016, the Brazilian RJ Debtors submitted a proposed restructuring plan (the "Brazilian RJ Plan") in the Brazilian RJ Proceeding. Stip. Facts ¶ 35. In mid-March 2017, the Oi Group released the proposed economic terms of a revised plan of reorganization. Stip. Facts ¶ 36. The revised plan had not yet been filed at the time of the trial on the Dutch Petition. Stip. Facts ¶ 37. Creditors of Coop and PTIF have actively participated in the Brazilian RJ Proceeding, including two Aurelius-managed funds-Syzygy Capital Management, Ltd. ("Syzygy") and Capricorn Capital Ltd. ("Capricorn")—that have filed pleadings with and requested certain relief from the Brazilian courts. Trial Tr. 591:22-592:12, Sept. 25, 2017 (Gropper).

E. The Prior Recognition Proceeding

On June 21, 2016, one day after the Brazilian RJ Proceeding was filed, Mr. Shah filed voluntary petitions in this Court under Chapter 15 of the Bankruptcy Code on behalf of four entities: Oi, Coop, Oi Móvel, and Telemar (the "Chapter 15 Debtors"). Stip. Facts ¶ 40. On the same day, Mr. Shah filed a joint verified petition and motion (the "Brazilian Petition") seeking recognition of the Brazilian RJ Proceeding for each of the Chapter 15 Debtors (Stip. Facts ¶ 41; TX 63) [Case No. 16–11791, ECF No. 3], as well as the Shah Declaration (TX 64) [Case No. 16–11791, ECF No. 4]. On June 21, 2016, this Court entered an order jointly consolidating the bankruptcy cases for the Chapter 15 Debtors under the Case Number 16–11791. [Case Number 16–11791, ECF No. 11].

The Shah Declaration informed the Court of Coop's nature as an SPV:

Coop is a special-purpose vehicle (an "SPV") with no ability to generate

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a return on cash proceeds itself, any proceeds from debt issuances at Coop must be on-lent to (eventually) an operating *184 Oi Group entity capable of earning a profit for Coop's creditors [and] Coop is also the obligor on any intragroup loans received by it from Oi Group affiliates in its capacity as an intragroup financing company in the Oi Group.

Shah Decl. ¶ 34. The Shah Declaration also stated that "[w]hen issuing long-term debt and as is customary for corporate enterprises, the Oi Group makes use of special purpose financing companies, intercompany guarantees, and intercompany transfers to reduce its cost of capital." Shah Decl. ¶ 18.

In addition, the Shah Declaration informed the Court of Coop's ties to the Netherlands. It stated: "Coop was incorporated ... in 2011 under the laws of the Netherlands" (Shah Decl. ¶ 30; Brazilian Petition ¶ 26); "Coop maintains its registered office in the Netherlands" (Shah Decl. ¶ 31; Brazilian Petition ¶ 27); "Coop enters routine filings with the Dutch Chamber of Commerce ... files tax returns with the Dutch tax authorities, employs Baker Tilly International as auditor, and completes other ministerial activities required by Dutch law" (Shah Decl. ¶ 31; Brazilian Petition ¶ 27); "Coop hired independent Dutch counsel to ensure the protection of its interests in a joint defense with its Oi Group affiliates" (Shah Decl. ¶ 32; Brazilian Petition ¶ 28); "Coop ... is governed by two directors, one of whom resides in the Netherlands" (Shah Decl. ¶ 31; Brazilian Petition ¶ 27); and "Coop's board of directors ... hold [its] meetings in the Netherlands" (Shah Decl. ¶ 32; Brazilian Petition ¶ 28).

On June 22, 2016, the Court held a hearing on the Chapter 15 Debtors' motion for provisional relief under Section 1519 of the Bankruptcy Code, in which they requested protection of their U.S. property under the automatic stay pursuant to Section 362 of the Bankruptcy Code. [Case No. 16–11791, ECF No. 28]. The Court found a "risk of irreparable harm if the automatic stay" was not put into effect immediately, and was presented with no objections or claims that the stay would prejudice any parties. Hr'g. Tr. 9:8–25, June 22, 2016 [Case No 16–11791, ECF No. 28]. Accordingly, the Court granted the relief. *See Order*

Granting Provisional Relief [Case No 16–11791, ECF No. 22].

On July 21, 2016, a hearing was held by the Court on the Chapter 15 Debtors' request to recognize the Brazilian RJ Proceeding as a foreign main proceeding under Chapter 15 for each of the Chapter 15 Debtors, including, but not limited to, Coop (the "Prior Recognition Hearing"). [Case No. 16–11791, ECF No. 41]. At the conclusion of the Prior Recognition Hearing, the Court granted the request, ruling as follows:

I conclude the Brazilian RJ proceeding is ... a foreign ma[in] proceeding with respect to each of the debtors. For three of the debtors, I note that the bankruptcy code establishes a presumption that a debtor's [] registered office is the center of main interest that is the COMI, and that's true for three of these entities.

And I note that the integrated OI group enterprise is managed, directed, and monitored as a strategic whole in Brazil while major group decisions are affected at the OI group headquarters, the OI group headquarters is the corporate nerve center here.

• • • •

And in fact, I also find that Brazil is the appropriate center of main interest for the remaining entity, which is an SPV. Case law including the OAS case notes that the COMI of an SPV turns at a location of the corporate nerve center and the expectation of creditors. And here, I find that the COMI analysis for *185 the SPV here is essentially the same as it was in OAS and I reach the same conclusion that Brazil is the appropriate place.

Hr'g Tr. 21:10–15, July 21, 2016 (citing *In re OAS S.A.*, 533 B.R. 83, 92 (Bankr. S.D.N.Y. 2015)). On July 22, 2016, the Court entered the *Order Granting Recognition of Foreign Main Proceeding and Certain Related Relief* [Case No. 16–11791, ECF No. 38] (the "Prior Recognition Order", and, together with all pleadings, hearings, and other activity in Case No. 16–11791, the "Prior Recognition Proceeding"). Stip. Facts ¶ 43.

On July 18, 2017, White & Case filed a notice titled Disclosure Pursuant to 11 U.S.C. § 1518 Regarding Substitution of Foreign Representative [Case No. 16–11791, ECF No. 79] (the "Rabelo Statement"). Stip. Facts ¶ 44. The Rabelo Statement declares that Mr. Shah's appointment as Coop's foreign representative

was terminated pursuant to resolutions and powers of attorney executed on July 18, 2017, and that Mr. Antonio Reinaldo Rabelo Filho was simultaneously appointed by the Coop Board to act as Coop's foreign representative in place of Mr. Shah. Stip. Facts ¶ 45. Mr. Rabelo was previously employed as a tax director at Oi, but left direct employment with Oi in May 2017. Stip. Facts ¶ 46-47.

F. Aurelius, the IBC, and the Dutch Bankruptcy Proceeding

Aurelius participated in the Prior Recognition Proceeding as an interested party and appeared at both the hearing on June 22, 2016, and the hearing on July 21, 2016. See Motion for Admission to Practice, Pro Hac Vice [Case No. 16-11791, ECF No. 44]. Aurelius did not object to the recognition of Brazil as the COMI for any of the Chapter 15 Debtors, including Coop. It also did not file any pleadings beyond its motion for admission. But Aurelius requested that certain language be included in the order granting provisional relief under Section 1519; the language provided that the interim stay would not apply to actions and property outside the United States and, in particular, the Netherlands. Hr'g Tr. 7:24-8:15 June 22, 2017. The Court's order granting Section 1519 relief included the language Aurelius requested. See Order Granting Provisional Relief¶ 1. Aurelius sought and received the inclusion of similar language in the proposed recognition order, resulting in a stipulation that, among other things, the stay under Section 1520 would apply only to actions and property within the United States. See Hr'g Tr. 9:23-10:15 July 21, 2017.

Notwithstanding its lack of objection to recognition of the Brazilian RJ Proceeding as the foreign main proceeding for Coop, "[i]t was always [Aurelius'] understanding and expectation that Coop would be reorganized in the Netherlands pursuant to the laws of the Netherlands." Trial Tr. 636:19-637:25, Sept. 25, 2017 (Gropper). This was true even at the time of the Prior Recognition Hearing. See id. Indeed, the same day that the Prior Recognition Order was entered, Aurelius distributed a memo "invit[ing] dialog with holders of more than \$50MM face amount of PTIF/[Coop] notes who are heavily weighted toward those notes—meaning that they hold a much larger percentage of the outstanding PTIF/ [Coop] notes than of the outstanding Telemar notes." OX 73 at 4. This memo argued that initial restructuring negotiations between the Oi Group and some of its creditors had undervalued the PTIF and Coop Notes, and directed interested parties to contact Aurelius. *Id.* at 3; Trial Tr. 603:24–604:22, Sept. 25, 2017 (Gropper). As of the date of this memo, Aurelius held only [redacted] of Coop Notes on a notional *186 basis. IBCX 20 at 2.

As of July 1, 2017, the IBC held \$2.6 billion of Oi Group debt, comprising approximately \$574 million of notes issued by Coop, \$1.9 billion of notes issued by PTIF, and \$165 million of bonds guaranteed by Telemar. IBCX 45 n.2.

As of July 19, 2017, the Steering Committee held \$1.23 billion of Oi Group debt, comprising approximately \$242 million of notes issued by Coop, \$88 million in notes issued by PTIF, \$864 million of notes issued by Oi and guaranteed by Telemar, and \$37 million in notes issued by Oi without a guarantee. Steering Committee Objection ¶ 18 n.38 [ECF No. 55].

Aurelius began taking legal action against Coop in the Netherlands weeks before the events in New York. In the spring of 2016, Aurelius began pursuing actions in the Dutch courts to enjoin the on-lending and transfer of funds from Coop to Oi under their loan agreements. Shah Decl. ¶¶ 56–57. These actions were ultimately unsuccessful. Shah Decl. ¶¶ 57–58; SCX 3. In addition, on June 27, 2016, shortly after the filing of the Brazilian Petition, but before the Prior Recognition Hearing, the Aurelius-managed fund Syzygy filed an involuntary bankruptcy petition against Coop in the Netherlands. Stip. Facts ¶¶ 49–51. This was followed by the filing of three additional involuntary petitions against Coop in the Netherlands in July 2016 by three different groups of creditors. Stip. Facts ¶¶ 49–51.

In the Prior Recognition Proceeding, the Court was informed of these involuntary petitions through a second declaration from Mr. Shah filed a little more than a week before the Prior Recognition Hearing. [Case No. 16–11791, ECF No. 32 ¶ 21]; see also Hr'g Tr. 8:16–25, July 21, 2017. In a subsequent declaration filed approximately one month after the Prior Recognition Order was entered, Mr. Shah informed this Court that following the involuntary filings against Coop in the Netherlands, Coop had filed its own petition for a suspension of payments proceeding in the Netherlands (as discussed further below). Third Decl. Notifying Court of a Change of Status ¶ 5 [Case No. 16–11791, ECF No. 48].

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Dutch bankruptcy proceedings are governed by two legal regimes, the EU regime established by the European Insolvency Regulation (the "EU Regulation") enacting the European Union Convention on Insolvency, and the Dutch national regime established by the Dutch Bankruptcy Act (the "DBA"). Berkenbosch Decl. ¶ 115; Declaration of Paul Michael Veder ("Veder Decl.") ¶¶ 12-15 [ECF No. 105-1]. When opening an insolvency proceeding, such as the one involving Coop, a Dutch court is obligated to sua sponte determine and declare which regime provides the basis for its jurisdiction. Berkenbosch Decl. ¶ 116; Veder Decl. ¶ 14. There are three bases for jurisdiction under the EU Regulation and DBA. First, under the EU regime, a Dutch court can open a "main" proceeding if the debtor's COMI under the EU Regulation is found to be within the Netherlands. Id. Second, the court can open a "secondary" or "territorial" proceeding if it finds that the debtor has its COMI under the EU Regulation in a different EU member state, but has an "establishment" in the Netherlands. Id. Third, if the Dutch court finds a debtor's COMI under the EU Regulation to be outside the EU, it may instead have jurisdiction under the DBA so long as the debtor either (1) has "domicile (woonplaats)" in the Netherlands; or (2) maintains an "office (kantoor)" in the Netherlands. Berkenbosch Decl. ¶ 117; Veder Decl. ¶ 34. For the purpose of the DBA, a legal entity has domicile in the same state as its statutory seat. Id.

The primary difference in finding jurisdiction under the EU Regulation rather *187 than the DBA is the automatic recognition granted to the proceeding by other EU member states. Trial Tr. 394:22–396:22, Sept. 19, 2017 (Veder); Berkenbosch Decl. ¶ 125. By contrast, Dutch insolvency proceedings under the DBA generally can receive recognition in other European nations only on a nation-by-nation basis using each nation's idiosyncratic legal protocols, although some member states—such as Germany—do still provide automatic recognition to Dutch insolvency proceedings under the DBA. Trial Tr. 395:9–396:10, 400:14–401:21, Sept. 19, 2017 (Veder).

Notably, even if COMI under the EU Regulation is found to be in the EU, the Dutch courts offer the same forms of relief for cases opened under the DBA. Berkenbosch Decl. ¶ 120. In both cases, Dutch law contemplates two forms of insolvency proceedings for companies: "suspension of payments (surseance van betaling) and bankruptcy (faillissement)." Veder Decl.

¶ 37. Initiation of a suspension of payments ("SoP") instates a general moratorium on all actions by unsecured ordinary creditors and restricts debtors from performing acts of "administration or disposal" with regard to the estate "without cooperation, authorization or consent of the administrator." Berkenbosch Decl. ¶ 130. In contrast, in a bankruptcy proceeding, an insolvency trustee becomes exclusively authorized to manage the estate. Berkenbosch Decl. ¶ 146.

While bankruptcy proceedings can be initiated upon the request of either a debtor or creditor, a SoP can only be granted at the request of the debtor. Veder Decl. ¶ 37. Accordingly, a Dutch court makes an initial determination regarding a SoP petition without holding a hearing or receiving input from creditors, shareholders, or other stakeholders. Berkenbosch Decl. ¶ 132; Veder Decl. ¶ 38. Upon request for a SoP proceeding, the Dutch court is obligated to grant a preliminary SoP if various initial criteria are met. Veder Decl. ¶ 38. Specifically, a SoP petition must contain evidence demonstrating that the debtor anticipates being unable to continue paying its debts as they fall due, and must include such documents as a balance sheet and a list of known creditors with their contact details. Veder Decl. ¶ 38. The SoP petition and any enclosed documents (e.g., a proposed composition plan) are subsequently made publically available. Berkenbosch Decl. ¶ 132. After granting the provisional SoP, a Dutch court will generally also grant a definitive SoP unless (1) a qualified majority of the unsecured ordinary creditors object; (2) there is a well-founded suspicion that the debtor will prejudice the interests of creditors; or (3) there is no prospect of the debtor being able to satisfy its creditors within a certain period of time. Berkenbosch Decl. ¶ 133.

Right after the filing of the first Dutch involuntary petition by Syzygy, Oi prepared a PowerPoint presentation dated June 30, 2016 and titled "Projeto Oceano." TX 152. The appendix of the PowerPoint addresses plans for the potential filing of insolvency proceedings across several jurisdictions, including timelines and descriptions of how those filings could interact. In discussion of a potential Dutch filing, the presentation reads as follows:

[The Brazilian RJ Proceeding] will not be recognized in the Netherlands therefore if creditors take action in the Netherlands, [Coop] will have to file for an additional insolvency proceeding, Suspension of Payments, to ensure they are protected in the Netherlands. Please note the current intention is that this will be used as a defensive measure only. An illustrative timeline is on the next slide.

TX 152 at Bates OiSA-0000579.

In fact, on July 26, 2016, the Coop Board petitioned for appointment of a silent administrator *188 for Coop in the Netherlands. Stip. Facts ¶ 52. Silent administration is primarily used to gather information about an entity while preparing it for an insolvency proceeding. Berkenbosch Decl. ¶ 49. On July 28, 2016, the Dutch District Court appointed Mr. Jasper Berkenbosch to the administrator post. Stip. Facts ¶ 53. Mr. Berkenbosch used the period of his appointment to "familiarize [him]self with Coop and the other Brazilian RJ Debtors by, among other methods, communicating with the Coop Board and its Dutch legal counsel." Berkenbosch Decl. ¶ 49.

On August 9, 2016, the Coop Board petitioned for a provisional SoP on an ex parte basis by filing a petition (the "SoP Petition") with the Dutch District Court. Stip. Facts ¶ 54. At 9:30AM the same morning, the Dutch District Court entered its order granting the SoP Petition (the "SoP Commencement Order") and commencing Coop's SoP proceeding (the "SoP Proceeding"). Trial Tr. 801:19-802:6, Sept. 25, 2017 (Berkenbosch); Stip. Facts ¶ 56. Coop filed the SoP Proceeding to facilitate its reorganization rather than its liquidation. TX 67 ¶ 5. In fact, the SoP Petition included a draft "composition plan" that proposed to incorporate the recoveries offered to creditors under the Brazilian RJ Plan. Stip. Facts ¶ 55; TX 26 Annex 13. A composition plan is the Dutch restructuring alternative to a liquidation and requires adoption by creditors and confirmation by a Dutch court. Trial Tr. 699:16-24, Sept. 25, 2017 (Berkenbosch). Pursuant to the SoP Commencement Order, the Dutch District Court appointed Mr. Berkenbosch as Coop's administrator (in such capacity, the "SoP Administrator") and Mr. W.F. Korthals Altes as the supervisory judge (the "Dutch Supervisory Judge"). Stip. Facts ¶ 57.

Shortly after Mr. Berkenbosch's appointment as SoP Administrator, Aurelius initiated a campaign of frequent and aggressive contact with Mr. Berkenbosch to convince him to move for the withdrawal of the SoP

Proceeding and conversion to a Dutch bankruptcy, including by repeatedly critiquing his performance as SoP Administrator and reminding him of his fiduciary duties. Trial Tr. 617:10–18, 618:13–20, 619:3–23, 620:14–621:11, Sept. 25, 2017 (Gropper); OX 4, 7, 9, 16, 27 (counsel letter on behalf of the IBC); Trial Tr. 816:11–19, Sept. 25, 2017 (Berkenbosch); SCX 6. Representatives of Aurelius actually apologized twice for the contents of these communications after Mr. Berkenbosch took actions several weeks later that were in line with Aurelius' demands. Berkenbosch Decl. ¶ 56 n.87; Trial Tr. 621:22–24, 640:13–641:20, 659:11–660:22, Sept 25, 2017 (Gropper); *id.* 767:15–769:4 (Berkenbosch).

Consistent with Aurelius' requests, Mr. Berkenbosch, in his capacity as SoP Administrator, and certain members of the IBC filed requests in early December 2016 to convert Coop's SoP Proceeding to a Dutch bankruptcy proceeding (collectively, the "Coop Conversion Requests"). Stip. Facts ¶ 58; TX 309.

The hearing on the Coop Conversion Requests took place before the Dutch District Court in early January 2017 (the "Conversion Hearing"). Stip. Facts ¶ 60. Whether requested by a debtor or a creditor, hearings held to determine whether to convert a SoP proceeding and/ or open a bankruptcy proceeding generally occur in chambers (in raadkamer). Veder Written Direct ¶ 39-40; Berkenbosch Decl. ¶ 140. In cases stemming from creditor requests, the district court will summon the petitioner and debtor, and may call the administrator and other creditors or relevant parties sua sponte or if the creditors have filed parallel bankruptcy requests. Id.; Berkenbosch Decl. ¶ 140. Either the Dutch *189 court or the administrator may notify creditors that they will be provided an opportunity to participate. Berkenbosch Decl. ¶ 140. In Coop's case, the Conversion Hearing was attended by Mr. Berkenbosch with counsel from Jones Day, the PTIF administrator, 8 counsel for Coop, and counsel for various creditors, including members of the IBC, certain Italian noteholders, and GoldenTree Asset Management LP, a member of the Steering Committee. Berkenbosch Decl. ¶ 73; Van Agteren 30(b)(6) Dep. Tr. 83:8-84:10.

8 PTIF was also undergoing a Dutch insolvency proceeding at this time, and had received a provisional SoP on October 3, 2016. TX 3 § 3.1(iv).

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In early February 2017, the Dutch District Court denied the Coop Conversion Requests (the "Conversion Denial Decision"). Stip. Facts ¶ 61. A little more than a week later, four creditors of Coop, including the Aureliusmanaged fund Syzygy, appealed the Conversion Denial Decision to the Dutch Court of Appeals. Stip. Facts ¶ 63; Veder Decl. ¶ 57. Three of these creditors, including Syzygy, are members of the IBC. IBCX 45 n.2; Trial Tr. 769:17–24, Sept. 25, 2017 (Berkenbosch). Mr. Berkenbosch did not appeal. Stip. Facts ¶ 62. Coop filed a response to the appeal on March 22, 2017. TX. 421. [redacted]

A hearing on the appeal took place in late March 2017 (the "Dutch Court of Appeals Hearing"). Stip. Facts ¶ 64. Counsel to the Coop Board attended [redacted] On April 19, 2017 (the "Conversion Date"), the Dutch Court of Appeals issued a decision overturning the Conversion Denial Decision, converting Coop's SoP Proceeding to a Dutch bankruptcy proceeding (the "Dutch Bankruptcy Proceeding"), and appointing Mr. Berkenbosch as Coop's Insolvency Trustee. Stip. Facts ¶ 65.

At the beginning of May 2017, Coop appealed the Dutch Court of Appeals' legal conclusions to the Dutch Supreme Court. Stip. Facts ¶ 66. The hearing on that appeal took place in the middle of June 2017. Stip. Facts ¶ 67. In its written pleadings, Coop challenged the Dutch Court of Appeals decision in part on procedural grounds, arguing that "the Court of Appeals ought to have summoned all the creditors in order to be heard and not allowed interested parties other than creditors to be heard." TX 3 § 3.4.1. The Dutch Supreme Court rejected this claim, interpreting Dutch law to oblige the court to summon only "the petitioner, the debtor and the administrator" and allowing the court to also "summon[] and hear[] other interested parties, such as (other) creditors or companies associated with the debtor" at its discretion. TX 3 § 3.4.2; see also Berkenbosch Decl. ¶ 190. [redacted] On July 7, 2017, the Dutch Supreme Court affirmed the Dutch Court of Appeals decision. Stip. Facts ¶ 68.

G. The Authority and Activities of the Dutch Insolvency Trustee

Under Dutch law, as under the U.S. Bankruptcy Code, commencement of a bankruptcy proceeding transfers certain powers away from the pre-insolvency debtor and its management team. Most significantly, "the debtor—and its board of directors—is no longer authorized

to manage and dispose of the assets composing the insolvent estate." Berkenbosch Decl. ¶ 156. Rather, only the insolvency trustee is empowered to "preserve, collect and liquidate all of the debtor's assets for distribution to creditors through the bankruptcy proceeding." Berkenbosch Decl. ¶ 157; Supplemental Declaration of Paul Michael Veder ("Veder Sup. Decl.") ¶ 12. The insolvency trustee gains exclusive authority to commence proceedings or bring and defend *190 against any legal action on behalf of the estate. Berkenbosch Decl. ¶ 156; Veder Sup. Decl. ¶ 12. Additionally, "any powers of attorney made by a debtor or its board of directors are automatically terminated by operation of law." Berkenbosch Decl. ¶ 157.

The debtor and not the insolvency trustee, however, remains the "legal owner" of the assets of the bankruptcy estate. Veder Sup. Decl. ¶ 11. The insolvency trustee is only appointed to administer the bankruptcy estate, not the "legal person of the debtor," and the debtor and its "corporate bodies (organen)" retain existence during the bankruptcy. Veder Decl. ¶ 60–61 (emphasis in original); Berkenbosch Decl. ¶ 158. "The debtor's management board and supervisory board remain in place, as do any internal corporate groups (such as a works council that looks after the interests of employees)." Veder Decl. ¶ 62.

"[T]he insolvency trustee is not entitled to dismiss or appoint management board members." Berkenbosch Decl. ¶ 158. The board of directors retains authority to call a general meeting of shareholders. Berkenbosch Decl. ¶ 158. The shareholders (or members) retain their equity holdings and their exclusive ability to amend the debtor's articles of association. Veder Decl. ¶¶ 62–63. More practically, while a debtor or its directors "may in principle still enter into agreements with third parties—loan agreements, for example—such agreements do not automatically bind the estate; the estate would only be liable in respect of such an agreement to the extent that the estate benefitted therefrom." Veder Sup. Decl. ¶ 12 [ECF No. 105–2].

The debtor also remains a distinct legal entity for the purposes of participation in the bankruptcy proceedings themselves, and may retain its own counsel, legal, financial or otherwise. Berkenbosch Decl. ¶ 158; Veder Sup. Decl. ¶ 19. The debtor may submit to the supervisory judge "article 69" petitions under Dutch law to challenge actions of the insolvency trustee. Berkenbosch Decl. ¶

159; Veder Decl. ¶ 64. The debtor can even request that the supervisory judge dismiss or replace the insolvency trustee. Veder Decl. ¶ 64. Likewise, any creditor or creditor committee is empowered to challenge the acts of an insolvency trustee with the supervisory judge and request an order directing the insolvency trustee to "commit or omit a certain act." Berkenbosch Decl. ¶ 166. The debtor also has a right to challenge creditor claims during the "verification" process or request amendments to the report of the creditors' meeting. Veder Decl. ¶¶ 64–66.

Most significantly, the board remains "solely entitled to offer a composition plan under Dutch law to the unsecured ordinary creditors on behalf of the debtor." Berkenbosch Decl. ¶ 161. This is because under Dutch law, "the composition plan is considered a contract between the debtor and its creditors." Veder Decl. ¶ 66. The insolvency trustee offers advice on the composition plan to the creditors, but cannot vote on the plan with the creditors. Veder Sup. Decl. ¶ 14. A plan is adopted "if more than 50 percent of the total amount of ordinary unsecured creditors present at the meeting where the plan is voted on, which together represent at least half of the total amount of ordinary unsecured claims outstanding, accept the plan." Berkenbosch Decl. ¶ 161. Notably, the board is not allowed to unilaterally bind the Dutch estate by voting in support of a plan of reorganization in a foreign proceeding that affects the estate assets. See TX 3 § 3.8.2.

Mr. Berkenbosch has taken several actions on behalf of the Coop Dutch bankruptcy estate in his roles as SoP Administrator and Insolvency Trustee. First, Mr. Berkenbosch has issued several communications *191 to Coop creditors in the form of public reports and notices on the status of Coop's insolvency proceedings and the proposed composition plan as required under Dutch law. Berkenbosch Decl. ¶ 59; TX 29–34; TX 162 Arts. 73a and 227. Some of the reports were published online and are accessible on the Central Insolvency Register in the Netherlands (TX 38 ¶ 1.3; TX 40 ¶ 1.3; Berkenbosch Decl. ¶ 112), as well as on a website Mr. Berkenbosch has maintained in his capacity as SoP Administrator and Insolvency Trustee. Berkenbosch Decl. ¶ 59.

Mr. Berkenbosch has engaged in multiple written, electronic, and in-person communications with Oi and the Coop Board. TX 30 \P 1.1, TX 82–87; Trial Tr. 701:23–

702:9, Sept. 25, 2017 (Berkenbosch); Berkenbosch Decl. ¶¶ 63, 65–70. Among other things, Mr. Berkenbosch has held videoconferences and in-person meetings with the Coop Board and Oi executives, as well as their Dutch, Brazilian and U.S. counsel, in Brazil, Portugal, London and the Netherlands. TX 30 ¶ 1.1; Berkenbosch Decl. ¶¶ 63, 66, 70. Mr. Berkenbosch has also sent Oi and the Coop Board a number of letters expressing his concerns and requests regarding the restructuring proceeding in Brazil. See, e.g., TX 82–87; Berkenbosch Decl. ¶¶ 63, 65, 68–70.

Mr. Berkenbosch has also responded to and satisfied requests for payment of Coop's day-to-day debts and expenses. *See* Declaration of Corinne Ball ("Ball Decl.") Ex. S [ECF No. 73] (November 30, 2016 email to J. Berkenbosch from Coop Board member requesting authorization of salary payment); *id.* Ex. T (January 25, 2017 email from J. Berkenbosch to RESOR and Coop Board member granting authorization for payment to the Coop Board's Dutch counsel).

Separate and apart from the Dutch insolvency proceedings, Mr. Berkenbosch has initiated actions in the Dutch courts on behalf of the Coop Dutch bankruptcy estate. In late May 2017, the Insolvency Trustee commenced a Dutch Pauliana action on behalf of the Dutch bankruptcy estate of Coop against Oi and Oi Móvel (the "Pauliana Proceeding"). Stip. Facts ¶ 69. Mr. Berkenbosch reports the goal of this action to be the "unwinding [of] the 2016 loans from Coop to Oi Móvel." Berkenbosch Decl. ¶ 25. 9 On August 2, 2017, the Amsterdam District Court in which the Pauliana Proceeding was filed rejected Coop's request to join as a separate, interested party:

The bankrupt debtor remains authorized to act as claimant or defendant insofar as it concerns claims that do not involve the estate. However, the claims in the main action and in the interim action concern claims "that have rights or obligations that belong to the insolvent estate as their subject" (article 25 Dutch Insolvency Act). It does not fit within the system of the law.

Berkenbosch Decl. ¶ 160. The Insolvency Trustee has also pursued a claim on behalf of Coop's estate against the Dutch tax authorities for a VAT (value added tax) refund of approximately €160,846. Berkenbosch Decl. ¶ 26; Dutch Petition ¶ 30.

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Pauliana actions are similar to fraudulent conveyance claims under U.S. law. Trial Tr. 655:11–17, Sept. 25, 2017 (Gropper); Berkenbosch Decl. ¶ 24; Trial Tr. 703:16–704:8, Sept. 25, 2017 (Berkenbosch).

Mr. Berkenbosch has also taken action in the Brazilian RJ Proceeding. Following the conversion order issued by the Dutch courts, the Brazilian RJ Court issued an order in mid-May 2017 (the "Brazilian Injunction Order") to prohibit Mr. Berkenbosch from taking actions which would disrupt the Brazilian RJ Proceeding. The *192 injunction of the Brazilian RJ Court ordered:

under penalty of R\$ 300,000.00 per event of non-compliance, that the Dutch Jas, Messrs. Jasper Berkenbosch and J.L.Groenewgen fully respect the decisions of the Brazilian law and, among other things, abstain from performing any act aimed at: (a) imposing or preventing an action or omission by the directors of [Coop] or PTIF or any representative[;] (b) performing or cooperating in the performance of any act that tends to encumber, assign, transfer or in any way alienate the assets of [Coop] and PTIF, in any jurisdiction, authorising the payment of everyday expenses, all under penalty of personal responsibility; and (c) using the cash of [Coop] and PTIF to pay attorneys fees, Brazilian or foreign who acted and act on behalf of the conversion into bankruptcy of the Dutch companies.

TX 53 at Bates OI-TRUSTEE-000001303; see also Declaration of Sérgio Ricardo Savi Ferreira ("Ferreira Decl.") ¶¶ 6-9 [ECF No. 105-3]; Declaration of Giuliano Colombo ("Colombo Decl.") ¶ 34 [ECF No. 105-7]; Declaration of Sheila Christina Neder Cerezetti ("Cerezetti Decl.") ¶ 56 [ECF No. 81]. The Insolvency Trustee has appealed this decision multiple times, earning at least partial relief in June 2017 as to assets located outside of Brazil. ¹⁰ In addition, Mr. Berkenbosch has obtained orders in the Brazilian RJ Proceeding requiring the Brazilian RJ Debtors to provide separate creditor lists (TX 471), and to allow creditors to have a non-

consolidated vote on the proposed consolidation (TX 485; Trial Tr. 785:12–19, 786:14–17, 828:12–829:4, Sept. 25, 2017 (Berkenbosch)).

See TX 54 at 6 ("[T]here is no evidence that foreign sovereignty was violated [T]he appealed decision, in explaining the trustee's impediments in any jurisdiction, obviously refers to the goods and assets located in Brazil, with respect to the sovereignty of the States."); TX 134 at 1 ("I grant partial suspensive effect on the assets requested so that the appealed decision expressly shows that the decisions made by the Brazilian courts impact the goods and assets located in domestic territory and those located abroad that are owned by the companies in the process of reorganization, except the cases in which foreign jurisdiction concludes otherwise in that regard, exclusively for the assets located in the territory subject to foreign jurisdiction, due to the principle of sovereignty of each State, and consequently, its Jurisdiction."); see also Cerezetti Decl. ¶¶ 57-61.

In early July 2017, the Insolvency Trustee received approval from the Dutch Supervisory Judge to commence the current Chapter 15 proceeding on behalf of Coop. Berkenbosch Decl. ¶ 99. On July 7, 2017, the Insolvency Trustee filed the Dutch Petition. Stip. Facts ¶ 70. On July 31, 2017, the Insolvency Trustee filed a supplement to the Dutch Petition [ECF No. 23]. Stip. Facts ¶ 71. To fund his various actions on behalf of the Coop Dutch bankruptcy estate, the Insolvency Trustee borrowed \$5 million from the IBC under a credit facility entered into on July 4, 2017. Rabelo Decl. ¶ 9; TX 58. Before accepting that financing, Mr. Berkenbosch contacted a number of other potential lenders, including Oi, the PTIF insolvency trustee, the Steering Committee, and other "third-party litigation funders." Berkenbosch Decl. ¶ 100; Trial Tr. 700:17-701:12, Sept. 25, 2017 (Berkenbosch); TX 119 at 1, 6-7.

H. The Current Proceedings

The Court held a trial on the Dutch Petition on September 18, 19, 25 and 26, 2017. See Notice of Filing of Evidentiary Hearing Transcripts [ECF No. 124]. During the four days of trial, the Court heard testimony from four witnesses: Mr. Rabelo, Mr. Berkenbosch, Mr. Dan Gropper (an Aurelius managing director), and Professor Paul Michael Veder (an expert on *193 Dutch insolvency law offered by Oi). By agreement of the parties and pursuant to the

Court's instruction, direct testimony of those witnesses was presented in written form and each appeared at trial for cross-examination and re-direct examination. Also by agreement of the parties and pursuant to the Court's direction, the Court accepted deposition designations in lieu of live testimony for three Brazilian law experts and three fact witnesses: Giuliano Colombo (Brazilian law expert for the Steering Committee), Professor Sheila Cerezetti (Brazilian law expert for Mr. Berkenbosch), Sergio Ricardo Savi Ferreira (Brazilian law expert for Oi), 11 Erick Alberti (financial advisor to the Steering Committee), Patrick Dyson (partner at an individual fund in the Steering Committee), Van Agteren (attorney and 30(b)(6) witness for the Steering Committee). In addition to the witness testimony, the Court heard argument of counsel, admitted exhibits into evidence, and accepted a stipulation from the parties with agreed-upon facts. After the trial, the parties submitted proposed findings of fact and conclusions of law. See Movants' Proposed FoF and Movants' Proposed CoL [ECF No. 120]; Objectors' Proposed FoF and CoL [ECF No. 121].

Mr. Colombo, Professor Cerezetti, and Mr. Ferreira also submitted written direct testimony.

CONCLUSIONS OF LAW

A. Chapter 15 and COMI Generally

Chapter 15 of the Bankruptcy Code was enacted by Congress as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23. Chapter 15 implemented the Model Law on Cross-Border Insolvency (the "Model Law"), promulgated by the United Nations Commission on International Trade Law ("UNCITRAL"). See H.R. REP. No. 109-31, at 105-07 (2005), reprinted in 2005 U.S.C.C.A.N. 88; In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd. (In Provisional Liquidation), 374 B.R. 122, 126 (Bankr. S.D.N.Y. 2007). The stated purpose of Chapter 15 "is to incorporate the Model Law on Cross-Border Insolvency so as to provide effective mechanisms for dealing with cases of cross-border insolvency," with the related goals of promoting cooperation between U.S. and foreign courts, greater legal certainty for trade and investment, fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested entities, including the debtor, protection and maximization of a debtor's assets, and the rescue of financially troubled businesses. 11 U.S.C. § 1501(a).

[1] [2] When interpreting Chapter 15, the statute directs that "the court shall consider its international origin, and the need to promote an application of this chapter that is consistent with the application of similar statutes adopted by foreign jurisdictions." 11 US.C. § 1508. "As each section of Chapter 15 is based on a corresponding article in the Model Law, if a textual provision of Chapter 15 is unclear or ambiguous, the Court may then consider the Model Law and foreign interpretations of it as part of its 'interpretive task.' " In re OAS, 533 B.R. at 92 (quoting O'Sullivan v. Loy (In re Loy), 432 B.R. 551, 560 (E.D. Va. 2010)). Legislative history also recommends consulting the Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency, U.N. Gen. Ass., UNCITRAL 30th Sess., U.N. Doc. A/CN.9/442 (1997) (the "Guide"), promulgated *194 by UNCITRAL, "for guidance as to the meaning and purpose of [Chapter 15's] provisions." H.R. Rep. No. 109-31, pt. 1, at 106 n.101 (2005); see also Morning Mist Holdings Ltd. v. Krys (In re Fairfield Sentry Ltd.), 714 F.3d 127, 136 (2d Cir. 2013). While the statutory text of Chapter 15 controls, international sources may be considered to the extent they assist in "carry[ing] out the congressional purpose of achieving international uniformity in crossborder insolvency proceedings." In re Fairfield Sentry, 714 F.3d at 136.

- [3] A Chapter 15 case is commenced by the foreign representative of a debtor filing a petition for recognition of a foreign proceeding. *See* 11 U.S.C. §§ 1504, 1515(a). The petition must be accompanied by certain evidentiary documents that are presumed authentic in the absence of contrary evidence. *See* 11 U.S.C. §§ 1515(b), 1516(b); *In re Bear Stearns*, 374 B.R. at 128.
- [4] [5] Section 1517 of the Bankruptcy Code identifies the requirements for recognition of a foreign proceeding. It provides that
 - an order recognizing a foreign proceeding shall be entered if—
 - (1) such foreign proceeding ... is a foreign main proceeding or foreign nonmain proceeding within the meaning of [S]ection 1502;

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(2) the foreign representative applying for recognition is a person or body; and

(3) the petition meets the requirements of [S]ection 1515.

11 U.S.C. § 1517(a). A recognition must be identified as either a main or a nonmain proceeding. See In re Bear Stearns, 374 B.R. at 126-27. "A simple recognition of a foreign proceeding without specifying more (i.e., non-declaration as to either 'main or nonmain') is insufficient as there are substantial eligibility distinctions and consequences." Id. at 127. For instance, upon the recognition of a foreign main proceeding, Section 1520 of the Bankruptcy Code provides certain "automatic, nondiscretionary relief," including imposition of an automatic stay with respect to the debtor and its property located within the United States. In re Fairfield Sentry, 714 F.3d at 133; 11 U.S.C. § 1520(a). A stay is also available on a discretionary basis upon the recognition of a foreign main or a foreign nonmain proceeding. 11 U.S.C. § 1521(a).

[6] Recognition is mandatory if all three requirements of Section 1517(a) are met. See 11 U.S.C. § 1517(a) ("[R]ecognition of a foreign proceeding shall be entered..."); see also In re Creative Fin., Ltd. (In Liquidation), 543 B.R. 498, 516 (Bankr. S.D.N.Y. 2016). "But recognition is not a 'rubber stamp exercise,' " and the burden rests on the foreign representative to prove each of the requirements of Section 1517. In re Creative Fin., 543 B.R. at 514 (internal citations omitted). Additionally, recognition is subject to termination or modification "if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist." 11 U.S.C. § 1517(d). However, "in considering such action the court shall give due weight to possible prejudice to parties that have relied upon the order granting recognition." Id.

[7] [8] Section 1506 of the Bankruptcy Code includes an overriding public policy exception, providing that a court may refuse to take an action under Chapter 15 if such action "would be manifestly contrary to the public policy of the United States." 11 U.S.C. § 1506. The exception is read narrowly, with legislative history stating that "the word 'manifestly' in international usage restricts the public policy exception to the most fundamental policies of the *195 United States." In re Fairfield Sentry, 714 F.3d at 139 (emphasis in original) (quoting H.R. Rep. No. 109–31, pt. 1, at 109 (2005)). Thus, "even the

absence of certain procedural or constitutional rights will not itself be a bar under [Section] 1506." *In re OAS*, 533 B.R. at 104 (quoting *In re Vitro S.A.B. de CV*, 701 F.3d 1031, 1069 (5th Cir. 2012)). This Court has previously held that "Brazilian bankruptcy law meets our fundamental standards of fairness and accords with the course of civilized jurisprudence." *In re OAS*, 533 B.R. at 103 (quoting *In re Rede Energia S.A.*, 515 B.R. 69, 98 (Bankr. S.D.N.Y. 2014)) (discussing Section 1506 in the context of, among other things, a request for substantive consolidation of the debtors' assets and liabilities for plan purposes in a Brazilian proceeding). Indeed, "Brazil has a comprehensive bankruptcy law that in many ways mirrors our own." *Id.* at 103–04 (describing similarities between Brazilian and U.S. insolvency law).

A foreign main proceeding is defined as "a foreign proceeding pending in the country where the debtor has the center of its main interests," referred to as "COMI." 11 U.S.C. § 1502(4). A foreign nonmain proceeding is "a foreign proceeding, other than a foreign main proceeding, pending in a country where the debtor has an establishment." 11 U.S.C. § 1502(5). An establishment means "any place of operations where the debtor carries out a nontransitory economic activity." 11 U.S.C. § 1502(2).

[9] The Bankruptcy Code neither defines COMI, nor prescribes the evidence that should be considered in making a determination of where a debtor's COMI is located. See In re Creative Fin., 543 B.R. at 517. "Because COMI is not statutorily defined, courts are free to develop and consider the particular factors that may be relevant, dependent upon the facts and circumstances present." Id. at 517. Several factors applicable to a COMI determination were identified in the case of In re SPhinX, Ltd., which stated:

[v]arious factors, singly or combined, could be relevant to such a determination: the location of the debtor's headquarters; the location of those who actually manage the debtor (which, conceivably could be the headquarters of a holding company); the location of the debtor's primary assets; the location of the majority of the debtor's creditors or of a majority of the creditors who would be affected

by the case; and/or the jurisdiction whose law would apply to most disputes.

351 B.R. 103, 117 (Bankr. S.D.N.Y. 2006). Also subject to consideration is "a debtor's 'nerve center,' including from where the debtor's activities are directed and controlled." In re Fairfield Sentry, 714 F.3d at 138 n.10. The Second Circuit has cited the SPhinX factors as "a helpful guide," but noted that "consideration of these specific factors is neither required nor dispositive" and that "any relevant activities, including liquidation activities and administrative functions, may be considered in the COMI analysis." Id. at 137. The Second Circuit has also noted that the EU Regulation states that COMI "should correspond to the place where the debtor conducts the administration of his interest on a regular basis and is therefore ascertainable by third parties." Id. at 138 (quoting EU Regulation, Preamble ¶ 13). This "underscores the importance of factors that indicate regularity and ascertainability." Id. The Second Circuit recognized, however, that "[t]he absence of a statutory definition for a term that is not self-defining signifies that the text is open-ended, and invites development by courts, depending on facts presented, without prescription or limitation." Id. at 138.

*196 The Second Circuit has held that "a debtor's COMI is determined based on its activities at or around the time the Chapter 15 petition is filed" In re Fairfield Sentry, 714 F.3d at 137; see also id. at 133-34. Thus, a court making a COMI determination should not conduct an inquiry into a debtor's entire operational history. See id. at 134 (citing In re Ran, 607 F.3d 1017, 1025 (5th Cir. 2010)). But "[t]o offset a debtor's ability to manipulate its COMI, a court may consider the period between the commencement of the foreign insolvency proceeding and the filing of the Chapter 15 petition." Id. at 137; see also In re Ran, 607 F.3d at 1026.

absence of evidence to the contrary, the debtor's registered office ... is presumed to be" the debtor's COMI. 11 U.S.C. § 1516(c). But this presumption is rebuttable, and is only applied "[f]or speed and convenience in instances in which the COMI is obvious and undisputed." In re Creative Fin., 543 B.R. at 514-15; see also In re SPhinX, 351 B.R. at 117 (citing legislative history). Moreover, the presumption "is especially inappropriate in a case where there is a substantial dispute." In re Creative Fin., 543 B.R. at 517; see also In re Bear Stearns, 374 B.R. at 129 ("[T]he Guide explains that the presumption does 'not prevent, in accordance with applicable procedural law, calling for or assessing other evidence if the conclusion suggested by the presumption is called into question by the court or an interested party.") (quoting Guide ¶ 122) (emphasis in original). Thus, the presumption "does not tie the hands of a court to examine the facts more closely in any instances where the court regards the issues to be sufficiently material to warrant further inquiry." In re Creative Fin., 543 B.R. at 515 (quoting In re Basis Yield Alpha Fund (Master), 381 B.R. 37, 52 (Bankr. S.D.N.Y. 2008)).

[13] [14] Additionally, the registered office "does not shift the risk of nonpersuasion, i.e., the burden of proof, away from the foreign representative seeking recognition as a main proceeding." In re Bear Stearns, 374 B.R. at 127 (quoting In re Tri-Continental Exch. Ltd., 349 B.R. 627, 635 (Bankr. E.D. Cal. 2006)). "[I]f the foreign proceeding is in the country of the registered office, and if there is evidence that the center of main interests might be elsewhere, then the foreign representative must prove that the center of main interest is in the same country as the registered office." Id. at 128 (quoting In re Tri-Continental Exch., 349 B.R. at 635); see also id. ("[The] presumption is not a preferred alternative where there is a separation between a corporation's jurisdiction of incorporation and its real seat.") (citing Jay Lawrence Westbrook, Locating the Eye of the Financial Storm, 32 BROOK. J. INT'L L. 3, 15 (2007)).

B. The Applicable Standard in this Proceeding

[15] Against this backdrop, the Court must determine the applicable legal standard for evaluating the Dutch Petition. The parties offer starkly different views. On the one hand, the Movants urge that the Court consider recognition of the Dutch Bankruptcy Proceeding under Section 1517(a) of the Bankruptcy Code de [10] [11] [12] Section 1516(c) provides that "[i]n the novo, evaluating the COMI of Coop as of the date that the Insolvency Trustee filed the Dutch Petition, essentially disregarding the Prior Recognition Order. See Movants' Proposed CoL ¶ 1-4 [ECF No. 120]. While acknowledging that Section 1517(d) grants the authority for "modification or termination" of an earlier recognition order, Movants contend that satisfaction of the standard set in Section 1517(a) mandates *197 withdrawal of the earlier order and issuance of a new recognition. See Movants' Proposed CoL ¶ 5–13; Dutch

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Petition 95–99, 105; Trustee Reply ¶84–87 [ECF No. 72]. On the other hand, the Objectors suggest a higher hurdle. Given the existence of the Court's Prior Recognition Order, they argue that Section 1517(d) applies to allow for "modification or termination," but contend that Movants must meet the exacting standard in Rule 60(b) of the Federal Rules of Civil Procedure to vacate the prior order and reach a different result on Coop's COMI. See, e.g., Objectors' Proposed FoF and Col. ¶63–70.

[16] As always, we start with the words of the statute. In re Caldor Corp., 303 F.3d 161, 167 (2d Cir. 2002) ("The task of resolving a dispute over the meaning of a provision of the Bankruptcy Code 'begins where all such inquires must begin: with the language of the statute itself.' ") (quoting United States v. Ron Pair Enters., 489 U.S. 235, 241, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989)). While the Movants look to Section 1517(a) to lobby for a de novo COMI determination, it is Section 1517(d) that most directly applies to this situation. That section specifically contemplates the question currently before this Court: a request to terminate or modify a prior recognition. See In re SPhinX, 351 B.R. at 116 (noting that "recognition itself is subject to review and modification under Bankruptcy Code section 1517(d)."). It provides that "[t]he provisions of this subchapter do not prevent modification or termination of recognition if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist" 11 U.S.C. § 1517(d). The statute thus breaks down the basis for modification or termination into two prongs. The first prong looks backwards to see whether the basis for recognition previously presented to the Court was flawed in some way. See 11 U.S.C. § 1517(d) (whether it is shown that the grounds for recognition were "fully or partially lacking"). The second prong looks forwards to whether something has changed since recognition. See id. (whether the grounds for recognition "have ceased to exist").

[17] Petitioner's advocacy of a *de novo* review under Section 1517(a) in this case fails because it reads subsection (d) out of the statute. If the termination or modification of recognition is governed by Section 1517(a), what is the purpose of Section 1517(d)? What would be the point in setting forth the two prongs in subsection (d) if not to provide guidance on the basis for modification or termination of recognition? ¹² See Knutzen v. Eben Ezer Lutheran Hous. Ctr., 815 F.2d 1343, 1348–49 (10th Cir. 1987) (a statute should be construed

"so that one section will not destroy another unless the provision is the result of obvious mistake or error.") (citations omitted)). By ignoring the existence of this language, Movants' position "is thus at odds with one of the most basic interpretive canons, that '[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant' " Corley v. United States, 556 U.S. 303, 314, 129 S.Ct. 1558, 173 L.Ed.2d 443 (2009) (quoting Hibbs v. Winn, 542 U.S. 88, 101, 124 S.Ct. 2276, 159 L.Ed.2d 172 (2004) (quoting 2A N. Singer, Statutes and Statutory Construction § 46.06, pp. 181–186 (6th ed. rev. 2000)); *198 Clark v. Rameker, - U.S. - , 134 S.Ct. 2242, 189 L.Ed.2d 157 (2014) (citing Corley, 556 U.S. at 314, 129 S.Ct. 1558). Of course, the so-called "antisuperfluous canon"—like other canons of statutory interpretation—is not absolute. For example, it cannot be used to override the unambiguous language of a statute. See Corley, 556 U.S. at 324-25, 129 S.Ct. 1558 (Alito, J., dissenting) ("such 'interpretative canon[s are] not a license for the judiciary to rewrite language enacted by the legislature.") (citations omitted). But no violence is done to the language of Chapter 15 by viewing Section 1517(d) as the controlling authority for a request to modify or terminate a prior order of recognition.

The parties concede that there can only be one foreign main proceeding. See Trustee Reply ¶ 85; Oi Objection ¶ 33 [ECF No. 58]; Steering Committee Objection ¶ 58. As acknowledged by the Insolvency Trustee, "recognition of the Dutch Bankruptcy Proceeding as a foreign main proceeding necessarily entails termination of the recognition of the Brazilian proceeding as a foreign main proceeding." Trustee Reply ¶ 85.

This conclusion is reinforced by the placement of subsections (a) and (d) within the same statutory section. It is hard to imagine why Congress would place these two provisions within the same section of Chapter 15 unless it was intended that both subsections be given effect where appropriate. It is not the case that these provisions are separated by time or space within Chapter 15, having both been enacted simultaneously. See Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109–8, 119 Stat. 23, 139–140 (Apr. 20, 2005). The applicability of subsection (d) is further confirmed by the one relevant sentence of legislative history, which plainly states that "[subsection (d)] states the grounds for modifying or terminating recognition." H.R. Rep. 109–

31, pt. 1 (2005); see also Guide, Art. 17, § 4 (noting that the prior articles did "not prevent modification or termination of recognition if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist").

But while the language of Section 1517(d) contemplates the Court's ability to alter a prior recognition determination if one of the two prongs is satisfied, nothing in Section 1517(d) requires it. Section 1517(d) instead contains much more open-ended language. It provides that "[t]he provisions of subchapter [1517] do not prevent [the Court] from modif[ying] or terminat[ing]" a prior recognition order. 11 U.S.C. § 1517(d). The use of such permissive phrasing suggests that the Court is left with discretion. See Rastelli v. Warden, Metro. Correctional Center, 782 F.2d 17, 23 (2d Cir. 1986); ("The use of a permissive verb—'may review' instead of 'shall review' suggests a discretionary rather than mandatory review process."); In re New Haven Projects Ltd. Liab. Co., 225 F.3d 283, 287 (2d Cir. 2000) ("This Court has observed that '[t]he verb "may" generally denotes a grant of authority that is merely permissive.") (quoting International Cablevision, Inc. v. Sykes, 997 F.2d 998, 1005 (2d Cir.1993)); see also Jama v. Immigration and Customs Enforcement, 543 U.S. 335, 346, 125 S.Ct. 694, 160 L.Ed.2d 708 (2005) (the connotation that "may" implies discretion is particularly apt when it is used in contrast to the word "shall").

[18] The discretion left to a court under Section 1517(d) is markedly different from other provisions governing recognition under Chapter 15. Of particular relevance here, the provision relied upon by the Movants-Section 1517(a)—speaks in mandatory terms. It provides that "an order recognizing a foreign proceeding shall be entered" if the conditions for recognition are met. 11 U.S.C. § 1517(a) (emphasis added). Section 1515 of the Bankruptcy Code also uses mandatory language when specifying the information that must be included in a petition for recognition. See 11 U.S.C. § 1515(b) ("A petition for recognition shall be accompanied by") (emphasis added). When used in a statute, the word "shall" is ordinarily the language of a legislative command. See *199 Alabama v. Bozeman, 533 U.S. 146, 153, 121 S.Ct. 2079, 150 L.Ed.2d 188 (2001) (concluding that the absolutist language of a statute precluded the state's argument for an exception); Escondido Mut. Water Co. v. La Jolla Indians, 466 U.S. 765, 104 S.Ct. 2105, 80 L.Ed.2d 753 (1984) ("Congress' apparent desire that the Secretary's

conditions 'shall' be included in the license must therefore be given effect unless there are clear expressions of legislative intent to the contrary."); Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 35, 118 S.Ct. 956, 140 L.Ed.2d 62 (1998) ("The mandatory 'shall' ... normally creates an obligation impervious to judicial discretion."); see also In re Suffolk Regional Off—Track Betting Corp., 542 B.R. 72, 84–85 (Bankr. E.D.N.Y. 2015) ("The use of the mandatory 'shall' language denotes a ministerial duty imposed by statute")

The lack of mandatory language in Section 1517(d)coupled with the use of "shall" elsewhere in Chapter 15—demonstrates that this distinction is deliberate and, therefore, such discretion was intended for Section 1517(d). See Weinstein v. Albright, 261 F.3d 127, 137-38 (2d Cir. 2001) (when a statute uses both "may" and "shall," the normal inference is that each is used in its usual sense, the one being permissive and the other mandatory); Lopez v. Davis, 531 U.S. 230, 241, 121 S.Ct. 714, 148 L.Ed.2d 635 (2001) ("Congress' use of the permissive 'may' ... contrasts with the legislators' use of a mandatory 'shall' in the very same section."); United States ex rel. Siegel v. Thoman, 156 U.S. 353, 359, 15 S.Ct. 378, 39 L.Ed. 450 (1895) ("In the law to be construed here it is evident that the word 'may' is used in special contradistinction to the word 'shall' "); cf. Gustafson v. Alloyd Co., 513 U.S. 561, 570-71, 115 S.Ct. 1061, 131 L.Ed.2d 1 (1995) (an act of Congress "should not be read as a series of unrelated and isolated provisions.") (internal quotations omitted).

Of course, the case law on the distinction between mandatory and permissive language in statutes focuses largely on the difference between the terms "shall" and "may." This is not surprising given the frequency with which these terms are used in American statutes and given that these terms have well-established meaning in American jurisprudence. The Court is mindful that Section 1517(d) does not use the term "may," despite the fact that "may" is used elsewhere in Chapter 15. See, e.g., 11 U.S.C. §§ 1505, 1507(a), 1509(b), 1511(a). But Congress does not follow a uniform code to guide its statutory construction (see Robert A. Katzmann, Judging Statutes 51-53 (2014)), and there are many possible variants of a permissive phrase. See, e.g., Leland v. Moran, 235 F.Supp.2d 153, 169 (N.D.N.Y. 2002), aff'd, 80 Fed.Appx. 133 (2d Cir. 2003) (holding that a statute providing that a "commissioner shall have the power to" take certain actions to abate pollution "does not constrain the

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[commission's] discretion whether to enforce or prosecute violations ... but merely provides the [commission] with a grant of authority."); see id at 163–164 (holding that where a building inspector "is authorized" to take action under a statute, he has "discretion" to determine "whether and how to enforce the provisions at issue").

The lack of case law on the exact phrasing of subsection (d) does not justify disregarding its obvious discretionary meaning. See In re Stringer, 847 F.2d 549, 551 n.2 (9th Cir. 1988) ("We note in passing that lack of caselaw supporting the literal construction of a statute is not usually a reason to ignore its plain meaning. Moreover, lack of interpretive caselaw may well mean that other courts and litigants have not doubted the plain meaning of the statute."); *200 Am. Nat'l Red Cross v. S. G., 505 U.S. 247, 263, 112 S.Ct. 2465, 120 L.Ed.2d 201 (1992) (rejecting alternative interpretative theories of a statute that "violate[] the ordinary sense of the language used."); Caminetti v. U.S., 242 U.S. 470, 485, 37 S.Ct. 192, 61 L.Ed. 442 (1917) ("[I]f [the statutory language] is plain, ... the sole function of the courts is to enforce it according to its terms."); In re Caldor Corp., 303 F.3d at 167-68 (" '[A]s long as the statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of the statute.") (quoting Ron Pair Enters., 489 U.S. at 240-241, 109 S.Ct. 1026). 13

13 Movants suggest that "[t]ermination of a recognition order under [Section] 1517(d) is discretionary in some circumstances but is mandatory here because recognition of the Dutch Bankruptcy Proceeding as the foreign main proceeding is mandatory under [Sections] 1517(a) & (b)." Movants' Proposed CoL, ¶ 10; id. (suggesting this as the "only interpretation" that harmonizes these provisions). But there is nothing in the language of subsection (d) that supports such a tortured reading, which requires that the same statutory language take on two different meanings. See Robinson v. Shell Oil Co., 519 U.S. 337. 340, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997) ("Our first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case."). Instead, the proper interpretation is the most obvious one: subsections (a) and (b) govern a recognition request and subsection (d) applies to a request to terminate or modify an order of recognition already entered.

It is nonetheless instructive to review a few similarly phrased provisions in the Bankruptcy Code to see how such language is used. See Nat'l Credit Union Admin. v. First Nat. Bank & Tr. Co., 522 U.S. 479, 501, 118 S.Ct. 927, 140 L.Ed.2d 1 (1998) (it is an "established canon of construction that similar language within the same statutory section must be accorded a consistent meaning"); Ratzlaf v. United States, 510 U.S. 135, 143, 114 S.Ct. 655, 126 L.Ed.2d 615 (1994) ("A term appearing in several places in a statutory text is generally read the same way each time it appears."); Anderson v. Fed. Deposit Ins. Corp., 918 F.2d 1139, 1143 n.4 (4th Cir. 1990) ("We believe the more appropriate rule of statutory construction is the principle that a court should, if possible, construe statutes harmoniously."); In re Betacom of Phoenix, Inc., 225 B.R. 703, 707 (D. Ariz. 1998), rev'd on other grounds, 240 F.3d 823 (9th Cir. 2001) ("Congressional intent may be clarified by analogizing to similar language in an unrelated statute, that applies to similar parties, subject matter or relationships."). A review of these similar instances demonstrates a consistent use of the "nothing prevents" formulation for situations where discretion may be exercised consistent with certain conditions, but where no action is mandated.

Starting closest to home, such phrasing is used in one other provision of Chapter 15. Section 1506 provides that "[n]othing in this chapter prevents the court from refusing to take an action governed by this chapter if the action would be manifestly contrary to the public policy of the United States." 11 U.S.C. § 1506. The case law on Section 1506 has focused on the significance of the phrase "manifestly contrary." See In re Fairfield Sentry, 714 F.3d at 139 (observing that the section "does not create an exception for any action under [C]hapter 15 that may conflict with public policy, but only an action that is manifestly contrary."); In re Vitro, 701 F.3d at 1069-70 (taking restrictive reading of Section 1506 to cover only "exceptional circumstances"). But more relevant for our purposes, the section is considered to be a discretionary exception, consistent with the section's use of the same kind of open ended approach employed by Section 1517(d). See *201 In re Creative Fin., 543 B.R. at 515 (characterizing Section 1506 as "permit[ting] a court to refuse recognition" on specified grounds).

This same kind of phrasing is also found in the most commonly cited source of bankruptcy court discretion, Section 105(a). That provision reads as follows:

The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

11 U.S.C. § 105(a) (emphasis added). Rather than being read as a directive, Section 105(a) is understood as providing courts with discretion to accommodate the unique facts of a case consistent with the policies or directives set by the other applicable substantive provisions of the Bankruptcy Code. See Sears, Roebuck & Co. v. Spivey, 265 B.R. 357, 371 (E.D.N.Y. 2001) ("Section 105 of the Bankruptcy Code bestows on bankruptcy courts a specific equitable power to act in accordance with principles of justice and fairness."); cf. In re Tennant, 318 B.R. 860, 871 (9th Cir. BAP 2004) (approving a bankruptcy court's sua sponte dismissal of a case under Section 105(a) after the debtor failed to file its Statement of Financial Affairs within the 15 days required by Rule 1007(c)); In re Durham, 461 B.R. 139, 141 (Bankr. D. Mass. 2011) (noting that Section 109(g)(2) on Chapter 13 debtor eligibility "'does not explicitly prescribe for [sic] sua sponte dismissal or conversion,' [but Section] 105(a) 'accommodates such a result.' ") (quoting In re Kazis, 256 B.R. 242, 244 (Bankr. D. Mass. 2000)).

Like Section 1517(d), Section 105(a) only contemplates exercise of the granted discretion when appropriate. Under Section 105(a), the standard for appropriate action is whether the exercise of discretion would contravene another section of the Bankruptcy Code. See In re Headlee Mgmt. Corp., 519 B.R. 452, 459 (Bankr. S.D.N.Y. 2014) (Section 105(a) cannot be used to "override explicit mandates of other sections of the Bankruptcy Code.") (citing Law v. Siegel, — U.S. —, 134 S.Ct. 1188, 1193, 188 L.Ed.2d 146 (2014)); GAF Corp. v. Johns–Manville Corp. (In re Johns–Manville Corp.), 26 B.R. 405, 415 (Bankr. S.D.N.Y. 1983) (Section 105 "does not permit the court to ignore, supersede, suspend or even misconstrue the statute itself or the rules.") (citing 2

Collier on Bankruptcy ¶ 105.02 (15th ed. 1982)). Thus, Section 105(a) is markedly similar to Section 1517(d), which cabins off a court's discretion for modifying or terminating recognition to instances where one of the two prongs set forth in the subsection have been met.

Another provision of the Bankruptcy Code-Section 524(f)—also employs the same kind of negative formulation to preserve discretion, but this time for a debtor rather than a court. Sections 524(c) and (d) govern the specific conditions that permit debtor-creditor repayment agreements (e.g. reaffirmation agreements) involving dischargeable debts. See 11 U.S.C. §§ 524(c)–(d). Section 524(f) states that "[n]othing contained in subsection (c) or (d) of this section prevents a debtor from voluntarily repaying any debt." 11 U.S.C. § 524(f). This exception preserves a debtor's freedom to make payments on a dischargeable debt if the debtor determines such a choice is warranted. See In re Journal Register Co., 407 B.R. 520, 533 (Bankr. S.D.N.Y. 2009). Once again, the language does not mandate action but rather preserves the right to act where appropriate. *202 In the case of Section 524(f), the standard for what is appropriate is a truly voluntary election by the debtor, a condition which courts have construed strictly, consistent with the broader goals of debtor protection manifested in the surrounding provisions. See In re Nassoko, 405 B.R. 515, 523-24 (Bankr. S.D.N.Y. 2009); In re Cruz, 254 B.R. 801, 815-16 (Bankr. S.D.N.Y. 2000).

Last but not least, the Court has surveyed instances of similar negative phrasing elsewhere in the U.S. Code. There are well over 100 instances using the language "does not prevent," let alone other formulations. They are far too numerous and disparate to be summarized here. But importantly, the Court has been unable to find any instances where such phrasing appears to have been used to mandate action. Like 1517(d), these statutes refer back to strictures of a statutory scheme and illuminate instances where, within that scheme, discretion may be exercised under appropriate circumstances. See, e.g., 31 U.S.C. § 5318 ("(1) In general.—A financial institution ... shall not establish, maintain, administer, or manage a correspondent account in the United States for, or on behalf of, a foreign bank that does not have a physical presence in any country. (2) Prevention of indirect service to foreign shell banks. ... (3) Exception.—Paragraphs (1) and (2) do not prohibit a covered financial institution from providing a correspondent account to a foreign bank, if

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the foreign bank—....") (emphasis added); 10 U.S.C. § 2204 ("To prevent overdrafts and deficiencies in the fiscal year for which appropriations are made, appropriations made to the Department of Defense or to a military department, and reimbursements thereto, are available for obligation and expenditure only under scheduled rates of obligation, or changes thereto, that have been approved by the Secretary of Defense. This section *does not prohibit* the Department of Defense from incurring a deficiency that it has been authorized by law to incur.") (emphasis added). ¹⁴

14 See also 42 U.S.C. § 1996a ("(2) This section does not prohibit such reasonable regulation and registration by the Drug Enforcement Administration of those persons who cultivate, harvest, or distribute peyote as may be consistent with the purposes of this section and section 1996 of this title.") (emphasis added); 49 U.S.C. § 49102 ("(a) General. -The purpose of this chapter is to authorize the transfer of operating responsibility under long-term lease of the 2 Metropolitan Washington Airport properties ... to a properly constituted independent airport authority created by Virginia and the District of Columbia (b) This chapter does not prohibit the Airports Authority and Maryland from making an agreement to make Baltimore/Washington International Airport part of a regional airports authority") (emphasis added).

Consistent with this statutory analysis, the only court to have applied Section 1517(d) has concluded that relief under this provision is discretionary. See In re Loy, 448 B.R. 420, 438 (Bankr. E.D. Va. 2011) (stating that "revisiting a recognition determination is not mandatory, it is within the Court's discretion to do so"). In Lov, the debtor sought to revoke the bankruptcy court's prior recognition of an English bankruptcy proceeding as a foreign main proceeding. The crux of the dispute in Loy was the debtor's contention that COMI was erroneously found to exist in England when, in fact, the debtor resided in the United States. Despite extensive efforts to get to the bottom of this factual question, the court was unable to obtain a clear factual record due to the debtor's lack of cooperation. Given this difficulty, the court in Loy denied the debtor's request, stating that "[t]he Court will not afford the Debtor the extraordinary remedy of revocation of recognition without a complete factual record." Id. at 436. In reaching that decision, *203 the court applied the "plain meaning rule" to Section 1517(d). Id. at 438. It concluded that "[t]he actual language dictates that

the subchapter's provisions 'do not prevent modification or termination' "to mean that "revisiting a recognition determination is not mandatory" but rather "within the Court's discretion." Id. at 438 (emphasis in the original) (quoting 11 U.S.C. § 1517(d)).

[19] For many of the same reasons set forth above, the Court also rejects the Objectors' contention that Rule 60(b) of the Federal Rules of Civil Procedure governs the request for relief in this case. The Objectors contend that Section 1517(d) does not provide a standard for obtaining relief from recognition and, therefore, such relief should be governed by the procedural rules that would normally apply where a party seeks to vacate a court order. This means, they say, that we should use Rule 60(b) here. But the Court disagrees. It is true that Rule 60(b) is the procedural rule that normally governs a request for relief from an order. 15 Fed. R. Civ. P. 60(b) (basis for relief includes mistake, inadvertence, surprise, excusable neglect, newly discovered evidence and fraud); see United States v. Int'l Bd. of Teamsters, 247 F.3d 370, 391 (2d Cir. 2001) (relief under Rule 60(b) is "properly granted only upon a showing of exceptional circumstances."). But it is not true that no standard exists in Chapter 15 for the situation before the Court. As explained above, subsection (d) provides the standard for a request to terminate or modify recognition-a discretionary standard that examines where there was a mistake in the initial grant of recognition or has been a subsequent change in circumstances. As such, there is no need for Rule 60(b) to fill a gap in the statutory standard.

Rule 60(b) is made applicable to bankruptcy proceedings by Rule 9024 of the Federal Rules of Bankruptcy Procedure.

Moreover, the stringent requirements of Rule 60(b) are a poor fit here. As numerous courts have recognized, the recognition process must be sufficiently flexible to achieve the goals of Chapter 15. In *In re Oversight & Control Comm'n of Avanzit, S.A.*, 385 B.R. 525 (Bankr. S.D.N.Y. 2008), for example, the court observed that "Chapter 15 recognizes that the status of the foreign proceeding can change, and the change can affect the right to recognition before or after it is granted." *Id.* at 533; *see In re Loy*, 448 B.R. at 440 (citing the *Avanzit* case for the idea that "recognition determinations are malleable, and, as facts warrant in a specific case, the court may revisit recognition."). In the same vein, the court in *In re British Am. Ins. Co.*, 425 B.R. 884 (Bankr. D. Fla. 2010), allowed

facts relating to the debtor's COMI to be admitted after the recognition proceedings had commenced. The court observed that Section 1517(d) allowed courts to adjust their rulings based on changed circumstances, which exhibited "a policy that the recognition process remain flexible, taking into account the actual facts relevant to the court's decision rather than setting an arbitrary determination point." Id. at 910; see In re SPhinX, 351 B.R. at 112 (noting that Chapter 15 maintains, and in some respects enhances, the "maximum flexibility" of bankruptcy courts in handling ancillary cases in light of principles of international comity and respect for the laws and judgments of other nations). Indeed, courts have gone so far as to view a recognition order as less than a final order, seeing it as a reflection of the facts presented to the court at the time. See In re Ernst & Young, Inc., 383 B.R. 773, 781 (Bankr. D. Colo. 2008) (court concluding that its recognition ruling was a summary *204 determination rather a decision that was "full and final").

C. Judicial Estoppel Does Not Apply to these **Proceedings**

Before assessing the Dutch Petition under Section 1517(d), the Court must first address Movants' claims that such an analysis is unnecessary because of the doctrine of judicial estoppel. More specifically, the Movants contend that Coop is barred by judicial estoppel from arguing in this proceeding that its COMI is in Brazil because of prior representations by Coop to the Dutch courts. Importantly, Movants do not claim that Coop ever explicitly or affirmatively represented to the Dutch courts that its COMI was in a particular location. See Trustee Reply ¶ 32 ("Coop's behavior ... presents a classic case for judicial estoppel") (emphasis added); id. ¶ 34 (acknowledging that the Objectors are correct in "not[ing] that Coop's petition never uses the term COMI"). But the Movants nonetheless argue that estoppel should apply because the information provided by Coop resulted in the Dutch courts finding that Coop's COMI under the EU Regulation is in the Netherlands and Coop never contested that finding.

estoppel prevents a party from asserting a factual position in one legal proceeding that is contrary to a position that is successfully advanced in another proceeding." BPP Illinois, LLC v. Royal Bank of Scotland Grp. PLC, 859 F.3d 188, 192 (2d Cir. 2017) (quoting Rodal v. Anesthesia Grp. of Onondaga, P.C., 369 F.3d 113, 118 (2d Cir. 2004)).

Judicial estoppel aims "to protect the integrity of the judicial process ... by prohibiting parties from deliberately changing positions according to the exigencies of the moment." New Hampshire v. Maine, 532 U.S. 742, 749-50, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001) (quotations omitted). "[T]he exact criteria for invoking judicial estoppel will vary based on specific factual contexts." BPP Illinois, 859 F.3d at 192 (quoting Adelphia Recovery Trust v. Goldman, Sachs & Co., 748 F.3d 110, 116 (2d Cir. 2014)). But judicial estoppel generally requires that "[A] a party's later position is 'clearly inconsistent' with its earlier position; [B] the party's former position has been adopted in some way by the court in the earlier proceeding; and [C] the party asserting the two positions would derive an unfair advantage against the party seeking estoppel." Id. at 192 (quoting In re Adelphia Recovery Tr., 634 F.3d 678, 695-96 (2d Cir. 2011)). The third requirement is sometimes couched in terms of "'unfair detriment [to] the opposing party' rather than advantage to the party to be estopped." In re Adelphia Recovery Tr., 634 F.3d at 696 (quoting New Hampshire, 532 U.S. at 751, 121 S.Ct. 1808) (alteration in original). But the Second Circuit limits application of judicial estoppel to "situations where the risk of inconsistent results with its impact on judicial integrity is certain." Id. "This requirement means that judicial estoppel may only apply where the earlier tribunal accepted the accuracy of the litigant's statements." Id. (citing DeRosa v. Nat'l Envelope Corp., 595 F.3d 99, 103 (2d Cir. 2010)).

[25] Under applicable law, silence in a prior proceeding is generally not treated as comparable to a statement for purposes of judicial estoppel. Classic applications of the doctrine involve affirmative declarations or postures that are directly at odds with a latter position. In New Hampshire, for example, the state of New Hampshire was estopped from contesting the location of its shared boundary with Maine only after previously entering a consent decree "expressly" determining the issue. New Hampshire, 532 U.S. at 746, 121 S.Ct. 1808. Similarly, a shipping company in *205 Rapture Shipping was estopped from denying the existence of a contract it had explicitly relied upon in earlier proceedings in front of [21] [22] [23] [24] "The doctrine of judicial Dutch court. See Rapture Shipping, Ltd. v. Allround Fuel Trading B.V., 350 F.Supp.2d 369 (S.D.N.Y. 2004). Alternatively, the court in AXA Marine & Aviation Ins. rejected a judicial estoppel argument where an insurer's denial of coverage did not actually contradict an earlier statement in a related proceeding that coverage had not

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been declined "to date." AXA Marine & Aviation Ins. (UK) Ltd. v. Seajet Indus. Inc., 84 F.3d 622, 628 (2d Cir. 1996).

[26] Instead, silence in a prior proceeding provides a basis for judicial estoppel where it violates some affirmative duty to speak. Perhaps the most common example in bankruptcy court involves a debtor's failure to declare the existence of assets or potential assets. Such cases of judicial estoppel rest on the debtor's legal obligation to completely and accurately inform the court of its assets, and the damage caused to the bankruptcy system and individual creditors by a failure to do so. See, e.g., BPP Illinois, 859 F.3d at 192-194 (examining a debtor's duty to list all assets prior to confirmation of a plan and finding the debtor had violated the duty by not revealing a fraud claim it subsequently pursued); In re Adelphia Recovery Tr., 634 F.3d at 697-98 (finding that a statutory trust created to pursue claims on behalf of certain estate claimants had taken inconsistent positions by failing to reveal to the court and certain creditors the existence of potential fraudulent conveyance claims); Galin v. United States, 2008 WL 5378387, at *10-11 (E.D.N.Y. Dec. 23, 2008) (holding divorcee judicially estopped in tax case from claiming equitable title to property after having asserted that she had no interest in any real property during an earlier pre-divorce personal bankruptcy).

[27] Where such legal disclosure obligations are not violated, judicial estoppel based on a failure to act arises where the omission flaunts a party's fundamental procedural obligations so as to actively mislead a court. In Guinness PLC v. Ward, 955 F.2d 875, 898-900 (4th Cir. 1992), for example, Ward was estopped in a proceeding seeking enforcement of a foreign money judgment from raising the argument that the proceeding violated a prior settlement between the parties. The court observed that Ward had continued with his appeal of the underlying foreign action after the purported settlement without informing the British appellate courts of the settlement, thereby "inherently and explicitly informing [the British appellate courts] that no events had occurred which would render such appeals improper." Id. at 899. Thus, it was inappropriate to rely on the settlement in the U.S. court while Ward himself had acted inconsistently in the British proceedings. Id. at 899-900.

But courts generally have refused to apply judicial estoppel to silence where a party is not otherwise obligated to speak up or take action. For example, in Bridgeway Corp. v. Citibank, 45 F.Supp.2d 276, 283-84 (S.D.N.Y. 1999), aff'd, 201 F.3d 134 (2d Cir. 2000), Citibank was not judicially estopped from arguing that a Liberian court judgment was unenforceable due to impartiality of the Liberian judicial system. The court held that such a stance was not "clearly inconsistent" with participating in and defending itself against suits in the Liberian courts without making such arguments there, which plaintiff insisted "implicitly" embraced the opposite position. Id. The court was not swayed by plaintiff's argument that Citibank had not made such claims until it was faced with an unfavorable decision in Liberia. Id.; see also Esparza v. Stephens, 2017 WL 1197137, at *5 (E.D. Tex. Mar. 31, 2017) *206 (judicial estoppel did not bar Texas from opposing a habeas petition after not submitting written materials earlier in the proceeding where it was not required to do so under the applicable rules); Nettles v. Daphne Utilities, 2014 WL 3845072, at *3 n.2 (S.D. Ala. Aug. 5, 2014) (judicial estoppel did not bar a party from objecting to a jury demand despite not addressing the issue in an earlier responsive pleading when the rules did not require that the objection be raised earlier and the objection was not inconsistent with later pleadings).

[28] In the present case, Movants' estoppel argument seeks to bar Coop from asserting a position on COMI under Chapter 15 based upon (1) the jurisdictional statements made by Coop in its Dutch SoP Petition; and (2) Coop's failure to legally contest or appeal any of the Dutch courts' findings regarding Coop's COMI. Movants' Proposed CoL ¶ 81–83. But Movants' estoppel argument fails because the COMI finding under the EU Regulation in the Dutch proceedings is not the same as a COMI finding under Chapter 15 of the Bankruptcy Code.

It is true that Chapter 15's use of the COMI concept stems indirectly from the EU Regulation. The Guide explains that the use of COMI "as the determinant that a foreign proceeding is a 'main' proceeding was modeled on the use of that concept in the European Union Convention on Insolvency Proceedings ... that was already in the process of being adopted when UNCITRAL drafted the Model Law." *In re Bear Stearns*, 374 B.R. at 129 (citing Guide, U.N. Gen. Ass., UNCITRAL 30th Sess., U.N. Doc. A/CN.9/442 (1997)). Consequently, "Congress instructed that '[i]n interpreting [Chapter 15], the court shall consider its international origin, and the need to promote an application of this chapter that is consistent

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with the application of similar statutes adopted by foreign jurisdictions.' "In re Fairfield Sentry, 714 F.3d at 136 (quoting 11 U.S.C. § 1508) (alterations in the original); see also In re Ocean Rig UDW Inc., 570 B.R. 687, 703 n.6 (Bankr. S.D.N.Y. 2017).

As a result of their related histories, Chapter 15 and the EU Regulation share many significant traits, especially with respect to the concept of COMI. Both regimes require COMI inquiries for each debtor entity rather than for collective corporate groups. See Case 341/04, Bondi v. Bank of America, N.A. (Eurofood), 2006 E.C.R. I-3813, p. 18–19, \P 30, 2006 WL 1142304 (E.C.J. May 2, 2006) ("[E]ach debtor constituting a distinct legal entity is subject to its own court jurisdiction."); Veder Decl. ¶ 32 ("[A] court [in the EU] faced with a corporate group insolvency needs to ascertain the COMI individually for each legal entity"); 11 U.S.C. § 1502(1) (" '[D]ebtor' means an entity that is the subject of a foreign proceeding."). Both regimes include an initial presumption that a legal entity's COMI is the location of the debtor's registered seat or office. See Veder Decl. ¶ 20 (citing 3(1) Insolvency Regulation (recast)); 11 U.S.C. § 1516(c). U.S. and European courts have also emphasized the principle that COMI should be established by "objective factors" which are "ascertainable by third parties." Veder Decl. ¶ 30 (citation omitted); see In re Fairfield Sentry, 714 F.3d at 136 ("The focus on regularity and ascertainability should also inform our interpretation of the text.").

Despite all these similarities, however, the EU Regulation and Chapter 15 are far from identical. As the Second Circuit has flatly stated, "the EU Regulation does not operate as an analog to Chapter 15." *In re Fairfield Sentry*, 714 F.3d at 136. The COMI inquiries underpinning both regimes are conceptually and procedurally different, and have evolved under separate *207 lines of case law written by judges operating with different purposes and concerns.

First and foremost, the EU Regulation is not an implementation of the UNCITRAL Model Law. ¹⁶ The EU Regulation's principal concern is coordination and recognition between insolvency proceedings among the European member states. Trial Tr. 487:13–488:8, Sept. 19, 2017 (Veder). Because of this focus on coordinating insolvency proceedings within the EU, "a main insolvency proceeding in one EU member state is automatically recognized by all other EU member states." *In re Fairfield*

Sentry, 714 F.3d at 136 (citing EU Regulation art. 16). Once a COMI determination is made in one state, it is binding on other EU member state courts. See Trial Tr. 478:23-479:13, Sept. 19, 2017 (Veder); Berkenbosch Decl. ¶ 126. Consequently, "the EU has no need for a recognition petition such as provided under Chapter 15." In re Fairfield Sentry, 714 F.3d at 136. When a court finds a debtor's COMI to be outside the EU, it looks to the applicable national insolvency regime rather than the EU Regulation. See Berkenbosch Decl. ¶ 115-17; Veder Decl. ¶ 12–15, 33–35. In the Netherlands, it is the DBA that dictates the specific procedures and forms of relief available to a debtor in the Dutch courts and governs how to treat insolvency proceedings for a debtor with a Dutch "establishment" but a non-EU COMI. See Berkenbosch Decl. ¶ 115–17; Veder Decl. ¶ 12–15, 33–35.

The testimony from Prof. Veder is clear on this point:
Q. Could you explain to the Court, is the European
Insolvency Regulation an effort to implement the
UNCITRAL model law in European law?
A. Not at all.
Q. Could you please explain to the court why?
A. Okay. So the European Insolvency Regulation
is a self-contained body that only applies within
the EU that determines jurisdiction, choice of law,

the EU that determines jurisdiction, choice of law, recognition issues within the European Union. The model law is something completely different. It is exactly what it says, it's a model law that's been implemented in whatever state that adopts it. It's like the U.S. standards adoption of Chapter 15 based on the model law, the UK has done something similar, but the EU Insolvency Regulation is not an implementation of that model law.

Trial Tr. 487:13-488:8, Sept. 19, 2017 (Veder).

The EU Regulation is also a "poor analog" in regards to the timeframe considered in a COMI analysis. *In re Fairfield Sentry*, 714 F.3d at 136 n.9 (discussing *In re Millennium Global Emerging Credit Master Fund Ltd.*, 458 B.R. 63, 74 (Bankr. S.D.N.Y. 2011)). The EU Regulation looks to the date of the filing of the foreign insolvency proceedings (Veder Decl. ¶ 31), whereas in the U.S. the inquiry centers on the date of the Chapter 15 recognition petition. *See In re Fairfield Sentry*, 714 F.3d at 136.

While both regimes include a registered office presumption, divergent case law has led to a different application of that presumption under the EU Regulation than under Chapter 15. The European Court of Justice

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set the standard for applying and overcoming the presumption in the *Eurofood* and *Interedil* ¹⁷ cases. *See* Movants' Proposed CoL ¶ 50; Veder Decl. ¶¶ 22–31. Under these cases, the EU courts do not pursue a comprehensive exploration of the evidence, but rather uphold the presumption unless it is demonstrated that a debtor's management and assets sit *together* in a different state, and that such facts are ascertainable by third parties:

a company's central administration is not in the same place as its registered office, the presence of company *208 assets and the existence of contracts for the financial exploitation of those assets in a Member State other than that in which the registered office is situated cannot be regarded as sufficient factors to rebut the presumption unless a comprehensive assessment of all the relevant factors makes it possible to establish, in a manner that is ascertainable by third parties, that the company's actual centre of management and supervision and of the management of its interests is located in that other Member State.

Veder Decl. ¶ 30 (quoting Interedil ¶ 59).

17 Case C-396/09, Interedil Srl (*Interedil*) v. Fallimento Interedil Srl, 2011 E.C.R. I-9915.

This is far different than U.S. law. In the U.S., the registered office presumption is applied merely "[f]or speed and convenience in instances in which the COMI is obvious and undisputed." In re Creative Fin., 543 B.R. at 514-15; see also In re SPhinX, 351 B.R. at 117 (citing legislative history). The presumption "does not shift the risk of nonpersuasion, i.e., the burden of proof, away from the foreign representative seeking recognition as a main proceeding." In re Bear Stearns, 374 B.R. at 127 (quoting In re Tri-Continental Exch., 349 B.R. at 635). "In fact, Congress changed the relevant language of the Model law by substituting ... 'evidence' ... for the Model Law's 'proof' ... to clarify this issue." In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd., 389 B.R. 325, 335 (S.D.N.Y. 2008). "[T]he Guide explains that the presumption does 'not prevent, in accordance with applicable procedural law, calling for

or assessing other evidence if the conclusion suggested by the presumption is called into *question by the court* or an interested party." *In re Bear Stearns*, 374 B.R. at 129 (emphasis in original) (quoting Guide, ¶ 122). Thus, the presumption "does not tie the hands of a court to examine the facts more closely in any instances where the court regards the issues to be sufficiently material to warrant further inquiry." *In re Creative Fin.*, 543 B.R. at 515 (quoting *In re Basis Yield*, 381 B.R. at 52). The presumption "is especially inappropriate in a case where there is a substantial dispute." *In re Creative Fin.*, 543 B.R. at 517.

In sum, "whatever may be the proper interpretation of the EU Regulation, the Model Law and Chapter 15 give limited weight to the presumption of jurisdiction of incorporation as the COMI." In re Bear Stearns, 374 B.R. at 128 (quoting Westbrook, Locating the Eye of the Financial Storm, 32 BROOK. J. INT'L L. at 15-16). "[I]f the foreign proceeding is in the country of the registered office, and if there is evidence that the center of main interests might be elsewhere, then the foreign representative must prove that the center of main interest is in the same country as the registered office." In re Bear Stearns, 374 B.R. at 128 (quoting In re Tri-Continental Exch., 349 B.R. at 635); see also id. ("[The] presumption is not a preferred alternative where there is a separation between a corporation's jurisdiction of incorporation and its real seat.") (citing Westbrook, Locating the Eye of the Financial Storm, 32 BROOK. J. INT'L L. at 15).

The distinctions in the substantive use of the presumption are reflected in the procedures used by Dutch and U.S. courts. The Dutch court's procedures for issuing a determination on European COMI are very different from what occurs in a Chapter 15 recognition proceeding. In the Netherlands, the DBA requires a COMI finding as the preliminary jurisdictional step in an insolvency proceeding, which can be initiated by a debtor's ex parte filing of a suspension of payments petition. See Trial Tr. 802:7-15, Sept. 25, 2017 (Berkenbosch). The Dutch courts do not sua sponte seek further information beyond what is provided *209 in the petition (Berkenbosch Decl. ¶ 119), which can result in an extremely rapid COMI determination. This case is a perfect example. Coop filed its SoP Petition on August 9, 2016 and received confirmation of its provisional SoP at 9:30AM that same morning. See Trial Tr. 801:19-802:6 Sept. 25, 2017 (Berkenbosch). That confirmation found Coop's COMI to be in the Netherlands under the EU Regulation. TX 28 at 3-4 ("[T]his district court is competent to open these main proceedings as in its opinion the centre of the debtor's main interests lies in the Netherlands The district court: -grants [Coop] a provisional suspension of payments."). This procedure is a far cry from the U.S. requirement to hold a hearing on recognition—on notice of not less than 21 days—at which time the court will hear any objections. See Fed. R. Bankr. P. 2002(q)(1). This can be an involved and contested process in the U.S. See, e.g., In re Bear Stearns, 389 B.R. 325 (denying appeal of Chapter 15 recognition of Cayman Islands proceeding upon objections from foreign secured creditors and a COMI hearing, despite appellant's registered office in the Cayman Islands implicating the statutory COMI presumption); In re Millennium Glob. Emerging Credit Master Fund, 458 B.R. 63, aff'd, 474 B.R. 88 (S.D.N.Y. 2012) (affirming bankruptcy court's COMI finding and recognition of Bermuda proceedings as foreign main proceeding under Chapter 15); In re Gerova Fin. Grp., Ltd., 482 B.R. 86 (Bankr. S.D.N.Y. 2012) (despite secured creditors' argument under Section 1506 and opposition to wind-up proceedings, the court granted recognition of Bermuda proceedings as foreign main proceedings under Chapter 15 after one day hearing). Given the different legal standard and process for determining COMI under the EU Regulation and Chapter 15, it is inappropriate to apply judicial estoppel in these proceedings. See Brown v. Watters, 599 F.3d 602, 615 (7th Cir. 2010) (noting that party does not take inconsistent positions when statutory standards relied upon are different in material respects).

In addition, each of the two factual bases relied upon by Movants suffers from other defects. The first argument relies on Coop's SoP Petition. The Movants argue that the "Jurisdiction" section of the SoP Petition shows that Coop presented facts to the Dutch District Court that would necessarily lead it to conclude that Coop's COMI was located in the Netherlands. See TX 26 ¶ 8.1. More specifically, the Insolvency Trustee asserts that when a debtor's COMI is in the EU, it has a statutory duty to "submit sufficient information to enable the judge to determine whether it has jurisdiction under the [EU Regulation] Regime." Berkenbosch Decl. ¶ 119. Movants contend that Coop provided no information in that section that could rebut the presumption that the location of a company's registered office is the same as its COMI, and, in fact, further buttressed that conclusion with additional details about Coop's Dutch presence. Trustee Reply ¶ 33; see also Berkenbosch Decl. ¶ 119. In addition to the "Jurisdiction" section, Movants also cite to a statement concerning Coop's purpose for filing the SoP Petition:

In order to ensure that the restructuring of the indebtedness as contemplated by the RJ Plan, to the extent it concerns [Coop], will be recognised and bind creditors in relation to the assets and liabilities of [Coop] in the Netherlands (and in other European member states), [Coop] has submitted, together with this petition, a draft composition plan.

TX 26 ¶ 6.1. Because recognition of a Dutch composition plan would only occur automatically across EU member states under the EU Regulation, the Movants argue this statement conclusively demonstrates *210 Coop's awareness that its SoP Petition would lead to a finding of Dutch COMI. See Trustee Reply ¶ 38.

But Movants have not established that Coop had an affirmative duty to provide more information than is contained in the SoP Petition or that its silence flaunted some fundamental procedural obligations so as to actively mislead a court. Movants' position is undercut by the breadth of information contained in Coop's SoP Petition. Coop did not make any representations about its COMI but it did present the relevant facts about its operations. Those facts included not only information about Coop's registered office in the Netherlands but also information about Coop's role as a financing SPV for the Oi Group. For example, the SoP Petition highlighted Coop's role as a "financing vehicle" 18 dependent on the Oi Group operations for repayment of Coop's debts, 19 described the Brazilian RJ Proceeding and the recognition granted to those proceedings both in the U.S. and the U.K., ²⁰ and repeatedly emphasized that a Coop restructuring and payment of Coop debts was entirely reliant on a successful Brazilian restructuring of the Oi *211 Group as a whole. 21 It is these same facts that led to this Court's prior order recognizing Coop's COMI in Brazil, notwithstanding the location of its registered office. See Prior Recognition Order at 2-5; Hr. Tr. 20:17-21:15, July 22, 2017. Thus, it cannot be said that the Dutch courts were misled by Coop given its fulsome disclosure

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of the relevant facts about its corporate existence and operations. See Period Homes, Ltd. v. Wallick, 275 Ga. 486, 488, 569 S.E.2d 502 (2002) (denying estoppel claim in part because debtor did not mislead bankruptcy court about a post-petition breach of contract claim when it failed to amend its asset schedule but still informed the Chapter 7 trustee of the claim's existence and amount of damages sought); Sports Page, Inc. v. First Union Mgmt., Inc., 438 N.W.2d 428, 431–32 (Minn. Ct. App. 1989) (affirming lower courts rejection of a judicial estoppel argument based on debtor's failure to include a claim in its asset schedules because debtor had otherwise informed the bankruptcy trustee of the claim's existence). ²²

18 Coop is referred to as Finco throughout the SoP Petition. The SoP Petition states that

Itlhe business of Finco consists of (i) attracting financing from the international capital markets, primarily in the form of issuing listed notes (the Notes), (ii) receiving funds from PTIF via a credit agreement entered into between Finco and PTIF on 2 June 2015 (as amended from time to time, hereinafter the Finco Loan), and (iii) on-lending amounts that Finco has attracted via the Notes or from PTIF (via the Finco Loan). The Notes are unsecured but guaranteed by Oi. Finco has no real estate and no other operations of its own. Finco has one employee, Mr. Lavatori Correa, who is one of Finco's directors.

TX 26¶1.2.

19 The SoP Petition states that

[a]s a financing vehicle, Finco has no revenuegenerating capacity or other assets (other than intra-group loans) of its own. Additionally, the Notes are guaranteed by Oi. Therefore, Finco's ability to repay its debts depends entirely on the success of the RJ Proceedings and, consequently, the continuity of the Oi Group's business and revenues. In view of these facts, Finco's financial and economic situation is inherently linked to that of the Oi Group as a whole. Finco will be able to repay its debts only to the extent the Oi Group is able to do so, which is inconsistent with a bankruptcy liquidation of the Oi Group.

TX 26 ¶ 2.2.

The SoP Petition explains that

[t]he Brazilian Court assumed jurisdiction in relation to Finco based on the fact that Finco is merely a financing vehicle and not an operating company within the Oi Group, and the Oi Group's 'main place of business' is in Rio de Janerio, Brazil (p. 89501 of the RJ Acceptance Order)." TX 26 ¶ 3.4. "The U.S. Bankruptcy Court of the Southern District of New York (the U.S. Bankruptcy Court) recognised the RJ Proceedings, including in respect of Finco, on 22 July 2016. Consequently, creditors of Finco are also subject to a moratorium in the United States, where they can no longer enforce their claims.

TX 26 ¶ 3.5.

The SoP Petition further states that

Recognition proceedings have since been effected in various jurisdictions[,] including the United States (as previously noted). In the United States, an interim order recognising the RJ Proceedings with respect to, amongst others, Oi and Finco through [C]hapter 15 proceedings was granted on 22 June 2016. At a hearing on 21 July 2016, the U.S. Bankruptcy Court recognised the RJ Proceedings as a 'foreign main proceeding' with respect to each of the [C]hapter 15 debtors, including Finco. Similarly, on 23 June 2016 the RJ Proceedings were recognised in respect of Oi and two of its Brazilian subsidiaries as a 'foreign main proceeding' in Great Britain in accordance with the UNCITRAL Model Law on Cross-Border Insolvency as set out in Schedule 1 to the Cross-Border Insolvency Regulations 2006 (S.I. 2006 No 1030).

TX 26 ¶ 5.3.

The SoP Petition makes clear that "the outcome of the restructuring for the creditors of Finco is entirely dependent on the RJ Proceedings and RJ Plan. The assets and value of the Oi Group can only be realized for the benefit of the creditors of Finco through the RJ Proceedings." TX 26 ¶ 5.6. It states

Itlhe background to this request is that any voting that takes place on the suspension of payment proceedings related to Finco prior to the voting on the RJ Plan in the RJ Proceedings is likely to disrupt the negotiation process in the RJ Proceedings. At the same time, the content of the Dutch Plan and the economic reality of any consideration for the creditors of Finco will need to be paid by the Brazilian operating entities of the Oi Group, which in turn is dependent on the success of the RJ Plan. This implies that any vote on the suspension of payments before the voting in the RJ Proceedings is not likely to have any practical effect

TX 26 ¶ 7.2.

22

It is also unclear whether a failure to object to the Dutch COMI findings committed any violence

to the Dutch insolvency proceedings. In fact, the Movants do not claim that Coop's position on its COMI had any impact whatsoever on the Dutch Proceedings. The Insolvency Trustee himself conceded that regardless of the location of a debtor's COMI and the source of the Dutch Court's jurisdiction, a Dutch debtor has available the same forms of relief and insolvency procedures within the Netherlands. Berkenbosch Decl. ¶ 120. Thus, the Dutch District Court was not misled by any implied representation into opening or continuing any proceedings that it would otherwise have curtailed. See, e.g., Guinness, 955 F.2d at 899 (holding that plaintiff, by continuing with an appeal after purportedly reaching a settlement, and not informing the appellate courts of the settlement, was "inherently and explicitly informing [the appellate courts] that no events had occurred which would render such appeals improper").

Admittedly, there is evidence that Coop was aware of the effect of the EU recognition "in other European member states." TX 26 ¶ 6.1; see Trustee Reply ¶ 38. But as Professor Veder testified, recognition of a Dutch composition plan by other EU member states is not limited to the automatic mechanism provided for under the EU Regulation. Trial Tr. 394:22-396:22, Sept. 19, 2017 (Veder). Even for proceedings established under the DBA, member state national regimes provide for their own recognition procedures, including automatic recognition in Germany and UNCITRAL Model Lawstyle recognition in the UK. See id. But judicial estoppel is not a tool to be used in such a nuanced situation, particularly given that Coop presented a fulsome picture of Coop in its SoP Petition. Thus, Coop was simply not "blowing hot and cold with the judicial process to such a degree as to violate the essential integrity of that process." Guinness, 955 F.2d at 899 (quotations omitted).

[29] The Movants' other estoppel argument relies upon Coop's failure to contest *212 or appeal the Dutch District Court's COMI finding. Movants' Proposed CoL ¶ 83. But Coop's Dutch law expert testified that such actions are not possible, a conclusion that the Court credits. Compare Trial Tr. 477:19–480:14, Sept. 19, 2017 (Veder), with Trial Tr. 836:19–838:7, Sept. 25, 2017 (Berkenbosch). But for this Court's purposes, it does not even matter. In its subsequent submissions to the Dutch District Court [redacted], Coop [redacted] expressed its disagreement with the Dutch COMI finding, laid out its concerns regarding the impact of a successful conversion on the Oi

Group's restructuring, and argued that the DBA rather than the EU Regulation should govern the insolvency proceedings. ²³ So even if each Dutch court made its own independent finding regarding COMI and jurisdiction as the Insolvency Trustee states (Trial Tr. 835:12–836:18 Sept. 25, 2017 (Berkenbosch)), they appear to have done so with knowledge of Coop's opposition to a Dutch COMI.

23 [redacted] For example, Coop submitted the following to the Dutch District Court for the Conversion Hearing:

Oi Coop does not agree with the Administrator's position that Oi Coop's COMI is in the Netherlands. Oi Coop's COMI is in Brazil, as was determined by the Brazilian Court even before the suspension of payments procedure began (see also p. 89498 of the ruling of the Brazilian Court of 29 June 2016, Exhibit 9 with the Supplementary Petition), and recognized by the court in the United States in the Chapter 15 Procedure.

TX 449 \P 11.1.1; see also id. at \P 11.1.6 ("Because the COMI is in Brazil, the [EU Regulation] is not applicable."). [redacted]

[redacted] [redacted]

D. <u>This Court Does Not Abstain Under Comity from</u> <u>Determining Recognition Under Chapter 15</u>

Movants' comity argument also fails. The Insolvency Trustee argues that the Court should refrain from making its own determination on Coop's COMI, and instead simply grant comity to the Dutch court decisions that found COMI under the EU Regulation to be located in the Netherlands. The Trustee writes that this Court should "accord[] the decisions of the Dutch Courts the same effect they are already entitled to throughout the European Union, where they are final and binding." Trustee Reply ¶ 49. But while comity is crucial to a proper functioning of Chapter 15, the Court disagrees that it should defer to the Dutch courts in assessing COMI under Chapter 15.

[30] [31] International comity is "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws." *Hilton v. Guyot*, 159 U.S. 113, 163–64, 16 S.Ct. 139, 40 L.Ed. 95 (1895).

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The doctrine is "concerned with maintaining amicable working relationships between nations, a 'shorthand for good neighbourliness, common courtesy and mutual respect between those who labour in adjoining judicial vineyards.' " JP Morgan Chase Bank v. Altos Hornos de Mex., S.A. de C.V., 412 F.3d 418, 423 (2d Cir. 2005) (quoting British Airways Bd. v. Laker Airways Ltd., [1984] E.C.C. 36, 41 (Eng. C.A.)). American courts have long recognized the importance of comity "[p]articularly in the bankruptcy context, ... because '[t]he equitable and orderly distribution of a debtor's property requires assembling all claims against the limited assets in a single proceeding." In re Atlas Shipping A/S, 404 B.R. 726, 733 (Bankr. S.D.N.Y. 2009) (second alteration in the original) (quoting *213 Victrix S.S. Co., S.A. v. Salen Dry Cargo A.B., 825 F.2d 709, 713-14 (2d Cir. 1987)).

within a court's discretion and the burden of proof to establish its appropriateness is on the moving party." Duff & Phelps, LLC v. Vitro S.A.B. de C.V., 18 F.Supp.3d 375, 382 (S.D.N.Y. 2014) (quoting Maersk, Inc. v. Neewra, Inc., 2010 WL 2836134, at *10, 2010 U.S. Dist. LEXIS 69863, at *29 (S.D.N.Y. July 9, 2010)); see also Fox v. Bank Mandiri (In re Perry H. Koplik & Sons, Inc.), 2007 WL 781905, at *2, 2007 Bankr. LEXIS 925, at *9-10 (Bankr. S.D.N.Y. Mar. 31, 2007) ("[A] decision to grant comity to the determination of a foreign court is a matter within the court's discretion, as to which the party seeking to invoke comity has the burden of establishing that the foreign court's determination is appropriate.") (citing Allstate Life Ins. Co. v. Linter Grp. Ltd., 994 F.2d 996, 999 (2d Cir. 1993)). The doctrine is a form of abstention; it "is not an imperative obligation of courts but rather is a discretionary rule of 'practice, convenience, and expediency." JP Morgan, 412 F.3d at 423 (quoting Pravin Banker Assocs., Ltd. v. Banco Popular del Peru, 109 F.3d 850, 854 (2d Cir. 1997)); see also Sec. Inv'r Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC (In re Madoff), 2016 WL 6900689, at *10, 2016 Bankr. LEXIS 4067, at *32 (Bankr. S.D.N.Y. Nov. 21, 2016) ("Dismissing an action based on comity is a form of abstention") (citations omitted). "[C]ourts generally extend comity provided the foreign court had proper jurisdiction and recognition of its judgment or proceeding does not prejudice the rights of United States citizens or violate domestic public policy." Rapture Shipping, 350 F.Supp.2d at 373 (citing Victrix, 825 F.2d at 713).

[35] [36] [37] "A central tenet of [C]hapter 15 is the importance of comity in cross-border insolvency proceedings." In re Rede Energia, 515 B.R. at 89 (citing In re Cozumel Caribe S.A. de C.V., 482 B.R. 96, 114-15 (Bankr. S.D.N.Y. 2012)); In re Atlas Shipping, 404 B.R. at 738 ("Chapter 15 Embodies Principles of Comity"); In re Vitro, 701 F.3d at 1043 ("[c]entral to Chapter 15 is comity."). But "Chapter 15 does impose certain requirements and considerations that act as a brake or limitation on comity." Krys v. Farnum Place, LLC (In re Fairfield Sentry Ltd.), 768 F.3d 239, 245 (2d Cir. 2014) (quoting In re Vitro, 701 F.3d at 1054); see also In re Rede Energia, 515 B.R. at 91. Where the Bankruptcy Code provides the standard for a court's determination, comity does not enter the equation. See In re Fairfield Sentry Ltd., 768 F.3d at 246 ("[W]hen a statute's language is plain, the sole function of the courts—at least where the disposition [32] [33] [34] "The decision to grant comity is a matter required by the text is not absurd—is to enforce it according to its terms.") (quoting Sebelius v. Cloer, 569 U.S. 369, 381, 133 S.Ct. 1886, 185 L.Ed.2d 1003 (2013)). For example, the Second Circuit in Fairfield Sentry found the plain language of Section 1520(a)(2) required the bankruptcy court in a Chapter 15 case to conduct its own review of a transaction under Section 363 of the Bankruptcy Code, notwithstanding that the transaction had been approved by the British Virgin Islands court where the foreign main proceeding was pending. See In re Fairfield Sentry Ltd., 768 F.3d at 246. Thus, the Second Circuit explicitly rejected the notion that the bankruptcy court should defer to the foreign court's determination based on the principle of international comity. See id. at 245-46; see also In re Vitro, 701 F.3d at 1054 (holding that while "comity should be an important factor in determining whether relief will be granted," the court was "compelled ... to get into the weeds of Chapter 15 to determine" the scope of a foreign representative's *214 authority and the nature of the relief the bankruptcy court could grant).

> [38] In the case of recognition under Chapter 15, "[b]oth the plain language and legislative history of Chapter 15 ... requires [a bankruptcy court to make] a factual determination with respect to recognition before principles of comity come into play." In re Bear Stearns, 389 B.R. at 334. So while comity governs recognition of a foreign judgment (see Rapture Shipping, 350 F.Supp.2d at 373), it does not govern the initial recognition of a foreign proceeding under Chapter 15. Recognition of a proceeding requires the application of "objective criteria,"

and it is only post-recognition relief which "turns on subjective factors that embody principles of comity." *In re Atlas Shipping*, 404 B.R. at 738 (quoting *In re Bear Stearns*, 389 B.R. at 333 (citing 11 U.S.C. §§ 1507, 1517, 1521, 1525; Model Law Art. 7, 17, 21, 25)); *see also In re Ran*, 390 B.R. 257, 292 (Bankr. S.D. Tex. 2008) ("By arguing comity without satisfying the conditions for recognition, [the foreign trustee] urges this Court to ignore the statutory requirements of 11 U.S.C. § 1517 comity is not an element of recognition; it is rather, a consideration once recognition is granted.").

[39] [40] The objective criteria of the recognition procedure "reflects a policy determination by UNCITRAL and Congress that this Court should not assist a representative of a foreign action unless the debtor has a sufficient presence in the country in which the foreign action is taking place." In re British Am. Ins. Co., 488 B.R. 205, 213 (Bankr. S.D. Fla. 2013) (citing In re Bear Stearns, 389 B.R. at 333–34). "If the debtor does not have its center of main interests or at least an establishment in the country of the foreign proceedings, the bankruptcy court should not grant recognition and is not authorized to use its power to effectuate the purposes of the foreign proceeding." In re Bear Stearns, 389 B.R. at 334 (citing House Report at 1:13; Guide ¶ 73, 75, 128).

In fact, Chapter 15 makes no mention of comity in Section 1517 or any other section setting forth the requirements for a grant of recognition. Rather, Section 1509(b) provides that:

[i]f the court grants recognition under section 1517 ... the foreign representative may apply directly to a court in the United States for appropriate relief in that court; and a court in the United States shall grant comity or cooperation to the foreign representative.

11 U.S.C. § 1509(b) (emphasis added). Likewise, Section 1507 allows courts to "provide additional assistance to a foreign representative ... consistent with the principles of comity" "if recognition is granted" 11 U.S.C. § 1507(a)—(b) (emphasis added). The statute also refers to requests for relief from "court[s] in the United States other than the court which granted recognition," as requests for "comity or cooperation." 11 U.S.C. § 1509(c) (emphasis added). Similarly, if recognition has been denied under

Chapter 15, "the court may issue any appropriate order necessary to prevent the foreign representative from obtaining *comity or cooperation*" from other U.S. courts. 11 U.S.C. § 1509(d) (emphasis added); *see In re Atlas Shipping*, 404 B.R. at 738–39 (conducting related analysis of references to comity throughout Chapter 15).

An examination of Section 304 of the Bankruptcy Code— Chapter 15's statutory predecessor—further underscores the requirement that a bankruptcy court conduct an independent assessment of recognition. "While much of the jurisprudence developed under [S]ection 304 is preserved in the context of new [S]ection 1507, [S]ection 304 did not have a recognition requirement as a first step.... Chapter 15, on the other *215 hand, imposes a rigid procedural structure for recognition of foreign proceedings as either main or nonmain" In re Ran, 390 B.R. at 290-91 (quoting In re Bear Stearns, 374 B.R. at 132) (first omission in the original); see also In re British Am. Ins. Co., 488 B.R. at 213 ("The general principles of comity that governed acknowledgement of cross-border matters under former [S]ection 304 no longer apply to recognition under [C]hapter 15.") (citing Lavie v. Ran, 406 B.R. 277, 282 (S.D.Tex.2009), aff'd, 607 F.3d 1017 (5th Cir.2010)). "Requiring recognition as a condition to nearly all court access and consequently as a condition to granting comity distinguishes Chapter 15 from its predecessor [S]ection 304." In re Bear Stearns, 389 B.R. at 333. "Prior to the enactment of Chapter 15, access to the United States courts by a foreign representative was not dependent on recognition; rather, all relief under [S]ection 304 was discretionary and based on subjective, comityinfluenced factors." In re Ran, 390 B.R. at 291 (citing In re Bear Stearns, 374 B.R. at 126; In re Basis Yield, 381 B.R. at 46; Westbrook, Locating the Eye of the Financial Storm, 32 BROOK, J. INT'L L. at 1024; Daniel Glosband, SPhinX Chapter 15 Opinion Misses the Mark, 25 AM. BANKR. INST. J. 44, 45 (Dec./Jan.2007)). Chapter 15 changed this by establishing an objective eligibility requirement for recognition to promote predictability and reliability. See In re Bear Stearns, 389 B.R. at 333. This is in contrast to the standards for post-recognition relief, which under Chapter 15 remained "flexible and pragmatic in order to foster comity and cooperation in appropriate cases." Id.

[41] All these principles dictate that this Court make its own determination on recognition in this case, rather than defer to the Dutch courts. While the parties disagree as to whether the Dutch Petition should be

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evaluated under Section 1517(a) or 1517(d), it is clear that Chapter 15 itself provides the standard for the U.S. courts to apply. As explained above, Section 1517(a) sets forth explicit requirements for recognition while Section 1517(d) provides a basis for the "modification or termination" of a prior recognition hearing. See 11 U.S.C.\(\xi\) 1517(a); 11 U.S.C.\(\xi\) 1517(d). Given that Chapter 15 provides the standard for the present dispute, abstention based on comity is inappropriate. See In re Fairfield Sentry Ltd., 768 F.3d at 246.

Even if comity could be appropriately considered, the Insolvency Trustee's argument would fail for a different reason. The principles of comity do not fit comfortably where the task before the foreign court was different from that which faces this Court. For the reasons discussed earlier, a COMI finding for the purposes of an insolvency proceeding under the EU Regulation is not the same as a COMI finding under Chapter 15. Here, the Insolvency Trustee has even gone beyond asking for comity and requested that this Court "accord[] the decisions of the Dutch Courts the same effect they are already entitled to throughout the European Union ...," where such decisions are granted automated recognition. Trustee Reply ¶ 49. There is no basis in statute or case law for such treatment.

Finally, the Insolvency Trustee's reliance on *In re Ocean Rig* as a basis for comity here is misplaced. The Insolvency Trustee refers to one statement from that case:

[t]o the extent that a determination of center ... of main interests is relevant to eligibility to file proceedings in other countries, and has been decided by the foreign court, it may well be appropriate for a U.S. bankruptcy court to give deference or comity to the determination of *216 the foreign court in the jurisdiction in which the foreign proceeding is filed.

In re Ocean Rig, 570 B.R. at 703 n.6; Trial Tr. 927:18–11, Sept. 26, 2017 (Ball). But this statement, made in a single footnote and unrepeated elsewhere, was clearly dicta. Indeed, the court in Ocean Rig explicitly stated that "since the Cayman Court has not decided the issue here, no issue of deference or comity arises." Id. Moreover, these statements followed the observation that it is appropriate to look to foreign interpretations of

COMI "from other international jurisdictions that have adopted the Model Law," which was not the case in the Cayman Islands. Id. (emphasis added). Neither the Netherlands nor Brazil have adopted the Model Law. See Status UNCITRAL Model law on Cross–Border Insolvency (1997), http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html (last visited Nov. 13, 2017) (listing countries that have adopted the Model Law and not including Brazil or the Netherlands). ²⁴

See also Ferreira Decl. ¶ 18 ("Brazilian insolvency legislation has not adopted the UNCITRAL Model Law on Cross–Border Insolvency"); Trial Tr. 487:13–17, Sept. 19, 2017 (Veder) ("Q. Could you explain to the Court, is the European Insolvency Regulation an effort to implement the UNCITRAL model law in European law? A. Not at all.").

E. The Court Will Not Exercise its Discretion to Grant Relief Under the First Prong of Section 1517(d)

[42] The Court now turns to the crux of this dispute: whether the Prior Recognition Order for the Brazilian RJ Proceeding should be terminated under Section 1517(d) of the Bankruptcy Code. The Court starts by addressing the first prong under subsection (d), and concludes that the grounds for granting recognition to the Brazilian RJ Proceeding were not "fully or partially lacking." 11 U.S.C. § 1517(d).

Under this first prong, the Movants contend the Court was misled at the Prior Recognition Hearing because certain information was concealed from the Court such that the Court lacked a basis for its ruling. More specifically, Mr. Berkenbosch alleges that the Court was not informed of certain important facts at the time of the Prior Recognition Hearing. See Movants' Proposed CoL ¶ 46, 89, 104. 25 The Court rejects the Movants' request to modify or terminate the Prior Recognition on this basis for two reasons: (1) the evidence relied upon by the Court in its Prior Recognition Order justified its finding that Coop's COMI was in Brazil; and (2) the evidence that Movants contend was omitted is not significant enough to grant relief under the first prong.

Within the same submission, the Movants present two different versions of the facts that were not disclosed to the Court. Compare Movants' Proposed FoF ¶ 89, with Movants' Proposed CoL ¶ 46. It is unclear

which of these two lists represent Movants' position. But regardless of which list—or both—control, the Court's conclusion is the same.

First, the record demonstrates that the Court was provided a broad picture of the relevant facts, and a sufficient basis for its Prior Recognition Order. The Chapter 15 Debtors presented Coop's ties to Brazil as a special purpose financing vehicle for the Oi Group at the Prior Recognition Hearing. The Oi Debtors informed the Court that "Coop is a special-purpose vehicle (an SPV) with no ability to generate a return on cash proceeds itself" (Shah Decl. ¶ 34), that "any proceeds from debt issuances at Coop must be on-lent to (eventually) an operating Oi Group entity capable of earning a profit for Coop's creditors" (id.), that Coop is "the obligor on any intragroup loans received by it from Oi Group affiliates in its capacity as an intragroup financing company in the Oi group" (id.), that *217 "Coop exists exclusively to service the financing needs of the economically integrated Oi Group" (id. ¶ 30), and that "Coop's assets consist solely of receivables owed to it by its Brazilian Oi Group affiliates" (id. ¶ 33).

But the Chapter 15 Debtors also disclosed the key facts about Coop's ties to the Netherlands. For example, the Court was informed that "Coop was incorporated ... in 2011 under the laws of the Netherlands" (Shah Decl. ¶ 30; Brazilian Petition ¶ 26); "Coop maintains its registered office in the Netherlands" (Shah Decl. ¶ 31; Brazilian Petition ¶ 27); "Coop enters routine filings with the Dutch Chamber of Commerce ... files tax returns with the Dutch tax authorities, employs Baker Tilly International as auditor, and completes other ministerial activities required by Dutch law" (Shah Decl. ¶ 31; Brazilian Petition ¶ 27); ²⁶ "Coop hired independent Dutch counsel to ensure the protection of its interests in a joint defense with its Oi Group affiliates" (Shah Decl. ¶ 32; Brazilian Petition ¶ 28); "Coop ... is governed by two directors, one of whom resides in the Netherlands" (Shah Decl. ¶ 31; Brazilian Petition ¶ 27); and "Coop's board of directors ... hold [their] meetings in the Netherlands" (Shah Decl. ¶ 32; Brazilian Petition ¶ 28). ²⁷ Given all of the facts provided by the Chapter 15 Debtors in the Prior Recognition Proceeding, the Court concludes that the grounds for recognition were not lacking.

- Movants incorrectly suggest that Coop did not disclose its retention of Dutch professionals. Movants' Proposed Fof ¶89. This is clearly incorrect.
- 27 Some facts relating to Coop's Dutch ties were not disclosed, such as that Coop's books and records were in the Netherlands, that Coop had a bank account in the Netherlands, and the existence of Coop's tax claim against Dutch authorities. Trustee Reply ¶ 4. But none of those facts are significant given the broad disclosure provided to the Court. For example, information about the tax claim was relatively unimportant given the size of the claim. See Berkenbosch Decl. ¶ 26 (noting claim on behalf of Coop estate against Dutch tax authorities for VAT refund of approximately €160,846). It is difficult to argue that the existence of the tax claim was crucial information when even Coop's courtappointed Dutch fiduciary, Mr. Berkenbosch, was unaware of when it came into existence. See Trial Tr. 691:10-20, Sept. 25, 2017 (Berkenbosch).

Second, none of the facts identified by Movants as undisclosed at the Prior Recognition Hearing justify relief under the first prong of Section 1517(d). In short, the absence of these facts did not mislead the Court so as to result in an erroneous COMI determination. A few of the specific facts relied upon by Movants are worthy of discussion.

Movants rely most heavily upon Coop's prior statements about its COMI under the EU Regulation. Movants point out that the Court was not informed of: (1) the existence of "prior resolutions of the Coop Board stating [that] COMI [under the EU Regulation] was in the Netherlands"; and (2) the existence of an "opinion letter to [underwriters] of the 2021 Notes" which discusses Coop's COMI under the EU Regulation. Trustee Reply ¶ 78. But for reasons explained earlier, these statements regarding the location of Coop's COMI under the EU Regulation are not dispositive for determining COMI under U.S. law. ²⁸ The Dutch District Court found *218 Coop's COMI under the EU Regulation to be in the Netherlands—without a hearing and on the same day that the SoP Petition was filed-based on the presumption triggered by Coop's corporate location. It made this determination notwithstanding the other information about Coop contained in the SoP Petition, such as Coop's status as a special purpose financing vehicle for the Oi group.

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There is another reason to afford less weight to the opinion letter: it was not public. As information that was not ascertainable by third parties, therefore, this document is of limited utility in determining COMI under Chapter 15. *In re Fairfield Sentry*, 714 F.3d at 138 (underscoring the importance of regularity and ascertainability in determining COMI) (quoting EU Regulation, Preamble ¶ 13 stating that COMI "should correspond to the place where the debtor conducts the administration of his interest on a regular basis and is therefore ascertainable by third parties.").

At the Prior Recognition Hearing this Court was well aware that Coop's registered office was in the Netherlands. But the registered office presumption is not accorded the same weight under U.S. law. See supra at 23-25. Given the different standard under U.S. law, therefore, this Court considered the information about Coop's SPV status to be highly relevant in reaching a different conclusion about Coop's COMI under Chapter 15 at the Prior Recognition Hearing. See Hr'g Tr. 21:10-15, July 21, 2016 ("Case law including the OAS case notes that the COMI of an SPV turns at a location of the corporate nerve center and the expectation of creditors. And here, I find that the COMI analysis for the SPV here is essentially the same as it was in OAS and I reach the same conclusion that Brazil is the appropriate place."); see also In re OAS, 533 B.R. at 102 (noting that COMI of a financing SPV depended upon: (1) the location of the corporate nerve center of the corporate group the SPV served; (2) the expectations of the SPV's creditors; and (3) the function the SPV played within its corporate group). 29

The Court notes that its Prior Recognition Order and COMI determination were not discussed by the Dutch courts in the SoP or Dutch Bankruptcy Proceeding, despite having been made before the SoP was issued in the Netherlands. This just reinforces the distinct legal tasks before this Court under Chapter 15, which is an adoption of the Model Law, and the Dutch courts under the EU Regulation, which is not an adoption of the Model Law.

The Movants further contend that the Chapter 15 Debtors did not disclose to the Court that Coop engaged in business beyond the issuance of notes, such as hedging and financing activities. They even argue that Coop is not an SPV, claiming that it engages in other activities beyond paying off debt that it accrued and then passed on to the Oi Group. But this is not borne out by the

evidence. The record does not show that Coop took actions other than those consistent with its nature as a special purpose financing vehicle. While Coop's Articles of Association list a number of other potential activities that the company could hypothetically engage in (SCX 1, Art. 3), no evidence was presented that it has ever actually engaged in activities beyond its role as an SPV. Movants make much of the notion that Coop "held" money that it received before on-lending the funds to the Oi Group (see Trustee Reply ¶ 4), implying that significant economic activity was involved in such "holding." But the record does not support that conclusion. Nothing appears to have been done with this cash while being held in the bank in the Bahamas. Rabelo Decl. ¶¶ 20, 22. The mere act of holding those funds is not inconsistent with Coop's SPV nature; it is hard to imagine how an entity like Coop could obtain funds and on-lend them without at some point "holding" the money. Moreover, Movants have not pointed to anything in the record establishing that Coop even made the decision about when these funds were transferred. Indeed, one would expect such a decision to be made directly or indirectly by the Oi Group in Brazil. For all these reasons, therefore, the *219 record here does not support Movants' claim that Coop acted outside the parameters of its role as a special purpose financing vehicle.

The Movants also complain that the Chapter 15 Debtors in the prior case concealed certain actions that Coop had taken or was planning to take, such as that: (1) Coop fraudulently transferred the PT sale proceeds to Brazilian affiliates just days before commencing restructuring activities (Trustee Reply ¶ 4); (2) Oi replaced the Dutch member of the Coop Board with an Oi employee (Trustee Reply ¶ 78); 30 and (3) the newly reconstituted Coop Board approved loan amendments that looked to Brazil and not the Netherlands (Trustee Reply ¶ 78). The Movants also note that Coop failed to disclose that it was planning to file the SoP in the Netherlands after the Prior Recognition Order was entered. Movants' Proposed CoL ¶ 46. But none of these actions would be sufficient to sway the COMI determination made at the Prior Recognition Hearing. It is not even clear how these actions would be relevant to the Court's determination that Coop's COMI is in Brazil. As to the first, the existence of prepetition transfers is not a factor normally identified as relevant to recognition under Section 1517. See In re Fairfield Sentry, 714 F.3d at 133 (noting that a debtor's COMI is determined at the timing of filing of the Chapter 15 petition, except in circumstances of COMI manipulation). In any event, there has been no cogent explanation why it would be so here, particularly when Coop was required as a special purpose financing vehicle to on-lend any funds it received—which would include the proceeds of the PT sale—to the Oi Group. See Trial Tr. 676:13–23, Sept. 25, 2017 (Berkenbosch); TX 16 at 4 (2021 Notes Offering Memorandum) ("We expect to use the net cash proceeds of the PT Portugal Disposition for the repayment of indebtedness of our company or to carry out corporate transactions that aim to consolidate the telecommunications sector in Brazil, including the acquisition of interests in other mobile operators.").

30 The Court notes that the first two of these facts were disclosed to the Court prior to the Prior Recognition Hearing. See Motion for Provisional Relief [Case No. 16-11791, ECF No. 7, Ex. D] (Writ of Summons, dated March 16, 2016, attached to Section 1519 motion filed by Chapter 15 Debtors) (discussing financial problems of Oi Group and intercompany transfers of PTIF and Coop, as well as replacement of board members of PTIF and Coop with all new board members that were either employees of or counsel to Oi); Motion for Provisional Relief [Case No. 16-11791, ECF No. 7, Ex. F] (Writ of Summons, dated March 30, 2016, in Dutch proceeding brought by Capricorn against Coop) (discussing intercompany transfers of Coop and noting that Oi terminated Coop's only outside director and replaced that director with an employee of Oi, so that the board now consists of the CFO of Oi and another Oi employee).

There is also no convincing explanation of the relevance of the second action cited by the Movants-the replacing of the Dutch member of the Coop Board-particularly given that Mr. Correa's replacement of T.I.M. preserved the status quo of Coop having one director based in the Netherlands. See Trial Tr. 184:7-12, Sept. 18, 2017 (Rabelo) (prior to T.I.M.'s replacement, Coop had one director in the Netherlands and one in Brazil); Trial Tr. 679:10-22, Sept. 25, 2017 (Berkenbosch) (upon appointment, Mr. Correa moved to the Netherlands); Shah Decl. ¶ 31 (informing the Court that Coop had one director in the Netherlands and one in Brazil). As to the third action cited by the Movants regarding loan amendments, the amendments would not have changed this Court's COMI determination. If anything, the *220 amendments provide additional ties to Brazil.

The fourth action cited by the Movants regarding Coop's intentions to file the SoP Petition fairs no better. Despite the Movants' assertions that the SoP was always planned by the Oi Group as part of a global restructuring strategy, the Court finds that the SoP Petition was filed for defensive purposes in response to the involuntary petitions. *See infra* n. 55 and accompanying text. In any event, the Chapter 15 Debtors promptly informed the Court of the filing of the SoP Petition within two weeks of the event. *See* Third Decl. of Shah Notifying Court of a Change of Status ¶ 5 [Case No. 16–11791, ECF No. 48].

The Movants also argue that the Chapter 15 Debtors withheld facts regarding PTIF, such as PTIF being Coop's largest creditor and the PTIF Loan Agreement having a Netherlands forum selection clause. But the Court finds that adequate information regarding PTIF was provided to the Court in the earlier proceeding. See Brazilian Petition, at 3 n.5 (stating that PTIF is an "affiliated Debtor[] ... organized under the laws of the Netherlands"); id. ¶ 30 (stating that Oi Coop is an obligor on intercompany claims of an affiliate); Motion for Provisional Relief [Case No. 16-11791, ECF No. 7, Ex. D] (Writ of Summons, dated March 16, 2016, in Dutch proceeding brought by the Aurelius-managed fund Capricorn against PTIF, Coop, and others, alleging that (1) "PTIF and [Coop] are Dutch legal entities that are full subsidiaries of Oi" (¶ 2.1.1); (2) PTIF and Coop "are both engaged in financing activities for the Oi Group" ($\P 2.1.3$); and (3) that in issuing the PTIF Loan, PTIF "basically transferred all its available funds to [Coop]" (¶ 2.4.3) and became "[Coop]'s largest creditor" (¶ 2.4.2).). As for the Netherlands forum selection clause in the PTIF Loan Agreement, it doesn't tell the whole story. The PTIF Loan Agreement is actually "governed by and construed in accordance with the laws of Brazil" (TX 5 § 6.5), and was executed not in Dutch, but "in both [the] English and Portuguese languages," while setting out that "[i]n the event of any dispute or controversy, the Portuguese version [would] prevail" (TX 5 § 6.4).

Finally, the Movants allege that the Chapter 15 Debtors misled this Court by suggesting that the Brazilian public prosecutor in the Brazilian RJ Proceeding had issued an opinion concluding that "for the purposes of the Brazilian Bankruptcy Law and the Model Law, 'there is no question' that the COMI of each of the RJ Debtors, including the Dutch-incorporated entities Coop and PTIF, is in Rio de Janeiro, Brazil." See Movants'

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CoL ¶¶46, 104–09 (quoting Decl. of Shah Notifying Court of a Change of Status ¶ 7(iv) [Case No. 16–11791, ECF No. 32]). The Movants contrast this statement with the actual words of the public prosecutor that referred to the "main place of business" of the Oi Group. See Movants' CoL ¶¶ 106–07. But this is much ado about nothing as the Chapter 15 Debtors provided the Court with a copy of the prosecutor's opinion itself. See Request of the Office of the Public Prosecutor, attached as Ex. B. to Decl. of Shah Notifying Court of a Change of Status [Case No. 16–11791, ECF No. 32–2]. The Court could and did read this opinion in the prior case, and thus was fully informed of its content at the time the Court entered the Prior Recognition Order.

Putting aside the basis for the Court's Prior Recognition Order, the Court has another reservation about exercising its discretion to grant relief under the first prong of Section 1517(d): the behavior of the Coop creditor Aurelius. The evidence *221 at trial demonstrates that Aurelius' failure to object at the Prior Recognition Hearing was a strategic decision, not one based on a lack of information or some fundamental misunderstanding of the facts. Aurelius was armed with the crucial information about Coop. 31 But Aurelius nonetheless said nothing when the Court inquired about the COMI of Coop. It remained silent when the Court stated that the COMI of an SPV like Coop turns on the "location of the corporate nerve center and the expectations of creditors." Hr'g Tr. at 21:10-12, July 21, 2016. It voiced no disagreement when the Court stated that "the integrated O[i] group enterprise is managed, directed, and monitored as a strategic whole in Brazil while major group decisions are affected at the O[i] group headquarters, [and] the O[i] group headquarters is the corporate nerve center" Id. at 20:24-21:3. Most crucially, it offered no objections when the Court opined that "the COMI analysis for the SPV here [(Coop)] is essentially the same as it was in OAS" and then concluded that Coop's COMI was in Brazil. Id. at 21:13-15. 32 Aurelius failed to object notwithstanding its view that COMI for Coop is and always has been in the Netherlands. Movants' Proposed CoL ¶ 45; Trial Tr. 637:17-25, Sept. 25, 2017 (Gropper).

Aurelius' awareness of these crucial facts about Coop is also reflected in the significant litigation already pending against Coop at the time of the Prior Recognition Hearing. In March 2016, the Aureliusmanaged fund Capricorn filed an action in the

Netherlands to avoid the PTIF loan and to hold PTIF, Coop, and various of their directors liable for damages suffered by Capricorn as a result of the PTIF loan and the Coop loan. See Motion for Provisional Relief [Case No. 16-11791, ECF No. 7, Ex. D] (Writ of Summons, dated March 16, 2016, in main proceeding brought by Capricorn against PTIF, Coop, and others). That litigation shows that Aurelius was aware of the transfer of cash from Coop to Oi affiliates and was concerned about such transfers. See id.; see also Trial Tr. 575:10-22, Sept. 25, 2017 (Gropper). That same month, Capricorn filed a summary proceeding seeking to enjoin Coop from further transferring funds to any member of the Oi Group. See Motion for Provisional Relief [Case No. 16-11791, ECF No. 7, Ex. F] (Writ of Summons, dated March 30, 2016, in summary proceeding brought by Capricorn against Coop).

32 In fact, there were no objections to the requested relief at the Prior Recognition Hearing. See Hr'g Tr. 9:8–9, July 21, 2016 (counsel noting that they received no objections at the Prior Recognition Hearing to the petition for recognition).

Why did Aurelius remain silent at the Prior Recognition Hearing? As will be explained more fully below in discussing the second prong of Section 1517(d), the silence was part of a strategy by Aurelius based on its view that Coop's debt was undervalued. Under that strategy, Aurelius significantly increased its holdings of Coop debt after the Prior Recognition Hearing and took action to overturn this Court's Prior Recognition Order, notwithstanding its lack of objection at the Prior Recognition Hearing.

F. The Court Will Not Exercise its Discretion to Grant Relief Under the Second Prong of Section 1517(d)

[43] The Court now turns to the second prong of Section 1517(d): whether recognition of the Brazilian RJ Proceeding should be modified or terminated because the grounds for granting recognition "have ceased to exist." 11 U.S.C. § 1517(d). To assess this question, the Court must examine what has changed since entry of the Prior Recognition Order. ³³ Almost all of *222 the central facts regarding Coop have remained unchanged since the Prior Recognition Order. Coop remains a special purpose financing vehicle for the Oi Group with a registered office in the Netherlands. The only significant change has been the progression of the Dutch insolvency proceedings and the activities of the Insolvency Trustee arising out of those

proceedings. ³⁴ But for the reasons explained below, the Court declines on this record to modify or terminate the Prior Recognition Order—finding a Brazilian COMI—under the second prong of subsection (d) based on this change.

- 33 The Insolvency Trustee and the IBC argue that under Fairfield Sentry, the Court must analyze COMI based only on the facts as of July 7, 2017, the date that the Insolvency Trustee filed his petition for recognition. But as previously noted, the Court is not making a determination of COMI under Section 1517(a), but rather is examining whether recognition should be modified or terminated pursuant to Section 1517(d). The second prong of subsection (d) explicitly contemplates looking to how facts have changed since the Prior Recognition Order. See 11 U.S.C. 1517(d). Additionally, allegations of COMI manipulation have been raised in this proceeding. See SC Objection ¶¶ 65-92; Oi Objection ¶¶ 67-74; Trial Tr. 136:5-9, Sept. 18, 2017 (Cunningham). In such circumstances, courts may examine events prior to a Chapter 15 petition. See In re Fairfield Sentry, 714 F.3d at 137.
- Two minor facts have changed between the date of the Prior Recognition Order on July 22, 2016 and the Insolvency Trustee's request for recognition on July 7, 2017. First, at the time of the Prior Recognition Order. Coop had two directors, one who resided in Brazil and the other in the Netherlands. Following the opening of Coop's Dutch Bankruptcy Proceeding, the Coop Board of Directors removed both prior directors, and since April 2017 Coop has one director, Bryoptha, which is a Brazilian entity based in Rio de Janiero. Trial Tr. 188:20-25, Sept. 18, 2017 (Rabelo); Stip. Facts ¶ 11. Second, Coop's Netherlands-based director, Mr. Correa, served as Coop's sole employee at the time of the Prior Recognition Order. Stip. Facts. ¶ 14. His employment was terminated with his directorship around late April 2017, and Coop currently has no employees. Berkenbosch Decl. ¶ 10; Trial Tr. 194:9-21, Sept. 18, 2017 (Rabelo). These changes are not significant enough to provide a basis for relief under Section 1517.

[44] [45] The Court is mindful that the activities of foreign liquidators and administrators can be relevant to a COMI analysis. See In re Fairfield Sentry, 714 F.3d at 137 (directing examination of a debtor's COMI at the time the Chapter 15 petition is filed rather than the earlier date when the foreign insolvency proceeding was filed, and holding that "any relevant activities, including

liquidation activities and administrative functions, may be considered"). Where a foreign representative "has engaged in significant pre-U.S. filing work to operate (or even liquidate) the foreign debtor in the jurisdiction where the foreign insolvency proceeding was commenced (even if in a letterbox jurisdiction), the COMI can be found to have shifted from the foreign debtor's original principal place of business to the new locale." *In re Creative Fin.*, 543 B.R. at 518.

[46] [47] But the activities of a judicial administrator must be of sufficient significance to produce a shift in COMI. For instance, "when a foreign representative relocates all of the primary business activities of a debtor to his or her location, the COMI may 'become lodged with the foreign representative." In re Creative Fin., 543 B.R. at 519 (quoting In re Fairfield Sentry Ltd., 440 B.R. 60, 65 (Bankr. S.D.N.Y. 2010), aff'd, 2011 WL 4357421 (S.D.N.Y. Sept. 16, 2011), aff'd, 714 F.3d 127 (2d Cir. 2013)). In circumstances involving debtors without significant operations in a jurisdiction, a foreign representative's work to operate or liquidate a foreign debtor provides a basis for U.S. recognition of letterbox jurisdiction insolvency proceedings—so long as the estate fiduciaries in those jurisdictions do enough work." Id. at 518 (emphasis added). But such a change in COMI can only *223 take place "where material activities have been undertaken in the jurisdiction in which the foreign proceeding was filed-thus providing a meaningful basis for the expectations of third parties." Id. at 501 (emphasis added); see id. at 518.

Two cases identify some facts to consider when assessing whether the actions of a foreign trustee are sufficient to change creditor expectations and COMI. In Creative Finance, the court held that the conduct of a liquidator appointed in the British Virgin Islands (the "BVI") was not significant enough to shift the foreign debtor's COMI from the U.K, Spain, or Dubai-the locations at which the debtor's principal actually conducted business-to the BVI, the letterbox jurisdiction where the debtor was organized but did not conduct business activities. See In re Creative Fin., 543 B.R. at 511. The principal of that debtor had filed a voluntary proceeding in BVI, but had not provided the liquidator with enough funding to do more than the bare minimum required by BVI law. See id. at 502. The tasks undertaken by the liquidator included administrative tasks like opening bank accounts for the debtors, gathering and preparing required documents,

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providing creditor notices, holding creditor meetings, and issuing formal reports. See id. at 508–09. But the liquidator did not collect or liquidate any of the debtor's assets, shut down any of the debtor's businesses, pay any taxes, bring any causes of action, or conduct any investigations (including into a monetary transfer by the debtor's principal that was made after a judgment against the debtors). See id. at 509. Finding that the liquidator had not managed the debtor's business or taken the necessary steps to liquidate the debtor in any material way, the Court concluded that COMI had not shifted to the BVI. See id. at 511.

In In re British Am. Ins. Co. Ltd., 425 B.R. 884, the court discussed the activities of a judicial manager appointed in the Bahamas and his impact on the COMI of the foreign debtor. In that case, the manager argued that the debtor's COMI was located in the Bahamas in part because of the broad powers conferred upon him by his order of appointment and his initial activities as judicial manager, which included the retention of professionals, investigatory work, and preparation and submission of certain reports to the Bahamian court. See id. at 913. The court, however, observed that other than the judicial manager's appointment, the debtor's contacts with the Bahamas were "limited to those necessary to retain its charter and insurance license." Id. at 913. Specifically, the debtor had no directors, managers, or other employees located in the Bahamas at the time of the judicial manager's appointment and was being managed by a wholly owned subsidiary located outside of the Bahamas. See id. Other than the location of its registered office, limited professional representations, and the manager's oversight, all of the administrative functions were taking place outside of the Bahamas and none of its books and records, except for required corporate records, were maintained in the Bahamas. See id. Prior to the manager's appointment, none of the debtor's liquid assets were located in the Bahamas, although he established accounts in the Bahamas after his appointment. See id. No material creditors were located in the Bahamas. See id. The court observed:

> [t]here may be instances where a foreign representative remains in place for an extended period, and relocates all of the primary business activities of the debtor to his location (or brings business to a halt), thereby causing creditors

and other parties to look to the judicial manager as the location of the debtor's business. This would lead to the conclusion that *224 the center of its main interest has become lodged with the foreign representative.

Id. at 914. The court further noted the primary components of the debtor's business, which directly touched its creditors, were still taking place outside of the Bahamas. *See id.*

These same factors have been discussed in a few other cases. See, e.g., In re Suntech Power Holdings Co., Ltd., 520 B.R. 399, 419-20 (Bankr. S.D.N.Y. 2014) (holding that COMI shifted to the Cayman Islands from China based on the appointment and actions of joint provisional liquidators in the Cayman Islands who operated with broad authority to, among other things, take control of debtor assets, take legal action on behalf of the debtor, open bank accounts and borrow money, and exercise rights over the debtor's operating subsidiaries in accordance with the debtor's equity rights); In re Soundview Elite, Ltd., 503 B.R. 571, 594 (Bankr. S.D.N.Y. 2014) (noting that COMI was located at debtor's principal place of business in the U.S., but if the joint official liquidators "were to undertake active day-to-day management of the Debtors that are the subject of the Cayman proceedings, and for a sufficient period of time, [the court] might be able to eventually find that the COMI shifted to the Cayman Islands. ..."); In re British Am. Isle of Venice, Ltd., 441 B.R., 713, 723 (Bankr., S.D., Fla., 2010) (where liquidator in BVI foreign proceeding took control of a debtor that had no officers or directors and became the sole person responsible for the management of the debtor for a period of over 14 months, court found that "in light of the Petitioner's concerted efforts on behalf of the Debtor, and the extended passage of time since his appointment, third parties must necessarily consider the Petitioner's offices in the British Virgin Islands to be the location of the Debtor's COMI."); In re Betcorp Ltd., 400 B.R. 266, 292 (Bankr. D. Nev. 2009) (in making COMI determination, noting that "[t]he location of those that manage Betcorp—the liquidators (since commencing the winding up divests the directors of their authority)—is Australia.").

In seeking relief here, the Movants highlight steps taken by Mr. Berkenbosch in connection with the Dutch insolvency

proceedings. First, they cite to Mr. Berkenbosch's communications with and notices to Coop's creditors and other stakeholders. 35 Second, they note that the Insolvency Trustee performed certain administrative and management duties, such as securing Coop's books and records, paying Coop's debts as they came due, and paying professionals, and obtaining financing. Berkenbosch Decl. ¶¶ 82, 100, 102; TX 57–58; see also Stip. Facts ¶ 25(c) (referencing Coop's court-controlled bank account in the Netherlands). Third, they observe that Mr. Berkenbosch has engaged in litigation activities on behalf of the Coop estate, including filing the Pauliana Proceeding in the Netherlands against Oi and Oi Móvel, pursuing a claim against Dutch taxing authorities for a VAT refund of €160,846, and protecting the interest of Coop's Dutch estate in the Brazilian RJ Proceeding. 36 Berkenbosch Decl. ¶¶ 5, 25-26; *225 TX 471, 485; Trial Tr. 753:4-13, 828:23-829:4, Sept. 25, 2017 (Berkenbosch). Movants emphasize that the Insolvency Trustee has control over the assets of Coop's Dutch estate and is the only party with the power to investigate, pursue, and settle claims and causes of action on behalf of the Dutch estate. Berkenbosch Decl. ¶¶ 156–57.

- These include communications with the Coop Board, PTIF, Aurelius, and the Steering Committee, as well as published notices and public reports required by Dutch law. TX 29–35; TX 38, 40, 47; TX 162, Arts. 73(a) and 227; TX 215–256; TX 309 ¶ 2.10.1; TX 461–467; TX 482, 486; Berkenbosch Decl. ¶¶ 55, 59; Declaration of Dan Gropper ("Gropper Decl.") ¶ 16 [ECF No. 77].
- For example, the Insolvency Trustee obtained orders directing the Brazilian RJ Debtors to provide separate creditor lists and to allow creditors a non-consolidated vote with respect to the proposed consolidation in the Brazilian RJ Proceedings, as well as filing the instant proceeding before this Court and requesting recognition of the Dutch Bankruptcy Proceedings. TX 471; TX 485; Trial Tr. 786:14–17, 828:12–829:4, Sept. 25, 2017 (Berkenbosch).

But these facts are not enough to shift Coop's COMI from Brazil to the Netherlands. While the Insolvency Trustee's activities are more significant than those previously discussed in the *Creative Finance* case, they nonetheless fall short for two reasons: 1) his actions do little to change the economic realities associated with Coop's status as a special purpose financing vehicle and the related expectations of its creditors; and 2) there are significant

legal and pragmatic limitations on the Insolvency Trustee. There is also an independent reason for the Court to decline to exercise its authority to grant relief under Section 1517(d): Aurelius' role in bringing about the very facts that the Movants now rely upon as a basis to modify or terminate recognition. The Court will examine each of these three issues separately.

1. The SPV Nature of Coop and Creditor Expectations

Coop's status as an SPV was central to the Court's prior recognition of Brazil as the location of Coop's COMI. See Hr'g Tr. 21:10–15, July 21, 2016 ("Case law including the OAS case notes that the COMI of an SPV turns at a location of the corporate nerve center and the expectation of creditors. And here, I find that the COMI analysis for the SPV here is essentially the same as it was in OAS and I reach the same conclusion that Brazil is the appropriate place."). It remains the backbone of the Court's determination today that the Insolvency Trustee's activities do not change Coop's COMI under the second prong of Section 1517(d).

The significance of Coop's SPV status is best explained by comparing the facts here with those in In re OAS, 533 B.R. 83 (Bankr. S.D.N.Y. 2015). In OAS, the court found that the COMI of a special purpose financing entity was located in Brazil, despite its incorporation in Austria. In doing so, the court noted that COMI analysis for SPV entities is "less straightforward than the typical case." In re OAS, 533 B.R. at 101. The court in OAS focused on the economic reality of the debtor's purpose as an SPV. The court observed that having issued notes, the SPV debtor "had no other business except to pay them off. This was the very business it and the other Brazilian Debtors were engaged in through the Brazilian Bankruptcy Proceedings Moreover, the Brazilian Bankruptcy Proceedings provide the only realistic chance to repay the [notes]." Id.

The court in *OAS* further reflected on the fact that Brazil was the debtor's nerve center and headquarters. *See id.* The debtor's parent was a Brazilian entity that was the debtor's sole shareholder and had the power to elect the debtor's executive officers and "determine the outcome of any action requiring shareholder approval, including transactions with related parties, acquisitions and dispositions of assets and the timing and payment of

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any future dividends, according to Brazilian Corporation Law." Id. at 101-02. The Court also considered *226 creditor expectations, observing that the offering memoranda for certain notes focused on the corporate group and its Brazilian contacts, not the individual debtor. See id. at 102–03. 37 The Court concluded that purchasers of the notes "understood that they were investing in Brazilian-based businesses, and [the debtor's] place of incorporation, or for that matter its very existence, was immaterial to their decision to purchase their notes." Id. at 103. Furthermore, the Court noted that "the purchasers expected to receive repayment from the cash generated by the operations of the [corporate group], and in the event of a default, might ultimately have to enforce their rights in a Brazilian bankruptcy proceeding. [The debtor] had no separate, ascertainable presence in Austria; it was part of, and inseparable from, the [corporate group] located in Brazil. Finally, the [noteholders] had no legitimate expectation that the Austrian courts would play any role in the determination or payment of their claims." Id.

37 The OAS offering memoranda stated that the guarantors on the notes were all organized under the laws of Brazil, the debtor was described as a special purpose financing company whose principal purpose was to finance the operations of the larger corporate group, and extensively discussed the business, financials, and management of that corporate group, but failed to include similar information regarding the debtor. See In re OAS, 533 B.R. at 102. Importantly, the offering memoranda described the risks associated with the business of the corporate group, not the debtor individually, and the risks that the investments could be affected by the Brazilian economy and government actions. See id. Purchasers of the notes were warned that if the corporate parent and its subsidiaries could not repay their indebtedness, including the guaranteed obligations, "they might become subject to bankruptcy proceedings in Brazil, and Brazilian laws might be less favorable to creditors compared to the laws of the United States or other jurisdictions." Id. at 102-03. The offering memoranda did not discuss the risks of operating in Austria, merely mentioning that "Austria would not enforce U.S. judgments, the U.S. securities laws or awards of punitive damages." Id. at 103.

The situation before this Court is remarkably similar to the *OAS* case. Coop was formed as a special purpose financing company, and was incorporated in the

Netherlands specifically to provide the Oi Group with access to the international capital markets and thereby decrease the cost of capital. Shah Decl. ¶ 30; Rabelo Decl. ¶ 7. Coop has no subsidiaries, revenue-generating operations or business of its own. Trial Tr. 181:11-13, Sept. 18, 2017 (Rabelo); Rabelo Decl. ¶ 8. It does not and has never held any equity investments. Trial Tr. 682:2-13, Sept. 25, 2017 (Berkenbosch). Coop has never had any employees that were responsible for managing its finances, and since May 1, 2017 has had no employees at all. Trial Tr. 194:9-21, 352:13-15, Sept. 18, 2017 (Rabelo); Berkenbosch Decl. ¶ 10. Since its formation, Coop has only performed two functions: (i) borrowing, or issuing or assuming notes; and (ii) on-lending to the Oi Group. Trial Tr. 224:17–23; 351:20–352:4, Sept. 18, 2017 (Rabelo); Rabelo Decl. ¶¶ 8, 13; Shah Decl. ¶¶ 30, 35. Indeed, under the provisions of one of its note indentures, Coop has no authority to undertake any activities other than these two functions. TX 15 § 4.17. Like the debtor in OAS, Coop raised money for its parent and now has no real business other than paying off the underlying obligations. And crucially, the Brazilian RJ Proceeding provides the only realistic chance to repay Coop's debt's. See Trial Tr. 725:18-726:7, Sept. 25, 2017 (Berkenbosch).

Also similar to the debtor in OAS, Coop's nerve center and headquarters are clearly located in Brazil. Coop has no operations or business independent of the Oi Group and is operated within the Oi Group *227 as part of a single, integrated economic unit. Trial Tr. 682:15-18, Sept. 25, 2017 (Berkenbosch); Rabelo Decl. ¶ 10. The Oi Group, in turn, is headquartered and managed from the principal executive office of Oi in Rio de Janeiro, Brazil, with every aspect of the Oi Group's operations, finances, corporate management, employee management and payroll, and short- and long-term strategic planning directed from Brazil. Shah Decl. ¶ 8. Coop has never held money for any entity other than a member of the Oi Group. Trial Tr. 352:10-12, Sept. 18, 2017 (Rabelo). As the sole member (shareholder) of Coop, Oi has the exclusive power to elect Coop's directors and also the power to dictate any corporate action of sufficient magnitude as to require member approval. 38 Rabelo Decl. ¶ 7; Trial Tr. 181:3-5, Sept. 18, 2017 (Rabelo). Significantly, the people that actually manage Coop in the context of the Brazilian RJ Proceeding are located in Brazil. Trial Tr. 362:16-363:5, Sept. 18, 2017 (Rabelo); Rabelo Decl. ¶ 10.

38 Of course, this power is now subject to whatever restrictions exist by virtue of Coop's two foreign bankruptcy proceedings.

In contrast to these weighty connections to Brazil, Coop's corporate contacts in the Netherlands largely reflect the minimum requirements necessary to remain registered as a Dutch company. See In re Bear Stearns, 374 B.R. at 130 n.8 (denying recognition of a foreign Cayman Islands proceeding where "the only business done in the Cayman Islands apparently was limited to those steps necessary to maintain the [debtors] in good standing as registered Cayman Islands companies, [causing] the [debtors to] closely approximate the 'letterbox' companies referred to in the Eurofood decision."). As a Dutch financing company, Coop must comply with certain minimum substance requirements in the Netherlands for Dutch and Brazilian tax purposes. Shah Decl. ¶ 31. For instance, Coop maintains a registered office in the Netherlands (id.), enters routine filings with the Dutch Chamber of Commerce (id.), pays taxes in the Netherlands (Trial Tr. 204:19-22, Sept. 18, 2017 (Rabelo)), files tax returns with the Dutch tax authorities (Shah Decl. ¶ 31), and historically has maintained one director located in the Netherlands (Trial Tr. 183:21-187:8, Sept. 18, 2017 (Rabelo)).

But even these contacts with the Netherlands are less fulsome than they first appear. For example, Coop's office is an office in name only. Coop maintains its registered address in the Netherlands at a "trust office," which serves as the registered seat for a large number of entities. Trial Tr. 678:20-679:4, Sept. 25, 2017 (Berkenbosch). Coop initially used the offices of its Dutch director T.I.M., which is a company whose business it is to serve as a third-party director for and rent out its office space to many companies simultaneously. Trial Tr. 343:23-344:10, Sept. 18, 2017 (Rabelo). Moreover, Mr. Correa, who was both the sole employee and a one-time director of Coop and lived in the Netherlands, appears to have performed his duties only at home or in internet cafés, and not at Coop's registered office. Trial Tr. 345:22-346:7, Sept. 18, 2017 (Rabelo). In fact, Mr. Berkenbosch testified that he had no knowledge of anyone ever having worked at Coop's registered office and that even he had never visited the location. Trial Tr. 678:2-4; 681:20-25, Sept. 25, 2017 (Berkenbosch). Coop's board meetings were conducted by telephone conference. Trial Tr. 189:10-22, Sept. 18, 2017 (Rabelo). While Coop's books and records are in the Netherlands, copies are held in Brazil at Oi headquarters. Trial Tr. 201:20–23, *228 Sept. 18, 2017 (Rabelo). Additionally, Coop's board resolutions were always transcribed in English rather than in Dutch. Trial Tr. 45:2–8, Sept. 18, 2017 (Rabelo).

There are some differences between this case and OAS. But these differences do not change the Court's conclusions. For instance, the Movants note that Coop held the funds it received from PTIF for a period of time before transferring them to other Oi Group entities, unlike the immediate funds transfer that occurred in the OAS case. But the Court sees no significance to that fact, other than what appears to be an effort to maximize a tax advantage. The Movants also note minor differences relating to the location of employees, directors, and offices. But these differences don't change the economic reality here, and instead largely reflect the requirements for maintaining Coop's tax status in the Netherlands. As Coop's SPV nature remains unchanged since the Prior Recognition Hearing, it significantly undermines any claim that COMI has shifted to the Netherlands by virtue of the Insolvency Trustee's activities.

This is equally true for evidence concerning Coop's creditors' expectations. For the purposes of a COMI analysis, creditor expectations can be evaluated through examination of the public documents and information available to guide creditor understanding of the nature and risks of their investments. See In re Fairfield Sentry, 714 F.3d at 138 (underscoring the importance of regularity and ascertainability in determining COMI) (quoting EU Regulation, Preamble ¶ 13 stating that COMI "should correspond to the place where the debtor conducts the administration of his interest on a regular basis and is therefore ascertainable by third parties."). Coop's creditors fall into three buckets: (1) holders of the Coop Notes; (2) PTIF; and (3) other miscellaneous Dutch creditors. Stip. Facts ¶ 16; Trial Tr. 312:15-19, Sept. 18, 2017 (Rabelo). Evaluating creditor expectations, like the broader COMI analysis, is not a box-checking exercise, and each category does not warrant equal weight here. 39 While a detailed analysis of creditor expectations was not conducted at the Prior Recognition Hearing, extensive evidence was submitted on this issue during the trial in this case. A review of that evidence confirms that a reasonable creditor would have looked to Brazil for their recovery at the time of the Prior Recognition Hearing and would still do so now.

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For instance, the third category does not factor into this analysis in any meaningful way given the small value of those claims (approximately £50,000) when considering all Coop creditors. See Stip. Facts ¶ 16.

To assess the expectations of the first bucket of creditors—the noteholders—this Court primarily looks to the associated indentures and offering materials. See In re OAS, 533 B.R. at 101–03 (reviewing offering memorandum to establish noteholder expectations as part of a COMI analysis); In re Millennium Glob. Emerging Credit Master Fund Ltd., 474 B.R. 88, 93–94 (S.D.N.Y. 2012) (same); In re Suntech, 520 B.R. at 418 (considering terms of indenture to establish creditor expectations regarding likely location of a restructuring as part of a COMI analysis). These documents direct investors to look towards Brazil and the Oi Group as a whole when evaluating the risks associated with the Coop Notes in three ways.

First, both series Coop Notes are fully guaranteed by Oi, underlying the clear truth that any chance of repayment stems from the revenue-producing operations in Brazil, not an empty financing vehicle in the Netherlands. Stip. Facts ¶ 22; TX 15 *229 § 11; TX 18 § 2; see In re OAS, 533 B.R. at 103 ("[P]urchasers of the 2019 Notes understood that they were investing in Brazilian-based businesses, and OAS Investments' place of incorporation, or for that matter its very existence, was immaterial to their decision to purchase their notes.... [T]he purchasers expected to receive repayment from the cash generated by the operations of the OAS Group, and in the event of a default, might ultimately have to enforce their rights in a Brazilian bankruptcy proceeding."). The 2021 Notes Indenture reinforce Coop's limited role to creditors by explicitly barring Coop from establishing any operations or taking any actions beyond its role as a financing SPV for the Oi Group. TX 15 § 4.17. The offering memoranda for both series of notes similarly speak of the Oi Group as a single integrated operation, ⁴⁰ and the 2021 Notes clearly describe Coop's conduit role and complete dependence on the Brazilian entities. 41

- The offering memoranda states that "all references to 'our company,' 'we,' 'our,' 'ours,' 'us,' or similar terms are to Oi S.A. and its consolidated subsidiaries." TX 16 at i; TX 19 at i.
- For example, the offering memorandum for the 2021
 Notes states:

[Coop], a wholly-owned subsidiary of Oi organized under the laws of the Netherlands, has no operations other than the issuing and making payments on the Notes and other indebtedness ranking equally with the Notes, and using the proceeds therefrom as permitted by the documents governing these issuances, including lending the net proceeds of the Notes and other indebtedness incurred by [Coop] to Oi and subsidiaries of Oi. Accordingly, the ability of [Coop] to pay principal, interest and other amounts due on the Notes and other indebtedness will depend upon the financial condition and results of operations of Oi and its subsidiaries that are creditors of [Coop].

TX 16 at 18.

Second, the indentures for both series of Coop Notes actually allow the issuer itself to be swapped among Oi Group entities at Oi's sole discretion. TX 17 § 10.01; TX 15 § 10.01. The 2022 Notes were not even originally issued by Coop, but rather by Oi's predecessor entity, Brasil Telecom S.A. Stip. Facts. ¶ 20. Movants argue that this clause should be discounted because the right to swap issuers was lost upon the filing of the Brazilian RJ Proceeding and the associated default under the terms of the indentures. Trial. Tr. 975:2-976:15, Sept. 26, 2017 (Brilliant). But while Movants are correct about the impact of the default, a reasonable investor would consider such a significant right when assessing the risks of an investment in the Coop Notes up through the default triggered by the filing of the Brazilian RJ Proceeding, which was only one day before the Brazilian Petition was filed. One would assume that creditors would consider this right even up through the filing of the Dutch Petition given what the right reflects about how the Oi Group operates.

Third, the risks identified in the materials primarily point creditors toward Brazil even if they sometimes also mention the Netherlands. See In re OAS, 533 B.R. at 102 (weighing the "'Risk Factors' that all note purchasers were warned to 'carefully consider'" in the offering materials). The definition of "Events of Default" in the 2021 Notes Indenture includes restructuring or liquidation ("whether judicial or extrajudicial") or "any event ... under the laws of Brazil, the Netherlands or any political subdivision thereof [that] has substantially the same effect." TX 15 § 6.01(9) (emphasis added). The focus on Brazil is even clearer for the 2022 Notes Indenture, which references Brazil in defining the "Events of Default" but excludes any reference to the Netherlands. See TX 17 *230 § 6.01(8) ("any event ... under the laws

of Brazil or any political subdivision thereof [that] has substantially the same effect."). In discussing default and insolvency risk, the offering memoranda for both series of notes explicitly advises of the possibility of a Brazilian bankruptcy:

> [i]f we are unable to pay our indebtedness, including our obligations under the notes, then we may become subject to bankruptcy proceedings in Brazil. Brazilian bankruptcy laws are significantly different from, and may be less favorable to creditors than, those of the United States.

TX 19 at 26; see also TX 16 at 21. The offering memoranda also warn of risks stemming from Brazilian regulation of Oi's fixed line business, ⁴² and of currency risk related to Brazil's exchange rate, ⁴³ potential foreign exchange taxes, ⁴⁴ and laws governing cross-border currency flow. ⁴⁵ Admittedly, the offering memorandum for the 2021 Notes also raises the risk of a change in E.U. banking regulations requiring new licensing for Coop's operation, ⁴⁶ but this does not come close to balancing the scales. ⁴⁷

42 The offering memorandum for the 2021 Notes states: A substantial portion of our assets, including our fixed-line telecommunications network are dedicated to providing an essential public service. These assets would not be available for liquidation in the event of our bankruptcy or attachment to secure a judgment, and in the case of our bankruptcy would, pursuant to the terms of our concession and Brazilian law, revert to the Brazilian government. Although the Brazilian government would be obligated to compensate us for early termination of our concessions, we cannot assure you that the amount ultimately paid by the Brazilian government would be equal to the market value of the reverted assets. These restrictions on liquidation may lower significantly the amounts available to holders of the Notes in the event of our liquidation and may adversely affect our ability to obtain adequate financing.

TX 16 at 19.

The offering memorandum warns that "[t]he foreign exchange policy of Brazil may affect the ability of Oi

- to make money remittances outside Brazil in respect of the guarantee." TX 16 at 20.
- The offering memorandum also warns that "[t]he imposition of [Brazilian] IOF [(foreign exchange)] taxes may indirectly influence the price and volatility of the Notes." TX 16 at 21.
- The offering memorandum states that "[r]estrictions on the movement of currency out of Brazil may impair the ability of holders of the notes to receive interest and other payments on the Notes." TX 16 at 19.
- The offering memorandum warns that "[i]f regulations in the European Union are changed, and [Coop] is required to obtain a banking license from the European Central Bank as a result of issuing the Notes, it could have a material adverse effect on us and your investment in the Notes." TX 16 at 21.
- In fact, the documents direct creditors to look beyond the Netherlands to a third location: New York. Both Coop Note Indentures are governed by New York law, designate New York as the forum for any disputes related to the Coop Notes, and require that Coop maintain an office or agency in New York City for the purpose of service of process. Stip. Facts ¶23–24. The Bank of New York Mellon is the indenture trustee for both series of Coop Notes. Stip. Facts ¶25.

In the context of creditor expectations, Movants once again cite the board resolutions and Clifford Chance opinion letter that include statements that Coop's COMI under the EU Regulation is in the Netherlands. TX 148 ¶ 6; TX 149 ¶ 6; TX 150 Annex at 4 ¶ 6; TX 304 ¶ 3.18. But as discussed extensively above in the estoppel context, COMI under the EU Regulation is not the same as COMI under Chapter 15, and Movants offered no evidence at trial or cogent explanation that establishes that a creditor would expect such statements about EU COMI would be binding *231 in a U.S. Chapter 15 proceeding. This is particularly true for creditor expectations at the time the Dutch Petition was filed, which occurred after this Court had ruled that Coop's COMI was in Brazil in the Prior Recognition Proceeding.

The Court turns to the second creditor category, which includes only PTIF. Admittedly, PTIF is a Dutch entity and Coop's largest creditor. Dutch Petition ¶ 8. Movants flag the PTIF Loan Agreement, which included a Netherlands forum selection clause, as proof that PTIF expected to be repaid in the Netherlands by a Dutch entity.

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Trustee Reply ¶ 24; TX 5 § 8.1. Movants also rely on the change in maturity date on the PTIF Loan, reasoning:

[o]n March 17, 2016, the PTIF Loan Agreement was amended, to ... amend the original maturity date of June 2, 2016 to various maturity dates depending on different tranches of borrowing to closely track the maturity dates of the PTIF Notes, indicating the intent to use the funds held by Coop to repay amounts due under the PTIF Notes.

Movants' Proposed FoF ¶ 60. But while these facts provide some support for their position, Movants' position once again ignores economic reality. Like Coop, PTIF is a special purpose subsidiary created under Dutch law to facilitate financing for a foreign operating parent. Stip. Facts ¶ 2; TX 16 at 4; Brazilian Petition n.5, ¶ 43. As a Dutch SPV for PT, one would reasonably expect that its economic fate had been tied to its Portuguese parent. After the Oi Group sold PT in 2014, PTIF played a similar role for Oi as a sibling entity to Coop. Stip. Facts ¶ 2; Rabelo Decl. ¶ 19; Berkenbosch Decl. ¶ 17; TX 16 at 4; Trial Tr. 347:11-17, Sept. 18, 2017 (Rabelo); Motion for Provisional Relief [Case No. 16-11791, ECF No. 7, Ex. N ¶¶ 2.1, 2.5, 2.12] (Statement of Defence [sic] on Appeal, dated June 7, 2016). Once PTIF became a subsidiary to Oi, Oi had control over both PTIF and Coop and used these entities consistent with their SPV Nature: to funnel money to the Oi Group in Brazil. In fact, PTIF was required under applicable law and the terms of its own outstanding notes to on-lend any borrowed funds to other Oi Group entities. Motion for Provisional Relief [Case No. 16–11791, ECF No. 7, Ex. N ¶¶ 2.1, 2.5, 2.12] (Statement of Defence [sic] on Appeal, dated June 7, 2016); Rabelo Decl. ¶ 19.

One also can safely assume that PTIF was aware that Coop—as an Oi Group SPV like itself—was required to on-lend the monies that Coop received from PTIF and, therefore, that the PTIF funds would end up with the Oi Group in Brazil. Any representative for PTIF also would have known that Coop, like PTIF, was a mere financing vehicle for Oi, without any revenue-generating operations of its own from which it could repay its debt. Once again, therefore, a reasonable creditor would look to Brazil for recovery. 48

Notably, aside from its Netherlands forum selection clause, the PTIF Loan Agreement is "governed by and construed in accordance with the laws of Brazil" (TX 5 § 6.5), and was executed not in Dutch, but "in both [the] English and Portuguese languages," while setting out that "[i]n the event of any dispute or controversy, the Portuguese version [would] prevail" (TX 5 § 6.4).

Even if the evidence were more supportive of Movants' position, it would be difficult to credit the "expectations" of a sibling shell financing entity-without operations and wholly owned and governed by the same parent in Brazil-to the same degree as the expectations of the third party investors holding the Coop Notes. Rabelo Decl. ¶ 19; Berkenbosch Decl. ¶ 17; see In re Bear Stearns, 374 B.R. at 130 (discounting the significance that two *232 of the three investors in the debtors -Cayman Islands based investment fund entities with no operations of their own-were also located in the Cayman Islands, because they were sibling Bear Stearns vehicles which had "the same minimum Cayman Islands profile."). Of course, PTIF is currently undergoing its own bankruptcy in the Netherlands where it has had its own insolvency trustee appointed. Trial Tr. 781:17-25, Sept. 25, 2017 (Berkenbosch). Neither the PTIF board of directors nor its Dutch insolvency trustee were parties to the current proceeding. Trial Tr. 781:20-782:18, Sept. 25, 2017 (Berkenbosch). If either has an interest in or opinion regarding the outcome of this case, they chose not to share them with this Court. Trial Tr. 781:17-25, Sept. 25, 2017 (Berkenbosch). 49

Mr. Berkenbosch testified at trial as to hearsay conversations he has had with the PTIF Insolvency Trustee, but this testimony was struck. Trial. Tr. 781:20–782:18, Sept. 25, 2017 (Berkenbosch). Mr. Berkenbosch made similar statements in paragraph 25 of his written direct testimony, but the parties agreed that these statements could not be used "for the truth of the matter asserted therein, but for Mr. Berkenbosch's state of mind." Berkbenbosch Decl. ¶ 25; Trial. Tr. 665:5–15, Sept. 25, 2017 (Berkenbosch). These statements are not, therefore, evidence of PTIF's views.

2. The Limits on the Insolvency Trustee

The actions of the Insolvency Trustee—and their effect on COMI-also must be discounted in light of the significant legal and practical limitations on his authority with respect to Coop. At first blush, the Insolvency Trustee appears to enjoy a fairly broad purview: (i) administering the bankruptcy estate (but not the legal person) of the debtor; (ii) liquidating the assets of the estate; and (iii) distributing the proceeds thereof to the creditors of the debtor in accordance with their ranking. Veder Decl. ¶ 60. But Dutch law and the economic realities of the case make his authority broader in theory than practice. These realities dictate Mr. Berkenbosch's potential courses of action for the Dutch Bankruptcy Proceeding: (i) liquidate Coop with only the assets available in the Netherlands; and/or (ii) participate in the Brazil RJ Proceeding, either by litigating with respect to the intercompany claims or negotiating with the Oi Group in the context of that proceeding. Consequently, none of Mr. Berkenbosch's actions change the fact that Coop's main proceeding—the only proceeding that can facilitate Coop's restructuring is the Brazilian RJ Proceeding.

As an initial matter, the Coop Board maintains its separate existence and retains the sole power to propose a composition plan under Dutch law. Trial Tr. 698:8-22, Sept. 25, 2017 (Berkenbosch). Mr. Berkenbosch can only render advice to creditors regarding any proposal made by the Coop Board. Id. In other words, the Insolvency Trustee cannot actually restructure Coop, but rather can only negotiate and, failing consensus, litigate on behalf of the Dutch Coop estate. Mr. Berkenbosch conceded that he cannot restructure Coop independently of the Brazil RJ Proceeding, and testified that the possibility of a standalone restructuring of Coop independent of the Brazilian RJ Proceeding was so unlikely that he had never even contemplated it prior to his deposition in this case. Trial Tr. 725:18-726:7, Sept. 25, 2017 (Berkenbosch). Mr. Berkenbosch further testified that bankruptcy proceedings in the Netherlands almost always end in a liquidation. Trial Tr. 762:8-12, Sept. 25, 2017 (Berkenbosch). In fact, he has not personally been involved in a Dutch bankruptcy proceeding that ended with approval of a composition plan in his 18-year career. *233 Trial Tr. 699: 3-12; 730:23-731:5, Sept. 25, 2017 (Berkenbosch). Mr. Berkenbosch also conceded that Coop's biggest assets—its intercompany claims against Oi and Oi Móvel—are located in Brazil. See Trial Tr. 762:15-25, Sept. 25, 2017 (Berkenbosch). As was the situation in OAS, therefore, the Brazilian RJ Proceeding provides the

only realistic chance that Coop will be able to repay its debts. Absent some consensual resolution, it appears that any recovery on these claims would require litigation in Brazil. Indeed, Aurelius and Mr. Berkenbosch themselves have repeatedly looked to the Brazilian RJ Proceeding to obtain relief with respect to Coop and issues relating to the proposed Brazilian RJ Plan. Two Aurelius-managed funds, Capricorn and Syzygy, have actively participated in the Brazilian RJ Proceeding by filing pleadings and asking for relief from the Brazilian courts. Trial Tr. 592:9-12, Sept. 25, 2017 (Gropper). Mr. Berkenbosch has also appeared in the Brazilian RJ Proceeding, entering objections, filing pleadings, and expressing his opinions to the Brazilian courts. Trial Tr. 785:11-18, Sept. 25, 2017 (Berkenbosch). Recently, an appeal that Mr. Berkenbosch filed received a favorable decision from the Brazilian Court of Appeals, requiring the Brazilian RJ Debtors to provide separate creditor lists and allow creditors to have a non-consolidated vote on the proposed consolidation in the Brazilian RJ Proceeding. TX 471, 485; Trial Tr. 786:13-17, Sept. 25, 2017 (Berkenbosch).

The Brazilian courts have explicitly highlighted the limits of Mr. Berkenbosch's authority, which only further confirms that Coop's COMI is in Brazil. Following conversion of the SoP Proceeding by the Dutch courts, the Insolvency Trustee filed a motion with the Brazilian RJ Court objecting to the relief sought by the Brazilian RJ Debtors in the Brazilian RJ Proceeding. Ferreira Decl. ¶ 6. In response, the Brazilian RJ Court rejected the Insolvency Trustee's motion and issued the Brazilian Injunction Order declaring, among other things, that the Insolvency Trustee did not have the power to represent or act as the managing body of Coop, that Coop is a financial vehicle of the Oi Group and not operational, and that the Oi Group's operational activities and main place of business are in Brazil, making all issues related to the parent company and its subsidiaries subject to Brazilian law. Ferreira Decl. ¶¶ 6-9. The order makes clear that the Insolvency Trustee would be fined if he tried to oppose or inhibit the actions regularly performed by the Brazilian courts or the Coop Board. Ferreira Decl. ¶ 9. 50

On appeal of the Brazilian Injunction Order, the Insolvency Trustee and Capricorn, an Aureliusmanaged fund, obtained an order from the Court of Rio de Janiero, Eighth Civil Chamber stating in part that the Brazilian Injunction Order has extraterritorial effect except in instances in which

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foreign jurisdictions have found otherwise for assets within their jurisdictions. Ferreira Decl. ¶ 14–17. Thus, the Brazilian Court order still is in place for Oi Group assets in Brazil, the only assets that provide a chance for recovery for Coop's creditors.

The Movants rely on the Insolvency Trustee's initiation of the Pauliana Proceeding as evidence that Coop's COMI is now in the Netherlands. But the Movants once again ignore economic reality. The Insolvency Trustee conceded that the Pauliana Proceeding is simply another way to seek recovery of the money loaned from Coop to Oi and Oi Móvel in Brazil. Trial Tr. 703:16-704:25, Sept. 25, 2017 (Berkenbosch); Berkenbosch Decl. ¶ 25 (stating that the goal of this action is the "unwinding [of] the 2016 loans from Coop to Oi Móvel."). These are the same loan transactions *234 that are the subject of Coop's intercompany claims against Oi and Oi Móvel, claims that the Insolvency Trustee concedes are located in Brazil. Trial Tr. 703:16-704:25, Sept. 25, 2017 (Berkenbosch) (subject of Pauliana Proceeding are same loans that are subject to the intercompany claims); id. at 762 (Coop's largest assets are intercompany claims against Oi and Oi Móvel and those assets are located in Brazil). On this evidentiary record, there is no reason to expect that the mere initiation of the Pauliana Proceeding would dramatically affect where Coop creditors would look for recovery on their claims given that the assets of Oi and Oi Móvel remained in Brazil even after Mr. Berkenbosch's appointment. 51 See In re Creative Fin., 543 B.R. at 501 (noting that to change COMI from jurisdiction in which debtor did business to a letterbox jurisdiction requires material activities that provide "a meaningful basis for the expectations of third parties."). 52

The Movants fail to articulate a theory of creditor recovery against Oi and Oi Móvel other than against the assets in Brazil or the Netherlands. While the Movants reference Oi Group operations in Europe, they provide no evidence or explanation of how assets located in Europe would lead a creditor to conclude that their recovery would be obtained through the Dutch Bankruptcy Proceeding. See Movants' Proposed FoF ¶ 100 (referencing U.K bank account of Oi Móvel used to process payments relating to roaming agreements) (citing TX 107 ¶ 11; TX 284 ¶¶ 18, 28; Trial Tr. 289:22-25, Sept. 18, 2017 (Rabelo)). In his testimony, Mr. Berkenbosch also references U.S. assets of Oi and Oi Móvel as one of the reasons for filing these proceedings, but does not clarify what type of assets or quantify their value. See Trial Tr. 789:3–13, Sept. 25, 2017 (Berkenbosch). In sum, the Movants provide no specific information regarding non-Brazilian assets of Oi or Oi Móvel in the record or explain how such assets impact the dispute before this Court.

Movants do not appear to place much reliance on the few assets that the Insolvency Trustee does control as a basis for a Dutch COMI. The Court finds that such funds are insufficient to support a COMI finding in the Netherlands, particularly given that the amount of assets controlled by the Insolvency Trustee is eclipsed by the amount of the loan borrowed by the Insolvency Trustee in the Dutch Proceedings from members of the IBC. See Berkenbosch Decl. ¶ 26 (claim against Dutch authorities for VAT of €160,846); Dutch Certified Petition ¶ 30 (same); Stip. Facts ¶ 26-27 (courtsupervised account in the Netherlands with balance of approximately €416,905 and bank account in New York with approximately USD \$50,000 held in trust by Jones Day); Berkenbosch Decl. ¶ 100 (discussing USD \$5 million credit facility for loan from IBC to Insolvency Trustee); TX 58 (credit facility).

Of course, one might imagine a circumstance where the filing of such a Pauliana Proceeding might be more significant. For example, it might be different if recovery in such an action might be possible against assets located outside Brazil. This could be the case if some of the cash transfers from Coop to the Oi Group in Brazil had not occurred, and the funds instead had remained in the Netherlands or some other jurisdiction in which the Insolvency Trustee had direct access to them. But these are not the facts here. Instead, the factual record demonstrates inherent limitations on the Insolvency Trustee's ability to shift COMI in this case, regardless of how much work he performs. See In re Fairfield Sentry, 714 F.3d at 138 (noting that "[t]he absence of a statutory definition for a term [like COMI] that is not self-defining signifies that the text is open-ended, and invites development by courts, depending on facts presented, without prescription or limitation.") (emphasis added); cf. In re Creative Fin., 543 B.R. at 501, 519 (noting that recognition of letterbox jurisdictions is possible "so long as the estate fiduciaries do enough work," but the material activities *235 must provide "a meaningful basis for the expectations of third parties").

Given the totality of the evidence, therefore, the Movants have not satisfied their burden of showing that the COMI

of Coop has shifted from Brazil to the Netherlands based on events after the Prior Recognition Order.

3. The Plan of Aurelius

While the Court finds that the SPV nature of Coop, creditor expectations, and the limits on the Insolvency Trustee's powers are a sufficient basis to deny the Movants' request to modify or terminate the Prior Recognition Order, there is another reason: the actions of the creditor Aurelius. The evidence establishes that Aurelius chose to sit on the sidelines during this Court's Prior Recognition Hearing, while simultaneously planning-and later executing-a strategy to undo that recognition and block the Brazilian RJ Proceeding. The Court finds these actions provide an independent basis to decline to exercise this Court's discretion to modify or terminate recognition under the second prong of Section 1517(d). See In re Lov. 448 B.R. 420, 438 (Bankr. E.D. Va. 2011) (noting that revisiting a recognition determination under Section 1517(d) is not mandatory, but within the Court's discretion.).

As a threshold matter, it is important to understand Aurelius' investment strategy here. Aurelius' investment philosophy involves finding securities that are undervalued based on "business drivers," and considering where the securities sit in the capital structure, the existence of a legal dispute, the restructuring process, or a combination of these factors. Trial Tr. 603:7-15, Sept. 25, 2017 (Gropper). Aurelius believed that the PTIF and Coop Notes were undervalued in initial restructuring negotiations between the Oi Group and certain of its creditors. OX 73 at 3. On July 22, 2016, the same day as this Court's Prior Recognition Hearing, Aurelius published a memo that shared its analysis with the market and invited other creditors with significant holdings in Coop Notes or PTIF notes to contact Aurelius. OX 73. Aurelius' analysis, based on an internal waterfall model, was premised on holders of Coop and PTIF notes recovering directly against Coop and PTIF as "issuers" and also recovering against Oi based on its guarantees. Trial Tr. 605:14-606:19, Sept. 25, 2017 (Gropper). This dual recovery strategy is sometimes referred to as a "double dip." Trial Tr. 607:19-23, Sept. 25, 2017 (Gropper). Under this strategy, Aurelius believed that it was important to take into account the prepetition transfers of money moving between the Oi financing entities, Coop and PTIF. Trial Tr. 609:21–25, Sept. 25, 2017 (Gropper). Thus, by pressing for strict corporate separateness and enforcement of intercompany claims, Aurelius would have two paths for recovery against Oi Group assets.

This double dip strategy would have been compromised by a plan in the Brazilian RJ Proceeding that sought substantive consolidation of Oi Group debtors and eliminated intercompany claims, because such a plan would allow the noteholders only "one dip," that is a single claim against the consolidated Oi Group assets. Trial Tr. 610:21-25, 612:12-17, Sept. 25, 2017 (Gropper). While Aurelius believed that multinational restructurings in Brazil should respect corporate separateness (Trial Tr. 612:18-24, Sept. 25, 2017 (Gropper)), it also understood that the issue of whether the Oi Group plan would permit a double dip would ultimately be decided by the Brazilian courts. Trial Tr. 613:12-17, Sept. 25, 2017 (Gropper). Moreover, Aurelius was aware of the recent restructuring of Rede Energia S.A. and its subsidiaries, in which the Rede corporate group's substantively consolidated plan was approved *236 in Brazil notwithstanding Aurelius' understanding that "bondholders were denied the right to vote." Trial Tr. 614:6–615:5, Sept. 25, 2017 (Gropper). 53 It is logical to conclude that Aurelius understood that if it were to wait until the conclusion of the Brazilian RJ Proceeding to oppose substantive consolidation, there was a risk that the Brazilian courts would approve a plan that eliminated the double dip and that this Court might later recognize such plan in a Chapter 15 proceeding.

Although Mr. Gropper of Aurelius claimed that he "[didn't] know what the impact [of the *Rede* case] was from a Chapter 15 perspective" (Trial Tr. 615:4–5, Sept. 25, 2017 (Gropper)), it bears noting that the Rede Group's Brazilian plan was subsequently recognized by this Court in a published decision. *In re Rede Energia*, 515 B.R. 69.

As part of its strategy, Aurelius decided not to object to the Court's prior recognition of Brazil as Coop's COMI, notwithstanding its view that Coop's COMI has always been the Netherlands. See Movants' Proposed CoL ¶ 45 ("Even if the developments of the last year are ignored, Coop's COMI is and always has been in the Netherlands."); Trial Tr. 637:17–25, Sept. 25, 2017 (Gropper) (Aurelius' expectation even at the time of the Prior Recognition Hearing that Coop would be reorganized in the Netherlands). Aurelius kept silent at

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the Prior Recognition Hearing while pursuing bankruptcy proceedings for Coop in the Netherlands with the intent of overturning this Court's Prior Recognition Order, and undermining the Brazilian RJ Proceeding. One can safely assume that Aurelius concluded from its involvement in the *OAS* case that relief requested in a U.S. bankruptcy court by an "independent fiduciary" acting pursuant to its legal obligations was more likely to be viewed favorably by the court than steps taken by a creditor. ⁵⁴ *See* Trial Tr. 616:19–25, Sept. *237 25, 2017 (Gropper) (Aurelius wanted a conversion so that someone with the powers of the Insolvency Trustee would be appointed for Coop).

Aurelius played a markedly similar role in the OAS case in 2015, which involved not only an analogous fact pattern, but even most of the same professionals. At the end of March 2015, OAS Group entities, including OAS Investments and OAS Finance, two finance SPVs incorporated in Austria and the BVI respectively, commenced Brazilian bankruptcy proceedings. See In re OAS, 533 B.R. at 89, 101; OAS Finance Petition ¶ 4 [Case No. 15-11304, ECF No. 2]. In mid-April 2015, the Brazilian foreign representative of four of those entities (including the two SPVs) commenced Chapter 15 cases in this Court. See In re OAS, 533 B.R. at 90. The next day, Aurelius and another hedge fund, both OAS Group creditors, filed a petition to appoint joint provisional liquidators (the "JPLs") in the BVI for one of the SPV entities, OAS Finance. See In re OAS, 533 B.R. at 91; OAS Finance Petition ¶ 36. Roughly a month later, the JPLs filed their own petition for recognition under Chapter 15. See In re OAS, 533 B.R. at 91; OAS Finance Petition ¶ 41. In mid-May 2015, the two funds filed an objection to the Brazilian foreign representative's petition for OAS Investment's recognition, arguing, among other things, that OAS Investments' COMI was in Austria. See In re OAS, 533 B.R. at 91. In the recognition hearing held later that month, representatives of the Brazilian debtors acknowledged that they would not be proceeding with the OAS Finance recognition petition at that time given the status of the competing BVI proceedings. See OAS Hr'g. Tr. 4:9-10:10, May 23, 2015 [Case No. 15-10937, ECF No. 71]. In July 2015, the Court denied the objection as to OAS Investments and recognized the Brazilian restructuring as its foreign main proceeding. See In re OAS S.A., 533 B.R. at 103. Over the remainder of the summer, the parties engaged in a discovery dispute and geared up for a recognition fight for OAS Finance. See e.g. Letter Filed by John Cunningham at 1 [Case No. 15-

11304, ECF No. 22]. A recognition hearing was held in August, in which the Court questioned the petitioners and objectors on how it ought to account in its COMI analysis for the filing of the BVI proceeding by Aurelius and the second fund, and whether those actions could qualify as COMI manipulation. See OAS Hr'g. Tr. 22:3-26:22, 63:2-68:19, Aug. 18, 2015 [Case No. 15-11304, ECF No. 68]. The Court expressed the sentiment that the actions of the JPLs themselves, including pursuit of the Chapter 15 recognition, were generally in line with their legal responsibilities, considered separately from the actions that lead to their appointment. See OAS Hr'g. Tr. 25:6-12, Aug. 18, 2015 [Case No. 15-11304, ECF No. 68] ("THE COURT: No. No. I don't -I'm not impugning anything with the JPL's. They did what they were supposed to do I'm focusing on the commencement of the proceeding, which was really before they undertook their duties"); id. 66:9-68:13 ("MR. CUNNINGHAM: [Aurelius] submitted to the jurisdiction in Brazil by objecting and participating, got an adverse result, and then, in essence, launched this proceeding in our view clearly as a strategic tactic to ... create a poisoned pill. ... [T]his was an attempt to control OAS Finance to try to disrupt-you saw that the very first moves that were made by the JPL's were to try to withdraw OAS Finance from the Brazilian proceedings, the attempt to strip us of authority from taking any actions here. THE COURT: But that's-it strikes me that that's a proper thing for the JPL's to do once they're appointed."). On December 30, 2015, before the Court issued a decision on the matter, the parties reported a settlement, "contingent on ... the closing of a plan of reorganization in Brazil for the OAS Group that is consistent with the terms of the settlement agreement." Letter Filed by Andrew Rosenblatt at 1 [Case No. 15-11304, ECF No. 70].

Aurelius' actions following the issuance of the Prior Recognition Order are consistent with execution of this strategy. First, Aurelius significantly increased its Coop investment. In June 2016, two Aurelius-managed entities held investments in the Oi Group—Syzygy in Coop Notes and Capricorn in PTIF notes. But Syzygy's Coop Notes holdings were relatively small. OX 118. By the time that Mr. Berkenbosch filed his Chapter 15 proceeding, however, Syzygy's holdings in Coop Notes had increased by a multiple of over [redacted], substantially all of which were purchased after this Court's recognition of the Brazilian RJ Proceeding. OX 118; Trial Tr. 590:18–22, Sept. 25, 2017 (Gropper). Capricorn already held a substantial position in PTIF notes at the time the

Recognition Order was entered, and maintained that position thereafter. *See* Trial Tr. 582:5–8, Sept. 25, 2017 (Gropper); OX 29. This position provided additional exposure to the outcome of Aurelius' strategy given that one of PTIF's principal assets is its intercompany claim against Coop for approximately USD \$4 billion (Trial Tr. 595:4–7, Sept. 25, 2017 (Gropper)).

Second, Aurelius took actions to bring about the Dutch Bankruptcy Proceeding for Coop. In late June 2016, approximately a month before entry of this Court's Prior Recognition Order, the Aurelius-managed Syzygy and certain other bondholders initiated involuntary bankruptcy proceedings against Coop in the Netherlands. Trial Tr. 589:11-15, Sept. 25, 2017 (Gropper). The SoP Petition subsequently filed by Coop on August 9, 2016 is a common defensive response taken by debtors in the Netherlands to the filing of an involuntary bankruptcy petition and appears to be defensive in this case. Trial Tr. 734:24–735:6, Sept. 25, 2017 (Berkenbosch). 55 Upon his *238 appointment as SoP administrator, Aurelius almost immediately began applying pressure on Mr. Berkenbosch both directly and through counsel to have the SoP withdrawn and a bankruptcy declared, repeatedly reminding him of his fiduciary duties. Trial Tr. 617:10-18, 618:13-619:6, Sept. 25, 2017 (Gropper); OX 4, 7. Aurelius continued its barrage of letters through the fall of 2016. Trial Tr. 617:14-18, 619:11-23, 620:14-621:11, Sept. 25, 2017 (Gropper); OX 9, 16, 27 (counsel letter on behalf of the IBC); SCX 6. Aurelius also pressed other bondholders to contact Mr. Berkenbosch to urge him to have the SoP withdrawn and a bankruptcy declared, all to force Oi to negotiate with the Coop and PTIF bondholders. OX 36 at Bates Aurelius-000899. The record is devoid of similar demands, threats, or protests by other creditors.

While the Insolvency Trustee asserts that the request for a SoP was part of a comprehensive strategy by Oi to pursue plan recognition in the European Union, the evidence does not support that assertion. See Berkenbosch Decl. ¶ 50. The document relied upon for this allegation explicitly states that the filing of a SoP would be used only as a defensive measure. TX 152 at 41 ("RJ will not be recognized in the Netherlands therefore if creditors take action in the Netherlands, the Fincos will have to file for an additional insolvency proceeding, Suspension of Payments, to ensure they are protected in the Netherlands. Please note the current intention is that this will be used as a defensive measure only. And

illustrative timeline is on the next slide."); *see also* Trial Tr. 733:6–13, Sept. 25, 2017 (Berkenbosch).

Aurelius also met with Mr. Berkenbosch and provided him with a roadmap to pursue its double dip strategy, which included the only third party recovery analysis that Mr. Berkenbosch ever received. SCX 6; Trial Tr. 818:17-822:9, Sept. 25, 2017 (Berkenbosch). Aurelius intended that, after a bankruptcy was declared and a trustee with the power to act on behalf of the Coop estate was installed, a proceeding would be commenced in the United States on behalf of Coop under either Chapter 15 or Chapter 11. Trial Tr. 616:19-617:9, Sept. 25, 2017 (Gropper)). In December 2016, Mr. Berkenbosch ultimately applied for withdrawal of the SoP and petitioned for bankruptcy, with a supporting petition filed by members of the IBC, which had been formed in November 2016. Trial Tr. 647:22-2, 648:6-8, Sept. 25, 2017 (Gropper); Trial Tr. 770:2-6, Sept. 25, 2017 (Berkenbosch). As a part of extensive litigation in the Dutch District Court, the Dutch Court of Appeals, and the Dutch Supreme Court, Mr. Berkenbosch was appointed the Insolvency Trustee for Coop's Dutch Bankruptcy Proceeding.

The credible evidence establishes that, consistent with Aurelius' investment strategy, one of the goals of the Dutch Bankruptcy Proceeding was to block this Court's recognition of the Oi Group's Brazilian plan. In early January 2017—well before the Dutch Court of Appeals granted the request to convert the SoP to a bankruptcy proceeding-Mr. Berkenbosch's counsel prepared a memo for him (the "Jones Day Memo") analyzing the effects of U.S. recognition of a Dutch bankruptcy proceeding as Coop's foreign main proceeding. OX 55. The Jones Day Memo laid out a strategy for "Blocking Recognition of a Brazilian Plan for Coop" were such a plan to be approved by creditors in Brazil. OX 55 ¶ 2.2. The Jones Day Memo noted that Mr. Berkenbosch could "block the implementation of any RJ Plan and the discharge of Coop's notes by objecting to the recognition of any RJ Plan for Coop in the United States." OX 55 ¶ 2.2.3. This would "effectively prevent the Oi Group from raising any new capital in the international debt or equity markets" OX 55 ¶ 2.2.4. Recognition of the Dutch Bankruptcy Proceeding as the foreign main proceeding by this Court was critical to Mr. Berkenbosch's ability to carry out this strategy. OX 55 ¶¶ 2.2.5, 2.2.8. ⁵⁶

To fund this litigation strategy, the IBC (including Aurelius) provided a USD \$5 million loan to Mr.

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Berkenbosch. Trial Tr. 771:13–17, Sept. 25, 2017 (Berkenbosch); TX 58. Mr. Berkenbosch testified that this loan was necessary for him to bring certain litigation in the U.S. and Brazil, including the Dutch Petition. Trial Tr. 839:18–22, Sept. 25, 2017 (Berkenbosch); Trial Tr. 700:17–702:9, Sept. 25, 2017 (Berkenbosch). As a condition of receiving the loan, Mr. Berkenbosch agreed to concede that the PTIF claim asserted against Coop (which is a key component of value for holders of PTIF notes) is valid and not subject to subordination. Trial Tr. 772:18–773:21, Sept. 25, 2017 (Berkenbosch).

*239 When questioned regarding the Jones Day Memo, Mr. Berkenbosch testified that "blocking" the Brazilian RJ Plan was not his goal. Trial Tr. 714:25–715:4, Sept. 25, 2017 (Berkenbosch). But such demur is not credible as it is inconsistent with other statements of Mr. Berkenbosch. For example, Mr. Berkenbosch prepared a letter for the Dutch Supervisory Judge stating that recognition of the Dutch Bankruptcy Proceeding as a foreign main proceeding under Chapter 15 would "provide the bankruptcy trustee with the authority to block the Brazilian RJ plan if it does not comply with Dutch laws and regulations." OX 80 at 3; Trial Tr. 722:12–723:13, Sept. 25, 2017 (Berkenbosch). St. It is also inconsistent with [redacted].

57 Mr. Berkenbosch equivocated on this subject throughout his trial testimony. He testified first that preventing a plan inconsistent with Dutch law was an objective. Trial Tr. 719:19-25, Sept. 25, 2017 (Berkenbosch). But he then walked his answer back: "Q. Right. Sir, your testimony-I'm not trying to put words in your mouth, I just want to understand it. If this paragraph 2.2.8 accurately reflects one of the objectives. Please tell me if it does or it doesn't. A. Okay. I'm going to read it again then. Q. Sure (Document Review.). A. It is-it is difficult for me to say and to confirm that this is an objective. I would like to have to look very close at the wording. Q. I'll tell you what, sir, let's turn to Tab ... A. Because this says, "No reorganization plan approved in Brazil if conflicted with Dutch bankruptcy proceedings," and ves. Dutch bankruptcy proceedings are very. very important, but I can imagine that there is some discretion before-also before the U.S. court would not-or would prevent the implementation of the reorganization plan. This is just very black and white. I'm not sure if I'm entirely clear." Trial Tr. 720:16-721:17, Sept. 25, 2017 (Berkenbosch).

Mr. Berkenbosch testified that he wasn't sure if the draft version of this letter was ever sent (Trial Tr. 724:17–725:14, Sept. 25, 2017 (Berkenbosch)), and that the letter is "an earlier draft, so it's very difficult for me to say that—doing it again, I would have used a few other words. Some words are a bit strong, so it's difficult for me to say." Trial Tr. 724:8–12, Sept. 25, 2017 (Berkenbosch). But there was no dispute that he drafted the letter.

Having found as a factual matter that Aurelius engaged in such a strategy, the question then becomes the legal significance of these actions. The parties offer very different conclusions. The Objectors characterize the efforts of Aurelius as a bad faith effort at COMI manipulation. They note that U.S. courts have tried to prevent COMI manipulation by scrutinizing the motives and actions of parties in interest prior to the commencement of a Chapter 15 case and indeed even before the filing of a foreign proceeding. See Objectors' Proposed FoF and CoL ¶¶ 103-04 (citing In re Fairfield Sentry, 714 F.3d at 137; In re Suntech, 520 B.R. at 416; In re Millennium Global Emerging Credit Master Fund Ltd., 458 B.R. 63, 75 (Bankr. S.D.N.Y. 2011) ("Use of the [C]hapter 15 petition date as the date for determining recognition also leads to the possibility of forum shopping, as it gives prima facie recognition to a change of residence between the date of opening proceedings in the foreign nation and the [C]hapter 15 petition date.")). While Objectors take no issue with the appointment of Mr. Berkenbosch, they complain of efforts by Aurelius and the Aurelius-led IBC to manipulate COMI as part of an orchestrated strategy to block the Brazilian RJ Proceeding and preserve their hopes for a double dip strategy. See Objectors' Proposed FoF and CoL ¶ 105.

Movants strongly disagree. They maintain that Aurelius could not manipulate COMI because it is a creditor and thus without the ability to move assets, change headquarters or take other actions that *240 could impact the COMI analysis. See Movants' Proposed CoL¶41. They further argue that COMI manipulation cannot be found based on the Dutch proceedings given that Mr. Berkenbosch acted as a Court appointed fiduciary for the benefit of Coop and its creditors. See Movants' Proposed CoL¶40; Trustee Reply 70–73; Trial Tr. 936:14–25 Sept. 26, 2017 (Ball).

Mr. Berkenbosch's actions within the scope of his authority as a fiduciary appointed by the Dutch Court,

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in and of themselves, do not trigger any concerns about COMI manipulation or improper conduct. See, e.g., OAS H'rg. Tr. 25:6–12 [Case No. 15–11304, ECF No. 68] ("THE COURT: No. No. I don't—I'm not impugning anything with the JPL's. They did what they were supposed to do. ... I'm focusing on the commencement of the proceeding, which was really before they undertook their duties"); see also id. 66:9–68:13; In re Suntech, 520 B.R. at 419–20 (holding that joint provisional liquidators did not manipulate COMI in bad faith when they acted consistent with their duties under their order of appointment and took actions that they would have taken even if they did not intend to file for Chapter 15).

The Court instead must focus on the actions of Aurelius. The Court recognizes that a creditor like Aurelius does not have the same fiduciary obligations to the creditor body as a debtor. It is expected to act on behalf of its own interests. Not surprisingly then, the few cases on COMI manipulation address the efforts of a debtornot a creditor-to influence COMI leading up to the filing of a Chapter 15 recognition proceeding. See, e.g., In re Fairfield Sentry, 714 F.3d at 133 (identifying concern regarding "a debtor's ability to manipulate its COMI"); In re Creative Fin., 543 B.R. at 523 (finding debtors' principals—and thereby the debtors themselves—guilty of bad faith and noting that under Fairfield Sentry, such activities could constitute bad faith invocation of the Bankruptcy Code that could "trump any apparent COMI premised on the locale of a foreign representative's activities."). The Court also agrees with the Movants that a creditor does not have the same control as a debtor over certain facts relevant to COMI, such as the location of a debtor's registered office.

But the evidence here presents a disturbing picture: a creditor unhappy with Brazilian insolvency proceedings decided to strategically remain silent through a Chapter 15 recognition of those proceedings by this Court while planning—and eventually executing—a strategy designed to reverse that recognition and block any restructuring in the Brazilian proceeding. As the evidentiary record reflects that this strategy existed at the time of the Prior Recognition Hearing, Aurelius' actions also reflect a lack of candor before the Court. Such actions are clearly within the realm of concerns identified in the COMI manipulation cases. See In re Fairfield Sentry, 440 B.R. at 66 (identifying activities that may constitute an "opportunistic shift to establish COMI," including

"insider exploitation, untoward manipulation, [and] overt thwarting of third party expectations."); *In re Creative Fin.*, 543 B.R. at 513, 523 (finding debtors' principals—and thereby the debtors themselves—guilty of bad faith for, among other things, attempting to control a BVI liquidator by the purse strings); *cf. In re Compañia de Alimentos Fargo, S.A.*, 376 B.R. 427 (Bankr. S.D.N.Y. 2007) (dismissing under Section 305 an involuntary Chapter 11 filed by creditors amidst concerns that case was filed to "hijack" a foreign insolvency proceeding in Argentina or, at a minimum increase the creditors' leverage in any negotiations).

*241 Bankruptcy courts often are required to consider issues of bad faith. For example, bankruptcy courts are called upon to determine whether to subordinate creditor claims. See In re LightSquared Inc., 511 B.R. 253, 333, 340-41, 345-46 (Bankr. S.D.N.Y. 2014) (equitably subordinating the claims held by an SPV created by a competing company to pursue an end-run around the eligible assignee provisions of the credit agreement in violation of the implied covenant of good faith and fair dealing); In re Adler, Coleman Clearing Corp., 277 B.R. 520, 566 (Bankr. S.D.N.Y. 2002) (equitably subordinating the "customer claim" filed pursuant to SIPA against a securities clearing firm because the customer was the "knowing" beneficiary of fraud and other illegal conduct that led to the firm's failure). Similarly, bankruptcy courts sometimes address whether to limit a creditor's ability to credit bid. See In re The Free Lance-Star Publ'g Co. of Fredericksburg, VA, 512 B.R. 798, 804-08 (Bankr. E.D. Va. 2014) (restricting a creditor's right to credit bid based on an "overly zealous loan-to-own strategy" and the negative impact its misconduct had on the auction process); In re Fisker Auto. Holdings, Inc., 510 B.R. 55, 60-61 (Bankr. D. Del. 2014) (restricting credit bidding because it might freeze out other "suitors" and "the proposed sale purchaser had insisted on an unfair process, i.e., a hurried process"). Bankruptcy courts also place restrictions on parties' ability to inappropriately collude when submitting bids for an auction sale. See In re Stroud Ford Inc., 163 B.R. 730, 733-34 (Bankr. M.D. Pa. 1993) (denying motion to sell estate property because a payment made between bidders to withdraw an objection "smack[ed] of inappropriateness and could have only stifled the bankruptcy mechanism designed to ensure that the estate is fairly compensated for its assets."); In re Edwards, 228 B.R. 552, 565-66 (Bankr. E.D. Pa. 1998) (denying objection to Section 363 sale after finding no

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evidence that an agreement between joint bidders was aimed at controlling and depressing the sale price)).

Movants contend that they cannot be penalized for Aurelius' actions, noting that the Objectors "have not claimed that ... the Insolvency Trustee [is] estopped from bringing or supporting the petition." Movants' Proposed FoF ¶41 n.13. Movants note that the Insolvency Trustee had not yet been appointed at the time of the Prior Recognition Hearing, that the IBC was not yet in existence at that time, that Aurelius only accounts for [redacted] of the IBC holdings, and that there is no evidence Aurelius controls the IBC. *Id.* Movants' argument is misdirected, however, as this Court is not relying on estoppel to make this ruling, and therefore need not establish privity between Aurelius and any other party. *In re Avaya Inc.*, 573 B.R. 93, 103-04 (Bankr. S.D.N.Y. 2017) (judicial estoppel requires privity or identity).

Rather, as has been explained above, this Court is assessing the facts in this case and the forward-looking policy implications generally of Aurelius' strategy and tactics as factors in its exercise of discretion under Section 1517(d). The Court finds it appropriate to consider Aurelius' actions in the Section 1517(d) analysis given its unique and central role in creating the factual record now before the Court. It was Aurelius that initiated litigation in the Netherlands in the spring of 2016 to enjoin the fund transfers being made pursuant to Coop's loans to Oi and Oi Móvel. Shah Decl. ¶¶ 56-57. Aurelius bargained to remain silent at the Prior Recognition Hearing in return for stipulations which protected its authority to take further actions overseas and in the Netherlands. Hr'g Tr. *242 7:24-8:15 June 22, 2017; Hr'g Tr. 9:23-10:15 July 21, 2017. 59

The significance of these stipulations was not clear to the Court at the time as they largely mirrored the relevant statutory language. See Hr. Tr. 10:15–22, July 21, 2016. In hindsight, the requests make clear Aurelius' intent even then was the use of a Dutch proceeding to compete with and potentially derail the Brazilian RJ Proceeding.

It was also Aurelius that filed a Dutch involuntary insolvency petition against Coop just six days after Mr. Shah filed the Brazilian Petition. While three other involuntary petitions were subsequently filed, Aurelius was first off the line, and it also sought to rally likeminded creditors to its cause by circulating its investment

memo. OX 73 at 4. Once Mr. Berkenbosch received his appointment as SoP Adminstrator, it was Aurelius that once again sprang into action, immediately applying frequent and aggressive pressure to Mr. Berkenbosch to press Aurelius' agenda. Trial Tr. 617:10–18, 618:13–20, 619:3–23, 620:14–621:11, Sept. 25, 2017 (Gropper); OX 4, 7, 9, 16, 27 (counsel letter on behalf of the IBC); Trial Tr. 816:11–19, Sept. 25, 2017 (Berkenbosch); SCX 6. So immediate and forceful was its campaign to convince Mr. Berkenbosch that Aurelius representatives felt obligated to later apologize once he eventually joined in the conversion efforts. Berkenbosch Decl. ¶ 55 n.87; Trial Tr. 621:22–24, 640:13–641:20, 659:11–660:22, Sept 25, 2017 (Gropper); *id.* 767:15–769:4 (Berkenbosch).

Critically, after the Dutch District Court denied the Conversion Requests, it was Aurelius' affiliate Syzygy and three other funds (two of whom are reported members of the IBC), which appealed that decision, not Mr. Berkenbosch. Stip. Facts ¶62–3; IBCX 45 n.2. And finally, it was again Aurelius and the IBC which provided the actual funding for Mr. Berkenbosch to file this case. Rabelo Decl.¶9; TX 58.

The actions of Aurelius are at odds with many of the goals of Chapter 15 set out in Section 1501. These include: promoting cooperation between U.S. and foreign courts, greater legal certainty for trade and investment, fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested entities, including the debtor, protection and maximization of a debtor's assets, and the rescue of financially troubled businesses. 11 U.S.C. § 1501. Rather than promote cooperation between U.S. and foreign courts, Aurelius seeks leverage over the Chapter 15 Debtors by attempting to block the Brazilian RJ Proceeding. Thus, Aurelius has weaponized Chapter 15 to collaterally attack both the Brazilian RJ Proceeding and the Oi Group's proposed Brazilian RJ Plan. The result undermines the goals of maximizing the Chapter 15 Debtors' assets and assisting in the rescue of their financially troubled business.

Indeed, the actions of Aurelius are inconsistent with the trend in international insolvency law. For example, UNCITRAL has a working group studying cross border insolvencies of multinational enterprise groups of the kind at issue in this case. The working group has published draft legislative provisions on the issue. Those drafts define an "Enterprise" as "any entity, regardless of its legal form, that is engaged in economic activities and may be governed by insolvency law, and an "Enterprise Group" as "two or more enterprises that are interconnected by control or significant ownership." Facilitating the Cross-Border Insolvency of Multinational Enterprise Groups: Draft Legislative Provisions, Article 2. Definitions, United Nations Commission of International Trade Law, Working Group V (Insolvency Law), Fifty-First Session, New York, 10-19 May *243 2017 (dated 2 March 2017), http://www.uncitral.org/uncitral/en/commission/ working_groups/5Insolvency.html (last accessed on Nov. 12, 2017). Among the objectives of the draft law is the promotion of cooperation between courts and other competent authorities among States involved in cases of cross-border insolvency affecting members of an enterprise group. Id. at Chapter 1. General Provisions, Preamble.

Of particular relevance to this case, the draft legislation seeks to promote:

- Fair and efficient administration of cross-border insolvencies concerning enterprise group members that protects the interests of all creditors and other interested persons, including the debtors;
- Protection and maximization of the overall combined value of the operations and assets of enterprise group members affected by insolvency and of the enterprise group as a whole; and
- Facilitation of the rescue of financially troubled enterprise groups, thereby protecting investment and preserving employment.

Id., Preamble, Sections (d), (e), and (f). The draft legislation provides for cooperation in a variety of ways, including:

- Authority to enter into agreements concerning the coordination of insolvency proceedings of group members in different foreign jurisdictions;
- The appointment of a single insolvency representative to administer and coordinate insolvency proceedings concerning members of the same enterprise group in different foreign jurisdictions; and
- Use of a "planning proceeding" open to members of the enterprise group who have a COMI in the foreign

jurisdiction where the proceeding is being held but also to members of the enterprise group whose COMI is in another foreign jurisdiction.

See id., Articles 9, 10, 11, 12. Aurelius' actions here are at odds with the focus of this draft legislation on cooperation, value maximization and enterprise preservation. ⁶⁰

The Court notes that neither Brazil nor the Netherlands has enacted the UNCITRAL Model Law that is reflected in Chapter 15 of the United States Bankruptcy Code.

In sum, the strategy pursued by Aurelius in these cases is a troubling one that the Court refuses to countenance. The Court recognizes that the facts here are novel, unlike any reported decision that the Court or the parties have been able to locate. The result here is certainly not a traditional application of COMI manipulation principles, normally applied to a debtor with only one foreign proceeding. But the Court reaches this result based on the discretion granted it under Section 1517(d), the Court's authority to address issues of bad faith and other inequitable conduct, and the Court's evidentiary findings above. In reaching this conclusion, moreover, the Court takes to heart the Second Circuit's guidance that the factors relevant for COMI are open-ended and must be developed by courts on a case-by-case basis. See In re Fairfield Sentry, 714 F.3d at 138 (noting that "[t]he absence of a statutory definition for a term [like COMI] that is not self-defining signifies that the text is open-ended, and invites development by courts, depending on facts presented, without prescription or limitation."); c.f. U.S.C. § 105(a).

The Court is also mindful that the Movants always have the ability to come back to this Court and challenge the recognition of any plan approved in the Brazilian RJ Proceeding. See *244 In re OAS, 533 B.R. at 104. As OAS noted in overruling an objection to recognition:

[o]bjections based on the speculation that the Brazilian Court will approve a plan or plans that permit substantive consolidation, unfair distributions or the elimination of creditor fraudulent transfer claims are premature. They depend on the contents and effect of one or more plans that the Brazilian

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Court has not yet approved and may never approve. ... In addition, Aurelius and Alden will have the chance to object to any plans in Brazil and challenge any motion in this Court seeking recognition and enforcement of any plans approved by the Brazilian Court.

In re OAS, 533 B.R. at 104.

CONCLUSION

For all the reasons set forth above, the Court denies the Dutch Petition and request for related relief. ⁶¹ The Objectors are directed to settle a proposed order on seven days' notice. The proposed order must be submitted

by filing a notice of the proposed order on the Case Management/Electronic Case Filing docket, with a copy of the proposed order attached as an exhibit to the notice. A copy of the notice and proposed order shall also be served upon Movants' counsel.

The Movants raised an argument regarding Mr. Shah's replacement as foreign representative by Mr. Rabelo. *See* Trustee's Supp. to the Dutch Petition at ¶ 2 [ECF No. 23]. The parties should consider their position on this issue in light of the Court's ruling today and contact the Court within 14 days of this decision regarding how they would like to proceed on this issue.

All Citations

578 B.R. 169

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In re SunEdison, Inc., 577 B.R. 120 (2017)

64 Bankr.Ct.Dec. 209

577 B.R. 120 United States Bankruptcy Court, S.D. New York.

IN RE: SUNEDISON, INC., et al., Debtors. SMP Ltd., Plaintiff,

v.

SunEdison, Inc., Defendant, and

GCL-Poly Energy Holdings Limited Defendant-Intervenor.

Case No. 16–10992 (SMB) (Jointly Administered)

|
Adv. Proc. No. 17–01057 (SMB)

|
Signed October 13, 2017

Synopsis

Background: Company that was the subject of insolvency proceedings pending in Korea brought adversary proceeding for determination that supply and licensing agreement between itself and Chapter 11 debtor had not been validly terminated by Chapter 11 debtor based on ipso facto clause in parties' agreement. Parties crossmoved for summary judgment.

Holdings: The Bankruptcy Court, Stuart M. Bernstein, J., held that:

[1] parties' selection of New York law as the law that would govern supply and licensing agreement between them, without regard to New York choice of law principles, would be honored by bankruptcy judge, and

[2] in deciding whether Chapter 11 debtor, in reliance on ipso facto clause in its supply and licensing agreement with Korean company, had properly terminated this agreement based on the other company's commencement its own insolvency proceeding under Korean law, bankruptcy court would not grant comity to commencement order entered by Korean court to extent requested by Korean debtor, by evaluating validity of ipso facto clause under Korean law.

Company's motion denied; Chapter 11 debtor's crossmotion granted.

West Headnotes (11)

[1] Federal Courts

- Conflict of Laws; Choice of Law

Federal court that is sitting in diversity jurisdiction must apply the substantive law of the state in which it sits, including that state's choice of law rules.

Cases that cite this headnote

[2] Bankruptcy

Application of state or federal law in general

Bankruptcy court must apply choice of law rules of state in which it sits, unless significant federal policy calls for application of federal conflicts rule.

Cases that cite this headnote

[3] Contracts

Agreements relating to actions and other proceedings in general

Sophisticated commercial parties' selection of New York law as the law that would govern supply and licensing agreement between them, without regard to New York choice of law principles, would be honored by bankruptcy judge in the Southern District of New York, in which one of the parties and its affiliates later filed for Chapter 11 relief; accordingly, bankruptcy judge had to abjure a conflicts analysis and instead apply New York substantive law in ruling on enforceability of ipso facto clause in parties' agreement, and in deciding whether debtor properly terminated agreement based on the other party's commencement of foreign insolvency proceedings in accordance with Korean law.

Cases that cite this headnote

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[4] Bankruptcy

ipso facto' clauses

Ipso facto clauses, which allow one party to terminate contract based on the other party's bankruptcy filing, are enforceable under New York law, absent fraud, collusion or overreaching.

Cases that cite this headnote

[5] Bankruptcy

ipso facto' clauses

In deciding whether Chapter 11 debtor, in reliance on ipso facto clause in its supply and licensing agreement with Korean company, had properly terminated this agreement based on the other company's commencement its own insolvency proceeding under Korean law, bankruptcy court would not grant comity to commencement order entered by Korean court to extent requested by Korean debtor, by evaluating validity of ipso facto clause under Korean law as opposed to the New York law as agreed by parties in choice-of-law provision, where commencement order was silent on whether Chapter 11 debtor could terminate supply and licensing agreement.

Cases that cite this headnote

[6] Courts

Comity between courts of different countries

International Law

Public policy and comity in general

Judgment

Judgments of Courts of Foreign Countries

"Comity" is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will upon the other, but is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to rights of its own citizens

or of other persons who are under protection of its laws.

Cases that cite this headnote

[7] Courts

Comity between courts of different countries

International Law

Public policy and comity in general

There are two aspects to the doctrine of comity, abstention comity and choice-of-law comity, which are also referred to, respectively, as "comity among courts" and "comity among nations."

Cases that cite this headnote

[8] Courts

Comity between courts of different countries

Under abstention comity, or "comity among courts," United States courts should ordinarily decline to adjudicate creditor claims that are the subject of a foreign bankruptcy proceeding.

1 Cases that cite this headnote

[9] Courts

Comity between courts of different countries

Abstention comity, or "comity among courts," is concerned with which court should decide the parties' rights, and relatedly, with whether a United States court should enforce a foreign bankruptcy court's order relating to the debtor's assets or the adjudication of a creditor's claims.

1 Cases that cite this headnote

[10] Courts

Comity between courts of different countries

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Abstention comity, or "comity among courts," aims to prevent an "end run" around a foreign bankruptcy proceeding.

1 Cases that cite this headnote

[11] International Law

Public policy and comity in general

Choice-of-law comity, or "comity among nations," can limit the reach of domestic law to conduct occurring abroad.

Cases that cite this headnote

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MEMORANDUM DECISION GRANTING GCL-POLY ENERGY HOLDINGS LIMITED'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND DENYING SMP LTD.'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

STUART M. BERNSTEIN, United States Bankruptcy

The plaintiff, SMP Ltd. ("SMP")—a debtor under Korean bankruptcy law—sued the defendant SunEdison, Inc. ("SunEdison")—a U.S. debtor—seeking a declaratory judgment under Count I of its *Complaint*,

dated May 1, 2017 ("Complaint") (ECF Doc. # 1) 1 that SunEdison's termination of a September 28, 2011 supply and license agreement (the "SLA") *123 was invalid because the termination violated Korean insolvency law. The defendant-intervenor GCL-Poly Energy Holdings Limited ("GCL") purchased certain of SunEdison's assets in bankruptcy and is the ultimate party in interest concerning the validity of the termination. GCL moved for partial judgment on the pleadings or, alternatively, partial summary judgment validating SunEdison's termination of the SLA, (see Defendant-Intervenor GCL Poly Energy Holdings Limited's Brief in Support of its Motion for Partial Judgment on the Pleadings or, in the Alternative, for Partial Summary Judgment, dated July 31, 2017 ("GCL Motion") (ECF Doc. # 18)), and SMP cross-moved for partial summary judgment urging the opposite result. (See Memorandum of Law (I) in Opposition to Defendant-Intervenor GCL-Poly Energy Holdings Limited's Motion for Partial Judgment on the Pleadings or, in the Alternative, for Partial Summary Judgment, and (II) in Support of SMP Ltd.'s Cross Motion for Partial Summary Judgment, dated Aug. 14, 2017 ("SMP Motion") (ECF Doc. # 28).)

"ECF Doc. # —" refers to documents filed on the docket of this adversary proceeding. "ECF Main Case Doc. # —" refers to documents filed in the SunEdison chapter 11 case.

The impetus driving the parties' disagreement revolves around the difference between the termination and the rejection of the SLA. SunEdison licensed certain intellectual property to SMP under the SLA. If SunEdison's termination was valid, SMP can no longer use the intellectual property. If, however, SunEdison is limited to rejecting the SLA, SMP can continue to use SunEdison's intellectual property without its consent. *See* 11 U.S.C. § 365(n)(1)(B). For the reasons that follow, the Court concludes that the termination of the SLA was valid. Accordingly, GCL's motion for partial summary judgment is granted, and SMP's cross-motion is denied.

BACKGROUND

The parties have stipulated to the pertinent facts, (see Stipulation of Undisputed Facts Pursuant to Local Bankruptcy Rule 7056–1, dated July 31, 2017 (the "Fact Stipulation") ² (ECF Doc. # 21)), relevant to Count I.

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2 References to paragraphs in the Fact Stipulation will be denoted as "(¶—__)"

A. Formation of SMP and the SLA

This litigation concerns a plant built in Ulsan, Korea (the "Plant") to manufacture polycrystalline silicon, also known as "polysilicon," a vital material used in the production of solar wafers for solar cells. (¶ 1.) In 2011, SunEdison Products Singapore Pte. Ltd. ("SunEdison Singapore") and Samsung Fine Chemicals Ltd. ("SFC," and collectively with its affiliates, "Samsung") formed SMP as a joint venture under the laws of the Republic of Korea to ensure a supply of polysilicon in Korea.³ (¶ 4.) The parties' Joint Venture Agreement, dated Feb. 15, 2011, contemplated, inter alia, that (a) SunEdison Singapore or its affiliate would license to SMP the technology necessary for SMP to build and operate a polysilicon manufacturing plant, and (b) polysilicon products manufactured by SMP would be sold only to SunEdison Singapore and SFC. (¶ 7.) SunEdison relied on SFC to contribute employees to the joint venture, secure financing, provide land within an existing Samsung industrial complex on which to build the Plant, and provide supplies (e.g., electricity, argon, nitrogen, water, etc.) to the extent available to SFC at favorable rates. (¶ 10.) SunEdison contributed the technology, equipment, Plant design, and certain knowledge, and *124 provided training to SMP's employees so they could manufacture polysilicon at the Plant. (¶ 11.) The manufacture of polysilicon at the Plant is SMP's sole business, the Plant is not presently operating, (¶ 5), and SMP does not have any other business or operations. (¶ 12.)

3 Initially, SFC and SunEdison Singapore each held 50% of SMP's equity, but SunEdison Singapore currently owns 62.25%. (¶ 4.)

In connection with the joint venture, and among other things, SunEdison and SMP entered into the SLA. (¶ 14.) Among other things, SunEdison granted SMP a license to use certain polysilicon production technology to install, operate and maintain the equipment at the Plant and to design, construct, operate and maintain the Plant. The SLA contains two provisions crucial to the current dispute. (¶ 15.) First, section 8.2(a)(ii) includes an *ipso facto* clause (the "Ipso Facto Clause") that permits either party to terminate the SLA if the other, *inter alia*, files bankruptcy or is unable to pay its debts as they become

due. 4 (¶ 21.) Second, section 11.9 selects New York and U.S. federal law as the governing law, without regard to their conflict of laws principles. 5 (¶ 22.)

- Section 8.2(a)(ii) states:
 - (a) This Agreement may be terminated by either Party upon written notice to the other Party:
 - (ii) If (A) such other Party, any of its creditors or any other eligible party files or commences a proceeding for liquidation, bankruptcy, receivership, reorganization, rehabilitation, composition or dissolution of such other Party (and, in the case of any such proceeding brought against such other Party, such proceeding has not been stayed or dismissed within ninety (90) days after the filing thereof), or (B) such other Party is unable to pay or has suspended payment of its debts generally as they become due (except debts being contested in good faith), or (C) the creditors of such other Party have taken over its management, or (D) the relevant financial institutions have suspended the clearing house privileges of such other Party.
- 5 Section 11.9 states:

The validity of this Agreement, the construction and enforcement of its terms and the interpretation of the rights and duties of the Parties hereunder shall be governed by the laws of the State of New York and the Federal laws of the United States applicable thereto without giving effect to the conflicts of laws principles thereof. This Agreement is not subject to the United Nations Convention on Contracts for the International Sale of Goods.

B. The Bankruptcy Proceedings

SMP began a shut-down process for the Plant in March 2016 and completed the shut-down in April 2016. (¶ 30.) On April 21, 2016, SunEdison, SunEdison Singapore, and certain affiliates (the "SunEdison Debtors") each commenced bankruptcy cases under chapter 11 of the Bankruptcy Code. (¶ 30.) Two weeks later, on May 3, 2016, SMP filed an application for rehabilitation under the Republic of Korea's Debtor Rehabilitation and Bankruptcy Act ("DRBA") with the 21st Civil Division of the Ulsan District Court (the "Korean Bankruptcy Court"). On June 13, 2016, the Korean Bankruptcy Court issued an order (the "Commencement Order") commencing the proceeding (the "Korean Bankruptcy Proceeding"), which remains pending in the Korean Bankruptcy Court. (¶ 31.) The Commencement Order

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appointed SMP's representative director to act as the "custodian," and fixed certain schedules relating to the filing and inspection of claims and the filing of a rehabilitation plan, but did not expressly grant any relief *125 to SMP such as a stay of creditor actions. As of the date of the commencement of the Korean Bankruptcy Proceeding, the SLA was an executory contract in full force and effect. (See ¶¶ 32, 34.) SunEdison, SunEdison Singapore and MEMC Pasadena, Inc., another SunEdison Debtor, each filed a proof of claim against SMP in the Korean Bankruptcy Proceeding. (¶33.)

A copy of the Commencement Order translated into English is attached as Exhibit B to the Declaration of Marshall R. King in Support of Defendant—Intervenor's Motion for Partial Judgment on the Pleadings or, in the Alternative, for Partial Summary Judgment, dated July 31, 2017 (ECF Doc. # 19).

On August 26, 2016, the SunEdison Debtors filed a motion (the "Sale Motion") for an order approving, inter alia, the sale of their solar materials business, 7 which included their assets pertaining to SMP. GCL acted as the stalking horse bidder for the sale, and the Sale Motion sought approval of an agreement between SunEdison and GCL (the "Stalking Horse Agreement") to sell the assets to GCL. Under the Stalking Horse Agreement, SunEdison was required to reject the SLA and "take such actions in Korea or the United States as [GCL] may reasonably request to terminate the [SLA] (including exercising their contractual rights, pursuant to and in accordance with the terms and conditions of such agreement), and in connection with such termination, exercise any rights under the [SLA] to require SMP to promptly return all proprietary information, technology, equipment and other licensed assets to Sellers and take no actions inconsistent with the exercise of such termination...." (¶ 35.)

7 See Debtors' Motion For (1) An Order (A) Approving
The Bidding Procedures For The Sale Of The Solar
Materials Business, (B) Establishing The Notice
Procedures And Approving The Form And Manner Of
Notice Thereof, (C) Approving Procedures For The
Assumption And Assignment Of Certain Executory
Contracts And Unexpired Leases, (D) Scheduling
A Sale Hearing, And (E) Granting Related Relief
And (II) An Order (A) Approving The Sale Of
The Solar Materials Business Free And Clear Of All

Liens, Claims, Encumbrances, And Other Interests, (B) Approving The Assumption And Assignment Of Certain Executory Contracts And Unexpired Leases Related Thereto, And (C) Granting Related Relief, dated Aug. 26, 2016 (ECF Main Case Doc. # 1072).

SMP received proper notice of the Sale Motion, (¶ 35), and in fact, filed a reservation of rights objecting to the proposed sale ("SMP Sale Objection"). (¶ 36.) On October 25, 2016, the Court entered an order that approved the Sale Motion and Stalking Horse Agreement, and adjourned the SMP Sale Objection. (See Order (I) Authorizing the Sale of Solar Materials Business Free and Clear of all Liens, Claims, Encumbrances, and Interests; (II) Approving the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases; and (III) Granting Related Relief, signed Oct. 24, 2016 (ECF Main Case Doc. # 1466).)

Following Court-ordered mediation, the Court signed an order approving a settlement agreement that resolved the SMP Sale Objection (the "Settlement Agreement"). (See Stipulated Order Approving Settlement Agreement, signed March 27, 2017 8 (ECF Main Case Doc. # 2657).) The Settlement Agreement permitted the sale to go forward while preserving the issue now before the Court. Among other things, the Settlement Agreement required SunEdison to send a notice terminating the SLA in accordance with the terms of the SLA. SunEdison, GCL and SMP "acknowledge and agree that SMP's rights to contest and challenge [SunEdison's] rights to terminate [the SLA] are hereby fully preserved." (Settlement Agreement at ¶ 7.) SMP could challenge the termination either in this Court or pursuant to arbitration under the SLA. (Id.) In consideration for these and other agreements contained in the Settlement Agreement, SunEdison *126 agreed to pay SMP \$5 million. (Id. at ¶ 3.) On March 22, 2017, the Korean Bankruptcy Court also approved the Settlement Agreement. (¶ 37.)

A copy of the Settlement Agreement is annexed as an exhibit to the stipulation.

C. The Termination and this Adversary Proceeding

SunEdison transmitted the termination notice to SMP in accordance with the Settlement Agreement on or about March 30, 2017 (the "Termination Notice"). (¶ 39.) The Termination Notice invoked the Ipso Facto Clause stating that SunEdison was terminating the SLA "as a result of SMP's pending rehabilitation proceeding and its failure to

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pay debts generally as they come due." It also warned that any unauthorized use or attempt to use the intellectual property specified in the SLA would result in immediate action by SunEdison and any use of the proprietary equipment that was covered by SunEdison patents would constitute a willful infringement of SunEdison's patent rights. (¶ 39.) SMP received the Termination Notice in Ulsan, Korea on March 31, 2017 (Korean Standard Time). (¶ 39.)

Post-termination, SMP filed a petition in this Court for recognition of the Korean Bankruptcy Proceeding under Chapter 15 of the Bankruptcy Code on May 1, 2017. (See In re SMP Ltd., Case No. 17-11192 (SMB).) The Court granted recognition of the Korean Bankruptcy Proceeding as a "foreign main proceeding" pursuant to 11 U.S.C. § 1517(b)(1) on June 15, 2017. (See Order Granting Recognition and Relief in Aid of a Foreign Main Proceeding, dated June 15, 2017 ("Recognition Order") (ECF Case No. 17-11192 Doc. # 31).) The text of the Recognition Order engendered disagreement regarding the language granting comity to the Korean Bankruptcy Proceeding undoubtedly in anticipation of the pending dispute. As reflected by the deletions and interlineations to paragraph 4 of the Recognition Order, comity was granted to the Commencement Order only to the extent necessary to support the findings in the Recognition Order.

Forgoing the arbitration option, SMP commenced this adversary proceeding in this Court on May 1, 2017. Count I of the *Complaint* seeks a judgment declaring the SLA's Ipso Facto Clause unenforceable and SunEdison's Termination Notice invalid. (*Complaint* at ¶ 47.) According to SMP, Korean law renders *ipso facto* provisions in executory contracts unenforceable against a debtor in a Korean rehabilitation proceeding. (*Id.* at ¶ 39.) As a result, once the Commencement Order was entered in SMP's Korean Bankruptcy Proceeding, SunEdison could not exercise its right to terminate the SLA pursuant to the Ipso Facto Clause. (*Id.* at ¶ 40.)

GCL moved for partial summary judgment on Count I on July 31, 2017. (See GCL Motion.) GCL contends that a federal court must apply the choice of law rules of the state in which it sits, and New York's choice of law rules require a court to honor a governing law provision in a contract absent fraud or overreaching. (Id. at 7–10.) The SLA specifies that it is to be governed by New York law,

and *ipso facto* clauses are enforceable in New York. (*Id.* at 10–13.)

Alternatively, the *GCL Motion* sought judgment on the pleadings as to Count I. In light of the factual record developed outside of the pleadings and the Court's disposition of the cross-motions for partial summary judgment, the Court does not address GCL's motion for judgment on the pleadings.

SMP cross-moved for partial summary judgment on Count I on August 14, 2017. (See SMP Motion.) Taking a different view, SMP argues that the Court should not look to New York law to decide the matter, and instead, should apply Korean *127 insolvency law, which renders ipso facto provisions in bilateral or executory contracts unenforceable against a Korean debtor. (Id. at 9-13.) According to SMP, principles of comity mandate that this Court give effect to the Commencement Order and apply Korean law. (Id. at 19-29.) In support of its argument regarding Korean insolvency law, SMP provided declarations by an expert in Korean insolvency law. (See Declaration of Chiyong Rim Regarding Korean Law Governing the Korean Law Dispute, dated Aug. 14, 2017 ("Rim Declaration") (ECF Doc. # 29) and Redacted Supplemental Declaration of Chivong Rim Regarding Korean Law Governing the Korean Law Dispute, dated Sept. 5, 2017 (ECF Doc. # 39).) GCL responded, inter alia, that even if Korean law governed, the Ipso Facto Clause was not automatically unenforceable, and instead, depended on an inquiry into the facts and circumstances surrounding the termination. (GCL's (I) Reply in Support of its Motion for Partial Judgment on the Pleadings or, in the Alternative, for Partial Summary Judgment and (II) Opposition to SMP's Cross-Motion for Partial Summary Judgment, dated Aug. 28, 2017 ("GCL Reply"), at 11-18 (ECF Doc. # 32).) GCL also supplied an expert declaration in support of its position. (See Declaration of Eunjai Lee in Support of GCL's Opposition to SMP's Motion Regarding Korean Law, dated Aug. 28, 2017 ("Lee Declaration") (ECF Doc. # 33).)

The Court heard oral argument on September 28, 2017 and reserved decision. ¹⁰ Although SMP appears to have the stronger argument concerning Korean insolvency law regardless of which test is applied, the Court does not decide the question in light of its disposition of the crossmotions.

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SMP filed an unauthorized sur-reply after the hearing in the form of a letter, (Letter from Jane VanLare, Esq. to the Court, dated Oct. 2, 2017 (ECF Doc. # 47)), to which GCL objected but also responded. (Letter from Marshall R. King, Esq. to the Court, dated Oct. 3, 2017 (ECF Doc. # 49).) The Court has not considered either post-hearing submission.

DISCUSSION

A. New York Law

[1] [2] But for the arguments relating to the effect of the Commencement Order, the resolution of this dispute would be simple and straight forward. First, a federal court sitting in diversity jurisdiction must apply the substantive law of the state in which it sits, including that state's choice of law rules, Klaxon Co. v. Stentor Elec. Mfg. Co., Inc., 313 U.S. 487, 496, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941), and consequently, a bankruptcy court must apply New York's choice of law rules unless a "significant federal policy" calls for the application of a federal conflicts rule. Geron v. Seyfarth Shaw LLP (In re Thelen LLP), 736 F.3d 213, 219 (2d Cir. 2013) (citations omitted), answering different certified question, 24 N.Y.3d 16, 995 N.Y.S.2d 534, 20 N.E.3d 264 (2014); Harrison v. New Jersey Cmty. Bank (In re Jesup & Lamont, Inc.), 507 B.R. 452, 475 (Bankr. S.D.N.Y. 2014) ("To perform a choice of law analysis, a bankruptcy court ordinarily applies the choice of law rules of the state in which it is located.") (citations omitted).

[3] Here, the parties selected New York as the governing law without regard to its conflict of law rules. 11 Under N.Y. GEN. OBLIG. LAW § 5-1401 (McKinney 2017) ("GOL § 5–1401"), "parties to any contract ... arising out of a transaction covering in the aggregate not less than two hundred *128 fifty thousand dollars ... may agree that [New York law] shall govern their rights and duties in whole or in part, whether or not such contract ... bears a reasonable relation to [New York]." Where the parties' contract selects New York law and, as here, the amounts involved meet the monetary threshold under GOL § 5-1401, the Court must abjure a conflicts analysis or consider foreign law or foreign public policy, and must instead apply New York substantive law. IRB-Brasil Resseguros, S.A. v. Inepar Invs., S.A., 20 N.Y.3d 310, 958 N.Y.S.2d 689, 982 N.E.2d 609, 612 (2012) (The "plain language of General Obligations Law § 5-1401 dictates that New York substantive law applies when parties

include an ordinary New York choice-of-law provision" and "[e]xpress contract language excluding New York's conflict-of-law principles is not necessary."), *cert. denied*, — U.S. ——, 133 S.Ct. 2396, 185 L.Ed.2d 1105 (2013).

As discussed in the succeeding text, the SLA also selected federal conflict principles but SMP did not identify or discuss any.

GOL § 5–1401 promotes the public policy of New York. It recognizes that parties select New York law because its commercial law is better developed and predictable, it promotes New York's reputation as a center of international commerce and any conflicts analysis would only serve to frustrate their desire for greater certainty. See Innovative BioDefense, Inc. v. VSP Techs., Inc., No. 12 Civ. 3710(ER), 2013 WL 3389008, at *4 (S.D.N.Y. July 3, 2013) (Under GOL § 5-1401, "the parties' choice of law provision is enforceable, unless procured by fraud or overreaching, even if, under a traditional choice-oflaw analysis, the application of New York law would violate a fundamental public policy of another, more interested jurisdiction."); Lehman Bros. Commercial Corp. v. Minmetals Int'l Non-Ferrous Metals Trading Co., 179 F.Supp.2d 118, 138 (S.D.N.Y. 2000) ("Although the public policy behind China's licensing requirements is no doubt strong, [GOL § 5-1401] implicates other policies that are vitally important not only to contracting parties but also to the international community."); Supply & Bldg. Co. v. Estee Lauder Int'l, Inc., No. 95 Civ. 8136 (RCC), 2000 WL 223838, at *2-3 (S.D.N.Y. Feb. 25, 2000) (contract meeting the requirements of GOL § 5-1401 and containing a New York choice of law provision mandated application of New York substantive law notwithstanding argument that application of New York law would violate Kuwaiti public policy); see also IRB-Brasil Resseguros, 958 N.Y.S.2d 689, 982 N.E.2d at 612 ("It strains credulity that the parties would have chosen to leave the question of the applicable substantive law unanswered and would have desired a court to engage in a complicated conflictof-laws analysis, delaying resolution of any dispute and increasing litigation expenses.").

[4] Second, *ipso facto* clauses are enforceable under New York law absent fraud, collusion or overreaching. *W.F.M. Rest., Inc. v. Austern*, 35 N.Y.2d 610, 364 N.Y.S.2d 500, 324 N.E.2d 149, 150, 153 (1974) (following the dismissal of the tenant's bankruptcy, *ipso facto* clause allowing a landlord to terminate a commercial lease upon the filing of a bankruptcy petition by, or against, a tenant

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was enforceable absent fraud, collusion or overreaching by the landlord); *Murray Realty Co. v. Regal Shoe Co.*, 265 N.Y. 332, 193 N.E. 164, 165 (1934) (enforcing *ipso facto* clause in a lease); *First Nationwide Bank v. Brookhaven Realty Assocs.*, 223 A.D.2d 618, 637 N.Y.S.2d 418, 421 ("Once the bankruptcy proceeding terminated[,] the enforceability of that [*ipso facto*] clause was to be determined by State law and the contract between the parties."), *leave to appeal dismissed*, 88 N.Y.2d 963, 647 N.Y.S.2d 715, 670 N.E.2d 1347 (1996).

*129 SMP's reliance on dicta in 151 W. Assocs. v. Printsiples Fabric Corp., 92 A.D.2d 76, 459 N.Y.S.2d 605 (1983), aff'd, 61 N.Y.2d 732, 472 N.Y.S.2d 909, 460 N.E.2d 1344 (1984), (SMP Motion at 28), to support the contrary argument, is misplaced. The dispute in Printsiples was whether the purchase of a company's unsecured claims by a third party, and transfer of equity to the same third party, constituted an "arrangement" triggering an ipso facto clause in a commercial lease. Printsiples, 459 N.Y.S.2d at 605-07. Three of the five justices concluded that it did not. Id. at 606-07. In dicta, the majority added that while section 365(e)(1) of the Bankruptcy Code ¹² did not apply because the company was not in bankruptcy, that provision nonetheless showed Congress' intent "that an executory contract or unexpired lease not be terminated solely because of a lease forfeiture provision. If such a clause is not to be given effect after the commencement of a bankruptcy proceeding, there can be even less justification for doing so in the absence of a proceeding." Id. at 607.

- 12 Section 365(e)(1) of the Bankruptcy Code provides:

 Notwithstanding a provision in an executory contract or unexpired lease, or in applicable law, an executory contract or unexpired lease of the debtor may not be terminated or modified, and any right or obligation under such contract or lease may not be terminated or modified, at any time after the commencement of the case solely because of a provision in such contract or lease that is conditioned on—
 - (A) the insolvency or financial condition of the debtor at any time before the closing of the case:
 - (B) the commencement of a case under this title; or
 - (C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement.

11 U.S.C. § 365(e)(1).

Two justices dissented. In addition to concluding that the events constituted an "arrangement," *id.* at 611, they rejected the majority's invocation of federal bankruptcy law because no bankruptcy petition had been filed. *Id.* The Court of Appeals affirmed the Appellate Division's judgment but did not endorse its *dicta*. The Court concluded, as did the Appellate Division, that the "arrangement" did not trigger the *ipso facto* clause. 472 N.Y.S.2d 909, 460 N.E.2d at 1345. It did not mention federal bankruptcy law.

As the Printsiples dissent argued, the Appellate Division's dicta regarding the effect of Bankruptcy Code § 365(e) (1) was misplaced. No court has cited Printsiples for the proposition that ipso facto clauses are unenforceable outside of bankruptcy, ¹³ and two reported decisions by bankruptcy courts in this circuit have disagreed with the Printsiples dicta. See Comp III, Inc. v. Computerland Corp. (In re Comp III, Inc.), 136 B.R. 636, 638-39 (Bankr. S.D.N.Y. 1992) ("The plaintiffs invite me to apply the Printsiples reasoning to the facts of this case as a matter of public policy. However enticing the invitation, I must decline, as I am of the view that where an executory contract has been terminated in accordance with its terms prior to bankruptcy, section 365(e)(1) does not authorize the bankruptcy court to reach beyond the veil of the petition to reinstate the contract.") (Brozman, J.); *130 In re Gordon Car & Truck Rental, Inc., 59 B.R. 956, 960 (Bankr. N.D.N.Y. 1985) (construing the pertinent language in *Printsiples* as *dicta* and declining to adopt it).

The only decision affirmatively citing the majority decision in *Printsiples* that this Court could locate was *Greene Techs. Inc. v. Atoma Int'l of Am. Inc.*, which cited it for the uncontroversial proposition that section 365(e)(1) of the Bankruptcy Code precludes "the termination of an executory contract solely by operation of an ipso facto clause that terminates the contract automatically in the event of bankruptcy." 296 A.D.2d 695, 745 N.Y.S.2d 242, 243–44 (2002) (emphasis omitted).

Accordingly, under New York law, the Ipso Facto Clause is enforceable. ¹⁴

At oral argument, SMP argued that New York's choice of law rules should not preclude SMP from relying on Korean law because the Settlement Agreement merely established a procedure, the

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parties reserved their rights, and SMP could have initiated a proceeding in Korea at an earlier time to resolve the question, and presumably, avoid New York's conflict of laws rule. (Transcript of 9/28/17 Hrg ("9/28/17 Tr.") at 68:8-71:19 (ECF Doc. # 48).) While I agree that SMP preserved its rights, it does not follow that I should disregard New York law and apply Korean law or that SMP was somehow blindsided. The prospect of SunEdison's termination of the SLA dated back to the Stalking Horse Agreement, but SMP did not seek relief from the termination in the Korean Bankruptcy Court at that time or at any subsequent time. Moreover, by the time the parties entered into the Settlement Agreement, it was clear that SunEdison intended to terminate the SLA. SMP nonetheless agreed to litigate the validity of any termination in this forum or in an arbitration, and ultimately selected this forum. SMP's counsel knew or should have known that this Court would be bound to apply New York's choice of law rules under Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. at 496, 61 S.Ct. 1020. Notably, the Termination Agreement did not modify the governing law provision in the SLA.

B. Federal Law and Comity

[5] The SLA's choice of law provision referred to "Federal laws of the United States" in addition to New York law. (¶22.) That provision, however, excluded consideration of federal choice of law rules, and moreover, SMP has not identified a different federal choice of law rule or argued that the Ipso Facto Clause would be treated differently under federal law. Furthermore, the SunEdison Debtors had the statutory right to exercise the termination right under the Ipso Facto Clause as the statutory successors to SunEdison. See 11 U.S.C. § 541(a). Bankruptcy Code § 363(b) permitted the SunEdison Debtors to engage in a transaction outside of the ordinary course of business after notice and a hearing. The Court approved the termination of the SLA twice, albeit subject to SMP's rights. The Stalking Horse Agreement included a provision that required SunEdison to terminate the SLA. The Court approved the agreement and the sale pursuant to 11 U.S.C. § 363(b). The Court again authorized the termination when it approved the Settlement Agreement, which required SunEdison to send the Termination Notice. Instead of pointing to any specific federal law or principle, SMP blends the contractual reference to "Federal laws" into its argument that federal principles of comity should override the SLA's choice of law provision. (See, e.g., SMP Motion at 27 ("The Court's consideration of Korean law is even more appropriate here where ...

the SLA's choice of law provision includes both New York *and* federal laws. Thus, even if the governing law clause did have some bearing on the Court's power grant comity—which it does not—this express provision for the applicability of 'Federal laws' plainly permits the application of federal law regarding comity.") (emphasis in original).)

[7] [8] Comity "is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." Hilton v. Guyot, 159 U.S. 113, 163-64, 16 S.Ct. 139, 40 L.Ed. 95 (1895). There are two aspects to the doctrine of comity, *131 abstention and choice of laws, sometimes referred to respectively as "comity among courts" and "comity among nations." See Maxwell Commc'n Corp. plc v. Societe Generale (In re Maxwell Commc'n Corp. plc), 93 F.3d 1036, 1047 (2d Cir. 1996). The Second Circuit has explained comity abstention in favor of a foreign bankruptcy proceeding in the following manner:

U.S. courts should ordinarily decline to adjudicate creditor claims that are the subject of a foreign bankruptcy proceeding. "Since '[t]he equitable and orderly distribution of a debtor's property requires assembling all claims against the limited assets in a single proceeding,' American courts regularly defer to such actions." Finanz AG, 192 F.3d at 246 (quoting Victrix S.S. Co., S.A. v. Salen Dry Cargo A.B., 825 F.2d 709, 713-14 (2d Cir.1987)); Allstate Life Ins. Co., 994 F.2d at 999. In such cases, deference to the foreign court is appropriate so long as the foreign proceedings are procedurally fair and (consistent with the principles of Lord Mansfield's holding) do not contravene the laws or public policy of the United States." Cunard S.S. Co. Ltd. v. Salen Reefer Servs. AB, 773 F.2d 452, 457-59 (2d Cir.1985).

JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V., 412 F.3d 418, 424 (2d Cir. 2005).

[9] [10] Abstention comity, or "comity among courts," is concerned with which court should decide the parties' rights, and relatedly, whether a U.S. court should enforce a foreign bankruptcy court's order relating to

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the debtor's assets or the adjudication of a creditor's claims. Abstention comity aims to prevent an "end-run" around the foreign bankruptcy proceeding, see id. at 427; Oui Fin. LLC v. Dellar, No. 12 Civ. 7744(RA), 2013 WL 5568732, at *10 (S.D.N.Y. Oct. 9, 2013), by a creditor seeking to collect a claim against a foreign debtor through a U.S. court proceeding instead of through the foreign bankruptcy case. See JP Morgan, 412 F.3d at 427-29 (abstaining from deciding a collection action in favor of a Mexican bankruptcy proceeding to resolve claim despite New York forum selection and choice of law clauses in the loan agreement); Finanz AG Zurich v. Banco Economico S.A., 192 F.2d 240, 246-50 (2d Cir. 1999) (abstaining in an action brought by noteholder for payment from guarantor where guarantor was in a Brazilian bankruptcy proceeding); Allstate Life Ins. Co. v. Linter Grp. Ltd., 994 F.2d 996, 998-1000 (2d Cir.) (abstaining in securities actions brought by holders of indentures against an Austrian issuer subject to a Australian bankruptcy proceeding despite New York forum selection and choice of law provisions in the indenture agreement), cert. denied, 510 U.S. 945, 114 S.Ct. 386, 126 L.Ed.2d 334 (1993); Victrix S.S. Co., S.A. v. Salen Dry Cargo A.B., 825 F.2d 709, 713-15 (2d Cir. 1987) (vacating attachment obtained by creditor against a party in a Swedish bankruptcy proceeding, and explaining that the Court would "not aid [the creditor's] effort to evade the writ of the Swedish bankruptcy court"); Cunard S.S. Co. Ltd. v. Salen Reefer Servs. AB, 773 F.2d 452, 456-60 (2d Cir. 1985) (same); Oui Fin. LLC v. Dellar, 2013 WL 5568732, at *10-12 (abstaining in an action asserting breach of contract and fraud claims against a non-debtor guarantor based on a French debtor's failure to pay a promissory note because it was an "end-run" around the foreign bankruptcy proceeding); Ecoban Fin. Ltd. v. Grupo Acerero del Norte, S.A. de C.V., 108 F.Supp.2d 349, 351-54 (S.D.N.Y. 2000) (abstaining in an action to collect on past-due promissory notes against debtors in Mexican bankruptcy proceedings), aff'd, 2 Fed.Appx. 80 (2d Cir.), cert. denied, 534 U.S. 814, 122 S.Ct. 39, 151 L.Ed.2d 12 (2001).

SMP is not asking this Court to defer to the Korean Bankruptcy Court to decide *132 the validity of the termination notice, and confirmed during oral argument that it was not seeking abstention and wanted me to decide the issue. (9/28/17 Tr. at 64:8–11.) Furthermore, both this Court and the Korean Bankruptcy Court approved the Settlement Agreement under which SMP agreed to

bring its challenge to the Termination Notice in this Court or before arbitrators in accordance with the SLA, and SMP brought it here. Accordingly, there is no effort to make an "end-run" around the Korean Bankruptcy Proceeding. Nor is any party seeking to collect a claim. Although SunEdison did file a claim in the Korean Bankruptcy Proceeding, SMP has not contended that the claim resolution process will implicate the validity of the termination. Instead, SMP is asking the Court to grant comity to the Commencement Order, a subject to which I will return shortly.

[11] As noted, the other branch of comity concerns choice of law, or "comity among nations," and can limit the reach of domestic law to conduct occurring abroad. See Maxwell, 93 F.3d at 1047. SMP submits that it is not relying on comity as a principle to resolve the appropriate choice of law, (see Reply in Further Support of SMP Ltd.'s Cross Motion for Partial Summary Judgment, dated Sept. 5, 2017 ("SMP Reply"), at 6 n. 5 (ECF Doc. # 41)), and confirmed at oral argument that it did "not believe that this is a choice-of law-issue." (9/28/17 Tr. at 65:5.)

In fact, this is precisely what it is. SMP argues that the Court should grant comity to the Commencement Order by which it means give extraterritorial effect to all of the Korean insolvency law. It cites several cases in support of this proposition, but they are distinguishable. For example, in In re Daebo Int'l Shipping Co., 543 B.R. 47 (Bankr. S.D.N.Y. 2015), Daebo commenced a bankruptcy proceeding in Korea pursuant to the DRBA. The DRBA authorizes a Korean court to issue a stay order preventing creditors from executing against the debtor's assets or taking actions to collect their claims against the debtor. Id. at 49. The Korean bankruptcy court issued such an order in accordance with the DRBA that expressly stayed creditors from enforcing or executing on their rehabilitation claims pending the court's determination of Daebo's application to commence rehabilitation proceedings. Id. at 50.

Five Daebo creditors subsequently filed maritime attachment proceedings in Louisiana federal district court against a vessel, the TRADER, to obtain *quasi-in-rem* jurisdiction to litigate their unsecured claims against Daebo. *Id.* at 50–51. After the Louisiana federal district court declined to vacate the attachments, Daebo commenced a chapter 15 case in this district, and sought an order vacating the attachments. *Id.* at 52. The principle

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issue was whether Daebo owned or merely leased the TRADER. The TRADER was ostensibly leased to Daebo pursuant to a sale-and-leaseback transaction, but the attaching creditors argued that the transaction was a secured loan and Daebo was the true owner of the TRADER. *Id.* The parties stipulated that the Bankruptcy Court could decide the validity of the attachments. *Id.* They further stipulated or agreed that the Korean stay order barred any creditor from taking any action against Daebo's assets, that the Korean court had worldwide jurisdiction over Daebo's assets and its creditors' claims although the attaching creditors subsequently insisted that the stay order did not have effect outside of Korea, and that to the extent that the TRADER belonged to Daebo, the attachments should be vacated. *Id.* at 53.

The Bankruptcy Court concluded that the DRBA and the stay order were *133 "clear," the stay order had worldwide effect, and it was consistent with the purposes of chapter 15 to give them effect. Id. at 54. It noted that U.S. creditors could file claims in the Korean proceeding. Id. It next ruled that to the extent the attachments were directed at Daebo's property, they were barred by the stay order and the DRBA and should be lifted as a matter of comity. Id. at 55. Since the attaching creditors agreed that Daebo was the true owner of the TRADER, the attachments had to be vacated in light of the stay order. Id. Furthermore, it appeared to the Bankruptcy Court that the Korean court was essentially treating the transaction as a secured loan. Id. at 56. The Bankruptcy Court rejected the attaching creditors' other theories, and vacated the attachments. Id. at 59.

In *Daebo*, the Bankruptcy Court granted comity to a specific Korean stay order that prevented creditors from seizing the debtor's assets, and required them to file claims in the Korean proceeding to effect a payment. This result is entirely consistent with the principles underpinning abstention comity. Other cases cited by SMP in addition to those already noted similarly granted comity to the express orders of a foreign bankruptcy court that dealt with the claims administered in the foreign proceeding. *See In re Metcalfe & Mansfield Alt. Invs.*, 421 B.R. 685, 698–700 (Bankr. S.D.N.Y. 2010) (granting comity to an approved Canadian plan of reorganization that specifically provided for third-party non-debtor releases); *Barclays Bank PLC v. Kemsley*, 992 N.Y.S.2d 602, 609 (N.Y. Sup. Ct. 2014) (granting comity to U.K. debtor's

discharge order, which "by its terms, released [the debtor] from all of his debts").

In contrast, the Commencement Order appoints a custodian and sets schedules but does not contain any language that prevented SunEdison from terminating the SLA. SMP contends that the "silent" Commencement Order automatically sweeps in every aspect of Korean insolvency law, this Court must apply Korean insolvency law, including Korean common law, ¹⁵

Matthew Kaslow 900200-00050 | 8/3/2018 05:41:27

See Rim Declaration at ¶ 15 ("Unlike the United States Bankruptcy Code, [Korean bankruptcy law] does not have an express provision on the enforceability of a bankruptcy termination clause.").

and invalidate the Termination Notice because the Korean custodian wants to perform the SLA. This argument raises an interesting question. At oral argument, the Court asked SMP's counsel whether, if the situation were reversed, Korean law would preclude SunEdison from assuming the SLA if the Korean custodian wanted to terminate it. (9/28/17 Tr. at 62:11–17; 62:20–63:1.) Ultimately, SMP's counsel confirmed that notwithstanding U.S. bankruptcy and New York law, this Court should recognize the Korean custodian's right triggered by, but not mentioned in, the Commencement Order, to make the decision to perform or terminate the SLA granted under Korean law. (9/28/17 Tr. at 67:7–24.)

See Rim Declaration at ¶ 15 ("Unlike the United States Bankruptcy Code, [Korean bankruptcy law] does not have an express provision on the enforceability of a bankruptcy termination clause.").

SMP has not provided support for the remarkable proposition that SMP's Korean Bankruptcy Proceeding sweeps in the entirety of Korean insolvency law under principles of international comity, and trumps U.S. bankruptcy and state law. Daebo, which it cites for this proposition, (see SMP Reply at 6), did not so hold; it granted comity to the DRBA to the extent the DRBA authorized the issuance of the stay order. Moreover, the parties selected New York law to govern their contractual rights, and the application of Korean law ignores that choice and their presumed expectations. As the English High Court recently observed in a case involving similar

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facts and issues regarding the effect of Korean insolvency law on an *ipso facto* *134 clause valid under English law, while the parties "might have expected that a Korean court would apply Korean insolvency law to the insolvency of the Company, they might have been very surprised to find that an English court would apply Korean insolvency law to the substantive rights of the parties under a contract which they had agreed should be governed by English law." *In re Pan Ocean Co. Ltd* [2014] EWHC 2114 (Ch), at ¶ 112, 2014 WL 2807873 (2014). ¹⁶

The Westlaw report does not include the paragraph numbers that appear in the printed decision. The printed version of the opinion is annexed to the *Lee Declaration* as Exhibit I.

For the reasons stated, I decline in the exercise of discretion to grant comity to the Commencement Order to the extent advocated by SMP. Accordingly, GCL's motion for partial summary judgment is granted, and SMP's motion for partial summary judgment is denied. Settle order on notice.

All Citations

577 B.R. 120, 64 Bankr.Ct.Dec. 209

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In re Platinum Partners Value Arbitrage Fund L.P., 583 B.R. 803 (2018)

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583 B.R. 803 United States Bankruptcy Court, S.D. New York.

IN RE PLATINUM PARTNERS VALUE

ARBITRAGE FUND L.P. (In Official Liquidation), ¹ et al., Debtors in Foreign Proceedings.

The last four digits of the United States
Tax Identification Number, or similar foreign
identification number, as applicable, follow in
parentheses: Platinum Partners Value Arbitrage
Fund L.P. (in Official Liquidation) (1954); Platinum
Partners Value Arbitrage Fund (International) Ltd.
(in Official Liquidation) (2356); and Platinum
Partners Value Arbitrage Intermediate Fund Ltd.
(in Official Liquidation) (9530).

Case No. 16–12925 (SCC) (Jointly Administered) | | | Signed 04/17/2018

Synopsis

Background: Foreign representatives of debtors in Cayman Islands liquidation proceedings recognized under Chapter 15 as foreign main proceedings filed motion for order directing business that had provided audit services to funds to comply with subpoena to produce documents.

Holdings: The Bankruptcy Court, Shelley C. Chapman, J., held that:

[1] documents were "necessary" to foreign representatives' investigation of the funds' affairs, and

[2] arbitration provisions of engagement letter did not preclude foreign representatives from seeking prelitigation discovery of documents from auditor.

Motion granted.

West Headnotes (9)

[1] Bankruptcy

Cases Ancillary to Foreign Proceedings

Comity plays a significant role in cross-border insolvency proceedings.

Cases that cite this headnote

[2] Courts

Comity between courts of different countries

International Law

Public policy and comity in general

Comity, in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other, but it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.

Cases that cite this headnote

[3] Bankruptcy

Cases Ancillary to Foreign Proceedings

Chapter 15 provides courts with broad, flexible, and pragmatic rules to fashion relief that is largely discretionary and turns on subjective factors that embody principals of comity. 11 U.S.C.A. §§ 1507, 1509, 1519, 1521.

Cases that cite this headnote

[4] Bankruptcy

Cases Ancillary to Foreign Proceedings

One of the main purposes of Chapter 15 is to assist a foreign representative in the administration of the foreign estate, and Rule 2004 proceedings are one of the mechanisms by which bankruptcy courts provide such assistance. Fed. R. Bankr. P. 2004.

Cases that cite this headnote

[5] Bankruptcy

Compelling attendance

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The language of Rule 2004 is permissive and in the proper context the bankruptcy court may authorize the examination of third parties that possess knowledge of the debtor's acts, conduct, liabilities or financial condition which relate to the administration of the bankruptcy estate. Fed. R. Bankr. P. 2004.

Cases that cite this headnote

[6] Bankruptcy

- Cases Ancillary to Foreign Proceedings

Bankruptcy

Production of documents

Documents concerning investment funds that were debtors in Cayman Islands liquidation proceedings recognized under Chapter 15 as foreign main proceedings, which foreign representatives sought from business that had provided audit services to funds, were "necessary" to foreign representatives' investigation of the funds' affairs, within meaning of Chapter 15 provision enabling foreign representative to take broad discovery concerning property and affairs of foreign debtor; auditor was uniquely situated to provide information about the funds' financial affairs for the years leading up to the funds' liquidations, discovery sought in the subpoena was not impermissible under Cayman Islands law, and auditor made no showing that liquidators' discovery requests were unduly burdensome. 11 U.S.C.A. § 1521(a); Fed. R. Bankr. P. 2004.

1 Cases that cite this headnote

[7] Bankruptcy

Cases Ancillary to Foreign Proceedings
Chapter 15 provision allowing the court
to grant appropriate relief at the request
of foreign representative providing for
"information concerning the debtor's assets,
affairs, rights, obligations or liabilities"
enables a foreign representative to take broad
discovery concerning the property and affairs
of a debtor. 11 U.S.C.A. § 1521(a)(4).

Cases that cite this headnote

[8] Bankruptcy

Examination and Discovery

International Law

Public policy and comity in general

Foreign discovery laws should be considered for comity concerns, they are not determinative of whether discovery should be permitted under United States law.

Cases that cite this headnote

[9] Bankruptcy

Cases Ancillary to Foreign Proceedings

Bankruptcy

Production of documents

Foreign representatives of debtors in Cayman Islands liquidation proceedings recognized under Chapter 15 as foreign main proceedings were not precluded from seeking pre-litigation discovery of documents from business that had provided audit services to funds based on arbitration provisions of engagement letter, as there was no "dispute, controversy, or claim" at issue that fell within parameters of the arbitration clauses, rather, foreign representatives were only seeking information essential to an investigation of debtors' financial affairs and the identification of assets for the benefit of creditors. 11 U.S.C.A. § 1521; Fed. R. Bankr. P. 2004.

Cases that cite this headnote

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the Liquidators of the Platinum Partners Value Arbitrage Fund L.P. (in Official Liquidation)

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MEMORANDUM DECISION ON MOTION
OF THE FOREIGN REPRESENTATIVES OF
PLATINUM PARTNERS VENTURE ARBITRAGE
FUND (INTERNATIONAL) LIMITED FOR
AN ORDER COMPELLING COHNREZNICK
LLP TO COMPLY WITH A SUBPOENA
FOR PRODUCTION OF DOCUMENTS

SHELLEY C. CHAPMAN, UNITED STATES BANKRUPTCY JUDGE

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Before the Court is the motion (the "Motion") of Margot MacInnis and Nilani Perera (the "International Fund Liquidators"), the foreign representatives of Platinum Partners Venture Arbitrage Fund (International) Limited (in Official Liquidation) (the "International Fund"), for an order pursuant to 11 U.S.C. §§ 105(a), 542(e), and 1521(a) and Rule 2004 of the Federal Rules of Bankruptcy Procedure, directing CohnReznick LLP ("CohnReznick") to comply with a subpoena to produce documents served on August 31, 2017 (the "Subpoena"). Martin Nicholas John Trott and Christopher Barnett Kennedy (the "Master Fund Liquidators," and together with the International Fund Liquidators, the "Liquidators"), the duly appointed joint official liquidators and foreign representatives of Platinum Partners Value Arbitrage Fund L.P. (in Official Liquidation) (the "Master Fund") filed a Joinder to the Motion (the "Joinder"). CohnReznick filed a Memorandum of Law in Opposition to the Motion (the "Objection").

The International Fund Liquidators bring the Motion in order to obtain records concerning the International Fund, the Master Fund, and Platinum Partners Value Arbitrage Intermediate Fund Ltd. (the "Intermediate Fund" and collectively with the International Fund and the Master Fund, the "Funds") that are within the possession of CohnReznick, which provided audit services to the Funds for calendar years 2014 and 2015. CohnReznick objects to the Motion and argues that it need not comply with the Subpoena on the grounds that (i) the Subpoena seeks documents that the Liquidators would be unable to obtain under applicable Cayman law and (ii) the Subpoena impermissibly seeks "pre-suit discovery" concerning potential claims that would fall within the scope of the arbitration provisions in the engagement letters between CohnReznick and the Funds. Alternatively, if the Motion were granted, CohnReznick argues that the Subpoena is overly broad and should be narrowed substantially.

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For the reasons set forth below, the Court will grant the Motion and require CohnReznick to comply with the Subpoena.

I. BACKGROUND

A. The Platinum Funds

The Master Fund, a multi-strategy hedge fund that invests and trades in U.S. and non-U.S. financial instruments and other funds, assets, and holding companies, is a Cayman Islands exempted limited partnership. The Master Fund was established in or about 2003. By 2012, most of its assets were highly illiquid and it was unable to honor numerous redemption requests *806 from its investors in a timely manner. In August 2016, following its failure to honor numerous such requests, the Master Fund and its offshore feeder fund, the International Fund, were placed into liquidation by order of the Grand Court of the Cayman Islands (the "Grand Court"). ²

Each of the Funds is in liquidation pursuant to orders of the Grand Court (cause nos. FSD 131 of 2016 (AJJ) ("Master Fund Liquidation"), 118 of 2016 (AJJ) ("International Fund Liquidation,"), and FSD 30 of 2017 (AJJ) (the "Intermediate Fund Liquidation" and collectively with the Master Fund Liquidation and the International Fund Liquidation, the "Cayman Proceedings").

The relationships between the Funds are as follows. The Intermediate Fund, an exempted limited liability company incorporated in the Cayman Islands and a limited partner in the Master Fund, was to invest all of its investable capital in the Master Fund. The International Fund, an exempted limited company under the laws of the Cayman Islands, was to invest all of its capital in the Intermediate Fund. The International Fund offered participating shares to prospective investors; its stated investment objective was to achieve superior capital appreciation through its indirect investment in the Master Fund. As such, the financial position of the International Fund was dependent upon the performance of the Master Fund and, in turn, the value of the assets in which the Master Fund held interests. ³

See Kennedy Declaration in Support of Ch. 15 Petitions for Recognition as Foreign Main Proceedings [ECF No. 2] ¶ 17. Prior to the appointment of the Liquidators, the Funds were managed by Platinum Management (NY) LLC ("Platinum Management"), which is headquartered in New York. Platinum Management administered the Funds' operations and was responsible for managing, trading, investing, and allocating the Funds' assets. Platinum Management maintained records, correspondence, and other information pertaining to the Funds' operations and investments.

On December 14, 2016, shortly after the initiation of the Master Fund Liquidation and the International Fund Liquidation, a federal grand jury in the United States District Court for the Eastern District of New York indicted certain senior executives of Platinum Management on charges of conspiracy, securities fraud, investment advisor fraud, and wire fraud in connection with the operation of the Funds. See United States v. Nordlicht, et al., Cr. No. 16-640 (E.D.N.Y. Dec. 14, 2016). Five days later, the Securities and Exchange Commission (the "SEC") filed a civil complaint against Platinum Management and the indicted individuals seeking various forms of relief in connection with the alleged "multipronged fraudulent scheme." See Sec. & Exch. Comm'n v. Platinum Mgmt. (NY) LLC, et. al., Civ. No. 16-06848 (E.D.N.Y. Dec. 19, 2016) (the "SEC Action"). According to the complaint filed in the SEC Action, Mark Nordlicht and David Levy, the co-chief investment officers of Platinum Management, have asserted their Fifth Amendment rights against self-incrimination when questioned by the Litigation Trustee for Black Elk (a Master Fund investment) concerning Platinum related matters. 4

4 Compl. ¶¶ 182–85, SEC Action.

B. Procedural History

On October 18, 2016, Christopher Barnett Kennedy and Matthew James Wright, ⁵ in their capacity as duly appointed *807 joint liquidators, filed petitions in this Court for the recognition of the Master Fund Liquidation and the International Fund Liquidation in the Cayman Islands as foreign main proceedings under chapter 15 of title 11 of the United States Code (the "Bankruptcy Code"). Pursuant to the Order Directing Joint Administration of Debtors' Chapter 15 Cases entered by this Court on October 25, 2016, the chapter 15 cases of the Master Fund and the International

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Fund were consolidated for procedural purposes. There were no objections filed to the request for recognition. On November 22, 2016, this Court entered an order (the "Recognition Order") recognizing the Master Fund Liquidation and the International Fund Liquidation as foreign main proceedings under chapter 15 of the Bankruptcy Code.

Messrs. Christopher Barnett Kennedy and Matthew James Wright were originally appointed as the joint official liquidators of the Master Fund and the International Fund. In September 2017, Mr. Wright resigned and Mr. Martin Nicholas John Trott replaced him as the joint official liquidator of the Master Fund.

As a result of the Grand Court's determination on October 23, 2016 that the Master Fund and the International Fund should not have the same official liquidators, the Grand Court appointed Margot MacInnis and Nilani Perara as the joint official liquidators of the International Fund. The International Fund Liquidators are also joint official liquidators of the Intermediate Fund.

The Liquidators are officers of the Grand Court who are obligated under Cayman law to "collect, realise, and distribute" the Funds' assets, and they are empowered to investigate the "promotion, business, dealings and affairs" of the Funds, including the causes of their failure. In furtherance of this objective, the Recognition Order expressly authorizes the Liquidators to "examine witnesses, take evidence, and seek the production of documents within the territorial jurisdiction of the United States concerning the assets, affairs, rights, obligations or liabilities of the Funds, the Funds affiliates and the Funds' subsidiaries," including "upon written request, obtaining turnover of any and all documents ... that are property of, concern or were made or issued on behalf of the Funds"

- See Motion ¶ 3 (citing Declaration of Stephen Leontsinis in Support of Chapter 15 Petitions ¶¶ 37, 40 (citing Sections 102 and 110 of the Companies Law of the Cayman Islands)).
- 7 Recognition Order ¶ 7.

In August 2017, the International Fund Liquidators, in their capacity as the joint official liquidators of the Intermediate Fund, filed a chapter 15 petition in this Court with respect to the Intermediate Fund

Liquidation. ⁸ On September 7, 2017, this Court entered the Order Directing Joint Administration of Debtors' Chapter 15 Cases and, on October 12, 2017, this Court entered an order recognizing the Intermediate Fund Liquidation.

8 Case No. 17–12269, ECF No. 1.

C. The Funds' Relationship with CohnReznick

CohnReznick is a limited liability partnership engaged in the provision of accounting, assurance, tax, and business advisory services. The Funds engaged CohnReznick to provide audit services to the Funds for calendar years 2014 and 2015, the two years preceding the collapse of the Master Fund and the initiation of the Cayman Proceedings. The engagement letters between each Fund and CohnReznick (the "Engagement Letters") contain an arbitration clause which states, in relevant part, that:

Any dispute, controversy, or claim arising out of or relating to the services or the performance or breach of the Agreements (including disputes regarding the *808 validity or enforceability of this Agreement) or in any prior services or agreements between the parties shall be finally resolved by arbitration in accordance with the International Institute for Conflict Prevention and Resolution ("IICPR") Rules for Non-Administered Arbitrations ... Such arbitration shall be binding and final. In agreeing to arbitration, the parties acknowledge that in the event of any dispute (including a dispute over fees) the parties are giving up the right to have the dispute decided in a court of law before a judge or jury and instead the parties are accepting the use of arbitration for resolution. 9

The Engagement Letters are governed by New York law.

General Terms and Conditions, "Dispute Resolution," Cheifetz Declaration at Exs. 1–4.

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CohnReznick issued audit opinions on the Funds' financial statements for the year 2014, but it terminated its engagement with the Funds prior to completing an audit or issuing an audit opinion for the Funds' financial statements for the year 2015.

To assist in their investigation of the Funds, the International Fund Liquidators asked CohnReznick to make available its records concerning the Funds. The Master Fund Liquidators separately made an informal request for documents from CohnReznick. In response, CohnReznick produced copies of original documents that it maintained were the property of the Funds, but it did not provide other documents in its possession concerning the Funds, such as its audit work papers, engagement documents, communications, representations, invoices, and other relevant documents within its audit file.

Accordingly, on August 31, 2017, the International Fund Liquidators served the Subpoena upon CohnReznick, seeking, among other things, "[a]ll documents and communications concerning [CohnReznick's] engagement to perform and/or [its] performance of auditing, accounting, or other services for, on behalf of, or in relation to any Fund" and "[a]ll documents concerning the assets, liabilities, and other financial affairs of [any] Fund, whether provided by the Fund or obtained from other sources." ¹⁰ The Master Fund Liquidators did not file a separate subpoena; rather, the cover letter to the Subpoena indicated that the Master Fund Liquidators consented to the issuance of the Subpoena by the International Fund Liquidators.

Motion at Ex. 3 (Kennedy Declaration) at Ex. 1(Subpoena) at Annex A at pp. 6–7.

On October 2, 2017, CohnReznick served written objections to the Subpoena upon the International Fund Liquidators. The parties were unable to resolve the objections consensually. On December 14, 2017, counsel to the International Fund Liquidators filed a pre-motion letter with this Court, requesting a conference and, if necessary, leave to file a motion to compel CohnReznick to comply with the Subpoena (the "Gordon Letter"). On January 2, 2018, counsel to CohnReznick filed a letter in response to the Gordon Letter, expressing CohnReznick's objection to any further production under the Subpoena. After a brief conference with the Court, the parties agreed on a briefing schedule for a motion to compel.

On January 25, 2018, the International Fund Liquidators filed the Motion, together with the Declaration of Christopher Barnett Kennedy (the "Kennedy Declaration") and the Declaration of Jack Gordon in support of the Motion; the Master Fund Liquidators filed the Joinder, together with the Declaration of Warren E. Gluck in Support of the Joinder (the "Gluck Declaration"). *809 On February 16, 2018, CohnReznick filed the Objection, together with the Declaration of David M. Cheifetz (the "Cheifetz Declaration") and the Declaration of Rachael Reynolds (the "Reynolds Declaration") in support of the Objection. On March 2, 2018, (i) the International Fund Liquidators filed a Reply Memorandum of Law in Support of the Motion (the "Reply") and the Declaration of Mark A. Russell in Support of the Motion (the "Russell Declaration") and (ii) the Master Fund Liquidator filed a Reply in Support of the Motion (the "Master Fund Reply"). Oral argument on the Motion was held on April 5, 2018.

II. APPLICABLE LAW

A. Chapter 15 of the Bankruptcy Code

By commencing an ancillary case under chapter 15 and obtaining recognition of a foreign main proceeding, a foreign representative receives a "[r]ight of direct access" to courts in the United States, subject to any limitations that the court may impose consistent with the policy of chapter 15. 11 U.S.C. § 1509. 11 Section 1521(a) of the Bankruptcy Code provides that, upon recognition of a foreign main proceeding, a bankruptcy court may, "at the request of a foreign representative, grant any appropriate relief" ... "where necessary to effectuate the purpose of [chapter 15] and to protect the assets of the debtor or the interests of the creditors." 11 U.S.C. § 1521(a). Such relief includes "the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities;" and "granting any additional relief that may be available to a trustee, except for relief available under sections 522, 544, 545, 547, 548, 550, and 724(a)." 11 U.S.C. §§ 1521(a)(4) and (a)(7).

Specifically, once recognition is granted pursuant to section 1517 of the Bankruptcy Code, the foreign representative has the capacity to sue and be sued in a court in the United States. 11 U.S.C. § 1509(b)(1).

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However, the court's power to grant relief under section 1521 is not without restriction; section 1522(a) specifically states that relief under section 1519 or section 1521 may be granted "only if the interests of the creditors and other interested entities, including the debtor, are sufficiently protected." 11 U.S.C. § 1522(a). "The idea underlying [§ 1522] is that there should be a balance between relief that may be granted to the foreign representative and the interests of the persons that may be affected by such relief." In re Int'l Banking Corp. B.S.C., 439 B.R. 614, 626 (Bankr. S.D.N.Y. 2010) (citing GUIDE TO ENACTMENT OF THE UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY ¶ 161). Indeed, the plain text of section 1521 suggests that the court should exercise discretion and grant relief only when it is necessary and appropriate. See In re SPhinX Ltd., et al., No. 06–11760 (RDD) (Order Denying Ex Parte Motion of the Foreign Representatives for ... an Order Compelling the Production of Documents and Examination of Witnesses Pursuant to § 1521 of the Bankruptcy Code and Rule 2004 of the Federal Rules of Bankruptcy Procedure, dated May 14, 2007 (Ex. A, Tr. 6:23–7:1) (Cheifetz Declaration at Ex. 10).

[2] [3] Comity plays a significant role in crossborder insolvency proceedings. In re Cozumel Caribe S.A. de C.V., 482 B.R. 96, 114-15 (Bankr. S.D.N.Y. 2012). "'Comity,' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the *810 legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws." Hilton v. Guyot, 159 U.S. 113, 163-64, 16 S.Ct. 139, 40 L.Ed. 95 (1895). If recognition is granted, section 1507 of the Bankruptcy Code grants the bankruptcy court authority to "provide additional assistance to a foreign representative under this title or under other laws of the United States" provided that such assistance is "consistent with the principles of comity" and satisfies the fairness considerations set forth in subsection (b) thereof. 11 U.S.C. § 1507(a) and (b). Thus, chapter 15 provides courts with broad, flexible, and pragmatic rules to fashion relief that is "largely discretionary and turns on subjective factors that embody principals of comity." In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd., 389 B.R. 325, 333 (S.D.N.Y. 2008).

B. Other Provisions of the Bankruptcy Code and Rules Pertaining to Discovery

Foreign representatives in chapter 15 cases seeking courtordered discovery at times seek relief pursuant to section 542(e) of the Bankruptcy Code and/or Rule 2004 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), which are either directly applicable to chapter 15 cases or, in the alternative, delineate relief which can be granted by the court pursuant to section 1521(a)(4) or section 1521(a)(7).

Section 542(e) of the Bankruptcy Code provides, in pertinent part, that "[s]ubject to any applicable privilege, after notice and a hearing, the court may order an attorney, accountant, or other person that holds recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs, to turn over or disclose such recorded information to the trustee." 11 U.S.C. § 542(e). Courts have held that a foreign representative may seek disclosure pursuant to section 542(e). See In re AJW Offshore Ltd., 488 B.R. 551, 564 (Bankr. E.D.N.Y. 2013).

[4] Bankruptcy Rule 2004 authorizes a party in interest, such as a foreign representative, to subpoena documents relating "to the acts, conduct, or property or to the liabilities and financial condition of the debtor, or to any matter which may affect the administration of the debtor's estate" Fed. R. Bankr. P. 2004(a), 2004(b). Relief sought pursuant to Bankruptcy Rule 2004 may also be available pursuant to sections 1507, 1521(a)(4) or 1521(a)(7). " '[O]ne of the main purposes of chapter 15 is to assist a foreign representative in the administration of the foreign estate," and Rule 2004 proceedings are one of the mechanisms by which bankruptcy courts provide such assistance." Krys v. Paul, Weiss, Rifkind, Wharton & Garrison, LLP (In re China Med. Techs., Inc.), 539 B.R. 643, 649 (S.D.N.Y. 2015) (citing In re Millennium Glob. Emerging Credit Master Fund Ltd., 471 B.R. 342, 347 (Bankr. S.D.N.Y. 2012)); see also In re AJW Offshore Ltd., 488 B.R. at 564 (permitting discovery by a chapter 15 foreign representative under Rule 2004); In re Pro-Fit International Ltd., 391 B.R. 850, 860 (Bankr. C.D. Cal. 2008) (discovery under section 1521(a)(4) includes "the examination of witnesses pursuant to Rule 2004 and the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities.").

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[5] The language of Rule 2004 is permissive "and in the proper context the Court may authorize the examination of third parties that possess knowledge of the debtor's acts, conduct, liabilities or financial *811 condition which relate to the administration of the bankruptcy estate." In re Enron Corp., 281 B.R. 836, 840 (Bankr. S.D.N.Y. 2002) (citations omitted). However, a court's discretion is not unfettered. Courts have imposed limits on the use of Rule 2004 examinations; for instance, "once an adversary proceeding or contested matter is commenced, discovery should be pursued under the rules of [such adversary proceeding] and not by Rule 2004." Id. (citations omitted). This so-called "pending proceeding rule" reflects a concern that parties to a litigation could circumvent an adversary's rights by using Rule 2004 rather than obtaining discovery through the rules applicable to such other adversary proceeding. See In re Millennium Glob. Emerging Credit Master Fund Ltd., 471 B.R. at 347; In re Glitnir banki hf., No. 08-14757 (SMB), 2011 WL 3652764, at *4 (Bankr. S.D.N.Y. Aug. 19, 2011). However, those matters and entities that are not affected by an adversary proceeding should not be able to avoid examination under Rule 2004, even if it is likely that the entity seeking discovery will eventually sue the target. Id. at *4 n.11, *5 n.12 (citations omitted).

III. DISCUSSION

A. Chapter 15 of the Bankruptcy Code Authorizes the Court to Grant the Relief Sought in the Motion

[6] The Liquidators argue that the documents subpoenaed from CohnReznick are both relevant and necessary to their ongoing investigation of the Funds' affairs because, as the Funds' outside auditor, CohnReznick has a unique set of documents and analyses concerning the Funds' assets, liabilities, and financial affairs which would assist the Liquidators' investigation and understanding of the Funds' affairs for the two years immediately prior to the Funds' liquidations. ¹² As such, the relevance of the documents the Liquidators seek goes well beyond any claim that the Liquidators might ultimately pursue against CohnReznick. 13 In addition, the Liquidators argue that, because former executives of the Funds have asserted their Fifth Amendment rights, the Liquidators will be unable to obtain information about the conduct, assets, or financial condition of the Funds from such individuals and instead must depend almost entirely on third-party discovery for such information. 14

- Reply at 1–2; Joinder ¶ 41.
- Reply at 1.
- 14 Motion ¶ 26.

[7] The Liquidators assert that the documents they have requested under the Subpoena plainly concern "information concerning the debtor's assets, affairs, rights, obligations or liabilities" within the meaning of section 1521(a)(4) of the Bankruptcy Code, and pursuant to (i) paragraph 7 of the Recognition Order, (ii) section 1521(a)(4), and (iii) this Court's holding in Millennium Global and other relevant precedent, this Court is expressly authorized to grant the Liquidators the relief sought in the Motion. ¹⁵ "By its terms, this provision enables a [f]oreign [r]epresentative to take broad discovery concerning the property and affairs of a debtor." In re Millennium Global, 471 B.R. at 346. The Liquidators support their assertion that such relief under section 1521(a)(4) is routinely granted in chapter 15 cases with numerous examples. 16 Further, they argue *812 that the relief sought in the Motion also falls within the Court's powers to grant relief pursuant to section 1521(a)(7) of the Bankruptcy Code and Bankruptcy Rule 2004.

- 15 See generally Motion ¶ 30–41.
- See e.g., Gluck Declaration, Exs. C–E (attaching orders permitting foreign representative to seek discovery in Inre Transfield ER Cape Ltd. (BVI), No. 10–16270 (MG) (Bankr. S.D.N.Y. Jan. 13, 2011); In re Saad Invs. Fin. Co. (No. 5) Ltd., No. 09–13985 (KG) (Bankr. D. Del. August 14, 2014); In re ICP Strategic Credit Income Fund Ltd., et al., No. 13–12116 (REG) (Bankr. S.D.N.Y. November 14, 2013); and In re The International Banking Corporation B.S.C. (c), No. 09–17318 (SMB) (Bankr. S.D.N.Y. January 15, 2010 and December 30, 2015)).

CohnReznick does not dispute the significance of the documents the Liquidators seek or the Liquidators' authority to obtain documents pursuant to the terms of the Recognition Order. Instead, it asserts that the Subpoena is not "necessary" or "appropriate," pointing to the plain language in section 1521(a) which states that "appropriate relief" may be granted "where necessary to effectuate the purpose of [chapter 15]." ¹⁷ It argues that the Motion is inappropriate because the purpose of chapter 15 is to aid not only the debtor but all

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interested entities, and by providing the Liquidators with "an open door" to obtain all of CohnReznick's work papers not otherwise discoverable under Cayman law, its interests, as well as the interests of comity and parity, are not being protected. 18 Specifically, CohnReznick asserts that foreign representatives may not avail themselves of broader discovery rights than they allegedly would otherwise enjoy under the laws of their home forum. Simply put, CohnReznick asserts that Cayman law would not permit the Liquidators to obtain CohnReznick's work papers, and that therefore such relief should not be granted by this Court. CohnReznick also opposes the Motion on the grounds that the requested relief is unnecessary because (i) the Liquidators have not attempted to obtain discovery first in the Caymans and (ii) CohnReznick has already turned over a substantial number of documents. 19 CohnReznick urges the Court to exercise some degree of discretion in exercising its powers under section 1521(a).

- 17 11 U.S.C. § 1521(a).
- 18 Objection at 8.
- 19 See generally Objection at 5–13.

For the reasons discussed below, the Court finds that the relief sought in the Motion is necessary and appropriate under section 1521(a) of the Bankruptcy Code.

1. There Are No Grounds to Deny the Motion on the Basis of Comity

a. CohnReznick Has Not Demonstrated That the Discovery Sought in the Subpoena Is Impermissible Under Cayman Law

CohnReznick argues that the Court should deny the Motion because the Liquidators would not be permitted to obtain in the Cayman Islands the discovery sought in the Subpoena. As a result, CohnReznick posits that allowing the Liquidators to bypass Cayman law would be a "perversion of the comity concerns that underlie chapter 15 and would just invite forum shopping." ²⁰ In support of its argument, CohnReznick cites to the Reynolds Declaration, in which Ms. Reynolds states that, under Cayman law, insolvency representatives may not

obtain audit work papers or materials that are not the debtor's property. ²¹

- Objection at 6.
- See Objection at 6 ("As more fully set forth in the accompanying declaration of Rachael Reynolds ..., under Cayman law, insolvency representatives may not obtain audit workpapers or materials that are not the debtor's property." (citing to Reynolds Declaration ¶ 13–28)).

The Liquidators believe that this Court need not even address the issue of what a Cayman court would say about the discoverability *813 of the subpoenaed documents. Indeed, in oral argument, counsel for the Master Fund Liquidator argued quite emphatically that the question is irrelevant to this Court's chapter 15 analysis. While that may indeed be so, nonetheless, the Court will examine the question of Cayman law. Specifically, the Liquidators criticize CohnReznick's interpretation of Cayman law, arguing that CohnReznick has failed to introduce any evidence that the Cayman courts have affirmatively prohibited the discovery of evidence of the type sought here. At best, they say, the Reynolds Declaration supports the conclusion that Cayman law on this issue is, as the Liquidators characterize it, "unsettled." ²² The Court agrees.

22 See Reply at n.2 (citing Russell Declaration ¶ 11).

The Reynolds Declaration describes the relief which may be available under section 138 of the Companies Law of the Cayman Islands (2016 Revision) (the "Companies Law"). Section 138 states that a Cayman court may require any person that "has in his possession any property or documents to which the company appears to be entitled" to "deliver such property or documents to the official liquidator." 23 Reynolds states that the Liquidators "may ... try to rely" upon section 138(1)." 24 Ms. Reynolds concedes, however, that there is little judicial guidance from Cayman courts as to whether "audit working papers" constitute "property or documents to which the company appears to be entitled" as such term is used in section 138(1). Ms. Reynolds states that liquidators in the Cayman Islands currently cite to one case, China Milk Products Group Limited (In Liquidation), 25 in support of applications seeking production of audit work papers that allegedly contain information belonging to the debtor; however, the China

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Milk decision does not squarely support CohnReznick's position here.

- Reynolds Declaration ¶ 21.
- 24 See id. ¶¶ 20–21.
- 25 See Reynolds Declaration at Ex. 3 (China Milk Products Group Limited (In Liquidation) (FSD 83 of 2011 (AJJ), 20 May 2015).

In China Milk, the Cayman liquidators sought assistance from the Grand Court in obtaining discovery of audit work papers from the auditors who had previously been engaged by China Milk, the company in liquidation. While the parties had agreed that the audit work papers at issue were property of the auditors, the auditors acknowledged that information about the assets, liabilities, and transactions of China Milk could not be regarded as exclusively belonging to the auditor simply because the documents containing such information formed part of the audit work papers. The Grand Court permitted certain discovery sought by the China Milk liquidators, reasoning that

the official liquidators are not seeking to obtain information about audit programs and procedures in respect of which [the auditors] claim a proprietary interest. They are seeking information about China Milk's own assets and liabilities and, ... it is not disputed that [the auditor's] audit working papers and files are likely to include copies of documents and information extracted from China Milk's books and records. ²⁶

The Grand Court concluded that the liquidators were entitled to obtain audit work papers and files pursuant to section 138 of the Companies Law if such documents were found to contain information from the company's own books and records. ²⁷ The *814 court also noted that Hong Kong law, which governed the engagement letter ²⁸ between the debtor and the auditor, permitted such discovery.

26 Id. ¶ 16.

- 27 *Id.* ¶ 20.
- As previously noted, the CohnReznick Engagement Letters are governed by New York law, not Cayman law, a fact which CohnReznick elects to ignore in its arguments and observations concerning Cayman law.

Relying on the Reynolds Declaration, CohnReznick argues that, under Cayman law, insolvency representatives may not obtain audit work papers or materials that are not the debtor's property. ²⁹ The Reynolds Declaration makes clear, however, that Cayman courts "have not yet given any further guidance on precisely what will constitute 'documents containing information belonging to a company', which may be obtained under section 138, notwithstanding that the documents themselves form part of the 'audit working papers.' "30 Accordingly, because the Cayman courts have not clearly defined what portions of audit work papers constitute a debtor's property, any assertion that audit working papers are the sole property of an auditor under Cayman law and cannot be produced to a company's liquidator for that reason is simply unsupported.

- Objection at 6 (citing to Reynolds Declaration ¶ 13–28).
- Reynolds Declaration ¶ 25.

Additionally, although the Reynolds Declaration recognizes the Grand Court's ultimate holding in *China Milk*, Ms. Reynolds states that subsequent applications by liquidators for production of information pursuant to Cayman law (which have relied on the decision in *China Milk*) have proven unsuccessful. ³¹ While that may be true, she cites no authority to support such assertion and, more importantly, concedes that these applications have all been unsuccessful on other grounds. ³² CohnReznick also has not attempted to distinguish the facts in *China Milk* from the instant case by demonstrating that its audit work papers do not contain any information extracted from the Funds' books and records, which they undoubtedly do.

- 31 See id. ¶¶ 24–25.
- 32 *Id.* ¶ 25.

The Liquidators, in contrast, maintain that the Cayman courts have not yet fully addressed whether, in light

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of certain case law, audit work papers are available to liquidators pursuant to section 138 of the Companies Law, at least where the question of entitlement is governed by Cayman law. 33 In the Russell Declaration, submitted by the International Fund Liquidators in support of the Reply, Mr. Russell states that this question is unsettled under Cayman law. Mr. Russell cites to Singularis Holdings Ltd. v. PricewaterhouseCoopers, [2014] UKPC 36 ("Singularis"), a decision in which the Judicial Committee of the Privy Council denied an attempt by liquidators in a Cayman insolvency proceeding to obtain documents from the debtor's former auditor by way of a Bermuda recognition proceeding but nonetheless expressed doubt about whether information acquired in serving as a company's auditor would belong exclusively to such auditor simply because the auditor recorded such information in working papers which constitute its property. 34 Although in Singularis the Privy Council did not directly address the issue of whether audit working papers constitute "information belonging to a company," it nonetheless stated that

> *815 [the liquidators] have accepted before the Board that the information which they seek belongs to [its auditors] and was therefore properly excluded from the order made by the Grand Court of the Cayman Islands. Whether this was correct was not therefore a point argued before the Board. Nonetheless, the Board would not wish to part with this case without expressing their doubts about whether information which PwC acquired solely in their capacity as the company's auditors can be regarded as belonging exclusively to them simply because the documents in which they recorded that information are their working papers and as such their property. 35

- 33 See Reply at 4 n.2; Russell Declaration ¶ 11, 13.
- 34 See Russell Declaration ¶ 13 (citing Singularis ¶ 30).

35 See Reynolds Declaration at Ex. 9 (Singularis Holdings Ltd. v. PricewaterhouseCoopers, [2014] UKPC 36 ¶ 30).

After considering the evidence presented by the parties on the issue of whether audit work papers sought by liquidators are discoverable under the Companies Law—namely, the decision of the Grand Court in *China Milk*, the dictum of the Privy Council in *Singularis*, and the statements by the declarants here that there are no additional decisions by Cayman courts on the issue—the Court finds that it has not been provided with evidence sufficient to enable it to conclude that Cayman law prohibits the discovery sought in the Subpoena. Accordingly, the argument that comity prohibits granting the Motion fails.

b. Principles of Comity Support Granting the Motion

[8] Even assuming arguendo that the discovery of audit work papers in connection with the orderly wind-up of a company was clearly prohibited under Cayman law, which it is not, the scope of discovery available in the foreign jurisdiction is not a valid basis upon which this Court, in the exercise of its discretion, must limit relief available to the Liquidators pursuant to the Bankruptcy Code and Rules. Foreign law does not preclude the availability of additional relief under chapter 15, particularly when granting such relief does not run contrary to the public policy of the foreign jurisdiction. Although the boundaries of the international comity doctrine have been described as "amorphous" and "fuzzy," 36 it is well-established that comity does not require that the relief available in the United States be identical to the relief sought in the foreign bankruptcy proceeding; it is sufficient if the result is comparable and that the foreign laws are not repugnant to our laws and policies. 37 As the Supreme Court has aptly noted, "[a] foreign nation may limit discovery within its domain for reasons peculiar to its own legal practices, culture, or traditions-reasons that do not necessarily signal objection to aid from United States federal courts." 38

36 See In re Nat'l Bank of Anguilla (Private Banking Tr.) Ltd., 580 B.R. 64, 92 (Bankr. S.D.N.Y. 2018) (citing JP Morgan Chase Bank v. Altos Hornos de Mexico, 412 F.3d 418, 423 (2d Cir. 2005)).

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See In re Vitro S.A.B. de CV, 701 F.3d 1031, 1044 (5th Cir. 2012) (collecting cases); In re Rede Energia S.A., 515 B.R. 69, 91 (Bankr. S.D.N.Y. 2014); In re Metcalfe & Mansfield Alt. Invs., 421 B.R. 685, 697 (Bankr. S.D.N.Y. 2010).

38 Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 261, 124 S.Ct. 2466, 159 L.Ed.2d 355 (2004). CohnReznick relies heavily on the guidance of the Supreme Court in Intel, in which the Court stated that, in determining whether a discovery order should be granted pursuant to 28 U.S.C. § 1782, a district court should consider whether the discovery request "conceals an attempt to circumvent foreign proofgathering restrictions or other policies of a foreign country or the United States." Intel, 542 U.S. at 264-65, 124 S.Ct. 2466. While foreign discovery laws should be considered for comity concerns, they are not determinative of whether discovery should be permitted under U.S. law. Indeed, the Supreme Court specifically stated that "[b]eyond shielding material safeguarded by an applicable privilege, however, nothing in the text of § 1782 limits a district court's production-order authority to materials that could be discovered in the foreign jurisdiction if the materials were located there." Id. at 260, 124 S.Ct. 2466. The primary question is whether a foreign government would be offended by the assistance provided by the U.S. court. Id. at 261, 124 S.Ct. 2466.

> Although the Liquidators inconsistently reject and embrace the applicability of section 1782 in their pleadings, see Motion ¶ 42; Gordon Letter at 2, the Court accepts CohnReznick's arguments that section 1782 is analogous to seeking discovery assistance under section 1521 and that courts routinely read the discovery provisions of section 1521 (or former section 304) in concert with section 1782. See Objection at 10 (citing In re Barnet, 737 F.3d 238, 251 (2d Cir. 2013) (explaining that, in light of section 1782, Congress "may have intended to limit the relief provided by chapter 15"); In re Hughes, 281 B.R. 224, 230 (Bankr. S.D.N.Y. 2002) (noting that "when determining the scope of discovery permissible in a 304 proceeding, section 304 should be read together with [§ 1782]"); Hopewell, 258 B.R. at 586 (noting that "§ 1782 provides a further reason not to distort § 304 and use it as a discovery tool in aid of arbitration")).

*816 The Liquidators submit that CohnReznick has "fail[ed] to introduce any evidence, let alone 'authoritative proof,' that Cayman would be actively hostile to evidence obtained from an auditor under U.S. law, much less that Cayman has affirmatively prohibited such discovery." ³⁹

In support of this assertion, the Liquidators present unrebutted evidence that, far from being hostile to Cayman litigants seeking evidence under U.S. law, Cayman courts are in fact receptive to evidence obtained through U.S. discovery procedures, even if such evidence may not be discoverable under Cayman law. In Lyxor Asset Management S.A. v. Phoenix Meridian Equity Limited, the Cayman Islands Court of Appeal explicitly dismissed the notion that a plaintiff should be confined to the ordinary process of discovery permitted in the Grand Court where such right was conferred under a U.S. statute, 28 U.S.C. § 1782. 40 In addressing Lyxor's argument that [the Cayman litigant] should have been enjoined from seeking discovery from a non-party under U.S. law because it could have obtained the same information pursuant to Cayman law, the Lyxor court stated that

> [t]hat submission may or may not be well-founded but it misses the point.... The right to take pre-trial deposition testimony ... is a right conferred by U.S. law-it is not a right conferred by, or to be withheld under, Cayman law. The relevant question is not whether [the Cayman litigant] could achieve a similar result in the Cayman Islands but whether (if it could) it is acting oppressively or abusively in seeking to rely on the right which it enjoys under U.S. law. [The Cayman litigant] has taken the view that its interests are best served by seeking to obtain the information which it needs by taking oral depositions in New York ... rather than by proceeding by way of further and better particulars and interrogatories in the Grand Court It cannot be said that, in making that choice, it is acting oppressively or unconscionably or that its choice amounts to an abuse of the process of the Cayman Courts. 41

Reply at 5.

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40 See Russell Declaration at Ex. 1 (Lyxor Asset Management S.A. v. Phoenix Meridian Equity Limited, 2009 CILR 553).

41 *Id.* ¶¶ 57–58.

So too here. The decision in *Lyxor* demonstrates that Cayman courts take a permissive, and indeed, solicitous, view of a Cayman litigant's efforts to utilize U.S. discovery procedures when possible, so *817 long as such litigant is not acting oppressively or abusing the process of the Cayman courts. Indeed, it is worth noting that this Court and others in the United States routinely preside over Cayman-based chapter 15 cases in which these courts have occasion to observe the active contributions of Cayman jurists and practitioners to the development of international insolvency law and practice and their dedication to principles of comity.

Because Cayman law neither prohibits nor is hostile to the discovery sought here under U.S. law, principles of comity decisively weigh in favor of granting the Motion. The Liquidators argue persuasively that CohnReznick's interpretation of comity would reduce the role of this Court to that of "an avatar" for the foreign court presiding over the foreign main proceeding. 42 Further, requiring this Court to ensure compliance with foreign law prior to granting relief sought pursuant to chapter 15 would require the Court to engage in a full-blown analysis of foreign law each and every time a foreign representative seeks additional relief in the United States, which may result in differing interpretations of U.S. law depending on where the foreign main proceeding was pending. ⁴³ As the Liquidators correctly assert, this interpretation is contrary to the intent of the Model Law on which chapter 15 is based. 44

- 42 See Master Fund Reply ¶ 8.
- See id. ¶ 5. Citing In re Condor Ins. Ltd., 601 F.3d 319, 326–27 (5th Cir. 2010), CohnReznick asserts that assistance under chapter 15 "is not supposed to enlarge [a foreign representative's] powers" beyond the powers available in her home jurisdiction. Objection at 6. In Condor, the Fifth Circuit permitted a foreign representative to bring an avoidance action under the law of St. Kitts and Nevis, noting that, while section 1521(a)(7) of the Bankruptcy Code explicitly prohibits a foreign representative from bringing an avoidance action under chapter 5, section 1521 is

silent regarding avoidance proceedings that apply foreign law. *Id.* at 324. The Liquidators correctly point out that, while *Condor* holds that a U.S. court may grant relief available under foreign avoidance law, the decision did not opine on the inverse; *i.e.*, the *Condor* court did not hold that relief under chapter 15 is *limited* to the relief available under the law of the liquidator's home forum. *See* Reply at 6 n.5. Moreover, section 1521 is not silent as to the relief sought here. *See* Master Fund Reply ¶ 17.

44 See Master Fund Reply ¶ 5.

The Court is unpersuaded by CohnReznick's reliance on the decision in Singularis for the proposition that a U.S. court should not be able to compel the disclosure of documents which would not have been obtainable under Cayman law. In Singularis, as previously discussed, the Judicial Committee of the Privy Council found that the Bermuda court had no jurisdiction under common law to compel the disclosure of documents from the debtor's auditor. PwC. because such documents would not have been obtainable under the law of the Cayman Islands pursuant to where the winding-up was being carried out. 45 However, as CohnReznick admits, Singularis, which was an appeal from the Court of Appeal of Bermuda, is only authoritative and not technically binding on Cayman courts or on this Court. 46 Moreover, even assuming that Singularis were applicable here, its facts are distinguishable from the facts of this case, and the Court has serious reservations about its rationale. In Singularis, the Privy Council determined that Bermuda's law with respect to discovery pertained only to a Bermuda windup proceeding, and Singularis was a Cayman company in a Cayman liquidation proceeding. Further, finding that the Bermuda *818 court had (i) no power to wind up a non-Bermudan registered company and (ii) no jurisdiction to conduct an ancillary liquidation, the Privy Council concluded that the Bermuda court had no statutory jurisdiction and instead, turned to the court's authority under common law. Here, in stark contrast, section 1521 specifically provides this Court with the authority to order the discovery sought by the Liquidators.

- 45 See Reynolds Declaration ¶¶ 33–36.
- 46 See Reynolds Declaration ¶ 35.

For all of the foregoing reasons, the Court concludes that application of section 1521 of the Bankruptcy Code to

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grant the Motion does not offend widely accepted notions comity.

2. CohnReznick's Additional Arguments Are Unavailing

CohnReznick advances a number of additional arguments, all of which are unavailing. First, CohnReznick also argues that the Subpoena is inappropriate because the Liquidators have not attempted to seek discovery in the Caymans from CohnReznick Cayman, which has access to the same working documents. 47 In support of its assertion, CohnReznick cites to In re Bd. of Dirs. of Hopewell, 258 B.R. 580, 586 (Bankr. S.D.N.Y. 2001) in which this court denied a motion for discovery under former section 304 (the predecessor to chapter 15) in part because the foreign representative had not sought the assistance of the foreign court. 48 Hopewell is factually distinguishable from this case; in denying the motion therein, the court found that "[t]he relief Hopewell seeks is particularly inappropriate as it involves an arbitration, which is supposed to take place with a minimum of court supervision and interference ..." 49 As there is no pending arbitration or proceeding in this case (as discussed infra), Hopewell is inapposite and does not support CohnReznick's position.

- 47 See Objection at 5–6.
- See Objection at 7–8, 9.
- 49 Hopewell, 258 B.R. at 585.

In fact, CohnReznick readily acknowledges that there is no absolute rule that the Liquidators must exhaust their rights in the Cayman Islands before seeking relief in this Court. ⁵⁰ The Court agrees and declines to impose such a requirement on the Liquidators. Moreover, the Court observes that this argument is inconsistent with CohnReznick's comity argument. CohnReznick cannot, on the one hand, object to discovery under U.S. laws by arguing that the Liquidators should have first sought discovery in the Caymans, and on the other hand, argue that such relief would not be permissible under Cayman law.

50 See Objection at 7.

CohnReznick further contends that the Subpoena is unnecessary since it has already turned over a thousand electronic files amounting to nearly one gigabyte of information and the Liquidators have made no showing or suggestion that they are missing any records. 51 CohnReznick's arguments are unconvincing for a number of reasons. First, CohnReznick does not cite to any statute or legal authority that suggests that a foreign representative must demonstrate that it is missing any records before seeking discovery of such information. It also defies logic that the Liquidators would trouble themselves to the lengths they already have in order to seek documents already in their possession. Indeed, the purpose of discovery is to determine what information about the debtor is missing or known. As the Debtors' auditor, CohnReznick is uniquely situated *819 to provide information about the Funds' financial affairs in the years leading up to the Funds' liquidation; this is not the type of "broad fishing expedition" denied by the court in SPhinX Ltd. And, as discussed infra, CohnReznick has made no showing that the Liquidators' discovery requests are unduly burdensome, particularly since CohnReznick only served as auditor for the Funds for two years. Accordingly, the Court finds it irrelevant that CohnReznick has already surrendered a number of documents to the Liquidators and declines to place any additional burden on the Liquidators to demonstrate missing records from such delivered documents.

51 See Objection at 8.

B. The Arbitration Provisions of the Engagement Letter Are Not Binding Because There Is No "Dispute, Controversy, or Claim" at Issue

[9] CohnReznick argues that the Funds are precluded from seeking pre-litigation discovery pursuant to the Bankruptcy Code or Bankruptcy Rule 2004 because the parties are contractually bound by the arbitration clause in the Engagement Letters, which broadly applies to "[a]ny dispute, controversy, or claim" arising out of or related to the rendering of CohnReznick's services and such clause requires that such dispute, controversy, or claim be finally resolved by arbitration and not by a court of law. ⁵²

52 See General Terms and Conditions, "Dispute Resolution," Cheifetz Declaration at Exs. 1–4.

CohnReznick argues that the language in the relevant arbitration clauses is broad enough to encompass the discovery disputes between the Liquidators and

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CohnReznick, as such disputes can be considered a "dispute, controversy, or claim arising out of or related to the services or the performance or breach of [the Engagement Letters]." 53 CohnReznick maintains that "questions about the existence of such disputes, controversies, or claims must be decided 'with a healthy regard for the federal policy favoring arbitration.' "54 Moreover, if the Court permits the Liquidators to conduct pre-suit discovery, and the Liquidators ultimately commence arbitration proceedings against CohnReznick, CohnReznick asserts that it will have lost its bargained-for right to have all disputes-including discovery disputesdecided and finally resolved by arbitration. Additionally, CohnReznick alleges that the "true purpose" of the Liquidators' discovery requests is to search for "something CohnReznick did wrong to support a claim against it," including but not limited to breach of contract and/or negligence claims, and such non-core state law claims would be covered by the arbitration clauses in the Engagement Letters. 55 For these reasons, CohnReznick submits that this Court should preclude any discovery that relates to the investigation of potential pre-petition state law claims against CohnReznick because the Court must give effect to the relevant arbitration clauses in the Engagement Letters. 56

- 53 See Objection at 17 (citing Cheifetz Declaration).
- See Objection at 17 (citing Mitsubishi Motors Corp. v.
 Soler Chrysler–Plymouth, Inc., 473 U.S. 614, 626, 105
 S.Ct. 3346, 87 L.Ed.2d 444 (1985)).
- Objection at 18.
- 56 See id. at 16–17.

In further support of its argument, CohnReznick relies on *In re Daisytek, Inc.*, 323 B.R. 180 (N.D. Tex. 2005), in which the United States District Court for the Northern District of Texas considered on appeal whether a pre-insolvency arbitration *820 agreement superseded bankruptcy-related discovery sought by a creditors' trust during the pendency of a bankruptcy case for the purpose of investigating potential claims. In *Daisytek*, the creditors' trust sought to conduct a Rule 2004 examination of the debtors' former accountants, and, like CohnReznick, the accountants argued that the arbitration clauses under the relevant engagement letters prevented the trust from seeking court-ordered discovery. ⁵⁷ The court held that the discovery fell within

the bounds of the arbitration clause if the potential claims arising from the discovery would be subject to arbitration. 58 Vacating the Bankruptcy Court's order authorizing the Rule 2004 examination, ⁵⁹ the court stated that "[t]he proper focus is on the underlying nature of the proceedings that could flow from the information obtained through the Rule 2004 examination," 60 and remanded the matter to the Bankruptcy Court, directing it to determine the extent to which the proceedings the trust intended to initiate derived exclusively from the provisions of the Bankruptcy Code. The court held that "[i]f the court determines that a proceeding does not derive exclusively from the Code, the court has no choice but to abstain and allow the parties to arbitrate the matter." 61 If, however, the Bankruptcy Court determined that such proceeding derived exclusively from the Code, the Bankruptcy Court would have discretion to refuse to enforce the applicable arbitration agreement if arbitration would conflict with the purposes of the Code. 62 CohnReznick submits that the holding in Daisytek supports its argument that, because the Liquidators seek discovery in order investigate potential pre-petition state law claims against CohnReznick, such proceedings are non-core, state law claims that fall under the arbitration clauses in the Engagement Letters.

- 57 323 B.R. at 185–86.
- 58 Id. at 186 (citing In re Nat'l Gypsum Co., 118 F.3d 1056, 1067 (5th Cir. 1997) ("[W]e believe that nonenforcement of an otherwise applicable arbitration provision turns on the underlying nature of the proceeding, i.e., whether the proceeding derives exclusively from the provisions of the Bankruptcy Code and, if so, whether arbitration of the proceeding would conflict with the purposes of the Code.")).
- 59 *Id.* at 188.
- 60 *Id.* at 187.
- 61 *Id.* at 186–87 (citations omitted).
- 62 *Id.* at 187 (citations omitted).

The Liquidators submit that the arbitration provisions under the Engagement Letters are irrelevant because the Liquidators have not asserted any claim against CohnReznick at this time; they are merely seeking information "essential to an investigation of the company's affairs and the identification of assets for the

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benefit of creditors." ⁶³ They argue that, in the absence of a pending proceeding, CohnReznick has no contractual right to limit the relief available to the Liquidators under the Bankruptcy Code. ⁶⁴ In fact, they emphasize that, were the Motion to be denied on the basis that the relevant arbitration clauses govern the instant discovery dispute, this would eviscerate the pending proceeding rule and undermine the fundamental purposes of section 1521(a) (4) and Bankruptcy Rule 2004. As counsel stated *821 at the hearing on the Motion, chapter 15 proceedings cannot be held hostage by an arbitration clause when there is no dispute pending.

63 Motion ¶ 8.

64 See Reply at 8–11. The Liquidators also argue that the decision in Daisytek was wrongly decided and point to three subsequent decisions that have rejected its finding. See Reply at 11–14 (citing In re Millennium Lab Holdings II, LLC, 562 B.R. 614, 631 (Bankr. D. Del. 2016); In re Friedman's, Inc., 356 B.R. 779, 783 (Bankr. S.D. Ga. 2005); In re New Century TRS Holdings, Inc. 407 B.R. 558, 571 (Bankr. D. Del. 2009)

The Court agrees. One of the significant objectives of chapter 15 is to provide judicial assistance to foreign representatives in gathering information which will enable them to comply with their duties. It would be at cross purposes with this objective, in the context of a foreign representative's application seeking discovery pursuant to section 1521, to interpret an arbitration clause so broadly that it eliminates this right.

Inasmuch as CohnReznick relies on the holding in Daisytek in support of its position, the Court concludes that the holding in Daisytek does not dictate a different result. Here, the relief sought under Motion derives exclusively from the provisions of the Bankruptcy Code. The discovery sought by the Liquidators from CohnReznick clearly falls within the scope of relief set forth in sections 542(e), 1521(a)(4), and 1521(a)(7) of the Bankruptcy Code and Bankruptcy Rule 2004. Although the holding in Daisytek can be interpreted broadly, the court's decision was predicated on the fact that the Bankruptcy Court did not consider the underlying nature of the proceedings in its decision to overrule the auditor's objection of Rule 2004 examination. 65 Here, the Court has considered the underlying nature of the proceedings before it, and it concludes that the Liquidators' discovery requests are derived from the Bankruptcy Code and Rules, and, accordingly, this Court has discretion to decline to apply the arbitration clauses at this time.

65 Daisytek, 323 B.R. at 188.

The instant discovery dispute is neither a pending proceeding nor a "dispute, claim, or controversy" that falls within the parameters of the arbitration clauses in the Engagement Letters. 66 The Liquidators have continuously stated that their main purpose in issuing the Subpoena was to obtain information from CohnReznick about the Funds. It is well recognized that the information and knowledge which an auditor is likely to have regarding a debtor for which the auditor worked is essential to the investigation of such debtor's financial affairs. 67 Here, as argued by counsel for the Master Fund Liquidators at oral argument on the Motion, the notion that the Liquidators, who must manage the affairs of the Funds whose assets were largely U.S.-based and held by U.S. subsidiaries, do not have the power to seek relief under U.S. law, cannot be countenanced. Moreover, the need for discovery in this case is particularly acute given the anticipated lack of cooperation by the Funds' executives and the alleged criminal fraud with respect to the Funds.

- As explicitly stated by the court in *Daisytek*, a "proceeding" is more than a discovery device, "it is a procedural mechanism that enables one to obtain some form of remedy or other relief." *Id.* at 187. Furthermore, the "pending proceeding rule" does not bar relief for potential litigation. *See In re Glitnir*, 2011 WL 3652764, at *5 & n.12 ("That the Foreign Representative may eventually litigate with the same defendants, here or in Iceland, does not call for a different conclusion. In analogous circumstances, a bankruptcy trustee is free to use Rule 2004 to obtain evidence against a target even though it is likely that the trustee will eventually sue the target.").
- 67 See In re Hughes, 281 B.R. at 229 ("The issues concerning the insolvency of [the debtor], and when [the debtor] became insolvent requires the Joint Liquidators to understand as much as possible about the financial affairs of [the debtor]. The information and knowledge which the [auditor's] employees are likely to have is essential to this investigation.").

Accordingly, the Court determines that the arbitration clauses under the Engagement *822 Letters do not

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limit the relief available to the Liquidators under the Bankruptcy Code and Rules with respect to the Subpoena.

that the Subpoena is overly broad and should be narrowed, are hereby overruled.

IT IS SO ORDERED.

IV. CONCLUSION

For all of the foregoing reasons, the Motion is granted. Any other arguments made and not specifically addressed in this Decision, including but not limited to the argument

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UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 15th day of May, two thousand and eighteen.

Before: Ralph K. Winter,

Christopher F. Droney, *Circuit Judges*, Alvin K. Hellerstein,

District Judge.*

IN RE: TRIBUNE COMPANY FRAUDULENT CONVEYANCE LITIGATION

ORDER

Docket No. 13-3992(L)

13-3875(XAP)

13-4178(XAP)

13-4196(XAP)

NOTE HOLDERS, Deutsche Bank Trust Company Americas, Law Debenture Trust Company of New York, Wilmington Trust Company, INDIVIDUAL RETIREES, William A. Niese, on behalf of a putative class of Tribune Company retirees,

Plaintiff - Appellant-Cross-Appellees,

Mark S. Kirschner, as Litigation Trustee for the Tribune Litigation Trust,

Plaintiff,

Tendering Phones Holders, Citadel Equity Fund Ltd., Camden Asset Management LLP and certain of their affiliates.

Plaintiff-Intervenors,

v.

Large Private Beneficial Owners, Financial Institution Holders,

CERTIFIED COPY ISSUED ON 05/15/2018

^{*}The Honorable Alvin K. Hellerstein, of the United States District Court for the Southern District of New York, sitting by designation.

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Financial Institution Conduits, Merrill Lynch, Pierce, Fenner & Smith, Inc., on behalf of a putative class of former Tribune Company shareholders, Pension Funds, including public, private, and Taft Hartlet Funds, Individual Beneficial Owners, Mario J. Gabelli, on behalf of a putative class of former Tribune Company shareholders, Mutual Funds, At-Large, Estate of Karen Babcock, Phillip S. Babcock, Phillip S. Babcock, Douglas Babcock, Defendants listed on Exhibit B,

Defendants - Appellee-Cross-Appellants,

Current and Former Directors and Officers, Betsy D. Holden, Christopher Reyes, Dudley S. Taft, Enrique Hernandez, Jr., Miles D. White, Robert S. Morrison, William A. Osborn, Harry Amsden, Stephen D. Carver, Dennis J. FitzSimons, Robert Gremillion, Donald C. Grenesko, David Dean Hiller, Timothy J. Landon, Thomas D. Leach, Luis E. Le, Mark Hianik, Irving Quimby, Crane Kenney, Chandler Bigelow, Daniel Kazan, Timothy Knight, Thomas Finke, SAM ZELL AND AFFILIATED ENTITIES, EGI-TRB, LLC, Equity Group Investments, LLC, SAM Investment Trust, Samuel Zell, Tower CH, LLC, Tower DC, LLC, Tower Dl, LLC, Tower EH, LLC, Tower Gr, Large Shareholders, Chandler Trust and their representatives, FINANCIAL ADVISORS, Valuation Research Corporation, Duff & Phelps, LLC, Morgan Stanley & Co. Inc. and Morgan Stanley Capital Services, Inc., GreatBanc Trust Company, Citigroup Global Markets, Inc., CA PUBLIC EMPLOYEE RETIREMENT SYSTEM, CALPERS, UNIVERSITY OF CA REGENTS, T. ROWE PRICE ASSOCIATES, INC., MORGAN KEEGAN & COMPANY, INC., NTCA, DIOCESE OF TRENTON-PENSION FUND, FIRST ENERGY SERVICE COMPANY, MARYLAND STATE RETIREMENT AND PENSION SYSTEM, T BANK LCV QP, T BANK-LCV- PT, JAPAN POST INSURANCE, CO., LTD., SERVANTS OF RELIEF FOR INCURABLE CANCER (AKA DOMINICAN SISTERS OF HAWTHORNE), NEW LIFE INTERNATIONAL, NEW LIFE INTERNATIONAL TRUST, SALVATION ARMY, SOUTHERN TERRITORIAL HEADQUARTERS, CITY OF PHILADELPHIA EMPLOYEES, OHIO CARPENTERS' MIDCAP (AKA OHIO

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CARPENTARS' PENSION FUND), TILDEN H. EDWARDS, JR., MALLOY AND EVANS, INC., BEDFORD OAK PARTNERS, LP, DUFF AND PHELPS LLC, DURHAM J. MONSMA, CERTAIN TAG-ALONG DEFENDANTS, MICHAEL S. MEADOWS, WIRTZ CORPORATION,

Defendants.

IT IS HEREBY ORDERED that the mandate in this case is recalled in anticipation of further panel review.

For the Court:

Catherine O'Hagan Wolfe, Clerk of Court

pouleofe

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Catherine O'Hagan Wolfe Cle

United States Court of Appeals, Second Circuit

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Cite as: 584 U.S.____(2018)

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Statement of KENNEDY, J. and THOMAS, J.

SUPREME COURT OF THE UNITED STATES

DEUTSCHE BANK TRUST COMPANY AMERICAS, ET AL. v. ROBERT R. MCCORMICK FOUNDATION, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 16-317. Decided April 3, 2018

Statement of JUSTICE KENNEDY and JUSTICE THOMAS respecting the petition for certiorari.

The parties are advised that consideration of the petition for certiorari will be deferred for an additional period of time. This will allow the Court of Appeals or the District Court to consider whether to recall the mandate, entertain a Federal Rule of Civil Procedure 60(b) motion to vacate the earlier judgment, or provide any other available relief in light of this Court's decision in *Merit Management Group, LP v. FTI Consulting, Inc.*, 583 U. S. ___ (2018). The petition for certiorari in this case was pending when the Court decided *Merit Management*. The Court of Appeals or the District Court could decide whether relief from judgment is appropriate given the possibility that there might not be a quorum in this Court. See 28 U. S. C. §2109.

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UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

IN RE: TRIBUNE COMPANY FRAUDULENT CONVEYANCE LITIGATION

Nos. 13-3992-cv(L), 13-3875 (XAP), 13-4178 (XAP), 13-4196 (XAP)

PLAINTIFFS-APPELLANTS-CROSS-APPELLEES'
REPLY IN SUPPORT OF MOTION TO RECALL MANDATE

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This Court should recall its mandate, vacate its decision of March 29, 2016, in its entirety, and remand this case to the district court for further proceedings consistent with *Merit Management Group, LP* v. *FTI Consulting, Inc.*, 138 S. Ct. 883 (2018).

Defendants do not seriously dispute that recall is appropriate here. Every factor considered by this Court weighs in favor of it. See generally *Sargent* v. *Columbia Forest Prods., Inc.*, 75 F.3d 86, 90 (2d Cir. 1996); Mot. 5-9. Defendants are constrained to concede (at 16) that *Merit Management* "forecloses" a central element of this Court's decision: that Section 546(e) reaches *every* defendant in this case. This Court held that it "clearly" does because all the transfers at issue were made through financial intermediaries. *In re Tribune Co. Fraudulent Conveyance Litig.*, 818 F.3d 98, 112, 120 (2d Cir. 2016). But that is precisely the holding rejected by *Merit Management*, leaving the two decisions "unquestionably at odds." *Sargent*, 75 F.3d at 90. Defendants note (at 2) that recall is an "extraordinary request," but barely acknowledge the extraordinary circumstance that prompted our motion: a statement by two Justices *expressly asking* this Court to consider "available relief in light of" *Merit Management*. See Mot. App.¹

¹ Defendants misstate (at 8) the operation of 28 U.S.C. § 2109. While Justices Kennedy and Thomas noted that "there might not be a quorum" to address this case right now, Section 2109 requires affirmance only after "a majority of the qualified justices" actually conclude "that the case cannot be heard and determined

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Defendants' Opposition is, instead, a rearguard battle to rehabilitate this Court's decision on different grounds. But the arguments they advance already have been rejected, are equally undermined by *Merit Management*, or are new and plainly fact bound. Each is best addressed in the first instance (if at all) by the district court.

I. STATE-LAW FRAUDULENT-CONVEYANCE CLAIMS ARE NOT PROPERTY OF THE ESTATE THAT MUST "REVERT" TO CREDITORS—AND THIS COURT DID NOT HOLD OTHERWISE

Defendants' lead argument attempts to avoid *Merit Management* altogether. According to Defendants, Plaintiffs' state-law fraudulent-conveyance claims "were vested exclusively in the bankruptcy trustee and they never reverted to plaintiffs." Opp. 9. Thus, they say, Plaintiffs could bring those state-law claims only if the district court had dismissed the bankruptcy case, which it didn't do. But Defendants *lost* that argument in the district court, which held that "creditors' avoidance claims are not property of the estate" in the first place. *In re Tribune Co. Fraudulent Conveyance Litig.*, 499 B.R. 310, 322 & n.12 (S.D.N.Y. 2013). And, contrary to their suggestions here (at 9), Defendants did not win their "reverter" argument on appeal, either. Rather, this Court stated that it "need not

at the next ensuing term"—not "the end of the current Term" (Opp. 8), as Defendants claim.

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resolve either the 'property' or the reversion issues." *Tribune*, 818 F.3d at 117; see also *id*. at 118 (stating that the reverter issue was "unclear").²

What is more, Defendants argued that, "[i]f the avoidance claims reached Appellants at all, they did so still limited by section 546(e)." Dkt. 143 at 23. That argument, of course, assumed that Section 546(e) protected *all* transfers in which financial institutions acted as conduits. But *Merit Management* overruled that understanding. Thus, even if Defendants' argument were correct, endorsement of it by this Court would not end the case: The district court would *still* need to determine whether Section 546(e) reaches each of the approximately 3,300 differently situated defendants in this case in light of *Merit Management*. See *infra* Part III.

In any event, Defendants' "reverter" argument mischaracterizes our position and is divorced from the Bankruptcy Code's text. Our argument is *not*, as Defendants suggest, that the state-law fraudulent-conveyance claims have "reverted" to creditors. Rather, such claims never became property of the estate to begin with.

The bankruptcy estate comprises "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1).

² Indeed, there would have been no reason for this Court to hold that Section 546(e) preempted Plaintiffs' fraudulent-conveyance claims if they didn't otherwise possess such claims.

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And a state-law fraudulent-transfer claim is *not* property of the debtor. See Dkt. 219 at 18-33. Rather, "fraudulent transfer claims have long belonged to a transferor's *creditors*." *In re Cybergenics Corp.*, 226 F.3d 237, 241 (3d Cir. 2000).³ Indeed, in *In re Colonial Realty Co.*, 980 F.2d 125 (2d Cir. 1992), this Court held that fraudulently transferred property is not property of the estate until it is recovered—and that an avoidance action itself is not "an 'act to obtain possession of property of the estate." *Id.* at 131-132 (quoting 11 U.S.C. § 362(a)(3)).⁴ Because fraudulent-conveyance claims are not property of the estate to begin with, they need not "revert" to creditors before creditors can bring such claims.

Defendants nevertheless assert that "the text of today's Code" supports their "reverter" argument. Opp. 11. Yet Defendants do not cite Section 541(a)'s definition of property of the estate. Indeed, they do not cite *any* "text of today's Code." Rather, they rely on two Supreme Court cases from "[o]ne hundred forty years ago" (Opp. 10)—*Glenny* v. *Langdon*, 98 U.S. 20 (1878), and *Trimble* v. *Woodhead*, 102 U.S. 647 (1880). But those cases relied on a provision of the

³ See also 5 COLLIER ON BANKRUPTCY ¶ 541.07, n.1 (16th ed. 2018) (the "correct" reading of Section 541(a) is that "fraudulent transfer claims arising out of a leveraged buyout [a]re not" property of the estate).

⁴ It is telling that defendants rely (at 11) on *In re MortgageAmerica Corp.*, 714 F.2d 1266, 1275 (5th Cir. 1983). This Court expressly rejected *MortgageAmerica*'s reasoning in *Colonial Realty*, 980 F.2d at 131.

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Bankruptcy Act of 1867 that vested fraudulently conveyed property in the trustee—a provision Congress *deleted* when it enacted the Bankruptcy Code of 1978. See Dkt. 219 at 29-30. Text from the Bankruptcy Act that has been *repealed* by the Code plainly is not the "text of today's Code" (Opp. 11).

II. MERIT MANAGEMENT FATALLY UNDERMINES THIS COURT'S UNDERSTANDING OF THE PURPOSES AND PREEMPTIVE FORCE OF SECTION 546(e)

Defendants next assert (at 13-16) that nothing about *Merit Management* undermines this Court's preemption analysis. But ever since *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941), the question at the heart of any implied-preemption case has been whether a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Accord *Tribune*, 818 F.3d at 110; *Marentette* v. *Abbott Labs., Inc.*, 886 F.3d 112, 117 (2d Cir. 2018). It thus follows ineluctably that a court's erroneous perception of the "purposes and objectives of Congress" in enacting the allegedly preemptive federal statute will profoundly affect the analysis of implied preemption.

We showed in the Motion (at 10-12) that the Supreme Court in *Merit Management* determined the purposes and objectives of Congress underlying Section 546(e) to be very different than did this Court. See *Merit Management*, 138 S. Ct. at 896-97. *Defendants have no response*. They simply repeat this Court's interpretation of Congress's purposes, as if it remained self-evidently

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correct even now. Opp. 5-6, 13. Indeed, they go so far as to quote (at 6) this Court's comment that it "perceive[d] no conflict between Section 546(e)'s language and its purpose" (*Tribune*, 818 F.3d at 120)—even though the Supreme Court *rejected* this Court's interpretation of such language. Any serious analysis of *Merit Management* shows that it undermined this Court's understanding of Congress's purpose just as much as it undermined this Court's understanding of Congress's text. This Court's holding on preemption—built on that erroneous understanding—thus falls as well.

But rather than engage in such analysis, Defendants offer only misdirection. First, they say that Merit Management did not directly address any preemption issue. Opp. 13-14. That is true, undisputed, and irrelevant. We did not argue that Merit Management necessitates remand to consider preemption anew because the case directly addressed preemption. Rather, we showed that Merit Management necessitates reconsideration because this Court's preemption opinion rests on an understanding of Congress's purposes that has been rejected by Merit Management.

Second, Defendants point to the denial of certiorari in another case. Opp. 3, 6-7, 14. The answer to that misguided argument is simple: "the denial of a writ of certiorari imports no expression of opinion upon the merits of the case." *Golb* v. *Attorney General of N.Y.*, 870 F.3d 89, 98 (2d Cir. 2017) (quoting *Teague* v. *Lane*,

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489 U.S. 288, 296 (1989)); see also *Smith* v. *General Motors Corp.*, 108 F.3d 1370 (Table), 1997 WL 138452, at *2 (2d Cir. 1997) (stating with respect to denial of certiorari in a preemption case that a "denial of certiorari has no precedential weight whatsoever, and marks no change in the law"); *Teague*, 489 U.S. at 296 ("The 'variety of considerations that underlie denials of the writ' counsels against according denials of certiorari any precedential value.") (citation omitted).

In sum, Defendants simply fail to engage with our showing that *Merit Management* necessitates reconsideration of this Court's preemption holding because of what it teaches about the purposes of Section 546(e), the allegedly preemptive enactment in this case. That issue should be addressed anew by the district court on remand, unburdened by this Court's March 2016 decision.

III. THIS COURT SHOULD NOT CONSIDER DEFENDANTS' NEW ARGUMENTS REGARDING THE SCOPE OF SECTION 546(e)

Even if Section 546(e) does preempt state law (or if Plaintiffs' claims only "revert" subject to it), the question remains whether it protects *all* of the defendants in this case. As Defendants concede, *Merit Management* "forecloses" the Court's original reason for holding that it does. Opp. 16. So instead, Defendants ask the Court to reach the same conclusion for a different reason. It should not.

A. To begin with, Defendants have never before made the argument advanced in their Opposition. The argument is that the definitions of "financial institution" and "financial participant" bring every transfer in the case within the

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scope of Section 546(e), regardless of *Merit Management*'s holding. Opp. 16-22. But that argument appears nowhere in Defendants' district-court briefs. *In re Tribune Co. Fraudulent Conveyance Litig. ("District Court Case")*, No. 11-MD-2296 (S.D.N.Y.), Dkt. 1671; Dkt. 2293. Nor does it appear anywhere in their briefs in this Court. No. 13-3992, Dkts. 143-145; Dkts. 229-231.

There is therefore no reason for this Court to consider the argument now. Appellants—and cross-appellants, like Defendants here—must present *all* arguments in their initial briefs. *E.g.*, *Rodriguez ex rel. Rodriguez* v. *DeBuono*, 175 F.3d 227, 230 n.1 (2d Cir. 1999) (per curiam); *Frank* v. *United States*, 78 F.3d 815, 833 (2d Cir. 1996), vacated on other grounds, 521 U.S. 1114 (1997). Even ordinary appellees may not raise new arguments at oral argument, *United States* v. *Cedeño*, 644 F.3d 79, 83 n.3 (2d Cir. 2011), or in post-argument letters, *In re Literary Works in Elec. Databases Copyright Litig.*, 654 F.3d 242, 248 n.4 (2d Cir. 2011), much less after the court's decision. That the law has changed during the pendency of this case is no justification. "The circuits were split" on the scope of Section 546(e) when this case first reached this Court, so Defendants cannot argue "that [they were] misled by the then-current law of this circuit into waiving" their argument. *Johnson* v. *Testman*, 380 F.3d 691, 696 (2d Cir. 2004).⁵

⁵ The interpretation of Section 546(e) adopted by the Supreme Court had been law in the Eleventh Circuit since 1996. See *In re Munford, Inc.*, 98 F.3d 604 (1996).

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Nor should this Court condone Defendants' attempt to undermine the district court's management of this case. That court ordered Defendants to raise in the initial motion to dismiss "any ground which, if successful, would dispose of the entirety of the Individual Creditor Actions." Master Case Order No. 3 ¶ 12(i), District Court Case, Dkt. 1395. Defendants are now trying to raise various new arguments based on Section 546(e) that they contend (wrongly) are a "global reason[]" to dismiss "plaintiffs' avoidance claims." Opp. 17 & n.4. If any court is to consider those new arguments—and they should not—it should be the district court on remand. See, e.g., Bishop v. Wells Fargo & Co., 870 F.3d 104, 106-07 (2d Cir. 2017) (per curiam) (remanding, in an analogous posture, even a purely legal issue to district court); Carpenter v. Republic of Chile, 610 F.3d 776, 780 (2d Cir. 2010) (per curiam) (same).

B. Defendants' new argument is premised on factual assertions never before tested in this case—confirming that it is not ripe for review by this Court. For example, under Defendants' new theory, a bank through whose hands merger consideration was remitted must have "act[ed] as agent" for Tribune or its former shareholders. 11 U.S.C. § 101(22)(A).⁶ But "[t]he question whether an agency relationship exists is highly factual." *Cleveland* v. *Caplaw Enters.*, 448 F.3d 518,

⁶ The entity may also act as "custodian." 11 U.S.C. \S 101(22)(A). That is not relevant here. See id. \S 101(11).

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522 (2d Cir. 2006). In particular, agency is a fiduciary relationship, *Johnson* v. *Priceline.com, Inc.*, 711 F.3d 271, 277 (2d Cir. 2013), which most bank-customer relationships are not, *Manufacturers Hanover Tr. Co.* v. *Yanakas*, 7 F.3d 310, 318 (2d Cir. 1993). The documents Defendants cite (at 17-20) do not suffice to determine that agency relationships existed here for any Defendant, let alone *all* of them.

Another factual issue is whether the relationship Defendants posit is in connection with a "securities contract." 11 U.S.C. § 101(22)(A). That term's definition encompasses contracts "to *purchase* shares." *Tribune*, 818 F.3d at 120 (emphasis added). But this Court did not hold, as Defendants suggest (at 20), that it encompasses contracts to *redeem* shares. Indeed, this Court has expressly declined to rule on that issue. *In re Quebecor World (USA) Inc.*, 719 F.3d 94, 99 (2d Cir. 2013). That distinction matters because the merger agreement covering approximately half of the transfers here involved the cancellation, not the purchase, of shares. Merger Agreement § 2.1(a), *In re Tribune Co.*, No. 08-13141 (Bankr. D. Del.), Dkt. 5442 ("All Shares . . . shall be automatically canceled and shall cease to exist.").

In addition to such factual questions, Defendants' new argument embeds legal errors. For example, it requires "customer" to have "its ordinary meaning." Opp. 18 n.6. But the Bankruptcy Code gives "customer" a technical meaning.

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11 U.S.C. §§ 741(2), 761(9). It does not use the word in any other way. *Id.* §§ 561(b)(2)(B), 745-749, 751, 752, 763-766, 783(a). The meaning here should be correspondingly limited. See, *e.g.*, *Hall* v. *United States*, 566 U.S. 506, 519 (2012) ("[I]dentical words and phrases within the [Bankruptcy Code] should normally be given the same meaning." (quotation marks omitted)).

Similar problems plague the distinct argument (Opp. 21-22) that Tribune was a "financial participant." For example, the swap agreements on which that argument rests were part of the very leveraged buyout we challenge. Tribune Co. 2007 Form 10-K at 6, https://bit.ly/2qSyUy8. A transferor cannot immunize challenges to a transaction simply by including certain derivatives in it. See H.R. Rep. No. 109-31(I), at 130-31 (2005), reprinted in 2005 U.S.C.C.A.N. 88, 191 (noting that the definition of "financial participant" protects "major market participants" to prevent "systemic impact upon the markets from a single failure"). Like their other new arguments, this one is indisputably fact bound—the kind of argument to be evaluated, in the first instance if at all, by the district court.

CONCLUSION

This Court should recall its mandate, vacate its March 29, 2016, judgment, in its entirety, and remand this case to the district court for further proceedings consistent with *Merit Management*.

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Respectfully submitted,

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Dated: April 27, 2018

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CERTIFICATE OF COMPLIANCE

I certify that this motion complies with the type-volume limitation of Fed. R.

App. P. 27(d)(2)(C) because it contains 2,598 words. The motion complies with

the typeface and style requirements of Fed. R. App. P. 27(d)(1)(E), 32(a)(5) and

32(a)(6) because it was prepared in Microsoft Word using 14-point Times New

Roman font, with footnotes in 14-point Times New Roman font.

/s/ Lawrence S. Robbins
Lawrence S. Robbins

Dated: April 27, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on April 27, 2018, I caused a true and correct copy of the foregoing to be filed with the Court by CM/ECF, thereby effecting electronic service on counsel for all parties.

/s/ Lawrence S. Robbins
Lawrence S. Robbins

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13-3992(L)

13-3875, 13-4178, 13-4196

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

IN RE TRIBUNE COMPANY FRAUDULENT CONVEYANCE LITIGATION

On Appeal from the United States District Court for the Southern District of New York, Nos. 11-md-2296 & 12-mc-2296 Before the Honorable Richard J. Sullivan

OPPOSITION OF DEFENDANTS-APPELLEES-CROSS-APPELLANTS TO MOTION OF PLAINTIFFS-APPELLANTS-CROSS-APPELLEES TO RECALL THE MANDATE

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CORPORATE DISCLOSURE STATEMENT

The undersigned Defendants-Appellees-Cross-Appellants previously filed corporate disclosure statements pursuant to Federal Rule of Appellate Procedure 26.1. *See* ECF Nos. 30, 135, 136, 138 & 139. Defendants-Appellees-Cross-Appellants incorporate and rely upon those corporate disclosure statements in satisfaction of their obligations under Federal Rule of Appellate Procedure 26.1, with the following amendments:

Each of the following Defendants-Appellees-Cross-Appellants states that it has no parent corporation and no publicly held corporation owns 10% or more of its stock: DiMaio Ahmad Capital LLC, now operating as DA Capital LLC; Employee Retirement System of Texas; Illinois Municipal Retirement Fund; Ohio Public Employees Retirement System; Oppenheimer Main Street All Cap Fund (f/k/a/Oppenheimer Main Street Select Fund and Oppenheimer Main Street Opportunity Fund); Oppenheimer Main Street Mid Cap Fund (f/k/a as Oppenheimer Main Street Small Cap Fund); Oppenheimer Variable Account Funds doing business as Oppenheimer Main Street Small Cap Fund/VA (f/k/a Oppenheimer Main Street Small & Mid-Cap Fund/VA); Pensions Reserve Investment Management Board of Massachusetts; Russell U.S. Core Equity Fund (incorrectly named as "Russell US Core Equity Fund," and f/k/a Russell Equity I Fund and Russell Investment

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Company Diversified Equity Funds); School Employees Retirement System of Ohio; Texas Education Agency.

Bank of Montreal Holding Inc. (as successor in interest to BMO Nesbitt Burns Trading Corp. S.A.) states that it is ultimately wholly owned by the Bank of Montreal. Bank of Montreal holds 100% of the issued and outstanding common shares of Bank of Montreal Holding Inc. BMO Life Assurance Company ("BMOLA") holds 100% of the Class K Preference Shares and Class L Preference Shares of Bank of Montreal Holding Inc. BMO Life Holdings (Canada), ULC ("BMO ULC") holds 100% of the issued and outstanding shares of BMOLA. BMO Life Insurance Company ("BMOLI") holds 100% of the issued and outstanding common shares of BMO ULC. Bank of Montreal holds 100% of the issued and outstanding common shares of BMOLI.

Barclays Capital Inc. states that it is an indirectly held wholly owned subsidiary of Barclays PLC, a publicly held company whose shares are traded on the London and New York stock exchanges. Barclays PLC has no parent company, and no publicly held company owns more than 10% of its stock.

Bear Stearns Securities Corp. (which changed its name to J.P. Morgan Clearing Corp.) was a wholly owned subsidiary of J.P. Morgan Securities LLC, which is a wholly owned subsidiary of J.P. Morgan Broker-Dealer Holdings Inc., which is a wholly owned subsidiary of JPMorgan Chase & Co., a publicly held

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corporation. J.P. Morgan Clearing Corp. was merged into J.P. Morgan Securities LLC on October 1, 2016.

BNP Paribas Prime Brokerage Inc. states that on March 12, 2018, it merged into BNP Paribas Securities Corp., which is a wholly owned indirect subsidiary of BNP Paribas, which is a publicly owned company organized under the laws of France. No publicly held entity owns 10% or more of the stock of BNP Paribas.

Charles Schwab Futures, Inc. (f/k/a optionsXpress, Inc.) is a wholly owned subsidiary of optionsXpress Holdings, Inc., which is in turn 100% owned by The Charles Schwab Corporation, a publicly traded company.

Credit Suisse Securities (Europe) Ltd. states that it is a wholly owned subsidiary of Credit Suisse Investment Holdings (UK), which in turn is a wholly owned subsidiary of Credit Suisse Investments (UK), which is jointly owned by Credit Suisse AG and Credit Suisse AG, Guernsey Branch. Credit Suisse AG, Guernsey Branch is a branch of Credit Suisse Group AG, and Credit Suisse AG is 100% owned by Credit Suisse Group AG. Credit Suisse Group AG is a corporation organized under the laws of Switzerland and whose shares are listed on the Six Swiss Exchange and are also listed on the New York Stock Exchange in the form of American Depositary Shares. No publicly held company owns 10% or more of Credit Suisse Group AG.

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Credit Suisse Securities (USA) LLC states that it is a wholly owned subsidiary of Credit Suisse (USA), Inc., whose voting stock is 100% owned by Credit Suisse AG, which is 100% owned by Credit Suisse Group AG, which is a corporation organized under the laws of Switzerland and whose shares are listed on the Six Swiss Exchange and are also listed on the New York Stock Exchange in the form of American Depositary Shares. No publicly held company owns 10% or more of Credit Suisse Group AG.

Credit Suisse (USA), Inc. states that it is a wholly owned subsidiary of Credit Suisse Holdings (USA) Inc., whose voting stock is 100% owned by Credit Suisse AG, which is 100% owned by Credit Suisse Group AG, which is a corporation organized under the laws of Switzerland and whose shares are listed on the Six Swiss Exchange and are also listed on the New York Stock Exchange in the form of American Depositary Shares. No publicly held company owns 10% or more of Credit Suisse Group AG.

Deutsche Bank Securities Inc. states that it is a wholly-owned subsidiary of DB U.S. Financial Markets Holding Corporation, which in turn is a wholly-owned subsidiary of DB USA Corporation, previously doing business as Taunus Corporation, which in turn is a wholly-owned subsidiary of Deutsche Bank A.G., a publicly traded corporation. No other publicly held company owns 10% or more of the stock of Deutsche Bank Securities Inc.

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Deutsche Investment Management Americas Inc. states that it is a wholly owned subsidiary of DeAM US Holding Corporation. DeAM US Holding Corporation is a wholly owned subsidiary of DWS Group GmbH & Co. KGaA. DWS Group GmbH & Co. KGaA is publicly traded in part and 77.75% owned by DB Beteiligungs Holding GmbH. DB Beteiligungs Holding GmbH is wholly owned by Deutsche Bank AG. No publicly traded corporation holds 10% or more of the stock of Deutsche Bank AG.

Frank Russell Company states that it is a wholly owned subsidiary of the London Stock Exchange Group, LLC. "Frank Russell," "Frank Russell Investments," and "Frank Russell Trust" do not exist, to the best of counsel's knowledge.

Goldman Sachs & Co. LLC (formerly known as Goldman, Sachs & Co.) states that it is a wholly-owned subsidiary of The Goldman Sachs Group, Inc. ("GS Group") except for de minimis non-voting, non-participating interests held by unaffiliated broker-dealers. GS Group is a corporation organized under the laws of Delaware, and its shares are publicly traded on the New York Stock Exchange. GS Group has no parent corporation, and to the best of GS Group's knowledge, no publicly held company owns 10% or more of the common stock of GS Group.

Goldman Sachs Execution & Clearing, L.P. was merged into Goldman Sachs & Co. LLC in June 2017.

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Goldman Sachs International Holdings LLC states that it is an indirect, wholly-owned subsidiary of The Goldman Sachs Group, Inc. ("GS Group"). GS Group is a corporation organized under the laws of Delaware, and its shares are publicly traded on the New York Stock Exchange. GS Group has no parent corporation, and to the best of GS Group's knowledge, no publicly held company owns 10% or more of the common stock of GS Group.

GS Investment Strategies LLC states that it is an indirect, wholly-owned subsidiary of The Goldman Sachs Group, Inc. ("GS Group"). GS Group is a corporation organized under the laws of Delaware, and its shares are publicly traded on the New York Stock Exchange. GS Group has no parent corporation, and to the best of GS Group's knowledge, no publicly held company owns 10% or more of the common stock of GS Group.

Harbor Capital Advisors, Inc. states that it is wholly owned by Robeco US Holding, Inc., which is wholly owned by Robeco US Holding B.V., which is wholly owned by ORIX Corporation Europe N.V. ORIX Corporation, a publicly traded company, owns 100% of the outstanding shares of ORIX Corporation Europe N.V.

JPMorgan Chase 401(k) Savings Plan is an "employee pension benefit plan" as defined by the Employee Retirement Security Act, its income is exempt from federal income tax under Section 501(a) of the Internal Revenue Code, and is

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sponsored by JPMorgan Chase Bank, N.A., a wholly owned subsidiary of JPMorgan Chase & Co., a publicly held corporation.

- J.P. Morgan Clearing Corp. was merged into J.P. Morgan Securities LLC on October 1, 2016.
- J.P. Morgan Securities plc (formerly J.P. Morgan Securities Ltd.) is an indirect wholly owned subsidiary of JPMorgan Chase Bank, N.A., which is a wholly owned subsidiary of JPMorgan Chase & Co., a publicly held corporation.

JPMorgan Trust II is an open-end, management investment company organized as a Delaware statutory trust. JPMorgan Trust II issues shares of beneficial interest in series, with each series corresponding to a separate fund. JPMorgan Trust II has no parent corporation and, as of March 30, 2018, no publicly held corporation owns, of record, ten percent or more of any class of shares of a relevant fund for its own benefit.

J.P. Morgan Whitefriars, Inc. (n/k/a J.P. Morgan Whitefriars LLC) is a wholly owned subsidiary of J.P. Morgan Overseas Capital Corporation, which is a wholly owned subsidiary of J.P. Morgan International Finance Limited, which is an indirect wholly owned subsidiary of JPMorgan Chase & Co., a publicly held corporation.

Manulife Investment Exchange Funds Corp. (incorrectly named as "Manulife Invst Ex FDS Corp.-MIX") states that it is a wholly owned subsidiary of Manulife Investment Exchange Funds Trust.

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Manulife Investments (f/k/a "Manulife Mutual Funds") states that it is a division of Manulife Asset Management Limited, which is a wholly owned subsidiary of Manulife Asset Management Holdings (Canada) Inc. (f/k/a/ "FNA Financial Inc."), which is itself a wholly owned subsidiary of The Manufacturers Life Insurance Company, which is wholly owned by Manulife Financial Corporation, a publicly traded company.

Manulife U.S. Equity Fund states that it has no parent corporation and that The Manufacturers Life Insurance Company owns more than 10% of its units. The Manufacturers Life Insurance Company is wholly owned by Manulife Financial Corporation, a publicly traded company.

MassMutual Premier Main Street Small/Mid Cap Fund (f/k/a "MassMutual Premier Main Street Small Cap Fund") no longer exists, to the best of counsel's knowledge.

MUFG Union Bank N.A., formerly known as Union Bank, N.A., states that it is a wholly owned subsidiary of MUFG Americas Holdings Corporation, which is a wholly owned subsidiary of MUFG Bank, Ltd., which in turn is a wholly owned subsidiary of Mitsubishi UFJ Financial Group.

Neuberger Berman BD LLC states that, effective January 1, 2017, Neuberger Berman LLC changed its name to Neuberger Berman BD LLC ("NB BD LLC"), and, following a consolidation of certain legal entities, became 100% owned by

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Neuberger Berman Investment Advisers LLC ("NBIA"). Both NB BD LLC and NBIA are indirect wholly-owned subsidiaries of Neuberger Berman Group LLC. NBSH Acquisitions, LLC is the parent company of Neuberger Berman Group LLC ("NBG"). No publicly held company owns more than 10% of NBG's equity.

ODDO BHF Aktiengesellschaft states that it is a wholly owned subsidiary of ODDO BHF Group S.A. Brussels and ODDO BHF Group Ltd., London, which are each directly or indirectly wholly owned by ODDO BHF S.C.A., Paris, which is a partnership organized under French law. Upon information and belief, no publicly traded company owns 10 % or more of the partnership interest in ODDO BHF S.C.A., Paris.

Pacific Select Fund states that it is a wholly owned subsidiary of Pacific Mutual Holding Company. "Pacific Select Fund Equity Index Portfolio" is not a corporate entity, but an investment fund operating under the Pacific Select Fund. "Pacific Select" does not exist, to the best of counsel's knowledge.

RBC Capital Markets Arbitrage, S.A., formerly known as RBC Capital Markets Arbitrage, LLC, states that it is an indirect, wholly owned subsidiary of Royal Bank of Canada, which is publicly traded on the New York Stock Exchange and Toronto Stock Exchange.

RBC O'Shaughnessy U.S. Value Fund states that it is a Canadian trust for which RBC Global Asset Management Inc. is its investment advisor. RBC Global

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Asset Management Inc. is an indirect wholly owned subsidiary of Royal Bank of Canada, which is publicly traded on the New York Stock Exchange and the Toronto Stock Exchange.

Russell Investment Group (also named as "Russell Investments") states that it is a registered trade name of investment management business affiliates formerly under the common control of Russell Investments Group, Ltd.

Russell Investments Trust Company (f/k/a Frank Russell Trust Company) states that it is a wholly owned subsidiary of Russell Investments US Institutional Holdco, Inc.

Schultze Asset Management, LP states that, effective on June 30, 2015,

Schultze Asset Management, LLC changed its name to Schultze Asset Management,

LP. Schultze Asset Management, LP has no parent corporation and no publicly held
corporation owns 10% or more of an ownership interest in Schultze Asset

Management, LP.

Scotia Capital Inc. states that it is owned entirely by The Bank of Nova Scotia, a publicly held foreign bank with its head office in Halifax, Nova Scotia, Canada. No publicly held corporation owns 10% or more of any class of shares of The Bank of Nova Scotia.

Scotia Capital (USA) Inc. states that it is a wholly owned subsidiary of Scotia Holdings (US) Inc., which is wholly owned by BNS Investments Inc. BNS

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Investments Inc. is wholly owned by The Bank of Nova Scotia, a publicly held foreign bank with its head office in Halifax, Nova Scotia, Canada. No publicly held corporation owns 10% or more of any class of shares of The Bank of Nova Scotia.

Security Global Investors-Rydex/SGI states that it is the former doing-business-as name for Security Global Investors, LLC, which was merged with and into Security Investors LLC, and no publicly held corporation owns 10% or more of its stock.

Swiss American Corporation states that it is a wholly owned subsidiary of Credit Suisse (USA), Inc., which in turn is a wholly owned subsidiary of Credit Suisse Holdings (USA) Inc., whose voting stock is 100% owned by Credit Suisse AG, which is 100% owned by Credit Suisse Group AG, which is a corporation organized under the laws of Switzerland and whose shares are listed on the Six Swiss Exchange and are also listed on the New York Stock Exchange in the form of American Depositary Shares. No publicly held company owns 10% or more of Credit Suisse Group AG.

TD Ameritrade Clearing, Inc. states that it is a wholly owned subsidiary of TD Ameritrade Online Holdings Corp. TD Ameritrade Online Holdings Corp. is a wholly owned subsidiary of TD Ameritrade Holdings Corporation. TD Ameritrade Holding Corporation is a publicly traded corporation with no parent company. The

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Toronto-Dominion Bank, a publicly held entity, owns more than 10 percent of TD Ameritrade Holding Corporation's stock.

Transamerica Asset Management, as owner of the DIA Mid Cap Value

Portfolio, states that it is directly owned by Transamerica Premier Life Insurance

Company ("TPLIC") and AUSA Holding, LLC ("AUSA"), both of which are
indirect, wholly owned subsidiaries of Aegon N.V. TPLIC is owned by

Commonwealth General Corporation ("Commonwealth"). Commonwealth and

AUSA are wholly owned by Transamerica Corporation, a financial services holding
company. Transamerica Corporation is owned by The AEGON Trust, which is
owned by Aegon International B.V., which is owned by Aegon N.V., a Netherlands
corporation, and a publicly traded international insurance group.

Transamerica Premier Life Insurance Company (f/k/a "Monumental Life Insurance Company") states that it is a wholly owned subsidiary of Commonwealth General Corporation. Commonwealth General Corporation is a direct wholly owned subsidiary of Transamerica Corporation, which is a wholly owned subsidiary of The AEGON Trust. The AEGON Trust is a wholly owned subsidiary of Aegon International B.V., which is wholly owned by Aegon N.V. Aegon N.V. is a publicly traded holding company with its headquarters in The Hague, the Netherlands, and more than 10% of its stock is owned by Vereniging Aegon.

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UBS AG states that it is wholly owned by UBS Group AG. UBS Group AG is a publicly traded company with no parent corporation and no publicly held company owns 10% or more of its stock.

UBS Financial Services, Inc. states that is wholly owned by UBS Americas Inc., which is in turn wholly owned by UBS Americas Holding LLC, which is in turn wholly owned by UBS AG, which is in turn wholly owned by UBS Group AG. UBS Group AG is a publicly traded company with no parent corporation and no publicly held company owns 10% or more of its stock.

UBS Global Asset Management (Americas) Inc. states that it is a wholly owned subsidiary of UBS Americas Inc., which is in turn wholly owned by UBS Americas Holding LLC, which is in turn wholly owned by UBS AG, which is in turn wholly owned by UBS Group AG. UBS Group AG is a publicly traded company with no parent corporation and no publicly held company owns 10% or more of its stock.

UBS Global Asset Management (US) Inc. states that it is a wholly owned subsidiary of UBS Americas Inc., which is in turn wholly owned by UBS Americas Holding LLC, which is in turn wholly owned by UBS AG, which is in turn wholly owned by UBS Group AG. UBS Group AG is a publicly traded company with no parent corporation and no publicly held company owns 10% or more of its stock.

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UBS O'Connor LLC states that it is a wholly owned subsidiary of UBS Americas Holding LLC, which is in turn wholly owned by UBS AG, which is in turn wholly owned by UBS Group AG. UBS Group AG is a publicly traded company with no parent corporation and no publicly held company owns 10% or more of its stock.

UBS Securities LLC states that it is wholly owned (directly and indirectly) by UBS Americas Holding LLC, which in turn is wholly owned by UBS AG, which in turn is wholly owned by UBS Group AG. UBS Group AG is a publicly traded company with no parent corporation and no publicly held company owns 10% or more of its stock.

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INTRODUCTION

Two years ago, this Court affirmed the dismissal of these actions, holding that because Section 546(e) of the Bankruptcy Code would have barred a bankruptcy trustee from asserting constructive fraudulent-conveyance claims to avoid the payments at issue—i.e., it would have "safe harbored" them—Section 546(e) preempted the creditor-plaintiffs from doing the same. The preemption issue was the focus of the litigation because it was understood that the payments came within Section 546(e)'s scope: entities covered by Section 546(e) had served as intermediaries for the payments, and this Court had previously held that suffices. *See In re Quebecor World (USA) Inc.*, 719 F.3d 94, 99 (2d Cir. 2013).

Two months ago, the Supreme Court rejected *Quebecor*'s interpretation of Section 546(e), holding in *Merit Management Group, LP v. FTI Consulting, Inc.*, that the safe harbor applies only if the transfer to be avoided was "made by or to (or for the benefit of)" a covered entity; it is not enough that a covered entity served as an intermediary. 138 S. Ct. 883 (2018). Although plaintiffs' certiorari petition in this case remains pending, the Supreme Court appears to lack a quorum and thus will soon be statutorily required to affirm this Court's decision. Hoping to avoid that result, plaintiffs ask this Court to cut off the Supreme Court's process by recalling the mandate and vacating the judgment in its entirety in light of *Merit Management*.

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There is no legitimate basis for that extraordinary request. "[C]ourts are exceptionally stingy in recalling mandates." *Sargent v. Columbia Forest Prods.*, *Inc.*, 75 F.3d 86, 92 (2d Cir. 1996). The recall power "can be exercised only in extraordinary circumstances and is one of last resort, to be held in reserve against grave, unforeseen contingencies." *Christian Louboutin S.A. v. Yves Saint Laurent Am. Holding, Inc.*, 709 F.3d 140, 142 (2d Cir. 2013) (quotation marks omitted). Here, the relief requested is unwarranted because, for multiple reasons, *Merit Management* does not "call[] into serious question the correctness of th[is] court's judgment." *Sargent*, 75 F.3d at 89-90 (quotation marks omitted).

First, regardless of whether Section 546(e) applies, this Court's judgment should not be disturbed because—as this Court previously recognized—plaintiffs have no claims to assert. Under the Bankruptcy Code and longstanding Supreme Court precedent, when Tribune filed for bankruptcy, all creditors' avoidance claims vested in the bankruptcy trustee, the creditors' statutory representative, in order to promote a comprehensive and rational reorganization, and they have not reverted to the creditors.

Second, Section 546(e) still preempts plaintiffs' claims. Contrary to plaintiffs' contention, *Merit Management* does not undermine this Court's prior holding that Section 546(e) preempts state-law claims to avoid safe-harbored transfers. That case addressed only whether a payment was within the scope of

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Section 546(e). It involved an avoidance claim asserted under *federal* law and raised no issue of state-law preemption. Indeed, while *Merit Management* was pending, the Supreme Court denied a certiorari petition in a companion to this case—*Whyte v. Barclays Bank PLC*—that sought review of the *preemption analysis adopted in this case*. This Court's central preemption holding, therefore, should not be vacated. *See Sargent*, 75 F.3d at 92 (scope of mandate recall must be "justified" and not on a "piggy-back basis").

And the payments at issue are still safe harbored. They were "made by" Tribune, which was a covered entity in two independent ways: as a "financial institution" and as a "financial participant." Moreover, the payments were "made ... to (or for the benefit of)" Tribune's shareholders, who were themselves "financial institutions" and thus also covered entities. This Court previously had no need to address these points, but the record supporting them is indisputable. Under this Court's prior preemption ruling in this case, Section 546(e) still preempts plaintiffs' claims.

This Court, therefore, should deny plaintiffs' motion in full and finally bring these cases to a close. Recall and vacatur would be particularly inequitable now, more than a decade after thousands of passive investors received payment for their stock as part of a transaction they played no role in arranging. *See Christian*

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Louboutin, 709 F.3d at 142 (equities and "substantial lapse[s] in time" are factors in deciding recall motions).

If the Court recalls the mandate, however, it should vacate only the premise that a covered entity's involvement as a mere intermediary sufficed to bring the transfer within Section 546(e)'s safe harbor, deny the request for a remand, and amend its opinion to reaffirm the judgment because plaintiffs' claims did not revert to them or because Tribune or its shareholders were covered entities. Should the Court call for further proceedings here or in the district court, it should limit the proceedings to those two issues. Further, if the Court remands, it should retain jurisdiction to quickly resolve these long-running cases. *United States v. Jacobson*, 15 F.3d 19, 21-22 (2d Cir. 1994).

STATEMENT OF THE CASE

In a 2007 leveraged buyout ("LBO"), Tribune "purchased all of its stock" from its thousands of public shareholders for about \$8 billion. *In re Tribune Co. Fraudulent Conveyance Litig.*, 818 F.3d 98, 105-106 (2d Cir. 2016). In December 2008, Tribune petitioned for Chapter 11 bankruptcy protection. *Id.* at 106. Years later, bondholders and other unsecured creditors—plaintiffs here—filed dozens of suits against the former shareholders alleging that Tribune's LBO payments were avoidable under state constructive fraudulent-conveyance laws. *Id.* at 106-107. Judge Sullivan dismissed the consolidated cases because he concluded that the

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Bankruptcy Code's automatic stay provision deprived plaintiffs of statutory standing. *Id.* at 107-108.

In March 2016, this Court affirmed the dismissal, but on the alternative ground that plaintiffs' claims were preempted by Section 546(e) of the Bankruptcy Code. That section expressly bars bankruptcy trustees from claiming constructive fraudulent conveyance to avoid a "transfer ... made by or to (or for the benefit of)" a covered entity if the transfer was a "settlement payment ... [or] in connection with a securities contract." 11 U.S.C. §546(e). Among the covered entities are "financial institution[s]" and "financial participant[s]." *Id*.

Consistent with settled law in this Circuit (and most other circuits to address the question), this Court assumed that Tribune's bankruptcy estate would have been barred by Section 546(e) from seeking to avoid the payments as constructive fraudulent conveyances under the Bankruptcy Code simply because those payments went through intermediaries who were covered entities. 818 F.3d at 105-106, 112. This Court then held that the creditor-plaintiffs could not make an "end run" around that bar by bringing the claims themselves under state law. Rather, allowing creditors to assert state-law constructive fraudulent-conveyance claims that the bankruptcy trustee—the creditors' statutory representative—would be prohibited from bringing under the Bankruptcy Code would undermine the purpose of Section 546(e)'s safe harbor, which is to provide "finality ... and

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certainty" to the securities markets. *Id.* at 110, 119, 123. And, this Court found, there is "no conflict between Section 546(e)'s language and its purpose." *Id.* at 120. Consequently, this Court held that Section 546(e) preempted plaintiffs' state-law constructive fraudulent-conveyance claims. *See id.* at 123-124.

For "substantially the [same] reasons," this Court simultaneously affirmed the dismissal of the avoidance claims asserted in another case "heard in tandem." Whyte v. Barclays Bank PLC, 644 F. App'x 60 (2d Cir. 2016) (summary order), cert. denied, 137 S. Ct. 2114 (2017). Like the plaintiffs here, Whyte was a creditor representative suing under state law. The only defendant there—Barclays Bank—was undisputedly a covered entity. Accordingly, when Whyte petitioned for certiorari, she presented only the question whether Section 546(g)—a materially identical provision to Section 546(e) covering swap payments instead of securities payments—preempts state-law claims to avoid transactions within Section 546(g)'s scope. Pet. i, No. 16-239 (U.S. Aug. 19, 2016). The petition did not present "the separate question" whether the safe harbor applies to transactions merely because a covered entity served as an intermediary. Br. in Opp. 3, No. 16-239 (U.S. Oct. 24, 2016).

Plaintiffs in this case also petitioned for certiorari. As in *Whyte*, the petition challenged this Court's ruling regarding the preemptive effect of the Bankruptcy Code's safe harbor, but unlike in *Whyte*, it also challenged this Court's ruling

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regarding Section 546(e)'s substantive scope. *See* Pet. i, No. 16-317 (U.S. Sept. 9, 2016).

In May 2017, the Supreme Court granted the certiorari petition in *Merit Management*, which presented substantially the same question about Section 546(e)'s scope as the *Tribune* plaintiffs' petition but arose from a Seventh Circuit decision on the other side of the circuit split on the issue. *See* Pet. i, No. 16-784 (U.S. Dec. 16, 2016). Apart from that, *Merit Management* bore no resemblance to this case. It involved a bankruptcy trustee's federal-law claim to avoid a comparatively modest payment made by a privately held company to its few shareholders through a bank. 138 S. Ct. at 890-891. Here, in contrast, creditors assert state-law claims to avoid billions of dollars in payments that were made to thousands of shareholders by a public company using Computershare Trust Company, N.A. ("Computershare"), one of the principal paying agents and depositaries for such transactions in the public securities markets.

Shortly after granting the *Merit Management* petition, the Supreme Court denied the petition in *Whyte*, declining to review of the same preemption question presented in *Tribune*. It did not act on the *Tribune* petition.

In February 2018, the Supreme Court decided *Merit Management*, holding that "the only relevant transfer for purposes of the safe harbor is the transfer that the trustee seeks to avoid" and thus it "is simply irrelevant" that a covered entity

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served as an intermediary. 138 S. Ct. at 888, 895. Put another way, courts "must look to the overarching transfer [sought to be avoided] to evaluate whether it meets the safe-harbor criteria." *Id.* at 897. With no preemption question presented, the Court did not address Section 546(e)'s preemptive force.

Several weeks later, Justices Kennedy and Thomas issued a joint statement about the *Tribune* petition. The statement explained that "there might not be a quorum in [the Supreme] Court" to hear *Tribune*, and so "consideration of the petition for certiorari will be deferred for an additional period of time [to] allow the Court of Appeals or the District Court to consider whether to recall the mandate ... or provide any other available relief in light of this Court's decision in *Merit Management*." Mot. App. Should the Supreme Court continue to be unable to attain a quorum by the end of the current Term, it will have to affirm this Court's decision. 28 U.S.C. §2109.

Plaintiffs moved this Court on April 10 to recall the mandate. Plaintiffs note (at 5-6) that this Court's decision is "at odds" with *Merit Management*'s holding that Section 546(e) does ""not protect transfers in which [covered entities] served as mere conduits" (quoting 138 S. Ct. at 892). Plaintiffs' motion, however, goes beyond *Merit Management*'s limited holding and requests (at 10) that this Court "vacate its judgment *in its entirety*" for two reasons (emphasis added). First, plaintiffs assert (at 6-7), without support, that "neither the debtor nor the vast

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preponderance of the relevant shareholders are ... safe-harbored entities." Second, they contend (at 7 n.5, 10-12) that even if the Tribune LBO transaction is within Section 546(e)'s scope, this Court's preemption ruling "cannot possibly be reconciled" with *Merit Management*.

ARGUMENT

I. REGARDLESS OF SECTION 546(e), PLAINTIFFS' CLAIMS ARE FORECLOSED BECAUSE THEY NEVER REVERTED FROM THE TRUSTEE

Before even considering whether §546(e) still applies in light of *Merit Management*, the Court should deny plaintiffs' effort to vacate the judgment because, as the Court's opinion already recognized after full briefing on the issue, ¹ plaintiffs have no right to assert avoidance claims. The claims were vested exclusively in the bankruptcy trustee and they never reverted to plaintiffs. Nothing in *Merit Management*—where the claim was brought by the bankruptcy trustee—discredits this Court's well-informed analysis of this issue.

Outside bankruptcy, creditors have standing under state law to bring fraudulent-conveyance claims. But the filing of a bankruptcy petition under the federal Bankruptcy Code changes that. The bankruptcy trustee becomes the creditors' statutory representative and obtains the exclusive right to bring fraudulent-conveyance claims. 28 U.S.C. §1409(c); 11 U.S.C. §§541, 544, 548. And "creditors are bound by the outcome of the trustee's action." *St. Paul Fire &*

¹ See ECF Nos. 143; 219, at 18-33; 230.

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Marine Ins. Co. v. PepsiCo, Inc., 884 F.2d 688, 700-701 (2d Cir. 1989). Thus, this Court noted that "[o]nce Tribune entered bankruptcy, the creditors' avoidance claims were vested in the federally appointed trustee." 818 F.3d at 111.

Wholly independent of Section 546(e), this feature of the federal bankruptcy scheme dooms plaintiffs' claims. As this Court noted, a "critical step in ... [plaintiffs'] theory" in this case is that "fraudulent conveyance actions revert to creditors if either the two-year statute of limitations passes without an exercise of the trustees' powers under Section 544 or the Section 362(a) stay is lifted by the bankruptcy court." 818 F.3d at 114. But that step "has no support in the language of the Code." *Id*.

One hundred forty years ago, the Supreme Court recognized the fundamental bankruptcy principle that creditors' "remedies," including the avoidance of fraudulent conveyances, "are absorbed in the great and comprehensive remedy" given the trustee "to collect and distribute among [creditors] the property of their debtor." *Glenny v. Langdon*, 98 U.S. 20, 22, 28 (1878). Soon after, the Court held that a bankruptcy trustee, once vested with the right to pursue what, outside bankruptcy, would be creditors' claims, cannot be "divested" of them, even after the trustee has failed to timely assert them. *Trimble v. Woodhead*, 102 U.S. 647, 649-650 (1880); *see also Moyer v. Dewey*, 103 U.S. 301, 303 (1880) (describing *Trimble*).

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In the current Bankruptcy Code, Congress preserved the vesting of claims in the trustee and provided for reversion in one very limited situation, which is absent here: upon "dismissal of [the bankruptcy] case," 11 U.S.C. §349(b). Against the backdrop of *Trimble* and *Glenny*, the text of today's Code shows that Congress intended to maintain the longstanding rule against reversion. *See In re MortgageAmerica Corp.*, 714 F.2d 1266, 1275 (5th Cir. 1983); *see also Dewsnup v. Timm*, 502 U.S. 410, 419 (1992); *Manhattan Props. v. Irving Tr. Co.*, 291 U.S. 320, 336 (1934); *BFP v. Resolution Tr. Corp.*, 511 U.S. 531, 537 (1994).

This rule makes practical sense. Before the bankruptcy filing, creditors can exercise their state-law remedies free from any restrictions the Code imposes.

Once the debtor files for bankruptcy, however, all the Code's interrelated provisions (including Sections 544, 546(e), and 548) apply, the trustee pursues a comprehensive remedy for the benefit of the entire estate, and creditors are bound by the outcome. If creditors conclude that their debtor's bankruptcy filing is not in their best interests, they can seek dismissal of the bankruptcy case. 11 U.S.C. §1112. But they cannot enjoy the benefits of bankruptcy without its burdens, opting in and out of particular Code provisions as they see fit.

This Court recognized that vesting all fraudulent-conveyance claims in the bankruptcy trustee serves "to simplify proceedings, reduce the costs of marshalling the debtor's assets, and assure an equitable distribution among creditors." 818

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F.3d at 115. As this Court noted, plaintiffs' "hypothesized" reversion is "hardly consistent" with these goals. *Id.* at 114. Allowing certain creditors to eat their cake and have it too—with individual creditors permitted to seek avoidance for their own benefit while the trustee brings the same claims to maximize the aggregate value of the estate for *all* creditors' benefit—would lead to duplicative litigation and potentially contradictory results regarding the same property. That is why reversion can occur only upon dismissal of the bankruptcy case.

This risk of duplicative litigation is not theoretical. In light of *Merit Management*, the Tribune estate representative has sought leave in the case he brought against the same Tribune shareholders to assert constructive fraudulent-conveyance claims under Section 548 of the Bankruptcy Code to avoid the LBO payments to the shareholders, just as the creditor plaintiffs are trying to do here under state law.² Permitting these creditors to bring duplicative claims would undermine the basic structure of the Code. For this reason alone, the Motion should be denied.

II. EVEN IF PLAINTIFFS' CLAIMS REVERTED, MERIT MANAGEMENT WOULD NOT REQUIRE VACATUR OF THE DECISION

Even if any fraudulent-conveyance claims could have reverted to plaintiffs, Merit Management would not alter the result here. It does not affect this Court's

² See Letters, Kirschner v. FitzSimons, No. 12-2652 (S.D.N.Y.), ECF 5600 (Mar. 7, 2018), ECF 5635 (Mar. 23, 2018).

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prior ruling that state-law claims to avoid transfers within Section 546(e)'s scope are preempted, and plaintiffs' own allegations, augmented by an undisputed record, make clear that the LBO payments are still safe harbored by Section 546(e).

- A. Merit Management Does Not Touch This Court's Conclusion Regarding Section 546(e)'s Preemptive Force
- 1. This Court correctly held in this case that Section 546(e) preempts state-law claims to avoid transfers that are within its scope. The "purpose" of Section 546(e), this Court observed, is "to promote finality and certainty for investors" "in the event of a major bankruptcy affecting" securities markets. 818 F.3d at 120-121 (quotation marks and alterations omitted). Allowing creditors to bring avoidance claims that the trustee is barred from bringing would thwart Congress' objective by "increas[ing] the disruptive effect of an unwinding by lengthening the period of uncertainty for intermediaries and investors" (just as allowing fraudulent-conveyance claims to revert to creditors would undermine Congress' goal of centralizing whatever claims can be brought in the trustee). *Id.* at 119; *see id.* at 121-122.
- 2. Plaintiffs contend (at 10) that *Merit Management* "necessitates careful reconsideration of whether Section 546(e) preempts *any* state-law fraudulent-conveyance actions, even those directly against financial institutions." Plaintiffs are wrong. *Merit Management* presented and addressed only the distinct question of Section 546(e)'s scope, i.e., whether it safe harbors a transaction merely because

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a covered entity served as an intermediary. Nowhere did the Supreme Court utter the word "preemption" or even allude to the concept—it had no occasion to because the case involved a *federal-law* avoidance suit *by the trustee*, not a state-law suit by individual creditors. 138 S. Ct. at 891.

That *Merit Management* had nothing to do with preemption is confirmed by the Supreme Court's denial of the *Whyte* certiorari petition shortly after it granted the *Merit Management* petition. The *Whyte* petition challenged only this Court's conclusion that the Bankruptcy Code's safe harbor preempts state-law claims to avoid a transaction within its scope. If *Merit Management* had implicated this Court's preemption ruling, the Supreme Court surely would have also held the *Whyte* petition pending final disposition of *Merit Management*. *See* Stern et al., *Supreme Court Practice* 243-244 (7th ed. 1993).

Although plaintiffs' certiorari petition rightly treated the scope and preemption questions as distinct, *see* Pet. i, plaintiffs now contend (at 10-12) that the two issues are linked because "this Court's key rationale for preemption—that the policies ostensibly animating Section 546(e) warrant interpreting the section more broadly than its plain text provides—cannot be reconciled with what the Supreme Court has now said."

Plaintiffs' argument rests on a misreading of the passages it quotes (at 11) from this Court's opinion and *Merit Management*. Those passages addressed

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Section 546(e)'s scope, not its preemptive force. *See Tribune*, 818 F.3d at 120; *Merit Management*, 138 S. Ct. at 896-897. And in rejecting the respondent's "purposivist" argument for a safe harbor whose scope would have been so broad that it would have covered nearly any payment made through a bank, the Supreme Court did not reject the proposition that Congress intended Section 546(e) to promote finality and certainty for parties to transfers *within* its scope; it rejected only the respondent's argument that that purpose expanded the scope of Section 546(e) beyond its plain text. *See Merit Management*, 138 S. Ct. at 896-897.

3. Plaintiffs' final argument—that this Court's preemption analysis conflicts with other precedents from the Supreme Court and other circuits (at 10, 12 & n.7)—has nothing to do with whether *Merit Management* warrants recalling the mandate. It is also wrong. This Court neither assumed that, regardless of its text, Section 546(e) must be interpreted as broadly as its purpose might support, nor improperly disregarded the background presumption against preemption.

Instead, this Court recognized the presumption, *see*, *e.g.*, 818 F.3d at 110 ("As in the present matter, the presumption against preemption usually goes to the weight to be given to the lack of an express statement overriding state law."), but concluded that, under settled Supreme Court precedent, it deserved less weight here because this case concerns bankruptcy and the securities markets—two areas where there has been "a history of significant federal presence," *id.* at 110-111.

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This Court correctly focused on Section 546(e)'s purpose because the controlling question in any conflict-preemption analysis is whether "state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." 818 F.3d at 110 (quotation marks omitted). Even the precedents invoked by plaintiffs recognize that "the Bankruptcy Code can supersede state-law property rules by implication." *In re Northington*, 876 F.3d 1302, 1312 (11th Cir. 2017) (quotation marks omitted).

B. Section 546(e) Covers The LBO And Therefore Plaintiffs' Claims Are Preempted

Although *Merit Management* forecloses one basis to conclude that the LBO transaction was safe harbored by Section 546(e), it leaves open many others.

Contrary to plaintiffs' bald assertion (at 6-7), the complaints, undisputed transaction documents that are integral to them,³ and public records establish that Tribune and all the shareholders were covered entities under Section 546(e): the entity "by" whom the LBO payments were "made"—Tribune—was both a "financial institution" and a "financial participant," and all the shareholders—"to (or for the benefit of)" whom the payments were "made"—were also "financial

The Court should assume the truth of these materials because plaintiffs' complaints relied "heavily upon [their] terms and effect." *Mangiafico v. Blumenthal*, 471 F.3d 391, 398 (2d Cir. 2006); *see also Rothman v. Gregor*, 220 F.3d 81, 88-89 (2d Cir. 2000).

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institutions." See §546(e). Consequently, plaintiffs' avoidance claims are preempted.⁴

1. Tribune and all the shareholders were "financial institutions." Under the Bankruptcy Code, the term "financial institution" includes a "customer" of a "commercial or savings bank [or] trust company ... acting as agent ... for [the] customer ... in connection with a securities contract." 11 U.S.C. §101(22); see Collier on Bankruptcy ¶5-555.03 n.3 (16th ed. 2018). Although it would suffice if either Tribune or the shareholders qualifies as a financial institution, see §546(e) (safe harboring a transfer made "by or to (or for the benefit of)" a covered entity (emphasis added)), in actuality both do.

Tribune qualifies because it was a "customer" of Computershare—a trust company and a commercial or savings bank, as indicated by its full name (Computershare Trust Company, N.A.)⁵—and Computershare was its agent in the

⁴ Many defendants are also covered entities (e.g., "financial institutions," "stockbrokers," "financial participants") for *individualized* reasons. Defendants reserve the right to raise these individualized reasons, as well as additional global reasons, in any further proceedings.

See Office of the Comptroller of the Currency, Trust Banks Active as of March 31, 2018, at https://www.occ.treas.gov/topics/licensing/national-banks-fed-savings-assoc-lists/trust-by-name-pdf.pdf; Office of the Comptroller of the Currency, National Banks Active as of March 31, 2018, at https://www.occ.treas.gov/topics/licensing/national-banks-fed-savings-assoc-lists/national-by-name-pdf.pdf. The Court may take judicial notice of Computershare's status as a "financial institution." See Fed. R. Evid. 201; Enron Corp. v. International Fin.

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LBO transaction. Tribune "retained" Computershare "to act as Depositary in connection with the Tender Offer." Tribune Offer to Purchase ("Tribune Offer") 113, *In re Tribune Co.* ("*Tribune Bankruptcy Case*"), No. 08-13141 (Bankr. D. Del. Aug. 20, 2010) (ECF 5437-5). Computershare was to hold the tendered shares "on [Tribune's] behalf," deem them "accepted" for payment upon Tribune's "notice," and then pay the shareholders for them. *Id.* at 81; *see* "Customer," *Black's Law Dictionary* (10th ed. 2014) ("A person ... for whom a bank has agreed to collect items"); *cf.* U.C.C. §4-104(a)(5) ("Customer' means a person ... for whom a bank has agreed to collect items").

Thus, the bankruptcy examiner reported that Computershare "acted as agent for Tribune for the purpose of receiving payment from Tribune and transmitting payment to the tendering stockholders" during the first step of the LBO.

Examiner's Report, vol. 1, at 206, *Tribune Bankruptcy Case* (Aug. 3, 2010) (ECF 5247) (emphasis added); *id.* ("Tribune ... disbursed \$4.284 billion to

Corp. (In re Enron Corp.), 341 B.R. 451, 453-454, 458 (Bankr. S.D.N.Y. 2006) (taking judicial notice of defendant's status as "financial institution" under 546(e)).

Although the Bankruptcy Code defines "customer" for certain purposes, *see* 11 U.S.C. §741(2), Congress declined to limit the meaning of "customer" for purposes of defining "financial institution." *See* §101(22) ("financial institution" means a specified entity when such entity "is acting as agent ... for a customer (whether or not a 'customer,' as defined in section 741)" (emphasis added)). Thus, "customer" in this context must be given its ordinary meaning. *Ransom v. FIA Card Servs.*, *N.A.*, 562 U.S. 61, 69 (2011) ("Because the [Bankruptcy] Code does not define 'applicable,' we look to the ordinary meaning of the term.").

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Computershare Trust Company, N.A. to consummate the Tender Offer."); Step
One Flow of Funds Memorandum at 2, *Tribune Bankruptcy Case* (Aug. 20, 2010)
(ECF 5444-4) (documenting \$4.284 billion transfer from Tribune to
Computershare "to consummate the Stock Repurchase"). And Computershare
played the same agent role during the second step of the LBO, when Tribune
"disbursed approximately \$4 billion to [Computershare] to consummate the
Merger." Examiner's Report, vol. 1, at 461; *see also* Agreement and Plan of
Merger ("Merger") §2.2(a), *Tribune Bankruptcy Case* (Aug. 20, 2010) (ECF 5442)
(requiring Tribune to "deposit" merger consideration "with a U.S. bank or trust
company, to act as a paying agent"); Step Two Flow of Funds Memorandum 5, *Tribune Bankruptcy Case* (Aug. 20, 2010) (ECF 5461-15) (documenting \$3.98
billion transfer from Tribune to Computershare "to consummate the Acquisition").

The shareholders were also the "customers" of an "agent." As plaintiffs themselves allege, Computershare agreed to collect the payments from Tribune and deliver them to the shareholders (and vice-versa with the shares), and thus the shareholders were Computershare's customers, and it was the "Shareholders' agent." N.Y. Compl. ¶¶149, 157 (ECF 1558), No. 11-md-2296 (S.D.N.Y.), in Joint App'x JA903-905 (ECF 118) (2d Cir.); *accord*, *e.g.*, Cal. Compl. ¶¶147, 155 (ECF 1533), Del. Compl. ¶¶145, 153 (ECF 1507), Ill. Compl. ¶¶143, 151 (ECF 1564), Tex. Compl. ¶¶144, 152 (ECF 1501), No. 11-md-2296 (S.D.N.Y.). That is confirmed by

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the transaction documents, which state that, at both steps of the LBO, Computershare was "agent for stockholders for the purpose of receiving payment from [Tribune] and transmitting payment to the ... stockholders." Tribune Offer 82; *see also* Merger \$2.2 (instructing Computershare as "Paying Agent" to hold merger consideration "in trust for the benefit of holders of the Shares").

Additionally, in concluding that Section 546(e) preempted plaintiffs' claims, this Court has already determined that the Tribune LBO transaction occurred "in connection with ... securities contract[s]" between Tribune and its shareholders.

See Tribune, 818 F.3d 105, 120. Plaintiffs did not dispute that point, nor could they. A "securities contract" is "a contract for the purchase [or] sale ... of a security" or "any other ... similar" "agreement or transaction." 11 U.S.C. \$741(7)(A)(i), (vii). Here, Tribune "purchased all of its stock" from the shareholders, 818 F.3d at 105, pursuant to a tender-offer agreement and a merger agreement, see Tribune Offer 1; Merger §§2.1(a), 2.2(b).

Thus, both Tribune and the shareholders were "customers" of

Computershare, which served as their agent in the LBO, and hence are themselves

"financial institutions" under the Bankruptcy Code. This analysis is consistent

with *Merit Management*. The Supreme Court acknowledged but did "not address"

(because the defendant had not raised) the possibility that the transaction at issue

was safe harbored because "either the debtor or petitioner … qualified as a

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'financial institution' by virtue of its status as a 'customer.'" 138 S. Ct. at 890 n.2; see also Oral Tr. 15-16, No. 16-784 (Nov. 6, 2017) at 15-16 (Breyer, J.) ("[W]hy are we hearing this case? ... [I]t seems to me that Citizens Bank is acting [as] agent or custodian of a customer, namely VVD, and it seems to me that Credit Suisse is acting as—as an agent or custodian for VVD. So why doesn't that cover it?").

2. Tribune was also a "financial participant." §546(e). A "financial participant" is

an entity that, ... at the time of the date of the filing of the [bankruptcy] petition, has one or more agreements or transactions described in ... section 561(a) [which includes swap agreements] with ... any ... entity (other than an affiliate) of a total gross dollar value of not less than \$1,000,000,000 in notional ... principal amount outstanding (aggregated across counterparties) at such time or on any day during the 15 month-period preceding the date of the filing of the petition, or has gross mark-to-market positions of not less than \$100,000,000 (aggregated across counterparties) in one or more such agreements or transactions with ... any ... entity (other than an affiliate) at such time or on any day during the 15-month period preceding the date of the filing of the petition.

§101(22A)(A). Tribune qualifies in several ways. Here, it suffices to mention only one: through Tribune's swap agreements. When Tribune filed its bankruptcy petition in December 2008, it had in place three swap agreements with Barclays Bank (not a Tribune affiliate) whose total gross dollar value in notional principal amount outstanding was \$2.5 billion both on that date and throughout the preceding 15-month period, 2007 Form 10-K at 43, 51, *Tribune Bankruptcy Case*

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(Aug. 20, 2010) (ECF 5437-3), and whose aggregate gross mark-to-market position was about \$150 million.⁷

CONCLUSION

The Court should deny the motion to recall the mandate. In the alternative, if it grants the motion, it should vacate only that portion of its opinion that addressed the intermediary question decided in *Merit Management*, decline to remand, and reaffirm the dismissal on either of the grounds discussed above.

If the Court believes further proceedings are warranted, it should confirm that all parts of its prior opinion except the intermediary ruling remain law of the case, and limit those proceedings to the two dispositive legal questions discussed above: whether plaintiffs' claims have reverted to them, and, if so, whether the LBO payments were made by, to, or for the benefit of a covered entity. If the Court remands, it should retain jurisdiction under the *Jacobson* procedure.

⁷ See Proposed Confirmation Order 30, 40, *Tribune Bankruptcy Case*, (July 20, 2012) (ECF 12072-2) (allowing Barclays' "Swap Claims" against Tribune for \$150,948,822).

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Trust; Rydex Variable Trust Multi-Hedge Strategies Fund; SBL Fund Series H; SBL Fund Series O; Schwab 1000 Index Fund; Schwab Capital Trust; Schwab Fundamental US Large Company Index Fund; Schwab Investments; Schwab S&P 500 Index Fund; Schwab S&P 500 Index Fund (F/K/A Schwab Institutional Select S&P 500 Fund); Schwab Total Stock Market Index Fund; Security Global Investors-Rydex/SGI; Security Investors, LLC; Transamerica Asset Management, as owner of the DIA Mid Cap Value Portfolio; Transamerica Blackrock Large Cap Value VP (F/K/A Transamerica T. Rowe Price Equity Income VP); Transamerica Partners Mid Cap Value; Transamerica Partners Mid Cap Value F/K/A Diversified Investors Portfolios; Transamerica Partners Mid Value Portfolio (f/k/a Transamerica Partners Mid-Cap Value Portfolio f/k/a/ Diversified Investors Mid-Cap Value Portfolio); Transamerica Partners Portfolios (F/K/A Diversified Investors Portfolios); Transamerica Series Trust (F/K/A Aegon/Transamerica Series Trust); The Vanguard Group, Inc.; Vanguard 500 Index Fund (incorrectly named as "Vanguard Index 500 Fund"); Vanguard Tax-Managed Growth & Income Fund; Vanguard Asset Allocation Fund; Vanguard Balanced Index Fund (incorrectly named as "Vanguard Balanced Index Fund (a/k/a Vanguard Balanced Index Equity Fund)"); Vanguard Consumer Discretionary Index Fund; Vanguard Equity Income Fund; Vanguard Fenway Funds; Vanguard Fiduciary Trust Company; Vanguard FTSE Social Index Fund; Vanguard Growth and Income Fund; Vanguard High Dividend Yield Index Fund; Vanguard Index Funds; Vanguard Institutional Index Fund (incorrectly named as "Vanguard Institutional Index Funds"); Vanguard Institutional Total Stock Market Index Fund; Vanguard Large Cap Index Fund; Vanguard Malvern Funds; Vanguard Mid-Cap Index Fund; Vanguard Mid-Cap Value Index Fund; Vanguard Quantitative Funds; Vanguard Scottsdale Funds; Vanguard Structured Large-Cap Equity Fund; Vanguard Tax-Managed Funds; Vanguard Total Stock Market Index Fund; Vanguard Valley Forge Funds; Vanguard Value Index Fund; Vanguard Variable Insurance Fund; Vanguard Variable Insurance Funds; Vanguard VVIF Equity Fund Index; Vanguard VVIF Equity Income VGI; Vanguard VVIF Midcap Index Fund; Vanguard Whitehall Funds; Vanguard Windsor Funds; Vanguard Windsor II Fund; Vanguard World Fund (f/k/a Vanguard World Funds); VFTC - Vanguard Company Stock Account 21; and Woodmont Investments Ltd.

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April 20, 2018

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B).

- Exclusive of the exempted portions of the brief, as provided in Fed. R.
 App. P. 32(f), the brief contains 5,094 words.
- The brief has been prepared in proportionally spaced typeface using
 Microsoft Word 2016 in 14 point Times New Roman font. As permitted by Fed.
 R. App. P. 32(g)(1), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

/s/ Philip D. Anker PHILIP D. ANKER

April 20, 2018

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UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 13-3992, 13-3875, 13-4178, 13-4196	Caption [use short title]
Motion for: Court to Recall Its Mandate	In re: Tribune Company Fraudulent Conveyance Litigation
Set forth below precise, complete statement of relief sought: That the Court recall its mandate, vacate its March 29,	<u>.</u>
2016, decision in its entirety, and remand to district	
court for further proceedings in light of Merit Management	
Group LP v. FTI Consulting, Inc., 138 S. Ct. 883 (2018).	
MOVING PARTY: Noteholders and Retirees	OPPOSING PARTY: Tribune Shareholders
✓ Plaintiff Defendant	
Appellant/Petitioner Appellee/Respondent	
MOVING ATTORNEY: Lawrence S. Robbins	OPPOSING ATTORNEY: Philip D. Anker
[name of attorney, with firm, add	dress, phone number and e-mail]
Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP	Wilmer Cutler Pickering Hale and Dorr LLP
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(202) 775-4500, lrobbins@robbinsrussell.com	New York, NY 10007
Court- Judge/ Agency appealed from: United States District Cou	rt for the Southern District of New York
Please check appropriate boxes: Has movant notified opposing counsel (required by Local Rule 27.1): VYes No (explain):	FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUCTIONS PENDING APPEAL: Has this request for relief been made below? Has this relief been previously sought in this court? Requested return date and explanation of emergency:
Opposing counsel's position on motion: Unopposed Opposed Don't Know	
Does opposing counsel intend to file a response:	
Yes No Don't Know	
Common and a second	ts for oral argument will not necessarily be granted) enter date: Argument was held November 5, 2014
Signature of Moving Attorney: /s/ Lawrence S. Robbins Date: 4/10/2018	Service by: CM/ECF Other [Attach proof of service]
pare:orzete	Service by: Total Carlotter [Attach proof of service]
Form T-1080 (rev. 12-13)	

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UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

IN RE: TRIBUNE COMPANY FRAUDULENT CONVEYANCE LITIGATION

Nos. 13-3992-cv(L), 13-3875 (XAP), 13-4178 (XAP), 13-4196 (XAP)

PLAINTIFFS-APPELLANTS-CROSS-APPELLEES' MOTION TO RECALL MANDATE

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Plaintiffs-Appellants-Cross-Appellees hereby move that this Court recall its mandate, vacate its decision of March 29, 2016, in its entirety, and remand this case to the district court for further proceedings consistent with *Merit Management Group, LP v. FTI Consulting, Inc.*, 138 S. Ct. 883 (2018). This Court's cases recognize the Court's inherent power to take those actions, as discussed below. And the Court should take them in light of the statement concerning this case issued on April 3, 2018, by two Justices of the Supreme Court, which asked this Court to "consider whether to recall the mandate . . . or provide any other available relief in light of this Court's decision in *Merit Management*."²

BACKGROUND

This case involves fraudulent-conveyance claims brought under state law by creditors of bankrupt debtor Tribune Company, including several hundred retirees who entrusted Tribune with more than \$100 million of deferred income retirement funds. Tribune was forced into bankruptcy by a disastrous leveraged buyout that paid its shareholders while leaving its creditors—who as a matter of law must be

¹ In re Tribune Co. Fraudulent Conveyance Litig., 818 F.3d 98 (2d Cir. 2016), petition for cert. pending sub nom. Deutsche Bank Trust Co. Ams. v. Robert R. McCormick Found., No. 16-317 (filed Sept. 9, 2016).

² Deutsche Bank Trust Co. Ams. v. Robert R. McCormick Found., No. 16-317, 2018 WL 1600841, at *1 (Apr. 3, 2018). See Appendix.

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paid *first*—with only a small fraction of what they were owed.³ State law gives creditors the power to undo such transfers because they "unfairly or improperly deplete . . . assets or . . . dilute the[ir] claims against those assets." 5 COLLIER ON BANKRUPTCY ¶ 548.01, at 548-10 (16th ed. 2017), *quoted in Merit Management*, 138 S. Ct. at 888. See generally 1 GERRARD GLENN, FRAUDULENT CONVEYANCES & PREFERENCES § 58 (1940 ed.) (reflecting state policing of fraudulent conveyances since before the American Revolution); *Orr* v. *Kinderhill Corp.*, 991 F.2d 31, 34-35 (2d Cir. 1993) (same).

The district court dismissed the creditors' claims on the ground that the creditors lacked standing. *In re Tribune Co. Fraudulent Conveyance Litig.*, 499 B.R. 310, 325 (S.D.N.Y. 2013). The court nevertheless analyzed at length—and expressly rejected—the shareholder-defendants' arguments that the claims were preempted by 11 U.S.C. § 546(e). *Id.* at 316-20.

This Court "affirm[ed] the dismissal of the complaint, on preemption rather than standing grounds." 818 F.3d at 124. In doing so, the Court expressly rejected the district court's conclusion that plaintiff-creditors lack standing—thus recognizing that these fraudulent-conveyance claims belong to the plaintiffs. *Id.* at

2

³ As the Supreme Court has recently reminded us, "[t]he Code's priority system"—which puts creditors ahead of shareholders—"constitutes a basic underpinning of business bankruptcy law." *Czyzewski* v. *Jevic Holding Corp.*, 137 S. Ct. 973, 983 (2017).

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108-09. But the Court affirmed anyway because it also disagreed with the district court about preemption, holding that Section 546(e) impliedly preempts *all* state-law claims seeking to avoid transfers involving a financial institution, even when that institution served only as an intermediary for payments to others, such as Tribune's shareholders. Because the transfers at issue were made *through* financial institutions acting as conduits, the Court affirmed the dismissal as to all claims.

Plaintiffs sought certiorari on the grounds that this Court erred in holding (1) that Section 546(e) shields from avoidance transfers in which a financial institution acts as a mere conduit for fraudulently transferred property; (2) that the presumption against federal preemption of state law does not apply in the bankruptcy context; and (3) that Section 546(e) impliedly preempts state-law fraudulent-conveyance actions brought by private parties, rather than by the "trustee" mentioned in the statute.

The Supreme Court has not acted on the certiorari petition. Instead, the Court granted certiorari in *Merit Management* and, in disagreement with this Court as to the basic scope of Section 546(e), held that Section 546(e) has no bearing on claims seeking to avoid transfers in which a financial institution served as a mere intermediary.

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It has now been nearly two months since the Supreme Court decided *Merit Management*, but still it has not acted on the petition for certiorari in this case. Instead, Justices Kennedy and Thomas issued the statement quoted above, suggesting that *this* Court may wish to recall its mandate or provide other relief in light of *Merit Management*, noting "the possibility that there might not be a quorum in th[e Supreme] Court." 2018 WL 1600841, at *1. The two Justices further "advised" the parties "that consideration of the petition for certiorari will be deferred for an additional period of time" to permit this Court to act. *Ibid*.

ARGUMENT

This Court should now recall its mandate. The courts of appeals "have an inherent power to recall their mandates." *Mancuso* v. *Herbert*, 166 F.3d 97, 100 (2d Cir. 1999) (quoting *Calderon* v. *Thompson*, 523 U.S. 538, 549 (1998)). "One circumstance that may justify recall of a mandate is [a] supervening change in governing law that calls into serious question the correctness of the court's judgment." *Sargent* v. *Columbia Forest Prods.*, *Inc.*, 75 F.3d 86, 90 (2d Cir. 1996) (internal quotation marks omitted). Consistent with that principle, this Court has granted motions to recall the mandate where its decision conflicts with a subsequent decision from a state high court (in diversity cases) or the Supreme Court of the United States. See, *e.g.*, *id.* at 91; *Sanchez* v. *United States*, 839 F.2d 40, 42 (2d Cir. 1988) (per curiam).

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I. THIS CASE MEETS THIS COURT'S TEST FOR RECALLING THE MANDATE

This Court has considered four factors when determining whether to recall a mandate in light of a subsequent decision of the Supreme Court of the United States: (1) whether this Court's decision is "inconsistent with" the later Supreme Court decision; (2) whether the movant's papers "made the argument that prevailed" in the Supreme Court; (3) whether there was "a substantial lapse of time" before moving to recall the mandate; and (4) whether the equities "strongly favor" relief. *Sargent*, 75 F.3d at 90; see *Stevens* v. *Miller*, 676 F.3d 62, 69 (2d Cir. 2012) (listing *Sargent* factors). Those factors support recalling the mandate in this case.

First, this Court's decision is "unquestionably at odds," *Sargent*, 75 F.3d at 90, with the Supreme Court's decision in *Merit Management*. This Court held that Section 546(e)'s safe harbor "clearly covers payments, such as those at issue here, by commercial firms to financial intermediaries to purchase shares from the firm's shareholders." *Tribune*, 818 F.3d at 120; see also *id*. at 112 ("Transfers in which either the transferor or transferee is not such an intermediary are clearly included in the language."). That holding reaffirmed this Court's longstanding interpretation "that a transfer may qualify for the section 546(e) safe harbor even if the financial intermediary is merely a conduit" for the transfer. *In re Quebecor World (USA)*

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Inc., 719 F.3d 94, 99 (2d Cir. 2013); see also *Enron Creditors Recovery Corp.* v. *Alfa, S.A.B. de C.V.*, 651 F.3d 329, 333 (2d Cir. 1988).

The Supreme Court granted certiorari in *Merit Management* "to resolve a conflict among the circuit courts as to the proper application of the § 546(e) safe harbor." 138 S. Ct. at 892. The first case the Court cited as part of the circuit conflict being resolved was this Court's *Quebecor* decision. *Id.* at 892 n.6. In resolving the split against this Court's position, the Supreme Court affirmed the Seventh Circuit's contrary holding that Section 546(e) "did *not* protect transfers in which financial institutions served as mere conduits." *Id.* at 892 (emphasis added). Rather, the Supreme Court held, "the relevant transfer for purposes of the § 546(e) safe harbor is the same transfer that the trustee seeks to avoid pursuant to its substantive avoiding powers." *Id.* at 897. If *that* transfer is made by or to (or for the benefit of) a financial institution, then it falls within Section 546(e)'s scope. Where a financial institution served only as a conduit for a transfer between entities that are not financial institutions, however, Section 546(e)'s exception to a trustee's avoidance powers does not apply.

Here, the challenged transfer is from the debtor company (Tribune) to its shareholders. Because neither the debtor nor the vast preponderance of the

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relevant shareholders are financial institutions or other safe-harbored entities,⁴ Section 546(e)'s safe harbor does not apply.⁵ This Court's opinion therefore squarely conflicts with the Supreme Court's opinion in *Merit Management*. Indeed, Justices Kennedy and Thomas took the extraordinarily unusual step of stating that the Supreme Court is deferring action on the certiorari petition in this case specifically so that this Court can "consider whether to recall the mandate . . . in light of this Court's decision in *Merit Management*." 2018 WL 1600841, at *1.

Second, plaintiff-creditors' "appeal papers . . . made the argument that prevailed" in the Supreme Court. *Sargent*, 75 F.3d at 90. We expressly stated that "Plaintiffs preserved below—and hereby preserve here—the position that *Enron* and *Quebecor* were wrongly decided and should be reconsidered by this Court en banc or by the Supreme Court in an appropriate case." Doc. 214 at 82. The

⁴ In addition to financial institutions, Section 546(e) also protects transfers "made by or to (or for the benefit of) a commodity broker, forward contract merchant, stockbroker, . . . financial participant, or securities clearing agency." 11 U.S.C. § 546(e). For simplicity, we refer here to these entities collectively as financial institutions.

Although some of the Tribune shareholders are financial institutions, the vast preponderance are not. This Court should vacate its 2016 decision and allow the district court to decide in the first instance whether Section 546(e) preempts clawbacks from *any* of the shareholders. After *Merit Management*, it is clear that Section 546(e) has nothing to say about, and therefore cannot possibly preempt actions seeking to avoid, transfers in which neither the transferor nor the transferee is a financial institution. Even as to actions against financial institutions, the reasoning of *Merit Management* demonstrates why preemption does not exist, as explained in Point II below.

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"appropriate case," as it turned out, was *Merit Management*, which overruled the very legal rule that plaintiff-creditors argued was erroneous. Indeed, both the plaintiffs and the defendants in this case filed briefs as *amici curiae* in the Supreme Court in *Merit Management*, with defendant-shareholders unsuccessfully urging reversal of the Seventh Circuit and plaintiff-creditors successfully urging that the Supreme Court reject this Court's *Quebecor* and *Enron* decisions and affirm the Seventh Circuit.

Third, there was not a "substantial lapse of time between issuance of [the] mandate and the present motion." *Sargent*, 75 F.3d at 90. In *Sargent*, this Court explained that there was not a substantial lapse of time because, when the supervening case was decided by the Vermont Supreme Court, "a petition for a writ of certiorari was pending in the Supreme Court, and the motion to recall the mandate was filed within two weeks of the denial of the petition for certiorari." *Ibid.* Here, too, our petition for certiorari was pending in the Supreme Court when it issued *Merit Management*—indeed, it is *still* pending. And we are filing this motion to recall the mandate within days of the statement by Justices Kennedy and Thomas that consideration of the certiorari petition will be delayed to provide this Court time to consider whether to recall the mandate.

⁶ See also *Rudgayzer* v. *Google, Inc.*, No. 13 CV 120, 2014 WL 12676233, at *3 (E.D.N.Y. Feb. 10, 2014) (applying *Sargent* factors in granting Rule 60(b) motion

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Finally, "the equities strongly favor" recalling the mandate in this case. Sargent, 75 F.3d at 90. As noted, this is an extraordinary—and, to our knowledge, unique—case. In a typical case, a pending petition for certiorari that presents a question addressed and resolved favorably by another Supreme Court decision would be granted, the judgment vacated, and the case remanded to the court of appeals for further proceedings in light of that decision. See STEPHEN M. SHAPIRO, ET AL., SUPREME COURT PRACTICE, ch. 5.12(b), at 346. Here, however, it appears that there may be some doubt as to the existence of a quorum in the Supreme Court to do so. But, rather than simply allowing this Court's decision to be affirmed by operation of 28 U.S.C. § 2109, the Supreme Court has taken the extraordinary step of delaying consideration of the petition—and it has evidently done so specifically to "allow" this Court "to consider whether to recall the mandate" in light of *Merit* Management. 2018 WL 1600841, at *1. It is difficult to imagine circumstances in which it is more appropriate for a court of appeals to recall its mandate than where, as here, two Justices have stated that the Supreme Court is deferring consideration of its decision for the express purpose of allowing this Court to do so.

that was filed "a mere 10 days" after the supervening decision); *Tal* v. *Miller*, No. 97 Civ. 2275, 1999 WL 38254, at *2 (S.D.N.Y. Jan. 27, 1999) (applying *Sargent* factors in granting Rule 60(b) motion (by a pro se movant) filed "just over a month" after the supervening case was decided).

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II. THE COURT SHOULD VACATE ITS JUDGMENT IN ITS ENTIRETY

This Court should vacate its judgment in its entirety. *Merit Management* does not just fatally undermine this Court's basis for applying Section 546(e) to transfers in which neither the transferor nor the transferee is a financial institution. It also necessitates careful reconsideration of whether Section 546(e) preempts *any* state-law fraudulent-conveyance actions, even those directly against financial institutions. It does so because this Court's key rationale for preemption—that the policies ostensibly animating Section 546(e) warrant interpreting the section more broadly than its plain text provides—cannot be reconciled with what the Supreme Court has now said.

Courts have almost unanimously disagreed with this Court's preemption conclusion, both before and after this Court ruled. See generally Peter V. Marchetti, A Note to Congress: Amend Section 546(e) of the Bankruptcy Code to Harmonize the Underlying Policies of Fraudulent Conveyance Law and Protection of the Financial Markets, 26 Am. Bankr. Inst. L. Rev. 1, 55-62, 68-72 (2018) (collecting cases). The flaw in this Court's reasoning is that it "used a faulty intentionalist approach to interpret section 546(e)." Id. at 72. To be more specific, in reasoning that cannot possibly be reconciled with the later Supreme Court decision in Merit Management, this Court wrote:

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We do not dwell on this because we perceive no conflict between Section 546(e)'s language and its purpose. Section 546(e) is simply a case of Congress perceiving a need to address a particular problem within an important process or market and using statutory language broader than necessary to resolve the immediate problem. Such broad language is intended to protect the process or market from the entire genre of harms of which the particular problem was only one symptom. The legislative history of Section 546(e) clearly reveals such a purpose.

818 F.3d at 120 (emphasis added).

But the *same* argument was made to the Supreme Court in *Merit Management* as a reason to construe Section 546(e) broadly—and the unanimous Supreme Court resoundingly rejected it. "Merit fails to support its purposivist arguments. In fact, its perceived purpose is actually contradicted by the plain language of the safe harbor." 138 S. Ct. at 896-97.

The rationale that Merit "fail[ed] to support" was exactly the same as this Court's: "Merit contends that the broad language of § 546(e) shows that Congress took a 'comprehensive approach to securities and commodities transactions' that 'was prophylactic, not surgical,' and meant to 'advanc[e] the interests of parties in the finality of transactions.' Brief for Petitioner 41-43." *Id.* at 896. And "Merit posits that Congress' concern was plainly broader than the risk that is posed by the imposition of avoidance liability on a securities industry entity." *Ibid.* Those contentions—rejected by the Supreme Court as "nothing more than an attack on the text of the statute," *id.* at 897—exactly parallel this Court's reasoning quoted

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above, and its repeated emphasis on the need for "finality" in the securities markets. See 818 F.3d at 119, 121.

This Court's approach in its *Tribune* opinion is also inconsistent with other recent Supreme Court decisions on statutory interpretation. See, *e.g.*, *Encino Motorcars*, *LLC* v. *Navarro*, No. 16-1362, 584 U.S. ____, 2018 WL 1568025, at *7 (Apr. 2, 2018) (""[I]t is quite mistaken to assume . . . that whatever might appear to further the statute's primary objective must be the law.'") (quoting *Henson* v. *Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017)); *Cyan, Inc.* v. *Beaver County Emps. Ret. Fund*, No. 15-1439, 583 U.S. ____, 2018 WL 1384564, at *11 (Mar. 20, 2018) ("Even if Congress could or should have done more, still it 'wrote the statute it wrote—meaning, a statute going so far and no further.'") (quoting *Michigan* v. *Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2033-34 (2014)).

In short, this Court's rationale for finding implied preemption of *any* statelaw claim (even one against a financial institution) cannot survive *Merit*Management.⁷ Defendants have no valid arguments for dismissing any of

⁷ Case law and party concessions postdating this Court's March 29, 2016, decision reveal additional flaws in this Court's reasoning. For example, citing the controlling authority in *BFP* v. *Resolution Trust Corp.*, 511 U.S. 531 (1994), the Eleventh Circuit has given case-dispositive weight to the presumption against preemption in bankruptcy cases. *In re Northington*, 876 F.3d 1302, 1312 (11th Cir. 2017) (abrogation of creditors' rights provided by state law requires a "clear textual indication that Congress intended that result"). This Court, by contrast, wrote that, "[o]nce a party enters bankruptcy, the Bankruptcy Code constitutes a

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plaintiffs' state-law complaints. If they wish to attempt to raise any particular arguments for dismissal, those arguments should be addressed in the first instance by the district court, unhindered by this Court's ruling of March 29, 2016.

CONCLUSION

This Court should recall its mandate, vacate its March 29, 2016, judgment, and remand this case to the district court for further proceedings consistent with *Merit Management*.

wholesale preemption of state laws regarding creditors' rights." 818 F.3d at 111 (emphasis added); see also id. at 112 (here "there is no measurable concern about federal intrusion into traditional state domains"). Vacating this Court's March 29, 2016, decision would allow the district court to take a fresh look at whether the presumption against preemption applies. Indeed, the shareholder-defendants conceded in the Supreme Court, in two separate briefs, that a presumption against preemption applies. 16-317 Br. in Opp. 10 (filed Nov. 4, 2016) (asserting that this Court "never said" that the presumption against preemption does not apply in bankruptcy cases); 16-317 Supp. Br. 1 (filed Jan. 12, 2018) ("the Second Circuit ... expressly acknowledged the 'recognized presumption against preemption' of state law in the bankruptcy context"). But see 818 F.3d at 110 (stating only that "Appellants argue that a recognized presumption against preemption limits the implied preemption doctrine.") (emphasis added). The district court should be free to follow the Supreme Court's statement that "[t]his Court has often applied a 'presumption in favor of concurrent state court jurisdiction' when interpreting federal statutes." Cyan, 2018 WL 1384564, at *8 n.2 (quoting Mims v. Arrow Financial Servs., LLC, 565 U.S. 368, 378 (2012), in turn quoting *Tafflin* v. *Levitt*, 493 U.S. 455, 458-59 (1990)).

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this motion complies with the type-volume limitation of Fed. R.

App. P. 27(d)(2)(A) because it contains 3,224 words, excluding the parts of the

motion exempted by Fed. R. App. P. 32(f), which is less than the 5,200 word

limitation set forth in Fed. R. App. P. 27(d)(2)(A). The motion complies with the

typeface and style requirements of Fed. R. App. P. 27(d)(1)(E), 32(a)(5) and

32(a)(6) because it was prepared in Microsoft Word using 14-point Times New

16

Roman font, with footnotes in 14-point Times New Roman font.

/s/ Lawrence S. Robbins

Lawrence S. Robbins

Dated: April 10, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on April 10, 2018, I caused a true and correct copy of the foregoing to be filed with the Court by CM/ECF, thereby effecting electronic service on counsel for all parties.

/s/ Lawrence S. Robbins
Lawrence S. Robbins

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APPENDIX

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Cite as: 584 U.S. ____ (2018)

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Statement of KENNEDY, J. and THOMAS, J.

SUPREME COURT OF THE UNITED STATES

DEUTSCHE BANK TRUST COMPANY AMERICAS, ET AL. v. ROBERT R. McCORMICK FOUNDATION, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 16-317. Decided April 3, 2018

Statement of JUSTICE KENNEDY and JUSTICE THOMAS respecting the petition for certiorari.

The parties are advised that consideration of the petition for certiorari will be deferred for an additional period of time. This will allow the Court of Appeals or the District Court to consider whether to recall the mandate, entertain a Federal Rule of Civil Procedure 60(b) motion to vacate the earlier judgment, or provide any other available relief in light of this Court's decision in *Merit Management Group, LP v. FTI Consulting, Inc.*, 583 U. S. ___ (2018). The petition for certiorari in this case was pending when the Court decided *Merit Management*. The Court of Appeals or the District Court could decide whether relief from judgment is appropriate given the possibility that there might not be a quorum in this Court. See 28 U. S. C. §2109.

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UNITED STATES COURT OF APPEALS FOR THE SE OND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 29th day of March, two thousand and sixteen.

Before: Ralph K. Winter,

Christopher F. Droney,

Circuit Judges,

Alvin K. Hellerstein,

District Judge.*

IN RE: TRIBUNE COMPANY FRAUDULENT CONVEYANCE LITIGATION

NOTE HOLDERS, Deutsche Bank Trust Company Americas, Law Debenture Trust Company of New York, Wilmington Trust Company, INDIVIDUAL RETIREES, William A. Niese, on behalf of a putative class of Tribune Company retirees,

Plaintiff - Appellant-Cross-Appellees,

Mark S. Kirschner, as Litigation Trustee for the Tribune Litigation Trust,

Plaintiff,

Tendering Phones Holders, Citadel Equity Fund Ltd., Camden Asset Management LLP and certain of their affiliates,

Plaintiff-Intervenors,

v.

Large Private Beneficial Owners, Financial Institution Holders,

MANDATE ISSUED ON 08/01/2016

JUDGMENT

Docket Nos. 13-3992(L) 13-3875(XAP) 13-4178(XAP) 13-4196(XAP)

^{*} The Honorable Alvin K. Hellerstein, of the U.S. District Court for the Southern District of New York, sitting by designation.

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Financial Institution Conduits, Merrill Lynch, Pierce, Fenner & Smith, Inc., on behalf of a putative class of former Tribune Company shareholders, Pension Funds, including public, private, and Taft Hartlet Funds, Individual Beneficial Owners, Mario J. Gabelli, on behalf of a putative class of former Tribune Company shareholders, Mutual Funds, At-Large, Estate of Karen Babcock, Phillip S. Babcock, Phillip S. Babcock, Douglas Babcock, Defendants listed on Exhibit B

Defendants - Appellee-Cross-Appellants,

Current and Former Directors and Officers, Betsy D. Holden, Christopher Reyes, Dudley S. Taft, Enrique Hernandez, Jr., Miles D. White, Robert S. Morrison, William A. Osborn, Harry Amsden, Stephen D. Carver Dennis J. FitzSimons, Robert Gremillion, Donald C. Grenesko, David Dean Hiller, Timothy J. Landon, Thomas D. Leach, Luis E. Le, Mark Hianik, Irving Quimby, Crane Kenney, Chandler Bigelow, Daniel Kazan, Timothy Knight, Thomas Finke, SAM ZELL AND AFFILIATED ENTITIES, EGI-TRB, LLC, Equity Group Investments, LLC, SAM Investment Trust, Samuel Zell, Tower CH, LLC, Tower DC, LLC, Tower Dl, LLC, Tower EH, LLC, Tower Gr, Large Shareholders, Chandler Trust and their representatives, FINANCIAL ADVISORS, Valuation Research Corporation, Duff & Phelps, LLC, Morgan Stanley & Co. Inc. and Morgan Stanley Capital Services, Inc., GreatBanc Trust Company, Citigroup Global Markets, Inc., CA PUBLIC EMPLOYEE RETIREMENT SYSTEM, CALPERS, UNIVERSITY OF CA REGENTS, T. ROWE PRICE ASSOCIATES, INC. MORGAN KEEGAN & COMPANY, INC., NTCA, DIOCESE OF TRENTON-PENSION FUND, FIRST ENERGY SERVICE COMPANY, MARYLAND STATE RETIREMENT AND PENSION SYSTEM, T BANK LCV OP, T BANK-LCV-PT, JAPAN POST INSURNACE, CO., LTD., SERVANTS OF RELIEF FOR INCURABLE CANCER (AKA DOMINICAN SISTERS OF HAWTHORNE), NEW LIFE INTERNATIONAL, NEW LIFE INTERNATIONAL TRUST, SALVATION ARMY, SOUTHERN TERRITORIALHEADQUARTERS, CITY OF PHILADELPHIA EMPLOYEES, OHIO CARPENTERS' MIDCAP (AKA OHIO CARPENTARS' PENSION FUND), TILDEN H. EDWARDS, JR., MALLOY AND EVANS, INC., BEDFORD OAK PARTNERS, LP, DUFF AND PHELPS LLC, DURHAM J. MONSMA, CERTAIN TAG-ALONG DEFENDANTS, MICHAEL S. MEADOWS, WIRTZ CORPORATION,

Defen	dants.		

The appeals in the above captioned case from a dismissal by the United States District Court for the Southern District of New York were argued on the district court's record and the parties' briefs. Upon consideration thereof,

Case 13-3992, Document 369, 08/29/2016, 1839298, Page3 of 3

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the district court's dismissal of the complaint is AFFIRMED on preemption rather than standing grounds.

For The Court: Catherine O'Hagan Wolfe, Clerk of Court

A True Copy

Catherine O'Hagan Wolfe Cle

United States Court of Appear

Second Circuit

SUPREME COURT OF THE UNITED STATES

Pages: 1 through 68

Place: Washington, D.C.
Date: November 6, 2017

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		1
1	IN THE SUPREME COURT OF TH	E UNITED STATES
2		-
3	MERIT MANAGEMENT GROUP, LP,)
4	Petitioner,)
5	v.) No. 16-784
6	FTI CONSULTING, INC.,)
7	Respondent.)
8		-
9		
10	Washington, D.C.	
11	Monday, November 6,	2017
12		
13	The above-entitled matter	came on for oral
14	argument before the Supreme Court	of the United States
15	at 10:03 a.m.	
16		
17	APPEARANCES:	
18	BRIAN C. WALSH, St. Louis, Missou	ri; on
19	behalf of the Petitioner.	
20	PAUL D. CLEMENT, Washington, D.C.	; on
21	behalf of the Respondent.	
22		
23		
24		
25		

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1	PROCEEDINGS
2	(10:03 a.m.)
3	CHIEF JUSTICE ROBERTS: We'll hear
4	argument this morning in Case 16-784, Merit
5	Management Group versus FTI Consulting.
6	Mr. Walsh.
7	ORAL ARGUMENT OF BRIAN C. WALSH
8	ON BEHALF OF THE PETITIONER
9	MR. WALSH: Mr. Chief Justice, and may
10	it please the Court:
11	The relevant transfers in this case
12	are the transfers by and to the financial
13	institutions, Credit Suisse and Citizens Bank.
14	We know that because Congress included
15	intermediaries in the safe harbor from the very
16	beginning, focusing on what they do rather than
17	who they are.
18	We know that because Congress used the
19	disjunctive, "by or to or for the benefit of" a
20	financial institution or another institution,
21	which precludes an approach that looks only at
22	the party that has a beneficial interest in the
23	transaction.
24	JUSTICE KENNEDY: I'll I'll read
25	them I'll read them with more care, but the

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1	circuits that come out as as you would ask
2	us to, it seems to me focus on the word
3	"settlement" and that that controls everything
4	And they don't talk about transfer. Of course
5	there was a transfer in a lay sense, but that's
6	not the transfer here that the trustee seeks to
7	avoid.
8	MR. WALSH: Well, Your Honor, the
9	there was a lot of discussion of whether or not
10	something is a settlement payment in some of
11	the earlier cases. In 2006, Congress added
12	"securities contract" and "commodities
13	contract" to the statute, and those are much
14	broader concepts.
15	And so there's there's much less
16	discussion about whether something is or is not
17	a settlement payment because frequently it is a
18	transfer in connection with a securities
19	contract.
20	But it is true that the transfer
21	targeted by the plaintiff in this case is the
22	end-to-end transfer between the parties with

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the beneficial interest. But that is not a distinct or separable or independent transfer

from the transfers that made it up; the

23

24 25

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5

1	transfers that the parties contemplated when
2	they entered into this contract that they're
3	JUSTICE GINSBURG: Mr. Walsh, could
4	you explain I mean, here we have two
5	parties, Valley View and Merit. And you don't
6	claim that either of those is a 546(e) entity,
7	do you?
8	MR. WALSH: Neither of those is a
9	financial institution
10	JUSTICE GINSBURG: Yes.
11	MR. WALSH: one of the other
12	institutions named in the statute. That's
13	correct.
14	JUSTICE GINSBURG: So now the trustee
15	is alleging that Merit got money that otherwise
16	would have been available for distribution to
17	creditors. That's the claim.
18	MR. WALSH: That's the gist of it,
19	yes.
20	JUSTICE GINSBURG: So why should it
21	matter whether the transmission was through the
22	banks rather than handed over by Valley View to
23	Merit?
24	MR. WALSH: Because the goal of the

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25 statute is to protect the securities and

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1	commodities markets, not just to protect
2	particular players in the markets. We know
3	JUSTICE GINSBURG: Well, how how is
4	the either bank at risk of anything here?
5	MR. WALSH: Neither bank is at risk of
6	liability in this particular case, but the
7	broader issue is that parties who receive
8	distributions from securities or commodities
9	transactions have a decision to make. Can we
10	safely reinvest in something else? Can we make
11	a distribution to our own investors or the
12	benefits of our pension fund or what what
13	have you? Or do we have to create a reserve?
14	Or do we have to anticipate that there may be
15	litigation that comes along six, eight
16	JUSTICE SOTOMAYOR: I'm sorry, who's
17	insecure about that? The banks or the person
18	to whom the money was ultimately sent?
19	MR. WALSH: Investors in general would
20	be insecure about that, Your Honor.
21	JUSTICE SOTOMAYOR: Well, I understood
22	that the safe harbor was not intended to
23	protect people involved in financial
24	transactions. That's always a risk whenever

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you get into a deal that's contingent on any

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1	basis.
2	MR. WALSH: Well
3	JUSTICE SOTOMAYOR: If Congress wanted
4	to do that, why bother even creating the
5	fraudulent transfer provisions? Just say any
6	contract that any of these people sign in any
7	of these fields is exempt.
8	MR. WALSH: Well, Your Honor, I agree
9	that anyone engaging in any transaction has
10	some possibility that there could be a claim
11	that would come along later, but Congress has
12	focused here on the securities and commodities
13	markets
14	JUSTICE SOTOMAYOR: Going going
15	back to this transfer question.
16	MR. WALSH: Yes.
17	JUSTICE SOTOMAYOR: The
18	fraudulent-transfer provision says the trustee
19	may avoid any transfer or any obligation. So
20	it's not talking just about voiding a transfer;
21	it's talking about voiding an obligation.
22	Isn't the contractual obligation an
23	obligation?
24	MR. WALSH: The contractual
25	JUSTICE SOTOMAYOR: Or a contractual

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1	rights obligations? So why can't a trustee
2	choose what it is he or she wants to avoid,
3	whether it's a transfer or an obligation?
4	MR. WALSH: Your Honor, the
5	JUSTICE SOTOMAYOR: And that define
6	the scope of who's involved?
7	MR. WALSH: Sure. The reference to
8	obligation in the fraudulent-transfer statutes
9	is is generally in reference to a debt
10	incurred by the debtor to someone else. And if
11	that debt causes the debtor to become insolvent
12	or inadequately capitalized and the other
13	the other aspects of the statute are satisfied,
14	then the
15	JUSTICE SOTOMAYOR: I'm sorry, the,
16	here, debtor sold something to someone else or
17	was obligated to send money ultimately to
18	Merit. So how does that not fit into
19	obligation?
20	MR. WALSH: Well, that obligation has
21	been paid already. It would that that
22	application of the statute would normally be in
23	a situation where the
24	JUSTICE SOTOMAYOR: You think that

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obligation issue is one that's prospective and

25

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9

1 not --2 MR. WALSH: It typically arises in that context. And also the safe harbor, 546(e) 3 does not apply to obligations; it only applies 4 5 to transfers. 6 JUSTICE ALITO: And what you called 7 the -- the end-to-end transfer is the transfer that the trustee is seeking to avoid; isn't 8 9 that right? 10 MR. WALSH: That is correct. JUSTICE ALITO: That's the one that is 11 allegedly construction --12 MR. WALSH: That is --13 JUSTICE ALITO: -- constructively 14 15 fraudulent. 16 MR. WALSH: That is correct. 17 JUSTICE ALITO: So why does -- why 18 shouldn't the exemption provision be applied to 19 the transfer that the trustee is seeking to avoid, if the -- otherwise, is your argument 20 that these intermediate transfers are -- are 21 22 constructively fraudulent? 23 MR. WALSH: My argument is not that 24 the intermediate transfers are constructively

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fraudulent. My argument is that the

25

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10

1	intermediate transfers can't be separated from
2	the overall end-to-end transfer, and so that by
3	avoiding the overall transfer, the trustee
4	would necessarily be avoiding the intermediate
5	transfers as well.
6	To think of it a different way
7	JUSTICE ALITO: So why shouldn't the
8	transfer why shouldn't the exemption be
9	applied to the transfer that the trustee is
10	seeking to avoid, as opposed to intermediate
11	transfers that can't that are not
12	constructively fraudulent?
13	MR. WALSH: Well, I think a useful way
14	to think about it, Your Honor, is that there's
15	only \$55 million involved here. And we can
16	say, as a shorthand, now that we know how the
17	transfer played out because it was 10 years
18	ago we can say there was a transfer from
19	Valley View to Merit, but it's not different
20	from the transfer of the same \$55 million that
21	Valley View sent to Citizens Bank.
22	And it's not different from the subset
23	of that transfer that Citizens Bank sent to
24	Merit on two different occasions three years
25	apart. In other words, I understand the

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1	trustee's point that I'm only seeking to to
2	avoid this broader transfer, but when we have
3	an overriding prohibition like 546(e), I don't
4	think it's sufficient simply to say, But that's
5	not what I'm doing.
6	JUSTICE GINSBURG: Well, could the
7	trustee, absent 546(e), seek to avoid the
8	transfer from Credit Suisse to Citizens Bank?
9	MR. WALSH: The trustee, absent the
10	safe harbor, could seek to avoid the transfer
11	from Credit Suisse to Citizens Bank.
12	JUSTICE KENNEDY: Why why was there
13	not adequate consideration for that? There
14	there it was it was just a pass-through.
15	MR. WALSH: I'm I'm not agreeing on
16	
17	JUSTICE KENNEDY: What would there be
18	to avoid?
19	MR. WALSH: I'm sorry. I'm not
20	agreeing on the on the merits. I'm I'm
21	suggesting the trustee could pursue that claim.
22	JUSTICE GINSBURG: But would you
23	MR. WALSH: I do think there was
24	adequate consideration for it, and that claim
25	would fail, but the trustee could seek to

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1	pursue it.
2	CHIEF JUSTICE ROBERTS: Your friend on
3	the other side says that your theory would
4	cover the simple use of a check to convey a
5	straight-forward purchase and sale if the
6	purchaser pays with a check. Is that correct?
7	MR. WALSH: Your Honor, not
8	necessarily. And the Court doesn't need to go
9	nearly that far to rule in our favor in this
10	case.
11	The safe harbor goes at least as far
12	as what we have here, where we have an
13	intermediary, a financial institution serving
14	as an intermediary in much the same way that a
15	broker or a clearing agency would serve as an
16	intermediary
17	CHIEF JUSTICE ROBERTS: I I
18	understand that, but I'm concerned about the
19	scope of the rationale that we would adopt, and
20	you say not necessarily. When would it be
21	enough that the purchaser just paid by check?
22	MR. WALSH: Well, I think let me
23	address the scope first. I think the scope of
24	checks or wire transfers is actually quite a
25	bit less than than my opponent would

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1 suggest. 2 The vast majority of transfers in securities and commodities, involving public 3 securities in particular, are going to clear 4 5 through the -- the indirect holding system. 6 They're going to clear through paper, debits, and credits and not with wire transfers or 7 checks. 8 JUSTICE BREYER: I'm just curious, 9 10 though, it says look, I have two shares of company X in my -- I have an account somewhere, 11 12 okay? 13 MR. WALSH: Yes. 14 JUSTICE BREYER: So knowing I'm about 15 to go bankrupt, I take my share, and I tell 16 them go transfer it to my wife. Right? 17 MR. WALSH: Yes. JUSTICE BREYER: Now, you'll say they 18 19 can't attack that as a fraudulent conveyance. 20 I'm just trying to think, you know, of --21 MR. WALSH: Well, actually --22 JUSTICE BREYER: -- the paradigm case 23 of a fraudulent conveyance. 24 MR. WALSH: Well, actually, Your

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Honor, that -- that very well might be a case

25

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1	that wouldn't fall within the safe harbor.
2	JUSTICE BREYER: Why not?
3	MR. WALSH: Because if you transfer
4	your stock to your wife
5	JUSTICE BREYER: No, no, no. I told
6	you it's being held in a in a bank, and I
7	tell the bank to do it.
8	MR. WALSH: It's being held in the
9	indirect system, and you you sell it to your
10	wife. Then in then in that case, there's
11	safe harbor.
12	JUSTICE BREYER: It does. So this
13	covers that's, I think, the thrust of this
14	is going to cover all kinds of things.
15	I have another another question,
16	which is which is, and this is just a
17	puzzle, look, when they define financial
18	institutions what we have here is a
19	transfer, we wanted to have a Valley View,
20	VVD, Valley Downs, see, wants to give \$55
21	million to a group of people that include the
22	Merit Downs or whatever, Merit, right?
23	MR. WALSH: Yes. Yes.
24	JUSTICE BREYER: That's what they want
25	to do. Neither of them is financial

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15

1	institutions. But the way they do it is Valley
2	Downs says its friend, Credit Suisse, which is,
3	you have the line of credit, you send it to the
4	Citizens Bank, which is the escrow.
5	MR. WALSH: Correct.
6	JUSTICE BREYER: So you say, in real
7	terms, it goes from Valley to Merit, but we do
8	it by means of the guy who gives the line of
9	credit, which is a bank, Credit Suisse, and
10	they send it to the escrow agent, which is
11	Citizens Bank, okay?
12	MR. WALSH: That's correct.
13	JUSTICE BREYER: And so the argument
14	here is, because they used these two agents,
15	now, suddenly, does it fall into the securities
16	the bank or the or the bank exception,
17	the Industrial Savings Bank exception, the et
18	cetera, et cetera.
19	MR. WALSH: Correct, right.
20	JUSTICE BREYER: Okay. And so why are
21	we hearing this case? For this reason now,
22	this is slightly a side issue, but it's very
23	puzzling, and I think I should know the answer,
24	when I look up the definition of financial

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institution, it says that not only is it Credit

25

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1	Suisse and not only is it Citizens Bank, but it
2	is also the customers of each of those
3	financial institutions in an instance where the
4	bank is acting as agent or custodian for a
5	customer.
6	Now, it seems to me that Citizens Bank
7	is acting for agent or custodian of a customer,
8	namely VVD, and it seems to me that Credit
9	Suisse is acting as as an agent or custodian
10	for VVD.
11	So why doesn't that cover it?
12	MR. WALSH: I think that is a fair way
13	to look at it, Your Honor.
14	JUSTICE BREYER: Well, why doesn't
15	that cover it? Why are we dealing with a case
16	which is coming out of something and deciding
17	all kinds of things about banks and my wife, if
18	I you know, where this is absolutely dealt
19	with in a statute, under under another
20	provision, and nobody refers us to that
21	provision, and I can't understand why they
22	didn't what's going on?
23	MR. WALSH: Your Honor, we did we
24	did refer to that provision in in both of

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our briefs, if I remember correctly.

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1	JUSTICE BREYER: You may have put it
2	in your briefs, but, I mean, why in the lower
3	courts wasn't this just said, look, point to
4	that, Judge, this involves a customer of a
5	financial institution, namely VVD, and,
6	therefore, it's in the exempt area? Point to
7	that. And I want to know why that didn't
8	happen.
9	MR. WALSH: That I don't
10	JUSTICE BREYER: It's your case. You
11	can do it in a sense the way you want, but, I
12	mean, where this is just standing out and we're
13	asked to decide a question that I think is
14	fraught with difficulty, I would like to know
15	the answer.
16	MR. WALSH: I'm afraid I don't have a
17	good answer for why that did not come up
18	earlier.
19	JUSTICE SOTOMAYOR: I'm sorry.
20	Perhaps it's simple.
21	JUSTICE ALITO: Oh, I thought you
22	conceded it. Didn't both parties didn't
23	both parties concede that that Valley View
24	is not a financial institution?
25	JUSTICE GINSBURG: You just did in

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1	answer to my question.
2	MR. WALSH: No, I'm sorry.
3	JUSTICE GINSBURG: I said I asked
4	you that, with the question that Justice Breyer
5	raised in mind, I asked you specifically, Do
6	you agree that neither Valley View nor Merit is
7	an entity enumerated under 546(e)?
8	MR. WALSH: I may have I may have
9	misunderstood the difference between the two
10	questions, Your Honor.
11	JUSTICE BREYER: I think it's the
12	same, but, I mean, at some point, you know, if
13	we have two cases involving the Fishing Act,
14	and it involves fishermen, and both parties
15	concede we are we are fishermen, but, in
16	fact, what they are is both farmers and have
17	nothing to do with fish, I would say we'd have
18	a problem in this Court about whether we should
19	hear the case.
20	MR. WALSH: And and, Justice
21	Ginsburg, in response to your question, neither
22	of the parties to this case is a is a
23	financial institution, as that term is is
24	generally understood.
25	In trying to

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1	JUSTICE BREYER: But not as the
2	statute understands it, which uses it to
3	include a customer of a financial institution
4	in circumstances which are present here.
5	MR. WALSH: That in the rather
6	unusual definition of financial institution,
7	this is a situation in which the banks act as
8	acted as agents, that's that's an escrow
9	agent.
10	JUSTICE GINSBURG: If you if this
11	was such a standout issue, you must have
12	thought about it, and yet, you relegated it to
13	a footnote in your reply brief.
14	MR. WALSH: And I and I don't know
15	whether it's a standout issue or not, Your
16	Honor, but that is a quirk in the definition of
17	financial institution, that is true. That is
18	true.
19	I think one of the one of the ways
20	to think about what's going on here is whether
21	Congress is protecting particular institutions
22	or whether Congress is protecting transactions.
23	If Congress wanted to protect banks
24	and brokers and clearing agencies from
25	liability, and that was the only purpose of the

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1	statute here, that could have been resolved in
2	Section 550, which is the section of the
3	Bankruptcy Code that deals with who has
4	liability if there is a transfer that's
5	avoided.
6	JUSTICE SOTOMAYOR: Well, that
7	actually, 550, I think, works very strongly
8	against you because 550 says the trustee may
9	recover for the benefit of the state the
10	property transferred, so it seems to be talking
11	about who has control and dominion of the
12	property that the trustee is seeking to
13	recover.
14	MR. WALSH: Well, Your Honor, control
15	and dominion is a test that's been leveled by
16	the lower courts. It's it's not a
17	rationale. It's a test to determine whether a
18	party had the beneficial interest in the
19	transaction, such that it's appropriate to
20	impose liability on that party.
21	JUSTICE SOTOMAYOR: They that's how
22	they've defined it under 550.
23	MR. WALSH: That is how they
24	JUSTICE SOTOMAYOR: It makes common

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25 sense, which is --

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1	MR. WALSH: That is how they've
2	defined it. But what
3	JUSTICE SOTOMAYOR: go to who
4	ultimately has control of the property.
5	MR. WALSH: And and the question
6	is, Your Honor, the reason the courts have
7	applied that definition to the term "initial
8	transferee" is because the party that initially
9	receives a transfer is not necessarily the
10	initial transferee. It's a non-literal
11	definition of the term "initial transferee."
12	JUSTICE SOTOMAYOR: Exactly.
13	MR. WALSH: And but the reference I
14	was making to 550 earlier, Your Honor, is to
15	550(c), which is an example of a situation in
16	which Congress perceived that there's a
17	problem, that a transfer may be avoided and
18	certain parties may be liable.
19	And Congress's response would say,
20	Avoid the transfer all you want, but here is
21	the very limited subset of parties against whom
22	you may recover.
23	That is what the opponent here would
24	like to happen here. That is what they propose
25	is the actual function of 546(e), that it only

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1	protects banks and brokers and clearing
2	agencies. And Congress didn't do it in 550,
3	which would have accomplished that.
4	There there's also the problem here
5	that the statute protects transfers by banks
6	and brokers and clearing agencies and these
7	other parties. And that has nothing to do with
8	protecting the bottom lines of banks and
9	brokers.
10	It has everything to do with
11	protecting transactions. So, for example, if
12	Goldman Sachs were to sell me 100 shares of
13	Berkshire Hathaway stock for \$100 apiece, that
14	is a significant hit to the bottom line of
15	Goldman Sachs because the stock is worth many,
16	many times that much.
17	Nevertheless, that is not an avoidable
18	transfer because it's by a broker to me, even
19	though I am not a cog in the financial system.
20	JUSTICE KENNEDY: But they're parties
21	to the transaction. They're not acting just as
22	a pass-through agent.
23	MR. WALSH: But it would also apply,
24	Your Honor, if Goldman Sachs, on behalf of one

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of its clients, made that transaction. I

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1	probably wouldn't even know whether I was
2	dealing with Goldman Sachs' own balance sheet
3	or whether I was dealing with someone who was
4	trading through Goldman Sachs.
5	But those transfers go outside of the
6	circle of the six entities that are identified
7	in the statute. Nevertheless, a trustee can't
8	get them back. And so that is a significant
9	problem with the notion that all that is going
10	on here is we're trying to protect banks and
11	brokers from liability because if they get hit
12	with liability, there will be a cascade of
13	other banks and brokers that will that will
14	fail.
15	When we're talking about systemic risk
16	to the financial markets, we're not just
17	talking about banks and brokers going under.
18	If parties aren't willing to provide capital to
19	the financial system or if other parties like
20	private equity funds or pension funds collapse,
21	we have systemic risk to the financial
22	institution as well.
23	JUSTICE GORSUCH: Mr. Walsh
24	MR. WALSH: Yes?
25	JUSTICE GORSUCH: can you help me

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1	out with what happens to the law of preferences
2	under your interpretation?
3	As you know, trustees can avoid
4	transfers leading up to the bankruptcy that
5	meet certain conditions.
6	MR. WALSH: Yes.
7	JUSTICE GORSUCH: And a lot of that
8	would seem to go away, that power would seem to
9	go away under your interpretation, if a bank or
10	financial institution is involved. So that a
11	lot of avoidable transactions would become
12	unavoidable all of a sudden.
13	How do we reconcile your your
14	interpretation with that that apparent
15	difficulty?
16	MR. WALSH: I'm I'm not sure that
17	there is such a difficulty, Your Honor. A
18	typical preference claim, for example, would be
19	that the debtor repaid a vendor outside of the
20	ordinary course of business.
21	And the pursuit of that claim against
22	the manufacturer of a widget that sold it to
23	the debtor would not obviously implicate the
24	safe harbor here. There are no securities
25	JUSTICE GORSUCH: Well, but often

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1	MR. WALSH: no commodities.
2	JUSTICE GORSUCH: often a transfer
3	that's avoidable does involve a financial
4	institution. You'd agree with that, surely?
5	MR. WALSH: It it may, but it
6	JUSTICE GORSUCH: May, but
7	MR. WALSH: does not very often
8	involve securities or commodities
9	JUSTICE GORSUCH: Well, but it could
10	
11	MR. WALSH: if that's the
12	JUSTICE GORSUCH: Well, but it could.
13	I mean, why not? I mean, do you have any
14	empirical information on that?
15	MR. WALSH: I don't have empirical
16	information.
17	JUSTICE GORSUCH: No.
18	MR. WALSH: I I do have the the
19	overlap between securities transactions and
20	bankruptcy is very small. There are a million
21	or so bankruptcy cases filed every year. It's
22	very
23	JUSTICE GORSUCH: So not a
24	triviality we don't need to worry about, even
25	though it was a central feature of the Seventh

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1	Circuit's opinion?
2	MR. WALSH: I wouldn't say it's a
3	triviality, but it's not there's a lot of
4	talk in the briefs about the exception
5	swallowing the rule. And the rule is a good
6	bit broader, a good bit broader than the
7	exception here, Your Honor.
8	JUSTICE GORSUCH: But we don't have
9	any nobody has any data on that? We're
10	just we're just going on your your
11	representation versus your friend's
12	representation otherwise?
13	MR. WALSH: I I suppose that's
14	correct, Your Honor.
15	JUSTICE GORSUCH: All right.
16	MR. WALSH: But but the variety of
17	things that are untouched by the safe harbor
18	are are significant transactions in real
19	estate, transactions in vehicles. Trustees can
20	avoid liens because they're unperfected.
21	That's that's not implicated by the safe
22	harbor unless it would happen to be a lien on a
23	security, perhaps, or on a commodity.
24	And so the overlap here between
25	bankruptcy and security is a relatively

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1	confined space. And what Congress has
2	determined is that if you're dealing with
3	constructive fraud, the concerns of the
4	securities and commodities markets prevail. If
5	you're dealing with
6	JUSTICE KAGAN: Mr. Walsh?
7	MR. WALSH: Yes.
8	JUSTICE KAGAN: Could I take you back
9	to Justice Alito's question, perhaps just put a
10	little bit of a different spin on it? I mean,
11	if you look at 546(e), it's clearly an
12	exception to the avoidance power. It says
13	"notwithstanding" all these sections which deal
14	with avoidance, the trustee may not avoid the
15	following transfers.
16	So, I mean, it seems odd to read that
17	in any other way than to start with the
18	transfer that the trustee seeks to avoid. Why
19	should we not do that? Why isn't that exactly
20	what the text tell us tells us to do, where
21	you start with the transfer that the trustee
22	seeks to avoid and then you ask whether there's
23	a safe harbor that applies to that transfer?
24	MR. WALSH: I think the the first
25	my first response, Your Honor, is that when

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1	we're dealing with a prohibition of that sort,
2	we don't simply look at what the party says it
3	is doing.
4	So, if I'm called to a visit with a
5	U.S. attorney because I allegedly filled a
6	wetland, it's not a sufficient response for me
7	to say I didn't fill a wetland; I built a
8	parking lot. We have to look at, well, what
9	did I do in the process of building the parking
10	lot? Did I put a bunch of gravel in a wetland?
11	And if I did, I have a problem, notwithstanding
12	that I characterize my actions in a different
13	way.
14	But a second response is that because
15	these transfers, the way we characterize the
15 16	these transfers, the way we characterize the different pieces of this transaction as
	-
16	different pieces of this transaction as
16 17	different pieces of this transaction as transfers are integrally integrally
16 17 18	different pieces of this transaction as transfers are integrally integrally interrelated, to say that a trustee can avoid
16 17 18 19	different pieces of this transaction as transfers are integrally integrally interrelated, to say that a trustee can avoid the end-to-end transfer without affecting the
16 17 18 19 20	different pieces of this transaction as transfers are integrally integrally interrelated, to say that a trustee can avoid the end-to-end transfer without affecting the others, the intermediate transfers, in any way
16 17 18 19 20	different pieces of this transaction as transfers are integrally integrally interrelated, to say that a trustee can avoid the end-to-end transfer without affecting the others, the intermediate transfers, in any way is just inconsistent with reality.

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25 the court has to say whether this is the kind

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1	of transfer that the trustee can avoid, and in
2	doing that, the court is looking at the what
3	you call the end-to-end transfer.
4	And then all of a sudden, when it
5	comes to the safe harbor, you're saying that
6	the trustee has to flip and look at another
7	transfer entirely. And that seems like a
8	strange thing for a safe harbor to do.
9	I mean, usually what we think is that,
10	you know, a safe harbor would shield from
11	avoidance a transfer that's being challenged,
12	rather than a transfer that isn't being
13	challenged.
14	MR. WALSH: I I think the
15	difference in between what you're saying and
16	what I'm saying, Your Honor, is that it's not a
17	different transfer entirely. If if we were
18	talking about, say, the transfer of the real
19	estate, where the plans were to build the
20	racetrack, then then that would be a
21	different transfer.
22	But the transfer of \$55 million from
23	Valley View to the escrow agent and the
24	subsequent transfers from the escrow agent to
25	the shareholders of Bedford Downs, they aren't

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1	they aren't different transfers. They're
2	just different ways of looking at the same
3	transfer because they made up the long
4	JUSTICE KENNEDY: Well, but in in
5	your hypothetical, if the land were held as
6	an in escrow for 30 days until everybody got
7	the title in, then there would be an exemption.
8	MR. WALSH: No, because it's not
9	securities or commodities. It's real estate.
10	JUSTICE BREYER: What about this,
11	where it says a trust fee, gee, tree sorry,
12	a trustee may not avoid a transfer that is a
13	settlement payment made by a financial
14	institution? Joe that's right, isn't it?
15	So far?
16	MR. WALSH: Yes.
17	JUSTICE BREYER: Yes. Right? Joe
18	Smith buys a piece of property from Bill Brown
19	for \$10 million. Joe Smith puts into escrow
20	\$10 million. It's Bank of America is the
21	escrow agent. Brown puts in the deed. When
22	both are there, Bank of America gives each the
23	other. Why hasn't Bank of America given a
24	settlement payment?

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MR. WALSH: Your Honor, I don't think

25

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1	the term "settlement payment" has ever been
2	understood to apply outside
3	JUSTICE BREYER: It doesn't mean that
4	
5	MR. WALSH: outside securities and
6	commodities in financial transactions. So
7	JUSTICE BREYER: I see. So so it
8	is not a settlement payment. It's just it's
9	not a settlement payment, a payment for a real
10	estate transaction.
11	MR. WALSH: It is a payment for a real
12	estate transaction. That's correct.
13	JUSTICE BREYER: It is not? It is not
14	a real estate transaction payment?
15	MR. WALSH: I'm sorry, a settlement
16	payment as defined in the code is not a real
17	estate transaction payment, yes.
18	JUSTICE BREYER: But if the same thing
19	were true and what they had bought was a 5
20	million acres of wheat, then it would be?
21	MR. WALSH: If if they bought the
22	crop and it was a forward contract under the
23	code, then that the the purchase of the
24	crop
25	JUSTICE BREYER: Thank you, thank you.

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1	I see.
2	MR. WALSH: could very well be
3	covered by this.
4	JUSTICE BREYER: Thank you.
5	MR. WALSH: Unless there are further
6	questions, I'd like to reserve the balance of
7	my time.
8	CHIEF JUSTICE ROBERTS: Thank you,
9	counsel.
10	Mr. Clement.
11	ORAL ARGUMENT OF PAUL D. CLEMENT
12	ON BEHALF OF THE RESPONDENT
13	MR. CLEMENT: Mr. Chief Justice, and
14	may it please the Court:
15	I think it would be helpful if I could
16	start with the elephant in the room, which is
17	Justice Breyer's question about the definition
18	of financial institution and then address the
19	question presented.
20	So, Justice Breyer, a couple of points
21	about that.
22	First of all, I think it could not be
23	clearer that that's never been at issue in this
24	case, and even more to the point, the
25	Petitioner, when they were trying to get this

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1	Court to take the case, emphasized the fact
2	that this wasn't in dispute as a sort of a
3	positive feature of this petition.
4	So, if you look at page 3 of the
5	petition, it is clear that the Petitioner
6	JUSTICE BREYER: I have no doubt that
7	neither party wanted it resolved on that basis.
8	And so what's nagging at the back of my head is
9	that, since it seems so clear, it's like two
10	farmers who decide they have some other
11	financial interest in fishing, and they'd love
12	to have this Court decide the Fishing Act, but,
13	in fact, if you look at the Farming Act, you've
14	got the answer to the dispute between them.
15	And can two parties who would just
16	love it, if we could decide an issue that
17	really isn't at issue before them, and can they
18	stipulate away all of the actual, you know,
19	they stipulate away the basic rule that a
20	contract is valid upon signing or something, in
21	order to get us to decide a question?
22	MR. CLEMENT: So, Justice Breyer, if
23	you really had the farmer/fisher idea fisher
24	person idea, I think what you would do is
25	dismiss the case as improvidently granted,

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1	which would serve my client's interest just
2	fine. But I think there are two very good
3	reasons why that issue was not put front and
4	center by my friends here.
5	The first is that it's completely
6	inconsistent with their overall theory of the
7	case. Their overall theory of the case is that
8	every customer of every one of the six
9	protected entities is protected ipso facto by
10	virtue of the fact that it went through one of
11	those entities.
12	So it's more than a little bit of an
13	embarrassment for them to come across a
14	definition that says that customers of one of
15	the six, in relatively narrow circumstances,
16	are also covered. It's inconsistent with their
17	overall theory. They really can't argue both
18	things. Here's the
19	JUSTICE KAGAN: Do you think, though,
20	Mr. Clement I'm sorry, if you want to
21	MR. CLEMENT: Well, I was just going
22	to say the second point why they're not making
23	it, which is it doesn't apply here anyways,
24	which is, as I read that provision, it is very
25	narrow, and it protects the customer only when

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1	the bank is acting when the bank is acting
2	as an agent or custodian.
3	It doesn't say when the bank has acted
4	or in the past acted. It says when the the
5	bank is acting as the custodian or the agent.
6	So if, hypothetically, we had the
7	the trustee had tried to avoid the transfer
8	while the money was still at Citizens Bank,
9	then maybe, just maybe, we'd still probably
10	want to have a debate and actually look at, you
11	know, and talk about what agent means in this
12	context, but then maybe it applies.
13	And maybe it applies for a reason
14	then, which is, in that context, maybe Citizens
15	Bank is actually inconvenienced by this, but
16	this is why I think that I really disagree with
17	my friend when he says that the transfer the
18	trustee sought to avoid and the underlying
19	transfers are sort of indivisible.
20	Think about what happens if we prevail
21	in this case, given the transfer that the
22	trustee sought to avoid. If we prevail at the
23	end of the day, Merit owes the estate some \$16
24	million. Citizens Bank doesn't have to do a
25	thing. Credit Suisse doesn't have to do a

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1	thing. If they want to wire the money, they
2	can pick one of those banks, and one of those
3	banks will actually benefit to the extent of
4	the wire transfer fee.
5	But there's no obligation to do that.
6	They can pick Bank of America instead. It is
7	not as if, if they win here, that the poor
8	folks at Citizens Bank need to go and sort of
9	unearth that escrow agreement and reverse
10	something on it.
11	They don't have to do a thing, which,
12	of course, explains why they're not here as
13	amici, why
14	CHIEF JUSTICE ROBERTS: Well, it's not
15	that simple. I mean, this is not simply I
16	think you try to portray it, it's simply a
17	matter of conduits that that don't have
18	anything to do with it, but as I understand it,
19	the intermediaries had a lot to do this
20	this they were there functioning as
21	intermediaries intermediaries for several
22	years. They had certain compliance obligations
23	to check.
24	There were going to be payments in

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this event, but no payments in that event.

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1	They were seriously involved. They weren't
2	just, you know, stamping the papers and moving
3	the money.
4	MR. CLEMENT: You're right, Mr. Chief
5	Justice, to a degree, but for whatever the sort
6	of exertion they did, they were compensated.
7	And the trustee's not trying to get that
8	compensation back.
9	I mean, if you can imagine this case,
10	when the wire transfer went from Credit Suisse,
11	the money went to Citizens and then eventually
12	to Merit. I assume Credit Suisse got paid, I
13	don't know, \$1,000 to do that transfer.
14	Now, if the trustee here thought, you
15	know, this whole thing is such a bunch of
16	baloney, that we should get the money back from
17	Merit and we shouldn't have had to pay that
18	\$1,000 to Credit Suisse, so I have a theory, as
19	the trustee, as to why I can avoid the transfer
20	to Credit Suisse, well, of course, that's
21	covered by 546(e) through the straight-forward
22	way we think the statute should be read, which
23	is this affirmative defense, this exception,
24	this safe harbor talks about a transfer that

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25 the trustee may not avoid.

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1	It then cross-references five sections
2	of the statute, each one of which uses the term
3	"may avoid." It describes a transfer that the
4	trustee may avoid. It just seems like these
5	provisions there are all these textual
6	interrelationships between the two provisions,
7	such that it seems perfectly natural to say
8	that, when you're applying 546(e), you look at
9	the transfer that the trustee is seeking to
10	avoid.
11	CHIEF JUSTICE ROBERTS: Could what
12	if the trustee would there be situations in
13	which it would make sense for the trustee to
14	want to avoid one of the intermediary transfers
15	rather than simply the ultimate one?
16	MR. CLEMENT: It might, but they
17	probably run into 546(e), I mean, which is to
18	say you can imagine a situation where you
19	really thought that, you know, the money
20	stopped at one of those banks, and so the
21	the ultimate transferee, the right person to
22	bring the action against was the bank.
23	Or if the bank's trading on its own
24	account or something, I think, in that
25	situation, and, you know, you'd have a transfer

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1	where the transfer that the trustee was
2	bringing under 544, 545, all those various
3	provisions, the transfer you're seeking to
4	avoid was a transfer to a bank.
5	CHIEF JUSTICE ROBERTS: Well, would i
6	be in a situation where there's no money with
7	the ultimate seller to recover? They also
8	become bankrupt. Credit Suisse is not
9	bankrupt?
10	MR. CLEMENT: I suppose right,
11	no look, in that situation, an aggressive
12	trustee might seek to avoid a transfer to the
13	bank, but in that situation, 546(e) stops that
14	in its tracks.
15	And I think it's also important to
16	remember that 546(e) is added at a point where
17	you already have limitations as to which
18	transferee you can recover from. And part of
19	what Congress is worried about is the idea
20	that, in some situations, and maybe the ones
21	that we were talking about in this kind of
22	hypothetical, it would actually be tough to
23	figure out whether or not the financial
24	intermediary really was just a conduit, in

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which case they'd be protected under

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1	preexisting law, or whether they sort of ended
2	up with the money when the music stopped.
3	And what Congress tried to do in
4	546(e) was to provide a nice brightline rule
5	that protects these intermediaries, and it
6	seems like it is consistent with both the
7	general interest and the brightline nature of
8	the rule to say this is relatively
9	straightforward, let's look at the transfer the
10	trustee is seeking to avoid. If the trustee is
11	seeking to avoid a transfer that is by, to, or
12	for the benefit of one of these six entities,
13	that's it, motion to dismiss
14	JUSTICE KAGAN: Well, does that
15	mean does that mean, Mr. Clement, that we
16	all we do is we look at the trustee's
17	complaint, we leave it to him to decide the
18	question?
19	MR. CLEMENT: Yes, Justice Kagan, but
20	I think the reason that that doesn't create
21	some sort of mischief here is that, in making
22	that the complaint, the affirmative part of
23	the complaint, the trustee isn't just sort of
24	free to pick transfers at random that he or she

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25 seeks to invalidate.

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1	They have to come up with a transfer
2	that fits the terms and the requirements of one
3	of those provisions of the code in Chapter 5.
4	JUSTICE KAGAN: So that that might
5	be right.
6	I was trying to think of cases in
7	which there could be mischief by relying
8	entirely on the trustee's power to define the
9	transfer.
10	And here is what I came up with, is
11	that there truly is a transfer from a debtor to
12	a bank, if the bank's not serving as an
13	intermediary, it is a real transfer of stock,
14	right?
15	And now, 546 546(e) is going to
16	prevent the trustee from avoiding that. But
17	then the trustee says: So, in order to get
18	around 546(e), I'm going to define the transfer
19	differently, I'm going to ask where the bank
20	then transferred the stock and and and
21	say that the transfer that I want to avoid is
22	from the original debtor to whoever it was that
23	the bank transferred the stock to, even though
24	those really were two separate transactions.
25	Could the trustee play games like

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Could the trustee play games like

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1	that?
2	MR. CLEMENT: I don't think they I
3	mean, they could try, but I don't think they
4	would get away with it. And I think that, you
5	know, in any case where the trustee brings an
6	action against somebody, they're going to have
7	essentially two kinds of defenses to raise.
8	One is going to be an affirmative
9	defense based on 546(e). Now, it may be in
10	your hypothetical the trustee's kind of pled
11	around that, but you still have to the
12	trustee still has to essentially satisfy the
13	terms of the original avoidance provision, and
14	I don't think, for purposes of that
15	hypothetical, though it might depend on some
16	details of it, that the trustee would be able
17	to do that.
18	And then, of course, there's a second
19	piece of this, which is to make this in a in
20	a transfer situation, to really get any juice
21	for the effort, you have to not only avoid the
22	transfer, but you also have to get recovery
23	under 550.
24	And in the hypothetical that you're

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25 talking about, the third-party subsequent

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1	transferee would not be the immediate the
2	initial transferee under 550. And so, as long
3	as they took it in good faith and paid value
4	for it, they'd be completely protected.
5	So I just don't think it would work.
6	And I think it is important to recognize that,
7	you know, this is not a situation where the
8	trustee can just sort of, you know, pick the
9	well, today, I feel like the Credit Suisse to
10	Citizens Bank transfer is the one I'm going
11	after.
12	That would satisfy
13	JUSTICE KENNEDY: Well, if we're if
14	we're writing the the opinion to accept your
15	proposition, how do we how do we qualify it?
16	Do we do we say that this does not apply to
17	transfers where the settlement institution does
18	not have an equity participation?
19	I mean, what what
20	MR. CLEMENT: See, I wouldn't do that,
21	Justice Kennedy. I think that's that is the
22	way some of the courts had have written it,
23	but I think the simpler way to write the
24	opinion is to say, to apply 546(e), just look
25	to the transfer that the trustee seeks to

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1	avoid, and it's as simple as that.
2	If the transfer that the trustee seeks
3	to avoid
4	JUSTICE KENNEDY: But that that
5	that then involves Justice Kagan's concern that
6	you're giving the the trustee a chance a
7	chance to define the transfer in a particular
8	way. Now, if the if the Bankruptcy Code
9	defines a transfer so it's abundantly clear
10	what transfer is involved, then that's one
11	thing.
12	MR. CLEMENT: Well, but I tried to be
13	responsive to Justice Kagan's question, and I
14	think that the code puts all sorts of limits on
15	the trustee when they're picking the transfer
16	that they're seeking to avoid.
17	So, for example, for certain
18	provisions of the code, you can only avoid a
19	transfer at a certain time period if it's a
20	transfer to an insider. Now, that seems to me
21	to buttress the idea that that provision of the
22	code doesn't really care much about the
23	intermediaries because otherwise you could say,
24	well, there's never a transfer to an insider
25	because it always goes through a bank first.

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1	So I think the trustee is disciplined
2	not just by 546(e) but by the various things
3	that the trustee has to show to qualify the
4	particular transfer for being avoidable under
5	one of the affirmative avoidance powers.
6	JUSTICE KAGAN: What do you think is
7	wrong, Mr. Clement, with the alternative
8	approach? If I understand the alternative
9	approach, which Justice Kennedy was referring
10	to, it's more of a functional analysis; you ask
11	who has dominion and control of a particular
12	piece of property at a particular point. And
13	and that seems more what the Seventh Circuit
14	was doing than than what your brief
15	suggests.
16	So why do you think that that's a
17	worse alternative than the one you're
18	suggesting?
19	MR. CLEMENT: Well, Justice Kagan, let
20	me start by saying it's a lot better
21	alternative than my client losing this case.
22	So, if you find that attractive, I mean, that's
23	fine.
24	Here's the reason, though, that,
25	honestly, I don't think it's right. Because I

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1	think one point my my friend and I agree on
2	is that when Congress was passing the
3	predecessor to 546(e) back in the day, there
4	was already substantial protection for the
5	intermediaries under the recovery provision,
6	550, if they were truly conduits and weren't
7	the beneficial owners.
8	And so I think what Congress was
9	trying to do with 546(e) was to provide an
10	alternative, more brightline way for the
11	financial intermediaries to get out of the case
12	early at the motion to dismiss stage.
13	And the problem with this looking for
14	the beneficial ownership is it's really the
15	same inquiry, and it could be fact-specific in
16	a particular case, that Congress was trying to
17	supplement with this brightline rule.
18	And we think our rule gives a nice
19	brightline rule that courts can apply at the
20	motion to dismiss stage, literally just look at
21	the complaint, look at the transfer the
22	trustee's seeking to avoid, and then, if it
23	satisfies 546(e), you know, you're done,
24	trustee loses. If it doesn't, we move forward.
25	Of course, when you move forward, you

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1	can still get into this beneficial interest
2	inquiry. That's part of the 550 inquiry
3	because here, as in almost every case
4	JUSTICE GINSBURG: How how do you
5	how do you answer what your colleague
6	stressed; that is, it doesn't say for the
7	only for the benefit of a financial
8	institution. It says "by." If a transfer is
9	by a financial, that's enough.
10	MR. CLEMENT: You're right, Justice
11	Ginsburg, and we think that's right, but we
12	think what Congress was addressing in that
13	situation was the precise situation that the
14	Southern District of New York dealt with in a
15	case called Seligson, which I think both
16	parties agree is the case that Congress was
17	trying to address with the predecessor to
18	546(e).
19	And that was a situation where the
20	financial intermediary there I believe it
21	was a commodity broker is the bankrupt. And
22	so
23	JUSTICE BREYER: So for this
24	MR. CLEMENT: And so, in that
25	situation, you do want to protect and shield

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1	the transfers by the bankrupt because the one
2	thing Congress was clearly concerned with is
3	you'd have a bankruptcy by one of the hub
4	players in the financial industry and that
5	would create this sort of ripple effect to
6	everybody who dealt with them.
7	JUSTICE BREYER: So, for this
8	provision, do I have this right? A, look to
9	the the transaction that the trustee is
10	trying to set aside as a preference or
11	fraudulent conveyance. B, ask the question:
12	Who is the person who directed that that
13	transfer be made? All right.
14	If it's a financial institution, et
15	cetera, stop right there, good-bye, you're out.
16	If not, continue to question 3. And question 3
17	is: Who is the initial transferee and not a
18	conduit of that transfer? And if the answer is
19	a financial institution, you're out. And
20	otherwise we go on to ask the other questions.
21	And that means that a that the
22	transferee, the initial transferee, if he's
23	receiving money that he is to hold for the
24	benefit of the other, he still is the initial
25	transferee. And you will look to such matters

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1	as to who this money is to benefit later on in
2	your your efforts. Is that right?
3	MR. CLEMENT: Well, Justice Breyer, I
4	think you've aptly captured the Seventh
5	Circuit's reasoning.
6	JUSTICE BREYER: Uh-huh.
7	MR. CLEMENT: I'm actually asking you
8	to make this case even simpler.
9	JUSTICE BREYER: Uh-huh.
10	MR. CLEMENT: I'm asking you to look
11	at the transfer that the trustee seeks to
12	avoid.
13	JUSTICE BREYER: Yeah.
14	MR. CLEMENT: That has to be by
15	somebody and to somebody
16	JUSTICE BREYER: Yeah.
17	MR. CLEMENT: in order for it to
18	satisfy 544, 545, 547, or the two provisions of
19	548 that 546(e) cross-references.
20	JUSTICE BREYER: Right.
21	MR. CLEMENT: So there you have, right
22	on the face of the complaint, a transfer by
23	someone, to someone, or for the benefit of
24	someone, because as we explained in the brief
25	

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1	JUSTICE BREYER: Do you have what it
2	says?
3	MR. CLEMENT: the reason that
4	language is there is because the avoidance
5	power is not limited to transfers to somebody
6	who is like an insider or a creditor but also
7	to somebody who is for the benefit of a
8	creditor or an insider. So just look at the
9	face of the complaint, apply 546(e) to the
10	transfer that the trustee has put at issue, and
11	if the terms are satisfied, then the trustee
12	loses.
13	And if the terms are not satisfied,
14	then you move forward and you probably analyze
15	all of those transferee questions before the
16	case is all over, but I do think it's more
17	faithful to what Congress was trying to
18	accomplish when it enacted the predecessor to
19	546(e) to have a nice, brightline protection
20	that's there for the financial intermediaries.
21	It doesn't protect all of their
22	customers. It doesn't protect Merit. They
23	have other arguments they can eventually make,
24	but what they wanted was a nice brightline rule
25	so clearing agencies, commodity brokers, and

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1	then eventually stockbrokers and financial
2	institutions and financial participants would
3	all have a nice, clean motion to dismiss
4	argument to win their case.
5	JUSTICE SOTOMAYOR: May I address a
6	question that confused me in your briefing?
7	JUSTICE BREYER: Yeah.
8	JUSTICE SOTOMAYOR: You kept saying
9	that the initial transfer had to be by the
10	debtor.
11	But the code permits the trustee to
12	void a non-debtor's transfer if the property
13	that the non-debtor is transferring is of an
14	interest of the debtor in property.
15	So it's not so clean to say that the
16	transfer has to be by the debtor. It can also
17	be by the debtor's agent, a non-debtor.
18	MR. CLEMENT: Justice Sotomayor, I
19	think you're right that it's certainly not
20	clean. Now, I think, at the end of the day,
21	we're actually right, and I get some solace
22	from the fact that our position is supported by
23	Professor Brubaker, who's spent a lot more time
24	looking at the code than I have.
25	So I think we're actually right that

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1	even when it's a transfer by a third-party of
2	an interest of the debtor, it actually ends up,
3	for purposes of the code, being a transfer
4	"made by," which I think is the relevant term,
5	"made by" the debtor.
6	JUSTICE SOTOMAYOR: So that's how
7	you're reading that then.
8	MR. CLEMENT: That's how we're reading
9	it, but I want to make as clear as I can that
10	nothing turns on that. Our position I think
11	it makes if you if you accept that, it
12	makes our position that much clearer.
13	But nothing turns on it. And I think
14	what that just helps to show is that, either in
15	100 percent of the cases or the vast majority
16	of the cases, that when you get to transfer by,
17	either for purposes of the avoidance power or
18	for purposes of the exception of 546(e), it's
19	going to be a transfer by the bankrupt. And
20	whether it's 99 or 100 percent, nothing
21	ultimately turns on it.
22	JUSTICE SOTOMAYOR: So why but why
23	then did you argue that the transfer from
24	Credit Suisse to Citizens Bank both involved

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25 property of the debtor, why did you argue that

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1	that wouldn't qualify because it wasn't a
2	transfer by the debtor?
3	MR. CLEMENT: Because the way we read
4	Chapter 5 of the code is it essentially ignores
5	conduits for purposes of identifying who's the
6	transferor and who's the transferee. And we do
7	think that's consistent throughout Chapter 5.
8	That's why for its
9	JUSTICE SOTOMAYOR: You don't think
10	Credit Suisse or or Citizens Bank fell under
11	the safe harbor automatically? They're both
12	financial
13	MR. CLEMENT: I think I think if
14	the trustee had tried to avoid that transfer,
15	it would automatically satisfy 546(e).
16	What I'm making, though, is the point
17	that I don't think, properly understood, that
18	is even a transfer by Credit Suisse. And I
19	think maybe the way to try to at least
20	understand the point I'm making, but nothing
21	turns on it
22	JUSTICE SOTOMAYOR: Oh, okay. That's
23	what I'm
24	MR. CLEMENT: is is think about
25	the charitable giving exception. Now, it

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1	allows it exempts certain transfers by the
2	debtor to a qualifying charitable institution.
3	Now, I would think the vast majority
4	of those are made by telling your bank I want
5	to give \$2,000 to this charity. Now, if you
6	accept their view that you subdivide
7	everything, well, then that's not a transfer by
8	the debtor to the charity. It's a transfer by
9	the debtor to Credit Suisse, which is not a
10	charity, and then a transfer by Credit Suisse
11	to the charity.
12	And that doesn't come within the
13	exception to the power, which is nonsense.
14	That's clearly not what Congress was trying
15	JUSTICE GORSUCH: So but, Mr.
16	Clement, on that, I assume your friend will get
17	up and say, well, a lot of those charitable
18	contributions are by check, and those aren't
19	covered.
20	And just as just as we heard when I
21	asked the question about avoidable transfers,
22	it became an empirical debate about how many of
23	those would be covered.
24	So how how clean a line is this

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25 really? I mean, what you're suggesting?

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1	MR. CLEMENT: Well, two things,
2	Justice Gorsuch. First of all, my friend would
3	want to tell you that the checks aren't
4	covered.
5	JUSTICE GORSUCH: Yeah.
6	MR. CLEMENT: But, with all due
7	respect, I don't think he has a theory as to
8	why. And I think that's that's what's
9	critical. I mean, you know, if there's no word
10	in that statute that allows you to draw that
11	distinction, as the colloquy with Justice
12	Breyer showed, there might be a theory based on
13	the definition of financial institution
14	JUSTICE GORSUCH: Customer.
15	MR. CLEMENT: why the escrow
16	situation is different from the check
17	situation.
18	But if he's right, and all you have to
19	do is have a any kind of transfer and we
20	don't ignore any transfers by or to a financial
21	institution, I don't think he's offered you a
22	theory for why checks don't count. So that
23	would be the first point.
24	The second point would be, yeah,
25	there's some empirical debates here we don't

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1	know the answers to.
2	JUSTICE GORSUCH: Right.
3	MR. CLEMENT: But if we're looking for
4	a clean answer, I mean, I think both sides are
5	giving you a clean answer. They're basically
6	giving you an answer that says, if it's a
7	settlement payment or a margin payment or a
8	payment in connection with a securities
9	contract, unless there's like the one person
10	out there that's doing these things with bags
11	of cash, it's covered.
12	JUSTICE GORSUCH: Yeah.
13	MR. CLEMENT: We're giving you the
14	clean position that
15	JUSTICE GORSUCH: The amici the
16	amici give us a very clean position, right,
17	that we need a transferee under the statute and
18	a debtor under the statute. I read the red
19	brief as being a little more equivocal on that.
20	Maybe I misread it.
21	Do you endorse the amici's clean
22	position without qualification?
23	MR. CLEMENT: Well, we think our
24	position is even cleaner, I mean, so so

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25 but we think -- if you're referring to

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1	Professor Brubaker's
2	JUSTICE GORSUCH: Yeah.
3	MR. CLEMENT: We think we get to the
4	exact same place. I think, maybe since I'm
5	coming at this more like a lawyer instead of a
6	bankruptcy professor, I think about it in
7	really simple terms, and it maps on to the
8	procedural history of this case.
9	The trustee here brought a complaint.
10	It was a complaint that identified a transfer
11	for avoidance. The Merit filed an answer
12	with an affirmative defense. The affirmative
13	defense was based on 546(e).
14	It just seems logical, as as
15	Justice Kagan suggested, albeit in a question,
16	so she might not have meant it, but but as
17	Justice Kagan suggested, like what world do you
18	look at different transfers for purposes of the
19	exception to the affirmative defense than the
20	transfer that you're looking at for the prima
21	facie case of avoidance in the first instance?
22	It seems like the statutes work
23	together very well, hand in glove.
24	And we haven't talked a lot about the
25	policy implications of their clean position,

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1	which is that, sort of, as long as there is a
2	bank anywhere involved in a securities
3	transaction, it's exempted.
4	And the consequences of that are, I
5	mean, really quite simple and quite striking,
6	which is, in a case like this, where otherwise
7	the unsecured creditors are going to get 15
8	cents on the dollar, which is already enough to
9	ruin your whole day
10	JUSTICE GORSUCH: All right. All
11	right. But the Second Circuit is very
12	concerned about the effect that this would have
13	on the leveraged buyout industry and and,
14	therefore, the economy more broadly.
15	I can understand an argument that
16	Congress in 1978 wasn't much concerned about
17	the leverage buyout industry because it didn't
18	exist, as we now know it, but what what else
19	do you say in response to that, the parade of
20	horribles that we've heard?
21	MR. CLEMENT: Well, I mean, I don't
22	actually think it's much of a parade of
23	horribles, Your Honor, but let me try to be as
24	responsive as I can, which is to say, I think

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25 if Congress were really concerned about the

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1	leverage buyout situation, it would have
2	written a very different exemption than the one
3	that it wrote here. It might have defined
4	something like leverage buyout. It might have
5	exempted certain smaller ones or larger ones.
6	You know, when you have this provision
7	applied in the context of a very large
8	transaction on the public markets, there are
9	lots of the trustees' prima facie case,
10	including that there wasn't sufficient value
11	provided and the like, those are going to be
12	relatively difficult to prove, I mean, at least
13	if you believe in sort of the efficiencies of
14	markets.
15	But when you have leverage buyouts for
16	small companies, I mean, that is a fertile
17	ground for essentially getting money out of the
18	company and away from unsecured creditors and
19	to some favored party.
20	So as as the trustee's amicus brief
21	said, to sort of carve out, you know, leverages
22	buyouts from the fraudulent avoidance laws,
23	that's carving out a lot because these are
24	transactions where there is a risk that's quite
25	considerable to molting the interest of the

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1	unsecured creditors.
2	The last thing I'll say before I sit
3	down is just, in addition to all the other
4	textual arguments we make in the brief, I do
5	think it's worth emphasizing that, under their
6	view of the statute, Congress's effort in 2005
7	to add financial participants as the sixth on
8	the list of protected entities was completely
9	superfluous and just a fool's errand, because I
10	can't imagine that financial participants who
11	are defined as entities with \$100 million or a
12	billion dollars in transactions were doing
13	those transactions with cash.
14	So those financial participants were
15	already customers of these five entities, so if
16	that's enough to bring you into the statute,
17	Congress was utterly wasting its time in 2005.
18	JUSTICE KAGAN: May I ask,
19	Mr. Clement, you might have no insight on this
20	and you might not be able to say anything about
21	it, so if so, just say so, but it is curious to
22	me, I've never seen a bankruptcy case, maybe
23	ever, but certainly a bankruptcy case like this
24	one, in which we do not have a solicitor

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general brief.

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1	Do you have any thoughts about why the
2	SG didn't file here?
3	MR. CLEMENT: No, I don't have any
4	particular thoughts, other than I do think
5	that, if what we were urging on you was really
6	a catastrophe for the markets or something
7	else, boy, I sure think the SG would be here,
8	you know, waving at least a yellow flag.
9	To me, the amici that aren't here that
10	speak even louder, though, are frankly, the
11	lack of financial institutions, stockbroker,
12	clearing agency amici.
13	I mean, look, normally, I don't think
14	you really draw any inference through from
15	the amici that aren't here, but, you know, if
16	you told me that, wow, there's this provision
17	that's in the code that is specifically
18	designed to protect your interests, and the
19	Seventh Circuit adopted a narrow construction
20	of it, and it's going up to the Supreme Court
21	of the United States, and they will decide the
22	scope of this exemption that protects your
23	industry, I mean, if if you had any thought
24	that you were not fully protected by the
25	Respondent's view as much as the Petitioner's

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1	view, I would think it would be worth your
2	while to file an amicus brief.
3	And the fact that they're not here, I
4	think, underscores that the entities that
5	Congress was trying to protect are fully
6	protected by our view, and they're fully
7	protected by the Petitioner's view. It's just
8	so is the rest of the world.
9	And I just don't think there's any
10	view that Congress actually intended to not
11	just protect those six financial entities, but
12	to protect everybody else who essentially
13	transacted in them, in connection with the
14	securities contract.
15	So we think the decision below should
16	be affirmed.
17	Thank you.
18	CHIEF JUSTICE ROBERTS: Thank you,
19	counsel.
20	Four minutes, Mr. Walsh.
21	REBUTTAL ARGUMENT OF BRIAN C. WALSH
22	ON BEHALF OF THE PETITIONER
23	MR. WALSH: Thank you.
24	I'd like to return to Justice Kagan's
25	question a little bit earlier about whether we

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1	can focus solely on the transfer as the trustee
2	identifies and characterizes it.
3	And I think it's useful to think about
4	what happens if that end-to-end transfer in
5	this case is avoided and some amount of that
6	would have to be refunded by Merit. I think
7	the question we have to ask is then, So what of
8	the transfers from Citizens Bank out of escrow
9	to Merit?
10	Can we say that those transfers are
11	still valid and in effect and have been
12	consummated and have been paid, and Citizens
13	has satisfied its obligations because Merit has
14	the 16 and a half million dollars?
15	And I think the answer to all those
16	questions is no because, once the broader
17	transfer is avoided and a recovery is made,
18	everything else falls with it as well.
19	So when we say the
20	JUSTICE SOTOMAYOR: Sorry. I thought
21	that 550 said that post that transferees
22	from Bedford could be protected by other safe
23	havens, if they paid consideration in in
24	good faith, et cetera, they would be okay?
25	MR. WALSH: No, that that's right.

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1	If if well, Bedford didn't receive the
2	transfer, Your Honor, the shareholders of
3	Bedford, including my client, received the
4	transfer.
5	JUSTICE SOTOMAYOR: Right.
6	MR. WALSH: If they had transferred it
7	on
8	JUSTICE SOTOMAYOR: Right.
9	MR. WALSH: And that's what we were
10	talking about, the good faith defense would
11	come into play.
12	But what I'm talking about is the
13	transfers from Citizens out of escrow to the
14	shareholders. If the if the broader
15	transfer is avoided and recovery is had against
16	Merit, then those transfers into and out of
17	escrow involving financial institutions are not
18	in full force and effect.
19	JUSTICE BREYER: So what?
20	MR. WALSH: So
21	JUSTICE BREYER: I mean, if I write a
22	check, and it goes to the postman, and the
23	postman delivers it to Smith, and I get my
24	money back from Smith, then I guess you could
25	say, well, the postman that putting it in

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1	the mailbox didn't have any financial effect.
2	So what?
3	MR. WALSH: So the the so what,
4	Your Honor, is that, when the trustee says, I'm
5	only seeking to avoid the one transfer and the
6	rest can
7	JUSTICE BREYER: Well, it is all he's
8	trying to avoid.
9	MR. CLEMENT: and the rest can be
10	disregarded
11	JUSTICE BREYER: Well, no, but I mean
12	it has no effect. If FedEx, you know,
13	delivered the check. I mean, there are many
14	ways of delivering the check. If they're just
15	a conduit, the bank, it's quite true in a sense
16	that transfer from the bank didn't have any
17	effect because the people who got the money had
18	to give it back to the people who deposited the
19	money.
20	But my question was, so what?
21	MR. WALSH: The so what is that the
22	statute says the trustee may not avoid the
23	transfer by a financial institution. And so by
24	by avoiding the transfer, the broader
25	transfer

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1	JUSTICE BREYER: And there's no
2	there's no consequence to Citizens Bank, is
3	there?
4	MR. WALSH: It would not hit Citizens'
5	bottom line, that's correct.
6	JUSTICE BREYER: No no no
7	consequence?
8	MR. WALSH: That's correct.
9	JUSTICE BREYER: Okay.
10	MR. WALSH: I do want to talk about
11	consequences, though, because this is a case
12	involving 16 and a half million dollars. As
13	the Court is aware, both sides in the Tribune
14	case have filed amicus briefs. That case is,
15	let's call it 100 times larger than ours, it's
16	more than that.
17	And the issue there, and Justice
18	Gorsuch mentioned the Second Circuit's opinion,
19	which is justifiably concerned about what
20	happens, there are thousands of defendants in
21	that case.
22	Of course, if Goldman Sachs or Merrill
23	Lynch received a distribution in that case for
24	its own account, they don't have liability,

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25 that transfer can't be avoided. I think

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1	everybody would agree about that. But there
2	are employees who held company stock, there are
3	pension funds that held stock in Tribune. All
4	these other entities remain exposed.
5	Over the past 30 years, Congress has
6	expanded and expanded the safe
7	harbor to bolt on different concepts, including
8	financial institutions. At the same time, the
9	courts, with a few exceptions, have been
10	interpreting the statute broadly.
11	And if Congress thought that the
12	courts were out of line, it could very well
13	have cut the statute back. It didn't do that.
14	The statute has continued to expand. And it's
15	important.
16	And one one last point, Mr. Clement
17	mentioned the Seligson case. And what Congress
18	was I'm sorry.
19	CHIEF JUSTICE ROBERTS: You can finish
20	your point.
21	MR. WALSH: The the notion that
22	transfers by an institution are protected by
23	the safe harbor covers a good bit more than
24	transfers by an institution into the clearing

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25 system.

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1	The example I gave before where
2	Goldman Sachs transferred me a bunch of
3	Berkshire Hathaway stock for a nominal amount
4	of money is covered as well, so it's broader
5	than Seligson.
6	CHIEF JUSTICE ROBERTS: Thank you,
7	counsel. The case is submitted.
8	(Whereupon, 11:02 a.m., the case was
9	submitted.)
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