American Bankruptcy Institute
International Caribbean Insolvency Symposium

Chapter 15 Update

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2026

ABI International Caribbean Insolvency Symposium

The Westin Grand Cayman Seven Mile Beach

Title: Chapter 15 Update

Session Time: **Thursday, January 15, 2026 at 8:00am-8:50am**

I. *Purdue Pharma* Comes to Chapter 15
   a. Discussion of the decisions in *In re Crédito Real, S.A.B. de C.V., SOFOM, E.N.R*, 670 B.R. 150 (Bankr. D. Del. 2025), and *In re Odebrecht Engenharia e Construcao S.A. - Em Recuperacao Jud.*, 669 B.R. 457 (Bankr. S.D.N.Y. 2025), which held that *Harrington v. Purdue Pharma L.P.*, 603 U.S. 204 (2024) did not preclude enforcing foreign restructuring plans or confirmation orders that contained non-consensual third party releases.

II. Developments in the Creation and Evaluation of COMI
   a. *In re Mega Newco Ltd.* (24-12031) (Bankr. S.D.N.Y. 2024)
      i. Discussion of the background of the transaction and request for recognition, including creation of UK subsidiary and UK scheme.
      ii. Discussion of Judge Wiles's decision in *Mega Newco*, including the concerns raised regarding potential "COMI shopping" and factors that may weigh in favor or against such a determination

   b. *In re Fossil* (UK) Global Services Ltd. (25-90525) (Bankr. S.D. TX)
      i. Discussion of Fossil's implementation of the strategy employed in *Mega Newco*, including Judge Peck's opinion in the UK proceeding regarding likelihood of recognition.

   c. *In re Geden Holdings, Ltd.* (25-90138) (Bankr. S.D. TX)
      i. Discussion of Judge Perez's decision to deny recognition of a Maltese liquidation, despite the debtor having its registered office in Malta, principally on the basis that the proceeding had laid fallow for an extended period of time and the appointed liquidator had not undertaken significant efforts in Malta.

III. Availability of 546(e) Safe Harbor in Chapter 15 and *In re Fairfield*
   a. Discussion of the decision of the Court of Appeals for the Second Circuit in *In re Fairfield*, 147 F.4th 136 (2d Cir. 2025), which held that section 546(e) of the Bankruptcy Code applies extraterritorially.

IV. What's Coming Next?
   a. The panelists will discuss what practitioners are likely to encounter in 2026 and what developments may await in Chapter 15.

Because the majority of the five *Bank Brussels Lambert* factors favor exercising personal jurisdiction, the Defendant has not established that the Court's exercise of personal jurisdiction over them would be unreasonable. The Court thus finds that exercising jurisdiction over the Defendant is reasonable and comports with "traditional notions of fair play and substantial justice . . . ." *See Int'l Shoe*, 326 U.S. at 316, 66 S. Ct. 154.

V. CONCLUSION

For the foregoing reasons, the Court DENIES the Defendant's Motions to Dismiss the Amended Complaint. The Liquidators shall submit a proposed order consistent with the findings in this decision in accordance with Local Bankruptcy Rule 9074-1.

IT IS SO ORDERED.

IN RE: CRÉDITO REAL, S.A.B. DE C.V., SOFOM, E.N.R.,[1] Debtor in a foreign proceeding.

Case No. 25-10208 (TMH)

United States Bankruptcy Court, D. Delaware.

Signed April 1, 2025

Background: Foreign representative petitioned for recognition of Chapter 15 debtor's Mexican insolvency proceeding as a foreign main proceeding and enforcement of its Mexican-court-approved "concurso" plan, which contained nonconsensual third-party releases. The United States International Development Finance Corporation (DFC), a claimant in the Mexican proceeding, objected to enforcement of plan, arguing that releases were not authorized under Chapter 15 and would be manifestly contrary to public policy of the United States.

Holdings: The Bankruptcy Court, Thomas M. Horan, J., held that:

(1) the Supreme Court's analysis in *Harrington v. Purdue Pharma*, 144 S.Ct. 2071, which held that Chapter 11 plan of reorganization cannot provide for nonconsensual third-party release of claims against non-debtor, does not change the way bankruptcy courts should interpret "catchall" provisions of sections of Chapter 15 empowering courts to grant appropriate relief and to provide additional assistance upon recognition of foreign proceeding;

(2) Chapter 15 authorizes bankruptcy courts to enforce nonconsensual third-party releases ordered by foreign courts; and

(3) nonconsensual third-party releases contained in debtor's "concurso" plan were not manifestly contrary to the public policy of the United States.

Objection overruled; recognition granted.

1. Bankruptcy ⚿2341

By enacting Chapter 15 of the Bankruptcy Code, Congress sought to facilitate cooperation between the courts of the United States and the courts of foreign countries in cross-border insolvency cases and to empower a court exercising bankruptcy jurisdiction to render assistance to

1. The last four identifying digits of the tax number and the jurisdiction in which the Chapter 15 Debtor pays taxes is Mexico – 6815. The Chapter 15 Debtor's corporate headquarters is located at Avenida Insurgentes Sur No. 730, 20th Floor, Colonia del Valle Norte, Alcaldía Benito Juárez, 03103, Mexico City, Mexico.

the foreign court. 11 U.S.C.A. § 1501 et seq.

2. Bankruptcy ⚿2341

In a proceeding under Chapter 15 of the Bankruptcy Code, the bankruptcy court should be guided by the main policy goals of the chapter, namely, cooperation and comity with foreign courts and deference to those courts within the confines established by the chapter. 11 U.S.C.A. § 1501.

3. Bankruptcy ⚿2341

Upon recognition of foreign main proceeding, bankruptcy court has broad discretion to order enforcement of orders entered in that proceeding, consistent with guiding principles of comity. 11 U.S.C.A. § 1521.

4. Bankruptcy ⚿2341

Principles of comity are particularly compelling in bankruptcy context, where United States courts have long recognized need to extend comity to foreign bankruptcy proceedings, since equitable and orderly distribution of debtor's property requires assembling all claims against the limited assets in single proceeding; if all creditors cannot be bound, then plan of reorganization will fail.

5. Bankruptcy ⚿2341

When considering whether to enforce order entered in foreign main proceeding, bankruptcy courts should aim to maximize assistance to foreign court conducting that proceeding. 11 U.S.C.A. §§ 1507, 1521.

6. Bankruptcy ⚿2341

Two provisions through which bankruptcy courts may enforce orders entered in a foreign main proceeding are the section of the Bankruptcy Code empowering courts to grant appropriate relief and the Code section empowering courts to provide additional assistance upon recognition of a foreign proceeding. 11 U.S.C.A. §§ 1507, 1521.

7. Bankruptcy ⚿2341

Broad grants of discretion afforded by the sections of the Bankruptcy Code empowering bankruptcy courts to grant appropriate relief and to provide additional assistance upon recognition of a foreign proceeding are limited in multiple ways, including by the Code section setting forth Chapter 15's public policy exception. 11 U.S.C.A. §§ 1506, 1507, 1521.

8. Bankruptcy ⚿2341

Because refusing to take an action under the public policy exception of Chapter 15, that is, one that is manifestly contrary to the public policy of the United States, is an extraordinary act, that section of the Bankruptcy Code should be narrowly interpreted; the word "manifestly" in international usage restricts the exception to the most fundamental policies of the United States. 11 U.S.C.A. § 1506.

See publication Words and Phrases for other judicial constructions and definitions.

9. Bankruptcy ⚿2341

Under the public policy exception of Chapter 15, the bankruptcy court's discretion to enforce orders of a foreign court is circumscribed by fundamental policies of fairness. 11 U.S.C.A. § 1506.

10. Bankruptcy ⚿2341

For a bankruptcy court to enforce an order of a foreign court in an insolvency proceeding, relief that is granted in the foreign proceeding does not have to be identical to relief that might be available in a proceeding in the United States; instead, courts should look to the fairness of the foreign proceeding. 11 U.S.C.A. §§ 1506, 1507, 1521.

11. Bankruptcy ⚿2341

Under Chapter 15 of the Bankruptcy Code, judgment of foreign court should be enforced, as matter of comity, if forum of foreign proceeding offers full and fair trial abroad before court of competent jurisdiction, conducting trial upon regular proceedings, after due citation or voluntary appearance of defendant, and under system of jurisprudence likely to secure impartial administration of justice between citizens of its own country and those of other countries, and there is nothing to show either prejudice in court, or in system of laws under which it is sitting. 11 U.S.C.A. §§ 1506, 1507, 1521.

12. Bankruptcy ⚿2341

In examining procedural fairness of foreign main proceeding, for purposes of determining whether order of foreign court should be enforced in light of Chapter 15's public policy exception, among factors bankruptcy courts may consider are whether: (1) creditors of the same class are treated equally in the distribution of assets, (2) liquidators are considered fiduciaries and are held accountable to the court, (3) creditors have the right to submit claims which, if denied, can be submitted to bankruptcy court for adjudication, (4) liquidators are required to give notice to debtor's potential claimants, (5) there are provisions for creditors' meetings, (6) foreign country's insolvency laws favor its own citizens, (7) all assets are marshaled before one body for centralized distribution, and (8) there are provisions for an automatic stay and for lifting of such stays to facilitate the centralization of claims. 11 U.S.C.A. §§ 1506, 1507, 1521.

13. Bankruptcy ⚿2341

Supreme Court's analysis in *Harrington v. Purdue Pharma*, 144 S.Ct. 2071, in holding that Chapter 11 plan cannot provide for nonconsensual third-party release of claims against non-debtor, does not change the way bankruptcy courts should interpret Chapter 15 "catchall" provisions empowering courts to grant appropriate relief and to provide additional assistance upon recognition of a foreign proceeding, based on plain language of Bankruptcy Code and canons of statutory interpretation; in contrast to catchall section relied upon by the *Purdue* Court, which enumerates relief Chapter 11 plans may provide, is limited to matters concerning the debtor, and directs courts to look to rest of Code to determine whether a provision is appropriate, Chapter 15 catchalls afford courts a broad grant of authority to provide relief while setting out express limitations, bearing in mind guiding principles of comity and cooperation, and nowhere prohibit nonconsensual third-party releases. 11 U.S.C.A. §§ 1123(b)(6), 1507, 1521(a)(7).

14. Bankruptcy ⚿2021.1

In determining how to construe particular sections of the Bankruptcy Code, court's interpretation starts where all such inquiries must begin: with the language of the statute itself.

15. Bankruptcy ⚿2021.1

If the text of the Bankruptcy Code is unambiguous, courts construe it according to its plain meaning.

16. Bankruptcy ⚿2021.1

If the text of the Bankruptcy Code is ambiguous, then courts turn to legislative history and the canons of construction to determine congressional intent in enacting the statute.

17. Statutes ⚿1065

Canons of construction are no more than rules of thumb that help courts determine the meaning of legislation.

18. Bankruptcy ⚿2341

Chapter 15 of the Bankruptcy Code, in particular, its "catchall" provisions empowering courts to grant appropriate relief and to provide additional assistance upon recognition of foreign proceeding, authorizes United States bankruptcy courts to enforce nonconsensual third-party releases granted in a foreign insolvency proceeding under that country's laws; plain language of Chapter 15 catchalls affords courts a broad grant of authority to provide relief while setting out express limitations, the relief in question would be available to a trustee and so was permissible under catchall, catchall's list of prohibited relief does not include nonconsensual third-party releases, by enforcing nonconsensual third-party releases originating in foreign courts bankruptcy courts would promote Chapter 15's goals of comity and providing assistance to foreign courts during foreign insolvency proceedings, and such releases are widely accepted by foreign courts. 11 U.S.C.A. §§ 1501, 1507, 1521(a)(7).

19. Bankruptcy ⚿2021.1

Bankruptcy Code's definition of "includes" and "including" codifies the rule of statutory construction that such terms are illustrative, and not exclusive or limiting. 11 U.S.C.A. § 102(3).

See publication Words and Phrases for other judicial constructions and definitions.

20. Statutes ⚿1377

Canon of statutory construction "expressio unius est exclusio alterius" stands for the proposition that the expression of one thing means the exclusion of another.

See publication Words and Phrases for other judicial constructions and definitions.

21. Bankruptcy ⚿2341

In determining whether relief may be granted as part of the "additional assistance" referenced in the section of the Bankruptcy Code empowering bankruptcy courts to provide additional assistance upon recognition of a foreign proceeding, court should look to the remainder of Chapter 15 to guide its decision. 11 U.S.C.A. § 1507.

22. Bankruptcy ⚿2341

In determining whether to provide "additional assistance" upon recognition of a foreign proceeding under Chapter 15, bankruptcy courts do not have to reject relief solely because it would be unavailable in the United States. 11 U.S.C.A. § 1507.

23. Bankruptcy ⚿2341

A major purpose in the enactment of Chapter 15 of the Bankruptcy Code was to promote comity for the orders of foreign courts. 11 U.S.C.A. § 1501 et seq.

24. Bankruptcy ⚿2341

"Catchall" provisions of Chapter 15 of the Bankruptcy Code, empowering courts to grant appropriate relief and to provide additional assistance upon recognition of foreign proceeding, should be read in their context pursuant to the canon of ejusdem generis. 11 U.S.C.A. §§ 1507, 1521(a)(7).

25. Bankruptcy ⚿2341

Bankruptcy courts should use Chapter 15's public policy exception to deny enforcing foreign relief sparingly. 11 U.S.C.A. § 1506.

26. Bankruptcy ⚿2341

Nonconsensual third-party releases contained in Chapter 15 debtor's Mexican-court-approved "concurso" plan were not manifestly contrary to the public policy of the United States; United States International Development Finance Corporation (DFC), a claimant in debtor's Mexican insolvency proceeding, objected to debtor's concurso plan, but not to the releases, in

the Mexican proceeding and only raised concerns about releases on appeal, DFC did not object to fairness of Mexican proceeding, in which it played an active role, nor did it identify a constitutional or statutory right on which debtor's concurso plan impinged, concurso plan was product of a fair process and of arms'-length negotiations among debtor, recognized creditors, and shareholders, concurso plan's releases were customary and permitted under Mexican law, concurso plan was approved by majority of recognized creditors, and permitting third-party releases was a policy decision that Congress could and had made. 11 U.S.C.A. § 1506.

27. Bankruptcy ⚿2341

Chapter 15's public policy exception applies where the procedural fairness of the foreign proceeding is in doubt or cannot be cured by the adoption of additional protections, or where recognition of the foreign proceeding would impinge severely a United States constitutional or statutory right. 11 U.S.C.A. § 1506.

28. Constitutional Law ⚿3879

Full and fair opportunity to be heard is a central tenet of procedural fairness in the United States.

29. Bankruptcy ⚿2341

Nonconsensual third-party releases are not manifestly contrary to the public policy of the United States, for purposes of Chapter 15's public policy exception; rather, such releases are expressly permitted under the Bankruptcy Code in the context of asbestos cases. 11 U.S.C.A. §§ 524(g), 1506.

30. Bankruptcy ⚿2341

To be "manifestly contrary" to the public policy of the United States within the meaning of Chapter 15's public policy exception, which provides that the court may refuse to take an action governed by Chapter 15 if the action would be manifestly contrary to such policy, the contested relief must impinge on some constitutional or statutory right. 11 U.S.C.A. § 1506.

See publication Words and Phrases for other judicial constructions and definitions.

31. Bankruptcy ⚿2341

Lack of specific availability in United States courts does not equate to manifest contrariness to United States public policy, within meaning of Chapter 15's public policy exception. 11 U.S.C.A. § 1506.

32. Bankruptcy ⚿2341

Simple fact that a United States court could not grant nonconsensual third-party releases in a typical Chapter 11 plan did not make them manifestly contrary to United States public policy so as to require the Bankruptcy Court to prohibit enforcement of such releases in foreign debtor's Chapter 15 case. 11 U.S.C.A. §§ 1123(b)(6), 1506.

John Henry Knight, Richards, Layton & Finger, P.A., Wilmington, DE, for Debtor.

Timothy Jay Fox, Jr., Office of the United States Trustee, Wilmington, DE, for U.S. Trustee.

OPINION

Thomas M. Horan, United States Bankruptcy Judge

In its June 27, 2024 decision in Harrington v. Purdue Pharma, L.P.,[2] the Supreme Court held that a chapter 11 plan of reorganization cannot provide for a nonconsensual third-party release of claims against a

2. 603 U.S. 204, 144 S.Ct. 2071, 219 L.Ed.2d 721 (2024).

non-debtor.[3] Following that decision, the international insolvency community has debated whether, under chapter 15, a bankruptcy court nonetheless may enter an order enforcing a *foreign plan* containing such releases.[4] That is the question presented here. At the recognition hearing held in this chapter 15 case on March 11, 2025, in an oral bench ruling, this Court held that such an order is permissible after Purdue and granted enforcement of a Mexican plan containing such releases.

[1] Section 1501 of title 11 of the United States Code (the "Bankruptcy Code") describes the "purpose and scope of application" of chapter 15.[5] When it enacted chapter 15, Congress sought to facilitate cooperation between the courts of the United States and the courts of foreign countries in cross-border insolvency cases and to empower a court exercising bankruptcy jurisdiction to render assistance to the foreign court.[6]

In this case, Robert Wagstaff, the foreign representative (the "Foreign Representative") of Crédito Real, S.A.B. de C.V., SOFOM, E.N.R. (the "Chapter 15 Debtor"), petitioned for entry of an order recognizing the Chapter 15 Debtor's Mexican bankruptcy case (the "Mexican Prepack Proceeding") as a foreign main proceeding.[7] That request was unopposed.

The Foreign Representative also asked this Court to render assistance to the Mexican court by recognizing and enforcing the plan that the Mexican court approved. The parties refer to that plan as the Concurso Plan [8] and the order approving it as the Concurso Order.[9]

The United States International Development Finance Corporation (the "DFC") opposed this relief, arguing that the nonconsensual third-party releases contained in the Concurso Plan are not authorized under chapter 15 and would be "manifestly contrary to the public policy of the United States."[10] This Court overruled that objection and entered its Order Granting (I) Recognition of Foreign Main Proceeding, (II) Full Force and Effect to Concurso Plan and Certain Related Relief (the "Recognition Order").[11] On March 25, 2024, the

3. Id. at 226–27, 144 S.Ct. 2071 (''Confining ourselves to the question presented, we hold only that the bankruptcy code does not authorize a release and injunction that, as part of a plan of reorganization under Chapter 11, effectively seeks to discharge claims against a nondebtor without the consent of affected claimants.'').

4. See, e.g., Joshua Kieran-Glennon, Restructuring Update: Third-Party Releases after Purdue Pharma – Solutions in Irish Law, McCann FitzGerald (Nov. 7, 2024), available at https://perma.cc/HR72-YR79; Michelle McGreal, Douglas Deutsch, & Robert Johnson, Purdue Pharma Bankruptcy Ruling Sidesteps Chapter 15 Implications, Bloomberg (July 10, 2024), available at https://perma.cc/5U5G-CXBF.

5. 11 U.S.C. § 1501.

6. Id.; see also In re ABC Learning Ctrs. Ltd., 728 F.3d 301, 304–05 (3d Cir. 2013) (examining Congress's purpose in enacting chapter 15 and explaining the objectives of the legislation); In re Irish Bank Resol. Corp., No. 13-12159 (CSS), 2014 WL 9953792, at *9–10 (Bankr. D. Del. Apr. 30, 2014), aff'd, 538 B.R. 692 (D. Del. 2015).

7. Verified Petition for Recognition of Foreign Main Proceeding and Motion for Order Granting Full Force and Effect to the Concurso Plan and Related Relief Pursuant to 11 U.S.C. §§ 105, 1507(a), 1509(b), 1515, 1517, 1520 and 1521 (the ''Verified Petition'') [D.I. 2].

8. Foreign Rep. Ex 7.

9. Foreign Rep. Ex. 8.

10. 11 U.S.C. § 1506.

11. D.I. 51.

DFC filed its notice of appeal.[12] This is the Court's written opinion in support of the Recognition Order.[13]

I. Background [14]

The Chapter 15 Debtor was one of Mexico's largest non-bank financial lending institutions.[15] Its customers were located predominantly in Mexico, elsewhere in Latin America, and in the United States.[16] It is a Mexican company, and it held or holds direct or indirect equity interests in entities located in Mexico, the United States, Honduras, Panama, Turks and Caicos, Costa Rica, Nicaragua, Guatemala, and El Salvador.[17]

In 2021, amid a liquidity crisis, the Chapter 15 Debtor began discussions with its key creditors on a restructuring.[18] These negotiations failed, and in June 2022, an ad hoc group of unsecured creditors (the "Ad Hoc Group") filed an involuntary chapter 11 petition against the Chapter 15 Debtor (the "Involuntary Chapter 11 Case").[19]

On June 28, 2022, one of the Chapter 15 Debtor's shareholders commenced a liquidation proceeding in the 52nd Civil State Court of Mexico City, Mexico (the "Mexican Liquidation Proceeding").[20] The court appointed Fernando Alonso-deFlorida Rivero as judicial liquidator (the "Mexican Liquidator").[21]

Then, on July 14, 2022, the Foreign Representative filed a petition under chapter 15 in this Court (the "Prior Chapter 15 Case"), along with a petition for recognition of the Mexican Liquidation Proceeding as a foreign main proceeding.[22]

Following these events, the Chapter 15 Debtor, the Mexican Liquidator, the Foreign Representative, and the Ad Hoc Group adjourned pending disputed matters in the Involuntary Chapter 11 Case and the Prior Chapter 15 Case to pursue

12. D.I. 58.

13. See Del. Bankr. L.R. 8003-2 (''Any bankruptcy Judge whose order is the subject of an appeal may file a written opinion that supports the order being appealed or that supplements any earlier written opinion or recorded oral bench ruling or opinion within 7 days after the filing date of the notice of appeal.'').

14. This background section is based on the (i) Verified Petition; (ii) the Declaration of Juan Pablo Estrada Michel Pursuant to 28 U.S.C. § 1746 in Support of the Petitioner's Verified Petition for Recognition of Foreign Main Proceeding and Motion for Order Granting Full Force and Effect to the Concurso Plan and Related Relief Pursuant to 11 U.S.C. §§ 105, 1507(a), 1509(b), 1515, 1517, 1520 and 1521 (the ''Estrada Dec.'') [D.I. 3] (Foreign Rep. Ex. 2); and (iii) the Supplemental Declaration of Juan Pablo Estrada Michel Pursuant to 28 U.S.C. § 1746 in Support of the Petitioner's Verified Petition for Recognition of Foreign Main Proceeding and Motion for Order Granting Full Force and Effect to the Concurso Plan and Related Relief Pursuant to 11 U.S.C. §§ 105, 1507(a), 1509(b), 1515, 1517, 1520 and 1521 (the ''Estrada Supp. Dec.'') [D.I. 41] (Foreign Rep. Ex. 11). The Verified Petition, Estrada Dec., and Estrada Supp. Dec. were admitted without objection. Messrs. Wagstaff and Estrada were not cross-examined.

15. Verified Petition ¶ 1.

16. Id.

17. Id. ¶ 4.

18. Id. ¶ 11.

19. Id. ¶ 12; In re Crédito Real, S.A.B. de C.V., SOFOM, E.N.R., Case No. 22-10696 (TMH) (formerly Case No. 22-10842 (DSJ) in the United States Bankruptcy Court for the Southern District of New York).

20. Id. ¶ 13.

21. Estrada Dec. ¶ 48.

22. Verified Petition ¶ 14; In re Crédito Real, S.A.B. de C.V., SOFOM, E.N.R., Case No. 22-10630 (TMH).

settlement discussions.[23] These negotiations succeeded, and the Chapter 15 Debtor, the Mexican Liquidator, and the Ad Hoc Group entered into a restructuring support agreement (the "RSA") to implement a global restructuring of the Chapter 15 Debtor's assets and liabilities.[24] It was under the terms of the RSA that the Mexican Liquidator commenced the Mexican Prepack Proceeding.[25] The parties agreed that that Foreign Representative would seek recognition here of the Mexican Prepack Proceeding as a foreign main proceeding and an order giving full force and effect to the Concurso Plan.[26]

On October 6, 2023, the Chapter 15 Debtor commenced the Mexican Prepack Proceeding at the direction of the Mexican Liquidator by filing a voluntary petition with the Mexican court.[27] On November 13, 2023, the Mexican Court issued a judgment officially commencing the conciliation stage of the Mexican Prepack Proceeding (the "Concurso Judgment").[28]

The Concurso Judgment imposed protective measures designed to preserve the Chapter 15 Debtor's estate, including a stay on all enforcement and collection actions against the Chapter 15 Debtor's assets and a prohibition on paying obligations due before the date of the commencement of the Mexican Prepack Proceeding.[29] Miguel Escamilla Villa was appointed as the Conciliator [30] of the Mexican Prepack Proceeding.[31] The Concurso Judgment was served on creditors and other parties through publication in a nationwide newspaper and in the Official Journal of the Federation; additionally, a summary of the judgement was registered in the Public Registry of Commerce to ensure that all interested parties, including foreign creditors, were adequately informed.[32]

On March 20, 2024, the Mexican Court issued a judgment of recognition that confirmed the ranking and classification of all the creditors' claims (the "Recognition Judgment").[33]

On May 21, 2024, the Concurso Plan was presented to the creditors recognized under the Recognition Judgment, and on July 1, 2024, with the consent of the majority of the recognized creditors, the Conciliator formally submitted the plan to the Mexican Court.[34] On August 15, 2024, the Mexican Court issued the Concurso Order overruling all objections to the Concurso Plan and finding that the Concurso Plan satisfied all of the requirements of the Mexican Bankruptcy Law and did not violate Mexican public policy.[35] The Concurso

23. Verified Petition ¶ 15.

24. Id. ¶ 20; Foreign Rep. Ex. 9.

25. Verified Petition ¶ 20.

26. Id.

27. Id. ¶ 21; Foreign Rep. Ex. 4.

28. Foreign. Rep. Ex. 5.

29. Estrada Dec. ¶ 55.

30. Under Mexican bankruptcy law, the court appoints the Conciliator to work with the debtor and its recognized creditors on an agreement about the debtor's restructuring. See id. ¶ 29 for a description of the role of the Conciliator.

31. Id. ¶ 56.

32. Id. ¶ 57.

33. Id. ¶ 58; Foreign Rep. Ex. 6.

34. Estrada Dec. ¶ 60.

35. Id. ¶ 61; see also Ley de Concursos Mercantiles [LCM] (Bankruptcy Law) art. 64, Diario Oficial de la Federación [DOF] 12-5-2000, últimas reformas DOF 14-1-2014 (Mex.) (establishing the requirements for a plan to

Plan received support representing 56.55% of the aggregate outstanding unsecured claims.[36]

The Concurso Plan is consistent with the terms of the RSA and provides for the repayment of creditors who are located in the United States.[37] It establishes the creation of a special purpose vehicle through a Mexican trust, to which almost all of the Chapter 15 Debtor's remaining assets will be transferred.[38] Upon the monetization, sale, or assignment of such assets, the corresponding proceeds will be distributed according to the priority scheme set forth in the Mexican Bankruptcy Law, *pari passu* and *pro rata* among unsecured creditors.[39] Upon the distribution, the unsecured claims will be cancelled or extinguished in accordance with the Concurso Plan.[40]

Clause 16 of the Concurso Plan contains exculpatory provisions that shield certain parties who played roles in the negotiation and implementation of the Chapter 15 Debtor's restructuring process, including the Ad Hoc Group, the Mexican Liquidator, the Chapter 15 Debtor's former directors and officers, the Indenture Trustee, and certain related parties (the "Release").[41] These parties are exculpated for any actions or inactions taken during the restructuring process prior to the creditors' formal acceptance of the plan, subject to the Concurso Plan's carve-outs and exceptions.[42] Specifically, the Concurso Plan provides:

> In any event, [the Chapter 15 Debtor] and the Recognized Creditors agree not to bring any action, complaint, suit or claim, as the case may be, against the Participating Recognized Creditors nor [the Chapter 15 Debtor], respectively, as well as their shareholders, its former general manager Felipe Guelfi Regules, liquidator, directors, officers, secretaries, depositaries and officers, and The Bank of New Mellon, as trustee for [the Chapter 15 Debtor]'s foreign-denominated bonds denominated in U.S. dollars, legal tender in the United States of America, and euros, legal tender in the European Union as the case may be, for any act or omission incurred by them during the Bankruptcy Proceeding and at any time prior to the execution of this Agreement, except for actions, complaints, claims or demands, as the case may be, for acts or omissions of [the Chapter 15 Debtor] that have caused damage or impairment to the Bankruptcy Estate and that they have failed to declare or disclose to the Participating Recognized Creditors during the negotiations of this Settlement Agreement and up to the date of its execution.[43]

As written, the Release is customary in Mexican settlement agreements and is permitted under Mexican Bankruptcy Law.[44] Under the Concurso Order, the Mexican Court determined that the Concurso Plan and the Release are consistent with Mexican Bankruptcy Law and not in violation of the public or individual interest of any specific creditor.[45] The Concurso Order has not been subject to a stay in

obtain approval under Mexican Bankruptcy Law).

36. Estrada Dec. ¶ 62.

37. Id. ¶ 63.

38. Id.

39. Id.

40. Id.

41. Id. ¶ 66; Concurso Plan, Clause 16.

42. Concurso Plan, Clause 16.

43. Concurso Plan Clause 16.

44. See Estrada Supp. Dec. ¶ 17.

45. Id. ¶ 25.

Mexico, so it remains in effect and is enforceable under Mexican law.[46]

The DFC was an active participant in the Mexican Prepack Proceeding.[47] It filed a proof of claim and objected to the approval of the Concurso Plan on grounds that were unrelated to the Release.[48] On November 21, 2024, the DFC appealed the Concurso Order, challenging, among other things, the Release.[49] On December 10, 2024, the Ad Hoc Group, the Chapter 15 Debtor, and the Conciliator each filed a reply to the DFC's appeal.[50] In their respective briefs, the Chapter 15 Debtor and Ad Hoc Group argued that the Release does not violate Mexican Bankruptcy Law, and they defended the propriety of the Release.[51] The DFC appeal remains pending.[52]

On February 7, 2025, the Foreign Representative filed the Verified Petition, commencing this chapter 15 case and seeking entry of an order recognizing the Mexican Prepack Proceeding and enforcing the Concurso Plan and Concurso Order. The DFC objected.[53]

On March 11, 2025, this Court conducted an evidentiary hearing to consider the Verified Petition and concluded that it possessed the power to grant (i) recognition to the Mexican Prepack Proceeding as a foreign main proceeding, and (ii) comity and full force and effect to the Concurso Plan. The Court accordingly entered the Recognition Order.[54]

II. The DFC Objection

In the DFC Objection, the DFC argued that the Concurso Plan cannot be recognized in its current form because the Release is not authorized under Bankruptcy Code sections 1507 and 1521.

It contends that Bankruptcy Code section 1521(a) does not include third-party releases as relief available to a foreign debtor. Specifically, the DFC argues that the term "any appropriate relief" used in that section refers to relief available under the Bankruptcy Code. The DFC contends that non-consensual third-party releases are not available. Relatedly, it contends that Bankruptcy Code section 1507, which provides that a U.S. court may grant "additional assistance" to a foreign representative, also does not provide for such relief.

The DFC posits that the Foreign Representative wrongly relies on the catchall provisions of Bankruptcy Code section 1521(a)(7) and 1507 to justify enforcement of the Concurso Plan. In so doing, it points to Purdue. However, the DFC does not argue that Purdue's refusal to approve a non-consensual third-party release in that chapter 11 case means that such a release cannot be available in chapter 15. Instead, the DFC argues that Purdue offers a framework for thinking about statutory in-

46. Id.

47. Id. ¶ 22.

48. Id. ¶¶ 23–24.

49. Id. ¶ 26.

50. Id. ¶ 27.

51. Id.

52. Id. ¶ 23.

53. See Objection of United States International Development Finance Corporation to Verified Petition for Recognition of Foreign Main Proceeding and Motion for Order Granting Full Force and Effect to the Concurso Plan and Related Relief Pursuant To 11 U.S.C. §§ 105, 1507(a), 1509(b), 1515, 1517, 1520 and 1521 (the "DFC Objection") [D.I. 30].

54. Following entry of the Recognition Order, this Court entered orders dismissing the Involuntary Chapter 11 Case and the Prior Chapter 15 Case.

terpretation that means this Court lacks authority to order enforcement of the Release.

The DFC contends that this Court should read the catchall provisions of Bankruptcy Code sections 1521(a)(7) and 1507 in the same way the Purdue Court read Bankruptcy Code section 1123(b)(6), and therefore conclude that catchall provisions like these are limiting provisions that provide no authority for enforcement of the Release.

The DFC also argues that the Release is "manifestly contrary to the public policy of the United States" as provided in Bankruptcy Code section 1506.

III. Discussion

This is a core proceeding under 28 U.S.C. § 157(b)(2)(P) because it involves "matters under chapter 15 of title 11." The DFC did not contest that recognition of the Mexican Prepack Proceeding under Bankruptcy Code section 1517 was appropriate, and this Court entered an order granting recognition of the Mexican Prepack Proceeding as a foreign main proceeding. As a consequence of that recognition, this Court "shall grant comity or cooperation to the [F]oreign [R]epresentative."[55]

Chapter 15 begins with a policy statement. Section 1501, which is titled "Purpose and scope of application," provides:

> (a) The purpose of this chapter 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 objectives of—
>
> (1) cooperation between—
>
> (A) courts of the United States, United States trustees, trustees, examiners, debtors, and debtors in possession; and
>
> (B)) the courts and other competent authorities of foreign countries involved in cross-border insolvency cases;
>
> (2) greater legal certainty for trade and investment;
>
> (3) fair and efficient administration of cross-border insolvencies that protects the interests of all creditors, and other interested entities, including the debtor;
>
> (4) protection and maximization of the value of the debtor's assets; and
>
> (5) facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.[56]

55. 11 U.S.C. § 1509(b)(3) (directing a court to grant comity if it has granted recognition under section 1517 and subject to any limitations consistent with the policy of chapter 15).

56. 11 U.S.C. § 1501(a). The language of this section closely tracks the Preamble of the UNCITRAL Model Law of Cross-Border Insolvency, which provides that:

> The purpose of this Law is to provide effective mechanisms for dealing with cases of cross-border insolvency so as to promote the objectives of:
>
> (a) Cooperation between the courts and other competent authorities of this State and foreign States involved in cases of cross-border insolvency;
>
> (b) Greater legal certainty for trade and investment;
>
> (c) Fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor;
>
> (d) Protection and maximization of the value of the debtor's assets; and
>
> (e) Facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.

[2] No other chapter of the Bankruptcy Code sets forth a similar statement about its purpose. The inclusion of this policy statement in section 1501 highlights that the Court should be guided by the main policy goals of chapter 15—cooperation and comity with foreign courts and deference to those courts within the confines established by chapter 15.

The importance of comity is reinforced in section 1507(b), which instructs that the provision of "additional relief" be "consistent with the principles of comity . . . ."[57] It is then further emphasized in section 1509(b)(3), which provides that when a U.S. court grants recognition of a foreign proceeding under Bankruptcy Code section 1517, it "shall grant comity or cooperation to the foreign representative."[58] Therefore, in deciding the issues presented here, this Court is mindful of the context in which it operates and considers the centrality of cooperation and comity in reaching its decision.

[3–5] Upon recognition of a foreign main proceeding, the Court has broad discretion to order enforcement of orders entered in a foreign main proceeding, consistent with the guiding principles of comity.[59] These principles of comity are particularly compelling in the bankruptcy context, where "American courts have long recognized the need to extend comity to foreign bankruptcy proceedings, because the equitable and orderly distribution of a debtor's property requires assembling all claims against the limited assets in a single proceeding; if all creditors could not be bound, a plan of reorganization would fail."[60] Therefore, when considering whether to enforce an order entered in a foreign main proceeding, U.S. bankruptcy courts should aim to maximize assistance to the foreign court conducting the foreign main proceeding.[61]

[6] Two provisions through which a U.S. bankruptcy court may enforce orders entered in a foreign main proceeding are Bankruptcy Code sections 1521(a)

57. 11 U.S.C. § 1507(b).

58. 11 U.S.C. § 1509(b)(3).

59. See In re Energy Coal S.P.A., 582 B.R. 619, 626–27 (Bankr. D. Del. 2018) (quoting In re Daebo Int'l Shipping Co., 543 B.R. 47, 52–53 (Bankr. S.D.N.Y. 2015)) (explaining that the Bankruptcy Code gives courts ''broad discretion'' and instructs them to be ''guided by principles of comity and cooperation with foreign courts in deciding whether to grant the foreign representative additional post-recognition relief''); In re Grant Forest Prods., Inc., 440 B.R. 616, 621 (Bankr. D. Del. 2010) (stating that this broad power is designed to promote cooperation between U.S. courts and foreign courts in cross-border insolvency cases); In re Elpida Memory, Inc., No. 12-10947 CSS, 2012 WL 6090194, at *7–8 (Bankr. D. Del. Nov. 20, 2012) (reiterating the broad discretion certain sections of chapter 15 accord, consistent with principles of comity). See generally Hilton v. Guyot, 159 U.S. 113, 164, 16 S.Ct. 139, 40 L.Ed. 95 (1895) (defining comity as 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 protections of its laws'').

60. In re Energy Coal S.P.A., 582 B.R. at 627 (quoting In re Atlas Shipping A/S, 404 B.R. 726, 733 (Bankr. S.D.N.Y. 2009)) (internal quotation marks and alterations omitted). See generally In re ABC Learning Ctrs. Ltd., 728 F.3d at 304–07 (discussing the origins of chapter 15 and emphasizing the role of comity in bankruptcy proceedings).

61. See In re ABC Learning Ctrs. Ltd., 728 F.3d at 306 (explaining that chapter 15 directs U.S. courts to act ''in aid of the main proceedings, in preference to a system of full bankruptcies . . . in each state where assets are found'' (quoting H.R. Rep. No. 109–31(1), at 109 (2005) reprinted in 2005 U.S.C.C.A.N. 88, 171)).

and 1507. The Foreign Representative asked that this Court enforce the Concurso Plan under those sections. Section 1521(a) empowers bankruptcy courts to grant appropriate relief, whereas section 1507 empowers bankruptcy courts to provide additional assistance.

[7, 8] However, Bankruptcy Code section 1521(a)'s and 1507's broad grants of discretion are limited in multiple ways. A main limitation on the court's discretion under these sections is Bankruptcy Code section 1506. That section provides that the court may "refus[e] to take an action governed by [chapter 15] if the action would be manifestly contrary to the public policy of the United States."[62] Refusing to take an action under Bankruptcy Code section 1506 is an extraordinary act. That section should be "narrowly interpreted, as the word 'manifestly' in international usage restricts the public policy exception to the most fundamental policies of the United States."[63] As a consequence, that authority rarely is exercised.[64]

[9–12] Under Bankruptcy Code section 1506, the Court's discretion to enforce orders of a foreign court is circumscribed by fundamental policies of fairness. Since before the enactment of chapter 15, for a U.S. bankruptcy court to enforce an order of a foreign court in an insolvency proceeding, courts have required that the foreign proceeding afford litigants the same fundamental protections that they would have received in a U.S. court.[65] Relief that is

62. 11 U.S.C. § 1506.

63. In re Ephedra Prods. Liab. Litig., 349 B.R. 333 (S.D.N.Y. 2006) (citing H.R. Rep. No. 109–31(I) at 109, reprinted in 2005 U.S.C.C.A.N. 88, 172).

64. See In re PT Bakrie Telecom Tbk, 628 B.R. 859, 890–91 (Bankr. S.D.N.Y. 2021) (reading the public policy exception narrowly because the word ''manifestly'' restricts it to the ''most fundamental'' U.S. policies and finding that, prior to Purdue, non-consensual third-party releases were not manifestly contrary to U.S. public policy); In re Sino-Forest Corp., 501 B.R. 655, 665 (Bankr. S.D.N.Y. 2013) (emphasizing that courts should construe this section narrowly and finding that, prior to Purdue, non-consensual third-party releases were not manifestly contrary to U.S. public policy); In re Metcalfe & Mansfield Alternative Invs., 421 B.R. 685, 697 (Bankr. S.D.N.Y. 2010) (construing the section narrowly and finding that, prior to Purdue, U.S. bankruptcy courts could enforce non-consensual third-party releases because they were not manifestly contrary to U.S. public policy). Compare In re Rede Energia S.A., 515 B.R. 69, 98 (Bankr. S.D.N.Y. 2014) (stating that section 1506 should be construed narrowly and used sparingly and finding that to enact the Brazilian plan would not be manifestly contrary to the public policies of the United States because ''Brazilian bankruptcy law meets our fundamental standards of fairness and accords with the course of civilized jurisprudence''), with In re Toft, 453 B.R. 186, 198 (Bankr. S.D.N.Y. 2011) (finding that while a difference in U.S. law from the foreign law does not necessarily preclude enforcement under chapter 15, the plan component at issue was affirmatively banned under U.S. law, enforcement would subject the enforcer to criminal liability, and enforcement would directly compromise privacy rights established in a comprehensive statutory scheme and based on constitutional rights).

65. Courts are divided on the statutory source of this limitation, but they agree that it is a central tenet of whether to afford foreign orders comity in insolvency proceedings, and it has remained so throughout multiple iterations of the Bankruptcy Code and the U.S. bankruptcy system itself. See Vertiv, Inc. v. Wayne Burt PTE, Ltd., 92 F.4th 169, 180 (3d Cir. 2024) (holding that a court should examine the foreign proceeding's fairness pursuant to principles of comity); In re Irish Bank Resol. Corp., 2014 WL 9953792 at *18 (explaining that a court must examine the procedural fairness of the foreign proceedings pursuant to the public policy exception of section 1506); In re PT Bakrie Telecom Tbk, 628 B.R. at 884 (clarifying that the considerations of fairness a court must examine in its determination of whether to enforce an order of a foreign court overlap with the considerations of Bankruptcy Code sections 1521 and 1507,

granted in a foreign proceeding does not have to be identical to relief that might be available in a U.S. proceeding.[66] Instead, the cases teach that we should look to the fairness of the foreign proceeding.[67] Therefore, as a matter of comity, if the forum of the foreign proceeding offers "a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it is sitting," the judgment should be enforced.[68]

all combining to ''assure the just treatment and protection against prejudice of claim holders in the United States through adequate procedural protections''); In re Rede Energia S.A., 515 B.R. at 90 (holding that Bankruptcy Code section 1507 establishes the fairness considerations that courts must examine in determining whether to grant comity to a foreign court's order); In re Sino-Forest Corp., 501 B.R. at 662–63 (emphasizing the importance of ensuring fairness in the foreign proceeding when determining whether to grant a foreign order comity under chapter 15); In re Atlas Shipping A/S, 404 B.R. at 733 (explaining that before Congress enacted chapter 15, Bankruptcy Code section 304 required bankruptcy courts, when considering whether to enforce foreign orders, to determine that such enforcement would not prejudice the rights of U.S. citizens); Phila. Gear Corp. v. Phila. Gear de Mex., S.A., 44 F.3d 187, 193–94 (3d Cir. 1994) (directing the District Court, in determining whether to grant comity to a Mexican proceeding, to make findings on certain considerations of fairness, including whether the Mexican court was a duly authorized tribunal, whether the plan provided for equal treatment of creditors, whether recognition would be inimical to the U.S. policy of equality, and whether the U.S. creditor would be prejudiced); Canada S. Ry. Co. v. Gebhard, 109 U.S. 527, 536, 3 S.Ct. 363, 27 L.Ed. 1020 (1883) (considering whether to afford comity to a Canadian insolvency plan and determining that the Canadian proceedings did not deprive creditors of their property without due process of law).

66. In re Metcalfe, 421 B.R. at 697 (explaining that enforcement of relief in a foreign plan does not require identical relief to be available in the United States); In re Toft, 453 B.R. at 198 (emphasizing that the mere fact that U.S. law differs from the law of the foreign main proceeding does not preclude enforcement as ''manifestly contrary'' to U.S. public policy).

67. See In re Elpida Memory, Inc., 2012 WL 6090194, at *7–8 (explaining that comity is limited to instances where U.S. parties are provided the same fundamental protections that litigants in the United States would receive and finding that Bankruptcy Code section 1520(a) requires U.S. Bankruptcy Courts to apply the standard for a sale of assets under Bankruptcy Code section 363 to comport with this limitation); In re Agrokor d.d., 591 B.R. 163, 184 (Bankr. S.D.N.Y. 2018) (construing section 1506 to allow deference to the foreign court so long as the foreign proceedings are procedurally fair and not manifestly contrary to U.S. public policy); In re Atlas Shipping A/S, 404 B.R. at 733 (''Federal courts generally extend comity whenever the foreign court had proper jurisdiction and enforcement does not prejudice the rights of United States citizens or violate domestic public policy.'').

68. Hilton v. Guyot, 159 U.S. 113, 202–03, 16 S.Ct. 139, 40 L.Ed. 95 (1895); accord In re Metcalfe, 421 B.R. at 698; see also In re Elpida Memory, Inc., 2012 WL 6090194, at *7 (requiring, for enforcement of the foreign plan, that the foreign proceeding afford the litigants the same fundamental protections that they would receive in the United States); In re PT Bakrie Telecom Tbk, 628 B.R. at 878–79 (looking to Hilton and other cases for factors of fairness in determining whether to grant comity). In examining the procedural fairness of a foreign main proceeding, courts have also looked at:

> (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

A. Statutory Interpretation of Bankruptcy Code Sections 1521(a) and 1507

[13] The DFC argues that the Supreme Court's analysis of Bankruptcy Code section 1123(b) in Purdue changes the way courts should interpret sections 1521(a) and 1507. It does not.

This section begins by recounting the DFC's argument in further detail. Next, it examines the plain meaning of the language in Bankruptcy Code sections 1521(a) and 1507. Then, it analyzes congressional intent through canons of statutory construction to confirm the plain meaning interpretation. As it proceeds through the plain language analysis and then the canons of construction analysis, it also compares the conclusions derived from sections 1521(a) and 1507 to section 1123(b)(6) and the conclusions the Supreme Court derived from that section. Because the power to enforce the Concurso Plan and the Concurso Order may only derive from Bankruptcy Code sections 1521(a)(7) or 1507(a) (the "Chapter 15 Catchalls"), the focus of this analysis is on those subsections.

The DFC specifically argues that the Chapter 15 Catchalls are analogous to the catchall provision of Bankruptcy Code section 1123(b)(6), so the Court should interpret them all the same way.[69] Section 1123(b) enumerates certain relief that a chapter 11 plan may provide. Subsection (6)—or, as the Supreme Court refers to it in Purdue, the "catchall"—provides that a chapter 11 plan may "include any other appropriate provision not inconsistent with the applicable provisions of this title."[70] The Purdue Court held that subsection (6) does not allow a chapter 11 plan to include nonconsensual third-party releases when interpreted in light of its surrounding context pursuant to the statutory canon of *ejusdem generis*.[71] It explained that the other provisions in section 1123(b) authorized relief that concerns the debtor, its rights and responsibilities, and its relationship with its creditors.[72] Because none of the other provisions in section 1123(b) consider a third-party's relationship with a creditor, the Supreme Court explained, subsection (6) must be interpreted in that context and should not extend to govern a third-party's relationship with a creditor by granting nonconsensual third-party releases.[73]

The DFC urges this Court to apply a similar analysis to sections 1521(a)(7) and 1507(a). It asserts that because those subsections are catchalls, like section 1123(b)(6), and because neither section 1521(a) nor 1507 discusses third-party relationships, then the Chapter 15 Catchalls

> 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.
>
> Vertiv, Inc. v. Wayne Burt PTE, Ltd., 92 F.4th at 181 (internal alterations omitted); accord In re PT Bakrie Telecom Tbk, 628 B.R. at 879 (quoting Allstate Life Ins. v. Linter Grp., 994 F.2d 996, 999 (2d Cir. 1993)); In re Sino-Forest Corp., 501 B.R. at 662–63 (quoting Finanz AG Zurich v. Banco Economico S.A., 192 F.3d 240, 249 (2d Cir. 1999)).

69. DFC Objection at 4.

70. 11 U.S.C. 1123(b)(6).

71. Purdue, 603 U.S. at 217–18, 144 S.Ct. 2071.

72. Id. at 218, 144 S.Ct. 2071.

73. Id.

should not extend to allow nonconsensual third-party releases. Neither the plain language nor canons of statutory interpretation support the DFC's arguments.

[14–17] In determining how to interpret sections 1521(a) and 1507, "[o]ur interpretation ... starts 'where all such inquiries must begin: with the language of the statute itself.' "[74] If the text of the statute is unambiguous, we construe it according to its plain meaning.[75] If it is ambiguous, then we turn to legislative history and the canons of construction to determine congressional intent in enacting the statute.[76] However, "[i]n any event, canons of construction are no more than rules of thumb that help courts determine the meaning of legislation[.]"[77]

Section 1521, subsection (a) provides:

> Upon recognition of a foreign proceeding, whether main or nonmain, where necessary to effectuate the purpose of this chapter and to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief, including—
>
> (1) staying the commencement or continuation of an individual action or proceeding concerning the debtor's assets, rights, obligations or liabilities to the extent they have not been stayed under section 1520(a);
>
> (2) staying execution against the debtor's assets to the extent it has not been stayed under section 1520(a);
>
> (3) suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under section 1520(a);
>
> (4) providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities;
>
> (5) entrusting the administration or realization of all or part of the debtor's assets within the territorial jurisdiction of the United States to the foreign representative or another per-

74. Ransom v. FIA Card Services, N.A., 562 U.S. 61, 69, 131 S.Ct. 716, 178 L.Ed.2d 603 (2011) (quoting United States v. Ron Pair Enters., 489 U.S. 235, 241, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989)); see also In re Phila. Newspapers, LLC, 599 F.3d 298, 304 (3d Cir. 2010), as amended (May 7, 2010) ("It is the cardinal canon of statutory interpretation that a court must begin with the statutory language.").

75. See Jensen v. Pressler & Pressler, 791 F.3d 413, 418 (3d Cir. 2015) ("Our interpretive task begins and ends with the text of the statute unless the text is ambiguous or does not reveal congressional intent with sufficient precision to resolve our inquiry." (internal quotations omitted)); Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253–54, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there."); In re Smale, 390 B.R. 111, 113 (Bankr. D. Del. 2008) ("[T]he starting point is to examine the plain meaning of the text of the statute.... '[W]hen a statute's language is plain, the sole function of the courts, at least where the disposition by the text is not absurd, is to enforce it according to its terms.' " (quoting Hartford Underwriters Ins. v. Union Planters Bank, N.A., 530 U.S. 1, 6, 120 S.Ct. 1942, 147 L.Ed.2d 1 (2000))).

76. See In re WW Warehouse, Inc., 313 B.R. 588, 591 (Bankr. D. Del. 2004) ("If, after a studied examination of the statutory context, the natural reading of a provision remains elusive, the statute is ambiguous and the Court must seek guidance beyond the statutory text." (internal quotations omitted)); In re Smale, 390 B.R. at 114 ("[A]pplying the plain meaning of the statute is the default entrance—not the mandatory exit.").

77. Conn. Nat'l Bank v. Germain, 503 U.S. at 253, 112 S.Ct. 1146.

son, including an examiner, authorized by the court;

(6) extending relief granted under section 1519(a); and

(7) 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).[78]

Meanwhile, section 1507 provides:

(a) Subject to the specific limitations stated elsewhere in this chapter the court, if recognition is granted, may provide additional assistance to a foreign representative under this title or under other laws of the United States.

(b) In determining whether to provide additional assistance under this title or under other laws of the United States, the court shall consider whether such additional assistance, consistent with the principles of comity, will reasonably assure—

(1) just treatment of all holders of claims against or interests in the debtor's property;

(2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;

(3) prevention of preferential or fraudulent dispositions of property of the debtor;

(4) distribution of proceeds of the debtor's property substantially in accordance with the order prescribed by this title; and

(5) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.[79]

[18, 19] The plain language of the two sections demonstrates that the DFC's interpretation is incorrect for multiple reasons. Beginning with section 1521, subsection (a) enumerates some relief that a bankruptcy court may grant at the request of a foreign representative. However, the section begins by explaining the court may grant "any" appropriate relief. Even though that statement is followed by a list of some relief a court may grant, the word "including" indicates that the enumerated relief is not a complete and exclusive list. Congress expressly addresses the term "including" at Bankruptcy Code section 102(3), providing that the word "'includes' and 'including' are not limiting."[80] This definition codifies the rule of statutory construction that the terms "includes" and "including" are illustrative, and not exclusive or limiting.[81]

It is true that when comparing this "any . . . including" language to that in section 1123(b), they are, at first blush, similar. Section 1521(a) allows a bankruptcy court to "grant any appropriate relief, including . . . any additional relief" while section 1123(b) allows a plan to "include any other appropriate provision." But the critical difference lies in the language that qualifies "any . . . including" in each section.

Section 1521(a) qualifies that language by explaining that any additional relief a court grants should be of the kind that is

78. 11 U.S.C. § 1521(a).

79. 11 U.S.C. § 1507.

80. 11 U.S.C. § 102(3).

81. See, e.g., Am. Sur. Co. v. Marotta, 287 U.S. 513, 517, 53 S.Ct. 260, 77 L.Ed. 466 (1933) (overruling lower court that found the word ''includes'' in section 1(9) of the Bankruptcy Act of 1898 to be one of limitation); Friedman v. P+P, LLC (In re Friedman), 466 B.R. 471, 482, n.20 (B.A.P. 9th Cir. 2012) (explaining and providing sources to support the proposition that ''including'' is not a word of limitation).

available to a trustee,[82] and then lists relief that a court should not grant. It is well-settled that enforcement of a third-party release contained in a foreign plan is appropriate under that section.[83]

Meanwhile, section 1123(b) simply states that a court may include any "other" chapter 11 plan provision that is not "inconsistent with the applicable provisions of this title." In Purdue, the Supreme Court explained that the word "other" directs courts to look to the other provisions in section 1123(b) to determine what further relief a court could grant.[84] By looking at section 1123(b)(1)–(5), the Supreme Court thus concludes that subsection (6) should only grant similar relief, as in relief that concerns the debtor and its rights, responsibilities, and relationships.[85] However, section 1521(a) does not direct courts to look to the "other" provisions when providing relief under its catchall.[86] Instead, section 1521(a) allows courts to grant "any additional relief that may be available to a trustee."[87] Accordingly, section 1521(a) does not direct courts to limit its relief to the kind afforded in other provisions, but rather, to relief available to a trustee. Because the relief in question would be available to a trustee, it is permissible under section 1521(a)(7).

Second, section 1521(a)(7) qualifies its "any . . . including" language by listing specific relief that a court is not permitted to grant under that section.[88] That list of prohibited relief does not include nonconsensual third-party releases.[89] By establishing explicit boundaries, Congress allowed relief that does not exceed those boundaries.

On the other hand, in section 1123(b), rather than provide specific prohibited relief, Congress directs courts to look to the whole of the Bankruptcy Code to determine if the requested provision is consistent with it. In Purdue, the Supreme Court framed this section as one that "set[s] out a detailed list of powers, followed by a catchall."[90] It explained, "Congress could have said in [section 1123(b)](6) that 'everything not expressly prohibited is permitted[ ]' " but instead limited it to "any other appropriate provision not inconsistent with the applicable provisions of this title."[91] In comparison, in section 1521(a)(7), Congress did expressly enumerate what it wanted to prohibit; in a chapter 15 case, a court cannot grant relief under sections 522, 544, 545, 547, 548, 550, and 724(a). By specifically enumerating relief that the court cannot grant under section 1521, Congress more concretely defined the outer bounds of what the court can grant, thus also more concretely defining what is included in what the court can

82. The term ''trustee'' is defined in chapter 15 as ''includ[ing] a trustee [and] a debtor in possession in a case under any chapter of this title . . . .'' 11 U.S.C. § 1502(6).

83. See, e.g., In re Arctic Glacier Int'l, Inc., 901 F.3d 162 (3d Cir. 2018) (enforcing third party releases in a Canadian plan of arrangement); In re Avanti Commc'ns Grp. PLC, 582 B.R. at 618 (finding that it had the power to enforce third-party releases under either section 1521(a)(7) or section 1507(a)).

84. Purdue, 603 U.S. at 218, 144 S.Ct. 2071.

85. Id. at 218–19, 144 S.Ct. 2071.

86. 11 U.S.C. § 1521(a)(7).

87. Id.

88. 11 U.S.C. § 1521(a)(7) (''except for relief available under sections 522, 544, 545, 547, 548, 550, and 724(a)'').

89. Id.

90. Purdue, 603 U.S. at 218, 144 S.Ct. 2071.

91. Id.; 11 U.S.C. § 1123(b)(6).

grant, bearing in mind the guiding principles of comity and cooperation.

[20] Briefly turning to a canon of statutory construction before moving onto examining the plain language of section 1507, the canon of *expressio unius* confirms this reading of the express prohibitions established in section 1521(a)(7). "*Expressio unius est exclusio alterius*" stands for the proposition that the expression of one thing means the exclusion of another.[92] By establishing a list of relief that courts should not grant under section 1521(a)(7), the section implies that other forms of relief not expressly prohibited are permitted. Therefore, enforcing foreign orders providing for nonconsensual third-party releases is within the scope of authority that section 1521(a) provides.

Section 1507 similarly affords courts a broad grant of authority to provide relief while setting out express limitations. Section 1507 establishes that a court may provide "additional assistance to a foreign representative" if the court has recognized the proceeding. Notwithstanding that the term "additional assistance" is a broad term at the outset, it also suggests that even if a court cannot grant relief under section 1521(a)(7), it may grant relief under section 1507. Thus, section 1507 implies an even more expansive grant of power than already found in section 1521(a).

[21] However, section 1507 does have limitations. First, it states that any assistance should be "[s]ubject to the specific limitations stated elsewhere in this chapter[.]"[93] Therefore, in determining whether relief may be granted as part of section 1507's "additional assistance," a court should look to the remainder of chapter 15 to guide its decision. Nevertheless, this instruction differs from section 1123(b)(6)'s instruction to look at subsections (1)–(5) to contextualize appropriate relief because chapter 15 covers a broader array of topics than section 1123(b)(1)–(5), which is limited to matters concerning and connected to the debtor. Section 1507's instruction also differs from section 1123(b)(6)'s other instruction that any other provisions not be inconsistent with applicable provisions of "this title" (as in, the Bankruptcy Code). Chapter 15 has a much different purpose and context—mainly to promote comity and international cooperation—thus entailing different limitations when compared to the Bankruptcy Code at large.[94] Accordingly, relief that is appropriate subject to limitations in chapter 15 must be different than relief that is not inconsistent with the applicable provisions of the Bankruptcy Code.

Second, section 1507(b) establishes a list of considerations for courts when determining whether to provide such additional assistance. Those factors, like much of chapter 15, focus on whether relief would be "consistent with principles of comity[.]"[95] They direct a court to confirm that any additional assistance would reasonably assure just treatment of creditors, protection of U.S. claim holders against prejudice, prevention of preferential or fraudulent transfers, equitable distribution of assets in accordance with the Bankruptcy Code, and the provision of an opportunity for a fresh start for the debtor.[96]

92. In re Thompson, 217 B.R. 375, 378 n.5 (B.A.P. 2d Cir. 1998).

93. 11 U.S.C. § 1507(a).

94. See 11 U.S.C. § 1501 (establishing the scope and purpose of chapter 15).

95. 11 U.S.C. § 1507(b).

96. Id.

[22] By adding this list of considerations, Congress again established boundaries for courts in granting relief under chapter 15 and directed courts on how to determine if it is appropriate to grant relief. And again, these express prohibitions provide a more explicit and fuller picture of the broad relief a court may grant, as compared to that in section 1123(b)(6), and they direct a court to focus on principles of comity when considering granting the relief. Because comity is central to chapter 15, the relief granted in the foreign court does not have to be available in U.S. courts under chapter 11.[97] In other words, U.S. courts do not have to reject relief solely because it would be unavailable in the United States. However, there must be metrics to assess whether the proposed relief is appropriate. Section 1507(b) solves that problem by providing these considerations while prioritizing comity to foreign courts.

As with section 1521, section 1507 thus differs from section 1123(b) because section 1123(b) does not expressly establish specific boundaries; instead, it directs courts to look to the rest of the Bankruptcy Code to determine whether a provision is appropriate. Because Congress expressed specific prohibitions, courts do not need to read further into its words like they do for section 1123(b).[98] The plain language of section 1507 (and section 1521) already enumerates the boundaries unambiguously.

Here, the Mexican Prepack Proceeding provided all the protections set out in section 1507(b).[99] Therefore, section 1507 allows this Court to enforce the relief entered in the Mexican Prepack Proceeding.

Accordingly, the plain language of both section 1521(a)(7) and section 1507(a) permit a U.S. court to enforce a foreign order for nonconsensual third-party releases. Nevertheless, even if the Chapter 15 Catchalls are ambiguous, the legislative history and canons of statutory construction confirm this interpretation and corresponding Congressional intent.[100]

[23] Congress enacted chapter 15 in 2005 as part of the Bankruptcy Abuse Prevention and Consumer Protection Act to "provide effective mechanisms for dealing with cases of cross-border insolvency."[101] The legislative history of chapter 15 shows that a major purpose in its enactment was to promote comity for the orders of foreign courts. In fact, as discussed above, section 1501 explicitly establishes one of its purposes as promoting cooperation between U.S. courts and foreign

97. In re Metcalfe, 421 B.R. at 697.

98. See Kaufman v. Allstate N.J. Ins., 561 F.3d 144, 155 (3d Cir. 2009) ("In interpreting a statute, the Court looks first to the statute's plain meaning and, if the statutory language is clear and unambiguous, the inquiry comes to an end." (citing Conn. Nat'l Bank v. Germain, 503 U.S. at 253–54, 112 S.Ct. 1146)).

99. For a fuller discussion of the fairness of the Mexican proceeding, see infra section B on section 1506's public policy considerations.

100. Even where the plain language of a statute is ambiguous, courts will often examine the congressional intent to confirm their interpretation, especially for chapter 15 cases. See In re Elpida Memory, Inc., 2012 WL 6090194, at *5 ("[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 with the application of similar statutes adopted by foreign jurisdictions.' " (quoting 11 U.S.C. § 1508)); In re Premier Int'l Holdings, Inc., 423 B.R. 58, 63–64 (Bankr. D. Del. 2010) ("Moreover, regardless of whether the text is plain or ambiguous, it is appropriate to identify, if possible, a congressional purpose consistent with the Court's interpretation.").

101. In re ABC Learning Ctrs. Ltd., 728 F.3d at 304.

courts.[102] Further, section 1508 directs courts "[i]n interpreting this chapter, [to] 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."[103] Thus, granting bankruptcy courts the authority to enforce nonconsensual third-party releases originating in foreign courts would promote chapter 15's goals of comity and providing assistance to foreign courts during foreign insolvency proceedings.[104]

Moreover, in examining multinational laws, as chapter 15 directs, nonconsensual third-party releases are widely accepted by foreign courts. Courts have previously looked to multinational laws in interpreting chapter 15 and determining whether certain relief would comport with international insolvency norms and the UNCITRAL Model Law on Cross-Border Insolvency, on which chapter 15 is based.[105] Other countries recognize nonconsensual third-party releases in insolvency proceedings.[106] Most relevant here, Mexican law provides for such releases.[107] That Mexican law provides for such releases further encourages the authority of this Court to enforce such releases in comity with the Mexican court.

[24] Additionally, the DFC is correct that the sections should be read in their context pursuant to the canon of *ejusdem generis*. The Supreme Court has repeatedly stated that "a 'fundamental canon of statutory construction' [is] that 'the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.' "[108] However, the DFC neglects the major differences between the contexts of chapters 11 and 15. Namely, chapter 15 exists to provide assistance to foreign courts by granting comity to their orders.[109] Doing so promotes the purpose of an insolvency proceeding, which is to provide for equitable and orderly distribution of a debtor's assets in a manner that is enforceable across borders.[110]

Of course, a court's ability to enforce a foreign court's order has limitations, but

102. 11 U.S.C. § 1501.

103. 11 U.S.C. § 1508.

104. See In re ABC Learning Ctrs. Ltd., 728 F.3d at 306 (finding that chapter 15 directs courts to act in aid of main proceeding and to maximize assistance).

105. See In re Servicos de Petroleo Constellation S.A., 600 B.R. 237, 273–74 (Bankr. S.D.N.Y. 2019) (''[I]t is therefore appropriate for U.S. bankruptcy courts to consider interpretations from other international jurisdictions that have adopted the Model Law.'' (citing In re Fairfield Sentry Ltd., 714 F.3d 127, 136 (2d Cir. 2013)).

106. See In re Avanti Commc'ns Grp. PLC, 582 B.R. at 618 (finding such schemes common under United Kingdom law); In re Metcalfe, 421 B.R. at 699 (explaining that a Canadian court had the power to enter such relief).

107. See supra note 35, 44–46 and accompanying text (explaining that the Mexican court here found the releases to be valid under Mexican law); Ad Hoc Group of Vitro Noteholders v. Vitro S.A.B. de C.V. (In re Vitro S.A.B. de C.V.), 701 F.3d 1031, 1039–40 (5th Cir. 2012) (explaining that a Mexican court approved the releases at issue and that relief available in a foreign court need not be identical to or available under U.S. law).

108. United States v. Miller, 604 U.S. ——, ——, 145 S.Ct. 839, 221 L.Ed.2d 373 (2025) (quoting Davis v. Mich. Dept. of Treasury, 489 U. S. 803, 809, 109 S.Ct. 1500, 103 L.Ed.2d 891 (1989)).

109. See In re ABC Learning Ctrs. Ltd., 728 F.3d at 306 (explaining courts should ''maximize assistance'').

110. See In re Energy Coal S.P.A., 582 B.R. at 627 (quoting In re Atlas Shipping A/S, 404 B.R. at 733) (explaining how comity to foreign court orders in the bankruptcy context is particularly important to promote the goals of bankruptcy).

Congress specified such limitations in the Bankruptcy Code. It specified relief that a court cannot grant under section 1521(a)(7).[111] It provided protections to consider before granting relief under section 1507.[112] It established that if such relief is manifestly contrary to public policy or violates a U.S. citizen's fundamental rights or procedural fairness, then it is not available.[113] All these limitations provide boundaries for relief under chapter 15 and ensure that it can have far-reaching consequences, so long as it is within these boundaries.[114] Accordingly, enforcing nonconsensual third-party releases granted in a foreign insolvency proceeding under that country's laws and in a fair proceeding is within this Court's authority under the Bankruptcy Code.

B. The Third-Party Releases Are Not Manifestly Contrary to the Public Policy of the United States

[25] The DFC also contends that the Concurso Plan should not be enforced under the public policy exception of Bankruptcy Code section 1506. As explained above "[t]he public policy exception has been narrowly construed, because the 'word 'manifestly' in international usage restricts the public policy exception to the most fundamental policies of the United States.' "[115] Therefore, courts should use this exception to deny enforcing foreign relief sparingly.[116]

[26, 27] "The public policy exception applies 'where the procedural fairness of the foreign proceeding is in doubt or cannot be cured by the adoption of additional protections' or where recognition 'would impinge severely a U.S. constitutional or statutory right.' "[117] The DFC did not object to the fairness of the proceedings, nor did it identify a constitutional or statutory right on which the Concurso Plan impinges. Nonetheless, the facts demonstrate that the Mexican proceeding comported with U.S. standards of procedural fairness, and the Concurso Plan does not violate any constitutional or statutory rights.

In the Mexican Prepack Proceeding, the DFC did not object to the Release and only raised the issue on appeal. There was an opportunity for objection, consistent with our own procedures, but the DFC did not avail itself of that opportunity. Article 164 of the Mexican Bankruptcy Law provides for an opportunity to object to a *concurso* plan, after which the Mexican court is to verify that the *concurso* plan complies with all the requirements for a valid plan and is not contrary to public policy; only then can a *concurso* plan be approved.[118] The DFC, having failed to object in the Mexican Prepack Proceeding, cannot contend that there was a procedural unfairness, and in fact, does not contend that the Mexican's courts procedures were unfair.

111. See 11 U.S.C. § 1521(a)(7) (''except for relief available under sections 522, 544, 545, 547, 548, 550, and 724(a)'').

112. See 11 U.S.C. § 1507(b).

113. See 11 U.S.C. § 1506.

114. See In re Atlas Shipping A/S, 404 B.R. at 741 (acknowledging the boundaries for discretionary relief that Congress set in chapter 15).

115. In re ABC Learning Ctrs. Ltd., 728 F.3d at 308 (quoting H.R. Rep. No. 109–31(1), at 109 reprinted in 2005 U.S.C.C.A.N. 88, 172).

116. In re ENNIA Caribe Holding N.N., 594 B.R. 631, 640 (Bkrtcy.S.D.N.Y. 2018) (citing In re Toft, 453 B.R. at 193).

117. In re ABC Learning Ctrs. Ltd., 728 F.3d at 310 (quoting In re Qimonda AG Bankr. Litig., 433 B.R. 547, 570 (E.D. Va. 2010)).

118. Estrada Supp. Dec. ¶ 25.

Even though the DFC does not argue the Mexican proceedings were unfair or identify any facts that would support a finding of unfairness, this Court finds that the Mexican proceedings offered "a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it is sitting."[119]

U.S. courts frequently have recognized Mexican *concurso* plans as being the product of a fair process.[120] In so holding, those courts have found that the contested Mexican *concurso* plans embodied arms'-length agreements and conformed to the general distribution priorities established in the Bankruptcy Code.[121] Mexican law also provides for due process to consider objections to a plan.[122] After creditors have been given the opportunity to object, Mexican law provides that the court may verify the plan if it complies with all the requirements for a valid plan and is not contrary to public policy.[123]

The present decision does not diverge from those prior decisions confirming the fairness of Mexican proceedings. The uncontroverted evidence before the Court is that the Concurso Plan's Release is customary and permitted under Mexican law; the Release is the product of arms'-length negotiations among the Chapter 15 Debtor, the Recognized Creditors, and the Shareholders; and the Concurso Plan was approved by a majority of the Recognized Creditors.[124]

[28] It also is undisputed that the DFC played an active role in the Mexican Prepack Proceeding.[125] The DFC filed a proof of claim asserting that it was a privileged creditor.[126] The Mexican Court instead allowed the DFC's claim as an unsecured creditor and granted the DFC status as a Recognized Creditor.[127] The DFC has appealed that ruling, and the appeal remains pending.[128] The DFC did not object to the

119. Hilton v. Guyot, 159 U.S. at 202–03, 16 S.Ct. 139. Some courts have held that even where a claimant does not object to the fairness of the foreign proceeding, the bankruptcy court should nevertheless make a finding that the foreign proceeding was fair. See In re PT Bakrie Telecom Tbk, 628 B.R. at 884 (finding that, to enforce a foreign plan, a bankruptcy court must make a finding that the foreign proceeding abided by fundamental standards of procedural fairness).

120. See, e.g., In re Cozumel Caribe, S.A. de C.V., 482 B.R. 96, 114–17 (Bankr. S.D.N.Y. 2012) (finding a Mexican insolvency proceeding fair); In re Metrofinanciera, S.A.P.I. de C.V., Sociedad Financiera de Objeto Multiple, E.N.R., No. 10-20666, 2010 WL 10075953, *3–4 (Bankr. S.D. Tex. Sept. 24, 2010) (same); JP Morgan Chase Bank v. Altos Hornos de Mex., S.A. de C.V., 412 F.3d 418, 428 (2d Cir. 2005) (same).

121. See, e.g., In re Metrofinanciera, 2010 WL 10075953, at *3.

122. See, e.g., id.

123. Ley de Concursos Mercantiles [LCM] (Bankruptcy Law) art. 64, Diario Oficial de la Federación [DOF] 12-5-2000, últimas reformas DOF 14-1-2014 (Mex.); see also Estrada Supp. Dec. ¶ 25 (confirming the availability under Mexican law).

124. Estrada Supp. Dec. ¶¶ 15–21.

125. Id. ¶ 22.

126. Id. ¶ 23.

127. Id.

128. Id. It bears noting that should the Mexican appellate court determine that the Release is impermissible, the Release would be-

Release but did object to the Concurso Plan on other grounds.[129] The Mexican Court overruled the DFC's plan objection and entered the Concurso Order approving the Concurso Plan. In so doing, the Mexican Court found that the Concurso Plan complied with Mexican law and "neither the public interest nor the individual interest of any specific creditor is violated, since the terms agreed to will apply to all creditors equally . . . ."[130] The extent of the DFC's participation and the Mexican court's finding that the Concurso Plan would not violate the public interest or the interests of any creditors both emphasize the DFC's opportunity (of which it did not avail itself) to object to the Release before the approval of the Concurso Plan. The Mexican court provided the DFC with a full and fair opportunity to be heard, which is a central tenet of U.S. procedural fairness.[131]

Therefore, in consideration of the fairness of this proceeding, the procedural safeguards typical under Mexican law, and the fact that the DFC has not identified an example of lack of fairness, this Court finds that the Mexican proceeding was procedurally fair.

[29–31] Likewise, the DFC has identified no constitutional or statutory right upon which the Concurso Plan impinges. Its only argument is that nonconsensual third-party releases are manifestly contrary to U.S. public policy because the Purdue decision prohibits them in most chapter 11 plans.[132] However, far from being "manifestly contrary to the public policy of the United States," nonconsensual third-party releases are expressly permitted under Bankruptcy Code section 524(g) in the context of asbestos cases. Furthermore, in Purdue, the Supreme Court noted that while it held that nonconsensual third-party releases are not permitted under chapter 11 (except in the asbestos context under Bankruptcy Code section 524(g)), Congress could have authorized them.[133] Indeed, the Supreme Court framed this issue in terms of the policy choices that Congress is authorized to make. To be manifestly contrary to U.S. public policy, the contested relief must impinge on some constitutional or statutory right; if a nonconsensual third-party release impinged on some constitutional right, the Supreme Court would not have said that Congress could provide for it. Accordingly, Congress has authorized nonconsensual third-party releases before, and the Supreme Court has explicitly said that it could do so again in the context of chapter 11 if it so desired. Lack of specific availability in U.S. courts does not equate to manifest contrariness to U.S. public policy, especially where, as

come ineffective here. This Court is not granting the Release. Instead, it is simply enforcing the Concurso Plan. If the Release provision of the Concurso Plan is later altered as a result of the DFC's appeal, the Release would only be enforceable in the United States—if at all—to the extent provided by the Concurso Plan.

129. Id. ¶ 24.

130. Concurso Order at 60.

131. Cf. Vertiv, Inc., 92 F.4th at 181 ("[A] United States court is well within its discretion to deny the extension of comity to foreign proceedings that deny 'notice and opportunity to be heard' to a party opposing comity.").

132. But see In re Metcalfe, 421 B.R. at 697 (explaining that even if relief in a foreign order is not typically available in a U.S. proceeding, it may be available in a chapter 15 proceeding pursuant to principles of comity).

133. See Purdue, 603 U.S. at 222, 144 S.Ct. 2071 (noting that "the [Bankruptcy Code] *does* authorize courts to enjoin claims against third parties without their consent, but does so in only *one* context" (emphasis in original)).

here, the contested relief is available in other contexts and could be made available more broadly by a simple act of Congress.[134]

The In re Vitro S.A.B. de C.V. court makes a similar point. While the Fifth Circuit denied enforcement of a Mexican plan's third-party release provisions, it noted that "although our court has firmly pronounced its opposition to [nonconsensual third-party] releases, relief is not thereby precluded under § 1507, which was intended to provide relief not otherwise available under the Bankruptcy Code or United States law."[135] Thus, it found that it could not deny the relief simply on the basis that third-party releases were not available in its jurisdiction.[136] Instead, the In re Vitro court only declined to enforce the plan in that case because of the role in the approval process of the votes of insiders holding intercompany claims.[137]

[32] Simply put, if permitting third-party releases is a policy decision that Congress can and has made, it cannot also be true that enforcing such releases where principles of cooperation and comity so require in chapter 15 would be "manifestly contrary to the public policy of the United States." The simple fact that a U.S. court could not grant such releases in a typical chapter 11 plan does not make them manifestly contrary to U.S. public policy so as to require this Court to prohibit enforcement of the Release in this chapter 15 case. The DFC's public policy exception argument fails.

CONCLUSION

Accordingly, chapter 15 authorizes this Court to enforce nonconsensual third party releases ordered by foreign courts. The plain language of Bankruptcy Code sections 1521(a) and 1507 give this Court a broad grant of discretion to aid foreign courts in accordance with principles of comity. Nothing in the plain language of these statutes or the legislative history or canons of construction indicates that Congress intended to diverge from this policy of comity to prohibit enforcing releases entered by foreign courts. The Mexican Prepack Proceeding was fair, and the Concurso Plan and the Concurso Order are not manifestly contrary to U.S. public policy. Therefore, this Court enforces the Concurso Plan and the Concurso Order in their entirety.

134. See In re Metcalfe, 421 B.R. at 697 (so holding); In re Rede Energia S.A., 515 B.R. at 91 (holding the same and emphasizing that the "public policy exception is clearly drafted in narrow terms and the few reported cases that have analyzed section 1506 at length recognize that it is to be applied sparingly" (internal quotations and alterations omitted)); In re ABC Learning Ctrs., 728 F.3d at 311 (finding that although Australian insolvency law used a different prioritization scheme from U.S. bankruptcy law, recognizing and enforcing the Australian proceeding would not be manifestly contrary to U.S. public policy, and in fact, refusing to recognize and enforce it would allow claimants to circumvent the Australian courts and undermine U.S. public policies of ordered proceedings and equal treatment).

135. In re Vitro, 701 F.3d at 1062.

136. Id.

137. Id. at 1067. Because the court decided that case on other grounds, it did not rule on whether third-party releases would be manifestly contrary to public policy under section 1506. Id. at 1069–70

ed his ability to understand what he was doing at the time he improperly touched the genitals of the seven-year-old victim in his sex-abuse case. Such a mental health impairment, he contends, could have been considered a mitigating circumstance that would have allowed the IJ to determine that his sexual-abuse conviction was not, in fact, a "particularly serious crime" that barred him from seeking withholding of removal. But Garcia was concededly aware of both (1) his diabetes diagnosis and (2) the fact that his diabetes might have mental health consequences. These were the precise bases of his motion to remand, which the BIA denied. In light of Garcia's awareness—before the conclusion of his removal proceedings—that diabetes could impact his mental health, we cannot say that the BIA abused its discretion in concluding that he had failed to "adequately explain[ ] why he did not previously make allegations or present medical evidence or a personal affidavit regarding his mental health at the time of his 2017 offense." Supp. Special App'x at 4.

[18] Last of all, we reject Garcia's contention that the BIA did not adequately explain its decision. We require a "minimum level of analysis . . . if judicial review is to be meaningful." *Poradisova v. Gonzales*, 420 F.3d 70, 77 (2d Cir. 2005). Here, the BIA offered enough explanation for us to understand why it ruled as it did. Nothing more was required.

III. Conclusion

To summarize, we hold as follows:

1. We have limited jurisdiction under 8 U.S.C. § 1252(a)(2)(D) to determine whether Garcia's conviction under NYPL § 130.60(2) constitutes "sexual abuse of a minor," making this offense an "aggravated felony"; and we review this question *de novo.*
2. We have limited jurisdiction under 8 U.S.C. § 1252(a)(2)(D) to determine whether the BIA erred in declining to equitably toll the 90-day deadline for Garcia to file his motion to reopen; we review the BIA's decision for abuse of discretion.
3. Garcia's conviction for second-degree sexual abuse under NYPL § 130.60(2) categorically constitutes "sexual abuse of a minor" under 8 U.S.C. § 1101(a)(43)(A), and is therefore an "aggravated felony" under 8 U.S.C. § 1227(a)(2)(A)(iii). We therefore dismiss his petition for review of his removal order for lack of jurisdiction pursuant to 8 U.S.C. § 1252(a)(2)(C).
4. The BIA did not abuse its discretion in denying Garcia's untimely motion to reopen his removal proceedings, because it had a reasonable basis to conclude that he did not merit equitable tolling of the deadline to file such a motion. We therefore deny his petition for review of the BIA's denial of his motion to reopen.

For the foregoing reasons, we DISMISS the petition in No. 22-6421 and DENY the petition in No. 24-26.

LTD., Debtor.*

Nos. 22-2101-bk(L), 23-965(L)
August Term 2023

United States Court of Appeals,
Second Circuit.

Argued: April 12, 2024

Decided: August 5, 2025

Background: Liquidators appointed in British Virgin Islands (BVI) insolvency proceedings for debtors, "feeder funds" that had invested with New York investment company before it was exposed as a Ponzi scheme, brought approximately 300 separate actions in the United States against investors who had redeemed their shares in the funds for cash shortly before scheme's collapse, seeking to recover over $6 billion in allegedly inflated redemption payments, and actions were consolidated after liquidators obtained recognition of BVI proceedings pursuant to Chapter 15 of the Bankruptcy Code. Investors moved to dismiss. The United States Bankruptcy Court for the Southern District of New York, Stuart M. Bernstein, J., issued a series of orders, inter alia, dismissing most actions for lack of personal jurisdiction over foreign investors, 2018 WL 3756343, ruling that liquidators were bound by redemptions' "net asset value" calculations, 596 B.R. 275, determining that the Code's avoidance "safe harbor" for securities transactions barred liquidators' claims based on BVI statutory law, but not their constructive trust claims against those investors alleged to have known that the calculations were inflated due to the fraud, 2020 WL 7345988, and denying reconsideration, 2021 WL 771677. On appeal, the District Court, Vernon S. Broderick, J., 630 F.Supp.3d 463, affirmed. Liquidators appealed, and investors cross-appealed.

Holdings: The Court of Appeals, Menashi, Circuit Judge, held that:

(1) liquidators' actions were "with respect to" the funds' subscription agreements with investors and, thus, the agreements' forum-selection clause established personal jurisdiction over all of the investors in New York;

(2) the Code's "safe harbor" for securities transactions applies extraterritoriality to avoidance claims under foreign law;

(3) liquidators' allegations did not establish that funds' administrator acted with actual intent to hinder, delay, or defraud creditors, and so liquidators' claims did not qualify for the carve-out for intentional fraudulent transfer claims under the Code's "safe harbor" for securities transactions;

(4) even if liquidators had plausibly alleged that funds' administrator acted with actual fraudulent intent, they did not plausibly allege that administrator's knowledge of the possible fraud was attributable to funds; and

(5) the Code's "safe harbor" barred liquidators' avoidance claims under BVI common law.

District Court's judgment affirmed in part and reversed in part.

See also 2014 WL 1219748.

1. Bankruptcy ⚿2341

Under Chapter 15 of the Bankruptcy Code, if company has entered insolvency proceedings in foreign jurisdiction, representative of its estate may file petition for

* The list of consolidated appeals may be found at Docket No. 22-2101, Order of November 23, 2022, Exhibit A, ECF No. 30; and at Docket No. 23-965, Order of August 3, 2023, Exhibit B, ECF No. 192, and Order of August 28, 2023, ECF No. 295. Parties that have withdrawn from the appeal by letter or stipulation are listed in Docket Nos. 22-2101 and 23-965.

"recognition" of the foreign proceeding in United States bankruptcy court; recognition of the foreign proceeding as a "foreign main proceeding" triggers certain automatic protections, including application of the automatic stay within the United States. 11 U.S.C.A. §§ 1504, 1515, 1520.

2. Federal Courts ⚿2787

Parties can consent to personal jurisdiction through forum-selection clauses in contractual agreements.

3. Federal Courts ⚿3581(4)

Court of Appeals reviews district court decisions on personal jurisdiction for clear error on factual holdings and de novo on legal conclusions.

4. Contracts ⚿159

Under New York law, the context considered by courts construing contracts using the word "and," in particular, whether the word should be read in the conjunctive or disjunctive sense, includes whether the parties used language other than "and" elsewhere in the contract to convey a disjunctive meaning.

5. Bankruptcy ⚿2092.6

Subscription agreements' forum-selection clause, providing that any proceeding had to be "with respect to" the agreement "and" the investment fund to be subject to New York's jurisdiction, established Bankruptcy Court's personal jurisdiction over redeeming investors in adversary proceedings in New York brought by liquidators of Chapter 15 debtors, British Virgin Islands (BVI) "feeder funds" that had invested with New York investment company before it was exposed as a Ponzi scheme; in this context "and" was properly read conjunctively, and liquidators' actions had an "established or discoverable relation" to the subscription agreements, since liquidators sought to recover payments made to shareholders for redemption of shares, redemption-related dispute was governed by funds' articles of association, and there was "clear and direct" relationship between articles and subscription agreements, both of which shared a common subject matter, namely, funds' relationship with investors.

6. Contracts ⚿143.5

Under New York law, as a general rule, 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.

7. Contracts ⚿159

Under New York law, contractual phrase "with respect to" is synonymous with phrases such as "related to," "in connection with," and "associated with"; these phrases are not necessarily tied to the concept of a causal connection and are broader in scope than the term "arising out of."

See publication Words and Phrases for other judicial constructions and definitions.

8. Contracts ⚿159

Under New York law, contractual term "related" means connected by reason of an established or discoverable relation.

See publication Words and Phrases for other judicial constructions and definitions.

9. Contracts ⚿206

Under New York law, courts require only a "discoverable relation" between the dispute and the agreement to satisfy a forum-selection clause, and but-for causation might qualify as a discoverable relation.

10. Alternative Dispute Resolution ⚿137

A controversy may "relate to" a contract, for purposes of a dispute-resolution clause, when the controversy arose out of a

subsequent agreement between the parties and the "relationship" between the contract and the subsequent agreement was "clear and direct."

11. Contracts ⚿127(4)

Purpose of forum-selection clause is to ensure that parties will not be required to defend lawsuits in far-flung fora, and promote uniformity of result.

12. International Law ⚿392

A basic premise of the legal system is that, in general, United States law governs domestically but does not rule the world.

13. International Law ⚿393

Pursuant to the 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.

See publication Words and Phrases for other judicial constructions and definitions.

14. Statutes ⚿1415

When a statute gives no clear indication of an extraterritorial application, it has none.

15. International Law ⚿393

There are two reasons for the presumption against extraterritoriality for federal statutes; first and most notably, the presumption serves to avoid the international discord that can result when United States law is applied to conduct in foreign countries, and second, the presumption reflects the more prosaic commonsense notion that Congress generally legislates with domestic concerns in mind.

16. International Law ⚿393

Although a risk of conflict between the American statute and a foreign law is not a prerequisite for applying the presumption against extraterritoriality for federal statutes, where such a risk is evident, the need to enforce the presumption is at its apex.

17. International Law ⚿393

Because the consistent application of the presumption against extraterritoriality for federal statutes preserves a stable background against which Congress can legislate with predictable effects, courts assume that Congress legislates against the backdrop of the presumption.

18. International Law ⚿393

At first step of two-step framework for analyzing issues related to extraterritoriality of federal statutes, court asks whether presumption against extraterritoriality has been rebutted, that is, whether statute gives clear, affirmative indication that it applies extraterritorially; if statute contains such unmistakable indication, then claims alleging exclusively foreign conduct may proceed.

19. International Law ⚿393

At first step of two-step framework for analyzing issues related to extraterritoriality of federal statutes, possible interpretations of statute, broad definitional language, and generic terms like "any" or "every" do not rebut presumption against extraterritoriality.

20. International Law ⚿393

At first step of two-step framework for analyzing issues related to extraterritoriality of federal statutes, which asks whether presumption against extraterritoriality has been rebutted, an express statement of extraterritoriality is not essential; context can be consulted as well.

21. International Law ⚿392

If statute does not apply extraterritorially, court proceeds to second step of two-step framework for analyzing issues related to extraterritoriality of federal

statutes and asks whether case involves domestic application of statute; court answers that question by looking to statute's focus.

22. International Law ⚿392

Focus of statute, for purposes of applying second step of two-step framework for analyzing issues related to extraterritoriality of federal statutes, is object of its solicitude, which can include conduct it seeks to regulate, as well as parties and interests it seeks to protect or vindicate.

23. International Law ⚿392

If conduct relevant to federal statute's focus occurred in United States, then case involves permissible domestic application of statute even if other conduct occurred abroad.

24. International Law ⚿392

If conduct relevant to focus of federal statute occurred in foreign country, then case involves impermissible extraterritorial application regardless of any other conduct that occurred in United States territory.

25. International Law ⚿393

Step two of two-step framework for analyzing issues related to extraterritoriality of federal statutes, which asks whether case involves domestic application of statute, is designed to apply the presumption against extraterritoriality to claims that involve both domestic and foreign activity, separating the activity that matters from the activity that does not.

26. Bankruptcy ⚿2341, 2701

Bankruptcy Code's "safe harbor" for securities transactions, providing defense from general avoiding power with respect to settlement payments made by, to, or for the benefit of a financial institution in connection with a securities contract, applies extraterritoriality to avoidance claims under foreign law; although the safe harbor provision, by its own terms, does not apply in a foreign proceeding under Chapter 15 of the Code, separate subsection of Code providing that any provision "relating to securities contracts" such as the safe harbor provision "shall apply in a case under [C]hapter 15" manifests an unmistakable congressional intent to apply extraterritorially, since that subsection must apply extraterritorially if it is to have any effect at all, given that Chapter 15 expressly prohibits a foreign representative from using avoidance powers set forth in the Code or under state law, leaving it with those avoidance powers it possesses under foreign law. 11 U.S.C.A. §§ 544(b), 546(e), 561(d), 1521(a)(7).

27. Bankruptcy ⚿2341

Chapter 15 expressly prohibits a foreign representative from using the statutory avoidance powers of the Bankruptcy Code. 11 U.S.C.A. § 1521(a)(7).

28. Bankruptcy ⚿2341

Chapter 15 of the Bankruptcy Code bars a foreign representative from asserting avoidance claims under state law. 11 U.S.C.A. §§ 544(b), 1521(a)(7).

29. Bankruptcy ⚿2704

Relief under state fraudulent transfer laws is available to a bankruptcy trustee only via the Bankruptcy Code's strong-arm provision, that is, the subsection of the Code authorizing trustees to avoid any conveyances which unsecured creditor could have avoided under applicable state law. 11 U.S.C.A. § 544(b).

30. Bankruptcy ⚿2341

A case under Chapter 7 or 11 of the Bankruptcy Code is not a proceeding "under Chapter 15" simply because a foreign representative who has obtained recognition under Chapter 15 intervenes in the case; the Chapter 7 or 11 case, on the one hand, and the Chapter 15 case, on the

other, are separate cases. 11 U.S.C.A. §§ 1504, 1523(a).

31. Bankruptcy ⚿2341, 3008.1

Domestic bankruptcy trustees cannot bring Chapter 15 cases. 11 U.S.C.A. §§ 1504, 1515(a).

32. Bankruptcy ⚿2341, 3008.1

Domestic bankruptcy trustee has no power to avoid "close-out" transactions—or any other transactions—in Chapter 15. 11 U.S.C.A. §§ 561, 1521(a).

33. Bankruptcy ⚿2002

Generally, bankruptcy court must apply choice-of-law rules of forum state.

34. Statutes ⚿1156

Court construing a federal statute relies on the canon against superfluity when doing so is consistent with and reinforces court's reading of the statute in other respects.

35. Statutes ⚿1214

Canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme.

36. Bankruptcy ⚿2341

Main purpose of Chapter 15 of the Bankruptcy Code is to permit filing by foreign, not domestic, debtors.

37. Bankruptcy ⚿2645.1

Just as when the debtor is a domestic entity and the alleged fraud occurred when the debtor transferred property from United States bank accounts, the transfer at issue is a "domestic transfer" regardless of the nationality of the recipient, by parity of reasoning, a transfer by a foreign debtor from a foreign bank account is a "foreign transfer."

38. Bankruptcy ⚿2701

A Chapter 15 foreign representative and the bankruptcy court cannot prevent the enforcement of "close-out rights," even if the exercise of those rights involves the transfer of collateral located abroad, and cannot invoke non-United States law to avoid and recover those transfers if they have already occurred. 11 U.S.C.A. § 561(d).

39. International Law ⚿392

A finding of extraterritoriality at step one of two-step framework for analyzing issues related to extraterritoriality of federal statutes will obviate step two's "focus" inquiry.

40. Bankruptcy ⚿2701

Foreign-law claim need not include fraud as an element in order to fall within the "intentional fraudulent transfer claims" carve-out from the Bankruptcy Code's avoidance "safe harbor" for securities transactions; it is sufficient if the facts alleged in support of those claims include actual intent to hinder, delay, or defraud creditors. 11 U.S.C.A. §§ 546(e), 548(a)(1)(A).

41. Bankruptcy ⚿2701

Avoidance claims brought against redeeming investors by liquidators appointed in British Virgin Islands (BVI) insolvency proceedings for Chapter 15 debtors, "feeder funds" that had invested with New York investment company before it was exposed as a Ponzi scheme, based on theory that funds' administrator acted with actual fraudulent intent that could be imputed to funds, did not qualify for carve-out for intentional fraudulent transfer claims from Bankruptcy Code's "safe harbor" for securities transactions; liquidators did not plausibly allege that administrator actually intended to hinder, delay, or defraud creditors, such as by interfering with creditors' rights or collection processes, or

that it was "substantially certain" that investment company was a Ponzi scheme, but, at most, the allegations showed that administrator was reckless as to the risk of fraud when it continued to issue "net asset value" certificates despite its suspicions about investment company. 11 U.S.C.A. §§ 546(e), 548(a)(1)(A).

42. Torts ⚿130

In general, civil responsibility is imputed to an individual for the usual results of his conduct, regardless of whether in the instance under consideration he actually had those consequences in mind.

43. Fraud ⚿4

Although, in general, civil responsibility is imputed to an individual for the usual results of his conduct, in order to establish an intent to hinder, delay, or defraud creditors the law requires proof of an added element, namely, his mental apprehension of those consequences.

44. Bankruptcy ⚿2649

While proof of natural consequences of one's acts may serve as circumstantial evidence that one appreciated those consequences, for purposes of establishing debtor's actual intent to defraud under the fraudulent transfer section of the Bankruptcy Code, fact-finder is nevertheless required to find, based on all of the direct and circumstantial evidence, that debtor did form an actual intent to defraud creditors. 11 U.S.C.A. § 548(a)(1)(A); Restatement (Second) of Torts § 8A.

45. Bankruptcy ⚿2649

To establish intent to hinder, delay, or defraud creditors, for purposes of avoiding transfer as actually fraudulent, plaintiff must show that debtor had intent to interfere with creditors' normal collection processes or with other affiliated creditor rights for personal or malign ends. 11 U.S.C.A. § 548(a)(1)(A).

46. Bankruptcy ⚿2649

Requisite actual intent, for purposes of Bankruptcy Code's fraudulent transfer provision, must be something more than just intent to prefer one creditor over another. 11 U.S.C.A. § 548(a)(1)(A).

47. Bankruptcy ⚿2649

Mere intent to prefer one creditor over another, although incidentally hindering or delaying creditors, will not establish a fraudulent transfer under Bankruptcy Code's fraudulent transfer provision. 11 U.S.C.A. § 548(a)(1).

48. Bankruptcy ⚿2726(4)

Under the so-called "Ponzi scheme presumption," the existence of a Ponzi scheme demonstrates actual intent as a matter of law, for fraudulent transfer purposes, because transfers made in the course of a Ponzi scheme could have been made for no purpose other than to hinder, delay, or defraud creditors. 11 U.S.C.A. § 548(a)(1)(A).

See publication Words and Phrases for other judicial constructions and definitions.

49. Bankruptcy ⚿2701

Even if liquidators appointed in British Virgin Islands (BVI) insolvency proceedings for Chapter 15 debtors, "feeder funds" that had invested with New York investment company before it was exposed as a Ponzi scheme, had plausibly alleged that funds' administrator acted with actual fraudulent intent when it continued to issue "net asset value" certificates despite its suspicions about investment company, such that liquidators' avoidance claims against redeeming investors might have qualified for carve-out for intentional fraudulent transfer claims from Bankruptcy Code's "safe harbor" for securities transactions, liquidators did not plausibly allege that administrator's knowledge of

the possible fraud was attributable to funds; liquidators had consistently maintained that funds were victims of a fraud perpetrated by administrator, and, in absence of allegations that administrator's conduct benefited funds as well as administrator, adverse interest exception to imputation would apply. 11 U.S.C.A. §§ 546(e), 548(a)(1)(A).

50. Principal and Agent ⚿180

Notice of fact that agent knows or has reason to know is not imputed to principal if agent acts adversely to principal in transaction or matter, intending to act solely for agent's own purposes or those of another person.

51. Corporations and Business Organizations ⚿2404(1)

Under New York law, the adverse interest exception to the to imputation of conduct of corporation's agents to corporation does not apply where the agent is perpetrating a fraud that will also benefit corporation as his principal.

52. Bankruptcy ⚿2701

Claims brought under British Virgin Islands (BVI) law by liquidators appointed in BVI insolvency proceedings for Chapter 15 debtors, "feeder funds" that had invested with New York investment company before it was exposed as a Ponzi scheme, by which liquidators sought to recover debtors' redemption payments to investors who allegedly knew that payments' "net asset value" calculations were inflated due to fraud, were barred by the Bankruptcy Code's "safe harbor" for securities transactions; under plain text of statute, safe harbor was not limited to claims brought pursuant to a bankruptcy trustee's statutory avoidance powers under the Code, but applied to claims that a litigant could bring outside of bankruptcy, including under foreign statutory or common law, liquidators' constructive trust claims were "avoidance" claims, and parties agreed that subject transactions were "settlement payment[s]" made to "financial institution[s] . . . in connection with a securities contract." 11 U.S.C.A. §§ 546(e), 561(d).

53. Statutes ⚿1132

Statutory "notwithstanding" clause does not naturally give rise to an inference that one may do what the statute forbids using mechanisms other than those identified in the clause; instead, the "notwithstanding" clause just shows which of two or more provisions prevails in the event of a conflict, that is, that the operative provision "overrides" the provisions identified in the notwithstanding clause, and nothing more.

See publication Words and Phrases for other judicial constructions and definitions.

54. Statutes ⚿1132

Statutory "notwithstanding" clause confirms rather than constrains breadth.

55. Bankruptcy ⚿2701

"Notwithstanding" clause set forth in the Bankruptcy Code's "safe harbor" for securities transactions, which states that, notwithstanding the enumerated sections of the Code, trustee may not avoid the transfers described by the safe harbor, establishes that the safe harbor provision overrides the enumerated avoidance sections; it does not imply that the operative language of the safe harbor limits only the use of the enumerated statutory avoidance powers. 11 U.S.C.A. §§ 544, 545, 546(e), 547, 548(a)(1)(B), 548(b).

56. Bankruptcy ⚿2701

Phrase "avoiding powers," as used in the section of the Bankruptcy Code governing limitations on avoiding powers, is not a term of art referring only to the

statutory avoidance powers under the Code. 11 U.S.C.A. § 546(e).

See publication Words and Phrases for other judicial constructions and definitions.

57. Statutes ⚿1205

Court will recognize term of art when statute includes word or phrase with specialized common-law meaning.

58. Statutes ⚿1123

Without a statutory definition, courts rely on a phrase's plain meaning at the time of enactment.

59. Bankruptcy ⚿2704

Bankruptcy Code's strong-arm provision is not limited to avoidance of fraudulent transfers under state statutes; rather, it gives trustee statutory standing to avoid transfers on any grounds that could be asserted by unsecured prepetition creditor. 11 U.S.C.A. § 544(b)(1).

60. Bankruptcy ⚿2704

Bankruptcy trustee may employ the Bankruptcy Code's strong-arm provision to bring an unjust enrichment claim under state law. 11 U.S.C.A. § 544(b)(1).

61. Bankruptcy ⚿2154.1

Bankruptcy trustee has no standing generally to sue third parties on behalf of the estate's creditors, but may only assert claims held by the bankrupt corporation itself.

62. Bankruptcy ⚿2704

When acting under the Bankruptcy Code's strong-arm provision, bankruptcy trustee is vested with the rights of actual creditors to avoid certain transfers; accordingly, even if trustee itself is otherwise barred from asserting a claim because of *Shearson Lehman Hutton, Inc. v. Wagoner*, 944 F.2d 114, trustee, standing in the shoes of creditors, is not barred from asserting the claim. 11 U.S.C.A. § 544(b).

63. Bankruptcy ⚿2154.1, 2704

Unless bankruptcy trustee is proceeding under the Bankruptcy Code's strong-arm provision, the trustee has no power to assert claims under state law on behalf of creditors. 11 U.S.C.A. § 544(b).

64. Bankruptcy ⚿2701

Focus of the Bankruptcy Code's "safe harbor" for securities transactions is the transaction, not the specific legal authority that a bankruptcy trustee would use to avoid that transaction; it prohibits state statutory as well as common-law claims that seek to avoid covered transactions. 11 U.S.C.A. § 546(e).

65. Trusts ⚿91

In general, constructive trust claim does not require showing of insolvency and does require bad faith on part of recipient of property.

66. Bankruptcy ⚿2701

Whether a claim is an avoidance claim for purposes of the Bankruptcy Code's "safe harbor" for securities transactions depends on the remedy sought—that is, whether it would avoid a covered transaction—rather than the legal elements of the claim. 11 U.S.C.A. § 546(e).

67. Bankruptcy ⚿2701

Bankruptcy Code's "safe harbor" for securities transactions was intended to protect from avoidance proceedings payments by and to commodities and securities firms in the settlement of securities transactions or the execution of securities contracts. 11 U.S.C.A. § 546(e).

68. Bankruptcy ⚿2701

By adopting the broad language of the Bankruptcy Code's avoidance "safe harbor" provision, Congress sought to prevent settled securities transactions from being unwound in a way that would seriously

undermine markets in which certainty, speed, finality, and stability are necessary to attract capital. 11 U.S.C.A. § 546(e).

On Appeal from the United States District Court for the Southern District of New York

Paul D. Clement, Clement & Murphy, PLLC, Alexandria, Virgina (Matthew D. Rowen, Clement & Murphy, PLLC, Alexandria, Virgina; David J. Molton, Marek P. Krzyzowski, Brown Rudnick LLP, New York, New York; Caitlin J. Halligan, David Elsberg, Andrew R. Dunlap, Michael Duke, Max H. Siegel, Selendy Gay Elsberg PLLC, New York, New York, on the brief), for Plaintiffs-Appellants-Cross-Appellees.

Jeffrey A. Rosenthal, Cleary Gottlieb Steen & Hamilton LLP, New York, New York (Carmine D. Boccuzzi, Jr., Cleary Gottlieb Steen & Hamilton LLP, New York, New York; Elsbeth Bennett, Nowell D. Bamberger, Cleary Gottlieb Steen & Hamilton LLP, Washington, DC, on the brief), for Defendants-Appellees-Cross-Appellants.

Before: Nardini, Menashi, and Lee, Circuit Judges.

Menashi, Circuit Judge:

The debtors in this bankruptcy case—Fairfield Sentry Limited ("Sentry"), Fairfield Sigma Limited ("Sigma"), and Fairfield Lambda Limited ("Lambda" and, together with Sentry and Sigma, the "Funds")—were investment funds based in the British Virgin Islands ("BVI") that invested heavily in Bernard L. Madoff Investment Securities ("BLMIS"). The Funds were forced into liquidation in the BVI after BLMIS was exposed as a Ponzi scheme in 2008. The plaintiffs-appellants-cross-appellees—Kenneth M. Krys and Greig Mitchell—are the liquidators appointed for the Funds in the BVI insolvency proceedings. The defendants-appellees-cross-appellants are investors and successors-in-interest of investors in the Funds who redeemed their shares for cash shortly before the collapse of the Ponzi scheme. The Funds are also plaintiffs-appellants-cross-appellees.

In approximately 300 separate actions in the United States, the liquidators attempted to recover the redemption payments made to the defendants, which exceeded $6 billion. These actions were consolidated in the bankruptcy court in the Southern District of New York after the liquidators obtained recognition of the BVI insolvency proceedings pursuant to Chapter 15 of the Bankruptcy Code. In a series of orders, the bankruptcy court dismissed most of the actions on the grounds that (1) it lacked personal jurisdiction over certain defendants, (2) the liquidators were bound by the Net Asset Value calculations that set the price at which the defendants redeemed the shares, and (3) the safe harbor for securities transactions under the Bankruptcy Code barred the liquidators' claims. The bankruptcy court sustained constructive trust claims against certain defendants that allegedly knew or had reason to know that the Net Asset Value calculations were inflated due to the Madoff fraud.

The district court affirmed the judgment of the bankruptcy court. On appeal, the liquidators seek restoration of the non-constructive-trust claims, and the defendants seek dismissal of the constructive trust claims. We hold that all of the liquidators' claims should have been dismissed pursuant to the safe harbor for securities transactions under § 546(e) of the Bankruptcy Code. Accordingly, we reverse the judgment insofar as the district court allowed the constructive trust claims to proceed, and we otherwise affirm.

BACKGROUND

Bernard L. Madoff ran the largest Ponzi scheme in history until the SEC exposed the scheme on December 11, 2008. Before then, the Funds raised capital from investors and gave it to BLMIS, supposedly to invest in securities. In fact:

> the money that [the Funds] transferred to BLMIS was not invested, but, rather, was used by Madoff to pay other BLMIS investors or was otherwise misappropriated by Madoff for unauthorized uses. Further, none of the securities shown on statements provided to [the Funds] by BLMIS were in fact purchased for [the Funds]. Additionally, none of the amounts withdrawn by [the Funds] from its accounts with BLMIS were proceeds of sales of securities or other investments. Instead, such amounts represented the monies of more recent investors into the Madoff scheme.

App'x 4620. At the same time, the Funds unknowingly supported Madoff's scheme by attracting "new investors and new investments," which "allow[ed] Madoff to make payments to early investors who sought to liquidate their investments" and to "maintain[ ] the illusion that BLMIS was making active investments and engaging in a successful investment strategy." *Id.* at 4630-31. "Sentry was the largest of all the so-called 'feeder funds' to maintain accounts with BLMIS," while "Sigma and Lambda were indirect BLMIS feeder funds established for foreign currency (respectively, Euro and Swiss franc) investment through purchase of shares of Sentry." *Id.* at 4630. "Sentry's account statements with BLMIS as of the end of October 2008 showed in excess of $6 billion of invested assets supposedly held by BLMIS." *Id.*

Investors purchased shares in the Funds by signing the Subscription Agreement, which was substantially identical for all three Funds. The Subscription Agreement bound the investors to the terms of the Funds' Articles of Association. The Subscription Agreement specified that it would be governed by New York law and that "any suit, action or proceeding ... with respect to this Agreement and the Fund may be brought in New York." *Id.* at 1029.

Pursuant to the Articles of Association, an investor had the option to redeem its shares in the Fund at any time for cash. The redemption price of each share was to equal the current Net Asset Value per Share ("NAV"). The Articles provided that "[t]he Net Asset Value per Share shall be calculated at the time of each determination by dividing the value of the net assets of the Fund by the number of Shares then in issue or deemed to be in issue" and then applying certain adjustments. *Id.* at 274. The Articles assigned ultimate responsibility for certifying the periodic calculations of the NAV to the directors of the Funds, but in practice the Funds delegated the task of calculating and certifying the NAV to the administrators of the Funds, primarily Citco Fund Services (Europe) B.V. ("Citco").

"In calculating each of the Funds' Net Asset Value, the Funds' administrators used and relied on account statements provided by BLMIS purportedly showing securities and investments, or interests or rights in securities and investments, held by BLMIS for the account of Sentry." *Id.* at 4631. These account statements, however, were "utterly fictitious." *Id.* at 4632. "[N]o securities were ever purchased or sold by BLMIS for Sentry and any stated cash on hand in the BLMIS accounts was based on misinformation and fictitious account statements. ... Indeed, no investments of any kind were ever made by BLMIS for Sentry." *Id.* Rather, the money in Sentry's account with BLMIS was used

to perpetuate the Ponzi scheme. As a result, the NAVs that Citco and the Funds certified were artificially inflated. In fact, Sentry's account with BLMIS contained no assets. The liquidators allege that:

> [o]ver the course of fifteen years, in its capacity as service providers to the Funds, Citco reviewed information concerning BLMIS not available to the general public, and expressed internal alarm about what that information showed with respect to the likelihood of fraud at BLMIS, but turned a blind eye to the reality reflected in the information and instead proceed[ed] with issuing the Certificates as if there were no problem.

Id. at 4634. The Funds, however, "believed that the amounts provided in connection with [redemptions by investors] represented the proceeds arising from the profitability" of investments in BLMIS. *Id.* at 4632.

After the exposure of the Ponzi scheme in 2008, "the Funds' boards of directors suspended any further redemptions of Shares and the calculation of the Funds' Net Asset Values," and "[i]n 2009, the Funds were put into liquidation proceedings in the BVI." *Id.* at 4647. The BVI court appointed the liquidators as representatives of the Funds' estates with responsibility for "all aspects of the Funds' business, including protecting, realizing, and distributing assets for the Funds' estates." *Id.* at 4648.

As the district court explained, "[w]hen a Ponzi scheme collapses, those who have already withdrawn some or all of their funds and recovered some or all of their investments are insulated from loss to a certain degree, while those whose money is still invested will suffer substantial loss, and sometimes receive nothing in return." *Fairfield Sentry Ltd. v. Citibank, N.A. London* (*Fairfield V*), 630 F. Supp. 3d 463, 475 n.11 (S.D.N.Y. 2022). For that reason, the liquidators initiated proceedings in the BVI against investors in the Funds—or transferees of such investors—that had redeemed shares before the collapse. The liquidators aimed to recover the redemption payments and "to distribute the recoveries equitably among members" of the Funds. *Id.* at 475. In support of that goal, the liquidators advanced the theory that the redemption payments "were mistaken payments and constituted or formed part of avoidable transactions, and generally represent assets of Sentry's estate that [the redeeming investors] are not entitled to keep." App'x 4648.

The Commercial Division of the Eastern Caribbean High Court of Justice of the BVI, however, held that the investors had "paid good consideration for the Redemption Payments by surrendering their shares with the Funds, and, consequently, the Liquidators were barred from recovering those payments." *Fairfield V*, 630 F. Supp. 3d at 476. The Eastern Caribbean Court of Appeal affirmed, and the case was then considered by the Privy Council in London. The Privy Council held that "the communications from Sentry to the Redeemers were 'certificates' within the meaning of Article 11, which meant that the NAV as determined by Citco was binding." *Id.* at 477 (citing *Fairfield Sentry Ltd (In Liquidation) v. Migani* [2014] UKPC 9, 2014 WL 1219748 (PC)). The Privy Council "based its reasoning on the need for finality and certainty in securities transactions." *Id.* The Privy Council did not consider whether Citco acted in bad faith.

In addition to the BVI proceedings, the liquidators "filed about 300 actions in the United States to claw back over $6 billion" in allegedly inflated redemption payments. *Id.* at 478. While the defendants in the BVI and U.S. proceedings "partially overlapped," the parties in this case "agree that the claims asserted in the U.S. Pro-

ceedings are not the same as those asserted in the BVI Proceedings, as they involved different redemption transactions at different time periods." *Id.* at 478 n.22. In the U.S. proceedings, the liquidators asserted causes of action for "(1) unjust enrichment; (2) money had and received; (3) mistaken payment; (4) constructive trust . . .; (5) unfair preferences under BVI's Insolvent Act § 245; (6) undervalue transactions under the Insolvent Act § 246 (collectively, the 'BVI Avoidance Claims'); (7) breach of contract; and (8) breach of the implied covenant of good faith and fair dealing." *Id.* at 479.

[1] In July 2010, the bankruptcy court in the Southern District of New York granted recognition of the BVI proceedings as a foreign main proceeding under Chapter 15 of the Bankruptcy Code, consolidated all the cases the liquidators had filed, and stayed the U.S. proceedings pending resolution of the BVI proceedings. Under Chapter 15 of the Bankruptcy Code, if a company has entered insolvency proceedings in a foreign jurisdiction, a representative of its estate may file a petition for recognition of the foreign proceedings in U.S. bankruptcy court. *See* 11 U.S.C. §§ 1504, 1515. Upon the filing of a petition for recognition, the bankruptcy court determines whether to recognize the foreign proceeding as either a "foreign main proceeding," if it is "pending in the country where the debtor has the center of its main interests," or a "foreign nonmain proceeding," if it is pending in the country where the debtor merely "has an establishment." *Id.* § 1517. Recognition as a foreign main proceeding triggers certain automatic protections, including application of the automatic stay within the United States. *Id.* § 1520. Once recognition is granted, the bankruptcy court "may provide additional assistance to a foreign representative under [the Bankruptcy Code] or under other laws of the United States." *Id.* § 1507. In particular, "[u]pon recognition of a foreign proceeding," the bankruptcy court may "grant[ ] any . . . relief that may be available to a trustee," with certain exceptions, including relief pursuant to the statutory avoidance powers granted to the trustee by the Bankruptcy Code. *Id.* § 1521(a)(7).

The bankruptcy court lifted the stay after the Privy Council issued the *Migani* decision in 2014, and the liquidators moved for leave to amend the complaint to add allegations of bad faith on the part of Citco. The defendants moved to dismiss the liquidators' claims on the grounds of lack of personal jurisdiction, failure to state a claim, and the safe harbor for securities transactions of § 546(e) of the Bankruptcy Code. That section 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, as defined in section 101 or 741 of this title, made by or to (or for the benefit of) a . . . financial institution . . . in connection with a securities contract, as defined in section 741(7), . . . except under section 548(a)(1)(A) of this title.

Id. § 546(e). Section 561(d), meanwhile, provides that:

> [a]ny provisions of this title relating to securities contracts . . . shall apply in a case under Chapter 15, so that enforcement of contractual provisions of such contracts and agreements in accordance with their terms will not be stayed or otherwise limited by operation of any provision of this title or by order of a court in any case under this title, and to limit avoidance powers to the same extent as in a proceeding under chapter 7 or 11 of this title (such enforcement not to be limited based on the presence or

absence of assets of the debtor in the United States).

Id. § 561(d).

The bankruptcy court resolved the motions in a series of orders issued between 2018 and 2020. First, the bankruptcy court decided that the forum selection clause in the Subscription Agreements did not suffice to establish personal jurisdiction over 206 foreign defendants who had moved to dismiss for lack of personal jurisdiction. *In re Fairfield Sentry Ltd.* (*Fairfield I*), No. 10-13164, 2018 WL 3756343, at *8-14 (Bankr. S.D.N.Y. Aug. 6, 2018). Second, the bankruptcy court dismissed all the claims in the complaint except for the BVI Avoidance Claims and the constructive trust claims against the defendants alleged to have known the NAV calculations were inflated. *In re Fairfield Sentry Ltd.* (*Fairfield II*), 596 B.R. 275, 282 (Bankr. S.D.N.Y. 2018). In *Fairfield II*, the bankruptcy court held that (1) *Migani* did not preclude the liquidators' claims under the preclusion rules of either the United States or the BVI; (2) the NAVs stated in the certificates were binding on the Funds—and therefore on the liquidators—regardless of Citco's bad faith, except with respect to the defendants who allegedly knew the NAVs were inflated; (3) the doctrine of *ex turpi causa non oritur actio* did not bar the liquidators' claims; (4) neither the Subscription Agreement nor the Articles required investors to return payments based on inflated NAVs; (5) the redemption payments were settlement payments made in connection with securities contracts and therefore qualified as covered transactions under the safe harbor for securities transactions of § 546(e); and (6) § 546(e) applied extraterritorially in Chapter 15 by virtue of § 561(d). *See id.* at 290-315.

The bankruptcy court declined to decide in *Fairfield II* whether—despite the transactions being covered—the safe harbor barred the liquidators' claims. *See id.* at 314-15 ("[T]he redemptions at issue were Covered Transactions because they were settlement payments made in connection with securities contracts. The more difficult question is whether the transferor or the transferee was a covered entity—either a financial institution or a financial participant.") (citation omitted). After receiving additional argument on that question, the bankruptcy court decided that the safe harbor barred the liquidators' claims that were based on BVI statutory law. *See In re Fairfield Sentry Ltd.* (*Fairfield III*), No. 10-13164, 2020 WL 7345988, at *7 (Bankr. S.D.N.Y. Dec. 14, 2020). The bankruptcy court decided that the constructive trust claims were not barred, however, because those claims were based on BVI common law. *See id.* at *8. The bankruptcy court reasoned that § 546(e) did not apply directly to the constructive trust claims and did not impliedly preempt those claims because "[c]ourts do not assume that otherwise applicable foreign law is preempted absent express statutory language to that effect." *Id.* at *10.

The bankruptcy court denied the defendants' motion for reconsideration of its decision that the safe harbor did not bar the constructive trust claims. *In re Fairfield Sentry Ltd.* (*Fairfield IV*), No. 10-13164, 2021 WL 771677 (Bankr. S.D.N.Y. Feb. 23, 2021). The U.S. District Court for the Southern District of New York affirmed the judgment of the bankruptcy court that dismissed all claims except the constructive trust claims. *See Fairfield V*, 630 F. Supp. 3d at 473.

Before this court are two appeals from the judgment of the district court in *Fairfield V*. In the appeal docketed at No. 22-2101, the liquidators argue that the district court should have reversed the bankruptcy court's dismissal of all the non-construc-

tive-trust claims. In the appeal docketed at No. 23-965, the defendants against which the constructive trust claims were asserted argue that the district court should have reversed the bankruptcy court's decision that the constructive trust claims could be maintained despite the safe harbor for securities transactions.

DISCUSSION

These appeals require us to answer two questions. The first question is whether the forum selection clause in the Subscription Agreements establishes personal jurisdiction over the defendants. We conclude that it does. The second question is whether the safe harbor of 11 U.S.C. § 546(e) bars the liquidators' actions. We conclude that the safe harbor applies extraterritorially and bars the actions. Because that conclusion resolves the case, we need not resolve the other disagreements between the parties.

I

[2] "Parties can consent to personal jurisdiction through forum-selection clauses in contractual agreements." *D.H. Blair & Co., Inc. v. Gottdiener*, 462 F.3d 95, 103 (2d Cir. 2006). The Subscription Agreements for the Funds contain a forum selection clause, which provides as follows:

> 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. . . . Nothing herein shall affect the Fund's right to commence any Proceeding or otherwise to proceed against Subscriber in any other jurisdiction or to serve process upon Subscriber in any manner permitted by any applicable law in any relevant jurisdiction.

App'x 1029. Despite the forum selection clause, the district court held that it lacked personal jurisdiction over 206 of the defendants. The district court "agree[d] with the Bankruptcy Court's determination that the word 'and' should be read conjunctively, and that the claims here are not 'with respect to' the Subscription Agreement." *Fairfield V*, 630 F. Supp. 3d at 482-83. For that reason, the district court held that "the forum selection clause cannot establish the Bankruptcy Court's personal jurisdiction over the relevant Defendants-Appellees." *Id.* at 486.

A

[3] "We review district court decisions on personal jurisdiction for clear error on factual holdings and *de novo* on legal conclusions." *D.H. Blair*, 462 F.3d at 103 (quoting *Mario Valente Collezioni, Ltd. v. Confezioni Semeraro Paolo, S.R.L.*, 264 F.3d 32, 36 (2d Cir. 2001)).

[4] We have recognized that "[c]ourts applying New York law to contracts using the word 'and' look to the context in which the word is used to determine whether it should be read in the conjunctive or disjunctive sense." *Spanski Enters., Inc. v. Telewizja Polska S.A.*, 832 F. App'x 723, 725 (2d Cir. 2020). That context includes whether the parties used language other than "and" elsewhere in the contract to convey a disjunctive meaning. *See, e.g.*, *id.* ("[R]eading the Agreement as a whole suggests that, when the parties sought to provide for unilateral rights, they used the term 'each party' to distinguish from the conjunctive 'TVP and SEI.' ").

[5, 6] As the district court correctly observed, "in other parts of the Subscription Agreement, the parties repeatedly use 'or' or 'and/or' to show disjunctive meaning." *Fairfield V*, 630 F. Supp. 3d at 484.[1] Yet the liquidators do not argue that the word "and" must be read disjunctively. The liquidators concede, for example, that "if a bank invested in one of the Funds through a Subscription Agreement and separately provided banking services to the Fund, any dispute over the banking services would be 'with respect to the Fund,' but not with respect to the Subscription Agreements" and therefore would not be covered by the forum selection clause. Appellants' Br., No. 22-2101, at 50. Accordingly, we accept that the word "and" should be read conjunctively. Under that reading, the forum selection clause covers the liquidators' actions only if those actions are "with respect to" the Subscription Agreements.[2]

The liquidators argue that the district court erred not in reading "and" conjunctively but in concluding that the proceedings here are not "with respect to this [Subscription] Agreement." We agree.

[7, 8] We have explained that the phrase "with respect to" is "synonymous" with phrases such as "related to," "in connection with," and "associated with." *Coregis Ins. Co. v. Am. Health Found., Inc.*, 241 F.3d 123, 128-29 (2d Cir. 2001). These phrases are "not necessarily tied to the concept of a causal connection" and are "broader in scope" than "the term 'arising out of.'" *Id.*; *see also ACE Cap. Re Overseas Ltd. v. Cent. United Life Ins. Co.*, 307 F.3d 24, 32 (2d Cir. 2002) (describing the phrase "relating to" as "expansive"). "Related" means "connected by reason of an established or discoverable relation." *Coregis*, 241 F.3d at 128 (quoting Webster's Third New International Dictionary 1916 (1986)); *see also Related*, Black's Law Dictionary (12th ed. 2024) ("Connected in some way; having relationship to or with something else."); *Dan's City Used Cars, Inc. v. Pelkey*, 569 U.S. 251, 260, 133 S.Ct. 1769, 185 L.Ed.2d 909 (2013) ("The phrase 'related to' ... embraces state laws 'having a connection with or reference to' [the specified subject matter] whether directly or indirectly.") (quoting *Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 370, 128 S.Ct. 989, 169 L.Ed.2d 933 (2008)).

The liquidators' actions have an "established or discoverable relation" to the Sub-

1. *See, e.g.*, App'x 1027 ("Subscriber has obtained sufficient information from the Fund or its authorized representatives to evaluate such risks."); *id.* ("The Subscriber irrevocably authorizes the Fund and/or the Administrator to disclose, at any time, any information held by the Fund or the Administrator in relation to the Subscriber or his investment in the Fund to the Investment Manager or any affiliate of the Investment Manager or the Administrator.").

2. As the district court recognized, "because the Subscription Agreement regulates the investment relationship between the members and the Funds, any dispute over the Subscription Agreement is necessarily also 'with respect to the fund.'" *Fairfield V*, 630 F. Supp. 3d at 484. For that reason, a conjunctive reading renders "and the Fund" superfluous because the forum selection clause would have the same scope if it applied to proceedings only "with respect to this Agreement." App'x 1029. As a general rule, "[a]n 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 Cap. 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)). Such avoidance is not possible here, however, because a disjunctive reading would render "with respect to this Agreement" superfluous. Under that reading, the forum selection clause would have the same scope if it applied to proceedings only "with respect to the Fund."

scription Agreements. *Coregis*, 241 F.3d at 128. The liquidators seek "to recover payments made to shareholders for the redemption of shares in the Funds prior to December 2008," when the Ponzi scheme was revealed. App'x 4618. The liquidators allege that these payments "did not conform to or follow the terms of the Funds' Subscription Agreements, Articles of Association and/or other offering documents." *Id.* at 4621. The lawsuits arise out of the relationship between the defendants as investors and the Funds as issuers of securities, and that relationship came into being through the Subscription Agreements. As the liquidators note, "the Subscription Agreements are the only documents that Defendants executed, and the only documents that bound Defendants to the Funds' Articles of Association, which established the mechanics for processing Fund redemptions." Appellants' Br., No. 22-2101, at 47. While the Subscription Agreements did not expressly incorporate the terms of the Articles of Association, *see Fairfield V*, 630 F. Supp. 3d at 486, those agreements informed investors that the Articles governed their relationship to the Funds. Because of this "discoverable relation" between the liquidators' actions and the Subscription Agreements, the actions are "with respect to" the Agreements. *Coregis*, 241 F.3d at 128-29.

B

The defendants respond that this argument endorses a "but-for" test that we have rejected in cases involving arbitration clauses. *See* Appellees' Br., No. 22-2101, at 77 (citing *Necchi S.p.A. v. Necchi Sewing Mach. Sales Corp.*, 348 F.2d 693 (2d Cir. 1965); *Cooper v. Ruane Cunniff & Goldfarb Inc.*, 990 F.3d 173 (2d Cir. 2021)). The Subscription Agreements represent a but-for cause of the liquidators' actions precisely because those agreements created the investment relationships between the defendants and the Funds. *See Bostock v. Clayton County*, 590 U.S. 644, 656, 140 S.Ct. 1731, 207 L.Ed.2d 218 (2020) (explaining that "but-for" causation "is established whenever a particular outcome would not have happened 'but for' the purported cause").

[9] It is not clear that we have rejected a but-for test for forum selection clauses. We require only a "discoverable relation" between the dispute and the agreement, *Coregis*, 241 F.3d at 128, and but-for causation might qualify as a "discoverable relation." Two other circuit courts have relied on our decision in *Coregis* to hold that but-for causation does qualify as a sufficient relationship between the dispute and the agreement. *See Carlyle Inv. Mgmt. LLC v. Moonmouth Co. SA*, 779 F.3d 214, 220 (3d Cir. 2015); *Huffington v. T.C. Grp., LLC*, 637 F.3d 18, 22 (1st Cir. 2011). In fact, the insurer-defendant in *Coregis* prevailed on its argument that the lawsuits for which the insured sought coverage were "related to" insolvency because "the Lawsuits would not have been brought *but for* the insolvency of the Companies, and . . . consequently the Lawsuits arise out of, are based upon, or are related to the insolvency." *Coregis*, 241 F.3d at 126 (emphasis added). Our own precedent therefore suggests that a lawsuit is "related to" its but-for cause.

[10] However that may be, the liquidators disclaim reliance on a but-for test here. *See* Reply Br., No. 22-2101, at 6-7. Our precedents hold that a controversy may "relat[e] to" a contract for purposes of a dispute-resolution clause when the controversy arose out of a subsequent agreement between the parties and the "relationship" between the contract and the subsequent agreement was "clear and direct." *Pervel Indus., Inc. v. T M Wallcovering, Inc.*, 871 F.2d 7, 8-9 (2d Cir. 1989).

In this case, there was a "clear and direct" relationship between the Subscription Agreements and the Articles of Association from which the liquidators' claims arose. The purpose of the Subscription Agreements was to make the investors who signed the agreements shareholders in the Funds pursuant to the terms of the Articles. A dispute between investors and the Funds regarding the redemption of shares, which is governed by the Articles, is "related to" the Subscription Agreements and falls within the scope of the forum-selection clause.

In *David L. Threlkeld & Co. v. Metallgesellschaft Ltd. (London)*, we considered the arbitration rules of the London Metal Exchange, which provided that "[a]ll disputes arising out of or in relation to any contract which contains an [arbitration clause] shall be referred to arbitration." 923 F.2d 245, 247 (2d Cir. 1991) (alteration omitted). The plaintiff and the defendant had entered into forward contracts for commodities trades, and those contracts contained arbitration clauses. The plaintiff "assert[ed] that its claims arise out of a collateral agreement with [the defendant], namely an agreement to value [the plaintiff's] forward contracts, and because the collateral agreement lacks an arbitration clause, the claims are not arbitrable." *Id.* at 251. We rejected that argument because "[t]he forward contracts were the genesis of the parties' relationship; the alleged collateral agreement stemmed directly from the forward contracts," and "[t]he metals contracts between [the parties] represent the subject matter of the alleged valuation agreements." *Id.* at 251-52.

The same reasoning applies here. The Subscription Agreements were "the genesis of the parties' relationship," and while the Articles preceded the Subscription Agreements, the defendants' obligations under the Articles "stemmed directly" from the Subscription Agreements. The two documents obviously share a common "subject matter": the relationship between the defendants, as investors and shareholders, and the Funds. This relationship is sufficiently "clear and direct" for the liquidators' claims to "relat[e] to" the Subscription Agreements. *Pervel Indus.*, 871 F.2d at 8-9.

[11] The alternative interpretation of the district court is that the Funds sold securities to investors all over the world under Subscription Agreements that would allow the investors to bring lawsuits related to the securities in any forum worldwide. That is commercially implausible. As the First Circuit has explained:

> forum selection clauses have varying purposes, but one reasonably inferred where, as here, a security is being offered to a range of customers is to concentrate all related litigation in a single forum. This assures the defendant that it will be able to litigate all of the actions in one place convenient to it; that one set of rules will apply; that consolidation may be readily available; that inconsistent outcomes can be minimized; and that a single lead precedent can control all cases.

Huffington, 637 F.3d at 22-23. The bankruptcy and district courts expressed skepticism of the liquidators' interpretation of the forum-selection clause on the ground that it would sweep almost any litigation between the subscribers and the Funds into New York. As the liquidators note, "that is a feature of the clause, not a bug." Appellants' Br., No. 22-2101, at 49. The purpose of a forum-selection clause is to "ensure that parties will not be required to defend lawsuits in far-flung fora, and promote uniformity of result." *Martinez v. Bloomberg LP*, 740 F.3d 211, 219 (2d Cir. 2014) (quoting *Magi XXI, Inc. v. Stato della Citta del Vaticano*, 714 F.3d 714, 722

(2d Cir. 2013)). In fact, "[t]he complexity of this decade-plus-long case illustrates the point." Appellants' Br., No. 22-2101, at 49.[3]

We conclude that the forum-selection clause established personal jurisdiction over all of the defendants.

II

We turn to the merits of the liquidators' claims. The district court agreed with the decision of the bankruptcy court in *Fairfield III* that the safe harbor for securities transactions bars those claims the liquidators brought under BVI statutory law. The district court explained that § 561(d) overcame the presumption against extraterritorial application of American law and that, in any event, the application of the safe harbor to this case was domestic rather than foreign. The district court also agreed with the decision of the bankruptcy court in *Fairfield III* and *Fairfield IV* that the safe harbor does not bar those claims the liquidators brought under BVI common law—namely, unjust enrichment, money had and received, mistaken payment, and constructive trust. Because the bankruptcy court decided in *Fairfield II* that BVI law barred all of the liquidators' common-law claims except for the constructive trust claims, *see Fairfield II*, 596 B.R. at 300-01, the net result of the district court's decision in *Fairfield V* was that the only claims remaining were the constructive trust claims against the defendants alleged to have known about the inflated NAV calculations.

On appeal, the liquidators argue that the safe harbor does not bar any of the claims. The defendants argue that the safe harbor bars all of the claims, including the constructive trust claims. We agree with the defendants. We first address the liquidators' argument that the defendants' position involves an extraterritorial application of the safe harbor in violation of the presumption against extraterritoriality. We then address the scope of the safe harbor.

A

[12–14] "It is a basic premise of our legal system that, in general, 'United States law governs domestically but does not rule the world.' " *RJR Nabisco, Inc. v. Eur. Cmty.*, 579 U.S. 325, 335, 136 S.Ct. 2090, 195 L.Ed.2d 476 (2016) (quoting *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 454, 127 S.Ct. 1746, 167 L.Ed.2d 737 (2007)). "This principle finds expression 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." *Id.* "When a statute gives no clear indication of an extraterritorial application, it has none." *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 255, 130 S.Ct. 2869, 177 L.Ed.2d 535 (2010).

1

[15–17] The Supreme Court has identified two reasons for the presumption against extraterritoriality. First and "[m]ost notably, it serves to avoid the international discord that can result when U.S. law is applied to conduct in foreign countries." *RJR Nabisco*, 579 U.S. at 335, 136 S.Ct. 2090. "Although 'a risk of conflict

3. *See* Appellants' Br., No. 22-2101, at 49 ("Absent a clause concentrating cross-border litigation over billions of dollars in redemption payments in a single forum, the Liquidators would have to slog through expensive and time-consuming discovery and litigation against hundreds of individual Defendants at the threshold, just to establish personal jurisdiction. Contrary to the district court's belief, it makes perfect sense that the parties chose a broad forum selection clause to avoid just that outcome.").

between the American statute and a foreign law' is not a prerequisite for applying the presumption against extraterritoriality, where such a risk is evident, the need to enforce the presumption is at its apex." *Id.* at 348, 136 S.Ct. 2090 (citation omitted) (quoting *Morrison*, 561 U.S. at 255, 130 S.Ct. 2869). Second, the presumption "reflects the more prosaic 'commonsense notion that Congress generally legislates with domestic concerns in mind.' " *Id.* at 336, 136 S.Ct. 2090 (quoting *Smith v. United States*, 507 U.S. 197, 204 n.5, 113 S.Ct. 1178, 122 L.Ed.2d 548 (1993)). Because the "consistent application of the presumption 'preserves a stable background against which Congress can legislate with predictable effects,' " *Yegiazaryan v. Smagin*, 599 U.S. 533, 541, 143 S.Ct. 1900, 216 L.Ed.2d 521 (2023) (alteration omitted) (quoting *Morrison*, 561 U.S. at 261, 130 S.Ct. 2869), we "assume that Congress legislates against the backdrop of the presumption," *EEOC v. Arab Am. Oil Co.* (*Aramco*), 499 U.S. 244, 248, 111 S.Ct. 1227, 113 L.Ed.2d 274 (1991).

[18–20] The Court has prescribed a "two-step framework for analyzing extraterritoriality issues." *RJR Nabisco*, 579 U.S. at 337, 136 S.Ct. 2090. "At the first step, we ask whether the presumption against extraterritoriality has been rebutted—that is, whether the statute gives a clear, affirmative indication that it applies extraterritorially." *Id.* If the statute contains such an "unmistakable" indication, "then claims alleging exclusively foreign conduct may proceed." *Abitron Austria GmbH v. Hetronic Int'l, Inc.*, 600 U.S. 412, 418, 143 S.Ct. 2522, 216 L.Ed.2d 1013 (2023). At this step, "possible interpretations," *Morrison*, 561 U.S. at 264, 130 S.Ct. 2869, broad definitional language, *Abitron*, 600 U.S. at 420-21, 143 S.Ct. 2522, and "generic terms like 'any' or 'every' do not rebut the presumption against extraterritoriality," *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 118, 133 S.Ct. 1659, 185 L.Ed.2d 671 (2013). Still, "an express statement of extraterritoriality is not essential," *RJR Nabisco*, 579 U.S. at 340, 136 S.Ct. 2090, because "[a]ssuredly context can be consulted as well," *Morrison*, 561 U.S. at 265, 130 S.Ct. 2869.

[21–25] If the statute does not apply extraterritorially, then we proceed to the second step and ask "whether the case involves a domestic application of the statute." *RJR Nabisco*, 579 U.S. at 337, 136 S.Ct. 2090. A court will answer that question "by looking to the statute's 'focus.' " *Id.* "The focus of a statute is the object of its solicitude, which can include the conduct it seeks to regulate, as well as the parties and interests it seeks to protect or vindicate." *WesternGeco LLC v. ION Geophysical Corp.*, 585 U.S. 407, 413-14, 138 S.Ct. 2129, 201 L.Ed.2d 584 (2018) (internal quotation marks and alterations 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." *RJR Nabisco*, 579 U.S. at 337, 136 S.Ct. 2090. 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." *Id.* In this way, "[s]tep two is designed to apply the presumption against extraterritoriality to claims that involve both domestic and foreign activity, separating the activity that matters from the activity that does not." *Abitron*, 600 U.S. at 419, 143 S.Ct. 2522.

2

In this case, the district court held that "the presumption against extraterritoriality does not bar the application of § 546(e) to [the liquidators'] claims because (1)

Congress has expressed a clear intent to apply § 546(e) extraterritorially through § 561(d), and (2) even if there were no such [c]ongressional intent, the application of § 546(e) here is a domestic one that passes step two of the test." *Fairfield V*, 630 F. Supp. 3d at 489-90. The district court was correct at step one, so we need not proceed to step two.

[26] Section 546(e) does not, by its own terms, apply in a foreign proceeding under Chapter 15. *See* 11 U.S.C. § 546(e). If § 546(e) applies extraterritorially to the proceeding here, it must do so through § 561(d), which provides that any provision "relating to securities contracts" such as § 546(e) "shall apply in a case under chapter 15." *Id.* § 561(d). We therefore ask whether the language of § 561(d) "manifests an unmistakable congressional intent to apply extraterritorially." *RJR Nabisco*, 579 U.S. at 339, 136 S.Ct. 2090. We conclude that it does. The only plausible reading of § 561(d) is that it applies extraterritorially.

[27–29] Section 561(d) must apply extraterritorially if it is to have any effect at all. Through § 561(d), the safe harbor limits the foreign representative's avoidance powers. And the only avoidance powers a foreign representative has in a case under Chapter 15 are those that it possesses under foreign law. Chapter 15 expressly prohibits a foreign representative from using the statutory avoidance powers of the Bankruptcy Code. *See* 11 U.S.C. § 1521(a)(7) (authorizing the court in a Chapter 15 proceeding to grant a foreign representative "any additional relief that may be available to a trustee, except for relief under sections 522, 544, 545, 547, 548, 550, and 724(a)"). Nor can a foreign representative assert avoidance claims under state law: a bankruptcy trustee may assert such claims only pursuant to § 544(b), and § 1521(a)(7) denies the foreign representative access to relief under that section.[4] The district court correctly recognized that, if § 561(d) is to have any application, it must necessarily apply to avoidance claims under foreign law—that is, it must apply extraterritorially.

3

The liquidators' counterarguments are not convincing. First, the liquidators appeal to § 1523(a), which provides that "[u]pon recognition of a foreign proceeding, the foreign representative has standing in a case concerning the debtor pending under another chapter of this title to initiate actions under sections 522, 544, 545, 547, 548, 550, 553, and 724(a)." 11 U.S.C. § 1523(a). Based on this section, the liquidators assert that the "major premise" of the district court—that a foreign representative has no domestic avoidance powers in a Chapter 15 case—is "flat wrong." Appellants' Br., No. 22-2101, at 59. The liquidators argue that a case under Chapter 7 or 11 in which a foreign representative has intervened to initiate an avoidance

4. We elaborate further on § 544(b) in Part II.B.2. We note that at least one district court—while acknowledging that a foreign representative cannot use § 544(b) to assert state-law fraudulent conveyance claims—has held that such claims may proceed without relying on § 544(b) "if the basis of such relief is non-bankruptcy law and the foreign representative, under non-bankruptcy law, has standing to seek the relief." *In re Massa Falida do Banco Cruzeiro do Sul S.A.*, 567 B.R. 212, 222 (Bankr. S.D. Fla. 2017). We disagree. Section 1521(a)(7) allows a court in a Chapter 15 case to "grant[ ] any additional relief that may be available to a trustee" except for relief under the avoidance provisions of the Bankruptcy Code. 11 U.S.C. § 1521(a)(7). Relief under state fraudulent transfer laws is available to a trustee only via § 544(b). Accordingly, such relief would be available to a foreign representative only via § 544(b).

action "would plainly be 'a case under chapter 15,' as Chapter 15 is what empowers a foreign liquidator to bring the avoidance action." Reply Br., No. 22-2101, at 20.

The text of § 1523(a) refutes this argument. It applies "in a case concerning the debtor pending *under another chapter* of this title." 11 U.S.C. § 1523(a) (emphasis added). If the case is "under another chapter," it cannot be "under chapter 15" for purposes of § 561(d). The foreign proceeding under Chapter 15 and the domestic proceeding are separate cases; indeed, other sections of Chapter 15 speak of foreign and domestic proceedings concerning the same debtor "pending concurrently."[5] The liquidators' argument also conflicts with the text of § 561(d), which provides that the safe harbor "shall apply in a case under chapter 15 ... to limit avoidance powers to the same extent as in a proceeding under chapter 7 or 11 of this title." 11 U.S.C. § 561(d). This language would not make sense if, as the liquidators contend, the safe harbor applies directly to a case under Chapter 7 or 11 in which a foreign representative has intervened.

The liquidators advert to § 1504, which states that "[a] case under [Chapter 15] is commenced by the filing of a petition for recognition of a foreign proceeding under section 1515." *Id.* § 1504. The liquidators argue that this language shows that "[e]verything that follows that filing in the U.S. Courts is 'a case under Chapter 15,' even if the provisions of Chapter 15 empower foreign liquidators to use authorities under other chapters." Reply Br., No. 22-2101, at 20.

[30] Not so. Section 1504 says that a Chapter 15 case begins when a foreign representative petitions for recognition of a foreign proceeding. And § 1523(a) says that once the foreign proceeding has been recognized, the foreign representative has standing to intervene in a case pending under another chapter and to avail himself of the avoidance powers under the Bankruptcy Code. But, as the text of § 1523(a) indicates, the foreign representative's intervention does not transform a case "pending under another chapter of this title" into a case "under Chapter 15." The Chapter 7 or 11 proceeding is a separate case from the Chapter 15 proceeding. Similarly, § 1528 provides that "[a]fter recognition of a foreign main proceeding, a case *under another chapter of this title* may be commenced only if the debtor has assets in the United States." 11 U.S.C. § 1528 (emphasis added). Such a case would be "under another chapter of this title," not "under Chapter 15," even though a Chapter 15 proceeding has been commenced pursuant to § 1504.

A case under Chapter 7 or 11 of the Bankruptcy Code is not a proceeding "under Chapter 15" simply because a foreign representative who has obtained recognition under Chapter 15 intervenes in the case. The Chapter 7 or 11 case, on the one hand, and the Chapter 15 case, on the other, are separate cases.

[31, 32] Second, the liquidators argue that § 561(d) need not apply extraterritorially to have effect because it "limit[s] the power of *domestic* trustees to avoid 'closeout' transactions, which is the focus of § 561 as a whole." Reply Br., No. 22-2101, at 22. Domestic trustees, however, cannot

5. *See* 11 U.S.C. § 1501(b)(3) (stating that Chapter 15 applies when "a foreign proceeding and a case under this title with respect to the same debtor are pending concurrently"); *id.* § 1529 ("If a foreign proceeding and a case under another chapter of this title are pending concurrently regarding the same debtor, the court shall seek cooperation and coordination under sections 1525, 1526, and 1527.").

bring Chapter 15 cases.[6] Thus, a domestic trustee has no power to avoid "close-out" transactions—or any other transactions—in Chapter 15. *See* 11 U.S.C. § 1521(a) ("Upon recognition of a foreign proceeding . . . the court may, *at the request of the foreign representative*, grant any appropriate relief.") (emphasis added).[7] Moreover, § 561(a) already provides that the exercise of close-out rights under securities contracts, commodity contracts, forward contracts, repurchase agreements, swap agreements, and master netting agreements "shall not be stayed, avoided, or otherwise limited by operation of any provision of this title or by any order of a court or administrative agency *in any proceeding under this title*." 11 U.S.C. § 561(a) (emphasis added). Thus, Congress has separately provided that close-out transfers generally cannot be avoided "in any proceeding under this title"—including in Chapter 15—at least with respect to domestic applications.

[33] Third, the liquidators argue that § 561(d) could apply when a foreign representative brings foreign law avoidance claims regarding *domestic* transactions. Appellants' Br., No. 22-2101, at 65. But the liquidators have not identified a case in which a *domestic* transaction was subject to avoidance in a *foreign* bankruptcy under *foreign* law. The liquidators suggest that "in *this very case*, Defendants insist that some of *their own transfers* are domestic transfers targeted by foreign-law avoidance claims." Reply Br., No. 22-2101, at 23. Yet if a court determined that the transfers at issue were domestic, it would likely decide that domestic law applied to the avoidance claims. Generally, "a bankruptcy court must apply the choice of law rules of the forum state," *In re Thelen LLP*, 736 F.3d 213, 219 (2d Cir. 2013), and "[t]he domestic nature of th[e] transfers . . . tips the scales . . . in favor of domestic adjudication," *In re Picard*, 917 F.3d 85, 105 (2d Cir. 2019); *see also In re Bankr. Est. of Norske Skogindustrier ASA*, 629 B.R. 717, 736 (Bankr. S.D.N.Y. 2021) ("The Second Circuit recently suggested that the choice of law inquiry for avoidance actions should focus on the location of the debtor's transfer.").

4

[34, 35] Because § 561(d) must apply extraterritorially to serve a meaningful function, the liquidators fall back on the assertion that "the superfluity canon is no match for the substantive presumption against extraterritoriality." Reply Br., No. 22-2101, at 21. To be sure, we have avoided the suggestion that "the presumption against superfluity necessarily trumps, by itself, the presumption against extraterritoriality in every instance." *United States v. Epskamp*, 832 F.3d 154, 165 n.10 (2d Cir. 2016). But we "rely on the canon against superfluity" when doing so is "consistent with and reinforces our reading of the statute in other respects." *Id.* Here, the domestic interpretation would render the whole of § 561(d) superfluous, and

6. *See* 11 U.S.C. § 1515(a) ("A *foreign representative* applies to the court for recognition of a foreign proceeding in which the foreign representative has been appointed by filing a petition for recognition.") (emphasis added); *id.* § 1509(a) ("A *foreign representative* may commence a case under section 1504 by filing directly with the court a petition for recognition of a foreign proceeding under section 1515.") (emphasis added).

7. The liquidators respond that "there is no bar to a domestic trustee participating in a proceeding initiated by a foreign representative under Chapter 15, and § 561(d) would make clear that a domestic trustee could not avoid close-out transfers in that proceeding." Reply Br., No. 22-2101, at 22. But the liquidators fail to cite any case in which a domestic trustee intervened in a Chapter 15 proceeding.

there is an obvious alternative interpretation available. *See Yates v. United States*, 574 U.S. 528, 543, 135 S.Ct. 1074, 191 L.Ed.2d 64 (2015) ("We resist a reading of [a statutory section] that would render superfluous an entire provision passed in proximity as part of the same Act."); *Homaidan v. Sallie Mae, Inc.*, 3 F.4th 595, 602 (2d Cir. 2021) (rejecting an interpretation under which "the other subsections . . . would be swallowed up"). "[T]he canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme." *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 386, 133 S.Ct. 1166, 185 L.Ed.2d 242 (2013).

[36, 37] In addition to the text of § 561(d), the purpose of Chapter 15 indicates that § 561(d) applies extraterritorially. Section 561(d) applies "in a case under chapter 15," and "the main purpose of chapter 15 is to permit filing by *foreign, not domestic, debtors.*" 1 Collier on Bankruptcy ¶ 13.03 (16th ed.) (emphasis added). A transfer by a foreign debtor initiated in the foreign jurisdiction would likely be considered a foreign transfer for the purpose of the extraterritoriality analysis, even if the recipient is a domestic institution.[8] When Congress provided that § 561(d) applies "in a case under chapter 15," it did so with respect to the prototypical Chapter 15 case and the prototypical type of transfer that would be challenged in a Chapter 15 proceeding. Nothing in the text suggests that it applies to an exceptional or rare circumstance.

[38] Moreover, "the context from which the statute arose" demonstrates that § 561(d) applies the safe harbor of § 546(e) extraterritorially. *Bond v. United States*, 572 U.S. 844, 866, 134 S.Ct. 2077, 189 L.Ed.2d 1 (2014).[9] Congress enacted § 561(d) in response to the collapse of Long Term Capital Management L.P. ("LTCM"), a hedge fund based in the Cayman Islands:

> [The President's Working Group on Financial Markets] hypothesized the effect of a default on the LTCM Fund's counterparties. It noted that if the LTCM Fund was the subject of a Cayman Islands insolvency proceeding, "its Cayman receiver could have sought a Section 304 injunction prohibiting at least temporarily the liquidation of U.S. collateral pledged by LTCM to its counterparties." This might force U.S. secured creditors to seek the permission of the foreign bankruptcy court to liquidate their collateral, or at least delay them from liquidating any U.S. Treasury securities pledged by the Fund under a master netting agreement.

Fairfield II, 596 B.R. at 312-13 (citation omitted) (quoting President's Working Group, Hedge Funds, Leverage, and the Lessons of Long-Term Capital Management (Apr. 1999)). "Congress and the Working Group were primarily and under-

8. We have held that when ''the debtor is a domestic entity,'' and ''the alleged fraud occurred when the debtor transferred property from U.S. bank accounts,'' the transfer at issue is a *domestic* transfer, regardless of the nationality of the recipient. *In re Picard*, 917 F.3d at 99 n.9. By parity of reasoning, a transfer by a foreign debtor from a foreign bank account would be a foreign transfer. In *Picard*, we expressed ''no opinion on whether either factor standing alone''— the nationality of the debtor or the location of the bank account—''would support a finding that a transfer was domestic.'' *Id.*

9. *See* Samuel L. Bray, *The Mischief Rule*, 109 Geo. L.J. 967, 968 (2021) (''The mischief rule instructs an interpreter to consider the problem to which the statute was addressed, and also the way in which the statute is a remedy for that problem. . . . [T]he generating problem is taken as part of the context for reading the statute.'') (footnote omitted).

standably concerned with U.S. creditors and U.S. markets" but "recognized that the financial contagion they feared did not stop at the border." *Id.* at 314. In fact, § 561(d) expressly provides that enforcement of financial contracts is "not to be limited based on the presence or absence of assets of the debtor in the United States." 11 U.S.C. § 561(d). Accordingly, "a chapter 15 foreign representative (and the bankruptcy court) cannot prevent the enforcement of Close-Out Rights, even if the exercise of those rights involves the transfer of collateral located abroad[,] and cannot invoke non-U.S. law to avoid and recover those transfers if they have already occurred." *Fairfield II*, 596 B.R. at 314.

The problem that Congress sought to address when it enacted § 561(d) required an extraterritorial application. We agree with the amicus that "[i]t cannot be that Congress, legislating in the wake of the LTCM collapse, intended to hobble investors by leaving them exposed to the risk of avoidance litigation brought by the bankruptcy estates of failed foreign companies, especially when the Bankruptcy Code bars domestic trustees from bringing the exact [same] claims."[10]

As the district court recognized, the liquidators seek to "have it both ways—benefiting from the domestic forum Chapter 15 has created for foreign law claims as a matter of comity while trying to avoid the limitations that Chapter 15 imposes on their power to bring these claims." *Fairfield V*, 630 F. Supp. 3d at 490 (internal quotation marks and citation omitted). We have previously doubted that "[a]llowing a plaintiff's claim to go forward because the cause of action applies extraterritorially, while then applying the presumption [against extraterritoriality] to block a different provision setting out defenses to that claim," could be the result Congress intends "when it writes provisions limiting civil liability." *Force v. Facebook*, 934 F.3d 53, 73 (2d Cir. 2019). That result would "seem only to increase the possibility of international friction" and "could also give the plaintiffs an advantage when they sue over extraterritorial wrongdoing that they would not receive if the defendant's conduct occurred domestically." *Id.* It is similarly implausible that Congress intended to allow a foreign debtor and its representative to take advantage of U.S. bankruptcy law to bring avoidance actions unconstrained by the safe harbor that applies to the avoidance actions of a domestic trustee or debtor-in-possession.

5

[39] We agree with the district court insofar as it held that § 561(d) applies § 546(e) extraterritorially. Because "a finding of extraterritoriality at step one will obviate step two's 'focus' inquiry," *RJR Nabisco*, 579 U.S. at 338 n.5, 136 S.Ct. 2090, we need not identify the statutory focus or determine whether the conduct in this case occurred abroad.

B

Because the safe harbor of § 546(e) applies extraterritorially through § 561(d), we must decide whether the safe harbor bars the liquidators' claims. The parties agree that the transactions here are "settlement payment[s]" made to "financial institution[s] . . . in connection with a securities contract." 11 U.S.C. § 546(e). But the liquidators insist that this point is not conclusive. First, the liquidators argue that their statutory claims fall within the carve-

10. Brief of the Securities Industry and Financial Markets Association as Amicus Curiae Supporting Appellees 14.

out from the safe harbor for intentional fraudulent transfer claims. Second, the liquidators argue that because § 546(e) uses the term "avoid"—a term of art referring to the statutory avoidance powers conferred by the Bankruptcy Code—the safe harbor applies only to statutory avoidance claims under the Bankruptcy Code or under foreign law that exist solely in bankruptcy. That would mean the safe harbor does not apply to common-law claims under domestic or foreign law. To the extent that courts have applied the safe harbor to domestic common-law claims, according to the liquidators, those decisions have relied on an implied-preemption theory that does not apply to foreign law. Third, the liquidators argue that their constructive trust claims do not resemble traditional avoidance claims because the constructive trust claims depend on the defendants' knowledge and do not depend on the insolvency of the debtor.

The district court rejected the first argument on the ground that the liquidators' claims under BVI statutory law do not contain a fraud element and therefore do not resemble intentional fraudulent transfer claims under § 548(a)(1)(A). But the district court agreed with the liquidators that the safe harbor did not bar the BVI common-law claims because "[t]here is nothing to suggest that Congress intended the Bankruptcy Code to preempt foreign common law claims." *Fairfield V*, 630 F. Supp. 3d at 494. And the bankruptcy court agreed with the liquidators that the constructive trust claims were not avoidance claims because the constructive trust claims "proceed on different theories and different proof" than the BVI avoidance claims. *Fairfield IV*, 2021 WL 771677, at *3.

[40] We reject all three arguments. First, we agree with the liquidators that a foreign-law claim need not include fraud as an element in order to fall within the carve-out for intentional fraudulent transfer claims; it is sufficient if "the facts alleged in support of those claims include actual intent to hinder, delay, or defraud creditors." Appellants' Br., No. 22-2101, at 78. But we conclude that the liquidators do not allege such an intent here. Second, we conclude that § 546(e) applies to domestic common-law claims irrespective of implied-preemption principles. By virtue of § 561(d), the safe harbor applies in Chapter 15 "to the same extent as in a proceeding under chapter 7 or 11." 11 U.S.C. § 561(d). For that reason, foreign common-law avoidance claims fall within the scope of the safe harbor in cases under Chapter 15. Third, a common-law claim that seeks to avoid a covered transaction does not escape the safe harbor based on its legal theory or required proof. Because the constructive trust claims fall under the safe harbor and do not qualify for the carve-out for intentional fraudulent transfer claims, those claims are barred.

1

[41] The safe harbor of § 546(e) contains a carve-out for avoidance claims brought under § 548(a)(1)(A). *Id.* § 546(e). Section 548(a)(1)(A), in turn, allows the trustee or debtor-in-possession to avoid transfers made and obligations incurred "with actual intent to hinder, delay, or defraud" a creditor. *Id.* § 548(a)(1)(A). The liquidators argue that their claims "allege actual fraud and therefore fall within the exception to the safe harbor." Appellants' Br., No. 22-2101, at 75. According to the liquidators, the statutory claims rely on allegations that Citco acted with the actual intent to hinder, delay, or defraud creditors and that this intent is imputed to the Funds. We disagree.

First, the liquidators have not plausibly alleged that Citco actually intended to

hinder, delay, or defraud creditors. The liquidators allege that—after becoming suspicious of BLMIS's operations and attempting three times to verify the existence of the Funds' assets at BLMIS between May 2000 and December 2002—"Citco never again tried to gain evidence from Madoff that the Funds' assets existed until his fraud was ultimately exposed in December 2008." App'x 4998. Additionally, "Citco failed to verify the pricing information for the Funds' portfolio from independent sources and instead relied on BLMIS statements, even though it knew that such account statements contained incorrect information." *Id.* at 5000. At the same time, "Citco accepted dramatically higher fees—tied directly to the Net Asset Value certified by Citco—in exchange for the risks to Citco of doing business with BLMIS." *Id.*

[42, 43] When credited, the liquidators' allegations might establish that Citco was negligent or reckless with respect to the risk of fraud at BLMIS but do not establish that Citco *intended* to hinder, delay, or defraud creditors. "[M]any courts look to the Restatement (Second) of Torts to refine the concept of intent under section 548." 5 Collier on Bankruptcy ¶ 548.04[a] (16th ed.). According to the Restatement, "[t]he word 'intent' is used . . . to denote that the actor desires to cause consequences of his act, or that he believes that the consequences are *substantially certain* to result from it." Restatement (Second) of Torts § 8A (1965) (emphasis added). The Restatement explains:

> If the actor *knows that the consequences are certain, or substantially certain*, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result. As the probability that the consequences will follow decreases, and becomes less than substantial certainty, the actor's conduct loses the character of intent, and becomes mere recklessness, as defined in § 500. As the probability decreases further, and amounts only to a risk that the result will follow, it becomes ordinary negligence, as defined in § 282.

Id. § 8A cmt. b (emphasis added). It is true, as Judge Hand explained over a hundred years ago, that "in general, civil responsibility is imputed to a man for the usual results of his conduct, regardless of whether in the instance under consideration he actually had those consequences in mind." *In re Condon*, 198 F. 947, 950 (S.D.N.Y. 1912) (L. Hand, J.). But "in specific cases like this," in order to establish an "intent to hinder, delay, or defraud" creditors, "the law requires proof of that added element, his mental apprehension of those consequences, before it attaches to his conduct the result in question." *Id.* at 950-51. The allegations here do not show that Citco was "substantially certain" that BLMIS was a Ponzi scheme and that investors who redeemed shares late would be defrauded. At most, Citco was reckless in continuing to issue the NAV certificates despite its suspicions regarding BLMIS.

We have previously said that a presumption of intent would be appropriate "where a large entity, firm, institution, or corporation is acting in a manner that easily can be foreseen to result in harm." *AUSA Life Ins. Co. v. Ernst & Young*, 206 F.3d 202, 221 (2d Cir. 2000). That case involved a claim of securities fraud against the accounting firm Ernst & Young, which allegedly had falsely certified that the financial statements of one of its auditing clients were prepared in accordance with GAAP and that the client was in compliance with the financial covenants in its debt securities. We concluded that the investor-plaintiffs had established that Ernst & Young acted with the "intent to deceive, manipu-

late, or defraud" required to sustain a claim of securities fraud. *Id.* at 221. Ernst & Young had actual knowledge that the financial statements were inaccurate and that the client had defaulted on its debt securities, but it nonetheless certified to the contrary. *See id.* at 207-210. In this case, by contrast, Citco suspected—but did not know—that BLMIS was engaging in fraud. While that suspicion might establish recklessness or negligence, it does not establish that Citco intended to hinder, delay, or defraud investors. *See* Restatement (Second) of Torts § 8A cmt. b.

[44] The Seventh Circuit has similarly stated that even when a transferor's "primary purpose may not have been to render the funds permanently unavailable to [creditors]," an actual intent for purposes of § 548(a)(1)(A) might still be present if the transferor "certainly should have seen this result as a natural consequence of its actions." *In re Sentinel Mgmt. Grp.*, 728 F.3d 660, 667 (7th Cir. 2013). We agree with those jurists who have explained that "*Sentinel* should not be read as replacing the traditional, more demanding standard for ascribing actual intent with a presumption that a person is aware of the natural consequences of her acts." *In re Lyondell Chem. Co.*, 554 B.R. 635, 651 (S.D.N.Y. 2016). While "proof of the natural consequences of one['s] acts may serve as circumstantial evidence that one appreciated those consequences," the fact-finder is nevertheless "required to find, based on all of the direct and circumstantial evidence, that the debtor did form an actual intent to defraud creditors, as that standard was described by Judge Hand or as intent is described in the Restatement (Second) of Torts." *Id.* at 651 n.17.

[45] To establish an intent to hinder, delay, or defraud creditors, a plaintiff "must show that the debtor had an intent to interfere with creditors' normal collection processes or with other affiliated creditor rights for personal or malign ends." 5 Collier on Bankruptcy ¶ 548.04[a]; *see also In re Lyondell*, 554 B.R. at 650. The liquidators do not allege that Citco interfered with creditors' rights or collection processes. In fact, the liquidators' claims are based on Citco *facilitating* the redemption of the defendants' shares in the Funds. The non-redeeming investors, meanwhile, were not even creditors at the time the defendants redeemed the shares but were shareholders in the Funds. As the bankruptcy court recognized, a shareholder in the Funds became a creditor only after submitting a redemption request. *See Fairfield II*, 596 B.R. at 303 ("[T]he Defendants became creditors when they requested redemptions."). "A contract arose at the time that the [shareholders] served their notices of redemption. At that moment, they were entitled to be paid the NAV per share computed in accordance with Article 11(1) in exchange for their shares." *Id.* at 297. When Citco processed the defendants' redemption requests, the non-redeeming shareholders were not yet creditors of the Funds but shareholders with potential redemption rights.

[46–48] Moreover, "[t]he requisite actual intent" for purposes of § 548(a)(1)(A) "must be something more than just an intent to prefer one creditor over another." 5 Collier on Bankruptcy ¶ 548.04[a]. Thus, "[m]ere intent to prefer one creditor over another, although incidentally hindering or delaying creditors, will not establish a fraudulent transfer under section 548(a)(1)." *In re Rubin Bros. Footwear, Inc.*, 119 B.R. 416, 423 (S.D.N.Y. 1990); *accord Richardson v. Germania Bank*, 263 F. 320, 325 (2d Cir. 1919) ("[A] very plain desire to prefer, and thereby incidentally to hinder creditors, is (1) not as a matter of law an intent obnoxious to [the prohibition on fraudulent transfers]; and (2) is not

persuasive in point of fact that such intent . . . ever existed."). The liquidators' allegations establish at most that Citco preferred investors who redeemed shares early over those who allowed their investments to remain with the Funds. Even if Citco were substantially certain that its conduct would result in a preference for some creditors over others, it still would not have had the requisite intent to establish an intentional fraudulent transfer under § 548(a)(1)(A).[11]

[49] Second, the liquidators have not plausibly alleged that Citco's intent—whatever it was—is attributable to the Funds. Section 548(a)(1)(A) requires that the *debtor* make the transfer with the actual intent to hinder, delay, or defraud creditors. The liquidators claim that "the Citco Administrator's fraudulent intent is attributable to the Funds, which authorized the transfers." Appellants' Br., No. 22-2101, at 75. We disagree.

[50] The liquidators have consistently maintained that the Funds were *victims* of a fraud that Citco perpetrated. The complaint alleges, for example, that "Citco issued the Certificates without good faith. The Funds were the primary victims of Citco's conduct and its lack of good faith in issuing the Certificates." App'x 4643. Under well-established principles, "notice of a fact that an agent knows or has reason to know is not imputed to the principal if the agent acts adversely to the principal in a transaction or matter, intending to act solely for the agent's own purposes or those of another person." Restatement (Third) of Agency § 5.04 (2006); *see Center v. Hampton Affiliates, Inc.*, 66 N.Y.2d 782, 784, 497 N.Y.S.2d 898, 488 N.E.2d 828 (1985) ("[W]hen an agent is engaged in a scheme to defraud his principal, either for his own benefit or that of a third person, the presumption that knowledge held by the agent was disclosed to the principal fails because he cannot be presumed to have disclosed that which would expose and defeat his fraudulent purpose."). If the allegations are correct, Citco's knowledge of the possible fraud at BLMIS would not be imputed to the Funds.

[51] The New York Court of Appeals has emphasized that the adverse interest exception applies only in the "narrow circumstance where the corporation is actually the victim of a scheme undertaken by the agent to benefit himself or a third party personally, which is therefore entirely opposed (*i.e.*, 'adverse') to the corporation's own interests." *Kirschner v. KPMG LLP*, 15 N.Y.3d 446, 467, 912 N.Y.S.2d 508, 938 N.E.2d 941 (2010). It does not apply "[w]here the agent is perpetrating a fraud that will [also] benefit his principal." *Id.* The complaint does not allege that Citco's conduct benefited the Funds as well as Citco but that "[t]he Funds were the primary victims of Citco's conduct." App'x 4643. It is difficult to see how the

11. "Under the so-called Ponzi scheme presumption, the existence of a Ponzi scheme demonstrates actual intent as a matter of law because transfers made in the course of a Ponzi scheme could have been made for no purpose other than to hinder, delay or defraud creditors." *In re BLMIS LLC*, 12 F.4th 171, 181 (2d Cir. 2021) (internal quotation marks and alteration omitted). While "most courts" apply some form of the Ponzi scheme presumption, 5 Collier on Bankruptcy ¶ 548.04[3][b], "[s]ome courts have rejected the Ponzi scheme presumption on the ground that it improperly treats preferences as fraudulent transfers," *In re BLMIS*, 12 F.4th at 201 (Menashi, J., concurring) (citing cases). We have "applied the Ponzi scheme presumption in prior cases when its application was uncontested." *Id.* at 202 n.7. In this case, neither party has argued that the presumption alters the analysis applicable to the transfers here. Accordingly, "[w]e need not and therefore do not address" the effect of the presumption. *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 435 n.53 (2d Cir. 2004).

Funds could have benefited by maintaining investments with BLMIS; the Funds would surely suffer losses when the scheme collapsed, and in the meantime the Funds did not receive the personal benefits from the scheme that Madoff and (allegedly) Citco received.

The Privy Council's explanation of its decision in *Migani* indicates that BVI law would not impute Citco's bad faith to the Funds in this case. *See In re Lyondell*, 554 B.R. at 647 ("State law supplies the governing law principles for assessing the imputation of a corporate officer's intent to a corporation for purposes of § 548.") (citing *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 83, 114 S.Ct. 2048, 129 L.Ed.2d 67 (1994)). The Privy Council stated that even if the issue of Citco's bad faith had been raised in *Migani*, the NAVs nonetheless would have been binding on the Funds because the alleged fraud was "external to the fund," and therefore "the redemption liabilities were determined by the directors in good faith, as the articles required." *Skandinaviska Enskilda Banken AB (Publ) v. Conway (as Joint Official Liquidators of Weavering Macro Fixed Income Fund Ltd.)* (*Weavering II*) [2019] UKPC 36 ¶ 24.[12]

We conclude that the liquidators' claims do not qualify for the carve-out for intentional fraudulent transfer claims under § 546(e). The allegations do not establish either that Citco acted with the actual intent to hinder, delay, or defraud creditors or that Citco's knowledge of the possible fraud at BLMIS is attributable to the Funds. Because the carve-out does not apply, the claims cannot proceed if the main clause of § 546(e) covers such claims.

2

[52] The liquidators allege in the complaint that "[t]he Redemption Payments that were made to Defendants were mistaken payments and constituted or formed part of *avoidable transactions*, and generally represent assets of Sentry's estate that Defendants are not entitled to keep." App'x 4648 (emphasis added). The liquidators nevertheless argue on appeal that the constructive trust claims are not, in fact, "avoidance claims" within the meaning of the Bankruptcy Code.

In support of that conclusion, the liquidators contend that the safe harbor does not prohibit all "avoidance claims" but instead limits the trustee's ability to use the specific avoidance powers conferred by the Bankruptcy Code. Appellees' Br., No. 23-965, at 18. According to the liquidators, "[i]n this context, 'avoiding power' is a term of art that refers to the extraordinary statutory powers conferred on a trustee in domestic bankruptcy proceedings by §§ 544, 545, 547, and 548 of the Bankruptcy Code." *Id.* at 19. As a result, § 546(e) applies only to claims brought pursuant to

12. In *Weavering II*, which also involved a Ponzi scheme, the individual responsible for fraudulently inflating the NAVs, Magnus Peterson, was found to have ''directly, and through his company WCUK, managed and controlled the Company for all purposes relevant to these proceedings.'' [2019] UKPC 36 ¶ 25. For that reason, the Privy Council decided that the fraud ''cannot be considered external to the Company.'' *Id.* ¶ 24. The liquidators in *Weavering II*, who sought to recover redemption payments, argued that ''Peterson's knowledge of the fraud would not be imputed to the company that he was defrauding.'' *Id.* ¶ 26. The Board explained that it was ''not concerned here with attributing knowledge'' but with the fact that Peterson, who had the authority to calculate and to certify the NAVs, did so ''on a fraudulent basis.'' *Id.* The Board explained that while its prior decision in *Migani* did not consider the ''operation of the fraud,'' in that case ''the redemption liabilities were determined by the directors in good faith, as the articles required,'' and ''[t]he fraud which operated on the assessment of the NAV was external to the fund.'' *Id.* ¶ 24.

the trustee's statutory avoidance powers under the Bankruptcy Code and does not apply to common-law claims that a litigant could bring outside of bankruptcy. *See id.* at 18. The liquidators conclude that § 561(d)—which provides that § 546(e) applies in Chapter 15 "to the same extent" as in Chapter 7 or 11—can apply only to claims brought under foreign statutory law that are analogous to a bankruptcy trustee's statutory avoidance powers. *See id.* at 21.

The liquidators acknowledge that courts have held that § 546(e) bars state common-law claims, but in their view these courts have not held that § 546(e) directly covers such claims. Instead, according to the liquidators, these courts have held only that § 546(e) might *impliedly preempt* state common-law claims. *See id.* at 26. Because implied preemption applies only to conflicts between federal law and state law, the same bar would not apply in cases of conflict between federal law and foreign law. The liquidators maintain—and the district court agreed—that the rationale for applying the safe harbor to state common-law claims is inapplicable to foreign common-law claims, so the BVI constructive trust claims may proceed against the defendants alleged to have known that the NAV calculations were inflated.

[53, 54] We are not persuaded. The premise of the liquidators' argument—that the safe harbor applies only to the statutory avoidance powers conferred by the Bankruptcy Code—contradicts the statutory text. Section 546(e) does not say that it bars only avoidance actions that utilize the statutory avoidance powers. Rather, it says that "*[n]otwithstanding* sections 544, 545, 547, 548(a)(1)(B), and 548(b) of this title, the trustee may not avoid" the transfers the safe harbor describes. 11 U.S.C. § 546(e) (emphasis added). According to the liquidators, a statute that says "despite your specific power to avoid transfers, you shall not avoid these transfers" really means "you may avoid these transfers as long as you do not use your specific power to do so." That is not a natural reading of the text. Indeed, the Supreme Court has explained that "[a] 'notwithstanding' clause does not naturally give rise to ... an inference" that one may do what the statute forbids using mechanisms other than those identified in the "notwithstanding" clause. *NLRB v. SW Gen., Inc.*, 580 U.S. 288, 302, 137 S.Ct. 929, 197 L.Ed.2d 263 (2017). Instead, the notwithstanding clause "just shows which of two or more provisions prevails in the event of a conflict." *Id.* Such a clause "simply shows that" the operative provision "overrides" the provisions identified in the notwithstanding clause, "and nothing more." *Id.* at 304, 137 S.Ct. 929. As a result, this sort of clause "confirms rather than constrains breadth." *Id.* at 302, 137 S.Ct. 929.

[55] In this case, the notwithstanding clause of § 546(e) establishes that the safe harbor provision overrides §§ 544, 545, 547, 548(a)(1)(B), and 548(b). It does not imply that the operative language of the safe harbor, which provides that the trustee "may not avoid" a "settlement payment," limits only the use of the enumerated statutory avoidance powers. 11 U.S.C. § 546(e).

[56–58] We also disagree with the liquidators' assertion that "avoiding powers" is a term of art referring only to the statutory avoidance powers under the Bankruptcy Code. We will recognize a term of art when a statute includes a word or phrase with a "specialized common law meaning." *Food Mktg. Inst. v. Argus Leader Media*, 588 U.S. 427, 438, 139 S.Ct. 2356, 204 L.Ed.2d 742 (2019). In this case, however, the liquidators argue that "avoid" has a *narrower* meaning than it would have had under the common law and that

it does *not* encompass common-law claims that seek to avoid transfers. If Congress intended to restrict the ordinary meaning of "avoid" when it enacted the Bankruptcy Code, it would have provided a statutory definition identifying that technical sense. It did not. "Without a statutory definition," we rely on "the phrase's plain meaning at the time of enactment." *Tanzin v. Tanvir*, 592 U.S. 43, 48, 141 S.Ct. 486, 208 L.Ed.2d 295 (2020).

The liquidators recognize that courts have applied the safe harbor to bar state common-law claims in addition to claims that rely on statutory avoidance powers. The liquidators argue, however, that these cases did not hold that the state common-law claims were "avoidance claims" within the meaning of the safe harbor but instead that the safe harbor impliedly preempted the state common-law claims. *Cf. Hillman v. Maretta*, 569 U.S. 483, 490, 133 S.Ct. 1943, 186 L.Ed.2d 43 (2013) ("State law is pre-empted . . . when the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' ") (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581 (1941)). The liquidators conclude that "the implied-preemption doctrine has no application here" because that doctrine reflects "the unique relationship between federal law and state law under the Constitution" and does not apply to claims under foreign law. Appellees' Br., No. 23-965, at 32-33.

We do not agree that the application of § 546(e) to bar the trustee from avoiding covered transfers through state common-law claims depends on implied preemption. Rather, § 546(e) directly provides that the trustee "may not avoid" such transfers. 11 U.S.C. § 546(e). We have relied on implied preemption to answer a different question. Because § 546(e) provides that "the *trustee* may not avoid" those transfers, *id.* (emphasis added), the question of whether someone other than the trustee may avoid such transfers has arisen. In *In re Tribune Co. Fraudulent Conveyance Litig.*, we explained that "[s]ection 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." 946 F.3d 66, 81 (2d Cir. 2019).[13] Our phrasing of the issue assumed that no "plain language argument" was available to suggest that the safe harbor allows *the trustee* to bring state-law avoidance claims. We relied on implied preemption to conclude that—while § 546(e) literally bars only the trustee from avoiding covered transfers—the safe harbor also bars other litigants from avoiding those transfers because of its preemptive effect. *See In re Tribune*, 946 F.3d at 94. That is how the decision has been understood. *See, e.g.*, *In re Nine W. LBO Sec. Litig.*, 482 F. Supp. 3d 187, 203 (S.D.N.Y. 2020) ("In *Tribune* . . . the Second Circuit held that § 546(e) impliedly preempts state law fraudulent conveyance claims by individual creditors that *would be barred by the safe harbor if brought by a bankruptcy trustee*.") (emphasis added).

We have subsequently applied *Tribune* to affirm the decision of a district court that "unjust enrichment claims" were "preempted by § 546(e) because they seek

13. *See also In re Tribune Co. Fraudulent Conveyance Litig.*, 499 B.R. 310, 316 (S.D.N.Y. 2013) ("Section 546(e) addresses its prohibition on avoiding settlement payments only to the bankruptcy trustee . . . . Because Congress has spoken so clearly with respect to the object of the limitation in Section 546(e), the Court discerns no basis in the text for barring [state-law constructive fraudulent conveyance] claims brought by Individual Creditors who have no relation to the bankruptcy trustee.").

the same remedy as the Trustees' fraudulent conveyance claims, which it found were safe harbored under that provision." *In re Nine W. LBO Sec. Litig.*, 87 F.4th 130, 150 (2d Cir. 2023). We explained that this conclusion followed from "§ 546(e)'s plain language and legislative history," but the parties did not litigate whether the text or the congressional policy was dispositive. *Id.* Our precedent does not foreclose the straightforward conclusion that § 546(e) directly bars the trustee from avoiding a covered transfer through either a statutory or a common-law claim.[14]

The liquidators' contention that the safe harbor does not directly apply to common-law claims is wrong even based on their technical reading of the notwithstanding clause. The parties agree that the safe harbor applies to avoidance actions by a bankruptcy trustee pursuant to § 544, § 545, § 547, or § 548 of the Bankruptcy Code. One of these enumerated provisions—§ 544—expressly empowers the trustee to avoid transfers that could be avoided by an unsecured creditor under applicable state law, including state common law. Specifically, § 544(b)(1) provides that "the trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of this title or that is not allowable only under section 502(e) of this title." 11 U.S.C. § 544(b)(1).

[59, 60] In most cases, the trustee relies on § 544(b)(1) to assert claims under state fraudulent conveyance statutes.[15] But § 544(b)(1) "is not limited to the avoidance of fraudulent transfers [under state statutes]. Rather, it gives a trustee statutory standing to avoid transfers on any grounds that could be asserted by . . . an unsecured prepetition creditor." *In re Park South Sec., LLC*, 326 B.R. 505, 514 (Bankr. S.D.N.Y. 2005). Thus, a trustee "could employ" § 544(b)(1) "to bring an unjust enrichment claim under state law." *Id.* To the extent that such a claim sought to avoid a transaction that falls within the scope of the safe harbor, however, it would be expressly barred by § 546(e) even under the liquidators' technical reading of that provision.

[61–63] In fact, an avoidance claim on behalf of creditors based on a common-law theory such as unjust enrichment or constructive trust could be brought by the trustee *only* pursuant to § 544(b). "It is well settled that a bankruptcy trustee has

14. We are also not persuaded that whether § 546(e) bars state-law avoidance claims due to text or preemption is dispositive. Section 561(d) provides that "shall apply in a case under chapter 15 . . . to limit avoidance powers to the same extent as in a proceeding under chapter 7 or 11 of this title." 11 U.S.C. § 561(d). If § 546(e) limits avoidance powers in domestic proceedings through text as well as implication, those limitations apply in a case under chapter 15 to the same extent. The statutory directive to apply the same limitations to foreign as to domestic proceedings precludes the argument that the reasoning by which § 546(e) limits certain avoidance powers applies only to the domestic context. Moreover, Congress has provided that "[n]othing in [Chapter 15] 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." *Id.* § 1506. To the extent that § 546(e) preempts state-law avoidance claims, it does so because extending the safe harbor in that way is necessary to "the accomplishment and execution of the full purposes and objectives of Congress." *Hillman*, 569 U.S. at 490, 133 S.Ct. 1943 (quoting *Hines*, 312 U.S. at 67, 61 S.Ct. 399).

15. *See* 5 Collier on Bankruptcy ¶ 544.06 ("The state laws most frequently used by trustees under section 544(b)(1) are the Uniform Fraudulent Transfer Act ('UFTA') and its successor, the 2014 Uniform Voidable Transactions Act ('UVTA').").

no standing generally to sue third parties on behalf of the estate's creditors, but may only assert claims held by the bankrupt corporation itself." *Shearson Lehman Hutton, Inc. v. Wagoner*, 944 F.2d 114, 118 (2d Cir. 1991); *see also Caplin v. Marine Midland Grace Tr. Co. of N.Y.*, 406 U.S. 416, 428, 92 S.Ct. 1678, 32 L.Ed.2d 195 (1972).[16] Section 544(b) creates an exception to the general rule in *Wagoner*. "[W]hen acting under section 544(b), a trustee is vested with the rights of actual creditors to avoid certain transfers. So even if the trustee itself is otherwise barred from asserting the claim because of *Wagoner*, the trustee, standing in the shoes of the creditors, is not barred from asserting the claim." *In re Stanwich Fin. Servs. Corp.*, 488 B.R. 829, 834 (D. Conn. 2013). Unless he is proceeding under § 544(b), the bankruptcy trustee has no power to assert claims under state law on behalf of creditors. A constructive trust claim under state common law *must* be brought under § 544(b), but even the narrow reading of the safe harbor of § 546(e) would apply to such a claim.

[64] The liquidators claim that "even assuming that the Safe Harbor applies extraterritorially through 11 U.S.C. § 561(d), the furthest the statutory limitation on statutory 'avoidance powers' could reach is foreign *statutory* avoidance powers that exist only in bankruptcy." Appellees' Br., No. 23-965, at 13 (citation omitted). But the focus of § 546(e) is the transaction, not the specific legal authority that a domestic trustee would use to avoid that transaction. *Cf. Merit Mgmt. Grp. LP v. FTI Consulting Inc.*, 583 U.S. 366, 379, 138 S.Ct. 883, 200 L.Ed.2d 183 (2018) ("[T]he focus of the inquiry is the transfer that the trustee seeks to avoid."). It prohibits state statutory as well as common-law claims that seek to avoid covered transactions. We conclude that, through § 561(d), the safe harbor operates in Chapter 15 to prohibit claims under foreign statutory or common law that seek to avoid the same category of covered transactions. That includes the constructive trust claims in this case.

3

The liquidators attempt to rescue the constructive trust claims by arguing that the claims " 'proceed on different theories and different proof' than avoidance claims under the Bankruptcy Code." Appellees' Br., No. 23-965, at 25 (quoting *Fairfield IV*, 2021 WL 771677, at *3). The liquidators explain that "insolvency is not an element of the Constructive Trust Claims, but obviously is an element of an avoidance action under Chapter 5 of the Code (and a claim under the BVI Insolvency Act)." *Id.* at 24 (internal quotation marks and citation omitted). In addition, "whereas the Constructive Trust Claims require a showing of knowledge on the part of Defendants that the value of the assets they received was inflated, . . . knowledge is not an element of any of the avoidance actions created by Chapter 5." *Id.* at 24-25.

[65–67] In general, a constructive trust claim does not require a showing of insolvency and does require bad faith on the part of the recipient of the property. *See,*

16. We expressed uncertainty in *Tribune* as to whether state-law fraudulent conveyance claims become the property of the debtor's estate when a bankruptcy proceeding commences. *See* 946 F.3d at 88. But we did not doubt that the trustee acquires the power to assert such a claim through § 544(b)(1), regardless of whether it is technically part of the debtor's estate. *See id.* (noting the "ambiguities as to exactly what is transferred to trustees *et al.* by Section 544(b)(1)"); *id.* at 89 (observing that "Section 544(b)(1) does not expressly state whether the bundle of rights transferred can revert" to creditors after a bankruptcy proceeding).

e.g., *El Ajou v. Dollar Land Holdings plc* [1994] 2 All ER 685, 700 (identifying the elements of a constructive trust claim under BVI law). But it does not follow from these distinctions that the constructive trust claims are not avoidance claims. Whether a claim is an avoidance claim for purposes of the safe harbor depends on the remedy sought—that is, whether it would avoid a covered transaction—rather than the legal elements of the claim. "[I]t is the remedy sought, rather than the allegations pled, that determines whether § 546(e) preempts a state law claim," *In re Nine W.*, 482 F. Supp. 3d at 207, because "§ 546(e) 'was intended to protect from avoidance proceedings payments by and to commodities and securities firms in the settlement of securities transactions or the execution of securities contracts,'" *In re Nine W.*, 87 F.4th at 150 (quoting *In re Tribune*, 946 F.3d at 90). The liquidators concede that the constructive trust claims seek a "similar remedy" as an avoidance action using the Bankruptcy Code's avoidance powers. Appellees' Br., No. 23-965, at 25. That is dispositive.

In any event, we do not agree that the constructive trust claims proceed on a different theory than a traditional avoidance claim. Taking the liquidators' allegations as true, the defendants did not do anything that would have been wrongful if the Funds had not been insolvent. To the contrary, the defendants were contractually entitled to redeem their shares at a price based on the NAV that Citco calculated. The liquidators recognize that "[t]he Articles provide shareholders with a contractual right to redeem their shares in exchange for their Redemption Payments at the NAVs determined by the Funds" and that "[t]he Liquidators' claim that Defendants are inequitably retaining funds in excess of the pro rata share purportedly owed to all shareholders ... therefore relies on the Funds entering liquidation." *Id.* at 26. It misses the point to insist that constructive trust claims, unlike avoidance claims, require bad faith on the part of the transferee and do not require insolvency. While that may be true of constructive trust claims in general, it is not true of these constructive trust claims. The district court erred in allowing the claims to proceed.

CONCLUSION

[68] By adopting the "broad language" of the safe harbor provision, Congress sought to prevent "settled securities transactions" from being unwound in a way that "would seriously undermine ... markets in which certainty, speed, finality, and stability are necessary to attract capital." *In re Tribune*, 946 F.3d at 90-92. "A lack of protection against the unwinding of securities transactions ... 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." *Id.* at 93. Contrary to arguments advanced on appeal, there is "no conflict between Section 546(e)'s language and its purpose." *Id.* at 92. That language operates here to bar claims seeking to avoid covered transactions. We reverse the judgment of the district court insofar as it allowed the constructive trust claims to proceed and otherwise affirm.

2025 WL 2484883
Only the Westlaw citation is currently available.
United States Bankruptcy Court, S.D. Texas, Houston Division.

IN RE: GEDEN HOLDINGS, LTD., Debtor.

Case No: 25-90138
|
SIGNED August 28, 2025

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MEMORANDUM OPINION DENYING PETITION FOR RECOGNITION (ECF NO. 1) AND DISMISSING MOTION TO STRIKE AS MOOT (ECF NO. 32)

Alfredo R Pérez, United States Bankruptcy Judge

BACKGROUND

***1** Geden Holdings, Ltd. ("Geden") was registered in Malta on October 14, 2002 (ECF No. 26-1 at 2). Geden owned many subsidiary companies which operated ships in the international shipping market (ECF No. 26-1 at 2). On June 15, 2017, the First Hall of the Civil Court (the "Maltese Court") found Geden unable to pay its debts and ordered the dissolution and winding up of Geden (the "Maltese Proceeding") (ECF No. 26-1). Under Maltese law, after the windup order was entered, Geden was deemed insolvent as of September 16, 2016, the date the windup application was filed (ECF No. 26-8 at 5). On June 15, 2017, Mr. Paul Darmanin (the "First Liquidator") was appointed as liquidator (ECF No. 26-8 at 6). On September 12, 2018, the First Liquidator filed an application requesting the Maltese Court to revoke his assignment as liquidator (the "Application to Resign") and on September 19, 2018, the Maltese Court granted the Application to Resign (ECF No. 26-3).

On December 4, 2023, Dr. Reuben Balzan ("Dr. Balzan") was appointed by the Maltese Court as liquidator ("Liquidator") and foreign representative ("Foreign Representative") of Geden (ECF No. 26-2) and authorized by the Maltese Court to file for Chapter 15 relief [hereinafter, the "Chapter 15 Case"] (ECF No. 26-8 at 2). The actions that occurred between the granting of the Application to Resign and Dr. Balzan's appointment are the basis for the Chapter 15 Case and the related objection.

On April 28, 2025, Geden filed the Chapter 15 Petition for Recognition of Foreign Proceeding (the "Petition" or "Petition for Recognition") (ECF No. 1), requesting the Court recognize the Maltese Proceeding pursuant to Section 1517 of the United States Bankruptcy Code (the "Bankruptcy Code"). Advantage Award Shipping, LLC ("Advantage Award") filed an objection in response to the Petition (the "Objection") (ECF No. 23). Geden filed a Reply to Advantage Award's Objection (ECF No. 33) and an Emergency Motion to Strike Advantage Award's Objection (the "Motion to Strike") (ECF No. 32). On June 3, 2025, Eclipse Liquidity, Inc. ("Eclipse") filed a Memorandum in Support of the Petition (the "Eclipse Memo in Support of Petition") (ECF No. 36). Before the Court is a contested Petition for Recognition of the Maltese Proceeding and the related Motion to Strike.

On June 4, 2025, the Court heard argument on the issue of recognition of the Maltese Proceeding (ECF No. 40). The Court took extensive testimony from Dr. Balzan (ECF No. 40). The Court admitted exhibits at ECF Nos. 26-1 through 26-8, 25-26,

25-28, 25-29, 25-31, 25-33, and 25-35 (ECF No. 40). The Court took judicial notice of ECF Nos. 25-1 through 25-25, 25-27, 25-30, 25-32, and 25-34. The Motion to Strike was continued to June 25, 2025 (ECF No. 40). Advantage Award's response deadline to the Motion to Strike was set for June 13, 2025, and Geden was given until June 20, 2025, to file a reply. The Court requested Geden provide a declaration with all the facts regarding property loaned to the estate as stated on the record. On June 13, 2025, Advantage Award filed an Objection to the Motion to Strike (ECF No. 45). On June 20, 2025, Geden filed a Reply to the Advantage Award Objection to the Motion to Strike (ECF No. 48) and a Brief on the property loaned to the estate (ECF No. 47), as requested by the Court at the June 4, 2025, hearing.

***2** On June 25, 2025, the Court heard argument from both parties. The Court took the Motion to Strike and the Petition for Recognition under advisement (ECF No. 51).

JURISDICTION

28 U.S.C. § 1334 provides the District Courts with jurisdiction over this proceeding. 28 U.S.C. § 157(b)(1) states "Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title." This Court has jurisdiction over this proceeding as it is a core proceeding the Court can consider under 28 U.S.C. § 157(b)(2)(P). This proceeding has been referred to the Bankruptcy Court under General Order 2012-6. The Court has constitutional authority to enter final orders and judgments. *Stern v. Marshall*, 564 U.S. 462, 486–87, 131 S.Ct. 2594, 180 L.Ed.2d 475 (2011). Venue is proper in this District pursuant to 28 U.S.C. § 1408.

LEGAL STANDARD

Pursuant to § 1509(a) of the Bankruptcy Code, "[a] foreign representative may commence a case under section 1504 by filing directly with the court a petition for recognition of a foreign proceeding under section 1515." A petition for recognition that is properly filed by a foreign representative and meets the requirements of § 1515 is evaluated for recognition under § 1517. Section 1517 of the Bankruptcy Code provides, in relevant part:

> (a) Subject to section 1506, after notice and a hearing, an order recognizing a foreign proceeding shall be entered if—
>
> (1) such foreign proceeding for which recognition is sought is a foreign main proceeding or foreign nonmain proceeding within the meaning of section 1502;
>
> (2) the foreign representative applying for recognition is a person or body; and
>
> (3) the petition meets the requirements of section 1515.
>
> (b) Such foreign proceeding shall be recognized—
>
> (1) as a foreign main proceeding if it is pending in the country where the debtor has the center of its main interests ["COMI"]; or
>
> (2) as a foreign nonmain proceeding if the debtor has an establishment within the meaning of section 1502 in the foreign country where the proceeding is pending.

11 U.S.C. § 1517(a)–(b). Section 1517 is subject to the public policy exception of § 1506, which states, "[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. Section 1506 is a narrow exception intended to be invoked only under

"exceptional circumstances concerning matters of fundamental importance for the United States." *Lavie v. Ran (In re Ran)*, 607 F.3d 1017, 1021 (5th Cir. 2010) [hereinafter "*Ran-Circuit*"].

Subject to any constraints § 1506 might impose, use of the word "shall" in § 1517(a) makes recognition mandatory in instances where the requirements of § 1517 have been satisfied. *In re Creative Fin. Ltd.*, 543 B.R. 498, 514 (Bankr. S.D.N.Y. 2016) [hereinafter "*Creative Finance*"]; *see In re Millard,* 501 B.R. 644, 653 (Bankr. S.D.N.Y. 2013) ("[b]ecause section 1517(a) is preceded by the word *shall,* it takes away judicial discretion from me in the first instance."). The burden of proof on the requirements of recognition under § 1517 is on the foreign representative. *Ran-Circuit*, 607 F.3d at 1021.

I. FOREIGN MAIN PROCEEDING.

***3** A "foreign main proceeding" means a foreign proceeding pending in the country where the debtor has the center of its main interests, otherwise referred to as COMI. 11 U.S.C. §§ 1517(b)(1), 1502(4). Chapter 15 does not define COMI. However, a debtor's COMI "lies where the debtor conducts its regular business, so that the place is ascertainable by third parties." *In re Fairfield Sentry Ltd.*, 714 F.3d 127, 130 (2d Cir. 2013) [hereinafter "*Fairfield Sentry*"].

Because § 1517 is written in the present tense,[1] COMI is determined at the time the Chapter 15 petition is filed. *Fairfield Sentry*, 714 F.3d at 130; *See United States v. Wilson*, 503 U.S. 329, 333, 112 S.Ct. 1351, 117 L.Ed.2d 593 (1992) ("Congress' use of a verb tense is significant in construing statutes"). According to the Fifth Circuit Court of Appeals,

> Congress's choice to use the present tense requires courts to view the COMI determination in the present, i.e. at the time the petition for recognition was filed. If Congress had, in fact, intended bankruptcy courts to view the COMI determination through a lookback period or on a specific past date, it could have easily said so. This is particularly significant because Congress is clearly capable of creating lookback periods in the Bankruptcy Code.

Ran-Circuit, 607 F.3d at 1025. Therefore, consideration of a debtor's entire operational history and/or COMI determination based on the date of the initiation of the foreign proceeding is not the proper inquiry for the Court. *Fairfield Sentry*, 714 F.3d at 134. However, "to offset a debtor's ability to manipulate its COMI, a court may also look at the time period between the initiation of the foreign liquidation proceeding and the filing of the Chapter 15 petition." *Id.* at 133.

1 11 U.S.C. § 1517(b)(1) (Such foreign proceeding shall be recognized ... as a foreign main proceeding if it is pending in the country where the debtor has the center of its main interests ....).

For speed and convenience reasons in situations where COMI is obvious and undisputed, § 1516(c) presumes COMI is the place of the debtor's registered office.[2] However, this presumption is rebuttable. *Fairfield Sentry*, 714 F.3d at 137. According to the UNCITRAL Guide to Enactment of the Model Law on Cross–Border Insolvency:

> Article 16 establishes presumptions that allow the court to expedite the evidentiary process; at the same time they do not prevent, in accordance with the 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.[3]

The court always has the power to make its own determination on recognition under § 1517, notwithstanding § 1516. *In re Basis Yield Alpha Fund (Master)*, 381 B.R. 37, 52 (Bankr. S.D.N.Y. 2008). The legislative history of § 1516 indicates the statutory presumption of § 1516(c) may be of less weight in the event of a serious dispute. *Id.* at 53; *see In re SPhinX, Ltd.*, 351 B.R. 103, 112 (Bankr. S.D.N.Y. 2006) [hereinafter "*SPhinX–Bankruptcy*"], *aff'd* 371 B.R. 10 (S.D.N.Y. 2007). As a result, § 1516 "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 Basis Yield Alpha Fund (Master)*, 381 B.R. at 52. "Even in the absence of an objection, courts must undertake their own jurisdictional analysis and grant or deny recognition under Chapter 15 as the facts of each case warrant." *Ran-Circuit*, 607 F.3d at 1021; *see In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 389 B.R. 325, 335 (S.D.N.Y. 2008) [hereinafter "*Bear Stearns-District*"]. Furthermore, at no time does the rebuttable presumption relieve the petitioner (here, Geden) of its burden of proof/risk of non-persuasion. *Bear Stearns-District*, 389 B.R. at 334.

2 11 U.S.C. § 1516(c) (In the absence of evidence to the contrary, the debtor's registered office ... is presumed to be the center of the debtor's main interests.).

3 U.N. Comm'n on Int'l Trade Law, *Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency*, U.N. Doc. A/CN.9/Guide/2013, at 122 (2013).

***4** Factors for the Court to examine when determining whether to rebut the presumption that COMI is debtor's place of registration or incorporation include:

> 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.

SPhinX–Bankruptcy, 351 B.R. at 117. The flexibility inherent in Chapter 15 strongly suggests courts should not apply these factors mechanically and instead view the facts of the case in accordance with Chapter 15's emphasis on protecting the reasonable interests of parties in interest pursuant to fair procedures and the maximization of the debtor's value. *Id.* Additionally, the Second Circuit Court of Appeals has held any relevant activities, including liquidation activities and administrative functions, may be considered in the court's COMI analysis. *Fairfield Sentry*, 714 F.3d at 133–34.

II. FOREIGN NONMAIN PROCEEDING.

A foreign proceeding should be recognized as a "foreign nonmain proceeding if the debtor has an establishment within the meaning of section 1502 in the foreign country where the proceeding is pending." 11 U.S.C. §§ 1517(b)(2), 1502(5). Establishment is defined as "any place of operations where the debtor carries out a nontransitory economic activity." 11 U.S.C. § 1502(2). Compared to the determination of COMI, Chapter 15 provides no evidentiary presumption in the determination of whether a debtor has an establishment in a particular jurisdiction for finding a foreign nonmain proceeding.

A "place of operations" is "a place from which economic activities are exercised on the market (i.e. externally) ...." *Lavie v. Ran*, 406 B.R. 277, 284 (S.D. Tex. 2009) [hereinafter "*Ran–District*"] (internal quotations marks omitted). Establishment has been described as a "local place of business," and to have an establishment in a country, the debtor must conduct business in that country. *In re Brit. Am. Ins. Co. Ltd.*, 425 B.R. 884, 914–15 (Bankr. S.D. Fla. 2010) (quoting *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 374 B.R. 122, 131 (Bankr. S.D.N.Y. 2007) [hereinafter "*Bear Stearns-Bankruptcy*"], *aff'd*, 389 B.R. 325 (S.D.N.Y. 2008)). "Therefore, the terms 'operations' and 'economic activity' require showing of a local effect on the marketplace, more than mere incorporation and record-keeping and more than just the maintenance of property." *Brit. Am. Ins. Co.*, 425 B.R. at 915. The court's establishment analysis should focus on whether the debtor has an

establishment in the foreign country when the foreign representative files for recognition under Chapter 15. *Ran–District*, 406 B.R. 277 at 285 ("Because courts undertake the establishment analysis when the foreign representative files for recognition, it follows that the court should weigh only the evidence as it exists at the time of filing in the U.S. court.").

DISCUSSION

At issue is whether the Maltese Proceeding is subject to recognition under § 1517 of the Bankruptcy Code. The Petition for Recognition is contested by the Advantage Award Objection (ECF No. 23). In response to the Objection, Geden filed the Motion to Strike (ECF No. 32). The Motion to Strike raises the issue of whether Advantage Award has standing (as a party in interest or creditor) to object to the Petition for Recognition. Furthermore, Geden alleges the Objection impermissibly attempts to preserve Advantage Award's right to personal jurisdiction while objecting to the substantive relief of the Petition.

***5** The Court first addresses the Petition for Recognition. With respect to the arguments raised in the Motion to Strike, the Court notes recognition under § 1517 is not a "rubber stamp exercise," and the Court must make an independent determination as to whether the Maltese Proceeding meets the definitional requirements of the Bankruptcy Code. *Basis Yield Alpha Fund (Master)*, 381 B.R. at 40; *see Bear Stearns-Bankruptcy*, 374 B.R. at 126. "Even in the absence of an objection, courts must undertake their own jurisdictional analysis and grant or deny recognition under Chapter 15 as the facts of each case warrant." *Ran-Circuit*, 607 F.3d at 1021. In doing so, the Court may "consider any and all relevant facts (including facts not yet presented) ...." *Basis Yield Alpha Fund (Master)*, 381 B.R. at 40. Therefore, regardless of the Motion to Strike, the Court must determine whether the Maltese Proceeding meets the requirements of § 1517 of the Bankruptcy Code.

It is undisputed the Maltese Proceeding is a foreign proceeding under § 101(23).[4] Dr. Balzan as the foreign representative applying for recognition is a person or body under § 1517(a)(2), and the petition meets the requirements of § 1515, as required by § 1517(a)(3). The relevant inquiry for the Court is whether the Maltese Proceeding is a foreign main or foreign nonmain proceeding.

[4] Hr'g Tr., 11:16-17 (June 25, 2025) – Advantage Award argument (Certainly, we don't oppose that the Malta proceeding is a real proceeding.).

I. FOREIGN MAIN PROCEEDING.

A. Application of the § 1516(c) Presumption.

Geden argues the presumption established under § 1516(c)[5] applies to the Petition for Recognition, as Advantage Award has provided no affirmative evidence to rebut the presumption and prove Geden's COMI is anywhere but Malta (Hr'g Tr., 8:3-4 (June 25, 2025)). It is undisputed Geden was registered in Malta in 2002 (ECF No. 26-1 at 2). According to the testimony of Dr. Balzan, when asked on cross examination if Geden was operated out of Turkey, Dr. Balzan replied "I couldn't answer that. I – I have no knowledge of that" (Hr'g Tr., 35:6-7 (June 4, 2025)). Geden argues this is the only testimony addressing Turkey, and it does not rebut the § 1516(c) presumption.

[5] 11 U.S.C. § 1516(c) (In the absence of evidence to the contrary, the debtor's registered office ... is presumed to be the center of the debtor's main interests.).

As stated in the Legal Standard, the § 1516(c) presumption is rebuttable, and while it can be used in "easy cases," reliance on the presumption is inappropriate in cases where there is a substantial dispute. *Creative Finance*, 543 B.R. at 517; *see also SPhinX–Bankruptcy*, 351 B.R. at 112 (The legislative history of § 1516 indicates the statutory presumption of § 1516(c) may be of less weight in the event of a serious dispute.). Advantage Award argues because the Chapter 15 Case is not an "easy case,"[6] and a substantial dispute exists regarding Geden's COMI,[7] the § 1516(c) presumption does not apply. Additionally,

Advantage Award argues the Court must follow *Ran-Circuit* and undertake its own jurisdictional analysis, granting or denying recognition as the facts of the Chapter 15 Case warrant. *See* *Ran-Circuit*, 607 F.3d at 1021. In determining whether the § 1516(c) presumption applies, the Court reviews the evidence submitted by both parties. [8]

[6] Hr'g Tr., 13:15-20 (June 25, 2025) – Advantage Award argument (I think by the fact that this is now our second hearing and there has already been a small mountain of papers filed in this case. I don't think anybody here would characterize this exactly -- I don't think anybody would characterize this as the easy case that the Court in *Creative Finance* was referring to.).

[7] Hr'g Tr., 13:24-14:5 (June 25, 2025) – Advantage Award argument (Again, I don't think that anybody could really characterize our disputing about COMI and the fact that I'm going to spend a decent chunk of time this afternoon talking about it is anything other than raising a substantial dispute. And the Court certainly can wrestle with the issue of whether or not there is sufficient evidence to have rebutted that presumption.).

[8] For example, see evidence of a dispute at ECF No. 26-5 at 31-33 (The Irrevocable Performance Guarantee, entered between Geden and Eclipse is on Geden letterhead that includes an address in Malta, but Geden mailing address listed in the document is in Istanbul, Turkey.).

***6** Comparison of this Chapter 15 Case with another Chapter 15 petition for recognition of foreign proceeding in the Southern District of Texas helps the Court understand whether this Chapter 15 Case is an "easy case." *See In re Telefónica del Perú S.A.A.*, No. 25-90022 (ARP) (Bankr. S.D. Tex. February 25, 2025) [hereinafter "*Telefónica del Perú*"]. For example, where debtor's registered offices are in Lima, Peru, and debtor has extensive connections with Peru, [9] debtor argued the § 1516(c) presumption should apply. *Petitioner's Declaration and Verified Petition for Recognition*, ECF No. 2-1 at 26-28 (Bankr. S.D. Tex., February 25, 2025) (filed in *Telefónica del Perú*, No. 25-90022). Based on the facts of *Telefónica del Perú*, the Court found debtor's COMI in Peru and the Peruvian proceeding to be a "foreign main proceeding" subject to recognition under §§ 1502(4) and 1517(b)(1). *Telefónica del Perú,* No. 25-90022, ECF No. 87 at 4 (Bankr. S.D. Tex., June 25, 2025) (order available on CM/ECF).

[9] Chapter 15 debtor is incorporated in Peru and, at all times since its incorporation, has maintained its registered offices and employees in Peru; chapter 15 debtor is operationally and functionally centered in Lima, Peru, organized under a centralized and interconnected senior management and, is subject to combined cash management and accounting functions in Peru; chapter 15 debtor's statutory books, records, and corporate documents are kept in Peru, have been public, and are therefore ascertainable by creditors and third parties; strategic and key operating decisions and key policy decisions for the Chapter 15 debtor are made by management located in Lima, Peru; the Chapter 15 debtor's corporate accounting, accounts payable, insurance procurement, accounts receivable, financial planning, internal auditing, marketing, treasury, real estate, research and development, and tax services are provided in Lima, Peru; the Chapter 15 debtor's finance, legal, human resources, payroll, billing, freight management, procurement and engineering services are carried out in Lima, Peru; key information technology and systems used by the Chapter 15 debtor are provided from Lima, Peru; the Chapter 15 debtor's cash management functions are maintained and directed from Lima, Peru; management and senior staff of the Chapter 15 debtor regularly attend meetings in Lima, Peru; the Chapter 15 debtor's assets are located in Peru; and capital expenditure decisions affecting the Chapter 15 debtor are managed in Lima, Peru (Case No. 25-90022, ECF No. 2-1 at 26-28).

Here, Geden's complicated operational history, as discussed in more detail below, strengthens the need for the Court to make its determination based on specific facts. The Court cannot rely on the § 1516(c) presumption and must examine the facts of the Chapter 15 Case to determine whether to grant or deny the Petition for Recognition.

B. Factual Analysis of the Chapter 15 Case.

The Court analyzes the facts of the Chapter 15 Case to determine Geden's COMI as of April 28, 2025 (the "Petition Date") (ECF No. 1). *See* *Fairfield Sentry*, 714 F.3d at 130.

Geden argues Geden was registered as a corporation under Maltese law, the Maltese Court has been administering the Maltese Proceeding since 2017, and Dr. Balzan, the Foreign Representative, Liquidator, and sole person in control of Geden resides and works in Malta (ECF No. 33 at 6; Hr'g Tr., 9:4-17 (June 25, 2025)). Geden argues over the last nine years, Geden has had no other operations in any other jurisdiction and even before Dr. Balzan arranged funding and sought authority from the Maltese Court to bring the Chapter 15 Case, Malta was already Geden's only remaining locus of business activity (ECF No. 33 at 6-7). Additionally, Geden argues because the Maltese Proceeding was commenced in Malta, and it is possible Maltese law will apply to many of the actions Dr. Balzan will take, the law of Malta will apply to most disputes (Hr'g Tr., 9:21-24 (June 25, 2025)).

***7** The Court must also address the Eclipse Memo in Support of Petition. As stated in *SPhinX–Bankruptcy*,

> Because their money is ultimately at stake, one generally should defer, therefore, to the creditors' acquiescence in or support of a proposed COMI. It is reasonable to assume that the debtor and its creditors (and shareholders, if they have an economic stake in the proceeding) can, absent an improper purpose, best determine how to maximize the efficiency of a liquidation or reorganization and, ultimately, the value of the debtor[.]

SPhinX–Bankruptcy, 351 B.R. at 117. Here, however, Eclipse (a creditor) is funding the fees of Dr. Balzan's counsel, [10] and as discussed in more detail below, Eclipse is also a participant in litigation involving Geden in Pennsylvania state court. Therefore, the Court declines to defer to Eclipse's support of COMI in Malta. Instead, the Court independently examines the facts provided by Eclipse to determine whether to grant or deny the Petition for Recognition.

10 Hr'g Tr., 43:2-4 (June 4, 2025) – Advantage Award cross examination of Dr. Balzan (Q. just to be clear, Eclipse is funding the fees of your counsel as of today, correct? A. Yes.).

According to the Eclipse Memo in Support of Petition, Geden owned fifty subsidiaries that owned vessels, and each subsidiary was a Maltese company that filed annual consolidated financial statements in Malta (ECF No. 36 at 2). The vessels were financed by various banks, secured by Maltese ship mortgages, registered in Malta, and flew the Maltese flag (ECF No. 36 at 2). Geden paid tonnage taxes in Malta on Maltese-registered vessels, but Geden did not pay any taxes in Turkey on the income earned by the vessels it owned (ECF No. 36 at 2). Furthermore, while Geden Line, located in Turkey, served as a manager for Geden vessels, all transactions designated Geden Line as agents only (ECF No. 36 at 2). Geden Line represents it acts as a manager for several vessel owners in several countries (ECF No. 36 at 2). Additionally, Eclipse states Geden's Malta address was 85 St. John's Street, Valletta, Malta, and Geden bank statements from Citibank N.A. London were transmitted to that same address (ECF No. 36 at 3). According to Eclipse, "correspondence dated September 5, 2022 and December 7, 2023 purportedly sent by Geden on its letterhead to its bankers in London and in Turkey, listed its address as Geden Holdings, Ltd., 85 St. John's Street, Valletta, Malta" (ECF No. 36 at 3). Eclipse provides no evidence of this correspondence. Lastly, Eclipse states Geden filed its audited annual financial reports with the Maltese corporate authorities. However, the only audited annual financial report provided by Eclipse is from 2014 (ECF No. 36-2).

As discussed, the Court must determine COMI as of the Petition Date. *Ran-Circuit*, 607 F.3d at 1025. Consideration of Geden's entire operational history and/or COMI determination based on the date of the initiation of the Maltese Proceeding is not the proper inquiry for the Court. *Fairfield Sentry*, 714 F.3d at 134. Therefore, the only evidence presented by Geden or Eclipse with respect to the relevant time period is Dr. Balzan's presence in Malta and work as Foreign Representative and Liquidator in Malta.

***8** According to the Declaration of Dr. Balzan, based on his knowledge, the First Liquidator did not receive any documents or other information from Geden (ECF No. 26-8 at 6). In the Application to Resign, the First Liquidator stated he contacted ex-representatives of Geden and held a meeting with them and their foreign lawyers in Malta (ECF No. 26-3). The ex-

representatives and shareholders of Geden were unwilling to participate in the process or cover the expenses, making it impossible for the First Liquidator to determine if there were any conflicts or accept the appointment (ECF No. 26-3). As a result, the Maltese Court granted the Application to Resign. The First Liquidator's appointment lasted from June 15, 2017, to September 19, 2018 (ECF No. 26-3; ECF No. 26-8 at 6). Dr. Balzan testified he assumes no liquidation activities took place between the time the Maltese Court granted the Application to Resign, and December 2023, when Dr. Balzan was appointed Foreign Representative and Liquidator. [11]

11 Hr'g Tr., 41:16-22 (June 4, 2025) – Advantage Award cross examination of Dr. Balzan (Q. And it's also fair to say that to your knowledge, between September 19th, 2018 and when you were appointed as liquidator in December 2023, there were no liquidation activities occurring in Malta either, correct? A. Correct. I know that there was no liquidator appointed, so presumably I have to make -- I have to assume that no liquidation activities were taking place.).

Advantage Award argues because there is no dispute Geden was not operational for many years prior to the Petition Date, the only material activities that could create COMI in Malta are the actions of Dr. Balzan (Hr'g Tr., 18:5-19 (June 25, 2025)). Advantage Award relies on the interpretation of *Fairfield Sentry* as set out in *Creative Finance*:

> The effect of [the *Fairfield Sentry*] holding is that in instances in which a foreign representative has engaged in significant preU.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... *Fairfield Sentry* now provides a means for U.S. recognition of letterbox jurisdiction insolvency proceedings—so long as the estate fiduciaries in those jurisdictions do enough work.

Creative Finance, 543 B.R. at 518. Advantage Award argues that before liquidation, Geden's business activities were based out of Turkey and Malta was a letterbox jurisdiction, so the Court must determine whether Dr. Balzan did enough work to shift Geden's principal place of business to Malta (ECF No. 23 at 13). At the June 4, 2025, hearing, Advantage Award stated, "I don't think you're going to hear the parties dispute the fact that at one point the COMI would have -- for Geden would have been in Turkey" (Hr'g Tr., 20:18-21 (June 4, 2025)). Counsel for Geden responded they have "not conceded the COMI would have been in Turkey or Istanbul specifically prior to the liquidation being filed" (Hr'g Tr., 22:23-25 (June 4, 2025)), and the complaint attached to the Declaration of Dr. Balzan was only offered to show Dr. Balzan looked at the document, not for the truth of the matter (Hr'g Tr., 37:13-19 (June 25, 2025)). Because the Court determines COMI as of the Petition Date, whether Geden's COMI was previously in Turkey is irrelevant. *See Ran-Circuit*, 607 F.3d at 1025 ("If Congress had, in fact, intended bankruptcy courts to view the COMI determination through a lookback period or on a specific past date, it could have easily said so."). For the Chapter 15 Case to qualify as a foreign main proceeding, the relevant inquiry is whether Dr. Balzan engaged in significant pre-Petition work to operate or liquidate Geden in Malta. *See Creative Finance*, 543 B.R. at 518; *Fairfield Sentry*, 714 F.3d at 133–34 (The Second Circuit Court of Appeals has held "any relevant activities, including liquidation activities and administrative functions, may be considered in the court's COMI analysis."). To ensure no manipulation of Geden's COMI has occurred, the Court may also look at the period between the initiation of the foreign liquidation proceeding and the Petition Date.

***9** According to the Declaration of Dr. Balzan, upon his appointment as Liquidator and Foreign Representative in December 2023, he learned Geden had been actively defending itself in Pennsylvania state court for many years (the "Pennsylvania State Court Litigation") (ECF No. 26-8 at 7). Subsequently, Dr. Balzan appealed the Pennsylvania State Court Litigation. [12] Mr. Gaitas, who was also representing Eclipse in the Pennsylvania State Court Litigation against Geden, represented Dr. Balzan in the appeal. [13] On March 25, 2024, in response to Dr. Balzan's appeal of the Pennsylvania State Court Litigation, the Superior Court of Pennsylvania issued a show cause order (the "Show Cause Order"), directing Dr. Balzan to show cause why he has standing to appeal the order entered in Geden's favor (ECF No. 25-27). On April 8, 2024, Dr. Balzan filed a response to the

Show Cause Order (ECF No. 25-28). The Superior Court of Pennsylvania found Dr. Balzan lacked standing to appeal the order entered in Geden's favor and on April 26, 2024, Dr. Balzan's appeal was dismissed (ECF No. 25-30). On June 4, 2024, Dr. Balzan filed a Petition for Allowance of Appeal to the Supreme Court of Pennsylvania (ECF No. 25-31). On June 21, 2024, Dr. Balzan filed a Petition to the Supreme Court of Pennsylvania for Extraordinary Jurisdiction (ECF No. 25-33). On December 3, 2024, the Supreme Court of Pennsylvania denied Dr. Balzan's Petition for Extraordinary Jurisdiction (ECF No. 25-34). On January 21, 2025, the Supreme Court of Pennsylvania denied Dr. Balzan's Petition for Allowance of Appeal (ECF No. 25-32). As a result, Advantage Award argues the only action Dr. Balzan took during the relevant period was his unsuccessful attempt to intervene in the Pennsylvania State Court Litigation (Hr'g Tr., 26:8-11 (June 25, 2025)).

12 ECF No. 26-8 at 13; Hr'g Tr., 72:10-14 (June 4, 2025) – Advantage Award cross examination of Dr. Balzan (Q. So after you were appointed as Geden's liquidator in Malta, you then sought to appeal the Pennsylvania trial court's dismissal of all counts against Geden on behalf of Geden, correct? A. Correct.).

13 Hr'g Tr., 72:15-20 (June 4, 2025) – Advantage Award cross examination of Dr. Balzan (Q. And you represented [sic] Mr. Gaitas to represent you in that action, correct? A. Correct. Q. And at the same time, Mr. Gaitas was representing Eclipse who was suing Geden in that action, correct? A. Correct.).

Geden filed the Petition for Recognition on April 28, 2025 (ECF No. 1). Dr. Balzan testified he reviewed the pleadings and documents submitted in the Pennsylvania State Court Litigation during the Chapter 15 Case, but he could not recall if he reviewed the pleadings and documents prior to the Chapter 15 Case. [14] Dr. Balzan testified he asked Eclipse, who is funding the fees of Dr. Balzan's counsel, [15] for information, but did not recall if he asked Eclipse to provide him with copies of documents Eclipse may have obtained from Geden in any prior litigation. [16]

14 Hr'g Tr., 67:17-23 (June 4, 2025) – Advantage Award cross examination of Dr. Balzan (Q. Did you ever review any pleadings, any documents that were submitted by any of the defendants in the Pennsylvania actions? A. You mean going all the way back to 2020 or prior to that? Q. Going back to 2020. A. I mean, I have reviewed them now during these Chapter 15 proceedings. I don't recall if I had already reviewed them prior to the Chapter 15 proceedings....).

15 Hr'g Tr., 43:2-4 (June 4, 2025) – Advantage Award cross examination of Dr. Balzan (Q. just to be clear, Eclipse is funding the fees of your counsel as of today, correct? A. Yes.).

16 Hr'g Tr., 66:25-67:16 (June 4, 2025) – Advantage Award cross examination of Dr. Balzan (Q. Is it true that you have never asked Eclipse to provide you with discovery - - documents that they obtained in discovery in any prior litigation regarding Geden, Advantage, or anybody related to that? A. No, it's probably not entirely true. When I was contacted -- when I was in contacts with their lawyers, I -- I was asking for information. So I'm -- I know I did ask for information to be able to form my own opinion on whether -- of what was happening and the action I should be taking -- taking as liquidator, so I did ask them for information. Q. But did you ask them to provide you with copies of any documents they may have obtained, for example, from Geden Holdings, Limited, in any litigation that they had instituted prior? A. I don't recall (indiscernible) for that specific information, but I do recall that I (indiscernible) for information.).

According to the testimony of Dr. Balzan, general responsibilities as liquidator in a Maltese proceeding include identifying creditors and assets, paying creditors, paying taxes, and holding creditor meetings (Hr'g Tr., 32:5-24 (June 4, 2025)). However, Dr. Balzan testified in his role as Liquidator of the Maltese Proceeding, he has not paid any taxes, brought any legal actions outside of the Chapter 15 Case, convened any creditors meetings, or reached out to any former officers of directors of Geden (Hr'g Tr., 33:2-34:1 (June 4, 2025)). Furthermore, since his appointment as Liquidator and Foreign Representative sixteen months ago, Dr. Balzan has not sought discovery of any parties in a country other than the United States. [17]

17 Hr'g Tr., 77:8-21 (June 4, 2025) – Advantage Award cross examination of Dr. Balzan (Q. In those 16 months between when you were appointed and today, you have not sought discovery of any parties in a country other than the United States, correct? A. Correct.).

***10** In support of Advantage Award's argument that Dr. Balzan has not engaged in material activities sufficient to establish COMI in Malta, Advantage Award compares the actions of Dr. Balzan with the actions of the liquidator and foreign representative in *Creative Finance* (Hr'g Tr., 18:20-25 (June 25, 2025)). In *Creative Finance*, the liquidator did not collect any assets, liquidate any assets, shut down any businesses, or pay any taxes. According to the testimony of Dr. Balzan, he has also not completed any of these actions (Hr'g Tr., 19:3-18 (June 25, 2025)).

In response, Geden argues the Chapter 15 Case is distinguishable from *Creative Finance*[18] because Geden is not trying to manipulate COMI, and the court in *Creative Finance* used evidence of the inaction of the liquidator to respond to the idea COMI was being manipulated by *Creative Finance* insiders (Hr'g Tr., 39:24-40:1 (June 25, 2025)). However, the court in *Creative Finance* explicitly states "bad faith...was not germane to this Court's recognition analysis.... [R]ecognition turned solely on the requirements of section 1517, and the Liquidator's failure to show a COMI (or establishment) in the BVI, by reason of his minimal effort in managing the Debtors' affairs." *Creative Finance*, 543 B.R. at 522. Therefore, this Court finds it appropriate to analyze the actions of Dr. Balzan in light of the actions the court in *Creative Finance* determined were not material activities sufficient to find COMI in the jurisdiction where the activities took place.

18 This Chapter 15 Case is distinguishable from *Creative Finance* in that the Court does not attribute any bad faith to Dr. Balzan. To the contrary, Dr. Balzan has acted with the utmost good faith and professionalism, as demonstrated by his candid testimony.

The court in *Creative Finance* held if compliance with the statutory duties of the liquidator required material effort, COMI could have been established. *Creative Finance*, 543 B.R. at 511. However, even the most basic business activities, "such as getting bank records, ledgers, journals and backup documents for cash receipts and expenditures," were not undertaken. *Id*. As a result, the activities of the liquidator fell short of anything that could be characterized as material effort. *Id.* Here, Dr. Balzan testified he has not satisfied what he considers to be the general responsibilities of a liquidator in a Maltese proceeding (Hr'g Tr., 32:5-24; 33:2-34:1 (June 4, 2025)).[19] Therefore, the actions of Dr. Balzan are insufficient to establish Geden's COMI in Malta as of the Petition Date. Additionally, there is no evidence COMI has been manipulated by Geden. *See Fairfield Sentry*, 714 F.3d at 133 ("To offset a debtor's ability to manipulate its COMI, a court may also look at the time period between the initiation of the foreign liquidation proceeding and the filing of the Chapter 15 petition."). Based on the facts of the Chapter 15 Case, the Maltese Proceeding is not recognized as a foreign main proceeding subject to recognition under the Bankruptcy Code.

19 Dr. Balzan's testimony may be explained by the fact his appointment came after many years of inactivity in the Maltese Proceeding. Nevertheless, while inactivity and the passage of time may be an explanation, it is not an excuse.

II. FOREIGN NONMAIN PROCEEDING.

In contrast to COMI, the existence of an "establishment" is a factual question, with no presumption in its favor. *Ran-Circuit*, 607 F.3d at 1026 (quoting *Bear Stearns-District*, 389 B.R. at 338). For Geden to have an "establishment" in Malta, Geden must have (1) had a place of operations in Malta and (2) been carrying out a nontransitory economic activity in Malta as of the Petition Date. *See Ran-Circuit*, 607 F.3d at 1027.

***11** According to Geden, control of Geden rests with the Maltese Court and Dr. Balzan, all economic activity of Geden should be under the Maltese Court and Dr. Balzan, and major decisions in the Maltese Proceeding must be approved by the Maltese Court (ECF No.33 at 7). As a result, Geden argues the material and substantive activities of Dr. Balzan in Malta demonstrate Geden has a local and non-transitory place of business, and therefore, an establishment, in Malta (ECF No. 33 at 7-8). However, based on the same evidence that led the Court to conclude the Maltese Proceeding is not a foreign main proceeding, the Maltese Proceeding is also not a foreign nonmain proceeding under §§ 1502 and 1517 of the Bankruptcy Code. There is no evidence

Geden had a place of operations in Malta as of the Petition Date. There is no evidence Geden was conducting business in Malta as of the Petition Date. *Brit. Am. Ins. Co.*, 425 B.R. at 914–15. Finally, there is no evidence the actions of Dr. Balzan had an effect on the Malta marketplace as of the Petition Date, or rose beyond mere incorporation, record-keeping, or maintenance of property. [20] *Id.* at 915 ("[T]he terms 'operations' and 'economic activity' require showing of a local effect on the marketplace, more than mere incorporation and record-keeping and more than just the maintenance of property."). Based on the facts of the Chapter 15 Case, the Maltese Proceeding is not recognized as a foreign nonmain proceeding subject to recognition under the Bankruptcy Code.

20 Hr'g Tr., 27:22-28:4 (June 25, 2025) – Advantage Award argument (Geden did not keep records or an office in Malta or maintain property in Malta.).

III. THE MOTION TO STRIKE.

Because the Petition for Recognition is denied and the Maltese Proceeding is not recognized under Chapter 15 of the Bankruptcy Code, the Motion to Strike is moot. Therefore, the Court does not need to address the issues of standing or personal jurisdiction raised by Geden in the Motion to Strike.

CONCLUSION

For the reasons stated, the Maltese Proceeding is not recognized as a foreign main or foreign nonmain proceeding under the Bankruptcy Code. Therefore, the Petition for Recognition is DENIED.

Because the Petition for Recognition is denied, the associated Motion to Strike is DISMISSED AS MOOT

A SEPARATE ORDER WILL ISSUE.

All Citations

--- B.R. ----, 2025 WL 2484883

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	:	
	:	**Chapter 15**
MEGA NEWCO LIMITED,	:	
	:	**Case No. 24-12031 (MEW)**
Debtor in a Foreign Proceeding	:	

DECISION GRANTING RECOGNITION OF A FOREIGN PROCEEDING AND ENFORCING AN ORDER APPROVING A SCHEME OF ARRANGEMENT

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HONORABLE MICHAEL E. WILES
UNITED STATES BANKRUPTCY JUDGE

Mega Newco Limited ("**Mega Newco**") is a wholly owned subsidiary of a Mexican financial services company named Operadora de Servicios Mega, S.A. De C.V., Sofom, E.R. (the "**Parent**"). Mega Newco was formed under the laws of England and Wales on September 30, 2024, for the purpose of assisting its Parent in the completion of a restructuring of obligations

under a set of notes (the "**U.S. Notes**") that the Parent issued in 2020 under an Indenture that is governed by New York law. Mega Newco has asked this Court (i) to grant recognition of a foreign proceeding (the "**English Scheme Proceeding**") that Mega Newco commenced in the High Court of Justice Business and Property Courts of England and Wales (the "**English Court**"), and (ii) to enforce, in the United States, an order entered by the English Court (the "**English Court Order**") that approved the scheme of arrangement (the "**Scheme of Arrangement**") that Mega Newco proposed.

The Parent is based in Guadalajara, Mexico and has its headquarters there. For various reasons, the Parent faced liquidity constraints and needed to restructure its obligations, including its obligations under the U.S. Notes. The Parent negotiated with an ad hoc group of noteholders that collectively owned more than 25 percent of the outstanding U.S. Notes, and the parties reached agreement on the terms of a possible restructuring at some time during 2024. I will not attempt to describe in full the deal that the parties reached, but it provides that holders of the U.S. Notes may choose to receive either partial cash payments from the Parent or to receive equity in the Parent in exchange for their U.S. Notes. The agreement also gives certain holders of the exiting U.S. Notes the opportunity to buy new notes to be issued by the Parent.

The Parent has also negotiated consensual arrangements to refinance and restructure other debt obligations. Those other agreements are contingent on the completion and enforcement of the agreed restructuring of the U.S. Notes. Together all of these negotiated restructurings will improve creditor recoveries, strengthen the finances of the Parent, and preserve the value of the operating business.

However, the agreed restructuring of the U.S. Notes raised practical problems. The U.S. Notes could not be restructured outside of a bankruptcy proceeding except with the affirmative

consent of one hundred percent of the holders of the U.S. Notes. As a general matter it is not possible to obtain that level of affirmative consent to a note restructuring, and that is particularly so in this case, where dealings with some of the holders of the U.S. Notes are constrained because they are what the Debtor has referred to as "Sanctioned Persons." Bankruptcy laws would permit a restructuring of the U.S. Notes without one hundred percent consent, but most of those laws would not have permitted a surgical restructuring of just the U.S. Notes. However, U.K. laws permit the approval of a consensual scheme of arrangement that deals with a single set of note obligations, and pursuing such a scheme of arrangement in the English Court also promised to be less expensive and time-consuming than other alternatives. The parties therefore wished to implement the desired restructuring of the U.S. Notes through the English Court under a U.K. scheme of arrangement.

U.K. courts have held that they have jurisdiction to approve a scheme of arrangement so long as the debtor has a substantial connection with the U.K., which may include the presence of a registered office or the fact that the relevant obligations are governed by U.K. laws. However, the Parent did not have its registered office in the U.K.; the U.S. Notes are governed by New York law (not English law); and the Parent had no substantial business operations or facilities in the U.K. Counsel conceded during the hearing that I held on February 7, 2025, that the Parent therefore would not have had the right, in its own name and on its own behalf, to seek approval of a proposed scheme of arrangement by the English Court.

Mega Newco was created to address this issue. More particularly:

- Mega Newco was incorporated on September 30, 2024, under the laws of England and Wales, and listed its registered office as an address in London.

- Mega Newco signed documents by which it made itself an additional obligor under the U.S. Notes. Mega Newco also agreed that the Parent could seek contribution from Mega Newco for any payment made by the Parent on the U.S. Notes.
- Mega Newco then filed the necessary papers to commence the English Scheme Proceeding on November 14, 2024. Mega Newco also commenced this Chapter 15 proceeding in November 2024.

The papers submitted to the English Court made clear that Mega Newco was created for the purpose of enabling the English Court to take jurisdiction over the proposed scheme of arrangement. The English Court has approved the exercise of jurisdiction on this basis, and it has approved Mega Newco's proposed Scheme of Arrangement, including those provisions that resolve the noteholders' claims against the Parent as well as against Mega Newco. The holders of U.S. Notes had the right to appear at a meeting that was convened to solicit votes with respect to the proposed Scheme of Arrangement, and the holders of more than seventy-five percent of the U.S. Notes appeared either in person or through proxies. The Scheme of Arrangement was approved unanimously by those who voted, and no objections were filed with the English Court.

No party has objected to the proposed recognition of the English Scheme Proceeding in this Chapter 15 case, or to the enforcement, in the United States, of the English Court Order and the Scheme of Arrangement. The Office of the United States Trustee raised some issues about the release provisions in the Scheme of Arrangement, but it has reached an agreement with the Debtor on a modification to those provisions insofar as they would be given effect in the United States. No other issues have been raised.

Under Chapter 15, a foreign bankruptcy or insolvency proceeding may be recognized, and the orders entered in such a proceeding may be enforced, if the foreign proceeding is either a

"foreign main proceeding" or a "foreign nonmain proceeding." 11 U.S.C. § 1517(a)(1). A foreign proceeding is a "foreign nonmain proceeding" if it is pending in a country in which a debtor has an "establishment." I issued a decision in *In re Mood Media Corp.*, 569 B.R. 556, 561-63 (Bankr. S.D.N.Y. 2017), in which I held that for this purpose an "establishment" must be an actual place from which economic market-facing activities are regularly conducted. However, Mega Newco represented to the English Court that it has never engaged in any business, let alone any regular market-facing activities that it conducted from a location in the U.K. Mega Newco has engaged in restructuring activities, but those activities are not themselves sufficient to show the existence of an "establishment" in the U.K. If restructuring activities alone were sufficient, then any proceeding in which a debtor sought relief would automatically qualify as a "foreign nonmain proceeding," and the requirement of an "establishment" would be deprived of any meaning. *See Lavie v. Ran (In re Ran)*, 607 F.3d 1017, 1028 (5th Cir. 2010) (holding that if a foreign "bankruptcy proceeding and associated debts, alone, could suffice to demonstrate an establishment, this would render the framework of Chapter 15 meaningless. There would be no reason to define establishment as engaging in a nontransitory economic activity. The petition for recognition would simply require evidence of the existence of the foreign proceeding."); *see also In re Modern Land (China) Co.*, 641 B.R. 768, 785-86 (Bankr. S.D.N.Y. 2022) (holding that a foreign restructuring proceeding "cannot itself constitute nontransitory economic activity to support recognition as a foreign nonmain proceeding"); *Rozhkov v. Pirogova (In re Pirogova)*, 612 B.R. 475, 484 (S.D.N.Y. 2020) (same).

A foreign proceeding is a "foreign main proceeding" if it is taking place in the jurisdiction where the debtor has its center of main interests, or COMI. 11 U.S.C. § 1502(4). Section 1516(c) of the Bankruptcy Code provides that "[i]n the absence of evidence to the

contrary, the debtor's registered office . . . is presumed to be the center of the debtor's main interests." 11 U.S.C. § 1516(c). Mega Newco's registered office is in London. Unlike some other cases, there is no "contrary evidence" in the record before me that indicates that Mega Newco's own COMI is located outside the United Kingdom. *See In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 374 B.R. 122, 129-30 (Bankr. S.D.N.Y. 2007) (holding that other evidence before the Court showed that the debtor's COMI was not situated where the debtor had contended). Mega Newco has engaged in restructuring activities in the U.K., and those may be considered in determining whether its COMI is in the U.K. *See Morning Mist Holdings Ltd. v. Krys (In re Fairfield Sentry Ltd.)*, 714 F.3d 127, 138 (2d Cir. 2013). These restructuring activities apparently are the only activities in which Mega Newco has ever engaged.

As a matter of form, then, Mega Newco argues that the requirements for recognition of the English Scheme Proceeding as a "foreign main proceeding" have been satisfied. I nevertheless cannot help but see significant risks in the structure that has been used here. Chapter 15 is premised on the idea that a debtor who seeks to restructure an obligation is actually the subject of a foreign proceeding, and that the foreign proceeding is located in the country where that debtor has its COMI. Here, the whole structure admittedly was created for the purpose of restructuring the U.S. Notes issued by the Parent. However, the Parent is not a party to the English Scheme Proceeding, and the Parent's COMI is in Mexico, not the U.K. Mega Newco was created, and then voluntarily subjected itself to the Parent's liabilities under the U.S. Notes, just so that the U.S. Notes issued by the Parent could be restructured in a jurisdiction that was not otherwise available.

If we were routinely to allow this structure in all cases, no matter what the circumstances, the ordinary predicates for Chapter 15 relief could be stripped of meaning. Any debtor company

could restructure its obligations anywhere it chose without even subjecting itself to a foreign proceeding. All that a debtor would need to do is to form a new subsidiary in a jurisdiction of its choice and then cause that new subsidiary to assume the parent company's obligations. The parent company's COMI would no longer be relevant to the parent's restructuring of its debts. The laws of the chosen jurisdiction would govern a restructuring, no matter how those laws might affect the legitimate expectations of creditors and regardless of whether the debtor had chosen a particular jurisdiction for the purpose of favoring insiders or for other improper reasons.

Courts and commentators have long worried about instances in which a debtor might try to manipulate its COMI, fearing that such a manipulation could be done to thwart creditor expectations or to accomplish other improper objectives. *See, e.g., In re Fairfield Sentry Ltd.,* 440 B.R. 60, 65-66 (Bankr. S.D.N.Y. 2010) (identifying concerns and explaining that courts may make a broader assessment of COMI if there has been an "opportunistic shift to establish COMI (i.e., insider exploitation, untoward manipulation, overt thwarting of third party expectations.)"); *see also In re Modern Land (China) Co.,* 641 B.R. 768, 782-83 (Bankr. S.D.N.Y. 2022) (same); *In re Ocean Rig UDW Inc.*, 570 B.R. 687 (Bankr. S.D.N.Y. 2017) (same). The issue before me, then, boils down to this: does the underlying structure in this case constitute such an improper manipulation of COMI? Should I disregard the form of the transactions and disregard the participation by Mega Newco, and look instead to whether the Parent, on its own, has satisfied the conditions for relief under Chapter 15?

Clearly, the structure before me could be used in another case as a way of frustrating and thwarting the legitimate expectations of creditors. This case, however, involves no such frustration or thwarting of creditor rights. Mega Newco was formed, and the English Scheme Proceeding was pursued, for laudable objectives. The Scheme of Arrangement will enable a

broader restructuring to be accomplished efficiently and thereby will enhance all parties' recoveries. It will also maximize the value of the underlying businesses. In these respects, the enforcement of the Scheme of Arrangement is fully consistent with the stated purposes of Chapter 15. *See* 11 U.S.C. § 1501(a).

In addition, the procedures that the parties have followed were not implemented in any way that took unfair advantage of the holders of the U.S. Notes. The whole process was worked out with the involvement and consent of the affected creditors, and not for the purpose of harming them or of thwarting their expectations. The Noteholders and their Indenture Trustee are aware of the basis on which U.K. jurisdiction has been asserted and have not objected to it. There similarly is not a single objection to the recognition of the U.K. proceeding or the enforcement of the U.K. order.

If COMI manipulation is a matter of concern because of the risk that creditors' rights and expectations might be thwarted, then one of the main factors I ought to consider, in deciding whether such a manipulation has occurred, is whether the affected creditors have asserted any objection. *See In re SPhinX, Ltd.*, 351 B.R. 103, 117 (Bankr. S.D.N.Y. 2006) (holding that COMI determinations should not be made "mechanically," that COMI should be assessed "in light of chapter 15's emphasis on protecting the reasonable interests of parties in interest pursuant to fair procedures and the maximization of the debtor's value," that creditors presumably are in the bast position to determine whether their own expectations are being thwarted, and therefore that "one generally should defer . . . to the creditors' acquiescence in or support of a proposed COMI"). Ironically, the only thing that would thwart creditor expectations in the case before me would be if I were to decline to enforce the English Court Order. It would

be absurd for me to thwart the creditors' constructive desires and expectations in the guise of supposedly protecting them.

If there were an actual contention or evidence that the structure at issue here had been used in an unfair way and had thwarted third-party expectations, there would be serious questions in my mind as to whether it ought to be approved. However, in light of the support of all of the affected parties and their overwhelming consent to the English Scheme Proceeding and the approval of the Scheme of Arrangement, and the other factors that I have cited, I see no cause in this particular case to look past the form of the transactions or to pursue theoretical issues that no affected party wishes to pursue. I will therefore recognize the English Scheme Proceeding and enforce the English Court Order.

A separate Order has been issued to reflect the Court's rulings.

Dated: New York, New York
February 24, 2025

s/Michael E. Wiles
Honorable Michael E. Wiles
United States Bankruptcy Judge

could have taken action to seek relief. Bluntly, it was not the City's unclean hands but Cranston's unexplained and unwarranted delay in adjudicating whatever rights it had in the Property that supports the laches bar.

Conclusion

For the reasons discussed above, the Order of the Bankruptcy Court is affirmed.

So Ordered.

IN RE: ODEBRECHT ENGENHARIA E CONSTRUÇÃO S.A. - EM RECUPERAÇÃO JUDICIAL, et al., Debtors in a Foreign Proceeding.

Case No. 25-10482 (MG)

United States Bankruptcy Court,
S.D. New York.

Signed April 21, 2025

Background: Foreign representative of Brazilian debtors filed motion seeking recognition of debtors' Brazilian judicial reorganization proceeding as foreign main proceeding and enforcement of related reorganization plan in the United States. United States Trustee (UST) objected to the extent language in proposed recognition order provided additional relief, including exculpation of certain non-debtor parties and injunction that UST argued constituted an impermissible nonconsensual third-party release.

Holdings: The Bankruptcy Court, Martin Glenn, Chief Judge, held that:

(1) under Chapter 15, courts are not limited in the discretionary relief they grant by that relief afforded by the foreign court or the plan of reorganization;

(2) the Court would approve enforcement mechanism of proposed order that prevented disgruntled creditors who were bound by debtors' Brazilian plan from suing in the United States to recover on claims that were barred by the plan;

(3) the Court would approve the proposed order's exculpation provision; and

(4) as a matter of first impression for the court, assuming arguendo that subject paragraph of order created a nonconsensual third-party release, the Court had the power to issue such order in support of a foreign proceeding, pursuant to at least its power under the section of the Bankruptcy Code outlining the discretionary relief a court may order upon recognition of a foreign proceeding.

Objections overruled; motion granted.

1. Bankruptcy ⚿2341

Although Chapter 15 of the Bankruptcy Code, based on the Model Law on Cross-Border Insolvency proposed by the United Nations Commission on International Trade Law, replaced the section of the Code setting forth the statutory framework for cases filed in the United States that are ancillary to insolvency proceedings filed in foreign countries, many of the principles underlying that section remain in effect under Chapter 15, including the principles of comity and cooperation with foreign courts in deciding whether to grant foreign representative additional post-recognition relief. 11 U.S.C.A. § 304 (repealed); 11 U.S.C.A. § 1501 et seq.

2. Bankruptcy ⚿2341

Bankruptcy court's discretion to order recognition of foreign proceeding is exceedingly broad, since court may grant "any appropriate relief" that would further purposes of Chapter 15 and protect debt-

or's assets and the interests of creditors. 11 U.S.C.A. § 1521(a).

3. Bankruptcy ⚿2341

To determine what relief could fall under catch-all "additional relief" language in the section of the Bankruptcy Court outlining the discretionary relief a court may order upon recognition of a foreign proceeding, courts look to relief available under the now-deleted section of the Code setting forth the statutory framework for cases filed in the United States that are ancillary to insolvency proceedings filed in foreign countries. 11 U.S.C.A. § 304 (repealed); 11 U.S.C.A. § 1521(a)(7).

4. Bankruptcy ⚿2341

Relief under the section of the Bankruptcy Court outlining the discretionary relief a court may order upon recognition of a foreign proceeding will be granted only if the interests of the creditors and other interested entities, including the debtor, are sufficiently protected. 11 U.S.C.A. §§ 1521, 1522(a).

5. Bankruptcy ⚿2341

Section of the Bankruptcy Code governing additional assistance the court may provide if recognition of a foreign proceeding is granted provides additional discretionary grounds for the court to grant relief to a foreign representative. 11 U.S.C.A. § 1507.

6. Bankruptcy ⚿2341

Public policy exception to Chapter 15, providing that a bankruptcy court may decline to grant relief requested in a Chapter 15 case if the action would be manifestly contrary to the public policy of the United States, is narrowly construed. 11 U.S.C.A. § 1506.

7. Bankruptcy ⚿3555

Exculpation provisions in a Chapter 11 plan are designed to insulate court-supervised fiduciaries and some other parties from claims that are based on actions that relate to a debtor's restructuring.

8. Bankruptcy ⚿3555

Exculpation clause approved at confirmation of a Chapter 11 plan may exculpate estate fiduciaries like a committee, its members, and estate professionals for their actions in the bankruptcy case, except where those actions amount to willful misconduct or gross negligence.

9. Bankruptcy ⚿3555

Exculpation provisions in Chapter 11 plans are "not uncommon" and are generally permissible so long as they are properly limited and not overly broad.

10. Bankruptcy ⚿3555

A proper exculpation provision in a Chapter 11 plan is a protection not only of court-supervised fiduciaries, but also of court-supervised and court-approved transactions; in absence of gross negligence or intentional wrongdoing, parties should not be liable for doing things that court authorized them to do and that court decided were reasonable things to do.

11. Bankruptcy ⚿3555

In the Chapter 11 context, exculpated parties who are not estate fiduciaries generally are entitled to benefit from a broad exculpation provision where they have been actively involved in all aspects of the cases and have made significant contributions to the success of the cases.

12. Bankruptcy ⚿3555

In determining whether to approve exculpation provisions in Chapter 11 plans, among factors that courts consider are whether the beneficiaries of the exculpation participated in good faith in negotiating the plan and bringing it to fruition, and whether the provision is integral to the plan.

13. Bankruptcy ⚿2341

Under Chapter 15 of the Bankruptcy Code, courts, despite being ancillaries to foreign proceedings, are not limited in the discretionary relief they grant by that relief afforded by the foreign court or the plan of reorganization; although there are limitations to courts' discretionary powers under Chapter 15, they are not obligated to grant only that relief which is similar or parallel to that granted abroad or specified in the plan at issue. 11 U.S.C.A. §§ 1507, 1521.

14. Bankruptcy ⚿2341

Under the expansive grant of power in the section of the Bankruptcy Code governing "additional assistance" the court may provide if recognition of a foreign proceeding is granted, even if a court cannot grant relief under the "additional relief" language in the catch-all subsection of the section of the Code outlining the discretionary relief a court may order upon recognition, the court may grant relief under the "additional assistance" section. 11 U.S.C.A. §§ 1507, 1521(a)(7).

15. Bankruptcy ⚿2341

When a bankruptcy court is determining what relief to grant to a foreign representative upon recognition of a foreign proceeding, the drafters of Chapter 15 referenced principles of comity as limiting factors, rather than foreign rulings or even the availability of relief under foreign law. 11 U.S.C.A. §§ 1507, 1521.

16. Bankruptcy ⚿2341

Bankruptcy Court, on motion by foreign representative of Brazilian debtors seeking recognition of debtors' Brazilian judicial reorganization proceeding as foreign main proceeding and enforcement of related reorganization plan in the United States, would approve enforcement mechanism in proposed recognition order that prevented disgruntled creditors who were bound by debtors' Brazilian plan from suing in the United States to recover on claims that were barred by the plan, despite United States Trustee's (UST) objection that the provision provided relief beyond the scope provided by the Brazilian confirmation order and plan; granting the requested relief to the foreign representative was in furtherance of comity, as it enabled the full enforcement of debtors' plan by closing the door to potential workarounds to the plan. 11 U.S.C.A. § 1521.

17. Courts ⚿96(5)

Courts in the Southern District of New York are not bound by the analytical approach taken in a Fifth Circuit case.

18. Bankruptcy ⚿2341, 3555

Courts can provide exculpations in Chapter 15 proceedings to the same extent they can in Chapter 11 cases, so long as the exculpation is not contrary to United States public policy. 11 U.S.C.A. §§ 1506, 1507, 1521.

19. Bankruptcy ⚿2341, 3555

Exculpation provision in Chapter 15 debtors' proposed recognition order complied with requirements placed on exculpation provisions in Chapter 11 cases, and so would be approved by the Bankruptcy Court over United States Trustee's (UST) objection, where exculpated parties were indenture trustee of certain notes cancelled pursuant to debtors' Brazilian plan, custodians of those notes, and clearing system involved with effectuation of plan, those parties were clearly essential to implementation of plan, which was being supervised by Brazilian court, there was no indication in the record that exculpated parties acted in anything but good faith, it was uncontested that cancellation of subject notes was a central part of plan and that absent cooperation of exculpated parties the notes could not be cancelled, and

so order's exculpation provision was integral to recognition and enforcement of plan. 11 U.S.C.A. §§ 1507, 1521.

20. Bankruptcy ⚿2341

Given that, in Chapter 11 context, estate fiduciaries are entitled to exculpation when they have been actively involved in bankruptcy proceeding and made significant contributions to its success, and when exculpation applies to court-supervised and-approved transactions, although gross negligence and willful misconduct must be excluded from scope of exculpation provision, the logical analogue in the Chapter 15 context is exculpation of parties who have been actively involved in the foreign restructuring, and who are exculpated for behavior relating to court-supervised and -approved transactions, whether those transactions are supervised in the United States or abroad.

21. Bankruptcy ⚿2341

Assuming arguendo that paragraph of proposed recognition order barring actions within territorial jurisdiction of United States that contravened relief provided in foreign debtors' Brazilian plan and confirmation order created a nonconsensual third-party release, Bankruptcy Court had power to issue such order, pursuant to at least its power under section of Bankruptcy Code outlining the discretionary relief court may order upon recognition of foreign proceeding; although *Harrington v. Purdue Pharma*, 144 S.Ct. 2071, prohibited nonconsensual third-party releases in Chapter 11 plans, Court wielded significantly more power under subject section of Chapter 15, whose plain text authorized it to grant "any" appropriate relief available to a trustee, than under Code provision at issue in *Purdue*, release enabled just treatment of all claimants and was not contrary to public policy of United States, and pre-*Purdue* caselaw as well as that under Chapter 15's predecessor supported Court's reading. 11 U.S.C.A. § 304 (repealed); 11 U.S.C.A. §§ 1123(b), 1506, 1521, 1522(a).

22. Bankruptcy ⚿2341

Where subsections of section of the Bankruptcy Court outlining the discretionary relief a court may order upon recognition of a foreign proceeding do not expressly authorize the relief requested in a Chapter 15 case, to determine whether the relief can be considered "appropriate relief" under that section of the Code, court must first examine plain language of section, after which it looks at caselaw from Chapter 15's statutory predecessor. 11 U.S.C.A. § 304 (repealed); 11 U.S.C.A. § 1521(a).

23. Bankruptcy ⚿2341

Under section of the Bankruptcy Code permitting court to grant relief pursuant to Code section outlining the discretionary relief a court may order upon recognition of a foreign proceeding only if the interests of creditors, the debtor, and other interested entities are "sufficiently protected," term "sufficient protection" embodies three basic principles: the just treatment of all holders of claims against the bankruptcy estate, the protection of United States claimants against prejudice and inconvenience in the processing of claims in the foreign proceeding, and the distribution of proceeds of the foreign estate substantially in accordance with the order prescribed by United States law. 11 U.S.C.A. §§ 1521, 1522(a).

See publication Words and Phrases for other judicial constructions and definitions.

24. Bankruptcy ⚿3555

Bankruptcy Code does not provide bankruptcy courts, in Chapter 11 cases, with the authority to authorize nonconsen-

sual third-party releases. 11 U.S.C.A. § 1123(b).

25. Bankruptcy ⚿2341

A party can lose rights in an ancillary proceeding under Chapter 15 which it otherwise would have had in a plenary case under the Bankruptcy Code.

26. Bankruptcy ⚿2341

In an ancillary proceeding under Chapter 15, 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. 11 U.S.C.A. § 1506.

27. Bankruptcy ⚿2341

Bankruptcy courts, acting as ancillaries to foreign proceedings, may extinguish claims that would be available in plenary actions in the United States in the name of comity.

28. Bankruptcy ⚿2341

Bankruptcy courts, pursuant to the section of the Bankruptcy Code outlining the discretionary relief court may order upon recognition of a foreign proceeding, may issue orders pursuant to their discretionary powers which contain nonconsensual third-party releases, whether or not those releases originate from a foreign court. 11 U.S.C.A. § 1521.

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MEMORANDUM OPINION GRANTING MOTION FOR RECOGNITION OF FOREIGN MAIN PROCEEDINGS AND OVERRULING UST OBJECTIONS

MARTIN GLENN, CHIEF UNITED STATES BANKRUPTCY JUDGE

This Court has already entered an order ("Order," ECF Doc. 21) granting all the relief requested by the foreign representative (Adriana Henry Meirelles, or "Foreign Representative") of the above-captioned foreign debtors ("Debtors"): recognizing the Debtors' Brazilian *recuperação judicial* ("RJ") proceeding as the Debtors' foreign main proceeding, recognizing the full force and effect of the subsequent RJ plan ("RJ Plan"), giving full force and effect to the related Brazilian court confirmation order, and providing further relief which this Court deemed just and proper. No party objected to the recognition of the Brazilian RJ proceeding as the foreign main proceeding, nor to the recognition and enforcement of the RJ Plan in the United States. The only objection was filed by the United States Trustee ("UST"), which objected to language in the Debtors' proposed order [1] which provided additional relief. ("Objection," ECF Doc. # 16.) The Foreign Representative filed a reply ("Reply," ECF Doc. # 18).

The Court entered the Debtors' final proposed order without further modifica-

1. The proposed order was edited twice, but the language to which the UST objected remained the same throughout. This opinion therefore relies on the language in the order ultimately entered, *see* ECF Doc. # 21.

tions. The Court now writes separately to address two of the UST's objections, both of which were overruled at the hearing, to provide further clarification, as the UST has made similar objections in multiple Chapter 15 cases.

I. BACKGROUND

A. Company Structure and History

The Debtors, along with certain other related entities and affiliates (the "OEC Group"), are part of the business division of Novonor S.A. – Em Recuperação Judicial ("Novonor") and its related entities and affiliates (the "Novonor Group"), one of the largest private business groups in Brazil today, with businesses in engineering, construction and in the development and operation of infrastructure. (ECF Doc. # 2 at 3.) The OEC Group is one of the largest construction companies in the world and employs over 17,000 people. (*Id.* at 10.) The OEC Group's operational and economic activities are primarily concentrated in Brazil. (*Id.* at 12.) The Foreign Representative's motion seeking recognition and enforcement of the RJ Plan provides additional details on each of the Debtors and on the OEC Group as a whole. (*See generally id.*)

The Debtors or their affiliates have filed two previous Chapter 15 proceedings. On August 26, 2019, Novonor (formerly known as Odebrecht S.A.) and certain affiliates (the "Novonor Debtors") filed a petition ("Novonor Petition") seeking recognition of the jointly administered judicial reorganization proceeding pending at the time before a Brazilian court. (*Id.* at 3 n.3.) On September 18, 2019, this Court entered an order granting the relief sought in the Novonor Petition and recognizing the Brazilian RJ proceeding as a foreign main proceeding for all the Novonor Debtors. (*Id.*) A bit over a year later, on November 24, 2020, a subset of three of the Debtors sought recognition of an extrajudicial reorganization (*recuperação extrajudicial*, or "EJ") and enforcement of an agreed plan of reorganization ("EJ Plan") which had been approved by the First Bankruptcy and Judicial Recovery Court of the District of the Capital of the State of São Paulo. (*Id.* at 3–4.) The aim of the Brazilian EJ Proceeding was to optimize the OEC Group's capital structure and provide additional runway for the OEC Group to reach an environment favorable to the resumption of its growth. (*Id.*) The EJ Plan only involved the obligations of a subset of the current set of Debtors and resulted in the replacement of certain New York law-governed notes with new notes, enabling a restructuring of a financial liability exceeding $3.1 billion. (*Id.* at 4–5.)

Due to the pressures of the pandemic, a financial crisis in Brazil, a reduction in infrastructure investments, and lower demand for infrastructure projects in countries where the OEC Group operates, a broader restructuring became necessary. (*Id.* at 5.) In June 2024, the Debtors filed the Brazilian RJ Proceeding to implement a comprehensive restructuring of the OEC Group's liabilities to ensure the preservation and continuation of its business through an agreed plan of reorganization (the RJ Plan). In broad strokes, the RJ Plan involves (i) a restructuring of the OEC Group's existing capital structure both to satisfy the OEC Group's existing debt and strengthen its cash flow; (ii) the creation of a new business unit, with a healthy capital structure and high technical capacity; and (iii) an injection of liquidity to finance future projects through a minimum $120 million debtor-in-possession financing facility, subject to certain conditions precedent being met. (*Id.* at 6.) After two rounds of voting, the ultimate result was a resounding vote in favor of the RJ Plan by the creditor classes and claimants

present to vote, and after resolving certain objections and finding that the requisite amount of creditor support and all other legal requirements were met, the Brazilian court issued an order confirming the RJ Plan (the "Brazilian Confirmation Order") on March 7, 2025. (*Id.* at 26–28.)

On March 14, 2025, the Foreign Representative filed in this Court a motion for recognition and enforcement, along with a proposed order and a copy of the RJ Plan. (ECF Doc. # 2.) The proposed order was modified before becoming the ultimate Order, but the relevant provisions, excerpted below, did not change. The United States Trustee objected to portions of the proposed order, as discussed below.

B. Terms of RJ Plan

The only term of the RJ Plan that matters for the following discussion can be found at clause 11.5 of the RJ Plan:

> 11.5. Settlement. The fulfillment of the payment obligations in accordance with the terms and conditions established in this Plan will entail, automatically and regardless of any additional, broad, general and unrestricted formality, the discharge of all Bankruptcy Credits against the Companies under Reorganization and their officers, directors, agents, employees and representatives.

(Objection at 5 (citing RJ Plan).) All parties agreed during the recognition hearing that this provision does not constitute a nonconsensual third-party release.

C. UST Objection

The UST objected to portions of the proposed order granting recognition (but *not* to the recognition of the Brazilian RJ proceeding or to the enforcement of the RJ Plan as written). The Court overruled the UST's objections. However, two of the UST's objections merit further discussion, as they have recurred throughout multiple Chapter 15 cases.

First, the UST argued that the following limitation on liability is inappropriate because it is a "veiled exculpation clause," it goes beyond the relief granted by the Brazilian court, and there is no statutory basis for granting the limitation:

> The Directed Parties [2] and their respective officers, directors, employees, representatives, advisors, attorneys, professionals and managers, in each case, solely in their respective capacities as a Directed Party, shall be entitled to a full limitation of liability from and shall have no liability for any and all claims, obligations, suits, judgments, damages, rights, causes of action, liabilities from, or in connection with, any action or inaction taken in furtherance of and/or in accordance with this Order, these Chapter 15 Cases, the Brazilian RJ Proceeding, the Brazilian Confirmation Order and the RJ Plan, except for any liability arising from any action or inaction constituting gross negligence, fraud, willful misconduct or professional malpractice as determined by this Court.

(Order ¶ 7; Objection at 11.) Assuming *arguendo* that the limitation on liability is appropriate, the UST also objected on the grounds that the limitation "lacks the hallmarks of an acceptable exculpation provision in a chapter 11 proceeding": there is

2. The ''Directed Parties'' are: (i) The Bank of New York Mellon, as the indenture trustee (the ''Indenture Trustee'') under the indentures related to the 2024 Notes, the 2026 Notes, the 2027 Notes, the 2029 Notes, the 2033 Notes, the 2046 Notes, and the Perpetual Notes (collectively, the ''NY Notes''); (ii) the Depository Trust Company (''DTC''), Euroclear Bank S.A./N.V., and/or Clearstream Banking, Société Anonyme, as clearing systems, as applicable; (iii) Epiq Corporate Restructuring LLC; and (iv) the custodians of the NY Notes. (Order ¶ 5 n.3.)

no temporal limitation, and the clause creates "prospective immunity by exculpation." (Objection at 13–14.) Furthermore, the UST argued, the exculpation applies to too many parties—it applies to anyone in connection with "any action or inaction taken in furtherance of and/or in accordance with this Order, this Chapter 15 Case, the Brazilian RJ Proceeding, the Brazilian Confirmation Order and the RJ Plan," so the exact parties to whom the exculpation applies are not known, and it also covers non-estate fiduciaries. (*Id* at 15.) (The UST also objected to the absence of a carveout for bad faith, breach of fiduciary duty, and legal malpractice, all of which are required by the New York Rules of Professional Conduct; the Order was amended to include a carveout for malpractice claims.) Second, the UST argued that the proposed order created impermissible nonconsensual third-party releases. As compared to the release of the debtors contemplated by the RJ Plan (cited above, Section 11.5 of the RJ Plan), the order provides as follows:

> Except as provided in paragraph 12 of this Order, all persons and entities are permanently enjoined and restrained from (i) commencing or taking any action or asserting any claim, within the territorial jurisdiction of the United States, that is inconsistent with, in contravention with, or would interfere with or impede the administration, implementation and/or consummation of the RJ Plan, the Brazilian Confirmation Order or the terms of this Order; and (ii) taking any action against the Debtors or their property located in the territorial jurisdiction of the United States to recover or offset any debt or claims that are extinguished, novated, cancelled, discharged or released under the RJ Plan and the Brazilian Confirmation Order. No action may be taken within the territorial jurisdiction of the United States to confirm or enforce any award or judgment that would otherwise be in violation of this Order without first obtaining leave of this Court.

(Order ¶ 11.) The UST took the position that (1) this language creates "an expansive third-party release" because it "enjoins *all persons and entities* from *taking any action*." (Objection at 16–17.) The UST argued that section 1521(a) of the Code does not provide courts with a statutory basis for issuing orders which contain third-party releases: applying the canon of *ejusdem generis* as the Supreme Court did in *Harrington v. Purdue Pharma*, 603 U.S. 204, 144 S.Ct. 2071, 219 L.Ed.2d 721 (2024) (henceforth "*Purdue*"), the UST claimed that third-party releases are "not similar in nature to the relief provided in section 1521(a)" because third-party releases are not designed to protect a debtor (unlike the provisions of section 1521(a)), so cannot fit under that subsection of the Code. (Objection at 17–18.) The UST also argued that the release supposedly created by the above section of the Order does not fall within the category of "appropriate relief" under section 1521(a) of the Code because "third-party releases may not be imposed without consent through a bankruptcy plan under United States law," citing *Purdue*. (*Id.* at 18.)

D. Foreign Representative's Reply

The Foreign Representative's reply can be summarized as follows. First, the language of the order limiting liability is customary and similar to language this Court approved in other chapter 15 cases. (Reply at 4–5.) Second, the provision in Section 11.5 of the RJ Plan is proper under both Brazilian and U.S. law, as it does not create a third-party release. (*Id.* at 5–6.) The Foreign Representative then argued that the UST misread the language of the proposed confirmation order, as it does not

create a wide-reaching release but rather bars only those "actions that contravene relief set forth in the RJ Plan and Brazilian Confirmation Order" —i.e., the order sought only "enforcement of the relief granted in the Brazilian RJ Proceeding within the territorial jurisdiction of the United States and nothing more." (*Id.* at 6.) Even if Section 11.5 of the RJ Plan did create nonconsensual third-party releases, however, the Foreign Representative maintained that enforcement of such a provision is acceptable because *Purdue* does not apply in Chapter 15 cases. (*Id.* at 7–9.)

II. LEGAL STANDARD

A. Relief in a Chapter 15 Proceeding

[1] In 2005, Congress adopted Chapter 15 of the Bankruptcy Code based on the Model Law on Cross-Border Insolvency proposed by the United Nations Commission on International Trade Law in 1997. Chapter 15 replaced section 304 of the Bankruptcy Code, which originally provided the statutory framework for cases filed in the United States that are ancillary to insolvency proceedings filed in foreign countries. Section 304 provided a bankruptcy court with broad discretion in fashioning an appropriate remedy in a particular case. While Chapter 15 replaced section 304, many of the principles underlying section 304 remain in effect under chapter 15, including the principles of comity and cooperation with foreign courts in deciding whether to grant the foreign representative additional post-recognition relief. *In re SPhinX, Ltd.*, 351 B.R. 103, 112 (Bankr. S.D.N.Y. 2006) ("[C]hapter 15 maintains—and in some respects enhances—the 'maximum flexibility,' that section 304 provided bankruptcy courts . . . in light of principles of international comity and respect for the laws and judgments of other nations." (internal citation omitted)).

Section 1520 outlines the mandatory relief automatically granted upon recognition of a foreign main proceeding under Chapter 15. The relief available under this provision is not at issue in this case. Rather, it is the relief available to the foreign representative at the Court's discretion under sections 1521 and 1507 of the Code which are relevant.

[2–4] "Section 1521(a) outlines the discretionary relief a court may order upon recognition of a foreign proceeding, whether main or non-main .... The discretion that is granted is 'exceedingly broad' since a court may grant 'any appropriate relief' that would further the purposes of chapter 15 and protect the debtor's assets and the interests of creditors." *In re Atlas Shipping A/S*, 404 B.R. 726, 739 (Bankr. S.D.N.Y. 2009) (internal citation omitted). Section 1521(a) reads as follows:

> (a) Upon recognition of a foreign proceeding, whether main or nonmain, where necessary to effectuate the purpose of this chapter and to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief, including—
>
> (1) staying the commencement or continuation of an individual action or proceeding concerning the debtor's assets, rights, obligations or liabilities to the extent they have not been stayed under section 1520(a);
>
> (2) staying execution against the debtor's assets to the extent it has not been stayed under section 1520(a);
>
> (3) suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under section 1520(a);
>
> (4) providing for the examination of witnesses, the taking of evidence or the delivery of information concerning

> the debtor's assets, affairs, rights, obligations or liabilities;
>
> (5) entrusting the administration or realization of all or part of the debtor's assets within the territorial jurisdiction of the United States to the foreign representative or another person, including an examiner, authorized by the court;
>
> (6) extending relief granted under section 1519(a); and
>
> (7) 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). To determine what relief could fall under the catch-all at the beginning of the subsection ("additional relief"), courts look to relief available under the now-deleted section 304 of the Code. Courts give varying weight to section 304 precedent. *See In re Vitro S.A.B. de CV*, 701 F.3d 1031, 1057 (5th Cir. 2012) (holding that relief available under section 1521(a) is "co-extensive" with that available under section 304); *compare In re Cozumel Caribe, S.A. de C.V.*, 482 B.R. 96, 114 (Bankr. S.D.N.Y. 2012) (viewing section 304 caselaw as providing "useful precedents"). Relief under section 1521 will 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).

[5] Section 1507 provides additional discretionary grounds for the Court to grant relief to the foreign representative. Section 1507 reads:

> (a) Subject to the specific limitations stated elsewhere in this chapter the court, if re cognition is granted, may provide additional assistance to a foreign representative under this title or under other laws of the United States.
>
> (b) In determining whether to provide additional assistance under this title or under other laws of the United States, the court shall consider whether such additional assistance, consistent with the principles of comity, will reasonably assure—
>
> (1) just treatment of all holders of claims against or interests in the debtor's property;
>
> (2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;
>
> (3) prevention of preferential or fraudulent dispositions of property of the debtor;
>
> (4) distribution of proceeds of the debtor's property substantially in accordance with the order prescribed by this title; and
>
> (5) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.

11 U.S.C. § 1507.

[6] Section 1506 provides that a bankruptcy court may decline to grant relief requested in a chapter 15 case if the action would be "manifestly contrary to the public policy of the United States." 11 U.S.C. §§ 1506. This public policy exception is narrowly construed. *See In re Ocean Rig UDW Inc.*, 570 B.R. 687, 707 (Bankr. S.D.N.Y. 2017); *see also In re Toft*, 453 B.R. 186, 195 (Bankr. S.D.N.Y. 2011) ("[T]hose courts that have considered the public policy exception codified in [section] 1506 have uniformly read it narrowly and applied it sparingly.").

B. Exculpations in Chapter 11s

[7–9] "Exculpation provisions are designed to 'insulate court-supervised fiduciaries and some other parties from claims that are based on actions that relate to the restructuring.' " *In re Genesis*

Glob. HoldCo, LLC, 660 B.R. 439, 527 (Bankr. S.D.N.Y. 2024) (quoting *In re Aegean Marine Petroleum Network Inc.*, 599 B.R. 717, 720 (Bankr. S.D.N.Y. 2019)). "It is well settled that an exculpation clause approved at confirmation may exculpate estate fiduciaries like a committee, its members, and estate professionals for their actions in the bankruptcy case except where those actions amount to willful misconduct or gross negligence." *In re LATAM Airlines Grp. S.A.*, No. 20-11254 (JLG), 2022 WL 2206829, at *50 (Bankr. S.D.N.Y. June 18, 2022) (citations omitted). Such provisions in chapter 11 plans are "not uncommon" and are generally permissible "so long as they are properly limited and not overly broad." *Id.* at *49 (quoting *In re Nat'l Heritage Found., Inc.*, 478 B.R. 216, 233 (Bankr. E.D. Va. 2012)).

[10] Generally, it has been recognized that:

> [A] proper exculpation provision is a protection not only of court-supervised fiduciaries, but also of court-supervised and court-approved transactions. If this Court has approved a transaction as being in the best interests of the estate and has authorized the transaction to proceed, then the parties to those transactions should not be subject to claims that effectively seek to undermine or second-guess this Court's determinations. In the absence of gross negligence or intentional wrongdoing, parties should not be liable for doing things that the Court authorized them to do and that the Court decided were reasonable things to do.

Aegean Marine Petroleum Network, 599 B.R. at 721.

[11, 12] In the Chapter 11 context, "in general, exculpated parties who are not estate fiduciaries are entitled to benefit from a broad exculpation provision where they have been actively involved in all aspects of the Chapter 11 Cases and have made significant contributions to the success of the cases." *In re Wythe Berry Fee Owner LLC*, No. 22-11340 (MG), 2024 WL 2767121, at *13 (Bankr. S.D.N.Y. May 29, 2024) (cleaned up). This Court in *Wythe Berry* exculpated a creditor group, among others, because its participation "was instrumental to the Debtor formulating a plan on an expedited basis, and their support was essential to the successful negotiation of the Plan" and related agreements. *Id.* (cleaned up). And while the exculpation reached beyond the set of estate fiduciaries, it still was limited just to "court-supervised and court-approved transactions." *Aegean Marine Petroleum Network*, 599 B.R. at 721. *See also In re Residential Cap. LLC*, Case No. 12-12020 (MG), 2013 WL 12161584, at *13 (Bankr. S.D.N.Y. Dec. 11, 2013) (order confirming plan contained exculpations for parties "instrumental to the successful prosecution of the Chapter 11 Cases or their resolution pursuant to the Plan, and/or provided a substantial contribution to the Debtors"); *KG Winddown, LLC, et al.*, Case No. 20-11723 (MG) (Bankr. S.D.N.Y. 2020) (ECF Doc. # 494) (permitting exculpation of purchaser as non-estate fiduciary); *Genco Shipping & Trading Ltd.*, 513 B.R. 233 (Bankr. S.D.N.Y. 2014) (ECF Doc. # 322) (approving exculpation provision in plan providing exculpation for non-estate fiduciaries). "In determining whether to approve exculpation provisions, courts also consider whether the beneficiaries of the exculpation participated in good faith in negotiating the plan and bringing it to fruition, and whether the provision is integral to the plan .... Courts in this and other districts have approved exculpation provisions ... for estate fiduciaries and non-estate fiduciaries." *In re: Klaynberg*, No. 22-10165 (MG), 2023 WL 5426748, at

*17–18 (Bankr. S.D.N.Y. Aug. 22, 2023). Finally, courts in the Second Circuit allow exculpation provisions so long as they apply to post-petition conduct and explicitly exclude gross negligence and willful misconduct. *Id.* ("Courts in the Second Circuit have held that [exculpation provisions] . . . are appropriate when confined to postpetition activity and explicitly exclude gross negligence and willful misconduct."). *But see In re PTL Holdings LLC*, No. 11-12676 BLS, 2011 WL 5509031, at *12 (Bankr. D. Del. Nov. 10, 2011) (sustaining UST's objection to exculpation of non-estate fiduciaries and limiting exculpation clause to just estate fiduciaries).

Additionally, courts in this district have exculpated behavior that occurred after the effective date of a plan of reorganization when that behavior was "authorized by bankruptcy courts to carry out the bankruptcy process." *See In re Ditech Holding Corp.*, No. 19-10412 (JLG), 2021 WL 3716398, at *9 (Bankr. S.D.N.Y. Aug. 20, 2021) ("It is settled that exculpatory provisions are proper to protect those authorized by bankruptcy courts to carry out the bankruptcy process, even after the effective date of a plan . . . . The Exculpation Provision expressly covers acts falling under the 'administration of the Plan'—which by definition occurs post-Effective Date . . . . [T]he Exculpation Provision in Section 10.7 of the Plan applies to shield the conduct of these Individual Defendants [in implementing the plan] from collateral attack in a separate lawsuit."); *In re Aegean Marine Petroleum Network Inc.*, 599 B.R. at 720 ("I think that a proper exculpation provision is a protection not only of court-supervised fiduciaries, but also of court supervised and court-approved transactions . . . . In the absence of gross negligence or intentional wrongdoing, parties should not be liable for doing things that the Court authorized them to do and that the Court decided were reasonable things to do."); *In re Granite Broad. Corp.*, 369 B.R. 120, 139 (Bankr. S.D.N.Y. 2007) (approving exculpation clause "for actions in connection, related to, or arising out of the Reorganization Cases," noting that the language "generally follows the text that has become standard in this district and is sufficiently narrow to be unexceptional" and that "the Plan provides exculpation only for acts or omissions in connection with the Plan and the bankruptcy cases. It requires, in effect, that any claims in connection with the bankruptcy case be raised in the case and not be saved for future litigation."); *In re Flushing Hosp. & Med. Ctr.*, 395 B.R. 229, 235 (Bankr. E.D.N.Y. 2008) ("It is apparent that the exculpation provisions quoted above are not limited to pre-effective date claims. By their terms, these provisions apply to 'any act or omission in connection with, or arising out of . . . the administration of the Plan.' Adopting [the objector's] interpretation would render the 'administration of the Plan' clause meaningless, because conduct during the administration of the Plan necessarily occurs after the effective date of the Plan.").

Exculpations have been granted by courts in this district in Chapter 15 cases, including protection of non-fiduciaries. *See, e.g.*, *In re Olinda Star Ltd.*, 614 B.R. 28, 48 (Bankr. S.D.N.Y. 2020) (exculpating, among others, the indenture trustees and record holders of certain debtor-issued notes, as well as an information agent, because "such relief is necessary and appropriate to prevent interference with the consummation of" the foreign scheme of arrangement and "because without such exculpations the ability of [the foreign debtors' liquidators] and their advisors to take action to effectuate the restructuring would be limited"); *In re Oi S.A.*, 587 B.R. 253, 269 n.3 (Bankr. S.D.N.Y. 2018) (noting that the court found that the exculpation

requested by the foreign representative was "appropriate under the circumstances").

C. *Purdue* in Chapter 15s

Courts in this district have long enforced foreign restructuring plans in Chapter 15 cases which include nonconsensual third-party releases, most doing so pursuant to sections 1507 and 1521 of the Code. *See, e.g.*, *In re Ocean Rig UDW Inc.*, 570 B.R. 687 (Bankr. S.D.N.Y. 2017) (recognizing and enforcing scheme of arrangement that released affiliate guarantees); *In re Towergate Fin. plc*, Case No. 15–10509–SMB (Bankr. S.D.N.Y. Mar. 27, 2015) (ECF Doc. # 16); *In re New World Res. N.V.*, Case No. 14-12226-SMB (Bankr. S.D.N.Y. Sept. 9, 2014) (ECF Doc. # 20); *In re Sino–Forest Corp.*, 501 B.R. 655, 665 (Bankr. S.D.N.Y. 2013) (enforcing foreign order containing third-party releases); *In re Magyar Telecom B.V.*, Case No. 13-13508-SHL, 2013 WL 10399944 (Bankr. S.D.N.Y. Dec. 11, 2013) (ECF Doc. # 26); *In re Metcalfe & Mansfield Alt. Inv.*, 421 B.R. 685, 696 (Bankr. S.D.N.Y. 2010) (concluding that "principles of enforcement of foreign judgments and comity in chapter 15 cases strongly counsel approval of enforcement in the United States of the third-party non-debtor release and injunction provisions included in the Canadian Orders, even if those provisions could not be entered in a plenary chapter 11 case.").

The Supreme Court held in *Purdue* that "the Bankruptcy Code does not authorize a bankruptcy court to approve, as part of a plan of reorganization under Chapter 11, a release and injunction that extinguishes claims against non-debtor third parties without the consent of affected claimants." 603 U.S. 204, 204, 144 S.Ct. 2071, 219 L.Ed.2d 721 (2024). To date, only one written decision has been issued on the question whether *Purdue* applies in chapter 15 proceedings: *In re: Credito Real, S.A.B. de C.V., SOFOM, E.N.R.*, No. 25-10208 (TMH), 2025 WL 977967, at *1 (Bankr. D. Del. Apr. 1, 2025). The *Credito Real* case is discussed below.

III. DISCUSSION

For this Court to provide the relief requested by the Foreign Representative, it must be available to the Foreign Representative under either sections 1507 or 1521 of the Code. The authority to issue the exculpation and the third-party release contained in the Order must, therefore, stem from one of these two sections of the Code.

One of the UST's objections is consistent across both provisions: that the provision provides relief beyond the scope provided by the Brazilian Confirmation Order and the RJ Plan. This objection is addressed first, followed by provision-specific objections.

A. Provision of Relief Outside Scope of Foreign Court Orders and Plan

[13] Both the text of Chapter 15 and caselaw building upon it indicate that U.S. courts operating pursuant to Chapter 15 are *not* limited in the discretionary relief they grant by that relief afforded by the foreign court or the plan of reorganization. There are limitations to courts' discretionary powers under Chapter 15, but they are not obligated to grant only that relief which is similar or parallel to that granted abroad or specified in the plan at issue.

[14, 15] The text of Chapter 15 of the Code indicates that U.S. courts, despite being ancillaries to foreign proceedings when operating under Chapter 15, *see In re Foreign Econ. Indus. Bank Ltd., "Vneshprombank" Ltd.*, 607 B.R. 160, 168 (Bankr. S.D.N.Y. 2019), are not hamstrung by the operations of foreign courts and law when determining what relief to grant to

the foreign representative. Section 1521(a) enables courts to grant "any appropriate relief" so long as that relief is "necessary to effectuate the purpose of [Chapter 15] and to protect the assets of the debtor or the interests of the creditors" (followed by a non-exclusive list of examples of the type of relief the court may grant). Section 1507 permits a court to grant "additional assistance" subject to "specific limitations stated elsewhere in" Chapter 15, so long as the "additional assistance" is available "under this title or under other laws of the United States." Under the "expansive grant of power" in section 1507, "even if a court cannot grant relief under section 1521(a)(7), it may grant relief under section 1507." *Credito Real*, 2025 WL 977967, at *11. The drafters of Chapter 15 referenced principles of comity as limiting factors, rather than foreign rulings or even the availability of relief under foreign law. *See* 11 U.S.C. § 1507(b) (requiring court to consider "the principles of comity" when deciding whether to grant relief); *In re Comair Ltd.*, No. 21-10298(JLG), 2021 WL 5312988, at *9 (Bankr. S.D.N.Y. Nov. 14, 2021) ("Post-recognition relief under section 1521 'is largely discretionary and turns on subjective factors that embody the principles of comity.' ") (internal citation omitted).

[16] The relief provided in the Recognition Order puts an enforcement mechanism in the U.S. order that prevents disgruntled creditors who are bound by the RJ Plan from suing in the U.S. to recover on claims that are barred by the RJ Plan. Granting this relief to the Foreign Representative is in furtherance of comity, as it enables the full enforcement of the RJ Plan by closing the door to potential workarounds to the Plan.

B. Exculpation

The provision in the Order which provides for an exculpation reads as follows:

> The Directed Parties and their respective officers, directors, employees, representatives, advisors, attorneys, professionals and managers, in each case, solely in their respective capacities as a Directed Party, shall be entitled to a full limitation of liability from and shall have no liability for any and all claims, obligations, suits, judgments, damages, rights, causes of action, liabilities from, or in connection with, any action or inaction taken in furtherance of and/or in accordance with this Order, these Chapter 15 Cases, the Brazilian RJ Proceeding, the Brazilian Confirmation Order and the RJ Plan, except for any liability arising from any action or inaction constituting gross negligence, fraud, willful misconduct or professional malpractice as determined by this Court.

(Order ¶ 7.)

The UST objected to the provision of this relief, as discussed above. It relies on a Fifth Circuit case, *Vitro S.A.B. de C.V.*, 701 F.3d 1031, 1044 (5th Cir. 2012), to structure its analysis of section 1521 and 1507. The Fifth Circuit in *Vitro* adopted a three-step framework to determine whether relief requested by a foreign representative is available: "a court . . . should first consider the specific relief enumerated under § 1521(a) and (b). If the relief is not explicitly provided for there, a court should then consider whether the requested relief falls more generally under § 1521's grant of any appropriate relief. We understand 'appropriate relief' to be relief previously available under Chapter 15's predecessor, § 304. Only if a court determines that the requested relief was not formerly available under § 304 should a court consider whether relief would be appropriate as 'additional assistance' under § 1507." *Id.* at 1054. Following this rubric, the UST argued that none of the seven

enumerated bases for relief under section 1521 apply: the first five concern the debtor and do not explicitly authorize exculpations, the sixth concerns extension of relief upon the filing of a petition, and the seventh concerns the relief available to a trustee which the UST claimed is irrelevant to the limitation of liability in the Order. (Objection at 12.) The UST also found no support for the exculpation in section 1507. Without providing much support for its argument, it claimed that the foreign representative "can only get the relief that is set forth in the RJ Plan or is otherwise sanctioned by the Bankruptcy Code—neither of which circumstance exists here." (Objection at 17.) The first part of this argument—that this Court cannot grant such an exculpation because the exact relief is not in the RJ Plan—is addressed and rejected above. The second part of the argument—that such exculpation is not "sanctioned by the Bankruptcy Code"—is addressed below.

[17] First, courts in this district are not bound by the analytical approach taken in *Vitro*. *See, e.g.*, *In re PT Bakrie Telecom Tbk*, 628 B.R. 859, 877 (Bankr. S.D.N.Y. 2021) (noting that, as between sections 1521 and 1507, "often courts have found it unnecessary to determine the primacy of these two provisions if the outcome would be the same under either section," and collecting cases); *In re Atlas Shipping*, 404 B.R. at 741 (granting relief under section 1521 and concluding that it was unnecessary to determine whether "additional assistance" was available under section 1507).

[18] Courts can provide exculpations in Chapter 15 proceedings to the same extent they can in Chapter 11 cases pursuant to sections 1507 and 1521, so long as the exculpation is not contrary to U.S. public policy in violation of section 1506.

[19, 20] In the Chapter 11 context, at least in this district, non-estate fiduciaries are entitled to exculpation when they have been actively involved in the bankruptcy proceeding and made significant contributions to its success, and when the exculpation applies to court-supervised and -approved transactions. *In re Wythe Berry Fee Owner LLC*, 2024 WL 2767121, at *13; *In re: Klaynberg*, No. 22-10165 (MG), 2023 WL 5426748, at *17 (Bankr. S.D.N.Y. Aug. 22, 2023) (noting that courts also look to whether parties have acted in good faith and look to whether the exculpation provision is critical to plan implementation). Gross negligence and willful misconduct must be excluded from the scope of the exculpation provision. *In re Wythe Berry Fee Owner LLC*, 2024 WL 2767121, at *13. The logical analogue in the Chapter 15 context is exculpation of parties who have been actively involved in the foreign restructuring, and who are exculpated for behavior relating to court-supervised and -approved transactions, whether those transactions are supervised here or abroad. (Where a foreign plan is enforced in the U.S. pursuant to a Chapter 15 recognition proceeding, the U.S. court may also be the one supervising and approving.) Here, the exculpated parties (the Directed Parties) are the indenture trustee of certain notes cancelled pursuant to the RJ Plan, the custodians of those notes, and the clearing system involved with the effectuation of the RJ Plan. (Order ¶ 7.) These parties are clearly essential to the implementation of the RJ Plan, which is being supervised by a Brazilian court. There is no indication in the record before the Court that the Directed Parties have acted in anything but good faith. Moreover, the Foreign Representative has submitted that the cancellation of these notes is "one of the central parts of the RJ Plan" and that without the cooperation of the Directed Parties, they cannot be cancelled;

no party has contested this claim. (Reply at 9.) The exculpation provision in the Order is, therefore, integral to the recognition and enforcement of the RJ Plan. The Court finds that the exculpation provision in the Order complies with the requirements courts place on exculpation provisions in Chapter 11 cases. *See also In re Olinda Star*, 614 B.R. at 48 (granting exculpation when "necessary and appropriate to prevent interference with the consummation of the foreign restructuring scheme").

C. Putative Nonconsensual Third-Party Release

The provision in the Order which the UST claims creates impermissible third-party releases reads as follows:

> Except as provided in paragraph 12 of this Order, all persons and entities are permanently enjoined and restrained from (i) commencing or taking any action or asserting any claim, within the territorial jurisdiction of the United States, that is inconsistent with, in contravention with, or would interfere with or impede the administration, implementation and/or consummation of the RJ Plan, the Brazilian Confirmation Order or the terms of this Order; and (ii) taking any action against the Debtors or their property located in the territorial jurisdiction of the United States to recover or offset any debt or claims that are extinguished, novated, cancelled, discharged or released under the RJ Plan and the Brazilian Confirmation Order. No action may be taken within the territorial jurisdiction of the United States to confirm or enforce any award or judgment that would otherwise be in violation of this Order without first obtaining leave of this Court.

(Order ¶ 11.)

[21] It is not clear that this language creates a third-party release: unlike most third-party releases, the third parties are on the plaintiff's side of the "v." ("all persons and entities," language which conceivably covers more than just the debtors' creditors and claimholders), as the defendant's side consists only of "the Debtors [and] their property."[3] Assuming *arguendo* that paragraph 11 of the Order does create nonconsensual third-party releases, the Court finds that it has the power to issue such an order in a Chapter 15 case, pursuant to at least section 1521, in support of a foreign proceeding.

[22] Since subsections 1521(a)(1)–(7) do not expressly authorize non-debtor third-party releases, a court should decide whether the requested relief can be considered "appropriate relief" under section 1521(a). To do so, the Court must first examine the plain language of section 1521. *Grajales v. Comm'r of Internal Revenue*, 47 F.4th 58, 62 (2d Cir. 2022) ("Statutory interpretation always begins with the plain language of the statute.") (internal citation and quotation marks omitted). It will then look at caselaw from Chapter 15's predecessor, section 304, which, as noted above, is instructive in interpreting the scope of section 1521(a).

3. If this provision is not, in fact, a third-party release, it should be considered an injunction in support of the RJ Plan, given that, as the Foreign Representative convincingly explained, this section of the Order is carefully limited to bar only those actions that contravene relief provided in the RJ Plan and the Brazilian Confirmation Order. (Reply at 6.) All this provision does, per the Foreign Representative, is enforce the relief granted in the Brazilian RJ Proceeding within the territorial jurisdiction of the United States. (*Id.*) Under this reading, the provision would be enforced as a foreign plan-supporting injunction, a type of relief available under section 1521 of the Code. *See, e.g., In re Rede Energia S.A.*, 515 B.R. 69, 93 (Bankr. S.D.N.Y. 2014); *In re Olinda Star*, 614 B.R. at 47–48.

1. Text of Chapter 15

Judge Horan's recent opinion in *Credito Real* provides a lucid explanation why courts can enforce nonconsensual third-party releases found in foreign plans of reorganization. Here, all parties agreed during the recognition hearing that there is no third-party release in the RJ Plan, or even in the Brazilian court order confirming the RJ Plan. Rather, there is a provision in *this* Court's order recognizing the Brazilian proceeding as the foreign main proceeding and enforcing the RJ Plan which might be construed as a nonconsensual third-party release. However, there is no meaningful difference between *enforcing, via order, a foreign plan* with a third-party release provision, and *issuing an order enforcing a foreign plan*, which order contains a third-party release which itself is not in the foreign plan. The practical effect is the same—a U.S. court issues an order, which takes effect in the United States, which releases claims over which the U.S. court has jurisdiction.

In *Credito Real*, Judge Horan addressed a common objection to the grant of third-party releases under sections 1521 and 1507, one which the UST made here: that courts must apply *Purdue*'s *ejusdem generis* approach to interpreting section 1123(b) of the Code to sections 1521 and 1507, and in so doing, find that courts have no authority to grant third-party releases under those sections. Judge Horan walked through the differences in language between section 1123(b) and, in turn, 1521 and 1507, to find that courts wield significantly more power under the latter two sections. Regarding section 1521, he notes first that it allows a court to grant "any" appropriate relief, and then provides a non-exhaustive list of examples. 2025 WL 977967 at *9. Section 1521(a)(7) qualifies the "any . . . including" language in the section "by explaining that any additional relief a court grants should be of the kind that is available to a trustee." *Id.* at *10. (Per Judge Horan, it is "well-settled that enforcement of a third-party release contained in a foreign plan is appropriate under that section." *Id.* (*citing In re Arctic Glacier Int'l, Inc.*, 901 F.3d 162 (3d Cir. 2018) (enforcing third party releases in a Canadian plan of arrangement); *In re Avanti Commc'ns Grp. PLC*, 582 B.R. at 618 (finding that it had the power to enforce third-party releases under either section 1521(a)(7) or section 1507(a))).) Section 1521 thus differs from section 1123(b), which "simply states that a court may include any 'other' chapter 11 plan provision that is not "inconsistent with the applicable provisions of this title.' " *Id.* The Supreme Court in *Purdue* read "other" as directing courts to look to the other provisions of 1123(b) to determine what further relief a court could grant. But "section 1521(a) does not direct courts to look to the 'other' provisions"—listed in subsections (a)(1)–(7)—"when providing relief under its catchall," instead allowing "courts to grant 'any additional relief that may be available to a trustee.' " *Id.* The limitation in section 1521(a), therefore, is not whether the relief is similar to those listed in 1521(a)(1)–(7), but whether the relief is available to the trustee. Moreover, section 1521(a)(7) qualifies its "any . . . including" language by listing specific relief a court is *barred* from granting under that section—and that list of prohibited relief does not include nonconsensual third-party releases. "By establishing explicit boundaries, Congress allowed relief that does not exceed those boundaries . . . . By specifically enumerating relief that the court cannot grant under section 1521, Congress more concretely defined the outer bounds of what the court can grant, thus also more concretely defining what is included in what the court can grant, bearing in mind the guiding principles of comity and coopera-

tion." *Id.*; *see also id.* at *11 (citing the canon of *expressio unius* to support the conclusion). Judge Horan conducts a similar analysis of section 1507 to again find that, unlike section 1123(b), it establishes a broad set of powers and precisely defines the court's limitations under that section, "provid[ing] a more explicit and fuller picture of the broad relief a court may grant, as compared to that in section 1123(b)(6)." *Id.* at *11. In sum, both sections 1521 and 1507 differ from 1123(b) "because section 1123(b) does not expressly establish specific boundaries; instead, it directs courts to look to the rest of the Bankruptcy Code to determine whether a provision is appropriate. Because Congress expressed specific prohibitions [in 1521 and 1507], courts do not need to read further into its words like they do for section 1123(b). The plain language of section 1507 (and section 1521) already enumerates the boundaries unambiguously." *Id.* at *12.

[23] Section 1522(a) permits the Court to grant relief pursuant to section 1521 only if the interests of creditors, the debtor, and other interested entities are "sufficiently protected." "Sufficient protection" embodies "three basic principles: 'the just treatment of all holders of claims against the bankruptcy estate, the protection of U.S. claimants against prejudice and inconvenience in the processing of claims in the [foreign] proceeding, and the distribution of proceeds of the [foreign] estate substantially in accordance with the order prescribed by U.S. law.' " *Atlas Shipping*, 404 B.R. at 740. The Court finds that, in the present case, the issuance of a third-party release which enables the distribution of the foreign debtor's estate in the manner set forth in the RJ Plan enables the just treatment of all claimants, substantially in accordance with U.S. law.

[24] Section 1506 provides another boundary: a bankruptcy court may decline to grant relief requested in a Chapter 15 case if the action would be "manifestly contrary to the public policy of the United States." 11 U.S.C. §§ 1506. This public policy exception is narrowly construed. *See In re Ocean Rig UDW Inc.*, 570 B.R. at 707. *Purdue* did not hold that nonconsensual third-party releases are contrary to the public policy of the U.S. In fact, the majority expressly stated that "[b]oth sides of this policy debate may have their points." *Purdue*, 603 U.S. at 226, 144 S.Ct. 2071. The Supreme Court's holding was narrow: Chapter 11 of Title 11 does not provide bankruptcy courts, in Chapter 11 cases, with the authority to authorize such releases. It cannot be read to hold that nonconsensual third-party releases are "manifestly contrary to" U.S. public policy such that they would be barred by section 1506. *See also Credito Real*, 2025 WL 977967, at *15–16 (similar).

Following the logic of *Credito Real* and *Purdue*, the Court finds that the text of section 1521 permits the grant of a nonconsensual third-party release in support of a foreign debtor's plan of reorganization. Pre-Code caselaw, as well as opinions interpreting section 304, also support this finding.

Longstanding precedent holds that bankruptcy courts can strip U.S. parties of rights they have under the laws of the United States. As far back as 1883, the Supreme Court sanctioned the enforcement of a Canadian scheme of arrangement under which certain bonds would be issued to replace prior ones. U.S. bondholders argued that the scheme of arrangement, to which they had not consented, was imposed in such a way that violated the U.S. Constitution's bar on certain contractual impairments and hence the scheme should not be recognized by U.S. courts; the Supreme Court rejected this argument:

> [E]very person who deals with a foreign corporation impliedly subjects himself to such laws of the foreign government, affecting the powers and obligations of the corporation with which he voluntarily contracts, as the known and established policy of that government authorizes. To all intents and purposes, he submits his contract with the corporation to such a policy of the foreign government, and whatever is done by that government in furtherance of that policy which binds those in like situation with himself, who are subjects of the government, in respect to the operation and effect of their contracts with the corporation, will necessarily bind him.

Canada Southern Ry. Co. v. Gebhard, 109 U.S. 527, 537–38, 3 S.Ct. 363, 27 L.Ed. 1020 (1883). And building on *Gebhard*, the Second Circuit in *Cunard* dismissed a U.S. lawsuit solely on the grant of comity to a foreign proceeding. *Cunard S.S. Co. Ltd. v. Salen Reefer Servs. A.B.*, 49 B.R. 614, 618 (S.D.N.Y. 1985), *aff'd sub nom. Cunard S.S. Co. v. Salen Reefer Servs. AB*, 773 F.2d 452, 452 (2d Cir. 1985). The sole concern of the Second Circuit was that the foreign court governing the foreign proceeding was a court of competent jurisdiction, and that enforcement of the foreign proceeding would not violate public policy in the U.S.; the fact that U.S. law would have led to a different outcome, and even the fact that a right granted by U.S. law was being stripped by enforcement, did not matter. *Id.* at 617–19.

[25] A battery of similar cases makes it clear that a party can lose rights in an ancillary proceeding which it otherwise would have had in a plenary case under the Bankruptcy Code. *See, e.g.*, *In re Ephedra Prods. Liab. Litig.*, 349 B.R. 333, 337 (S.D.N.Y. 2006) (recognizing Canadian order as an exercise of comity even though it overrode a defendant's constitutional right to a civil jury trial); *In re Bd. of Directors of Multicanal S.A.*, 307 B.R. 384, 389–91 (Bankr. S.D.N.Y. 2004) (holding that foreign law can "override" U.S. law (specifically, the Trust Indenture Act) via the enforcement of a foreign plan pursuant to section 304 which deprived a creditor of rights that he would have had under the TIA); *see also Allstate Life Ins. Co. v. Linter Group Ltd.*, 994 F.2d 996, 999–1000 (2d Cir.1993) (dismissing bondholders' federal securities fraud action in granting comity to Australian insolvency proceeding, as it would have been "inefficient and inequitable to permit the individual claims to go forward. Indeed, since these individuals were sued solely because of their affiliation with the [foreign debtors], to allow these claims to go forward in the United States ... would defeat the purpose of granting comity in the first place."); *Lindner Fund, Inc. v. Polly Peck Int'l PLC*, 143 B.R. 807, 807–11 (S.D.N.Y.1992) (dismissing federal securities fraud action in favor of foreign reorganization based on comity and noting that "American courts have traditionally extended comity to foreign bankruptcy proceedings by dismissing actions filed by creditors in United States courts"); *Smith v. Dominion Bridge Corp.*, No. 96-7580, 1999 WL 111465, at *1–5 (E.D. Pa. Mar. 2, 1999) (staying action against foreign debtor in U.S. courts out of comity considerations, and noting that courts have, under certain circumstances, extended the stay to cover non-debtor co-defendants).

[26, 27] As the Second Circuit has previously stated, "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." *United JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V.*, 412 F.3d 418, 424 (2d Cir. 2005). So long as these guidelines are re-

spected, a long string of caselaw indicates that bankruptcy courts may, acting as ancillaries to foreign proceedings, extinguish claims that would be available in plenary actions in the U.S. in the name of comity.

2. Pre-*Purdue* Caselaw

Given the above analysis, it is not surprising that pre-*Purdue* chapter 15 courts which faced the question whether limitations on a bankruptcy court's powers in plenary cases carried over into the chapter 15 context came to the same conclusion that courts operating under section 304 did: ancillary cases are fundamentally different, and limitations that exist in plenary cases do not always carry over. In *In re Metcalfe & Mansfield Alternative Invs.*, the court had to determine whether a third-party release which might not be available in a plenary case under chapter 11 should be granted in a chapter 15. 421 B.R. at 694. The potential limiting factor there was not the appropriateness of the release under *Metromedia* (moot post-*Purdue*), but a more fundamental one—the *jurisdictional* limitation on chapter 11 courts in *Manville*. The *Metcalfe* court determined that the scope of its authority to release non-debtors in plenary proceedings did not matter because such jurisdictional limitations did not carry over into the chapter 15 context: "whatever the precise limits of a bankruptcy court's jurisdiction to approve a third-party non-debtor release and injunction in a plenary chapter 11 case, the important point for present purposes is that the jurisdictional limits derive from the scope of bankruptcy court 'related to' jurisdiction under 28 U.S.C. § 1334, and the prudential limits courts have applied in chapter 11 cases under the Bankruptcy Code. This Court is not being asked to approve such provisions in a plenary case; rather, the Court is being asked to order enforcement of provisions approved by the Canadian courts. The correct inquiry, therefore, is whether the foreign orders should be enforced in the United States in this chapter 15 case." *Id.* at 695–96. The *Metcalfe* court then moved onto what it considered to be the sole limiting factor: whether *principles of comity* counseled in favor of the grant. *Id. Metcalfe* was a section 1507 case, but its holding carries over into section 1521: there is no reason why a jurisdictional limitation *on bankruptcy courts acting in plenary cases* should hamper courts' ability to act as ancillaries to foreign proceedings. Its logic still holds after *Purdue*: *Purdue* only held that *chapter 11* of the Code does not give courts the power to grant such releases, and did not say anything about limitations on the power of courts to act as ancillaries to foreign proceedings under chapter 15.

[28] To summarize, (1) the plain text of Chapter 15, (2) caselaw under its predecessor (section 304), and (3) pre-*Purdue* caselaw in this district all support a finding that courts can, pursuant to section 1521 of the Code, issue orders pursuant to their discretionary powers under section 1521 which contain nonconsensual third-party releases, whether or not those releases originate from a foreign court. Having found that this power exists under section 1521, this Court need not conduct a full analysis of section 1507 to determine whether it, too, so permits. *See In re Sino-Forest Corp.*, 501 B.R. at 666 (recognizing and enforcing foreign court order approving non-debtor release); *In re Avanti Commc'ns Grp. PLC*, 582 B.R. at 618 (same); *Metcalfe & Mansfield*, 421 B.R. at 696 (same).

IV. CONCLUSION

For the foregoing reasons, this Court finds that it had the authority under the Code to issue the Order as written. The

United States Trustee's objections were **OVERRULED**.

IN RE: FAIRFIELD SENTRY LIMITED, et al., Debtors in Foreign Proceedings.

Fairfield Sentry Ltd. (In Liquidation), et al., Plaintiffs,

v.

BNP Paribas Securities Services Luxembourg, et al., Defendants.

Case No. 10-13164 (JPM)
Adv. Pro. No. 10-03627 (JPM)

United States Bankruptcy Court, S.D. New York.

Signed May 12, 2025

Background: Liquidators and foreign representatives of Chapter 15 debtors that had been established as feeder funds to allow investors to participate in New York-based Ponzi scheme and that were being liquidated in accordance with British Virgin Islands (BVI) law brought adversary proceeding seeking imposition of a constructive trust and recovery of inflated redemption payments made by debtors to investor, a Luxembourg bank which allegedly had knowledge of the underlying fraudulent scheme. Investor moved to dismiss for lack of personal jurisdiction.

Holdings: The Bankruptcy Court, John P. Mastando, III, J., held that:

(1) plaintiffs were not precluded from arguing investor had contacts with forum by arguing that redemption transfers were foreign for purposes of extraterritoriality;

(2) investor's investments in feeder funds demonstrated purposeful availment of forum;

(3) investor's use of United States-based correspondent accounts demonstrated purposeful availment of forum;

(4) investor's use of United States-based correspondent accounts was sufficiently related to the harm alleged;

(5) investor's United States-oriented business activity alone did not support exercise of specific jurisdiction; and

(6) exercising personal jurisdiction over investor was reasonable.

Motion denied.

1. Torts ⚿432

Under British Virgin Islands (BVI) law, lack of good faith, i.e. bad faith, includes wrongdoing by one who acts recklessly as well as one who acts with actual knowledge that he is acting wrongfully or willfully blinds himself to that fact.

2. Trusts ⚿102(1)

To establish a constructive trust claim under English law, which would apply in the British Virgin Islands (BVI), the plaintiff must show, first, a disposal of his assets in breach of fiduciary duty; second, the beneficial receipt by the defendant of assets which are traceable as representing the assets of the plaintiff; and third, knowledge on the part of the defendant that the assets he received are traceable to a breach of fiduciary duty.

3. Constitutional Law ⚿3964

To subject foreign defendant to personal jurisdiction in the United States, due process requires that the defendant have sufficient minimum contacts with the forum in which the defendant is sued such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. U.S. Const. Amend. 5.

Faculty

Thomas S. Kessler is a partner with Cleary Gottlieb Steen & Hamilton in its New York office, where he represents debtors, creditors and other parties-in-interest in a broad range of restructuring matters, including bankruptcy proceedings, out-of-court restructurings and bankruptcy-related transactions. He advises clients in high-profile restructuring matters, and he has worked with debtors and creditors to navigate complex, multi-billion dollar distressed situations and regularly litigates high-stakes contested matters, adversary proceedings and other complex civil cases. Mr. Kessler's practice spans a variety of industries and geographies, with a particular focus on cross-border matters, including acting as U.S counsel in foreign restructurings and lead counsel in chapter 15 proceedings. His work on the LATAM Airlines and Garuda Indonesia restructurings has been recognized by the Turnaround Management Association, which awarded both matters 2023 "Transaction of the Year" in their respective categories. Mr. Kessler was honored in 2024 as one of ABI's "40 Under 40," and he was awarded the 2022 Community Excellence Award from the LGBT Bar Association of Greater New York. He received his B.A. *magna cum laude* in 2010 from the University of Akron and his J.D. in 2013 from Columbia Law School, where he was a James Kent Scholar.

Hon. Christopher M. Lopez is a U.S. Bankruptcy Judge for the Southern District of Texas in Houston, appointed on Aug. 14, 2019. He previously was a member of the Business, Finance & Restructuring Group of Weil, Gotshal & Manges LLP and focused on representations ranging from top global corporations in mega-restructurings to middle-market debtor and creditor representations. Judge Lopez lectures across the country on bankruptcy issues. He also serves as an adjunct professor at Thurgood Marshall School of Law. Judge Lopez currently serves as a council member of the State Bar of Texas's Bankruptcy Law Section, an advisor to the State Bar of Texas Young Lawyers Committee, a member of the Nominations Committee for the National Conference of Bankruptcy Judges, and a member of the National Bankruptcy Conference. He received his B.A. in psychology in 1996 from the University of Houston, his M.A. in religion in 1999 from Yale Divinity School and his J.D. from the University of Texas School of Law in 2003.

David W. Parham is a partner in the Bankruptcy Practice Group at Akerman LLP in Dallas. He represents corporate and partnership debtors, creditors' committees, equityholders, secured and unsecured creditors, lessors and trustees in bankruptcy proceedings, and litigation and workouts across sectors that include restaurants, hospitals and health care, insurance, real estate, retail, aviation, telecommunications, distribution, manufacturing, energy and mining. Mr. Parham also handles commercial litigation in bankruptcy, federal and state courts, routinely prosecuting and defending claims against directors and officers for breach of fiduciary duty and litigating matters involving alleged fraud, fraudulent conveyance and preference. He is regularly recognized in *Chambers USA* for his efficiency. Mr. Parham received his B.B.A. with distinction in 1978 from the University of Oklahoma and his J.D. in 1981 from the University of Oklahoma College of Law, where he was admitted to the Order of the Coif.

Siobhan Sheridan is senior counsel in the Cayman Islands office of Walkers LLP. She joined the firm in 2019 and is a member of its Insolvency and Dispute Resolution Group, where she advises on both

contentious and noncontentious insolvency matters, restructurings and a wide range of distressed situations. Ms. Sheridan's experience includes representing insolvency practitioners and creditors — including banks, alternative credit providers, customers and suppliers — as well as company management across complex cross-border disputes and restructuring mandates. She is a member of the Cayman Islands Legal Practitioners Association (CILPA) and the Law Society of England and Wales. Ms. Sheridan received her LL.B. from the University of Warwick.