AMERICAN BANKRUPTCY INSTITUTE

International Caribbean Insolvency Symposium

Choice-of-Law Issues

John R. Dodd, Moderator
Baker McKenzie | Miami

Shane Donovan
Mourant | British Virgin Islands

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2026

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Learning Objectives

- **Conflicts of Laws in U.S. Standing Rules vs. Foreign Insolvency Regimes:** Understand how U.S. prudential standing doctrines interact with foreign statutory rights in cross-border insolvency.
- **Jurisdictional Conflicts & Extraterritorial Reach:** Examine offshore courts' jurisdiction over foreign creditors and the extraterritorial application of insolvency laws.
- **Choice of Law & Recognition of Foreign Insolvency Statutes:** Analyze how onshore courts apply offshore insolvency statutes, public policy exceptions, and judicial discretion.
- **Practical Planning:** Identify strategies for structuring cross-border insolvency to mitigate risk and achieve enforceable outcomes.

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Trott v. Deutsche Bank AG (SDNY, 2025) – Cayman Section 147 Claims in U.S. Courts

- **Key Issue:**
  - Whether Cayman liquidators can pursue fraudulent trading claims (Companies Act s.147) in U.S. courts, and the impact of U.S. standing doctrines.
- **Summary:**
  - The Cayman liquidators sought to recover from Deutsche Bank under s.147 for knowingly participating in fraudulent trading.
  - U.S. court held that the liquidators had constitutional standing (injury to the company, not just creditors), but lacked prudential standing under the Second Circuit's Wagoner rule.
    - **Wagoner rule:** Bars claims by a trustee against third parties where the debtor is imputed with the conduct of its management who participated in a fraud against creditors.
  - The court found the liquidators' s.147 claims are subject to the Wagoner Rule, even though s.147 grants the liquidator the authority to personally request the court to address management fraud.
  - Summary judgment for Deutsche Bank; the court held that a foreign statutory right could not override this rule governing prudential standing.
- **Takeaway:**
  - Some U.S. courts may refuse to enforce foreign recovery provisions where prudential standing doctrines would bar similar claims under U.S. law, limiting the reach of foreign insolvency statutes in U.S. litigation.
  - Confirms the continued risk of U.S. courts may deny liquidator standing in cross-border cases, even where the foreign law provides exclusive standing to the liquidators.

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Dundon v. McKinsey (SDNY Bankr., 2025) – U.S. Choice of Law and *In Pari Delicto*

- **Key Issue:**
  - Application of U.S. choice of law rules to claims by a U.S. bankruptcy trustee against a foreign consultant under the laws of multiple jurisdictions.
- **Summary:**
  - Trustee for Endo International sued McKinsey for aiding and abetting breaches of fiduciary duty and fraudulent transfers under New York, Pennsylvania, and Irish law.
  - The court held that *Wagoner* applied to the claims under New York law, but did not bar claims under Pennsylvania and Irish law. *I.e.*, the bankruptcy court only applied prudential standing rule where the law in the jurisdiction governing the claims would bar the claims.
  - This decision is in tension with Trott, which applied a U.S. prudential standing rule to a s.147 claim under Cayman law.
- **Takeaway:**
  - Courts in the U.S. do not necessarily take a consistent approach to the choice of law analysis, which highlights how particular courts can impact whether foreign law claims will succeed in U.S. insolvency litigation.

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UBS AG v. Fairfield Sentry Ltd. (Privy Council, 2019) – Anti-Suit Injunctions & Cross-Border Claims

- **Key Issue:**
  - Whether BVI courts can restrain liquidators from pursuing avoidance claims in foreign courts under BVI law.
- **Summary:**
  - UBS sought to enjoin BVI liquidators from pursuing s.249 IA 2003 claims in U.S. courts.
  - Privy Council held that s.249 does not confer exclusive jurisdiction on the BVI court; foreign courts may apply BVI insolvency law if their own rules permit.
  - Privy Council found no basis for an anti-suit injunction; comity and cross-border cooperation are favored.
  - U.S. courts' willingness to apply foreign insolvency law is a matter for U.S. private international law.
- **Takeaway:**
  - BVI insolvency statutes do not preclude foreign courts from granting relief; anti-suit injunctions will not be granted absent oppression or abuse.
  - Reinforces the principle of modified universalism and the need for cross-border judicial cooperation.

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In re Fairfield Sentry Ltd. (2d Cir. 2025) – BVI Avoidance Claims & U.S. Safe Harbor

- **Key Issue:**
  - Whether BVI liquidators can recover redemption payments from U.S. investors under BVI law, and the application of U.S. safe harbor provisions.
- **Summary:**
  - BVI liquidators sought to claw back over $6 billion in redemption payments made before the Madoff collapse.
  - U.S. courts recognized the BVI liquidation under Chapter 15.
  - Second Circuit held that U.S. Bankruptcy Code §546(e) safe harbor for securities transactions applies extraterritorially via §561(d), barring both statutory and common law avoidance claims under foreign law.
  - Constructive trust claims under BVI law are also barred, as they sought to avoid covered transactions.
  - Forum selection clauses in subscription agreements were held to establish personal jurisdiction in New York.
- **Takeaway:**
  - U.S. safe harbor provisions can preclude foreign liquidators' avoidance actions, even where foreign law would otherwise permit recovery.
  - U.S. courts will apply domestic policy protections (finality of securities settlements) over foreign insolvency claw-back rights.

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Conway & Ors v. Air Arabia PJSC (Cayman Grand Court, 2025) – Extraterritoriality of Fraudulent Trading Claims

- **Key Issue:**
  - Whether Cayman fraudulent trading claims (s.147) have extraterritorial effect and can be served on foreign creditors.
- **Summary:**
  - Air Arabia, a UAE-based creditor, submitted proofs of debt in a Cayman liquidation and was sued under s.147 for alleged participation in fraudulent trading.
  - Court held: (1) Lodging a proof of debt is a submission to the Cayman court's jurisdiction for all purposes, including s.147 claims; (2) s.147 has extraterritorial effect—claims can be brought against persons outside the Cayman Islands.
  - Service out of the jurisdiction is permitted without leave; the court's discretion and requirement for sanction provide safeguards against injustice.
- **Takeaway:**
  - Cayman fraudulent trading claims can reach foreign parties, especially those who participate in the liquidation process.
  - Confirms the broad reach of Cayman insolvency remedies and the importance of creditor conduct in cross-border cases.

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Practical Planning – Navigating Conflicts of Law

- **Key Strategies:**
  - **Confirm the agreement on the goal and objective of the engagement/matter (*i.e.*, preservation/ protection, asset tracing and recovery, and/or clear evidence of wrongdoing?).**
  - **Early Day Considerations**
    - **Asset / Claim mapping**
    - **Choose an anchor forum**
    - **Will Recognition feature in asset recovery or claims litigation**
    - **Routes to recovery**
    - **Funding**
  - **Recognition**
  - **Asset Recovery**
  - **Enforceability Considerations**

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Practical Planning – Navigating Conflicts of Law

- **Factors to consider in planning Recognition and Enforceability:**
  - **Venue Selection:**
    Consider where the claims are most likely to be recognized and enforced.
  - **Proof of Debt:**
    Lodging proofs in offshore liquidations may submit creditors to broad jurisdictional reach.
  - **Service Protocols:**
    Understand the local rules for service out of jurisdiction and submission to jurisdiction.
  - **Anticipate Defenses:**
    U.S. courts may apply standing and in pari delicto doctrines or policy-based safe harbors even to foreign statutory claims.
  - **Cross-Border Cooperation:**
    Leverage recognition and cooperation regimes (*e.g.*, Chapter 15, UNCITRAL Model Law), but be aware of the local public policy exceptions.

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Key Takeaways

- U.S. and offshore courts may apply local standing and policy defenses to foreign insolvency claims. Nature of proceeding – collective, for restructuring/insolvency?
- Submission to jurisdiction (*e.g.*, by proof of debt) can expose foreign creditors to local remedies.
- Extraterritorial reach of avoidance and fraudulent trading claims is expanding, but subject to safeguards and judicial discretion.
- Effective cross-border insolvency planning requires careful attention to choice of law, forum, and procedural posture.

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

FOR PUBLICATION

In re: ENDO INTERNATIONAL PLC, *et al.*,[1] Debtors.	Case No. 22-22549 (JLG) Chapter 11
MATTHEW DUNDON, TRUSTEE OF THE ENDO GUC TRUST, Plaintiff, v. MCKINSEY & COMPANY, INC. AND MCKINSEY & COMPANY, INC. UNITED STATES, Defendants.	Adv. Pro. No. 24-07027 (DSJ)

DECISION AND ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS

APPEARANCES:

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Mark D. Kotwick
Laura E. Miller
Andrew J. Matott

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Counsel for Defendants McKinsey & Company, Inc. and McKinsey & Company, Inc. United States

[1] The last four digits of Endo International plc's tax identification number are 3755. Due to the large number of Debtors in the chapter 11 cases, a complete list of the debtor entities and the last four digits of their federal tax identification numbers is not provided herein. A complete list of such information may be obtained on the website of the Debtors' claims and noticing agent at https://restructuring.ra.kroll.com/Endo.

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DAVID S. JONES
UNITED STATES BANKRUPTCY JUDGE

I. INTRODUCTION

Before the Court is a motion to dismiss an opioid-related adversary proceeding in which a trustee charged with acting for unsecured creditors of a reorganized pharmaceutical company seeks to hold the company's former corporate strategy consultant liable for the alleged massive destruction of corporate value that the company experienced after the company energetically pursued sales-maximizing strategies espoused by the consultant, from which addiction, related injuries, and ultimately, unsustainable liabilities followed.

Like other pharmaceutical companies, Endo International plc and its related entities ("**Endo**" or "**Debtors**")[2] manufactured, marketed, promoted, sold, and distributed opioid products, in addition to marketing non-opioid products. Seeking to increase the profitability of its opioid business, Endo engaged the consulting services of McKinsey & Company, Inc. and McKinsey & Company, Inc. United States ("**McKinsey**" or "**Defendants**"). According to the complaint, McKinsey professionals designed and helped implement aggressive sales-expanding strategies and practices that increased Endo's short-term revenues, which led to rampant opioid abuse and addiction, and, eventually, to unsustainable liabilities for Endo. Ultimately, Endo spent years defending thousands of lawsuits, filed for Chapter 11 bankruptcy protection from the

[2] Unless there is need to specify, this Decision refers to the Debtor entities collectively as Endo. These Debtor entities include Endo International plc, Endo Health Solutions Inc., Endo Pharmaceuticals, Inc., and Endo U.S. Inc.

avalanche of opioid litigation and liabilities the company faced, and entered a plea deal with the United States Department of Justice for its role in the opioid crisis.

Endo's bankruptcy led to the creation of a trust charged with seeking recoveries for the benefit of Endo's general unsecured creditors. The trustee, Matthew Dundon ("**Trustee**" or "**Plaintiff**"), has filed this action, in which he asserts claims against McKinsey on various legal theories, all of which involve contentions that McKinsey injured Endo by designing and helping to implement opioid sales-maximizing strategies that ultimately led to massive losses and liabilities. The complaint is detailed below, but in general it asserts that McKinsey served as Endo's long-time consultant, and induced, encouraged, and facilitated reckless maximization of sales of Endo's opioid products, leading to improper uses of Endo products, widespread addiction and other harms, and, eventually, massive and unsustainable corporate liabilities and costs. Broadly speaking, the complaint seeks damages from McKinsey on three types of theories. The first is that Endo's retention of McKinsey included indemnification provisions under which the Trustee (standing in Endo's shoes) is entitled to at least $1.5 billion to compensate it for harms flowing from McKinsey's negligence in pushing Endo into calamitous opioid sales practices. The second is that McKinsey is liable to the Trustee standing in Endo's shoes for corporate economic harm because McKinsey aided and abetted breaches of fiduciary duty by Endo's directors and officers. And the third is that McKinsey must repay to the Trustee the amount of certain Endo payments to McKinsey (in the principal amount of roughly $8.5 million) on the theory that those payments constituted constructive fraudulent transfers.

McKinsey has moved to dismiss the complaint.

For reasons explained further below, the Court partially grants (in most instances without prejudice) and partially denies the motion. The only claim that is not dismissed is the portion of the indemnification claim that arises from costs Endo incurred other than settlement payments. The Court is scheduling a conference at or after which it will determine whether this decision and order should be deemed a report and recommendation requiring further review by an Article III court, while also addressing next steps in the litigation.

II. BACKGROUND

A. The Parties

The plaintiff in this action is Matthew Dundon, not in any individual capacity but solely in his capacity as the trustee for the Endo GUC Trust (the "**GUC Trust**"), which was established pursuant to the Fourth Amended Joint Chapter 11 Plan of Reorganization of Endo International plc and its Affiliated Debtors (the "**Plan**"), [*Fourth Amended Joint Chapter 11 Plan of Reorganization of Endo International plc and its Affiliated Debtors*, Case No. 22-22549 (JLG), Dkt No. 3849], and the Endo GUC Trust Agreement dated April 23, 2024, by and among (i) the Trustee, (ii) UMB Delaware Inc, as Delaware Trustee, (iii) Endo International plc, and (iv) Endo, Inc., acting on behalf of itself and as successor-in-interest to the estates of the above-captioned debtors and debtors-in-possession. *See* Complaint ("**Complaint**" or "**Compl.**"), *Matthew Dundon, Trustee of The Endo GUC Trust v. McKinsey & Company, Inc. and McKinsey & Company, Inc. United States*, Case No. 24-07027, Dkt. No. 1 ¶ 16. The GUC Trust's beneficiaries are certain of Endo's unsecured creditors, including, among others, thousands of women implanted with defective vaginal mesh products and victims of the opioid crisis. *See id.* ¶¶ 16–17.

The non-party Debtors and its affiliates are comprised of various corporate entities, which are summarized below in the order in which they appear in the Complaint:

- Non-party Endo International plc ("**Endo plc**"), the ultimate parent of the Endo enterprise, is an Irish public limited company that is both incorporated and headquartered in Dublin, Ireland.
- Non-party Endo Health Solutions Inc. ("**Endo Health Solutions**") is incorporated in Delaware and headquartered in Malvern, Pennsylvania. Prior to May 23, 2012, Endo Health Solutions was known as Endo Pharmaceuticals Holdings Inc.
- Non-party Endo Pharmaceuticals, Inc. ("**Endo Pharmaceuticals**") is incorporated in Delaware and headquartered in Malvern, Pennsylvania.
- Non-party Endo U.S. Inc. ("**Endo U.S.**") is incorporated in Delaware and headquartered in Malvern, Pennsylvania.
- Non-party Par Pharmaceutical Holdings, Inc. ("**Par Holdings**") is incorporated in Delaware and headquartered in Chestnut Ridge, New York. Par was acquired by Endo plc in September 2015, and during the relevant time period, was an operating company of Endo plc.
- Non-party Par Pharmaceutical Companies, Inc. ("**Par Companies**") is incorporated in Delaware and headquartered in Chestnut Ridge, New York. Par Companies is a wholly owned subsidiary of Par Holdings.
- Non-party Par Pharmaceutical, Inc. ("**Par Pharma Inc.**" individually, and together with Par Holdings and Par Companies, "**Par**" or "**Par Pharmaceutical**") is incorporated in Delaware and headquartered in Chestnut Ridge, New York. Par Pharma Inc. is a wholly owned subsidiary of Par Companies.

Id. ¶¶ 20–27. The Debtors and their affiliates are pharmaceutical companies that manufactured, marketed, promoted, sold, and distributed extended-release opioid drugs containing oxymorphone throughout the United States. *See id.* ¶¶ 22–23. Specifically, Endo Health Solutions and Endo Pharmaceuticals were both involved in manufacturing, marketing and distributing Endo's branded and generic opioids—Endo Health Solutions focused on drug development and Endo Pharmaceuticals focused on drug sales. *See id*. Endo U.S. is the immediate parent of Endo Health Solutions and Endo Pharmaceuticals, *id.* ¶ 24, and Endo plc is the ultimate parent of the entire Endo enterprise. *Id.* ¶ 21. Endo acquired Par Pharmaceutical—generic opioid manufacturers—in 2015. *Id.* ¶¶ 190–91.

Defendants are "one of the oldest, largest, and perhaps most prestigious, management consulting firms in the world," providing "strategic advice and direction to managers, directors, and owners of a multitude of companies in myriad industries," including the pharmaceutical industry. *Id.* ¶¶ 57, 65, 67. Defendant McKinsey & Company, Inc. is incorporated and headquartered in New York, and Defendant McKinsey & Company, Inc. United States is an entity incorporated in Delaware and headquartered in New York. *Id.* ¶¶ 18–19.

B. Endo's Opioid Sales and Its Relationship with McKinsey

Prior to the 2000s, Endo sold an immediate release oxymorphone tablet under the brand name Numorphan, which quickly gained notoriety for what users described as a quick and sustained effect. *See id.* ¶ 54. In the early 2000s, Endo began planning for what was ostensibly a relaunch of Numorphan, rebranded as Opana. *See id.* ¶ 55. Opana pills were manufactured in two forms: an immediate release tablet ("**Opana IR**") and an extended-release tablet ("**Opana ER**"). *Id.* Opana ER and a reformulated version of Opana ER were Schedule II drugs under the Controlled Substances Act, meaning drugs "with a high potential for abuse," with use potentially leading "to severe psychological or physical dependence." *Id.* ¶ 47. In 2006, the U.S. Federal Drug Administration ("**FDA**") approved Opana, and shortly thereafter, Endo engaged McKinsey to assist in maximizing Opana's commercial value, among other consulting services. *Id.* ¶ 119. McKinsey reviewed Endo's financials, and by late 2006 and early 2007 McKinsey met with Endo's directors to discuss findings and potential strategic paths forward. *Id.* ¶¶ 120, 121.

1. <u>The Master Services Agreement and Statements of Work</u>

On August 14, 2007, McKinsey and Endo (through Endo Pharmaceuticals Holdings Inc. and its affiliates) finalized a long-term business relationship by executing a Master Services Agreement ("**MSA**"), which governed the work that McKinsey would perform for Endo over the next decade. *Id.* ¶ 123; *see Declaration of Marissa E. Miller in Support of Defendants' Motion to Dismiss* ("**M. Miller Decl.**"), Dkt. No. 18, Ex. 5 (a full copy of the MSA is docketed in this declaration). The MSA set the stage for a series of subsequent agreements that would govern individual projects. Compl. ¶ 248. The Master Services Agreement is governed by New York law without regard to conflicts of law principles. *See* M. Miller Decl., Dkt. No. 18, Ex. 5, MSA ¶ 6. Pursuant to the MSA, McKinsey was to perform work for Endo on a project-by-project basis, with each individual project governed by a separate Project Work Order and Statement of Work ("**SOW**" or "**Obligation**") agreements consistent with the MSA. Compl. ¶ 123. Under the MSA, McKinsey was to propose the services that the firm would provide to Endo and how much Endo would pay for those services. *Id*. If accepted by Endo, each PWO or SOW was executed by Endo Pharmaceuticals or Endo Pharmaceuticals Holdings Inc. on behalf of each entity and its affiliates. *Id*.

Between November 9, 2015, and October 10, 2016, Endo executed six SOWs with McKinsey. *Id.* ¶ 249. Under each agreement, Endo was to pay for advice from McKinsey. *Id.* ¶ 247. Under the various SOWs, Endo was to pay McKinsey a total of approximately $8.33 million in fees over the course of 2015 and 2016. *Id.* ¶ 253.

2. <u>The Master Services Agreement Indemnification Provisions</u>

Under the MSA, McKinsey agreed to indemnify and hold Endo harmless from and against losses resulting primarily from McKinsey's negligence or, in some circumstances not implicated here, from its gross negligence. *Id.* ¶ 276. The MSA states, in relevant part, that McKinsey:

> agrees to indemnify and hold harmless [Endo] (including its affiliates) and the directors, officers, stockholders, agents and employees of [Endo] (and such affiliates) (collectively, "Client Indemnified Persons"), from and against all claims, liabilities, losses, damages, and expenses as incurred (including reasonable legal fees and disbursements of counsel and the costs of McKinsey professional time), joint or several (including actions or proceedings in respect thereof) (collectively "Losses"), to the extent that any such Losses are determined by an arbitration pursuant to Section 6 or are otherwise finally determined, as the

> case may be, to have resulted primarily from the Applicable Standard (as defined below), willful misconduct, or bad faith of any McKinsey Indemnified Person toward Client in the performance of the services hereunder.

M. Miller Decl., Dkt. No. 18, Ex. 5, MSA ¶ 3(A).

The scope of the MSA's indemnification obligation is limited, however, by a provision stating that "[n]either party shall be liable under this Section 3 for any settlement, compromise or consent to judgment effected without prior written consent, which consent shall not be unreasonably withheld." *Id.* ¶ 3(D).

The "applicable standard" for McKinsey's provision of services under the MSA depends on the nature of the particular engagement:

> For engagements (i) in which McKinsey is working with [Endo] with respect to (a) valuing, structuring or negotiating a transaction or potential transaction with a third party, or (b) conducting due diligence with respect thereto, or (ii) in which Materials or information about McKinsey's work is shared with a third party, the Applicable Standard shall be gross negligence. For all other engagements, the Applicable Standard is negligence.

See Miller Decl., Ex. 5, MSA ¶ 3(A); Compl. ¶ 277.

Through the work done through the MSA and various SOWs, Endo alleges that McKinsey led Endo and other pharmaceutical manufacturers "down a dark, dangerous path that resulted in today's current opioid epidemic and the financial ruin of Endo and many other pharmaceutical manufacturers." Compl. ¶ 247. As a result, Endo was subjected to more than 3,100 opioid-related lawsuits. *Id.* ¶ 263.

3. <u>McKinsey's Services and Advice</u>

The Trustee alleges that although McKinsey is a preeminent management consulting firm, its "implementation" consulting style involves not only developing strategies for its clients but becoming deeply ingrained in the everyday operations of its client's business and overseeing the implementation of the strategy. *Id.* ¶¶ 57–59. McKinsey "has a broad and deep practice in the pharmaceutical industry, and in particular, the opioid market, with clients ranging from major opioid manufacturers to large wholesale distributors who purchase and distribute opioids." *Id.* ¶ 65. In fact, while working with Endo, McKinsey also advised and promoted similar strategies at other major opioid manufacturers including Purdue, Johnson & Johnson, Teva Pharmaceuticals, and Mallinckrodt. *Id.* ¶ 70. At the same time that McKinsey advised these companies, McKinsey was embedded within every sector of the opioid industry, including distributors and the primary regulator, the FDA. *See id.* ¶¶ 71–104. The Trustee alleges that McKinsey was the architect of a deceptive and aggressive sales and marketing scheme to maximize the sale of opioids and deployed this "playbook" to increase the sales of Johnson & Johnson's opioids Nucynta [*id.* ¶¶ 81–85, 149, 170] and Purdue's OxyContin [*id.* ¶¶ 71–80], and implemented a near-identical strategy to increase the sales of Endo's Opana ER [*id.* ¶¶ 170–71]. The Trustee further alleges that, "[a]s a result, McKinsey was intimately aware that opioids, and especially Endo's Opana, pure oxymorphone twice as potent as Purdue's OxyContin, were highly addictive and unsafe for the treatment of long-term chronic pain." *Id.* ¶ 109.

Endo retained McKinsey in 2007 to advise it on strategic, long-term goals and, following Endo's launch of Opana ER into the United States market, McKinsey's efforts increasingly focused on expanding the promotion and sale of Endo's branded and generic opioid products. *Id.* ¶¶ 119–20. Even before the parties' engagement, Endo's leadership and McKinsey's consultants were purportedly aware of the potential for widespread abuse of Opana ER. *Id.* ¶¶ 137–47. Following a cascade of articles, investigations, and state public health alerts concerning the increasing abuse of Opana ER in addition to the impending expiration of its patent and the expected decrease in profits, Endo, in consultation with McKinsey, devised a plan to "reformulate Opana ER into a purportedly 'crush-resistant' tablet ("**Reformulated Opana ER**") and submit[ted] a Supplemental New Drug Application" to the FDA. *Id.* ¶¶ 125–29. Although the FDA approved Reformulated Opana ER, the agency denied Endo's request to include a product description of its purported abuse-deterrent properties because the agency determined that the reformulated opioid was no less abuse-deterring than the original Opana ER. *Id.* ¶¶ 129–32. Indeed, shortly after its release, reports emerged of the rampant abuse of Reformulated Opana ER. *Id.* ¶ 136.

In February 2013, Endo hired a new chief executive officer, Rajiv De Silva, a former leader in McKinsey's Pharmaceuticals and Medical Products Group. *See* Compl. ¶ 150. The Trustee claims that following De Silva's hiring, McKinsey consultants often interacted directly with him and maintained weekly performance meetings with him and other Endo senior management employees at which weekly Endo opioid sales data was reviewed. *Id.* ¶¶ 152–53.

"At the core of McKinsey's scheme to boost Opana ER profits" in the face of the reports of abuse of the drug was a "complete overhaul of Endo's sales and marketing tactics for the drug, which McKinsey dubbed 'Sales Force Blitz.'" *Id.* ¶ 169. From 2015 through at least 2016, McKinsey spearheaded a "sales force blitz" strategy to increase sales of Endo's opioid products. *Id.* ¶ 7. According to the Plaintiff, the "plan for Sales Force Blitz was to assign more sales representatives to push Opana ER to prescribers via 'targeting' the 'sweet spot of doc[tors]' amenable to prescribing the drug in greater quantities." *Id.* ¶ 172. This strategy also included targeting healthcare providers that McKinsey knew prescribed large volumes of opioids, redeploying sales representatives to hit target goals, increasing sales quotas, and focusing on selling higher doses of Opana ER. *Id.* As McKinsey recommended, Endo hired hundreds of sales representatives to conduct in-person marketing of Opana ER and Reformulated Opana ER to healthcare providers. *See* M. Miller Decl., Dkt. No. 18, Ex. A, Sched. A ¶ 10. Specifically, Endo sales representatives marketed Reformulated Opana ER to prescribers by touting Opana ER's purported abuse deterrence, crush resistance and/or tamper resistance. *See id.* Moreover, certain Endo sales managers were even aware that certain sales representatives were making claims regarding reformulated Opana ER's purported abuse deterrence, crush resistance, and/or tamper resistance during sales calls. *See id.* The Trustee claims that McKinsey "encouraged" Endo's directors and officers to "effectively work around the FDA's concerns" about the abuse potential of Reformulated Opana ER and to disseminate marketing materials implying that Reformulated Opana ER was abuse-deterrent. Compl. ¶ 157.

McKinsey not only designed and advised Endo with regard to its Sales Force Blitz strategy, the consulting company spearheaded its day-to-day execution. *Id.* ¶ 176. "McKinsey curated and maintained control over a list of prescriber 'targets' who McKinsey believed would more readily prescribe Opana ER; liaised directly with third-party contractors to develop that target list; and personally trained Endo's sales force on how to persuade targeted healthcare providers to prescribe Opana ER." *Id.* ¶¶ 176, 177–89. As a result of McKinsey's tactics to target high-prescribing doctors and "push false messaging that Reformulated Opana ER was safer than its original formulation and less likely to be abused or diverted," Opana ER sales stabilized from its previous decline due to generic drug competition. *Id.* ¶ 189. In fact, "reports in November 2016 revealed that although 24,400 health care providers were writing prescriptions for Reformulated Opana ER, nine percent of those providers wrote 50% of all Opana ER prescriptions, validating McKinsey's efforts to target high volume prescribers of Opana ER." *Id.*

In 2015, the Trustee alleges upon information and belief that McKinsey advised Endo regarding its $8 billion acquisition and integration of a leading generic opioid manufacturer, Par

Holdings, Par Companies, and Par Pharma Inc., to "boost Endo's profits through the sale of opioids—both branded and generic." *Id.* ¶¶ 190–91. The Trustee contends that, as with Endo's directors and officers, Par's directors and officers were aware of the abuse and misuse of its opioid products. *Id.* ¶ 192. Following the 2015 acquisition, the boards and management of Endo and the Par began to overlap such that the companies "were effectively operated as a single entity, with a single vision and strategy to maximize the sale of opioids." *Id.* ¶ 194. Tasked with determining how to maximize profits at the Par entities, McKinsey advised the company to increase its presence in the generic opioid market while discontinuing sixty-seven of its non-opioid products. *Id.* ¶ 195–97.

C. Endo's Legal Issues and Bankruptcy

Throughout 2016, McKinsey continued to advise Endo to maximize opioid sales, even as federal and state authorities began investigating Endo's deceptive marketing practices. *Id.* ¶ 201. In March 2016, Endo entities agreed to an "Assurance of Discontinuance" with the New York State Attorney General concerning Endo's improper marketing practices for Opana ER. *Id.* ¶ 202. The Assurance of Discontinuance stated that "[t]he Attorney General found that Endo improperly marketed Opana ER to be crush resistant, when Endo's own studies showed that the pill could be crushed and ground." *Id.* ¶ 202. The Assurance of Discontinuance also stated that the state's investigation "revealed that Endo had no meaningful program in place to ensure that its sales representatives were not encouraging healthcare providers engaged in abuse and diversion to write more prescriptions for Opana ER." *Id.* ¶ 203. Even after the Assurance of Discontinuance, the Complaint alleges that McKinsey did not stop advising Endo's salesforce to continue its "Blitz" and pursue high-prescribing doctors aggressively and that with McKinsey input, Endo waited until June 2016 to instruct sales representatives not to discuss Opana ER being abuse deterrent or crush resistant with doctors. *Id.* ¶ 205–06.

In June 2017, the FDA requested that Endo remove Reformulated Opana ER from the market "due to the public health consequences of abuse." *Id.* ¶ 213. Endo agreed to remove Reformulated Opana ER from the market a month later. *Id.* Since then, Endo has been named in over 3,500 lawsuits, resulting in, among others, $1.2 billion in damages and settlements, $344 million in defense costs, and $240 million in professional fees in connection with its bankruptcy proceedings. *Id.* ¶¶ 225–29, 280. On February 28, 2024, Endo entered into a civil settlement agreement ("**DOJ Settlement**") with the United States Department of Justice ("**DOJ**") through which Endo pled guilty to a pled guilty to a misdemeanor violation of the Food, Drug, and Cosmetic Act. *See* M. Miller Decl., Dkt. No. 18, Ex. 3, Ex. A at 1. In connection with this agreement, Endo was subjected to a criminal fine of over $1 billion and criminal forfeiture of over $475 million. *See id.* at 3.

Likewise, McKinsey has been named in hundreds of lawsuits across the country arising from its role in the opioid crisis and has paid nearly $1 billion to settle just a fraction of these proceedings. Compl. ¶¶ 220–21. For example, McKinsey entered into a deferred prosecution agreement in December 2024 in which McKinsey agreed to pay $650 million to resolve the federal government's criminal and civil investigation into the consulting firm's consulting work with Purdue regarding the sales and marketing of OxyContin. *See Declaration of Laura E. Miller in Support of Plaintiff's Opposition to Defendants' Motion to Dismiss the Complaint*, Dkt. No. 28, Ex. B.

On August 16, 2022, Endo filed voluntary petitions under Chapter 11 of the Bankruptcy Code in this Court. *Id.* ¶ 263. More than a year and a half later, on March 22, 2024, this Court entered an order confirming Endo's Plan. *See* M. Miller Decl., Dkt. No. 18, Ex. 1 (attaching the Plan, Case No. 22-22549 (JLG), Dkt No. 3849). As stated, pursuant to Section 6.2 of the Plan and the Endo GUC Trust Agreement dated April 23, 2024, Matthew Dundon became Trustee for the GUC Trust. *See* Compl. ¶ 16. A GUC Trust—short for General Unsecured Creditors Trust—is a post-confirmation litigation and distribution vehicle created in a Chapter 11 bankruptcy case to handle claims of general unsecured creditors. The Endo Plan and GUC Trust Agreement provided that the Debtors and holders of the Trust Transferred Assets would transfer "all claims against the GUC Excluded Parties (each as defined in the Plan), including Defendants," to the GUC Trust for the benefit of unsecured creditors. *Id.* ¶¶ 16–17. The GUC Trust's beneficiaries are a subset of Endo's unsecured creditors including, among others, thousands of women implanted with defective vaginal mesh products and victims of the opioid crisis. *Id.* ¶ 17. Endo's opioid creditors received hundreds of millions of dollars of cash from the beneficiaries of the GUC Trust and other Endo creditors who otherwise had a claim to that cash, in partial exchange for granting the GUC Trust rights to these causes of action. *Id.*.

On July 24, 2024, three weeks before filing this action, the Trustee filed a separate lawsuit against the directors and officers of Endo, seeking damages for those individuals' conduct. *See* M. Miller Decl., Dkt. No. 18, Ex. 2. That case remains pending in this Court. *See generally Dundon v. De Silva, et al.*, Adv. Case No. 24-07022 (DSJ) (Bankr. S.D.N.Y. July 24, 2024).

D. Procedural Background of this Action

On August 15, 2024, the Trustee filed the Complaint asserting nine causes of action against McKinsey. *See generally* Compl. On November 11, 2024, McKinsey filed a motion to dismiss ("**Motion**") all nine causes of action pursuant to Rules 8, 12(b)(1) or 12(b)(6) of the

Federal Rules of Civil Procedure, made applicable to this proceeding by Rules 7008 and 7012 of the Federal Rules of Bankruptcy Procedure. Dkt. No. 17. The Trustee filed an opposition ("**Opposition**" or "**Opp.**") [Dkt. No. 27], and McKinsey filed a reply ("**Reply**") [Dkt. No. 33]. The Court heard oral argument on March 6, 2025, and reserved decision. This decision's Discussion sections summarize the parties' arguments.

III. JURISDICTION

The Court has subject matter jurisdiction over this adversary proceeding under 28 U.S.C. §§ 157(a)–(c) and 1334(b), and the *Amended Standing Order of Reference M-431*, dated January 31, 2012 (Preska, C.J.). This adversary proceeding presents both "core" and "non-core" proceedings under 28 U.S.C. § 157(b) and (c), and, as noted in this decision's conclusion, the Court directs the parties to discuss at an upcoming conference the extent to which this Court has the authority, on consent or otherwise, to enter a final judgment. If and to the extent necessary, the Court is prepared to enter a further order deeming this decision to constitute a report and recommendation subject to review by an Article III judge before entry of a final judgment. Venue in the Southern District of New York is proper under 28 U.S.C. §§ 1408 and 1409 because this adversary proceeding arises under and in connection with cases commenced under the Bankruptcy Code.

IV. LEGAL STANDARD ON THE MOTION

In considering a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the court must assess the legal sufficiency "of the allegations in support of a complaint in light of the pleading requirements" set forth in Rule 8 of the Federal Rules of Civil Procedure**.** *In re Revlon, Inc.*, No. 22-10760 (DSJ), 2023 WL 2229352, at *10 (Bankr. S.D.N.Y. Feb. 24, 2023) (quoting *In re Extended Stay, Inc.*, Case No. 09-13764, 2020 WL 10762310, at *5 (Bankr. S.D.N.Y. Aug.

8, 2020)). To survive a Rule 12(b)(6) motion, a plaintiff must show that the complaint "contain[s] sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Courts apply the "[t]wo working principles" articulated in *Ashcroft v. Iqbal* to evaluate a motion to dismiss. *In re Tops Holding II Corp.*, 646 B.R. 617, 646 (Bankr. S.D.N.Y. 2022) (quoting *Pension Benefit Guar. Corp. v. Morgan Stanley Inv. Mgmt.*, 712 F.3d 705, 717 (2d Cir. 2012)).

First, "[w]hile legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). Rule 8's pleading standard does not necessitate detailed factual allegations, but "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* at 678. In evaluating factual sufficiency, the court must accept all factual allegations set forth in the complaint as true and draw all reasonable inferences in the plaintiff's favor. *Id.* In doing so, the court must be able to identify the elements of each cause of action and determine whether the complaint states sufficient facts to support recovery. *Id.* at 675.

Second, "only a complaint that states a *plausible* claim for relief survives a motion to dismiss." *Id.* at 679 (emphasis added). The determination of whether a complaint states a plausible claim for relief is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* "To be plausible, the complaint need not show a probability of plaintiff's success, but it must evidence more than a mere possibility of a right to relief." *Nakahata v. New York-Presbyterian Healthcare Sys., Inc.*, 723 F.3d 192, 197 (2d Cir. 2013) (internal citations omitted). "Because plausibility is a standard lower than probability, a given set of actions may well be subject to diverging interpretations, each of which is plausible."

Anderson News, L.L.C. v. Am. Media, Inc., 680 F.3d 162, 184 (2d Cir. 2012). Thus, "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007) (internal citations omitted).

On a motion to dismiss pursuant to Rule 12(b)(6), "courts must consider the complaint in its entirety as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). In doing so, the Court may consider "any written instrument attached to [the complaint] as an exhibit or any statements or documents incorporated in it by reference" as well as any documents "integral" to the complaint, *i.e.*, "where the complaint 'relies heavily upon [the document's] terms and effects.'" *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152–53 (2d Cir. 2002) (quoting *Int'l Audiotext Network, Inc. v. Am. Tel. & Tel. Co.*, 62 F.3d 69, 72 (2d Cir. 1995)). Defendants filed numerous documents in support of their respective motions. *See supra* Section II. D. Some of those documents are mentioned, cited, or relied on by the Plaintiff in the Complaint, and others are docketed in the main Chapter 11 case for Endo.

V. DISCUSSION

This decision addresses the Trustee's causes of action in the order set forth in the Complaint.

A. Indemnification

The first count of the Complaint asserts that the Trustee, standing in Endo's shoes, is contractually entitled to indemnification under the MSA "for the costs Endo incurred due to McKinsey's reckless opioid marketing and sales strategies." Compl. ¶ 10. As noted, under the

MSA, McKinsey agreed to indemnify and hold Endo harmless for losses arising primarily from McKinsey's negligence (the contractually specified standard for the types of claims asserted here). *See* M. Miller Decl., Dkt. No. 18, Ex. 5, MSA ¶ 3(A); *id.* ¶ 276. The asserted losses include costs of defending against investigations and lawsuits, liabilities arising from Endo's marketing of opioid products, and, specifically, negotiated settlement payments to resolve governmental and/or private claims arising from Endo's opioid sales. Compl. ¶ 280. As paragraph 280 of the Complaint alleges and McKinsey emphasizes, the stakes are enormous; by McKinsey's calculation, the Trustee seeks indemnification for more than $1.2 billion in settlement payment amounts and an additional roughly $344 million in legal fees and other costs. *See* Motion at 26.

McKinsey asserts two grounds for dismissal of the Trustee's indemnification claims, one of which if adopted would cover the entirety of the indemnification claim based on New York's public policy against indemnification for intentional torts, and the second of which would bar "only" the Trustee's demand for indemnification for Endo's $1.2 billion in settlement payments in connection with opioid litigation or investigations, the latter argument being that Endo never sought or secured McKinsey's advance written consent for settlements and that any recovery therefore is barred under the express terms the MSA. *See* M. Miller Decl., Dkt. No. 18, Ex. 5, MSA ¶ 3(D) ("Neither party shall be liable under this Section 3 for any settlement, compromise or consent to judgment effected without prior written consent, which consent shall not be unreasonably withheld.").

By way of preview and for reasons detailed below, the Court rejects the first argument as unsupported by facts alleged in the Complaint or otherwise chargeable against the Trustee in this motion to dismiss the Complaint. New York public policy does indeed preclude indemnification for liability arising from intentional torts. But the Court cannot conclude, based solely on facts alleged in the Complaint or other sources that can be considered on a motion to dismiss, that Endo acted with the requisite intent to harm or injure others.

The Court agrees, however, that the Trustee has not plausibly alleged a breach of a contractual indemnification obligation under the MSA for settlement or consent judgment payments by Endo. The Complaint does not allege that Endo requested or obtained McKinsey's prior written consent to any settlements, as the MSA expressly required; in fact, the Complaint appears not even to allege generally that Endo complied with applicable conditions precedent under the contract. McKinsey adamantly insists that no such consent was requested or given, but the question is whether the Complaint states a claim, so McKinsey's representations carry no weight in deciding the Motion. But here, the Complaint is insufficient. There is serious question whether the key provision as worded constitutes a condition precedent as opposed to a contractual provision that must be considered as part of the Trustee's prima facie pleading obligation to establish a breach of contract. Moreover, even assuming the provision merely establishes a condition precedent, the Court concludes for reasons detailed below that, despite the existence of some inconsistent case law as to whether a plausible breach claim can be stated in the absence of an allegation that a condition precedent was met, the better-reasoned and most on-point authority establishes that a failure to allege compliance with a condition precedent to an indemnification requirement can support dismissal on a motion to dismiss, and does so here given the importance and clarity of the dispositive consent issue.

1. Parties' Arguments

As more briefly noted above, McKinsey raises two main arguments. The first is that all indemnification claims of the Trustee are barred by New York's public policy-based prohibition of requiring indemnifications for the consequences of a plaintiff's own intentional torts. Motion at 26–27. McKinsey points to the Complaint's allegation that the directors and officers were repeatedly informed of the abuse and misuse of Endo's opioid products, but to boost profits, they continued to spearhead and approve aggressive and deceptive marketing plans. *See* Reply at 22 (citing Compl. ¶¶ 141–42, 158–59, 161–62, 169–76, 192, 196–97, 236, 238–39, 245–46, 291, 298, 305). McKinsey argues that these admissions in the complaint demonstrate that the Trustee himself has pleaded Endo's intentionality and intent to harm others. Reply at 22–23. McKinsey further contends that Endo made judicially binding admissions of intentional misconduct when (1) Endo entered into a plea agreement with the DOJ and pled guilty to a misdemeanor violation of the Food, Drug, and Cosmetic Act, (2) Endo entered into a civil settlement with the DOJ, and (3) the Trustee filed a separate breach-of-fiduciary-duty action alleging misconduct by Endo's directors and officers. Motion at 2; *see also* M. Miller Decl., Dkt. No. 18, Ex. 3. McKinsey emphasizes that even the Complaint in this action alleges that Endo's directors and officers were repeatedly informed of the abuse and misuse of Endo's opioid products but continued to spearhead and approve aggressive and deceptive marketing plans. *See* Reply at 22 (citing Compl. ¶¶ 141–42, 158–59, 161–62, 169–76, 192, 196–97, 236, 238–39, 245–46, 291, 298, 305)

Additionally, McKinsey argues that even if indemnification was available for intentional torts, the Trustee is precluded from asserting recovery for the settlement payments (again, reportedly in excess of $1.2 billion) because the MSA contained a condition precedent requiring Endo to seek and obtain McKinsey's written consent for "any settlement, compromise or consent to judgment" for which indemnity was sought. Motion at 2. McKinsey contends and the Trustee does not dispute that the Complaint contains no allegation of advance notice to McKinsey or written consent by McKinsey. Motion at 2; M. Miller Decl., Dkt. No. 18, Ex. 5, MSA ¶ 3(D)

("Neither party shall be liable under this Section 3 for any settlement, compromise or consent to judgment effected without its prior written consent, which consent shall not be unreasonably withheld.").

The Trustee's Opposition contends that the New York public policy-based case law barring indemnification for intentional torts is narrow and requires both a finding of intentional conduct and an intention to harm or injure others. Opp. at 32. The Trustee contends that nothing McKinsey has identified establishes any conduct chargeable to Endo or its officers that constitutes an intentional tort, or that demonstrates the intent to harm or injure others. Opp. at 32–33. McKinsey's Reply reiterates and reinforces its initial contentions. *See generally* Reply.

2. Discussion – Public Policy Against Indemnification for Intentional Torts

a. Legal Standard

As an initial matter, the Trustee's claim for contractual indemnification claim undisputedly is governed by New York law through the application of the MSA's choice-of-law clause. *See* M. Miller Decl., Dkt. No. 18, Ex. 5, MSA ¶ 7 ("This agreement and the proposals shall [] be governed by and construed in accordance with the laws of the State of New York without regard to conflicts of law principles[.]"); Motion at 27 n.19.

While New York law treats indemnification agreements according to principles of contract law, *see Weissman v. Sinorm Deli, Inc.*, 88 N.Y.2d 437, 446 (1996) (noting that it is axiomatic that an indemnity contract is interpreted "to effectuate the intention of the parties as expressed in the unequivocal language" of the contract), New York law embraces a public policy exception to that rule that prohibits a party from indemnifying itself against its own intentional torts. *Barbagallo v. Marcum LLP*, No. 11-CV-1358, 2012 WL 1664238, at *4–7 (E.D.N.Y. May 11, 2012) (dismissing indemnification claim for damages and defense costs because "intentional torts . . . cannot be indemnified against either by contract or common law”). This New York public policy-based rule precludes indemnification both for the obligation to pay damages arising from intentional torts, and for the costs associated with defending against intentional tort claims. *See Barbagallo*, No. 11-CV-1358, 2012 WL 1664238, at *5 (“Permitting recovery for the defense of such claims would contradict the ‘fundamental principle that no one shall be permitted to take advantage of his own wrong’ by allowing it to avoid one of the costs imposed by intentional tort liability—i.e., the costs of defending itself against these claims.”). Although this exception frequently is applied in the context of insurance contracts, New York courts apply the same rule when evaluating contractual indemnification provisions in other contexts. *Cf. Barbagallo*, No. 11-CV-1358, 2012 WL 1664238, at *4 (applying New York intentional tort indemnification bar in context of an employment contract).

The New York “public policy exception for intentionally harmful conduct is a narrow one, under which it must be established that the [defendant] acted intentionally, but further, that it acted with the intent to harm or injure others.” *Lawrence v. Cont’l Cas. Co., Inc.*, No. 12-CV-412, 2013 WL 4458755, at *6 n.12 (E.D.N.Y. Aug. 16, 2013) (quotation marks omitted) (quoting *J.P. Morgan Secs. Inc. v. Vigilant Ins. Co.*, 21 N.Y.3d 324, 335 (2013)); *Campers’ World Intern., Inc. v. Perry Ellis Intern., Inc.*, No. 02 CIV 453, 2002 WL 1870243, at *6 (S.D.N.Y. Aug. 13, 2002); *In re Residential Cap.*, LLC, 524 B.R. 563, 596 (Bankr. S.D.N.Y. 2015). The enforcement bar therefore applies only to the extent the damages flow from the demonstrated intentional causation of harm. *In re Residential Cap., LLC*, 524 B.R. 563, 596 (Bankr. S.D.N.Y. 2015) (citing *Austro v. Niagara Mohawk Power Corp.*, 66 N.Y.2d 674, 676 (1985)).

Courts are not quick to stretch the bar on indemnity for intentional torts. For example, in *J.P. Morgan Secs. Inc. v. Vigilant Ins. Co.*, the court denied the movant's motion to dismiss plaintiff's claim for indemnification because the movant had not sufficiently demonstrated that the plaintiff intended to cause harm despite a Securities and Exchange Commission order "undoubtedly finding the [plaintiff]'s numerous securities law violations to be willful." *J.P. Morgan Secs. Inc. v. Vigilant Ins. Co.*, 21 N.Y.3d 324, 335 (2013). Similarly, in *Gibbs-Alfano v. Burton*, the Second Circuit held that an indemnification clause remained enforceable where the "party seeking indemnification settled, without admitting liability, claims against it alleging intentional wrongdoing." 281 F.3d 12, 21 (2d Cir. 2002). The Second Circuit concluded that in the absence of a judgment of intentional conduct on the part of the indemnitees, New York's public policy does not prevent the enforceability of an indemnification clause. *Id.*

b. Analysis

The New York public policy-based bar on indemnification for intentional torts does not justify dismissal of the Trustee's claim for contractual indemnification. The requisite intent is not established by any or all of Endo's allegations of director and officer misconduct, Endo's civil settlement, and /or its misdemeanor plea. Rather, McKinsey's motion shows the existence of factual issues requiring further development to resolve issues of intent.

First, while the complaint alleges that Endo's former directors and officers breached their fiduciary duties, [*see* Compl. ¶¶ 230–46], accepting this allegation as true does not support a finding that Endo acted with the specific intent to harm others. The public policy exception to indemnification is not triggered merely by allegations of willful misconduct or breach of fiduciary duties. *See Great Am. Ins. Co. v. Houlihan Lawrence, Inc.*, 449 F. Supp. 3d 354, 367 (S.D.N.Y 2020) ("claims of breach of fiduciary duty . . . do not require intentionality");

Goldfarb, 53 N.Y.2d at 400 (indemnitee not barred by his "gross negligence, recklessness or wantonness"). Rather, evidence of breaches of fiduciary duties may lead to the discovery of "a business purpose which had an intended result of causing harm, but this is a factual issue" that is not appropriate for a motion to dismiss. *Bank of N.Y. v. Neumann*, 216 A.D.2d 189, 190 (1st Dep't 1995). This Court is thus unable to conclude that the Trustee's allegations against Endo's own directors and officers for breach of fiduciary duty establishes that Endo's conduct constituted an intentional tort.

Second, also unfounded is McKinsey's contention that the intentional tortiousness of Endo's conduct is established by Endo's DOJ Civil Settlement Agreement. *See* M. Miller Decl., Dkt. No. 18, Ex. 3, Ex. B. On May 30, 2023, Justice Department's Civil Division, Fraud Section filed Claim No. 3157 on behalf of various federal agencies against Endo in its bankruptcy case, "alleging that from 2011 to 2017 Endo knowingly caused the submission of false and fraudulent claims to federal healthcare programs for prescriptions of Opana ER without a medically accepted indication." *See* M. Miller Decl., Dkt. No. 18, Ex. 3, Ex. B at PDF p. 57. However, in its settlement with the Justice Department, Endo explicitly denied wrongdoing, stating that "[t]his Agreement is neither an admission of wrongdoing or liability by Endo or by the Debtors nor a concession by the United States that its claims are not well founded. Endo and the Debtors deny all allegations in Claim No. 3157 and deny that they engaged in the Covered Conduct." *See* M. Miller Decl., Dkt. No. 18, Ex. 3, Ex. B at PDF p. 58. Endo's express denial of wrongdoing cannot be construed as an admission that it committed an intentional tort.

Similarly, Endo's misdemeanor plea under the Food, Drug, and Cosmetic Act is not an admission of intentional wrongdoing. The DOJ Civil Division, Consumer Protection Branch charged Endo with a "misdemeanor violation of the Food, Drug, and Cosmetic Act ("**FDCA**"), contrary to . . . [21 U.S.C. §§ 331(a), 333(a)(1), and 352(f)(1)] in that [Endo] caused the introduction and delivery for introduction into interstate commerce of Opana ER, a drug that was misbranded in that the drug's labeling lacked adequate directions for use." M. Miller Decl., Dkt. No. 18, Ex. 3 at PDF p. 108. In Endo's plea agreement, it admitted responsibility "for the misbranding of reformulated Opana ER by marketing the drug in a manner designed to convey abuse deterrence, but with a label that failed to include adequate directions for use for its claimed abuse deterrence, in violation of the Federal Food, Drug, and Cosmetic Act." M. Miller Decl., Dkt. No. 18, Ex. 3, Ex. B, Sched. A. ¶ 16. Misdemeanor violations of 11 U.S.C. § 331 can be established without a finding of knowledge or intent. *See, e.g.*, *United States v. Hiland*, 909 F.2d 1114, 1127–28 (8th Cir. 1990) ("Under § 333(a)(1), neither knowledge nor intent is required for a misdemeanor violation of § 331.") (citing *United States v. Park*, 421 U.S. 658, 668–73 (1975)); *United States v. Marschall*, 82 F.4th 774, 779 (9th Cir. 2023) (referencing 21 U.S.C. §§ 331, 352 and the omission of any scienter requirement from the language of these various provisions). Accordingly, Endo's plea agreement admitting to misbranding its products in violation of the FDCA provisions referenced above does not demonstrate the requisite intention to harm.

Thus, the Court cannot now conclude that New York's public policy exception for intentional torts bars Endo's contractual indemnification claim against McKinsey. The motion to dismiss the claim on this basis is therefore denied.

3. <u>Discussion – MSA Consent Requirement for Indemnification of Settlement Payments</u>

a. Legal Standard

To establish a claim for a breach of contract under New York law, "a plaintiff must prove (1) a contract; (2) performance of the contract by one party; (3) breach by the other party; and (4) damages." *Terwilliger v. Terwilliger*, 206 F.3d 240, 246 (2d Cir. 2000) (quoting *First Investors*

Corp. v. Liberty Mut. Ins. Co., 152 F.3d 162, 168 (2d Cir. 1998) (in turn quoting *Rexnord Holdings, Inc. v. Bidermann*, 21 F.3d 522, 525 (2d Cir. 1994))) (internal quotations omitted).

Further, on an issue to which the parties devote great attention, a party does not have a valid breach of contract claim "where the party seeking to enforce the contract has failed to perform a specified condition precedent." *POSCO Energy Co. v. FuelCell Energy, Inc.*, 560 F. Supp. 3d 747, 753 (S.D.N.Y. 2021) (quoting *Phoenix Signal & Elec. Corp. v. N.Y. State Thruway Auth.*, 90 A.D.3d 1394, 1396–97, 935 N.Y.S.2d 201 (3d Dep't 2011)). "[A] condition precedent is 'an act or event, other than a lapse of time, which, unless the condition is excused, must occur before a duty to perform a promise in the agreement arises.'" *Bank of N.Y. Mellon Tr. Co., N.A. v. Morgan Stanley Mortg. Capital, Inc.*, 821 F.3d 297, 305 (2d Cir. 2016) (internal citation omitted). "Conditions precedent are not readily assumed. While specific, talismanic words are not required, the law nevertheless demands that conditions precedent be 'expressed in unmistakable language.'" *Comerica Leasing Corp. v. Bombardier Inc.*, No. 16 CIV. 614 (PGG), 2019 WL 11027701, at *6 (S.D.N.Y. Sept. 30, 2019). "[W]hen commercial parties expressly agree to a condition precedent to the creation or enforceability of an obligation and there is no ambiguity arising out of other language in their contract, the only question for the court is whether the condition precedent has been complied with." *Id.* (internal citations omitted).

The Federal Rules of Civil Procedure provide that "[a] pleading that states a claim for relief must contain a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). This requirement, of course, is subject to the requirements of *Iqbal* and *Twombly*, *supra*, that the complaint contain allegations of fact that establish the plausibility of the plaintiff's claim for relief. Meanwhile, Federal Rule of Civil Procedure 9(c) provides that "[i]n pleading conditions precedent, it suffices to allege generally that all conditions precedent have occurred or been performed . . .” Fed. R. Civ. P. 9(c). No express language contained in FRCP 8(a)(2) and 9(c) requires that the performance or occurrence of a particular condition precedent be affirmatively pled by a claimant. Fed. R. Civ. P. 8(a)(c); 9(c). As discussed below, courts have not all agreed about the extent to which *Iqbal*'s pleading requirements apply and require more when a plaintiff alleges breach of a contract that featured one or more conditions precedent to a defendant's obligations.

b. Analysis

McKinsey contends that the Trustee did not allege, because he cannot, that Endo ever notified McKinsey or sought and received McKinsey's written consent to enter the settlements for which Plaintiff is seeking indemnification. Motion at 2, 28. As a result, McKinsey contends that under the clear and unambiguous terms of the MSA, the company need not indemnify Endo for those damages—a result that McKinsey argues can be decided on a Rule 12(b)(6) motion to dismiss. Motion at 28 (citing *Napster, LLC v. Rounder Recs. Corp.*, 761 F. Supp. 2d 200, 209 (S.D.N.Y. 2011) (indemnification claim "dismissed for failure to comply with the advance-consent provision") and *Erickson Air-Crane Inc. v. EAC Holdings, L.L.C.*, 84 A.D.3d 464, 465 (N.Y. App. Div. 2011) ("Plaintiff's conceded failure to comply with the[] express conditions when it unilaterally settled certain third-party claims is fatal to its demand for indemnification.")).

In opposition, the Trustee first observes that the MSA's requirement of notice and written consent to settlements is relevant to only a subset of the damages for which indemnification is sought – although as noted McKinsey says this subset is worth more than $1.2 billion. Opp. at 2. The Trustee alleges several categories of indemnifiable losses other than settlement, compromises, or consent to judgment payments under Section 3(A) of the MSA, including $240 million in professional fees incurred during Endo's bankruptcy and $344 million incurred in defending opioid-related lawsuits. *See* Compl. ¶¶ 226, 280. The Trustee further argues that McKinsey has not shown or even contended that there is any notice or consent condition precedent to Endo's recovery of non-settlement buckets of indemnifiable losses under the MSA. Opp. at 34.

Regarding whether Endo sought or obtained prior written consent from McKinsey for settlements, the Trustee argues that this constitutes an issue of fact that cannot be resolved on a motion to dismiss. Opp. at 35–36. The Trustee argues that "under New York law, the failure of a plaintiff to comply with conditions precedent is an affirmative defense." Opp. at 34 (quoting *Endovasc, Ltd. v. J.P. Turner & Co., LLC*, 169 F. App'x 655, 657 (2d Cir. 2006)). Further, Plaintiff argues, "the Federal Rules of Civil Procedure . . . do not compel a litigant to anticipate potential affirmative defenses . . . and to affirmatively plead facts in avoidance of such defenses." *Id.* (quoting *McGlynn v. Sinovision Inc.*, 2024 U.S. Dist. LEXIS 26641, at *3 (S.D.N.Y. Feb. 15, 2024) (citing *Abbas v Dixon*, 480 F.3d 636, 640 (2d Cir. 2007)); *United Res. Recovery Corp. v. Ramko Venture Mgmt.*, 584 F. Supp. 2d 645, 657 (S.D.N.Y. 2008) (plaintiff has "no obligation to affirmatively plead compliance with conditions precedent").

Responding to the authority on which McKinsey relies, the Trustee distinguishes *Napster* by arguing that the advance-consent provision in that case was broad and applied to all indemnifiable costs, and the plaintiff had conceded that it had failed to obtain "written consent," which was fatal to its claim unlike the facts in this case. Opp. at 35–36. Similarly, the Trustee notes that the *Erickson Air-Crane* plaintiff had admitted that it failed to comply with a condition precedent in a stock purchase agreement, which made any demand for indemnification "contingent" in that case. Opp. at 36; *Erickson Air-Crane Inc. v. EAC Holdings, LLC*, 84 A.D.3d

464, 465 (App. Div. 1st Dept.). In the present case, the Trustee emphasizes that the Trustee has not conceded that Endo failed to comply with a condition precedent; rather, the Trustee asserts that as a trustee who lacks first-hand knowledge of the underlying events he needs discovery as to whether Endo complied with the notice and consent condition precedent (a representation that implicitly concedes or at least suggests that the Trustee presently is unaware of any notice or consent having been given). *See* Opp. at 36.

Despite the parties' intensive focus on the pleading requirements that apply to the satisfaction of conditions precedent in a contract, the Court has some uncertainty about whether the Trustee has even plausibly pled facts establishing a prima facie case that McKinsey breached a contractual obligation in the first place. The elements of a New York contract claim include a showing that the plaintiff establish, among other things, performance by the plaintiff and a breach of an agreement by the defendant counterparty. *Terwilliger*, 206 F.3d at 246. The MSA could not be more explicit that McKinsey undertook no indemnification obligation whatsoever as to settlement payments other than as to settlements to which McKinsey gave advance written consent, which it was not to withhold unreasonably. *See* M. Miller Decl., Dkt. No. 18, Ex. 5, MSA ¶ 3(D). The Complaint nowhere alleges that such consent was sought or given, and McKinsey adamantly insists none was supplied; in fact, McKinsey insists that no notice was given, and the Trustee has not alleged shown otherwise, rather urging that it be allowed to take discovery to attempt to make its case. In fact, so far as the Court can tell, nothing in the Complaint even alleges in general terms that Endo complied with conditions precedent to McKinsey's settlement indemnification obligations. Given the MSA's plain terms, a breach by McKinsey would consist of a refusal to pay after McKinsey had received notice and consented to a proposed settlement, and/or damages flowing from an unreasonable refusal to provide such consent. That has not been alleged, and the Court does not perceive how the Complaint's nonconclusory allegations of fact meet the pleading requirements enunciated in *Iqbal* and *Twombly* as to performance under the contract by Endo (including the giving of notice) or breach (a nonpayment after having given consent or an unreasonable withholding of consent by McKinsey).

Moreover, even assuming that notice and consent to Endo's settlements are properly deemed a "condition precedent" to McKinsey's indemnification obligations, the Court adopts and follows Judge Crotty's analysis in *Napster* and subsequent similar decisions on the facts present here. The MSA's indemnification provisions are clear and create a bright-line threshold for the obligation on the part of McKinsey, and the issue is not obscure or one of many possible conditions precedent such that a detailed recitation of how various requirements were met would be unreasonable to require. Rather, the written consent requirement is express, objective, clear, readily determinable, and utterly central to the parties' obligations – McKinsey expected and required that, and for it to be liable to indemnify Endo for any settlement, it must have consented to the settlement, subject to the proviso that it would not unreasonably withhold its consent. Yet not only has there been no allegation of notice or consent, so far as the Court can tell the Complaint lacks any allegation even generally that Endo or the Trustee satisfied relevant conditions precedent. The Court therefore at a minimum cannot conclude that the Complaint pleads "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 570.

Napster involved indemnification demands made by a music streaming platform, Napster, against a record label called Rounder with which Napster had entered a streaming agreement. *See generally* 761 F. Supp. 2d 200 (S.D.N.Y. 2011). Napster sought indemnification for its settlement costs resolving copyright infringement claims against Napster for streaming allegedly copyright-violative music obtained from the record label. *Id.* The Court granted the record label's motion to dismiss, in relevant part, for "failure to comply with [a contractual] advance consent provision." *Id.* at 202. The contract at issue provided, much like the Endo-McKinsey contract at issue here, that "[n]o payments shall be made nor costs incurred in connection with any such claim without the prior written consent of [the other party], such consent not to be unreasonably withheld." *Id.* at 204. Napster settled the copyright claims it faced and only then turned to its content providers for indemnification. *Id.* at 205. Napster sued Rounder (the record label defendant) and did not specifically allege Rounder's consent to Napster's settlement, but alleged generally that Napster had complied with all conditions precedent. *Id.*

In dismissing Napster's claims, the Court emphasized the pleading requirements that not only must the Federal Rules' textual requirements be met, but that, as the Supreme Court has explained, "[t]o avoid dismissal, the complaint must contain 'enough facts to state a claim to relief that is plausible on its face,' that is to say facts that 'nudge [ ] [the plaintiff's] claims across the line from conceivable to plausible . . . ." *Id.* (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Plausibility, in turn, requires only that the allegations in the complaint "raise a reasonable expectation that discovery will reveal evidence" in support of the claim. *Twombly*, 550 U.S. at 555; *see also Arar v. Ashcroft*, 585 F.3d 559, 617 (2d Cir. 2009). The Court rejected as conclusory and insufficient a general allegation by Napster – seemingly not present in the Trustee's Complaint here – that Napster had followed or satisfied all applicable conditions precedent, and the *Napster* court noted that even that general allegation was inconsistent with an acknowledgement of a lack of notice. 761 F. Supp. 2d at 208. While acknowledging that some cases held that a plaintiff need not allege compliance with specific conditions precedent, the *Napster* court held that those earlier decisions either predated the *Iqbal* and *Twombly* plausibility pleading standard, failed to fully take it into account, or were otherwise distinguishable. *Id.* at 208–09.[3]

The Court agrees that a complaint seeking indemnification for settlements that were subject to an express advance-written-consent requirement cannot fail to allege facts showing that such consent or some other trigger for the defendant's liability exists. And here, the situation is even more stark, as the Court has identified no general allegation of compliance with conditions precedent; the Trustee has identified none, and even if such an allegation were present in the lengthy Complaint, it alone would be insufficient for reasons just stated.

As noted, the Court questions whether such a fundamental deficiency even fits exclusively in the rubric of conditions precedent, or whether it should also be viewed as constituting a part of the plaintiff's prima facie pleading requirement to show a breach. Setting that musing aside, at a minimum, the Court concludes that the Complaint here does not plausibly allege a claim for breach of McKinsey's indemnification obligation relating to settlements.

This conclusion is reinforced by a decision by then-District Judge Nathan, holding that Rule 9(c)'s statement that conditions precedent may be alleged generally does not justify holding pleadings to a standard less rigorous than that required by *Iqbal*. *See Dervan v. Gordian Grp. LLC*, No. 16-CV-1694-SJN, No. 16-CV-1694-AJN, 2017 WL 819494 (S.D.N.Y. Feb. 28, 2017). Like the parties here, the plaintiff in *Dervan*, who alleged his former employer's breach of a

[3] The Trustee correctly observes that the holding in *Napster* was buttressed by the Court's observation that the plaintiff there acknowledged noncompliance with a condition precedent even as it generally alleged satisfaction of all conditions, but that observation was by way of reinforcement, not central or necessary to the Court's conclusion that a plausible allegation was required, even of conditions precedent, notwithstanding the wording of Fed. R. Civ. P. 9(c). *See Napster, LLC v. Rounder Recs. Corp.*, 761 F. Supp. 2d 200, 209 (S.D.N.Y. 2011).

severance agreement, argued that under Rule 9(c) his fulfillment of the contract so as to be entitled to performance by the former employer was adequately alleged by a mere general averment. *Id.* The Court disagreed, holding in a thorough and persuasive analysis that the *Iqbal* pleading requirements applied even as to whether a condition precedent were satisfied, because *Iqbal* expressly reached Rule 9(b) with its comparable language saying "intent" can be alleged generally. *Id.* at *3–7. Thus, the Court concluded that Dervan had failed to plausibly allege his own performance under the agreement, and his breach of contract claim accordingly was dismissed. *Id.*

Dervan has been followed by numerous cases for the proposition that "the occurrence or performance of a condition precedent—to the extent that it need be pled as a required element of a given claim—must be plausibly alleged in accordance with Rule 8(a)." *Ashland Glob. Holdings Inc. v. Valvoline, Inc.*, No. 21-CV-00498-RA, 2022 WL 219997, at *6 (S.D.N.Y. Jan. 25, 2022) (quoting *Dervan*, 2017 WL 819494, at *6, and citing numerous other decisions that "followed *Dervan*'s lead"). The *Ashland* court therefore dismissed the complaint.

In the face of this persuasive authority, the Court declines to follow the authorities relied on by the Trustee, many of which are distinguishable in any event. It is true that the Second Circuit has not ruled on whether Rule 9(c) requires plaintiffs to affirmatively plead performance of conditions precedent. *See Mendez v. Bank of Am. Home Loans Servicing, LP*, 840 F. Supp. 2d 639, 648 (E.D.N.Y. 2012). The Trustee identifies a number of earlier decisions declining to dismiss a complaint (at least one that alleged generally that conditions precedent were satisfied, as the Complaint here does not) on the rationale that Rule 9(c) authorizes general allegations of satisfaction of conditions precedent, and/or that a failure to perform a condition precedent is an affirmative defense that does not support a motion to dismiss.[4] None of these decisions, however, grapple with the analysis of *Napster*, *Dervan*, *Ashland*, and cases discussed in those decisions, all of which insist that the *Iqbal* plausibility applies and requires more than mere conclusory statements, especially where the complaint is so glaringly silent about a central provision.

As the *Ashland* court further held, the resulting dismissal was and should be without prejudice to repleading so that the plaintiff can "amend at least once after having the benefit of a court's reasoning in dismissing" the claim. *Ashland*, 2022 WL 219997, at * 8. As such, the Court rules here: the Trustee's claim for indemnification of its settlement costs is dismissed without prejudice to its right to amend to allege additional facts demonstrating its compliance with the notice and written consent requirement of the MSA's settlement-indemnification provision.

The Court thus grants without prejudice McKinsey's motion to dismiss the Trustee's claim for indemnification for settlement payments, while it denies the motion to dismiss indemnification claims for other asserted expenses.

B. Aiding and Abetting in the Breach of Fiduciary Duties

The Complaint's next claims assert that McKinsey's conduct aided and abetted breaches of fiduciary duty by Endo officers and directors by encouraging and enabling them to implement

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[4] *See, e.g.*, *Mendez*, 840 F. Supp. 2d at 648 (acknowledging inconsistent case law and holding that the pleading of performance of specific conditions precedent is not required) (citing *Kiernan v. Zurich Cos.*, 150 F.3d 1120, 1124 (9th Cir. 1998) ("Rule 9(c) does not expressly require that performance of conditions be pled, it merely sets forth the manner in which such pleadings should be made.")); *Baraliu v. Vinya Capital, L.P.*, No. 07 Civ. 4626, 2009 U.S. Dist. LEXIS 35712, at *5 (S.D.N.Y. Mar. 31, 2009) ("Under the Federal Rules, a plaintiff is required to 'allege generally that all conditions precedent have occurred or been performed.' Fed. R. Civ. P. 9(c). Plaintiff fails to do so, and in fact admits in another part of his complaint that the conditions precedent were not satisfied, and hence this claim must be dismissed."); *Randolph Equities, LLC v. Carbon Capital, Inc.*, No. 05 Civ. 10889, 2007 U.S. Dist. LEXIS 21670, at *4 (S.D.N.Y. Mar. 26, 2007) ("Defendants' contention that Rule 9(c) mandates Plaintiffs to plead with specificity the performance of each condition precedent is misguided."); *United Res. Recovery Corp. v. Ramko Venture Mgmt.*, 584 F. Supp. 2d 645, 657 (S.D.N.Y. 2008) (plaintiff has "no obligation to affirmatively plead compliance with conditions precedent"); *CVC Claims Litig. LLC v. Citicorp Venture Capital Ltd.*, No. 03 Civ. 7936, 2006 U.S. Dist. LEXIS 31395, at *4 (S.D.N.Y. May 18, 2006) (holding that plaintiff failed to state a claim because plaintiff failed to allege, even generally, that the conditions precedent were performed or had occurred).

reckless sales-maximization strategies that fueled the opioid crisis, resulting in heavy corporate liabilities. *See* Compl. ¶¶ 282–314 (Second through Sixth Causes of Action).

McKinsey moves to dismiss each of these counts on identical grounds: that the claims are barred under the *Wagoner* and *in pari delicto* doctrines, and that the claims are time-barred. The Trustee disagrees. The parties' contentions are detailed in the course of the following discussion, which begins with the time-bar question.

1. Statute of Limitations

A claim may be dismissed as time-barred at the motion to dismiss juncture "only if a complaint clearly shows the claim is out of time." *Harris v. City of N.Y.*, 186 F.3d 243, 250 (2d Cir. 1999).

The Complaint was filed on August 15, 2024, but the parties agree that the relevant point for computing the timeliness of the Trustee's claims was Endo's bankruptcy petition date, namely, August 16, 2022. Compl. ¶ 20; 11 U.S.C. § 108(a) (imposing two-year toll of unexpired statutes of limitations as of a debtor's bankruptcy petition date).

Pertinent to the possible claim accrual date, the Complaint alleges that McKinsey worked with Endo over an extended time including "[t]hroughout 2016," [Compl. ¶ 201], and the Trustee's opposition to the motion to dismiss advances no possible accrual date after 2016. *See* Opp. at 31 ("the Trustee has alleged actionable misconduct as late as 2016"). The Complaint alleges that the FDA made adverse regulatory findings in March 2017 and that Endo agreed to withdraw its reformulated Opana ER product from the market in July 2017 [Compl. ¶¶ 211, 213], although "residual sales" of Opana ER continued into 2018 [Compl. ¶ 217] and Endo thereafter continued to sell generic versions of its product or opioid products that relied on Endo patents [Compl. ¶ 216].

The parties disagree about what limitations period applies. McKinsey urges the Court to apply New York's three-year statute of limitations pursuant to CPLR 214(4) and Pennsylvania's two-year statute of limitations pursuant to 42 Pa. C.S.A § 5524(7) for the aiding and abetting breach of fiduciary duty claims (Counts II—VI), keying off of the latest McKinsey conduct alleged in the Complaint, namely, activities throughout 2016. *See* Motion at 25–26; Reply at 17–20; Compl. ¶ 201. The Trustee argues that the applicable statute of limitations is six years pursuant to CPLR 213(7) as to the New York-based Par Pharmaceutical, with additional time tacked on due to executive orders issued by the governor of New York during the COVID-19 pandemic which tolled the statute of limitations for 228 days. Opp. at 26–30. The Trustee contends that Pennsylvania law (pertinent to domestic Endo entities other than the Par Pharmaceutical entities) and Irish law (pertinent to Endo Plc) allow a six-year period, either explicitly or, in the case of Ireland, as a matter of laches case law. *Id.*

The Court thus must begin by identifying the applicable law. The Court applies the law of the forum state – New York – to determine which statute of limitations to apply. *Halperin v. Morgan Stanley Inv. Mgmt. (In re Tops Holding II Corp.)*, 646 B.R. 617, 692 (Bankr. S.D.N.Y. 2022). Where another jurisdiction's law may apply, New York law calls for applying the shorter of the relevant New York limitations period, or the other jurisdiction's limitations period. *See* CPLR 202; *Sutton v. Tapscott*, 120 F.4th 1115, 1121 (2d Cir. 2024). The Court's analysis therefore begins with a review of the possible sources of law and the applicable provisions under each.

a. New York Law

The parties agree that New York law applies to Endo affiliate Par Pharmaceutical, which was headquartered in New York, so this discussion addresses the sole applicable time bar as to

Par while also addressing one pertinent period as to the other Endo entities in light of the requirement of the New York borrowing statute to apply the shorter of New York's and the other relevant jurisdiction's limitations periods.

New York's relevant law is complex, and parsing the relevant strands is a somewhat time-consuming exercise. By way of overview, for reasons about to be explained, the applicable New York statute of limitations for the types of aiding and abetting claims brought by the Trustee is generally three years, because the relief sought is monetary rather than equitable and the claims do not sound in fraud. The other key issue, advanced although somewhat conclusorily by the Trustee, is that the Trustee nevertheless is entitled to rely on a six-year term provided by New York's CPLR 213(7) for suits by a corporation against its officers and/or directors for a number of types of harms those officials caused the corporation to experience. The case law is not consistent whether a bankruptcy trustee could ever be entitled to bring such a claim, although there is significant authority in favor of authorizing such claims by a trustee. Even assuming a trustee could bring such a claim, the Court concludes that CPLR 213(7) is inapplicable to the claims against McKinsey here because the claims are not leveled against corporate officers or directors, but rather, in a suit in which no director or officer is even a party, are brought against a consultant on an aiding and abetting theory (among other grounds). The statute specifies that only claims against officers and directors fall within the scope of CPLR 213(7), no prior case has authorized reliance on CPLR 213(7) in suits against parties other than officers and directors, and the Court concludes that the use of the statute in such an expansive manner would be contrary to the CPLR's language and would harmfully allow artful plaintiffs to evade clear, independent, expressly applicable and shorter limitations periods merely by asserting that third parties helped directors harm companies.

Under New York law, the limitations period applicable to aiding and abetting fiduciary duty breaches varies depending on the nature of the claim and/or the remedy sought.

Sections 213 and 214 of the New York CPLR "do not specify the statute of limitations period in which claims of . . . aiding and abetting breach of fiduciary duty must be brought." *AJ Ruiz Consultoria Empresarial S.A. v. Banco Bilbao Vizcaya Argentaria, S.A.*, No. AP 21-01213 (LGB), 2024 WL 460482, at *16 (Bankr. S.D.N.Y. Feb. 6, 2024), *report and recommendation adopted*, No. 24-CV-3466 (JGLC), 2025 WL 934416 (S.D.N.Y. Mar. 27, 2025). Relevant case law has concluded that "[t]he statute of limitations for a claim of aiding and abetting a breach of fiduciary duty is the same limitations period that would apply to the underlying breach," where the underlying claim is sounded in fraud. *Balta v. Ayco Co.*, LP, 626 F. Supp. 2d 347, 359 (W.D.N.Y. 2009) (citing *Williams v. Sidley Austin Brown & Wood, LLP*, 15 Misc. 3d 1125(A) at *5, 841 N.Y.S.2d 222 (N.Y. Sup. Ct. 2007)); *see also* CPLR 213(8) ("an action based upon fraud" has a statute of limitations the "greater of six years from the date the cause of action accrued or two years from the time the plaintiff or the person under whom the plaintiff claims discovered the fraud, or could with reasonable diligence have discovered it"); *In re Signature Apparel Grp. LLC*, 577 B.R. 54, 82 (Bankr. S.D.N.Y. 2017) ("A six year statute of limitations applies to breach of fiduciary claims . . . where the cause of action is based on actual fraud.") (citing *Kaufman v. Cohen*, 307 A.D.2d 113, 117, 760 N.Y.S.2d 157, 164 (N.Y. 2003)); *In re Lifetrade Litig.*, No. 17-CV-2987 (JPO), 2023 WL 6215332, at *2 (S.D.N.Y. Sept. 25, 2023), *on reconsideration in part*, No. 17-CV-2987 (JPO), 2024 WL 1892254 (S.D.N.Y. Apr. 30, 2024). An exception to this rule is that "courts will not apply the fraud Statute of Limitations if the fraud allegation is only incidental to the claim asserted; otherwise, fraud would be used as a means to litigate stale claims." *Kaufman*, 307 A.D.2d at 119 (quoting *Powers Mercantile Corp. v.*

Feinberg, 109 A.D.2d 117, 120, 490 N.Y.S.2d 190, 192–93 (N.Y. App. Div. 1985), *aff'd sub nom. Powers Mercantile Co. v. Feinberg*, 67 N.Y.2d 981, 494 N.E.2d 106 (N.Y. 1986)).

The statute of limitations for aiding and abetting breach of fiduciary duty claims not sounding in fraud is limited to three years if "the remedy sought is purely monetary in nature." *See IDT Corp. v. Morgan Stanley Dean Witter & Co.*, 12 N.Y.3d 132, 139, 907 N.E.2d 268 (N.Y. 2009) (citing CPLR 214(4)). However, it is six years where "the relief sought is equitable in nature." *Id.* (citing CPLR 213(1)). Meanwhile, "where an allegation of fraud is essential to a breach of fiduciary duty claim, courts have applied a six-year statute of limitations under CPLR 213(8)." *Id.* (citing *Kaufman v. Cohen*, 307 A.D.2d 113, 119, 760 N.Y.S.2d 157 (N.Y. App. Div. 2003)). In other words, for the longer, six-year statute of limitations to apply, the cause of action must either (1) seek an equitable remedy,[5] or (2) seek relief for a breach of fiduciary that is rooted in fraud.[6]

The facts alleged in the Complaint make clear that neither scenario is present here. The Complaint does not allege fraudulent conduct either on McKinsey's part, or on Endo's fiduciaries' part, instead alleging facts that, if assumed true, allege negligence (perhaps to a heightened degree, such as gross or reckless conduct) and breaches of a duty of care. Meanwhile, the Complaint seeks monetary damages from McKinsey. *See* Compl. ¶ 90 ("Prayer for Relief"

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[5] *See Carlingford Ctr. Point Assocs. v. MR Realty Assocs., L.P.,* 772 N.Y.S.2d 273, 274 (N.Y. App. Div. 2004) ("A breach of fiduciary duty claim is governed by either a three-year or six-year limitation period, depending on the nature of the relief sought . . . [t]he shorter time period applies where monetary relief is sought, the longer where the relief sought is equitable in nature . . . ."); *Cooper v. Parsky,* 140 F.3d 433, 440–41 (2d Cir. 1998) (recognizing that a six-year statute of limitations only controls claims for breach of fiduciary duties seeking equitable relief); *Meridien Int'l Bank Ltd. v. Gov't of the Republic of Liberia*, 23 F. Supp. 2d 439, 452 (S.D.N.Y. 1998) (same) (citing *Philip Morris Inc. v. Heinrich*, No. 95 CIV. 0328 (LMM), 1996 WL 363156, at *16 (S.D.N.Y. June 25, 1996)); *Golden Pac. Bancorp v. F.D.I.C.*, 273 F.3d 509, 518 (2d Cir. 2001) (same, discussed by *Fezzani v. Bear, Stearns & Co.*, No. 99 CIV. 0793 (RCC), 2004 WL 1781148, at *2–3 (S.D.N.Y. Aug. 10, 2004) and *Wagley v. JP Morgan Chase Bank, N.A. as trustee of Mary Penney Wagley Irrevocable Tr.*, No. 18 CIV. 8668 (PGG), 2020 WL 5768688, at *6 (S.D.N.Y. Sept. 26, 2020)).

[6] *See IDT Corp.*, 12 N.Y.3d at 139; *Cohen v. S.A.C. Trading Corp.*, 711 F.3d 353, 361 & n.3 (2d Cir. 2013) (citing CPLR 213(8)).

seeking "[r]ecovery against McKinsey in an amount to be determined at trial" and "[a]warding Plaintiffs prejudgment and post-judgment interest at the maximum rate permitted by law"). The Complaint does also seek "[a]ny further relief as the Court deems just, proper or equitable," *see id.*, but the primary thrust of the Complaint is to demand monetary damages, and, because the Complaint concerns historic conduct that is not ongoing and that arose in a since-discontinued commercial relationship, the Court cannot envision equitable relief that could result from the action. *See Bascuñan v. Elsaca*, No. 15 CIV. 2009 (GBD), 2021 WL 3540315, at *7 (S.D.N.Y. Aug. 11, 2021) (a review of the complaint made it clear that what plaintiff sought was money damages). Further, the fact that what the Trustee seeks is monetary damages weighs in favor of classifying the breach of fiduciary claims against the Par entities as legal claims. Thus, New York law's three-year limitations period applies.

In turn, there is no dispute that the last McKinsey conduct relevant to the Trustee's aiding and abetting breach of fiduciary claims occurred no later than 2016, and so these claims are accordingly time-barred (unless the Trustee is saved by CPLR 213(7), discussed below). *See* CPLR 214(4). This conclusion is buttressed by additional case law that McKinsey emphasized arising from cases that featured allegations similar to those here. *See Global Crossing Estate Rep. v. Winnick*, 2006 WL 2212776, at *18 (S.D.N.Y. 2006) (applying three-year period to breach of fiduciary duty claim advanced by estate representative of bankrupt corporation); *Tatko v. Sheldon Slate Prods. Co., Inc.*, 769 N.Y.S.2d 626, 628 (N.Y. App. Div. 2003) (applying three-year period to breach of directors' fiduciary duties claim in derivative action).

The Trustee has failed to grapple either with this case law, or with the reality that New York law differentiates among the types of claims and misconduct at issue in determining what limitations period applies. Rather, the Trustee somewhat cursorily argues for a blanket six-year period, citing CPLR 213(7). CPLR 213(7) supplants the "general rule [of CPLR 213(1)] in particular circumstances." *In re Lifetrade Litig.*, No. 17-CV-2987 (JPO), 2023 WL 6215332, at *2 (S.D.N.Y. Sept. 25, 2023), *on reconsideration in part*, No. 17-CV-2987 (JPO), 2024 WL 1892254 (S.D.N.Y. Apr. 30, 2024); *see also Roslyn Union Free Sch. Dist. v. Barkan*, 16 N.Y.3d 643, 648, 950 N.E.2d 85, 87 (2011). But the text of CPLR 213(7), which where applicable imposes a six-year statute of limitations, makes clear that its coverage does not extend to this case; it covers only "an action by or on behalf of a corporation against a present or former director, officer or stockholder for an accounting or to procure a judgment on the ground of fraud, or to enforce a liability, penalty or forfeiture, or to recover damages for waste or for an injury to property or for an accounting in conjunction therewith." CPLR 213(7).

Some but not all courts have applied the six-year statute of limitations under CPLR 213(7) for claims brought by a bankruptcy trustee against a corporation's directors or officers on behalf of the corporation. *See FDIC v. Bober*, No. 95 CIV. 9529 (JSM), 2000 WL 235271, at *3 (S.D.N.Y. Mar. 1, 2000) (noting that, contrary to the discussion in *Purves v. ICM Artists, Ltd.,* 119 B.R. 407 (S.D.N.Y.1990), the plain language of CPLR 213(7) is not limited to derivative actions but covers any action "brought by or on behalf of a corporation"); *Pereira v. Centel Corp. (In re Argo Communs. Corp.)*, 134 B.R. 776, 787–88 (Bankr. S.D.N.Y. 1991) ("Based on the plain language of [CPLR] 213(7), the same statute of limitations must apply when a corporation asserts its own cause of action and when a shareholder asserts the same cause of action on the corporation's behalf. Consistent with this interpretation, the statute encompasses both actions 'by' and those 'on behalf of' a corporation.'"). Accordingly, there is a strong argument, not decided by the Court here, that CPLR 213(7) does not apply solely to shareholder derivative actions, as suggested by McKinsey. *See Lippe v. Bairnco Corp.*, 230 B.R. 906, 913–14 (S.D.N.Y. 1999); *Argo Commc'ns Corp.*, 134 B.R. at 787; Reply at 18.

However, the statute on its face does not apply to the Defendants in this action. McKinsey is not a present or former "director[], officer[], or stockholder[] of a corporation on whose behalf the action was being brought." *Grika v. McGraw*, 55 Misc. 3d 1207(A) at *12, 57 N.Y.S.3d 675 (N.Y. Sup. 2016), *aff'd sub nom. L.A. Grika on behalf of McGraw*, 161 A.D.3d 450, 76 N.Y.S.3d 546 (N.Y. 2018). At least one court in this Circuit has considered whether CPLR 213(7) applies to *de facto* directors, officers, or shareholders and concluded that it does not. *See Steinfeld v. Richard A. Eisner & Co., LLC (In re Gen. Vision Servs., Inc.)*, No. 05-01759 (SMB), 2006 WL 687162, at *3 (Bankr. S.D.N.Y. Mar. 13, 2006), *order aff'd, appeal dismissed*, 423 B.R. 790 (S.D.N.Y. 2010), and *order aff'd, appeal dismissed*, 423 B.R. 790 (S.D.N.Y. 2010). The *Steinfeld* court examined an analogous situation from *Trinity Coop Apartments*, a New York Appellate Division case, where the defendants sued "were not officers, directors or shareholders of the plaintiff, but allegedly controlled the plaintiff's officers and directors." *Id.* (citing *Trinity Coop. Apts., Inc. v. J.S. Bldg. Corp.*, 270 N.Y.S.2d 644, 645 (N.Y. App. Div. 1966)). There, the Appellate Division ruled that these defendants "may have controlled the persons who were nominally the officers and directors of plaintiff did not render the 6–year Statute of Limitations . . . applicable to them." *Trinity Coop. Apts.*, 270 N.Y.S.2d at 645. Relying on *Trinity Coop Apartments*, *Steinfeld* held that the general, three-year statute of limitations for injuries to property, *see* CPLR 214(4), controls even if the defendants are *de facto* officers, directors, or shareholders. *Steinfeld*, 2006 WL 687162, at *3 (CPLR 213(7) governs claims against *nominal* officers, directors and shareholders, but does not apply to *de facto* officers, directors and shareholders).

Similarly, Defendants here are two corporations in the McKinsey corporate umbrella who are third parties accused of harming Endo entities by their consulting activities, with one alleged mechanism of harm being aiding and abetting in breaches of fiduciary duties by certain former directors and officers of the debtor-corporations at issue. *See* Compl. ¶¶ 18–19. The limited authority on point has rejected applying the longer limitation period of CPLR 213(7) to such claims. Rather, as one court held, "a breach of fiduciary duty derivative claim seeking only monetary damages against a defendant who is not a 'director, officer or shareholder' of the company is not a claim governed by CPLR 213(7), and thus is subject to a three-year statute of limitations." *Grika v. McGraw*, 55 Misc. 3d 1207(A) at *11 (applying a three-year statute of limitations to a cause of action alleging a claim for aiding and abetting a breach of fiduciary duty) (citing *Bd. of Managers of Chelsea 19 Condo. v. Chelsea 19 Assocs.*, 73 A.D.3d 581, 582, 905 N.Y.S.2d 8, 10 (N.Y. App. Div. 2010)). Earlier case law also has concluded that where claims for aiding and abetting breach of fiduciary are brought against non-directors or officers, a Trustee's reliance on CPLR 213(7) is misplaced. *See In re Invs. Funding Corp. of N.Y. Sec. Litig.*, 523 F. Supp. 533, 547 (S.D.N.Y. 1980). Such a result would ignore the plain language of CPLR 213(7), which applies specifically and exclusively to claims against directors and officers, and it would contravene the notion, espoused in *Kaufman*, that courts should not allow CPLR 213(7) to be "used as a means to litigate stale claims." 307 A.D.2d at 119.

The Trustee has filed a separate adversary proceeding against former Endo directors and/or officers of the debtor corporations. *See* Compl. ¶¶ 187–213; *see also Dundon v. De Silva, et al.*, Adv. Case No. 24-07022 (DSJ) (Bankr. S.D.N.Y. July 24, 2024), Dkt. No. 1. Nothing in this Decision is intended to bind any party in that litigation, which may present different issues or arguments that the Court has not considered here. Be that as it may, the Trustee's reliance on CPLR 213(7) here fails.

As shown above, then, New York law establishes a three-year limitations period for the types of claims at issue here. And those claims thus expired no later than the end of 2019, well before the COVID-related tolling measures adopted by New York took effect, and well before August 2022 petition date.

The Trustee's opposition contends that Pennsylvania law provides additional protections in the form of a "discovery" rule and/or an "adverse domination" doctrine. Opp. at 29–30. The Trustee's Opposition does not present argument that similar doctrines apply and are satisfied here under New York law, and so the Court need not and cannot address whether either doctrine extends the applicable statute of limitations under New York law.

b. Pennsylvania and Ireland Law

Because New York's borrowing statute requires applying the shorter of the relevant limitations periods under New York law or the law of any other relevant jurisdiction, the Court's New York law holding alone is fatal to all of the Trustee's aiding-and-abetting claims. Moreover, at least the claims for which Pennsylvania law arguably could apply (meaning those involving Endo entities other than Par and Endo Plc) likewise are untimely as a matter of Pennsylvania law, thus creating an independent reason to dismiss those claims.

Under Pennsylvania law, claims for aiding and abetting breach of fiduciary duty are subject to a two-year statute of limitation. *See* 42 Pa. C.S. § 5524; *Weis-Buy Servs., Inc. v. Paglia*, 411 F.3d 415, 422 (3d Cir. 2005) (applying Pennsylvania statute of limitation to breach of fiduciary duty claim); *Appel v. Kaufman*, 481 F. App'x 774, 776 (3d Cir. 2012); *In re Swarthmore Grp., Inc.*, 667 B.R. 258, 270 (Bankr. E.D. Pa. 2025). The six-year statute of limitations prescribed by 42 Pa. C.S.A. § 5527(b) ("Any civil action or proceeding which is neither subject to another limitation specified in this subchapter . . . must be commenced within six years.") is inapplicable here because the statute of limitations for causes of action for breach of fiduciary duty is provided in 42 Pa. C.S. § 5524. The Trustee's argument to the contrary is unfounded, and depends on cases involving conduct that preceded 1982, when Pennsylvania enacted legislation expanding its pre-existing two-year limitations period to include claims "founded on negligent, intentional, or otherwise tortious conduct or any other action or proceeding sounding in trespass, deceit or fraud." 42 Pa. C.S.A. § 5524(7). McKinsey cites an array of post-amendment cases establishing that Pennsylvania has applied the two-year period to breach of fiduciary duty claims accruing after 1982. *See* Reply at 19 n.12 (citing numerous cases). The Trustee did not meaningfully or successfully controvert this showing at oral argument.

Additionally, and contrary to the Trustee's arguments, neither the "discovery rule" nor the "adverse domination" doctrine tolls the applicable Pennsylvania statute of limitations, at least to a sufficient degree to render the claims timely under Pennsylvania law. *See* Opp. at 29–30.

The discovery rule provides that "[w]here a plaintiff could not reasonably have discovered his injury or its cause . . . Pennsylvania courts have applied the discovery rule to toll the statute of limitations. Where the discovery rule does apply, the two-year period on legal malpractice actions begins to run where the plaintiff knew or in the exercise of reasonable diligence should have known of the injury and its cause." *Knopick v. Connelly*, 639 F.3d 600, 607 (3d Cir. 2011) (citations omitted); *see also Beauty Time, Inc. v. VU Skin Systems, Inc.*, 118 F.3d 140, 144 (3d Cir. 1997). The discovery rule delays the running of the statute of limitations where "despite the exercise of reasonable diligence," a plaintiff cannot know that he is injured and by what cause. *Fine v. Checcio*, 870 A.2d 850, 858 (Pa. 2005). Here, the Debtor and its directors and officers were incontrovertibly on notice that a claim had accrued when "Endo Health Solutions and Endo Pharmaceuticals entered into an Assurance of Discontinuance with the New York State Attorney General concerning their improper marketing practices for Opana ER" in March 2016, [Compl. ¶ 202], long before the filing of this Complaint in August 2024 or even the bankruptcy petition date. The Complaint makes inescapable that Endo's engagement of McKinsey and McKinsey's sale-maximization efforts were sought and approved by Endo's leadership, the antithesis of the type of concealed fraudulent conduct that the discovery rule is designed to allow to be addressed. And the Trustee has presented no law showing that his subsequent appointment somehow resets or revives the discovery rule. *See* Reply at 20 (stating that the Trustee's argument was flatly rejected in both *Seitz v. McCauley (In re Marchese)*, 2018 Bankr. LEXIS 2105 (Bankr. E.D. Pa. 2018) (the case cited by the Trustee in support of this very argument) and *In re National Forge Co.*, 344 B.R. 340 (W.D. Pa. 2006)).

Facts alleged in the Complaint, both individually and collectively, also establish that the adverse domination doctrine is inapplicable, and, specifically, that it fails to extend the two-year limitations period that applies to Pennsylvania-headquartered Endo entities; at a minimum, any possible toll would not reach the August 2022 petition date.

Courts have previously applied the adverse domination doctrine to toll Pennsylvania's statute of limitations where appropriate. *See Resolution Tr. Corp. v. Farmer,* 865 F.Supp. 1143, 1151 (E.D. Pa. 1994); *In re Lloyd Securities, Inc.,* 153 B.R. 677, 684–85 (E.D. Pa. 1993); *In re Numedco,* 1991 WL 204908 (Bankr. E.D. Pa. 1991). To survive a motion to dismiss, the Trustee must plead facts "to raise a claim of control of Debtor by the [defendants]," *In re Sverica Acquisition Corp., Inc.*, 179 B.R. 457, 470 (Bankr. E.D. Pa. 1995), thereby making it a factual inquiry. *See Hayward v. Medical Center of Beaver County,* 530 Pa. 320, 608 A.2d 1040, 1043 (Pa. 1992) (citing *Smith v. Bell Telephone Co. of Pa.,* 397 Pa. 134, 142, 153 A.2d 477, 481 (Pa. 1959)). And in Pennsylvania, "the plaintiff must negate the possibility that an informed person or persons could have induced the corporation to initiate suit" and "must show that those in such position were active participants in true wrongdoing, that is, their conduct was more culpable than mere negligence." *Farmer*, 865 F. Supp. at 1157.

The Complaint merely alleges that the identified directors and officers served at Endo Health Solutions and Endo Pharmaceuticals from 2013 to 2019. *See* Compl. ¶¶ 30–33, 35–38. Of these individuals, the last departure of an Endo Health Solutions director or officer occurred in 2019 (when the last allegedly involved Par director also stopped serving) and the last departure of an Endo Pharmaceutical director or officer occurred in 2016 (the last year in which McKinsey is alleged to have committed any liability-generating acts). *See* Compl. ¶¶ 30–39. Even taking as true the Trustee's assertion that the limitations period did not begin to run until the last of the alleged "wrongdoer" directors departed in 2016 or, for that matter, even in 2019, *see* Opp. at 30, the Pennsylvania statute of limitations nevertheless would have expired by sometime in 2021—well before these Chapter 11 cases were commenced. The Court therefore need not examine at this stage whether there existed non-culpable actors who, in theory, could have pursued claims during the relevant period or induced Endo to do so, including shareholders proceeding derivatively. *See Farmer*, 865 F. Supp. at 1156 (noting that "the plaintiff must negate the possibility that an informed shareholder or director could have induced the corporation to initiate suit"). Ultimately any such argument might face an uphill battle, as McKinsey (the defendant) has not plausibly been alleged to have exercised the required degree of control, and all that has been alleged about the Endo entities is a mix of corporate leaders who left on dates ranging between 2016 and 2019.

The Trustee also argues that "fact issues remain as to whether [the Pennsylvania and Irish statute of limitations] periods reach back to an earlier time than New York's statute of limitations . . . thus warranting application of the New York limitations period." Opp. at 31. Here, the Trustee again refers to the adverse domination doctrine, *see id.*, which the Trustee argues would extend the Pennsylvania or Irish statute of limitations periods longer than New York statute of limitations period, thereby warranting the application of the New York statute under New York's borrowing statute. *See* CPLR 202. The argument pressed by the Trustee during the hearing and in his briefing depended on the incorrect assertion that a six-year New York statute applies, which, as discussed, is not the case here. And as previously discussed, even the most generous reading of the facts of the Complaint while applying the adverse domination doctrine would still cause the Pennsylvania statute of limitations to expire well before the petition date.

Thus, given that Pennsylvania's statute of limitations is shorter than that of New York's, the Court applies Pennsylvania's statute of limitations to bar the Trustee's claims for aiding and abetting breach of fiduciary duty as those claims pertain to the Endo Health Solutions and Endo Pharmaceuticals entities. *See* CPLR 202.

Finally, the Court assumes as correct the Trustee's contention, not meaningfully rebutted by McKinsey, that Irish law would apply a laches theory to these claims as to Endo International plc, and that the practical result under Irish law would be that claims brought within six years would not be rejected on laches grounds. Because the New York borrowing statute applies the shorter of New York's and other jurisdictions' statute of limitations under New York choice of law principles, *see* CPLR 202, the Trustee's claims for aiding and abetting breach of fiduciary duty by the directors of the Endo International plc entity (Count II) are time-barred by virtue of the required application of New York law, *see* CPLR 214(4), even if Irish law prescribed a longer statute of limitations for this cause of action.

c. Conclusion

To recap, all claims of aiding and abetting fiduciary breach are time-barred as to all relevant corporations by virtue of New York's limitations period. In addition, to the extent those claims implicate or are premised on events by or involving entities as to which Pennsylvania law applies, those claims are also, and independently, time-barred by operation of Pennsylvania law. To guard against unfair prejudice to the Trustee in the event the Complaint's timeliness deficiencies result from curable drafting gaps rather than insurmountable merits flaws, dismissal on this basis is without prejudice to a possible amendment by the Trustee. *Cf. Ashland*, 2022 WL 219997, at * 8 (allowing plaintiff to "amend at least once after having the benefit of a court's reasoning in dismissing" the claim).

2. *Wagoner* and *In Pari Delicto* Doctrines

In brief, the *in pari delicto* doctrine, where applicable, bars certain wrongdoers from recovering against individuals who assisted them in their own culpable conduct. Here, McKinsey argues that the Complaint makes clear that Endo itself initiated and pursued its opioid-sale maximization scheme, in part by hiring McKinsey. McKinsey argues that New York's *in pari delicto* doctrine squarely bars recovery in this circumstance. Moreover, McKinsey also argues (overbroadly) that the *Wagoner* standing doctrine adopted by the Second Circuit deprives the Trustee of standing to seek to recover here due to the clear applicability of New York's *in pari delicto* bar.

The *Wagoner* and *in pari delicto* doctrines do warrant dismissal of some of the Trustee's claims, namely those that depend on New York law, but portions of the Trustee's claims are governed by Pennsylvania and/or Ireland law and, as will be seen, cannot appropriately be dismissed under the *Wagoner* and *in pari delicto* doctrines. That is so because those jurisdictions require a more flexible, equitable analysis that cannot properly be resolved at the motion to dismiss stage, at least on the pleadings in this case. And, although McKinsey is correct that the *Wagoner* doctrine applicable in the Second Circuit creates a federal-law limitation on the standing of bankruptcy trustees to pursue relief, that doctrine does not support a blanket ban whenever New York's substantive law would bar the claim; rather, the doctrine requires looking to the relevant law governing the Trustee's substantive claims to determine whether the Trustee is pursuing a claim that belongs to creditors rather than the corporation, and/or whether the Trustee is pursuing relief on a theory that cannot prevail as a matter of law. Thus, in cases such as this one where the *in pari delicto* doctrine is the main substantive law at issue, whether *Wagoner* bars recovery depends on whether governing substantive law presents a flat bar that justifies dismissal. New York's stringent *in pari delicto* doctrine presents such a bar on the facts pled here, but Pennsylvania's and Ireland's laws do not.

As detailed below, McKinsey is correct about the substance of New York's *in pari delicto* doctrine, but overstates the impact here of the *Wagoner* doctrine, which holds that trustees lack standing to bring an action that the pre-petition debtor corporation could not have successfully brought, but which does not impose a blanket ban of all claims by a trustee against aiders and abettors of corporate wrongdoing. Rather, whether *Wagoner* bars recovery requires consideration of the underlying applicable substantive law. And in the case of the laws of Pennsylvania and Ireland, the required equitable analysis cannot be resolved through this motion to dismiss. That reality precludes dismissing claims as to which Pennsylvania's or Ireland's law applies based on the *Wagoner* doctrine.

a. Legal Background – the Wagoner Doctrine

The Constitution limits federal courts' power to deciding cases or controversies. U.S. Const. art. III, § 2, cl. 1. "The doctrine of standing is derived directly from this constitutional provision. It focuses upon the party seeking to invoke federal jurisdiction, rather than upon the justiciability of the issue at stake in the litigation." *Hirsch v. Arthur Andersen & Co.*, 72 F.3d 1085, 1091 (2d Cir. 1995) (internal citations omitted).

Binding Second Circuit precedent instructs that "[u]nder the Bankruptcy Code the trustee stands in the shoes of the bankrupt corporation and has standing to bring any suit that the bankrupt corporation could have instituted had it not petitioned for bankruptcy." *Shearson Lehman Hutton, Inc. v. Wagoner*, 944 F.2d 114, 118 (2d Cir. 1991) (citing 11 U.S.C. §§ 541–42). "It is well settled that a 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." *Id.* (further citations omitted). This rule has become known as "the *Wagoner* rule."[7] Courts have somewhat-confusingly and inconsistently referred to it both as a rule "followed in New York" and as a "federal rule of standing." *Compare, e.g.*, *In re ICP Strategic Income Fund, Ltd.*, 730 F. App'x 78, 82 (2d Cir. 2018) ("According to the *Wagoner* rule, followed in New York, the *in pari delicto* doctrine applies to successors in interest of wrongdoers, including bankruptcy trustees and foreign liquidators.") (citing *Mediators, Inc. v. Manney* (*In re Mediators,*

[7] This rule applies to committees of creditors that sue on behalf of a bankrupt debtor. *See The Mediators, Inc. v. Manney* (*In re The Mediators, Inc.*), 105 F.3d 822, 825–26 (2d Cir. 1997). It also applies to a litigation trustee like the Trustee who brings this action. *O'Connor v. DL-DW Holdings, L.L.C.* (*In re Extended Stay, Inc.*), No. 11-02254 (JLG), 2020 WL 10762310, at *54 (Bankr. S.D.N.Y. 2020 (citing *Kirschner v. Grant Thorton LLP* (*In re Refco, Inc. Secs. Litg.*), 628 F. Supp. 2d 432 (S.D.N.Y. 2008)).

Inc.), 105 F.3d 822, 825–26 (2d Cir. 1997))), *with In re Food Mgmt. Grp., LLC*, 380 B.R. 677, 694 (Bankr. S.D.N.Y. 2008) ("The *Wagoner* rule as applied in the Second Circuit is a federal rule of standing."). The *Wagoner* decision itself speaks in terms of standing. *See, e.g.*, *Wagoner*, 944 F.2d at 118 ("the trustee stands in the shoes of the bankrupt corporation and has standing to bring any suit that the bankruptcy corporation could have instituted had it not petitioned for bankruptcy"; a "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"; and claims for aiding and abetting a fraud by the bankrupt entity are beyond trustee's "capacity to sue because the claims were never part of the assets of the bankrupt. . ."). Applying these principles, the *Wagoner* court held that "when a bankrupt corporation has joined with a third party in defrauding its creditors, the trustee cannot recover against the third party for the damage to the creditors." *Id.* In turn, the *Wagoner* court continued, the court must determine whether the allegedly culpable non-debtor entity "could have been liable on any legal theory presented," and, "[n]ormally, this would include not only a determination that the right would run to the corporation rather than to its creditors, but also a determination that [the bankrupt corporation] would have been able to withstand a motion to dismiss for failure to state a claim." *Id.* at 119.

Wagoner went on to consider yet another complexity not present here — the possible applicability of an arbitration agreement. But for purposes of this decision, the key takeaways are that (1) the *Wagoner* doctrine turns on whether a trustee has standing to pursue relief; (2) this question requires consideration both of whether the bankrupt corporation itself, but for the bankruptcy, possessed and had the right to bring the claim; and (3) the trustee's standing also can be defeated by the inability of the bankrupt corporation's hypothetical claim to withstand a motion to dismiss, because, if the corporation could not have survived such a motion, then there would be no viable or meaningful corporate right for the trustee to pursue in court.

b. Parties' Contentions and Discussion

McKinsey asserts that this rule bars the Trustee's action because "[a] claim against a third party for defrauding a corporation with the cooperation of management accrues to creditors, not to the guilty corporation." *Hirsch*, 72 F.3d at 1094 (2d Cir. 1995) (quoting *Shearson Lehman Wagoner*, 944 F.2d at 120). In McKinsey's argument, any allegation by the Trustee that it injured the Debtor's creditors in cooperation with the Debtors' officers and directors only gives rise to claims belonging to those creditors, rather than the Debtors, thereby depriving the Trustee of standing. McKinsey strenuously argues that, as the federal constitution defines this Court's jurisdiction, applying the *Wagoner* rule requires only consideration of federal law. In support of this argument, McKinsey contends that the Second Circuit has applied the *Wagoner* rule even when evaluating claims arising from law other than New York law. *See* Reply at 4 (citing *Hirsch*, 72 F.3d at 1094).

McKinsey oversimplifies and overstates the preclusive effect of the *Wagoner* doctrine. *Hirsch* itself states "[w]hether the rights belong to the debtor or the individual creditors is a question of state law." *Hirsch*, 72 F.3d at 1093 (internal citations omitted). After having noted that that the complaint in *Hirsch* identifies two types of wrongdoing, "(1) the distribution of misleading PPMs to investors; or (2) the provision of deficient professional services directly to Googel, Sisti, and Colonial," 72 F.3d at 1092, the Second Circuit panel continued, "Connecticut law has recognized the standing of creditors to maintain causes of action for negligence, breach of fiduciary duty, and fraud in precisely these circumstances," *Hirsch*, 72 F.3d at 1093 (citing, *inter alia*, *Tackling v. Shinerman,* 630 A.2d 1381, 1384 & n.2 (1993) (Connecticut law recognizes liability in negligence of attorneys and accountants to third parties whose reliance is foreseeable without regard to privity)). Thus, it is clear that on some level, application of the *Wagoner* rule requires an analysis of state law. Specifically, it requires determining whether the Trustee's claims alleging that McKinsey aided and abetted breaches of fiduciary duty would vest, under the relevant state law, in the Debtors or in the Debtors' creditors.

To answer that question of vesting, the Court must first determine which state law governs the Trustee's aiding-and-abetting claims by performing a choice-of-law analysis. McKinsey contends that New York law governs; the Trustee argues that either Pennsylvania or Irish law governs at least as to Debtors that had their headquarters or principal place of business in Pennsylvania or Ireland. Opp at 13. The parties agree that New York's substantive law governs any claims that McKinsey aided or abetted others' breaches of fiduciary duties to Par Pharmaceuticals (which includes Par Pharmaceutical Holdings, Inc., Par Pharmaceutical Companies, Inc., or Par Pharmaceutical, Inc.).

Traditionally, performing a choice of law analysis begins with determining whether the relevant jurisdictions' laws actually conflict. Here, they do.

In New York, "[a] claim against a third party for defrauding a corporation with the cooperation of management accrues to creditors, not to the guilty corporation." *Wagoner*, 944 F.2d at 120 (citing, *inter alia*, *Barnes v. Schatzkin*, 212 N.Y.S. 536, 537 (App. Div. 1st Dep't 1925)). "According to the allegations of the amended complaint, the [persons in control of the bankrupt company] and the defendants were joint tort-feasors. The claims on which the plaintiff seeks to recover were never part of the assets of [the debtor], nor did they arise in favor of the plaintiff as trustee in bankruptcy. They belonged to various creditors." *Barnes*, 212 N.Y.S. at 537.

By contrast, under Pennsylvania law, claims for aiding and abetting managers' and directors' breach of fiduciary duty to belong to the corporation. *See In re Adelphia Commcn's Corp.*, 365 B.R. 24, 45–46 & n.68 (Bankr. S.D.N.Y. 2007) (citing *Official Committee of Unsecured Creditors v. R.F. Lafferty & Co.*, 267 F.3d 340, 348 (3d Cir. 2001)). Courts applying Pennsylvania law reached this conclusion despite the controlling officers and directors of the bankrupt corporations being the wrongdoers. *See In re Adelphia Commcn's Corp.*, 365 B.R. 24, 32, 45–46 (Bankr. S.D.N.Y. 2007) (describing the wrongdoers as including the debtor's "former management" yet still holding that claims for aiding and abetting those former managers' breaches of fiduciary duty belong to the debtor under Pennsylvania law). Meanwhile, as to Irish law, the Trustee has provided a declaration of an Irish law expert which McKinsey has not rebutted, contending that, although Ireland does not have a well-developed *in pari delicto* doctrine, Irish courts likely would borrow from English common law, which provides a relatively flexible, equity-driven approach somewhat akin to Pennsylvania's. See *Declaration of Ruairi Rynn in Support of Plaintiff's Opposition to Defendant's Motion to Dismiss the Complaint* ("**Rynn Decl.**"), Dkt. No. 30. The Irish law declaration also asserts that the "principles underlying the *Wagoner* doctrine, and its overall effect, would run contrary to general principles of Irish insolvency law insofar as it provides that a claim should accrue to a company's creditors rather than to a liquidator (or an equivalent such as a trustee in this instance) acting in the collective interests of the Company's creditors and for the benefit of that company's insolvency estate." Rynn Decl., Dkt. No. 30 ¶ 35; *see also id.* ¶ 36.

This differing law requires that, to the extent New York law applies, the *Wagoner* doctrine applies and bars the Trustee's claims, both because under New York law those claims belong to creditors rather than first to the bankruptcy corporation and thence to the Trustee, and because, in any event, New York's strict *in part delicto* doctrine would require the granting of a motion to dismiss. By contrast, the laws of Pennsylvania and Ireland both have a more flexible *in pari delicto* (or equivalent) doctrine that does not support granting a motion to dismiss for failure to state a claim, and both jurisdictions appear not to preclude lawsuits by culpable corporations for harms to that corporation itself by others.

To backtrack analytically, it is necessary to more carefully explain what law applies, and why.

Absent an implication of important federal bankruptcy policy, bankruptcy courts apply the choice-of-law rules of the states in which they sit. *Bianco v. Erkins* (*In re Gaston & Snow*), 243 F.3d 599, 605–07 (2d Cir. 2001); *Statek Corp. v. Dev. Specialists, Inc.* (*In re Coudert Bros. LLP*), 673 F.3d 180, 187–88 (2d Cir. 2012). The parties have identified no important federal bankruptcy policy implicated in this case, so the Court applies New York's choice of law rules. New York courts approach this issue in two ways – either by following New York's traditional "interests analysis" test it uses for normal tort claims, or by following the "internal affairs doctrine" which applies the law of the corporation's state of incorporation. *In re Adelphia Commc'ns Corp.*, 365 B.R. at 39 ("The New York cases that address choice of law issues applicable to claims for aiding and abetting breaches of corporate fiduciary duty are split on whether the law of the *state of incorporation* or the law of the *state with the greatest interests* applies.").

The most-thoroughly-reasoned decision applying New York choice of law rules in determining whether to apply the internal affairs rule or interests analysis to claims for aiding and abetting breaches of fiduciary duty chooses to use the interests analysis. New York rejects "any automatic application of the so-called 'internal affairs' choice-of-law rule." *Id.* at 40 (quoting *Greenspun v. Lindley*, 330 N.E.2d 473, 478 (N.Y. 1975)). The allegations in the Complaint concern McKinsey's relationship with the Debtors, rather than "the nature or extent of the fiduciary duties that were owed . . . or the extent to which fiduciary duties were breached." *Id.* at 41. Accordingly, "[t]here is no risk that different courts might reach different conclusions as to the applicable standards for appropriate officer or director conduct, or as to claims for failure to satisfy these standards." *Id.* Additionally, the Court notes that none of the allegations specifically concern activities that occurred in Delaware or Ireland, the Debtors' places of incorporation.

Thus, "[t]here are no compelling reasons to apply the 'internal affairs' doctrine here, since the claims do not involve 'matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders.'" *Id.* (quoting *Edgar v. MITE Corp.*, 457 U.S. 624, 645 (1982)). For this reason, this Court will apply the "the law of the jurisdiction with the greatest interest in the dispute." *Id.* at 40.

McKinsey and the Trustee dispute which jurisdiction has the greatest interest in this dispute. McKinsey asserts that New York has the greatest interest, while the Trustee argues that Ireland has the greatest interest for debtor Endo plc and that Pennsylvania has the greatest interest for all debtors other than Par Pharmaceutical Holdings, Inc., Par Pharmaceutical Companies, Inc., and Par Pharmaceutical, Inc.

The weight of the law favors the Trustee, as the authorities the Trustee cites have closer factual similarities to this case than the authorities cited by McKinsey. This Court has stated, "[t]he tort is deemed to have occurred where the related economic losses resulting from the tort had been sustained. In the case of a tort for aiding and abetting breach of fiduciary duty, related economic losses have been deemed to have been incurred in the relevant corporation's principal place of business." *In re Hydrogen, L.L.C.*, 431 B.R. 337, 350 (Bankr. S.D.N.Y. 2010) (citing, *inter alia*, *In re Adelphia Commc'ns,* 365 B.R. at 39). "The jurisdiction with the greatest interest is that of the principal place of business, where any injury as a consequence of any aiding and abetting would have been suffered." *In re Magnesium Corp. of Am.*, 399 B.R. 722, 742–43 (Bankr. S.D.N.Y. 2009) (applying New York law to evaluate an aiding-and-abetting breach of fiduciary duty claim regarding a corporation headquartered in New York and incorporated in Delaware). McKinsey's main argument to the contrary is that Endo entered a substantial settlement leading to significant liability as a result of a lawsuit or investigation brought by the New York State Attorney General, but, as the Trustee points out, the Endo entities were based in Pennsylvania and felt the economic impact of that and other settlements there, and New York's settlement was but one of six settlements – not the sole driver of Endo's legal or economic woes.

McKinsey cites *Anwar v. Fairfield Greenwich Ltd.*, which does involve aiding-and-abetting breach of fiduciary duty claims, but this case's "core facts implicated in every cause of action . . . center on conduct that occurred in New York." 728 F. Supp. 2d 372, 400 (S.D.N.Y. 2010). But *Anwar* involved plaintiffs "widely dispersed throughout the world and their injury was sustained in various 'locations with only limited connection to the conduct at issue,'" a web of financial connections that sprawled across the globe. *Id.* By contrast, in this case, the place where the alleged harms were primarily felt was in each entity's headquarters and principal place of business, which was Pennsylvania in the case of the Endo Debtors. This case also involves the far fewer parties compared to the large and diffuse plaintiff class in *Anwar*, where it was hard to locate a central locus of harm from the alleged conduct. Thus, *Anwar*'s reasoning has less relevance and cannot overcome the clear rules set out by *In re Hydrogen L.L.C.* and *In re Magnesium Corp. of Am.*

Similarly, *Solow v. Stone* does not establish that New York has the greatest interest in this dispute. *See* 994 F. Supp. 173 (S.D.N.Y. 1998). It does not appear that the parties in that case ever contested which jurisdiction had the greatest interest in the dispute, and as that court commented, "it appears that the acts giving rise to the aiding and abetting . . . claims took place, in significant part, in New York . . . . In any case, it appears that there is no jurisdiction with an interest greater than New York's with respect to these tort claims." *Solow v. Stone*, 994 F. Supp. 173, 177 (S.D.N.Y.), *aff'd*, 163 F.3d 151 (2d Cir. 1998). Here, in addition to the predominant locus of harm being in Pennsylvania, the Trustee identifies Pennsylvania as the headquarters of Endo Health Solutions, Endo Pharmaceuticals, and Endo U.S. and pleads that McKinsey met and presented to numerous leaders of these entities and other debtor entities outside of New York, *see, e.g.* Compl. ¶¶ 119–21, 128, 154–55, drawing the reasonable factual inference from the Complaint that meetings or presentations to the Debtors' directors or senior management occurred at the headquarters of these debtor entities. For this reason, *Solow* cannot overcome the clear rules set out by *In re Hydrogen L.L.C.* and *In re Magnesium Corp. of Am*. For the same reasons, *In re Allou Distributors, Inc.* does not persuade this Court to find New York has the greatest interest in the dispute before this Court. *See* 387 B.R. 365 (Bankr. E.D.N.Y. 2008). In that case, "the acts giving rise to the claim [were] alleged to have taken place in whole or in large part, in New York" and "the alleged fraudulent transfers were made by Allou from its headquarters in New York to or for the benefit of the Corporate Defendants which are alleged to be New York corporations." *Id.* at 396.

McKinsey further cites *Cromer Fin. Ltd. v. Berger* for the principle that "New York [] has a strong interest in regulating the conduct of an entity which relies in its marketing and in the performance of its work on the implicit representation that it has conformed its conduct to the standards set in New York[.]" 137 F. Supp. 2d 452, 493 (S.D.N.Y. 2001). However, that case lacks the persuasive power to displace *In re Hydrogen L.L.C.* and *In re Magnesium Corp. of Am.*'s rules. The *Cromer Fin. Ltd.* opinion acknowledges that, under the interests analysis performed under New York's choice of law rules, "a court's paramount concern is the locus of the fraud, that is, the place where the injury was inflicted, as opposed to the place where the fraudulent act originated. The place in which the injury is deemed to have occurred is usually where the plaintiff is located." *Cromer Fin. Ltd. v. Berger*, 137 F. Supp. 2d 452, 492 (S.D.N.Y. 2001) (internal quotations omitted) (quoting *Rosenberg v. Pillsbury Co.*, 718 F. Supp. 1146, 1150 (S.D.N.Y. 1989) (citing *Sack v. Law*, 478 F.2d 360, 365–66 (2d Cir. 1973)); *see also Odyssey Re (London) Ltd. v. Stirling Cooke Brown Holdings Ltd.*, 85 F. Supp. 2d 282, 292 (S.D.N.Y. 2000)). That case departed from these general rules only because "a substantial portion of the fraudulent conduct has occurred in New York," "actions were in furtherance of a fraud created and perpetuated in—with its 'locus' in—New York," and key business decisions relevant to the claims occurred in New York. *Cromer Fin. Ltd. v. Berger*, 137 F. Supp. 2d 452, 461, 492–93 (S.D.N.Y. 2001) (the investment manager in question made the investment decisions at issue in New York, and a New York-headquartered investment bank held all assets in question, while the offshore fund managed by the investment manager "had no offices, employees, or operations of its own"). Just like *Fairfield Greenwich*, and unlike this case, the *Cromer Fin. Ltd.* litigation arose out financial fraud with a clear nexus in New York. By contrast, the Debtors other than Par operated their businesses from Pennsylvania and Ireland, and the Court draws from the Complaint the inference that important actions by McKinsey occurred in or were directed at those locations while clearly causing harms focused there. The allegations in this case do not involve a web of financial transactions and related activity with no clear locus other than New York. That fact pattern commonly appears in claims for aiding-and-abetting breaches of fiduciary duty arising from Ponzi schemes or other financial frauds, which this case is not.

Lastly, the other cases cited by McKinsey fail to persuade on this choice-of-law issue because they do not analyze choice of law in the context of a claim for aiding and abetting breach of fiduciary duty. *See Advanced Portfolio Techs., Inc. v. Advanced Portfolio Techs., Ltd.*, No. 94 CIV. 5620 (JFK), 1999 WL 64283, at *2 (S.D.N.Y. Feb. 8, 1999); *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL*, 739 F.3d 45, 47 (2d Cir. 2013) (further citations omitted). For these reasons, if the Trustee has any claims against the defendant for aiding and abetting alleged breaches of fiduciary duty, they accrued under the laws of the headquarters jurisdiction of each debtor.

Thus, the Court will apply the law of the headquarters of each debtor to determine whether the Complaint states a claim for aiding and abetting breaches of fiduciary duties owed to such debtor. For Par, New York law applies – as noted above, the parties do not dispute this. For the remaining debtors other than Endo International plc, Pennsylvania law applies. For Endo International plc, Irish law applies.

3. The *In Pari Delicto* Defense

McKinsey, throughout its briefing, argues that the *in pari delicto* defense bars the Trustee's claims for aiding and abetting breach of fiduciary duty. The New York *in pari delicto* doctrine holds that "one wrongdoer may not recover against another." *Picard v. J.P. Morgan Chase & Co. (In re Bernard L. Madoff Inv. Sec. LLC.)*, 721 F.3d 54, 63 (2d Cir. 2013) (citing *Kirschner v. KPMG LLP,* 938 N.E.2d 941, 950 (N.Y. 2010)). Pennsylvania also recognizes this doctrine, *Feld & Sons, Inc. v. Pechner, Dorfman, Wolfee, Rounick & Cabot*, 458 A.2d 545, 548

(Pa. Super. Ct. 1983), though, as discussed below, Pennsylvania and New York take different approaches to it. It is unclear whether Irish law recognizes this defense, but Irish law does apply a similar concept comparable to Pennsylvania's approach to *in pari delicto*. Below, the Court addresses this defense under the law of all three relevant jurisdictions. As a global matter, the law that that governs an *in pari delicto* defense comes from the same jurisdiction as the law that gives rise to the claim. *See ICP Strategic Credit Income Fund, Ltd. v. DLA Piper L.L.P (U.S.)* (*In re ICP Strategic Credit Income Fund Ltd.*), 568 B.R. 596, 608. (S.D.N.Y. 2017), *aff'd sub nom. In re ICP Strategic Income Fund, Ltd.*, 730 F. App'x 78 (2d Cir. 2018).

a. New York: Par

New York applies the *in pari delicto* defense strictly. "Indeed, the principle that a wrongdoer should not profit from his own misconduct is so strong in New York that we have said the defense applies even in difficult cases and should not be 'weakened by exceptions.'" *Kirschner v. KPMG LLP*, 15 N.Y.3d 446, 464, 938 N.E.2d 941, 950 (2010) (quoting *McConnell v. Commonwealth Pictures Corp.,* 166 N.E.2d 494, 497 (N.Y. 1960)). To that end, "the doctrine can apply on a motion to dismiss if its application is 'plain on the face of the pleadings.'" *Deangelis v. Corzine* (*In re MF Glob. Holdings Ltd. Inv. Litig.*), 998 F. Supp. 2d 157, 189 (S.D.N.Y. 2014), *aff'd sub nom. In re MF Glob. Holdings Ltd. Inv. Litig. (DeAngelis v. Corzine)*, 611 F. App'x 34 (2d Cir. 2015). Furthermore, as under New York law, "[a] claim against a third party for defrauding a corporation with the cooperation of management accrues to creditors, not to the guilty corporation," *Shearson Lehman Hutton, Inc. v. Wagoner*, 944 F.2d 114, 120 (2d Cir. 1991) (citing, *inter alia*, *Barnes v. Schatzkin*, 212 N.Y.S. 536, 537 (App. Div. 1st Dep't 1925)), so application of *in pari delicto* may deprive the Trustee of standing. *In re Verestar, Inc.*, 343 B.R. 444, 480 (Bankr. S.D.N.Y. 2006) ("Since the District Court Complaint itself alleges the facts that give rise to an *in pari delicto* defense, the Committee's aiding and abetting and conspiracy claims against the Bear Stearns Defendants must be dismissed under the *Wagoner* doctrine and *in pari delicto.*") (internal citations omitted). As noted above, "[t]he debtor's misconduct is imputed to the trustee because, innocent as he may be, he acts as the debtor's representative." *Picard v. J.P. Morgan Chase & Co.* (*In re Bernard L. Madoff Inv. Sec. LLC.*), 721 F.3d 54, 63 (2d Cir. 2013) (citing *Wight v. BankAmerica Corp.,* 219 F.3d 79, 87 (2d Cir. 2000)).

As the Debtors, being corporations rather than individuals, "must act solely through the instrumentality of their officers or other duly authorized agents," they "must, therefore, be responsible for the acts of [their] authorized agents even if particular acts were unauthorized." *Kirschner v. KPMG LLP*, 938 N.E.2d 941, 950 (N.Y. 2010) (citing, *inter alia*, *Ruggles v. American Cent. Ins. Co. of St. Louis,* 21 N.E. 1000, 1002 (N.Y. 1889)). The law imposes this rule because "the principal is generally better suited than a third party to control the agent's conduct." *Id.* at 951.

The Trustee's complaint reveals that the Debtors' directors and officers took at least equal part in the wrongs the Trustee alleges McKinsey committed against the Debtors: "McKinsey advised Endo's Boards of Directors to increase promotional resources in its pain division," Compl. ¶ 121; "in 2016, Endo poured an additional $21 million into sales and marketing for, among other things, 'pain sales force expansion,' and that of the $240.2 million spent on sales and marketing that year, approximately 23% (or $110 million) was devoted to Endo's pain division," Compl. ¶ 175; "McKinsey encouraged Endo's leadership to effectively work around the FDA's concerns about the ability to abuse Reformulated Opana ER." Compl. ¶ 157; Endo's leadership executed on that encouragement when "De Silva [Endo's CEO] met with

Susan Hall, Endo Health Solutions' Chief Scientific Officer and Global Head of R&D and Quality, to discuss proposing updated labeling to the FDA. Even though De Silva and Hall were aware of the extensive abuse of Reformulated Opana ER by injection, the proposed labeling contained the statements that 'OPANA ER has physicochemical properties that are expected to reduce abuse via the intranasal route. The in vitro data demonstrate that OPANA ER has physicochemical properties expected to deter abuse via injection,'" Compl. ¶ 161, which "conveyed the false expectation that Reformulated Opana ER would deter abuse," *id.*; "McKinsey's recommendations, upon information and belief, were approved by the Boards of Endo and Par, and implemented by Endo and Par management with McKinsey's assistance over the following year." Compl. ¶ 197; "Endo, with the knowledge and assistance of McKinsey at every step of the way, misleadingly promoted Opana ER products as having a lower potential for abuse, hired sales representatives to target high volume prescribers of Opana ER and designed compensation structures to encourage them to push the sales of Opana ER, utilized a speaker program to pay millions of dollars to prescribers, and promoted misleading and harmful narratives about 'pseudoaddiction.'" Compl. ¶ 237. Thus, as New York law would require dismissal on *in pari delicto* grounds of any claims asserting aiding and abetting breaches of fiduciary duty, the *Wagoner* doctrine would strip the Trustee of standing to bring the aiding-and-abetting breach of fiduciary duty claims under New York law.

b. The Non-Statutory Insider and Adverse Interest Exceptions Do Not Apply

The Trustee responds that the Complaint adequately alleges McKinsey "was a non-statutory insider," Opp. at 15, such that the New York aiding-and-abetting breach of fiduciary duty claims should survive because "[t]he *Wagoner* rule does not protect insiders." *Feltman v. Kossoff & Kossoff LLP* (*In re TS Emp., Inc.*), 597 B.R. 543, 550 (Bankr. S.D.N.Y. 2019) (citing

In re Optimal U.S. Litig., 813 F. Supp. 2d 383, 400 (S.D.N.Y. 2011) ("[I]n pari delicto does not apply to the actions of fiduciaries who are insiders in the sense that they either are on the board or in management, or in some other way control the corporation.") (internal quotations omitted)). "The insider exception derives from the notion that it would be inequitable to allow an insider to rely on *in pari delicto* imputation because it would essentially shield the insiders from the consequences of their own handiwork." *Id.* (quoting *In re PHS Grp. Inc.*, 581 B.R. 16, 30–31 (Bankr. E.D.N.Y. 2018)).

"The Bankruptcy Code defines an 'insider' [to include] a 'director of the debtor[,] officer of the debtor[, or] person in control of the debtor." *Feltman v. Kossoff & Kossoff LLP* (*In re TS Emp., Inc.*), 597 B.R. 543, 550 (Bankr. S.D.N.Y. 2019) (quoting 11 U.S.C. § 101(31)(B)). However, the Code's list of persons and entities that qualify as insiders does not define itself as exclusive, and for that reason, one can qualify as a "non-statutory insider." Courts examine the following factors to identify non-statutory insiders:

> (1) the close relationship between the debtor and the third party; (2) the degree of the individual's involvement in the debtor's affairs; (3) whether the defendant had opportunities to self-deal; and (4) whether the defendant holds or held a controlling interest in the debtor corporation.

Feltman v. Kossoff & Kossoff LLP (*In re TS Emp., Inc.*), 597 B.R. 543, 550 (Bankr. S.D.N.Y. 2019) (quoting *In re PHS Grp. Inc.*, 581 B.R. 16, 33 (Bankr. E.D.N.Y. 2018)) (internal citations omitted). Relatedly, "[t]he non-statutory insider need not have actual control over the Debtor; rather, the question there 'is whether there is a close relationship between debtor and third party and anything other than closeness to suggest that any transactions were not conducted at arm's length.'" *Pergament v. Anton Inc.* (*In re PHS Grp. Inc.*), 581 B.R. 16, 31 (Bankr. E.D.N.Y. 2018) (quoting *In re Winstar Commc'n Inc.*, 554 F.3d 382, 396–97 (3d Cir. 2009)). The Trustee admits that "[t]he principal consideration in a non-statutory insider analysis is the degree of control the defendant exercised over the debtor. The insider need not have had actual control over the debtor, only enough control 'to give him or her an opportunity to engage in that bad conduct.'" Opp. at 16 (quoting *Pergament*, 581 B.R. at 32).

Applying these factors and as detailed below, the Trustee has not adequately pled facts plausibly suggesting that McKinsey was a non-statutory insider of Endo. A "close relationship" between the entities has been pled, but Endo officials are alleged to have kept and exercised decision-making authority at all times so that McKinsey lacked authority to make final decisions, an opportunity to self-deal, or a controlling interest at Endo. More specifically, the Trustee has plausibly alleged that McKinsey and the Debtors had a close relationship; this resulted naturally from McKinsey's "implementation consulting" methods. *See* Compl. ¶ 176 ("McKinsey not only advised Endo in connection with the Sales Force Blitz, it spearheaded the day-to-day execution of the strategy."); Compl. ¶ 177 ("McKinsey created and managed a curated list of healthcare providers that Endo salespeople were directed to target (or to exclude from targeting) to prescribe greater amounts of Opana ER."); Compl. ¶ 178 ("Using its patented FieldGuide technology, McKinsey created this list of healthcare professional targets based on the number of Opana ER prescriptions they had prescribed in the past four months. Only physicians with high prescribing rates—at least 48 prescriptions within the past four months—made the list."). These allegations also show McKinsey had a high degree of involvement in the Debtors' affairs. However, the Complaint never alleges that McKinsey had any opportunity to self-deal in its relationship with the Debtors or, with respect to transactions between the Debtors and McKinsey, that they dealt at anything other than arm's length.

The Complaint does not plead that McKinsey installed De Silva, who had worked at McKinsey, as the Debtors' CEO; it pleads that De Silva "was hired as CEO." Compl. ¶ 150.

Adopting wording that avoids saying who decided to hire the Debtors' CEO cannot give rise to a plausible inference that the defendant controlled the Debtors because that CEO had once worked for the defendant. Moreover, the allegations that post-date Mr. De Silva's hiring do not plausibly allege that McKinsey controlled the Debtors or had any opportunity to self-deal. For example, with respect to the FieldGuide technology, for which "Endo paid separately," Compl. ¶ 179, the Complaint does not plead that McKinsey had the power to cause the Debtors to purchase FieldGuide data, but rather pleads that "executives had to request data on healthcare providers directly from McKinsey." Compl. ¶ 179. The Complaint's discussion of FieldGuide represents the closest it comes to alleging McKinsey had an opportunity to engage in self-dealing, and even in that discussion it does not plead self-dealing but rather the integration of McKinsey into Endo operational processes whose adoption resulted from decisions made at and by Endo entities.

The Complaint also alleges no real exercise of control over the Debtors by McKinsey. It generally alleges "McKinsey [] harmed Endo by recklessly steering Endo's leadership to boost opioid sales," and "McKinsey continued to push Endo to aggressively market Opana." Compl. ¶¶ 124, 141. On specific facts, the Complaint merely alleges that McKinsey told Endo's CEO, a former McKinsey consultant, that the sales force was "not going after the new targets aggressively enough" and that sales associates "have to feel accountability to deliver." Compl. ¶¶ 188, 205. Beyond that, the Complaint shows that the Debtors' board of directors and management team held control over the Debtors' business decisions. Compl. ¶ 197 ("McKinsey's recommendations, upon information and belief, were approved by the Boards of Endo and Par, and implemented by Endo and Par management with McKinsey's assistance over the following year.").

Constructive criticism of the Debtors' sales force sent via email and couched as a business recommendation cannot turn a consultant into a non-statutory insider. The Complaint does not plead that McKinsey imposed consequences on such sales associates, any of their supervisors, or any of the Debtors' directors or officers to make them "feel accountability to deliver." Compl. ¶ 205. These allegations merely establish the "monitoring of a debtor's operations and proffering advice to management." *In re PHS Grp. Inc.*, 581 B.R. 16, 32 (Bankr. E.D.N.Y. 2018) (quoting *In re KDI Holdings, Inc.*, 277 B.R. 493, 511 (Bankr. S.D.N.Y. 1999)). With regards to Par, the Complaint does not plead that McKinsey had an opportunity to engage in self-dealing or held any control over Par. Compl. ¶¶ 190–97. For that reason, the Complaint fails to plausibly allege that McKinsey counts as an insider, either of Par or of the Debtors writ large.

To the miniscule extent McKinsey could have had any degree of "control" over the debtor such that it had the "opportunity to engage in [] bad conduct," *In re PHS Grp. Inc.*, 581 B.R. at 32, the complaint unequivocally shows that the Debtors' directors and officers fully participated in all such bad conduct. The Debtors' directors and officers channeled the Debtors' resources into pushing opioid sales, Compl. ¶¶ 175, 189, they attempted to dodge FDA concerns regarding their opioids' chemical composition and marketing, *id.* ¶¶ 129–36, 156–61, and they routed millions of dollars towards speakers and publications that misleadingly downplayed the risks of opioids. *Id.* ¶¶ 162–68.

The Trustee also has not pled sufficient facts to successfully invoke the adverse interest exception to the *in pari delicto* doctrine. "'[T]his most narrow of exceptions' is reserved for cases of 'outright theft or looting or embezzlement where the fraud is committed *against* a corporation rather than on its behalf.'" *In re Bernard L. Madoff Inv. Sec. LLC.*, 721 F.3d 54, 64

(2d Cir. 2013) (quoting *Kirschner,* 938 N.E.2d at 952 (emphasis in original)). As noted above, the Complaint never plausibly pleads that McKinsey had the opportunity to engage in self-dealing, let alone that it did so. Throughout the Complaint, the Trustee pleads that McKinsey had a relentless focus on increasing the Debtors' profits. *See, e.g.*, Compl. ¶ 148. The Trustee cannot accuse the Defendants of having an interest sufficiently adverse to those of the Debtors to escape application of the *in pari delicto* defense.

Thus, the Trustee has failed to plead that McKinsey qualifies as an insider in any way or that McKinsey held an interest adverse to that of the Debtors and the Wagoner doctrine calls for dismissal of claims for aiding and abetting in breaches of fiduciary duty that arise under New York law.

c. Pennsylvania: Endo Health Solutions and Endo Pharmaceuticals

Pennsylvania law treats the *in pari delicto* defense as an equitable doctrine that requires considering the facts and circumstances giving rise to each application. *See In re Adelphia Commc'ns Corp.*, 365 B.R. 24, 45–46 (Bankr. S.D.N.Y. 2007), *aff'd in part sub nom. Adelphia Recovery Tr. v. Bank of Am., N.A.*, 390 B.R. 64 (S.D.N.Y. 2008), *adhered to on reconsideration*, No. 05 CIV. 9050 (LMM), 2008 WL 1959542 (S.D.N.Y. May 5, 2008) (". . . the Pennsylvania Supreme Court has eschewed blind reliance on agency doctrine, and instead has looked to the extent to which application of *in pari delicto* is equitable under the circumstances."). For example, in *Universal Builders*, the Pennsylvania Supreme Court distinguished "between charging a litigant with responsibility for his own unclean hands and charging a principal with the unclean hands of its agent based solely on agency theory." *See Adelphia*, 365 B.R. at 47 (describing *Universal Builders*, 430 Pa. 550, 555, 244 A.2d 10, 13–14 (1968)). The court stated that even if the conduct should be imputed solely on the basis of agency theory, the application of the doctrine is within the discretion of the chancellor, and that discretion should be "applied cautiously" and "not be invoked if its application will produce an inequitable result." *Universal Builders, Inc.*, 430 Pa. at 555. The court also noted that although the *in pari delicto* doctrine applies in courts of law and courts of equity, "it generally had been held that the doctrine operates only to deny equitable, and not legal, remedies," and the court saw no reason to apply *in pari delicto* to deny the plaintiff a legal right. *Id.* at 14. In applying Pennsylvania law, the court in *Adelphia* concluded that "*in pari delicto* is not a mechanical application of the law of agency but rather involves discretionary attention to the fairness of applying it to the facts in a given case. And that is a matter that includes as a factor the extent to which it would be 'at the expense of innocent creditors.'" 365 B.R. at 48–49 (quoting *Universal Builders Inc.*, 244 A.2d at 14).

Thus, the application of *in pari delicto* under Pennsylvania law is not mechanical and requires the exercise of judicial discretion informed by balancing the facts of the case to arrive at a fair, or equitable, result. Here, the Trustee argues, it "would be patently unjust for McKinsey to use misconduct by Endo's former management—misconduct which McKinsey itself fomented and steered—as a shield to bar claims brought by the Trustee, who committed no wrongdoing, and whose beneficiaries are Endo's innocent unsecured creditors." Opp. at 24. McKinsey has not argued that Pennsylvania law requires a different result, instead contending that any possible claims under Pennsylvania and Ireland claims are duplicative of claims governed by New York law, and that only New York law should be applied. *See* Reply at 8–16. As described in more detail *supra* in the *in pari delicto* analysis regarding New York, the Trustee's Complaint strongly suggests that the Debtors' directors and officers bore substantial responsibility for the wrongs the Trustee alleges McKinsey committed against the Debtors, but this reality does not preclude that consideration of more thoroughly developed facts could eventually show that it would be inequitable to bar the Trustee's claims under the *in pari delicto* doctrine. It is also possible that McKinsey will ultimately successfully advance the defense. But it is too soon to tell what the outcome will be, and premature to dismiss the action as conclusively barred by the *in pari delicto* doctrine.

The Court therefore declines to grant the motion to dismiss based on *in pari delicto* grounds as to the Trustee's aiding and abetting claims that arise under Pennsylvania law. By extension, because Pennsylvania law would not require dismissal on *in pari delicto* grounds of the claims asserting aiding and abetting breaches of fiduciary duty, the *Wagoner* doctrine does not strip the Trustee of standing to bring the aiding-and-abetting breach of fiduciary duty claims to the extent those claims arise under Pennsylvania law, *i.e.*, the claims based on conduct at Endo entities other than the Par companies (as to which New York law controls) and Endo International plc (as to which Irish law controls).

d. Ireland: Endo International plc

Irish law recognizes a principle similar to *in pari delicto* called *ex turpi causa non oritur actio*, which translates from Latin to mean "action does not arise from a dishonourable cause." Rynn Decl., Dkt. No. 30 ¶¶ 10–13. The Trustee has submitted a declaration of an expert in Irish law, to which McKinsey has submitted no response addressing Irish law. In his declaration, Mr. Rynn explains that while he is unaware of Irish law considering application of these principles "in the context of the attribution to a company of the wrongdoing of its directors" as McKinsey seeks in the Motion, there is English authority that would be persuasive to an Irish court deciding this issue. *Id.* ¶¶ 15–16. According to Mr. Rynn's unrebutted submission, the English Supreme

Court considered this very question in *Bilta (UK) Ltd (in liquidation) v Nazir* and *Singularis Holdings Ltd (in liquidation) v Daiwa Capital Markets Europe Ltd*.[8]

In dismissing an appeal of the decision in *Bilta*, the English court held that the directors who perpetrated the fraud could not attribute their wrongdoing to the company and that *ex turpi causa non oritur actio* could not defeat the company's claim acting through its liquidator against the third parties who assisted the fraud. *See id.* ¶¶ 18–19 (citing *Bilta (UK) Ltd (in liquidation) v Nazir* [2015] UKSC 23, [2016] AC 1, paragraph 7). In support of this determination, Lord Neuberger stated that, "the question is simply an open one: whether or not it is appropriate to attribute an action by, or a state of mind of, a company director or agent to the company or the agent's principal in relation to a particular claim against the company or the principal must depend on the nature and factual context of the claim in question." *See id.* ¶ 20 (quoting *Bilta (UK) Ltd (in liquidation) v Nazir* [2015] UKSC 23, [2016] AC 1, paragraph 9). Similarly, in rejecting the appeal of the decision in *Singularis*, the English Supreme Court applied *Bilta* and held that, "the answer to any question whether to attribute the knowledge of the fraudulent director to the company is always to be found in consideration of the context and the purpose for which the attribution is relevant." *See id.* ¶ 24–25 (quoting *Singularis Holdings Ltd (in liquidation) v Daiwa Capital Markets Europe Ltd* [2019] UKSC 50, [2020] AC 1189, paragraph 34).

Thus, applying Irish law would likely yield the same result as would arise under Pennsylvania law, for reasons just discussed: the *in pari delicto* determination in Ireland is not mechanical, but rather requires a determination based on the facts and circumstances of the case.

[8] The full citation to these cases are *Bilta (UK) Ltd (in liquidation) v Nazir* [2015] UKSC 23, [2016] AC 1 and *Singularis Holdings Ltd (in liquidation) v Daiwa Capital Markets Europe Ltd* [2019] UKSC 50, [2020] AC 1189, respectively.

As stated above in the New York-law and Pennsylvania-law analyses, the Trustee's complaint plausibly alleges that the Debtors' directors and officers played a substantial part in the wrongs the Trustee alleges McKinsey committed against the Debtors. The Court does not now know whether the *in pari delicto* defense ultimately will carry the day. At this stage, however, an Irish court would likely conclude that dismissal is premature because deciding the defense's application would require fact-finding to determine whether equity favors barring Plaintiff's claims under the facts of this case.

The Court therefore denies Defendant's motion to dismiss on the basis of *in pari delicto* or *Wagoner* for the aiding and abetting claims to the extent those claims arise under or depend on application of Irish law.

C. Constructive Fraudulent Transfer

In the final three counts of the Complaint (the Seventh, Eighth, and Ninth), the Trustee seeks to avoid obligations and transactions alleged to be constructive fraudulent transfers, and then, consequently as requested in the Ninth Cause of Action, to recover as avoided transfers the payments that Endo made to McKinsey for its opioid-related consulting services. Compl. ¶ 10. The dollar amount at issue is roughly $8.5 million – a large amount that is dwarfed by the monetary damages requested in the Trustee's aiding and abetting and indemnification claims. *See* Compl. ¶ 253. The Complaint and briefing tend to group together and collectively seek or oppose avoidance of what they term "Transactions" or "Obligations and Transfers," *e.g.*, Compl. ¶¶ 321, 328, 330, but in reality the defined term "Obligation" refers to six "Statements of Work" (again, SOWs) between Endo and McKinsey by which Endo retained McKinsey to perform certain work and Endo agreed to pay McKinsey for that work. Meanwhile, the term "Transfers" refers to payments that Endo made to McKinsey for work completed under those SOWs.

The Complaint's Seventh Cause of Action seeks the avoidance of the Obligations and Transfers under Bankruptcy Code § 544(b)(1) in connection with Pennsylvania state law regarding fraudulent transfers, while the Eighth Cause of Action seems identical relief under the same Bankruptcy Code provision in conjunction with New York fraudulent transfer law. The Ninth Cause of Action complements the Seventh and Eighth causes of action by seeking "recovery of avoided conveyances" pursuant to Bankruptcy Code § 550(a), *i.e.*, actual repayment to the Trustee of the amounts that McKinsey received from Endo on account of the six SOWs at issue.

The basic premise of the Trustee's fraudulent conveyance claims is that, although Endo retained McKinsey and McKinsey performed work under the MSA and the SOWs, the result was so cataclysmic for Endo that even at the time of the agreements and/or performance under the agreements by McKinsey, Endo was insolvent when taking into account the then-present value of the liabilities Endo would eventually incur due to its own actions compounded by McKinsey's wrongheaded strategy. As a result, the Trustee contends, the services rendered did not constitute fair consideration or reasonably equivalent value for the amounts paid by Endo to McKinsey because McKinsey's advice was so destructive as to have no actual value whatsoever, and instead had negative value; the theory advanced is that the Trustee therefore is entitled to avoid and be repaid the amounts Endo paid to McKinsey under the SOWs. *See e.g.*, Compl. ¶ 254 (Endo "received no consideration in exchange for the Transactions except for the keys to its own destruction").

McKinsey responds that Endo got exactly what it bargained for and paid for, namely, agreed-upon opioid-related consulting services. *See* Motion at 30. More precisely and completely, McKinsey seeks dismissal on four bases: (1) the Trustee has failed to plausibly allege Endo's insolvency as is required to state a fraudulent conveyance claim; (2) the Trustee has failed to plausible allege that Endo did not receive "fair consideration" or "reasonably equivalent value" for its payments in light of the absence of any allegation that McKinsey did not perform work as contemplated by the SOWs; (3) the constructive fraudulent conveyance claims are stated with insufficient particularity; and (4) those claims are time-barred.

For reasons explained below, the motion to dismiss the fraudulent conveyance claims is granted with leave for Plaintiff to replead, for failure to plead a lack of fair consideration or reasonably equivalent value received by Endo in exchange for its payments for contracted-for services by McKinsey. The Court concludes the Trustee has plausibly alleged all other elements of a fraudulent conveyance claim, but the facts alleged in the Complaint do not support a plausible inference that the Obligations themselves (meaning the SOWs) could be set aside as fraudulent conveyances, nor does the Complaint allege facts from which it can be plausibly inferred that the contracted-for amounts due and paid by Endo were not in fact due on account of the antecedent debts owed under the various SOWs by virtue of agreed-upon work that McKinsey performed. Indeed, the MSA provides that all of McKinsey's work for Endo "shall be on a project basis," that McKinsey was to submit to Endo a written proposal "outlining the services to be provided and the estimated costs," and that "[u]pon approval" the parties would "complete and execute a project work order." M. Miller Decl., Dkt. No. 18, Ex. 5, MSA ¶ 1. The Trustee has alleged no facts to plausibly suggest that the "Obligations" were not validly entered into in accord with this agreed process, nor to contest that the resulting payments were for contractual obligations that arose as a result.

Nevertheless, because the Court does not rule out the possibility that repleading could get the Trustee across the line to plausible fraudulent conveyance claims, the dismissal of those claims is without prejudice to the Trustee's right to attempt to replead.

1. Governing Substantive Law

As noted, the Complaint asserts that the Obligations and Transfers can be avoided as constructive fraudulent transfers under § 544 and New York Fraudulent Conveyance Act, New York's Debtor & Creditor Law ("**NYDCL**") § 273–275, and under § 544 and Pennsylvania Uniform Voidable Transfer Act ("**PUVTA**"), 12 Pa. C.S.A. §§ 5104(a)(2), 5105. *See* Compl. ¶¶ 309–21. Section 544(b)(1) of the Bankruptcy Code provides as follows:

> [T]he trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of this title or that is not allowable only under section 502(e) of this title.

11 U.S.C. § 544(b)(1). This provision permits a trustee to take advantage of state statutes to avoid fraudulent transfers for the benefit of the estate. *See In re Fitzpatrick Container Co.*, 670 B.R. 425, 440 (Bankr. E.D. Pa. 2025). The applicable nonbankruptcy law that the Trustee seeks to apply is, in the alternative, New York law through the NYDCL and Pennsylvania law through the PUVTA.

To the extent a transfer is avoided under section 544 of the Bankruptcy Code through the application of the relevant state's laws, Count Nine of the Complaint pursues recovery "for the benefit of the estate, [for] the property transferred, or, if the court so orders, the value of such property, from . . . the initial transferee of such transfer or the entity for whose benefit such transfer was made." 11 U.S.C. § 550(a)(1).

2. Applicable Pleading Standards

Under the Bankruptcy Code in conjunction with the NYDCL and the PUVTA, courts have consistently held that "claims of constructive fraud do not need to meet the heightened pleading requirements of Fed. R. Civ. P. 9(b)." *In re Bernard L. Madoff Inv. Sec. LLC*, 458 B.R. 87, 110 (Bankr. S.D.N.Y. 2011) (quoting *Bank of Commc'ns v. Ocean Dev. Am., Inc.*, No. 07–CIV–4628, 2010 WL 768881, at *6 (S.D.N.Y. Mar. 8, 2010) (claims under the Code and NYDCL do not need to meet Fed. R. Civ. P. 9(b) pleading standards)); *see also In re Atomica Design Grp., Inc.*, 556 B.R. 125, 160 (Bankr. E.D. Pa. 2016) (applying Rule 8 pleading standards to claims under the Code and PUVTA) (internal citations omitted). Rather, the Trustee need only satisfy the pleading standard set forth in Rule 8(a) by providing a "short and plain statement of the claim showing that [the Trustee] is entitled to relief." Fed. R. Civ. P. 8(a)(2); *see also Enron Corp. v. Granite Constr. Co. (In re Enron Corp.),* No. 03–93172, 2006 WL 2400369, at *5 (Bankr. S.D.N.Y. May 11, 2006) ("The Court does not see any reason to break with its precedent in applying Rule 8(a) in evaluating the pleadings in a constructive fraudulent conveyance matter herein."); *Sec. Inv. Prot. Corp. v. Stratton Oakmont, Inc.*, 234 B.R. 293, 319 (Bankr. S.D.N.Y. 1999) ("The pleading of constructive fraud [under the NYDCL], as opposed to actual fraud, must only comply with F.R.C.P. 8(a) . . . ."); *In re Atomica Design Grp., Inc.*, 556 B.R. 125, 160 (Bankr. E.D. Pa. 2016) (holding that claims for constructive fraudulent transfer are not subject to the heightened pleading standard of Rule 9 because "fraud does not have to be proven" thereunder) (internal citations omitted). Claims subject to Rule 8(a)'s pleading requirement must satisfy the plausibility requirement described above and enunciated in *Iqbal* and *Twombly*.

Contrary to McKinsey's assertion that "the Trustee cannot pursue avoidance claims under both Pennsylvania and New York law," [Motion at 36 n.25], a plaintiff may plead constructive fraudulent conveyance claims in the alternative. *See* Fed. R. Civ. P. 8(d)(2) ("A party may set out 2 or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones."); *see also Wadsley v. Rev Recreation Grp., Inc.*, No. 1:17-CV-339-TLS, 2018 WL 1400888, at *4 (N.D. Ind. Mar. 19, 2018) ("Pleading under the laws of three different states amounts to nothing more than pleading three alternative theories.")

3. <u>Detailed Conflict-of-Law Analysis Is Unnecessary Because New York and Pennsylvania Law Do Not Differ in a Way Material to This Case</u>

Because the Complaint asserts alternative theories that the Obligations and Transfers can be avoided as constructive fraudulent transfers under § 544(b)(1) through the application of either New York's or Pennsylvania's state avoidance law, the Court must first consider choice of law principles.

In performing a conflict of law analysis, the Court must follow the choice-of-law rules of the forum state—in this case, New York. *Bianco v. Erkins (In re Gaston & Snow)*, 243 F.3d 599, 607–08 (2d Cir. 2001); *see also In re Trinsum Grp., Inc.*, 460 B.R. 379, 389 (Bankr. S.D.N.Y. 2011). In New York, "the law of the jurisdiction with the most significant contacts to the relevant transfers and relevant parties applies to a state constructive fraudulent transfer claim brought under section 544(b) of the Code. Contacts to be considered include the domicile, residence, place of incorporation and place of business of the parties; the place of injury; and the place of injury-causing conduct." *In re Hydrogen,* 431 B.R. 337, 353–54 (Bankr. S.D.N.Y. 2010) (citing *In re WorldCom, Inc.,* 2003 WL 23861928, at *40 (Bankr. S.D.N.Y. Oct. 31, 2003)). However, if the possibly controlling jurisdictions have substantively identical law, no further choice of law analysis is required. *In re Thelen LLP,* 736 F.3d 213, 219 (2d Cir. 2013) (in a case involving fraudulent conveyance claims to which New York and/or California law may pertain, the court applied New York choice-of-law rules as the forum state, affirming that "[u]nder New York law, the first step in any case presenting a potential choice of law issue is to determine whether there is an actual conflict between the laws of the jurisdictions involved") (internal quotations and citations omitted).

Here, the Trustee has alleged that the Obligations were entered into and the Transfers were sent by "Endo, through Endo Pharmaceuticals, Inc., Endo Health Solutions Inc., Endo U.S. Inc., and potentially other affiliated entities acting by its direction and on its behalf." Compl. ¶ 249. Both Endo Pharmaceuticals Inc. and Endo Pharmaceuticals Holdings Inc. are incorporated in Delaware and headquartered in Pennsylvania. Compl. ¶ 249. No party has argued that Delaware law applies. *See generally* Compl.; Motion. The entities that comprise Par Pharmaceuticals are based in New York and appear concededly to be governed by New York law. Because the Trustee has not alleged the transferor Endo-related entities with specificity, the Court will analyze the constructive fraudulent transfers under the laws of both New York and Pennsylvania. As will be seen, those two bodies of law do not differ in a way that is material to the outcome of McKinsey's motion to dismiss, thus obviating the need for a more extensive choice-of-law analysis. *See, e.g.*, *Thelen*, 736 F.3d at 219.

4. Counts Seven and Eight: Constructive Fraudulent Transfer Merits

Counts Seven and Eight seek to avoid the "Obligations and Transfers" as constructively fraudulent under sections 544(b) of the Bankruptcy Code, which allows for the recovery of voidable transfers under applicable state laws—here, NYDCL[9] §§ 273, 274, and 275, and PUVTA §§ 5104(a)(2) and 5105, respectively. To state a claim for constructive fraudulent

[9] In December 2019, NYDCL was repealed and replaced with the Uniform Voidable Transactions Act ("**UVTA**"). The UVTA became effective on April 4, 2020 but does not apply to transfers occurring before the UVTA's effective date. N.Y. Debt. & Cred. Law § Ch. 12, art. 10, Refs Annos (McKinney 2020). Accordingly, the Court analyzes these causes of action under the UFCA because the Obligations were incurred and the Transactions transpired before April 2020.

transfer under these two states' provisions, the plaintiff must plausibly allege that (1) the transaction was made without "fair consideration" (to the extent New York law applies) or "reasonably equivalent value" (to the extent Pennsylvania law applies), and (2) the that the debtor was insolvent at the time of, or as a result of, the transaction. *See* NYDCL §§ 273; PUVTA §§ 5104(a)(2), 5105; *see also In re Rosenblum*, 545 B.R. 846, 866 (Bankr. E.D. Pa. 2016) (analyzing Sections 5104(a)(2) and 5105 of the Pennsylvania UFTA); *Silverman v. Actrade Capital, Inc. (In re Actrade Fin. Techs., Ltd.)*, 337 B.R. 791, 802–03 (Bankr. S.D.N.Y. 2005) (analyzing Sections 273–275 of the NYDCL).

McKinsey argues for dismissal of the Complaint on the following grounds: (1) the Trustee has not plausibly alleged that the Obligations and Transfers were without fair consideration or reasonably equivalent value, (2) the Trustee has not plausibly alleged that Endo was insolvent or rendered insolvent as a result of the Obligations and Transfers, (3) the Trustee's claims are time-barred, and (4) the Trustee has not sufficiently particularly pled the Transfers and Obligations.

Again, the Court concludes that the Trustee has not plausibly alleged a claim for constructive fraudulent transfer with respect to Endo's payments to McKinsey under the laws of either New York and Pennsylvania, because he has failed to plausibly allege a lack of "fair consideration" or "reasonably equivalent value."

a. Fair Consideration and Reasonably Equivalent Value; Antecedent Debt

McKinsey maintains that the Trustee has not pled facts plausibly alleging an absence of fair consideration and/or reasonably equivalent value because the Complaint contains no factual allegation that McKinsey failed to perform exactly the tasks or services that it was assigned under the MSA and each SOW for which Endo paid contracted-for rates. Put more simply, the

Complaint is premised on the fact that Endo hired McKinsey to perform services, the MSA specifies that McKinsey's work was to be done on a "project basis" with services and compensation to be pre-approved by Endo in a specific "project work order" or SOW, and there is no allegation of fact contesting that McKinsey performed those services or that the payments it received were due under the governing contracts. Thus, McKinsey argues that Endo's payments to McKinsey were in satisfaction of antecedent debt that Endo owed on account of each SOW. As detailed below, case law makes clear that a payment on account of antecedent debt generally constitutes one for which "fair consideration" or "reasonably equivalent value" is received, in the form of satisfaction of an otherwise-due payment obligation.

The Trustee's response is twofold. First, the Trustee argues that he is challenging the "Obligations" themselves as fraudulent conveyances, such that the entire contract under which each contested payment was made should be set aside, which in turn invalidates or eliminates Endo's pre-existing contractual obligation to pay McKinsey. Second, the Trustee argues that even if the SOW itself were not invalidated, the value of work performed was well less than zero given the corporate harms that Endo experienced as a result of following McKinsey's advice, and, further, that the SOWs included language by which McKinsey committed to provide "lasting value" to Endo, a commitment that McKinsey did not satisfy. The Trustee again contends that McKinsey's asserted failure to deliver "lasting value" breached this contractual commitment and, thus, made Endo not obliged to pay McKinsey on the SOWs, in addition to establishing that Endo did not receive "fair consideration" or "reasonably equivalent value" for its payments.

As detailed below and to summarize the Court's conclusions, the Trustee has not plausibly alleged that the Obligations themselves satisfy the requirements of an avoidable fraudulent conveyance. Even assuming the adequacy of the Trustee's insolvency allegations, there is no plausible allegation that, when the "Obligations" (meaning the SOWs or, earlier, the MSA) were entered, either Endo or McKinsey were not embarking on a an agreement among sophisticated actors by which Endo would retain and pay McKinsey to provide specified professional services, which McKinsey would and did provide. Thus, although there is considerable case law recognizing that ordinarily the value of services provided presents a fact issue not well suited to being resolved on a motion to dismiss, the lack of a plausible basis to avoid Endo's retention of McKinsey through the MSA and the SOWs puts the ball in the Trustee's court to identify some facts to overcome a presumption, also recognized in case law, that the payment of contractually due amounts represents the satisfaction of an antecedent debt, which is a paradigmatic form of "fair consideration" or "reasonably equivalent value" to the paying entity. Cases holding otherwise generally are anchored in some additional invalidating factor not present here – such as that the payment due under the contract was a product of self-dealing or other tainted process, or the payment was excessive and was based on subjective and distorted assertions of obligations, or that the value of the consideration in exchange was plausibly alleged to be not equivalent to the payment or to a sum certain that was contractually due.

Here, the only factual allegation in the Complaint that the Trustee argues shows the fees were not really due or were excessive appears in and near paragraph 250 of the Complaint, which is an undeveloped allegation that McKinsey failed to deliver "lasting value" as envisioned by the governing contracts. This allegation merely characterizes what may be a prefatory or aspirational statement in a contract that is not attached to the Complaint. It does not identify any basis to invalidate the contracts or excuse payment under them, and neither the Complaint nor the Trustee's opposition briefing explain what renders payment not due in satisfaction of the antecedent debt imposed (with Endo's advance approval) by the MSA and the SOWs. To reiterate in more detail the standard that the Complaint here does not meet, the court must determine if well-pleaded factual allegations state a "plausible claim for relief." *Iqbal*, 556 U.S. at 679 (internal citation omitted). A claim is plausible when the factual allegations permit "the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. (internal citation omitted). A complaint that pleads only facts that are "merely consistent with a defendant's liability" does not meet the plausibility requirement. *Id.* at 678 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)). And "[a] pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Id*. (quoting *Twombly*, 550 U.S. at 555) (internal quotation marks omitted). Rather, "[t]he pleadings must create the possibility of a right to relief that is more than speculative." *Spool v. World Child Int' Adoption Agency*, 520 F.3d 178, 183 (2d Cir. 2008) (citation omitted). Particularly given the MSA's requirements that all proposed work and compensation must have been pre-approved by Endo, the Trustee has not plausibly alleged that the payments were not in satisfaction of an antecedent debt, and, thus, were not made in exchange for "fair consideration" or "reasonably equivalent value," namely, the elimination (by satisfaction) of Endo's payment obligations to McKinsey.

If the Trustee believes these deficiencies can be cured by a more detailed repleading, the Trustee may file an amended complaint in an attempt to do so.

Turning to a more detailed legal analysis that undergirds the broad conclusions just articulated, the first element that a plaintiff must establish to state a claim for constructive fraudulent transfer is that the transferor made the transfer or incurred the obligation without receiving "fair consideration" under New York law or "reasonably equivalent value" under Pennsylvania law. *See* NYDCL §§ 273, 274, 275; PUVTA §§ 5104(a)(2), 5105.

"Fair consideration" under the NYDCL and "reasonably equivalent value" under both PUVTA and the Bankruptcy Code are functionally equivalent, apart from the NYDCL's additional requirement that the transaction had been conducted in "good faith."[10] *See In re Liberty Bridge Cap. Mgmt., GP, LLC*, 670 B.R. 676, 685 n. 35 (S.D.N.Y. 2025) (the NYDCL is functionally equivalent to "reasonably equivalent value" under the Bankruptcy Code, except for the additional requirement of good faith); *In re Vivaro Corp.*, 524 B.R. 536, 550 (Bankr. S.D.N.Y. 2015) ("Courts use the term 'fair consideration' interchangeably with 'reasonably equivalent value,' relevant in Bankruptcy Code section 548 fraudulent transfer claims, when examining constructive fraud claims."); *see also Fidelity Bond and Mortgage Co. v. Brand*, 371 B.R. 708, 719–20 (E.D. Pa. 2007) ("The constructive fraud provisions of the PUFTA and the Bankruptcy Code should be construed and interpreted uniformly because consistency between the two statutes was a goal of those who drafted the PUFTA and who have since interpreted it."). As such, at the motion to dismiss stage, a plaintiff stating a claim for constructive fraudulent transfer in New York "need only allege a lack of reasonably equivalent value ***or*** a lack of good faith on the part of the transferee," *Geron v. Cent. Park Realty Holding Corp. (In re Nanobeak Biotech Inc.)*, 656 B.R. 350, 363 (Bankr. S.D.N.Y. 2024) (emphasis added) (quoting *Gowan v. The Patriot Grp., LLC (In In re Dreier LLP)*, 452 B.R. 391, 443 (Bankr. S.D.N.Y. 2011), whereas a plaintiff stating the same claim in Pennsylvania need only adequately allege a lack of reasonably equivalent value. *See In re Rosenblum*, 545 B.R. 846, 866 (Bankr. E.D. Pa. 2016).

[10] As noted above at n.9, UVTA replaced the NYDCL and in doing so, eliminated the requirement for good faith, but because this Court is applying the NYDCL, the requirement of good faith applies.

The Bankruptcy Code does not define "reasonably equivalent value." *See BFP v. Resolution Trust Corp.*, 511 U.S. 531, 114 S. Ct. 1757, 128 L. Ed. 2d 556 (1994); *Mellon Bank, N.A. v. The Official Comm. of Unsecured Creditors of R.M.L., Inc. (In re R.M.L.)*, 92 F.3d 139, 148 (3d Cir. 1996) ("Thus, 'Congress left to the courts the obligation of marking the scope and meaning of [reasonably equivalent value].'") (quoting *In re Morris Communications NC, Inc*., 914 F.2d 458, 466 (4th Cir. 1990)). However, the Code does define "value" for purposes of fraudulent transfer analysis as "property, or satisfaction or securing of a present or antecedent debt of the debtor, but [value] does not include an unperformed promise to furnish support to the debtor or to a relative of the debtor." 11 U.S.C. § 548(d)(2)(A). Considering the Code's definition of "value" and the absence of a statutory definition for "reasonably equivalent value," courts in the Second and Third Circuits have divided the inquiry into two considerations: (1) whether the transferor received any value at all from the challenge transaction, and (2) whether the value received was reasonably equivalent or approximately equal to the value the transferor gave. *See In re Actrade Fin. Techs. Ltd.*, 337 B.R. 791, 802–03 (Bankr. S.D.N.Y. 2005); *In re R.M.L., Inc.*, 92 F.3d at 149.

Whether fair consideration or reasonably equivalent value has been given generally is an inherently fact-driven inquiry and not subject to a mathematical formula. *See In re Actrade Fin. Techs. Ltd.*, 337 B.R. at 803. To determine whether reasonably equivalent value was provided, courts in the Second and Third Circuits examine the totality of circumstances of the transaction, including the arms-length nature of the transaction and the good faith of the transferee. *See In re Bernard L. Madoff Inv. Sec. LLC*, 454 B.R. 317, 334 (Bankr. S.D.N.Y. 2011) (internal citations omitted) (". . . the Court must ultimately examine the totality of the circumstances, including the arms-length nature of the transaction; and . . . the good faith of the transferee."); *In re David*

Cutler Indus., Ltd., 502 B.R. 58, 73 (Bankr. E.D. Pa. 2013) (internal citations omitted) (courts in the Third Circuit look to the totality of the circumstances, considering such factors as fair market value compared to the actual price paid, the arm's-length nature of the transaction, and the good faith of the transferee). While the foregoing determination is largely factual, courts have dismissed constructive fraudulent transfer claims where the complaint does not plausibly allege the absence of fair consideration. *See, e.g.*, *In re Trib. Co. Fraudulent Conv. Litig.*, 10 F.4th 147, 172–73 (2d Cir. 2021).

Without more, the just-reviewed case law would suggest that the motion to dismiss should be denied to allow development of the factual question of whether Endo received "fair consideration" for its payments, in light of the Trustee's allegation that McKinsey's advice caused devastating economic harms to Endo. However, the Bankruptcy Code and case law recognize payment of an antecedent debt as an example of equivalent value when assessing whether a transaction was either actually or constructively fraudulent – assuming the validity of the debt in question. 11 U.S.C. § 548(d)(2)(A) (value "means property, or satisfaction or securing of a present or antecedent debt of the debtor"). Abundant case law deems payment of antecedent debt generally dispositive as to whether "fair consideration" or "reasonably equivalent value" has been received. As one court put it, "[i]t is well-settled law that contract provisions negotiated between parties dealing at arm's length with relative equality of bargaining power, ought not be disturbed by judicial intervention." *Grey v. FDIC*, 88 Civ. 7452 (MJL)(THK), 1998 U.S. Dist. LEXIS 12653, at *66 n.33 (S.D.N.Y. Aug. 14, 1998); *cf. In re Enron Corp.*, 357 B.R. 32, 50 (Bankr. S.D.N.Y. 2006) (asserting the presumption of equal value in contractually agreed upon services and those provided in the context of an employment agreement); *see also In re Central Illinois Energy Cooperative*, 526 B.R. 786, 791 (Bankr. C.D.

Ill. 2015) ("It is widely recognized by courts that where a debtor makes prepetition payments on a contractual debt, in order for those payments to be avoidable as constructively fraudulent, it is necessary for the trustee to first avoid the underlying contract as a fraudulently incurred obligation."). Accordingly, in *In re All-Type Printing, Inc.*, the court concluded that when a debtor paid an individual, it "received in exchange a dollar-for-dollar satisfaction of the [debt]," which was satisfaction of an antecedent debt, and thus for equivalent value. *See* 274 B.R. 316, 324 (Bankr. D. Conn. 2010).

The Trustee here relies heavily on several courts' recognition that the dispositive effect of a binding contractual obligation can be overcome if the underlying contract itself is avoided or invalid, and here argues that it has alleged a lack of any valid "antecedent debt" by seeking to avoid the Obligations themselves, not just the payments under those agreements. *E.g.*, Compl. ¶¶ 249, 252, 315–28; Opp. at 38. This approach, if successful, would find support in case law, although as noted above, the Trustee has not plausibly alleged the avoidability of the Statements of Work, especially in light of the MSA's clear pre-approval requirements and the lack of allegations showing that those procedures were invalid or not followed. Examples of case law presenting the pleading strategy the Trustee is pursuing include *In re All-Type Printing, Inc.*, in which the court dismissed a fraudulent conveyance claim seeking to avoid a payment, but stated that the result might have been different if the contract itself had been challenged, because "[t]he foregoing conclusion is premised upon the fact that All–Type's *incurring of the [debt]* has not been avoided; the underlying analysis would be different had the Trustee also sought and obtained an avoidance of the incurring of that obligation. In that event the Payments could no longer be supported by the value of debt satisfaction since no debt would exist." 274 B.R. at 324 (emphasis in original); *see also In re Nirvana Rest. Inc.*, 337 B.R. 495, 502 (Bankr. S.D.N.Y.

2006) (holding that an obligation that is avoided as fraudulent "cannot serve as fair consideration for [] subsequent [t]ransfers") (internal quotation marks omitted).

Here, however, for reasons already discussed, the Trustee has not alleged facts plausibly stating a claim to disallow the governing contracts, termed the "Obligations" in the Complaint. Rather, as McKinsey observes, there are no facts alleged to call into question that "[t]he Agreements were negotiated at arm's length and with Endo's knowledge of the services McKinsey was to provide, and there are no allegations that the fees agreed to were off-market." Reply at 25; *see* Motion at 30–31. Indeed, as noted, the Master Service Agreement[11] expressly requires that McKinsey's work occur on a "project basis" with a scope of work and estimated compensation specified and pre-approved by Endo.

Having closely studied the Complaint and the MSA as well as the parties' contentions, the Court sees no allegation of fact supporting a plausible inference either that the governing contracts were invalid when entered or that they were not performed by McKinsey such that Endo owed no antecedent debt to McKinsey at the time of the challenged payments.

Turning first in more detail to whether the "Obligations" can be avoided, the proper focus of the reasonably equivalent value inquiry is the specific transaction sought to be avoided, *In re Churchill Mortg. Inv. Corp.,* 256 B.R. 664, 678 (Bankr. S.D.N.Y. 2000), and so the Court must examine the allegations concerning the possible invalidity of those agreements. The Complaint alleges only that the "Obligations" (meaning the SOWs) "required McKinsey to provide services that created lasting value in exchange for payment." Compl. ¶ 250. The Complaint does not attach the Statements of Work, nor does it quote them beyond this rather broad and aspirational language. The Complaint does allege at length, and plausibly, that following the resulting

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[11] The MSA is integral to or incorporated in the Complaint, and therefore is properly considered in deciding this Motion. *See, e.g.*, *Chambers v. Time Warner, Inc.*, 282 F.3d 147 (2d Cir. 2002).

McKinsey "advice" was catastrophic for Endo, and certainly not something that created lasting value. But the Court does not see any factual allegation that, at the time of entry into the MSA or the SOWs, Endo's entry into pre-approved work orders for services specified by a contracting consultant was anything other than a valid and enforceable forward-looking services agreement between sophisticated parties—an agreement to retain and pay McKinsey a specified amount for specified work, which the Court cannot credit as a plausible transfer or conveyance by Endo for which it did not receive "fair consideration" or "reasonably equivalent value" in the form of McKinsey's agreement to perform specified professional services. The Trustee thus has failed to plausibly allege the invalidity of the "Obligations."

The Trustee might also try to contend that the "Obligations," meaning the SOWs, were breached by McKinsey such that payment was not in fact due. But the Complaint also fails to identify any specific contractual provision that was breached by McKinsey, and certainly not in a manner that excused as a contractual matter Endo's obligation to pay McKinsey under the governing contracts. Although the Trustee quotes contractual language saying McKinsey undertook to create "lasting value" for Endo, [Compl. ¶ 250], the quoted language sounds prefatory and aspirational and has not been alleged or shown to be an enforceable metric or deliverable owed by McKinsey to trigger Endo's payment obligation.

The Trustee does identify and the Court has considered decisions declining to dismiss complaints where a plaintiff asserted that poor performance under a contract rendered payment not contractually required. *See* Trustee Opp. at 38–39 (citing *Kirschner v. Large S'holders (In re Tribune Co. Fraudulent Conveyance Litig.)*, 10 F.4th 147, 173–74 (2d Cir. 2021) (dismissal premature given question as to whether advisors conformed with industry standards and so delivered value reasonably equivalent to the success fees paid)); *Am. Tissue, Inc. v. Donaldson,* *Lufkin & Jenrette Sec. Corp.*, 351 F. Supp. 2d 79, 106 (S.D.N.Y. 2012); *Silverman v. Meister Seelig & Fein, LLP (In re Agape World, Inc.)*, 467 B.R. 556, 571–72 (Bankr. E.D.N.Y. 2012); *Jacobs v. D'Alessandro (In re Dewey & Leboeuf LLP)*, Nos. 12-12321, 14-01919, 2014 Bankr. LEXIS 4051 (Bankr. S.D.N.Y. Sept. 23, 2014); *Global Crossing Estate Representative v. Winnick*, No. 04-cv-2558, 2006 U.S. Dist. LEXIS 53785, at *33 (S.D.N.Y. Aug. 3, 2006). The Court has identified additional similar decisions. *See Murray v. Prescott, Ball & Turben, Inc. (In re Chicago, Missouri & Western Ry. Co.)*, 124 B.R. 769, 773 (Bankr. N.D. Ill. 1991) (plaintiffs sufficiently alleged they did not receive reasonably equivalent value for the transfers based on the quality of the investment advisors' services); *In re Oakwood Homes Corp.*, 340 B.R. 510, 525 (Bankr. D. Del. 2006) (noting that the "quality of professional services is within the scope of a fraudulent conveyance action," and that inadequately performed professional services could serve as a basis for recovery) (quoting *BCPM Liquidating LLC v. PricewaterhouseCoopers LLP (In re BCP Mgmt.)*, 320 B.R. 265, 280 (Bankr. D. Del. 2005)).

These cases are distinguishable and do not plausibly demonstrate that the facts alleged here are sufficient to overcome the conclusion that here Endo made a payment on account of a valid antecedent debt, and that, as a result, it has not plausibly alleged the absence of fair consideration or reasonably equivalent value. Many involve successful efforts to call into question the validity of the underlying payment obligation that led to the transfer, which as just discussed the Trustee has failed to accomplish here.

Kirschner, for example, involved an attempt to avoid "success fees" that had been paid to financial advisers; thus, a challenge to their performance plausibly challenged the contractual existence or amount of a payment obligation in the first place, whereas here the amounts due have not been alleged to be based in part on subjective factors like Endo's long-term results or anything other than a sum certain due under a contract with no alleged irregularity in its negotiation or adoption. *See* 10 F.4th 147. Similarly, in *Am. Tissue Inc.*, Judge Lynch, then of the District Court, denied a dismissal motion as to fraudulent conveyance claims against an investment firm that claimed that the payer of its fees received "equivalent value" in the form of an equity distribution – a consideration that presents inherent stock valuation and "equivalence" questions, whereas here Endo received services to which it specifically agreed and for which it specifically agreed to pay a sum certain in a preapproved Statement of Work. *See* 351 F. Supp. 2d 79. Further, McKinsey's compensation under each Statement of Work has not been alleged to have been contingent on outcome or any particular deliverable for the services rendered. Meanwhile, in *Jacobs*, which concerned an attempt to avoid extraordinarily high compensation paid to a partner in the eventually bankrupt and defunct law firm Dewey Leboeuf, there were plausible allegations that the partner who received the payments had sufficient decision-making power that he could unduly influence and taint the firm's payment decision-making, and a further plausible allegation that "the Contract payments were so exorbitant that they could not be justified by the services that D'Alessandro performed," thus defeating a presumption that his compensation must have been for an antecedent debt and thus been accompanied by fair consideration. *See* 2014 Bankr. LEXIS 4051, at *31. Unlike D'Alessandro, there is no plausible allegation of undue influence by McKinsey over Endo's decision to enter the contracts at issue, or over the amount of pre-approved compensation that would be due for the specified services, and the amount of the payments – approximately $8.5 million in total – is not so high as to be inherently questionable. *See id.* And in *Winnick*, which arose from the Global Crossing bankruptcy, the court denied a motion to dismiss a claim to recover $58.7 million in fees paid to banking professionals for securities offerings and related services, but only where those professionals were alleged to have engaged in self-dealing to such an extent that the legitimacy of the payment obligation was called into question, especially against a backdrop of triable fact issues regarding the actual value of what the company received on account of the professional services it lucratively commissioned. *See* 2006 U.S. Dist. LEXIS 53785.

Silverman is the most analogous and favorable case cited by the Trustee. There, the Bankruptcy Court for the Eastern District of New York denied a motion to dismiss fraudulent conveyance claims brought against pre-petition counsel to a debtor that engaged in a Ponzi scheme on the ground that the value of services rendered presented a fact question. *See* 467 B.R. 556. That decision aligns with the Trustee's theory that a payment of professional fees may be avoided if the professional services were so incompetent or otherwise flawed as to render the payment greater than the value received by the company in exchange. *See id.* The *Silverman* decision is still distinguishable, however. It arose against the backdrop of a Ponzi scheme that called into question the bona fides of the entity that retained the professional, and the decision does not reveal indications comparable to those here that have the "badges of regularity," to coin a phrase – a pre-approved agreement not alleged to have been unusually or excessively priced to provide specified professional services in exchange for a pre-agreed estimated compensation amount. *See id.* The Complaint simply does not plausible articulate any way in which the payments to McKinsey were not earned or due under the contract. Hindsight-backed assertions that McKinsey's advice proved harmful have not been shown to excuse Endo's contractual obligation to pay for that advice when the services were rendered and the payment was due under the governing contracts.

In sum, the Complaint and the MSA here make clear that Endo voluntarily hired McKinsey to perform specified services for a pre-agreed fee, that McKinsey did so, and that

McKinsey was paid the resultingly due compensation, while the Complaint identifies nothing that plausibly could invalidate Endo's payment obligations to McKinsey under the governing contracts. The Complaint here thus does not give rise to the sort of plausible triable issue that the court perceived existed in any authority raised by the Trustee, even fully taking *Silverman* into account. The Complaint thus fails to allege the absence of reasonably equivalent value or fair consideration where all available facts indicate that Endo's payments were on account of antecedent debt that Endo owed to McKinsey. This remains true even assuming that McKinsey's work (and Endo's decision-making) caused terrible corporate harm. The Trustee may have a remedy, seemingly most viably for indemnification, but the fraudulent conveyance claims as pled fail to plausibly state a claim.

As noted, the Court will allow the Trustee to replead in an amended complaint to attempt to state additional facts that will support its contention that the amounts paid to McKinsey were not accompanied by a receipt by Endo of fair consideration or reasonably equivalent value.

b. Insolvency

Although the insufficient pleading of a lack of reasonably equivalent value or fair consideration is fatal to the Trustee's claim as now pled (subject to possible amendment), the Court will review the remaining applicable elements of the fraudulent conveyance claims. The second element of a constructive fraudulent transfer claim in both New York and Pennsylvania is insolvency. Under both the NYDCL and PUVTA, a transfer made, or obligation incurred by a debtor is voidable as to a creditor if the debtor made the transfer or incurred the obligation at a time when the debtor either was insolvent or was rendered insolvent as a result of the transfer. *See* NYDCL §§ 273; PUVTA §§ 5104(a)(2), 5105. The Trustee's theory of insolvency, while likely challenging to prove and possibly ultimately not viable, does rise to the level of plausibility, on the theory that when Endo received and followed McKinsey's advice Endo was on the road to economic perdition of such a magnitude that, even discounted for present value as of the time of the "Obligations and Transfers," the impact of future losses rendered Endo balance sheet-negative.

A debtor is presumed insolvent if it is not paying debts as they become due, which has not been alleged to have been the case with Endo, but insolvency can also be proven by demonstrating that the debtor is "book value" insolvent. *See In re Fitzpatrick Container Co.*, 670 B.R. 425, 441 (Bankr. E.D. Pa. 2025) (citing *In re R.M.L., Inc.*, 92 F.3d 139, 154–55 (3d Cir. 1996)). A debtor is book value insolvent "if, at fair valuation, the sum of the debtor's debts is greater than the sum of the debtor's assets." PUVTA §§ 5102(a); *see also* NYDCL § 271(a) (a company is insolvent when the "present fair salable value of his assets is less than the amount that will be required to pay his probable liability on his existing debts as they become absolute and matured"). To determine insolvency, courts use the "balance sheet" test to evaluate the company's assets and liabilities. *See In re Wonderwork Inc.*, 611 B.R. 169, 211 (Bankr. S.D.N.Y. 2020) ("The NYDCL incorporates a 'balance sheet' test for insolvency.") (quoting *In re Nirvana Rest.*, 337 B.R. 495, 506 (Bankr. S.D.N.Y. 2006)); *In re R.M.L., Inc.*, 92 F.3d 139, 154–55 (3d Cir. 1996). The only potentially salient difference between the insolvency laws of New York and Pennsylvania is that under New York law, if the plaintiff demonstrates the absence of "fair consideration," the court may presume insolvency and the burden shifts to the defendant to rebut it. *See In re Wonderwork Inc.*, 611 B.R. at 211.

Ordinarily, "[t]he operative reference point for determining insolvency is the time at which the transfer took place." *In re Trinsum Grp., Inc.*, 460 B.R. 379, 392 (Bankr. S.D.N.Y. 2011). However, while courts cannot presume insolvency from a subsequent insolvency or use other impermissible hindsight, courts may consider information "originating subsequent to the transfer date if it tends to shed light on a fair and accurate assessment of the asset or liability as of the pertinent date, which assures that the valuation is based in reality." *In re Adelphia Commc'ns Corp.*, 512 B.R. 447, 495 (Bankr. S.D.N.Y. 2014), as corrected (Sept. 10, 2014), *aff'd sub nom. In re Adelphia Commc'n's Corp.*, No. 02-41729 REG, 2015 WL 1208588 (S.D.N.Y. Mar. 17, 2015), *aff'd sub nom. In re Adelphia Commc'n's Corp.*, 652 F. App'x 19 (2d Cir. 2016) (internal citations and quotations omitted). For example, subsequent discovery of fraud can be appropriately considered when determining the real financial condition of the debtor at the time of the transfer. *Id.* at 495 (citing *In re Coated Sales Inc.*, 144 B.R. 663, 668 (Bankr. S.D.N.Y. 1992)). In calculating insolvency, courts also consider contingent liabilities that are capable of reasonable estimation. *In re Xonics Photochemical, Inc.*, 841 F.2d 198, 200 (7th Cir. 1988); *see also* 5 Collier on Bankruptcy ¶ 548.05(3)(a) (16th ed. 2025). Contingent liabilities must be discounted by the likelihood that the contingency will occur, and the amount of discount used often presents factual issues. *See In re Xonics Photochemical, Inc.*, 841 F.2d at 200; *see also In re Wonderwork, Inc.*, 611 B.R. at 211; 5 Collier on Bankruptcy ¶ 548.05(3)(a) (16th ed. 2025).

Courts recognize that "insolvency is ordinarily a question of fact." *In re Tops Holding II Corp.*, 646 B.R. 617, 658 (Bankr. S.D.N.Y. 2022) (quoting *In re Tronox Inc.*, 429 B.R. 73, 98 (Bankr. S.D.N.Y. 2010)). The calculation of insolvency often necessitates expert testimony as to the value of assets and the exposure to liabilities and requires the court to engage in the technical exercise of weighing the evidence. *See id.*; *see also* 5 Collier on Bankruptcy ¶ 548.05 (16th ed. 2025). Considering the fact-intensive nature of the insolvency analysis, "courts should not dismiss a complaint that contains sufficient facts to permit a plausible inference of insolvency even if the defendant has its own plausible arguments for solvency." *In re Tops Holding II Corp.*, 646 B.R. at 658 (internal quotation marks omitted). Even though a complaint cannot "simply parrot" the applicable statute, a complaint will not be dismissed when the "defendant's allegations of solvency are more probable than the complaint's allegations of insolvency." *Id.* A complaint need not be dismissed if it does not include balance sheet specifics or other specific financial information so long as the face of the complaint allows the court to draw a reasonable inference of insolvency. *Id.* at 658–59 (internal quotation marks omitted); *see also In re Atomica Design Grp.*, Inc., 556 B.R. 125, 166 (Bankr. E.D. Pa. 2016).

i. Parties' Arguments

In the Complaint, the Trustee maintains that Endo was insolvent at the time of the Transactions as the value of its assets "was substantially less than its liabilities." Compl. ¶ 260. In so arguing, the Trustee maintains that even though Endo had a substantial market capitalization at the time of the Transfers and Obligations, Endo was facing enormous, not-yet-recognized liability resulting from the destructive effects of opioids and the breadth of litigation that Endo faced as a result. *See* Compl. ¶ 255. In alleging that Endo was subjected to contingent liabilities, the Trustee contends that, at the time that the Transfers and Obligations were made to McKinsey, Endo was already subject to both lawsuits and government investigations regarding a variety of its products, opioid and otherwise. *Id.* ¶ 256–57. The Trustee claims that Endo "consistently underreported the full scope of the liabilities it faced in order to maintain the façade that its assets exceeded its liabilities," and "underreport[ed] its tax liability by billions of dollars to paint a false picture of financial stability and success." *Id.* ¶ 259. As a result, Endo's fair market value was "grossly exaggerated by several billions of dollars," and a majority of its assets were "comprised of good will and general intangibles." *Id.* ¶ 260. The Plaintiff contends that McKinsey's "reliance on the market capitalization of the stock" as of the petition date fails to justify dismissal given the Complaint's allegations of Endo's underreporting of its liabilities, the exaggeration of Endo's fair market value, and the fact that McKinsey's advice was a poison pill that accelerated Endo's liabilities. Opp. at 41. The Trustee concludes by stating that the lawsuits were "indicative of Endo's liabilities at the time of the [Transfers and Obligations]." *Id.* at 42.

In opposition, McKinsey terms the Trustee's allegations conclusory, and argues that the Complaint's factual allegations in fact show that "Endo was neither insolvent at the time of the Transactions nor rendered insolvent thereby." *See* Motion at 31. McKinsey emphasizes that Endo's Chapter 11 filing occurred six years after the Transactions were executed, and that, when the Transfers and Obligations were executed, the "market capitalization of Endo's stock was worth billions of dollars until immediately before the Chapter 11 filing." *Id.* at 32. McKinsey further notes that its consulting work resulted in hundreds of millions of dollars of profits and argues that the $8.33 million dollar Transfers made Endo insolvent would be "implausible." *Id.* at 32–33. Relatedly, McKinsey maintains that the Trustee's case is predicated on purely contingent liabilities that resulted from Endo's exposure to opioid litigation, which is impermissible because the Trustee failed to allege that the potential risk of the contingent liabilities rendered Endo insolvent *at the time* of the Transfers and Obligations. Reply at 27–28. McKinsey further argues that a case relied on by the Trustee, *Coated Sales*, does not apply to fraudulent transfers because the case involved preferential transactions and that the transactions at issue in *Coated Sales* had been discovered later due to fraud and illegality, neither of which is alleged to be present here. *Id.* at 28 (citing *In re Coated Sales, Inc.*, 144 B.R. at 666).

ii. Analysis

Viewing the allegations in the light most favorable to the Trustee, the Court concludes that the Trustee has alleged facts that supports a plausible inference that Endo was insolvent at the time of the Obligations and Transfers due to the likelihood of future opioid-related liabilities that Endo took on by obtaining and following McKinsey's advice, notwithstanding that at the time its market capitalization appeared to reflect financial soundness. The passage of six years from the last date of complained-of McKinsey conduct until Endo's bankruptcy petition may eventually prove decisive in McKinsey's favor, but the Court cannot rule for McKinsey as a matter of law based on the pleadings in connection with Endo's payments to McKinsey.

First, although the Complaint does not assign any specific value to the liabilities, the Complaint has sufficiently alleged that Endo was exposed to such massive liabilities and losses (including $1.2 billion in settlements and hundreds of millions of dollars in other costs), such that the Complaint supports a plausible inference that Endo was insolvent at the time of the its payments to McKinsey, even discounting the value of those eventual settlements and other losses. *See, e.g.*, *In re Amcad Holdings, LLC*, 579 B.R. 33, 39–40 (Bankr. D. Del. 2017) (the trustee adequately pled insolvency when the Complaint alleged "large payments and payouts" led to insolvency, and no "specific financial information" was provided); *In re Dewey & LeBoeuf LLP*, 2014 WL 4746209, No. 12–12321 (MG), at *12 (Bankr. S.D.N.Y. Sept. 23, 2014) (motion to dismiss was denied when an insolvency date was not yet fixed but "[s]ubsequent developments–including the indictments of former senior [Debtor] personnel" support that the allegations in the complaint provided room for discovery to illuminate an appropriate date before which no transfer can be recovered). In contrast to McKinsey's assertions, it is permissible when determining insolvency to consider contingent liabilities, such as liability arising from litigation and regulatory lawsuits, that are capable of reasonable estimation. *See, e.g., In re Xonics Photochemical, Inc.*, 841 F.2d at 200.

McKinsey relies on *In re Xonics* to argue that Plaintiff cannot show that Endo's contingent liabilities were greater than its assets, but this argument ignores that although the Seventh Circuit characterized as "absurd" the proposition that that the contingent liabilities in that case were greater than the debtor's assets, the court also observed that it is not impermissible to consider contingent liabilities in an insolvency calculation when those liabilities can be estimated based on the probability of their occurrence. *See In re Xonics Photochemical, Inc.*, 841 F.2d at 200; *see also* Motion at 32. Doing so requires determining the appropriate discount rate to apply to the eventual litigation liability, which will require evidence and expert testimony. *See In re Tronox, Inc.*, 503 B.R. at 315 (weighing competing expert testimony, the court set the value of past tort and environmental claims in order to determine that a debtor was insolvent at the time of its IPO); *see also In re Wonderwork, Inc.*, 611 B.R. at 211 ("The amount of any discount, and hence, the question of solvency, presents an issue for trial."). Thus, although as McKinsey observes the Court must apply a "balance sheet" test to determine whether the liabilities that Endo incurred actually resulted in its insolvency, *see* Motion at 31 (citing *In re Trinsum Grp., Inc.*, 460 B.R. 379, 392 (Bankr. S.D.N.Y. 2011)), to the extent the Court must fix a value on contingent liabilities, fact-finding is necessary here to determine the appropriate discount rate and the precise timing of these contingent liabilities as compared to Endo's asset values at the time of the Transactions. That cannot be done at the present stage of this litigation.

Second, despite McKinsey's contentions otherwise, the Complaint plausibly alleges that the Transfers and Obligations occurred when at least some of the liabilities had already been incurred by Endo. Compl. ¶ 256 ("At the time of the [Transfers and Obligations], Endo . . . had already been the subject of lawsuits and government investigations with respect to its marketing and sale of opioid products, including Opana, as well as its products generally."). As noted, insolvency is measured as of the point at which the transfers occurred and cannot be presumed from a later insolvency, but courts may consider information originating subsequent to the transfer date if it tends to shed light on an accurate, realistic valuation of the company as of the pertinent date. *In re Adelphia Commc'n's Corp.*, 512 B.R. at 495 (quoting *In re Coated Sales Inc.*, 144 B.R. at 668).

For example, the court in *Coated Sales* stated that courts are permitted to use "hindsight" to superimpose "current circumstances" onto "a previous set of circumstances," when subsequent fraud has been discovered. *In re Coated Sales*, 144 B.R. at 668. In that case, the court considered the post-transaction discovery of false accounts, phantom inventory, and illegal transfers to determine the debtor's actual financial condition at the date of the transfers at issue. *Id*. McKinsey attempts to use the *Coated Sales* case to highlight the fact that the court there used hindsight only when there was a subsequent discovery of fraud, and contends that "[h]ere, no fraud or illegality is ever alleged." Reply at 28. This contention ignores the salient similarity of the circumstances here, in which an unacknowledged problem – here large-scale generation of liability through reckless opioid sales practices, whereas in *Coated Sales* the unacknowledged value-destroying factor was fraud – in each case causing a company to underreport or fail to acknowledge liabilities in a way that led to an exaggerated perception of the company's solvency. *See* Compl. ¶ 260. Thus, the circumstances here are not unlike *Coated Sales*, and the Court may consider the fact that the asset valuation could have been lower than reported due to the underreported liabilities Endo faced.

Lastly, one argument of the Trustee fails. The Trustee contends that the claim in Count Seven for constructive fraudulent transfer under the laws of New York is entitled to a presumption of Endo's insolvency because the Trustee has alleged facts sufficient to support a plausible inference of an absence of "fair consideration." *See In re Wonderwork Inc.*, 611 B.R. at 211. That argument fails (subject to possible repleading) in light of the Court's conclusion that the Trustee has not plausibly alleged an absence of fair consideration for the payments that Endo made.

Nevertheless, and more broadly, even assuming that Endo was achieving near-term profits at the time of the services rendered, McKinsey has not rebutted Endo's possible insolvency because questions of fact exist regarding the appropriate values and timing of the contingent liabilities. Granting the motion to dismiss in light of the facts alleged would involve impermissibly failing to draw plausible inferences in the Trustee's favor, while making possibly plausible but not inescapable inferences in McKinsey's favor. *See In re Tronox Inc.*, 429 B.R. at 91 ("It is also quite irrelevant whether Defendants' [solvency] scenario has 'greater plausibility,' as Defendant assert. For pleading purposes, a defendant's rebuttal of a plaintiff's contentions with its own does not entitle the defendant to dismissal of an action.").

Therefore, the Court concludes that the Trustee has alleged facts that support the inference that Endo was insolvent at the time of the Obligations and Transfers.

c. Counts Seven and Eight Should Not Be Dismissed as Time-Barred

In Counts Seven and Eight, the Trustee asserts claims for constructive fraudulent transfer under the NYDCL and PUVTA. McKinsey[12] asserts that nearly all of Plaintiff's fraudulent transfer claims based in New York are time-barred as most of the relevant Obligations and Transfers occurred outside of New York's six-year limitations period. Motion at 34. Because more than six years passed between the most recent Transfer and the petition date, the Trustee

[12] In the Motion, McKinsey did not argue the statute of limitations affirmative defense for the fraudulent transfer claims under Pennsylvania.

relies on the existence of certain predicate or "triggering" creditors that the Trustee claims have the benefit of an extended period of time within which to file their claims. Opp. at 43–45. Specifically, the Trustee argues that it can step into the shoes of the Internal Revenue Service ("**IRS**") and the U.S. Department of Health and Human Services ("**HHS**") as triggering creditors to circumvent New York's statute of limitations. *Id.* McKinsey maintains that the Trustee cannot rely on these two predicate creditors because (1) the Plaintiff failed to identify which specific debtor made the transfers at issue and (2) the Plaintiff failed to allege that the IRS and HHS each independently held a claim against that specific debtor. Motion at 34–36.

As stated above, the Complaint was filed on August 15, 2024, but the parties agree that the relevant point for computing the timeliness of the Trustee's claims was Endo's bankruptcy petition date, namely, August 16, 2022. Compl. ¶ 20; 11 U.S.C. § 108(a) (imposing two-year toll of unexpired statutes of limitations as of a debtor's bankruptcy petition date). Thus, without a triggering creditor (discussed below), the six-year statute of limitations for these fraudulent transfer claims under New York law makes timely any claim accruing on or after August 16, 2016.

The Complaint seeks to avoid a series of Transfers dating from March 11, 2015, to December 20, 2016. *See* Compl., Schedule B. Of the $8.33 million in Transfers the Plaintiff seeks to avoid, ten transactions totaling $4.83 million occurred before August 16, 2016—meaning outside of the six-year statute of limitations in New York. *See id.* However, from the face of the Complaint, two Transfers occurred within the statute of limitations, namely the October 4, 2016 Transfer totaling $3 million and the December 20, 2016 Transfer totaling $500,000. Further, five of the six SOWs that the Plaintiff seeks to avoid as constructively fraudulent Obligations occurred outside of the statute of limitations, but the October 10, 2016

SOW was executed within the statute of limitations. In sum, without a triggering creditor, the Trustee's claims for the ten Transfer and five Obligations referenced above are outside of New York's six-year statute of limitations.

Section 544 of the Bankruptcy Code states that a trustee may avoid a fraudulent transfer that is voidable under applicable law "by a creditor"—often referred to as a "golden creditor" or "triggering creditor"—holding an allowable unsecured claim. 11 U.S.C. § 544. "It is not necessary that the claim held by that creditor at the bankruptcy filing be identical to the one held at the time of the fraudulent conveyance, or, under some applicable fraudulent transfer laws, that the creditor even have had a claim at the time of the transfer, only that the petition date creditor could avoid the transfer under applicable non-bankruptcy law." *In re Tops Holding II Corp.*, 646 B.R. at 651 (internal quotations and citations omitted). "[B]efore a trustee is able to utilize applicable state or federal law referred to in Section 544(b), there must be an allegation and ultimately a proof of the existence of at least one unsecured creditor of the Debtor who at the time the transfer occurred could have, under applicable local law, attacked and set aside the transfer under consideration." *In re Wingspread Corp.*, 178 B.R. 938, 946 (Bankr. S.D.N.Y. 1995) (quoting *In re Smith,* 120 B.R. 588, 590 (Bankr. M.D. Fla. 1990)). When using the IRS as the "golden creditor," a ten-year statute of limitations for enforcement is measured from the date of an unpaid tax obligation's assessment, but the IRS need not assess the tax to qualify as a triggering creditor. *See, e.g., Togut v. Perevoski (In re Kossoff PLLC)*, Nos. 21-10699, 22-01141, 2023 Bankr. LEXIS 2554, at *6 (Bankr. S.D.N.Y. Oct. 17, 2023) (citing 26 U.S.C. § 6502(a)(1)).

The Complaint alleges that the IRS filed proofs of claim against at least Endo U.S. Inc., Endo Pharmaceuticals Inc., and Endo Health Solutions Inc. for the "fiscal periods ending in 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2016, 2017, 2018, 2020, and 2021, which were due and owing at all relevant times, including but not limited to August 16, 2012, through and including the Petition Date." Compl. ¶ 265–66. Thus, the IRS's status as a triggering creditor would extend the statute of limitations for fraudulent transfer under New York law to cover all the relevant Transfers and Obligations.

The Trustee has also asserted the HHS as a golden creditor because the HHS filed a claim against "Endo International plc and its affiliated debtors," which the Trustee has alleged has a six-year reach-back period. Compl. ¶ 270–271. In a footnote, McKinsey claims that the HHS's six-year statute of limitations could not be a triggering creditor for any of the claims because six years is not enough time to cover any Transfers or Obligations. Motion at 34–35 n.23. At first blush, the Court is skeptical of the application of the HHS to extend the statute of limitations but given that the Plaintiff has alleged the IRS as a predicate creditor and that creditor has a ten-year statute of limitations, the Court declines to decide the arguments relating to HHS at this time.

In response to the Trustee's assertion that the IRS operates as a predicate creditor, the Defendants maintain that the Trustee must identify a specific unsecured creditor holding an allowed claim *at that specific transferor* to benefit from a longer statute of limitations and that in failing to do so, plaintiffs have failed to meet their pleading burden. Reply at 29–30 (citing *In re Tops Holding II Corp.*, 646 B.R. at 655 ("[I]t is the IRS's status as a creditor at the time of the transfer . . . that gives it standing[.]")). However, this is "contrary to the law of this District," which requires only the identification of a triggering creditor to put "defendants on notice of the creditors who supply the basis for the right to sue, and will permit them to answer, seek relevant discovery, and defend against these claims." *In re Bernard L. Madoff Inv. Sec. LLC*, 557 B.R. 89, 120 (Bankr. S.D.N.Y. 2016) (quoting *Global Crossing Estate Rep. v. Winnick,* No. 04–CIV–2558, 2006 WL 2212776, at *11 (S.D.N.Y. Aug. 3, 2006) (Lynch, J)); *Musicland Holding Corp.*

v. Best Buy Co. (*In re Musicland Holding Corp.*), 398 B.R. 761, 780 (Bankr. S.D.N.Y. 2008); *In re RCM Global Long Term Cap. Appreciation. Fund, Ltd.,* 200 B.R. 514, 523–24 (Bankr. S.D.N.Y. 1996). The Trustee argues that McKinsey overstated his pleading obligation, adding that discovery is needed to ascertain whether the IRS held a claim against a specific Endo entity, and that in any event, Endo Pharmaceuticals Inc. is alleged as an entity at which the IRS held a claim and that is the same Endo entity that signed the SOWs. *See* Opp. at 44; Compl. ¶ 265. Defendants claim that neither of the *45 John Lofts, LLC* or *Bernard L. Madoff* cases cited by Plaintiff suggest that discovery is appropriate for a plaintiff to assess whether it has sufficiently alleged a golden creditor because, in these cases, standing was at issue not the statute of limitations. Reply at 30 (citing 599 B.R. 730 (Bankr. S.D.N.Y. 2019) and 557 B.R. 89).

For now, the Trustee has adequately alleged that IRS is a triggering creditor so that his claims are timely, pending further development if and as the case goes forward and includes fraudulent conveyance claims. *See 45 John Lofts, LLC v. Meridian Capital Grp., LLC (In re 45 John Lofts, LLC)*, 599 B.R. 730, 742 (Bankr. S.D.N.Y. 2019) ("there is ample authority to suggest that consideration of the qualifying creditor question be left until motions for summary judgment"). Defendants also cite *In re Mallinckrodt PLC*, where the Court dismissed the fraudulent transfer claims in an amended complaint because the plaintiff failed to demonstrate that the IRS had claims against the specific debtor entities that made the transfers and failed to demonstrate that any entity was the alter ego of an entity at which the IRS held a claim. Motion at 35 (citing No. 20-12522 (JTD), 2024 WL 206682, at *39 (Bankr. D. Del. Jan. 18, 2024)). While Plaintiff will ultimately need to demonstrate that the IRS held a claim at the specific transferor entities involved in the Transfers and Obligations, the allegations in the Complaint are sufficient for the Court to plausibly infer that the claims are not facially time-barred and the cases in this District have found that fact-finding is appropriate to discover whether the specific debtor-entity has a predicate creditor. *See In re Bernard L. Madoff Inv. Sec. LLC*, 557 B.R. at 120; *45 John Lofts, LLC*, 599 B.R. at 742.

To be sure, to succeed in its claim for Transfers and Obligations occurring before August 16, 2016, the Trustee would need eventually to establish the existence of an unsecured creditor that has an allowable claim against the specific entity seeking to void the Transfer or Obligation and that could have pursued that claim at the time of the Transfer or Obligation. But for purposes of this motion, the Court cannot conclusively determine that the IRS' rights to avoid the Transfers and Obligations occurring before August 16, 2016 are time-barred.

d. Counts Seven and Eight are Pled with Sufficient Particularity to Satisfy Rule 8

Finally, McKinsey maintains that the Trustee has not met his pleading burden under Rule 8(a)(2) because the Trustee does not plead assertedly necessary details of the Transfers or Obligations to state a claim for constructive fraudulent transfer. Motion at 33. Specifically, McKinsey argues that nowhere does the Complaint specify which Endo entity made and which McKinsey entity received each Transfer, nor does the Complaint specify which McKinsey entity was owed each Obligation. *Id.* While McKinsey claims that the Trustee's failure to specify transferors and transferees for each Transfer and Obligation is fatal to Counts Seven and Eight, the Court concludes that the Trustee generally has provided sufficient information to meet its pleading requirements under Rule 8(a)(2), except as to the Court's substantive determination that the Complaint fails to plead a lack of fair consideration or reasonably equivalent value to Endo in connection with the Obligations and Transfers.

As stated above, claims for constructive fraudulent transfer must satisfy the pleading standards set forth in Rule 8(a) as opposed to the heightened pleading standards in Rule 9. *See* *supra* Section II. C. 2.; Fed. R. Civ. P. 8(a)(2); *In re Atomica Design Grp., Inc.*, 556 B.R. 125, 160 (Bankr. E.D. Pa. 2016) (holding that claims for constructive fraudulent transfer are not subject to the heightened pleading standard of Rule 9 because "fraud does not have to be proven" thereunder) (internal citations omitted). At the motion to dismiss stage, a complaint need only allege that the transfer for which avoidance is sought was for less than reasonably equivalent value at a time when the debtor was insolvent, but the complaint must do more than recite the statutory elements of each. *See In re PennySaver USA Publ'g, LLC*, 587 B.R. 445, 455–56 (Bankr. D. Del. 2018). The purpose of this pleading requirement is to ensure the defendant receives "fair notice" of the claim and thus, "the sole consideration should be whether, consistent with the requirements of Rule 8(a), the complaint gives the defendant sufficient notice to prepare an answer, frame discovery, and defend against the charges." *In re Bernard L. Madoff Inv. Sec. LLC*, 458 B.R. 87, 111 (Bankr. S.D.N.Y. 2011) (quoting *Nisselson v. Drew Indus., Inc. (In re White Metal Rolling & Stamping Corp.),* 222 B.R. 417, 429 (Bankr. S.D.N.Y. 1998) (internal citations omitted)). Courts have found that "complaints that identify the dates, amounts, source, and transferee of each of the alleged transfers successfully support claims of constructive fraudulent transfer under Fed. R. Civ. Pro. 8(a)(2)'s pleading standard." *In re PennySaver USA Publ'g, LLC*, 587 B.R. at 456 (citing *In re AgFeed USA, LLC*, 546 B.R. 318, 337 (Bankr. D. Del. 2016) ("Here, the complaint identifies the date, amounts, source and transferee of each of the transfers . . . At this stage of the proceedings, the Court concludes that the facts alleged by the Trustee are sufficient to support a claim for constructive fraud under section 548(a)(1)(B).")).

Here, regarding the Obligations, the Complaint identifies the date and group of obligors (Endo Pharmaceuticals and Endo Pharmaceuticals Holdings Inc.) for each Obligation. *See* Compl., Schedule A. The Complaint also identifies McKinsey as the Obligee for each

Obligation. *See* Compl. ¶ 123 ("Each proposal outlined the services that McKinsey would provide to Endo and how much Endo would pay for those services."). The Complaint explains that each SOW "was executed by Endo Pharmaceuticals or Endo Pharmaceuticals Holdings Inc. on behalf of each entity 'and its affiliates,'" and that the "SOWs routinely referred to 'Endo Pharmaceuticals' or simply 'Endo,' highlighting that McKinsey's services were understood to be directed to, and for the benefit of, Endo's business enterprise as a whole." Compl. ¶ 123. For each of the Transfers, the Complaint identifies the date, amount, and group of transferor/transferees. *See* Compl. ¶ 253 ("Endo, through Endo Pharmaceuticals, Inc., Endo Health Solutions Inc., and Endo U.S. Inc., and potentially other affiliated entities acting by its direction and on its behalf, transferred millions of dollars to or for the benefit of McKinsey, including but not limited to no less than $8.33 million to or for the benefit of McKinsey in 2015 and 2016, as reflected on Schedule B."). The Trustee also explains that "[a]lthough the invoices related to the Transfers list only 'Endo Pharmaceuticals,' upon information and belief, the Transfers were effectuated by Endo Pharmaceuticals, Inc., Endo Health Solutions Inc., and Endo U.S. Inc. on behalf of and with funding from other Endo entities." Compl. ¶ 253 n. 6.

These allegations are adequately pled, even though McKinsey argues that to satisfy Rule 8(a), the Trustee must plead the exact debtor-entities that incurred each Obligation and made each Transfer and the exact McKinsey entity that was a party to each Obligation and Transfer. *See* Motion at 33 (citing *In re PennySaver USA Publ'g, LLC*, 587 B.R. 445). In the Complaint, the Trustee has alleged the dates and amounts of each Transfer and has listed a few affiliated Endo entities as transferors and two affiliates McKinsey entities as transferees. *See supra*. From the Complaint, McKinsey can ascertain which Transfers and Obligations Endo seeks to avoid regardless of the fact that McKinsey does not know the exact Endo entity and McKinsey entity involved. The allegations in the Complaint contain sufficient information for McKinsey to prepare for litigation on the merits as the company is aware of the SOWs and payments that Endo seeks to avoid as constructively fraudulent transfers. Courts have similarly found that listing a few transferors as a group does not result in pleading insufficiency as the defendant has fair notice of the claims against them. *See In re M. Fabrikant & Sons, Inc.*, 394 B.R. 721, 740 (Bankr. S.D.N.Y. 2008) (holding Rule 8(a) was satisfied despite the complaint aggregating transfers over "a period lasting nearly four years" and it was impossible to determine what amount was sought for each transfer); *see also Court–Appointed Receiver for Lancer Mgmt. Group LLC v. 169838 Canada, Inc.,* 2008 WL 2262063 at *3 (S.D. Fla. May 30, 2008) (the identity of the property transferred to each defendant as well as the specifics relating to capacity (i.e., initial transferee, conduit or otherwise) in which defendant received the relevant property need not be alleged to satisfy Rule 8).

Thus, the Trustee has sufficiently alleged the details of the Transfers and Obligations in satisfaction of Rule 8(a), and Counts Seven and Eight are not dismissed on this basis, but again, Counts Seven and Eight are dismissed (without prejudice) because of the Complaint's lack of plausible allegations of the lack of fair consideration or reasonably equivalent value received by Endo on account of its payments to McKinsey.

D. Recovery of Voidable Transactions

To the extent a transfer is avoided under section 544 of the Bankruptcy Code through the application of the relevant state's laws, Count Nine of the Complaint pursues recovery "for the benefit of the estate, [for] the property transferred, or, if the court so orders, the value of such property, from . . . the initial transferee of such transfer or the entity for whose benefit such transfer was made." 11 U.S.C. § 550(a)(1). The parties appear to agree that Count Nine "is wholly dependent upon the successes of the seventh and eight causes of action." Motion at 36. Because the Court has dismissed without prejudice the fraudulent transfer claims of Counts Seven and Eight, Count Nine similarly is dismissed, but will be revived if the Trustee successfully amends his complaint and makes plausible his claims under Counts Seven and Eight.

VI. CONCLUSION

For the reasons stated above, McKinsey's motion to dismiss the Complaint is DENIED IN PART solely as to the Trustee's claims for indemnification of amounts other than Endo's settlement payments, and GRANTED in all other respects, without prejudice to repleading to the extent the Trustee believes he can plead additional facts to cure the deficiencies identified in this decision. The parties are to meet and confer and to jointly contact chambers to schedule a conference to discuss next steps in the litigation. That conference should occur within one month of the issuance of this decision and order. Topics for the conference should include, without limitation, (1) whether the Trustee wishes to amend his complaint and, if so, on what schedule and pursuant to what process that should be accomplished, and (2) the extent to which a final judgment by an Article III court will be required, and, in light of that discussion, an explanation of the parties' views on whether this decision and order should be viewed as a report and recommendation that requires further proceedings in District Court. The parties may raise any other topic for discussion that they think will advance the resolution of this case.

IT IS SO ORDERED.

Dated: New York, New York
September 29, 2025

s/ David S. Jones
Honorable David S. Jones
United States Bankruptcy Judge

22-2101-bk(L), 23-965(L)
In re Fairfield Sentry Ltd.

In the United States Court of Appeals
FOR THE SECOND CIRCUIT

AUGUST TERM 2023
Nos. 22-2101-bk(L), 23-965(L)

IN RE FAIRFIELD SENTRY LTD.,
Debtor.[*]

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

ARGUED: APRIL 12, 2024
DECIDED: AUGUST 5, 2025

Before: NARDINI, MENASHI, and LEE, *Circuit Judges*.

The debtors in this bankruptcy case were investment funds based in the British Virgin Islands ("BVI") that invested in Bernard L. Madoff Investment Securities and were forced into liquidation in 2008. Liquidators were appointed for the funds in the BVI insolvency proceedings. In approximately 300 separate actions in the United

[*] 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.

States, the liquidators attempted to recover redemption payments made to investors in the funds shortly before the revelation of the Madoff Ponzi scheme. Those payments exceeded $6 billion. These actions were consolidated in the bankruptcy court 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 their 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. We reverse in part and affirm in part the judgment of the district court.

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*.

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. Proceedings 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.

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-constructive-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

"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

"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)).

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.'").

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

[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.").

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.

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.*

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[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."

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 (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 (2008)).

The liquidators' actions have an "established or discoverable relation" to the Subscription 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 (2020) (explaining that "but-for" causation "is established whenever a particular outcome would not have happened 'but for' the purported cause").

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.

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.

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

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[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.").

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

"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 (2016) (quoting *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 454 (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 (2010).

1

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. "Although 'a risk of conflict 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 (citation omitted) (quoting *Morrison*, 561 U.S. at 255). Second, the presumption "reflects the more prosaic 'commonsense notion that Congress generally legislates with domestic concerns in mind.'" *Id.* at 336 (quoting *Smith v. United States*, 507 U.S. 197, 204 n.5 (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 (2023) (alteration omitted) (quoting *Morrison*, 561 U.S. at 261), we "assume that Congress legislates against the backdrop of the presumption," *EEOC v. Arab Am. Oil Co.* (*Aramco*), 499 U.S. 244, 248 (1991).

The Court has prescribed a "two-step framework for analyzing extraterritoriality issues." *RJR Nabisco*, 579 U.S. at 337. "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 (2023). At this step, "possible interpretations," *Morrison*, 561 U.S. at 264, broad definitional language, *Abitron*, 600 U.S. at 420-21, 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 (2013). Still, "an express statement of extraterritoriality is not essential," *RJR Nabisco*, 579 U.S. at 340, because "[a]ssuredly context can be consulted as well," *Morrison*, 561 U.S. at 265.

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. 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 (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. 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.

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.

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. We conclude that it does. The only plausible reading of § 561(d) is that it applies extraterritorially.

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

[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

§ 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 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

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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).

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.

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

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[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.").

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.

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 'close-out' transactions, which is the focus of § 561 as a whole." Reply Br., No. 22-2101, at 22. Domestic trustees, however, cannot 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

[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).

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.

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*

[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.

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

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 there is an obvious alternative interpretation available. *See Yates v. United States*, 574 U.S. 528, 543 (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 (2013).

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.

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 (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

[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).

> 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 understandably 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

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,"

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

RJR Nabisco, 579 U.S. at 338 n.5, 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-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.

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

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.*

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, manipulate, 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.

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.

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.

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]

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.

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[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).

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 (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.

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 (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 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 (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]

[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.

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

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 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.

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 (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. As a result, this sort of clause "confirms rather than constrains breadth." *Id.* at 302.

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).

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 (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 (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 (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 (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

[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

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 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]

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.").

[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 the safe harbor of § 546(e) "shall apply in a case under chapter

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).

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

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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 (quoting *Hines*, 312 U.S. at 67).

[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

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.

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 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 (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

Transfer Act ('UFTA') and its successor, the 2014 Uniform Voidable Transactions Act ('UVTA').").

[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).

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.

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.*, 583 U.S. at 379 ("[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.

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, 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

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.

United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

DEBRA ANN LIVINGSTON
CHIEF JUDGE

Date: August 05, 2025
Docket #: 22-2101bk
Short Title: In Re: Fairfield Sentry Limited

CATHERINE O'HAGAN WOLFE
CLERK OF COURT

DC Docket #: 19-cv-3911
DC Court: SDNY (NEW YORK CITY)
DC Judge: Broderick

BILL OF COSTS INSTRUCTIONS

The requirements for filing a bill of costs are set forth in FRAP 39. A form for filing a bill of costs is on the Court's website.

The bill of costs must:
* be filed within 14 days after the entry of judgment;
* be verified;
* be served on all adversaries;
* not include charges for postage, delivery, service, overtime and the filers edits;
* identify the number of copies which comprise the printer's unit;
* include the printer's bills, which must state the minimum charge per printer's unit for a page, a cover, foot lines by the line, and an index and table of cases by the page;
* state only the number of necessary copies inserted in enclosed form;
* state actual costs at rates not higher than those generally charged for printing services in New York, New York; excessive charges are subject to reduction;
* be filed via CM/ECF or if counsel is exempted with the original and two copies.

United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

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VERIFIED ITEMIZED BILL OF COSTS

Counsel for

____

respectfully submits, pursuant to FRAP 39 (c) the within bill of costs and requests the Clerk to prepare an itemized statement of costs taxed against the

____

and in favor of

____

for insertion in the mandate.

Docketing Fee ______________________

Costs of printing appendix (necessary copies ______________) ______________________

Costs of printing brief (necessary copies ______________ ____) ______________________

Costs of printing reply brief (necessary copies ______________) ______________________

(VERIFICATION HERE)

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Signature

Digitally signed by Advance Performance Exponents Inc
Date: 2025.05.20 16:07:54 -05:00
Reason: Apex Certified
Location: Apex

Neutral Citation Number: [2025] CIGC (FSD) 41

Cause No: FSD 2024-0183 (JAJ)

IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

BETWEEN:

(1) SIMON CONWAY

(2) ANTHONY MANTON

(3) MOHAMMED FARZADI

Suing as Joint Official Liquidators of ABRAAJ HOLDINGS (In Official Liquidation)

Plaintiffs

-and-

AIR ARABIA PJSC

Defendant

Appearances:	**Mr Tom Smith KC of counsel and Mr Peter Sherwood and Ms Kalyani Dixit of Carey Olsen for the Plaintiffs**
	Mr Steven Thompson KC of counsel and Mr Erik Bodden, Ms Alecia Johns and Mr Harry Clark of Conyers, Dill & Pearman LLP for the Defendant
Before:	**The Honourable Justice Jalil Asif KC**
Heard:	**12 and 13 November 2024**
Judgment:	**20 May 2025**

Insolvency—submission of proof of debt—whether leave to serve out of the jurisdiction required to bring fraudulent trading claim under Companies Act, s.147

Insolvency—whether Companies Act, s.147 has extraterritorial effect—whether leave to serve out of the jurisdiction required to bring fraudulent trading claim more generally

Practice and procedure—requirement in CWR O.24, r.2(1) that applications related to existing liquidation must be brought within the liquidation—whether to waive irregularity in commencing proceedings by writ

JUDGMENT

Table of Contents

A. **Introduction**

1. The parties are agreed that this case raises a novel point, on which there is no authority in the Cayman Islands other than a very short judgment of Jones J in *Re ICP Strategic Credit Income Fund* [2014] 2 CILR 1, which the Defendant invites me to disregard and which the Plaintiffs criticise in other respects.

2. The primary issue before me is whether leave to serve out of the jurisdiction is required for a claim under s.147 of the Companies Act (2023 Revision), namely the fraudulent trading provision, where the person from whom a contribution to the company's assets is sought has submitted a proof of debt within the liquidation. Secondly, the arguments presented raise the wider question whether s.147 of the Companies Act is of extraterritorial effect, such that leave to serve out is not needed in any event, even where the person from whom a contribution is sought has not submitted a proof of debt. This is obviously of wider importance to the conduct of insolvent liquidations under the jurisdiction of the Court generally. Thirdly, the case raises procedural points regarding the appropriate form for applications brought under Part V of the Companies Act by liquidators and the applicable procedural route if leave to serve out of the jurisdiction is required for a claim under s.147 of the Act.

3. I record at the outset that the Defendant disputes that the Court has any jurisdiction over it. The Defendant also disputes that the Plaintiffs' service of these proceedings by email and delivery by courier to the Defendant's offices in Sharjah, United Arab Emirates was effective. The Defendant has indicated that its participation in the hearing of the Plaintiffs' summons should not itself be treated as being a submission to the jurisdiction of the Grand Court.

4. The procedural route taken to bring the matter before me is slightly unusual in that, having served the amended writ on the Defendant in the UAE on the basis that leave to do so is not required, the Plaintiffs have proactively issued a summons seeking declarations from the Court to that effect, and that service on the Defendant has been effective, rather than waiting for the Defendant to acknowledge service contesting jurisdiction under GCR O.11 and for the Defendant to apply to set aside service. However, the Defendant did not object to this procedural approach.

5. I am very grateful to Mr Tom Smith KC and Mr Steven Thompson KC and their supporting legal teams for their extremely helpful written and oral arguments. They have not made my task any easier, but they have illuminated the path towards my conclusions. I am also grateful to the parties for their patience in awaiting this judgment.

B. Relevant background

B.1 The underlying liquidation proceedings

6. The current writ action arises out of the collapse of the Abraaj group of companies in early 2018. The First and Third Plaintiffs, along with a Mr Michael Jervis, were initially appointed as joint provisional liquidators of Abraaj Holdings by McMillan J on 18 June 2018. On 11 September 2019, McMillan J put Abraaj Holdings into official liquidation and those same individuals were appointed as its joint official liquidators. Following Mr Jervis' death, the Second Plaintiff was appointed to replace Mr Jervis as a joint official liquidator on 15 February 2024.

7. The first meeting of Abraaj Holdings' creditors took place on 17 July 2018. The Defendant attended and was appointed to the Liquidation Committee. Mr Conway's unchallenged evidence is that the Defendant has attended 29 of the 33 Liquidation Committee meetings held between 29 September 2018 and 1 January 2024 and continues to be a member of the Liquidation Committee.

8. The Defendant has submitted two proofs of debt within Abraaj Holdings' liquidation, as follows:

   8.1 A proof of debt dated 4 July 2018 for approximately US $78.8 million in respect of monies said to be owed under a short-term investment agreement dated 9 January 2018, which provided for a *"minimum guaranteed return"* of 10.25% per annum. This loan forms part of the foundation for the Plaintiffs' claim against the Defendant in these proceedings.

   8.2 A proof of debt dated 12 April 2019 for approximately US $108.5 million arising from a Subscription Agreement dated 7 May 2012 between Abraaj Holdings and the Defendant, amongst others. This loan also provides part of the basis for the Plaintiffs' current claim.

9. The Plaintiffs state that the Defendant's first proof of debt was adjudicated for the purpose of voting for and constituting the Liquidation Committee only, and that neither of the Defendant's proofs of debt have been adjudicated or admitted for any other purpose.

10. The Defendant's proofs of debt are both signed by Mr Adel Abdulla Ali, the Defendant's CEO, and record the following contact addresses for the Defendant:

Post	Air Arabia Head Office, Building A1, Next to Cargo Entrance, Sharjah International Airport, P.O. Box 132, Sharjah, United Arab Emirates
Email	oromeih@airarabia.com magarwal@airarabia.com and vraghavan@airarabia.com
Telephone	+971 6 508 8988

B.2 Summary of the Plaintiffs' intended claim against the Defendant

11. The Plaintiffs commenced these proceedings against the Defendant by a writ issued on 14 June 2024. Their claim is for a declaration pursuant to s.147 of the Companies Act that the Defendant is liable to contribute to Abraaj Holdings' assets because the Defendant was knowingly a party to Abraaj Holdings' business being carried on with intent to defraud creditors and/or for a fraudulent purpose.

12. Originally, the writ also named Abraaj Holdings as a co-plaintiff and included a claim by Abraaj Holdings against the Defendant for dishonest assistance, based on the same facts as the s.147 claim. However, on 19 August 2024 and prior to service of the writ, the Plaintiffs amended the writ to remove Abraaj Holdings and to delete the dishonest assistance claim. They did not need leave to do so as the writ had not been served.

13. The Plaintiffs served the amended writ on the Defendant at the addresses stated in the Defendant's proofs of debt by email on 26 August 2024 and by delivery by courier on 10 September 2024.

14. The basis for the Plaintiffs' claim against the Defendant is certain loans made by the Defendant to Abraaj Holdings or other Abraaj entities from time to time from about March 2013 until early 2018. The Plaintiffs allege that the Defendant made short-term loans to Abraaj Holdings totalling nearly US $1 billion over this period. The Plaintiffs allege that the loans were used by Mr Arif Naqvi, the

founder of the Abraaj group and Abraaj Holdings' executive director, vice chairman and CEO at the relevant time, to help prop up Abraaj Holdings and the wider Abraaj group while it was suffering from a chronic shortage of cash.

15. The Plaintiffs intend to argue that the way in which the Defendant made the loans enabled Mr Naqvi to "window dress" Abraaj Holdings' accounts and conceal that cash shortage from the Abraaj group's investors and creditors, and to defeat, hinder or delay the payment of Abraaj Holdings' creditors and creditors of the wider Abraaj corporate group. The Plaintiffs allege that, for example, the loans from the Defendant were often made to off-balance sheet entities associated with the Abraaj group, which allowed Abraaj Holdings and the Abraaj group to avoid disclosing the resulting debt owed to the Defendant, and the loan proceeds were paid into bank accounts for Abraaj group companies to inflate the cash balances in the year-end financial statements or to procure inflated bank balance confirmations to appease investors demanding to have visibility over fund balances, before the monies were then repaid to the Defendant.

16. Further, the Plaintiffs allege that the circumstances in which the loans were made, including continuous "roll-overs" of loans, and the terms on which the loans were made, were highly unusual, artificial and uncommercial. As an example of the last point, the Plaintiffs assert that the Defendant negotiated favourable terms such as high interest rates or exorbitant lending fees in exchange for the loans.

17. The Plaintiffs intend to assert that the Defendant knew, or suspected but made a deliberate decision to avoid confirming that suspicion, that Abraaj Holdings was carrying on its business with an intent to defraud creditors or for a fraudulent purpose, such that the Defendant was a knowing participant in the carrying on of Abraaj Holdings' business fraudulently for the purpose of s.147(2) of the Companies Act.

18. The Plaintiffs say that the effect of the concealment of Abraaj Holdings' cashflow insolvency and the insolvency of the wider Abraaj group was artificially to delay Abraaj Holdings' inevitable collapse and to facilitate Abraaj Holdings' continued perpetuation of a fraud on its creditors and on the creditors of the Abraaj group.

19. It is then said for the Plaintiffs that if the loans had not been made, Abraaj Holdings' deteriorating financial position would have been revealed far sooner: Abraaj Holdings would have gone into official liquidation earlier than June 2018 (when it went into provisional liquidation), with the consequence that the losses suffered by Abraaj Holdings' creditors would have been significantly lower than has transpired.

20. The Plaintiffs will apparently contend that, in those circumstances, as a result of the Defendant's knowing participation in the carrying on of Abraaj Holdings' business fraudulently, the Court should order that the Defendant is liable to make a contribution to Abraaj Holdings' assets pursuant to s.147 of the Companies Act.

B.3 Summary of the Defendant's response to the Plaintiffs' intended claim

21. The Defendant has not yet filed a Defence to the Plaintiffs' claim but has indicated its intended position in its skeleton argument for the hearing of this summons. The Defendant rejects the Plaintiff's claim. The Defendant stresses that it is wholly unconnected to Abraaj Holdings. It argues that, unlike most fraudulent trading claims, it is not an insider, e.g. a director, controller or shadow director, and nor is it a shady associate such as a spouse, relative or friend of Mr Naqvi or others involved in Abraaj Holdings' management. Instead, it is a well-known and reputable, listed, international airline operating a large fleet of aircraft from its base in the UAE to numerous destinations in the Middle East, Asia and Europe. It says that it happens to have had a trading relationship with Abraaj Holdings, which commenced long before Abraaj Holdings became insolvent. This was at a time, the Defendant asserts, when Abraaj Holdings had a good reputation in the Middle East and worldwide, and a huge business footprint. The Defendant says it is "bemused" by the Plaintiffs' claim, which it describes as opportunistic and brought simply because the Defendant has deep pockets.

22. It is clear that, if this matter proceeds to a determination on the merits, it will be hotly contested on both sides.

C. <u>The issues on the Plaintiffs' summons</u>

23. There are five primary areas of dispute between the parties arising from the Plaintiffs' summons:

    23.1 Were the Plaintiffs wrong to have commenced these proceedings by writ? Should they instead have issued a summons within the winding up proceedings and, if so, what is the consequence?

    23.2 Has the Defendant submitted to the jurisdiction of the court by lodging its proofs of debt, such that the Plaintiffs did not need leave to serve the Defendant out of the jurisdiction?

    23.3 Were the Plaintiffs properly able to use the methods of service that they adopted, namely email and courier delivery to the Defendant's offices, or should the proceedings have been served personally upon the Defendant?

    23.4 Does s.147 of the Companies Act have extraterritorial effect, so that leave is not required to serve a claim under s.147 out of the jurisdiction?

    23.5 Were the Plaintiffs entitled to serve the writ on the Defendant out of the jurisdiction without needing leave, by virtue of GCR O.11, r.1(2)?

24. It is useful to note here that, as explained by Lewison LJ in the English case of <u>*Orexim Trading Ltd v Mahavir Port and Terminal Pte Ltd*</u> [2018] 1 W.L.R. 4847 at [20], the word *"jurisdiction"* is slippery in that it has different possible meanings in a legal context. The first is that it can describe a territory, for example the Cayman Islands or England and Wales. It is this use which is intended when employing the phrase *"service out of the jurisdiction"*. Secondly, it can mean the power of the court to do something. Thirdly, it can mean whether the court will exercise a power that it possesses on settled principles. Lewison LJ gave as an example the question that he was called upon to decide in <u>*Orexim*</u> *"whether the court has jurisdiction to permit service of the claim out of the jurisdiction."* It is important to bear these different meanings in mind in a case such as this.

D. Summary of the parties' arguments

D.1 Form of proceedings used and consequences

25. Based on the wording of CWR O.24, r.2(1), Mr Thompson KC, appearing for the Defendant, submits that the Plaintiffs have used the wrong procedural form to pursue their claim. He says that the Plaintiffs should simply have filed an ordinary summons within the existing liquidation proceedings relating to Abraaj Holdings. Mr Thompson relies on CWR O.24, r.2(1), which provides:

> *"(1) Every application or appeal to the Court made in connection with a proceeding which is already pending before the Court shall be made by summons."*

He also referred me to *Phillips v McGregor-Paterson* [2009] EWHC 2385 (Ch) and to the Bahamian appeal in *AWH Fund v ZCM Asset Holding* [2019] UKPC 37 to support his submission.

26. By the time that the summons came to be argued before me, the Plaintiffs had accepted that the proceedings should have been commenced by summons issued within the liquidation proceedings. Mr Smith KC, appearing for the Plaintiffs, explains the Plaintiffs' reasons for not doing so as being:

26.1 as originally contemplated, the proceedings included Abraaj Holdings as a co-plaintiff bringing a dishonest assistance claim, which had to be brought by way of separate proceedings and could not have been included in a summons within the liquidation proceedings; and

26.2 the common practice within the Cayman Islands is for liquidators to bring claims by separate writ action, rather than by summons within the liquidation proceedings, and Mr Smith gives examples including writ actions brought arising out of the insolvencies in the *Weavering*, *Platinum Partners* and *Traded Life Policies* cases.

The Plaintiffs therefore invite the Court to waive the irregularity in the form of proceedings used under GCR O.2, r.1.

27. In response to Mr Smith's first submission, Mr Thompson contends that the Plaintiffs' claim should always have been brought by ordinary summons within the liquidation proceedings, as required by CWR O.24, r.2(1). He says that Abraaj Holdings' intended claim for dishonest assistance is irrelevant to the proper procedural form that the Plaintiffs should have used for their own separate claim: the Defendant's position appears to be that Abraaj Holdings would have had to bring its claim by separate

proceedings in parallel to the Plaintiffs filing a summons for relief under s.147 within the liquidation proceedings.

28. In answer to Mr Smith's second justification for the Plaintiffs using a writ instead of a summons, Mr Thompson says that the fact that an erroneous practice may have grown up in the Cayman Islands of using new proceedings to bring liquidators' claims provides no justification for the Plaintiffs' breach of the clear requirement of CWR O.24, r.2(1).

29. Mr Thompson complains that the Plaintiffs have not filed any summons seeking that the Court waive the irregularity in the form of the proceedings. He submits that the proceedings remain irregular unless and until the Court decides to exercise its discretion to do so: see *Metroinvest Anstalt v Commercial Union* [1985] 1 WLR 513 at 520C.

30. Mr Smith submits that there is no prejudice resulting from the Plaintiffs' use of an incorrect procedural form and invites the Court to direct that the proceedings are treated as having been commenced by summons within the liquidation proceedings instead of by separate writ. In this context, Mr Smith draws my attention to the English cases of *Re Continental Assurance Co of London plc (No.2)* [1998] 1 WLUK 361, [1998] 1 B.C.L.C. 583; *Hughes and another v Beckett and others* [1998] Lexis Citation 1530 (which is the appeal from *Re Continental Assurance*); and *Phillips v McGregor-Paterson* [2009] EWHC 2385 (Ch), where the court took such an approach.

31. Mr Thompson, however, argues that the Plaintiffs' adoption of the wrong procedural approach leads to complex consequences: if the Court is to waive the irregularity, then the question arises on what terms? Mr Thompson says that the Court should consider whether the innocent party has suffered any prejudice, and should not allow a party to achieve through the back door that which it could not through the front door: see *Leal v Dunlop Bio-Processes* [1984] 1 WLR 874, cited in the *Supreme Court Practice 1999* at 2/1/3.

32. He submits that the Court must consider whether proceedings in the correct form could have been validly served on the Defendant and how they should have been served, and then decide whether the Plaintiffs have obtained an unfair procedural advantage by adopting the wrong procedural form.

33. As explained more fully later in this judgment, Mr Thompson says that the CWR do not contain any provisions requiring service of a petition under Part V of the Companies Act nor service of an ordinary summons under that Part of the Act. Such applications therefore do not fall within CWR O.1, r.4(1), which applies the rules on service in the GCR where a document is required by the CWR to be served. He submits that as a result neither the CWR nor the GCR provide a procedural route for service of applications under Part V of the Companies Act. Moreover, neither the Companies Act, the CWR nor the GCR contains any provision allowing service of an application under Part V of the Companies Act outside the territory of the Cayman Islands.

34. Mr Thompson contends that by adopting an incorrect procedural form, namely a writ instead of an ordinary summons, the Plaintiffs have obtained an unfair procedural advantage in that they are able to argue that they validly served the writ on the Defendant in the UAE under the GCR when they would otherwise have been unable to serve a summons outside the territory of the Cayman Islands under the CWR.

35. Although not expressly submitted, the Defendant's position appears to be that the Court should therefore refuse to waive the irregularity and should dismiss the current proceedings, leaving the Plaintiffs to start again using the correct procedural form and to address the question of service when it arises but in the correct procedural context. It was agreed before me that there is no relevant limitation issue that would prevent the Plaintiffs from doing so.

D.2 Jurisdictional consequences of lodging proof of debt

36. Mr Smith's primary submission is that the Defendant has submitted to the jurisdiction of the Grand Court as a result of its participation in the liquidation of Abraaj Holdings by submitting proofs of debt. He argues that the Defendant should not be allowed to benefit from Abraaj Holdings' liquidation by seeking payment of dividends through the proof of debt procedure, without the burden of complying with orders made in that proceeding and any related proceedings. Otherwise, the Defendant could obtain priority access to Abraaj Holdings' assets in subversion of the statutory liquidation scheme because the Plaintiffs would be required to adjudicate and potentially pay a dividend on the Defendant's proofs of debt, whilst being unable to obtain a contribution from the Defendant under s.147 to Abraaj Holdings' assets available to creditors. This would deprive the estate

of additional funds and cause loss to other creditors at the same time as unfairly favouring the Defendant. Mr Smith argues that the purpose of the relevant law on submission to the jurisdiction by filing a proof of debt is to avoid this outcome.

37. Mr Smith contends that the Plaintiffs therefore did not need any leave to serve the Defendant with the current proceedings in the UAE. He relies on: *Rubin v Eurofinance SA* [2012] UKSC 46 at [165] and earlier authorities going back to *Ex p Robertson, In re Morton* (1875) LR 20 Eq 733; *Stichting Shell Pensioenfonds v Krys* [2015] AC 616; *Erste Group Bank v VMZ Red October* [2015] EWCA Civ 379, [2015] 1 CLC 706; *Glencore International AG v Exter Shipping Ltd* [2002] EWCA Civ 524, [2002] CLC 1090; *NMC Healthcare Limited v Noor Capital PSC* [2022] ADGMCFI 0003; *Crumpler and Farmer v Yoong and Three Arrows Capital Ltd* (Claim No. BVIHC (COM) 2023/0003, Claim No. BVIHC (COM) 2022/0119) (unreported, 12 December 2023); *Dicey, Morris & Collins, The Conflict of Laws* (16th ed.), Rule 33 and paragraph 11-036, and *Briggs, Civil Jurisdiction and Judgments* (7th ed.) at paragraph 21.02.

38. Mr Thompson argues that the Court cannot determine the question of submission to the jurisdiction of the Grand Court as a result of lodging a proof of debt without first determining whether s.147 of the Companies Act has extraterritorial effect. His argument is that the Defendant has no presence within the Cayman Islands, so the Court cannot or should not exercise jurisdiction over the Defendant unless s.147 does have extraterritorial effect.

39. Mr Thompson submits that, if s.147 does not have extraterritorial effect, then it would be illogical for the availability of relief under s.147 of the Act as regards a foreign target to be dependent on whether the foreign target is a creditor of the company and has submitted a proof of debt. Mr Thompson relies on this to support his argument outlined later in this judgment that any submission to the jurisdiction by lodging a proof of debt does not extend to s.147 claims.

40. Mr Thompson concedes that submission of a proof of debt is an acceptance by the creditor that the Cayman Islands is the appropriate jurisdiction for the due administration of the liquidation, including the recovery of the company's debts and assets: see *ex parte Robertson; In re Morton* (1875) LR 20 Eq 733.

41. He submits that despite being positioned next to ss.145 and 146 in Part V of the Companies Act, s.147 is different in nature from those sections. Mr Thompson characterises both ss.145 and 146 as concerning unwinding of transactions that have already occurred in order to restore the *status quo ante*, and argues that s.147 is not concerned with restoring the *status quo* but with creating a new statutory liability to contribute to the estate in the exercise of the court's discretion: see *In re M. C. Bacon* [1991] Ch 127 and *Re Howard Holdings Inc* [1998] BCC 549. He submits that there are other aspects of the nature of ss.145 and 146 that also differentiate them from s.147. Mr Thompson says that the difference in the nature of the remedy under s.147 must inform the reading of the case law on submission to the jurisdiction and supports the Defendant's position that lodging a proof of debt may be a submission for the purposes of ss.145 and 146 but is not a submission for the purpose of s.147 of the Act.

42. Mr Thompson adopts a narrow reading of the authorities on which Mr Smith relies. He argues that *ex parte Robertson* concerned recovery of a void payment and the underlying proceedings in *Rubin v Eurofinance SA* were avoidance claims and the *rationes* of these cases is confined to such claims. He says that neither case involved relief for fraudulent trading, and therefore they do not shed light on whether a submission to the jurisdiction covers claims for relief under s.147 of the Companies Act. He submits that *Stichting Shell Pensioenfonds v Krys* is even further removed from this case in that it involved a creditor in the British Virgin Islands who was attempting (a) to rely on a pre-judgment conservatory attachment issued by the Dutch court in respect of approximately US $71 million held in a bank account in Ireland, which was also claimed by the liquidators, and (b) to pursue a damages claim against the company before the Dutch court for misrepresentation. The creditor was held to be amenable to an anti-suit injunction to prevent it from pursuing the Dutch proceedings.

43. Mr Thompson therefore submits that none of these cases is authority that submitting a proof of debt amounts to submission to the jurisdiction for the purposes of a s.147 claim, which he describes as a purely discretionary statutory claim for a new liability to contribute, and which has nothing to do with any attempt to realise or get in an asset of the company or to adjust concluded transactions or return payments or property to the company. Mr Thompson argues that it would be an unacceptable extension of the principle in *ex parte Robertson* for submission of a proof of debt to expose a foreign creditor to a claim to impose a new liability owed to the liquidator, and not otherwise due to the company, without any of the safeguards envisaged by the parallel case law in England on which the

Plaintiffs rely, namely *Re Paramount Airways* [1993] Ch 223; *Bilta (UK) Ltd v Nazir (No 2)* [2016] AC 1; and *AWH Fund v ZCM Asset Holding* [2019] UKPC 37.

D.3 Validity of methods of service used

44. The Plaintiffs seek a declaration that service of the writ has been validly effected by email and courier delivery to the Defendant's office in Sharjah, using the addresses specified in the Defendants' proofs of debt.

45. Mr Smith argues that the Plaintiffs were entitled to use the methods of service specified in the Defendant's proofs of debt and were not required to serve the writ upon the Defendant by personal service. Alternatively, on the basis that the Plaintiffs' claim should be treated as having been commenced by a summons within the liquidation proceedings instead of by way of a writ, Mr Smith submits that there is no requirement for personal service upon the Defendant because GCR O.65, r.1 is not engaged and the Plaintiffs were entitled to serve by the methods appropriate for ordinary service specified in GCR O.65, r.5 and 5A.

46. Mr Thompson maintains that the applicable rules do not provide a procedural route for service of a summons seeking relief under s.147 beyond the borders of the Cayman Islands. He asserts that CWR O.1, r.4(1), which applies the rules in the GCR relating to service, is engaged only where the document in question is *"... required to be served by these Rules"*, i.e. the CWR must explicitly provide that the document must be served. In the absence of such a provision, Mr Thompson says, there is no applicable procedural mechanism in the CWR for service of the document in question. The Defendant's case is that there is no provision in the CWR requiring service of a summons seeking relief under s.147, so that the summons would have to be listed before a judge for directions in the first instance, including directions as to service of the summons. However, the judge would not have power to order service overseas because that would require express authority by statute or applicable rules, and there is none.

47. Secondly, Mr Thompson suggests that, in reality, the Plaintiffs are seeking to obtain an order for substituted service without complying with the procedural and evidential requirements for such an order. He says that there is no evidence that personal service of the proceedings on the Defendant is

impractical, and there is no suggestion that the Defendant is seeking to evade service. He relies on Cadogan Properties Ltd v Mount Eden Land Ltd [1999] 6 WLUK 421, [2000] I.L.Pr. 722 to support the Defendant's position that substituted service should not be permitted in the absence of evidence satisfying these requirements.

D.4 Availability of GCR O.11, r.1(2) and extraterritorial effect of s.147 of the Companies Act

48. Alternatively to the Plaintiffs' primary case, Mr Smith argues that the Plaintiffs were entitled to serve the Defendant in the UAE without the necessity for leave by virtue of GCR O.11, r.1(2). This is on the basis that the claim is one which the Court has power to determine by virtue of a *"Law"* notwithstanding that the defendant is not within the Cayman Islands.

49. Mr Smith submits that a claim under s.147 of the Companies Act is one which the Court has power to determine by virtue of a Law as a matter of construction of the Companies Act because s.147 has extraterritorial effect, i.e. s.147 is applicable to conduct wherever it occurred geographically and whatever the nationality of the respondent. In support of the Plaintiffs' position, Mr Smith relies on the English cases of *Re Paramount Airways* [1993] Ch 223; *Clark v Oceanic Contractors Inc.* [1983] 2 A.C. 130; *Bilta (UK) Ltd v Nazir (No 2)* [2016] AC 1; and the decision in the appeal to the Privy Council from the Court of Appeal of the Bahamas in *AWH Fund v ZCM Asset Holding* [2019] UKPC 37. Mr Smith accepts that these decisions are not binding on the Grand Court but says that they should be treated as being of strong persuasive authority, in accordance with the approach in *Schramm v Financial Secretary* [2004-05 CILR 104] and *Miller v R* [1998] CILR 161.

50. Secondly, Mr Smith argues that if s.147 does not have extraterritorial effect, then it would be rendered effectively toothless and that that cannot have been Parliament's intention. The resulting need for a liquidator to bring a s.147 claim in the jurisdiction where the respondent is resident, if that were possible under the law of that country, would be inconsistent with the general principle that the winding up of a company should take place within its legal jurisdiction of incorporation: see *Re Philadelphia Alternative Asset Fund* (unreported, Henderson J, 22 February 2006),[1] *Re Silver Base Group Holdings Limited* (unreported, Doyle J, 8 December 2021) and *Re BCCI SA* [1992] B.C.C. 83.

[1] Reported in note form at [2006] CILR Note 7

51. Mr Thompson contends that GCR O.11, r.1(2) is not available to the Plaintiffs as a matter of principle. He relies on _Re Harrods (Buenos Aires) Ltd_ [1992] Ch 72 to argue that the ability to serve process out of the jurisdiction depends on whether the statute in question contemplates on its face that proceedings may be brought against persons not within the jurisdiction of the court. Mr Thompson submits that s.147 of the Companies Act does not.

52. Further, Mr Thompson argues that, as a matter of principle, a claim under s.147 can only be served within the Cayman Islands. He says that this conclusion is consistent with and flows from the decisions in _Re Paramount Airways_; _Bilta (UK) Ltd v Nazir (No 2)_ and _AWH Fund v ZCM Asset Holding_.

53. Mr Thompson invites the Court to depart from the previous decision of Jones J in _In re ICP Strategic Credit Income Fund_ [2014] 2 CILR 1 where Jones J considered that s.147 does have extraterritorial effect. Mr Thompson points out that the case was before Jones J on an application by the liquidators for sanction to commence a claim for relief under s.147 of the Companies Act in the United States. He contends that the application was not opposed and was not fully argued, and does not appear to have considered the English line of authority on service in this context.

54. Mr Thompson relies in addition on _In re Tucker (R.C.), ex parte Tucker (K.R.)_ [1990] Ch 148, where the Court refused to issue a summons against the bankrupt's brother, who was resident in Belgium, requiring him to produce documents and attend at court for examination, and _In re Akkurate_ [2021] Ch 73, which concerned an application by liquidators for an order that two Italian companies deliver their books and records and give an account of their dealings with the company in liquidation. In both those cases, the courts came to the conclusion that the relevant statutory provisions did not have extraterritorial effect, albeit in _In re Akkurate_ [2021] Ch 73, Sir Geoffrey Vos C, indicated at para [53] that if he had not concluded that _Re Tucker_ was binding authority, he would have been inclined to a different result (espousing the same comment by David Richards J in _MF Global_ [2016] Ch 325). Mr Thompson argues that I should adopt the same approach as in _Re Tucker_ to construing whether s.147 of the Companies Act contemplates that proceedings might be brought against foreign nationals outside the Cayman Islands, rather than applying the line of authority exemplified by _Re Paramount Airways_; _Bilta (UK) Ltd v Nazir (No 2)_ and _AWH Fund v ZCM Asset Holding_ or adopting the preferred

responses of David Richards J and Sir Geoffrey Vos, even though I am not bound by _Re Tucker_ as they were.

55. In support of the Defendant's wider argument, Mr Thompson submits that it should be inferred from the absence of any provision in the CWR permitting service of an application under Part V of the Companies Act outside the Cayman Islands that s.147 of the Act (and seemingly ss.145 and 146) are not intended to have extraterritorial effect.

56. The Plaintiffs respond to this argument by reference to _Orexim Trading Ltd v Mahavir Port and Terminal Pte Ltd_ [2018] 1 WLR 4847 and _Re NMC Healthcare Ltd_ [2024] ADGMCFI 0007. Mr Smith argues that the fact that the Defendant has submitted proofs of debt can itself be a sufficient connection with the jurisdiction, if that needs to be considered at this stage rather than at the stage of determining whether or not to order the relief sought. He relies on the English cases of _Jyske Bank (Gibraltar) Ltd v Spjeldnaes_ [2000] BCC 16[2]; _Avonwick Holdings Ltd v Azitio Holdings Ltd_ [2018] EWHC 2458 (Comm); and _Suppipat v Narongdej_ [2020] EWHC 3191 (Comm).

E. Analysis

57. Notwithstanding the different competing sequences in which the Plaintiffs and the Defendant addressed the topics for decision, I consider it is most useful to approach matters in the following order:

57.1 the statutory framework and context for s.147 of the Companies Act;

57.2 the jurisdictional consequences of lodging a proof of debt;

57.3 the correct form of proceedings for applications under s.147 of the Act and the consequences of adopting a different form of proceedings;

57.4 whether the methods of service used by the Plaintiffs were valid;

57.5 whether s.147 of the Act has extraterritorial effect;

2 Reversed in part on appeal: see _Jyske Bank (Gibraltar) Ltd v Spjeldnaes (No.2)_ [1999] 7 WLUK 620

57.6 whether the Plaintiffs can rely on GCR O.11, r.1(2) to permit them to serve the Defendant in the UAE without leave of the court.

E.1 The statutory framework and context for section 147 of the Companies Act

58. Section 147 of the Companies Act is contained within Part V of the Act. It provides as follows:

> *"(1) If in the course of the winding up of a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose the liquidator may apply to the Court for a declaration under this section.*
>
> *(2) The Court may declare that any persons who were knowingly parties to the carrying on of the business in the manner mentioned in subsection (1) are liable to make such contributions, if any, to the company's assets as the Court thinks proper."*

59. Section 147 is adjacent to ss.145 and 146 of the Companies Act, dealing respectively with voidable preferences and dispositions at an undervalue.

60. As Mr Thompson points out:

60.1 an application under s.147 can only be brought by a liquidator;

60.2 a respondent can only be made liable under s.147 if it were knowingly a party to the fraudulent business;

60.3 if those requirements are met, the court has an unfettered discretion to declare that the respondent should make such contribution to the company's assets as the court thinks proper (including no contribution).

61. As Mr Thompson also points out, the Companies (Amendment) Act 2007 repealed the previous text of Part V of the Companies Act and replaced it with a completely new version of Part V. By the Companies (Amendment) Law, 2007 (Commencement) Order, 2009, this took effect from 1 March 2009. The new Part V, including ss.145, 146 and 147, was based on a review of the insolvency regime in the Cayman Islands carried out by the Law Commission and appears to have been modelled on the English Companies Act 1948. The equivalent to s.145 of the Companies Act (voidable preferences) is now s.239 of the English Insolvency Act 1986; the equivalent to s.146 of the Act (dispositions at an undervalue) is s.238 of the English Act; and the equivalent to s.147 of the Act (fraudulent trading)

is s.213 of the English Act. Mr Thompson noted that s.213 of the English Act can be traced back to 1928.

62. At the same time as the replacement of Part V of the Companies Act, the previous reliance in the Cayman Islands on the English Insolvency Rules 1986 was abandoned and the Cayman Islands introduced its own Companies Winding Up Rules, which also came into force on 1 March 2009.

63. Both parties rely on this statutory history in support of parts of their arguments before me and, for the reasons I address later, is relevant to my determination of the issues raised.

E.2 Jurisdictional consequences of lodging a proof of debt

a) <u>The nature of a submission to the jurisdiction</u>

64. The first point of principle, which is not in dispute between the parties, is that submission to the jurisdiction (of whatever kind) is separate and distinct from establishing the jurisdiction of the court over a person by service of process. It is always open to anyone outside the geographical jurisdiction of a court voluntarily to submit to the personal jurisdiction of that court, even if they could not validly be served with proceedings issued from the court. As a matter of law and fact, that is exactly what every plaintiff who is based in another country does when they elect to use a court which is foreign to them to pursue a claim. The authors of *Dicey, Morris & Collins on the Conflict of Laws* express it this way (citations and footnotes omitted):

> ***"11R–062 RULE 33—The court has jurisdiction to entertain a claim in personam against a person who submits to the jurisdiction of the court.***
>
> ***11–063*** *A person who would not otherwise be subject to the jurisdiction of the court may be precluded by its own conduct from objecting to the jurisdiction, and thus give the court an authority over him which, but for that submission, it would not possess.*
>
> ***11–064*** *A claimant who begins proceedings in general gives the court jurisdiction to entertain a counterclaim against the claimant which may extend to cases in which, if separate proceedings were to be brought, permission to serve process ... might not be obtainable. Although it is sometimes said that it is not necessary that the counterclaim be related to the claim, the true principle is that a counterclaim is allowed so that justice can be done as between the parties. ..."*

This analysis is supported by, amongst others, the English Court of Appeal decision in <u>*Glencore International AG v Exter Shipping Ltd*</u> [2002] EWCA Civ 524, on which the Plaintiffs rely.

65. It follows that, in a case where the court's jurisdiction over a defendant is based on voluntary submission, the procedural rules on service out are irrelevant and have no part to play in establishing jurisdiction because the court's jurisdiction over the defendant is not founded on service at all. Thus, it is not necessary for a plaintiff to obtain leave to serve the proceedings overseas; nor, following a defendant's submission to the jurisdiction, is it necessary for a plaintiff to continue to rely on any leave to serve overseas which has already been granted.

b) *Lodging a proof of debt is a submission to the jurisdiction*

66. Secondly, it is also not in dispute in this case that lodging a proof of debt in a winding up process amounts to a submission to the jurisdiction of the court with conduct of the winding up. For this purpose, it is not necessary that the proof of debt has been admitted, adjudicated or a dividend paid. The mere fact of lodging the proof of debt is treated as a submission to the jurisdiction: see *Stichting Shell Pensioenfonds v Krys* at [31] (set out below) where the proof of debt had been rejected by the liquidators, *Erste Group Bank v VMZ Red October* at [51] and *NMC Healthcare Limited v Noor Capital PSC* at [56].

c) *The scope of the submission to the jurisdiction resulting from lodging a proof of debt*

67. The area of disagreement between the parties is as to the scope of the submission to the jurisdiction which results from lodging a proof of debt.

68. Mr Smith argues:

68.1 a submission to the jurisdiction by lodging a proof of debt is effective for all purposes connected with the winding up of the company, adopting the broad principles that he says should be drawn from the relevant case law in England and in the Privy Council;

68.2 the distinction that the Defendant seeks to make between ss.145 and 146 on one side and s.147 on the other is misconceived; and

68.3 the Defendant's approach would lead to bizarre consequences.

69. Mr Thompson contends that a submission to the jurisdiction by lodging a proof of debt is not effective for claims under s.147 of the Companies Act, although he concedes that it would be effective for

claims under ss.145 and 146 of the Companies Act. Mr Thompson relies on a narrow reading of the same authorities on which the Plaintiffs rely.

70. In my judgment, the Plaintiffs' arguments on this topic are to be preferred.

71. I start with the relevant English and BVI authorities, which are not strictly binding on me, but which are of persuasive value.

72. *Rubin v Eurofinance SA* [2012] UKSC 46 was a conjoined appeal in two underlying cases, the second of which was *New Cap Reinsurance Corp v Lloyds Syndicate 991*. In *New Cap*, the Lloyds syndicate had submitted proofs of debt to New Cap's administrator in Australia and had participated in creditors' meetings. The administrator admitted the syndicate's claim to the extent of approximately £650,000. The administrator then brought unfair preference claims against the syndicate in respect of two substantial payments made to the syndicate by New Cap shortly before New Cap went into administration. The syndicate refused to accept service and did not participate in the Australian proceedings. The administrator obtained a default judgment from the New South Wales Supreme Court, Equity Division, for about US $8 million. The administrator pursued a claim in England to enforce the Australian judgment. The English judge at first instance recognised and enforced the Australian judgment. The Court of Appeal upheld that decision, and the syndicate appealed to the Supreme Court. The Supreme Court dismissed the syndicate's appeal. In Part VIII of the judgment, Lord Collins JSC, giving the majority judgment, considered the question of the effect of submission to the jurisdiction by lodging a proof of debt:

> *"164. The Syndicate did not take any steps in the avoidance proceedings as such which would be regarded either by the Australian court or by the English court as a submission. Were the steps taken by the Syndicate in the liquidation a submission for the purposes of the rules relating to foreign judgments?*
>
> *165. In English law there is no doubt that orders may be made against a foreign creditor who proves in an English liquidation or bankruptcy on the footing that by proving the foreign creditor submits to the jurisdiction of the English court. In* Ex p Robertson, In re Morton *(1875) LR 20 Eq 733 trustees were appointed over the property of bankrupt potato merchants in a liquidation by arrangement. A Scots merchant received payment of £120 after the liquidation petition was presented, and proved for a balance of £247 and received a dividend of what is now 20p in the pound. The trustees served a notice of motion, seeking repayment of the £120 paid out of the insolvent estate, out of the jurisdiction. The respondent objected to the jurisdiction of the English court on the ground that he was a domiciled Scotsman. On appeal from the county court, Sir James Bacon CJ held that the court had jurisdiction. He said, at pp 737-738:*

> *'... what is the consequence of creditors coming in under a liquidation or bankruptcy? They come in under what is as much a compact as if each of them had signed and sealed and sworn to the terms of it - that the bankrupt's estate shall be duly administered among the creditors. That being so, the administration of the estate is cast upon the court, and the court has jurisdiction to decide all questions of whatever kind, whether of law, fact, or whatever else the court may think necessary in order to effect complete distribution of the bankrupt's estate. ... [C]an there be any doubt that the Appellant in this case has agreed that, as far as he is concerned, the law of bankruptcy shall take effect as to him, and under this jurisdiction, to which he is not only subjected, but under which he has become an active party, and of which he has taken the benefit .. [The Appellant] is as much bound to perform the conditions of the compact, and to submit to the jurisdiction of the court, as if he had never been out of the limits of England.'*

...

167. I would therefore accept the liquidators' submission that, having chosen to submit to New Cap's Australian insolvency proceeding, the Syndicate should be taken to have submitted to the jurisdiction of the Australian court responsible for the supervision of that proceeding. It should not be allowed to benefit from the insolvency proceeding without the burden of complying with the orders made in that proceeding."

Lords Mance and Clarke JJSC, who gave separate judgments, agreed with Lord Collins JSC's reasoning and conclusions on this point.

73. The second relevant case is Stichting Shell Pensioenfonds v Krys [2015] AC 616. This involved an anti-suit injunction obtained in the BVI against a Dutch creditor, which had submitted a proof of debt in the liquidation being conducted in the BVI, but which sought in parallel to enforce its claims against money held in a company bank account in Ireland through proceedings before the courts of the Netherlands. In a judgment given by Lords Sumption and Toulson JJSC, the Privy Council responded to criticisms of that part of Lord Collins JSC's judgment in Rubin concerning submission to the jurisdiction set out above and elaborated on the scope of a submission to the jurisdiction by filing a proof of debt as follows:

> *"31. It has been suggested by Professor Briggs in a recent lecture in Singapore (New Developments in Private International Law: A Busy 12 Months for the Supreme Court, 21 November 2013) that this conclusion was 'astonishing' because no proof had been admitted and no dividend had been paid. Miss Newman, adopting this criticism, submitted that Lord Collins was wrong on this point. The Board is satisfied that his statement was correct. The present case is not properly speaking a case of election, like those in which a party must elect between two mutually inconsistent remedies. In such cases he is usually not taken to elect until he has actually obtained one of the remedies. The question here is not what remedy is Shell entitled to have, but whether it has submitted to the jurisdiction of the court. A submission may consist in any procedural step consistent only with acceptance of the rules under which the court operates. These rules may expose the party submitting to consequences which extend well beyond the matters with which the relevant procedural step was concerned, as when the commencement of proceedings is followed by a counterclaim. In the present case the defendant lodged a proof. It cannot make any difference to the character of that act whether the proof is subsequently admitted or a dividend paid, any more than it makes a difference to the submission implicit in beginning*

an ordinary action whether it ultimately succeeds. This result is neither unjust nor contrary to principle, for by submitting a proof the creditor obtains an immediate benefit consisting in the right to have his claim considered by the liquidator and ultimately by the court according to its merits and satisfied according to the rules of distribution if it is admitted. The Board would accept that the submission of a proof for claim A does not in itself preclude the creditor from taking proceedings outside the liquidation on claim B. But what he may not do is take any step outside the liquidation which will get him direct access to the insolvent's assets in priority to other creditors. This is because by proving for claim A, he has submitted to a statutory scheme for the distribution of those assets pari passu in satisfaction of his claim and those of other claimants.

32. Turning to Miss Newman's reservation, the argument was that Shell had not submitted to the jurisdiction of the BVI courts for all purposes. In particular, it was said to have submitted only for the purpose of claims under the Insolvency Act and Rules, and not for the purpose of claims governed by the general law, such as its claim in the Netherlands for misrepresentation and breach of warranty. This, it was said, was because the BVI courts have no subject matter jurisdiction over the damages claim that is being asserted in the Netherlands. The Board has no hesitation in rejecting this contention. It has no bearing on the question whether Shell submitted by participating in the injunction proceedings, because that submission necessarily involved an acceptance on its part of the court's jurisdiction to grant the injunction sought in those proceedings. The point appears to the Board to be equally irrelevant to the question whether Shell submitted by lodging a proof of debt for the redemption price. Liquidation is a mode of collective enforcement of claims arising under the general law. There is, in the present context, no relevant difference between the claim for which Shell proved (a debt arising from its redemption notice) and the claim for which it did not prove but which it has put forward in the Dutch proceedings (damages for misrepresentation and breach of warranty). They both arise under the general law. They are both capable of being proved in the liquidation. If they are proved, the BVI courts will have subject matter jurisdiction to adjudicate on them. And so far as they submitted by proving for anything in the liquidation, Shell submitted to a statutory regime which precluded it from acting so as to prevent the assets subject to the statutory trust from being distributed in accordance with it."

74. The breadth of the impact of submitting a proof of debt was helpfully summarised and commented upon in *Erste Group Bank v VMZ Red October* [2015] EWCA Civ 379, where Gloster LJ stated:

"51. The English law principle articulated in Rubin*, and recently affirmed in* Shell*, is that a foreign creditor submits to the jurisdiction of the court supervising a company's insolvency by proving in that insolvency. That, by itself, is sufficient without more (and irrespective of whether the proof has been accepted or a dividend has been received) to require the creditor to have all questions, of whatever kind, as against the debtor resolved within the insolvency as administered by the court of the jurisdiction of that insolvency. The rationale for the rule was first set out in* Ex parte Robertson; Re Morton *(1875) LR 20 Eq 733, at 737–738. The latest summary of the law is to be found in paragraphs 29 et seq of* Shell*.*

…

59. Thirdly, contrary to Mr Salzedo's submissions, it is not a valid argument that the claims being brought in the foreign jurisdiction (i.e. here the conspiracy claims, in Shell *the claims for misrepresentation and breach of warranty) could be said to be different in character from the claim in respect of which the proof of debt was submitted in the liquidation, or brought under the general law rather than the relevant insolvency rules, or even that such claims are subject to the exclusive jurisdiction of the foreign court, whether by virtue of an exclusive jurisdiction clause or otherwise. …"*

75. Having quoted paragraph [51] from Gloster LJ's judgment, in *NMC Healthcare Limited v Noor Capital PSC*, Andrew Smith J went on to say this:

> *"57. Further, as Mr Smith submitted, two corollaries of this principle, both stated in the* Stichting Shell *case (cit sup) at paras 31 and 32, are these:*
>
> *a. The creditor submits to the jurisdiction of the court of the insolvency from the time when it submits a proof.*
>
> *b. Submission to the jurisdiction of the court of the insolvency constitutes submission to any order of the court in connection with the insolvency procedure, including orders for injunctive relief."* (Emphasis added)

76. I have no doubt that the principles expressed in *Rubin*, *Stichting Shell Pensioenfonds*, *Erste Group Bank* and *NMC Healthcare* regarding submission to the jurisdiction as a consequence of lodging a proof of debt are general common law principles that apply with equal force in the Cayman Islands. I do not accept Mr Thompson's argument that those judgments should be read narrowly as applying only to cases within the four corners of each judgment, namely claims to recover void payments or preferences. It is clear that the Supreme Court and Privy Council were laying down general statements of principle concerning the nature and scope of submission to the jurisdiction by lodging a proof of debt, which were then helpfully elucidated by Gloster LJ and Andrew Smith J.

d) Is a claim under s.147 of the Companies Act within the scope of a submission to the jurisdiction?

77. The question then arises whether a fraudulent trading claim under s.147 of the Companies Act falls outside the scope of submission to the jurisdiction, as Mr Thompson submits, or is within it, as Mr Smith argues. As indicated earlier in this section, I prefer Mr Smith's position.

78. The first reason for rejecting Mr Thompson's argument is that a declaration under s.147 that a person should contribute to the estate must properly be characterised as an order within the winding up proceedings, as referenced in *Rubin v Eurofinance SA* at [167]. It is the very fact of the winding up that gives rise to the liquidator's statutory cause of action under s.147 to apply for relief and the court's power to grant that relief. To put it another way, it is a question *"of whatever kind"* which it is necessary that the court decide *"in order to effect complete distribution of the ... estate"*: see *Ex p Robertson, In re Morton* at pp 737-738.

79. Secondly, in my judgment, Mr Thompson's argument that s.147 claims are different in nature from claims under s.145 and s.146 of the Companies Act, such that they should be treated differently as

regards submission to the jurisdiction, is incorrect. There are significantly more similarities between claims of these types than there are differences.

79.1 First, they are all statutory claims that only arise in the context of an insolvent liquidation, following the making of a winding up order, and vest in the liquidator, not the company. They are additional to any claims that the company itself might have.

79.2 Secondly, they each give the liquidator a power or remedy to achieve a proper distribution of the estate by remedying some deficiency resulting from pre-liquidation conduct.

79.3 Thirdly, the remedy in each case is for the purpose of bringing additional assets into the estate for the benefit of the general body of unsecured creditors, it is not for the benefit of the company more generally or for secured creditors, due to the claims being personal to the liquidator.

79.4 Fourthly, the remedy in each case is against someone whose conduct has caused the value of the estate to be diminished in some way, whether that is due to a preference, a void payment or assistance in fraudulent trading causing or facilitating the deficiency in the estate to increase.

80. In this context, it is useful to refer to the decision of Fancourt J in the English case of *Re Tradestar Ltd v Goldfarb* [2018] EWHC 3595 (Ch), concerning s.213 of the English Insolvency Act 1986, which is the equivalent provision to s.147 of the Companies Act. Fancourt J explained:

> *"19 ... the starting point seems to me to be that Section 213 is concerned not with losses that the company has suffered but with losses that a creditor or creditors of the company have suffered. The section, as Mr Clarke rights says, is not a remedy for the benefit of the company, nor does it depend on any right of action that the company may have; it is a remedy for the benefit of creditors. ...*
>
> *21 ... the nature of the inquiry is as to loss caused to the company's creditors generally through an insufficiency of assets with which to meet their debts. ... the focus is on the impact of such a claim on the availability of assets for the creditors generally, not on loss caused to the victim by the tortious conduct. The question of loss is not, therefore, one of loss caused to a victim of fraud by those perpetrating the fraud but a loss resulting to creditors of the company as a result of depletion of funds that should be available for them.*
>
> *22 Section 213 is not concerned as such with losses recoverable in claims by victims against those responsible for frauds, nor with the extent of loss that might be recoverable on conventional principles of causation and quantum in such a claim, except to the extent that any such claim that could be brought adversely affects the position of the creditors of the company. ...*
>
> *24 The focus, for the purposes of the section, is on what loss, in terms of diminution in assets available for the body of creditors, is a consequence of the fraudulent conduct. ..."*

81. Thirdly, in <u>*Re ICP Strategic Credit Income Fund Ltd*</u> [2014] 2 CILR 1, which counsel told me is the only relevant Cayman Islands authority that they could locate on s.147 of the Companies Act, Jones J expressed the view that ss.146 and 147 should be considered as being complementary. He said:

> *"5. I think that s.147 should be read together with s.146. Both of these sections were introduced by the Companies (Amendment) Law 2007. Both sections deal with the consequences of fraudulent trading. Section 147 creates a compensatory remedy when any part of a company's business has been carried on with intent to defraud creditors. Section 146 creates a restitutionary remedy when any of a company's property has been disposed of at an undervalue with intent to defraud its creditors. These sections create statutory remedies aimed at different aspects of the same kind of mischief. There is no apparent reason why the legislature should have intended that official liquidators be permitted to pursue the s.146 remedy in a foreign court but prohibited from pursuing the s.147 remedy in a foreign court. …"*

82. Although <u>*Re ICP Strategic Credit Income Fund Ltd*</u> is a decision of the Grand Court, I put this factor third, rather than first, because the application for sanction in that case was not opposed and the judgment was briefly expressed, so that Jones J's reasoning was not fully tested or set out; that both sides before me have criticised different facets of the judgment; and that, as explained later in this judgment, I have reached a different conclusion from Jones J on one aspect of the construction of s.147 of the Companies Act. Accordingly, its authoritativeness is questionable in certain respects.

83. For all of these reasons, I accept Mr Smith's argument that ss.145, 146 and 147 of the Companies Act are intended to be similar in purpose, and to provide a liquidator with a suite of tools to bring additional assets into the estate to improve outcomes for unsecured creditors. In my judgment, there is no principled basis for the relief under s.147 of the Act to fall outside the scope of a submission to the jurisdiction by filing a proof debt whilst the relief available under ss.145 and 146 is within it.

84. This conclusion is consistent with the approach of Lords Sumption, Toulson and Hodge JJSC in the Supreme Court in <u>*Bilta v Nazir*</u>, where they treated the corresponding provisions in the English legislation as being cognate. Having set out s.213 of the English Insolvency Act 1986, Lord Sumption JSC said:

> *"108. Most codes of insolvency law contain provisions empowering the court to make orders setting aside certain classes of transactions which preceded the commencement of the liquidation and may have contributed to the company's insolvency or depleted the insolvent estate. They will usually be accompanied by powers to require those responsible to make good the loss to the estate for the benefit of creditors. …*

> *110. Section 213 is one of a number of discretionary powers conferred by statute on the English court to require persons to contribute to the deficiency who have dealt with a company now in liquidation in a manner which has depleted its assets."*

To similar effect, in their consideration of the extraterritorial effect of s.213 of the English Insolvency Act, Lords Toulson and Hodge JJSC at [214] treated ss.213, 238 and 239 (and s.133) as having the same statutory context and purpose and being subject to the same approach to construction.

85. Finally, I agree with Mr Smith's point that if the Defendant's position were correct that s.147 of the Companies Act is excluded from any submission to the jurisdiction, it would generate unfair and absurd results. Most obviously, a liquidator would be obliged to pay a dividend to a creditor based outside the Cayman Islands without the possibility of any recourse to s.147. This would be so even in the clearest case of the involvement of that creditor in blatant fraudulent trading before the collapse of the company, unless there exists some mechanism by which the liquidators could obtain leave to serve that creditor outside the Cayman Islands, which it is the Defendant's case that there is not.

e) *Limiting factors to avoid injustice*

86. As part of his argument against the conclusion that filing a proof of debt amounted to a submission to the jurisdiction for claims under s.147 of the Companies Act, Mr Thompson relies heavily on Sir Donald Nicolls V-C's indication in *Re Paramount Airways* [1993] Ch 223, which I discuss in detail later in this judgment, that he considered it was important that there were limiting factors to avoid potential injustice. Mr Thompson relies on the absence of one of those limiting factors in the Cayman Islands. I record here that Mr Smith disagrees that the limiting factors form part of the Vice Chancellor's *ratio* in *Re Paramount Airways* and argues that they merely supported the conclusion that he had already expressed that s.238 of the English Insolvency Act 1986 has extraterritorial effect.

86.1 The Vice Chancellor explained at 239F-H that there are two important safeguards built into the English statutory scheme. The first is that the court has an overall discretion whether or not to make any order for a contribution and could decide to make no order, even if relevant conduct were proven. The court could also do so where it is not satisfied that the defendant is sufficiently connected with England for it to be just and proper to make an order. The Grand Court has the same discretion when determining an application under s.147 of the Companies Act, so this safeguard, insofar as it is a requirement for s.147 to have extraterritorial effect, is provided for in the Cayman Islands.

86.2 The second safeguard identified by the Vice Chancellor is the need to obtain leave to serve the claim on the defendant out of the jurisdiction. This requires the applicant to persuade the court to exercise its discretion in the applicant's favour, applying the familiar test for obtaining leave to serve out. Sir Donald Nicolls V-C indicated that where the respondent is out of the jurisdiction, the court will consider whether the respondent has a sufficient connection with England.

86.3 Mr Thompson argues that if filing a proof of debt amounts to submission for the purpose of a claim under s.147 of the Companies Act, then that removes the second of the two protections against potential injustice that the Vice Chancellor considered were important in reaching his conclusion on the breadth of the meaning of "any person", albeit it is in practical terms the first filter in time that will be applied.

87. The short answer to Mr Thompson's complaint is that there is an equivalent filter in the Cayman Islands because a liquidator would always have to obtain sanction from the supervising court pursuant to s.110 of and Part 1 of Schedule 3 to the Companies Act to pursue the s.147 claim. In deciding whether to grant sanction, the judge should consider the strengths and weaknesses of the proposed claim, including whether there is likely to be a sufficient connection with the jurisdiction to justify making an order against the defendant. This is because the court will not authorise liquidators to take action that is unlikely to succeed or to result in a substantial recovery: to do so would be to waste the limited resources within the estate, which is, *ex hypothesi*, insolvent. The judge's review and authorisation on a sanction application is therefore equivalent to that on an application for leave to serve out.

88. Thus, if it is important that there are limiting factors to the breadth of the court's jurisdiction as envisaged by Sir Donald Nicholls V-C, then their essence is replicated in the Cayman Islands, albeit in a slightly different form.

89. This consideration applies also in relation to the question whether s.147 of the Companies Act has extraterritorial effect, which I address later in this judgment.

E.3 Form of proceedings used and consequences

90. As I have indicated, it is now common ground that CWR O.24, r.2(1) requires that where there are existing proceedings, an application under Part V of the Companies Act, which includes an application under s.147, must be brought by summons within the liquidation proceedings. For the avoidance of doubt, I agree that this is the effect of CWR O.24, r.2(1) and that the practice that appears to have been adopted in other cases in the Cayman Islands of bringing such applications by separate proceedings is wrong.

91. I note in passing that CWR O.24, r.4 requires that there should be only one court file in respect of any company in liquidation, which reinforces that any applications relating to an existing liquidation should be made within the liquidation proceedings.

92. The Plaintiffs' claim has therefore been commenced using the wrong procedural form. The Plaintiffs need the court to waive the irregularity under GCR O.2, r.1, having appropriate regard to GCR O.2, r.1(3) which indicates that the court should not wholly set aside proceedings merely on the ground that the wrong form of process was utilised.

93. I agree with Mr Thompson that the question whether the Court should waive the irregularity in the form of these proceedings is not as straightforward as the Plaintiffs suggest. Mr Thompson is correct that the court must look at the question whether the Plaintiffs have obtained an unfair or improper advantage by using an incorrect procedure and indeed are seeking to obtain by the backdoor that which they could not properly obtain by the front door.

94. In this regard, Mr Thompson focusses on the question of service of the process on the Defendant. As I have recorded, he submits that there is no mechanism within the CWR which permits service of a summons for relief under Part V of the Companies Act outside the Cayman Islands, and that the relevant GCR are not available because of the particular way in which CWR O.1, r.4(1) is drafted. On this footing, he argues that the Plaintiffs have obtained an improper procedural advantage by using a writ, which can be served outside the Cayman Islands with or without leave, whereas a summons under CWR O.24, r.1(2) could not be.

95. I disagree with Mr Thompson's conclusion for three reasons relating to the effect of the Defendant's submission to the jurisdiction, the effect of GCR O.1, r.2 in this context and the proper construction of CWR O.1, r.4(1).

a) *<u>The effect of submission to the jurisdiction</u>*

96. As I have explained earlier in this judgment, the effect of any submission to the jurisdiction is that the question of leave to serve outside the Cayman Islands becomes otiose. That is because the person in question has voluntarily made themselves amenable to the jurisdiction of the Grand Court, wherever they are based geographically; there is no longer any necessity for them to be served with process for the Grand Court to obtain *in personam* jurisdiction over them.

97. Thus, as a result of the Defendant's submission to the jurisdiction of the Grand Court by filing their proofs of debt, the Plaintiffs would have been entitled to serve a summons upon the Defendant within the liquidation proceedings without the need to obtain leave to serve out. As this would have been an ordinary summons within the liquidation proceedings, there would not have been any necessity for personal service upon the Defendant.

98. CWR O.24, r.2(2) provides that GCR O.32 applies to any summons for relief under Part V of the Companies Act. Amongst other matters, GCR O.32 requires that a summons must be served not less than 4 days before it is heard (unless it is a time summons or the court otherwise directs).

99. GCR O.32 says nothing about the manner in which service should take place. However, it is well established that the parties can agree their own mechanism for service: see *<u>Kenneth Allison Ltd v A E Limehouse & Co</u>* [1992] 2 AC 105 referenced at paragraph 10/3/1 of the *Supreme Court Practice 1999*. I consider that by providing contact details in its proofs of debt, the Defendant was providing addresses to the Plaintiffs which the Plaintiffs were entitled to utilise to serve documents upon the Defendant related to the liquidation of Abraaj Holdings: that must have been the whole purpose of providing such addresses.

100. In my judgment, given the scope and effect of the Defendant's submission arising from submitting its proofs of debt, the Plaintiffs would have been entitled to serve a summons upon the Defendant

making a claim under s.147 of the Companies Act using the addresses specified in the Defendant's proofs of debt.

b) *The effect of GCR O.1, r.2*

101. The architecture of GCR O.1, r.2 is a little convoluted.

101.1 GCR O.1, r.2(1) states that the Grand Court Rules apply to all proceedings in the Grand Court, subject to the provisions in GCR O.1, r.2 that follow. The subsequent sub-rules then set out carve-outs and exclusions to the carve-outs.

101.2 GCR O.1, r.2(2) substantially limits the application of the GCR to criminal proceedings.

101.3 GCR O.1, r.2(4) excludes the application of the majority of the GCR to proceedings governed by other sets of Rules, including proceedings governed by the CWR.

101.4 However, GCR O.1, r.2(5) provides exceptions to the previous exclusions. So far as relevant, these are as follows:

> *"(5) Notwithstanding the provisions of paragraphs (2) to (4) of this rule —*
> *…*
> *(c) except in the case of petitions in proceedings governed by the Matrimonial Causes Rules (as amended and revised), every originating process or other document required to be served by these Rules or any other rules in connection with any civil proceedings shall be served in accordance with Orders 10 and 65 …"*

101.5 For this purpose, *"any other rules in connection with any civil proceedings"* must include the CWR.

102. The overall effect of GCR O.1, r.2, so far as service is concerned, is therefore that GCR O.10 and GCR O.65 apply to any document required to be served by the GCR or by the CWR. This is so independently of whether CWR O.1, r.4(1) is available.

103. Consequently, the Plaintiffs would have been entitled to serve a summons issued pursuant to CWR O.24, r.2 on the Defendant in accordance with GCR O.65. Because of the Defendant's submission to the jurisdiction, the Plaintiffs did not need to obtain leave to serve the Defendant in the UAE pursuant to GCR O.11.

104. GCR O.65, r.5 deals with ordinary service. It permits service by leaving the document at the proper address of the person to be served, by post, by fax (subject to limitations set out in the rule) or as otherwise directed by the court. In addition, GCR O.65, r.5A permits service by email where an address for service by electronic means has been provided for that purpose.

105. Accordingly, even if I am wrong that the Plaintiffs were entitled to treat the addresses stated on the proof of debt as service addresses for the Defendant, the Plaintiffs would still have been entitled to serve a summons upon the Defendant making a claim under s.147 of the Companies Act by relying on GCR O.65.

c) *<u>The proper interpretation of CWR O.1, r.4(1)</u>*

106. CWR O.1, r.4 is entitled ***"Application of Grand Court Rules etc"***. Rule 4(1) is in the following terms:

> *"(1) Every petition, summons, order or other document required to be served by these Rules, shall be served in accordance with GCR Orders 10 and 65, unless some other method of service is expressly required or permitted by these Rules. Where any such petition, summons, order or other document is required to be served out of the jurisdiction then GCR O.11 shall apply to these Rules."*

107. As previously indicated, Mr Thompson submits that *"required to be served by these Rules"* is the crucial qualifying factor that must be satisfied in order for the Plaintiffs to gain access to the ability to serve out of the jurisdiction under GCR O.11 in accordance with the second sentence of CWR O.1, r.4(1). Mr Thompson says correctly that there is no language in CWR O.24 that specifies that a summons under CWR O.24, r.2 is *"required to be served"*. He argues that this would have been the end of the road for any attempt by the Plaintiffs to serve a summons on the Defendant within the liquidation proceedings.

108. Mr Smith responds that CWR O.24, r.2(2) expressly applies GCR O.32 to any summons issued under that rule. GCR O.32, r.3(2) then requires that every summons must be served on every other party, unless the court otherwise orders or the Rules otherwise provide. He says that this is sufficient to satisfy the "required to be served" rubric in CWR O.1, r.4(1) because the terms of GCR O.32, r.3(2) are incorporated into CWR O.24 by reference and are therefore to be treated as part of the CWR to that extent and for that purpose.

109. Whilst this is a slightly strained reading of CWR O.1, r.4(1), I consider that it is an acceptable one. Lewison LJ in *Orexim Trading Ltd v Mahavir Port and Terminal Pte Ltd* [2018] 1 W.L.R. 4847, said at [32]:

> *"32. Given the extent of the court's powers under section 423, I would a priori expect procedural rules to exist to enable the court to exercise those powers."*

To similar effect is the Privy Council's judgment in *AWH Fund v ZCM Asset Holding* [2019] UKPC 37, an appeal from the Court of Appeal of the Bahamas. Lady Arden, giving the opinion of the Board, said:

> *"53. In the Board's judgment, the present case is close to* Seagull *because, as the Board has already held, section 160 is not territorially limited in its application (above, paras 37 to 42). As in* Seagull*, it would be odd, therefore, if proceedings under that section could not be served out of the jurisdiction in an appropriate case. Further, a person who voluntarily enters into a transaction as a result of which he becomes a creditor of a company must anticipate that, if the company is wound up, the liquidation may be conducted in the place of its incorporation."*

The case of *Seagull* to which Lady Arden referred is *In re Seagull Manufacturing Co Ltd* [1993] Ch 345, where the English Court of Appeal held that it was permissible to serve an order for the public examination of a director out of the jurisdiction.

110. In my judgment, and in light of my conclusion below that s.147 of the Companies Act does have extraterritorial effect, it would be equally odd if there were no route by which a summons issued under CWR O.24, r.2 could be served out of the jurisdiction. To the extent that it is needed, the reading of CWR O.1, r.4(1) which I have described provides the mechanism.

d) A further point on the interpretation of CWR O.1, r.4(1)

111. Mr Thompson's argument that a summons for relief under Part V of the Companies Act is not subject to any rules on service, and therefore cannot be served out the jurisdiction, assumes that *"required to be served by these Rules"* qualifies each of the kinds of documents referred to in the opening clause of CWR O.1, r.4(1). In other words, CWR O.1, r.4(1) should be read as if it said:

> *"Every petition [required to be served by these Rules], [every] summons [required to be served by these Rules], [every] order [required to be served by these Rules] or [every] other document required to be served by these Rules ..."*

Consequently, his argument is that *"required to be served by these Rules"* provides a threshold requirement for the availability of resort to the mechanisms in GCR Orders 10, 11 and 65 when considering service of petitions, summonses and orders.

112. I am not persuaded that Mr Thompson's construction of CWR O.1, r.4(1) is necessarily correct. In my view, it is reasonably arguable that on a natural reading of CWR O.1, r.4(1), *"required to be served by these Rules"* is an adjectival phrase used to identify the kinds of *"other document[s]"* to which CWR O.1, r.4(1) applies in addition to petitions, summonses and orders generally. The intention of CWR O.1, r.4(1) may be to bring within the universe of petitions, summons and orders for which recourse may be had to the service rules in GCR Orders 10, 11 and 65 any *"other documents required to be served by these Rules"*. Examples of documents referenced within the CWR which the Rules state must be served but where no mechanism for service is specified, so that they would fall within the scope of CWR O.1, r.4(1), include further particulars of a claim, a defence, a notice of appearance, various kinds of affidavit, a notice requiring attendance of a deponent for cross-examination, a notice requiring someone to submit a statement of affairs, a notice of rectification of the Register of Members and supporting report of the liquidator, and an application by a restructuring officer or liquidator to resign.

113. If this broader construction of CWR O.1, r.4(1) is correct, then resort to GCR Orders 10, 11 and 65 is available for all petitions, summonses, orders, and all other documents which the CWR require to be served. However, this particular point concerning the construction of CWR O.1, r.4(1) was not argued before me and I do not need to reach a conclusion on the issue. I therefore leave this point for debate and decision in a case where it is material to the outcome.

e) *Conclusion and relief*

114. In the circumstances, I conclude that the Plaintiffs have not obtained any improper procedural advantage by wrongly commencing these proceedings by way of writ instead of by way of ordinary summons within the liquidation. Accordingly, it is appropriate that I order that the proceedings should be treated as if commenced by way of summons issued within the liquidation proceedings. The cause number will therefore need to be updated to reflect this.

E.4 Validity of methods of service used

115. I have considered this issue already in the context of whether or not to waive the irregularity in the form of the proceedings used by the Plaintiff. In short, it is well established that the parties can agree

their own mechanism for service: see _Kenneth Allison Ltd_, and, in my judgment, that is the purpose of a creditor providing contact details on a form of proof of debt. Alternatively, the Plaintiffs would have been entitled to rely on GCR O.65, r.5 to serve a summons on the Defendant. There was no need for the Plaintiffs to obtain leave to serve the Defendant in the UAE or for the proceedings to be served on the Defendant by way of personal service. The methods of service utilised by the Plaintiffs were therefore appropriate and valid.

E.5 Extraterritorial effect of section 147 of the Companies Act

116. Mr Thompson disputes that s.147 of the Companies Act should be construed as having extraterritorial effect. He relies on this conclusion in support of his argument that the Defendant's submission to the jurisdiction resulting from submission of its proofs of debt does not include submission for the purposes of claims under s.147, which I have already rejected. In addition, he also relies upon this argument to support his position that service out of the Cayman Islands without leave is not permissible under GCR O.11 r.1(2).

a) _The English approach_

117. The relevant authorities on this point that were cited to me are _Ex parte Blain: Re Sawers_ (1879) 12 Ch.D 522, _Clark v Oceanic Contractors Inc_ [1983] 2 A.C. 130, _Re Paramount Airways_ [1993] Ch 223, _Bilta (UK) Ltd v Nazir (No 2)_ [2016] AC 1, and _Orexim Trading Ltd v Mahavir Port and Terminal Pte Ltd_ [2018] 1 W.L.R. 4847.

118. The principle expressed in _Ex parte Blain: Re Sawers_ (1879) 12 Ch.D 522 at p.526 is that:

> *"... English legislation, unless the contrary is expressly enacted or so plainly implied as to make it the duty of an English Court to give effect to an English statute, is applicable only to English subjects or to foreigners who by coming into this country, whether for a long or a short time, have made themselves during that time subject to English jurisdiction. Every foreigner who comes into this country, for however limited a time, is, during his residence here within the allegiance of the Sovereign, entitled to the protection of the Sovereign and subject to all the laws of the Sovereign. But, if a foreigner remains abroad, if he has never come into this country at all, it seems to me impossible to imagine that the English Legislature could have ever intended to make such a man subject to particular English legislation."*

119. *Ex parte Blain* was considered by the House of Lords in *Clark v Oceanic Contractors Inc*, where Lord Scarman restated the principle in more modern language at p.145 as follows:

> *"Put into the language of today, the general principle being there stated is simply that, unless the contrary is expressly enacted or so plainly implied that the courts must give effect to it, United Kingdom legislation is applicable only to British subjects or to foreigners who by coming to the United Kingdom, whether for a short or a long time, have made themselves subject to British jurisdiction. Two points would seem to be clear: first, that the principle is a rule of construction only, and secondly, that it contemplates mere presence within the jurisdiction as sufficient to attract the application of British legislation. Certainly there is no general principle that the legislation of the United Kingdom is applicable only to British subjects or persons resident here. Merely to state such a proposition is to manifest its absurdity. Presence, not residence, is the test."*

Lord Wilberforce memorably described the question at p.152 as being:

> *"Who, it is to be asked, is within the legislative grasp, or intendment, of the statute under consideration?"*

Mr Thompson relies heavily on this approach to the construction of s.147 of the Companies Act. However, it is clear from the subsequent cases that I now consider that the law in England has moved on from *Ex parte Blain*.

120. The English Court of Appeal in *Re Paramount Airways* was concerned with an application by administrators of a company to set aside certain transactions with a bank in Jersey on the basis that they were at an undervalue. The administrators obtained leave to serve the bank in Jersey on the basis that *"entered into a transaction with any person at an undervalue"* in s.238 of the Insolvency Act 1986 meant exactly that, i.e. there was no limitation to be applied to *"any person"*. The bank successfully applied to set aside leave on the basis that s.238 did not have extraterritorial effect: the Registrar accepted the bank's argument that there was an implied limitation such that s.238 only applied to persons within England. The administrators appealed to the Court of Appeal. Sir Donald Nicholls V-C gave a judgment with which Taylor and Farquarson LJJ agreed. He concluded that in construing the expression *"any person"* in s.238, it was not possible to identify any limitation which represented the presumed intention of Parliament. The words therefore had to be given their literal unrestricted meaning, and s.238 should therefore be understood as having extraterritorial effect so that the court had jurisdiction to make an order under s.238 against a foreigner resident abroad.

121. The Vice Chancellor described the task as follows at p.233B:

> *"... the court is concerned to inquire as to the persons with respect to whom Parliament is presumed to have been legislating when using the expression, 'any person,' and in making that inquiry Parliament is to be taken to have been legislating only for British subjects or foreigners*

coming to the United Kingdom, unless the contrary is expressed (which it is not here) or is plainly implicit."

122. His analysis at p.235F-236C was that:

> *"... on its face, the legislation is of unlimited territorial scope. To be within the sections a transaction must possess certain features. For instance, it must be at an undervalue and made at a time when the company was unable to pay its debts, the company must be in the course of being wound up in England or subject to an administration order, and so on. If a transaction satisfies these requirements, the section applies, irrespective of the situation of the property, irrespective of the nationality or residence of the other party, and irrespective of the law which governs the transaction. In this respect the sections purport to be of universal application. The expression 'with any person' merely serves to underline this universality. It is, indeed, this generality which gives rise to the problem.*
>
> *In these circumstances one is predisposed to seek for a limitation which can fairly be read as implicit in the scheme of the legislation. Parliament may have been intending to legislate in such all-embracing terms. Parliament may have intended that the English court could and should bring before it, and make orders against, a person who has no connection whatever with England save that he entered into a transaction, maybe abroad and in respect of foreign property and in the utmost good faith, with a person who is subject to the insolvency jurisdiction of the English court. Indeed, he might be within the sections and subject to orders even though he had not entered into a transaction with the company or debtor at all. Such an intention by Parliament is possible. But self-evidently in some instances such a jurisdiction, or the exercise of such a jurisdiction, would be truly extraordinary.*
>
> *The difficulty lies in finding an acceptable implied limitation. Let me say at once that there are formidable, and in my view insuperable, objections to a limitation closely modelled on the formula enunciated in* <u>Ex parte Blain</u>*, 12 Ch.D. 522 as explained by Lord Scarman in* <u>Clark v Oceanic Contractors Inc</u> *[1983] 2 A.C. 130, 145. The implied limitation for which Hambros Jersey contended is riddled with such serious, glaring anomalies that Parliament cannot be presumed to have intended to legislate in such terms."*

123. The Vice Chancellor expressed at p.236C-H four primary objections to the limitation on the scope of s.238 suggested by the bank:

123.1 Using presence of the other party within the jurisdiction as the controlling factor for application of s.238 would be extremely capricious. A transaction with a foreigner who is usually resident within the jurisdiction would be outside the legislation if he happened to be abroad, or chose to be abroad, at the time the transaction was effected. Conversely, a foreign national resident abroad would find that the transaction with him was within the Act if, but only if, he happened to be physically present at the time of the transaction.

123.2 The bank's proposed criterion would mean that the legislation was unable to address a transaction by a debtor with an overseas company wholly controlled by him. The Vice

Chancellor indicated that siphoning money abroad in this way is a typical kind of case to which the legislation must have been intended to apply.

123.3 The bank's test would draw a distinction between the position of British subjects and others on a matter of substantive law affecting property transactions. It would be surprising if Parliament had such an intention.

123.4 The test would mean that there was no remedy in respect of a transaction with an overseas company, or a foreigner living within the country but abroad at the crucial moment, even if the subject matter was English land. Sir Donald Nicholls V-C considered that the bank's concession that such a case might be within the legislation demonstrated the weakness of the bank's position. He pointed out that if a transaction relating to English land is within the legislation, regardless of the identity or whereabouts of the other party to the transaction, why should this not be the case where the transaction related to shares in an English company, or Government stocks, or money in an English bank account? His conclusion was that this showed that the physical absence or presence of the other party at the time of the transaction was irrelevant to the appropriateness of the transaction being within the scope of consideration by the court under s.238.

124. Sir Donald Nicholls V-C went on to consider whether there was any other basis for there being an implied limitation on the scope of s.238 but concluded at 237G that there was none:

> *"In the end I am unable to discern any satisfactory limitation. I am unable to identify some other class. The case for some limitation is powerful, but there is no single, simple formula which is compelling, save for one expressed in wide and loose terms (e.g., that the person, or the transaction, has a 'sufficient connection' with England) that would hardly be distinguishable from the ambit of the sections being unlimited territorially and the court being left to display a judicial restraint in the exercise of the jurisdiction."*

125. Finally, of relevance, the Vice Chancellor said at 239C-E:

> *"…Trade takes place increasingly on an international basis. So does fraud. Money is transferred quickly and easily. To meet these changing conditions English courts are more prepared than formerly to grant injunctions in suitable cases against non-residents or foreign nationals in respect of overseas activities. As I see it, the considerations set out above and taken as a whole lead irresistibly to the conclusion that, when considering the expression 'any person' in the sections, it is impossible to identify any particular limitation which can be said, with any degree of confidence, to represent the presumed intention of Parliament. What can be seen is that Parliament cannot have intended an implied limitation along the lines of* Ex parte Blain*, 12 Ch.D. 522. The expression therefore must be left to bear its literal, and natural, meaning: any person."*

126. Re Paramount Airways was considered by the Supreme Court in 2016 in Bilta (UK) Ltd v Nazir (No 2). Seven Justices of the Supreme Court sat to hear the appeal where the primary issues were the availability of *ex turpi causa* as a defence to a liquidator's attempts to pursue fraudulent trading claims against those involved in a VAT carousel fraud and whether the dishonesty of the company's directors could properly be attributed to the company itself. The question of the extraterritorial reach of s.213 of the English Insolvency Act was addressed only briefly but nonetheless authoritatively. All of the Justices agreed with the discussion of the extraterritorial effect of s.213 of the Insolvency Act in the judgments of Lord Sumption JSC, and of Lords Toulson and Hodge JJSC. Lord Sumption JSC's conclusion was that:

> *"106. This is a short point and a straightforward one. ...*
>
> *107. ... The appellants' case is that the provision has no extraterritorial effect and therefore no application to Jetivia which is domiciled in Switzerland or Mr Brunschweiler, who is domiciled in France. In effect the submission is that in subsection (2) 'any persons' means only persons in the United Kingdom. In my opinion this argument is misconceived.*
>
> *108. Most codes of insolvency law contain provisions empowering the court to make orders setting aside certain classes of transactions which preceded the commencement of the liquidation and may have contributed to the company's insolvency or depleted the insolvent estate. They will usually be accompanied by powers to require those responsible to make good the loss to the estate for the benefit of creditors. Such powers have been part of the corporate insolvency law of the United Kingdom for many years. In the case of a company trading internationally, it is difficult to see how such provisions can achieve their object if their effect is confined to the United Kingdom.*
>
> *109. The English court, when winding up an English company, claims worldwide jurisdiction over its assets and their proper distribution. ...*
>
> *110. Section 213 is one of a number of discretionary powers conferred by statute on the English court to require persons to contribute to the deficiency who have dealt with a company now in liquidation in a manner which has depleted its assets. None of them have any express limits on their territorial application. Another such provision, section 238, which deals in similar terms with preferences and transactions at an undervalue, was held by the Court of Appeal to apply without territorial limitations in* In re Paramount Airways Ltd *[1993] Ch 223. Delivering the leading judgment in that case, Sir Donald Nicholls V-C observed (i) that current patterns of cross-border business weaken the presumption against extraterritorial effect as applied to the exercise of the courts' powers in conducting the liquidation of a United Kingdom company; (ii) that the absence in the statute of any test for what would constitute presence in the United Kingdom makes it unlikely that presence there was intended to be a condition of the exercise of the power; and (iii) that the absence of a connection with the United Kingdom would be a factor in the exercise of the discretion to permit service out of the proceedings as well in the discretion whether to grant the relief, which was enough to prevent injustice. These considerations appear to me, as they did to the Chancellor and the Court of Appeal, to be unanswerable and equally applicable to section 213."*

127. To similar effect, Lords Toulson and Hodge JJSC said:

> *"212. The appellants accept that the English courts have jurisdiction in personam. Their challenge is to the court's subject matter jurisdiction as discussed by Hoffmann J in* Mackinnon v Donaldson Lufkin & Jenrette Securities Corpn *[1986] Ch 482, 493 and Lawrence Collins LJ in* Masri v Consolidated Contractors International (UK) Ltd (No 2) *[2009] QB 450, paras 30-31. It relates to whether the court can regulate the appellants' conduct abroad. Whether a court has such subject matter jurisdiction is a question of the construction of the relevant statute. In the past it was held as a universal principle that a United Kingdom statute applied only to United Kingdom subjects or foreigners present in and thus subjecting themselves to a United Kingdom jurisdiction unless the Act expressly or by necessary implication provided to the contrary:* Ex p Blain; In re Sawers *(1879) 12 ChD 522, 526, James LJ. That principle has evolved into a question of interpreting the particular statute:* Clark v Oceanic Containers Inc *[1983] 2 AC 130, Lord Scarman, at p 145, Lord Wilberforce, at p 152;* Masri v Consolidated Contractors International (UK) Ltd (No 4) *[2010] 1 AC 90, Lord Mance, at para 10; and* Cox v Ergo Versicherung AG *[2014] AC 1379, Lord Sumption JSC, at paras 27-29. In* Cox *Lord Sumption JSC suggested that an intention to give a statute extraterritorial effect could be implied if the purpose of the legislation could not effectually be achieved without such effect: para 29.*
>
> *213. In our view section 213 has extraterritorial effect. Its context is the winding up of a company registered in Great Britain. In theory at least the effect of such a winding up order is worldwide:* Stichting Shell Pensioenfonds v Krys *[2015] AC 616, paras 34, 38. The section provides a remedy against any person who has knowingly become a party to the carrying on of that company's business with a fraudulent purpose. The persons against whom the provision is directed are thus (a) parties to a fraud and (b) involved in the carrying on of the now-insolvent company's business. Many British companies, including Bilta, trade internationally. Modern communications enable people outside the United Kingdom to exercise control over or involve themselves in the business of companies operating in this country. Money and intangible assets can be transferred into and out of a country with ease, as the occurrence of VAT carousel frauds demonstrates. We accept what HMRC stated in their written intervention: there is frequently an international dimension to contemporary fraud. The ease of modern travel means that people who have committed fraud in this country through the medium of a company (or otherwise) can readily abscond abroad. It would seriously handicap the efficient winding up of a British company in an increasingly globalised economy if the jurisdiction of the court responsible for the winding up of an insolvent company did not extend to people and corporate bodies resident overseas who had been involved in the carrying on of the company's business.*
>
> *214. In our view the Court of Appeal reached the correct decision in* In re Paramount Airways Ltd *[1993] Ch 223, in which it held that the court had jurisdiction under section 238 of IA 1986 (which empowers the court to make orders against any person to reverse transactions at an undervalue) to make an order against a foreigner resident abroad. Sir Donald Nicholls V-C expressed the view (p 239D-E) that Parliament did not intend to impose any limitation on the expression 'any person' in sections 238 and 239 of IA 1986 and that it must be left to bear its literal, natural meaning. We reach the same conclusion in relation to the use of that expression in section 213 for essentially the same reasons. The section, like sections 238 and 239 and also section 133 (which concerns the public examination of persons responsible for the formation and running of a British company) share the statutory context of the winding up of a British company. …*
>
> *215. The appellants argued that it was wrong that they should be required to defend themselves against a claim when it would only be after the substantive hearing that the court could decide whether to exercise its jurisdiction on the basis that the defendants were sufficiently connected with England. We do not agree. While the court which hears the claim will have to decide whether in all the circumstances the appellants are sufficiently connected with England, we think that the respondents have a good arguable case that they are. …"*

128. The increasingly international nature of commerce was also recognised by the English Court of Appeal in <u>*Orexim Trading Ltd v Mahavir Port and Terminal Pte Ltd*</u> [2018] 1 W.L.R. 4847, where Lewison LJ had to decide whether the applicable procedural rules allowed a claim under s.423 of the Insolvency Act 1986 concerning transactions at an undervalue to be served out of the jurisdiction. Having quoted Sir Donald Nicholls V-C's comments in <u>*Re Paramount Airways*</u> and noted Lord Sumption's characterisation of these as *"unanswerable"*, Lewison LJ went on to say:

> *"33. In construing the words of the paragraph it is also worth bearing in mind a change in judicial attitude towards the service of proceedings outside England and Wales. In days gone by the assertion of extra-territorial jurisdiction was described as 'exorbitant'. But following the globalisation (and digitalisation) of the world economy that attitude can now be seen as out of date."*

I consider that the last comment applies with even more force as regards the business and economic circumstances of the Cayman Islands.

129. Separately, Mr Thompson sought to argue that one of the reasons why s.147 of the Companies Act does not have extraterritorial effect is that there is no mechanism by which a summons seeking such relief can be served out of the jurisdiction. I agree with Mr Smith that such an argument approaches the question from the wrong end of the telescope and impermissibly seeks to use secondary legislation to interpret primary legislation, contrary to the principles set out by Lord Lowry in <u>*Hanlon v Law Society*</u> [1981] AC 124 at 193-194. Moreover, the GCR are not admissible as an aid to construction of s.147 of the Companies Act because they were not made contemporaneously with the Act and were made by a completely different body from the legislature, amongst other reasons.

b) <u>*The Cayman authority: Re ICP Strategic Credit Income Fund Ltd again*</u>

130. In <u>*Re ICP Strategic Credit Income Fund Ltd*</u> [2014] 2 CILR 1, Jones J reached similar conclusions to those in the English cases referenced. The company in question was in liquidation in the Cayman Islands and the liquidation had been recognised in the United States of America as a foreign main proceeding under Chapter 15 of the US Bankruptcy Code. The liquidators had brought proceedings in the US against a US law firm. They alleged that the law firm had assisted in the commission of a fraud by the company's CEO and were pursuing claims for aiding and abetting breach of fiduciary duty and aiding and abetting fraud. The liquidators subsequently decided that they also wished to pursue an application under s.147 of the Companies Act for the law firm to contribute to the estate. They applied to the Grand Court for sanction to add the s.147 claim to the existing proceedings in the

US on the basis that the US Bankruptcy court would be likely to apply substantive Cayman law when determining the claim.

131. Of relevance on the issue of extraterritoriality, Jones J said:

> *"5. I think that s.147 should be read together with s.146. Both of these sections were introduced by the Companies (Amendment) Law 2007. Both sections deal with the consequences of fraudulent trading. Section 147 creates a compensatory remedy when any part of a company's business has been carried on with intent to defraud creditors. Section 146 creates a restitutionary remedy when any of a company's property has been disposed of at an undervalue with intent to defraud its creditors. These sections create statutory remedies aimed at different aspects of the same kind of mischief. There is no apparent reason why the legislature should have intended that official liquidators be permitted to pursue the s.146 remedy in a foreign court but prohibited from pursuing the s.147 remedy in a foreign court. This would be the result if the word 'Court' (which is used in s.147 only) is construed to mean the Grand Court of the Cayman Islands. It seems to me that this is an anomalous and illogical result which the legislature is inherently unlikely to have intended to achieve.*
>
> *6. Counsel for the JOLs also drew my attention to the fact that the s.147 remedy is modelled on the current English law. It is actually identical to s.213 of the English Insolvency Act 1986, except that the word 'court' (with a lower case 'c') is not used as a defined term to mean the English High Court. In* Bilta (UK) Ltd v Nazir (No. 2)*, it was held that s.213 of the English statute has extraterritorial effect and that the expression 'any person' includes those who are domiciled and resident out of the jurisdiction. I think that s.147 of the Cayman Islands statute must be construed in the same way. If the remedy was available only against persons resident or domiciled in this country, it would be stripped of much of its utility. If the remedy is available against foreigners, as I think it is, then it is inherently unlikely that the legislature would have intended that official liquidators be prohibited from seeking the remedy in foreign courts.*
>
> *7. For these reasons, I concluded that, on its true construction, official liquidators are not prohibited from pursuing s.147 claims in foreign courts. The alternative of pursuing the claim in this court is not open to the JOLs in the circumstances of this case. DLA carries on its practice in the United States. The firm does not have any presence in the Cayman Islands. The damage suffered by the funds resulted from acts committed in New York and advice given by a lawyer working in the firm's New York office. In these circumstances, there would appear to be no basis under GCR, O.11 upon which this court could exercise jurisdiction over DLA. It follows that any proceedings against DLA for a s.147 remedy will have to be commenced, if at all, in the United States."*

132. Mr Thompson points out that the liquidators' application for sanction was unopposed and suggests that the question of the extraterritoriality of s.147 of the Companies Act is unlikely to have been fully argued before Jones J. He therefore invites me to conclude that *Re ICP Strategic Credit Income Fund Ltd* was wrongly decided, or at least that I should not follow it.

133. I disagree with Mr Thompson on this point. Jones J was an extremely knowledgeable judge of the Financial Services Division with vast experience in the Cayman Islands in private practice and on the bench. Moreover, his comments in *Re ICP Strategic Credit Income Fund Ltd* regarding the

extraterritorial effect of s.147 chime with those of the English judges in the cases that I have referred to above.

c) *Conclusion on extraterritorial effect of s.147 of the Companies Act*

134. In my judgment, the English cases addressing the interpretation of the English legislation comparable to ss.145, 146 and 147 of the Companies Act also reflect the law of the Cayman Islands.

134.1 It is significant that Part V of the Companies Act was introduced as a replacement for the previous text of Part V in 2007 and took effect from 2009, as Mr Thompson noted in his submissions. Part V of the Companies Act therefore does not have the same lengthy legislative history in the Cayman Islands as do the corresponding provisions in the UK legislation even though Part V is clearly inspired by the English legislation. It is therefore likely that Parliament intended s.147 to be interpreted similarly to the way expressed by Sir Donald Nicolls V-C in *Re Paramount Airways*, reflecting the state of the law at the time that Part V of the Companies Act was enacted and came into force, i.e. without an implied limitation on its territorial scope along the lines of *Ex parte Blain*.

134.2 Moreover, it is important to bear in mind that, well before 2007, the Cayman Islands had become a major global financial services centre offering the ability for businesses around the world to incorporate exempt companies in the Cayman Islands in order to provide them with corporate structures suitable for international business of all kinds. With this comes a significant likelihood that insolvency and fraud touching such corporate structures will have an international element.

134.3 Providing the environment for a successful financial services centre requires, amongst other things, robust mechanisms for dealing with insolvency and fraud, on which international clients can depend. Given that the whole nature of exempt companies under the Companies Act is that their business must be carried on outside the Cayman Islands, it is inevitable that most of the transactions that they enter into, if not all, will be with entities operating outside the Cayman Islands, even if some of those entities might be other Cayman Islands exempt companies.

134.4 Against that background, in my judgment it is extremely likely that Parliament intended ss.145, 146 and 147 of the Companies Act to have extraterritorial effect so that liquidators have appropriate powers to pursue those involved in transactions or conduct that have the effect of diminishing the value of an insolvent estate wherever they are located and wherever the transaction in question took place. It would make absolutely no sense if ss.145, 146 and 147 were limited to persons and transactions within the Cayman Islands.

134.5 The old approach to limiting extraterritoriality because of the perception that the court would be exercising an exorbitant power, and the risk of overstepping the court's geographical limits, has become far less of a concern due to the growth of international cross-border trade, the globalisation of the world economy and the speed with which digital transactions can be effected.

135. Similarly to Jones J in *Re ICP Strategic Credit Income Fund Ltd*, I therefore conclude that s. 147 of the Companies Act was intended to, and does, have extraterritorial effect.

E.6 Availability of GCR O.11, r.1(2)

136. Whether it would be permissible for the Plaintiffs to serve process out of the jurisdiction without leave under GCR O.11, r.1(2) does not arise for decision in this case in light of the conclusions I have already expressed. However, I will address it since both parties argued the point and my decision on it may become relevant if either party were to pursue an appeal.

137. GCR O.11, r.1(2) allows service out of the jurisdiction without leave when:

> *"… every claim made in the action begun by the writ is one which by virtue of a Law or these Rules the Court has power to hear and determine notwithstanding that the person against whom the claim is made is not within the jurisdiction of the Court or that the wrongful act, neglect or default giving rise to the claim did not take place within the jurisdiction …"*

138. GCR O.11, r.9 extends the application of GCR O.11, r.1 to petitions and summonses, which are the two methods that claims under s.147 of the Companies Act should be commenced, as follows:

> *"(1) Subject to O.73, r.8, and O.102, rr.16 and 1 of this Order shall apply to the service out of the jurisdiction of an originating summons, notice of motion or petition as it applies to the service of a writ.*
>
> *(2) Service out of the jurisdiction of any summons, notice or order issued, given or made in any proceedings is permissible with the leave of the Court, but leave shall not be required for such service in any proceedings in which the writ, originating summons, motion or petition may by these Rules or under any Law be served without leave."*

139. It appears that there is no Cayman authority on the question whether this allows a claim under s.147 of the Companies Act to be served out of the jurisdiction without leave other than the passing comments of Jones J in _ICP Strategic Credit Income Fund Ltd_. On this point, Mr Thompson relies on the English cases of _Re Harrods (Buenos Aires) Ltd_ [1992] Ch 72 and _Re Banco Nacional de Cuba_ [2001] 1 WLR 2039. Mr Smith responds with _Orexim Trading Ltd v Mahavir Port and Terminal Pte Ltd_ [2018] 1 W.L.R. 4847.

140. In _Re Harrods (Buenos Aires) Ltd_ the Court of Appeal was concerned with RSC O.11, r.1(2), which was in substantively the same terms as GCR O.11, r.1(2). At page 116 of the report, Dillon LJ stated that to be within RSC O.11, r.1(2), the statute must at least indicate on its face that it is expressly contemplating proceedings against persons who are not within the jurisdiction of the court. He added that it is not enough that the statute gives a remedy in general cases without expressly contemplating a foreign element.

141. Lightman J (as he then was) in _Re Banco Nacional de Cuba_ said that it is *"quite clear"* that a claim under s.423 of the English Insolvency Act 1986 that a transaction was at an undervalue is not one where service out is permissible without leave. However, other than quoting the passage from Dillon LJ's judgment in _Re Harrods (Buenos Aires) Ltd_ summarised in the previous paragraph, the learned judge did not give any reasons for reaching that conclusion.

142. _Orexim Trading Ltd_ also concerned s.423 of the Insolvency Act 1986. The English Court of Appeal had to consider whether the court had power to grant leave to serve an application under s.423 of the Act outside England and Wales: it was not argued that the claimant did not need leave to do so. The judge at first instance accepted the defendant's argument that _Re Harrods (Buenos Aires) Ltd_ applied and that s.423 did not expressly authorise proceedings to be brought against persons outside England and Wales, so leave should be set aside. The Court of Appeal disagreed and expressly did not follow _Re Harrods (Buenos Aires) Ltd_ and _Re Banco Nacional de Cuba_, and instead applied _Re Paramount Airways Ltd_ to conclude that:

> *"48. Mr Gruder, supported by Mr Pearce, argued that in order to come within the 'gateway' the enactment in question must expressly authorise the bringing of proceedings against persons outside England and Wales. ... I do not accept this argument. First, it will be a rare statute that explicitly authorises proceedings to be brought against persons outside England and Wales. ... Third, I do not accept that there is a significant difference for these purposes between a statute which explicitly provides for proceedings to be brought against persons outside England and*

> *Wales, and one which on its true construction does that. Fourth, in the case of section 423, the* Paramount Airways case *[1993] Ch 223 holds that section 423 'on its face' does allow such proceedings to be brought, subject to the safeguards to which Sir Donald Nicholls V-C referred."*

143. I accept Mr Smith's argument that, applying that approach, s.147 of the Companies Act does permit proceedings to be brought against persons outside the geographical territory of the Grand Court and so, to the extent that *Re Harrods (Buenos Aires) Ltd* remains good law and is appropriate to be applied in the Cayman Islands, neither of which in my view is certain, s.147 of the Act satisfies the test in *Re Harrods (Buenos Aires) Ltd* for determining whether the proceedings can be served out of the jurisdiction without leave.

144. I have set out earlier in this judgment Lewison LJ's indication in *Orexim Trading Ltd* at [32] that, given the extraterritorial nature of the statutory provisions being considered, he would *a priori* expect procedural rules to exist to enable the court to exercise those powers. I agree and adopt that position regarding s.147 of the Companies Act. It would be surprising for s.147 to be available in circumstances where the respondent has filed a proof of debt so that leave to serve out is not required, but not to be available where the respondent has not done so, whether that is because they are not a creditor at all or because they have made a strategic decision not to file a proof of debt because of the risk that a s.147 claim might ensue. In my judgment, GCR O.11, r.1(2) does provide the appropriate route by which a s.147 claim can be served upon a respondent who has not filed a proof of debt.

145. If this were not the case, a liquidator would have to pursue such a claim in the respondent's home jurisdiction. I consider that there are a number of difficulties with this, which demonstrate that it cannot be the correct approach.

146. First, it would result in inconsistency in application between different cases because the ability to pursue the claim would depend on whether or not the respondent's home jurisdiction would (a) recognise and (b) apply Cayman Islands law. The parties did not adduce evidence as to the countries that would or would not apply Cayman Islands law to enable a claim under s.147 of the Companies Act to be advanced, but it was suggested in argument by Mr Smith that the willingness of the US Bankruptcy Court to apply foreign law under Chapter 15 of the US Bankruptcy Code is unique. I do not need to reach a conclusion on this as it is sufficient that there would be a real question in

many cases whether the foreign court would apply Cayman Islands law, leading to the risk of capricious outcomes depending on extraneous factors.

147. Secondly, it would depend on having to read the term "Court" in s.147 of the Companies Act, which is specifically defined in the Act to mean the Grand Court of the Cayman Islands, as meaning the court in the respondent's home jurisdiction. This was the solution adopted by Jones J in *ICP Strategic Credit Income Fund Ltd*. He reached that conclusion because he considered that otherwise the remedy under s.147 would only be available where the respondent is resident or domiciled in the Cayman Islands. At paragraph 7 of his judgment, Jones J said that it was not possible for the liquidators to pursue a s.147 claim against the law firm in question in the Cayman Islands because the firm did not have a presence in the Islands, the conduct in question occurred in the US and the damage was suffered in the US. It appears from his recital of those factors that Jones J considered that the claim did not get through any of the gateways specified in GCR O.11, r.1(1) to obtain leave to serve out. He does not appear to have considered whether the liquidators were entitled to rely on GCR O.11, r.1(2) to serve a summons out of the jurisdiction without leave on the basis that s.147 has extraterritorial effect, as he had already concluded. It is unlikely in the extreme that that possibility was argued before him, given that the liquidators were positively seeking sanction to be permitted to add the s.147 claim to the existing proceedings in the US Bankruptcy Court, for which Jones J had already given sanction. With some diffidence, I therefore disagree with Jones J that it would not have been possible for the liquidators to have brought the s.147 claim in that case before the Grand Court, and that it is therefore necessary to stretch the meaning of "Court" in s.147 of the Companies Act so that it means any court in the world. In my view, such an interpretation unjustifiably ignores that "Court" is a defined term in the Act and stretches the meaning of "Court" beyond breaking point. It also has the unwelcome consequence of having to rely upon a court in another jurisdiction to exercise a discretionary power that Parliament intended to be entrusted to the Grand Court.

148. Thirdly, I agree with Mr Smith that it would significantly undermine the central role of the court supervising the liquidation. Where a company is incorporated in the Cayman Islands, any liquidation should take place within that jurisdiction and should be under the overall control of the Grand Court. There are two helpful Cayman Islands judgments where this was addressed.

148.1 In *Re Silver Base Group Holdings Ltd* (unreported, 8 December 2021), Doyle J said:

> *"6. The Company is incorporated under the laws of the Cayman Islands. I have full regard to the importance of the laws of the place of a company's incorporation and the international recognition of light-touch provisional liquidators appointed for restructuring purposes. ...*
>
> *7. Ian Fletcher puts it well at paragraph 30-054 when he refers to the long accepted fundamental principle that the law of the place of a company's incorporation is primarily, 'possibly immutably', competent to control all questions concerning a company's initial formation and subsequent existence. Dicey Rule 179 sets out the common law and private international law position that the authority of a liquidator (and I would add a provisional liquidator) appointed under the law of the place of incorporation should be recognised in other jurisdictions."*

Doyle J's reference to *"Ian Fletcher"* is to his book, *The Law of Insolvency 5th Edition (2020)*.

148.2 In the earlier case of *Re Philadelphia Alternative Asset Fund Ltd* (unreported, 22 February 2006), where the issue was whether a members' winding up in the Cayman Islands should give way to a receiver appointed in the US, Henderson J said, starting at page 2, line 22:

> *"When the petitioners made the decision to invest in a company domiciled in the Cayman Islands they would have had a reasonable and legitimate expectation that, in the event a winding up was necessary it would occur in the Cayman Islands under the applicable law here. ...*
>
> *This is the fund's domicile. The established rule is that any winding up must take place here although, if there are assets in a foreign jurisdiction, ancillary proceedings abroad may be necessary: see* North Australian Territory Co v Goldsborough, Mortand Co. *(1889) 61 LT 716. Counsel have been unable to cite any precedent either here or elsewhere for what Mr Hodgson now asks. I am unaware of any instance of an English or Cayman Court declining to make a winding up order in the place of incorporation of a company for the sake of deferring to a foreign receivership in respect of that company. The court of the country of domicile is the 'principle court to govern' a liquidation: per Vaughn Williams, J. in* Re English, Scottish and Australian Chartered Bank *[1893] 3 Ch. 385, at 394. The fund having been incorporated here, this is the proper court for the management of its liquidation: see* International Credit v Adham *[1994] 1 BCLC 66 at 71. These principles are so clear and of such longevity that it would be wrong in principle to deny the petitioners this winding up order. That remains so whether there will be some duplication of effort and wasted cost or not."*

Henderson J reached this conclusion notwithstanding that the winding up petition was supported by a minority of the members only, most of the assets were in the US and the majority of the members appeared to be content to await the outcome of the US receivership.

148.3 This approach is also consistent with the statement of Sir James Bacon CJ in *Ex parte Robertson; Re Morton* (1875) L.R. 20 Eq. 733, that the court supervising the liquidation has power to decide:

> *"... all questions of whatever kind, whether of law, fact, or whatever else the Court may think necessary in order to effect complete distribution of the bankrupt's estate."*

149. In *Orexim Trading Ltd* Lewison LJ indicated that it was an important part of his reasoning in concluding that a claim for relief under s.423 of the English Insolvency Act could be served out of the jurisdiction that the safeguards described by Sir Donald Nicolls V-C in *Re Paramount Airways Ltd* remained in place, and that these included the need to obtain leave to serve out. As I have already found in this judgment, the need for a liquidator wishing to pursue a claim under s.147 of the Companies Act to obtain prior sanction from the Grand Court judge supervising the liquidation provides an equivalent safeguard. As a result, my conclusion that an application under s.147 of the Act may be served out under GCR O.11, r.1(2) without leave does not offend the need to guard against the risk of potential injustice to the respondent by having to answer the liquidator's claim, if that is a necessary requirement.

F. Disposal

150. For the reasons that I have set out in this judgment, I conclude as follows.

150.1 Submission to the jurisdiction is separate and distinct from establishing the jurisdiction of the court over a person by service of process.

150.2 Where the court's jurisdiction over a defendant is based on voluntary submission, the procedural rules on service out are irrelevant because the court's jurisdiction is not founded on service.

150.3 Lodging a proof of debt in a winding up process is a submission to the jurisdiction of the court with conduct of the winding up. It is irrelevant whether the proof of debt has been admitted, adjudicated or a dividend paid.

150.4 Submission to the jurisdiction by lodging a proof of debt is effective for all purposes connected with the winding up of the company, including a claim under s147 of the Companies Act.

150.5 To the extent that it is necessary that the ability to invoke s.147 of the Companies Act requires limiting factors, they are provided in the Cayman Islands by the need for a liquidator to obtain sanction to pursue the application and the ability of the judge determining the application to consider the respondent's connection with the Cayman Islands when deciding whether or not to make any order.

150.6 Any application under Part V of the Companies Act must be brought by summons within the liquidation proceedings: CWR O.24, r.2(1). The practice that appears to have been grown up of bringing such applications by separate proceedings is wrong.

150.7 The Plaintiffs' claim was commenced using the wrong procedural form. However, the Plaintiffs have not obtained any improper procedural advantage by issuing a writ instead of an ordinary summons within the liquidation proceedings. The Court will therefore waive the irregularity and treat the proceedings as having been commenced by summons within the liquidation proceedings. The cause number will need to be updated to reflect this.

150.8 Service of the claim upon the Defendant was valid and effective.

150.9 Section 147 of the Companies Act does have extraterritorial effect.

150.10 On its true construction, s.147 of the Companies Act provides for claims to be brought against persons outside the Cayman Islands.

150.11 As a result, a claim under s.147 of the Companies Act can be served out of the jurisdiction without leave under GCR O.11.

151. I invite counsel to indicate within 14 days of finalisation of this judgment whether they require a further hearing to deal with consequential matters or whether they will invite me to deal with those aspects on the basis of short written submissions.

Dated 20 May 2025

THE HONOURABLE JUSTICE JALIL ASIF KC
JUDGE OF THE GRAND COURT

Easter Term
[2019] UKPC 20
Privy Council Appeal No 0082 of 2018

JUDGMENT

UBS AG New York and others (Appellants) *v* Fairfield Sentry Ltd (In Liquidation) and others (Respondents) (British Virgin Islands)

From the Court of Appeal of the Eastern Caribbean Supreme Court (British Virgin Islands)

before

Lord Reed
Lord Hodge
Lord Briggs
Lady Arden
Lord Kitchin

JUDGMENT GIVEN ON

20 May 2019

Heard on 25 and 26 February 2019

Appellants	*Respondents*
Lord Falconer QC	Gabriel Moss QC
Tom Smith QC	Stephen Midwinter QC
Henry Phillips	William Hare
(Instructed by Gibson Dunn & Crutcher LLP)	(Instructed by Forbes Hare LLP (London))

LORD HODGE:

1. This appeal, which comes to the Board with the leave of the Court of Appeal of the Eastern Caribbean Supreme Court ("the ECCA"), is an appeal against the judgment of the ECCA dated 20 November 2017 (Pereira CJ and Blenman and Thom JJA) dismissing the appeal by the appellants (referred to collectively as "UBS") against Leon J's judgment dated 11 March 2016. The subject of the appeal to the Board is the ECCA's upholding of Leon J's refusal to grant an anti-suit injunction to restrain the liquidators of Fairfield Sentry Ltd ("the liquidators") from pursuing proceedings in the United States under section 249 of the British Virgin Islands' Insolvency Act 2003 ("the IA 2003"). This section empowers the High Court of the BVI ("the High Court") to set aside voidable transactions, such as an unfair preference or an undervalue transaction, and to make orders to restore the position to what it would have been if the company had not entered into such transactions.

2. The dispute arises out of the multi-billion dollar Ponzi scheme which Bernard L Madoff operated through his company Bernard L Madoff Investment Securities LLC ("BLMIS"). Fairfield Sentry Ltd ("Sentry"), Fairfield Sigma Ltd ("Sigma") and Fairfield Lambda Ltd ("Lambda") were "feeder" funds. Sigma and Lambda invested in Sentry which in turn invested over 95% of its funds in BLMIS. Between 1997 and 2008 Sentry invested some US$7.2 billion in BLMIS. After Mr Madoff's fraud came to light following his arrest in December 2008, the High Court made orders to wind up each of Sentry, Sigma and Lambda.

3. Ponzi schemes have in common with many asset bubbles, including share speculations, that those who invest early and realise their investment before the crash can make significant profits, while those, who invest later or otherwise retain their investment in the scheme when it crashes, lose everything. It is, as an anonymous pamphleteer during the South Sea Bubble of 1720 stated, a case of "devil take the hindmost". The liquidators' claims are an attempt to modify that unfortunate result and share the pain among investors.

4. In the case of Sentry the matter arose in this way. Investors purchased redeemable shares in Sentry, which were offered at the net asset value per share ("NAV") of Sentry's mutual fund ("the Fund") at the opening of business on the effective date of purchase. Those investments provided funds for Sentry to invest principally in BLMIS. Investors could withdraw their investment in Sentry by redeeming their shares in accordance with article 10 of Sentry's articles of association. The redemption payment on a share was based on the NAV of the Fund on the day of the request to redeem or the following day and certificates of NAV were issued by Sentry's administrator on behalf of the directors, giving a binding valuation of the

shares which were redeemed. Those valuations of the Fund by the Fund's administrator on behalf of the directors of Sentry were based on fraudulent reports created by BLMIS, which did not have assets under its management which could give rise to the purported valuations.

5. The liquidators by raising proceedings in the United States under section 249 of the IA 2003 and on common law grounds are seeking to recover funds paid out to investors in Sentry who redeemed their shares at valuations which, as hindsight reveals, bore no relationship to the actual value of their shares. Proceedings have been commenced against several hundreds of defendants in the United States and they are currently before the US Bankruptcy Court in New York. The proceedings relating to UBS concern redemptions of shares in Sentry made between 2004 and 2008. By order dated 6 December 2018 United States Bankruptcy Judge, Bernstein J, dismissed the liquidators' claims at common law against all defendants except to the extent that the claims alleged a constructive trust against defendants who had knowledge of the Madoff frauds but allowed the statutory avoidance claims under section 249 of the IA 2003 to proceed.

6. The liquidators were appointed by the High Court by order dated 21 July 2009. They raised the proceedings in the United States with the permission of the High Court in an order dated 10 November 2010. UBS did not challenge that order at the time. Sanction to proceed with the litigation in the United States was removed and later restored in proceedings in the BVI. The liquidators are officers of the High Court (section 184(1) of the IA 2003) and are subject to the direction of that court.

7. The dispute between the liquidators and investors who redeemed their investments before the crash has been strenuously undertaken both in the BVI, including an appeal to the Board in 2014, and in the United States. It is not necessary to set out the varied skirmishes and battles which have led to this appeal to the Board. Nor is it necessary to discuss the merits of the liquidators' claims. It suffices to state that UBS as a potential debtor of the liquidators' claims under section 249 of the IA 2003 seeks an anti-suit injunction from the BVI courts to restrain the liquidators from proceeding with their claims in the United States. After Leon J dismissed UBS's application for an anti-suit injunction and the ECCA dismissed its appeal, UBS appeals to the Board with the leave of the ECCA.

8. Lord Falconer QC in a skilful presentation urged the Board to grant an anti-suit injunction, which failing, declaratory relief. The core of his submission was that section 249 of the IA, properly interpreted, conferred a right to grant relief only on the High Court which was the domestic court charged with the supervision of the winding up, enabling it to alter the consequences of concluded transactions which would otherwise remain binding on the insolvent company. As a result, no foreign court was empowered to grant such relief. The High Court had no authority to delegate power to grant such

relief to a foreign court and had not purported to do so. Accordingly, it would involve a misapplication of the insolvency regime of the BVI if a foreign court were to exercise powers under section 249, would introduce commercial uncertainty and would be oppressive to the interests of alleged debtors of the insolvent company. Further, the BVI courts were the natural forum for the claims and the liquidators had put forward no evidence that proceedings in the United States would enable them to obtain more assets for the liquidation than proceedings in the BVI.

9. Gabriel Moss QC for the liquidators in a powerful submission submitted, first, that UBS had already argued in the US Bankruptcy Court the question whether the section 249 claims can be pursued in the United States and had lost. It was an abuse of process to attempt to relitigate the issue in the BVI. Secondly, UBS offered no coherent basis on which it could be argued that the US proceedings were vexatious or oppressive so as to justify an anti-suit injunction. Thirdly, UBS had no standing before the High Court to invoke the anti-suit injunction. Fourthly, there was no basis for the declaratory relief, which UBS sought for the first time before the Board, because it was for the US Bankruptcy Court to decide under US rules of private international law whether it would apply BVI insolvency law in dealing with the liquidators' applications. Section 249 of the IA did not bear the meaning which UBS advanced. It was not unusual for courts to assist foreign liquidation proceedings by applying the law of those proceedings, including a statutory power to adjust or reverse voidable transactions. As Pereira CJ had held, there was no reason why BVI law should wish to prevent a foreign court from applying BVI insolvency rules in the context of cross-border cooperation relating to an insolvent BVI company.

Discussion

10. Section 249 of the IA 2003 so far as relevant provides

> "(1) Subject to section 250, where it is satisfied that a transaction entered into by a company is a voidable transaction the Court, on the application of the office holder,
>
> > (a) may make an order setting aside the transaction in whole or in part;
> >
> > (b) in respect of an unfair preference or an undervalue transaction, may make such order as it considers fit for restoring the position to what it would have been if the company had not entered into that transaction; …"

Subsection (2) lists some of the powers which may be exercised under subsection (1)(b), including payment to the office holder of such sums as the court may direct. Section 244 defines "voidable transactions" as including an unfair preference or an undervalue transaction and those transactions are defined in sections 245 and 246. Section 250 protects the interests of third parties who have acquired an interest in good faith and for value. Of more direct relevance to the dispute is the definition of "Court" in section 2 of the IA 2003, which provides that it means the High Court.

11. Section 249 gives the court a discretion, once it has set aside the voidable transaction, to make such order as it thinks fit to restore the position of the company. This provision, like those in the modern statutory insolvency regimes of several common law countries, has empowered the court to devise a suitable remedy to achieve restitution rather than merely annulling the transaction and leaving the consequences of that annulment to the operation of the general law. But the existence of that discretion to devise a remedy, in the Board's view, casts no light on whether the power to unravel voidable transactions is conferred solely on the High Court at first instance.

12. The central question on the appeal is a question of statutory interpretation. It is whether section 249 of the IA 2003 either expressly or by necessary implication confers an exclusive jurisdiction on the High Court so as to preclude foreign courts, which assist in a BVI liquidation, from exercising such powers. The answer is that it does not. The section is a provision in the domestic insolvency law of the BVI. It, read with section 2, identifies the court within the BVI which is to exercise the statutory powers which it confers. It gives jurisdiction to the High Court and not the magistrates' court. It contains no express prohibition on a foreign court from exercising those powers at the request of a BVI office holder and no such prohibition arises by necessary implication. In short, the section does not address the matter of the powers of a foreign court; one would not expect it to do so. On the contrary, it is a question for each foreign court from which a BVI office holder seeks assistance to determine whether it can use the statutory tools which BVI insolvency legislation has conferred on the BVI court.

13. Further support for this conclusion can be found in other provisions of the IA 2003. Part XIX of the IA 2003 is in force and relates to orders which the BVI court may make in aid of foreign proceedings. Section 467 allows a foreign representative (such as an insolvency body, officer or practitioner) to apply to the High Court for an order in aid of the foreign insolvency proceeding and empowers the High Court to make such order or grant such other relief as it considers appropriate. Section 467(5) provides that the High Court in making such an order may apply the law of the BVI or the law applicable in respect of the foreign proceeding. The High Court's power to make an order is subject to section 468 which sets out the matters which the court must consider. This provision, which appears to be modelled on the now-superseded section 304(c) of the United States Bankruptcy Code, instructs the court to be guided by "what will best ensure the economic and expeditious administration of the foreign proceeding to the extent consistent with" specified public policy goals. Those goals (set out in section

468(1)) include the just treatment of all persons claiming in the foreign proceeding, the prevention of preferential dispositions of property subject to the foreign proceeding, and comity. They also include the protection of persons in the BVI against prejudice and inconvenience in the processing of claims in the foreign proceedings (section 468(1)(b)) and the need for the distributions in the foreign proceedings to be substantially in accordance with the order of distributions in a BVI insolvency (section 468(1)(d)). Section 468(3) prohibits the court from making an order under section 467 that is contrary to the public policy of the BVI. The existence of this domestic regime to assist a foreign insolvency proceeding strongly militates against any implication of exclusivity in section 249. No issue of a lack of comity arises. As Mr Moss submitted, the BVI legislature must have been expecting foreign courts to be able to apply BVI insolvency law.

14. In the Board's view, UBS can derive no assistance in interpreting section 249 from Part XVIII of the IA 2003, which is designed to implement the UNCITRAL Model Law on Cross-Border Insolvency, because the BVI legislature has not brought those provisions into force. In any event, it is by no means clear that incorporation of the UNCITRAL Model Law would disincline, let alone forbid, a court from applying a foreign insolvency law. It appears to the Board that the United States Courts have interpreted the relevant statutory provisions as permitting the application of foreign insolvency law in both their now-superseded section 304 of the US Bankruptcy Code (*In re Metzeler* 78 BR 674, 677 (Bkrtcy SDNY 1987) and chapter 15 of the US Bankruptcy Code, which is based on the UNCITRAL Model Law, *In re Atlas Shipping A/S* 404 BR 726, (April 27 2009, SDNY), *In re Condor Insurance Ltd* 601 F 3d 319 (March 17 2010, 5th Cir), and *In re Hellas Telecommunications II* 535 BR 543, 566-567 (Bkrtcy SDNY 2015)).

15. The Board also observes that it is not uncommon for the courts in one country to apply the insolvency laws of another when giving assistance to the latter country. In the United Kingdom section 426(5) of the Insolvency Act 1986, like section 467(5) of the IA 2003, gives the court authority to apply the insolvency law of the jurisdiction of the court which is requesting assistance. Thus, in *England v Smith* [2001] Ch 419, the Court of Appeal of England and Wales applied the insolvency law and practice of the requesting Australian court, and not the practice of the English courts, in dealing with an application to examine an accountant who had been involved in the audit of the accounts of the insolvent Australian company. It held that the requesting court had exercised its discretion under section 596B of the Australian Corporations Law in seeking the examination and that the English court should not perform that task again unless it was shown that the requesting court had been ignorant of some material fact or subsequent events had undermined the justification for the order of the requesting court (paras 22-28 per Morritt LJ). Lord Falconer sought to distinguish *England v Smith* from the circumstances of this appeal on the ground that in the former case the Australian Court had exercised its discretion to order examination of the accountant whereas it would fall on the US court to apply section 249. While accepting that *England v Smith* gives no direct guidance on the ambit of section 249, the Board

observes that it is an example of an English court adopting Australian practice rather than domestic practice in its decision-making in assisting in a cross-border insolvency. The case and the statutory provisions which the Board mentions in para 13 provide a backdrop against which section 249 is to be construed.

16. It is correct, as UBS submits, that in exercising powers under section 249 of the IA 2003 a foreign court would not be vindicating property rights which a BVI company had prior to its winding up. It would be responding to an application by the liquidators for that court to exercise a discretionary power in the BVI's statutory insolvency scheme to adjust concluded transactions in the interests of the company's creditors as a whole. There is also a possibility that different foreign courts may exercise the discretion so conferred in different and not necessarily consistent ways, particularly if their conceptions of public policy differed. Just as section 468(1)(b) and (d) (to which the Board refers in para 13 above) influence the exercise of the High Court's discretion under section 467 in response to applications for assistance by foreign representatives, so may foreign courts be constrained by their domestic legislation. But those considerations do not militate against the Board's conclusion that section 249 does not prohibit a foreign court from exercising the powers which it confers.

17. The Board is satisfied that the application to the BVI courts to seek an anti-suit injunction against the liquidators is misconceived. First, the liquidators have raised the proceedings in the United States with the authority of the High Court. They are officers of the High Court. If there were grounds for preventing the liquidators from proceeding with the US claims, the High Court would not need to grant an injunction but could revoke its permission for the proceedings to continue. The High Court has not done so.

18. The Board observes that the High Court, when considering whether to grant or revoke permission to the liquidators to bring proceedings in New York, would have had the opportunity to form its own view as to whether it would be unjust and oppressive for the prospective defendants to be sued in that jurisdiction and whether New York was an appropriate forum for such a challenge. The Board also attaches considerable weight to the view of the ECCA (judgment of Pereira CJ para 79) that the public policy of the BVI favours the enforcement of the BVI's insolvency regime overseas.

19. Secondly, it is now a question for the US courts whether they should apply BVI law as the liquidators request. Lord Falconer concedes that it is arguable that the US court could competently apply BVI law under US rules of private international law. In *Deutsche Bank AG v Highland Crusader Offshore Partners LP* [2010] 1 WLR 1023, para 50, Toulson LJ summarised key principles concerning anti-suit injunctions and forum non conveniens. He recognized the need for caution out of considerations of comity because an anti-suit injunction involves interference in the process of a foreign court. The Board has repeated this need for caution in its judgment in *Stichting Shell*

Pensioenfonds v Krys [2014] UKPC 41; [2015] AC 616, para 42 in which, in a judgment delivered by Lord Sumption and Lord Toulson, it stated:

> "Where the issue is whether the BVI or the foreign court is the more appropriate or convenient forum, it can in principle be decided by either court. Comity will normally require that the foreign judge should decide whether an action in his own court should proceed: *Barclays Bank plc v Homan* [1993] BCLC 680, *Mitchell v Carter* [1997] 1 BCLC 673 (Millett LJ)."

There is no ground in this case for departing from the norm which considerations of comity support. This appeal is not concerned with the extent of the powers of a BVI court to give assistance to a foreign liquidation. As a result there is no need to address the boundaries of a common law principle of modified universalism which have been discussed in the judgment of the UK Supreme Court in *Rubin v Eurofinance SA (Picard intervening)* [2012] UKSC 46; [2013] 1 AC 236 and the judgment of the Board in *Singularis Holdings Ltd v PricewaterhouseCoopers* [2014] UKPC 36; [2015] AC 1675. It is for the US court to interpret chapter 15 of the US Bankruptcy Code and to apply the rules of its private international law.

20. Thirdly, absent a prohibition in section 249 on a foreign court from using the powers which it conferred, there is no question of vexatious or oppressive litigation, such as might justify the grant of an injunction. In *Deutsche Bank AG* (above) Toulson LJ observed that the courts had refrained from attempting a comprehensive definition of vexatious and oppressive litigation. But its general nature is clear. The Board in *Société Nationale Industrielle Aerospatiale v Lee Kui Jak* [1987] AC 871, 893-897 identified as examples of such litigation proceedings which were so absurd that they could not possibly succeed, proceedings raised simply to annoy or harass a defendant, and proceedings in a foreign court which it would otherwise be unjust to allow the claimant to pursue. No such injustice arises in this case.

21. The Board in its judgment dated 16 April 2014 (*Fairfield Sentry Ltd v Migani* [2014] UKPC 9), which related to other redemptions of Sentry's shares, rejected the liquidators' claims in unjust enrichment based on a mistake on the ground that the defendants were contractually entitled to receive the sums paid on redeeming their shares. The US Bankruptcy Court has similarly dismissed such claims and claims in contract in relation to the redemptions which it is considering except to the extent that the liquidators amend their common law claims to plead a constructive trust in cases where there is evidence that the recipients of the redemptions had knowledge of the fraud, and otherwise confined the liquidators' claims to those under section 249 of the IA 2003 (para 5 above). The liquidators' claims against UBS which have been allowed to proceed are not in conflict with the Board's decision in 2014.

22. The Board can deal shortly with UBS' application for a declaration. What UBS seeks is a declaration on the interpretation of section 249 of the IA 2003 which contradicts the conclusion which the Board has reached in paras 10-16 above. The Board would not necessarily have refused the application on the ground that it is a new claim for relief which was not sought in the courts in the BVI, because it is a remedy addressed to the same subject matter as the application for the injunction and it interferes less in the foreign proceedings than such an injunction. But the Board questions whether it is the task of the BVI courts to give an advisory opinion to the US courts at the request of a defendant in US proceedings for use in those proceedings, particularly as it appears that the US court treats foreign law as a matter of law rather than a question of fact: *In re Hellas Telecommunications II* (above), 562 footnote 23.

23. Having reached these conclusions, the Board does not need to consider the liquidators' challenge to UBS's standing to raise these proceedings or the liquidators' submission that these proceedings are an abuse of process because the parties have already argued these matters without success before the US Bankruptcy Court in New York.

Tribute to Gabriel Moss QC

24. While this judgment was being prepared the Board received the very sad news of the untimely death of Gabriel Moss, who so skilfully presented the case for the liquidators. The Board wishes to pay tribute to his intellect and humanity and acknowledge his unrivalled contribution to corporate insolvency law as a practitioner, author and university teacher.

Conclusion

25. The Board will humbly advise Her Majesty that the appeal should be dismissed.

Faculty

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