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No. 2018-010

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

HIGHLAND FLOATING RATE OPPORTUNITIES FUND; HIGHLAND GLOBAL ALLOCATION FUND; HIGHLAND LOAN MASTER FUND, L.P.; HIGHLAND OPPORTUNISTIC CREDIT; AND NEXPOINT CREDIT STRATEGIES FUND,

Plaintiffs-Appellants,

v.

DRYSHIPS INC.; OCEAN RIG INVESTMENTS INC.; TMS OFFSHORE SERVICES LTD.; SIFNOS SHAREHOLDERS INC.; AGON SHIPPING INC.; ANTONIOS KANDYLIDIS; AND GEORGE ECONOMOU,

Defendants-Appellees.

On Appeal from the High Court No. 2017-198
Carl B. Ingram, Chief Justice, Presiding

JOINT ANSWERING BRIEF FOR APPELLEES

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Defendants-Appellees DryShips Inc., Ocean Rig Investments Inc. ("ORI"), TMS Offshore Services Ltd., Sifnos Shareholders Inc., Agon Shipping Inc. ("Agon"), Antonios Kandylidis and George Economou (collectively, the "Defendants") respectfully submit this Joint Answering Brief in response to the Brief of Plaintiffs-Appellants Highland Floating Rate Opportunities Fund, Highland Global Allocation Fund, Highland Loan Master Fund, L.P., Highland Opportunistic Credit Fund and NexPoint Credit Strategies Fund (collectively, "Highland"), by which Highland appeals from the High Court's Order Granting Motions to Dismiss filed on September 27, 2018 (the "Order").[1]

INTRODUCTION

This Court should affirm the High Court's Order dismissing Highland's Complaint. As the High Court recognized, Highland lacks standing to pursue its claims as the result of its own tactical decisions. It made those decisions in an effort to pursue fraudulent conveyance claims on its own behalf – and exclusively for its own benefit – rather than demanding that an indenture trustee bring the claims on behalf of all noteholders or participating in a litigation trust established for the benefit of all creditors in a court-supervised restructuring.

The Republic of the Marshall Islands is the third stop on Highland's globetrotting expedition in search of a forum receptive to its baseless claims. Initially, Highland submitted a draft complaint, asserting the same claims that it now seeks to prosecute here, to the United States Bankruptcy Court for the Southern District of New York (the "SDNY Bankruptcy Court"), and told that court that New York was "the only place in the world that creditors under

[1] Messrs. Economou and Kandylidis (the "Individuals") are contemporaneously filing an additional Answering Brief addressing issues that are unique to them, as authorized by this Court's Order Enlarging Brief Page Limits filed on March 6, 2019. By submitting these Briefs, the Individuals do not waive, and expressly preserve, their objections and defenses based on the High Court's lack of jurisdiction over them.

these facts can bring such a cause of action." S.A.79:23-80:2.[2] It also told the New York court that if non-party Ocean Rig UDW Inc. ("UDW") proceeded with a Cayman Islands debt restructuring, "Highland and other noteholders will no longer be deemed creditors of the Debtors and will lose their standing to sue for fraudulent conveyance . . . ." A.527. That is precisely what happened when the court-supervised Cayman Islands debt restructuring was consummated: Highland's creditor claims against UDW were discharged, and Highland lost standing to bring its fraudulent conveyance claims against Defendants as a result.

When Highland failed to obtain favorable rulings from the SDNY Bankruptcy Court, it dropped its litigation there and turned its attention to the Cayman Islands, where proceedings were underway to restructure UDW's debt, as well as the debt of three of its subsidiaries, by way of "schemes of arrangement" – akin to plans of reorganization under United States bankruptcy practice. The Grand Court of the Cayman Islands (the "Cayman Court") conducted six days of hearings over the course of six months, with briefing, oral argument and the right to appeal afforded to Highland and all other interested parties. Similar to the position that it took in New York, Highland objected on the basis that "the inevitable effect" of an order approving the restructuring would be "the deprivation of Highland's status as a creditor, and hence, its ability to pursue any claim [that] is dependent upon that status." S.A.374:20-25.

Ultimately, the Cayman Court approved the schemes of arrangement with the overwhelming support of UDW's creditors – 98.51% by number and 97.91% by amount. S.A.307. As a result, UDW and its subsidiaries successfully restructured $3.7 billion in debt, avoided liquidation and created substantial value for creditors. As the Cayman Court found, "[u]nder each of the four Schemes, the creditors achieve a better result than in a liquidation."

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[2] Citations to "S.A." refer to Defendants-Appellees' Supplemental Appendix filed concurrently herewith. Citations to "A." refer to Plaintiffs-Appellants' Appendix filed on March 6, 2019.

S.A.483 ¶ 130. This was true for all creditors, including Highland. S.A.462 ¶ 18. Highland was the lone objector.

The Cayman Court expressly addressed the fact that "[t]he effect of the UDW Scheme is to remove Highland's status as a creditor capable of pursuing the draft Complaint" that Highland had originally submitted in New York. S.A.477 ¶ 105. The Cayman Court concluded that "[t]here is nothing inherently unfair to Highland in the fact that the Scheme results in ***all*** creditors losing their ability to pursue these claims themselves," particularly given that the schemes called for the establishment of a litigation trust (the "Preserved Claims Trust," or "PCT") to investigate and, if appropriate, pursue the claims held by UDW and two of its subsidiaries based on the transactions that Highland complains about.[3] S.A.482 ¶ 125 (emphasis in original). Highland was given the opportunity to participate in the PCT as an "Enforcer," but chose not to do so. A.14.

Though Highland now describes the Cayman court-approved schemes as "unconscionable," Br. 9, it did not appeal from the Cayman Court's judgment approving the schemes. S.A.314 ¶ 49. Moreover, the SDNY Bankruptcy Court has granted comity to the Cayman judgment in ancillary proceedings brought pursuant to Chapter 15 of the United States Bankruptcy Code. S.A.9 ¶ 18; S.A.293-99. The result is that Highland's claims against UDW have been discharged, the UDW-issued notes that served as the predicate for Highland's creditor status (the "UDW Notes") have been released, and Highland is no longer a creditor of UDW. Br.

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[3] Highland's claims, premised on its contention that Defendants engaged in "self-interested transactions" and "pilfered cash," do not have any merit. Brief of Appellants ("Br.") 1. Highland challenges, for instance, UDW's acceptance of shares of its stock at prices approved by fairness opinions as repayment of a debt that Defendant DryShips owed to it, the purchase of a drillship for oil and gas exploration and development in a distressed sale at a highly favorable price, and the entry into a management agreement at market rates, the substance of which has now been approved by approximately 98% of UDW's creditors as part of the debt restructuring. The Court need not consider the merits of Highland's claims, however, because Highland lacks standing to pursue them as discussed in Parts I-II, *infra*.

25. Highland nonetheless initiated this action in the RMI on the eve of the final hearing in the Cayman restructuring proceedings, seeking to take yet another bite at the apple.

The High Court correctly determined that Highland lacks standing to bring its lawsuit in the RMI, and that certain of Highland's claims fail for additional reasons.[4]

First, it is undisputed that Highland failed to comply with the "no action" clause in the indenture that governed the UDW Notes. Similar to the requirement that a shareholder make a demand on a company's board of directors before proceeding with a derivative suit, no action clauses require that a noteholder make a demand on the indenture trustee to bring claims on behalf of all noteholders before attempting to bring those claims on its own behalf as Highland seeks to do here. The excuses that Highland's counsel have invented for its undisputed failure to comply with the no action clause – primarily that it cannot do so because there is no longer a trustee ***today*** – cannot save its claims. As the High Court correctly found, "Highland made a tactical decision not to comply with the no action clause from March 24[, 2017, when UDW defaulted under the UDW Notes by commencing the Cayman restructuring proceedings] through September 22, 2017 [when the UDW scheme took effect, Highland lost its creditor status and the indenture trustee was discharged]." A.25. Highland makes no effort to challenge the High Court's factual finding – which was based on substantial record evidence and entirely

[4] The High Court also correctly determined that it lacks personal jurisdiction over the Individuals because they do not have sufficient contacts with the RMI to satisfy due process. The Individuals address the personal jurisdiction ruling in their separate Brief. However, it is unnecessary for this Court to reach the constitutional question presented by that ruling in the event that it affirms the dismissal of the entire case for lack of standing. *See, e.g.*, *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of."); *PVC Windoors, Inc. v. Babbitbay Beach Constr., N.V.*, 598 F.3d 802, 807-08 (11th Cir. 2010) (affirming dismissal for lack of personal jurisdiction and only addressing due process prong to the extent necessary to do so because "federal courts are duty bound to avoid a constitutional question if answering the question is unnecessary to the adjudication of the claims at hand.").

appropriate on Defendants' motion to dismiss for lack of standing under MIRCP 12(b)(1). Nor does Highland present any other valid excuse for its failure to comply with a contractual condition precedent to bringing suit. *See* Part I, *infra.*

Second, it is also undisputed that only a creditor may prosecute a fraudulent conveyance claim and that Highland lost its creditor standing when the UDW scheme became effective – just as Highland told the New York and Cayman Courts would happen. Highland's argument that the High Court erred by granting comity to the Cayman Court's judgment (on the theory that the RMI has a public policy against debt restructuring) finds no support in RMI authorities, and cannot be squared with the Nitijela's recent adoption of the UNCITRAL Model Law on Cross-Border Insolvency Implementation Act, 2018 (codified at 30 MIRC Ch. 7). Contrary to Highland's argument, the Model Law confirms that the RMI has an unequivocal policy preference for facilitating foreign debt restructurings and cooperating with foreign courts overseeing such restructurings. The High Court also properly rejected Highland's untenably overbroad reading of RMI Business Corporations Act Section 128(5). That statute provides, as relevant here, that "[t]he transfer of domicile of any corporation out of the Republic shall not . . . adversely affect the rights of creditors . . . ." Business Corporations Act 1990, 52 MIRC Ch. 1 §128(5). As the High Court correctly recognized, Highland did not lose its creditor standing because UDW transferred its domicile from the RMI to the Cayman Islands. Highland instead lost its creditor standing as the result of the Cayman Court-supervised restructuring that took effect almost a year and a half later. *See* Part II, *infra.*

Finally, the High Court properly dismissed Highland's claims for constructive fraudulent conveyance (Second, Fourth and Sixth Causes of Action) for failure to state a claim. *See* Part III, *infra.*

Fundamentally, Highland's effort to manufacture a situation in which it could prosecute the fraudulent conveyance claims solely for its own benefit – instead of making a demand on the

indenture trustee to bring the claims on behalf of all UDW noteholders or participating in the PCT's activities on behalf of all UDW creditors – backfired. It no longer has standing to prosecute its claims, and the High Court properly dismissed Highland's Complaint.

STATEMENT OF THE CASE

UDW, a Cayman Islands company, is the parent of a group of companies that operates as an international offshore oil drilling contractor, owning and operating drilling rigs.[5] The group provides drilling services for offshore oil and gas exploration, development, and production, and specializes in the ultra-deepwater and harsh environment segments of the offshore drilling industry.

Formerly registered as an RMI non-resident corporation, UDW transferred its domicile to the Cayman Islands in April 2016. A.92-94 ¶¶ 4, 8. UDW never maintained an office or other place of business in the RMI, nor did it transact business in the RMI or hold property or bank accounts in the RMI. S.A.521 ¶¶ 28-30.

The Highland entities – Plaintiffs-Appellants – are Delaware, Massachusetts and Cayman Islands entities with their principal place of business in Dallas, Texas, United States. A.95-96 ¶¶ 12-16. Each is a former creditor of UDW, collectively having held $74 million in face amount of UDW Notes. A.91, 95-96 ¶¶ 1, 12-17.

In 2014, UDW "began to experience a financial strain resulting from a steep decline in the market for its services" due to a sharp drop in oil prices to historical lows. A.91 ¶ 2. The extended oil and gas industry down-cycle ultimately led UDW and three of its non-party subsidiaries to commence restructuring proceedings in the Cayman Islands to address approximately $3.7 billion in outstanding debt.[6] S.A.302 ¶ 2. The debt restructuring received

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[5] UDW was acquired by Transocean Ltd. in a transaction that closed on December 5, 2018.

[6] UDW was not unique in this regard. Several other offshore drilling companies filed for bankruptcy protection in 2017. *See* Bryan Sims, *Offshore Oil Service Firms Dominate North*

court approval and took effect in September 2017, and Highland lost its status as a UDW creditor as a result. S.A.312, 314 ¶¶ 41, 50. Highland commenced this action four days before the final hearing in the Cayman restructuring proceedings, as described in more detail below.

UDW Issues The UDW Notes Subject To The Notes Indenture

In 2014, UDW issued 7.25% Senior Unsecured Notes due 2017 – *i.e.*, the UDW Notes. A.95, 99-100 ¶¶ 12, 29. Highland's $74 million holding made it the majority holder as of the date it brought this lawsuit. A.96 ¶ 17.

The UDW Notes are governed by a New York law indenture (the "Notes Indenture"). A.95 ¶ 12; S.A.262-63 § 12.06. Section 6.06 of the Notes Indenture, titled "Limitation on Suits," contains the no action clause. It provides, in relevant part:

> Except to enforce the right to receive payment of principal, premium, if any, or interest or Additional Amounts, if any, when due, ***no holder may pursue any remedy with respect to this Indenture or the Notes*** unless:
>
> (1) such Holder has previously given the Trustee notice that an Event of Default is continuing;
>
> (2) Holders of at least 25% in aggregate principal of the then outstanding Notes have made a written request to the Trustee to pursue the remedy;
>
> (3) such Holders have offered the Trustee, and the Trustee has received (if required), security or indemnity (or both) satisfactory to it against any loss, liability or expense;

American Energy Bankruptcies, Reuters (Nov. 16, 2017), *available at* https://www.reuters.com/article/us-oil-bankruptcy/offshore-oil-service-firms-dominate-north-american-energy-bankruptcies-idUSKBN1DG31E; *see also Pacific Drilling Files For Bankruptcy*, The Maritime Executive (Nov. 13, 2017), *available at* https://www.maritime-executive.com/article/pacific-drilling-files-for-bankruptcy (noting that Pacific Drilling, Paragon Offshore, Vantage Drilling, Hercules and Seadrill, among others filed for Chapter 11 bankruptcy in 2017).

> (4) the Trustee has not complied with such request within 60 days after its receipt of the request and the offer of security or indemnity (or both) satisfactory to it; and
>
> (5) Holders of a majority in aggregate principal amount of the then outstanding Notes have not given the Trustee a direction inconsistent with such request within such 60-day period.

S.A.239 § 6.06 (emphasis added). The no action clause gave the indenture trustee the opportunity to pursue any valid claims on behalf of all noteholders, instead of allowing any single noteholder to bring claims solely on its own behalf.

The original indenture trustee in respect of the UDW Notes (the "Notes Trustee") was Deutsche Bank Trust Company Americas. S.A.144. Apparently unhappy with Deutsche Bank, Highland exercised a contractual right to replace it with Wilmington Savings Fund Society, FSB effective as of June 2, 2017. S.A.545-46 ¶¶ 9-10; S.A.579-82; S.A.585-607.

The Notes Indenture identifies the Cayman Islands as a "Permitted Jurisdiction" to which UDW might move its domicile by way of merger, consolidation or a sale of all or substantially all of its assets. *See* S.A.234-36 § 5.01 (permitting redomiciliation by consolidation or merger to a "Permitted Jurisdiction"); S.A.168 (defining "Permitted Jurisdiction" to include the Cayman Islands); A.31.

UDW Commences The Cayman Proceedings And The Cayman Court-Appointed Provisional Liquidators Commence The New York Proceedings

UDW and three of its non-party, wholly owned subsidiaries – Drill Rigs Holdings Inc., Drillships Financing Holding Inc., and Drillships Ocean Ventures Inc. (collectively, the "Subsidiary Debtors," and together with UDW, the "Debtors") – initiated the Cayman Court proceedings by filing "winding up petitions" with the Cayman Court on March 24, 2017.[7] The purpose of the petitions was to facilitate the appointment of joint provisional liquidators ("JPLs")

[7] The Subsidiary Debtors are RMI non-resident corporations which, unlike UDW, never transferred their domiciles to the Cayman Islands. S.A.96.

to oversee the restructuring of the Debtors' debt. The Cayman Court appointed two JPLs, and the JPLs then commenced provisional liquidation proceedings under the Cayman Islands Company Law. S.A.302 ¶ 3. The commencement of the Cayman proceedings constituted an event of default under Section 6.01(8) of the Notes Indenture, accelerating all amounts due under the UDW Notes. A.109-10 ¶ 63; *see also* S.A.237-38 § 6.01(8).

The JPLs immediately commenced proceedings in the SDNY Bankruptcy Court by which they sought United States "recognition" of the Cayman proceedings pursuant to Chapter 15 of the United States Bankruptcy Code. S.A.4 ¶ 4. The JPLs also moved the SDNY Bankruptcy Court for a temporary restraining order and provisional relief enjoining creditors affected by the Debtors' proposed schemes of arrangement from "commencing or continuing any actions against the Debtors or their property within the territorial jurisdiction of the United States." S.A.4 ¶ 5. The SDNY Bankruptcy Court granted the temporary restraining order and scheduled a hearing to be held in early April 2017 on the JPLs' motion for provisional relief. *Id.*

Highland Objects To The JPLs' Request For Provisional Relief And Submits The Draft New York Complaint To The SDNY Bankruptcy Court

On March 31, 2017, Highland filed a "Limited Objection" to the JPLs' request for provisional relief. S.A.13-22. By its objection, Highland sought, *inter alia*, authority to commence a fraudulent conveyance action under New York's Debtor and Creditor Law.

Highland attached a 45-page draft complaint as an exhibit to its Limited Objection. S.A.24-70. The allegations in the draft New York complaint were virtually identical to those in the subsequently-filed RMI complaint. *See* A.10 ("Notwithstanding the reorganization [of claims], the substance is the same").

At a hearing conducted in April 2017, Highland argued that it should be permitted to commence its proposed fraudulent conveyance action because New York is "the only place in the world that creditors under these facts can bring such an action." S.A.79:23-80:3. Highland

specifically represented to the SDNY Bankruptcy Court: "It doesn't exist in Cayman. ***It doesn't exist in the Republic of Marshall Islands***."[8] *Id.* (emphasis added).

Highland fully understood that it would lose its standing to pursue fraudulent conveyance claims if it failed to promptly exercise its rights. As it represented to the SDNY Bankruptcy Court in an April 14, 2017 filing: "It is critical to note in this case that the [restructuring support agreement between the Debtors and certain of their creditors] contemplates that the Notes will be discharged under the Debtors' Schemes of Arrangement." A.527. Highland went on to admit that "[i]f an involuntary case is not commenced prior to the proposed Schemes of Arrangement being sanctioned by the Cayman Court, Highland and other noteholders will no longer be deemed creditors of the Debtors and will lose their standing to sue for fraudulent conveyance in a subsequent U.S. Bankruptcy Case." *Id.*

The Notes Trustee was a party to the SDNY Bankruptcy Court proceedings. Highland served its Limited Objection, including its draft complaint, on the Notes Trustee, and the Notes Trustee's counsel appeared at the hearings in respect of Highland's objection. A.519-21; A.561-64; S.A.77. It is undisputed, however, that Highland never made a demand on the Notes Trustee to bring the claims described in the draft complaint on behalf of all noteholders. Instead, Highland sought the Bankruptcy Court's authorization to prosecute those claims on its own behalf, to the detriment of the other noteholders.

The Bankruptcy Court granted the JPLs' motion for provisional relief over Highland's objection. S.A.545 ¶ 7. Highland continued to participate in the New York proceedings for several months, taking extensive discovery (both document discovery and depositions). S.A.7

[8] Highland was not able to proceed with its proposed New York lawsuit because Highland named UDW as a defendant, and the New York Bankruptcy Court's temporary restraining order precluded it from "commencing or continuing any actions against the Debtors or their property within the territorial jurisdiction of the United States." S.A.33 ¶ 22; S.A.4 ¶ 5.

¶ 11. It ultimately abandoned that litigation, however, and moved on to litigate in other jurisdictions, as discussed below. S.A.128-29.

The Debtors Seek Cayman Court Approval Of The Schemes Of Arrangement And The Preserved Claims Trust

In May 2017, the Debtors petitioned the Cayman Court for approval of their schemes of arrangement (the "Schemes"). S.A.302-03 ¶¶ 4-5. Each Debtor submitted its own Scheme. UDW's Scheme (the "UDW Scheme") provided for the "Scheme Indebtedness" (including the UDW Notes) held by "Scheme Creditors" (including Highland) to be released and discharged fully and absolutely in exchange for new equity in UDW or, alternatively, cash. S.A.310-11 ¶¶ 37-38; A.13-14. In particular, Highland's claims against UDW arising out of or in connection with the UDW Notes were released. S.A.311 ¶ 39; S.A.408 § 5.1 ("On the Restructuring Effective Date . . . each UDW Scheme Creditor will release fully and absolutely its UDW Scheme Claims . . . ."). Thus, Highland's assertion that "the UDW Scheme itself did not include any release of creditor claims" is false.[9] Br. 10.

The UDW Scheme also provided for the establishment of a Cayman Islands litigation trust – the PCT. The PCT was charged with addressing on behalf of all Scheme Creditors any claims that UDW and Defendants-Appellees Agon and ORI might have arising from the transactions that Highland challenged in its draft New York complaint. S.A.309-10 ¶ 33; S.A.377-99; A.14. The PCT received $1.5 million in initial funding from the reorganized debtors to investigate such claims, and the former JPLs were appointed as fiduciaries responsible for the investigation and potential pursuit of such claims. S.A.309-10 ¶ 33. Any recovery by the PCT is to be distributed for the benefit of all UDW Scheme Creditors, including Highland. *Id.*

[9] Highland has previously acknowledged that its claims were released. A.334 (stipulating that "all scheme claims . . . including those belonging to Highland . . . were released").

The PCT deed provided for the appointment of three "Enforcers" to enforce the terms of the trust. S.A.380 § 4.3. Highland was given the right to appoint one of the Enforcers, but declined to participate in the PCT process as part of its high-risk strategy of trying to pursue claims on its own behalf, to the detriment of all other creditors. S.A.309-10 ¶ 33; A.14.

The Cayman Court Conducts The Convening Hearing And Highland Objects To The UDW Scheme Because It Will Lose Creditor Standing

In July 2017, the Cayman Court conducted a three-day "Convening Hearing" in respect of the schemes of arrangement. S.A.303-05 ¶¶ 6, 9, 10. The purpose of the Convening Hearing was for the Cayman Court to consider whether it would permit the Debtors to convene "Creditors' Meetings" at which the Scheme Creditors would vote on the Schemes. S.A.303 ¶ 6.

The five Highland Plaintiffs-Appellants appeared at the Convening Hearing and objected to the UDW Scheme. S.A.305 ¶¶ 13-14. The main thrust of Highland's position was that it would be inequitable to proceed with the Schemes because Highland would lose standing to pursue its fraudulent conveyance claims if the UDW Scheme were approved. *See, e.g.*, S.A.322:13-17 ("[I]f the UDW scheme becomes effective, Highland will cease to be a creditor of UDW and, hence, will be unable to pursue its draft complaint."); *see also* S.A.328:24-329:7 ("Highland and the 2019 Notes Creditors will lose their standing as creditors by reason of the scheme . . . and . . . we will lose our right to claim in respect of that indebtedness, not against UDW, but against third parties"). Highland's hand-picked Notes Trustee appeared at the Convening Hearing and supported Highland's position. S.A.305 ¶ 14. No other party objected. *Id.*

The Cayman Court considered and rejected Highland's objections or deferred them to a later hearing known as a "Sanction Hearing," described below, and authorized the Debtors to convene the Creditors' Meetings. S.A.306 ¶ 18.

The Scheme Creditors Overwhelmingly Approve The Schemes

The Creditors' Meetings were conducted the following month. All Scheme Creditors, including Highland, had the opportunity to ask questions and express their views at the Creditors' Meetings. Highland participated, and exercised its rights by asking several questions about the UDW Scheme. S.A.307 ¶ 21.

The UDW Scheme was approved by an overwhelming affirmative vote, with every Scheme Creditor who voted – other than Highland – voting in favor. S.A.307 ¶ 22-23. The creditors who voted in favor included eight creditors who the Cayman Court found to be "***in exactly the same position as Highland*** (as holding exclusively 2019 Notes and who are not members of, or affiliates of, the Group or the Ad Hoc Group)." S.A.472 ¶ 81 (emphasis added).

The SDNY Bankruptcy Court Grants "Recognition" To The Schemes Based On Its Finding That The Debtors Had Their "Center Of Main Interests" In The Cayman Islands

In August 2017, shortly after the Creditors' Meetings, the SDNY Bankruptcy Court held an evidentiary hearing on the JPLs' petitions for "recognition" of the Cayman proceedings.[10] After considering the extensive factual record, the SDNY Bankruptcy Court issued an order granting recognition of the Cayman proceedings, together with a memorandum opinion setting forth its rationale for doing so. S.A.6-7; S.A.83-88; S.A.91-125.

[10] A primary purpose of Chapter 15 is to encourage cooperation between courts in the United States and other countries involved in cross-border insolvency cases, and it is frequently employed where, as in this instance, "assistance is sought in the United States by a foreign court or a foreign representative in connection with a foreign proceeding." *See* 11 U.S.C. § 1501(b)(1); S.A.4 ¶ 4. In order for a United States court to provide assistance to a foreign court or foreign representative, a determination must be made to "recognize" the foreign proceeding as either a "foreign main proceeding" or a "foreign nonmain proceeding." 11 U.S.C. §§ 1517, 1520-21; S.A.4 ¶ 4.

In granting recognition to the Cayman proceedings, the Bankruptcy Court determined that each of the four Debtors had its "center of main interests" in the Cayman Islands.[11] S.A.115-16. It did so based on its factual findings that each of the Debtors had extensive ties to the Cayman Islands, including that each of them:

> (i) conduct their management and operations in the Cayman Islands, (ii) have offices in the Cayman Islands, (iii) hold their board meetings in the Cayman Islands, (iv) have officers with residences in the Cayman Islands, (v) have bank accounts in the Cayman Islands, (vi) maintain their books and records in the Cayman Islands, (vii) conducted restructuring activities from the Cayman Islands, (viii) provided notices of relocation to the Cayman Islands to paying agents, indenture trustees, administrative and collateral agents, and investment services providers, and (ix) filed a Form 6-K with the SEC showing that their office was in the Cayman Islands.

S.A.118.

Highland did not appear at the recognition hearing, having advised the SDNY Bankruptcy Court in June 2017 that it had "determined that it will not take a position on" recognition. S.A.128.

Highland Files Its RMI Complaint

Highland commenced this action by filing its Complaint in the High Court on August 31, 2017. This was four days before the Sanction Hearing – *i.e.*, the final stage of the Cayman proceedings – was scheduled to begin.

As Chief Justice Ingram found, "the Complaint is essentially a copy of the Draft New York Complaint." A.13. In the Complaint, Highland seeks to characterize as fraudulent conveyances various transactions involving assets of UDW and its affiliates. The Highland entities purport to bring their claims "in their capacities ***as creditors of Ocean Rig UDW Inc.***,"

[11] "The Bankruptcy Code defines a 'foreign main proceeding' as 'a foreign proceeding pending in the country where the debtor has the center of its main interests.'" S.A.115 (quoting 11 U.S.C. § 1502(4)).

alleging that they are suing as "holders of $74 million in notes issued by [UDW]." A.91 introductory paragraph & ¶ 1 (emphasis added). Highland asked the High Court to "avoid" the challenged transactions and award Highland "the value of those transfers to the extent necessary to satisfy" Highland's purported $74 million claim against UDW – *i.e.*, the amount that would have been due under the UDW Notes if they had not been discharged under UDW's Scheme. A.127 Conclusion and Prayer ¶ (a).

The Cayman Court Conducts The Sanction Hearing And Highland Again Objects Because It Will Lose Standing To Prosecute Its Fraudulent Conveyance Claims

The Cayman Court conducted a hearing to determine whether to "sanction," or approve, the Schemes of Arrangement on September 4-6, 2017 – *i.e.*, the Sanction Hearing. S.A.308 ¶ 25; *see also* S.A.304, 308 ¶¶ 8, 26.

Highland once again was the only creditor to object. *Id.* ¶ 27. It argued, as it had done at the Convening Hearing, that the UDW Scheme was inequitable because it would discharge Highland's claims under the UDW Notes, thus depriving Highland of its status as a creditor of UDW, and therefore its standing to pursue its fraudulent conveyance claims. S.A.308 ¶ 28. As Highland admitted to the Cayman Court: "[T]he effect of the UDW Scheme is to remove Highland's status as a creditor capable of pursuing the Draft Complaint, ***or any other claim arising out of the matters alleged therein which is conditional upon its creditor status***." S.A.356 ¶ 57 (emphasis added); *see also* S.A.374:20-25.

Highland made these representations to the Cayman Court after it filed its Complaint with the RMI High Court in which it articulated its position that the UDW Scheme was invalid based on BCA § 128(5). Nonetheless, Highland made a tactical decision not to bring this supposed infirmity in the Cayman proceedings to the Cayman Court's attention. As Highland's counsel admitted in response to questioning by the SDNY Bankruptcy Court at a hearing on the anti-suit injunction:

THE COURT: Did you make that argument [based on BCA § 128(5)] in the Cayman?

MR. REID: We did not.

THE COURT: Okay. You had an opportunity to make whatever arguments you wanted in the Cayman Islands, correct?

MR. REID: We did. ***But we didn't need to.***

A.497:8-12 (emphasis added). In other words, Highland ***chose*** not to raise this issue in the Cayman proceedings, electing instead to save BCA § 128(5) as an excuse to litigate in yet another forum – the RMI.[12]

Highland was more candid with the Cayman Court on a different issue, admitting that its concern about the PCT, at least in part, was that Highland would "lose the ability to determine whether and how those claims should be brought and, thereafter, the manner in which they should proceed." S.A.357 ¶ 60(b). More to the point, of course, Highland would have to share a recovery by the PCT with the other Scheme Creditors instead of keeping any recovery in its own lawsuit for itself.

The Cayman Court Approves The Schemes

The Cayman Court entered orders sanctioning each of the four Schemes on September 15, 2017. S.A.312 ¶ 42; S.A.428-31. The sanction order in respect of the UDW Scheme (the "UDW Sanction Order") provides, in relevant part:

> THIS COURT HEREBY SANCTIONS the Scheme of Arrangement, a copy of which is annexed hereto, pursuant to section

[12] Highland's tactical decision not to raise BCA § 128(5) in the Cayman proceedings is particularly suspect because one of the issues that the Cayman Court needed to address was whether its judgment approving the Schemes would be given extraterritorial effect. As Highland's own expert opined, "the Cayman courts require evidence that a scheme for a foreign company will receive sufficient recognition and enforcement outside Cayman . . . ." A.571 ¶ 34; *see also* S.A.619 ¶ 37. In a truly bizarre turn, Highland takes UDW's RMI law expert to task for failing to raise BCA § 128(5) in the Cayman proceedings despite Highland's own tactical decision not to do so. Br. 9.

> 86(2) of the Companies Law (2016 Revision) ***so as to be binding on*** the Petitioner and ***the Scheme Creditors*** (as defined therein).

S.A.428 (emphasis added). As discussed above, Highland is a "Scheme Creditor" subject to this Order. S.A.310-11 ¶ 38; A.14.

The Cayman Court also issued a "Judgment" setting forth its reasons for sanctioning the Schemes. S.A.457-83. In its Judgment, the Cayman Court considered Highland's objections, including Highland's requests that the Cayman Court "exclude Highland from those creditors of UDW that were bound by the Scheme and/or refuse to sanction the UDW Scheme on the ground that it was unfair to Highland." S.A.477 ¶ 104. The Cayman Court also took note of Highland's admission that "[t]he effect of the UDW Scheme is to remove Highland's status as a creditor capable of pursuing the draft complaint. . . ." S.A.477 ¶ 105; *see also* S.A.462 ¶¶ 22-23 ("Highland argues that the effect of the UDW Scheme is to remove entirely its status as a creditor of UDW and hence its ability to bring those claims.").

The Cayman Court rejected Highland's objections, finding that "[t]he restructuring of all four schemes put together is the best way of maximizing value for the creditors of the Group." S.A.483 ¶ 130. It explained: "the alternative to the Schemes will involve inevitably the liquidation of the Group and enforcement of security by creditors which it is accepted would result in value destruction generally for all creditors." S.A.461 ¶ 11; *see also* S.A.461 ¶ 14 ("The estimated recovery for Scheme Creditors under the Schemes is appreciably higher in each case than the estimated recovery the creditors would receive on a liquidation."). The Cayman Court specifically found that "if the UDW Scheme becomes effective, Highland would also fare better than on a liquidation." S.A.462 ¶ 18.

The Cayman Court further determined that the PCT was the best vehicle to address any claims arising out of the transactions that Highland characterizes as fraudulent conveyances. S.A.472 ¶¶ 77-78. It concluded that "the PCT is a much fairer way of dealing with any claims

that may properly be asserted against officers of UDW and their affiliates" because "[i]t treats all of UDW's Scheme Creditors rateably and does not give any priority to anyone." S.A.482 ¶ 125; *see also* S.A.472 ¶ 78 ("It is not a unique right of Highland alone to bring these claims. The PCT is set up so that if there is any value in the claims, the UDW Scheme creditors would be entitled to share in that value."); S.A.472 ¶ 77 ("It seems to me that no unfairness results from this to Highland as all UDW Scheme Creditors will benefit from any recoveries pro-rata in accordance with the amount of their Scheme claims against UDW.").

The UDW Sanction Order is now final. The time to appeal has long since run, and Highland did not appeal, nor did anyone else. S.A.314 ¶ 49. Furthermore, "[t]he Cayman Court shall have exclusive jurisdiction to hear and determine any suit, action or proceeding and to settle any dispute which may arise out of . . . any provision of th[e] UDW Scheme or its implementation . . . ." S.A.424-25 ¶ 28.1.

The SDNY Bankruptcy Court Grants Comity To The Sanction Orders

The SDNY Bankruptcy Court entered an order granting comity to the sanction orders in September 2017. S.A.296 ¶ 2(a) ("[T]he Sanction orders, the Schemes, the Restructuring Documents and all other agreements related thereto are hereby recognized, granted comity and given full force and effect . . . ."). It found that enforcing the Cayman Court's judgment was "in the interests of the public and of international comity" and "will not cause hardship to creditors of the Debtors . . . that is not outweighed by the benefits of granting [the] relief." S.A.295 ¶ 9. It further found that, absent the relief requested, "the efforts of the Debtors, the Cayman Court and the [JPLs] in conducting the Cayman proceedings and effecting restructuring under the Schemes and Cayman law may be thwarted by the actions of certain creditors," which result would be "inimical to the purposes of chapter 15" of the United States Bankruptcy Code. S.A.295-96 ¶ 11.

Highland was given notice of the JPLs' motion for this relief, but chose not to oppose it and did not appear at the hearing conducted by the Bankruptcy Court. S.A.10 ¶ 19. Highland did not appeal the Bankruptcy Court's order.

The Schemes Take Effect, The UDW Notes Are Discharged, And Highland Loses Its Creditor Status

The Schemes took effect on September 22, 2017 (the "Restructuring Effective Date"). S.A.314 ¶ 50. On that date, all creditor claims against UDW under the UDW Notes and other Scheme Indebtedness were released and discharged. S.A.302, 314 ¶¶ 2, 51. Furthermore, the Notes Trustee executed a Release of Notes that provided that UDW "is hereby fully and forever released and discharged from its Obligations under the Indenture and no Person will have any right, power, privilege or interest with respect to such Obligations of the Issuer." *Id.*; S.A.486-93. Accordingly, as of the Restructuring Effective Date, Highland was no longer a creditor of UDW. S.A.314 ¶ 51; Br. 25.

Highland is thus wrong when it asserts that it is "the only remaining party with viable creditor claims." Br. 28; *see also* Br. 11. It makes this claim based on its refusal to execute a validly completed "confirmation form" acknowledging that its claims against UDW were released.[13] As the High Court correctly found, however, "the UDW Notes are discharged ***by***

[13] Highland is entitled to a distribution under the UDW Scheme, but has not yet received that distribution because it struck language from the confirmation form that it executed. Br. 10. Accordingly, Highland's distribution is being held by a "Holding Period Trustee." S.A.311 ¶ 39 n.4. The Holding Period Trustee will continue to hold Highland's distribution in trust for a period of three years from the Restructuring Effective Date – *i.e.*, until September 2020 – and Highland may claim the distribution during that period by executing a valid confirmation form. *Id.*

operation of the Scheme," and "no UDW Scheme Creditor has any remaining interest in or entitlement to any claim under the UDW Notes . . . ." A.14 (emphasis added).

The High Court Grants Defendants' Motions To Dismiss

Defendants moved the High Court to dismiss the Complaint in October 2017. All Defendants submitted a joint motion, and Messrs. Economou and Kandylidis made an additional motion raising issues unique to them. After the motions were fully briefed, the High Court heard oral argument of counsel in June 2018. At the High Court's request, the parties then submitted supplemental, post-hearing briefing.

The High Court issued its Order Granting Motions to Dismiss in September 2018. In its careful and thoroughly reasoned Order, the High Court dismissed Highland's Complaint in its entirety pursuant to MIRCP 12(b)(1) and 12(b)(6). It did so primarily on standing grounds.

First, the High Court held that "Highland's failure to comply with the no-action clause mandates dismissal of its claims." A.24. Chief Justice Ingram considered and rejected Highland's argument that it should be excused from compliance with this "contractual condition precedent to Highland bringing suit" because there is no longer an indenture trustee on whom to make a demand. A.25. The High Court found that Highland's current inability to make such a demand is the result of Highland's "tactical decision not to comply with the no action clause from March 24 through September 22, 2017." *Id.* As the High Court put it: "Highland knew that if it did not timely comply with the no-action clause and allow the Trustee to consider action on behalf of all creditors, Highland's claims against UDW would be released, the Trustee would be discharged, and Highland would no longer be a creditor with the status to pursue claims for fraudulent conveyances." *Id.*

Second, the High Court held that "the UDW Scheme eliminated Highland's status as a creditor of UDW, and thus eliminated Highland's standing to prosecute the claims that it asserts in its Complaint." A.26. It further found that the "Cayman Court's final judgment is dispositive

of Highland's claims" because that Court's determination that the UDW Scheme is binding on all Scheme Creditors – including Highland – confirms that Highland no longer has creditor standing. A.28. In deciding to grant comity to the Cayman Court's final judgment, the High Court specifically addressed and rejected Highland's public policy argument, concluding that "the RMI does not have a policy against restructuring be the restructuring under Chapter 11 of the United States bankruptcy code or the Cayman Islands court-supervised restructuring." A.30. The High Court also considered and rejected Highland's contention that BCA § 128(5) somehow resuscitates Highland's creditor status.

In addition, the High Court (i) dismissed the Complaint against the Individuals for lack of personal jurisdiction, (ii) dismissed Highland's fraudulent conveyance counts for failure to state a claim to the extent that they are based on Delaware statutes and/or a theory of "constructive fraudulent conveyance," (iii) dismissed the aiding and abetting claim against the Individuals for failure to state a claim, and (iv) recognized that "if Highland were permitted to proceed with its fraudulent conveyance claims under Section 128(5), this would have the effect of reinstating $74 million of UDW debt that was discharged as part of the restructuring, putting all of UDW's creditors at risk."[14] A.33; *see generally* A.33-42.

STANDARD OF REVIEW

On appeal from a dismissal for lack of standing pursuant to MIRCP 12(b)(1), this Court reviews the High Court's legal conclusions *de novo* and its factual findings for clear error. *See Samsung Heavy Equip. Indus. Co. v. Focus Invs., Ltd.*, RMI S. Ct. No. 2018-02, at 8 (Sept. 6, 2018) ("Dismissal of a complaint, where no factual matters have been determined, is reviewed *de*

[14] As noted above, the Individuals address the personal jurisdiction and aiding and abetting rulings in their separate Brief; those rulings are not addressed herein. Furthermore, Highland does not appeal from the High Court's dismissal of its fraudulent conveyance claims to the extent that they are based on Delaware statutes. *See* A.956 ("Delaware statutes don't govern here, which we recognize as true.").

novo."); *Kramer and PII v. Are and Are*, 3 MILR 56, 61 (2008) ("Findings of fact by the High Court will not be set aside unless 'clearly erroneous.'" (citation omitted)). *See also, e.g.*, *Cortlandt St. Recovery Corp. v. Hellas Telecomms., S.a.r.l.*, 790 F.3d 411, 417 (2d Cir. 2015) ("On appeal from a dismissal under Rule 12(b)(1), we review the court's factual findings for clear error and its legal conclusions *de novo*.").

"A motion to dismiss for want of standing implicates the court's subject matter jurisdiction and is therefore appropriately brought under Rule 12(b)(1)." *Kabua v. M/V Mell Springwood, et al.*, H. Ct. Civ. No. 2015-200 (June 20, 2016), at p. 12. On a Rule 12(b)(1) motion, the plaintiff "bears the burden of establishing standing." *Apex Digital, Inc. v. Sears, Roebuck & Co.*, 572 F.3d 440, 443 (7th Cir. 2009); *see also Celestine v. Transwood, Inc.*, 467 F. App'x 317, 318 (5th Cir. 2012) ("'The burden of proof for a Rule 12(b)(1) motion to dismiss is on the party asserting jurisdiction.'") (citation omitted).

A dismissal for failure to state a claim pursuant to MIRCP 12(b)(6) is reviewed *de novo*. *Momotaro v. Chief Elec. Off.*, 2 MILR 237, 241 (2004). Under Rule 12(b)(6), "[a] complaint may be dismissed as a matter of law for two reasons: (1) lack of a cognizable legal theory or (2) insufficient facts under a cognizable legal theory." *Kabua*, H. Ct. Civ. No. 2015-200, at p. 19. In assessing the sufficiency of a plaintiff's allegations, the court may consider "the factual allegations in the plaintiffs' . . . complaint, documents attached to the complaint as an exhibit or incorporated in it by reference, . . . matters of which judicial notice may be taken, or documents either in plaintiff's possession or of which plaintiff had knowledge and relied on in bringing suit." *Brass v. Am. Film Techs., Inc.*, 987 F.2d 142, 150 (2d Cir. 1993); *see also In re Lipitor Antitrust Litig.*, 868 F.3d 231, 249 (3d Cir. 2017) ("[W]e may consider documents 'integral to or explicitly referred to in the complaint' without turning a motion to dismiss into a motion for summary judgment.").

The High Court's denial of leave to amend the complaint is reviewed for abuse of discretion. *See Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1041 (9th Cir. 2011) ("[A] district court may dismiss without leave where a plaintiff's proposed amendments would fail to cure the pleading deficiencies and amendment would be futile.").

Finally, this Court "may affirm a dismissal on any ground supported by the record, whether or not the High Court relied on other grounds or reasoning." *Momotaro*, 2 MILR at 241; *see also Luman v. Theismann*, 647 F. App'x 804, 807 n.1 (9th Cir. 2016) ("We may affirm the dismissal . . . on any ground supported by the record.").

QUESTIONS PRESENTED

1. Whether the High Court erred by dismissing Highland's Complaint given Highland's undisputed failure to comply with the Notes Indenture's no action clause.

2. Whether the High Court erred by dismissing Highland's Complaint for lack of standing in light of the fact that Highland is no longer a creditor of UDW.

3. Whether the High Court erred by dismissing Highland's claims for constructive fraudulent conveyance where such claims do not exist under either RMI statute or American common law.

ARGUMENT

I. The High Court Did Not Err By Dismissing Highland's Complaint In Light Of Highland's Failure To Comply With The No Action Clause.

The High Court properly dismissed the Complaint in light of Highland's undisputed failure to comply with the Notes Indenture's no action clause. *See, e.g.*, *Rimrock High Income Plus (Master) Fund, Ltd. v. Avanti Commc'ns Grp. PLC*, 69 N.Y.S.3d 287, 287-88 (1st Dep't 2018) ("Plaintiffs failed to comply with the no action clause, and thus lack standing to pursue their claims."); *ACE Securities Corp. v. DB Structured Prods., Inc.*, 977 N.Y.S.2d 229, 231 (1st Dep't 2013) ("[T]he certificate holders lacked standing to commence the action on behalf of the

trust."); *Feldbaum v. McCrory Corp.*, 1992 WL 119095, at *8 (Del. Ch. 1992) ("Since plaintiffs have not complied with the procedures for bringing suit set forth in those clauses, I further conclude that they as individual holders of bonds may not maintain their fraudulent conveyance claims.") (applying New York law). Indeed, as the High Court found, Highland made a "tactical decision not to comply with the no action clause." A.25. Highland made this decision as part of its effort to bring a lawsuit on its own behalf and solely for its own benefit, rather than demanding that the Notes Trustee bring a lawsuit on behalf of all noteholders – which would have required Highland to share any recovery with the other noteholders.

A no action clause "is a standard provision present in many trust indentures." *Akanthos Capital Mgmt., LLC v. CompuCredit Holdings Corp.*, 677 F.3d 1286, 1298 (11th Cir. 2012). Through these "bargained-for contractual provisions," "plaintiffs waive their rights to bring claims that are common to all bondholders, and thus can be prosecuted by the trustee, unless they first comply with the procedures set forth in the clause . . . ." *Feldbaum*, 1992 WL 119095, at *5, 7; *Quadrant Structured Prods. Co. v. Vertin*, 23 N.Y.3d 549, 555 (N.Y. 2014) ("An indenture is essentially a written agreement that bestows legal title of the securities in a single Trustee to protect the interests of individual investors who may be numerous or unknown to each other."). Thus, compliance with a no action clause is a "contractual condition precedent to bringing suit." *Akanthos*, 677 F.3d at 1290 (quoting order certifying appeal); *id.* at 1289.

Highland does not dispute that the Notes Indenture's no action clause applies on its face to bar Highland's fraudulent conveyance claims because it is broadly drafted to address "any remedy with respect to this Indenture ***or the Notes*** . . . ." S.A.239 § 6.06. *See Quadrant*, 23 N.Y.3d at 564 ("[A] no-action clause similar to the clauses in *Feldbaum* and *Lange*, that refers specifically to claims and remedies arising under the indenture ***and the securities***, applies to all claims," including fraudulent transfer claims (emphasis added)); *see also Feldbaum*, 1992 WL 119095, at *7 ("The clause in question bars all action 'with respect to' the indenture or the

securities. A fraudulent conveyance action is such an action."); *Akanthos*, 677 F.3d at 1294 ("Courts applying New York law have consistently held . . . that no-action clauses bar fraudulent conveyance claims.") (collecting cases).[15]

Highland's contention that the High Court's enforcement of the no action clause was somehow "unprecedented" and that Highland should therefore be excused from complying with its contractual obligations lacks merit. Br. 28. As discussed below, Highland did not comply with the no action clause, the fact that there is no longer a Notes Trustee today does not excuse Highland's failure to make a demand when it had the opportunity to do so, Highland's effort to sue on its own behalf contravenes the purposes of the no action clause, and the amendment that Highland sought leave to make would have been futile.

A. Highland Did Not Comply With The No Action Clause.

As the High Court found, Highland failed to comply with ***any*** of the no action clause's requirements. A.24 (Highland did not (i) "give the Trustee notice that an event of default was continuing, as required by Indenture Section 6.06(1)," (ii) "make a 'written request to the Trustee to pursue the remedy,' as required by Indenture Section 6.06(2)," or (iii) "offer[] the Trustee . . . security or indemnity (or both) satisfactory to the [Trustee] . . . as required by Indenture Section 6.06(3)," and as a result (iv) "[t]he 60 day waiting period mandated by Indenture Section 6.06(4)

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[15] Furthermore, courts applying New York law agree that no action clauses may be invoked not only by parties to the indenture, but also by third parties like the Defendants here. *See, e.g.*, *Akanthos*, 677 F.3d at 1292 ("A number of courts applying New York law have addressed this argument, both explicitly and implicitly, and have held that non-party defendants may still assert the no-action clause.") (collecting cases); *Fed. Housing Fin. Agency v. Morgan Stanley Mortg. Capital Holdings LLC*, 2016 WL 1587344, at *2 (Sup. Ct., N.Y. Cty. 2016) (holding that non-party to indenture "has standing to raise the issue of [the plaintiff's] non-compliance with the [no action] clause"); *Feldbaum,* 1992 WL 119095, at *7 ("The policy favoring the channeling of bondholder suits through trustees mandates the dismissal of individual-bondholder actions no matter whom the bondholders sue.").

never passed"). Highland does not allege or even argue that it performed any of the required actions.

Highland's contention that "[t]he Indenture Trustee received notice" that Highland was threatening to bring fraudulent conveyance claims against Defendants cannot excuse Highland's failure to comply with its contractual obligations. Highland represented to the SDNY Bankruptcy Court that "***Highland*** intends to commence a state court action under New York Debtor and Creditor Law to seek to avoid the fraudulent transfers," and submitted a draft complaint in which only ***Highland*** was named as a plaintiff. S.A.17 ¶ 8 (emphasis added); S.A.24-70. These actions cannot be construed as satisfying Highland's obligations to demand that the Notes Trustee bring suit on behalf of all noteholders and provide the Trustee with security, not to mention complying with any of the other no action clause requirements. *See, e.g.*, *Bailey v. Fish & Neave*, 8 N.Y.3d 523, 528 (N.Y. 2007) ("[C]ourts 'may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing.'" (citation omitted)); *Walnut Place LLC v. Countrywide Home Loans, Inc.*, 948 N.Y.S.2d 580, 581 (1st Dep't 2012) ("Plaintiffs' argument that the 'Event of Default' provision does not apply in this case is unavailing. Plaintiffs' interpretation of the 'no-action' clause would improperly excise the 'Event of Default' provision and distort the plain meaning of the clause." (citing *Bailey*, 8 N.Y.3d at 528)); *Akanthos*, 677 F.3d at 1296 (rejecting argument that noteholders could directly pursue fraudulent conveyance claims because they held a majority interest in the notes where they failed to satisfy the other no action clause requirements).

B. The High Court Correctly Rejected Highland's Effort To Evade The No Action Clause By Waiting To Bring Suit Until The Eve Of The Notes Trustee's Discharge.

Highland's contention that the High Court should have excused its failure to comply with the no action clause because there is no longer an Indenture Trustee ***today*** is not persuasive.

Highland correctly alleges that UDW's commencement of the Cayman restructuring proceedings on March 24, 2017 constituted an Event of Default under the Notes Indenture. A.109-10 ¶ 63. That Event of Default triggered Highland's right to invoke the no action clause procedure. *See Quadrant*, 23 N.Y.3d at 566-67 (holding that right to invoke a no action clause like the one here, which requires that the noteholder give the trustee notice of the existence of an event of default, is triggered by occurrence of such an event of default). Highland first told the Bankruptcy Court on April 21 that it would lose standing to bring its fraudulent conveyance claims as a result. S.A.600-06; A.527. Highland then installed its own hand-picked Notes Trustee effective June 2, 2017. S.A.545-46 ¶¶ 9-10; S.A.579-82; S.A.585-91. Highland thus had every opportunity to comply with the no action clause procedure during the six months that passed between the commencement of the Cayman proceedings on March 24, 2017 and the discharge of the Notes Trustee on the September 22, 2017 Restructuring Effective Date. Indeed, as the High Court observed, "at the time Highland filed the present lawsuit on August 31, 2017, the Trustee had not as yet been discharged." A.25.

Highland's "tactical decision not to comply with the no action clause" – made in an effort to keep any recovery for itself, instead of sharing such a recovery with other noteholders – cannot excuse it from its contractual obligations.[16] *Id. See also, e.g.*, *Akanthos*, 677 F.3d at 1296 ("We therefore reject the 'novel proposition that a party to a contract should be excused from complying with a condition precedent merely because it was ***capable*** of compliance.'") (emphasis in original).

[16] Highland does not challenge the High Court's finding that Highland's failure to invoke the no action clause procedure was tactically motivated, just as it fails to take issue with a number of the High Court's other findings. These findings are not necessary to the High Court's ruling because Highland's failure to comply with the no action clause is evident from the face of its Complaint and the Notes Indenture that is discussed in the Complaint. A.95-109-10 ¶¶ 12, 63. Nonetheless, they highlight the fallacy of Highland's argument that enforcing the no action clause against it would be inequitable.

Furthermore, Highland's argument that "a no-action clause applies only 'when the Trustee is authorized to decide whether to act'" contorts the authorities upon which it relies beyond recognition. Br. 29-30. For instance, in *Feldbaum*, the Delaware Chancery Court stated that "bondholders will be excused from compliance with a no-action provision where they allege specific facts which if true establish that the trustee itself has breached its duty under the indenture or is incapable of disinterestedly performing that duty." 1992 WL 119095, at *7-8. As Chancellor Allen explained, excusing compliance in that circumstance is permitted "[f]or the same reason that equity has long recognized that, in some circumstances, corporate shareholders will be excused from making a demand to sue upon corporate directors . . . ." *Id.* To put a finer point on it, these fiduciaries cannot be expected to sue themselves. And in *Quadrant*, New York's Court of Appeals held that a no action clause would not preclude a direct noteholder action if an event of default had not yet occurred under an indenture which provided that a demand could be made on the trustee only after such an event of default had occurred. 23 N.Y.3d at 566-67. Neither of these authorities supports Highland's position that a noteholder may lie in wait, with full knowledge that an indenture trustee will be discharged after the noteholder brings suit, and then point to that discharge as an excuse for failing to comply with a no action clause.

Ellington Credit Fund, the primary authority upon which Highland relies, is similarly distinguishable. Br. 29-30. The key distinction between *Ellington* and this case is that the plaintiffs in *Ellington* were deprived of the opportunity to invoke the no action clause procedure by the defendants' fraud, not by their own strategic choices. In *Ellington*, the plaintiffs were holders of certificates issued by twenty-one securitization trusts. *Ellington Credit Fund, Ltd. v. Select Portfolio Servicing, Inc.*, 837 F. Supp. 2d 162, 175-76 (S.D.N.Y. 2011). The court concluded that no action clauses applied to claims concerning eighteen of the twenty-one securitization trusts, but did not bar claims concerning the other three trusts because the investors

were fraudulently induced to exercise "clean up calls," or redemption rights, that led to the trustees in those three trusts being discharged. *Id.* at 177. The result was that "there is no longer a Trustee (or even a trust) through whom such a dispute could be channeled." *Id.* at 185. The *Ellington* plaintiffs did not learn of their injury until after they had been fraudulently induced to wind up the relevant trusts and discharge the trustees. *Id.* at 177-78. Thus, they never had the opportunity to make a demand on the trustees to prosecute their claims, and it would have been inequitable to enforce the no action clause against them as a result.

Highland does not allege that Defendants fraudulently induced it to give up its ability to comply with the no action clause as happened in *Ellington*. Nor does it claim that Defendants engaged in any other conduct that interfered with its ability to meet its contractual obligations. Highland should not be excused from compliance simply because it ***chose*** not to do so in an effort to maximize its own potential recovery at the expense of other noteholders. *See, e.g.*, *Walnut Place*, 948 N.Y.S.2d at 581 (rejecting plaintiff's asserted excuse from compliance with no action clause: "The "'prevention/impossibility' doctrine, upon which plaintiffs' argument relies, only applies, where, unlike here, nonperformance of a condition precedent was caused by the party insisting that the condition be satisfied."); *Akanthos*, 677 F.3d at 1297 (enforcing no action clause because plaintiffs' failure to comply was not the result of any wrongful acts by the defendant).

C. Highland's Effort To Bring This Lawsuit In Its Own Name, And Exclusively For Its Own Benefit, Contravenes The Purposes Of The No Action Clause.

Highland's cynical effort to invoke the purposes of the no action clause to support its position makes no sense. Those purposes are to protect bond issuers like UDW from having to defend meritless lawsuits and to ensure that any legitimate claims are brought for the benefit of all noteholders. Highland's effort to bring this lawsuit exclusively on its own behalf, to the exclusion of other noteholders, is exactly what the no action clause is designed to protect against.

This is all the more true now that the Cayman Court has established the PCT to act on behalf of all UDW Scheme Creditors.

As an initial matter, interpretation of a no action clause "'is a matter of basic contract law.'" *Cortlandt St. Recovery Corp. v. Bonderman*, 31 N.Y.3d 30, 39 (N.Y. 2018) (citations omitted). As New York's highest court has made clear, "under our law where the language of the contract is clear we rely on the terms of the document to give effect to the parties' intent." *Quadrant*, 23 N.Y.3d at 564. Highland has never argued that the no action clause is ambiguous. Accordingly, the "purpose" of the clause does not enter the equation. *Id.* at 559-60 ("In construing a contract we look to its language, for 'a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms.'"). Even if the clause's purpose were relevant, moreover, it would weigh against Highland's effort to pursue a recovery on its own behalf to the detriment of UDW's other former creditors.

As Highland acknowledges, the purposes of the no action clause include "protecting issuers like UDW 'from the expense involved in defending lawsuits that are either frivolous or otherwise not in the economic interest of the corporation and its creditors' and protecting bondholders 'against the exercise of poor judgment by a single bondholder or a small group of bondholders, who might otherwise bring a suit against the issuer that most bondholders would consider not to be in their collective economic interest.'" Br. 28-29 (quoting *Feldbaum*, 1992 WL 119095, at *5-6). Furthermore, "by delegating the right to bring a suit enforcing rights of bondholders to the trustee," no action clauses "ensure that the proceeds of any litigation actually prosecuted will be shared ratably by all bondholders." *Cortlandt*, 31 N.Y.3d at 43 (citations and internal quotation marks omitted).

Both the High Court and the Cayman Court have made findings that establish that permitting Highland to pursue its claims would directly contravene the purposes of the no action clause. In the context of Highland's argument that its creditor standing is resuscitated by BCA §

128(5) (discussed in Part II.B, *infra*), the High Court correctly determined that permitting Highland to proceed with its claims at this juncture would have the effect of "reinstating $74 million of UDW debt that was discharged as part of the restructuring, ***putting all of UDW's creditors at risk***." A.33 (emphasis added). While this suit is not brought against UDW, the High Court recognized that if it accepts Highland's contention that BCA § 128(5) reinstates Highland's creditor standing against the Defendants, the same reasoning applies to Highland's claims against UDW itself. A.34 ("Either the release [of claims against UDW] is effective, in which case the Court should dismiss Highland's claims, or it is nullified by BCA § 128(5), in which case Highland can sue UDW as well as Defendants."). As the High Court further found, "[t]his would undermine the UDW Scheme." *Id.* Highland makes no effort to challenge the High Court's conclusion in this respect.

Similarly, the Cayman Court determined that "[t]here are a number of uncertainties which would arise in any litigation brought by Highland," including "a disruption to the on-going management of the [Ocean Rig] Group," and "potential competition between the PCT claims," brought for the benefit of all creditors, and Highland's claims. S.A.482-83 ¶ 127. It also found that "the PCT is a much fairer way of dealing with any claims that may properly be asserted against officers of UDW and their affiliates. It treats all of UDW's Scheme Creditors rateably and does not give any priority to anyone." S.A.482 ¶ 125 (emphasis in original).

Highland's effort to proceed with its fraudulent conveyance claims could benefit only one party – Highland – at the expense of both UDW and its other former creditors. This is directly at odds with the purposes of the no action clause, and cannot justify a deviation from the Notes Indenture's plain and unambiguous terms. *Quadrant*, 23 N.Y.3d at 564.

D. The High Court Properly Denied Highland's Request For Leave To Amend.

Finally, the High Court did not abuse its discretion by denying Highland leave to amend. Highland requested leave to "affirmatively allege without any doubt that there is no longer a

trustee who can file suit in lieu of Appellants." Br. 30-31. Such an amendment would serve no useful purpose. It is undisputed that the UDW Notes have been released and that the Notes Trustee has been discharged. This does not provide any basis for Highland to escape compliance with the no action clause, however, for the reasons discussed above. Accordingly, the proposed amendment would be futile. *Cervantes*, 656 F.3d at 1041.

II. The High Court Did Not Err By Dismissing Highland's Complaint For Lack Of Standing Given That Highland Is No Longer A Creditor Of UDW.

The High Court correctly held that Highland lacks standing for a second and independent reason – because it is no longer a creditor of UDW. As the High Court recognized, "Highland has not disputed that the UDW Scheme extinguished its status as a creditor of UDW." A.27. Not only did Highland repeatedly tell the SDNY Bankruptcy Court and the Cayman Court that this would be the case, but it also admitted to the High Court that "Plaintiffs no longer have any creditor recourse against UDW" because "the Cayman judgment eliminated liability ***against UDW***." S.A.665, 670 (emphasis in original); *see also* Br. 25 ("[T]he UDW Scheme discharged the debt due to Highland from UDW"). Highland further admitted that "in order for Plaintiffs to assert any fraudulent conveyance claims, they must be creditors." S.A.665. Thus, Highland admits that it no longer has the requisite status to prosecute its fraudulent conveyance claims. The analysis can and should end there.

It is common ground that the High Court properly looked to the common law of fraudulent conveyance as derived from the Statute of Elizabeth.[17] A.26 ("The parties agree that the common law of fraudulent conveyance . . . is derived from the Statute of Elizabeth."); *see also Husky Int'l Elecs., Inc. v. Ritz*, 136 S. Ct. 1581, 1587 (2016) (recognizing that the Statute of Elizabeth constitutes a "restatement of the law of so-called fraudulent conveyances."). The

[17] In the absence of RMI authority, RMI courts "may look to court decisions of the United States as well as accepted common law principles for guidance." *In re Matter of Public Law No. 1995-118*, 2 MILR 105, 110 (1997); *see also, e.g., Likinbod v. Kejlat*, 2 MILR 65, 66 (1995).

parties also agreed below that South Carolina law best reflects U.S. common law derived from the Statute of Elizabeth. *See* A.26. This is so because South Carolina is the only state that has not replaced the common law as derived from the Statute of Elizabeth with a modern uniform statute.

Under the common law of fraudulent conveyance, only a creditor has standing to prosecute a fraudulent conveyance claim, and if the plaintiff loses its creditor status, it may no longer prosecute the claim. *See Eberhard v. Marcu*, 530 F.3d 122, 130-31 (2d Cir. 2008) ("In keeping with centuries of common law and statutory tradition, state and federal courts construing [New York fraudulent conveyance law] have continued to allow only creditors to set aside fraudulent transactions. Non-creditors can find no relief in a statute whose 'object . . . is to enable a creditor to obtain his due despite efforts on the part of a debtor to elude payment.'"); *Carr v. Guerard*, 616 S.E.2d 429, 430 (S.C. 2005) ("[A]s soon as his judgment became more than ten years old, [the plaintiff] lost his judgment-creditor status. ***Because he is no longer a creditor, he lacks standing to bring an action under the Statute of Elizabeth***." (emphasis added)). *See also RRR, Inc. v. Toggas*, 98 F. Supp. 3d 12, 13, 19-20 (D.D.C. 2015) (applying South Carolina law and granting renewed motion to dismiss "long-running" fraudulent conveyance action for lack of standing where underlying judgment lapsed and plaintiff lost the right to prosecute the claims as a result); *Terry v. Belfort*, 70 A.D.3d 1028, 896 N.Y.S.2d 378, 379-80 (2d Dep't 2010) (party that accepted distribution from restitution fund for victims of securities fraud pursuant to a court order, which conditioned such distributions on recipients waiving their judgments against transferor, was no longer a creditor and could no longer prosecute fraudulent conveyance claims). The "creditor standing requirement was the received construction of the Statute of Elizabeth since at least the early Seventeenth Century." *Eberhard*, 530 F.3d at 130 (internal quotation marks omitted).

Thus, as the High Court correctly concluded, "Highland's fraudulent conveyance claims were extinguished with the coming into effect of the UDW Scheme." A.27. The High Court also correctly granted comity to the Cayman Court's judgment and rejected Highland's contention that BCA § 128(5) revives its creditor claims. A.27-33.

A. The High Court Properly Granted Comity To The UDW Sanction Order.

The High Court correctly recognized that the Cayman Court's final judgment is "dispositive of Highland's claims." A.27. The Cayman Court determined that the UDW Scheme is "binding on . . . the Scheme Creditors," including Highland. S.A.428. As a result, "Highland's status as a creditor of UDW, and it[s] standing to pursue the claims asserted here, was extinguished" on the Restructuring Effective Date. A.28. The Cayman Court entered the UDW Sanction Order with full knowledge that doing so would divest Highland of standing to pursue its fraudulent conveyance claims. And while the Cayman Court did not have the opportunity to address Highland's contentions based on BCA § 128(5), that is only because Highland made a tactical decision not to raise those arguments in the Cayman proceedings. A.497:8-12 ("[W]e didn't need to.").

Highland does not dispute that "'[c]omity has long counseled courts to give effect, whenever possible, to the executive, legislative and judicial acts of a foreign sovereign so as to strengthen international cooperation.'" A.29 (quoting *Asignacion v. Rickmers*, H. Ct. Civ. No. 2016-026 (Nov. 10, 2016), at p. 18). Nor does it dispute that granting comity is "particularly important" in the context of foreign restructurings like UDW's "because otherwise dissatisfied creditors can upset a reorganization that already has gone into effect by bringing a collateral attack in another jurisdiction." *Id.* (citing *Victrix S.S. Co., S.A. v. Salen Dry Cargo A.B.*, 825 F.2d 709, 713-14 (2d Cir. 1987)). As the High Court recognized, this is precisely what Highland seeks to do here – without regard to the fact that allowing it to proceed would "have the effect of reinstating $74 million of UDW debt that was discharged as part of the restructuring, putting all

of UDW's creditors at risk." A.34. Highland does not argue that the Cayman Court lacked jurisdiction over it, or that the Cayman proceedings failed to comport with due process. Instead, Highland contends that the High Court should have refused to grant comity to the UDW Sanction Order on the theory that the Cayman Islands restructuring somehow violated RMI public policy.[18] This argument is plainly wrong, and this Court should reject it for several reasons.

First, in asserting that the Nitijela made "a deliberate policy choice to preclude RMI companies from pursuing the type of reorganization that exists under the Cayman Islands insolvency regime," Highland chooses to ignore the Nitijela's recent adoption of the UNCITRAL Model Law on Cross-Border Insolvency Implementation Act, 2018 (the "Model Law"), 30 MIRC Ch. 7, §§ 700 et seq.[19] The Model Law is the RMI's equivalent of Chapter 15 of the United States Bankruptcy Code – the same statute pursuant to which the SDNY Bankruptcy Court already afforded comity to the UDW Sanction Order. *See* 11 U.S.C. § 1501(a) ("The purpose of this chapter is to incorporate the Model Law on Cross-Border Insolvency . . . ."). *See also* S.A.296 ¶ 2(a). The Nitijela enacted the Model Law in March 2018 – just half a year after Highland brought this lawsuit.

The Model Law contemplates that non-resident RMI corporations may be reorganized in accordance with the law of foreign jurisdictions, and thus evinces a public policy ***in favor*** of debt

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[18] Highland abandoned its public policy position at oral argument before the High Court. A.914:7-10 ("The notion that the public policy of the Marshall Islands is somehow hostile to restructuring is not the point. We have never argued that."). Thus, this Court need not even consider this argument on appeal. *See, e.g.*, *United States v. McGehee*, 672 F.3d 860, 873 (10th Cir. 2012) ("'We typically find waiver . . . where a party attempts to reassert an argument that it previously raised and abandoned below.'" (citation and emphasis omitted)); *Kashimawo-Spikes v. U.S. Bancorp*, 170 F. App'x 984, 985 (8th Cir. 2006) ("claim relinquished below need not be addressed on appeal" (citing *United States v. Olano*, 507 U.S. 725, 732-33 (1993))).

[19] Highland strains the limits of good advocacy by omitting to bring the Model Law to the Court's attention in the context of its public policy argument. The Model Law was addressed in the briefing below. *See* S.A.670.

restructurings. Its stated objectives include "[c]ooperation between the High Court and other competent authorities of the Republic and foreign States involved in cases of cross-border insolvency," "[f]air and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor," "[p]rotection and maximization of the value of the debtor's assets," and "[f]acilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment." Model Law, introductory clause. What's more, in addition to UDW's Cayman Islands restructuring, several RMI-incorporated companies have brought Chapter 11 reorganization proceedings in the United States in recent years.[20] The Nitijela affirmatively endorsed the use of such foreign restructurings by enacting the Model Law.

Moreover, the Model Law's legislative history makes clear that the Nitijela sought to foreclose wasteful, resource-intensive collateral attacks on foreign insolvency proceedings like this one. Indeed, the legislative history appears to directly address this case:

> In recent months, non-resident creditors have filed cases in the High Court to collect debts from non-residents, including non-resident domestic corporations. In some cases, the creditors ***have already filed a case (or two) in a foreign jurisdiction and have lost or do not like how their cases are proceeding.*** Looking for another bite at the apple, the creditors file a second or third case in the High Court.
>
> The cases tend to be complex and take a lot of High Court time, time that could be spent on local matters. ***This bill will give the High Court the statutory authority to stay or dismiss cases in favor o[f] foreign proceedings and to assist foreign insolvency proceedings.*** The bill will help the High Court manage its time and resources effectively for the benefit of the people of the Marshall Islands.

Model Law, N.B. No. 12, Bill Summary (emphasis added).

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[20] *See, e.g., In re Eagle Bulk Shipping Inc.*, No. 14-12303-shl (Bankr. S.D.N.Y. filed Aug. 6, 2014); *In re Genco Shipping & Trading Ltd.*, No. 14-11108-shl (Bankr. S.D.N.Y. filed Apr. 21, 2014); *In re Gen. Mar. Corp.*, No. 11-15285-mg (Bankr. S.D.N.Y. filed Nov. 17, 2011); *In re Omega Navigation Enters., Inc.*, No. 11-35926 (Bankr. S.D. Tex. filed July 8, 2011).

Second, Highland does not identify any evidence to support the proposition that the RMI ever had a public policy against restructuring the debt of non-resident RMI corporations. As Highland acknowledges, comity should be denied only where the foreign proceeding is "***repugnant***" to the forum's public policy. Br. 20 (emphasis added) (quoting *In re Schimmelpenninck*, 183 F.3d 347, 365 (5th Cir. 1999)). *See also, e.g.*, *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199, 1215 (9th Cir. 2006); *see also In re Hashim*, 213 F.3d 1169, 1172 (9th Cir. 2000) ("The [public policy] exception should be interpreted narrowly . . . ."). Highland does not point to any pronouncement by the Nitijela or other indication that foreign debt restructurings are repugnant to RMI public policy. The closest Highland comes is to point to Business Corporations Act Sections 105 (which authorizes the High Court to supervise the liquidation of a dissolved corporation) and 106 (which sets out procedures for the resolution of creditor claims in respect of a dissolved corporation). Br. 21-22. According to Highland, the fact that RMI law only specifies procedures for winding up an insolvent corporation's affairs by liquidation, and does not include a procedure for a domestic restructuring, demonstrates a "deliberate policy choice to preclude RMI companies" from restructuring their debt. Br. 12, 21. Highland is wrong. The Nitijela's silence on the topic of restructurings – prior to enacting the Model Act – is not evidence of a public policy prohibiting them.[21] *See Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 749 (1989) ("Ordinarily, 'Congress' silence is just that – silence.'" (citation omitted)); *Zuber v. Allen*, 396 U.S. 168, 185 (1969) ("Legislative silence is a poor beacon to follow in discerning the proper statutory route."); *Symons v. Chrysler Corp. Loan Guarantee Bd.*, 670 F.2d 238, 242 (D.C. Cir. 1981) ("Drawing

[21] *Chubb Ins. (China) Co. v. Eleni Maritime Ltd.*, RMI S. Ct., No. 2016-002 (June 6, 2017), cited by Highland, is irrelevant. Br. 22. *Chubb* stands for the unremarkable proposition that RMI law does not include aspects of an international protocol that the Nitijela chose not to adopt. It says nothing about public policy, not to mention comity.

inferences as to congressional intent from silence in legislative history is always a precarious business.").

Highland's contention that the Nitijela expressed a policy preference against debt restructuring by enacting BCA § 128(5) is even further afield. That statute says nothing about debt restructuring; it addresses the effects of a transfer of domicile. To the extent that Highland's contention is that ***this particular restructuring*** violated public policy due to the transfer of UDW's domicile, the Court should reject that argument as well. Not only is Highland's interpretation of BCA § 128(5) wrong, as discussed in Part II.B, *infra,* but even if it were correct it would fall short of establishing that the UDW Sanction Order is repugnant to RMI public policy.[22] *See Asignacion*, H. Ct. Civ. No. 2016-026, at p. 23 (granting comity to holding in foreign proceedings that claims must be resolved under Philippine law, not RMI law, despite argument that choice of law and forum provisions were contrary to RMI law). This is all the more true given that Highland and the other noteholders agreed that the Cayman Islands was a Permitted Jurisdiction to which UDW might transfer its domicile. A.31.

Third, this Court need look no further than the Order to dispel Highland's argument that "[t]he High Court eschewed its mandate as a sovereign tribunal of reaching its own decision on whether extending comity to the Cayman UDW Scheme comports with RMI law and public policy . . . ." Br. 20. Far from "eschewing" any "mandate" to which it might be subject, the High Court conducted a public policy analysis and concluded that "[g]ranting comity would not

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[22] *Jaffe v. Samsung Elecs. Co.*, 737 F.3d 14 (4th Cir. 2013), does not support Highland's argument. Br. 23-24. In that case, the Fourth Circuit determined that the bankruptcy court had properly denied a request by the administrator of a German bankruptcy estate for authority to terminate certain intellectual property licenses in light of (1) "Congress's determination 'that allowing patent licenses to be terminated in bankruptcy would "impose[] a burden on American technological development" and (2) record evidence that granting the requested relief would "slow the *pace* of innovation, to the detriment of the U.S. economy." *Jaffe*, 737 F.3d at 23 (emphasis in original) (citations omitted). Highland does not point to any equivalent adverse effect on the RMI that could result from enforcing the UDW Sanction Order.

be against RMI public policy." A.29-30. As the High Court correctly recognized, "the RMI does not have a policy against restructuring be the restructuring under Chapter 11 of the United States bankruptcy code or the Cayman Islands court-supervised restructuring."[23] A.30. The fact that Highland disagrees with the result does not mean that the High Court failed to analyze the issue.

Finally, Highland's suggestion that the UDW Sanction Order violates RMI public policy on the theory that it "provide[d] releases to the non-debtor third parties" who Highland has named as defendants in this case is wrong. This is so for the simple reason that Highland's claims were dismissed for lack of standing, not based on third-party releases. As the High Court correctly recognized – and as Highland has repeatedly admitted when it served its purposes to do so – it was the discharge of Highland's creditor claims ***against UDW*** that resulted in its loss of standing to prosecute its fraudulent conveyance claims. A.27. Highland does not cite any authority from any jurisdiction for the proposition that a discharge of ***the debtor's*** debts in a court-supervised restructuring violates public policy. Far from violating public policy, such a discharge is a core element of any restructuring. *See, e.g.*, *DPWN Holdings (USA), Inc. v. United Air Lines, Inc.*, 747 F.3d 145, 150 (2d Cir. 2014) ("The [Chapter 11] discharge of [preconfirmation] claims serves the bankruptcy policy of providing debtors with a 'fresh start' to permit their continued operation free of pre-bankruptcy debts."); *In re Premier Automotive Servs., Inc.*, 492 F.3d 274, 284 (4th Cir. 2007) ("'The purpose of Chapter 11 reorganization is to assist financially distressed business enterprises by providing them with breathing space in which to return to a viable state.'" (citation omitted)). Furthermore, the rare cases Highland has

[23] Highland's opaque assertion that the High Court "conflated bankruptcy restructuring with the ability of RMI corporations to liquidate and wind up their affairs under the provisions of the BCA" finds no support in the High Court's Order. Br. 21. If anything, it appears to be Highland that is conflating things, as it cites in support of this argument the section of the High Court's Order that deals with BCA § 128(5) – not comity. *Id.* (citing A.32-33).

identified in which United States courts have denied comity are easily distinguished.[24] Br. 19-21.

B. BCA § 128(5) Does Not Resuscitate Highland's Creditor Standing.

The High Court correctly held that BCA Section 128(5) does not operate to reinstate Highland's creditor standing. Section 128(5) provides:

> ***The transfer of domicile of any corporation of the Republic shall not*** affect any obligations or liabilities of the corporation incurred prior to such transfer, nor affect the choice of law applicable to obligations or rights prior to such transfer, nor ***adversely affect the rights of creditors*** or shareholders of the corporation ***existing immediately prior to such transfer.***

BCA § 128(5) (emphasis added). As the High Court correctly recognized, BCA § 128(5) ensured that "any creditor action [Highland] could have brought immediately before the transfer [of UDW's domicile], it could have brought immediately after the transfer." A.30. The statute has no application here because Highland lost its creditor status as the result of a Cayman Islands court-supervised restructuring a year and a half later, not because of UDW's transfer of its domicile.

While Defendants have not been able to identify any legislative history for BCA § 128(5), the statute is similar to those in other jurisdictions providing that creditors and other

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[24] In *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, a United States court refused to grant comity to an antisuit injunction entered in a later-filed British proceeding that was specifically "intended to interfere with and terminate" the United States action. 731 F.2d 909, 938 (D.C. Cir. 1984). Here, it is this later-filed action that is intended to "interfere with" the UDW Sanction Order. In *In re Vitro S.A.B. de C.V.*, the Fifth Circuit declined to grant comity to the debtor's bankruptcy plan because the plan included provisions that released the obligations of non-debtor third-parties in violation of the United States Bankruptcy Code. 701 F.3d 1031, 1038, 1057-59 (5th Cir. 2012). As discussed above, Defendants do not rely on such releases here. Finally, in *Overseas Inns S.A. P.A. v. United States*, granting comity would have prevented the U.S. Internal Revenue Service from collecting U.S. federal income taxes owed by the debtor. 911 F.2d 1146, 1149 (5th Cir. 1990). In declining to do so, the court cited reports from both houses of Congress establishing an "inexpungable public policy that favors payment of lawfully owed federal income taxes." *Id.*

corporate stakeholders do not lose their rights simply because a company goes through a change of formal legal status, be it through a transfer of domicile, merger or dissolution. For instance, the American Bar Association has promulgated a Model Business Corporations Act that contains transfer of domicile provisions that have a similar import as BCA § 128(5), ensuring that the mere act of transferring a company's domicile does not eliminate its liabilities or impair creditors' ability to enforce those liabilities. ABA Model Business Corporation Act (2016 Revision) § 9.24(a)(2) ("When a domestication becomes effective . . . all debts, obligations and other liabilities of the domesticating corporation are the debts, obligations and other liabilities of the domesticated corporation."). As the ABA commentary explains: "The domesticated corporation is the same entity as the domesticating corporation." *Id.*, Official Comment. Put differently, BCA § 128(5) ensured that Ocean Rig UDW Inc., a Cayman Islands Corporation, had all the same liabilities, and was subject to the same creditor claims, on the day after UDW transferred its domicile as Ocean Rig UDW Inc., a Marshall Islands Corporation, had the day before the transfer was effected.

This is no different from a "survival statute" which provides that claims against dissolved corporations do not automatically abate as a result of the dissolution, as they would at common law. *See* 16A Fletcher Cyc. Corp. § 8144 (2018) ("all jurisdictions have statutes enabling suits to be brought against, and defended by, a dissolved corporation"); *cf. Bd. of Educ. v. Herzog Bldg. Corp.*, 190 N.E.2d 152, 154 (Ill. Ct. App. 1963) (holding that claim survived corporate merger under Illinois merger statute: "[I]t would be a travesty on justice and pervert the intent of the statute if a corporation could rid itself of its obligations by merging with another corporation just before suit was filed against the absorbed corporation.").[25]

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[25] The Illinois statute provided, in terms similar to those of BCA § 128(5):

> "Such surviving or new corporation shall thenceforth be responsible and liable for all the liabilities and obligations of each of the corporations so merged or

Highland's interpretation, in contrast, would expand the statute's reach far beyond any reasonable understanding of its language. According to Highland, "[t]o provide any meaning to the statute, BCA § 128(5) must . . . be read as stopping the clock at the time of redomiciliation," such that Highland's rights "persist ***regardless of what occurred after UDW's redomiciliation out of the RMI***." Br. 13, 24 (emphasis added). Thus, according to Highland, it would have continued to have standing to bring its fraudulent conveyance claims even if UDW had paid the debt in full or Highland had sold its UDW Notes to a third party. This interpretation finds no support in the statutory language and defies both logic and common sense.

1. The High Court Correctly Interpreted BCA Section 128(5) Based On The Plain Meaning Of Its Language.

The High Court correctly determined that the statutory language does not support Highland's argument that BCA § 128(5) reinstates its creditor standing. A.31. Needless to say, "'[s]tatutory interpretation begins with the plain meaning of the statute's language.'" *Lekka v. Kabua*, 3 MILR 167, 171-72 (2013) (citation omitted). Under the plain meaning of Section 128(5), a corporation's "***transfer of domicile***" may not "adversely affect the rights of creditors" which existed "immediately prior to such transfer." BCA § 128(5) (emphasis added). Here, UDW's transfer of domicile to the Cayman Islands in April 2016 did not adversely affect Highland's creditor rights. Rather, it was the restructuring of UDW's debt in September 2017 – 17 months later – that resulted in Highland losing its creditor standing. As the High Court recognized, the statute says nothing about a company's ability to engage in debt restructurings or any other activities that are permitted under the laws of the jurisdiction to which it transfers its

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> consolidated; and any claim existing or action or proceeding pending by or against any of such corporations may be prosecuted to judgment as if such merger or consolidation had not taken place . . . . Neither the rights of creditors nor any liens upon the property of any of such corporations shall be impaired by such merger or consolidation."

Ill. Rev. Stat. 1961, Ch. 32, § 157.69(e) (quoted in *Herzog Bldg. Corp.*, 190 N.E.2d at 153).

domicile. A.31 ("[N]othing in the language of Section 128(5) provides that Highland['s] rights as a creditor cannot be affected by subsequent law or acts."). The High Court properly declined to expand the statute's reach to cover such activities.

The sole case that Highland relies on to support its reading of Section 128(5), *Independent Investor Protective League v. Time, Inc.*, 50 N.Y.2d 259 (1980), actually demonstrates the flaw in Highland's atextual interpretation. In that case, New York's Court of Appeals – its highest court – was called on to interpret New York's survival statute, which provides that "[t]he dissolution of a corporation shall not affect any remedy available to . . . [its] shareholders for any right or claim existing . . . before such dissolution." *Id.* at 264 (interpreting N.Y. Bus. Corp. Law § 1006). The question was whether an investor who previously had standing to bring a derivative action on behalf of Sterling Communications, Inc. lost that standing upon Sterling's dissolution. The Court of Appeals answered that question in the negative, holding that "the corporate dissolution ***in itself*** cannot preclude a qualified plaintiff from being deemed a shareholder 'at the time of bringing the [derivative] action.'" *Id.* (quoting N.Y. Bus. Corp. Law § 626(b)) (emphasis added)); *see also Snyder v. Pleasant Valley Finishing Co.*, 756 F. Supp. 725, 730 (S.D.N.Y. 1990) (under N.Y. Bus. Corp. Law § 1006, "[a] corporation's dissolution or liquidation, ***without more,*** will not defeat a shareholder's right to prosecute an action on the corporation's behalf" (emphasis added)).

Similarly, BCA § 128(5) protected Highland from losing any rights as the result of the transfer of domicile ***in itself***. It does not, however, immunize Highland from the effect of a court-supervised debt restructuring conducted a year and a half later with the support of every creditor who voted other than Highland. *See Snyder*, 756 F. Supp. at 730-31 (distinguishing *Independent Investor Protective League* and holding that representative of former shareholder in dissolved New York corporation lacked standing to bring derivative claim where "plaintiff's voluntary surrender of shares constitutes 'something more' than the mere liquidation of Textiles

and Finishing, without which plaintiff might otherwise retain the right to maintain this derivative action.").

2. The High Court Correctly Recognized That Additional Factors Support Its Interpretation Of The Statutory Language.

The High Court's straightforward application of the plain and unambiguous statutory language is dispositive, as discussed above. As the High Court recognized, its conclusion is further bolstered for several reasons.

First, Highland is in a particularly poor position to invoke BCA § 128(5) to challenge the elimination of its creditor standing in a Cayman Islands restructuring given that "Highland agreed [in the Notes Indenture] that the Cayman Islands was a 'Permitted Jurisdiction' to which . . . UDW could transfer." A.31. Thus, Highland was on notice that UDW might become subject to Cayman Islands law, rather than RMI law, and has no basis to complain that this in fact happened.

Second, Highland lost its ability to bring its claims because it "slept on its rights" for six months after UDW initiated the Cayman proceedings, when it had the opportunity to invoke the no action clause procedure. *Id.* Highland retained the right to bring a fraudulent conveyance action when UDW transferred its domicile to the Cayman Islands. Thus, BCA § 128(5) is not implicated. Highland could, moreover, have invoked the no action clause procedure at any time after UDW commenced the Cayman proceedings. It ***chose*** not to do so because it was only interested in bringing claims on its own behalf and for its own benefit, and did not want to share any recovery with other noteholders. It was this tactically motivated decision – not UDW's transfer of its domicile – that led to the loss of Highland's standing to bring its fraudulent conveyance claims when the UDW Scheme was consummated.

Third, "Highland has not established that in the absence of the transfer of domicile, the UDW board could not have pursued the Cayman Island[s] winding up." A.31. Accordingly,