there was no basis to treat the "transfer of domicile" as "adversely affect[ing]" Highland's creditor rights as would be required for BCA § 128(5) to apply. Chief Justice Ingram based that conclusion on a compelling record, including the opinion of Defendants' Cayman law expert that "[h]ad UDW not redomesticated to the Cayman Islands, it could nevertheless have been subject to a restructuring in the Cayman Islands because it had property and conducts business in the Cayman Islands." S.A.611 ¶ 10; *see also* S.A.612 ¶ 11. This opinion was corroborated by the fact that "[t]hree of UDW's subsidiaries restructured their debt through the Cayman Proceedings while remaining RMI corporations," and by the SDNY Bankruptcy Court's detailed factual findings to the effect that UDW had extensive contacts with the Cayman Islands. A.31; S.A.118. Highland's expert implicitly conceded this point, opining only that "***a foreign company with limited connection to Cayman***" would face difficulties in successfully restructuring its debt in the Cayman Islands, without addressing the question whether ***UDW*** was such a company. A.572 ¶ 37 (emphasis added). As the High Court put it: "The Moss declaration does not show that absent the transfer of domicile, UDW would have been a 'foreign company with limited connection to the Cayman,' and not able to restructure its debt through the Cayman procedure." A.33.

On appeal, Highland does not meaningfully challenge the substance of Chief Justice Ingram's finding that redomiciliation was not necessary to UDW's debt restructuring. Instead, Highland makes two procedural arguments, neither of which is persuasive. Initially, Highland accuses the High Court of inappropriately "incorporating a proximate cause element" into BCA § 128(5) by requiring the plaintiff to "show that the loss of the right was ***solely*** caused by the [re]domiciliation." Br. 25 (emphasis in original). But the High Court did no such thing. Rather than reading the statute to impose a ***heightened*** causation requirement, it concluded that UDW's redomiciliation was not even a ***but-for*** cause of Highland's loss of creditor standing. *See* A.31;

see also, e.g., *Holmes v. SIPC*, 503 U.S. 258, 268 (1992) (explaining that a proximate cause element requires a showing above and beyond but-for causation).

Highland also argues, in the alternative, that "even if the High Court was correct in reading a proximate cause requirement into BCA § 128(5)," the High Court "erred by dismissing Appellants' claims on that basis at the motion to dismiss stage." Br. 26. This argument misses the mark because the High Court's opinion did not impose a proximate cause requirement or even include the term "proximate cause" anywhere in its analysis.

Highland is also wrong in asserting that the High Court was required to blindly accept its "factual" allegations to the effect that there was a "direct tie between redomiciliation and the wiping out of Highland's notes." Br. 26. The High Court was not required to credit these allegations. Initially, the High Court's determination of foreign law based on expert opinions "must be treated as a ruling on a question of law." MIRCP 44.1. Thus, it was not required to accept Highland's allegation that UDW's transfer of its domicile was necessary to the debt restructuring in the face of an expert opinion to the contrary. Moreover, because the Defendants made a "factual attack" on Highland's standing (*i.e.*, supported by declarations and documentary evidence), "[t]he law is clear that . . . the district court may properly look beyond the jurisdictional allegations of the complaint and view whatever evidence has been submitted on the issue to determine whether in fact subject matter jurisdiction exists."[26] *Apex*, 572 F.3d at 443-44

[26] Highland discusses only the inapplicable standard for "facial" challenges to standing, and ignores the standard for factual challenges, notwithstanding the extensive factual record developed by the parties. Br. 26 (quoting *Amidax Trading Grp. v. S.W.I.F.T. SCRL*, 671 F.3d 140, 145 (2d Cir. 2011), for the proposition that "[i]n reviewing a ***facial attack*** to the court's jurisdiction, we draw all facts – which we assume to be true unless contradicted by more specific allegations or documentary evidence – from the complaint and from the exhibits attached thereto.") (emphasis added)). Even so, the authorities that Highland relies on recognize that allegations in the plaintiff's complaint need not be taken as true on a motion to dismiss for lack of standing if they are "contradicted by . . . documentary evidence." Br. 17 (quoting *Boelter v. Hearst Comm'ns, Inc.*, 192 F. Supp. 3d 427, 437-38 (S.D.N.Y. 2016)); Br. 26 (quoting *Amidax Trading Grp.*, 671 F.3d at 145). The High Court correctly applied the standard applicable to

(internal quotation marks and citation omitted); *see also id.* (holding that, where a defendant makes a "factual challenge" to a plaintiff's standing on a Rule 12(b)(1) motion "'no presumptive truthfulness attaches to plaintiff's allegations'" (citations omitted) (quoting *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977)); *see also Ogle v. Church of God*, 153 F. App'x 371, 375 (6th Cir. 2005) ("Where the defendant brings a factual attack on subject matter jurisdiction, no presumption of truth applies to the allegations contained in the pleadings, and the court may consider documentary evidence in conducting its review."). Based on the record developed by the parties, the High Court correctly rejected Highland's allegation of a "direct tie" between the transfer of UDW's domicile and the elimination of Highland's creditor standing, and determined that Highland lacked standing because, *inter alia*, it failed to show that UDW's transfer of its domicile was necessary to UDW's Cayman debt restructuring. A.33.

Finally, the High Court also correctly recognized that Highland's interpretation of BCA § 128(5) produces an "absurd result." A.33. As Chief Justice Ingram explained, if Highland is correct that BCA § 128(5) "stops the clock," and locks in for all time the rights that a creditor of a former RMI corporation had the day before the company transferred its domicile, that could lead to such creditors having "***more rights*** than if the transfer of domicile had not occurred." *Id.* (emphasis added). This would be the result if "the RMI changed its laws [after the company transferred its domicile] in a way that ***limited creditors rights***," because under Highland's reading of Section 128(5), "creditors of the re-domiciled corporation would still be entitled to creditor rights under the old RMI law." *Id.* (emphasis added). This concern is particularly apt

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factual challenges, A.19, and its consideration of evidence outside the pleadings in assessing a factual attack on standing does not convert the proceeding into one for summary judgment. *See Am. Postal Workers Union of Los Angeles, AFL-CIO v. U.S. Postal Serv.*, 861 F.2d 211, 213-14 (9th Cir. 1988) (granting motion to dismiss for lack of standing where plaintiff did not have "contractual authorization to bring suit": "Even though [the district court] had to consider affidavits beyond the pleadings, such a review does not convert the preliminary hearing on standing into a summary judgment procedure.").

now that the Nitijela has adopted the Model Law, which expressly endorses foreign restructurings that may impact on creditors' rights by, for instance, eliminating creditor standing to bring fraudulent conveyance claims. The High Court correctly declined to interpret a statute in a way that would lead to absurd results. *Dribo v. Bondrik*, 3 MILR 127, 138 (2010) ("We are to avoid [statutory] constructions that produce 'odd' or 'absurd results' or that is 'inconsistent with common sense.'" (citations omitted)).

III. The High Court Did Not Err By Dismissing Highland's Claims For Constructive Fraudulent Conveyance (Second, Fourth And Sixth Causes Of Action).

Finally, the High Court properly dismissed Highland's claims for "constructive fraudulent conveyance" because there is no such claim at common law.

As the High Court recognized, under applicable common law, a claim for fraudulent conveyance "requires actual intent, defined as intent of the grantor to delay, hinder or defraud its creditor." A.35 (citing *Royal Z Lanes, Inc. v. Collins Holding Corp.*, 524 S.E.2d 621, 623 (S.C. 1999)). Such intent must be proven by clear and convincing evidence. *Id.* This burden may be met in either of two ways: either by direct evidence of fraudulent intent, or by evidence of "badges of fraud" that can give rise to a presumption of intent. *Id.* "[T]he badges are not a substitute for intent, but only a way [of] proving intent, and any presumption may be rebutted." *Id.*

Constructive fraudulent conveyance is a separate species of fraudulent conveyance that does not require proof of fraudulent intent. Many states have enacted statutes that permit such claims, and the Nitijela recently followed suit – although the RMI statute does not apply retroactively to Highland's claims. Nitijela of the RMI, 39th Constitution Regular Session, Uniform Voidable Transaction Act 2018, Bill No. 133 ("UVTA"); *see also id.* § 15 (UVTA applies only "prospectively to causes of action accruing on or after the effective date."). These statutes create liability for fraudulent conveyance even absent proof of fraudulent intent. *See*

UVTA Bill Summary at 16 (noting that model acts "render a transfer made or obligation incurred without adequate consideration to be 'constructively fraudulent' – *i.e.*, without regard to the actual intent of the parties" – under specified conditions). *See also Marine Midland Bank v. Murkoff*, 508 N.Y.S.2d 17, 21 (2d Dep't 1986) (intent of the drafters of the Uniform Fraudulent Conveyance Act was to extend fraudulent conveyance law "to apply to situations where no such actual intent could be proven," which was accomplished by "provid[ing] relief based . . . on the rationale of constructive fraud."). No such claim exists at common law. *Royal Z. Lanes, Inc.*, 524 S.E.2d at 623 (fraudulent conveyance requires proof of fraudulent intent).

Highland does not dispute that there is no claim for constructive fraudulent conveyance at common law. Instead, it argues that it "included the term 'constructive' in these causes of action to make clear that they seek to avoid the transfers under the common law both by alleging and proving actual fraud, and by alleging and showing a badge of fraud, thereby creating a rebuttable presumption of actual intent to defraud." Br. 33. Highland confuses the point. The High Court did not dismiss Highland's First, Third, Fifth or Seventh causes of cation – which plead actual fraud – for failure to state a claim. If this case proceeds, Highland will have the opportunity to try to prove those claims either by direct evidence of fraudulent intent or by attempting to show that there are sufficient badges of fraud to establish a rebuttable presumption. Regardless of the method of proof, this is the same claim – one that requires proof of fraudulent intent. On the other hand, the High Court correctly dismissed Highland's claims for constructive fraudulent conveyance, which do not exist at common law.

Highland's proposed amendment would be futile for this same reason. There is no reason to permit it to plead two duplicative claims with the only difference being the evidence Highland will seek to marshal to prove them.

CONCLUSION

The High Court correctly held that Highland lacks standing. Highland lost that standing as the consequence of a series of tactical choices that it made in the course of its ill-fated, multi-jurisdictional quest for a way to prosecute the claims on its own behalf to the exclusion of UDW's other creditors. This Court should require Highland to abide by the consequences of its "tactical decision not to comply with the no action clause." A.25. Highland made that decision with full knowledge that it would lose creditor standing upon the consummation of the UDW Scheme, as it repeatedly told the New York and Cayman courts was going to happen. That prediction has now come true. Moreover, there is nothing unfair about this. As the Cayman Court concluded, the debt restructuring was "the best way of maximizing value for the creditors of the Group," and avoided a liquidation that "would result in value destruction generally for all creditors." S.A.483 ¶ 130; S.A.461 ¶ 11. Furthermore, "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 priority to anyone." S.A.482 ¶ 125. Based on this record, the High Court properly dismissed Highland's Complaint for lack of standing, and this Court should affirm the High Court's Order with prejudice.

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May 15, 2019

STATEMENT OF RELATED CASES

Pursuant to RMI Supreme Court Rules of Procedure 28(b)(11) and 28(c), Defendants-Appellees submit that they are not aware of any related cases pending in the Republic of the Marshall Islands' courts or agencies.

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CERTIFICATE OF SERVICE

I hereby certify that on May 15, 2019, Majuro date, a true and correct copy of Defendants-Appellees' Joint Answering Brief for Appellees was served on the following attorneys of record by email attachment in PDF format to:

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