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

ANSWERING BRIEF FOR INDIVIDUAL APPELLEES

CARLSMITH BALL LLP
Arsima A. Muller
1001 Bishop Street, Suite 2100
Honolulu, HI 96813
Telephone: (808) 523-2597
amuller@carlsmith.com

LAW OFFICE OF STEVEN J. FINK PLLC
Steven J. Fink
100 Wall Street, 15th Floor
New York, NY 10005
Telephone: (646) 802-6976

ORRICK, HERRINGTON & SUTCLIFFE LLP
William S. Haft
Daniel A. Rubens
Emmanuel B. Fua
51 West 52nd Street
New York, NY 10019
Telephone: (212) 506-5000

Counsel for Defendants-Appellees

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Defendants-Appellees George Economou and Antonios Kandylidis (collectively, the "Individuals") respectfully submit this Answering Brief. For the reasons set forth herein, this Court should affirm the High Court's Order Granting Motions to Dismiss filed on September 27, 2018 (the "Order") to the extent that it (1) dismissed Plaintiff-Appellant Highland's[1] complaint against the Individuals for lack of personal jurisdiction and (2) dismissed Highland's cause of action against the Individuals for Aiding and Abetting Fraudulent Conveyances (Eighth Cause of Action) for failure to state a claim.[2]

INTRODUCTION

Even if this Court reverses the High Court's dismissal of Highland's complaint for lack of standing, the Court should still affirm the High Court's dismissal of the complaint against the Individuals for lack of personal jurisdiction.[3] Two things would have needed to be true for the High Court to properly exercise personal jurisdiction over the Individuals. First, the Individuals' conduct would need to have fallen within one or more prongs of the RMI long-arm statute. Second, the Individuals would have needed to have minimum contacts with the RMI sufficient to satisfy due process. The High Court correctly determined that it could not exercise personal

---

[1] "Highland" refers collectively to 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.

[2] This Court should also affirm all other aspects of the High Court Order, for the reasons set forth in the Joint Answering Brief for Appellees dated May 15, 2019 (the "Joint Answering Brief"). By submitting these Briefs, the Individuals do not waive, and expressly preserve, their position that the High Court lacks personal jurisdiction over them.

[3] This Court need not reach the constitutional question presented by the High Court's jurisdictional analysis 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 addressing due process prong only 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.").

jurisdiction over the Individuals because Highland failed to demonstrate that the Individuals had minimum contacts with the RMI and thus failed to satisfy the second prong of this test.

As to the first prong of the personal jurisdiction test, the High Court determined that Section 251(1)(n) of the RMI long-arm statute – Section 251 of the Judiciary Act of 1983, Title 27 MIRC Chapter 2 – applies. A.38.[4] The applicable version of Section 251(1)(n), which has since been amended,[5] provided for jurisdiction over a defendant who "commits an act of commission or omission of deceit, fraud or misrepresentation which is intended to affect, and does affect persons in the Republic." The High Court determined that this provision applies because the Individuals are alleged to have engaged in fraudulent transactions outside the RMI that had an affect on a non-resident RMI corporation.

Although the Individuals respectfully disagree with the High Court's determination in this regard, there is no need for this Court to address the long-arm statute on this appeal. That is so because on the second prong of the personal jurisdiction analysis, the High Court correctly determined that it could not exercise jurisdiction over the Individuals consistent with due process. Since the Individuals' conduct at issue in this case occurred outside the RMI, Highland must demonstrate that the "effects test" articulated by the United States Supreme Court in *Calder v. Jones*, 465 U.S. 783 (1984), is satisfied. The High Court properly determined that Highland failed to satisfy this burden because the Individuals "have not committed any act expressly aimed at the Marshall Islands," A.40, and because the "brunt" of the alleged injury was not suffered in the RMI. The Individuals' status as directors and officers of non-resident RMI corporations does not change this result. Furthermore, the High Court properly denied Highland's request for jurisdictional discovery because the facts material to the due process analysis are not in dispute.

---

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

[5] Section 251(1)(n) was amended after the commencement of this case. Nitijela of the Republic of the Marshall Islands, 39th Constitutional Regular Session, 2018: Judiciary (Amendment) Act, 2018, N.B. No. 109 ("N.B. No. 109"), at pp. 4-5. The parties agree that the applicable version of the statute is the one that existed when the case was filed, as quoted above.

This Court should also affirm the dismissal of Highland's claim for aiding and abetting fraudulent conveyances because no such claim exists under any RMI statute or United States common law.

STATEMENT OF THE CASE

The Individuals adopt and incorporate by reference the statement of the case set forth in the Joint Answering Brief. They set forth below additional background relevant to personal jurisdiction and Highland's aiding and abetting claim.

Jurisdictional Facts

The Individuals are citizens of Greece, each of whom maintains a residence in Monaco. S.A.513 ¶ 27; S.A.521 ¶ 27. Neither of them has ever been to the RMI. S.A.511 ¶ 4; S.A.519 ¶ 4. Neither of them transacts any business within the territorial limits of the RMI, maintains a personal residence or place of business in the RMI, or employs anyone resident in the RMI, except to the extent that retaining counsel for this and other litigation in the RMI could be deemed to constitute employing someone in the RMI. S.A.511-12 ¶¶ 5-21; S.A.519-20 ¶¶ 5-21.

Mr. Economou is the CEO and Chairman of the Board of Appellee DryShips Inc. ("DryShips"), a non-resident RMI corporation. S.A.510, 513 ¶¶ 1, 28; S.A.516. When Highland filed the Complaint, he was also the CEO and Chairman of the Board of non-party Ocean Rig UDW Inc. ("UDW").[6] S.A.510 ¶ 2.

Mr. Kandylidis is the President, the CFO and a Director of DryShips. S.A.510 ¶ 1. He was also the President and CFO of UDW when Highland commenced this action.

UDW was a non-resident RMI corporation before it transferred its domicile to the Cayman Islands in April 2016. A.107-08 ¶ 55. Consistent with the statutory framework governing non-resident RMI corporations, UDW never maintained an office or other place of business in the RMI, transacted business in the RMI, employed anyone resident in the RMI,

[6] UDW was acquired by Transocean Ltd. in a transaction that closed on December 5, 2018. The Individuals no longer hold any executive or Board positions with UDW.

owned property located in the RMI, or maintained any bank accounts in the RMI.[7] S.A.521 ¶¶ 28-30. Currently, UDW's only office is located in the Cayman Islands. S.A.521 ¶ 28. Before it transferred its domicile to the Cayman Islands, UDW's principal place of business was in Cyprus. A.40.

Highland alleges that, from mid-2015 to April 2016, Mr. Economou engaged in a series of transactions through which he caused assets to be transferred from UDW to other companies that he is alleged to own and control. A.91 ¶ 3. Messrs. Economou and Kandylidis are alleged to have directed the actions of UDW and the other entity Defendants with respect to those transactions. A.97-98 ¶¶ 23-24. Highland does not allege that Mr. Economou or Mr. Kandylidis engaged in any conduct related to the challenged transactions within the territorial limits of the RMI. Moreover, given that UDW has never had assets or bank accounts in the RMI, none of the transactions that Highland complains of involved moving funds or other assets into or out of the RMI.

The High Court's Ruling

The High Court held that it lacks personal jurisdiction over the Individuals because an exercise of such jurisdiction would offend due process. The High Court properly conducted a two-part analysis, first evaluating whether Highland's claims fall within any prong of the RMI long-arm statute, and then evaluating whether exercising such jurisdiction would comport with due process. A.37.

In conducting the first prong of the personal jurisdiction analysis, Chief Justice Ingram concluded that Highland had adequately alleged facts that would bring its claims within RMI long-arm statute Section 251(1)(n), which provides for jurisdiction over a defendant who "commits an act of commission or omission of deceit, fraud or misrepresentation which is intended to affect, and does affect persons in the Republic." Citing this Court's recent decision in *Myjac Fnd., Panama v. Arce and Alfaro*, RMI SCT. No. 2017-006 (July 30, 2018), he

[7] RMI Business Corporations Act section 2(j) defines a "non-resident corporation" as a corporation "not doing business in the Republic." Section 2(q) specifies that "doing business in the Republic" includes "carrying on business or conducting transactions in the Republic."

determined that the alleged fraudulent transfers had an "effect" on UDW, and that UDW constituted a "person in the Republic" for purposes of the statute. A.38.

As to the second prong, however, the High Court concluded that the Individuals do not have sufficient RMI contacts that are relevant to Highland's claims to support an exercise of jurisdiction over them. A.40. In conducting his due process analysis, Chief Justice Ingram applied the *Calder v. Jones* "effects test," which comes into play "[i]f a defendant has not conducted activities in the forum, as the Individual Defendants have not . . . ."[8] *Id.* He held that the effects test is not satisfied here because "the transactions for which Highland seeks to hold the Individual Defendants liable . . . were not expressly aimed at the RMI," and "[t]o the extent that the four transactions affected or harmed UDW, when it was a Marshall Islands non-resident domestic corporation, they affected or harmed UDW where it had its principal place of business – in Cypress, and later in the Cayman Islands – not in the RMI." *Id.*

Additionally, the High Court dismissed Highland's claim for aiding and abetting fraudulent conveyances for failure to state a claim. It did so based on Chief Justice Ingram's recognition that "[n]either RMI statutory law or American common law allow for actions of aiding and abetting fraudulent conveyances." A.42.

STANDARD OF REVIEW

The Individuals adopt and incorporate by reference the discussion of the standard of review set forth in the Joint Answering Brief. Furthermore, "[t]he plaintiff bears the burden of proving the existence of personal jurisdiction and, in attempting to carry that burden, is entitled to favorable inferences from the pleadings, affidavits, and other documents submitted on the issue." *Myjac*, RMI SCT. No. 2017-006, at 6. "[T]he law is clear that Plaintiffs must make a *prima facie* showing of personal jurisdiction before [jurisdictional] discovery should be permitted." *Leibovitch v. Islamic Republic of Iran,* 188 F. Supp. 3d 734, 760 n.18 (N.D. Ill. 2016), *aff'd*, 852 F.3d 687 (7th Cir. 2017).

---

[8] 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).

QUESTIONS PRESENTED

1. Whether the High Court erred by determining that it lacked personal jurisdiction over the Individuals.

2. Whether the High Court erred by dismissing Highland's Eighth Cause of Action, for aiding and abetting fraudulent conveyances.

SUMMARY OF ARGUMENT

This Court should affirm the High Court's rulings dismissing Highland's claims against the Individuals for lack of personal jurisdiction and dismissing the aiding and abetting cause of action for failure to state a claim.

First, the High Court correctly determined that it could not exercise personal jurisdiction over the Individuals consistent with due process. In order for such an exercise of jurisdiction to comply with due process, the Individuals would need to have "minimum contacts" with the RMI, and Highland's claims would need to arise from those contacts. *Samsung Heavy Equip. Indus. Co. v. Focus Invs. Ltd.*, RMI SCT. No. 2018-02, at 10 (May 28, 2018). The High Court correctly determined that Highland failed to demonstrate the existence of minimum contacts that could have justified it in exercising personal jurisdiction over the Individuals. A.37.

The Individuals' status as non-resident officers and directors of non-resident RMI corporations does not establish that they have minimum contacts that could satisfy due process. As the United States Supreme Court held in *Shaffer v. Heitner*, due process is not satisfied by the exercise of jurisdiction over a non-resident officer or director of a forum corporation simply by virtue of that status. 433 U.S. 186, 215-17 (1977). Thus, Highland's contention that "exercising jurisdiction over directors and officers of RMI companies comports with due process" is wrong. Brief of Appellants ("Br.") 35. *See* Part I.A, *infra*.

Highland's reliance on the trial court decision in *Frontline, Ltd. v. DHT Holdings, Inc.*, H. Ct. Civ. No. 2017-092 (June 7, 2017), is misplaced for the same reason. In *Frontline*, Chief Justice Ingram held that exercising personal jurisdiction over non-resident officers and directors of an RMI corporation satisfied due process because of their status as officers and directors. H. Ct. Civ. No. 2017-092, at 15. He did so in reliance on Delaware authorities. Delaware courts

have determined that exercising jurisdiction over non-resident officers and directors of Delaware corporations satisfies due process under *Shaffer v. Heitner* because Delaware has enacted a broad jurisdictional consent statute that puts officers and directors on "explicit statutory notice" that serving in those capacities constitutes a consent to the jurisdiction of Delaware courts. *Armstrong v. Pomerance*, 423 A.2d 174, 176 (Del. 1980). The RMI does not have an equivalent statute. Thus, the Individuals were not on explicit statutory notice – and indeed had no reason to expect – that they would be required to litigate in the RMI claims arising from their conduct outside the RMI. Accordingly, requiring them to do so would violate due process. *Shaffer*, 433 U.S. at 215-17. *Frontline* did not address the differences between the Delaware and RMI statutory schemes because the director defendants there did not contest jurisdiction. H. Ct. Civ. No. 2017-092, at 15. When *Frontline* was referenced at oral argument in this case, Chief Justice Ingram's comment about his decision in *Frontline* was unambiguous: "I was wrong." A.988:19. *See* Part I.B, *infra.*

Highland is also unable to demonstrate the existence of minimum contacts that could justify the High Court's exercise of personal jurisdiction over the Individuals by way of the *Calder v. Jones* effects test. That test applies because it is undisputed that the Individuals did not engage in any of the conduct upon which Highland bases its claims within the RMI. Highland has failed to meet its burden of establishing that the effects test is satisfied here because the Individuals' conduct was not "expressly aimed at" the RMI and because the "brunt" of the alleged injury was not suffered in the RMI. *See Pebble Beach Co. v. Caddy,* 453 F.3d 1151, 1156 (9th Cir. 2006). *See* Part I.C, *infra.*

To the extent the Court reaches the reasonableness prong of the minimum contacts test, it should affirm the High Court's dismissal because an analysis of the relevant factors demonstrates that an exercise of personal jurisdiction over the Individuals would be unreasonable. *See* Part I.D, *infra.*

Furthermore, the three opinions that Highland cites in which United States courts exercised personal jurisdiction over the defendants in fraudulent conveyance cases are easily

distinguished, *see* Part I.E, *infra*, and the High Court correctly denied Highland's request for jurisdictional discovery, *see* Part I.F., *infra*.

Second, the High Court properly dismissed the aiding and abetting claim because no such claim exists under any RMI statute or United States common law.

ARGUMENT

I. The High Court Did Not Err By Dismissing The Complaint Against The Individuals For Lack Of Personal Jurisdiction.

"There are two broad types of personal jurisdiction: specific jurisdiction and general jurisdiction." *Samsung*, RMI SCT. No. 2018-02, at 9. General jurisdiction, as the name implies, refers to the power of a state to adjudicate all causes of action against a defendant regardless of where the cause of action arose. For general jurisdiction to exist, the defendant must be engaged in "continuous and systematic contacts" with the forum. *Helicopteros Nacionales de Columbia S.A. v. Hall*, 466 U.S. 408, 415-16 (1984). "For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile . . . ." *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1780 (2017) (original source of quotation omitted). In contrast, "[s]pecific jurisdiction refers to jurisdiction over causes of action arising from or related to a defendant's actions within the forum state." *Samsung Heavy Equip. Indus.*, RMI SCT. No. 2018-02, at 9 (quoting *Sondergard v. Miles, Inc.*, 985 F.2d 1389, 1392 (8th Cir. 1993)).

Highland does not take issue with the High Court's conclusion that "Highland has not alleged facts sufficient to establish that the Individual Defendants are subject to general jurisdiction in the RMI." A.37. Instead, it incorrectly contends that the Individuals are subject to specific jurisdiction in the RMI in connection with the claims that Highland has brought against them. But "[s]pecific jurisdiction may not be exercised where none of the actions complained of occurred within or had any connection with the forum state." *Samsung Heavy Equip. Indus.*, RMI SCT. No. 2018-02, at 9.

To establish that the High Court could properly exercise specific jurisdiction over the Individuals, Highland would have needed to show both (i) "that the Republic's long arm' statute confers jurisdiction"; and (ii) "that the exercise of jurisdiction by the court is consistent with due

process; i.e. that defendants . . . have 'minimum contacts' with the Republic." *Samsung*, RMI SCT. No. 2018-02, at 10. Given the High Court's determination that long-arm statute Section 251(1)(n) confers jurisdiction, Highland challenges only Chief Justice Ingram's determination that due process would not be satisfied by an exercise of such jurisdiction.

Courts have interpreted "minimum contacts" to mean "(a) a defendant 'has performed some act or consummated some transaction within the forum or otherwise purposefully availed himself of conducting activities in the forum,' (b) 'the claim arises out of or results from the defendant's forum-related activities,' and (c) 'the exercise of jurisdiction is reasonable.'" *Id.* at 10 (quoting *Pebble Beach,* 453 F.3d at 1154-55). Where a claim is based on conduct outside the forum, the first prong can be satisfied by showing that the defendant has either "(1) 'purposefully availed' himself of the privilege of conducting activities in the forum, or (2) 'purposefully directed' his activities toward the forum." *Pebble Beach*, 453 F.3d at 1155. "If the plaintiff fails to satisfy either of [the first two] prongs, personal jurisdiction is not established in the forum state." *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2004). If the plaintiff satisfies its burden in respect of the first two prongs, "the burden then shifts to the defendant to 'present a compelling case' that the exercise of jurisdiction would not be reasonable." *Samsung Heavy Equip. Indus. Co. v. Focus Invs. Ltd.*, H. Ct. Civ. No. 2017-081, at p. 6 (Feb. 17, 2018) (citation omitted).

The High Court correctly concluded that it lacks personal jurisdiction over the Individuals because they "have not conducted activities in the RMI that satisfy the first two prongs of the minimum contacts test." A.39. The Individuals' status as officers and directors of non-resident RMI corporations does not demonstrate that they "purposefully availed" themselves of the privileges of conducting activities in the RMI in a manner that would subject them to High Court jurisdiction as to claims arising from their conduct outside the RMI. *Schaffer*, 433 U.S. at 216. The trial court's reasoning in *Frontline* does not counsel in favor of a different result because that case was based on inapplicable Delaware caselaw interpreting a Delaware statute that has no RMI equivalent. Indeed, Chief Justice Ingram, who authored *Frontline,* has since recognized that it was wrongly decided. Furthermore, the *Calder v. Jones* effects test is not

satisfied here because Highland failed to show that the Individuals "purposefully directed" their conduct towards the RMI or that Highland's alleged injuries arose from the Individuals' forum-related activities. For all of these reasons, the first two prongs of the minimum contacts test are not met. Even if those two prongs were satisfied, moreover, the High Court still would have lacked personal jurisdiction over the Individuals because an analysis of the applicable factors demonstrates that it would not have been reasonable for the High Court to exercise jurisdiction over them as is required by the third prong of the minimum contacts test.

A. The Individuals' Status As Non-Resident Officers And Directors Of Non-Resident RMI Corporations Does Not Satisfy The "Purposeful Availment" Prong Of The Minimum Contacts Analysis.

Highland's argument that the Individuals purposefully availed themselves of the benefits of RMI law in a way that subjects them to jurisdiction in this case by accepting their roles as non-resident officers and directors of non-resident RMI corporations is wrong. Indeed, the United States Supreme Court rejected precisely this argument in *Shaffer v. Heitner*. *Shaffer* addressed the constitutionality of Delaware's use of a "sequestration statute" to obtain personal jurisdiction over non-resident officers and directors of Delaware corporations in suits involving their conduct in those capacities.[9] The plaintiff argued that "by accepting positions as officers or directors of a Delaware corporation," the defendants had availed themselves of the benefits of Delaware law such that an exercise of jurisdiction over them would be consistent with due process. 433 U.S. at 215-16. The *Shaffer* Court rejected this argument, holding that "this line of reasoning . . . does not demonstrate that appellants have 'purposefully avail(ed themselves) of the privilege of conducting activities within the forum State' in a way that would justify bringing them before a Delaware tribunal." *Id.* at 216 (citation omitted). The Court reasoned that the director and officer defendants "had no reason to expect to be haled before a Delaware court"

[9] Under the sequestration statute, Delaware courts could sequester a defendant's property located in the State of Delaware – including stock in a Delaware corporation, which was deemed to be present in the State of Delaware. Having sequestered the stock, Delaware courts purported to exercise *quasi in rem* jurisdiction over claims against Delaware fiduciaries. *Shaffer*, 433 U.S. at 190-91.

given that "Delaware, unlike some States, has not enacted a statute that treats acceptance of a directorship as consent to jurisdiction in the State." *Id.*

Shaffer is dispositive of Highland's argument that the Individuals are subject to the High Court's jurisdiction because of their status as officers and directors of non-resident RMI corporations. The RMI long-arm statute establishes only a very limited basis to exercise personal jurisdiction over non-resident officers and directors of RMI corporations – it applies only to their "acts ***within the territorial limits of the Republic***." Judiciary Act § 251(1)(i) (emphasis added).[10] There is no RMI statute that treats acceptance of a position as a non-resident officer or director of an RMI corporation as a consent to jurisdiction in the RMI for acts taken in those capacities outside the RMI. Here, it is undisputed that the Individuals did not engage in any of the challenged conduct within the RMI. Thus, they did not have explicit statutory notice that they were subject to jurisdiction in the RMI, and they "had no reason to expect to be haled before a[n] [RMI] court," for claims arising from that conduct.[11] *Shaffer,* 433 U.S. at 216; *see also World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) ("[T]he foreseeability that is critical to due process analysis is . . . that the defendants' conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.").

B. Highland's Reliance On *Frontline* Is Misplaced.

As Chief Justice Ingram expressly stated at oral argument, *Frontline* was wrongly decided. A.988:19. This is so because *Frontline* summarily relied on Delaware caselaw

---

[10] Section 251(1)(i) affords RMI courts with jurisdiction as to causes of action arising from acts taken "within the territorial limits of the Republic as director, manager, trustee or other officer of a corporation organized under the laws of the Republic." Judiciary Act § 251(1)(i).

[11] Plaintiffs' suggestion that Mr. Economou has consented to jurisdiction because he previously defended a civil action in the RMI is wrong. That case never proceeded past a motion to dismiss. *See Rosenquist v. Economou*, 3 MILR 144 (2011). Further, "[a]ctions in a previous lawsuit cannot be sufficient to confer jurisdiction." *Kayser v. C.J. Ingram*, H. Ct. Civ. Nos. 2010-027 & 2011-0022, at p. 10 (Aug. 4, 2011). *See also Alkanani v. Aegis Def. Servs., LLC*, 976 F. Supp. 2d 13, 37 n.10 (D.D.C. 2014) ("[I]t is well established that [even] consent to personal jurisdiction in one case does not waive the right to assert lack of personal jurisdiction in another case in that same forum.").

applying Delaware's broad jurisdictional consent statute for officers and directors. Jurisdiction in that case was not contested, and without the benefit of adversarial briefing on the question, the High Court overlooked an essential point: Delaware law cannot control on this question because the RMI lacks a jurisdictional consent statute analogous to that of Delaware. Highland nonetheless relies heavily on this flawed decision throughout its brief. This Court should not give any weight to the trial court decision in *Frontline*, which has since been repudiated by Chief Justice Ingram, who rendered it.

In *Frontline*, the High Court held that it had personal jurisdiction over non-resident directors of an RMI corporation – who, as noted, had ***not*** contested the exercise of such jurisdiction – by virtue of their status as directors. *Frontline*, H. Ct. Civ. No. 2017-092 at pp. 14-15. In so doing, he followed Delaware authorities and "note[d] that a Delaware statute authorizes Delaware courts to exercise personal jurisdiction over directors." *Id.* The *Frontline* decision did not analyze the extent to which RMI law was consistent or inconsistent with the Delaware authorities upon which it relied, or the due process implications of any differences.

The Delaware statute that Chief Justice Ingram cited in *Frontline* is inconsistent with the RMI long-arm statute in ways that are critical to the due process analysis. Specifically, Delaware's response to *Shaffer v. Heitner* was to adopt 10 Del. Code § 3114, which establishes that non-resident directors and officers of Delaware corporations are deemed to have consented to the appointment of a Delaware agent for service of process as to essentially all actions involving their conduct as directors and officers.[12] *Hazout v. Tsang Mun Ting*, 134 A.3d 274, 285 (Del. 2016). It has been interpreted as a jurisdictional consent. *See, e.g.*, *Armstrong*, 423 A.2d at 175 ("One part of [10 Del. Code § 3114] provides that serving in the capacity of director

[12] The Delaware statute provides that by serving as a director or officer of a Delaware corporation after the relevant provision's effective date, such director or officer "shall . . . be deemed thereby to have consented to the appointment of the registered agent of such corporation (or, if there is none, the Secretary of State) as an agent upon whom service of process may be made in all civil actions or proceedings brought in this State, by or on behalf of, or against such corporation, in which such [director or officer] is a necessary or proper party, or in any action or proceeding against such [director or officer] for violation of a duty in such capacity . . . ." 10 Del. Code §§ 3114(a), (b).

of a Delaware corporation after June 30, 1978, is consent to in personam jurisdiction in Delaware in actions relating to the defendant's capacity as director."); *see also, e.g., Alfred v. Walt Disney Co.*, 2015 WL 177434, at *3 (Del. Ch. 2015) ("Delaware jurisdiction over an out-of-state defendant can arise by . . . 10 Del. C. § 3114, which provides for service of process on out-of-state individuals who are directors or officers of Delaware corporations, who are implied to have consented to such jurisdiction.").

The Delaware Supreme Court addressed the due process implications of the Delaware statute in *Armstrong*. It held that it was constitutional for a Delaware court to exercise jurisdiction over non-resident directors who had accepted their positions ***after*** the operative date specified in the statute, but that a Delaware court could not exercise jurisdiction over directors who already held that position prior to the statute's operative date. 423 A.2d at 175-76. Emphasizing that "[t]he only substantive difference for present purposes between Shaffer and the instant case is the existence of s 3114 as the basis for jurisdiction," *Armstrong* makes clear that the critical distinction for due process purposes is that ***"[t]he defendants accepted their directorships with explicit statutory notice, via s 3114, that they could be haled into the Delaware Courts."***[13] *Armstrong*, 423 A.2d at 176, 180 (emphasis added); *id.* at 178-79 (adopting Chancery Court's reasoning that due process requirements of "fair play and substantial justice" are satisfied where directors accepted those positions "with knowledge of the existence of s 3114."). The same cannot be said here given that RMI long-arm statute Section 251(1)(i) applies only to acts within the territorial limits of the RMI. *See, e.g., Chee v. Zhang*, H. Ct. Civ. No. 2016-254, at p. 13 (Oct. 16, 2017) ("Acts involving stock in Marshall Islands corporations, when taken outside the territorial limits of the Republic, are not sufficient to meet this requirement, even when taken by a corporate officer or director."). Thus, without explicit statutory notice, the Individuals could not "reasonably anticipate being haled into court" in the

[13] The other Delaware Supreme Court case that Highland cites is distinguishable for the same reason. *See Hazout*, 134 A.3d at 290 ("Moreover, § 3114 provided explicit notice to Hazout that, by accepting a position as a director and officer of a Delaware corporation, he consented to appear in this state . . . ."); *see also id.* at 284.

RMI to address Highland's claims, and an exercise of personal jurisdiction over them would offend due process. *World-Wide Volkswagen*, 444 U.S. at 297.

Finally, Highland's suggestion that the RMI courts should follow Delaware law on this point makes no sense given the critical difference between Delaware's jurisdictional consent statute and RMI long-arm act Section 251(1)(i). Br. 37. While Highland is correct that "Marshall Islands law requires the courts to look to Delaware corporate law," 10 Del. C. § 3114 is a procedural statute that is not part of Delaware's corporate code. And even if it were, RMI courts follow only Delaware common law, not Delaware statutes, and they do not follow Delaware law at all where there is a conflict between an RMI statute and the Delaware equivalent – as is the case here. RMI Business Corporations Act, 52 MIRC Ch. 1 § 13 ("***Insofar as it does not conflict with any other provision of this Act,*** the ***non-statutory*** law of the State of Delaware . . . is hereby declared to be and is hereby adopted as the law of the Republic . . . ." (emphasis added)); *see also Republic of the Marshall Islands v. Kijiner*, 3 MILR 43, 46 (2007) ("The Republic has cited a number of U.S. cases in support of its argument. Those cases, however, deal with FRAP 9(c) which is substantially different from RMI S. Ct. Rule 9(c). ***To the extent those cases are relied upon as authority for imposing a requirement not contained in RMI's rule, those cases are inapposite and not instructive.***" (emphasis added)).

C. The Individuals Did Not Purposefully Direct Their Conduct Towards The RMI.

Highland also failed to show that the Individuals "purposefully directed" their challenged conduct toward the forum. *Pebble Beach*, 453 F.3d at 1156. Where, as here, a claim is based on conduct outside the forum, the first prong of the minimum contacts test may be met by showing that the defendant purposefully directed its conduct towards the forum. *Id.* Purposeful direction is evaluated using the "effects test" derived from the United States Supreme Court's decision in *Calder v. Jones*. *Id.*

In *Calder*, the question was whether a California court could exercise jurisdiction, consistent with due process, over two Florida residents – one who was the president and editor of the *National Enquirer*, and another who was a reporter – for reputational injuries suffered by a

California resident as the result of an allegedly libelous article. *Calder* held that due process was satisfied because the defendants had engaged in "intentional, and allegedly tortious, actions" that "were expressly aimed at California" with the knowledge "that the brunt of th[e] injury would be felt by [the plaintiff] in the State in which she lives and works and in which the *National Enquirer* has its largest circulation." *Calder*, 465 U.S. at 789-90.

The Supreme Court's holding in *Calder* has been distilled into a three-pronged "effects test." "To satisfy this test the defendant 'must have (1) committed an intentional act, which was (2) expressly aimed at the forum state, and (3) caused harm, the brunt of which is suffered and which the defendant knows is likely to be suffered in the forum state." *Pebble Beach*, 453 F.3d at 1156.

The High Court correctly determined that the effects test is not satisfied here. This is true because Highland has failed to show either that the Individuals' conduct was "expressly aimed" at the RMI (second "effects test" requirement) or that the "brunt" of the alleged harm was felt in the RMI (third requirement).

1. Highland Has Not Shown That The Individuals' Conduct Was "Expressly Aimed" At The RMI.

The High Court held that the second prong of the effects test is not satisfied because "the transactions for which Highland seeks to hold the Individual Defendants liable . . . were not expressly aimed at the RMI." A.40. Even accepting as true for purposes of this appeal Highland's allegation that the challenged transactions (*i.e.*, the alleged fraudulent conveyances) were entered into in order "to siphon money away from Ocean Rig and thereby reduce the collateral available to its [sic] and its creditors," A.91 ¶ 3, the mere fact that UDW was a non-resident RMI corporation is not enough to establish that the Individuals' conduct was expressly aimed at the RMI. *See IMO Indus., Inc. v. Kiekert AG*, 155 F.3d 254, 265 (3d Cir. 1998) ("[T]he *Calder* 'effects test' can only be satisfied if the plaintiff can point to contacts which demonstrate that the defendant . . . made the forum the focal point of the tortious activity. Simply asserting that the defendant knew that the plaintiff's principal place of business was located in the forum would be insufficient in itself to meet this requirement."); *see also Axiom Foods, Inc. v.*

Acerchem Int'l, Inc., 874 F.3d 1064, 1070-71 (9th Cir. 2017) (no jurisdiction where forum state was not "'the focal point both of the [defendants' conduct] and of the harm suffered'" (citations omitted)); *Lamont v. Conner*, 2019 WL 1369928, at *6 (N.D. Cal. Mar. 26, 2019) ("[T]here is express aiming when a defendant knows his action will have a potentially devastating impact upon a plaintiff who defendant knows lives or works in the forum state." (citing *Wash. Shoe Co. v. A-Z Sporting Goods Inc.*, 704 F.3d 668, 675 (9th Cir. 2012))).

None of the transactions were entered into in the RMI, no assets were moved into or out of the RMI, and there is nothing in the record to suggest that any of UDW's creditors that allegedly were harmed by these transfers – including, most importantly, Highland – was present in the RMI. Thus, the "expressly aimed" requirement is not satisfied. *IMO Indus.*, 155 F.3d at 265; *see also Chee*, H. Ct. Civ. No. 2016-254, at pp. 10-13 (no jurisdiction over claim brought by non-resident as to ownership of stock of RMI corporation based on conduct that took place outside the RMI); *Hand v. Wholesale Auto Shop, LLC*, 2018 WL 305818, at *4 (N.D. Ala. Jan. 5, 2018) (no jurisdiction where subject transaction occurred outside the forum state, even where out-of-state defendants allegedly made fraudulent statements during phone calls with plaintiffs who were within the forum state); *Bell Helicopter Textron, Inc. v. C & C Helicopter Sales, Inc.*, 295 F. Supp. 2d 400, 410 (D. Del. 2002) (no jurisdiction in Delaware over Delaware corporation where none of the transactions at issue occurred in Delaware, the plaintiffs were not harmed in Delaware, and "the only act" by the defendants in Delaware was incorporation).

Highland's contention that the minimum contacts test is satisfied by the Individuals' role in incorporating UDW in the RMI and then transferring its domicile to the Cayman Islands is wrong. *See* Br. 40. As the High Court correctly recognized, "Highland['s] claims do not arise out or result from forum-related activities (*i.e.*, the incorporation and redomiciling of UDW), but from the four above-referenced transactions [*i.e.*, the alleged fraudulent conveyances] consummated outside of the RMI." A.39. Thus, these contacts do not satisfy due process

because Highland's injury does not "arise[] out of or result[] from" them.[14] *Samsung*, RMI SCT. No. 2018-02, at 14. *See also, e.g.*, *Matus v. Premium Nutraceuticals, LLC*, 715 F. App'x 662, 663 (9th Cir. 2018) (a claim arises out of or results from a defendant's forum-related activities if the plaintiff "would not have been injured '***but for***'" the defendants' in-forum conduct (citation omitted)); *In re Tezos Secs. Litig.*, 2018 WL 4293341, at *5 (N.D. Cal. Aug. 7, 2018) (same); *Andrew v. Radiancy, Inc.*, 2017 WL 2692840, at *6 (M.D. Fla. June 22, 2017) ("The law is clear that, when specific jurisdiction is at issue, the Court must disregard forum contacts that are not connected to the plaintiff's causes of action." (citing *Bristol-Myers Squibb*, 137 S. Ct. at 1781 ("When there is no such connection, specific jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the State.")).

Fundamentally, Highland confuses the question whether the Individuals' alleged conduct "affected ***UDW***" (as would be necessary to trigger long-arm statute section 251(1)(n)), on the one hand, with the question whether that conduct was "expressly aimed" at the ***RMI*** (as would be required to satisfy the effects test), on the other. Br. 40. The "'minimum contacts' analysis looks to the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there." *See Walden v. Fiore*, 571 U.S. 277, 285 (2014). Highland does not cite any authority for the proposition that conduct directed towards a corporation is deemed to be expressly aimed at its place of incorporation for purposes of a minimum contacts analysis. It is not. *Cas. Assurance Risk Ins. Brokerage Co. v. Dillon,* 976 F.2d 596, 600 (9th Cir. 1992) (holding that defendants' conduct was not "purposefully directed" at Guam despite the fact that the plaintiff was incorporated in Guam: "[T]he fact that [plaintiff] is a Guam corporation is not enough to satisfy the minimum contacts analysis.").

---

[14] *Family Fed'n for World Peace v. Moon*, 129 A.3d 234 (D.C. 2015), cited by Highland, is inapposite. In that case, "at least one of th[e] acts [constituting the alleged misconduct] and a significant one, the allegedly wrongful amendment of the Articles of Incorporation, indubitably occurred within the District by filing here." *Id.* at 243. The amendment of articles of incorporation went to the crux of the case in *Family Fed'n*, which was a "dispute over legal control of a District of Columbia nonprofit corporation." *Id.* at 238. Here, in contrast, the High Court correctly determined that the incorporation and redomiciliation of UDW were not the transactions that gave rise to Highland's alleged injury. A.39.

2. Highland Has Not Shown That The Brunt Of The Alleged Injury Was Felt In The RMI.

Highland also failed to satisfy the third effects test requirement because the "brunt" of the claimed injury was not felt in the RMI. It is undisputed that Highland did not suffer any injury in the RMI; Highland has its principal place of business in Texas and does not allege that it has any presence in the RMI. A.95-96 ¶¶ 12-16. This is dispositive because the "brunt of the injury" prong of the effects test looks to the place where the ***plaintiff*** suffered its alleged injury. *See, e.g.*, *Calder*, 465 U.S. at 789-90 (petitioners "knew that the brunt of that injury would be felt ***by respondent*** in the State in which she lives and works and in which the *National Enquirer* has its largest circulation" (emphasis added)). *See also IMO Indus.*, 155 F.3d at 256 ("***the plaintiff*** must have felt the brunt of the harm caused by that tort in the forum, such that the forum can be said to be the ***focal point*** of the harm suffered by the plaintiff as a result of the tort" (emphasis added)); *Williams v. Progressive Cty.. Mutual Ins. Co.*, 2019 WL 1434241, at *6 (S.D. Cal. Mar. 29, 2019) ("Plaintiff's harm . . . occurred in Texas, thus it was not possible for Defendants to have known any harm it caused would be suffered in California").

Even if this Court were to assess this prong by looking to the locus of the purported injury to UDW – as opposed to the locus of the purported injury to Highland – the High Court correctly recognized that any such harm was felt at UDW's principal place of business in Cyprus, not in the RMI. A.40. Highland makes no effort to distinguish the authorities that the High Court cited in support of this conclusion.[15] *See also Cas. Assurance Risk Ins.*, 976 F.2d at 599 ("[I]t is difficult to see how the brunt of the effects could be felt on Guam" because the alleged injury to a Guam corporation was suffered "in other jurisdictions" where it conducted its business); *Int'l Adm'rs, Inc. v. Life Ins. Co. of N. Am.*, 753 F.2d 1373, 1376 n.4 (7th Cir. 1985)

[15] A.40 (citing *Dakota Indus., Inc. v. Dakota Sportswear, Inc.*, 946 F.2d 1384, 1388-89 (8th Cir. 1991) (The plaintiff corporation "has its principal place of business in the forum state and thus suffered the economic injury there."); *Ubiquiti Networks, Inc. v. Kozumi USA Corp.*, 2012 WL 1901264, at *5 (N.D. Cal. May 25, 2012) (Delaware corporation harmed for personal jurisdiction purposes in California, its principal place of business); *Corinthian Mortg. Corp. v. First Sec. Mortg. Co.*, 716 F. Supp. 527, 529 (D. Kan. 1989) (collecting cases for the proposition that injury to corporation occurs "at its principal place of business")).

("The connection [to the place of incorporation] is a legal and formal one, and seems to us to have little to do with the business activities of the firm. The place of incorporation is frequently a matter of little concern, except as a way of achieving tax and other advantages.").

Chief Justice Ingram also correctly recognized that this case is materially different from *Myjac*. *Myjac* involved the misappropriation of shares in RMI-incorporated holding companies with no principal place of business that "can only be considered to be at home in the Marshall Islands." A.41. *See also Myjac*, RMI SCT. No. 2017-006, at 10. Unlike the corporations at issue in *Myjac*, UDW had its principal place of business outside the RMI. Moreover, despite Highland's protestations to the contrary (Br. 41), *Myjac* did not purport to make a broad pronouncement as to the circumstances that might support jurisdiction, or even conduct a plenary review of the High Court's exercise of jurisdiction. *Myjac* came to this Court on appeal from an order denying a motion pursuant to MIRCP 60(b)(4) to set aside a default judgment. Under Rule 60(b)(4), the only question was whether "this is one of the 'exceptional cases' in which 'the court that rendered judgment lacked even an arguable basis for jurisdiction.'" *Myjac*, RMI SCT. No. 2017-006, at 4, 10. Here, the question is whether Highland has carried its burden to prove the existence of personal jurisdiction over the Individuals. It has not.

D. It Would Not Be Reasonable For The High Court To Exercise Jurisdiction Over The Individuals.

This Court need not reach the third prong of the minimum contacts test – reasonableness – if it agrees with the High Court that Highland has failed to meet the first two prongs for the reasons discussed above. Even if the Court were to conclude that the first two prongs are satisfied, however, it should still affirm because it would not have been reasonable for the High Court to exercise jurisdiction over the Individuals. Indeed, an analysis of the applicable factors demonstrates that such an exercise of jurisdiction would be unreasonable. *Dole Food Co. v. Watts*, 303 F.3d 1104, 1114 (9th Cir. 2002) (listing factors).

First, the Individuals have not "purposefully injected" themselves into the RMI's affairs in a manner that would make it fair to exercise jurisdiction over them. As in *Shaffer v. Heitner*, the Individuals lack the sort of contacts with the forum that could satisfy due process. This case

is not like *Dole,* for example, where the defendants were alleged to have injured a corporation with its principal place of business in the forum, and also had communications with corporate representatives in the forum jurisdiction. Highland does not cite any authority to support its contention that a defendant's alleged misconduct constitutes "purposeful injection" into the forum's affairs merely because that conduct is alleged to have an effect on a corporation that is incorporated there. Br. 42. Moreover, as the High Court recognized, "Highland['s] claims do not arise out or result from forum-related activities (*i.e.*, the incorporating and redomiciling of UDW . . . .)." A.39.

Second, requiring the Individuals to litigate in the RMI would place a significant burden on them given that they are citizens of Greece who maintain a residence in Monaco. *See Chee*, H. Ct. Civ. No. 2016-254 at p. 15 ("Freemen would be burdened by litigating in a relatively remote foreign forum, the Marshall Islands, when an alternative forum, British Columbia, is available. Exercising jurisdiction would be unreasonable under such circumstances."). *See generally Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 114 (1987) ("The unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders.").

Third, the factor regarding "competing sovereign interests" in regulating a defendant's conduct is neutral where, as here, claims are brought under local law against non-resident defendants. *See AirWair Int'l Ltd. v. Schultz*, 73 F. Supp. 3d 1225, 1239-40 (N.D. Cal. 2014).

Fourth, the RMI has no interest in adjudicating this dispute among foreign parties for conduct in other jurisdictions that caused injury, if anywhere, in those other jurisdictions. The Nitijela made this clear in the legislative history to its recent amendments to the RMI long-arm statute. The Bill Summary states:

> In recent months, non-resident plaintiffs have filed complex cases in the High Court against other non-residents, including non-resident domestic corporations, after their lawsuits in foreign jurisdictions have failed to give them the results they wanted. They file cases in the High Court looking for a second or third bite at the apple. ***This bill would discourage non-resident plaintiffs from***

> ***filing cases in the High Court that can and should be decided in other jurisdictions.***

N.B. No. 109, at p. 5 (emphasis added). *See also, e.g., Chee*, H. Ct. Civ. No. 2016-254 at pp. 22-23 (the RMI had "no particular interest" in adjudicating a dispute as to ownership of stock of a non-resident RMI corporation brought by a non-resident based on conduct outside the RMI); *see also In re Nazi Era Cases Against German Defendants Litig.*, 320 F. Supp. 2d 204, 230 (D.N.J. 2004) ("[T]he interest of the forum state is primarily to protect its own residents from tortious conduct by out-of-state residents" (citation omitted)).

Fifth, the RMI is not the most efficient forum to resolve this dispute. No relevant witnesses or evidence are located in the RMI – or, indeed, within thousands of miles of the RMI. *See Cas. Assurance Risk Ins.*, 976 F.2d at 600 ("[T]he judicial system's interest in efficiency would be thwarted by litigating this dispute in Guam. As noted by the district court, '[t]he majority of potential witnesses and tangible evidence are located either in Indiana or in Washington, D.C.'"); *Quilala v. Sun Power*, 2015 WL 4986012, at *7 (D. Haw. Aug. 20, 2015) (jurisdiction in Hawaii not reasonable where "most (if not all) of the witnesses and evidence needed to prove or disprove Plaintiffs' claims will likely be found in California"). Indeed, Highland originally told the New York Bankruptcy Court that 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. After Highland decided to drop its litigation in New York, it proceeded to litigate in the Cayman Islands, and came to the RMI only as a last resort. Highland cannot credibly claim in light of this blatant forum shopping that the RMI is the most efficient jurisdiction to adjudicate its claims.

Sixth, "the plaintiff's convenience is not of paramount importance." *Dole*, 303 F.3d at 1116. *See also, e.g., Cas. Assurance Risk Ins.*, 976 F.2d at 600 ("Because CARIB does not do any business on Guam and maintains its major offices in Washington, D.C., the interests of the plaintiff and the forum in litigating this dispute on Guam are slight.").

Seventh, Highland cannot argue in good faith that there is no alternative forum given its previous representation that its claims could ***only*** be brought in New York.

In short, it would have been unreasonable for the High Court to exercise jurisdiction over the Individuals even if it had found that the first two minimum contacts factors were satisfied. This is an independent basis upon which this Court may affirm the jurisdictional ruling. *Momotaro v. Chief Elec. Off.*, 2 MILR 237, 241 (2004) (this Court "may affirm a dismissal on any ground supported by the record").

E. The Additional Authorities That Highland Cites Do Not Support The Existence Of Minimum Contacts.

Highland's citation to a handful of United States court decisions that have exercised jurisdiction over transferees in fraudulent conveyances cases does not aid its cause because those cases are easily distinguished. Br. 38-39. For instance, in *Montoya v. Akbari-Shahmirzadi (In re Akbari-Shahmirzadi)*, 2016 WL 6783245 (Bankr. D.N.M. Nov. 14, 2016), the New Mexico bankruptcy court held that the receipt of a transfer that ***originated in the forum jurisdiction*** before passing through a Swiss bank account was a sufficient contact where "[t]he transfer was sure to hurt Debtor's [U.S.] creditors, and therefore ***was 'expressly aimed'*** by the recipient and the transferor ***at the forum jurisdiction*** (the United States)," and ***"[t]he brunt of the wrongful conduct by the transferor and the transferee would clearly be felt in the forum jurisdiction***, and in particular by Debtor's creditors."[16] *Id.* at *1, 3 (emphasis added). Here, by contrast, Highland has made no showing that any creditors harmed by the transactions at issue reside in the RMI. Highland's other citations are similarly unavailing. *See In re Teknek, LLC*, 354 B.R. 181, 198 (Bankr. N.D. Ill. 2006) (minimum contacts with the United States existed where defendants "used American banks as the focal point for those funds, and then transferred all such funds through this focal point to themselves individually"); *Sugartown Worldwide LLC v. Shanks*, 2015 WL 1312572, at *6-7 (E.D. Pa. Mar. 24, 2015) (minimum contacts with Pennsylvania existed where defendant orchestrated fraudulent transfers to avoid satisfaction of Pennsylvania default judgment by a Pennsylvania creditor). No such facts are present here, and indeed Mr. Kandylidis is not even sued as a transferee.

[16] "In bankruptcy cases, the 'forum' is the United States." *Id.* at *2.

F. The High Court Properly Denied Highland's Request For Jurisdictional Discovery.

Highland is not entitled to jurisdictional discovery because the facts relevant to the due process analysis are not in dispute. Highland certainly has not demonstrated that the High Court abused its discretion in denying such discovery, as would be required to justify reversal on this issue. *See Boschetto v. Hansing*, 539 F.3d 1011, 1020 (9th Cir. 2008).

"[T]he case law is clear that Plaintiffs must make a *prima facie* showing of personal jurisdiction before such discovery should be permitted . . . ." *Leibovitch*, 188 F. Supp. 3d at 760 n.18; *see also Kelly v. Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 855 (5th Cir. 2000) ("When the lack of personal jurisdiction is clear, discovery would serve no purposes and should not be permitted."); *In re Tezos Secs. Litig.*, 2018 WL 4293341, at *5 n.9 ("Because Anvari has failed to make a colorable showing, his additional request for jurisdictional discovery is denied."). While Highland selectively quotes a Third Circuit decision for the proposition that jurisdictional discovery should be allowed unless the plaintiff's position is "clearly frivolous," it omits the Third Circuit's qualification that to obtain discovery, the plaintiff must "present[] factual allegations that suggest 'with reasonable particularity' the possible existence of the requisite 'contacts between [the party] and the forum state.'" *Toys "R" Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 456 (3d Cir. 2003). Here, the High Court properly denied Highland's request for jurisdictional discovery because Highland failed to meet this burden.

Highland also failed to meet its additional burden to "identify the discovery needed, the facts expected to be obtained thereby, and how such information would support personal jurisdiction." *Nat'l Sur. Corp. v. Ferguson Enters., Inc.*, 2014 WL 5472436, at *1 (N.D. Tex. Oct. 29, 2014). Highland's request for discovery as to "the Individual Defendants' understanding" of the transactions, their intent in entering into the transactions and "the total number of RMI companies for which they serve as director, officer, or beneficial owners" would not shed any light on the jurisdictional issue. Br. 44-45. Indeed, none of the key jurisdictional facts is disputed: Messrs. Economou and Kandylidis have never been to the RMI, none of the allegedly fraudulent transfers occurred in the RMI or involved assets in the RMI, Highland

suffered its claimed injury at its principal place of business in Texas, and to the extent that UDW was injured, it suffered that injury at its principal place of business in Cyprus (now the Cayman Islands) – not the RMI. Thus, the requested discovery could serve no useful purpose. *See Poe v. Babcock Int'l, PLC*, 662 F. Supp. 4, 7 (M.D. Pa. 1985) (where plaintiffs "me[e]t defendants' affidavit evidence with mere speculation, plaintiff[s'] request for an opportunity to conduct discovery on the matter must be denied.").

This case should never have been brought in the RMI in the first place, as the Nitijela recognized in the legislative history to its recent amendments to the RMI long-arm statute. N.B. No. 109, at p. 5 (seeking to "discourage non-resident plaintiffs from filing cases in the High Court that can and should be decided in other jurisdictions"). The High Court was not required to encourage Highland's blatant forum shopping by permitting it to take jurisdictional discovery – and thus prolong the case – in light of the undisputed record establishing the absence of personal jurisdiction over the Individuals. Thus, the High Court did not err, let alone abuse its discretion, by denying Highland's request for such discovery. *See Boschetto*, 539 F.3d at 1020 ("The denial of Boschetto's request for discovery, which was based on little more than a hunch that it might yield jurisdictionally relevant facts, was not an abuse of discretion.").

II. The High Court Did Not Err By Dismissing Highland's Claim For Aiding And Abetting Fraudulent Conveyances (Eighth Cause of Action).

Highland's appeal from the High Court's dismissal of its aiding and abetting claim is ill-founded because Highland is unable to point to any authority to support the existence of such a claim. As Chief Justice Ingram recognized in the Order, it is black letter law that "[i]n the absence of special legislation, we may safely affirm, that a general creditor cannot bring an action on the case against his debtor, ***or against those combining and colluding with him to make dispositions of his property***, although the object of those dispositions be to hinder, delay and defraud creditors." A.41 (quoting *Adler v. Fenton,* 65 U.S. 407, 413 (1860) (emphasis added)). It is undisputed that the Nitijela has not enacted any "special legislation" authorizing such a claim. Br. 41.

Highland's argument that certain United States "courts have recognized that a state's passage of [a statute governing fraudulent conveyance claims] does not necessarily displace otherwise applicable common law tort principles of aiding and abetting or conspiracy liability" misses the mark. *Id.* at 34. Neither of the cases that Highland cites holds that an aiding and abetting claim exists. In the first case, a federal court certified to the Minnesota Supreme Court the question whether a claim for aiding and abetting fraudulent conveyance exists as a matter of Minnesota law. It did so only after noting that the court had previously dismissed claims for aiding and abetting the alleged fraudulent transfers because "[t]he reasoning of courts outside Minnesota that declined to impose liability on non-transferees based on conspiracy and aiding and abetting theories was persuasive." *Arena Dev. Grp., LLC v. Naegele Commc'ns, Inc.*, 2008 WL 1924179, at *9 (D. Minn. Apr. 29, 2008). Highland has not provided, and Defendants have not been able to identify, any subsequent ruling by the Minnesota Supreme Court on this issue. In the second case, a bankruptcy court sitting in Arizona concluded that Arizona law recognizes a claim for ***conspiracy*** to commit fraudulent transfer – not aiding and abetting. *In re Kohner*, 2014 WL 4639920, at *8 (Bankr. D. Ariz. Sept. 11, 2014). Thus, Highland has not cited a single decision of a United States court recognizing the existence of an aiding and abetting claim.

Highland's reliance on English common law fares no better because, once again, Highland fails to cite a single authority that establishes the existence of an aiding and abetting claim. As Chief Justice Ingram correctly recognized, no claim for aiding and abetting fraudulent conveyance was brought in the one English case that Highland relies on. A.42. Instead, in that case – *Vivendi v. Richards* [2013] BCC 771 – "the only claims . . . were for breach of fiduciary duty and dishonest assistance of breach of fiduciary duty." A.42; A.796 ¶ 117, A.811 ¶ 179.

Highland has not cited any authority under the law of any jurisdiction that recognizes the existence of a claim for aiding and abetting fraudulent conveyance at common law. Accordingly, the High Court correctly dismissed this claim.

CONCLUSION

This Court should affirm the High Court's Order dismissing the Complaint with prejudice.

Respectfully submitted,

CARLSMITH BALL LLP
1001 Bishop Street, Suite 2100
Honolulu, HI 96813
Telephone: (808) 523-2597
amuller@carlsmith.com

LAW OFFICE OF STEVEN J. FINK PLLC
Steven J. Fink
100 Wall Street, 15th Floor
New York, NY 10005
Telephone: (646) 802-6976

ORRICK, HERRINGTON & SUTCLIFFE LLP
William S. Haft
Daniel A. Rubens
Emmanuel B. Fua
51 West 52nd Street
New York, NY 10019
Telephone: (212) 506-5000

Counsel for Defendants-Appellees

May 15, 2019

STATEMENT OF RELATED CASES

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

CARLSMITH BALL LLP

Arsima A. Muller
Counsel for Defendants-Appellees

CERTIFICATE OF SERVICE

I hereby certify that on May 15, 2018, 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:

James McCaffrey, M.I. Adm. # 103
THE MCCAFFREY FIRM, LTD.
RRE (BoMI) Bldg., 2nd Flr.
P.O. Box 509
Majuro, MH 96960, Marshall Islands
Tel: +692-625-6000
james@mccaffreyfirm.com

William T. Reid, IV
REID COLLINS & TSAI LLP
1301 S. Capital of Texas Hwy., C-300
Austin, Texas 78746
Tel: +1-512-647-6100
wreid@rctlegal.com

Attorneys for Plaintiffs-Appellants

CARLSMITH BALL LLP

Arsima A. Muller
Counsel for Defendants-Appellees