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

APPELLEES' APPENDIX
VOLUME 3 OF 3 (S.A.494 – S.A.679)

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Exhibit 19

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GEORGE ECONOMOU AND
ANTONIOS KANDYLIDIS

IN THE HIGH COURT OF THE
REPUBLIC OF THE MARSHALL ISLANDS

HIGHLAND FLOATING RATE OPPORTUNITIES FUND, HIGHLAND GLOBAL ALLOCATION FUND, HIGHLAND LOAN MASTER FUND, L.P., HIGHLAND OPPORTUNISTIC CREDIT FUND, AND NEXPOINT CREDIT STRATEGIES FUND, Plaintiffs, v. DRYSHIPS INC., OCEAN RIG INVESTMENTS INC., TMS OFFSHORE SERVICES LTD., SIFNOS SHAREHOLDERS INC., AGON SHIPPING INC., ANTONIOS KANDYLIDIS, and GEORGE ECONOMOU, Defendants.	CIVIL ACTION NO. 2017-198 **DEFENDANTS GEORGE ECONOMOU'S AND ANTONIOS KANDYLIDIS'S MOTION TO DISMISS COMPLAINT; MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS COMPLAINT; DECLARATION OF GEORGE ECONOMOU; DECLARATION OF ANTONIOS KANDYLIDIS; CERTIFICATE OF SERVICE**

DEFENDANTS GEORGE ECONOMOU'S AND
ANTONIOS KANDYLIDIS'S MOTION TO DISMISS COMPLAINT

Defendants George Economou and Antonios Kandylidis, by and through their undersigned counsel, hereby move this Court for dismissal of the Complaint filed by Plaintiffs Highland Floating Rate Opportunities Fund, Highland Global Allocation Fund, Highland Loan Master Fund, L.P., Highland Opportunistic Credit Fund and NexPoint Credit Strategies Fund on August 31, 2017.

This Motion is brought pursuant to MIRCP Rules 7(b), 12(b)(2), and 12(b)(6), and is based upon the attached Memorandum of Law in Support of Motion to Dismiss the Complaint, the October 30, 2017 Declaration of George Economou, the October 30, 2017 Declaration of Antonios Kandylidis, and the records and files herein.

DATED: Majuro, Marshall Islands, October 31, 2017

Respectfully submitted,

ARSIMA A. MULLER

Attorney for Defendants
GEORGE ECONOMOU AND
ANTONIOS KANDYLIDIS

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IN THE HIGH COURT OF THE
REPUBLIC OF THE MARSHALL ISLANDS

HIGHLAND FLOATING RATE OPPORTUNITIES FUND, HIGHLAND GLOBAL ALLOCATION FUND, HIGHLAND LOAN MASTER FUND, L.P., HIGHLAND OPPORTUNISTIC CREDIT FUND, AND NEXPOINT CREDIT STRATEGIES FUND,	)	CIVIL ACTION NO. 2017-198
Plaintiffs,	)	**ORAL ARGUMENT REQUESTED**
v.	)	
DRYSHIPS INC., OCEAN RIG INVESTMENTS INC., TMS OFFSHORE SERVICES LTD., SIFNOS SHAREHOLDERS INC., AGON SHIPPING INC., ANTONIOS KANDYLIDIS, and GEORGE ECONOMOU,	)	
Defendants.	)	

DEFENDANTS GEORGE ECONOMOU'S AND
ANTONIOS KANDYLIDIS'S MEMORANDUM OF LAW
IN SUPPORT OF THEIR MOTION TO DISMISS THE COMPLAINT

Defendants George Economou ("Mr. Economou") and Antonios Kandylidis ("Mr. Kandylidis," and collectively with Mr. Economou, the "Individual Defendants") respectfully submit this memorandum of law in support of their motion, pursuant to MIRCP Rules 7(b), 12(b)(2) and 12(b)(6), to dismiss Plaintiffs' Complaint (the "Complaint").[1] By submitting their motion to dismiss and the papers in support thereof, Defendants do not waive, and expressly preserve, their objections and defenses based on the Court's lack of jurisdiction over them.

INTRODUCTION

The Court should dismiss Plaintiffs' Complaint against the Individual Defendants because the Court lacks personal jurisdiction over them. The Complaint does not allege any wrongful conduct by either Individual Defendant within the territorial limits of the Republic of the Marshall Islands (the "RMI") or any other facts that could justify an exercise of jurisdiction over them. Indeed, neither Individual Defendant has ever been to the RMI, nor have they engaged in any acts that could subject them to this Court's jurisdiction. *See generally* Declaration of George Economou dated October 30, 2017 (the "Economou Declaration") and Declaration of Antonios Kandylidis dated October 30, 2017 (the "Kandylidis Declaration").

The Court should also dismiss Plaintiffs' Eighth Cause of Action, for aiding and abetting fraudulent conveyance. This cause of action – which is asserted against both Individual Defendants and is the only claim against Mr. Kandylidis – does not exist under applicable law.

FACTUAL BACKGROUND

Mr. Economou is a citizen of Greece who maintains his primary residence in Monaco. Economou Decl. ¶ 27. He has never been to the RMI. *Id.* ¶ 4. He does not transact any business within the territorial limits of the RMI, he does not maintain a personal residence or place of

[1] The Individual Defendants also join in the arguments set forth in Defendants' Joint Memorandum of Law in Support of Motion to Dismiss the Complaint dated October 31, 2017 (the "Joint Memorandum").

business in the RMI, and he does not employ 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. *Id.* ¶¶ 5-21.

Mr. Economou is the CEO and Chairman of the Board of Defendant DryShips Inc. ("DryShips"), a non-resident corporation organized under the laws of the RMI. *Id.* ¶¶ 1, 28, Exh. A. He is also CEO and Chairman of the Board of non-party Ocean Rig UDW Inc. ("UDW"). *Id.* ¶ 2. He is not an officer, director, manager or trustee of any of the entity Defendants other than DryShips. *Id.* ¶ 3.

Mr. Kandylidis is a citizen of Greece who maintains his primary residence in Monaco. Kandylidis Decl. ¶ 27. He has never been to the RMI. *Id.* ¶ 4. He does not transact any business within the territorial limits of the RMI, he does not maintain a personal residence or place of business in the RMI, and he does not employ anyone resident in the RMI, except to the extent that retaining RMI counsel for this lawsuit could be deemed to constitute employing someone in the RMI. *Id.* ¶¶ 5-21.

Mr. Kandylidis is the President, CFO and Director of DryShips. *Id.* ¶ 1. He is also President and CFO of UDW. Mr. Kandylidis is not an officer, director, manager or trustee of any of the entity Defendants other than DryShips. *Id.* ¶¶ 2-3.

Plaintiffs allege 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. Complaint ¶ 3. Mr. Economou and Mr. Kandylidis are alleged to have directed the actions of UDW and the entity Defendants with respect to those transactions. *Id.* ¶¶ 23-24. Plaintiffs do not allege that Mr. Economou or Mr. Kandylidis engaged in any conduct related to the transactions within the territorial limits of the RMI.

ARGUMENT

The Individual Defendants submit this memorandum in support of their motion to dismiss pursuant to MIRCP Rules 12(b)(2) (for lack of personal jurisdiction) and 12(b)(6) (for failure to state a claim). These rules mirror United States Federal Rules of Civil Procedure 12(b)(2) and 12(b)(6), respectively.

On a Rule 12(b)(6) motion, the court accepts all well-pleaded facts as true and views those facts in the light most favorable to the plaintiff. *See Gonzales v. Kay*, 577 F.3d 600, 603 (5th Cir. 2009); *Dorsey v. Portfolio Equities, Inc.*, 540 F.3d 333, 338 (5th Cir. 2008). However, "conclusory allegations are not considered as expressly pleaded facts or factual inferences." *Rosenquist v. Economou*, 3 MILR 144, 151 (2011) (citation omitted). Likewise, "inferences that are not objectively reasonable cannot be drawn in the plaintiff's favor." *Id.* (citation omitted).

I. THE COURT SHOULD DISMISS THE COMPLAINT AGAINST THE INDIVIDUAL DEFENDANTS FOR LACK OF PERSONAL JURISDICTION

The Court lacks personal jurisdiction over the Individual Defendants. Plaintiffs allege that "Defendants Economou and Kandylidis are subject to personal jurisdiction in this Court as non-resident directors of RMI corporations," citing the Court's decision in *Frontline, Ltd. v. DHT Holdings,* H. Ct. Civ. No. 2017-092 (June 7, 2017). They are wrong. Jurisdiction was not contested in *Frontline,* and the Court has since recognized that jurisdiction over a non-resident officer or director who contests jurisdiction does not exist solely because of that individual's status as officer or director. *Chee v. Zhang*, H. Ct. Civ. No. 2016-254 at pp. 17-18 (Oct. 16, 2017) ("There is no allegation that [Defendant] took any action of any kind in any capacity (i.e., as a shareholder or officer) within the territorial limits of the Republic … therefore … there is not statutory long-arm personal jurisdiction over [Defendant] under Section 251(i).").

Plaintiffs claim that the Court has ***specific jurisdiction*** over the Individual Defendants – *i.e.*, jurisdiction arising from particular acts that purportedly subjected them to the Court's jurisdiction, rather than a more generalized presence within the territory of the RMI.[2] Compl. ¶ 27. In order to establish personal jurisdiction, Plaintiffs must establish both that (1) the RMI's long-arm statute extends to the Individual Defendants and (2) the assertion of personal jurisdiction is consistent with due process. *Frontline*, H. Ct. Civ. No. 2017-092 at p.16; *ICT Pharm., Inc. v. Boehringer Ingelheim Pharm., Inc.*, 147 F. Supp. 2d 268, 271 (D. Del. 2001). It is Plaintiffs' burden to establish that the Court has personal jurisdiction over each defendant. *See Astra Zeneca AB v. Mylan Pharms., Inc.*, 72 F. Supp. 3d 549, 552 (D. Del. 2014); *ICT Pharm., Inc.*, 147 F. Supp. 2d at 270-71. They have failed to meet that burden as to either prong of the personal jurisdiction analysis.

A. THE RMI LONG ARM STATUTE DOES NOT PROVIDE ANY BASIS FOR THE COURT TO EXERCISE JURISDICTION OVER THE INDIVIDUAL DEFENDANTS

Under the RMI long-arm statute – Section 251 of the Judiciary Act of 1983, Title 27 MIRC Chapter 2 – the Court has jurisdiction over a corporate director or officer only to the extent that the claims at issue are predicated on the defendant's "acts ***within the territorial limits of the Republic*** as director, manager, trustee or other officer of a corporation organized under the laws of the Republic." *See* Judiciary Act §§ 251(1)(i), 254 (emphasis added). Plaintiffs have not alleged that the Individual Defendants engaged in any misconduct within the territorial limits of the RMI. Nor could they, since neither Mr. Economou nor Mr. Kandylidis has ever been to the RMI. Economou Decl. ¶ 4; Kandylidis Decl. ¶ 4.

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[2] Plaintiffs do not allege that the Court has ***general jurisdiction*** over the Individual Defendants, nor could they because the Individual Defendants are not domiciled in the RMI. *Helicopteros Nacionales de Columbia S.A. v. Hall*, 466 U.S. 408, 416 (1984); *see also Bristol-Myers Squibb Co. v. Super. Ct. of Cal., San Francisco*, 137 S. Ct. 1773, 1780 ("For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile" (citation omitted)).

The Court should dismiss the Complaint against the Individual Defendants accordingly. *See Chee*, H. Ct. Civ. No. 2016-254 at pp. 12-13 ("Section 251(i) requires, as a prerequisite to jurisdiction, that Freeman not only have acted as secretary, but also that he have done so 'within the territorial limits of the Republic'; and it creates jurisdiction only as to causes of action 'arising from' one of the jurisdiction-creating acts taken within the Republic."); *Yandall Investments Pty Ltd. v. White Rivers Gold Ltd.*, H. Ct. Civ. No. 2010-158 (May 19, 2017), pp. 2-3 (director's execution of share certificates outside of RMI not deemed to constitute an act within the RMI for purposes of establishing personal jurisdiction).

B. *FRONTLINE* DOES NOT SUPPORT PLAINTIFFS' POSITION

The Complaint cites the Court's decision in *Frontline* to support Plaintiffs' claim that the Court has jurisdiction over the Individual Defendants. Complaint ¶ 27. *Frontline* states that "personal jurisdiction over non-resident directors of an in-forum corporation is consistent with Delaware corporate law." *Frontline*, H. Ct. Civ. No. 2017-092 at p. 15. In *Frontline*, however, the directors did not contest personal jurisdiction, and thus the issue was not considered on a fully developed record. *Id.* ("For these reasons ***and in the absence of a successful challenge to personal jurisdiction by the Director Defendants,*** the Court concludes that it has jurisdiction over the Director Defendants.") (emphasis added).

Frontline does not justify a finding of jurisdiction here, where such jurisdiction is being contested, because the "corporate law" referenced in *Frontline* consists of a Delaware statute that is flatly inconsistent with the RMI long-arm statute. The Delaware statute, 10 Del. Code § 3114, establishes that directors and officers of Delaware corporations are deemed to have consented to the appointment of a Delaware agent for service of process, and has been interpreted by Delaware courts to constitute a jurisdictional consent. *See, e.g.*, *Armstrong v. Pomerance*, 423 A.2d 174, 175 (Del. 1980) ("One part of [10 Del. Code § 3114] provides that serving in the

capacity of director 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 statute, such as the long-arm statute, or, as alleged by the Plaintiff here, 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.").

In contrast, as discussed above, RMI Judiciary Act Section 251(1)(i) provides that jurisdiction over a non-resident director of an RMI corporation may be maintained only in respect of "acts ***within the territorial limits of the Republic*** as director, manager, trustee or other officer of a corporation organized under the laws of the Republic." (Emphasis added).

There is no basis in RMI law for this Court to rely on any Delaware statute – not to mention one that conflicts with an RMI statute. Section 13 of the Business Corporations Act ("BCA"), Title 52 MIRC Chapter 1, provides that "[t]his Act shall be applied to make the laws of the Republic, ***with respect to the subject matter hereof***, uniform with the laws of the State of Delaware and other states of the United States of America ***with substantially similar legislative provisions."*** (Emphasis added.) The RMI long-arm statute is not found in the BCA, and so there is no requirement that it be interpreted consistent with the laws of the State of Delaware. And even if the BCA did apply, Section 13 goes on to make clear that it is only "***non-statutory***" law of Delaware and other jurisdictions that is adopted as the law of the RMI, and only "***[i]nsofar as it does not conflict with***" RMI law.[3]

[3] It is also of course true that Marshall Islands courts "may look to decisions of the United States as well as generally accepted common law principles for guidance." *In the Matter of P.L. No. 1995-118*, 2 MILR 105, 110 (1997).

Here, there is a direct conflict between an RMI statute, which provides that non-resident directors of an RMI corporation are subject to this Court's jurisdiction only as to their acts within the territorial limits of the Republic, and a Delaware statute, which has been interpreted to afford Delaware courts with jurisdiction over directors of Delaware corporations as to all disputes arising out of their conduct as directors, regardless of where the offending conduct took place.

The RMI Constitution of course vests the legislative power of the Republic in the Nitijela, not the Delaware state legislature. RMI Constitution, Article IV, Section 1. Thus, this Court is bound to follow the laws enacted by the Nitijela, not conflicting statutes of the State of Delaware or any other jurisdiction. *See, e.g.*, *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. EXERCISING PERSONAL JURISDICTION OVER THE INDIVIDUAL DEFENDANTS WOULD BE INCONSISTENT WITH DUE PROCESS

Even if the Complaint had established a basis for jurisdiction under the RMI long-arm statute – it does not – exercising jurisdiction over the Individual Defendants would be inconsistent with principles of due process. Due process demands that the defendant must have sufficient "minimum contacts" with the forum jurisdiction such that traditional notions of justice and fair play are not offended by the defendant being brought before its courts. *Chee*, H. Ct. Civ. No. 2016-254 at p.13 (citing *Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1155 (9th Cir. 2006)). As the Court explained in *Frontline*, a party has minimum contacts with the forum only if each of the following three elements are met:

> (i) a defendant "has performed some act or consummated some transaction within the forum or otherwise purposefully availed [itself] of the privileges of conducting activities in the forum," (ii) "the claim arises out of or results from the defendant's forum-related activities," and (iii) "the exercise of jurisdiction is reasonable."

Frontline, H. Ct. Civ. No. 2017-092 at p. 16 (citing *Pebble Beach Co.*, 453 F.3d at 1155); *Fed. Deposit Ins. Corp. v. British-Am. Ins. Co.*, 828 F.2d 1439, 1441-1442 (9th Cir. 1987); *Chee*, H. Ct. Civ. No. 2016-254 at pp. 13, 18. These requirements are not satisfied here.

1. The Individual Defendants Did Not Engage In Any Forum-Related Activities

Where a defendant lacks the necessary minimum contacts with the RMI, exercising jurisdiction over him violates traditional notions of fair play and substantial justice. *Frontline*, H. Ct. Civ. No. 2017-092 at p. 18. Where, as here, a defendant does not conduct activities in the forum, jurisdiction is appropriate only if he "purposefully directed" his activities to the forum. *Chee*, H. Ct. Civ. No. 2016-254 at pp. 14, 19. In order to assess whether a party purposefully directed his activities towards the forum, courts apply the "effects test" articulated by the United States Supreme Court in *Calder v. Jones*, 465 U.S. 783 (1984), and applied by this Court in *Frontline* (pp. 18-19) and *Chee* (p.19). This test requires the plaintiff to show that the defendant "committed an intentional act … expressly aimed at the forum [and] caused harm, the brunt of which is suffered and which the defendant knows is likely to be suffered in the forum state." *Pebble Beach Co.*, 453 F.3d at 1156; *see also Calder*, 465 U.S. at 788-89. To establish that the defendant "expressly aimed" his conduct toward the relevant jurisdiction, the plaintiff has to demonstrate that "the defendant knew that the plaintiff would suffer the brunt of the harm caused by the tortious conduct in the forum, and point to specific activity indicating that the defendant expressly aimed its tortious conduct at the forum." *IMO Indus., Inc. v. Kiekert AG*, 155 F.3d 254, 265-266 (3d Cir. 1998) ("Simply asserting that the defendant knew that the plaintiffs'

principal place of business was located in the forum would be insufficient in itself to meet this [deliberate targeting] requirement.").

The mere allegation that Defendants are officers or directors of non-resident RMI corporations is not sufficient to establish minimum contacts, notwithstanding the Court's ruling to the contrary in *Frontline*. If a plaintiff fails to show that the defendant "manifest[ed] behavior intentionally targeted at and focused on' the forum," *IMO Indus.* at 265 (quoting *ESAB Group Inc. v. Centricut, Inc.*, 126 F.3d 617, 625 (4th Cir. 1997)), the plaintiff fails to establish jurisdiction. Here, the Complaint does not allege that Mr. Economou or Mr. Kandylidis took any action directed at the Marshall Islands, and thus the first and second prongs of the minimum contacts test cannot be met.

2. Exercising Jurisdiction Over the Individual Defendants Would Not Be Fair or Reasonable

The third prong of the minimum contacts test cannot be met either. As Delaware's Supreme Court recognized in *Armstrong*, it is only where a defendant is on notice that he is subject to jurisdiction in a foreign court that the court's exercise of personal jurisdiction over him is fair and reasonable. 423 A.2d at 176. The Delaware Supreme Court held that the exercise of personal jurisdiction over non-resident directors was constitutional because "[t]he defendants accepted their directorships ***with explicit statutory notice, via § 3114,*** that they could be haled into the Delaware Courts to answer for alleged breaches of the duties imposed on them . . . ." *Id.* (emphasis added); *see also id.* at 178-80 (quoting trial court decision in *Pomerance v. Armstrong* and also quoting *Swenson v. Thibaut,* 39 N.C. App. 77, 250 S.E.2d 279, 290 (1978), appeal dismissed, 296 N.C. 740, 254 S.E.2d 181-83 (1979)). Here, the Individual Defendants accepted their positions as directors and officers of an RMI corporation with the understanding, based on Judiciary Act Section 251(1)(i), that they could be required to litigate in the courts of the RMI

for alleged misconduct as an officer or director only to the extent that such conduct took place within the RMI. There was no reason for them to believe that they could be forced to defend litigation in the RMI based upon their conduct in those capacities outside the territorial limits of the RMI. Thus, this Court's exercise of jurisdiction over them would violate due process.

II. THE COURT SHOULD DISMISS PLAINTIFFS' EIGHTH CAUSE OF ACTION BECAUSE RMI LAW DOES NOT RECOGNIZE A CLAIM FOR AIDING AND ABETTING FRAUDULENT CONVEYANCE

Plaintiffs' Eighth Cause of Action asserts a claim for aiding and abetting fraudulent conveyance that does not exist under applicable law. Specifically, Plaintiffs allege that the Individual Defendants "knowingly participated in Ocean Rig's fraudulent conveyances and provided substantial assistance in their execution." Complaint ¶ 128. There is no such claim, however.

> The United States Supreme Court set out the established common law rule in 1860:
>
> In 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.

Adler v. Fenton, 65 U.S. 407, 413 (1860) (emphasis added). Thus, a claim for aiding and abetting fraudulent conveyance may be established only by legislation. The Nitijela has not adopted such legislation. Indeed, even jurisdictions that have established a statutory claim for fraudulent conveyance do not recognize aiding and abetting liability. *See, e.g.*, *Trenwick Am. Litig. Trust v. Ernst & Young LLP*, 906 A.2d 168, 203 (Del. Ch. 2006) ("Despite the breadth of remedies available under state and federal fraudulent conveyance statutes, those laws have not been interpreted as creating a cause of action for 'aiding and abetting'."); *Fed. Deposit Ins. Corp. v. Porco,* 75 N.Y.2d 840, 842 (1990) ("the traditional rule in this State rejects any cause of action for mere participation in the transfer of a debtor's property prior to the creditor's obtaining a

judgment or a lien on that property."); *Mack v. Newton*, 737 F.2d 1343, 1357 (5th Cir. 1984) ("[T]he general rule under the Bankruptcy Act is that one who did not actually receive any of the property fraudulently transferred (or any part of a 'preference') will not be liable for its value, even though he may have participated or conspired in the making of the fraudulent transfer (or preference).") (emphasis added).

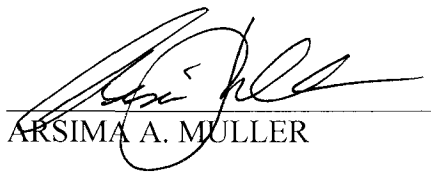
There is no such thing as a claim for aiding and abetting fraudulent conveyance, and the Court should dismiss Plaintiffs' Eighth Cause of Action accordingly.

CONCLUSION

For the reasons and upon the authorities set forth above and in the accompanying Joint Memorandum, the Court should dismiss the Complaint and grant Mr. Economou and Mr. Kandylidis such other and further relief as the Court deems just and proper.

DATED: Majuro, Marshall Islands, October 31, 2017

Respectfully submitted,



ARSIMA A. MULLER

Attorney for Defendants
GEORGE ECONOMOU AND
ANTONIOS KANDYLIDIS

Exhibit 20

**IN THE HIGH COURT OF THE
REPUBLIC OF THE MARSHALL ISLANDS**

HIGHLAND FLOATING RATE OPPORTUNITIES FUND, HIGHLAND GLOBAL ALLOCATION FUND, HIGHLAND LOAN MASTER FUND, L.P., HIGHLAND OPPORTUNISTIC CREDIT FUND, AND NEXPOINT CREDIT STRATEGIES FUND, Plaintiffs, v. DRYSHIPS INC., OCEAN RIG INVESTMENTS INC., TMS OFFSHORE SERVICES LTD., SIFNOS SHAREHOLDERS INC., AGON SHIPPING INC., ANTONIOS KANDYLIDIS, and GEORGE ECONOMOU, Defendants.	)	CIVIL ACTION NO. 2017-198

**DECLARATION OF GEORGE ECONOMOU
IN SUPPORT OF HIS MOTION TO DISMISS THE COMPLAINT**

I, GEORGE ECONOMOU, attest to the facts set forth herein based upon my personal knowledge and my review of corporate records, and could and would testify competently to the matters set forth herein if called upon to do so:

1. I am the CEO and Chairman of the Board of Defendant DryShips, Inc. ("DryShips"), a non-resident corporation organized under the laws of the Republic of the Marshall Islands ("RMI").

2. I am also CEO and Chairman of the Board of non-party Ocean Rig UDW Inc. ("UDW"). UDW was previously a non-resident corporation organized under the laws of the RMI, and redomiciled to the Cayman Islands in April 2016.

3. I am not an officer, director, manager or trustee of any of the Defendants in this lawsuit other than DryShips.

4. I have never been to the RMI.

5. I do not and have not ever transacted business within the territorial limits of the RMI.

6. I do not and have not ever operated a motor vehicle within the territorial limits of the RMI.

7. I do not and have not ever operated a vessel or aircraft within the territorial waters or airspace of the RMI.

8. I have not ever committed a tortious act, or indeed any act, within the territorial limits of the RMI.

9. I have never entered into any contract to insure any person or property located within the territorial limits of the RMI at the time of entry into the contract.

10. I have never entered into any contract to insure against any risk within the territorial limits of the RMI.

11. I do not and have not ever owned, used, occupied or possessed any land or interest in land within the territorial limits of the RMI.

12. I have not entered into any express or implied contract with a resident of the RMI which is to be performed wholly or partly, by either party, within the territorial limits of the RMI other than retaining counsel to represent me in this and other litigation.

13. I do not and have not ever performed any acts within the territorial limits of the RMI as director, manager, trustee or other officer of DryShips, UDW, or any other corporation organized under the laws of the RMI.

14. I do not and have not ever performed any acts within the territorial limits of the RMI as executor, guardian, trustee or administrator of an estate in the RMI.

15. I have not committed any acts outside the territory of the RMI that have caused injury to a person or persons within the territorial limits of the RMI.

16. I do not and have not ever engaged in any solicitation or sales activity within the territorial limits of the RMI.

17. I do not and have not ever processed, serviced or manufactured any products, materials or things used or consumed within the RMI.

18. I have not violated the provisions of Title 20, Chapter 4, Section 403, of the Consumer Protection Act.

19. I have not committed any act of commission or omission of deceit, fraud or misrepresentation which was intended to affect, and did affect persons in the RMI.

20. I do not and have not ever maintained a place of business in the RMI.

21. I do not and have not ever employed anyone resident in the RMI, except to the extent that retaining RMI counsel in this and other proceedings could be deemed to constitute employing a person resident in the RMI.

22. I do not and have not ever maintained any bank accounts in the RMI.

23. I do not and have not ever maintained a telephone listing in the RMI.

24. I have never entered into any contract in the RMI.

25. I do not and have not ever maintained a registered agent for service of process in the RMI.

26. I do not and have not ever advertised in the RMI.

27. Litigating this dispute in the RMI would place a significant burden on me, as I am a citizen of Greece and a resident of Monaco and do not maintain any contacts with the RMI.

28. DryShips is a nonresident RMI corporation that was formed in 2004, as reflected in the Certificate of Good Standing annexed hereto as Exhibit A.

29. DryShips' only office is located in Athens, Greece. DryShips does not maintain an office or other place of business in the Republic of the RMI, transact business within the territorial limits of the RMI or employ anyone resident in the RMI.

30. DryShips does not maintain any bank accounts in the RMI.

31. DryShips does not own any property located in the territory of the RMI.

32. Meetings of the Board of Directors of DryShips are held in the licensed shipping office of DryShips in Greece. No DryShips Board meeting has ever been held in the RMI.

33. Other than its incorporation in the RMI, DryShips' only contacts with the RMI that I am aware of are that it maintains a registered agent for service of process in the RMI and that certain of the ships owned by DryShips are flagged in the RMI.

I, GEORGE ECONOMOU, declare under penalty of law that the foregoing is true and correct to the best of my knowledge and belief.

Dated: October 20, 2017

GEORGE ECONOMOU

Exhibit 21

Exhibit A

THE REPUBLIC OF THE MARSHALL ISLANDS

REGISTRAR OF CORPORATIONS

CERTIFICATE OF GOODSTANDING

I HEREBY CERTIFY, That I have made a diligent examination of the files of The Trust Company of the Marshall Islands, Inc., Registrar of Corporations for non-resident corporations, in respect of all instruments filed in accordance with § 5 of the Marshall Islands Business Corporations Act regarding

DRYSHIPS INC.
Registration Number 11911

incorporated on

September 9, 2004

and with Registered Agent

The Trust Company of the Marshall Islands Inc.
Trust Company Complex
Ajeltake Road, Ajeltake Island
Majuro, Marshall Islands MH96960

and upon such examination, I find no filed or recorded instruments that would contravene that such corporation is and remains a subsisting corporation and that the corporation has paid all taxes and fees due and payable and, therefore, is in good standing as of the date hereon.

REGISTRAR OF CORPORATIONS
SEAL
REPUBLIC OF THE MARSHALL ISLANDS

WITNESS my hand and the official seal of the Registry on October 27, 2017.

Denise M. Francis

Denise M. Francis
Deputy Registrar

Exhibit 22

IN THE HIGH COURT OF THE
REPUBLIC OF THE MARSHALL ISLANDS

HIGHLAND FLOATING RATE OPPORTUNITIES FUND, HIGHLAND GLOBAL ALLOCATION FUND, HIGHLAND LOAN MASTER FUND, L.P., HIGHLAND OPPORTUNISTIC CREDIT FUND, AND NEXPOINT CREDIT STRATEGIES FUND, Plaintiffs, v. DRYSHIPS INC., OCEAN RIG INVESTMENTS INC., TMS OFFSHORE SERVICES LTD., SIFNOS SHAREHOLDERS INC., AGON SHIPPING INC., ANTONIOS KANDYLIDIS, and GEORGE ECONOMOU, Defendants.	)	CIVIL ACTION NO. 2017-198

DECLARATION OF ANTONIOS KANDYLIDIS
IN SUPPORT OF HIS MOTION TO DISMISS THE COMPLAINT

I, ANTONIOS KANDYLIDIS, attest to the facts set forth herein based upon my personal knowledge and my review of corporate records, and could and would testify competently to the matters set forth herein if called upon to do so:

1. I am the President, CFO, and Director of Defendant DryShips, Inc. ("DryShips"), a non-resident corporation organized under the laws of the Republic of the Marshall Islands ("RMI").

2. I am the President and CFO of non-party Ocean Rig UDW Inc. ("UDW"), having been appointed on May 17, 2016 and December 16, 2016, respectively.

UDW was previously a non-resident corporation organized under the laws of the RMI. In April 2016, the company redomiciled to the Cayman Islands.

3. I am not an officer, director, manager or trustee of any of the Defendants in this lawsuit other than DryShips.

4. I have never been to the RMI.

5. I do not and have not ever transacted business within the territorial limits of the RMI.

6. I do not and have not ever operated a motor vehicle within the territorial limits of the RMI.

7. I do not and have not ever operated a vessel or aircraft within the territorial waters or airspace of the RMI.

8. I have not ever committed a tortious act, or indeed any act, within the territorial limits of the RMI.

9. I have never entered into any contract to insure any person or property located within the territorial limits of the RMI at the time of entry into the contract.

10. I have never entered into any contract to insure against any risk within the territorial limits of the RMI.

11. I do not and have not ever owned, used, occupied or possessed any land or interest in land within the territorial limits of the RMI.

12. I have not entered into any express or implied contract with a resident of the RMI which is to be performed wholly or partly, by either party, within the territorial limits of the RMI other than retaining counsel for this litigation.

13. I do not and have not ever performed any acts within the territorial limits of the RMI as director, manager, trustee or other officer of DryShips, UDW, or any other corporation organized under the laws of the RMI.

14. I do not and have not ever performed any acts within the territorial limits of the RMI as executor, guardian, trustee or administrator of an estate in the RMI.

15. I have not committed any acts outside the territory of the RMI that have caused injury to a person or persons within the territorial limits of the RMI.

16. I do not and have not ever engaged in any solicitation or sales activity within the territorial limits of the RMI.

17. I do not and have not ever processed, serviced or manufactured any products, materials or things used or consumed within the RMI.

18. I have not violated the provisions of Title 20, Chapter 4, Section 403, of the Consumer Protection Act.

19. I have not committed any act of commission or omission of deceit, fraud or misrepresentation which was intended to affect, and did affect persons in the RMI.

20. I do not and have not ever maintained a place of business in the RMI.

21. I do not and have not ever employed anyone resident in the RMI, except to the extent that retaining RMI counsel in this proceeding could be deemed to constitute employing a person resident in the RMI.

22. I do not and have not ever maintained any bank accounts in the RMI.

23. I do not and have not ever maintained a telephone listing in the RMI.

24. I have never entered into any contract in the RMI.

25. I do not and have not ever maintained a registered agent for service of process in the RMI.

26. I do not and have not ever advertised in the RMI.

27. Litigating this dispute in the RMI would place a significant burden on me, as I am a citizen of Greece and I maintain my primary residence in Monaco. I do not maintain any contacts with the RMI.

28. UDW's only office is located in the Cayman Islands. UDW does not maintain an office or other place of business in the RMI, transact business within the territorial limits of the RMI or employ anyone resident in the RMI.

29. UDW does not maintain any bank accounts in the RMI.

30. UDW does not own any property located in the territory of the RMI.

31. Meetings of the Board of Directors of UDW are held in the Cayman Islands. No UDW Board meeting has ever been held in the RMI.

32. Other than its former incorporation in the RMI, UDW has no contacts with the RMI that I am aware of.

I, ANTONIOS KANDYLIDIS, declare under penalty of law that the foregoing is true and correct to the best of my knowledge and belief.

Dated: October 30, 2017

ANTONIOS KANDYLIDIS

Exhibit 23

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IN THE HIGH COURT
REPUBLIC OF THE MARSHALL ISLANDS

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

Plaintiffs,

v.

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

Defendants.

Civil Action 2017-198

PLAINTIFFS' RESPONSE IN OPPOSITION TO INDIVIDUAL DEFENDANTS' MOTION TO DISMISS

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Plaintiffs, by and through their counsel, hereby file this Response in Opposition to the Motion to Dismiss filed by Defendants George Economou and Anthony Kandylidis (the "**Individual Defendants**").

INTRODUCTION

The Individual Defendants seek to dodge their liability for the fraudulent transfers alleged in Plaintiffs' Complaint through a motion to dismiss for lack of personal jurisdiction, despite the fact that: (1) they are directors and officers of the RMI company whose assets were fraudulently transferred, and control or are directors and officers of the RMI companies that initially received those fraudulent transfers; and (2) they directed and personally benefited from the transfers. The Court should reject the Individual Defendants' attempt to avoid their liability under RMI law for their part in fraudulent transfers that involved only RMI companies that they controlled.

In fact, this Court has already held that it can exercise personal jurisdiction over non-resident directors and officers of an in-forum corporation for claims premised on their actions as directors and officers, and that such an exercise of jurisdiction comports with due process principles. *See Frontline, Ltd. v. DHT Holdings, Inc.*, H. Ct. Civ. No. 2017-092 at p.16 (June 7, 2017). That is exactly what Plaintiffs have pleaded here. Plaintiffs' claims arise out of the Individual Defendants' conduct undertaken as directors and officers of Ocean Rig UDW ("**UDW**")—an RMI company at the time of those actions. Thus, the exercise of jurisdiction is both proper and consistent with principles of due process.

Moreover, jurisdiction is separately available under the RMI long-arm statute, which permits a plaintiff to file suit in the RMI against a defendant who "commits an act or commission or omission of deceit, fraud or misrepresentation which is intended to affect, and does affect persons in the Republic." Judiciary Act § 251(1)(n). Plaintiffs allege that the Individual Defendants directed and benefited from the fraudulent transfers out of UDW—a "person" who was "affect[ed] . . . in the Republic." Plaintiffs further allege that after siphoning away UDW's assets, the Individual Defendants redomiciled UDW to the Cayman Islands ("**Cayman**") in an effort to

discharge debts owed to Plaintiffs and to avoid this type of litigation, where their fraudulent and deceptive acts, which fundamentally affected UDW's corporate status in the RMI, would be at-issue. Thus, jurisdiction is proper under the RMI long-arm statute, and is consistent with cases from all over the United States in which courts sitting in a debtor's state of organization exercise jurisdiction over foreign recipients of fraudulent transfers.

The Individual Defendants also feebly argue that the Court's exercise of jurisdiction would offend principles of due process. The Individual Defendants chose the RMI as the place of incorporation for UDW and then voluntarily agreed to become directors and officers of UDW. Although the burden is on them to make a "compelling case" that litigation in the RMI would be unduly burdensome or unfair, they have not even tried to make such a showing. Indeed, Mr. Economou has previously appeared in RMI courts to defend a derivative action in which he was named as a defendant, without asserting a personal jurisdiction defense or arguing that litigating in the RMI was any burden at all. Of course, the RMI is the most appropriate forum to hear Plaintiffs' claims—which all parties agree are governed by RMI law—and are premised on fraudulent transfers initially received by RMI companies (controlled by the Individual Defendants) who have appeared in this action. Thus, this is the only proceeding in which Plaintiffs can seek full relief from all parties. And, the RMI is the jurisdiction with the most significant interest in determining the merits of Plaintiffs' claims and the import of UDW's redomiciliation to Cayman on Plaintiffs' standing to assert those claims.

Finally, the Individual Defendants argue that Plaintiffs' eighth cause of action for their aiding and abetting of the fraudulent transfers should be dismissed for failure to state a claim. However, under common law, an individual who knowingly and dishonestly assists another in extracting cash from a debtor to the detriment of creditors is liable, and therefore the Individual Defendants' argument should be rejected.

FACTUAL BACKGROUND

Plaintiffs incorporate by reference the Factual Background included in their opposition to Defendants' parallel joint motion to dismiss, which describes the fraudulent transfers in detail.

With respect to jurisdiction, Plaintiffs allege that the Individual Defendants are non-resident directors and officers of RMI corporations, including UDW (Compl. ¶¶ 26–27), who engaged in four self-dealing transactions that harmed UDW and Plaintiffs, while significantly benefiting the Individual Defendants in their personal capacities (*id.* ¶ 1). These transactions, which were each directed by Economou (as Chairman and CEO of UDW) and Kandylidis (as President and CFO of UDW), were designed to siphon money away from UDW, thereby reducing the assets available to UDW creditors. (*Id.* ¶¶ 3–7, 23–24).

The Individual Defendants directed the fraudulent transfers not only to benefit themselves financially, but also so that they could obtain greater control over UDW's voting shares. (*Id.* ¶¶ 50–57.) Specifically, the Individual Defendants fraudulently transferred funds away from UDW so that those funds could be used to purchase an additional 40.4% of UDW voting shares through a special purpose vehicle controlled by the Individual Defendants and created to hold the shares. (*Id.* ¶¶ 36–39.) When the shares purchased with the fraudulently transferred funds were combined with the shares the Individual Defendants already controlled, the Individual Defendants controlled the shareholder vote that resulted in UDW's redomiciliation out of the RMI and into Cayman. (*Id.* ¶¶ 55–56.) Unlike the RMI, which has made the policy choice not to provide judicial debt restructuring proceedings to insolvent RMI companies, Cayman law permitted the Individual Defendants to use a scheme of arrangement to nullify corporate debts owed to Plaintiffs in an attempt to shield their liability under RMI law. (*Id.* ¶¶ 8–9.)

ARGUMENT

An RMI court may exercise personal jurisdiction over a defendant where (1) RMI law provides a basis for jurisdiction, and (2) the exercise of jurisdiction is consistent with principles of due process. *Frontline*, at p.16. Where, prior to any discovery, a defendant moves to dismiss for

lack of personal jurisdiction under Rule 12(b)(2), the plaintiff need "only make a prima facie showing of jurisdictional facts to withstand the motion to dismiss." *Chee v. Zhang*, H. Ct. Civ. No. 2016-254, at p.9 (Oct. 16, 2017). Moreover, "courts are to assist the plaintiff by allowing jurisdictional discovery unless the plaintiff's claim is 'clearly frivolous.'" *Toys "R" Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 456 (3d Cir. 2003) (internal citation omitted)).

I. RMI law permits the Court to exercise jurisdiction over non-resident directors and officers of RMI companies.

A. The Individual Defendants consented to jurisdiction in the RMI.

This Court has squarely held that it may exercise personal jurisdiction over non-resident directors of RMI corporations, recognizing that "personal jurisdiction over non-resident directors of an in-forum corporation is consistent with Delaware corporate law" and "comports with due process." *Frontline*, at p.15; *see also* Del. Code Ann. tit. 10, § 3114(a), (b).

Here, the Individual Defendants admit that they serve and as directors and officers of the transferor of the alleged fraudulent transfers, UDW, a corporation organized under RMI law at the time of the fraudulent transfers and until its redomiciliation out of the RMI in April 2016. Economou Decl. ¶¶ 1–2; Kandylidis Decl. ¶¶ 1–2. The Individual Defendants also serve as directors and officers of Defendant DryShips Inc., a corporation organized under RMI law and subject to the Court's exercise of personal jurisdiction in this action. *Id.* Plaintiffs' claims against the Individual Defendants arise out of their actions taken as directors and officers of either UDW, DryShips, or both. (Compl. ¶¶ 1, 3–7, 23–24.). Thus, like the non-resident directors of the RMI company in *Frontline*, the Individual Defendants are subject to this Court's jurisdiction.

Moreover, the RMI is a well-known jurisdiction to the Individual Defendants. It was the Individual Defendants who opted to incorporate both UDW and DryShips, among numerous other companies, in the RMI. Despite making the choice to take advantage of RMI law when incorporating their companies in the jurisdiction, the Individual Defendants now seek to avoid being held accountable in an RMI Court for their theft of tens of millions of dollars from an RMI

company for their own economic benefit. That is exactly the type of inequitable result prohibited both this Court's holding in *Frontline*, as well as Delaware law.

B. The RMI long-arm statute establishes an independent basis for the Court's exercise of personal jurisdiction over the Individual Defendants.

The Individual Defendants are also subject to jurisdiction in the RMI under the RMI long-arm statute. Judiciary Act § 251(1)(n) ("**§ 251(1)(n)**") permits the Court to exercise jurisdiction over an individual who "commits an act or commission or omission of deceit, fraud or misrepresentation which is intended to affect, and does affect persons in the Republic." That is precisely what Plaintiffs allege here: The Individual Defendants' fraudulent actions, including (i) fraudulently siphoning money away from UDW, (ii) accelerating its descent into insolvency, and (iii) orchestrating its redomicilation to the Cayman Islands in an effort to shield the transfers from creditors, were "intended to affect, and [did] affect," UDW, a "person in the Republic" at the time of the Individual Defendants' actions.[1] (*See, e.g.*, Compl. ¶¶ 1–11.)

As this Court noted in *Chee,* a defendant is subject to jurisdiction pursuant to § 251(1)(n) when the causes of action brought against the defendant are asserted by an RMI company or "***arise out of any injury done to [an RMI company]***." *Chee*, at p.11 (emphasis added). There, the Court went on to state that a defendant is subject to jurisdiction under § 251(1)(n) when the plaintiff's causes of action "arise out of the 'effect' [on the RMI company] itself." *Id*. at p.12. Here, Plaintiffs' fraudulent transfer causes of action each relate to the Individual Defendants' diversion of assets from UDW, making those assets unavailable to UDW to satisfy its debts, including those owed to

[1] Based upon the information currently available, Plaintiffs do not allege jurisdiction under Judiciary Act § 251(1)(i), which, unlike § 251(1)(n), requires conduct by the director "within the territorial limits of the Republic." Nor do Plaintiffs assert, based upon the information currently available, that the Individual Defendants are subject to general personal jurisdiction in the RMI. Thus, Defendants' argument that personal jurisdiction does not lie here because the Individual Defendants' actions were not undertaken "within the territorial limits of the Republic" is inapplicable.

Plaintiffs. There is no question that the Individual Defendants' conduct affected UDW, an RMI company. And, Plaintiffs' fraudulent transfer claims here arise out of that "effect."[2]

The plaintiffs' claims in *Chee* and *Yandal*, where this Court held jurisdiction did not lie under § 251(1)(n), provide useful counter-examples to the claims Plaintiffs assert here and underscore why, in this case, the Individual Defendants are subject to jurisdiction under § 251(1)(n), whereas the defendants in *Chee* and *Yandal* were not. In *Chee*, the plaintiff brought claims against an RMI company, as well as two non-resident individuals, related to a dispute over the ownership of shares of the RMI company. *Chee*, at pp.2–3. The plaintiff argued that the individuals were subject to jurisdiction under § 251(1)(n) because their fraudulent conduct affected their co-defendant, which was the RMI company whose ownership was at issue. The Court rejected the plaintiff's simplistic argument because none of her claims were being asserted by an RMI company or arose out of an injury to an RMI company. *Id*. at p.11. Instead, the only party that was affected by the individuals' conduct was the plaintiff, who was not a "person in the Republic." *Id.* at p.12.

Similarly, the plaintiffs in *Yandal* filed suit against a RMI company and its director, arguing that this Court had jurisdiction over the director based upon the effect his conduct had on the co-defendant RMI company. *Yandal Invs. Pty Ltd. v. White Rivers Gold Ltd.*, H. Ct. No. 2010-158, at p.4 (May 19, 2011). The Court held that it lacked personal jurisdiction over the director because the fraud alleged by the plaintiffs only affected the plaintiffs (who were not RMI residents), but did not affect the RMI company, who the plaintiffs alleged also committed the fraud. *Id.*

[2] The Individual Defendants' motion raises certain legal issues, including on § 251(1)(n), that overlap with those briefed in the motion to dismiss that is currently before the Court in *Sammons v. Economou et al.*, H. Ct. No. 2017-131. For the reasons discussed in that briefing, as well as here, the Court in *Sammons* should exercise jurisdiction over Mr. Economou. However, Plaintiffs in this action point to additional facts in support of the application of § 251(1)(n), and therefore, even if the Court dismisses the claims against Mr. Economou in *Sammons* for lack of personal jurisdiction, it should exercise jurisdiction over Plaintiffs' claims against him in this action.

Because Plaintiffs in this action, unlike in *Chee* and *Yandal*, plead that: (1) the fraudulent transfers directed by the Individual Defendants were intended to and did affect UDW, a person in the Republic, by decreasing its assets; and (2) Plaintiffs' claims arise out of that effect, jurisdiction lies over those defendants pursuant to § 251(1)(n).[3]

C. The exercise of jurisdiction is consistent with the approach employed by U.S. courts adjudicating fraudulent transfer claims against foreign transferees.

If the Individual Defendants' personal jurisdiction arguments were to succeed, it would lead to an entirely inequitable result. Plaintiffs have alleged that the Individual Defendants incorporated the transferor, UDW, and the transferees in the RMI, and dominated and controlled both UDW and the RMI recipients of the fraudulent transfers. Thus, the Individual Defendants controlled both the RMI transferor and the RMI transferees, and used their positions to transfer tens of millions of dollars from UDW to other RMI companies in order to ultimately line their own pockets, hindering Plaintiffs' creditor rights against UDW. (Compl. ¶¶ 1–7, 23–24.) And then, in an attempt to ensure they would never be held accountable for those transfers of the debt that was owed to creditors, the Individual Defendants fled the RMI and redomiciled UDW in Cayman, where they could restructure UDW's debt with the goal of wiping out Plaintiffs' ability to be paid what they were owed on debt that arose when UDW was an RMI company. (*Id.* ¶¶ 8–11, 50–57.)

In far less egregious circumstances, U.S. courts have rejected efforts by foreign defendants in fraudulent transfers cases to use a personal jurisdiction defense to shield themselves from answering for their actions in the jurisdiction in which the transferor was organized. Indeed, ***"[c]ourts have held with near uniformity that they have personal jurisdiction to hear fraudulent***

[3] As Mr. Economou did in *Sammons*, the Individual Defendants may argue that any "injury" to UDW occurred outside of the RMI, where UDW's operations are centered. But § 251(1)(n) requires only an "effect" on a person in the Republic. And even the effect need not be felt "within the territorial jurisdiction of the Republic" for the long-arm statute to apply. In any event, as discussed above, UDW was injured in the RMI by the Individual Defendants' scheme to render it insolvent and redomicile it to Cayman. Moreover, cases describing where an "injury" occurred for purposes of a choice-of-law analysis—such as those cited by Mr. Economou in his *Sammons* brief—are simply irrelevant to the personal jurisdiction analysis. Indeed, all parties agree that RMI law applies to Plaintiffs' claims in this action.

transfer cases . . . even when the transfer is the only contact between the [forum] debtor and the foreign transferee." *In re Akbari-Shahmirzadi*, No. 11-15351, 2016 WL 6783245, at *3 (Bankr. D.N.M. Nov. 14, 2016) (emphasis added). In *Akbari-Shahmirzadi*, for example, the New Mexico court exercised jurisdiction over a United Arab Emirates company that received a fraudulent transfer from the Swiss bank account of an individual residing in New Mexico. *Id.*; *see also, e.g.*, *In re Teknek, LLC*, 354 B.R. 181, 198–99 (Bankr. N.D. Ill. 2006) (exercising jurisdiction over out-of-state LLC members where members' "mere act of causing of withdrawal of money from a limited liability company" organized in the forum was "a contact, the potential effects of which [fraudulent transfer law] was designed to prevent"); *Sugartown Worldwide LLC v. Shanks*, No. 14-CV-5963, 2015 WL 1312572, at *1, *7 (E.D. Pa. Mar. 24, 2015) (exercising jurisdiction over foreigner who, although never having traveled to Pennsylvania, participated in and received fraudulent transfers from Pennsylvania entity). Similarly, this Court has personal jurisdiction over the Individual Defendants for Plaintiffs' claims related to their part in the fraudulent transfers they directed out of UDW, an RMI company, and subsequently benefitted from.

II. The exercise of personal jurisdiction is consistent with due process principles.

A. Exercising jurisdiction over directors and officers of RMI companies comports with due process.

In *Frontline*, the Court recognized that the exercise of jurisdiction over non-resident directors "comports with due process." *Frontline*, at p.15. And, as the Court noted, the Delaware Supreme Court has expressly reached the same conclusion. *See Hazout v Ting*, 134 A.3d 274, 292 (Del. 2016) ("By becoming a director and officer of a Delaware corporation, [the non-resident director] purposefully available himself of certain duties and protections under our law."); *see also, e.g.*, *Ryan v. Gifford*, 935 A.2d 258, 273 (Del. Ch. 2007) ("It almost goes without any further elaboration that, as chief financial officer of a Delaware corporation, Jasper availed himself of Delaware law such that he should reasonably anticipate being haled into Delaware's courts."). Here, as discussed in Section I.A above, the Individual Defendants are non-resident directors and

officers of both the transferor, UDW, as well as transferee Defendant DryShips. Thus, the exercise of personal jurisdiction over the Individual Defendants comports with due process.

B. Exercising jurisdiction pursuant to the RMI long-arm statute comports with due process, and the Individual Defendants offer no compelling reason why jurisdiction is unreasonable.

Although the Court need not go any further than the *Frontline* analysis to determine the exercise of jurisdiction here comports with due process, the application of RMI's long-arm statute to these defendants also satisfies the due process principles applied outside of the director and officer context. RMI courts find due process to be satisfied when "(i) a defendant 'has performed some act or consummated some transaction with the forum or otherwise purposefully availed itself of the privileges of conducting activities in the forum', (ii) 'the claim arises out of or results from the defendant's forum related activities,' and (iii) 'the exercise of jurisdiction is reasonable." *Chee*, at p.10 (quoting *Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1154–55 (9th Cir. 2006)). Where the plaintiff alleges out-of-forum conduct with an in-forum effect, "the first and second prongs can be satisfied" if the defendant "purposefully directed his activities towards the forum." *Id.* at p.14. Under this "effects test," first articulated in *Calder v. Jones*, 465 U.S. 783 (1984), purposeful direction in these circumstances is satisfied if the defendant "(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." *Id.*

Here, Plaintiffs allege that the Individual Defendants committed the intentional acts of incorporating UDW in the RMI, causing it to transfer tens of millions of dollars to entities controlled by Individual Defendants (thereby driving UDW toward insolvency), and causing it to redomicile to Cayman to pursue restructuring proceedings that it could not have pursued under RMI law. Moreover, Plaintiffs allege that through those proceedings, the Individual Defendants sought to wipe out the debt UDW incurred to Plaintiffs while it was an RMI corporation, and attempted to leave the Plaintiffs with no ability to recover what they are owed, in contravention of RMI law, *see* RMI Business Corporations Act § 128(5). These intentional acts were aimed at the

RMI. Indeed, it is difficult to come up with any other jurisdiction at which the Individual Defendants aimed their conduct, which went to the "very essence of" UDW's existence as an RMI company. *Family Fed'n for World Peace v. Moon*, 129 A.3d 243 (D.C. 2015) (holding that exercise of personal jurisdiction complied with due process when non-resident director defendants voluntarily served as directors of in-forum corporation, controlled the corporation, and participated in wrongful activities outside of the forum that went to the "very essence" of the corporation's existence). Finally, as directors and officers of UDW, it was foreseeable to the Individual Defendants that fraudulently transferring tens of millions of dollars out of UDW while it was an RMI corporation would cause harm in the RMI.

Courts have repeatedly held that exercising jurisdiction over a foreign transferee satisfies due process principles and does not offend notions of fair play and justice, even in circumstances where the receipt of the alleged transfer is the only contact between the transferee and the debtor. *See Akbari-Shahmirzadi*, 2016 WL 6783245, at *3. Here, of course, the Individual Defendants have far more significant contacts with UDW than the mere receipt of fraudulent transfers, including choosing RMI as the jurisdiction for UDW's incorporation, and then serving as directors for the company. Thus, they have purposefully directed their activities toward the RMI, and could have "reasonably anticipated being haled into court there."[4] *Burger King v. Rudzewicz*, 471 U.S. 462, 474 (1985); *see also, e.g.*, *Akbari-Shahmirzadi*, 2016 WL 6783245, at *3 (holding that it did not violate due process to exercise jurisdiction in New Mexico over a United Arab Emirates company that received fraudulent transfer from Swiss bank account from an individual residing in New Mexico); *Sugartown*, 2015 WL 1312572, at *5–8 (holding that it did not violate due process to exercise jurisdiction in Pennsylvania over foreigner who received fraudulent transfers from Pennsylvania LLC).

[4] Indeed, Mr. Economou was previously named as a defendant in a derivative action against DryShips and its directors, and in that action, did not assert a personal jurisdiction defense. In other words, Mr. Economou had actual knowledge that claims related to his conduct as a director were likely to be brought in the RMI. Decl. of Craig A. Boneau in Supp. of Pls.' Opp'n to Individual Defs.' Mot. to Dismiss ("**Boneau Decl.**") ¶¶ 2–5.

Where, as here, the plaintiff makes a prima facie case of purposeful direction by the defendant towards the forum, "then it is the defendant's burden to 'present a compelling case' that the third prong, reasonableness, has not been satisfied." *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2004) (quoting *Burger King*, 471 U.S. at 476–78). Here, the Individual Defendants have not even attempted to present "a compelling case" that jurisdiction is unreasonable. Nor could they make such a showing, as the factors weighed by courts in addressing reasonableness[5] all weigh in Plaintiffs' favor:

The extent of the defendant's purposeful direction. Here, the extent of availment is significant. The Individual Defendants selected the RMI as UDW's place of incorporation, and then engaged in a scheme to pilfer its assets, drive it toward insolvency, and redomicile it to a jurisdiction with materially different insolvency law. In other words, the Individual Defendants engaged in a multi-year course of conduct directed toward RMI as UDW's place of incorporation.

The burden on the defendant. The Individual Defendants do not argue that defending this action in the RMI presents any undue burden on them. Indeed, Mr. Economou has previously defended civil actions in the RMI on the merits without challenging either personal jurisdiction or venue. *See* Boneau Decl. ¶¶ 2–5.

Conflicts of law between the forum state and the defendant's state. The parties agree that RMI law applies to Plaintiffs' claims. Moreover, the Individual Defendants' countries of citizenship (Greece) and residency (Monaco) have no connection to the dispute.

The forum's interest in adjudicating the dispute. The RMI's interest in claims brought against RMI companies and their directors and officers for the receipt of fraudulent transfers from an RMI company cannot be disputed. *See Frontline*, at p.15 ("The Marshall Islands is a logical location to try a breach of fiduciary duty claim against [non-resident directors] arising from their service as directors of a Marshall Islands corporation."). Moreover, as discussed in Plaintiffs'

[5] *See, e.g.*, *Dole Food Co. v. Watts*, 303 F.3d 1104, 1114 (9th Cir. 2002); *Dahon N. Am., Inc. v. Hon*, No. 11-CV-5835, 2012 WL 1413681, at *6 (C.D. Cal. Apr. 24, 2012) (listing reasonableness factors).

opposition to Defendants' joint motion to dismiss, the RMI has a significant interest in determining the effect of UDW's redomiciliation on Plaintiffs' standing to bring the fraudulent transfer claims asserted against the Individual Defendants.

Judicial efficiency. Exercising personal jurisdiction over the Individual Defendants will enable the Court to adjudicate in one proceeding all of Plaintiffs' claims, rather than encouraging piecemeal litigation across the globe.

The plaintiff's interest in convenient and effective relief. Again, this is the only proceeding in which Plaintiffs can seek full relief from all Defendants. *See, e.g.*, *Dahon*, 2012 WL 1413681, at *6 (exercising jurisdiction over foreign defendant challenging jurisdiction where co-defendant affiliates were all subject to jurisdiction).

The existence of an alternative forum. The Individual Defendants do not point to any preferred or alternative forum, let alone one in which all defendants are amendable to suit, and Plaintiffs are unaware of any forum in which they can bring fraudulent transfer claims governed by RMI law against all Defendants.

Because each of these factors weighs in favor of Plaintiffs, the exercise of jurisdiction here is reasonable, and the Individual Defendants' due process argument fails.

III. Jurisdictional discovery is appropriate.

At a minimum, the Court should permit Plaintiffs to conduct jurisdictional discovery. "[W]here pertinent facts bearing on the question of jurisdiction are in dispute, discovery should be allowed." *Am. W. Airlines, Inc. v. GPA Grp., Ltd.*, 877 F.2d 793, 801 (9th Cir. 1989). Indeed, "courts are to assist the plaintiff by allowing jurisdictional discovery ***unless the plaintiff's claim is 'clearly frivolous***.'" *Toys "R" Us, Inc.*, 318 F.3d at 456 (emphasis added) (holding that it was abuse of discretion by district court to dismiss claims on motion to dismiss without the benefit of jurisdictional discovery). Thus, in order to move forward with jurisdictional discovery, a plaintiff need only come forward with a "colorable showing" that personal jurisdiction exists. *Maple Leaf*

Adventures Corp. v. Jet Tern Marine Co., No. 15-CV-2504, 2016 WL 3063956, at *9 (S.D. Cal. Mar. 11, 2016).

Here, Plaintiffs have certainly put forward a "colorable showing" that personal jurisdiction exists over the Individual Defendants in the RMI, and that their claims are not "clearly frivolous." Plaintiffs allege that as directors and officers of RMI companies, the Individual Defendants engaged in a fraudulent scheme to drain UDW of its assets, drive it toward insolvency, and then redomicile the company to a forum that provides corporate restructuring and the discharge of debt. Plaintiffs should be afforded an opportunity to investigate the Individual Defendants' understanding of these transactions and their effects upon UDW in the RMI, and the Individual Defendants' intent in entering into the transactions.

The conclusory declarations submitted by the Individual Defendants demonstrate that jurisdictional discovery is necessary. For example, parroting § 251(1)(n), both Individual Defendants averred that "I have not committed any act of commission or omission of deceit, fraud or misrepresentation which was intended to affect, and did affect persons in the RMI." Economou Decl. ¶ 19; Kandylidis Decl. ¶ 19. But in bringing fraudulent transfer claims against the Individual Defendants for their pilfering of UDW, that is precisely what Plaintiffs allege transpired, and Plaintiffs should be permitted cross-examination to explore and discover the Individual Defendants' basis for statements such as these. *See, e.g.*, *Orchid Biosciences, Inc. v. St. Louis Univ.*, 198 F.R.D. 670, 674 (S.D. Cal. 2001) ("Plaintiff should be allowed [to] explore the quality, quantity and nature of all of Defendant's contacts with this forum and draw its own conclusions and proffer its own arguments as to whether Defendant should be subject to personal jurisdiction in this Court.").

The declarations, in fact, leave many questions unanswered. For instance, although the Individual Defendants admit to being directors and officers of UDW and DryShips, they do not disclose the total number of RMI companies for which they serve as director, officer, or beneficial owner. Similarly, although Mr. Economou discloses that he has retained RMI counsel to represent him in this and other RMI proceedings, he does not disclose that he appeared in at least one of

those proceedings without raising any jurisdictional defense. *See* Boneau Decl. ¶¶ 2–5. Absent jurisdictional discovery, Plaintiffs are handcuffed from understanding what qualifications might apply to the Individual Defendants' conclusory statements. Of course, as to all of these factual issues, the need for discovery is particularly acute here, where relevant information is peculiarly within the Individual Defendants' knowledge and possession. *See Toys "R" Us*, 318 F.3d at 457 (authorizing discovery into whether defendant's business activities targeted forum where such information was "known only to defendant").

IV. Plaintiffs have adequately alleged an aiding and abetting claim against the Individual Defendants.

Finally, the Court should reject the Individual Defendants' separate argument for the dismissal of Plaintiffs' aiding and abetting claim. A person, such as the Individual Defendants, who knowingly and dishonestly assists another in extracting cash from a debtor to the detriment of creditors is liable under English common law. *See* Decl. of Gabriel Moss, QC ¶¶ 38–40. Accordingly, the Individual Defendants' motion to dismiss the Eighth Cause of Action for failure to state a claim should be denied.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny the Individual Defendants' Motion to Dismiss. In the alternative, Plaintiffs respectfully request an opportunity to perform jurisdictional discovery prior to any dismissal of claims against the Individual Defendants.

Dated: December 21, 2017

Respectfully submitted,

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Attorneys for Plaintiffs

Exhibit 24

IN THE HIGH COURT OF THE
REPUBLIC OF THE MARSHALL ISLANDS

HIGHLAND FLOATING RATE OPPORTUNITIES FUND, HIGHLAND GLOBAL ALLOCATION FUND, HIGHLAND LOAN MASTER FUND, L.P., HIGHLAND OPPORTUNISTIC CREDIT FUND, AND NEXPOINT CREDIT STRATEGIES FUND, Plaintiffs, v. DRYSHIPS INC., OCEAN RIG INVESTMENTS INC., TMS OFFSHORE SERVICES LTD., SIFNOS SHAREHOLDERS INC., AGON SHIPPING INC., ANTONIOS KANDYLIDIS, and GEORGE ECONOMOU, Defendants.	)	CIVIL ACTION NO. 2017-198

FILED
JAN 29 2018
ASST. CLERK OF COURTS
REPUBLIC OF THE MARSHALL ISLANDS

REPLY DECLARATION OF EVAN C. HOLLANDER
IN SUPPORT OF DEFENDANTS' MOTIONS TO DISMISS

I, EVAN C. HOLLANDER, attest to the facts set forth herein based upon my personal knowledge, and could and would testify competently to the matters set forth herein if called upon to do so:

1. I am a Senior Partner in the Restructuring Group at Orrick, Herrington & Sutcliffe LLP ("Orrick"), resident in New York, New York. I am over 21 years of age and am not a party to this lawsuit. I make this declaration in support of the motions of Defendants DryShips Inc., Ocean Rig Investments Inc., TMS Offshore Services Ltd., Sifnos Shareholders Inc., Agon Shipping Inc., Antonios Kandylidis and George Economou (collectively, "Defendants") to dismiss the Complaint in the above-captioned action filed by Plaintiffs Highland Floating Rate

Opportunities Fund, Highland Global Allocation Fund, Highland Opportunistic Credit Fund, Highland Loan Master Fund, L.P. and NexPoint Credit Strategies Fund (collectively, "Plaintiffs").

2. I previously submitted a declaration to this Court dated October 30, 2017 in support of Defendants' Motion to Dismiss Highland's Complaint (the "Hollander Opening Declaration" or "Hollander Op. Decl.").

3. As described in more detail in the Hollander Opening Declaration, Orrick has represented the Ocean Rig Debtors and the JPLs in New York bankruptcy proceedings ancillary to the Cayman Proceedings.[1] I have played a leading role in Orrick's representation of the Ocean Rig Debtors.

HIGHLAND'S LIMITED OBJECTION TO THE DEBTORS' PROVISIONAL RELIEF MOTION IN THE CHAPTER 15 CASES

4. As described in more detail in the Hollander Opening Declaration, on March 27, 2017, the Debtors commenced Chapter 15 bankruptcy proceedings in the United States Bankruptcy Court for the Southern District of New York (the "New York Bankruptcy Court") and moved for a temporary restraining order and provisional relief seeking, *inter alia*, to enjoin creditors affected by the Debtors' Schemes from "commencing or continuing any actions against the Debtors or their property within the territorial jurisdiction of the United States" (the "Provisional Relief Motion"). *See* Hollander Op. Decl. ¶¶ 4-5. Highland filed a Limited Objection to the Provisional Relief Motion on March 31, 2017, seeking, *inter alia*, authority to commence (i) involuntary bankruptcy proceedings in the United States against one or more of the Ocean Rig Debtors and (ii) a fraudulent conveyance action under the NYDCL as set forth in the Draft New York Complaint. *Id.* ¶ 6 & Exh. A.

[1] Capitalized terms defined in the Hollander Opening Declaration are afforded the same meanings herein.

5. On April 3, 2017, the New York Bankruptcy Court held a hearing on the Debtors' Provisional Relief Motion at which Highland's counsel appeared. A true and correct copy of excerpts of the transcript of that hearing is annexed hereto as Exhibit A.

6. During the April 3, 2017 hearing, the New York Bankruptcy Court requested additional briefing from the parties regarding whether the United States Bankruptcy Code permitted the Court to enjoin the filing of involuntary bankruptcy proceedings against the Debtors. The JPLs and Highland each filed supplemental briefing on that question on April 14, 2017. A true and correct copy of Highland's Memorandum of Law in Further Support of its Limited Objection, dated April 14, 2017, is annexed hereto as Exhibit B.

7. On April 20, 2017, the New York Bankruptcy Court held a further hearing on whether it could enjoin the filing of involuntary bankruptcy proceedings. The New York Bankruptcy Court ruled during the hearing that it had the power to do so, and ordered that its prior injunction against such filings remain in place.

HIGHLAND'S REPLACEMENT OF THE INDENTURE TRUSTEE FOR THE UDW NOTES

8. As described in more detail in the Hollander Opening Declaration, Plaintiffs in these proceedings are suing in their capacity as holders of the UDW Notes, which were governed by the Indenture. *See* Hollander Op. Decl. ¶¶ 13-14 & Exh. I. The Indenture established Deutsche Bank Trust Company Americas ("DBTCA") as the Indenture Trustee in respect of the UDW Notes, and set forth the rights and responsibilities of the Trustee. Section 7.08(b) of the Indenture allowed the holders of a majority of the outstanding principal amount of the UDW Notes to remove the Trustee and appoint a successor trustee.

9. On February 28, 2017, pursuant to the Indenture, Plaintiffs, in their capacity as majority holders of the UDW Notes, provided a written notice of the removal of DBTCA as the

Indenture Trustee in respect of the UDW Notes and the installation of a successor Trustee (the "Notice of Removal"). The Notice of Removal stated that the trustee removal and installation would become effective upon the successor Trustee's written acceptance of its appointment as Indenture Trustee. The Notice of Removal further stated that a "tripartite agreement" designed to facilitate the transition would be forthcoming. A true and correct copy of Highland's Notice of Removal, dated February 28, 2017, is annexed hereto as Exhibit C.

10. UDW subsequently agreed to the appointment of Wilmington Savings Fund Society ("WSFS") as successor Trustee and UDW, DBTCA and WSFS executed an "Agreement of Resignation, Appointment and Acceptance," dated as of June 2, 2017 (the "Tripartite Agreement"), to effect the resignation of DBTCA and the appointment of WSFS as Indenture Trustee. A true and correct copy of the Tripartite Agreement is annexed hereto as Exhibit D.

THE RESOLUTION OF THE MOTION TO ENJOIN PLAINTIFFS FROM PROSECUTING THIS LAWSUIT

11. On October 11, 2017, UDW's general counsel advised Highland by letter that the Ninth Cause of Action in the RMI Complaint contravened the order of the Cayman Court sanctioning UDW's Scheme and the order of the New York Bankruptcy Court granting comity and giving full force and effect to UDW's Scheme, and would need to be withdrawn. Having not received a response to that letter, the Foreign Representative filed a motion in the New York Bankruptcy Court on October 23, 2017, seeking, *inter alia*, to enforce provisions of the Enforcement Order and enjoin Plaintiffs from prosecuting the Complaint in these proceedings. *See* Hollander Op. Decl. ¶ 20 & Exh. K.

12. On November 16, 2017, the New York Bankruptcy Court held a hearing on that motion at which Highland appeared and opposed the relief sought by the Foreign Representative.

A true and correct copy of excerpts of the transcript of those proceedings is annexed hereto as Exhibit E.

13. Following the hearing, the Foreign Representative withdrew the motion after Highland agreed to withdraw the Ninth Cause of Action from its Complaint in this lawsuit.

I, EVAN C. HOLLANDER, declare under penalty of law that the foregoing is true and correct to the best of my knowledge and belief.

Dated: January 26, 2018
New York, New York

EVAN C. HOLLANDER

Exhibit 25

EXHIBIT A

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re: OCEAN RIG UDW INC., *Debtor.*	Case No. 17-10736-mg New York, New York April 3, 2017 10:07 a.m. - 11:50 a.m.

LEAD CASE

17-10736-MG SIMON APPELL AND ELEANOR FISHER, CHAPTER 15

HEARING RE ORDER TO SHOW CAUSE WHY THE PROVISIONAL RELIEF ORDER EXTENDING STAY RELIEF SHOULD NOT BE GRANTED.

PRELIMINARY OBJECTION OF THE AD HOC GROUP OF HOLDERS OF 6.5 DRH SECURED NOTES TO (A) CHAPTER 15 DEBTORS MOTION FOR (I) EX PARTE EMERGENCY RELIEF AND (II) PROVISIONAL RELIEF PURSUANT TO 11 USC SECTIONS 1519, 1521 (A)(7) AND 362 AND (B) APPLICATION BY JOINT PROVISIONAL LIQUIDATORS, SIMON APPELL AND ELEANOR FISHER FOR ORDER (I) SCHEDULING HEARING ON VERIFIED PETITION OF OCEAN RIG UDW INC. ET AL (IN PROVISIONAL LIQUIDATIONS AND MOTION FOR RECOGNITION AND RELATED RELIEF AND (II) SPECIFYING FORM AND MANNER OF SERVICE OF NOTICE (DOC #26)

MEMBER CASES

17-10737-MG SIMON APPELL AND DRILL RIGS HOLDINGS INC.

HEARING RE: ORDER TO SHOW CAUSE WHY THE PROVISIONAL RELIEF ORDER EXTENDING STAY RELIEF SHOULD NOT BE GRANTED.

17-10738-MG SIMON APPELL AND DRILLSHIPS FINANCING HOLDING

HEARING RE: ORDER TO SHOW CAUSE WHY THE PROVISIONAL RELIEF ORDER EXTENDING STAY RELIEF SHOULD NOT BE GRANTED.

17-10739-MG SIMON APPELL AND DRILLSHIPS OCEAN VENTURES INC.

HEARING RE: ORDER TO SHOW CAUSE WHY THE PROVISIONAL RELIEF ORDER EXTENDING STAY RELIEF SHOULD NOT BE GRANTED.

BEFORE THE HONORABLE MARTIN GLENN
UNITED STATES BANKRUPTCY JUDGE

A P P E A R A N C E S :

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For the Ad Hoc Group of Holders of 6.5% DRH Secured Notes; Ad Hoc Group of 6.5% Senior Secured Noteholders:	PATRICK J. NASH, JR., ESQ. BRIAN SCHARTZ, ESQ. ALEX CROSS, ESQ. (via phone) Kirkland & Ellis LLP 300 North LaSalle Street Chicago, Illinois 60654 (312) 862-2000; (312) 862-2200 fax
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(Proceedings recorded by electronic sound recording)

automatic stay. And some of the claims were direct. And I said, yeah, they belong to creditors. I applied 105 and precedent in the circuit to grant not a permanent injunction, but a preliminary injunction against prosecuting those direct claims while various things happen in the Chapter 11 case. But I don't know.

All I see is lots of issues that are going to be expensive to deal with. Fine. If I have to deal with it, I'll deal with it. But what this struck me as, you ought to be engaging first and see whether you can cut through a lot of this stuff and get what you're looking for with the JPL's in place. I guess it's only provisional at this point.

MR. SABIN: That's correct, Your Honor. And it may only stay provisional if they have their way. So, I take with much respect the Court admonition, and we certainly would love to have an open dialogue with the provisional joint liquidators. I would like to, in essence, get to the summary fashion of --

THE COURT: Go ahead.

MR. SABIN: -- that piece of the relief dealing with the complaint. And indeed, Your Honor, 1519 in its terms on its face, and when it otherwise borrowers from 1521 in terms of what relief can be otherwise given, doesn't say 362. Now, I know there's lots of cases, but none of them, assuming for the moment that our complaint can be read fairly as a matter of facts and law, as a direct claim, and assuming for the moment that our

complaint otherwise, vis-à-vis the Debtor, the O-Rig, the parent, UDW, is simply a nominal defendant. No --

THE COURT: It's not nominal. Listen. I'm sorry, Mr. Sabin, I've read the complaint. It's not a nominal defendant. If you sue them, I'm not saying you can't, just be prepared to defend the contempt.

MR. SABIN: Understood.

THE COURT: Okay?

MR. SABIN: No one's going to violate your orders, Your Honor.

THE COURT: Look. I'm not deciding today, maybe you're going to be persuasive, and you'll have case authority that will support your position that the automatic stay doesn't apply to a state court law suit that specifically names the Debtor parent. Okay. Fine. You'll test it, because I guarantee you that Mr. Hollander is going to file a motion to hold your clients in contempt.

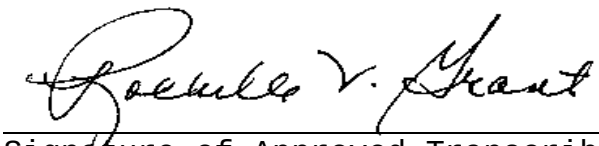
MR. SABIN: Yes, that's assuming that we otherwise violate your order, which we have no intention of doing, Your Honor.

THE COURT: You know, you haven't done it; I don't give advisory opinions; and all I'm saying is, if you go ahead and do it, you do it with your eyes open. If Mr. Hollander brings -- you do it, and he brings on a contempt motion, I'll decide the contempt motion. You'll oppose it, and I'll decide

CERTIFICATION

I, Rochelle V. Grant, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

Dated: April 5, 2017



Signature of Approved Transcriber

Exhibit 26

EXHIBIT B

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	Chapter 15
OCEAN RIG UDW, INC., et al.	:	Case No. 17- 10736 (MG)
Debtors in a Foreign Proceeding.	:	Jointly Administered

MEMORANDUM OF LAW IN FURTHER SUPPORT OF LIMITED OBJECTION OF HIGHLAND CAPITAL MANAGEMENT LP TO THE MOTION FOR (I) *EX PARTE* EMERGENCY RELIEF AND (II) PROVISIONAL RELIEF PURSUANT TO 11 U.S.C. §§ 1519, 1521(a)(7), AND 362

Highland Capital Management LP, on behalf of certain of its or its affiliates' funds and managed accounts (collectively, "Highland"), respectfully submits this Memorandum of Law, and the Affidavit of Stephen Gradwell Leontsinis attached hereto as Exhibit A, in further support of its Limited Objection (the "Objection") [Dkt. No. 25] to the *Motion for Ex Parte Relief and (II) Provisional Relief Pursuant to 11 U.S.C. §§ 1519, 1521(a)(7), and 362* [Dkt. No. 8] (the "Motion"), filed by the joint provisional liquidators and foreign representatives (collectively, the "Provisional Liquidators") of Ocean Rig UDW, Inc. and its affiliated debtors (collectively, the "Debtors").[1]

[1] All capitalized terms not otherwise defined herein shall have the same meaning as assigned to such terms in the Objection.

PRELIMINARY STATEMENT

In 2005, Congress enacted chapter 15 of the United States Bankruptcy Code to incorporate the United Nations Commission on International Trade Law's Model Law on Cross-Border Insolvency (the "Model Law"). As the legislative history of Section 1501 of the Bankruptcy Code explains, chapter 15 proceedings are intended to be ancillary to cases brought in a debtor's home country "unless a full United States bankruptcy case is brought under another chapter." H.R. Rep. No. 109-31(I), at 106 (2005), 2005 WL 832198. Because a foreign representative must first obtain recognition of a foreign proceeding before he can bring a full case, chapter 15 is the foreign representative's means for accessing the United States bankruptcy system. This is not true of creditors who, by virtue of Section 303(b), have the unfettered right to seek relief under the Bankruptcy Code. This distinction makes sense when one considers that one purpose of a chapter 15 recognition proceeding is to promote efficiency and cooperation with other sovereigns, while the purpose of permitting creditors to file an involuntary petition against a party unable to pay its debts is focused on protecting those creditors' interests in the assets of an insolvent debtor – assets which equitably belong to creditors.[2] Nonetheless, the question of whether a creditor can file an involuntary petition after foreign representatives have filed a petition for recognition is a case of first impression and the determination of this issue is of great importance to the interpretation of creditors' rights in a chapter 15 proceeding.

Nothing in the Bankruptcy Code restricts a creditor's right to file an involuntary petition under Section 303 other than the imposition of the automatic stay under Section 362(a). The filing of a chapter 15 petition for recognition does *not* trigger the imposition of the 362(a) stay

[2] *See* S. Rep. 95-989, at 32-33 (1978), 1978 WL 8531 ("Because the assets of an insolvent debtor belong equitably to his creditors, the bill permits involuntary cases in order that creditors may realize on their assets through reorganization as well as through liquidation.")

(nor create section 541 estate property, including avoidance actions the proceeds of which would belong to all creditors), and Section 1520(c) expressly preserves creditors' rights to file an involuntary petition even post-recognition, when a stay is imposed under Section 1520(a). Congress specifically preserved creditors' 303(b) filing rights by providing that the stay of actions imposed by a recognition order "does not affect the right of a foreign representative or *an entity* to file a petition commencing a case under this title." 11 U.S.C. § 1520(c) (emphasis added). At least one commentator, former Texas Bankruptcy Judge Leif Clark, has recognized that Section 1520(c) specifically allows creditors to file an involuntary case any time before or after the filing of a recognition petition, including during the gap period between the filing of a petition and the determination of whether to enter a recognition order. Congress has made clear that the interests of comity and cooperation served by giving foreign representatives access to U.S. bankruptcy courts do not trump the United States' interest in protecting creditors and permitting them access to the U.S. bankruptcy system.

Consistent with the plain language of Section 1520(c), Section 1529 contemplates that an involuntary case may be filed any time before or after a petition for recognition has been filed, so long as any relief granted in the chapter 15 case is coordinated with the relief granted in the chapter 7 or chapter 11 case. The legislative history acknowledges this right when explaining that, if necessary and appropriate, "the court has ample authority under [Section 1529] and section 305 to exercise its discretion to dismiss, stay or limit a United States case filed after a petition for recognition . . . has been filed but before it has been approved." H.R. Rep. No. 109-31(I), at 117 (2005), 2005 WL 832198.

On the other hand, where the drafters wanted to restrict an entity's right to file an involuntary petition, they did so unambiguously. Though Section 303(b)(4) generally permits a

foreign representative to file an involuntary case, once a foreign representative files a petition for recognition and seeks access to U.S. bankruptcy courts, Section 1511 of the Bankruptcy Code limits his or her right to commence a full bankruptcy case until *after* he or she obtains a recognition order. Section 1511 states, "*[u]pon recognition*, a foreign representative may commence – (1) an involuntary case under section 303; or (2) a voluntary case under section 301 or 302, if the foreign proceeding" is a main proceeding." (*See* 11 U.S.C. § 1511). To make this limitation clear, the legislative history of Section 1501 states, "an order granting recognition is required as a prerequisite to the use of Sections 301 and 303 by a foreign representative." H.R. Rep. No. 109-31(I), at 106 (2005), 2005 WL 832198. If a foreign representative who has filed a chapter 15 petition wants to thereafter file an involuntary or voluntary petition, Section 1511(b) requires the representative to submit a certified copy of the recognition order with his or her bankruptcy petition. 11 U.S.C. § 1511(b). The unmistakable conclusion is that a foreign representative cannot invoke the assistance afforded under chapter 15 and also gain access to the rights under chapters 7 or 11 until a determination is made whether to recognize the foreign proceeding. No such limitation is imposed on creditors, nor should there be, as the fact that a foreign entity has filed a proceeding in a foreign jurisdiction should have no bearing on the right of United States creditors to obtain the relief and protection afforded by United States law.

Not only does the Bankruptcy Code permit creditors like Highland to file an involuntary petition against the Debtors, but public policy and the equities of these cases dictate that this Court permit the prompt exercise of these rights by modifying the current Provisional Relief Order (as defined herein). The most important reason to modify the Provisional Relief Order is that, unless an involuntary petition is filed, there is currently no entity or person with the authority to file the avoidance actions to recover the millions of dollars of cash that were

knowingly and intentionally siphoned from the Debtors, at the expense of their creditors and shareholders, in order to enrich certain officers and directors personally and entities they control.[3] Under the Cayman Orders, the Provisional Liquidators do not currently have the right to sue for fraudulent disposition in the Cayman Islands, and they cannot sue for avoidance in chapter 15, because such actions are not the Debtors' property under Section 1528 of chapter 15. Highland and other creditors are unable to sue for avoidance in the Cayman Islands without leave of the Cayman Court, because entry of a provisional liquidation order stays all actions against the Debtors. A chapter 7 trustee or a chapter 11 debtor may, however, using the section 541 property created upon the filing of the involuntary petition, commence an avoidance action under Section 544 and New York Debtor and Creditor Law to seek recovery of fraudulently conveyed property on behalf of all of the Debtors' creditors.[4]

It is critical to note in this case that the RSA contemplates that the Notes will be discharged under the Debtors' Schemes of Arrangement. If 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. The proposed Schemes of Arrangement would effectively release the claims of creditors against the Debtors' insiders, a sweeping non-consensual, third-party release negotiated by a handful of senior lenders and these same insiders (who, under the Schemes of Arrangement, will receive

[3] *See Affidavit of Stephen Gradwell Leontsinis* ("Collis Crill Affidavit") ¶¶ 56-60 (attached hereto as Exhibit A).

[4] Highland, other creditors and an official committee could also seek standing to sue for avoidance and recovery on behalf of all creditors by filing a motion with the Court. *See Unsecured Creditors Committee of Debtor STN Enterprises, Inc. v. Noyes (In re STN Enterprises)*, 779 F.2d 901 (2d Cir. 1985) (Conferring standing upon a creditors' committee to sue on behalf of the estate when the debtor has failed to bring the action itself, subject to the requirements set forth therein).

compensation of over $200 million, including receiving a 10-year management agreement, 9.5% of new equity and continued control of the Debtors' Board of Directors) that violates U.S. public policy and harms, rather than protects, non-consenting creditors. This result would be manifestly contrary to the public policy of the United States and the dictates of the Second Circuit.

Moreover, as a matter of public policy, the stated purposes of chapter 15 are best served by the concurrent commencement of a chapter 7 or chapter 11 case. Section 1501(a) states that the purposes of chapter 15 are, among other things, to protect and maximize the value of the debtor's assets and to ensure the fair and efficient administration of cross-border insolvencies that protects the interests of *all* creditors. To the extent the Debtors' assets were fraudulently transferred to insiders or others, the only way to recover these assets, protect the creditors' and shareholders' interests, and maximize value is to commence a case in the United States that will permit a trustee (or Highland and other creditors) to bring New York state avoidance actions. In addition, there are several ways in which bankruptcy cases protect the interests of creditors that are not available in the Debtors' Cayman Islands winding up proceedings, such as the United States requirements for the filing of a debtor's schedules and statement of financial affairs, rights of parties-in-interest to take discovery, request information and examine witnesses and affiants, the appointment of a committee to represent the interests of unsecured creditors, and the presence of a United States Trustee as an independent overseer.[5] For all these reasons, Highland and other creditors are entitled as a matter of law to file an involuntary case against the Debtors.

[5] The Board of Directors of the Debtors have preserved their rights to commence a chapter 7 or chapter 11 petition, whether before, or in response to, any involuntary case commenced against them, thus the filing of an involuntary petition would not prejudice the Debtors. *See* Cayman Orders ¶ 6.

BACKGROUND

On April 7, 2017, this Court entered an Order Granting Provisional Relief [Dkt. No. 41] (the "Provisional Relief Order"), in these cases pursuant to which, among other things, the Court stayed certain actions against the Debtors and their Assets but held that the order was without prejudice to the Court's continuing consideration and adjudication of the relief requested in Highland's Objection. For a recitation of the facts underlying the Provisional Relief Order and these cases, Highland respectfully refers the Court to the Motion and the Objection and requests that this Court take judicial notice of the record made in, and the pleadings filed on the docket of, these cases as well as the Debtors' public filings with the Securities and Exchange Commission.

ARGUMENT

THE PROVISIONAL RELIEF ORDER SHOULD BE MODIFIED TO PERMIT HIGHLAND AND OTHERS TO FILE AN INVOLUNTARY PETITION AGAINST THE DEBTORS

A. The Statutory Provisions of the Bankruptcy Code Preserve Highland's Right to File an Involuntary Petition Even After a Petition for Recognition under Chapter 15 is Filed

Generally, the Bankruptcy Code authorizes an unsecured (or undersecured) creditor to file an involuntary petition against a debtor, subject to satisfying certain requirements contained in Section 303, and nothing in the Bankruptcy Code or relevant case law limits that right in the context of a chapter 15 proceeding. Section 303(b)(1) provides, in relevant part:

> (b) An involuntary case against a person is commenced by the filing with the bankruptcy court of a petition . . . –
>
> (1) by three or more entities, each of which is either a holder of a claim against such person that is not contingent as to liability or the subject of a bona fide dispute as to liability or amount, or an indenture trustee representing such a holder, if such . . . claims aggregate at least $15,775 more than the value of any lien on property of the debtor securing such claims. . . .

11 U.S.C. §303(b)(1). Section 303 also authorizes a foreign representative to file an involuntary case. 11 U.S.C. §303(b)(4) ("An involuntary case is commenced by the filing of a petition . . . by a foreign representative of the estate in a foreign proceeding . . ."). Only the imposition of the automatic stay upon the filing of a chapter 7 or chapter 11 petition restricts creditors from filing an involuntary petition and gaining access to the bankruptcy system.[6] The filing of a chapter 15 petition does not trigger the automatic stay, and Section 103 of the Bankruptcy Code expressly makes Section 362 inapplicable to chapter 15 proceedings. 11 U.S.C. § 103(a) ("chapters 1, 3 and 5 of this title apply in a case under chapter 7, 11, 12 or 13 of this title."). Contrary to the broad grant of authority given to creditors to file an involuntary petition, Congress included provisions in chapter 15 that restrict a foreign representative's rights to obtain access to federal and state courts, including bankruptcy courts, until after the foreign representative has obtained recognition.

1. Broad Rights Reserved for Entities other than the Foreign Representative

The rights granted to creditors under Section 303(b) are explicitly preserved under Section 1520(c) of the Bankruptcy Code, even when other actions are expressly stayed by Section 1520(a). Section 1520(c) provides:

> (c) Subsection (a) [which imposes a stay and grants other rights upon recognition of a foreign proceeding] does not affect the right of a foreign representative or an entity to file a petition commencing a case under this title or the right of any party to file claims or take other proper actions in such a case.

11 U.S.C. § 1520(c). Section 1520(c) clarifies what might otherwise have been ambiguous in the statute: though Section 1520(a) makes reference to the imposition of a Section 362(a) stay upon recognition of a foreign proceeding, the Section 362(a) automatic stay that is triggered by

[6] The filing of a chapter 12 (family farmer) or chapter 13 (individual wage earner) case also triggers the automatic stay, but neither of these chapters is relevant to the instant case.

the filing of a chapter 7 or 11 case is not triggered by the filing of a chapter 15 petition and does not otherwise bar creditors from filing an involuntary petition. In addition, unlike the relief granted only upon recognition under Section 1520(a), the right granted to creditors to file an involuntary petition under Sections 303 and 1520(c) is not dependent on recognition. The Honorable Judge Leif Clark, a retired judge from the U.S. Bankruptcy Court for the Western District of Texas, in providing commentary on chapter 15 proceedings, has recognized that Section 1520(c) provides that entities other than the foreign representative may file an involuntary case against the debtor during the gap period between the filing of a petition and the determination of whether to enter a recognition order. Judge Clark explains:

> [S]ection 1520(c) provides that the stay arising by virtue of section 1520(a) does not prevent the commencement of a full [i.e., chapter 7 or chapter 11] bankruptcy case under the U.S. bankruptcy law by any party.

A. Collier Monograph: *Ancillary and Other Cross-Border Insolvency Cases Under Chapter 15 of the Bankruptcy Code* (hereinafter, "*Collier Monograph*"), ¶ 7[2].

Finally, consistent with the express language of Section 1520(c), Section 1529 contemplates that an involuntary case may be filed regardless of whether a petition for recognition has been filed or a recognition order has been entered, so long as relief granted in the chapter 15 proceeding is coordinated with the relief granted in the chapter 7 or chapter 11 case. Section 1529 provides, in relevant part:

> (1) If the case [under another chapter of this title] in the United States is pending at the time the petition for recognitions of such foreign proceeding is filed –
>
> (A) any relief granted under section 1519 or 1521 must be consistent with the relief granted in the case . . .; and
>
> (B) section 1520 does not apply even if such foreign proceeding is recognized as a foreign main proceeding.

> (2) If a case in the United States under this title commences after recognition, *or after the date of the filing of the petition for recognition*, of such foreign proceeding –
>
> (A) any relief in effect under section 1519 or 1521 shall be reviewed by the court and shall be modified or terminated if inconsistent with the case in the United States;[7] and
>
> (B) if such foreign proceeding is a foreign main proceeding, the stay and suspension referred to in section 1520(a) shall be modified or terminated if inconsistent with the relief granted in the case in the United States.

11 U.S.C. §1529. (emphasis added)

As further indicia of Congress's intent to preserve creditors' rights to file an involuntary petition, even after a chapter 15 petition has been filed, Section 1529 acknowledges that chapter 7 and 11 cases may exist concurrently with chapter 15 proceedings and that the court must coordinate the relief granted in the different actions. So, for example, if a chapter 7 or chapter 11 case is pending when the chapter 15 petition is filed, the bankruptcy case dominates, the Section 1520 effects of recognition do not apply, and any relief granted under Sections 1519 and 1521 must be consistent with the full bankruptcy case. 11 U.S.C. § 1529(1). If an involuntary petition is filed after a petition for recognition is filed but before recognition has been determined, the Section 362 stay overrides the current Provisional Relief Order, a worldwide estate is created under Section 541(a), including the avoidance actions that are the subject of the draft Complaint, and the relief that has already been granted under Sections 1519 and 1521 (and the stay imposed by Section 1520) must be reviewed and modified or terminated, if necessary, to preserve the rights provided by chapters 7 and 11 of the Bankruptcy Code. Essentially, "[i]n general, the chapter 7 or chapter 11 case is dominant." *Collier Monograph*, ¶ 12[1][a].

[7] Pursuant to Sections 303 and 362, upon the filing of an involuntary petition, the automatic stay under Section 362(a) would supersede the Provisional Relief Order.

Only if a bankruptcy petition is filed *after* a recognition order has been entered do the provisions of chapter 15 dominate those of chapters 7 and 11, and then only with respect to the scope of the property under the bankruptcy court's jurisdiction as set forth in Section 1528. Normally, in a bankruptcy case, the court has jurisdiction over all assets in which the debtor has any interest, wherever located. 11 U.S.C. §541(a). Pursuant to Section 1528, however, the effects of a bankruptcy case that is commenced *after* the recognition order is entered "shall be restricted to the assets of the debtor that are within the jurisdiction of the United States . . . and such other assets that are not subject to the jurisdiction and control of a foreign proceeding that has been recognized under this chapter." 11 U.S.C. §1528. This limited exception may have significant ramifications. In the instant cases, if Highland and other creditors are not permitted to file an involuntary case *before* a recognition order is entered, this Court will not have jurisdiction over assets outside of the United States, including possible proceeds subject to recovery as a result of the avoidance actions that are the subject of the draft Complaint.

Case law, too, recognizes that chapter 15 proceedings and full blown bankruptcy cases may proceed, and to protect creditors, sometimes should proceed, simultaneously. In *In re Tradex Swiss AG,* 384 B.R. 34, 44 (Bankr. Mass. 2008), an involuntary chapter 7 petition had been filed by creditors after bankruptcy proceedings in Switzerland had commenced but before the chapter 15 petition was filed. A trustee was already in the process of collecting the debtor's assets and the Swiss proceeding was in limbo pending certain appeals. The court held that "there is no impediment to maintaining a Chapter 7 case in connection with the Chapter 15 one" and ruled that the purposes of chapter 15 were best served by *not* dismissing the pending chapter 7 case and letting the trustee continue administering the debtor's chapter 7 estate. *Id*. at 44.

Similarly, in *In re RHTC Liquidating Co.*, 424 B.R. 714 (Bankr. W.D. Pa. 2010), a Canadian Companies Act proceeding was recognized as a foreign main proceeding. When the debtor's assets were sold for less than the outstanding claims, and the Canadian monitor failed to seek to subordinate insider and inter-company claims, creditors filed an involuntary chapter 7 petition in the United States. The Canadian Monitor moved to dismiss the case under Section 305. After considering each of the stated purposes of chapter 15, the court refused to dismiss the involuntary petition, finding that the fairness of the foreign proceedings was questionable, there were concerns over the protection of non-insider creditors and, rather than protecting creditors, dismissal would have the opposite effect. The court stated, "[t]he recognition of a foreign proceeding . . . was never intended to be an automatic bar to additional proceedings being brought in the United States that might, to some extent, conflict with or overlap the foreign proceeding. This should be apparent from the fact that a request for dismissal under Section 305(a)(2) is subject to the discretion of the bankruptcy court." *Id*. at 729.

2. Filing Rights Granted to the Foreign Representative are Limited

It is clear that a plain reading of the statutory provisions contained in the Bankruptcy Code do not restrict, and indeed contemplate that, an entity (including unsecured creditors and/or the debtor, if it has the power to do so under applicable non-U.S. law) can file a voluntary or involuntary petition with respect to a debtor at any time before or after a recognition order is entered. This conclusion becomes inescapable once the provisions that restrict a *foreign representative's* rights to file a chapter 7 or chapter 11 petition are considered. Indeed, where Congress wanted to restrict chapter 7 and chapter 11 filing rights, it did so unambiguously.

After filing a petition, but before an order of recognition is entered, a foreign representative has limited rights as set forth in Sections 1519(a) and 1521. The focus of these rights is to seek,

on a provisional basis, a stay with respect to the debtor and/or its assets to the extent necessary to protect the debtor's assets and the interests of creditors. Nothing in Sections 1519 or 1521, however, permits a foreign representative to commence an involuntary or voluntary proceeding after a chapter 15 petition has been filed but before a recognition order has been entered.[8] Rather, under Section 1511(a), recognition is *a prerequisite* to the foreign representative right to file a bankruptcy petition.

Section 1511(a) provides:

(a) Upon recognition, a foreign representative may commence –

(1) an involuntary case under section 303; or

(2) a voluntary case under section 301 or 302, if the foreign proceeding is a main proceeding.

11 U.S.C. § 1511(a). Moreover, Section 1511(b) requires a foreign representative to attach a certified copy of the recognition order to any petition it files for chapter 7 or chapter 11 relief, further highlighting the express intent of the drafters to limit the foreign representative's rights after filing a chapter 15 petition. *See* 11 U.S.C. §1511(b).

The broad grant of rights to creditors (without any limitations as to the timing of the exercise of such rights) and to foreign representatives under Section 1520(c), coupled with the express limitation of those rights when exercised by a foreign representative that has filed a petition for recognition, makes it clear that Congress did not intend to restrict creditors like Highland from exercising their 303(b) rights to file an involuntary petition before recognition of a foreign proceeding. Moreover, there is nothing in the Bankruptcy Code or the legislative history of chapter 15 that remotely suggests that creditors' 303(b) rights are in any way restricted simply because a

[8] Currently, the Cayman Orders empower the Provisional Liquidators to seek relief only under chapter 15 of the Bankruptcy Code.

petition for recognition has been filed. Rather, the statute and case law recognize and, where appropriate, support the concurrent pendency of involuntary cases and chapter 15 proceedings in order to protect creditors' interests and ensure the fair administration of cross-border insolvencies.

B. Permitting Highland and Others to File an Involuntary Petition Against Ocean Rig and/or the Other Debtors Would be in the Best Interests of Creditors

There are at least two important reasons to permit Highland and others to file an involuntary petition against one or more of the Debtors. The first is to preserve the ability of a trustee (or Highland, other creditors or an official committee, if given standing) to file and prosecute avoidance actions against insiders and others who have received millions of dollars of Ocean Rig's cash as part of a scheme to defraud Ocean Rig's creditors. As Mr. Leontsinis explains in the Collis Crill Affidavit, pursuant to Section 104(4) of the Cayman Companies Law, a liquidator can only carry out the functions conferred upon him/her by the Cayman Court, and his/her powers are limited by the order of appointment. *See* Collis Crill Affidavit ¶ 30. Under the Cayman Orders, the Provisional Liquidators do not have the power to use Cayman Islands law to sue for fraudulent dispositions in the Cayman Islands. *See* Cayman Orders [Dkt. No. 4-1]. Even if the Provisional Liquidators were to become official liquidators (assuming the proposed Schemes of Arrangement failed), the official liquidator could only sue for fraudulent dispositions with the sanction of the Cayman Court.

Furthermore, the Provisional Liquidators cannot sue to avoid the fraudulent conveyances in the Debtors' chapter 15 proceeding, because the draft Complaint and the New York state law avoidance actions described therein are not "assets of the debtor" over which the Provisional Liquidators would have authority and control or this Court would have jurisdiction, but are assets of the Debtors' creditors. *See* 11 U.S.C. §1528. *See Cottone v. Selective Surfaces, Inc.*, 68 A.D.3d 1038, 1040 (N.Y. App. Div. 2009) (Dismissing a New York state law "derivative"

fraudulent conveyance claim, the court held that "[h]ere the company is the alleged transferor of assets, not a creditor, and thus a fraudulent conveyance claim may not be maintained on its behalf pursuant to Debtor and Creditor Law §276.") Nor do the Provisional Liquidators, as foreign representatives, have the same rights to step into the shoes of creditors to assert state law avoidance claims in a chapter 15 proceeding as does a trustee in a chapter 7 or chapter 11 case. *See* 11 U.S.C. §1521(a)(7). Thus, without an involuntary case, the Provisional Liquidators currently have no recourse to recover the Debtors' fraudulently transferred assets.

Moreover, creditors themselves have no independent recourse in either the Cayman Islands or New York State outside of a chapter 7 or chapter 11 case. Pursuant to Section 97 of the Cayman Companies Law, when a provisional liquidation order is entered by the Cayman Court, a creditor's right to sue in the Cayman Islands is stayed.[9] *See* Collis Crill Affidavit, ¶ 25. Furthermore, if the Provisional Relief Order is not modified to permit Highland (or others) to file its draft (or a similar) Complaint in New York state court, then creditors' efforts to recover the cash that Ocean Rig fraudulently transferred to insiders will be stymied. On the other hand, in a bankruptcy case, either a trustee or a debtor-in-possession could commence an avoidance action[10] on behalf of all of the creditors of the Debtors' estates. 11 U.S.C. § 544(a).

The second reason for permitting Highland and others to file an involuntary petition is that if creditors are stayed from exercising their 303(b) filing rights, the Debtors will have a

[9] Although a creditor could apply to the Cayman Court for leave to pursue claims against the Debtors, it is highly unlikely that the Cayman Court would grant such leave, because to do so would permit a creditor to recover for its own benefit and not the benefit of all creditors. *See* Collis Crill Affidavit, n.33.

[10] In addition, Highland and/or an official committee could seek standing to sue for avoidance and recovery on behalf of all creditors. *See STN Enterprises*, 779 F.2d at 904 ("section 1103(c)(5) and 1109(b) imply a qualified right for creditors' committees to initiate suit [to recover fraudulent conveyances] with the approval of the bankruptcy court.").

virtually unfettered ability to obtain approval of a scheme that favors insider management by more than $200 million at the expense of third-party creditors (most of whom are U.S. investors) and will be able to avoid many of the important safeguards that U.S. bankruptcy law imposes on debtors, including the requirements under Section 1129 of the Bankruptcy Code that a plan be proposed in good faith, that all impaired, non-consenting creditors receive at least as much under the plan as they would in a hypothetical liquidation and that the plan not discriminate unfairly and be deemed fair and equitable. 11 U.S.C. §§ 1129(a)(3), (7), (8) and (b). No such requirements are imposed by Cayman Islands law, and the Cayman Court's obligations are primarily to ensure that proper procedures were followed in obtaining creditors' votes.[11] *See* Collis Crill Affidavit ¶¶ 48, 51 and 52.

C. **The Purposes of Chapter 15 Are Best Served in this Case If Highland Is Permitted to File an Involuntary Case Against Ocean Rig If Necessary**

Section 1501 sets forth the purposes of enacting chapter 15, including (i) to protect and maximize the value of the debtor's assets and (ii) to fairly and efficiently administer cross-border insolvencies in a way that protects the interests of all creditors. 11 U.S.C. §§1501(a)(3) and (4).

To the extent the Debtors' assets were fraudulently transferred to insiders or others, as explained in more detail in the draft Complaint, the only way to commence actions to recover these assets and maximize value for *all* creditors is to permit Highland and other creditors to commence an involuntary case, create an estate under Section 541(a) that would include, among other things, the draft Complaint, and trigger the strong-arm powers of a trustee under Section 544 of the Bankruptcy Code for the benefit of *all* creditors. It is critical to note in this case that

[11] As set forth in the Collis Crill Affidavit, the standard the Cayman Court must consider is whether an intelligent and honest man, acting in respect of his interest, might reasonably approve the scheme of arrangement. This standard is less objective and provides less of a safeguard for creditors' interests than the standards set forth in Section 1129 of the Bankruptcy Code. *See* Collis Crill Affidavit ¶52.4.

the RSA contemplates that the Notes will be discharged upon approval of the Debtors' Schemes of Arrangement. If 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 chapter 7 or chapter 11 case. *See N.Y. Debt. & Cred. §§ 273, 276* (transfers are fraudulent as to "creditors").; *United States v. Watts*, 786 F.3d 152, 162 (2d Cir. 2015) (It is well-settled under New York law that the challenger of a fraudulent conveyance must be a creditor of the transferor; New York law defines a creditor as "'a person having a claim' against the transferor"). The proposed Schemes of Arrangement would effectively release the claims of creditors against the Debtors' insiders for actual fraudulent actions, a sweeping exculpation negotiated by a handful of senior lenders and these same insiders (who, under the Schemes of Arrangement, will receive compensation of over $200 million, including receiving a 10-year management agreement, 9.5% of new equity and continued control of the Debtors' Board of Directors) that violates U.S. public policy and harms, rather than protects, at least two classes of non-consenting creditors. By denying Highland and other creditors' rights to file an involuntary petition, this Court would be indirectly permitting non-consensual, third-party releases that are manifestly contrary to the public policy of the United States. *See In re Vitro S.A.B de C.V.*, 701 F.3d 1031, 1067-69 (5th Cir. 2012), *cert dismissed*, 133 S.Ct. 1862 (2013) (Court refused to enforce Mexican reorganization plan that provided for broad non-consensual, third-party releases, noting that comity has its limits, that under United States law, non-debtor releases "are only appropriate in extraordinary circumstances" which were lacking in the case at bar and that, to rubber stamp provisions of a foreign plan that contradicted United States law would be "disregarding the considerations and safeguards Congress included in § 1507(b)"); *see*

also In re Metromedia Fiber Networks, Inc., 416 F.3d 136, 141-43 (2d Cir. 2005) (non-consensual, third-party releases should not be approved "absent the finding that truly unusual circumstances render the release terms important to success of the plan.")

There are several other significant protections that are provided to creditors under chapter 7 and chapter 11 of the Bankruptcy Code that are not available to creditors under a scheme of arrangement or provisional liquidation proceeding in the Cayman Island. For example, in the Cayman Island, parties-in-interest do not have discovery rights to develop facts to support objections to proposed schemes of arrangement. Likewise, parties-in-interest are very rarely permitted to cross-examine witnesses who file affidavits in support of such schemes, again in order to objectively determine whether the scheme is in the parties' best interests. *See* Collis Crill Affidavit ¶¶ 40 and 42. In U.S. bankruptcy cases, creditors have the benefit of sworn schedules, statements of financial affairs and affidavits and the right to take discovery in connection with reorganization plans, to examine witnesses and to request that the Court order a Bankruptcy Rule 2004 examination where appropriate. These discovery rights are crucial in situations, such as this case, where certain creditors (such as certain senior lenders) have had superior access to information about the Debtors and other creditors (like Highland) have been denied such access. [12]

In addition, under the Cayman Orders, the Cayman Court dispensed with the need to form a liquidation committee, so there is no body similar to an official creditors' committee to represent the interest of unsecured creditors. Furthermore, the Cayman Islands liquidation

[12] Highland has been advised that the Debtors created a data room in 2016 and that certain senior lenders have had access to the data room connection with the negotiation of the RSA. Despite requests made by Highland's counsel for equal access, Highland has not been permitted to review the documents or other information contained in the data room, thus perpetuating the discriminatory treatment that has plagued the Debtors' dealing with Highland and other creditors *See Preliminary Objection of the Ad Hoc Group of Holders of the 6.5% DRH Secured Notes* [Dkt No. 26] ¶¶ 25 - 35.

proceedings do not have an independent, government employee like the United States Trustee to oversee the Debtors' actions and protect the interests of unsecured creditors. Clearly, the goal of protecting creditors would be better served by the concurrent pendency of a full bankruptcy case, especially when chapter 15 expressly permits and preserves the rights of creditors to file involuntary petitions under Section 303 of the Bankruptcy Code even before recognition.

The interests of the public policy of the United States under these circumstances favors the filing of an involuntary case against Ocean Rig to recover and preserve assets, protect all creditors' and shareholders' interests, maximize value and facilitate the rescue of the failing Debtors.

CONCLUSION

For the foregoing reasons, Highland respectfully requests that the Court modify the Provisional Relief Order to permit Highland and others to file an involuntary petition for relief against the Debtors (or any one of them).

Dated: New York, New York
April 14, 2017

Respectfully submitted,

VENABLE LLP

By: /s/ Jeffrey S. Sabin
Jeffrey S. Sabin
Kostas D. Katsiris
Rockefeller Center
1270 Avenue of the Americas, 24th Floor
New York, New York 10020
Telephone: (212) 307-5500

Counsel for Highland Capital Management

Exhibit 27

EXHIBIT C

HIGHLAND CAPITAL MANAGEMENT

February 28, 2017

Via Hand Delivery and Certified Mail RRR #7016 2070 0000 9470 7048
Deutsche Bank Trust Company Americas
60 Wall Street – 16th Floor
MSNY60-1630
New York, New York 10005
Attn: Trust and Agency Service
Client Services Manager – Ocean Rig UDW Inc.

Re: *Ocean Rig UDW Inc. 7.25% Notes Due 2019: Notice of Removal of the Trustee and Appointment of Successor Trustee*

Client Services Manager – Ocean Rig UDW, Inc.:

Reference is made to the Indenture dated as of March 26, 2014, between Ocean Rig UDW, Inc., and Deutsche Bank Trust Company Americas ("***Deutsche Bank***") as Trustee, for the issuance of 7.25% Senior Notes Due 2019 (the "***Indenture***"). All capitalized terms not otherwise defined herein shall have their meaning as set forth in the Indenture. This letter constitutes written notice on behalf of the holders of a majority of the aggregate principal amount of the currently outstanding Notes ("***Majority Holders***"), pursuant to §7.08 of the Indenture, of the removal of Deutsche Bank as Trustee and the installation of Wilmington Trust, N.A. ("***Wilmington Trust***") as the successor Trustee.

The undersigned holders of Notes, namely NexPoint Credit Strategies Fund, Highland Opportunistic Credit Fund, Highland Global Allocation Fund, Highland Floating Rate Opportunities Fund, and Highland Loan Master Fund, L.P.[1] in aggregate hold $74,122,000 of the total $131,000,000 in principal amount of the currently outstanding Notes, or approximately 56.5% of the Notes. Therefore, the undersigned holders of Notes constitute the Majority Holders pursuant to Indenture §2.08.

Indenture §7.08(b) states: "[t]he Holders of a majority in aggregate principal amount of the then outstanding Notes may remove the Trustee by so notifying the Trustee and the Issuer in writing and may appoint a successor Trustee." Accordingly, the Majority Holders hereby invoke §2.08 and hereby give notice to Deutsche Bank pursuant to §7.08 that Deutsche Bank hereby is removed as Trustee and replaced by Wilmington Trust effective upon Wilmington Trust's written acceptance of its appointment as successor Trustee under the Indenture.

[1] NexPoint Credit Strategies Fund, Highland Opportunistic Credit Fund, Highland Global Allocation Fund, and Highland Floating Rate Opportunities Fund hold the Notes through their Custodian, State Street Bank and Trust Company. *See* State Street Positions attached.

Please respond with your written acknowledgement of this Notice. The Majority Holders and Wilmington Trust, as successor Trustee, will provide a draft tripartite agreement between Majority Holders, Deutsche Bank, and Wilmington Trust to facilitate the transition. Please let us know if there is any other way we can assist in the transition to the successor Trustee.

Signed this day, February 28, 2017 by the undersigned Majority Holders:

NexPoint Credit Strategies Fund *Aggregate Principal: $18,439,000*

By: _____
Name: Brian Mitts
Title: Executive Vice President

Highland Opportunistic Credit Fund *Aggregate Principal: $2,437,000*

By: _____
Name: Brian Mitts
Title: Executive Vice President

Highland Global Allocation Fund *Aggregate Principal: $37,083,000*

By: _____
Name: Brian Mitts
Title: Executive Vice President

Highland Floating Rate Opportunities Fund *Aggregate Principal: $18,439,000*

By: _____
Name: Brian Mitts
Title: Executive Vice President

Highland Loan Master Fund, L.P. *Aggregate Principal: $563,000*

By: Highland Capital Loan GP, LLC, its general partner
By: Highland Capital Management, L.P., its sole member
By: Strand Advisors, Inc., its general partner

By: 

Name: Scott Ellington
Title: Secretary

cc: **Via Certified Mail RRR #7016 2070 0000 9470 7024**
Ocean Rig UDW Inc. Tribune House
c/o Ocean Rig Cayman Management Services SEZC Limited
P.O. Box 309, Ugland House
South Church Street, George Town
Grand Cayman, KY1-1104, Cayman Islands
Attention: Mr. Savvas Georghiades

Via Certified Mail RRR #7016 2070 0000 9470 7031
Seward & Kissel
One Battery Park Plaza
New York New York 10004
United States of America
Attention: Gary J. Wolfe, Esq.
Robert Lustrin, Esq.

Custody/Positions

Positions by Settle Location

Date: Real Time (02/27/2017) *Funds: 5 of 36 Selected* *View Date:* *February 27, 2017*

STATE STREET.

Available position does not include shares out for loan. Each Position can be detailed to determine whether a portion of the security is on loan, out for registration, blocked, etc.

Fund	Fund Name	SS Asset ID	Security Name	Settle Loc	Traded
PY1D	HLC FLOATING RATE OPP FUND	67500PAA6	OCEAN RIG UDW	EUR - EUROCLEAR	182,000.000
PY1D	HLC FLOATING RATE OPP FUND	67500PAA6	OCEAN RIG UDW	DTC - USA	15,418,000.000
PY2N	HIGHLAND GLOBAL ALLOCATION	67500PAA6	OCEAN RIG UDW	EUR - EUROCLEAR	909,000.000
PY2N	HIGHLAND GLOBAL ALLOCATION	67500PAA6	OCEAN RIG UDW	DTC - USA	36,174,000.000
PY3A	NEXPOINT CREDIT STRATEGIES	67500PAA6	OCEAN RIG UDW	DTC - USA	12,280,000.000
PY3A	NEXPOINT CREDIT STRATEGIES	67500PAA6	OCEAN RIG UDW	EUR - EUROCLEAR	909,000.000
PY3B	HLC OPPORTUNISTIC CREDIT FUND	67500PAA6	OCEAN RIG UDW	DTC - USA	2,437,000.000
PYM3	SCA MLPCC PLEDGEE NXPT CR STRT	67500PAA6	OCEAN RIG UDW	DTC - USA	5,250,000.000

S.A.582

Exhibit 28

EXHIBIT D

Agreement of Resignation, Appointment and Acceptance

This Agreement of Resignation, Appointment and Acceptance, dated as of June 2, 2017 (this "**Agreement**") is entered into by and among Ocean Rig UDW Inc. (the "**Issuer**"), Deutsche Bank Trust Company Americas, a state banking corporation duly organized and existing under the laws of the State of New York ("**DBTCA**"), in its various capacities as Trustee, Registrar, Transfer Agent, Paying Agent and Notes Custodian under the Indenture (defined below), and Wilmington Savings Fund Society, FSB, a federal savings bank duly organized and existing under the laws of the United States of America having its principal corporate trust office at 500 Delaware Avenue, Wilmington, Delaware 19801 ("**WSFS**"). Capitalized terms not otherwise defined herein shall have the same meaning ascribed to such terms in the Indenture.

WHEREAS, the Issuer issued 7.25% Senior Notes due 2019 (the "**Notes**") under an indenture dated as of March 26, 2014 (as may be amended, restated or otherwise modified from time to time, the "**Indenture**");

WHEREAS, DBTCA acts as Trustee (the "**Prior Trustee**") under the Indenture;

WHEREAS, the Issuer initially appointed the Prior Trustee as the Registrar, Transfer Agent, Paying Agent and Notes Custodian under the Indenture;

WHEREAS, Section 7.08(b) of the Indenture provides that the holders of a majority in aggregate principal amount of the Notes then outstanding may remove the Trustee by so notifying the Trustee and the Issuer in writing;

WHEREAS, on or about February 28, 2017, the Prior Trustee received a Notice of Removal as Trustee from holders purporting to hold a majority in aggregate principal amount of the outstanding Notes (the "**Majority Holders**") directing its removal as Trustee;

WHEREAS, the Issuer, the Majority Holders, the Prior Trustee and WSFS are agreeable to the removal and replacement of the Prior Trustee, in its capacity as Trustee, Registrar, Transfer Agent, Paying Agent, and Notes Custodian under the Indenture; and

WHEREAS, WSFS (the "**Successor Trustee**") is willing to accept such appointments as successor Trustee, Registrar, Transfer Agent, Paying Agent and Notes Custodian under the Indenture.

NOW, THEREFORE, the Issuer, the Prior Trustee and the Successor Trustee, for and in consideration of the premises and of other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, hereby consent and agree as follows:

1. Resignation of DBTCA; Appointment of WSFS

1.1 In accordance with Sections 7.08 and 7.11 of the Indenture, DBTCA hereby resigns as Trustee, Registrar, Transfer Agent, Paying Agent and Notes Custodian under the Indenture (the "**Resignation**").

1.2 Effective immediately upon the Resignation taking effect as provided for herein, WSFS is hereby appointed as Trustee, and will be appointed 10 Business Days thereafter as Registrar, Transfer Agent, Paying Agent and Notes Custodian under the Indenture.

2. Acceptance by WSFS

2.1 WSFS hereby accepts its appointment as Successor Trustee, Registrar, Transfer Agent, Paying Agent and Notes Custodian under the Indenture and will perform the rights, powers and duties as Trustee, Registrar, Transfer Agent, Paying Agent and Notes Custodian under the Indenture.

2.2 Promptly after the execution and delivery of this Agreement, the Successor Trustee shall cause a notice of its succession to be sent to each holder of the Notes, substantially in the form attached as Exhibit A hereto.

3. Issuer Representations and Warranties. The Issuer represents and warrants to the Prior Trustee and the Successor Trustee that:

3.1 The execution and delivery of this Agreement has been duly authorized by the Issuer, and this Agreement constitutes the Issuer's legal, valid, binding and enforceable obligation; and

3.2 US $131,000,000 in aggregate principal of the Notes are currently outstanding as of the date of this Agreement and the last date on which interest was paid on the Notes was October 1, 2016.

4. Prior Trustee's Representations and Warranties. The Prior Trustee represents and warrants to the Issuer and the Successor Trustee that:

4.1 The execution and delivery of this Agreement has been duly authorized by the Prior Trustee, and this Agreement constitutes the Prior Trustee's legal, valid, binding and enforceable obligation;

4.2 Without independent investigation, to the best of the knowledge of a Responsible Officer of the Prior Trustee, the Prior Trustee has not received written notice from the Issuer of any Default or Event of Default, other than the Defaults and/or Events of Default identified in the Notice to the Trustee dated October 20, 2016, attached hereto as Exhibit B, and the Officers' Certificate dated March 29, 2017, attached hereto as Exhibit C; and

4.3 Without independent investigation, to the best of the knowledge of a Responsible Officer of the Prior Trustee, there is no action, suit or proceeding pending or, threatened against the Prior Trustee before any court or governmental authority arising out of any action or omission by the Prior Trustee under the Indenture.

5. Successor Trustee's Representations and Warranties. The Successor Trustee represents and warrants to the Issuer and the Prior Trustee that:

5.1 The execution and delivery of this Agreement has been duly authorized by the Successor Trustee and this Agreement constitutes the Successor Trustee's legal, valid, binding and enforceable obligation;

5.2 The Successor Trustee is eligible to serve as Trustee under Section 7.10 of the Indenture; and

5.3 The Successor Trustee is eligible to serve as Registrar, Transfer Agent, Paying Agent and Notes Custodian under Section 2.03 of the Indenture.

6. Assignment and Transfer

6.1 The Prior Trustee hereby assigns, transfers, delivers and confirms to the Successor Trustee all the right, title, and interest of the Prior Trustee in and to the trusts under the Indenture and all the estates, properties, rights, powers, trusts, duties and obligations of the Trustee under the Indenture.

6.2 The Prior Trustee shall deliver to the Successor Trustee, as of or promptly following the date hereof, all of the documents in its possession listed on Exhibit D hereto. Upon receipt of a written request, the Prior Trustee shall execute and deliver such further instruments and shall do such other things as the Successor Trustee or the Issuer may reasonably request so as to more fully and certainly vest and confirm in the Successor Trustee all the estates, properties, rights, powers, trusts, duties and obligations hereby assigned, transferred, delivered and confirmed to the Successor Trustee, provided, however, that the Issuer shall promptly reimburse or indemnify the Prior Trustee for any reasonable costs and expenses the Prior Trustee incurs in connection with the Prior Trustee's obligations (other than delivery of the documents identified on Exhibit D) under this Section 6.2.

7. Notices

7.1 Unless otherwise provided herein, all notices, requests and other communications to any party hereunder shall be in writing (including facsimile and electronic transmission in PDF format) and shall be given to such party, addressed to it, as set forth below:

If to the Issuer:

Ocean Rig Cayman Services SEZC Limited
PO Box 309, Ugland House South Church Street
George Town Grand Cayman, KY1-1104
Cayman Islands
Attention: Iraklis Sbarounis

If to Prior Trustee:

Deutsche Bank Trust Company Americas
c/o Deutsche Bank National Trust Company
100 Plaza One, 6th Floor:
Mail Stop: JCY03-0699
Jersey City, New Jersey 07311
Attention: Corporate Team – Ocean Rig UDW Inc.
Facsimile: (732) 578-4635

If to the Successor Trustee:

Wilmington Savings Fund Society, FSB
500 Delaware Avenue

Wilmington, Delaware 19801
Fax: 302-421-9137
Attn: Patrick Healy

8. Miscellaneous

8.1 This Agreement and the resignation, appointment and acceptance effected hereby with regard to the role of Trustee shall be effective as of the date hereof. The Successor Trustee shall be appointed as Registrar, Transfer Agent, Paying Agent and Notes Custodian under the Indenture 10 Business Days thereafter.

8.2 This Agreement shall be governed by and construed in accordance with the laws governing the Indenture, and except as otherwise expressly provided herein or unless the context otherwise requires, all terms used herein which are defined in the Indenture shall have the meaning assigned to them in the Indenture.

8.3 This Agreement does not constitute a waiver or assignment by the Prior Trustee of any compensation, reimbursement, expenses or indemnity to which it is or may be entitled under the Indenture, regardless of the resignation, removal or replacement of the Prior Trustee by way of this Agreement, and nothing contained herein shall in any way abrogate the obligations of the Issuer to the Prior Trustee under the Indenture or any lien created in favor of the Prior Trustee. The Issuer hereby acknowledges and affirms its obligations to the Successor Trustee as set forth in Section 7.07 of the Indenture.

8.4 The parties hereto agree that this Agreement does not constitute (a) an assumption by the Successor Trustee of any liability of the Prior Trustee arising out of any actions or inaction by the Prior Trustee under the Indenture or (b) an assumption by the Prior Trustee of any liability of the Successor Trustee arising out of any actions or inaction by the Successor Trustee under the Indenture.

8.5 This Agreement may be executed in any number of counterparts each of which shall be an original, but such counterparts shall together constitute but one and the same instrument. The exchange of copies of this Agreement and of signature pages by facsimile or PDF transmission shall constitute effective execution and delivery of this Agreement as to the parties hereto and may be used in lieu of the original Agreement for all purposes. Signatures of the parties hereto transmitted by facsimile or PDF shall be deemed to be their original signatures for all purposes.

8.6 The Issuer, Prior Trustee and Successor Trustee hereby acknowledge receipt of an executed and acknowledged counterpart of this Agreement and its effectiveness as provided for herein.

[*Signature pages follow*]

IN WITNESS WHEREOF, the parties hereto have caused this Agreement of Resignation, Appointment and Acceptance to be duly executed and acknowledged all as of the day and year first written above.

Ocean Rig UDW Inc.,
as Issuer

By: _____
Name:
Title:

Deutsche Bank Trust Company Americas,
as Prior Trustee, Registrar, Transfer Agent,
Paying Agent and Notes Custodian

By Deutsche Bank National Trust Company

By: _____
Name: RODNEY GAUGHAN
Title: VICE PRESIDENT

By: _____
Name: Brendon Meyer
Title: Director

Wilmington Savings Fund Society, FSB,
as Successor Trustee, Registrar, Transfer Agent,
Paying Agent and Notes Custodian

By: _____
Name: Geoffrey J. Lewis
Title: Vice President

Exhibit A

NOTICE
TO HOLDERS OF THE FOLLOWING SECURITIES:

OCEAN RIG UDW INC.
7.25% SENIOR NOTES DUE 2019
CUSIP 67500PAA6 / ISIN US67500PAA66
CUSIP Y64263AA7 / ISIN USY64263AA761[1]

(COLLECTIVELY, THE "NOTES")

NOTICE IS HEREBY GIVEN, under Section 7.08 of the Indenture dated as of March 26, 2014 (the "Indenture") by and between Ocean Rig UDW Inc. (the "Issuer"), and Wilmington Savings Fund Society, FSB ("WSFS"), as successor trustee (the "Trustee"), registrar, transfer agent, paying agent and notes custodian under the Indenture, that on [____ __], 2017, Deutsche Bank Trust Company Americas, as the Trustee, Registrar, Transfer Agent, Paying Agent and Notes Custodian under the Indenture, resigned as Trustee under Section 7.08 of the Indenture.

Holders of the Notes are further advised that WSFS has accepted appointment as successor Trustee, registrar, paying agent and notes custodian under Section 7.08 of the Indenture. The appointment of WSFS as successor Trustee, will be effective as of the opening of business on [____ __], 2017 with the appointment of WSFS as Registrar, Transfer Agent, Paying Agent and Notes Custodian to occur 10 Business Days thereafter.

The address of the corporate trust office of WSFS is as follows:

Wilmington Savings Fund Society, FSB
500 Delaware Avenue
Wilmington, Delaware 19801

Contact information for WSFS's counsel is as follows:

Pillsbury Winthrop Shaw Pittman LLP
1540 Broadway
New York, New York 10036-4039
Phone: (212) 858-1000
Fax: (212) 858-1500
Attn: Leo T. Crowley, Esq. leo.crowley@pillsburylaw.com
Frank Vivero, Esq. frank.vivero@pillsburylaw.com

The Trustee may conclude that a specific response to a particular inquiry from an individual Holder is not consistent with an equal and full dissemination of significant information to all Holders.

---

[1] The CUSIP and ISIN numbers, if any appearing herein, have been included solely for the convenience of the holders of the Notes (the "Holders"). The Trustee assumes no responsibility for the selection or use of such numbers and makes no representation as to the correctness of the CUSIP and ISIN numbers, if any, listed above.

Holders should not rely on the Trustee as their sole source of information. Holders should consider consulting their own legal, financial and business advisors for advice regarding this matter. The Trustee makes no recommendations and gives no investment, legal or tax advice as to the above matters or the Indenture generally.

Wilmington Savings Fund Society, FSB, as Trustee

Exhibit B

Notice to the Trustee, dated October 20, 2016

Ocean Rig UDW Inc.

OCEAN RIG

Registered Office:
Trust Company Complex
Ajeltake Road
Ajeltake Island, Majuro
Marshall Islands MH 96960

Notice to the Trustee

October 20, 2016

To:
Deutsche Bank Trust Company Americas (the "Trustee")
60 Wall Street – 16th floor
MSNYC60-1630
New York, New York 10005
Attn: Trust and Agency Service
Client Services Manager – Ocean Rig UDW Inc.

Indenture dated March 26, 2014 (the "Indenture") for 7.25% Senior Notes Due 2019, between Ocean Rig UDW Inc. and the Trustee

Cusips: Y64263AA7 / 67500PAA6

All capitalized terms are as per their definitions under the Indenture.

Please note the Ocean Rig UDW Inc. (the "Issuer") intends to pay Default Interest, as per the provisions of Section 2.12 of the Indenture, on the applicable amount of $18,125,000, which was originally due on October 3, 2016 and was actually paid on October 7, 2016.

Kindly note the below:

- Default Interest rate: 9.25% (7.25% Interest Rate plus 2.00% Default Interest Rate).
- Applicable amount on which Default Interest is calculated: $18,125,000
- Default Interest period: from October 3, 2016 to October 7, 2016
- Default Interest amount: $18,628.47
- Rate per 1,000 for Default Interest: 0.037257
- Special Record Date: November 5, 2016
- Special Interest Payment Date: November 16, 2016

In accordance with Section 2.12 of the Indenture, the Issuer hereby requests the Trustee to immediately notify the Holders of the information set forth in this notice.

Best regards,

Niki Fotiou
Attorney in fact

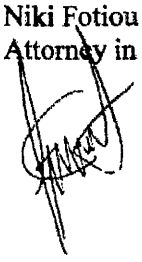

Exhibit C

Officers' Certificate, dated March 29, 2017

OFFICERS' CERTIFICATE

OCEAN RIG UDW INC.

March 29, 2017

Ladies and Gentlemen:

The undersigned, Iraklis Sbarounis, the Secretary, and Anthony Kandylidis the President and Chief Financial Officer, of OCEAN RIG UDW INC. (in provisional liquidation), a Cayman Islands exempted company (the "**Company**"), in their respective capacities as such, do hereby certify as follows:

1. This Officers' Certificate is delivered to Deutsche Bank Trust Company Americas, as trustee (the "**Trustee**"), under Section 4.04(b) of the Indenture, dated as of March 26, 2014, between the Company and the Trustee (the "**Indenture**").

2. Reference is made to the press release (the "**Press Release**") issued by the Company and attached as Exhibit A hereto. As a result of the actions described in the Press Release, Events of Default have occurred under Sections 6.01(5), 6.01(8)(A) and 6.01(8)(C) of the Indenture.

3. The Company is taking the actions described in the Press Release with respect to the Events of Default specified above.

All capitalized terms used herein but not defined herein shall have the meanings given to such terms in the Indenture.

[*Signature Page Follows*]

IN WITNESS WHEREOF, the undersigned have executed this Officers' Certificate as of the date first set forth above.

OCEAN RIG UDW INC.

By: _____
Name: KARLIS SBAROUNIS
Title: SECRETARY

By: _____
Name: ANTHONY KANDYLIDIS
Title: President and CFO

cc: Simon Appell and
Eleanor Fisher, as joint provisional liquidators

Exhibit A

Press Release

OCEAN RIG

OCEAN RIG UDW INC. REACHES AGREEMENT ON COMPREHENSIVE DELEVERAGING AND RECAPITALIZATION TRANSACTION

- **Implementation commences with the appointment of joint provisional liquidators in the Cayman Islands**
- **Operations to continue unaffected and trade creditors/vendors will continue to be paid in the ordinary course of business**
- **Company will emerge with the industry's youngest ultra-deep water fleet and a strong balance sheet, poised to take advantage of ongoing industry opportunities**

March 28, 2017, Grand Cayman, Cayman Islands – Ocean Rig UDW Inc. (NASDAQ:ORIG) ("Ocean Rig" or the "Company"), an international contractor of offshore deepwater drilling services, today announced that it and its subsidiaries Drill Rigs Holdings Inc. ("DRH"), Drillships Financing Holding Inc. ("DFH") and Drillships Ocean Ventures Inc. ("DOV" and collectively, the "Scheme Companies") have entered into a Restructuring Support Agreement (the "RSA") with creditors representing over 72% of Ocean Rig's outstanding consolidated indebtedness for a financial restructuring (the "Restructuring"). The RSA provides that the Restructuring will be implemented by four separate but interconnected schemes of arrangement under Cayman Islands law (the "Company Scheme," the "DRH Scheme," the "DFH Scheme," the "DOV Scheme" and collectively, the "Schemes").

Pursuant to the terms of the RSA, the Scheme Companies presented winding up petitions to the Grand Court of the Cayman Islands (the "Grand Court") on March 24, 2017 and sought the appointment of joint provisional liquidators (the "JPLs") for the purpose of the Restructuring. On March 27, 2017, the Grand Court appointed Simon Appell and Eleanor Fisher of AlixPartners as the JPLs. By virtue of the appointment of the JPLs, provisional liquidation proceedings were commenced in the Cayman Islands (the "Provisional Liquidation Proceedings") and the Scheme Companies are beneficiaries of a moratorium in the Cayman Islands. The JPLs will work together with the Scheme Companies' directors to implement the Restructuring and are anticipated to promote the Schemes alongside the directors on behalf of the Scheme Companies. The Schemes are required to be approved by the Grand Court. In addition, on March 27, 2017, the JPLs (in their capacity as foreign representatives of the Scheme Companies) commenced cases under Chapter 15 of the U.S. Bankruptcy Code for each of the Scheme Companies seeking, among other things, recognition of the Provisional Liquidation Proceedings as foreign main proceedings.

Restructuring Support Agreement

The RSA became effective on March 23, 2017. It requires the Scheme Companies to apply to the Grand Court before, or as soon as practicable after, May 8, 2017 for permission to convene a meeting of creditors to vote on the Schemes. Pursuant to the RSA, the Company will not make any further payments of any kind on or relating to its existing financial indebtedness.

The Schemes will affect only the financial indebtedness of the Scheme Companies and their guarantor affiliates. Operations of the Scheme Companies will continue to be unaffected and trade creditors/vendors of the Scheme Companies will continue to be paid in the ordinary course of business and will not be affected by the Schemes. If conditions of the Schemes are satisfied, the Scheme Companies will be substantially deleveraged through an exchange of approximately $3.69 billion principal amount of debt for (i) new equity of the Company (the "New Equity"), (ii) approximately $288 million of cash (the "Cash Consideration"), and (iii) $450 million of new secured debt (the "New Secured Loans"). More particularly:

(a) In the Company Scheme, the approximately $131 million of claims outstanding in respect of the Company's senior unsecured notes (the "SUNs") and those in respect of the Company's guarantees of the debt facilities of DRH, DFH and DOV (the "Company Guarantees") will be discharged in exchange for New Equity. The New Equity will have a value equal to the asset value of the Company prior to the restructuring of the debt facilities at DRH, DFH and DOV, and will be allocated among the holders of the Company Guarantees and the SUNs pro rata on the basis of the notional amount of the claims of such holders.

(b) If the DRH Scheme is sanctioned, the approximately $460 million of claims outstanding in respect of DRH's senior secured notes (the "SSNs") will be transferred to the Company in exchange for (i) New Equity and (ii) Cash Consideration. The Cash Consideration will be shared pro rata with the DOV Lenders (defined below) and DFH Lenders (defined below). The value of the New Equity provided to the holders of the SSNs will be equal to the asset value of DRH, less the Cash Consideration received by such holders. **Holders of SSNs who agree to be bound to the terms of RSA in the manner specified therein by no later than 5:00 pm (New York time) on April 11, 2017 shall be entitled to a pro rata share (allocated in accordance with the amount of the SSNs held by each consenting holder) of an early consent fee of $2.5 million.**

(c) In the DOV Scheme and the DFH Scheme, the lenders under DOV's $1.3 billion credit facility (the "DOV Lenders") and the lenders under DFH's $1.9 billion credit facility (the "DFH Lenders") will transfer their loans to the Company in exchange for (i) New Equity, (ii) the New Secured Loans and (iii) Cash Consideration. The Cash

Consideration will be shared pro rata among the DOV Lenders, the DFH Lenders and the holders of the SSNs. However, if the DRH Scheme is not sanctioned, the Cash Consideration will be distributed among the holders of the DFH Loans and the DOV Loans only. The New Secured Loans will be shared pro rata among the DOV Lenders and the DFH Lenders. The value of the New Equity provided to the DFH Lenders and the DOV Lenders will be equal to the asset value of DFH and DOV, respectively, less the Cash Consideration and New Secured Loans received by the DFH Lenders and the DOV Lenders. **DOV Lenders and DFH Lenders who agree to be bound to the terms of RSA in the manner specified therein by no later than 5:00 pm (New York time) on April 11, 2017 shall be entitled to a pro rata share (allocated in accordance with the amount of the loans held under the DFH and DOV credit facilities by such each consenting DFH Lender and DOV Lender) of an early consent fee of $30 million.**

The Company Scheme, the DOV Scheme and the DFH Scheme are all inter-conditional, meaning that for any one of those Schemes to become effective, all three must be sanctioned by the Grand Court. If all four Schemes are sanctioned and become effective, the holders of the SUNs and the beneficiaries of the Company Guarantees will receive approximately 20.9% of the New Equity under the Company Scheme, the holders of the SSNs will receive approximately 2.9% of the New Equity under the DRH Scheme, the DFH Lenders will receive approximately 40.2% of the New Equity under the DFH Scheme, and the DOV Lenders will receive approximately 36% of the New Equity under the DOV Scheme, in each case subject to dilution in respect of New Equity of 9.5% to be reserved under a new management equity plan. If the Schemes are sanctioned, the existing shareholders of the Company will be diluted to an insignificant amount of the post-restructuring equity of the Company.

George Economou, Ocean Rig's Chairman and Chief Executive Officer, commented:

"Ocean Rig, similar to all rig operators, faces a deep and prolonged industry downturn. Given these conditions, Ocean Rig is taking the appropriate steps to allow us to emerge as a much stronger company that can take advantage of opportunities as they emerge. Our entire team at Ocean Rig is wholly committed to the success of the company and looks forward to our emergence from this financial restructuring that will ultimately enable us to better service our customers in the long term.

Court Protection in the Cayman Islands and the United States

As previously noted, on March 27, 2017, the Grand Court appointed the JPLs for the purpose of the Restructuring. By virtue of the Provisional Liquidation Proceedings, the Scheme Companies are beneficiaries of a moratorium in the Cayman Islands. Pursuant to the Order of the Grand Court

appointing the JPLs, any creditor of the Company has liberty to apply to the Grand Court at any time to vary or discharge the appointment order, on not less than 14 clear days' notice to the JPLs.

On March 27, 2017, the JPLs commenced Chapter 15 proceedings for the Scheme Companies under the U.S. Bankruptcy Code in the U.S. Bankruptcy Court for the Southern District of New York. Under these proceedings, the Scheme Companies will seek recognition in the United States of the Provisional Liquidation Proceedings in the Cayman Islands as foreign main proceedings under the U.S. Bankruptcy Code. Recognition of the Provisional Liquidation Proceedings as foreign main proceedings will result, inter alia, in the imposition of a stay of virtually all actions against the Scheme Companies and their property within the territorial jurisdiction of the United States for the duration of the Chapter 15 proceedings. Subsequently, the JPLs will seek an enforcement order recognizing and giving effect to the Schemes in the United States if and when the Schemes are sanctioned by the Grand Court. Recognition of the Schemes and the subsequent enforcement order by the U.S. Bankruptcy Court will result, inter alia, in a permanent injunction on creditors taking any actions in the United States against the Scheme Companies that would be in contravention to the terms of the Schemes.

Simon Appell, a JPL and foreign representative of the Scheme Companies said:

"The appointment of the JPLs will give the Grand Court comfort that the affairs of the Scheme Companies will be subject to the supervision of independent office holders. Our role will be to consider the Restructuring and, if appropriate, to promote the Schemes on behalf of the Scheme Companies and help ensure that all creditors are treated fairly." He added, "The Chapter 15 proceedings are also an important step for implementing a successful restructuring of the Company, as recognition of the Provisional Liquidation Proceedings as foreign main proceedings in the United States will stay creditor actions against the Scheme Companies in the United States. In addition, an order of the U.S. Bankruptcy Court giving effect to the Schemes in the United States, should they be sanctioned by the Grand Court, will ensure that the Restructuring will be enforceable in the United States."

Additional Information

Ocean Rig has retained Prime Clerk LLC as the Information Agent for the purposes of the Restructuring. Copies of the RSA and further information on the Ocean Rig group can be obtained from Prime Clerk LLC:

Email:	oceanrigteam@primeclerk.com
Telephone:	(855) 631-5346 (United States and Canada toll-free) (917) 460-0913 (international)

Mailing Address: Ocean Rig Processing
c/o Prime Clerk LLC
830 Third Avenue, 3rd Floor
New York, NY 10022

In the course of negotiating the RSA, the Company and its advisors made available certain information regarding its business plan and financial restructuring proposal to its creditors. The Company has made a copy of this presentation available on its website at www.ocean-rig.com under the Investor Relations section.

Contact details for the JPLs are as follows:

- Eleanor G. Fisher of AlixPartners (Cayman) Limited

  38 Market Street
  2nd Floor, Suite 4208
  Camana Bay, Grand Cayman
  KY1-9006
  Cayman Islands
  Email: EFisher@alixpartners.ky

- Simon Appell, of AlixPartners Services UK LLP

  6 New Street Square
  London EC4A 3BF
  United Kingdom
  Email: Sappell@alixpartners.com

About Ocean Rig UDW Inc.

Ocean Rig is an international offshore drilling contractor providing oilfield services for offshore oil and gas exploration, development and production drilling, and specializing in the ultra-deepwater and harsh-environment segment of the offshore drilling industry.

Ocean Rig's common stock is listed on the NASDAQ Global Select Market where it trades under the symbol "ORIG."

Our registered office is c/o Maples Corporate Services Limited, PO Box 309, Ugland House, Grand Cayman, KY1-1104, Cayman Islands. Visit the Company's website at www.ocean-rig.com.

Forward-Looking Statements

Matters discussed in this release may constitute forward-looking statements within the meaning of the Private Securities Litigation Reform Act of 1995. The Private Securities Litigation Reform Act of 1995 provides safe harbor protections for forward-looking statements in order to encourage companies to provide prospective information about their business. The Company desires to take advantage of the safe harbor provisions of the Private Securities Litigation Reform Act of 1995 and is including this cautionary statement in connection with such safe harbor legislation.

Forward-looking statements relate to Ocean Rig's expectations, beliefs, intentions or strategies regarding the future. These statements may be identified by the use of words like "anticipate," "believe," "estimate," "expect," "intend," "may," "plan," "project," "should," "seek," and similar expressions. Forward-looking statements reflect Ocean Rig's current views and assumptions with respect to future events and are subject to risks and uncertainties.

The forward-looking statements in this release are based upon various assumptions, many of which are based, in turn, upon further assumptions, including without limitation, management's examination of historical operating trends, data contained in Ocean Rig's records and other data available from third parties. Although Ocean Rig believes that these assumptions were reasonable when made, because these assumptions are inherently subject to significant uncertainties and contingencies which are difficult or impossible to predict and are beyond Ocean Rig's control, Ocean Rig cannot assure you that it will achieve or accomplish these expectations, beliefs or projections described in the forward-looking statements contained herein. Actual and future results and trends could differ materially from those set forth in such statements.

Important factors that, in Ocean Rig's view, could cause actual results to differ materially from those discussed in the forward-looking statements include factors related to (i) our ability to come to a satisfactory resolution with our creditors regarding a restructuring of our debt and to successfully conclude such a restructuring; (ii) the offshore drilling market, including supply and demand, utilization, day rates and customer drilling programs, commodity prices, effects of new rigs and drillships on the market and effects of declines in commodity process and downturns in the global economy on the market outlook for our various geographical operating sectors and classes of rigs and drillships; (iii) hazards inherent in the drilling industry and marine operations causing personal injury or loss of life, severe damage to or destruction of property and equipment, pollution or environmental damage, claims by third parties or customers and suspension of operations; (iv) newbuildings, upgrades, and shipyard and other capital projects; (v) changes in laws and governmental regulations, particularly with respect to environmental matters; (vi) the availability of competing offshore drilling vessels; (vii) political and other uncertainties, including risks of terrorist acts, war and civil disturbances; piracy; significant governmental influence over many aspects of local economies, seizure; nationalization or expropriation of property or

equipment; repudiation, nullification, modification or renegotiation of contracts; limitations on insurance coverage, such as war risk coverage, in certain areas; political unrest; foreign and U.S. monetary policy and foreign currency fluctuations and devaluations; the inability to repatriate income or capital; complications associated with repairing and replacing equipment in remote locations; import-export quotas, wage and price controls imposition of trade barriers; regulatory or financial requirements to comply with foreign bureaucratic actions; changing taxation policies; and other forms of government regulation and economic conditions that are beyond our control; (viii) the performance of our rigs; (ix) our ability to procure or have access to financing and our ability comply with covenants in documents governing our debt; (x) our substantial leverage, including our ability to generate sufficient cash flow to service our existing debt and the incurrence of substantial indebtedness in the future; (xi) our ability to successfully employ our drilling units; (xii) our capital expenditures, including the timing and cost of completion of capital projects; (xiii) our revenues and expenses; (xiv) complications associated with repairing and replacing equipment in remote locations; and (xv) regulatory or financial requirements to comply with foreign bureaucratic actions, including potential limitations on drilling activities. Due to such uncertainties and risks, investors are cautioned not to place undue reliance upon such forward-looking statements.

Risks and uncertainties are further described in reports filed by Ocean Rig with the U.S. Securities and Exchange Commission, including the Company's most recently filed Annual Report on Form 20-F.

Investor Relations / Media

Nicolas Bornozis
Capital Link, Inc. (New York)
Tel. 212-661-7566
E-mail: oceanrig@capitallink.com

Exhibit D

Documents to be delivered to Successor Trustee (to the extent within the possession of the Prior Trustee), which documents may be in electronic form:

1. File of closing documents from original issuance.
2. An executed copy of the Indenture dated as of March 26, 2014.
3. A copy of the most recent compliance certificate delivered pursuant to Section 4.04 of the Indenture.
4. Original Global Notes.
5. Copies of any notices sent by the Prior Trustee to the Issuer or the Holders of Notes under the terms of the Indenture which are not otherwise publicly available.

Exhibit 29

IN THE HIGH COURT OF THE
REPUBLIC OF THE MARSHALL ISLANDS

HIGHLAND FLOATING RATE OPPORTUNITIES FUND, HIGHLAND GLOBAL ALLOCATION FUND, HIGHLAND LOAN MASTER FUND, L.P., HIGHLAND OPPORTUNISTIC CREDIT FUND, AND NEXPOINT CREDIT STRATEGIES FUND, Plaintiffs, v. DRYSHIPS INC., OCEAN RIG INVESTMENTS INC., TMS OFFSHORE SERVICES LTD., SIFNOS SHAREHOLDERS INC., AGON SHIPPING INC., ANTONIOS KANDYLIDIS, and GEORGE ECONOMOU, Defendants.	)	CIVIL ACTION NO. 2017-198

FILED

JAN 29 2018

ASST. CLERK OF COURTS
REPUBLIC OF THE MARSHALL ISLANDS

REPLY DECLARATION OF CAROLINE MORAN
IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

I, CAROLINE MORAN, attest to the facts set forth herein based upon my personal knowledge, and could and would testify competently to the matters set forth herein if called upon to do so:

My And My Firm's Experience

1. I am a partner of Maples and Calder in the dispute resolution and insolvency department. I am based in the Cayman Islands office. My practice includes advising on all aspects of domestic and cross border insolvency and restructuring issues, in particular, consensual and non-consensual restructurings, provisional and official liquidations. I am over 21 years of age and am not a party to this lawsuit.

2. I obtained an LLB in Law and French from Trinity College Dublin in 2000 and a Diploma in Accounting and Finance from Dublin Business School in 2003. I joined Maples and Calder as

an associate in 2007, and was elected as a partner in 2016. Before joining Maples and Calder, I was previously with A&L Goodbody in Dublin, Ireland.

3. I was admitted as a solicitor in Ireland in 2004. In 2007, I was admitted as a solicitor of the Supreme Court of England and Wales and of the Eastern Caribbean Supreme Court (British Virgin Islands).

4. I was admitted to practice as an attorney of law in the Cayman Islands in 2010, having previously practiced as an Irish solicitor with Maples and Calder in Dublin, and I have practiced in the Cayman Islands continuously since that time.

5. My practice focuses on restructuring, insolvency and commercial litigation, and I have advised our clients (including on numerous occasions provisional and official liquidators of Cayman Islands companies) in connection with a significant number of complex cross-border disputes, insolvency and restructuring proceedings. I represent clients as an advocate in the Grand Court and the Cayman Islands Court of Appeal.

6. I have particular expertise in complex cross-border restructurings and insolvencies. I acted for the debtors and the provisional liquidators in the Cayman Islands proceedings relating to debtors Trident Microsystems Inc. and Suntech Power Holdings Co., Ltd. I am also a representative of one of the permanent non-governmental organization delegations to Working Group V (Insolvency Law) at UNCITRAL.

7. Maples and Calder is a law firm that advises financial, institutional and business clients worldwide on the laws of the Cayman Islands, Ireland and the British Virgin Islands. Maples and Calder is the largest law firm in the Cayman Islands, currently employing approximately 250 lawyers, of which 100 are based in the Cayman Islands. It is one of only three Cayman Islands law firms ranked in the top band in both Chambers Global and The Legal 500 for dispute resolution (which includes insolvency and restructuring).

8. Maples and Calder acted as Cayman Islands attorneys to Ocean Rig UDW Inc. ("**UDW**"), Drill Rigs Holdings Inc. ("**DRH**"), Drillships Financing Holdings Inc. ("**DFH**") and Drillships Ocean Ventures Inc. ("**DOV**" and together with DRH and DFH the "**RMI Entities**"), in their provisional liquidation proceedings (the "**Provisional Liquidation Proceedings**") and scheme of arrangement proceedings (the "**Scheme Proceedings**," and, together with the Provisional Liquidation Proceedings, the "**Cayman Proceedings**") in the Grand Court of the Cayman Islands (the "**Grand Court**"). I am familiar with all aspects of the Cayman Proceedings and the restructuring, including the schemes of arrangement (the "**Schemes**") that were proposed by UDW, DRH, DFH and DOV (together the "**Scheme Companies**") after negotiation with certain of their financial creditors (the "**Scheme Creditors**") and were ultimately approved by the Grand Court through entry of the Sanction Orders on September 14, 2017. I am also familiar with Cayman Islands insolvency law.

Documents Supplied

9. In preparing this Declaration, I have reviewed the declaration of Gabriel Moss, QC ("**Mr Moss**") dated December 20, 2017 (the "**Moss Decl.**"). For ease of reference in this response I have adopted the section headings used therein.

Summary

10. On 14 November, 2017, I filed an expert declaration in the US Bankruptcy Court for the Southern District of New York in the matter of *Ocean Rig UDW Inc. et al., Debtors in Foreign Proceedings*, Case No 17-10736 (MG) (Jointly Administered) (attached as B to the Moss Decl.) (the "**US Decl.**"). In that declaration I addressed Highland's argument that, by virtue of Section 128(5) of the RMI Business Corporations Act, it maintains a claim in respect of certain notes issued by UDW that were discharged pursuant to the UDW Scheme insofar as that argument related to matters of Cayman Islands law. Specifically, at paragraphs 25 to 26 of the US Decl. I state as follows:

> *"25. While I offer no opinion as to RMI law, Highland's argument is premised on a misconception about Cayman Islands law. Specifically, Highland's declarant, Gabriel Moss, QC, asserts that "[t]he re-domestication to Cayman made creditors potentially subject to the compulsory effects of a Cayman scheme and arguably had an adverse effect on creditors' rights as they existed prior to the re-domestication." Moss Decl. ¶ 36. This does not acknowledge that it is not necessary for a company to be incorporated in or re-domesticated to the Cayman Islands in order to be subject to the Cayman Islands restructuring regime. Had 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. This point is further evidenced by the fact that DRH, DFH and DOV all remain domiciled in the RMI, but the DRH, DFH and DOV Schemes were all sanctioned by the Grand Court (as well as recognized and enforced by this Court). Accordingly, because UDW conducted business and held property in the Cayman Islands, it was liable to be wound up in the Cayman Islands and therefore subject to restructuring in the Cayman Islands regardless of whether it was incorporated there.*
>
> *26. Section 94 of the Companies Law provides that either a creditor (including any contingent or prospective creditor), contributory (which for all practical purposes means a shareholder), or the company can petition for the compulsory winding up of a company.... Accordingly, it was not necessary for UDW to adopt amended articles of association authorising the directors to present a winding up petition (and thus seek the appointment of provisional liquidators under section 104(3) of the Companies Law in order to obtain a moratorium to facilitate the restructuring) because the petition could equally have been filed by a creditor. Moreover, a board of directors may present a scheme of arrangement on behalf of a company absent shareholder authorisation."*

11. I confirm that having reviewed the Moss Decl. (and the exhibits thereto) my views as set out in the US Decl. above remain unchanged.

12. Mr Moss states that, in preparing the Moss Decl., he was asked to answer the following questions:

    1 *Does Cayman Law require that the filing of the winding up petition seeking the winding up of a company be approved by a shareholder resolution absent an amendment to the articles of incorporation to invoke Cayman statute vesting that power in the company's directors?*

    2 *Would a foreign company with limited connection to Cayman face greater obstacles in persuading a Cayman court that it has or should exercise jurisdiction to wind up the foreign company and appoint a provisional liquidator, and/or sanction (confirm) a scheme of arrangement (plan) as opposed to a Cayman-incorporated company?*; and

    3 *Is there liability in English common law (in the sense of judge made law) for knowing assistance to a fraudulent conveyance or transfer of assets?*

13. I have been asked to address Mr Moss's responses to questions 1 and 2 which I do below. I have not been asked to address question 3 which concerns English common law, not the law of the Cayman Islands.

Response to Mr Moss

Consent Requirements for Winding Up

14. As a matter of Cayman Islands law, the directors will only be permitted to file a winding up petition on behalf of a Cayman Islands incorporated company if expressly authorised in the company's articles of association or by shareholder resolution.[1] If the Company is not a

1 Mr Moss sets out his answer to question 1 in paragraphs 24 to 26 of the Moss Decl. At paragraph 25 Mr Moss states that the meaning and scope of s. 94(2) of the Companies Law (2016 Revision) (the "Companies Law") "appears to be controversial". No explanation is given as to what Mr Moss means by this statement. However, it is not correct to say the meaning and scope of this section is still considered to be controversial in the Cayman Islands. The principles established in *Emmadart Ltd*, to which Mr Moss refers (i.e., that a director of a solvent company may only file a winding up petition where he is authorised by a shareholder resolution or a specific provision in the company's articles of association) apply in the Cayman Islands as confirmed in *Banco Economico S.A. v Allied Leasing & Fin. Corp* (attached as Exhibit A to this Declaration). S. 94(2) of the Companies Law codifies this position as a matter of statute for companies incorporated after 1 March 2009. Therefore, companies incorporated prior to this date are subject to the common law position and must rely on the principles established in *Emmadart*, whereas companies incorporated after this date may rely on s. 94(2) (see *China Shanshui Cement Group Limited*, paragraph 70, attached as Exhibit B to this Declaration). A question as to the application of s. 94(2) to insolvent companies was raised following the decision in *China Milk Products Group Limited* (attached as Exhibit C to this Declaration) in which it was held that directors of insolvent companies were in fact entitled to present a winding-up petition on behalf of and in the name of the company without reference to the shareholders and irrespective of the terms of the articles of association. This decision was seen as controversial and contrary to settled case law. However, the interpretation applied to s. 94(2) in *China Milk* was

Cayman Islands incorporated company, then the issue (i.e., whether or not the directors are validly authorised to file the petition) would be a matter of the law of the jurisdiction of incorporation.

15. At paragraph 28, Mr Moss states that he disagrees with my statement in paragraph 26 of the US Decl., quoted above, that a creditor could equally have filed a winding up petition instead of UDW. In this regard Mr Moss states that "*a filing by a creditor would present considerable difficulties*" and they "*rarely have the financial information necessary to prove insolvency*". Mr Moss concludes that "*[t]o have a creditor file instead of the company would require a very unusual degree of co-operation with the company, which might be treated with suspicion by the Court.*" This is said to be on the basis that the shareholders would be disenfranchised.

16. These statements are incorrect. The appointment of restructuring provisional liquidators is a two-step process. Firstly a winding up petition must be filed under section 92 of the Companies Law to enliven the proceeding and secondly a summons must be filed under section 104(3) of the Companies Law seeking the appointment of restructuring provisional liquidators. In the Cayman Islands, where a company needs to access the restructuring regime but its directors do not have authority to present a winding up petition, the usual practice is for the company to identify a friendly creditor, often a director or other group member, who is owed money, to file the winding up petition (i.e. step one).. Then the company itself will file the summons seeking the appointment of restructuring provisional liquidators (i.e. step two). The application for the appointment of restructuring provisional liquidators, does not require either shareholder approval or specific authorisation in the company's articles of incorporation. Rather the decision to seek the appointment of restructuring provisional liquidators can be taken at board level by way of a resolution of the board of directors.

17. This is done without any subterfuge and the Court would typically be informed that the creditor is filing the petition purely to allow the company to access the restructuring provisional liquidation regime. So for example, in *the Matter of Suntech Power Holdings Co., Ltd*,[2] the winding up petition was filed by a creditor of the company under section 92 of the Companies Law on the grounds that the company was unable to pay its debts. The company then filed the summons seeking the appointment of restructuring provisional liquidators under section 104(3). In that case the petitioning creditor was a director of the company and had standing to file the petition by virtue of unpaid services fees in the amount of US$16,666. The Court had no difficulties with the petition and proceeded to appoint restructuring provisional liquidators at the request of the company. The Court did not require authorisation in the company's articles of association or by shareholder resolution to undertake this second step of the process, in which the company requested and the Court appointed restructuring provisional liquidators.

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subsequently reversed in *China Shanshui* which re-confirmed the established position that s. 94(2) applies to both insolvent and solvent companies. Accordingly, since the decision in *China Shanshui* there is no longer any controversy as to the meaning and scope of s. 94(2) of the Companies Law.

[2] No written ruling or reasons were provided in this case. A copy of the Petition and Order for Appointment of the Provisional Liquidators is attached as Exhibit D to this Declaration.

18. In *the Matter of CHC Group Ltd*[3] this practice was expressly approved by a written ruling of the Grand Court. In that case, again a creditor filed the winding up petition under section 92 of the Companies Law and the company applied under section 104(3) for the appointment of restructuring provisional liquidators. The petitioning creditor, CHC Helicopter SA, was a member of the same group as the subject of the petition. The Grand Court considered the restrictions on directors' ability to file winding up petitions under the principles set out in *Emmadart* and confirmed that these restrictions did not apply to an application for the appointment of provisional liquidators and that the directors do not need authorisation to file an application to appoint restructuring provisional liquidators under section 104(3). Further, the Grand Court expressed no concern or suspicion as to the manner in which the winding up petition had been filed, and proceeded to appoint restructuring provisional liquidators.

19. Mr Moss' suggestion that a creditor led petition would face "*considerable difficulties*" in practice because of a lack of information to prove insolvency reflects a misunderstanding of the procedure by which restructuring provisional liquidators are appointed. As noted above at paragraph [16], this involves a two-step process. First, the filing of the winding-up petition. In the context of an application for restructuring provisional liquidators (as was the case for UDW and the other Scheme Companies) it is intended from the outset that the winding up petition will never be heard. All that a creditor need show is that there is a debt owed to it by the company which is outstanding and has not been paid. A creditor will readily have this information available to it. Secondly, the filing of a summons (and affidavit in support) seeking the appointment of restructuring provisional liquidators, which would not require authorisation in the articles of association or shareholder resolution. This is filed by the company along with all of the supporting material. Accordingly all of the necessary information on the company's finances, solvency position and restructuring proposals is provided by the company itself.

20. Mr Moss also asserts that a creditor led petition would face "*considerable difficulties*" because, if a creditor files the winding up petition, "*other creditors might give notice of opposition thereby considerably complicating matters.*" The Court will always give interested/objecting creditors the opportunity to be heard on an application to appoint restructuring provisional liquidators regardless of who files the petition.

Discretionary Jurisdiction to Wind Up a Foreign Company

21. I would note that question 2 as stated in Mr Moss's declaration has not been framed in a neutral manner and does not take into account UDW's actual circumstances. It specifically refers to a foreign company "*with limited*" connection to the Cayman Islands. First, this presupposes an insufficient nexus to the jurisdiction. Secondly, it is hypothetical and is in any event irrelevant to the Schemes in which each of the RMI Entities was found by the Grand Court to have had significant connections to the Cayman Islands[4]. UDW was in substantially the same position as

[3] (Unreported) 24 January 2017. Attached as Exhibit E to this Declaration.

[4] Each of the RMI Entities is registered as a foreign company under Part IX of the Companies Law (2016 Revision). They each held (and hold) substantially all of their assets in the Cayman Islands, namely bank accounts with amounts standing to credit and held (and hold) all of their books and records and unpledged share certificates in the jurisdiction.

the RMI Entities in terms of the assets it held and business it carried out in the Cayman Islands. Accordingly, even if it had not redomesticated to the Cayman Islands, it would presumably have been found by the Grand Court as having a sufficient connection to the Cayman Islands on the same basis as the RMI Entities.

22. Mr Moss sets out his answers to question 2 in paragraphs 30 to 37 of the Moss Decl. As a preliminary point I would note that question 2 covers several different issues. For clarity I separate these out as follows:

    (i) whether the Court's "*has*" the jurisdiction to:

        (a) wind up the foreign company;

        (b) appoint a provisional liquidator; and / or

        (c) sanction a scheme of arrangement.

    (ii) whether the Court "*should*" exercise jurisdiction to:

        (a) wind up the foreign company;

        (b) appoint a provisional liquidator; and / or

        (c) sanction a scheme of arrangement.

23. It is clear that question 2 covers both the court's jurisdiction and the exercise its discretion. These are two separate issues. Further the question is being asked in respect of three related but separate processes (winding up, appointment of provisional liquidators and sanction of schemes of arrangements). However, the answers contained in paragraphs 30 to 37 of the Moss Decl. conflate these issues. For clarity I have separated each element and address them individually below.

As holding companies the RMI entities have no operations and their primary activities are limited to the conduct of board meetings, all of which have taken place in the Cayman Islands since 3 February 2017. Each of the RMI Entities had Cayman Islands resident directors and had only minimal connection to the Marshall Islands, namely the maintenance of its registration under the Marshall Islands Business Corporations Act.

Jurisdiction to wind up a foreign company

24. Paragraph 30 of the Moss Decl. describes the basis of the court's jurisdiction to wind up a foreign company. However, it does not address the test for the court's jurisdiction to sanction a scheme of arrangement, or to appoint provisional liquidators to a foreign company. For completeness, I set these out below at paragraphs [25] and [26]. *Jurisdiction to appoint provisional liquidators*

25. Under s. 104(3) of the Companies Law (after the presentation of a winding up petition) in order to establish jurisdiction to appoint restructuring provisional liquidators, the company must show that it: (i) is or is likely to become unable to pay its debts within the meaning of s. 93 (i.e., cash flow insolvent); and (ii) intends to present a compromise of arrangement to its creditors.[5]

Jurisdiction to sanction a scheme of arrangement

26. Under s. 86(5) of the Companies Law the court has jurisdiction to sanction a scheme of arrangement in respect of any company "*which is liable to be wound up*". A company that is liable to be wound up is a company listed at section 91 of the Companies Law namely:

    a. an existing company;

    b. a company incorporated and registered under the Companies Law;

    c. a body incorporated under any other law; and

    d. a foreign company which-

        i. has property located in the Islands;

        ii. is carrying on business in the Islands;

        iii. is the general partner of a limited partnership; or

        iv. is registered as a foreign company under Part IX.

27. Provided a foreign company satisfies any one of the requirements under section 91(d), the foreign company is liable to be wound up and the Grand Court therefore has jurisdiction to scheme that foreign company. This is the case even if, at the time of the application, the Grand

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5 I would note that in order to establish jurisdiction to appoint restructuring provisional liquidators there is no requirement for the company to demonstrate a prima facie case for a winding up order. This is in contrast to an application for the appointment of provisional liquidators by a creditor or contributory under s. 104(2) which requires proof of a prima facie case for a winding up order. Provisional liquidators appointed under s. 104(2) are not restructuring provisional liquidators, rather they are appointed to protect the company pending the hearing of the winding up petition for example to prevent dissipation of assets or mismanagement. For the avoidance of confusion, such an application under s. 104(2) is different to an application brought by a creditor under s. 92 of the Companies Law as described at paragraphs [16-20].

Court would not actually exercise its jurisdiction to wind it up, if asked to do so, as a matter of discretion.[6]

28. I would note that nothing in the Moss Decl. suggests that in circumstances where UDW had remained an RMI corporation (i.e., absent the redomestication) the Grand Court would have lacked jurisdiction to wind up the company, appoint restructuring provisional liquidators and / or sanction a scheme of arrangement, on the same basis that the Grand Court determined that it had jurisdiction over the RMI Entities.

Discretion to wind up a foreign company

29. The considerations that a court will have when deciding whether to exercise its discretion are separate and distinct from the test for establishing its jurisdiction.

30. Paragraph 32 of the Moss Decl. sets out the requirements applied under English law when the court is determining whether to exercise its discretion to wind up (i.e., liquidate) a foreign company. The Grand Court would find English case law persuasive on this point and I agree that it is the *Latreefers* test that would apply on a winding up in the Cayman Islands. I address Mr Moss' comments on the application of the *Latreefers* test in the context of winding up a foreign company below. However, I would note that the Court's discretion to wind up a foreign company did not come into play in the UDW scheme proceedings because there was no winding up. The applicable tests for the exercise of the Grand Court's discretion to appoint provisional liquidators, or to sanction a scheme of arrangement are different to the test for winding up. These are set out at paragraphs [34 to 36] below.

31. Paragraph 33 of the Moss Decl. states correctly that in order to exercise its discretion to wind up a company the Grand Court would need to be satisfied of a sufficient connection (between the foreign company and the jurisdiction) when applying the first limb of the *Latreefers* test. The Grand Court was satisfied that each of the RMI Entities had a sufficient connection to the jurisdiction and on this basis appointed joint provisional liquidators to each of the Scheme Companies and approved the Schemes. In this regard, UDW was in materially the same position as the RMI Entities save for its redomestication. Therefore, even if UDW had not migrated to the Cayman Islands, I would expect the Grand Court to have considered that UDW had sufficient connection to the jurisdiction to satisfy the first limb of the *Latreefers* test.[7]

32. I also note that paragraph 33 of the Moss Decl. is factually incorrect as it states that the RMI Entities' only assets in the Cayman Islands consisted of non-debtor subsidiary share certificates.

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[6] *Re Magyar Telecom* [2015] 1 BCLC 418 at para 11 (attached as Exhibit F to this Declaration).

[7] I understand that Plaintiffs have argued that absent its redomestication, UDW would have been positioned differently to the RMI Entities because in the case of the RMI Companies, their parent company (i.e., UDW) was a Cayman Islands domiciled company when the Cayman Proceedings were commenced, whereas UDW does not have a Cayman Islands domiciled parent. Based on the principles set out in the English case law which would be persuasive in the Cayman Islands, I do not believe that this distinction would make a material difference to the analysis of a Cayman Court in light of UDW's considerable connections to the Cayman Islands.

As noted above, each of the Scheme Companies (i.e., UDW and the RMI Entities) in fact also held Cayman Islands bank accounts (with amounts to its credit) and all of its books and records in the jurisdiction, as they continue to do as at the date of this declaration. The Scheme Companies are holding companies. As such this represents substantially all of their assets.

33. Paragraph 34 of the Moss Decl. states that in order to satisfy the second limb of the *Latreefers* test, the Grand Court would have to be satisfied that "*there would be a reasonable possibility, if a winding up order is made, of benefit to those applying for the winding up order*". Where there are assets in the jurisdiction, it will normally follow that there will be benefit to those applying for a winding up order.[8] UDW had assets in the Cayman Islands and therefore satisfied this requirement.

34. Paragraph 35 of the Moss Decl. states that the third limb of the *Latreefers* test requires that a person interested in the distribution of assets must be subject to jurisdiction of the Cayman Islands Court, and that this cannot be satisfied simply by that company presenting the winding up petition. Any such requirement would have been satisfied for UDW because a number of UDW's creditors were / are Cayman Islands incorporated entities including Highland Loan Master Fund, L.P, the Fourth Plaintiff in these proceedings.

Discretion to appoint joint provisional liquidators

35. When determining whether to exercise its discretion to grant an application for the appointment of restructuring provisional liquidators the discretionary factors that apply are not the same as in the case of a winding up. This is because the intention is that the company undergo a restructuring and that there be no winding up. In *Re Trident Microsystems (Far East) Ltd*[9] the Grand Court considered that the relevant discretionary factors that should be satisfied are that: (a) a restructuring is more beneficial than a liquidation; and (b) there is a real prospect of a restructuring being effected. The extent to which it is necessary to establish the elements of the *Latreefers* test (in the context of an application for the appointment of restructuring joint provisional liquidators) has not been expressly considered by the Cayman Courts. However, given that there is no requirement to establish a prima facie case for the making of a winding up order, and given that the intention is to restructure rather than liquidate the company, the second and third limbs of the *Latreefers* test are not relevant to discretion to appoint provisional liquidators because a winding up order will not be made.

36. In this regard, the Grand Court was satisfied that it was not exercising exorbitant jurisdiction in appointing joint provisional liquidators to either UDW or the RMI Entities. I consider that this would have been the case even if UDW had not redomesticated to the Cayman Islands and the Grand Court would have accepted jurisdiction over UDW as a foreign company and exercised its discretion to appoint joint provisional liquidators and sanction its scheme of arrangement in the same way as it did in respect of the RMI Entities.

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[8] *Re Compania Merabello San Nicholas SA* [1972] 3 All ER 448 (Attached as Exhibit G to this Declaration)

[9] Grand Court, unreported, 1 June 2012 (Attached as Exhibit H to this Declaration)

Discretion to sanction a scheme of arrangement

37. With respect to the Court's discretion to sanction a scheme of arrangement of a foreign company, it is necessary to show only that the company has a sufficient connection to the jurisdiction (see *Re Drax Holdings Ltd*[10]). Where a company has shifted its centre of main interests to the jurisdiction in question, as was the case with UDW to the Cayman Islands, this requirement will be satisfied (see *Re Magyar Telecom BV*[11]). The Cayman Islands Court will also need to be satisfied that the scheme will be substantially effective outside of the Cayman Islands in relevant jurisdictions. Mr Moss is correct that a sworn Expert Report of Dennis Reeder was filed with the Grand Court to opine on whether Cayman Schemes would be recognised and enforced by the RMI Court. No evidence was filed in those proceedings, at any stage, challenging Mr Reeder's expert evidence.

38. In conclusion, my views as set out in the US Decl. remain unchanged. Even in circumstances where UDW had not migrated to the Cayman Islands, there are no reasons to believe that it would not have been able to complete its restructuring in the Cayman Islands in the same manner as the RMI Entities.

Additional Matters

39. Finally, I am advised that Plaintiffs have made the point in their opposition to Defendants' motions to dismiss that the claims transferred to the Preserved Claims Trust (the "**PCT**") did not include fraudulent conveyance claims. The Cayman Court was aware of this fact, as demonstrated by the record in the proceedings before that Court. *See, e.g.*, the Scheme Companies' Skeleton Argument in Scheme Proceedings dated 28 August 2017 , (excerpt attached as Exhibit J to this Declaration) Foot Note 24 ("*Highland had misunderstood the subject-matter of that trust, believing it to comprise Highland's cause of action under the NYDCL, rather than any causes of action of UDW or its affiliates arising out of the same operative facts.*"); Ad Hoc Group's Skeleton Argument in Scheme Proceedings dated 28 August 2017, (excerpt attached as Exhibit K to this Declaration), ¶ 9(6) ("*It is true that the PCT Claims are not precisely the same causes of action as the DCL Claims . . . .*"); Highland's "skeleton argument" submitted in connection with the Sanctions Hearing, a copy of which is attached to my Declaration in this lawsuit dated October 30, 2017 as Exhibit E, ¶ 60 ("[T]*he claims "preserved" under the PCT are not Highland's or any other creditors' claim.*"); *see generally id.* ¶¶ 59-60). This difference is acknowledged in the judgment of the Grand Court[12] at paragraphs 23 and 24 of the judgment "[Highland] *asserts that the Preserved Claims Trust ('PCT') suggested as the way of dealing with these claims by the JPLs, is an inadequate and unfair replacement to its own draft Complaint which it wishes to bring...The PCT is intended to preserve the alleged claims of UDW and its relevant subsidiaries against third parties for the benefit of all UDW Scheme Creditors...* At

[10] [2004] 1 BCLC 10 at [29] (Attached as Exhibit I to this Declaration).

[11] [2015] 1 BCLC 418 (Attached as Exhibit F to this Declaration)

[12] Attached as Exhibit L to this Declaration

paragraph 125 of the judgment, the Grand Court concludes that the PCT is nevertheless a fair way of dealing with the alleged claims "*As to Highland's complaint, those matters feature claims alleging that wrongs were committed against UDW. There is nothing inherently unfair to Highland in the fact that the Scheme results in all creditors losing their ability to purse these claims themselves...I find 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 a priority to anyone.*"

I, CAROLINE MORAN, declare under penalty of law that the foregoing is true and correct to the best of my knowledge and belief.

Dated: January 26, 2018
Grand Cayman, Cayman Islands

CAROLINE MORAN

Exhibit 30

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IN THE HIGH COURT
REPUBLIC OF THE MARSHALL ISLANDS

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

Plaintiffs,

v.

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

Defendants.

Civil Action 2017-198

PLAINTIFFS' POST-HEARING MEMORANDUM

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Plaintiffs Highland Floating Rate Opportunities Fund, Highland Global Allocation Fund, Highland Opportunistic Credit Fund, Highland Loan Master Fund, L.P., and NexPoint Credit Strategies Fund (collectively, "**Plaintiffs**"), by and through their attorney James McCaffrey, and pursuant to the Court's June 6, 2018 Order, file this supplemental brief crystallizing the arguments made to the Court during the June 6, 2018 oral argument on Defendants' motions to dismiss.

I. INTRODUCTION

This is an action in which Plaintiffs seek to hold Defendants accountable for their receipt of fraudulent conveyances from Ocean Rig UDW Inc. ("**UDW**") totaling hundreds of millions of dollars. Defendants attempt to avoid liability for their receipt of those fraudulent conveyances through a series of illogical and non-merits arguments, including that: (1) RMI BCA § 128(5) does not mean what it says; and (2) Plaintiffs should be barred from bringing their claims because a no-action clause that once existed, but no longer does, and was intended to provide protections that are no longer necessary or relevant, should nonetheless provide Defendants with a get-out-of-jail-free card. Moreover, Defendants assert these attenuated arguments at the motion to dismiss stage, before Plaintiffs have conducted any discovery. Not only do Defendants' arguments fail legally, if accepted at the pleading stage, they would lead to an entirely inequitable result.

Pursuant to RMI Business Corporations Act ("**BCA**") § 128(5), RMI law and public policy bar a company's transfer of domicile, such as UDW's transfer from the RMI to the Cayman Islands, from "*adversely affect[ing] the rights of creditors or shareholders of the corporation existing immediately prior to such transfer*" of domicile. In other words, even upon UDW's redomiciliation to Cayman, Plaintiffs retained all creditor rights under RMI law, including the undisputed creditor right to bring an action for fraudulent conveyance in order to recover a debt due. With no legitimate argument that BCA § 128(5) should not function as it reads, Defendants attempt to import a causation requirement into the statute that does not exist.

But as Defendants admit, redomiciliation was the first and most significant step in a direct chain of events that resulted in Plaintiffs' loss of a creditor right, and therefore Defendants cannot prevail at the motion to dismiss stage based on their manufactured causation defense. *See* Jt. Mot. at 24–25. Moreover, as Defendants state in their own brief, "***the result of the redomiciliation*** was that a different body of corporate and insolvency law (Cayman Islands law) applied to UDW than that which applied before the redomiciliation (RMI law)." *Id.* at 27 (emphasis added). That result is exactly why BCA § 128(5) is implicated here. Plaintiffs' well-pleaded causation allegations, paired with Defendants' admissions, not only defeat the motion to dismiss, but go so far as to create an issue of fact under BCA § 128(5). Otherwise, it is unclear when the statute could ever fulfill its purpose to protect a creditor's rights from being adversely affected by an RMI corporation's transfer of domicile.

Next, Defendants rely on a vague res judicata argument that seeks to block this Court from deciding an issue of first impression under RMI law based on a Cayman proceeding that did not even consider this provision of the BCA. Moreover, there is no Cayman judgment that directly bars Plaintiffs' claims as to these RMI Defendants. Simply put, the Cayman judgment eliminated liability ***against UDW***, the transferor of the fraudulent conveyances, who is not a party to these proceedings. In other words, these Defendants contend that they should also be entitled to freedom from liability because Plaintiffs' standing was eliminated through a Cayman proceeding that wiped out the debt owed by UDW. Meanwhile, it is BCA § 128(5) that gives Plaintiffs standing because it says that creditors' rights cannot be adversely affected by redomiciliation.

It defies reason that a Cayman proceeding that did not consider an RMI statute, in which the RMI statute was not relevant to the court's decision, and which awarded ***no release*** to these Defendants, would function to bar an RMI court from interpreting the RMI statute and

determining, in the first and only instance, whether these Defendants are liable for the receipt of fraudulent conveyances. In reality, Defendants are attempting to use res judicata and comity-based arguments to manufacture a release from liability based on the Cayman scheme of arrangement (the "**Scheme**") that they explicitly did not receive in that Scheme. Defendants should not be able to effectively obtain an *ex post facto* release from this Court based on proceedings in the Cayman Islands in which UDW affirmatively did not seek such a release for third-parties, including these Defendants. Moreover, any argument that Plaintiffs' claims here are a threat to the Scheme is belied by the fact that UDW—the only entity that could possibly make such an argument—is not a party to this action and has not sought to appear. As Plaintiffs' counsel pointed out during argument, "Where's Waldo?" UDW's absence makes it clear that Defendants' assertions that the Scheme and UDW will be irremediably harmed by this action are baseless.

Similarly, there is no basis to apply the no-action clause contained in the Indenture. As discussed at length during argument, no-action clauses have a well-defined purpose: to protect noteholders from being prejudiced by the actions of other noteholders. Here, there are no other noteholders. Further, there is no trustee to bring the claims Plaintiffs assert here. Thus, this case falls squarely within the exception to the application of no-action clauses when the underlying purpose is no longer relevant and it is impossible or implausible for the noteholder to actually comply with the clause. As a result, the Court should not allow Defendants to shield their liability by relying on the no-action clause.

Defendants' arguments attacking certain of the causes of action for failure to state a claim fare no better because the common law indisputably permits a plaintiff asserting fraudulent conveyance to prove intent to defraud by, among other things, pointing to the "badge of fraud" of grossly inadequate consideration or a transfer to a close relative. All of Plaintiffs' claims titled

"Constructive Fraudulent Conveyance" allege a badge of fraud unquestionably recognized at common law, and thus are adequately pleaded here.

Finally, because jurisdiction over the Individual Defendants, who are directors and officers of RMI corporations, is proper under the RMI long-arm statute and in accord with due process, the Individual Defendants' motion to dismiss for lack of personal jurisdiction should be denied.

II. ARGUMENT AND AUTHORITIES[1]

Pursuant to the Court's instruction that the parties submit concise, post-hearing briefs that crystallize the arguments, Plaintiffs discuss below the core legal and factual issues that arose during the June 6 oral argument related to both the Joint Motion to Dismiss and the Individuals Defendants' Motion to Dismiss. Plaintiffs incorporate herein their opening briefs in opposition to the Joint Motion to Dismiss and the Individual Defendants' Motion to Dismiss.

A. Plaintiffs Have Standing to Assert Fraudulent Conveyance Claims Against Non-Debtors.

1. Defendants Do Not Have a Release.

Defendants now admit that the claims Plaintiffs assert in this action ***were not released as part of the Cayman Scheme***. *See* Tr. at 96:18–21. Thus, Defendants agree that at no point have ***these*** Defendants paid for or received a release, either from Plaintiffs or as part of a judicial restructuring, for the fraudulent conveyance claims Plaintiffs are now asserting in this action. UDW, for its part, did obtain a release as part of the Cayman Scheme. That release bars Plaintiffs from pursuing claims against UDW, which as the Court is aware, is not named in and has not

[1] Plaintiffs' opposition to Defendants' Joint Motion to Dismiss contains a detailed recitation of Defendants' misconduct and the fraudulent conveyances at-issue in this litigation. *See* Opp'n to Jt. Mot. at 1–13. Because the substantive adequacy of Plaintiffs' factual allegations were not the focus of Defendants' arguments for dismissal during the June 6 hearing, Plaintiffs do not repeat the recitation of facts here.

appeared in this action. But UDW's release in no way affects Plaintiffs' ability to pursue, as a creditor of UDW pursuant to BCA § 128(5), fraudulent conveyance claims against these third-party RMI Defendants who did not obtain releases of liability in the Cayman Scheme.

2. The PCT Does Not Hold Plaintiffs' Creditor Claims.

Similarly, Defendants now admit that the Preserved Claims Trust (the "**PCT**") ***does not hold Plaintiffs' fraudulent conveyance claims***, but rather, only holds UDW's company claims against management for breach of fiduciary duty. *See* Tr. at 102:10–12, 110:9–13. In other words, the RMI corporate Defendants named in this action who received fraudulent conveyances from UDW to Plaintiffs' detriment are completely outside of the reach of the PCT's claims. Of course, there is little reason to believe that the PCT will pursue even UDW's breach of fiduciary duty claims against UDW's management, considering that management has stated its views that it does not believe the claims have any merit. Regardless, that the PCT may, someday, pursue claims based on different causes of action with different elements, against only the Individual Defendants, does not present any risk of competing litigation with this proceeding because the PCT cannot bring fraudulent conveyance claims against any of the Defendants named in this action. And, in no event would there ever be any competing claims as to the RMI corporate Defendants before this Court.

3. RMI BCA § 128(5) Preserves Plaintiffs' Standing as Creditors at the Time of UDW's Redomiciliation, Including Their Right to Bring the Creditor Claims Asserted Here.

The key issue on Defendants' motion to dismiss is whether, as Plaintiffs argue, RMI BCA § 128(5) preserved their creditor status upon UDW's redomiciliation, thereby permitting them to proceed with creditor claims against Defendants. As the Court recognized during oral argument, this is a significant issue of statutory interpretation, and a matter of first impression. But the Court

need go no further than the plain language of BCA § 128(5) to conclude that Plaintiffs retained creditor standing upon UDW's move to Cayman. Defendants' arguments, each addressed in turn below, are nothing more an effort to avoid the plain language of the statute, by turning themselves in knots. Those efforts, however, should fail.

a. The unambiguous language of RMI BCA § 128(5) preserves a creditor's rights as a result of any adverse effect caused by a debtor's redomiciliation, including the loss of the right to bring a fraudulent conveyance claim.

The Nitijela affirmatively used clear and specific language in RMI BCA § 128(5): "[t]he transfer of domicile of any corporation out of the Republic ***shall not affect any obligations or liabilities of the corporation incurred prior to such transfer, . . . nor adversely affect the rights of creditors or shareholders of the corporation existing immediately prior to such transfer.***" (Emphasis added). The language is unambiguous. If a creditor held a right prior to the corporation's transfer of domicile, BCA § 128(5) preserves that right, which shall not be affected by the redomiciliation. Plaintiffs were creditors of UDW prior to the transfer of domicile. Compl. ¶¶ 8–11. As creditors, they held the right to bring creditor claims against third-parties, such as Defendants. Plaintiffs have alleged that Economou's entire purpose for redomiciling UDW was to restructure its debt, attempting to eliminate Plaintiffs' and other similarly situated creditors' rights. *Id.* ¶¶ 9, 27, 53, 109, 115. BCA § 128(5) stops the clock at the time of redomiciliation, and affords creditors of an RMI company the security that when they deal with that company, their rights cannot be prejudiced or affected if the company and its principals subsequently decide to redomicile. Thus, Plaintiffs' claims here, which arise out of Plaintiffs' creditor status as of the time of redomiciliation, and their standing to assert those claims, persist regardless of what occurred after UDW's redomiciliation out of the RMI.

New York's interpretation of New York Business Corporation Law § 1006(b) ("**NYBCL § 1006(b)**") is instructive, and Defendants have not offered any meaningful response to Plaintiffs' analysis. NYBCL § 1006(b) states that "[t]he dissolution of a corporation shall not affect any remedy available to or against such corporation, its directors, its officers or shareholders for any right or claim existing or any liability incurred before such dissolution." Interpreting NYBCL § 1006(b), New York's highest court has held that, "[u]nder this statute, the rights and remedies of the shareholders existing prior to dissolution are viewed as if the dissolution never occurred," and therefore shareholders retain standing to bring derivative causes of action even after dissolution. *Indep. Inv'r Protective League v. Time, Inc.*, 50 N.Y.2d 259, 264 (N.Y. 1980). In other words, even though the shareholders were no longer technically shareholders (since the company no longer existed), they could still bring shareholder derivative claims.

RMI BCA § 128(5) operates similarly, protecting creditor rights that exist prior to redomiciliation, including standing to bring fraudulent conveyance actions, from steps taken after redomiciliation to a jurisdiction that does not similarly value those rights. Thus, although the Scheme discharged the debt due to Plaintiffs from UDW, in the RMI, Plaintiffs need not be current creditors with a right to recourse against the debtor in its new domicile to have standing to pursue the fraudulent conveyances against third parties, since BCA § 128(5) preserves that right. Like in *Independent Investor Protective League*, where a shareholder of a dissolved corporation could, by operation of NYBCL § 1006(b), still file a derivative suit on behalf of the dissolved corporation notwithstanding the dissolution and the lack of shareholder status, Plaintiffs can, by operation of RMI BCA § 128(5), file a creditor claim against third-parties, notwithstanding that as a result of the redomiciliation, Plaintiffs no longer have any creditor recourse against UDW. Cherry-picking language from *Independent Investor Protective League*, Defendants' only response is that it was

not the redomiciliation "in itself" that caused Plaintiffs to lose their rights, but rather, events that followed the redomiciliation, such as the application of Cayman law during the Cayman proceeding. Jt. Reply at 14. But, as explained further below, this is yet another attempt by Defendants to seek dismissal on the basis of proximate cause.

b. RMI BCA § 128(5) does not have an implicit proximate cause requirement, but if it does, it should not be decided on a motion to dismiss.

Nothing in the language of BCA § 128(5) indicates that it incorporates a proximate cause element that requires the plaintiff asserting an affected right under RMI law to show that the loss of the right was ***solely*** caused by the domiciliation, and not some other factor. All BCA § 128(5) does is preserve a creditor's right to assert an otherwise existing right, such as the ability to bring a fraudulent conveyance claim to recover a debt owed. It does not create any new rights to which a proximate cause element could apply.

But even if BCA § 128(5) incorporates a proximate cause element, this issue is not susceptible to resolution on a motion to dismiss. Indeed, in the standing and jurisdictional contexts, a plaintiff need only show a "line of causation between defendants' action and their alleged harm that is more than attenuated." *Maya v. Centex Corp.*, 658 F.3d 1060, 1070 (9th Cir. 2011); *see also Amidax Trading Group v. S.W.I.F.T. SCRL*, 671 F.3d 140, 145 (2d Cir. 2011) ("In 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.").

At the outset, Defendants' own motion to dismiss demonstrates the "line of causation" between UDW's redomiciliation and the extinguishment of Plaintiffs' notes. Defendants detail six steps that they allege occurred between UDW redomiciling and Plaintiffs' notes being extinguished. Each of those steps necessarily builds on the last in a line of causation that could

hardly be more clear: (1) redomicile; (2) amend UDW's articles under Cayman law; (3) insert into the amended articles a provision that allows UDW's board of directors to put UDW in provisional liquidation without shareholder approval (a right that does not exist under RMI law); (4) negotiate with creditors to get support for the Scheme; (5) obtain Board authorization to go forward with the UDW provisional liquidation; and (6) seek Cayman court sanction order approving the Scheme and wiping out Plaintiffs' notes. Jt. Mot. at 24–25. The obvious tie between each of these events and the ultimate step of wiping out Plaintiffs' debt affirmatively shows that Defendants' attempt to avoid the impact of BCA § 128(5) on the basis of a causation defense must fail.

Indeed, in the Complaint, Plaintiffs make detailed factual allegations describing the direct tie between redomiciliation and the wiping out of Plaintiffs' notes, which at this stage of the case, are assumed to be true and from which the Court must draw all inferences in Plaintiffs' favor. *See Amidax Trading Group*, 671 F.3d at 145; *Pinder v. Knorowski*, 660 F. Supp. 2d 726, 736 (E.D. Va. 2009) ("Generally, questions of proximate cause are not decided on a motion to dismiss."). These allegations include:

- The redomiciliation to Cayman was part of a single plot to avoid application of RMI law for the sole purpose of cramming down Plaintiffs' claims. UDW began considering redomiciliation as early as March 2016, and deliberately structured the ORIG Transaction, executed on April 5, 2016, to amass sufficient voting shares to adopt the Amended Articles required to fully effect the redomiciliation with the support of only a fraction of third-party equity holders. Compl. ¶¶ 43, 53–56.

- Less than ten days after the ORIG Transaction closed, UDW announced it would redomicile from RMI to Cayman. *Id.* ¶ 55.

- In announcing the redomiciliation, UDW expressly represented that the move was for the purposes of "liability management" and in order to "provide us with more flexibility going forward." *Id.* ¶ 43.

- UDW could not have filed the winding up petition that initiated the Cayman insolvency proceedings absent a shareholder resolution without the adoption of the Amended Articles that invoked a specific provision of Cayman law. Decl. of Gabriel Moss ¶ 29.

- UDW's redomiciliation was critical because Defendants have not and cannot cite any authority to support that a Cayman court would exercise its discretionary jurisdiction to wind up a group of solely foreign entities with only a limited nexus to Cayman. *Id.* ¶¶ 30–37.

Defendants' counter-argument, of course, is contradicted by Defendants' own admission that "the ***result of the redomiciliation*** was that a different body of corporate and insolvency law (Cayman Islands law) applied to UDW than that which applied before the redomiciliation (RMI law)." Jt. Mot at 27 (emphasis added). Similarly, Defendants' counter-argument is contradicted by statements of UDW's Cayman counsel, who bragged on its website that "***as a result of the transfer*** (in the case of UDW) and the registrations (in the case of the [RMI Subsidiaries]), the four companies were able to benefit from the Cayman Islands' scheme of arrangement regime—of which there is no equivalent in the Marshall Islands—and also the well-established statutory framework and highly regarded Court system in the Cayman Islands." *See* Ogier, *Ocean Rig – Schemes of Arrangement in the Cayman Islands* (Oct. 10, 2017), http://www.ogier.com/publications/ocean-rig-schemes-of-arrangement-in-the-cayman-islands (emphasis added).

Plaintiffs' characterization is also consistent with the factual findings of the New York bankruptcy court, which observed that UDW redomiciled from RMI to Cayman for the express purpose of facilitating a restructuring under the Cayman insolvency regime to avoid the "likely outcome" of a liquidation in RMI. *In re Ocean Rig UDW Inc.*, 570 B.R. 687, 694–95, 703 (Bankr. S.D.N.Y. 2017).

At a minimum, Plaintiffs' detailed allegations—supported by Defendants' and UDW's multiple admissions—tracing UDW's decision to redomicile and the consequences thereof, present more than a sufficient fact issue to preclude dismissal at this early stage. Moreover, the

Court should not credit Defendants' hindsight attempts to construct hypothetical universes in which UDW obtains a Cayman restructuring without redomiciling, either by remaining an RMI company during the restructuring or through the initiation of a Cayman restructuring by what Defendants characterize as a "friendly creditor." *See* Jt. Reply at 15–16. The fact remains, UDW and its principals ***did affirmatively opt to redomicile UDW to Cayman***, in a concerted effort to wipe out, under Cayman law, debts owed to Plaintiffs. It was this action that adversely affected Plaintiffs' creditor rights. Plaintiffs certainly dispute, as an issue of fact, whether UDW could have obtained the same result from a Cayman court absent redomiciliation. But even if it could have, the die was cast when UDW decided to seek redomiciliation, and UDW and Defendants must now live with the consequences under BCA § 128(5).

c. RMI BCA § 128(5) reflects RMI's reasonable policy of treating creditors fairly, and its operation as proposed by Plaintiffs leads to consistent and logical results.

The Court should also reject Defendants' hyperbolic contention that permitting Plaintiffs to proceed with this action, against non-debtors, would pose a grave and irreversible threat to UDW's $3.7 billion Scheme. Of course, UDW has not appeared before this Court—as Plaintiffs' counsel articulated at argument, "Where's Waldo?" UDW's failure to appear is a silent admission that it does not view Plaintiffs' action against non-debtors to be a threat to the Scheme. Moreover, the application of BCA § 128(5) and its plain language would have no such effect. Again, it is Defendants—who are not protected by any release, and against whom the PCT cannot proceed—that are pushing this parade-of-horribles. In any event, BCA § 128(5) operates in a manner similar to relatively common corporate continuation or survival statues, which continue a company's legal existence within a jurisdiction to avoid prejudicing any claims or other rights that arose while the company was still incorporated in the jurisdiction. *E.g.*, Del. Code Title 8, § 390 ("The transfer, domestication or continuance of a corporation out of this State in accordance with this section and

the resulting cessation of its existence as a corporation of this State pursuant to a certificate of transfer shall not be deemed to affect any obligations or liabilities of the corporation incurred prior to such transfer, domestication or continuance, the personal liability of any person incurred prior to such transfer, domestication or continuance, or the choice of law applicable to the corporation with respect to matters arising prior to such transfer, domestication or continuance."); *see also In re Morris*, 171 B.R. 999, 1004 (S.D. Ill. 1993) ("Corporate survival statutes, by their very nature, are intended to continue the existence of a corporation for purposes of winding up corporate affairs."). In enacting BCA § 128(5), the Nitijela intended to provide creditors and shareholders of RMI corporations with predictability and certainty that when they deal with an RMI company, that company's transfer of domicile will not affect any of their creditor rights.

This is precisely the fact pattern in which BCA § 128(5) must apply. Economou and UDW utilized the Cayman Scheme not only to undo UDW's obligations to its creditors, but also to try to protect Economou and his cohorts from blatant fraudulent-conveyance liability. Critically, had UDW remained domiciled in the RMI and ultimately forced into liquidation, Plaintiffs could have attacked UDW's transfers as fraudulent. But, Plaintiffs were unable to do so in the Cayman proceeding. It is the purported loss of this right—to avoid transfers as a creditor—that adversely affects Plaintiffs here. BCA § 128(5) applies to preserve Plaintiffs' rights as they existed at the time of redomiciliation. It does not give Plaintiffs greater rights, and it does not create a cause of action where one did not otherwise exist. This Court should not allow Defendants to rewrite RMI law so that they can avoiding defending, for the first time anywhere in the world, their alleged receipt of fraudulent conveyances totaling hundreds of millions of dollars from UDW.

Indeed, even outside of the context of BCA § 128(5), the RMI has made the clear policy choice to permit only a liquidation of an insolvent company, not a restructuring that allows the

company to extinguish its debt over the objection of its creditors. Defendants argue that the Court should grant comity to recognize the Cayman Scheme that did just that. Jt. Mtn. at 20. In requesting that this Court grant comity and defer to the Cayman Scheme—even though it did not release Defendants from fraudulent transfer liability—Defendants ignore that "the obligation of comity expires when the strong public policies of the forum are vitiated by the foreign act." *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 937–38 (D.C. Cir. 1984) ("No nation is under an unremitting obligation to enforce foreign interests which are fundamentally prejudicial to those of the domestic forum."). Even U.S. courts subject to heightened deference requirements under Chapter 15 and § 304 enforce this exception. *E.g.*, *In re Vitro S.A.B. de CV*, 701 F.3d 1031, 1036 (5th Cir. 2012) (refusing under Chapter 15 to enforce Mexican reorganization plan that purported to impose releases of non-debtors on non-consenting creditors, in contravention of U.S. policy); *Overseas Inns S.A. P.A. v. United States*, 911 F.2d 1146, 1150 (5th Cir. 1990) (refusing to extend comity to Luxembourg bankruptcy plan as repugnant to strong U.S. public policy because Luxembourg law treated IRS as unsecured creditor, whereas under U.S. law, IRS is treated as secured creditor with priority status). Not only does the RMI lack a corporate restructuring regime, but the Nitijela additionally passed BCA § 128(5) to prevent RMI corporations from evading their liabilities and obligations incurred in the RMI by simply redomiciling to another jurisdiction that permits a company to prejudice the rights of existing creditors.

4. The No-Action Clause Does Not Apply Here.

Next, Defendants argue that the no-action clause contained in the Indenture that previously governed the notes continues to bar Plaintiffs from bringing this action, regardless of the Court's resolution of the other standing and jurisdictional issues. Of course, Defendants also admit—as they must—that (i) the Indenture no longer governs the notes following the Cayman court's sanction of the Scheme, and (ii) there is no longer a trustee in place to whom Plaintiffs could even

provide a demand to initiate a fraudulent conveyance action against Defendants. In Defendants' view, Plaintiffs are stuck in the upside-down universe in which they are the only parties left who can bring these claims, but because of the impossibility of first demanding that a non-existent trustee bring the claims, Plaintiffs are simply out of luck, and Defendants get off scot-free.

But no-action clauses are not designed to completely bar or take away an otherwise cognizable action. Rather, they are intended to channel claims through a centralized trustee, avoid piecemeal litigation, and protect the issuer from duplicative claims—none of which apply here, where UDW is not a party, the trustee and the trust no longer exist, and literally no other creditors besides Plaintiffs can bring these claims.

Ellington Credit Fund, Ltd. v. Select Portfolio Servicing, Inc., 837 F. Supp. 2d 162, 185 (S.D.N.Y. 2011), discussed at length during the oral argument, is the most instructive case cited by any party. There, the court discussed two different sets of securitizations—three that were "called," *i.e.*, the operative trusts no longer existed, and eighteen that were "uncalled," *i.e.*, trusts that were still existing and governed by operative indentures. *See id.* at 177 & n.5. In discussing the plaintiffs' claims related to the eighteen uncalled securitizations, the court explained that a no-action clause continued to govern, and that the plaintiffs could not bring their claims because they had failed to comply with the terms of the clause. *Id.* at 185. However, the court explained, "the same cannot be said for Plaintiffs' claims on behalf of the three called securitizations." *Id.*

The court identified two independent bases for its conclusion that the no-action clause did not govern the cancelled indentures. First, and not relevant here, the *Ellington* plaintiffs alleged that they were fraudulently induced to purchase notes, in which case a no-action clause does not apply. *Id.* Second, and relevant here, the court also explained that "nothing in [the no-action clause] indicates that the ***prerequisites to bringing suit*** survive the termination of the trusts or provide

standing for the former trustee to litigate claims on behalf of the terminated securitizations." *Id.* (emphasis in original). In so explaining, the court made the common-sense observation that there would not "be any rationale for enforcing a no-action provision that purported to apply after" the termination of the three called securitizations, since the *Ellington* plaintiffs "had bought out the interests of any certificateholders who would otherwise need to be protected from the expense of a frivolous suit and there [was] no longer a Trustee (or even a trust) through whom such a dispute could be channeled." *Id.* Thus, the court concluded, the plaintiffs ***were only required*** to satisfy the no-action clause for the eighteen uncalled securitizations for which a trustee continued to serve under an extant indenture, ***and not*** for the three terminated trusts. *Id.* The court's reasoning applies equally here, where there is no longer a trustee and where Plaintiffs are the only noteholders who did not sign a release and who did not accept any payment as a result of the Cayman Scheme.

Defendants' contrary and superficial reading of *Ellington* advanced during argument ignores the full extent of the court's holdings. While Defendants are correct that a plaintiff's allegation of fraudulent inducement may serve as an independent exception to the application of an otherwise applicable no-action clause, the *Ellington* court ***also*** specifically held that a no-action clause cannot be enforced as a "prerequisite to bringing suit" where there is no longer a trustee to notify (or even a trust). In other words, a noteholder of a closed trust should not be kicked out of court based on the impossibility of complying with the terms of the previously applicable no-action clause. But Defendants have read that part of the court's analysis out of the opinion in an effort to limit its application.

The New York Court of Appeals' recent discussion of no-action clauses in *Cortlandt Street Recovery Corp. v. Bonderman*, 96 N.E.3d 191 (N.Y. 2018) fully supports the analysis in *Ellington*. There, New York's highest court reiterated that "the primary purpose of a no-action clause . . . 'is

to protect issuers from the expense involved in defending individual lawsuits that are either frivolous or otherwise not in the economic interest of the corporation and its creditors." *Id.* at 200 (quoting *Quadrant Structured Prods. Co. v. Vertin*, 16 N.E.3d 1165, 1176 (N.Y. 2014)). Indeed, in *Quadrant*, the Court noted that a no-action clause "cannot serve as an outright prohibition on a suit filed by a securityholder in the case where the Trustee is without authorization to act," since the entire purpose of a no-action clause is to channel actions through a trustee. 16 N.E.3d at 1177. Here, there is no longer a trustee (and certainly no trustee that is authorized to act and bring fraudulent conveyance claims against these Defendants), and therefore the no-action clause "cannot serve as an outright prohibition" on Plaintiffs' ability to file suit.

Finally, to the extent the three-week overlap between Plaintiffs' initial filing of this action and the removal of the trustee by virtue of the Cayman court sanctioning the Scheme is fatal to Plaintiffs' standing, the issue can be easily remedied by dismissal ***without prejudice*** and then Plaintiffs re-filing the claims, since upon re-filing, Plaintiffs could affirmatively allege without any doubt that there is no longer a trustee who can file suit in lieu of Plaintiffs. During the June 6 argument, Defendants offered no substantive response, instead arguing that Plaintiffs' proposal was "just games" and that because, in Defendants' view, Plaintiffs did not strictly comply with the no-action clause before filing suit, "they lost their rights" to bring a fraudulent conveyance action going forward, in perpetuity. *See* Tr. at 106:5–7. Plaintiffs agree that amendment or re-filing is not required here, where both sides acknowledge that there is no longer a trustee and where Plaintiffs are the only remaining noteholders who can bring these claims. However, Defendants have offered no support for their position that Plaintiffs' claims should be dismissed with prejudice on the basis of the no-action clause, and if anyone is "playing games," it is Defendants, through their continued reliance on the now-meaningless no-action clause.

5. Res Judicata Does Not Bar Plaintiffs' Standing Arguments.

Defendants' res judicata argument finds no support in fact or law. The argument asserts that the Cayman Scheme is res judicata of Plaintiffs' claims here, premised on fraudulent conveyances received by non-debtors and preserved by RMI BCA § 128(5). Moreover, the Cayman Scheme the Defendants rely on: (i) did not provide a release to Defendants, (ii) did not assign Plaintiffs' claims to the PCT, and (iii) did not address the scope or application of BCA § 128(5), which all parties agree is an issue of first impression under RMI law.

As an affirmative defense, Defendants bear the burden of proof. *See* MIRCP 8(c)(1). At this early stage, they have come nowhere close to making such a showing (nor will they be able to make such a showing on a full factual record). *See Jalley v. Mojilong*, 3 MILR 106, 111–12 (2009) (declining to apply res judicata where record did not adequately reflect whether issue was actually litigated and decided in prior proceeding). At bottom, Defendants' argument is that because Plaintiffs did not raise an issue of first impression under an RMI statute in the Cayman proceeding in which Plaintiffs' substantive claims were not litigated, this Court should not be allowed to decide the issue. Plaintiffs' participation in the Cayman proceeding was a good-faith effort to mitigate the harm caused by UDW's and Defendants' ploy to wipe out their debt and should not now work as a bar to this Court deciding RMI-law issues that were never the subject of the Cayman proceeding.

In seeking to bar Plaintiffs' claims, Defendants acknowledge that the merits of Plaintiffs' fraudulent conveyance claims have not been litigated in any court in any jurisdiction. *See* Tr. at 14:15–19. In other words, Defendants acknowledge that they are not relying on an actual judgment that releases Plaintiffs' claims. Rather, Defendants argue that during the Cayman proceeding, Plaintiffs' status as creditors under RMI law, and whether the Scheme would have extraterritorial

effect in the RMI, were actually litigated and actually decided in favor of UDW (and, by proxy, Defendants). The Court should reject Defendants' analysis.

With respect to claim preclusion, Defendants have failed to satisfy any of the elements, let alone by a preponderance of the evidence, as is their burden. A "'claim' refers to the 'violation of but one right by a single legal wrong.'" *Jalley*, 3 MILR at 110 (quoting *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316, 321 (1927)). Plaintiffs' "claims" that Defendants received fraudulent conveyances were not litigated in the Cayman proceeding, and therefore claim preclusion is the wrong res judicata framework in which to analyze Defendants' defense here. Moreover, although a broader claim preclusion framework may be applied in a second action in the context of a prior bankruptcy proceeding, *see* Jt. Reply at 11, the cases cited by Defendants require the second proceeding to, for example, "impair, destroy, challenge, or invalidate the enforceability or effectiveness of the reorganization plan." *Corbett v. MacDonald Moving Servs., Inc.*, 124 F.3d 82, 88 (2d Cir. 1997). As discussed above, Plaintiffs' action here does not seek to unwind, destroy, or invalidate the Cayman Scheme, and nothing that occurs in this action will have any effect on that plan or on UDW. Rather, Plaintiffs seek to assert creditor rights, by virtue of BCA § 128(5), against non-debtor, RMI companies and individuals that did not obtain releases in the Cayman Scheme.

Even if the Court determines that there are overlapping "claims," Defendants cannot satisfy any of the other elements of claim preclusion. Most problematic for Defendants are that UDW, as the debtor in the Cayman proceeding, and the Defendant–transferees named in this action, are not in privity simply by virtue of being corporate affiliates. Indeed, if Defendants received fraudulent conveyances from UDW, it was to the ***detriment*** of UDW and its creditors. *See* 18A Wright & Miller, Federal Practice & Procedure § 4460 (2d ed. 2017) ("Parties on opposite sides of a contract ordinarily do not have authority to bind each other by litigation with third parties."); *see also, e.g.*,

Janney Montgomery Scott, Inc. v. Shepard Niles, Inc., 11 F.3d 399, 410 (3d Cir. 1993) (explaining in contexts of joinder and preclusion that interests of parent and subsidiary were, in fact, adverse). If the Cayman proceeding had been litigated to a final result that included a release in favor of these Defendants, and not only UDW, the result might differ; but, as discussed above, Defendants acknowledge that they did not obtain a release in the Cayman proceeding, only UDW did.

Rather than claim preclusion, it appears that Defendants are actually attempting to invoke issue preclusion, which applies to the "re-litigation of issues," which can be "single, certain and material point[s] arising out of the allegations and contentions of the parties' or simply a question of law or fact presented as part of a party's broader claim." *Jalley*, 3 MILR at 110 (internal quotation marks and citations omitted). During the June 6 hearing, Defendants appeared to argue that at least the following specific issues were decided in the Cayman proceeding: (1) that Highland is bound by the Scheme, Tr. at 14:19–21; (2) that the scheme applies extraterritorially in the RMI, *id.* at 14:21–24; and (3) that Plaintiffs are no longer creditors under RMI law and therefore lack standing to bring claims, *id.* at 97:23–25. But, none of these issues were actually decided by the Cayman court, and again, Defendants certainly have not carried their evidentiary burden to show, by a preponderance of the evidence, that they were each litigated in Cayman and decided in UDW's favor. *See Jalley*, 3 MILR at 110. The only thing the Scheme accomplished was to release the notes and the claims as to UDW and as to subsidiaries that are not defendants here. Nothing more. But irrespective of Defendants' proposed issues, the Cayman court certainly did not determine whether BCA § 128(5) preserves Plaintiffs' creditor right to bring fraudulent conveyance claims against non-debtors, such as Defendants. And, to the extent the res judicata analysis implicates matters of RMI public policy—such as whether a Cayman scheme of

arrangement can trump the plain language of BCA § 128(5)—it is up to this Court, as one sitting in the RMI, to decide these issues of RMI law and public policy.

6. Defendants Have Abandoned Their Argument that UDW Is a Necessary Party.

Finally, Defendants now acknowledge that they are no longer seeking dismissal of this action on the independent basis of UDW being a necessary party. *See* Tr. at 15:8–12, 43:15–18. That is because the great weight of the caselaw under Federal Rule of Civil Procedure 19 (which parallels MIRCP 19) provides that a transferor is not a necessary party in a fraudulent conveyance action where complete relief can be accorded among those already parties, such as here. *E.g.*, *Kramer v. Mahia*, No. 10-CV-46901, 2014 WL 10474969, at *59 (E.D.N.Y. Dec. 24, 2014) (affirming and adopting bankruptcy court's finding that debtor is not a necessary party where money judgment could be awarded against defendant without regard to debtor).

B. Plaintiffs Have Adequately Alleged Fraudulent Conveyance Claims Under RMI Law.

In the Complaint, Plaintiffs assert seven causes of action that challenge four fraudulent conveyances, and an eighth cause of action against the Individual Defendants for aiding and abetting fraudulent conveyances. Four of the causes of action (the First, Third, Fifth, and Seventh) seek to avoid four separate transactions on a direct theory of actual fraudulent conveyance under RMI common law or Delaware's statutory equivalents. Three of the causes of action (the Second, Forth, and Sixth) alternatively seek to avoid three of those four transfers on a separate theory of fraudulent conveyance, under RMI common law or Delaware's statutory equivalents, styled as "constructive fraudulent conveyance" and relying on the proof of a "badge of fraud" and the creation of a rebuttable presumption of actual fraud.

In their motions to dismiss, Defendants only seek to dismiss the following claims or theories for failure to state a claim: (1) each of the fraudulent conveyance claims (under any theory) to the extent they are premised on Delaware statutory law, and not RMI Common law; (2) the three

claims styled as "constructive fraudulent conveyance" as not cognizable at common law; and (3) the aiding and abetting fraudulent conveyances claim. *See* Jt. Mot. at 30–32; Individual Defs.' Mot. at 10–11. In other words, Defendants ***do not*** move to dismiss for failure to state a claim the four direct, actual fraudulent conveyance claims to the extent they are premised on RMI common law. Those claims, Defendants acknowledge, are adequately alleged, and may go forward so long as Plaintiffs prevail on Defendants' standing and jurisdictional defenses.

Thus, the issues for the Court to address, are (1) whether Plaintiffs may premise any of the seven fraudulent conveyance causes of action on Delaware statutory law, and (2) whether Plaintiffs have adequately alleged "constructive fraudulent conveyance" under RMI common law. In addressing these issues at this stage of the litigation, the Court is required to accept as true all factual allegations in the Complaint, construe those facts in the light most favorable to Plaintiffs, and determine whether Plaintiffs may be entitled to relief under ***any reasonable reading of the Complaint***. *Asignacion v. Rickmers*, H. Ct. Civ. No. 2016-026 (Nov. 10, 2016), at p.8. In other words, "[o]n a Rule 12(b)(6) motion '[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.'" *Id.* (quoting *Kahawaiolaa v. Norton*, 222 F. Supp. 2d 1213, 1216 (D. Haw. 2002)).

1. Plaintiffs Pleaded Statutory Fraudulent Conveyance Claims in the Alternative.

As an initial matter, Plaintiffs pleaded each of their fraudulent conveyance claims, whether actual or "constructive" fraudulent conveyance, alternatively under either RMI common law or the Delaware Code. *See, e.g.*, Compl. ¶ 77 ("Under either common law or Delaware Code §§ 1304(a)(1), 1307, & 1308, Plaintiffs are entitled to avoid and recover the value of the Insider Loan Forgiveness Transfers from DryShips and Economou to the extent necessary to satisfy Plaintiffs' claims."). Pleading a cause of action under alternative legal frameworks is both common and

permissible. *See* MIRCP 8(d)(2) ("If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient."); 5 Wright & Miller, Federal Practice & Procedure § 1282 (3d ed.) (noting that a "plaintiff may plead both statutory and common law grounds for relief for the same conduct by the defendant"). Plaintiffs pleaded both common law and Delaware statutory law as support for their claims out of an abundance of caution due to the lack of controlling RMI case law describing fraudulent conveyance under RMI law, and to the extent the Court is going to view any state's statutory regime as instructive on the contours of RMI common law, Delaware's is an appropriate candidate. To be clear, however, Plaintiffs are not asserting claims in this Court under Delaware law, and as discussed below, Plaintiffs have adequately alleged all of their fraudulent conveyance claims under RMI common law.

2. Plaintiffs' Claims Styled as "Constructive" Fraudulent Conveyances Were Well-Recognized at Common Law.

As discussed above, Defendants do not move to dismiss Plaintiffs' First, Third, Fifth, or Seventh causes of action, each of which challenge transfers as "actual fraudulent conveyances." Rather, they challenge only the Second, Fourth, and Sixth Causes of Action—styled by Plaintiffs as "constructive" fraudulent conveyance claims—as unrecognized under the common law.

The parties agree that in order for Plaintiffs to assert any fraudulent conveyance claims, they must be creditors. Whether Plaintiffs are creditors is, as discussed above, a matter of first impression for this Court under RMI law and BCA § 128(5). Where the parties disagree is on the contours of the common law framework that governs the claims that Plaintiffs have styled as "constructive fraudulent conveyances." According to Defendants, to prevail on a fraudulent conveyance claim under common law, Plaintiffs "will need to prove actual fraud," which Defendants construe as "moral turpitude or intentional wrong." Jt. Mot. at 32; Tr. at 48:24–25.

Defendants are simply incorrect. That is because common-law courts interpreting the Statute of Elizabeth developed a rebuttal presumption that transfers made by insolvent debtors without fair consideration were fraudulent. *See BFP v. Resolution Tr. Corp.*, 511 U.S. 531, 540–41 (1994) ("English courts [analyzing the Statute of Elizabeth] soon developed the doctrine of 'badges of fraud': proof by a creditor of certain objective facts (for example, a transfer to a close relative, a secret transfer, a transfer of title without transfer of possession, or ***grossly inadequate consideration***) would raise a ***rebuttable presumption of actual fraudulent intent***." (emphases added)). In other words, a plaintiff challenging a transfer under common law can prevail by directly showing actual fraudulent intent (as Plaintiffs have alleged in the First, Third, Fifth, and Seventh Causes of Action), ***or*** by establishing a "badge of fraud," including a transfer to a close relative or a transfer for grossly inadequate consideration. By their Second, Fourth, and Sixth Causes of Action, Plaintiffs seek to hold Defendants liable based on a legal presumption of actual fraudulent intent by pleading the following badges of fraud: transfers made to affiliated insiders, Compl. ¶¶ 79, 96, 104, for inadequate consideration, *id.* ¶¶ 84, 100, 114, at a time when UDW knew it owed a massive amount of debt and would be unable to repay that debt as it came due, *id.*

Such claims are cognizable under the common law, and Defendants appear at times to concede the point. *See* Jt. Reply at 19 ("The 'badges of fraud' may in some instances serve as a method for proving actual fraud short of direct evidence of fraudulent intent."). Indeed, "[w]hen the Uniform Fraudulent Conveyance Act was drafted, the rebuttable presumption of fraud concept," discussed directly above, "had a widespread following in the [United States]" under the common law. *Marine Midland Bank v. Murkoff*, 508 N.Y.S.2d 17, 21 (N.Y. App. Div. 1986). Jurisdictions that enacted the Uniform Fraudulent Conveyance Act intended, through the passage of a statutory claim, "to displace and eradicate the State's common-law presumption of intent to

defraud flowing from certain acts and to provide relief ***based on those acts*** on the rationale of constructive fraud." *Id*. (emphasis added). In jurisdictions like South Carolina that have not adopted any Uniform Act, the rebuttable presumption paradigm that applies to common law fraudulent conveyance persists—as the South Carolina Supreme Court case cited by Defendants demonstrates. *Royal Z Lanes, Inc. v. Collins Holding Corp.*, 524 S.E.2d 621, 623 (S.C. 1999) ("As noted above, grossly inadequate consideration is treated as a 'badge of fraud' under this Court's precedent. A badge of fraud creates a rebuttable presumption of intent to defraud." (internal citations omitted)). Whereas, in jurisdictions that have passed the uniform statutes, such as New York, the badges of fraud and rebuttable presumptions are now analyzed through the framework of statutory constructive fraudulent transfer. *Marine Midland Bank*, 508 N.Y.S.2d at 21.

In other words, under the common law, there remain distinct pathways to proving a fraudulent conveyance claim, including by directly showing actual fraud, ***or*** by showing a badge or fraud, which, once shown, creates a rebuttable presumption of intent to defraud. ***Contrary to Defendants' argument, there simply is no requirement that a common-law fraudulent conveyance plaintiff directly prove, in all cases, moral turpitude or intentional wrong.*** If a plaintiff asserting fraudulent conveyance under the common law alleges or proves a badge of fraud, including grossly inadequate consideration, the burden then shifts to the defendant.

At bottom, Defendants appear to nitpick Plaintiffs' use of the term "constructive" as a product of state statutory law, such as the Uniform Fraudulent Conveyance Act, which post-dates the common law of fraudulent conveyance. Plaintiffs included such term in the Second, Fourth, and Sixth Causes of Action because, whether under a common law or statutory regime, that is how practitioners tend to describe theories of fraudulent conveyance or fraudulent transfer that rely on an allegation of a badge of fraud and the creation of a rebuttable presumption of intent to defraud.

In other words, Plaintiffs 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. However, to the extent Plaintiffs' mere use of the term "constructive" is the issue (as a term that is a creature of statute and not common law), the underlying substantive common law, described above, remains the same, and Plaintiffs can certainly amend to clarify that they assert two parallel theories of fraudulent conveyance under the common law—(1) direct proof of actual intent, and (2) proof of a badge of fraud and rebuttable presumption of intent to defraud. *See* MIRCP 15(a)(2) ("The court should freely give leave when justice so requires.").

3. Whether RMI Common Law Recognizes a Claim of Aiding and Abetting Fraudulent Conveyance is a Matter of First Impression in this Court.

RMI law is silent on whether a plaintiff may allege a claim of aiding and abetting fraudulent conveyance. It is true that the majority of United States jurisdictions do not currently permit the claim. But decisions from the United States that dismiss claims of aiding and abetting fraudulent transfer do so on the basis of the specific statutory language governing the claim under the relevant state statute. *See, e.g.*, *GATX Corp. v. Addington*, 879 F. Supp. 2d 633, 644 (E.D. Ky. 2012) (surveying U.S. jurisdictions and concluding that courts that dismiss aiding and abetting claims do so on "the plain language of the respective state fraudulent conveyance laws"). Here, as Defendants have repeatedly emphasized, Plaintiffs' claims derive from the common law, not statute. Accordingly, U.S. decisions dismissing aiding and abetting claims under state statutory regimes are of little value. In any event, even in some states that have passed uniform statutes, courts have recognized that a state's passage of such an act does not necessarily displace otherwise applicable common law tort principles of aiding and abetting or conspiracy liability. *See, e.g.*, *Arena Dev. Grp., LLC v. Naegele Comm'ns, Inc.*, No. 06-CV-2806, 2008 WL 1924179, at *10 (D. Minn. Apr.

29, 2008) (recognizing that aiding and abetting liability could survive the passage of state fraudulent transfer act and certifying question to state supreme court); *In re Kohner*, No. 13-AP-199, 2014 WL 4639920, at *8 (Bankr. D. Ariz. Sept. 11, 2014) (recognizing that common law claim of conspiracy to commit fraudulent transfer survived passage of fraudulent transfer act).

In addition, while in the absence of RMI authority, RMI courts look to "[t]he rules of common law, . . . as generally understood and applied in the United States," *see Likinbod v. Keljat*, 2 MILR 65, 66 (1995), American common law often is traced back to English common law, as illustrated by the parties' discussion of the Statute of Elizabeth in this very action. In the absence of any recent U.S. common law decisions on the aiding and abetting issue, this Court can and should look to English common law, which, as discussed in Plaintiffs' opposition brief, supports an aiding and abetting theory. *See* Opp'n to Individual Defs.' Mot. at 14.

C. The Court May Exercise Long-Arm Jurisdiction Over the Individual Defendants Pursuant to Judiciary Act § 251(1)(n), and Consistent with Due Process Principles.

Notwithstanding that the Individual Defendants opted to incorporate UDW in the RMI and agreed to become directors and officers of multiple RMI corporations, including UDW, they challenge this Court's exercise of personal jurisdiction over them for claims that arise out of their fraudulent actions undertaken as directors and officers. Because jurisdiction is proper under the RMI long-arm statute and comports with traditional notions of fair play and substantial justice, the Individual Defendants' motion to dismiss for lack of personal jurisdiction should be denied. At the very least, Plaintiffs should be afforded an opportunity to conduct jurisdictional discovery.

1. Plaintiffs Have Adequately Alleged Long-Arm Jurisdiction Under § 251(1)(n).

As this Court noted in *Chee v. Zhang*, H. Ct. Civ. No. 2016-254, at p.9 (Oct. 16, 2017), the RMI long-arm statute (unlike Delaware's, and contrary to this Court's prior interpretation in *Frontline*) does not automatically provide for long-arm jurisdiction over directors and officers of

RMI corporations simply by virtue of their positions. However, as the Court also noted in *Chee*, the version of Judiciary Act § 251(1)(n) that governs this action separately provides that "a person" 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*** . . . is subject to the civil jurisdiction of the courts of the Republic ***as to any cause of action arising from any of those matters***" (emphases added).

In *Chee*, this Court held that § 251(1)(n) could apply, by way of example, where the claims at-issue "arise out of any injury done to [an RMI company]." *Chee*, at p.11. Here, Plaintiffs' fraudulent conveyance causes of action each relate to the Individual Defendants' diversion of assets from UDW, making those assets unavailable to UDW to satisfy its debts, including those owed to Plaintiffs. Thus, the Individual Defendants' fraudulent conduct affected UDW, a "person in the Republic" at the time. Plaintiffs' fraudulent conveyance claims here arise out of that "effect," and therefore the Individual Defendants are subject to personal jurisdiction.

In *Chee* and *Yandal Invs. Pty Ltd. v. White Rivers Gold Ltd.*, H. Ct. No. 2010-158 (May 19, 2011), this Court ultimately held that jurisdiction did not lie under § 251(1)(n). These decisions provide useful counter-examples to the claims Plaintiffs assert here and underscore why, in this case, the Individual Defendants are subject to long-arm jurisdiction. In *Chee*, the plaintiff brought claims against an RMI company, as well as two non-resident individuals, related to a dispute over the ownership of shares of the RMI company. *Chee*, at pp.2–3. The plaintiff argued that the individuals were subject to jurisdiction under § 251(1)(n) because their fraudulent conduct affected their co-defendant, which was the RMI company whose ownership was at-issue. This Court rejected the plaintiff's simplistic argument because none of her claims were being asserted by an RMI company or arose out of any injury to an RMI company. *Id*. at p.11. Instead, the only party

that was affected by the individuals' conduct was the plaintiff, who was not a "person in the Republic." *Id.* at p.12. Similarly, the plaintiffs in *Yandal* filed suit against an RMI company and its director, arguing that this Court had jurisdiction over the director based upon the effect his conduct had on the co-defendant RMI company. *Yandal*, at p.4. The Court held that it lacked personal jurisdiction over the director because the fraud alleged by the plaintiffs only affected the plaintiffs (who were not RMI residents), but did not affect the RMI company, who the plaintiffs alleged also committed the fraud. *Id.*

Here, Plaintiffs have alleged conduct by the Individual Defendants that specifically targeted and affected UDW as an RMI person, in that UDW's assets were depleted as a result of Individual Defendants' actions. *See, e.g.*, *In re Hydrogen, L.L.C.*, 431 B.R. 337, 354–55 (Bankr. S.D.N.Y. 2010) (debtor "is the victim of the alleged constructive fraudulent transfers"). Unlike in *Chee* and *Yandal*, the affected RMI person (UDW) is a ***victim*** of Defendants' misconduct, and is not named as a defendant. Moreover, unlike other provisions of the RMI long-arm statute, nothing in § 251(1)(n) requires the effect to be felt by the RMI person within the territorial limits of the RMI. *Compare, e.g.*, Judiciary Act § 251(1)(f) (long-arm jurisdiction where person insures against "any risk *within the territorial limits of the Republic*" (emphasis added)).

In any event, it is not merely the fraudulent conveyances that depleted UDW's assets that form the basis of Plaintiffs' claims and provide a nexus to the RMI. Rather, Plaintiffs' claims arise out of the Individual Defendants' specific and affirmative decision to incorporate UDW in the RMI, and then cause it to redomicile to another jurisdiction so that it could pursue a restructuring, not available in the RMI, that would wipe out UDW's debts, in an attempt to leave Plaintiffs with no ability to recover what they are owed. In other words, unlike in *Chee* and *Yandal*, Plaintiffs do not assert long-arm jurisdiction under § 251(1)(n) merely because the litigation happens to relate

to an RMI company. To the contrary, the core issue in this litigation pertains to UDW's ***status as an RMI company***, its subsequent redomiciliation, and the import of BCA § 128(5) on Plaintiffs' creditor status. Under these unique circumstances, the Court can certainly conclude that § 251(1)(n) is satisfied. *Cf. Family Fed'n for World Peace v. Moon*, 129 A.3d 243 (D.C. 2015) (analyzing Washington D.C.'s "transacting business" long-arm statute and exercising jurisdiction over non-resident director who controlled forum corporation and participated in wrongful activities outside of the forum that went to the "very essence" of the corporation's forum existence).

2. The Court's Exercise of Jurisdiction Comports with Due Process Principles.

The Court's exercise of personal jurisdiction pursuant to the RMI long-arm statute also satisfies due process principles. As an initial matter, even though long-arm jurisdiction is not automatically available against a director or officer of an RMI company (unlike in Delaware), Delaware courts have held that such an exercise of jurisdiction comports with due process principles, since, "[b]y becoming a director and officer of a Delaware corporation, [the director] purposefully availed himself of certain duties and protections under [Delaware] law." *Hazout v. Ting*, 134 A.3d 274, 292 (Del. 2016). Contrary to Defendants' position during argument, the Delaware Supreme Court's constitutional analysis does not depend on whether the director had advance statutory notice, prior to accepting the directorship, that he could be sued in Delaware for fraudulent actions undertaken as a director of the corporation. Rather, in deciding that the constitutional inquiry as applied to out-of-state directors was not even a "close question," the Court explained that where the parties to a transaction understand that the law of the corporation's home jurisdiction will apply to claims arising out of the transaction—such as here, where the parties to this litigation agree that RMI law applies to Plaintiffs' fraudulent conveyance claims—the parties could certainly foresee that they would be subject to litigation in such jurisdiction. *Id.* at 293. This

is not an action, for example, where Plaintiffs seek to "drag corporate officers and directors" into the RMI for a cause of action "where the underlying conduct and claims have no rational connection to [the RMI] and provide no rational basis for [the RMI] to apply its own law." *Id.* at 291 n.60. Rather, Plaintiffs' claims specifically arise out of the Individual Defendants' decision to incorporate UDW in the RMI and then affirmatively redomicile it to the Cayman Islands, and are claims governed by RMI law as applied to RMI corporations.

Armstrong v. Pomerance, 423 A.2d 174 (Del. 1980), discussed by Defendants during argument and cited in the Individual Defendants' reply brief, also supports Plaintiffs' position. There, the Court held (as in *Hazout*) that the exercise of personal jurisdiction over out-of-state directors comports with due process. *Armstrong*, 423 A.2d at 176–77. Even though the acceptance of Delaware corporate directorships was the ***sole*** contact between the defendants and the state, jurisdiction was proper, since "by purposefully availing themselves of the privilege of becoming directors of a Delaware corporation, have thereby accepted significant benefits and protections under the laws of [the] State," such as the power to manage a Delaware business and its affairs, the opportunity to receive interest-free unsecured loans from the corporation, and the opportunity to receive indemnification. *Id.* at 176 & n.4. Here, too, the Individual Defendants purposefully availed themselves of the privilege of becoming directors and officers of RMI corporations (including UDW), through which they received benefits under the BCA, including, as in *Armstrong*, the power to manage UDW and to receive loans and indemnification from UDW. *See, e.g.*, BCA §§ 48, 59, 60, 62. And, as discussed above, the Individual Defendants' contacts were even greater than the mere acceptance of director and officer roles, in that the Individual Defendants affirmatively chose to incorporate UDW in the RMI and then to redomicile UDW to Cayman. Indeed, these Individual Defendants took advantage of the privileges of RMI law over

and over, until the point when Plaintiffs sought to hold them accountable for their actions through this lawsuit. Having availed themselves of the benefits of RMI law, the Individual Defendants cannot now escape the consequences.

In short: The constitutional analysis in *Hazout* and *Armstrong* applies equally here, where the Individual Defendants knowingly accepted the benefits and protections provided to directors and officers under RMI law. *See, e.g.*, *Ryan v. Gifford*, 935 A.2d 258, 273 (Del. Ch. 2007) ("It almost goes without any further elaboration that, as chief financial officer of a Delaware corporation, Jasper availed himself of Delaware law such that he should reasonably anticipate being haled into Delaware's courts."). The basis for long-arm jurisdiction over directors and officers may differ between Delaware (automatic) and the RMI (in this case, § 251(1)(n)), but the constitutional analysis, as applied to directors and officers, is the same. Accordingly, this Court's exercise of long-arm jurisdiction over the Individual Defendants does not offend traditional notions of fair play and substantial justice.

But even if the additional step of analyzing this case under the more general "effects test" of *Calder v. Jones* applies, jurisdiction is proper. That test applies where the plaintiff cannot show, in the first instance, that the defendant purposefully availed himself of the privileges of conducting activities in the forum and that the claim arises out of those activities. *See Chee*, at p.10 (citing *Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1154–55 (9th Cir. 2006)). As discussed above, the Individual Defendants' acceptance of director and officer roles for RMI companies, including UDW, constitutes purposeful availment, and Plaintiffs' fraudulent conveyance claims arise out of the Individual Defendants' fraudulent actions as directors and officers. Thus, Plaintiffs need not satisfy the "effects test" as an alternative proxy for purposeful availment.

However, Plaintiffs can also satisfy the "effects test," which requires a showing that the Individual Defendants "(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." *See id.* at p.14 (citing *Calder v. Jones*, 465 U.S. 783 (1984)). The Individual Defendants' intentional acts of incorporating UDW in the RMI, and then engaging in fraudulent conveyances to the detriment of UDW and Plaintiffs, and then opting to redomicile UDW to Cayman, were each aimed at the RMI. These actions caused harm, the brunt of which was suffered in the RMI. It is, after all, harm to UDW that is the relevant inquiry, not to Plaintiffs, who are merely bringing creditor claims for the fleecing of UDW. *See, e.g.*, *In re Hydrogen, L.L.C.*, 431 B.R. at 354–55 (debtor "is the victim of the alleged constructive fraudulent transfers"). And by redomiciling UDW to Cayman, Defendants attempted (but for the application of BCA § 128(5)) to paper over the fraudulent conveyances.

Finally, with the first two prongs of purposeful availment satisfied, it is Defendants' burden to establish that the third prong, reasonableness, has not been satisfied. Defendants here have not undertaken to challenge Plaintiffs' analysis of the reasonableness factors, as each of the factors clearly weighs in Plaintiffs' favor. *See* Opp'n to Individual Defs.' Mot. at 11–12. Accordingly, this Court's exercise of jurisdiction over the Individual Defendants is reasonable.

III. CONCLUSION

At bottom, Plaintiffs request that this Court, sitting in the RMI, (i) determine the meaning of RMI law, as applied to RMI corporate Defendants (and their officers and directors) who have not obtained a release from liability, and (ii) adjudicate the merits of fraudulent conveyance claims seeking the recovery of hundreds of millions of dollars that cannot be brought, anywhere else in the world, by any other creditor or by the PCT. Accordingly, Plaintiffs respectfully request that

the Court deny Defendants' motions to dismiss or, in the alternative, grant Plaintiffs leave to conduct jurisdictional discovery and/or to amend the Complaint.

Dated: July 16, 2018

Respectfully submitted,

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Exhibit 31

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IN THE HIGH COURT OF THE
REPUBLIC OF THE MARSHALL ISLANDS

HIGHLAND FLOATING RATE OPPORTUNITIES FUND, HIGHLAND GLOBAL ALLOCATION FUND, HIGHLAND LOAN MASTER FUND, L.P., HIGHLAND OPPORTUNISTIC CREDIT FUND, AND NEXPOINT CREDIT STRATEGIES FUND, Plaintiffs, v. DRYSHIPS INC., OCEAN RIG INVESTMENTS INC., TMS OFFSHORE SERVICES LTD., SIFNOS SHAREHOLDERS INC., AGON SHIPPING INC., ANTONIOS KANDYLIDIS, and GEORGE ECONOMOU, Defendants.	)	CIVIL ACTION NO. 2017-198

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PRELIMINARY STATEMENT

Highland concedes, as it must, that it lacks standing unless RMI BCA Section 128(5) resuscitates its claims.[1] As Highland admits in its Post-Hearing Brief, "in order for Plaintiffs to assert any fraudulent conveyance claims, they must be creditors." Pl. P-H Br. at 22.[2] Highland further concedes that it is no longer a creditor because "the Cayman judgment eliminated liability ***against UDW***, the transferor of the fraudulent conveyances…." *Id.* at 2 (emphasis in original). Thus, Highland lacks standing to assert its fraudulent conveyance claims. Highland's familiar response is that "BCA § 128(5) stops the clock at the time of redomiciliation" and affords Highland with standing to pursue those claims "regardless of what occurred after UDW's redomiciliation out of the RMI." *Id.* at 6. This argument is not only wrong, but it is riddled with logical inconsistencies that doom Highland's claims.

Fundamentally, BCA § 128(5) cannot afford Highland ***greater*** rights than it had when UDW redomiciled to the Cayman Islands. To whatever extent Highland held fraudulent conveyance claims before UDW redomiciled in April 2016, those claims were subject to at least two contingencies. First, they were governed by the no-action clause set forth in the Notes Indenture. Second, they remained subject to events that might eliminate Highland's creditor status – for instance, if Highland sold its UDW Notes, if the Notes were repaid in full or, as in fact happened, if Highland's creditor status was eliminated by operation of a court-supervised-and-approved debt restructuring. Defendants do not believe that BCA § 128(5) comes into play here at all because Highland lost its rights as a result of the debt restructuring, not UDW's redomiciliation. But even if

[1] Capitalized terms defined in Defendants' Joint Memorandum of Law on Common Issues in Support of Motion to Dismiss Highland's Complaint are afforded the same meanings herein.

[2] Citations to Plaintiffs' Post-Hearing Memorandum appear as "Pl. P-H Br. at __," and citations to Defendants' Joint Supplemental Brief Crystallizing Argument Made to the Court similarly appear as "Def. P-H Br. at __."

the statute did apply, the most it could do would be to preserve "the rights of creditors. . . ***existing immediately prior to such transfer***," not to establish a new, unfettered right to bring a fraudulent conveyance claim untethered from a contractual condition precedent to bringing suit. 52 MIRC § 128(5) (emphasis added).

Highland is also unwilling to own up to the consequences of its arguments. If the Court were to somehow "stop[] the clock at the time of redomiciliation" and determine that creditor standing exists "regardless of what occurred after UDW's redomiciliation," then Highland would have the right to sue UDW to recover for its $74 million in UDW Notes, and all other UDW Scheme Creditors would similarly have the right to sue UDW for the $3.7 billion in debt that was discharged in the Cayman Proceedings. Highland cannot have it both ways, using BCA § 128(5) to preserve only the claims that it wants to pursue and no others.

The Cayman Court already determined that Highland is bound by the UDW Scheme. Highland had a full and fair opportunity to litigate the issue in the Cayman Proceedings. It did so, and it lost. Highland could have raised its argument based on BCA § 128(5) in that proceeding, but chose not to do so. Alternatively, Highland could have brought a proceeding in this Court for a declaratory judgment that BCA § 128(5) invalidated the Cayman Proceedings, and sought to stay the Cayman Proceedings until the issue was resolved. Again, it chose not to do so. Highland also could have appealed the Cayman Court's ruling, but chose not to do that either. Instead, Highland elected to make its unfounded collateral attack in this Court. The Cayman Court's judgment is now final, and Highland should not be permitted to relitigate whether it is bound by the UDW Scheme.

Highland's contention that Defendants did not obtain releases in the Cayman Proceedings is true, but it is also irrelevant. Defendants are not moving to dismiss based on any purported release. Instead, they are moving to dismiss for lack of standing, just as Highland correctly told the Cayman Court that "Highland and the 2019 Notes Creditors will lose their standing as creditors by reason of

the scheme. . . ." Moran Op. Decl., Ex. C at 487:1-2. Having considered Highland's arguments, the Cayman Court 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 affiliate's." Moran Op. Decl., Ex. J ¶ 125. Again, Highland is bound by this ruling.

The Court should dismiss Highland's Complaint for any or all of these reasons: for failure to comply with the no-action clause despite its many opportunities to do so; because the Sanction Order conclusively establishes that Highland is no longer a creditor of UDW, and thus lacks standing to pursue its fraudulent conveyance claims against Defendants; and because Highland's strained interpretation of BCA § 128(5) is simply wrong.

ARGUMENT

I. The No-Action Clause Bars Highland's Claims.

Highland has dropped any pretense that it complied with the no-action clause, constructively or otherwise. It is thus relegated to arguments about why it should be excused for failing to meet its contractual obligations. Highland's excuses are easily disposed of.

First, Highland makes the head-spinning argument that (1) BCA § 128(5) requires the Court to run the clock back to ***April 2016***, thus conferring creditor standing on Highland, but (2) Highland should be excused from complying with the no-action clause because the indenture trustee is no longer in place ***today***. Pl. P-H Br. at 6, 13-14. Again, Highland cannot have it both ways. The reason why there is no indenture trustee today is because the UDW Notes no longer exist. Thus, Highland lacks creditor standing and its case should be dismissed. If, on the other hand, the Court accepts Highland's argument that we should travel back in time to April 2016 to evaluate Highland's creditor standing, then that standing must be subject to the same constraints that were in place at that time, including the no-action clause. Highland could have invoked the no-action clause at any point during the six-month window between the March 2017 event of default triggered by UDW's

commencement of the Cayman Proceedings and the September 2017 Restructuring Effective Date. *It **chose*** not to do so. The Court should dismiss the Complaint accordingly.

Second, *Ellington Credit Fund* is inapplicable for this same reason. 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. *Ellington Credit Fund, Ltd. v. Select Portfolio Servicing, Inc.*, 837 F. Supp. 2d 162, 177-78 (S.D.N.Y. 2011). Thus, they never had the opportunity to make a demand on the trustees, and it would have been inequitable to enforce the no-action clause against them as a result. This is in stark contrast to Highland, which not only was aware of its purported injuries, but had a 45-page draft complaint ready to file in March 2017. Instead of making a demand on the trustee at that or any other time, Highland chose to wait almost six months to file its Complaint at the 11th hour before the UDW Scheme became effective, knowing that the UDW Notes and the indenture trustee would soon be discharged. *Ellington* does not excuse compliance with a no-action clause under facts even remotely analogous to these. Neither does any other authority that Highland has cited.

Third, Highland's arguments based on the intent of the no-action clause are fully addressed in Defendants' Post-Hearing Brief, at pages 10-11. As the Cayman Court already recognized, permitting Highland to pursue its claims would be detrimental to both UDW (the issuer) and all Scheme Creditors (including the former UDW Noteholders) – the very parties who the no-action clause is designed to protect. Moran Op. Decl., Ex. J ¶¶ 125, 127. This is hardly a case where the Court should override clear and unambiguous contractual language based on arguments about the parties' intent, particularly given that it was Highland itself that manufactured a situation where there would be no indenture trustee or UDW Noteholders when it prosecuted this suit. *See, e.g.*, *Quadrant Structured Prods. Co. v. Vertin*, 23 N.Y.3d 549, 559-60 (2014) ("[A] written agreement

that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms.") (citation omitted).[3]

Highland made a tactical decision not to comply with the no-action clause because it wanted to pursue the fraudulent conveyance claims on its own behalf, rather than having a trustee pursue them on behalf of all UDW Noteholders or, in the case of the PCT, on behalf of all Scheme Creditors. By so doing, Highland waived the right to pursue those claims as a matter of law, and the Court should dismiss the Complaint accordingly.

II. Highland's Claims Are Barred By The Cayman Court's Sanction Order.

Highland admits that "the Cayman judgment eliminated liability ***against UDW***." Pl. P-H Br. at 2 (emphasis in original). Thus, the Sanction Order eliminated Highland's standing to pursue its fraudulent conveyance claims because, as Highland again admits, "in order for Plaintiffs to assert any fraudulent conveyance claims, they must be creditors," and Highland is no longer a creditor. *Id.* at 22. The Court should grant comity to the Cayman Court's rulings, apply the doctrine of claim preclusion and dismiss Highland's Complaint. Highland's contrary arguments are not persuasive.

First, the Court should reject Highland's ill-founded public policy argument and grant comity to the Sanction Order. Highland has repeatedly reversed itself on this issue. It originally argued that the RMI has a public policy against debt restructurings. *See* Plaintiffs' Response to Defendants' Joint Motion to Dismiss Complaint ("MTD Opp'n") at 22-24. Highland then disavowed this contention at oral argument, misrepresenting to the Court that "we have never argued that." Tr. at 53:7-10. Highland reversed itself yet again in its Post-Hearing Brief, in which it

[3] Highland doubles down on its tactical gamesmanship by proposing that the Court dismiss the case without prejudice and allow Highland to refile a new complaint in which it would "affirmatively allege . . . that there is no longer a trustee." Pl. P-H Br. at 16. Not only would following this proposal improperly elevate form over substance, but it could not change the fact that the case should be dismissed with prejudice because Highland failed to comply with the no-action clause when it had the opportunity to do so.

reverted to its original argument. Indeed, Highland's Post-Hearing Brief cuts and pastes from its opposition brief its unsupported statement that "the RMI has made [a/the] clear policy choice to permit only a liquidation of an insolvent company, not a restructuring" and its quotation from the *Laker Airways* case that "the obligation of comity expires when the strong public policies of the forum are vitiated by the foreign act." *Compare* Pl. P-H Br. at 12-13 *with* MTD Opp'n at 22-23.

Highland's reversion to its original position is particularly surprising because the Nitijela conclusively put this issue to rest earlier this year by adopting the UNCITRAL Model Law on Cross-Border Insolvency Implementation Act, 2018 (the "Model Law"), 30 MIRC Ch. 7, §§ 700 et seq. The Model Law contemplates that non-resident RMI corporations will be reorganized in accordance with the law of foreign jurisdictions, and thus demonstrates that the RMI has a public policy ***in favor*** of debt restructurings.

The Model Law's 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." *Id.*, introductory clause. Furthermore, Model Law Section 717(2) specifically provides that a foreign proceeding (defined to include either a reorganization or a liquidation) is to be "recognized" as a "foreign main proceeding" if the proceeding is pending in the jurisdiction where the debtor has its "center of its main interests," or COMI. The New York Bankruptcy Court already determined that this test is satisfied by the UDW Scheme under the United States' implementation of the Model Act. *In re Ocean Rig UDW Inc.*, 570 B.R. 687, 704-06 (Bankr. S.D.N.Y. 2017). It made the same determination as to UDW's three subsidiary debtors that did not redomicile, and thus remained non-

resident RMI corporations throughout the Cayman Proceedings. Highland did not dispute this finding in the New York Proceedings, and cannot do so here (nor has it even attempted to do so).

Thus, this Court should grant comity to the Cayman Court's Sanction Order, consistent with the authorities that strongly encourage granting comity to foreign orders in cross-border restructuring proceedings. Def. P-H Br. at 16-17.

Second, Highland's collateral attack is precluded by the Sanction Order. In the guise of its argument under BCA § 128(5), Highland is trying to relitigate the exact same claim that it already litigated and lost in the Cayman Proceedings: whether it is bound by the Scheme. Highland's fully-litigated objections that it submitted to the Cayman Court – including its request that it be allowed to opt out from the UDW Scheme – constitute a claim for *res judicata* purposes, and Highland is precluded from re-litigating that same claim yet again in this Court. Def. P-H Br. at 19-20.

Remarkably, Highland contends that the Cayman Court did not decide the question whether Highland is bound by the Scheme. Pl. P-H Br. at 19. This could not be further from the truth. The Sanction Order specifically provides that the UDW Scheme is "binding on . . . the Scheme Creditors," which includes Highland. Moran Op. Decl. ¶ 39 and Ex. I at 1. Highland offers no support for its contrary assertion, nor is there any.

Third, Highland's contention that it should not be bound by the Cayman Court's rulings because Highland chose not to raise BCA § 128(5) in the Cayman Proceedings has not become any stronger by its repetition. Highland does not dispute that it ***could*** have raised BCA § 128(5) in the Cayman Proceedings. *See Jalley v. Mojilong*, 3 MILR 106, 109 (2009) (holding that claim preclusion "prevents parties from re-litigating the same claim including 'all grounds for or defenses to, recovery that were previously available to the parties, ***regardless of whether they were asserted or determined in the prior proceeding.***'") (citation omitted) (emphasis added). Indeed, the one point that Highland's Cayman law expert Mr. Moss and Defendants' expert Ms. Moran agree on is

that the Cayman Court considered the issue whether its orders would have extraterritorial effect. Moss Decl. ¶ 34; Moran Reply Decl. ¶ 37. Highland even goes so far as to criticize Mr. Reeder for failing to address BCA § 128(5) in the declaration that he submitted to the Cayman Court on this subject. MTD Opp'n at 11. Thus, there is no question that Highland could have raised BCA § 128(5) in the Cayman Proceedings had it chosen to do so.[4]

Highland ***chose*** not to raise BCA § 128(5) in the Cayman Proceedings, just as it ***chose*** not to invoke the no-action clause when it had the opportunity to do so. By its own admission, Highland was aware of BCA § 128(5) in August 2017, a month before the Sanction Hearing. Tr. at 69:17-20. Yet Highland did not even mention the existence of BCA § 128(5) to the Cayman Court, and apparently hid the existence of its arguments under § 128(5) from its own counsel in the Cayman Proceedings. Tr. at 100:3-11. Claim preclusion prevents precisely what Highland is trying to do – holding back arguments in the first and proper forum only to raise them in a collateral attack in a subsequent and improper forum. *See, e.g., Coleman v. CDCR*, 2014 WL 4446798, at *4 (E.D. Cal. Sept. 9, 2014) ("Claims which could have been brought in the earlier action are also barred by the doctrine to prevent parties from 'by negligence or design withhold[ing] issues and litigat[ing] them in consecutive actions.") (citation omitted). The alternative is endless, piecemeal litigation.

Fourth, Highland's argument that Defendants "are not in privity [with UDW] ***simply by virtue of being corporate affiliates***" misses the point. Pl. P-H Br. at 18 (emphasis added). Highland does not dispute that Defendants all have precisely the same interest as UDW in defending the UDW Scheme – which establishes that Highland lacks standing to pursue its claims. Highland also fails to

[4] Defendants do not contend that ***issue preclusion*** bars Highland from relitigating the extraterritorial effect of the Cayman Court's rulings as Highland suggests. Pl. P-H Br. at 19. Instead, ***claim preclusion*** prevents Highland from litigating its arguments under BCA § 128(5) now that the Sanction Order is final because Highland could have raised BCA § 128(5) in the Cayman Proceedings if it had chosen to do so.

take on Defendants' showing of individualized facts that are sufficient to establish privity as to each of them. Defendants' Reply Br. at 10; Tr. at 34:17-36:7; Post-Hearing Br. at 18-19.

Finally, Highland's argument that Defendants have failed to meet their evidentiary burden is plainly wrong. Defendants have included in the record:

- Ms. Moran's Opening and Reply Declarations, which describe the Cayman Proceedings and attach relevant portions of the record of those proceedings, including excerpts of the objections raised by Highland in its written submissions and orally at the various hearings;
- The UDW Scheme;
- The Sanction Order; and
- The Cayman Judgment, which provides the Cayman Court's reasons for issuing the Sanction Order and reflects that the Cayman Court considered and rejected the arguments that Highland made in that proceeding – many of which are the same as, or variations on a theme of, the arguments that Highland is now making in support of its improper collateral attack.

Highland does not say what facts it believes to be missing from the record. There are none.

The Cayman Court already held that Highland is bound by the UDW Scheme. Thus, Highland lacks standing to pursue its fraudulent conveyance claims, and this Court should dismiss Highland's Complaint.

III. BCA § 128(5) Cannot Resuscitate Highland's Creditor Standing.

BCA § 128(5) is inapplicable because Highland lost its creditor standing as a result of the UDW Scheme, not UDW's redomiciliation. Try as it might, Highland cannot change this fact. Nor can it justify its effort to stretch the provision's reach far beyond the statutory language.

First, Highland does not cite any authority that supports its contention that Section 128(5)'s protection against the loss of creditor rights resulting from "the transfer of domicile of any corporation out of the Republic" applies to a loss of rights that results from a debt restructuring that happened seventeen months later. 52 MIRC § 128(5).

As Defendants demonstrated in their reply brief, *Independent Investor Protective League* stands only for the proposition that a statute such as BCA § 128(5) protects against a loss of rights that results from UDW's redomiciliation "***in itself***." *Independent Investor Protective League v. Time, Inc.*, 50 N.Y.2d 259, 264 (1980) (emphasis added); *see generally* Def. Reply at 14. While Highland incorrectly accuses Defendants of "[c]herry-picking language," the fact remains that *Independent Investor Protective League* deals only with a deprivation of rights that is the direct and immediate result of a corporate dissolution – or, analogously, redomiciliation. Pl. P-H Br. at 7. Thus, if anything, the case supports Defendants' interpretation of BCA § 128(5), not Highland's.

Highland's argument that "BCA § 128(5) operates in a manner similar to relatively common corporate continuation or survival statutes" also supports Defendants' interpretation. Pl. P-H Br. at 11. Highland is unable to point to a single case applying any of these analogous statutory provisions on facts like those present here, where the loss of rights at issue resulted from a separate transaction that occurred long after the corporate dissolution or other event that was the subject of the statutory protection. The mere existence of other statutes with analogous provisions does not aid Highland because it does not appear that ***any*** court has ***ever*** applied such a provision in the manner that Highland asks this Court to apply BCA § 128(5).

Second, Highland's contention that it would have been able to assert its fraudulent conveyance claims if only "UDW [had] remained domiciled in the RMI ***and [was] ultimately forced into liquidation***" proves Defendants' point. Pl. P-H Br. at 12. As Highland admits, it is the fact that UDW's debt was restructured, instead of going through a liquidation, that Highland is really complaining about. Defendants, however, have conclusively demonstrated that UDW could have restructured its debt in the Caymans whether or not it redomiciled there. Def. P-H Br. at 23-26.

Highland's causation arguments fail for the same reason. Highland again relies on Mr. Moss for the proposition that UDW could not have commenced the Cayman Proceedings without

redomiciling. Pl. P-H Br. at 9-10. In so doing, Highland ignores Defendants' showing that Mr. Moss offers only counter-factual opinions about a theoretical company with "limited connection to Cayman," and does not offer any opinions specific to UDW, which had extensive connections with the Caymans when it commenced the Cayman Proceedings. Moss Dec. ¶ 23(ii). *See generally* Defendants' Reply at 15-16; Tr. at 41:2-43:12, 108:14-109:3; Def. P-H Br. at 23-26.[5]

Highland does not even try to grapple with the conclusive record evidence demonstrating that UDW could have restructured its debt through the Cayman Proceedings whether or not it transferred its domicile to the Cayman Islands. Instead, Highland states that "Plaintiffs certainly dispute, as an issue of fact, whether UDW could have obtained the same result from a Cayman court absent redomiciliation." Pl. P-H Br. at 11. This assertion does not meet Highland's evidentiary burden to establish standing. Def. P-H Br. at 23-24.

If Highland held fraudulent conveyance claims the day before UDW redomiciled to the Cayman Islands, it still held those claims the day after. That is all that BCA § 128(5) protects, and the Court should reject Highland's Hail Mary effort to resuscitate creditor claims that it forfeited as a result of its own litigation strategy.

IV. Permitting Highland To Proceed With Its Collateral Attack Would Undermine The UDW Scheme.

This lawsuit impacts UDW in myriad ways. Its two most senior officers as of the time the suit was brought are named as defendants, two of its wholly owned subsidiaries are also named as

[5] Highland cites a new authority in connection with its causation argument that was not cited by any party in the motion to dismiss briefing: *Maya v. Centex Corp.*, 658 F.3d 1060, 1073 (9th Cir. 2011). *Maya* supports Defendants. In that case, the 9th Circuit ***dismissed*** the claim at issue at the pleading phase for failure to establish standing. *Id.* at 1072-73. The dismissal was without prejudice because the district court had failed to give the Plaintiff an opportunity to come forward with an amendment ***supported by expert evidence*** in an effort to establish causation. *Id.* Here, Highland already has submitted Mr. Moss's expert opinions, but those opinions fail to meet Highland's burden for the reasons discussed in the text and in Defendants' other submissions. Thus, this case is ripe for dismissal with prejudice.

defendants, management time and company resources will be diverted if this action proceeds to discovery, and, as the Cayman Court found, there is a risk of "competition between the PCT claims and any claims Highland might seek to bring." Moran Op. Decl. Ex. J ¶ 127. Most fundamental, of course, is the risk that the entire $3.7 billion debt restructuring will be upended if the Court accepts Highland's argument that former creditors have standing to assert creditor claims "regardless of what occurred after UDW's redomiciliation out of the RMI." Pl. P-H Br. at 6.

Highland's only response is to invoke its refrain of "Where's Waldo?" Pl. P-H Br. at 3, 11. This is no answer at all. It does not change the fact that if Highland can undo the release of its creditor claims, then it can sue UDW to enforce its $74 million in UDW Notes, and all UDW Scheme Creditors can make the same arguments as a basis to resuscitate their own claims.

Highland's transparent effort to goad UDW into voluntarily appearing in this action is just another example of Highland's tactical games. Highland chose not to name UDW as a defendant in this lawsuit because it already litigated with UDW the question whether it is bound by the Scheme, and lost, in the Cayman Proceedings. If Highland wants to try to re-litigate this issue with UDW, it knows exactly where "Waldo" is – in the Cayman Islands. Highland chose not to raise its BCA § 128(5) arguments or to appeal there, and instead ran to this Court in the hope of more favorable treatment. Regardless, the risks that Highland's arguments pose for the UDW Scheme are very real.

Similarly, Highland's mischaracterization that Defendants are not seeking dismissal based on UDW's status as an indispensable party "because the great weight of the caselaw . . . provides that a transferor is not a necessary party in a fraudulent conveyance action" is wrong. Pl. P-H Br. at 20. UDW is plainly a necessary party to this lawsuit because its rights are implicated by Highland's arguments under BCA § 128(5). As Defendants' counsel explained at oral argument, Defendants are not pursuing this as a separate basis for dismissal because the indispensable party analysis reduces to the question whether UDW could be joined as a party to this action. That, in turn, rises and falls

with Highland's argument based on BCA § 128(5). If the Court adopts Highland's interpretation of the statute, then UDW can be joined as a party to this lawsuit – just as it could be sued by all of its former creditors whose claims were resolved in the Cayman Proceedings. Tr. at 43:19-44:11.

V. The PCT

The Cayman Court determined: "the PCT is a much fairer way of dealing with any claims that may properly be asserted against officers of UDW and their affiliate's." Moran Op. Decl., Ex. J ¶ 125. The adequacy of the PCT was fully litigated in the Cayman Proceedings, and the Court should not permit Highland to relitigate this issue for the reasons set forth in Defendants' Post-Hearing Brief at 30-31. In any event, Highland's arguments are not persuasive.

First, Highland's central point – that the PCT does not hold creditors' fraudulent conveyance claims – is a strawman. Pl. P-H Br. at 5. It is not the name of the claim that matters. What matters is that the PCT is the vehicle selected by the Cayman Court to pursue on behalf of all Scheme Creditors claims challenging the transactions about which Highland complains.

Second, Highland's contention that "the RMI corporate Defendants named in this action who received fraudulent conveyances from UDW to Plaintiffs' detriment are completely outside of the reach of the PCT's claims" is false. Pl. P-H Br. at 5. Again, the Cayman Court already addressed this issue when it held that the PCT was the most appropriate vehicle to pursue claims "against officers of UDW ***and their affiliate's***." Moran Op. Decl., Ex. J ¶ 125.[6]

The PCT, of course, could assert claims against Defendants for aiding and abetting, unjust enrichment, and undoubtedly other legal theories if it determines that it has a good faith basis for

[6] Highland has argued in other proceedings that the PCT would be unable to successfully prosecute breach of fiduciary duty claims against Messrs. Economou and Kandylidis because of exculpatory provisions in UDW's Articles of Association. This is wrong as a matter of Cayman law. Highland has not raised such an argument in its opposition to Defendants' motion to dismiss, at oral argument or in its Post-Hearing Brief in this proceeding. The Court should not consider such an argument if Highland attempts to raise it for the first time on reply.

doing so. Indeed, Highland's own expert, Mr. Moss, opined as a matter of English law: "Where a fraudulent conveyance or transfer is dishonestly carried out by a director of a company, then as a matter of English judge-made legal principles the director commits a dishonest breach of his directors' duties. ***Any party who dishonestly assists such a dishonest breach of duty is liable***." Moss Decl. ¶ 38 (emphasis added) (footnote omitted). While Highland may now wish to disavow this opinion, its assertion that there is no legal theory on which the PCT could proceed against Defendants is contradicted by its own expert and cannot be taken seriously.

VI. The Court Should Dismiss Highland's Delaware Statutory Claims And Constructive Fraudulent Conveyance Claims.

At the very least, the Court should dismiss Highland's claims based on Delaware statutes and the notion of "constructive" fraud, which are not supportable at common law.

First, Highland now concedes that it is "not asserting claims in this Court under Delaware law." Pl. P-H Br. at 22. Thus, the Court should dismiss Highland's First through Seventh Causes of Action to the extent that they purport to be based on Delaware statutes. *See, e.g., Pecorino v. Vutec Corp.*, 934 F. Supp. 2d 422, 450 (E.D.N.Y. 2012) (alleging claims in the alternative "does not preclude the alternative claims from being dismissed if they do not state a cause of action.").

Second, the Court should dismiss Highland's Second, Fourth and Sixth Causes of Action, for constructive fraudulent conveyance. As Highland admits, "constructive fraudulent conveyance" is a statutory creation. Pl. P-H Br. at 23-24 ("Jurisdictions that enacted the Uniform Fraudulent Conveyance Act intended, through the passage of a statutory claim, 'to displace and eradicate the State's common-law presumption of intent to defraud flowing from certain acts and to provide relief ***based on those acts*** on the rational of constructive fraud.'") (citation omitted) (emphasis in original). No such claim exists at common law, and thus no such claim can be asserted as a matter of RMI law. *See generally* Def. P-H Br. at 33-34.

Highland further concedes that its Second, Fourth and Sixth Causes of Action for "constructive fraudulent conveyance" challenge the very same transactions that are already the subject of its First, Third and Fifth Causes of Action for actual fraudulent conveyance, and offers no valid reason for permitting such duplicative claims. Pl. P-H Br. at 20. Under Statute of Elizabeth jurisprudence, badges of fraud can "'create[] a rebuttable presumption of intent to defraud.'" Pl. P-H Br. at 25 (citation omitted)). Highland's argument that the rebuttable presumption is somehow equivalent to the statutory cause of action for constructive fraudulent conveyance, however, is wrong. Indeed, it is based on a misreading of Highland's own cases. *See Marine Midland Bank v. Murkoff*, 508 N.Y.S.2d 17, 21 (N.Y. App. Div. 1986) (explaining the development of the uniform statutes as distinguished from common law presumptions of proof). Highland's argument that common law fraudulent conveyance does not require "moral turpitude or intentional wrong" is similarly wrong. Pl. P-H Br. at 24. *See Husky Int'l Elecs., Inc. v. Ritz*, 136 S. Ct. 1581 1586-87 (2016). Whatever "pathways" may be available to ***prove*** Highland's First, Third and Fifth causes of action for actual fraudulent conveyance are just that – matters of ***proof***, not a basis for a separate claim for "constructive" fraud that does not exist at common law. Pl. P-H Br. at 24.

CONCLUSION

For the reasons and upon the authorities set forth above and in Defendants' prior submissions, the Court should dismiss the Complaint with prejudice, and grant Defendants such other and further relief as the Court deems just and proper.

DATED: Majuro, Marshall Islands, August 14, 2018

Respectfully submitted,

Dennis J Reeder

Dennis J. Reeder
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