IN THE HIGH COURT
OF THE
REPUBLIC OF THE MARSHALL ISLANDS

HIGHLAND FLOATING RATE OPPORTUNITIES FUND, ET AL.,	CIVIL ACTION NO. 2017-198
Plaintiffs,	
vs.	**ORDER GRANTING MOTIONS TO DISMISS**
DRYSHIPS INC., ET AL.,	
Defendants.	

TO: James McCaffrey, counsel for Plaintiffs
Dennis Reeder, counsel for defendants Dryships Inc., Ocean Rig Investments Inc., TMS Offshore Services, Ltd., SIFNOS Shareholders Inc., and Agon Shipping Inc.
Arsima Muller, counsel for defendants Economou and Kandylidis

I. INTRODUCTION

In their August 31, 2017 Complaint ("Complaint"), the plaintiffs as creditors of Ocean Rig UDW Inc. ("UDW") seek (i) to avoid and recover the value of the defendants' allegedly fraudulent conveyances to the extent of the plaintiffs' claims and (ii) to recover damages from individual defendants for aiding and abetting the fraudulent conveyances. In response, the defendants filed "Defendants' Joint Motion to Dismiss Complaint" ("Defs.' Joint MTD") and individual defendants filed "Defendants George Economou's and Antonios Kandylidis's Motion to Dismiss" ("Ind. Defs.' MTD") on a number of grounds. For the reasons set forth below, the Court grants the motions and dismisses this case.

II. BACKGROUND

Having considered the parties' submissions and arguments, the Court finds that the

alleged and relevant facts are as follows.

A. The Parties

1. *Plaintiffs*

Plaintiff Highland Floating Rate Opportunities Fund is a series of trust established under Highland Funds I, a Delaware statutory trust, with its principal place of business in Dallas, Texas. Highland Floating Rate Opportunities Fund brings this suit in its capacity as a beneficial owner and holder of (i) outstanding UDW 7.25% Senior Notes due 2019 (the "Notes") governed by an indenture, dated as of March 26, 2014 (the "Indenture"), by and between Deutsche Bank Trust Company Americas as Trustee and UDW, and (ii) term loans (the "Term Loan Debt") made pursuant to that certain Credit Agreement, dated as of July 12, 2013, as amended and restated by and among Drillships Financing Holding Inc. and Drillships Projects Inc. as borrowers, Ocean Rig as guarantor, Deutsche Bank AG New York Branch as administrative and collateral agent, and the lenders party thereto.[1] Complaint ¶ 12.

Plaintiff Highland Global Allocation Fund is a series of trust established under Highland Funds II, a Massachusetts statutory trust, with its principal place of business in Dallas, Texas. Highland Global Allocation Fund brings this suit in its capacity as a beneficial owner and holder of the Notes, and is additionally a shareholder of UDW. Complaint ¶ 13.

Plaintiff Highland Loan Master Fund, L.P. is a Cayman Islands limited partnership with its principal place of business in Dallas, Texas. Highland Loan Master Fund, L.P. brings this suit in its capacity as a beneficial owner and holder of the Notes. Complaint ¶ 14.

Plaintiff Highland Opportunistic Credit Fund is a series of trust established under

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[1]Plaintiff Highland Floating Rate Opportunities Fund no longer held the Term Loan Debt when they commenced this action. Hollander Decl. ¶ 13 and Exh. ¶¶ 12-16.
12-16.

Highland Funds I, a Delaware statutory trust, with its principal place of business in Dallas, Texas. Highland Opportunistic Credit Fund brings this suit in its capacity as a beneficial owner and holder of the Notes. Complaint ¶ 15.

Plaintiff NexPoint Credit Strategies Fund is a Delaware statutory trust, with its principal place of business in Dallas, Texas. NexPoint Credit Strategies Fund brings this suit in its capacity as a beneficial owner and holder of the Notes, and is additionally a shareholder of UDW. Complaint ¶ 16.

The plaintiffs (collectively "Highland") comprise the majority holders in the aggregate principal amount of the Notes. Complaint ¶ 17.

2. *Defendants*

Defendant DryShips Inc. ("DryShips") is a Republic of the Marshall Islands ("RMI") corporation (Entity Number 11911) with its principal offices in Athens, Greece. DryShips was UDW's parent company until April 5, 2016. According to DryShips' SEC filings, Defendant Economou exerted substantial control over DryShips as its chairman, president, CEO, and principal shareholder. Since September 9, 2016, Economou has been the sole owner of DryShips' Series D Preferred Stock, giving him complete control over the company. Complaint ¶ 18.

Defendant Ocean Rig Investments Inc. ("ORI") is an RMI corporation (Entity Number 80821). ORI is a wholly-owned, non-debtor subsidiary of UDW. Complaint ¶ 19.

Defendant TMS Offshore Services Ltd. ("TMS") is an RMI corporation (Entity Number 61708). According to UDW's SEC filings and public statements, Defendant Economou beneficially owns and controls TMS. Complaint ¶ 20.

Defendant Sifnos Shareholders Inc. ("Sifnos") is an RMI corporation (Entity Number 3

0631). According to DryShips' SEC filings and public statements, Defendant Economou beneficially owns and controls Sifnos. Complaint ¶ 21.

Defendant Agon Shipping Inc. ("Agon") is an RMI corporation (Entity Number 83434). Agon is a wholly-owned, non-debtor subsidiary of UDW. Complaint ¶ 22.

Defendant George Economou ("Economou") is a citizen of Greece who, Highland alleges, maintains residences in New York City, Athens, and Saint Barthelemy. Economou is the CEO and chairman of both UDW and DryShips, and beneficially owns and controls numerous other entities that provide services or financing to UDW and DryShips, including TMS and Sifnos, among others. Further, Highland, upon information and belief, alleged, Economou dominates and controls UDW, DryShips, ORI, TMS, Agon, and Sifnos, and in coordination with his nephew, Kandylidis, directed such entities' activities with respect to the transactions alleged in the Complaint. Complaint ¶ 23.

Defendant Antonios Kandylidis ("Kandylidis") is a resident and citizen of Greece. Kandylidis is Economou's nephew, and President and Chief Financial Officer of both UDW and DryShips. At the time, UDW loaned $120 million to DryShips and then decided to forgive the loan in total, Kandylidis served as Executive Vice President of both UDW and DryShips. Highland, upon information and belief, alleged in the Complaint, Kandylidis directed the actions of UDW, DryShips, ORI, and possibly other entities with respect to the transaction in coordination with Economou. Complaint ¶ 24.

Economou and Kandylidis are sometimes referred together as "Individual Defendants."

B. Challenged Transactions

At all times relevant, UDW operated and leased ultra-deepwater drillships and semi-submersible drilling rigs to provide drilling services for major oil companies. Starting in

2014, UDW began to experience a financial strain resulting from a steep decline in the market for its services. As the price of oil slipped, so did the demand for the type of drilling UDW's fleet provides to its customers. As UDW's customers moved to terminate their contracts and pursue other avenues of petroleum exploration and production, UDW's cash flow began to dry up and it lost any predictability as to its long-term success. Complaint ¶ 2.

Highland, having held $74 million in notes issued by UDW, alleges that in an effort to insulate himself and his companies from any financial distress at UDW, Economou orchestrated a series of transactions that allowed him to siphon money away from UDW and thereby reduce the collateral available to it and its creditors. Specifically, UDW, with Economou leading the way, entered into four sets of transactions that, in total, transferred hundreds of millions of dollars in value from UDW to Economou and his companies from mid-2015 to April 2016 in exchange for little to nothing. Complaint ¶¶ 1, 3. The transactions are described below.

First, UDW loaned its parent company DryShips, whose CEO, president, and controlling shareholder was Economou, $120 million in late 2014 (the "DryShips Loan"). By mid-2015, UDW forgave the $120 million loan in two transactions. Although at the time UDW was unable to pay its own debts, UDW received only its own shares in exchange for forgoing payment of $120 million plus interest. For purposes of the transaction the shares were priced at approximately 30% above the trading price of UDW shares on the effective date of the forgiveness. Following the transaction, as Economou allegedly planned, UDW held the shares as treasury stock until UDW was redomiciled in the Cayman Islands ("Cayman") in April 2016 and put into liquidation proceedings in March 2017, when the shares were rendered worthless. Complaint ¶ 4.

Second, in 2016, amid its deteriorating economic situation, in 2016 UDW signed a new

management deal with Economou's management company, TMS, obligating UDW to make an up-front payment of $2 million and then to pay $835,000 per month (more than $10 million annually) in management fees for the next ten years. The agreement subjected UDW to a $150 million early termination fee (the "TMS Management Contract"). In January 2017, UDW and TMS entered into an amendment to the management agreement increasing the management fees to nearly $1.3 million per month ($15.5 million annually), and allowing TMS to receive up to $10 million in an annual performance fee at the discretion of UDW's board of directors, which Economou chaired. The amendment also retroactively awarded TMS an annual performance award of $7 million for 2016. Complaint ¶ 5.

Third, in 2016, UDW created a subsidiary, Ocean Rig Investments, Inc. ("ORI"), and then transferred $180 million of its cash to ORI for no apparent value (the "ORI Cash Transfer"). Then, ORI used $49.9 million of the $180 million to purchase the remaining UDW shares owned by DryShips. Within three days, DryShips then used $45 million of those funds to pay an outstanding debt to Sifnos, a company beneficially owned by Economou. The transfer of the $180 million achieved nothing other than to make $180 million of UDW's cash inaccessible to creditors and channel $45 million to Economou. Complaint ¶ 6.

Fourth, as it had with ORI, in late April 2016 UDW used another subsidiary named Agon to direct funds to Economou through a suspect purchase of a drillship for $65 million in a Brazilian bankruptcy proceeding (the "Agon Drillship Purchase"). At the time of the purchase, UDW had gone through the extremely costly process of cold stacking three of its drillships and had numerous customers terminate their contracts for future use of UDW drillships. Despite that, UDW transferred $65 million in cash to Agon so that Agon could purchase a drillship via a Brazilian bankruptcy auction. Agon was the only bidder in the auction for the ship. The fact that

UDW had numerous rigs sitting idle made the purchase of an additional rig for $65 million appear to be ludicrous, but the transaction becomes even more suspect when considering the additional layup and reactivation costs of between $130 and $160 million over the next three years. Although the acquisition apparently made absolutely no sense from UDW's perspective, it made sense for Economou personally. The bankrupt Brazilian entity that sold the drillship owed management fees to Economou. And, with the influx of $65 million, Economou was able to get that debt paid. Complaint ¶ 7.

C. Redomiciling UDW

At the time of these allegedly fraudulent transactions, UDW was an RMI company, and Highland was a creditor of UDW. In April 2016, the UDW board transferred UDW's domicile to the Cayman. Complaint ¶ 8.

D. Winding Up Proceedings

On May 24, 2017, almost a year after the domicile transfer, the UDW board initiated liquidation proceedings. In those proceedings, Highland is to be paid only a tiny fraction of what they are due on the Notes UDW issued. In contrast, Economou and other insiders who held only equity are set to retain a 9% equity stake in the reemerged UDW and retain their role in management of the Company. Moreover, Economou's company, TMS, will continue to provide management services under the amended management agreement, receiving $1.3 million per month. Complaint ¶ 10.

From the Defendants' perspective, the purpose of filing the winding up petitions was to facilitate the appointment of joint provisional liquidators ("JPLs") to oversee the restructuring. By order of the Cayman Court dated March 27, 2017, two JPLs were appointed. Upon their appointment, provisional liquidation proceedings were commenced under Part V of the Cayman

Islands Company Law (2016 Revision). Moran Decl. ¶ 3.

Also, on March 27, 2017, the JPLs commenced Chapter 15 bankruptcy proceedings in the New York Bankruptcy Court by filing petitions seeking that Court's recognition of the Cayman restructuring proceedings (the "Cayman Proceedings"). Hollander Decl. ¶ 4. That same day, the JPLs also moved the New York Bankruptcy Court for a temporary restraining order and provisional relief (the "Provisional Relief Motion") enjoining, among other things, creditors affected by the debtors' (UDW, Drill Rigs Holdings Inc., Drillships Financing Holding Inc., and Drillships Ocean Ventures Inc. together "Debtors") proposed schemes of arrangement from "commencing or continuing any actions against the Debtors or their property within the territorial jurisdiction of the United States." The New York Bankruptcy Court granted the temporary restraining order on March 27, 2017 and scheduled a hearing on the Provisional Relief Motion for April 3, 2017. Hollander Decl. ¶ 5.

E. Highland's Draft New York Complaint

On March 31, 2017, Highland filed a limited objection to the Provisional Relief Motion (the "Limited Objection"). In that Limited Objection, Highland sought, *inter alia*, authority to commence (i) involuntary bankruptcy proceedings against one or more of the Debtors and (ii) a fraudulent conveyance action under the New York Debtor and Creditor Law (the "NYDCL") seeking to recover amounts in respect of certain transfers described in the draft complaint attached to the Limited Objection (the "Draft New York Complaint"). Defs.' Joint MTD, 6.

The Draft New York Complaint asserted five counts against UDW, as well the Defendants herein. Highland challenged the same purported fraudulent conveyances that are the subject of its present complaint: (i) UDW's acceptance in June through August 2015 of shares of its stock in repayment of a $120 million loan that it had made to its former parent company,

Defendant DryShips; (ii) the terms of a management agreement entered into with Defendant TMS; (ii) the funding of Defendant ORI with $180 million, and ORI's use of approximately $50 million of those funds in April 2016 to purchase the remaining UDW shares owned by DryShips, as well as DryShips' subsequent transfer of a portion of those funds to Defendant Sifnos; and (iv) Defendant Agon's purchase of a drillship during the market down-cycle. In the Draft New York Complaint, Counts I-IV were for actual fraudulent conveyance, and Count V was for constructive fraudulent conveyance. In their Complaint, Highland alleges these same claims, but have reorganized them such that its First, Third, Fifth and Seventh Causes of Action are for actual fraudulent conveyance, and the Second, Fourth and Sixth Causes of Action are for constructive fraudulent conveyance. Notwithstanding the reorganization, the substance is the same. Highland has also added an Eighth Cause of Action against Messrs. Economou and Kandylidis for aiding and abetting fraudulent conveyance, and a Ninth Cause of Action for declaratory relief. *Id.*

At a hearing conducted on April 3, 2017, Highland argued that New York is "the only place in the world that creditors under these facts can bring such an action" and that "[i]t doesn't exist in the Republic of the Marshall Islands." Hollander Decl. Exhibit B, at 20:23-21:3; *see also* Hollander Decl. Exh. C, at 6. Nonetheless, when its initial efforts in the New York Bankruptcy Court proved unsuccessful, Highland dropped its litigation there and moved onto other venues, as discussed below. Hollander Decl. ¶ 11 and Exh. G.

F. The Cayman Convening Hearing

On May 22, 2017, the Debtors filed petitions with the Cayman Court seeking that Court's approval of what are known as schemes of arrangement effecting their financial restructuring (the "Schemes of Arrangement"). Moran Decl. ¶ 4. Schemes of arrangement under the laws of the Cayman Islands are similar in many respects to Chapter 11 plans under United States bankruptcy

practice. *Id.* ¶ 5.

After notice was provided to creditors including Highland, the Cayman Court conducted what is known as a convening hearing on July 11, 12, and 13, 2017 (the "Convening Hearing"). At the Convening Hearing, the Cayman Court considered whether it would permit the Ocean Rig Debtors to convene meetings ("Creditors' Meetings") of the creditors affected by the Schemes of Arrangement (the "Scheme Creditors") for the purpose of considering the Schemes and, if thought fit by the Scheme Creditors, approving each Scheme. Moran Decl. ¶ 9; *see also id.* ¶¶ 6, 10.

Highland appeared at the Convening Hearing and objected to the UDW Scheme of Arrangement. Moran Decl. ¶13. Highland did so in its capacity as holder of the Notes (approximately $74 million of New York law governed unsecured notes issued by UDW due 2019). Moran Decl. ¶¶ 12, 14. Among other things, Highland complained that if the Schemes of Arrangement were approved, it would be deprived of the ability to prosecute the fraudulent conveyance claims that it is now attempting to pursue in this action. *See, e.g.*, Moran Decl. Exh. Cat 468:13-17 ("[I]f the UDW scheme becomes effective, Highland will cease to be a creditor of UDW and, hence, will be unable to pursue its draft complaint."); *see also id.*, at 486:24-487:7. Moran Decl. ¶ 15. No other party objected to the Schemes of Arrangement. *Id.* ¶ 14.

The Cayman Court rejected Highland's objections or deferred them to a later hearing known as a sanction hearing, described below, and authorized the Debtors to convene the Creditors' Meetings. Moran Decl. ¶18.

G. The Creditors' Meetings

The Creditors' Meetings were conducted on August 11, 2017, after the creditors were provided with notice and access to an explanatory statement (analogous to a disclosure statement

in United States bankruptcy procedure) that contained the information necessary to make an informed decision about the merits of the proposed Schemes of Arrangement. Moran Decl. ¶¶ 7, 18, 20.

All Scheme Creditors had the opportunity to ask questions and let their views be known at the Creditors' Meetings. Highland participated and exercised this right by asking several questions at the UDW Creditors' Meeting. Moran Decl. ¶ 21.

Each Scheme of Arrangement was approved by the unanimous vote of all Scheme Creditors who voted, other than Highland. The UDW Scheme of Arrangement was the only scheme as to which Highland voted, and Highland was the only Scheme Creditor to vote against this or any other Scheme. Of the $3,691,697,000 of indebtedness to be restructured under the UDW Scheme (excluding accrued and unpaid interest), creditors holding $3,548,907,492.01 (or 96.08% of all UDW Scheme indebtedness) voted on the Scheme. Of this amount, 330 creditors (representing 98.51% of the votes cast) holding $3,472,785,492.01 of the UDW Scheme indebtedness (representing 97.91 % of the amount voted) voted to accept the UDW Scheme. Only the five Highland plaintiffs (representing 1.49% of the vote cast) holding $74,122,000 of the UDW Scheme indebtedness (representing 2.09% of the amount voted) voted to reject the UDW Scheme. Moran Decl. ¶¶ 22-23 and Exh. B ¶ 48.

H. The New York Recognition Hearing

The New York Bankruptcy Court conducted a recognition hearing on August 16, 2017. It then issued, on August 24, 2017, an order granting recognition of the Cayman Proceedings as well as a Memorandum Opinion setting forth its rationale for doing so. Hollander Decl. ¶ 10 and Exhs. E and F.

Highland originally had indicated that it would object to the JPLs' request for recognition,

and took extensive discovery (including document production and depositions) in an effort to support its contemplated objection. Highland ultimately terminated its discovery efforts and wrote to the New York Bankruptcy Court on June 16, 2017, advising that Court that it would not object to recognition. Hollander Decl. ¶ 11 and Exh. G.

I. The Complaint

On August 31, 2017, Highland commenced this action by filing the Complaint with this Court. As discussed above, the Complaint is essentially a copy of the Draft New York Complaint except that (i) the claims are asserted under common law and Delaware statutory law rather than under the NYDCL, (ii) UDW is not named as a defendant, and (iii) the Complaint seeks a declaratory judgment that "any purported release obtained in the Cayman insolvency proceeding be declared null and void and that Highland's standing to pursue its claims as creditors of an RMI corporation cannot be collaterally attacked on the basis of the Cayman proceedings."[2] *Compare* Complaint with Hollander Decl. Exh. A.

Highland plaintiffs are explicit that they purport to bring the Complaint "***in their respective capacities as creditors of Ocean Rig UDW Inc.*** . . ." Complaint, introductory paragraph (emphasis added). Specifically, they allege that they sue as "holders of $74 million in notes issued by Ocean Rig. . . ." Complaint ¶ 1.

J. The UDW Scheme and the Preserved Claims Trust

The UDW Scheme of Arrangement provided for all UDW Scheme indebtedness to be discharged in exchange for new equity in UDW or, alternatively, cash pursuant to a cash option.

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[2]Highland dismissed Count 9 for a declaratory judgment "that any purported release obtained in the Cayman insolvency proceeding be declared null and void and that Highland's standing to pursue is claims as creditors of an RMI corporation cannot be collaterally attacked on the basis of the Cayman proceedings initiated in violation of§ 128(5) of the RMI Business Corporations Act" ("BCA").

Moran Decl. ¶ 37.

Pursuant to the Scheme, certain claims of UDW Scheme Creditors, including Highland, were discharged, fully and absolutely. These discharged claims include all claims against UDW arising directly or indirectly in relation to or in connection with the UDW Notes or guarantees given by UDW in respect of, among other things, the Term Loan Debt. Moran Decl. ¶¶ 38-39. Following the discharge, no UDW Scheme Creditor has any remaining interest in or entitlement to any claim under the UDW Notes or the guarantees. *Id.* ¶ 39. Indeed, the UDW Notes are discharged by operation of the Scheme. *Id.* ¶ 41.

The UDW Scheme also provides for the establishment of a litigation trust (the "Preserved Claims Trust," or "PCT") for the benefit of all holders of UDW Scheme indebtedness, including Highland. Under the UDW Scheme, all causes of action are assigned to the PCT that are held by UDW, Defendant Agon or Defendant ORI arising out of the circumstances identified in the Draft New York Complaint. The PCT has initial funding of $1.5 million provided by the reorganized debtors, and the former JPLs are appointed as fiduciaries responsible for the investigation and potential pursuit of any claims transferred to the PCT. Any recovery by the PCT trustees is to be distributed for the benefit of all UDW Scheme Creditors, including Highland. Moran Decl. ¶ 33. Highland was entitled to appoint one of three "Enforcers" with a right to enforce the terms of the Trust but has not done so. *Id.* and Exh. G § 4.3.

K. The Sanction Hearing

After again providing notice to creditors, the Cayman Court conducted on September 4, 5 and 6, 2017, a hearing to determine whether it should "sanction," or approve, the Schemes of Arrangement (the "Sanction Hearing"). Moran Decl. ¶ 25; *see also id.* ¶¶ 8, 26. Highland was once again the only creditor to object. Moran Decl. ¶ 27. As at the Convening Hearing, one of

Highland's primary arguments at the Sanction Hearing was that the UDW Scheme was unfair and inequitable because it would cancel and release all claims under the UDW Notes, and thus deprive Highland of its status as a creditor of UDW and its standing to pursue the claims alleged in the Draft New York Complaint. Moran Decl. ¶ 28; *see also, e.g.*, Moran Decl. Exh. E ¶ 57 ("[T]he effect of the UDW Scheme is to remove Highland's status as a creditor capable of pursuing the Draft Complaint, or any other claim arising out of the matters alleged therein which is conditional upon its creditor status."); *see also* Moran Decl. Exh. B, at 921: 17-22 ("[W]e submit to the Court that in the present case the issue is whether the Court should sanction the scheme, the inevitable effect of which is the deprivation of Highland's status as a creditor, and hence, its ability to pursue any claim is dependent upon that status."). Highland argued that the PCT would be inadequate to protect its interests because Highland would lose the ability to control the litigation. Moran Decl. ¶ 34.

L. The Cayman Court's Approval of the Schemes

The Cayman Court ultimately approved the Schemes of Arrangement and rejected Highland's arguments. The Cayman Court entered orders sanctioning, or approving, the Schemes of Arrangement on September 15, 2017 (the "Sanction Order"). Moran Decl. ¶ 42 and Exh. I. As reflected in the UDW Scheme, "[t]he Cayman Court shall have exclusive jurisdiction to hear and determine any suit, action or proceeding and to settle any dispute which may arise out of . . . any provision of this UDW Scheme or its implementation. . . ." Moran Decl. Exh. H ¶ 28.1.

The Cayman Court also issued a Judgment (the "Cayman Judgment") on September 18, 2017, setting forth its reasons for sanctioning the Schemes of Arrangement. Moran Decl. Exh. J. The Cayman Court found that "[t]he restructuring of all four schemes put together is the best way

of maximizing value for the creditors of the Group." *Id.* ¶ 130. Furthermore, "[u]nder each of the four Schemes the creditors achieve a better result than in a liquidation. That is the position for the UDW 2019 Notes holders and the guarantee Scheme Creditors alike." *Id.*; *see also id.* ¶ 11 ("[T]he alternative to the Schemes will involve inevitably the liquidation of the Group and enforcement of security by creditors which it is accepted would result in value destruction generally for all creditors."); ¶ 14 ("The estimated recovery for Scheme Creditors under the Schemes is appreciably higher in each case than the estimated recovery the creditors would receive on a liquidation."). This is equally as true for Highland as it is for other creditors. *Id.* ¶ 18 (noting that Highland opposed the UDW Scheme "notwithstanding that if the UDW Scheme becomes effective, Highland would also fare better than on a liquidation.").

The Cayman Court also addressed Highland's admission that it would lack standing to pursue the fraudulent conveyance claims at issue in this case once the Schemes of Arrangement had become effective:

> A significant feature of Highland's objection to being forced into a single class involves a draft Complaint which alleges that UDW and/or certain of its subsidiaries had improperly or fraudulently transferred property to related third parties and that such transactions should be set aside as fraudulent conveyances under the New York Debtor and Creditor Law. Highland argues that the effect of the UDW Scheme is to remove entirely its status as a creditor of UDW and hence its ability to bring those claims.

Id. ¶¶ 22-23; *see also id.* ¶ 105 ("The effect of the UDW Scheme is to remove Highland's status as a creditor capable of pursuing the draft Complaint. . . .").

The Cayman Court concluded that the Preserved Claims Trust adequately addresses the fraudulent conveyance claims, if any, possessed by Scheme Creditors including Highland. Indeed, it concluded that "the PCT is a much fairer way of dealing with any claims that may properly be asserted against officers of UDW and their affiliate's" because "[i]t treats all of

UDW's Scheme Creditors rateably and does not give any priority to anyone." *Id.* ¶ 125; *see also id.* ¶ 127 ("There are a number of uncertainties which would arise in any litigation brought by Highland which, depending upon how it proceeds, could well end up with an adverse result for the UDW Scheme Creditors. One of those consequences is a disruption to the ongoing management of the Group and another is potential competition between the PCT claims and any claims Highland might seek to bring."); ¶ 78 ("It is not a unique right of Highland alone to bring these claims. The PCT is set up so that if there is any value in the claims, the UDW Scheme creditors would be entitled to share in that value."); ¶ 77 ("It seems to me that no unfairness results from this to Highland as all UDW Scheme Creditors will benefit from any recoveries pro-rata in accordance with the amount of their Scheme claims against UDW."). The Sanction Order is now final. The time to commence an appeal from the Sanction Order expired on September 29, 2017. Highland did not commence an appeal. Nor did any other party. Moran Decl. ¶ 49.

M. The New York Enforcement Order

On August 22, 2017, the JPLs filed a motion with the New York Bankruptcy Court for an order granting comity to the Cayman Schemes of Arrangement and enforcing them in the United States (the "Enforcement Motion"). Hollander Decl. ¶ 17. Following a hearing conducted on September 20, 2017, the New York Bankruptcy Court entered an order enforcing the Sanction Order ("the Enforcement Order"). Hollander Decl. Exh. J. The Enforcement Order gives full force and effect to the Sanction Order, the Schemes themselves, and the Debtors' restructuring documents. *Id.* Among other things, the Enforcement Order provides: "[T]he Sanction orders, the Schemes, the Restructuring Documents and all other agreements related thereto are hereby recognized, granted comity and given full force and effect and are binding upon and enforceable

against all entities (as that term is defined in section 101 (15) of the Bankruptcy Code) in accordance with their terms, and such terms shall be binding upon and fully enforceable against the Scheme Creditors, whether or not they have actually agreed to be bound by the Schemes or have participated in the Cayman Proceedings." Enforcement Order, at 4 ¶ 2(a).

Highland was given notice but chose not to appear or oppose the Enforcement Motion. Hollander Decl. ¶ 19.

N. The Effective Date

The restructuring effective date for the Schemes of Arrangement occurred on September 22, 2017 (the "Restructuring Effective Date"). Moran Decl. ¶ 50. Upon the Restructuring Effective Date, all creditor claims against UDW under the UDW Notes and UDW's guarantees of the obligations of certain of its subsidiaries, including the Term Loan Debt, were discharged. Moreover, the indenture trustee in respect of the UDW notes has executed a Release of Notes. Moran Decl. Exh. K. Moran Decl. Exh. ¶ 51.

III. LEGAL STANDARD

The Defendants seek dismissal of the Complaint pursuant to MIRCP Rules l 2(b)(1) (for lack of subject matter jurisdiction) and 12(b)(6) (for failure to state a claim).[3] These rules mirror United States Federal Rules of Civil Procedure 12(b)(l), 12(b)(6) and 19(b), respectively, and RMI courts look to United States cases for interpretation of such rules. *Kabua v. M/V Mell Springwood, et al.*, H. Ct. Civ. No. 2015-200 (Jun. 20, 2016), at p 12.

Dismissal pursuant to Rule 12(b)(1) is proper when the court lacks the statutory or constitutional power to adjudicate a claim. *Neroni v. Coccoma*, 591 F. App'x 28, 29 (2d Cir.

[3]The Defendants have, in the course of their briefing, abandoned their motion to dismiss under and MIRCP 19(b) for failure to name a necessary and indispensable party.

2015) (internal quotation marks omitted). A motion to dismiss for lack of standing brought under Rule 12(b)(l) implicates the court's subject matter jurisdiction. *Kabua*, H. Ct. Civ. No. 2015-200, at p 12 (dismissing plaintiffs' claims for lack of standing where plaintiffs had no interest in the property at issue). It is the plaintiff's burden to prove jurisdiction in the face of a motion to dismiss for lack of subject matter jurisdiction. *Celestine v. Trans Wood, Inc.*, 467 F. App'x 317, 318 (5th Cir. 2012); *Trinity Outdoor, L.L.C. v. City of Rockville*, 123 F. App'x 101, 105 (4th Cir. 2005). "Where the defendant brings a factual attack on subject matter jurisdiction [under 12(b)(l)], no presumption of truth applies to the allegations contained in the pleadings, and the court may consider documentary evidence in conducting its review." *Ogle v. Church of God*, 153 Fed. App'x 371, 375 (6th Cir. 2005). Thus, in considering a motion to dismiss under Rule 12(b)(l) for lack of standing, a court may consider evidence outside the pleadings without converting the motion to dismiss to one for summary judgment. *Trinity Outdoor, L.L.C.*, 123 F. App'x, at 105. The court "may consider the complaint supplemented by undisputed facts evidenced in the record, or the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Herbert v. National Academy of Sciences*, 974 F.2d 192, 197 (D.C. Cir. 1992).

On 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." *Kabua*, H. Ct. Civ. No. 2015-200, at p 19. When deciding a motion to dismiss pursuant to MIRCP l 2(b)(6), the court must determine whether, after accepting the material allegations as true and giving the plaintiff the benefit of every reasonable inference that logically flows from the particularized facts alleged, the complaint sets forth sufficient facts to support a cognizable claim. *See Rosenquist v. Economou*, 3 MILR 144, 151 (2011); *Kabua*, H. Ct. Civ. No. 2015-200,

at 19. *See also United States ex rel. Tessler v. City of N. Y.*, 2017 WL 4457141, at *2 (2d Cir. 2017); *Gonzales v. Kay*, 577 F.3d 600, 603 (5th Cir. 2009). However, "conclusory allegations are not considered as expressly pleaded facts or factual inferences." *Rosenquist*, 3 MILR, at 151 (citation omitted).

Likewise, "inferences that are not objectively reasonable cannot be drawn in the plaintiffs favor." *Id.* (citation omitted). In assessing the sufficiency of a plaintiff's allegations, the court may consider "the factual allegations in the plaintiffs' amended complaint, documents attached to the complaint as an exhibit or incorporated in it by reference, matters of which judicial notice may be taken, or documents either in plaintiffs' possession or of which plaintiff had knowledge and relied in bringing suit." *Brass v. Am. Film Techs., Inc.*, 987 F.2d 142, 150 (2d Cir. 1993); *see also Lito Martinez Asignacion v. Rickmers Genoa Shiffahrtgesellschaft MBH & CIE KG*, H. Ct. Civ. No. 2016-026 (Nov. 10, 2016), at 9 ("a court may look to matters of public record in deciding a Rule 12(b)(6) motion"); *In re Lipitor Antitrust Litig.*, 868 F.3d 231, 249 (3d Cir. 2017) ("[W]e may consider documents 'integral to or explicitly referred to in the complaint' without turning a motion dismiss into a motion for summary judgment"); *Cartee Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 47 (2d Cir. 1991) (holding that district court appropriately considered documents not attached to complaint where plaintiff either had the documents in its possession or had knowledge of and relied on the documents in bringing suit).

The legal standard for a Rule 12(b)(2) motion is set forth below with the discussion of the motion.

IV. DISCUSSION

A. Causes of Action

In their Complaint, Highland asserts nine causes of action. With respect to the four

challenged transactions, Highland in their first seven causes of action seeks a judgment avoiding the transactions as fraudulent conveyances and awarding Highland the value of the transactions to extent necessary to satisfy its claims.

- In the First Cause of Action, Highland seeks with respect to the DryShips Loan to avoid the transaction and recover the value to the transaction transfer from Dryships and Economou under either common law or Delaware Code §§ 1304(a)(l), 1307, & 1308.

- In the Second Cause of Action, Highland seeks with respect to the DryShips Loan to avoid the transaction and recover the value to the transaction transfer from Dryships and Economou under either common law or Delaware Code §§ 1304(a)(2), 1307, & 1308.

- In the Third Cause of Action, Highland seeks with respect to the TMS Management Contract to avoid the transaction and recover the value to the transaction transfer from TMS and Economou under either common law or Delaware Code §§ 1304(a)(l), 1307, & 1308.

- In the Fourth Cause of Action, Highland seeks with respect to the TMS Management Contract to avoid the transaction and recover the value to the transaction transfer from TMS and Economou under either common law or Delaware Code §§ 1304(a)(2), 1307, & 1308.

- In the Fifth Cause of Action, Highland seeks with respect to the ORI Cash Transfer to avoid the transaction and recover the value to the transaction transfer from ORI and Economou under either common law or Delaware Code §§ 1304(a)(l), 1307, & 1308.

- In the Sixth Cause of Action, Highland seeks with respect to the ORI Cash Transfer to avoid the transaction and recover the value to the transaction transfer from ORI and Economou under either common law or Delaware Code §§ 1304(a)(2), 1307, & 1308.

- In the Seventh Cause of Action, Highland seeks with respect to the Agon Drillship Purchase to avoid the transaction and recover the value to the transaction transfer from Agon and Economou under either common law or Delaware Code §§ 1304(a)(l), 1307, & 1308.

In the Eight Cause of Action, Highland seeks damages against Economou and Kandylidis for aiding and abetting fraudulent conveyances made with respect to the DryShips Loan and the TMS Management Contract. And, in the Ninth Cause of Action, Highland sought a declaratory

judgment Court, pursuant to 30 MIRC § 202, that any purported release obtained in the Cayman insolvency proceeding be declared null and void and that Highland's standing to pursue their claims as creditors of an RMI corporation cannot be collaterally attacked on the basis of the Cayman proceedings initiated in violation of § 128(5) of the RMI Business Corporations Act. However, as noted above, Highland voluntarily dismissed the Ninth Cause of Action.

B. Grounds for Dismissal

In response to Highlands' causes of action, the Defendants have moved to dismiss on several grounds, including the following:

1. that the Indenture's no-action clause bars Highland's claims;

2. that Highland lacks standing to assert its claims because the UDW Scheme extinguished Highland's status as a creditor;

3. that Highland's claims are barred by the Cayman Court's UDW Sanction Order;

4. that the BAC § 128(5) does not preserve Highland's creditor standing;

5. that permitting Highland to proceed with a collateral attack would undermine the UDW Scheme;

6. that Highland's fraudulent conveyance claims that are based on Delaware statutes and constructive fraud are not supportable by the common law;

7. that the Court does not have personal jurisdiction over the Individual Defendants; and

8. that Highland's claims for aiding and abetting fraudulent conveyances are not supportable at common law.

The Court has carefully considered the parties' moving papers and argument, including the "Defendants' Joint Supplement Brief . . . Made to the Court" ("Defts' Joint Supp Brief") and the Plaintiffs' Post-Hearing Memorandum ("Plts' Post-Hrg Memo").

1. *The Indenture's No-action Clause Bars Highland's Claims.*

The Indenture's no-action clause provides:

"Except to enforce the right to receive payment of principal, premium, if any, or interest or Additional Amounts, if any, when due, ***no holder may pursue any remedy with respect to this Indenture or the Notes*** unless:

(1) such Holder has previously given the Trustee notice that an Event of Default is continuing;

(2) Holders of at least 25% in aggregate principal amount of the then outstanding Notes have made a written request to the Trustee to pursue the remedy;

(3) such Holders have offered the Trustee, and the Trustee has received (if required), security or indemnity (or both) satisfactory to it against any loss, liability or expense;

(4) the Trustee has not complied with such request within 60 days after its receipt of the request and the offer of security or indemnity (or both) satisfactory to it; and

(5) Holders of a majority in aggregate principal amount of the then outstanding Notes have not given the Trustee a direction inconsistent with such request within such 60-day period."

Notes Indenture (Hollander Op. Decl. Ex. I, Section 6.06 (emphasis added)). The law governing the Indenture is the law of New York. Hollander Op. Decl. Ex. I, Section 12.06. The purpose of the no-action clause is to protect the issuer from lawsuits that are frivolous or otherwise not in the economic interest of the corporation and most of its creditors. *See Feldbaum v. McCrory Corp.*, 1992 WL 119095, at *6 (Del. Ch. 1992) (applying New York law).

With respect to fraudulent conveyance claims, courts applying New York law agree that broadly phrased no-action clauses like this one bar fraudulent conveyance claims. *See, e.g., Akanthos Capital Mgmt., LLC v. CompuCredit Holdings Corp.*, 677 F.3d 1286, 1295 (11th Cir. 2012) ("Because courts in the absence of allegations of trustee misconduct have adhered to the general rule that no-action clauses bar fraudulent conveyance claims, we find no persuasive reason to deviate from that rule in the present case").

In Defts' Joint Supp Brief, at 2-11, the Defendants maintain that Highland failed to comply with the procedural requirements of the Indenture's no-action clause and that Highland's

failure constitutes a waiver by Highland of any right to bring the fraudulent conveyance claims. *See Feldbaum*, 1992 WL 119095, at *5 ("Absent an allegation of fraud in the inducement of the purchase, clauses of this sort are generally applied to foreclose bondholder suits under the indenture, where plaintiff has not complied. *See Elliott Associates, L.P v. Bio–Response, Inc.*, Del.Ch., C.A. No. 10,624, Berger, V.C. (May 23, 1989); *Friedman v. Chesapeake & Ohio Ry.*, 395 F.2d 663 (2d Cir.1968); *Ernst v. Film Production Co.*, N.Y. Supr., 264 N.Y.S. 227 (1933).")

In response, Highland maintains that it need not comply with the no-action clause because there no longer is a trustee who can pursue a remedy. *See* Plts' Post-Hrg Memo, at 13-16; *Ellington Credit Fund, Ltd. v. Select Portfolio Servicing, Inc.*, 837 F. Supp. 2d 162, 185 (S.D.N.Y. 2011) ("Moreover, nothing in § 6.07 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.")

However, as the Defendants argue, Highland could have taken steps to meet the procedural requirements of the no-action clause at any time from March 24, 2017 (the date of default, *i.e.*, the date UDW filed for restructuring) until September 22, 2017 (the Restructuring Effective Date). However, Highland failed to do so. Highland did not give the Trustee notice that an event of default was continuing, as required by Indenture Section 6.06(1). Highland did not make a "written request to the Trustee to pursue the remedy," as required by Indenture Section 6.06(2). Highland did not "offered the Trustee, and the Trustee received (if required), security or indemnity (or both) satisfactory to it against any loss, liability or expense," as required by Indenture Section 6.06(3). The 60-day waiting period mandated by Indenture Section 6.06(4) never passed because Highland never made a demand in the first place.

Highland's failure to comply with the no-action clause mandates dismissal of its claims.

Compliance with the no-action clause was a contractual condition precedent to Highland bringing suit against the Defendants. Although Highland is correct that after the September 22, 2017 Restructure Effective Date, there is no trustee to whom Highland can make a request to pursue its claims, at the time Highland filed the present lawsuit on August 31, 2017, the Trustee had not as yet been discharged. Highland could have referred its claims to the Trustee and could have asked the Trustee to suspend its proceeding pending consideration of its claims.

Highland made a tactical decision not to comply with the no action clause from March 24 through September 22, 2017. Highland was well aware that the Notes would be released and the Indenture Trustee would be discharged on the Restructuring Effective Date. *See* Moran Op. Decl. ¶ 10 ("[T]he Ocean Rig Debtors provided Highland with a copy of the proposed explanatory statement and the Schemes of Arrangement more than six weeks before the Convening Hearing [which was conducted on July 11-13, 2017]."). This was the basis for Highland's repeated representations to the Cayman Court that it would lose standing to pursue its claims if the UDW Scheme became effective. *See, e.g.*, July 13, 2017 Cayman Court Tr. (Moran Op. Decl. Ex. C), at 468:13-17 ("[I]f the UDW scheme becomes effective, ***Highland will cease to be a creditor of UDW*** and, hence, will be unable to pursue its draft complaint.") (emphasis added); *id.*, at 486:24-487:7 ("Highland ***and the 2019 Notes Creditors will lose their standing as creditors by reason of the scheme. . . .***") (emphasis added); Highland Skeleton Arg. (Moran Op. Decl. Ex. E) ¶ 57; Sept. 5, 2017 Cayman Court Tr. (Moran Op. Decl. Ex. F), at 921:17-22. Highland knew that if it did not timely comply with the no-action clause and allow the Trustee to consider action on behalf of all creditors, Highland's claims against UDW would be released, the Trustee would be discharged, and Highland would no longer be a creditor with the status to pursue claims for fraudulent conveyances. Under these circumstances, the Court concludes that

Highland is barred from bringing its claim for its failure to comply with the Indenture's no-action clause.

2. *Highland Lacks Standing to Assert Its Claims Because the UDW Scheme Extinguished Highland's Status as a Creditor.*

As noted above and as the Defendant urge in Defts' Joint Supp Brief, at 12, the UDW Scheme eliminated Highland's status as a creditor of UDW, and thus eliminated Highland's standing to prosecute the claims that it asserts in its Complaint.

The parties agree that the common law of fraudulent conveyance (which is at issue here) is derived from the Statute of Elizabeth. Plaintiffs' Response to Defendants' Joint Motion to Dismiss Complaint (the "Opp'n Brief"), at 31 ("As Defendants acknowledge, '[t]he modern law of fraudulent transfers had its origin in the Statute of Elizabeth. . . .'"). *See also, e.g., Husky Int'l Elecs., Inc. v. Ritz*, 136 S. Ct. 1581, 1587 (2016) (describing the Statute of Elizabeth as a "restatement of the law of so-called fraudulent conveyances."). The parties also agree that South Carolina law best reflects U.S. common law derived from the Statute of Elizabeth. *See* the transcript of oral argument on June 6, 2018, at 88:19-89:6 ("South Carolina is the one state, that we can tell, that hasn't adopted one of the either Uniform Fraudulent Conveyance Act or the Uniform Fraudulent Transfer Act. . . . They still rely on common law for fraudulent transfer."). *See generally* Defendants' Opening Brief, at 18-19. Only a creditor has standing to prosecute a fraudulent conveyance claim under the Statute of Elizabeth because a fraudulent conveyance is only fraudulent as to creditors. *Carr v. Guerard*, 365 S.C. 151, 154, 616 S.E.2d 429 (S.C. 2005) ("[A]s soon as his judgment became more than ten years old, [the plaintiff] lost his judgment-creditor status. ***Because he is no longer a creditor, he lacks standing to bring an action under the Statute of Elizabeth.***") (emphasis added).

The UDW Scheme extinguished Highland's status as a creditor of UDW when it became

effective on September 22, 2017. Moran Op. Decl. ¶¶ 41, 50. The UDW Scheme thus eliminated Highland's standing to assert fraudulent conveyance claims challenging transfers of UDW's assets, including the claims asserted in this action. The UDW Scheme contained provisions that released all claims that UDW Scheme Creditors, including Highland, held against UDW. UDW Scheme (Moran Op. Decl. Ex. H) §§ 5.1, 5.2. Furthermore, the indenture trustee for the UDW Notes executed a Release of Notes that released and discharged the UDW Notes effective on the September 22, 2017 Scheme Effective Date. Moran Op. Decl. ¶ 51; Release of Notes (Moran Op. Decl. Ex. K) ¶ 2.

Highland has not disputed that the UDW Scheme extinguished its status as a creditor of UDW. Indeed, as discussed above, Highland conceded this point when it represented to the Cayman Court that it would lose standing to prosecute its fraudulent conveyance claims under the UDW Scheme. *See, e.g.*, July 13, 2017 Cayman Court Tr. (Moran Op. Decl. Ex. C), at 468:13-17, 486:24-487:7; Highland Skeleton Arg. (Moran Op. Decl. Ex. E) ¶ 57; Sept. 5, 2017 Cayman Court Tr. (Moran Op. Decl. Ex. F), at 923:20-25.

Highland's argument that the UDW Scheme did not purport to release third-party claims, such as their fraudulent conveyance claims in this case, is not persuasive. Even though Highland's fraudulent conveyance claims are not expressly released by the UDW Scheme, the UDW Scheme did eliminate Highland's status as a UDW creditor upon which its fraudulent conveyance claims are based. Hence, Highlands' fraudulent conveyance claims were extinguished with the coming into effect of the UDW Scheme.

3. *Highland's Claims Are Barred by the Cayman Court's UDW Sanction Order.*

As the Defendants argue in Defs' Joint Supp Brief, 15-16, the Cayman Court's final judgment is dispositive of Highland's claims. By Order dated September 15, 2017 (the "Sanction

Order"), the Cayman Court "sanctioned," or approved, the UDW Scheme. Moran Op. Decl. Ex. I. The Sanction Order provides:

> "THIS COURT HEREBY SANCTIONS the Scheme of Arrangement, a copy of which is annexed hereto, pursuant to section 86(2) of the Companies Law (2016 Revision) ***so as to be binding on*** the Petitioner and ***the Scheme Creditors*** (as defined therein)."

Moran Op. Decl. Ex. I, at 1 (emphasis added).

The Highland plaintiffs are "Scheme Creditors" subject to the Cayman Court's Order. *See* Moran Op. Decl. ¶ 38. Thus, Highland's status as a creditor of UDW, and it standing to pursue the claims asserted here, was extinguished on the Restructuring Effective Date (*i.e.*, September 22, 2017. Moran Op. Decl. ¶ 50).

The Cayman Court also issued a Judgment on September 18, 2017, in which it provided its rationale for sanctioning the UDW Scheme. Moran Op. Decl. Ex. J. The Cayman Court found that "[t]he restructuring of all four schemes put together is the best way of maximizing value for the creditors of the Group." *Id.* ¶ 130. "Under each of the four Schemes the creditors achieve a better result than in a liquidation. *Id.*

Throughout the process, the Cayman court afforded Highland an opportunity to be heard. Highland actively participated in six days of hearings before the Cayman Court, and the Cayman Court considered and addressed Highland's arguments in the Cayman Judgment. The Cayman Court noted Highland's objections, including its request that "the court should direct the amendment of the UDW Scheme so as to give effect to [a] modification [proposed by the Highland] and/or to exclude Highland from those creditors of UDW that were bound by the Scheme and/or refuse to sanction the UDW Scheme on the ground that it was unfair to Highland." *Id.* ¶ 104. The Cayman Court also took note of Highland's admission that "***[t]he effect of the UDW Scheme is to remove Highland's status as a creditor*** capable of pursuing the

draft Complaint and [Highland's] proposal seeks to carve Highland out of the UDW Scheme to preserve its standing as a creditor." *Id.* ¶ 105 (emphasis added).

However, the time to appeal from the Sanction Order expired September 29, 2017. No appeal was filed. The Sanction Order is now final. Moran Op. Decl. ¶ 49. Highland had notice and an opportunity make its arguments for the Cayman Court. Highland does not – and cannot – argue that the Cayman Proceedings violated due process.

Under these circumstances, the Court can grant comity to, *i.e.*, recognize and give effect to, the Sanction Order. "[C]omity has long counseled courts to give effect, whenever possible, to the executive, legislative and judicial acts of a foreign sovereign so as to strengthen international cooperation." *Asignacion v. Rickmers*, H. Ct. Civ. No. 2016-026 (Nov. 10, 2016), at p. 18 (citation omitted). It is particularly important to grant comity to foreign restructurings because otherwise dissatisfied creditors can upset a reorganization that already has gone into effect by bringing a collateral attack in another jurisdiction. *Victrix S.S. Co., S.A. v. Salen Dry Cargo A.B.*, 825 F.2d 709, 713-14 (2d Cir. 1987) ("***[I]f all creditors could not be bound, a plan of reorganization would fail.*** . . . Under general principles of comity . . . federal courts will recognize foreign bankruptcy proceedings provided the foreign laws comport with due process and fairly treat claims of local creditors.") (emphasis added) (internal citations omitted); *In re Schimmelpenninck*, 183 F.3d 347, 365 (5th Cir. 1999) (quoting *Victrix S.S. Co. v. Salen Dry Cargo A.B.*, 773 F.2d 452, 458 (2d Cir. 1985)) ("We favor granting comity to foreign bankruptcy proceedings because 'the assets of the debtor [can] be dispersed in an equitable, orderly, and systematic manner, rather than in a haphazard, erratic or piecemeal fashion.'").

Comity should be denied only when foreign laws are repugnant to the laws and policies of the forum. *In re Schimmelpenninck*, 183 F.3d, at 365. Granting comity would not be

against RMI public policy. Notwithstanding Highland's arguments, the RMI does not have a policy against restructuring be the restructuring under Chapter 11 of the United States bankruptcy code or the Cayman Islands court-supervised restructuring.

The New York Bankruptcy Court already has granted comity to the Sanction Order. *See* Order Granting JPL's Motion for an Order Giving Full Force and Effect to Cayman Schemes of Arrangement (Hollander Op. Decl. Ex. J), at 4 ("[T]he Sanction orders, the Schemes, the Restructuring Documents and all other agreements related thereto are hereby recognized, granted comity and given full force and effect ....").

For these reasons, the Court recognizes and grants the Sanction Order, the Judgment, and related documents comity and orders that they shall have full force and effect in the RMI. Because the Court grants the Sanction Order comity, it need not consider the Defendants' argument of claim preclusion.

4. *BCA § 128(5) Does Not Preserve Highland's Creditor Standing.*

Highland argues that Section 128(5) of the Business Corporations Act preserves its standing as a UDW creditor notwithstanding the transfer of UDW's domicile. Section 128(5) provides as follows:

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

Highland is correct in that any creditor action it could have brought immediately before the transfer, it could have brought immediately after the transfer. However, for at least three reasons, this language does not preserver Highland's creditor standing in the face of changes in the law and actions by others.

First, nothing in the language of Section 128(5) provides that Highland rights as a creditor cannot be affected by subsequent law or acts. In fact, Highland by contract agreed that UDW could be subject to a different set of laws. In the Indenture, Highland agreed that the Cayman Islands was a "Permitted Jurisdiction" to which the UDW could transfer. In April 2016, the UDW board transferred UDW's domicile to the Cayman Islands.

Eleven months thereafter, in March 2017, the UDW board took advantage of Cayman law and commenced winding up proceedings. The winding up action was an event of default under the Indenture, and as a creditor Highland could have taken steps to pursue their fraudulent conveyance claims in the RMI. However, Highland did not make a demand for action on the Indenture trustee as required under the no-action clause. Highland waited until August 31, 2017, to file this case. Two weeks thereafter, on September 15, 2017, the Cayman action (in which Highland had participated) became final with the issuing of the Sanction Order. The Sanction Order terminated Highland's rights as a UDW creditor. Highland did not appeal the Sanction Order. Highland's rights to bring fraudulent conveyance claims evaporated. Highland slept on its rights.

Second, Highland has not established that in the absence of the transfer of domicile, the UDW board could not have pursued the Cayman Island winding up. As the Defendants argue in Defs' Joint Supp Brief, at 24-26, the record evidence demonstrates that UDW could have restructured its debt through the Cayman Proceedings without redomiciling to the Cayman Islands. Three of UDW's subsidiaries restructured their debt through the Cayman Proceedings while remaining RMI corporations. There were four debtors in the Cayman Proceedings: UDW, and three of its subsidiaries: Drill Rigs Holdings Inc., Drillships Financing Holdings Inc. and Drillships Ocean Ventures Inc. (the "RMI Subsidiaries"). Moran Op. Decl. ¶¶ 2, 3. The RMI

Subsidiaries were RMI corporations at the time of the restructuring, and remain RMI companies today. Moran Reply Decl. ¶¶ 8, 10. The RMI Subsidiaries' presence and operations in the Caymans established a basis for them to undergo restructuring proceedings there, and "UDW was in substantially the same position as the RMI Entities in terms of the assets it held and business it carried out in the Cayman Islands." *Id.* ¶ 21 & n.4.

Thus, as UDW's Cayman law expert Caroline Moran opined: "[E]ven if it had not redomesticated to the Cayman Islands, [UDW] 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." *Id.* This is corroborated by the New York Bankruptcy Court's findings, establishing that UDW's center of main interest was in the Cayman Islands based upon its factual findings that UDW had its management and operations, offices, board meetings, officers' residences, bank accounts and books and records in the Cayman Islands, conducted restructuring activities there, and had given notice to the SEC and its contractual counterparties that it had relocated there. *In re Ocean Rig UDW Inc.*, 570 B.R. 687, 704 (Bankr. S.D.N.Y. 2017).

Either UDW's board or a friendly creditor could have initiated the Cayman Proceedings if UDW had remained an RMI corporation. Cayman law allows a company's directors to file a winding up petition provided they are authorized to do so under the law of the country of incorporation. Moran Reply Decl. ¶ 14. Under RMI law, winding up proceedings may be initiated by the board of directors. *See* 52 MIRC § 48 ("Subject to limitations of the articles of incorporation and of this Act as to action which shall be authorized or approved by the shareholders, all corporate powers shall be exercised by or under authority of, and the business and affairs of every corporation shall be managed by, a board of directors."); 52 MIRC § 71 (listing corporate actions that require a vote of the shareholders, which does not include initiating

winding up proceedings). A winding up petition also could have been initiated under Cayman law by a friendly creditor. Moran Reply Decl. ¶ 16.

In the face of the Defendants' 12(b)(1) motion to dismiss for lack of standing, the burden of proof is on the plaintiffs, Highland, asserting the Court has subject matter jurisdiction. However, regarding the need redomiciliation, Highland has not overcome the record set forth by the Defendants. The Moss declaration does not show that absent the transfer of domicile, UDW would have been a "foreign company with limited connection to the Cayman," and not able to restructure its debt through the Cayman procedure.

Third, under Highland's interpretation of Section 128(5), if after the transfer of a corporation's domicile from the RMI to another jurisdiction, the RMI changed its laws in a way that limited creditors rights (*i.e.*, to match the Cayman statute), then creditors of the re-domiciled corporation would still be entitled to creditor rights under the old RMI law. They would have more rights than if the transfer of domicile had not occurred. This is an absurd result: it argues against Highland's interpretation of Section 128(5) as preserving creditor rights in the face of action taken under a new or different law.

For these reasons, the Court concludes that BCA Section 128(5) does not preserve Highland's rights as a creditor.

5. *Permitting Highland to Proceed with a Collateral Attack Would Undermine the UDW Scheme.*

Another argument against Highland's interpretation of Section 128(5), is that if Highland were permitted to proceed with its fraudulent conveyance claims under Section 128(5), this would have the effect of reinstating $74 million of UDW debt that was discharged as part of the restructuring, putting all of UDW's creditors at risk. As the Defendants argue in Defts' Joint Supp Brief, at 27, the Cayman Proceedings restructured approximately $3.7 billion in debt, and

"resulted in a massive deleveraging of the Ocean Rig Debtors." Moran Op. Decl. ¶ 2. The UDW Scheme, in particular, was supported by 98.5% of the creditors who cast a vote, with only Highland voting against. *Id.* ¶ 23. This included several creditors whom the Cayman Court found to be "in exactly the same position as Highland (as holding exclusively 2019 Notes and who are not members of, or affiliates of, the Group or the Ad Hoc Group)." Cayman Judgment (Moran Op. Decl. Ex. J) ¶ 81.

If the Court were to accept Highland's arguments under BCA § 128(5), there would be nothing to prevent Highland from suing UDW under the UDW Notes. Highland's entire argument is premised on the notion that BCA § 128(5) operates to prevent the loss of any creditor rights that existed prior to UDW's redomiciliation. Highland's contention that claims against UDW would be barred because "UDW sought and obtained a release" cannot be squared with Highland's premise that the same release is ineffective to eliminate Highland's creditor status for purposes of its fraudulent conveyance claims. Tr., at 85:4-5. Either the release is effective, in which case the Court should dismiss Highland's claims, or it is nullified by BCA § 128(5), in which case Highland can sue UDW as well as Defendants. If Highland were permitted to proceed, this would have the effect of reinstating $74 million of UDW debt that was discharged as part of the restructuring, putting all of UDW's creditors at risk. Complaint ¶ 1 (Plaintiffs are "holders of $74 million in notes issued by Ocean Rig. . . ."). This would undermine the UDW Scheme.

6. *Some of Highland's Fraudulent Conveyance Claims Are Recognized Under the Common Law.*

The Defendants argue that to the extent that Highland's fraudulent conveyance claims are based upon Delaware statutes and constructive fraud, a statutory claim, they are not recognized by the common law and should be dismissed. *See* Defs' Joint Supp Brief, at 33. In response,

Highland argues that they have adequately alleged their fraudulent conveyance claims under common law, including the common law notion of "badges of fraud." *See* PLS' Post-Hrg Memo, at 24. At the end of the day, the parties seem to be saying the same thing.

That is, in the absent of an RMI statute, the American common law applies to Highland's fraudulent conveyance claims. *See Mongaya v. AET MCV Beta LLC, et al.*, RMI SCT Civ. No. 2017-003, at 9-10 (Aug. 7, 2018); *Samsung Heavy Industries Co. Ltd. v. Focus Inv. Ltd. and Karamehmet*, RMI SCT Civ. No. 2018-02, at 19-20 (Sept. 6, 2018) (*citing Likinbod and Alik v. Kejlat*, 2 MILR 65, 66 (1995)). Delaware statutes and statutory provisions providing for a claim of constructive fraudulent conveyance do not apply in the RMI.

As the Defendants point out, the American common law of fraudulent conveyances is the Statute of Elizabeth. *Husky Int'l Elecs., Inc. v. Ritz*, 136 S. Ct., at 1587. The Statute of Elizabeth requires actual intent, defined as intent of the grantor to delay, hinder or defraud its creditor. *See, e.g., Royal Z. Lanes, Inc. v. Collins Holding Corp.*, 524 S.E.2d 621, 623 (S.C. 1999). The common law does not recognize the claim of constructive fraudulent conveyance, but instead requires proof of actual intent by clear and convincing evidence. *See id.*, at 622; *see also Oskin v. Johnson*, 735 S.E.2d 459, 463 (S.C. 2012) (actual fraud under the Statute of Elizabeth must be established by clear and convincing evidence); *Sumner v. Janicare, Inc.*, 366 S.E.2d 20, 21 (S.C. Ct. App. 1988) ("a transfer for valuable consideration may be set aside only where . . . made by the grantor with the actual intent of defrauding his creditors and when the intent is imputable to the grantee."). Actual intent may be established by "badges of fraud" which may result in an inference or presumption. However, the badges are not a substitute for intent, but only a way proving intent, and any presumption may be rebutted. *Royal Z. Lanes*, 524 S.E.2d, at 623; *Marine Midland Bank v. Murkoff*, 508 N.Y.S.2d 17, 20 (N.Y. App. Div. 1986).

Accordingly, the Court dismisses Highland's First, Third, Fifth, and Seventh Causes of Action to the extent they are based upon Delaware statutory law, and the Court dismisses the Plaintiff's Second, Fourth, and Sixth Causes of Action, which are based upon Delaware statutory law and clams of constructive fraudulent conveyance.

7. *The Court Does Not Have Personal Jurisdiction Over the Individual Defendants.*

The Individual Defendants argue that the Court should dismiss the Highland's claims against them because the Court does not have personal jurisdiction over them. When a defendant moves to dismiss for lack of personal jurisdiction under MIRCP Rule 12(b)(2), the plaintiff bears the burden of demonstrating that the court has jurisdiction over the defendant. *See Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1154 (9th Cir. 2006). "This demonstration requires that plaintiff make only a *prima facie* showing of jurisdictional facts to withstand the motion to dismiss." *Id.* (internal quotations and citations omitted).

In considering a motion to dismiss, courts assume the truth of the allegations contained in the complaint. *See Mann v. Brenner*, 375 Fed. App'x 232, 235 (3d Cir. 2010) ("the District Court must accept the plaintiff's well-pleaded allegations as true. . . ."). "To withstand a . . . motion to dismiss, 'a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face."'" *Eurofins Pharma US Holdings v. BioAlliance Pharma SA*, 623 F.3d 147, 158 (3d Cir. 2010) (*citing Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (*quoting Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L.Ed.2d 929 (2007)). "[T]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 129 S. Ct., at 1949.

In the present case, Highland has not established that the Court has personal jurisdiction over the Individual Defendants as residents, by personal service within the RMI, or by consent.

Accordingly, the Court must determine if it has personal jurisdiction over the Individual Defendants as non-residents.

As the Supreme Court stated in *Samsung Hvy, Eqpt. Inds. Co., Ltd., v Focus Invs. Ltd and Karamehmet*, SCt. Civil Case No. 2018-02, at 9 (May 28, 2018): "There are two broad types of personal jurisdiction: specific jurisdiction and general jurisdiction. *Helicopteros Nacionales de Columbia v. Hall*, 466 U.S. 408, 414-16 (1984). Specific jurisdiction refers to jurisdiction over causes of action arising from or related to a defendant's actions within the forum state. *Id.* at 414. Specific jurisdiction may not be exercised where none of the actions complained of occurred within or had any connection with the forum state. *Sondergard v. Miles, Inc.*, 985 F.2d 1389, 1392 (8th Cir. 1993). In contrast, general jurisdiction refers to the power of a state to adjudicate any cause of action involving a particular defendant regardless of where the cause of action arose. For general jurisdiction to exist, the non-resident defendant must be engaged in 'continuous and systematic contacts' within the forum. *Helicopteros*, supra, at 416."

In the present case, Highland has not alleged facts sufficient to establish that the Individual Defendants are subject to general jurisdiction in the RMI. The Individual Defendants' contacts in the RMI are not continuous or substantial enough to establish general jurisdiction. Accordingly, the Court need only consider the question of whether the Individual Defendants' contacts are sufficient to establish specific jurisdiction. *See Glencore Grain Rotterdam B. V. v. Shivnath Rai Harmarain Co.*, 284 F .3d 1114, 1125 (9th Cir. 2002).

In order to establish specific jurisdiction, Highland must establish two things: (i) that the RMI's long-arm statute confers such jurisdiction; and (ii) that the exercise of such jurisdiction is consistent with principles of due process, *i.e.*, the defendant must have "minimum contacts" with the forum.

a. **Highland has made a showing that personal jurisdiction exists under the RMI's "long arm statute."**

Under the RMI's "long arm statute," Section 251 of the Judiciary Act 1983, 27 MIRC Ch. 2, a non-resident person or entity is subject to civil jurisdiction in the RMI if the non-resident engages in specified conduct. *See* 27 MIRC 251. Only causes of action referenced in Section 251, may be asserted against a person in proceedings based upon Part VII, Division 2, of the Judiciary Act 1983. *See* 27 MIRC 254.

Highland has alleged facts that would support the assertion of personal jurisdiction under Section 251(1)(n), which provides as follows:

> (1) Any person, corporation or legal entity who, in person or through an agent or servant
>
> * * *
>
> (n) 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 RMI as to any cause of action arising from any of those matters.

Highland has adequately alleged common law fraudulent conveyance claims against the Individual Defendants who specifically targeted and affected UDW, an RMI person, depleting UDW of its assets through the DryShips Loan, the TMS Management Contract, the ORI Cash Transfer, and the Agon Drillship Purchase. This "affect" on UDW resulted in the alleged loss to Highland. *See, e.g., Myjac Fnd., Panama v Arce and Alfaro*, RMI SCT. No. 2017-006, at 9 (Jul 30, 2018); *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").

However, in addition to satisfying the RMI's long arm statute, Highland must also show that the non-resident Individual Defendants have 'minimum contacts' with the RMI such that the Court's exercise of jurisdiction would be fair and in accordance with due process.

b. Highland has not made a showing that the exercise of personal jurisdiction over the Individual Defendants is in accordance with due process.

The exercise of such jurisdiction must be consistent with the due process principles, *i.e.*, the defendant must have "minimum contacts" with the forum. Courts have interpreted "minimum contacts" to mean that (a) a defendant "has performed some act or consummated some transaction within the forum or otherwise purposefully availed himself of the privileges of conducting activities in the forum," (b) "the claim arises out of or results from the defendant's forum-related activities," and (c) "the exercise of jurisdiction is reasonable." *Pebble Beach Co.*, 453 F.3d, at 1154-1155. "The plaintiff bears the burden of satisfying the first two prongs of the test. If the plaintiff fails to satisfy either of these prongs, personal jurisdiction is not established in the forum state. If the plaintiff succeeds in satisfying both of the first two prongs, the burden then shifts to the defendant to 'present a compelling case' that the exercise of jurisdiction would not be reasonable." *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (C.A.9 (Cal.), 2004) (*citing Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476–78, 105 S. Ct. 2174, 85 L.Ed.2d 528 (1985)).

Having carefully reviewed the parties' submissions and arguments, the Court concludes that the Individual Defendants have not conducted activities in the RMI that satisfy the first two prongs of the minimum contacts test. First, the alleged fraudulent transactions (*i.e.*, the DryShips Loan, the TMS Management Contract, the ORI Cash Transfer, and the Agon Drillship Purchase) were not consummated in the RMI, nor did the Individual Defendants perform some act in the RMI with respect to the transactions. Second, Highland claims do not arise out or result from forum-related activities (*i.e.*, the incorporation and redomiciling of UDW), but from the four above-referenced transactions consummated outside of the RMI.

If a defendant has not conducted activities in the forum, as the Individual Defendants have not, the first and second prongs can be satisfied only if he has "'purposefully directed' his activities toward the forum." *Pebble Beach, supra*, 453 F.3d, at 1155. Purposeful direction is evaluated under the "effects test" articulated by the U.S. Supreme Court in *Calder v. Jones*, 465 U.S. 783 (1984).

> To satisfy this test the defendant must have (1) committed an intentional act, which was (2) expressly aimed at the forum state, and (3) caused harm, the brunt of which is suffered and which the defendant knows is likely to be suffered in the forum state.

Pebble Beach, supra, 453 F.3d, at 1156 (internal quotation marks omitted).

However, the Individual Defendants have not committed any act expressly aimed at the Marshall Islands. On the contrary, the transactions for which Highland seeks to hold the Individual Defendants liable — the four above-referenced transactions — were not expressly aimed at the RMI. To the extent that the four transactions affected or harmed UDW, when it was a Marshall Islands non-resident domestic corporation, they affected or harmed UDW where it had its principal place of business — in Cypress, and later in the Cayman Islands — not in the RMI.[4] *See, e.g., Dakota Indus., Inc. v. Dakota Sportswear, Inc.*, 946 F.2d 1384, 1388-89 (8th Cir. 1991) (the plaintiff corporation "has its principal place of business in the forum state and thus suffered the economic injury there"); *Ubiquiti Networks, Inc. v. Kozumi USA Corp.*, 2012 WL 1901264, at *5 (N.D. Cal. 2012) (Delaware corporation harmed for personal jurisdiction purposes in California, its principal place of business); *Corinthian Mortg. Corp. v. First Sec. Mortg. Co.*, 716 F. Supp. 527, 529 (D. Kan. 1989) (collecting cases for the proposition that injury to corporation occurs "at its principal place of business").

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[4]Prior to its redomiciling to the Cayman Islands, UDW's principal place of business was in Cypress. It was never the RMI. Kandylidis Dec. ¶¶ 28-32.

As UDW has a principal place of business outside of the RMI, this case differs materially from the *Myjac* case. In *Myjac*, the Supreme Court found that two RMI non-resident domestic corporations were holding companies and as such had no principal place of business. Accordingly, the Supreme Court held "it is reasonable and consistent with due process for the court to exercise jurisdiction over individuals who . . . claim to be shareholders of corporations that can only be considered to be at home in the Marshall Islands; . . . ." *Myjac*, at 10. In the present case, UDW is not merely a holding company with no principal place of business. It has had and has a principal place of business outside the RMI. The Supreme Court's decision in *Myjac* is distinguishable.

For these reasons, the Court dismisses Highland's claims against the Individual Defendants for lack of personal jurisdiction.

8. *Highland's Claims for Aiding and Abetting Fraudulent Conveyances Are Not Provided for by Statute or American Common Law.*

The Individual Defendants argue that the Court should dismiss Highland's claims for aiding and abetting fraudulent conveyances, because neither is provided for under RMI statute nor American common law.

The parties agree that the RMI does not by statute provide for causes of action based upon aiding and abetting fraudulent conveyances. In the absent of such a statute, the Court must look to the American common law. *See Mongaya, supra.* However, the American common law does not provide for causes of action for aiding and abetting fraudulent conveyances. The United States Supreme Court set out the established American 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). Neither RMI statutory law or American common law allow for actions of aiding and abetting fraudulent conveyances.

In support of their claims for aiding and abetting, Highland refers the Court to an English case, *Vivendi v. Richards* [2013] BCC 771. *See* Decl. of Gabriel Moss, QC ¶¶ 38–40. Although in *Vivendi* there were facts alleged that could be construed as supporting a fraudulent conveyance claim, no such claim was brought. Instead, the only claims in that case were for breach of fiduciary duty and dishonest assistance of breach of fiduciary duty. Moss Decl. Exh. K, at pp. 796 ¶ 117, 811 ¶ 179. While *Vivendi* may establish potential grounds for liability under English law, it is not relevant to the question whether there is such a thing as a claim for aiding and abetting fraudulent conveyance under RMI law, English law, or any other law.

For these reasons, the Court dismisses Highland's claims for aiding and abetting fraudulent conveyances.

V. CONCLUSION

For the above reasons, the Court grants "Defendants' Joint Motion to Dismiss Complaint" and grants "Defendants George Economou's and Antonios Kandylidis's Motion to Dismiss." Accordingly, the Court dismisses this matter with the parties to bare their own costs.

So, Ordered and Entered: September 27, 2018.

Carl B. Ingram
Chief Justice, High Court