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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 Foreign Proceedings.	(Jointly Administered)

HIGHLAND'S RESPONSE IN OPPOSITION TO FOREIGN REPRESENTATIVE'S MOTION PURSUANT TO SECTION 1521(a) OF THE BANKRUPTCY CODE AND RULE 9020 OF THE FEDERAL RULES OF BANKRUPTCY PROCEDURE FOR AN ORDER ENFORCING PRIOR ORDER OF BANKRUPTCY COURT AND ENJOINING HIGHLAND FROM PROSECUTING ITS COMPLAINT IN THE HIGH COURT OF THE REPUBLIC OF THE MARSHALL ISLANDS AND RELATED RELIEF

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Highland Floating Rate Opportunities Fund, Highland Global Allocation Fund, Highland Loan Master Fund, L.P., Highland Opportunistic Credit Fund, NexPoint Credit Strategies Fund, and Highland Capital Management, L.P. ("**Highland**"), submit this Response in Opposition to Foreign Representative's[1] Motion Pursuant to Section 1521(a) of the Bankruptcy Code and Rule 9020 of the Federal Rules of Bankruptcy Procedure for an Order Enforcing Prior Order of Bankruptcy Court and Enjoying Highland from Prosecuting its Complaint in the High Court of the Republic of the Marshall Islands and Related Relief ("**Motion**"), as follows:

INTRODUCTION

Ocean Rig UDW, Inc. ("**UDW**") successfully implemented a scheme of arrangement in the Cayman Islands (the "**Scheme**") and in doing so, transformed all creditors to equity holders, thereby depriving its creditors of standing to bring fraudulent-transfer claims in the U.S., which requires that plaintiffs be current creditors to have standing. Notwithstanding the fact that UDW never obtained a release of Highland's claims in the Scheme—the Preserved Claims Trust expressly states, "the alleged claims [in Highland's Draft Complaint] ***are not*** being released under the Schemes"[2]—UDW asks this Court to provide non-debtor recipients of fraudulent transfers a full release from any liability under Republic of the Marshall Islands ("**RMI**") law. If this Court issues an injunction here, those non-debtors will be the real beneficiaries, not UDW. UDW is not seeking comity of prior-issued releases in its Scheme, but instead is asking this Court to invoke its ancillary jurisdiction to block an RMI court from making its own decision as to what effect, if any, the Scheme has on Highland's standing to bring its RMI claims.

[1] Although the relief is technically requested by the foreign representative as authorized by the Cayman Islands court, the foreign representative, who is the Vice President and Secretary of UDW, is now acting on behalf of UDW with no court oversight because the provisional liquidation proceedings in the Cayman Islands are closed.

[2] Dkt. 162-7 at 3.

Importantly, when Highland purchased over $74 million of UDW debt ("**2019 Notes**") that gives rise to Highland's claims in the RMI, UDW was an RMI-incorporated company. UDW later decided to redomicile and reincorporated in the Cayman Islands. Consequently, UDW became subject to an RMI statute promulgated by the RMI legislature, the Nitijeļā, that governs the terms of an RMI company's departure from the jurisdiction. *See* § 128 of the RMI Business Corporations Act ("**RMI BCA § 128**") (entitled "Transfer of domicile of domestic corporation to foreign jurisdiction"). Critically, RMI BCA § 128(5) states: "The 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).

This RMI statute was not addressed in the provisional liquidation proceedings ("**Cayman Proceedings**") or in this Court. Although UDW submitted evidence on the enforcement of the Scheme in the RMI through an expert in the Cayman Proceedings, that expert omitted any reference to RMI BCA § 128(5) and the clearly expressed RMI policy that redomiciliation of an RMI company "shall not" adversely affect the rights of creditors that existed prior to redomiciliation.[3] Instead, UDW's RMI-law expert stated that if the Scheme were approved, *it would be enforced* in the RMI to prohibit creditor claims there. *See* Ex. A to the Decl. of Stephen Leontsinis ("**Leontsinis Dec.**"), at 5–6.

Now, rather than directly seeking enforcement in the RMI as UDW's expert opined, UDW asks this Court to indirectly enforce its Cayman Scheme in the RMI through the United States. The roundabout way UDW is employing to block Highland's pending fraudulent-transfer

[3] The same RMI attorney appeared in these proceedings to provide evidence on RMI law and again omitted any reference to RMI BCA § 128(5). *See* Decl. of Dennis Reeder, Dkt. 7.

claims in the RMI (the "**RMI Proceeding**") is even more egregious given that the defendants, who are all RMI corporations or officers thereof, have already appeared in that proceeding and filed motions to dismiss asserting the same standing arguments that UDW relies on here. Ex. F to the Decl. of James McCaffrey ("**McCaffrey Dec.**").

Although it is clear that UDW and the RMI defendants would like to avoid having the RMI court apply its law to Highland's claims, the RMI court is the proper forum to determine whether the RMI defendants' standing argument will succeed. And, this Court, acting solely in its capacity as an ancillary court in the United States, should not step in to prevent the RMI court from making that determination.

Significantly, RMI BCA § 128(5)'s prohibition on adversely affecting creditors' rights means Highland retained its standing to bring its third-party fraudulent-transfer claims as of the date of redomicile, regardless of whether the Scheme discharged the debt due from UDW or whether Highland's debt was transformed to equity. As a result, asserting the RMI claims does not violate the Scheme, or this Court's order, because there is no need to unwind the discharge of its debt. Under RMI law, Highland need not be a current creditor with the ability to recover its debt from UDW. Highland only had to be a creditor at the time of redomicile who was later harmed. There is no dispute that Highland meets that requirement.

And, as is clear from UDW's representations in the Cayman Proceedings, the Scheme only prohibits Highland from asserting claims that require it to be a *current* creditor of UDW because creditors were transformed to equity. Ex. A to the Decl. of Craig A. Boneau ("**Boneau Dec.**"), Transcript of Convening Hearing at 192:14–193:2.[4] Although creditors were asked to

[4] At the Convening Hearing, UDW's counsel told the Cayman court, "***It's permissible for a scheme directly to release claims against third parties*** where that's necessary to give effect to the arrangement . . . . ***But even that's not what's being proposed***. The only reason why there's

sign affirmative releases to receive distributions under the Scheme, Highland never signed that release and has not received a distribution under the Scheme. Because Highland's claims were not released and because it does not need to be a current creditor with a right to recourse against UDW to assert its claims against non-debtor fraudulent transfer recipients in the RMI, there is no violation of the Scheme. Thus, the permanent injunction UDW seeks would provide the non-debtor recipients of those fraudulent transfers a full release from Highland's claims, despite no such release being included in the Scheme.

Notably, UDW fails to articulate any true harm to the Scheme or to UDW that would result from Highland's pursuit of the RMI claims. UDW points only to the potential interference with unnamed "claims" in the Preserved Claims Trust ("**PCT**"), which received the discharged *debtors'* claims, as proof that Highland's pursuit of the RMI claims will interfere with the Scheme. Notwithstanding UDW's affirmative representations to this Court, the PCT does not have the power to bring fraudulent-transfer claims. Decl. of Gabriel Moss ("**Moss Dec.**") ¶ 31. Because no creditors' claims were assigned to the trust, the PCT does not have the power to bring creditor claims. Meanwhile, because Joint Provisional Liquidators ("**JPLs**") do not have the power to bring Cayman statutory claims and because they no longer are JPLs anyway, the UDW claims transferred to the trust do not include any fraudulent-transfer claims. In fact, it is entirely unclear what claims against third parties the PCT has at all.

UDW cannot justify the injunction it seeks here. And its attempt to do so by relying solely on conclusory statements such as, "the [RMI Proceeding] would cause severe financial

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any interference with the creditor's right to claim under New York Debtor and Creditor Law is because ***the effect of the scheme is to release the claims that the creditors have against UDW, which is what gives them standing to bring debtor and creditor law action***." *Id.* (emphasis added).

harm to the Debtors," must fail. Mot. at 14. Hyperbolic generalities cannot change the fact that Highland is bringing its claims against third parties that received tens of millions of dollars in fraudulent transfers and that will have no effect on UDW's continued operations now that UDW has re-emerged from provisional liquidation and is moving forward with its business.

Finally, any complaint regarding forum-shopping or inconvenience is absurd considering that the RMI defendants themselves chose to incorporate there. And, any argument that the application of RMI law to Highland's creditor claims is somehow unfair or prohibited should equally fall on deaf ears because the choice to originally incorporate in RMI and to subsequently redomicile was made by UDW and its executives. Accordingly, UDW's Motion is not based on a concern that UDW's Scheme will be disrupted or that the RMI defendants will not receive a fair shake in the RMI Proceeding, but instead on a fear that the RMI defendants will be held accountable for their conduct under RMI law.

In short, the remedy for UDW as a proxy for the third-party RMI defendants is to simply seek comity in the RMI as UDW's RMI law expert told the Cayman Court that it could do. The remedy is not to invoke this Court's ancillary jurisdiction to create releases that were not provided or to seek an anti-foreign suit injunction without articulating any harm.

FACTUAL BACKGROUND

I. Highland Initiates the RMI Proceeding

On August 31, 2017, Highland filed its complaint in the RMI asserting claims for fraudulent transfer against RMI companies and directors and officers thereof,[5] and seeking a

[5] RMI has incorporated large parts of Delaware law and looks to Delaware for guidance on interpretation. McCaffrey Dec. ¶¶ 21–22. Thus, although UDW states that Highland has no basis to assert that the Delaware fraudulent-transfer statute applies in the RMI, that is clearly a decision for the RMI court to make, and an argument the RMI Defendants have put forward in their motion to dismiss in the RMI Proceeding. Ex. F, McCaffrey Dec.

court declaration that Highland had standing to bring its fraudulent-transfer claims pursuant to RMI BCA § 128(5).[6] Ex. A, McCaffrey Dec. On that same day, the RMI Corporate Defendants' counsel Dennis Reeder obtained a copy of the complaint from the RMI court. McCaffrey Dec. ¶ 11. Shortly thereafter, on September 4, 2017, the RMI Corporate Defendants were served through their RMI registered agent. *Id.* ¶ 12. After receiving permission from the RMI court on October 10, 2017, Highland served the RMI Individual Defendants through alternative service pursuant to RMI Rule of Civil Procedure 4(f)(3). *Id.* ¶ 14. The RMI Defendants received an extension of their time to file a responsive pleading from the RMI High Court, and, on October 31, 2017, filed a joint motion to dismiss on behalf of all defendants, and an additional motion to dismiss solely on behalf of the RMI Individual Defendants. Exs. F & G, McCaffrey Dec.

II. The Scheme is Approved, But the PCT Does Not Contain Creditor Claims

The judgment approving the Scheme was issued on September 18, 2017. The Scheme includes the PCT, which was set up to investigate and potentially pursue the claims transferred into the trust.[7] Dkt. 151-1 ¶ 76. Critically, however, the PCT does not have standing to bring the fraudulent-transfer claims Highland is bringing in the RMI. Moss Dec. ¶ 31. Pursuant to the Scheme, the PCT only received assignment of "any causes of action belonging to UDW, Agon Shipping Inc. and/or Ocean Rig Investments Inc. arising out of the circumstances identified in the Draft Complaint." Dkt. 162-7 at 2. Although a previous draft of the PCT purported to assign

[6] Defendants in the RMI are: DryShips, Inc. Ocean Rig Investments, Inc., TMS Offshore Services, Ltd., Sifnos Shareholders, Inc., Agon Shipping, Inc., (together the "**RMI Corporate Defendants**"), Antonios Kandylidis, and George Economou (together the "**RMI Individual Defendants**") (collectively the "**RMI Defendants**"). *See* Ex. A, McCaffrey Dec.

[7] Despite its stated purpose, the document creating the PCT expressed extreme skepticism of the merits of the claims, stating multiple times that "the Board of UDW does not consider that these claims have merit and . . . that these claims would be unlikely to succeed/would be more than likely to fail." Dkt. 162-7 at 2–3.

the creditor claims identified in Highland's draft complaint, the final version of the PCT contains no such assignment. Ex. B, Leontsinis Dec. This is confirmed by the JPLs, who acknowledged to the Cayman court that no creditor claims were being assigned to the PCT: "The claims set out in the Draft Complaint are direct creditor claims resulting from certain alleged fraudulent transfers by UDW and two of its subsidiaries (Ocean Rig Investments (ORI) and Agon Shipping (Agon)) to certain affiliated parties. ***These creditor claims are not being transferred to the Trust***." Ex. A, Boneau Dec. (emphasis added).

So, despite the affirmative representations made by UDW to this Court that the "purpose of that Trust is to fund the investigation and ***prosecution of the exact fraudulent conveyance claims that Highland has brought in an RMI Court***" and that "such claims have already been transferred to the Preserved Claims Trust," this is simply not true.[8] Further, it is undisputed that UDW cannot itself assert any creditor-type claims, so there are also not any similar claims to Highland's fraudulent-transfer claims in the PCT. Moss Dec. ¶¶ 27–33.[9] And, because, as discussed further below, Highland did not sign the required release to receive disbursement

[8] In the concurrent proceeding that UDW initiated in the Cayman Islands to enjoin the Cayman Islands-incorporated Highland fund, UDW represented to the Cayman Islands court—despite the JPLs' prior representations to the court and the unambiguous text of the PCT—that "***the claims identified in the Draft Complaint***, and any causes of action held by UDW, Agon or ORI arising out of the circumstances identified in those claims ***were to be (and now have been) transferred into the 'Preserved Claims Trust***.'" Dkt. 162-13 at 13 ¶ 33 (emphasis added).

[9] There is an equivalent to a Bankruptcy Trustee's Chapter 5 rights found in section 146 of the Cayman Companies Law ("**Section 146**"), but only a joint *official* liquidator obtains those rights. *Id.* ¶¶ 23–24. A joint *provisional* liquidator does not. *Id.* ¶ 27. Here, there were only joint provisional liquidators, never any joint official liquidators. *Id.* ¶ 26; Leontsinis Dec. ¶ 4. Thus, the JPLs never had the right to bring a claim under Section 146. And, even if the JPLs had obtained the rights, those rights are not assignable under Cayman Islands law. Moss Dec. ¶¶ 27–31. There are no other means by which a debtor may stand in the shoes of a creditor and assert creditor claims under Cayman law. Creditors, however, do have the right to assert a fraudulent-transfer claims under the Cayman Fraudulent Disposition Law. *Id.* ¶ 30.

under the Scheme, it is the only remaining creditor that can pursue its rights in the RMI. Exs. C & D, Leontsinis Dec.

If this court enjoins Highland from pursuing the RMI claims, it would in effect create a release for these third-party recipients of the fraudulent transfers, who gave no value under the Scheme. Meanwhile, because no claims or any similar fraudulent-transfer claims were transferred to the PCT, Highland is the only party left standing to pursue those claims.[10]

III. Highland Does Not Receive Disbursement Under the Scheme Because It Does Not Sign the Required Releases

In connection with the Scheme, the JPLs required each creditor to sign a confirmation form stating, "[t]o the extent that a Scheme Creditor wishes to receive any of its Scheme Creditor Entitlements, a validly completed . . . Confirmation Form . . . must be submitted." Ex. C, Leontsinis Dec. Because the Scheme did not release creditor claims, the Confirmation Form included a release stating: "[e]ach UDW Scheme Creditor . . . hereby irrevocably warrants, undertakes and represents to UDW . . . that the Liabilities under the . . . [2019 Notes] released and waived by it pursuant to the UDW Scheme ***are released and waived in full***." *Id*. at Annex A ¶ 3 (emphasis added). Highland signed the Confirmation Form, but marked out this paragraph to ensure that it did not affirmatively waive its claim, and impair its ability to pursue its RMI Claims. Ex. D, Leontsinis Dec. As a result, Highland has not received any disbursements

[10] It is unclear what claims at all are in the PCT. With regard to Economou, there are potential breach of fiduciary duty claims but those claims are subject to the exculpation in UDW's articles of incorporation, "No director shall be personally liable to the Corporation or any of its shareholders for monetary damages for breach of fiduciary duty as a director, except to the extent such exemption from liability or limitation thereof is not permitted under the BCA as the same exists or may hereafter be amended." McCaffrey Dec. ¶ 28. As to the RMI Corporate Defendants, no fiduciary duty existed between them and UDW, so no breach of fiduciary duty claims exist. Whatever claims may exist in the PCT, it is uncontroversial that there are greater challenges presented by those claims than by the fraudulent-transfer claims Highland asserts in the RMI, assuming Highland can establish standing to bring those claims.

pursuant to the Scheme. Leontsinis Dec. ¶ 10. All other creditors have affirmatively waived their claims.

ARGUMENT

I. Highland Has Not Violated the Scheme by Initiating the RMI Proceeding

Highland's RMI Proceeding is not an attempt to attack the Scheme or impact the re-emerged debtor. And nothing Highland is doing in the RMI is a violation of the Scheme.

The Scheme discharges the debt due under the 2019 Notes. Dkt. 149-1 at § 13.4, Schedule 5. Thus, as Highland has acknowledged, it lacks standing to bring the fraudulent-conveyance claims under NYDCL identified in the Draft Complaint. Mot. at 10 & n.7. But, as UDW has repeatedly acknowledged, Highland lost its standing to bring claims under the NYDCL not because it has released its fraudulent-transfer claims against the non-debtor RMI Defendants, but rather simply because it is no longer a current creditor of UDW. Notably, the PCT is clear that although Highland lost its creditor status upon sanction of the Scheme, and thus its "standing to pursue direct claims under NYDCL," Highland's claims against the recipients of the fraudulent transfers were "***not* being released under the Schemes**." Dkt. 162-7 at 3–4 (emphasis added). The specific language in the PCT conforms to what UDW has represented to the Cayman Court and this Court—that there is no release of third-party claims.

UDW, in unambiguous terms, told the Cayman Court that the Scheme "doesn't deprive them [Highland] of any property rights, ***neither does it directly interfere with the creditor's right to bring claims against third parties***." Ex. A, Boneau Dec. at 192:11–14. "The only reason," according to UDW, "why there's any interference with the creditor's right to claim under the New York Debtor and Creditor Law is because the effect of the scheme is to release the claims that the creditors have against UDW which is that which gives them standing to bring a debtor and creditor law action." *Id*. at 192:21–193:2. UDW then represented to this Court that

the Scheme only contained *two* third-party releases, neither of which was a release of claims by Highland against the fraudulent-transfer recipients identified in the RMI complaint. Dkt. 160 at 7:6–23.

Because UDW redomiciled from the RMI, RMI BCA § 128 governs Highland's creditor status in the RMI. That statute sets forth: "The 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). Ex. J, McCaffrey Dec. (RMI BCA § 128(5)). Under Highland's interpretation of RMI BCA § 128(5), Highland's remedies against recipients of fraudulent transfers from an RMI corporation persist, regardless of what occurs after the RMI corporation redomiciles. *Cf. Indep. Inv'r Protective League v. Time, Inc.*, 50 N.Y.2d 259, 264 (1980) (interpreting N.Y. Bus. Corp. Law § 1006(b), which states, "[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*," and holding that a shareholder had standing to bring a derivative cause of action even after dissolution because "[u]nder this statute, the rights and remedies of the shareholders existing prior to dissolution are viewed as if the dissolution never occurred" (emphasis added)).

In other words, under RMI law, the clock is effectively stopped at the time of redomiciliation, and nothing that is done thereafter may negatively impact the rights of the creditor because the changed domicile. Thus, although the Scheme discharged the debt due to Highland from UDW, in the RMI, Highland need not be a current creditor with a right to recourse against the debtor in its new domicile to have standing to pursue the fraudulent transfers

against third parties. Instead, whatever rights Highland had as a creditor at the time UDW redomiciled, including the right to recover fraudulent transfers against third parties, remain vested in Highland under RMI law.

Consequently, neither Highland nor the RMI court need unwind the Scheme for Highland to pursue its claims. Instead, the RMI court need only look to see what rights existed at the time of redomiciliation. There is no violation of the Scheme, because Highland is not attempting to pursue a claim against UDW, nor to have the RMI court reinstate its right to seek recourse against UDW. Highland is solely seeking to pursue claims against third-party recipients of fraudulent transfers that arise under RMI law—claims that, if this Court grants an injunction, will be pursued by no one because no party other than Highland has these claims.

Critically, UDW has identified no injury whatsoever to it or the Scheme that is caused by Highland's pursuit of claims against non-debtor recipients of fraudulent transfers in the RMI. In fact, because UDW assigned its claims against many of these non-debtors to the PCT, any claims asserted by Highland against them cannot affect the Scheme because the Scheme contemplates the PCT pursuing these same defendants, albeit under other theories of liability.[11] Moreover, now

[11] To the extent the Court views cause of action number nine, the declaratory judgment action, in the RMI Proceeding as too close to a collateral attack on the Scheme, Highland is willing to amend its pleadings to clarify that the claim is solely seeking to establish Highland's standing with regard to the fraudulent-transfer claims asserted in causes of action one through eight of the RMI Complaint. The sole purpose of that cause of action was to put defendants on notice as to the basis of Highland's standing to bring its fraudulent-transfer claims and to crystalize that issue for the RMI court from the start. Despite UDW's argument to the contrary, as explained above, it is unnecessary for the RMI court to declare the releases "null and void" in a declaratory judgment cause of action for Highland to establish standing to pursue its fraudulent-conveyance claims, because the right to assert those claims existed at the time of UDW's redomiciliation and is protected by RMI BCA § 128(5). In any event, the impact, if any, of Highland amending its lawsuit to clarify what it seeks in that claim is for the RMI court to determine.

that the Scheme is approved, UDW has successfully reemerged and is now listed on the NASDAQ, and is presumably conducting business as contemplated by the Scheme. Mot. at 10.

Additionally, no argument has been made or evidence provided to establish that any purported release of Highland's claims exists. UDW implemented a Scheme without releases of third-party claims. Meanwhile, the third-parties did not contribute any value to the Scheme, nor was their involvement critical to the Scheme, and as a result there would have been no basis to provide them a release.[12]

Further, any argument that there are non-debtor releases that pertain to Highland's claims should be foreclosed in this Court, in light of the representation, mentioned above, that the Scheme only contained two, limited third-party releases, neither of which have any relevance to Highland's claims in the RMI. Consequently, any attempt by UDW to use this Court in an ancillary proceeding to expand the scope of the Scheme to create a non-existent release from fraudulent-transfer liability under RMI law to the non-debtor RMI Defendants that was not obtained in the main proceeding should be rejected.

II. Chapter 15 Should Not Be Used to Extend the Jurisdiction of the Cayman Islands into the Courts of the RMI

UDW asks this Court to use the power granted it by Chapter 15 to impede litigation in the RMI, preventing Highland from asserting its rights that arise under RMI law, based on an order issued by a Cayman court. The JPLs have already acknowledged that in the Chapter 15 context, "Congress limited the jurisdiction of United States bankruptcy courts to debtors and assets that

[12] *Compare In re Sino-Forest Corp.*, 501 B.R. 655, 657–58, 664 (Bankr. S.D.N.Y. 2013) (granting comity to a foreign third-party release where the releasee paid a $117 million settlement); *In re Metcalfe & Mansfield Alternative Invs.*, 421 B.R. 685, 692 (Bankr. S.D.N.Y. 2010) (granting comity to third-party release where the released parties' "participation was viewed as vital to the restructuring").

are within the territorial jurisdiction of the United States." Dkt. 47 at 16 (citing *In re JSC BTA Bank*, 434 B.R. 334, 342 (Bankr. S.D.N.Y. 2010)). The JPLs further argued that if Highland had been permitted to go forward with the involuntary bankruptcy proceeding it contemplated, that would have led to "'disruptive consequences,' including the use of a United States court as a 'global clearing house' for resolving the right to proceed against the Debtors in appropriate foreign tribunals," which was not what Congress intended when it enacted Chapter 15. Dkt. 47 at 18 (citing *In re JSC BTA Bank*, 434 B.R. at 336).

Now, in contrast, UDW asks this Court to be precisely that kind of "global clearing house," and, significantly, to expand the role to include prohibiting a RMI proceeding against non-debtors that could have no conceivable effect on the re-emerged debtor's assets in the United States. Chapter 15 is not intended to be used as a conduit through which UDW can indirectly enforce its broad interpretation of the Cayman Scheme in the RMI. And, the Court should not allow UDW to do so here.

If this Court were to grant the injunction UDW seeks it would be deciding that the law of one nation, the Cayman Islands, is superior to the law of another nation, the RMI. While presumably it is possible that there could be a case in which a U.S. court would need to make a comity choice between the laws of two foreign sovereigns, this is not such a case. Rather than interceding in a dispute about the effect of RMI's redomiciliation statute on Highland's standing to bring fraudulent-transfer claims, the Court should deny UDW's request and allow the RMI High Court to determine the issues presented by the motions to dismiss that have already been filed by the RMI Defendants in the RMI Proceeding.

A. This Court's Decision Under Chapter 15 to Recognize and Enforce the Scheme Should Not Supplant the RMI's Ability to Choose What Effect the Scheme Will Have in RMI

UDW seeks to have this Court issue an anti-foreign suit injunction prohibiting the RMI court from, as an issue of first impression, interpreting its law regarding the effect of redomiciliation on a creditor's right to bring a fraudulent-transfer claim. *See China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33, 35 (2d Cir. 1987) ("The fact that the injunction operates only against the parties, and not directly against the foreign court, does not eliminate the need for due regard to principles of international comity because ***such an order effectively restricts the jurisdiction of the court of a foreign sovereign***.") (emphasis added) (internal citations omitted); *LAIF X SPRL v. Axtel, S.A. de C.V.*, 390 F.3d 194, 200 (2d Cir. 2004) (same). Essentially, UDW asks this Court to use its decision to recognize and enforce the Scheme in the United States under Chapter 15 as a proxy for enforcing it in the RMI, the debtor's former domicile. This type of exportation of the United States' statutory scheme for enforcement is not the type of relief that should be provided in an ancillary proceeding. *See* 8 Collier on Bankruptcy ¶ 1502.01[8] ("[C]hapter 15, and the Model Law, intend that ancillary cases be limited to property within the recognizing country."); *id.* ¶ 1521.04 ("Like a chapter 15 case, [a foreign nonmain proceeding] is territorial and confined to assets within its territory.").

Moreover, the circumstances in this case should give the Court even more pause because the RMI has: (1) not adopted the Model Law; (2) made the policy choice to prohibit the type of reorganization reflected by the Scheme—which is of course why UDW fled the RMI in the first place; and (3) promulgated a statute that forbids a redomiciling company from adversely affecting the rights of its creditors as they exist at the time of redomiciliation. McCaffrey Dec. ¶¶ 23–26. Thus, using the entirely different statutory regime in the United States to impose a scheme upon the RMI is particularly inequitable.

B. The JPLs' Statements to the Court Make Clear that the Purpose of the Enforcement Order Was to Prohibit Conduct in the Territorial United States, Consistent with Chapter 15 Ancillary Jurisdiction

The JPLs consistently identified conduct in the United States as the driving force behind the need for this Court to protect the debtor from Highland, seeking this Court's assistance in preventing potential U.S.-based litigation. Specifically, in their motion seeking enforcement of the Scheme, they requested that this Court enforce the Scheme to "ensure that . . . no party is allowed to undermine a nearly unanimous, court-sanctioned restructuring ***by initiating or continuing actions in the United States*** based on matters comprehensively restructured under the Schemes." Dkt. 122 ¶ 2 (emphasis added). The JPLs also stated that the Enforcement Order should be issued because without it "the Debtors are concerned that disgruntled Scheme Creditors who did not accept the Schemes ***will attempt to litigate their claims, which are released under the Schemes, in New York***." *Id*. ¶ 3 (emphasis added). They went on to state:

- "If parties ***are permitted to commence actions in the United States*** in contravention of the Schemes, the newly restructured Debtors will be forced to . . . defend[] these actions." *Id.* ¶ 17.
- "If the Schemes . . . are not given permanent effect, there is a risk that parties ***could bring proceedings in the United States against members of the Group or their respective property in the U.S.***" *Id.* ¶ 20.
- "The . . . purpose of the Relief Requested is to prevent creditors from . . . ***proceeding in the United States against the reorganized Debtors*** in respect of debts that have been discharged in Cayman Proceedings." *Id.* ¶ 35

At the hearing on the motion, counsel for the JPLs stated, "Petitioners are here today seeking an order from this Court granting comity and giving full force and effect to the schemes in the United States and issuing a permanent injunction ***enjoining parties from taking actions in the United States*** in contravention of the scheme." Dkt. 160 at 4:20–24. Counsel went on to state, "If the schemes are not given permanent effect in the United States, then there is a substantial risk that certain ***creditors may take actions here*** in contravention of the restructuring." *Id*. at 6:19–

22.[13] And, consistent with Chapter 15 ancillary jurisdiction, this Court's order enforcing the scheme has numerous references limiting the prohibition of conduct to the territorial United States. Dkt. 153 at 4-5 ¶¶ 2(a)-(b), (d)-(f).

In compliance with the Court's order, Highland has not taken any action in the courts of the United States in contravention of the Scheme. But now, UDW seeks to widen the reach of this Court's order to the RMI, the nation that UDW chose as its place of incorporation at the time it issued the debt Highland purchased. This Court should deny that request.[14]

C. The Limited Nature of the Automatic Stay in a Chapter 15 Proceeding Should Inform UDW's Request

Even outside of the ancillary-proceeding context of a Chapter 15, the relief UDW seeks, an anti-foreign suit injunction, should only be used "sparingly" and "granted 'only with care and great restraint.'" *China Trade & Dev. Corp.*, 837 F.2d at 36; *see also LAIF X SPRL*, 390 F.3d at 200. That restraint should apply to an even greater extent in a Chapter 15 ancillary proceeding. Although Congress did not include any language regarding the issuance of an anti-foreign suit injunction in Chapter 15, it did include limitations on the automatic stay that occur upon recognition of a foreign proceeding to proceeding that could impact the ***debtor's*** property in the territorial United States. *See* 11 U.S.C. § 1520; *see also In re JSC BTA Bank*, 434 B.R. at 345.

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[13] Although no mention of the RMI Proceeding was made during the September 20, 2017 hearing, RMI counsel to the RMI Defendant Corporations, who appeared both in the Cayman Proceedings and in this proceeding as an expert on RMI law on behalf of JPLs (Ex. A, Leontsinis Dec. & Dkt. 7), received the RMI complaint on August 31, 2017, and the RMI Corporate Defendants were served with the RMI complaint on September 4, 2017. McCaffrey Dec. ¶¶ 11–12.

[14] To the extent the Court reads its Enforcement Order to apply to Highland's claims asserted in the RMI, Highland urges the Court to modify its order pursuant to 11 U.S.C. § 1522 to limit its application to litigation in the territorial United States, as contemplated by all representations made to the Court by the JPLs.

The injunction UDW seeks here would apply to ***non-debtor property*** in a proceeding taking place ***outside the United States*** pursuant to non-U.S. law, and would of course last permanently. This is relief well beyond a temporary stay. Therefore, the limitations put upon the less extreme, temporary automatic stay are instructive as to the minimum limitations that should apply to the permanent relief sought here.

The RMI Proceeding that UDW seeks to enjoin will have no conceivable effect on the property of the debtor in the United States, and UDW has identified none. Moreover, the debtor is not a party to the RMI Proceeding. It is a suit to recover fraudulent transfers made to non-debtor recipients, brought by the only party with a right to bring those claims. Thus, the Court should deny UDW's request.

III. UDW Cannot Meet the Necessary Factors Under the *China Trade* Test to Obtain the Extraordinary Relief of an Anti-Foreign Suit Injunction

UDW's request must fail because it has not met its burden to establish the *China Trade* and permanent injunction requirements. The Second Circuit made clear in *China Trade* that "an anti-foreign-suit injunction should be 'used sparingly' and should be granted 'only with care and great restraint.'" 837 F.2d at 36. The Second Circuit takes a "restrictive" approach to the issuance of foreign anti-suit injunctions. *Bailey Shipping Ltd. v. Am. Bureau of Shipping*, No. 12-CV-5959, 2013 WL 5312540, at *8 (S.D.N.Y. Sept. 23, 2013). And, "[p]rinciples of comity weigh heavily in the decision to impose a foreign anti-suit injunction." *LAIF X SPRL*, 390 F.3d at 200 (denying anti-foreign suit injunction because the Mexican court was appropriate forum to determine the relationship between a Mexican company and a party that transacted with it).

The Second Circuit has identified two threshold requirements a court must find and five additional factors a court must weigh before issuing an anti-foreign suit injunction. *C.D.S., Inc. v. Bradley Zetler, CDS, LLC*, 213 F. Supp. 3d 620, 628 (S.D.N.Y. 2016). The two threshold

requirements are that (1) the parties are the same in both matters, and (2) resolution of the case before the enjoining court is dispositive of the action to be enjoined. *LAIF X SPRL*, 390 F.3d at 199. The five additional factors are: (1) frustration of a policy in the enjoining forum; (2) the foreign action would be vexatious; (3) a threat to the enjoining court's jurisdiction; (4) the proceedings in the other forum prejudice other equitable considerations; or (5) whether adjudication of the same issues in separate actions would result in delay, inconvenience, expense, inconsistency, or a race to judgement. *Dow Jones & Co. v. Harrods, Ltd.*, 237 F. Supp. 2d 394, 422–23 (S.D.N.Y. 2002). Factors one and three have a "greater significance" in the analysis, but do not by themselves, justify the issuance of an anti-foreign suit injunction. *Ibeto Petrochem. Indus. Ltd. v. M/T Beffen*, 475 F.3d 56, 64 (2d Cir. 2007). Even if the *China Trade* factors are met, UDW must also establish the preliminary injunction requirements. *Bailey Shipping*, 2013 WL 5312540 at *15–16. UDW cannot meet this high burden.

A. UDW Did Not Meet the Two Threshold Requirements

1. The Parties Are Not the Same in this Matter and the RMI Proceeding

In the RMI Proceeding, Highland brings claims against seven defendants, none of which are UDW or any of the debtors this or the Cayman Proceedings. Here, the only party seeking an injunction is UDW. Although parties need not be exactly the same in each proceeding, they must be "sufficiently similar" such that their "interests are aligned." *In re Millenium Seacariers*, 354 B.R. 674, 680 (Bankr. S.D.N.Y. 2006). To be aligned such that non-identical parties are sufficiently similar, their economic interests must match. *Id.* (holding that first threshold requirement was not met because party seeking injunction in the U.S. failed to "ma[k]e [a] direct showing of how its economic interests match those of" the party to the foreign proceeding).

UDW made no attempt to explain how its economic interests matches those of the RMI Defendants, nor could it. Instead, UDW relies on the proposition that as the transferor, UDW is

an indispensable party to the RMI Proceeding, citing a case from the Middle District of Pennsylvania and a 1906 decision from New York's Fourth Department that are clearly not precedential on the issue and hardly persuasive. While there is no RMI case on point, RMI Rule of Civil Procedure 19 is nearly identical to FRCP 19, and the weight of caselaw under FRCP 19 provides that a transferor is not a necessary party where complete relief can be accorded among those already parties. *E.g.*, *Kramer v. Mahia (In re Khan)*, 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); *see also Gordon v. Livecchi (In re Livecchi)*, Adv. No. 11-02027, 2014 WL 7013463, at *4 (Bankr. W.D.N.Y. Dec. 11, 2014) (holding that debtor is not a necessary party where debtor no longer has interest in transferred property). Thus, UDW fails to meet its burden on the first threshold issue.[15]

2. The Resolution of the Matter Before this Court Is Not Dispositive of the RMI Proceeding

UDW also fails to meet the second threshold requirement. To determine whether the matter in this Court is dispositive of the matter proceeding in the RMI, the Court must determine whether the "substance of the claims and arguments raised in the two actions is the same." *Bailey Shipping*, 2013 WL 5312540, at *10. The analysis "requires great precision in assessing the 'substance' of the claims at issue in the foreign action." *Id*. And, "*China Trade*'s threshold cannot be satisfied unless a determination by the foreign court on the claim in question would leave little or nothing for the domestic court to decide." *Id*. Where the movant fails to establish

[15] As discussed above, to the extent the ninth cause of action in the RMI for declaratory relief creates alignment of the parties because it seeks a declaration rendering the releases in the Scheme null and void, Highland is willing to amend its RMI complaint to clarify the relief requested in the ninth cause of action.

that resolution of the matter pending in the United States would resolve the issues presented by the foreign proceeding, the movant fails to meet second threshold requirement. *Id.* at *13 (holding that a domestic claim for negligent misrepresentation did not present the same "factual and legal elements" as a foreign claim that did not rely on a negligence theory and so was not dispositive of that claim); *ED Capital, LLC v. Bloomfield Inv. Res. Corp.*, 155 F. Supp. 3d 434, 443 (S.D.N.Y. 2016) (holding second threshold factor was not met and stating, "even if the Court resolved [the plaintiff's] declaratory judgment action, issues relating to [the foreign] claims would remain unresolved in the Netherlands Action."), *aff'd in part, vacated in part on other grounds*, 660 F. App'x 27 (2d Cir. 2016) (summary order).

Here, UDW has not established that the Court's decision on the injunction will address any of the issues in the RMI Proceeding. This Court is not being asked to interpret and apply RMI BCA § 128(5), nor to address the merits of Highland's fraudulent-transfer claims. To be sure, if Highland is prohibited from going forward in the RMI, then effectively this Court will have ended that lawsuit, and taken away from the RMI court the opportunity to decide those issues, which are ripe in the RMI, where the RMI Defendants have already filed motions to dismiss on precisely these issues. But that is not the test for the "dispositive" threshold factor because if it was, all anti-foreign suit injunctions would be dispositive. Moreover, the RMI court's decision on Highland's claims will not be dispositive as to whether this Court will continue to enforce the Scheme within the territorial jurisdiction of the United States.

As with the first threshold factor, UDW relies solely on Highland's ninth cause of action for declaratory relief to establish the second factor, and then attempts to bootstrap the fraudulent-transfer causes of action to that argument. Again, to the extent the ninth cause of action meets the "dispositive" requirement, which it does not, Highland will amend its complaint to clarify the

relief sought. The Court's decision to enforce the Scheme in this Chapter 15 proceeding is not dispositive for *China Trade* purposes of that issue of RMI law. Thus, UDW's request for an anti-foreign suit injunction should be denied.

B. The Five Additional Factors Favor Restraint

Even if the two threshold requirements are met, the Court must still weigh the five additional factors before issuing an anti-foreign suit injunction. *E.g.*, *David Benrimon Fine Art LLC v. Durazzo*, No. 17-CV-6382, 2017 WL 4857603, at *4 (S.D.N.Y. Oct. 26, 2017) (declining to issue anti-suit injunction after finding that two threshold requirements were satisfied). Factors one and three (the public policy factors) are given greater significance, but cannot, by themselves, justify the issuance of an anti-foreign suit injunction. *Ibeto Petrochem.*, 475 F.3d at 64.

Factor 1: No frustration of a policy in the enjoining forum. The RMI Proceeding is not a collateral attack on this Court's decision to enforce the Scheme in the United States pursuant to Chapter 15. As discussed above, the RMI has not adopted the Model Law, but has passed RMI BCA § 128, which is relevant to the RMI court's analysis because UDW transferred its domicile from the RMI to the Cayman Islands prior to provisional liquidation. Therefore, the decision in the RMI on what effect will be given to the Scheme is fundamentally different than the decision this Court made to enforce the Scheme, raises entirely different issues under entirely different statutory schemes, and will have no impact on the enforcement of this Court's order in the territorial United States. Thus, allowing the RMI court to interpret and apply RMI law will not undermine this Court's Enforcement Order.

Factor 2: The foreign action is not vexatious. Foreign actions are not vexatious when the plaintiffs are within their rights to bring the action, and the defendants in that action have a fair opportunity to be heard. *See David Benrimon Fine Art*, 2017 WL 4857603 at *3 (holding a

French proceeding not vexatious where the plaintiffs were within their rights to bring the action in France); *C.D.S., Inc.*, 213 F. Supp. 3d at 629 (holding a foreign proceeding not vexatious because it was not brought "to undermine th[e] [c]ourt's jurisdiction," but to enforce contract to which foreign defendant was a party); *Cybernaut Capital Mgmt. Ltd. v. Partners Grp. Access Secondary 2008, L.P.*, No. 13-CV-5380, 2013 WL 4413754, at *5 (S.D.N.Y. Aug. 7, 2013) (holding a Cayman proceeding not vexatious where "Petitioners were given a full chance to brief [the relevant] issue before the Cayman Islands court").

Here, there is no question that Highland was within its rights to bring the RMI Proceeding. At the time it filed that action, the Scheme was not approved and this Court had not entered its enforcement order. And, the RMI Defendants have already filed motions to dismiss the RMI Proceeding, asserting a slew of purportedly dispositive defenses. Exs. F & G, McCaffrey Dec.

UDW's attempt to characterize the RMI Proceeding as vexatious because Highland told this Court and the Cayman Court that it could only pursue NYDCL claims in the United States, and that NYDCL claims do not exist in the RMI, is baseless. Both of those statements are true. But they are beside the point now. Highland is not pursuing any NYDCL claims anywhere. Instead, Highland is pursuing RMI fraudulent transfers in the RMI. It is not a distinction without a difference, as UDW appears to argue, because of RMI BCA § 128. It is hardly vexatious for Highland to assert its rights in RMI considering all the ties to RMI created by UDW's and the RMI Defendants' choices to incorporate there.

Factor 3: No threat to the enjoining court's jurisdiction. The RMI Proceeding in no way threatens this Court's jurisdiction. Where there is no concern that the foreign court will encroach on the domestic court's jurisdiction, the factor weighs against issuing an injunction. *Compare*

*MasterCard Int'l Inc. v. Argencard Sociedad Anonima, N*o. 01-CV-3027, 2002 WL 432379, at *10 (S.D.N.Y. Mar. 20, 2002) ("There is nothing in this case to suggest that the Argentine action poses a threat to this Court's jurisdiction over the present action."), *with Int'l Fashion Prods., B.V. v. Calvin Klein, Inc.*, No. 95-CV-0982, 1995 WL 92321, at *2 (S.D.N.Y. Mar. 7, 1995) ("[I]f the District Court in the Netherlands issues an injunction requiring the delivery of CKI's Spring '95 line, that will destroy this Court's jurisdiction to adjudicate claims relating to those particular goods."); *see also China Trade & Dev. Corp.*, 837 F.2d at 37. Here, no finding the RMI court will make in the RMI Proceeding will encroach on this Court's ability to exercise its ancillary jurisdiction in this Chapter 15 case. Thus, this factor favors exercising restraint, and denying the Motion.

Factor 4: The proceedings in the other forum do not prejudice other equitable considerations. The equities do not favor the issuance of an injunction here. After incorporating in the RMI, UDW and its executives redomiciled to a jurisdiction where it could take advantage of favorable insolvency laws to the detriment of its creditors, as it is permitted to do under Cayman law. The RMI, however, has a different statutory regime, and in the RMI, as a former RMI company, UDW, its creditors, and its recipients of fraudulent transfers are subject to that regime as well. Highland has not forum-shopped by bringing suit in RMI; rather, Highland has gone to the jurisdiction whose laws governed the company that issued the debt it bought giving rise to its creditor status. *David Benrimon Fine Art*, 2017 WL 4857603 at *4 (declining to issue anti-suit injunction after finding that moving party's equitable considerations, including alleged forum shopping, were unpersuasive). And, Highland's suit in RMI is against those same executives that chose to incorporate UDW there in the first place, and other RMI corporations related to those executives.

Factor 5: Adjudication of the same issues in separate actions will not result in delay, inconvenience, expense, inconsistency, or a race to judgement. The RMI Defendants and UDW, all of which chose to incorporate in RMI or be a director or officer of an RMI company, cannot now complain that having to litigate in the RMI is too expensive or inconvenient. They could have selected any nation in the world and incorporated under its laws. They chose the RMI. They must now deal with whatever consequences result from that choice, including the application of RMI law, and the fact that the RMI is in a remote part of the Pacific Ocean. *See C.D.S., Inc.*, 213 F. Supp. 3d at 629. Moreover, there is no need for UDW to appear in the RMI Proceeding because nothing that will be determined there will impact UDW's ability to move forward with its business and implement the Scheme.[16]

C. UDW Does Not Meet Its Burden to Establish that It Will Suffer Irreparable Harm if the Court Does Not Issue the Requested Injunction

"Irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction. Accordingly, the moving party must first demonstrate that such injury is likely before the other requirements for the issuance of an injunction will be considered." *Freedom Holdings, Inc. v. Spitzer*, 408 F.3d 112, 114 (2d Cir. 2005) (citation, quotation marks, and ellipses omitted). To satisfy the irreparable harm requirement, a plaintiff "must demonstrate that absent a preliminary injunction they will suffer an injury that is neither remote nor speculative, but actual and imminent." *Id.* (citation and quotation marks omitted). A plaintiff

[16] UDW also argues that it would have to go to the RMI to contest that suit because the RMI Proceeding would be in direct competition with the PCT. Mot. at 21. As discussed above, however, the PCT does not have the power to bring any creditor claims and is thus not in direct competition with Highland on any claim. However, to the extent the trustee of the PCT disagrees, the trustee would be the appropriate party to make any arguments in the RMI. It is unclear why the re-emerged debtor, now that the provisional liquidation has been discharged, would have any reason to make those arguments on behalf of the trustee.

carries the "heavy burden of clearly establishing the threat of irreparable harm." *City of Newburgh v. Sarna*, 690 F. Supp. 2d 136, 165 (S.D.N.Y. 2010) (citation omitted).

Despite that heavy burden, UDW rests its entire irreparable-harm argument on the conclusory statement that the RMI Proceeding seeks to "upend the Debtors' restructuring to the financial detriment of both the Debtors and the other Scheme Creditors, by nullifying the Scheme." Mot. at 22. At the outset, Highland has made clear that it is not seeking to "upend" the Scheme or "nullify" it as a whole. Highland is merely seeking to enforce its rights as of the date that UDW redomiciled from the RMI, which Highland has the right to do under RMI law. Moreover, UDW fails entirely to explain how Highland establishing that it has standing to pursue its fraudulent-transfer claims against non-debtors will have any impact whatsoever on UDW or the implementation of the Scheme. The economic concerns of non-debtors and their desire to avoid litigating these claims do not create irreparable harm to UDW sufficient to justify a permanent anti-suit injunction. *See In re Millenium Seacariers*, 354 B.R. at 681 (dissolving anti-foreign suit injunction where attempt to keep injunction in place was "driven by the economic interests of non-debtors").

CONCLUSION

For the reasons discussed herein, Highland respectfully requests that the Court deny UDW's Motion.[17]

[17] As is clear from the briefing, a contempt order should not be issued against Highland. Not only was Highland's RMI complaint on file before this Court issued the Enforcement Order, by going forward in the RMI, Highland has not violated that order. And even if the Court were to find that Highland technically did violate its order, it was certainly not the type of willful violation that gives rise to a finding of civil contempt.

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