No. 21-_____

IN THE
Supreme Court of the United States

THE ESTATE OF OMAR FONTANA, DENILDA PEREIRA FONTANA, ANTÔNIO CELSO CIPRIANI, MARISE PEREIRA FONTANA CIPRIANI, EMIDIO CIPRIANI, AND DEVOM CONSULTORIA E PARTIPAÇÕES LTDA,

Petitioners,

v.

ACFB ADMINISTRAÇÃO JUDICIAL LTDA – ME, ACTING BY AND THROUGH ANTONIO VIVIANA SANTOS DE OLIVEIRA CAVALCANTE, THE TRUSTEE OF DEBTOR TRANSBRASIL S.A. LINHAS AÉREAS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Ritzen Group, Inc. v. Jackson Masonry, LLC*, __ U.S. __, 140 S. Ct. 582 (2020), this Court held that a bankruptcy court order is final and appealable if it conclusively disposes of a "discrete dispute" within the overarching bankruptcy case. In particular, the Court found that an order disposing of a motion for relief from the automatic stay resolves a discrete dispute where: (1) the motion "initiates a discrete procedural sequence, including notice and a hearing," (2) it is "separate from the rest of the case," (3) it "occurs before and apart from proceedings on the merits of the creditors' claims," and (4) the order "grants or denies relief according to a statutory standard." *Id.* at 586, 589, 591.

This matter involves the finality of a discovery order entered in a case under Chapter 15 of the Bankruptcy Code. Although discovery orders in cases under other chapters of the Code are usually not final, in Chapter 15 cases they often involve stand-alone proceedings, may be the *only* substantive order entered in the case, and are often distinct from other Chapter 15 matters. The Second Circuit has held that such an order is final and appealable. *In re Barnet*, 737 F.3d 238 (2d Cir. 2013). The court below reached the opposite conclusion. The question presented is:

Should the Court grant certiorari to resolve a conflict among the courts of appeals over whether a stand-alone discovery order entered in a Chapter 15 case is final and appealable?

PARTIES TO THE PROCEEDING

The Estate of Omar Fontana;

Denilda Pereira Fontana, in her personal capacity and as trustee of Petitioner Estate of Omar Fontana;

Antônio Celso Cipriani;

Marise Pereira Fontana Cipriani;

Emidio Cipriani;

Devom Consultoria e Partipações Ltda; and

ACFB Administração Judicial LTDA – ME, acting by and through Antonio Viviana Santos de Oliveira Cavalcante, the Trustee of Debtor Transbrasil S.A. Linhas Aéreas.

RULE 29.6 STATEMENT

Petitioner Devom Consultoria e Partipações Ltda ("Devom") is a limited liability company organized and existing under the laws of Brazil. No corporation is a parent of Devom and no publicly held corporation owns 10% or more of its stock.

RELATED CASES

In re: Transbrasil S.A. Linhas Aéreas, No. 20-12238, U.S. Court of Appeals for the Eleventh Circuit. Judgment entered July 19, 2021.

In re: Transbrasil S.A. Linhas Aéreas, No. 19-23700, U.S. District Court for the Southern District of Florida. Judgment entered March 16, 2020.

In re: Transbrasil S.A. Linhas Aéreas, No. 11-19484, U.S. Bankruptcy Court for the Southern District of Florida. Judgment entered July 16, 2019 and August 21, 2019.

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JURISDICTION

The Court of Appeals entered its judgment on July 19, 2021 and denied the Petitioners' petition for rehearing on September 2, 2021. The court had jurisdiction under 28 U.S.C. § 158(d). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The following statutory provisions and rules are relevant to this matter.[1] 11 U.S.C. § 362, 11 U.S.C. § 1520, 11 U.S.C. § 1521, 28 U.S.C. § 1782, and Fed. R. Bankr. P. 2004.

PRELIMINARY STATEMENT

This matter arises out of a Chapter 15 bankruptcy case involving Tranbrasil S.A. Linhas Aéreas ("Transbrasil"), a Brazilian airline placed in

[1] The relevant portions of these provisions are reproduced in Petitioners' Appendix. *See* Pet. App. 56a.

involuntary bankruptcy in Brazil in 2002 (the "Brazilian Bankruptcy Case"). Petitioners are the estate of Omar Fontana, the founder of Transbrasil; several members of his family; a former president of Transbrasil; and a privately owned corporation whose assets include stock in Transbrasil. Respondent is the trustee of Transbrasil's Brazilian bankruptcy estate (the "Trustee").

In 2011, the Trustee filed a petition in the U.S. Bankruptcy Court for the Southern District of Florida (the "Bankruptcy Court") under 11 U.S.C. § 1515(a), seeking recognition of the Brazilian Bankruptcy Case as a foreign "main proceeding" under 11 U.S.C. § 1517. *See also* 11 U.S.C. § 1515. The Bankruptcy Court granted the petition on May 11, 2011, establishing the U.S. proceeding as an ancillary proceeding. By its nature, an ancillary Chapter 15 proceeding is not a full-blown U.S. bankruptcy case. Rather, it is a limited-purpose administrative proceeding designed to provide assistance in the United States to the representative of a foreign bankruptcy estate seeking to fulfill administrative responsibilities under applicable foreign bankruptcy law. *See* 11 U.S.C. §§ 1504, 1507(a).

In the petition for recognition, the Trustee stated that the purpose of the Chapter 15 proceeding was to locate assets of Transbrasil and related companies that may have been in or transferred through the United States. The Trustee, however, has not located any significant assets in the U.S. Rather, the only significant activity in the Chapter 15 case since November 2013 has been the Trustee's efforts seeking

discovery from Petitioners and a third-party entity related to them.

The question presented is the finality of the Bankruptcy Court's orders permitting the Trustee's far-reaching discovery, and specifically denying Petitioners' requests for a protective order. The Eleventh Circuit determined that the Bankruptcy Courts orders were not final, and therefore not appealable, notwithstanding that the orders are the only substantive orders that have been entered in the Chapter 15 case and the Trustee has used the Chapter 15 proceeding essentially only to obtain such discovery. In *In re Barnet*, 737 F.3d 238 (2d Cir. 2013), the Second Circuit reached the opposite conclusion from the decision below, reasoning that such orders dispose of a discrete dispute within the Chapter 15 case and are properly final and appealable. This Court should grant certiorari to resolve this conflict among the courts of appeals.

In addition, the Court should grant certiorari because the decision below conflicts with this Court's resolution of the question of the finality of bankruptcy court orders in *Ritzen Group, Inc. v. Jackson Masonry, LLC*, __ U.S. __, 140 S. Ct. 582 (2020). Further, the question presented is important as it involves the appellate jurisdiction of the courts of appeals. Finally, the decision below is wrong.

STATEMENT OF THE CASE

The Freeze Order

In 2015, the Trustee filed a motion in the Brazilian Bankruptcy Case to extend the scope of the Brazilian bankruptcy proceeding to encompass additional entities and individuals, including Petitioners (the "Separate Action"). This motion effectively sought to pierce the corporate veil and include Petitioners' assets as part of Tranbrasil's bankruptcy estate.

The Trustee also sought from a Brazilian court an order freezing Petitioners' assets pending the outcome of the Separate Action. In December 2018, a Brazilian appellate court (the "Court of Justice") entered an order (the "Freeze Order") blocking the disposal, or transfer, of Petitioners' assets in Brazil and abroad. Critically, however, the Court of Justice later clarified that the Freeze Order did not apply to Petitioners' personal financial assets and was appropriately limited by Brazilian bank privacy principles that protect the privacy of personal financial information. As a result, in order to avoid violating bank privacy protections, the Freeze Order carved-out and did not permit the Trustee to gain access to or use Petitioners' personal financial information. Rather, the Freeze Order contemplated that it could be implemented only in a manner consistent with such principles.

The Discovery Dispute

In January and February of 2019, the Trustee issued subpoenas to five financial institutions where Petitioners maintained accounts or did business (the

"Subpoenas"). The Subpoenas sought Petitioners' personal financial records of every description for the past twenty years. Petitioners filed a motion for a protective order, which the Bankruptcy Court denied. Petitioners then filed a motion for reconsideration, which the Bankruptcy Court also denied. These two orders, denying Petitioners' motions for a protective order and for reconsideration (the "Bankruptcy Court Orders") are the subject of this Petition.

The Appeal to the District Court

Petitioners appealed the Bankruptcy Court Orders to the District Court. Their principal argument was that the orders exceeded the scope of 11 U.S.C. § 1521(a)(4), the relevant statute governing discovery in Chapter 15 proceedings.

Although discovery in bankruptcy cases generally is governed by Federal Rule of Bankruptcy Procedure 2004(b), Chapter 15 is the only chapter under the Bankruptcy Code to have its own statutory provision regulating discovery. Section 1521(a)(4) limits discovery to "the *debtor's* assets, affairs, rights, obligations or liabilities." 11 U.S.C. § 1521(a)(4) (emphasis added). Quite clearly, the Trustee sought far more than what section 1521(a)(4) authorizes.

The Trustee filed a motion to dismiss the appeal on the ground that the Bankruptcy Court Orders were non-final and non-appealable. In opposing the motion, Petitioners argued that the Orders were final and appealable because they were issued in a Chapter 15 proceeding. In Chapter 15, discovery orders are appealable because the proceeding is ancillary to a

foreign bankruptcy case, and if the orders were deemed non-final they would characteristically evade appellate scrutiny. Petitioners relied principally on *In re Barnet*, 737 F.3d 238 (2d Cir. 2013), which addressed the finality of discovery orders under section 1521(a)(4). *Barnet* held that such orders are final and appealable.

The Rationale of Barnet

The court in *Barnet* analogized section 1521(a)(4) (governing discovery in Chapter 15 cases) to 28 U.S.C. § 1782(a) (authorizing discovery "for use in a proceeding in a foreign or international tribunal."). The court noted that a discovery order under section 1782(a) "constitutes a final resolution of a petition to take discovery in aid of a foreign proceeding and is, therefore, immediately appealable." 737 F.3d at 244. "Chapter 15 proceedings, like Section 1782 proceedings, are ancillary to a suit in another tribunal, such that there will never be a final resolution on the merits beyond the discovery itself." *Id.*

The *Barnet* court also analogized 1521(a)(4) to 11 U.S.C. § 1520(a), which makes 11 U.S.C. § 362 applicable in Chapter 15 proceedings. Section 362(a) imposes an automatic stay of non-bankruptcy proceedings against the debtor in the United States. The *Barnet* court stated, "once recognition [of a foreign proceeding] is granted, the imposition of automatic relief requires no further action by the Bankruptcy Court. The discretionary relief permitted by Section 1521 requires an extra step, but once that step is taken, and the Bankruptcy Court has chosen to

exercise its discretion, a party aggrieved by Section 1521 stands in the same position as one aggrieved by Section 1520. If appellate review is available to one, therefore, it should be available to the other." *Id.*

The District Court acknowledged that the reasoning in *Barnet* and Petitioners' reliance on it "have merit," but felt bound by an earlier decision of the Eleventh Circuit holding that a previous discovery order in this case was non-final. Accordingly, the District Court granted the Trustee's motion to dismiss and denied Petitioners' motion for reconsideration.

Petitioners' Further Appeal and the Rationale of Ritzen

Petitioners appealed to the Court of Appeals for the Eleventh Circuit on June 18, 2020. Six months earlier, on January 14, 2020, this Court decided *Ritzen Group, Inc. v. Jackson Masonry, LLC*. __ U.S. __, 140 S.Ct. 582 (2020), in which it addressed the question of the finality of a bankruptcy court order denying relief from an automatic stay. Concluding that such an order is indeed final and appealable, the Court explained that bankruptcy court orders are final "if they finally dispose of discrete disputes within the larger bankruptcy case." *Id.* at 587. The Court found that an order denying relief from stay disposes of a discrete dispute where (1) the motion "initiates a discrete procedural sequence, including notice and a hearing," (2) which is "separate from the rest of the case," (3) "occurs before and apart from proceedings on the merits of the creditors' claims," and (4) "grants or denies relief according to a statutory standard." *Id.* at 589, 591.

According to the Court, these factors demonstrate finality regardless of the procedural posture of the case: "It does not matter whether the bankruptcy court has preclusively resolved a substantive issue. It does not matter whether the court rested its decision on a determination potentially pertinent to other disputes in the bankruptcy case, so long as the order conclusively resolved the movant's entitlement to the requested relief." *Id.* at 591.

The Opinion of the Court of Appeals

In their appeal to the Eleventh Circuit, Petitioners argued that the Bankruptcy Court Orders were final because they conclusively resolved a discrete dispute separate from the rest of the Chapter 15 proceeding (including any possible future implementation of the Freeze Order in the United States), and otherwise satisfied the *Ritzen* criteria. Petitioners also argued that, assuming the orders were non-final, they fell within the exception to the finality rule established by *Gillespie v. U.S. Steel Corp.*, 379 U.S. 148 (1964).

On July 19, 2001, the Court of Appeals held that (1) the Bankruptcy Court Orders were non-final and non-appealable, and (2) did not fall within the *Gillespie* exception. Petitioners seek review of the first holding, but not the second.

In conducting its analysis, the Court of Appeals applied what it called "the *Ritzen Group* framework," concluding that the Bankruptcy Court Orders did not satisfy the *Ritzen* criteria. Pet. App. at 9a. The court reasoned as follows:

> Discovery, whether in a Chapter 15 case or otherwise, is ordinarily not "discrete" or "separate" from the proceeding for which discovery is sought. To the contrary, discovery is merely a preliminary step to obtain information for use in some other proceeding, and thus, discovery disputes are nothing more than "disputes over minor details about how a bankruptcy case will unfold." As such, the appropriate procedural unit for determining finality is not the discovery dispute but the proceeding for which discovery is sought.

Id. The court added: "Here, that proceeding is the implementation of the Freeze Order, as the record is clear that the Trustee sought the discovery in part to aid in implementing the Freeze Order. And the record demonstrates that the Freeze Order may eventually be implemented in the Chapter 15 case." *Id*.

The court rejected Petitioners' argument that Chapter 15 discovery orders should be treated differently from other discovery orders for two reasons. First, it held that "the record belies the [Petitioners'] assertion that the Bankruptcy Court has 'nothing left to do' in this Chapter 15 proceeding" because it "may be called upon to implement the Freeze Order based on the discovery at issue in the discovery orders." *Id*. at 10a-11a. Second, it held that "we are not convinced that the primary authority the [Petitioners] rely on for their position, the out-of-circuit decision in *In re Barnet*, 737 F.3d 238 (2d Cir. 2013), applies here." *Id*. at 11a.

The court rejected the applicability of *Barnet* for two reasons.

> First, the Second Circuit did not have the benefit of *Ritzen Group* when it issued *Barnet*, so it did not wrestle with the question of whether discovery under Chapter 15 is a 'discrete' or 'separate' proceeding or 'merely a preliminary step' in some other proceeding. As such, the two bases for its decision are largely irrelevant under the now-required analysis to the extent the Second Circuit analogized discovery orders under Chapter 15 to orders in other contexts instead of applying *Ritzen Group*'s framework.
>
> Second, there is no indication in *Barnet* that any proceedings other than discovery proceedings were contemplated in that Chapter 15 case. As such, *Barnet* is different than this case, where the record is clear that the Trustee sought the discovery in part to aid in implementing the Freeze Order in the Chapter 15 case.

Id. at 11a-12a.

The Court of Appeals conceded that, in some cases, discovery may be the only purpose of a Chapter 15 proceeding. In those instances, the court agreed that it would make sense to treat a discovery order as final and appealable. According to the court below,

however, "that's not the case we have. Instead, the discovery orders here were 'merely a preliminary step' in the Freeze Order proceeding," which the court characterized as its own "separate" and "distinct" proceeding. *Id*. at 13a.

REASONS FOR GRANTING THE PETITION

The Court should grant certiorari for four reasons. First, the decision below, concluding that the discovery orders entered in Transbrasil's Chapter 15 case are not final and appealable, conflicts irreconcilably with an authoritative decision of the Second Circuit concluding that discovery orders entered in a Chapter 15 case are indeed final and appealable. Second, the decision below conflicts irreconcilably with this Court's analysis in *Ritzen*. Third, the decision below involves an important, recurring question that merits this Court's review. Finally, the decision below is wrong.

I. THE DECISION BELOW CREATES A SPLIT OF AUTHORITY BETWEEN THE SECOND AND ELEVENTH CIRCUITS.

In *Barnet*, the Second Circuit treated the discovery order in question as one that, on its own, finally resolved a discrete dispute in the Chapter 15 case—a dispute over discovery. In the decision below, the Eleventh Circuit refused to do the same, instead treating the discovery orders in question like discovery orders in ordinary civil litigation—as part and parcel of some other potential proceeding. The two decisions irreconcilably conflict because only one may be correct, and the reasoning of one is

fundamentally inconsistent with the reasoning of the other.

Notably, the decision below did not involve a discovery order entered in the context of some already pending substantive dispute initiated within the Chapter 15 proceeding. For example, the Trustee had not already commenced an adversary proceeding against Petitioners seeking some form of substantive relief against them, and then sought discovery in the context of that proceeding. Rather, the Trustee sought discovery as a stand-alone matter, which Chapter 15 permits (and regulates under its own unique statutory criteria). *See* 11 U.S.C. § 1521(a)(4). Although it is hypothetically true that the Trustee *might* decide in the future to bring some other kind of substantive proceeding within the Chapter 15 case, no such proceeding is yet in prospect. Nor does the possibility of such a future proceeding necessarily have anything to do with the discovery orders at issue here—they may be completely unrelated. Moreover, the possibility of some other proceeding is virtually always true. When a trustee seeks discovery as a stand-alone matter in a Chapter 15 case, it is typically the case that the trustee might well pursue some other kind of substantive claim later on. Certainly, that was also true in *Barnet*, yet the Second Circuit concluded that the discovery order in question was final. There is simply no way to reconcile the two decisions.

In conducting its analysis, the Second Circuit relied on an analogy between the issuance of discovery orders in Chapter 15 cases and relief under section 1520(a). Section 1520(a) provides: "Upon recognition

of a foreign proceeding that is a foreign main proceeding—(1) sections 361 and 362 apply with respect to the debtor and the property of the debtor that is within the territorial jurisdiction of the United States." 11 U.S.C. § 1520(a). In a nutshell, section 1520(a) makes the automatic stay provisions of section 362 applicable in the Chapter 15 context. Both these provisions enjoin various forms of debt-collection activity against the debtor while the debtor remains in bankruptcy.

The *Barnet* court reasoned that, because an order imposing an automatic stay under section 1520(a) is final, a discovery order under section 1521(a)(4) should also be treated as final. *In re Barnet*, 737 F.3d at 244. According to the court, the only difference between a stay imposed under section 1520(a) and a discovery order under section 1521(a)(4) is that the stay is imposed by operation of law, and the discovery order is within the bankruptcy court's discretion. The court found, however, that this difference is immaterial. *Id.*

The Eleventh Circuit disagreed. It rejected the *Barnet* court's analogy between sections 1520(a) and 1521(a)(4), and it distinguished *Barnet* itself more generally as "irrelevant" on the ground that "the Second Circuit did not have the benefit of *Ritzen Group* when it issued *Barnet*, so it did not wrestle with the question of whether discovery under Chapter 15 is a 'discrete' or 'separate' proceeding." Pet. App. at 11a-12a.

With respect, the Eleventh Circuit's observation is inapposite, as *Barnet* reached the correct outcome

under the criteria this Court applied in *Ritzen*. In *Ritzen*, this Court held that an order denying a creditor's motion for relief from the automatic stay under section 362(a), and thus continuing the stay in place, is final and appealable because it resolved a discrete proceeding. It did not matter that further proceedings on the particular creditor's claim were yet to be resolved in the bankruptcy court at the time of the order denying relief from stay. Nor did it matter that the creditor might possibly renew its motion for relief from stay at a later date. What mattered was that (1) a motion for relief from stay "initiates a discrete procedural sequence, including notice and a hearing," (2) it is "separate from the rest of the case," (3) it "occurs before and apart from proceedings on the merits of the creditors' claims," and (4) the relevant order "grants or denies relief according to a statutory standard." *Ritzen Grp., Inc.*, 140 S. Ct. at 586, 589, 591.

The same is true of a stand-alone discovery order in a Chapter 15 case. In *Ritzen*, this Court held that an order denying relief from stay under section 362(a) is final. In *Barnet*, the Second Circuit held that, just as an order under section 1520(a)—which makes section 362 applicable to Chapter 15 cases—is final, so too is a discovery order under section 1521(a). The imposition of an automatic stay under section 1520(a) derives directly from 362(a). The only conceptual difference between *Ritzen* and *Barnet* is that *Ritzen* involved section 362(a) and *Barnet* involved section 1521(a). Otherwise, the Second Circuit applied essentially the same reasoning as this Court did in *Ritzen*.

In *Barnet*, the Second Circuit also properly framed the issue as whether a discovery order under section 1521(a)(4) resolves a discrete proceeding. The court answered that question with a resounding "yes"—just like *Ritzen*. In contrast, the Eleventh Circuit answered with a resounding "no," creating the circuit split at issue here. Additionally, although the Eleventh Circuit acknowledged that a discovery order might be final if the discovery proceeding was the "only proceeding" in a Chapter 15 case, that conflicts with *Barnet*, which did not render such a narrow holding. This Court should grant certiorari to resolve this disagreement among the courts of appeals. *See* U.S. Sup. Ct. R. 10 (stating that a petition for certiorari may be granted if "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter.").

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISION IN *RITZEN*.

In *Ritzen*, this Court analyzed at length the criteria for determining whether a bankruptcy court order resolves a "discrete" dispute and is thus final for appellate purposes. The court below made no attempt to apply those criteria. Instead, it took an entirely different approach: considering whether the dispute before it might later lead to some other, hypothetical proceeding within the Chapter 15 case. That approach, however, conflicts with *Ritzen* because applying the Eleventh Circuit's method would require a conclusion diametrically opposed to the one this Court actually reached: under the Eleventh Circuit's

approach, an order denying relief from stay would not be final where, as in *Ritzen*, it served as a prelude to a proceeding on the creditor's claim.

In *Ritzen*, the creditor sought relief from stay so that it could continue its already pending lawsuit against the debtor in state court. The bankruptcy court's denial of the creditor's motion for relief from stay meant that the action would not proceed in state court, but would instead be litigated in the bankruptcy court as part of the process of determining the creditor's claim. Because the order denying relief from stay was preliminary to further proceedings in the bankruptcy court, under the Eleventh Circuit's approach the order would not be final. This Court, however, held the opposite. The Eleventh Circuit's analysis in this case thus does not square with this Court's precedent.

Unlike ordinary civil litigation, in which orders entered during the course of a case are not typically appealable until the entire *case* is finally resolved, bankruptcy orders are final so long as they resolve a discrete dispute within the larger bankruptcy case. As this Court held in *Ritzen*, "the usual judicial unit for analyzing finality in ordinary civil litigation is the case, but in bankruptcy, it is often the proceeding." 140 S. Ct. at 588. As a result, "[c]orrect delineation of the dimensions of a bankruptcy 'proceeding' is a matter of considerable importance." *Id.* at 587. The critical task is to identify "the appropriate procedural unit for determining finality." *Id.*

Examining the order in question in the context in which it arose, this Court observed in *Ritzen* that

"[a]djudication of a stay-relief motion . . . occurs before and apart from proceedings on the merits of creditors' claims. The motion initiates a discrete procedural sequence, including notice and a hearing, and the creditor's qualification for relief turns on the statutory standard." *Id.* at 589. The question was thus "whether the order in question terminates a procedural unit separate from the remaining case, not whether the bankruptcy court has preclusively resolved a substantive issue. *It does not matter whether the court rested its decision on a determination potentially pertinent to other disputes in the bankruptcy case*, so long as the order conclusively resolved the movant's entitlement to the requested relief." *Id.* at 591 (emphasis added).

A key flaw in the Eleventh Circuit's analysis was its failure to heed this Court's admonition that "[i]t does not matter whether the court rested its decision on a determination potentially pertinent to other disputes in the bankruptcy case . . . ." *Id.* Indeed, rather than heed this admonition, the court below treated it as the major premise on which it based its decision: the fact that the Trustee might make use of the discovery it obtained to commence some other proceeding within the Chapter 15 case was the reason it cited for determining that the order was not final. This reasoning obviously does not square with this Court's analysis.

The decision below also conflicts with this Court's contextual focus on whether the order in question involved the application of discrete statutory criteria. Like relief from stay under section 362, stand-alone discovery in a Chapter 15 case is just one of several

forms of relief available under section 1521(a). *See* 11 U.S.C. §§ 1521(a)(1)-(7). The statutory grounds for obtaining relief are set out in the provision, directing that the bankruptcy court shall grant relief "where necessary to effectuate the purpose of this chapter and to protect the assets of the debtor or the interests of the creditors." § 1521(a). In addition, "[t]he bankruptcy court . . . may only grant discretionary relief under § 1521 if it determines that 'the interests of the creditors and other interested entities, including the debtor, are sufficiently protected.'" *Jaffe v. Samsung Electronics Co., Ltd.*, 737 F.3d 14, 24 (4th Cir. 2013). Other courts have determined that orders granting other forms of relief under section 1521 are final and appealable. *See Jaffe v. Samsung Electronics Co., Ltd.*, 737 F.3d 14 (4th Cir. 2013) (section 1521(a)(5)). Under this Court's analysis in *Ritzen*, the same result is compelled here.

III. THE DECISION BELOW INVOLVES AN IMPORTANT QUESTION OF LAW.

The Courts of Appeals have a "virtually unflagging" obligation to exercise the jurisdiction conferred upon them. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). The question of the Eleventh Circuit's appellate jurisdiction in this case is thus vitally important. *See also Ritzen*, 140 S. Ct. at 587 ("Correct delineation of the dimensions of a bankruptcy 'proceeding' is a matter of considerable importance."). The issue is likewise recurring, particularly given the frequency with which requests for discovery are made in Chapter 15 cases under section 1521. For these additional reasons, certiorari is warranted.

IV. THE DECISION BELOW IS WRONG.

Finally, for all of the reasons addressed above, the decision below is wrong. Given the conflict among the Courts of Appeals on the question presented, the conflict between the decision below and this Court's decision in *Ritzen*, and the importance of the question presented, certiorari is warranted.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court grant certiorari to review the decision of the Eleventh Circuit in this case.

Respectfully Submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, DATED JULY 19, 2021

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 20-12238

IN RE: TRANSBRASIL S.A. LINHAS AÉREAS,

Debtor.

ESTATE OF OMAR FONTANA, *et al.*,

Plaintiffs-Appellants,

versus

ACFB ADMINISTRAÇÃO JUDICIAL LTDA,
AS TRUSTEE OF TRANSBRASIL
S.A. LINHAS AÉREAS,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Florida. D.C. Docket No. 1:19-cv-23700-CMA, Bkcy No. 11-bk-19484-AJC.

July 19, 2021, Decided

Appendix A

MARTIN, Circuit Judge:

Several parties appeal two discovery-related orders in a bankruptcy case. After careful consideration, and with the benefit of oral argument, we conclude the orders were not final and thus dismiss this appeal for lack of jurisdiction.

I. BACKGROUND

In 2002, Transbrasil S.A. Linhas Aéreas ("Transbrasil"), an airline, was placed in involuntary bankruptcy in Brazil (the "Brazilian Bankruptcy Case"). In 2011, seeking U.S. recognition of the Brazilian Bankruptcy Case, the Trustee[1] for Transbrasil's estate filed a petition in the Bankruptcy Court for the Southern District of Florida ("the Bankruptcy Court") under Chapter 15 of the Bankruptcy Code. See 11 U.S.C. § 1515(a). Chapter 15 was enacted to "provide effective mechanisms for dealing with cases of cross-border insolvency." 11 U.S.C. § 1501(a); *see also* 1 Collier on Bankruptcy ¶ 13.03[1][a] (16th ed. 2021) [hereinafter "Collier"] (stating one "objective of chapter 15 is to furnish effective mechanisms to achieve cooperation between courts of the United States and courts of foreign countries involved in cross-border insolvency cases"). Section 1515(a), part of Chapter 15, permits a foreign representative to apply to a bankruptcy court "for recognition of a foreign proceeding . . . by filing a petition for recognition." The Trustee here, as the foreign

1. The current trustee is ACFB Administração Judicial Ltda — ME ("ACFB"). Before ACFB, two people served as co-trustees: Gustavo Henrique Sauer de Arruda Pinto and Alfredo Luiz Kugelmas. We refer to ACFB and its predecessors as the "Trustee."

representative, sought Chapter 15 recognition of the Brazilian Bankruptcy Case in order to seek information about any assets of Transbrasil and related companies that might have been in or transferred through the United States. The Bankruptcy Court granted the petition.

In 2015, the Trustee filed a motion in the Brazilian Bankruptcy Case to extend that case to additional entities and individuals, including the plaintiffs-appellants in this appeal (the "Affected Parties"). This request effectively sought to pierce the corporate veil and include the Affected Parties' assets in the bankruptcy estate. The Trustee also filed a request in the Brazilian Bankruptcy Case to freeze the Affected Parties' assets. According to the Trustee, it sought to extend the Brazilian Bankruptcy Case to the Affected Parties and to freeze their assets because the Affected Parties "controlled Transbrasil when it was operational and received assets derived from a scheme to raid the company's coffers." A Brazilian court entered an order freezing the Affected Parties' assets (the "Freeze Order"). The Freeze Order indicated that it should also be implemented by the Bankruptcy Court for assets in the United States.

In 2019, the Trustee issued several subpoenas to U.S.-based financial entities concerning the Affected Parties' financial affairs.[2] The Trustee said the discovery was relevant for three purposes: (1) to support the Trustee's claims against the Affected Parties in the Brazilian

2. Chapter 15 has its own provision for discovery. *See* 11 U.S.C. § 1521(a)(4); *see also* 1 Collier ¶ 13.07[2] ("Section 1521(a)(4) authorizes the court to give the foreign representative the power to engage in discovery[.]" (footnote omitted)).

Bankruptcy Case, (2) to investigate potential claims against participants in a supposed scheme to divert assets from Transbrasil, and, relevant here, (3) to aid in implementing the Freeze Order for assets in the United States. The Affected Parties moved for a protective order to shield them from the subpoenas, and the Bankruptcy Court denied that motion. The Bankruptcy Court also denied the Affected Parties' motion for reconsideration. The Affected Parties appealed both orders to the District Court.

The District Court dismissed the appeal for lack of jurisdiction. The District Court found that the Bankruptcy Court's orders denying the protective order and denying reconsideration were not final orders the District Court could review. The District Court noted that, in this very same Chapter 15 case, this Court previously ruled that an order denying a motion to quash a different subpoena was not final. *See Marigrove, Inc. v. Sauer de Arruda Pinto*, No. 15-11596, ECF No. 41, slip op. at 1-2 (11th Cir. Aug. 7, 2015) (unpublished) (per curiam).[3] Based on *Marigrove*, the District Court here found "the Eleventh Circuit resolved the precise issue raised by [the parties], in this very case, mandating the Court come to the same

3. In *Marigrove*, the Trustee served a subpoena on a third party concerning Marigrove, Inc. and other entities (collectively "Marigrove"), who moved to quash the subpoena. *Marigrove*, slip op. at 1. The Bankruptcy Court denied in part the motion to quash, and Marigrove appealed. *Id.* The District Court dismissed the appeal, and Marigrove then appealed that dismissal to this Court. *Id.* This Court dismissed Marigrove's appeal for lack of jurisdiction, noting that as a "general rule, orders denying motions to quash subpoenas are not final orders that are immediately appealable." *Id.* at 2-3.

conclusion."[4] The District Court denied the Affected Parties' motion for reconsideration. The Affected Parties appealed both rulings.

II. DISCUSSION

We consider *de novo* all jurisdictional issues.[5] *In re Donovan*, 532 F.3d 1134, 1136 (11th Cir. 2008). This Court

4. The District Court also denied the Affected Parties leave to appeal the Bankruptcy Court's discovery orders as a discretionary interlocutory appeal. *See* 28 U.S.C. § 158(a)(3). The Affected Parties do not challenge this ruling on appeal, so we do not address it here.

5. In passing, the Trustee says "all Subpoena recipients have produced the requested documents," so "it is entirely possible that this appeal is moot." An appeal is moot, and this Court lacks jurisdiction, when the case "no longer presents a live controversy with respect to which the court can give meaningful relief." *Aaron Private Clinic Mgmt. LLC v. Berry*, 912 F.3d 1330, 1335 (11th Cir. 2019) (quotation marks omitted). Our Court has an obligation to consider sua sponte whether an appeal is moot, *id.*, so we pressed counsel at oral argument on this issue. The parties agreed that even if the documents have been produced, there is at least some relief a court could give, such as ordering the Trustee to destroy the documents in the United States. *Cf. Church of Scientology of Cal. v. United States*, 506 U.S. 9, 13, 113 S. Ct. 447, 450, 121 L. Ed. 2d 313 (1992) (holding that an appeal concerning produced tape recordings was not moot because a court could "effectuate a partial remedy by ordering the [receiving party] to destroy" copies of the recordings). However, in light of our holding that this Court lacks jurisdiction over the appeal because the Bankruptcy Court's discovery orders were not final, we need not also decide whether this appeal is moot. *See Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.*, 549 U.S. 422, 431, 127 S. Ct. 1184, 1191, 167 L. Ed. 2d 15 (2007) ("[T]here is no mandatory 'sequencing of jurisdictional issues.'").

has jurisdiction "over only final judgments and orders arising from a bankruptcy proceeding." *Id.*; *see* 28 U.S.C. § 158(d)(1). By the same token, we lack jurisdiction over interlocutory bankruptcy orders. *In re Celotex Corp.*, 700 F.3d 1262, 1265 (11th Cir. 2012) (per curiam). The Affected Parties primarily argue the discovery orders were final and thus this Court has jurisdiction over their appeal. In the alternative, the Affected Parties argue the discovery orders fall under one of the exceptions to the final judgment rule. We address each argument in turn.

A. The Discovery Orders Were Not Final

The Affected Parties argue that this Court has jurisdiction over their appeal because the Bankruptcy Court's orders denying their motion for a protective order and their motion for reconsideration were final orders. It is well-established that, as a "general proposition," discovery orders are "not final orders" and therefore "not immediately appealable." *In re Int'l Horizons, Inc.*, 689 F.2d 996, 1000-01 (11th Cir. 1982) (quotation marks omitted). However, the Affected Parties argue that discovery orders in Chapter 15 cases are final orders because "chapter 15 proceedings are, by definition, proceedings ancillary to bankruptcy cases in foreign courts" and thus "a bankruptcy court has nothing left to do after granting or denying discovery." As the parties acknowledge, our framework for deciding whether a bankruptcy order is final comes from the Supreme Court's recent decision in *Ritzen Group, Inc. v. Jackson Masonry, LLC*, 589 U.S. __, 140 S. Ct. 582, 205 L. Ed. 2d 419 (2020).

In ordinary civil litigation, a decision is "final" for purposes of appeal only "upon completion of the entire case, *i.e.*, when the decision terminates the action or ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Id.* at 586 (alteration adopted and quotation marks omitted). But bankruptcy litigation is a bit different than ordinary civil litigation. "A bankruptcy case embraces an aggregation of individual controversies. Orders in bankruptcy cases qualify as 'final' when they definitively dispose of discrete disputes within the overarching bankruptcy case." *Id.* (citation and quotation marks omitted); *see also Donovan*, 532 F.3d at 1136 ("Finality is given a more flexible interpretation in the bankruptcy context[.]"). It is therefore common for a bankruptcy court to resolve discrete disputes, thereby allowing separate "appeals from discrete, controversy-resolving decisions," even "while the umbrella bankruptcy case remains pending." *Ritzen Grp.*, 140 S. Ct. at 586-87. "In short," although in ordinary civil litigation the "usual judicial unit for analyzing finality" is "the case," in bankruptcy it is often "the proceeding." *Id.* at 587 (quotation marks omitted); *see also In re Charter Co.*, 778 F.2d 617, 621 (11th Cir. 1985) ("In bankruptcy proceedings, it is generally the particular adversary proceeding or controversy that must have been finally resolved, rather than the entire bankruptcy litigation."). As such, a court considering whether an order in a bankruptcy case is final must "define" the "appropriate procedural unit for determining finality." *Ritzen Grp.*, 140 S. Ct. at 588-89.

In *Ritzen Group*, the Supreme Court considered whether a bankruptcy court's order denying relief from

the automatic stay is a final order. *Id.* at 586. Under the automatic stay, the "filing of a bankruptcy petition automatically halts efforts to collect prepetition debts from the bankrupt debtor outside the bankruptcy forum." *Id.* at 589. However, a creditor may move for relief from the automatic stay (a "stay-relief motion") when the creditor has a claim against the debtor's estate. *Id.* In *Ritzen Group*, the debtor argued that an order denying a stay-relief motion is a final order because the relevant proceeding for determining finality is the stay-relief motion. *See id.* The creditor, in turn, argued that the relevant proceeding is the creditor's claim against the debtor's estate, so a ruling on the stay-relief motion is only "a first step" in the claim proceeding and thus not final. *Id.*

The Supreme Court agreed with the debtor and held that "the appropriate 'proceeding' is the stay-relief adjudication." *Id.* As a result, the Court held that an order denying a stay-relief motion is a final order. *Id.* It reasoned that an "order ruling on a stay-relief motion disposes of a procedural unit anterior to, and separate from," the creditor's claim and "initiates a discrete procedural sequence." *Id.* Stated differently, the Supreme Court viewed the stay-relief motion and the creditor's claim as two "discrete" or "separate" proceedings and thus held that an order on the stay-relief motion is a final order in that separate proceeding. However, in doing so, the Supreme Court also cautioned that courts should not view "disputes over minor details about how a bankruptcy case will unfold" as separate proceedings. *Id.* at 590.

Applying the framework provided by *Ritzen Group*, we hold that the Bankruptcy Court's discovery orders were not final orders.[6] Discovery, whether in a Chapter 15 case or otherwise, is ordinarily not "discrete" or "separate" from the proceeding for which the discovery is sought. *Id.* at 589. To the contrary, discovery is "merely a preliminary step" to obtain information for use in some other proceeding, and thus discovery disputes are nothing more than "disputes over minor details about how a bankruptcy case will unfold." *Id.* at 590. As such, the "appropriate procedural unit for determining finality" is not the discovery dispute but the proceeding for which the discovery is sought. *Id.* at 588. Here, that proceeding is the implementation of the Freeze Order, as the record is clear that the Trustee sought the discovery in part to aid in implementing the Freeze Order. And the record demonstrates that the Freeze Order may eventually be implemented in the Chapter 15 case. The Brazilian court that entered the Freeze Order indicated that the Order should be implemented by the Bankruptcy Court for assets in the United States. Specifically, the Brazilian court stated the Affected Parties' assets in the United States "must be frozen/attached," which could be done by

6. As noted above, the District Court made the same finding based on this Court's order in *Marigrove*, which concluded that a separate discovery order in this same Chapter 15 case was not a final order. *See Marigrove*, slip op. at 1-2. The parties dispute the scope of *Marigrove's* holding and whether *Marigrove* governs this appeal. Because we hold that the discovery orders here were not final under the Supreme Court's recent decision in *Ritzen Group*, we need not consider this Court's earlier unpublished (and therefore nonprecedential) order in *Marigrove*.

"directly petition[ing]" the Bankruptcy Court. This shows the discovery at issue in the discovery orders may be used by the Trustee to aid in implementing the Freeze Orders.[7] On this record, the discovery orders were "merely a preliminary step" in the Freeze Order proceeding and thus were not final orders. *Id.* at 590.

We are not persuaded otherwise by the Affected Parties' argument that discovery orders under Chapter 15 should receive special treatment in terms of finality. Again, the Affected Parties say discovery orders under Chapter 15 are final orders because "chapter 15 proceedings are, by definition, proceedings ancillary to bankruptcy cases in foreign courts" and thus "a bankruptcy court has nothing left to do after granting or denying discovery." For starters, the record belies the Affected Parties' assertion that the Bankruptcy Court has "nothing left to do" in this Chapter 15 proceeding. As just discussed, the Bankruptcy Court may be called upon to implement the Freeze Order based on the discovery at issue in the

7. The Affected Parties say the subpoenas at issue in the discovery orders were directed at their personal financial accounts, but the Freeze Order does not apply to such accounts. As such, the Affected Parties argue the discovered information cannot be used to implement the Freeze Order. The Trustee disagrees and argues that the Freeze Order does not exclude the Affected Parties' personal financial accounts. We do not view this dispute as material. Even assuming the Affected Parties are correct that the Freeze Order does not apply to their financial accounts, that does not mean the discovered information cannot be used in aid of implementing the Freeze Order. For instance, the discovered information could be used by the Trustee to locate other assets that are covered by the Freeze Order.

discovery orders. Beyond that, we are not convinced that the primary authority the Affected Parties rely on for their position, the out-of-circuit decision in *In re Barnet*, 737 F.3d 238 (2d Cir. 2013), applies here.

In *Barnet*, the foreign representatives petitioned a bankruptcy court under Chapter 15 for recognition of a liquidation proceeding in Australia. *Id.* at 241. The foreign representatives sought discovery from a company, and the court denied the company's motion to stay the discovery. *Id.* On appeal, the Second Circuit categorically held that a discovery order under Chapter 15 is immediately appealable for two reasons. *Id.* at 244. First, the Second Circuit compared discovery under Chapter 15 to discovery under 28 U.S.C. § 1782(a), which permits discovery "for use in a proceeding in a foreign or international tribunal." *Id.* (quotation marks omitted). It noted that, like discovery under section 1782(a), discovery under Chapter 15 is "ancillary to a suit in another tribunal, such that there will never be a final resolution on the merits beyond the discovery itself." *Id.* (quotation marks and citation omitted). Second, the Second Circuit noted that "a party aggrieved by the automatic relief imposed by Section 1520" (another provision in Chapter 15) could immediately appeal, as "the imposition of automatic relief requires no further action by the Bankruptcy Court." *Id.* Therefore, the Second Circuit reasoned, if "appellate review is available to one, . . . it should be available to the other." *Id.*

Barnet is distinguishable from this case for a couple reasons. First, the Second Circuit did not have the benefit of *Ritzen Group* when it issued *Barnet*, so it did not

wrestle with the question of whether discovery under Chapter 15 is a "discrete" or "separate" proceeding or "merely a preliminary step" in some other proceeding. *See Ritzen Grp.*, 140 S. Ct. at 589-90. As such, the two bases for its decision are largely irrelevant under the now-required analysis to the extent the Second Circuit analogized discovery orders under Chapter 15 to orders in other contexts instead of applying *Ritzen Group's* framework.[8]

Second, there is no indication in *Barnet* that any proceedings other than discovery were contemplated in that Chapter 15 case. As such, *Barnet* is different than this case, where the record is clear that the Trustee sought the discovery in part to aid in implementing the Freeze Order in the Chapter 15 case. In our view, this difference matters. If a Chapter 15 case exists solely to

8. Neither do we adopt *Barnet's* analogy between discovery orders under Chapter 15 and those under section 1782(a). Like the Second Circuit, our Court has held that discovery orders under section 1782(a) are immediately appealable. *See In re Furstenberg Fin. SAS v. Litai Assets LLC*, 877 F.3d 1031, 1034 (11th Cir. 2017) ("In a § 1782 proceeding, the underlying case is necessarily conducted in a foreign tribunal. Therefore, once the district court has ruled on the parties' motions concerning the evidentiary requests, there is no further case or controversy before the district court." (alteration adopted and quotation marks omitted)). But it does not follow from the section 1782(a) context that all discovery orders in the Chapter 15 context are also categorically final and thus immediately appealable. In a section 1782(a) proceeding, there is nothing but the discovery, so the discovery order must be immediately appealable. *See id.* In a Chapter 15 case, by contrast, and as this case demonstrates, a discovery order is ordinarily a "preliminary step" of a larger proceeding.

obtain discovery for use in a foreign bankruptcy case, then the discovery might not be "merely a preliminary step" in some other Chapter 15 proceeding. Instead, in such a case, it would seem the discovery is the *only* proceeding, and thus a discovery order may be a final order that is immediately appealable, as the Second Circuit held in *Barnet*. But again, that's not the case we have. Instead, the discovery orders here were "merely a preliminary step" in the Freeze Order proceeding.

In sum, the Bankruptcy Court's discovery orders were not final orders.

B. The Discovery Orders Do Not Fall Under One of the Exceptions to the Final Judgment Rule

As an alternative to their argument that the Bankruptcy Court's discovery orders were final, the Affected Parties also argue the orders fall under one of the exceptions to the final judgment rule, and thus this Court has jurisdiction. Specifically, citing *Gillespie v. U.S. Steel Corp.*, 379 U.S. 148, 153-54, 85 S. Ct. 308, 311-12 (1964), the Affected Parties argue that the discovery orders "fall within the exception for intermediate resolution of issues fundamental to the merits of the case." In *Gillespie*, the Supreme Court held that "even an order of marginal finality should be accorded immediate review if the question presented is fundamental to further conduct of the case." *Atl. Fed. Sav. & Loan Ass'n of Ft. Lauderdale v. Blythe Eastman Paine Webber, Inc.*, 890 F.2d 371, 376 (11th Cir. 1989).

The Affected Parties say the question presented in the merits of their appeal—whether the discovery orders are valid—is fundamental to the further conduct of the Chapter 15 case and thus the *Gillespie* exception applies. They say the validity of the discovery orders is fundamental to the conduct of the case because if the orders are invalid, then the Trustee will be forced to end its discovery into the Affected Parties' financial affairs, which they assert is the only remaining purpose of the Chapter 15 case.

We reject the Affected Parties' assertion. For one thing, the Supreme Court has since narrowed the *Gillespie* exception to the "unique facts of that case"; otherwise, the Supreme Court said, the final judgment rule "would be stripped of all significance." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 477 n.30, 98 S. Ct. 2454, 2462 n.30, 57 L. Ed. 2d 351 (1978), *superseded by rule on other grounds as stated in Microsoft Corp. v. Baker*, 582 U.S. __, 137 S. Ct. 1702, 198 L. Ed. 2d 132 (2017). In *Coopers & Lybrand*, the Supreme Court characterized *Gillespie* as a case involving "an unsettled issue of national significance" in which "none of the policies of judicial economy served by the finality requirement" were at play. *Id.* The Affected Parties do not attempt to liken this case to those "unique facts," and we see little resemblance ourselves.

In any event, the Affected Parties fail to show how the validity of the discovery orders is fundamental to the conduct of the Chapter 15 case. The record does not indicate that the Chapter 15 case exists solely to obtain information about the Affected Parties' financial affairs.

For instance, the Trustee initiated the Chapter 15 case in part to seek information on Transbrasil's assets in the United States more broadly. In fact, the Affected Parties acknowledge that, even if the discovery orders are invalid, the Trustee "will still be able to search for Transbrasil's assets" in the Chapter 15 case. As such, the validity of the discovery orders is not fundamental to the conduct of this case and thus the *Gillespie* exception does not apply.

III. CONCLUSION

The Bankruptcy Court's discovery orders were not final orders and thus were not immediately appealable. The discovery orders also do not fall under one of the exceptions to the final judgment rule. Our Court therefore lacks jurisdiction over this appeal.

DISMISSED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, DATED MARCH 16, 2020

UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 19-23700-CIV-ALTONAGA

IN RE: TRANSBRASIL S.A. LINHAS AÉREAS,

Debtor.

March 16, 2020, Decided
March 16, 2020, Entered

ORDER

CECILIA M. ALTONAGA, UNITED STATES DISTRICT JUDGE

THIS CAUSE comes before the Court on Appellees, Gustavo Henrique Sauer de Arruda Pinto and Alfredo Luiz Kugelmas's ("Trustees[']") Motion for Dismissal of Appeal [ECF No. 21]. Appellants, The Estate of Omar Fontana, Denilda Pereira Fontana, Emidio Cipriani, Antônio Celso Cipriani, Marise Pereira Fontana Cipriani, and Devom Consultoria e Participações Ltda., filed a Response [ECF No. 26]; to which the Trustees filed a Reply [ECF No. 27]. The Court has carefully considered the parties' written submissions, the record, and applicable law. For the following reasons, the Motion is granted, and the appeal is dismissed for lack of jurisdiction.

Appendix B

I. BACKGROUND

This appeal arises from two discovery orders entered in a chapter 15 proceeding ("U.S. Bankruptcy Case"):[1] (1) a June 16, 2019 Order [Bankr. ECF No. 474] denying a joint motion for a protective order from subpoenas *duces tecum* for Rule 2004 examination; and (2) an August 21, 2019 Order [Bankr. ECF No. 494] denying Appellants' motion to reconsider the June 16, 2019 Order (collectively "Bankruptcy Court Orders"). The issues before the Court are (1) whether the Bankruptcy Court Orders are "final" such that the Court has jurisdiction, and (2) if not, whether the Orders nevertheless merit discretionary review.

A. The Bankruptcy Cases and Freeze Order

Trustee Gustavo Henrique Sauer de Arruda Pinto commenced the U.S. Bankruptcy Case on April 7, 2011 to render assistance to an insolvency proceeding pending in Brazil (the "Brazil Bankruptcy Case") regarding Debtor, Transbrasil S.A. Linhas Aéreas. (*See* Mot. 2; *see also* Verified Pet. for Recognition of Foreign Main Proceeding [Bankr. ECF No. 2]).

On September 16, 2015, in the Brazil Bankruptcy Case, the Trustees filed a motion with the Third Judicial Reorganization and Bankruptcy Court for the Judicial District of São Paulo, Central Civil Venue ("Brazilian Bankruptcy Court") to extend the Brazil Bankruptcy

1. *In re Transbrasil S.A. Linhas Aéreas*, Bankr. No. 11-19484 (S.D. Fla. filed Apr. 7, 2011). References to docket entries in the U.S. Bankruptcy Case are denoted with "Bankruptcy ECF No."

Case to additional entities and individuals, including Appellants. (*See* Mot. 6). In connection with their motion, the Trustees requested the Brazilian Bankruptcy Court enter a provisional order freezing Appellants' assets. (*See id.*). This request was initially denied but on May 4, 2017, the São Paulo Tribunal of Justice (the "Brazilian Appellate Court") entered an order ("Freeze Order") prohibiting the alienation of Appellants' assets. (*See id.*).

On December 18, 2018, the Brazilian Appellate Court issued a more detailed decision concerning the Freeze Order (the "December 18, 2018 Freeze Order"). (*See* [Bankr. ECF No. 437] 4-19).[2] The December 18, 2018 Freeze Order refers to discovery already obtained in the related U.S. Bankruptcy Case and anticipates further discovery:

> [A]t this time, if it cannot be said for certain that there was fraud, there is circumstantial evidence suggesting so, pointing to odd transactions corroborated by existing documents, the big picture of which has been reinforced by the information gathered in the ancillary proceedings taking place in the U.S. state of Florida.
>
> . . .

2. Appellants refer the Court to Bankr. ECF No. 14-1 at 100, 114-15; however, this citation appears to be a scrivener's error. The Court located the December 18, 2018 Freeze Order on the bankruptcy court docket.

> Moreover, concerning the appellees' assets,[2] to enforce the court order on the assets located in that country, the appellant [may] . . . directly petition the judge of the U.S. Bankruptcy Court — State of Florida, which would have jurisdiction as legally recognized in court in that country, and, in accordance with the local laws, execute orders from the competent Brazilian court hearing the Transbrasil bankruptcy case[.]

(Dec. 18, 2018 Freeze Order 11, 15-16 (alterations added); *see also* Mot. 7).

In January 2019, the Trustees issued several subpoenas to U.S.-based financial entities. (*See* [Bankr. ECF Nos. 436, 438-41]; *see also* Mot. 3). According to the Trustees, the discovery sought is relevant for three reasons: (1) to support the Trustees' pending claims against Appellants in the Brazil Bankruptcy Case; (2) to investigate additional potential claims that may be brought against participants in the scheme to divert assets from the Debtor; and (3) to aid in the implementation of the Freeze Order. (*See* Mot. 3).

On February 13, 2019, Appellants filed their Joint Motion for Protective Order from the subpoenas with the bankruptcy court. (*See* [Bankr. ECF No. 445]). The bankruptcy court denied the motion. (*See generally* June 16, 2019 Order). The Trustees filed a Joint Motion for Reconsideration [Bankr. ECF No. 477], which was also denied. (*See generally* Aug. 21, 2019 Order). This appeal followed.

Appendix B

B. Prior Discovery in the U.S. Bankruptcy Case

This is not the first case in this District concerning discovery in the U.S. Bankruptcy Case. (*See* Mot. 4). In 2014, the Trustees issued a subpoena *duces tecum* for Rule 2004 examination to obtain financial information concerning several non-parties, including Cave Creek Holdings, Corp. ("Cave Creek"), Cel-Air Inc. ("Cel-Air"), Energy Ventures Limited, and Trilogy Holdings Limited. (*See id.*). Cave Creek, Cel-Air, and another non-party, Marigrove, Inc. ("Marigrove") moved to quash the subpoenas, but these motions were denied by the bankruptcy court on April 25, 2014. (*See* Apr. 25, 2014 Order [Bankr. ECF No. 95]).

On appeal, the district court affirmed the bankruptcy court order in part. *See Marigrove, Inc. v. Pinto*, No. 14-cv-22580, 2015 U.S. Dist. LEXIS 66312 Order (S.D. Fla. Mar. 30, 2015) ("March 30, 2015 Order"). Cave Creek, Cel-Air, and Marigrove appealed the district court's order. *See Marigrove, Inc. v. Pinto*, No. 15-11596 (11th Cir. filed Apr. 14, 2015) ("Marigrove, Inc. Appeal"). Before the briefs were filed, the Eleventh Circuit posed a jurisdictional question, requesting the parties "address whether [the Eleventh Circuit] has jurisdiction to review the district court's order affirming in part and dismissing in part the bankruptcy court's April 2014 'Order on . . . Motion to Quash Subpoena *Duces Tecum* for Rule 2004 Examination.' ***Specifically, was the bankruptcy court's order 'final.***'" (Marigrove, Inc. Appeal, Jurisdictional Question (May 20, 2015) (alterations and emphasis added)).

Appendix B

The Trustees and the Discovery Targets filed responses to the jurisdictional question. (*See* Marigrove, Inc. Appeal, Trustees' Resp. to Jurisdictional Question (June 3, 2015); Marigrove, Inc. Appeal, Appellants' Br. in Resp. to Jurisdictional Question (June 3, 2015)). Like the Trustees in this case, Cave Creek, Cel-Air, and Marigrove argued the bankruptcy court's order was final and thus subject to review by the district court:

> Below, the district court should have analyzed the bankruptcy court's order in the context of the proceeding in which it was brought: a discovery proceeding under chapter 15 recognized for the very purpose of issuing piecemeal discovery on third parties with respect to Transbrasil's assets . . . . Unlike discovery orders in other cases, in this chapter 15 proceeding there are no further steps to be taken by the court or the parties with respect to Appellants or the Rule 2004 subpoena "to enable the court to adjudicate on the merits" and, thus, the order is final and appealable.

(Marigrove, Inc. Appeal, Appellants' Br. in Resp. to Jurisdictional Question 14 (alteration added)).

The Eleventh Circuit affirmed the March 30, 2015 Order, noting "[a]s a general rule, orders denying motions to quash subpoenas are not final orders that are immediately appealable." (Marigrove, Inc. Appeal, Jurisdictional Order (Aug. 7, 2015) (alteration added; citations omitted)).

II. ANALYSIS

The district court functions as an appellate court in reviewing bankruptcy decisions. *In re Piper Aircraft Corp.*, 362 F.3d 736, 738 (11th Cir. 2004) (citation and internal quotation marks omitted). Under 28 U.S.C. section 158(a), the district court has jurisdiction to hear appeals "(1) from final judgments, orders, and decrees; (2) from interlocutory orders and decrees issued under section 1121(d) of title 11 . . . ; and (3) with leave of the court, from other interlocutory orders and decrees." *Id.* (alteration added). The present Motion requires the Court resolve whether the Bankruptcy Court Orders are "final;" and if not, whether as interlocutory Orders they merit discretionary review.

A. Whether the Bankruptcy Court Orders are Final

For the purpose of appellate jurisdiction, a final order "is one 'by which a district court disassociates itself from the case.'" *Doe No. 1 v. United States*, 749 F.3d 999, 1004 (11th Cir. 2014) (quoting *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106, 130 S. Ct. 599, 175 L. Ed. 2d 458 (2009); other citation omitted). "An interlocutory order or decree is one which does not finally determine a cause of action but only decides some intervening matter pertaining to the cause, and which requires further steps to be taken in order to enable the court to adjudicate the cause on the merits." *Matter of Kutner*, 656 F.2d 1107, 1111 (5th Cir. 1981) (citation omitted). "In civil litigation generally . . . a 'final decision'. . . is normally limited to an order that resolves the entire case." *Ritzen Grp., Inc. v. Jackson*

Masonry, LLC, __ U.S. __, 140 S. Ct. 582, 205 L. Ed. 2d 419, 2020 WL 201023, at *2 (U.S. Jan. 14, 2020) (alterations added). But "[t]he regime in bankruptcy is different. A bankruptcy case embraces an aggregation of individual controversies. Orders in bankruptcy cases qualify as 'final' when they definitively dispose of discrete disputes within the overarching bankruptcy case." *Id.* (alteration added; citations and first internal quotation marks omitted).

Appellants argue the Bankruptcy Court Orders are "final" because they fully resolve a discrete dispute — namely, whether the subpoenas are enforceable, leaving nothing for the bankruptcy court to do regarding the controversy. (*See* Resp. 10). Relying on *In re Barnet*, 737 F.3d 238 (2d Cir. 2013), Appellants draw a distinction between discovery orders generally, and those in chapter 15 bankruptcy cases. (*See* Resp. 7-10). In *In re Barnet*, the court analogized discovery orders in chapter 15 proceedings to "discovery orders issued pursuant to 28 U.S.C. [section] 1782(a), which provides for discovery 'for use in a proceeding in a foreign or international tribunal.'" *Id.* at 244 (alteration added; quoting 28 U.S.C. § 1782(a)). According to *In re Barnet*, chapter 15 discovery orders are final and appealable because they, "like Section 1782 proceedings, are ancillary to a suit in another tribunal, . . . such that there will never be a final resolution on the merits beyond the discovery relief itself." *Id.* (alteration added; citations and internal quotation marks omitted). Appellants contend the Court should come to the same conclusion.

Appellants argue the *In re Barnet* holding is reinforced by the Supreme Court's recent decision in *Ritzen Grp., Inc.*, __ U.S. __, 140 S. Ct. 582, 205 L. Ed. 2d 419, 2020 WL 201023. (*See* Resp. 10). In *Ritzen Group*, the Supreme Court found a bankruptcy court order denying relief from an automatic stay was final and appealable because it "dispos[ed] of a procedural unit anterior to, and separate from, claim-resolution proceedings." *Ritzen Grp., Inc.*, __ U.S. __, 140 S. Ct. 582, 205 L. Ed. 2d 419, 2020 WL 201023 at *5 (alteration added). The Court distinguished the dispute over the automatic stay from disputes "over minor details about how the bankruptcy case will unfold," noting "[r]esolution of a motion for stay relief can have large practical consequences." *Id.* (alteration added; citation omitted).

Naturally, the Trustees take a contrary view. They emphasize discovery orders, generally, are non-final and not immediately appealable. (*See* Mot. 9). According to the Trustees, Appellants' position "slices the case too thin and threatens to turn chapter 15 cases into an unworkable morass of frequent appeals from every disputed subpoena." (Reply 6 (alteration removed; internal quotation marks omitted)). Significantly, the Trustees point out another judge in this District has already "concluded that [a chapter 15 discovery order] was interlocutory" and "[t]he Eleventh Circuit agreed." (*Id.* (alterations added)).

The Court finds Appellants' argument and the reasoning in *In re Barnet* have merit. Ultimately, however, they are not dispositive given countervailing authority from this Circuit. As noted by Trustees, the Eleventh Circuit has already considered, *in connection with*

this very case, whether a bankruptcy court order on a motion to quash a subpoena is "final." Appellants insist the district court's opinion in the Marigrove, Inc. Appeal "misapprehended the issue before it" (Resp. 12), but they ignore the effect of the Eleventh Circuit's *affirmance* of the district court.

It is particularly noteworthy that in the Marigrove, Inc. Appeal, the Eleventh Circuit asked the parties to address whether the bankruptcy court order on the motion to quash was final. (*See* Marigrove, Inc. Appeal, Jurisdictional Question). In response to the jurisdictional question, Cave Creek, Cel-Air, and Marigrove made the same arguments Appellants make here — namely that "[u]nlike discovery orders in other cases, in this chapter 15 proceeding there are no further steps to be taken by the court or the parties with respect to Appellants or the Rule 2004 subpoena 'to enable the court to adjudicate on the merits' and, thus, the [discovery] order is final and appealable." (Marigrove, Inc. Appeal, Appellants' Brief in Resp. to Jurisdictional Question 14). That Cave Creek, Cel-Air, and Marigrove did not cite — and the Eleventh Circuit did not address — *In re Barnet* does not change the outcome. At bottom, the Eleventh Circuit resolved the precise issue raised by Appellees' Motion, in this very case, mandating the Court come to the same conclusion. [3]

3. Neither does *Ritzen Group* change the outcome. Although *Ritzen Group* affirms the same principle on which the *In re Barnet* court relies — that orders disposing of "a procedural unit anterior to, and separate from, claim-resolution proceedings" are final — *Ritzen Group* does not concern a discovery order. *Ritzen Grp., Inc.*, 140 S. Ct. 582, 205 L. Ed. 2d 419, 2020 WL 201023 at *5.

B. Whether the Bankruptcy Court Orders Merit Discretionary Review

Appellants next argue the Discovery Orders merit discretionary review even if they are interlocutory. The Court disagrees.

"In determining when to exercise [its] discretionary authority, a district court will look to the standards which govern interlocutory appeals from the district court to the court of appeals pursuant to 28 U.S.C. [section] 1292(b)." *Figueroa v. Wells Fargo Bank N.A.*, 382 B.R. 814, 824 n.5 (S.D. Fla. 2007) (first alteration omitted; second and third alterations added; quoting *In re Celotex Corp.*, 187 B.R. 746, 749 (M.D. Fla. 1995); other citation omitted). To obtain interlocutory review, "a party must demonstrate that: (1) the order presents a controlling question of law; (2) over which there is a substantial ground for difference of opinion among courts; and (3) the immediate resolution of the issue would materially advance the ultimate termination of the litigation." *Laurent v. Herkert*, 196 F. App'x 771, 772 (11th Cir. 2006) (citation omitted). "[D]istrict courts should allow interlocutory bankruptcy appeals sparingly since interlocutory bankruptcy appeals should be the exception, not the rule." *In re Hinners*, No. 12-80924-MC, 2012 U.S. Dist. LEXIS 130509, 2012 WL 4049967, at *1 (S.D. Fla. Sept. 13, 2012) (alteration added; citation omitted).

Appellants contend the "central issue in this case is whether the [Appellants]' personal financial information is within the scope of permissible discovery in chapter

15 cases." (Resp. 16 (alteration added)). According to Appellants, there is conflicting authority regarding whether discovery in this case should be governed by Federal Rule of Bankruptcy Procedure 2004(b), which authorizes relatively broad discovery; or by 11 U.S.C. section 1521(a)(4), which Appellants contend limits discovery to information concerning the "debtor's assets, affairs, rights, obligations or liabilities." (*Id.* 4 (quoting 11 U.S.C. § 1521(a)(4))).

Appellants point to two bankruptcy cases from the Southern District of New York appearing to treat the interplay between Rule 2004(b) and section 1521(a)(4) differently: *In re Glitnir banki hf.*, No. 08-14757, 2011 Bankr. LEXIS 3296, 2011 WL 3652764 (Bankr. S.D.N.Y. Aug. 19, 2011), and *In re Millennium Global Emerging Credit Master Fund Ltd.*, 471 B.R. 342 (Bankr. S.D.N.Y. 2012). Appellants quote from each case to demonstrate the contrast. (*See* Resp. 17). First, Appellants point to language in *Glitnir*, where the court stated

> Section 1521(a)(4) expressly governs the Foreign Representative's discovery rights. Bankruptcy Rule 2004 complements those rights, and may provide a procedural mechanism to obtain a subpoena under Rule 9016 of the Federal Rules of Bankruptcy Procedure, but *cannot expand* those rights beyond what the statute and the order issued pursuant to the statute permit.

2011 Bankr. LEXIS 3296, 2011 WL 3652764, at *6 (emphasis added). Appellants contrast this excerpt with one from *Millennium Global*, where the court observed it

> need not reach this issue on this motion, but the Court notes that one of the main purposes of chapter 15 is to assist a foreign representative in the administration of the foreign estate . . . which would militate in favor of granting a foreign representative *broad discovery rights using the full scope of Rule 2004*.

471 B.R. at 346-47 (citation omitted; alteration and emphasis added).

While these statements seem to conflict, Appellants do not establish a "substantial ground for difference of opinion among courts" for two reasons.[4] First, cases outside and within this District appear largely, if not uniformly, to agree with *In re Millenium Global. See, e.g.*, *In re Petroforte Brasileiro de Petroleo Ltda.*, 542 B.R. 899, 911 (Bankr. S.D. Fla. 2015) ("The Court agrees with the interpretation in *Millennium* and finds that Rule 2004 is applicable in this chapter 15 case."); *In re Markus*, 607 B.R. 379, 390 (Bankr. S.D.N.Y. 2019) (noting, under section 1507(a), "Rule 2004 [is] fully applicable in a chapter 15 case" (alteration added; citations and quotation marks omitted)); *In re AJW Offshore, Ltd.*, 488 B.R. 551, 561 (Bankr. E.D.N.Y. 2013) ("[D]iscovery will only be permitted by motion on notice with an opportunity for hearing to the adverse parties and by making examination and production of documents under Rule 2004 . . . with any discovery to be allowed to be subject to conditions imposed

4. The Court assumes, without deciding, the Bankruptcy Court Orders present a controlling issue of law.

in accordance with [section] 1522." (alterations added; citation omitted)). Appellants present no direct authority, and the Court can find none, approving the holding in *In re Glitnir* with respect to the issue whether section 1521(a)(4) limits discovery otherwise available under Rule 2004(b).

While not dispositive to the analysis of whether there is a "substantial ground for difference of opinion," the Court finds the lack of authority supporting *In re Glitnir* militates against the notion it presents a conflict of laws meriting interlocutory review. *See Couch v. Telescope Inc.*, 611 F.3d 629, 633 (9th Cir. 2010) ("[J]ust because a court is the first to rule on a particular question or just because counsel contends that one precedent rather than another is controlling does not mean there is such a substantial difference of opinion as will support an interlocutory appeal." (alteration added; quotation marks and citation omitted)); *Arista Networks, Inc. v. Cisco Sys. Inc.*, No. 16-cv-00923, 2018 U.S. Dist. LEXIS 98177, 2018 WL 2761855, at *5 (N.D. Cal. June 8, 2018) (finding the defendant's "contention that reasonable jurists could disagree and that one out-of-circuit case suggests a different result" was "insufficient to show a substantial ground for difference of opinion." (citation omitted)); *In re Chinese-Manufactured Drywall Prod. Liab. Litig.*, No. CV 09-2047, 2018 U.S. Dist. LEXIS 76528, 2018 WL 2095729, at *5 (E.D. La. May 7, 2018) ("The threshold for establishing a 'substantial ground for difference of opinion' is higher than mere disagreement or even the existence of some contrary authority." (quotation marks and citation omitted)); *Sunflower Redevelopment, LLC v. Illinois Union Ins. Co.*, No. 4:15-cv-577, 2016 U.S. Dist.

LEXIS 39858, 2016 WL 1228659, at *4 (W.D. Mo. Mar. 28, 2016) ("A substantial ground for disagreement is reflected by a sufficient number of conflicting and contradictory opinions, but not by an established body of law or dearth of cases." (quotation marks and citation omitted)); *LaBelle v. Philip Morris Inc.*, No. 2:98-3235-23, 1999 U.S. Dist. LEXIS 24271, 1999 WL 33591439, at *1 (D.S.C. June 16, 1999) ("The mere fact that there is some difference of opinion among legal commentators on a particular issue is insufficient to establish the substantial ground for difference of opinion that is required by [section] 1292(b), particularly in light of the rather one-sided judicial authority to the contrary." (alteration added; internal quotation marks and citation omitted)); *Oyster v. Johns-Manville Corp.*, 568 F. Supp. 83, 88 (E.D. Pa. 1983) (finding a "single case demonstrates that while there may be grounds for differences of opinion, they are not, however, *substantial*" (emphasis in original)).

Second, on close review of *In re Glitnir*, the Court finds its holding is too narrow to present a direct conflict with *Millennium Global*. In *In re Glitnir*, the bankruptcy court signed a recognition order authorizing a foreign representative of an Icelandic bank undergoing liquidation to issue subpoenas concerning the bank's assets and liabilities. 2011 Bankr. LEXIS 3296, 2011 WL 3652764, at *1. The bankruptcy court quoted from a portion of the recognition order, noting it tracked the language of section 1521(a)(4):

Appendix B

> The Foreign Representative is hereby authorized to examine witnesses, take evidence, seek production of documents, and deliver information concerning the assets, affairs, rights, obligations or liabilities of Glitnir, as such information is required in the Icelandic Proceeding under the law of the United States.
>
> In addition, Rule 2004 states in relevant part that the Court may allow a party in interest to examine an entity and compel the production of documents only as to "the acts, conduct, or property or to the liabilities and financial condition of the debtor, or to any matter which may affect the administration of the debtor's estate."

2011 Bankr. LEXIS 3296, 2011 WL 3652764, at *6.

The foreign representative issued subpoenas to several U.S. entities seeking financial information pertaining to two individuals. *See* 2011 Bankr. LEXIS 3296, [WL] at *3. The individuals moved to quash the subpoenas. *See id.* In partially granting the motions, the bankruptcy court stated "[s]ection 1521(a)(4) expressly governs the Foreign Representative's discovery rights. Bankruptcy Rule 2004 complements those rights . . . but cannot expand those rights beyond what the statute ***and the order issued pursuant to the statute*** permit." 2011 Bankr. LEXIS 3296, [WL] at *6 (alterations and emphasis added; footnote call number omitted). The *In re Glitnir* court commented on the interplay between 1521(a)(4) and Rule 2004(b), but it did so with reference to the recognition

order "track[ing]" section 1521(a)(4). *Id.* (alteration added). Absent the recognition order, it is unclear the *In re Glitnir* court would have declined to consider the broadening effect of other chapter 15 provisions.

The court in *Millennium Global* made the point:

> [W]hile *Glitnir* contrasted the broader language of Bankruptcy Rule 2004, it did not consider the authority of the Bankruptcy Court, under 11 U.S.C. [section] 1507(a), to "provide additional assistance to a foreign representative under this title [the Bankruptcy Code] or under other laws of the United States." ***Additional assistance can be provided by making Bankruptcy Rule 2004 fully applicable***. The Court need not reach this issue on this motion, but the Court notes that one of the main purposes of chapter 15 is to assist a foreign representative in the administration of the foreign estate . . . which would militate in favor of granting a foreign representative broad discovery rights using the full scope of Rule 2004. This conclusion would be consistent with case law under the predecessor of chapter 15, 11 U.S.C. [section] 304, whose authorization of "other appropriate relief" to a foreign representative was construed to allow for broad discovery. . . . Moreover, although chapter 15 is more explicit than [section] 304 in specifically providing that a foreign representative can request discovery in aid of a foreign proceeding under [section] 1521(a)(4), ***there is no authority that chapter 15 was***

> ***intended to limit the discovery available to foreign representatives***.

471 B.R. at 346-47 (third alteration in original; citations omitted; emphasis added).

Because *In re Glitnir*'s reliance on only section 1521(a)(4) appears to be constrained by the case's factual background, the Court does not find its holding to be in substantial conflict with *Millennium Global*. In other words, the contrast between the two cases appears to be one of breadth, and not substance.

III. CONCLUSION

Appellants do not establish the Bankruptcy Court Orders are final, nor do they satisfy the second prong of the test for discretionary interlocutory review. Mindful district courts "should allow interlocutory bankruptcy appeals sparingly," *In re Hinners*, 2012 U.S. Dist. LEXIS 130509, 2012 WL 4049967, at *1 (citation omitted), it is

ORDERED AND ADJUDGED Appellees, Gustavo Henrique Sauer de Arruda Pinto and Alfredo Luiz Kugelmas' Motion for Dismissal of Appeal **[ECF No. 21]** is **GRANTED**. This appeal is **DISMISSED** for lack of jurisdiction.

DONE AND ORDERED in Miami, Florida, this 16th day of March, 2020.

/s/ Cecilia M. Altonaga
CECILIA M. ALTONAGA
UNITED STATES DISTRICT JUDGE

APPENDIX C — ORDER OF THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, FILED AUGUST 21, 2019

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Chapter 15
Case No. 11-19484-BKC-AJC

IN RE:

TRANSBRASIL S.A. LINHAS AÉREAS,

Debtor in a Foreign Proceeding.

ORDER DENYING JOINT MOTION FOR RECONSIDERATION

THIS CAUSE came before the Court for hearing on August 15, 2019 upon the *Joint Motion for Reconsideration of and to Alter or Amend Order Denying Motion for Protective Order from Subpoenas Duces Tecum for Rule 2004 Examination* ("Joint Motion") (ECF 477). The Joint Motion was filed by the Estate of Omar Fontana, Denilda Pereira Fontana, Antonio Celso Cipriani, Marise Pereira Fontana Cipriani, Emidio Cipriani, and Devom Consultoria e Partipacoes Ltda (collectively, the "Movants"),

On March 21, 2019, the Court conducted a hearing upon the Movants' joint motion for protective order (ECF 445) from certain subpoenas for Rule 2004 Examinations served on financial institutions (ECFs 436, 438, 439,

440, 441, and 444). At the conclusion of the hearing on the motion for protection, the Court took the matter under advisement and invited the parties to submit further argument in the form of proposed memorandum decisions supporting each party's respective position. The Court received proposed opinions from the Trustees and the Movants. Upon review of the parties' submissions, the Court considered the arguments and positions of the Movants, again, but was no more persuaded by their proposed order than it was by their proffers and representations at the hearing. The Court ruled in favor of the Trustees, having been persuaded by their arguments and written submissions. Accordingly, after certain revisions and editing, the Court entered the *Order Denying Motion for Protective Order from Subpoenas Duces Tecum for Rule 2004 Examination* on July 16, 2019 (ECF 474), as proposed by the Trustees and as amended by the Court.

The Movants thereafter sought reconsideration of the Order denying the motion for protective order by filing the Joint Motion. On August 15, 2019, the Court provided the Movants an opportunity to present argument on the Joint Motion. However, having considered the Joint Motion and the representations at the hearing thereon, the Court determined the Movants' arguments raised no new issues of law or fact that the Court did not previously consider when entering the *Order Denying Motion for Protective Order from Subpoenas Duces Tecum for Rule 2004 Examination* on July 16, 2019. Any "errors" by the Court, which the Court does not concede exist, are immaterial and inconsequential to the Court's ruling in favor of

discovery. Moreover, the Court found no merit to any of the additional arguments raised upon reconsideration, including the argument that this Court is required to also recognize the legal proceeding taken against the Movants before authorizing discovery, notwithstanding that this Court has already recognized the foreign main proceeding.

The Court believes that discovery is justified and warranted under the circumstances and concludes there is no basis to reconsider its prior Order. It is

ORDERED AND ADJUDGED that the *Joint Motion for Reconsideration of and to Alter or Amend Order Denying Motion for Protective Order from Subpoenas Duces Tecum for Rule 2004 Examination* (ECF 477) is DENIED.

APPENDIX D — ORDER OF THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, FILED JULY 16, 2019

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Chapter 15
Case No. 11-19484-AJC

IN RE:

TRANSBRASIL S.A. LINHAS AÉREAS

Debtor in a Foreign Proceeding.

ORDER DENYING MOTION FOR PROTECTIVE ORDER FROM SUBPOENAS DUCES TECUM FOR RULE 2004 EXAMINATION

THIS CAUSE came before the Court for hearing on March 21, 2019 (the "*Hearing*"), upon the joint motion (ECF 445, the "*Motion*") of the Estate of Omar Fontana (the "*Fontana Estate*"), Denilda Pereira Fontana, Antonio Celso Cipriani, Marise Pereira Fontana Cipriani, Emidio Cipriani, and Devom Consultoria e Participacoes Ltda. (collectively, the "*Movants*") for protective order from certain subpoenas for Rule 2004 Examinations served on financial institutions (ECFs 436, 438, 439, 440, 441, and 444, the "*Subpoenas*"), and the response in opposition to the Motion filed by Gustavo Henrique Sauer de Arruda Pinto and Alfredo Luiz Kugelmas (the "*Trustees*"), as Trustees of Transbrasil S.A. Linhas Aéreas ("*Transbrasil*"). ECF 451.

Appendix D

The Court has considered the Motion, the Trustees' response, the record in this matter, and the argument of counsel at the Hearing. For the reasons set forth herein, the Motion is DENIED.

BACKGROUND

1. This case (the "*Chapter 15 Case*") is an ancillary proceeding filed before this Court under Chapter 15 of the Bankruptcy Code for the purpose of rendering assistance to the insolvency proceedings of Transbrasil pending in the 19th Civil Court of São Paulo, Brazil (together with appeals relating thereto, the "*Brazilian Proceedings*"). Recognition was sought and obtained, and now the Trustees in the Transbrasil insolvency proceedings seek to use the tools available under Chapter 15 to, among other things, take discovery regarding assets that were diverted from Transbrasil.

2. The Subpoenas seek financial information of the Movants from the two years preceding the commencement of the Brazilian Proceedings up to the present, to the extent that it is available through the financial institutions that have received subpoenas. The Trustees maintain that this discovery is relevant for three reasons: (1) to support the Trustees' pending claims against the Movants in the Brazilian Proceedings (i.e. a request to extend the bankruptcy to Movants and find that Movants are alter egos of Transbrasil), (2) to investigate additional potential claims that could be brought against participants in the scheme to divert assets from Transbrasil, and (3) to aid the implementation of the Freeze Order (defined below)

rendered in the Brazilian Proceedings. *See* ECF 445, p. 19, lns 2-12 and p. 23, lns 6-11, 17-24.

3. The Movants seek the Court's intervention because they claim the discovery sought has no nexus to Transbrasil and because it violates the terms of the Freeze Order.

THE BRAZILIAN PROCEEDINGS

4. The Court has reviewed translations of various orders rendered at the trial court and appellate level in the Brazilian Proceedings, heard argument regarding those orders at the Hearing, reviewed additional [translated] orders from the Brazilian Proceedings which were filed in this case after the Hearing, and considered the Expert Report of Professor Keith S. Rosenn with Respect to Brazilian Law (ECFs 464, 467 and 469, collectively, the "*Rosenn Report*"), which was filed by the Movants.[1]

5. On September 16, 2015, the Trustees filed a motion with the Third Judicial Reorganization and Bankruptcy

1. The Court "may consider any relevant material or source, including testimony" to make a determination of foreign law. Fed.R.Civ.P. 44.1. Where the Rosenn Report presents a summary of orders that have been translated to English and filed with the Court, it can be reviewed to navigate the voluminous filings. Where the foreign orders themselves refer to Brazilian statutes, the Rosenn Report's description of those statutes can be considered under Rule 44.1 and Fed.R.Evid. 702. However, Mr. Rosenn's interpretation of foreign orders is not the proper subject of expert opinion testimony under Fed.R.Evid. 702 nor a "determination of foreign law" under Fed.R.Civ.P. 44.1.

Court for the Judicial District of São Paulo, Central Civil Venue (the "*Brazilian Bankruptcy Court*") to pierce the corporate veil and extend the Transbrasil bankruptcy to various entities and individuals, including the Movants and three companies who have not appeared in this Chapter 15 Case (together, the "*Additional Defendants*"). *See* Motion, ECF 445:3; ECF 437, Ex. A at 2. This motion commenced what the Rosenn Report and the Trustees refer to as an "incidental proceeding" or an "adversarial proceeding." *See* ECF 467, ¶ 6(3), ¶ 8. On November 30, 2016, the Brazilian Bankruptcy Court denied the Trustees' request for an urgent provisional order freezing the assets of the Additional Defendants to preserve the status quo during the litigation of the merits. *See Id.* at ¶ 9 (this order was not filed in the Chapter 15 Case, but all parties agree that it denied the freeze order requested by the Trustees).

6. On May 4, 2017, the Sao Paulo Tribunal of Justice (the "*Brazilian Appellate Court*") reversed the portion of the order denying the preliminary relief, effectively freezing assets of the Additional Defendants (including the Movants) until judgment on the Trustees' claim to pierce the corporate veil and extend the bankruptcy of Transbrasil. The parties refer to this Order as the "*Freeze Order*." By its terms, it appears the Freeze Order was intended to be a restraint on alienation but not an impediment to the use and enjoyment of assets during the pendency of the proceedings. The Freeze Order provides that its purpose "is only to avoid any possible sale of assets by the appellees while the incidental proceeding is judged; however, this restriction does not represent a restriction of any kind on the full exercise of the regular

use and enjoyment of these assets." ECF 425, p. 11. The Freeze Order, together with a certified translation thereof, is attached to the Trustees' Response to Motion to Terminate Recognition [ECF 425] as Exhibit 1 thereto.

7. On July 25, 2018, the Brazilian Bankruptcy Court effectuated the Freeze Order by ordering the Central Bank's BACENJUD system to block the financial assets of the Additional Defendants in the pending Brazilian adversarial case (the Movants and others). ECF 453, p. 4-5; ECF 464, ¶ 14. That same order required the production of certain financial information regarding the Additional Defendants: a request to the Brazilian taxing authorities for copies of defendants' asset declarations, as well as a request to the National Financial System's Customer Registration (CSS-BACEN) for information regarding current accounts, savings accounts, time deposits and other assets and rights in the name of the defendants. *Id.*

8. On December 18, 2018, a panel of three judges of the same intermediate appellate court issued a more detailed decision on the Freeze Order. This decision references discovery previously taken in this Chapter 15 Case ("the big picture . . . has been reinforced by the information gathered in the ancillary proceedings taking place in the U.S. state of Florida") and anticipates that comity by this Court may be sought in this Chapter 15 Case to enforce the Freeze Order ("to enforce the court order on assets located [outside of Brazil, the Trustees may] directly petition the judge of the U.S. Bankruptcy Court – State of Florida, which would have jurisdiction as legally recognized in court in that country, and, in accordance

with the local laws, execute orders from the competent Brazilian court hearing the Transbrasil bankruptcy case"). ECF 437, pp. 11, 15-16.[2]

9. The Brazilian Appellate Court relied upon "concrete facts" including a large volume of suspicious and unexplained transfers, the unaccounted for loss of a R$100,000,000 bailout from the Brazilian government two years before the commencement of the Brazilian Proceedings, and the unexplained loss of Transbrasil's accounting books, which "ought to show the destination of the monies and assets, all of which gives credence to allegations that the destination of these large transfers was concealed and the amounts were apparently embezzled by the appellees." *Id.* at 9-10.

10. The thrust of the Freeze Order, as explained in the December 2018 order, is to block "the disposal, or transfer, of the [Additional Defendants'] assets in Brazil and abroad (immovable and moveable assets, including the companies' aircraft and stock)." *Id.* at 19. The purpose of the Freeze Order is to preserve the status quo of the Additional Defendants' assets: "to prevent the disposal of

2. The Movants have moved for reconsideration of the Freeze Order in Brazil [DE 445:5] but the Court has not been made aware of any order staying the Freeze Order. Accordingly, the Court will take into consideration the Freeze Order, as it stands, unless and until it is overturned, reversed or stayed. *See In re Petroforte Brasileiro de Petroleo Ltda.*, 542 B.R. 899, 910 (Bankr. S.D. Fla. 2015) (finding no cause to abate or stay discovery pending the outcome of an appeal in the Brazilian main case where there was no stay pending appeal).

the [Additional Defendants'] assets – *disposal effected to avoid paying obligations that may result if the motion to extend the effects of the bankruptcy and pierce the corporate veil is granted.*" *Id.* at 16-17.

11. The Freeze Order includes a limitation on the garnishment of bank accounts, and "allows any personal, professional or corporate billing or income necessary for the [Movants] to carry out their business and economic activity and also allows the [Movants] to make regular movements with their deposit and savings accounts[.]" *Id.* at 19.

> As for the rest of the assets, they must be frozen/attached, including any assets located in the United States of America, particularly until other evidence can be gathered in order to reveal the true facts concerning the appellees' involvement in possible fraudulent practices, whereby a large volume of the bankrupt debtor's assets were allegedly siphoned off using controlled and associated companies, and intermediaries too, including offshore companies that created a channel to funnel cash and hide its origin.

Id. at 8.

12. The Brazilian Appellate Court outlines two options to enforce or implement the Freeze Order against assets in the U.S.: (1) letters rogatory, and (2) a direct request for equivalent measures available under U.S. law, which

request should be made in this Chapter 15 Case. *Id.* at 15-16. To date, no request has been made in this Court to enforce the Freeze Order. Instead, the Trustees have elected to first conduct discovery to identify property and the U.S. laws necessary to effectively "freeze" such assets depending on their type and location in the United States.

13. On December 19, 2018, the day immediately following its detailed ruling on the Freeze Order, the Brazilian Appellate Court denied the appeal brought by the Additional Defendants against the July 25, 2018 decision of the Brazilian Bankruptcy Court. ECF 455. The appeal argued that the bankruptcy judge incorrectly read the Freeze Order and that freezing their bank accounts incorrectly denied them the earnings in those accounts. The Brazilian Appellate Court denied the interlocutory appeal because it had already issued an order clarifying that bank accounts were not to be frozen under the Freeze Order and for procedural reasons. *Id.*; ECF 464, ¶ 18. Significantly, the Brazilian Appellate Court did not reverse the financial discovery that was granted to the Trustees by the Brazilian Bankruptcy Court.

14. On February 13, 2019, the Brazilian Appellate Court denied a request for clarification brought by the Additional Defendants regarding the factual allegations relied upon in the Freeze Order. ECF 464, ¶¶ 19-20.

15. On June 14, 2019, the Brazilian Bankruptcy Court issued another order directing that certain third parties produce financial information regarding the Additional Defendants (including the Movants) to the Trustees and

addressing a request from the Trustees for approval of the form of the Subpoenas. The Trustees requested account statements from Brazilian banks, information on checking, saving and time deposit accounts from the Customer Registry of the National Financial System, and information on suspect property and financial operations from the Counsel for Financial Activities Control, all relating to the Additional Defendants in the pending adversarial proceeding. *See* ECF 466, pp. 57-58. The Brazilian Bankruptcy Court, "supplementing the preliminary ruling ordering the freezing of the assets requested during the processing of this incident and observing the exact content of the appellate decision . . ., which maintained said freezing" authorized each of the types of financial discovery requested by the Trustees. *Id.*

16. Additionally, in Item II.7 and Item IV.p, the Trustees reported on this Chapter 15 Case, the Motion, and the request for information to assist with implementing the Freeze Order in the U.S. *See Id.* at 18-20; 28. In response, the Brazilian Bankruptcy Court stated that "under the terms of Chapter 15 of the Bankruptcy Code, there is no reason not to entertain the measures related to the location and retrieval of assets and the instruction of any legal measures to be taken by the bankruptcy estate pertaining to Transbrasil S/A Linha Aereas abroad, for the benefit of creditors, as well as in order to obtain information related to its financial transactions, without prejudice to whatever measures may be taken in Brazil to the same effect and that are being determined by this Court ruling over the principal bankruptcy." *Id.* at 58. The Brazilian Bankruptcy Court did not express

concern over issues raised by the Movants with respect to the Subpoenas (such as relevance or banking secrecy). Instead, the Brazilian Bankruptcy Court stated that "I have not understood the reason why the trustee is postulating that a specific measure be authorized when, during the processing of said ancillary bankruptcy proceeding, several diligences were requested directly to the North-American Court." *Id.* at 59.

ANALYSIS

A trial court has "broad discretion . . . to decide when a protective order is appropriate and what degree of protection is required." *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984). The Motion asserts that once a 2004 examination is challenged, the burden shifts to the party seeking the examination to show "good cause" exists for taking the discovery. *See* ECF 445, p. 7 (citing *In re Kelton*, 389 B.R. 812, 820 (Bankr. S.D. Ga. 2008) (denying motion for protective order and allowing UST to take examination "to investigate many of the apparent anomalies in debtors' filings."). "'Generally, good cause is shown if the [Rule 2004] examination is necessary to establish the claim of the party seeking the examination, or if denial of such request would cause the examiner undue hardship or injustice.'" *Id.* (quoting *In re Metiom, Inc.*, 318 B.R. 263, 268 (S.D.N.Y. 2004) (quoting *In re Dinubilo*, 177 B.R. 932, 943 (E.D. Cal. 1993), called into doubt on other grounds by *In re Symington*, 209 B.R. 678 (Bankr. D.Md. 1997))).

The Movants argue that they are non-debtor third parties and that the Subpoenas do not set forth the requisite nexus between their financial information and the administration of the Transbrasil estate. They reason that the Subpoenas seek information that implicates the rights and privacy interests of non-debtors and the Court should therefore apply a higher level of scrutiny. The Freeze Order, they argue, cannot establish the requisite nexus because it "did not authorize such [financial] discovery to occur in Brazil" and in fact the Freeze Order carves out bank accounts. ECF 445.

The Movants' argue that because bank accounts are expressly excluded from seizure under the Freeze Order, the Trustees are violating the Freeze Order by seeking to take discovery relating to bank accounts. The Movants also argue that the only two means of implementing the Freeze Order in the U.S. are those set forth in the Freeze Order itself – either letters rogatory or a direct petition in this Chapter 15 Case. They argue that since discovery was omitted from the list of options, discovery is not appropriate. At the Hearing, counsel for Movants argued that the order rendered by the Brazilian Appellate Court on February 13, 2019 contained a finding that the Subpoenas go beyond the limits of the Freeze Order. *See* ECF 445, pp. 7-10. However, even the Rosenn Report (submitted by the Movants) explains that the Additional Defendants sought clarification on a number of points (including a clarification that the "measures that the Trustee sought to implement in the United States went beyond the scope of what had been authorized by the Tribunal of Justice's decision of December 18, 2018"), but

that such request for clarification was denied. ECF 464, ¶¶ 19-20.

The Movants also argue that the Subpoenas are not narrowly tailored to lead to the discovery of admissible evidence. The information sought by the Subpoenas is not limited to transactions with or relating to Transbrasil, but rather the Subpoenas seek all banking records of the Additional Defendants for a 20-year period. The Movants assert that the breadth of the Subpoenas demonstrates that they were served for the "improper purpose of harassing [the Movants], creating burdensome discovery proceedings in the United States, and to circumvent the discovery orders and procedures of the [Brazilian] Proceeding." *Id.* at 9.

The Trustees assert the Subpoenas seek information relevant to implement the Freeze Order and to fully litigate the claims on which the Freeze Order is based. The Subpoenas seek financial discovery dating back to the time in which Transbrasil was operational in order to investigate claims that the assets of Transbrasil were, as the Brazilian Appellate Court stated, "siphoned off by the bankrupt debtor [and] passed through offshore companies, including dollar smugglers, before reaching its final destination." ECF 437. The Trustees justify the breadth of the Subpoenas because of the complex web of intermediaries that facilitated the scheme to deplete Transbrasil's assets. In addition, the Trustees assert that the bank account information sought by the Subpoenas is calculated to lead to information about assets of the Additional Defendants which should be enjoined

or attached under the Freeze Order. Specifically, the Trustees assert that the records regarding the bank accounts of the Additional Defendants are reasonably calculated to lead to information regarding the purchase, sale, transfer and use of assets which are in fact subject to the Freeze Order.

It is uncontested that the Subpoenas are governed by Rule 2004 and that procedural matters are governed by the law of the forum. Thus, applying U.S. law, this Court must decide whether, in an ancillary case where the foreign court has found preliminary evidence that assets were diverted from the bankrupt and has ordered assets of third parties be frozen to preserve the status quo, the financial affairs of such third parties are within the scope of Rule 2004. The Court believes they are.

An examination under Rule 2004 may relate "to any matter which may affect the administration of the debtor's estate." Rule 2004 may be used for "discovering assets, examining transactions, and determining whether wrongdoing has occurred." *In re Strecker*, 251 B.R. 878, 882 (Bankr. D.Colo. 2000) (citing *In re Duratech Indus., Inc.*, 241 B.R. 283, 289 (E.D.N.Y. 1999)). It is well established that investigation of *potential* claims against third parties is a proper use of discovery in an ancillary case. *See In re Hughes*, 281 B.R. 224, 228 (Bankr. S.D.N.Y. 2002) (explaining that ancillary proceedings are "intended to enable domestic courts to aid foreign courts, so as to promote a more efficient and economic administration of transnational insolvency proceedings" and finding that investigating potential claims falls squarely within the broad scope of permissible Rule 2004 discovery).

With respect to *pending* claims against third parties in a foreign adversary case, the case law developed under 28 U.S.C. § 1782 provides a relevant framework for discovery. "Section 1782 is analogous to seeking discovery assistance under section 1521 and [] courts routinely read the discovery provisions of section 1521 (or former section 304) in concert with section 1782." *In re Platinum Partners Value Arbitrage Fund L.P.*, 583 B.R. 803, 815 (Bankr. S.D.N.Y. 2018). The Supreme Court has identified a number of discretionary factors that courts should consider in ruling on a §1782 application: (1) whether the person from whom discovery is sought is a participant in the foreign proceeding; (2) the nature of the foreign tribunal, the character of the proceeding underway abroad, and the receptivity of the foreign court to U.S. court assistance; (3) whether the application conceals an attempt to circumvent foreign proof–gathering restrictions of a foreign country; and (4) whether the application is unduly intrusive or burdensome. *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 264-65 (2004); see *In re Clerici*, 481 F. 3d 1324, 1334 (11th Cir. 2007) (reciting factors).

Applying the *Intel* analysis by analogy in a Chapter 15 context, the court in *Platinum Partners* determined that the foreign court would not be offended by the evidence the liquidator sought in the U.S., even if that type of evidence would not be available if it were located in the home country. 583 B.R. at 815. Judge Mark similarly rebuffed a request for a protective order regarding discovery in aid of a pending adversary proceeding in Brazil, rejecting the argument that such discovery was

duplicative and/or should first have been sought through the Brazilian proceedings. *See In re SAM Industrias S.A.*, Case No. 18-23941-BKC-RAM, (Bankr. S.D.Fla.), ECF 43 (Mar. 14, 2019), ECF 62 (April 11, 2019), ECF 73 (May 22, 2019), ECF 78 (June 14, 2019). Here, the evidence is being sought from financial institutions in the U.S., who are not parties to the adversarial proceeding pending in Brazil, and the nature of the proceeding here and the history of the proceedings, in general, indicate that the Brazilian courts are receptive to U.S. court assistance.

Under the *Intel* analysis, the key question is not whether the Freeze Order authorizes discovery of the financial information of the Additional Defendants, but whether seeking such information in the U.S. is an attempt to circumvent a foreign proof-gathering restriction or whether the Brazilian courts would be offended by the evidence sought by the Trustees in the U.S. Considering that similar financial discovery regarding the Additional Defendants at Brazilian banks has been authorized by the Brazilian Bankruptcy Court [ECF 466, pp. 57-58], this Court believes that similar discovery from U.S. banks would not be offensive to or prohibited by the Brazilian courts. The Court rejects Movants contention that what is not expressly authorized is implicitly prohibited. The Freeze Order is akin to a preliminary injunction; it is not a discovery order, and that is why the Brazilian Bankruptcy Court has separately ordered financial discovery from sources available within Brazil, first on July 25, 2018 and second on June 14, 2019. *See* ECF 453; ECF 466, pp. 57-58.

Moreover, the Trustees do not need permission or approval from the Brazilian Bankruptcy Court for the Subpoenas or for financial discovery relating to the Additional Defendants. The Brazilian Bankruptcy Court has stated that "there is no reason not to entertain the measures related to the location and retrieval of assets" in the Chapter 15 Case [*Id.* at 58, Item II.7]. This Court therefore concludes that the Brazilian courts are receptive to and are not offended by the production of information relating to the Additional Defendants from financial institutions in the U.S. Brazilian trial and appellate courts have been given the opportunity to express disapproval for the Subpoenas and have not done so.

The bank account records of the Additional Defendants from the time period where the scheme was being carried out (1997 to 2002) are relevant to the veil-piercing and extension claims brought by the Trustees and may affect the administration of the Transbrasil estate. Those records may also show the involvement of other participants in the scheme. The bank account records may reveal the purchase, sale or use of assets that are currently held by the Additional Defendants and which may be subject to the Freeze Order. Although the Freeze Order does not apply to the deposits held by such financial institutions, it would apply to real property, aircraft and stocks held by the Additional Defendants in the U.S.; and, because such high-value assets may be purchased or maintained using a bank account, discovery of the accounts of the Additional Defendants may reveal such assets.

Finally, Movants argue that it would not be appropriate for this Court to grant comity to the Freeze Order. However, the Brazilian Appellate Court points to "concrete facts" of substantial assets that were siphoned off of Transbrasil by insiders [ECF 437, p. 9] and concludes that "if it cannot be said for certain that there was fraud, there is circumstantial evidence suggesting so, pointing to odd transactions corroborated by existing documents." *Id.* at 11. These findings, among others, of the Brazilian Appellate Court, establish a nexus between the financial affairs of the Additional Defendants and the assets of Transbrasil, which have never been accounted for and which appear to have been diverted for the benefit of insiders. In light of the nuanced and intentionally opaque manner in which Transbrasil's assets were diverted and its books and records were never turned over to the Trustees, the broad financial discovery about individuals and companies against whom the Freeze Order was rendered is entirely appropriate.

The argument that the Subpoenas are unduly burdensome misses the mark because the Subpoenas do not require the Movants to do anything. *See In re Cty of Orange*, 208 B.R. 117, 121 (Bankr. S.D.N.Y. 1997) ("The mere assertion that a subpoena is burdensome, without evidence to prove the claim, cannot form the basis for an 'undue burden' finding"). Accordingly, having given this matter careful consideration, the Court concludes that the discovery sought by the Subpoenas is neither harassing nor otherwise improper. It is therefore

ORDRERED AND ADJUDGED that the Motion is DENIED.

APPENDIX E — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED SEPTEMBER 2, 2021

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 20-12238-BB

IN RE: TRANSBRASIL S.A. LINHAS AEREAS,

Debtor.

ESTATE OF OMAR FONTANA, DENILDA PEREIRA FONTANA, ANTONIO CELSO CIPRIANI, MARISE PEREIRA FONTANA CIPRIANI, EMIDIO CIPRIANI, DEVOM CONSULTORIA E PARTIPACOES LTDA,

Plaintiffs-Appellants,

versus

ACFB ADMINISTRACAO JUDICIAL LTDA, AS TRUSTEES OF TRANSBRASIL S.A. LINHAS AREAS,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

Appendix E

BEFORE: MARTIN, ROSENBAUM, and LUCK, Circuit Judges.

PER CURIAM:

The Petition for Panel Rehearing filed by Appellants is DENIED.

APPENDIX F — RELEVANT STATUTORY PROVISIONS

11 U.S.C. § 362. Automatic stay

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title [11 USCS § 301, 302, or 303], or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970 [15 USCS § 78eee(a)(3)], operates as a stay, applicable to all entities, of—

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning a tax liability of a debtor that is a corporation for a taxable period the bankruptcy court may determine or concerning the tax liability of a debtor who is an individual for a taxable period ending before the date of the order for relief under this title.

(b) The filing of a petition under section 301, 302, or 303 of this title [11 USCS § 301, 302, or 303], or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970 [15 USCS § 78eee(a)(3)], does not operate as a stay—

(1) under subsection (a) of this section, of the commencement or continuation of a criminal action or proceeding against the debtor;

(2) under subsection (a)—

(A) of the commencement or continuation of a civil action or proceeding—

(i) for the establishment of paternity;

(ii) for the establishment or modification of an order for domestic support obligations;

(iii) concerning child custody or visitation;

(iv) for the dissolution of a marriage, except to the extent that such proceeding seeks to determine the division of property that is property of the estate; or

(v) regarding domestic violence;

(B) of the collection of a domestic support obligation from property that is not property of the estate;

(C) with respect to the withholding of income that is property of the estate or property of the debtor for payment of a domestic support obligation under a judicial or administrative order or a statute;

(D) of the withholding, suspension, or restriction of a driver's license, a professional or occupational license, or a recreational license, under State law, as specified in section 466(a)(16) of the Social Security Act [42 USCS § 666(a)(16)];

(E) of the reporting of overdue support owed by a parent to any consumer reporting agency as specified in section 466(a)(7) of the Social Security Act [42 USCS § 666(a)(7)];

(F) of the interception of a tax refund, as specified

in sections 464 and 466(a)(3) of the Social Security Act [42 USCS §§ 664 and 666(a)(3)] or under an analogous State law; or

(G) of the enforcement of a medical obligation, as specified under title IV of the Social Security Act [42 USCS §§ 601 et seq.];

(3) under subsection (a) of this section, of any act to perfect, or to maintain or continue the perfection of, an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) of this title [11 USCS § 546(b)] or to the extent that such act is accomplished within the period provided under section 547(e)(2)(A) of this title [11 USCS § 547(e)(2)(A)];

(4) under paragraph (1), (2), (3), or (6) of subsection (a) of this section, of the commencement or continuation of an action or proceeding by a governmental unit or any organization exercising authority under the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, opened for signature on January 13, 1993, to enforce such governmental unit's or organization's police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power;

(5) [Deleted]

(6) under subsection (a) of this section, of the exercise by a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency of any contractual right (as defined in section 555 or 556 [11 USCS § 555 or 556]) under any security agreement or arrangement or other credit enhancement forming a part of or related to any commodity contract, forward contract or securities contract, or of any contractual right (as defined in section 555 or 556 [11 USCS § 555 or 556]) to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with 1 or more such contracts, including any master agreement for such contracts;

(7) under subsection (a) of this section, of the exercise by a repo participant or financial participant of any contractual right (as defined in section 559 [11 USCS § 559]) under any security agreement or arrangement or other credit enhancement forming a part of or related to any repurchase agreement, or of any contractual right (as defined in section 559 [11 USCS § 559]) to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with 1 or more such agreements, including any master agreement for such agreements;

(8) under subsection (a) of this section, of the commencement of any action by the Secretary of Housing and Urban Development to foreclose a mortgage or deed of trust in any case in which the mortgage or deed of trust held by the Secretary is

insured or was formerly insured under the National Housing Act and covers property, or combinations of property, consisting of five or more living units;

(9) under subsection (a), of—

(A) an audit by a governmental unit to determine tax liability;

(B) the issuance to the debtor by a governmental unit of a notice of tax deficiency;

(C) a demand for tax returns; or

(D) the making of an assessment for any tax and issuance of a notice and demand for payment of such an assessment (but any tax lien that would otherwise attach to property of the estate by reason of such an assessment shall not take effect unless such tax is a debt of the debtor that will not be discharged in the case and such property or its proceeds are transferred out of the estate to, or otherwise revested in, the debtor).

(10) under subsection (a) of this section, of any act by a lessor to the debtor under a lease of nonresidential real property that has terminated by the expiration of the stated term of the lease before the commencement of or during a case under this title to obtain possession of such property;

(11) under subsection (a) of this section, of the

presentment of a negotiable instrument and the giving of notice of and protesting dishonor of such an instrument;

(12) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Transportation under section 31325 of title 46 (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage, or a security interest in or relating to a vessel or vessel under construction, held by the Secretary of Transportation under chapter 537 of title 46 [46 USCS §§ 53701 et seq.] or section 109(h) of title 49 [49 USCS § 109(h)], or under applicable State law;

(13) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Commerce under section 31325 of title 46 (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage in a vessel or a mortgage, deed of trust, or other security interest in a fishing facility held by the Secretary of Commerce under chapter 537 of title 46 [46 USCS§§ 53701 et seq.];

(14) under subsection (a) of this section, of any action by an accrediting agency regarding the accreditation status of the debtor as an educational institution;

(15) under subsection (a) of this section, of any action by a State licensing body regarding the licensure of the debtor as an educational institution;

(16) under subsection (a) of this section, of any action by a guaranty agency, as defined in section 435(j) of the Higher Education Act of 1965 [20 USCS § 1085(j)] or the Secretary of Education regarding the eligibility of the debtor to participate in programs authorized under such Act;

(17) under subsection (a) of this section, of the exercise by a swap participant or financial participant of any contractual right (as defined in section 560 [11 USCS § 560]) under any security agreement or arrangement or other credit enhancement forming a part of or related to any swap agreement, or of any contractual right (as defined in section 560 [11 USCS § 560]) to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with 1 or more such agreements, including any master agreement for such agreements;

(18) under subsection (a) of the creation or perfection of a statutory lien for an ad valorem property tax, or a special tax or special assessment on real property whether or not ad valorem, imposed by a governmental unit, if such tax or assessment comes due after the date of the filing of the petition;

(19) under subsection (a), of withholding of income from a debtor's wages and collection of amounts withheld, under the debtor's agreement authorizing that withholding and collection for the benefit of a pension, profit-sharing, stock bonus, or other plan established under section 401, 403, 408, 408A, 414, 457, or 501(c) of the Internal Revenue Code of 1986 [26 USCS § 401, 403, 408, 408A, 414, 457, or 501(c)], that is sponsored by the employer of the debtor, or an affiliate, successor, or predecessor of such employer—

> **(A)** to the extent that the amounts withheld and collected are used solely for payments relating to a loan from a plan under section 408(b)(1) of the Employee Retirement Income Security Act of 1974 [29 USCS § 1108(b)(1)] or is subject to section 72(p) of the Internal Revenue Code of 1986 [26 USCS § 72(p)]; or
>
> **(B)** a loan from a thrift savings plan permitted under subchapter III of chapter 84 of title 5 [5 USCS §§ 8431 et seq,], that satisfies the requirements of section 8433(g) of such title [5 USCS § 8433(g)];
>
> but nothing in this paragraph may be construed to provide that any loan made under a governmental plan under section 414(d) [26 USCS § 414(d)], or a contract or account under section 403(b) [26 USCS § 403(b)], of the Internal Revenue Code of 1986 constitutes a claim or a debt under this title;

(20) under subsection (a), of any act to enforce any lien against or security interest in real property following entry of the order under subsection (d)(4) as to such real property in any prior case under this title, for a period of 2 years after the date of the entry of such an order, except that the debtor, in a subsequent case under this title, may move for relief from such order based upon changed circumstances or for other good cause shown, after notice and a hearing;

(21) under subsection (a), of any act to enforce any lien against or security interest in real property—

> **(A)** if the debtor is ineligible under section 109(g) to be a debtor in a case under this title; or
>
> **(B)** if the case under this title was filed in violation of a bankruptcy court order in a prior case under this title prohibiting the debtor from being a debtor in another case under this title;

(22) subject to subsection (l), under subsection (a)(3), of the continuation of any eviction, unlawful detainer action, or similar proceeding by a lessor against a debtor involving residential property in which the debtor resides as a tenant under a lease or rental agreement and with respect to which the lessor has obtained before the date of the filing of the bankruptcy petition, a judgment for possession of such property against the debtor;

(23) subject to subsection (m), under subsection (a)(3), of an eviction action that seeks possession of the residential property in which the debtor resides as a tenant under a lease or rental agreement based on endangerment of such property or the illegal use of controlled substances on such property, but only if the lessor files with the court, and serves upon the debtor, a certification under penalty of perjury that such an eviction action has been filed, or that the debtor, during the 30-day period preceding the date of the filing of the certification, has endangered property or illegally used or allowed to be used a controlled substance on the property;

(24) under subsection (a), of any transfer that is not avoidable under section 544 [11 USCS § 544] and that is not avoidable under section 549 [11 USCS § 549];

(25) under subsection (a), of—

(A) the commencement or continuation of an investigation or action by a securities self regulatory organization to enforce such organization's regulatory power;

(B) the enforcement of an order or decision, other than for monetary sanctions, obtained in an action by such securities self regulatory organization to enforce such organization's regulatory power; or

(C) any act taken by such securities self regulatory organization to delist, delete, or refuse to permit

quotation of any stock that does not meet applicable regulatory requirements;

(26) under subsection (a), of the setoff under applicable nonbankruptcy law of an income tax refund, by a governmental unit, with respect to a taxable period that ended before the date of the order for relief against an income tax liability for a taxable period that also ended before the date of the order for relief, except that in any case in which the setoff of an income tax refund is not permitted under applicable nonbankruptcy law because of a pending action to determine the amount or legality of a tax liability, the governmental unit may hold the refund pending the resolution of the action, unless the court, on the motion of the trustee and after notice and a hearing, grants the taxing authority adequate protection (within the meaning of section 361 [11 USCS § 361]) for the secured claim of such authority in the setoff under section 506(a) [11 USCS § 506(a)];

(27) under subsection (a) of this section, of the exercise by a master netting agreement participant of any contractual right (as defined in section 555, 556, 559, or 560 [11 USCS § 555, 556, 559, or 560]) under any security agreement or arrangement or other credit enhancement forming a part of or related to any master netting agreement, or of any contractual right (as defined in section 555, 556, 559, or 560 [11 USCS § 555, 556, 559, or 560]) to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with 1 or more

such master netting agreements to the extent that such participant is eligible to exercise such rights under paragraph (6), (7), or (17) for each individual contract covered by the master netting agreement in issue;

(28) under subsection (a), of the exclusion by the Secretary of Health and Human Services of the debtor from participation in the medicare program or any other Federal health care program (as defined in section 1128B(f) of the Social Security Act [42 USCS § 1320a-7b(f)] pursuant to title XI or XVIII of such Act [42 USCS §§ 1301 et seq. or 1395 et seq.]); and

(29) under subsection (a)(1) of this section, of any action by—

(A) an amateur sports organization, as defined in section 220501(b) of title 36 [36 USCS § 220501(b)], to replace a national governing body, as defined in that section, under section 220528 of that title [36 USCS § 220528]; or

(B) the corporation, as defined in section 220501(b) of title 36 [36 USCS § 220501(b)], to revoke the certification of a national governing body, as defined in that section, under section 220521 of that title [36 USCS § 220521].

The provisions of paragraphs (12) and (13) of this subsection shall apply with respect to any such petition filed on or before December 31, 1989.

(c) Except as provided in subsections (d), (e), (f), and (h) of this section—

(1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate;

(2) the stay of any other act under subsection (a) of this section continues until the earliest of—

(A) the time the case is closed;

(B) the time the case is dismissed; or

(C) if the case is a case under chapter 7 of this title [11 USCS §§ 701 et seq.] concerning an individual or a case under chapter 9, 11, 12, or 13 of this title [11 USCS §§ 901 et seq., 1101 et seq., 1201 et seq., or 1301 et seq.], the time a discharge is granted or denied;

(3) if a single or joint case is filed by or against a debtor who is an individual in a case under chapter 7, 11, or 13 [11 USCS §§ 701 et seq., 1101 et seq., or 1301 et seq.], and if a single or joint case of the debtor was pending within the preceding 1-year period but was dismissed, other than a case refiled under a chapter other than chapter 7 after dismissal under section 707(b) [11 USCS § 707(b)]—

(A) the stay under subsection (a) with respect to any action taken with respect to a debt or property

securing such debt or with respect to any lease shall terminate with respect to the debtor on the 30th day after the filing of the later case;

(B) on the motion of a party in interest for continuation of the automatic stay and upon notice and a hearing, the court may extend the stay in particular cases as to any or all creditors (subject to such conditions or limitations as the court may then impose) after notice and a hearing completed before the expiration of the 30-day period only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed; and

(C) for purposes of subparagraph (B), a case is presumptively filed not in good faith (but such presumption may be rebutted by clear and convincing evidence to the contrary)—

(i) as to all creditors, if—

(I) more than 1 previous case under any of chapters 7, 11, and 13 [11 USCS §§ 701 et seq., 1101 et seq., and 1301 et seq.] in which the individual was a debtor was pending within the preceding 1-year period;

(II) a previous case under any of chapters 7, 11, and 13 [11 USCS §§ 701 et seq., 1101 et seq., and 1301 et seq.] in which the individual was a debtor was dismissed within such

1-year period, after the debtor failed to—

(aa) file or amend the petition or other documents as required by this title [11 USCS §§ 101 et seq.] or the court without substantial excuse (but mere inadvertence or negligence shall not be a substantial excuse unless the dismissal was caused by the negligence of the debtor's attorney);

(bb) provide adequate protection as ordered by the court; or

(cc) perform the terms of a plan confirmed by the court; or

(III) there has not been a substantial change in the financial or personal affairs of the debtor since the dismissal of the next most previous case under chapter 7, 11, or 13 [11 USCS §§ 701 et seq., 1101 et seq., or 1301 et seq.] or any other reason to conclude that the later case will be concluded—

(aa) if a case under chapter 7 [11 USCS §§ 701 et seq.], with a discharge; or

(bb) if a case under chapter 11 or 13 [11 USCS §§ 1101 et seq. or 1301 et seq.], with a confirmed plan that will be fully performed; and

> **(ii)** as to any creditor that commenced an action under subsection (d) in a previous case in which the individual was a debtor if, as of the date of dismissal of such case, that action was still pending or had been resolved by terminating, conditioning, or limiting the stay as to actions of such creditor; and

(4)(A)(i) if a single or joint case is filed by or against a debtor who is an individual under this title, and if 2 or more single or joint cases of the debtor were pending within the previous year but were dismissed, other than a case refiled under a chapter other than chapter 7 after dismissal under section 707(b) [11 USCS § 707(b)], the stay under subsection (a) shall not go into effect upon the filing of the later case; and

> **(ii)** on request of a party in interest, the court shall promptly enter an order confirming that no stay is in effect;

> **(B)** if, within 30 days after the filing of the later case, a party in interest requests the court may order the stay to take effect in the case as to any or all creditors (subject to such conditions or limitations as the court may impose), after notice and a hearing, only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed;

> **(C)** a stay imposed under subparagraph (B) shall be effective on the date of the entry of the order allowing the stay to go into effect; and

(D) for purposes of subparagraph (B), a case is presumptively filed not in good faith (but such presumption may be rebutted by clear and convincing evidence to the contrary)—

(i) as to all creditors if—

(I) 2 or more previous cases under this title in which the individual was a debtor were pending within the 1-year period;

(II) a previous case under this title in which the individual was a debtor was dismissed within the time period stated in this paragraph after the debtor failed to file or amend the petition or other documents as required by this title or the court without substantial excuse (but mere inadvertence or negligence shall not be substantial excuse unless the dismissal was caused by the negligence of the debtor's attorney), failed to provide adequate protection as ordered by the court, or failed to perform the terms of a plan confirmed by the court; or

(III) there has not been a substantial change in the financial or personal affairs of the debtor since the dismissal of the next most previous case under this title, or any other reason to conclude that the later case will not be concluded, if a case under chapter 7 [11 USCS §§ 701 et seq.], with a discharge,

and if a case under chapter 11 or 13 [11 USCS §§ 1101 et seq. or 1301 et seq.], with a confirmed plan that will be fully performed; or

(ii) as to any creditor that commenced an action under subsection (d) in a previous case in which the individual was a debtor if, as of the date of dismissal of such case, such action was still pending or had been resolved by terminating, conditioning, or limiting the stay as to such action of such creditor.

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest;

(2) with respect to a stay of an act against property under subsection (a) of this section, if—

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization;

(3) with respect to a stay of an act against single asset real estate under subsection (a), by a creditor

whose claim is secured by an interest in such real estate, unless, not later than the date that is 90 days after the entry of the order for relief (or such later date as the court may determine for cause by order entered within that 90-day period) or 30 days after the court determines that the debtor is subject to this paragraph, whichever is later—

(A) the debtor has filed a plan of reorganization that has a reasonable possibility of being confirmed within a reasonable time; or

(B) the debtor has commenced monthly payments that—

(i) may, in the debtor's sole discretion, notwithstanding section 363(c)(2) [11 USCS § 363(c)(2)], be made from rents or other income generated before, on, or after the date of the commencement of the case by or from the property to each creditor whose claim is secured by such real estate (other than a claim secured by a judgment lien or by an unmatured statutory lien); and

(ii) are in an amount equal to interest at the then applicable nondefault contract rate of interest on the value of the creditor's interest in the real estate; or

(4) with respect to a stay of an act against real property under subsection (a), by a creditor whose claim is

secured by an interest in such real property, if the court finds that the filing of the petition was part of a scheme to delay, hinder, or defraud creditors that involved either—

(A) transfer of all or part ownership of, or other interest in, such real property without the consent of the secured creditor or court approval; or

(B) multiple bankruptcy filings affecting such real property.

If recorded in compliance with applicable State laws governing notices of interests or liens in real property, an order entered under paragraph (4) shall be binding in any other case under this title purporting to affect such real property filed not later than 2 years after the date of the entry of such order by the court, except that a debtor in a subsequent case under this title may move for relief from such order based upon changed circumstances or for good cause shown, after notice and a hearing. Any Federal, State, or local governmental unit that accepts notices of interests or liens in real property shall accept any certified copy of an order described in this subsection for indexing and recording.

(e)(1) Thirty days after a request under subsection (d) of this section for relief from the stay of any act against property of the estate under subsection (a) of this section, such stay is terminated with respect to the party in interest making such request, unless the court, after

notice and a hearing, orders such stay continued in effect pending the conclusion of, or as a result of, a final hearing and determination under subsection (d) of this section. A hearing under this subsection may be a preliminary hearing, or may be consolidated with the final hearing under subsection (d) of this section. The court shall order such stay continued in effect pending the conclusion of the final hearing under subsection (d) of this section if there is a reasonable likelihood that the party opposing relief from such stay will prevail at the conclusion of such final hearing. If the hearing under this subsection is a preliminary hearing, then such final hearing shall be concluded not later than thirty days after the conclusion of such preliminary hearing, unless the 30-day period is extended with the consent of the parties in interest or for a specific time which the court finds is required by compelling circumstances.

(2) Notwithstanding paragraph (1), in a case under chapter 7, 11, or 13 [11 USCS §§ 701 et seq., 1101 et seq., or 1301 et seq.] in which the debtor is an individual, the stay under subsection (a) shall terminate on the date that is 60 days after a request is made by a party in interest under subsection (d), unless—

(A) a final decision is rendered by the court during the 60-day period beginning on the date of the request; or

(B) such 60-day period is extended—

(i) by agreement of all parties in interest; or

(ii) by the court for such specific period of time as the court finds is required for good cause, as described in findings made by the court.

(f) Upon request of a party in interest, the court, with or without a hearing, shall grant such relief from the stay provided under subsection (a) of this section as is necessary to prevent irreparable damage to the interest of an entity in property, if such interest will suffer such damage before there is an opportunity for notice and a hearing under subsection (d) or (e) of this section.

(g) In any hearing under subsection (d) or (e) of this section concerning relief from the stay of any act under subsection (a) of this section—

(1) the party requesting such relief has the burden of proof on the issue of the debtor's equity in property; and

(2) the party opposing such relief has the burden of proof on all other issues.

(h)(1) In a case in which the debtor is an individual, the stay provided by subsection (a) is terminated with respect to personal property of the estate or of the debtor securing in whole or in part a claim, or subject to an unexpired lease, and such personal property shall no longer be property of the estate if the debtor fails within the applicable time set by section 521(a)(2) [11 USCS § 521(a)(2)]—

> **(A)** to file timely any statement of intention required under section 521(a)(2) [11 USCS § 521(a)(2)] with respect to such personal property or to indicate in such statement that the debtor will either surrender such personal property or retain it and, if retaining such personal property, either redeem such personal property pursuant to section 722 [11 USCS § 722], enter into an agreement of the kind specified in section 524(c) [11 USCS § 524(c)] applicable to the debt secured by such personal property, or assume such unexpired lease pursuant to section 365(p) [11 USCS § 365(p)] if the trustee does not do so, as applicable; and
>
> **(B)** to take timely the action specified in such statement, as it may be amended before expiration of the period for taking action, unless such statement specifies the debtor's intention to reaffirm such debt on the original contract terms and the creditor refuses to agree to the reaffirmation on such terms.

(2) Paragraph (1) does not apply if the court determines, on the motion of the trustee filed before the expiration of the applicable time set by section 521(a)(2) [11 USCS § 521(a)(2)], after notice and a hearing, that such personal property is of consequential value or benefit to the estate, and orders appropriate adequate protection of the creditor's interest, and orders the debtor to deliver any collateral in the debtor's possession to the trustee. If the court does not so determine, the stay provided by subsection (a) shall terminate upon the conclusion of the hearing on the motion.

(i) If a case commenced under chapter 7, 11, or 13 [11 USCS §§ 701 et seq., 1101 et seq., or 1301 et seq.] is dismissed due to the creation of a debt repayment plan, for purposes of subsection (c)(3), any subsequent case commenced by the debtor under any such chapter shall not be presumed to be filed not in good faith.

(j) On request of a party in interest, the court shall issue an order under subsection (c) confirming that the automatic stay has been terminated.

(k)(1) Except as provided in paragraph (2), an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

> **(2)** If such violation is based on an action taken by an entity in the good faith belief that subsection (h) applies to the debtor, the recovery under paragraph (1) of this subsection against such entity shall be limited to actual damages.

(l)(1) Except as otherwise provided in this subsection, subsection (b)(22) shall apply on the date that is 30 days after the date on which the bankruptcy petition is filed, if the debtor files with the petition and serves upon the lessor a certification under penalty of perjury that—

> > **(A)** under nonbankruptcy law applicable in the jurisdiction, there are circumstances under which the debtor would be permitted to cure the entire

monetary default that gave rise to the judgment for possession, after that judgment for possession was entered; and

(B) the debtor (or an adult dependent of the debtor) has deposited with the clerk of the court, any rent that would become due during the 30-day period after the filing of the bankruptcy petition.

(2) If, within the 30-day period after the filing of the bankruptcy petition, the debtor (or an adult dependent of the debtor) complies with paragraph (1) and files with the court and serves upon the lessor a further certification under penalty of perjury that the debtor (or an adult dependent of the debtor) has cured, under nonbankruptcy law applicable in the jurisdiction, the entire monetary default that gave rise to the judgment under which possession is sought by the lessor, subsection (b)(22) shall not apply, unless ordered to apply by the court under paragraph (3).

(3)(A) If the lessor files an objection to any certification filed by the debtor under paragraph (1) or (2), and serves such objection upon the debtor, the court shall hold a hearing within 10 days after the filing and service of such objection to determine if the certification filed by the debtor under paragraph (1) or (2) is true.

(B) If the court upholds the objection of the lessor filed under subparagraph (A)—

(i) subsection (b)(22) shall apply immediately

and relief from the stay provided under subsection (a)(3) shall not be required to enable the lessor to complete the process to recover full possession of the property; and

(ii) the clerk of the court shall immediately serve upon the lessor and the debtor a certified copy of the court's order upholding the lessor's objection.

(4) If a debtor, in accordance with paragraph (5), indicates on the petition that there was a judgment for possession of the residential rental property in which the debtor resides and does not file a certification under paragraph (1) or (2)—

(A) subsection (b)(22) shall apply immediately upon failure to file such certification, and relief from the stay provided under subsection (a)(3) shall not be required to enable the lessor to complete the process to recover full possession of the property; and

(B) the clerk of the court shall immediately serve upon the lessor and the debtor a certified copy of the docket indicating the absence of a filed certification and the applicability of the exception to the stay under subsection (b)(22).

(5)**(A)** Where a judgment for possession of residential property in which the debtor resides as a tenant under a lease or rental agreement has been obtained by the

lessor, the debtor shall so indicate on the bankruptcy petition and shall provide the name and address of the lessor that obtained that pre-petition judgment on the petition and on any certification filed under this subsection.

(B) The form of certification filed with the petition, as specified in this subsection, shall provide for the debtor to certify, and the debtor shall certify—

(i) whether a judgment for possession of residential rental housing in which the debtor resides has been obtained against the debtor before the date of the filing of the petition; and

(ii) whether the debtor is claiming under paragraph (1) that under nonbankruptcy law applicable in the jurisdiction, there are circumstances under which the debtor would be permitted to cure the entire monetary default that gave rise to the judgment for possession, after that judgment of possession was entered, and has made the appropriate deposit with the court.

(C) The standard forms (electronic and otherwise) used in a bankruptcy proceeding shall be amended to reflect the requirements of this subsection.

(D) The clerk of the court shall arrange for the prompt transmittal of the rent deposited in accordance with paragraph (1)(B) to the lessor.

(m)(1) Except as otherwise provided in this subsection, subsection (b)(23) shall apply on the date that is 15 days after the date on which the lessor files and serves a certification described in subsection (b)(23).

(2)(A) If the debtor files with the court an objection to the truth or legal sufficiency of the certification described in subsection (b)(23) and serves such objection upon the lessor, subsection (b)(23) shall not apply, unless ordered to apply by the court under this subsection.

(B) If the debtor files and serves the objection under subparagraph (A), the court shall hold a hearing within 10 days after the filing and service of such objection to determine if the situation giving rise to the lessor's certification under paragraph (1) existed or has been remedied.

(C) If the debtor can demonstrate to the satisfaction of the court that the situation giving rise to the lessor's certification under paragraph (1) did not exist or has been remedied, the stay provided under subsection (a)(3) shall remain in effect until the termination of the stay under this section.

(D) If the debtor cannot demonstrate to the satisfaction of the court that the situation giving rise to the lessor's certification under paragraph (1) did not exist or has been remedied—

(i) relief from the stay provided under subsection

(a)(3) shall not be required to enable the lessor to proceed with the eviction; and

(ii) the clerk of the court shall immediately serve upon the lessor and the debtor a certified copy of the court's order upholding the lessor's certification.

(3) If the debtor fails to file, within 15 days, an objection under paragraph (2)(A)—

(A) subsection (b)(23) shall apply immediately upon such failure and relief from the stay provided under subsection (a)(3) shall not be required to enable the lessor to complete the process to recover full possession of the property; and

(B) the clerk of the court shall immediately serve upon the lessor and the debtor a certified copy of the docket indicating such failure.

(n)(1) Except as provided in paragraph (2), subsection (a) does not apply in a case in which the debtor—

(A) is a debtor in a small business case pending at the time the petition is filed;

(B) was a debtor in a small business case that was dismissed for any reason by an order that became final in the 2-year period ending on the date of the order for relief entered with respect to the petition;

(C) was a debtor in a small business case in which a plan was confirmed in the 2-year period ending on the date of the order for relief entered with respect to the petition; or

(D) is an entity that has acquired substantially all of the assets or business of a small business debtor described in subparagraph (A), (B), or (C), unless such entity establishes by a preponderance of the evidence that such entity acquired substantially all of the assets or business of such small business debtor in good faith and not for the purpose of evading this paragraph.

(2) Paragraph (1) does not apply—

(A) to an involuntary case involving no collusion by the debtor with creditors; or

(B) to the filing of a petition if—

(i) the debtor proves by a preponderance of the evidence that the filing of the petition resulted from circumstances beyond the control of the debtor not foreseeable at the time the case then pending was filed; and

(ii) it is more likely than not that the court will confirm a feasible plan, but not a liquidating plan, within a reasonable period of time.

(o) The exercise of rights not subject to the stay arising under subsection (a) pursuant to paragraph (6), (7), (17), or (27) of subsection (b) shall not be stayed by any order of a court or administrative agency in any proceeding under this title.

Appendix F

11 U.S.C. § 1520. Effects of recognition of a foreign main proceeding

(a) Upon recognition of a foreign proceeding that is a foreign main proceeding—

> **(1)** sections 361 and 362 [11 USCS §§ 361 and 362] apply with respect to the debtor and the property of the debtor that is within the territorial jurisdiction of the United States;
>
> **(2)** sections 363, 549, and 552 [11 USCS §§ 363, 549, and 552] apply to a transfer of an interest of the debtor in property that is within the territorial jurisdiction of the United States to the same extent that the sections would apply to property of an estate;
>
> **(3)** unless the court orders otherwise, the foreign representative may operate the debtor's business and may exercise the rights and powers of a trustee under and to the extent provided by sections 363 and 552 [11 USCS §§ 363 and 552]; and
>
> **(4)** section 552 [11 USCS § 552] applies to property of the debtor that is within the territorial jurisdiction of the United States.

(b) Subsection (a) does not affect the right to commence an individual action or proceeding in a foreign country to the extent necessary to preserve a claim against the debtor.

(c) Subsection (a) does not affect the right of a foreign representative or an entity to file a petition commencing a case under this title or the right of any party to file claims or take other proper actions in such a case.

Appendix F

11 U.S.C. § 1521. Relief that may be granted upon recognition

(a) Upon recognition of a foreign proceeding, whether main or nonmain, where necessary to effectuate the purpose of this chapter [11 USCS §§ 1501 et seq.] and to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief, including—

(1) staying the commencement or continuation of an individual action or proceeding concerning the debtor's assets, rights, obligations or liabilities to the extent they have not been stayed under section 1520(a) [11 USCS § 1520(a)];

(2) staying execution against the debtor's assets to the extent it has not been stayed under section 1520(a) [11 USCS § 1520(a)];

(3) suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under section 1520(a) [11 USCS § 1520(a)];

(4) providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities;

(5) entrusting the administration or realization of all or part of the debtor's assets within the territorial

jurisdiction of the United States to the foreign representative or another person, including an examiner, authorized by the court;

(6) extending relief granted under section 1519(a) [11 USCS § 1519(a)]; and

(7) granting any additional relief that may be available to a trustee, except for relief available under sections 522, 544, 545, 547, 548, 550, and 724(a) [11 USCS §§ 522, 544, 545, 547, 548, 550, and 724(a)].

(b) Upon recognition of a foreign proceeding, whether main or nonmain, the court may, at the request of the foreign representative, entrust the distribution of all or part of the debtor's assets located in the United States to the foreign representative or another person, including an examiner, authorized by the court, provided that the court is satisfied that the interests of creditors in the United States are sufficiently protected.

(c) In granting relief under this section to a representative of a foreign nonmain proceeding, the court must be satisfied that the relief relates to assets that, under the law of the United States, should be administered in the foreign nonmain proceeding or concerns information required in that proceeding.

(d) The court may not enjoin a police or regulatory act of a governmental unit, including a criminal action or proceeding, under this section.

(e) The standards, procedures, and limitations applicable to an injunction shall apply to relief under paragraphs (1), (2), (3), and (6) of subsection (a).

(f) The exercise of rights not subject to the stay arising under section 362(a) [11 USCS § 362(a)] pursuant to paragraph (6), (7), (17), or (27) of section 362(b) [11 USCS § 362(b)] or pursuant to section 362(o) [11 USCS § 362(o)] shall not be stayed by any order of a court or administrative agency in any proceeding under this chapter [11 USCS §§ 1501 et seq.].

Appendix F

28 U.S.C. § 1782. Assistance to foreign and international tribunals and to litigants before such tribunals

(a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.

A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.

(b) This chapter [28 USCS §§ 1781 et seq.] does not preclude a person within the United States from voluntarily giving his testimony or statement, or producing a document

or other thing, for use in a proceeding in a foreign or international tribunal before any person and in any manner acceptable to him.

Appendix F

Fed. R. Bank. R. 2004. Examination

(a) Examination on motion. On motion of any party in interest, the court may order the examination of any entity.

(b) Scope of examination. The examination of an entity under this rule or of the debtor under § 343 of the Code [11 USCS § 343] may relate only to the acts, conduct, or property or to the liabilities and financial condition of the debtor, or to any matter which may affect the administration of the debtor's estate, or to the debtor's right to a discharge. In a family farmer's debt adjustment case under chapter 12 [11 USCS §§ 1201 et seq.], an individual's debt adjustment case under chapter 13 [11 USCS §§ 1301 et seq.], or a reorganization case under chapter 11 of the Code [11 USCS §§ 1101 et seq.], other than for the reorganization of a railroad, the examination may also relate to the operation of any business and the desirability of its continuance, the source of any money or property acquired or to be acquired by the debtor for purposes of consummating a plan and the consideration given or offered therefor, and any other matter relevant to the case or to the formulation of a plan.

(c) Compelling attendance and production of documents or electronically stored information. The attendance of an entity for examination and for the production of documents or electronically stored information, whether the examination is to be conducted within or without the district in which the case is pending, may be compelled as provided in Rule 9016 for the attendance of a witness at a hearing or trial. As an officer of the court, an attorney may issue and sign a subpoena on behalf of the court

where the case is pending if the attorney is admitted to practice in that court.

(d) Time and place of examination of debtor. The court may for cause shown and on terms as it may impose order the debtor to be examined under this rule at any time or place it designates, whether within or without the district wherein the case is pending.

(e) Mileage. An entity other than a debtor shall not be required to attend as a witness unless lawful mileage and witness fee for one day's attendance shall be first tendered. If the debtor resides more than 100 miles from the place of examination when required to appear for an examination under this rule, the mileage allowed by law to a witness shall be tendered for any distance more than 100 miles from the debtor's residence at the date of the filing of the first petition commencing a case under the Code or the residence at the time the debtor is required to appear for the examination, whichever is the lesser.