No. 24-

IN THE

Supreme Court of the United States

NICHOLAS PIAZZA, *et al.*,

Petitioners,

v.

GRAMERCY DISTRESSED OPPORTUNITY FUND II L.P., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under 9 U.S.C. § 16(a), a litigant has an immediate right to appeal any order "refusing a stay" pending arbitration or "denying a petition" seeking to compel arbitration. Here, the defendants filed a motion asking the district court, among other things, to stay the litigation and order the parties to arbitrate. The court denied the motion, and the defendants appealed. The Tenth Circuit, however, dismissed the appeal on jurisdictional grounds, reasoning that because the motion was not captioned as a "motion to compel arbitration" and made arguments in the alternative, it fell outside of § 16's scope. In doing so, the appellate court further deepened an entrenched circuit split.

The question presented is:

Whether, under 9 U.S.C. § 16, a circuit court has appellate jurisdiction over an interlocutory order denying a motion for a stay pending arbitration or for an order compelling arbitration.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of this Court's Rules, Petitioner SP Capital Management LLC states that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

Petitioner TNA Corporation Solutions, LLC states that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

PARTIES TO THE PROCEEDING

1. Petitioners were defendants-appellants in the court of appeals. They are Nicholas Piazza; SP Capital Management, LLC; Oleksandr Yaremenko; TNA Corporate Solutions, LLC; and Oleg Bakhmatyuk.

2. Respondents were plaintiffs-appellees in the court of appeals. They are Gramercy Distressed Opportunity Fund II, L.P.; Gramercy Distressed Opportunity Fund III, L.P.; Gramercy Distressed Opportunity Fund III-A, L.P.; Gramercy Funds Management LLC; Gramercy EM Credit Total Return Fund; and Roehampton Partners LLC.

RELATED PROCEEDINGS

None.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The order of the court of appeals is unreported. *Gramercy Distressed Opportunity Fund II L.P. v. Piazza*, Nos. 22-8050 & 22-8063, 2023 WL 6296948 (10th Cir. May 10, 2023). It is reprinted in the Appendix to the Petition ("App.") at 1a–8a.

There are two district court orders on Petitioners' motions. The first is unreported. *Gramercy Distressed Opportunity Fund II, L.P. v. Piazza*, No. 21-CV-223-F, 2022 WL 3091501 (D. Wyo. July 7, 2022). The second is reported at 628 F. Supp. 3d 1125 (D. Wyo. 2022). They are reprinted at App. 9a–5a, 59a–122a.

JURISDICTION

The Tenth Circuit entered judgment on May 10, 2023 (App. 1a–8a) and denied a timely petition for rehearing en banc on April 22, 2024 (App. 123a–24a). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

9 U.S.C. § 16(a), provides:

An appeal may be taken from—

(1) an order—

(A) refusing a stay of any action under section 3 of this title,

(B) denying a petition under section 4 of this title to order arbitration to proceed,

(C) denying an application under section 206 of this title to compel arbitration,

(D) confirming or denying confirmation of an award or partial award, or

(E) modifying, correcting, or vacating an award;

(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

(3) a final decision with respect to an arbitration that is subject to this title.

STATEMENT

This case is about the scope of the appellate courts' jurisdiction to review an order refusing to compel arbitration under the Federal Arbitration Act ("FAA").

1. Plaintiffs-Respondents (collectively, "Gramercy") brought a civil complaint in the District of Wyoming against the five Defendants-Petitioners, asserting a variety of RICO and common law tort claims. App. 3a.

The district court had federal subject matter jurisdiction under 28 U.S.C. § 1367.

Petitioners responded by filing a document titled "Motion to Dismiss Plaintiffs' Complaint" along with a memorandum in support.[1] The motion's very first argument was that the trial court should stay or dismiss the lawsuit because the dispute is subject to binding arbitration under the FAA. App. 3a–4a. The motion expressly invoked the FAA, repeatedly asked the court to "stay" or "stay or dismiss" the litigation, and stated that it was "a request to refer an international dispute to arbitration" and that the court should "refer this dispute to arbitration in London." App. 20a–21a, 68a, 149a, 150a, 289a. The motion's conclusion said, "For the foregoing reasons, the Complaint should be stayed or dismissed pending arbitration, pursuant to Rules 12(b)(1), (2), (6), (7), 19(a), and 19(b)." App. 200a, 311a. The motion made other arguments as well, asserting in the alternative that Gramercy's complaint should be dismissed for lack of personal jurisdiction, *forum non conveniens*, and failure to state a claim. App. 179a–200a, 297a–311a.

In its response, Gramercy addressed the arbitration issue head-on, arguing that the parties' dispute isn't subject to arbitration. App. 221a–30a, 319a–30a. Ultimately, the district court sided with Gramercy, concluding that Petitioners did not meet "their burden to show that the case should be dismissed or stayed due

1. As the Tenth Circuit's order explains, because of a delay in service of process, Oleg Bakhmatyuk proceeded on a different schedule than the other defendants, and he filed a separate motion. But the two motions made substantially similar arguments, and the district court made substantially similar rulings denying them. *See* App. 3a n.1.

to the arbitration clauses" at issue in the case. App. 30a; *see also* App. 97a.

2. Petitioners appealed to the Tenth Circuit under 9 U.S.C. § 16. That section of the FAA confers appellate jurisdiction over any interlocutory order that "refuse[s] a stay of any action under section 3 of [the FAA]," "den[ies] a petition under section 4 of [the FAA]," or "den[ies] an application under section 206 of [the FAA]." 9 U.S.C. § 16(a)(1).

The Tenth Circuit, however, never reached the merits of the appeal. In its May 10, 2024 Order, the court held that it lacked appellate jurisdiction because Petitioners' trial-level motion did not satisfy the "bright-line" test laid out in *Conrad v. Phone Directories Co.*, 585 F.3d 1376 (10th Cir. 2009). App. 1a–2a.

As the Order explained, *Conrad* imposes a "two-step process" to determine appellate jurisdiction under § 16. App. 5a (quoting *Conrad*, 585 F.3d at 1385). "First, we look to whether the motion is 'explicitly styled as a motion under the FAA.'" *Id.* at 5a–6a (quoting *Conrad*, 585 F.3d at 1385). The court held that the motion at issue here was not but was instead titled a "motion to dismiss." *Id.* at 6a. *Conrad*'s second step asks "whether it is plainly apparent from the four corners of the motion that the movant seeks only the relief provided for in the FAA . . . ." *Id.* (quoting *Conrad*, 585 F.3d at 1385). The court held that the motion "does not pass muster" because "even if the text of the memorandum in support could be read as seeking relief under the FAA . . . , it also requests that the district court dismiss [Respondents'] claims with prejudice on the merits." *Id.* at 6a. In the panel's view, the critical flaw

was that Petitioners did not break out their motion into two separate filings.

In applying this hyper-technical rule, the Order acknowledged that "one could argue that *Conrad* improperly mixed the [] issue [of whether the litigant waived its arbitration rights] with the jurisdictional issue," and that "waiver is not ordinarily a jurisdictional issue." *Id.* at 8a. But it noted that *Conrad* "remains binding precedent in this circuit," and therefore applied it. *Id.*

Petitioners filed a petition for rehearing en banc, contending that both *Conrad* and the Order conflict with the plain text of the FAA, Supreme Court precedent, the published decisions of several circuit courts, and the Federal Rules of Civil Procedure. Ten and a half months later, the appellate court denied the request for rehearing. App. 124a. This Petition followed.

REASONS FOR GRANTING THE PETITION

I. An entrenched circuit split has existed for years.

"Ordinarily, courts of appeals have jurisdiction only over 'final decisions' of district courts." *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 627 (2009) (quoting 28 U.S.C. § 1291). However, the FAA "makes an exception to that finality requirement." *Id.* Section 16 provides that "[a]n appeal may be taken from . . . an order . . . refusing a stay of any action under section 3 of this title," "denying a petition under section 4 of this title," or "denying an application under section 206 of this title to compel arbitration." 9 U.S.C. § 16(a)(1).

The appellate courts, however, have fractured over how to determine whether a district court order falls within § 16's purview. Indeed, at least two courts of appeals have expressly recognized this longstanding split. *Devon Robotics, LLC v. DeViedma*, 798 F.3d 136, 145 (3d. Cir. 2015) (the circuits "have answered [this jurisdictional question] in a variety of ways"); *Fit Tech, Inc. v. Bally Total Fitness Holding Corp.*, 374 F.3d 1, 5 (1st Cir. 2004) ("The courts are divided as to whether a request to dismiss a case based on an arbitration clause should be treated as a request for an order compelling arbitration.").

The caselaw has coalesced around three distinct approaches: broad, narrow, and functional. *Devon Robotics*, 783 F.3d at 145 (discussing these three approaches). At one end of the spectrum, the First, Second, Sixth, Eighth, and Eleventh Circuits have adopted a broad approach, focusing on the purpose or essence of the motion and refusing to "elevate a label over substance." *Sourcing Unlimited, Inc. v. Asimco Int'l, Inc.*, 526 F.3d 38, 46 (1st Cir. 2008) (court had jurisdiction because "[t]he record shows that everyone, including the district court, viewed this motion as one seeking to compel arbitration"). Courts applying this approach require only that the challenged motion "either 'explicitly or implicitly ask[] the court to order arbitration'" or "manifest[] an intent to compel arbitration." *Zachman v. Hudson Valley Fed. Credit Union*, 49 F.4th 95, 100 n.3 (2d Cir. 2022) (citation omitted). In doing so, they have generously construed a variety of different motions—including motions to dismiss and for summary judgment—as seeking relief under the FAA, and therefore immediately appealable. *E.g.*, *Cappuccitti v. DirecTV, Inc.*, 623 F.3d 1118, 1121 (11th Cir. 2010) (court had jurisdiction over motion that sought arbitration or, in the alternative, dismissal under Rule 12(b)(6)); *Turi v.*

Main St. Adoption Servs., LLP, 633 F.3d 496, 501 (6th Cir. 2011) ("The district court's denial of Main Street's motion to dismiss, which was based on the parties' arbitration clause, is independently reviewable under the [FAA.]"), *overruled in part on other grounds by Henry Schein, Inc. v. Archer & White Sales, Inc.*, 586 U.S. 63 (2019); *Suburban Leisure Ctr. v. Amf Bowling Prods.*, 468 F.3d 523, 524–25 (8th Cir. 2006) (court had jurisdiction over motion to dismiss that asked in the alternative to compel arbitration); *Simon v. Pfizer Inc.*, 398 F.3d 765, 771–72 (6th Cir. 2005) (similar); *Fit Tech*, 374 F.3d at 6 ("[Bally's] request for dismissal in favor of the accountant remedy can be treated as encompassing the lesser alternative remedy of a stay and reference [to arbitration].").

At the other end of the spectrum, the DC Circuit has adopted the narrow approach, strictly construing § 16's exception to the final judgment rule and refusing to treat motions brought under Rule 12 or Rule 56 as immediately appealable. *Bombardier Corp. v. Amtrak*, 333 F.3d 250, 254 (D.C. Cir. 2003) (court lacked jurisdiction based upon the "principal of narrow construction[,] . . . [which] counsels against broad construction of a motion forwarded for review").

Finally, the Third, Fourth, Ninth, and Tenth Circuits have adopted the functional approach, which is meant to focus the inquiry on the relief requested by the motion. *See W. Sec. Bank v. Schneider Ltd. P'ship*, 816 F.3d 587, 589–90 (9th Cir. 2016) (adopting functional approach after identifying several circuits that have done the same). The leading case for the functional approach is *Conrad v. Phone Directories Co.*, 585 F.3d 1376 (10th Cir. 2009). There, the Tenth Circuit adopted a two-step test: To invoke appellate jurisdiction under § 16, a litigant "must

either move to compel arbitration and stay litigation explicitly under the FAA, or must make it plainly apparent that [it] seeks only the remedies provided for by the FAA . . . in [its] prayer for relief." *Conrad*, 585 F.3d at 1385. The court stressed that "[t]he first, simplest, and surest way to guarantee appellate jurisdiction under § 16(a) is to caption the motion in the district court as one brought under [the] FAA." *Id.* That is, the test's primary focus is on *the way litigants title their filings*. If the motion does not explicitly invoke the FAA, "the court must look beyond the caption . . . to determine whether it is plainly apparent from the four corners of the motion that the movant seeks only the relief provided for in the FAA." *Id.* But this second step comes with its own exacting standard: to meet it, the litigant must move *exclusively* under the FAA, "rather than any other judicially-provided remedy." *Id.*

At least two circuits—the Third and the Fourth—initially adopted *Conrad*'s two-part test, but have since begun to abandon it. In 2015, the Third Circuit "join[ed] the Tenth and Fourth Circuits in focusing [its] § 16(a) inquiry on a movant's requested relief." *Devon Robotics*, 798 F.3d at 145–46. But in practice, the Third Circuit's application of the functional approach has been more generous. The *Devon Robotics* court explained that "when determining [its] jurisdiction, [it] must examine the substance of the order rather than merely its language," and "[a]n explicit reference to the FAA, namely §§ 3, 4, or 206, in the caption of a motion is not dispositive." *Id.* at 146–47 (first quoting *U.S. Fire Ins. Co. v. Asbestospray, Inc.*, 182 F.3d 201, 207 (3d Cir. 1999) (Alito, J.)). To fall within § 16's ambit, "a motion [must] at least request an order compelling arbitration or an order directing that arbitration proceed." *Id.* at 147. Critically—and directly at odds with *Conrad* and the decision below—the Third

Circuit does "not read § 16 as barring jurisdiction where both a motion to compel arbitration and a motion to dismiss (or a motion for summary judgment) are made in the alternative." *Id.*

Moreover, in recent years the Third Circuit has begun to depart even further from *Conrad*'s hyper-formal version of the functional approach. In *Henry v. Wilmington Trust, NA*—an opinion that cites to *Devon Robotics* just once and to *Conrad* not at all—the court explained that it has "consistently held that under 9 U.S.C. § 16(a), 'all orders that have the *effect* of declining to compel arbitration [are] reviewable.' The substance of the motion and order, and not its form, determines its appealability." 72 F.4th 499, 505 (3d Cir. 2023) (emphasis added) (quoting *Palcko v. Airborne Express, Inc.*, 372 F.3d 588, 592 (3d Cir. 2004)); *see also Bacon v. Avis Budget Grp., Inc.*, 959 F.3d 590, 597–99 (3d Cir. 2020) (denial of motion for summary judgment was appealable because it was, in substance, a motion to compel arbitration).

The Fourth Circuit has followed a similar path. In 2012, the court adopted *Conrad*, holding that "when a motion is not styled [or captioned] in a dispositive manner, [the] inquiry into appellate jurisdiction should be based on . . . whether [the movant] made it clear within the four corners of its motion to dismiss that it was seeking enforcement of the arbitration agreement." *Wheeling Hosp., Inc. v. Health Plan of the Upper Ohio Valley, Inc.*, 683 F.3d 577, 585–86 (4th Cir. 2012); *see also Rota-McLarty v. Santander Consumer USA, Inc.*, 700 F.3d 690, 698–99 (4th Cir. 2012) (applying *Conrad*).

A few years later, however, the court's approach began to shift. In *Dillon v. BMO Harris Bank, N.A.*, the

Fourth Circuit cited *Conrad*, but nevertheless held that "a motion to dismiss is an appropriate vehicle to 'invoke the full spectrum of remedies under the FAA, including a stay under § 3.'" 787 F.3d 707, 714 (4th Cir. 2015) (quoting *Choice Hotels Int'l, Inc. v. BSR Tropicana Resort, Inc.*, 252 F.3d 707, 710 (4th Cir. 2001)). More tellingly, in *Noe v. City National Bank*, the Fourth Circuit considered whether it had jurisdiction under § 16 over an interlocutory order denying a party's "Motion to Dismiss, Motion to Stay, and to Strike Class Action Allegations." 828 F. App'x 163, 164 (4th Cir. 2020) (per curiam). Despite the movant's failure to caption its motion explicitly under the FAA and its inclusion of alternative requests for relief, the court held that it had appellate jurisdiction. *Id.* at 165 (citing *Dillon*, 787 F.3d at 713–14).

Even the Tenth Circuit has bucked *Conrad*, in substance if not in form. In *Grosvenor v. Qwest Corp.*, the circuit court was called on to decide whether it had appellate jurisdiction over the denial of a motion that, like the one at issue here, combined a motion to compel arbitration with a request for other relief. 733 F.3d 990, 997 (10th Cir. 2013). Though the court purported to apply *Conrad*, it reached the opposite conclusion: "Had Qwest sought an order granting it summary judgment on the issue of contract formation and an order compelling arbitration, there would be no question as to our jurisdiction." *Id.* at 1000.

Thus, the Third, Fourth, and Tenth Circuits have come to recognize what other courts have observed: while *Conrad* is described as a "functional" test, in practice it enforces a "strict view of § 16(a)," *United States ex rel. Dorsa v. Miraca Sci., Inc.*, 983 F.3d 885, 888 (6th Cir. 2020)—one that cannot be reconciled with the FAA's text, structure, or purpose.

II. *Conrad* and the Order were wrongly decided.

A. *Conrad* and the Order are contrary to the FAA's plain text and this Court's precedent.

Section 16 gives litigants an unqualified right to immediately appeal any order "refusing a stay" or "denying a petition" or "application" for an order compelling arbitration. 9 U.S.C. § 16(a)(1). The purpose of this statutory provision is two-fold. First, it reflects the FAA's strong pro-arbitration bias insofar as "Congress provided for immediate interlocutory appeals of orders *denying*—but not of orders *granting*—motions to compel arbitration." *Coinbase, Inc. v. Bielski*, 599 U.S. 736, 740 (2023). That is, the FAA's goal is "moving the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible," and to further that purpose, "§ 16 generally permits immediate appeal of orders hostile to arbitration." *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 85–86 (2000) (first quoting *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983)). That bias is even more potent in cases like this one, where the parties' dispute involves an international transaction. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985) ("[T]he emphatic federal policy in favor of arbitral dispute resolution . . . applies with special force in the field of international commerce.").

Second, § 16 is intended to avoid a potentially colossal waste of both the judiciary's and the parties' resources. If an order denying arbitration isn't immediately appealable, then the district court and the parties must litigate the case to final judgment only to have an appellate court overturn the judgment years later if the litigation should have been sent to arbitration in the first instance. And in

that case, "many of the asserted benefits of arbitration (efficiency, less expense, less intrusive discovery, and the like) would be irretrievably lost . . . ." *Coinbase*, 599 U.S. at 736.

This Court has confirmed that § 16's directive is unequivocal. "By that provision's clear and unambiguous terms, *any litigant* who asks for a stay under § 3 *is entitled to an immediate appeal* from denial of that motion—regardless of whether the litigant is in fact eligible for a stay." *Arthur Andersen*, 556 U.S. at 627 (emphases added); *see also Digital Equip. Corp. v. Desktop Direct*, 511 U.S. 863, 880 n.7 (1994) (§ 16 "essentially provid[es] for immediate appeal when a district court rejects a party's assertion that, under the Arbitration Act, a case belongs before a commercial arbitrator and not in court"). *Arthur Andersen* emphasized that the test is a simple one: courts need only ask "whether § 3 was invoked in a denied stay request." 556 U.S. at 629. Last Term, the Court made a similar pronouncement, declaring that whenever a trial court "denies a request for arbitration, §16 of the FAA authorizes an immediate interlocutory appeal." *Smith v. Spizzirri*, 144 S. Ct. 1173, 1178 (2024).

Despite the FAA's text and this Court's clear direction to follow it, *Conrad* and the Order indisputably impose a jurisdictional requirement over and above "ask[ing] for a stay" or making "a request for arbitration." As the Order itself acknowledges, *Conrad* adopted a rigid and formalistic two-step inquiry. *See* App. 4a (noting *Conrad*'s "strict rules for invoking § 16(a)(1)"). Rather than trying to ground this new test in the text of § 16, the Tenth Circuit relied entirely on a desire for "clear, bright-line rules" "where jurisdictional matters are concerned" and a "policy preference . . . disfavoring piecemeal appeals."

Conrad, 585 F.3d at 1382; App. 4a–5a. But *Arthur Andersen* specifically rejected this line of reasoning. There, the respondents claimed that an adverse ruling would "produce a long parade of horribles, enmeshing courts in fact-intensive jurisdictional inquiries and permitting frivolous interlocutory appeals." 556 U.S. at 629. The Court found those arguments unavailing, noting that they simply could not "surmount the plain language of the statute." *Id.*; *see also id.* at 633–34 (Souter, J., dissenting) (raising concern about "'piecemeal' appeals" and preference for a "bright-line rule" (quoting *Abney v. United States*, 431 U.S. 651, 656 (1977)).

B. *Conrad* and the Order are inconsistent with longstanding federal practice.

The rule announced in *Conrad* also cannot be reconciled with longstanding federal practice. The Federal Rules of Civil Procedure expressly permit parties to argue in the alternative—just as Petitioners did here. Rule 12(b) provides that "[n]o defense or objection is waived by joining it with one or more other defenses or objections . . . in a motion." The Rule "was designed to modernize civil litigation by promoting the expeditious *and simultaneous* presentation of defenses and objections . . . ." 5B Charles Allen Wright & Arthur R. Miller, Federal Practice & Procedure § 1347 (emphasis added). Likewise, Rule 8 permits a party to plead in the alternative even if the theories are mutually exclusive. Fed. R. Civ. P. 8(d) ("A party may set out two or more statements of a claim or defense alternatively or hypothetically . . . . [T]he pleading is sufficient if any one of them is sufficient.").

Consistent with these Rules, arguments in the alternative are a commonplace throughout the judiciary, in both civil and criminal cases, at trial and on appeal. *E.g.*, 1 Moore's Manual, Federal Practice & Procedure § 7.72[1] ("Frequently, a defendant will file a motion to dismiss for lack of personal jurisdiction pursuant to Rule 12(b)(1), and in the alternative, a motion to transfer the case to another district under Section 1404(a), and possibly an additional or alternative motion under Section 1406(a) for dismissal due to improper venue."); 3 Moore's Manual, Federal Practice & Procedure § 24.80[3][c] ("A party that is subject to an adverse ruling may file a Rule 60(b) motion seeking relief from judgment and in the alternative a Rule 59(e) motion to alter or amend the judgment."); *Russell v. Zimmer, Inc.*, 82 F.4th 564, 571–72 (7th Cir. 2023) (taking up argument that the court should deny the motion to dismiss or in the alternative allow the party to amend the complaint); *United States v. Wright*, 46 F.4th 938, 942 (9th Cir. 2022) (taking up argument that court should reduce criminal sentence or in the alternative order home detention); *Hill v. Snyder*, 919 F.3d 1081, 1084 (8th Cir. 2019) (taking up argument in bankruptcy that motion for extension should be denied or in the alternative, the court should have allowed an evidentiary hearing on the issue).

Moreover, while the circuits are split over whether to apply the broad, functional, or narrow approach to § 16, there is much broader agreement that, notwithstanding *Conrad*, litigants may combine a motion for arbitration with alternative requests for relief without forgoing their appellate rights. *Henry*, 72 F.4th at 503, 505; *Devon Robotics*, 798 F.3d at 147; *Grosvenor*, 733 F.3d at 1000; *Cappuccitti*, 623 F.3d at 1121; *Turi*, 633 F.3d at 501;

Asimco, 526 F.3d at 42, 46; *Suburban Leisure*, 468 F.3d at 524–25; *Simon*, 398 F.3d at 771–72.[2]

If *Conrad* is permitted to stand, then litigants are—in the context of seeking an order compelling arbitration, and in that context only—forbidden from pleading in the alternative. In form and in substance, *Conrad* lays a trap for the unwary, declaring that, unlike perhaps every other area of federal practice, parties must break out a request for arbitration into a separate CM/ECF event, lest they lose their interlocutory appellate rights.

C. *Conrad* and the Order are inconsistent with analogous interlocutory appeals.

The rule announced in *Conrad* is also inconsistent with the jurisdictional rules governing interlocutory appeals asserting qualified immunity.

Since its decision in *Mitchell v. Forsyth*, this Court has applied the collateral order doctrine to permit interlocutory appeals by government officials asserting qualified immunity. 472 U.S. 511, 530 (1985). In *Mitchell*, the Court held that *any* district court "denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision.'" *Id.* Over the intervening decades, the Court has articulated this

2. The Order asserts "that *Conrad* does not preclude pleading in the alternative." App. 7a. But that assertion cannot be squared with the facts of this case or *Conrad* itself, which states that if "the movant in the district court requests a judicial remedy that is inconsistent with the position that the issues involved may be decided only by the arbitrator, the movant is no longer proceeding exclusively under the FAA" and cannot seek interlocutory review. *Conrad*, 585 F.3d at 1386.

jurisdictional rule on several occasions, and it has never adopted anything like the stringent and formalistic restrictions that *Conrad* imposes on § 16 appeals. *E.g.*, *Ortiz v. Jordan*, 562 U.S. 180, 188 (2011) ("When summary judgment is denied to a defendant who urges that qualified immunity shelters her from suit . . . an immediate appeal may be pursued."); *Johnson v. Fankell*, 520 U.S. 911, 915 (1997) (interlocutory jurisdiction lies over any "order rejecting a qualified immunity defense on the ground that the defendant's actions—if proven—would have violated clearly established law"); *Behrens v. Pelletier*, 516 U.S. 299, 301 (1996) ("[A] district court's rejection of a defendant's qualified-immunity defense is a 'final decision' subject to immediate appeal . . . ."). And critically, there is no persuasive reason why a court would choose to interpret the scope of the collateral order doctrine—a judicially created rule—more broadly than § 16—a statute duly enacted by Congress.[3]

Nor can Respondents reasonably challenge the analogy between § 16 and qualified-immunity appeals. Recently, the Court made the same comparison when it held that district courts are required stay their proceedings while a § 16 appeal is pending. *Coinbase*, 599 U.S. at 742 ("In the Circuits that have considered the issue in the analogous contexts of qualified immunity and double jeopardy,

3. That is all the more true given the sustained criticism the collateral order doctrine has received over the years. *E.g.*, *Ashcroft v. Iqbal*, 556 U.S. 662, 672 (2009) (the doctrine "may have expanded beyond the limits dictated by its internal logic"); Bryan Lammon, *Finality, Appealability, and the Scope of Interlocutory Review*, 93 Wash. L. Rev. 1809, 1842 & n.180 (2018) ("Rarely is the collateral order doctrine mentioned without accompanying criticism. Indeed, it is probably the most maligned rule of federal appellate jurisdiction.").

moreover, district courts likewise must automatically stay their proceedings while the interlocutory appeal is ongoing."). And the analogy is fitting for another reason: Both types of interlocutory appeals are intended to accomplish a similar end. The purpose of qualified immunity isn't only to "shield[] Government officials 'from liability,'" but also to provide for "a limited 'entitlement not to stand trial or face the other burdens of litigation.'" *Iqbal*, 556 U.S. at 672 (first quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); then quoting *Mitchell*, 472 U.S. at 526). Likewise, the purpose of the FAA isn't only to have an arbitrator decide the ultimate issues in the dispute, but also to avoid the burdens of full-fledged litigation in the federal courts. *Green Tree*, 531 U.S. at 85.

In short, these two types of interlocutory appeals share a similar structure and a similar purpose. Courts have no reasonable justification to impose a stringent standard on one, but not the other.

III. This case presents a critical issue and is an appropriate vehicle to resolve it.

A. The petition raises an important and recurring jurisdictional question.

The question posed by the petition has far-reaching consequences for the FAA's liberal federal policy favoring arbitration. Every circuit, save two, has weighed in on the scope of § 16, yet we are no closer to achieving a consensus. In fact, at least three of those circuits—the Third, Fourth, and Tenth—have applied their preferred approach inconsistently over time, creating intra-circuit splits on top of the existing inter-circuit one. The result is a fractured, unworkable, and inconsistent patchwork

that does nothing to promote Congress's desire to "mov[e] the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." *Green Tree*, 531 U.S. at 85 (quoting *Moses H. Cone Mem. Hosp.*, 460 U.S. at 22).

Unless this Court steps in to clarify that § 16 applies broadly to *any* order that seeks relief under the FAA, regardless of how it is packaged, courts and parties will continue to run up the deadweight losses that result from litigating over which forum should hear their dispute. *See* Larry E. Ribstein & Bruce H. Kobayashi, *An Economic Analysis of Uniform State Laws*, 25 J. Legal Stud. 131, 138 (1996).

Indeed, because this Court has recognized the need for nationwide uniformity on the procedural rules that govern arbitrations, it has granted certiorari to address questions like the one presented here. *E.g.*, *Smith v. Spizzirri*, 144 S. Ct. 1173 (2024) (resolving circuit split over whether 9 U.S.C. § 3 permits district courts to dismiss rather than stay a case pending arbitration); *Coinbase*, 599 U.S. 736 (resolving circuit split over whether district courts are required to stay proceedings pending an interlocutory appeal under § 16); *Badgerow v. Walters*, 596 U.S. 1 (2022) (resolving circuit split relating to jurisdiction of requests to confirm or vacate arbitral awards under FAA sections 9 and 10). Answering the question presented is all the more urgent given that arbitration agreements are extraordinarily common, even ubiquitous, in today's world. Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 Stan. L. Rev. 1631 (2005) (discussing the proliferation of mandatory arbitration agreements); Jeff Sovern et al., *"Whimsy Little Contracts" with Unexpected Consequences: An Empirical Analysis of Consumer*

Understanding of Arbitration Agreements, 75 MD. L. REV. 1, 2 (2015) ("Arbitration contracts have become ubiquitous in consumer contracts.").

B. This case is an appropriate vehicle for the Court to decide the question.

This case is well-suited for the Court's review. The issue is squarely presented and fully developed, and the record is minimal. It is true that the petition seeks review of an unpublished order, but for three reasons, "[t]he fact that the Court of Appeals' order under challenge here is unpublished [should] carr[y] no weight in [this Court's] decision to review the case." *Comm'r v. McCoy*, 484 U.S. 3, 7 (1987).

First, this posture is typical in interlocutory appeals that involve the denial of a motion to compel arbitration, and the Court often grants review of such orders (whether they are published or not). *E.g.*, *Coinbase*, 599 U.S. at 740; *Sw. Airlines Co. v. Saxon*, 596 U.S. 450, 455 (2022); *Henry Schein*, 586 U.S. at 67; *New Prime Inc. v. Oliveira*, 586 U.S. 105, 108 (2019); *Arthur Andersen*, 556 U.S. at 627.[4]

Second, *Conrad* is a published decision, and the parties all agree that the order under review applied *Conrad*'s two-part test. Thus, this petition presents an opportunity for the Court to review *Conrad*, which, despite being wrongly decided, has proven influential. *See* Part I, *supra*.

4. The Court has granted review of unpublished orders in other contexts as well. *E.g.*, *Shapiro v. McManus*, 577 U.S. 39, 42 (2015); *Felkner v. Jackson*, 562 U.S. 594, 597–98 (2011); *Krupski v. Costa Crociere S. p. A.*, 560 U.S. 538, 546 (2010); *Republic of Iraq v. Beaty*, 556 U.S. 848, 855 (2009); *Kimbrough v. United States,* 552 U.S. 85, 93 (2007).

Third and finally, as discussed above, in an appeal that involves a dispute over whether the case belongs in arbitration, it makes more sense to resolve the issue now rather than waiting for the parties to go through cost-intensive discovery, trial, and post-trial proceedings. Further litigation will not change the question presented; it would be better to avoid a "waste [of] scarce judicial resources" by resolving this issue on the front end. *Coinbase*, 599 U.S. at 743.

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

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July 2024

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APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, FILED MAY 10, 2023

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 22-8050
(D.C. No. 2:21-CV-00223-NDF)
(D. Wyo.)

GRAMERCY DISTRESSED OPPORTUNITY FUND II L.P.; GRAMERCY DISTRESSED OPPORTUNITY FUND III, L.P.; GRAMERCY DISTRESSED OPPORTUNITY FUND III-A, L.P.; GRAMERCY FUNDS MANAGEMENT LLC; GRAMERCY EM CREDIT TOTAL RETURN FUND; ROEHAMPTON PARTNERS LLC,

Plaintiffs-Appellees,

v.

NICHOLAS PIAZZA; SP CAPITAL MANAGEMENT LLC; OLEKSANDR YAREMENKO; TNA CORPORATE SOLUTIONS LLC,

Defendants-Appellants,

and

OLEG BAKHMATYUK,

Defendant.

Appendix A

No. 22-8063
(D.C. No. 2:21-CV-00223-NDF)
(D. Wyo.)

GRAMERCY DISTRESSED OPPORTUNITY FUND II L.P.; GRAMERCY DISTRESSED OPPORTUNITY FUND III, L.P.; GRAMERCY DISTRESSED OPPORTUNITY FUND III-A, L.P.; GRAMERCY FUNDS MANAGEMENT LLC; GRAMERCY EM CREDIT TOTAL RETURN FUND; ROEHAMPTON PARTNERS LLC,

Plaintiffs-Appellees,

v.

OLEG BAKHMATYUK,

Defendant-Appellant,

and

NICHOLAS PIAZZA; SP CAPITAL MANAGEMENT LLC; OLEKSANDR YAREMENKO; TNA CORPORATE SOLUTIONS LLC,

Defendants.

ORDER

Before **HARTZ**, **McHUGH**, and **CARSON**, Circuit Judges.

HARTZ, Circuit Judge.

In these consolidated interlocutory appeals, Defendants seek to reverse the district court's denial of

their motions to dismiss, which contended that Plaintiffs are obliged to arbitrate this dispute. Following *Conrad v. Phone Directories Co.*, 585 F.3d 1376 (10th Cir. 2009), we dismiss the appeals for lack of jurisdiction. Although the Federal Arbitration Act (FAA) permits the interlocutory appeal of an order "refusing a stay of any action under section 3 of [the FAA]" or "denying a petition under section 4 of [the FAA] to order arbitration to proceed," 9 U.S.C. § 16(a)(1)(A), (B), the order that Defendants seek to appeal is not such an order because the motion that it denied included a request for dismissal with prejudice on the merits.[1]

The relevant facts are few. Plaintiffs filed suit against Defendants in the United States District Court for the District of Wyoming alleging claims under the Racketeer Influenced and Corrupt Organizations Act (RICO), *see* 18 U.S.C. § 1962, and various state-law causes of action. Defendants responded to the complaint by filing a motion to dismiss and memorandum in support, arguing both that the action should be stayed or dismissed under the

1. Because of a delay in service of process, Defendant Oleg Bakhmatyuk proceeded on a different case-management schedule than the other Defendants. As a result, Defendants filed two motions to dismiss—one by all Defendants except Mr. Bakhmatyuk, and the other by Mr. Bakhmatyuk. The two motions made substantially identical arguments (except that Mr. Bakhmatyuk did not argue for dismissal for failure to join an indispensable party), and both motions requested dismissal on the merits *and* relief under the FAA. The district court made substantially similar rulings on both motions, Defendants have pursued a similar appeal on each, and our analysis applies equally to both appeals. Therefore, for convenience we write in terms of only one motion, one order, and one appeal.

FAA and that the complaint should be dismissed with prejudice on the merits. (In addition, the motion sought dismissal under the doctrine of forum non conveniens and under Federal Rule of Civil Procedure 19 for failure to join indispensable parties.) The district court's order rejected Defendants' arguments that the dispute should be arbitrated and their merits arguments (except for dismissing without prejudice one count against one Defendant). *See Gramercy Distressed Opportunity Fund II, L.P. v. Bakhmatyuk*, No. 21-cv-223, 2022 U.S. Dist. LEXIS 141633, 2022 WL 3091501 (D. Wyo. July 7, 2022).[2] Invoking 9 U.S.C. § 16(a)(1), Defendants appealed only the portion of the order denying relief under the FAA. Plaintiffs moved to dismiss the appeal for lack of jurisdiction.

Conrad requires us to grant the motion to dismiss for lack of jurisdiction. Our opinion in that case set forth strict rules for invoking § 16(a)(1). We provided two justifications for such strictness. First, "there is a long-established policy preference in the federal courts disfavoring piecemeal appeals," and "we are bound to construe statutes conferring jurisdiction narrowly." 585 F.3d at 1382; *see also Pre-Paid Legal Servs., Inc. v. Cahill*, 786 F.3d 1287, 1290 (10th Cir. 2015) ("If there is ambiguity as to whether the instant statute confers federal jurisdiction over this case, we are compelled to adopt a reasonable, narrow construction." (brackets and internal quotation marks omitted)). Second, "where jurisdictional

2. *See also Gramercy Distressed Opportunity Fund II, L.P. v. Bakhmatyuk*, 628 F. Supp. 3d 1125, 2022 WL 4292978 (D. Wyo. 2022) (denying Mr. Bakhmatyuk's motion to dismiss).

matters are concerned, we prefer clear, bright-line rules." 585 F.3d at 1382. As Justice Gorsuch recently explained:

> Jurisdictional rules, this Court has often said, should be clear and easy to apply. For parties, complex jurisdictional tests complicate a case, eating up time and money as they litigate, not the merits of their claims, but which court is the right court to decide those claims. For courts, jurisdictional rules mark the bounds of their adjudicatory authority. Judges therefore benefit from straightforward rules under which they can readily assure themselves of their power to hear a case, while adventitious rules leave them with almost impossible tasks to perform that squander their limited resources.

Axon Enter., Inc. v. Fed. Trade Comm'n, 598 U.S. 175, 143 S. Ct. 890, 915-16, 215 L. Ed. 2d 151 (2023) (Gorsuch, J., concurring) (citations, brackets, and internal quotation marks omitted). Thus, we interpreted § 16(a) as "encompassing only those motions explicitly brought under the FAA or unmistakably invoking its remedies, rather than all motions founded at least in part on arbitration agreements." *Conrad*, 585 F.3d at 1382; *see id.* at 1383 ("[Section] 16(a) permits interlocutory appeals only over those motions brought explicitly pursuant to the FAA, or motions in which it is unmistakably clear that the defendant seeks only the relief offered by the FAA.").

To effectuate this interpretation, *Conrad* established "a coherent, two-step process" to determine whether we have jurisdiction. *Id.* at 1385. First, we look to whether the

motion is "explicitly styled as a motion under the FAA." *Id.* If it is not, we move to step two. For this step:

> [T]he court must look beyond the caption to the essential attributes of the motion itself. *The goal of this inquiry is to determine whether it is plainly apparent from the four corners of the motion that the movant seeks only the relief provided for in the FAA, rather than any other judicially-provided remedy.* To do so, the court should look to the relief requested in the motion. If the essence of the movant's request is that the issues presented be decided exclusively by an arbitrator and not by any court, then the denial of that motion may be appealed under § 16(a).

Id. at 1385-86 (citation omitted) (emphasis added).

Defendants' motion does not pass muster under either step. The motion itself was not styled as a motion under the FAA; indeed, it referred to no rule of procedure or any statute in the caption or text. And even if the text of the memorandum in support could be read as seeking relief under the FAA (although the one-sentence Conclusion states, "For the foregoing reasons, the Complaint should be stayed or dismissed pending arbitration, pursuant to [Federal] Rules [of Civil Procedure] 12(b)(1), (2), (6), (7), 19(a), and 19(b)," Aplt. App. at 193), it also requests that the district court dismiss Plaintiffs' claims with prejudice on the merits.

Defendants argue that their motion is distinguishable on the facts from the motion in *Conrad*. But for us to

pursue such distinctions would defeat the purpose of having a bright-line rule and violate the precedent set by the published opinion in *Conrad*. *See* 585 F.3d at 1384 (rejecting an approach that "would require courts of appeals carefully to parse the district court motions and memoranda to determine, factually, whether the arguments pressed in the district court sufficiently raised the concerns of the FAA to deem the motion brought 'under section 3' or 'under section 4.'" (quoting 9 U.S.C. § 16(a)(1)(A), (B))).

Defendants also contend that their arguments for dismissal on the merits were made in the alternative to their request for relief under the FAA, and that we should apply the *Conrad* test to the section of their district-court memorandum requesting relief under the FAA. We agree with Defendants that *Conrad* does not preclude pleading in the alternative. But even when a party pleads in the alternative, there may come a point at which a choice must be made. In particular, a party can waive the right to pursue arbitration by simultaneously pursuing merits relief in the courts. After all, one seeking arbitration is contending that judicial review is inappropriate. To pursue adjudication on the merits by the court is contrary to the purported desire to have the claims resolved by an arbitrator in the first instance. We made this very point in *Conrad*, saying that if "the movant in the district court requests a judicial remedy that is inconsistent with the position that the issues involved may be decided only by the arbitrator, the movant is no longer proceeding exclusively under the FAA and has forfeited [its] right to interlocutory review under § 16(a)." *Id.* at 1386; *see also Hill v. Ricoh Americas Corp.*, 603 F.3d 766, 773 (10th Cir. 2010) ("An

important consideration [in determining whether a party has forfeited the right to demand arbitration] is whether the party now seeking arbitration is improperly manipulating the judicial process."). A defendant should not be permitted to see whether the district court is receptive to its merits arguments before deciding whether to appeal the denial of a request to compel arbitration. Our approach does not set a trap for unwary litigants. In *Conrad* we noted the procedure that can be followed by a party that seeks arbitration but wishes the district court to rule in its favor on the merits if arbitration is denied: "If a party files a motion under FAA §§ 3 or 4, that motion is denied by the court, and the denial is affirmed on interlocutory appeal, nothing prevents that party from then filing a Rule 12 motion to dismiss." 585 F.3d at 1383 n.2.

We recognize that waiver is not ordinarily a jurisdictional issue (although perhaps it may moot the dispute, *see Kaw Nation v. Norton*, 405 F.3d 1317, 1322 (Fed. Cir. 2005) (appeal was moot because government had paid the funds that were the subject of the original dispute and had "waived any right it might have to recover those payments.")), and one could argue that *Conrad* improperly mixed the waiver issue with the jurisdictional issue. But it remains binding precedent in this circuit, it facilitates appellate review, and capable counsel can easily follow its precepts.

For the foregoing reasons, we DISMISS Defendants' appeals for lack of jurisdiction and REMAND to the district court for further proceedings.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING, FILED JULY 7, 2022

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Case No. 21-CV-223-F

GRAMERCY DISTRESSED OPPORTUNITY FUND II, L.P., GRAMERCY DISTRESSED OPPORTUNITY FUND III, L.P., GRAMERCY DISTRESSED OPPORTUNITY FUND III-A, L.P., GRAMERCY FUNDS MANAGEMENT LLC, GRAMERCY EM CREDIT TOTAL RETURN FUND, AND ROEHAMPTON PARTNERS LLC,

Plaintiffs,

vs.

OLEG BAKHMATYUK, NICHOLAS PIAZZA, SP CAPITAL MANAGEMENT, LLC, OLEKSANDR YAREMENKO AND TNA CORPORATE SOLUTIONS, LLC,

Defendants.

ORDER ON THE PIAZZA DEFENDANTS' MOTION TO DISMISS

Defendants Nicholas Piazza, SP Capital Management, LLC, Oleksandr Yaremenko, and TNA Corporate Solutions, LLC (the "Defendants") move to dismiss

the complaint on several theories.[1] ECF No. 43, 44 (Memorandum and Exhibits). At the parties' requests, the Court granted extensions of time on the briefing of this motion. Plaintiffs have responded (ECF No. 50), and Defendants filed their reply. ECF No. 53.[2] For the reasons that follow, the Court denies the great bulk of the motion, dismissing only Count 1 as to Yaremenko and granting leave to amend.

I. Fact Allegations

Six Plaintiffs (Gramercy Distressed Opportunity Fund II, L.P., Gramercy Distressed Opportunity Fund III, L.P., Gramercy Distressed Opportunity Fund III-A, L.P., Gramercy EM Credit Total Return Fund, Roehampton Partners LLC, and Gramercy Funds Management LLC (collectively, unless otherwise specified herein, "Gramercy" or Plaintiffs) sue the Defendants and another individual, Oleg Bakhmatyuk. Mr. Bakhmatyuk has not yet appeared.

The complaint runs 105 pages. ECF No. 1 (filed December 7, 2021). The Court does not attempt to

1. All Defendants except Oleg Bakhmatyuk join in the motion. For convenience, the Court refers to the movants as the Defendants, recognizing this does not include Mr. Bakhmatyuk.

2. The Court also granted the stipulated requests for excess pages, doubling the authorized page limits. ECF No. 40; ECF No. 49 (order of March 2, 2022). The net result is only a dismissal of a single claim against a single defendant with leave to amend. Counsel are forewarned that future requests for excess pages will be closely scrutinized for good cause.

comprehensively summarize all the allegations. In a nutshell, Gramercy alleges that Bakhmatyuk and the Defendants together engaged in a multi-year pattern of racketeering activity to defraud Gramercy of the value of notes it holds from non-parties UkrLandFarming PLC ("ULF") and its subsidiary Avangardco IPL ("AVG," together with ULF, the "Company"), which are Ukrainian agricultural companies that Bakhmatyuk controls. Gramercy brings three claims for civil liability under the federal Racketeer Influenced and Corrupt Organizations ("RICO") laws, 18 U.S.C. § 1961 *et al.* The RICO claims are the basis of the Court's subject-matter jurisdiction. Gramercy also brings state law claims for fraud, tortious interference with contract (*i.e.*, the ULF and AVG notes), civil conspiracy and aiding and abetting.

Gramercy alleges the following facts, excerpted from the Complaint. The Court takes these fact allegations as true for purposes of the Rule 12(b)(6) motion.

Since October 2015, Gramercy has held more than 25% of AVG's notes (hereafter, the "AVG Notes"). The AVG Notes are governed by the AVG Trust Deed. ECF No. 1 ¶¶ 46, 47; ECF No. 44-19 (Def. Ex. 5, excerpts), ECF Nos. 44-20 through 44-23 (Def. Ex. 5A, complete copy).[3]

3. The complaint alleges the Trust Deeds but does not attach them. On Rule 12(b)(6) motions, the Court is generally constrained to the substance of the complaint and documents attached to it unless the motion is converted to summary judgment. *Gee v. Pacheco*, 627 F.3d 1178, 1186 (10th Cir. 2010) (citing *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322, 127 S. Ct. 2499, 168 L. Ed. 2d 179 (2007)). However, the Court can consider documents which are

The AVG Trust Deed gives certain rights to Noteholders above 25%. Since 2017, Gramercy has held roughly 41% of the AVG Notes.

Meanwhile, between 2013 and 2017, Gramercy purchased over 28% of ULF's notes (hereafter, the "ULF Notes"). ECF No. 1 ¶ 48. The ULF Notes are governed by the ULF Trust Deed. *Id.* ¶ 49; ECF No. 44-24 (Def. Ex. 6, excerpts), ECF Nos. 44-25 and 44-26 (Def. Ex. 6A, complete copy). The ULF Trust Deed gives certain rights to Noteholders above 25%. Gramercy has held more than 25% of the ULF Notes since July 21, 2016.

Since at least 2016, Ukrainian oligarch Oleg Bakhmatyuk has perpetrated a complex, multi-faceted scheme in order to maintain control over his agricultural business, (ULF and AVG), so that he could exploit the Company's assets as his own personal war chest and frustrate Gramercy's right to recover on the Notes.

Gramercy—one of the largest creditors of the Company and the largest single Noteholder—had blocking rights under the Notes that made it the only meaningful check on Bakhmatyuk's control. At some point after the annexation of Crimea by Russia, Bakhmatyuk became the target of an investigation by the Ukrainian authorities for embezzlement of government relief funds from a

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referred to in and central to the allegations and whose authenticity is not disputed. *Gee*, 627 F.3d at 1186 (citing *Jacobson v. Deseret Book Co.*, 287 F.3d 936, 941 (10th Cir. 2002)). Gramercy's response does not challenge the authenticity of the Trust Deeds attached to Defendants' motion. The Court therefore considers the Trust Deeds.

Ukrainian bank he owned. By 2016, Bakhmatyuk's reign as one of Ukraine's leading agriculture tycoons was under siege, eventually leading him to embark on the scheme described herein.

In Bakhmatyuk's efforts to restructure Company Notes, his direct negotiations with Gramercy — by and through his agents and co-conspirators — were at center stage. Bakhmatyuk's goal was to force Gramercy to accept an unfair deal in a vacuum, independent of the arrangements he made with other creditors. Gramercy repeatedly indicated its willingness to accept equity in exchange for debt relief, but it was unwilling to accept unfair offers with no transparency into the Company's finances and prospects. This was contrary to Bakhmatyuk's plan. Bakhmatyuk made minor concessions along the way that suggested some willingness to negotiate in good faith, but ultimately these concessions all served the purpose of stringing Gramercy along until Bakhmatyuk could fully execute his scheme.

Bakhmatyuk first bought up chunks of the Company's secured and unsecured debt at artificially reduced prices through straw purchasers and reached preferential deals with the Company's institutional lenders (such as state-owned Ukrainian banks). He then eventually effectuated the surreptitious transfer of more than a billion dollars of Company assets to dummy companies created to preserve his stronghold.

At all times, Bakhmatyuk was aided by a cadre of loyalists who assisted him in spreading misinformation

to Gramercy, sabotaging its legal and economic rights, and ultimately diverting assets into newly formed Wyoming shell companies (including Defendant TNA Corporate Solutions, LLC) in order to exploit the state's confidentiality protections. Bakhmatyuk's main ally in this illegal scheme was Wyoming-based businessman Nicholas Piazza, with whom he has shared a close business relationship since at least 2008. Piazza, a U.S. citizen with deep ties and property interests in Wyoming, has spent much of his career working in Ukraine, fostering the connections that allow him to market himself and his companies as fixers for wealthy Ukrainians and Eastern Europeans.

In 2011, together with Defendant Oleksandr Yaremenko — a businessman in Kiev, Ukraine and business partner of Piazza — Piazza formed SP Advisors, a group of companies that they later consolidated under the ownership of SP Capital. SP Capital is a Wyoming LLC that Piazza operates from offices in Wyoming and that does business under the name SP Advisors. SP Advisors holds itself out as providing advisory and asset management services to an Eastern European client base and touts in public fora its expertise in shielding foreign assets in Wyoming entities under the cloak of Wyoming law.

Bakhmatyuk and the Defendants used the mail and wire to carry out their deception of Gramercy and the fraudulent transfers. They disseminated false information regarding the Company's performance, used straw purchasers to reacquire the Company's debt held by other creditors to isolate Gramercy, and finally transferred the

Company's assets to the Wyoming dummy entities that Piazza, Yaremenko, and their business SP Advisors had formed for hiding the assets from Gramercy.

Gramercy alleges that through the foregoing pattern of racketeering activity, Bakhmatyuk carried out a scheme of misinformation and deception that culminated in the siphoning of nearly a billion dollars of assets for the purposes of preventing a Gramercy-led creditor takeover and obliterating the value of Gramercy's Notes.

II. Analysis

As a matter going to the Court's jurisdiction, the Court first addresses Mr. Yaremenko's Rule 12(b)(2) argument. The Court will then turn to the Defendants' other arguments in the sequence they present.

A. Defendant Yaremenko's Personal Jurisdiction Argument

1. Standard of Review for Rule 12(b)(2) Motions

In a motion to dismiss for lack of personal jurisdiction, the "[p]laintiff bears the burden of establishing personal jurisdiction over the defendant." *OMI Holdings, Inc. v. Royal Ins. Co. of Canada*, 149 F.3d 1086, 1091 (10th Cir. 1998) (citation omitted). For the plaintiff to defeat a Rule 12(b)(2) motion to dismiss, the plaintiff need only make a "prima facie showing by demonstrating, via affidavit or other written materials, facts that if true would support jurisdiction over the defendant." *Id.*

Appendix B

"The allegations in the complaint must be taken as true to the extent they are uncontroverted by the defendant's affidavits. ... If conflicting affidavits of the parties collide, the Court will resolve all factual disputes in the plaintiff's favor." *Eleutian Tech., LLC v. Global Educ. Techs., LLC*, Civ. 07-181—J, 2009 U.S. Dist. LEXIS 139813, 2009 WL 10672360, *3 (D. Wyo. Jan. 23, 2009) (quoting *Behagen v. Amateur Basketball Ass'n of U.S.A.*, 744 F.2d 731, 733 (10th Cir. 1984)). In this case, Yaremenko does not supply an affidavit. The Court accordingly takes as true the Complaint's allegations regarding Yaremenko's involvement in the alleged scheme.

"The law of the forum state and constitutional due process limitations govern personal jurisdiction in federal court." *Old Republic Ins. Co. v. Cont'l Motors, Inc.*, 877 F.3d 895, 903 (10th Cir. 2017). Wyoming's long-arm statute extends the jurisdictional reach of Wyoming courts as far as constitutionally permissible. Wyo. Stat. § 5-1-107. Therefore, the exercise of jurisdiction is permitted so long as it does not offend the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

"The Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties, or relations.'" *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-72, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985) (citation omitted). Thus, for a court to have personal jurisdiction over a nonresident defendant, there must exist "'minimum contacts' between the defendant and the forum state." *OMI Holdings*, 149

F.3d at 1090 (citations omitted). To satisfy the minimum contacts standard, a court may assert either specific or general jurisdiction over the defendant. *See id.* at 1091. "In what we have called the 'paradigm' case, an individual is subject to general jurisdiction in her place of domicile." *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1024, 209 L. Ed. 2d 225 (2021) (citing *Daimler AG v. Bauman*, 571 U.S. 117, 137, 134 S. Ct. 746, 187 L. Ed. 2d 624 (2014)).

In this case, Plaintiffs assert only specific jurisdiction. Specific jurisdiction "depends on an affiliation between the forum and the underlying controversy, principally, activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation." *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919, 131 S. Ct. 2846, 180 L. Ed. 2d 796 (2011) (internal quotation marks omitted). When a court has specific jurisdiction, it is "confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction." *Id.*

"Specific jurisdiction calls for a two-step inquiry: (a) whether the plaintiff has shown that the defendant has minimum contacts with the forum state; and, if so, (b) whether the defendant has presented a 'compelling case that the presence of some other considerations would render jurisdiction unreasonable.'" *Old Republic*, 877 F.3d at 904 (citing *Burger King*, 471 U.S. at 476-77). "The minimum contacts test for specific jurisdiction encompasses two distinct requirements: (i) that the defendant must have purposefully directed its activities

at residents of the forum state, and (ii) that the plaintiff's injuries must arise out of the defendant's forum-related activities." *Old Republic*, 877 F.3d at 904 (citation and quotation marks omitted).

The minimum contacts for specific jurisdiction "must show that the defendant deliberately 'reached out beyond' its home—by, for example, 'exploi[ting] a market' in the forum State or entering a contractual relationship centered there." *Ford Motor*, 141 S. Ct. 1017 at 1025 (quoting *Walden v. Fiore*, 571 U.S. 277, 285, 134 S. Ct. 1115, 188 L. Ed. 2d 12 (2014)). "[A] strict causal relationship" is not required, but the suit must "arise out of or relate to the defendant's contacts with the forum." *Id.* at 1026.

"The purposeful direction requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts, . . . or of the unilateral activity of another party or a third person." *Old Republic*, 877 F.3d at 904 (citations and quotation marks omitted). "Mere foreseeability of causing injury in another state is insufficient to establish purposeful direction." *Id.* (citation omitted). But "where the defendant deliberately has engaged in significant activities within a State, ... he manifestly has availed himself of the privilege of conducting business there." *Id.* (citations and quotations omitted).

"Once the 'purposefully directed' and 'arising out of' requirements are met, the court must then 'inquire whether the exercise of personal jurisdiction would offend

traditional notions of fair play and substantial justice.'" *Gas Sensing Tech. Corp. v. Ashton*, 16-cv-272-F, 2017 U.S. Dist. LEXIS 114446, 2017 WL 2955353 at *4 (D. Wyo. Jun. 12, 2017).

2. The Court Has Specific Jurisdiction Over Yaremenko

In this case, the Complaint alleges that Yaremenko made several, purposeful contacts with the State of Wyoming and the claims arise from those contacts. *See, e.g.*, ECF No. 1 ¶¶ 18, 20, 34, 70, 84, 138. Gramercy alleges among other things that in 2011, Yaremenko formed SP Advisors with Piazza. SP Advisors is a group of companies that they later consolidated under the ownership of SP Capital, a Wyoming LLC that Piazza operates from offices in Wyoming and that does business under the name SP Advisors. Yaremenko signs the annual reports of SP Advisors. In 2017, along with Piazza, Yaremenko organized TNA, the Wyoming shell company into which Bakhmatyuk allegedly wrongfully transferred the Company's assets, for the purpose of facilitating those transfers. Yaremenko signs the annual reports for TNA. In addition, Yaremenko gave a webinar for SP Advisors discussing the virtues of forming entities in Wyoming because the state's laws do not require disclosure of owners or directors.

These contacts satisfy the purposeful direction to the forum and the claims against Yaremenko arise out of them. Plaintiffs are also correct that Yaremenko cannot slough off these personal contacts onto any corporate entity. At the very least, Yaremenko acted personally in forming

TNA and SP Advisors, if not also the rest of the conduct that Gramercy alleges with respect to him.

Moreover, exercising jurisdiction over Yaremenko does not offend traditional notions of fair play and substantial justice. Yaremenko has maintained significant business contact with Wyoming for over ten years. The claims against him arise from those contacts. It is not unfair for him to defend the claims here. Accordingly, Yaremenko's motion to dismiss for lack of personal jurisdiction is denied.

B. Motion to Stay or Dismiss Based on Arbitration Clauses

The Defendants argue an arbitration clause in the Trust Deeds[4] requires Gramercy to arbitrate, and on

4. Defendants also argue that subscription agreements and prospectuses govern the AVG and ULF Notes, contain similar arbitration and "no-action" provisions, and are incorporated in the Complaint. Gramercy does not directly address this point. The Complaint does not appear to mention subscription agreements or prospectuses. Defendants cite *Slater v. A.G. Edwards & Sons, Inc.*, 719 F.3d 1190, 1196 (10th Cir. 2013), for considering public disclosures filed with the SEC without converting a Rule 12(b)(6) motion to summary judgment. But they do not state whether these documents are publicly filed. In similar circumstances, a sister court converted a motion to stay based on an arbitration clause to summary judgment. *See, e.g., Barney v. Sun Fab Fabrication Indus. Contracting, Inc.*, No. CV 11-106 ACT/LAM, 2011 WL 13284645, at *1 (D.N.M. Oct. 7, 2011). If this were a motion to *compel* arbitration, the Court could consider such documents. *See, e.g., BigBen 1613, LLC v. Belcaro Grp., Inc.*, No. 17-CV-00272-PAB-STV, 2018 U.S. Dist. LEXIS 151935, 2018 WL 4257321, at *3 (D. Colo. Sept. 6, 2018) (collecting cases). But as

this basis, Defendants argue the case must be stayed or dismissed.

Defendants point to Sections 29.1 and 23.2 respectively of the AVG and ULF Trust Deeds as providing for mandatory arbitration in London, England for "any dispute arising out of or connected with" "these presents" (AVG Trust Deed) and "this Trust Deed" (ULF Trust Deed). Both of the trust deeds are governed by English law. AVG Trust Deed § 20.1, ULF Trust Deed § 23.1.

Specifically, the AVG Trust Deed reads:

> Any dispute arising out of or connected with these presents, including a dispute as to the validity, existence or termination of the presents or the consequences of their nullity and/or this clause 29.1 (a Dispute), shall be resolved:
>
> (a) subject to clause 29.l(b) below, by arbitration in London, England ...
>
> (b) at the option of the Trustee (*or where entitled to do so) any Noteholder*, by proceedings brought in the courts of England, which courts are to have exclusive jurisdiction.

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it is, the Court does not convert the motion to summary judgment and excludes the subscription agreements and prospectuses. Fed. R. Civ. P. 12(d).

Appendix B

AVG Trust Deed § 29.1(a), (b) (in relevant parts, emphasis added).[5] The ULF Trust Deed similarly defines "dispute:"

> Subject to Clause 23.3 (*Courts*), any dispute arising out of or in connection with this Trust Deed (including a dispute regarding the existence, validity or termination of this Trust Deed and a dispute relating to non-contractual obligations arising out of or in connection with this Trust Deed) (a "Dispute") shall be referred to and finally resolved by arbitration.

ULF Trust Deed § 23.2.1.[6] The definition of "dispute" in the Trust Deeds is quite broad, particularly as to any dispute connected with "these presents" or in connection with the Trust Deed.

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5. Defendants do not argue Section 29.1(b) of the AVG Trust Deed applies here. The Court accordingly has not combed through the 106 pages of the AVG Trust Deed to determine whether other sections of the document expressly entitle Plaintiffs to bring this action, such that the courts of England would have exclusive jurisdiction. In any case, it seems highly doubtful that the AVG Trust Deed would contemplate a fraudulent scheme carried out by nonsignatories — AVG's control person, Bakhmatyuk, and his business partners — or the formation of shell LLCs in a foreign jurisdiction (the United States) to defraud particular Noteholders.

6. The referenced Clause 23.3 regards when the Trustee can bring an action in court (and specifies the courts of England), but unlike the other trust deed, it does not reference Noteholders.

Appendix B

1. Arbitration of Arbitrability?

Defendants argue the Trust Deeds delegate arbitrability to arbitrators, citing the incorporation of the London Court of International Arbitration Rules, which vest the authority to determine arbitrability in the arbitrator. AVG Trust Deed § 29.1, ULF Trust Deed § 23.2.1, ECF No. 44 Memorandum at 20 (quoting LCIA Rules (2020), Article 23.1). "[W]hen the parties clearly and unmistakably agreed to arbitrate arbitrability, all questions of arbitrability—including the question of whether claims fall within the scope of the agreement to arbitrate—had to be resolved by an arbitrator." *Belnap v. Iasis Healthcare*, 844 F.3d 1272, 1284 (10th Cir. 2017).

But here, neither Plaintiffs nor Defendants are parties to the Trust Deeds. The parties to this case did not agree to arbitrate anything amongst themselves. When there is a nonsignatory involved, the Court independently determines arbitrability itself and does not defer to the contract's agreement to arbitrate arbitrability. *See, e.g., Belnap*, 844 F.3d at 1293 (finding under Utah law the signatory plaintiff was not required to arbitrate his claims against a nonsignatory defendant, regardless that he agreed to arbitrate arbitrability as to the signatory defendant). *See also Mars, Inc. v. Szarzynski*, No. CV 20-01344 (RJL), 2021 U.S. Dist. LEXIS 125486, 2021 WL 2809539, at *5 (D.D.C. July 6, 2021). Accordingly, the Court will not stay or dismiss this action in order to leave this question to an arbitrator.

2. Is this a "Dispute" Within the Scope of Arbitration?

Applying the arbitration clauses to the Defendants in this dispute would encompass a remarkably wide swath: the Plaintiffs are not parties to the Trust Deeds, and neither are the Defendants. None have held a position of authority in a party to the Trust Deed, or even worked for them. Messrs. Yaremenko and Piazza allegedly are businessmen whom Bakhmatyuk enlisted to create the Wyoming LLCs (Defendants SP Capital and TNA Corporate Solutions) to funnel assets out of AVG in contradiction of the Trust Deeds' restrictions on asset transfers.

However, the Court need not resolve whether this dispute is in connection with the Trust Deeds or otherwise within the scope of the arbitration clauses. Both Trust Deeds also provide that "[a] person who is not a party to these presents has no rights under the Contracts (Rights of Third Parties) Act 1999 to enforce any term of these presents, but this does not affect any right or remedy of a third party which exists or is available apart from that Act." *Id.* § 32. The AVG Trust Deed refers to "Noteholders" in numerous provisions, but they are not parties to it. The ULF Trust Deed contains a similar provision:

> A person who is not a party to this Trust Deed has no right under the Cont[r]acts (Rights of Third Parties) Act 1999 to enforce any term of this Trust Deed except and to the extent (if any) that this Trust Deed expressly provides for such act to apply to any of its terms.

ULF Trust Deed § 1.6. *See also id.*, Schedule 5, Terms and Conditions of the Notes at 90 § 18 (similar provision). Noteholders are not identified as parties to the ULF Trust Deed. It expressly addresses Noteholders in numerous other provisions, but not in the arbitration clause.

Although Defendants argue the Court should apply the United States' law of equitable estoppel (as will be discussed below), they do not appear to contest that English law governs the interpretation of the arbitration clause. Plaintiffs present an expert declaration of Ben Valentin, Q.C. ECF No. 50-2. Mr. Valentin is a barrister with law degrees from both the University of Oxford and Cornell Law School, practicing in London for many years and specializing in commercial dispute resolution. He appears qualified to opine on English law relating to arbitration agreements.[7]

In English common law, a contract cannot confer rights on third parties. Valentin Dec. ¶ 18. Thus, in general, "only the contracting parties are entitled to enforce the provisions of a contract," including an agreement to arbitrate. *Id.* There is an exception under the Contracts (Rights of Third Parties) Act of 1999 ("CRTPA"), if the contract expressly provides that non-parties can enforce its terms or if it purports to confer a benefit on the non-

7. Plaintiffs present Mr. Valentin's declaration under Federal Rule of Civil Procedure 44.1, under which the court may determine an issue about foreign law by "consider[ing] any relevant material or source, including testimony, whether or not ... admissible under the Federal Rules of Evidence." In their reply, Defendants do not challenge either Plaintiffs' presentation of the declaration or Mr. Valentin's qualifications.

party. *Id.* ¶¶ 19-20. But the Trust Deeds do not do either. Rather, they expressly provide that non-parties have no rights under them except if expressly stated therein. The Trust Deeds do not expressly give third parties such as Defendants a right to enforce the arbitration clause. Under English law, "[w]here the parties have used unambiguous language, the court must apply it." ECF No. 50-2 Valentin Dec. ¶ 40(4) (citing *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900, per Lord Clarke JSC, at [23] (UK Supreme Court)). In their reply, Defendants do not dispute these points of law. The Court finds that under English law, Defendants cannot enforce the arbitration clause against Plaintiffs.

3. Equitable Estoppel

This leads to Defendants' primary argument on arbitrability: equitable estoppel. They argue that under *GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC*, 140 S. Ct. 1637, 1643-44 (2020), Plaintiffs are equitably estopped from denying the arbitration clauses because their claims rely on the Trust Deeds. The case determined that the "Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, [does not] conflict[] with domestic equitable estoppel doctrines that permit the enforcement of arbitration agreements by nonsignatories." *Id.* at 1642.

The parties disagree whether this issue is governed by English law (the governing law chosen in the Trust Deeds) or instead by domestic law. Plaintiffs argue in

favor of English law, which to Mr. Valentin's knowledge, has "never applied the doctrine of equitable estoppel in the way contended for by the Defendants: that is to say, in order to enforce an arbitration agreement to which the enforcing applicant is not a party." ECF No. 50-2 at 29(2). Defendants rely instead on the domestic law of equitable estoppel, albeit finding no law on point in Wyoming.

Although not mentioned in the Supreme Court's opinion, *GE Energy* involved a contract that chose German law. *Outokumpu Stainless USA LLC v. Converteam SAS*, No. CV 16-00378-KD-C, 2017 U.S. Dist. LEXIS 11995, 2017 WL 401951, at *2 (S.D. Ala. Jan. 30, 2017). The Supreme Court appears to have referred to "domestic" equitable estoppel doctrines because that is how the issue was framed in the lower courts. *GE Energy* cites *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630, 129 S. Ct. 1896, 173 L. Ed. 2d 832 (2009) for the arbitrability of a dispute being an issue of state law. The issue in *Arthur Andersen* was whether state contract law or federal law of arbitration governed arbitrability of disputes; the Court made plain that between those two bodies of law, state law of contract governed. *Id.* at 630-31. But there was no issue of foreign law in that case. Meanwhile, *GE Energy* expressly leaves the question of which body of law governed the equitable estoppel in that case to the remand. *Id.* at 1648.[8] Plaintiffs also cite the Second Circuit's decision in *Motorola Credit Corp. v. Uzan*, 388

8. It appears on remand the Eleventh Circuit ordered supplemental briefing on this issue but did not publish a decision. *Outokumpu Stainless USA, LLC v. Converteam SAS*, 2020 U.S. App. LEXIS 24286, *2 (11th Cir. July 31, 2020).

F.3d 39 (2d Cir. 2004), holding that "where the parties have chosen the governing body of law, honoring their choice [in determining arbitrability] is necessary to ensure uniform interpretation and enforcement of that agreement and to avoid forum shopping." *Id.* at 51 (determining arbitrability under Swiss law as chosen in the contract and distinguishing cases that did not raise choice-of-law).

It is unnecessary for the Court to decide whether English or domestic law applies to this issue, because Defendants have not cited any domestic law that extends equitable estoppel to a nonsignatory plaintiff. In *GE Energy*, the Court noted that "[g]enerally, in the arbitration context, equitable estoppel allows a nonsignatory to a written agreement containing an arbitration clause to compel arbitration where a *signatory* to the written agreement must rely on the terms of that agreement in asserting its claims against the nonsignatory." *Id.* at 1644 (emphasis added; internal quotation marks omitted).

The other cases on which Defendants rely for this issue likewise discuss enforcement of an arbitration agreement only against a signatory plaintiff. ECF No. 44 at 14-19, citing *Lenox MacLaren Surgical Corp. v. Medtronic, Inc.*, 449 F. App'x 704, 705, 708 (10th Cir. 2011) (noting the plaintiff entered the agreement containing an arbitration clause and framing the issue as "concerning the application of estoppel to permit a nonsignatory to compel a signatory to arbitrate"); *Reeves v. Enter. Prods. Partners, LP*, 17 F.4th 1008, 1009, 1013 (10th Cir. 2021) (noting the plaintiffs signed contracts containing the arbitration clauses, and discussing Oklahoma law regarding equitable estoppel against signatories); *Weller v. HSBC Mortg. Servs.*,

Inc., 971 F. Supp. 2d 1072, 1076, 1082 (D. Colo. 2013) (noting the plaintiff executed a note, deed of trust, and arbitration agreement with the defendant, discussing equitable estoppel against signatory plaintiff, following *Lenox MacLaren*); *Roe v. Gray*, 165 F. Supp. 2d 1164, 1165-66 (D. Colo. 2001) (noting the plaintiff signed the membership agreement that was later amended to require arbitration); *Belnap v. Iasis Healthcare*, 844 F.3d 1272, 1293 (10th Cir. 2017) (applying Utah law and language of the arbitration clause, nonsignatory defendants could not compel signatory plaintiff to arbitrate).

Plaintiffs cite a case that compelled a nonsignatory plaintiff to arbitrate, but it is distinguishable here. *Mars, Inc. v. Szarzynski*, CV 20-01344 (RJL), 2021 U.S. Dist. LEXIS 125486, 2021 WL 2809539 (D.D.C. July 6, 2021). The court applied the law of Belgium, which permits compelling a third-party beneficiary to arbitrate when it consciously participated in the performance of the contract. The plaintiff in that case was the parent of a signatory (the former employer of the defendant), and the alleged facts showed the parent met the standard. *Id.* at *7-8.[9]

Here, it is clear that Plaintiffs are not signatories. They assert claims based in part on provisions of the Trust Deeds, but it is undisputed that they did not sign and are not identified as parties in the Trust Deeds. The

9. In their reply, Defendants in fact attempt to distinguish *Mars* because it regards a nonsignatory plaintiff. But they do not assert that Plaintiffs here are signatories or step into the shoes of a signatory for purposes of the arbitration clause.

only signatories to the Trust Deeds are AVG, ULF, the trustees, and the Surety Providers. ECF Nos. 44-20 at 1, 44-23 at 99-104; ECF Nos. 44-25 at 1, 44-26 at 58-71 (of the pdf).

Nor does the present motion give any reason for the Court to conclude that English or Wyoming (or other domestic) law would extend equitable estoppel to compel a nonsignatory plaintiff to arbitrate in this case. Defendants do not cite any authorities suggesting that any jurisdiction is likely to do so, particularly where (1) none of the defendants are signatories either and (2) the Trust Deeds state that nonparties do not have the right to enforce any provision unless that right is expressly given therein.

In short, Defendants have not met their burden to show that the case should be dismissed or stayed due to the arbitration clauses in the Trust Deeds. Their motion on this basis is therefore denied.

C. Motion to Dismiss Based on the "No-Action" Clause

Defendants next argue that the so-called "No-Action" clauses of the Trust Deeds apply and bar Plaintiffs' claims because Plaintiffs did not comply with the clauses' pre-suit requirements.

1. Standard of Review

Under Rule 12(b)(6), the Court should dismiss a claim if it fails as a matter of law. *See supra*, note 1. The interpretation of an unambiguous contract is a matter of

law that can be resolved on such a motion. *See, e.g.*, ECF No. 50-2 Valentin Dec. ¶¶ 44(4) (English law of contract); *Applied Predictive Techs., Inc. v. MarketDial, Inc.*, 598 F. Supp. 3d 1264, 2022 WL 1063204, at *9, n.6 (D. Utah 2022) (applying Utah law); *McCollam v. Sunflower Bank, N.A.*, 598 F. Supp. 3d 1104, 2022 WL 1134276, at *3 (D. Colo. 2022), (applying Colorado law), *appeal pending.*

2. Do the No-Action Clauses Bar Plaintiffs' Action?

Defendants point to the No-Action clause in the ULF Trust Deed, which provides:

> Pursuant to Condition 14 (*Enforcement*), at any time after the Notes become due and payable, the Trustee may ... institute such proceedings against the Issuer and/or any Surety Provider as it may think fit to enforce the terms of this Trust Deed, the Notes and/or the Surety Deed (whether by arbitration pursuant to the Trust Deed or the Surety Deed or by litigation), but it need not take any such proceedings and nor shall the Trustee be bound to take, or omit to take any step or action (including instituting such proceedings) unless (i) it shall have been so directed by an Extraordinary Resolution or so requested in writing by Noteholders holding at least one-quarter in principal amount of the Notes outstanding and (ii) it shall have been indemnified and/or secured and/or pre-funded to its satisfaction. *No Noteholder may proceed directly against the Issuer or any Surety Provider unless the Trustee, having become*

> *bound so to proceed, fails to do so within a reasonable time and such failure is continuing.*

ULF Trust Deed at 6-7, § 2.5 (emphasis added).[10] The No-Action clause in the AVG Trust Deed similarly provides:

> *Only the Trustee may enforce the provisions of these presents*. No Noteholder shall be entitled (i) to take any steps or action against the Issuer or the Surety Provider to enforce the performance of any of the provisions of these presents and/or the Surety Agreement or (ii) take any other proceedings (including lodging an appeal in any proceedings) in respect of or concerning the Issuer or the Surety Providers, in each case unless the Trustee having become bound as aforesaid to take any such action, steps or proceedings fails to do so within a reasonable period and such failure is continuing.

AVG Trust Deed at 14, § 8.3 (emphasis added). The complaint does not allege compliance with the pre-suit procedures of the No-Action clauses, and Defendants argue compliance was required in order for Plaintiffs to state claims.

This argument fares no better for Defendants than the arbitration clause. Defendants are not parties to the Trust Deed to be able to enforce the No-Action clauses. Defendants do not point to any language in the No-Action

10. The referenced Condition 14 (Enforcement) is identical to Section 2.5. ECF No. 44-26 at 22 § 14.

clauses that would give them the right to enforce those provisions. Nor does the Court see any.

In reply, Defendants do not address this argument head-on. ECF No. 53 at 5-7. They assert that Plaintiffs argue one of the Defendants, SP Capital is a Noteholder. Defendants assert that SP Capital therefore has as much right to enforce the Trust Deeds as Plaintiffs do. But Defendants do not cite any language in the Trust Deeds or authority in English law suggesting the No-Action clause protects Noteholders from being sued by other Noteholders. By their express terms, these clauses only restrict Noteholders from suing the Issuers and Security Providers.[11]

In short, because Defendants are not parties to the Trust Deeds, they cannot enforce the No-Action clauses. This is the first reason the Court denies this part of their motion.

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11. Defendants also overstate Plaintiffs' argument. Plaintiffs argue Defendant SP Capital was directly involved in the fraudulent scheme, but they do not allege it is a Noteholder. ECF No. 50 at 47 (citing Complaint ¶ 102). Rather, they allege that according to a former Noteholder, Ashmore Investment Management Limited, "an investor named Beaufort" bought Notes previously held by Ashmore. They further allege that Beaufort is "partially owned by S. Pierce Advisors, which is, upon information and belief, part of SP Advisors, Piazza's network of related companies under the umbrella of [Defendant] SP Capital." Complaint ¶¶ 101, 102. A letter of the US-Ukraine Business Council indicated that Piazza controls the Notes through SP Capital. *Id.* ¶¶ 96, 102. But the Complaint does not allege that Defendants Piazza or SP Capital themselves are actually Noteholders.

The second reason the Court rejects Defendants' argument is that the No-Action clauses unambiguously restrict the trustee and Noteholders in bringing claims against the *Issuer* or *Surety Provider*. Plaintiffs are not suing the Issuers (AVG and ULF) or any Surety Provider. Defendants argue that Plaintiffs are in effect bringing a derivative claim on behalf of the Issuers, but the No-Action clauses do not regard derivative claims brought on behalf of the Issuers.

Rather, Defendants point to English law restricting derivative claims to the trustee. ECF No. 44 at 24-25. They cite *In the matter of Colt Telecom Group plc* [2002] EWHC 2815 (Ch) ¶ 62 (ECF No. 44-47 (Ex. 11)) for the proposition that this restriction does not harm the public. They also cite the case for finding a claim for administration was a "remedy with respect to [the] Indenture or the Notes" and was therefore barred by the no-action clause. *Id.* ¶¶ 56-61. But that holding is based on the language of the no-action clause for Colt Telecom Group: "[a] holder may not pursue any remedy with respect to this Indenture or the Notes unless" certain conditions are met. The noteholder also did not seek damages unique to itself, but rather sought an "administration order." The nearest equivalent in New York law (which governed) was the appointment of a receiver. *Id.* ¶ 32. The Court accordingly does not find *Colt Telecom* persuasive.

Defendants further cite the U.K. Companies Act 2006, Part 11, "Derivative claims and proceedings by members." ECF No. 44-45. But the statute limits its application to the United Kingdom. Chapter 1 applies only to "proceedings

in England and Wales or Northern Ireland." Chapter 1 § 260(1).[12] In addition, this chapter regards only shareholders of a company, not debt holders. It regards causes of action "vested in the company, and seeking relief on behalf of the company." *Id.* Part 11, Chapter 1 § 260(1)(a), (b). Even assuming arguendo Plaintiffs' claims were vested in the Company, they do not seek relief on its behalf. Rather, Plaintiffs seek damages for themselves. Their damages are a loss in value of the Notes they hold, but they allege that Defendant Bakhmatyuk uniquely targeted his scheme against Plaintiffs (and perhaps for a time, Ashmore) to suffer greater losses than other Noteholders. The U.K. Companies Act 2006 does not support Defendants' argument.

Finally, Defendants cite *Elektrim SA v. Vivendi Holdings 1 Corp.*, [2008] EWCA Civ 1178, ¶ 101. ECF No. 44-46. In that case, Vivendi Holdings ("Vivendi") held bonds in Elektrim Finance BV ("Elektrim Finance"), guaranteed by its parent or affiliate, Elektrim SA ("Elektrim"). Vivendi acquired the Elektrim Finance bonds after Vivendi's parent was involved in unrelated disputes with Elektrim. Vivendi then sued the bond trustee and Elektrim (as the guarantor) in Florida, alleging among other things fraud. Elektrim and the trustee sought and obtained an anti-suit injunction from an English court because the trust deed contained a no-

12. The second of two chapters applies only to proceedings in Scotland, and likewise applies only to shareholders bringing a claim "to protect the interests of the company and obtain a remedy on its behalf." Chapter 2, § 265(1).

action clause,[13] and although styled as a tort, the Florida action alleged only conduct that would equally affect all bondholders.

The *Elektrim* opinion noted that "in consenting to no-action clauses by purchasing bonds, bondholders waive their rights to bring *claims that are common to all bondholders* , and thus can be prosecuted by the trustee, unless they first comply with the procedures in the instrument constituting the bonds." *Id.* ¶ 3 (emphasis added). "The commercial purpose of the no-action clause leads me to conclude that the no-action clause applies to claims which are in substance claims to enforce the trust deed or the bonds, as well as to claims which are in terms claims to enforce them." *Id.* ¶ 100 (emphasis added). Thus, the "no action clause should be construed, to the extent reasonably possible, as an effective bar to individual bondholders pursuing, for their own account, what are in substance class claims," *i.e.*, applicable to all bondholders treated as a class. *Id.* ¶ 101.

However, Vivendi's claims were in substance class claims because the only loss it asserted was a contractual benefit ("contingent payment/equity kicker") that applied equally to all bondholders. ECF No. 44-46 ¶ 102. The allegedly fraudulent conduct was also not unique to Vivendi: "if Elektrim defrauded or deceived anybody by the ... press release, then it was the entire class of bondholders. The statements in the press release were not

13. The opinion in *Elektrim* does not appear to recite the no-action clause in question.

made to ... [Vivendi] alone in some private capacity." *Id.* ¶ 103. On these facts, *Elektrim* is easily distinguishable from this case. Again, Plaintiffs allege that Bakhmatyuk singled them out (and perhaps one other investor, Ashmore) among the Noteholders.[14]

Furthermore, although *Elektrim* also found the bondholder's breach of fiduciary duty claim in substance alleged breaches of the issuer's obligations (and thus was barred by the no-action clause), *id.* ¶ 106, the bondholder was suing the trustee and guarantor. The opinion does not appear to state whether the guarantor was a signatory to the trust deed or signed only a separate guaranty agreement. But either way, the guarantor was one of the central actors involved in and necessary for the bond issuance. Defendants did nothing of the sort here. The Court does not find *Elektrim* persuasive.

Thus, under English law, Piazza Defendant's "No-Action" argument fails because as nonsignatories to the Trust Deeds, they do not have the right to enforce those clauses. Those clauses also only regard litigation against the issuers and sureties. This part of the motion to dismiss is therefore denied.

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14. The Court cannot consider Defendants' contentions that Plaintiffs have refused to negotiate reasonably with the Company, have only beneficial ownership of the Notes, or the materials Defendants cite characterizing Plaintiffs as "vulture funds." Defendants both contradict and go beyond the Complaint in this regard, which is inappropriate on a Rule 12(b)(6) motion.

D. Failure to Join Indispensable Parties

Defendants argue this case must be dismissed under Rule 12(b)(7) for failure to join parties under Rule 19. Defendants argue that AVG and ULF are required and indispensable parties under that rule who cannot be joined because of the No-Action clauses and probable lack of personal jurisdiction in this Court. Thus, Defendants argue the Court should dismiss this action.

Federal Rule of Civil Procedure 19 provides:

> (a) Persons Required to Be Joined if Feasible.
>
> (1) Required Party. A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:
>
> (A) in that person's absence, the court cannot accord complete relief among existing parties; or
>
> (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
>
> > (i) as a practical matter impair or impede the person's ability to protect the interest; or

> (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

A district court's decision that a party is a required party under Rule 19(a) or an indispensable party under Rule 19(b) is reviewed for an abuse of discretion. *N. Arapaho Tribe v. Harnsberger*, 697 F.3d 1272, 1277 (10th Cir. 2012). "[T]he standards set out in Rule 19 for assessing whether an absent party is indispensable are to be applied in a practical and pragmatic but equitable manner." *Symes v. Harris*, 472 F.3d 754, 760 (10th Cir. 2006) (internal quotation marks omitted).

Defendants attempt to argue both prongs of Rule 19(a), but in truth rely only on the second. They believe that if Plaintiffs win a judgment here against them, Plaintiffs "could stand to collect on the debt from ULF and AVG, while [also] recovering here," thus exposing Defendants to a substantial risk of double or inconsistent obligations. This argument asks the Court to disbelieve Plaintiffs' allegations that Defendants have drained the Company of all or nearly all of its assets ("[t]hese asset transfers left little or no value in the Company," Complaint ¶ 10(c)). Moreover, even if Plaintiffs win a judgment against Defendants and nonetheless pursue duplicative damages against the Company in a separate suit, this does not show a substantial risk of double or inconsistent obligations for Defendants. Defendants appear to assume that the Company would in turn sue them, but this likewise asks the Court to disbelieve Plaintiffs' allegations that

Defendants have in effect covertly taken control of the Company.

Defendants also argue that allowing this case to go forward without AVG and ULF would "deprive them of their rights to have disputes related to the Notes litigated in the manner described in those agreements." Plaintiffs' claims do rely in part on terms in the Trust Deeds — for instance restrictions on the Company's ability to transfer its assets — but the claims are not premised on the Company itself transferring its assets through its officers acting within lawful corporate authority. Rather, they allege that Bakhmatyuk, Yaremenko, and Piazza wrongfully abused Bakhmatyuk's control of the Company to siphon out its assets to SP Capital and TNA for Bakhmatyuk's personal benefit.

Defendants also ignore the practical reality that is reasonably inferred from Plaintiffs' allegations. Plaintiffs allege that Bakhmatyuk and Defendants have left the Company an empty shell with "little or no value." Complaint ¶ 10(c). At the time the complaint was filed (December 7, 2021), the Company apparently continued operations.[15] But having no significant assets to fund litigation costs, practically speaking the Company would not be able to pursue or defend litigation. And having no

15. Plaintiffs allege for instance that Igor Petrashko "returned to ULF in an unofficial capacity" sometime after his dismissal from a Ukrainian government post in May 2021. Complaint ¶ 24. They also allege that Oleksiy Yergiyev "appears to have a broader role within the Company" than his former position as Head of Investments at AVG. *Id.* ¶ 158.

significant assets from which to collect a judgment against the Company, it is also difficult to imagine the Trustee deciding to pursue any legal action against the Company on behalf of the Noteholders. The Trustee has the right to demand adequate pre-suit funding before bringing any litigation.

In light of these fact allegations, it is difficult to see how allowing Plaintiffs to pursue their claims against Defendants would "as a practical matter" (Rule 19(a)(1)(A)) impair or impede the Company's protection of any interests under the Trust Deeds or otherwise.

Even assuming the Company were in a position to pursue or respond to litigation, the Court is not persuaded that any finding in this case would impair or impede its ability to protect its interests. Defendants argue that the claims here will require Plaintiffs to show the Issuers breached the Subscription Agreements or Trust Deeds. ECF No. 44 at 28. But Defendants do not argue any law to suggest that a judgment in this action would be claim or issue preclusive in any present or future litigation against the Company.

Defendants argue that preclusive effect is not required to show an interest is impaired or impeded, citing a case from the District of Puerto Rico. *Puerto Rico Med. Emergency Grp., Inc. v. Iglesia Episcopal Puertorriquena, Inc.*, 321 F.R.D. 475, 480 (D.P.R. 2017). In that case, the court found all claims (including a RICO claim) stemmed from a contract between the plaintiff ("PRMEG") and a hospital, Saint Luke's. The

allegations surrounding the contract are complex and involve several defendants but regard double-billing of insurance companies in violation of the contract. Saint Luke's was not a party to the action. The court found that it could "potentially [be] prejudice[d] in future litigation" if the court found it had breached the contract, apparently because the insurance companies might then sue St. Luke's regarding the same set of transactions. But again, in this case, there is no suggestion that future litigation regarding these claims is actually likely against the Company.

Defendants also cite *Symes*, 472 F.3d at 760, for the proposition that when a party's claims are premised on rights against a corporation, but brought against an individual, the corporation is a necessary party. In *Symes*, the plaintiffs brought claims that were premised in substantial part on the rights of a company they had formed as a joint venture with the defendants. The joint venture was not a party in the lawsuit. This left the defendants open to a substantial risk of being sued again by the joint venture for the same claims. *Id.* But again, this case is distinguishable for the same reason: Defendants do not show any risk that they could later be sued by the Company on the same claims that Plaintiffs bring.

In their reply, Defendants also argue prejudice to holders of senior debt and to other Noteholders because Plaintiffs are attempting to obtain a judgment ahead of them. ECF No. 53 at 14. But again, Plaintiffs are not suing the Company. They're suing Defendants, who are nonsignatories to the Trust Deeds, and they're suing them

for unique damages. Nor do Defendants indicate that other Noteholders have sued Defendants for the same conduct, or are likely to do so in the future. Accordingly, the Court finds AVG and ULF are not required parties under Rule 19(a). The motion to dismiss on this basis is denied.

E. Forum Non Conveniens

Defendants next argue the case must be dismissed under the doctrine of forum non-conveniens in favor of the London Court of International Arbitration ("LCIA"). They argue there are only two threshold requirements. First, there must be an "adequate alternative forum where the defendant is amenable to process." *Archangel Diamond Corp. Liquidating Trust v. Lukoil*, 812 F.3d 799, 804 (10th Cir. 2016) (quoting *Fireman's Fund Ins. Co. v. Thyssen Mining Constr. of Can., Ltd.*, 703 F.3d 488, 495 (10th Cir. 2012)). "Second, 'the court must confirm that foreign law is applicable.'" *Id.* "[I]f both threshold requirements are met, the court weighs the private and public interests to determine whether to dismiss" the case. *Id.*

But "there is ordinarily a strong presumption in favor of the plaintiff's choice of forum, which may be overcome only when the private and public interest factors clearly point towards dismissal and trial in the alternative forum." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255, 102 S. Ct. 252, 70 L. Ed. 2d 419 (1981). Defendants contend that they are "amenable to process in England," but provide no facts in support. ECF No. 44 at 29. Notably, they do not provide declarations or any form of consent to personal jurisdiction in England. In their reply, Defendants argue that

> English jurisdiction rules are far-reaching[,] including where a claim 'is made in respect of' a contract 'that is governed by English law' or 'a breach of contract committed within the jurisdiction,' or where the alleged damages result from a tort 'committed ... within the jurisdiction.'

ECF No. 53 at 16 (citing ECF No. 53-2, Civil Procedure Rule 6.36 and ECF No. 53-3, Practice Direction 6B.3.1(6)(c), (7)(a), (9)(b)).

Even if Defendants are correct in interpreting the English rules of civil procedure and practice direction, the Court is not persuaded. Defendants contend that the LCIA is the adequate alternative forum. ECF No. 44 at 29. They do not explain, however, whether the English civil procedure rules or practice direction even apply in the LCIA. Nothing in the exhibits that Defendants attach suggests that they do.[16] LCIA presents itself as a non-profit company, not part of the Ministry of Justice. *See, e.g.*, https://www.lcia.org/LCIA/organisation.aspx .

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16. Rule 6.36 states: "In any proceedings to which rule 6.32 [service in Scotland and Northern Ireland] or 6.33 [service in the United Kingdom] does not apply, the claimant may serve a claim form out of the jurisdiction with the permission of the court if any of the grounds set out in paragraph 3.1 of Practice Direction 6B apply." Practice Direction 6B(3.1) provides a "claimant may serve a claim form out of the jurisdiction with the permission of the court under rule 6.36 where" certain conditions are met. Most of those conditions plainly would not apply to Defendants if Plaintiffs attempted to arbitrate or sue them in England, and none appear certain.

In addition, the Court is not persuaded that any of Defendants are clearly subject to jurisdiction in either LCIA or the courts of England. Other than as to Bakhmatyuk (who allegedly had or was invited to meetings in London, but who is not a movant), the complaint does not appear to allege that any Defendants engaged in any conduct in England or otherwise have significant business or personal connections to England. The forum non conveniens motion is denied.

F. Rule 12(b)(6) Motion on RICO Claims

1. Standard of Review

To survive a motion to dismiss asserting a claim fails for plausibility, a "complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atl. Corp v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). The claim must allege "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* This standard is "not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.*

Thus, "the pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* "'[L]abels and conclusions' and 'a formulaic recitation of the elements of a cause of action'

will not suffice." *Khalik v. United Air Lines*, 671 F.3d 1188, 1191 (10th Cir. 2012) (quoting *Twombly*, 550 U.S. at 555). The Court does not accept legal conclusions as true. *Berneike v. CitiMortgage*, 708 F.3d 1141, 1144 (10th Cir. 2013). But "[d]etermining whether a complaint states a plausible claim for relief will ... be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679.

Allegations of fraud, meanwhile, must be pled "with particularity." Fed. R. Civ. P. 9(b). This pleading standard applies not only to Gramercy's common law fraud claim but also to mail and wire fraud for its RICO claims. *See, e.g., George v. Urb. Settlement Servs.*, 833 F.3d 1242, 1254 (10th Cir. 2016) (for mail and wire fraud in RICO claim, plaintiffs must "set forth the time, place and contents of the false representation, the identity of the party making the false statements and the consequences thereof").

2. Elements of Civil RICO

"Any person injured in his business or property by reason of a violation" of the Racketeer Influenced and Corrupt Organizations Act (RICO)'s four criminal offenses involving the activities of organized criminal groups in relation to an enterprise (18 U.S.C. §§ 1962(a)-(d)) "may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, can bring a civil cause of action for damages." 18 U.S.C. § 1964(c). "RICO is founded on the concept of racketeering activity. The statute defines 'racketeering

activity' to encompass dozens of state and federal offenses, known in RICO parlance as predicates." *RJR Nabisco, Inc. v. European Community*, 579 U.S. 325, 329-30, 136 S. Ct. 2090, 195 L. Ed. 2d 476 (2016). Interstate mail fraud (18 U.S.C. § 1341), interstate or foreign wire fraud (18 U.S.C. § 1343) and inducing interstate or foreign travel (18 U.S.C. § 2314) are among them. 18 U.S.C. § 1961(1)(B).

"A predicate offense implicates RICO when it is part of a 'pattern of racketeering activity'—a series of related predicates that together demonstrate the existence or threat of continued criminal activity." *RJR Nabisco*, 579 U.S. at 330 (citing *inter alia* 18 U.S.C. § 1961(5), specifying that a "pattern of racketeering activity" requires at least two predicates committed within 10 years of each other). Stated concisely, "RICO's § 1962 sets forth four specific prohibitions aimed at different ways in which a pattern of racketeering activity may be used to infiltrate, control, or operate 'a[n] enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce." *Id.* Three of them are pertinent in Plaintiffs' complaint:

> Section 1962(b) makes it unlawful to acquire or maintain an interest in an enterprise through a pattern of racketeering activity. Section 1962(c) makes it unlawful for a person employed by or associated with an enterprise to conduct the enterprise's affairs through a pattern of racketeering activity. Finally, § 1962(d) makes it unlawful to conspire to violate any of the other three prohibitions.

Id. Plaintiff's first cause of action pleads a § 1962(c) claim against all Defendants; the second cause of action pleads § 1962(b) against Bakhmatyuk (and hence, that claim is not involved in Defendants' present motion); and the third cause of action pleads § 1962(d) against all Defendants.

3. Extraterritorial Application of RICO

Defendants argue that the RICO claims fail because Plaintiffs rely on extraterritorial conduct for the predicate acts. In *RJR Nabisco*, the Court held a two-step framework is required for extraterritoriality issues:

> At the first step, we ask whether the presumption against extraterritoriality has been rebutted—that is, whether the statute gives a clear, affirmative indication that it applies extraterritorially. ... If the statute is not extraterritorial, then at the second step we determine whether the case involves a domestic application of the statute, and we do this by looking to the statute's "focus." If the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad; but if the conduct relevant to the focus occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory.

579 U.S. at 337 (following *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 130 S. Ct. 2869, 177 L. Ed. 2d 535 (2010) and *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 133 S. Ct. 1659, 185 L. Ed. 2d 671 (2013)).

With respect to RICO § 1962(b) and (c), the general "presumption against extraterritoriality [for federal statutes] has been rebutted—but only with respect to certain applications of the statute." *RJR Nabisco*, 579 U.S. at 338. "RICO defines racketeering activity to include a number of predicates that plainly apply to at least some foreign conduct." *Id.* "Congress's incorporation of these (and other) extraterritorial predicates into RICO gives a clear, affirmative indication that § 1962 applies to foreign racketeering activity—but only to the extent that the predicates alleged in a particular case themselves apply extraterritorially." *Id.* at 339. Thus, "a pattern of racketeering activity may include or consist of offenses committed abroad in violation of a predicate statute for which the presumption against extraterritoriality has been overcome." *Id.*

"[A] RICO enterprise must engage in, or affect in some significant way, commerce directly involving the United States—e.g., commerce between the United States and a foreign country." *Id.* at 344. In addition, because § 1964(c) (the private right of action) does not overcome the presumption against extraterritoriality, "[a] private RICO plaintiff ... must allege and prove a *domestic* injury to its business or property." *Id.* at 346.

In this case, Plaintiffs allege three predicate offenses for each of the RICO claims: mail fraud, wire fraud and inducement of interstate or foreign travel. 18 U.S.C. §§ 1341, 1343 and 2314. The latter two predicates expressly refer to "interstate or foreign" commerce or travel, respectively, but this in itself does not suffice to rebut the presumption against extraterritoriality. *RJR Nabisco*, 579 U.S. at 344. In that case, the Supreme Court did not reach whether mail and wire fraud (and the Travel Act, 18 U.S.C. § 1952)[17] were extraterritorial. The court below had concluded that they were not, and the appellant did not dispute those conclusions. *Id.* at 345.

It appears the Tenth Circuit has not yet decided after *RJR Nabisco* whether any of these predicates are extraterritorial. Cases outside this circuit reflect a growing consensus that they are not. *See, e.g., United States v. Elbaz*, 39 F.4th 214,, 2022 WL 2348691 (4th Cir. June 30, 2022) (wire fraud); *United States v. Napout*, 963 F.3d 163, 178 (2d Cir. 2020); *Skillern v. United States*, No. 20-13380-H, 2021 U.S. App. LEXIS 11056, 2021 WL 3047004, at *7-8 (11th Cir. Apr. 16, 2021) (mail and wire fraud); *United States v. All Assets Held at Bank Julius, Baer & Co.*, 251 F. Supp. 3d 82, 98-99 (D.D.C. 2017) (Section 2314 transportation of goods), *recon. in part on other issues*, 315 F. Supp. 3d 90 (D.D.C. 2018). Thus, the Court looks to the second step — the "focus" of each predicate and whether Plaintiffs allege a domestic violation thereunder. The circuits that have addressed

17. Section 1952 regards interstate or foreign travel of oneself, not inducing another to such travel or the transportation of goods as in § 2314.

the focus of mail and wire fraud appear to agree that it is the misuse of the instrumentality — domestic mails and domestic wires, respectively. *See, e.g., United States v. Hussain*, 972 F.3d 1138, 1143-44 (9th Cir. 2020) (misuse of the instrumentality in furtherance of the scheme to defraud); *Elbaz*, 39 F.4th 214, 2022 WL 2348691, at *1. "Wires" include the internet. *United States v. Kieffer*, 681 F.3d 1143, 1153-54 (10th Cir. 2012). Therefore, "a claim predicated on mail or wire fraud involves sufficient domestic conduct when (1) the defendant used domestic mail or wires in furtherance of a scheme to defraud, and (2) the use of the mail or wires was a core component of the scheme." *Bascuñán v. Elsaca*, 927 F.3d 108, 122 (2d Cir. 2019).

In this case, Plaintiffs specifically allege Defendants (Bakhmatyuk, Piazza, and other agents of Bakhmatyuk) sent several mailings and emails to Gramercy and its representatives in the United States. The "Count 1 Defendants" caused "false and material representations by means of U.S. ... mail communications directly to representatives of Gramercy and its agents, knowing that Gramercy is located in the United States, and specifically in the state of Connecticut." Complaint ¶ 178. They also allege specific mailings and emails to Gramercy in Connecticut. *See, e.g., Id.* As for Yaremenko, SP Capital and TNA, Plaintiffs allege the transfers in Section V(D) of the Complaint (¶¶ 122-123, 138-140) took place over the wires to TNA in Wyoming. *Id.* ¶ 178(7). Plaintiffs allege facts that plausibly support these communications and transfers were core components of Defendants' scheme to defraud. The communications allegedly were intended

to deceive or string along Plaintiffs with a false hope that the Company was negotiating in good faith but in the meanwhile, Defendants were carrying out the scheme to drain the Company's assets into SP Capital and TNA. Plaintiffs therefore allege sufficient domestic conduct within the focus of the mail and wire frauds, regardless that other conduct occurred extraterritorially.

As for the § 2314 predicate, it does not appear that any court has yet addressed the focus of this part of § 2314. This portion of the statute focuses on inducing another person to travel in interstate or foreign commerce in furtherance of a scheme to defraud. Plaintiffs allege the Defendants caused Gramercy representatives to travel from the United States to Europe for meetings with Bakhmatyuk and his agents in the scheme. They allege Defendants' purpose of the meetings was to deceive and string Plaintiffs along. These facts plausibly allege that the inducement of Gramercy representatives to foreign travel was a core component of the scheme.

Finally, the third cause of action alleges conspiracy to conduct the scheme alleged in Count 1, and thereby involves the same predicate acts as Count 1. *Id.* ¶ 202. *RJR Nabisco* assumed without deciding that "§ 1962(d)'s extraterritoriality tracks that of the provision underlying the alleged conspiracy." 579 U.S. at 341.

Accordingly, this part of the motion to dismiss is denied.

4. Are the RICO Claims Barred as Securities Fraud?

Defendants next argue that Plaintiffs RICO claims are barred because "any conduct that would have been actionable as fraud in the purchase or sale of securities" is excluded from the RICO private right of action. ECF No. 44 at 37 (citing the Private Securities Litigation Reform Act 1995 amendment of RICO, Pub. L. No. 104-67 § 107, 109 Stat. 737, 758 (1995)).

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor..., except that no person may rely upon any conduct that would have been actionable as fraud in the *purchase or sale* of securities to establish a violation of section 1962.

18 U.S.C. § 1964(c) (in relevant part, emphasis added). By the express language of § 1964, only claims alleging fraud in the purchase or sale of a security are subject to this bar.

Defendants cite for instance the Tenth Circuit's decision in *Bixler v. Foster*, 596 F.3d 751, 760 (10th Cir. 2010) which applied the bar against a RICO claim brought by shareholders of Mineral Energy and Technology Corp. (METCO), who was also a plaintiff. The shareholders alleged that in return for their shares in METCO, they were to receive shares from the surviving entity in a planned merger, UKL. They alleged the defendants

defrauded them from receiving the UKL stock as provided in the transaction, and thus the subsequent merger was a fraud. The stock swap constituted a purchase or sale of security, and thus the claim was barred.

But here, Plaintiffs do not allege Defendants defrauded them in the purchase or sale of the Notes. Plaintiffs purchased the Notes before the allegedly fraudulent scheme, and they allege they still hold them. Defendants' motion recognizes Plaintiffs allege they were attempting to restructure or otherwise collect on the Notes, and they do not attempt to explain how this would constitute a sale or purchase. ECF No. 44 at 40-41. This part of Defendants' motion is denied.

5. Pattern of Racketeering Activity

Defendants next challenge the RICO claims because in their view, Plaintiffs do not allege a pattern of racketeering activity inferring continuing criminal activity but just "past transfers of corporate assets in violation of corporate documents." ECF No. 44 at 40-41. As noted above, a "'pattern of racketeering activity" requires at least two predicates committed within 10 years of each other. 18 U.S.C. § 1961(5). It also requires at least two "related predicates that together demonstrate the existence or threat of continued criminal activity." *RJR Nabisco*, 579 U.S. at 330. This "continuity" requirement precludes claims that regard only "closed-ended" conduct, a single scheme to accomplish a discrete goal directed at a finite group of individuals, in which there is not even a potential

to extend to other persons nor threat of future criminal conduct. *See, e.g., Boone v. Carlsbad Bancorporation, Inc.*, 972 F.2d 1545, 1556 (10th Cir. 1992).

But here, Plaintiffs' allegations reasonably infer the potential that Piazza, Yaremenko, SP Capital and TNA will engage in future mail and wire fraud, and/or inducement to foreign travel, as they allegedly specialize in sheltering Eastern European assets in Wyoming LLCs. Even if TNA exists solely to hold the Company's assets for Bakhmatyuk's benefit, the allegations also reasonably infer that Bakhmatyuk will engage in further fraudulent schemes and could use TNA to shelter other assets. He also allegedly was under official investigation in Ukraine in 2016 for "embezzlement of government relief funds from a Ukrainian bank he owned." Complaint ¶ 3. Taking all of these facts together, Plaintiffs plead a plausible pattern of racketeering activity involving all Defendants. This part of the motion to dismiss is denied.

6. RICO Damages and Fraud Allegations

Finally, Defendants argue that Plaintiffs' "RICO damages are unworkable and unprovable because Gramercy could still recover on its Notes," and that they fail to allege fraud with particularity. Both arguments either ignore or misconstrue the allegations. Plaintiffs allege that Defendants have left the Company with little to no value for paying amounts due on the Notes, having purposefully transferred all assets to SP Capital and TNA to avoid paying Plaintiffs on the Notes. The allegations

leave no room for doubt that Plaintiffs plausibly allege damages resulting from the alleged scheme to defraud under RICO.[18]

Plaintiffs also plead fraud with more than sufficient particularity, with one exception as to Yaremenko. As noted, the complaint runs over 100 pages. Plaintiffs allege the who, what, where and when of specific communications, meetings, and transfers.

Defendants argue that the complaint does not allege any of the Defendants themselves committed RICO predicate acts, and they further argue that the conspiracy claim (Count 3) cannot save the primary claim (Count 1). This ignores many allegations of specific communications by Piazza (Complaint ¶¶ 178(4), (6), (8)) and specific communications by others acting as agents of Bakhmatyuk and Piazza. *Id.* ¶¶ 178(1), (3). Plaintiffs further allege that SP Advisors and TNA committed these same predicate acts through Piazza, who controlled them, and by way of their relationship with Bakhmatyuk. *Id.* ¶¶ 170(5), 176. These allegations support Plaintiffs' claims that Piazza, SP Advisors and TNA committed RICO predicate acts.

However, as for Yaremenko, the analysis is different. Plaintiffs allege he was "closely involved in SP Advisors' efforts to further the Count 1 Enterprise's scheme,"

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18. In a footnote, Defendants postulate that Plaintiffs will either have problems with indefinite damages or with the statute of limitations. The Court does not address this argument, as it is raised only in a footnote and the statute of limitations is generally an affirmative defense.

including by signing the annual accounts for TNA, helping to establish TNA as a "dummy" company to receive Company assets in transfers lacking consideration in order to shield those assets from Plaintiff, and managing TNA with Piazza. Complaint ¶¶ 8, 18, 20, 138, 143, 144, 167, 170(4). These allegations do not suffice for Count 1.[19] But they do plausibly support Count 3, that Yaremenko agreed to further the other Defendants' (including Bakhmatyuk)'s enterprise. *CGC Holding Co., LLC v. Broad and Cassel*, 773 F.3d 1076, 1088 (10th Cir. 2014) ("Pursuant to § 1962(d), conspiracy to commit a RICO violation also constitutes a violation of the Act when a conspirator adopts the goal of furthering the enterprise, even if the conspirator does not commit a predicate act"). Thus, this part of the motion to dismiss is granted in part only with respect to Yaremenko on Count 1. It is otherwise denied.

III. Conclusion

Consistent with the foregoing, Defendants' Piazza, Yaremenko, SP Capital, and TNA's motion to dismiss (ECF No. 43) is DENIED IN PART and GRANTED IN PART. Count 1 is dismissed with respect to Yaremenko only. If they can remedy the deficiency noted on that claim, Plaintiffs may amend the complaint by **August 5, 2022**. Absent a timely amended claim, the dismissal of Count 1

19. For Count 1, Plaintiffs allege the Count 1 Defendants (including Piazza, SP Capital, TNA, and Yaremenko) committed predicate acts themselves and aided and abetted those of Bakhmatyuk and his agents. *See, e.g.*, Complaint ¶¶ 170, 175, 176. In their response, Plaintiffs do not appear to argue aiding and abetting liability for civil RICO. The Court therefore does not reach that issue.

as to Yaremenko will become with prejudice without further action by the Court.

IT IS SO ORDERED this 7th day of July, 2022.

/s/ Nancy D. Freudenthal
NANCY D. FREUDENTHAL
UNITED STATES SENIOR DISTRICT JUDGE

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING, FILED SEPTEMBER 15, 2022

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Case No. 21-CV-223-F

GRAMERCY DISTRESSED OPPORTUNITY FUND II, L.P., *et al.*,

Plaintiffs,

vs.

OLEG BAKHMATYUK, *et al.*,

Defendants.

ORDER ON DEFENDANT OLEG BAKHMATYUK'S MOTION TO DISMISS

Defendant Oleg Bakhmatyuk ("Bakhmatyuk") moves to dismiss the complaint on several theories. ECF No. 75 (Motion), 76 (Memorandum and Exhibits). Plaintiffs[1] oppose the motion (ECF No. 94), and Bakhmatyuk has replied. ECF No. 96.[2] For the reasons that follow, the Court denies the motion.

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1. Gramercy Distressed Opportunity Fund II, L.P., Gramercy Distressed Opportunity Fund III, L.P., Gramercy Distressed Opportunity Fund III-A, L.P., Gramercy EM Credit Total Return Fund, Roehampton Partners LLC, and Gramercy Funds Management LLC (collectively, "Gramercy" or Plaintiffs).

2. The reply is five pages over the limit in Local Rule 7.1(b)(2), and Bakhmatyuk did not request leave to exceed. The Court considers only the first ten pages of the reply.

Appendix C

I. Jurisdiction to Hear the Motion

As a preliminary issue, all other Defendants — Nicholas Piazza, SP Capital Management, LLC ("SP Capital"), TNA Corporate Solutions, LLC ("TNA") and Oleksander Yaremenko, collectively the "Piazza Defendants" — have filed an interlocutory appeal pursuant to 9 U.S.C. § 16 of the Federal Arbitration Act ("FAA"). ECF 85 (Piazza Defendants' Notice of Appeal). Specifically, they appeal from the portion of the Court's July 7, 2022 order (ECF 67) denying their motion to dismiss or stay in favor of arbitration.

"The filing of a notice of appeal ... confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58, 103 S. Ct. 400, 74 L. Ed. 2d 225 (1982). Plaintiffs argue the appeal is frivolous (and thus the Court should disregard it) because the Piazza Defendants are not parties to the arbitration agreement. Regardless that the Court has found the Piazza Defendants are not parties to that agreement, they have the right to an interlocutory appeal from the Court's denial of the portion of their motion relating to arbitration. *Arthur Anderson LLP v. Carlisle*, 556 U.S. 624, 628-29 (2009). "The jurisdictional statute here unambiguously makes the underlying merits irrelevant, for even utter frivolousness of the underlying request for a § 3 stay cannot turn a denial into something other than "[a]n order ... refusing a stay of any action under section 3.'" *Id.* Plaintiffs also note the Piazza Defendants did not label their motion to stay or dismiss as one under

the FAA, but the title is not important. The Piazza Defendants expressly argued for a stay under section 3 of the FAA. ECF 44 at 14. The Court accordingly cannot conclude that the appeal is frivolous.

Nonetheless, the Court has jurisdiction to hear Bakhmatyuk's motion because the order on appeal does not decide any claims or issues as to him.[3] The claims against him are therefore not involved in the appeal. In the alternative, if the Tenth Circuit later concludes that Bakhmatyuk's motion is "involved in the appeal" because the issues overlap, the Court is authorized to deny a motion "for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending." Fed. R. Civ. P. 62.1. Thus, the Court proceeds to rule on Bakhmatyuk's motion.

II. Background

The Court summarized the fact allegations in the July 7 order. ECF 67. The Court assumes familiarity with that order. Capitalized terms and acronyms have the same meaning here as in that order.

In a nutshell, Gramercy alleges that Bakhmatyuk and the Piazza Defendants together engaged in a multi-year pattern of racketeering activity to defraud Gramercy of the value of Notes it holds from non-parties UkrLandFarming PLC ("ULF") and its subsidiary Avangardco IPL ("AVG,"

3. Service to Bakhmatyuk was delayed. Although he now shares counsel with the Piazza Defendants, his counsel did not appear on his behalf until July 7, 2022.

together with ULF, the "Company"), which are Ukrainian agricultural companies that Bakhmatyuk controls. The Notes were issued under Trust Deeds. ECF 44-20 through 44-23 (AVG); ECF 44-25 and 44-26 (ULF).[4]

"Bakhmatyuk acts as CEO and Chairman of the Board and owns and controls ULF. Since 2011, ULF has been the parent company of AVG." ECF 1 ¶ 21. "In or around September 2011, AVG announced an agreement with Bakhmatyuk, to transfer his approximately 77.5% shareholding in AVG to ULF, which was 100% controlled by Bakhmatyuk. Since 2011, AVG has been a partially owned subsidiary of ULF. ULF and AVG, both of which are owned and controlled by Bakhmatyuk, are referred to herein as the Company." *Id.* ¶ 22.

Gramercy brings three claims for civil liability under the federal Racketeer Influenced and Corrupt Organizations ("RICO") laws, 18 U.S.C. § 1961 *et al.* The RICO claims are the basis of the Court's subject-matter jurisdiction. Gramercy also brings state law claims for fraud, tortious interference with contract (*i.e.*, the ULF and AVG Notes), civil conspiracy and aiding and abetting.

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4. Plaintiffs' expert Ben Valentin, Q.C., notes there are also supplemental trust deeds, and nothing therein changes his opinions regarding the Trust Deeds. ECF 50-2 at 9, n.10. Plaintiffs filed supplemental trust deeds (ECF 50-3 through 50-6), but they are not referenced in any briefs. As neither side argues those documents on the present motion, the Court does not consider them.

III. Analysis

A. Personal Jurisdiction

1. Standard of Review for Rule 12(b)(2) Motions

As stated in the July 7 order, in a motion to dismiss for lack of personal jurisdiction, the "[p]laintiff bears the burden of establishing personal jurisdiction over the defendant." *OMI Holdings, Inc. v. Royal Ins. Co. of Canada*, 149 F.3d 1086, 1091 (10th Cir. 1998) (citation omitted). For the plaintiff to defeat a Rule 12(b)(2) motion to dismiss, the plaintiff need only make a "prima facie showing by demonstrating, via affidavit or other written materials, facts that if true would support jurisdiction over the defendant." *Id.*

"The allegations in the complaint must be taken as true to the extent they are uncontroverted by the defendant's affidavits. ... If conflicting affidavits of the parties collide, the Court will resolve all factual disputes in the plaintiff's favor." *Eleutian Tech., LLC v. Global Educ. Techs., LLC*, Civ. 07-181-J, 2009 U.S. Dist. LEXIS 139813, 2009 WL 10672360, *3 (D. Wyo. Jan. 23, 2009) (quoting *Behagen v. Amateur Basketball Ass'n of the U.S.*, 744 F.2d 731, 733 (10th Cir. 1984)). In this case, Bakhmatyuk does not supply an affidavit. The Court accordingly takes as true the Complaint's allegations regarding his involvement in the alleged scheme.

"The law of the forum state and constitutional due process limitations govern personal jurisdiction in federal

court." *Old Republic Ins. Co. v. Cont'l Motors, Inc.*, 877 F.3d 895, 903 (10th Cir. 2017). Wyoming's long-arm statute extends the jurisdictional reach of Wyoming courts as far as constitutionally permissible. Wyo. Stat. § 5-1-107. Therefore, the exercise of jurisdiction is permitted so long as it does not offend the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

"The Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties, or relations.'" *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-72, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985) (citation omitted). Thus, for a court to have personal jurisdiction over a nonresident defendant, there must exist "'minimum contacts' between the defendant and the forum state." *OMI Holdings*, 149 F.3d at 1090 (citations omitted). To satisfy the minimum contacts standard, a court may assert either specific or general jurisdiction over the defendant. *See id.* at 1091. "In what we have called the 'paradigm' case, an individual is subject to general jurisdiction in her place of domicile." *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1024, 209 L. Ed. 2d 225 (2021) (citing *Daimler AG v. Bauman*, 571 U.S. 117, 137, 134 S. Ct. 746, 187 L. Ed. 2d 624 (2014)).

In this case, Plaintiffs assert only specific jurisdiction. Specific jurisdiction "depends on an affiliation between the forum and the underlying controversy, principally, activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation."

Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919, 131 S. Ct. 2846, 180 L. Ed. 2d 796 (2011) (internal quotation marks omitted). When a court has specific jurisdiction, it is "confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction." *Id.*

"Specific jurisdiction calls for a two-step inquiry: (a) whether the plaintiff has shown that the defendant has minimum contacts with the forum state; and, if so, (b) whether the defendant has presented a 'compelling case that the presence of some other considerations would render jurisdiction unreasonable.'" *Old Republic*, 877 F.3d at 904 (citing *Burger King*, 471 U.S. at 476-77). "The minimum contacts test for specific jurisdiction encompasses two distinct requirements: (i) that the defendant must have purposefully directed its activities at residents of the forum state, and (ii) that the plaintiff's injuries must arise out of the defendant's forum-related activities." *Old Republic*, 877 F.3d at 904 (citation and quotation marks omitted).

The minimum contacts for specific jurisdiction "must show that the defendant deliberately 'reached out beyond' its home—by, for example, 'exploi[ting] a market' in the forum State or entering a contractual relationship centered there." *Ford Motor*, 141 S. Ct. 1017 at 1025 (quoting *Walden v. Fiore*, 571 U.S. 277, 285, 134 S. Ct. 1115, 188 L. Ed. 2d 12 (2014)). "[A] strict causal relationship" is not required, but the suit must "arise out of or relate to the defendant's contacts with the forum." *Id.* at 1026.

"The purposeful direction requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts, . . . or of the unilateral activity of another party or a third person." *Old Republic*, 877 F.3d at 904 (citations and quotation marks omitted). "Mere foreseeability of causing injury in another state is insufficient to establish purposeful direction." *Id.* (citation omitted). But "where the defendant deliberately has engaged in significant activities within a State, ... he manifestly has availed himself of the privilege of conducting business there." *Id.* (citations and quotation marks omitted).

"Once the 'purposefully directed' and 'arising out of' requirements are met, the court must then 'inquire whether the exercise of personal jurisdiction would offend traditional notions of fair play and substantial justice.'" *Gas Sensing Tech. Corp. v. Ashton*, 16-cv-272-F, 2017 U.S. Dist. LEXIS 114446, 2017 WL 2955353 at *4 (D. Wyo. Jun. 12, 2017).

2. The Court Has Specific Jurisdiction Over Bakhmatyuk

Plaintiffs allege that Bakhmatyuk made several, purposeful contacts with the State of Wyoming and the claims arise from those contacts. Gramercy alleges among other things that Bakhmatyuk has had a business relationship with Piazza since 2008. ECF 1 ¶¶ 27, 29. During that entire time period, Piazza has been a resident of Wyoming and also based his relevant businesses (SP Capital, d/b/a SP Advisors and TNA) in the state.

Bakhmatyuk caused ULF to enter a "cooperation agreement" with SP Advisors in 2014, which was announced as appointing SP Advisors as ULF's investment relations advisor and corporate broker. SP Advisors was involved in Bakhmatyuk's sale of five per cent of ULF to Cargill in 2014. *Id.* ¶ 31. Bakhmatyuk directed Piazza to use his connections with a purportedly independent analyst, Concorde, to spread false information (*Id.* ¶ 72); he also directed Piazza and Yaremenko to form TNA in Wyoming, as a backup plan if Plaintiffs did not agree to his proposal for restructuring the Company's debt. *Id.* ¶ 84.

Bakhmatyuk had Piazza and SP Advisors act (either directly or through a company partly owned by SP Capital) as straw purchasers to acquire the Company's debt from Noteholders other than Plaintiffs and attempt to acquire the Notes from Plaintiffs as well. *Id.* ¶¶ 93, 102, 109, 112. When it was clear Plaintiffs would not accept Bakhmatyuk's restructuring or straw purchases, he directed Piazza and SP Advisors (and Yaremenko, but he is not directly pertinent here because he was not located in Wyoming) to "plan and orchestrate a complex set of transactions through which the Company's assets could be isolated from creditors — at this point, ostensibly Gramercy — by transferring them to a number of newly-formed shell companies." *Id.* ¶ 123. The shell companies included those "organized under the umbrella of TNA, which is nominally owned by Piazza, but, upon information and belief, is actually under Bakhmatyuk's control." *Id.* Plaintiffs allege Bakhmatyuk had Piazza and SP Advisors (and Yaremenko) proceed with transfers of at least 100 subsidiaries of ULF to TNA in Wyoming, so that he could

continue to maintain his control of those businesses away from ULF's creditors, such as Plaintiffs. *Id.* ¶¶ 138-144. Plaintiffs' claims regard those very asset transfers.

While the Court has not comprehensively cataloged all of Bakhmatyuk's contacts with Wyoming alleged in the complaint, the foregoing contacts with Wyoming residents (Piazza, SP Advisors and TNA) satisfy the purposeful direction to the forum, and the claims against Bakhmatyuk arise out of them.

Moreover, exercising jurisdiction over Bakhmatyuk does not offend traditional notions of fair play and substantial justice. He has maintained significant business contact with Wyoming since at least 2016, when he allegedly began to plan the asset transfers. Again, the claims against him arise from those contacts with the state. It is not unfair for him to defend the claims here. Accordingly, Bakhmatyuk's motion to dismiss for lack of personal jurisdiction is denied.

B. Motion to Stay or Dismiss Based on Arbitration Clauses

Bakhmatyuk repeats many of the Piazza Defendants' arguments for staying or dismissing the action in favor of arbitration, with a few significant twists. Plaintiffs argue the motion is one for reconsideration. However, the July 7 order regarded only the claims against the Piazza Defendants. Although Bakhmatyuk raises many of the same issues as the earlier motion, the Court will not treat his motion as a request for reconsideration under *Servants of Paraclete v. Does*, 204 F.3d 1005 (10th Cir. 2000).

However, to the extent Bakhmatyuk makes the same arguments as the Piazza Defendants, nothing has changed. Except as noted below, the analysis of the July 7 order (ECF 67 at 11-18) remains the same and is incorporated here. And as follows, Bakhmatyuk's additional arguments do not change the outcome: Bakhmatyuk is not a party to the arbitration clauses and cannot enforce them against Plaintiffs.

As the July 7 order held, although the arbitration clauses agree to arbitrate arbitrability, when there is a nonsignatory involved (here, Bakhmatyuk), the Court independently determines arbitrability itself and does not defer to the contract's agreement to arbitrate arbitrability. *See, e.g., Belnap v. Iasis Healthcare*, 844 F.3d 1272, 1293 (10th Cir. 2017) (finding under Utah law the signatory plaintiff was not required to arbitrate his claims against a nonsignatory defendant, regardless that he agreed to arbitrate arbitrability as to the signatory defendant). *See also Mars, Inc. v. Szarzynski*, No. CV 20-01344 (RJL), 2021 U.S. Dist. LEXIS 125486, 2021 WL 2809539, at *5 (D.D.C. July 6, 2021).

1. The Arbitration Clauses in the Notes

Bakhmatyuk argues that Plaintiffs are parties to the terms and conditions of the Notes and the Trust Deeds. He points out:

> [T]he ULF and AVG Trust Deeds contain Schedules showing the form language for the Notes, including their terms and conditions. Ex. 5A; Ex. 6A. These terms and conditions state

> unequivocally that Noteholders are bound by the Trust Deeds' and Notes' terms. See Ex. 6A at Schedule 5, pg. 58; Ex. 5A at Part 2, pg. 42. Each Trust Deed also contains two arbitration clauses: one in the Trust Deed portion, and one in the Schedules showing the form of the Notes.

ECF 76 at 11. The Piazza Defendants focused exclusively on the Trust Deeds. Bakhmatyuk focuses on both the Trust Deeds and the Notes. As to the Trust Deeds, Bakhmatyuk's argument fails for the reasons stated in the July 7 order.

As to the Notes, however, Bakhmatyuk is correct that Plaintiffs are parties, and the Notes contain arbitration clauses. He points to three facts:

(1) Plaintiffs' allegation that they "formed binding contracts with the Company, the terms of which are contained in the ULF Trust Deed and the AVG Trust Deed" (ECF 1 ¶ 215).

(2) The opinion of Plaintiffs' expert, Mr. Ben Valentin, Q.C., that "the parties to the Notes are: (i) the Issuer, (ii) the Trustee, and (iii) any Noteholder of the Notes," (ECF 50-2 ¶¶ 10-11).

(3) The Schedules in the Trust Deeds that set forth the form terms and conditions of the Notes. ULF Trust Deed, Schedule 5 at 58; AVG Trust Deed, Schedule 2, Part 2 at 42. Those conditions state that the Notes are subject to the terms of the Trust Deeds, and they contain arbitration

clauses. AVG Trust Deed, Schedule 2, Part 2 at 68 § 20.2; ULF Trust Deed, Schedule 5 at 90 § 19.2.

Plaintiffs do not directly respond to the argument that they are parties to the Notes. Their "binding contracts" allegation is part of the tortious interference with contract claim. The cause of action does not expressly allege whether the interfered-with contracts are the Trust Deeds, the Notes, or both. ECF 1 ¶¶ 214-18 (Fifth Cause of Action). The form Notes[5] incorporate the Trust Deeds by reference: "This Note forms one of a series of Notes *constituted by a Trust Deed* (the Trust Deed) dated 29 October, 2010 ... made between the Issuer, the Original Surety Providers and [the] Trustee." AVG Trust Deed, Schedule 2 at 39 (emphasis added). *See also id.* at 42 (Conditions of the Notes, stating the same). "The statements in these Conditions include summaries of, and *are subject to, the detailed provisions of and definitions in the Trust Deed." Id.* The form Notes provide that "[t]he Noteholders ... are entitled to the benefit of, *are bound by, and are deemed to have notice of, all the provisions of the Trust Deed*." *Id.* (emphasis added). See also ULF Trust Deed at Schedule 5 (form ULF Note).

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5. Neither side filed copies of actual Notes. However, the Trust Deeds define the Notes as "substantially in the form set out in [the] Schedule[s]." ULF Trust Deed at 3; AVG Trust Deed at 11 § 3.4. *See also* ECF 76-5 (legal memorandum of Bakhmatyuk's English law expert, Dr. Marcos Dracos) at 7 ¶ 28. Plaintiffs did not object to considering the conditions in the form Notes as equivalent to the conditions in the Notes they hold. The Court accordingly considers them as such.

It thus appears Plaintiffs allege *the Notes* are the contracts to which they are parties, regardless that the form Notes do not have a signature blank for the Noteholder. This is consistent with the rest of the complaint, in which Plaintiffs' allegations of "contractual rights" consistently refer to rights under the Notes.[6] It is also consistent with the opinions of both sides' experts on English law, noted above. Thus, Plaintiffs are parties to the Notes and are subject to the arbitration clauses therein — both those stated directly and incorporated from the Trust Deeds.

However, Bakhmatyuk's further arguments — that Plaintiffs are parties to the *Trust Deeds*, and that he himself is a party to the Trust Deeds — are incorrect. He points to the Eleventh Circuit's opinion on remand from *GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC*, 140 S. Ct. 1637, 207 L. Ed. 2d 1 (2020), *Outokumpu Stainless USA, LLC v. Coverteam SAS*, No. 17-10944, 2022 U.S. App. LEXIS 18846, 2022 WL 2643936 (11th Cir. July 8, 2022) ("*GE Energy II*"). The remand opinion issued the day after the July 7 order; Bakhmatyuk contends it shows the June 7 order is inconsistent with *GE Energy* because this Court

6. *See, e.g.*, ECF 1 ¶ 168 ("by employing all means necessary to prevent Gramercy, one of the largest creditors with significant contractual rights, from exercising its contractual rights *under the Notes* and to prevent Gramercy from achieving a meaningful recovery *on its Notes*"), ¶ 200 ("to depress the value of Gramercy's Notes"), ¶ 211 ("deterred from enforcing its contractual rights *under the Notes*"), ¶ 212 ("would have sought to enforce its contractual rights *under the Notes*"), ¶¶ 218 ("right to pursue an enforcement action *under the Notes*").

found Plaintiffs were not parties to the Trust Deeds simply because they did not sign them. ECF 76 at 8. He further argues that his status as a corporate insider (and related facts) make it appropriate to consider him a party to the Trust Deeds as well.

In *GE Energy*, the Supreme Court held that the "[New York] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, ... [does not] conflict[] with domestic *equitable estoppel doctrines* that permit the enforcement of arbitration agreements by nonsignatories." *GE Energy*, 140 S. Ct. at 1642 (emphasis added).[7] The Court remanded for the Eleventh Circuit to determine which body of law applied to this issue and whether equitable estoppel was available to the defendant.

On remand, the majority of the panel held that since the New York Convention does not bar application of an arbitration clause by a nonsignatory, the plain language of the contract made GE Energy a contract party, regardless that it was a nonsignatory. The contract expressly defined "Seller" as including an attached list of potential subcontractors, and GE Energy was in that list. Thus, GE Energy was a party and could enforce the arbitration clause against the signatory plaintiff without the need for equitable estoppel. *GE Energy II*, 2022 U.S. App. LEXIS 18846, 2022 WL 2643936, at *3.

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7. The New York Convention applies here. It is "a multilateral treaty that addresses international arbitration." *GE Energy*, 140 S. Ct. at 1644 (citing 21 U.S.T. 2517, T.I.A.S. No. 6997). The United States adopted it as to commercial relationships. 1970 U.S.T. LEXIS 115, 1970 WL 104417 (U.S. Treaty Dec. 29, 1970).

Appendix C

The only aspect of this case that bears similarity to *GE Energy II* is that Plaintiffs are contract parties to *the Notes* despite being nonsignatories. Nothing in *GE Energy* or *GE Energy II* suggests that Plaintiffs are parties to the *Trust Deeds* — which expressly define the parties entering into them as the Issuers, the Trustee, and the Surety Providers. ECF 44-20 at 2, 4 (AVG); ECF 44-25 at 2, 5 (ULF). Nor do those opinions suggest any reason to find that Bakhmatyuk is a party to the Trust Deeds or Notes. Unlike GE Energy — whose name in the list expressly made it a contract party under the contract's definition of "Seller" — Bakhmatyuk is mentioned in the Trust Deeds only in defining "Permitted Holders" and "Related Parties." ULF Trust Deed at 104; AVG Trust Deed at 77, 80. "Permitted Holders" are pertinent only to "Redemption at the Option of the Holders upon a Change of Control." ULF Trust Deed at 81 (Schedule 5, form Note) § 7.2; AVG Trust Deed at 80 (Schedule 2, form Note) § 8.2. As for "Related Parties," it is not plain to the Court what Trust Deed or form Note provisions, if any, rely on that definition. Plaintiffs' English law expert, Ben Valentin Q.C., confirms that mentioning a nonsignatory in a contract does not make the person a contract party. ECF 94-1 at 7 ¶ 16. The Trust Deeds or Notes would have to expressly define Bakhmatyuk as a party, and they do not do so. They also do not otherwise give him a right to enforce the arbitration clauses.

Nor does Bakhmatyuk's status as a corporate insider of the Issuers — CEO, Chairman of the Board, and controlling shareholder — make him a party to the Trust Deeds or Notes. He asserts that he signed the Directors'

Certificates to the Trust Deeds. The present record includes only the unsigned forms for those documents. AVG Trust Deed at 95 (form of directors' certificate); ULF Trust Deed at 123 (form of officers' certificate). But even assuming in his favor that he signed those certificates, by definition Bakhmatyuk signed them in his capacity as a director or officer, not as an individual.

Bakhmatyuk does not cite any law — foreign or domestic — that treats a nonsignatory owner, director or officer as though he or she is a party to a company's contracts, absent some inequity to a third person that would result from continuing to recognize the company's separate existence. It is black-letter American law that corporate entities are legally distinct from their individual owners, officers and directors. *See, e.g.*, 1 *Fletcher Cyc. Corp.* § 25 (Sep. 2021 update); *Ridgerunner LLC v. Meisinger*, 2013 WY 31, 297 P.3d 110, 115 (Wyo. 2013); *ARW Expl. Corp. v. Aguirre*, 45 F.3d 1455, 1460-61 (10th Cir. 1995). Even when an individual defendant is the sole shareholder of a corporate defendant, that "is generally insufficient in itself to warrant disregarding separate corporate existence. Courts do not lightly pierce the corporate veil, even in deference to the strong policy favoring arbitration." *Id.* at 1460-61 (internal quotation marks and citations omitted). Rather, corporate veil piercing requires showing the corporate form has been abused and continuing to recognize it would result in fraud or inequity to another person. *See, e.g.*, 1 *Fletcher Cyc. Corp.* § 41; *Ridgerunner*, 297 P.3d at 115-16. Unsurprisingly, Bakhmatyuk does not argue such facts here. In short, Bakhmatyuk has not shown that being a

corporate insider makes him a party to the Company's contracts, unless the contract expressly includes him as an individual as a party — and the Trust Deeds and Notes do not.

Thus, while it is clear that Plaintiffs, are subject to the arbitration clauses in the Notes — including those incorporated therein from the Trust Deeds — it is equally clear that Bakhmatyuk is not a party to the Notes or the Trust Deeds. As the July 7 order held, English law does not give nonparties the right to enforce the arbitration clauses. ECF 67 at 14-15.[8] Thus, Bakhmatyuk cannot contractually require Plaintiffs to arbitrate their claims against him.

2. Additional Issuance Documents and Bakhmatyuk's Relationship Agreement

Bakhmatyuk also argues Plaintiffs' claims are based on all "issuance documents," which in his view includes not only the Trust Deeds, Notes, prospectuses and subscription agreements but also his April 2010 "Relationship Agreement" with AVG. The Relationship Agreement predates the issuances, but it is the only one of these documents that Bakhmatyuk signed. He asserts that it governs his transactions with AVG and has an arbitration clause which the Court should apply against Plaintiffs. Of course, Plaintiffs are not parties to the Relationship Agreement. Bakhmatyuk also does

8. As with the Piazza Defendants, Bakhmatyuk does not appear to dispute that English law governs the interpretation of the arbitration clauses.

not appear to cite where the Notes or Trust Deeds even mention the Relationship Agreement, if at all. His argument instead hinges on the notion that all of these separate documents must not only be construed together but in effect form one contract, so that he can enforce his arbitration clause with AVG against Plaintiffs.

Bakhmatyuk does not dispute that Rule 12(d) applies here, but he urges the Court to consider the Relationship Agreement (and also the prospectuses and subscription agreements) because these documents are central to Plaintiffs' allegations. This is not persuasive. The Tenth Circuit recognizes only limited exceptions from Rule 12(d):

> (1) documents that the complaint incorporates by reference; (2) documents referred to in the complaint if the documents are central to the plaintiff's claim and the parties do not dispute the documents' authenticity; and (3) matters of which a court may take judicial notice.

Gee v. Pacheco, 627 F.3d 1178, 1186 (10th Cir. 2010) (quotation marks and citations omitted, citing *inter alia Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322, 127 S. Ct. 2499, 168 L. Ed. 2d 179 (2007)). *See also Hartleib v. Weiser Law Firm, P.C.*, 861 F. App'x 714, 719 (10th Cir. 2021) (following *Gee*).

The complaint does not refer to the prospectuses, subscription agreements, or Relationship Agreement. Bakhmatyuk appears to assume that it would suffice to show these unreferenced documents are nonetheless

central to the allegations and their authenticity is not disputed. But the exception to Rule 12(d) requires all three elements: reference to the document in the complaint, centrality to the plaintiff's claims, and undisputed authenticity.

Bakhmatyuk also has not shown any of these documents are central to Plaintiffs' claims. He argues these documents incorporate each other, and that both American and English law interpret documents of the same transaction together to determine their meaning. ECF 76 at 10 (citing *ADR Tr. Corp. v. Fed. Sav. and Loan Ins. Corp.*, 25 F.3d 1493, 1497 (10th Cir. 1994); Restatement (2d) of Contracts § 202 (1981); and Lord Justice Kim Lewison, *The Interpretation of Contracts* § 3.06 (7th Ed. 2020), the latter provided at ECF 76-3, at 4). The Court does not take issue with this principle of contract law as far as it goes, but none of the cited authorities address it in the context of Rule 12(d) and a motion to stay or dismiss in favor of arbitration. Mr. Valentin is also persuasive that this principle has no application when there are no disputed terms between the contracts, *i.e.*, when the contracts are unambiguous and do not need construction. ECF 94-1 at 8 ¶ 26. More importantly, Bakhmatyuk does not cite any authority (foreign or domestic) for interpreting related contracts as though a party to one is a party to all.

Bakhmatyuk does not otherwise explain how or why the prospectuses, subscription agreements, or Relationship Agreement are central to Plaintiffs' claims. Plaintiffs state they are "not suing to enforce the terms of any of the documents submitted by Bakhmatyuk." ECF

94 at 12, n.8. The prospectuses, subscription agreements, and Relationship Agreement may be pertinent to Bakhmatyuk's defenses, but this does not make them central to Plaintiffs' claims for purposes of the exceptions to Rule 12(d).

Also, the facts matter here. Bakhmatyuk cites where the prospectuses and subscription agreements allegedly incorporate the Trust Deeds — the only "issuance documents" that are referenced in the complaint — but not *vice versa*. He cites only one instance where the ULF form Note refers to itself as "this Prospectus." ULF Trust Deed at 77. Specifically, this occurs in Section 5.10 regarding reports:

> As long as any Notes are outstanding, the Issuer will furnish to the Noteholders and the Trustee: (a) within 120 days after the end of the Issuer's fiscal year ... (ii) information with a level and type of detail that is substantially comparable in all material respects to the sections in *this Prospectus* entitled "Management's Discussion and Analysis of Financial Condition and Results of Operations" and "Business."

Id. (emphasis added).

It makes no sense for the form Note to refer to itself as "this Prospectus." The document is electronically searchable, and this is the only occurrence of the word "prospectus" located in the entire ULF Trust Deed. There is also no section in the ULF Trust Deed (including

the form Note) entitled "Management's Discussion and Analysis...." The reference appears to be a drafting error, an unintentional holdover from copying the provision from a prospectus.

Bakhmatyuk also argues the Court can take judicial notice of the prospectuses because "when issued, [they] were governed by the EU Prospectus Directive (2003/71/EC), which imposes a uniform obligation to file and publish the prospectus." ECF 76 at 4. The EU directive requires approved prospectuses to be filed with "the competent authority of the home Member State," and that authority "shall publish [the approved prospectuses or a list of them] on its website *over a period of 12 months*." https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32003L0071, at Chapter III, Art. 14, §§ 1, 4 (emphasis added). The prospectuses identify the authorities that approved them (respectively, the Central Bank of Ireland and the UK Financial Services Authority), but Bakhmatyuk does not point to any public office where the prospectuses remain available now. Although the Court is not required to search the Internet on this issue, in this instance the Court exercised its discretion to do so. Neither the Central Bank of Ireland nor the UK Financial Conduct Authority list any prospectuses from UKL or AVG. https://www.centralbank.ie/regulation/industry-market-sectors/securities-markets/prospectus-regulation/prospectuses; https://marketsecurities.fca.org.uk/.

In the case Bakhmatyuk cites, *Slater v. A.G. Edwards & Sons, Inc.*, 719 F.3d 1190 (10th Cir. 2013),

the documents judicially noticed were filed with the U.S. Securities and Exchange Commission. *Id.* at 1196, 1198-1206. Once a document is filed with the SEC, it remains publicly available, absent special circumstances. Merely pointing to a document's statement that it was published when issued several years ago — without also showing it remains available at a public office today — is insufficient for judicial notice. In short, Bakhmatyuk has not shown that the subscription agreements, prospectuses, or Relationship Agreement fall within any exception from Rule 12(d).

Neither side requests converting the motion to summary judgment, and the Court concludes doing so would be inappropriate for several reasons. Chief among them is that Bakhmatyuk does not assert he is a signatory or expressly defined as a party in any of the prospectuses or subscription agreements. And as to the Relationship Agreement, again, he cites no authority that his being a party to that contract makes him a party to any of the other "issuance documents." Thus, converting to summary judgment is unlikely to change the outcome on his motion to stay or dismiss for arbitration.

In sum, the subscription agreements, prospectuses, and Relationship Agreement do not make Bakhmatyuk a party to the Notes or the Trust Deeds. Nor do any of those documents make it appropriate to treat him as though he were a party to the Notes or Trust Deeds for purposes of the arbitration clauses. Thus, his only possible way of enforcing the arbitration clauses is through equitable estoppel — if it applies to him.

3. Equitable Estoppel?

The July 7 order reasoned that neither American nor English law extended equitable estoppel to allow a nonsignatory defendant (there, the Piazza Defendants) to enforce an arbitration clause against nonsignatory plaintiffs. The analysis is now different: Bakhmatyuk is still a nonsignatory requesting equitable estoppel, but Plaintiffs are contract parties. As will be seen, with this posture the Court must now decide the choice of law for equitable estoppel.

a. The English and American Laws of Equitable Estoppel Differ When a Contract Party Brings Tort Claims Against a Nonsignatory.

Bakhmatyuk argues two bodies of equitable estoppel give him the right to require Plaintiffs to arbitrate their claims: English law and federal common law. As to English law, Bakhmatyuk presents the opinions of an expert, Dr. Marcos Gregorios Dracos. ECF 76-5 (Dracos First Legal Memorandum), ECF 96-2 (Dracos Second Legal Memorandum). *See* Fed. R. Civ. P. 44.1 ("Determining Foreign Law"). Dr. Dracos is a barrister practicing law in England and Wales.[9] He was called to the English Bar in 2005 and has been a member of the Chambers of Lord

9. Appendix A to the first memorandum, containing his curriculum vitae, was not filed. The Court has reviewed Dr. Dracos' cited practice webpage instead. Both of his memoranda are unsworn. In light of his credentials, the Court will consider the unsworn memoranda. See Rule 44.1 (courts may consider "any relevant material or source ... whether or not admissible under the Federal Rules of Evidence").

Grabiner Q.C., One Essex Court, since 2006. *Id.* ¶ 3. His "practice focuses on international commercial dispute resolution, with particular emphasis on arbitration and private international law." *Id.* ¶ 4. He has a Ph.D. in law from Cambridge University in English contract law. *Id.* ¶ 5. Dr. Dracos is qualified to opine on English contract law and its application to arbitration clauses.

In Dr. Dracos' opinion, "English courts have allowed third parties to invoke arbitration or jurisdiction agreements, even though they were not parties to them, where those agreements covered the claims asserted by a claimant, which was party to those agreements." ECF 76-5 ¶ 33. "The underlying basis was that the claimant's attempt to act contrary to the arbitration or jurisdiction clause to which it had agreed was inequitable, unconscionable, vexatious and/or oppressive." *Id.* In summary, he opines that English law permits a nonparty to an arbitration clause to request a "stay [of] the proceedings against it on the ground that A's suit, being contrary to the expressed intention of A [to arbitrate "any disputes with B and/or C (a non-party)"], is inequitable, vexatious and/or oppressive and/or on the ground of forum non conveniens." *Id.* ¶ 59.[10] *See also* ECF 96-2 (Second Memorandum), ¶¶ 53, 54. The stay would be discretionary and determined "in light of all the circumstances." ECF 76-5, ¶ 59. He bases this opinion on the authorities he discusses therein. *Id.* ¶ 60.

10. *See also* Dracos First Memorandum ¶ 52 ("A promises B that all disputes connected with a contract, including disputes against C, a non-party, will be resolved in a particular way... This is exactly the question my colleague [Mr. Valentin] and I are addressing and on which we disagree.").

Dr. Dracos' opinion is not persuasive first and foremost because it rests upon the inaccurate assumption that Plaintiffs expressed an intention to arbitrate disputes with Bakhmatyuk. As the Court concludes above, the arbitration clauses do not state that they extend to disputes with non-parties at all, let alone to Bakhmatyuk specifically. The Trust Deeds (as incorporated into the Notes) also expressly state that third-parties have no rights thereunder. *See, e.g.*, ULF Trust Deed § 1.6. Thus, the Trust Deeds also cannot be construed to *imply* that the arbitration clauses extend to Bakhmatyuk.[11] Thus, the Court finds Dr. Dracos' opinion on English law is unpersuasive due to the inaccurate assumption that the arbitration clauses extend to disputes against Bakhmatyuk.

The second reason Dr. Dracos' opinion is not persuasive is that the authorities he discusses do not address equitable estoppel as to tort claims (whether statutory or common law) brought against a non-contract party. Specifically, he discusses two English cases: *Sea Premium Shipping Ltd. v. Sea Consortium Pte Ltd.* (Unreported, High Court of Justice of England and Wales, David Steel J, 11 April 2001); *Dell Emerging Markets (EMEA) Ltd v. IB Maroc.*

11. In his first memorandum, Dr. Dracos opines that the "clause which excludes the application of the Contracts (Rights of Third Parties) Act 1999" is irrelevant because the issue here regards the "general power of the court to prevent inequitable conduct," not a contract right. ECF 76-5, ¶ 58. In his second memorandum, Dr. Dracos appears to agree that the provision prohibits Bakhmatyuk from claiming the benefit of the arbitration clauses. ECF 96-2, ¶¶ 30-31.

com SA [2017] EWHC 2397 (Comm). ECF 76-5 ¶¶ 34-51. Dr. Dracos further cites for the same proposition a treatise by Dicey, Morris & Collins, *The Conflict of Laws*, 15th ed. (to which he refers as "Dicey & Morris"), an Australian case cited therein involving a jurisdiction clause governed by English law, *Global Partners Fund Ltd v. Babcock & Brown Ltd (In Liquidation)* [2010] NSWCA 196, and *VTB Capital v. Nutritek* [2013] UKSC 5, at [106], for citing *Global Partners Fund* with approval. *Id.* ¶¶ 52-57.

In response, Plaintiffs provide a reply declaration from their English law expert, Mr. Valentin. He distinguishes *Sea Premium* and *Dell* because they regard contractual claims. ECF 94-1 (Expert Opinion in Reply of Ben Valentin, Q.C.) at 5, ¶ 9(2). He notes that none of Plaintiffs' claims in this case are contractual — *i.e.*, Plaintiffs do not bring a breach of contract claim. *Id.* at 12, ¶¶ 32, 33. Mr. Valentin also distinguishes *Global Partners Fund* and the U.K. Supreme Court citation to it in *VTB Capital* because the latter "merely [pointed to it] as an example ... in which the inclusion of a jurisdiction clause might be a factor pointing to the jurisdiction of the English Court over a claim against non-parties," distinguished *Global Partners Fund* on its facts, and "did not suggest that the ... Australian case represented English law." ECF 94-1 at 12, n.13.

Bakhmatyuk did not provide copies of Dr. Dracos' authorities,[12] but his discussion reflects these cases

12. The additional authorities to which the second memorandum refers as being attached (ECF 96-2 at Appx. A) were not filed.

involved claims to enforce contracts and promises. *See, e.g.*, ECF 76-5 at 12 ¶ 45 (quoting *Dell*, ""it would be inequitable or oppressive and vexatious for a party to a contract ... to seek to enforce *a contractual claim* arising out of that contract without respecting the jurisdiction clause within that contract," emphasis added). The same is true of the English law treatise. *Id.* ¶ 53 (quoting Dicey & Morris's discussion of claims "seek[ing] to enforce the promise," and "a clear statement on which reliance has been placed"). He attempts to extend his cited authorities beyond contractual and quasi-contractual[13] claims by opining that while the claims in *Sea Premium* and *Dell* "were characterized as contractual in nature, the legal bases of the claims were statutes or legal rules dehors [*i.e.*, outside of] the contract." ECF 76-5, ¶ 48. What Dr. Dracos means by this is left opaque. If he means "legal bases" in the sense of statutes or rules providing a vehicle for bringing the claim (the underlying case in *Dell* was brought in Dubai, for example), this would not change the subject of the claims.

Dr. Dracos also does not address the difference between non-contractual claims that regard the same subject as a contract at issue *versus* claims that do not. He refers to "non-contractual claims" in three cases, the first of which is *Fiona Trust v. Privalov* [2007] UKHL 40, but does not explain what the claims were. ECF 76-5 ¶ 49,

13. In *Sea Premium*, the claim was "quasi-contractual" because the new owner of a vessel sought to enforce the contract (a charter entered into by the vessel's prior owner) against the claimant, and the new owner was not a party by novation or assignment. ECF 76-5 at 10 ¶ 36 (quoting the opinion).

nn. 22, 23. In the Court's research, the claims included alleged invalidity of the contract due to bribery and fraud in its inducement. *Fiona Trust* [2007] UKHL 40, 2007 WL 2944855 (a case summary; the opinion itself was not available to the Court in Westlaw or Lexis).[14] However, that case involved only contract parties. It is not on point for a non-contract party requesting equitable estoppel.

Dr. Dracos also refers to claims for "tort[ious duty] and ... breach of fiduciary duty" in *Global Partners Fund*. ECF 96-2, ¶ 25. He is persuasive that this Australian case interpreting English law is a valid source for English law, given that the English law treatise discusses it. But in that case, one of the four respondents was a party to the contract, a limited partnership agreement (the "LPA"). [2010] NSWCA 196 (2010), 79 ACSR 383, 2010 WL 3213034, [2010] ALMD 8000. The other two respondents who are pertinent here — a third was in liquidation, and the court did not permit suit against it — had "rights conferred upon them as Indemnified Persons under the LPA." *Id.* ¶ 73. The court held the choice of law and forum selection clause bound them because the proceeding was one "in which such an indemnity may arise." *Id.* ¶ 79. The opposite is true here — the Trust Deeds expressly note that third-parties have no rights thereunder.[15]

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14. In this instance, the Court exercised its discretion to locate the cases that Dr. Dracos characterizes as having "non-contractual" claims. **Going forward, all parties must attach the foreign law cases that they cite**.

15. *Global Partner Funds* also held the Indemnified Persons were bound under the principle of assuming reasonable businessmen would not want litigation relating to the LPA pending in two places,

Last, Dr. Dracos discusses *Times Trading Corp v. National Bank of Fujairah (Dubai Branch)* [2020] 1 CLC 790, a case Mr. Valentin discusses in his reply declaration for the proposition that English law only allows nonparties to enforce a jurisdiction clause when the claims are contractual. Dr. Dracos notes the claims in that case were actually "for breach of contract and in the alternative 'tort and bailment.'" ECF 96-2, ¶ 45. Dr. Dracos posits that the claims all arose from the contractual relationship, and the case shows the label of claims is not important but only the scope of the arbitration clauses and whether "the party to the clause is acting unconscionably/vexatiously/oppressively." *Id.* ¶¶ 45, 46.

Times Trading regarded coal that was misdelivered without its original bills of lading. National Bank held bills of lading on the coal and first sued the vessel's owner, Rosalind. Rosalind later asserted the vessel was "bareboat chartered" to Times, and it was Times that had issued the bills of lading (thus, if anyone was liable, it was Times). National Bank then sued Times in Singapore on the bills of lading. Times sought to enjoin that action in favor of the arbitration clause incorporated in the bills of lading from the charterparty. National Bank asserted to the contrary that the charterparty was a sham, and thus there was no arbitration clause between them. The court held that "[h]ere (although the pleaded case encompasses bailment and tort) *it has never been said that the real*

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because they were "so closely connected with the implementation of the" LPA. *Id.* ¶ 79. However, this reasoning does not actually appear to be a separate basis for the holding. Presumably these nonparties were indemnified in the LPA because of their close involvement in implementing it.

nature of the claim is noncontractual; the dispute is all about the contract — the issue is whether the contract Times asserts is real, or a sham." *Times Trading*, 1 C.L.C. at 808. *I.e.*, the bailment and tort claims regarded only the same subject as the contract. In that context, the court treated the case as contractual and quasi-contractual. *Id.*

But here, Plaintiffs' claims cannot be construed as quasi-contractual. The claims do not regard only the same subject as the Notes (or through them, the Trust Deeds). While the tortious interference claim relies on the incorporated Trust Deed provisions that restrict the Company's ability to transfer assets, that claim is against nonparties to the Notes and Trust Deeds. It also requires Plaintiffs to show not only that the Company breached the incorporated Trust Deed terms but also that the Defendants engaged in tortious conduct that caused or induced those breaches. The other claims (civil conspiracy, aiding and abetting, and RICO) have even less direct connection to the Notes and incorporated provisions of the Trust Deeds. Each of those claims require proof of an underlying tort (for the RICO claims, more specifically a RICO predicate act), not just a breach of the Trust Deed terms. Thus none of Plaintiffs' claims regard only the same subject as a contractual or quasi-contractual claim.

And finally, Dr. Dracos relies on Dicey & Morris's statement that a non-contract party can seek to enforce an arbitration clause based on the judicial proceeding being "vexatious or oppressive" or a forum non conveniens. ECF 76-5, ¶ 53 (quoting the treatise); ECF 96-2, ¶¶ 37-41. But as the Court notes above, Dicey & Morris' entire discussion of this issue assumes "*A promises B* that all

disputes connected with a contract, *including disputes against C, a non-party*, will be resolved in a particular way." ECF 76-5 ¶ 52 (emphasis added, citing Dicey & Morris ¶ 12-111). This assumption carries through all of the treatise's conclusions on which Dr. Dracos relies:

> [I]t has been suggested that *where A has promised B not to sue C* in the forum court, C, though having no contractual right to relief, may still contend that the bringing of proceedings against him in that court is *vexatious or oppressive, or otherwise unconscionable, presumably on the ground that if A has made a clear statement on which reliance has been placed*, it should not be open to A to proceed as if that statement had never been made, and the court's inherent power to stay proceedings, for example, on the footing that they are oppressive or vexatious, or that the court is, *in the light of the promise made*, a forum non conveniens, may still [be] available to justify jurisdictional relief.

Id. ¶ 53 (emphasis added).[16] In short, Bakhmatyuk does not show that English law allows nonsignatories to enforce

16. *Elektrim SA v. Vivendi Holdings 1 Corp.*, [2008] EWCA Civ 1178, ¶ 101 (ECF 44-46) involved tort claims, but the case held only that they came within a "No Action" clause. It did not regard arbitration or equitable estoppel. A case cited therein, on which the Piazza Defendants relied in their reply, *The Angelic Grace* [1995] 1 Lloyd's Rep 87, p. 91, cols. 1 and 2 (ECF 53-5), held that tort claims (specifically, negligence and collision claims) came within an arbitration clause, but did not involve a nonparty and the tort claims covered the same subject as the contract.

arbitration clauses when a contract party brings tort claims that do not regard the same subject as the contract.

This is an area in which English law appears to significantly differ from American law. For purposes of equitable estoppel on arbitration clauses, American law does not draw a distinction between contractual claims and torts. *See, e.g., Brophy v. Ament*, CV 07-0751 JB/KBM, 2008 U.S. Dist. LEXIS 95879, 2008 WL 11363888, at *14 (D.N.M. July 9, 2008) (citing cases holding nonsignatories could compel arbitration against signatories on tort claims). Thus, the Court must decide whether English or American law governs equitable estoppel.

b. The Choice of Law for Equitable Estoppel

Bakhmatyuk argues American law governs this issue, particularly Wyoming law. Since Wyoming has not addressed this issue, he argues the Court should make an *Erie* prediction by following the general weight and trend of the federal law. ECF 76 at 12-16. He cites Judge Tjoflat's concurrence in the judgment in *GE Energy II*, 2022 U.S. App. LEXIS 18846, 2022 WL 2643936, at *5-6, and *Reeves v. Enterprise Products Partners, LP*, 17 F.4th 1008 (10th Cir. 2021).

However, *Arthur Anderson LLP v. Carlisle*, 2009 U.S. LEXIS 3463, 556 U.S. 624 (2009) made plain that federal courts should not apply federal common law to this issue. The Court held that Sections 2 and 3 of the FAA do not "purport[] to alter background principles of state contract law regarding the scope of agreements

(including the question of who is bound by them) ... *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally." *Id.* at 630-31 (internal quotation marks omitted). States cannot enact anti-arbitration laws, but they otherwise provide the underlying law of contract that applies to domestic arbitration clauses. *Arthur Andersen* involved a domestic arbitration agreement. There was no issue of whether a foreign jurisdiction's law governed. In that context, the Court's reference to "state law" as controlling is reasonably understood to mean that the "relevant law of contract" that governs the contract — whether it be foreign or domestic—also governs the question of who is bound by arbitration clauses. Thus, in the Tenth Circuit, *Arthur Andersen* made clear that federal common law does not govern who may be bound by an arbitration clause. *Lenox MacLaren Surgical Corp. v. Medtronic*, 449 F. App'x 704, n.2 (10th Cir. 2011).[17]

GE Energy does not change *Arthur Andersen's* reasoning. It cites *Arthur Andersen* for that proposition, determines the New York Convention does not bar its application, and does not reach whether the governing law was that chosen in the contract or otherwise. Nor is *Reeves* contrary. The contract in that case was domestic, and the Tenth Circuit expressly recognized that the question was governed by state contract law. *Reeves*, 17

17. Bakhmatyuk cites *Lenox* in support of applying federal common law to determine whether equitable estoppel allowed a nonsignatory to invoke an arbitration clause. The opinion discusses federal case law but does so because it was the same as the governing state law of Colorado. *Lenox*, 449 F. App'x at 709.

F.4th at 1011. It refers to the "general weight and trend of authority" only as a factor for making an *Erie* guess, which again was appropriate because the contract was not international. *Id.* at 1012.

Thus, *Arthur Andersen* and *GE Energy* point the way: the parties' choice of law governs equitable estoppel. This is consistent with the Tenth Circuit's application of a foreign choice of law provision in interpreting a forum-selection clause. *Yavuz v. 61MM, Ltd.*, 465 F.3d 418, 428 (10th Cir. 2006) ("*Yavuz I*"). "We see no particular reason, at least in the international context, why a forum-selection clause, among the multitude of provisions in a contract, should be singled out as a provision not to be interpreted in accordance with the law chosen by the contracting parties." *Id.* (citing the Restatement (2d) of Conflict of Laws § 204 (1971)).[18]

Yavuz I discusses several U.S. Supreme Court cases "emphasiz[ing] the primacy of the parties' agreement regarding the proper forum," and notes "when the contract contains a choice of law clause, a court can effectuate the parties' agreement concerning the forum only if it interprets the forum clause under the chosen law." *Id.* at 428-430.

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18. Plaintiffs also cite for this point another case interpreting a forum-selection clause, *Kelvion, Inc. v. PetroChina Canada Ltd.*, 918 F.3d 1088, 1092 n.2 (10th Cir. 2019). But it adds nothing significant to *Yavuz I*. The cited footnote explains the parties chose the law of the Province of Alberta, Canada and did not dispute it was similar to Tenth Circuit law.

> [R]espect for the parties' autonomy and the demands of predictability in international transactions require courts to give effect to the meaning of the forum-selection clause under the chosen law, at least absent special circumstances (such as, perhaps, the chosen jurisdiction's refusal to hear a case that has no ties to the jurisdiction).

Yavuz I, 465 F.3d at 430. This reasoning applies equally well to the interpretation of international arbitration clauses, including equitable estoppel.

Bakhmatyuk argues to the contrary *Yavuz I* is inapposite because it does not regard an arbitration clause, has only a "limited" discussion thereof, and predates *GE Energy I*. ECF 96 at 6. Yet *Yavuz I* spends over a page discussing Supreme Court cases on arbitration clauses. It quotes *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519, 94 S. Ct. 2449, 41 L. Ed. 2d 270 (1974) as treating "[a]n agreement to arbitrate before a specified tribunal [as], in effect, a specialized kind of forum-selection clause." *Yavuz I*, 465 F.3d at 429. It quotes at some length from *Scherk* and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 629, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985), another case regarding an international arbitration clause. The Tenth Circuit recognized that "[t]o be sure, [those] opinions did not address the choice of law issue presented here ... [b]ut *the same reasoning applies*." *Yavuz I*, 465 F.3d at 430 (emphasis added). Indeed, Bakhmatyuk

himself points to *Scherk* for support. ECF 96 at 6, n.7.[19] *GE Energy I* did not change the law with regard to honoring contractual choices of law, so the fact that *Yavuz I* and citations therein predate *GE Energy I* is irrelevant. They remain good law on this point.

The Court also finds the Second Circuit's reasoning in *Motorola Credit Corp. v. Uzan*, 388 F.3d 39, 51 (2d Cir. 2004) persuasive.

> [W]here the parties have chosen the governing body of law, honoring their choice is necessary to ensure uniform interpretation and enforcement of that agreement and to avoid forum shopping. This is especially true of contracts between transnational parties, where applying the parties' choice of law is the only way to ensure uniform application of arbitration clauses within the numerous countries that have signed the New York Convention.

Id. "Furthermore, respecting the parties' choice of law is fully consistent with the purposes of the FAA." *Id.* The point of the FAA is to honor the parties' intentions

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19. Bakhmatyuk also argues that *Kelvion*, 918 F.3d at 1093, supports applying the federal common law here because the Tenth Circuit found equitable claims were "inextricably linked" to the parties' contract. ECF 96 at 6, n.7. But the parties in *Kelvion* were contract parties, and the equitable claims were for unjust enrichment and quantum meruit on the same subject as the contract. The same is not true here.

regarding arbitration. *See, e.g.*, *Arthur Anderson*, 556 U.S. at 630-31 ("to place such agreements upon the same footing as other contracts").

The concurring opinion in *GE Energy II* on which Bakhmatyuk relies does not discuss *Arthur Andersen*, and all but one of the cases cited therein on this issue predate that opinion. The one case it cites post-dating *Arthur Andersen* is from the Ninth Circuit and therefore is not binding here. *Setty v. Shrinivas Sugandhalaya LLP*, 3 F.4th 1166 (9th Cir. 2021).[20]

In sum, based on *Arthur Andersen, Yavuz I* and *Motorola Credit*, the Court applies English law to the equitable estoppel issue. As the Court concludes above, Bakhmatyuk has not shown that equitable estoppel applies under English law. Accordingly, the Court denies Bakhmatyuk's motion to stay or dismiss in favor of arbitration.

C. The "No-Action" Clauses

Bakhmatyuk repeats the Piazza Defendants' arguments on the "No-Action" clauses of the Trust Deeds. In support, Bakhmatyuk contends that Plaintiffs' claims are really "about a breach of the contract" and have only been masked as RICO and tort claims to get around these clauses. He does not, however, challenge the common law

20. *Setty* also includes a dissent disagreeing with the majority's application of federal common law. *Id.* at 1169 (Bea, J.). Judge Bea relied primarily on *Arthur Andersen*, reasoning that *GE Energy* did not change its framework. *Id.* at 1171-73.

tort claims under Rule 12(b)(6), and his argument against the RICO claims fails as will be seen below. Bakhmatyuk also argues that Plaintiffs have no allegations of actual, unique targeting of Plaintiffs, as necessary to defeat the No-Action clauses. He argues the alleged targeting amounts only to a lack of good faith in negotiating with Plaintiffs. ECF 76 at 16. But he does not explain why, if true, that would not constitute conduct uniquely directed to and injuring Plaintiffs, given their unique position among Noteholders alleged in the complaint.

Thus, for the same reasons the Court rejected the Piazza Defendants' arguments regarding the "No-Action" clause in the July 7 order, the Court likewise denies this part of Bakhmatyuk's motion.

D. Forum Non Conveniens

Bakhmatyuk next argues the case must be dismissed under the doctrine of forum non conveniens in favor of the London Court of International Arbitration ("LCIA") or a judicial court in London. As the July 7 order notes, there are two threshold requirements. First, there must be an "adequate alternative forum where the defendant is amenable to process." *Archangel Diamond Corp. Liquidating Trust v. Lukoil*, 812 F.3d 799, 804 (10th Cir. 2016). "Second, 'the court must confirm that foreign law is applicable.'" *Id.* "[I]f both threshold requirements are met, the court weighs the private and public interests to determine whether to dismiss" the case. *Id.* More specifically, the Court must confirm whether foreign law applies to a majority of the issues. *Id.* at 805-806.

Bakhmatyuk bears the burden of showing forum non conveniens dismissal is appropriate. *Rivendell Forest Prods., Ltd. v. Canadian Pac. Ltd.*, 2 F.3d 990, 993 (10th Cir. 1993).

"[T]here is ordinarily a strong presumption in favor of the plaintiff's choice of forum, which may be overcome only when the private and public interest factors clearly point towards dismissal and trial in the alternative forum." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255, 102 S. Ct. 252, 70 L. Ed. 2d 419 (1981). Bakhmatyuk argues that when a plaintiff is foreign, this presumption has less weight, citing. *Yavuz v. 61 MM, Ltd.*, 576 F.3d 1166, 1172 (10th Cir. 2009) ("*Yavuz II*"). Plaintiffs in this case are not foreign. Gramercy Management is based in Connecticut. ECF 1 ¶ 13. The Gramercy Funds are organized in the Cayman Islands, but Gramercy Management manages them from Connecticut. *Id.* ¶¶ 13, 14. Roehampton Partners is a Delaware LLC based in Connecticut. *Id.* ¶ 15. Thus, the presumption in favor of Plaintiffs' choice of forum applies here.

In the end, however, the Court does not reach the weight to give Plaintiffs' choice of forum because the threshold requirements are not met.

1. Is the LCIA or a Judicial Court in London an Adequate Alternative Forum?

Bakhmatyuk largely repeats the Piazza Defendants' arguments, which remain unpersuasive. He also argues that by purchasing the Notes containing arbitration

clauses specifying LCIA, Plaintiffs agreed the LCIA is an "adequate alternative forum" because it is the forum chosen in the arbitration clauses. This argument ignores that the Notes expressly provide that third-parties do not have rights thereunder. Plaintiffs' purchase of the Notes therefore did not constitute acceptance of LCIA as an adequate forum for claims against third-parties such as Bakhmatyuk.

Nor does Bakhmatyuk otherwise show that he and the Piazza Defendants are subject to the jurisdiction of LCIA or a judicial court in London. Plaintiffs allege that he had or was invited to meetings in London, but they do not allege he lives there. Rather, they allege he has for some years now lived in Vienna, Austria. He was served by alternative means there. He does not appear to dispute that he currently resides in Vienna. He argues that his Relationship Agreement specifies the LCIA and thus he "can be compelled" to litigate Plaintiffs' claims there. ECF 76 at 18. But like the Piazza Defendants, he does not provide a declaration or affidavit in support. And because Plaintiffs are third-parties to the Relationship Agreement, they cannot compel him to arbitrate thereunder.

Bakhmatyuk further argues the Court can and should condition dismissal on the Defendants agreeing to jurisdiction in LCIA. He cites *Yavuz II*, 576 F.3d at 1182. On remand from *Yavuz I*, the district court conditioned dismissal on two things: (1) that the American defendants — who the plaintiff believed were not amenable to service in the forum chosen by the plaintiff and an international defendant — enter a written agreement to jurisdiction

there, and (2) that the forum's courts accept jurisdiction. Otherwise, the action in the district court could be reinstated. *Id.* at 1182. The Tenth Circuit found this was not an abuse of discretion and therefore affirmed.

The Court declines to exercise its discretion to order a conditional dismissal. The forum non conveniens facts in *Yavuz II* differ significantly from this case. First, the plaintiff and one of the defendants had a contract with each other that was directly at issue. The contract chose a forum (Switzerland) where that defendant "appear[ed] to be amenable to service." It was therefore plain that a significant part of the case belonged in Switzerland. The same is not true here. Second, the defendants informed the *Yavuz* court that they "agreed to enter into a written stipulation that they would submit to the jurisdiction of the court in Fribourg, Switzerland." *Id.* at 1182. None of the Defendants have done so here. They only state in their briefs (through counsel) that they agree to the LCIA, and they do not explain how or if the LCIA (or a judicial court in London) would enforce those statements.

Third and relatedly, *Yavuz II* applied forum non conveniens in favor of *judicial courts* in the alternative forum. Bakhmatyuk instead wraps his unsuccessful request for arbitration into his forum non conveniens argument. He gives very little attention to the suggestion of judicial courts in London. Fourth, the *Yavuz* parties agreed that those two conditions were the only issues standing in the way of a forum non conveniens dismissal. *Id.* at 1182. Here, Plaintiffs oppose forum non conveniens dismissal on every factor, and they are persuasive that

the other threshold factor is not met because foreign law does not apply to the majority of issues.

2. Does Foreign Law Apply?

Bakhmatyuk argues English law governs Plaintiffs' RICO and tort claims because it is the governing law in the Trust Deeds, Notes, and the other "issuance documents" on which Bakhmatyuk relies.[21] He points in particular to the Trust Deeds' broad provisions (as incorporated in the Notes) that English law governs "[t]hese presents and any non-contractual obligations arising out of or in connection with them." ECF 76 at 19 (citing AVG Trust Deed at 31 § 27; ULF Trust Deed at 29 § 23.1). He relies on the Piazza Defendants' argument that *The Angelic Grace* [1995] 1 Lloyd's Rep 87, p. 91, cols. 1 and 2, finds "under English law that tort claims 'arose out of the contract, since the same facts founded the [] claim in tort as founded the claims [] in contract.'" ECF 53 at 10.

The Notes' choice of law provisions are broad, but again Plaintiffs are suing non-parties to those contracts. *The Angelic Grace* involved only parties to the contract at issue. Bakhmatyuk does not cite any authority — foreign or domestic — extending a contractual choice of law provision to non-contract parties, particularly when the claims are torts. Accordingly, he does not show that

21. Motions to dismiss under the forum non conveniens doctrine are not brought under Rule 12(b)(6). *Cf., Atl. Marine Const. Co., Inc. v. U.S. Dist. Ct.*, 571 U.S. 49, 61 (2013), 134 S. Ct. 568, 187 L. Ed. 2d 487. Accordingly, Rule 12(d)'s restrictions do not apply to this part of Bakhmatyuk's motion.

the Notes' choice of law clauses (or those of the other "issuance documents") govern any issues other than the interpretation of those contracts.

As to the RICO claims, the question is not so much a choice of law as whether Plaintiffs could bring those claims at all in LCIA or a judicial court in London (or whether English law has an analogue). The briefing leaves this issue unclear. The unavailability of RICO claims abroad is not sufficient, standing alone, to make forum non conveniens inappropriate. *Archangel Diamond*, 812 F.3d at 805-06; *Yavuz II*, 576 F.3d at 1177 n.6 (collecting cases). For present purposes, it suffices to say that the RICO claims are governed by American law.

As to Plaintiffs' common law tort claims, both sides agree the Court applies Wyoming's choice of law analysis. ECF 50 at 39 (Plaintiffs' response to Piazza Defendants, citing *BancOklahoma Mortg. Corp. v. Capital Title Co.*, 194 F.3d 1089, 1103 (10th Cir. 1999)); ECF 76 at 19. "In analyzing choice of law questions, th[e Wyoming Supreme] Court uses the approach defined by the Restatement (Second) of Conflict of Laws." *Elworthy v. First Tenn. Bank*, 2017 WY 33, 391 P.3d 1113, 1120 (Wyo. 2017).

> The Second Restatement enumerates specific factors that identify the state with the most significant contacts to an issue, and the relevant factors differ according to the area of substantive law governing the issue and ... the nature of the issue itself. *See, e.g.*, Restatement (Second) at §§ 6, 145, 188. To properly apply

> the Second Restatement method, a court must begin its choice of law analysis with a characterization of the issue at hand in terms of substantive law. *Id.* at § 7.

Id. Thus, although both sides brief the choice of law as one-size fits all, the Court must determine choice of law claim by claim or issue by issue.

Bakhmatyuk argues the choice is between English and Ukrainian law because (a) the Notes were issued on England and Irish market exchanges; (b) the negotiations (in which he and his agents allegedly made fraudulent misrepresentations and omissions) to restructure the Notes were held in London; and (c) the Company's physical assets were and still are in Ukraine — regardless that Defendants allegedly transferred legal ownership to shell companies in Wyoming (SP Capital and/or TNA), where Bakhmatyuk continues to have beneficial ownership. Thus, Bakhmatyuk focuses on the international locations where Defendants' conduct occurred *before* the alleged unlawful transfers, and the location of the physical assets as opposed to the ownership of those assets. He does not appear to address where he and his agents initiated the allegedly fraudulent telephone calls and emails, where Plaintiffs received them, or where their injury is felt.

Plaintiffs argue to the contrary that the choice is between Wyoming and Connecticut law. Connecticut is where Plaintiffs are located, and thus where Defendants directed their allegedly false and misleading telephone calls and emails to Plaintiffs, and the location where

the injury is felt. Wyoming is where the Defendants engaged in the scheme (or in Bakhmatyuk's case, he directed the others to engage in the scheme) to create the shell companies and unlawfully transfer the Company's subsidiaries to them. Bakhmatyuk continues to have beneficial ownership of the Company through the Wyoming entities. Plaintiffs further argue there is no need to actually choose between Connecticut and Wyoming law because there is no conflict. ECF 94 at 14 (relying on ECF 50, opposition to the Piazza Defendants' motion, at 28-29). Thus the Court would apply the law of the forum state, Wyoming. *Employers Mut. Cas. Co. v. Bartile Roofs, Inc.*, 618 F.3d 1153, 1170 (10th Cir. 2010); *Act I, LLC v. Davis*, 2002 WY 183, 60 P.3d 145, 149 (Wyo. 2002). Plaintiffs do not directly respond why English or Ukrainian law would not apply.

a. Fraud (Fourth Cause of Action).

For choice of law on a fraud claim,

> [w]hen a defendant's representations and a plaintiff's reliance take place in different states, the Second Restatement prescribes the following factors to consider in making a choice of law determination on a fraud or misrepresentation claim:
>
> (a) the place, or places, where the plaintiff acted in reliance upon the defendant's representations,
>
> (b) the place where the plaintiff received the representations,

> (c) the place where the defendant made the representations, [and]
> (d) the domicile, residence, nationality, place of incorporation and place of business of the parties,

Elworthy, 391 P.3d at 1121-22 (in relevant part, quoting Restatement (Second) of Conflict of Laws § 148 (1971)). "The[se factors'] relative importance in a given case should be determined ... with emphasis upon the purpose sought to be achieved by the relevant tort rules." Restatement (2d) of Conflict of Laws § 148 cmt. e.

Plaintiffs' fraud claim against Bakhmatyuk alleges that he misrepresented his intent to restructure the Notes since 2016 and fraudulently omitted to inform Gramercy of numerous material facts, including the asset transfers he was orchestrating with Piazza and others. ECF 1, Fourth Cause of Action. Plaintiffs allege damages in this claim arising before, during and after the unlawful transfers. They allege for instance that absent the fraud, they would have

> pursued other avenues. Specifically, if not for the misrepresentations and omissions of material facts, Gramercy would have sought to enforce its rights under the Notes, more aggressively pursued collective restructuring negotiations, sold its Notes at fair value and reinvested the money, and/or taken other remedial measures such as litigation.

ECF 1 ¶ 211. *See also Id.* ¶¶ 212-213.

Appendix C

The places where Plaintiffs received the fraudulent statements are Connecticut and London. They acted in reliance in at least Connecticut by not seeking to sell the Notes at fair market value. London is the place where Bakhmatyuk made some of the misrepresentations and omissions. It appears that he or his agents (at his direction) made other misrepresentations and omissions from Ukraine. "The place where the defendant made his false representations ... is as important a contact in the selection of the law governing actions for fraud and misrepresentation as is the place of the defendant's conduct in the case of injuries to persons or to tangible things." Restatement § 148, cmt. c.

As for the domiciles, residences, nationalities, places of incorporation and places of business of the parties, these do not weigh in favor of London. Plaintiffs are Connecticut-based and organized in the Cayman Islands and Delaware. ECF 1, ¶¶ 13-15. Bakhmatyuk lives in Vienna and has dual citizenship in Ukraine and Cyprus. He apparently runs the Company (whose tangible assets are located in Ukraine) from Vienna, and he has beneficial ownership of the Company's assets or subsidiaries in Wyoming shell companies.

Finally, there is no tangible thing that is the subject of a transaction between the parties. The closest this case comes to such a tangible thing is the Notes that Plaintiffs hold, which originally issued in Ireland and London. Plaintiffs allege their holdings grew over time, but neither side briefs whether they purchased all of those holdings on the Ireland and/or London exchanges,

or through private transactions. And as the Court held above that Bakhmatyuk cannot enforce the Notes' choice of law clauses, that does not factor into this analysis. The "tangible thing" factor carries no weight in this instance.

Overall, the choice between Connecticut and English law is a close one on the fraud claim. Plaintiffs allege Bakhmatyuk and the Piazza Defendants singled out Plaintiffs in the alleged fraudulent scheme. The parties met in London, but Defendants knew that Plaintiffs' representatives traveled there from Connecticut, where Plaintiffs were headquartered. Bakhmatyuk does not assert that Plaintiffs have an office in London. In the end, the Court finds the Restatement Section 148 factors weigh in favor of Connecticut having the most significant relationship to the fraud claim.

b. Tortious Interference With Contract (Fifth Cause of Action).

The Wyoming Supreme Court has not addressed choice of law for tortious interference, but *Elworthy's* broad language arguably adopts the Restatement's approach beyond just the fraud and breach of contract claims at issue in that case. 391 P.3d at 1120. In any case, the Court predicts under *Erie* that the Wyoming Supreme Court would follow the Restatement for choice of law on this tort as well.

The Restatement does not treat tortious interference specifically. Therefore, it is subject to the general principles stated in Section 145:

> (1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.[22]
>
> (2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
> (a) the place where the injury occurred,
> (b) the place where the conduct causing the injury occurred,
> (c) the domicil[e], residence, nationality, place of incorporation and place of business of the parties, and
> (d) the place where the relationship, if any, between the parties is centered.
>
> These contacts are to be evaluated according to their relative importance with respect to the particular issue.

Restatement (Second) of Conflict of Laws § 145. These factors are quite similar to those analyzed above on the fraud claim.

In this case, the tortious interference claim is against all Defendants and appears to focus on the unlawful

22. Section 6 in turn identifies several broad policy considerations including "the needs of the interstate and international systems." Restatement (2d) of Conflict of Laws § 6.

transfers as wrongful interference with the Notes. The claim appears to refer to Bakhmatyuk's direct involvement in the restructuring negotiations only to allege that he was aware of Plaintiffs' contracts with the Company (*i.e.*, the Notes), not that his false statements in the negotiations constituted interference. ECF 1 ¶ 216. The claim refers to section V(d) of the complaint for the acts of interference (*id.* ¶ 217); that section alleges unauthorized asset transfers. ECF 1 at 50-58. [23] The transfers that are the subject of this case allegedly occurred in Wyoming. Bakhmatyuk directed Piazza regarding those transfers from apparently Vienna. From there, he also directed Yaremenko and other agents in Ukraine regarding the transfers to be accomplished in Wyoming.

Bakhmatyuk nonetheless argues that Wyoming has very little connection to this case. This ignores that the complaint alleges he specifically enlisted a Wyoming resident (Defendant Piazza) along with Yaremenko to form shell Wyoming companies (Defendants SP Capital and TNA) to hide the Company's assets (*i.e.*, subsidiaries) from Plaintiffs. The complaint further alleges that Piazza and Yaremenko tout themselves as having expertise in using Wyoming's corporate law specifically to shelter assets from creditors. Wyoming has a significant interest in this claim.

Turning to the Restatement Section 145 factors, the place where the injury occurred is Connecticut — the place

23. Section V(d) of the complaint alleges transfers in Cyprus and Wyoming, but Plaintiffs do not seek relief for the Cyprus transfers in this case.

where Plaintiffs hold the Notes and feel the damages from Defendants causing the Company to breach its obligations thereunder. The place where the injury-causing conduct occurred is primarily Wyoming, with less occurring in Vienna and Ukraine. The domiciles, residences, and places of business are the same as noted above, plus Defendants Piazza, TNA, and SP Advisors are all in Wyoming. As for the place where the parties' relationship is centered, Plaintiffs do not have a contractual relationship with Bakhmatyuk or the Piazza Defendants. They met with Bakhmatyuk in London for the negotiations to restructure the Notes, but again, this claim does not focus on those negotiations other than to show Bakhmatyuk was aware of the Notes.

Overall, the Court finds the forum with the most significant relationship to the tortious interference claim is either Wyoming or Connecticut. Wyoming is the place where the allegedly wrongful acts of interference occurred. Defendants allegedly chose Wyoming for sheltering assets from Plaintiffs because Wyoming's corporate law is particularly friendly to owners seeking privacy. Connecticut is the forum where the injury is felt. Either way, foreign law does not govern the tortious interference claim.

c. Conspiracy and Aiding and Abetting

As for Plaintiffs' conspiracy and aiding and abetting claims, the Restatement provides:

> (1) The law selected by application of the rule of § 145 determines the circumstances in which two or more persons are liable to a third person for the acts of each other.
>
> (2) The applicable law will usually be the local law of the state where the injury occurred.

Restatement (2d) of Conflict of Laws § 172 (joint torts). Thus, the choice of law for these claims is likewise between Wyoming and Connecticut.

Thus, in addition to not showing the LCIA or judicial courts in London are adequate alternative fora, Bakhmatyuk has also not shown that foreign law applies to the majority of issues. The Court therefore does not reach the weighing of public and private interests. Bakhmatyuk's forum non conveniens motion is denied.

E. Rule 12(b)(6) Motion on RICO Claims

Finally, Bakhmatyuk raises one of the Piazza Defendants' several unsuccessful theories on the RICO claims. Specifically, he argues that the claims are subject to the Private Securities Litigation Reform Act of 1995 ("PSLRA") bar for conduct that would constitute securities fraud. The PSLRA amended the RICO statute by adding the following exception:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor..., except that *no*

> *person* may rely upon any conduct that *would have been actionable* as fraud in the *purchase or sale* of securities to establish a violation of section 1962.

18 U.S.C. § 1964(c) (in relevant part, emphasis added). By the express language of § 1964, only claims alleging conduct that would be actionable as fraud in the purchase or sale of a security are subject to this bar.

Conduct that would be actionable as securities fraud would need to meet the elements of securities fraud.

> For a private plaintiff (as distinct from the SEC) to prevail on a claim for violation of Exchange Act § 10(b) and Rule 10b-5, the plaintiff must prove six elements: "(1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation."

Detroit St. Partners, Inc. v. Lustig, 403 F. Supp. 3d 934, 944 (D. Colo. 2019) (quoting *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 37-38, 131 S. Ct. 1309, 179 L. Ed. 2d 398 (2011)). Thus, the PSLRA amendment bars "a RICO claim alleging fraud in connection with the sale [or purchase] of securities." *Bixler v. Foster*, 596 F.3d 751, 759 (10th Cir. 2010).

Appendix C

While the Piazza Defendants' motion focused on Plaintiffs' allegations of fraud in the negotiations to restructure the Company's debts (*i.e.*, the Notes), Bakhmatyuk focuses instead on Plaintiffs' purchases of part of its holdings in 2016 and 2017. ECF 1 ¶¶ 46, 48 (alleging as to AVG that Gramercy purchased Notes between 2011 and 2017, and the same as to ULF between 2013 and 2017). While Plaintiffs purchased some of the Notes in the Company's issuances completed by 2013 — well before the first phase of Bakhmatyuk's alleged scheme began — they also purchased more of the Notes during the first phase of that scheme in 2016-17.

The complaint alleges that during 2016-17, Bakhmatyuk was among other things disseminating false information regarding the Company's financial performance "to allow Bakhmatyuk to purchase other debt at a steep discount and put pressure on Gramercy to accept a restructuring or otherwise sell its Notes ... at a steep haircut on their value." ECF 1 ¶¶ 10(a), 71-96. Plaintiffs do not allege that Bakhmatyuk's dissemination of false information in 2016-17 caused them losses in their purchases of that time period. They do not allege Defendants defrauded them in the purchase or sale of any of the Notes, but rather that his fraud caused them to not attempt selling or taking other action to protect their rights under the Trust Deeds incorporated in the Notes.

Bakhmatyuk relies in part like the Piazza Defendants on *Bixler*, 596 F.3d at 760, which applied the PSLRA bar against a RICO claim brought by shareholders of Mineral Energy and Technology Corp. (METCO). But

the July 7 order already distinguishes that case because the alleged fraud occurred in the transaction in which the plaintiffs were supposed to receive stock, *i.e.*, in the purchase of a security. *Bixler* does not involve purchases of securities allegedly independent of the fraud but occurring concurrently with it, such as Plaintiffs allege here. *Bixler* does not support Bakhmatyuk's argument.

However, Bakhmatyuk also raises *Sensoria, LLC v. Kaweske*, 581 F. Supp. 3d 1243, 1268 (D. Colo. 2022). *Sensoria* notes: "It is enough that the scheme to defraud and the sale of securities coincide.'" *Id.* (citing *S.E.C. v. Zandford*, 535 U.S. 813, 822, 122 S. Ct. 1899, 153 L. Ed. 2d 1 ... (2002). To "coincide" in *Zandford* meant a stockbroker "selling his customer's securities and using the proceeds for his own benefit without the customer's knowledge or consent." 535 U.S. at 815. The stockbroker wrote "a check to himself from [the customer's] account knowing that redeeming the check would require the sale of securities." *Id.* at 821. His undisclosed intent to take the proceeds "coincided" with the sales of the securities because that was the reason he executed the sales. Thus, the SEC stated a securities fraud claim on behalf of the customers, not just a simple theft claim, and did not have to plead any misrepresentations or omissions regarding the value of the securities. *Id.* at 820-22.

In *Sensoria*, the RICO claims involved the loss of the plaintiffs' equity interest in one of the defendants. The defendants argued

> the grievance underlying the [complaint] is in substance securities fraud. In their

> characterization, the solicitation (which began in late 2015), stock purchases (which ran simultaneously with the solicitations through 2016 and into early 2017), and actions contrary to the investment entity's interests (which began around the same time) are one unified fraud scheme.

581 F. Supp. 3d at 1268. The plaintiffs attempted to distinguish their RICO claims by

> differentiat[ing] between Defendants' act of (1) inducing them to buy the shares and later (2) converting the investment entity's assets, thereby depriving them of their investment principal, profits from the business had it been managed properly, and assets by which to protect their equity interest.

Id. The plaintiffs were not persuasive in that case because

> *[t]he [complaint] portrays a unified fraud scheme*. The sequence of events makes it difficult to separate Defendants' alleged actions regarding the sale of Clover Top Holdings, Inc. stock from their alleged actions that harmed the value of the business. *That degree of interrelatedness* and the PSLRA bar's broad scope warrant applying the bar to Plaintiffs' RICO claims. Because Plaintiffs could—and actually do—allege violations of the securities laws on the same facts, the PSLRA bar prevents

> them from framing them as RICO violations as well.

Id. at 1269 (emphasis added).

Here, unlike *Sensoria*, Plaintiffs could not state a claim for securities fraud. They bought many of their Notes years before the scheme began. As to the Notes they purchased in 2016-17, they could not show loss causation, *i.e.*, fraud in connection with the purchase of those Notes. They allege Bakhmatyuk depressed the price of Notes in 2016-17; therefore, the inference is that the Notes Plaintiffs bought during that time frame were a bargain at the time. Plaintiffs do not allege a loss on those purchases until the 2019-20 asset transfers three years later. And unlike *Sensoria*, Plaintiffs do not allege a "unified scheme" of fraud, such that the 2019-2020 asset transfers could serve as fraud in connection with those purchases three years earlier. Plaintiffs here allege two fraudulent schemes: the first (and earliest) was to create pressure for Plaintiffs to sell or restructure at steep discounts in value while also stringing them along with representations of negotiating in good faith. The asset transfers were a second scheme that Bakhmatyuk did not conceive until January 2017 as a "backup plan" in case the first scheme did not work. ECF 1 ¶ 84. The asset transfers remained a "backup plan" until early 2019. *Id.* ¶¶ 122-123. This was approximately two years after Plaintiffs stopped purchasing Notes.

In *Sensoria's* terms, the asset transfers here are not so interrelated with Plaintiffs' 2016 to 2017 purchases of the Notes to constitute fraud in connection with those

purchases. In the Supreme Court's terms in *Zandford*, the asset transfers did not "coincide" with Plaintiffs' 2016 and 2017 purchases because Bakhmatyuk had not yet formed an intent to pursue that course. Although he was preparing asset transfers as a backup, he was continuing to pursue the first fraudulent scheme at the time, and that scheme did not result in Plaintiffs purchasing or selling Notes or suffering an economic loss to support an actionable securities fraud claim. In short, Bakhmatyuk does not cite any cases that would find Plaintiffs allege fraudulent conduct in connection with their 2016 and 2017 purchases of Notes.

There remains one last issue for Bakhmatyuk's motion, by way of the Piazza Defendants' arguments that he incorporates. In their reply, the Piazza Defendants argued the PSLRA bar extends to RICO claims that would be actionable as securities fraud *by anyone*, regardless that the plaintiff in the case could not state such a claim. ECF 53 at 16. This is an aspect of a case they cited in their motion, *MLSMK Inv. Co. v. JP Morgan Chase & Co.*, 651 F.3d 268 (2d Cir. 2011), but which they did not brief until replying to a footnote (ECF 50 at 37, n.17) where Plaintiffs anticipated the issue. Plaintiffs argued they do not allege "any other creditors bought or sold their debt positions in reliance on the misrepresentations or omissions directed at Gramercy," citing *Johnson v. KB Home*, 720 F. Supp. 2d 1109, 1117 (D. Ariz. 2010).

Even in their reply, the Piazza Defendants did not explain how they believed the "actionable-by-anyone" theory applied on Plaintiffs' allegations, and they do not

cite a Tenth Circuit or Supreme Court case addressing this issue. Rather, they cite *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 85, 126 S. Ct. 1503, 164 L. Ed. 2d 179 (2006), which held that for purposes of securities fraud claims, fraud "coincides" with a securities transaction regardless of whether the plaintiff himself made the transaction, or someone else did (with fraudulent intent), citing *inter alia Zandford. Dabit* does not add anything significant here to *Zandford* regarding the meaning of "coincide" or "in connection with" a purchase or sale of a security.

In any case, since the issue was briefed by Plaintiffs in only a footnote and by the Piazza Defendants only in reply, the Court did not consider the so-called "actionable-by-anyone" argument framed sufficiently to address it in the July 7 order. The briefing on Bakhmatyuk's motion does not flesh out this issue either. However, Plaintiffs themselves point out that they allege other Noteholders sold their Notes during the time period that Bakhmatyuk caused the false information to be disseminated. For the sake of completeness, therefore, the Court addresses this issue now.

Plaintiffs argue that their RICO claims are not barred because they do not allege any other investor relied on the misrepresentations and omissions directed to Plaintiffs, i.e., in their negotiations with Bakhmatyuk and his agents to restructure the debts. That is accurate as far as it goes, but it does not address the First Concorde Report, which they allege Concorde sent "to investors, including Gramercy, via electronic mail." ECF 1 at ¶ 72.

Concorde's email sending that report to Plaintiffs is among the communications that Plaintiffs allege as wire fraud in the RICO claims. The inference from their allegations is that the First Concorde Report is fraud in connection with other investors' sales of their Notes. Thus, if the PSLRA bar extends as far as the Defendants argue, the email sending the First Concorde Report would be barred.

However, the "actionable-by-anyone" issue presents a circuit split that the Tenth Circuit has not yet addressed. Three circuits are — to somewhat varying extents —on the same side of the divide as *MLSMK: Howard v. Am. Online Inc.*, 208 F.3d 741, 749-50 (9th Cir. 2000) (although the plaintiffs lacked standing to bring securities fraud claim, the bar nonetheless applied because they "do not dispute that their securities fraud claims could be brought by a plaintiff with proper standing"); *Affco Investments 2001, L.L.C. v. Proskauer Rose, L.L.P.*, 625 F.3d 185, 189-90 (5th Cir. 2010) (not addressing this question but affirming dismissal of RICO claims as barred *and* dismissal of securities fraud claims for failure to plead reliance and scienter); *Lerner v. Colman*, 26 F.4th 71, 82 (1st Cir. 2022) (agreeing with *MLSMK* arguably in *dicta;* there was no security involved, so there was no need to reach whether the scope was "actionable-by-anyone" or not).

The Seventh Circuit appears to disagree with *MLSMK*. *Menzies v. Seyfarth Shaw LLP*, 943 F.3d 328, 333-35 (7th Cir. 2019) analyzed only whether the plaintiff could bring securities fraud, not whether the allegations would be "actionable-by-anyone," a theory the

defendant raised at least in the case below. This holding is arguably *dicta* because although the RICO claim was not barred, the plaintiff also failed to state a claim based on the elements. The district court in *Menzies* concluded, persuasively, that the PSLRA bar cannot be broader than § 1964(c)'s general rule to which it is an exception, thus the bar extends only to RICO claims for which the plaintiff could have brought a securities fraud claim. *Menzies v. Seyfarth Shaw LLP*, 197 F. Supp. 3d 1076, 1105-07 (N.D. Ill. 2016), *aff'd in part, vacated in part*. "Securities fraud conduct that merely injured some third-party (rather than the RICO plaintiff himself) cannot be 'actionable' conduct under a plain reading of the RICO exception, because it does not relate to the 'conduct' being relied upon by the 'person' bringing suit to address 'his' injury to business or property." *Id.* at 1107.

Several courts notes that Congress intended the PSLRA bar to "eliminate securities fraud as a predicate offense in a civil RICO action." *Bald Eagle*, 189 F.3d at 327 (citing H.R. Conf. Rep. No. 104-369, at 47 (1995)). This, however, does not answer whether Congress intended to bar a RICO claim even when there was no actual possibility of a securities fraud action on the facts. Doing so would conflict with Section 1964(c)'s own reference to the PSLRA bar as an "exception;" as a matter of logic, exceptions are not broader than the general rule. It also would not be consonant with other statements in the legislative history that "[t]he 'focus' of the Amendment was on 'completely eliminating the so-called 'treble damage blunderbuss of RICO' in securities fraud cases.'" *Bald Eagle*, 189 F.3d at 327-28 (quoting 141 Cong. Rec. H2771, daily ed. Mar.

7, 1995) (statement of Rep. Cox)). If the plaintiff cannot bring a securities fraud claim, there is no securities fraud action from which to remove treble damages.

In short, the Court finds the interpretation that stays closest to the statutory text of § 1964(c) and the legislative history is that the PSLRA bar regards only RICO claims for which *the plaintiff* could have brought a securities fraud claim. If Congress intended to also bar RICO claims if a third-party could have sued for securities fraud, they could have said "conduct that would have been actionable *by anyone* as fraud in the purchase or sale of securities." They did not do so, and the *MLSMK* approach interprets the statute as though they had. The Supreme Court has consistently interpreted civil RICO by its express terms and will not read in limitations that are not expressed in the statute. *See, e.g., Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 128 S. Ct. 2131, 170 L. Ed. 2d 1012 (2008) (affirming Seventh Circuit's holding that reliance was not required in a civil RICO claim, abrogating Sixth and Eleventh Circuit precedents); *cf., Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 121 S. Ct. 2087, 150 L. Ed. 2d 198 (2001) (reversing Second Circuit's interpretation of civil RICO "person" that added a distinction not expressed in the statute).

In short, Bakhmatyuk has not shown the PSLRA bars the RICO claims, and his motion to dismiss those claims is therefore denied.

IV. Conclusion

Consistent with the foregoing, Bakhmatyuk's motion to stay or dismiss (ECF 75) is DENIED. The time for Bakhmatyuk to answer the complaint is tolled while Piazza Defendants' interlocutory appeal is pending, and if he also files an interlocutory appeal, then until both appeals are concluded.

IT IS SO ORDERED this 15th day of September, 2022.

/s/ Nancy D. Freudenthal
NANCY D. FREUDENTHAL
UNITED STATES SENIOR DISTRICT JUDGE

APPENDIX D — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, FILED APRIL 22, 2024

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 22-8050
(D.C. No. 2:21-CV-00223-NDF)
(D. Wyo.)

GRAMERCY DISTRESSED OPPORTUNITY FUND II L.P., *et al.*,

Plaintiffs-Appellees,

v.

NICHOLAS PIAZZA, *et al.*,

Defendants-Appellants,

and

OLEG BAKHMATYUK,

Defendant.

No. 22-8063
(D.C. No. 2:21-CV-00223-NDF)
(D. Wyo.)

GRAMERCY DISTRESSED OPPORTUNITY FUND II L.P., *et al.*,

Plaintiffs-Appellees,

Appendix D

v.

OLEG BAKHMATYUK,

Defendant-Appellant,

and

NICHOLAS PIAZZA, *et al.*,

Defendants.

ORDER

Before **HARTZ**, **McHUGH**, and **CARSON**, Circuit Judges.

Appellants' petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

/s/ Christopher M. Wolpert
CHRISTOPHER M. WOLPERT, Clerk

APPENDIX E — DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' COMPLAINT IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING, FILED FEBRUARY 7, 2022

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Civil Action No. 0:21-cv-00223-NDF

GRAMERCY DISTRESSED OPPORTUNITY FUND II, L.P., GRAMERCY DISTRESSED OPPORTUNITY FUND III, L.P., GRAMERCY DISTRESSED OPPORTUNITY FUND III-A, L.P., GRAMERCY FUNDS MANAGEMENT LLC, GRAMERCY EM CREDIT TOTAL RETURN FUND, AND ROEHAMPTON PARTNERS LLC,

Plaintiffs,

vs.

OLEG BAKHMATYUK, NICHOLAS PIAZZA, SP CAPITAL MANAGEMENT, LLC, OLEKSANDR YAREMENKO, AND TNA CORPORATE SOLUTIONS, LLC,

Defendants.

Appendix E

Complaint Filed: December 7, 2021
Judge: Hon. Nancy D. Freudenthal

DEFENDANTS NICHOLAS PIAZZA, SP CAPITAL MANAGEMENT, LLC, OLEKSANDR YAREMENKO, AND TNA CORPORATE SOLUTIONS, LLC MOTION TO DISMISS PLAINTIFFS' COMPLAINT

Defendants Nicholas Piazza, SP Capital Management, LLC, Oleksandr Yaremenko, and TNA Corporate Solutions, LLC (the "Moving Defendants"), through undersigned counsel, move this Court to dismiss Plaintiffs' Complaint on the grounds and for the reasons set forth in the Memorandum in Support of this motion filed contemporaneously herewith.

Dated: February 7, 2022

Respectfully submitted,

Nicholas Piazza, SP Capital Management, LLC, Oleksandr Yaremenko, and TNA Corporate Solutions, LLC

BY: /s/ Paula A. Fleck P.C.
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Appendix E

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APPENDIX F — MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS, IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING, FILED FEBRUARY 7, 2022

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Civil Action No. 0:21-cv-00223-NDF

GRAMERCY DISTRESSED OPPORTUNITY FUND II, L.P., GRAMERCY DISTRESSED OPPORTUNITY FUND III, L.P., GRAMERCY DISTRESSED OPPORTUNITY FUND III-A, L.P., GRAMERCY FUNDS MANAGEMENT LLC, GRAMERCY EM CREDIT TOTAL RETURN FUND, AND ROEHAMPTON PARTNERS LLC,

Plaintiffs,

vs.

Appendix F

OLEG BAKHMATYUK, NICHOLAS PIAZZA,
SP CAPITAL MANAGEMENT, LLC,
OLEKSANDR YAREMENKO, AND
TNA CORPORATE SOLUTIONS, LLC,

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS NICHOLAS PIAZZA, SP CAPITAL MANAGEMENT, LLC, OLEKSANDR YAREMENKO, AND TNA CORPORATE SOLUTIONS, LLC'S MOTION TO DISMISS

Judge: Hon. Nancy D. Freudenthal

[TABLES INENTIONALLY OMITTED]

INTRODUCTION

Plaintiffs[1] are vulture investors organized in the Cayman Islands and managed out of Connecticut that purchased unsecured Notes in two Ukrainian companies on the London and Irish Stock Exchanges. The Ukrainian companies, Avangardco IPL ("AVG") and UkrLandFarming PLC ("ULF"), issued Notes to investors in 2010 and 2013, respectively, to raise capital. Both were highly successful companies that lost almost

1. Gramercy Distressed Opportunity Fund II, L.P., Gramercy Distressed Opportunity Fund III, L.P., Gramercy Distressed Opportunity Fund III-A, L.P., Gramercy Funds Management LLC, Gramercy EM Credit Total Return Fund, and Roehampton Partners LLC are referred to herein as "Gramercy" and "Plaintiffs."

half of their business assets and value following the 2014 invasion of the Crimea and devaluation of the Ukrainian currency. Consistent with Plaintiffs' status as vulture investors, Plaintiffs bought their unsecured Notes in AVG and ULF before and *after* the bad news, consistent with three of these Cayman Island Plaintiffs affirmatively calling themselves "*Distressed Opportunity* Funds."

While Plaintiffs now seek litigation opportunities arising from AVG's and ULF's distress, their claims are barred and this Court should grant Moving Defendants' motion to dismiss.[2]

First, there are Subscription Agreements and Trust Deeds governing the Notes providing for mandatory arbitration in London, England, under English law for "any dispute arising out of or connected with the Notes." Plaintiffs' claims should be dismissed, as they are equitably estopped from disclaiming the arbitration clauses in the contracts while asserting legal rights under those same contracts. *GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC*, 140 S. Ct. 1637, 1643–44 (2020).

Second, Plaintiffs lack standing, as their suit is predicated on injury to AVG and ULF, they have suffered the same alleged injury as every other Noteholder, and they are precluded by the "No-Action" clause in the Trust Deed governing their Notes from bringing this suit without first requesting in writing that the Note Trustee

2. Moving Defendants are Nicholas Piazza, SP Capital Management, LLC, Oleksandr Yaremenko, and TNA Corporate Solutions, LLC.

institute such proceeding (and the Trustee failing to do so). *See*, *e.g.*, *Peak Partners, LP v. Republic Bank*, 191 F. App'x 118, 126 (3d Cir. 2006) ("The main function of a no-action clause is to delegat[e] the right to bring a suit enforcing the rights of bondholders to the trustee, or to the holders of a substantial amount of bonds. This function is a central feature of an Indenture, the primary purpose of which is to centralize enforcement powers by vesting legal title to the securities in one trustee.") (internal citations and quotations omitted).

Third, Plaintiffs' Complaint should be dismissed under Rule 19 for failure to join AVG and ULF, which are indispensable parties that cannot be joined—both as a matter of jurisdiction and because of the mandatory arbitration clause.

Fourth, this Court should dismiss this case under a *forum non conveniens* analysis given that virtually all the alleged facts relate to matters in Europe, the United Kingdom, and Ukraine, with the location of the evidence being almost all overseas (witnesses, documents, and third-party witnesses), English law governing the matter by agreement, and the existence of an adequate alternative forum.

Fifth, Plaintiffs RICO claims suffer from a host of infirmities, including:

a. The Court should dismiss Gramercy's RICO claims because RICO does not apply extraterritorially to the conduct alleged by Gramercy. *RJR Nabisco, Inc. v. European Community*, 579 U.S. 325, 337–38 (2016).

b. In 1995, Congress amended the RICO statute to remove securities-related claims, such as what Plaintiffs allege here from serving as a RICO predicate act. *See Bixler v. Foster*, 596 F.3d 751, 755, 760 (10th Cir. 2010) (claim against company's directors and lawyers for transferring assets away and rendering stockholders' investment "worthless falls" within broad scope of prohibition of RICO related securities claims). Plaintiffs' attempt to circumvent this rule should be rejected.

c. The Complaint alleges what amounts to a single scheme to devalue the Notes, not the pattern of racketeering activity required to state a RICO claim.

d. Gramercy's claims must be dismissed for lack of RICO injury, as they remain creditors with contractual and other legal remedies that still hold out the possibility that the debt, and therefore the alleged injury, may be eliminated or significantly reduced.

e. Plaintiffs have failed to meet the standards of Rule 9(b) for their RICO claims that sound in fraud because there is insufficient factual matter as to the Moving Defendants.

Sixth, there is no subject matter jurisdiction over the remaining claims.

Seventh, Plaintiffs have not pleaded personal jurisdiction over Defendant Yaremenko.

In the end, by bringing this action before this Court, Gramercy seeks to ignore the plain language of the documents governing the Notes from which this case stems—the Trust Deeds, Subscription Agreements, and prospectuses—in order to cut in line ahead of secured creditors. Gramercy could have initiated a vote or petitioned the Trustee to take action, but it elected to pursue neither option with the aim of negotiating on its own behalf to get a better deal than the other Noteholders. These sophisticated "distressed opportunity" and "emerging markets" funds appeal to xenophobia to try to recover their debts ahead of secured lenders and to the detriment of the other Noteholders with whom they are on equal footing.

This Court should firmly reject the attempt to disguise this contractual dispute, which is subject to arbitration and other dispute resolution provisions, as a salacious conspiracy to extract treble damages through RICO and dismiss the Complaint.

BACKGROUND

I. PLAINTIFFS ARE SOPHISTICATED INVESTORS THAT PURCHASED UNSECURED ULF AND AVG NOTES WITH DISCLOSURE OF THE RISKS DESCRIBED IN THE COMPLAINT.

While maintaining an office in the United States, Plaintiff investment funds are organized in the Cayman Islands. Compl. ¶ 14. As their own names indicate, these investors focus on "distressed opportunities" and

"emerging markets." *Id.* Their Complaint centers around Gramercy holdings of unsecured Notes of two Ukrainian companies, AVG and ULF. *Id.* ¶¶ 45–50. Both companies were founded by Oleg Bakhmatyuk and incorporated in Cyprus in the 2000s. *Id.* ¶¶ 2 1– 22. AVG produces eggs and egg products in Ukraine, and ULF produces grain, eggs, milk, and meat for human and animal consumption. *Id.*

As described in the Complaint, AVG and ULF sought capital in international financial markets through Note issuances for AVG in 2010 and for ULF in 2013 in London and Ireland, respectively. *Id.* ¶¶ 45–50. Each company provided prospectuses to potential investors that, among other things, disclose the key risks to the companies and to the investment.[3] *See* Exs. 3–4, 7–8.[4]

The disclosed "Risk Factors" include:

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3. The prospectuses are incorporated by reference into the Complaint. *See GFF Corp. v. Associated Wholesale Grocers*, 130 F.3d 1381, 1384–85 (10th Cir. 1997) (holding that courts may consider outside documents that are both central to the plaintiff's claims and to which the plaintiff refers in his complaint without converting the motion to dismiss under Fed. R. Civ. P. 12(b)(6)). When documents incorporated into the complaint conflict with allegations in the complaint, the Court need not accept those allegations as true. *See Slater v. A.G. Edwards & Sons, Inc.*, 719 F.3d 1190, 1196 (10th Cir. 2013).

4. All exhibit citations are in reference to the exhibits attached to the concurrently filed Declaration of Jeanifer E. Parsigian in Support of Defendants' Motion to Dismiss.

- ***"The Ukrainian currency may depreciate further in the near future, given the absence of significant currency inflow from exports and foreign investment, limited foreign currency reserves, the need for borrowers to repay a substantial amount of short-term external debt."*** Ex. 4, AVG Prospectus at 34; *see also* Ex. 3, ULF Prospectus at 46 (emphasis added).[5]

- "Ukraine's economy depends heavily on its trade flows with Russia and the rest of the CIS and ***any major change in relations with Russia could have adverse effects on the economy***." Ex. 4, AVG Prospectus at 36; *see also* Ex. 3, ULF Prospectus at 41 (emphasis added).

- "The Group and its business has been, and will continue to be, controlled by a single ultimate beneficial owner and ***will be subject to related party transactions***." Ex. 4, AVG Prospectus at 9; *see also* Ex. 3, ULF Prospectus at 11 (emphasis added).

- "***The Group has engaged and continues to engage in transactions with related parties that may present conflicts of interest, potentially resulting in the conclusion of transactions on less favourable terms than those that could be obtained in arm's-length transactions.***" Ex.

5. The June 2013 ULF Prospectus is substantively identical to the ULF prospectuses issued in March and May 2013. *See* Exs. 7, 8.

4, AVG Prospectus at 9; *see also* Ex. 3, ULF Prospectus at 23 (emphasis added).

- "Avangard has been and will continue to be controlled by a majority shareholder. The Issuer has four controlling shareholders, each of which is fully owned by Oleg Bakhmatyuk, the Chairman of the Issuer's Board of Directors, who is also a direct shareholder of the Issuer. The Issuer's controlling shareholders and Oleg Bakhmatyuk control approximately 77.5% of the Issuer. As such, the controlling shareholders and Mr. Bakhmatyuk continue to exercise control over the Issuer, such as electing or appointing members of the Board of Directors, approving significant transactions, declaring dividends, if any, limiting or waiving pre-emption rights of the Issuer's shareholders, increasing or decreasing the Issuer's authorised share capital and influencing other policy decisions. In addition, the controlling shareholders and Mr. Bakhmatyuk may engage in business activities with entities that compete with Avangard . . . Any such conflicts of interest or transactions could have a material adverse effect on Avangard's business, results of operations and financial condition." Ex. 4, AVG Prospectus at 9; *see also* Ex. 3, ULF Prospectus at 11.

In addition to these specific disclosures on business risk, the prospectuses disclosed that "the Notes will be structurally subordinated to other liabilities" and that the total outstanding debt was $1.3 billion—most of it secured and ahead of the Notes. *See* Ex. 4, AVG

Prospectus at 12, 26–27; Ex. 3, ULF Prospectus at 37, 54. Further, the disclosures informed potential investors that Ukrainian courts will not enforce foreign court judgments (including those of this Court)[6] but, pursuant to the New York Convention treaty on arbitral awards to which Ukraine and the United Kingdom are parties, will enforce arbitration decisions, as will Cyprus where AVG and ULF are incorporated.[7] Ex. 4, AVG 2010 Prospectus at iv–v; Ex. 3, ULF Prospectus at iii–iv.

In the wake of Russia's annexation of Crimea in 2014, many of these risk factors became a reality, particularly because AVG and ULF had significant operations in eastern Ukraine. Compl. ¶¶ 2, 51, 53–54. The invasion resulted in a global collapse of commodity prices and disruption of the AVG and ULF operations, among other outcomes. *Id.* Yet, even after the invasion, and with notice of its status as an unsecured creditor subordinate to other debts, Gramercy continued purchasing AVG and ULF Notes opportunistically. *Id.* ¶¶ 46–49. Specifically, in October 2014, Gramercy held just over 25% of the AVG Notes, but, by 2017, Gramercy held over 40%, indicating it purchased 15% of the outstanding Notes, amounting to more than one third of its position *after* the events causing AVG to be in distress. *Id.* Similarly, Gramercy

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6. *See also* Ex. 4, AVG 2010 Prospectus at 29; Ex. 3, ULF Prospectus at 46 ("Foreign judgments may not be enforceable in Ukraine.").

7. The prospectuses also disclosed that the Notes would be subject to arbitration and governing law provisions selecting English law and an English forum. Ex. 4, AVG 2010 Prospectus at 222, § 20; Ex. 3, ULF 2013 Prospectus at 244, § 19.

did not reach a position of holding 25% of the outstanding ULF Notes (at which point it obtained certain contractual rights) until July 2016. *Id.* ¶ 49 n. 4.

II. THE TRUST DEEDS GOVERN THE PARTIES' RIGHTS AND OBLIGATIONS INCLUDING AS TO DISPUTE RESOLUTION.

The Complaint admits the Notes are governed by Trust Deeds detailing the rights granted and obligations imposed on the Noteholders (including Plaintiffs), the Trustee, and the Issuers (ULF and AVG) in relation to the AVG and ULF Notes.[8] Compl. ¶¶ 47, 49. Plaintiffs admit they have specific, enumerated rights. *Id.* ¶¶ 47, 49–50, 67. And Plaintiffs assert that the Issuers have specific obligations. *Id.* ¶¶ 47, 49–50, 67, 215–218.

As described in the Complaint, Gramercy alleges that it has the power to block certain modifications to the terms of the Notes and resolutions of the Noteholders. *Id.* ¶¶ 47, 49–50, 67. Gramercy "obtained significant rights, including the right to initiate enforcement proceedings on the Notes and to block certain resolutions of the Noteholders, which equated to a veto right over any proposed restructuring of the Notes[.]" *Id.* ¶ 50.

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8. These documents are incorporated by reference into the Complaint due to Plaintiffs' reliance on them for their claims. *See supra* note 2; Exs. 5–6. In addition to the prospectuses and Trust Deeds, the Subscription Agreements relating to the issuance of the Notes for each company are incorporated into the Complaint and state largely the same terms and disclosures. *See* Exs. 1–2.

Critically, though not revealed in the Complaint, the Trust Deeds select English law as the governing law for the agreements and require arbitration of any disputes connected with the Notes or Trust Deeds.[9]

AVG Trust Deed

20.1 Governing Law

The Trust Deed, the Notes, and the Surety Agreement, and any non contractual obligations arising out of or in connection with

9. The Subscription Agreements similarly contain governing law and arbitration provisions. *See* Ex. 2, AVG Subscription Agreement at 24, § 18 ("This Agreement, and any non-contractual obligations arising out of or in connection with it, shall be governed by and construed in accordance with the laws of England . . . The parties irrevocably agree that any dispute arising out of or connected with this Agreement, including a dispute as to the validity, existence or termination of this Agreement or the consequences of its nullity and/or this Clause 18.2 (a Dispute), shall be resolved . . . by arbitration in London, England, conducted in the English language by three arbitrators, in accordance with the LCIA Rules, which rules are deemed to be incorporated by reference into this clause[.]"); Ex. 1, ULF Subscription Agreement at 31, § 22 ("This Agreement, and any non-contractual obligations arising out of or in connection with it, shall be governed by and construed in accordance with the laws of England. . . . [A]ny dispute arising out of or in connection with this Agreement (including a dispute regarding the existence, validity or termination of this Agreement and a dispute relating to non-contractual obligations arising out of or in connection with this Agreement (a 'Dispute') shall be referred to and finally resolved by arbitration under the LCIA Arbitration Rules.").

them are governed by, and will be construed in accordance with, English law.

29. Arbitration

29.1 Any dispute arising out of or connected with these presents, including a dispute as to the validity, existence or termination of the presents or the consequences of their nullity and/or this clause 29.1 (a Dispute), shall be resolved:

(a) subject to clause 29.1(b) below, by arbitration in London, England, conducted in the English language by three arbitrators, in accordance with the LCIA Rules, which rules are deemed to be incorporated by reference into this Condition . . . ; or

(b) at the option of the Trustee (or where entitled to do so) any Noteholder, by proceedings brought in the courts of England, which courts are to have exclusive jurisdiction. . . .

Ex. 5, AVG Trust Deed at 32, § 29; *id.* at 68, § 20 (emphasis added).

Appendix F

ULF Trust Deed

23.1 Governing Law

This Trust Deed, and any non-contractual obligations arising out of or in connection with it, is governed by, and shall be construed in accordance with, English law.

23.2 Arbitration

23.2.1 Subject to Clause 23.3 (*Courts*), any dispute arising out of or in connection with this Trust Deed (including a dispute regarding the existence, validity or termination of this Trust Deed and a dispute relating to non-contractual obligations arising out of or in connection with this Trust Deed) (a "Dispute") shall be referred to and finally resolved by arbitration under the LCIA Arbitration Rules (the "Rules"), which Rules are deemed incorporated by reference into this Trust Deed, as amended herein;

. . .

23.2.5 The seat of arbitration shall be London, England and the language of the arbitration shall be English.

Ex. 6, ULF Trust Deed at 29, § 23.

In addition to determining *where* and *how* an action must be brought, both the AVG and the ULF Trust Deeds

dictate *who* may bring the action. Specifically, the Trust Deeds contain a "No Action Clause," which affords the first right to act to the Trustee—*not the Noteholders.* The No Action Clause states:

> **2.5 Enforcement action after the Notes become due and payable**
>
> Pursuant to Condition 14 (*Enforcement*),[10] at any time after the Notes become due and payable, the Trustee may, at its discretion and without further notice, institute such proceedings against the Issuer and/or any Surety Provider as it may think fit to enforce the terms of this Trust Deed, the Notes

10. Condition 14 states, "At any time after the Notes become due and payable, **the Trustee may, at its discretion and without further notice, institute such steps, actions or proceedings against the Issuer and/or any Surety Provider as it may think fit to enforce the terms of the Trust Deed, the Notes and/or the Surety Deed (whether by arbitration pursuant to the Trust Deed or the Surety Deed or by litigation)**, but it need not take any such steps, actions or proceedings and nor shall the Trustee be bound to take, or omit to take any step or action (including instituting such proceedings) unless (a) it shall have been so directed by an Extraordinary Resolution or so requested in writing by Noteholders holding at least one-quarter in principal amount of the Notes outstanding and (b) it shall have been indemnified and/or secured and/or prefunded to its satisfaction. **No Noteholder may proceed directly against the Issuer or any Surety Provider unless the Trustee, having become bound so to proceed, fails to do so within a reasonable time and such failure is continuing**." Ex. 6, ULF Trust Deed at 89, § 14. *See also* Ex. 5, AVG Trust Deed at 13, § 7.

> and/or the Surety Deed (whether by arbitration pursuant to the Trust Deed or the Surety Deed or by litigation), but it need not take any such proceedings and nor shall the Trustee be bound to take, or omit to take any step or action (including instituting such proceedings) unless (i) it shall have been so directed by an Extraordinary Resolution or so requested in writing by Noteholders holding at least one-quarter in principal amount of the Notes outstanding and (ii) it shall have been indemnified and/or secured and/or pre-funded to its satisfaction. No Noteholder may proceed directly against the Issuer or any Surety Provider unless the Trustee, having become bound so to proceed, fails to do so within a reasonable time and such failure is continuing.

Ex. 6, ULF Trust Deed at 6–7, § 2.5 (emphases added).[11]

The Trust Deeds provide a clear path for recovery in the event a dispute arises in connection with the Notes, including the right to have the Trustee call for a vote to

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11. *See also* Ex. 5, AVG Trust Deed at 14, § 8.3 ("Only the Trustee may enforce the provisions of these presents. No Noteholder shall be entitled (i) to take any steps or action against the Issuer or the Surety Provider to enforce the performance of any of the provisions of these presents and/or the Surety Agreement or (ii) take any other proceedings (including lodging an appeal in any proceedings) in respect of or concerning the Issuer or the Surety Providers, in each case unless the Trustee having become bound as aforesaid to take any such action, steps or proceedings fails to do so within a reasonable period and such failure is continuing.")

restructure or petition the Trustee to take action under Section 14 of the Trust Deed.

The AVG Notes also have 15 Sureties, and the ULF Notes have 61 Sureties. Ex. 2, AVG Subscription Agreement at 28–33 (Schedule 2); Ex. 1, ULF Subscription Agreement at 37–41 (Schedule 2); Ex. 6, ULF Trust Deed at 70, § 5.4 ("to secure Indebtedness that is expressly subordinated to the Notes or a Surety Provider's Suretyship in respect of the Notes, *provided* that all Obligations under the Notes or the Suretyship, as the case may be, are secured on a senior basis to the Indebtedness so secured").

III. PLAINTIFFS HAVE REFUSED TO ACCEPT REASONABLE TERMS TO RESTRUCTURE THE NOTES.

While the Complaint touts Gramercy's rights as a Noteholder under the Trust Deeds, Gramercy pursued none of its contractual remedies.

The Complaint describes the negotiations that began in 2015, following the Russian invasion and devaluation in Ukrainian currency, and continued into 2019. *See* Compl. ¶ 57. Gramercy asserts these negotiations were not undertaken in good faith but provides no support for this claim. Instead, Gramercy admits that for each of these negotiations, AVG and ULF retained and relied upon the advice of outside consultants, including Ernst & Young and Ziff Ivin, consistently indicated its willingness to engage in good-faith negotiations, and actively engaged Plaintiffs, as further discussed below. *Id.* ¶¶ 86–90, 99, 118, 168, 178, 182, 201.

Appendix F

In 2015, AVG and other Noteholders agreed to a restructuring proposal that extended the maturity date from October 29, 2015 to October 28, 2018 and converted the semi-annual interest payments from cash to payments in kind. *Id*. ¶ 57. Gramercy voted in favor of this restructuring, and it was approved on October 26, 2016. *Id.* Gramercy also voted in favor of a similar scheme of arrangement for the ULF Notes, which was approved on April 22, 2016. *Id.* ¶ 58. These restructuring attempts were part of ongoing efforts to negotiate a longer-term solution for the Noteholders.

Not surprisingly, all of these negotiations occurred in Europe. In 2017, the parties met in London to discuss another potential restructuring proposal. *Id.* ¶ 9 1. Gramercy rejected this offer. *Id.* ¶ 92. Later that year, AVG and ULF retained Ziff, an independent, third-party consultant, whom Gramercy approved of, to provide a restructuring proposal. *Id.* ¶ 99. Under the Ziff proposal, which considered a prior financial audit conducted by Ernst & Young, another third-party consultant, Gramercy would have received 35 to 50 cents on the dollar, with a cash sweep upside. *Id*. While the restructuring proposal expectedly afforded recovery to secured senior creditors first, it would have ensured payment to all creditors over a period of time. Gramercy blocked this proposal from moving forward, despite knowing secured creditors would maintain priority ahead of unsecured creditors, as was expressly contemplated in the prospectuses. *Id.*

In 2018, after Gramercy blocked these efforts, the parties met in London, and ULF/AVG offered Plaintiffs

the option of selling their position, which Plaintiffs also rejected. *Id.* ¶¶ 103, 180. The negotiations continued through 2018, but Gramercy and ULF/AVG were unable to reach an agreement. *Id.* ¶¶ 104–114. They met again in Kyiv in 2019 to further negotiate a potential restructuring that would have resulted in another party's (Cargill's) buyout of Gramercy's position. *Id.* ¶¶ 132–133, 154. Gramercy continued to reject these offers in an attempt to strongarm the negotiations. *Id.* ¶¶ 120–121, 180.

While Gramercy tries to paint itself as the good guy seeking a fair deal for all, even its Complaint reveals this is a farce. Gramercy simultaneously claims it "was consistent in demanding a comprehensive restructuring . . . led by independent advisors, involving a robust due diligence process, and multilateral negotiations [with] all creditors" but admits it *turned down* the request of another unsecured creditor to join together in negotiations. *Id.* ¶¶ 4, 182.

IV. PLAINTIFFS ALLEGE RICO AND TORT CLAIMS AGAINST DEFENDANTS WITHOUT ESTABLISHING THEIR INVOLVEMENT IN THE ACTUAL DISPUTE.

Plaintiffs assert seven causes of action against different combinations of Defendants. Plaintiffs do not assert any claims against ULF or AVG. Because Bakhmatyuk has not yet been served, he is not a part of this Motion to Dismiss. The first cause of action is asserted against all Defendants under the Racketeer Influenced and Corrupt Organizations Act (RICO) 18 U.S.C. § 1962(c),

alleging Defendants, as part of an enterprise, engaged in a pattern of racketeering activity, including wire and mail fraud and inducement to interstate or foreign travel. *Id.* ¶¶ 161– 186. The second cause of action is asserted against Bakhmatyuk under RICO 18 U.S.C. § 1962(b) in addition to and in the alternative to the other RICO claims as a result of Bakhmatyuk's alleged control over the Company. *Id.* ¶¶ 187–195. The third cause of action under RICO 18 U.S.C. § 1962(d), conspiracy to violate the other RICO provisions, is asserted against all of the Defendants. *Id.* ¶¶ 196–207. The fourth cause of action asserts common law fraud against Bakhmatyuk and Piazza resulting from "numerous false communications directed toward Gramercy in connection with their scheme to defraud Gramercy and maintain Bakhmatyuk's control over the Company." *Id.* ¶¶ 208–213. The fifth cause of action asserts tortious interference with contract—namely, the Trust Deeds—against Bakhmatyuk, Piazza, SP Capital, and TNA. *Id.* ¶¶ 214–218. The sixth cause of action asserts civil conspiracy against all of the Defendants. *Id.* ¶¶ 219–222. The seventh cause of action asserts aiding and abetting against all of the Defendants. *Id.* ¶¶ 223–226.

While Plaintiffs' Complaint is lengthy, more telling is the information Plaintiffs *do not* allege. They do not allege that any of the Moving Defendants made any misrepresentations to Gramercy. Plaintiffs attempt to link Piazza to the information presented by Concorde but fail to allege specific connections beyond "upon information and belief." *Id.* ¶¶ 72, 178. There are also no allegations that the sureties are not capable of making payment. Thus, accepting all of the allegations as true, the only claim is

that Moving Defendants purchased AVG and ULF Notes. *Id*. ¶¶ 6, 10. Moreover, Plaintiffs do not and cannot allege that these purchases violate the Trust Deeds or any law. Finally, while Plaintiffs do allege "damages" in theory, those "damages" are far from clear. Plaintiffs vaguely claim that their damages are that they would have sold the Notes at some unspecified time, to an unspecified person, at an unspecified price, or that they would have initiated a restructuring at an unspecified time and would have received something unspecified in return. *Id*. ¶¶ 10, 182, 185, 211. And Plaintiffs seek the same, unspecified relief in an action currently pending in Cyprus court based on the same claimed transfers to Cypriot entity Maltofex alleged in the Complaint. *Id.* ¶¶ 124–127.

LEGAL STANDARD

To survive a motion to dismiss, the facts alleged in a complaint must be enough to state a claim for relief that is plausible, not merely speculative. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007). The Court must accept the well-pleaded allegations of the complaint as true and construe them in plaintiffs' favor, *id*. at 555, but allegations that are purely conclusory are not entitled to an assumption of truth. *Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009).

Appendix F

ARGUMENT

I. THE COURT MUST STAY THIS LITIGATION AND COMPEL ARBITRATION IN LONDON, PURSUANT TO THE ULF AND AVG TRUST DEEDS.

It is well established that the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1 *et seq.*, requires courts to "rigorously enforce agreements to arbitrate." *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987). Indeed, the FAA codifies "a liberal federal policy favoring arbitration agreements," *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24– 25 (1983)—a policy that "applies with special force in the field of international commerce" where, as here, the New York Convention applies. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985); *see*, *e.g.*, *Northrop & Johnson Yachts-Ships, Inc. v. Royal Van Lent Shipyard, B. V.*, 855 F. App'x 468, 471–72 (11th Cir. 202 1) (explaining the "presumption in favor of arbitration" under the FAA "is stronger when the [New York] Convention" is implicated).

When presented with a request to refer an international dispute to arbitration, courts perform a "very limited inquiry" into whether (1) "there is an agreement in writing to arbitrate the subject of the dispute"; (2) "the agreement provide[s] for arbitration in the territory of the signatory of the Convention"; (3) "the agreement arise[s] out of a legal relationship whether contractual or not, which is considered as commercial"; and (4) whether "a party to the agreement not an American citizen" or "the commercial

relationship ha[s] some reasonable relation with one or more foreign states." *Riley v. Kingsley Underwriting Agencie*s, *Ltd*., 969 F.2d 953, 959 (10th Cir. 1992) (citing *Ledee v. Ceramiche Ragno*, 684 F.2d 184, 186–87 (1 st Cir. 1982)).

Here, all four jurisdiction requirements are easily met: *First*, each of the Trust Deeds that Plaintiffs rely on for their claims contains an agreement in writing to arbitrate those claims. *See infra* § I. The arbitration agreements delegate the question of arbitrability to the arbitrator and, in any event, cover this dispute. *Id.* While Moving Defendants are not parties to the Trust Deeds, equitable estoppel prevents Plaintiffs from avoiding arbitration of their claims under those agreements. *Id. Second*, the arbitration agreement provides for arbitration in England, a signatory of the Convention. *See BCB Holdings Ltd. v. Gov't of Belize*, 110 F. Supp. 3d 233, 243 (D.D.C. 2015), *aff'd*, 650 F. App'x 17 (D.C. Cir. 2016) (recognizing that England is a party to the New York Convention). *Third*, the arbitration agreements arise out of the sale of unsecured Notes from ULF and AVG to Plaintiffs and the resulting contractual relationship governed by the terms of the Trust Deeds. *Fourth*, and finally, neither ULF nor AVG, each a party to one of the relevant Trust Deeds, is an American citizen. *See* Compl. ¶¶ 21–22.

Therefore, under the Convention and Sections 3 and 4 of the FAA, the court must stay or dismiss Plaintiffs' action in its entirety and refer this international dispute to arbitration in London.[12]

12. While the Trust Deeds include a term that states that third parties do not have rights under an English statute, the

Appendix F

A. Plaintiffs are equitably estopped from avoiding the valid, enforceable arbitration agreements in the Trust Deeds.

Plaintiffs should be compelled to arbitrate their claims because they are equitably estopped from disclaiming the arbitration clauses in the contracts while asserting legal rights under those same contracts. *GE Energy Power Conversion France SAS, Corp.*, 140 S. Ct. at 1643–44 (explaining that nonsignatories may enforce arbitration agreements subject to the New York Convention through domestic-law equitable estoppel doctrines). Equitable estoppel "precludes a party from asserting rights he otherwise would have had against another when his own conduct renders assertion of those rights contrary to equity." *Lenox MacLaren Surgical Corp. v. Medtronic, Inc.*, 449 F. App'x 704, 708 (10th Cir. 2011) (internal citation and quotation omitted) (unpublished). Under this doctrine, a signatory to an arbitration agreement "cannot, on the one hand, seek to hold the non-signatory liable pursuant to duties imposed by the agreement, which contains an arbitration provision, but, on the other hand, deny arbitration's applicability because the defendant is a non-signatory." *Id.* (internal citation omitted).

Contract (Rights of Third Parties) Act 1999 (the "Act") to enforce the Trust Deed, the term states it "does not affect any right or remedy of a third party which exists or is available apart from the Act." Ex. 5, AVG Trust Deed at 33, § 32; *see also* Ex. 6, ULF Trust Deed, Terms and Conditions of the Notes at 19, § 18. Thus, the term does not affect—and expressly preserves—Moving Defendants' right to compel arbitration under the doctrine of equitable estoppel, which exists and is available apart from the Act.

"The scope of the arbitration agreement, including the question of who it binds, is a question of state contract law." *Reeves v. Enter. Prods. Partners, LP*, 17 F.4th 1008, 1011 (10th Cir. 2021) (citing *Arthur Andersen L.L.P. v. Carlisle*, 556 U.S. 624, 630–31 (2009)). While neither the Wyoming Supreme Court nor any other Wyoming state court or any federal court interpreting Wyoming law has yet to address the circumstances under which a nonsignatory may enforce an arbitration clause, the Court may seek guidance on this question from "the general weight and trend of authority in the relevant area of law." *Id.* at 1012 (internal quotation omitted) (looking to Oklahoma state appellate court decisions and other state and federal jurisdictions for guidance. The Tenth Circuit, like others, has held that equitable estoppel permits a nonsignatory to compel arbitration in two, independent circumstances: (1) when the signatory must "rely on the terms of the written agreement containing the arbitration clause" or (2) when the signatory raises allegations of "substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract." *Id.* (noting that "[m]any other states and circuits have adopted th[is] . . . understanding of equitable estoppel") (internal citations and quotations omitted). Here, Plaintiffs are estopped from avoiding the arbitration agreement under either prong, as each applies.

First, there is no question Plaintiffs must rely on the terms of the Trust Deeds in asserting their claims. For purposes of equitable estoppel under this first prong, a plaintiff's claims are said to "rely" on the contract where the contract "form[s] the legal basis of those

claims." *Lenox*, 449 F. App'x at 709 (internal citations and quotations omitted). The claims must be "so intertwined with the agreement" that "it would be unfair to allow the signatory to rely on the agreement in formulating its claims but to disavow availability of the arbitration clause of that same agreement." *Id.* at 710 (internal quotation omitted). Here, the entire crux of Plaintiffs' allegations is that Defendants carried out a scheme designed to prevent Gramercy from exercising its rights under the ULF and AVG Trust Deeds that contain the arbitration agreements:

- Each cause of action asserted in the Complaint is based on Gramercy's inability to exercise its rights under the Trust Deeds. Compl. ¶ 168 (alleging that the aim of the RICO enterprise's unlawful conduct was to "employ[ ]all means necessary to prevent Gramercy . . . *[f]rom exercising its contractual rights under the Notes* . . . "); *id.* ¶ 212 (alleging that Defendants "fraudulently induced Gramercy *to forego enforcement of its contractual rights*"); *id.* ¶ 217 (alleging Defendants "intentionally and wrongfully *interfered with [AVG and ULF's] contractual obligations*, and in doing so, *caused [AVG and ULF] to breach [their] contractual obligations to Gramercy*, rendered [them] completely unable to perform under [the] contracts with Gramercy, and *destroyed Gramercy's contractual rights to remedy the breach*"); *id.* ¶ 220 (alleging Defendants "combined and agreed to participate in a scheme designed to defraud Gramercy and *deprive it of its contractual rights*") (emphases added to all).

- The Complaint alleges that Gramercy purchased AVG and ULF Notes; that the Notes were governed by the AVG Trust Deed and ULF Trust Deed, respectively; that the terms of the Trust Deeds impose certain restrictions on the companies' activity (i.e., requiring any sale of material assets be for fair market value and be reported to the Trustee); and that Gramercy, "as the holder of more than 25% of the principal amount of the total" of each the AVG and ULF Notes outstanding, "*had the power to initiate proceedings to enforce the terms of the Trust Deeds* and to effectively veto any proposed restructuring of the Notes." Compl. ¶¶ 45–50 (emphasis added).

- The Complaint then describes in over 100 paragraphs an alleged "multi-faceted scheme . . . that *illegally undermined Gramercy's legal and economic rights*" *under the Trust Deeds* "through the intentional dissemination of misinformation (including direct misrepresentations), non-arms-length debt purchases, and asset stripping." *Id.* ¶ 70 (emphasis added).

- The entire action is predicated on the Trust Deeds and the allegation that Defendants transferred away assets in violation of the arrangement set forth in the Trust Deeds, which is cited multiple times for that purpose. *See*, *e.g.*, *id.* ¶ 76 ("[C] hanges in the Company structure between 2012 and 2016 . . . caused ULF's 'direct control

of its key assets [to be] dispersed between the group's other subsidiaries;" but "[n]one of these transfers were publicly disclosed by the Company or disclosed to the Trustee *as required under both Trust Deeds*."); *id.* ¶ 127 ("[T]he Company failed to give notice to the Trustee of these affiliate transactions, *as required under the Trust Deeds*" and "failed to follow the terms of the asset sale restrictions *in the Trust Deeds*."); *id.* ¶ 145 ("[T]he Company did not disclose the change to the Trustee under the Notes or the Noteholders, *despite being required to do so by the Trust Deeds*."); *id.* ¶ 146 ("*[T]he terms of the Trust Deeds require* the Company to report material dispositions or restructurings promptly and to give notice of affiliate transactions over $5 million, but ULF never provided such a report about either the Maltofex or TNA Transfers") (emphases added to all).

- Plaintiffs' tortious interference claim alleges interference with—and thus relies entirely on—the ULF and AVG Trust Deeds. *See id.* ¶¶ 214–18 (alleging "Gramercy *formed binding contracts with the Company, the terms of which are contained in the ULF Trust Deed and the AVG Trust Deed*" and Defendants "intentionally and wrongfully interfered with these contractual obligations") (emphasis added).

Thus, Plaintiffs' claims are predicated upon the existence and validity of the Trust Deeds—not only factually but

also legally. It would be unfair to allow Plaintiffs to avoid the arbitration provisions of those same agreements. *Lenox*, 449 F. App'x at 709; *see also*, *e.g.*, *Weller v. HSBC Mortg. Servs., Inc.*, 971 F. Supp. 2d 1072, 1083 (D. Colo. 2013) (finding signatory's claim against nonsignatory defendant "should be arbitrated under the principles of equitable estoppel" because "[t]here would be no legal basis for [the] claim without the underlying [ ] agreement of which the arbitration clause is an integral part").

Second, Plaintiffs are estopped under the second prong because they allege concerted misconduct by both nonsignatories *and* signatories to the Trust Deeds: ULF and AVG. Estoppel under the second prong is appropriate where the allegations show that the claims against the nonsignatory are "intimately founded in and intertwined with the obligations imposed by the contract containing the arbitration clause." *Lenox*, 449 F. App'x at 710 (quotation omitted). Importantly, courts apply this prong to estop a signatory from avoiding arbitration even where the "concerted misconduct" alleged is between a defendant-nonsignatory (here, Moving Defendants) and a non-party signatory (here, ULF and AVG). *See*, *e.g.*, *Reeves*, 17 F. 4th at 1014–15 ("The linchpin for equitable estoppel is equity—fairness," and "it is 'especially inequitable' when a 'signatory non-defendant . . . is charged with interdependent and concerted misconduct with a nonsignatory defendant' . . . and the signatory 'in essence' becomes a party to the litigation.").

As demonstrated above, Plaintiffs' claims are entirely dependent on AVG and ULF's obligations to Gramercy

under the Trust Deeds—so much so, that Plaintiffs devote an entire section of the Complaint to listing those obligations so they can then explain how Defendants allegedly interfered with their ability to enforce them. *See* Compl. ¶¶ 45–50; *see Lenox*, 449 F. App'x at 710 (A plaintiff 's "actual dependance on the underlying contract in making out the claim against the nonsignatory defendant is [ ] always the *sine qua non* of an appropriate situation for applying equitable estoppel."). This dispute will unquestionably involve facts regarding how ULF and AVG allegedly failed to comply with the terms of the Trust Deeds that Gramercy was then allegedly prevented from enforcing. As such, Plaintiffs' claims against Defendants are "inherently inseparable" from and "integrally related" to their relationship and agreement with each of ULF and AVG. *Reeves*, 17 F.4th at 1014; *see also*, *e.g.*, *Roe v. Gray*, 165 F. Supp. 2d 1164, 1174–75 (D. Colo. 2001) (holding nonsignatories could compel arbitration where claims against them "were based on the same factual allegations, and even the same contract, as the claims against [signatories]" to the arbitration agreements). Plaintiffs cannot now avoid the arbitration agreements in the Trust Deeds merely by intentionally omitting ULF and AVG as named defendants. *See Reeves*, 17 F.4th at 1014 ("The purpose of the doctrine of equitable estoppel is to prevent parties playing fast and loose with the courts and also to protect[ ] the judicial system. [Plaintiffs] simply plead around [non-party signatories], who would have to become crucial parties to the litigation," to attempt to avoid arbitration.).

Finally, Plaintiffs assert no allegations of fraud in the inducement or anything else that would call the validity

of the arbitration agreements in the Trust Deeds into question. Absent any claim the agreements containing the arbitration clauses are themselves are unenforceable (which Plaintiffs could not make because their claims depend on the validity of these agreements) the FAA requires this Court to enforce them. *See Belnap v. Iasis Healthcare*, 844 F.3d 1272, 1280 (10th Cir. 2017) (a "court 'shall' order arbitration 'upon being satisfied that the making of the agreement for arbitration . . . is not in issue'") (quoting 9 U.S.C. § 4).

B. The arbitration agreements in the Trust Deeds are broad and encompass all of Plaintiffs' claims.

The arbitration agreements in the Trust Deeds require all disputes related to the Notes held by Plaintiffs to be resolved in arbitration in London, England. *See* Ex. 5, AVG Trust Deed at 32, § 29.1; Ex. 6, ULF Trust Deed at 30, § 23.2.1. This Court "must 'place[the] arbitration agreements on an equal footing with other contracts, and . . . enforce [it] according to [its] terms.'" *Belnap*, 844 F.3d at 1280 (quoting *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 67 (2010)); *accord GE Energy*, 140 S. Ct. at 1643. Because arbitration "is simply a matter of contract," parties may agree not only to arbitrate the merits of a dispute, but also to arbitrate the threshold question of arbitrability. *Id.* Thus, before deciding whether a dispute falls within the scope of a valid arbitration agreement, the court must first determine whether the parties have agreed that *arbitrators*—rather than the court—should decide arbitrability. *Id.* at 1280–81. Whereas here, the

parties have agreed to arbitrate arbitrability, the court must stay the litigation and compel all claims to arbitration so that an arbitrator can decide arbitrability in the first instance. *Id*. at 1292–93.

Each Trust Deed delegates arbitrability to the arbitrator. While there is a general presumption under the FAA that the threshold issue of arbitrability should be determined by a court, questions of arbitrability must be referred to an arbitrator where there is "clear and unmistakable" evidence from the arbitration agreement that the parties intended the question of arbitrability to be resolved by an arbitrator. *Id*. at 1290. Moreover, the court may infer such intent from the incorporation in the agreement of rules that making arbitrability subject to arbitration. *Id.* Here, the Trust Deeds incorporate the London Court of International Arbitration (LCIA) Arbitration Rules. *See* Ex. 5, AVG Trust Deed at 32, § 29.1 ("Any dispute . . . shall be resolved . . . in accordance with the LCIA Rules, which rules are deemed to be incorporated by reference into this Condition."); Ex. 6, ULF Trust Deed at 29, § 23.2.1 ("[A]ny dispute . . . shall be referred to and finally resolved by arbitration under the LCIA Arbitration Rules (the 'Rules'), which Rules are deemed incorporated by reference into this Trust Deed."). The LCIA Arbitration Rules, in turn, provide for the arbitration of arbitrability disputes:

> The Arbitral Tribunal shall have the power to rule upon its own jurisdiction and authority, including any objection to the initial or continuing existence, validity, effectiveness or scope of the Arbitration Agreement.

LCIA Arbitration Rules (2020), Article 23.1.[13] Thus, the incorporation of the LCIA Rules satisfies the "clear and unmistakable" evidence necessary to require that questions of arbitrability be referred to the arbitrator. *See Belnap*, 844 F.3d at 1281 (finding that incorporation of substantively identical JAMS Rules constituted "clear and unmistakable" evidence of an intent to arbitrate arbitrability).[14]

Even if the Court had the authority to decide the issue of arbitrability, Plaintiffs claims fall within the arbitration agreements' broad scope. The strong presumption favoring arbitration "applies with even greater force"

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13. The previous versions of the LCIA Arbitration Rules in effect at the time the Trust Deeds and Supplemental Trust Deeds were executed include the same rule vesting authority to decide arbitrability disputes with the arbitrator. *See* LCIA Arbitration Rules (2014), Article 23.1; LCIA Arbitration Rules (1998), Article 23.1.

14. *See also*, *e.g.*, *ROI Props. Inc. v. Burford Cap. Ltd.*, No. CV-18-03300-PHX-DJH, 2019 WL 1359254, at *4 (D. Ariz. Jan. 14, 2019) (The "gateway issue of arbitrability must be left to the arbitrator because the [] arbitration provision specifically provides that the LCIA rules govern arbitrations and the LCIA rules provide that the arbitrator decides the issues of arbitrability."); *SteppeChange LLC v. VEON Ltd.*, 354 F. Supp. 3d 1033, 1043 (N.D. Cal. 2018) ("The invocation of the LCIA Rules in the [deed] constitutes clear and unmistakable evidence that the parties have agreed to arbitrate arbitrability."); *Innospec Ltd. v. Ethyl Corp.*, No. 3:14-CV-158-JAG, 2014 WL 5460413, at *3 (E.D. Va. Oct. 27, 2014) ("The incorporation of the LCIA Rules, which give the arbitrator jurisdiction to determine arbitrability, meets the 'clear and unmistakable' standard.").

when a broad arbitration clause is at issue. *P&P Indus., Inc. v. Sutter Corp.*, 179 F.3d 861, 871 (10th Cir. 1999). Under the FAA, "a court *must* stay proceedings if satisfied that the parties have agreed in writing to arbitrate an issue or issues underlying the district court proceeding." *Williams*, 203 F.3d at 764 (emphasis added) (quotation omitted); 9 U.S.C. § 3.

Here, the arbitration agreements encompass "any dispute arising out of or in connection with" the Trust Deeds. Ex. 5, AVG Trust Deed at 32, § 29.1; Ex. 6, ULF Trust Deed at 29, § 23.2. The Tenth Circuit has interpreted the phrase "arising out of," as used in an arbitration agreement, broadly to mean "originating from," "growing out of," or "flowing from." *Williams*, 203 F.3d at 765. Moreover, an arbitration agreement adding the language "in connection with" has also been interpreted "quite expansively." *Dodson Int'l Parts, Inc. v. Williams Int'l Co. LLC*, 12 F.4th 1212, 1220 (10th Cir. 2021); *see also Brown v. Coleman Co.*, 220 F.3d 1180, 1184 (10th Cir. 2000) (holding that an arbitration clause covering all disputes "arising under or in connection with" the agreement is "the very definition of a broad arbitration clause as it covers not only those issues arising under the [ ] contract, but even those issues with any connection to the contract"). Here, as described above, all of Plaintiffs' claims flow from and have a direct connection to the Trust Deeds; indeed, without the Trust Deeds, Plaintiffs would have *no* claims. Plaintiffs cannot avoid the arbitration provisions they agreed to by masking their contract claims as tort claims. *See* C*helsea Family Pharmacy, PLLC v. Medco Health Sols., Inc.*, 567 F.3d 1191, 1198 (10th Cir.

2009) ("Focusing on the facts rather than on a choice of legal labels prevents a creative and artful pleader from drafting around an otherwise-applicable arbitration clause."); *Lawit v. Maney & Gordon, P.A.*, No. 13-CV-0835 SMV/LFG, 2014 WL 11512612, at *4 n.2 (D.N.M. Jan. 17, 2014) ("It is well-established that a party cannot avoid arbitration by simply casting its complaint in tort instead of contract.") (collecting cases).

II. THE "NO-ACTION" CLAUSE PRECLUDES THIS ACTION

Plaintiffs lack standing to bring this action seeking to recover for alleged injuries of ULF and AVG that are alleged to have had assets transferred away. The Trust Deeds expressly preclude Plaintiffs from bringing those claims. Under English law, which governs the Trust Deeds and Plaintiffs' claims arising thereunder, Plaintiffs as Noteholders have no standing to pursue claims against third parties on behalf of the issuers, ULF and AVG, without first satisfying procedural requirements set forth in the Trust Deeds (which they have not). Likewise, Plaintiffs would lack standing to bring the issuers' claims on their own behalf if U. S. law applied to those claims. Thus, regardless of which law is applied, Plaintiffs lack standing to bring this action.

Plaintiffs assert claims for RICO, RICO conspiracy, fraud and tortious interference based on ULF and AVG's alleged loss of assets that, they claim, rendered the Notes less valuable. *See*, *e.g.*, Compl. ¶¶ 181–186, 200–206, 212–213, 219–220. Plaintiffs, as Noteholders, generally lack

standing under U.S. law to seek recovery on their own behalf for injuries to ULF and AVG. *See Bixler*, 596 F.3d at 758 (dismissing investors' RICO claims for lack of standing because alleged "injuries were based on the diminution of the value of [investors'] shares, and not on direct injury to them"); *Baltus-Michaelson v. Credit Suisse First Bos., LLC*, 116 F. App'x 308, 310 (2d Cir. 2004) ("It is well-settled that shareholders lack standing to assert individual claims based on injury to the corporation" and not on "a duty owed to them or injury sustained by them that is separate and distinct from that of the corporation."); *Rand v. Anaconda-Ericsson, Inc.*, 794 F.2d 843 (2d Cir.), *cert. denied*, 479 U.S. 987 (1986) (shareholder of an injured corporation did not have individual standing to bring a claim under civil RICO).

Plaintiffs assert rights they have only by virtue of being Noteholders in ULF and AVG and allege no injury different from the injury that affects all Noteholders equally because of the loss of company assets. Generally, under the law of the United States, in order to bring such a derivative claim on behalf of the company, a securityholder must first make a demand on the corporation and its directors and officers to take action, which demand is refused. *See Bixler*, 596 F.3d at 757–58 (Generally, investors are "prohibit[ed] . . . from initiating actions to enforce the rights of the corporation unless the corporation's management has refused to pursue the same action for reasons other than good-faith business judgment"); *see also*, *e.g.*, Fed. R. Civ. P. 23.1 (providing that a shareholder may not bring a derivative action to enforce a right of the corporation without first demanding

that the directors of the corporation take action, or stating that such demand would be futile). This is particularly true where, as here, a no-action clause in the deed governing the underlying issuance expressly requires individual creditors to act through an appointed trustee to enforce the terms of that deed. *Akanthos Cap. Mgmt., LLC v. CompuCredit Holdings Corp.*, 677 F.3d 1286, 1293 (11th Cir. 2012) (recognizing that "no-action clauses have generally been upheld by courts") (quotation omitted); *Peak Partners*, 191 F. App'x at 127 ("The main function of a no-action clause is to delegat[e] the right to bring a suit enforcing the rights of bondholders to the trustee, or to the holders of a substantial amount of bonds. This function is a central feature of an Indenture, the primary purpose of which is to centralize enforcement powers by vesting legal title to the securities in one trustee.") (internal citation and quotation omitted).

Indeed, the no-action clause in the Trust Deeds governing Plaintiffs claims make this abundantly clear. The Trust Deeds vest the respective Trustee with sole authority to enforce rights arising under the Deeds and expressly prohibit Noteholders, such as Plaintiffs, from doing so on an individual basis:

> **2.5 Enforcement action after the Notes become due and payable**
>
> Pursuant to Condition 14 (*Enforcement*), at any time after the Notes become due and payable, *the Trustee may, at its discretion and without further notice, institute such proceedings*

> *against the Issuer and/or any Surety Provider as it may think fit to enforce the terms of this Trust Deed, the Notes and/or the Surety Deed* (whether by arbitration pursuant to the Trust Deed or the Surety Deed or by litigation), but it need not take any such proceedings and nor shall the Trustee be bound to take, or omit to take any step or action (including instituting such proceedings) *unless (i) it shall have been so directed by an Extraordinary Resolution or so requested in writing by Noteholders holding at least one-quarter in principal amount of the Notes outstanding* and (ii) it shall have been indemnified and/or secured and/or pre-funded to its satisfaction. *No Noteholder may proceed directly against the Issuer or any Surety Provider unless the Trustee, having become bound so to proceed, fails to do so within a reasonable time and such failure is continuing.*

Ex. 6, ULF Trust Deed at 6–7, § 2.5.[15] Specifically, the "no-action clause" precludes Plaintiffs from bringing suit to enforce the terms of the Trust Deed on their own behalf without first requesting in writing that the Trustee institute such proceeding, and the Trustee's failure to do so. Plaintiffs have not taken this step, and do not allege that they have. The requirement that creditors act through a trustee to pursue derivative claims based on injury to the company is entirely consistent with applicable English law. *See* Ex. 11, *In the matter of Colt Telecom Group plc*

15. *See also* Ex. 5, AVG Trust Deed at 14, § 8.3.

[2002] EWHC 2815 (Ch) ¶ 62 (finding no "evidence of harm to the public by the enforceability of [no-action] clauses so far as this country [England] or any other country is concerned"); *see also* Ex. 9, U.K. Companies Act 2006, Part 11 (setting forth procedural requirements that must be met before shareholders may pursue a derivative claim on behalf of the company). English courts do not hesitate in enforcing no-action clauses to prevent Noteholders from doing exactly what Plaintiffs attempt with their Complaint—namely, to circumvent the process negotiated and agreed to through the Trust Deeds, the purpose of which is to "promote liquidity" by ensuring Noteholders "act through the Trustee, and share equally in the fortunes of the investment, and not compete with each other." Ex. 10, *Elektrim SA v. Vivendi Holdings 1 Corp*, [2008] EWCA Civ 1178, ¶ 101 (the "no action clause should be construed, to the extent reasonably possible, as an effective bar to individual bondholders pursuing, for their own account, what are in substance class claims").

Moreover, English courts have interpreted no-action clauses broadly to encompass tort claims where, as here, the alleged injury was ultimately loss of a contractual right. *See, e.g.*, *id.* ¶¶ 104–105 (finding no- action clause barred suit where, although the cause of action was "framed as a claim in the tort of 'fraud' . . . the object of the claim [wa]s to compensate [Bondholder] for the loss of a contractual right or entitlement under the Bond Terms which it had by virtue of being a Bondholder"); Ex. 11, *Colt Telecom* at ¶¶ 56–61 (finding claim for administration was a "remedy with respect to [the] Indenture or the Notes" and, therefore, barred by the no-action clause); Compl.

¶ 181 (alleging Defendants "sabotaged Gramercy's *legal and economic rights* as one of the largest creditors of the Company by. . . . *rendering Gramercy's contractual right . . . ineffectual or worthless*") (emphases added). Plaintiffs do not challenge the validity of the no-action clauses or the Trust Deeds themselves; they simply ignore them. Plaintiffs cannot escape English law or their obligations under the Trust Deeds by bringing their derivative claims in a U.S. court.

III. THE COMPLAINT SHOULD BE DISMISSED BECAUSE ULF AND AVG ARE INDISPENSABLE PARTIES THAT CANNOT BE JOINED.

Rule 12(b)(7) provides that a complaint may be dismissed for failure to join a party under Rule 19, which sets out a two-step test for determining whether dismissal is appropriate. First, the court determines whether joinder is required, either because "(1) in th[e] person's absence, the court cannot accord complete relief among existing parties;" or (2) failure to join would "leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest." Fed. R. Civ. P. 19(a). If joinder is not feasible, the court must then decide "whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed," considering the factors enumerated in Rule 19(b). *Merrill Scott & Assocs., Ltd. v. Concilium Ins. Servs.*, 253 F. App'x 756, 762 (10th Cir. 2007) (quoting *Davis v. United States*, 192 F.3d 951, 959 (10th Cir. 1999)). Under this test, ULF and AVG are required parties without which it would be improper to

proceed under Rule 19. *See Symes v. Harris*, 472 F.3d 754, 760–61 (10th Cir. 2006).

A. ULF and AVG are required parties under Rule 19(a).

ULF and AVG are required parties under both prongs of Rule 19(a) because the Court cannot accord complete relief in their absence and their absence would create a substantial risk of double recovery or inconsistent obligations.

To begin, ULF and AVG unquestionably have an interest in the subject of this action. Indeed, the entire impetus of Gramercy's claims is its purchase of ULF and AVG's Notes. The Tenth Circuit has held that where a party's claims are premised on rights against a corporation, yet the action is brought against the individual, the corporation is a necessary party. *Id.* at 760. Plaintiffs' claims put squarely at issue ULF and AVG's rights, obligations, and performance with respect to the Notes. Proceeding with this action could lead to a determination that their actions breached the relevant agreements *in their absence* and would certainly deprive them of their rights to have disputes related to the Notes litigated in the manner described in those agreements.

Further, this Court cannot grant full relief because Plaintiffs will retain their interest in the outstanding Notes and could stand to collect on the debt from ULF and AVG, while recovering here based on the claim that they would have sold the Notes at a market value absent the alleged

conduct. Alternatively, Plaintiffs (or other Noteholders) could seek to exercise their rights under the agreements to have the Trustee bring an action in the London Court of International Arbitration that could entitle Plaintiffs to a double recovery. Thus, there is substantial risk that Defendants in this matter may incur "double, multiple, or otherwise inconsistent obligations—the precise harm [Rule 19] was partially designed to avoid." *Id.*

However, while they are required parties, ULF and AVG cannot be joined. In the first instance, if they were named, the arbitration agreement for any dispute arising from the purchase of the Notes and the "no-action" clause of the agreements would unquestionably apply. Moreover, it is extremely unlikely that Plaintiffs could plead personal jurisdiction over the Ukrainian entities. Thus, the Court must move to the second step and determine whether ULF and AVG are indispensable.

B. ULF and AVG are indispensable parties under Rule 19(b).

"Fed. R. Civ. P. 19(b) provides that [i]f a person as described in subdivision (a)(1)–(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable." *Id.* The Court must consider "(1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties; (2) the extent to which any prejudice could be lessened or avoided . . . ; (3) whether a judgment

rendered in the person's absence would be adequate; and (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder." Fed. R. Civ. P. 19(b).

Here, the prejudice to ULF or AVG is obvious, as Plaintiffs' claims would require the Court to decide whether ULF or AVG acted in breach of the Subscription Agreements or Trust Deeds, which creates the possibility of consequences for those entities in other jurisdictions. There is no way to ameliorate this risk. In addition, a judgment rendered without the issuers of the Notes would be inadequate. Gramercy would continue to hold outstanding debt and the restructuring disputes would remain unresolved.

Finally, Gramercy has an adequate remedy through arbitration in London. *See infra* § IV.A (discussing the adequacy of London as adequate alternative forum). Dismissal would not foreclose Gramercy's ability to pursue its claims in the proper forum—arbitration in London. In sum, ULF and AVG are not only necessary but also indispensable parties because all the equitable considerations of Rule 19(b) weigh in favor of dismissal.

IV. THE CASE SHOULD BE DISMISSED UNDER THE DOCTRINE OF FORUM NON CONVENIENS.

The proper forum for this matter, as plainly established in the Trust Deeds, Subscription Agreements, and prospectuses, is the London Court of International Arbitration. The Court should dispose of this matter easily under the doctrine of forum non-conveniens.

Two threshold requirements must be met in order to dismiss on the basis of forum non conveniens. First, there must be an "adequate alternative forum where the defendant is amenable to process." *Archangel Diamond Corp. Liquidating Trust v. Lukoil*, 812 F. 3d 799, 804 (10th Cir. 2016) (quoting *Fireman's Fund Ins. Co. v. Thyssen Mining Constr. of Can., Ltd.*, 703 F.3d 488, 495 (10th Cir. 2012)). "Second, 'the court must confirm that foreign law is applicable.'" *Id.* "[I]f both threshold requirements are met, the court weighs the private and public interests to determine whether to dismiss" the case. *Id.* Here, the threshold requirements are met because (1) the London Court of International Arbitration is an adequate, available forum, in light of the Subscription Agreements, Trust Deeds, and prospectuses and as affirmed by Tenth Circuit case law; (2) foreign law is applicable, even where the claims alleged arise under RICO; and (3) both private and public interests weigh in favor of dismissal.

A. The London Court of International Arbitration is an adequate alternative forum.

At the outset of any forum non conveniens inquiry, the court must determine whether there exists an alternative forum. Ordinarily, this requirement will be satisfied when the defendant is "amenable to process" in the other jurisdiction. *Yavuz v. 61 MM, Ltd.*, 576 F.3d 1166, 1172 (10th Cir. 2009); *Gschwind v. Cessna Aircraft Co.*, 161 F.3d 602, 605–06 (10th Cir. 1998); *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.22 (1981). Given that each of the relevant contracts in this matter not only permit but also affirmatively requires arbitration of

any disputes connected to the Notes arbitration before the LCIA, Moving Defendants are amenable to process in England, which has been widely recognized as an adequate alternative forum. *See Levien v. hibu plc*, 475 F. Supp. 3d 429, 439 (E.D. Pa. 2020) ("As numerous courts have recognized, the judicial system in England is plainly adequate.") (citing *Wilmot v. Marriott Hurghada Mgmt., Inc.*, 712 F. App'x 200, 204 (3d Cir. 2017)), *aff'd*, No. 20-2731, 2021 WL 5742664 (3d Cir. Dec. 2, 2021).

Further, English law provides an adequate remedy for Plaintiffs' claims. The remedy provided by the alternate forum "need not be the same as that provided by the American court." *Yavuz*, 576 F.3d at 1174 (quoting *Gschwind*, 161 F.3d at 607). "Instead, the alternative forum is not inadequate unless its remedy is "so clearly inadequate . . . that it is no remedy at all." *Piper Aircraft Co.*, 454 U.S. at 254. While Plaintiffs' claims are brought under RICO, courts have expressly held that this is not a basis for denying dismissal on the grounds of forum non conveniens. *Archangel*, 812 F.3d 799 at 804–805 ("Federal courts have refused to afford RICO claims special treatment in *forum non conveniens* inquiries and have found dismissal on this basis proper in cases involving RICO claims.") (quoting *Windt v. Qwest Commc'ns Int'l, Inc.*, 529 F.3d 183, 193 (3d Cir. 2008)).[16] Thus, as the Tenth

16. *See also Kempe v. Ocean Drilling & Expl. Co.*, 876 F.2d 1138, 1145 (5th Cir.) (absence of equivalent of RICO in foreign jurisdiction does not bar dismissal on grounds of forum non conveniens where foreign law permits recovery for fraud, negligence, and breach of fiduciary duty), *cert. denied*, 493 U.S. 918 (1989).

Circuit did in *Archangel*, this Court should not foreclose consideration of forum non conveniens when some of the claims are based on U.S. law and some are based on foreign law, particularly where, as here, the contracts unequivocally state that English law governs. *Id.* ("To do otherwise would allow a party to avoid a forum non conveniens dismissal simply by including a claim based upon a domestic statute."); *Gas Sensing Tech. Corp. v. Ashton*, No. 16-CV-272-F, 2017 WL 2955353, at *15 (D. Wyo. June 12, 2017) (Freudenthal, J.) (dismissing on the basis of forum non conveniens where the "majority of the case" was subject to Australian law).

B. English law applies.

The Subscription Agreements, Trust Deeds, and prospectuses each select English law as the governing law. *See supra* pp. 7—8. Even if the Court were to determine these documents do not govern the issue, there would be still no reason U.S. law would apply. Both ULF and AVG are Ukrainian businesses, such that Ukrainian law would be appropriate. Further, all the conduct alleged in the complaint occurred in England or Ukraine, such that there is no basis to apply U.S. law over the law of those countries. Moving Defendants have met the threshold requirements of showing foreign law applies and an adequate alternative forum exists. The Court should thus move to weighing the private and public interests that all favor dismissal on forum non conveniens.

C. Private and public interests weigh in favor of dismissal.

The many private and public interest factors considered for forum non conveniens uniformly weigh against finding Wyoming a proper forum. Indeed, all signs for the appropriate forum point outside of the United States, namely England or Ukraine. This case involves the purchase of Notes from a Ukrainian business by Cayman Island investors through the London and Irish Stock Exchanges. Compl. ¶¶ 14, 21–22; Ex. 2, AVG Subscription Agreement at 6; Ex. 1, ULF Subscription Agreement at 2. Plaintiffs are not Wyoming residents, so their "choice of forum 'warrants less deference'" in this analysis. Compl. ¶¶ 13–15; *Yavuz*, 576 F.3d at 1172 (quoting *Gschwind*, 161 F.3d at 605–06); *see also Gas Sensing Tech. Corp.*, 2017 WL 2955353 at *14 (Freudenthal, J.).

Starting with the private interests, the factors include "relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses;[17] possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive." *Piper*

17. While technology advancements could provide *some* assistance, courts have reasoned that live testimony of witnesses is preferable. *Wallert v. Allan*, 141 F. Supp. 3d 258, 281 (S.D.N.Y. 2015) ("[W]hile videotaped testimony is usable in court when necessary (e.g., witness unavailability), live testimony is preferable."). Furthermore, all of the relevant facts occurred outside the United States.

Aircraft Co., 454 U.S. at 241 n.6 (quoting *Gulf Oil Co. v. Gilbert*, 330 U.S. 501, 508 (1947)). But, Plaintiffs' Complaint demonstrates the key witnesses, evidence, and documents are located outside the United States:

- Bakhmatyuk is a dual citizen of Ukraine and Cyprus, residing in Oberwaltersdorf, Austria. Compl. ¶ 16.

- Piazza resides part-time in Ukraine. *Id.* ¶ 17.

- Yaremenko (who is a likely witness only because he is a Defendant; as described below, he had no involvement in the alleged conduct) is a Ukrainian citizen and resident of Kyiv. *Id.* ¶ 18.

- Petrashko is a Ukrainian citizen and served as Ukraine's Minister of Economic Development and Trade. *Id.* ¶¶ 24, 44.

- SP Capital has an office in Ukraine. *Id.* ¶ 19.

- SP Advisors' primary office is in Ukraine. *Id.*

- The Note issuers upon which Plaintiffs' claims are based, AVG and ULF are incorporated in Cyprus, with all of their operations in Ukraine. *Id.* ¶¶ 21–22.

- Plaintiff funds are organized under the laws of the Cayman Islands. *Id.* ¶ 14.

- All of the negotiations regarding a potential restructuring occurred in London or Ukraine. *Id.* ¶¶ 85, 91, 116, 119, 129, 180.

- The alleged misrepresentations occurred outside the United States in London. *Id.* ¶¶ 70, 85, 91, 116, 119, 129, 130, 158, 171, 180.

Further, the Notes were issued on the London and Irish Stock Exchanges. *See* Ex. 2, AVG Subscription Agreement at 6; Ex. 1, ULF Subscription Agreement at 2. None of the surety providers is located in the United States. *See* Ex. 2, AVG Subscription Agreement at 28–30 (Schedule 2); Ex. 1, ULF Subscription Agreement at 37–41 (Schedule 2). The Trustees are not located in the United States. Ex. 5, AVG Trust Deed at 82 (Bank of New York Paying Agents and Transfer Agent located in London; Registrar located in Luxembourg); Ex. 6, ULF Trust Deed at 1. Because all of the key evidence, witnesses (including third-party witnesses), and documents are outside Wyoming or even the United States, private interest factors weigh in favor of dismissal.

Public interest factors include "the administrative difficulties flowing from court congestion; the 'local interest in having localized controversies decided at home'; the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action; the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty." *Piper Aircraft Co.*, 454 U.S. at 241 n.6 (quoting *Gilbert*,

330 U.S. at 509). Indeed, the prospectuses confirm that *Ukraine would not even enforce a judgment entered by this Court.*[18] That public interest factor alone weighs heavily in favor of dismissal. The Court should not expend resources on a case whose outcome may have no ultimate effect, especially where a judgment by the agreed upon forum (in arbitration) would be enforced.

Gramercy grasps at straws to try to find a connection to the state. In fact, Plaintiffs do not allege the transfers actually occurred in Wyoming. Compl. ¶¶ 139–144. As supported by the documents, nature of the dispute, and nature of the parties, there is no *local* interest in having this controversy decided in Wyoming. *Gas Sensing Tech. Corp.*, No. 16-CV-272-F at *17 (Freudenthal, J.) (holding Wyoming had "very little connection" to case focused on conduct in Australia); *see also Levien v. hibu plc*, 475 F. Supp. 3d 429 (E.D. Pa. 2020), *aff'd*, No. 20-2731, 2021 WL 5742664 (3d Cir. Dec. 2, 202 1) (granting dismissal on the basis of forum non conveniens where the allegedly fraudulent statements were published through the London Stock Exchange).

This Court's holding in *Gas Sensing Technology Corp. v. Ashton* is particularly informative, where this Court reasoned:

> Defendants reside in Australia and, therefore, a majority of the evidence for Plaintiffs' claims

18. Ex. 4, AVG 2010 Prospectus at iv; Ex. 3, ULF Prospectus at iii. In contrast, the prospectuses expressly state that an arbitration award is enforceable in Ukraine. *Id.*

> is located in Australia as well. Thus, the administrative difficulties favor Defendants because Plaintiffs not only filed this action, but also actions in Australia alleging similar claims against Defendants. In addition, this Court previously found it lacks personal jurisdiction over several key Defendants, including ProX, Meldrum, and Mactaggart. Moreover, the members of the Wyoming community have very little connection to this case because all claims revolve around the hostile takeover of WellDog, including Plaintiffs' claims that Defendants misappropriated Gas Sensing's intellectual property and trade secrets in furtherance of their conspiracy takeover theory. Rather, Australia and its citizens have a strong interest in resolving this dispute because all Defendants reside in Australia, the majority of the actions at issue took place in Australia, WellDog is the Australian subsidiary of Gas Sensing, and Plaintiffs have already availed themselves to Australia's jurisdiction. Finally, as the Court previously explained, although this case involves both American and Australian law, the majority of the issues are properly under Australia's authority. For all of these reasons, the Court finds the private and public weigh in Defendants' favor.

2017 WL 2955353 at *17 (Freudenthal, J.) (citation omitted). The defendants, witnesses, and evidence in this matter are located outside of the United States.

As discussed in Section VII below, this Court lacks jurisdiction over Yaremenko, and Plaintiffs have not been able to serve Bakhmatyuk, over whom this Court also likely lacks jurisdiction. This Court is not familiar with English law, or Cypriot or Ukrainian law, for that matter, and the Court's resources should not be devoted to applying foreign law in this case. Finally, as stated above, a judgment from this Court would not be enforced by Ukrainian courts. Ex. 4, AVG 2010 Prospectus at iv; Ex. 3, ULF Prospectus at iii. These private and interest factors overwhelmingly favor dismissal.

V. GRAMERCY'S COMPLAINT MUST BE DISMISSED BECAUSE ITS RICO CLAIMS FAIL ON MULTIPLE GROUNDS.[19]

Gramercy's RICO claims should be dismissed because Gramercy has alleged predicate acts that do

19. Title 18 U.S.C. § 1962 has four subsections, three of which (b, c, and d) are at issue. Section 1962(b) makes it illegal for "any person through a pattern of racketeering activity . . . to acquire or maintain, directly or indirectly, any interest in or control" in a RICO enterprise, while § 1962(c) makes it illegal for "any person employed by or associated with any" RICO enterprise "to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity . . . ," and § 1962(d) makes it unlawful "to conspire to violate any of" the statute's subsections. Gramercy has alleged violations of § 1962(c) and (d) by all Defendants and a violation of § 1962(b) by Bakhmatyuk. Compl. ¶¶ 161–206. "A conspiracy claim under 18 U.S.C. § 1962(d) fails when the substantive claim based on [other § 1962 subsections] is without merit." *BancOklahoma Mortg. Corp. v. Cap. Title Co.*, 194 F.3d 1089, 1103 (10th Cir. 1999).

not apply extraterritorially, and Gramercy does not allege a domestic application of those predicates. These claims also fail because the Private Securities Litigation Reform Act ("PSLRA") bars Gramercy's attempt to disguise allegations of securities fraud as RICO violations through artful pleading, as all the conduct Gramercy alleges is intimately tied to its purchase of securities from ULF and AVG. Moreover, Gramercy's RICO claims fail because Gramercy has not alleged a pattern of racketeering activity, and Gramercy does not have cognizable RICO damages. The Complaint also does not satisfy the heightened pleading standard of Federal Rule of Civil Procedure 9(b) with respect to the RICO claims or state law claims based on the same allegations. As these inadequacies show, Gramercy's desire to seek treble damages is not enough to transform an isolated incident of alleged securities fraud into a RICO violation. The RICO statute does not and cannot support such an expansive reach.

A. RICO does not reach the extraterritorial conduct alleged.

The Court should dismiss Gramercy's RICO claims because RICO does not apply extraterritorially to the conduct alleged by Gramercy. In *RJR Nabisco, Inc. v. European Community*, the Supreme Court held that RICO applies extraterritorially "only with respect to certain applications of the statute." 579 U.S. 325, 338 (2016). Sections 1962(b) and (c) apply to foreign racketeering activity "only to the extent that the predicates alleged in a particular case themselves apply extraterritorially."

Id. at 339. The Supreme Court has set out a two-step process for analyzing extraterritoriality issues. *Id.* at 337. First, courts ask "whether the statute gives a clear, affirmative indication that it applies extraterritorially." *Id.* If the statute does not apply extraterritorially, the second step is to "determine whether the case involves a domestic application of the statute . . . by looking to the statute's 'focus.'" *Id.*

If a predicate statute does not apply extraterritorially, "conduct committed abroad . . . cannot qualify as a predicate under RICO's plain terms." *Id.* at 339. "[A] RICO enterprise must engage in, or affect in some significant way, commerce directly involving the United States. . . . Enterprises whose activities lack that anchor to U.S. commerce cannot sustain a RICO violation." *Id.* at 344.

Gramercy has alleged predicate acts of mail and wire fraud under 18 U.S.C. §§ 1341 and 1343 and inducement to interstate or foreign travel under 18 U.S.C. § 2314. These statutes do not "manifest[ ] an unmistakable congressional intent to apply extraterritorially," and thus the foreign conduct Gramercy alleges "cannot qualify as a predicate under RICO's plain terms." *Id.* In *RJR Nabisco, Inc.*, the Supreme Court "left undisturbed the Second Circuit Court of Appeals' decision below" that neither wire fraud nor mail fraud applies extraterritorially. *Nuevos Destinos, LLC v. Peck*, No. 3:19-CV-00045, 2019 WL 6481441, at *20 (D.N.D. Dec. 2, 2019), *aff'd*, 999 F.3d 641 (8th Cir. 2021). Post-*RJR Nabisco, Inc.*, the Second Circuit has reaffirmed its conclusion that the wire fraud statute does not rebut the presumption against extraterritoriality. *See United*

States v. Napout, 963 F.3d 163, 178 (2d Cir. 2020). Courts addressing the question in light of the Supreme Court's guidance in *RJR Nabisco, Inc.* are largely unanimous, holding the mail and wire fraud statutes do not apply extraterritorially. *See Skillern v. United States*, No. 20-13380-H, 2021 WL 3047004, at *8 (11th Cir. Apr. 16, 2021); *United States v. All Assets Held at Bank Julius*, 251 F. Supp. 3d 82, 101–03 (D.D.C. 2017); *ASI, Inc. v. Aquawood, LLC*, No. CV 19-763 (JRT/HB), 2020 WL 5913578, at *12 (D. Minn. Oct. 6, 2020), *motion to certify appeal denied*, No. CV 19-763 (JRT/HB), 2021 WL 396818 (D. Minn. Feb. 4, 2021). Courts that have held otherwise rely on case law from the First and Third Circuit decided before *RJR Nabisco, Inc. See*, *e.g.*, *Drummond Co., Inc. v. Collingsworth*, No. 2:15-CV-506-RDP, 2017 WL 3268907, at *17 (N.D. Ala. Aug. 1, 2017), *overruled by Skillern*, 2021 WL 3047004, at *8. This Court should follow those circuits that have addressed the issue after the Supreme Court's guidance in *RJR Nabisco, Inc.* and find mail and wire fraud do not apply extraterritorially.

The inducement to interstate or foreign travel statute does not pass step one of the extraterritoriality analysis because it does not "give[ ] a clear, affirmative indication that it applies extraterritorially." *RJR Nabisco, Inc.*, 579 U.S. at 337. The statute "includes only a general reference to 'foreign commerce,' which the Supreme Court has found insufficient to rebut the presumption against extraterritoriality." *All Assets Held at Bank Julius*, 251 F. Supp. 3d at 98. Thus, none of the predicate statutes at issue applies to extraterritorial conduct.

Applying step two, Gramercy has not alleged a domestic application of the predicate acts. "[T]he focuses of the mail and wire fraud statutes are the acts of 'depositing' and 'transmitting,' respectively." *Skillern*, 2021 WL 3047004, at *8. And "the focus of [the inducement to interstate or foreign travel statute] is the transportation or transfer of property." *All Assets Held at Bank Julius*, 251 F. Supp. 3d at 99. The conduct Gramercy relies on in alleging violations of all three predicates occurred outside the United States, with a focus on securities issued outside the United States and governed by contracts applying foreign law. Gramercy's allegations do not show a permissible domestic application of the predicate statutes. Rather, the conduct at issue revolves around Notes sold by two Ukrainian businesses, AVG and ULF. Compl. ¶ 1. AVG and ULF were both incorporated in Cyprus. *Id.* ¶¶ 21–22. And the Notes at issue were sold on the London Stock Exchange and clearly state that English law governs. *See*, *e.g.*, *id.* ¶ 45. Finally, the Gramercy funds that bought the Notes are organized under the law of the Cayman Islands. *Id.* ¶ 14. Gramercy has not shown a domestic application of the predicate acts, and thus attempts to impermissibly apply RICO extraterritorially.

B. The Private Securities Litigation Reform Act bars Gramercy's RICO claims.

The Court should dismiss Counts 1–3 because Gramercy's claims sound in securities law, not the criminal conspiracies that the RICO Act is intended to target. Congress has made this clear—amending RICO in 1995 to state that "any conduct that would have been

actionable as fraud in the purchase or sale of securities" cannot establish a RICO violation. Pub. L. No. 104–67 § 107, 109 Stat. 737, 758 (1995). The PSLRA was intended to "eliminate securities fraud as a predicate offense in a civil RICO action" and bar plaintiffs from "plead[ing] other specified offenses, such as mail or wire fraud, as predicate acts under civil RICO if such offenses are based on conduct that would have been actionable as securities fraud." *MLSMK Inv. Co. v. JP Morgan Chase & Co.*, 651 F.3d 268, 278–79 (2d Cir. 2011) (quoting H.R. Rep. 104–369, at 47 (1995)). The PSLRA's bar is broadly construed; "[even] alleged predicate acts [that] do not describe securities fraud . . . [if] also *undertaken in connection with the purchase of a security* . . . cannot support a civil RICO claim after enactment of the PSLRA." *Bixler*, at 760 (emphasis added) (internal quotation omitted). Because the ULF and AVG Notes are securities, and Gramercy's RICO causes of actions stem from fraud in connection with the Notes, the PSLRA bars these claims.

As an initial matter, Plaintiffs' notes are "presumed to be a 'security,'" considering the four factors provided by the Supreme Court: (1) the purpose of the note; 2) the plan of distribution of the note and "whether it is an instrument in which there is 'common trading for speculation or investment'"; (3) the reasonable expectations of investors; and (4) "whether some factor such as the existence of another regulatory scheme significantly reduces the risk of the instrument, thereby rendering application of the Securities Acts unnecessary." *Reves v. Ernst & Young*, 494 U.S. 56, 66–67 (1990) (citation omitted). The ULF and AVG Notes (1) were sold "in an effort to raise capital for

[the seller's] general business operations" and purchased "in order to earn profit in the form of interest"; (2) were "offered and sold to a broad segment of the public," (3) are "investments" in character; and, (4) involve risk that is only eliminated "when, and if, a payment is made." *Id.* at 67–70.

As a result, the Notes fall under the broad bar of the PSLRA to any RICO claim based on predicate acts "undertaken in connection with the purchase of a security." *Bixler*, 596 F.3d at 760 (internal quotation omitted). In *Bixler*, the plaintiffs, minority shareholders in METCO, brought a RICO action against METCO's directors and lawyers alleging shareholders were damaged by METCO's transfer of mining claims in exchange for UKL stock that was not paid. *Id.* at 755. The *Bixler* plaintiffs alleged this scheme "defrauded them of their share of the UKL stock and rendered their METCO investment virtually worthless" and functioned as a "fraudulent means of transferring the mining claims to a third entity." *Id.* The Tenth Circuit found the plaintiffs' RICO claims were barred by the PSLRA, noting that the plaintiffs' alleged predicates acts "cannot support a RICO claim after enactment of the PSLRA." *Id.* (quoting *Bald Eagle Area Sch. Dist. v. Keystone Fin., Inc.*, 189 F.3d at 321, 330 (3rd Cir. 1999)). The court in *Bixler* noted that a contrary decision would "[a]llow[ ] plaintiffs to engage in 'surgical presentation of the cause of action' [and] would undermine the purpose of the RICO amendment." *Id.* (quoting *Bald Eagle Area Sch. Dist.*, 189 F.3d at 330); *see also Braverman v. LPL Fin. Corp.*, 2011 WL 13289787, at *5 (D.N.M. Apr. 21, 2011) ("Activities such as mail fraud,

wire fraud, bank fraud, and interstate travel in support of racketeering activities are considered to be undertaken in connection with the purchase of a security, despite also possibly constituting illegal or fraudulent acts.").

Like in *Bixler*, Gramercy has alleged only predicate acts committed in connection with securities that cannot support a RICO claim. Gramercy alleges mail fraud, wire fraud, and inducement to interstate or foreign travel, intended to "dr[i]ve down the value of Gramercy's Notes . . . prevent [Gramercy] from collectively negotiating a favorable restructuring of its Notes . . . and strip[ ] [ULF and AVG] of [their] assets, thereby rending Gramercy's investment virtually worthless." Compl. ¶¶ 178, 180. Gramercy describes the alleged RICO enterprise's "overarching goal" as "preserving Bakhmatyuk's control over [ULF and AVG] and eliminating Gramercy's legal and economic rights and devaluing its Notes." *Id.* ¶ 178. Specifically, for the wire fraud and mail fraud predicate acts, Gramercy alleges the Defendants engaged in misrepresentations or omissions related to ULF and AVG financial reports, note purchases, and asset transfers—all for the purported purpose of frustrating Gramercy's attempts to restructure or otherwise collect on its Notes. *Id.* ¶ 178. And Gramercy's inducement to interstate or foreign travel predicate acts all allege that Gramercy was induced to travel to either London or Kyiv for negotiations to restructure the Notes. *Id.* ¶ 180.

The RICO predicate acts Gramercy alleges are thus intimately connected to the sale or purchase of securities—AVG and ULF Notes—and barred by the PSLRA. This

Court should not reward Gramercy's attempt to "dissect [its] claims through artful pleading in order to circumvent the PSLRA exclusion." *Braverman*, 2011 WL 13289787, at *5 (citing *Bixler*, 596 F.3d at 760).

C. Plaintiffs fail to allege a pattern of racketeering activity.

To bring a RICO claim, Gramercy "must allege a violation of 18 U.S.C. § 1962, which consists of four elements: (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Hall v. Witteman*, 584 F.3d 859, 867 (10th Cir. 2009) (internal quotation omitted). "To satisfy RICO's pattern requirement, [Gramercy] need[s] to allege not only that the [D]efendants . . . committed two or more predicate acts, but also 'that the predicates themselves amount to, or that they otherwise constitute a threat of, *continuing* racketeering activity.'" *Id.* (emphasis added) (quoting *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 240 (1989)). The continuity requirement is difficult to meet, and "the plaintiff must demonstrate either a closed period of repeated conduct or past conduct that by its nature projects into the future with a threat of repetition." *Boone v. Carlsbad Bancorporation, Inc.*, 972 F.2d 1545, 1555 (10th Cir. 1992) (internal quotation omitted). The continuity requirement achieves Congress's "intent that RICO reach activities that amount to or threaten long-term criminal activity." *Bixler*, 596 F.3d at 761 (quoting *H.J. Inc.*, 492 U.S. at 243 n.4).

Here, Gramercy fails to allege a pattern of racketeering activity. Gramercy does not allege any facts that constitute

long-term criminal activity—in contrast, Gramercy's allegations are wholly based on alleged past transfers of corporate assets in violation of corporate documents, to the detriment of Noteholders. All three RICO counts depend on Gramercy's notion that Moving Defendants committed predicate acts so Bakhmatyuk could retain control of AVG and ULF and Gramercy would be prevented from exercising its rights under the Notes or collecting on them. *See* Compl. ¶¶ 168, 171, 172, 178, 179, 180, 185, 187, 191, 193, 196, 204–206. Gramercy alleges these predicate acts were carried out in a three-part scheme, through: a "campaign of misinformation," "straw purchasers," and "asset transfers." *Id.* ¶ 10. Assuming *arguendo* Gramercy could prove these three phases of the alleged scheme, the RICO claims would still fail to allege the pattern element required under § 1962. The purported scheme alleges activity by Defendants undertaken to achieve a singular goal and without a threat of continuing wrongful activity.

"[A] closed-ended series of predicate acts constituting a single scheme" does not satisfy the continuity requirement. *Boone*, 972 F.2d at 1556 ("a single scheme (the transfer of debt) to accomplish a discrete goal (the merger) directed at a finite group of individuals ([ ] shareholders) 'with no potential to extend to other persons or entities'" does not state a RICO violation) (quoting *Sil –Flo, Inc. v. SFHC, Inc.*, 917 F.2d 1507, 1516 (10th Cir.1990)). Gramercy's RICO counts must be dismissed because Gramercy cannot show continuity—a necessary element of establishing a pattern under RICO. Gramercy alleges that Defendants acted through an enterprise to prevent Gramercy from initiating enforcement proceedings on the Notes and lower

the value of the Notes—even though Gramercy has not followed the arbitration process for such a dispute, set forth in the subscription agreements that they signed. Compl. ¶¶ 178, 180. Gramercy also goes to great lengths to make allegations "on information and belief" that Defendants were using the press to spread misinformation about AVG and ULF's financial status. *Id*. ¶¶ 72, 178. But taken as a whole, Gramercy's conclusory claims allege only "one scheme, one result, one set of participants and one method of commission." *Sullivan v. Boettcher & Co.*, 714 F. Supp. 1132, 1136 (D. Colo. 1989); *see also Kaplan v. Reed*, 28 F. Supp. 2d 1191, 1198 (D. Colo. 1998) ("What Plaintiffs have pled is acts by William Reed for the purpose of defrauding those who were his creditors. This is insufficient to plead a violation of § 1962(c).").

This alleged "single scheme to accomplish [one] discrete goal," targeted at a single victim—Gramercy as holder of its AVG and ULF Notes—is not sufficiently distinct activity to allege a pattern under RICO. *Bixler*, 596 F.3d at 761. "[N]o threat of continuing fraudulent activity can be inferred from the nature of th[is] scheme." *Torwest DBC, Inc. v. Dick*, 810 F.2d 925, 929 (10th Cir. 1987). Gramercy thus has not pleaded a claim under § 1962.

D. Gramercy does not have cognizable RICO damages.

Gramercy has not stated cognizable RICO damages. Gramercy's RICO damages are unworkable and unprovable because Gramercy could still recover on its Notes. Thus,

"when a creditor alleges he has been defrauded RICO injury is speculative when contractual or other legal remedies remain which hold out a real possibility that the debt, and therefore the injury, may be eliminated or significantly reduced. "The RICO claim is [ ] not ripe until those remedies are exhausted and the damages are clear." *In re Merrill Lynch P'Ships Litig.*, 154 F.3d 56, 59–60 (2d Cir. 1998). Should Gramercy recover on its Notes under the process agreed to with their issuance, it would benefit along with ULF/AVG's other Noteholders and any injury would decrease. *Id.* Thus, Gramercy's damages are insufficiently definite to be deemed accrued.[20] *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 339 (1971).

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20. Gramercy is caught between a rock and a hard place on this point. If it argues that it has a definite injury even though it has not exhausted other remedies, its claims are likely barred by the four-year statute of limitations for civil RICO claims. *See Robert L. Kroenlein Tr. ex rel. Alden v. Kirchhefer*, 764 F.3d 1268, 1274 (10th Cir. 2014). In fact, Gramercy was on inquiry notice in early 2015 according to its own Complaint. *See* Compl. ¶ 57-58 (describing inability to make payment at Notes' redemption date and need to restructure to payments in kind during 2015 and early 2016); *id.* ¶ 1 (claiming this "scheme" has been ongoing "[s]ince at least 2016"). Even if Gramercy did not understand the gravity of its potential losses when negotiating restructuring, "[o]nce a plaintiff has inquiry notice of facts that would suggest to a reasonable person that he has been injured, the plaintiff has a duty to commence a diligent investigation concerning that injury." *Robert L. Kroenlein Tr.*, 764 F.3d at 1280. Should the Court deny their motion to dismiss and find Gramercy's injury is sufficiently definite, Moving Defendants will pursue an early summary judgment motion on statute of limitations grounds.

In short, Gramercy lacks a RICO injury, as it has not shown that it has exhausted "contractual or other legal remedies . . . which hold out a real possibility that the debt, and therefore the injury, may be eliminated or significantly reduced." *In re Merrill Lynch*, 154 F.3d at 59; *see also First Nationwide Bank v. Gelt Funding Corp.*, 27 F.3d 763, 768–69 (2d Cir. 1994) ("a plaintiff who claims that a debt is uncollectible because of the defendant's conduct can only pursue the RICO treble damages remedy after his contractual rights to payment have been frustrated"); *cf. Harbinger Cap. Partners Master Fund I, Ltd. v. Wachovia Cap. Markets, LLC*, 347 F. App'x 711, 713 (2d Cir. 2009) (dismissing RICO claims where it could not "be determined whether [ongoing recovery] proceedings w[ould] mitigate or remedy Appellants' damages"). Here, Gramercy's alleged injury is too speculative and not cognizable as RICO damages. Any damages that may result from Gramercy failing to collect on its Notes in the future is unrecoverable because "the fact of their accrual is speculative or their amount and nature unprovable." *Zenith Radio Corp.*, 401 U.S. at 339. This Court should find that Gramercy's alleged RICO damages are "too speculative." *Id.* Allowing Gramercy to recover treble damages for a loss that it cannot show it will suffer would amount to an undeserved windfall. Because Gramercy has not alleged cognizable RICO damages, these claims should be dismissed.

E. The Complaint does not satisfy Rule 9(b) for any claim asserted.

Setting aside the fatal flaws to the RICO claims described above, Gramercy's RICO claims still fail for lack

of the particularity Rule 9(b) requires for "RICO predicate acts based on fraud." *Cayman Expl. Corp. v. United Gas Pipe Line Co.*, 873 F.2d 1357, 1362 (10th Cir.1989). "[A] complaint alleging fraud [must] set forth the time, place and contents of the false representation, the identity of the party making the false statements and the consequences thereof." *Tal v. Hogan*, 453 F.3d 1244, 1263 (10th Cir. 2006) (internal quotation marks omitted), *cert. denied*, 549 U.S. 1209, 127 (2007). This requirement is meant to ensure that defendants have "clear notice of the factual basis of the predicate acts." *Cayman*, 873 F.2d at 1362. A complaint that makes allegations against a large group of defendants without specifying facts as to why each individual defendant should be liable is insufficient under these standards. *See Burnett v. Mortg. Elec. Registration Sys., Inc.*, 706 F.3d 1231, 1240 (10th Cir. 2013).

Under these standards, Gramercy has failed to plead with particularity that any of the Moving Defendants committed predicate acts under RICO or were involved in a conspiracy. Their bald assertions are insufficient under the pleading standards and cannot satisfy Rule 9(b). Gramercy cannot summarily allege, as it does here, that Moving Defendants are participants in the underlying scheme to defraud Gramercy without providing any specific allegations about *each* Moving Defendant's alleged role, decisions made by *each* Moving Defendant, or actions taken by *each* Moving Defendant in support of the alleged conspiracy. *See Pahls v. Thomas*, 718 F.3d 1210, 1225 (10th Cir. 2013) (stressing "the need for careful attention to particulars, especially in lawsuits involving multiple defendants[; where] 'it is particularly important'

that plaintiffs 'make clear exactly *who* is alleged to have done *what* to *whom*, . . . as distinguished from collective allegations") (internal quotation omitted).

As to Defendant Yaremenko, throughout the 102-page Complaint, factual statements about Yaremenko are extremely limited, and those that exist do nothing to explain Yaremenko's involvement in this alleged scheme or any underlying fraud. There are no allegations that Yaremenko even had a single conversation with Gramercy, let alone made any representations to Gramercy. Nor does it allege that he has had any conversation with or relationship with ULF, AVG, or Bakhmatyuk. The only *facts* relating to Yaremenko are that he is listed as the Chief Legal Officer of SP Advisors, the Chief Operating Officer and a founding partner of SP Capital, and a signatory on the annual statements for TNA. Compl. ¶ 18. Gramercy's attempt to rely solely on Yaremenko's professional affiliation with SP Advisors and TNA to meet its burden to plead involvement in a fraudulent scheme is insufficient. *See Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (10th Cir. 2008) (where a complaint's allegations are "so general that they encompass a wide swath of conduct, much of it innocent, then the plaintiffs 'have not nudged their claims across the line from conceivable to plausible.'") (internal quotation marks omitted).

The same is true of Defendants Piazza, SP Capital, and TNA. Gramercy's conclusory claims concerning these three defendants fail to adequately plead their commission of any predicate acts or role in a conspiracy to defraud Gramercy. For example, Gramercy alleges that it had

contact with Piazza only twice, an email on October 18, 2018 and a phone call on March 24, 2020. Compl. ¶¶ 112, 154, 178, 208. Gramercy alleges that in the October 2018 email, Piazza expressed interest in purchasing secured debt on behalf of SP Capital. *Id.* ¶¶ 112, 178, 208. And Gramercy alleges that in the March 2020 phone call, Piazza offered to buy Gramercy's position as a third party, but "on information and belief" was acting on behalf of Bakhmatyuk. *Id.* ¶¶ 154, 178, 208. Neither of these alleged incidents is sufficient to give rise to any inference of malfeasance. Gramercy's failure to allege more than two isolated incidents of contact with Piazza in over 100 pages demonstrates the conclusory nature of the RICO allegations against him. Similarly, Gramercy's allegations "on information and belief" that Concorde was acting as an agent of Piazza and Bakhmatyuk are unsupported by fact and conclusory. *Id.* ¶¶ 72, 178.

Plaintiffs' allegations against SP Capital and TNA, as corporate vehicles for Yaremenko and Piazza, also fail. *See*, *e.g.*, *id.* ¶ 170. Gramercy does not plead any instances of direct interaction between itself and SP Capital or TNA. Gramercy's conclusory allegations against individuals associated with SP Capital and TNA fall far short of pleading involvement of these two corporate Defendants. And Gramercy's attempt to tie the corporate Defendants to predicate acts through allegations that SP Capital was involved in a debt purchase from Ashmore and that TNA held a webinar on Wyoming corporate law fall woefully short. *Id.* ¶ 170. Thus, Gramercy has failed to particularly allege that either SP Capital or TNA committed any predicate act or was involved in a conspiracy to defraud Gramercy.

"[T]he threat of treble damages and injury to reputation which attend RICO actions justify requiring [Gramercy] to frame its pleadings in such a way that will give the [Moving Defendants], and the trial court, clear notice of the factual basis of the predicate acts." *Cayman*, 873 F.2d at 1362. Because the Complaint lacks facts linking the Moving Defendants to any predicate acts or underlying conspiracy, this Court should dismiss Gramercy's RICO claims as inadequately pleaded.

The Court should dismiss Gramercy's state law claims against the Moving Defendants for the same reasons. The common law fraud claim (Count 4) repeats the same, insufficient allegations with respect to Piazza as those asserted in support of the RICO claim. Compl. ¶¶ 207–213; *see Lane v. Buckley*, No. 15-CV-155-F, 2015 WL 12915717, at *5 (D. Wyo. Nov. 10, 2015) (Freudenthal, J.) (finding allegations did "not come close to meeting the pleading requirements for a [common law] fraud claim" where complaint alleged only that defendants signed allegedly unlawful agreement violating terms of trust). Plaintiffs' tortious interference claim against Piazza, SP Capital and TNA (Count 5) is based on the same "orchestrated transfers" but adds no new allegations demonstrating how the transfers were unlawful, much less the role Piazza or either of the two entity Defendants played in alleged misconduct. *See* Compl. ¶¶ 214-218. Finally, the civil conspiracy (Count 6) and aiding and abetting (Count 7) claims against all Moving Defendants again fail to allege what each Defendant actually did in furtherance or as participants of the alleged scheme (*id.* ¶¶ 219-226) and, in any event, must fail as a matter of law along with the

underlying fraud and tortious interference claims. *See*, *e.g.*, *Lane*, 2015 WL 12915717, at *5 ("a plaintiff cannot claim civil conspiracy . . . without an underlying cause of action in tort") (quoting *White v. Shane Edeburn Const., LLC*, 285 P.3d 949, 958 (Wyo. 2012)).

VI. GRAMERCY'S OTHER CLAIMS FAIL FOR LACK OF SUBJECT MATTER JURISDICTION.

Because the RICO claims should be dismissed for the reasons described above, Gramercy's state law claims for fraud, tortious interference with contract, civil conspiracy, and aiding and abetting should be dismissed for lack of subject matter jurisdiction. Gramercy relies on supplemental jurisdiction under 28 U.S.C. § 1367 to create subject matter jurisdiction for their state law claims because they are related to its federal RICO claims. Compl. ¶¶ 36–37. However, as described above, those RICO claims fail as a matter of law leaving no remaining causes of action over which the district court has federal question jurisdiction. With no federal claims at issue, this Court should decline to exercise supplemental jurisdiction over Gramercy's state law claims. *See Birdwell v. Glanz*, 790 F. App'x 962, 964 (10th Cir. 2020) ("When the federal claims disappear early in the litigation, a federal court should generally decline to exercise supplemental jurisdiction.").

Declining supplemental jurisdiction here would further the relevant interests of "comity, convenience, economy, and fairness." *Id.* These Notes were issued on the London and Irish Stock Exchanges, are governed by English law, and are subject to arbitration provisions

designating an English forum. In these circumstances, comity, convenience, judicial economy, and fairness all dictate against spending resources to adjudicate legal issues that implicate foreign laws, foreign documents, and foreign interests. Retaining supplemental jurisdiction is also contrary to concerns of economy and fairness, as the foreign interests would be better resolved by foreign courts. This Court should dismiss the state law claims for lack of subject matter jurisdiction. *See*, *e.g.*, *Sullivan v. Harris*, 2019 WL 5258045, at *5 (W.D. Wyo. Jan. 23, 2019) (dismissing plaintiff's RICO claims and declining to exercise supplemental jurisdiction over the remaining state law claims).

VII. DEFENDANT YAREMENKO IS NOT SUBJECT TO PERSONAL JURISDICTION IN WYOMING.

Plaintiffs fail to meet their burden to show that non-resident Yaremenko maintains sufficient contacts with Wyoming such that personal jurisdiction would be proper.[21] *Dental Dynamics, LLC v. Jolly Dental Grp., LLC*, 946 F.3d 1223, 1228–29 (10th Cir. 2020). General jurisdiction is found only where the defendant is domiciled in the forum. *Daimler AG v. Dauman*, 571 U.S. 117, 137 (2014); *see also Cunningham v. ASI, LLC*, 18-CV-183-F, 2019 WL 5399820, at *2 (D. Wyo. Jan. 9, 2019) (Freudenthal, J.) (the demanding requirements for general jurisdiction are only

21. Because Wyoming's long-arm statute extends jurisdiction to the extent authorized by the Due Process Clause, the personal jurisdiction inquiry collapses into a single question of due process. *See Eighteen Seventy L.P. v. Jayson*, 532 F. Supp. 3d 1125, 1131 (D. Wyo. 2020).

met "as to individuals *if they are domiciled in the forum state*.") (emphasis added). Plaintiffs admit that Yaremenko is a Ukrainian resident and therefore not subject to general jurisdiction. Compl. ¶ 18. *See Cunningham*, 2019 WL 5399820, at *2 (Freudenthal, J.) (finding Wyoming court had no general jurisdiction over individual defendant residing in Arizona).

Specific jurisdiction arises only where a defendant has "purposefully directed its activities at residents of the forum state" and alleged injuries "arise out of the defendant's forum-related activities." *Dental Dynamics*, 946 F.3d at 1229 (internal quotation marks omitted). Plaintiffs' *sole* alleged connection to Wyoming is that Yaremenko "upon information and belief, agreed to sign the annual statements" for TNA, a company incorporated in Wyoming. Compl. ¶ 84. These annual statements are not related in any way to Plaintiffs' claims, nor do Plaintiffs allege that they are.[22] *See Walden v. Fiore*, 571 U.S. 277, 284 (2014) (finding only conduct related to the suit creates a substantial connection with the forum). Further, Plaintiffs do not allege that Yaremenko was involved with any of the purchases of the Notes, or that Yaremenko

22. The Complaint also describes an alleged presentation by Piazza and Yaremenko in which they purportedly explain that "Wyoming is a particularly attractive jurisdiction for businesses." Compl. ¶ 34. However, as with the TNA annual statements, Plaintiffs fail to connect this presentation to their claims and, in fact, *admit* that the alleged presentation occurred *after* any of the alleged unlawful conduct. *See*, *e.g.*, *id.* ¶¶ 138–143 (describing alleged presentation on November 19, 2020, *after* alleged "TNA Transfers" beginning November 2019).

has ever done business with Bakhmatyuk. Jurisdiction over Yaremenko cannot be based solely on his position as an agent of a company incorporated in Wyoming. *See*, *e.g.*, *Celtig, LLC v. Patey*, 347 F. Supp. 3d 976, 983–84 (D. Utah 2018) (explaining that a court cannot exercise jurisdiction over an agent based on allegations of the company's wrongful act).

Nor can Plaintiffs rely on a "conspiracy" theory of jurisdiction to create jurisdiction over Yaremenko. For this theory to apply, Plaintiffs must allege "more than 'bare allegations' that a conspiracy existed, and must allege facts that would support a prima facie showing of a conspiracy"—which they have not done, particularly as to Yaremenko. *Melea, Ltd. v. Jawer SA*, 511 F.3d 1060, 1069 (10th Cir. 2007)*; see infra* Section V.E. Even if Plaintiffs could sufficiently plead this claim, they must still show minimum contacts for each Defendant, which they cannot. *See Hart v. Salois*, 605 F. App'x 694, 700 (10th Cir. 2015). For these reasons, Plaintiffs cannot establish jurisdiction based on a conspiracy. *See*, *e.g.*, *Good v. Khosrowshahi*, 296 F. App'x 676, 679–80 (10th Cir. 2008).

Finally, the exercise of personal jurisdiction over Yaremenko would violate the principles of fair play and substantial justice. *See Dental Dynamics*, 946 F.3d at 1229. In considering the principles of fair play and substantial justice, the Court weighs similar factors as those under the doctrine of forum non conveniens.[23] *See*

23. These factors include burden on defendant, the forum state's interest in resolving the dispute, and the location of the majority of parties, witnesses, and evidence.

id.; *see supra* § IV (discussing these factors at length). The principles of fair play and justice weigh strongly against finding personal jurisdiction here, for the other reasons examined above, and thus, all claims against Yaremenko must be dismissed for lack of personal jurisdiction.

CONCLUSION

For the foregoing reasons, the Complaint should be stayed or dismissed pending arbitration, pursuant to Rules 12(b)(1), (2), (6), (7), 19(a), and 19(b).

Dated: February 7, 2022

Respectfully submitted,

Nicholas Piazza, SP
Capital Management, LLC,
Oleksandr Yaremenko, and
TNA Corporate Solutions,
LLC

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Appendix F

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APPENDIX G — PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING, FILED MARCH 9, 2022

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Civil Action No. 21-cv-00223-NDF

GRAMERCY DISTRESSED OPPORTUNITY FUND II, L.P., GRAMERCY DISTRESSED OPPORTUNITY FUND III, L.P., GRAMERCY DISTRESSED OPPORTUNITY FUND III-A, L.P., GRAMERCY FUNDS MANAGEMENT LLC, GRAMERCY EM CREDIT TOTAL RETURN FUND, AND ROEHAMPTON PARTNERS LLC,

Plaintiffs,

v.

Appendix G

OLEG BAKHMATYUK, NICHOLAS PIAZZA, SP CAPITAL MANAGEMENT, LLC, OLEKSANDR YAREMENKO, AND TNA CORPORATE SOLUTIONS, LLC,

Defendants.

PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS

[TABLES INTENTIONALLY OMITTED]

Plaintiffs Gramercy Distressed Opportunity Fund II, L.P., Gramercy Distressed Opportunity Fund III, L.P., Gramercy Distressed Opportunity Fund III-A, L.P., and Gramercy EM Credit Total Return Fund (collectively, unless otherwise specified herein, the "Gramercy Funds"), Roehampton Partners LLC ("Roehampton"), and Gramercy Funds Management LLC ("Gramercy Management") (together with the Gramercy Funds and Roehampton, "Plaintiffs" or "Gramercy"), by and through their undersigned counsel, respectfully submit this Opposition to the Motion to Dismiss [Doc. No. 43] filed by Defendants Nicholas Piazza ("Piazza"), SP Capital Management, LLC ("SP Capital"), Oleksandr Yaremenko ("Yaremenko"), and TNA Corporate Solutions, LLC ("TNA") (collectively, the "Piazza Defendants") (the "Motion").[1]

1. Capitalized terms not otherwise defined herein shall have the meanings provided in the Complaint.

Appendix G

PRELIMINARY STATEMENT

Defendant Nicholas Piazza is a Cody, Wyoming-based businessman and the founder and Chief Executive Officer of SP Capital Management, LLC, a Wyoming-based company he formed in 2012 with his partner, SP Capital's Chief Operating Officer, co-defendant Oleksandr Yaremenko. Operating from its Wyoming offices, SP Capital is part of a Wyoming cottage industry that received worldwide media attention last year following the release of the so-called Pandora Papers by the International Consortium of Investigative Journalists. The Pandora Papers revealed that the assets of international oligarchs, business tycoons, and politicians (often of ill-repute) have migrated from international financial centers to states like Wyoming to exploit the state's corporate-privacy laws, which are among the strongest in the country. This is the cornerstone of the Piazza Defendants' business plan. Indeed, Piazza and Yaremenko openly tout SP Capital's expertise in shielding the assets of wealthy Eastern European clients by transferring them to Wyoming entities to exploit the confidentiality protections of Wyoming law.

The Piazza Defendants' asset-shielding expertise and "advisory and asset management services" were pivotal to the scheme orchestrated by their largest client and benefactor, Defendant Oleg Bakhmatyuk. As detailed in the Complaint [Doc. No. 1], Bakhmatyuk's years-long, multifaceted scheme directly targeted Gramercy Management, a Connecticut-based investment-management firm that, through its investment funds,

was the largest noteholder of Bakhmatyuk's agricultural conglomerate, UlkraLandFarming PLC ("ULF") and its subsidiary Avangardco IPL ("AVG," and together with ULF, the "Company"). Through a pattern of racketeering activity accomplished through the use of U.S. mail and wires, Bakhmatyuk and his main ally Piazza carried out a scheme of misinformation and deception that culminated in the surreptitious transfers of nearly a billion dollars of Company assets to a Wyoming shell company formed by the Piazza Defendants for that purpose, Defendant TNA (the "TNA Transfers").

Remarkably, within the Piazza Defendants' 50-page motion, the TNA Transfers are hardly mentioned. Instead, they turn a blind eye to the TNA Transfers in order to foist a fictional narrative that portrays them as innocent bystanders to a scheme they contend was enacted wholly in Europe. They contend, for example, that (1) the Complaint does not "establish[] their involvement in the actual dispute," (2) "the only claim is that Moving Defendants purchased AVG and ULF Notes," and (3) "all the conduct alleged in the Complaint occurred in England or Ukraine." Mem. in Support of Motion to Dismiss ("Mot.") [Doc. No. 44] at 11-12, 30. This simply is not credible. And each of the Piazza Defendants' legal arguments are strawmen that flow from this obfuscation.

First, the Piazza Defendants' lead argument that Gramercy's claims are subject to LCIA arbitration in London fails because it hinges on the fallacy that the Piazza Defendants, as third-parties, can invoke the Trust Deeds' arbitration provision on an equitable-estoppel theory. But the Piazza Defendants ignore that English

law governs whether they can compel arbitration, and under English law, they cannot. Even assuming U.S. law applies, the equitable estoppel-argument is rooted in the fiction that Gramercy's claims are claims to enforce the Notes. They are not.

Second, the Piazza Defendants' position that the Trust Deeds' no-action clauses require Gramercy to seek a remedy for the fraudulent and tortious misconduct alleged in the Complaint through an English indenture trustee fails for a familiar reason: under English law, they have no right to invoke the no-action clauses. Even if they could, those clauses apply only to claims asserted against the Company or the Surety Providers to enforce the terms of the Trust Deeds. Gramercy's claims are against strangers to the Trust Deeds based on the Piazza Defendants' fraudulent and tortious conduct, not for breach of contract.

Third, the Piazza Defendants' contention that ULF and AVG are required and indispensable parties under Federal Rule of Civil Procedure 19 fails because a judgment in Gramercy's favor would not *impair* the Company's interests; it would *further* the Company's interests in laying blame for the Company's contractual shortcomings on Defendants. In any event, the Piazza Defendants' argument hinges entirely on Gramercy's tortious interference claim; none of the six other claims require a determination that there was a breach. And courts routinely have held that the other parties to a contract are not required or indispensable parties when a tortious interference claim is asserted. This is particularly true here because a ruling that the Company breached the contracts would neither bind the Company

in later proceedings nor otherwise sufficiently impair the Company's interests to satisfy Rule 19.

Fourth, the Piazza Defendants' contention that the doctrine of forum non conveniens supports dismissal because a London arbitration somehow is a more convenient forum than Wyoming strains credulity given that the Piazza Defendants are Wyoming companies and their principal officers. The contention fails for at least three independent reasons: (1) the Piazza Defendants have not shown—and cannot show—that foreign law governs the vast majority of this dispute, (2) they have not shown that England is an "available" alternative forum, and (3) they have not shown that private- and public-interest factors point clearly toward dismissal.

Fifth, each of the Piazza Defendants' scattershot attacks on the RICO cause of action are unavailing because they are rooted in the same mischaracterizations of the Complaint. In short, (a) the RICO claim does not fail based on extraterritoriality because, consistent with well-settled law, Gramercy has alleged substantial use of domestic mail and/or wires – as well as inducements of interstate travel – as a core component of the scheme; (b) PSLRA preemption is a red herring because Gramercy's RICO claims do not involve the purchase or sale of securities; (c) the extensive, multi-year scheme alleged in the Complaint meets RICO's continuity requirement at the pleading stage; (d) the argument that Gramercy has not alleged cognizable damages does not find support in the law and ignores that Gramercy cannot seek a remedy for Defendants' misconduct under the Notes; and (e) the Complaint contains detailed allegations regarding the

Piazza Defendants' misconduct that amply satisfy Rule 9(b).

Finally, Yaremenko's last-ditch personal jurisdiction argument cannot be squared with his extensive contacts with Wyoming. Gramercy alleges, among other things, that Yaremenko is a "founding partner" and the Chief Operating Officer of SP Capital, a Wyoming company; he directly participated in the alleged scheme, including the TNA Transfers; and, in fact, signs the annual reports for TNA, an entity formed specifically to facilitate the fraudulent transfers into Wyoming. In any case, if there were any doubt that these contacts were sufficient, the law is clear that jurisdictional discovery should proceed. The Court should deny the Piazza Defendants' Motion to Dismiss.

STATEMENT OF FACTS

I. GRAMERCY BECOMES THE COMPANY'S LARGEST BONDHOLDER PURSUANT TO TRUST DEEDS THAT DO NOT PROVIDE REMEDIES AGAINST THIRD PARTIES ENGAGED IN FRAUD.

A. Gramercy Management Is a Long-Term Investor That Ushered the Company Through Multiple Consensual Restructurings Until It Was Defrauded.

Plaintiff Gramercy Management is a Connecticut-based investment management firm. Compl. ¶ 13. From

its Connecticut offices, it manages the Gramercy Funds on behalf of the fund's investors, substantially comprised of U.S.-based state, local and corporate pension plans and university endowments. Gramercy also acquired Notes on behalf of other investors, including Plaintiff Roehampton, a Delaware LLC that maintains its principal place of business in Connecticut. *Id.* ¶¶ 14-15.

As a long-term investor in emerging markets, Gramercy made a substantial investment beginning in 2011 in the Ukrainian agricultural conglomerate ULF, which Bakhmatyuk consolidated with AVG to form one of the largest agricultural companies in Eurasia. *Id.* ¶¶ 42, 46, 48. Gramercy believed in the Company's long-term viability. Between 2011 and 2017, Gramercy purchased approximately 41.4% of the AVG Notes and approximately 28.6% of the ULF Notes, making it one of AVG's largest creditors—and its largest noteholder, holding (as of September 30, 2021) ULF Notes and AVG Notes with a face value of $240 million and $123 million, respectively, including principal and accrued interest. *Id.* ¶ 46. All of Gramercy's purchases took place before the onset of the scheme or before it was known. *See, e.g., id.* ¶ 96.

Contrary to the Piazza Defendants' misplaced "vulture fund" characterization, Gramercy did not resort to litigation or orchestrate a non-consensual reorganization plan when the Company first began to face financial difficulties following the annexation of Crimea, despite requests from other creditors to do so. Far from it. Rather than orchestrate a creditor takeover—Bakhmatyuk's preoccupation in the wake of

the creditor takeover of another Ukrainian agricultural company in that period, Mriya Agro Holdings ("Mriya"),[2] *see id.* ¶¶ 51, 55—Gramercy supported the Company through two consensual restructurings of the ULF and AVG Notes to address uncertainty in the business and temporary financial pressures. First in 2015, and again in 2016, Gramercy was approached by Bakhmatyuk, and after a period of good-faith negotiations, voted in favor of restructuring proposals that, among other things, extended redemption dates, allowed certain interest payments to be satisfied by payment in kind, and waived certain events of default. *Id.* ¶¶ 57-58. Given that it held in excess of 25% of the Notes, these restructurings could not have been effectuated without Gramercy's consent. *Id.* ¶¶ 46-49.

B. The Trust Deeds Govern Contractual Claims Against the Company and Sureties, But Do Not Shield Remote Third Parties Engaged In Fraud.

The AVG and ULF Notes are governed by trust deeds (the "Trust Deeds"). *Id.* Each Trust Deed contains a choice-of-law provision stating that the Trust Deed will be governed by and construed according to English law. *See* Doc. No. 44-21 § 27; Doc. No. 44-26 § 19.1. The parties to the Trust Deeds are AVG and ULF, as well as the Surety Providers—*i.e.*, a number of AVG and ULF affiliates whose assets guaranteed the Company's repayment obligations under the Notes. *See* Doc. No. 44-20 at 2; Doc.

2. Gramercy was not a Mriya creditor or otherwise involved.

No. 44-25 at 2. Compl. ¶¶ 47, 49. None of the Defendants are parties to the Trust Deeds.

As a holder of more than 25% of the Notes, Gramercy had valuable rights under the Notes. One such right was the power to block certain resolutions of the noteholders (including in relation to restructurings). Another right, reflected in the Trust Deeds' no-action clauses, was the power to instruct the Indenture Trustees to initiate proceedings against the Issuer, the Surety Providers, or both "to enforce the terms of the Trust Deed, the Notes and/or the Surety Deed." Compl. ¶¶ 47, 49; Doc. No. 44-26 § 14. Noteholders, including Gramercy, are prohibited from instituting any proceeding against ULF or any Surety Provider *to enforce the terms of the Trust Deeds, the Notes or Surety Deed* "unless the Trustee, having become bound so to proceed, fails to do so within a reasonable time and such failure is continuing." Doc. No. 44-26 § 14 (emphasis added). The AVG Trust Deed states that "[o]nly the Trustee may *enforce the provisions of these presents*" and that "[n]o Noteholder shall be entitled (i) to take any steps or action *against the Issuer or the Surety Provider* to enforce the performance of any of the provisions of these presents and/or the Surety Agreement or (ii) take any other proceedings (including lodging an appeal in any proceeding) in respect of or concerning the Issuer or the Surety Providers, in each case unless the Trustee having become bound as aforesaid to take any such action, steps or proceedings fails to do so within a reasonable period and such failure is continuing." Doc. No. 44-20 § 8.3 (emphasis added).

Appendix G

Two important limitations confine the scope of the no-action clauses. First, the no-action clauses extend only to proceedings brought against the Issuers (ULF or AVG), the Surety Providers, or both. They do not extend to proceedings brought against parties who are not signatories to the Trust Deeds—such as Defendants. Second, the no-action clauses only prohibit proceedings to enforce the terms of the Trust Deeds. They do not prohibit proceedings asserting extracontractual claims—such as Gramercy's claims under the RICO statute and state tort law. Nothing in the Trust Deeds authorizes—let alone requires—Gramercy to instruct the Indenture Trustees to sue non-signatories such as the Piazza Defendants for violating the RICO statute and to assert state-law claims sounding in tort.

The Trust Deeds make clear that, because they are not parties to the Trust Deeds, the Piazza Defendants have no power to invoke the no-action clauses or *any* other provision of the Trust Deeds. Both contain a provision that expressly denies all third parties such as the Piazza Defendants, any rights under the Trust Deeds:

> "A person who is not a party to these presents has no rights under the Contracts (Rights of Third Parties) Act 1999 to enforce any term of these presents, but this does not affect any right or remedy of a third party which exists or is available apart from that Act." Doc. No. 44-21 § 32.
>
> "No person shall have any right to enforce any term or condition of the Notes under the

> Contracts (Rights of Third Parties) Act 1999 except and to the extent, if any, that the Notes expressly provide for such Act to apply to any of their terms." Doc. No. 44-26 § 18.

These provisions mean that the Piazza Defendants have no right to invoke the arbitration agreements in the Trust Deeds to compel Gramercy to arbitration. They also mean that the Piazza Defendants (a) have no right to invoke the no-action clauses as a potential bar to Gramercy's causes of action; and (b) have no right to invoke the choice-of-law provisions to argue (incorrectly) that English law governs Gramercy's RICO claims and state-law tort claims.

While trying to bury in a footnote that the Trust Deeds expressly eliminate any third-party rights, *see* Mot. at 14 n.12, the Piazza Defendants emphasize certain disclosures contained within the ULF and AVG prospectuses concerning the possibility of further depreciation of Ukrainian currency, the possible economic impact arising from any changes in Ukraine's relationship with Russia, and the fact that "[t]he Group and its business has been, and will continue to be, controlled by a single ultimate beneficial owner," namely, Bakhmatyuk, "and will be subject to related party transactions." Mot. at 4. The Piazza Defendants seem to suggest that these risk disclosures mean that the Trust Deeds allowed for the kind of rampant, undisclosed fraud alleged in the Complaint. That is not true. The risk disclosures clearly do not cover or provide any basis for Gramercy to have anticipated the wide-ranging fraudulent scheme Bakhmatyuk and his allies perpetrated against Gramercy. While Gramercy

acknowledges that Russia's annexation of Crimea in early 2014, together with a global collapse in commodity prices, disrupted the Company's operations, none of Gramercy's claims are based on those events. *See* Compl. ¶¶ 53–54. Furthermore, the notion that the disclosure of related party transactions in the "ordinary course of its business" encompassed the extensive misconduct Gramercy alleges, including the covert looting of over a billion dollars of assets to Wyoming and Cyprus shell companies, is absurd.

II. GRAMERCY'S SUBSTANTIAL, GOOD-FAITH EFFORTS TO EFFECTUATE A COMPREHENSIVE RESTRUCTURING IN ACCORDANCE WITH INTERNATIONAL NORMS ARE FRUSTRATED BY DEFENDANTS' EXTENSIVE, MULTI-FACETED SCHEME.

Although Gramercy ushered the Company through two smaller-scale restructurings, it was expected at the time that a larger-scale restructuring eventually would be needed. *Id.* ¶ 58. Then, in late 2016, the picture became worse for Bakhmatyuk. Not only was he increasingly concerned that a Mriya-like fate would befall the Company, *id.* ¶ 51, in October 2016, the National Anti- Corruption Bureau of Ukraine ("NABU") launched an investigation into Bakhmatyuk in connection with a historic stabilization loan of around UAH 1.2 billion that the National Bank of Ukraine ("NBU") provided in 2014 to VAB Bank, a bank that Bakhmatyuk owned at the time. *Id.* ¶ 59. Presaging the conduct at issue in the Complaint, the focus of the investigation was whether Bakhmatyuk had embezzled the loan funds for his own personal use and benefit (either

directly or through companies he owned). *Id.* As a result, Bakhmatyuk fled to Austria, where he now resides. *Id.* ¶ 64. (Later criminal proceedings revealed that VAB Bank had transferred the funds—which were supposed to meet VAB Bank's clients' guaranteed deposits—to Bakhmaytuk-controlled companies through Meinl Bank AG, which itself had its banking license revoked due to allegations of money laundering.) *Id.* ¶ 60.

Against this backdrop, Gramercy, along with another creditor, Ashmore, opened a dialogue with Bakhmatytuk and his representatives regarding the need for a comprehensive restructuring for the benefit of all stakeholders. *Id.* ¶ 78. Gramercy's substantial good-faith efforts persisted for years, as they were strung along by Bakhmatyuk's minor concessions, such as the appointment of Ernst & Young to conduct a "light independent business review" that ultimately was so restricted in scope that it essentially proved worthless, and the Company's subsequent retention of Ziff Ivin—yet another financial advisor tasked with assessing the Company's financial condition without enough access to provide any real insight. *Id.* ¶¶ 86-87, 99.

Contrary to the Piazza Defendants' narrative, Gramercy did not "refuse to accept reasonable terms." Mot. at 9. Rather, throughout the period of negotiations, Bakhmatyuk used misinformation as a sword in an effort to press Gramercy into accepting a low-ball offer rather than continuing its efforts to effectuate a holistic restructuring on equitable terms for all creditors. One of Bakhmatyuk's most significant misinformation tools

was the supposedly independent research firm, Concorde Capital, a firm with extensive ties to Piazza that eventually revealed itself to be nothing more than a shill. Compl. ¶¶ 23, 26-28.

Seizing upon misinformation spread by his allies, Bakhmatyuk and others delivered offers to Gramercy in Connecticut that were far from fair. For example, Bakhmatyuk proposed that Gramercy accept a haircut of half of the notional value of its Notes, half the value of the interest, and to extend the maturity date of the Notes for ten years, without offering any potential upside for these substantial concessions. *Id.* ¶ 91. Later, Ziff Ivin was co-opted to deliver another one-sided proposal—touted by the Piazza Defendants as reasonable—that noteholders take 35-50% on the Notes, extend the maturity date for 9 years, and accept other unfavorable terms. *Id.* ¶ 99. This proposal, like the others, rightly was rejected by Gramercy, which either received the Defendants' misleading communications knowingly transmitted to Connecticut or was baited to travel from Connecticut to London or Kyiv only to find it had wasted its time. Indeed, while asking Gramercy to accept large concessions, Bakhmatyuk assiduously resisted giving up any of his equity in the Company in order to achieve a consensual restructuring because he needed to preserve his stranglehold on the Company. *See id.* ¶¶ 151, 153. As a prime example, while living in Austria, Bakhmatyuk used the Company to wage his own personal war against the NABU investigation against him, going so far as to cause the Company to print a message against the then-head of the NABU on 1 billion eggs sold to supermarkets

in Ukraine. *Id.* ¶ 11. Thus, the underlying circumstances demonstrate that Gramercy's efforts to achieve a consensual restructuring, at its substantial cost and expense, were derailed by Bakhmatyuk's bad faith—not the opposite.

Indeed, as Gramercy's independent investigation eventually would uncover, Bakhmatyuk's participation in the negotiations was nothing more than a facade that allowed him to keep Gramercy at bay long enough so that he could effectuate a multi-faceted scheme with the integral assistance of his close allies, the Piazza Defendants. *See, e.g.*, *id.* ¶¶ 151, 153.

In the first phase of the scheme, Bakhmatyuk and the Piazza Defendants leveraged their media and other connections in Ukraine to disseminate false financial information to artificially devalue the price of Company debt in order to allow Bakhmatyuk to purchase as much debt as he could find at a steep discount—in particular, leveraging the Piazza Defendants' deep connections to Concorde, who issued at least two misleading reports spoon fed to them by Defendants. *See id.* ¶¶ 10, 72-76, 108.

Next, in the second phase, Bakhmatyuk and Piazza orchestrated straw purchases from other creditors, with the Piazza Defendants serving as the most prominent straw purchasers, to marginalize and isolate Gramercy through the substitution of Bakhmatyuk's cronies (who often entered into bogus put-and-call arrangements that left Bakhmatyuk with control over the debt) for independent creditors. *Id.* ¶¶ 10, 93. The Complaint

specifically alleges Piazza's acquisition of debt on behalf of Bakhmatyuk, including from Ashmore, which had been Gramercy's main ally in pursuing a holistic restructuring, *Id.* ¶ 102, 109. The Piazza Defendants were not mere debt purchasers; they acquired the debt on non-arms' length terms as a front for Bakhmatyuk and as part of an overall scheme targeting Gramercy.

And finally, having forestalled any enforcement action that Gramercy may have taken, Bakhmatyuk enlisted the Piazza Defendants to employ their "expertise"—the surreptitious transfer of assets into sham Wyoming companies designed to exploit Wyoming law.

III. DEFENDANTS' TRANSFER OF OVER $870 MILLION OF ASSETS WAS EFFECTUATED THROUGH WYOMING-BASED COMPANIES FORMED UNDER WYOMING LAW FOR THE EXPRESS PURPOSE OF EXPLOITING WYOMING CORPORATE PROTECTIONS.

After myopically highlighting this dispute's connections to Europe without even acknowledging the scheme's deep connections to Connecticut and Wyoming, the Piazza Defendants conclude their self-serving factual recitation by arguing that "accepting all of the allegations as true, the only claim is that Moving Defendants purchased AVG and ULF Notes." Mot. at 12. Nowhere in their recounting of the "facts" do the Piazza Defendants' even acknowledge, much less wrestle with, the detailed allegations regarding the TNA Transfers, which drive home the profound connection between the Defendants' scheme and Wyoming.

Appendix G

As alleged in the Complaint, but ignored by the Piazza Defendants, in 2017 – two months prior to the Company's default on its debt obligations to Gramercy and the other creditors under the restructured Notes – Bakhmatyuk enlisted Piazza, Yaremenko and SP Advisors to incorporate a new entity, TNA, in Wyoming for the purpose of facilitating fraudulent asset transfers, with Piazza listing himself as the beneficial owner and Yaremenko acting as the signatory of TNA's annual statements. *Id.* ¶¶ 84, 142, 170. Having formed the entities years earlier with premeditation, Bakhmatyuk fully unleashed his asset-transfer plan in 2019, when Piazza, Yaremenko, and SP Advisors orchestrated a complex set of transactions intended to shield more than $1 billion in assets from Gramercy. The first transfers of over $300 million in Company assets were to a Cypriot company called Maltofex (wholly-owned by Bakhmatyuk). Compl. ¶¶ 124-125. Those transfers are the subject of a separate action in Cyprus in which none of the Piazza Defendants are parties. *See id.* ¶ 160.

Thereafter, and without any disclosure to Gramercy, the Defendants effectuated the TNA Transfers, which transferred over $870 million in Company assets and at least one hundred ULF subsidiaries, to TNA in Wyoming for no consideration. *Id.* ¶¶ 125, 128, 139, 140, 218. The TNA Transfers included the transfer of eight companies formerly owned by AVG, effectively dissipating all of AVG, leaving only two subsidiaries, both of which are based in Crimea and therefore no longer under AVG's control. *Id.* ¶ 139. In suggesting that Gramercy should have pursued contractual remedies, the Piazza Defendants ignore the TNA transfers altogether, arguing, for example, that

Gramercy could have proceeded contractually against the Surety Providers. As alleged in the Complaint, however, certain of the Surety Providers themselves were among the transferred entities. *Id.* ¶¶ 76, 125.

The TNA Transfers followed the roadmap Piazza and Yaremenko described in a November 2020 webinar presentation, where they touted SP Advisors' establishment of corporate structures in Wyoming through which clients in Eastern Europe can hold their assets, with Piazza listing himself as a nominal director or shareholder to conceal the true owner's identity. *Id.* ¶¶ 33-34. In the webinar, Yaremenko explained that Wyoming was a particularly attractive jurisdiction for businesses to protect their assets against "corporate raiding" because it offers complete confidentiality and does not have residency requirements for shareholders or directors. *Id* ¶ 34. The Defendants effectuated these transfers surreptitiously, forcing Gramercy to incur significant costs investigating and unraveling their scheme. *Id.* ¶ 218.

While the Piazza Defendants would like to pretend the Wyoming connections do not exist, the Complaint alleges in detail the scheme's deep connections to Wyoming and each Defendant's purposeful availment of Wyoming law.

Appendix G

LEGAL ARGUMENT

I. THE PIAZZA DEFENDANTS CANNOT INVOKE THE TRUST DEEDS' ARBITRATION CLAUSES AS NON-SIGNATORIES UNDER ENGLISH LAW.

The Piazza Defendants move to compel arbitration under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), 9 U.S.C. §§ 201–208. Mot. at 13–14. To determine whether to compel arbitration under § 206, a court first examines whether the parties have "an agreement in writing to arbitrate the subject of the dispute." *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953, 959 (10th Cir. 1992). No agreement exists here because the Piazza Defendants "are not parties to the Trust Deeds." Mot. at 14. The Piazza Defendants thus resort to seeking to compel arbitration under an equitable-estoppel theory. *Id.* at 14–19. That argument fails for at least two reasons. First, the Piazza Defendants fail to grasp that English law governs whether they can invoke the arbitration agreements, and under English law, they cannot. Second, even assuming U.S. law applies (which it does not), the Piazza Defendants' equitable-estoppel arguments hinge on the fiction that Gramercy's claims are disguised breach-of-contract claims. That is simply not so.

Appendix G

A. English Law Governs Whether the Piazza Defendants, As Non-signatories, Can Compel Arbitration, and Under English Law, They Cannot.

When a contract including an arbitration agreement selects a body of law in a choice-of-law provision, that body of law governs whether a non-signatory can compel or be compelled to arbitration. *See, e.g.*, *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995); *Motorola Credit Corp. v. Uzan*, 388 F.3d 39, 50–51 (2d Cir. 2004); *Mars, Inc. v. Szarzynski*, No. CV 20- 01344 (RJL), 2021 WL 2809539, at *6 (D.D.C. July 6, 2021); *SBMH Grp. DMCC v. Noadiam USA, LLC*, 297 F. Supp. 3d 1321, 1327 (S.D. Fla. 2017).

The Piazza Defendants ignore the Trust Deeds' English choice-of-law provisions. Instead, they note the absence of authority in Wyoming state court recognizing their equitable-estoppel theory, and then turn to decisions applying federal law for the principle that a non-signatory can sometimes compel a signatory to arbitration based on equitable estoppel. Mot. at 14–19 (citing *GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC*, 140 S. Ct. 1637 (2020); *Reeves v. Enter. Products Partners, LP*, 17 F.4th 1008 (10th Cir. 2021); *Lenox MaClaren Surgical Corp. v. Medtronic, Inc.*, 449 F. App'x 704 (10th Cir. 2011); *Weller v. HSBC Mortg. Servs., Inc.*, 971 F. Supp. 2d 1072 (D. Colo. 2013); *Roe v. Gray*, 165 F. Supp. 2d 1164 (D. Colo. 2001)). None of those cases are on point. None discusses whether the contract including the arbitration agreement also contained a

choice-of-law provision. Noting that the defendants in *Motorola* had similarly misrelied on decisions applying federal law rather than Swiss law, the Second Circuit stated that "these authorities do not hold that a court must set aside a choice-of-law clause in determining arbitrability; instead, they appear to be cases where neither party raised the choice-of-law issue." 388 F.3d at 51. That is equally true here.

Under English law, as set out in the expert declaration of Ben Valentin attached hereto as Exhibit 1[3] to the Declaration of Mark D. Gibson, the Piazza Defendants cannot compel arbitration, because they are not signatories to the Trust Deeds. Ex. 1, ¶ 8(1). In England, the common-law doctrine of privity of contract provides that a contract cannot confer rights on third parties. *Id.* ¶ 18. Thus, in general, an arbitration agreement can be invoked only by a party to the contract including the arbitration agreement. *Id.* The only potentially relevant exception here stems from an English statute, the Contracts (Rights of Third Parties) Act 1999 ("CRTPA"). *Id.* ¶ 19.

That exception does not apply. *Id.* ¶¶ 23–24. The CRTPA confers rights on third parties only if the contract either expressly provides that non-parties can enforce its terms, or purports to confer a benefit on the non-party. *Id.* ¶ 19(1). The CRTPA also applies only when the contract

3. "In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law." Fed. R. Civ. P. 44.1.

identifies the third party by name, by description, or as a member of an identified (or identifiable) class. *Id.* ¶ 19(2). And the CRTPA also allows parties to contractually agree that, notwithstanding the CRTPA, non-signatories will have no rights to invoke the terms of the contract. *Id.* ¶¶ 19(2), 19(4), 22.

As explained in the Valentin declaration, the CRTPA does not give the Piazza Defendants the right to invoke the arbitration agreements for at least three reasons. First, the Trust Deeds do not state that third parties can enforce their terms, and neither purports to confer a benefit on any of the Piazza Defendants. *Id.* ¶ 21(2)–(3). Second, the Trust Deeds do not identify the Piazza Defendants by name, description, or class as third parties entitled to enforce the Trust Deeds' terms. *Id.* ¶ 21(1). And third, the Trust Deeds *expressly contract out of the CRTPA*, eliminating any potential third-party rights to invoke the arbitration agreements that they otherwise would have had under the CRTPA. *Id.* ¶ 22; *accord* Doc. No. 44-25 §§ 1.6, 18; Doc. No. 44-21 §§ 21, 32.

The Trust Deeds' express elimination of third-party rights is fatal to the Piazza Defendants' argument. Yet, apart from erroneously suggesting that U.S. law applies, their only response, appearing in a footnote, is that the CRTPA "preserves" their right to invoke equitable estoppel, which they contend "exists and is available apart from the [CRTPA]." Mot. at 14 n.12. They are wrong. Given the English choice-of-law provision, for equitable estoppel to exist and be available to the Piazza Defendants in this context, that theory must exist and operate as an exception

to privity of contract under English law. It does not. Ex. 1, ¶¶ 23, 29. There is no authority in English law for the proposition that equitable estoppel permits enforcement of an arbitration agreement by a third party apart from the rights that may exist under the CRTPA—rights that are expressly disclaimed here. *Id.* ¶ 29. As a result, the general rule of privity applies under English law, and bars the Piazza Defendants' attempt to compel arbitration. *Id.* ¶¶ 29, 31.[4]

B. Even If the Piazza Defendants Could Invoke An Equitable-Estoppel Theory Under U.S. Law, That Theory Fails.

1. Gramercy Does Not Seek to Hold the Piazza Defendants Liable for Breaching Duties Imposed By the Trust Deeds.

The Tenth Circuit has recognized that equitable estoppel allows a non-signatory to seek to compel arbitration if the plaintiff–signatory seeks to hold the non-signatory liable "pursuant to duties imposed by the agreement." *Lenox*, 449 F. App'x at 708. In other

4. The structure of the Trust Deeds reinforces this conclusion. The ULF trust deed recognizes third-party rights for indemnification, noting that "[t]he Appointees of the Trustee [third parties] shall have the right under the Contracts (Rights of Third Parties) Act 1999 to enforce their rights against the Issuer or the Surety Providers, as the case may be, under this Clause 7.4." Doc. No. 44-25 § 7.4; Ex. 1, ¶¶ 22(2) n.9, 41(1). This provision shows that, had the parties intended for third parties to have the right to invoke the arbitration agreements, they would have said so.

words, "the contract must form the legal basis" for the claims against the non-signatory. *Id.* at 709. The Piazza Defendants try to meet this requirement by cobbling together allegations in the Complaint that reference Gramercy's rights under the Trust Deeds. From this, they argue that Gramercy's claims "rely" on the existence of the Trust Deeds. Mot. at 16–17. But the Tenth Circuit has rejected this precise argument. In *Lenox*, the Court held that "it is not enough that the contract is factually significant to the plaintiff's claims." 449 F. App'x at 709. So Gramercy's mere reference to its contractual rights in the Complaint does not create a basis to invoke equitable estoppel. The *Lenox* Court also held that it is not enough that the contract "has a 'but-for' relationship with" the plaintiff's claims. *Id.* at 709. So the fact that Gramercy's "claims are predicated upon the existence and validity of the Trust Deeds," as the Piazza Defendants argue, Mot. at 17, also is of no moment.

The Trust Deeds do not form the legal basis for Gramercy's claims. Gramercy has not sued the Piazza Defendants for breach of contract. Gramercy does not seek to hold the Piazza Defendants liable for breaching duties owed to Gramercy under the Trust Deeds. And Gramercy's claims do not depend on whether Defendants' conduct violated the terms of the Trust Deeds. Instead, Gramercy alleges that Defendants fraudulently strung Gramercy along during negotiations about restructuring the Company's Notes. Compl. ¶¶ 5–6. Had Defendants been honest and forthcoming, Gramercy could have taken appropriate measures, such as selling its notes or instructing the indenture trustees to initiate proceedings

against the Company for defaulting on them. *Id.* ¶ 10(a). Gramercy also alleges that Defendants fraudulently and tortiously stripped over a billion dollars in assets from ULF and AVG, sheltering those assets in Wyoming and Cypriot entities. *Id.* ¶ 10(c). Based on this conduct, Gramercy does not seek to hold Defendants liable to pay the ULF and AVG Notes. Instead, Gramercy seeks damages as a result of Defendants' misconduct that eviscerated Gramercy's rights under the Notes, including their right to seek repayment and their right as a holder of more than 25% of the notes to block an unfavorable restructuring, which Defendants instead effectuated through illicit means. *Id.* ¶¶ 181–185.

The District of Colorado's decision in *Roe v. Gray*, 165 F. Supp. 2d 1164 (D. Colo. 2001), does not help the Piazza Defendants. There, the court determined that non-signatories could seek to compel arbitration because the plaintiff had sued both the signatory and the non-signatories, and the plaintiff's claims against both were "based on the same factual allegations, and even the same contract." *Id.* at 1175. Here, in sharp contrast, Gramercy has not sued ULF or AVG, because they were looted by the Piazza Defendants; they did not participate in the alleged scheme.

2. Gramercy Has Not Alleged Interdependent and Concerted Misconduct Among ULF, AVG, and Defendants.

Under the equitable-estoppel doctrine, a non-signatory also can invoke an arbitration agreement when the

plaintiff–signatory "alleges substantially interdependent and concerted misconduct" by both the non-signatory and one or more of the signatories to the contract. *Lenox*, 449 F. App'x at 710. But "allegations of collusion between a signatory and a nonsignatory, alone, are not enough to estop a signatory from avoiding arbitration with a nonsignatory." *Id*. Rather, allegations of collusion will support a non-signatory's equitable-estoppel theory only if those allegations "establish that the claims against the nonsignatory are intimately founded in and intertwined with the obligations imposed by the contract containing the arbitration clause." *Id.* Again, even assuming this U.S. law applies (which it does not), that is not the case here.

The Piazza Defendants contend that equitable estoppel applies because Gramercy's claims "are entirely dependent on AVG and ULF's obligations" under the Trust Deeds, and because "this dispute will unquestionably involve facts regarding how ULF and AVG allegedly failed to comply with the terms of the Trust Deeds." Mot. at 18. Those contentions are wrong for all the reasons discussed above. They are also irrelevant. The question is whether Gramercy has alleged interdependent and concerted misconduct between the Piazza Defendants and the Company. It has not. Gramercy does not allege that the Company worked hand-in-hand with the Piazza Defendants, conspiring together to breach the terms of the Trust Deeds. Gramercy does not allege that the Piazza Defendants *colluded* with the Company; Gramercy alleges that they *abused* the Company by, among other things, misrepresenting its financial condition, resisting a consensual restructuring in favor of buying-up debt using

misinformation and straw purchasers, and eventually looting the Company by stripping assets. *See, e.g.*, Compl. ¶¶ 10(c), 12, 128, 168, 171.

The Piazza Defendants' cases are inapposite. In *Reeves*, the plaintiffs alleged that a signatory defendant worked together with non-signatories–defendants to fail to pay the plaintiffs overtime wages. 17 F.4th at 1013. Similarly, in *Weller*, the plaintiff alleged that a signatory–defendant and non-signatories–defendants conspired and worked together to unlawfully force the plaintiff to maintain flood insurance as part of his mortgage. 971 F. Supp. 2d at 1082. In both cases, because the plaintiff alleged that signatory and non-signatory defendants worked together to engage in concerted misconduct, the courts determined that the non-signatories could compel arbitration. *Reeves*, 17 F.4th at 1013; *Weller*, 971 F. Supp. 2d at 1082–83. Here, in stark contrast, Gramercy does not allege that the Company worked together with the Piazza Defendants to breach the Trust Deeds; Gramercy alleges that the Company was exploited by the Piazza Defendants.[5]

5. If the Court were to determine that, despite their non-signatory status, the Piazza Defendants can invoke the arbitration agreements in the Trust Deeds to compel Gramercy to arbitration, whether Gramercy's claims fall within the scope of the arbitration agreements would be a question for the arbitrator—not this Court—to resolve because the arbitration agreements adopt the rules of the London Court of International Arbitration. *See* Mot. at 20 n.13.

II. DEFENDANTS, AS NONSIGNATORIES, ALSO CANNOT INVOKE THE TRUST DEEDS' NO-ACTION CLAUSES UNDER ENGLISH LAW, WHICH, IN ANY CASE, DO NOT APPLY TO GRAMERCY'S NON-CONTRACTUAL CLAIMS AGAINST THIRD PARTIES.

A. The Piazza Defendants Cannot Invoke the No-Action Clauses Under English Law Because They Are Not Signatories to the Trust Deeds.

The Piazza Defendants' no-action-clause argument fares no better. That argument fails for the same reason as their arbitration argument: under English law, they have no right to invoke the no-action clauses because they are not parties to the Trust Deeds. Ex. 1, ¶¶ 8(2), 35–38. That should be the end of the inquiry.

B. Even If the Piazza Defendants Could Invoke the No-Action Clauses, Gramercy's Claims Do Not Fall Within Their Scope.

Even if they could invoke the no-action clauses, the Piazza Defendants' argument still would fail. The no-action clause in the ULF Trust Deed authorizes the Trustee to institute proceedings against the Issuer (ULF), any Surety Provider, or both "to enforce the terms of this Trust Deed, the Notes and/or the Surety Deed." Doc. No. 44-25 § 2.5. It then states that no noteholder can institute a proceeding against ULF or any Surety Provider to enforce the terms of the trust deed, the notes, or the surety deed "unless the Trustee, having become

bound so to proceed, fails to do so within a reasonable time and such failure is continuing." *Id.*

The AVG Trust Deed contains similar provisions. It authorizes the Trustee to institute proceedings against or in relation to the Issuer (AVG) and the Surety Providers "to enforce their respective obligations under these presents and the Surety Agreements or otherwise." Doc. No. 44-20 § 7.1. The no-action clause then states:

> Only the Trustee may enforce the provisions of these presents. No Noteholder shall be entitled (i) to take any steps or action against the Issuer or the Surety Provider to enforce the performance of any of the provisions of these presents and/or the Surety Agreement or (ii) take any other proceedings (including lodging an appeal in any proceeding) in respect of or concerning the Issuer or the Surety Providers, in each case unless the Trustee having become bound as aforesaid to take any such action, steps or proceedings fails to do so within a reasonable period and such failure is continuing.

Id. § 8.3. The conditions section of the AVG trust deed echoes these provisions, making clear that, generally, only the Trustee may sue AVG or the Surety Providers to enforce the provisions of the Trust Deed, the Surety Agreements, and the Notes, and that no noteholder can sue AVG or a Surety Provider to enforce these agreements "unless the Trustee, having become bound so to proceed, fails to do so within a reasonable period and such failure shall be continuing." Doc. No. 44-22 §§ 12.1–12.2.

The plain text shows that two conditions cabin the scope of the no-action clauses. *See* Ex. 1, ¶ 40 (noting that English principles of contract interpretation look first to plain text). First, the no-action clauses apply only to suits against the Issuer or a Surety Provider. Second, the no-action clauses apply only to suits seeking to enforce the terms of the Trust Deeds, the Notes, or the Surety Agreements. The provisions in the Trust Deeds eliminating third-party rights, when read together with the no-action clauses and the foregoing provisions, leave no doubt that the no-action clauses do not shield third parties from liability for extra-contractual misconduct. *See* Ex. 1, ¶ 41(1) (noting that English principles of contract interpretation call for reading the contract as a whole). The no-action clauses are thus no bar to Gramercy's claims. Gramercy has not sued the issuer of the ULF Notes (ULF), the issuer of the AVG Notes (AVG), or any of the Surety Providers. Gramercy also is not suing to enforce the terms of the Trust Deeds, the Notes, or Surety Agreements—naturally, the only claims that must be presented to the Trustee first. Stated differently, Gramercy is not suing for breach of contract. Instead, Gramercy is suing strangers to the contracts who fraudulently and tortiously conspired to eviscerate Gramercy's contractual rights. Compl. ¶¶ 181–184. Gramercy's claims thus are not subject to the no-action clauses.

Caselaw reinforces that conclusion. The District of Arizona's decision in *Allstate Life Insurance Co. v. Robert W. Baird & Co.*, No. CV-09-8162-PCT-GMS, 2011 WL 5024269 (D. Ariz. Oct. 21, 2011), is instructive. That case involved a no-action clause, like the ones here, that

generally prohibited bondholders from suing to enforce the terms of the indenture. *Id.* at *2. The court determined that the no-action clause did not bar the plaintiffs' claims because, just as here, the plaintiffs asserted statutory and state-law tort claims, not contractual claims. *Id.* at *3. Other courts similarly have held that a no-action clause is no bar to the plaintiff's suit when, as here, the no-action clause extends only to suits to enforce the contract, but the plaintiff's claims do not seek to enforce the contract's terms. *See, e.g.*, *Cruden v. Bank of N.Y.*, 957 F.2d 961, 974 (2d Cir. 1992) (determining that no-action clause was limited to contractual claims, so the clause did not bar a claim for fraudulent conveyance); *Kusner v. First Penn. Corp.*, 531 F.2d 1234, 1239 (3d Cir. 1976) (determining that no-action clause for suit seeking "any other remedy under or upon this Indenture" did not bar the plaintiff's statutory claims under the Securities and Exchange Act); *Regions Bank v. Blount Parrish & Co.*, No. 01 C 0031, 2001 WL 726989, at *7 (N.D. Ill. June 27, 2001) (concluding that no-action clause for suits seeking "any remedy with respect to this Indenture" did not apply to fraud claims).

Even though Gramercy is not suing either the Issuer or the Surety Providers, and even though Gramercy is not pursuing contractual claims, the Piazza Defendants contend that Gramercy must issue a written request to the Trustees to institute an arbitration against them in London, asserting RICO and state-law tort claims. That would be a bizarre result—one that cannot be squared with the caselaw. *See Cont'l Bank, N.A. v. Caton*, No. 88-1611-C, 1990 WL 129452, at *6–7 (D. Kan. Aug. 6, 1990) ("[T]he indenture agreements here limit [the Trustee's] actions to claims on the notes or under the indentures.

[The Trustee] has no power to assert individual tort claims on behalf of the noteholders against third persons which are wholly extraneous to the rights and obligations created by the notes and the indenture agreements."); *see* Ex. 1, ¶ 41(2) (noting that English principles of contract interpretation call for avoiding constructions that flout common sense).[6]

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6. In seeking to portray this case as an action on the Notes, the Piazza Defendants also suggest in passing that Gramercy lacks standing because its claims are allegedly derivative, not direct. Mot. at 22–23. Not so. Gramercy has pleaded direct injuries. As alleged in the Complaint, many creditors sold their debt to Defendants pursuant to put-call arrangements or on non-arms'-length terms, thus substituting Defendants or their cronies for independent creditors. *See* Compl. ¶ 150. Along the way, Defendants made misrepresentations directly to Gramercy that induced it to forego unique rights that it held. Compl. ¶¶ 10(a), 70–92; *see CGC Holding Co. v. Broad & Cassel*, 773 F.3d 1076, 1099 (10th Cir. 2014) (concluding that RICO plaintiffs had standing because they were allegedly the direct targets of the defendants' fraudulent scheme). The purpose of this, as alleged, was to isolate Gramercy, and ultimately to cause it injury by eviscerating its unique rights under the Notes, which were the only threat to Bakhmatyuk's control. Compl. ¶¶ 10(b), 93–121. And Gramercy also has alleged that it incurred damages traveling to Europe for negotiations that were a mere facade and in investigating and unraveling Defendants' scheme. *Id.* ¶¶ 10(c), 218. The fact that certain of the conduct may also have impacted other creditors (but not all creditors) does not impact Gramercy's standing. *See, e.g.*, *Bixler v. Foster*, 596 F.3d 751, 757 (10th Cir. 2010) (holding that when, as here, a corporate constituent alleges a "direct, personal interest in a cause of action," that person has standing "even if the corporation's rights are also implicated"); *In re M&L Bus. Mach. Co.*, 136 B.R. 271, 276 (Bankr. D. Colo. 1992) (concluding that creditors who were direct targets of misconduct, fraud, and misrepresentation had standing).

III. ULF AND AVG ARE NOT REQUIRED OR INDISPENSABLE PARTIES.

The Piazza Defendants' indispensable-parties argument fails because ULF and AVG are neither required parties under Rule 19(a) nor indispensable parties under Rule 19(b).

The Piazza Defendants contend that ULF and AVG are required parties because they allegedly have interests related to this action, and a judgment in Gramercy's favor could impair or impede those interests. Mot. at 26–27; *see* Fed. R. Civ. P. 19(a)(1)(B)(i). Tellingly, the Piazza Defendants do not—because they cannot—contend that a ruling in Gramercy's favor on its RICO claims or its state-law claims for fraud, civil conspiracy, or aiding and abetting could impair ULF's and AVG's interests. Instead, they focus on one element of one claim, the tortious interference claim, arguing that a determination that ULF or AVG breached the Trust Deeds could impair their interests. Mot. at 26–27. This argument fails for at least three reasons.

First, Gramercy alleges that ULF and AVG breached and defaulted on the Trust Deeds, and were unable to cure, *because of Defendants' fraudulent and tortious misconduct*. Compl. ¶ 217. ULF and AVG likely share Gramercy's interest in blaming Defendants for ULF's and AVG's contractual shortcomings. A ruling in Gramercy's favor would thus not impair ULF's and AVG's interests. To the contrary, it would likely further ULF's and AVG's interests in laying blame on Defendants, particularly since it is indisputable that the Notes were in default.

Second, the Piazza Defendants' argument collides head-on with the caselaw. Courts repeatedly have held that when, as here, a plaintiff asserts a tortious interference claim, the other parties to the contract are not required or indispensable parties. *See, e.g.*, *Arkansas v. Texas*, 346 U.S. 368, 369–70 (1953) (rejecting argument that an absent contracting party was a required party in tortious interference case); *Salton, Inc. v. Philips Domestic Appliances & Pers. Care B.V.*, 391 F.3d 871, 880 (7th Cir. 2004) ("[T]here is no rule that you cannot sue the interferer without also suing the party to your contract whom the defendant inveigled into breaking the contract."); *Stone's Pharmacy, Inc. v. Pharmacy Acct. Mgmt., Inc.*, 875 F.2d 665, 666 (8th Cir. 1989); *Alpha Pro Tech, Inc. v. VWR Int'l LLC*, 984 F. Supp. 2d 425, 458–59 (E.D. Pa. 2013) ("Indeed, '[t]he mere fact, however, that Party A, in a suit against Party B, intends to introduce evidence that will indicate that a non-party, C, behaved improperly does not, by itself, make C a necessary party.'"); *Abbott Point of Care, Inc. v. Epocal, Inc.,* No. CV-08-S-543-NE, 2008 WL 11297394, at *4 (N.D. Ala. June 23, 2008).

Third, a determination that ULF and AVG breached would not sufficiently impair any interest they might have as required by Rule 19. That is so because neither ULF nor AVG would be bound by the Court's determination. *See Aerotek, Inc. v. Beacon Hill Staffing Grp.*, No. 18-2645, 2019 WL 1455337, at *2–3 (E.D. Pa. Apr. 2, 2019) (concluding that a third party was not a required party under Rule 19 in a tortious interference case because the third party would not be bound by the court's judgment under the issue preclusion doctrine). That the

Court's determination might create "an unfavorable or inconvenient" precedent for ULF and AVG in future proceedings does not render them required parties under Rule 19. *Id.* at *3 (citing *Janney Montgomery Scott, Inc. v. Shepard Niles, Inc.*, 11 F.3d 399, 407 (3d Cir. 1993)); *accord Huber v. Taylor*, 532 F.3d 237, 251 (3d Cir. 2008) ("[W]here the preclusive effect of an action on any related litigation is speculative, joinder of an absent party is not compulsory under Rule 19(a)(2)(i).").

The Piazza Defendants also contend that the Court "cannot grant full relief" because Gramercy could "stand to collect on the debt from ULF and AVG" in an enforcement action under the Trust Deeds "while recovering here." Mot. at 27; *see* Fed. R. Civ. P. 19(a)(1)(A). The Piazza Defendants omit that an absent party is a required party under this provision of Rule 19 only if, "in that person's absence, the court cannot accord complete relief *among existing parties*." Fed. R. Civ. P. 19(a)(1)(A) (emphasis added). There is no question that, even without ULF and AVG, the Court can award Gramercy all the relief it seeks *against Defendants* in this action. *Cf. Sac & Fox Nation of Mo. v. Norton*, 240 F.3d 1250, 1258 (10th Cir. 2001) (finding that court could accord complete relief among the existing parties because it could award the requested relief without absent party). That Gramercy might theoretically be able to recover from ULF and AVG in a separate proceeding is irrelevant to the Rule 19 analysis.

The Piazza Defendants also contend that, without ULF and AVG, the Piazza Defendants face a substantial risk of incurring double, multiple, or inconsistent obligations,

because Gramercy could instruct the Trustees to pursue arbitration. Mot. at 27; *see* Fed. R. Civ. P. 19(a)(1)(B)(ii). This argument rests on the erroneous assumption that the Trustee could sue the Piazza Defendants under the Trust Deeds even though they are not parties to the Trust Deeds. As explained above, that is incorrect. *See supra* § II(B), p. 21; *Cont'l Bank, N.A.*, 1990 WL 129452, at *7 ("[T]he indenture agreements here limit [the Trustee's] actions to claims on the notes or under the indentures. [The Trustee] has no power to assert individual tort claims on behalf of the noteholders against third persons which are wholly extraneous to the rights and obligations created by the notes and the indenture agreements.").

Finally, even if the Court were to determine that ULF and AVG are required parties who cannot be joined, they are not indispensable such that the Court should dismiss the entire case. As explained above, a judgment rendered here without ULF and AVG would not prejudice them. *See* Fed. R. Civ. P. 19(b)(1). And even if the Court thought otherwise, it could eliminate any prejudice to ULF and AVG by dismissing only Gramercy's tortious interference claim, not the case in its entirety. *See* Fed. R. Civ. P. 19(b)(2).

IV. THE PIAZZA DEFENDANTS HAVE NOT, AND CANNOT, CARRY THEIR BURDEN OF SHOWING THAT THE DOCTRINE OF FORUM NON CONVENIENS APPLIES, MUCH LESS SUPPORTS DISMISSAL.

The Piazza Defendants bear the burden of showing that the Court should dismiss the case based on forum

non conveniens. *See Rivendell Forest Prods., Ltd. v. Canadian Pac. Ltd.*, 2 F.3d 990, 993 (10th Cir. 1993). "[T]here is ordinarily a strong presumption in favor of the plaintiff's choice of forum, which may be overcome only when the private and public interest factors clearly point towards dismissal and trial in the alternative forum." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255 (1981). That presumption applies with full force here because all of the people and documents associated with or related to Gramercy are located in Connecticut. Compl. ¶¶ 13–15; *see* Charles Alan Wright et al., *Federal Practice & Procedure* § 3828.2 ("Most federal courts, including the Supreme Court, agree that the plaintiff's selection of a forum is entitled to less deference when the plaintiff (or the real party in interest) is not a United States citizen."). The Piazza Defendants have failed to carry their heavy burden to overcome Gramercy's choice of forum.

A. The Piazza Defendants Have Not Carried Their Burden to Show That Arbitration in London Is An "Available" Forum and That Foreign Law Governs the Vast Majority of This Dispute.

Where, as here, the movant's proposed alternative forum is in a different country, the court may dismiss under the forum non conveniens doctrine only if the movant establishes three threshold elements: (1) foreign law governs the vast majority of the dispute; (2) the foreign forum is "available"; and (3) the foreign forum in "adequate." *Gas Sensing Tech. Corp. v. Ashton*, No. 16-CV-272-F, 2017 WL 2955353, at *14–15 (D. Wyo. June 12, 2017) (Freudenthal, J.); *Archangel Diamond Corp.*

Liquidating Trust v. OAO Lukoil, 75 F. Supp. 3d 1343, 1375–76 (D. Colo. 2014), *aff'd*, 812 F.3d 799 (10th Cir. 2016). The Piazza Defendants have not carried their burden as to at least the first two elements.

1. The Piazza Defendants Have Not Carried Their Burden to Show That Foreign Law Will Govern the Vast Majority of This Dispute.

Having ignored English law as to their arbitration argument, the Piazza Defendants do an about-face, arguing in a single conclusory paragraph that English law governs Gramercy's RICO and state-law claims because "[t]he Subscription Agreements, Trust Deeds, and prospectuses each select English law as the governing law." Mot. at 30. This argument, like so many others the Piazza Defendants press, hinges on the fallacy that Gramercy's claims are for breach of contract. They are not, and thus English law does not govern any of Gramercy's claims. *See* Ex. 1, ¶ 45. Rather, federal law governs Gramercy's RICO claims, and state law governs Gramercy's state-law claims for fraud, tortious interference with contract, civil conspiracy, and aiding and abetting.

When a federal court has supplemental jurisdiction over a state-law claim, the court "applies the substantive law, including choice of law rules, of the forum state." *BancOklahoma Mortg. Corp. v. Capital Title Co.*, 194 F.3d 1089, 1103 (10th Cir. 1999). Wyoming has adopted the most-significant-relationship test under the Restatement (Second) of Conflict of Laws. *Elworthy v. First Tenn.*

Bank, 391 P.3d 1113, 1120 (Wyo. 2017). Applying that test, the Court need not choose between Wyoming and Connecticut because their laws do not materially differ on the elements of fraud,[7] tortious interference,[8] civil conspiracy,[9] and aiding and abetting.[10] And "[w]hen there is no conflict, the [c]ourt applies the law of the forum." *Act I, LLC v. Davis,* 60 P.3d 145, 149 (Wyo. 2002). Thus, federal law applies to Gramercy's RICO claims and Wyoming law applies to Gramercy's state-law claims. Because none is governed by foreign law, the Piazza Defendants have not shown—and cannot show—that foreign law will govern the vast majority of the dispute, meaning that forum non conveniens does not apply.

2. The Piazza Defendants Have Not Carried Their Burden to Show That Arbitration in London is an "Available" Forum.

As a general rule, when a defendant has consented to jurisdiction in the alternative forum, that consent is

7. *Compare Centimark Corp. v. Vill. Manor Assocs. Ltd. P'ship*, 113 Conn. App. 509, 522 (Conn. App. Ct. 2009), *with Singer v. Lajaunie*, 339 P.3d 277, 285 (Wyo. 2014).

8. *Compare Rioux v. Barry*, 927 A.2d 304, 311–12 (Conn. 2007), *with Downs v. Homax Oil Sales, Inc.*, 421 P.3d 518, 524 (Wyo. 2018).

9. *Compare Charter Oak Lending Grp., LLC v. Aug.*, 127 Conn. App. 428, 447 (2011), *with White v. Shane Edeburn Const., LLC*, 285 P.3d 949, 958 (Wyo. 2012).

10. *Compare Efthimiou v. Smith*, 268 Conn. 499, 505 (2004), *with Jontra Holdings Pty Ltd v. Gas Sensing Tech. Corp.*, 479 P.3d 1222 (Wyo. 2021).

enough to show that the alternative forum is available. *Gschwind v. Cessna Aircraft Co.*, 161 F.3d 602, 606 (10th Cir. 1998). Here, however, the Piazza Defendants offer only a cryptic one-liner: "Moving Defendants are amenable to process in England." Mot. at 29. But they do not make clear that being "amenable to process" means that they will consent to jurisdiction in England. Nor do they do provide an affidavit or declaration stating that they will consent to jurisdiction in England. *Cf. Hislop v. Paltar Petrol. Ltd.*, No. 17-cv-02371-RBJ, 2018 WL 5014123, at *4 (D. Colo. Oct. 16, 2018) (determining that Australia was an available alternative forum because the defendants had "signed a declaration under the penalty of perjury stating they would consent to the jurisdiction of the Federal Court of Australia"). The Piazza Defendants also say nothing about whether Defendant Oleg Bakhmatyuk will consent to, or would otherwise be subject to, jurisdiction in England, much less provide a declaration from him stating that he will consent to jurisdiction in England. *See* 17 James Wm. Moore et al., *Moore's Federal Practice* § 111.74(2)(f) (3d ed. 2018) (alternative forum is "available" only if "the litigation may be conducted in the foreign forum against *all* the defendants remaining in the action" (emphasis added)). Thus, the Piazza Defendants have failed to carry their burden to show that arbitration in England is an "available" alternative forum.

B. The Piazza Defendants Have Not Carried Their Burden to Show That the Private-Interest and Public-Interest Factors Clearly Point Toward Dismissal.

Even assuming the threshold requirements could be met, the Piazza Defendants' forum non conveniens argument still fails because each of the private- and public-interest factors weighs against dismissal.

1. The Piazza Defendants Have Not Shown That the Private-Interest Factors Clearly Point Toward Dismissal.

The private-interest factors include (a) the relative ease of access to sources of proof; (b) availability of compulsory process for compelling attendance of witnesses; (c) cost of obtaining attendance of willing nonparty witnesses; (d) possibility of a view of the premises, if appropriate; and (e) all other practical problems that make trial of the case easy, expeditious, and inexpensive. *Piper*, 454 U.S. at 241 n.6. As to witnesses and documents, the Piazza Defendants strain to highlight as many connections to foreign jurisdictions as possible (many of them of tenuous relevance, if any), in the process wholly ignoring *all* of the extensive U.S. connections. To start, they ignore that all of Gramercy's witnesses and documents are located in the United States. Compl. ¶¶ 13-14.

The Piazza Defendants also ignore that the majority of Defendants are based in Wyoming:

- Piazza is a United States citizen who lives in Cody, Wyoming. He has "deep ties and property interests in Wyoming." He operates several companies based in Wyoming. One of those companies is Defendant SP Capital, which Piazza runs from offices in Wyoming. *Id.* ¶¶ 8, 17, 19.

- SP Capital is a Wyoming LLC that Piazza runs out of offices in Wyoming. SP Capital's principal office is in Afton, Wyoming. SP Capital's registered agent is a Wyoming LLC with its principal place of business in Cody, Wyoming. There are at least seven Wyoming LLCs that operate under the umbrella of SP Capital. Because SP Capital is based in Wyoming, relevant documents and correspondence within SP Capital's possession, custody, or control are likely available in Wyoming. *Id.* ¶¶ 8, 19.

- Like SP Capital, TNA is also a Wyoming LLC. Its principal place of business is in Jackson, Wyoming. Its registered agent is based in Cody, Wyoming. And from November 2019 through at least May 2020, at least 100 subsidiaries of ULF were transferred to TNA in Wyoming. And just like SP Capital, because TNA is based in Wyoming, relevant documents and correspondence in TNA's possession, custody, or control are likely available in Wyoming. *Id.* ¶¶ 20, 139.

As to Yaremenko, although it is presently unknown to what extent he lives or works in Wyoming, the Complaint alleges deep ties to Wyoming. He is the chief legal advisor of SP Advisors, a Wyoming-based company, "which is the registered trade name of SP Capital and also refers to the group of SP Capital subsidiaries through which it operates." Yaremenko was directly involved in establishing SP Advisors, is responsible for SP Advisor's operations, and provides legal support to SP Advisors. He is the chief operating officer and a partner of SP Capital. *Id.* ¶¶ 17-18. He also helped organize TNA in Wyoming and signs its annual statements. *Id.* ¶ 84.

Given the Piazza Defendants' deep ties to Wyoming, it is hard to take their argument seriously that it would be more convenient for them to litigate this dispute half a world away in London rather than in their own backyard in Wyoming. Even as to Bakhmatyuk and Yaremenko, neither of them live in England. Thus, none of the private-interest factors point to England; they all point decisively to the fact that this Court is the most appropriate forum.[11]

11. Also, as the Piazza Defendants recognize—and the experience of courts around the country during the pandemic bears out—alternative arrangements exist, such as live testimony by videoconference or deposition testimony in lieu of live testimony, although there is no reason to believe that these alternatives would be necessary here. *See* Mot. at 31 n.17.

2. The Piazza Defendants Have Not Shown That the Public-Interest Factors Clearly Point Toward Dismissal.

The public-interest factors include (a) administrative difficulties of courts with congested dockets; (b) the burden of jury duty on members of the community with no connection to the litigation; (c) the local interest in having localized controversies decided at home; and (d) the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508–09 (1947).

As to the first factor, the Piazza Defendants offer no evidence or argument about congestion in the Court's docket, nor do they contend that an arbitration in London would move faster than this case. Instead, they mainly contend that Ukrainian courts would not enforce the Court's judgment. Mot. at 33. Why that matters is anyone's guess. After all, any judgment against Piazza, SP Capital, and TNA could be enforced in Wyoming, because they reside in, are incorporated in, and are headquartered in Wyoming. And a judgment against Bakhmatyuk could be enforced against him in either Cyprus or Austria. *See* Compl. ¶ 16. The Piazza Defendants are therefore mistaken to suggest that there is a risk that the Court would expend resources on this case only to issue a judgment that cannot be enforced.

The Piazza Defendants are similarly misguided on the next three public-interest factors. The contention that "Gramercy grasps at straws to try to find a connection to

the state[,]" blinks reality. Mot. at 33. Unlike *Gas Sensing Technology*, which Piazza Defendants rely on, Mot. at 33–34, this case would not burden a Wyoming jury with a case having little to do with Wyoming. Far from it. This case's connections to Wyoming run deep and are central to the dispute. Piazza, SP Capital, and TNA are all Wyoming-based defendants. A key feature of this dispute is how the Piazza Defendants abused the protections afforded by Wyoming law by setting up shell entities in Wyoming that received fraudulent and tortious asset transfers worth hundreds of millions of dollars. And as explained above, Wyoming law governs Gramercy's state-law claims. *See supra* p. 29. Wyoming thus has a compelling interest in resolving a dispute with deep connections to the state, involving Wyoming-based defendants accused of abusing Wyoming's legal framework, and governed by Wyoming law.

V. GRAMERCY'S DETAILED ALLEGATIONS SATISFY ALL RICO REQUIREMENTS.

A. Gramercy Has Alleged Substantial Predicate Acts In the United States.

The Piazza Defendants make much of the fact that "RICO does not apply extraterritorially." Mot. at 35. Their argument rests on the false premise that "[t]he conduct Gramercy relies on in alleging violations of all three predicates occurred outside the United States, with a focus on securities issued outside the United States." *Id.* at 37. However, the threshold question of whether RICO applies extraterritorially is irrelevant here, because

Gramercy has alleged substantial domestic conduct. As one of the predicate acts of wire fraud, Gramercy alleges that Piazza (a Wyoming resident) and Yaremenko (COO of SP Capital in Wyoming) formed TNA (a Wyoming entity) as a repository for transfers of Company assets, which they helped orchestrate through U.S. wires. *See* Compl. ¶¶ 138-144, 178. Not only that, but with only a few exceptions, *all* of the predicate acts Gramercy alleges involve U.S. mail or wires or inducements to travel from the U.S. *Id.* ¶¶ 178, 180. These facts are plainly distinguishable from *RJR Nabisco*, for example, which involved "a scheme in which Colombian and Russian drug traffickers smuggled narcotics into Europe and sold the drugs for euros that . . . were used to pay for large shipments of RJR cigarettes into Europe." *RJR Nabisco, Inc. v. Eur. Cmty.*, 579 U.S. 325, 332 (2016).[12]

Even if Gramercy had not alleged asset transfers into TNA in Wyoming, which Gramercy alleges involved acts of mail and wire fraud *within the U.S.*,[13] Gramercy's

12. The Piazza Defendants also cite *Nuevos Destinos, LLC v. Peck*, No. 3:19-CV-00045, 2019 WL 6481441, at *21 (D.N.D. Dec. 2, 2019), where the court found that the scheme was hatched in Peru and "[t]he conduct underlying the predicate acts also occurred abroad."

13. The Piazza Defendants seem to assume that the TNA Transfers took place entirely in Europe, but that ignores Gramercy's allegation that they were effectuated "through the use of wires between Austria, Cyprus, Ukraine and Wyoming" (Compl. ¶ 178), and omissions of material facts aimed at Gramercy in the U.S. (*id.* ¶ 182). It also ignores that the transfers were made to TNA, a Wyoming company the Piazza Defendants formed for this specific purpose.

other allegations support a finding under "step two" of the *RJR Nabisco* analysis because "the case involves a domestic application" of the mail-and wire-fraud and fraudulent-inducement-to-travel statutes. *See* 579 U.S. at 337. Courts have found that "a claim predicated on mail or wire fraud involves sufficient domestic conduct" for *RJR Nabisco*'s step-two analysis if two conditions are present: "(1) the defendant used domestic mail or wires in furtherance of a scheme to defraud, and (2) the use of the mail or wires was a core component of the scheme to defraud." *Bascuñán v. Elsaca*, 927 F.3d 108, 122 (2d Cir. 2019). Applying this standard, courts have repeatedly found that RICO claims predicated on mail and wire fraud involve sufficient domestic conduct to survive dismissal.[14] As alleged in the Complaint, Defendants' use of domestic mail and wires to send emails and letters, and inducements to interstate travel from the U.S. for meetings, were a core component of their campaign of misinformation directed at Gramercy, which they knew was located in the

14. *See id.* at 123 (emphasizing that an overly narrow reading of RICO's extraterritorial reach "would effectively immunize offshore fraudsters from mail or wire fraud", and holding "[t]he SAC supports a reasonable inference that the repeated use of domestic mail and wires to fraudulently order a domestic bank to transfer millions of dollars out of a domestic account was a core component of the alleged scheme to defraud."); *Dennis v. JPMorgan Chase & Co.*, 343 F. Supp. 3d 122, 191 (S.D.N.Y. 2018) ("[A]lthough the conduct involved . . . is alleged to have taken place outside of the United States, the Court is not now in a position to dismiss plaintiffs' RICO claims as extraterritorial" because "Defendants' alleged scheme at least plausibly was directed at the United States, and the amended complaint therefore states a plausible domestic RICO claim.").

United States, including: the transmission *to Gramercy in Connecticut* of the First Concorde Report from Ukraine that "falsely represented that the Company was in a worse financial situation than it actually was"; various emails and telephone calls from Piazza and/or other Bakhmatyuk allies (including Petrashko and Kovtok) making false representations concerning various debt purchases and the Company's financial situation; and the Second Concorde Report from Ukraine containing "incongruously negative financial information" and falsely certifying the "independence" of the EY Report. Compl. ¶ 178. Gramercy also alleges multiple instances where Gramercy's employees were induced to travel from the U.S. to Europe for meetings with Bakhmatyuk and others acting on his behalf in furtherance of the scheme, or even had meetings in the U.S. *Id.* ¶¶ 114, 180. The use of U.S. mail and wires and inducements of Gramercy employees to travel interstate were "a core component" of phases 1 and 2 of the alleged scheme. *Id*. ¶¶ 178-180.

B. Gramercy's Claims Would Not Be Actionable Under the Securities Laws and Are Not Barred By the PSLRA.

The Piazza Defendants' contention that the PSLRA bars Gramercy's RICO claims fails for a simple reason: the conduct forming the basis of Gramercy's claims is not actionable as fraud in the purchase or sale of securities. In 1995, the PSLRA amended the RICO statute by including the language, "except that no person may rely upon any conduct that would have been actionable as fraud *in the purchase or sale of securities* to establish a violation of section 1962." Pub. L. No. 104–67 § 107 (emphasis added).

The cases cited by the Piazza Defendants all involve precisely the type of claims the PSLRA amendment to RICO was designed to bar—that is, securities-fraud claims masquerading as RICO claims. For example, the Piazza Defendants rely primarily on *Bixler,* where the court began its analysis by citing other decisions dismissing RICO claims under the PSLRA, emphasizing that in those cases, the RICO claims alleged "fraud in connection with the sale of securities" and "a Ponzi scheme that was accomplished by the purchase and sale of securities," respectively. 596 F.3d at 759. The Court went on to note that "section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and SEC Rule 10b–5, 17 C.F.R. § 240.10b–5, are directed at fraud 'in connection with the purchase or sale' of securities." *Id.* Applying that framework, the Court found that the plaintiffs' "allegations that defendants defrauded them from receiving UKL stock as provided in the transaction . . . describe a 'purchase' and 'sale' of securities." *Id.* at 760.[15] The Piazza Defendants also rely on *Braverman*

15. The plaintiffs were minority shareholders of a uranium mining company, METCO, who alleged that the defendants (directors and majority shareholders of METCO) negotiated a trade of METCO's uranium mining claims to subsidiaries of defendant UKL, an Australian corporation, pursuant to which METCO would receive $6.5 million and stock in UKL, and that the UKL stock would in turn "be distributed among the METCO shareholders" including plaintiffs "on a pro rata basis." *Id.* at *754-755. UKL allegedly abandoned the agreement and never paid the money or stock to UKL, and the plaintiffs alleged in their RICO lawsuit that "defendants defrauded them of their share of the UKL stock and rendered their METCO investment virtually worthless." *Id.* at *755.

v. LPL Fin. Corp., which likewise directly involved the purchase of securities. No. CV 11-0009 RB-LFG, 2011 WL 13289787, at *1 (D.N.M. Apr. 21, 2011) (plaintiff's claims that the defendant fraudulently induced the purchase of stock at an inflated price were barred by the PSLRA).

Contrary to the Piazza Defendants' contention that Gramercy has resorted to "artful pleading," Mot. at 40, the facts underpinning Gramercy's claims do not in any way involve the purchase or sale of securities. To the contrary, all three phases of Defendants' scheme began years after Gramercy began acquiring Company debt in 2011 and had amassed substantial holdings exceeding 25% of all outstanding Notes. *See* Compl. ¶ 46; *see id.* n.3. And even to the extent Gramercy acquired additional debt in 2017 unknowingly after the scheme's onset, Gramercy's allegations are not based on any fraud concerning those transactions.[16] That the scheme involves Gramercy's Notes, and that the Complaint contains allegations regarding misconduct by Defendants in connection the acquisition of debt from *other* creditors, is of no moment. The PSLRA does *not* bar all RICO claims that in any way involve securities transactions; it bars only RICO claims that would be actionable as securities fraud. *See Petters Co. v. Stayhealthy, Inc.*, No. CIV.03-3210 JRT/FLN, 2004 WL 1465830, at *3 (D. Minn. June 1, 2004) (requiring a

16. *See Mezzonen, S.A. v. Wright*, No. 97 CIV. 9380 LMM, 1999 WL 1037866, at *4 (S.D.N.Y. Nov. 16, 1999) (plaintiff's claims concerning "post-investment fraud" that may have induced plaintiff to continue holding securities are not actionable under securities laws).

"connection between the securities transaction and the misrepresentation").[17]

Gramercy's claims are not actionable under the securities laws and thus are not barred by the PSLRA. *See Marani v. Cramer*, No. 19-CV-05538-YGR, 2021 WL 5865517, at *5 (N.D. Cal. Dec. 10, 2021).

C. Gramercy's Detailed Allegations of an Extensive, Multi-Year Scheme Easily Plead Facts From Which a Jury Could Infer a Pattern of Racketeering Activity.

The Piazza Defendants challenge only one of the four elements of a RICO claim under 18 U.S.C. § 1962 – whether the Complaint adequately pleads a pattern of racketeering activity. Even as to this single element, however, the Piazza Defendants do not dispute that Gramercy has alleged at least two predicate acts—all that is required under the RICO statute. *See* Mot. at 40-42; 18 U.S.C. § 1961 ("'pattern of racketeering activity' requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and

17. Moreover, even if the Complaint were construed to include ancillary allegations of fraud in connection with purchases or sales of *other creditors*' notes, that would not save the Piazza Defendants' argument, because Gramercy has not alleged that any other creditors bought or sold their debt positions in reliance on the misrepresentations or omissions directed at Gramercy. *See Johnson v. KB Home*, 720 F. Supp. 2d 1109, 1117 (D. Ariz. 2010) (finding that there were no allegations that the investors who purchased securities did so in reliance on the deceptive acts, and thus the conduct would not be actionable under the securities laws).

the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity."). Indeed, Gramercy has alleged at least nine instances of mail or wire fraud spanning 2016 to 2021 (Compl. ¶ 178), and at least five instances of inducement to interstate travel spanning 2017 to 2019. *Id.* ¶ 180. Rather, they focus only on RICO's continuity requirement.

The Piazza Defendants' argument hinges on its mischaracterization of the Complaint as alleging a "closed-ended series of predicate acts constituting a single scheme." Mot. at 41 (internal quotations omitted). This is a mischaracterization on several levels. As an initial matter, Gramercy in fact alleges both a closed-ended scheme *and an open-ended scheme*. *See, e.g.*, *Hansen v. Native Am. Refinery Co.*, No. 2:06CV00109, 2007 WL 1108776, at *4 (D. Utah Apr. 10, 2007) ("A plaintiff may satisfy the continuity requirement either through a showing of closed or open-ended continuity" and "[i]n this case, under either approach, the plaintiffs' allegations are sufficient").[18]

Open-ended continuity may be established "when the predicate acts themselves evidence a danger of future repetition, or when a plaintiff can sufficiently establish that the predicate acts are part of an entity's regular way of conducting its ongoing legitimate business or its RICO enterprise." *Hansen*, 2007 WL 1108776, at *6. In *Hansen*,

18. *See also Resol. Tr. Corp. v. Stone*, 998 F.2d 1534, 1545 (10th Cir. 1993) ("even if the evidence were insufficient to establish close-ended continuity, there would nevertheless be sufficient evidence to establish open-ended continuity").

for example, the court was satisfied by plaintiffs' allegation that defendants had "continued their fraudulent practices up to the time of the filing of the plaintiffs' second amended complaint[,]" and also recognized that allegations that those orchestrating the scheme were principals of various business entities involved in the scheme "could support a finding that the defendants' wrongful actions constituted their regular way of doing business." *Id.* at *7.

Here, Gramercy has explicitly alleged the continuing nature of Defendants' scheme based on Defendants' very recently initiated efforts to transfer and shelter Company assets in Wyoming and Cyprus.[19] Furthermore, Gramercy has alleged Defendants' history of surreptitious, fraudulent financial transactions that evidence this was Defendants' "regular way of doing business", beginning with Bakhmatyuk's alleged embezzlement in connection with a 2014 loan to a bank he owned (Compl. ¶ 59); his transfer of personal assets to his children as a "gift" after fleeing to Austria (*id.* ¶ 64); the Piazza Defendants' long affiliation with Bakhmatyuk and aid in connection with the

19. *See, e.g.,* Compl. ¶ 170 ("Bakhmatyuk has continued to treat the Company's assets like a shell game . . . . There remains considerable risk that Bakhmatyuk will continue to move any remaining assets of the Company to another set of shell companies . . . ."); *id.* ("there remains a real risk that SP Advisors will continue to transfer the Company's assets in order to keep them out of Gramercy's reach"; *id.* ¶ 172 ("This conduct involves a threat of repetition because the Count 1 Defendants will continue to shift the assets further out of reach and use misrepresentations and fraud to conceal any such transfers and to frustrate Gramercy's legal and economic rights.").

alleged scheme over a multiple-year period, including in a manner consistent with their advertised business plan of hiding assets (*id.* ¶ 170); the asset transfers to the Cypriot entity Maltofex beginning in February 2019 (*id.* ¶ 124); and the subsequent asset transfers to TNA beginning in November 2019, with respect to which Gramercy specifically alleges a risk of continuing transfers (*id.* ¶¶ 138, 170). Courts routinely have held lesser allegations sufficient. *See, e.g.*, *Resol. Tr. Corp.*, 998 F.2d at 1545 ("the jury could have inferred that [defendants] would have continued to" engage in the deceptive loans "for as long as" there was demand for them).

Moreover, the Complaint amply alleges facts supporting a finding of closed-ended continuity. The Piazza Defendants begin with the myth that a "single" scheme is not actionable under RICO. That is simply wrong. Indeed, several of the cases the Piazza Defendants cite on this account were decided before the United States Supreme Court rejected the interpretation that RICO's pattern requirement was not satisfied by predicate acts which all occurred within a single illegal scheme. *See H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 240 (1989) ("it is implausible to suppose that Congress thought continuity might be shown only by proof of multiple schemes.").[20]

20. *See also Hansen*, 2007 WL 1108776, at *4 ("even if all the predicate acts the plaintiffs alleged occurred in furtherance of a single scheme, such allegations may be sufficient to establish a RICO claim"); *Resol. Tr. Corp.,* 998 F.2d at 1544 ("a single fraudulent scheme can give rise to RICO liability").

The Piazza Defendants also rely on clearly inapposite cases involving fraud in connection with a single merger or securities transaction or a small number of connected transactions in a condensed period of time.[21] But Gramercy is not alleging fraud in connection with its purchase of the Notes, nor do its claims arise out of one transaction or a discrete set of transactions of limited duration or extensiveness. Rather, Gramercy alleges an extensive multi-phased scheme, occurring over a period of at least five years, s*ee* Compl. ¶¶ 72-76, 178, which far exceeds the duration of schemes that have been held to satisfy the continuity requirement. *See Hansen*, 2007 WL 1108776, at *5 ("predicate acts occurring between June 2003 and January 2004" were sufficient for continuity); *see also Resol. Tr. Corp.*, 998 F.2d at 1544 (evidence from which "jury could infer that the scheme lasted from seven or eight months to . . . as many as eighteen months" was sufficient for continuity).

As to the extensiveness factors, Gramercy meets all of them.[22] Gramercy has alleged at least *fourteen*

21. *See Boone v. Carlsbad Bancorporation, Inc.*, 972 F.2d 1545, 1555 (10th Cir. 1992) (fraud in connection with a merger over an approximately one-year period); *Sullivan v. Boettcher & Co.*, 714 F. Supp. 1132, 1135 (D. Colo. 1989) (fraud in connection with purchase of bonds in 1983); *Kaplan v. Reed*, 28 F. Supp. 2d 1191, 1198 (D. Colo. 1998) (fraudulent transactions orchestrated by one individual for the purpose of defrauding his creditors); *Bixler*, 596 F.3d at 755 (fraud in connection with a stock transaction); *Torwest DBC, Inc. v. Dick*, 810 F.2d 925, 929 (10th Cir. 1987) (fraud in connection with real estate transaction).

22. Courts have identified the following relevant factors: "the number of the racketeering acts," "the variety of racketeering

racketeering acts, involving various emails, letters, and inducements to travel. Gramercy also alleges a variety of distinct injuries, including the evisceration of its rights to block a restructuring and impairment of its enforcement rights, economic damages as a result of lost opportunities to sell or otherwise dispose of the assets, and sunk travel and investigation costs. *See* Compl. ¶¶ 182-184. The complexity of the scheme is self-evident, as it involved (among other things) an alliance to orchestrate a scheme in multiple jurisdictions through market misinformation, multiple complex debt purchases and two sets of asset transfers involving over a billion dollars. And while Gramercy was the sole target of the scheme because, as it alleges, it had the blocking rights and Bakhmatyuk himself regarded it as the only unsecured creditor of concern, other debtors and stakeholders also may be victims of the scheme and, in any case, there is no multiple-victim requirement.[23] Compl. ¶¶ 2, 50. *See Hansen*, 2007 WL 1108776, at *6 (although plaintiffs claim that they were the "direct victims," they also "refer to creditors of the transferred entities as victims"); *100 Mount Holly Bypass v. Axos Bank*, No. 2:20-cv-00856, 2021 WL 3172024, at *12 (D. Utah July 27, 2021) (rejecting single-victim argument as applying "an inappropriate standard"). Courts have found far less

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acts," "whether the injuries caused were distinct," "the complexity and size of the scheme," "the number of victims," "and the nature or character of the enterprise or unlawful activity." *George v. Urb. Settlement Servs.*, 833 F.3d 1242, 1543-44 (10th Cir. 2016).

23. The victims exclude, among others, those who acquired their position as a result of the scheme in non-arms'-length transactions, including, most notably, Bakhmatyuk and the Piazza Defendants themselves.

extensive schemes sufficient. *See, e.g., CGC Holding Co., LLC*, 974 F.3d at 1212 (involving loan scheme orchestrated by one individual with assistance of two immediate family members).

Finally, in the event there were any doubts that Gramercy adequately alleges RICO continuity, the Tenth Circuit has held that "[w]hether a pattern exists is a question of fact for the jury to determine" and the court's role is to determine if "there is sufficient evidence to support the jury's finding." *Resol. Tr. Corp.*, 998 F.2d at 1543-45; *see also In re: EpiPen (Epinephrine Injection, USP) Mktg., Sales Pracs. & Antitrust Litig.*, 336 F. Supp. 3d 1256, 1320 (D. Kan. 2018). Applying that standard, Gramercy's allegations are more than enough to satisfy the pattern requirement at this stage.

D. Gramercy's Damages Satisfy RICO's Standing Requirement.

The Piazza Defendants claim that "Gramercy has not stated cognizable RICO damages," and seeks "speculative" damages, because it "could still recover on its Notes" and thus "has not shown that it has exhausted contractual or other legal remedies." Mot. at 42 (internal quotations omitted). Their entire argument is that if Gramercy were to "recover on its Notes under the process agreed to with their issuance" – namely, through an enforcement action brought by the Trustee pursuant to the Trust Deeds – then Gramercy "would benefit" and "any injury

would decrease." *Id.*[24] Yet again, the Piazza Defendants' argument hinges on the fallacy that Gramercy can pursue contractual remedies for the alleged misconduct by third parties. They cannot.

The principal cases the Piazza Defendants rely on to support their position are inapposite. *In re Merrill Lynch Ltd. Partnerships Litig.*, 154 F.3d 56 (2d Cir. 1998) concerns the accrual of claims for purposes of the statute of limitations (not whether there were cognizable RICO damages), and *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971) involved antitrust (not RICO) claims. The remaining cases they cite involve the dismissal of RICO claims based on narrow circumstances not present here. In *Harbinger Cap. Partners Master Fund I, Ltd. v. Wachovia Cap. Markets, LLC*, lenders sought to recover the value of a loan through one lawsuit while, simultaneously, a litigation trust sought to recover on the *same loan against the same defendants*. 347 F. App'x 711, 713 (2d Cir. 2009) (the lenders "acknowledge[d] the possibility of some recovery through the bankruptcy

24. The Piazza Defendants also contend that "Gramercy was on inquiry notice in early 2015" of its injury, and note their intention to "pursue an early summary judgment motion on statute of limitations grounds." Mot. n.20. Such a motion would be meritless. "A civil RICO injury means harm *from the predicate acts* that constitute racketeering." *Cory v. Aztec Steel Bldg., Inc.*, 468 F.3d 1226, 1234 (10th Cir. 2006) (emphasis added). Here, all of the predicate acts took place between 2016 and 2021. Thus, the injuries arising from these predicate acts could not have been felt until 2016, at the earliest.

proceedings").[25] In *First Nationwide Bank v. Gelt Funding Corp.*, the plaintiff alleged it was fraudulently induced to make a collateralized, nonrecourse loan, where it was "confined to recourse against the collateral property" and gave up "its right to sue the borrower personally upon default." 27 F.3d 763, 766-769 (2d Cir. 1994).

Multiple courts have recognized this line of Second Circuit authority is limited to the distinct facts not present here and does *not* establish that exhaustion of legal remedies is a prerequisite for RICO claims, as the Piazza Defendants suggest. For example, in *Town of Islip v. Datre*, the court found that those cases "involved situations where the amount of damages suffered was directly dependent on either a separate, ongoing proceeding . . . or a debt recoverable via foreclosure" and that "[n]one of them stand for the broad principle that, before bringing a RICO claim, all plaintiffs must exhaust every alternative means of recovery." 245 F. Supp. 3d 397, 409–10 (E.D.N.Y. 2017). In *Banco Intercontinental, S.A. v. Alvarez Renta*, the court rejected the application of *First Nationwide* because, unlike that case, "these loans did not have collateral for the Plaintiff to foreclose upon," and also rejected the notion

25. A brief submitted by one Defendant-Appellee states that "The Plan and disclosure statement contemplate that the Trustee will commence litigation against third parties, including [Defendants-Appellees] WCM and BDO, and that any recoveries from such actions will be shared with plaintiffs." Brief for Defendant-Appellee Wachovia Capital Markets, LLC at *7, *Harbinger Cap. Partners Master Fund I, Ltd. v. Wachovia Cap. Markets, LLC*, 347 F. App'x 711 (2d Cir. 2009) (No. 08-4692-CV)

that plaintiff was "required to seek recovery from every other person or entity suspected of defrauding it before it may seek recovery from Defendants," because that "would allow every person or entity accused of fraud to argue no recovery could be had against them or it until claims had been pursued against everyone." No. 04-20727-CIV, 2005 WL 8168717, at *3 (S.D. Fla. Aug. 23, 2005)

Indeed, the Tenth Circuit and district courts within it have held that the possibility of other avenues of recovery does not bar RICO claims. For example, in *Deck v. Engineered Laminates*, the court expressly held that where, as here, it is alleged that the defendant's misconduct caused the plaintiff to forego contractual remedies until after assets have been dissipated, such allegations are sufficient to state a cognizable RICO injury. 349 F.3d 1253, 1259-60 (10th Cir. 2003). The court also squarely rejected the argument that the claim was not ripe because there was no judgment on the contract claim. *Id.* at 1260. Instead, the court held that because the plaintiff had alleged other, non-contractual damages – and the injury was therefore "not dependent on the Plaintiff's being unable to recover fully on his contract claim" – "Plaintiff's RICO claim is ripe, even though some alleged damages may be too speculative to recover before the contract claim is resolved." *Id.*[26]

26. *See also Trejo v. Xclusive Staffing, Inc.*, No. 17-CV-01602-RM-MJW, 2018 WL 4372724, at *4 (D. Colo. May 16, 2018) (rejecting contention that plaintiff is "required to exhaust all other civil remedies against a defendant before bringing a RICO claim"); *Safe Streets All. v. Hickenlooper*, 859 F.3d 865, 888-891 (10th Cir. 2017) ("whether the Reillys might have pursued separate

Unlike the cases the Piazza Defendants cite, there is no parallel contract action here (nor could there be), and Gramercy is an unsecured creditor. Compl. ¶ 50. Gramercy alleges that Defendants' scheme "rendered Gramercy's rights to enforce the Notes worthless, as the Company was left with little to no assets to enforce against," including because "ownership of most of the Surety Providers" was transferred so that they "were no longer held directly by ULF[,]" *Id.* ¶¶ 76, 171 (emphasis added), and Gramercy seeks damages that are not recoverable in an enforcement action under the Notes, much less against the Defendants who are all non-parties to the agreements. *See supra* § II(B), p. 21. At most, the Piazza Defendants speculation about the remote possibility of duplicative recovery is an issue for consideration, if ever, at the damages phase of this case, but not one that supports dismissal.[27]

E. Gramercy's Allegations Concerning the Piazza Defendants' Participation In the Fraudulent Scheme Satisfy the Rule 9(b) Standard.

The Piazza Defendants do not contend Gramercy has failed to adequately allege predicate acts. *See* Compl. ¶¶ 178 and 180. Rather, they argue Gramercy "has

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nuisance claims is irrelevant to whether their § 1964(c) claims are viable" and rejecting the "unsupported announcement that a plaintiff must plead a 'concrete financial loss' to maintain a RICO claim for an injury to her property . . . [because] those words do not appear in § 1964(c).").

27. *See Imperial Cap. Bank v. Sussex Grp.*, LLC, No. CIV--09-0483-F, 2009 WL 2497326, at *4 (W.D. Okla. Aug. 17, 2009).

failed to plead with particularity *that any of the Moving Defendants committed predicate acts* under RICO or were involved in a conspiracy." Mot. at 44 (emphasis added). This ignores a litany of detailed allegations concerning each Defendant.

Beginning with Yaremenko, the Piazza Defendants contend Gramercy has done "nothing to explain Yaremenko's involvement in this alleged scheme," because "[t]here are no allegations that Yaremenko even had a single conversation with Gramercy" and Gramercy is "rely[ing] solely on Yaremenko's professional affiliations with SP Advisors and TNA." Mot. at 44-45. Once again, they ignore the TNA Transfers. Gramercy alleges that Yaremenko was "involved in establishing TNA in order to facilitate the transfers of Company assets to Wyoming dummy companies," and in managing TNA. Compl. ¶¶ 20, 170. Gramercy also alleges that "[i]n every year" after the formation of TNA, "Yaremenko signed the annual reports for TNA in order to continue to obscure Bakhmatyuk's interest in TNA which assisted in the commission of the fraud." *Id.* ¶ 221. The Piazza Defendants' effort to downplay the significance of that allegation fails, given that the entire purpose of forming TNA was to serve as a repository for the TNA Transfers; thus, the allegation that Yaremenko signed TNA's annual statements demonstrates his involvement in a critical component of Defendants' scheme. Moreover, Gramercy alleges that Yaremenko was involved in conceiving the plan to transfer Company assets to shell companies, agreeing with Bakhmatyuk and the other Defendants on this plan, and was "closely involved in SP Advisors'" efforts to facilitate the scheme, as SP

Advisors served as Piazza's and Yaremenko's vehicle to effectuate various aspects of the scheme. *See id.* ¶¶ 170, 202, 221.

The assertion that Gramercy failed "to allege more than two isolated incidents of contact with Piazza" likewise ignores Piazza's critical role in all three phases of Defendants' scheme. Mot. at 5. Gramercy has alleged Piazza's personal involvement in multiple predicate acts of mail or wire fraud in furtherance of Defendants' misinformation campaign and straw purchases. *See, e.g.*, Compl. ¶ 178. The Piazza Defendants also ignore Gramercy's allegation that "Piazza on behalf of Bakhmatyuk, surreptitiously purchased debt held by other creditors, including Ashmore, and held that debt on behalf of Bakhmatyuk." *Id.* ¶ 170. And once again, they ignore the TNA Transfers, including Gramercy's allegations that "Piazza created and held TNA as a nominal owner for Bakhmatyuk, so that Bakhmatyuk could shelter Company assets in Wyoming entities, out of Gramercy's reach." *Id.*

The Piazza Defendants also claim "Gramercy does not plead any instances of direct interaction between itself and SP Capital or TNA." Mot. at 46. That is beside the point, given that this is a RICO case, not a securities-fraud case. And in any event, Gramercy has alleged multiple instances of contact, including multiple telephone calls, between Piazza (acting on behalf of SP Capital and Bakhmatyuk) and Gramercy. *See* Compl. ¶170, 178. The Piazza Defendants' focus, once again, on the limited "interaction" directly between Gramercy and

the Defendants is a red herring. The Complaint alleges SP Capital's and TNA's direct involvement in the scheme. *See* Compl. ¶ 102 (SP Capital's involvement in Ashmore Debt Purchase); *id.* ¶ 170 (SP Advisors' involvement in TNA Transfers and formation of TNA); *id.* (describing TNA as the corporate vehicle formed to receive and currently holding Company assets in Wyoming).

Finally, the Piazza Defendants' Rule 9(b) arguments ignore that Gramercy also asserted a RICO conspiracy claim under 18 U.S.C. § 1962(d). It is not necessary "to prove that each defendant personally committed two predicate acts to prove a RICO conspiracy." *United States v. Kamahele*, 748 F.3d 984, 1006 (10th Cir. 2014). "To prevail under Section 1962(d), plaintiffs must prove that each defendant conspired to commit the substantive RICO offense, in that each defendant agreed to commission of the predicate acts and was aware that others had done likewise." *Shepard v. DineEquity, Inc.*, No. CIV.A. 08-2416-KHV, 2009 WL 8518288, at *9 (D. Kan. Sept. 25, 2009). Thus, even if the Court were to determine that Gramercy has not satisfied the "pattern" requirement as to any particular Defendant, that Defendant nonetheless is liable under § 1962(d).

The Piazza Defendants' cursory argument that the Court "dismiss Gramercy's state law claims . . . for the same reasons" should be rejected. *See* Mot. at 46-47.[28] Apart from their baseless arguments as to the

28. As the Piazza Defendants acknowledge, the Court has

particularity requirement under Rule 9(b), the Piazza Defendants do not otherwise assert that Gramercy failed to allege the elements of its state law causes of action, many of which need not be alleged with particularity. *Id.*[29]

VI. YAREMENKO IS SUBJECT TO PERSONAL JURISDICTION IN WYOMING.

The Piazza Defendants contend that the only contact Gramercy alleges between Yaremenko and Wyoming is that Yaremenko signs the annual statements for TNA,

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discretion to retain jurisdiction over the remaining state law claims even if the RICO claims are dismissed. *See* Mot. at 47-48. Gramercy respectfully submits that retaining the state law claims would serve judicial economy in light of the substantial resources Gramercy has expended – including in connection with effectuating service on Bakhmatyuk in Austria in compliance with the Hague Service Convention – and the additional expenses that Gramercy will incur prior to a decision on the Motion. *See Parker v. Town of Chelsea*, 620 F.Supp.2d 1266, 1271 (N.D. Okla. 2008) ("a federal court justifiably may retain jurisdiction of pendent [state law] claims if substantial time and energy has been expended on the case prior to disposition of the federal claims[,] particularly when the complaint does not present 'novel or unsettled questions of [state] law.'") (internal citation omitted).

29. As to the tortious interference claim, the Piazza Defendants claim that Gramercy failed to demonstrate "how the transfers were unlawful, much less the role Piazza or either of the two entity Defendants played." *Id.* at 47. As set forth above, Piazza's role is set forth with particularity, and Gramercy alleged that the transfers were alleged to have been for no consideration, for no proper purpose, and to frustrate Gramercy's rights. Compl. ¶¶ 138-144.

a Wyoming-based company. Mot. at 48-49. (quoting Complaint). While these contacts alone support specific jurisdiction, Gramercy has pleaded a lot more than that. Gramercy alleges that Yaremenko is a "founding partner" and the Chief Operating Officer of SP Capital, a Wyoming LLC with its principal office in Afton, Wyoming that openly advertises (through Piazza and Yaremenko) its expertise in shielding the assets of wealthy European businesspersons, like Bakhmatyuk, through the use of Wyoming shell companies. Compl. ¶¶ 18-19, 34. What's more, Gramercy alleges Yaremenko's role with respect to the formation and operation of TNA, alleging he "was involved in establishing TNA *in order to facilitate the transfers of Company assets to Wyoming dummy companies*." *Id.* ¶ 170(4) (emphasis added); *id.* ¶¶ 20, 84. Gramercy also alleges Yaremenko's willing and knowing participation in the scheme, including the fraudulent and tortious TNA Transfers. *Id.* ¶¶ 10.c., 70, 84, 123, 138, 168, 170(4), 175, 202(3), 204, 221. The Court thus has personal jurisdiction over Yaremenko because Gramercy's claims against him arise out of his purported contacts with Wyoming.

The Piazza Defendants' assertion that "a court cannot exercise jurisdiction over an agent based on allegations of the company's wrongful act" is unavailing because Gramercy's allegations directly implicate Yaremenko. Mot. at 49. *See ClearOne Commc'ns, Inc. v. Bowers*, 643 F.3d 735, 764 (10th Cir. 2011) ("In the instant case, the record firmly establishes that [the corporate officer] participated in the wrongful activity, and thus the

corporate shield doctrine has no applicability to him.").[30] And contrary to the Piazza Defendants conclusory assertion, the Court's exercise of personal jurisdiction over Yaremenko—the COO of at least one Wyoming-based business, with affiliations to others—in no way would violate principles of fair play and substantial justice. Mot. at 50.[31] *See* Compl. ¶ 18.

In addition, the Complaint adequately pleads a basis for the Court to exercise conspiracy jurisdiction over Yaremenko. When a plaintiff "plead[s] with particularity a conspiracy and overt acts taken in furtherance of the conspiracy, a co-conspirator's contacts with the forum may be attributed to other conspirators for jurisdictional purposes." *Nat'l Union Fire Ins. Co. of Pittsburgh, PA. v. Kozeny*, 115 F. Supp. 2d 1231, 1237 (D. Colo. 2000), *aff'd sub nom. Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Kozeny*, 19 F. App'x 815 (10th Cir. 2001). The Piazza Defendants assert, in a conclusory manner, that Gramercy has not alleged "more than 'bare allegations' that a conspiracy existed.'" Mot. at 49. But that ignores the detailed and extensive allegations of a conspiracy among the Defendants, including Yaremenko and the

30. *See also, Rusakiewicz v. Lowe,* 556 F.3d 1095, 1102–03 (10th Cir. 2009); *Hopkins AG Supply LLC v. First Mountain Bancorp,* No. CIV-12-1141-C, 2014 WL 12770215, at *2 (W.D. Okla. July 1, 2014); *Pharmacy Providers of Oklahoma, Inc. v. Q Pharmacy, Inc.*, No. CIV-12-1405-C, 2013 WL 1688921, at *3 (W.D. Okla. Apr. 18, 2013).

31. The Piazza Defendants cite *Dental Dynamics, LLC v. Jolly Dental Grp., LLC*, 946 F.3d 1223, 1232 (10th Cir. 2020), which is distinguishable because the Court found that the defendant did not have any "business dealings, property, or offices" in the forum.

Wyoming-based Defendants Piazza, SP Capital, and TNA, whose Wyoming contacts may be imputed to Yaremenko. *See* Compl. ¶¶ 200-206, 219-222; *see also Kozeny*, 115 F. Supp. 2d at 1237.

Finally, if the Court were to have doubts about personal jurisdiction over Yaremenko, jurisdictional discovery should be permitted. *See Health Grades, Inc. v. Decatur Mem'l Hosp.*, 190 F. App'x 586, 589 (10th Cir. 2006) ("a refusal to grant discovery constitutes an abuse of discretion if either the pertinent jurisdictional facts are controverted or a more satisfactory showing of the facts is necessary").

Appendix G

CONCLUSION

For all the foregoing reasons, Gramercy respectfully requests that this Court deny the Piazza Defendants' Motion to Dismiss the Complaint.

Date: March 9, 2022

Respectfully submitted,

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[CERTIFICATE OF SERVICE OMITTED]

APPENDIX H — MOTION TO DISMISS IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING, FILED JULY 15, 2022

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Civil Action No. 0:21-cv-00223-NDF

GRAMERCY DISTRESSED OPPORTUNITY FUND II, L.P., GRAMERCY DISTRESSED OPPORTUNITY FUND III, L.P., GRAMERCY DISTRESSED OPPORTUNITY FUND III-A, L.P., GRAMERCY FUNDS MANAGEMENT LLC, GRAMERCY EM CREDIT TOTAL RETURN FUND, AND ROEHAMPTON PARTNERS LLC,

Plaintiffs,

v.

OLEG BAKHMATYUK, NICHOLAS PIAZZA, SP CAPITAL MANAGEMENT, LLC, OLEKSANDR YAREMENKO, AND TNA CORPORATE SOLUTIONS, LLC,

Defendants.

DEFENDANT OLEG BAKHMATYUK'S MOTION TO DISMISS PLAINTIFFS' COMPLAINT

Defendant Oleg Bakhmatyuk, through undersigned counsel, hereby moves this Court to dismiss Plaintiffs'

Complaint on the grounds and for the reasons set forth in the Memorandum in Support of this motion filed contemporaneously herewith.

Dated: July 15, 2022 Respectfully submitted,

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Appendix H

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[CERTIFICATE OF SERVICE AND PROPOSED ORDER OMITTED]

APPENDIX I — MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT OLEG BAKHMATYUK'S MOTION TO DISMISS IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING, FILED JULY 15, 2022

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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING

Civil Action No. 0:21-cv-00223-NDF

GRAMERCY DISTRESSED OPPORTUNITY FUND II, L.P., GRAMERCY DISTRESSED OPPORTUNITY FUND III, L.P., GRAMERCY DISTRESSED OPPORTUNITY FUND III-A, L.P., GRAMERCY FUNDS MANAGEMENT LLC, GRAMERCY EM CREDIT TOTAL RETURN FUND, AND ROEHAMPTON PARTNERS LLC,

Plaintiffs,

v.

OLEG BAKHMATYUK, NICHOLAS PIAZZA, SP CAPITAL MANAGEMENT, LLC, OLEKSANDR YAREMENKO, AND TNA CORPORATE SOLUTIONS, LLC,

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT OLEG BAKHMATYUK'S MOTION TO DISMISS

[TABLES INTENTIONALLY OMITTED]

INTRODUCTION

Oleg Bakhmatyuk heads two Ukrainian powerhouse agricultural companies, AVG and ULF, which are among the largest producers of eggs, egg products, and other agricultural products in the world. Both companies contributed to Ukraine becoming a major source of global agricultural exports in recent years. Compl. ¶¶ 16, 21–22. But, as in the aftermath of Russia's invasion of Crimea in 2014, the companies' operations were disrupted by the full-scale Russian invasion of Ukraine in February 2022.

While the Court ruled on Piazza Defendants' Motion to Dismiss, ECF No. 67 ("Order"), Mr. Bakhmatyuk preserves for the record all arguments raised in the Piazza Defendants' Memorandum of Law ("MTD"), ECF No. 44. Mr. Bakhmatyuk writes on additional factors showing that Gramercy Plaintiffs' claims against him are subject to an

agreement to arbitrate, that the Court should dismiss on forum non conveniens grounds, and the Private Securities Litigation Reform Act of 1995 ("PSLRA") bars the claims. Further, Mr. Bakhmatyuk moves to dismiss based on lack of personal jurisdiction.

First, Mr. Bakhmatyuk is differently situated to the contracts than the Piazza Defendants. Specifically, he is signatory to a Relationship Agreement with AVG, executed in 2010 in anticipation of the issuances, that limits the terms on which he can transact with the company, and contains an arbitration clause selecting the LCIA. The Relationship Agreement is referenced and incorporated into the AVG and ULF Prospectuses containing the details of the unsecured Note investments. In addition, Mr. Bakhmatyuk is referenced throughout the Trust Deeds and Subscription Agreements and is properly considered a party to the transactions.

Second, since the Court's Order, the Eleventh Circuit ruled on remand from *GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC*, 140 S. Ct. 1637 (2020). On remand, the Eleventh Circuit held the Supreme Court's ruling "specifically disagreed with [the Circuit's] reading of Article II of the [New York] Convention as requiring the parties *actually sign* an agreement to arbitrate their disputes in order to compel arbitration." *Outokumpu Stainless USA, LLC v. Coverteam SAS*, 2022 WL 2643936, at *2–3 (11th Cir. July 8, 2022) ("*GE Energy II*"). The ruling's implications here are two-fold. *First*, a person or entity can be a party to an arbitration agreement without actually signing it. The

remand ruling found that GE Energy was a party to an arbitration agreement it did not sign because the definition of Seller included subcontractors and it was listed as a potential subcontractor. *Id.* at *3. This indicates that this Court's ruling that Gramercy Plaintiffs are not parties to the Trust Deeds is inconsistent with the Supreme Court's holding in *GE Energy*. *Compare* Order at 18 *with GE Energy*, 140 S. Ct. at 1647–48, and *GE Energy II*, 2022 WL 2643936, at *1–2.[1] It also provides further support that Mr. Bakhmatyuk is a party to the agreements and can enforce their arbitration clauses because of the references to him and his role in the Trust Deeds and other documents. *GE Energy II*, 2022 WL 2643936, at *2–3. *Second,* the concurrence in *GE Energy II* opines that "we must apply federal common law in determining whether equitable estoppel applies in New York Convention cases," even though German substantive law would apply pursuant to the contract at issue. *Id.* at *6 (Tjoflat, J., concurring). The Court should reach the same conclusion here in the event it does not find both Gramercy Plaintiffs and Mr. Bakhmatyuk are parties to the agreements. It is inequitable to allow Gramercy Plaintiffs to litigate claims based on their contractual rights, while avoiding their contractual agreements to arbitrate.

1. The Trust Deeds and form Notes explicitly bind Noteholders, like Gramercy Plaintiffs, to the Trust Deeds and the conditions of the Notes. Gramercy Plaintiffs alleged the same, and their English law practitioner, Ben Valentin, stated the same as well. *See supra* Background § 2.

Appendix I

BACKGROUND

The Court is familiar with the factual background from prior briefing. MTD at 3–12. Here, Mr. Bakhmatyuk provides only brief additional background on key facts.

I. THE TRUST DEEDS, SUBSCRIPTION AGREEMENTS, PROSPECTUSES, AND RELATIONSHIP AGREEMENT GOVERN THE TRANSACTION AT ISSUE.

The Complaint centers around Gramercy's holdings of unsecured Notes of AVG and ULF issued in 2010 and 2013, respectively, and purchased in international markets in London and Ireland, respectively. *Id.* ¶¶ 45–50. The Note issuance transactions are described and governed by a series of issuance documents, including Trust Deeds, Subscription Agreements, Prospectuses, and a Relationship Agreement between Mr. Bakhmatyuk and AVG.[2]

Because the Complaint relies heavily on the Trust Deeds and Gramercy's rights as a Noteholder, this Court can and should consider the Trust Deeds, Subscription Agreements, prospectuses, and Relationship Agreement at the motion to dismiss stage as effectively incorporated into the Complaint. The Court already determined that

2. *See* Exs. 1A (ULF Subscription Agreement), 2 (AVG Subscription Agreement), 3A (ULF Prospectus), 4A (AVG Prospectus), 5A (AVG Trust Deed), 6A (ULF Trust Deed), 7A (ULF Prospectus), 8A (ULF Prospectus), 18 (Relationship Agreement).

it could consider the Trust Deeds because they are "referred to in and central to the allegations" and there is no dispute as to their authenticity. ECF No. 67 at n.3. For the same reason, the Court can and should consider the Subscription Agreements, Prospectuses, and Relationship Agreement, which are also part of the same issuance transaction. Plaintiffs have not disputed the authenticity of the Subscription Agreements or Prospectuses, which were submitted with the MTD, nor is there a basis to dispute the Relationship Agreement's authenticity.

All these documents should be considered in their entirety, as each document by its terms incorporates the other,[3] and together encompass the parties' rights and obligations under the Notes. *See Resolution Trust Corp. v. Fed. Sav. and Loan Ins. Corp.*, 25 F.3d 1493,1499 (10th Cir. 1994) (holding courts must consider all writings that are part of the same transaction when interpreting a contract, even where a document does not explicitly

3. *See* Ex. 1A at pg. 2–5 (ULF Subscription Agreement incorporating the ULF Trust Deed), pg. 5–8 (ULF Subscription Agreement incorporating the ULF Prospectus); Ex. 2 at pg. 3–4, 7, 15 (AVG Subscription Agreement incorporating the AVG Trust Deed), pg. 5–10, 12–15, 20 (AVG Subscription Agreement incorporating the AVG Prospectus); Ex. 3A at pg. 46, 53, 216, 218–20 (ULF Prospectus incorporating the ULF Trust Deed), pg. 279 (ULF Prospectus incorporating the ULF Subscription Agreement), pg. 202–205 (ULF Prospectus incorporating the Relationship Agreement); Ex. 4A at pg. 14, 30, 51, 54–55, 196–98 (AVG Prospectus incorporating the AVG Trust Deed), pg. 245 (AVG Prospectus incorporating the AVG Subscription Agreement), pg. 9, 186–87 (AVG Prospectus incorporating the Relationship Agreement); Ex. 6A at pg. 77 (ULF Trust Deed incorporating the ULF Prospectus).

incorporate another by reference) (citing Restatement (Second) of Contracts § 202).[4] Here, each of the documents was executed around the same time, for the same purpose of issuing the Notes under the same transaction. Thus, the Court should read and interpret these documents together.

As an alternative basis to consider the Prospectuses, courts may consider publicly filed documents on a motion to dismiss without converting the motion. *Slater v. A.G. Edwards & Sons, Inc.*, 719 F.3d 1190, 1196 (10th Cir. 2013). The Prospectuses, when issued, were governed by the EU Prospectus Directive (2003/71/EC), which imposes a uniform obligation to file and publish the prospectus.[5] Each Prospectus states on its face that the obligation has been fulfilled.[6]

II. GRAMERCY IS PARTY TO THE TERMS AND CONDITIONS OF THE NOTES AND THE TRUST DEEDS.

Mr. Bakhmatyuk respectfully submits that the Court's conclusion that the Plaintiffs are not parties to

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4. English law also interprets documents of the same transaction together. *See* Ex. 19, Lord Justice Kim Lewison, *The Interpretation of Contracts* at 97, § 3.06 (7th Ed. 2020).

5. "The Prospectus should be filed with the relevant competent authority and be made available to the public … ." EU Prospectus Directive (2003/71/EC) ¶ 32.

6. *See e.g.*, Ex. 2 at § 5.5, pg. 7 (confirming the Prospectus was approved for the purposes of Directive 2003/71/EC); Ex. 1A at § 4.3, pg. 4 (same).

the AVG and ULF Trust Deeds is incorrect. Order at 12. Gramercy alleges that it "formed binding contracts with the Company, the terms of which are contained in the ULF Trust Deed and the AVG Trust Deed." Compl. ¶ 215. It has not argued otherwise in any submission. To the contrary, its proffered English law practitioner, Ben Valentin, states "the parties to the [AVG and ULF] Notes are: (i) the Issuer, (ii) the Trustee, and (iii) any Noteholder of the Notes." ("Valentin"), ECF No. 50-2 at ¶¶ 10–11.

Moreover, the ULF and AVG Trust Deeds contain Schedules showing the form language for the Notes, including their terms and conditions. Ex. 5A; Ex. 6A. These terms and conditions state unequivocally that Noteholders are bound by the Trust Deeds' and Notes' terms. *See* Ex. 6A at Schedule 5, pg. 58; Ex. 5A at Part 2, pg. 42. Each Trust Deed also contains two arbitration clauses: one in the Trust Deed portion, and one in the Schedules showing the form of the Notes.[7]

AVG Trust Deed & Schedules

Schedules 1–2 of the AVG Trust Deed show the forms of the Notes and the Conditions thereto. Schedule 2, Part 2, "Conditions of the Notes" explicitly states "[t]he Noteholders … are entitled to the benefit of, are bound by, and are deemed to have notice of all the provisions of the Trust Deed and the Surety Deed and are deemed to have notice of the Agency Agreement applicable to them."

7. Because the Trust Deeds each include the full form Notes, many terms appear both in the Trust Deed portion and in the Schedules of the full form Notes.

Ex. 5A at Schedule 2, Part 2, pg. 42. Similarly, Paragraph 5 of the AVG Trust Deed states "[t]he Conditions shall be binding on the Issuer, the Surety Providers, the Trustee, and the Noteholders." Ex. 5A at pg. 12.

The clause in the body of AVG Trust Deed commits to arbitration before the LCIA for "[a]ny dispute arising out of or connected with these presents…." Ex. 5A at § 29.1, pg. 32. Schedule 2 of the AVG Trust Deed, the form of the Note, also contains an arbitration clause stating that "[a]ny dispute arising out of or connected with the Notes, the Trust Deed or the Surety Agreement, … shall be resolved" by LCIA arbitration. Ex. 5A at Schedule 2, § 20.2, pg. 68.[8]

The AVG Trust Deed permits the Trustee and the Noteholders *("where entitled to do so")* to bring litigation in the "exclusive jurisdiction" of the courts of England. Further, the AVG Trust Deed states the right to bring an English Court proceeding under 29.1(b) is "for the benefit of the Trustee and Noteholders alone and shall not limit the right of the Trustee or Noteholders to bring proceedings in any other court of competent jurisdiction." Ex. 5A, AVG Trust Deed § 29.2 at pg. 32; *see also id.* at Schedule 5 § 20.2, pg. 68–69 (same for § 20.2(b) of Conditions). The right to bring proceedings, however, is limited by the provision that "Only the Trustee may

8. The AVG arbitration clauses differ only in whether they refer to "these presents" (in the contract body) or "the Notes, the Trust Deed or the Surety Agreement" (in Schedule 2).

enforce the provisions of these presents.[9]" Ex. 5A at § 8.3, pg. 14. It thus requires broadly that a Noteholder seeking to bring "any other proceedings . . . *in respect of or concerning the Issuer or the Surety Providers*" must seek action by the Trustee in the first instance. *Id.*

ULF Trust Deed & Schedules

Schedules 1-5 of the ULF Trust Deed show the forms of the Notes themselves and the Terms and Conditions to which they are subject (Schedule 5). The Terms and Conditions of the Notes explicitly state that "The Noteholders … are entitled to the benefit of, are bound by, and are deemed to have notice of all the provisions of the Trust Deed and the Surety Deed and are deemed to have notice of the Agency Agreement applicable to them." *See* Ex. 6A at Schedule 5, pg. 58.

The ULF Trust Deed body's arbitration clause commits to arbitration before the LCIA for "any dispute arising out of or in connection with this Trust Deed … and a dispute relating to noncontractual obligations arising out of or in connection with this Trust Deed." Ex. 6Aat § 23.2.1, pg. 29. The arbitration clause in Schedule 5 of the ULF Trust Deed states that "any dispute arising out of or in connection with the Notes, the Trust Deed, the Surety Deed and these Conditions (including a dispute

9. AVG Trust Deed at 8.3, pg. 14 (citing language above, and that "No Noteholder shall be entitled …(ii) to take *any other proceedings… in respect of or concerning the Issuer or the Surety Providers*, in each case unless the Trustee have become bound as aforesaid to take any such action, steps or proceedings fails to do so within a reasonable period and such failure is continuing.").

regarding the existence, validity or termination hereof or thereof and a dispute relating to non-contractual obligations arising out of or in connection herewith or therewith)" shall be referred to arbitration before the LCIA. Ex. 6A at Schedule 5, § 19.2.1, pg. 90.[10] Because the ULF Trust Deed does not provide for any alternative forums, the necessary implication is that the ULF Trust Deed requires mandatory arbitration.[11]

III. MR. BAKHMATYUK IS ALSO PARTY TO ARBITRATION PROVISIONS IN THE ISSUANCE DOCUMENTS

Mr. Bakhmatyuk is a party to a Relationship Agreement (Ex. 18) with AVG. Among other things, this agreement restricts the terms on which Mr. Bakhmatyuk can transact with the Company and affiliates, requires a certain number of independent directors on the board, and limits his ability to transfer shares in the company, including to entities in which he is alleged to have any interest. Ex. 18 at § 2.1, pg. 5–6; *id.* at § 6, pg. 8. Like the Trust Deeds, the Relationship Agreement has a provision selecting English law and requiring arbitration in London under LCIA Rules. Ex. 18 at § 7, pg. 8.

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10. In the ULF Trust Deed, the clause in Schedule 5 differs from that in the contract body in that Schedule 5 refers to "the Notes, the Trust Deed, the Surety Deed, and these Conditions," not just the Trust Deed. Both explicitly incorporate non-contractual disputes.

11. All four arbitration clauses encompass this dispute. Their breadth shows the intent to commit any disputes connected with the Notes to arbitration. Ex. 6A at Schedule 5, § 19.2.1, pg.90.

Appendix I

The Relationship Agreement (Ex. 18) is discussed and its terms are incorporated into the AVG and ULF Prospectuses. *See* Ex. 3A at pg. 202–205; Ex. 4A at pg.at 9, 186–190. The AVG Prospectus states, "the Issuer have entered into a Relationship Agreement aimed at, among other things, protecting the Issuer's interests in the case of conflicts of interests, the interests of Mr. Bakhmatyuk and other shareholders and members of Avangard's management … may, in some circumstances, conflict with the interests of Noteholders." Ex. 4Aat pg. 9. The ULF prospectus states, "Avangardco entered into an agreement (the 'Relationship Agreement') with Mr Bakhmatyuk … on 30 April 2010" and describes the limitations and obligations imposed on Mr. Bakhmatyuk within the agreement. Ex. 3A at pg. 202–205.

In addition to the foregoing, Mr. Bakhmatyuk is referenced numerous times throughout the Trust Deeds. Ex. 5A, at pg.77, 80; Ex. 6A at pg. 104, 108. Mr. Bakhmatyuk is defined in the Trust Deeds and Prospectuses as a "Permitted Holder" and any family members of his or entities that he or his family members own are defined as "Related Part[ies]." Ex. 4, AVG Prospectus at 231, 234; Ex. 3, ULF Prospectus at 255, 259; Ex. 5, AVG Trust Deed at 77, 80; Ex. 6, ULF Trust Deed at 104, 108. This indicates that Mr. Bakhmatyuk himself is a party to the Trust Deeds, while his family members and beneficiaries are related parties.

IV. THE ISSUANCE DOCUMENTS CONTEMPLATE THE ISSUES RAISED IN THE COMPLAINT

The central issues raised in the Complaint are expressly contemplated in the issuance documents. Both the AVG and ULF Trust Deeds contain language stating the Issuers and Surety Providers may not "sell, assign, transfer, convey or otherwise dispose of all or substantially all of its assets, taken as a whole, in one or more related transactions, to another Person." Ex. 6A at 5.6(B), pg. 52; Ex. 5A at 5.6, pg. 71. Likewise, the Prospectuses contain the same prohibition that "[t]he Issuer may not in a single transaction or through a series of related transactions, directly or indirectly, (i) merge, consolidate, amalgamate or otherwise combine with or into another Person . . . or (ii) sell, assign, transfer, convey, lease or otherwise dispose of all or substantially all of the properties or assets of the Issuer and its Restricted Subsidiaries, taken as a whole, in one or more related transactions, to any other Person or Persons" unless certain conditions are met. ULF Prospectus, Ex. 7A, at 5.6 p. 227. AVG Prospectus, Ex. 4A, at 5.6 p. 205.

These documents also contemplate potential conflicts of interest from Mr. Bakhmatyuk's other businesses and related party transactions. *See* Ex. 3A at pg. 204 ("Mr. Bakhmatyuk has direct and indirect interests in companies with which the Group has engaged in transactions . . . As a result, potential conflicts of interest between his duties to the Issuer and private interests may arise or have arisen." In addition, the Relationship Agreement sets forth the standards Mr. Bakhmatyuk must adhere to for transactions involving affiliates or

members of the Company Group. Ex. 18 § 2.1(d)(ii) ("all transactions, agreements or arrangements entered into between the Majority Shareholder or- any of his Affiliates and any member of-the Company Group are, and will be made, on an arm's length basis and on normal commercial terms[.]"). It further requires board approval of transactions valued over $15 million. *Id*. The Prospectuses contain multiple disclosures related to the potential for conflicts of interest involving Mr. Bakhmatyuk. *See* Ex. 4A at pg. 9 ("[T]he interests of Mr. Bakhmatyuk and other shareholders and members of Avangard's management . . . may, in some circumstances, conflict with the interests of Noteholders."); *id.* at 10, 48, 188; Ex. 3Aat pg. 23 ("The Group has engaged and continues to engage in transactions with related parties that may present conflicts of interest"); *id.* at 5, 11, 204.

These provisions go directly to the core of Plaintiffs' claims regarding Mr. Bakhmatyuk's alleged facilitation of the improper transfer of assets. Compl. ¶ 10.

LEGAL STANDARD

To survive a motion to dismiss, the facts alleged in a complaint must be plausible, not merely speculative. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007). The Court must accept well-pleaded allegations of the complaint as true, *id*. at 555, but conclusory allegations are not entitled to an assumption of truth. *Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009).

Appendix I

ARGUMENT

I. THE FAA REQUIRES THE COURT TO COMPEL ARBITRATION

Under the Federal Arbitration Act, courts "shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement." 9 U.S.C. § 3. When the request relates to an international dispute, courts perform a "very limited inquiry" into whether (1) "there is an agreement in writing to arbitrate the subject of the dispute"; (2) "the agreement provide[s] for arbitration in the territory of the signatory of the Convention"; (3) "the agreement arise[s] out of a legal relationship whether contractual or not, which is considered as commercial"; and (4) whether "a party to the agreement not an American citizen." *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953, 959 (10th Cir. 1992) (citing *Ledee v. Ceramiche Ragno*, 684 F.2d 184, 186–87 (1st Cir. 1982)). Here, all four requirements are satisfied, at minimum as to Mr. Bakhmatyuk. Therefore, the Court must stay or dismiss Gramercy Plaintiff's' claims and refer this dispute to arbitration in London.

A. The parties have agreed to arbitrate this dispute.

The first requirement for referring an international dispute to arbitration has two parts. The first part is whether the parties are bound to arbitration agreements, either directly or through equitable estoppel. The second is whether the dispute is within the scope of the agreements.

Appendix I

1. Gramercy Plaintiffs and Mr. Bakhmatyuk are parties to the arbitration agreements in the issuance documents.

Gramercy Plaintiffs

As described above, the AVG and ULF Trust Deeds explicitly state that, as Noteholders, Gramercy Plaintiffs are "bound by[] and [] deemed to have notice of all the provisions of the Trust Deeds." Ex. 6A, ULF Trust Deed at Schedule 5, pg. 58; Ex. 5A, AVG Trust Deed at Schedule 2, pg. 42. Further, Gramercy Plaintiff's Complaint states the AVG and ULF Trust Deeds are "binding contracts" it formed with the companies. *See* Compl. ¶ 215. And their proffered expert draws the same conclusion. Valentin at ¶¶ 10–11. To the extent this Court's ruling to the contrary was on the basis that Gramercy had to actually sign the Trust Deeds, *GE Energy* held otherwise. 140 S. Ct. at 1648. The Eleventh Circuit interpreted the Supreme Court's decision that way in holding GE Energy was party to the agreement, though not a signatory. *GE Energy II* at *3.

Plaintiffs are bound to the Trust Deeds, and the form Notes included therein, which contain arbitration provisions committing any dispute "arising out of" or in "connect[ion]" with the Notes, the Trust Deed, or the Surety Deed to LCIA arbitration. *See* Ex. 6A at Schedule 5 § 19.2.1, pg. 90–91; Ex. 5A at Schedule 2 §§ 20.1, 20.2, pg. 68–69.[12]

12. Although the AVG Trust Deed provides for Noteholder arbitration, English legal proceedings and other litigation where

Appendix I

Mr. Bakhmatyuk

Mr. Bakhmatyuk is also a party to the Trust Deeds through the Relationship Agreement with AVG, which contains a sweepingly broad arbitration clause that covers this dispute. This Relationship Agreement is cited, relied upon, and incorporated into the Prospectuses. *See* Ex. 4A at pg. 9, 186–190; Ex. 3A at pg. 202–205. The AVG and ULF Prospectuses are incorporated into the Subscription Agreements. Ex. 1A at § 1.3, pg. 2; *id.* at 1§ 6.2, pg. 6; Ex. 2at §§ 2.3, 6.7, 7, pg. 5–9, 15. The Relationship Agreement, like the Trust Deeds, has a provision selecting English law and requiring arbitration in London under LCIA Rules. Ex. 18 ¶ 7.

And even if this Court were to not consider the Relationship Agreement, it should still find that Mr. Bakhmatyuk is a party to the arbitration agreements. Indeed, Mr. Bakhmatyuk is *not* an unrelated third-party, but instead CEO, Chairman of the Board, and indirect controlling shareholder of ULF and AVG. He is referenced throughout the Trust Deeds and signed the applicable Directors' Certificate to the Trust Deed. These governing agreements show a clear intent to bind Mr. Bakhmatyuk to their terms, including the arbitration provisions. Thus, like in *GE Energy II*, the scope and language of the Trust

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the Noteholder has first pursued its rights through the Trustee (Ex. 5A, AVG Trust Deed at §§ 8.3 & 29), the arbitration agreement in the ULF Trust Deed ***mandates*** arbitration of "any dispute arising out of or in connection with the Notes, the Trust Deed, the Surety Deed and these Conditions." Ex. 6A, ULF Trust Deed at pg. 90.

Deeds show that Mr. Bakhmatyuk is "a defined party covered by the arbitration clause." 2022 WL 2643936, at *3.

2. Gramercy Plaintiffs are equitably estopped from avoiding the arbitration provisions.

Even if Mr. Bakhmatyuk were not a party, the principles of equitable estoppel apply to prohibit Gramercy Plaintiffs from proceeding based on their rights under the Trust Deeds while avoiding the arbitration agreements.

As an initial matter, the Court should apply U.S. equitable estoppel principles and permit Mr. Bakhmatyuk to enforce the arbitration agreements against Gramercy Plaintiffs even though English law governs the substantive dispute. This is the conclusion that Judge Tjoflat reached in his concurrence in *GE Energy II*, where he opined that federal common law should govern whether equitable estoppel applies in cases involving international arbitration. 2022 WL 2643936 at *5-6.

Similarly, the Tenth Circuit has relied on the federal "body of law concerning the application of estoppel to permit a nonsignatory to compel a signatory to arbitrate." *Lenox MacLaren Surgical Corp. v. Medtronic, Inc.*, 449 F. App'x 704, 708 (10th Cir. 2011). While state contract law governs the interpretation of arbitration agreements, because there is no Wyoming law directly on point, "the district court must attempt to predict what the state's highest court would do . . . [and] may seek guidance from decisions rendered by lower courts in the relevant state, appellate decisions in other states with similar legal

principles, district court decisions in interpreting the law of the state in question, *and the general weight and trend of authority in the relevant area of law*." *Reeves v. Enterprise Products Partners, LP*, 17 F.4th 1008, 1012 (10th Cir. 2021) (internal quotation marks and citations omitted) (emphasis added).

The Court should follow the general weight and trend of federal law and find that Plaintiffs are equitably estopped from avoiding the arbitration provisions. *See Lenox MacLaren Surgical Corp*, 449 F. App'x at 708 (describing the "common elements" applied by federal circuit courts "concerning the application of estoppel to permit a nonsignatory to compel a signatory to arbitrate"). *Reeves*, 17 F.4th at 1012–13 (looking to decisions of "other states and circuits" to support application of equitable estoppel against party to arbitration clause). The Court can also look to its sister state in the Tenth Circuit, Colorado, which applies equitable estoppel when signatories to arbitration agreements assert claims arising from a contract against a nonsignatory. *Frazier v. W. Union Co.*, 377 F. Supp. 3d 1248, 1264 (D. Colo. 2019); *Weller v. HSBC Mortg. Servs., Inc.*, 971 F. Supp. 2d 1072, 1083 (D. Colo. 2013). Wyoming also recognizes estoppel principles preventing inconsistent litigation positions, demonstrating that Wyoming would recognize equitable estoppel here. *See e.g., Snake River Brewing Co. v. Town of Jackson*, 39 P.3d 397, 408 (Wyo. 2002); *Exxon Corp. v. Bd. of Cnty. Comm'rs, Sublette Cnty.*, 987 P.2d 158, 165 (Wyo. 1999).

And even if the Court should decide English law applies to the question of equitable estoppel, Mr. Bakhmatyuk

would have rights as a third party to assert the arbitration clauses against Plaintiffs. Ex. 20, Dr. Dracos Mem. Mr. Bakhmatyuk submits here the opinion of Dr. Dracos. *Id.* Dr. Dracos has a PhD in law from Cambridge University in the field of English contract law. *Id.* ¶ 5. He has been a member of the English Bar since 2005 and focuses his practices on international commercial dispute resolution. *Id.* ¶ 4. Dr. Dracos explains that English law is not so narrow or rigid on the question of third-party enforcement of arbitration agreements as Gramercy Plaintiffs have argued. *Id.* ¶ 16. Rather, courts can provide redress when it would be "inequitable for a party to an arbitration clause to act contrary to it," and such redress can be provided both at the request of a party to the agreement and at the request of a non-party." *Id.* ¶ 25. English courts have allowed nonsignatories to invoke arbitration and jurisdiction agreements when those agreements "covered claims asserted by the claimant, which was a party to those agreements" to prevent "inequitable, unconscionable, vexatious and or/oppressive" results. Ex. 20 ¶ 33 (citing cases). Because nonsignatories are relying "on the general power of the court to prevent inequitable conduct," this analysis "is not affected by any clause which excludes the application of the Contracts (Rights of Third Parties) Act 1999," which expressly leaves third-party rights under other doctrines intact. *Id.* at 58.

3. Plaintiffs' claims are sufficiently intertwined with the Trust Deeds for estoppel to apply.

Gramercy's entire action is predicated on their rights under the Trust Deeds, and their allegation that AVG and

ULF transferred away assets *in violation of the terms of the Trust Deeds, Notes, and Relationship Agreement.* Plaintiffs' RICO enterprise is predicated on just that: "The aim of the Count I Enterprise's unlawful conduct was to maintain Mr. Bakhmatyuk's control over the Company and its assets by *employing all means necessary to prevent Gramercy, one of the largest creditors with significant contractual rights, from exercising its contractual rights under the Notes* and to prevent Gramercy from achieving a meaningful recovery on its Notes." Compl. ¶ 168. *See also* Compl. ¶¶ 45–50, 70, 76, 127, 145–146, 212, 214–18, 220. It would be unfair to allow Plaintiffs, whose claims are based factually and legally on the Trust Deeds, to avoid the arbitration provisions of those same agreements. *See Reeves*, 17 F.4th at 1013 (plaintiffs cannot "have it both ways and on one hand, seek to hold the nonsignatory liable pursuant to duties imposed by the agreement, which contains an arbitration provision, but, on the other hand, deny arbitration's applicability because defendant is a nonsignatory" (internal quotation marks omitted)).

B. The claims are within the scope of the arbitration clause.

Because as described in the MTD, the LCIA rules are incorporated into the Trust Deeds and delegate the question of arbitrability to the arbitrator, the Court need not determine whether Gramercy Plaintiffs' claims are within the scope of the arbitration provisions. MTD at 19-20. Gramercy Plaintiffs asserted the same in their opposition. Opp. at 20 n.5. Were this Court to decide the issue, however, Plaintiffs' claims clearly arise "out

of or in connection with the Notes, the Trust Deed, the Surety Deed." Ex. 6A at pg. 90. As this Court noted, "[t]he definition of 'dispute' in the Trust Deeds is quite broad, particularly as to any dispute connected with 'these presents' or in connection with the Trust Deed." Order at pg. 12. The relevant contract documents contemplate all the claims Plaintiffs allege, including: (1) Mr. Bakhmatyuk's control over AVG and ULF (*see* Ex. 18; Ex. 4A at pg. 9; Ex. 3A at pg. 11, 204); (2) Mr. Bakhmatyuk's alleged conflicts of interest with his other businesses (*see* Ex. 18, Relationship Agreement; Ex. 4A at pg. 9; Ex. 3A at pg. 11, 23, 204); and (3) asset transfers without approval of a noteholder with a stake as large as Gramercy's (*see* Ex. 5A at § 5.6, pg. 72; Ex. 6Aat§ 5.6(B), pg. 52). *Cf.* Order at n.5

Plaintiffs try to avoid this conclusion by framing the conduct as tort claims, but masking contract claims as tort claims is a tactic that is well-known and unavailing. *See, e.g.*, *Lawit v. Maney & Gordon, P.A.*, 2014 WL 11512612, at *4 n.2 (D.N.M. Jan. 17, 2014) (collecting cases); *Mid-Continent Cas. Co. v. Gen. Reins. Corp.*, 2009 WL 2588867, at *3 (N.D. Okla. Aug. 18, 2009).

C. The other three requirements for ordering international arbitration are met.

The remaining three requirements for staying a dispute in favor of international arbitration under the New York Convention are easily met. *Riley*, 969 F.2d at 959. The arbitration agreement provides for arbitration in England, a signatory of the Convention. *BCB Holdings Ltd. v. Gov't of Belize*, 110 F. Supp. 3d 233, 243 (D.D.C. 2015),

aff'd, 650 F. App'x 17 (D.C. Cir. 2016). The arbitration agreements arise out of the sale of unsecured Notes from ULF and AVG to Plaintiffs and the resulting contractual relationship governed by the terms of the Trust Deeds. Finally, neither ULF nor AVG, parties to the Trust Deeds, is an American citizen. *See* Compl. ¶¶ 21–22.

II. THE NO-ACTION PROVISION APPLIES

With respect to the "no-action" clause, because Gramercy has not, and could not, allege that it sought to make a demand on the Trustee or the corporation, it is "prohibit[ed] … from initiating actions to enforce the rights of the corporation." *Bixler v. Foster,* 596 F.3d 751 (10th Cir. 2010). Ultimately, their claim is that ULF and AVG caused assets to be transferred to Piazza Defendants without complying with the provision of the Trust Deed granting Gramercy approval rights over such transactions. *See also* Compl. ¶¶ 50, 69; ECF No. 50, Gramercy Response at 18– 19 (claiming "Defendants misconduct [] eviscerated Gramercy's rights under the Notes, including their right to seek repayment and their right as holder of more than 25% of the notes to block an unfavorable restructuring"). That claim is about a breach of the contract. The many contract provisions limiting the circumstances in which such transactions can be made, and the potential for conflicts of interest to arise with Mr. Bakhmatyuk's other business interests, confirm this interpretation. Gramercy barely masks that this lawsuit is an effort to get around the contract terms, but that is not consistent with the Trust Deeds or the FAA.

Gramercy's allegations that they were targeted, which amount to a claim that AVG and ULF "put on a

façade of good faith negotiation to forestall Gramercy from enforcing its rights," are insufficient to overcome the clearly contractual nature of the dispute. Compl. ¶ 6. Nor are these alleged misrepresentations sufficiently specific on their own to sustain a fraud or RICO claim. The crux of the complaint is that assets were transferred to keep them from the debtholders. That is exactly the type of action the Trustee must bring. The Trust Deeds require the Trustee to bring claims to enforce the agreement against the Issuer. Ex. 6, ULF Trust Deed at 6–7, § 2.5; Ex. 5, AVG Trust Deed at 14, § 8.3. Plaintiffs cannot avoid this requirement simply by suing someone other than the Issuer when the underlying claim is that the Issuer transferred assets out of the Company in violation of the Trust Deed. *Reeves v. Enter. Prod. Partners, LP*, 17 F.4th 1008 (10th Cir. 2021) (finding Plaintiff could not sue non-party to avoid arbitration agreement).[13]

Further, like *Elektrim*, Plaintiffs claims are common to all bondholders. Ex. 10, *Elektrim SA v. Vivendi Holdings 1 Corp*, [2008] EWCA Civ 1178, ¶ 10 (the "no action clause should be construed, to the extent reasonably possible, as an effective bar to individual bondholders pursuing, for their own account, what are in substance class claims"). The same is true here, as the Complaint alleges that the defendants drained the company of assets, diminishing the value of the Notes and the potential for recovery ***for all Noteholders***, not only Plaintiffs. Compl. ¶ 10.

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13. The Court distinguished this case, noting it "discuss[ed] enforcement of an arbitration agreement only against a signatory plaintiff." Here, Plaintiffs and Defendants are parties to the Trust Deeds.

III. THE CASE SHOULD BE DISMISSED UNDER THE DOCTRINE OF FORUM NON CONVENIENS

The Court should dismiss this action under the doctrine of *forum non conveniens*. The two threshold requirements that an "adequate alternative forum" exists and "foreign law is applicable" are met here. *Archangel Diamond Corp. Liq. Trust v. Lukoil*, 812 F.3d 799, 804 (10th Cir. 2016) (internal quotation omitted). Equally important, the private and public interests weigh heavily in favor of dismissal in this case especially with the ongoing conflict in Ukraine and Mr. Bakhmatyuk's addition to the litigation. *Id.*

Moreover, while "there is *ordinarily* a 'strong presumption in favor of hearing the case in the plaintiff's chosen forum,' a *foreign* plaintiff's choice of forum 'warrants less deference.'" *Yavuz v. 61 MM, Ltd.*, 576 F.3d 1166, 1172 (10th Cir. 2009) (quotation omitted) (emphasis added). As the Supreme Court has recognized, the assumption that the chosen forum is more convenient in such cases "is much less reasonable." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255-56 (1981). Because "the plaintiff[s] [are] foreign, the private and public interest factors need not so heavily favor the alternate forum." *Yavuz*, 576 F.3d at 1172 (quoting *Gschwind*, 161 F.3d at 606).

A. LCIA is an adequate alternative forum.

The relevant contracts in this matter provide for arbitration of any disputes connected to the Notes before

the LCIA. MTD at 29. Mr. Bakhmatyuk has agreed to the terms of the Relationship Agreement governing, among other things, his ability to transfer shares in AVG, which requires "any dispute arising out of or connected with" that Agreement also to be resolved by LCIA arbitration. Ex. 18 ¶ 7, pg. 8. Thus, Mr. Bakhmatyuk has agreed—and can be compelled—to litigate Plaintiffs' claims against him in LCIA arbitration.

Plaintiffs as Noteholders are also "bound by … all provisions of the Trust Deed[s]," including the arbitration provisions. Ex. 6A at Schedule 5, pg. 58, Ex. 5A at § 29.1, pg. 32. Plaintiffs do not dispute, and indeed affirmatively allege that they are bound by, the terms of the Trust Deeds. Compl. ¶ 15. Having agreed to arbitrate before the LCIA, they cannot now argue the forum is inadequate. Even their English law practitioner lists 10 LCIA arbitrations (out of 14) in his resume. Valentin at pg. 29. Further, the LCIA is one of the eight "best-known international commercial arbitration institutions" cited in the leading treatise on international arbitration, and the only organization cited in the UK, where ULF and AVG are listed. *See* Gary B. Born, *International Commercial Arbitration* 189–190 (3d ed. 2020).[14] The LCIA is an adequate forum to resolve Plaintiffs' claim against Mr. Bakhmatyuk. *Little v. XL Ins. Co. SE*, 2019 WL 6119118, *5 (S.D.N.Y. Nov. 18, 2019) (holding LCIA was adequate alternate forum).

14. Indeed, "[t]he LCIA is already [considered] the gold standard for international arbitration in London." Steven Barrett, Updating the gold standard, The Law Society Gazette (Oct. 26, 2020) https://www.lawgazette.co.uk/practice-points/updating-the-gold-standard/5106118.article

Finally, to the extent the Court doubts whether all defendants are amenable to LCIA arbitration in England, it can and should dismiss the case on the conditions that Defendants agree to submit to the jurisdiction of the LCIA. *Yavuz*, 576 F.3d at 1182 (affirming dismissal conditional on defendants' agreement to submit to jurisdiction of the Swiss courts).

B. English law applies

All relevant contracts in this matter—the Trust Deeds, Relationship Agreement, Subscription Agreement and Prospectuses—select English law as the governing law. Ex. 5A at § 27, pg. 31; Ex. 6A at § 23.1, pg. 29; Ex. 18 at § 7.1, pg. 8; Ex. 2 at § 18.1, pg. 23; Ex. 1A at § 22.1, pg. 31; Ex. 4A at § 20.1, pg. 222; Ex. 3A at § 19.1, pg. 244. Moreover, the governing law provisions are broad, covering breach-of-contract claims and all the non-contractual tort and RICO claims related to the Notes that are alleged in the Complaint:

- "These presents and ***any non-contractual obligations*** arising out of or in connection with them are governed by, and shall be construed in accordance with, English law." Ex. 5A § 27, pg. 31 (emphasis added);

- "This Trust Deed, and ***any non-contractual obligations*** arising out of or in connection with it, is governed by, and shall be construed in accordance with English law." Ex. 6A at § 23.1, pg. 29 (emphasis added);

The LCIA tribunal applies the parties' choice of law or the law applicable at the seat of arbitration. LCIA Arbitration Rules (2020), Article 16.4. Either way, English law would apply. Finally, under a Wyoming choice-of-law analysis, courts apply the law of the place with the most significant relationship to the claim—here England or Ukraine. Reply at 10–11. The threshold requirements of *forum non conveniens* are thus satisfied.

C. Private and public interest factors weigh heavily in favor of dismissal

At the time Plaintiffs' Complaint was filed, the private and public interest factors considered for *forum non conveniens* uniformly weighed strongly against finding Wyoming a proper forum. *See* MTD at 31–34. Now, these factors even more clearly favor dismissal.

First considering private interests, litigating this case in Wyoming presents significant practical problems, given that all the key witnesses and evidence reside in London, Ukraine, or elsewhere in Europe. Compl. ¶¶ 16, 21–24, 66 (Mr. Bakhmatyuk, ULF, AVG, Concorde, Petrashko, Ashmore, other European creditors, the Sureties, the Trustees are all located abroad). The war in Ukraine makes compulsory service and travel even more complex and expensive. It also makes it difficult to obtain necessary evidence and witness testimony in Wyoming for a proceeding principally involving ULF, AVG and more than a dozen entities which are all in Ukraine; this is in marked contrast to London, where all of the parties (including key third-parties ULF and AVG) consented that they would

litigate any such dispute. Further, Mr. Bakhmatyuk (like many of the other witnesses) is a non-English speaker, necessitating translations for all proceedings in which he will take part. These practical problems would overwhelm the litigation.[15]

Plaintiffs have *no* connection to the State of Wyoming. To the contrary, Gramercy has an office in London, England[16] and two of its representatives who met with Defendants—and thus are key witnesses—were based in London. *See* Compl. ¶¶ 85, 91 (describing meetings Gramercy's Jason Cook in London); ¶¶ 101, 103, 180(2), 180(3) (describing how Sergei Lioutyi, the Gramercy VP of EMEA Corporate Credit, traveled from London to meet with Mr. Bakhmatyuk).

Wyoming has "very little connection" to this case that revolves around Notes issued by Ukrainian companies and governed by English law. *Gas Sensing Tech. Corp*,

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15. The Prospectuses plainly state that Ukrainian courts will not enforce foreign court judgments (including those of this Court). Ex. 4A, pg. iv; Ex. 3A, pg. iii. In contrast, Ukraine will enforce an arbitral award, however, pursuant to the New York Convention to which Ukraine and the United Kingdom are parties, as will Cyprus where AVG and ULF are incorporated. Ex. 4A, pg. iv–v; Ex. 3A, pg. iii–iv. While Gramercy has questioned the relevance of this fact, Opp. at 32–33, Plaintiffs allege only that Wyoming entities have an ownership interest in certain foreign affiliates of ULF and AVG with primarily physical assets related to their business operations, *i.e.* agricultural production, in Ukraine. Compl. ¶¶ 139–144.

16. *About*, Gramercy, https://www.gramercy.com/.

2017 WL 2955353, at *17. This Court is not "at home with the [English] law that must govern the action" and will need to consider dueling English law opinions regarding legal issues throughout the case, as well as "unnecessary problems in conflict of laws"—especially in a dispute that could implicate the laws, not just of England, but of Ukraine, Cyprus, and Austria, where documents, witnesses, and the physical assets are located. *Piper Aircraft Co.*, 454 U.S. at 241 n.6. This Court's resources would not be well spent applying foreign law to a case that does not involve Wyoming's interests, against a Defendant over whom the Court lacks jurisdiction.

IV. THE PSLRA BARS PLAINTIFFS' RICO CLAIMS

The Court's Order held that the PSLRA did not bar Gramercy Plaintiffs' claims because "Plaintiffs purchased the Notes before the allegedly fraudulent scheme, and they allege they still hold them." Order at 37. But the PSLRA bars RICO claims alleging not only "the act of securities fraud itself" but also "conduct that would have been actionable as securities fraud." *Sensoria, LLC v. Kaweske*, 2022 WL 204606, at *18 (D. Colo. Jan. 24, 2022). Like in this case, Plaintiffs in *Sensoria* alleged a "unified fraud scheme" involving "solicitation . . . , stock purchases (which ran simultaneously . . .), and actions contrary to the investment entity's interests." *Id.* at *19. The court found the "degree of interrelatedness [of plaintiffs' allegations regarding securities sales and harm] and the PSLRA bar's broad scope warrant[ed] applying the bar to [p]laintiffs' RICO claims." *Id.* (rejecting plaintiffs' attempt to "differentiate between … (1) inducing them

to buy the shares and later (2) converting the investment entity's assets").

Here, Plaintiffs allege a "three phase" scheme, within which they raise securities fraud claims. Compl. ¶ 10(a)–(c). ***First***, Plaintiffs allege that Mr. Bakhmatyuk "disseminate[d] false information [to the market] . . . regarding the Company's financial performance …to allow Bakhmatyuk to purchase [securities] at a steep discount and put pressure on Gramercy to accept a restructuring of its Notes or otherwise sell its Notes." Compl. ¶10(a). Plaintiffs allege they were buying Notes throughout the period (2016–2017) of these misleading statements. *Id.* ¶¶ 46, 48, 71–96. ***Second***, Plaintiffs allege that Mr. Bakhmatyuk took advantage of this manipulated discounting to engage in "debt purchases involv[ing] put-and-call arrangements . . . [or] straw purchasers." *Id.* ¶ 10(b); *see also id.* ¶¶ 178(2, 4, 6, 8), 180(2, 3), 202(2). ***Finally***, Plaintiffs allege "Bakhmatyuk began to transfer assets to dummy companies created to hide and shield assets." *Id.* ¶ 10(c).

Similarly, in *Bixler v. Foster*, 596 F.3d 751, 754 (10th Cir. 2010), the Tenth Circuit applied the PSLRA bar and dismissed claims by minority investors in METCO alleging that company directors violated RICO when they transferred METCO's assets to an Australian company. This Court, however, distinguished *Bixler* because the present case does not involve a merger transaction where there was also an exchange of securities. Order at 37. But in this case, plaintiffs instead allege that *they purchased securities directly* during 2016-2017

while Mr. Bakhmatyuk was allegedly "disseminate[ing] false information . . . regarding the Company's financial performance." Compl. ¶¶ 10(a), 71–95. Thereafter, Mr. Bakhmatyuk allegedly took advantage of his market manipulation to engage in debt purchases with put-call arrangements and with straw purchases Compl. ¶¶ 10(b); *see id.* 93, 168, 200. By arguing this scheme did not occur in connection with a securities transaction, Plaintiffs attempt a "surgical presentation of the cause of action [that] would undermine the purpose of the [PSLRA]." *Bixler*, 596 F.3d at 760.

V. THE COURT LACKS PERSONAL JURSIDICTION OVER MR. BAKHMATYUK

A Wyoming court may exercise personal jurisdiction only if the two elements of purposeful, minimum contacts and traditional notions of fair play and justice are met. *Id.* at 1229. Neither element is met here.

A. Mr. Bakhmatyuk lacks minimum contacts with Wyoming.

Plaintiffs must establish either general or specific personal jurisdiction over Mr. Bakhmatyuk. Mr. Bakhmatyuk is not subject to general jurisdiction in Wyoming because he is not domiciled in the forum state. *Daimler AG v. Bauman*, 571 U.S. 117, 137 (2014). Plaintiffs admit Mr. Bakhmatyuk is a dual citizen of Cyprus and Ukraine and resides permanently in Oberwaltersdorf, Austria – more than 5,000 miles from Wyoming. Compl. ¶¶ 16, 64.

Plaintiffs also fail to allege the minimum contacts for specific personal jurisdiction, which arises only where the defendant has "purposefully directed its activities at residents of the forum state" and the alleged injuries "arise out of the defendant's forum-related activities." *Dental Dynamics*, 946 F.3d at 1229. To assess purposeful direction, the Court must focus on "the harmful effects of [the alleged conduct] in the forum state." *Id.* at 1231. But, the Complaint describes an alleged scheme perpetrated by Mr. Bakhmatyuk from Ukraine and Austria against Plaintiffs, Cayman Islands companies managed out of Connecticut, relating to agricultural businesses in Ukraine. *See, e.g.*, Compl. ¶¶ 1, 13–16, 21–22. Indeed, *all* Mr. Bakhmatyuk's alleged actions took place in Ukraine, England, or Austria. *Id.* ¶¶ 101, 103, 129, 150, 155. Plaintiffs do not allege that Mr. Bakhmatyuk ever directly corresponded with Plaintiffs in the United States. More importantly, they allege no injury in Wyoming as Plaintiffs, the "direct target" of the alleged scheme, have no connection to Wyoming. *See* Compl. ¶ 172. *Dental Dynamics*, 946 F.3d at 1229.

Plaintiffs also cannot rely on a "conspiracy" theory of jurisdiction to establish specific jurisdiction over Mr. Bakhmatyuk without establishing he has minimum contacts with Wyoming. *Melea, Ltd. v. Jawer SA*, 511 F.3d 1060, 1070 (10th Cir. 2007); *see also Hart v. Salois*, 605 F. App'x 694, 700 (10th Cir. 2015) ("[I]n addition to pleading a prima facie conspiracy, due process requires that a defendant also have minimum contacts with the forum."). An alleged coconspirator's presence within the forum might create the "minimum contacts" if the

conspiracy is directed towards the forum or substantial steps in furtherance of the conspiracy are taken in the forum; neither element is met here. *Melea*, 511 F.3d at 1070. The alleged conspiracy is directed at Gramercy in Connecticut, the Cayman Islands, and London, and all acts in furtherance of any purported conspiracy occurred in London, Kyiv, Vienna, or elsewhere in Europe. Plaintiffs cannot rely on a co-defendant's presence to establish minimum contacts of Mr. Bakhmatyuk. *See, e.g.*, *Hart*, 605 Fed. App'x at 700; *Good v. Khosrowshahi*, 296 F. App'x 676, 679–80 (10th Cir. 2008).

B. Exercising personal jurisdiction over Mr. Bakhmatyuk would violate the notions of fair play and substantial justice.

Even if Plaintiffs had satisfied the minimum contacts test, exercising personal jurisdiction over Mr. Bakhmatyuk would violate the notions of fair play and substantial justice considering: (1) the burden on the defendant; (2) the forum state's interest in the dispute; (3) the plaintiff's interest in convenient and effective relief; (4) the interstate judicial system's interest in the most efficient resolution; and (5) furthering fundamental social policies. *Dental Dynamics*, 946 F.3d at 1229. These factors do not support personal jurisdiction in Wyoming.

The burden on the defendant is "of primary concern" in determining reasonableness of personal jurisdiction, and when "the defendant is from another country, this concern is heightened." *Benton v. Cameco Corp.*, 375 F.3d 1070, 1079 (10th Cir. 2004). This concern weighs

heavily against exercising personal jurisdiction over Mr. Bakhmatyuk, who lives in Austria and is a Ukrainian and Cypriot citizen. It would unreasonably burden him to be forced to defend himself in Wyoming, thousands of miles away, particularly in this time of crisis.

Further, no other factor favors proceeding with this action in Wyoming. (1) Wyoming has no interest in adjudicating this dispute, as Plaintiffs allege no injury to Wyoming residents, and no issues are governed by Wyoming law. (2) The interest in a convenient and efficient resolution is best served through arbitration in London. (3) This would cause them no undue hardship, *as they agreed to the forum.* (4) Wyoming is not the most efficient forum due to the location of the witnesses, governing law, and the absence of necessary parties. (5) Exercising personal jurisdiction over Mr. Bakhmatyuk would interfere with the policy interests of Ukraine and England. *See Benton*, 375 F.3d at 1079–80. Thus, no interest of Plaintiffs, Wyoming, or this Court outweighs the significant burden to Mr. Bakhmatyuk from being forced to litigate this dispute in Wyoming.

VI. MR. BAKHMATYUK DID NOT ATTEMPT TO EVADE SERVICE

Mr. Bakhmatyuk was properly served in accordance with the Hague convention on June 17, 2022 at his residence in Vienna, Austria. ECF No. 66. Service is a critical prerequisite to litigation, particularly outside of the United States. As party to the Relationship Agreement providing for arbitration in London of these disputes,

Mr. Bakhmatyuk is not in a position to consent to this forum. Rather, he reserves all rights against Gramercy in connection with this improper litigation, including for Plaintiffs' violations of the applicable agreements.

Mr. Bakhmatyuk also did not evade service. ECF No. 57 at pg. 2. His absence from his residence was required given responsibilities to his companies. Plaintiffs mislead with an April 25, 2022 article from a publication "ReOrg Research" which reached out to a translator for Mr. Bakhmatyuk, but not to the movant. ECF No. 60 at pg. 1. ReOrg Research asked Mr. Bakhmatyuk's translator, not Mr. Bakhmatyuk, for comment on a hearing in the Cypriot litigation. Mr. Bakhmatyuk's translator wrote that he "d[id]n't have it in [him] to bother Oleg with this now that he's literally fighting to save the company." *See* Ex. 21. This publication for debt traders bizarrely changed this into a story that "Oleg Bakhmatyuk is ignoring Gramercy's Cypriot and U.S. lawsuits," and that Gramercy has been attempting to serve Mr. Bakhmatyuk with this action. *See* ECF 60-1, Ex. A. Even though the reporter never asked a word about the U.S. litigation or service. Ex. 21. Given the foregoing, the record does not support any evasion of service.

CONCLUSION

For the foregoing reasons, the Complaint should be stayed or dismissed pending arbitration, pursuant to Rule 12(b)(1), (2), (3), (6), (7), 19(a), and 19(b).

Dated: July 15, 2022

Respectfully submitted,

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Appendix I

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[CERTIFICATE OF SERVICE OMITTED]

APPENDIX J — PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING, FILED AUGUST 15, 2022

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Civil Action No. 21-cv-00223-NDF

GRAMERCY DISTRESSED OPPORTUNITY FUND II, L.P., GRAMERCY DISTRESSED OPPORTUNITY FUND III, L.P., GRAMERCY DISTRESSED OPPORTUNITY FUND III-A, L.P., GRAMERCY FUNDS MANAGEMENT LLC, GRAMERCY EM CREDIT TOTAL RETURN FUND, AND ROEHAMPTON PARTNERS LLC,

Plaintiffs,

v.

Appendix J

OLEG BAKHMATYUK, NICHOLAS PIAZZA,
SP CAPITAL MANAGEMENT, LLC,
OLEKSANDR YAREMENKO, AND
TNA CORPORATE SOLUTIONS, LLC,

Defendants.

**PLAINTIFFS' OPPOSITION TO
OLEG BAKHMATYUK'S MOTION TO DISMISS**

[TABLES INTENTIONALLY OMITTED]

Plaintiffs (together, "Plaintiffs" or "Gramercy"), by and through their undersigned counsel, respectfully submit this Opposition to the Motion to Dismiss filed by Defendant Oleg Bakhmatyuk ("Bakhmatyuk") (Doc. No. 76, the "Motion").[1]

PRELIMINARY STATEMENT

Bakhmatyuk's latest attempt to delay answering for his fraudulent scheme should be summarily rejected. After months of evading service, Bakhmatyuk's long-awaited motion to dismiss amounts to little more than a rehash of arguments rejected by the Court just eight days before he filed his motion, along with an unsupported personal jurisdiction challenge that has no legal merit. Bakhmatyuk offers no reason for the Court to revisit or alter any of its prior rulings and no evidence at all in support of his personal jurisdiction challenge.

1. Capitalized terms not otherwise defined herein shall have the meanings provided in the Complaint (Doc. No. 1).

Represented by the same counsel as the Piazza Defendants, Bakhmatyuk seeks a "do-over." However, he presents no credible argument that he is a party to any agreement with Gramercy, let alone that there is an agreement between them to arbitrate the claims at issue. And contrary to his assertions, nothing in the 11th Circuit's ruling on remand in *Outokumpu Stainless USA, LLC v. Coverteam SAS*, 2022 WL 2643936, at *2–3 (11th Cir. July 8, 2022) ("*GE Energy II*") even bears on this point, as that ruling (which is not binding here in any event) merely held that GE was a party to an arbitration agreement because it was expressly defined as a party—something that is indisputably not true here. Nor is there any merit to Bakhmatyuk's rehash of the Piazza Defendants' already-rejected equitable estoppel argument. As such, Gramercy's claims are not subject to arbitration. Bakhmatyuk's further attempts to urge reconsideration of the Court's refusal to dismiss the case based on the "no action" clauses, *forum non conveniens* and the PSLRA likewise should be summarily rejected. He advances the same arguments the Court already rejected. The result therefore should be the same.

That leaves Bakhmatyuk's contention that the Court lacks personal jurisdiction over him, which, like Yaremenko's jurisdictional challenge, fails because he ignores his extensive alleged contacts with Wyoming. He also ignores that the jurisdictional analysis for federal RICO claims brought against non-U.S. defendants aggregates all U.S. contacts, not just contacts with the forum. *See* Fed. R. Civ. P. 4(k)(2). In addition to the extensive contacts alleged between Bakhmatyuk

and Wyoming, Bakhmatyuk concedes that "the alleged conspiracy is directed at Gramercy in Connecticut." (Mot. at 24). Moreover, Bakhmatyuk does not contest that Plaintiffs adequately pleaded a conspiracy involving him and numerous Wyoming-based defendants. Thus, as a matter of law, even if the Complaint did not plead extensive contacts between Bakhmatyuk and Wyoming—which it does—these allegations easily support personal jurisdiction over Bakhmatyuk under Rule 4(k)(2) and based on conspiracy jurisdiction.

The Motion should be denied in its entirety.

PROCEDURAL HISTORY

Bakhmatyuk's long-awaited appearance must be considered in context. As detailed in Gramercy's status reports (Docs. No. 46, 54), Gramercy devoted substantial time and expense in an effort to serve Bakhmatyuk in accordance with the Hague Convention in Vienna—where he fled while under investigation by Ukrainian authorities for embezzlement of Ukrainian government funds. Frustrated by clear evidence that Bakhmatyuk was evading service, Gramercy contacted Winston & Strawn—who, to that point, purported to act only on behalf of the Piazza Defendants—to ask them if they had been in contact with Mr. Bakhmatyuk (which seemed obvious) and where he could be reached. Tellingly, they refused to respond, just as his longstanding Cyprus lawyers had months earlier. Further corroborating Mr. Bakhmatyuk's evasion of service, in late April, he cavalierly stated in an article through a translator (that he now attempts to

disavow) that he was "ignoring" this lawsuit. (Doc. No. 60-1).

In granting Gramercy permission to effectuate alternative service, including through publication (over the objection of the Piazza Defendants, who clearly were doing Bakhmatyuk's bidding *in absentia*), the Court (Rankin, J.) noted, among other things, that "[t]he timing of Defendants' notification of absence shortly after Plaintiffs' first Status Report Regarding Service [Doc. 46] filed on February 22, 2022, supports the notion that Defendant is evading service." (Doc. No. 61 at 3–4). On June 21, 2022, the day after the half page notice was published, Winston & Strawn sent an email confirming that it had been retained by Bakhmatyuk and acknowledging "service in accordance with the Hague Convention" on his behalf.[2] (Doc. No. 65-1).

Bakhmatyuk's response to the Complaint finally was to be filed on July 8, 2022 (Doc. No. 66), but his deadline to respond to the Complaint was extended by one week based on his assertion that "it would promote efficiency and conserve the resources of the Court if Mr. Bakhmatyuk is able to account for the Court's [July 7] order in his responsive pleading." (Doc. No. 70 at 2). Of course, no efficiencies were realized nor resources conserved given that his Motion, filed eight days later, rehashes the Piazza Defendants' arguments and also purported to support the Piazza Defendants' wholesale "motion for reconsideration."

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2. Bakhmatyuk argues without basis that he was not evading service, but the record speaks for itself, and, in any event, his evasion of service is not necessary to resolve this motion.

On August 2, Defendants changed tack. The Piazza Defendants withdrew their defective motion for reconsideration and filed a notice of appeal "under 9 U.S.C. § 16." (Doc. Nos. 84, 85). The appeal is frivolous given that none of the parties to this action are parties to an agreement to arbitrate claims against one another, and the Tenth Circuit lacks jurisdiction over the appeal because the Piazza Defendants' motion to dismiss was explicitly brought under "Rules 12(b)(1), (2), (6), (7), 19(a), and 19(b)," *not* any section of the FAA. (Doc. No. 44 at 50). Defendants have not sought a stay of these proceedings and, in any event, the appeal should not forestall a resolution of Bakhmatyuk's Motion, which should be denied.

LEGAL ARGUMENT

I. THERE IS NO BASIS FOR REVERSING THE COURT'S PRIOR RULINGS.

Apart from Bakhmatyuk's personal jurisdictional challenge and his argument that he is a party to the Trust Deeds, all of Bakhmatyuk's other arguments already have been rejected by the Court. While the Court has discretion to revisit or alter its prior rulings under Rule 54(b), "[w]hen entertaining a Rule 54(b) motion, the Court looks to Rule 59(e) for guidance" and will generally only grant relief "when the court has misapprehended the facts, a party's position, or the controlling law." *Weidenbach v. Casper-Natrona Cnty. Health Dep't*, No. 20-CV-08-SWS, 2021 WL 7286877, at *1 (D. Wyo. June 17, 2021) (internal quotations and citations omitted). Requests to alter prior legal rulings are analyzed "'by picking up where [the

Court] left off in the prior ruling—not by starting anew.'" *Ortega v. Siempre Unidos en Progreso*, No. CV 18-111 MV/KK, 2022 WL 409189, at *3 (D.N.M. Feb. 10, 2022) (citing *Kruskal v. Martinez*, 429 F. Supp. 3d 1012, 1026 (D.N.M. 2019)). Such motions "are not favored," *Georgia-Pac., LLC v. Diversified Transfer & Storage, Inc.*, No. 10-CV-83-F, 2010 WL 11432919, at *1 (D. Wyo. Sept. 22, 2010), and are "not a license for a losing party's attorney to get a second bite at the apple." *Maint. Enterprises, Inc. v. Dyno Nobel, Inc.*, No. 08-CV-170-B, 2009 WL 10671010, at *2 (D. Wyo. Nov. 19, 2009) (internal quotations and citations omitted). *See also Biles v. Schneider*, No. 19-CV-48-F, 2020 WL 10356508, at *3–4 (D. Wyo. Sept. 10, 2020) (Freudenthal, J.) (rejecting attempt to "rehash[]" arguments previously rejected under R. 54(b)). They are generally available only where the movant can show (1) new controlling authority, (2) new evidence, or (3) a clear indication that the Court erred. *Servants of Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000). Bakhmatyuk does none of these things in his motion.

A. Bakhmatyuk's Request For Dismissal Based On the Arbitration Clauses In the Trust Deeds Rehashes Already-Rejected Arguments and Fails Because He Is Not a Party To Any Agreement With Plaintiffs.

1. Bakhmatyuk is Not a Party To a Single Agreement With Gramercy.

As the Court already found, "[t]he parties to this case did not agree to arbitrate anything amongst themselves." Order on the Piazza Defendants' Motion to Dismiss (Doc.

No. 67, the "Order") at 12. That is correct and dispositive. *See generally Ragab v. Howard*, 841 F.3d 1134, 1137-38 (10th Cir. 2016) ("No party can be compelled to submit a dispute to arbitration without having previously agreed to so submit.") (internal citations omitted). Bakhmatyuk cannot point to a single agreement signed by himself and Gramercy that contains an agreement to arbitrate anything. In fact, he cannot point to any agreement at all that he entered into with Gramercy. Nor is there any merit to his claim that the documents incorporate one another by reference, as set forth more fully *infra.* Thus, there is no reason to treat Bakhmatyuk any differently than the Piazza Defendants.

Bakhmatyuk has identified only a single agreement to which he is a party: an April 30, 2010 Relationship Agreement between himself and AVG (the "Relationship Agreement"). But the Relationship Agreement, like the Subscription Agreement and Prospectuses, is not properly before the Court on a motion to dismiss, since it is neither referenced in nor attached to the Complaint and is not subject to judicial notice. *See* Order at 10 n.4. *See Gee v. Pacheco*, 627 F.3d 1178, 1186 (10th Cir. 2010) (internal quotations and citations omitted). On that basis alone, the Motion should be denied.

Even if the Court were to consider the Relationship Agreement, it cannot form an agreement to arbitrate as against Gramercy because (1) Gramercy is not a party or a signatory to the Relationship Agreement; (2) there is no allegation that Gramercy ever saw the Relationship Agreement; (3) the Relationship Agreement covers entirely irrelevant subject matter (Bakhmatyuk's relationship with

AVG and his agreement to restrict his conduct in specified ways) and therefore has nothing to do with this case or Gramercy; and (4) nothing in the Relationship Agreement could or did make Bakhmatyuk a party to the Trust Deeds or any of the other documents invoked by Bakhmatyuk. The only parties are Bakhmatyuk and AVG. ULF is not even a party, and thus the Relationship Agreement cannot apply to the ULF Trust Deeds. Since Bakhmatyuk is not a party to any agreement with Gramercy, there can be no agreement to arbitrate claims between them.

2. Contrary to Bakhmatyuk's Assertions, Not One of the Trust Deeds, Subscription Agreements, Prospectuses, and Relationship Agreement Incorporates The Terms of Any of the Other Agreements.

Bakhmatyuk attempts to avoid the absence of any agreement to arbitrate with Gramercy by arguing that each of the Trust Deeds, Subscription Agreements, Prospectuses, and Relationship Agreement "by its terms incorporates the other, and together encompass the parties' rights and obligations under the Notes." (Mot. at 3-4). As an initial matter, the Court already "excluded the subscription agreements and prospectuses" from consideration because they are not mentioned in the Complaint. Order at 10-11 n.4. This ruling, in turn, is fatal to Bakhmatyuk's argument that the Relationship Agreement may be considered.[3]

3. Other than citing the identical case the Piazza Defendants cited to argue that the Court should consider these documents, *Slater v. A.G. Edwards & Sons, Inc.*, 719 F.3d 1190 (10th Cir.

Even if the Court were to alter its decision not to consider these documents, the same result holds because none of these documents incorporates the terms of any other.[4] As the Court already held, where, as here, the agreement containing a purported arbitration clause is governed by foreign law, the Court applies the law of the contract to construe its terms. Order at 15; *see Mars, Inc. v. Szarzynski*, No. CV 20-01344 (RJL), 2021 WL 2809539, at *5 (D.D.C. July 6, 2021) ("Whether Mars is required to arbitrate its claims against Szarzynski depends on whether Mars, despite being a nonsignatory, is bound by the SED Contract. . . . This question is governed by the law of contract—in this case, Belgium law."). Here, all of the agreements invoked by Bakhmatyuk are governed by English law. The question of whether they incorporate any other agreements "by reference" is therefore a question of English law.

2013), Bakhmaytuk merely argues that the Court may consider these documents because they state that they should have been published. But Bakhmatyuk says nothing about where the Court can find published copies of either agreement and does not cite any authority supporting his position. *Slater* is unavailing as it merely held that that "[i]n a securities case, we may consider, in addition to the complaint . . . public documents filed with the SEC." *Slater*, 719 F.3d at 1196. This is not a securities case and the documents Bakhmatyuk seeks to rely on are not alleged to have been filed with the SEC. Accordingly, there is no basis for the Court to revisit its decision not consider the Subscription Agreements or the Prospectuses on this motion.

4. The Court properly determined that "[w]hen there is a nonsignatory involved, the Court independently determines arbitrability itself and does not defer to the contract's agreement to arbitrate arbitrability." (Order at 12) (citations omitted).

Tellingly, Bakhmatyuk's expert, Mr. Dracos, does not opine that any of the agreements incorporate the terms of any other as a matter of English law. Tellingly, none of the agreements were even included among the documents he reviewed in connection with his opinion. As Mr. Valentin explains in the Second Valentin Declaration,[5] "[t]here is no principle of English law whereby a party to one contract becomes a party to another contract simply because the contract is mentioned in a (third) non-contractual document (here: a prospectus). At the very least, as a matter of principle, clear, express language would be required in the relevant contracts for such an unusual situation to be found to arise. In the present case there is no such language, nor is the relevant contract (the Relationship Agreement) even mentioned in the agreements which contain the terms that Mr. Bakhmatyuk is seeking to invoke (the Trust Deeds)." Second Valentin Declaration ¶ 21. As such, the Trust Deeds, Subscription Agreements, Prospectuses, and Relationship Agreement do not incorporate one another under English law.

The same is true as a matter of federal common law, which Bakhmatyuk contends applies without legal support. It is well-settled that "the language used in a contract to incorporate extrinsic material by reference must explicitly, or at least precisely, identify the written material being incorporated and must clearly communicate that the purpose of the reference is to incorporate the referenced material into the contract

5. "Second Valentin Declaration" refers to the August 15, 2022 Second Declaration of Ben Valentin, attached hereto as Exhibit 1 to the Declaration of David R. Michaeli (attached hereto).

(rather than merely to acknowledge that the referenced material is relevant to the contract, e.g., as background law or negotiating history)." *Northrop Grumman Info. Tech., Inc. v. United States*, 535 F.3d 1339, 1345 (Fed. Cir. 2008). *See also Roberts v. Cent. Refrigerated Serv.*, 27 F. Supp. 3d 1256, 1264 (D. Utah 2014) (holding that "incorporation by reference requires that the reference be clear and unequivocal"); *United States v. Young*, No. CR 17-0694 JB, 2018 WL 6204601, at *27 (D.N.M. Nov. 28, 2018) ("The common law of contracts insists on explicit references and clear language of incorporation.").[6]

Not only do the agreements not incorporate one another's terms, in fact, none of the documents even *existed* at the time the Relationship Agreement was executed in 2010, and accordingly, none are referenced, let alone incorporated. Thus, the fact that the Relationship Agreement contains an arbitration clause is irrelevant: Bakhmatyuk does not argue that the Relationship

6. Bakhmatyuk's attempt to rely on federal common law makes no sense. The documents he relies on all contain English governing law clauses. "[W]hen a court interprets a contract, as a general matter it applies the law that the parties selected in their contract," and "applying the law of the jurisdiction in which the suit is pending (lex fori), is unsatisfactory." *Yavuz v. 61 MM, Ltd.*, 465 F.3d 418, 427, 430–31 (10th Cir. 2006). Bakhmatyuk does not argue that this contractual choice of law is invalid. To the contrary, his expert, Dracos, acknowledges the application of English law, rather than rebutting it. In any event, there is no incorporation by reference under federal common law, either. The same would be true under state law because Wyoming, like other U.S. states, likewise requires that any incorporation by reference be done with specificity. *See Schuler v. State*, 668 P.2d 1333, 1339 (Wyo. 1983).

Agreement extends to Gramercy or creates a basis to require arbitration of Gramercy's claims. Nor could he.

Bakhmatyuk fares no better in arguing that the Trust Deeds, Prospectuses or the Subscription Agreements incorporate one another's terms—or those of the Relationship Agreement. In fact, only the Prospectuses even mention the Relationship Agreement, without any indication that its terms are incorporated. The Subscription Agreements and Trust Deeds could not have incorporated, and do not incorporate, the Relationship Agreement's terms by reference because they do not even reference the Relationship Agreement. That should end the inquiry.

3. As the Court Already Held, Gramercy Is Not A Party to Any of the Relevant Agreements.

Not only is Bakhmatyuk not a party to any of the agreements he relies on in claiming an agreement to arbitrate, but neither is Gramercy. As the Court already held after carefully considering the Trust Deeds and their schedules, "[t]he AVG Trust Deed refers to 'Noteholders' in numerous provisions, but they are not parties to it" and "[t]he ULF Trust Deed contains a similar provision." Order at 13, *citing* ULF Trust Deed § 1.6 and *id.*, Schedule 5, Terms and Conditions of the Notes at 90 § 18 (similar provision). Bakhmatyuk has proffered no basis for the Court to reconsider its ruling on this issue. It is undisputable that neither Gramercy nor Bakhmatyuk signed an agreement with one another, let alone an agreement *to arbitrate* with one another.

4. The Remand Ruling In *GE Energy* Is Inapposite and Has No Bearing On This Case.

Bakhmatyuk next argues that the Court should overlook the fact that the litigants are not parties to any actual agreement to arbitrate because of the 11th Circuit's ruling on remand in *GE Energy II*. But that case does not represent a change in law, much less a change in controlling law. *See e.g. Biles*, No. 19-CV-48-F, 2020 WL 10356508, at *3 (finding that although Rule 59(e) permits a court to alter prior rulings, "relief is appropriate if there is new controlling law, new evidence not available previously, or a need to correct clear error or prevent manifest injustice." (internal quotations and citations omitted). *GE Energy II* merely held as a matter of contract interpretation that the agreement containing the arbitration clause in that case defined "party" *expressly* to include a list of subcontractors, and that since GE was on that list, the arbitration clause covered GE. *Id*. at *3 (holding that "GE Energy is a defined 'party' and entitled to enforce the arbitration clauses contained in the Contracts" because "Outokumpu agreed to arbitrate with GE Energy per the contract's plain terms."). No such contract clause exists here. In addition, as the Court already recognized, *GE Energy* did not hold that a court should apply local law rather than the law the parties chose to govern their contract to determine if an arbitration clause applies to non-parties. Order at 15-16. And, in any event, the Tenth Circuit already rejected that approach. *See Yavuz v. 61 MM, Ltd.*, 465 F.3d at 428-30. Thus, the holding in *GE Energy II* is entirely irrelevant.

GE Energy II also is not binding on this Court. Rulings in out-of-district cases like *GE Energy II* are generally not grounds for a court to revisit its own ruling on a legal matter. *See*, *e.g.*, *Santos v. The Boeing Co.*, No. 02 C 9310, 2004 WL 2515873, at *5 (N.D. Ill. Nov. 5, 2004) (holding Boeing's citation to a recent Eighth Circuit opinion was not grounds for reconsideration because the opinion "[was] not even controlling precedent" and "consist[ed] of nothing more than persuasive authority"). The same is true even for in-district decisions from other judges because such decisions are not binding on the Court and thus do not represent a significant or controlling change in the law. *See Doe v. Soc'y of Missionaries of Sacred Heart*, No. 11-CV-02518, 2014 WL 1715376, at *2 (N.D. Ill. May 1, 2014) (holding discovery decision by a Northern District judge in an unrelated case was not a change in the law warranting reconsideration of a contrary decision in the present case); *see also Harris v. Manpower Inc.*, No. 09-CV-2368 BEN JMA, 2010 WL 4932249, at *2 (S.D. Cal. Nov. 30, 2010) (holding unpublished district court decisions by other judges in a district are not a change in controlling law that would warrant reconsideration).

Thus, for multiple reasons, the decision on remand in *GE Energy II* provides no basis for this Court to revisit its prior rulings.

5. Bakhmatyuk Offers No Grounds to Alter the Court's Ruling on Equitable Estoppel.

The Court also should reject Bakhmatyuk's equitable estoppel argument, which relies on the *same* cases and

the *same* arguments the Piazza Defendants raised in their motion. As an initial matter, English law governs any question about whether the agreements can be construed to require arbitration among non-parties and non-signatories because all of the agreements state expressly that they are to be construed under English law. In fact, they also specify that England's statute on third party rights shall *not* be applicable. The Tenth Circuit has made clear that "under federal law the courts should ordinarily honor an international commercial agreement's forum-selection provision *as construed under the law specified in the agreement's choice-of-law provision*." *Yavuz v. 61 MM, Ltd.*, 465 F.3d at 428-30 (emphasis in original); *see also Kelvion, Inc. v. PetroChina Canada Ltd.*, 918 F.3d 1088, 1092 n.2 (10th Cir. 2019) ("In this circuit, forum-selection clauses are also construed according to the governing law selected in the contract."). Nothing in *GE Energy II* or in any other case cited by Bakhmatyuk disturbs these well-settled choice-of-law principles.

The Court already correctly has held that "under English law, Defendants cannot enforce the arbitration clauses against Plaintiffs." Order at 15. As Mr. Valentin explains in detail in the Second Valentin Declaration (and also explained in his first declaration), English law would not apply equitable estoppel in this case because "[e] quitable estoppel, as a means of extending the benefit of an arbitration agreement to a non-party, is not available under English law." Second Valentin Declaration ¶ 15; *see also* First Valentin Declaration ¶ 29.[7] Bakhmatyuk's title

7. "First Valentin Declaration" refers to the March 9, 2022 Expert Opinion of Ben Valentin (Doc. No. 50-2) submitted by

at AVG or ULF does not alter the analysis under English law since all of the relevant agreements expressly state that third parties shall *not* have rights under them, *see* Second Valentin Declaration ¶ 28, and because, in any event, Bakhmatyuk's conduct was *ultra vires* and not in connection with his roles at either company. And, moreover, the Court already emphasized, without resolving choice-of- law, that "Defendants have not cited any domestic law that extends equitable estoppel to a nonsignatory plaintiff." Order at 16. Bakhmatyuk makes no effort to cure this omission, and instead cites the identical cases the Court already considered and rejected as "discuss[ing] enforcement of an arbitration agreement only against a signatory plaintiff." *Id.* at 17. Thus, there is no basis for the Court to revisit this issue.[8]

B. Bakhmatyuk Raises No New Arguments Concerning the "No Action" Clauses and His Arguments Should Be Rejected.

Bakhmatyuk next rehashes the Piazza Defendants' argument that Gramercy's claims, none of which sound in contract, somehow are barred by the Trust Deeds' No-Action clauses. (Mot. at 16–17). But as the Court already

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Gramercy in opposition to the Piazza Defendants' motion to dismiss.

8. Bakhmatyuk also asserts that Gramercy's claims arise under the Prospectuses, Subscription Agreements, Trust Deeds or the Relationship Agreement and therefore fall within the scope of the arbitration clauses in those documents. This is incorrect. Gramercy is not suing to enforce the terms of any of the documents submitted by Bakhmatyuk.

held, this argument "fares no better for Defendants than the arbitration clause" because "Defendants are not parties to the Trust Deed to be able to enforce the No-Action clauses;" have not "point[ed] to any language in the No-Action clauses that would give them the right to enforce those provisions;" and because "[b]y their express terms, these clauses only restrict Noteholders from suing the Issuers and Security Providers." (Order at 20). Plaintiffs refer to their arguments in opposition to the Piazza Defendants' motion to dismiss, as well as the First Valentin Declaration, which conclusively demonstrate that Bakhmatyuk's rehashed argument lacks merit. (Doc. No. 50 at 21–24); First Valentin Declaration ¶¶ 35-43. In sum, as the Court already held, since Bakhmatyuk is neither an Issuer nor a Security Provider, and since Gramercy's claims likewise seek damages for a scheme and injury unique to Gramercy that did not target all noteholders (*see* Order at 18–24), the No Action clauses cannot form the basis for dismissal of Gramercy's claims against him.

C. There Is No Basis to Revisit the Court's Ruling On Forum Non Conveniens.

It is well-established, as the Court recognized in the Order, that "[t]here are two threshold questions in the *forum non conveniens* determination: first, whether there is an adequate alternative forum in which the defendant is amenable to process . . . and second, whether foreign law applies. . . . If the answer to either of these questions is no, the *forum non conveniens* doctrine is inapplicable." *Leventhal v. Liberty Mut. Fire Ins. Co.*, No. 09-CV-189-J, 2009 WL 10665420, at *1 (D. Wyo. Oct. 7, 2009). *See*

also Order at 28-29. Here, the answer to both threshold questions is no.

With respect to the first threshold question, Bakhmatyuk simply re-asserts the Piazza Defendants' argument that "LCIA is an adequate alternative forum." (Mot. at 18; *see also* Doc. No. 44 at 29). The Court already rejected that argument because it was "not persuaded that any of Defendants are clearly subject to jurisdiction in either LCIA or the courts of England" or amenable to process there. (Order at 29–30). In this regard, the Court emphasized that the Piazza Defendants did "not provide declarations or any form of consent to personal jurisdiction in England" and "[did] not explain . . . whether the English civil procedure rules or practice direction even apply in the LCIA." *Id.* at 29. Tellingly, Bakhmatyuk also makes no attempt to do so here.[9] Accordingly, there is no basis for the Court to reconsider its conclusion that Defendants' *forum non conveniens* argument fails on the first threshold question.

As to the second threshold question, Bakhmatyuk argues that "[a]ll relevant contracts in this matter . . .

9. Bakhmatyuk relies on *Yavuz* to suggest the Court "can and should dismiss the case on the conditions that Defendants agree to submit to the jurisdiction of the LCIA." (Mot. at 19). Unlike the defendants in *Yavuz*, none of the Defendants have "agreed to execute a written agreement consenting to process and jurisdiction" in the LCIA. *Yavuz v. 61 MM, Ltd.*, 576 F.3d 1166, 1171 (10th Cir. 2009). In any event, the Court is not required to order a conditional dismissal; it has full discretion to decline to do so. *See Miller v. Bos. Sci. Corp.*, 380 F. Supp. 2d 443, 448 (D.N.J. 2005).

select English law as the governing law." (Mot. at 19). However, the Court already has held that "neither Plaintiffs nor Defendants are parties to the Trust Deeds," and Bakhmatyuk offers no basis to reconsider that holding. Thus, the governing law provisions have no bearing on the *forum non conveniens* analysis. (Order at 12). In any event, as Gramercy explained in detail in its Opposition to the Piazza Defendants' Motion to Dismiss, federal law governs Gramercy's RICO claims, and state law governs Gramercy's state-law claims. *See* Doc. No. 50 at 28-29.

Only if the Court were to revisit its prior rulings on both of these threshold issues would it need to go "on to weigh the private and public interests." *Leventhal*, No. 09-CV-189-J, 2009 WL 10665420, at *1. The Court did not do so last time, and Bakhmatyuk offers no basis for the Court to do so here. But if the Court does reach the public and private interest factors, they weigh decidedly in favor of this case proceeding in Wyoming.

Like the Piazza Defendants, Bakhmatyuk focuses on identifying as many foreign connections as he can, while completely disregarding the substantial U.S. connections. Bakhmatyuk ignores that Gramercy's witnesses and documents are located in the United States. Compl. ¶¶ 13-14. Bakhmatyuk also ignores that the majority of Defendants are based in Wyoming, and the Court already has found that Yaremenko is subject to personal jurisdiction in Wyoming. Bakhmatyuk's assertion that he and "many of the other witnesses" do not speak English is irrelevant—indeed, he does not cite a single case to support that supposed language differences are relevant

to the *forum non conveniens* analysis—and, in any case, this argument cannot be squared with his insistence that England is the proper forum. *See* Mot. at 20.[10]

As to the public-interest factors, Bakhmatyuk does not address the first two factors at all (since there is no demonstrable administrative difficulty associated with the case proceeding in Wyoming and since there is no undue burden on a Wyoming jury since this case is profoundly connected to Wyoming). Nor does he contend that an arbitration in London would move faster than this case. Instead, Bakhmatyuk repeats the fallacy that "Wyoming has 'very little connection' to this case that revolves around Notes issued by Ukrainian companies and governed by English law." (Mot. at 21). This ignores the TNA Transfers and the efforts by the Piazza Defendants to effectuate other aspects of the scheme from Wyoming, which are detailed in Section II, *infra*, and which clearly support this case remaining in Wyoming. *See also* Order at 35.

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10. Bakhmatyuk also asserts that "[t]he Prospectuses plainly state that Ukrainian courts will not enforce foreign court judgments (including those of this Court)." (Mot. at 20 n.15). Like all of his other arguments, Gramercy addressed this argument in its Opposition to the Piazza Defendants' Motion: "[A]ny judgment against Piazza, SP Capital, and TNA could be enforced in Wyoming, because they reside in, are incorporated in, and are headquartered in Wyoming. And a judgment against Bakhmatyuk could be enforced against him in either Cyprus or Austria. *See* Compl. ¶ 16. The Piazza Defendants are therefore mistaken to suggest that there is a risk that the Court would expend resources on this case only to issue a judgment that cannot be enforced." (Doc. No. 50 at 33).

D. Bakhmatyuk Offers No Basis For the Court To Reconsider Its Ruling That the PSLRA Does Not Bar Plaintiffs' RICO Claims.

Without introducing or relying upon any new facts, arguments or authorities, Bakhmatyuk trots out the same arguments raised by the Piazza Defendants to contend that Gramercy's claims are barred by the PSLRA.[11] (Mot. at 21–22). The Court already considered and rejected Defendants' PSLRA arguments and should do so again here. Order at 36–37.

Bakhmatyuk first asserts the Court erred in holding that the PSLRA did not bar Gramercy's claims because "the PSLRA bars RICO claims alleging not only 'the act of securities fraud itself' but also 'conduct that would have been actionable as securities fraud.'" (Mot. at 21) (quoting *Sensoria, LLC v. Kaweske*, No. 20-cv-00942, 2022 WL 204606, at *18 (D. Colo. Jan. 24, 2022)). It is confounding that Bakhmatyuk suggests that the Court overlooked this argument. The first sentence of the Court's Order addressing the PSLRA states: "[Piazza] Defendants next argue that Plaintiffs RICO claims are barred because 'any conduct that would have been actionable as fraud in the

11. Bakhmatyuk does not argue that Gramercy has not satisfied its pleading burden with respect to its RICO or tort claims, apart from asserting that the PSLRA bars Gramercy's RICO claims, and thus concedes these causes of action are otherwise adequately pleaded.

purchase or sale of securities' is excluded from the RICO private right of action." Order at 36.[12]

Bakhmatyuk's only new authority is an easily distinguishable District of Colorado decision that found that "[b]ecause Plaintiffs could—and actually do—allege violations of the securities laws on the same facts, the PSLRA bar prevents them from framing them as RICO violations as well." *Sensoria*, No. 20-cv-00942, *LLC*, 2022 WL 204606, at *19. Here, the Court already correctly held that "Plaintiffs do not allege Defendants defrauded them in the purchase or sale of the Notes." Order at 37. In so holding, the Court also already considered and rejected the same arguments advanced by Bakhmatyuk concerning *Bixler v. Foster*, 596 F.3d 751 (10th Cir. 2010). Thus, Bakhmatyuk presents no basis for the Court to reconsider its ruling that the PSLRA does not bar Gramercy's RICO claims.

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12. The Piazza Defendants made the same point in their opening and reply briefs. (Doc. No. 44 at 37) ("Congress has made this clear—amending RICO in 1995 to state that 'any conduct that would have been actionable as fraud in the purchase or sale of securities' cannot establish a RICO violation"); *see also* Doc. No. 53 at 15 (citing *Zohar CDO 2003-1, Ltd. v. Patriarch Partners, LLC*, 286 F. Supp. 3d 634, 643–44 (S.D.N.Y. 2017) for the proposition that "if the alleged conduct could form the basis of a securities fraud claim against any party—[] the plaintiff, defendants or a non-party—it may not be fashioned as a civil RICO claim."). The argument is unavailing because Gramercy's claims are not actionable as securities fraud. *See id.* at 36–38.

II. BAKHMATYUK IS SUBJECT TO PERSONAL JURISDICTION IN WYOMING.

A. The Court Has Specific Jurisdiction Over Bakhmatyuk For the Same Reasons It Has Specific Jurisdiction Over Yaremenko.

In rejecting Yaremenko's personal jurisdiction argument, the Court applied the following standard for specific jurisdiction:

> "Specific jurisdiction calls for a two-step inquiry: (a) whether the plaintiff has shown that the defendant has minimum contacts with the forum state; and, if so, (b) whether the defendant has presented a 'compelling case that the presence of some other considerations would render jurisdiction unreasonable.'" *Old Republic*, 877 F.3d at 904 (citing *Burger King*, 471 U.S. at 476–77). "The minimum contacts test for specific jurisdiction encompasses two distinct requirements: (i) that the defendant must have purposefully directed its activities at residents of the forum state, and (ii) that the plaintiff's injuries must arise out of the defendant's forum-related activities." *Old Republic*, 877 F.3d at 904 (citation and quotation marks omitted).

Order at 8. Applying that standard, the Court found that it had specific jurisdiction over Yaremenko largely based on his involvement in the formation of SP Advisors and

TNA with Piazza. *Id.* at 9-10. The Court also found that "exercising jurisdiction over Yaremenko does not offend traditional notions of fair play and substantial justice" because "Yaremenko has maintained significant business contact with Wyoming for over ten years" and "[t]he claims against him arise from those contacts." *Id.* at 10.

The same analysis applies to Bakhmatyuk. Like Yaremenko, the Complaint alleges that Bakhmatyuk has a long-standing business relationship with Piazza and his Wyoming-based business, SP Advisors, back to "at least 2008." Compl. ¶¶ 8, 29-30. Further, both Bakhmatyuk and Yaremenko are alleged to have conducted and/or directed the conduct of activities in Wyoming in furtherance of Defendants' scheme, including the TNA Transfers. Indeed, as alleged in the Complaint, one of the focal points of Gramercy's lawsuit is that "Bakhmatyuk transferred at least 100 subsidiaries from ULF to TNA in Wyoming" for the specific purpose of availing himself of corporate confidentiality protections available under Wyoming law. Compl. ¶ 139. Gramercy also alleges that Bakhmatyuk retained the services of Piazza, a Wyoming resident, and Piazza's Wyoming-based business, SP Advisors (including Yaremenko), in order to establish TNA, a Wyoming company, to orchestrate the TNA Transfers, and to carry out other aspects of the scheme targeting Gramercy, including the debt purchases and misinformation campaign. *See e.g.*, Compl. ¶¶ 29-33, 202. The Complaint thus alleges substantial conduct by Bakhmatyuk that was specifically directed at Wyoming.

The Court's finding that Yaremenko is subject to suit in Wyoming applies equally to Bakhmatyuk. Both

Defendants purposefully directed their activities at Wyoming. In fact, the Complaint alleges that Yaremenko's forum-related activities that gave rise to Gramercy's injuries—namely, the formation of TNA and the facilitation of the TNA Transfers—were "orchestrated and directed" by Bakhmatyuk. *Id.* ¶ 193. It is telling that neither Bakhmatyuk nor the Piazza Defendants have asserted Wyoming is not a proper venue under 18 U.S.C. § 1391, effectively conceding that "substantial part of the events or omissions giving rise to the claim occurred" in Wyoming. 18 U.S.C. § 1391(2). Nor have they filed any affidavits disputing Gramercy's factual allegations concerning their contacts with Wyoming. Accordingly, for the same reasons the Court concluded it has jurisdiction over Yaremenko, it should reject Bakhmatyuk's jurisdictional challenge.

B. The Court Has Jurisdiction Over Bakhmatyuk Based on Fed. R. Civ. P. 4(k)(2).

In addition to being premised on the fallacy that he lacks contacts with Wyoming, Bakhmatyuk's jurisdictional challenge also reflects a fundamental misunderstanding of the jurisdictional analysis applicable to non-resident defendants in RICO actions. RICO (18 U.S.C. § 1965) authorizes "nationwide service of process," which courts (including courts in the 10th Circuit) have held authorizes jurisdiction over defendants served within the U.S., provided the exercise of jurisdiction comports with due process.[13] Courts have recognized that this expansive

13. *CGC Holding Co., LLC v. Hutchens*, 824 F. Supp. 2d 1193, 1199-1200 (D. Colo. 2011); *First Am. Mortg., Inc. v. First Home Builders of Fla.*, No. 10-CV-0824-RBJ-MEH, 2011 WL 4963924, at

jurisdictional reach is consistent with RICO's remedial purpose.[14]

Where, as here, a RICO complaint is served on a defendant outside of the U.S., Fed. R. Civ. P. 4(k)(2) applies.[15] Thus the appropriate inquiry is whether a foreign defendant has sufficient contacts *with the United States as a whole* such that the exercise of jurisdiction comports with due process. *Hetronic Int'l, Inc. v. Hetronic Germany GmbH*, 10 F.4th 1016, 1030-32 (10th Cir. 2021). Indeed, "[t]he purpose of Rule 4(k)(2) was to close a loophole that otherwise permitted foreign defendants who possessed sufficient contacts with the United States as a whole to evade enforcement of federal law by limiting their contacts with any one state in order to avoid jurisdiction in all fifty." *Compañía De Inversiones Mercantiles S.A. v. Grupo Cementos De Chihuahua, S.A.B. De C.V.*, 2021

*3 (D. Colo. Oct. 14, 2011); *Consumers Gas & Oil, Inc. v. Farmland Indus., Inc.*, 815 F. Supp. 1403, 1413 (D. Colo. 1992).

14. *See Johnson v. Investacorp, Inc.*, No. CIV. A. 3-89-2607-H, 1990 WL 25034, at *1 (N.D. Tex. Jan. 31, 1990) ("Congress intended by this section to enable a plaintiff to bring before a single court all members of a nationwide RICO conspiracy").

15. *CGC Holding Co., LLC*, 824 F. Supp. at 1199–200 ("whereas statutes might authorize service within a certain area—within the United States in the case of ERISA and RICO—Rule 4(k)(2)(B) expands the reach of service to the extent consistent with United States laws. Thus, if a statutory provision permits nationwide service but is silent with respect to worldwide service, then worldwide service is consistent with this statute, since such service does not contradict or oppose the statutory language") (internal quotations and citations omitted).

WL 4133917, at *12 (D. Colo. Sept. 10, 2021).[16] In other words, Rule 4(k)(2) is designed to ensure that wrongdoers like Bakhmatyuk—who have violated U.S. law through their contacts with the U.S.—cannot argue that their lack of minimum contacts with any particular jurisdiction deprives U.S. courts of jurisdiction.

Under Rule 4(k)(2), "which has been described as a kind of federal long-arm statute, a court may exercise personal jurisdiction over a foreign defendant if (1) the 'plaintiff's claims arise under federal law'; (2) 'the defendant is not subject to the jurisdiction of any state court of general jurisdiction'; and (3) 'the plaintiff can show that the exercise of jurisdiction comports with due process.'" *Hetronic Int'l, Inc.*, 10 F.4th at 1030 (quoting *CGC Holding Co.*, 974 F.3d at 1208). The first requirement is easily satisfied because Gramercy has asserted federal RICO claims against Bakhmatyuk. *See CGC Holding Co.*, 974 F.3d at 1208.[17] With respect to the second requirement,

16. The Tenth Circuit upheld the District of Colorado's finding of personal jurisdiction under Rule 4(k)(2) where defendant was served by alternate means "[a]fter encountering difficulties with conventional service of process in Mexico under the Hague Convention" and then argued that its "contacts did not satisfy the requirements of purposeful availment, relatedness, and reasonableness" but "never argued before the district court that those contacts could not, or should not, be aggregated under Rule 4(k)(2)." *Compania de Inversiones Mercantiles, S.A. v. Grupo Cementos de Chihuahua S.A.B. de C.V.*, 970 F.3d 1269, 1276-1284 (10th Cir. 2020).

17. "Of course, if a plaintiff properly invokes Rule 4(k)(2), it can rely on pendent jurisdiction for its state law claims, so long

the Tenth Circuit has joined the "majority of circuits" in placing "the initial burden on the defendant to identify a state in which the lawsuit could proceed." *Hetronic Int'l, Inc.*, 10 F.4th at 1030. "By failing to point to some other state that could exercise personal jurisdiction over [him], [Bakhmatyuk] concede[s] that [Plaintiffs have] satisfied the second element to establish personal jurisdiction under Rule 4(k)(2)." *Id.* at 1031. Indeed, Bakhmatyuk would need to, and has failed to, identify a U.S. jurisdiction where he contends he is subject to *general jurisdiction*.[18]

Finally, the due process requirement involves an assessment of whether Bakhmatyuk had "sufficient minimum contacts that demonstrate [he] purposefully directed [his] activities at the forum (the United States), and [Gramercy's] injuries arose in part from those forum-related activities." *Id.* (emphasizing that the minimum contacts test under Rule 4(k)(2) assesses contacts "with the United States" as opposed to with the forum). As set forth above in Section II(A) above, the Complaint pleads extensive contacts between Bakhmatyuk and Wyoming. But, in any event, Rule 4(k)(2) expands the jurisdictional analysis to include all of Bakhmatyuk's contacts with

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as those claims arose under the same nucleus of operative facts." *Munderloh v. Biegler GmbH*, 2022 WL 901408, at *3 (D. Ariz. Mar. 28, 2022) (quoting *Grayson v. Anderson*, 816 F.3d 262, 271 (4th Cir. 2016)).

18. Courts have found this second requirement to be satisfied where a defendant "has insufficient contacts with any one state for that state to exercise *general jurisdiction*." *Progressive Games, Inc. v. Amusements Extra, Inc.*, 83 F. Supp. 2d 1185, 1194 (D. Colo. 1999) (emphasis added).

the U.S, which Bakhmatyuk concedes were "directed at Gramercy in Connecticut." (Mot. at 24). Gramercy alleges in detail the numerous communications between Bakhmatyuk or his representatives acting on his behalf and U.S.-based representatives of Gramercy in connection with the misinformation campaign and debt purchase phases of the fraudulent scheme. *See e.g.*, Compl. ¶¶ 208(2), (3), (6), (7), (8), and (12). Indeed, in rejecting the Piazza Defendants' extraterritoriality challenge to Gramercy's RICO claims, the Court recognized Bakhmatyuk's numerous alleged contacts with the U.S. Order at 33-36 (citing allegations regarding Bakhmatyuk making or directing mailings to Gramercy in the U.S. and inducing travel from the U.S. to Europe).

These extensive U.S. contacts easily satisfy the due process requirement under Rule 4(k)(2), which provides an independent basis to find personal jurisdiction over Bakhmatyuk in Wyoming. *See Hetronic Int'l, Inc.*, 10 F.4th at 1032 (foreign defendant's filing of trademark application in the U.S. and entering a project agreement with a U.S.-based company were sufficient); *see also See CGC Holding Co.*, 974 F.3d at 1209 (foreign defendant's preparation of "loan commitment letters directed at U.S. borrowers" and receipt of "the net proceeds of the advance fees" were sufficient).

C. The Court Has Conspiracy Jurisdiction Over Bakhmatyuk.

While Rule 4(k)(2) alone resolves Bakhmatyuk's jurisdictional challenge, Bakhmatyuk's direct contacts

with Wyoming, combined with his Wyoming-based co-conspirators' contacts with Wyoming, also support the Court's exercise of conspiracy jurisdiction over him.

Bakhmatyuk argues, in an entirely conclusory manner and without citation, that "Plaintiffs also cannot rely on a 'conspiracy' theory of jurisdiction to establish specific jurisdiction over Mr. Bakhmatyuk without establishing he has minimum contacts with Wyoming." (Mot. at 23). This is an incorrect recitation of the law. Conspiracy jurisdiction may establish personal jurisdiction over a non-resident defendant—even when that defendant lacks minimum contacts—based on the contacts of a co-conspirator. *See Frickey v. Thompson*, 136 F. Supp. 3d 1300, 1310 (D. Kan. 2015) (personal jurisdiction existed over out-of-state co-conspirators where plaintiffs alleged "substantial steps occurred in Kansas in furtherance of the conspiracy," despite lack of allegations that defendant ever visited or conducted business in the forum). Courts repeatedly have recognized that where "[p]laintiffs plead with particularity a conspiracy and overt acts taken in furtherance of the conspiracy, a co-conspirator's contacts with the forum may be attributed to other conspirators for jurisdictional purposes." *Nat'l Union Fire Ins. Co. of Pittsburgh, PA. v. Kozeny*, 115 F. Supp. 2d 1231, 1237 (D. Colo. 2000), *aff'd sub nom. Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Kozeny*, 19 F. App'x 815 (10th Cir. 2001); *see also Sheldon v. Khanal*, No. CIV.A. 07-2112-KHV, 2008 WL 474262, at *3 (D. Kan. Feb. 19, 2008); *Mansfield Heliflight, Inc. v. Freestream Aircraft USA, Ltd.*, No. 2:16-CV-28, 2016 WL 7176586, at *8-10 (D. Vt. Dec. 7, 2016).

Indeed, Bakhmatyuk acknowledges this proposition, stating that "[a]n alleged co- conspirator's presence within the forum might create the 'minimum contacts' if the conspiracy is directed towards the forum or substantial steps in furtherance of the conspiracy are taken in the forum." (Mot. at 23). His assertion that "neither element is met here" simply is not credible for at least two reasons.

First, Bakhmatyuk has not moved to dismiss either the Count Three RICO conspiracy (apart from asserting the PSLRA bar) or the Count Six civil conspiracy claims against him. Thus, Bakhmatyuk has conceded that Plaintiffs adequately pleaded his participation in a conspiracy with the Piazza Defendants, and those allegations must be accepted as true for jurisdictional analysis purposes. Nor does Bakhmatyuk dispute that the Complaint adequately pleads that the Piazza Defendants are his co-conspirators. Thus, each of the cases Bakhmatyuk relies on to assert that conspiracy jurisdiction should not apply is easily distinguishable. (Mot. at 23-24). In those cases, the court found the plaintiffs failed to meet the threshold requirement of adequately alleging a conspiracy, whereas here that already has been determined in the Order.[19]

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19. *See Melea, Ltd. v. Jawer SA*, 511 F.3d 1060, 1069 (10th Cir. 2007) ("Melea has failed to make such a showing" of a conspiracy); *Hart v. Salois*, 605 F. App'x 694, 700 (10th Cir. 2015) ("Hart points to nothing in the Complaint supporting these [conspiracy] assertions"); *Good v. Khosrowshahi*, 296 F. App'x 676, 679–80 (10th Cir. 2008) (rejecting application of conspiracy jurisdiction because plaintiff failed to allege that a conspiracy existed).

Second, having conceded Gramercy adequately pleads a conspiracy, Bakhmatyuk is left to argue that (1) that the conspiracy is "directed at Gramercy" outside of Wyoming, and (2) "all acts in furtherance of any purported conspiracy occurred in London, Kyiv, Vienna, or elsewhere in Europe." (Mot. at 24). This argument intentionally misconstrues the law and rewrites the Complaint. In order to support the requisite minimum contacts, the Complaint need only allege that "the conspiracy is directed at the forum *or* substantial steps in furtherance of the conspiracy were taken in the forum." *Frickey*, 136 F. Supp. at 1310 (emphasis added). Bakhmatyuk ignores the numerous well-pleaded allegations that the Piazza Defendants took substantial steps in Wyoming in furtherance of the conspiracy, including that (1) Piazza, a Wyoming resident and long-time associate and business partner of Bakhmatyuk, and SP Capital, Piazza's Wyoming-based business, were engaged by, and acted on behalf of, Bakhmatyuk in furtherance of the conspiracy in Wyoming; (2) Piazza and Yaremenko took the necessary steps to incorporate the TNA entity formed specifically to facilitate the scheme in Wyoming; (3) Yaremenko signed the required annual limited liability company reports submitted to the Wyoming Secretary of State's office; (4) the Piazza Defendants, who are based in Wyoming, helped effectuate the TNA Transfers into Wyoming; (5) Piazza aided Bakhmatyuk's misinformation campaign by leveraging his connection to Concorde; and (6) Piazza surreptitiously acquired Ashmore's debt position on behalf of Bakhmatyuk through an entity within Piazza's network of related companies under the umbrella of SP

Capital. Compl. ¶¶ 18, 70-71, 84, 102, 168-170. Not only does Gramercy allege that Bakhmatyuk's co-conspirators took all of these acts in furtherance of the conspiracy in Wyoming, but Gramercy expressly alleges that "Bakhmatyuk orchestrated and directed" many of those Wyoming acts, including specifically the TNA Transfers and Ashmore Debt Purchase. *See id.* ¶¶ 7, 180, 193 and 200. *See also* Order at 4 (referring to Bakhmatyuk's efforts "by and through his agents and co-conspirators.") These allegations are more than sufficient to establish either that the conspiracy was directed towards Wyoming or that substantial steps in furtherance of the conspiracy were taken in Wyoming.[20]

Bakhmatyuk's only new contention concerning due process is that "[e]xercising personal jurisdiction over [him] would interfere with the policy interests of Ukraine and England." (Mot. at 25). But Bakhmatyuk does nothing to meet his burden to show that policy interests of either Ukraine or England would be affected. *United States v. Phoenix Fuel Corp.*, No. 11-CV-132-F, 2011 WL 13277580, at *5 (D. Wyo. Nov. 23, 2011) ("The burden on Defendants is to show that another state's policies would be affected"). Otherwise, Bakhmatyuk's arguments overlap completely with Yaremenko's and should be rejected.[21] Just like the

20. The same analysis concerning Rule 4(k)(2) and conspiracy jurisdiction likewise supports personal jurisdiction over Yaremenko, although the Court did not reach these grounds.

21. Both Yaremenko and Bakhmatyuk asserted the Court's exercise of jurisdiction would be burdensome because they are not U.S. citizens. *See* Mot. at 24 (noting Bakhmatyuk "lives

Court concluded with Yaremenko, there is nothing unfair to Bakhmatyuk about defending claims in Wyoming regarding his participation in a scheme with Wyoming businesses and their principals to hide assets in Wyoming entities formed to exploit Wyoming law. Order at 10.[22]

CONCLUSION

For all the foregoing reasons, Gramercy respectfully requests that this Court deny Bakhmatyuk's Motion to Dismiss the Complaint.

Date: August 15, 2022.

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in Austria"); Piazza Defendants' Mot. at 31-32 (asserting that both Yaremenko and Bakhmatyuk are not U.S. citizens). Both asserted Wyoming lacks an interest in the dispute. *See* Mot. at 24 ("Wyoming has no interest in adjudicating this dispute"); Piazza Defendants' Mot. at 33 ("there is no *local* interest in having this controversy decided in Wyoming"). Both asserted arbitration in London is the more convenient and efficient forum. Mot. at 24; Piazza Defendants' Mot. at 29-30. Both argued submitting to London arbitration would cause no undue hardship. *Id.* And both argued Wyoming is not the most efficient forum because of the location of the witnesses, governing law, and absence of necessary parties. *See* Mot. at 24; Piazza Defendants' Mot. at 31-34. The Court already rejected those arguments.

22. If the Court were to have any doubts about personal jurisdiction over Bakhmatyuk, the law is clear that jurisdictional discovery should be permitted. *See Health Grades, Inc. v. Decatur Mem'l Hosp.*, 190 F. App'x 586, 589 (10th Cir. 2006) ("a refusal to grant discovery constitutes an abuse of discretion if either the pertinent jurisdictional facts are controverted or a more satisfactory showing of the facts is necessary").

Respectfully submitted,
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[CERTIFICATE OF SERVICE OMITTED]